

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONNIE SANDERS

APPELLANT

VS.

NO. 2009-KA-0588-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Marshall County, Mississippi and a judgement of conviction for burglary of a commercial building against Ronnie E. Sanders. Circuit Court Judge Andrew K. Howorth sentenced Sanders to seven-years incarceration and a \$2,000 fine. After denial of post trial motions, Sanders appealed raising the following issue.

STATEMENT OF THE ISSUES

ISSUE 1: Whether the trial court erred in denying Sanders's motions for a continuance and mistrial after the state failed to comply with discovery rules by failing to disclose a witness until minutes before he took the stand to testify?

STATEMENT OF THE FACTS

Cousins Keith Luster and Ronnie Sanders were on trial as co-defendants in the Circuit Court of Marshall County for the November 12, 2007 burglary of M & W Quick Stop. On the morning of the second day of trial, Sanders failed to appear at court at the scheduled time. Sanders's defense counsel advised the court that he was in communication with Sanders and members of Sander's family. (T. 135-37). Defense counsel stated that Sanders was a patient at the Bolivar County hospital emergency room earlier in the morning, was discharged and in route to the Marshall County courthouse. Defense counsel provided the court with a faxed page from the Bolivar County Hospital showing Sanders had been a patient in the emergency room at 8:04 a.m. (Exhibit D-21). The page did not indicate whether Sanders was admitted to the hospital or provide a diagnosis or complaint. Based on the time of the admission, the trial court considered Sanders was already in default on his appearance in court because it would not have been possible for him to arrive at court on time, the Bolivar County hospital being two hours away. The trial judge determined Sanders was engaging in a ruse to delay his trial and proceeded without him. (T. 174-177).

On the first day of trial, Sanders's defense counsel cross examined the prosecution witnesses first and then Luster's attorney conducted cross examination. On the second day, when Sanders failed to appear, Luster's attorney conducted cross examination first in order to give Sanders time to arrive. (T. 177; 266-67). During the noon break of the second day of trial, Luster entered a guilty plea to accessory after the fact. (T. 193-97). When court resumed in the afternoon, Sanders was still nowhere to be found. (T.193-97). Sanders's defense counsel moved for a continuance prior to Luster's testimony, which the court denied. (T.197-99). Defense counsel also moved for a mistrial, which the court also denied. (T.198). Later in the trial, Luster testified for the prosecution. (T.200). Sanders never arrived at the courthouse that day and did not provide an explanation to the court as

to why he failed to appear. The jury convicted Sanders of burglary of a commercial building.

Sanders surrendered to authorities the following week. At sentencing, he received seven-years incarceration and a \$2,000 fine. (T. 261-69). After denial of post trial motions, Sanders appealed.

SUMMARY OF THE ARGUMENT

The conviction and sentence of the Circuit Court of Marshall County should be affirmed. The State did not commit a discovery violation for failing to disclose Luster as a witness before commencement of the trial; Sanders and Luster were co-defendants on trial together when Luster decided to plead guilty and testify against Sanders. Therefore, the State couldn't possibly have notified Sanders prior to trial that Luster would be a witness.

The trial court properly denied Sanders's motion for a continuance and mistrial. A trial court's decision to deny a motion for continuance will not be reversed unless it appears to have resulted in manifest injustice. *Stack v. State*, 860 So.2d 687, 691(¶ 7) (Miss.2003). A violation of Rule 9.04 is considered harmless error unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice. *Wyatt v. City of Pearl*, 876 So.2d 281, 284(¶ 10) (Miss.2004). The prosecution provided ample evidence of his guilt and no manifest injustice occurred in convicting Sanders of burglary of a commercial building.

ARGUMENT

In his only assignment of error, Sanders argues that the circuit court erred in denying his motion for a continuance and motion for mistrial. Sanders contends that the State did not disclose Luster's identity as a witness prior to trial, and this interfered with the defense's ability to adequately prepare its case and denied him a right to a fair trial. Sanders also contends that the procedure for the court's response to the discovery violation, as set forth in *Box v. State*, 437 So.2d 19 (Miss.1983) and Rule 9.04 of the Uniform Rules of Circuit and County Court, was not followed.

