IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEVIN DALE MCCAIN — APPELLANT

VS. — NO. 2009-KA-1865

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. SUFFICIENT EVIDENCE WAS PRESENTED ESTABLISHING THAT THE APPELLANT WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED §99-19-83.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS THE CASE AGAINST THE APPELLANT FOR A SPEEDY TRIAL VIOLATION.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT S-24 INTO EVIDENCE.

IV. THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO QUASH THE INDICTMENT.

STATEMENT OF THE FACTS

On January 30, 2008, Cheryl Jenkins began her day as a bank teller at the Halls Ferry Branch of Trustmark in Vicksburg, Mississippi. (Transcript p. 243 - 244). At approximately 9:20 a.m. the Appellant, Kevin Dale McCain, came to her window. (Transcript p. 244 - 245). As she was about

to ask the Appellant how she could help him, the Appellant gave her a note which read, "I want 20,000 in 100's, 50's, and 20's or all die." (Transcript p. 247). Ms. Jenkins was scared and began to turn away. (Transcript p. 247). As she did, the Appellant yelled for her to get back over there. (Transcript p. 247). She opened her drawer to get money and triggered the silent alarm. (Transcript p. 247). She took a random amount of money from her drawer and handed it to the Appellant. (Transcript p. 247). He put the money in his jacket and walked out of the bank. (Transcript p. 247). After he left the building, she told her co-workers that she had just been robbed and the bank was locked while they waited for police to arrive. (Transcript p. 248). It was later determined that $2,157.00 was taken from the bank. (Transcript p. 276).

The Appellant was arrested, tried, and convicted of robbery in violation of Miss. Code Ann. §99-3-73. The Appellant was sentenced as a habitual offender pursuant to Miss. Code Ann. §99-19-83 to life without the possibility of parole or probation.

SUMMARY OF THE ARGUMENT

This Court should affirm the Appellant's conviction and sentence as the Appellant did not establish that there were any reversible errors committed during his trial. There was sufficient evidence presented establishing that the Appellant was a habitual offender pursuant to Miss. Code Ann. §99-19-83. The trial court made findings of fact based on the evidence before it that the Appellant had previously been convicted of two separate felonies arising out of two separate incidents, that at least one of the felonies was a crime of violence, and that the Appellant served at least one year of the sentences. Where a trial court makes a finding of fact which is supported by the record, the appellate courts will not overturn that finding unless it is clearly erroneous. The trial court's finding that the Appellant met the requirements of the statute in question was not clearly erroneous.

Also, the Appellant's constitutional right to a speedy trial was not violated. The delay, admittedly, was beyond the presumptively prejudicial eight month mark; however, the delays were through no fault of the State. Also, while the Appellant did assert his right to a speedy trial some six months after his arrest, he offered no proof whatsoever to establish that his defense was in any way prejudiced as a result of the delays. The Appellant's statutory right to a speedy trial was also not violated. The majority of the approximately 493 day delay cannot be attributed to the State as the trial court found good cause for the first portion of the delay and as the second portion of the delay was the result of a joint motion for continuance.

The trial court did not err in allowing Exhibit S-24, the Texas Longhorns hat, into evidence. There was sufficient testimony from witnesses evidencing that the hat was exactly what it was claimed to be, the hat worn by the Appellant during the robbery and at the time of his arrests. Further, even if it were error to allow the hat into evidence, which the State is in no way conceding, the error would have been, at worst, harmless in light of the overwhelming evidence of the Appellant's guilt.

The trial court did not err in refusing to grant the Appellant's Motion to Quash the Indictment for a procedural defect as the motion was not filed until after original indictment had been amended and after the Appellant's trial had commenced.

ARGUMENT

I. SUFFICIENT EVIDENCE WAS PRESENTED ESTABLISHING THAT THE APPELLANT WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED §99-19-83.

The Appellant first argues that "the State failed to establish that [he] was a habitual offender under Mississippi Code Annotated Section 99-19-83." (Appellant's Brief p. 9). "At a bifurcated hearing, as required under the recidivist statutes, the State must prove the requirements set forth in

the habitual offender statute beyond a reasonable doubt." *Davis v. State,* 680 So.2d 848, 851 (Miss. 1996). Mississippi Code Annotated §99-19-83 reads as follows:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspected nor shall such person be eligible for parole or probation.

