

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01303 COA

BILLY A. LYNCH 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. CLARENCE E. MORGAN JR.

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: WILLIAM L. BAMBACH

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: CLYDE HILL

NATURE OF THE CASE: CRIMINAL - AGGRAVATED ASSAULT & POSSESSION OF A FIREARM BY A CONVICTED FELON

TRIAL COURT DISPOSITION: CT I AGGRAVATED ASSAULT: CT II POSSESSION OF A FIREARM BY A CONVICTED FELON: CT I 15 YEARS; CT II 3 YEARS CONSECUTIVE CT I; 5 YEARS SUSPENDED IN #4684 IS REVOKED BY COURT TO RUN CONCURRENTLY WITH THIS SENTENCE AND CONSECUTIVE TO ANY PREVIOUSLY IMPOSED

MANDATE ISSUED: 7/8/97

BEFORE THOMAS, P.J., DIAZ, HINKEBEIN, AND PAYNE, JJ.

HINKEBEIN, J., FOR THE COURT:

Billy A. Lynch was convicted in the Winston County Circuit Court of aggravated assault and the possession of a firearm by a convicted felon. Lynch was sentenced to serve a term of fifteen years

incarceration for the aggravated assault, and three years incarceration for the possession of a firearm by a convicted felon. Additionally, the court revoked a suspended sentence of five years that Lynch had received as punishment for a prior, non-related felony conviction. The court ordered Lynch to serve the previously suspended five year sentence concurrently with the sentence imposed in this case. Aggrieved by his conviction, Lynch appeals to this Court on the following grounds:

I. INEFFECTIVE ASSISTANCE OF COUNSEL WHICH CAN BE SHOWN BY DEFENSE COUNSEL'S LACK OF INVESTIGATION, VOIR DIRE AND LACK OF *BATSON* OBJECTIONS, AND FAILURE TO OBJECT TO HEARSAY EVIDENCE AND CONDUCT A MEANINGFUL CROSS-EXAMINATION.

II. THE TRIAL JUDGE MAY HAVE PREJUDICED THE JURY BY STATEMENTS MADE TO THEM.

III. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

## FACTS

At 1:20 a.m. on the morning of August 6, 1995 Montague Cistrunk was shot as he stood in the parking lot of the Noxapater Country Club, a so-called "juke joint" located in Winston County, Mississippi. Cistrunk received one bullet wound to his left arm and side, which was not fatal. Toby Wilson, a Winston County deputy sheriff, was the officer who initially responded to the crime scene. When Deputy Wilson arrived at the crime scene he observed Cistrunk lying on the ground, suffering from a gunshot wound. Cistrunk was picked up at the crime scene by an ambulance, which took him to the Winston County Hospital in Louisville, Mississippi. Cistrunk was subsequently transported to the University of Mississippi Medical Center in Jackson, where he was treated and released.

At the crime scene Deputy Wilson interviewed several witnesses who had observed the shooting incident. The witnesses, along with the victim, identified Billy A. Lynch as the assailant. Winston County Sheriff Billy Rosamond, who also responded to the shooting, subsequently left the crime scene and traveled to Lynch's residence. Sheriff Rosamond took Lynch into custody, informing him that he was under arrest for shooting Cistrunk. Lynch was subsequently indicted and convicted of aggravated assault and the possession of a firearm by a convicted felon. It is from this conviction that Lynch brings the instant appeal.

## ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL WHICH CAN BE SHOWN BY DEFENSE COUNSEL'S LACK OF INVESTIGATION, VOIR DIRE AND LACK OF *BATSON* OBJECTIONS, AND FAILURE TO OBJECT TO HEARSAY EVIDENCE AND CONDUCT A MEANINGFUL CROSS-EXAMINATION.

