IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TAVARES ANTOINE FLAGGS — APPELLANT

VS. — NO. 2006-KA-1702

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

IN THE COURT OF APPEALS OF MISSISSIPPI

TAVARES ANTOINE FLAGGS **APPELLANT**

VERSUS **NO. 2006-KA-1702-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Tavares Antoine Flaggs was convicted in the Circuit Court of the First Judicial District of Hinds County on a charge of murder and was sentenced to a term of life imprisonment. (C.P.74) Aggrieved by the judgment rendered against him, Flaggs has perfected an appeal to this Court.

Substantive Facts

The victim in this case, Derrick Wright [hereinafter "Derrick] had recently undergone two surgeries: one on his back approximately two months before his death, and the other on his shoulder some six weeks after the back surgery. Derrick's brother Christopher Wright [hereinafter "Christopher"] last saw Derrick alive about a week before the homicide. Christopher "observed him [Derrick] moving gingerly, being really stiff, trying to be really careful that he didn't do something to reinjure his back or cause him problems." Derrick

"couldn't get up and down without moaning and groaning." After the shoulder surgery, Derrick wore a "sling on his arm ... basically all the time." (T.189-94)

After the Wright brothers' mother and cousin expressed concern that they had not seen or heard from Derrick for some time, Christopher and his wife Linda went to Derrick's apartment, where they were met by their friend James Archie. The door was locked, and they "could not get Derrick" to answer. Christopher entered the apartment through a window and immediately detected "a bad odor." After Mr. Archie took a few steps into the apartment, he "turned and pushed" Christopher out, telling him that he "didn't need to go any further at that point." (T.197-98)

Christopher, Linda and Mr. Archie waited outside for the police for about an hour before Christopher decided to reenter the apartment. He "walked around to ... the hall leading to the bathroom" and saw Derrick's body lying "flat on the floor with his body turned to the sides, hands raised sort of in the air ... " While they waited for the police, Christopher, Linda and Mr. Archie "made sure" not to "touch anything" in the apartment. (T.198-201)

Mr. Archie testified that he was a longtime friend of Derrick's, and that he last saw Derrick alive "on a Saturday" about a week before he died. Derrick was wearing a sling on his arm and appeared to be "in a lot of pain ... " (T.205-08) Mr. Archie corroborated Christopher's testimony about the discovery of the body and about the fact that they "didn't bother anything" in the apartment before the police arrived. (T.208-14)

Officer Robert Jackson of the Jackson Police Department was dispatched to the apartment, where smelled the foul odor and "saw the victim laying [sic] on his back with his hands up." Officer Jackson "walked through the rest of the house to make sure no one else

was inside the apartment." He observed "faint footsteps," appearing to be in blood, going "from the hallway into the bedroom ... into the walk-in closet." He also found a white tee shirt that appeared to be "soaked in blood." Thereafter, Officer Jackson "went back out to the door. And by this time Officer Hubbard had walked up." Officer Jackson "stayed at the front door to make sure nobody went in." When crime scene investigator Charles Taylor arrived, the scene was turned over to him. (T.217-23)

Detective Taylor testified that when he arrived at the victim's apartment, he "spoke with the detectives and found out what they possibly knew, and then ... began to process the scene." (T.228) He found "cast off stains and splatter ... concentrated ... in [an] area of the north wall," and what appeared to be footprints around the body of the victim. Following these footprints, Detective Taylor went into the walk-in closet in the bedroom to find "a white T-shirt with some suspected blood stains on it." He found a wallet, "opened and its contents turned out," on the coffee table in the living room. In the kitchen, Detective Taylor observed a bloodstained towel in the garbage can, a knife blade in the sink, two other knives and a yellow screwdriver on the counter. Seeing no blood on the screwdriver, and believing that it had no evidentiary value at all, he did not collect it. Fingerprints were lifted from one of the knives. (T.239-58)

