# IN THE COURT OF APPEALS 12/03/96

# OF THE

# STATE OF MISSISSIPPI

**NO. 94-KA-01248 COA**

**JOHNNY PAUL THERIOT**

**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. KEITH STARRETT

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN H. OTT

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: J. DANIEL SMITH

NATURE OF THE CASE: CRIMINAL - AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: ADJUDICATED APPELLANT GUILTY OF AGGRAVATED ASSAULT AND SENTENCED HIM TO SERVE A TERM OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL CRIMINAL

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

COLEMAN, J., FOR THE COURT:

A jury empaneled in the Pike County Circuit Court found Johnny Paul Theriot guilty of the felony of aggravated assault; and the trial judge sentenced him as a habitual criminal "into the custody of the Mississippi Department of Corrections for and during the space of TWENTY YEARS without benefit of probation, parole, good time, or early release." We affirm.

**I. Facts**

At about midnight on Friday, August 19, 1994, Deborah Allen (Allen) arrived with her boyfriend, Freddie Mann (Mann), at the Ice House, a night club in McComb. Theriot joined Allen and Mann in shooting pool. During the course of the early morning hours of Saturday, August 20, 1994, a dispute too hot to be cooled by the Ice House arose between Allen and Mann, her boyfriend, a possible cause of which may have been Allen's jealousy of another woman who had joined Theriot, Mann, and Allen in their pastime of shooting pool.

The record further reflects that both Allen and Mann consumed alcoholic beverages while they were at the Ice House. In fact, during cross-examination by Theriot's counsel, Allen admitted that she had drunk five "shots" of tequila. Allen also admitted, perhaps understandably, that she did not recall when she finished her fifth shot of tequila, although she added that she had drunk a couple of glasses of water among the five shots of tequila. She recalled that Mann and she had danced several dances before they left the Ice House and that she had finished her fifth shot of tequila before she and Freddie had begun to dance.

As might be inferred from their dancing together, Allen and her boyfriend declared a truce in their dispute by approximately 3:15 a.m. because they left the Ice House at that time in Allen's car. Mann squealed the tires of Allen's car as he drove from the Ice House's parking lot. Hardly had Mann driven fifty yards from the Ice House when a police officer, who doubtlessly heard the squeal of the tires, unsurprisingly pulled Mann over and arrested him for driving under the influence of alcohol. After the police took Mann away, Allen returned to the Ice House to call her uncle, Gillis Windham, and Mann's sister to ask for their help in releasing Mann from jail. She was unable to reach Mann's sister, but while she waited for her uncle to return her call, some man told her that the Ice House had closed and that it was necessary for her to go elsewhere.

When Allen exited the Ice House door, she found Theriot standing outside. She told Theriot that she did not want to drive her car because she had been drinking and that she intended to walk to the police department, which she believed was "right on the corner there from the Ice House," to see what she could find out about her boyfriend. Theriot chivalrously responded by advising Allen that he knew the man who owned the transmission place right there, that she could park her car in his parking lot, and that he would take her to the police station. Allen got into Theriot's 1976 Chevrolet Impala automobile, which Theriot described as a "work car," and drove to where she thought the police station was located, only to discover once they got there that it had apparently moved. When Theriot admitted that he did not know to where the police station had been moved, Allen asked him

"to take [her] to a pay phone so [she] could call from another pay phone."

Theriot complied by driving somewhat circuitously to a convenience store named "The Patriot," where Allen began to use the pay telephone located there to attempt to call first her uncle, then Mann's sister, then another of Mann's sisters. After none of them answered, she succeeded in contacting her mother. After some indecision about where she and her mother would meet, and pursuant to Theriot's suggestion that she do so, Allen and her mother agreed that her mother would come to where Allen had parked her car in the parking lot of the transmission shop. Theriot told Allen that he would return her to her car so that she could await her mother's arrival.

