

IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KP-00307 COA

GEORGE MATTHEW LAZAR 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. JOHN M. MONTGOMERY

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: PRO SE

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: FORREST ALLGOOD

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTION FOR MURDER; SENTENCE OF LIFE IMPRISONMENT

MOTION FOR REHEARING FILED: 9/18/97

MANDATE ISSUED: 11/25/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

KING, J., FOR THE COURT:

George Matthew Lazar was convicted of capital murder in the Lowndes County Circuit Court and sentenced to life imprisonment in the custody of the Mississippi Department of Corrections. Aggrieved with his conviction, Lazar appeals and argues that several trial errors deprived him of a fair trial. Finding no error in the trial court's disposition of the case, we affirm.

FACTS

On January 20, 1991, the body of Deanna Veerkamp was found in the bathtub of her trailer home. Two autopsies revealed that Ms. Veerkamp died as a result of asphyxiation due to strangulation. One of the autopsies indicated that semen was found in her body and that Ms. Veerkamp's body held cuts and bruises indicative of defense injuries both of which were consistent with evidence of rape.

Subsequently, George Matthew Lazar was charged with capital murder for causing the death of Ms. Veerkamp, during the commission of rape. Lazar's arrest came as a result of evidence linking him to the crime scene around the time the murder occurred. One such piece of evidence was pubic hair found on Ms. Veerkamp's bed linen, which was microscopically compared to Lazar's and found to have the same microscopic characteristics. A second piece of evidence was that of the semen removed from Ms. Veerkamp's body and compared with a blood sample taken from Lazar. DNA testing indicated that the two samples held the same banding characteristics or gene makeup.

A third piece of evidence linking Lazar to the crime was an eyewitness' description of a car seen at Ms. Veerkamp's trailer in the early morning hours before her body was discovered. This description matched a car belonging to Lazar. In addition to this evidence, Lazar's co-workers told police that Lazar had numerous scratches on his arms and neck when he came into work after the weekend of Ms. Veerkamp's murder. One co-worker told police that when she inquired as to what had happened to him, Lazar told her that he had been with a "hot woman."

One of the autopsy reports indicated that Ms. Veerkamp had bruises around her wrists, which were consistent with having been handcuffed. Several of Lazar's co-workers told police that Lazar owned a pair of handcuffs and brought them to work with him everyday. It was also reported that Lazar had discussed fantasies in which he handcuffed his sex partner. Other evidence consisted of statements from witnesses to the police that Ms. Veerkamp was afraid of Lazar, who had been following her around.

Lazar was tried before a jury in the Lowndes County Circuit Court and found guilty of capital murder. In the sentencing phase of the trial, the jury failed to reach a verdict as to Lazar's punishment; therefore, the judge sentenced him to life imprisonment. Aggrieved with his conviction, Lazar now appeals to this Court requesting review of the following points of error:

- I. Whether the trial court erred in admitting DNA evidence.
- II. Whether the failure to preserve fingernail scrapings was a denial of a fair trial.
- III. Whether evidence of pubic hair was admissible into trial.
- IV. Whether the trial court erred by denying the defense's circumstantial evidence jury instruction and an impeachment instruction.
- V. Whether Lazar received ineffective assistance of counsel.
- VI. Whether the prosecutor committed error in his closing statement.
- VII. Whether cumulative errors circumvented a fair trial.

I.

WHETHER THE TRIAL COURT ERRED BY ADMITTING DNA EVIDENCE.

During the first autopsy a sample of vaginal fluid was removed from Ms. Veerkamp's body. A DNA test called polymerase chain reaction (PCR) was performed on this fluid and a blood sample taken from Lazar by two private laboratories. The laboratories, GeneScreen and GenTest, arrived at two different results. GeneScreen determined that the PCR test results were inconclusive because it indicated the presence of fluids from persons other than the victim and Lazar. On the other hand, the PCR test performed by GenTest indicated a match of the bands in the DNA chain of some of the fluid found in the vaginal sample with the blood sample taken from Lazar. After a hearing on a motion to determine the admissibility of the GenTest DNA test, the court found that pursuant to *Polk v. State*, 612 So. 2d 381 (Miss. 1992) and the recommendations of the National Research Council and its treatise on the use of DNA evidence in the forensic setting, the evidence was admissible in trial.

