IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MONTAE BLANCHARD — APPELLANT

VS. — NO. 2010-KA-0312

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. It was not error to try Montae Blanchard *in absentia*.

II. Blanchard received constitutionally effective representation at trial.

III. The verdict is supported by the overwhelming weight of the evidence.

STATEMENT OF THE CASE

On or about December 2, 2008, a Monroe Country grand jury indicted Montae Blanchard for armed robbery of David Mink. The indictment alleged that by Blanchard put Mink in fear of immediate injury to his person by the exhibition of a deadly weapon, a black BB pistol, and took cash and personal property from David Mink against his will. (C.P. 10) Blanchard was tried on February 18, 2010, before the Monroe County Circuit Court. He was convicted of armed robbery and was sentenced to serve fifty (50) years in the custody of the Mississippi Department of Corrections, pay a fine of Ten Thousand Dollars ($10,000) and to pay restitution in the amount of Five Thousand Dollars ($5,000.00). (Tr. 215) The instant appeal ensued.

STATEMENT OF THE FACTS

Montae Blanchard and his cousin Victoria robbed David Mink at gunpoint on January 7, 2008, while he was at work at Terrific Tax. The two took about $5,000.00 in cash. David Mink accurately described Blanchard, including the dreadlocks he wore at the time. Another witness, Dale Pierce, the owner of Terrific Tax, testified that a black male with dreadlocks and a black female were standing outside Terrific Tax in the parking lot. He stopped and spoke to them and they told him that someon had taken their car. Victoria confirmed in her testimony that Blanchard had dreadlocks on the day of the robbery and that when she saw him a couple of days later he head shaved his head and changed his appearance. Despite those changes, David Mink was able to identify Blanchard in a picture. Dale Pierce was also able to identify Blanchard through a one-way mirror at the police station. He testified that he knew Blanchard was person with the dreadlocks he had seen and spoken with in the parking lot despite his clean shaven head at the police station. It was a reasonable inference for the jury to make that Blanchard changed his appearance in order to avoid being identified as having committed the robbery.

David Mink testified that on the afternoon of the robbery he saw Blanchard and Victoria standing outside on the parking lot. He testified that he had never seen them before. He testified also that he got a good look at them. At about five minutes until five Victoria came in the store with a towel over her head and began to ask him questions. Blanchard remained outside. Mink told Victoria that he was getting ready to close. Blanchard came in the store talking on his cell phone. He was wearing a basketball jersey and had dreadlocks with beads in them. He had a skull cap over his head with a long extension down the back. The dreadlocks were hanging from beneath it. Victoria saw some candy and asked for some. She and Blanchard began play

fighting. Mink continued to tell them that he needed to close and that they needed to get out. At 5:00 Mink opened the door and told them to get out. Blanchard pulled a gun out of his waist and put it in Mink's face. Blanchard told Victoria, "We're fixing to do this." Then Blanchard handed the gun Victoria who grabbed the gun and pointed it in Mink's face. Blanchard walked around the counter and got the money bag with a little over $5,000.00 in it. Blanchard told Mink to come behind the counter and get by the telephone. He told Mink not to even think about going for the phone. He asked for Mink's cell phone and car keys, but Mink stated that he did not have them. Blanchard then began yelling and threatening Mink. Blanchard told Mink he was "Chris from Amory" and that Mink would not forget him. Mink then saw his mother walking up and he yelled to her to call 911. Blanchard jetted out the door. Mink's mother tried to stop him, but couldn't.

Victoria Blanchard testified that she went with Blanchard to Terrific Tax after he told her he "had a lick for her." She went in and conversed with Mink. Blanchard then entered the store and put the gun in Mink's face. Blanchard gave Victoria the gun and got the money bag. Victoria told her to throw the gun in Mink's face. She said she didn't want to, but he told her that he would do something bad to her if she did not. Victoria then put the gun in Mink's face. Blanchard then ordered Mink to get down, got the money bag and then the two left. Victoria maintained possession of the gun and hid it under a mattress at another cousin's house. Victoria did not ever know how much money was in the bag.