Detective Amos Clinton testified that he was dispatched to the scene, where he was briefed by several other officers. Upon entering the apartment, Detective Amos went immediately to the kitchen, where he found "things that seemed to be out of place." For instance, there was "[a] package of meat in the middle of the floor," and the trash can contained "bloody rags." The blade of a knife, missing its handle, was "lying in the kitchen sink." The handle was discovered "underneath the victim." In the living room, Detective

Clinton found "several items" which seemed to have been "disturbed." In his words, "It appeared that some type of altercation had occurred." (T.270-73)

Latent fingerprints taken from the scene were submitted to the Mississippi Crime Lab. According to Detective Amos, "I actually got a confirmation, a hit. We call it a hit. It came back to an individual." (T.276-78)

The state's expert fingerprint examiner, Paul Wilkerson, Jr., testified that the prints in question matched those of Tavares Flaggs. Mr. Wilkerson's opinion was "with a hundred percent certainty." In other words, "The fingerprints on both of the cards, Exhibit 36 and Exhibit 37, were made by the same person to the exclusion of everyone else in the world." (T.348-52, 368-69)

The state called Dr. Steven Hayne, who had conducted the autopsy on the body of the victim. The defense stipulated to Dr. Hayne's qualifications as a forensic pathologist. (T.314) Dr. Hayne went on to testify that when he performed the autopsy on April 25, 2005, "[t]here was decomposition present indicative that he [the victim] had been dead for a period of time." The victim had sustained 15 stab wounds, one chop wound and three slash wounds. Some of these wounds indicated defensive posturing. The lethal wound had gone "into the neck producing a stab wound of the right common carotid artery and the right jugular vein," causing "massive blood loss." (T.317-20) Dr. Hayne concluded that this wound was the cause of death; the manner of death was homicide. (T.332)

Detective Clinton was recalled to testify that he arrested Flaggs and gave him the *Miranda* warnings. After freely and voluntarily waiving his rights, Flaggs gave a statement which was tape-recorded and admitted into evidence. (T.374-79) Flaggs stated that he and Derrick had been smoking crack cocaine when Derrick

began to behave strangely, "fumbling around," running back and forth from the windows to the door, accusing Flaggs of trying to harm him, and threatening Flaggs with a screwdriver. After Derrick "jumped" at him with the screwdriver, Flaggs grabbed him, took the tool away from him, and wrestled with him from the hall to the bathroom. Derrick ran into the kitchen and grabbed a butcher knife; Flaggs took another knife and tried to stab Derrick with it, but the knife was too flimsy. Flaggs threw that knife down. As they struggled in the hallway, Derrick cut Flaggs on the arm and bit him. Flaggs took the knife away. Afraid that Derrick was trying to hurt or kill him, Flaggs began stabbing him. As blood was gushing out of Derrick's neck, Flaggs left took off his white tee shirt, left it in the closet, put on one of Derrick's shirts, and departed.[1]

SUMMARY OF THE ARGUMENT

The defendant's first proposition is procedurally barred by his failure to raise the issue of the denial of his motion for continuance in his motion for new trial. Alternatively, the state contends the trial court did not abuse its discretion in denying the untimely motion. Moreover, the denial did not result in a manifest injustice.

The trial court did not abuse its discretion in granting the state's challenge for cause to venireman Willie Sutton. This panel member stated unequivocally that he would not be able to follow the proceedings in the case.

Nor did the trial court abuse its discretion in denying the defendant's challenge for cause to venireman Johnny Byrd. Mr. Byrd stated repeatedly that certain relationships and

---

[1]Detective Clinton observed no scar to indicate that Flaggs had been cut or bitten. (T.384-85)

acquaintances notwithstanding, he would decide the factual issues solely on the evidence presented.

The defense has not shown that the trial court abused its discretion in allowing Dr. Hayne to testify regarding blood spatter evidence. Nor has the defense shown that it was prejudiced by this testimony.

