5/20/97

IN THE COURT OF APPEALS

STATE OF MISSISSIPPI

NO. 93-KA-01202 COA

JEFFERY SCOTT LAWRENCE

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 BRYAN JONES

COURT FROM WHICH APPEALED: CIRCUIT COURT OF JACKSON COUNTY

ATTORNEY FOR APPELLANT:

KELLY MCKOIN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: BEN SAUCIER

NATURE OF THE CASE: CRIMINAL--BURGLARY, RAPE AND SEXUAL BATTERY

TRIAL COURT DISPOSITION: GUILTY ON ALL COUNTS--FOR RAPE, RECEIVED A LIFE SENTENCE; FOR SEXUAL BATTERY, RECEIVED A TEN YEAR SENTENCE TO RUN CONSECUTIVELY WITH THE LIFE SENTENCE; FOR BURGLARY, RECEIVED A FIVE YEAR SENTENCE, TO RUN CONCURRENTLY WITH THE TEN YEAR SENTENCE FOR SEXUAL BATTERY; ALL SENTENCES TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

MANDATE ISSUED: 6/10/97

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

A jury in the Jackson County Circuit Court convicted the Appellant, Jeffery Scott Lawrence, of the felonies of rape, sexual battery, and burglary of an inhabited dwelling. For the rape conviction, the jury sentenced him to life imprisonment. The trial court sentenced Lawrence to serve a term of ten years for the crime of sexual battery to run consecutively with the rape sentence, and five years for the crime of burglary to run concurrently with the other sentences of life imprisonment and the term of ten years. In this appeal Lawrence presents this Court with four issues. We conclude that Lawrence's right to a speedy trial was not denied, nor did the trial court err when it refused to allow Appellant to examine the potential jurors individually on voir dire or to quash the jury panel. Further, although the lower court erred by not allowing the defendant to call witnesses in surrebuttal, this error was immaterial and thus, not reversible error. Finally, we affirm the lower court's denial of the defendant's motion for a new trial.

I. FACTS

On Saturday, October 7, 1989, at approximately 6:30 a.m., Jane Doe, a thirty-year-old registered nurse employed by Singing River Hospital in Ocean Springs, was sleeping alone in her home. Some of the windows in Doe's house, as well as the levelor blinds on those windows, were open. A man entered the house through a window in the living room and went into Doe's bedroom. Doe awakened to the sight of a Caucasian male standing at the foot of her bed.

Doe later described the intruder as having "scraggly," shoulder-length hair that looked as if it had not been brushed or washed in some time. He had "close-set" eyes, and Doe described him as wearing a white or "light colored" T-shirt. She added that the intruder smelled of alcohol.

After the intruder threatened Doe with bodily harm, he performed cunnilingus on her, and then he raped her. After this attack, Doe's assailant exited her bedroom. After Doe heard him leave, she called 911 to report the crimes. She then put on underwear and a robe, left her bedroom through an open window, and went to her next-door neighbor's house where she waited for the police to arrive.

Because Jackson County Deputy Sheriff Thomas Lamb was patrolling in an area near Doe's house, he was the first officer to respond to the radio dispatch about the attack on Doe. As Lamb negotiated one of the sharp curves on the route leading into Doe's subdivision, he spotted a blue and white Ford King-Cab pick-up truck coming from the opposite direction. Thomas Tarazano, an off-duty Orleans Parish Deputy Sheriff, was riding with Lamb. Both Lamb and Tarazano observed a Caucasian male with long, "kinky-looking," dirty hair and a white T-shirt driving the pick up. The driver of the pick-up looked away from the two officers as their vehicles passed in the tight curve.

Jackson County Deputy Sheriff Edward Mackie went on duty at 6:00 a.m. on October 7, 1989, relieving Deputy Lamb. Pursuant to the previously mentioned radio dispatch, he proceeded to Doe's home. After Doe's husband had returned home and had taken his wife to the hospital for an examination, Mackie and Orleans Parish Deputy Sheriff Tarazano went into the Does' home to investigate further and to secure what evidence they might find. Mackie found an open window in the

Does' bedroom with the screen removed. He found another screen off a window in the living room; this screen was bent. He also observed footprints in the soil outside and beneath the window from which the bent screen had been removed. These footprints pointed to the living-room window. Mackie later noticed a footprint just inside the window on the living room floor, made as though someone had just stepped into the living room through the open window.

The next officer to arrive on the scene was Robert Mabens, a detective sergeant in the criminal investigation division of the Jackson County Sheriff's Department. He gathered bed linens and other items of evidence from Doe's bedroom. He took some pictures at the scene, but these pictures were later lost and thus, were unavailable at Lawrence's trial. Apparently, there were no fingerprints obtained from the crime scene which were available at trial either.

On either October 13 or 15, 1989, Detective Mabens showed Doe a photographic line-up of eight pictures; one of which was a picture of Lawrence. According to Mabens' testimony at trial, Doe identified Lawrence as the rapist, but she also told Mabens that "she couldn't be one hundred percent sure until she heard his voice." Later, William Gennaro, also a detective with the Jackson County Sheriff's Department, with the aid of a Smith and Wesson Ident-A-Kit participated in the investigation by assisting Doe in making a composite of her assailant's face.

That same day, after Gennaro had completed the composite, he and Detective Hartwell Lott showed Doe a second photographic line-up consisting of six pictures. This line-up included the picture of a man named Riley Gross. A seventh picture of another man who the officers knew had been working in the area of the subdivision in which Doe lived was added to the other six pictures. This time, Doe identified Gross as the rapist, but according to Gennaro, she "couldn't give 100% identification."

