IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPP

NO. 93-KA-00026 COA

LARRY DALE LEWIS & JAMIE LEWIS

APPELLANTS

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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: SCOTT COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

ROY NOBLE LEE, JR., EVAN THOMPSON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL: BY DEIRDRE MCCRORY

DISTRICT ATTORNEY: J. KENNEDY TURNER

NATURE OF THE CASE: ARMED ROBBERY

TRIAL COURT DISPOSITION: LARRY LEWIS-GUILTY; SENTENCED TO 33 YEARS IN MDOC ; JAMIE LEWIS- GUILTY; SENTENCED TO 25 YEARS IN MDOC

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

DIAZ, J., FOR THE COURT:

Larry Dale Lewis (Larry) and his brother Jamie Lewis (Jamie) were both convicted of armed robbery in the Scott County Circuit Court. Larry was sentenced to serve thirty-three years in the Mississippi

Department of Corrections, and Jamie was sentenced to serve twenty-five years in the Mississippi Department of Corrections. Aggrieved from this judgment, the brothers appeal to this Court asserting the following issues: 1) that the lower court erred in not directing a verdict for the Appellants; 2) that the lower court erred in failing to grant the Appellants a continuance; 3) that the lower court erred in failing to grant a severance of the trial of the Appellants; and 4) that the lower court erred in admitting the statements of the Appellants into evidence because the statements were not voluntary confessions. Finding no merit to these issues, we affirm the judgments of the circuit court.

FACTS

On July 31, 1992, Mary Duncan (Duncan) and Margaret Crimm (Crimm) were working at the Snak-N-Gas convenience store. According to Duncan, Larry and Jamie came into the store around 11:15 to 11:20 P.M. Duncan testified that she was working behind the counter while Crimm was sweeping the floor. One of the brothers came in and went to the back of the store towards the beer cooler. The other one entered a few seconds later and also walked back towards the cooler. Duncan then testified that the older brother, identified as Larry, brought a six pack of beer to the counter, but one beer was missing from it. Duncan asked Larry if he only wanted five beers, or if he wanted a six-pack. Without saying anything he went back to the cooler. As the two men were returning back to the counter, Larry grabbed Crimm while Jamie went back behind the counter to Duncan. Duncan stated that Larry told her to open the register, while Jamie was behind the counter with Duncan, pointing half of a pair of scissors at her. Meanwhile, Larry was holding down Crimm with the other half of the scissors. Apparently, Jamie took the cash from the registers when Duncan opened them as instructed. The men then told Duncan and Crimm to go into the cooler and stay there until they left. Duncan and Crimm stood in the cooler until they saw the two men walk past the window of the store. Duncan immediately called the police.

Anita Nance, Jamie's girlfriend testified that Larry and Jamie picked her up in her car between 12:00 midnight and 1:30 A.M. on the night of the incident. The three proceeded to Larry and Jamie's sister's house. There, Jamie pulled some money out of his pockets, and he and Larry proceeded to split the cash.

DISCUSSION

SUFFICIENCY OF THE EVIDENCE

At trial, the surveillance tape that recorded the incident was played twice. Citing no authority, Larry and Jamie argue that the court should not have allowed the tape to be played for a second time on a larger screen. "[T]rial judges are vested with much discretion in the conduct of judicial proceedings." *Heidelberg v. State*, 584 So. 2d 393, 396 (Miss. 1991) (citations omitted). In addressing the issue of allowing a jury to take a videotape into the jury room, the supreme court has stated that the trial court has broad discretion to regulate the presentation of a tape recording to the jury, such as limiting the number of replays. *Walker v. State*, 671 So. 2d 581, 604 (Miss. 1995). Since the trial court has the discretion to regulate the presentation of a tape recording, it would logically follow, although not required, that the court would have the authority to ensure an effective presentation. In light of this standard, we do not think that the trial court abused its discretion in allowing the surveillance tape to

be replayed on a larger screen.

The Mississippi Supreme Court provides the standard for reviewing a sufficiency of the evidence question:

> [T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Washington's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where . . . the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993) (citations omitted). In reviewing the evidence, we find that it supports the verdict of the jury.

