IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CECIL R. BEN,
APPELLANT

VS. NO. 2009-CA-01495-COA

STATE OF MISSISSIPPI,
APPELLEE

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APPEAL FROM THE CIRCUIT COURT OF LEAKE COUNTY, MISSISSIPPI

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REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REPLY BRIEF OF APPELLANT

REQUEST FOR ORAL ARGUMENT

Defendant-Appellant, Cecil Ben, requests oral argument. The issues presented are sufficiently complex that argument would benefit the Court.

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REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Ben will discuss any factual disagreements with the State's version of the facts in the argument.

SUMMARY OF THE ARGUMENT

The evidence is insufficient to support the verdict or alternatively is against the overwhelming weight of the evidence. Ben was denied a speedy trial. The trial court made numerous evidentiary errors, including admitting out of court statements of Megan. Ben's right to a speedy trial was denied. Ben's sentence is excessive.

ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OR ALTERNATIVELYL, THE JURY VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND THE TRIAL COURT SHOULD HAVE GRANTED BEN A NEW TRIAL.

On appeal, Ben challenged both the weight and sufficiency of the evidence. The State argues that Ben cannot challenge the denial of his motion for directed verdict because he presented evidence after it was denied. Appellee's Brief, p. 14. This argument is misleading because Ben did not argue that the court erroneously denied his request for directed verdict. In order to alleviate any confusion the State's argument might cause, Ben challenged the weight and sufficiency of the evidence, not the decision to overrule his motion for directed verdict at the close of the state's evidence. That Ben has not waived those issues is demonstrated by the very case cited by the state in support of its waiver argument—*Stever v. State,* 503 So.2d 227 (Miss. 1987).

In that case, the Court did hold that by presenting evidence, the defendant waived the question of whether or not the motion for directed verdict was proper. The Court did not hold that he had waived his sufficiency of the evidence issue by presenting evidence because if it had it would not then have reversed Stever's conviction based on a finding that the evidence was insufficient to support the verdict. *Id.* at 230.

Because Ben preserved his challenge to the sufficiency and weight issues by requesting a peremptory instruction and by making a motion for new trial/jnov, he, as did Stever, preserved these issues.[1] The State's suggestion that this Court cannot hear these issues then is not only not well-taken but is in fact frivolous.

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[1] At trial, the Judge Cotton denied Ben's motion for directed verdict, peremptory instruction and motion for new trial/jnov. RE 8-16.

Next, the State argues that Ben's conviction should be affirmed because other evidence demonstrating Ben's guilt corroborated the testimony of the prosecutrix. As Ben pointed out, however, in his initial brief, there is no independent evidence whatsoever that corroborates the prosecutrix's testimony that the intercourse was anything other than consensual. The State cites no evidence which indicates that intercourse was forcible.[2]

As Ben also pointed out in his initial brief, while it is true that this Court generally has not required independent corroboration in a rape case involving an adult complainant, that rule applies only when the testimony of the prosecutrix is otherwise consistent and uncontradictory. Where, however, her testimony is inconsistent, contradictory or fails to comport with common experience, this Court in fact has required corroboration, not just that intercourse occurred, but that it was forcible. The State cites no cases to the contrary.

Rather, the State relies on the case of *Otis v. State,* 418 so.2d 65, 67 (Miss. 1982) for the proposition that corroboration of the lack of consent is not necessary, only corroboration of other facts. *Otis,* however, far from supporting the State's assertion that corroboration of the use of force in Ben's case is not necessary, supports the notion that it is. In *Otis,* the Court held that corroboration was not necessary because the "testimony of the prosecutrix is **positive and unequivocal** [emphasis added]." *Id.* Here it was not. Where corroboration of a prosecutrix' testimony is required, as here, the "corroboration must be, not merely of incidental details, but of the commission of the prohibited act." *Yancy v. State,* 202 Miss. 662, 668, 32 So.2d 151, 152 (1947). In other words, there must be some corroborative evidence not only that intercourse occurred, but that the intercourse in fact occurred without the prosecutrix' consent.