Shortly after Theriot and Allen departed The Patriot in Theriot's '76 Impala around sometime after four o'clock that morning, Allen either jumped from Theriot's moving car (Theriot's version to which he testified at trial), or Theriot pushed her out of the moving car onto the side of the road (Allen's explanation to which she testified at trial). Although Allen sustained significant bruises, scratches, and abrasions over much of her body after she exited Theriot's moving car, she first walked to a Mrs. Roberts' home and banged on her door and called for someone to call 911. When Allen received no response at Mrs. Roberts' home after a couple of minutes, she made her way to the next home in which Pamela Verdia lived. Verdia responded to Allen's knock on her door by opening it and allowing a hysterical Allen to come in. Verdia testified that her sixteen-year-old son dialed 911 and that in response to that call both an ambulance and Pike County deputy sheriff Eugene Jones came to her home.

As the result of the foregoing episode, a Pike County grand jury indicted Theriot for aggravated assault and grand larceny. The basis for the grand larceny count in the indictment was Allen's testimony that when Theriot pushed her from his car, her purse and Mann's wallet fell from the front seat where she had placed them onto the roadside. Allen claimed that after Theriot pushed her from his car, he turned around, came back to where he had pushed her, and got out of his car. Allen claimed that $272 in cash and a child-support check for fifty dollars were in her purse and that Mann's wallet contained $128.00. She charged that when Theriot returned to the scene, he stole these sums of money. However, the jury acquitted Theriot of the felony of grand larceny. We have already noted that the jury convicted Theriot of aggravated assault and that the trial court sentenced him to serve twenty years as a habitual criminal in the custody of the Mississippi Department of Corrections. Theriot has appealed his conviction of aggravated assault for our review. This Court reserves further narration of the witnesses' testimony for its consideration of the two issues which Theriot raises in his appeal.

**II. Issues and the law**

Theriot presents two issues for our review, analysis, and resolution. We state those two issues as Theriot states them in his statement of the issues in his brief:

> A. The court erred in permitting FBI agent Kevin Russ to testify about statements made by Mr. Theriot to him concerning the aggravated assault and grand larceny charges without any *Miranda* warning and without any prior disclosure of this statement to the defense.
>
> B. The court erred in permitting the prosecutor to question Mr. Theriot about a prior

collateral incident involving a Louisiana police officer.

We will resolve these issues in the order in which Theriot has presented them in his brief.

> **A. The court erred in permitting FBI agent Kevin Russ to testify about statements made by Mr. Theriot to him concerning the aggravated assault and grand larceny charges without any *Miranda* warning and without any prior disclosure of this statement to the defense.**

> **1. State's failure to furnish Theriot's counsel with copy of FBI Agent Russ' statement**

In its State's Discovery Form, the State made the following representations to Theriot's counsel about Theriot's statements:

> 2. Defendant had made a statement(s): **Oral** Yes ___ No X , **Written** Yes ___ No X , **Taped** Yes ___ No X , **Transcribed** Yes ___ No ___
>
> Statements were made to ______________________________ on the ___ day of ________ 199_ at ___ o'clock __ M.

. . . .

> 7. The following exculpatory material if any has been provided;

_______________________________________________________

This Court quotes the foregoing portion of the State's Discovery Form, which was marked as Exhibit D9 for identification at the request of Theriot's counsel to establish that the State never gave Theriot notice of the existence of any statement which he may have made to Russ. Indeed, the State acknowledges that it gave no notice to Theriot that it had any statement, exculpatory or otherwise, which Theriot gave to FBI Agent Russ.

**1. Testimony of Allen, Theriot, Barbara Smith, and FBI Agent Russ**

First we contrast Allen's and Theriot's accounts of Allen's untimely and extraordinary departure from Theriot's car as Theriot drove. Allen testified as follows:

> We went to leave . . . the Patriot going back to the Ice House. We turned in the opposite direction, and I said "This is not the way to the Ice House and he said "No, this is the way to my house." We had earlier had conversation about me using the phone at his house. While we were at The Patriot I was using my calling card to call because my family

