

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL WAYNE WILLIAMS

APPELLANT

VS.

FILED

NO. 2007-KA-0135

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE DEFENDANT TO DISPLAY HIS PROMINENT GOLD TEETH.
- II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO PLAY AN AUDIO TAPE RECORDING OF THE 911 CALL FOR THE JURY.
- III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SEVER COUNT III FROM COUNTS I AND II, NOR DID IT ERR IN REFUSING TO ALLOW THE DEFENDANT TO STIPULATE TO A PRIOR CONVICTION OF ARMED ROBBERY.
- IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION IN LIMINE REGARDING HIS ARREST IN A STOLEN VEHICLE.

STATEMENT OF THE FACTS

Curtis Johnson stopped at the Shell Station on Hanging Moss Road to purchase some cigarettes and soda for his wife after completing his shift at Char. (Transcript p. 54 - 55). As he entered the store, the Defendant, Michael Wayne Williams [hereinafter "Williams"] opened the door for Mr. Johnson and engaged in small talk with him. (Transcript p. 56). Williams followed Mr.

Johnson around the store talking with him and eventually asked if he would like to see some DVDs. (Transcript p. 57 - 58). Mr. Johnson made his purchases and exited the store. (Transcript p. 58).

As Mr. Johnson walked out of the Shell Station, he noticed a friend outside and walked to his vehicle to speak with him. (Transcript p. 59). As Mr. Johnson walked away from his friend's vehicle, Williams waved his hand at him and again asked if he wanted to see the DVDs. (Transcript p. 59). Mr. Johnson walked over to the white Lexus SUV Williams was driving. (Transcript p. 60). Williams was seated in the driver's seat and another man was seated in the passenger seat of the Lexus. (Transcript p. 61 and 72). As, Mr. Johnson opened the back passenger door to look at the DVDs, Williams pointed a gun at him and told him to get in the vehicle. (Transcript p. 60). Afraid for his life, Mr. Johnson complied. (Transcript p. 61). Williams then said, "give it up, empty your pockets." (Transcript p. 62). Mr. Johnson gave Williams his cell phone and \$600 in cash. (Transcript p. 63 and 67).

During this time, Williams circled the parking lot and drove onto Hanging Moss Road and then onto Forrest Avenue. (Transcript p. 63 - 64). Mr. Johnson asked him where he was going and begged Williams to let him go, saying that Williams had "everything I got man, I don't have anything else." (Transcript p. 63). Eventually, Williams slowed the vehicle and unlocked the back door. (Transcript p. 64). Mr. Johnson jumped from the vehicle and ran back to the Shell station. (Transcript p. 64). Mr. Johnson then got into his vehicle and drove to his house where he asked his wife to call police. (Transcript p. 66- 67).

Several days later, Officer Donald McClusky of the Jackson Police Department saw a suspicious white Lexus and wrote down the tag number. (Transcript p.129). He was unable to run the tag at the time because the system was down. (Transcript p. 129). When he later ran the number, he found that the vehicle was stolen. (Transcript p. 129). A few days later Officer McClusky saw

the same stolen Lexus being driven by the same man he previously saw driving the vehicle. (Transcript p. 128). Officer McClusky arrested the driver who was later identified as Williams. The driver of the Lexus was Williams. Williams' photograph was placed in a photograph line up because the stolen Lexus matched the description of the vehicle used in the armed robbery and kidnaping of Mr. Johnson. When presented with this photograph lineup, Johnson was able to identify Williams as the person who robbed and kidnaped him. (Transcript p. 70 and 204).

Williams was tried and convicted of armed robbery, kidnaping, and possession of a firearm by a convicted felon. He was sentenced to serve twenty-five years for armed robbery, twenty years for kidnaping, and three years for possession of a firearm by a convicted felon.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in refusing to allow Williams to display his gold teeth to the jury. Williams was not denied his right to present a meaningful defense as he was able to present his theory of defense to the jury through the cross-examination of numerous witnesses and during closing arguments. Further, the trial court did not abuse its discretion with regard to the discovery violation as it followed the requirements of Uniform Rule of Circuit and County Court Practice 9.04(I).

The trial court acted within its discretion in refusing to sever the possession of a firearm by a convicted felon charge from the armed robbery and kidnaping charges. It was also within the trial court's discretion to refuse to allow Williams to stipulate to the prior conviction.

The trial court properly allowed testimony regarding the fact that Williams was arrested while driving a stolen vehicle. The information was necessary to present the jury with the complete story and to show the identity of the defendant.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE DEFENDANT TO DISPLAY HIS PROMINENT GOLD TEETH.

