

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00094 COA**

RONNIE RAY, A/K/A RONNIE DUVAL RAY

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

DATE OF JUDGMENT:	11/09/95
TRIAL JUDGE:	HON. ROBERT WALTER BAILEY
COURT FROM WHICH APPEALED:	WAYNE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	STANFORD YOUNG
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	BILBO MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	ARMED ROBBERY: SENTENCED TO SERVE A TERM OF 8 YRS WITHOUT PAROLE, TO RUN CONSECUTIVE TO WAYNE COUNTY NO. 8430, & PAY COURT COSTS OF \$238.00
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

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

KING, J., FOR THE COURT:

Ronnie Ray, a/k/a Ronnie Duvall Ray, was convicted of armed robbery in the Wayne County Circuit Court and sentenced to serve eight years in the custody of the Mississippi Department of Corrections without parole. Ray's sentence in this case was to run consecutively to the fifteen year sentence that he received in Wayne County Cause No. 8430. Aggrieved, Ray appeals alleging the following three errors:

**I. WHETHER THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS
UNREASONABLY SUGGESTIVE IDENTIFICATIONS OF THE DEFENDANT BY
THE EYE-WITNESS.**

II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE JURY TO HEAR CERTAIN STATEMENTS AGAINST INTEREST MADE BY DANIEL ARRINGTON THEREBY DEPRIVING THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY AND TO A FAIR TRIAL.

III. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENDANT A MISTRIAL AFTER THE JURY WAS IMPROPERLY INFLUENCED BY CERTAIN IMPROPER AND UNNECESSARY PREJUDICIAL STATEMENTS THEREBY DEPRIVING THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY AND TO A FAIR TRIAL.

We find the appeal without merit and therefore, affirm the conviction.

FACTS

On January 9, 1993, Faye Joiner was working as a cashier at the Chevron Food Mart in Waynesboro. According to Joiner, a black male entered the store around 7:00 p.m. and purchased some candy. After making the purchase, the man went to the bathroom inside the store. When he came out of the bathroom, he commented that he had left his candy in the bathroom. He walked away as if to return to the bathroom but then went behind the counter where Joiner was standing. Just as Joiner was about to chastize him for coming behind the counter, the man put a small chrome handgun in her face and told her to give him the money. She gave him the money. The man took the money and ran from the store. Joiner locked the doors and called the police.

The police arrived and questioned Joiner about the robbery. Joiner gave the police a description of the robber but told them that she did not know who the man was. The police left the store but returned within an hour and a half with four to five photos of black males. Ronnie Ray was pictured in one of the photos. Joiner identified Ray as the man who robbed her. The police arrested Ray later that night, and Joiner again identified him at the police station from behind a two-way mirror. The following day, Joiner identified Ray in a line-up with several other black males.

Subsequently, Ray was tried and convicted of armed robbery. Aggrieved by his conviction and sentence, he appeals.

I. WHETHER THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS UNREASONABLY SUGGESTIVE IDENTIFICATIONS OF THE DEFENDANT BY THE EYE-WITNESS.

Ray argues that Joiner's pretrial identification of him in a photo line-up, a show-up, and an in person line-up were all impermissibly suggestive because the police received an anonymous telephone call that Ray committed the robbery, and he was automatically included in the photo spread. He argues that the anonymous telephone call and the police's failure to preserve the photos used in the line-up denied him a fair and impartial trial.

The State contends that Joiner's pre-trial identifications of Ray were not impermissibly tainted and the trial judge's denial of Ray's motion to suppress was amply supported by substantial, credible evidence.

"The standard of review for suppression hearing findings in a matter of pre-trial identification cases is whether or not substantial credible evidence supports the trial court's determination that, considering the totality of the circumstances the in-court identification testimony was not impermissibly tainted." *Ellis v. State*, 667 So. 2d 599, 605 (Miss. 1995); *Magee v. State*, 542 So. 2d 228, 231 (Miss. 1989). This Court will not disturb the trial court's determination unless it is not supported by substantial credible evidence. *Ellis*, 667 So. 2d at 605 (citing *Ray v. State*, 503 So. 2d 222, 224 (Miss. 1986)). Factors used to evaluate identification evidence are the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *York v. State*, 413 So. 2d 1372, 1383 (Miss. 1982) (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

In the present case the trial judge employed the *Biggers* factors and made the following findings:

. . . Here, the testimony that has been presented this afternoon is that this witness, Mrs. Joiner, had an opportunity to view the defendant for approximately fifteen minutes inside the store, the service station, which was well lighted. After the robbery, the police were called. They showed her at the store four to five different photographs of black males. She picked out the defendant. This was within one hour to one and a half hours of the robbery. Later the same night, she went to the police department, looked at the suspect, and by himself. She again identified him. She stated to Mr. Clanton that she could pick out the one who robbed her, although she did not know his name. The next morning she went at a live line-up and picked out the defendant again.

