

**IN THE COURT OF APPEALS 4/8/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00635 COA**

**ALFRED NELSON AND OWEN NELSON**

**APPELLANTS**

**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. MICHAEL RAY EUBANKS**

**COURT FROM WHICH APPEALED: MARION COUNTY CIRCUIT COURT**

**ATTORNEYS FOR APPELLANTS:**

**MORRIS SWEAT, SR.**

**JAMES C. RHODEN**

**ATTORNEY FOR APPELLEE:**

**OFFICE OF THE ATTORNEY GENERAL**

**BY: CHARLES W. MARIS, JR.**

**DISTRICT ATTORNEY: RICHARD DOUGLASS**

**NATURE OF THE CASE: CRIMINAL-ARMED ROBBERY**

**TRIAL COURT DISPOSITION: BOTH DEFENDANTS GUILTY OF ARMED ROBBERY AND  
BOTH SENTENCED TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MDOC**

MOTION FOR REHEARING FILED:5/27/97

MANDATE ISSUED: 8/5/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

BRIDGES, C.J., FOR THE COURT:

Brothers Alfred and Owen Nelson were indicted, tried and convicted in the Marion County Circuit Court for the armed robbery of a Trustmark bank in Columbia, Mississippi, and each sentenced to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections. On appeal, they present the following issues:

I. WHETHER THE CIRCUIT COURT COMMITTED ERROR IN ALLOWING THE PROSECUTOR TO USE A MAP TO WHICH THE DEFENDANTS OBJECTED ON THE GROUNDS THAT (a) THE PROSECUTOR FAILED TO

PRODUCE SAID MAP IN RESPONSE TO TIMELY FILED MOTIONS FOR DISCOVERY; (b) SAID MAP WAS HEARSAY; (c) SAID MAP WAS NOT TO SCALE; (d) SAID MAP HAD GROSS ERRORS IN CONTENT THAT WERE HIGHLY RELEVANT AND PERTINENT IN THE ARREST AND IDENTIFICATION OF THE PROPER SUSPECTS IN THE MATTER.

II. THE VERDICT RENDERED BY THE JURY WAS INAPPROPRIATE IN THAT SAME WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND BASED ON BIAS AND PREJUDICE, CONSIDERING THAT (a) AFTER A THREE DAY TRIAL THE JURY CONSIDERED AND DELIBERATED THE CASE ONLY TEN MINUTES; (b) THE PROSECUTOR FAILED TO INTRODUCE EVIDENCE THAT PROVED BEYOND A REASONABLE DOUBT AND TO A MORAL CERTAINTY OF THE IDENTITY OF THE DEFENDANTS AS THE PERSON OR PERSONS WHO COMMITTED THE ARMED ROBBERY IN QUESTION; (c) THE PROSECUTOR FAILED TO INTRODUCE EVIDENCE WHICH PROVED BEYOND A REASONABLE DOUBT AND TO A MORAL CERTAINTY THAT A DEADLY WEAPON WAS EXHIBITED BY THE PERSON WHO COMMITTED THE ROBBERY IN QUESTION; (d) THE EVIDENCE PRODUCED BY THE PROSECUTOR SHOWED THAT ONLY ONE PERSON COMMITTED AN ARMED ROBBERY AND (e) THE EVIDENCE DID NOT SHOW WHICH DEFENDANT, IF ANY, WAS THE PERSON WHO COMMITTED THE ARMED ROBBERY.

III. WHETHER THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PEREMPTORY INSTRUCTIONS NUMBERED D-1A, D-1B, AND D-1C OVER THE OBJECTION OF THE DEFENDANTS, CONSIDERING THE EVIDENCE ADDUCED BY THE PROSECUTION AT TRIAL.

Finding no error, we affirm.