The trial court did not abuse its discretion in finding that the state had not violated the rules of discovery with respect to the disclosure of the victim's shoulder apparatus. When this issue arose, the state had just learned of the existence of the apparatus, and had promptly notified the defense of this fact.

PROPOSITION ONE:

THE DEFENDANT'S FIRST PROPOSITION IS PROCEDURALLY BARRED; IN THE ALTERNATIVE, THE STATE SUBMITS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE UNTIMELY MOTION FOR CONTINUANCE; NOR DID THE DENIAL RESULT N A MANIFEST INJUSTICE

On July 24, 2006, the day of trial, the defense moved for a continuance to allow it time to obtain the toxicology report of the victim's blood. When the court inquired, "And what would be the exculpatory nature of it?" defense counsel answered, "[I]t goes toward proof that my client is telling the truth that they were, in fact ... both using cocaine." (T.17-18) The prosecutor objected and stated his position as follows, in pertinent part:

> Our response to the substantive allegations is that the toxicology report can either exculpate or inculpate, quite frankly, the defendant in terms of whether it meshes with his statement or not. ...
>
> From a procedural aspect, we object to it on the basis that this is evidence that is a work product which was never produced up to this point even though an attempt was made by the State to do so.

It's been in the– reference to it has been in the file the entire time of the existence of this file, and the defendant has had access to that information and could have asked for these tests to be run at any time, and, certainly, we would have complied with that.

But no such request was made, so it's not a timely request at this time to continue the trial on that basis. I don't think any due diligence... would have allowed this situation to arise.

And so only as part of the trial strategy now has the defendant decided that he wants this information when it could have been requested at any time during the course of this case. ...

So the point if it's not a timely request, and it's not an appropriate request given the time that's elapsed since the time of arraignment when this could have been requested by the defendant at any time.

(T.19-20)

Further discussion revealed that the state had provided discovery to the defense in December 2005. (T.22)

The court denied the motion with reasoning set out in pertinent part below:

My decision is based solely on the applicable cases.

And the prosecution is obligated to make all evidence available to the defense, to advise the defendant of the existence of all evidence that's been collected. However, the prosecution is not obligated to test every item of evidence that is collected.

The defense has been on notice since December of last year that this blood was collected, and if there's not a toxicology report in the discovery, then that's a red flag that it just may not have been done.

So I'm not granting the continuance of the day that it's set for trial. I'm not even convinced of the exculpatory nature of it.

> Just the fact that a human being may have been on cocaine at the time does not automatically result in the conclusion or the absolute conclusion that they were necessarily the initial aggressor. And in a murder case that's what is probative is what evidence there is.
>
> Assuming the defense in this case is going to be self-defense, there's got to be some kind of link other than the mere fact that a person was on cocaine. So the motion for continuance will be overruled for those reasons.
>
> (T.23-24)

The defense now contends the court's ruling constitutes reversible error. The state counters first that the defendant's failure to raise this issue in his motion for new trial bars its consideration on appeal. (C.P.76-77) *Johnson v. State*, 926 So.2d 246, 251 (Miss.App.2005), citing *Crawford v. State*, 787 So.2d 1236, 1242 (Miss.2001). Accord, *Shelton v. State*, 853 So.2d 1171, 1182 (Miss.2003).

Solely in the alternative, the state contends trial court did not err in denying this untimely motion. See *Jim v. State*, 911 So.2d 658, 660 (Miss.App.2005). "[T]he decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be reversed unless the decision results in manifest injustice." *Ross v. State*, 954 So.2d 968, 1007 (Miss. 2007). As the trial court correctly observed, "the mere fact" that the victim was "on cocaine" was not necessarily exculpatory. It follows that the defendant cannot show that a manifest injustice resulted from the court's ruling.

