

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00201 COA**

RAYFORD MOSS, JR.

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:	02/20/96
TRIAL JUDGE:	HON. JOSEPH H. LOPER, JR.
COURT FROM WHICH APPEALED:	GRENADA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT LASTER, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I SALE OR TRANSFER OF LESS THAN ONE OUNCE OF MARIJUANA: CT II SALE OR TRANSFER OF COCAINE A SCHEDULE II CONTROLLED SUBSTANCE: CT I 3 YRS; CT II 40 YRS; CT I AND CT II UNDER THE SENTENCE ENHANCEMENT PROVISION; CT I CONCURRENT TO CT II
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	2/19/98
CERTIORARI FILED:	
MANDATE ISSUED:	5/12/98

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

PAYNE, J., FOR THE COURT:

Rayford Moss, Jr., was convicted of one count of sale of marijuana and one count of sale of cocaine. The trial court sentenced Moss under the enhancement statute to serve a term of three years in count I and a term of forty years in count II. The sentences are to be served in the custody of the

Mississippi Department of Corrections with the sentence in count I to run concurrently to the sentence in count II. Moss's motion for JNOV or, in the alternative, a new trial was denied. Finding no error, we affirm the judgment of the circuit court.

FACTS

As part of an undercover operation, police officer David Porter and the confidential informant, Paul Shelton, went to the residence of Rayford Moss for the purpose of purchasing narcotics. Officer Porter was wired with a body transmitter and his automobile was equipped with surveillance equipment. Upon arrival at Moss's house, Shelton motioned for Guy Flowers, who was standing outside of Moss's house, to come over to the vehicle. Shelton asked Flowers where Moss was and informed him that he and Porter wanted to purchase narcotics. Shelton then went inside the house and shortly thereafter, returned to get Porter. The testimony indicated that once inside the house, Shelton introduced Porter to Moss and that Porter then gave Moss \$160 for a leafy substance that later tested positive for marijuana. Porter next inquired about purchasing cocaine, and Moss instructed him to come back later to get the cocaine. Several hours later, Porter returned to Moss's house where he, Flowers, and Moss went into a back room in the house. Porter testified that Moss gave him a large rock of cocaine and that Moss instructed Porter to give the money to Flowers. Porter testified that he then gave Flowers \$500 in cash.

Approximately two months later, Shelton encountered Moss at a convenience store. Shelton testified that Moss asked him to come to his house to which he complied. Shelton stated that when they got to Moss's house, Shelton, Moss, Moss's cousin, Rayford Eskridge, and Flowers got into Moss's car and went to a car wash in Oakland. Shelton testified that Moss then demanded to know "who was that man name on those papers." Shelton stated that when he replied that he did not know, Moss and Flowers assaulted him and demanded that he talk.

Following the State's case, Moss chose not to present any evidence in his own behalf. The jury subsequently returned a verdict of guilty for the sale of marijuana and the sale of cocaine. Feeling aggrieved, Moss filed this appeal asserting two issues.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION.

Moss takes issue with the testimony of Paul Shelton in which Shelton related the details of the alleged assault on his person by Moss two months after the drug transaction for which Moss is being tried. At trial, Moss objected to the admission of Shelton's testimony regarding the assault on the ground that Mississippi Rules of Evidence 404(b) and 403 prohibited the admission of this type of testimony. The trial court overruled the objection stating that the testimony was proof of guilty knowledge and that the evidence was more probative than prejudicial. On appeal, Moss does not argue that the trial court erred in admitting the testimony but that the trial court erred in failing to give a limiting instruction. Moss argues that wherever an objection based on 404(b) is overruled, the court must, *sua sponte*, give a limiting instruction should the evidence prove to be admissible under the 403 balancing test.

The State argues that any error in failing to give a limiting instruction was harmless at best in light of the overwhelming weight of the evidence against Moss. We agree. Moss is correct that a limiting instruction should have been given *sua sponte* by the trial court. The Mississippi Supreme Court has stated the following:

[W]herever 404(b) evidence is offered and there is an objection which is overruled, the objection shall be deemed an invocation of the right to MRE 403 balancing analysis and a limiting instruction. The court shall conduct an MRE analysis and, if the evidence passes that hurdle, give a limiting instruction unless the party objecting to the evidence objects to giving the limiting instruction.

***Smith v. State*, 656 So. 2d 95, 100 (Miss. 1995); see also *Bounds v. State*, 688 So. 2d 1362, 1371 (Miss. 1997)** (holding "that a trial judge was required to give a limited instruction sua sponte" for cases arising after the decision in *Smith v. State* which involve evidence of prior bad acts).

In the present case, the trial court clearly erred in failing to give a limiting instruction regarding Shelton's testimony of the alleged assault on his person by Moss. However, it is our position that this error was harmless. The State presented the testimony of Officer Porter who unequivocally identified Moss as being the person who sold him drugs not once but twice. In addition, the State presented the testimony of Paul Shelton who corroborated Porter's account of the transaction. The State also had video and audio evidence of the transaction. Moss, on the other hand, presented no evidence to dispute the State's case. Had the prior bad act in question been the same as the offense for which Moss was being charged, we might not be so quick to find the trial court's error to be harmless. Here, however, the charges of assault and sale of narcotics are two distinct crimes and there is little chance that the jury reached its guilty verdict based on the premise that a man who commits assault must also be guilty of selling narcotics. We therefore find the error by the trial court to be harmless and as such decline to reverse.

II. WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT A CONTINUANCE TO MOSS BECAUSE OF DISCOVERY VIOLATIONS BY THE STATE.