## FACTS

The north branch of the Trustmark National Bank in Columbia, Mississippi was robbed at gunpoint on the morning of April 20, 1993. Teller Tommye Patton (Patton) testified that she noticed a man enter the bank about ten o'clock that morning and go to a table in the middle of the bank containing information about various accounts. The man began to nervously fool with some advertising pamphlets before getting in the head teller's line. Patton did not have any customers in her line and invited the man over to her window. Patton stated that the robber was not wearing a mask and she could see him clearly. He was wearing a black jogging suit, a red shirt, a black cap with an "X" on it, and sunglasses. The man announced to Patton, "This is a robbery." He repeated his statement, and Patton turned to run. He warned her not to run and began going down the front of his pants. In the front waistband of his pants, Patton saw the handle of a gun. In fear for her life, she followed the man's instructions and gave him first hundred dollar bills, and then twenty dollar bills. The man fled the bank with approximately \$3,000.00 in cash. Patton identified Owen Nelson in a lineup as the man who robbed her in the bank. She again identified him at trial.

The manager of the branch, Sedgie Foxworth (Foxworth), noticed the severe look of distress on Patton's face and became aware that something was wrong. She told him that she had been robbed, and Foxworth immediately went after the suspect. Outside the bank, he saw that the suspect get into the passenger side of a black Thunderbird which was already moving. He noticed that the Thunderbird's license plate had a bluish tint to it, and could have possibly been a National Guard tag. He enlisted the aid of a friend with a vehicle and tried to follow the Thunderbird, but eventually lost sight of it.

Officer Joe Van Parkman (Van Parkman) of the Columbia Police Department was alerted and told of the bank robbery and to be on the lookout for two black males in a black car. As he proceeded south on the bypass, he passed two black males walking on the side of the road. One of them had a black "do rag" on his head. After investigating another couple (who, upon closer examination by Van Parkman, did not fit the description), Van Parkman went back to investigate the two black males. When he returned to the spot where he had seen them, they had vanished.

During the same period of time, Officer C.N. Brumfield (Brumfield) of the Columbia Police Department found an abandoned black Thunderbird parked in the driveway of Stamps Body Shop. The car's hood was still warm, as if it had recently been turned off. The owner of the body shop testified that he did not know to whom the car belonged, nor had he seen it parked there until after ten o'clock that morning. Brumfield learned that the car was titled to Alfred Nelson and Barbara Thompson. Foxworth identified the car as being the one he saw speeding off after the bank robbery. Alfred Nelson and his brother Owen were picked up in the field of a private hunting club off the Bypass. Alfred told Officer Brumfield that the black Thunderbird was his car, and because it had stopped running on Sunday, he parked it at Stamps Body Shop. The body shop owner disputed this. When given the keys to the car, the officers were able to crank the car immediately.

After the Nelson brothers were apprehended, a bloodhound was brought in to determine the suspects' trail. The dog started at the place of apprehension and picked up a trail leading all the way back to the black Thunderbird. Along the trail, the dog "alerted" on several items of clothing found on or near the side of the road. The items of clothing were: a black "do rag"; a black cap with an "X" on it; black sweatpants turned inside out; a pair of black pants with a belt; and cap with the words "Club Security" on it. Earlier, Bobby Reid, an investigator with the District Attorney's office, found a jacket with the sleeves turned inside out along the trail. The pocket of the black pants contained an envelope from Bill's Dollar Store, Alfred's employer. The pocket of the sweatpants contained a Trustmark advertising brochure. Alfred's former live-in girlfriend, Barbara Thompson (Thompson) testified that she did Alfred's laundry and was familiar with his clothes. She recognized the black pants and belt, the "do rag", and the cap with "Club Security" on it as being Alfred's. She also stated that she had seen Owen wearing the black sweat pants and jacket.

Chris Prine (Prine), a co-employee of Alfred Nelson's at Bill's Dollar Store, testified that the day before the robbery Alfred approached him and asked him if he owned a gun. Prine replied that he did, but that he did not lend his gun out. Alfred asked him if he knew where he could get a gun, and when Prine asked why he needed one, Alfred would not answer.

