IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01063 COA

GLADYS SCOTT AND JAMIE SCOTT

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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: SCOTT COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

FIRNIST J. ALEXANDER JR.

GAIL SHAW-PIERSON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY KLINGFUSS

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: ARMED ROBBERY

TRIAL COURT DISPOSITION: GLADYS SCOTT & JAMIE SCOTT- -EACH: ARMED ROBBERY 2 COUNTS -- COUNT I SENTENCED TO SERVE LIFE IMPRISONMENT IN MDOC; COUNT II SENTENCED TO SERVE LIFE IMPRISONMENT IN MDOC & CONSECUTIVE TO COUNT I

MANDATE ISSUED: 6/5/97

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

SUMMARY

Gladys Scott and Jamie Scott were each convicted of two counts of armed robbery. Feeling aggrieved, both appeal, assigning the following issues as error:

I. WHETHER THE TRIAL COURT ERRED IN DENYING THEIR MOTION FOR CONTINUANCE;

II. WHETHER THE TRIAL COURT ERRED IN DENYING THEIR MOTION FOR MISTRIAL RESULTING FROM THE STATE'S USE OF LEADING QUESTIONS;

III. WHETHER THE STATE IMPROPERLY COMMENTED ON THE DEFENDANTS' FAILURE TO TESTIFY; AND

IV. WHETHER THE PROSECUTION IMPROPERLY USED ITS PEREMPTORY STRIKES IN VIOLATION OF *BATSON*.

Finding no error, we affirm.

FACTS

On the night of December 24, 1993, Johnny Ray Hayes and Mitchell Duckworth left work at McCarty Farms around 10:30 P.M. Hayes drove them to the Mini Mart on Highway 35 where they bought beer and gasoline. While stopped at the Mini Mart, Hayes and Duckworth saw Jamie and Gladys Scott, sisters, pull into the Mini Mart parking lot in a blue Oldsmobile. Hayes and Duckworth were unable to see who else might have been in the Oldsmobile. Gladys approached Hayes and told him that she and Jamie wanted to go for a ride.

The four drove toward Hillsboro after stopping at the Oakdale Apartments. As they reached Hillsboro, Duckworth told Hayes that the same blue Oldsmobile they had seen at the Mini Mart was

following them. The four stopped at The Cow Pasture, a club in Hillsboro, in order to allow Gladys and Jamie to go to the restroom.

Upon returning to Hayes' car, Gladys asked if she could drive, and Hayes allowed her to drive his car. Gladys stopped at a house across the street from The Cow Pasture. She and Jamie got out of the car and spoke to the individuals in the blue Oldsmobile, which was parked on the side of the road. Hayes and Duckworth remained in Hayes' car. When the women returned, Gladys continued to drive. Soon thereafter, Jamie began to complain that she felt sick to her stomach and needed to throw up. Hayes asked Gladys to stop the car so that Jamie would not throw up in his car. Gladys pulled off the side of the road, and the blue Oldsmobile pulled up behind Hayes' car. As soon as the women got out of Hayes' car, a man shoved a shotgun through the passenger side window and ordered both men to get out of the car and lay down on the ground. The assailants hit both men in the head with the shotgun and took their wallets. At one point during the robbery, Jamie held the shotgun. After the robbery, Jamie and Gladys left with the other assailants in the blue Oldsmobile. They returned to Jamie's apartment where all five of the assailants split the money they had stolen.

Both victims testified at trial and positively identified Gladys and Jamie. As required by their plea bargains, two of the three males involved in the robbery, both of whom were teenagers, testified at trial that Jamie and Gladys were involved in the robbery and, in fact, planned the robbery.

ISSUES

I. DID THE TRIAL COURT ERR IN DENYING THE SCOTTS'

MOTION FOR CONTINUANCE AFTER THE STATE FAILED

TO RESPOND TO A RULE 4.06 DISCOVERY REQUEST?

