

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JASON BENARD FOXORTH

APPELLANT

VS.

NO. 2010-KA-0243-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE STATE DID NOT USE EVIDENCE OF A CO-INDICTEE'S GUILTY PLEA TO PROVE FOXWORTH'S GUILT. RATHER, THE STATE SOUGHT TO PREEMPTIVELY USE EVIDENCE OF THE CO-INDICTEE/WITNESS'S GUILTY PLEA AS A PRIOR STATEMENT CONSISTENT WITH HIS TRIAL TESTIMONY, AS IT WAS OBVIOUS THAT HIS CREDIBILITY WOULD BE THOROUGHLY ATTACKED ON CROSS- EXAMINATION.	5
II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FOXWORTH'S MOTION FOR CONTINUANCE.	11
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

STATE CASES

Clemons v. State, 732 So.2d 883 (Miss. 1999)	7
Foster v. State, 484 So.2d 1009, 1011 (Miss. 1986)	12
Hudderson v. State, 941 So.2d 221, 223 (Miss. Ct. App. 2006)	11
McCray v. State, 293 So.2d 807, 808 (Miss. 1974)	7
Shelton v. State, 853 So.2d 1171, 1181 (Miss. Ct. App. 2006)	11
White v. State, 616 So.2d 304 (Miss. 1993)	7-10

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JASON BENARD FOXORTH

APPELLANT

VS.

NO. 2010-KA-0243-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

- I. THE STATE DID NOT USE EVIDENCE OF A CO-INDICTEE'S GUILTY PLEA TO PROVE FOXWORTH'S GUILT. RATHER, THE STATE SOUGHT TO PREEMPTIVELY USE EVIDENCE OF THE CO-INDICTEE/WITNESS'S GUILTY PLEA AS A PRIOR STATEMENT CONSISTENT WITH HIS TRIAL TESTIMONY, AS IT WAS OBVIOUS THAT HIS CREDIBILITY WOULD BE THOROUGHLY ATTACKED ON CROSS-EXAMINATION.
- II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FOXWORTH'S MOTION FOR CONTINUANCE.

STATEMENT OF FACTS

Tavares Turner's roommate, Michael Williams, entrusted Turner with \$10,000 cash so that Turner could locate and purchase a vehicle for Williams. T. 393. Williams, who had a "smoking problem" wanted Turner to hold the money so that he would not "blow" it. T. 393. Unfortunately, Turner's coworker, Steven Fairley, discovered that Turner had a large sum of money. T. 557. One way or another, Fairley's friend, Jason Foxworth, also discovered that Turner had a large sum of money and decided that he wanted to rob Turner. T. 558-59. Because Foxworth did not know Turner, but knew that Fairley did, Foxworth was "on [Fairley]" for approximately a month "to do this robbery," before Fairley acquiesced. T. 594.

On July 6, 2005, Fairley met up with Foxworth, Mark Kee Brown, and an unknown male at a corner store. T. 560. Foxworth informed Fairley "it was time to . . . to rob Mr. Turner . . ." T. 560. Fairley then drove to Turner's home, while the other three men followed. T. 561. When Fairley arrived at Turner's house, the two began talking and watching television. T. 388, 562. Turner's cousin, Lenny Jackson, and Turner's uncle, Larry Turner, were also present in the home. Within five minutes, Foxworth, Brown, and the unknown male, all armed, entered Turner's home and began asking, "Where the money at?" T. 389, 565. The men ordered Turner, Fairley, and Jackson on the ground. T. 389, 565. The men kicked Turner and Jackson in the head and kept demanding money. T. 389, 619. One of the men then drug Larry Turner from another part of the house and demanded money from him. T. 389. Larry Turner was shot in the neck, and one of the men said, "Now you see I'm not playing with you." T. 389. At some point in the affray, Brown reached in Tavares Turner's pocket and took the \$10,000, which was wrapped in a sock. T. 434. After the shooting, Fairley, Foxworth, Brown, and the unknown male, ran out of the house and fled the scene. Tavares and his cousin ran next door to call the authorities. Larry Turner was dead on

arrival.

