

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREGORY SMITH A/K/A JR

APPELLANT

V.

FILED

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NO. 2006-KA-02149-SCT

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COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

**MISSISSIPPI OFFICE OF INDIGENT APPEALS
Benjamin A. Suber, MSB No [REDACTED]
301 N. Lamar St., Suite 210
Jackson, MS 39201
601- 576-4200**

Counsel for Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREGORY SMITH A/K/A JR

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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.

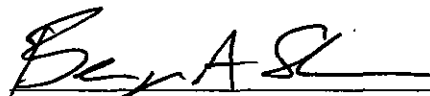
1. State of Mississippi
2. Gregory Smith
3. Bilbo Mitchell, District Attorney
4. Honorable Robert Walter Bailey, Circuit Court Judge

This the 15 day of June, 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Gregory Smith, 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

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1

GREGORY SMITH WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN CHARACTER EVIDENCE OF PRIOR BAD ACTS ABOUT PRIOR ARRESTS, CHARGES, BOND HEARINGS, OR OTHER UNRELATED CRIMES WERE ADMITTED OVER THE OBJECTIONS OF SMITH'S ATTORNEY.

ISSUE NO. 2

GREGORY SMITH WAS DENIED A FAIR TRIAL BECAUSE THE TRIAL COURT DID NOT SEVER THE TRIAL OF GREGORY SMITH AND LEWIS GREEN.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi, and a judgment of conviction for the crimes of Count I - robbery by use of a deadly weapon and Count II - capital murder. Smith was sentenced to life in the custody of the Department of Corrections following a jury trial on November 27-29, 2006, Honorable Robert Walter Bailey, presiding. Gregory Smith is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On the night of May 29, 2004, the Meridian Police Department responded to a possible homicide and robbery of Jeremy Scott [hereinafter Scott] at the home of Detrick Thomas in Meridian. [T. 86, 94, 102]. Scott's cause of death was from four gunshot wounds. [T. 130].

Approximately a year after the incident, Detective Andy Havard [hereinafter Harvard] was assigned the case involving Scott's death. [T. 102]. According to Harvard's testimony, after reading the case file he contacted Scott's mother and discovered that Scott had a cell phone that was not recovered at the crime scene. [T. 104]. Havard and Detective Boswell [hereinafter Boswell] issued a subpoena for Scott's phone records and then proceeded to call the people that were called from Scott's cell phone. [T. 105]. The information they gained from checking the phone records lead Havard and Boswell to question Ms. Williams (Anthony Evans' girlfriend), Greg Smith [hereinafter Smith] and Lewis Green [hereinafter Green]. [T. 106].

Upon hearsay and confrontational objections by defense counsels, the trial judge allowed Havard and Boswell to testify what both Smith and Green stated during their interviews. [T. 113-120, 230, 232, 235]. Upon further objection by defense counsel, the trial judge also admitted into evidence cd's and transcripts of the interviews. [T. 123-125].

According to the testimony of Havard and Boswell, Smith stated that he was at the house during the robbery and the homicide, but that he did not execute the shooting. [T. 113, 230-231]. Boswell continued to state, upon objection, that Smith stated Green was the one who actually did the shooting and when the shooting began Smith ran out the door. [T. 231, 247]. Smith told the officers that he watched the door and Anthony Evans held a gun on Scott while Green searched the house. [T. 232].

Harvard and Boswell testified still upon objection that Green told them that he, Anthony Evans, and Smith went to rob this guy. [T. 117-118, 235]. No report was made about Green's statements nor was a recording made of his statements. [T. 234]. Green said he had a long gun, Anthony Evans had a small gun, and Smith had a chrome gun. [T. 117, 120]. Green also told them that Smith was watching the door, Anthony was holding a gun on Scott, while he was searching the house. [T. 118-119, 235]. Green stated that Anthony Evans committed the shooting and not him. [119, 235].

SUMMARY OF THE ARGUMENT

The trial court improperly admitted into evidence transcripts and compact discs [hereinafter cds] of the appellant, Smith, talking to Detectives Havard and Boswell about a prior arrest and conviction. The evidence was directly before the jury in the form of a written

transcript and audio cds. This was unduly prejudicial. Also, the appellant, Smith, was denied a fair trial because his case was not severed from that of his co-defendant. Smith and his co-defendant were trying to exculpate themselves by shifting the blame to someone else. A separate trial was necessary to insure a fair determination of Smith's guilt or innocence without his co-defendant's hearsay and confrontational statements.

ARGUMENT

ISSUE NO. 1

GREGORY SMITH WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN CHARACTER EVIDENCE OF PRIOR BAD ACTS ABOUT PRIOR ARRESTS, CHARGES, BOND HEARINGS, OR OTHER UNRELATED CRIMES WERE ADMITTED OVER THE OBJECTIONS OF SMITH'S ATTORNEY.

There is no doubt that the transcripts and cd's containing Smith's interview with Havard and Boswell fall within area of bad acts as contemplated by M.R.E. 404(b).

Mississippi Rule of Evidence 404(b) provides:

Other Crimes, Wrongs, or Acts. 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.

