

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00392 COA

**DERYL BRAXTON, A/K/A DARYL BRAXTON, A/K/A DARRELL BRAXTON AND
DERRICK BRAXTON**

APPELLANTS

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 LESLIE HATCHER

COURT FROM WHICH APPEALED: TUNICA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

SIDNEY F. BECK, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED, III

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL: CONSPIRACY AND AGGRAVATED ASSAULT

**TRIAL COURT DISPOSITION: GUILTY; EACH SENTENCED TO SERVE FIVE YEARS FOR
CONSPIRACY. DARRELL TO SERVE FIFTEEN YEARS FOR EACH COUNT OF ASSAULT,
DERRICK TO SERVE TWELVE YEARS FOR EACH COUNT OF ASSAULT.**

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

DIAZ, J., FOR THE COURT:

The Appellants, Darrell Braxton (Darrell) and Derrick Braxton (Derrick) were charged along with two others, Tony Braxton and Bobby Braxton in a six count indictment alleging four counts of aggravated assault, and one count of conspiracy, and one count of accessory after the fact (on Bobby Braxton). An entry of nolle prosqui was made as to Bobby Braxton, and a severance and continuance was granted as to Tony Braxton. Deryl and Derrick, however, were each tried and convicted in the Tunica County Circuit Court of conspiracy, and four counts of aggravated assault. Daryl was sentenced to serve a term of five years in the Mississippi Department of Corrections for conspiracy, and fifteen years on each of the four aggravated assault charges. His sentences are to run concurrently with five years suspended. Derrick was sentenced to serve a term of five years in the Mississippi Department of Corrections for conspiracy, and twelve years for each of the four aggravated assault charges. His sentences are to run concurrently with four years suspended . Aggrieved from this judgment, the Appellants appeal to this Court asserting the following issues: (1) that the lower court erred in denying a continuance; (2) that the lower court erred in overruling a motion for a mistrial; and (3) that the verdict is against the overwhelming weight of the evidence. Finding no reversible error, we affirm.

FACTS

On October 2, 1993, Donald Gill, Randy Parker, Antonio Smith, Wesley Young and Leon Hubbard were standing in front of the laundry room of an apartment complex when three people approached them. When Donald Gill recognized Darrell and Derrick Braxton as two of the three people approaching the group, he ran into a field behind the building. Darrell ran after Gill and shot him three times. (Apparently, Gill was tried and acquitted of shooting a relative of the Braxtons two months prior to this incident.) The other men that were with Gill were ordered to lie on the ground. When Darrell returned to the laundry room the three assailants started to leave, but then backed around and began shooting at the men lying on the ground. Randy Parker was shot in the stomach, Antonio Smith was shot nine times, and Wesley Young was shot twice. The three assailants then left in a car.

DISCUSSION

I. MOTION FOR CONTINUANCE

The Appellants argue that the lower court erred in denying their motion for a continuance. The Braxtons assert that counsel did not have enough time to adequately prepare for trial, and also that counsel was unable to locate and secure certain defense witnesses, especially in view of the fact that defense counsel had other matters pending before the court in the interval.

This issue is procedurally barred because it was not raised as an issue for consideration in the defense's motion for a new trial. "Denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground." *Metcalf v. State*, 629 So. 2d 558, 562 (Miss. 1993). Despite this procedural bar, we will address this issue on its merits.

The Appellants were indicted on February 1, 1994, and were arraigned on February 3, 1994. Their case was originally set for trial on February 28, 1994. The defense filed a motion to continue the case until the August term. The trial court denied continuing the case until the August term, but did postpone the trial until March 9, 1994. Therefore, counsel had over a month to prepare for trial from the time of arraignment. This Court has ruled in many other cases that it was not an abuse of discretion to deny a continuance even though counsel had much less time to prepare for trial. See *e.g.* *Fisher v. State*, 532, So. 2d 992, 998 (Miss. 1988) (twenty-four days); *Boyington v. State*, 389 So. 2d 485 (Miss. 1980) (over the weekend); *Shaw v. State*, 378 So. 2d 631 (Miss. 1979) (8 days). We find no abuse of discretion here.

The Appellants further claim they were entitled to a continuance because of the unavailability of certain witnesses. The Braxtons claim that they followed the requirements set forth in Section 99-15-29 of the Mississippi Code by providing what they expect to prove by their absent witnesses. In their motion for a continuance, the Braxtons summarily conclude that they have witnesses in Mississippi, Tennessee, and Missouri that must make arrangements to attend the trial. Such a conclusory statement surely does not meet the requirements of Section 99-15-29 of the Mississippi Code.

Despite the fact that their motion for continuance was denied, the Braxtons were able to provide five alibi witnesses at trial. We can find nothing in the record or the briefs that would indicate that the defendant was handicapped or prejudiced in presenting his defense by virtue of his inability to obtain a continuance. The case was vigorously argued and presented to the jury for consideration. The evidence bearing on guilt presented by the State was straightforward and uncomplicated.

