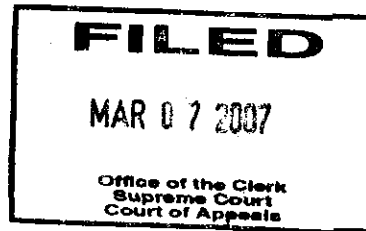


COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HANCE CHATAVIUS WEST

APPELLANT



V.

NO. 2006--KA-1353-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

BENJAMIN A. SUBER
MISSISSIPPI BAR NO. [REDACTED]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 NORTH LAMAR STREET, SUITE 210
JACKSON, MISSISSIPPI 39201
TELEPHONE: 601-576-4200

COUNSEL FOR APPELLANT

IN THE COURT OF APPEALS IN THE STATE OF MISSISSIPPI

HANCE CHATAVIUS WEST

APPELLANT

V.

NO.2006-KA-01353-COA

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

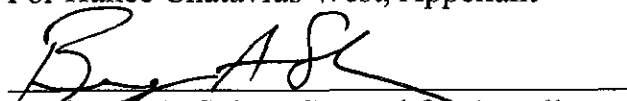
1. State of Mississippi
2. Hance Chatavius West
3. Joyce I. Chiles, District Attorney
4. Honorable W. Ashley Hines, Circuit Court Judge

This the 7th day of March, 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Hance Chatavius West, Appellant

By:


Benjamin A. Suber, Counsel for Appellant

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	2
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES	1
ISSUE NO. 1	
THE TRIAL COURT ERRED IN DENYING WEST’S MOTION FOR CONTINUANCE AFTER THE STATE FAILED TO COMPLY WITH DISCOVERY RULES BY NOT PROVIDING MEDICAL RECORDS REQUESTED UNTIL THE MORNING OF THE TRIAL.....	1
ISSUE NO. 2	
THE TRIAL COURT ERRED IN OVERRULING WEST’S OBJECTION TO EXCLUDE CHARACTER EVIDENCE OF PRIOR BAD ACTS IN VIOLATION OF RULES 403 AND 404 OF THE MISSISSIPPI RULES OF EVIDENCE.	1
STATEMENT OF THE CASE	2
FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

CASES

Robinson v. State, 508 So.2d at, 1067, 1070 (Miss. 1987)	5,6,10
Ballenger v. State, 667 So.2d 1242, 1256 (Miss. 1995)	11, 12
Bishop v. State, 761 So.2d 894 (Miss. Ct. App. 2000)	13
Box v. State, 437 So.2d 19 (Miss. 1983)	5, 6
Brown v. State, 890 So.2d 901, 912 (Miss. 2004)	13
Clemons v. State, 732 So.2d 883, 887 (Miss. 1999)	11
Darghty v. State, 530 So.2d 27, 33 (Miss. 1998)	7, 10, 11
Duplantis v. State, 644 So.2d 1235 (Miss. 1994)	5, 7, 10, 11
Inman v. State, 515 So.2d 1150, 1153 (Miss. 1987)	8
Jones v. State, 904 So.2d 149, 152 (Miss. 2005)	11
Lesley v. State, 606 So.2d 1084, 1080-90 (Miss. 1992)	12
McCullough v. State, 750 So.2d 1212, 1217 (Miss. 1999)	5-8, 10
Palmer v. State, 939 So.2d 792, 794 (Miss. 2006)	11-13
Powell v. State, 925 So.2d 878, 881 (Miss. Ct. App. 2005)	6, 9
Robinson v. State, 508 So.2d 1067, 1070 (Miss. 1987)	5, 6
Rose v. State, 556 So.2d 728, 731 (Miss. 1990)	12, 13
Simmons v. State, 813 So.2d 710, 716 (Miss. 2002)	13
Snelson v. State, 704 So.2d 452, 458 (Miss. 1997)	7, 10

IN THE COURT OF APPEALS IN THE STATE OF MISSISSIPPI

HANCE CHATAVIUS WEST

APPELLANT

V.

NO. 2006-KA-01353-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1

THE TRIAL COURT ERRED IN DENYING WEST'S MOTION FOR CONTINUANCE AFTER THE STATE FAILED TO COMPLY WITH DISCOVERY RULES BY NOT PROVIDING MEDICAL RECORDS REQUESTED UNTIL THE MORNING OF THE TRIAL.

