

IN THE COURT OF APPEALS 3/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01193 COA

**DARRYL TRAYLOR A/K/A DARYL TYROME TRAYLOR A/K/A DARRELL TYRONE
TRAYLOR**

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. BARRY W. FORD

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

C. EMANUEL SMITH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: SAMUEL REEDY, DENVIL CROWE

NATURE OF THE CASE: AGGRAVATED ASSAULT

**TRIAL COURT DISPOSITION: CONVICTED OF AGGRAVATED ASSAULT; CT I
SENTENCED TO 20 YRS IN THE MDOC; CT II SENTENCED TO 10 YRS IN THE MDOC;
SENTENCE ON CT II SHALL BE SUSPENDED**

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

THOMAS, P.J., FOR THE COURT:

Darrell Tyrome Traylor appeals his conviction of aggravated assault, raising the following issues as error:

I. WHETHER THE CIRCUIT COURT JUDGE COMMITTED REVERSIBLE ERROR WHEN HE DENIED TRAYLOR'S MOTION FOR CONTINUANCE?

II. WHETHER THE CIRCUIT COURT JUDGE COMMITTED REVERSIBLE ERROR WHEN HE DENIED TRAYLOR'S PROPOSED INSTRUCTIONS D-1 AND D-8?

III. WHETHER THE CIRCUIT COURT JUDGE COMMITTED REVERSIBLE ERROR WHEN HE DENIED TRAYLOR'S MOTION TO STRIKE THE ENTIRE VENIRE?

IV. WHETHER THE CIRCUIT COURT JUDGE COMMITTED REVERSIBLE ERROR WHEN HE DENIED TRAYLOR'S MOTION FOR NEW TRIAL?

Finding no error, we affirm.

FACTS

On September 11, 1993, Gerald Bernard Smith (Smith) was riding his motorcycle in Tupelo, Mississippi. Smith stopped his motorcycle. He got off and began to talk to Steven Sherrod (Sherrod). Darrell Tyrome Traylor (Traylor) walked behind Smith and hit him with a brick. The friends with Traylor beat Smith but Smith escaped. Smith went to the hospital and was treated for cuts and bruises. Smith went home at approximately 8:30 p.m.

At around 10:30 p.m. Smith took his sister to a club called Club 747. Smith drove around and went back to the club to pick her up at approximately 1:45 a.m. Traylor and Sherrod were present at the club and, along with another individual, surrounded Smith's car. Smith testified that Traylor and Sherrod had pistols. Smith called to the security guard and the guard jumped in front of Smith. A police car drove into the parking lot and the confrontation ended when Sherrod, Traylor, and the other individual ran away.

Smith, his sister, and three other people drove to the Waffle House. When they drove into the parking lot, Traylor and others were standing in the parking lot. Smith then drove to the Jr. Food Mart, across from the Waffle House, parked his car and walked to a friend's car in the Jr. Food Mart parking lot. According to Smith, Sherrod ran across the street and made threatening statements. Smith ran to his car and retrieved his pistol.

Traylor shot at Smith from the Ramada Inn parking lot. Smith shot back. Both continued firing until they had unloaded their pistols. Smith was shot once.

Mary Dixon (Dixon) was in the Jr. Food Mart parking lot that night. When the shooting started, she tried to run to her friend's car, but was hit with a bullet in the leg. Testimony accepted by the jury showed that Smith was shooting over Dixon's head throughout the entire fracas, and Traylor was shooting low, hence the bullet wound to Dixon's leg. Dixon's friends retrieved her from the ground and drove her to a hospital. The doctors removed a bullet from Dixon's leg.

Monday, Smith went to the police station and gave a statement to Office Ronny Thomas. Smith testified that he did not know Dixon was shot and told Officer Thomas that it was Traylor who was shooting at him that night.

ANALYSIS

I.

WHETHER THE CIRCUIT COURT JUDGE COMMITTED REVERSIBLE ERROR WHEN HE DENIED TRAYLOR'S MOTION FOR CONTINUANCE?

On the day of trial, the State tendered to Traylor's counsel as additional discovery notice the name of Bob Kitchen, the officer who was first to arrive at the scene, who would testify as a witness during the trial. Traylor's counsel objected to the discovery violation and made a motion for continuance. The trial judge ruled that this was a discovery violation; however, he let Traylor's counsel interview the witness before the trial started and limited Kitchen's testimony to only about what he found at the scene after the shooting. After interviewing the witness, Traylor's counsel did not renew his motion for continuance.

Under Rule 9.04(I), if a party has failed to comply with discovery, the trial court may :

order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deem just under the circumstances. If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed, and the defense objects to the introduction for that reason, the court shall act as follows: (1) Grant the defense a reasonable opportunity to interview the newly discovered witness . . . ; and (2) If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance . . . the court shall . . . exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence.

U.C.C.C.R. 9.04 (I).

Traylor did not renew his motion for continuance after interviewing the witness or otherwise object to the admission of this witness' testimony, and he has therefor abandoned his motion. The trial court had no notice the Traylor may have been unfairly suprised. There is no merit to this issue.

II.

**WHETHER THE CIRCUIT COURT JUDGE COMMITTED REVERSIBLE ERROR
WHEN HE DENIED TRAYLOR'S PROPOSED INSTRUCTIONS D-1 AND D-8?**

Traylor argues that it was reversible error to deny his proposed instructions D-1 and D-8. Instruction D-1 was Traylor's proposed circumstantial evidence instruction and D-8 was his proposed self-defense instruction. The lower court should give a circumstantial evidence instruction only when the prosecution can produce neither eyewitness nor a confession to the charged offense. *Nicolaou v. State*, 612 So. 2d 1080, 1085 (Miss. 1992). Traylor was being tried on charges of aggravated assault for shooting Gerald Smith and Mary Dixon. Gerald Smith testified that Traylor shot him. The trial judge found that there was sufficient testimony to refuse D-1. As there was direct evidence given by an eyewitness that Traylor was shooting in the direction of Gerald Smith, granting a circumstantial evidence instruction was not necessary for the lower court.