Almost nineteen months later, on May 15, 1991, Doe was walking down the corridor of the education department at Singing River Hospital when she "ran smack into" Lawrence, who was walking down the same corridor. Doe instantly and unequivocally recognized him as the man who had raped her. Officers from the Jackson County Sheriff's Department arrested Lawrence later that same evening.

II. LITIGATION

A. Pre-trial events

The events which took place prior to the actual trial are as follows in chronological order:

October 7, 1989: The crimes occurred.

May 15, 1991: Lawrence was arrested.

May 16, 1991: An initial hearing was held before the county court judge.

July 2, 1991 A preliminary hearing was conducted in the Jackson County Court, after which that court bound Lawrence over to await the action of the grand jury. He was represented by Gary Roberts.

August 21, 1992: The grand jury indicted Lawrence.

October 9, 1992: Lawrence was arraigned while he was represented by the public defender and his trial was set for October 23, 1992.

October 23, 1992: Lawrence's new trial counsel, Kelly McKoin, appeared for the first time on behalf of Lawrence and moved for a continuance so that he could prepare to defend Lawrence. There was no reason stated in the record as to why Lawrence replaced his attorney with McKoin. The trial judge granted the motion for continuance on the condition that McKoin obtain his client's waiver of his right to a speedy trial, including his right to be tried within 270 days of his arraignment.

November 2, 1992: Lawrence filed a motion to dismiss because the State allegedly violated his right to a speedy trial.

November 9, 1992: The trial court set the case for trial, and all matters were continued by agreement of both Lawrence and the State.

February 22, 1993: Trial was scheduled to begin, but the State moved for a continuance because one of its key witnesses was hospitalized. Lawrence consented to continuance and renewed his motion to dismiss which the trial judge denied after a full hearing on the motion.

May 24, 1993: Trial began.

B. Trial

On Monday, May 24, 1993, Lawrence's five-day trial began with voir dire and jury selection. During the defense's voir dire of the jury, Mr. Kelly McKoin, Lawrence's defense counsel, asked some questions about DNA evidence. He began by asking if any of the potential jurors knew anything about DNA, and whether DNA evidence would substitute for a juror's independent judgment as to the presumption of innocence. Mr. Roy Pike, former district attorney and member of the jury pool, indicated that it would weigh heavily in the State's favor, depending on how the test was taken and what the evidence showed. Mr. Pike also stated that any additional evidence would still have some pertinence as to the question of guilt or innocence. Mr. McKoin proceeded to ask the venire if anyone else felt the way that Mr. Pike did. None of the potential jurors raised his hand. Mr. McKoin then wanted to call out the individual juror's names and have each one answer "yes" or "no" to the same question. The State objected on the grounds that this was an attempt to individually voir dire the jurors. The trial judge sustained the objection and told Mr. McKoin that he could ask the jurors overall questions, but he could not individually voir dire them.

Mr. McKoin then asked for anyone who believed that DNA is the only evidence they would consider to please raise his hand; no one did. The defense contends that the trial court's denial of individual voir dire of the jury is reversible error.

At trial, the State's evidence consisted of: (1) Doe's description of her sexual battery and rape and her identification of Lawrence as her assailant; (2) the testimony of the two officers who had seen a man fitting Lawrence's physical description driving a blue pick-up with a white top on the road leading into Doe's subdivision; (3) the testimony of expert serologists from the Mississippi Crime Laboratory that Lawrence could have been the donor of the semen found in stains on the sheets taken from the bed in which the sexual battery and the rape had occurred, and (4) the opinion of Sudhir K. Sinha,

Ph.D., the State's DNA expert, that DNA samples cloned from the sperm samples found on the Doe's bed sheet, Doe's underwear, and the vaginal swab included in her rape kit, so matched the DNA taken from Lawrence's blood that he would be considered a donor of the sperm found in the semen stains. However, Dr. Sinha declined to opine that the DNA test results positively identified Lawrence as Doe's assailant as a fingerprint might.

Lawrence presented an alibi defense. Pam Haman testified that Lawrence, whom she then was dating, had spent Friday night, October 6, 1989, in her apartment in North Biloxi in anticipation of their sailing and camping trip with Margaret Sartor and Margaret Sartor's fiancé, Ron Sartor, to Horn Island early the next morning, October 7, 1989, in celebration of Margaret Sartor's birthday. Haman further testified that she and Lawrence awoke at 6:00 a.m. on Saturday morning, October 7, 1989, and met Margaret and Ron at 7:00 a.m. at the harbor for their camping trip. Lawrence, Haman, Margaret Sartor, and Ron Sartor all testified that they spent the entire weekend of October 7 and 8, 1989, camping on Horn Island and that they returned to the harbor at Ocean Springs just before sundown on Sunday, October 8.

Margaret Sartor, who worked as the Chief of the Environmental Management Flight at Keesler Air Force Base, elaborated that she had always celebrated her birthday by going camping or undertaking some similar excursion. On redirect examination, Margaret Sartor stated that she had celebrated her birthday the year before, October 7, 1988, by sailing to Horn Island with Donald Checkley, Dawn Spatzer, and Susan Checkley in Donald Checkley's sailboat. She did not meet Ron Sartor until April, 1989, and they were not married until December 10, 1989. She also explained that she spent her birthday in 1990 engaged in official military business in Orlando, Florida.