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[2] Specifically, the State cites only to Megan's testimony that he put his penis into her vagina and that the police recovered paper towels which Ben allegedly used to clean up after the act and that the paper towels contained DNA from both Ben and Megan. That Ben may have used paper towels to clean up after sex does not in any way indicate that he raped Megan.

As Ben pointed out in his initial brief, there is much in Megan's testimony which is contradictory, conflicts with the physical facts and surrounding circumstances and, quite simply, conflicts with common experience. Megan did not report the alleged rape until several days later although she had ample opportunity to do so to several people who got on the bus immediately after the incident. She refused STD and pregnancy testing. Her mother did not testify to any unusual behavior by Megan after the incident; nor did she corroborate Megan's testimony that she was extremely upset after it happened. She claimed to be suicidal, to have showered compulsively and stayed in her room asleep; yet, no one corroborated her claims. Tr. 198. She never sought treatment at school or through the Tribe. Tr.II/198. Megan's behavior then is contrary to common experience of how victims of forcible rape generally behave. *E.g., Upton v. State*, 6 So.2d 129, 130 (Miss. 1942) [failure to report can be a factor which contradicts claim of rape].

Moreover, Megan testified that she struggled furiously against the attack but had not a single scratch or bruise consistent with the fight she described. The examining nurse saw no marks; nor did the officers who responded to her call. Her clothing was not torn or damaged at all. Tr. 326-27. *Id.* [victim had no marks consistent with violence victim said occurred during rape]. No person testified to her disheveled appearance immediately after the alleged assault even though numerous were on the bus after it supposedly happened. In addition, Megan's trial testimony was inconsistent with her statements to officers and the examining nurse and was internally inconsistent as Ben detailed in his initial brief.

In short, Megan's summary, testimony was internally inconsistent and inconsistent with her statements and in some respects physically impossible--especially her descriptions of how he removed her panties while standing and simultaneously standing up with one leg over her body while holding her down. While some inconsistencies as to minor details might be normal, the

problem here is that the inconsistencies go to the heart of whether Ben in fact used physical force. In other words, Megan's inability to consistently recount how she was held and how her clothing was forcibly removed is not what one would expect from one who was telling the truth.

No reliable evidence exists as to the number of false rape accusations in this country. Estimates range from 2% to 41%. http://en.wikipedia.org/wiki/False_accusation_of_rape [search conducted 11/24/2010]. Both figures are probably inaccurate. British studies place the percentage at 8-9%. The FBI's 1996 Uniform Crime Report states that 8% of reports of forcible rape were determined to be unfounded upon investigation. *Id.* A Google search of the terms false + rape + accusation produces numerous examples demonstrating that such false claims are not uncommon.[3] By the same token, most claims of forcible rape are true. The problem comes in determining the real from the false. Corroborating evidence of force, therefore, is essential to such a determination.

In this country, the presumption of innocence dictates that the testimony in rape cases "should always be scrutinized with caution." *Richardson v. State,* 196 Miss. 560, 17 So.2d 799 (1944). "This Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence[,] even where that evidence is sufficient to withstand a motion for a directed verdict." *Lambert v. State*, 462 So.2d 308, 322 (Miss.1984) (Lee, J., dissenting) (citing *Shore v. State*, 287 So.2d 766 (Miss. 1974)); *Feranda v. State*, 267 So.2d 305 (Miss. 1972); *Barnes v. State*, 249 So.2d 383 (Miss. 1971); *Cook v. State*, 248 So.2d 434 (Miss. 1971); *Peterson v. State*, 242 So.2d 420 (Miss. 1970); *Hux v. State*, 234 So.2d 50 (Miss. 1970); *Quarles v. State*, 199 So.2d 58 (Miss. 1967); *Yelverton v. State*, 191 So.2d 393