Fairley pleaded guilty to armed robbery and testified against Foxworth. Foxworth and Brown were tried separately and each was convicted of capital murder and sentenced to life.

SUMMARY OF ARGUMENT

The State did not refer to Fairley's guilty plea during opening statements to suggest that the plea was substantive evidence of Foxworth's guilt. Instead, it was clear from the beginning that Fairley's credibility would be attacked, and the State sought merely to soften the blow of the impending attack on Fairley's credibility by being the first to admit to the jury that Fairley participated in the armed robbery which resulted in Larry Turner's death. Mississippi case law provides that it is permissible to use evidence of a co-indictee's guilty plea where it is obvious that the co-indictee/witness's credibility will be attacked.

Foxworth fails to show that the trial court abused its discretion in denying his motion for a mistrial. Although he claims that he was entitled to a continuance based on late discovery, the truth of the matter is that most of the evidence he claims he received on the day of trial had been provided in different forms long before trial. Foxworth fails to even articulate any resulting prejudice in his appellate brief.

ARGUMENT

I. THE STATE DID NOT USE EVIDENCE OF A CO-INDICTEE'S GUILTY PLEA TO PROVE FOXWORTH'S GUILT. RATHER, THE STATE SOUGHT TO PREEMPTIVELY USE EVIDENCE OF THE CO-INDICTEE/WITNESS'S GUILTY PLEA AS A PRIOR STATEMENT CONSISTENT WITH HIS TRIAL TESTIMONY, AS IT WAS OBVIOUS THAT HIS CREDIBILITY WOULD BE THOROUGHLY ATTACKED ON CROSS-EXAMINATION.

In summarizing the evidence the State intended to present at trial, the prosecutor made the following comment. "Ladies and gentlemen, we'll also have testimony in this case that Mr. Fairley was charged with this crime, I want to tell you this up front, and he pled to an armed robbery charge." T. 369. After defense counsel's motion for mistrial was overruled, the State resumed its opening with the following sentence, "He's currently serving a sentence in the penitentiary for his action." T. 370. Right out of the box, after a formal introduction, defense counsel opened with the following.

The defense contends that the proof in this case will show the following: That the prosecution's case against Jason Foxworth rests squarely on the credibility and believability of Steven Fairley, and we expect the proof to show that the testimony of Steven Fairley would not and will not be legally sufficient to base any finding of guilt beyond a reasonable doubt as to Jason Foxworth. The proof will show that Steven Fairley has improper reasons and improper motives in trying to implicate Jason Fairley in the death of Larry Turner.

The proof will show that Steven Fairley is biased and that he has a bias in naming Jason Foxworth as a participant in the death of Larry Turner. The proof is going to further show that the testimony of Steven Fairley as to how the entire incident leading up to the death of Larry Turner was planned and carried out is wholly uncorroborated.

Further, the proof will show that this trial is the first time that Steven Fairley's story will be cross-examined by a defense lawyer or anyone else for that matter to reveal the true inconsistencies, the contradictions in that story, as well as Fairley's improper bias and motives in trying to implicate Jason Fairley in the death of Larry Turner.