The State provided sufficient proof that the Appellant met these requirements.

A sentencing hearing was held on October 2, 2009 during which a certified copy of the Judgment and Commitment Order from the Clerk of the United States District Court of the Southern District in the case of *United States of America v. Kevin Dale McCain* was admitted into evidence. (Sentencing Hearing Exhibit 1). This document evidenced that the Appellant was convicted in Case No. 3:02cr45WN for a bank robbery which occurred on April 19, 2002 in Richland, Mississippi. (Sentencing Hearing Exhibits 1 and 6). It also confirmed that he was convicted and sentenced on January 8, 2003 to serve 72 months with 3 years of supervised release. (Sentencing Hearing Exhibit 1). A certified copy of the Judgment and Commitment Order from the Clerk of the United States District Court of the Southern District in the case of *United States of America v. Kevin Dale McCain* was also admitted into evidence. (Sentencing Hearing Exhibit 2). This document evidenced that the Appellant was convicted in Case No. 3:02cr116WN for a bank robbery which occurred on April 12, 2002 in Smith County, Texas. (Sentencing Hearing Exhibits 2 and 5). It also confirmed that he was convicted and sentenced on January 8, 2003 to serve 72 months with 3 years of supervised release. (Sentencing Hearing Exhibit 2). The sentences were served concurrently. (Sentencing Hearing Exhibits 1 and 2). At the conclusion of the hearing the trial court held as follows:

> . . . This gentleman, given the crimes that he has allegedly committed in other states and been sentenced to and given the conviction here in the State of Mississippi is facing life in prison. This Court does not take that lightly therefore if there are some records certifying that he was, in fact, that is the certified records from the Federal Bureau of Prisons certifying that he did, in fact, serve such time. . . I need those records and therefore I am going to continue this hearing for one week and those records be provided to the Court, if not, then the motion to dismiss with be ruled. We can't stop short. This gentleman is facing life in prison and it is important that all documents be - - all "I's" be dotted and all "T's" be crossed. There are some cases that talk about certified documents. . . . If there are some records to that effect with the Federal Prisons I need that documentation. Let's not short-stop. That is why we did it for a week or two to allow the State to get those records. If those records are available, let's get them up here. Okay, I'm going to give the State until next Friday to produce those records certifying from the Federal Bureau of Prisons that this person did, if fact, stay in that prison for the time that you say he did, for a year and a half.

(Transcript p. 429 - 430). The documents the court requested were submitted. (Record p. 111 - 120). On October 30, 2009, a subsequent sentencing hearing was held during which the trial court held that:

> there was a letter given to the court, that was filed stating, from Mr. Vincent E. Shaw, Senior Counselor for the Federal Bureau of Prisons in the Southeast Regional Office. That letter basically stated that Mr. Shaw sent a copy of public records to the State to be filed in the Circuit Court and those records do reflect that the Defendant, Mr. McCain, was, in fact, sentenced in 2003 in the Federal Court of the Southern District by Judge Henry Wingate to a term of six years in the federal penitentiary; that he began that sentence on the February 25, 2003 and that he was incarcerated in the federal system up until August 30, 2007. The Court hereby finds that does, in fact, satisfy the one year portion of the statute that says he has to at least one year in the penitentiary.

(Transcript p. 437 - 438). "Where a trial judge makes a factual finding supported by the record, [the Court of Appeals] will not overturn that finding of fact unless it is clearly erroneous." *Armstrong v. State,* 828 So.2d 239, 245 (Miss. Ct. App. 2002) (citing *West v. State*, 463 So.2d 1048, 1056 (Miss.1985)).[1] As such, there was sufficient evidence that the Appellant was a habitual offender

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[1] The trial court also found that at least one of the prior crimes was a crime of violence as required by the statute. (Record p. 124).

under Miss. Code Ann. §99-19-83.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS THE CASE AGAINST THE APPELLANT FOR A SPEEDY TRIAL VIOLATION.

