

NO. 2010-KA-00243-COA

In the Court of Appeals of the State of Mississippi

JASON BENARD FOXWORTH,

Appellant,

versus

STATE OF MISSISSIPPI,

Appellee,

**A Direct Criminal Appeal From the Circuit Court of
Harrison County, Mississippi, Second Judicial District,**

REPLY BRIEF FOR APPELLANT

"ORAL ARGUMENT REQUESTED"

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SUMMARY OF THE ARGUMENT

1. Foxworth asserts that the state's prosecutor committed reversal error informing the jury, over defense objection, during his opening statement that state's witness Steven Lamar Fairley, a co-defendant and co-indictee in this case, had been charged with this crime, and who had pled to an armed robbery charge, and was serving a sentence in the penitentiary. The trial judge erred in overruling the contemporaneous defense objections and defense motions for a mistrial. The state's prosecutor further compounded this error in the second or final part of the state's closing argument in referring to state's witness Steven Lamar Fairley, as the witness saying he's "guilty". The state's prosecutor's comments and remarks regarding co-defendant and co-indictee Steven Lamar Fairley were violative of this state's longstanding and general rule that where two or more persons are jointly indicted for the same offense, but are separately tried, a judgment of conviction or a plea of guilty 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, which warrants and mandates the reversal of Foxworth's conviction of capital murder and the remanding of Foxworth's case for a new trial.

2. The trial judge committed reversal error in failing to grant Foxworth a continuance of the trial date upon the Foxworth's trial counsel's first or second motion for a continuance of the trial date and that the trial judge did not follow the proper procedure and criteria set forth in *Box* in assessing the propriety of granting Foxworth's

motion for a continuance of the trial date. The trial judge's error in not granting Foxworth a reasonable continuance of the trial warrants and mandates in and of itself a reversal of Foxworth's conviction of capital murder and a remanding of Foxworth case for a new trial.

ARGUMENT

- 1. That the state's prosecutor made prejudicial remarks in his opening statement to the jury when he told the jury that co-defendant and co-indictee Steven Lamar Fairley was charged with this crime and had pled to an armed robbery charge and that he was serving a sentence in the penitentiary for his action.**

The State comments that Foxworth's trial counsel in the defense's opening statement made reference to the issue of co-indictee and State's witness Fairley's credibility as an issue in this case. (State's Brief - page 5). Every witness's credibility is an issue in every trial. In the defense's opening statement, Foxworth's trial counsel made no reference as to Fairley's earlier plea of guilty and the fact that Fairley was serving an incarcerated sentence in the penitentiary as its result. Of course, by this time the State's prosecutor had already made the objectionable remark in front of the jury

during the State's opening statement, which was not corrected by the trial judge upon Foxworth's timely objection. Foxworth's defense counsel may have had a strategy to not inquire as to Fairley's plea and resulting sentence by thinking that it would only enhance Fairley's credibility in Foxworth's present trial.

In violating a long-standing rule in criminal cases in the State of Mississippi involving co-defendants and a testifying co-defendant against another, the prosecution should not be allowed to dictate the defense's trial strategy.

It should also be noted that earlier in the trial during voir dire, the prosecution and the defense did not approach the issue of the credibility of Fairley as being a testifying co-indictee who had already pled guilty and been sentenced. Therefore, it was a complete surprise to the defense for the prosecution to open with this statement in the State's opening statement.

The State argues that the prosecution at trial responded that any reference to Fairley's guilty plea was not used as evidence of Foxworth's guilt. (State's Brief, page 6.) The prosecution never corrected itself in front of the jury. The trial judge never corrected this error in the presence of the jury. It is easy for the prosecution to say this comment was not being made to prejudice Foxworth, but the natural implication and consequence of such a remark as to a guilty plea by a testifying co-indictee would be if I pled guilty then so is the person I am testifying against. If this were not the case, why would there be such a rule to prohibit such remarks or evidence in this first place. If the prosecution can be excused on this point by only saying that the remark or evidence of

a co-indictee's guilty plea is not being offered as evidence against the defendant standing trial, then the rule to prohibit it would be meaningless and never enforced.

In its brief, the State cites *Clemons v. State* as being instructive. 732 So.2d 883 (Miss. 1999). In *Clemons*, the Court stated, "This case is extremely similar to *Robinson v. State*, 465 So.2d 1065 (Miss. 1985). In *Robinson*, the Court held that the admission of evidence of a co-indictee's guilty plea was not reversible error where no objection was made to either the question or answers in which the evidence was elicited, admission of the testimony was not assigned as error in the defendant's motion for new trial, and the defense counsel cross-examined the co-indictee regarding his guilty plea. (Citing *Robinson*, 465 So.2d at 1068-69). 732 So.2d 883, 890 (Miss. 1999). In Foxworth's trial, a timely objection was made by Foxworth's trial counsel [(The defense made a contemporaneous objection, which was overruled by the trial judge. Thereafter, the defense made a contemporaneous motion for a mistrial, which was also overruled by the trial judge. (T.T., Vol. III, pg. 369-370)(R.E. pp. 39-40)], this error was assigned in Foxworth's motion for a new trial, and Foxworth's defense counsel did not cross-examine Fairley to bring out further evidence of Fairley's previous guilty plea (nor did the prosecutor ask any questions to Fairley on direct examination or re-direct to elicit evidence of his earlier guilty plea.