ISSUE NO. 2

THE TRIAL COURT ERRED IN OVERRULING WEST'S OBJECTION TO EXCLUDE CHARACTER EVIDENCE OF PRIOR BAD ACTS IN VIOLATION OF RULES 403 AND 404 OF THE MISSISSIPPI RULES OF EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Washington County, Mississippi, and a judgment of conviction for the crimes of count I - aggravated assault and count II - felony failure to stop motor vehicle. The crime of count I - aggravated assault resulted in a term of twenty (20) years and the crime of count II - felony failure to stop motor vehicle resulted in a term of five (5) years to run consecutive with count I. A jury trial was held July 19-20, 2006, Honorable W. Ashley Hines, Circuit Judge, presiding. Hance Chatavius West is presently incarcerated with the Mississippi department of Corrections.

FACTS

According to the trial testimony, around noon of January 8, 2006, Laurence Clay [hereinafter Clay] went to the Kin Mar Grocery to get some beer for a football party that afternoon. [T. 82]. Clay was taken to the store by his sister Algea Clay [hereinafter Algea]. [T. 82]. Clay stated that when they pulled up to the store, he spotted a group of guys, along with Hance West [hereinafter West], outside of the store. [T. 83].

As Clay was walking to the store, he saw West bent over a car and when West noticed Clay he started walking toward Clay. *Id.* Clay said that he never made it into the store. As he was entering the store, West bumped him and words were said between them. [T. 84, 93]. Clay continued walking into the store when saw some guys out of the corner of his eyes break and run. [T. 93, 111]. Clay turned to see what was happening and he allegedly saw West coming out of the car with a gun. [T. 93].

He then was headed back to his sister's car and before he got to the car two shots were fired off. [T. 93-94]. Clay stated that he realized his nephew was in the car and told West not to shoot in the car because his nephew was in the car. [T. 93, 95, 112]. Clay then took off running across St. Charles street and ran across a church field next to the church and supposedly West was behind him shooting. [T. 96]. Clay said that there was about seven more shots and was hit with one of the last shots. [T. 96-97]. Clay kept running until he ran upon Sheriff Milton Gaston and his sister Algea at the streets of Edison and Walthall. [T. 98]. Algea took Clay to the hospital where he was treated. [T. 99].

Algea, who had two prior convictions for uttering forgery and felony worthless check, did have testimony that differed from her brother Clay. Algea testified that another person was in the vehicle with her, Clay, and her son. [T. 127]. Algea listed Michael Hamilton as another passenger in the car that Clay did not list as being in the car on that day. [T. 128]. Also, Algea stated that Clay went into the store to buy beer and when he came out of the store with the beer, he and West bumped each other. [T. 131, 140]. Algea said that Clay came back to the car and threw his bag containing beer in the window of the car and West started shooting. [T. 142].

After the alleged incident occurred, police officers were alerted to the incident. [T. 177]. Officer Galloway located the vehicle that was reported over the radio and was in pursuit. [T. 178-79]. The officer continued to state that once he encountered West, he attempted an initial traffic stop but West reportedly increased speed and failed to stop. [T. 179].

Officer Galloway stated that the chase lasted seven blocks and when the car chase ended, West bailed out of the vehicle and began running. [T. 183-84]. Once the officers apprehended West, Officer Galloway went back to where the vehicle was left and discovered that the vehicle he had been chasing was gone. [T. 186]. The vehicle was later located. [T. 188]. The gun that was used in the shooting was never discovered.

SUMMARY OF THE ARGUMENT

The trial court should have granted West a continuance of the trial. The State did not provide West with Clay's medical records until the day of trial, even though they were requested prior to that day. The State originally stated that they were not going to use the document but on the morning of trial they had the document. The trial court only allowed West a few minutes to view the document. This was a reversible error by the court in denying West his right to a fair trial. This Court should reverse the trial court and remand the case for a new trial.

The trial court should not have admitted prejudicial evidence. The State offered evidence of an alleged prior altercation. The evidence was offered by Clay, who did not see who hit him, was offered strictly to show that he acted in conformity therewith, not for motive. Even if it was offered to show motive, it still violated M. R. E. 403 because the evidence was more prejudicial than probative. This was reversible error by the court to admit this evidence and this Court should reverse the trial court and remand the case for a new trial.

ARGUMENT

ISSUE NO. 1

THE TRIAL COURT ERRED IN DENYING WEST'S MOTION FOR CONTINUANCE AFTER THE STATE FAILED TO COMPLY WITH DISCOVERY RULES BY NOT PROVIDING MEDICAL RECORDS REQUESTED UNTIL THE MORNING OF THE TRIAL.