The Appellant next argues that "the trial court erred in failing to dismiss [his] charges for the State's violation of his constitutional and statutory right to a speedy trial." (Appellant's Brief p. 12). "A defendant in a criminal case has a right to a speedy trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 3, §26 of the Mississippi Constitution." *Sharp v. State*, 786 So.2d 372, 377 (Miss. 2001). "In addition, Miss. Code Ann. §99-17-1 (2000) creates a statutory right to a speedy trial." *Id.* "Alleged speedy trial violations are examined and determined on a case-by-case basis due to the factual specifics of each action." *Brengettcy v. State,* 794 So.2d 987, 991 (Miss. 2001) (citing *Sharp v. State*, 786 So.2d at 377). Decisions "based on substantial, credible evidence" will be upheld. *Summers v. State*, 914 So.2d 245, 248 (Miss. Ct. App. 2005) (citing *Folk v. State*, 576 So.2d 1243, 1247 (Miss. 1991)).

The following is a time line of the pertinent events in this case:

1-30-08	Appellant Arrested	(Transcript p. 21).
5-8-08	Appellant Indicted	(Record p. 5 - 6).
5-9-08	Appellant Arraigned	(Transcript p. 18).
7-25-08	Omnibus Hearing[2]	(Transcript p. 10 - 12).
7-26-08	Appellant wrote a letter to the court which the trial court deemed to be an assertion of his right to a speedy trial. (Hearing Exhibit 2 and Transcript p. 37 - 38).	

[2] During this hearing, there was discussion about pending federal charges. The Appellant, himself, stated that they had "federal holds on me." (Transcript p. 11). The hearing was ultimately continued until the issue of whether the federal government or the state government was going to proceed with the charges. (Transcript p. 11).

9-10-08	Initial Trial Date[3]
11-20-08	Notice of Trial Setting on March 23, 2009 filed by State (Record p. 10)
12-08-08	Motion for Trial Setting on March 23, 2009 filed by State (Record p. 14).
2-13-09	Motion to Dismiss for Failure to Provide a Fast and Speedy Trial filed by the Appellant (Record. 23 - 24).
2-24-09	Hearing held on Motion to Dismiss (Beginning at Transcript p. 14).
3-3-09	Order Entered Denying Motion to Dismiss and Setting Trial for March 23, 2009 (Record p. 55).
3-10-09	Motion to Withdraw as Counsel filed by Appellant's Attorney Louis Field because "irreconcilable differences have arisen between the defendant and appointed counsel with respect to the means and methods of presenting defendant's defense." (Record p. 56).
6-8-09	Order Granting Joint Motion for Continuance filed by both the Appellant and the State and Setting Trial for September 14, 2009. (Record p. 68).
9-14-09	First Day of Trial

A. Constitutional Right to a Speedy Trial

The Mississippi Supreme Court has held the following with regard to claims of violation of a defendant's constitutional right to a speedy trial:

> In reviewing such a constitutional challenge, we have not set a specific length of time as being per se unconstitutional, but instead have applied the four-part balancing test articulated by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). *(citation omitted)*. The four *Barker* factors to consider are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Barker*, 407 U.S. at 530, 92 S.Ct. 2182. None of the four factors is determinative; rather, a totality of the

[3] As set forth in more detail below, the Appellant's trial did not take place on this date because the trial court tried a child molestation case which it gave priority to because of the previous continuances in the case and because of the nature of the case. (Transcript p. 47).

> circumstances test is used. *(citation omitted)*. "We are mindful indeed that no one factor is dispositive of the question. Nor is the balancing process restricted to the *Barker* factors to the exclusion of any other relevant circumstances." *(citation omitted)*.

Brengettcy, 794 So.2d at 992. An analysis of these factors in the case at hand fully establishes that the Appellant's constitutional right to a speedy trial was not violated.

1. The Length of the Delay

The relevant dates used to calculate the length of the delay are the arrest date and the trial date. *Brengettcy,* 794 So.2d at 992. The delay between the Appellant's arrest and the trial was slightly more than nineteen months. The Mississippi Supreme Court has held that "a delay of eight months or more is presumptively prejudicial." *Id.* (citing *Smith v. State*, 550 So.2d 406, 408 (Miss. 1989)). As such, it is necessary to address the remaining *Barker* factors. While this delay is sufficient to warrant an examination of the remaining factors, "this delay, standing alone, is not enough to establish a violation of the [Appellant's] constitutional right to a speedy trial." *State v. Magnusen*, 646 So.2d 1275, 1280 (Miss. 1994). Once it is determined that the delay is prejudicial, "the burden shifts to the prosecution to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of these reasons." *Summers*, 914 So.2d at 252-53 (quoting *Anderson v. State*, 874 So.2d 1000, 1006 (Miss. Ct. App. 2004)).

