

**IN THE COURT OF APPEALS 4/9/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-01137 COA**

**DERRICK BROOKS A/K/A DERRICK LAVONIA BROOKS**

**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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MARTIN A. KILPATRICK

ATTORNEY FOR APPELLEE:

ATTORNEY GENERAL MIKE MOORE, BY:

CHARLES W. MARIS, JR.

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF AGGRAVATED ASSAULT WITH A  
DEADLY WEAPON AND SENTENCED TO A TERM OF 16 YEARS IN THE CUSTODY OF  
THE MDOC AND ORDER TO PAY ALL COURT COSTS, \$192.50.

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Derrick Brooks was convicted in the Circuit Court of Washington County of the crime of aggravated assault with a deadly weapon and sentenced to a term of sixteen years in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Brooks appeals to this Court asserting two alleged errors. Finding merit in Brooks' arguments, this Court reverses this cause for a new trial consistent with this opinion.

## FACTS

At approximately 11:00 a.m. on the morning of November 7, 1993, Cedrick Jackson was leaving his home in Greenville, Mississippi, when he noticed a man jogging toward him. As Jackson looked up, he saw the man leveling a pistol at him and firing. The first shot hit the back glass of Jackson's car. Jackson then proceeded to pull out his own pistol and began firing at the oncoming man using his open car door as a shield. Jackson testified that at this point he could tell that his assailant was Derrick Brooks. Jackson and Brooks began circling Jackson's car all the while exchanging a substantial amount of gunfire, twenty-eight to thirty-two shots. In an amazing display of poor marksmanship, neither Brooks nor Jackson was hit. As Jackson was reloading his 9mm pistol, Brooks fled.

There were two witnesses to the gunfight, Clifton Davis and Dwight Lee, both of whom told police that it was Brooks who attacked Jackson. They told police that after attacking Jackson, Brooks jumped into a rust colored Camaro and drove off. Clifton Davis testified that while he did not think that the Camaro was Brooks' car, he had previously seen Brooks drive it around town.

Officer Kevin Isbell arrived on the scene to investigate. He did a search of the area and recovered nine spent shells in the road. He testified that there was no blood found on the scene and no indication that anybody had been shot.

As Officer Isbell was taking statements at the scene, Davis and Lee saw Brooks drive down the street in another automobile. They pointed him out to Officer Isbell, who proceeded to arrest Brooks. With the exception of his gloves and sunglasses, Brooks was dressed in the same way as the person who assaulted Jackson. The gun allegedly used by Brooks in the shootout was not recovered.

At trial, Brooks denied shooting at Jackson, and attempted to present the defense of "it wasn't me, it was my brother," George Powell. As part of this defense Brooks submitted evidence that his brother, and not he, owns a rust colored Camaro and that his brother was in town the day of the shooting. Brooks claimed that at the time of the gunfight he was washing his mother's Oldsmobile and had just run some errands when he was arrested.

Brooks put on evidence that some three months after the incident he had taken his mother to a hospital in Jackson for medical treatment when he saw his brother with a cast on his foot. When George's cast was cut off, Derrick saw what he claimed to be a bullet hole in George's left ankle. He said he knew it was a bullet hole because he could still see the bullet.

On the day of trial, defense counsel was informed by Brooks that on the day of the shooting his brother, George Powell, had gone to the home of Katrina Parrish, and that Parrish had seen a wound on Powell's foot. According to Parrish, Powell had come by her house sometime between 12:00 and 1:00 p.m. on November 7, and that he told her that he had been shot in the foot.

Defense counsel attempted to call Parrish as a witness; however, the trial court ruled that Brooks could not call Parrish to testify because he had failed to timely disclose her identity and anticipated testimony to the State.

Brooks was subsequently convicted of the crime of aggravated assault. After his conviction, Brooks made a motion for a new trial asserting that the State failed to disclose possible exculpatory information. The motion for new trial was denied by the trial court.

## DISCUSSION

Brooks asserts two errors on appeal which he claims warrant a reversal in this cause. Both errors deal with apparent discovery violations committed by the defense and by the State. Brooks argues that the trial court erred in refusing to allow him to call as a witness Katrina Parrish who could testify to the fact that Brooks' brother, George Powell, had been shot in the foot on the day in question. Brooks further argues that the trial court was in error in failing to grant a new trial after it was learned that the prosecution had failed to disclose the fact that a man using the name of Julius Woodard, an alias allegedly used by Brooks brother, was admitted into a Jackson, Mississippi, hospital with a gunshot wound to the foot.

We hold that the trial court, under the facts of this case, erred in refusing to allow Katrina Parrish to testify. Standing alone, such error might not warrant reversal. However, this coupled with what we find to be the State's tardy disclosure of exculpatory evidence, requires that a new trial be ordered.

### I.

Brooks asserts that the trial court erred in refusing to allow him to present the testimony of Katrina Parrish. The trial court excluded the testimony as being irrelevant and as being in violation of the discovery rules. The trial court stated:

At this point there is not testimony of any blood being found at the scene to indicate someone had been shot. There have been three witnesses who positively identified the defendant who said they've known him for several years, and I just don't believe that under our discovery rules that this witness should be permitted to testify. If the discovery is to be reinforced, it's got to be reinforced both ways.