Lazar now asks this Court to reverse his conviction and sentence. He contends that the trial court applied the wrong test to determine the admissibility of the DNA evidence. It is also Lazar's

contention that the laboratories should have administered a restriction fragment length polymorphis (RFLP) test instead of the PCR test on the vaginal sample. Lazar finally contends that the trial court should have suppressed the DNA evidence pursuant to Mississippi Rules of Evidence 402, 403, and 702 due to the evidence's unreliability and prejudice to him.

A. The trial court applied Polk v. State to determine the admissibility of the DNA evidence.

Lazar contends that the trial court erroneously applied *Polk v. State* to determine the admissibility of the DNA evidence. He argues that the court should have applied the criteria outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). We agree with the trial court's application of the guidelines set out in *Polk v. State*. *Polk*, 612 So. 2d at 390 (adopting *Ex Parte Perry v. State*, 586 So. 2d 242, 250 (Ala. 1991) which applied a modified version of *People v. Castro*, 545 N.Y.S.2d 985 (1989)).

Polk, the first Mississippi case to rely on DNA evidence, sets out a three-pronged test to use in determining the admissibility of DNA evidence at trial. *Id.* A court utilizing this test must make the following inquiry:

I. Is there a theory, generally accepted in the scientific community, that supports the conclusion that DNA forensic testing can produce reliable results?

II. Are there current techniques that are capable of producing reliable results in DNA identification and that are generally accepted in the scientific community?

III. In this particular case, did the testing laboratory perform generally accepted scientific techniques without error in the performance or interpretation of the tests?

In the present case, on the defense's motion to suppress the DNA evidence, the trial court conducted a hearing to determine the evidence's admissibility. The trial judge applied the three-pronged test outlined in *Polk*. In doing so, the court heard testimony from two experts in the field of microbiology and DNA testing. Dr. Sudhir Sinha, President and Lab Director of GenTest Lab in Metairie, Louisiana, and Dr. Donald Sittman, Associate Professor of biochemistry at the University of Mississippi Medical School in Jackson, Mississippi. Although prong I of the *Polk* test was not in dispute, both experts offered testimony that DNA testing was a proven technique generally accepted within the scientific community, which was capable of producing reliable results.

The trial court found that the PCR test conducted by GenTest laboratory was a generally accepted scientific technique capable of producing reliable results in DNA identification. Furthermore, based on Dr. Sinha's testimony, GenTest performed the test consistent with the procedures and protocol established by the lab to ensure that the tested samples were not contaminated during testing. Thus, the trial court concluded that prongs II and III of the *Polk* test were met. We find that the record supports the court's application and conclusions pursuant to the Mississippi Supreme Court's precepts set out in *Polk*.

Lazar argues that the court should have applied *Daubert* instead of *Polk*. We find that Lazar's

reliance on *Daubert* is misplaced. *Daubert*, a Supreme Court case, provided guidelines helpful in the application of the Federal Rules of Evidence when determining the admissibility of scientific evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 593-94. *Daubert* provided the following four criteria:

1. Whether the scientific theory can be or has been tested.
2. Whether the theory or technique has been subjected to peer review and publication.
3. The court should consider the scientific theory or technique's known or potential rate of error.
4. Whether the scientific theory or technique has been generally accepted in the scientific community.

Id.

Although the Supreme Court's edict maybe helpful, we are not bound to follow the guidelines established in *Daubert*, nor are we precluded from applying the more specific precepts set out in *Polk* concerning the admissibility of DNA evidence. Furthermore, the guidelines set out in *Polk* are akin to those established in *Daubert*; therefore, we find no error in the court's application of the *Polk* test.