> doesn't live in Pike County, and he kept suggesting that I could go to his house and use the phone. I told him that I didn't need to, that's why I had a calling card, and so when he said we were going to his house that kind of threw me, and I said "Why are we going to your house, I don't need to use the phone. I've already used the phone." And he said, 'No, you owe me." He said "I've spent too much time with you all night, and you owe me." I said "What do you mean, that we're going to have sex?" And he said "Yes, that's what I mean," and I said "What are you going to do, rape me?" And he said "If that's what it takes." I said "No, I'll open the door of this car and I'll jump out before you'll rape me." I thought by opening the door of the car it would cause him to slow down or stop . . . . I had pushed the door with my hands and feet when I went to open it. He sped up and the door came back on me, and I kind of went back to pushing, and when I went back to pushing, that's when he pushed me and I went out of the car.
>
> Q. Who pushed you?
>
> A. Mr. Theriot.
>
> Q. This might sound like an obvious question, but how do you know that he pushed you?
>
> A. I mean I could feel him pushing me on my shoulder.

Allen then explained that she had given her two daughters a trampoline. She always told her daughters "[t]o tuck and roll, and the thing that kept going through my mind was to tuck and roll." Allen testified that when her feet hit the ground, she "kind of balled up and I rolled . . . . and wound up in a ditch."

Theriot testified about Allen’s exit from his moving vehicle as follows:

> The only thing I can remember, the last phone call [which Allen made at The Patriot], she said she had to get back to where her car was, and I said "okay," and we got in the car, and I told her "I've got to go and pick up this girl that was supposed to meet me by my house," so she said okay at first, and then we got down the road and then she decided she wanted to make another phone call and right away, you know, like I said, she'd get hysterical one minute and the next minute she was crying and the next minute she'd say it was good for her boyfriend that he got picked up. And I said well, we're just down the road from my house, you know, which we was just a few miles away, and she was determined to get out of my car at that point. She said "Well, I've done this before," and I said "what you mean you've done this before." I thought she was trying to tell me something about her drunk boyfriend, and she said "I've jumped out of a car before. I said "Whoa, don't you do that in my car." I thought she was joking, you know, and I never had anybody approach me to do such a thing.

> Q. What did she do next?
>
> A. She opened up the door, she reached over and unlocked the door from the outside and she shoved it open, and she turned completely around, had her feet hanging out of the door and she said "I'm serious," and she grabbed her purse and put it in her lap and when I saw that she was getting in that position to jump I shoved my brakes on and when I shoved my brakes on I got down pretty low on the speed. You know, I don't know how fast I was going, but she jumped, you know, she freaked me out, you know, she just jumped out of the car.

Theriot next testified that after Allen jumped from his car, he drove to his house, got his friend, Janie McNeely, to go quickly with him to see if they could find Allen. They returned to the general area where Theriot thought Allen had jumped and then drove to The Patriot to see if Allen was there using the phone, but they were unable to find her. Theriot decided that Allen must be all right, so his friend and he returned to his house, where he made a pot of coffee.

On cross-examination the State asked Theriot if he had told Agent Russ what had happened on the night of August 20, 1994. Theriot's counsel objected on the ground that while he had asked the State to produce any statement which Theriot had made to any law enforcement officer, the State had represented that there were no such statements. The trial court considered Theriot's objection and the State's response to his objection outside the presence of the jury. The State argued that Theriot's statement to FBI Agent Russ was a prior inconsistent statement which could be admitted to impeach Theriot's version of the episode on August 20, to which he had testified in court. The trial judge then concluded:

> The purpose of this impeachment. This is not a prior conviction, and this is not a confession. This is just a prior inconsistent statement that you will be allowed to use purely for the purposes of impeaching what this witness has said today. You are attacking his credibility by attempting to show that he made a statement at some other time that was different from the statement today.

The trial judge overruled Theriot's objection on the ground that the State had failed to disclose the statement as a part of discovery and allowed the State to question Theriot about his statement to FBI Agent Russ.

We resort to the record to relate exactly what happened when the State cross-examined Theriot about his statement to Russ:

> Q. Mr. Theriot, allow me to re-ask my question. Did you make a statement to Kevin Russ, a Federal Bureau of Investigation agent concerning the events of the night of August 20, l994, that is your -- this incident with Deborah Allen?