After Lawrence rested, the State called three rebuttal witnesses: Donald Checkley; Susan Checkley, Donald's sister; and Timothy Lawton. These witnesses all testified that they had celebrated Margaret Sartor's October 7, 1989, birthday--the date the rape occurred--by sailing with her to Horn Island. All three witnesses denied that Lawrence was with them on that day. Donald Checkley also identified a collage of pictures which Margaret Sartor had given Timothy Lawton and his wife, Adele, for Christmas in 1989. Written on the back of the collage's frame were the words, "To Tim and Adele, Merry Christmas, 1989. Love, Ronnie and Margaret." Checkley testified that he had an identical copy of one of the pictures that comprised the collage and that Margaret Sartor had given it to him for Christmas that same year. Both Donald Checkley and Timothy Lawton testified that the picture was of Timothy Lawton's sailboat as it was approaching Donald Checkley's sailboat during the course of the October 7, 1989, outing to Horn Island.

When the State rested on rebuttal, the trial judge inquired if all parties rested. Lawrence's counsel responded, "Well Judge, we're going to have to . . . call back some rebuttal witnesses of our own. This can't be standing like it is." The State strongly objected to Lawrence's calling witnesses in surrebuttal to its rebuttal and argued that such surrebuttal was improper and without precedent. The State and Lawrence then argued over whether it was proper for the trial judge to allow Lawrence to call surrebuttal witnesses. The record reveals that the State and Lawrence directed their argument to whether Rule 4.07 of the Uniform Criminal Rules of Circuit Court Practice, the "Alibi Rule," required the State to divulge to Lawrence the names of its rebuttal witnesses since the State had not demanded that Lawrence notify it whether he intended to rely on an alibi as his defense. Lawrence argued that the State should have furnished him the names of its rebuttal witnesses whom it intended

to call to attack his alibi. The State retorted that since it had not demanded this information from Lawrence, it was not obliged to furnish him the names of its witnesses whom it planned to call to rebut Lawrence's alibi. Lawrence's counsel stated, "[W]e feel like that we should and ought to have the opportunity to not only put Mrs. Sartor and Ron Sartor back on the stand, but also to call [Dawn Spatzer, Donald Checkley's former girlfriend as witnesses in surrebuttal]." When the State and Lawrence concluded their respective arguments, the trial judge opined: "Gentlemen, I don't have any precedent for allowing rebuttal witnesses to rebut the State's witnesses; therefore, your request [to call witnesses in surrebuttal] will be denied."

III. ISSUES

On appeal, Lawrence raises four issues. Quoted verbatim from his brief, they read as follows:

A. The trial court was in error for failing to dismiss the indictment against the appellant on the ground the State did not give appellant a speedy trial as required by the Constitutions of the United States and the State of Mississippi.

B. The trial court was in error for failing to allow appellant to examine the jurors individually on voir dire and for failing to quash the jury panel.

C. The lower court was in error for refusing to allow the impeachment of the State's rebuttal witnesses.

D. The verdict of the jury is against the weight of the credible evidence.

IV. REVIEW AND RESOLUTION OF THE ISSUES

A. The trial court was in error for failing to dismiss the indictment against the appellant on the ground the State did not give appellant a speedy trial as required by the Constitutions of the United States and the State of Mississippi.

Facts and events relevant to this issue

The record indicates that on July 2, 1992 Gary Roberts represented Lawrence in some preliminary matters such as the preliminary hearing and attempts by the State to obtain blood, semen, and hair samples from Lawrence. When Lawrence was arraigned on October 9, 1992, the public defender represented him. When the trial court called this case for trial on October 23, 1992, Kelly McKoin appeared for the first time as Lawrence's trial counsel. The record contains the following colloquy which occurred among the prosecutor, McKoin, and the trial judge on the matter of continuing this case:

BY MR. HARKEY (the assistant district attorney):

Your Honor, the State would agree to a continuance for Mr. McKoin's client if he would enter and file with the Court a waiver of the 270 day rule and any other speedy trial rights he may have as a result of this continuance that he is asking for.

BY MR. McKOIN: I will do that. I didn't put that in the order, but I can inter-line that if that's agreeable.

BY MR. HARKEY: He can't waive it for his client. I need his client to sign it.

BY MR. McKOIN: Okay. Then I can get him to do it.

. . . .

BY THE COURT: I will grant the order subject to him waiving the 270 day rule and the speedy trial rule.

Notwithstanding the foregoing exchange, the State in its brief concedes that the validity of Lawrence's waiver of his right to a speedy trial "is not at issue, it merely provides a reason for the delay." Thus, we need not consider whether Lawrence was bound by McKoin's representation to the State and the trial court that he would obtain his client's written waiver to his right to a speedy trial. Instead, we need only consider the merit of Lawrence's argument that he was denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States of America and Section 26 of the Constitution of the State of Mississippi.

Lawrence points out that in *Flores v. State*, 574 So. 2d 1314, 1322 (Miss. 1990) the Mississippi Supreme Court determined that the length of delay was the "triggering mechanism" for adjudicating whether a criminal defendant's constitutional right to a speedy trial had been violated. Although the "triggering mechanism" is the length of the delay, once the question is brought before the court, it must then weigh the four factors set out in *Barker v. Wingo* to determine if there has in fact been a violation of the defendant's right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514 (1972). The length of the delay must also be presumptively prejudicial in order for it to trigger the inquiry. *Jaco v. State*, 574 So. 2d 625, 630 (Miss. 1990).

Application of the four *Barker* factors

In *Barker* the United States Supreme Court established four factors which must be "balanced" in the process of determining whether the prosecution has denied a criminal defendant's right to a speedy trial. These four factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has asserted his right to a speedy trial; and (4) whether the defendant has been prejudiced by the delay. *Barker*, 407 U.S. at 530. In *Stogner v. State*, 627 So. 2d 815, 818 (Miss. 1993), the Mississippi Supreme Court explained the process of balancing these four factors as follows:

These factors are weighed and balanced in each case according to the facts. "The weight given each necessarily turns on the peculiar facts and circumstances of each case, the quality of evidence available on each factor . . . . No one factor is dispositive."

quoting Jaco v. State, 574 So. 2d at 630.

