

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00044 COA**

**BARRY WALLACE**

**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

DATE OF JUDGMENT:	12/08/95
TRIAL JUDGE:	HON. FRANK VOLLOR
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	W. RICHARD JOHNSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	G. GILMORE MARTIN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	AGGRAVATED ASSAULT; LIFE SENTENCE
DISPOSITION:	AFFIRMED - 1/13/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/23/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HERRING, J., FOR THE COURT:

Barry Wallace was convicted of aggravated assault in the Circuit Court of Warren County, Mississippi, and was sentenced to life imprisonment without parole. He was also convicted of possession of a firearm after having been previously convicted of a felony and sentenced once again to life imprisonment without parole. The trial court ruled that both sentences were to run consecutively. Following the denial of his post-trial motions for relief, Wallace appealed to this Court. After a review of the record and argument of counsel, we affirm.

**A. THE FACTS**

Billy Joe Phillips went to the newly-opened Uptown Lounge in Vicksburg, Mississippi, during the early morning hours of June 18, 1995, after getting off work. He wanted to see the new deejay system which had been installed in the lounge. After being in the lounge or bar for about twenty minutes, Phillips left the building to go home. As he walked outside, Phillips encountered Barry Wallace. Wallace was on parole at the time, after serving a period of time in confinement as a result of an armed robbery conviction. Previously, he had accused Phillips of turning him into the authorities.

According to Phillips, he attempted to talk his way out of his encounter with Wallace, but he saw Wallace reaching for something which Phillips believed to be a weapon. As Phillips attempted to walk away, Wallace shot him in the neck, and Phillips fell to the ground. Phillips testified that after he had been shot, Wallace stood over him with a gun threatening to kill him. Phillips pleaded for his life, and Wallace got into an automobile and drove off.

Uptown Lounge owner, William Smith, and the lounge security guard, James McCline, were in the hallway of the lounge and near the front door when the shooting occurred. Both Smith and McCline testified that when they heard a gunshot they went outside to see what had happened. Both testified that they saw Wallace standing over Phillips with a gun. Although McCline did not know Wallace at the time of shooting, he identified Wallace as the person he saw standing over Phillips. Smith also identified Wallace, and both saw him get into a vehicle and leave the scene of the shooting. McCline wrote down the license plate number of Wallace's vehicle. By the use of the license plate number, the vehicle was later verified by the Vicksburg Police Department as a vehicle owned by Wallace.

After Police Detective Billy Brown arrived at the Uptown Lounge, an all-points bulletin was issued by the Vicksburg Police Department in search of Wallace. He was also reported to the National Crime Information Center as a fugitive wanted on an aggravated assault charge. His abandoned vehicle was found the next night. However, Wallace was not arrested until August 16, 1995, when he was apprehended in Milwaukee, Wisconsin. As a result of the shooting, Billy Joe Phillips is paralyzed from the neck down and has movement only in his head, neck, shoulders, arms and hands. He is a paraplegic.

Wallace's trial was scheduled for November 28, 1995. On November 27, 1995, his attorneys moved for a continuance and for a medical and physical examination of the Appellant. According to his counsel, Wallace stopped speaking to them on the day before the trial was to begin. The motion for a continuance alleged that Wallace was rubbing his head, crying, curling his hair, refusing to eat, and refusing to speak to his attorneys. In a hearing which was held on the motion, Wallace's wife, a home health nurse, testified that "something's . . . really wrong with his mind." In addition, Wallace would not respond to questions posed by the court.

Otha Jones, the Chief Deputy Sheriff of Warren County, testified at the hearing. He stated that Wallace was an inmate at the county jail while awaiting trial and that Wallace had showed no mental problems until the day prior to trial, although he was hostile and was cursing the jailors. On Thanksgiving Day, Wallace escaped from jail with six other inmates; however, they were recaptured that same day and returned to their cells. During his efforts to escape from jail, Wallace grabbed a fellow prisoner around the neck and held him at knife point for a period of time.

Jane Bond, a hearing officer for the Mississippi Department of Corrections, testified that a parole

hearing was held on September 26, 1995, in regard to Wallace's breach of his conditions of parole. According to Bond, Wallace understood his rights at the hearing, and she observed nothing in his demeanor to indicate to her that Wallace had any mental or physical problems.