For these reasons, the defendant's first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE'S CHALLENGE FOR CAUSE TO VENIREMAN WILLIE SUTTON

Flaggs argues additionally that the trial court committed reversible error in granting the state's challenge for cause to prospective juror Willie Sutton. In light of his responses during preliminary questioning and individual voir dire, Mr. Sutton was recalled and questioned as follows:

> [BY MR. ARTHUR:] Q. Mr. Sutton, I apologize for calling you back. Are you 26 years of age?
>
> A. Yes, sir.
>
> Q. Were you arrested on March 24, 1998 in Hinds County for the crime of arson?
>
> A. Yes.
>
> Q. Okay. Did you understand the question that Mr. Weinberg asked?
>
> A. No, sir.
>
> Q. You did not understand the question all four times?
>
> A. No, sir.
>
> Q. Okay. What part did you not understand?
>
> A. I didn't know what he was talking about.
>
> Q. You didn't know what the word arrest meant?
>
> A. Not really.
>
> **Q. Okay. Do you think you would be able to follow the proceedings in this case?**
>
> **A. No, sir.**

Q. You don't?

A. No.

Q. Okay. Can you assure us that you would be able to follow the proceedings in this case? Can you tell us certainly that you would be able to follow the proceedings in this case?

A. (Juror shakes head negatively.)

Q. Thank you.

(emphasis addded) (T.128-29)

Thereafter, the assistant district attorney announced that the state's first challenge for cause was "going to have to be Mr. Sutton... who says he can't even follow the proceedings in this case. We certainly are entitled to jurors who know what's going on." Taking issue with whether Mr. Sutton had responded untruthfully to the initial question of whether he had ever been arrested, the defense objected to the challenge. However, the state reiterated that the basis of its challenge was that "he very clearly said he is not able to follow the proceedings in this case, and we're entitled to jurors not so encumbered." The court agreed and granted the challenge for cause. (T.150-51)

"A juror who may be removed on a challenge for cause is one against whom a cause for challenge exists that would likely affect his competency or impartiality at trial." *Berry v. State*, 703 So.2d 269, 292 (Miss.1997). The determination of this issue is within the discretion of the trial court. *Pierre v. State,* 607 So. 2d 43, 49 (Miss.1992). "Because the trial judge hears and sees the individual jurors, he is in the better position to evaluate their responses and determine whether or not they should be excluded for cause." *Hervey v. State*, 764 So.2d 457, 460 (Miss.App.2000). The court's determination of this judicial question is entitled to great deference on appeal; it will not be set aside unless it is "clearly

wrong." *Id.*, quoting *Taylor v. State*, 672 So.2d 1246, 1264 (Miss.1996).

The record clearly supports the state's position and the court's acceptance of it. Mr. Sutton stated repeatedly and unequivocally that he would not be able to follow the proceedings in the case. He definitively demonstrated that he was not competent to serve as one of the fact finders in this trial. Accordingly, the trial court did not abuse its substantial discretion in granting the state's challenge for cause to this venireman. Flaggs' second proposition has no merit.

PROPOSITION THREE:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S CHALLENGE FOR CAUSE TO VENIREMAN JOHNNY BYRD

Flaggs argues next that the trial court committed reversible error in denying his challenge for cause to venireman Johnny Byrd. When the court asked the venire if anyone were personally acquainted with the district attorney, Mr. Byrd answered, "I've met her and spoke with her several times on some things that I do outside of my job." (T.42) The court questioned Mr. Byrd further as follows:

> Q. And what is your job?
>
> A. Business analyst for the city of Jackson, public safety, police, fire, court and 911.
>
> Q. Do you think that there is anything about that that would cause you to give the prosecutors an edge, so to speak, in the case?
>
> A. Not really.
>
> Q. You seemed to hesitate. Is there some question about that?
>
> A. I guess because I do the technical portion of the police department, I know most of the detectives, if not all of

them, because I train them in how to use computers and what not.

Q. All right. Well, do you think then you would give the prosecution side of the case a little more weight than you would the defense because of that?