> A. I don't recall a conversation with him about it, because he was constantly telling me not to be around her or he'd arrest me -- I don't know what you're getting at. Just kind of break it down to me so I can understand what you're saying.
>
> Q. Yes, sir, I will. Did you tell Kevin Russ that you, after Deborah Allen used the phone, that you took her back to the Ice House where her car was parked, and that she got out of the car there and that when you left her she was okay; that you took her back to the Ice House and left her and that she was okay?
>
> A. There was a reason I said that.
>
> Q. That's not my question. I'm asking if you said it.
>
> A. Yeah. Yeah.
>
> Q. Okay.
>
> A. If that's what he says, because I don't remember now.
>
> Q. Did you tell him that you took Deborah Allen back to the Ice House to her car and that she was okay.
>
> A. I got to say not to my memory, you know.

After Theriot rested his case, the State called two witnesses in rebuttal, Barbara Smith, who had previously testified as a witness for the State, and Kevin Russ, an agent with the Federal Bureau of Investigation. Russ did not testify for the State during its case in chief. Barbara Smith had previously testified that as an employee of The Patriot, she had reported to work at five minutes until four o'clock on the morning of August 20, 1994, so that she could open the convenience store for the cook who came to work at four o'clock in the morning. The store did not open until five o'clock that morning. Smith had testified that she had seen Theriot, whom she already knew, standing by his car while a woman, whom she did not then know, appeared to be talking on the pay telephone outside The Patriot. She had been quite certain that they left at 4:20 a. m. because that was the time which a clock with an illuminated dial hanging on the wall in The Patriot indicated.

As a rebuttal witness, Barbara Smith testified that Theriot had visited her at The Patriot several times, during each of which visits he discussed with her what had happened to Allen. We quote from the record the following portion of Smith's rebuttal testimony:

> Q. Would you tell us, please, what, if anything, [Theriot] said concerning what happened to her.
>
> A. He stated that he had brought her [to The Patriot] to use the telephone, that after she finished using the telephone that he took her directly back to her car, which was parked at Moak Transmission, and that he went home then

> Q And did you suggest to him anything concerning time elements?
>
> A. Well, I kept telling him, I said from the time that you left and the time that Pam [Verdia] had told me that the girl was there [at Verdia's house], there wasn't enough time. He didn't have enough time to take her to the Ice House and then her to conveniently wander back out that way. It wasn't enough time even for him to go to the Ice House and then bring her back out there.

The State called FBI Agent Kevin Russ as its second rebuttal witness. Russ testified that during his conversation with Theriot about a matter entirely unrelated to the case *sub judice*, Theriot told him that he had taken Allen back to her car and then went home. Again we quote from the record:

> Q. And would you tell us, please, if Mr. Theriot discussed with you the events of August 20, l994 concerning Deborah Allen?
>
> A. Yes, he did.
>
> Q. And would you tell us what Mr. Theriot said to you.
>
> A. The first occasion I talked to Mr. Theriot I was accompanied by Agent Hal Roth of the FBI, and Mr. Theriot told myself and Agent Roth that on the night that this incident happened at the Ice House that he had picked up the girl, and that when he had dropped her off he took her back to a transmission shop which is located just up the hill from the Ice House; that he dropped her off there. At that time she was totally unharmed, not marked or hurt.

Theriot's explanation of his encounter with Allen to Barbara Smith and FBI Agent Russ differed from his explanation to which he testified at the trial of this case. Theriot raises no issue about the rebuttal testimony of Barbara Smith.

**B. Theriot's arguments and the law**

**1. Theriot's admission that he made the statement to FBI Agent Russ**

We initially observe that the State in its brief correctly states that Theriot includes three grounds in his first issue on which to predicate the trial court's error in allowing the State to call FBI Agent Russ as a rebuttal witness. The first ground is Theriot's assertion that he admitted that he told Agent Russ "the story that he took Deborah Allen back to the Ice House." Without citing authority to support his argument, Theriot argues that because he admitted that he told this story to Agent Russ, the trial court erred by permitting the State to question Agent Russ about it in rebuttal. The State replies that "the record reflects that [Theriot] ultimately claimed that he did not remember [whether he told this story to Russ]." The record discloses that at best Theriot made only a qualified, or conditional, admission that he had made the statement. We base our finding on the following portions of Theriot's testimony, which we previously quoted: "If that's what [Russ] says, because I don't remember now,"

and "I got to say not to my memory, you know."

