IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DARRELL CRAIG — APPELLANT

VS. — NO. 2009-KA-0820

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On or about August 24, 2007, Darrell Craig was indicted along with five other defendants for the armed robbery of Lacey Taylor and other employees of Trustmark Bank pursuant to **Miss. Code Ann. § 97-3-79 (1972, as amended). (C.P. 1)** The indictment included an enhancement for the use of a firearm during the commission of a felony as set forth in **Miss. Code Ann. § 97-37-37 (1972, as amended). (C.P. 1)** Craig was arraigned on September 21, 2007. (C.P. 6)

He was tried on September 18, 2008. He was found guilty of one count of armed robbery and sentenced to thirty years in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE FACTS

On December 12th of 2006, at about 2:30 in the afternoon, three masked men rush in the front door of the Trustmark Bank in Gloster, Mississippi and ran straight toward the tellers. At least one of the men jumped the cage. The men were wearing hooded tops and casual jeans or pants. Their faces were covered with ski masks or something dark. (Tr. 95) The men ran toward the tellers on the right. Ms. Payen she pressed the silent alarm. (Tr. 95) All three men had

handguns. They yelled out, "Give us the money. Where's the money?" One man came in her office and had Ms. Payne open her drawers. Because she was able to see a little skin, she was able to identify all three men as black, but could not make out individuals because their faces were covered and they were wearing hoods. (Tr. 96) The man who went through her desk drawers told Ms. Payne to stand in a corner by the drive through. The men continued asking "Where's the money?" They were directed to the teller's drawers. They asked "Where's the rest of the money?" and the head teller, Lacy Wheeler, walked to the vault followed by one of the masked men. Ms. Payne and Terrence Bullock were asked to walk to the vault, too, behind the head teller. (Tr. 97) The men were taken into the part of the vault where the money was and they took the money and ran out. One of the men had a back pack to carry the money. They did not take anything from the bank to carry the money. (Tr. 98)

Ms. Payne did notice that one of the men had dreadlocks. (Tr. 99) She testified that the dreadlocks were consistent with the dreadlocks that Craig wore in a photograph she was shown. (Tr. 105) She testified that after the robbers left, they locked the doors and waited for law enforcement. The employees wrote reports about what happened including things they remembered and recalled. She testified that a dye pack was attached to the money that was taken by the robbers. (Tr. 101)

Mr. Bullock testified that he had just finished waiting on a customer in the drive-through. He was talking with Lacy and heard a crash right behind him. Mr. Bullock testified that Lacy's eyes grew big and he saw a gun pointed at her head. When Mr. Bullock turned toward Lacy, he saw another person jumping over the counter and that person had a gun to his head. (Tr. 107) Mr. Bullock testified that the guns were automatic handguns. (Tr. 107) He saw a third individual

in the lobby and heard the person say, "Don't move." The man in the lobby kept saying "We want the money. We want the money – (B). Where's the money at?" (Tr. 108) The person on the other side rail said, "Don't move bitch. We want the money out of the vault. Give us the money." (Tr. 109) Mr. Bullock testified that everything went quiet in the bank and that one of the alarms must have been triggered, since the cameras could be heard snapping." He heard them say, "That bitch hit that button." Lacy went down to her teller window. They took her and she started giving them the money out of her drawer. (Tr. 109) The man who had the gun next to Mr. Bullock's head had dreadlocks hanging down from under his mask. The man asked him, "What are you looking at?" and Bullock replied, "Nothing." The man told him they wanted money and Bullock showed the man his teller drawer and told him to get the money out of it. He told them, "All of y'all, get in the vault." Lacy was told to "Open up the vault." She said, "I'm trying. I'm trying." The men raked in the money and told Bullock and the others, "Don't move." and then they left the vault. Mr. Bullock dialed 911 on his cell phone. Lacy Wheeler and Carolyn Payne made sure the doors were locked.