B. Restriction Fragment Length Polymorphism (RFLP) Test v. Ploymerase Chain Reaction (PCR) Test.

Lazar contends that the victim's vaginal sample and his blood sample should have been subjected to the RFLP test instead of the PCR test. He claims that the PCR test is unreliable and has an extremely high rate of error. However, both tests are generally accepted in the scientific community as being reliable sources used to identify DNA.

The RFLP test measures the variation in the length of a strand of DNA in a particular person. Each person has cells with nuclei, which contain genes or chromosomes. These genes or chromosomes present a particular sequence or genetic pattern that is unique to each individual. The RFLP analysis can seclude the genetic sequences on the strand of DNA creating a genetic "fingerprint" of the DNA. However, there is one limitation to the RFLP test and that is it requires a minimum amount of sample. This problem arose in testing the vaginal sample submitted from Ms. Veerkamp's body. The sample was too small to conduct the RFLP test. Therefore, it was analyzed under the PCR test.

Unlike the RFLP test, the PCR test can utilize a very small amount of genetic material and make new copies of the gene. This technique focuses on a particular place on a DNA strand or chain and identifies the sequences of bands in that area. Because some genes may have several sequence variations, the identification of a specific individual can be difficult. However, the PCR process produces a repeat segment of the gene, which is then placed in a electrophoresis gel and hybridized. Just as in the RFLP technique, this allows for the measurement of the gene, and it then becomes possible to tell if the DNA came from a particular person. Furthermore, the laboratory conditions under which the PCR test is designed to be conducted insure a reliable result through a process of exclusion, when the evidence sample is compared to the sample taken from the suspect. Thus, what the PCR test may lack in specificity when compared with the RFLP, it compensates for in reliability.

The trial court determined that Lazar's claims that the PCR test results were unreliable and contained a high potential rate of error were unfounded. Experts testifying for the State and the Defendant stated that the PCR testing technique was generally accepted in the scientific community, particularly in the forensic setting. Both experts stated that the results of a PCR test were helpful only if the laboratory followed very strict testing procedures to ensure that a particular sample was not contaminated.

In this state, the admissibility of evidence lies within the discretion of the trial judge. M.R.E. 104. The trial court found that GenTest laboratory:

- (1) complied with all of the National Research Counsel's recommendations for a suitable testing program;
- (2) followed strict quality control guidelines throughout the DNA testing procedure;
- (3) followed standard operating procedures to determine that no samples were mislabeled or contaminated by DNA from another source, and the procedures complied with recommendations from the National Research Counsel;
- (4) checked and calibrated all materials and reagents used in performing the test;
- (5) conducted the test by running two control samples in parallel with unknown samples to indicate any errors in test performance;
- (6) preserved in detail its records of its testing procedures and took colored photographs of its results;
- (7) voluntarily participated in a proficiency testing program and laboratory personnel likewise participated in continuing education programs in the area of forensic DNA analysis; and
- (8) is accredited by the National Association of Blood Banks.

The trial court concluded that GenTest had performed PCR, a generally accepted scientific technique, without error in the performance and interpretation of the DQ Alpha test. The court noted the testimony of Dr. Sittman, the Defendant's expert in this area, that PCR was controversial and prone to contamination. The court held that Dr. Sittman's comments concerning the use of the PCR method went to credibility and not competency. The court considered the test reliable and found it admissible, limited to showing that the DNA found in the vaginal sample was a "match" with the blood sample taken from Lazar. Based upon the record and the trial court's findings, we do not find error in the court's decision to allow the results of the PCR test to be placed into evidence. The trial judge had the benefit of hearing the testimony and observing the exhibits provided by both experts in this extremely technical scientific area, and we find that he was in the best position to determine the admissibility of the results of the PCR test.

C. The trial court should have suppressed the DNA evidence due to its unreliability and prejudice pursuant to M.R.E. 401, 402, 403 and 702.

