

**IN THE COURT OF APPEALS 12/03/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00515 COA**

**DANIEL SMART**

**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: CIRCUIT COURT OF LOWNDES COUNTY

ATTORNEY FOR APPELLANT:

THOMAS L. KESLER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

NATURE OF THE CASE: CRIMINAL -- ARMED ROBBERY

TRIAL COURT DISPOSITION: DEFENDANT CONVICTED OF ARMED ROBBERY AND  
SENTENCED TO TERM OF TWENTY-EIGHT YEARS IN CUSTODY OF MISSISSIPPI  
DEPARTMENT OF CORRECTIONS AND ORDERED TO ATTEND DRUG AND ALCOHOL  
COUNSELING.

BEFORE BRIDGES, P.J., BARBER, KING, AND PAYNE, JJ.

BARBER, J., FOR THE COURT:

Daniel Smart was tried and convicted of armed robbery in the Circuit Court of Lowndes County. Smart was sentenced to serve a term of twenty-eight years imprisonment in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Smart appeals his conviction on the following grounds:

I. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF ANOTHER CRIME, THE DEFENDANT'S DESIRE TO PURCHASE DRUGS.

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT SUA SPONTE A LIMITING INSTRUCTION ON THE OTHER CRIME EVIDENCE.

#### FACTS

On May 11, 1993, the Charter Food Store in Columbus, Mississippi was robbed by a man armed with a knife. The clerk of the store, Dorothy Lenoir, alerted police to the incident and identified Daniel Smart as the robber. Acting on a tip, the police concentrated their search for Smart at the home of Rosie Poindexter. Police efforts directed at this residence proved fruitful. Upon a search of the home the officers discovered Smart hiding under a bed. Smart was arrested and charged with the armed robbery of the store.

#### ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF ANOTHER CRIME, THE DEFENDANT'S DESIRE TO PURCHASE DRUGS.

Smart asserts that the trial court erred in denying his motion in limine to bar the introduction of testimony regarding his admission of intent to purchase and/or possess illegal drugs. At trial, Smart objected to the testimony proposed by the State on the basis that it would violate Mississippi Rule of Evidence 404(b). Smart argues that the Rule 404(b) prohibition against the introduction of evidence of other crimes, wrongs, or acts to prove character was violated by the State's witness' testimony that Smart admitted to the witness that he needed money to purchase illicit drugs.

In analyzing the propriety of the trial court's ruling, we are governed by the principle that "[a] trial judge enjoys a considerable amount of discretion as to the relevancy and admissibility of evidence. Unless his judicial discretion is so abused as to be prejudicial to the accused, this Court will not

reverse his ruling." *Shearer v. State*, 423 So. 2d 824, 826 (Miss. 1982). In the case at bar, the trial judge conducted a hearing out of the presence of the jury, in which he allowed Smart to make his argument that a Rule 404(b) violation would occur if the proposed testimony were admitted. After considering both Smart's argument and the State's rebuttal, the trial court held the testimony admissible under Rule 404(b) because it was relevant to motive, identity, and intent of the defendant. Our examination of the record indicates that the trial court was clearly within its discretion as to evidentiary matters arriving at this conclusion. *See Neal v. State*, 451 So. 2d 743, 759 (Miss. 1984) (holding proof of other crimes admissible where necessary to identify defendant or prove motive). The trial court's admission of the testimony was not an abuse of discretion, because the evidence was clearly relevant to identifying the Defendant as the culprit. However, it must be noted that the testimony in question referred to Smart's alleged *intent* to buy drugs, not that he actually purchased drugs or had committed prior drug-related offenses. Because the testimony merely referred to Smart's statements of intent, not other crimes, wrongs, or acts that the witness had personal knowledge of, Rule 404(b) was not implicated in this case. Despite this erroneous characterization of the testimony, the trial court was within its discretion in choosing to admit the testimony.

Smart also contends that the trial court acted erroneously in not excluding the evidence pursuant to Mississippi Rule of Evidence 403, alleging that the prejudicial effect of the testimony substantially outweighed its probative value. Regarding this issue, our supreme court has repeatedly stated that Rule 403 acts as the "ultimate filter through which all otherwise admissible evidence must pass." *Watts v. State*, 635 So. 2d 1364, 1368 (Miss. 1994). In considering the propriety of the trial court's decision to admit the evidence, this Court's scope of review is governed by the rule that "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990). Most significantly, "[u]nless the trial judge's discretion is so abused as to be prejudicial to the accused, this Court will not reverse his ruling." *Shearer v. State*, 423 So. 2d 824, 826 (Miss. 1983).

After reviewing the record, we are convinced that the probative value of the testimony was not substantially outweighed by unfair prejudice to Smart. Furthermore, even if the trial court had made an erroneous evidentiary ruling, Smart has failed to demonstrate that he suffered any prejudice as a result of the ruling. *See Jenkins v. State*, 607 So. 2d 1171, 1175 (Miss. 1992) (holding error not grounds for reversal unless prejudicial). Considering the overwhelming evidence of Smart's guilt, any alleged error would be harmless. *See Mack v. State*, 650 So. 2d 1289, 1313 (Miss. 1994) (holding evidentiary error harmless in face of overwhelming evidence of defendant's guilt). Accordingly, this assignment of error fails.

## II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT SUA SPONTE A LIMITING INSTRUCTION ON THE OTHER CRIME EVIDENCE.

In addition to arguing that the trial court erred in its ruling on Smart's motion in limine, Smart asserts that the trial court should have, sua sponte, given a limiting instruction to the jury regarding the testimony at issue. In his brief, Smart acknowledges that he failed to request a limiting instruction. Smart then asserts that the trial court was in error in not giving a limiting instruction on its own

initiative. This Court holds that notwithstanding Smart's argument, under the facts of this case the trial court was not responsible for giving a limiting instruction in the absence of a request from one of the parties. *See* M.R.E.105 (stating that court shall grant instruction as to limited admissibility of evidence upon request by party); *see also Freed v. Killman*, 6 So. 2d 909, 910 (Miss. 1942) (holding court may not be held in error for failure to give limiting instruction when objecting party did not request such instruction). Despite the incorrect characterization of the testimony as being character evidence subject to the limitations of Rule 404(b), the evidence was properly presented to the jury for it to consider as it saw fit in resolving the disputed issues of this case. In sum, since the jury's consideration of the evidence was not restricted, there was no basis for any limiting instruction. Smart's assignment of error is without merit.

**THE JUDGMENT OF THE CIRCUIT COURT OF LOWNDES COUNTY OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF TWENTY EIGHT YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST LOWNDES COUNTY.**

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