At the conclusion of the hearing on the morning of trial, the trial court denied Wallace's motions for a continuance and a mental examination and stated that the court was firmly convinced, beyond a reasonable doubt, that Wallace was "putting on a ruse to avoid trial here today, and that he has no mental incapacity." Thereafter, the proceedings were recessed for lunch. During the lunch recess, Wallace started a fire at the jail and was sprayed with a fire extinguisher. After the lunch recess, he was shackled and escorted back into the court room dressed in orange jail fatigues and wrapped in a sheet in order to hide the shackles and fatigues. He also had a white powder in his hair and on his face as a result of being sprayed with the fire extinguisher. Voir dire examination of prospective jurors then ensued. During voir dire, Wallace began coughing, gagging, and sliding down in his chair. As a result, the deputies had to forcibly pick Wallace up off the floor of the courtroom and place him in his chair. During the episode, one prospective juror became nauseous and was allowed to leave the courtroom temporarily. After a bench conference concerning Wallace's conduct, he was physically carried by deputies out of the courtroom. Wallace's motion for mistrial was denied by the trial court because the court was of the opinion that Wallace's behavior was volitional and not caused by any mental or physical problems. Thereafter, the prospective jurors were instructed that Wallace's conduct in the courtroom during voir dire was not to be held against Wallace and that he was to be tried on the evidence presented during the trial. All prospective jurors agreed that they could render a decision based on the evidence and not based on the events of that day.

After voir dire was concluded, the court recessed the proceedings until the next day. Prior to the start of the trial on the next day, the trial court recited for the record the events that transpired the day before and overnight. Apparently, in addition to setting a fire in the jail, Wallace intentionally swallowed a number of pills and overdosed on cold medications, requiring that his stomach be pumped. He was examined at that time by a physician and later released from medical care. Before the start of the trial on November 29, 1995, Wallace again renewed his motion for a mistrial. The motion was once again denied by the trial court. Thereafter, attorneys for Wallace and the prosecutor attempted to negotiate a plea bargained settlement of the case, during which Wallace communicated with his counsel. After the plea bargaining attempts failed, Wallace's trial finally began.

At the conclusion of the trial, the jury found Wallace guilty of (1) aggravated assault and (2) possession of a firearm after previously being convicted of a felony. In the sentencing phase of the proceeding, the trial court found that Wallace was to be classified as an habitual offender and sentenced him to life imprisonment without parole on the aggravated assault conviction, and life imprisonment without parole as a result of his conviction of possession of a firearm after having been previously convicted of a felony. As stated above, both sentences were to run consecutively. In addition, Wallace's fifteen year sentence on a previous armed robbery charge was reinstated in a separate parole hearing held prior to trial.

## **B. THE ISSUES**

On appeal, Wallace raises the following issues:

### **I. DID THE COURT ERR IN FAILING TO GRANT A CONTINUANCE ASKED FOR**

## **ON THE MOTION FILED PRIOR TO TRIAL?**

### **II. DID THE TRIAL COURT ERR IN FAILING TO GRANT A MISTRIAL BASED ON CIRCUMSTANCES IN THE COURTROOM DURING VOIR DIRE?**

### **III. WAS THE VERDICT OF THE JURY THE PRODUCT OF BIAS AND PREJUDICE?**

## **C. ANALYSIS**

### **I. DID THE COURT ERR IN FAILING TO GRANT A CONTINUANCE ASKED FOR ON THE MOTION FILED PRIOR TO TRIAL?**

Whether or not to grant a continuance is within sound discretion of the trial court. *Coleman v. State*, 697 So. 2d 777, 780 (Miss. 1997); *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995). Only where a defendant can show that manifest injustice resulted from the trial court's denial of a motion for continuance will we reverse the judgment of a trial court for abusing its discretion in doing so. *Coleman*, 697 So. 2d at 779; *Lambert v. State*, 654 So. 2d 17, 22 (Miss. 1995). *See also* Miss. Code Ann. § 99-15-29 (Rev. 1994). Additionally, it is within the discretion of the trial court to decide whether to submit the accused for a medical and psychiatric evaluation to determine if he is capable of assisting in his defense and is otherwise able to stand trial. *Lavender v. State*, 378 So. 2d 656, 658 (Miss. 1980). The Mississippi Supreme Court has stated:

[I]n our opinion we have clearly set out the principle that if there is a reasonable probability that the accused is incapable of making a rational defense, he should receive proper and adequate psychiatric examination and evaluation.

