

**IN THE COURT OF APPEALS 12/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-01104 COA**

**ERVIN LATHAM**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN M. MONTGOMERY

COURT FROM WHICH APPEALED: NOXUBEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

KELLY HARDWICK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: FORREST ALLGOOD

NATURE OF THE CASE: CRIMINAL - MURDER

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF LIFE IN MDOC

MANDATE ISSUED: 5/29/97

BEFORE THOMAS, P.J., BARBER, DIAZ, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT

Ervin Latham was tried and convicted of murder in the Circuit Court of Noxubee County which sentenced him to life imprisonment in the custody of the Mississippi Department of Corrections. Asserting that the trial court committed reversible error, Latham appeals his conviction on the following grounds:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE PROSECUTION TO MAKE PREJUDICIAL COMMENTS IN THE PRESENCE OF THE JURY.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE TESTIMONY OF BARBARA CONNER IN REBUTTAL.

III. THE FAILURE OF THE PROSECUTION TO PROVIDE THE DEFENSE WITH THE PRIOR CRIMINAL RECORD OF WITNESS MICHAEL SLAUGHTER CONSTITUTES REVERSIBLE ERROR.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT FINDING THAT THE PROSECUTION IMPROPERLY COMMENTED ON LATHAM'S FAILURE TO GIVE A STATEMENT TO AUTHORITIES.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING LATHAM'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

We hold the issues raised by the Appellant to be without merit and affirm the decision of the trial court.

#### FACTS

On October 27, 1991, Valerie Wilkins was found lying on the ground next to the house trailer which she had shared with Ervin Latham for approximately twelve months. Wilkins had suffered a .22 caliber gunshot wound to her stomach and was pronounced dead by paramedics who were summoned to the crime scene. After being questioned by an officer of the Noxubee County Sheriff's Department, Latham allowed the officer to enter his trailer. While inspecting the trailer, the officer discovered a J.C. Higgins .22 caliber pistol lying on the bedroom floor, next to a pair of blood-soaked blue jeans. Latham identified the pistol as belonging to him. Additionally, the officer discovered that the sheets and pillow cases on Latham's bed had blood stains on them. Latham was subsequently arrested and charged with the murder of Valerie Wilkins.

At trial, the State produced a witness who testified that on the evening of the murder he observed

Latham walking beside the trailer carrying the victim in his arms. The witness further testified that when Latham detected his presence, Latham dropped the victim onto the ground and ran away. The witness also testified that when he observed Latham carrying the victim, Latham had a pistol in one of his hands. In addition to the eyewitness testimony, a technician from the state crime laboratory testified that the sheets, pillow cases, and blue jeans found in Latham's bedroom had Type O blood on them, the same blood type as the victim. A ballistics expert also testified that the bullet recovered from the victim's body exhibited class characteristics consistent with a sample bullet fired from Latham's .22 caliber revolver.

## ANALYSIS

### I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE PROSECUTION TO MAKE PREJUDICIAL COMMENTS IN THE PRESENCE OF THE JURY.

#### A. Statements made by the prosecution regarding why Latham failed to produce certain witnesses.

Latham assigns as error the trial court's rulings on two objections he raised in response to comments by the State concerning his failure to produce alibi witnesses at trial. During the State's cross-examination of Latham, he testified that there were several people with him on the night of the murder who could provide him with an alibi. The State then inquired as to where the witnesses were located at the time of trial. After Latham explained that one was in Ohio and that he did not know where the other two were, the State asked him "[s]o these people that are supposed to be able to verify that they were with you at all this time, they're not here right?" Latham's counsel promptly objected to the question, asserting that Latham had no obligation to produce the witnesses and that subpoenas had been issued for them. The trial court overruled Latham's objection and reminded him that he would have an opportunity to clarify the matter on redirect examination.

During closing arguments, Latham objected when the State referred to the absence of the alibi witnesses that he claimed were with him on the night of the murder. In response to the State's comment to the jury that "[w]ere you on trial for this crime, would you not have those people up here," and reference to the absence of alibi witnesses, Latham objected to the statements as improper closing argument and moved for a mistrial. The State argued that the reference to the absence of alibi witnesses was proper because Latham had only informed the court of their alleged existence on the previous day, and that the State did not have equal access to them. The trial court overruled Latham's objection and motion for mistrial.

