

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00583 COA

JIM HILL WEBSTER

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. GEORGE C. CARLSON JR.

COURT FROM WHICH APPEALED: TALLAHATCHIE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID G. HILL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN DISTRICT ATTORNEY: WILLIAMS, ROBERT L.,

NATURE OF THE CASE: CRIMINAL: MANSLAUGHTER

TRIAL COURT DISPOSITION: MANSLAUGHTER: SENTENCED TO SERVE A TERM OF 15
YRS IN THE MDOC & PAY ALL COST OF COURT

MANDATE ISSUED: 6/10/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

The Appellant, Jim Hill Webster (Webster) was convicted in the Tallahatchie County Circuit Court for manslaughter. Webster was sentenced to serve a term of fifteen years in the Mississippi Department of Corrections, and ordered to pay all court costs. Aggrieved from this judgment, he appeals to this court asserting the following issue: that the lower court erred by allowing the State to cross-examine a defense witness about a statement he made to police officers. Finding no reversible error, we affirm the judgment.

FACTS

On September 19, 1993, a gang that witnesses called "the Goose Pond Boys" began shooting into a crowd of people outside a club called Brother's Palace in Glendora, Mississippi. After the shooting was over, Timothy Allison, the victim, and Jessie Webster, the Appellant's brother, started a brawl. According to witnesses, Jessie Webster jumped on Allison's back. Allison then flipped Jessie over on his back, and began hitting him. At that point, Jim Webster, the Appellant, went over to his car, got a gun and shot Allison in the back.

After Allison was shot, Jim, Jessie, and another brother, Peter went to their mother's house. Later that night, two police officers came to the house and arrested Jessie for the murder of Allison. The officers brought Jessie to the Charleston Jail where he gave a statement to the police. The next morning, Jessie was transported to the Sumner Jail where he learned that his brother Jim had turned himself in to officials for shooting Allison. Jessie was later released.

At trial, Jessie testified that Allison had a gun and was pointing it at him, however, on cross-examination, the State impeached Jessie by asking him about a statement he made to police the night of the incident. In that statement to police, he made no reference to Allison having a gun.

DISCUSSION

Webster's sole issue on appeal is that the lower court erred by admitting the statement made by Jessie Webster to police officers the night of the incident. Webster argues that the statement was improperly admitted because the State did not produce any statement made by Jessie to law enforcement officials during discovery.

Pursuant to Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice This rule can now be found in Rule 9.04 of the Uniform Circuit and County Court Rules., Webster filed a motion for discovery requesting the names, addresses of the witnesses in chief to be called by the State. Along with this, copies of any statements given by any of these witnesses were also requested. During trial, Officer Jack Tucker testified that he could not remember whether Jessie Webster, the Appellant's brother had been taken into the police station merely for questioning, or had been booked and detained. At that point, the defense asked for a subpoena duces tecum for the police records pertaining to the time period that Jessie Webster was in police custody that night. The court granted the motion.

When the documents arrived from the jail, a statement which was made by Jessie Webster was

included among them. There was no mention in that statement that Timothy Allison had a gun. This statement was apparently a surprise to both the State as well as the defense. When the state mentioned that it intended to use this statement for impeachment purposes, Webster objected on the grounds that it was a discovery violation. The trial court sustained the objection, ruling that the State could not use the statement because it had not been disclosed to the defense, however, after Jessie testified on direct examination that Allison had a gun, the State was allowed to have Jessie read the statement into the record for impeachment purposes.

Box v. State first set forth the procedure trial courts should follow when confronted with a discovery violation. *Box v. State*, 437 So. 2d 19, 23 (Miss. 1983). Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice, reflects the procedures set forth in *Box*. When faced with previously undisclosed evidence to which the defendant has objected, the trial court should give the defendant a reasonable opportunity to familiarize himself with the evidence. *Eakes v. State*, 665 So. 2d 852, 862 (Miss. 1995). If the defendant thereafter believes he may be prejudiced by admission of the evidence because of his lack of opportunity to prepare to meet it, he must request a continuance. *Id.* Should the defendant fail to request a continuance, he has waived the issue. If he does request a continuance, the prosecution may choose to proceed without the undisclosed evidence, or else the trial court must grant the continuance. *Id.*

Webster vigorously argues that this discovery violation warrants a reversal of the judgment; however, without following the guidelines set forth in *Box*, we are unpersuaded by his argument. The supreme court has held that "an accused's remedy for tardy disclosure of that to which he is entitled in pre-trial discovery is a continuance under the circumstances." *Dowbak v. State*, 666 So. 2d 1377, 1385 (Miss. 1996). However, the accused's right to a continuance is not self-executing; therefore, he must affirmatively request a continuance, or waive the issue. *Id.* In the present case, Webster failed to request a continuance or a mistrial on the discovery issue. We therefore find that Webster has waived this issue for appeal because he has not followed the procedure set forth in both the rule and in *Box*.

We find no merit to this appeal. Therefore, we affirm the judgment of the lower court.

THE JUDGMENT OF THE TALLAHATCHIE COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER WITH SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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

HINKEBEIN, J., NOT PARTICIPATING.