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[3] *http://www.google.com/search?client=safari&rls=en&q=false+rape+accusation&ie=UTF-8&oe=UTF-8* [searched 11/24/2010]

(Miss. 1966); *Mister v. State*, 190 So.2d 869 (Miss. 1966); *Cole v. State*, 217 Miss. 779, 65 So.2d 262 (1953); *Dickerson v. State*, 54 So.2d 925 (Miss. 1951); *Jefferson v. State*, 52 So.2d 925 (Miss.1951); *Conway v. State*, 177 Miss. 461, 171 So. 16 (1936); see also *Hutchins v. State*, 220 So.2d 276 (Miss.1969); *Brown v. State*, 219 Miss. 748, 70 So.2d 23 (1954); *Williams v. State*, 220 Miss. 800, 72 So.2d 147 (1954); *Martin v. State*, 197 Miss. 96, 19 So.2d 488 (1944); *Holifield v. State*, 132 Miss. 446, 96 So. 306 (1923); *Bolden v. State*, 98 Miss. 723, 54 So. 241 (1910).

Moreover, in such cases, when, as here, wholly inadmissible, inflammatory evidence is injected into the trial and where the version of the occurrence by the defendant is just as plausible or more plausible as that of the person raped, a new trial should be ordered unless it can be said with confidence that the inadmissible, inflammatory material had no harmful effect on the jury. *Killingsworth v. State*, 374 So. 2d 221, 223 (Miss. 1979); *Ross v. State*, 954 So. 2d 968, 1016 (Miss. 2007).

II. CECIL BEN WAS DENIED A SPEEDY TRIAL IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The State's primary contention in support of its argument that Ben's constitutional right to a speedy trial was not denied is that the state required the time to allow for DNA testing. The problem with this argument is that the offense occurred on May 3rd of 2007. The evidence of the paper towels was gathered just a few days later on May 8th of 2007. Notwithstanding the fact that authorities had all the evidence in their possession at that time and knew Ben had been identified as the perpetrator, the evidence was not submitted to the crime lab until October of 2007 around the time Ben was arrested. Moreover, no testing was performed by the state crime lab to match the DNA profile until February of 2008 because no blood was even seized from Ben until the 18th of January of 2008. The Cellmark testing was completed in June of 2008. *See, Motion In Limine to Exclude DNA Evidence,* Supp.R.

The state never requested that Orchid Cellmark in Texas even perform DNA testing until after the state crime lab had first performed the initial tests for seminal fluid. thus, the delay was not due to the delay in **running** the tests. The delay then was not due to the fact that the time was necessary to conduct DNA test. The delay resulted from the failure of the state to make a timely request DNA testing. *Id.*

In short, the state could have requested DNA evidence shortly after May 8, 2007, when the paper towels were first found. Instead, the state did not even take a sample of Ben's blood for DNA testing until January 18, 2008. The state advances no reason for its failure request DNA testing in a timely fashion. This is not a case then involving a "neutral reason" for the delay. This is a case where the state's deliberate failure to promptly investigate resulted in a denial of a speedy trial.

The State suggests that Ben did not assert his right to a speedy trial until the trial date. Appellee's Brief. The State is not correct. Ben first asserted his right to a speedy trial on January 8, 2008. *See,* Supp.R. Ben's trial did not begin until May 13th of 2009. In any event, although the defendant has some responsibility to assert his speedy trial right, the primary burden falls on the court and the prosecutor to make sure that cases are brought to trial in a timely fashion. *Wiley v. State*, 582 So.2d 1008, 1012 (Miss.1991); Flores, 574 So.2d at 1323. D. The prejudice to the defendant.