In reviewing the propriety of prosecutorial comments on a defendant's failure to call witnesses on his own behalf, the general rule is that "the failure of either party to examine a witness *equally accessible* to both is not a proper subject for comment before a jury by either of the parties." *Morgan v. State*, 388 So. 2d 495, 497-98 (Miss. 1980) (emphasis added) (quoting *Phillips v. State*, 183 So. 2d 908, 911 (Miss. 1966)). The critical factor in determining if a party's comment on the opposing party's

failure to produce a witness is erroneous is whether that witness would be equally "accessible" or "available" to both parties. *Brown v. State*, 27 So. 2d 838, 840 (Miss. 1946). Whether the physical presence of a witness may be procured by process is not the whole question, rather it is also "whether or not the testimony of the witness is equally available to [each] party." *Brown*, 27 So. 2d at 841; *see also Burke v. State*, 576 So. 2d 1239, 1241 (Miss. 1991) (holding "[t]he mere fact that a witness may be hailed into court by the compulsory process thereof at the instance of either party does not necessarily make such witness equally accessible to each, or both"). This principle is exemplified in a case where a witness was equally accessible to both parties, as far as production under service of process was concerned, and the trial court's ruling that it was not proper for the plaintiff to comment upon the defendant's failure to call that witness was affirmed by the Mississippi Supreme Court. *See Brown*, 27 So. 2d at 840 (holding that in *Mississippi Cent. R.R. v. Robinson*, 64 So. 838, 839 (Miss. 1914), the witness' "loyalty to his employer would have impaired the availability of his testimony to the opposite party to the extent he would not have been an impartial, unbiased witness, such a one as would serve the cause of justice for either with equal candor").

In the case at bar, the trial court found that the alleged alibi witnesses referred to by Latham under cross-examination were not equally available to both parties. This factual determination was within the sound discretion of the trial court and as such will not be overturned in the absence of clear error. We hold that the trial court was not clearly erroneous in concluding that the witnesses in question were not equally accessible to both parties. Even if the trial court had been in error in concluding that the witnesses were not equally available, such error would be harmless, considering the substantial evidence supporting Latham's guilt. *See Burke v. State*, 576 So. 2d 1239, 1241 (Miss. 1991) (holding that "where there is substantial evidence supporting the defendant's guilt, a prosecutor's comment about a potential witness's absence is not reversible error in and of itself"). Accordingly, this issue is without merit.

B. Statements made by the prosecution concerning cases of "national prominence" allegedly to inflame the jury.

During closing argument, the State remarked that:

There are other cases that have I'm sure caught your attention in the last year or so or the last few years -- national cases -- cases that you followed in either the newspaper or followed on the television and the jury's come out with just perfectly outrageous verdicts and they interview a juror later and one of the jurors will say well, the State just didn't prove it.

The State also made reference to a case involving video-taped evidence, and argued that in all of these "outrageous verdicts" the jury "examined the truth and examined the lies and found themselves much more comfortable with the lies." The State then asked the jurors if they were willing to see the truth in the case at bar. Latham, however, failed to make a timely objection to these allegedly prejudicial remarks. Latham remained silent until the closing arguments were complete, the trial court had instructed the jury, and the jury had retired to deliberate.

By not making a contemporaneous objection to the State's allegedly prejudicial remarks Latham has waived this issue. *See Carr v. State*, 655 So. 2d 824, 853 (Miss. 1995) (holding objection not made contemporaneous to alleged error barred from review). However, even if the issue was not procedurally barred, there is no merit to Latham's argument. The trial record clearly demonstrates that the remarks made by the State were invited by Latham's earlier comments made during his closing argument. *See Malone v. State*, 486 So. 2d 360, 366 (Miss. 1986) (holding prosecution's remarks were legitimate response to argument made by defense counsel and therefore not in error). Even if the remarks had been in error, they were not the type of remarks relating to "law and order" designed to persuade the jury to "send a message" to society, that have been held prejudicial and grounds for reversal. *See Williams v. State*, 522 So. 2d 201, 209 (Miss. 1988) (stating that "[t]he issue which each juror must resolve is not whether or not he or she wishes to 'send a message' but whether or not he or she believes that the evidence showed the defendant to be guilty of the crime charged"). Since any alleged error would result in no prejudice to Latham, such error would not constitute grounds for reversal. *See Lentz v. State*, 604 So. 2d 243, 249 (Miss. 1992) (holding that even where error has occurred, conviction supported by overwhelming weight of evidence will not be overturned).