1. Length of Delay

The constitutional right to a speedy trial attaches at the time of formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge. *Hughey v. State*,

512 So. 2d 4, 7 (Miss. 1987). In *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1889), the Mississippi Supreme Court established that a delay of eight months is presumptively prejudicial, thereby triggering the inquiry into whether the defendant's right to a speedy trial has been denied. From May 15, 1991, the date of Lawrence's arrest, until May 24, 1993, the date of Lawrence's trial, 740 days, or more than two years, elapsed. However, Lawrence writes in his brief, "[A]ppellant is not arguing about the time after October 23, 1992, even though the State should be charged with some of the delays caused by the State after that date." Because Lawrence does not argue about the time after October 23, 1992, then this Court need not weigh the reasons for the delay following McKoin's first appearance, but only the reasons for the delay from May 15, 1991, when Lawrence was arrested, until October 23, 1992, the date the trial court first set his case for trial. This period includes 527 days;Because 1992 was a leap year, February of that year contained 29 days, rather than 28. Hence, the period from May 15, 1991, to May 15, 1992, contained 366 days. thus because it was longer than eight months, it is presumptively prejudicial and weighs against the State. *Id.* Nonetheless, one factor alone is not sufficient to determine if Lawrence's rights have been violated, the Court must examine and weigh the remaining factors. *Handley v. State*, 574 So. 2d 671, 676 (Miss. 1990). We must therefore balance all four factors in deciding whether Lawrence is entitled to have his convictions reversed and to be discharged.

2. Reason for delay

Of particular concern to this Court is the period of 416 days which elapsed between the date of Lawrence's preliminary hearing, July 2, 1991, when the county court bound him over to await the action of the grand jury, and August 21, 1992, the date of the indictment which the grand jury returned against him.

The record reflects that when the trial judge heard arguments on Lawrence's motion to dismiss, the assistant district attorney stated that Lawrence's first attorney, Gary Roberts, had delayed the obtaining of samples of hair, blood, saliva, and semen from his client by resisting a search warrant that had been served on Lawrence to obtain these evidentiary items. The consequence of this delay was a hearing on the matter in January of 1992. The tests were ordered and the results were finally available April 28, 1992. This date came after the grand jury had been convened for the April term of the Jackson County Circuit Court, and it therefore precluded the presentation of the evidence against Lawrence to that grand jury. The assistant district attorney also alleged that there had been no grand jury convened for the January, 1992, term of circuit court because of the change of district attorneys which followed the general elections in 1991. Thus, the State argued that it had presented the matter to the first available grand jury after it had accumulated the evidence it thought was necessary to make its case against Lawrence. Lawrence did not rebut, nor did he deny, any of these allegations which the assistant district attorney made as he argued against Lawrence's motion to dismiss.

In *Macon v. State*, 295 So. 2d 742, 744 (Miss. 1974), the appellant was bound over to the grand jury on April 8, 1972. Because the circuit court did not empanel a grand jury in May as was scheduled, the appellant was not indicted until after the May, 1972, term of the circuit court. This state's supreme court held that the State's failure to obtain an indictment of Macon at the May term did not deny the defendant his right to a speedy trial. *Id.* Furthermore, in *Diddlemeyer v. State*, 398 So. 2d 1343, 1344-45 (Miss. 1981), in response to the appellant's argument that he had been denied his constitutional right to a speedy trial, the Mississippi Supreme Court held that because the grand jury

was not in session and the court docket was overcrowded, the defendant was not denied his right to a speedy trial. Both *Macon* and *Diddlemeyer* require us to hold, in the case at bar, that because the circuit court did not empanel a grand jury at its January, 1992 term, and because the defense had delayed the State in obtaining crucial evidence, the period from July 2, 1991, until the date that the grand jury was empaneled at the August, 1992, term of the circuit court does not weigh against the State.

The State presented its case against Lawrence at the first session of the grand jury which followed the April term, which was the July term; the grand jury returned its indictment against Lawrence during that term.While the indictment was dated August 21, 1992, the grand jury empaneled during the July term returned it. The delays which have been previously discussed, are not attributable to the State. We are therefore of the opinion that the delay of 416 days between Lawrence's having been bound over by the county court and his indictment cannot weigh against the State.

The next period of concern is that between the date of Lawrence's indictment, August 21, 1992, and his arraignment on that indictment, October 9, 1992. This period contains forty-nine days. Although Lawrence does not complain of this period, we will address it briefly. In *State v. Magnusen*, 646 So. 2d 1275, 1282 (Miss. 1994), the Mississippi Supreme Court said a three and one half month (104 days) delay between indictment and arraignment is not at all unusual. The record in the case *sub judice* contains nothing about whether the delay of forty-nine days between indictment and arraignment was reasonable. However, because a delay of more than twice that long is considered not to be unusual, then this delay is considered reasonable and does not weigh against the State.

The third and final period of delay with which we are concerned is that time between October 9, 1992, the date of Defendant's arraignment, and October 23, 1992, the first date that the trial court set Lawrence's case for trial -- a mere fourteen days. Because this period is such a short amount of time, it is of no consequence and will not be addressed.