The state in its brief makes the same error as the trial court did in arguing that Ben's speedy trial argument should be denied because he failed to show actual prejudice. Again, however, actual "[p]rejudice is not the *sine qua non* of judicial relief for a deprivation of a defendant's Sixth Amendment right to a speedy trial." *Hoskins v. Wainwright,* 485 F.2d 1186, 1187 (5th Cir. 1973). A defendant suffers "prejudice" from "the mere loss of the right" to a

speedy trial. *Id.* "Prejudice," therefore, is "not used synonymously with 'impairment of the defense.'" *Id.*

In short, both the state and trial court err as a matter of law in making this argument. Even, however, if the argument were well taken, it is factually erroneous because Ben did demonstrate actual prejudice to his defense because the memories of the other passengers on the bus had dimmed by the time of the trial. The state's argument misses the point. The state waited until November of 2008 to even indict Ben—a year and a half after the alleged crime. The defense at that time did contact the witnesses who could not remember what Megan's demeanor was on the day in question. Tr. 43-44.

Moreover, Ben did prove that the lengthy delay caused anxiety and cost him his job. The circuit court judge did not even recognize that this form of prejudice was a legally cognizable form of prejudice in weighing the speedy trial factors although the Supreme Court has plainly held that incarceration and anxiety and concern are the principal forms of prejudice the speedy trial clause is designed to prevent:

> Inordinate delay between arrest, indictment and trial may impair a defendant's ability to present an effective defense. But the **major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.** To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends [emphasis added].

United States v. Marion, 404 U.S. at 320.

As for the state's contention that Ben knew who the passengers of the bus were so that he was not prejudiced in his ability to call them as witnesses, again, the state misses the point. Ben has never claimed he did not know who the passengers were; he claimed they could not remember the events of the day of in question.

In summary, the state caused the delay by failing to timely request DNA testing, and this Court should not allow the state to flout the constitutional right to a speedy trial by dismissing the violation under the rubric that the state had a "neutral reason" for delay. This is not a case where the evidence of Ben's guilt was overwhelming. It is based on the word of one individual whose testimony is far from compelling. The loss of any evidence which would have disputed Megan's testimony is significant.

III. THE TRIAL COURT ERRED IN ADMITTING NUMEROUS OUT OF COURT STATEMENTS OF THE ALLEGED VICTIM AND IN ADMITTING NURSE HOCKETT'S OPINION THAT MEGAN WAS TELLING THE TRUTH.

At trial, the state introduced numerous so-called "prior consistent" statements made by Megan to her friend Maurice Hines to bolster her credibility. The state argues that Miss.R.Evid., Rule 803(3) supports admission of this evidence because her "emotional statement to her friend was evidence of her 'state of mind' at that time." Appellee's Brief, p. 23. In support of the notion that such evidence is admissible, the state cites only one case for the proposition that the statement was admissible under Miss.R.Evid, 803(3) and that is the case of *Sherrell v. State,* 622 So.2d 1233, 1237 (Miss. 1993). That case, however, provides no support for the notion that the statement is admissible pursuant to that rule. In fact, it specifically holds to the contrary.

In *Sherrell,* the Court considered the admission of a murder victim's statement to a store clerk three days prior to her death that she had had a disagreement with Sherrell, who had been living with her, and that she feared that if she forced him to move out, he would kill her. The Court held that the "statement is **inadmissible** as an attempt to show her state of mind prior to her death. *See,* Miss.R.Evid., 803(3), comment, *see also Shephard v. U.S.,* 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933) [emphasis added]." On the other hand, the Court held that the portion of her statement regarding her intention to ask Sherrell to leave was admissible pursuant to Miss.R.Evid. 803(3) because it refuted Sherrell's confession. In that confession, Sherrell

attempted to explain the fact that he pawned the victim's personal property by claiming that she had given the property to him. *Sherrell,* 622 So.2d at 1237. That she was scared of him and wanted him to leave refuted the notion that the property was a gift.[4]

Significantly, *Sherrell* has been cited only one time on the issue in question, and in that case, the Court noted that the testimony about a defendant's state of mind was irrelevant. *Mosby v. State,* 749 So.2d 1090, 1097 (Miss. App. 1999). The state cites to no other case where testimony of the alleged victim made four days after the alleged rape has been deemed to be admissible under Rule 803(3)'s hearsay exception for "then existing mental, emotional or physical condition."

