IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-KA-00243-COA

JASON BERNARD FOXWORTH A/K/A JASON BENARD FOXWORTH — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	11/16/2007
TRIAL JUDGE:	HON. STEPHEN B. SIMPSON
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KEITH PISARICH
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
DISTRICT ATTORNEY:	CONO A. CARANNA II
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF CAPITAL MURDER AND SENTENCED TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT THE POSSIBILITY OF PAROLE
DISPOSITION:	AFFIRMED - 12/13/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, C.J., ISHEE AND CARLTON, JJ.

LEE, C.J., FOR THE COURT:

PROCEDURAL HISTORY

¶1. Jason Foxworth was found guilty in the Circuit Court of Harrison County of capital murder. He was sentenced to life in the custody of the Mississippi Department of Corrections (MDOC) without the possibility of parole.

¶2. Foxworth now appeals his conviction, asserting two issues: (1) reversible error occurred when the State told the jury in its opening statement that Steven Lamar Fairley, a co-defendant, had pleaded guilty to armed robbery in the same crime, and (2) the trial court committed reversible error in failing to grant either of his two motions to continue the trial date. Finding no reversible error, we affirm.

FACTS

¶3. Tavares Turner testified that he was holding approximately $10,000 cash for his roommate, Michael Williams, to purchase a car. Turner's coworker, Fairley, had an antique car for sale for $8,000. Turner told Fairley that he was holding a large amount of cash for Williams. Fairley told Foxworth about the cash. According to Fairley, Foxworth encouraged him to rob Turner before Turner had a chance to spend the cash.

¶4. One evening, Foxworth, Fairley, Mark Kee Brown, and an unidentified male met up and drove to Turner's home in D'Iberville, Mississippi. When they arrived, Fairley went inside, and he and Turner sat down to talk and watch television. Turner's cousin, Lenny Jackson, and Turner's uncle, Larry Turner (Larry), were also in the home. A few minutes later, Foxworth, Brown, and the unknown man entered the home and began asking: "Where the money at?" The three men were armed. They ordered Turner, Fairley, and Jackson to get on the ground. They kicked both Turner and Jackson in the head and demanded the money. Larry was taken into another room and shot in the neck. Larry subsequently died. Turner told the men that the cash was in his pocket in a sock. They took the sock and left.

DISCUSSION

I. CO-INDICTEE'S GUILTY PLEA

¶5. Prior to Foxworth's trial, Fairley pleaded guilty to a reduced charge of armed robbery and was sentenced to twenty years in the custody of the MDOC. Fairley testified at Foxworth's trial. During the State's opening statement, the following exchange occurred:

> [State]: . . . . Ladies and gentlemen, we'll also have testimony in this case that Mr. Fairley was charged with this crime, I want to tell you this up front, and he pled to an armed robbery charge.
>
> [Foxworth's attorney]: Your Honor, we object to that, if the Court please. We object to that, Your Honor, and we move for a mistrial.
>
> THE COURT: Overruled. Overruled.
>
> [State]: He's currently serving a sentence in the penitentiary for his action. . . .

¶6. At the conclusion of the State's opening statement, the trial court discussed the motion for a mistrial with the attorneys outside the presence of the jury. In overruling the motion, the trial court found: "The [S]tate has a right to anticipate defenses and to discuss those defenses in their opening statement." The trial proceeded. Foxworth's counsel attacked Fairley's credibility during the defense's opening statement.

¶7. The following morning, Foxworth renewed his objection and motion for a mistrial. A lengthy discussion ensued outside the presence of the jury. In denying the motion for a mistrial, the trial judge stated:

> I am at this time going to overrule the renewed motion for a mistrial. However, I'm going to direct that the [S]tate be prohibited from inquiring on direct examination whether or not Mr. Fairley has entered any type of plea or been adjudicated on any type of underlying felony of armed robbery or the fact that he was a co-indictee and charged in this case. . . . So if the statement was improper and error, I think, taken in the totality of the circumstances and the evidence that this Court anticipates to be elicited from Mr. Fairley, it was harmless error. If Mr. Fairley does not testify, then I will allow the defense to renew that motion for a mistrial. . . .

¶8. Foxworth is correct that evidence of a co-defendant's guilty plea or conviction is generally inadmissible "because such plea of guilty or conviction is no evidence of the guilt of the party being tried." *Buckley v. State*, 223 So. 2d 524, 528 (Miss. 1969). However, further analysis is necessary to determine whether reversible error occurred in this case.

