IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RAPHAEL FLOWERS — APPELLANT

VS. — NO. 2009-KA-0387

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. THE STATE WAS NOT BARRED BY DOUBLE JEOPARDY FROM PROSECUTING THE APPELLANT AFTER THE APPELLANT'S FIRST TRIAL ENDED IN MISTRIAL.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE APPELLANT'S ENTIRE STATEMENT TO POLICE INTO EVIDENCE.

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON VIOLATION OF UNIFORM CIRCUIT AND COUNTY COURT RULE 9.04.

STATEMENT OF THE FACTS

The Appellant, Raphael Flowers, who was eighteen years old at the time of the incidents in question, was indicted as follows: Count I- statutory rape of a seven year old male child; Count II - statutory rape of a seven year old male child; Count III - sexual battery of an eight year old male child; and Count IV - sexual battery of a seven year old child. (Record p. 1 - 2). The Appellant was first brought to trial for these charges in June of 2007 before Judge Betty Sanders. The Appellant

moved for a mistrial during the State's opening arguments and the motion was denied. (Transcript p. 2). The Appellant again moved for a mistrial during the State's cross-examination of a defense witness. (Transcript 143). This motion was granted and a mistrial was declared.

Prior to the retrial of the Appellant, Judge Jannie Lewis was appointed by the Mississippi Supreme Court as a Special Judge to hear the retrial. (Record p.253 and Transcript p. 222). Before the start of the second trial, the Appellant moved to dismiss the indictment on the grounds of double jeopardy. A hearing was held on the matter. After reviewing the transcript from the first trial as well as the pertinent case law, the trial court denied the motion. (Transcript p. 248 - 249).

During the trial, the victim listed in Count I [1] testified that he was playing outside of the Appellant's mother's house with three other boys[2] when they decided to go walking. (Transcript p. 321). The Appellant went walking with the boys and the group walked to the Appellant's mother's old house. (Transcript p. 321-322). When they got to the house, the Appellant lined the four victims up against the wall and the boys took turns going in a room with the Appellant. (Transcript p. 322). Count I Victim further testified that he went first to get it over with and that the Appellant "had told [him] to pull my pants down. He had pulled his pants down. Then he pulled his boxers down and I had pulled my boxers down. . . . He put it in my mouth and he put it in my butt. . . He put his penis in my mouth." (Transcript p. 322 - 323). When asked what was happening while the Appellant's penis was inside his butt, he responded, "he moved it back and forth." (Transcript p. 323).

Ken Spencer, the Chief Investigator for the Leflore County Sheriff's Department, read the statement given by the Appellant to police after his arrest into evidence:

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[1]The State will not use the names of the victims as they are minors.

[2]The three other boys were the boys identified in Counts II, III, and IV of the indictment. Each of these boys testified at trial; however, the State will not go into their testimony in its brief as a mistrial was granted on these counts because the jury was unable to reach a verdict on the counts.

> . . . That Sunday, the 23rd, I was home. It was between 1:00 and 3:00 p.m. that afternoon. [Count I Victim], who is about eight or nine years old, he's my cousin, came up to the house and asked me to come outside. I did, and he asked me to meet him at my old house on Park Street. We just moved in this house we are in now. [Count I Victim] left and walked over that way. And I left and walked over there. When I got there, he was inside the house, and he was by himself. I went in, and [Count I Victim] said he wanted some money, and he grabbed me through my gym shorts by my penis. He took my penis out and asked me could he suck it. He started sucking my penis. I told him to stop, and he kept going. Then he stopped. My penis was hard, but I hadn't nutted then. [Count I Victim] turned around and bent over and told me to put it in his booty. I stuck it in his booty, but it didn't go all the way in, just a little bit. I didn't try to go all the way in, and I pulled back. [Count I Victim] turned around and started jacking me of with his hand. When I nutted, he turned around, and I nutted on his butt between his cheeks. When I had done this, I gave [Count I Victim] $.50. It was two quarters. He left, and I went home. This is the only time I have ever done anything like this, and I didn't mean for it to go this far. I have never done this with any other boys. [Count I Victim] was the first time.

(Transcript p. 347).

The jury convicted the Appellant of Count I, the statutory rape of a seven year old boy. However, they were unable to reach a verdict on the remaining counts and the trial judge declared a mistrial on those counts. The Appellant was sentenced to serve thirty years in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The State was not barred by double jeopardy from prosecuting the Appellant after the Appellant's first trial ended in mistrial. Double jeopardy does not apply when the defendant moves for mistrial unless he or she can establish bad faith prosecutorial misconduct. The Appellant failed to do so. Furthermore, the record does not indicate that the prosecution was attempting to goad or provoke the Appellant into moving for a mistrial.