In fact, this exception to the hearsay rule is predicated on the notion that statements made contemporaneously with the event in question have some degree of reliability because they are made while or immediately after the event when the declarant's powers of reflection and fabrication are thought to be suspended. On the other hand, statements "of memory or belief to prove past events" are inadmissible because they are deemed to be unreliable because they do not spring from spontaneous reactions, but rather may be the product of reflective thought. *Shepard,* 290 U.S. at 105-106.

Spontaneity requires temporal proximity to the event. *See, e.g., United States v. Taveras,* 380 F.3d 532, 537 (1st Cir. 2004) [statement made the day after the event inadmissible]; *United States v. Lawrence,* 349 F.3d 109, 119 (3rd Cir. 2003) [statement made the day following the shooting not admissible]; *United States v. Wesela,* 223 F.3d 656, 663–64 (7th Cir. 2000) (statements made hours after events inadmissible because declarant's ability to return to work

[4] In a dissent joined by Justices Dan M. Lee and Sullivan, Justice Banks wrote that "[a]s the majority correctly notes, this is not the type of testimony permitted under Miss.R.Evid. 803(3). It is precisely the type of testimony deemed inadmissible in *Shepard v. United States,* 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933) cited in the Comment in explanation of our Rule 803(3)." *Sherrell,* 622 So.2d at 1239.

showed she had regained some of her composure and emotional control]. Clearly the time lapse in the instant case gave Megan ample opportunity for reflective thought.

The admission of Megan's hearsay testimony not only violates Mississippi's rules of evidence, it also has constitutional implications. In discussing the historical context of the "excited utterance" exception to the hearsay rule, the Supreme Court in *Crawford v. Washington,* 541 U.S. 36, 58, n.8 (2004) quoted approvingly the case of *Thompson v. Trevainion, Skin,* 402, 90 Eng. Rep. 179 (K.B. 1694): ("[T]o the extent the hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.'"). Thus, the Sixth Amendment and due process clauses of the Fourteenth Amendment require that temporal proximity must be narrowly construed. *See also, Tome v. United States*, 513 U.S. 150, 115 S.Ct. 696, 700, 130 L.Ed.2d 574 (1995) ["a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards"]. *Accord, Owens v. State*, 666 So.2d 814, 816 (Miss. 1995); *Comment, Rule 803(3), M.R.Evid.* [spontaneity is the key element for admissibility].

Here Hines testimony related Megan's recollection of past events which she made to him after ample time for reflection. As such, they were clearly inadmissible regardless of whether they might be relevant to bolster her testimony that she was raped. In fact, it is their very relevance that renders the statements prejudicial and reversible. The state argued at trial, as it does here, that her statements bolster her claim that she did not tell police about the incident earlier because she was ashamed and only finally did so because Hinds persuaded her that she needed to. The lack of temporal proximity, however, renders the testimony unreliable and

therefore inadmissible. Rule 803(3) categorically precludes the admission of such statements because, although relevant, they are more prejudicial than probative.[5] *See also, Miss.R.Evid.,* rule 403.

In his initial brief, Ben also argued the inadmissibility of Nurse Hockett's testimony that in her interview of Megan conducted several days after the alleged rape, she saw nothing to indicate Megan was untruthful in her account of the rape. Tr. 274. Ben argued that opinions that another witness is truthful have been uniformly deemed to be inadmissible. *Griffith v. State*, 584 So.2d 383, 387 (Miss. 1991). He argued that, although this testimony was not objected to, this Court could consider its cumulative effect along with other errors, such as the admission of Hines' testimony, in determining whether or not the jury was exposed to inadmissible evidence which may have improperly caused them to credit Megan's testimony.