It is true that the Mississippi Supreme Court opined in *Hall v. State*, 250 Miss. 253, 165 So. 2d 345, 350 (1964) that "[i]f the witness confesses or admits having made the prior inconsistent statements, ordinarily there is no necessity for further proof, as by the admission of the prior inconsistent written statement." However, the State cites *Jordan v. State*, 513 So. 2d 574, 581 (Miss. 1987), in which the supreme court held that "[w]here a witness neither admits nor denies a statement previously made, impeachment, in the form of testimony about the statement, is proper." We concur with the State that Theriot sufficiently hedged on whether he actually made the statement to FBI Agent Russ that the trial court did not err by allowing the State to examine Russ on rebuttal to elicit Theriot's prior inconsistent statement.

**2. Theriot's statement to FBI Agent Russ was without a *Miranda* warning**

Other than a general reference to *Miranda*, Theriot again offers no authority on which this Court might rest its reversal of the trial court on this issue. The State first contends in its brief that because Theriot did not include Russ' failure to give him a *Miranda* warning as a basis for his objection to Russ' rebuttal testimony, he has waived this portion of this issue for this Court's consideration. It then cites *Roberson v. State*, 595 So. 2d 1310 (Miss. 1992). While we agree with the State that Theriot has waived this portion of this issue for our resolution, we shall review and resolve it anyway.

We initially note that Theriot did not claim that his statement was the result of coercion and was therefore not free and voluntary. Had he made such a claim, we would then note that the record is utterly devoid of any evidence that his statement to Russ was not free and voluntary. The sole basis for Theriot's objection on this facet of his first issue is that the State failed to prove that he had been read his rights and that he had waived those rights against self-incrimination. Theriot's argument ignores the principle that a confession otherwise inadmissible as a part of the State's case in chief because of no *Miranda* warning, is otherwise voluntarily given, may be used to impeach the accused's credibility where his testimony during his trial contradicts his prior statements. As the Mississippi Supreme Court stated in *Booker v. State*, 326 So. 2d 791, 793 (Miss. 1976):

> We hold, therefore, that if a defendant's confession is ruled inadmissible because it was given involuntarily, with or without proper *Miranda* warnings, the confession is not admissible for any purpose. However, if the only objection to use of the confession is that it was obtained as a result of a defective *Miranda* warning, the state may use the confession to impeach the defendant's trial testimony without first establishing that the confession was freely and voluntarily given.

We hasten to recognize that Theriot's statement to Russ that he had returned Allen to her car unharmed was hardly a confession and was exculpatory in nature. Thus, it could be argued that as a potentially exculpatory statement, *Miranda* issues become inapplicable to it. However, this Court is content to hold that even as a "confession," Theriot's statement was admissible to impeach his explanation of the events which occurred in the early morning hours of August 20, 1994, especially in the absence of Theriot's claim that his statement to FBI Agent Russ was not free and voluntary.

**3. The State denied that it had any statements which Theriot had made to any law enforcement officer and did not provide Theriot with a copy of his statement to FBI Agent Russ during discovery**

This Court must review and resolve this third facet of Theriot's first issue because it was the basis on which he objected to Russ's testimony. Theriot's statement to FBI Agent Russ was discoverable. In *Glaskox v. State*, 659 So. 2d 591, 593 (Miss. 1995), the Mississippi Supreme Court again held that rebuttal evidence, especially a statement made by the accused, was subject to the rules of discovery and was therefore discoverable. The supreme court wrote:

> This Court has held that evidence offered in rebuttal is subject to the discovery rule. In *Johnson v. State*, 491 So. 2d 834 (Miss. 1986), this Court stated:
>
>> Under our holding in *Jackson v. State*, 426 So. 2d 405 (Miss. 1983); and *Morris v. State*, 436 So. 2d 1381 (Miss. 1983), there is no distinction in an incriminating statement being offered by the state's case in chief, or reserving it for rebuttal, the accused is nevertheless entitled to discovery so as not to be caught by surprise at trial

