

IN THE COURT OF APPEALS 10/01/96
OF THE
STATE OF MISSISSIPPI
NO. 92-KA-01167 COA

GEORGE BASS A/K/A GEORGE LAMB

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. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE T. HOLMES

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: ED PETERS

NATURE OF THE CASE: CRIMINAL-MURDER

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF LIFE IMPRISONMENT
IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

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

McMILLIN, J., FOR THE COURT:

This is an appeal by George Bass of his conviction for murder in the Circuit Court of Hinds County. Bass raises thirteen separate issues on appeal. Finding none of the issues warrants this Court's interference with the jury verdict, we affirm. The issues raised by Bass will be discussed individually.

I.

Background

Raymond Turner died as the result of injuries received in a fire at a duplex apartment. His companion, Mary Jane Horton, was severely injured in the fire. George Bass was subsequently indicted for the murder of Turner after an arson investigator for the Jackson Police Department determined that the fire was the result of a "molotov cocktail" of gasoline contained in a malt liquor bottle. The prosecution's theory of the case was that Bass had purposely burned the duplex in an attempt to gain revenge for a knife injury inflicted on him by Alonzo Bibbs, the occupant of the other side of the duplex building. The proof showed that, shortly before the fire, Bass had purchased a small quantity of gasoline and one bottle of malt liquor of the same brand found at the fire scene. After making these purchases, Bass had prevailed on an acquaintance to drive him to an area within walking distance of the duplex, ostensibly to retrieve a vehicle that had run out of gas. The acquaintance testified that there was no car in sight at the location where he let Bass out of his vehicle.

II.

Testimony Concerning Mary Jane Horton's Injuries

Bass claims that his conviction should be reversed due to the admission of evidence concerning the nature and extent of injuries received by Mary Jane Horton in the fire. Bass asserts that such proof was not probative on the issue of his guilt and was introduced for the sole purpose of inflaming the jury. The trial court admitted some evidence of Horton's injuries over Bass's objection on the basis that it constituted proof of the cause and extent of the fire; however, he ruled that evidence of her pain and suffering was inadmissible as having no probative value. The trial court is vested with wide latitude in ruling on the admissibility of evidence and can only be reversed for an abuse of discretion. *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990) (citations omitted). "Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of a party is affected . . ." M.R.E. 103(a). We conclude that the trial court did not abuse its discretion in admitting some evidence of Horton's injuries. The proof showed that Horton was in very close physical proximity to Turner at the inception of the incident. Such evidence could have helped the jury assess the seriousness of the incident. The jury is entitled to a complete picture of an alleged crime, and we do not determine this evidence to be substantially different from testimony as to the extent of the damage to the structure itself in terms of probative value. Certainly, the probative value of the evidence must be measured against the prejudicial effect of its admission under Mississippi Rule of

Evidence 403; however, we cannot conclude with the requisite certainty to warrant a reversal that the prejudicial impact of this evidence was so great as to deprive Bass of a fair trial.

In actuality, Bass's argument, to a certain extent, amounts to a claim of prosecutorial misconduct. He claims that the prosecution insisted on repeatedly attempting to place evidence of Horton's injuries before the jury after objections to similar evidence had been sustained. We do not believe that the prosecution's conduct in this case approaches, by any stretch, the level of misconduct necessary to warrant reversal. *See, e.g., Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990) (citations omitted).

III.

The Testimony of Assistant District Attorney Anderson

and "The Rule"

The prosecution offered the testimony of Leo Taylor concerning certain incriminating statements Bass had made to him during the time of their mutual incarceration. Taylor's credibility was attacked during cross-examination, seeking to imply that he had received favorable sentencing on a number of pending charges in exchange for his testimony against Bass. Once this strategy became apparent, the prosecuting attorney directed his assistant, who had handled the Taylor prosecution, to leave the courtroom. She was subsequently called in rebuttal to testify that her recommendations regarding Taylor's sentencing related to the quality of proof against him rather than to his testimony against Bass.