The State expends much effort in arguing that Hockett's testimony about Megan's demeanor at the time of the examination and her statements were admissible as statements made for the purposes of medical treatment. Since Ben never argued that Megan's statements to Hockett were not admissible, he will not address the state's argument in this regard. What the state fails to address is the substantive issue of the admissibility of Hockett's opinion of Megan's truthfulness. This is so because it is established beyond cavil that such opinions are inadmissible. *Griffin, supra.*

Rather the state falls back on the argument that Ben waived the error by not objecting. As for the state's contention that this Court cannot consider the error in determining whether to reverse, this Court has repeatedly held that it can consider such errors in a cumulative error calculus even though no objection was made. *Randall v. State,* 806 So.2d 185, 210 (Miss. 2001);

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[5] *Chapman v. California*, 386 U.S. 18 (1967) indicates, "before a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt ...."

Tudor v. State, 299 So.2d 682, 685-86 (Miss.1974); *Wood v. State*, 257 So.2d 193, 200 (Miss.1972); *Howell v. State*, 411 So.2d 772, 776 (Miss.1982); *Forrest v. State*, 335 So.2d 900, 902 (Miss.1976); *Smith v. State*, 457 So. 2d 327, 333-34 (Miss. 1984).

Here, the evidence of guilt was close. The jury had to analyze Megan's testimony in order to determine if she was truthful. Because the errors in admitting Hines testimony and Hockett's opinion unfairly bolstered her credibility, they are reversible error, singly or cumulatively.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO PRESENT BEN WITH A COMPLETE PANEL OF JURORS BEFORE REQUIRING HIM TO MAKE STRIKES TO JURORS.

Based on the state's, counsel for Ben believes that she misread the record on this issue and withdraws this issue and apologizes to the Court for the inconvenience caused by this error.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING TESTIMONY OF OTIS MINGO WHERE THE PROSECUTOR DID NOT PROVIDE NOTICE OF AN INTENT TO INTRODUCE MISS.R.EVID., RULE 404(B) TESTIMONY.

The state argues that the defendant waived this issue by (a) failing to make a specific objection; (b) failing to request a continuance; (c) cross-examining Mingo about the statement. The state does not seriously contend that it complied with UCCCR, Rule 9.04(A)(2) by providing the required "copy of any written or recorded statement of the defendant and the substance of any oral statement made by the defendant." Obviously, providing the name of the witness does not satisfy this requirement.

The Rule could have simply stated that the prosecution provide the defendant with the names of the witnesses and left it at that. A decision was made to require the production of statements. The rationale behind such a requirement is that a failure to specifically identify

evidence of evidentiary value places an unfair burden on the defendant to identify such material.[6] *See also,* Rule 16, F.R.Crim.P. [federal discovery rule] and *United States v. Sanders*, 266 F.Supp. 615 (W.D. La. 1967). For this reason, courts have held that it is not sufficient to merely provide a defendant with discovery materials without identifying those with evidentiary value. *E.g., United States v. Pascual*, 606 F.2d 561 (5th Cir. 1979) [government should identify documents]; *United States v. Laughlin*, 768 F.Supp. 957 (N.D. N.Y. 1991) [government would be required to identify documents it intended to use at trial where government provided defendant with several boxes of documents through discovery].

