

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCUS DAVIS

APPELLANT

V.

NO. 2009-KA-0805-SCT

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

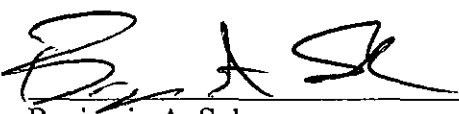
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Marcus Davis, Appellant
3. Honorable Dewayne Richardson, District Attorney
4. Honorable Richard A. Smith, Circuit Court Judge

This the 20 day of October, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCUS DAVIS

APPELLANT

V.

NO. 2009-KA-00805-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

ISSUE

MARCUS DAVIS WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN CHARACTER EVIDENCE OF A PREVIOUS ROBBERY WAS ADMITTED OVER THE OBJECTIONS OF DAVIS.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Leflore County, Mississippi. Marcus Davis was charged in the indictment for the crimes of Count I- Attempted Armed Robbery and Count II- Fleeing Law Enforcement. Davis was found guilty by a jury for the crime of Count I - Attempted Armed Robbery. Davis was sentenced by the court to a term of twenty (20) years in the custody of the Department of Corrections, with ten (10) years to be served, followed by ten (10) years of Post Release Supervision, with five (5) years supervised and

five (5) years unsupervised. Davis was sentenced following a jury trial from April 8-9, 2009, Honorable Richard A. Smith presiding. The trial court granted a directed verdict as to Count II of the indictment for the crime of Fleeing Law Enforcement. Marcus Davis is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On May 4, 2007, Bobbie McKay left the Dollar Tree after closing and traveled with Shannon Jefferson to the AmSouth Bank to make the night deposit. Tr. 77. Phoebe followed McKay and Jefferson to the bank per company policy to make the night deposit. *Id.* Upon arriving at the AmSouth Bank, McKay placed the money in the night drop. Tr. 78. As McKay double checked to make sure the deposit went into the night drop, she her Phoebe call her name. *Id.* Phoebe yelled, "Ms. Bobbie (McKay)." *Id.* McKay turned around and someone was coming towards her. *Id.*

McKay thought the person had a gun, but was not sure what the person had in his hands. *Id.* McKay assumed that the person was trying to rob her because she was making the night drop, however, no evidence was presented that the person was trying to rob McKay. Tr. 78-79. The person ran back into the car and the car took off down the road. Tr. 80. Phoebe went behind the car and called the police. *Id.*

According to the testimony Travis Anderson, he and Marcus Davis were working together back in May 2007. Tr. 97. Anderson testified that on May 3, 2007, the night prior to the alleged incident, Davis and Anderson were socializing at the La Pinata. Tr. 98. Anderson stated that Davis treated him to a meal and a drink. *Id.*

Anderson claimed that Davis was discussing that he was hurting financially. *Id.* Anderson continued to state that Davis stated that “he needed to hit a lick or something.” Tr. 99. Anderson testified that Davis told him that he had “hit a lick” before¹ and did not want to use his vehicle to do it again. *Id.* Davis wanted to use Anderson’s vehicle. Anderson told Davis that he did not think he could allow him to use his car. Tr. 101

However, on the day of the alleged attempted armed robbery, Anderson and Davis got together again. Tr. 103. Davis got into the car with Anderson. Tr. 104. Anderson claims that Davis told him that he needed to go to the bank. *Id.* Once they got to the bank, Anderson stated that Davis got out of the car and made a phone call. Tr. 105. Davis allegedly asked what time his friend girl got off of work. *Id.*

Davis then told Anderson that he was waiting for someone to pull up to the bank. Tr. 106. Once a car pulled up to the bank, Davis told Anderson that is who I need to see. *Id.* Anderson claims that Davis then pulled out a ski mask and a gun. *Id.*

Anderson said that he told Davis do not do it. Tr. 107. Anderson continued with his testimony that Davis ran to the lady at the bank. *Id.* The lady screamed and Davis ran back to the car and told Anderson to drive. *Id.* Anderson stated that only at the point is when he realized that Davis had tried to rob the lady. *Id.*

Anderson proceeded to testify that as he and Davis speed off in the car, a truck got behind them. *Id.* As Anderson was driving, the police then got behind the car. Tr. 108. Anderson claims he wanted to stop the car, but Davis allegedly would not let him stop. *Id.*

¹Davis allegedly told Anderson that he had previously robbed the Dollar Tree. Tr. 100.