The trial judge prevented West from having a fair trial. West requested the medical records of Clay prior to the day of trial. [T. 2]. The State did not provide the records until the day of trial. *Id.* The State initially declared that they did not intend to use the records and therefore they would not be introduced in evidence, however on the day of trial the State had the records. [T. 2-3]. West immediately asked for a motion for continuance for two reasons: one because it was the first setting; and two because they requested the medical records and did not acquire them. [T. 2]. The trial judge consequently denied the motion stating that the records were not “that crucial . . . to any aspect of the case.” [T. 3].

The State violated the discovery requirements by failing to disclose the medical records of Clay prior to the trial. *Box v. State*, 437 So.2d 19 (Miss. 1983) first set forth the procedure that trial courts should follow in settling discovery violations, however that procedure is now set forth in **Rule 9.04 of the Uniform Circuit and County Court Rules**. *McCullough v. State*, 750 So.2d 1212, 1217 (Miss. 1999), *Duplantis v. State*, 644 So.2d 1235 (Miss. 1994).

The Mississippi Supreme Court has held that “the essential purpose of Rule 9.04 is the elimination of trial by ambush and surprise.” *Robinson v. State*, 508 So.2d 1067, 1070

(Miss. 1987). See also **Rule 9.04** of the Uniform Circuit and County Court Rules. **Rule 9.04** states the following:

[T]he prosecution must disclose to each defendant or to defendant's attorney, and permit the defendant or defendant's attorney to inspect, copy, test, and photograph upon written request and without the necessity of court order the following which is in the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecution:

4. Any reports, statements, or opinions of experts, written, recorded or otherwise preserved, made in connection with the particular case and the substance of any oral statement made by any such expert.

U.R.C.C.C. § 9.04 (1997).

"Disclosure is the hallmark of fairness and the quest for justice that should be the goal of the criminal justice system." *Wooten v. State*, 811 So.2d 355, 365 (Miss. Ct. App. 2001); *Robinson*, 508 So.2d at 1070. When the state violates the rules of discovery, the trial court should abide by the rules set out in *Box*, which is now reflected in **Rule 9.04**. *McCullough*, 750 So.2d at 1217; *Box*, 437 So.2d at 23-24; *Powell v. State*, 925 So.2d 878, 881 (Miss. Ct. App. 2005). See also **U.R.C.C.P. § 9.04 (1997)**. The following procedure is set out in **Rule 9.04**:

If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, 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, to examine the newly produced documents, photographs or other evidence; and
2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a

continuance for a period or time reasonable necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

U.R.C.C.C. 9.04 I. The Mississippi Supreme Court held in *McCullough*, that failure to follow the *Box* guidelines¹ is prejudicial error, requiring reversal and remand. *McCullough*, 750 So.2d at 1217; *Snelson v. State*, 704 So.2d 452, 458 (Miss. 1997); *Duplantis*, 644 So.2d at 1250; *Darghty v. State*, 530 So.2d 27, 33 (Miss. 1998).

The State did not provide the medical records of Clay until the morning of trial. West requested a motion for continuance. The judge denied the motion and allowed a short recess for West to review over the records. The records are thick and can not possibly be reviewed in a short fifteen to twenty minute recess. The State originally proclaimed that they were not going to use the document at all but they changed their minds on the morning of trial. [T. 2, 246] **Rule 9.04** states that the defense should have a reasonable time to examine the newly produced documents, but West only had fifteen to twenty minutes to review the medical records. This short amount of time is not reasonable.

Testimony from Clay that he did not smoke marijuana could have been contradicted by an expert reviewing these records. Evidence was potentially available

¹*Box* guidelines are now reflected in Rule 9.04 of the Uniform Circuit and County Court Rules. *McCullough v. State*, 750 So.2d 1212, 1217 (Miss. 1999); *Duplantis v. State*, 644 So.2d 1235 (Miss. 1994).

in the medical records that Clay did smoke marijuana, but no expert was available to examine the records. The only witness available on the day of trial that knew anything about the medical records was the Director of Health Information Management and Compliance at the Delta Regional Medical Center. She was in no way an expert and could not analyze the records properly, she said so herself. [T. 247]. A motion for continuance would have allowed West a proper defense and a reasonable opportunity to review the records.

The Mississippi Supreme Court stated that there is no hard and fast rule determining how much time is a reasonable time for the defense to review the newly acquired evidence. *Inman v. State*, 515 So.2d 1150, 1153 (Miss. 1987); *Wooten*, 811 So.2d at 365. The medical records are nearly a half inch thick and a thorough review of the records could not be complete in such a short period of time.