This court is of the opinion that this procedure has not impermissibly tainted her ability to make an in-court identification, so therefore, the motion will be denied.

In addition to the trial judge's findings above, we note that one of the investigating officers, Robert Owen, testified that Joiner gave him a description of Ray before she was shown the photo line-up. Based on the totality of the circumstances, we find that the trial judge's determination that Joiner's pretrial identifications of Ray were not impermissibly suggestive is supported by substantial credible evidence.

II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE JURY TO HEAR CERTAIN STATEMENTS AGAINST INTEREST MADE BY DANIEL ARRINGTON THEREBY DEPRIVING THE DEFENDANT OF THIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY AND TO A FAIR TRIAL.

Ray contends that the trial judge erred by not allowing Travis Lampley to testify that Daniel Arrington bragged about having committed the robbery for which Ray was being tried. Ray attempted to have Lampley's testimony admitted under the hearsay exception of Mississippi Rule of Evidence 804(b)(3)

because Arrington was unavailable to testify.

After a lengthy discussion on the admissibility of Lampley's testimony, the trial judge made the following ruling:

Well, the first part is whether the declarant is unavailable. Under 804(a)(5), unavailability includes, absent from the hearing and the proponent of a statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3) or (4), his attendance or testimony) by process or other reasonable means. The testimony of the statements of the attorneys is that no subpoena was attempted to be had on this "unavailable witness", Arrington, until Friday before a Monday trial. Monday was October 23rd, 1995. This matter took place January 9th, 1993. That is not reasonable. You can't expect any officer to go serve a subpoena in two days. That is not reasonable.

So it's my opinion, first, that he is not unavailable under the rules. Under Rule 804(b)(3), statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. This is pretty vague and far-fetched. . . . I see nothing trustworthy about this alleged statement.

However, the trial judge did allow Ray to make a proffer of Lampley's testimony. In that testimony, we do not find that Lampley actually stated that Arrington told him that he robbed the Chevron Food Mart on January 9, 1993. He stated, "He didn't tell me about it, but I knew that he had done did something, because when he came to the auditorium he had a lot of money and he didn't have no money before he had left." This statement was not an admission or a statement against interest by Arrington.

The admission of evidence rests in the sound discretion of the trial judge, which must be exercised within the scope of the Mississippi Rules of Evidence. *Parker v. State*, 606 So.2d 1132, 1137 (Miss. 1992). We will not disturb the trial court's determination on the admission or exclusion of evidence absent an abuse of discretion and some prejudice to the defendant. *Id.* at 1138. In this case, we find neither an abuse of discretion nor prejudice to Ray.

III. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENDANT A MISTRIAL AFTER THE JURY WAS IMPROPERLY INFLUENCED BY CERTAIN IMPROPER AND UNNECESSARY PREJUDICIAL STATEMENTS THEREBY DEPRIVING THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY AND TO A FAIR TRIAL.

Ray claims that the trial court erred by not granting a mistrial as a result of Officer Robert Owen's testimony referring to prior bad acts of Ray. According to the record, on direct examination of Owen, the following occurred:

Q. All right. What efforts were made to go and get Mr. Ray that night?

A. Officers of the police department after the phone calls and after some trailing around of the trail that the armed robber had left when he left the scene, the officers went to an apartment that they knew Ray had lived in, due to the fact of some previous calls at that apartment, whether it be disturbance or whatever, I am not sure, where they had encounters with Mr. Ray.

The defense raised an objection and moved for a mistrial. The trial judge sustained the objection but overruled the motion for a mistrial. We find the trial judge's sustaining of Ray's objection was an appropriate curative action along with the instruction to the witness to, "Just tell what happened." While the witness' statement did not warrant a mistrial, Ray could have asked the court to instruct the jury to disregard the officer's statement. However, he did not request this or any further curative instruction. "It is the rule in this State that where an objection is sustained, and no request is made that the jury be told to disregard the objectionable matter, there is no error." *Perry v. State*, 637 So. 2d 871, 874 (Miss. 1994). Therefore, we find this argument without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF WAYNE COUNTY OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF EIGHT YEARS WITHOUT PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THIS SENTENCE IS TO BE SERVED CONSECUTIVELY TO THE SENTENCE IMPOSED IN WAYNE COUNTY CAUSE NO. 8430. ALL COSTS OF THIS APPEAL ARE TAXED TO WAYNE COUNTY.

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