2. The Reason for the Delay

"The second *Barker* factor requires determination of the reason for the delay and the party to whom the delay is attributable." *Brengettcy,* 794 So.2d at 993. The Appellant's trial was originally set for September 10, 2008, which was slightly less than eight months from his arrest date. Had the Appellant been tried on this date, there would be no reason to analyze the remaining *Barker* factors because it was within the eight month standard. The trial court explained during the hearing

the reason why the Appellant was not tried on this date:

> For the record, to clarify things. The week of September, the 9th and 10th, we were trying, this Court was trying the Zane Davenport case with the State's Attorney General. At the same time the District Attorney's Office was trying the Davis case in this court, County Court, with Judge Vollor. The week that Judge Vollor was trying Davis here in this court, County Court, which was my week that I had given the DA, it was his week and that case was handed down during the term of Grand Jury that I had set aside those weeks for the DA and I had given the Attorney General, give the nature of that case, priority of that week because it has been continued several times and I had set it down for that time. So, to make the record complete, this court was in session with a child molestation case against a law enforcement officer that I had set priority to it and I was trying that and it took the complete week. I don't know how many days the Davis case took. . . . So, for the record, that is why Kevin McCain's case was not heard that week, given that this Court had already set another case that I think may have been returned the same Grand Jury, but I'm not sure. But it was set during the 2008 term. But anyway, that is why this Court did not try it. . . . I think I've gone over the reason for the delay from the September date was that the Court had already set for at trial a case that it had set as a priority case. And that was with the Attorney General. That was due to no fault of the State. The State couldn't try it. It couldn't be in two places at one time. They elected to try Mr. Davis during that week with Judge Vollor here in this court.

(Transcript p. 45 - 47) (*emphasis added*). This Court has previously acknowledged that "[t]he preempting of a trial by another case constitutes 'good cause.'" *Clark v. State*, 14 So.3d 779, 784 (Miss. Ct. App. 2009)(quoting *McGhee v. State*, 657 So.2d 799, 803 (Miss. 1995)). Additionally, "[a] congested docket is considered 'good cause' for a delay if the continuance is actually granted for that reason." *Brengettcy,* 794 So.2d at 993 (citing *Sharp v. State*, 786 So.2d at 378). As the trial court stated on the record, the Appellant's trial was continued for that reason. Thus, this delay, as noted by the trial court, was through no fault of the State's and therefore, cannot be held against the State.

Subsequently, the State attempted to set the trial for the court's next available trial setting.[4]

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[4] The trial court stated that its next available trial setting was in March of 2009. (Transcript p. 47).

The Appellant did not file any objections to the State's motion to reset the Appellant's trial for March 23, 2010. (Transcript p. 18). Several months after the State filed its motion for trial setting the Appellant filed a Motion to Dismiss for Failure to Provide a Fast and Speedy Trial. A hearing was held during which the trial court found that there was no speedy trial violation. The trial court subsequently set the Appellant's trial for the date requested by the State, which was the court's next available trial setting.

Just days after the trial date was set, the Appellant's counsel, Louis Field moved to withdraw as counsel because "irreconcilable differences have arisen between the defendant and appointed counsel with respect to the means and methods of presenting defendant's defense." (Record p. 56). The trial court granted this motion and Eugene Perrier began representing the Appellant. (Record p. 60). A joint motion for a continuance was granted on June 4, 2009, no doubt to give the Appellant's new attorney time to prepare for trial, moving the trial to September 14, 2009 which was the date the Appellant's trial began. (Record p. 68).[5] Joint motions for a continuance are treated as if they were sought by the defense. *Sharp v. State*, 786 So.2d 372, 378 (Miss. 2001). The joint motion for a continuance waived the Appellant's right to assert his right to a speedy trial. *See Summers v. State*, 914 So.2d at 254.[6]

Accordingly, the original trial date set was within the eight month period which is considered non-prejudicial. The first continuance resulted from the trial court's decision to try a case which it

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[5] The actual motion for a continuance is not a part of the record, but was presumably filed or made *ore tenus* on or before the previously set trial date of March 23, 2009.