Mr. Bullock testified that the employees went through their robbery procedures and wrote down descriptions of what they could remember of the individuals. He testified that he remembered the individual who had a gun on him had a dark mask and locks hanging down under it. He testified that he remembered a red or maroon color jacket. He testified that the person was a black male. (Tr. 111)

A burned out car was found that same day, along with hooded sweat shirts, shoes, masks and guns. A witness placed Derrick Tobias at the site where the vehicle was burned with Darrell Craig and the other defendants. Craig was associated through DNA with a boot found beside the

burned out vehicle. A print from the opposite boot of the same make and design was found on the counter in the bank. Craig also had dreadlocks like those that hung down from below the masks worn by the robbers and owned a car like the one that was burned.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Craig's Motion to Dismiss pursuant to the 270 day rule and his constitutional right to a speedy trial. Craig's right to a speedy trial was not violated due to the 270 rule because he did not assert his right to a speedy trial within 270 days and also because a continuance for good cause was entered and only 131 days have elapsed that can be counted toward the statutory 270 day limit. The trial court did not err in admitting into evidence the DNA report which matched the DNA found in a boot from crime scene to a sample of DNA from Craig. Moyne's testimony was not speculative and was the statistical work of an accredited technician who was properly qualified as an expert witness. The trial court correctly admitted the articles of clothing and firearms which were supported by a proper chain of custody. The items were properly bagged and were in the custody of the Gloster Police Department until such time as they were in the custody of the Mississippi Bureau of Investigations. The trial court correctly excused the two jurors who conversed with members of the defendant's family during the lunch break. It is within the trial court's broad discretion to replace jurors with alternates when it is not longer appropriate for them to serve due to jury misconduct. These two jurors disobeyed the court's instruction given just moments before not to have contact with the lawyers, the parties, their families or witnesses during the trial.

ARGUMENT

I. The trial court correctly denied Craig's Motion to Dismiss pursuant to the 270 day rule and his constitutional right to a speedy trial.

On June 26, 2008, 279 days after his arraignment, Craig filed a Motion to Dismiss the charge of armed robbery based solely on the 270 day rule contained in Miss. Code Ann. § 99-17-1 (1972, as amended). (C.P. 21) Craig's motion cited only the statutory 270 day rule and Craig did not argue that he had been denied his constitutional right to a speedy trial. Further, the motion only requested dismissal as a remedy and did not demand a speedy trial under any theory. (C.P. 21-22) In an Order Rescheduling Trial Date, entered August 25, 2008, the trial court found that the jury trial was previously continued for good cause. (C.P. 32) The order rescheduled the trial to start on Thursday, September 18, 2008. (C.P. 32) The prosecution filed a response to Craig's Motion to Dismiss pursuant to the 270 day rule. (C.P. 45) On September 15, a hearing was held on Craig's Motion to Dismiss. Craig expanded his argument at the hearing to include a claim that his constitutional right to a speedy trial had been violated. The two arguments were conflated at the hearing and in the Appellant's brief. The Appellee will discuss the two claims separately.

Relevant Dates

Indictment (Constitutional)	August 13, 2007
Arraignment (Speedy Trial)	September 21, 2007
Original Trial Date	January 30, 2008
Continuance for good cause	January 30, 2008
Craig's Motion to Dismiss	June 26, 2008

Rescheduling Order	August 25, 2008
Hearing on Motion to Dismiss	September 15, 2008
Trial	September 18, 2008

A. The 270 Day Rule

Mississippi Code Annotated section 99-17-1 provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." "However, we have held that if a defendant fails to raise the statutory right to a speedy trial within 270 days of his arraignment, he acquiesces to the delay ." *Roach v. State*, 938 So.2d 863, 867 (Miss.Ct.App.2006). Craig filed his motion to dismiss 279 days after arraignment. (C.P. 21) Accordingly, Craig has "waived his right to complain about not being tried within 270 days, because he neither requested nor asserted his right to a speedy trial" within that time. *Guice v. State*, 952 So.2d 129, 140 (Miss.2007). Like Guice, Craig does not want a speedy trial, he wants a dismissal. His demand for dismissal for the violation of the right to speedy trial is not the equivalent of a demand for a speedy trial. While defendants are not obligated to put themselves on trial, and the State bears the responsibility of brining defendants to trial after indictment, a defendant does have some responsibility in asserting a right to a speedy trial. *Id.* [Citations omitted.]