Bass claims that such testimony was in violation of Mississippi Rule of Evidence 615. All violations of the rule of sequestration of witnesses do not automatically result in a reversal on appeal. The sanction imposed for a violation of the rule rests within the sound discretion of the trial court. *Jackson v. State*, 672 So. 2d 468, 480 (Miss. 1996) (citations omitted). The primary purpose of the rule is to prevent subsequent witnesses from tailoring their testimony to fit that offered by previous witnesses. *Powell v. State*, 662 So. 2d 1095, 1098 (Miss. 1995) (citations omitted). Ms. Anderson's testimony did not relate in any way to the direct evidence of Bass's guilt. Rather it was confined to the single narrow issue of the circumstances of Taylor's allegedly lenient sentence recommendation. Once it became apparent that her testimony on this point was going to be necessary, she was immediately excused from the courtroom.

We conclude that the trial court's handling of the testimony of Assistant District Attorney Anderson was within the discretion granted by law for the enforcement of the sequestration rule. Alternatively, we cannot see how Ms. Anderson's testimony, even if improperly admitted, could be said to have had such a prejudicial impact on the trial of this cause as to warrant appellate interference with the jury verdict. *See Baine v. State*, 604 So. 2d 258, 263 (Miss. 1992).

IV.

Improper Use of Voir Dire by the Prosecution

Bass complains that the State abused the voir dire process on several different occasions to accomplish or attempt to accomplish purposes not permitted under the law. We have reviewed each of the issues argued in Bass's brief and fail to conclude that any of his complaints constitute reversible error. He complains that his ability to voir dire on the effect of circumstantial evidence was improperly limited. He complains that the State attempted to shift the burden of proof to him by inquiring whether the potential jurors would "make" the defense prove any accusations that it made. He complains that the prosecution improperly implied that a grand jury indictment was the product of an adversarial proceeding, thereby improperly bolstering the impact of that indictment. He suggests that the prosecution unduly emphasized the fact that an appeal would lie from any conviction, thereby minimizing the seriousness of a guilty verdict. He claims that the prosecution attempted to intimidate the entire venire to prevent them from responding freely by subjecting one venire person to a hostile examination concerning a perceived discrepancy in her responses. Finally, he claims that the prosecution improperly attempted to influence the venire by impliedly ridiculing or holding up to scorn opinion evidence of diminished mental capacity. We assume that this last consideration was in contemplation of the penalty phase of this case, which was originally commenced as a capital murder prosecution seeking the death penalty. However, this issue appears moot since prior to the conclusion of the case, the prosecution elected to pursue only a murder conviction, with a maximum sentence of life imprisonment.

Our scope of review is limited to determining if the trial court committed an abuse of discretion in permitting the conduct of which Bass complains. *Jones v. State*, 381 So. 2d 983, 990 (Miss. 1980) (citations omitted). An abuse of discretion is indicated in circumstances where "clear prejudice" to the defendant appears. *Jones v. State*, 381 So. 2d 983, 990 (Miss. 1980) (citations omitted). The voir dire process in this case was extremely lengthy. The attorneys exhaustively pursued a number of topics. We do not feel, upon a full review of the transcript of the voir dire proceedings that the issues raised indicate the clear prejudice that would warrant this Court's interference. *Id.* It is evident from a review of the record that both sides were, in many instances, as intent on jockeying for position with the potential jurors as they were with legitimately inquiring into the qualifications (or possible disqualifications) of the venire. At the conclusion of the evidence, the trial court properly instructed the jury as to the actual law and what the duties of the jury were under the law. We find that this was more than sufficient to override any possible prejudice that may have arisen by the prosecution's alleged use of the voir dire to plant seeds designed to prejudice the defense in the minds of the jurors in the various ways alleged.

V.

Hearsay Objection to Investigator Morgan's Testimony

Bass claims that he was prejudiced by two of the court's rulings on the testimony of Investigator

Morgan. He was testifying on cross-examination as to certain statements made by one of the firemen responding to the blaze concerning an electric heater discovered in the duplex. The State objected on the ground that the statement was inadmissible as hearsay, and that the proper witness to describe the scene would be the fireman himself. The court sustained the objection. Later, Investigator Morgan was allowed, over defense objection, to testify that the heater had been moved by the firemen. Bass claims that the only way Morgan could know this was through the statement of another, so that his assertion was based upon hearsay. He claims that this treatment of Morgan's testimony prevented him from properly exploring the possibility of an accidental origin of the fire.