*Glaskox*, 659 So. 2d at 593 (quoting *Johnson*, 491 So. 2d at 837). In *Hart v. State*, 639 So. 2d 1313, 1317 (Miss. 1994), the Mississippi Supreme Court held that the appellant was procedurally barred from objecting to a discovery violation because he failed to comply with the procedures which that court first enunciated in *Box v. State*, 437 So. 2d 19 (Miss. 1983). The court wrote:

> Hart at no time attempted to comply with the well known options set forth in *Box v. State*, 437 So. 2d 19 (Miss. 1983), when a discovery violation of this type is alleged. Therefore, he is procedurally barred from raising the issue on appeal.

*Hart,* 639 So. 2d at 1317 (citations omitted). The options which our supreme court established in *Box* were the following:

First

> In cases where the state seeks to offer into evidence that which it ought to have disclosed pursuant to a discovery request but didn't, it is first incumbent upon the defendant to make timely objection. If this be done, the court's initial response should be a directive that the defense be given a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs, etc. The court should not be grudging in this allowance

Second

> If, after examining the evidence involved or interviewing the would-be witness, the defendant is of the opinion that he has been subjected to unfair surprise and that his

> defense will be prejudiced if the evidence is offered without his having had the opportunity to investigate independently the credibility of the evidence and possible responses thereto, it should then be incumbent upon him to request expressly that the court grant a continuance. In most instances this will necessitate a declaration of a mistrial. In any event, and in such a situation and absent unusual circumstances to the contrary, the trial court ought conditionally to grant the requested continuance, at which time the matter is checked back to the state.

Third

> If the state is of the opinion that for whatever reason it wants to use the witness or the evidence in its case against the defendant, the order for a continuance must stand. At this point, however, the state should have the election. If the state withdraws its offer of the evidence in dispute and agrees to proceed wholly without use of this evidence, the order for continuance should be withdrawn and the trial should proceed as in the ordinary course.

*Box*, 437 So. 2d at 23-24 (Robertson, J., concurring).

When the State confronted Theriot with FBI Agent Russ' testimony which it proposed to offer in rebuttal to impeach Theriot's testimony about the events of the early morning of August 20, Theriot did not move for a continuance. Thus he did not comply with the procedures which the supreme court had established in *Box v. State*. Thus, pursuant to *Hart v. State*, Theriot is procedurally barred from claiming a discovery violation in his appeal.

Theriot did not admit that he told FBI Agent Russ that he had returned Allen to her car unharmed. His statement to Russ was neither confession nor an admission; but it was free and voluntary. Thus, without the *Miranda* warning, it became admissible to impeach Theriot's version of events to which he testified at his trial. Finally, although Theriot's statement was discoverable, his counsel did not move for a continuance, the initial step in complying with the *Box* procedures. Therefore, Theriot is procedurally barred from claiming a discovery violation with regard to the State's failure to provide a copy of it as a part of its discovery. We accordingly decide this issue against Theriot and affirm the trial court's overruling Theriot's objection to FBI Agent Russ's testimony that Theriot told him that he had returned Allen to her car unharmed and had then gone home.

B. **The court erred in permitting the prosecutor to question Mr. Theriot about a prior collateral incident involving a Louisiana police officer.**

On direct examination Theriot stated, "I thought [Allen] was joking [about jumping out of my car], you know, and I never had anybody approach me to do such a thing." Later Theriot testified, "You know, I never had nobody do that to me in my life, jump out of a car, . . . ." During the State's cross-examination of Theriot, the following questions and answers occurred:

> Q. On direct examination when you were being examined by Mr. Strong,

> referring to this incident where Deborah Allen had jumped out of the car, you said nothing like this had ever happened to you?
>
> A. Speaking of someone jumping out of a vehicle.
>
> Q. In fact, you had an incident in Louisiana involving a Louisiana police officer that was holding onto your vehicle when you sped away, didn't you?
>
> A. That's not even---
>
>> BY MR. DOWDY: --Your Honor, can the prosecutor be more specific as to the date. Was it last week or--
>>
>> BY MR. SMITH: Yes, sir, I can.
>
> Q. On the 25th day of February, l990, in Terrebonne Parish, Louisiana, did you in fact drive away in a white van while a deputy was holding onto the van door?
>
> A. He was wanting to talk to me and it was several people there wanting to fight is the reason I drove off. Wasn't nobody in my van and nobody got thrown out.