Mississippi Code Annotated § 99-17-1 (1972, as amended) provides that the 270 day rule does not have effect "[u]nless good cause be shown, and a continuance duly granted by the court. An Order Rescheduling Trial Date, entered August 25, 2008, finds that the jury trial was previously continued for good cause. (C.P. 32) The order rescheduled the trial to start on

Thursday, September 18, 2008. (C.P. 32) This Order shows that case was continued for good cause from its original trial date of January 30, 2008 until the date trial was held, September 18, 2008, a total of 232 days. The period of time between Craig's arraignment and the date of trial is 363 days. According to **Mississippi Code Annotated § 99-17-1** (1972, as amended), the days which are counted during a continuance for good cause do not count toward the 270 day rule. Therefore, the delay, not counting the time covered by the continuance for good cause, is only 131 days, well short of 270 days as per the statute.

B. Constitutional Right to Speedy Trial

Craig also argues that his constitutional right to a speedy trial was violated. Although compliance with the statutory rule may be shown, such compliance does not necessarily mean that the constitutional requirement has been met. ***Flores v. State*, 574 So.2d 1314 (Miss. 1990)**. Unlike the statutory right to a speedy trial, the constitutional right to a speedy trial attaches at the time of arrest, not at arraignment. ***Atterberry v. State*, 667 So.2d 622, 626 (Miss.1995)**. Proper analysis of a constitutional right claim, requires a weighing test based upon the Barker factors, which "are (1) the length of delay, (2) the reasons for the delay, (3) assertion of the right to a speedy trial, and (4) prejudice to the defense." ***Sharp v. State*, 786 So.2d 372 (Miss. 2001)** (citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)).

The starting date to measure delay under a person's Sixth Amendment guarantee of a speedy trial is when that person was "accused." This can be an arrest, an indictment, or any formal charge, whichever is the first to occur. ***United States v. Marion*, 404 U.S. 307, 313-15 & 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)** (stating arrest or formal charges begin speedy trial period); ***Doggett v. United States*, 505 U.S. 647, 654-55, 112 S.Ct. 2686, 120 L.Ed.2d 520**

(1992) (stating indictment six years before arrest started speedy trial considerations).

In the hearing on the Motion to Dismiss, the State noted that the case was continued after an order for a body search was filed and that the defense had not opposed the motion. The State further noted that there was an attempt to extradite the other defendants from Louisiana so that all the defendants could be tried together for reasons of judicial economy. Further, other criminal cases older than were tried prior to Craig's case. The case was originally set for January 30, 2008. However three one day trials were held back to back that week and Craig's case was not tried that week. The next term of court available was February 25th, less than one month from the original date of trial and the case was not set for that date. Terms of court in Amite County are one week in duration. The next term of court, which was in April, was reserved for cases heard by another judge. The May term of Court the State prosecuted a case involving a sex offense against a 10 year old child. At the June term of court another, older criminal case was tried. The August term was allocated to another judge and the last term of court available was September, which was ultimately the term in which the case was tried. (Tr. 10) The trial court held that this was not attributable to the State. (Tr. 12) The trial court held that the crowded docket was a sufficient reason for the delay in the trial. (Tr. 12)

