

IN THE COURT OF APPEALS 3/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00072 COA

MARLON K. JACKSON, SR.

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. JAMES THOMAS

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

RICHARD V. DYMOND

KELLY C. WALKER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: FELONY: FORGERY OF A PRESCRIPTION

**TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE FIVE YEARS IN
THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS**

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

KING, J., FOR THE COURT:

A jury convicted Jackson of obtaining possession of a Scheduled III controlled substance by forging a prescription, and the Circuit Court of Hancock County sentenced him to serve five years in the custody of the Mississippi Department of Corrections. Aggrieved, Jackson appeals and contends the following:

- I. The circuit court erred in denying his request for a continuance;
- II. The verdict of the jury should be reversed because of the effect that a particular juror had on other members of the jury panel;
- III. The court erred in denying his request for a circumstantial evidence instruction;
- IV. Counsel at trial rendered ineffective assistance.

We find no merit in the issues assigned by Jackson and therefore, affirm the judgment and sentence.

FACTS

The Jackson sustained a severe injury to his back in the course of his employment as a longshoreman. This injury was further aggravated during an automobile accident. The Jackson's injury required numerous surgeries. During one of the procedures, the surgeon inadvertently punctured the Jackson's colon thereby infecting the Defendant's spinal fluid with bacteria. As a result of the surgical error, the Defendant suffered occasional memory lapses and ear problems.

Jackson's physicians, Dr. David Jarrott and Dr. Ted Willis respectively, prescribed Hydrocodone and ear drops for the Jackson's back and ear problems. On or about July 16, 1992, the Jackson visited the Wal-Mart pharmacy and presented to the clerk a page containing prescriptions for Hydrocodone and ear drops written by Dr. Willis. Upon presentation of the page by the Jackson, the pharmacist became suspicious because Dr. Willis customarily wrote multiple prescriptions on separate pages. The pharmacist telephoned Dr. Willis' office and was informed that Dr. Willis had not prescribed Hydrocodone for the Jackson. Thereafter, the pharmacist telephoned the police. Upon arrival at the pharmacy, the police instructed the pharmacist to fill and allow the Jackson to purchase the prescriptions. After Jackson had purchased the prescriptions, the police arrested and charged him with prescription forgery.

At trial, the clerk testified that she did not witness Jackson forging the prescription, and the Jackson denied forging the prescription. Jackson contends that another individual is responsible for the forgery, and that he presented the prescription unaware that it was a forgery.

DID THE TRIAL COURT ERR IN DENYING JACKSON'S MOTION FOR A CONTINUANCE?

The appellant contends that the trial court erred in denying his motion for a continuance because the influences of prescription medication impaired his ability to assist counsel with his defense. The granting of a continuance is within the sound discretion of the trial judge. *Lambert v. State*, 654 So.2d 17, 22 (Miss. 1995); *Johnson v. State*, 631 So.2d 185,189 (Miss. 1994); *Morris v. State*, 840, 844 (Miss. 1991) (trial judge is vested with broad discretionary powers in granting or refusing a continuance). This Court will not reverse the denial of a continuance unless manifest injustice appears to have resulted from the denial of the continuance. *Lambert*, 631 So.2d at 22 (citation omitted). In the instant case, we are not convinced that manifest injustice arose by commencement of the trial.

The record indicates that because of hospital confinement, the defendant requested and was granted a continuance on May 10, 1993. The order of continuance re-scheduled the trial for July 12, 1993. Thereafter, Defendant moved the court for an order authorizing the withdrawal and substitution of trial counsel. The court granted the Appellant's motion and ordered that the cause set for July 12, 1993, be continued until the first Monday of September 1993.

On or about September 13, 1993, the Appellant filed an additional motion for continuance, which stated that the influence of prescription medications would inhibit his ability to assist counsel with his defense and that the condition of his lumbar impaired his ability to sit for extended periods of time. No hearing was ever had on the motion, and the Appellant did not request a ruling from the court on the motion. Indeed, on the day of the trial, Jackson announced to the court that he was ready to proceed.

The party filing a motion is obligated to follow up that action by bringing it to the attention of the trial judge and requesting a hearing on it. *Davenport v. State*, 662 So. 2d 629, 631 (Miss. 1995) (quoting *Lambert v. State*, 518 So. 2d 621, 623 (Miss. 1987)). Because Defendant failed to obtain a ruling on the motion, and because Jackson announced his readiness to proceed with trial, we are unable to find the court in error for permitting the trial to commence. This assignment of error lacks merit.

II.

SHOULD THE JURY'S VERDICT BE REVERSED BECAUSE A JUROR WAS BIASED?