Lynch asserts that his trial counsel made numerous errors which, based on the totality of the

circumstances, show that he was denied legal representation sufficient to satisfy his Sixth Amendment right to counsel. Lynch focuses his assignment of error on his trial counsel's failure to object to certain alleged hearsay testimony, and also asserts that "the contradictions between witnesses is essential to this appeal." The State responds by arguing that the alleged errors committed by Smith's trial counsel, as contained in the trial court record, are insufficient to satisfy the elements of an ineffective assistance of counsel claim.

In order to demonstrate that he was denied the effective assistance of counsel, a criminal defendant must show that 1) the counsel's performance was deficient and that the deficient performance prejudiced the defense, and 2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Mohr v. State*, 584 So. 2d 426, 430 (Miss. 1991) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Taylor v. State*, 682 So. 2d 359, 363 (Miss. 1996) (citing *Strickland*, 466 U.S. at 694). In order to make a successful ineffective assistance of counsel claim a defendant must satisfy both prongs of the *Strickland* test. *Mohr*, 584 So. 2d at 430. The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. *Carney v. State*, 525 So. 2d 776, 780 (Miss. 1988).

Lynch raises the following points as alleged instances of misfeasance/non-feasance by his trial counsel that, in the aggregate, he claims constitute ineffective assistance of counsel:

1. Trial counsel did not conduct an adequate voir dire examination of the jury.
2. Trial counsel should have objected, on *Batson* grounds, to the State's peremptory challenges of jurors.
3. Trial counsel did not conduct an adequate pre-trial investigation of his case.
4. Trial counsel should have had a test performed so as to determine whether the victim was shot with a 9 mm weapon, the type of weapon owned by the defendant.
5. Trial counsel should have objected to inadmissible hearsay testimony.
6. Trial counsel did not conduct a meaningful examination and cross-examination of certain witnesses.
7. Trial counsel did not make an adequate record of the racial composition of the jury.

Addressing the first prong of the *Strickland* test, this Court must inquire as to whether Lynch has demonstrated that his court-appointed counsel performed in a deficient manner, resulting in prejudice to him. While Lynch has provided us with a lengthy listing of alleged error by his trial counsel, we feel that the majority, if not all, of these points were purely matters of trial strategy, and therefore were at his counsel's discretion. This Court is well aware that Mississippi law creates a strong, but rebuttable, presumption "that trial counsel's conduct is within the wide range of reasonable conduct and that decisions made by trial counsel are strategic." *Vielee v. State*, 653 So. 2d 920, 922 (Miss. 1995). However, for purposes of our review we will assume, *arguendo*, that Lynch's trial counsel

was deficient. This leads us to the second prong of *Strickland*.

Under the second prong of *Strickland*, Lynch is required to demonstrate that his trial counsel's deficient performance caused him prejudice. *Mohr*, 584 So. 2d at 430. This prejudice requirement mandates that the defendant show that "there is a reasonable probability that but for these errors by counsel, the defendant would have received a different result from the trial court." *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992). After carefully scrutinizing his brief we are unable to locate any argument by Lynch, much less any factual evidence in the trial court record, that he would not have been convicted but for the alleged errors of his trial counsel. About the closest Lynch comes to claiming that he was prejudiced by these alleged errors is when he states that by "[c]onducting such poor voir dire and jury selection," his trial counsel "**could** certainly **have** influenced the outcome of the trial[,] causing harm to Mr. Lynch." In an attempt to satisfy his burden of demonstrating prejudice, Lynch relies upon what effect various alleged actions/inactions of his trial counsel "**could have**" had on the jury, "**if**" his trial counsel had or had not taken these actions. We regard Lynch's allegations of "error," which supposedly resulted in prejudice to his case, as nothing more than his personal opinion, based entirely upon speculation. We are not persuaded by Lynch's speculations and hold that they fall woefully short of satisfying the prejudice requirement of *Strickland*. Because this Court is unable to conclude from the record that Lynch's trial counsel was constitutionally ineffective, we hold this assignment of error to be without merit.