Our rules of evidence provide that error predicated upon the receipt or exclusion of evidence must affect "a substantial right of the party." M.R.E. 103(a); *see also Jones v. State*, 669 So. 2d 1383, 1392-93 (Miss. 1995); *King v. State*, 615 So. 2d 1202, 1206 (Miss. 1993). The record in this case shows that, though the State's hearsay objection was sustained, it was not made until substantial testimony had been given concerning the fireman's statements. The jury was never admonished to disregard the evidence already in. Elsewhere in the record there was substantial testimony as to why the electric heater could not have been the source of the fire. Thus, even were we to assume that Morgan's testimony was admissible, we do not see how it would have substantially altered the proof on this possible defense. It was certainly within the power of the defendant, had he felt the evidence to have such exculpatory value as he now asserts, to subpoena the absent fireman, rather than to rely on the hope of getting his statements in through cross-examination of another witness. We conclude this issue to be without merit.

VI.

Floyd Batts's Statements to Investigators

There was some indication in the trial that Floyd Batts had been the subject of inquiry into responsibility for the fire because of his past romantic relationship with Mary Jane Horton. In questioning Investigator Morgan, Bass's counsel attempted to inquire whether, during the course of his investigation, he had obtained information from Batts that had proved to be false. The court sustained an objection based on hearsay. After a proffer out of the jury's presence, during which the State added an objection based upon the relevancy of the evidence, the trial court reaffirmed its earlier ruling holding the evidence inadmissible as hearsay.

We respectfully disagree with the trial court that this was a pure hearsay question. The evidence being offered was not an attempt to introduce the statements of Batts "to prove the truth of the matter asserted." *See* M.R.E. 801(c). The actual evidence being offered was that certain statements made by Batts to investigators were subsequently determined to be untrue. This proof was being offered for the apparent purpose of implicating Batts in the crime. Having reviewed the defendant's proffer, however, we conclude that the evidence had such little probative value as to render it inadmissible under Mississippi Rule of Evidence 401. There was no evidence whatever directly implicating Batts in the crime, and his misrepresentations to investigators were not directly related to the circumstances surrounding the fire itself. Rather, they related solely to his attempted concealment of the extent of his relationship with Horton and his knowledge of the location of the duplex where the fire occurred. Such matters, even if shown, would require the highest degree of speculation to

conclude that they, in any way, implicated Batts in the fire. We conclude that the evidence was properly excluded as having no probative value, one way or the other, on the issue of Bass's guilt.

VII.

Hypothetical Questions to the State's Expert

The State presented Dr. Rodrigo Galvez, a pathologist who autopsied Turner's body, to testify as to the cause of death. During cross-examination, the issue of Turner's possible intoxication arose. Bass's attorney attempted to frame a hypothetical question concerning the length of time it would take Turner to metabolize "several drinks" down to the .86 blood alcohol level that the autopsy revealed. The trial court sustained an objection, stating that there was no proof in the record as to how many drinks Turner had ingested, or over what period of time.

Bass now assigns this as error. We conclude that the trial court was correct. The court subsequently patiently pointed out to counsel for Bass that he was not limiting inquiries regarding the facts in evidence concerning scientifically measured blood alcohol content, but was concerned solely with the assumption of facts in counsel's question of the duration and amount of Turner's drinking prior to his death, on which there was no evidence. Subsequently, Dr. Galvez was questioned at some length regarding the effect of this level of blood alcohol.

Again, we point out that the exclusion of evidence cannot be the subject of reversible error unless it affects a substantial right of the defendant. M.R.E. 103(a). We are hard-pressed to see the substantial impact that Turner's conduct prior to his death, in terms of his intake of alcoholic beverages, has on the issue of guilt. It is equally as criminal to murder an intoxicated man by an explosive device as it is a sober man, and the supposition that Turner's death was due to an accidental fire started by him in a state of intoxication would call for rank speculation. There is no basis whatsoever for appellate interference with the jury's verdict on this issue.

VIII.

