IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHAWN O'NEAL — APPELLANT

V. — NO. 2007-KA-00788-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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SHAWN O'NEAL **APPELLANT**

V. **NO. 2007-KA-00788-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. Shawn O'Neal, Appellant
3. Honorable Haldon J. Kittrell, District Attorney
4. Honorable R.I. Prichard, III, Circuit Court Judge

This the 12th day of September, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE CASE

During the November Term, 2004 grand jury, Shawn Gavin O'Neal was indicted for wilfully, unlawfully, feloniously, purposely and knowingly causing serious bodily injury to Mary Landry, a human being, recklessly, under circumstances manifesting extreme indifference to the value of human life, by kicking her causing serious bodily injury to her, fracturing her femur with his steel-toed boot, requiring her to undergo surgery, while in a family relationship in that Mr. O'Neal and Ms. Landry lived together contrary to and in violation of Section of 97-3-7(4) of the Mississippi Code of 1972, as amended; against the peace and dignity of the State of Mississippi. After a jury trial, Mr. O'Neal was found guilty and sentenced to serve twenty years (20) in the Mississippi Department of Corrections with twelve (12) years suspended and five (5) years post release supervision.

STATEMENT OF FACTS

Shawn O'Neal and Mary Landry lived together for several years. On August 20, 2004, they were having a cook out with Ms. Landry's son, Nicholas, her nephew and niece and their child. All of the adults were drinking beer and after the cook out ended everybody left. Nicholas was the last to leave to go tubing with friends.

Ms. Landry testified that Mr. O' Neal was in a rush for everybody to leave. She said he was aggravated and annoyed and she felt uncomfortable with him and decided to leave because they were alone. She says she got into her car and cranked it up and pulled it to the back of the garage. Mr. O' Neal came around the hedges and got inside the car and turned the motor off and took the keys out of the ignition. Then he grabbed her hair and pulled her out of the car. He told her to get her *** in the house. She was afraid and didn't want to go inside so he leaned back and kicked her as hard

as he could with his steel-toed boots. T. 72. She remembers him stomping her a couple of other times in her back and her side and then she passed out. T. 74 and 89. She further stated that she felt threatened because she could feel his moods and had been attacked by him in the past. Specifically, she testified that on July 23, 2004, they were sitting in the car and Mr. O' Neal put his hands around her neck and told her he was going to kill her one day. He stomped and broke her leg approximately twenty two days later. T. 92.

Investigator James Murray, with the Lamar County Sherif's Department testified that when he arrived on the scene the paramedics were treating Ms. Landry. Shawn O' Neal was the one who called the paramedics. Investigator Murray stated that Mr. O' Neal's version was that he noticed Ms. Landry getting in her car to leave. She had been drinking heavily and he went to get the keys. The dog got in the way and he went to kick the dog and kicked her. They both fell and at that point he noticed her leg was twisted and he called 911. T. 55-56. On cross-examination he stated that Mr. O' Neal was wearing a pair of brown sandals when he booked him in. T. 56-57. He was with him the entire time after he arrived at the residence until he transported him to the jail and he never changed clothing. T. 60.

Nicholas Landry testified that Mr. O' Neal called him shortly after he left to go tubing and told him the dog tripped his mother. As a result, her leg was broken and she was unconscious. T. 115. Once he arrived home, Mr. O' Neal told him his mother was trying to get out of the door and the dog was in her way. He went to kick the dog to get him out of the way and missed the dog and kicked his mother. T. 115. Nicholas also testified that Mr. O' Neal had on combat boots during the cook-out and when he arrived home to see about his mother he had on sandals. T. 113 and 116. He further testified that the day his mother's leg was broken, he found a necklace that he gave his mother for Mother's Day in the garage ripped in 3 or 4 places. The necklace had a big locket of hair

stuck to it. T. 116. He gave a statement to the police on September 8, 2004, however he failed to mention the necklace. He gave the necklace to the District Attorney's Office the Friday before the trial began on March 27, 2007.

