

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDWARD DONELL BRIGGS

APPELLANT

VS.

FILED
FEB 13 2008
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-1145

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: STEPHANIE B. WOOD
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	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE FACTS	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AS THE EXPERT'S TESTIMONY WAS PROPERLY ALLOWED UNDER MISSISSIPPI RULE OF EVIDENCE 703	3
II. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS IT WAS NOT RAISED IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, BRIGGS IS NOT ENTITLED TO A NEW TRIAL AS THE TESTIMONY IN QUESTION DID NOT CAUSE INJURY OR AFFECT THE OUTCOME OF THE TRIAL	6
III. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS HE DID NOT RAISE IT IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, BRIGGS IS NOT ENTITLED TO A NEW TRIAL AS THE TESTIMONY IN QUESTION DID NOT CAUSE INJURY OR AFFECT THE OUTCOME OF THE TRIAL	7
IV. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS HE DID NOT RAISE IT IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL AS THE CUMULATIVE EFFECT OF THE TWO HARMLESS ERRORS IN HIS TRIAL DID NOT DEPRIVE BRIGGS OF A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL	8

CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

STATE CASES

<i>Alonso v. State</i> , 838 So.2d 309, 313 (Miss. Ct. App. 2002)	6, 7
<i>Beckum v. State</i> , 917 So.2d 808, 813 (Miss. Ct. App. 2005)	6, 7
<i>Byrom v. State</i> , 863 So.2d 836, 847 (Miss. 2003)	9
<i>Clark v. State</i> , 891 So.2d 136 (Miss. 2004)	9
<i>Collins v. State</i> , 361 So.2d 333 (Miss. 1978)	4
<i>Gibson v. State</i> , 731 So.2d 1087, 1098 (Miss. 1998)	8
<i>Gray v. State</i> , 728 So.2d 36, 56 (Miss. 1998)	4, 5
<i>Hall v. State</i> , 611 So.2d 915, 918 (Miss.1992)	3
<i>McIlwain v. State</i> , 700 So.2d 586, 590 (Miss.1997)	3
<i>Vardaman v. State</i> , 966 So.2d 885, 891 (Miss. Ct. App. 2007)	6, 7

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDWARD DONELL BRIGGS

APPELLANT

VS.

NO. 2007-KA-1145

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

- I. THE DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AS THE EXPERT'S TESTIMONY WAS PROPERLY ALLOWED UNDER MISSISSIPPI RULE OF EVIDENCE 703.
- II. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS IT WAS NOT RAISED IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, BRIGGS IS NOT ENTITLED TO A NEW TRIAL AS THE TESTIMONY IN QUESTION DID NOT CAUSE INJURY OR AFFECT THE OUTCOME OF THE TRIAL.
- III. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS HE DID NOT RAISE IT IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, BRIGGS IS NOT ENTITLED TO A NEW TRIAL AS THE TESTIMONY IN QUESTION DID NOT CAUSE INJURY OR AFFECT THE OUTCOME OF THE TRIAL.
- IV. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS HE DID NOT RAISE IT IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL AS THE CUMULATIVE EFFECT OF THE TWO HARMLESS ERRORS IN HIS TRIAL DID NOT DEPRIVE BRIGGS OF A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

STATEMENT OF THE FACTS

On January 10, 2006, Preston Halbert left his house on foot to get his sister some cigarettes at the Farm Market. (Transcript p. 103). On the way, he ran into his friend, Carol Malone. (Transcript p. 103). As the two were walking, it began to rain so Ms. Malone asked the Defendant, Edward Donell Briggs, and Tony Ames to drive them to the store. (Transcript p. 104 and 136 - 137). Mr. Halbert and Ms. Malone got into the backseat of the car and the four drove toward the Farm Market. (Transcript p. 106). During the ride, Mr. Ames said that Mr. Halbert owed Briggs money. (Transcript p. 106 and 138). Mr. Halbert disagreed and they began to argue. (Transcript p. 139). Ms. Malone then suggested that Mr. Halbert get out of the car because something was going to happen. (Transcript p. 109 and 139). Mr. Halbert attempted to exit the car and Mr. Ames swung at him. (Transcript p. 109). Mr. Halbert tried to run away but Briggs and Mr. Ames ran after him. (Transcript p. 141). Both Briggs and Mr. Ames hit and kicked Mr. Halbert multiple times. (Transcript p. 111 - 112 and 141). Mr. Halbert was knocked unconscious. (Transcript p. 112 and 142).