Theriot argues that "[w]hether or not several years ago Mr. Theriot drove off with a Louisiana police officer hanging on his door is totally irrelevant and unduly prejudicial . . . ." Theriot contends that he could have been impeached only on the matter of whether anyone had ever before jumped out of his car. Citing Rules 401, 402, and 403 of the Mississippi Rule of Evidence, he argues that his driving away in a van with a law enforcement officer hanging onto the van's door is irrelevant and more prejudicial than probative. Thus the trial court erred by allowing the State to cross-examine him about that incident as impeachment.

Theriot cites *Price v. Simpson*, 205 So. 2d 642, 643 (Miss. 1968), for the proposition that "[i]t is error to allow a witness to be contradicted on an immaterial matter." In *Price* the issue was whether George Payton Price was the putative father of Susie Elizabeth Simpson's child. The Mississippi Supreme Court held that it was error to introduce the testimony of another woman that Price had made her pregnant, for purpose of contradicting his testimony that he had not made the other woman pregnant because whether he had made her pregnant was irrelevant to the issue of whether he had made Simpson pregnant. *Id.* at 643.

On direct examination, Theriot had testified that after Allen jumped from his car he drove to his house to get his girl friend, Jane McNeely, who was waiting there at four in the morning to see him, so that she could return with him to look for Allen. When Theriot's counsel asked him on direct examination why he did not stop when Allen jumped to see about Allen, Theriot replied, "I was scared. I freaked. You know, I never had nobody do that to me in my life, jump out of a car, so I ran to get Janie, and I came back [to see about Allen] . . . ." Before the State began to cross-examine Theriot, it asked the trial judge to excuse the jury so that it could inquire whether the trial judge would allow it to cross-examine Theriot about this incident with the police officer in Louisiana as rebuttal to his testimony that nothing like Allen's jumping from his car had ever happened to him

before.

Theriot's counsel objected to the State's cross-examination of his client on this matter in the following language: "Your honor, we object to that. . . . . He [Theriot] said nobody had ever jumped out of his car before." Later, Theriot's counsel elaborated on his objection by stating to the trial judge, "Your Honor, there's been no testimony that this police officer was riding in [Theriot's] automobile." The trial judge responded, "Well, he was hanging on based on Mr. Theriot's testimony . . ; that's all I know." The trial judge ruled that the State would be allowed to cross-examine Theriot about the incident with the Louisiana police officer, but he sustained Theriot's objection to the State's bringing out that Theriot had been convicted of a felony under Louisiana law as the result of his driving his van with the police officer hanging on to its door.

This Court resolves this issue in the light of Rule 103 of the Mississippi Rule of Evidence. Rule 103(a) provides:

> (a) **Effect of Erroneous Ruling**. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; . . . .

M. R.E. 103(a).

In *Davis v. Singing River Electric Power Ass'n*, 501 So. 2d 1128, 1131 (Miss. 1987), the Mississippi Supreme Court relied on Rule 103(a) to hold:

> Because the appellant stated the specific ground for his objection -- the witness's incompetency -- we need not consider whether any other ground was apparent from the context. In other words, the context, which included appellant's specific objection, made it obvious that appellant considered no other ground. Therefore, the ground which he now urges on appeal -- impermissible impeachment by extrinsic evidence on collateral matter -- was waived by his failure to raise it at trial. Miss. R. Evid. 103(a)(1).

The only basis for Theriot's objection to the State's impeaching his testimony by cross-examining him about the incident in which he drove his van away with a police officer clinging to the van's door was that he had testified that nobody had ever jumped out of his car before and that there had been no testimony that the police officer was riding in Theriot's van.