Dr. Rocco Barbieri an orthopedic surgeon, was in the emergency room at Wesley Hospital when Ms. Landry arrived. He testified that the fracture of Ms. Landry's left femur in his experience was the result of an high energy force like a fall from a height or usually a car wreck. It's not something you see everyday from a simple fall. He performed the surgery on Ms. Landry and placed a metal rod down the left leg to hold the bone stable until it healed. This type of injury usually takes sixteen weeks to heal. T. 137.

Mr. O' Neal's version of how Ms. Landry's left femur was broken was that she had been drinking heavily and was polluted. He saw her in her car leaning over the steering wheel with the car started. He got in the car and pulled her back and grabbed the key and pulled it out of the ignition. He pulled her out of the car and placed her arm around his neck. As he was opening the door, and still holding on to Ms. Landry, his 65 pound dog ran in between them and he lost his balance and he and Ms. Landry fell and her left femur was broken. Mr. O' Neal also testified that he did not own steel-toed boots. He had an accident in an oil field and injured his foot. He says he crushed his foot and rheumatoid arthritis has compounded the situation. Because steel-toed boots are contained, he stated that he could not stand up in them. T. 154.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN ALLOWING A KEY WITNESS TO TESTIFY ABOUT A NECKLACE AND ADMITTING IT INTO EVIDENCE WHEN THE NECKLESS WAS NOT FURNISHED TO THE DEFENSE UNTIL THE SECOND DAY OF THE TRIAL.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING DR. ROCCO BARBIERI TO TESTIFY TO CAUSATION AS TO THE INJURY MS LANDRY RECEIVED AND THE STATE DID NOT QUALIFY HIM AS AN EXPERT.

SUMMARY OF THE ARGUMENTS

I. WHETHER MR. O' NEAL HAD SUFFICIENT NOTICE OF THE NECKLACE.

Mr. O' Neal contends that the trial court erred in allowing witness Nicholas M. Landry to testify concerning a necklace that he gave to his mother for Mother's Day. Mr. Landry testified that the necklace had a Number One pendant on it and he found it in the garage ripped in three or four places with a big locket of hair stuck in it. Mr. O' Neal's argument is that he only knew of the necklace the morning of Mr. Landry's testimony, almost three years after the alleged assault and this severely prejudiced his case.

In Box v. State, 437 So.2d 19 (Miss. 1983), the Supreme Court held that the testimony of a key witness of whose identity the State had constructive but not actual knowledge nine months before trial but which was not furnished to defense counsel in compliance with the order for production until the evening before trial, and photographs of automobile used in robbery that were not produced in compliance with such order until moments before their use at trial, should not have been admitted in evidence over objection, even though defendant did not seek continuance or mistrial.

In dealing with discovery violations, the court is faced with two conflicting interest. There is the prosecution's interest in presenting to the jury all relevant, probative evidence and on the other hand, there is the accused's interest in knowing reasonably well in advance of trial what the prosecution

will try to prove and how it will attempt to make its proof. Id.. at 21.

Where faced with a discovery violation, technical or otherwise, in a criminal proceeding, the Circuit Court should-pre-trial or during trial (1) Upon objection by a party, give that party a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witnesses, inspecting the physical evidence, etc. (2) If, after this opportunity for familiarization, the objecting party believes that it may be prejudiced by lack of opportunity to prepare to meet the evidence, it must request a continuance. Failure to do so constitutes an acquiescence that the trial may commence or proceed and that the discovery rule violator may use the evidence as though there had been no discovery violation. (3) if the objecting party requests a continuance, the discovery violator may choose to proceed with trial and forego using the undisclosed evidence. If the discovery violator is not willing to proceed without the evidence, the Circuit Court must grant the requested continuance. Houston v. State, 531 So.2d 598 (Miss. 1988) citing Cole v. State, 525 So.2d 365, 367-68 (Miss. 1987), Darghty v. State, 530 So.2d 27, 31-31 (Miss. 1988).