The Prosecution's Conference with a Witness on the Stand

Dr. Roy Young, who had treated Bass for the cut allegedly inflicted by Bibbs, testified for the State. The medical file contained photographs of the cut itself, and they were introduced as exhibits after being properly identified by Dr. Young. During the time the reporter was marking the exhibits, the prosecutor asked for permission to confer with the witness. Even though defense counsel objected, the court allowed the conference. Bass now claims this as reversible error under *Williams v. State*, 539 So. 2d 1049, 1052-53 (Miss. 1989). In *Williams*, the prosecuting attorney was apparently coaching a prosecution witness during cross-examination "through hand motions or mimicking." *Id.* at 1052. The supreme court condemned this as indicating "covertness and partiality between the witness and the signalling party." *Id.* at 1053.

This case is substantially different on the facts. The prosecutor was not attempting to improperly

direct a witness's response to cross-examination, but had merely asked the court's leave to confer briefly with the witness during a lull in the proceeding. *Williams*, therefore, deals with the issue of prosecutorial misconduct, while this case deals with an alleged abuse of discretion by the trial court in permitting this private communication. If, in fact, anything improper transpired during the conversation, a proposition for which there is no evidence in the record, it certainly did not affect the presentation of the State's case. The remainder of Dr. Young's testimony consisted of his honest admission that, because of the length of time that had transpired and the apparent changes in the defendant's appearance, he could not say with any degree of certainty that the defendant was the person shown in the photographs. Shortly thereafter, the trial court sustained an objection to certain of Dr. Young's testimony when the defendant asserted the medical privilege, and Dr. Young's testimony came to an abrupt end.

To the extent that it is improper to permit counsel to consult with a witness once that witness has taken the stand, in this case it must unquestionably be seen as harmless error. *Peterson v. State*, 671 So. 2d 647, 656 (Miss. 1996) (citations omitted).

IX.

Other Bad Acts of the Defendant

Over defense counsel's objection, several witnesses were permitted to testify as to certain instances of conduct of the defendant at times other than the crime itself. Leo Taylor testified that, during the time he and Bass were incarcerated together, Bass had repeatedly set toilet paper on fire in his cell. The trial court also permitted Deputy Doug Jones to testify that Bass had threatened to burn the jail.

Bass alleges this evidence to be improper evidence of other bad acts to show his character as being one likely to commit the crime of which he was accused in violation of Mississippi Rule of Evidence 404(b). The trial court permitted Taylor to testify as to the toilet paper fires on the basis that the defense had "opened the door" by attempting to impeach Taylor's testimony of Bass's jailhouse confession by showing alleged favorable treatment in the handling of Taylor's pending criminal charges. On that theory, Taylor was allowed to testify that the reason he went to the prosecution with the story of Bass's incriminating statements to him was, not to get a favorable deal, but because Bass was continuously setting fires in the jail with toilet paper.

The State, in its brief before this Court, does not attempt to defend the proposition that attempts to impeach Taylor made such evidence admissible. Instead, it argues that the defense opened up the introduction of this type of evidence by its inquiries of Anil Sethi, the convenience store owner who sold Bass a bottle of malt liquor on the night of the fire that was similar in character to that found on the scene. Sethi, who was acquainted with Bass, was asked on cross-examination if he had "ever seen [the defendant] in a violent rage, upset." He was further asked the question, "Now, have you ever known him to be violent based upon your past dealings with him?" Sethi's response to both inquiries was in the negative. The State contends that these questions put Bass's character in issue, so that the subsequent evidence of his improper behavior was admissible to rebut Sethi's testimony concerning Bass's nonviolent character.

Clearly, the trial court did not rely upon Sethi's testimony as a basis for the admission of the toilet paper burning evidence, since under this theory it would have been admissible without regard to Taylor's evidence, and the trial court had directed Taylor not to mention the burning incidents unless and until he determined that the defense had "opened the door" to this testimony, which he subsequently did. Nevertheless, if the evidence was admissible, it would not appear to matter that the trial court admitted the evidence under an incorrect theory, since there was no instruction given or requested limiting the purpose for which the jury could properly consider the evidence. *See* M.R.E. 105.

We conclude that the defense, in its cross-examination of Sethi, put the defendant's character for violent behavior in issue. This warranted the introduction of the evidence of Bass's conduct during his incarceration pending trial. Thus, we conclude that there is no basis for reversal of the conviction on this issue.