Based on the testimony of Mink, Pierce, Victoria and Shumpert, the verdict was supported by the overwhelming weight of the evidence. There was little or no evidence weighing against the verdict. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

SUMMARY OF THE ARGUMENT

It was not error to try Montae Blanchard *in absentia*. Blanchard was willingly and voluntarily absent from his trial. He had been told on numerous occasions by his counsel and her staff when the trial was and that he should be there. He had assured his counsel that he would be present and then did not show. He did not call to present a reason why he was unable to be present and he stopped answering his counsel's phone calls.

Blanchard received constitutionally effective representation at trial. Blanchard cannot overcome the presumption that his counsel's failure to object to hearsay and failure to move for a continuance were strategic decisions. Further, he cannot show that the outcome of the trial would have been any different if she had taken these actions.

The verdict is supported by the overwhelming weight of the evidence. The testimony of Shumpert, Pierce, Mink and Victoria makes an overwhelming case against Blanchard. Little or no evidence was presented at trial that weighs against the verdict.

ARGUMENT

I. It was not error to try Montae Blanchard *in absentia*.

The record reflects that Blanchard was present at plea negotiations two weeks before trial. He spoke with his attorney the day before trial and was well aware that his trial was scheduled for the next day. Section 99-17-9 states:

> In criminal cases the presence of the prisoner may be waived, and the trial progress, at the discretion of the court, in his absence, if he be in custody and consenting thereto. If the defendant, in cases less than felony, be on recognizance or bail or have been arrested and escaped, or have been notified by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or be in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment final and sentence be awarded as though such defendant were

personally present in court.

Miss.Code Ann. § 99-17-9 (2000) (emphasis added). Recent case law has found that this statute is not in violation of the Constitution. *Jackson v. State*, 689 So.2d at 763 (Miss.1997) (citing *Williams v. State*, 103 Miss. 147, 60 So. 73 (1912)).

Blanchard argues that his case is analogous to *Jay v. State*, 25 So.3d 257 (Miss. 2009) and that applying Jay to this case, he is entitled to a new trial. However, there is not evidence that Blanchard was mentally ill. His counsel, Luanne Thompson, informed the trial court that Blanchard had been at the courthouse two weeks prior for plea negotiations. She stated that she and her secretary had numerous conversations with Blanchard and each time he indicated that he was going to be ready for trial. The day before trial, the secretary called Blanchard to have him come to the courthouse to meet with Ms. Thompson. Blanchard told her that he was in Columbus at the temporary job placement agency trying to get a job. Blanchard initially told her that he was stuck in Columbus. Ms. Thompson then told him that he needed to come and talk to her. At that point, Blanchard assured her that he would come. When he did not show up, Ms. Thompson and her secretary continued to try to reach him. Ms. Thompson stated that there for about 25 calls to Blanchard's cell phone between 1:30 p.m. and 4:50 p.m. the day before trial. Blanchard finally returned his counsel's calls late in the afternoon at 10 until 5:00. Blanchard informed his counsel that he would be at the courthouse at 8:00 a.m. on the morning of trial. He did not appear at that time and did not answer any calls from his counsel or her secretary.

Based on Ms. Thompson's efforts to contact Blanchard, he clearly knew when his trial was and that he needed to be there. Pursuant to Mississippi Code Annotated § 99-17-7 (2005), in criminal cases the presence of the prisoner may be waived if the defendant is on recognizance or bail, has been arrested and escaped, or has received notice in writing by the proper officer of the

pendency of the indictment against him." Blanchard certainly knew of the pendency of the indictment against him, since he filed multiple pre-trial motions, including a motion for speedy trial. His signature appears on the Arraignment Order in which his bond was set and he was informed in writing of the requirement to meet with his attorney on "plea day." (C.P. 35) Blanchard was under an appearance bond requiring him to "be and personally appear before the Circuit Court of Monroe County, Mississippi, at the next regular term thereof to be holden in the City of Aberdeen, Mississippi, at the Monroe County Courthouse, commencing on the 19th day of August, A.D. 2009, at 9:00 a.m. on a charge of Strong Arm Robbery. . ." Blanchard's signature appears on this document setting his trial for August 19, 2009. Several continuances were granted and the trial was eventually held on February 18, 2010. His counsel represented to the trial judge the many contacts she and her secretary made to inform Blanchard of the necessity of his presence on the day of trial.