Next, the evidence did not support a self-defense instruction. Traylor testified that he did not have a gun that night. Traylor also testified that he did not shoot at Smith. Such facts do not support the giving of a self-defense instruction. This issue has no merit.

III.

**WHETHER THE CIRCUIT COURT JUDGE COMMITTED REVERSIBLE ERROR
WHEN HE DENIED TRAYLOR'S MOTION TO STRIKE THE ENTIRE VENIRE?**

Traylor argues that the trial court committed reversible error when it did not quash the entire jury panel after his motion.

Mississippi Code Annotated section 13-5-23 (Supp. 1996), states in pertinent part:

All qualified persons shall be liable to serve as jurors, unless excused by the court for one (1) of the following causes:

(a) When the juror is ill, or when on account of serious illness in the juror's family, the presence of the juror is required at home,

(b) When the juror's attendance would cause a serious financial loss to the juror or to the juror's business, or

(c) When the juror is under an emergency, fairly equivalent to those mentioned in the foregoing clauses (a) or (b).

An excuse of illness under clause (a) may be made to the clerk of court outside of open court by providing the clerk with either a certificate of a licensed physician or an affidavit of the juror, stating that the juror is ill or that there is a serious illness in the juror's family. The test of an excuse under clause (b) shall be whether, if the juror were incapacitated by illness or otherwise for a week, some other persons would be available or could reasonably be procured to carry on the business for the week, and the test of an excuse under clause (c) shall be such as to be the fair equivalent, under the circumstances of that prescribed under clause (b). In cases under clauses (b) and (c) the excuse must be made by the juror, in open court, under oath.

On the day of the trial, fifty-four jurors appeared in open court. At the announcement of court opening only forty-two jurors remained. Traylor argues that there were a number of jurors whom the lower court excused before the commencement of the court's inquiry into the jury panel and who did not meet the criteria in terms of the exemption for age under Mississippi Code Annotated 13-5-25(a). Traylor argues that the excusal of these jurors caused him to suffer substantial prejudice by being denied the opportunity for a jury panel drawn according to the statutory procedure.

Traylor acknowledges that the Mississippi Supreme Court has held that the selection of juries, under section 13-5-25, requires only substantial compliance with the statute. *See Pulliam v. State*, 515 So. 2d 945, 948 (Miss. 1987). However, Traylor argues that the Mississippi Legislature enacted the current version of section 13-5-23, in 1990, after the *Pulliam* decision and added mandatory language. He asks that we reconsider this previous holding and require that compliance with section 13-5-23 be mandatory.

Traylor's argument lacks merit because the decisions that interpreted this section not only held that substantial compliance is all that is required, the Mississippi Supreme Court has also held that the party alleging a violation of this section show prejudice. "[N]on-compliance with Section 13-5-23, Mississippi Code Annotated (Supp. 1985), on exemption of jurors does not warrant the quashing of the venire unless there is a showing of actual fraud, prejudice, or such a flagrant violation of duty as to amount to fraud." *Pulliam v. State*, 515 So. 2d 945, 948 (Miss. 1987) (citing *Parker v. State*, 201 Miss. 579, 586-87, 29 So. 2d 910 (1947)).

Traylor merely states that he was prejudiced in that when the number of excused jurors was so large that the entire jury selection scheme was totally defeated. Traylor does not suggest how he was prejudiced by the loss of the thirteen members of the venire without affidavits on file. He does not argue that losing the thirteen jurors caused a shortage of jurors. He does not argue that the lower court denied him the right to a jury trial. He merely states that because there are no affidavits filed he was prejudiced. Traylor has failed to meet his burden by showing how noncompliance with the statute prejudiced him nor demonstrate how the trial judge committed reversible error. This assignment of error is without merit.

IV.

WHETHER THE CIRCUIT COURT JUDGE COMMITTED REVERSIBLE ERROR WHEN HE DENIED TRAYLOR'S MOTION FOR NEW TRIAL?

A motion for a new trial challenges the weight of the evidence rather than its sufficiency. *Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989). New trial decisions rest in the sound discretion of the trial court, and the lower court should not grant the motion except to prevent an unconscionable injustice. *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994) (citations omitted); *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citation omitted). On review we accept as true all evidence favorable to the State, and we give the State the benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). This Court will reverse such a ruling only for an abuse of discretion. *McClain*, 625 So. 2d at 781.

Smith testified that Traylor pointed a pistol at him and shot until he emptied his pistol. There were many people standing around who were vulnerable to being shot as innocent bystanders. Smith also

testified that Traylor was the aggressor.

The jury's duty was to assess the credibility to the testimony of the various witnesses. Clearly, the jury's verdict was not against the overwhelming weight of the evidence, and the trial court properly denied the motion for new trial. This issue is without merit.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT OF CONVICTION OF TWO COUNTS OF AGGRAVATED ASSAULT; COUNT I, SENTENCED TO TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND MAKE RESTITUTION; COUNT II, SENTENCED TO TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS; SENTENCE ON COUNT II SUSPENDED PENDING GOOD BEHAVIOR; SENTENCE SHALL RUN CONSECUTIVE WITH COUNT I IS AFFIRMED. ALL COSTS ARE TAXED TO THE APPELLANT.

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