The decision to grant or deny a continuance is left to the sound discretion of the trial court. *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995). Unless manifest injustice appears to have resulted from the denial of the continuance, this Court will not reverse. *Id.* We are unable to determine that the trial court committed such an abuse of discretion in denying a continuance that this Court should reverse this conviction. *Atterberry*, 667 So. 2d at 631.

II. MOTION FOR MISTRIAL

The Appellants contend that the lower court should have granted their motion for a mistrial because the circuit clerk had entered the jury room. The granting of a mistrial lies within the sound discretion of the trial judge. *Hoops v. State*, 681 So. 2d 521, 528 (Miss. 1996).

The Appellants cite to *Horn v. State* in support of their argument. *Horn v. State*, 62 So. 2d 560 (Miss. 1953). In *Horn*, the supreme court held that it was reversible error when a juror asked the bailiff what the penalty was for manslaughter. The bailiff replied erroneously that the penalty was "one to ten" when in fact the actual penalty was not less than two years, nor more than twenty in the penitentiary. *Id.* at 560-61. The jury returned with a guilty verdict, but asked for the mercy of the court. When asked what was meant by requesting mercy of the court, the spokesman for the jurors

said that they intended that to mean one year in the penitentiary. *Id.* Relying on language from an earlier case, the *Horn* court reversed stating:

We are of the opinion that the record sustains the presumption that the statement made to the jury by the bailiff may have had a decided effect upon the verdict. The jury had retired from the bar, and had been in consideration of the case for an hour and a half, and upon receiving the statement of [the bailiff] they immediately made up their verdict.

Id. at 561 (citations omitted). The present case is distinguishable from *Horn*.

In this case, the jury retired at 10:55 A.M., and returned with ten unanimous verdicts at 12:18 P.M. The verdicts were passed to the court, and it was agreed after a bench conference that the verdicts were not in perfect form because they were not written on separate sheets of paper. The jury had merely filled in the blanks on one of the jury instruction sheets. The court sent the jury back to the jury room instructing them to return their verdicts on separate sheets of paper. After the jury was sent back to the jury room in order to write their verdicts on separate sheets of paper, the defense moved for a mistrial because the circuit clerk went into the jury room. When the court inquired into what transpired, the clerk responded that a juror asked her if they were to use ten sheets of paper on each count for each defendant. She replied to them that they should have ten sheets of paper for each count. The court denied the mistrial in this instance stating that the sole reason the jury was sent back to the jury room was to put their verdicts in proper form. The jury had already returned their unanimous verdicts earlier. The court went on to clarify the record that the ten separate verdicts which were subsequently delivered to the court were the same as the ones originally rendered in improper form.

We find no prejudicial impact from the clerk's actions in this instance. *See People v. Jacob*, 608 N.Y.S.2d 508, 509 (N.Y. 1994) (lower court did not commit reversible error in directing a clerk to deliver a new verdict sheet with instructions to the members of the jury that they should use the new verdict sheet to record their verdict.). Apparently, the jury had already come to unanimous verdicts, and the sole purpose of sending them back to the jury room was to complete the verdict forms. The clerk's actions constituted, if anything, harmless error.

III. WEIGHT OF THE EVIDENCE

Finally, the Appellants argue that the verdict was against the overwhelming weight of the evidence. In determining whether a verdict is against the overwhelming weight of the evidence, we must accept as true the evidence which supports the verdict. *Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995). We will only reverse where the trial court abused its discretion in not granting a new trial. *Id.* We will not order a new trial unless we are convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. *Id.* at 1105.

We find that the facts of this case support the jury's verdict; therefore, there is no merit to this issue.

THE JUDGMENTS OF CONVICTIONS IN THE TUNICA COUNTY CIRCUIT COURT OF CONSPIRACY AND AGGRAVATED ASSAULT WITH DERYL BRAXTON TO SERVE A TERM OF FIVE YEARS FOR COUNT I, CONSPIRACY, AND SEPARATE FIFTEEN

YEAR SENTENCES FOR COUNTS II, III, IV AND V OF AGGRAVATED ASSAULT WITH FIVE YEARS SUSPENDED ON EACH COUNT, AND DERRICK BRAXTON TO SERVE FIVE YEARS FOR COUNT I, CONSPIRACY AND SEPARATE TWELVE YEAR SENTENCES FOR COUNTS II, III, IV AND V OF AGGRAVATED ASSAULT WITH FOUR YEARS SUSPENDED ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL SENTENCES OF EACH APPELLANT SHALL RUN CONCURRENTLY. COUNT ONE IS TO BE SERVED CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. APPELLANTS ARE TO MAKE FULL RESTITUTION TO VICTIMS. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.