“The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal.” *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)). “When the trial court stays within the parameters of the Rules of Evidence, the decision to exclude or admit evidence will be afforded a high degree of deference.” *Id.*

Williams argues that he was denied the “right to mount a meaningful defense when [the court] refused to allow him to display prominent gold teeth displaying his initials.” (Appellant’s Brief p. 8). However, Williams was not denied his right to present a meaningful defense. Williams asserts in his brief that his theory of defense at trial “was that of misidentification; that another individual in a white Lexus sports utility vehicle robbed Curtis Johnson on January 31, 2005.” (Appellant’s Brief p. 8). Williams had ample opportunity to present his defense and did so. For example, Williams suggested to the jury that Mr. Johnson’s description of the assailant was flawed during his cross-examination of Officer Anthony Reginal. Officer Reginal testified during cross-examination that the only description given by the victim was that the assailant had a slim build and was wearing a blue sweater and blue jeans. (Transcript p. 118). Officer Reginal further testified on cross-examination that his report indicated that the assailant’s height, weight, and facial hair were unknown. (Transcript p. 118-119). He also testified that the victim did not mention that the assailant had gold teeth. (Transcript p. 119). Moreover, the victim was asked on cross-examination if he remembered whether the assailant had gold teeth. (Transcript p. 74). He responded, “Yes. I

know he has a couple of golds in his mouth in the front, but exactly where I don't know, but I do know it was some gold in his mouth though." (Transcript p. 74). He then testified that he told police about the gold teeth but admitted that information about the gold teeth was not in his statement. (Transcript p. 74). The matter was addressed again during cross-examination of Perry Tate. (Transcript p. 209). Also, defense counsel was able to fully address the theory of misidentification during closing. She argued as follows:

Now, [the victim] says he told the police the robber - - or gave him a description of the robber. Said he's got these gold teeth, but it's not in his written statement, and Officer Reginal denied hearing this. . . . Next, Officer Reginal came to testify. And you might remember one of the first things I asked him about was what kind of description Curtis Johnson was able to give him the day this happened. And he just kept saying, unknown, unknown, unknown, unknown height, unknown weight, unknown hair color. Couldn't give any information about a mustache or gold teeth, two things I specifically asked him about.

(Transcript p. 251-253). Further, there was much testimony regarding the victim's initial comments that he was forced into a tan Escalade and not a white Lexus. Accordingly, Williams was allowed a fair opportunity to develop his defense theory of misidentification and therefore was not prejudiced. *See Fuqua v. State*, 938 So.2d 277, 282-283 (Miss. Ct. App. 2006). As such, Williams' first issue is without merit.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO PLAY AN AUDIO TAPE RECORDING OF THE 911 CALL FOR THE JURY.

Williams argues that "the trial court abused its discretion when it permitted prosecutors to use an audio tape recording of a 911 call to police deliberately withheld from the defense until the midst of trial, in violation of court rules regarding discovery." (Appellant's Brief p. 10). This Court has previously stated that it is "limited in reversing a trial court's actions regarding discovery issues" and that it may only do so "if the trial court abused its discretion." *Byrom v. State*, 863 So.2d 836,

849 (Miss. 2003). In the case at hand, the trial court did not abuse its discretion.

On the morning of the second day of trial, the State announced that it intended to introduce the 911 tape into evidence and explained that they just received the tape the evening before while they were in trial. (Transcript p. 138 - 139). Defense counsel then objected stating that they first heard about the tape the day before, first listened to the tape earlier that morning, and that they did not have sufficient time to “deal with the tape.” (Transcript p. 138). The State responded that it contacted defense counsel the day before about the existence of the tape and informed them that they could come to the State’s office and listen to the tape at 8:30 a.m. that morning. (Transcript p. 139). After some brief discussion, defense counsel requested that they be given time to research the tape’s admissibility. (Transcript p. 141-142). The trial court agreed and inquired as to how much time defense counsel needed. (Transcript p. 149 and 152). Defense counsel responded that she needed half an hour and the court agreed. (Transcript p. 152).

After the recess, the court asked whether defense counsel had an opportunity to conduct research and counsel replied that she had a case to present to the court but that she needed additional time for research. (Transcript p. 155). After some discussion regarding the authenticity of the tape, the State asserted that it could authenticate the tape through the testimony of Lieutenant Riddley, Manager of Jackson Police Department Communications. (Transcript p. 157 and 194). Defense counsel objected arguing that the defense had never heard of this person and again asserted that there was a discovery violation. (Transcript p. 158). The State then noted that the witness would only testify as to the authenticity of the tape and that there would be no substantive testimony. (Transcript p. 159). The court agreed that the witness would not be testifying substantively and noted that the defense should not have been surprised by the fact that there was a 911 call. (Transcript p. 160 and 161).