I. WHETHER THE CIRCUIT COURT COMMITTED ERROR IN ALLOWING THE PROSECUTOR TO USE A MAP TO WHICH THE DEFENDANTS OBJECTED ON THE GROUNDS THAT (a) THE PROSECUTOR FAILED TO PRODUCE SAID MAP IN RESPONSE TO TIMELY FILED MOTIONS FOR DISCOVERY; (b) SAID MAP WAS HEARSAY; (c) SAID MAP WAS NOT TO SCALE; (d) SAID MAP HAD GROSS ERRORS IN CONTENT THAT WERE HIGHLY RELEVANT AND PERTINENT IN THE ARREST AND IDENTIFICATION OF THE PROPER SUSPECTS IN THE MATTER.

Because the pertinent events in this crime took place not in one isolated place, but over a large area, the state utilized a map showing the various locations of important happenings. The map showed the location of the bank, the body shop where the Thunderbird was found, the place where the Nelsons were apprehended, the path from the car to the place of apprehension, and the individual places along the trail where the pieces of clothing were found. Each location on the map was testified to and its accuracy verified. Each witness was then available for extensive cross-examination. On appeal, the Nelsons complain that by admitting the map into evidence, the trial court erred on four grounds: (1) they were not noticed about the map until the morning of trial; (2) the map is hearsay; (3) the map is not to scale; and (4) the map contains inaccuracies.

The map was a piece of demonstrative evidence for the purpose of familiarizing the jury with the layout of the day's activities when the bank was robbed. The Nelsons complain that the state violated Rule 4.06 of the Uniform Criminal Rules of Circuit Court, therefore resulting in reversible error. The state first attempted to utilize the map when Sedgie Foxworth was on the stand in order to determine what route he took when he pursued the fleeing bank robbers. The Nelsons interposed a non-specific objection to which the Court asked:

BY THE COURT: Have you seen it?

BY MR. SWEAT: Not before 8:50 this morning.

BY MR. MCDONALD: Judge, it was here yesterday, and when they asked to see it, we brought it over here, and it was in your chambers all yesterday, and we brought it over here again this morning.

BY MR. RHODEN: We didn't know what it was.

BY THE COURT: Okay, I'll let them--hand--let them look at it again, then. (MAP SHOWN TO DEFENSE ATTORNEYS BY MR. MCDONALD)

After a brief hearing outside the presence of the jury, the trial judge allowed the state to mark the map for identification only, and would not allow the jury to see it until the last witness had testified to it, and it could be introduced into evidence with whatever amendments needed. The Nelsons did not make any further objections, nor did they ask for a continuance to have time to study the map. After the map had been testified to by all the witnesses involved with it, the state offered it into evidence. The Nelsons objected:

BY MR. SWEAT: We would object on the discovery grounds, your Honor. We didn't receive that map until this morning before Court.

BY MR. MCDONALD: The map was prepared day before yesterday, and we had it up here day before yesterday.

BY THE COURT: Were they advised that it was here?

BY MR. RHODEN: We weren't told where it was or anything.

BY MR. SONES: But y'all were advised about it.

BY MR. RHODEN: Right, we knew it existed.

BY MR. SONES: And all you had to do was look at it.

BY THE COURT: Okay. All right, I'm going to let it be entered. It's for demonstrative purposes only.

BY MR. SONES: For the record, they saw it before we started today, and they've had an opportunity to cross-examine each witness on the map prior to its introduction.

The record is clear that the Nelsons were aware of the existence of the map. The record is unclear that a discovery violation ever occurred. Even if a discovery violation was clear from the record, it "is harmless error 'unless it shall affirmatively appear, from the whole record, that such . . . has resulted in a miscarriage of justice.'" *Dennis v. State*, 555 So. 2d 679, 682 (Miss. 1989). In the Nelson's case, they have not indicated how they were prejudiced by the introduction of the map. They extensively cross-examined each witness about the map. Additionally, they have failed to prove that a discovery violation indeed took place. This issue has no merit.

As for the Nelson's argument that the map was hearsay, they do not support their contention with any authority or case law or any substantive argument. The same holds true for the Nelson's contention about the scale and correctness of the map. The Mississippi Supreme Court has addressed the lack of supporting authority and substantial argument:

Not only do the appellants fail to cite any authority to support the three propositions, but they also decline to devote any discussion or attention whatsoever to these alleged errors. Therefore, this Court is unable to assess these issues on the merits. The failure to cite any authority can be treated as a procedural bar, and this Court is under no obligation to consider the assignments.

*Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992).

II. THE VERDICT RENDERED BY THE JURY WAS INAPPROPRIATE IN THAT SAME WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND BASED ON BIAS AND PREJUDICE, CONSIDERING THAT (a) AFTER A THREE DAY TRIAL THE JURY CONSIDERED AND DELIBERATED THE CASE ONLY TEN MINUTES; (b) THE PROSECUTOR FAILED TO INTRODUCE EVIDENCE THAT PROVED BEYOND A REASONABLE DOUBT AND TO A MORAL CERTAINTY OF THE IDENTITY OF THE DEFENDANTS AS THE PERSON OR PERSONS WHO COMMITTED THE ARMED ROBBERY IN QUESTION; (c) THE PROSECUTOR FAILED TO INTRODUCE EVIDENCE WHICH PROVED BEYOND A REASONABLE DOUBT AND TO A MORAL CERTAINTY THAT A DEADLY WEAPON WAS EXHIBITED BY THE PERSON WHO COMMITTED THE ROBBERY IN QUESTION; (d) THE EVIDENCE PRODUCED BY THE PROSECUTOR SHOWED THAT ONLY ONE PERSON COMMITTED AN ARMED ROBBERY AND (e) THE EVIDENCE DID NOT SHOW WHICH DEFENDANT, IF ANY, WAS THE PERSON WHO COMMITTED THE ARMED ROBBERY.

The Nelsons claim that the verdict was against the overwhelming weight of the evidence. Our standard of review is dictated by *McClain*:

[T]he challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. . . . New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

. . . .

The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be

believed.

*McClain v. State*, 625 So. 2d 774, 780 (Miss. 1993). Again, the Nelsons fail to support their contentions with authority. Their argument is scant, at best. Nonetheless, the record indicates that there was more than enough evidence of both Alfred and Owen Nelson's participation in the bank robbery. There was eyewitness testimony that Owen Nelson entered the bank, displayed a deadly weapon to a teller and demanded cash. When Owen fled the building, he got into a Thunderbird owned by his brother, Alfred. The Thunderbird was abandoned, and a trail led from the car to the two Nelson brothers. All along the trail, clothes and belongings were found that were identified as the Nelsons'. There was overwhelming evidence of guilt, and the jury's verdict was not against the overwhelming weight of the evidence.

### III. WHETHER THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PEREMPTORY INSTRUCTIONS NUMBERED D-1A, D-1B, AND D-1C OVER THE OBJECTION OF THE DEFENDANTS, CONSIDERING THE EVIDENCE ADDUCED BY THE PROSECUTION AT TRIAL.

Here we examine the issue of sufficiency of the evidence. The Nelsons contend the trial court erred in overruling their motion for peremptory instruction at the close of the State's evidence. The standard of review for challenges to the sufficiency of the evidence is set forth in *McClain v. State*:

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. In appeals from an overruled motion for JNOV the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with McClain's guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

*McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). We review the ruling on the last occasion the challenge was made: the Nelsons' motion for judgment notwithstanding the verdict. There was eyewitness testimony that Owen Nelson, while armed with a gun, robbed the Trustmark bank. Other testimony revealed that Alfred Nelson drove the getaway car. Still other witnesses testified that a bloodhound picked up the brothers' scent and followed a trail from the point of apprehension to the abandoned getaway car. Moreover, clothes and belongings identified as the brothers' were found on

the trial. Owen Nelson was identified at a lineup as the bank robber. This credible evidence must be accepted as true, and is viewed in a light most favorable to the state. The evidence being sufficient, the trial court did not err in overruling the Nelsons' peremptory instructions and motion for judgment notwithstanding the verdict. This issue has no merit.

**THE JUDGMENT OF THE MARION COUNTY CIRCUIT COURT OF CONVICTIONS OF ALFRED NELSON AND OWEN NELSON OF ARMED ROBBERY AND SENTENCES TO SERVE A TERM OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE TAXED TO MARION COUNTY.**

**McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**