In his brief, Jackson argues that the verdict should be reversed because a juror, Andrea McKinley, was biased and withheld this information during voir dire. In addition, Jackson alleges that juror McKinley told others that if she were selected to serve on the jury, she would vote to convict the Appellant because Appellant's son allegedly raped her neighbor's daughter. In support of his argument, Defendant cites *T.K. Stanley v. Cason*, 614 So. 2d 942 (Miss. 1992).

In *Cason*, the court held that a new trial was required because a juror withheld material information

during voir dire, which would have resulted in her being challenged by the appellants, and then relayed the information to other members of the jury during deliberations. Unlike the defendant in *Cason*, Jackson failed to file affidavits or introduce the testimony of live witnesses supporting his allegation that juror McKinley was biased and withheld this information during voir dire. The record is void of any evidence suggesting that juror McKinley was biased. Facts stated in the briefs of counsel are insufficient to support an assignment of error. All facts relied upon in briefs must appear in the record to be considered by this Court. *Gordon v. State*, 349 So. 2d 554, 555 (Miss. 1977). Because the record is void of evidence suggesting that juror McKinley was biased, we are unable to find merit in this assignment of error.

III.

DID THE TRIAL COURT ERR BY DENYING APPELLANT'S REQUESTS FOR CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS?

Jackson argues that the trial court should have granted his requests for instructions, which concerned circumstantial evidence because the state failed to prove by direct evidence: (1) That Jackson intended to cheat or defraud Dr. Willis; (2) That Jackson knowingly and intentionally acquired the drug; and (3) That Jackson was responsible for writing the forgery.

A circumstantial evidence instruction must be given where the prosecution is without a confession and wholly without eyewitnesses to the gravamen of the offense charged. *Woodward v. State*, 533 So. 2d 418, 431 (Miss. 1988) (citation omitted). However, an admission by a defendant on a significant element of the offense operates to render unnecessary the circumstantial evidence instruction. *Mack v. State*, 481 So. 2d 793, 795 (Miss. 1985).

The indictment charging Jackson contained the following language:

"did, with intent to cheat or defraud Dr. Ted Willis, knowingly and intentionally acquire or obtain possession of Hydrocodone, a Schedule III Controlled Substance by misrepresentation, fraud, forgery, deception or subterfuge, to wit: by passing a forged prescription to a practitioner, Debbie Treutel, at Wal-Mart Store, Inc., a Delaware corporation, d/b/a Wal-Mart Pharmacy

A significant element of the offense charged was the *passing* of the forged prescription. Nancy Vestell testified that she was a clerk at the pharmacy, and Jackson presented a forged prescription to her for filling. In addition, the Appellant admits to presenting the forged prescription to the Wal-Mart Pharmacy. Vestell's testimony is direct evidence relating to a significant element of the offense charged. Moreover, Jackson admits that he passed a prescription, which had been forged, to the pharmacy. Consistent with *Mack*, Defendant's admission obviates the necessity of giving the circumstantial evidence instruction. Therefore, we find no error by the trial court's denial of the requested circumstantial evidence instructions.

IV.

DID APPELLANT HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL AT
TRIAL?

Jackson contends that he was deprived of the effective assistance of counsel because trial counsel failed to interview and subpoena witnesses and because trial counsel had a conflict of interest, which greatly prejudiced his case. Specifically, Jackson suggests that the following were among the individuals who would have aided his defense, but were not subpoenaed or interviewed by trial counsel:

1. Wayne Bennett, who allegedly saw Vernon Copas pass a prescription for pain killers, which had been stolen from the Defendant;
2. Nolan Billiot, who allegedly saw Vernon Copas searching the glove compartment of Defendant's car when he was hospitalized;
3. Joe Varino, who allegedly removed five unfilled prescriptions from the glove compartment of Defendant's vehicle subsequent to his arrest;
4. A pharmacist from Albertson's in Slidell who had knowledge that someone other than the Defendant had passed prescriptions belonging to the Defendant at Albertson's pharmacy.

In addition, the Appellant alleges that trial counsel was representing Vernon Copas in a personal injury action and wanted to avoid compromising the representation; therefore, trial counsel failed to investigate information suggesting that Copas was responsible for forging the prescription.

Jackson's allegations are not supported by affidavits or the trial transcript. Absent record evidence supporting Jackson's contentions, we cannot conclude that trial counsel's performance was ineffective. This assignment of error lacks merit.

THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY OF CONVICTION OF PRESCRIPTION FORGERY AND SENTENCE OF 5 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

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

THOMAS, P.J., AND HERRING, J., NOT PARTICIPATING.