Last, the reviewing court must examine the prejudice to the defense caused by the delay. Craig does not set forth any specific instances of prejudice in his appellate brief, nor is there any showing of prejudice throughout the record. There has been no demonstration by Craig that the delay has caused him prejudice in any form. In *Trotter v. State*, 554 So.2d 313, 318 (Miss.1989), While a defendant is not required to affirmatively show prejudice in order to establish the denial of his right to a speedy trial an absence of prejudice causes this factor to weigh against the

defendant. ***Murray v. State*, 967 So.2d 1222 (Miss. 2007)** There are two aspects of prejudice under Barker: "(1) actual prejudice to the accused in defending his case, and (2) interference with the defendant's liberty." ***Id.*** (quoting ***Brengettcy v. State*, 794 So.2d 987, 994 (Miss.2001)**). In assessing whether the defendant suffered prejudice, we look to the three interests the speedy trial right was designed to protect: "[(i)] to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." ***Jenkins v. State*, 947 So.2d 270 (Miss. 2006)** (quoting *Mitchell v. State*, 792 So.2d 192, 212 (Miss.2001)). The most serious of these three interests is the last. ***Barker*, 407 U.S. at 532, 92 S.Ct. 2182**. There must be an evidentiary demonstration of prejudice because the Court "will not infer prejudice to the defense out of the 'clear blue.' " ***Murray v. State*, 967 So.2d at 1222 (Miss. 2007)**.

The length of the delay from indictment to trial is 402 days. While this is enough to trigger the presumption of prejudice, it is not a length of time that shocks the conscience and the presumption is easily overcome. First, the reasons for delay include a crowded docket which does not weigh against the State. Further, there was continuing discovery of evidence at the time of the first trial date, since DNA evidence had been recovered and buccal swabs had been ordered from Craig and the other defendants. Additionally, there were efforts to extradite the other to Mississippi in order to hold a single trial rather than five separate trials in the interest of judicial economy. All of these reasons for delay are legitimate and do not reflect any intent on the part of the State to maliciously deprive Craig of his right to a fair trial. Further, Craig never asserted his right to a speedy trial. Craig wanted a dismissal of the charges against him and therefore did not ever attempt to invoke his right to a speedy trial. Further, he made no effort to

argue that he was prejudiced in any way by the delay. He did not claim that there were any witnesses who were unable testify on his behalf due to the delay and no spoiled or missing evidence. Indeed, it appears that Craig has suffered no prejudice by the delay in his trial.

The State easily overcomes the presumptive prejudice of the 402 day delay from indictment to trial. The delay is minimal and does not shock the conscience. There are no factors that weigh heavily against the State. Further, the reasons for the delay are valid and were clearly not intended to harm the defendant. Finally, Craig has suffered no prejudice and does not even allege any prejudice. He never asserted his right to a speedy trial and never wished for a speedy trial, but rather wants a dismissal of the charge against him. This is a misuse of the right to a speedy trial. Further, due to Craig's failure to assert his right to a speedy trial within 270 days and due to the continuance for good cause contained in the order of the court (C.P. 32) there is no violation of **Mississippi Code Annotated § 99-17-1** (1972, as amended).

The trial court correctly denied Craig's Motion to Dismiss. This issue is without merit and the jury's verdict and the rulings of the trial court should be upheld.

II. The trial court did not err in admitting into evidence the DNA report which matched the DNA found in a boot from crime scene to a sample of DNA from Craig.

On January 16, 2008, the State filed a Motion and Affidavit for a Body Search which specifically requested a buccal swab from four defendants, Darrell Craig, Warren Williams, Dameon Washington and Derrick Tobias. (C.P. 12) A Timberland boot recovered by law enforcement from the scene where the defendants' vehicles were found burned had yielded DNA evidence. (C.P. 12) The requested swabs would determine whether the DNA matched any of the defendants. (C.P. 12) The trial court granted the motion and ordered that the swabs should be

delivered to Scales Biological Laboratory for testing. The trial court further ordered that the results of the testing should be made available to both the State and the Defendants. (C.P. 16) The shoe was delivered to Scales Biological Testing and the test was performed by an affiliated lab, DNA Security in Burlington, N.C. (Tr. 270)