¶9. We find the cases of *Clemons v. State*, 732 So. 2d 883 (Miss. 1999) and *White v. State*, 616 So. 2d 304, 308 (Miss. 1993) instructive on whether the State's comments should have resulted in a mistrial. In *Clemons*, Bobby Clemons was convicted by a jury of three counts of murder. *Clemons*, 732 So. 2d at 884-85 (¶1). His co-indictee, Timothy Sudberry, was called by the State to testify at Clemons's trial. *Id.* at 890 (¶27). On direct examination, Sudberry stated that he had pleaded guilty to accessory after the fact to the same crime for which Clemons was on trial. *Id.* On appeal, Clemons argued that he was denied the right to a fair trial because of Sudberry's testimony. *Id.* Clemons cited to *Johns v. State*, 592 So. 2d 86 (Miss. 1991), wherein the Mississippi Supreme Court found reversible error where a co-indictee testified that a jury had found her guilty of the same crime for which the defendant was being tried. *Id.* at 91-92. In *Johns*, the reversal was based on ineffective assistance of counsel for the defense counsel's failure to object to the co-indictee's testimony. *Id.* In affirming the verdict against Clemons, the supreme court found *Johns* distinguishable. *Clemons*, 732 So. 2d at 890 (¶29). In *Clemons*, the supreme court stated:

> The danger at issue in [*Johns*] is that one jury would rely upon the judgment of a prior jury in reaching its decision. The present case is distinguishable, however, because the case sub judice deals with a plea of guilty; that is, a prior admission of guilt, which is consistent with the testimony at trial. This is a significant distinction because prior statements have evidentiary value different from prior findings of other tribunals.

Id.

¶10. In *White*, the State told the jury during an explanatory statement that two co-conspirators had pleaded guilty to the same crime for which Joan White was on trial. *White*, 616 So. 2d at 305. The co-conspirators had not yet testified. *Id.* White moved for a mistrial, which was denied. *Id.* The supreme court found the statements should have been excluded because "the prosecutor jumped the gun." *Id.* at 308. However, no reversible error was found. *Id.* The supreme court noted the credibility of the co-conspirators was central to the case, and "[i]t would strain credulity to suggest that, but for the introduction of the guilty plea, this attack on [the co-conspirators] would not have been made." *Id.* The court also noted the guilt of the co-conspirators was not a disputed fact at trial. *Id.*

¶11. The State mentioned Fairley's guilty plea in its opening statement long before Fairley's credibility was attacked. While the statement was premature, we cannot find it to be reversible error. First, opening statements are not evidence. Second, the trial court instructed the State to refrain from questioning Fairley about the guilty plea on direct examination. The State complied, and Fairley's guilty plea was not discussed further during the trial. Third, the trial court stated that it would reconsider the motion for a mistrial if Fairley did not testify. Finally, Foxworth failed to show how he was prejudiced by the comments made during the opening statement.

¶12. Fairley's guilty plea was not discussed in opening statement as evidence of Foxworth's guilt; rather, the statement went to Fairley's credibility. Regardless, the trial court proceeded appropriately in instructing the State to refrain from further comments regarding the guilty plea. Fairley testified and was thoroughly cross-examined on his

involvement in the crime. While Fairley's guilty plea was not mentioned again after opening statements, Fairley's guilt was not disputed. Fairley admitted he returned to the crime scene approximately an hour after the shooting, was taken into custody, and gave a statement to the police. We find this issue is without merit.

II. CONTINUANCE

¶13. On November 2, 2007, and November 9, 2007, Foxworth filed motions to continue his trial, which was scheduled for November 13, 2007. In his second motion, Foxworth argued he needed additional time to prepare for trial as he had "only recently received additional discovery from the prosecution including the autopsy report, audio tapes[,] and photographs." A hearing was held on the motion.