[6] This is true even though the Appellant, himself, filed an Objection to the Continuance. (Record p. 69). As noted in the *Summers* case, the United States Supreme Court has held that a waiver of one's speedy trial right "may occur if there is a 'showing of record that the defendant OR his attorney freely acquiesced in a trial date beyond the speedy trial period.'" *Summers*, 914 So.2d at 254 (quoting *New York v. Hill*, 528 U.S. 110, 114, 120 S.Ct. 646, 98 L.Ed.2d 798(1988)) (*emphasis added*). The United States Supreme Court explained this rule by stating that "although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has - and must have - fully authority to manage the conduct of the trial." *Id.*

gave priority to due to the previous continuances filed in the case and the nature of the case. The State moved to have the trial set at the next possible trial setting. The case was not tried on that date due to a joint motion for a continuance presumably due to the Appellant's new counsel needing time to prepare for trial. These delays should not be weighed against the State.

3. The Assertion of the Right

"The third *Barker* factor to consider is whether the defendant asserted his right before the trial." *Brengettcy,* 794 So.2d at 994. "A defendant has no duty to bring himself to trial . . . Still he gains far more points under this prong of the *Barker* test where he has demanded a speedy trial." *Id.* (quoting *Jaco v. State*, 574 So.2d 625, 632 (Miss. 1990)). The Appellant asserted his right to a speedy trial on July 26, 2009, approximately six months after his arrest. (Transcript p. 37 - 38 and Hearing Exhibit 2).

4. Prejudice

"The final prong of the *Barker* analysis - prejudice to the defendant - has two aspects: (1) actual prejudice to the accused in defending his case, and (2) interference with the defendant's liberty." *Brengettcy,* 794 So.2d at 994 (citing *Perry v. State*, 637 So.2d 871, 876 (Miss. 1994)). "The Supreme Court has identified three main considerations in determining whether the accused has been prejudiced by lengthy delay; (1) preventing 'oppressive pretrial incarceration;' (2) minimizing anxiety and concern of the accused' and (3) limiting the possibility that the defense will be impaired." *Id.* (quoting *Barker*, 407 U.S. at 532). In his brief, the Appellant argues that "of the three interests sought to be protected under the prejudice factor, two clearly weigh in [his] favor; namely, protection against oppressive pretrial incarceration and the minimization of anxiety and concern of the accused." (Appellant's Brief p. 17). He further argues that his "defense was inherently prejudiced, at least to some extent, by the fact that he was incarcerated." (Appellant's

Brief p. 17). However, "[i]ncarceration alone is not sufficient prejudice to warrant reversal." *Clark v. State*, 14 So.3d at 785 (quoting *Birkley v. State*, 750 So.2d 1245, 1252 (Miss. 1999)). This Court has held that "[i]t is the possibility of impairment of a defendant's available defense that [it] considers most carefully." *Id.* Just as the record in *Clark*, the record in this case "reflects no specific impairment to any defense" which might have been available to the Appellant. *Id.* "Generally, proof of prejudice entails the loss of evidence, death of witnesses, or staleness of an investigation." *Sharp v. State*, 786 So.2d at 381. There was no proof of any of these in the Appellant's case. The Appellant's case, like that of *Sharp*, "unfolded the same as if it had been held much earlier." *Id.* As such, there is no substantiation for the Appellant's claim of prejudice.

With regard to the *Barker* factors addressed above, the Mississippi Supreme Court has held that:

> no mathematical formula exists according to which the *Barker* weighing and balancing process must be performed. The weight to be given each factor necessarily turns on the quality of evidence available on each and, in the absence of evidence, identification of the party with the risk of nonpersuasion. In the end, no one factor is dispositive. The totality of the circumstances must be considered.

Noe v. State, 616 So.2d 298, 300 (Miss.1993). In the Appellant's case, the delay, admittedly, was beyond the eight month mark; however, the delays were through no fault of the State. Also, while the Appellant did assert his right to a speedy trial some six months after his arrest, he offered no proof whatsoever to establish that his defense was in any way prejudiced as a result of the delay. Therefore, the Appellant's constitutional right to a speedy trial was not violated.