The court was then informed that Lieutenant Riddley was in a staff meeting and the court stated that it did not want to wait for her. (Transcript p. 166). The State then offered Detective Tate of the Jackson Police Department as a witness to authenticate the tape. (Transcript p. 166). The court informed defense counsel that she would be given time to speak with Detective Tate. (Transcript p. 167). At this point, defense counsel inquired as to whether their request for additional time to do research was denied. (Transcript p. 168). The court asked how much time would be needed and defense counsel responded that she did not know. (Transcript p. 168). After additional discussion, defense counsel was given ten minutes to meet with Detective Tate. (Transcript p. 171 - 172). Defense counsel agreed that she had sufficient time to meet with Detective Tate. (Transcript p. 173). The then court held that there was a discovery violation but that there was no unfair prejudice to the defendant. (Transcript p. 173 - 174). The court further noted that defense counsel was given an opportunity to meet with Detective Tate, to hear the tape at 8:30 a.m., and knew about the existence of the tape the day before. (Transcript p. 174).

After Detective Tate testified outside the presence of the jury, the court held that, out of an abundance of caution, it believed that there was still a question of authenticity. (Transcript p. 189). The State then notified the court that Lieutenant Riddley was outside and ready to testify. (Transcript p. 190). Defense counsel was allowed time to meet with Lieutenant Riddley and agreed that she had sufficient time to meet with her. (Transcript p. 191). Lieutenant Riddley then testified regarding the authenticity of the tape and the tape was admitted into evidence.

The court clearly followed the requirements of Uniform Rule of Circuit and County Court Practice 9.04(I), which states in pertinent part as follows:

* * *

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 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 of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

* * *

Defense counsel was informed about the existence of the tape on the evening prior to its admission, was allowed to listen to the tape the following morning before appearing in court, was allowed sufficient time to interview the witnesses called to authenticate the tape, and was also allowed the requested half an hour to do legal research. The court then, acting within its discretion, chose to allow the tape to be admitted.

Furthermore, even if the court was not acting within its discretion, Mississippi case law provides that an alleged discovery violation “is considered harmless error *unless* it affirmatively appears from the entire record that the violation caused a miscarriage of justice.” *Prewitt v. State*, 755 So.2d 537, 541 (Miss. Ct. App. 1999) (citing *Buckhalter v. State*, 480 So.2d 1128 (Miss. 1985)) (*Emphasis added*). There was certainly no miscarriage of justice in this case as there was sufficient evidence of Williams guilt regardless of whether the 911 tape was admitted into evidence. As such, Williams’ second issue is without merit.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SEVER COUNT III FROM COUNTS I AND II, NOR DID IT ERR IN REFUSING TO ALLOW THE DEFENDANT TO STIPULATE TO A PRIOR CONVICTION OF ARMED ROBBERY.

Williams asserts that the “trial court abused its discretion when it denied the motion of Mr. Williams to sever counts against him. . .” (Appellant’s Brief p. 12). “A trial court’s denial of a motion to sever multiple counts in a single indictment is reviewed for abuse of discretion.” *Dimaio*

v. State, 951 So.2d 581, 585 (Miss. Ct. App. 2006) (citing *Rushing v. State*, 911 So.2d 526, 532 (Miss. 2005)). The Mississippi Court of Appeals addressed a similar issue in *Wright v. State*, a case in which the defendant sought to have the charge of armed robbery severed from the charge of felony in possession of a firearm. 797 So.2d 1028, 1029 - 1030 (Miss. Ct. App. 2001). After quoting Mississippi Code Annotated §99-7-2, the Court held:

We find no authority limiting the applicability of this portion of the multi-count indictment statute simply because some element of the necessary proof as to one charge would be inadmissible on the other charge were it being tried separately. It is, in fact, difficult to envision a trial of multiple charges where some evidence relevant to one charge would not be subject to a Rule 404(b) challenge as to the other charge, no matter how closely related in time and circumstances the two alleged crimes might be. It is often the case that evidence is admissible for a limited purpose and inadmissible for some other purpose. In that case, the answer is not to exclude the evidence altogether, but to admit it subject to the jury being instructed as to the limited purpose for which the information is admitted.