In the present case, both Duncan and Crimm identified Larry and Jamie as the two men who robbed the store on July 31, 1992. Furthermore, Officer Marvin Williams of the Scott County Sheriff's Department, who has known Larry for about seven years identified Larry and Jamie from the surveillance tape that recorded the incident. After reviewing the record, we think the convictions are supported by the evidence.

CONTINUANCE

Larry and Jamie argue that the lower court erred in not granting their motion for a continuance. Larry and Jamie were indicted on October 7, 1992. Trial was set for October 19, 1992. Initially, Larry Lewis hired attorney Hal Ross to represent him, while Jamie had Roy Noble Lee, Jr appointed to him by the court. At the arraignment, attorneys for both Defendants announced that they were ready for trial. Later on, it was announced to the judge that Larry and Jamie wanted to be rearraigned, and that they would both plead guilty. On October 15, 1992, Larry and Jamie appeared before the court, and the court stood ready to receive their pleas. At that time, their attorneys announced that Larry and Jamie wanted to have a trial, and that both attorneys wanted to file a motion to withdraw. The court granted Mr. Ross' motion, but denied Mr. Lee's. At that time, Evan Thompson was appointed to represent Larry. Mr. Ross and Mr. Lee were both instructed to cooperate with Mr. Thompson. Mr. Lee was well informed on the facts of the case, and because no severance was granted, he would work closely with Mr. Thompson. Accordingly, the trial court reasoned that no prejudice resulted. Therefore, the motion for a continuance was denied.

The decision to grant or deny a continuance is left to the sound discretion of the trial court. *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995) (citations omitted). Unless manifest injustice appears to have resulted from the denial of the continuance, this Court should not reverse. *Atterberry*, 667 So. 2d at 631. To prevail, the defendant not only must show abuse of discretion, but also that the abuse actually worked an injustice in his case. *Morris v. State*, 595 So. 2d 840, 844 (Miss. 1991).

It is settled law that a defendant is not entitled to a continuance merely so that he could hire a private attorney instead of being represented by his court-appointed attorney. *Atterberry*, 677 So. 2d at 630 (citations omitted). The supreme court has held that when a defendant retains a new attorney at the eleventh hour, he is not entitled to a continuance merely because new counsel was unprepared. *Byrd v. State*, 522 So. 2d 756, 758 (Miss. 1988). In both *Atterberry* and *Byrd*, the defendants hired private attorneys after they had been appointed counsel, and then asked the court for a continuance because their newly hired attorneys would not be prepared for trial. *Atterberry*, 677 So. 2d at 630; *Byrd*, 522 So. 2d at 758. The trial court denied the two defense counsels' motions for continuance in each case, as well as the appointed attorney's motion to withdraw, but allowed and encouraged the new, retained attorney to assist and even participate in the trial. *Id.* Similarly in the case *sub judice*, the trial judge refused to grant a continuance based on the circumstances, but directed Mr. Ross, Larry's retained counsel, and Mr. Lee, Jamie's appointed counsel to cooperate and assist Mr. Thompson in preparing for trial. Furthermore, because Larry and Jamie were tried together, Mr. Lee was present the entire time with Mr.Thompson at the trial to assist him. We are of the opinion that no injustice resulted from the denial of the continuance. The Appellants make no showing that they would have been better prepared to meet the prosecution's evidence had they been given more time. We find no merit to this issue.

SEVERANCE

Larry and Jamie maintain that the trial court committed reversible error when it failed to grant their motion for severance. First of all, Larry may not raise this issue on appeal since he never moved for a severance at the time of trial. Therefore, we only need to determine whether Jamie was entitled to a severance.

The trial court has the discretion to grant a severance if it is necessary to promote a fair determination of the defendant's guilt or innocence. *Tillman v. State*, 606 So. 2d 1103, 1106 (Miss. 1992) (citations omitted). Absent a showing of prejudice, there are no grounds to hold that the trial court abused its discretion. *Id.* The trial court abuses its discretion in not granting a severance if one of the co-defendants tends to exculpate himself at the expense of the other defendant, or the balance of the evidence tilts more towards the guilt of one co-defendant than to the other. *Gossett v. State*, 660 So. 2d 1285, 1289 (Miss. 1995). Furthermore, in cases involving multiple defendants and where one is charged as a habitual offender, a severance would ordinarily be preferred. *Tillman*, 606 So. 2d at 1106 (citations omitted).