T. 377-78.

On the second morning of trial, and prior to the State calling Fairley to testify, defense counsel renewed his motion for mistrial. T. 496. Defense counsel presented the trial court with six cases which defense counsel believed stood for the proposition that the State cannot be the first party to bring forth evidence of a co-indictee's conviction of the same crime for which the defendant stands trial. T. 498-99. The State responded that any reference to Fairley's guilty plea was not used as evidence of Foxworth's guilt. T. 509. The State further responded that even if it were error to reference Fairley's guilty plea, that such error should be deemed harmless at best since Fairley would testify at trial and would be subject to cross-examination. T. 509. Upon questioning by the trial court, defense counsel agreed that the State was permitted to call Fairley as a witness and that Fairley could testify as to his role in the robbery and implicate Foxworth. T. 512-13. However, defense counsel opined that Fairley should not be permitted to testify on direct examination that he pleaded guilt to the same. T. 513. The trial court recognized that the cases submitted by defense counsel prohibit the State from first putting on evidence that a co-defendant has previously been convicted for the same offense for which the defendant is being tried because "it impermissibly suggests to the trier of fact that . . . their judgment may be pitted against the judgement of a jury with respect to the actions of the co-defendant." T. 514. However, the trial court recognized that in the present situation, the prosecutor's statement in opening related to the obvious impending impeachment Fairley would face on cross-examination. T. 514-17. The trial court ultimately overruled the motion for mistrial, and ruled that the State could examine Fairley as to his participation in the robbery, but could not bring out on direct examination that he was a co-indictee or that he had entered a guilty plea. T. 517.¹

¹Although this had been mentioned in opening statements, the trial court noted that attorney's statements are not evidence. T. 515. The jury was also instructed that attorneys statements and

In his first assignment of error, Foxworth takes the Court on a tour of cases which stands for the proposition that “where two or more persons are jointly indicted for the same offense but are separately tried, a judgment of conviction against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of the guilt of the party being tried.” *McCray v. State*, 293 So.2d 807, 808 (Miss. 1974) (citing *State v. Thornhill*, 171 So.2d 308 (1965); *Pieper v. State*, 134 So.2d 157 (1961); *Pickens v. State*, 91 So. 906 (1922)). The court’s concern in these pre-rules cases is, as noted by the trial court in the present case, that evidence of a co-indictee’s guilty plea or conviction places the jury “in the untenable position [of] pitting its prospective verdict against a guilty verdict previously entered by another jury carrying with it the court’s approval by way of the judgment and sentence.” *Id.* at 809. In the present case, the State mentioned that Fairley pleaded guilty to armed robbery, not to suggest Foxworth’s guilt, but rather to soften the blow of the impeachment Fairley would obviously face on cross-examination. Defense counsel’s opening statement centered almost entirely around a claim that Fairley was not a credible witness and that the State’s case “rests squarely on the credibility and believability of Steven Fairley.” T. 377.

The cases of *Clemons v. State*, 732 So.2d 883 (Miss. 1999), and *White v. State*, 616 So.2d 304 (Miss. 1993) are instructive. In *Clemons*’ murder trial, the State called Timothy Sudberry, who had been involved in the murders for which *Clemons* stood trial. *Id.* at 885 (¶3). The State elicited on direct examination that Sudberry had pleaded guilty to accessory after the fact for his participation in the murders. *Id.* at 890 (¶27). The Mississippi Supreme Court distinguished the situation in *Clemons* from the prohibition against putting on evidence that a co-indictee has been previously tried

arguments are not evidence. C.P. 100.

and convicted of the same crime for which the defendant is being tried. *Id.* at (¶29).

The danger at issue in that case is that one jury would rely upon the judgment of a prior jury in reaching its decision. The present case is distinguishable, however, because the case sub judice deals with a plea of guilty; that is, a prior admission of guilt, which is consistent with the testimony at trial. This is a significant distinction because prior statements have evidentiary value different from prior findings of other tribunals.

Moreover, whether an error in admitting this evidence is sufficiently prejudicial to warrant reversal may be resolved differently where the offending evidence is no more than a repetition of what is said by the witness before a jury and subject to cross examination, as opposed to evidence of the collective judgment of another jury. Thus, it must be determined whether the admission of the testimony in question was error. It is essentially an evidentiary issue.