The boot was received at DNA Security in September of 2007 and was tested by Kathryn Moyse, who was qualified as an expert in forensic DNA analysis and testified at trial. (Tr. 313) The testing of the boot produced a DNA profile that had more than one contributor. (Tr. 316) The date was then analyzed again to determine the major contributor to the DNA profile of the boot. On January 23, 2008, the lab received a buccal swab taken from Darrell Craig. (Tr. 317) Moyse then obtained a DNA profile of Darrell Craig from the swab. The resulting analysis showed that Craig could not be excluded as a contributor to the profile on the boot. (Tr. 317) The genetic profile obtained from Darrell Craig did match part of the mixture of DNA that was found on the boot, so the lab was able conclude that Craig could not be excluded, but could not make a one to one match. Moyse read from her report as follows:

> DNA analysis of the boot yielded a partial DNA profile indicative of a mixture containing DNA from more than one individual. The suspect, Darrell Craig, cannot be excluded as being a contributor to this mixture profile. The probability of excluding a random individual from this mixture profile is ninety-nine point nine, nine percent. (99.99%) The subjects Derrick Tobias and Warren Williams are excluded from as [sic] being contributors.

Moyse testified that the exclusion probability is the chance that a random individual will be excluded from the mixture. (Tr. 319) Counsel for the defense objected to the report from Moyse being admitted into evidence and the trial court directed that it be

marked for identification only. (Tr. 320) The report was never admitted into evidence.

Craig argues that the report was a violation of the rules of discovery. However, as noted above, the report was never admitted into evidence. Further, Craig's trial counsel was well aware that DNA evidence was being obtained since the prosecution filed its Motion for a Body Search some nine months prior, on January 16, 2008. Due to the backlog in the labs, the DNA report was not completed until the Friday before trial when the prosecutor received the verbal report that there was a conclusion. The prosecution notified defense counsel immediately and shared the report as soon as it was received.

The Appellant argues that the production of the report on the Monday before trial was unfair surprise and that the evidence should have been excluded because as a discovery violation. However, the Appellant did not trigger relief under Rule 9.04. He never asked for a continuance or a mistrial. URCCCP Rule 9.04 provides that:

> If during the course of trial the prosecution attempts to introduce evidence which had 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:
>
> Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or evidence; and,
>
> 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 nondisclosed evidence or grant a mistrial.

Craig argues on appeal that the only proper way to resolve the issue without prejudicing the defendant was to exclude the evidence. However, Rule 9.04, as quoted above requires that

the defense seek either a continuance or a mistrial if the opportunity to review the evidence does not suffice. Craig's trial counsel did not seek a continuance or a mistrial as required by the rule, and so, Craig cannot complain now to this court on appeal.

Craig complains that because Moyse testified as to the report, he was "forced" to testify. However, if Craig had requested a continuance and Moyse had testified two months later, the effect of her testimony would have been the same. It is the nature of the adversary system that the evidence of the opposing party must be rebutted in order to prevail.

Craig also complains that the Circuit Court erred in allowing into evidence testimony based upon the subject DNA report when the State's witness was not qualified to testify as an expert witness. However, the motion at trial (Tr. 319) and the motion in limine (C.P. 40) do not attack Ms. Moyse's qualifications as an expert witness. At the time Ms. Moyse was qualified as an expert witness (Tr. 313), there was no objection from the defense.

Appellate courts review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. ***Smith v. State*, 986 So.2d 290, 295 (Miss.2008)** (citations omitted). A trial court has great discretion in the admission or exclusion of evidence. The evidence presented by Ms. Moyne in her report was not "speculative" or "guesswork." It was a statistical probability derived through the use of standardized forensic testing by an accredited lab. The exclusion probability is a relevant calculation based on the DNA samples found in the shoe and taken from Darrell Craig. It excludes or does not exclude any individual based on a specific probability. Darrell Craig was specifically tested and was found to not be excluded.