The 416-days delay between Lawrence's preliminary hearing and his indictment would normally weigh heavily against the State. But because of the explanation given by the assistant district attorney of the circuit court's failure to empanel a grand jury for the January,1992 term and the delay in the test of DNA, there is quite another outcome. Lawrence's opposition to donating samples of his hair and bodily fluids contributed to the delay, therefore this period of delay is not weighed heavily against the State. The remaining period of sixty-three days between the dates of Lawrence's indictment and the first date his case was set for trial must weigh either equally against both the State and Lawrence or exclusively against Lawrence. Thus, we conclude that the second of the *Barker* factors weighs in favor of the State.

3. Whether the Right to A Speedy Trial Was Asserted

Lawrence did not raise the issue of the State's denial of his right to a speedy trial until November 2, 1992, when he filed a motion to dismiss on those grounds. Notwithstanding his motion to dismiss, Lawrence also made a second request for a continuance on that same day. On November 2, 1992, the trial court granted this second request for continuance. Finally, on February 22, 1993, the State requested a continuance because Deputy Sheriff Mabens had been hospitalized. Lawrence did not object to the State's request.

While it is true that the Mississippi Supreme Court has stated that there is some responsibility on the part of the defendant to assert his right to a speedy trial, the court has also said that the primary burden is on the courts and the prosecutors to assure that cases are brought to trial. *Flores v. State*, 574 So. 2d, 1314, 1323 (Miss. 1990). Lawrence did not assert his right to a speedy trial during the initial sixteen-month period between the time of his arrest and the date that was first set for his trial, and he requested two subsequent continuances because his new counsel of record was unprepared to defend him at trial. *Johnson v. State*, 666 So. 2d 784, 793 (Miss. 1995), holds that even where a defendant is late in asserting his right to a speedy trial, this is not fatal to his claim. . Lawrence's late assertion of his right to a speedy trial is likewise not fatal to his claim in this case, but this Court holds that because he was late asserting the right and requested continuances, we weigh this factor against Lawrence.

4. Prejudice

The United States Supreme Court has stated that prejudice to the defendant should be assessed in light of the three distinct interests which the speedy trial right was designed to protect: (1) the prevention of oppressive pretrial incarceration; (2) the minimization of anxiety and concern of the accused; and (3) the limitation of the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. As for the prevention of oppressive pretrial incarceration, Lawrence was released on bail within hours of his initial arrest on May 15, 1991, and remained free on bail until his trial began on May 24, 1993. With regard to the limitation of the possibility that his defense was impaired, Lawrence has not argued that the delay from his arrest until October 23, 1992, impaired his defense. With regard to the second interest, the minimization of anxiety and concern of the accused, Lawrence argues that the delay caused him much anxiety and embarrassment, not to mention a huge financial burden. Lawrence argues that he had to go through the misery of waiting all those months, and that these things all weigh in favor of the defense.

In recent years, the Mississippi Supreme Court has treated the prejudice prong of the *Barker* test in various ways. Although *Trotter v. State*, 574 So. 2d 1314, 1323 (Miss. 1989), held that no affirmative showing of prejudice is required in order to prove a defendant's constitutional right to a speedy trial has been denied, the court in *Polk v. State*, 612 So. 2d 381, 387 (Miss. 1992), said that without a showing of prejudice, this element cannot be weighed in favor of the defendant. The court held that where the defendant makes no argument that the delay either diminished his defense or strengthened the State's evidence, but only that he suffered "a great deal of anxiety," then this alone does not help his claim. *Id.*

Recently, the Mississippi Supreme Court has appeared to require criminal defendants to demonstrate an actual impairment of their defense if their claims of denial of a speedy trial are to succeed. *See, e.g., Skaggs v. State*, 676 So. 2d 897, 901-902 (Miss. 1996); *McGhee v. State*, 657 So. 2d 799, 804 (Miss. 1995). Although the court contends that no one factor is dispositive in balancing the elements, the court continues to rely on whether or not the defendant can prove he suffered actual prejudice to his defense as a result of the delay. *McGhee*, 657 So. 2d at 806 (Sullivan, J., dissenting).

Lawrence has not argued that the delay prejudiced his defense of alibi. Lawrence's argument about the manner in which he was prejudiced amounts to nothing more than an assertion that he suffered anxiety. Pursuant to *Polk*, "Anxiety alone [can] not help his claim." 612 So. 2d at 387.

Summary of this Issue

The first of the four *Barker* factors, length of delay, is presumptively prejudicial to Lawrence because it greatly exceeds the eight-month period of delay which the Mississippi Supreme Court has declared to be presumptively prejudicial. The second factor, the reason for delay, results in a tie between the State and Lawrence. This is because the 416-day delay between the date of the preliminary hearing and the date of the indictment cannot weigh against the State because no grand jury was empaneled in January, 1992, and because of Lawrence's change of representation sometime between the preliminary hearing and the date the case was set for trial. Additionally, this factor will not weigh against the State because the defense would not cooperate with the search warrant issued, which delayed presentment of the case to the grand jury. The third factor, Lawrence's assertion of his right to a speedy trial, weighs against Lawrence because Lawrence asserted it for the first time on November 2, 1992, and he simultaneously moved for a second continuance because his new counsel, Kelly McKoin, was not yet prepared to proceed with defending Lawrence. Furthermore, Lawrence elected not to contest the State's motion for a continuance in February, 1992, when Deputy Sheriff Mabens had been hospitalized. We understand Lawrence's argument on the prejudice, the fourth and final factor, to be nothing more than a complaint about anxiety. Therefore, we cannot weigh this factor against the State.

Because we believe the second factor cannot be weighed against the State, and weigh the third and the fourth factors against Lawrence, we reject Lawrence's argument that the State denied him his right to a speedy trial. Accordingly, we affirm the denial of his motion to dismiss the indictment.