Both Briggs and Tony Ames were charged with armed robbery and aggravated assault. Briggs was tried and convicted of aggravated assault. He was sentenced to serve ten years in the custody of the Mississippi Department of Corrections and to pay fines and restitution.

SUMMARY OF THE ARGUMENT

Briggs was not denied his right to confront the witnesses against him as the expert's testimony was properly allowed under Mississippi Rule of Evidence 703 in that the expert relied on radiologist's report in formulating her diagnosis and opinions.

Briggs is procedurally barred from raising his second, third, and fourth issues on appeal as they were not raised in his motion for new trial. Notwithstanding the bars, Briggs is not entitled to

a new trial as he was not deprived of a fundamentally fair and impartial trial.

ARGUMENT

I. THE DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AS THE EXPERT'S TESTIMONY WAS PROPERLY ALLOWED UNDER MISSISSIPPI RULE OF EVIDENCE 703.

The State had the burden of proving that Briggs purposely and knowingly caused bodily injury to Mr. Halbert by a means likely to produce death or serious bodily injury by striking him with brass knuckles, kicking him, and beating him with his fists. In order to establish the injury element of the crime, the State called Nell Shaw, the nurse practitioner who treated Mr. Halbert. After testimony regarding her qualifications, Ms. Shaw was qualified "to give an expert opinion as a qualified practicing nurse practitioner in the emergency room." (Transcript p. 162). Ms. Shaw ultimately testified to the following opinions: (1) there were no fractures in Mr. Halbert's hand or ribs (Transcript p. 164); (2) Mr. Halbert's facial injuries were such that he needed to consult with an ear, nose, and throat doctor specializing in sinus issues (Transcript p. 164 - 165); (3) Mr. Halbert's injuries were serious (Transcript p. 166); and (4) Mr. Halbert's injuries were consistent with either his being hit with a hard metal object or with someone's fist. (Transcript p. 165 - 166).

Briggs argues that Ms. Shaw's testimony regarding "the conclusions and interpretations of a CT scan, by a radiologist who was not present" was hearsay testimony and violated his Sixth Amendment right to confrontation. (Appellant's Brief p. 7). The standard of review for such issues was set forth by the Mississippi Supreme Court as follows:

"The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *McIlwain v. State*, 700 So.2d 586, 590 (Miss.1997) (citing *Hentz v. State*, 542 So.2d 914, 917 (Miss.1989)). Further, "[t]he qualifications of an expert in fields of scientific knowledge is left to the sound discretion of the trial judge." *Hall v. State*, 611 So.2d 915, 918 (Miss.1992). The trial judge's discretion must be within the boundaries of the Mississippi Rules of Evidence. *McIlwain*, 700 So.2d at 590.

Gray v. State, 728 So.2d 36, 56 (Miss. 1998).

In the present case, the complained of testimony was admissible under Mississippi Rule of Evidence 703 which reads as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular filed in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

As noted above, Ms. Shaw testified regarding her opinions, *inter alia*, that the facial injuries were serious and required the treatment of an ear, nose, and throat doctor specializing in sinus issues. In order to reach her conclusions regarding the extent of the injuries and the treatment of those injuries, she had to rely on the radiologist's report regarding the CT scan. According to the comment to Rule 703, this type of testimony falls squarely within the purposes of the rule:

There are three possible sources which may produce an expert's facts or data. Practice in Mississippi already recognizes two of them: (1) where the expert bases his opinion on personal observation, and (2) where he bases it either on a hypothetical question presented to him at trial or on the trial testimony of others which the expert has heard while sitting in the courtroom. *See Collins v. State*, 361 So.2d 333 (Miss. 1978). The new practice under Rule 703 brings a third source: the presentation of data to the expert outside of court and other than by his personal observation. The Advisory Committee's note to FRE 703 presents a persuasive rationale for the use of the third source. A physician, for example, bases his medical diagnosis of his patient on many sources. Most of his sources are admissible in evidence but only with the expenditure of substantial time in producing and examining various authenticating witnesses. Since these sources provide the doctor with information that he utilizes in making life-and-death decisions, his validation of them ought to be sufficient for trial, especially since he can be cross-examined.

(*Emphasis added*). Clearly, Ms. Shaw relied on the radiologist's report in deciding how to treat Mr. Halbert; thus, evidencing her validation of the report which "ought to be sufficient for trial." Briggs argues that "there is no showing that the radiologist was qualified, that he utilized reliable medical and scientific principles, or that he even viewed the correct CT exam." (Appellant's Brief p. 8). Ms.

Shaw could have been cross-examined about her reliance on this report and regarding any particular details that she relied upon in forming her opinions about the seriousness of the injury or her plan for treatment. Briggs did not take this opportunity at trial.