X.

The Mistrial Motion for Threats from the Prosecution

During defense counsel's cross-examination of Mary Jane Horton, he asked a number of questions that clearly intimated that the witness had been coached in her testimony concerning her actions in attempting to escape from the burning duplex apartment. There was, during a significant part of the trial, a running dispute as to which window Horton had used to effect her escape. Her original statement had indicated one window; however, upon apparently being shown another broken window that contained blood stains, she became convinced that the other window had been her escape route. Defense counsel unquestionably was attempting to convey the implication that she had changed her story to suit the needs of the prosecution.

The prosecuting attorney and defense counsel became engaged in an unfortunate heated exchange that included offers to engage in an immediate physical altercation. It appears that the trial court discerned early in the exchange that the situation had the potential to degenerate rapidly and he wisely excused the jury until proper courtroom decorum could be restored. The record reflects that the only statement made prior to the jury leaving the courtroom was by the prosecutor who said, "I'd like to have a talk with [defense counsel]." It is clear from the record that the prosecutor, at that point, was quite agitated and that he was not suggesting a calm discourse with opposing counsel. Nevertheless, the remainder of the verbal confrontation occurred outside the presence of the jury, as the trial court noted in denying defense counsel's motion for mistrial. That part of the confrontation cannot form the basis for a mistrial. *See, e.g., Parker v. State*, 401 So. 2d 1282, 1284 (Miss. 1981) (where supreme court held that comments made by trial judge out of presence of jury were not a basis for prejudice).

The trial judge has wide authority in the conduct of trials and is the best person to determine when the proceedings have degenerated to such an extent that the fairness of the trial may legitimately be brought into question. *Walker v. State*, 671 So. 2d 581, 609 (Miss. 1995) (citations omitted). We do not conclude that the average jury in Mississippi is, collectively, so sensitive that it could be diverted from its purpose by the fact that opposing counsel, in the setting of a hotly contested courtroom

proceeding, temporarily let their tempers get the best of them. While we, by no means, condone or excuse this unseemly confrontation, neither can we conclude that the trial judge, in his discretion, was in error when he determined that a mistrial was not warranted.

XI.

Improper Redirect Examination of Mary Jane Horton by the State

Bass alleges that there was reversible error in the manner in which the prosecution conducted its redirect examination of Mary Jane Horton. He complains that the examining attorney persisted in re-asking questions to which objections had been previously sustained and in leading Horton into a recital of her post-fire anxieties for the purpose of invoking the sympathy of the jury.

We have reviewed the record of this redirect examination. Most of it appears to have been an attempt to further belabor the issue of how Horton came to change her story on the particular window she used to depart the burning duplex. This issue, in the context of the proof in this case, appears so peripheral that we conclude that any impropriety in the method of examination used by the prosecution was unquestionably harmless error. We are required to reverse only in the event we determine that some fundamental right of the defendant has been violated. *Taylor v. State*, 672 So. 2d 1246, 1269-70 (Miss. 1996) (citations omitted). That is not the case in this instance.

XII.

The Escape Attempt of Leo Taylor

Bass attempted to elicit from Deputy Sheriff Brad Jones testimony that Leo Taylor had attempted an escape from jail. The trial court refused to permit such inquiry, and Bass now complains, claiming that this improperly limited his ability to impeach Taylor. "Specific instances of conduct by a witness, for the purpose of attacking . . . his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." M.R.E. 608(b); *see also Jackson v. State*, 645 So. 2d 921, 924 (Miss. 1994). There is no merit in this issue.

XIII.

Improper Closing Argument by the Prosecution

A.

The State's Golden Rule Argument

During closing argument, an assistant district attorney requested the jury to engage in an imaginary exercise with her to place themselves in the burning duplex for thirty seconds, which she would

proceed to time on her watch. She suggested to them that "you're breathing fire. You are in a fire ball."

We conclude that this argument was in the nature of a prohibited "golden rule" argument. *Chisolm v. State*, 529 So. 2d 635, 639 (Miss. 1988) (citations omitted). Nevertheless, we note that a contemporaneous objection to the argument was sustained. While the jury was not specifically admonished to disregard the suggestion of counsel, we determine that the prompt handling of this matter was sufficiently within the guidelines of *Alexander v. State* to avert any possible prejudice. *Alexander v. State*, 520 So. 2d 127, 131 (Miss. 1988).