At trial, during the State's direct examination of Porter, the prosecutor asked that he be permitted to play the audio tape of the first drug transaction and that he also be allowed to pass to the jury a transcription of the tape. The prosecution did not ask that the transcription be admitted into evidence, and the trial court instructed the jury that the transcription was to serve only in aiding them in following the conversation on the tape. The jury was instructed that the tape was the primary evidence and that the transcript should be disregarded to the extent that the jurors determined it to be incorrect or unreliable in any respect.

Moss's attorney, R.T. Laster, Jr., objected to the use of the transcript by the jury on the ground that the prosecution had violated the discovery rules in that Laster had not been provided a copy of the transcript until that morning. The trial judge determined that the prosecution should be allowed to play the tape and give the jury a copy of the transcript subject to the limiting instruction. The trial judge informed Laster that after they had all listened to the tape and followed along with the transcript, he would give Laster a recess so that he could discuss the tape with Moss in preparation for the cross-examination of Porter. After the recess, Laster asserted that he had insufficient time to compare the tape to the transcript and that he needed a continuance. The trial judge denied Laster's

request stating that nothing would be gained by a continuance. The trial judge indicated that he could find no deviation from the tape to the transcript. The trial judge indicated further that Laster had had the tape for several days, that he was able to listen to the tape and compare it to the transcript at the time the tape was played for the jury, and that he was also given an additional forty-five minutes to discuss the tape with his client and compare the tape to the transcript.

Furthermore, the prosecutor indicated to the court that the transcript had not been prepared until the day before trial, that he had contacted Laster at that time to tell him that they were having Officer Porter transcribe the tape, and that he offered to provide Laster with the transcript later that evening. The prosecutor stated that Laster indicated that he would pick up the transcript but failed to do so. The prosecutor stated further that he placed a copy of the transcript on defense counsel's table at 8:30 a.m. just prior to commencement of the trial.

On appeal, Moss argues that he was entitled to a continuance and that failure of the trial court to grant same resulted in reversible error. The State argues that even if the disclosure of the transcript were deemed tardy, Moss was given a postponement of the proceedings which was reasonable under the circumstances and that a further continuance was not necessary. The State argues further that Moss has not shown that the alleged discovery violation caused any prejudice to his case.

Moss is correct to the extent that one is entitled to a continuance if a discovery violation has occurred and the objecting party claims undue prejudice or unfair surprise. **URCCC 9.04**. The question before this court then is whether failure of the prosecution to provide Moss with a copy of the transcript was a discovery violation. Keeping in mind that the "purpose of discovery is to eliminate trial by ambush or surprise," we conclude that no discovery violation occurred in this instance. *Fuselier v. State*, **468 So. 2d 45, 56 (Miss. 1985)**. Moss received a copy of the audio tape two days before the beginning of the trial.⁽¹⁾ Moss's attorney, Laster, admitted that he had listened to the tape and discussed its contents with his client. Both at trial and on appeal, Moss complains that the transcript differs from the conversation on the tape but never indicates what the differences are. The trial judge, addressing Moss's allegation that the transcript and the tape differ, stated on the record that he had listened to the tape while reading along with the transcript and could find no differences. This Court, lacking a copy of the tape so that we could make our own comparison, has no choice but to defer to the trial judge's determination that no differences exist between the conversation on the tape and the transcription. *Duplantis v. State*, **644 So. 2d 1235, 1250 (Miss. 1994)** ("It is [appellant's] duty to present to this Court a record adequate to reveal any reversible errors."). As such, we are hard pressed to find that the contents of the transcript were a surprise to Moss. Thus, we find that Moss has not proven the existence of a discovery violation and was therefore not entitled to a continuance.

We find Moss's arguments to be without merit and affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT OF GRENADA COUNTY OF CONVICTION ON COUNT I OF THE SALE OF LESS THAN ONE OUNCE OF MARIJUANA WITHIN 1000 FEET OF A SCHOOL AND ENHANCED SENTENCE OF THREE YEARS AND CONVICTION IN COUNT II OF THE SALE OF COCAINE WITHIN 1000 FEET OF A SCHOOL AND ENHANCED SENTENCE OF FORTY YEARS WITH THE SENTENCE IN COUNT I TO RUN CONCURRENTLY TO THE SENTENCE IN COUNT II WITH BOTH

SENTENCES TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO GRENADA COUNTY.

McMILLIN AND THOMAS, P.JJ., DIAZ, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., AND HERRING, J.

COLEMAN, J., DISSENTS:

I agree with the majority that "the trial court clearly erred in failing to give a limiting instruction regarding Shelton's testimony of the alleged assault on his person by Moss." Because I disagree that the error was harmless, I respectfully dissent. The Mississippi Supreme Court has repeatedly and unequivocally required that trial judges *sua sponte* give limiting instructions to explain to the jury the restricted manner in which they may consider the evidence pursuant to Rules 404(b) and 403 of the Mississippi Rules of Evidence. In this case, the trial judge found that an assault on the confidential informant which occurred more than two months after the crime occurred for which the appellant was being tried was "proof of guilty knowledge." In the absence of an instruction which would explain to the jury the limited purpose for which this evidence was being admitted, *i. e.*, "proof of guilty knowledge," I am not persuaded beyond a reasonable doubt that this admitted error was harmless. Therefore, I would resolve this issue favorably to Moss and would reverse and remand this case for a new trial.

BRIDGES, C.J., AND HERRING, J., JOIN THIS SEPARATE OPINION.

1. On appeal, Moss complains that the prosecution's tardiness in getting the tape to him was also a violation of the discovery rules. We note, however, that Moss did not object to the tape being admitted on the basis of a discovery violation but rather, objected on the ground that the prosecution had not laid a proper predicate. As such, we will not address Moss's discovery violation claim as it pertains to the tape. *See Lester v. State*, 692 So. 2d 755, 772 (Miss. 1997) ("[O]bjection on one ground at trial waives all other grounds for objection on appeal.").