B. The trial court was in error for failing to allow appellant to examine the jurors individually on voir dire and for failing to quash the jury panel.

Because the defense was not allowed to individually voir dire the jury on whether each one believed that DNA was the only evidence to consider in this case, he contends that the trial court committed reversible error.

Mississippi Uniform Criminal Rules of Circuit Court Practice 5.02This rule can now be found in the Unif. R. Cir. County Ct. Prac. 3.05. states:

In the voir dire examination of jurors, the attorney shall direct to the entire venire questions only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked.

Mr. McKoin contended that based on *Odom v. State*, 355 So. 2d 1381 (Miss. 1978), he should have been allowed to individually voir dire the jury. However, *Odom* speaks of individual voir dire of a juror when that person has failed to respond to or fully answer a question asked by defense counsel during voir dire. *Id.* at 1383. *Odom* does not apply in this case because the jurors did respond. None of them raised his hand. The form of the question asked by Mr. McKoin was that if the jurors believed DNA was the only evidence to consider then that person should raise his hand. The jurors did not have to raise their hands in order to respond to the question. By not raising their hands, the jury was saying that they did not believe DNA was the only consideration in the case. The jurors

responded to Mr. McKoin's question, and there was no need for individual voir dire. This procedure has been used by the courts of this state for many years and has been repeatedly upheld as proper. *West v. State,* 463 So. 2d 1048, 1054 (Miss. 1985), *appeal after remand* 519 So. 2d 418 (Miss. 1988). Therefore, the trial court did not commit error when it refused to allow Mr. McKoin to individually voir dire the jury.

During the selection of the jury, Mr. McKoin indicated that he wanted Mr. Pike struck from the jury, and the whole panel quashed because of the prejudice caused by Mr. Pike's statements concerning DNA. The judge struck Mr. Pike for cause, but denied the appellant's motion to quash the jury panel because the judge held that prior to Mr. Pike being questioned, the jurors, by a show of hands, indicated, that they had some knowledge of DNA.

The Mississippi Supreme Court has held that the standard for evaluating denial of a motion to quash on appeal is:

The trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors. . . . Although broad, the discretion is not unlimited, and an abuse will be found on appeal where clear prejudice to the accused results from undue constraint on the defense.

Carlton v. State, 425 So. 2d 1036, 1040 (Miss. 1983), *quoting Jones v. State,* 381 So. 2d 983, 990 (Miss. 1980), *cert denied,* 449 U.S. 1003 (1980). In *Carlton,* the appellant claimed that he was unduly restricted by the trial judge as to what he could inquire during voir dire. *Carlton v. State,* 425 So. 2d 1036 (Miss. 1983). In the case at bar, the defendant is complaining of just the opposite. He is complaining of the answers he received when he asked certain questions. The defense counsel formulated his own questions and chose to whom he would ask them. He chose to ask questions concerning DNA of Mr. Roy Pike, a former district attorney, and Mr. Pike answered that he believed DNA to not be conclusive proof of guilt or innocence. Defense counsel obviously did not like Mr. Pike's answer to his question, although this answer is more favorable to the defense than if Mr. Pike had answered in the alternative. There was no prejudice due to undue constraint by the judge on the defense. Accordingly, it was not an abuse of discretion by the trial judge to deny Lawrence's motion to quash the jury panel.

C. The lower court was in error for refusing to allow the impeachment of the State's rebuttal witnesses.

As we have stated earlier, after Lawrence called his alibi witnesses, the State called its rebuttal witnesses who said the alibi witnesses were mistaken about the year of the boat trip to Horn Island. The rebuttal witnesses also had photographs taken from that trip, which were signed and dated by Margaret Sartor, that proved their testimony had to be correct. After the State rested, Lawrence attempted to call Margaret Sartor, among others, as a surrebuttal witness. The trial judge refused to allow Lawrence to call surrebuttal witnesses because he did not have "any precedent for allowing rebuttal witnesses to rebut the State's witnesses . . . ." Lawrence contends that this ruling was erroneous.

The refusal to allow Lawrence to call surrebuttal witnesses was error on the part of the trial judge. *Culberson v. State,* 405 So. 2d 126, 128 (Miss. 1981) *quoting, Nicholson v. State,* 243 So. 2d 552, 555 (Miss. 1971). There is a well-settled rule in Mississippi that where rebuttal evidence is

introduced, surrebuttal should be allowed, especially if it would prejudice the other side if they were denied the opportunity. *Culberson,* 405 So. 2d at 128. However, there was no resulting prejudice due to this error. The only limitation to this rule is that surrebuttal evidence will not be allowed where it would be cumulative of evidence already elicited. *Burrell v. State,* 613 So. 2d 1186, 1192 (Miss. 1983).

In this case, the denial of surrebuttal witnesses resulted in mere harmless error to Lawrence. The error was harmless because allowing Mrs. Sartor to testify as a surrebuttal witness would have resulted in evidence which was either cumulative or adverse to the defendant.

Although there was no proffer made by the defense counsel, it seems clear that evidence of when the photographs were taken is what Lawrence would have tried to elicit from Mrs. Sartor. Mrs. Sartor would have said either: (1) the photos were taken in 1988; or (2) the photos were taken in 1989. If she stated that they were taken in 1988, this evidence would have been cumulative since it would have been consistent with that to which she had previously testified. Any evidence which is merely cumulative of previously elicited evidence shall not be allowed in surrebuttal. *Id.* If she admitted that they were taken in 1989, then this would have been adverse to the defendant's case. Therefore, although we conclude that there was error on the part of the trial judge in excluding the surrebuttal evidence, the error, in this case, is in no way prejudicial to Mr. Lawrence because it would have been either cumulative or adverse.