The facts in the *McCullough* case are similar to the facts in this case. In *McCullough*, the prosecution informed McCullough that it intended to impeach his testimony using newly acquired evidence. The evidence was not provided to McCullough until the morning of trial. McCullough made an objection to the evidence and requested a continuance. The Mississippi Supreme Court held that “[s]ince the defense was not presented with the evidence until the morning of the trial, and McCullough requested a continuance which was denied, this Court finds prejudicial error.” *McCullough*, 750 So.2d at 1217. The Court in *McCullough* reversed and remanded the case. These facts are very related to the facts in the case

involving West. West did not receive the medical records until the morning of trial even though they were requested prior to trial.

The Mississippi Court of Appeals held in *Powell* that a violation of the discovery rules by the prosecution does not always result in a reversal of the conviction. *Powell*, 925 So.2d at 882. However, that case can be distinguished. In *Powell*, this court said that it was error for the State to use an impeaching document that was not disclosed to the defendant. *Id.* However, this court did not reverse because the defendant failed to bring the matter to the trial court's attention. *Id.* Powell filed a motion for a new trial after he was convicted stating that the court erred in allowing the State to impeach him because he was not given a copy of the impeaching document. *Id.* This court continued to say that if Powell would have brought this information up to the trial court during the trial, then the trial court would have been compelled to proceed in accordance with **Rule 9.04 I.** *Id.* In the case involving West, the trial court was immediately notified that the State had violated the discovery rules and asked for a continuance, which was subsequently denied by the court. [T. 2].

The Court in *Inman* stated that “[w]here that State is tardy in furnishing discovery which it was obligated to disclose and after an initial objection is made by the defense, the defendant is entitled upon a request to a continuance postponement of the proceeds reasonable under the circumstances.” *Id.* West did make a timely objection in asking for a continuance and the trial court only allowed a brief period

of time to review the medical records. The information in the medical records, if examined by a proper expert, would have prevented West from a trial by ambush and surprise. *Wooten v. State*, 811 So.2d at 365; *Robinson*, 508 So.2d at 1070. Without the opportunity to review the records, West was denied his right to a fair trial. See **U.R.C.C.P. § 9.04 (1997)**. Hence West was entitled to a continuance of the proceedings against him and failure to do so was prejudicial error which entitles a reversal and remand to the trial court. *McCullough*, 750 So.2d at 1217; *Snelson v. State*, 704 So.2d at 458; *Duplantis*, 644 So.2d at 1250; *Darghty v. State*, 530 So.2d at 33.

ISSUE NO. 2

THE TRIAL COURT ERRED IN OVERRULING WEST'S OBJECTION TO EXCLUDE CHARACTER EVIDENCE OF PRIOR BAD ACTS IN VIOLATION OF RULES 403 AND 404 OF THE MISSISSIPPI RULES OF EVIDENCE.

West objected to the introduction of a prior altercation which was ultimately denied by the trial court. The prior so-called altercation took place approximately a month prior to the alleged incident in this case. The exact day and time of the altercation is unknown. Clay had an on and off eight year relationship with West's sister, Odelia West. [T. 85, 114]. Clay and Odelia were having a "few words" at the C & G Lounge. [T. 87, 115]. Clay testified that he told Odelia that she had given him a sexually transmitted disease and Odelia was arguing with him, but he just ignored her at the lounge. [T. 87, 91]. Clay then claims that Odelia went and got West, who

was there also. *Id.* Clay claims that he and West had a few more words and when he went to leave he was hit from behind in the head with a beer bottle. [T. 92]. Clay admits that he did not see West hit him from behind. [T. 117]. Clay told the court that he had a cousin from Detroit, Michigan that said that West hit him in the head. *Id.* No evidence about getting hit in the head was presented to the court other than what Clay testified. The effect of the altercation was highly prejudicial to West.

“The standard of review regarding the admission or exclusion of evidence is abuse of discretion.” *Palmer v. State*, 939 So.2d 792, 794 (Miss. 2006); *Jones v. State*, 904 So.2d 149, 152 (Miss. 2005). “The admissibility of evidence rests within the discretion of the trial court, and reversal will be appropriate only when an abuse of discretion resulting in prejudice to the accused occurs.” *Palmer*, 939 So.2d at 794-95; *Clemons v. State*, 732 So.2d 883, 887 (Miss. 1999).