The standard of review for a trial court's ruling on a discovery violation is abuse of discretion. Montgomery v. State, 891 So.2d 179, 182 (Miss. 2004); Curry v. State, 939 So.2d 785 (Miss. 2006). In Montgomery from a review of the record the only information provided to the state was Larry Montgomery's name, address and telephone number. Mrs. Montgomery chose not to provide anything else to the state and violated the discovery process in failing to disclose what Larry Montgomery, her husband, would testify about at trial. The testimony of Larry Montgomery was excluded by the trial judge.

In Curry the state failed to disclose a DNA report until the first day of the fourth trial. Mr. Curry asserted that the trial judge's denial of his motions for a continuance and/or a mistrial, was an abuse of discretion. However, because Mr. Curry had the identical information from the Mississippi Crime

Lab the Supreme Court held that the trial court was within its discretion granted him in U.C.C.C.R. 9.04.

In Frierson v. State, 606 So.2d 604 (Miss. 1992), the state never informed Mr. Frierson that it had seized documentary evidence. Mr. Frierson argued that it's use at trial was in violation of Miss. U. Crim. R. 4.06 and amounted to trial by ambush. The Supreme Court cited Robinson v. State, 508 So.2d 1067 (Miss. 1987), and stated, we addressed Rule 4.06 and explained as follows:

"The essential purpose of Rule 4.06 is the elimination of trial by ambush and surprise. Disclosure is the hallmark of fairness and the quest for justice that should be the goal of the criminal justice system." Id. at 1070.

They further stated that when faced with a discovery violation the procedures set out in Box v. State, 437 So.2d 19 (Miss. 1983) should be followed. In the Frierson case counsel for the defense did not expressly raise a timely objection at trial. However, he approached the bench and sought a ruling from the court on the admissibility of the note on grounds of relevancy. The Circuit Court allowed only a five minute recess, giving counsel neither a reasonable opportunity to review the undisclosed evidence nor to make a determination of whether a motion for a continuance or a mistrial was in order. The Supreme Court found that the Circuit Court erred in not allowing a reasonable time for counsel to become familiar with the evidence and to seek a continuance if he thought it appropriate as required by Box. Frierson v. State, 606 So.2d at 607.

In the present case, the following testimony is relevant to show Mr. O' Neal suffered prejudice because there was insufficient notice of the necklace which was admitted into evidence as Exhibit 8.

T. 116-118.

Q. Did you find anything out of place in the garage?

A. After I started looking, I found a necklace that I gave my mother for Mother's Day that had a Number One Mom pendant on it that was ripped in three or four - - or ripped apart in three or four places. And it had a big locket of hair still stuck to it.

Q. Okay. Where did you find the necklace?

A. In the garage.

Q. What did you do with it?

A. I put it away?

Q. You put it away?

A. Yes, ma'am.

Ms. Turner: May I approach, Your Honor?

The Court: Sure.

Q. Do you recognize this?

A. Yes, ma'am. That's the necklace I got her.

Q. So this was the necklace that you found that day in the garage?

A. Yes, ma'am.

MR. HOWELL: Judge, we object. We've never been presented with this necklace or even knew of its existence until today.

MS. BARNES: Your Honor, we came into possession of this necklace on Friday and I showed it to the defense this morning.

MR. TURNER: That's correct. We didn't know about the necklace's existence until - -

MR. HOWELL: Well, this was Tuesday. They've known about it since Friday and never informed us.

THE COURT: I will overrule the objection at this time without going any further, the necklace, and let you cross-examine her.

MR. HOWELL: Yes, sir.

MS. TURNER: So shall I have it marked for identification purposes?

THE COURT: No, ma'am. If he know whose it is and where he found it I don't have any problem with you admitting it into evidence, but I'm going to reserve ruling weighing the probative, prejudicial and what situation comes out on cross-examination.

MS. TURNER: Okay. Thank you, Your Honor.