Furthermore, the Mississippi Supreme Court in *Gray v. State*, upheld the lower court's decision to allow the testimony the State's DNA expert regarding the results of tests that she did not personally conduct and noted the following testimony of the expert:

A: . . . My role is somewhat like a doctor in a hospital who has a lot of individuals who work on patient information or patient data, like a laboratory technician, or a nurse, or X-ray technician, and then the doctor is responsible for putting all that information together and evaluating and making diagnosis. It is a similar role.

728 So.2d 36, 55 (Miss. 1998). The Court further then that:

Rule 703 allows an expert to base his opinion on the opinion of others which are not in evidence so long as experts in the field ordinarily rely on such opinions in forming their own opinions. For example, a psychiatrist expert may rely on the reports of a patient's psychiatric history in arriving at his diagnosis. In such circumstances, the opinion of the non-testifying expert would serve simply as a premise supporting the testifying expert's opinion on a broader issue.

Id. at 56 - 57 (*Emphasis added*). Doctors and nurse practitioners both routinely rely on reports from radiologists and X-ray technicians when diagnosing their patients. The radiologist's report was merely "a premise supporting [Ms. Shaw's] opinion" that Mr. Halbert's injuries were serious and required additional treatment by a specialist. As such, the testimony was properly allowed and Brigg's right to confront witnesses against him was not denied.

II. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS IT WAS NOT RAISED IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, BRIGGS IS NOT ENTITLED TO A NEW TRIAL AS THE TESTIMONY IN QUESTION DID NOT CAUSE INJURY OR AFFECT THE OUTCOME OF THE TRIAL.

Briggs also argues that the “trial court erred in allowing expert opinion beyond the witness’ area of expertise.” (Appellant’s Brief p. 9). However, Briggs is procedurally barred from raising this issue on appeal as it was not raised in his Motion for New Trial. *See Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002) (holding that the issue in question was procedurally barred even though an objection was raised at trial because the matter was not raised in the motion for new trial) and *Beckum v. State*, 917 So.2d 808, 813 (Miss. Ct. App. 2005) (holding that the issue in question was procedurally barred as it was not specifically raised in defendant's motion for J.N.O.V. or motion for new trial).

Notwithstanding the bar, the admission of this testimony was at worst harmless error. This Court has recently held that in order “to warrant reversal on an issue, a party must show both error and a resulting injury.” *Vardaman v. State*, 966 So.2d 885, 891 (Miss. Ct. App. 2007) (citing *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So.2d 216, 221 (Miss.1969)). This Court further noted that “[a]n error is only grounds for reversal if it affects the final result of the case.” *Id.* (*Emphasis added*). In the case at hand, there was no resulting injury and no indication that Ms. Shaw’s testimony that Mr. Halbert’s injuries were consistent with being struck in the face with some hard metal object affected the outcome of the case. First, there was ample testimony, from witnesses other than Ms. Shaw, regarding the fact that Mr. Halbert was hit with a hard metal object or in particular with brass knuckles. (Transcript p. 110, 140, 174, and 175). Secondly, Ms. Shaw also testified on cross-examination that Mr. Halbert’s injuries could also be consistent with his being hit with a fist. (Transcript p. 166). Accordingly, the jury heard ample testimony regarding the use

of brass knuckles notwithstanding Ms. Shaw's testimony and could have concluded, based on that testimony alone, that brass knuckles were used. Further, Ms. Shaw also testified that the injuries could also be consistent with Mr. Halbert's being struck by fists as well as by a hard metal object. Thus, there is nothing in the record to show that Ms. Shaw's testimony regarding the cause of the injuries in any way affected the outcome of the trial.

As this issue is procedurally barred and as the alleged error did not cause injury or affect the outcome of the trial, Briggs is not entitled to a reversal of his conviction and sentence.

III. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS HE DID NOT RAISE IT IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, BRIGGS IS NOT ENTITLED TO A NEW TRIAL AS THE TESTIMONY IN QUESTION DID NOT CAUSE INJURY OR AFFECT THE OUTCOME OF THE TRIAL.

Briggs further complains that the "trial court erred in permitting hearsay testimony of brain injury." (Appellant's Brief p. 11). However, this issue is also procedurally barred as it was not raised in Briggs's Motion for New Trial. *See Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002) and *Beckum v. State*, 917 So.2d 808, 813 (Miss. Ct. App. 2005).