We have previously discussed the admission of the DNA evidence and determined that the trial court did not abuse its discretion in admitting the evidence. The DNA evidence was relevant and probative of Lazar's guilt or innocence, and the Mississippi Rules of Evidence favors admission of such evidence. *See* M.R.E. 401 advisory committee's note. Moreover, the probative value of the evidence was not substantially outweighed by undue prejudice as Lazar suggested. Therefore, we find that the admission of the evidence did not violate M.R.E. 403. In addition, when the State tendered Dr. Sinha as an expert witness in the field of molecular biology with a speciality in DNA analysis, Lazar offered no objection. At this late hour, Lazar may not claim that Dr. Sinha's testimony failed to comply with M.R.E. 702. *Irving v. State*, 498 So. 2d 305, 314 (Miss. 1986).

II.

WHETHER THE FAILURE TO PRESERVE FINGERNAIL SCRAPINGS WAS A DENIAL OF A FAIR TRIAL.

Lazar contends that he was denied due process and a fair trial because the State failed to preserve evidence of fingernail scrapings taken from Ms. Veerkamp during the first autopsy. However, the record fails to support Lazar's contentions. This Court must decide each case by the facts shown in the record, not assertions made in the brief. *Hansen v. State*, 592 So. 2d 114, 131 (Miss. 1991).

According to the testimony of Douglas Bachman, a former employee of the State Medical Examiner's Office, who was present at the first autopsy, there were no fingernail scrapings taken from Ms. Veerkamp's body. In addition, Dr. Sue Walker, a pathologist at the University Medical Center, testified that she had no knowledge of anyone collecting fingernail scrapings during the autopsy and collection of evidence. At trial, Lazar failed to rebut either witness' testimony, nor does he provide any support of his contentions in the brief submitted to this Court. Furthermore, Lazar attempts to raise issues contending that the State presented false testimony and evidence at trial and suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Again, the record does not support such allegations, and Lazar fails to provide any support in his briefs. Therefore, we find this issue to be without merit.

III.

WHETHER EVIDENCE OF PUBIC HAIR WAS ADMISSIBLE INTO TRIAL.

During the investigation of the crime scene, the police removed a blanket from Ms. Veerkamp's bed. That blanket was sent to the Mississippi Crime Lab in Meridian where it was examined for the presence of hair and seminal fluid. Forensic Scientist Lora H. Aria testified that she recovered one pubic hair that exhibited the same microscopic characteristics as the pubic hair submitted in the known sample of Lazar. At trial, the following exchange occurred:

Mr. Allgood (State): And in this instance, the pubic hair that was found on the blanket did, in fact, match those of George Lazar--the known sample, is that correct?

Ms. Aria: They contain the same microscopic characteristics, yes.

Mr. Allgood (State): Now so as not to mislead the jury, you're not saying that hair was, in fact, deposited by him and no one else in the whole world, is that correct?

Ms. Aria: Right. What I am saying is that they have the same microscopic characteristics and they could have come from George Lazar or somebody else who had hair exactly like George Lazar.

At no time during this exchange did defense counsel raise an objection to the admission of this evidence. Nor did defense counsel object to Aria being accepted as an expert in the field of forensic science specializing in serology and hair and fiber analysis. A party wishing to object to the admission of evidence at trial cannot wait until this Court's review to raise such an objection. *Crawford v. State*, 515 So. 2d 936, 938 (Miss. 1987). This contemporaneous objection rule's applicability is not diminished in a capital case. *Cole v. State*, 525 So. 2d 365, 369 (Miss. 1987).

Because Lazar failed to lodge a contemporaneous objection, we resolve this issue adversely to him. In doing so, we do not reach and specifically decline to comment on the merits of this issue.

IV.

WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENSE'S CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS AND AN IMPEACHMENT INSTRUCTION.

Lazar contends that the trial court failed to give circumstantial evidence jury instructions and an impeachment instruction. First, his contention concerning the circumstantial evidence instruction is without merit. During the jury instruction conference, the following colloquy occurred:

By Mitchell (Defense): Your Honor, we'd like to go to--we have two circumstantial evidence instructions DGP-15 and DBP-14. I'd like to go to 15 first because that's the instruction we would like.