D. The verdict of the jury was contrary to law and the weight of the evidence. The defense makes the argument that the jury's verdict was against the overwhelming weight of the evidence. In reviewing this claim, the Court should examine the trial judge's overruling of Lawrence's motion for a new trial. *Jones v. State,* 635 So. 2d 884, 887 (Miss. 1994). The decision of whether or not to grant a motion for a new trial rests in the sound discretion of the trial judge and should be granted only where the judge is convinced that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant the motion would result in an unconscionable injustice. *Id.* In determining whether a verdict is against the overwhelming weight of the evidence or not, this Court must view all evidence in the light most consistent with the jury verdict and should not overturn the verdict unless we find that the court abused its discretion when it denied the motion. *Blanks v. State,* 542 So. 2d 222, 228 (Miss. 1989). The proper function of the jury is to decide the outcome in this type of case, and the Court should not substitute its own view of the evidence for that of the jury's. *Id.* at 226. Likewise, the reviewing court may not reverse unless it finds there was an abuse of discretion by the lower court in denying the defendant's motion for a new trial. *Veal v. State,* 585 So. 2d 693, 695 (Miss. 1991).

The defense rests its whole argument on the fact that it claims the jury was tainted from the time of voir dire. He claims that because they were convinced that DNA was infallible, that they disregarded all evidence but that which was presented by the State. The function of the jury has been stated many times by this state's highest court and is still held to be that of the finder of fact. As stated in *Groseclose v. State:*

Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterance of any witness. . . . A reviewing court cannot and need not determine the exactitude which witnesses or what testimony the jury believed or

disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. [citation omitted].

440 So. 2d 297, 300 (Miss. 1983).

The Court has also stated that the jury is charged with weighing the evidence and considering conflicting evidence and the credibility of the witnesses. *Harris v. State*, 527 So. 2d 647, 649 (Miss. 1988). Once the jury has returned a verdict, the reviewing court is not at liberty to order a new trial unless it is convinced that the verdict was so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice. *Id.* In this case, there was conflicting evidence; the jury properly performed its duty by weighing the evidence and reaching a verdict. If the jury chose to disregard some of the evidence because they believed it was not credible, they were well within their rights and duties to do so. Because we have previously held that there was no error during voir dire, we also hold that the jury was not tainted at that time. Therefore, Defendant's argument that because the jury was tainted, it could not have given a verdict which was fair and supported by the overwhelming weight of the evidence is not relevant to this issue. Accordingly, we hold that the trial judge did not abuse his discretion, and we affirm his denial of Defendant's motion for a new trial.

V. CONCLUSION

After a thorough review of this case, we are of the opinion that there has been no reversible error committed by the trial court. Once the *Barker* factors had been balanced and weighed, it was clear that there was no denial of Defendant's right to a speedy trial. Although the defendant's counsel received some unfavorable answers during his voir dire of the jury, the answers were the best he could hope for to the question which he asked. The rest of the jury pool answered his questions by not raising their hands and therefore, there was no need for an individual voir dire. Although the judge may have committed error by not allowing Defendant to call surrebuttal witnesses during trial, this error was not reversible and caused no harm to Defendant's case. There was neither abuse of discretion by the trial judge nor an unconscionable injustice in the denial of the motion for a new trial. The jury properly performed its function by drawing reasonable inferences from the evidence

presented and rendering a verdict which was supported by the evidence. Therefore, we find no reversible error and affirm the lower court's ruling on all issues.

THE JUDGMENT OF CONVICTION IN THE JACKSON COUNTY CIRCUIT COURT ON COUNT I OF RAPE AND SENTENCE OF LIFE IMPRISONMENT; COUNT II OF SEXUAL BATTERY AND TEN YEARS IMPRISONMENT TO RUN CONSECUTIVELY TO THE RAPE SENTENCE; COUNT III OF BURGLARY OF AN INHABITED DWELLING AND FIVE YEARS TO RUN CONCURRENTLY WITH THE RAPE AND SEXUAL BATTERY SENTENCES, ALL TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO JACKSON COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., HERRING, HINKEBEIN, AND PAYNE, JJ., CONCUR.

COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING AND SOUTHWICK, JJ.

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01202 COA

JEFFERY SCOTT LAWRENCE

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

COLEMAN, J., DISSENTS:

Because I evaluate Margaret Sartor's testimony about when she took the photographs in the collage which she had given Timothy and Adele Lawton for Christmas, 1989 as being more than merely cumulative, I respectfully dissent. I would reverse and remand the trial court's judgment of Lawrence's guilt of rape, sexual battery, and burglary of an inhabited building for a new trial because I find that the trial judge erred reversibly when he refused to allow Lawrence's counsel to call Margaret Sartor in surrebuttal.

I have two concerns about this issue. First, Doe remained uncertain about the identity of her assailant after she had viewed two separate photographic line-ups. In fact, as the majority correctly relates, Doe identified one Riley Gross as her attacker from the six pictures which detective Hartwell Lott showed her in the second line-up. Officer Gennaro testified that even after Doe had viewed the second photographic line-up of six pictures, she "couldn't give 100% identification." Doe only became positive that Lawrence had raped and battered her more than nineteen months after the crimes had occurred when, according to her testimony, she encountered him by happenstance in the halls of the Singing River hospital, where she worked.