Id. at (¶¶29-30). The Court went on to find that evidence of Sudberry's guilty plea was admissible under MRE 801(d)(1) as being a prior statement consistent with his trial testimony. *Id.* at 891 (¶31). However, the court found that the evidence of the guilty plea should not have been received until after the witness's credibility had been attacked on cross-examination. *Id.* Nevertheless, the error in the early admission of the evidence was deemed harmless due to the following.

It was clear from the beginning that Sudberry's credibility was central to this case. His credibility was vigorously attacked on cross-examination. Prior inconsistent statements from Sudberry were elicited, admitted and explained. Moreover, on cross-examination Sudberry was questioned extensively about the nature of any sentencing arrangement he was receiving from the State. It is hard to believe that, but for the introduction of the guilty plea, this attack on Sudberry would not have been made. He was the primary witness against Clemons. Finally, without his testimony about any previous guilty plea, Sudberry made a detailed, in-court confession of his guilt. He clearly established the fact that he was guilty of the crime of accessory after the fact. Sudberry admitted that he was present in the car at the time of the incident, and after the murders it was he that hid the murder weapon. Moreover, he was subjected to a searching cross-examination by defense counsel. When Sudberry went one step further on direct examination and testified that he had previously pleaded guilty to the same crime, he added nothing to his otherwise competent testimony. Under these circumstances, the premature references and testimony cannot be deemed error sufficient to warrant reversal.

Id. at (¶33).

Similarly in the present case, the mention of Fairley's guilty plea in no way put the jury in the position of pitting its prospective verdict against the verdict of another jury. As with Sudberry's testimony in *Clemons*, it was clear from the beginning, as evidence by defense counsel's opening statement, that Fairley's credibility was central to the case. Prior inconsistent statements from Fairley were elicited, admitted, and explained. T. 572-76, 580-81. Fairley also confessed his guilt on the witness stand. T. 560, 569. Finally, Fairley too was subject to a searching cross-examination. Under the authority of *Clemons*, the trial court did not err in refusing to grant a mistrial based on the prosecutor's brief mention in opening statements that Fairley pleaded guilty to armed robbery.

An examination of *White v. State* leads to the same conclusion. In *White*, White's co-indictees testified for the State, and the prosecution was the first to reveal that the witnesses had pleaded guilty to the burglary for which White stood trial. 616 So. 2d 304, 305 (Miss. 1993). White relied on many of the same cases Foxworth relies on in his appellate brief in arguing that it was reversible error to allow the State to put on evidence that the co-indictees had pleaded guilty to the same crime for which White stood trial. *Id.* at 307. The Mississippi Supreme Court noted that where a co-indictee testifies at trial, putting on evidence of his prior guilty plea does not present the danger of the current jury relying on the judgement of another jury in reaching its verdict. *Id.* Rather, where the co-indictee admits his guilt on the witness stand, evidence of his prior guilty plea is simply a prior consistent statement which is admissible under our rules of evidence. *Id.* Like the *Clemons* court, the *White* court stated that the prosecution should have waited to put on evidence of the prior consistent statement, the guilty plea, until the co-indictee's credibility was attacked by defense counsel. *Id.* at 308. However, the court found that the preemptive strike was not reversible because, like in *Clemons* and the present case, the co-indictee's credibility was central to the State's case against White, the co-indictee's credibility was "vigorously attacked" on cross-examination, and

the co-indictee was forced to explain prior inconsistent statements on cross-examination. *Id.* All of the same is true in the present case.

Under the authority of *Clemons* and *White*, it is clear that the State's brief reference to the fact that Fairley pleaded guilty to armed robbery was not reversible error. Perhaps a better course of action would have been to wait until after defense counsel attacked Fairley's credibility. As stated by the court in *White*, "It would strain credulity to suggest that, but for the introduction of the guilty plea, this attack on [the co-indictee] would not have been made." *Id.* It should be noted that in *Clemons* and *White*, it was not reversible error for the State to go into detail on the co-indictees' direct examinations regarding the details of their guilty pleas to the same crime for which the appellants stood trial. In the present case, the only mention of Fairley's guilty plea was during opening statements. Out of an abundance of caution and after objection by defense counsel, the trial court instructed the parties to not extract testimony of Fairley's guilty plea during his examination. As such, there was actually no evidence of Fairley's plea placed before the jury. Therefore, if it was harmless error for the State to first put forth such evidence in *Clemons* and *White*, then certainly the State's brief mention of a guilty plea in its opening statement cannot be reversible error.