Eventually the car runs off the road and both men get out of the car. Tr. 109. Davis allegedly got out and ran. *Id.* Anderson stated that he just stopped and dropped to his knees until the police got to him. *Id.*

Anderson pled guilty the morning of trial and testified against Davis.

SUMMARY OF THE ARGUMENT

The trial court improperly admitted into evidence of alleged prior bad acts of Davis. The evidence of a crime other than that charged in the indictment is not admissible evidence against the accused. The trial court allowed the State to introduce evidence through testimony about an unrelated act that happened months prior the alleged case at hand. The probative value of the evidence did not substantially outweigh the prejudicial effect of the prior alleged crimes as required by M.R.E 403. This evidence was unduly prejudicial.

ARGUMENT

ISSUE NO. 1

MARCUS DAVIS WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN CHARACTER EVIDENCE OF A PREVIOUS ROBBERY WAS ADMITTED OVER THE OBJECTIONS OF DAVIS.

Marcus Davis made an *Ore Tenus Motion in limine* to exclude any evidence concerning an alleged crime. Tr. 27. The alleged crime happened December 2006, and involved robbing the Dollar Tree and involving Davis's wife. *Id.* Davis made the motion to exclude evidence of other bad acts, including the alleged prior robbery of the Dollar tree. *Id.* The trial court found that the events of the December 2006, robbery were interrelated, involved the same store, and so close in time that the prior robbery does fall under

Mississippi Rule of Evidence 404(b). Furthermore, the trial court ruled that the prior robbery would come in under motive, intent, or common plan. Tr. 42. The trial court further held that the events sought to be introduced by the State were relevant, and found under M.R.E. 403 that the probative value of the evidence was not substantially outweighed by its prejudicial effect. *Id.* Davis maintained an objection for the record. *Id.*

“This Court's standard of review when considering a trial judge's admission or exclusion of evidence is ... one of abuse of discretion.” *Miller v. State*, 996 So.2d 752, 756 (Miss. 2008). “Generally, evidence of a crime other than that charged in the indictment is not admissible evidence against the accused.” *Duplantis v. State*, 644 So.2d 1235, 1246 (Miss. 1994); *Ladner v. State*, 584 So.2d 743, 758 (Miss. 1991). “However, where another crime or act is ‘so interrelated [to the charged crime] as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences,’ proof of the other crime or act is admissible.” *Duplantis*, 644 So.2d at 1246 (*quoting Wheeler v. State*, 536 So.2d 1347, 1352 (Miss. 1988)); *Neal v. State*, 451 So.2d 743, 759 (Miss. 1984). “Proof of another crime or act is also admissible where necessary to identify the defendant, to prove motive . . .” *Id.*

The claims by Anderson about the alleged prior robbery involving Davis falls within the area of bad acts as contemplated by M.R.E. 404(b). Mississippi Rule of Evidence 404(b) provides:

Other Crimes, Wrongs, or Acts. 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.

Mississippi Rules of Evidence 404(b).

A two-part analysis is conducted in order to determine whether to admit evidence under Rule 404(b). “The evidence offered must (1) be relevant to prove a material issue other than the defendants’s character; and (2) the probative value of the evidence must outweigh the prejudicial effect.” *Crawford v. State*, 754 So.2d 1211, 1220 (Miss. 2000).

This Court stated that in order to pass muster under Rule 404(b), evidence must “be such that it satisfies some other evidentiary purpose beyond simply showing that [the defendant] is the sort of fellow likely to commit the crime charged.” *Watts v. State*, 635 So.2d 1364, 1368 (Miss. 1994) (quoting *Jenkins v. State*, 507 So.2d 89, 91 (Miss. 1987)). Even if the evidence does pass muster under Rule 404(b), it must still pass the test of Rule 403. *Watts*, 635 So.2d at 1368. The Court in *Jenkins* also stated:

To be sure, evidence admissible under Rule 404(b) is also subject to the prejudice test of Rule 403; that is, even though the Circuit Court considered the evidence at issue under Rule 404(b), it was still required by Rule 403 to consider whether its probative value on the issues of motive, opportunity and intent was substantially outweighed by the danger of unfair prejudice. In this sense Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass. *Watts*, 635 So.2d at 1368 (Miss. 1994) (quoting *Jenkins*, 507 So.2d at 93 (Miss. 1987)).