A two-part analysis is conducted in order to determine whether to admit evidence under Rule 404(b). "The evidence offered must (1) be relevant to prove a material issue other than the defendants's character; and (2) the probative value of the evidence must outweigh the prejudicial effect." *Crawford v. State*, 754 So.2d 1211, 1220 (Miss. 2000).

This Court stated that in order to pass muster under Rule 404(b), evidence must "be

such that it satisfies some other evidentiary purpose beyond simply showing that [the defendant] is the sort of fellow likely to commit the crime charged.” *Watts v. State*, 635 So.2d 1364, 1368 (Miss. 1994) (quoting *Jenkins v. State*, 507 So.2d 89, 91 (Miss. 1987)). Even if the evidence does pass muster under Rule 404(b), it must still pass the test of Rule 403. *Watts*, 635 So.2d at 1368. The Court in *Jenkins* also stated:

To be sure, evidence admissible under Rule 404(b) is also subject to the prejudice test of Rule 403; that is, even though the Circuit court considered the evidence at issue under Rule 404(b), it was still required by Rule 403 to consider whether its probative value on the issues of motive, opportunity and intent was substantially outweighed by the danger of unfair prejudice. In this sense Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass. *Watts*, 635 So.2d at 1368 (Miss. 1994) (quoting *Jenkins*, 507 So.2d at 93 (Miss. 1987)).

In the present case, neither prong was met. Looking at the first prong, the evidence containing Smith talking to Havard and Boswell about his alleged prior arrests or charges was not relevant to this case at all. The evidence about Smith’s alleged prior arrest or charges go directly to diminish his character and nothing else. The prosecution never gave any reason why he wanted the cds and transcripts admitted. The trial court apparently found the evidence admissible, though it is not clear upon what basis. The judge just admitted the cds and transcript, upon objection by the defense, because he just did not know:

BY MR. ANGERO: Your Honor, we would like to have the cds marked into evidence as well as the transcripts.

BY MR. STEPHENSON: Judge, to which we object. He can’t get the transcript in. Under no law can he get them in. Secondly. We certainly object, once again, to any confrontational things, whenever Mr. Green’s name might - - I assume he is doing Smith right now. It’s clearly in violation of a proffer. It’s a hearsay violation. It can’t come in. He certainly can’t get the transcripts in under any circumstance.

BY MR. JORDAN: We would make the same objection. Your Honor.

BY THE COURT: All right. I am going to have the four cds marked into evidence, because I don't know - - I mean, the voice on the cds will speak for themselves. I don't know about the transcription. Let the four cds be marked as a composite exhibit, Exhibit 3.

[T. 123-24]. The evidence therefore could not possibly have been properly admitted pursuant to one of the exceptions enumerated in M.R.E. 404(b).

Furthermore, the probative value of the evidence did not substantially outweigh the prejudicial effect of the prior alleged crimes as required by M.R.E. 403. As previously indicated, the prior alleged arrests and charges had absolutely no probative value regarding any of the exceptions set forth in M.R.E. 404(b), so there is no possible way it could have substantially outweighed the prejudicial effect of the evidence.

In fact the trial court did not even perform the required on-the-record balancing test. M.R.E. 403 is "the ultimate filter through which all otherwise admissible evidence must pass." *Brooks v. State*, 903 So.2d 691, 699 (Miss. 2005). When an objection is offered, and the objection is overruled, the objection shall be deemed an invocation of the right to M.R.E. 403 balancing analysis by the trial court. *Smith v. State*, 656 So.2d 95, 100 (Miss. 1995), *overruled on other grounds*, *Brown v. State*, 890 So.2d 901, 912 (Miss. 2004). "We say for the future, however, that wherever 404(b) evidence is offered and there is an objection which is overruled, the objection shall be deemed an invocation of the right to the M.R.E balancing analysis. . . ." *Easter v. State*, 878 So.2d 10, 21 (Miss. 2004). "If prior bad acts evidence falls within a 404(b) exception, its prejudicial effect must still be weighed against its probative value to determine admissibility under Mississippi Rule of Evidence 403."

Underwood v. State, 708 So.2d 18, 32 (Miss. 1998). See also *Edlin v. State*, 533 So.2d 403 (Miss. 1998); *Swington v. State*, 742 So.2d 1106, 1112 (Miss. 1999).

Here, there was no on-the-record determination by the trial court to determine if the probative value of the alleged prior conduct evidence substantially outweighed the prejudicial harm. An objection was made to prevent the cds and transcripts from being admitted into evidence and the court had an obligation to conduct a balancing test on the record for any evidence pertaining to M.R.E. 403. [T. 123]. In *Brooks*, the Court reversed and remanded the case because the trial court failed to conduct the required on-the-record balancing test. “We hold that the trial court made no attempt on the record to determine whether the probative value of the evidence outweighed the prejudicial harm.” *Brooks*, 903 So.2d at 699.

This is exactly the case here. The trial court made no attempt to review the cds or the transcript and perform the required on-the-record balancing test. Furthermore, even if the trial court had conducted the required balancing test, the evidence about the alleged prior arrests and charges would not have survived the analysis.