The bottom line is that the State did not attempt to use evidence of Fairley's guilty plea as evidence of Foxworth's guilt of capital murder. Instead, the State merely sought to soften the blow of Fairley's impeachment upon cross-examination regarding his involvement in the armed robbery. Accordingly, Foxworth's first assignment of error must fail.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FOXWORTH'S MOTION FOR CONTINUANCE.

Foxworth argues that he should have been granted a continuance because he was given for the first time on the morning of trial certain photographs, audio recordings, and the autopsy report. What Foxworth fails to mention in his appellate brief is that the photographs he received on the day of trial were merely colored photographs of the black and white photographs he had already been provided in discovery. T. 60-61. Any new photographs that were provided on the morning of trial were merely more photographs of the crime scene. T. 61. Further, although the trial court denied the motion for continuance, the trial court did exclude any new photographs which the State provided on the morning of trial. T. 63-64. Also, while Foxworth may have been given audiotapes of witness's statements on the morning of trial, defense counsel freely admitted that he had previously been provided through discovery the transcripts of those audiotapes. T. 61-62. No mention was made in the record of defense counsel having received the autopsy report on the first day of trial.

The trial court's decision to deny a motion for continuance will not be the basis for reversible error unless it can be shown that the ruling resulted in a "manifest injustice." *Shelton v. State*, 853 So.2d 1171, 1181 (¶35) (Miss. 2003). "Before there will be manifest injustice in the denial of a continuance, an accused must have suffered unfair surprise or prejudice." *Hudderson v. State*, 941 So.2d 221, 223 (¶6) (Miss. Ct. App. 2006). Foxworth never claimed unfair surprise or prejudice, and he fails to even articulate in his appellate brief how he was prejudiced by the denial of a continuance.

As to the photographs, any photographs which were provided for the first time on the morning of trial were excluded. As to the audio tapes, defense counsel was fully aware of the substance of the tapes since he had been provided the transcripts of the audio tapes long before trial.

Again, there is no evidence in the record that defense counsel received the autopsy report on the morning of trial. Even if Foxworth's assertion is true that he did not receive the autopsy report until Friday, November 9, 2007, the day he argued his motion for continuance, the jury was not seated until the following Wednesday. T. 55, 352-53. Even in situations where a defendant is entitled to a continuance due to late discovery, our reviewing courts have repeatedly held that "[t]here will no doubt be cases where postponement of a day or two, or in some cases even an hour or two, will suffice." *Foster v. State*, 484 So.2d 1009, 1011 (Miss. 1986). Even if Foxworth's claim regarding the autopsy report is true, he had five days to review it. It was undisputed that Larry Evans was shot to death by someone who invaded his home. It was undisputed that Foxworth was one of the men that invaded his home. Under our capital murder statute, regardless of who pulled the trigger, Foxworth was guilty of capital murder by virtue of his participation in the armed robbery. Therefore, it is difficult to imagine any argument Foxworth could have advanced, but failed to do so, to show that he was prejudiced by the allegedly late receipt of the autopsy report.

Foxworth failed to show unfair surprise or prejudice by the trial court's denial of his motion for continuance. The trial court did not abuse its discretion in denying the motion for continuance.

CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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 Lawrence P. Bourgeois
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney
Post Office Box 1180
Gulfport, MS 39502

Keith Pisarich, Esquire
Attorney at Law
Post Office Box 936
Biloxi, MS 39533

This the 28th day of February, 2011.



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680