The trial court did not abuse its discretion in allowing the Appellant's entire statement into evidence. The acts admitted by the Appellant which constituted the criminal act of fondling were so interrelated to the acts which constituted statutory rape as to constitute a single occurrence.

Additionally, evidence of those acts was necessary for the State to tell a rational and coherent story of what happened.

The trial court properly denied the Appellant's motion for new trial based upon violation of Uniform Circuit and County Court Rule 9.04. First, the alleged discovery violation did not prejudice the Appellant; nor does the record indicate that there was a miscarriage of justice. Second, the matter was not timely and properly brought before the trial court. When the testimony at issue was given, the Appellant failed to object. Lastly, the State affirmatively stated for the record that it was not aware of the information in question until it also heard the testimony at the sentencing hearing.

ARGUMENT

I. THE STATE WAS NOT BARRED BY DOUBLE JEOPARDY FROM PROSECUTING THE APPELLANT AFTER THE APPELLANT'S FIRST TRIAL ENDED IN MISTRIAL.

The Appellant first argues that "under double jeopardy the State was barred from prosecuting [him] again because the first case resulted in a mistrial based on prosecutorial misconduct." (Appellant's Brief p. 7). This Court has previously held that it is "unwilling to rule that the double jeopardy provision of the Fifth Amendment to the United States Constitution means that every time a defendant is put to trial he must be set free if the trial aborts and does not conclude with a final judgment." *Carter v. State*, 402 So.2d 817, 820 (Miss. 1981). "If mistrial is granted upon the court's motion or upon the State's motion, a second trial is barred because of double jeopardy, unless taking into consideration all the circumstances there was a 'manifest necessity' for the mistrial." *Jenkins v. State*, 759 So.2d 1229, 1234 (Miss. 2000). The record clearly indicates that in the case at hand,

the Appellant moved for mistrial on two separate occasions. (Transcript p. 2 and 143)[3]. Therefore, the following standard applies:

> Generally, a defendant who moves for mistrial is barred from later complaining of double jeopardy. (*citation omitted*). To overcome this bar, [the defendant] must show that error occurred and that it was committed by the prosecution purposefully to force [the defendant] to move for a mistrial. (*citations omitted*). Without proof of judicial error prejudicing the defendant or bad faith prosecutorial misconduct, double jeopardy does not arise. (*citations omitted*).

Nicholson on behalf of Gollott v. State, 672 So.2d 744, 750 (Miss. 1996).

The record indicates that the Appellant moved for mistrial because of the actions of the prosecutor and that the trial court granted the mistrial based on those actions. (Transcript p. 144). However, simply establishing that the prosecutor's actions were the basis for the trial court's granting the Appellant's motion for mistrial is not enough as evidenced by numerous cases wherein a mistrial was declared because of the actions of the prosecution, yet it was held that there was not a sufficient showing of bad faith prosecutorial misconduct and therefore, double jeopardy did not arise. *See Daniels v. State*, 9 So.3d 1194, 1199-1200 (Miss. Ct. App. 2009) (mistrial the result of prosecutorial discovery violation); *Roberson v. State*, 856 So.2d 532, 533-35 (Miss. Ct. App. 2003) (mistrial the result of prosecutorial discovery violation); *State v. Blendon*, 748 So.2d 77, 90 (Miss. 1999) (mistrial the result of prosecutorial discovery violation which resulted in monetary sanctions against prosecutor); and *Wheat v. State*, 599 So.2d 963, 964-65 (Miss. 1992) (retrial granted on sentencing portion of trial which was the result of the prosecution making the "you do not have the

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[3] The Appellant first moved for mistrial after the prosecutor stated the following during opening arguments: "Ladies and gentlemen of the jury, this is one of the saddest and sickening cases I've ever tried." The Appellant objected and moved for mistrial. The trial court did not grant a mistrial but did admonish the jury to disregard the statement. (Transcript p. 2 - 4). The Appellant moved for mistrial a second time during the prosecution's cross-examination of one of the defense's witnesses wherein the witness was asked, "And also if this happened over a year ago, why are you just waiting until today to come in and make this statement that you were with him the whole time?" (Transcript p. 143). It was upon this motion that a mistrial was declared. (Transcript p. 144).

final word" argument during closing).