B. Statutory Right to a Speedy Trial

Mississippi Code Annotated §99-17-1 states 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."

The two-step test for determining a possible violation of the statutory right to a speedy trial is as follows:

> The first step is to determine the total number of days between arraignment and trial. For this purpose, the date of arraignment is not counted but the date of trial and weekends are counted unless the 270th day falls on a Sunday. The second step is to consider each delay separately, because only those delays attributable to the State count toward the 270 days. For the second step, this Court must determine which party is responsible for the delay and their reason. The clock starts at the time of arraignment and not at the time of the arrest. The time prior to arraignment is not relevant in 270-day rule cases.

Clark v. State, 14 So.3d at 785-86 (quoting *Dies v. State*, 926 So.2d 910, 014 (Miss. 2006)).

1. Step 1 - Time Calculation

The Appellant was arraigned on May 9, 2008. As of the date of the hearing on the Appellant's motion to dismiss, approximately 291 days had passed since arraignment. The Appellant's trial was held on September 14, 2010, approximately 493 days after arraignment.

2. Step 2 - Who is Responsible for the Delays and What are the Reasons for the Delays

As shown above, the trial court found good cause for the delay from the original September 10, 2008 trial date to the March 23, 2009 trial date. "A finding of good cause is a finding of ultimate fact, and should be treated on appeal as any other finding of fact; it will be left undisturbed where there is in the record substantial credible evidence from which it could have been made." *Lawrence v. State,* 928 So.2d 894, 896 (Miss. Ct. App. 2005) (quoting *Walton v. State*, 678 So.2d 645, 648 (Miss.1996)). "Continuances for 'good cause' toll the running of the 270-day period, unless, 'the record is silent regarding the reason for the delay.'" *Reynolds v. State*, 784 So.2d 929, 933 (Miss. 2001).[7] The original trial date was approximately 124 days after the Appellant was arraigned which

[7]Additionally, sixteen days of that time should not be counted against the State as the State and the Appellant were involved in plea negotiations. (Transcript p. 41 - 42). "Time associated with an earnest attempt at plea negotiations will also not be weighted against the State." *Summers v. State*, 914 So.2d at 252 (quoting *Wesley v. State*, 872 So.2d

was within the statutory period. The days between that trial date and the new trial date of March 23, 2010 cannot be counted against the State as there was good cause shown for the delay. The next delay was the result of a joint motion for continuance which also cannot count against the State.

As such, even though the Appellant was not tried until approximately 493 days after his arraignment, there was no violation of his statutory right to a speedy trial. The majority of that delay cannot be attributed to the State because the trial court found good cause for the first delay and the second delay was the result of a joint motion for continuance.

Accordingly, the trial court did not err in refusing to dismiss the case against the Appellant for a speedy trial violation.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT S-24 INTO EVIDENCE.

The Appellant also argues that "the trial court erred in admitting Exhibit S-24." (Appellant's Brief p. 19). The Appellant argues that Exhibit S-24, a Texas Longhorns hat, was not properly admitted because "the State failed to authenticate" the exhibit. (Appellant's Brief p. 21). This Court has previously held:

> Our standard of review regarding whether the trial court committed error in the admission of particular evidence is well settled. The trial judge has considerable discretion in determining the admissibility of evidence. We will not reverse the trial court's decision merely because of an erroneous evidentiary ruling. Rather, the appellant must demonstrate that he was effectively denied a substantial right by the evidentiary ruling before a reversal is required. There must be a showing that the trial judge abused his discretion and that "the admission or exclusion of evidence ... results in prejudice and harm or adversely affects a substantial right of a party."

Seigfried v. State, 869 So.2d 1040, 1046 (Miss. Ct. App. 2003) (quoting *Kidd v. State*, 793 So.2d 675 (Miss. Ct. App. 2001)). Mississippi Rule of Evidence 901(a) states that "[t]he requirement of

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763, 767 (Miss. Ct. App. 2004)).

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 its proponent claims." Rule 901(b)(1) states that one way of so doing is from the "testimony of [a] witness with knowledge."