Bass argues that counsel persisted in her argument after his objection had been sustained; however, the remainder of the prosecution's argument on this point was to simply emphasize the fact that the proof had shown that the victim had remained alive in the fire for five minutes and to impress upon the jury the suffering that the victim had endured during that period of time. The test for determining whether improper closing argument requires reversal is "where the natural and probable effect of the improper argument . . . is to create an unjust prejudice against the accused and to secure a decision influenced by the prejudice so created" *Craft v. State*, 226 Miss. 426, 435, 84 So. 2d 531, 535 (1956).

We conclude that, on balance, this closing argument, though improper, cannot be said to have created unjust prejudice against the defendant requiring reversal in this case.

B.

Commenting Upon a Witness Who Did Not Testify

A part of the defense in this case was an attempt to cast suspicion upon Floyd Batts, based upon his romantic difficulties with Horton. During summation, the prosecution dismissed this possibility saying "[i]t's easy to accuse Batts because he's not here." Bass now claims this was improper under such cases as *Holmes v. State*, 537 So. 2d 882, 885 (Miss. 1988).

In *Holmes*, the supreme court reversed a conviction for carrying a concealed weapon where the defendant had claimed the weapons belonged to a friend, Mason. *Id.* at 882. In summation, the State asked the jury the rhetorical question, "Have you heard from [Mason]?" *Id.* at 883. The court said that "the failure of either party to examine a witness equally accessible to both parties is not a proper subject for comment before a jury." *Id.* at 885. The underlying rationale behind this rule appears to be that it plants an improper suggestion that the missing witness, if called, would not have corroborated some proposition advanced by the other side. Thus, in *Holmes*, the State improperly implied to the jury that Mason, if called, would have denied ownership of the weapon when there was no indication whatever that this was the case other than the defendant's failure to call Mason to admit ownership. This encourages, therefore, a speculative exercise by the jury to conjecture as to what missing witnesses might have said, rather than focussing upon the proof actually presented.

In the context of this case, this Court is doubtful that the jury was actually led to engage in improper speculation of what Batts might have said if called. The prosecution's comments do not directly

comment on Bass's failure to call Batts. Rather, they appear to be focused on an attack on the speculative nature of the defense asserted by Bass. We are told in the case of *Livingston v. State* that improper comments on the failure to call witnesses are subject to a harmless error analysis. *Livingston v. State*, 519 So. 2d 1218, 1222 (Miss. 1988). These comments are, on balance, "not of such a prejudicial nature so as to require reversal." *Id.* at 1222.

C.

Comments on Defendant's Failure to Testify

In final summation after the defense's closing argument was concluded, the prosecution asked the jury the question, "Did you ever hear him deny that this man went and bought two dollars worth of gas that night?" Bass now claims that this was an improper comment on the defendant's failure to testify. Such comments are, of course, improper and constitute a basis for reversal. *Taylor*, 672 So. 2d at 1265 (citations omitted).

However, in this case, we note that the comment was not directly on the defendant's failure to testify. Clearly, in the context of the State's argument, the "him" that failed to deny the purchase of gasoline was defense counsel, not the defendant. This argument was an attack on what the State perceived to be the shortcomings in the defense's final argument, not on the failure of the defendant to testify. Certainly, it is possible to envision possible evidence that could have been presented, other than the defendant's own denial, that would have tended to establish that the defendant did not purchase gasoline on the night in question. Such evidence would have permitted defense counsel, in summation, to attack the State's evidence of purchase. Thus, this argument can be seen as merely pointing out the strength of the State's case on this point without necessarily implicating the defendant's failure to testify. Given the wide latitude permitted to counsel in final argument, we cannot conclude that this argument constituted reversible error. *Griffin v. State*, 504 So. 2d 186, 194 (Miss. 1987).

XIV.