In the present case, the neither prong was not met. Looking at the first prong, this Court has stated that the “[a]dmission of evidence of unrelated crimes for the purpose of showing the defendant acted in conformity therewith has repeated been found reversible error.” *Duplantis*, 644 So.2d at 1247; *Rose v. State*, 556 So.2d 728, 731 (Miss. 1990).

Anderson, the day prior to Davis’ trial, stated that Davis had previously told him about

robbing the Dollar Tree. Tr. 27, 100. There was absolutely no evidence that connected Davis to the prior robbery at the Dollar Tree. The prior robbery occurred outside the Dollar Tree store, whereas the robbery involving the one charged in the indictment occurred at the bank. The prior robbery also occurred six (6) months earlier. The incidents were not that interrelated. The evidence should not have been admitted pursuant to one of the exceptions enumerated in M.R.E. 404(b).

These events involving the Dollar Tree could have been a coincidence. The witnesses involved in the previously robbery did not even recognize Davis. However they claimed that they knew who he was and had seen him previously. Tr. 65. There is absolutely no relation between the two cases. The events of December 2006, and May 2007, are two separate and distinct cases.

Furthermore, the probative value of the evidence did not substantially outweigh the prejudicial effect of the prior alleged crimes as required by M.R.E. 403. As previously indicated, the prior alleged bad acts did not have any probative value regarding the exceptions set forth in M.R.E. 404(b), so there is no possible way it could have substantially outweighed the prejudicial effect of the evidence.

M.R.E. 403 is “the ultimate filter through which all otherwise admissible evidence must pass.” *Brooks v. State*, 903 So.2d 691, 699 (Miss. 2005). When an objection is offered, and the objection is overruled, the objection shall be deemed an invocation of the right to M.R.E. 403 balancing analysis by the trial court. *Smith v. State*, 656 So.2d 95, 100 (Miss. 1995), *overruled on other grounds*, *Brown v. State*, 890 So.2d 901, 912 (Miss. 2004).

“We say for the future, however, that wherever 404(b) evidence is offered and there is an objection which is overruled, the objection shall be deemed an invocation of the right to the M.R.E 403 balancing analysis. . . .” *Easter v. State*, 878 So.2d 10, 21 (Miss. 2004). “If prior bad acts evidence falls within a 404(b) exception, its prejudicial effect must still be weighed against its probative value to determine admissibility under Mississippi Rule of Evidence 403.” *Underwood v. State*, 708 So.2d 18, 32 (Miss. 1998). *See also Edlin v. State*, 533 So.2d 403 (Miss. 1998); *Swington v. State*, 742 So.2d 1106, 1112 (Miss. 1999).

Even if evidence is relevant, M.R.E. 403 provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,” *Watts*, 635 So.2d at 1368 (Miss. 1994). “Candor requires acknowledgment that, though technically relevant in the sense just mentioned, evidence of the character of that at issue here is not of great probative value.” *Id.* However, “[i]f presented to the jury, it has great prejudicial effect and it would arguably inject collateral issues into the case. *Id.* *See Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218-19, 93 L.Ed. 168, 173-74 (1948); *McCormick, The Law of Evidence*, Section 190. The evidence in the case at hand was given directly to the jury from the testimony of Anderson. Tr. 100. The possibility arises that the jury improperly inferred that Davis “committed the crime for which he is on trial because he is a person who has displayed criminal propensities in the past.” *Watts*, 635 So.2d at 1368 (Miss. 1994) (quoting *Jenkins*, 507 So.2d at 92 (Miss 1987)); *McCormick, the Law of Evidence*.

It was reversal error for evidence of a prior bad act to have been presented to the jury.

Reversal of the trial court judgment, and a remand for a new trial is the appropriate remedy in this instance. Therefore, the Appellant respectfully submits that the Court should reverse this case and remand to the Leflore County Circuit Court for a new trial with the exclusion of the evidence of prior alleged robbery.

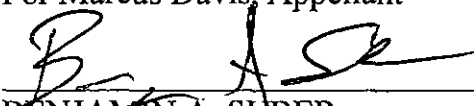
CONCLUSION

Marcus Davis is entitled to have his conviction of attempted armed robbery reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Marcus Davis, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 20 day of October, 2009.


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