## II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE TESTIMONY OF BARBARA CONNER IN REBUTTAL.

Latham asserts that the trial court committed reversible error by allowing Barbara Conner to testify in rebuttal and in allowing the State to put on extrinsic evidence regarding specific instances of his conduct in violation of the Mississippi Rules of Evidence. Regarding the assignment of error in allowing Conner to testify in rebuttal, the Mississippi Supreme Court has held that "the State should not withhold evidence for rebuttal which properly belong[s] as a part of its case-in-chief." *Barnes v. State*, 532 So. 2d 1231, 1234 (Miss. 1988). However, our supreme court has also noted that it is not always clear whether evidence is properly part of the State's case in chief or rebuttal. *Barnes*, 532 So. 2d at 1234. Accordingly, the court has held that "allowing testimony in rebuttal (as against the contention that it should have been submitted as part of the case in chief) is a matter which rests in the sound judicial discretion of the trial court." *Pierre v. State*, 364 So. 2d 1127, 1128 (Miss. 1978); *see also Barnes*, 532 So. 2d at 1234 (holding that in gray areas circuit court must be afforded some discretion, especially when defendant is offered opportunity for surrebuttal). In addition to showing that the trial court abused its discretion in allowing Conner to testify in rebuttal, Latham would need to demonstrate that such action caused prejudice to his case so as to require reversal. *See Jenkins v. State*, 607 So. 2d 1171, 1175 (Miss. 1992) (holding error not grounds for reversal unless prejudicial). Latham was offered an opportunity for surrebuttal, but declined. Additionally, Latham has failed to show that he suffered any prejudice as a result of the trial court's actions or that the trial court's decision to allow Conner's testimony in rebuttal was an abuse of judicial discretion. Accordingly, this issue is without merit.

Latham also asserts that the trial court committed reversible error in allowing the State to introduce extrinsic evidence regarding specific instances of his conduct, in violation of Rule 608(b) of the Mississippi Rules of Evidence. A review of the trial court record indicates that, indeed, the State did use its examination of Connor to introduce extrinsic evidence of specific instances of Latham's

conduct in order to impeach Latham's prior testimony before the court. Such use of Connor's testimony, of course, is in violation of Rule 608(b), which prohibits the use of extrinsic evidence to attack or support the credibility of a witness, other than by use of the witness' conviction of certain crimes. M.R.E. 608(b); *see also Jackson v. State*, 645 So. 2d 921, 923 (Miss. 1994) (holding that specific instances of conduct may not be proved by extrinsic evidence and may only be inquired into on cross-examination).

However, "[t]he mere fact that the trial court committed error in an evidentiary ruling does not by itself warrant a reversal by this Court." *Peterson v. State*, 671 So. 2d 647, 656 (Miss. 1996) (citing *Jackson*, 645 So. 2d at 924). In order for an error to require reversal of a case, "[a] denial of a substantial right of the defendant must have been affected by the evidentiary ruling . . ." *Newsom v. State*, 629 So. 2d 611, 614 (Miss. 1993). Only in cases where the trial court committed an abuse of discretion resulting in prejudice to the accused will this Court reverse the trial court. *Peterson*, 671 So. 2d at 656. Accordingly, since Latham has failed to demonstrate that he suffered any prejudice as a result of the trial court's admission of extrinsic evidence of his specific acts, this assignment of error is without merit.

### III. THE FAILURE OF THE PROSECUTION TO PROVIDE THE DEFENSE WITH THE PRIOR CRIMINAL RECORD OF WITNESS MICHAEL SLAUGHTER CONSTITUTES REVERSIBLE ERROR.

Latham asserts that the trial court was in error in failing to require the State to produce a complete criminal history of the witness Michael Slaughter. Latham alleges that such production is required pursuant to the discovery provisions of Uniform Circuit and County Court Rule 9.04. However, upon even a cursory inspection of Rule 9.04, it is readily apparent that no such production is mandated. Rule 9.04(A)(1) only requires the prosecution to produce the "[n]ames and addresses of all witnesses in chief proposed to be offered by the prosecution at trial . . .," but says nothing about requiring the State to produce a "complete criminal history" of its witnesses. U.R.C.C.C. 9.04(A)(1); *see also Thibodeaux v. State*, 652 So. 2d 153, 172-73 (Miss. 1995) (holding production of criminal records or convictions of prosecution's witnesses not mandated by discovery provisions of Rule 4.06(a)(1)). Additionally, Rule 9.04(A)(3) requires only that the prosecution produce a "[c]opy of the criminal record of the *defendant*, if proposed to be used to impeach." U.R.C.C.C. 9.04(A)(3) (emphasis added). Nowhere in the authority cited by Latham is there a requirement that the State provide a "complete criminal history" of its witness. Accordingly, this issue is without merit.

### IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT FINDING THAT THE PROSECUTION IMPROPERLY COMMENTED ON LATHAM'S FAILURE TO GIVE A STATEMENT TO AUTHORITIES.

