

IN THE COURT OF APPEALS 3/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01201 COA

LUTHER J. HARVEY

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. JAMES E. THOMAS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT:

JAMES L. DAVIS, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

**TRIAL COURT DISPOSITION: CONVICTED OF AGGRAVATED ASSAULT AND
SENTENCED TO SERVE 20 YEARS**

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

KING, J., FOR THE COURT:

Luther J. Harvey was convicted of aggravated assault in the Circuit Court of Harrison County for the stabbing of his ex-wife. Aggrieved, Harvey appeals alleging the following points of error: (1) the trial court erred in denying a continuance; (2) the trial court erred in allowing the State to cross-examine a defense witness about Harvey's psychiatric evaluation administered by physicians at the Mississippi State Hospital at Whitfield; (3) the trial court erred in denying jury instruction D-5; (4) ineffectiveness of counsel; (5) the charges should have been dismissed for failure to preserve potentially exculpatory evidence; and (6) the Court of Appeals is unconstitutional. Finding no merit in the Defendant's arguments, we affirm.

FACTS

The Defendant, Luther J. Harvey, was indicted on aggravated assault charges for the stabbing of his ex-wife. Prior to trial, Harvey was sent to Whitfield State Hospital for a mental evaluation pursuant to a motion by his first attorney, Woodrow Pringle. Harvey was at Whitfield from April 11, 1993, until June 11, 1993, when he was returned to the Harrison County Jail. In March, 1994, James Davis was appointed as Harvey's counsel, and Mr. Pringle was allowed to withdraw from the case. In the meantime, Harvey had filed a motion to dismiss alleging his right to a speedy trial was violated. After a hearing, this motion was denied because the court determined that the delays in the trial were due to the Defendant.

After Mr. Davis was appointed, he moved the court for a continuance so that the Defendant's medical records from various veterans' hospitals could be obtained. The defense believed that the records were necessary because Harvey planned to offer a defense of insanity. The court denied this motion holding that the medical report received from Whitfield was sufficient to determine whether the Defendant was sane at the time of the incident. Subsequently, a jury found Harvey guilty of aggravated assault, and he was sentenced to serve twenty (20) years in the custody of the Mississippi Department of Corrections. Harvey has since perfected this appeal.

I.

THE TRIAL COURT ERRED IN DENYING HARVEY A CONTINUANCE TO OBTAIN PRIOR MEDICAL RECORDS.

The Defendant filed a notice of intent to offer insanity as a defense to the aggravated assault indictment. Pursuant to this defense, defense counsel contends that attempts were made to obtain Harvey's psychiatric medical records from various Veterans Administration hospitals. Harvey moved the trial court to continue the trial, until such time as his counsel could receive these records. The trial court denied this continuance, and now Harvey complains that the court committed error.

The decision to grant or deny a motion for a continuance is within the sound discretion of the trial judge. *Fisher v. State*, 532 So. 2d 992, 998 (Miss. 1988). In the present case, the Defendant moved the court for a continuance in order to await psychiatric records to establish whether or not he was

sane when he stabbed his ex-wife. Harvey sought a continuance even though physicians at Whitfield, pursuant to his request, had already examined him and determined that he was sane at the time the incident occurred. As a result of this mental evaluation, the trial judge determined that even if Harvey's previous medical records showed that he had at some time been insane, he was at the time of the incident sane and capable of standing trial. Reviewing the record, we do not find that the trial judge abused his discretion by denying Harvey a continuance to obtain additional medical records.

II.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CROSS-EXAMINE A DEFENSE WITNESS ABOUT HARVEY'S MENTAL EVALUATION COMPLETED AT THE MISSISSIPPI STATE HOSPITAL AT WHITFIELD.

Harvey called his cousin, Dan Thomas, to the stand to testify as to his opinion on whether Harvey was insane when he stabbed his wife. The defense was allowed to question Thomas on his observations of Harvey before and after the incident. Thomas was also asked about certain medications that Harvey was prescribed and about Harvey's previous admissions in veterans' hospitals due to psychiatric problems. Then, on cross-examination, the State attempted to question Thomas about the State Hospital's mental evaluation and its ensuing report about Harvey. However, before the State could improperly form this line of questioning, the defense objected, and the court, out of the jury's presence, admonished the State for making such an attempt. We find no reason to elaborate further on this issue, except to say that the trial court properly sustained the timely objection and admonished the State out of the jury's presence.