Notwithstanding the bar, the admission of this testimony was at worst harmless error. "An error is only grounds for reversal if it affects the final result of the case." *Vardaman*, 966 So.2d at 891. Again there was no resulting injury and no indication on the record that Mr. Halbert's testimony that his doctor told him he could possibly have brain damage affected the outcome of the case. Even if this testimony were not allowed, there would be sufficient evidence that Briggs caused Mr. Halbert serious bodily injury. First, Ms. Shaw testified regarding the details of Mr. Halbert's injuries and the severity thereof. (See Testimony of Nell Shaw specifically p. 165-66). Also, Carol Malone testified that Mr. Halbert was knocked unconscious. (Transcript p. 142). Lastly, Officer James Ferris testified that when he spoke with Mr. Halbert two weeks after the incident that he had

a bandage over his nose and that his face was swollen. (Transcript p. 168). There is no doubt, even without Mr. Halbert's testimony regarding his doctor telling him about the possibility of brain damage, that the jury would still have found that Mr. Halbert received bodily injuries and that they were serious. Thus, the jury would still have found Briggs guilty and the outcome of the case would not be affected.

As this issue is procedurally barred and as the alleged error did not cause injury or affect the outcome of the trial, Briggs is not entitled to a reversal of his conviction and sentence.

IV. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON APPEAL AS HE DID NOT RAISE IT IN HIS MOTION FOR NEW TRIAL; HOWEVER, NOTWITHSTANDING THE BAR, THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL AS THE CUMULATIVE EFFECT OF THE TWO HARMLESS ERRORS IN HIS TRIAL DID NOT DEPRIVE BRIGGS OF A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

Lastly, Briggs argues that "the cumulative affect of the errors committed by the trial court denied Briggs a fair trial." (Appellant's Brief p. 12). However, Briggs is also procedurally barred from raising this issue on appeal as it was not raised in his motion for new trial. *See Gibson v. State*, 731 So.2d 1087, 1098 (Miss. 1998) (holding that "[a] trial judge cannot be put in error on a matter which was not presented to him for decision.").

Notwithstanding the bar, Briggs is not entitled to a new trial. In *Byrom v. State*¹, the Mississippi Supreme Court held the following with regard to cumulative error:

This Court has held that individual errors, not reversible in themselves, may combine with other errors to make up reversible error. The question under these and other cases is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. Where there is "no reversible error in any part, ... there is no reversible error to the whole."

¹ The State would like to note that both *Byrom v. State* cited above by the State and *Griffin v. State* cited by Briggs are both death penalty cases and therefore must be subject to higher scrutiny than the case at hand which is not a death penalty case.

* * *

What we wish to clarify here today is that upon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect.

863 So.2d 836, 847 (Miss. 2003) (*citations omitted*). In the case at hand, there were no reversible errors. As set forth above, Ms. Shaw's testimony that Mr. Halbert's injuries were consistent with being struck in the face with some hard metal object and Mr. Halbert's testimony that his doctor told him he could possibly have brain damage are individually harmless in that neither affected the outcome of the trial. However, they are also harmless when considered cumulatively. If neither Ms. Shaw's testimony regarding Mr. Halbert's injury being consistent with an injury caused by a hard metal object or Mr. Halbert's testimony regarding his doctor telling him that he could possibly have brain damage were allowed, the outcome of the trial would be no different. As set forth in detail above, the State provided sufficient evidence that Briggs caused Mr. Halbert bodily injury by a means likely to produce death or serious bodily injury even without the complained of testimony. Thus, there was sufficient evidence to support the jury's finding that Briggs was guilty of aggravated assault even without the complained of testimony. Accordingly, these harmless errors, even when analyzed cumulatively, did not affect the outcome of the trial. As the Supreme Court has previously held, "the Constitution does not guarantee a perfect trial, but it does entitle a defendant in a criminal case to a fair trial." *Clark v. State*, 891 So.2d 136 (Miss. 2004). The errors in the case at hand, just like the ones in *Byrom v. State*, "are individually harmless beyond a reasonable doubt, and when taken cumulatively, the effect of all errors committed during the trial did not deprive [the defendant] of a fundamentally fair and impartial trial." 863 So.2d at 847. Thus, Briggs is not entitled to a new trial.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Edward Donell Briggs as there were no reversible errors and as he was not deprived of a fundamentally fair and impartial trial.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



STEPHANIE B. WOOD

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

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:

Honorable Lee J. Howard
Circuit Court Judge
P. O. Box 1344
Starkville, MS 39760

Honorable Forrest Allgood
District Attorney
P. O. Box 1044
Columbus, MS 39703

W. Daniel Hinchcliff, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 N. Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 13th day of February, 2008.



STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

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