This finding makes it more likely than not that Darrell Craig wore the shoes in question since 99.99% of the time, a random individual would be excluded and he was not excluded. He

is statistically, one of the very rare people who could have left the DNA on that shoe. The evidence is therefore relevant and was correctly admitted by the trial court. Defense counsel had ample opportunity to cross examine Ms. Moyne about her results and her technique. Further, prior to her testimony at trial, defense counsel had an opportunity to voir dire Ms. Moyne.

This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

III. The trial court correctly admitted the articles of clothing and firearms which were supported by a proper chain of custody.

Rule 901 of the Mississippi Rules of Evidence provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Miss. R. Evid. 901(a). Our precedent is clear that "Mississippi law has never required a proponent of evidence to produce every handler of evidence." *Ellis v. State*, 934 So.2d 1000, 1005 (Miss.2006). In order for the defendant to show a break in the chain of custody, there must be an "indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." *Spann v. State*, 771 So.2d 883, 894 (Miss.2000). The defendant has the burden of proving tampering or substitution of the evidence, and "[a] mere suggestion that substitution could possibly have occurred does not meet the burden of showing probable substitution." *Ellis*, 934 So.2d at 1005. Craig has not attempted to prove that such tampering or substitution occurred.

Deputy Lester Lambert was picking the clothes up out of the road and Officer Danny Meaux got bags out of his patrol care and began putting the clothes in the bags. They were

sweatshirts with hoods, masks, and other similar items. (Tr. 171) The clothes were spread over a distance of one half to one mile along the road. (Tr. 171) Meaux then proceeded to the location where a burning vehicle had been found and found a boot, shoes and some weapons around the burned out vehicle. There were two handguns and an AKA with a broken stock. 9Tr. 172) Another deputy was photographing while Meaux was bagging items. Some of the items were laid out and photographed. (Tr. 173) Meaux identified pictures of the burned out car and a shoe and a tag from the car and the boot. (Tr. 175) The items of clothing found at the scene were photographed and bagged. (Tr. 177) Meaux also identified a photograph of the rifle and a handgun. (Tr. 179)

Meaux retrieved all the items and placed them in his patrol car. (Tr. 180) He took the items to the Gloster Police Department and turned them over to Chief of Police Tommy Lee who then placed the bags in evidence. (Tr. 180) Meaux then identified a bag that he carried in his car to collect evide3nce as one he had used that day to collect items from Highway 33. The bag has a place to log what evidence is picked up. (Tr. 181) Meaux identified the gloves in the bag as those he had picked up off the side of the highway. He then identified aa mask with the eyes cut out. He identified two hoods, a stocking cap and a white tee shirt that was cut. Meaux identified these items as those he picked up off Highway 33 on the date of the robbery. (Tr. 183) Meaux identified a jack, sweat pants and a red rag that he recovered from the burn site. (Tr. 184) The items were admitted as a composite exhibit. (Tr. 185) Meaux then identified a bag with two hooded sweatshirts that he retrieved from the burn site on the day of the robbery. These were admitted into evidence (Tr. 186) Meaux then identified a bag containing the pair of shoes and the tag from the burn site. These were also admitted into evidence. (Tr. 187) Meaux testified that he

put the weapons in a bag, leaving the top open and wrapped it around. Meaux identified the broken rifle, ammunition and hand gun. (Tr. 188) The weapons were in a box when they were identified in court. (Tr. 189) Meaux testified that when he recovered the gun from the burn site, he wrapped it in a paper bag and brought it to the police department and gave it to Chief of Police Tommy Lee. (Tr. 190) He testified that the rifle still had the red clay mud on it from the burn site. The two hand guns were in separate boxes and Meaux also identified them. The guns and ammunition were all marked for identification. (Tr. 191) Meaux then identified a bag containing a boot collected at the burn site on date of the robbery. Meaux testified that he had gloves on when the gathered the evidence. (Tr. 194)