A. I'm going to be fair and objective regardless of what the circumstances are.

(emphasis added) (T.42-43)

Shortly afterward, Mr. Byrd responded that he knew three of the state's witnesses. Again, he stated that this fact would not affect his determination of the factual issues. "Evidence is evidence. ... Facts are facts. I don't want to prejudge anyone because we're all human, and they may get it wrong." When the court inquired whether he would treat the testimony of these witnesses as if it had been given by strangers, Mr. Byrd answered, "Yes." (T.45)

During the state's voir dire, the prosecutor inquired, "Anyone have a concern about the reaction you might have to graphic pictures?" (T.83) Mr. Byrd answered that while performing his duties at his job he might "have inadvertently ... seen some of that." He elaborated, "It's just data to me." Furthermore, he had processed "just gobs" of such data and that he had made no attempt to remember the content of any of it. When asked, "[I]s there anything about all of that that would bother you as a juror?" he replied, "No." (T.84)

Mr. Byrd went on to state that although he worked closely with the police department, this fact would not affect his ability to be fair and impartial; that he would not be embarrassed if the jury returned a verdict of not guilty; and that his service would not affect any of his relationships with the officers in the department. (T.90).

The defense challenged Mr. Byrd for cause on the ground that his acquaintance with

police officers and state's witnesses would make it impossible for him to try the case fairly. (T.155-56) The prosecutor responded as follows:

> Your Honor, he didn't give any disqualifying answers. And the quotes that I wrote down were that he said he could be fair regardless. I know I can be fair. I have to be fair. I just don't know what more he could have said to indicate his willingness to be fair.
>
> (T.156)

The court then made this ruling:

> I can think of one. He kept saying the facts are the facts. Both of you are right. You're right, Mr. Labarre, and he kept coming up with things, but he always followed up every one of those by saying it wouldn't have any effect, that he would be fair, that the facts were the facts. So your challenge will be noted but denied.
>
> (T.156)

Again, the state submits that the trial court enjoys broad discretion to determine whether a prospective juror can be impartial. *Duncan v. State*, 939 So.2d 772, 778 (Miss.2006). The Supreme Court in *Duncan* elaborated that

> [t]o the extent that any juror, because of his relationship to one of the parties, his occupation, his past experience, or whatever, would normally lean in favor of one of the parties, or be biased against the other, or one's claim or the other's defense in the lawsuit, to this extent, of course, his ability to be fair and impartial is impaired. It should also be borne in mind that jurors take their oaths and responsibilities seriously, and when a prospective juror assures the court that, despite the circumstance that raises some question as to his qualification, this will not affect his verdict, this promise is entitled to considerable deference. *Harding v. Estate of Harding*, 185 So.2d 452, 456 (Miss.1966); *Howell v. State*, 107 Miss. 568, 573, 65 So. 641, 642 (1914).
>
> 939 So.2d at 779, quoting *Scott v. Ball*, 595 So.2d 848, 850 (Miss. 1992).

Incorporating by reference the authorities cited under Proposition Two of this brief, the state submits the trial court was in the best position to determine whether Mr. Byrd could try the case fairly, solely on the basis of the evidence, despite his acquaintances and relationships with officers of the Jackson Police Department, the district attorney, and Dr. Steven Hayne. No abuse of discretion has been shown in the court's denial of the challenge for cause. Flaggs' third proposition should be denied.

PROPOSITION FOUR:

THE DEFENSE HAS NOT SHOWN THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING DR. HAYNE TO TESTIFY REGARDING BLOOD SPATTER EVIDENCE; NOR HAS IT SHOWN THAT IT WAS PREJUDICED BY THIS TESTIMONY

The defendant argues additionally that because Dr. Hayne was not qualified as an expert in the field of analysis of blood spatter, the court should have excluded his testimony on this point. After the state called Dr. Hayne and asked a few preliminary questions, the defense offered to "stipulate to his qualifications as to a forensic pathologist." The court ruled, "It will be so stipulated." Defense counsel stated further, "I don't know if the State wants to go through all that, but I mean I don't have any objection to his qualifications as such." (T.313-14)