III. AND V.

THE CHARGES SHOULD HAVE BEEN DISMISSED FOR FAILURE TO PRESERVE POTENTIALLY EXCULPATORY EVIDENCE FOR THE DEFENDANT AND THE TRIAL COURT ERRED IN DENYING JURY INSTRUCTION D-5.

The Defendant was videotaped during his booking at the police department. However, the video was missing at the time of trial; therefore, it was not placed into evidence. On appeal, the Defendant claims that the video showed Harvey's behavior as "belligerent," "indicative of suicide," "freaked out," and "dangerous to other people." Harvey claims that the video would have provided exculpatory evidence establishing his defense of insanity. Consequently, Harvey argues that his constitutional rights were abridged by the police's failure to preserve this videotape as potentially exculpatory evidence. We disagree.

Harvey bases his argument on *California v. Trombetta*, 467 U.S. 479, 488-89 (1984) and *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), which held that the state has a duty to preserve potentially exculpatory evidence when such value was apparent prior to the destruction or spoliation of the evidence. Fatal to Harvey's argument, *Trombetta* and *Youngblood* also held that the defendant must show that the police acted in bad faith and that the evidence was of such a nature that comparable evidence could not otherwise be reasonably obtained. *Trombetta*, 467 U.S. at 488-89; *Youngblood*, 488 U.S. at 58.

First, Harvey does not allege that the police destroyed or erased the videotape of his booking with

the intent to derail his defense at trial. In fact, the record indicates that the video camera, which was positioned in the general booking area, was not used to explicitly record the Defendant's action, but was positioned in the booking area as a surveillance device. The tape within the video camera was used and reused without an intent to preserve evidence for any particular purpose. Further, on the record the Defendant does not allege any particular exculpatory acts, but just that "it would be nice if we had the video to review it ourselves." We do not find it apparent that the State destroyed or failed, in bad faith, to preserve evidence, which would have exculpated Harvey. Moreover, both sides presented eyewitness testimony regarding the Defendant's behavior. So, even if the evidence was destroyed, other evidence was available to substantiate the Defendant's claims of erratic behavior. Therefore, there was no prejudicial effect on Harvey's defense that could be attributed to the video's absence.

In addition, Harvey complains that the court erred by denying jury instruction D-5. D-5 instructed the jury that if it found the police had destroyed or lost the tape it could infer that the evidence was against the State's interest. Having found no bad faith on the part of the police, we find no error in the court's denial of this instruction. Therefore, this assignment of error is without merit.

IV.

THE DEFENDANT CLAIMS INEFFECTIVE ASSISTANCE OF COUNSEL.

Harvey's trial counsel claims that his first attorney, Woodrow Pringle, provided ineffective assistance of counsel. He does so by alleging that Pringle failed to properly research and develop the defense of insanity. Harvey also claims that Pringle failed to secure necessary medical history from various veterans hospitals, in order to establish Harvey's claim of insanity at the time he stabbed his wife. However, it was Pringle who moved the court for the mental evaluation that Harvey received at Whitfield. Subsequently, that mental evaluation determined that Harvey was indeed sane at the time of the incident. We will not second guess Harvey's previous attorney's trial strategy, but we do believe that he took the necessary steps to attempt to flesh out a defense of insanity for Harvey. We do not find any prejudicial effects to Harvey's defense that can be attributed to his first counsel.

When we consider effectiveness of counsel issues, we must consider the overall performance of counsel and whether it was deficient as well as whether the defense was prejudiced by any such deficiencies. *Moore v. State*, 676 So. 2d 244, 246 (Miss. 1996) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). The *Strickland* standard requires the defendant to meet two prongs: (1) allege with specificity and detail that counsel's performance was deficient; and (2) allege that the deficient performance so prejudiced the defense so as to deprive the defendant of a fair trial. *Moore*, 676 So. 2d at 246 (quoting *Perkins v. State* 487 So. 2d 791, 793 (Miss. 1986)). Harvey has failed to meet this burden. Therefore, we find no merit in this assignment of error.

VI.

THE MISSISSIPPI COURT OF APPEALS IS UNCONSTITUTIONAL.

Harvey finally argues that the new Mississippi Court of Appeals was unconstitutionally created, as

an inferior court, by the legislature. This issue was previously ruled upon in *Marshall v. State*, 662 So. 2d 566, 568 (Miss. 1995). The Mississippi Supreme Court held that this Court is clearly an inferior court that the legislature had full constitutional authority to establish. *Id.* Accordingly, we find no merit in this assignment of error.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF 20 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., AND PAYNE, J., NOT PARTICIPATING.