Rule 9.04 requires the prosecution to disclose the names, addresses, and testimonies of witnesses to be offered during their case-in-chief. *Box* sets forth the procedure for a trial court to follow in settling discovery violations; that procedure is now addressed in URCCC 9.04(I):

If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

If during the course of trial, the prosecution attempts to introduce evidence *which has not been timely disclosed to the defense as required by these rules*, and the defense objects to the introduction for that reason, the court shall act as follows:

1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.
3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

The State submits no discovery violation occurred. As soon as the prosecution was aware that Luster would testify against Sanders it notified defense. Also, the State would point out that the trial record before this Court is totally void of the defense making any request for discovery in this matter.

Sanders argues that "The information that might have been discovered in the testimony of Luster, if examined, would have prevented Sanders from a trial by ambush and surprise." (Appellant's brief at page 9). In considering whether denial of a continuance was error, the supreme court stated that "the question of whether defendant had a reasonable opportunity to prepare to confront the State's evidence at trial depends upon the particular facts and circumstances of each case." *Traylor v. State*, 582 So.2d 1003 (Miss.1991) citing *Reuben v. State*, 517 So.2d 1383 (Miss.1987).

In the case at bar, the facts do not support that Sanders was denied a "reasonable opportunity to prepare" or faced "trial by ambush." Luster and Sanders were charged in the same indictment and on trial together as co-defendants. Sanders always faced the possibility that Luster would testify against Sanders and in his own defense, if the opportunity presented itself. Sanders has not presented any concrete facts demonstrating how he was prejudiced by the circuit court's decision to deny his motion for a continuance. The defense claims it needed more time to adjust its strategy for the newly discovered evidence. Luster's testimony did not provide any new evidence of significance.

Basically, Luster's testimony was that he, Sanders and Gregory Michaels were riding back to Memphis from Oxford in a van being driven by Sanders. Luster testified they stopped, Sanders and Michaels exited the van and Luster passed out on a mattress in the back. Luster woke up when the two men returned to the van with bags. Luster could not see what was in the bags. The police stopped the van as they were headed back to Memphis. Michaels exited the vehicle and fled on foot; the deputies arrested Sanders and Luster. (T. 218-232). Luster's testimony did not really hurt Sanders's case but actually provided credibility to Sander's insinuation that Michaels was the perpetrator.

A trial court's decision to deny a motion for continuance will not be reversed "unless it

appears to have resulted in manifest injustice." *Stack v. State*, 860 So.2d 687, 691(¶ 7) (Miss.2003). Conclusory arguments alone are not sufficient to support a request for additional time. *Golden v. State*, 736 So.2d 1076, 1077-78(¶ 6) (Miss.Ct.App.1999). Rather, "[i]t is incumbent on the defendant seeking ... a continuance to show concrete facts that demonstrate the particular prejudice to the defense that will necessarily arise if a delay is not granted." *Id.* at 1078(¶ 6).

For the sake of argument, if this Court should find a violation of Rule 9.04, the supreme court ruled "[A] violation of Rule 9.04 is considered harmless error unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice." *Wyatt v. City of Pearl*, 876 So.2d 281, 284(¶ 10) (Miss.2004). Even cases involving clear discovery violations have ruled that such violations are harmless as long as the defendant was not prejudiced. *Gray v. State*, 926 So.2d 961, 971(¶ 25) (Miss.Ct.App.2006) (citing *Jones v. State*, 669 So.2d 1383, 1392 (Miss.1995)).