"When a defendant moves for a mistrial he or she will be barred from later claiming a double jeopardy violation, unless it can be shown that the error at issue was committed by the prosecution with the intent of forcing the defendant to move for a mistrial." *State v. Blendon*, 748 So.2d 77, 90 (Miss. 1999) (*emphasis added*). Thus, for the Appellant to succeed on this claim, bad faith prosecutorial misconduct must be shown. In other words, it has to be evident that the State intended to "goad" or "provoke" the Appellant into declaring a mistrial. *Roberson v. State*, 856 So.2d 532, 535 (Miss. Ct. App. 2003). The Appellant's own counsel stated, during a hearing prior to the second trial, that he was not arguing that the prosecutor "did anything intentional." (Transcript p. 147). Moreover, during the hearing on the Appellant's motion to dismiss on the grounds of double jeopardy, the prosecutor explained why he questioned the defense witness as he did which ultimately resulted in the mistrial. (Transcript p. 243 - 245). This unequivocally establishes that the prosecution was not attempting to goad the Appellant into moving for a mistrial. "A prosecutorial error necessitating the declaration of a mistrial does not necessarily amount to an intent to force the defendant to move for mistrial." *State v. Blendon*, 748 So.2d 77, 90 (Miss. 1999). The Appellant here, just as the defendant in *State v. Blending*, "failed to offer any evidence that the prosecutor had the intent to force the defense to move for a mistrial." *Id.* Accordingly, the State was not barred by double jeopardy from prosecuting the Appellant after the mistrial was declared.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE THE APPELLANT'S ENTIRE STATEMENT TO POLICE.

The Appellant also argues that he "was irreparably and unfairly prejudiced when character evidence of prior bad acts or other unrelated crimes not charged in the indictment were admitted over [his] objection." (Appellant's Brief p. 11). "[T]he admissibility of evidence rests within the trial

court's discretion." *McGowan v. State*, 859 So.2d 320, 328 (Miss. 2003). "Unless the trial court abused its judicial discretion to the point of prejudicing the accused, this Court must affirm the trial court's ruling." *Id.*

Specifically, the Appellant contends that his entire statement should not have been allowed into evidence; but instead the portions of the statement[4] concerning criminal acts not charged in the indictment should have been redacted as those portions were "evidence of prior bad acts or other unrelated crimes." (Appellant's Brief p. 11). Mississippi law is well-settled with regard to this issue:

> Evidence of other bad acts committed by a defendant is not generally admissible as a part of the State's case-in-chief. *Neal v. State*, 451 So.2d 743, 758 (Miss.1984). However, proof of another crime is admissible where the offense charged and that offered to be proved are so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences. *Underwood v. State*, 708 So.2d 18, 32 (Miss.1998). The rationale for admitting evidence of certain closely related acts is that the State "has a legitimate interest in telling a rational and coherent story of what happened...." *Brown v. State*, 483 So.2d 328, 329 (Miss.1986). The telling of the story may require revealing information about other wrongs perpetrated by the defendant. *Id.*

Sykes v. State, 749 So.2d 239, 244 (Miss. Ct. App. 1999) (*emphasis added*). A simple reading of the Appellant's statement illustrates just how interrelated the Appellant's act of raping the victim and fondling the victim were. Moreover, this Court has previously upheld a trial court's decision to allow evidence of a defendant's fondling his victim when he was only charged with statutory rape because the two acts were so interrelated and because the evidence was needed in order to tell a complete story and avoid confusion among jurors. *See Price v. State*, 898 So.2d 641, 654 (Miss. 2005). Additionally, the Court of Appeals noted in *Weathersby v. State*, that this Court had

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[4] The statement given by the Appellant is set forth above in the "Statement of the Facts" section of this brief. It was read into evidence on page 347 of the transcript and entered into evidence as Exhibit S-2.

previously held that "such a paring away of the facts surrounding a particular incident is not necessary" as "the jury is entitled to hear all the facts in order to have as complete a grasp as possible as to what actually occurred." 769 So.2d 857, 859 (Miss. Ct. App. 2000) (citing *Bell v. State*, 725 So.2d 836 (Miss. 1998)). The *Weathersby* Court further stated that:

> We do not think that a criminal defendant may scour the criminal code to find a statute different from the one under which he is being tried that arguably prohibits some action that occurred during the event and then use that as a basis to exclude evidence of that action. Were the jury limited to hearing only a piecemeal version of the critical events surrounding alleged criminal activity, cleansed of any mention of acts not directly related to the essential elements of the charged crime, the chance for misunderstanding and confusion would rise to an intolerably high level. Matters that, taken in isolation and out of context, might appear implausible could conceivably take on an entirely different light if the jury had a full understanding of all events. The theory of the law as found in Rule 404(b) that bars the jury from considering unrelated bad acts simply does not apply with the same force to bad acts that are inextricably intertwined in the criminal event being tried, and we decline to extend the concept that far.

Id. (*emphasis added*).