By the Court: I think you can have 14 with no problem. Do you have any objection to 14?

By Mr. Allgood (State): No, your Honor.

By the Court: We gave--all right. D-14 will be given.

This exchange in the record indicates that the court granted DGP-14. Lazar now alleges that the absence of DGP-14 in the record is proof that the court failed to submit a circumstantial evidence instruction to the jury. However, absent any such proof of the court's omission, we presume that,

since it was granted, DGP-14 was submitted to the jury for its consideration.

Next, Lazar claims that the trial court erred by refusing jury instruction DGP-10, an impeachment instruction. The trial court refused DGP-10 stating that it amounted to an improper comment on the evidence by the court. The court indicated that the instruction singled out a class of witnesses and would infer an improper bias on the part of the court. We agree that DGP-10 would have been an improper comment on the testimony; therefore, the court properly refused the instruction. *Foster v. State*, 508 So. 2d 1111, 1119 (Miss. 1987). Moreover, the court is under no obligation to provide duplicate instructions. *Davis v. State*, 431 So. 2d 468, 475 (Miss. 1983) ("A trial court is not required to give instructions which are covered by other instructions although the language may differ.") In the court's instruction C.01, the court advised the jury that it was the duty of the jury to determine the facts of the case and to determine the weight and credibility of the testimony provided in the case. Therefore, even though the court refused the impeachment instruction, the jury was fairly advised of its duty to determine the weight and credibility of the testimony provided by each witness. The trial court did not err in refusing DGP-10.

V.

WHETHER LAZAR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Lazar contends that he received ineffective assistance of counsel due to his counsel's failure to object to the introduction of pubic hair evidence; failure to call certain witnesses; and failure to object to the court's denial of a circumstantial evidence jury instruction. This Court reviews claims of ineffective assistance of counsel under the two-pronged test set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* places the burden on the defendant to show the deficiency of counsel's performance and that such performance was sufficient to constitute prejudice to the defense. *McQuarter v. State* 574 So. 2d 685, 687 (Miss. 1990). "The defendant must show that there is a reasonable probability that but for his attorney's errors, defendant would have received a different result in the trial court." *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992).

We have previously determined that Lazar's counsel requested and was granted a circumstantial evidence instruction; therefore, Lazar's contention that counsel's performance in this arena was deficient is without merit.

While finding the issue of admitting the pubic hair into evidence procedurally barred, some consideration must be given to it as we address the issue of ineffective assistance of counsel. Generally, trace evidence such as hair is admissible when a proper foundation is laid. *May v. State*, 524 So. 2d 957, 963 (Miss. 1988). Pursuant to M.R.E. 702, where it will assist the court and he has been properly qualified and instructed of the limitations of his testimony, an expert may inform the court of his observations regarding trace evidence. Lazar has failed to demonstrate why the observations of forensic scientist Lora Aria should not have been received into evidence, or that the outcome in this case would have been different without her observations. Therefore, the failure of Lazar's counsel to object to the admission of the pubic hair evidence was not prejudicial to Lazar's defense.

Lazar further contends that defense counsel provided ineffective assistance by failing to call Dr. Lloyd White and Deputy John Brown to testify on Lazar's behalf. First, Lazar alleges that Deputy John Brown was present during the initial autopsy of Ms. Veerkamp and could have provided valuable testimony concerning the existence of fingernail scrapings and physical injuries present on Ms. Veerkamp's body. Contrary to Lazar's contentions, the record merely indicates that Deputy Brown transported Ms. Veerkamp's body to the State Medical Examiner's Office for the autopsy. Even if Brown were present at the autopsy, Lazar fails to indicate or provide support that Brown's testimony would have changed the outcome of this trial.