Sanders has not presented any concrete facts demonstrating how he was prejudiced by the circuit court's decision to deny his motion for a continuance. The defense claims it needed more time to adjust its strategy for the newly discovered evidence. In short, it is unlikely a continuance would have resulted in a different verdict. There was ample evidence to convict Sanders without Luster's testimony. The van in which Sanders and Luster were riding was seen parked 200 to 300 yards from the scene of the burglary when authorities received the initial report of a burglary. (T. 106). A brief inspection was made of the premises but no burglary was detected. (*Id.*). Approximately thirty minutes later, it was determined the store was in fact burglarized and an individual was seen running on foot away from the store. (*Id.*). The burglary occurred in the early morning hours when no traffic was around. When the same officer saw the van on the highway headed away from the store he stopped it for further inspection. (T. 106-112). After a search of the van, Sanders and Luster were arrested. (T.110-17) A backpack with items stolen from the store and tools used in the burglary was

found on the ground within a few feet of the van, as well as some loose money. Four masks, including a black ski mask, three hand-held radios and four gloves were found in the van. (T. 110-18). A person wearing a black ski mask and gloves was seen in the store surveillance video. A pistol stolen in the burglary was recovered in the grass approximately 20 feet from the van. The clothing Sanders was wearing at the time of his arrest contained what appeared to be sheet rock residue and debris from a wooded area. Testimony established the suspect made entry into the store by breaking through an exterior wall and kicking in the sheetrock.(T.110-18; 139-160; Exhibits S 9-14).

In *Walker v. State*, 671 So.2d 581 (Miss.1995) the Supreme Court held Walker was not entitled to a continuance when the state announced before the trial commenced that one co-defendant was pleading guilty and would testify against Walker. Reversal on the grounds of a trial court's denial of a motion for continuance requires a showing that the trial court's decision resulted in a manifest injustice. *Id.* Sanders argues that such an injustice may have resulted had he had an opportunity to prepare for questioning Luster. (Appellant's brief at page 9).

Sanders argues that under *McCullough v. State*, 750 So.2d 1212 (Miss. 1999), and the line of cases following *McCullough*, as cited by Sanders, the State's failure to disclose Luster as a witness prior to trial is prejudicial error requiring reversal and remand. Sander's reliance on *McCullough* and subsequent cases is misplaced as *McCullough* can be factually distinguished. In *McCullough* the State informed the defense on the day of trial that it intended on impeaching the defendant's testimony with newly acquired evidence from a detective concerning an un-prosecuted youth court matter. While the trial court admitted the newly acquired evidence, the Supreme Court ruled it inadmissible under Mississippi Rules of Evidence, Rule 404(b) and held its admission into evidence reversible error. Such is not the case here for there has been no showing that Luster's testimony is

inadmissible.

In *Morris v. State*, 595 So.2d 840 (Miss.1991), the supreme court found no reversible error in the trial court's denial of a continuance where discovery was provided to the defense two days before trial, although defense counsel was orally informed of the identity and location of State's witnesses the previous week. *Id.* at 843. The Court found Morris made "no showing that he would have been better able to meet the prosecution's evidence given more time. Even a wrongful denial of continuance, which is not present here, does not mandate reversal absent a showing of injury." *Id.* at 844. The Court concluded:

Nothing is presented in this appeal which indicates the defense would have been handled any differently had the continuance been granted; therefore, even assuming for argument's sake the denial was not proper, the appellant has failed to show that he did not receive a fair trial.

Sanders fails to show how he was prejudiced. How can Sanders claim impairment of a defense never presented? Sanders called no witnesses of his own, but relied on cross-examination of the prosecution's witnesses in his attempt to place the blame for the crime on Gregory Michaels and in order to cast reasonable doubt of his own guilt.

Under the facts presented: where no discovery violation occurred; where cross-examination was conducted, and where there was no indication the case would have been handled differently had more time been allowed, the denial of a continuance was not error. The State submits that in reviewing the record, there is no merit to Sanders's argument that the trial court erred in denying his motion for a continuance or mistrial or that such denial resulted in a manifest injustice. This issue is without merit.

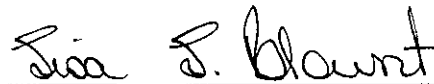
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's conviction of Ronnie Sanders for burglary of a commercial Building.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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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