As the acts admitted by the Appellant which constituted the criminal act of fondling were so interrelated to the acts which constituted statutory rape as to constitute a single occurrence and as evidence of those acts was necessary for the State to tell a rational and coherent story of what happened, the entire statement of the Appellant was admissible. Thus, the trial court did not abuse its discretion in allowing the statement into evidence.

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON VIOLATION OF UNIFORM CIRCUIT AND COUNTY COURT RULE 9.04.

Lastly, the Appellant argues that "the trial court erred in denying [his] motion for a new trial after the State failed to comply with discovery rules by failing to disclose medical records that a witness was receiving therapy." (Appellant's Brief p. 15). During the sentencing hearing, the State questioned Elnora Banks, the grandmother of Count I Victim, about how the victim had been since

the incident in question, and she responded that he was "doing okay since he going to counseling." (Transcript p. 547). This was the first time the State or the Appellant had heard that the victim had been to counseling. The Appellant did not object to the testimony during the sentencing hearing. He later filed a motion for new trial based upon violation of Uniform Circuit and County Court Rule 9.04. (Record p. 259). A hearing was held on this motion on February 9, 2009. (Transcript p. 564 - 579). During this hearing, counsel for the State stated for the record that he could not find "any record that the State knew or had in its possession any kind of documents that it did not produce to the defendant, particularly these records from this young child." (Transcript p. 572). He further stated that had the State been aware of the existence of records regarding counseling the victim received after the incident, the State would have certainly used them to in its case in chief. (Transcript p. 573). At the conclusion of the hearing, the trial judge denied the motion.

"The trial court has considerable discretion in matters pertaining to discovery, and its exercise of discretion will not be set aside in the absence of an abuse of that discretion." *Steadham v. State* 995 So.2d 835, 838 (Miss. Ct. App. 2008) (quoting *King v. State*, 857 So.2d 702, 714(¶ 12) (Miss.2003)). In the case at hand, the trial court did not err in denying the motion for new trial for several reasons. First and foremost, "a violation of Rule 9.04 is considered harmless error unless it affirmatively appears from the entire record that a violation caused a miscarriage of justice." *Powell v. State,* 925 So.2d 878, 881 -883 (Miss. Ct. App. 2005) (citing *Wyatt v. City of Pearl*, 876 So.2d 281, 284(Miss.2004). "Even in cases where it has been found that there was a clear discovery violation, the violation has been held to be harmless error where there was no prejudice suffered by the defendant." *Gray v. State,* 926 So.2d 961, 971 (Miss. Ct. App. 2006) (citing *Jones v. State*, 669 So.2d 1383, 1392 (Miss.1995)). The Appellant does not assert that the alleged discovery violation prejudiced his case. He simply states that had the trial court granted him a new trial then his counsel

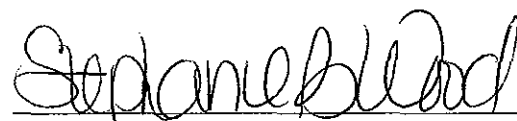
would have had time "to prepare and adjust his strategy for the newly discovered evidence." (Appellant's Brief p. 17). This generic assertion certainly does not establish that the Appellant was prejudiced by the alleged violation; nor does it affirmatively appear from the record that there was a miscarriage of justice. Secondly, the matter was not properly and timely brought to the attention of the trial court. *See O'Neal v. State,* 977 So.2d 1252, 1255 (Miss. Ct. App. 2008) (holding that because the defendant chose to allow the trial to continue, he waived any remedy for the State's discovery violation); *Powell v. State,* 925 So.2d 878, 882 (Miss. Ct. App. 2005)(holding that it would have been preferable for the defendant to have brought the violation to the court's attention when the matter first arose during trial); and *Williams v. State,* 854 So.2d 1077, 1080 (Miss. Ct. App. 2003) (holding that "[i]f a defendant who has been surprised by undisclosed discoverable evidence does not request a continuance at the time of such surprise, he waives this issue on appeal"). Lastly, the record indicates that the State was not aware that the victim had been seeing a counselor. As set forth above, counsel for the State informed the trial court that there was nothing in the State's files indicating that the victim had been to see a counselor. Accordingly, the trial court properly denied the Appellant's motion for new trial based upon violation of Uniform Circuit and County Court Rule 9.04.

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests this Honorable Court to affirm the Appellant's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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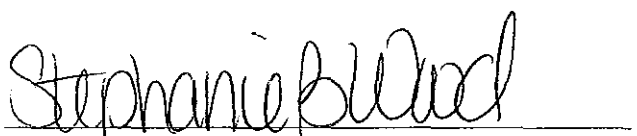
This the 15th day of December, 2009.



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