Brooks argues that Parrish's testimony was relevant in that it added substance to his defense that his brother Powell was the guilty party by showing the jury that Powell, who owned a rust colored Camaro, had received a gunshot wound on the day in question. Even though defense counsel agreed with the trial court that eliciting information that Powell told Parrish that he had been shot would be inadmissible hearsay, he could have placed before the jury that Powell was injured.

Our supreme court has stated: "While the admissibility of evidence is largely within the discretion of the trial court and reversal may be had only where that discretion has been abused, the discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence." *Cooper v. State*, 628 So. 2d 1371, 1375 (Miss. 1993) (citing *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990)).

Because the trial court excluded the testimony based upon the discovery violation and relevancy, we will look at both areas separately.

### **A. Discovery Violation**

Rule 4.06 of the Uniform Criminal Rules Circuit Court. Practice which is now Rule 9.04 of the Uniform Rules of Circuit and County Court Practice provides, in part:

(c) If the defendant requests discovery under this rule, the defendant shall, subject to constitutional limitations, promptly disclose to the prosecution and permit it to inspect, copy, test, and photograph, the following information and material which corresponds to that which the defendant sought and which is in the possession, custody, or control of the defendant or his or her counsel, or the existence of which is known, or by the exercise of due diligence may become known, to the defendant or his or her counsel:

(1) Names and addresses of all witnesses in chief proposed to be offered by the defendant at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved, of each witness, and the substance of any oral statement made by any such witness.

In determining whether there has been a violation of the discovery rules, the trial court must follow certain guidelines. These guidelines were set forth in *Box v. State*, 437 So. 2d 19 (Miss. 1983), and we repeat those guidelines now: 1. Upon the State's objection, the trial court should give the State a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witness, inspecting the physical evidence, etc. 2. If, after this opportunity for familiarization, the State believes it may be prejudiced by lack of opportunity to prepare to meet the evidence, the State *must* request a continuance. Failure to do so constitutes a waiver of the issue. 3. If the State does request a continuance the defendant may choose to proceed with trial and forego using the undisclosed evidence.

The trial judge has two options available under the rules; he may grant a continuance if requested, or he may exclude the evidence. Uniform Crim. R. Cir. Ct. Prac. 904(I)(2). However, if a party feels that it may be prejudiced by the evidence, it must request a continuance. *Harrison v. State*, 635 So. 2d 894, 898 (Miss. 1994). The failure to ask for a continuance will constitute a waiver of this issue. *Id.* "The state was required to make such request [for a continuance] if claiming unfair surprise or undue prejudice." *Tucker v. State*, 647 So. 2d 699, 704 (Miss. 1994).

First, in the case *sub judice* the state never made an adequate objection to this testimony, nor did it

request a continuance or make a motion that the evidence be excluded, and finally, the state did not tell the trial court that it would be prejudiced by this testimony. The only thing that the state said was:

I have done everything I can to confirm or disprove her statement, and I can't. I don't have enough investigative time to do it. One person that can confirm what she saw or said is her sister-in-law who happens to be in California, number not published. Just -- I can't get in touch with anybody and I can't do anything with it, Judge. I tried.

It would stretch this Court's imagination to find that this constituted a request for continuance, or an objection to the admission of the testimony. The long established rule in this state is that the failure to object to evidence will act as a waiver. See, *Jones v. State*, 606 So. 2d 1051, 1058 (Miss. 1992); *Crenshaw v. State*, 520 So. 2d 131, 134-35 (Miss. 1988).

Secondly, this Court does not feel that defense counsel was seeking an unfair tactical advantage by failing to disclose this information until the day of trial. The record shows that counsel did not learn of this witness until the morning of trial, and then promptly advised the state of this situation, giving the state a couple of hours to investigate the matter. We do not feel that the state was prejudiced in this matter, which is indicated by its failure to state so on the record. See *Tucker v. State*, 647 So. 2d 699, 703 (Miss. 1994).

Finally, the trial court did not evaluate the apparent discovery violation under the guidelines set forth in *Box* and enumerated in the rules of circuit court practice. The State admits that the trial court did not follow Rule 9.04(I)2, but argues that this fact is of no consequence where the proposed testimony was otherwise irrelevant.

In *Tucker v. State*, 647 So. 2d 699, 704 (Miss. 1994), a strikingly similar case to the one before us, our supreme court reversed Tucker's conviction finding that the trial court was in error in failing to follow the guidelines in *Box*, finding that the State did not complain of unfair surprise or undue prejudice, but merely raised a general objection, and finally, finding that defense counsel did not seek a tactical advantage in failing to disclose the information but merely found out about the witness on the day of trial.