In addition, Lazar claims that Dr. White, the former State Medical Examiner who performed the initial autopsy, should have been subpoenaed by defense counsel because he would have substantially contradicted the testimony of Dr. Steven Haynes. Although Dr. White was not called to testify, defense counsel extensively cross-examined Dr. Haynes concerning Dr. White's initial autopsy report. Thus, the jury was aware of the conflicting autopsy reports. The jury accepted Dr. Haynes' findings, and there is no indication that the result would have been different had Dr. White testified personally. Because Lazar has failed to satisfy the two prongs of *Strickland*, this Court is unable to find that defense counsel's performance was ineffective and prejudicial under the totality of the circumstances.

VI.

WHETHER THE PROSECUTOR COMMITTED ERROR IN HIS CLOSING STATEMENT.

Lazar contends that during closing arguments the prosecutor improperly commented on the State's burden of proof and the autopsy performed by Dr. White. Lazar further contends that his counsel was ineffective because he failed to object and that the trial court should have admonished the jury in regards to the prosecutor's comments.

Procedurally, Lazar failed to make a contemporaneous objection and is barred from raising this issue. *Cole v. State*, 525 So. 2d 365, 369 (Miss. 1987). Substantively, attorneys are afforded broad latitude in closing argument, and we do not find that the prosecutor exceeded the limits of argument in this case. *Berry v. State*, 575 So. 2d 1, 9 (Miss. 1990).

Lazar first takes issue with the following prosecutorial statement:

Now likewise ladies and gentlemen, you're going to find that the State must prove to you that what occurred during the course of her death was a rape, that she was killed with or without the design to effect death is what the instruction says. Whether or not the individual had what we normally call malice when he killed her doesn't make any difference in capital murder if he was, in fact, committing the crime of rape upon her body. Now ladies and gentlemen in that regard, look at the body of Deanna Veerkamp. Look at the photographs. Look at the doctor's drawings. You tell me that was not rape. You know she had sexual intercourse ladies and gentlemen because that's really not an issue for you to resolve back in the jury room because there's seminal fluid found in the vaginal swabs and washings. You know she'd had recent intercourse and she literally is covered in bruises, cuts, abrasions from her head to her toe and found without any clothes on strangled.

Lazar claims that this statement contravened the State's burden to prove each element of the crime of which he was charged. However, we find that Lazar has a faulty interpretation of § 97-3-19 of the Mississippi Code. The prosecutor correctly stated the law. The statute does not require the State to prove malice when a murder results during the commission of a felony, such as rape. Furthermore, we do not find that the prosecutor exceeded the limits of argument by summarizing the facts and evidence presented during the trial. This statement was neither inflammatory nor highly prejudicial to Lazar.

Lazar contends that his counsel's failure to object constituted ineffective assistance of counsel. Assuming an objection would have been appropriate, defense counsel's failure to make one does not rise to the threshold required to meet the *Strickland* two-pronged test, as we previously discussed.

Finally, Lazar contends that the prosecutor made various remarks about Dr. White in his closing argument. The prosecutor questioned Dr. White's credibility as compared to that of Dr. Haynes, the State's witness. Lazar claims that since Dr. White was not present to testify, the prosecutor should not have been allowed to question Dr. White's credibility or performance. However, these remarks relate to Dr. White's autopsy report, which the defense used in its cross-examination of Dr. Haynes. In addition, the defense brought out the existence or non-existence of fingernail scrapings during its examinations of Douglas Bachman and Dr. Sue Walker. Therefore, whether or not Dr. White was there to testify, the prosecutor did not exceed the limits of argument by commenting on the testimony or evidence raised by the defense. Therefore, this assignment of error is without merit.

VII.

WHETHER CUMULATIVE ERRORS CIRCUMVENTED A FAIR TRIAL.

Finally, Lazar claims that cumulative individual errors operated to deprive him of a fundamentally fair trial. The Mississippi Supreme Court has held that individual errors, not reversible in themselves, may combine with other errors to make up reversible error. *Hansen v. State* 592 So. 2d 114, 142 (Miss. 1991). However, in the case *sub judice* we have examined each

one of Lazar's assignments of error, and we have not found error in any of them. Therefore, we are unable to find cumulative error in the whole.

THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LOWNDES COUNTY.

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