Officer Tim Wroten testified that he went to the scene of the bank robbery and got a description of the vehicle and it out on the air for everybody to be on the lookout. (Tr. 199) He testified that later in the day he received a phone call regarding a burned vehicle in Wilkinson County. They got a description of another vehicle that had been seen at the burn site and which belonged to Derrick Tobias. (Tr. 199)

Officer Tommy Lee testified that Officer Meaux brought him the bagged evidence. Meaux was in custody of the bags which were closed. Meaux turned the bags over to him at the police department. (Tr. 210) Officer Lee identified all of the bags as those given to him by Officer Meaux. Officer Lee testified that when he received the firearms they were in a bag. (Tr. 211) Officer Lee testified that he placed the bags and their contents in the evidence room. (Tr. 212) Investigator Gerald Wall then took the bags of evidence, including the firearms, to the Mississippi Crime Lab. (Tr. 213) Later, Investigator Wall brought some of the items back and they were returned to the evidence room. (Tr. 213) Officer Stoll then came and took the bags

and the swabs to Scales Biological Testing along with the swabs. (Tr. 259) Stoll picked up the boot from Scales Lab and returned it to the Gloster Police Department on that same day. (Tr. 261)

The chain of custody is proper in this case. The evidence was collected and bagged by Officer Lambert who then took the sealed bags to the Gloster Police Department where they were placed in the evidence vault. The bags were not moved until Investigator Gerald Wall took the bags to the Mississippi Crime Lab. The Lab retained the pair of shoes, the boot and the firearms and Wall brought the clothes back to the Gloster Police Department. The Mississippi Bureau of Investigation sent the boot to Scales Biological Laboratory for testing. It was sent to an affiliated lab and then returned to Scales where it was picked up by Officer John Stoll. Stoll brought the clothes to Scales Laboratory on the day he picked up the boot.

Each and every step of the way, the evidence collected and placed in bags by Officer Lambert was in the custody of the Gloster Police Department, the Mississippi Bureau of Investigation or the Mississippi Crime Lab. There is no indication that anything was lost or tampered with.

Appellate courts review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. ***Smith v. State*, 986 So.2d 290, 295 (Miss.2008)** (citations omitted). A trial court has great discretion in the admission or exclusion of evidence. The trial judge found no indication or reasonable inference of tampering with evidence or substitution of evidence. In examining the record, there is sufficient evidence, under an abuse of discretion standard, to support the judge's finding that the clothes and firearms were what they were claimed to be. For the reasons stated, this argument is without merit. The jury's verdict and the rulings of the trial

court should be affirmed.

IV. The trial court correctly excused the two jurors who conversed with members of the defendant's family during the lunch break.

"[T]he dismissal of a juror for good cause and his replacement with an alternate is within the sound discretion of the trial judge." ***Shaw v. State*, 540 So.2d 26, 28 (Miss.1989)**. Therefore, the correct standard of review is abuse of discretion.

The record reflects that the trial court issued the following instruction to the jurors, "[f]rom this point on you're to have no contact with anybody involved in this case. That's any of the attorneys, the parties, the witnesses, anybody involved in this case." (Tr. 20) After voir dire, the trial court further instructed the jurors:

> Ladies and gentlemen of the jury, you've been selected to serve as a juror in this case. You've been given a juror button. We'll be breaking for lunch in just a moment. But anytime you're here at the courthouse make sure you have that juror button, because that clearly identifies you as a juror. And the reason is that no one should be talking with you involved in this case. You see there are family, witnesses and people around, so, please, keep that in mind.