Further, Blanchard's counsel never made a motion for a continuance based on Blanchard's absence. A trial judge cannot be held in error on a matter that he has not had the opportunity to consider. It is critical that an appellate court should not be the first court asked to rule on the specific argument. *Ballenger v. State*, 667 So.2d 1242, 1256 (Miss.1995). Absent error affecting fundamental rights, the trial judge must have been given an opportunity to consider an issue before that issue is raised here. *Berry v. State*, 728 So.2d 568, 571 (Miss.1999).

Further, informing the trial court that one is "tied up" out of town is not "tantamount" to an objection to the trial going forward. If indeed such a "tantamount" objection were possible, it was not timely, since this information was not given to the trial court until well into the State's case in chief. (Tr. 89-91)

Blanchard had notice of his trial due to the extraordinary efforts of his counsel to contact

him. Blanchard voluntarily left town allegedly going to a "temporary job placement agency." He told his counsel that he would return for trial the next morning. He did not. There is nothing in the record to suggest that his absence was anything other than voluntary and willing. This issue is without merit.

II. Blanchard received constitutionally effective representation at trial.

Blanchard argues that his trial counsel was ineffective for not objecting to hearsay testimony that Blanchard asserts was prejudicial to him. He further asserts that his counsel was ineffective for failing to preserve the issue of trial *in absentia* for appellate review.

Claims of ineffective assistance of counsel are reviewed by using the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on a claim of ineffective assistance of counsel, Blanchard has the burden of proof to show by a preponderance of the evidence that (1) counsel's performance was deficient, and (2) that the deficiency did, in fact, prejudice him. *Moreno v. State*, 967 So.2d 701, 703 (Miss.Ct.App.2007). In determining whether the first prong of *Strickland* concerning counsel's performance has been satisfied, appellate courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland*, 466 U.S. at 689. The second prong of the *Strickland* test requires that Blanchard prove prejudice by showing that there was a reasonable probability that, but for counsel's errors, the trial court's result would have been different. *Id.* at 694. Whether the prongs of this test are met is determined by an examination of the totality of the circumstances. *Id.* at 695.

Blanchard cannot overcome the presumption that the actions of trial counsel were strategic in nature. Because there is a strong presumption that counsel's performance was reasonable, "[t]he defendant must show that there is a reasonable probability that, but for the

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Further, an appellate court's review of trial counsel's performance is highly deferential, "with a strong presumption that [counsel's] conduct fell within the wide range of reasonable professional assistance." *Davis v. State*, 980 So.2d 951, 955 (Miss.Ct.App.2007) (quoting *Ross v. State*, 954 So.2d 968, 1004 (Miss.2007)). This includes trial counsel's choice of whether or not to make certain objections at trial. *Scott v. State*, 742 So.2d 1190, 1196 (Miss.Ct.App.1999).

Thus, the standard of review for this type of claim requires the reviewing court to assume that counsel's reason for not contemporaneously objecting to hearsay testimony was part of trial strategy. Further, even if assuming for the sake of argument that Blanchard's counsel's conduct fell outside the range of reasonable professional assistance, Blanchard has nonetheless failed to demonstrate the requisite showing of prejudice that resulted therefrom. An objection by Blanchard's trial counsel would not have changed the outcome of Blanchard's trial.

Ms. Thompson clearly knew that Blanchard was aware of his trial date because she and her staff had made herculean efforts to reach him to let him know that he was expected at trial. She also stated to the trial judge that he told her that he would be present and then did not appear. His statement to her that he would be present indicates that he voluntarily choose not to come. If he told his counsel that he would be present, then certainly, he was able to present. Further, he did not call after his assurance to Ms. Thompson that he would be present and present any reasons that he could not be present or that he was involuntarily detained. Based on the information that was available on the date of trial, Blanchard was voluntarily and willingly absent from his trial and his counsel could not be expect to misrepresent the facts to the trial court.

Finally, Mississippi appellate courts rarely consider issues of ineffective assistance of counsel on direct appeal unless "(1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge." *Graves v. State*, 914 So.2d 788, 798 (Miss.Ct.App.2005) (citations omitted).