Because the state can advance no cogent reason for not disclosing Ben's alleged statement, the state again relies on waiver to avoid the results of its failure to abide by the rules. Ben, however, did not waive the argument. He expressly objected on the ground that the statement had not been provided in discovery: "I'm arguing discovery violation for the statement not being given to us when we asked through a Court document . . . ." RE 19. Furthermore, implicit within an objection based on a Rule 404(b) objection and one based on a discovery violation is the notion that such evidence is unfairly prejudicial.[7] Rule 404(b) precludes the

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[6] Since many defendants have court-appointed attorneys, requiring the prosecution to identify materials with evidentiary value cuts down on the costs to the state which are increased when public defenders must expend extra work trying to unnecessarily guess what materials have evidentiary value or may be subject to motions to suppress. In this case, for example, Ben would have had time to file a pre-trial motion to suppress the statements with appropriate briefing so that the court would have been able to make a reasoned ruling informed by the appropriate facts and law. Pre-trial disclosure thus cuts down on reversals of convictions, again decreasing costs of criminal prosecutions. Thus as a practical matter, this Court should err on the side of encouraging pre-trial disclosure. Not only does it ultimately save costs, it promotes fair trials.

[7] Here, Ben was unable to investigate evidence that might have impeached Mingo because he had no time to do so when the statement was sprung on him at trial. Now the state ironically argues that he is unable to show that he was prejudiced. The unfairness of that argument is self-evident. The state cannot have its cake and eat it too. The prejudice to Ben is that he was entitled to rely on the state's obligation to play by the rules and provide any statements it intended to introduce at trial. To hold that the state is excused from doing so because the defendant was unable to prove at trial that the statement was somehow subject to impeachment would place an intolerable burden on the defendant. The prejudice to a defendant is the inability to investigate in

admission of evidence of other wrongs because such evidence is unfairly prejudicial unless it otherwise satisfies the criteria for admissibility. That the trial court understood Ben's objection to be to the timeliness of discovery is abundantly clear.

Moreover, the state's argument that Ben waived the argument because "Ben's counsel never . . . asked for 'a continuance or a mistrial'" is misleading. The trial court interrupted defense counsel while he was making his argument and overruled the objection, stating: "I'm not offering to give you time to go and recess and interview the witness." RE 19. *See, e.g., United States v. Mendiola,* 42 F.3d 259, 261 (5th Cir. 1994) [objection found to be adequate where trial judge's interruption precluded attorney from continuing to make his objection]. Ben's attorney did not ask for a continuance because the trial judge made it clear that he was not going to grant one. *Id.* [no need for an objection where judge had made his ruling]. The state's argument that Ben waived admission of Mingo's testimony is specious.

Similarly specious is the claim that Ben waived the error by cross-examining Mingo. The state cites the case of *Fielder v. State,* 235 Miss. 441, 108 So.2d 590 (1959) for the notion that an appellant waives an error in the admission of testimony by cross-examining the witness about it. The state is incorrect.

First of all, *Felder* is a case decided before this Court adopted the rules of civil and criminal procedure and the rules of evidence. Secondly, the holding in *Felder* is not nearly as broad as the state suggests. In *Felder,* the defendant was charged with receiving stolen property. The trial court erroneously admitted evidence from Hosey, one of the owners of the property, that accomplices of the defendant told the owner that they had stolen the property and sold it to appellant. The defendant made only one objection to the first of a number of questions about the statement and cross-examined Hosey about the statement. Significantly, the accomplices testified

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order to determine if the evidence is prejudicial. The prejudice is also that he was unprepared to

to what Hosey said they had said, so that the evidence was legally admissible as having come from non-hearsay witnesses. Under those circumstances, the court held that the error in admitting the hearsay version of the same evidence was harmless. Thus, the basis of the decision does not really hinge on the cross-examination issue, but rather the view of the Court that the error was harmless.

Moreover, any suggestion that a defendant waives the erroneous admission of evidence by cross-examination of the witness about it is unsound law that has not generally been followed by this Court or by any other court for that matter. The general rule in this and other courts is set out by McCormick and that is where an

> objection is made and overruled, [a party] is entitled to treat this ruling as the "law of the trial" and to negatively rebut or explain, if he can, the evidence admitted over his protest. **Consequently, there is no waiver if he cross-examines the adversary's witness about the matter** [emphasis added].