*Lavender*, 378 So. 2d at 658 (citations omitted). More recently, the Mississippi Supreme Court elaborated upon the appropriate standard of review to determine whether a trial court abused its discretion in denying a request for a mental evaluation in *Dunn v. State*, 693 So. 2d 1333 (Miss. 1997). In *Dunn*, the supreme court stated:

When the trial court has made a finding that the evidence does not show a probability that the defendant is incapable of making a rational defense, this Court will not overturn that finding unless the finding was manifestly against the overwhelming weight of the evidence.

*Dunn*, 693 So. 2d at 1340-41 (citation omitted).

Wallace contends that due to his inability to assist in his defense on the day before his trial, he was entitled to a continuance and a mental and physical examination. However, there was ample evidence presented for the trial court to conclude that Wallace's conduct prior to trial was the result of volitional and intentional acts by Wallace which were designed to delay the trial proceedings, rather than the result of any mental or physical condition requiring medical attention. The trial judge stated that he was firmly convinced that Wallace's behavior was intentional in an attempt to interfere with the progression of his trial. Moreover, it is noteworthy that Wallace became cooperative and communicated with his counsel when he realized that his trial would not be delayed. We rule that the trial court did not abuse its discretion in denying Wallace's motion for a continuance or for a physical

and mental examination.

## **II. DID THE TRIAL COURT ERR IN FAILING TO GRANT A MISTRIAL BASED ON CIRCUMSTANCES IN THE COURTROOM DURING VOIR DIRE?**

It is well settled that a trial court is given considerable discretion in ruling on motions for a mistrial. *Gossett v. State*, 660 So. 2d 1285, 1290 (Miss. 1995). In addition, Mississippi Rule of Circuit and County Court Practice 3.12 provides "the court *may* declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the party, the party's attorneys, or someone acting at the behest of the party or the party's attorney, resulting in substantial and irreparable prejudice to the movant's case." (emphasis added). However, when a trial court determines that misconduct does not reach a level of prejudice which warrants a mistrial, the court should instruct the jury to "disregard the impropriety in order to cure its prejudicial effect." *Gossett*, 660 So. 2d at 1291.

In the instant case, the trial court noted Wallace's disruptive behavior during the voir dire of prospective jurors and admonished the prospective jurors to disregard the Appellant's behavior. The prospective jurors were extensively questioned concerning their ability or inability to disregard Wallace's conduct in order to make sure that he received a fair trial. All prospective jurors indicated that Wallace's conduct would not affect their ability to render a fair and impartial verdict based upon the evidence presented in the case. In addition, the trial court stated on the record and outside the presence of the jury that it was of the opinion that Wallace's conduct was intentionally designed to disrupt the trial and was not due to any mental or physical problems. We rule that the trial court was within its discretion in denying Wallace's motion for mistrial and that any prejudicial effect on the jury as a result of Wallace's conduct was cured by the trial court's comprehensive admonition to the jury to disregard the Appellant's conduct.

## **III. WAS THE VERDICT OF THE JURY THE PRODUCT OF BIAS AND PREJUDICE?**

Under this assignment of error, Wallace advances several arguments: (1) the verdict of jury was a product of bias and prejudice as a result of hearing the testimony of the victim, Billy Joe Phillips, who, because of his paraplegia, was forced to testify from a rolling bed inside the courtroom; (2) "the courtroom circumstances" that caused one prospective juror to become nauseous and leave the courtroom also contributed to the bias and prejudice as evidenced by the jury's verdict; and (3) the evidence adduced at trial, even when viewed in a light most favorable to the State, was less than credible and does not support the verdict. Wallace, therefore, requests that the judgment of the trial court be vacated and that he be granted a new trial. It is noteworthy that he called no witnesses in his own defense.