Under Uniform Criminal Rule of Circuit Court Practice 4.06 which was in effect at the time of trial, upon written request, a defendant is entitled to the following information: "(1) the names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement . . . [and] (3) [a] copy of the criminal record of the defendant, if proposed to be used to impeach. . . ." Unif. Crim. R. Cir. C. Prac. 4.06. The rule further provided that "upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require." *Id.*

The Scotts each filed a Rule 4.06 discovery request seeking copies of the criminal records of all witnesses. The State did not produce such records. The Scotts failed to seek a hearing or a ruling to compel discovery of this information. One of the victims, Mitchell Duckworth, had been convicted in Simpson County once for grand larceny, three times for driving with a suspended license, and three times for DUI. The prosecutor stated to the court that he was aware of only one of Duckworth's convictions, one of the DUIs. Another one of the State's witnesses, Christopher Patrick, who was one of the participants in the robbery, also had a criminal record, and the trial court excluded his testimony.

Immediately prior to trial, the Defendants moved for dismissal or, alternatively, for a continuance

based on the State's failure to provide this information. Defense counsel informed the court that he knew that Duckworth had prior convictions. The prosecutor stated to the court that as far as he knew, Duckworth's record consisted of only one DUI. The trial court allowed the defense to question Duckworth prior to trial, and the defense informed the court of Duckworth's seven convictions. The Scotts then requested a continuance, but the trial court refused, stating that although the State should have provided the information, since the defense waited until the day trial was set to commence, he would deny the continuance. Further, instead of excluding his testimony, the trial court also allowed the defense to cross-examine Duckworth about his convictions. The Scotts assert that the failure to grant a continuance deprived them of a fair trial.

The defense is not automatically entitled to a witness' criminal record under Rule 4.06. Although a defendant is entitled to a copy of his or her own criminal record, the rule is silent regarding the criminal record of all witnesses. To be entitled to other discovery, the defense is required to show that the information is material to the preparation of the defense. This Rule necessarily implies that the defendant cannot make a discovery request for such information, and then sit back and wait for trial to begin before calling the matter to the attention of the trial court and expect to be granted a continuance or even a dismissal. Nonetheless, the matter is moot because the trial court ruled that the State should have provided this information. Therefore, we must go further in our analysis.

The purpose of Rule 4.06 is to avoid ambush or unfair surprise to either party. *Frierson v. State*, 606 So. 2d 604, 607 (Miss. 1992) (citations omitted). The Scotts have not shown unfair surprise. It is clear from the record in this matter that the defense knew prior to trial that Duckworth had been convicted of more than one offense even though the State mistakenly thought that Duckworth had only one conviction, a DUI. The State was surprised to learn of Duckworth's other convictions; the Defendants were not surprised by this information.

Additionally, the Scotts cannot show that the error worked to their detriment. In addition to allowing the defense time to interview the witness, the trial court allowed the defense to impeach Duckworth with evidence of all of his prior offenses without conducting a balancing test hearing to weigh the probative value of the evidence against its prejudicial effect as required by Mississippi Rule of Evidence 609. The Scotts have not shown any prejudice or that the admission of Duckworth's testimony affected a substantial right.

The decision of whether to grant a motion for continuance is left to the sound discretion of the trial court. This Court will reverse such a ruling only upon a showing of an abuse of discretion, the result of which would be manifest injustice to the defendants. *Jackson v. State*, 672 So. 2d 468, 476 (Miss. 1996); *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995); *Johnson v. State*, 631 So. 2d 185, 189 (Miss. 1994). The trial court did not abuse its discretion in denying the motion for continuance. Further, even if a continuance should have been granted, the Scotts have not shown any prejudice and were not subjected to manifest injustice as a result of this decision. This issue is without merit.

II. DID THE TRIAL COURT ERR IN DENYING THE SCOTTS' MOTION

FOR MISTRIAL IN RESPONSE TO THE PROSECUTION'S LEADING QUESTIONS?

The Scotts objected to leading questions eighteen times and made four motions for a mistrial. The trial court sustained eight of those objections and denied the motions for a mistrial. Trial courts have great discretion in permitting the use of leading questions. We will not reverse unless there has been a "manifest abuse of discretion resulting in injury to the complaining party. . . . This is because the harm caused is usually inconsiderable and speculative, and only the trial court was able to observe the demeanor of the witness to determine the harm." *Whitlock v. State*, 419 So. 2d 200, 203 (Miss. 1982) (citations omitted); *see also McDavid v. State*, 594 So. 2d 12, 16-17 (Miss. 1992).