"Relevancy and admissibility of evidence are largely within the discretion of the trial court and [an appellate court] will reverse only where that discretion has been abused." *Hentz v. State*, 542 So. 2d 914, 917 (Miss. 1989). In *Branch v. State*, 347 So. 2d 957, 959 (Miss. 1977), the appellant had testified that he hardly knew the victim, who had been a next-door neighbor, because of his fidelity to his wife. The State cross-examined Branch's wife about whether Branch had given her problems with

other women. The State argued that this was proper impeachment of Branch's testimony that he scarcely knew the prosecutrix, even though he had lived next door to her, because of his fidelity to his wife. The supreme court opined, "Although the cross-examination was vigorous, we cannot conclude that the trial court, in overruling Branch's motion for a mistrial, erred in finding that it was not prejudicial."

An accused is plainly under a duty to testify truthfully. The Mississippi Supreme Court has opined that "[i]n order to test the veracity of [the defendant's testimony], the prosecution may utilize traditional truth-testing devices of the adversary process." *Pierce v. State*, 401 So. 2d 730, 733 (Miss. 1981). One such device is impeachment by contradiction. *See Knotts v. Hassell*, 659 So. 2d 886, 889 (Miss. 1995) ("At best, the conversation with the attorney was a contradictory statement which could have been--and was--used to impeach the credibility of the physicians"); *Quinn v. State*, 479 So. 2d 706, 708-09 (Miss. 1985) ("It is only fair that the State should have the right to test the credibility of [the defendant] through the normal process of impeachment"). In the case *sub judice* Theriot was under a duty to testify truthfully. Relevancy and admissibility of evidence are largely within the discretion of the trial court. The trial court did not abuse its discretion when it permitted the State to cross-examine Theriot about the earlier incident in Louisiana in which he drove away in his van with a police officer clinging to the door because that episode tended to impeach Theriot's testimony to the jury that he had never experienced anything like Allen's jumping from his car. We therefore affirm the trial court's overruling Theriot's objection to the State's cross-examining him about the incident in Louisiana with the police officer.

**III. Summary**

Whether Allen jumped from Theriot's car or whether Theriot pushed her from his car was the issue for the jury to decide in the case *sub judice*. Theriot's earlier statement to FBI Agent Russ that he had returned Allen unharmed to her car parked in the transmission repair shop's parking lot contradicted his testimony that Allen jumped from his car as he was applying his brakes. A prior contradictory statement is an appropriate form of impeachment. Regardless of whether Theriot's statement to FBI Agent Russ was a confession, an admission, or an exculpatory statement, it became admissible to impeach Theriot's testimony that Allen had jumped from his car even without a *Miranda* warning. Although Theriot's statement to FBI Agent Russ was discoverable, his counsel did not move for a continuance, the initial step in complying with the *Box* procedures. Therefore, Theriot is procedurally barred from claiming a discovery violation with regard to the State's failure to provide a copy of Theriot's statement to Russ as a part of its discovery.

Theriot's explanation for why he did not stop to see about Allen when she jumped was that he became scared and "freaked" because nothing like that had ever happened to him before. Whether the incident in Louisiana when Theriot drove away with a police officer clinging to the door of his van was so similar to the incident in the case *sub judice* that it contradicted Theriot's testimony that nothing like that had ever happened to him before was for the jury's consideration. Given the basis of Theriot's objection to that cross-examination, *i. e.* the police officer was not inside Theriot's van, the trial judge did not abuse his discretion in permitting the State to cross-examine him about that earlier incident. We affirm the trial court's judgment of Theriot's guilt of aggravated assault and its sentence to serve a term of twenty years in the custody of the Mississippi Department of Corrections without benefit of probation, parole, good time, or early release as a habitual criminal.

**THE PIKE COUNTY CIRCUIT COURT'S JUDGMENT OF THERIOT'S GUILT OF AGGRAVATED ASSAULT AND ITS SENTENCE TO SERVE A TERM OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT BENEFIT OF PROBATION, PAROLE, GOOD TIME, OR EARLY RELEASE AS AN HABITUAL CRIMINAL ARE AFFIRMED. COSTS ARE ASSESSED TO APPELLANT.**

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