¶14. The new photographs received by Foxworth's counsel were color photographs that had previously been given to him in black and white. There were also approximately twenty photographs submitted that had not been previously given to defense counsel. These photographs were of the deceased victim at the crime scene. The trial court excluded the photographs that had not been previously given to Foxworth. As for the audio tapes, Foxworth's counsel admitted he had been provided a transcript of the tapes during discovery. The trial court instructed Foxworth's counsel to bring any discrepancies between the audio tapes and transcripts to the court's attention before trial. The autopsy report was not discussed at the hearing, and there is no evidence that Foxworth did not receive the autopsy report in a timely manner. Even if Foxworth first received the autopsy report on November 9, this still gave him until November 13 to review the report. Further, the victim's manner of death was not disputed by the parties, and Foxworth did not argue any prejudice regarding

when he received the autopsy report.

¶15. "The standard of review to grant or deny a motion for continuance is within the sound discretion of the trial court and will not be grounds for reversal unless shown to have resulted in manifest injustice." *Payton v. State*, 897 So. 2d 921, 931 (¶11) (Miss. 2003). We cannot find the trial court abused its discretion in denying Foxworth's motions for continuance. There has been no showing of manifest injustice. This issue is without merit.

¶16. **THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT THE POSSIBILITY OF PAROLE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.**

IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS AND RUSSELL, JJ., CONCUR. MAXWELL, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BARNES AND CARLTON, JJ. MYERS, J., NOT PARTICIPATING.

MAXWELL, J., SPECIALLY CONCURRING:

¶17. I agree with the result reached by the majority but write separately to address the propriety of the State's preemptive use of an accomplice's guilty plea to blunt a defendant's attack on an accomplice's credibility. I find this practice serves a proper evidentiary purpose and is permissible if a limiting instruction is given and the accomplice testifies at trial.

I. A Co-defendant's Guilty Plea Is Admissible for Other Purposes

¶18. The Mississippi Supreme Court has recognized that "[f]ederal and state appellate courts have found the admission of a co-conspirator's plea of guilty, while incompetent as

substantive evidence of the defendant's guilt, may be admissible for other purposes."[1] Considering what qualifies as a legitimate purpose, the United States Court of Appeals for the Fifth Circuit has held "[p]reemptively introducing a plea to counteract anticipated defense efforts at impeachment is a proper purpose." *United States v. Setser*, 568 F.3d 482, 494 (5th Cir. 2009). This legitimate evidentiary purpose focuses on lessening the impact of a defendant's attack on an accomplice's credibility. To proceed in this manner, the co-defendant must ultimately testify and be subjected to cross-examination.

¶19. Here, Foxworth and Fairley were initially charged as co-defendants for the capital murder of Larry Turner. Obviously, Foxworth and his attorney knew the State had allowed Fairley to plead guilty to the lesser offense of armed robbery—the underlying offense of the capital-murder charge.

¶20. Recognizing that finger pointing and credibility attacks aimed at Fairley would figure prominently in Foxworth's defense strategy, the State mentioned in its opening statement that Fairley had initially been charged with "this crime"—meaning capital murder. The prosecutor explained he wanted to tell the jury "up front" that Fairley had "pled to an armed robbery charge." The mention of Fairley's guilty plea drew an objection and request for a mistrial from Foxworth. But in overruling Foxworth's request, the trial judge correctly held

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[1] *White v. State*, 616 So. 2d 304, 307 (Miss. 1993) (citing *United States v. Medley*, 913 F.2d 1248, 1257–58 (7th Cir. 1990); *United States v. Davis*, 766 F.2d 1452, 1456 (10th Cir. 1985); *United States v. Wiesle*, 542 F.2d 61, 62–63 (8th Cir. 1976); *People v. Brunner*, 797 P.2d 788, 789 (Colo. Ct. App. 1990); *State v. Padgett*, 410 N.W.2d 143, 146 (N.D. 1987)); *see also State v. Braxter*, 568 A.2d 311, 316 (R.I. 1990) (holding guilty plea of accomplice in trial of defendant on same charge admissible when introduced to impeach accomplice but inadmissible to demonstrate guilt of defendant).

"the [S]tate has a right to anticipate defenses and to discuss those defenses in [its] opening statement." Yet the trial judge restricted the State from inquiring on direct examination whether Fairley had entered a guilty plea to a reduced charge. He also prevented the State from mentioning that Fairley initially had been charged with Foxworth as co-defendants in the capital-murder case.