Even if evidence is relevant, M.R.E. 403 provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,” *Watts*, 635 So.2d at 1368 (Miss. 1994). “Candor requires acknowledgment that, though technically relevant in the sense just mentioned, evidence of the character of that at issue here is not of great probative value.” *Id.* However, “[i]f presented to the jury, it has great prejudicial effect and it would arguably inject

collateral issues into the case. *Id.* See *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218-19, 93 L.Ed. 168, 173-74 (1948); *McCormick, The Law of Evidence*, Section 190. The evidence in the case at hand was given directly to the jury in the form of a written transcript and audio cds. The possibility arises that the jury improperly inferred that Smith “committed the crime for which he is on trial because he is a person who has displayed criminal propensities in the past.” *Watts*, 635 So.2d at 1368 (Miss. 1994) (quoting *Jenkins*, 507 So.2d at 92 (Miss 1987)); *McCormick, the Law of Evidence*.

Reversal of the trial court judgment, and a remand for a new trial is the appropriate remedy in this instance. *Id.* Therefore, the Appellant respectfully submits that the Court should reverse this case and remand to the Lauderdale County Circuit Court for a new trial with the exclusion of the evidence of prior arrests and charges.

ISSUE NO. 2

GREGORY SMITH WAS DENIED A FAIR TRIAL BECAUSE THE TRIAL COURT DID NOT SEVER THE TRIAL OF GREGORY SMITH AND LEWIS GREEN.

Gregory Smith’s trial attorney filed a motion to sever the trial of Smith and the co-defendants, Lewis Green and Anthony Evans, citing that they were jointly indicted with the crime of Armed Robbery Count 1 and Capital Murder Count 2. Further, defense counsel informed the trial court that evidence may be introduced by the prosecution or counsel for a co-defendant that may be inadmissible against Smith, but that may be admissible against the co-defendant. In addition, the defenses of defendants in this case are in conflict. The failure to sever Smith from co-defendant Green prevented him from a fair and impartial trial.

The trial judge effectively denied Smith's motion to sever the trial of Smith and his co-defendants the day of trial by submitting an order granting motion for severance of defendants and continuance of Anthony Evans; and ultimately, ordering Lewis Green and Gregory Smith's trial to proceed as scheduled [C.P. 28 and R.E.19].

"The granting or refusing of severance in cases not involving the death penalty shall be in the discretion of the trial judge." *Uniform Rule of Circuit and County Court*, 9.03. Therefore, the standard of review in the denial of a defendants motion to sever is an abuse of discretion. *Sanders v. State*, 942 So.2d 156 (2006), *King v. State*, 857 So.2d 702, 716 (Miss. 2003). "[T]he decision whether to grant a severance depends on whether the severance is necessary to promote a fair determination of the defendant's guilt or innocence." *Carter v. State*, 799 So.2d 40, 44 (Miss. 2001) (citing *Stevens v. State*, 717 So.2d 311, 312 (Miss. 1998)). "Where the testimony of one defendant did not tend to exculpate himself at the expense of another and there does not appear to be a conflict of interest among the co-defendants, severance is not required." *Id* at 45.

In determining whether a severance should be granted, one of two criteria must be met: (1) whether or not the testimony of one co-defendant tends to exculpate that defendant at the expense of the other defendant, and (2) whether the balance of the evidence introduced at trial tends to go more to the guilt of one defendant rather than the other. *Jenkins v. State*, 912 So.2d 165 (Miss. Ct. App. 2005); *Hawkins v. State* 538 So. 2d 1204, 1207 (Miss. 1989) (citing *Duckworth v. State*, 477 So.2d 935, 937 (Miss. 1985)). Absent a showing of prejudice, there are no grounds to hold that the trial court abused its discretion. *Id*.

Severance is also proper where the evidence points more to the guilt of one co-defendant than the other. *Payton v. State*, 785 So.2d 267, 269 (Miss. 1999).

In the case at hand, the trial court was given notice and was informed that each co-defendant's testimony would tend to exculpate one at the expense of the other. This fact was evident from statements given by each co-defendant to the detectives whereby each assessed blame on someone else.

Smith's statements, which were introduced into evidence upon objection, indicated that Green was the person that shot Scott. Green told the detectives that Evans shot Scott. Both co-defendants were trying to implicate someone else committed the shooting. Green also stated that Smith also had a gun. [T. 120]. Both co-defendants were attempting to shift the blame to another and to exculpate themselves.

A separate trial was necessary to insure a fair determination of Smith's guilt or innocence without Green's hearsay and confrontational statements. The trial court erred in not granting the severance of the defendants, and Smith is entitled to a new trial to promote a fair determination of his guilt or innocence.

CONCLUSION

Gregory Smith is entitled to have his robbery conviction reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Gregory Smith, Appellant

BY:


BENJAMIN A. SUBER
MISSISSIPPI BAR NO. 

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 Gregory Smith, 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 Robert W. Bailey
Circuit Court Judge
Post Office Box 1167
Meridian, MS 39302

Honorable E.J. (Bilbo) Mitchell
District Attorney, District 10
Post Office Box 5172
Meridian, MS 39302

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

This the 15 day of June, 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