(EXHIBIT 8, NECKLACE, WAS MARKED INTO EVIDENCE)

BY MS. TURNER:

Q. So you held onto the necklace for how long?

A. Three years.

Q. And then who did you give it to?

A. District Attorney.

• • •

T. 119 - 120.

Q. Let's talk about the necklace that you produced on Friday. Did you have a conference with the D.A. 'S office or with Ms. Turner on Friday?

A. Uh-huh (indicating yes).

Q. Okay. And you just brought that with you?

A. I remembered it.

Q. Okay. You remembered. What date did you find it, do you remember? I mean did you find it the day that this happened?

A. Yes, sir.

Q. And you never mentioned it to anyone, did you?

A. No.

Q. Okay. And, in fact, you gave a statement as witnessed by Detective Williamson, do you remember that?

A. Not really. It's been three years ago.

Q. Okay.

A. I interviewed a lot.

Q. Do you remember giving that statement?

A. Yes, sir.

Q. Okay.

A. Yes, sir.

Q. And that's your signature?

A. Yes, sir, it is.

Q. And that was given on the 8th day of September, 2004; is that correct?

A. Yes, sir.

Q. All right. And nowhere in here do you mention the necklace, do you?

A. No, sir.

•••

T. 127.

MR. SCHARTZ: Judge, at this time we would renew our objection to the necklace being introduced into evidence.

THE COURT: All right. I'll overrule the objection.

From a review of the record, the state responded to Mr. O' Neal's request for discovery and provided Mr. Nicholas Landry's statement. There was not any reference to a necklace in his

statement as admitted to by Mr. Landry during cross-examination. Mr. O' Neal was ambushed on the second day of his trial with extremely incriminating evidence. Upon objection by the defense, the trial court did not allow Mr. O' Neal's counsel a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witness, inspecting the physical evidence, etc., as required in Box. The trial court in Mr. O' Neal's case did not even give a five minute break as the court in Frierson. There was not any opportunity for Mr. O' Neal's counsel to make a determination of whether a motion for a continuance or a mistrial was in order. The trial court committed reversible error in admitting the necklace into evidence.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING DR. ROCCO BARBIERI, WHO HAD BEEN TENDERED AS A LAY WITNESS, TO TESTIFY TO CAUSATION OF THE INJURY MS LANDRY RECEIVED.

Mr. O' Neal contends that the trial court committed reversible error in allowing Dr. Rocco Barbieri to testify in the form of lay opinion to the cause of Ms. Landry's injury. The following testimony is offered to show the trial court committed reversible error:

T. 134.

> THE COURT: Excuse me. Have y'all tendered him as an expert?
>
> MS. TURNER: No, your Honor. Just a fact witness.
>
> THE COURT: Okay. Now, obviously they did not designate him as an expert?
>
> MR. SCHWARTZ: No, sir.
>
> THE COURT: Then he will not be allowed to give any expert opinions. He can testify to what he saw and did and he can't make any differentiations as to causation.
>
> MR. SCHWARTZ: That would be our position, Your Honor.

THE COURT: All right.

•••

T. 136.

Q. Would you say that this injury was consistent with a fall?

MR. SCHWARTZ: If the court please, same objection. He is not called as an expert. He is called as a fact witness. What they are calling for him to render at this point is an opinion as to causation.

THE COURT: I sustain. I sustain.

BY MS. TURNER:

Q. In this type of fracture would it - - what type of force would be necessary to - -

MR. SCHWARTZ: Same Objection, Your Honor.

THE COURT: I'll let him testify to that, because you did examine the fracture yourself?

A. Yes.

THE COURT: Okay.

