IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCUS DAVIS — APPELLANT

VS. — NO. 2009-KA-0805-SCT

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 Leflore County, Mississippi wherein Marcus Davis and Travis Anderson were indicted for one count of Attempted Armed Robbery and one count of Fleeing Law Enforcement. (CP1-4). Prior to trial, Travis Anderson entered a guilty plea. (Tr. 110). The trial court entered a directed verdict on the Fleeing Law Enforcement charge against Davis.(CP 43-44). After a trial by jury, Davis was convicted of Attempted Armed Robbery. (CP 42). Davis received twenty years in the custody of the Mississippi Department of Corrections, with ten years to serve and ten years of post release supervision, with five years supervised and five unsupervised. (CP 55-57). After denial of post trial motions, Davis appealed. (CP 59-60).

STATEMENT OF THE ISSUES

I: Did the trial court err by allowing the introduction of prior bad acts evidence?

SUMMARY OF THE ARGUMENT

The trial court properly admitted evidence of a December 2006 unsolved armed robbery of the same Dollar Tree for which Davis was a suspect. The evidence elicited during the testimony of Shannon Jefferson and Travis Anderson was admitted to show Davis's motive, intent or common plan of robbery. After ruling the evidence was admissible under M.R.E. Rule 404(b), the trial court properly determined under M.R.E. 403 that the probative value of the evidence substantially outweighed any unfair prejudice or confusion to the jury. The trial court also offered to give a limiting jury instruction.

If this Court finds error in admission of the December 2006 armed robbery evidence, the error does not rise to the level of reversible error.

STATEMENT OF THE FACTS

At Davis's trial the following evidence was introduced:

Shannon Jefferson, a previous Dollar Tree employee, testified he was a witness to the Dollar Tree robbery in December 2006 and the Dollar Tree robbery in May 2007. Jefferson testified Davis's wife Annette also worked for Dollar Tree and was with Jefferson when the Dollar Tree was robbed in December 2006. (Tr. 59, 64). According to Jefferson, one night in December 2006 as he and Annette were outside the Dollar Tree closing the store and on their way to make the night deposit, someone dressed in dark clothing ran up and stole the night deposit out of Annette's hands. (T. 60, 72). The assailant had on a hoodie so Jefferson could not see his face. (Tr. 65). Jefferson testified Davis use to pick up his wife Annette from work at the Dollar Tree in a large, white SUV. (Tr.58). Jefferson could not identify Davis as the person who committed either robbery and was unable to identify who was driving the get-away car at the May 2007 robbery. (Tr.68). Jefferson testified the individual who robbed the Dollar Tree store manager Bonnie McKay in May 2007 ran up behind her with a gun and then when she screamed he got in the passenger seat of a dark car and sped off. Tr. (69-70).

Bonnie McKay testified that she was the manager of the subject Dollar Tree store from June 1997 through May 2007. (Tr 75). Annette Davis was assistant manager of the Dollar Tree when it was robbed in December 2006. (*Id.*). McKay testified to the events surrounding the May 4, 2007 robbery and how the man approached with a gun as she dropped the store money in the bank's night deposit. (Tr. 77-80). McKay could not identify Davis as the man who attempted to rob her on May 4th, but described him as tall with a dark hoodie pulled over his head. (T. 78, 81).

Sergeant Roach with the Greenville Police testified to the high speed pursuit of a small four-door sedan from the robbery, the flight of the two men from the car and capture of one of the men. (Tr. 83-5). While Roach did not identify Davis as being in the car he was pursing, he testified that two men fled the

car when it stopped. (Tr. 85). Roach identified Anderson as being the man captured. (Id.). The man that got away fit Davis's description of being tall and slim. (T. 95-6). Roach further testified to finding Davis's work identification card from Viking Range in the car and then thinking it was Davis he saw fleeing. (T. 85, 87, 96).

Travis Anderson testified that he first met Davis when they were both working at Viking. (Tr. 97). According to Anderson, Davis treated him to dinner and drinks on May 3, 2007, the night before the robbery. (Tr. 98) At the dinner Davis told Anderson of his financial troubles and how "He needed to hit a lick, he had hit one once before and he didn't want to use his vehicle to do it again. He wanted to use my vehicle." (Tr. 100). Anderson told Davis that he did not think he could allow him to use his car. (Tr. 101).