A leading question is one which suggests a specific response. *Id.* Although technically leading questions, the vast majority of the questions in the case *sub judice* did not actually give "the answer."

The Defendants attempt to rely on *McDavid,* in which the Mississippi Supreme Court reversed a conviction of sale of cocaine; however, this case is easily distinguishable. *See McDavid*, 594 So. 2d at 16. *McDavid* involved a combination of errors, including the trial court's excluding McDavid's testimony regarding the actual drug sale, as well as leading questions and improper identification of the defendant's voice. Furthermore, the leading questions in *McDavid* amounted to the prosecutor testifying.

There was ample other evidence to convict the Defendants even without the testimony elicited by leading questions. Further, the Defendants were not injured by this testimony. This issue is without merit.

III. DID THE PROSECUTION IMPROPERLY COMMENT

ON THE DEFENDANTS' FAILURE TO TESTIFY?

The Scotts assert that the prosecution twice improperly commented on their failure to testify. A criminal defendant's constitutional right to not be compelled to testify against herself is violated not only by direct statements by the prosecution but also by indirect comments which "could reasonably be construed by a jury as a comment on the defendant's failure to testify." *Griffin v. State,* 557 So. 2d 542, 552 (Miss. 1990) (citations omitted). What constitutes an improper comment is "determined from the facts and circumstances of each case." *Jones v. State*, 669 So. 2d 1383, 1390 (Miss. 1995) (citations omitted).

The first allegedly improper comment occurred after the State rested. The defense attempted to call its first witness, Veronica Jones. The State objected, stating, "Your Honor, if it please the Court, we would have an objection. Miss Jones' name, or for that matter, any other witness's name, was not furnished to us in reciprocal discovery." The defense objected, and the jury was retired from the courtroom. The defense moved for mistrial, and the trial court overruled the motion.

The trial court was correct in denying the motion for mistrial. We discern no reasonable construction whereby the statement can be construed as a comment on the Defendants' failure to testify. First, the statement is clearly referring to witnesses, not the Defendants. Second, the statement was not implying that no witness would be testifying; rather, it was merely an objection to a potential discovery violation. The statement simply made no reference, direct or implied, to the Defendants.

The second allegedly improper statement occurred during closing argument when the prosecutor stated:

> Ladies and gentlemen, in the trial of a case, in this case and any other case, basically what we, as prosecutors, ask the jury to do is really just to do one thing, and that's for you to decide the case on what you have heard come from that witness stand, and not to set aside the things that you heard from the witness stand, and ignore them, and reach a verdict contrary to that evidence.
>
> What I would like for you to do now when you go into the jury room, is just simply ask yourself this: What did the evidence from that witness stand tell me in this case, what did I hear said from that witness stand, and how does it apply to the law that the Court has given to You?

. . . .

> Based upon what the truth was from the stand, based upon what the evidence from the witness stand said, it said they are guilty, and that's what we want you to do, to act upon what you heard, act upon what you told us you would do, and return a verdict of guilty as charged.

Although neither Defendant objected at trial, the Defendants now assert that these statements were improper comments on their failure to testify. The Mississippi Supreme Court has consistently held that failure to object at trial is a procedural bar to raising the issue as error on appeal. *Moawad v. State*, 531 So. 2d 632, 635 (Miss. 1988); *Billiot v. State*, 454 So. 2d 445, 462 (Miss. 1984). We need not address this issue because the trial court will not be found to be in error on a matter not placed before him at trial.

However, notwithstanding the procedural bar, there was no error. The Defendants' interpretation of the State's argument is entirely unreasonable. If we were to uphold the defendants' argument, we might as well deny the State a closing argument altogether. We simply refuse to do so. This issue is without merit.

IV. DID THE PROSECUTION EXERCISE ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER?

The Scotts assert that during jury selection, the State exercised two of its peremptory challenges to strike black jurors Dorothy Hollis and Frances Banks on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). The jury was composed of five black and seven white jurors. One alternate juror was white and one was black.