1 McCormick On Evid. § 55 (6th ed.).

As this Court has pointed out in rejecting an argument that a party waived an objection by cross-examining a witness:

> It is not logical, practical or fair to hold that when a witness is permitted over objection to give improper testimony that the other side must bear the brunt of the damage of such improper direct testimony, and not be permitted to minimize or mitigate it in any sense by cross-examination. 53 Am.Jur., Trial §144 at page 129 (1945).

Gowan v. Batson, 288 So.2d 468, 470 (Miss. 1974).

Finally, any such rule precluding the defendant from cross-examining a witness against him would violate the Sixth Amendment and the due process clauses of the federal constitution. *Gholson v. Estelle*, 675 F.2d 734, 742 (5th Cir. 1982) In *Gholson*, a state habeas case, the state argued that the defendant waived his right to complain about inadmissible evidence by cross-examining the witness about the evidence. The Court rejected the argument stating that the

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make a proper pre-trial objection.

Here Ben claimed his sentence is excessive. Even non-attorneys know that the constitution prevents excessive sentences. It is disingenuous of the state to argue that the trial judge was not aware that Ben was challenging the constitutionality of his sentence. *Starks v. State*, 798 So.2d 562, 565 -567 (Miss.App. 2001) [objection sufficient where context makes the ground obvious].

In *House v. State*, 445 So.2d 815 (Miss.1984), the Court discussed the meaning of "preserving" an error in the trial court. The Court said:

> "[g]enerally, this means that the matter must be presented to the trial court in such a form that the trial judge has the opportunity to consider it with full knowledge of the respective contentions of the parties. On the other hand, where an objection is made and where the basis therefor is obvious from the context, little of value is accomplished by insistence upon a technically correct objection. [citation omitted]"

Ben's objection, therefore, was sufficient to inform the trial judge that he was claiming that his sentence was excessive in view of the constitutional limitations on excessive sentences.

The state correctly points out that the general rule is that where a sentence is within the statutory limits provided by the legislature, this Court has held that it will not review a sentence to determine if it is excessive. Ben, however, in his initial brief pointed out circumstances where this and other Courts have declined to follow the general rule and have reviewed sentences and punitive damage awards.

Here, Ben was sentenced by a jury who did not have any knowledge of other sentences imposed on defendants who were similarly situated. Moreover, the jury was not provided with other mitigating factors because the jury is asked to determine guilt and sentence in one proceeding without a bifurcated trial. Due process requires that a sentence be based on reliable information regarding both the offense and the offender. *Roberts v. United States,* 445 U.S. 552, 556, 100 S.Ct. 1358, 1362 (1980).

In the context of sentences for similar offense, the facts do not support a life sentence. Therefore, this Court should remand the case for resentencing where he can present mitigating evidence in support of a lesser sentence with appropriate standards for imposing a sentence. *Davis v. State*, 724 So.2d at 346.

CONCLUSION

The evidence is either insufficient to support the verdict, or is so inconsistent and contradictory that the Court should reverse. Ben was denied a speedy trial. Moreover, the cumulative effect of evidentiary errors warrants a new trial. Alternatively, the court should reverse for resentencing.

RESPECTFULLY SUBMITTED,
CECIL R. BEN, APPELLANT

BY: *S/ JULIE ANN EPPS*
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellant, do hereby certify that I have this date mailed, by first class mail, postage prepaid, the original and three copies of the foregoing to the Clerk of this Court in Jackson, Mississippi at PO Box 249 Jackson, Mississippi 39205 have mailed by United States Mail, first class postage prepaid, a true and correct copy to the Honorable Vernon R. Cotten, Circuit Judge, at 205 Main Street, Carthage, Mississippi 39051-4117, W. Glenn Watts, Special Assistant Attorney General, PO Box 220, Jackson, Mississippi 39205 and Mark Duncan, PO Box 603, Philadelphia, Mississippi 39350.

This, the 24th day of November, 2010.

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