Latham assigns as error the trial court's failure to find that the State improperly commented on his not giving a statement to law enforcement officials before the trial. Latham argues that the State's comments to the trial judge during closing argument made reference to Latham's post-arrest silence. Latham is correct in citing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), for the proposition that "the use

for impeachment purposes of [defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." However, Latham failed to make a timely objection to the allegedly prejudicial remarks by the State. Accordingly, this issue is waived due to Latham's failure to make a contemporaneous objection to the alleged error. *See Carr v. State*, 655 So. 2d 824, 853 (Miss. 1995) (holding objection not made contemporaneous to alleged error barred from review).

Even if this assignment of error was not waived, it would be without merit. *See Austin v. State*, 384 So. 2d 600, 601 (Miss. 1980) (holding prosecutor's comment about defendant's silence, though improper, harmless error in view of overwhelming evidence of guilt beyond reasonable doubt). The trial court found that the remarks made by the State did not comment on Latham's not giving a statement to the authorities and that the comment complained of did not alert the jury to the fact that he failed to make a statement. Latham has produced no evidence to show that the trial court was clearly erroneous in reaching this conclusion, nor has he produced evidence to demonstrate that the remarks in question caused him prejudice. The test to determine if the State's argument was improper and requires reversal is "whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Dunaway v. State*, 551 So. 2d 162, 163 (Miss. 1989). Since Latham's argument would fail this test, if not procedurally barred, this assignment of error is without merit.

## V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING LATHAM'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

Latham's final assignment of error concerns his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article Three, Section 26 of the Mississippi Constitution. In determining if a violation of Latham's constitutional right to a speedy trial occurred, this Court is guided by the United States Supreme Court's ruling in *Barker v. Wingo*. *See Taylor v. State*, 672 So. 2d 1246, 1258 (Miss. 1996) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *Barker* requires the appellate court to analyze the following factors: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant resulting from the delay. *Taylor*, 672 So. 2d at 1258.

### 1. Length of the Delay

Under Mississippi law, a delay of eight months or longer is presumptively prejudicial. *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989). The Mississippi Supreme Court has held that "[t]he constitutional right to a speedy trial attaches at the time a person is effectively accused of a crime." *Skaggs v. State*, 676 So. 2d 897, 900 (Miss. 1996) (holding defendant's right to speedy trial attached at time of his arrest). Calculating the amount of time from Latham's October 1991 arrest to the time of his trial, the delay was approximately twenty-nine months. This length of delay is certainly sufficient to raise a presumption of prejudice and therefore compels a review of the remaining *Barker* factors.

### 2. Reason for the Delay

The State has demonstrated that the main reason for the delay in bringing this case to trial was the Noxubee County grand jury's repeated "passing" of the indictment. The Latham case was presented to the grand jury in March and September of 1992 and, on both occasions, the grand jury passed the case to the next term. It was not until the grand jury convened in September of 1993 that a true bill of indictment was returned. Although the grand jury in Noxubee county meets only twice each year, which coupled with the repeated "passing" of the case accounts for a substantial portion of the delay, this does not account for the State's apparent failure to present the Latham case to the March 1993 grand jury. However, there is no evidence to suggest that the State intentionally sought to delay the indictment or setting of a trial date. Although deliberate attempts to delay the trial are weighed heavily against the State, more neutral reasons such as negligence or an overworked judicial system should not be weighed as heavily against the State. *See State v. Magnusen*, 646 So. 2d 1275, 1281-82 (Miss. 1994) (holding mere negligence in causing delay should be weighed against State but not heavily). Since the bulk of the delay was caused by the operation of the Noxubee County grand jury, this factor weighs only slightly in favor of Latham.

### 3. Defendant's Assertion of his Right

Latham never requested a speedy trial during the twenty-nine month delay at issue in this case. It was not until the days immediately before trial, during the presentation of pre-trial motions, that Latham first alleged his constitutional right to a speedy trial had been violated. Since Latham waited until such a late date to assert this issue, this factor weighs in favor of the State.

### 4. Prejudice

Latham must show some prejudice in order to prove a constitutional speedy trial violation. *Magnusen*, 646 So. 2d at 1284. Prejudice to a defendant encompasses interference with his liberty and actual prejudice in defending his case. *Id.* Latham, who was not incarcerated during the delay, has failed to demonstrate that he suffered any prejudice from the delay in his prosecution. Most importantly, Latham has failed to demonstrate that his ability to defend his case was impaired in any way by the delay. Since the presumption of prejudice produced by the long delay is merely that, a presumption, this factor weighs heavily in favor of the State. *Id.* After balancing all of the *Barker* factors, this Court holds that Latham's right to a speedy trial was not violated. Accordingly, this issue is without merit.

**THE JUDGMENT OF THE CIRCUIT COURT OF NOXUBEE COUNTY OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST NOXUBEE COUNTY.**

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