In the present case, Larry was indicted as a habitual offender, but Jamie was not. According to the law stated above, it would seem that a severance would have been preferred. In reviewing the record, this seemed to be the only argument that Jamie relied on in his motion for a severance. However, we do not find that Jamie suffered any prejudice as a result. At trial, the only reference made as to Larry's indictment as a habitual offender was made by the judge when he was addressing Larry after the State had rested. The judge merely stated that any prior criminal records of each Defendant may be introduced into evidence if each Defendant chose to testify. He also added that the records would be easily excludable from the evidence as well. In fact, when addressing Jamie, the judge specifically stated that he was not indicted as a habitual offender. Neither Larry nor Jamie chose to testify. We fail to see how Jamie was prejudiced by the judge's statements.

For the first time on appeal however, Jamie makes the argument that both he and Larry made incriminating statements regarding each other. The Mississippi Supreme Court has stated, "[i]t is elementary that different grounds than the objections presented to the trial court cannot be presented for the first time on appeal." *Russell v. State*, 607 So. 2d 1107, 1117 (Miss. 1992) (quoting *Thornhill v. State*, 561 So. 2d 1025, 1029 (Miss. 1989)). Because this assertion was not made at trial, Jamie did not properly place that issue before the court for review. *Id.* "A trial judge cannot be put in error on a matter which was not presented to him for decision." *Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991) (citations omitted).

Even despite the procedural bar, in applying the criteria stated above in reviewing whether a severance should have been granted, we do not find that the statements made by each Defendant exculpated themselves at the expense of the other. The statements given by each brother acknowledged the other in the crime, but primarily implicated themselves. "[W]here all the evidence at trial went to the guilt of both appellants and not to one more than the other, it is not error to try the defendants jointly." *Johnson v. State*, 512 So. 2d 1246, 1254 (Miss. 1987). Such is the case here. Furthermore, adequate jury instructions were given where the jury was told to consider each statement only as to the guilt of the speaker, and not as evidence of guilt of the other brother. Therefore, we do not find reversible error here.

APPELLANT'S STATEMENTS

Finally, Larry and Jamie infer from their brief that the statements that they signed were not voluntary confessions. Larry and Jamie, having only fifth grade and seventh grade educations respectively, maintain that they were not informed of their rights while they were being questioned, and that they did not know what they were signing.

The trial judge sits as a fact finder when determining whether a confession is freely and voluntarily given. *Porter v. State*, 616 So. 2d 899, 907 (Miss. 1993). The standard used for determining whether a confession is voluntary is whether that statement is a product of the accused's free and rational choice, taking into consideration the totality of the circumstances. *Porter*, 616 So. 2d at 907-08 (citations omitted).

Both Officer Williams and Deputy McNeece testified that Larry and Jamie were advised of their *Miranda* rights before they were questioned. McNeece testified before the jury that he read the waiver statement to both Larry and Jamie, and both brothers signed the document waiving their rights. Both waivers were introduced into evidence. After they signed the waivers, each Defendant made a separate statement which was written down by McNeece. Each statement was typed, and read back to the respective brother and asked if any changes needed to be made. He then asked if each would sign the document as his own statement which each of them did. At the suppression hearing, Jamie, Officer Williams, and Deputy McNeece all testified that no threats or promises of leniency were made on the condition that the statements were signed. Larry testified on direct that both officers promised him that bond would be set if he signed the statement.

Based on the totality of the circumstances, this Court does not find that the trial judge was manifestly wrong in determining that the signed statements were voluntary confessions. We find no merit to this issue. Based on the foregoing, we do not find that the trial court committed any reversible error. Therefore, we affirm the judgment of the lower court.

THE JUDGMENT AND CONVICTION OF THE SCOTT COUNTY CIRCUIT COURT FINDING LARRY DALE LEWIS GUILTY OF ARMED ROBBERY WITH SENTENCE OF THIRTY THREE (33) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND JAMIE LEWIS GUILTY OF ARMED ROBBERY WITH SENTENCE OF TWENTY FIVE (25) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO SCOTT COUNTY.

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