# IN THE COURT OF APPEALS 09/17/96

# OF THE

# STATE OF MISSISSIPPI

## NO. 93-KA-00431 COA

**RAYMOND MCLAUGHLIN, JR.**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. RICHARD MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JEFF E. BRADLEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: GLENN WHITE

NATURE OF THE CASE: CRIMINAL: UTTERING

TRIAL COURT DISPOSITION: GUILTY VERDICT; SENTENCED TO 15 YRS IMPRISONMENT

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Raymond McLaughlin was convicted of uttering and sentenced to fifteen years in prison without parole. He appeals, alleging prosecutorial misconduct and a violation of his right against self-incrimination. We affirm.

## FACTS

In 1992, McLaughlin negotiated a check at a check cashing business in Hattiesburg drawn on an account belonging to his former employer, a construction company. A video surveillance system photographed the transaction. The following day, the construction company stopped payment on the check, and it was returned to the check cashing business stamped "PAYMENT STOPPED." The owner of the check cashing business called the construction company and was informed that the check was reported stolen from one of the company's employees. The check had been made payable to the employee and was indorsed with the employee's name.

The matter was reported to the police, and a review of the video surveillance identified McLaughlin as the individual who presented the check for payment. In addition, McLaughlin's finger and palm prints were found on the instrument. McLaughlin was arrested and charged with uttering.

At trial, McLaughlin explained his version of events. He testified that a man had asked him for help in cashing a check. Since the man did not have his own identification, he asked McLaughlin to present the check for cashing using McLaughlin's own identification. McLaughlin denied having indorsed the check and denied any knowledge that the indorsement was a forgery. McLaughlin did not try to produce the man who had asked for his help at trial.

In rebuttal, the State presented expert testimony that McLaughlin's palm print found on the check reflected that McLaughlin probably indorsed the check.

## DISCUSSION

*1. Prosecutorial Misconduct*

During the prosecution's opening statements, the following exchange took place:

> [PROSECUTOR:] You will have testimony . . . that [McLaughlin] had every opportunity to steal, forge, and cash this check. . . .

> [DEFENSE:] Your Honor, at this time we are going to have to object to the statements of the Assistant District Attorney and ask for a mistrial. The Assistant District Attorney, in opening statement[s], accused the defendant of another crime, that is, stealing the checks, separate and apart from that which is alleged, and because of the inference that he has committed more than one

crime . . . we are going to ask for a mistrial. . . .

> [PROSECUTOR:] One of the basic elements that has to be proven in the case of uttering is that the defendant knew that the check was, in fact, false, counterfeited, forged, or whatever. And the evidence to be presented by the State will show that this individual was exposed to the opportunity to get the check, and, therefore, knew that it was forged and not legitimate, so that's all part of the proof that has to be introduced as evidence in the case. . . .

. . . .

[COURT]: Note the objection and overrule the same.

On appeal, McLaughlin argues that the prosecution impermissibly implicated him in a forgery—an improper reference to another crime. The State urges this Court to conclude that the issue is waived because McLaughlin cites forgery as the other crime, rather than stealing, and that the argument presented here is substantively different than that presented in the above defense objection. *See Thornhill v. State*, 561 So. 2d 1025, 1029 (Miss. 1989) (citations omitted). We conclude, however, that the issue is not waived. The question remains the same: Did the prosecution raise other crimes evidence in its opening statement? We hold that it did not.

The disposition of this case is suggested by *Rowland v. State*, 531 So. 2d 627 (Miss. 1988). In *Rowland*, a defendant convicted of forgery argued on appeal that the prosecutor's opening statement impermissibly raised acts constituting other crimes of false pretenses and obstruction of justice. *Rowland*, 531 So. 2d at 629-30. In rejecting the defendant's argument, the supreme court concluded that the allegations made by the prosecution in its opening statement were not unfair characterizations of the evidence and implied that the other crimes are so closely related to the crime charged that the argument does not, in fact, present other crimes. *Id.* at 630. Instead, the prosecution was simply explaining to the jury how the defendant came to committing the crime of forgery. *Id.*

In this case, the prosecution's suggestion that McLaughlin had an opportunity to steal and forge the instrument at issue merely offered the jury an explanation of an essential element of the crime of uttering, *i.e.*, that McLaughlin knew the instrument tendered to the check cashing business bore a forged indorsement. *See* Miss. Code Ann. § 97-21-59 (1972) (criminalizing "utter[ing] . . . as true, and with intent to defraud, any forged . . . instrument . . . *knowing such instrument . . . to be forged* . . . .."). Evidence of other crimes is admissible to show knowledge or intent. M.R.E. 404(b). Accordingly, the trial court did not err in overruling McLaughlin's objection to the statement.

*2. Self-Incrimination*

During the trial of this case, McLaughlin was asked by the prosecution to demonstrate how he would have indorsed the check to show the jury that the hand print on the check was positioned consistent with McLaughlin's hand size. By presenting this evidence, the prosecution was responding to an earlier challenge made by the defense when a witness showed how the palm print would have been created by McLaughlin while endorsing the check. The defense argued that the witness' hand was not the same size as McLaughlin's. On appeal, McLaughlin argues that compelling him to demonstrate how he would have signed the check violated his rights against self-incrimination. We conclude that his position is without merit. The demonstration does not implicate rights against self-incrimination.

As the supreme court has explained:

> '[B]oth federal and state courts have usually held that [the protection against self-incrimination] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.'
>
> Th[e Supreme] Court also stated that 'the privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate' [the privilege against self-incrimination].

*Porter v. State*, 519 So. 2d at 1230, 1232 (Miss. 1988) (citations omitted). The demonstration in this case does not violate McLaughlin's rights against self-incrimination.

**THE JUDGMENT OF CONVICTION OF THE FORREST COUNTY CIRCUIT COURT OF UTTERING AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITHOUT PAROLE AS A HABITUAL OFFENDER, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO FORREST COUNTY.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.**