Dr. Hayne went on to testify that "[i]n forensic pathology the two main tasks are the determination of the cause of death and manner of death involving a human being." The process of making this determination included, among other things, analyzing "the circumstances of the crime scene investigation ... " (T.315-16)

Near the conclusion of its direct examination of Dr. Hayne, the state inquired whether the blood spatter on the wall near the body would have assisted him in forming an

opinion "about how he got to where he [the victim] was when he was in this position as shown here?" The defense objected on the ground that Dr. Hayne had no actual knowledge of the crime scene. The state responded, "That's why it was in the form of a hypothetical question, Your Honor." (T.337-38) The court overruled the objection, and Dr. Hayne continued to testify as follows:

> It would indicate two things, counselor. The blood spattering could be cast off from a weapon or it could be cast off from the decedent, and the decedent could be moving in a backward position away from the indicated area where the blood spatter was located. That would be a distinct possibility. Falling backwards. He could have possibly been dragged forward to an enclosed area, which would seem less likely since I don't see any footprints in the area in the photograph that you showed me.
>
> (T.338)

When the prosecutor inquired, "How much spatter would you expect to come from the body during–" the defense objected, stating, "I don't think he's been qualified as a blood spatter expert." This objection, too, was overruled, and Dr. Hayne answered the question. The state then tendered the witness. (T.338-39)

"Whether to admit expert testimony is a decision left to the sound discretion of the trial court." *Marbra v. State*, 904 So.2d 1169, 1176 (Miss.App.2004). Dr. Hayne had testified that the field of forensic pathology encompassed analysis of the crime scene, which would include blood spatter. Flaggs has cited no authority to the contrary. Accordingly, the state submits he has failed to show an abuse of discretion in the court's ruling.

Assuming but in no way conceding that Dr. Hayne was not properly qualified as a blood spatter expert, the state contends the defense has not begun to show that the

admission of this testimony requires reversal here. Indeed, the defendant has not even alleged how this testimony might have affected the outcome of his trial.

Incorporating by reference the evidence recounted under its Statement of Facts, the state asserts that the prosecution presented overwhelming evidence of Flaggs' guilt. This victim was stabbed 15 times in addition to being chopped and slashed. The defendant's claim of self-defense was discredited by the sheer number of the wounds, the victim's physical limitations, and the defendant's actions and inactions after the killing. Furthermore, the defense presented no evidence at trial.

In light of these facts, the state submits the outcome of the trial would been the same even if the opinion testimony on blood spatter patterns had been excluded. Again, we point out that the defendant has failed even to argue how he was prejudiced by this testimony. Accordingly, any arguable error in admitting it was harmless. *Rash v. State*, 840 So.2d 774, 777 (Miss.App.2003), citing *DeSalvo v. State*, 776 So.2d 704 (Miss.App.2000). The defendant's fourth proposition should be denied.

PROPOSITION FIVE:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE STATE HAD NOT VIOLATED THE RULES OF DISCOVERY WITH RESPECT TO THE DISCLOSURE OF THE SHOULDER APPARATUS

The defendant's final issue arose outside the presence of the jury, before the state had called its first witness. That issue implicates the following excerpt from the record:

> BY MR. LABARRE: Your Honor, if I could, I don't know what Mr. Weinberg has got, but he has brought in this morning some type of an apparatus that was used allegedly by Derrick Wright, who is the deceased in this case, that he says that the family brought to him. It was not recovered by the police in evidence. It is something that was used for like a post shoulder surgery.

This is the first time I've seen it. We talked about the fact, I believe we did yesterday, dealing with the surgery and that sort of thing, but I would object to his use of that item of evidence at this point.

Apparently, the family has had it all this time, and they've just now brought it to the district attorney's attention. He's just bringing it in today to me. I think he did mention to me yesterday, I believe, that they had something like that.

BY MR. WEINBERG: Counsel is correct, Your Honor. It was not brought to my attention until talking to Chris yesterday. He said that his brother had been wearing this and was wearing it the last time he saw him alive.