We hold that the combined effect of failing to object, failing to follow the guidelines in *Box*, and the apparent lack of prejudice on the State, leads this Court with no choice but to find error. However, that does not end our inquiry. The State argues that the trial court's failure to follow the guidelines does not warrant a reversal in this cause because the evidence presented was irrelevant, citing the case of *Hall v. State*, 546 So. 2d 673, 676-77 (Miss. 1989). This leads us to our next point.

## **B. Relevancy**

The State argues that the trial court was correct in finding that the testimony was irrelevant; therefore, it does not matter if there was or was not a discovery violation. However, this Court does find some relevance in Parish's proffered testimony.

First, Parish can place Powell in the rust colored Camaro one hour after the shooting. While this

might be cumulative, considering the father's testimony placing Powell in the Camaro thirty minutes after the shooting, and this Court might exclude the testimony if it were all Parish could testify to, that is not the case before us. Parish could place an injury on Powell that was received at about the time that Brooks was allegedly involved in a shootout with Jackson. This tied in with Brooks', albeit weak, testimony that his brother had a gunshot wound, tends to make her testimony relevant. Finally, her testimony becomes even more relevant considering the State had information that a man using the name of Julius Woodard, an alias of Powell, had received a gunshot wound on November 7.

We find that Parish's testimony was relevant and because of our earlier discussion on the discovery violation, the trial court should have admitted the testimony. We do not intend for this opinion to mean that a trial court can never exclude evidence on account of a discovery violation; however, under the particular facts of this case, and in light of the decision in *Tucker*, we must hold the exclusion of the testimony here to be error.

## II.

Brooks next argues that the trial court was in error in failing to grant a new trial because the State had failed to produce possible exculpatory evidence learned during trial. During his motion for a new trial Brooks asserted that the day of trial he informed the State that Brooks' brother, George Powell, had been shot in the left foot, that he had left Greenville heading for Jackson, Mississippi, at approximately 1:00 p.m. on November 7, and that he might have used an alias, Julius Woodard, upon his arrival in Jackson. He further asserted that the day after trial the prosecution informed him that they had information that a person, using the name of Julius Woodard, had checked into a hospital in Jackson, Mississippi, in the early evening of November 7, with a gunshot wound to the foot. Brooks argues that this information was possibly exculpatory and the failure to disclose warrants a new trial.

"The standard of review of a post-trial motion is abuse of discretion." *Flowers v. State*, 601 So. 2d 828, 833 (Miss. 1992) (citing *Robinson v. State*, 566 So. 2d 1240, 1242 (Miss. 1990)). This Court will not reverse the trial court's failure to grant a new trial unless we determine that the trial court has abused its discretion. *McNeal v. State*, 617 So. 2d 999, 1009 (Miss. 1993); *Burrell v. State*, 613 So. 2d 1186, 1191 (Miss. 1993); *Pierre v. State*, 607 So. 2d 43, 54 (Miss. 1992); *Alexander v. State*, 602 So. 2d 1180, 1183 (Miss. 1992); *Parker v. State*, 606 So. 2d 1132, 1140 (Miss. 1992).

At the motion for new trial, the State argued that it did not feel that it had to disclose this information because it did not feel that it was relevant. The trial judge agreed with the State and found that it did not matter if George Powell and Julius Woodard were the same person and that the evidence showed that George Powell was shot on the same day that his brother was involved in a shootout with Jackson. The trial court subsequently refused to grant a new trial.

Now on appeal, the State asserts that the trial court did not abuse its discretion in finding that the testimony was irrelevant, and finally, that the evidence could have been discovered by Brooks through due diligence.

This Court does not agree with the State's position that the testimony was irrelevant. If the State really did feel that the information was irrelevant, then why did the prosecution seek out information of whether a man using the name of Julius Woodard checked into a hospital in Jackson, Mississippi, with a gunshot wound to the foot.

In *United States v. Agurs*, 427 U.S. 97, 110-113 (1976), the Supreme Court stated:

[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314. This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.

On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. . . .

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

The evidence is clearly relevant, possibly exculpatory, and should have been disclosed by the State as soon as it learned of its existence. While the jury could have given no credibility to the testimony, and could have easily believed that Brooks and not his brother was involved in the shootout, Brooks should have been given the opportunity to present the evidence to the jury. The fact that his brother was shot in the foot on the day that Brooks was supposedly involved in a shootout, coupled with the fact that a car similar to Powell's fled the scene, could possibly exculpate Brooks, or could possibly create a doubt in some jurors' mind as to his guilt. The State knew that Brooks' defense all along was that his brother, George Powell, was responsible for the shooting, and it should have known that this evidence lends some credence to Brooks' defense.

The error of exclusion of testimony coupled with the failure of the State to timely produce exculpatory evidence compels us to reverse this case for a new trial.

**THE CONVICTION OF AGGRAVATED ASSAULT WITH A DEADLY WEAPON AND SENTENCE OF THE WASHINGTON COUNTY CIRCUIT COURT ARE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL. COSTS ARE TAXED TO WASHINGTON COUNTY.**

**FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND**

**SOUTHWICK, JJ., CONCUR.**

**KING, J., NOT PARTICIPATING.**