Alleged Discovery Violations

During the testimony of Ed Morgan, an investigator for the Jackson Fire Department, defense counsel learned that he had taken a statement from Mary Jane Horton which had not been furnished to the defense. Bass moved for a mistrial for this discovery violation; however, the trial court denied the motion on the conclusion that the motion had not been timely made. Bass claims this as reversible error. He asserts that the statement contained information that could have been exculpatory in nature. Particularly, he claims the statement bolsters his claim that Horton was coached in her testimony concerning certain events surrounding the fire, and that Morgan's explanation for the discrepancy in Horton's testimony revealed for the first time that Horton was, at the time, under medication. Bass claims that he was prejudiced in not being able to pursue further the nature of Horton's medication as

a possible further means of impeaching her credibility.

We conclude that the trial court was not in error when he found that defense counsel failed to make a contemporaneous objection to the introduction of evidence concerning Horton's statement. If such an objection is not made, the law considers an objection on that ground to be waived. *Thornton v. State*, 313 So. 2d 16, 18 (Miss. 1975) (citations omitted). Beyond that, however, our review of the record convinces this Court that there was ample development of the discrepancies in the various statements made by Horton concerning the fire, so that we can discern no substantial prejudice to Bass by virtue of Morgan's reference to information in the statement. As to the medication issue, Morgan simply testified that his first conversation with Hobson occurred when she was in the hospital and under sedation for pain. It is the rankest speculation to suggest that this information provided the jump-off point for an inquiry that would lead to the ultimate conclusive impeachment of this witness's testimony.

Additionally, Bass claims that the belated disclosure of two reports concerning certain scientific analysis done on the evidence entitled him to a mistrial. At the time this case was tried, discovery violations were governed by Uniform Criminal Rule of Circuit Court Practice 4.06(i). This rule provided that a surprised party in a criminal proceeding was entitled to a reasonable opportunity to review the new evidence. If the party, after such review, claimed unfair surprise or undue prejudice, the court had a number of options. It could have (a) excluded the evidence, (b) granted a continuance to permit the party to prepare to meet the evidence, or (c) granted a mistrial. The State urges that the trial court followed these procedures by offering Bass a continuance to review the statement. Bass represented to the trial court and argues before this Court that a continuance was not a sufficient remedy for these nondisclosures, apparently because of the additional investigatory work he claimed had become necessary.

The record is clear that the trial court offered defense counsel a recess to prepare to meet the evidence in these scientific reports. He even inquired as to how long counsel would request the recess to last. At that point, counsel affirmatively waived any such request and consented to the trial continuing. We conclude that the trial court was following the dictates of the discovery rules explicitly in his handling of this matter. This proposed method of handling the late disclosure was well within his discretion, and, on these facts, we cannot conclude that it was error to choose this method to handle the matter rather than the alternative of declaring a mistrial. We are informed of no information that would suggest that, at that point in the trial, a mistrial was the only appropriate remedy for the State's tardy disclosure.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO HINDS COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.

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KING, J., CONCURRING IN PART, DISSENTING IN PART:

While agreeing with the bulk of the majority opinion, I write separately to express my concern regarding Section XIII C of that opinion, " Comments on Defendant's Failure to testify."

The specific prosecution remark complained of was, "Did you ever hear him deny that this man went and bought two dollars worth of gas that night?" The majority dismissed the Defendant's objection, by saying the prosecutor's remark was not a comment on the Defendant's failure to testify, but rather a comment upon what the Defendant's attorney failed to say.

I find this argument to be disingenuous and an exercise in intellectual dishonesty. Counsel's summation is not intended, nor can it be considered, as evidence. It is rather his opportunity to argue his interpretation of the evidence. *Dowbak v. State*, 666 So. 2d 1377, 1387 (Miss. 1996); *Nixon v. State*, 533 So. 2d 1078, 1100 (Miss. 1987).

Counsel serves as the representative of his client, and can bind that client by his action and statements. *Pace v. Financial Sec. Life*, 608 So. 2d 1135, 1138 (Miss. 1992) (party bound by acts of attorney). Emphasizing that Defendant's attorney failed to deny something has no value, unless it's purpose is to attribute to and bind the Defendant by such failure. Whether intentional or not, that is the actual effect of the prosecutor's remark.

Additionally, this remark would seem to infer that the Defendant has an affirmative obligation to prove his innocence, rather than requiring the prosecution to prove his guilt.