At trial, Wallace objected to the testimony of Billy Joe Phillips on the ground that it would likely inflame and prejudice the jury to hear Phillips testify from a stretcher. The State explained that due to Phillips's injuries and his paralysis, he was bedridden and unable at that time to sit in a wheel chair. Consequently, Phillips could only testify from a rolling bed. The trial court overruled Wallace's objection without explanation. However, since Phillips was the only eyewitness to the shooting and was in fact the victim, any prejudicial effect on the jury caused by his testifying from a rolling bed was clearly outweighed by the relevance of his testimony. **M.R.E. 403**. The trial court has broad discretion in determining the relevance and the prejudicial effect of evidence introduced at trial. *See Hoops v. State*, 681 So. 2d 521, 531 (Miss. 1996). We rule that the trial court did not abuse its

discretion in permitting Phillips to testify from a rolling bed.

Wallace also asserts that "the courtroom circumstances" during the voir dire of prospective jurors produced a verdict based upon bias and prejudice. As stated above, the trial court concluded that Wallace's behavior during voir dire was intentional and was designed to cause a delay of his trial. It is noteworthy that as the trial progressed, Wallace became more cooperative, answered questions posed to him by the trial court, and was involved in negotiations for a plea bargain. After Wallace's behavior during voir dire, the trial court admonished the jury that Wallace was not to be tried on such conduct but instead, the case was to be adjudged on the charges found in the indictment and on the evidence presented to them at trial. Thus, the trial court was of the opinion that any prejudice to the Appellant as a result of his actions in front of the jury was promptly cured by the court's admonitions to the jury. We agree.

Wallace further argues that even when the evidence is viewed in a light most favorable to the verdict of guilty, the evidence still weighs in favor of the Appellant, and he is therefore entitled to a new trial. Essentially, Wallace challenges the legal sufficiency of the evidence presented against him, which requires us to consider *all* of evidence in a light most consistent with the verdict of the jury. *Carr v. State*, 655 So. 2d 824, 837 (Miss. 1995). Not only must we consider the evidence presented in a light most favorable to the verdict, but we must also give the prosecution the benefit of all favorable inferences which may be reasonably drawn from the evidence. *Id.* Thus, our authority to interfere with the jury's verdict is limited.

There was considerable evidence presented at trial which established that Wallace shot Phillips. Three witness, including the victim, identified Wallace as the person they saw standing over Phillips with a gun in hand. It is uncontroverted that at the time of the shooting Wallace had been convicted on a prior armed robbery charge. Thus, we rule that there was sufficient evidence for the jury to find Wallace guilty of (1) aggravated assault and (2) possession of a weapon after previously being convicted of a felony.

Wallace also contends that the jury's verdict was against the overwhelming weight of the evidence. The Mississippi Supreme Court has ruled that in determining "whether or not a jury verdict is against the overwhelming weight of the evidence, 'this Court must accept as true the evidence which supports the verdict and will reverse only when it is convinced that the circuit court has abused its discretion in failing to grant a new trial.'" *Nicolaou v. State*, 612 So. 2d 1080, 1083 (Miss. 1992) (quoting *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss. 1989)). As we have ruled, there was sufficient evidence for the jury to convict Wallace on the charges of aggravated assault and possession of a deadly weapon after previously being convicted of a felony. Based on the record, we are not convinced that the trial court abused its discretion in refusing to grant a new trial in this case or in failing to rule that the jury's verdict was against the overwhelming weight of the evidence. Accordingly, we affirm the judgment of the trial court.

**THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I OF AGGRAVATED ASSAULT AND SENTENCE AS A HABITUAL OFFENDER TO LIFE WITHOUT PAROLE; COUNT II OF POSSESSION OF A FIREARM AFTER A FELONY CONVICTION AND SENTENCE OF LIFE WITHOUT PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.**

**SENTENCE IN COUNT II SHALL RUN CONSECUTIVELY TO SENTENCE IN COUNT I. EACH OF THESE SENTENCES SHALL RUN CONSECUTIVELY TO WARREN COUNTY CAUSE #9278. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WARREN COUNTY.**

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