Id. (*emphasis added*). In the case at hand, there is no dispute that Williams' possession of the gun is interwoven in his kidnaping and robbing the victim as the gun was used to kidnap and rob the victim. (Transcript p. 4). Furthermore, the judge gave a limiting instruction just as the judge in *Wright v. State*. Thus, the court acted within its discretion in refusing to sever the counts as requested by Williams.

Williams further argues that the trial court erred in refusing to allow Williams to stipulate to a prior conviction with regard to the charge of possession of a firearm by a convicted felon. (Appellant's Brief p. 12). Again, the trial court acted within its discretion in denying Williams his request to stipulate to the prior conviction. See *Carter v. State*, 941 So.2d 846, 854 (Miss. Ct. App. 2006) and *Evans v. State*, 802 So.2d 137, 140 (Miss. Ct. App. 2001) (both holding that "[w]hen a prior conviction is an element of a crime, the State is authorized to introduce evidence of the conviction and is not limited in its method of proof"). Moreover, as noted above, the trial judge gave

a limiting instruction charging the jury to consider the testimony regarding Williams' previous felony conviction with regard only to the charge of possession of a firearm by a convicted felon and not as evidence of guilt as to the charges of armed robbery and kidnaping. (Transcript p. 222). "Jurors are presumed to follow the instructions of the court." *Long v. State*, 934 So.2d 313, 316 (Miss. Ct. App. 2006) (citing *Grayson v. State*, 879 So.2d 1008, 1020 (Miss.2004)). Thus, Williams' third issue is without merit.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION IN LIMINE REGARDING HIS ARREST IN A STOLEN VEHICLE.

Lastly, Williams argues that the "trial court abused its discretion when it denied the Motion in Limine of Mr. Williams to refer to his arrest in a stolen vehicle, in violation of the Mississippi Rules of Evidence." (Appellant's Brief p. 13). "It is well-settled law that [the reviewing court] will not overturn a trial judge's admission of evidence unless the admission amounts to an abuse of discretion." *Townsend v. State*, 933 So.2d 986, 991 (Miss. Ct. App. 2005). Additionally, "evidentiary rulings are affirmed unless they affect a substantial right of the complaining party." *Id.*

Williams argues that references to his being arrested while in a stolen vehicle violated Mississippi Rule of Evidence 404(b). While this Court has held that "the admission of evidence of unrelated crimes for the purpose of showing the accused acted in conformity therewith to be reversible error," this Court has also held that:

where another crime is 'so interrelated to the charged crime as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences,' proof of the other crime or act is admissible. Proof of another crime is also admissible where necessary to identify the defendant, to prove motive, or to prove scienter. Evidence of other crimes or bad acts is also admissible in order to tell the complete story so as not to confuse the jury. [T]he State has a 'legitimate interest in telling a rational and coherent story of what happened....' Where substantially necessary to present to the jury 'the complete story of the crime' evidence or testimony may be given even though it may reveal or suggest other crimes. (citations

omitted).

Ballenger v. State, 667 So.2d 1242, 1256-1257 (Miss. 1995) (*emphasis added*). In the case at hand, information regarding Williams' arrest in a stolen vehicle was not presented to the jury to show that he acted in conformity therewith, but was instead presented to explain to the jury why the defendant was arrested and how his picture came to be in the photograph lineup presented to Mr. Johnson. (Transcript p. 12). The information was also presented to establish the identity of the defendant. (Transcript p. 11). Thus, the evidence clearly falls within the exceptions allowed by the Rule and Mississippi case law. As such, Williams' fourth issue is without merit.

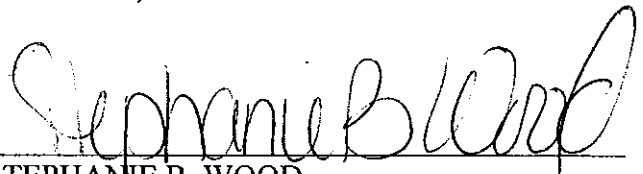
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of the defendant as the trial court acted within its discretion with regard to the admission of evidence and with regard to the discovery violation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

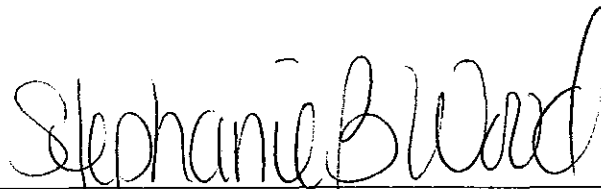
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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