The reasons for the challenges were given as follows:

We struck [Dorothy Hollis], because in talking with John Ingram and Marvin Williams, who are two Deputies in Scott County who are both Black, they knew most of these jurors, but had no information whatsoever on her, and she's not married, and we just didn't know enough about her from her jury form. . . .

[W]e struck [Frances Banks], because she is not working. She is either not married or not working. We couldn't tell from the juror form. Said her occupation was "laid off."

The Scotts failed to offer any proof in rebuttal to the State's articulated reasons, merely stating, "He gave no reason whatsoever as far as one juror, Dorothy Hollis, no reason at all. He just didn't have a reason. She was Black, and he didn't want her on the jury."

In ruling on the *Batson* issue, the court concluded as follows:

In considering the manner of the strikes, and the answers of the D.A., and reasons for his strikes, I find the strikes were not racially motivated, and based upon attorney discretion.

I note, particularly, that he accepted a Black juror, while at the same time having peremptory strikes that he had not exercised. That is with members of the regular jury, as well as the selection of the fourteenth juror. He had a strike remaining when he accepted the Black juror, Ethel Ree Anderson, when he could have struck that juror, and John Reeves, Jr., a White juror, would have been seated.

Therefore, this Court is satisfied that the strikes were not based upon racial discrimination.

Although they assert that the State's reasons for its challenges were discriminatory, the Scotts failed to make the juror forms part of the record on appeal. The burden rests upon the appellants to ensure that the record contains sufficient evidence to support assignments of error. *Hansen v. State*, 592 So. 2d 114, 127 (Miss. 1991).

The reasons required to justify a peremptory challenge do not have to rise to the level required of a challenge for cause. *Chisolm v. State*, 529 So. 2d 630, 632 (Miss. 1988). Failure to adequately fill out a juror card has been accepted by the Mississippi Supreme Court as a potentially race neutral reason for exercising a peremptory challenge. *Conerly v. State*, 544 So. 2d 1370 (Miss. 1989)*; Lockett v.* State, 517 So. 2d 1346, 1350 (Miss. 1987). The Scotts did not attempt to rebut the State's assertion at trial that it was unable to obtain much information about either Hollis or Banks from their juror forms. In *Conerly*, the trial court made a factual finding that the juror forms indeed were adequately filled out. *Conerly*, 544 So. 2d at 1375. Here, the trial court apparently agreed with the State that the juror forms were uninformative.

The trial court's factual findings are given due deference and will not be overturned on appeal unless

there is an error that is against the overwhelming weight of the evidence or is clearly erroneous. *Harper v. State*, 635 So. 2d 864, 868 (Miss. 1994) (citations omitted); *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993); *Chisolm*, 529 So. 2d at 633. From the record, it is clear that the trial judge made a genuine effort to properly weigh the State's reasons for its peremptory strikes and made an on-the-record determination of the merits of the reasons as required by *Hatten.* The ruling of the trial court was not clearly erroneous or against the weight of the evidence when we examine all of the facts and circumstances surrounding this case. This issue is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF SCOTT COUNTY OF CONVICTION OF COUNT I: ARMED ROBBERY AND SENTENCE OF LIFE IMPRISONMENT AND COUNT II: ARMED ROBBERY AND SENTENCE OF LIFE IMPRISONMENT TO RUN CONSECUTIVE TO SENTENCE IN COUNT I FOR APPELLANT GLADYS SCOTT IS AFFIRMED.

THE JUDGMENT OF THE CIRCUIT COURT OF SCOTT COUNTY OF CONVICTION OF COUNT I: ARMED ROBBERY AND SENTENCE OF LIFE IMPRISONMENT AND COUNT II: ARMED ROBBERY AND SENTENCE OF LIFE IMPRISONMENT ON COUNT II TO RUN CONSECUTIVE TO SENTENCE IN COUNT I FOR APPELLANT JAMIE SCOTT IS AFFIRMED. ALL COSTS ARE ASSESSED AGAINST THE APPELLANTS.

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