Secondly, while it was not until the State's rebuttal that its witnesses established that Margaret Sartor

had taken the pictures which were included in the collage, the jury was denied the opportunity of hearing from the photographer, Margaret Sartor, about when she took these pictures. I suggest that the following excerpt from Lawrence's "voir dire" of Donald Checkley about these two pictures included in the collage demonstrates that Margaret Sartor's testimony about when she took these pictures was not cumulative:

Q. All right. Do you have something that shows that [picture] was made on October the 7th, 1989?

A. I don't have the negatives.

Q. Do you have -- well who has the negatives?

A. I would suggest Margaret has the . . .

Q. Okay. So if she has them, then she would know when she made them, wouldn't she?

Nevertheless, the jury deliberated Lawrence's guilt with the uncontradicted testimony that the pictures had to have been taken in 1988, one year before the attack on Doe.

The crux of the testimony of the State's rebuttal witnesses, Donald Checkley, Checkley's sister Susan, and Tim Lawton, all of whom were friends of both Margaret Sartor and Lawrence, was that Lawrence's three witnesses were mistaken about the year in which they celebrated Margaret Sartor's birthday by sailing with Lawrence. Lawrence's alibi witnesses were mistaken because according to the State's three rebuttal witnesses, it was on October 7, 1989, that the Sartors, Donald Checkley, his sister Susan, and Donald Checkley's former girl friend, Susan Spatzer, had sailed to Horn Island to celebrate Margaret Sartor's birthday. The State's rebuttal witnesses added that Tim Lawton had also sailed his boat to Horn Island with them on October 7, 1989. All three of the State's rebuttal witnesses denied that Lawrence had sailed with them to Horn Island on October 7, 1989; and all three of them further denied seeing Lawrence on Horn Island at any time on October 7, 1989.

It was *in rebuttal*, and not as an exhibit to impeach any of Lawrence's witnesses on cross-examination, that the State introduced the collage which Margaret Sartor had assembled and had given to the Lawtons for their Christmas present in 1989. Lawton and Donald Checkley testified that two of the photographs in the collage, which were of their sailing their respective sail boats to Horn Island, were taken by Margaret Sartor on October 7, 1989. As further proof that the photographs accurately documented that the Sartors had gone sailing with the Checkleys and Lawton on October 7, 1989, the State had the witnesses read aloud the inscription on the back of the collage, which read, "To Tim and Adele, Merry Christmas, 1989; Love Ronnie and Margaret."

The United States Court of Appeals for the Fifth Circuit has explained the purpose of rebuttal as follows:

[T]he purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party." *United States v. Delk*, 586 F. 2d 513, 516 (5th Cir. 1978 (quoting *Luttrell v. United States*, 320 F.2d 462, at 464 (5 Cir., 1963).

The Mississippi Supreme Court has twice opined that "[t]he rule is well settled in this state that where rebuttal evidence is introduced, surrebuttal should be allowed, particularly where to fail do to

so would be prejudicial." *Culberson v. State*, 405 So. 2d 126, 128 (Miss. 1981) (quoting *Nicholson v. State*, 243 So. 2d 552, 555 (Miss. 1971)). The majority opinion acquiesces in the foregoing quotation as a correct statement of a general rule of trial procedure and concedes that "[t]he refusal to allow Lawrence to call surrebuttal witnesses was error on the part of the trial court." (Majority Opinion, p. 20 (Citations omitted)).

In *Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1983), which the majority opinion cites, the Mississippi Supreme Court held that the trial court's refusal to permit defendant's sister to testify as a surrebuttal witness in a murder prosecution during which she had been present in the courtroom while other witnesses testified -- a violation of the sequestration rule -- was not an abuse of discretion, because her testimony was cumulative to alibi testimony already elicited from the defendant's parents.

I distinguish *Burrell* because, as I previously submitted, Margaret Sartor's testimony about when she took the photographs was not cumulative. Instead, Margaret Sartor's testimony would have "explain[ed], repel[led], counteract[ed], or disprove[d] the [rebuttal evidence of the State]" that the pictures were taken in 1989 as the State's three rebuttal witnesses testified. *See United States v. Delk*, 586 F. 2d at 516. When the State rested on rebuttal, Lawrence had been given no opportunity to "to explain, repel, counteract, or disprove the [State's] evidence" that Margaret Sartor had taken these two pictures on any date other than October 7, 1989. The exchange between Lawrence's counsel and Donald Checkley establishes that Margaret Sartor's testimony about when she took the two pictures might "explain, repel, counteract, or disprove the evidence" of Checkley. Margaret Sartor had only testified that she had celebrated her birthday on October 7, *1988*, with David Checkley, his sister, and his then girlfriend. She never had the opportunity to testify about when she took the two pictures which Donald Checkley had testified were taken on October 7, 1989. These two pictures were admitted into evidence as a part of the State's rebuttal case. Because of the previously related circumstances of Doe's initial uncertainty about her attacker's identity and her finally identifying Lawrence as her assailant more than nineteen months after her attack and because the State's rebuttal testimony that Margaret Sartor took the pictures in 1989 rather than 1988 went unchallenged and unrebutted before the jury, I find that Margaret Sartor's surrebuttal testimony about when she took these two pictures was not cumulative.

Therefore, with the purpose of rebuttal and surrebuttal in mind and with *Culberson* for my precedent, I would hold that it was prejudicial to Lawrence, whose only defense was that of alibi, for the trial court to deny him the opportunity to call Margaret Sartor in surrebuttal for the purpose of allowing her to testify when she took the two pictures which the 1989 Christmas gift to the Lawtons contained. I propose that such prejudice necessitates a reversal of the trial court's judgment and remand of this case for a new trial.

KING AND SOUTHWICK, JJ., JOIN THIS OPINION.