II. Preemptive Use of an Accomplice's Guilty Plea

¶21. The Fifth Circuit has considered the admission of a co-defendant's guilty plea in a procedural posture quite similar to this one. In *United States v. Veltre*, 591 F.2d 347, 349 (5th Cir. 1979), defense counsel objected to the government's mention of an accomplice's guilty plea during its opening statement. On appeal, Veltre, like Foxworth, claimed the preemptive mention of his accomplice's guilty plea entitled him to a mistrial. The Fifth Circuit disagreed, recognizing "[d]efense counsel's expected defense on this theory was merely brought out in advance by the [g]overnment to blunt adverse impact on the jury and to minimize the impression that the [g]overnment was trying to conceal [the co-defendant's] guilty plea." *Id.* The Fifth Circuit acknowledged that in cases where the co-defendant testifies at trial and is "subject to the rigors of cross-examination," the government's "disclosure of the guilty plea to blunt the impact of attacks on [the co-defendant's] credibility serves a legitimate purpose and is permissible." *Id.* (citing *United States v. King*, 505 F.2d 602, 607 (5th Cir. 1974)). More recently in *United States v. Valuck*, 286 F.3d 221, 228-29 (5th Cir. 2002), the Fifth Circuit found the government's introduction of a co-conspirator's guilty plea during opening statement and again during direct examination served a dual purpose. It reduced "the potential effects of impeachment, while showing the jury that [the

accomplice] had not been provided any 'sweetheart deal' in exchange for his testimony." *Id.* at 229. Approving this strategy, the Fifth Circuit reflected: "Surely, the government is permitted to outline its evidence during opening [statement], and that, of course, includes evidence about an accomplice's guilty plea." *Id.* (citing *United States v. Magee*, 821 F.2d 234, 241 (5th Cir. 1987)).[2]

¶22. But when offering the guilty plea of a witness-accomplice, protective measures must be taken: (1) the guilty plea must serve a legitimate purpose, and (2) a proper limiting instruction should be given. *United States v. Marroquin*, 885 F.2d 1240, 1247 (5th Cir. 1989). Potential prejudice may be reduced by instructing the jury that "the fact that an accomplice has entered a plea of guilty to an offense charged is not evidence, in and of itself, of the guilt of any other person" and that such testimony should be "received with caution and weighed with great care." *Valuck*, 286 F.3d at 228.

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[2] While this case solely concerns the State's preemptive use of a co-defendant's plea agreement during opening statement, I see no legitimate prohibition against either the State or defendant mentioning an accomplice's guilty plea during voir dire. The control of voir dire is largely left to the circuit court's discretion, and as long as the judge is agreeable, questions surrounding a co-defendant's guilty plea are fair game for both sides. Why should the defendant be restricted from eliciting from prospective jurors whether they are more likely to convict because a co-conspirator has plead guilty to the same charge? And in turn, the State should be permitted to inquire whether potential jurors would refuse to consider the testimony of a cooperating witness who testifies with the benefit of a plea agreement. Such inquiries focus on a central goal of voir dire—to uncover the prospective jurors' bias or pre-conceived notions of guilt. A Missouri appellate court has recognized that "[s]uch voir dire questions are allowed as being relevant because, any time the State enters into a plea agreement with a witness, the issues of bias and self-interest arise, since plea agreements are 'double-edged swords' that 'not only support a witness'[s] credibility by showing an interest to testify truthfully, but also impeach a witness'[s] credibility by showing an interest in testifying favorably for the government, regardless of the truth.'" *State v. Golatt,* 81 S.W.3d 640, 645 (Mo. Ct. App. 2002) (quoting *State v. Dudley,* 51 S.W.3d 44, 54 (Mo. Ct. App. 2001)).

¶23. Indeed, the State's assessment of Foxworth's defense rang true. During his opening statement, Foxworth's attorney vigorously attacked Fairley's credibility as a witness. This tactic continued throughout the trial. Fairley testified and was thoroughly examined about his alleged bias. Abiding by the trial judge's earlier ruling restricting questions about the original charge and guilty plea, neither excluded topic was broached. Thus, Foxworth's attorney withdrew his earlier proposed limiting instruction, which would have likely been given if not for the trial court's restriction against mentioning Fairley's guilty plea or the original charge and would have provided adequate protection here.

¶24. Contrary to the trial judge's ruling, since Fairley was subjected to cross-examination, I find inquiry into the original charge and ultimate guilty plea was a proper topic for examination. I also find it permissible to allow inquiry into these topics by either party during opening statement.

BARNES AND CARLTON, JJ., JOIN THIS OPINION.