“The general rule is that evidence of a crime, other than the one for which the accused is being tried, is not admissible.” *Palmer*, 939 So.2d at 795; *Ballenger v. State*, 667 So.2d 1242, 1256 (Miss. 1995); *Duplantis v. State*, 644 So.2d 1235, 1246 (Miss. 1994). The exceptions to the general rule are contained in **M.R.E. 404(b)**:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

The Mississippi Supreme Court has held that the “admission of evidence of unrelated crimes for the purpose of showing the accused acted in conformity

therewith is reversible error, but admission for the above reasons is permissible.” *Palmer*, 939 So.2d at 795; *Ballenger*, 667 So.2d at 1256; *Duplantis*, 644 at 1247; *Rose v. State*, 556 So.2d 728, 731 (Miss. 1990).

In the case at hand, the trial judge allowed the evidence in stating that motive was the reason. [T. 90]. If everything is true as claimed by Clay then it would not be motive. Clay alleges that West hit him in the back of the head with a beer bottle. Motive is defined as “[s]omething especially willful desire that leads one to act.” *Black’s Law Dictionary* 461 (Bryan A. Garner ed., pocket 2nd ed., West 2001). Clay being knocked out would not lead one to act out against him again. Clay would have a motive to act against West, if the incident in the lounge was true, not the other way around. If West had beat him up and won the fight, he would have no reason to harm him again. This evidence was admitted strictly to show prejudice against West and to show that he acted in conformity therewith on a particular occasion, not to show motive.

“Even [if] the testimony passed muster under **Miss. R. Evid. 404(b)** it still must be admissible under the ultimate filter of **Miss. R. Evid. 403**, meaning that the risk of undue prejudice cannot substantially outweigh the probative value.” *Palmer*, 939 So.2d at 795; *Ballenger*, 667 So.2d at 1257; *Duplantis*, 664 So.2d at 1246-47, *Lesley v. State*, 606 So.2d 1084, 1080-90 (Miss. 1992). The Mississippi Supreme Court “has held that whenever **Miss. Rule Evid. 404(b)** evidence is offered and there is an objection which is overruled, the objection shall be deemed an invocation of the

right to a **Miss. R. Evid. 403** balancing analysis.” *Palmer*, 939 So.2d at 795; *Brown v. State*, 890 So.2d 901, 912 (Miss. 2004); *Bishop v. State*, 761 So.2d 894 (Miss. Ct. App. 2000). However, the trial court in this case did not conduct the balancing test. The court just stated that is was relevant to motive and thinks it is admissible. [T. 90]. The judge never mentioned Rule 403 and never mentioned anything about a balancing analysis.

“Rule 403 provides for the exclusion of evidence, even if relevant, where the risk of undue prejudice outweighs its probative value.” *Palmer*, 939 So.2d at 795; *Simmons v. State*, 813 So.2d 710, 716 (Miss. 2002). In *Rose*, the Supreme Court reversed and remanded the case because the evidence that was admitted was presented from three co-defendants, who all had a debatable reputation. *Rose*, 556 So.2d at 731. In the current case, the only evidence from the previous incident was from the victim, Clay, who did not see what had happened. He was knocked out and when he woke up, he was told from that West had hit him in the head. Clay could have named anybody as the person that hit him the head and no one was to dispute the evidence. Clay said a cousin from Michigan told him that West had hit him in the head. Clay’s cousin was not at trial to verify this and Clay’s sister said she did not know of any other family members that were there on the night of the alleged incident. This evidence being admitted was clearly more prejudicial than probative to West and should have been excluded.

The evidence that was admitted was offered to show that the accused acted in conformity therewith, not to show motive. The evidence of the details of the alleged prior altercation was provided by someone who had no personal knowledge of what happened, no evidence that the incident occurred, and was highly prejudicial. The incident was more prejudicial than probative and should be found to be reversible error. For this reason this Court should reverse and remand this case based on these facts.

CONCLUSION

Hance Chatavius West is entitled to have his convictions for aggravated assault and failure to stop motor vehicle convictions reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Hance Chatavius West, Appellant

BY: _____


BENJAMIN A. SUBER
MISSISSIPPI BAR NO. [REDACTED]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Hance West, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable W. Ashley Hines
Circuit Court Judge
Post Office Box 1315
Greenville, MS 38701-1315

Honorable Joyce I. Chiles
District Attorney
Post Office Box 426
Greenville, MS 38702-0426

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 7th day of March, 2007.


BENJAMIN A. SUBER
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200