## II. THE TRIAL JUDGE MAY HAVE PREJUDICED THE JURY BY STATEMENTS MADE TO THEM.

Lynch complains of a comment made by the trial judge wherein the judge told the jury that because it was Friday, he wanted "to try to move right along with [the case]." The entire statement was as follows:

Good morning; one more day. We have a criminal case to try this morning, and we are going to move right along with it. I know it's Friday, and I know y'all want to get through. It's Friday; the Judge wants to get through, and I guess the lawyers do, so we are going to try to move right along with it.

Lynch contends that this statement by the court "**could have** forced the jury to speed up their deliberation and wrongfully convict the defendant." The State responds that this issue is "both procedurally and substantively unsound." We agree.

It is readily apparent to this Court that the judge's comments, made prior to the beginning of Lynch's trial, had no effect on the jury's deliberations made at the conclusion of trial. However, as argued by the State, Lynch's failure to cite any authority in support of his assignment of error renders moot this Court's obligation to analyze his claim. As recently as this past year, the Mississippi Supreme Court has reaffirmed its time-honored rule that an appeals court "is under no duty to consider assignments of error when no authority is cited." *Hoops v. State*, 681 So. 2d 521, 526 (Miss. 1996) (citing *Hewlett v. State*, 607 So. 2d 1097, 1106 (Miss. 1992)); *see also Kelly v. State*, 553 So. 2d 517, 520 (1989) (holding that "[t]his [c]ourt has repeatedly said that we are under no obligation to consider assignments of error when no authority is cited."). Clearly, "it is the duty of an appellant to provide authority and support of an assignment [of error]," a duty which Lynch has failed to fulfill. *See Hoops*, 681 So. 2d at 526 (stating that appellant has duty to provide authority to support his assignment of error). Due to Lynch's failure to direct this court to any legal authority in support of his

argument, this Court holds that Lynch's so-called "assignment" of error presents no question for our review.

### III. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Lynch contends that the trial court committed reversible error in denying his motion for new trial. Lynch argues that "[i]n this particular case the evidence against Mr. Lynch is contradicted," and that "there is no link to the weapon that is alleged to have been used by Mr. Lynch." Lynch concludes by stating that "[t]hese facts contradict the verdict that the jury reached." The State responds that any conflicts in the testimony of the witnesses was a factual issue for the jury to resolve, and that the jury's verdict was "most assuredly not contrary to the overwhelming weight of the evidence."

Motions for a new trial challenge the weight of the evidence and "[implicate] the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). New trial decisions rest within the discretion of the trial court. *McClain*, 625 So. 2d at 781. A new trial motion should only be granted when the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). This Court will reverse and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. *McClain*, 625 So. 2d at 781.

We hold that the alleged conflicts between the testimony of various jurors was precisely the type of factual dispute that a jury is entrusted to resolve. As the Mississippi Supreme Court has held, "[u]nder our system, the jury is charged with the responsibility for weighing and considering conflicting evidence and the credibility of witnesses." *Harris v. State*, 527 So. 2d 647, 649 (Miss. 1988). Because Lynch has failed to demonstrate that affirming his conviction would amount to an "unconscionable injustice," as is required by our standard of review, we hold that the trial court was within its discretion in denying Lynch's motion for new trial. In this case the jury simply performed its assigned duty as trier of fact; there was no error. Contrary to Lynch's assertions, we hold that a mere conflict in the evidence adduced at trial does not automatically render a verdict contrary to the overwhelming weight of the evidence. Accordingly, this issue is without merit.

**THE JUDGMENT OF THE WINSTON COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN (15) YEARS; CONVICTION OF POSSESSION OF A FIREARM BY A CONVICTED FELON AND SENTENCE OF THREE (3) YEARS TO RUN CONSECUTIVELY WITH SENTENCE FOR AGGRAVATED ASSAULT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS; AND REVOCATION OF LYNCH'S PRIOR FIVE (5) YEAR SUSPENDED SENTENCE TO RUN CONCURRENTLY WITH SENTENCES IMPOSED IN THIS CASE IS AFFIRMED. COSTS ARE ASSESSED AGAINST WINSTON COUNTY.**

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