BY MS. TURNER:

Q. Okay. What type of force would be necessary to cause this type of f

A. Usually a high-energy force.

Q. High-energy force?

A. High-energy force. A fall from a height or usually something you usually see every day from a simple fall.

Ramos v 87
725 So 2d 972
Smith v 84

Mr. O' Neal's contention is the same as the defendant in K ...s v. State, 710 So.2d 380 (Miss. 1998). He contends that all of the above statements were based on Dr. Barbieri's training and experience as an orthopedic surgeon and therefore should have been classified as expert opinion and subjected to the foundational requirements of Miss. R. Evid. 702 and the discovery rules of Unif. Crim. R. Cir. Ct. Prac. 4.06 (a)(4), which is now cited 9.04 (A) (4).

> FN5, Rule 4.06(a)(4) states in pertinent part that the prosecution must disclose to each defendant any reports or statements 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. Ramos v. State, 710 So.2d at 387.

The Court in Ramos cited Sample v. State, 643 So.2d 524 (Miss. 1994), where the Supreme Court stated that there is a very thin line between fact and opinion. The Supreme Court stated that the problem with the police officer's "expert" testimony is that it runs afoul of our stated policy requiring that expert witnesses be first tendered as such before being allowed to express expert opinions. Ramos v. State, 710 So.2d at 387 citing Roberson v. State, 569 So.2d 691, 696. To sanction this testimony attempts to circumvent this policy by the familiar retreat to Miss. R. Evid. 701, which some attorneys would use to justify all transgressions of our discovery and evidentiary policies concerning expert opinion. Ramos v. State, 710 So.2d at 387.

The Court in Sample further held that it is important that we not blur the distinction between Rules 701 and 702, not so much for admissibility, as for notice and an opportunity to prepare rebuttal. Expert testimony and opinions are subject to special discovery rules in both the civil and criminal arenas. Miss. R. Civ. P. 26(b)(4); Unif. R. Cir. Ct. 4.06(a)(4). This Court has also adopted a policy which dictates that Rule 702 witnesses be offered as such before offering Rule 702 testimony. Sample v. State, 643 So.2d at 529 citing Roberson v. State, 569, So.2d at 696.

The Court stated that the police officer was allowed to express his opinions concerning the value, normal street usage and customary packaging of marijuana based upon training and experience as a narcotics officer. He was therefore, a Rule 702 expert. Ramos v. State, 710 So.2d at 387 citing Wells v. State, 604 So.2d 279 (Miss. 1992).

In Frierson v.State, 606 So.2d 604 (Miss. 1992), the circuit court admitted into evidence a note which the state failed to establish who wrote it and when it was written. There was a reference in the note to a package and the court allowed Lieutenant Randy Corbin to interpret the meaning of the term "package" as used in the note as being a reference to cocaine and left the impression with the jury that the defendant was a drug dealer. The Supreme Court reversed holding this testimony was improper and should have been stricken from the record. The Supreme Court further held that Lieutenant Corbin was not qualified as an expert witness and his testimony amounted to an inadmissible opinion by a lay witness.

In the present case, Mr. O' Neal contends that Dr. Barbieri's testimony concerning the cause of Ms. Landry's injury amounted to expert testimony and inadmissible opinion by a lay witness.

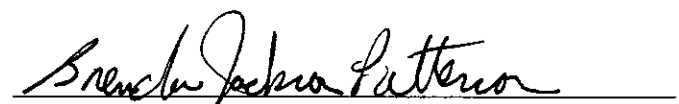
CONCLUSION

The trial court abused its discretion by failing to allow defense counsel a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witness or inspecting the necklace to make a determination of whether a motion for a continuance or a mistrial was in order. The purpose of adhering to the discovery rule is to eliminate trial by ambush and surprise. Frierson v. State, 606 So.2d at 607. Therefore, this case should be reversed and remanded for a new trial.

Further, because the testimony of Dr. Barbieri should be characterized as an expert opinion, not lay testimony, it should have been subjected to the foundational requirements of Miss. R. Evid. 702 and the discovery rules of Unif. Crim. R. Cir. Ct. Prac. 9.04(A)(4). Therefore, this case should be reversed and remanded for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Shawn O'Neal, 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:

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This the 12thday of September, 2007.

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