Anderson testified that the following evening he met up with Davis and drove him to the bank in Anderson's car. (Tr. 106). As they sat in the car in the bank parking lot, Davis indicated to Anderson that he was waiting for someone to get to the bank. (*Id.*). Davis called someone on his cell phone; Anderson heard Davis ask what time the friend girl got off from work. (*Id.*). After a car drove up, Davis told Anderson that was who he needed to see and exited the car. (*Id.*). Davis then pulled out a dark ski mask and a gun.. (Tr. 106-7, 125). Davis ran toward the lady, she screamed, Davis ran back to the car and told Anderson to drive off. (Tr. 107).

After police were notified, a high speed chase ensued. Eventually the car ran off the road and both men fled the car. (Tr. 109) Anderson testified he stopped and dropped to his knees until the police got to him but Davis got away. (Tr. 109). After being caught, Anderson was reluctant to identify Davis for fear of retaliation; Anderson admitted at trial that he initially lied to the police. (Tr. 111-13, 124). Anderson testified he was hoping to receive a reduced sentence in exchange for his testimony. (Tr. 122-24).

At trial, Chad Wilshire, an investigator with the Greenwood Police Department, testified to his investigation of the attempted robbery. (Tr. 130-140) Wiltshire found a dark ski mask in the car abandoned

by the two fleeing men, a cellular telephone and also a gun in the glove box. (Tr. 130, 134). Cellular telephone records indicated the phone belonged to Davis and a call was placed from the phone to the Dollar Tree about 15 minutes before the attempted robbery.(Tr. 136-37).

ARGUMENT

PROPOSITION: The trial court did not err by allowing the introduction of prior bad acts evidence.

Davis claims that the trial court erred in allowing the introduction of evidence that Davis was involved in the 2006 robbery of the same Dollar Tree store employee. Davis argues that it was not relevant under M.R.E. 404(b) and was more prejudicial than probative under M.R.E. 403. Davis claims the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

The admissibility and relevancy of evidence is within the discretion of the trial court and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Reynolds v. State*, 784 So.2d 929, 932 (Miss.2001). "As long as the trial court remains within the confines of the Mississippi Rules of Evidence, its decision to admit or exclude evidence will be accorded a high degree of deference." *Johnston v. State*, 567 So.2d 237, 238 (Miss.1990). Additionally, "the admission or exclusion of evidence must result in prejudice or harm, if a cause is to be reversed on that account." *Jackson v. State*, 594 So.2d 20, 25 (Miss.1992).

Mississippi Rules of Evidence require that evidence be relevant, and, if so, it is generally admissible. M.R.E. 401 & 402. However, even relevant evidence may not be admissible due to prejudice, confusion, or waste of time. M.R.E. 403. Where proof of other crimes or acts of the defendant is offered into evidence pursuant to Rule 404(b), it is still subjected to the requirement that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. M.R.E. 403. Rule 403 is the "ultimate filter through which all otherwise admissible evidence must pass." *Bounds v. State*, 688 So.2d 1362, 1370 (Miss.1997).

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.* Proof of another crime is also admissible where it is necessary to identify the defendant, or is material to prove motive, or there is a connection between the act proposed to be proved and that charged, or the accusation involves a series of criminal acts which must be proved to make out the offense, or it is necessary to prove scienter or guilty knowledge. *Underwood*, 708 So.2d at 32. The State, in presenting its theory of the case, has a legitimate interest in making sure that its theory is presented in a rational and coherent manner. *Brown v. State*, 483 So.2d 328, 330 (Miss.1986), *Sykes v. State*, 749 So.2d 239, 244(¶ 21) (Miss.Ct.App.1999) .

Mississippi Rules of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The trial judge found the events of the December 2006 robbery were admissible to show Davis's motive, intent, or common plan to rob the Dollar Tree store. (Tr. 42). The evidence was not admitted to prove that Davis acted in conformity with his character. Jefferson testified to the circumstances surrounding the December 2006 robbery, the fact that Davis's wife was employed at the Dollar Tree at the time and was actually the one holding the night bank deposit when robbed.