During the lunch break immediately after that instruction was given, two jurors, Odessia Ross and Patricia Martin were sitting at a round concrete picnic table on the grounds of the courthouse.[1] Both were wearing their juror's buttons. (Tr. 116) The defendant's grandmother along with at least one other family member joined the two jurors at the picnic table and began talking with them. The family members were also subpoenaed as witnesses. (Tr. 115) The incident was reported to the prosecution by the sheriff. The prosecutor stated that he had also

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[1]The Appellant stresses in his brief that these two jurors were African American. However, the record is silent as to the race of the two jurors who were replaced by alternates. Further, there is nothing in the record to indicate the race of the two alternates or the racial composition of the jury. There was no objection at trial based on the race of the two jurors who were replaced.

seen the violation. (Tr. 84) The two jurors were identified when they were seated in the jury box and at the next recess, they were called into chambers. (Tr. 115)

The facts revealed that the family had befriended these two jurors and had eaten and talked with them. (Tr. 117) This Court has previously held that "if [the jurors] were exposed to improper influences, which might have produced the verdict, the presumption of law is against its purity." *Collins v. State*, 99 Miss. 47, 54 So. 665, 665-66 (1911). See also *Rucker v. State*, 248 Miss. 65, 158 So.2d 39, 42 (1963). The jury was carefully chosen to exclude those who had personal relationships with the primary parties and witnesses in the case. Here, that careful work by the court is undone by those who apparently are deliberately ignoring the trial court's instruction not to have contact between jurors and others involved in the case. While the trial court carefully did not accuse the individuals of having conversations about the case, it was clear that they had ignored the court's instructions and that, at the very least, there was an appearance of impropriety about the trial. The trial court was clearly within its discretion to excuse these two jurors whose impartiality was now tainted. Had the trial continued with these two jurors, the presumption of law would be against the purity of the verdict.

The replacement of regular jurors with alternates is governed by section 13-5-67 of the Mississippi Code which states that "[a]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties." **Miss.Code Ann. § 13-5-67 (Supp.2001)**. The decision to dismiss a juror for good cause and the subsequent replacement with an alternate is completely within the trial court's discretion. *Stevens v. State*, 513 So.2d 603, 604 (Miss.1987). See also *Myers v. State*, 565 So.2d 554, 557 (Miss.1990) (noting that "good cause" is merely a

euphemism for "disqualified"); ***Horton v. State*, 726 So.2d 238, 247 (Miss.Ct.App.1998)**. The Mississippi Supreme Court, however, has made it clear that the trial courts do not have the authority to remove and replace jurors arbitrarily. ***Myers*, 565 So.2d at 557**. The court has even suggested that the trial court should articulate into the record the exact reasons for excusing a juror. ***Stevens*, 513 So.2d at 605**. Nonetheless, the court in *Stevens* upheld the trial court's decision to exclude and replace the juror even where its specific reasons for dismissal were not included in the record. ***Id.*** The court reasoned that even though the trial court did not follow the proper procedure for excusing and replacing a juror, the aggrieved party was not entitled to reversal because he could not prove that the trial court's decision resulted in any prejudice. ***Id.*** See also ***Vaughn v. State*, 712 So.2d 721, 724 (1998)** (holding that "[a]bsent a showing of prejudice, we will not find that a trial court abused its discretion in replacing a juror with an alternate"); ***Shaw v. State*, 540 So.2d 26, 28 (Miss.1989)**; ***Horton*, 726 So.2d at 247**. The Mississippi Court of Appeals has held that dismissing juror and replacing juror with alternate after defense rested case but prior to deliberation was not an abuse of trial court's discretion, where four people in courtroom witnessed juror being disruptive and talking to another juror throughout trial. ***McCoy v. State*, 820 So.2d 25 (Miss.Ct.App.2002)**. In the instant case, the problem is far more egregious, since the public fraternization of jurors with the family and witnesses of the defendant casts a shadow on the integrity of the trial and the verdict if it is not remedied.

In the instant case, the trial court correctly put on the record the reason for replacing the two jurors with alternates. Further, Craig cannot show any prejudice, since he cannot show that but for the replacement of the two jurors, he would have been acquitted. Further, had he believed

that he was prejudiced by the replacement of these two jurors, the proper course of action was to make a motion for mistrial which Craig did not do. The trial court was well within its discretion to excuse the two jurors. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

The assignments of error presented by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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