BY THE COURT: Which was when?

BY MR. WEINBERG: About a week– a little over a week before they found him dead, which would have been obviously a few days before the death, within three or four days of the death at the very most, I would think, given the state of decomposition at the time the body was found, although I don't claim any expertise in that area.

We do intend to have one or more of the State's witnesses identify that; that is, Christopher Wright and James Archie, the two lay witnesses who will testify first for the State, as being what the victim was wearing when they saw him last, and both of them apparently had seen him about the same time.

BY THE COURT: Do you have it with you?

BY MR. WEINBERG: Yes, sir. This apparatus here. We expect them to testify about the fact that the victim had something that made his arm up like this subsequent to the shoulder surgery that we had made Your Honor aware of yesterday, and this is merely supportive of that testimony.

BY THE COURT: All right.

BY MR. LABARRE: Your Honor, if I could, again, this goes back to whether or not the surgery actually occurred. I have no way of knowing that other than what they say.

All this surgery stuff came up about a week or so

before– well, about a week ago. And I don't know– like I say, I have no way that I can refute this evidence at this point at this late hour as well.

I don't know whether this was some type of prescribed apparatus by a doctor, what that doctor would say or did say about his abilities or whether he should wear this or for how long or even when the surgery occurred. I don't have any way to do something with that.

BY THE COURT: All right. The Court does find that it would be probative in corroborating the question you just posed, Mr. Labarre, and that is corroborating or corroborative evidence that some sort of medical treatment involving the shoulder did, in fact, occur. It's not remote in time or so remote that it would diminish its probative value.

For any evidence to be admissible it needs to be authenticated and needs to be relevant. I can see the relevance and assuming that it's properly authenticated. Absent some other objection, it would seem to the Court to be admissible.

As to just now finding out about it, it's my understanding that the State just learned of it itself, so I don't find that it's a discovery violation that would trigger a Box procedure. So your objection is noted and overruled.

(emphasis added) (T.178-81)

The defense now argues that this ruling requires reversal. The defendant's contention to the contrary, URCCCP 9.04 "only applies when there has been a discovery violation... Thus, the applicability of Rule 9.04(I) depends upon the presence of an actual discovery violation." *Coleman v. State*, 915 So.2d 468, 475 (Miss.App.2005). Here, it was uncontradicted that the prosecution had just learned of the existence of the apparatus the day before the hearing on this issue, and that it had promptly apprised the defense of this development. The trial court properly determined that no discovery violation had occurred.

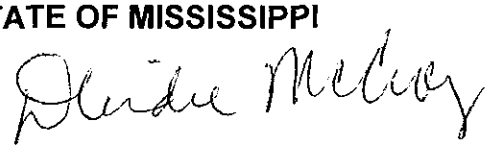
"This Court is limited in reversing a trial court's actions regarding discovery issues." *Moore v. State*, 822 So.2d 1100, 1007 (Miss.App.2002). It "may reverse a trial judge's ruling regarding discovery issues" only if it finds "an abuse of discretion." *Id.*, citing *Conley v. State*, 790 So.2d 773, 782(¶ 20) (Miss.2001). Under the circumstances presented here, the defense cannot establish that the court abused its broad discretion in finding that no discovery violation had occurred. *Moore*, 822 So.2d 1007. See also *Gray v. State*, 799 So.2d 53, 60 (Miss.2001). The defendant's final proposition should be rejected.

CONCLUSION

The state respectfully submits that the arguments presented by Flaggs have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI



BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Bobby Burt DeLaughter
Circuit Court Judge
P. O. Box 27
Raymond, MS 39154

Honorable Eleanor Faye Peterson
District Attorney
P. O. Box 22747
Jackson, MS 39225-2747

Donald W. Boykin, Esquire
Attorney At Law
515 Court Street
Jackson, MS 39201

This the 19th day of July, 2007.

DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680