Anderson testified that on the night prior to the subject armed robbery, Davis asked Anderson if he could use Anderson's car to "hit a lick" because Davis had used his own vehicle in another robbery against

Dollar Tree and they might recognize him. (Tr. 99,100). According to Anderson, Davis confessed to the December 2006 robbery of the Dollar Tree store where Davis's wife worked. (Tr.100). The two robberies were interrelated. Anderson's testimony was probative of Davis's plan, preparation and motive.

The December 2006 robbery was close in time to the subject robbery. Both robberies involved the night deposit for the Dollar Tree. Jefferson witnessed both robberies. Both robberies happened just after the store closed. In both robberies the assailant was in dark clothing wearing a hoodie. In the December 2006 robbery, Davis's wife was working at the Dollar Tree and according to Anderson, Davis told him he called the store before the robbery to see what time his wife got off work. (Tr. 100) With this information Davis knew what time to rob the employees of the night deposit. Anderson testified that shortly before the attempted robbery in the case *sub judice*, Davis called someone and asked what time did his "friend girl" get off. (Tr.105). Davis's cell phone records established Davis called the Dollar Tree shortly before it closed, which corroborates Anderson's testimony. (Tr.135-37).

"If the evidence is allowed under Rule 404(b), it must still pass through Rule 403, which is the ultimate filter through which all otherwise admissible evidence must pass." *Bounds v. State*, 688 So.2d 1362, 1370 (Miss.1997). "The decision of whether to admit evidence is left to a trial court's broad discretion." *Brown v. State*, 534 So.2d 1019, 1024-25 (Miss.1988). In the case at hand, the trial court held that the evidence sought to be introduced by the State was relevant, and found under M.R.E. 403 that the probative value of the evidence was not substantially outweighed by its prejudicial effect. (Tr. 42.). The evidence was properly admitted. *Simms v. State*, 813 So.2d 710 (Miss.2002).

An error is harmless when it is apparent on the face of the record that a fair-minded jury could have arrived at no verdict other than that of guilty. *Floyd v. City of Crystal Springs*, 749 So.2d 110, 120 (Miss.1999) (citing *Forrest v. State,* 335 So.2d 900, 903 (Miss.1976)). This Court has previously held that "[w]here the prejudice from an erroneous admission of evidence dims in comparison to other overwhelming

evidence, this Court has refused to reverse." *Carter v. State,* 722 So.2d 1258, 1262 (Miss.1998) (citing *Holland v. State*, 587 So.2d 848, 864 (Miss.1991)). In this case, the evidence of Davis's guilt is overwhelming; therefore, a fair-minded jury could have arrived at no verdict other than guilty.

The State does not concede that the trial court erred in admission of evidence of the 2006 armed robbery. However, in the event this Court should find error, the prejudice to Davis, if any, from the admission of the 2006 armed robbery, is not reversible error. The evidence of guilt dims in light of the overwhelming evidence of Davis's guilt presented by the State: the officers's testimony, Anderson's testimony, Davis's cell phone and work identification card being found in the car and Davis's cell phone record showing he called Dollar Tree shortly before the robbery. The weight and potential for unfair prejudice resulting from the subject testimony pales in comparison to the evidence of Davis's guilt. Clearly, the 2006 armed robbery evidence did not prejudice Davis to such an extent as to require reversal.

CONCLUSION

The trial court properly admitted the evidence of the December 2006 armed robbery. It was not admitted to show Davis acted in conformity with the previous robbery; it was admitted to show Davis's motive, intent, or common plan. The trial court also found the testimony was relevant and any prejudicial effect did not outweigh its probative value However, in the event this Court finds error, the trial court's admission of the evidence against Davis does not rise to reversible error. The prejudice from the admission, if any, pales in comparison to the evidence of Davis's guilt. Accordingly, based on the arguments contained herein and the record on appeal, the State would ask this Court to affirm Davis's conviction and the sentence of the Circuit Court of Leflore County.

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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This the 22nd day of January, 20010.

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