There was sufficient testimony from witnesses with knowledge to support a finding that the hat in Exhibit S-24 was, in fact, exactly what it was claimed to be - the hat worn by the Appellant during the robbery and during his arrests. First, Rita McNair of the Mendenhall Police Department testified that when she arrested the Appellant after the robbery, he was wearing a Texas Longhorns hat. (Transcript p. 283 and 285).[8] Investigator Troy Kimble, a Crime Scene Investigator for the Vicksburg Police Department, testified that the Appellant was incarcerated in Simpson County and that he spoke with Officer McNair about the Appellant and the personal items he had with him at the time of his arrest. (Transcript p. 331). Investigator Kimble also testified that he received a Texas Longhorns hat from the Simpson County Jailer. (Transcript p. 327 and 331 - 333). This testimony from witnesses with knowledge - Officer McNair and Investigator Kimble - sufficiently authenticated the hat as the one worn by the Appellant. Thus, the trial court did not abuse its discretion in allowing the hat into evidence.

Even if it were error to allow the hat into evidence, which the State is in no way conceding, the error would be harmless in light of the overwhelming evidence of the Appellant's guilt. *See Bruce v. State*, 35 So.3d 1236, 1241 (Miss. Ct. App. 2010) (finding an error in the admission of evidence harmless in light of the overwhelming weight of the evidence). That evidence includes,

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[8]The Appellant was originally arrested for driving with a suspended license, failure to yield to blue lights, improper passing, and reckless driving after going around a roadblock Officer McNair was manning. (Transcript p. 280). The Appellant posted bond and was released, but his vehicle was impounded. (Transcript p. 280, 281, and 283). After recognizing the Appellant on the news later that evening as the man she arrested earlier in the day, Officer McNair contacted her superior and also contacted the towing service. (Transcript p. 281 and 285). She asked the towing service to notify her when the Appellant tried to retrieve his vehicle. (Transcript p. 285). The Vicksburg Police Department was contacted after the Appellant's second arrest at the towing company. (Transcript p. 286).

but is not limited to, the fact that Ms. Jenkins was able to pick the Appellant out of a photograph line-up and also provided an in-court identification of the Appellant as the man who robbed her. (Transcript p. 244 and 250). Video of the crime was played for the jury and several still photos from that video were entered into evidence which displayed the face of the Appellant as he robbed the bank. (Transcript p. 269 - 276 and Exhibits 3 - 10). The note given to Ms. Jenkins during the robbery was found in the Appellant's car. (Transcript p. 299, 310 - 317 and Exhibit 16). As such, even if the admission of the hat into evidence were error, it was, at worst, harmless error.

IV. THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO QUASH THE INDICTMENT.

Finally, the Appellant argues that "the trial court erred in denying [his] motion to quash the indictment." (Appellant's Brief p. 21). On September 15, 2009, the Appellant filed a *pro se* Motion to Quash the Indictment alleging that the original indictment, prior to any amendments, was invalid as "it was not properly filed by the Circuit Clerk of Warren County." (Record p. 85 - 86). He argues on appeal that the indictment did not meet the requirements of Miss. Code Ann. §99-7-9 in that it was not stamped "filed." (Appellant's Brief p. 21). However, this argument is waived as it was not raised until after the Appellant's trial had commenced. Miss. Code Ann. §99-7-21 states that:

> All objections to an indictment for a defect appearing on the face thereof, shall be taken by demurrer to the indictment, and not otherwise, before the issuance of the venire facias in capital cases, and before the jury shall be impaneled in all other cases, and not afterward. . . .

(*Emphasis added*). Additionally, Miss. Code Ann. §99-11-35 states that:

> A person shall not be acquitted or discharged in a criminal case, before verdict, for any irregularity or informality in the pleadings or proceedings; nor shall any verdict or judgment be arrested, reversed or annulled after the same is rendered, for any defect or omission in any jury, either grand or petit, or for any other defect of form which might have been taken advantage of before verdict, and which shall not have

been so taken advantage of.

By the time the Appellant filed his motion to quash, the original indictment has been amended and his trial had already commenced. As such, he waived the right to raise this procedural defect.

CONCLUSION

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

Respectfully submitted,

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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:

Honorable Isadore W. Patrick, Jr.
Circuit Court Judge
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