This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

III. The verdict is supported by the overwhelming weight of the evidence.

A motion for a new trial challenges the weight of the evidence. "The evidence should be weighed in the light most favorable to the verdict." *Dilworth v. State*, 909 So.2d 731 (Miss. 2005). Mississippi appellate courts will only disturb a verdict when it is "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Id.* (citing *Bush v. State*, 895 So.2d 836, 844 (Miss.2005)).

The evidence at trial overwhelmingly supported Blanchard's conviction for armed robbery. The evidence overwhelmingly showed that Montae Blanchard and his cousin Victoria robbed David Mink at gunpoint on January 7, 2008, while he was at work at Terrific Tax. The two took about $5,000.00 in cash. David Mink accurately described Blanchard, including the dreadlocks he wore at the time. Another witness, Dale Pierce, the owner of Terrific Tax, testified that a black male with dreadlocks and a black female were standing outside Terrific Tax in the parking lot. He stopped and spoke to them and they told him that someon had taken their car. Victoria confirmed in her testimony that Blanchard had dreadlocks on the day of the robbery and that when she saw him a couple of days later he head shaved his head and changed his appearance. Despite those changes, David Mink was able to identify Blanchard in a picture.

Dale Pierce was also able to identify Blanchard through a one-way mirror at the police station. He testified that he knew Blanchard was person with the dreadlocks he had seen and spoken with in the parking lot despite his clean shaven head at the police station. It was a reasonable inference for the jury to make that Blanchard changed his appearance in order to avoid being identified as having committed the robbery.

David Mink testified that on the afternoon of the robbery he saw Blanchard and Victoria standing outside on the parking lot. He testified that he had never seen them before. He testified also that he got a good look at them. At about five minutes until five Victoria came in the store with a towel over her head and began to ask him questions. Blanchard remained outside. Mink told Victoria that he was getting ready to close. Blanchard came in the store talking on his cell phone. He was wearing a basketball jersey and had dreadlocks with beads in them. He had a skull cap over his head with a long extension down the back. The dreadlocks were hanging from beneath it. Victoria saw some candy and asked for some. She and Blanchard began play fighting. Mink continued to tell them that he needed to close and that they needed to get out. At 5:00 Mink opened the door and told them to get out. Blanchard pulled a gun out of his waist and put it in Mink's face. Blanchard told Victoria, "We're fixing to do this." Then Blanchard handed the gun Victoria who grabbed the gun and pointed it in Mink's face. Blanchard walked around the counter and got the money bag with a little over $5,000.00 in it. Blanchard told Mink to come behind the counter and get by the telephone. He told Mink not to even think about going for the phone. He asked for Mink's cell phone and car keys, but Mink stated that he did not have them. Blanchard then began yelling and threatening Mink. Blanchard told Mink he was "Chris from Amory" and that Mink would not forget him. Mink then saw his mother walking up and he yelled to her to call 911. Blanchard jetted out the door. Mink's mother tried to stop him, but

couldn't.

Victoria Blanchard testified that she went with Blanchard to Terrific Tax after he told her he "had a lick for her." She went in and conversed with Mink. Blanchard then entered the store and put the gun in Mink's face. Blanchard gave Victoria the gun and got the money bag. Victoria told her to throw the gun in Mink's face. She said she didn't want to, but he told her that he would do something bad to her if she did not. Victoria then put the gun in Mink's face. Blanchard then ordered Mink to get down, got the money bag and then the two left. Victoria maintained possession of the gun and hid it under a mattress at another cousin's house. Victoria did not ever know how much money was in the bag.

Based on the testimony of Mink, Pierce, Victoria and Shumpert, the verdict was supported by the overwhelming weight of the evidence. There was little or no evidence weighing against the verdict. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

The assignments of error presented by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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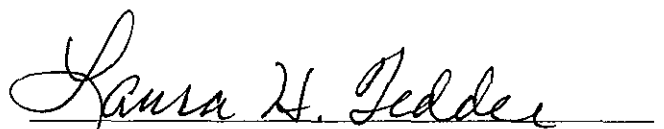
This the 22nd day of July, 2010.



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