

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00761 COA**

HAROLD DEARMAN

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	05/28/96
TRIAL JUDGE:	HON. MICHAEL RAY EUBANKS
COURT FROM WHICH APPEALED:	LAMAR COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	DAVID L. CAMPBELL THOMAS E. SCHWARTZ
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
DISTRICT ATTORNEY:	RICHARD L. DOUGLASS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I BURGLARY OF AN INHABITED DWELLING:CT II RAPE: CT I SENTENCED TO 15 YRS WITH 7 YRS SUSPENDED; CT II SENTENCED TO 42 YRS WITH 21 YRS SUSPENDED; CT I CONSECUTIVE TO CT II
DISPOSITION:	AFFIRMED -2/10/98
MOTION FOR REHEARING FILED:	2/24/98
CERTIORARI FILED:	4/21/1998
MANDATE ISSUED:	

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

PER CURIAM:

Harold Dearman was convicted of breaking into the home of an eighty-two year-old woman on the night of January 29, 1995 and forcibly raping her. On appeal, he argues that because the State failed

to disclose the substance of the examining physician's testimony, that the trial court erred in allowing the physician to give an opinion regarding sexual penetration of the victim and in failing to grant a mistrial for the discovery violation. Finding his argument without merit, we affirm.

Dearman initially complained that the State had failed to provide Dr. Chmelicek's name as a witness; however, Dearman then withdrew his objection, stating that he wanted to preserve his opportunity to call Dr. Chmelicek as a witness. Dearman then moved to exclude any testimony of Dr. Chmelicek on the issue of penetration, claiming that the doctor's testimony would be different from his written report. At that point, the district attorney assured the court that he did not intend to ask Dr. Chmelicek whether or not the victim had been penetrated. However, Dearman informed the court that he did intend to ask the doctor if there was evidence of penetration. The State then called Dr. Chmelicek to testify and asked him his opinion on the physical trauma the victim experienced. The doctor responded that there was severe trauma and attempted penetration. Dr. Chmelicek then volunteered his opinion that there probably was penetration. At that point, Dearman objected and asked for a mistrial, which the court denied.

The supreme court has held that "[r]ules of discovery are [designed] to prevent trial by ambush." *Nichols v. Tubb*, 609 So. 2d 377, 384 (Miss. 1992). However, if after a complete examination of the record, it becomes apparent that there is no miscarriage of justice, then if error is present, it is harmless. *Dennis v. State*, 555 So. 2d 679, 682 (Miss. 1989) (citations omitted). In the present case, it appears that Dr. Chmelicek's answer was spontaneous and unresponsive to the question being asked by the State. Nevertheless, Dr. Chmelicek's testimony was consistent with his written report and did not present an unfair surprise to Dearman at trial. Furthermore, Dearman had previously informed the trial court that he planned to ask Dr. Chmelicek whether or not there had been any penetration. Therefore, the doctor's opinion on penetration would have been elicited when Dearman questioned him. Under the circumstances, we can say with confidence that the trial court's refusal to grant Dearman's motion for a mistrial did not result in a miscarriage of justice.

THE JUDGMENT OF THE MARION COUNTY CIRCUIT COURT ON CHANGE OF VENUE FROM LAMAR COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I OF BURGLARY OF AN INHABITED DWELLING AND SENTENCE OF FIFTEEN (15) YEARS WITH SEVEN (7) YEARS SUSPENDED AND FINE OF \$10,000.00 AND RESTITUTION IN THE AMOUNT OF \$19,041.88, AND ON COUNT II OF RAPE AND SENTENCE OF FORTY-TWO (42) YEARS WITH TWENTY-ONE (21) YEARS SUSPENDED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. SENTENCE IMPOSED ON COUNT I SHALL RUN CONSECUTIVE TO SENTENCE IMPOSED ON COUNT II. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LAMAR COUNTY.

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