In *Clemons*, the Court cites a series of federal and state appellate cases for the proposition that admission of a co-conspirator's plea of guilty, while incompetent as substantive evidence of the defendant's guilt, may be admissible for other purposes.

732 So.2d 883, 890 (Miss. 1990).

The State also cites the case of *White v. State*, 616 So.2d 304 (Miss. 1993) as being instructive. However, in *White*, the Court said, "Finally, where, as here, the issue of the witness' guilt is based on conduct not involving the defendant and not at issue in the trial where the witness testifies, the reason for the prohibition loses its force." *White v. State*, 616 So.2d 304, 307 (Miss. 1993). In Foxworth case, the witness' (Fairley's) guilt would have been based on conduct involving Foxworth.

On the following morning of the trial, defense counsel provided the trial judge with authorities and case law to substantiate the defense's objection and motion for a mistrial. (T.T. Vol, pp. 496-520)(R.E. pp. 41-65). During this lengthy colloquy with the trial judge, defense trial counsels had provided the following Mississippi cases: *Pickens v. State*, 91 So. 906 (Miss. 1990); *McCray v. State*, 293 So.2d 807 (Miss. 1974); *Ivy v. State*, 301 So.2d 292 (Miss. 1974) and *Henderson v. State*, 403 So.2d 139 (Miss. 1981) and *Randall v. State*, 806 So.2d 185 (Miss. 2001). (T.T. pp. 497-498)(R.E. pp. 42-43).

The state's prosecutor added further prejudice by making a comment in his closing remarks to the jury that Fairley testified "I'm guilty" on the witness stand. The defense made a contemporaneous objection and motion for a mistrial. The trial judge sustained the defense's objection this time but overruled the defense motion for a mistrial. (T.T. pg. 672)(R.E. pg. 66). Regardless of the judge's ruling, more damage and prejudice were done to Foxworth. It is totally inconsistent for the trial judge to sustain this defense objection but not to have sustained the earlier defense objection following

the state's prosecutor's comments as to Fairley's plea and sentence.

In the present case, Foxworth, Brown, and Fairley were jointly indicted. (T.R. Vol. I, pg. 14)(R.E. pg. 20). Before Foxworth's trial, Fairley had pleaded guilty to the reduced charge of armed robbery. He received a 25 year sentence. The armed robbery in question being the underlying predicate armed robbery felony charge to this capital murder charge in this case. The jury would have been put on notice of this even more by the State's prosecutor informing them that he (Fairley) "was charged with this crime". See *supra*.

In *Pickens v. State*, the Mississippi Supreme Court approved the general rule announced in 16 C.J. 670: "Where two persons have been jointly indicted for the same offense, but are separately tried, a judgment of conviction against one of them is not competent on the trial of the other inasmuch as his conviction is no evidence either of joint action or of the guilt of the accused. 91 So. 906 (Miss. 1920).

In *Pieper v. State*, the State offered Rucker, a co-indictee, as a witness against the accused Pieper. *Pieper v. State*, 134 So.2d 157 (Miss. 1961). In *Pieper*, the Mississippi Supreme Court held that where two or more persons were jointly indicted for the same offense, but separately tried, judgment of conviction against one of them was not competent on the trial of the other, since his plea of guilty was not evidence of the guilt of the accused. *Pieper v. State*, 134 So.2d 157 (Miss. 1961).

In *Buckley v. State*, Travis Buckley and Billy Roy Pitts were jointly indicted for kidnaping. *Buckley v. State*, 223 So.2d 524 (Miss. 1969). Buckley was granted a

severance. Testimony was presented to the jury in Buckley's trial that Pitts, the co-indictee, pled guilty, and that as a result of his plea of guilty he had been sentenced to serve a term of five years in the state penitentiary. Buckley had made an objection to this testimony. Again, the Mississippi Supreme Court cited the well settled law in this state that where two or more persons were jointly indicted for the same offense, but separately tried, judgment of conviction against one of them was not competent on the trial of the other, since his plea of guilty was not evidence of the guilt of the accused. *Buckley v. State*, 223 So.2d 524, 528 (Miss. 1969).

In *Buckley*, the Court went on to note "Not only was this testimony designed to lead the jury to believe that since Pitts had plead guilty to the charge, that his co-indictee, Buckley, was also guilty, but it was also designed to bolster the testimony of Pitts. *Buckley v. State*, 223 So.2d 524, 528 (Miss. 1969).

In *Ivy v. State*, Mike Ivy and Clinton Smith were jointly indicted for the sale of a controlled substance. *Ivy v. State*, 301 So.2d 292 (Miss. 1974). The cases were severed. The Court went on to state that "the jury thus had before it evidence of the co-indictee's conviction and sentence from which it could likely conclude that Ivy was guilty because his associate and co-indictee was convicted and sentenced, or more modernly put, the jury could find he was guilty by association." *Ivy v. State*, 301 So.2d 292, 293 (Miss. 1974).

The Court further stated, "We have consistently held evidence of this nature to be inimical to a fair trial." *Ivy v. State*, 301 So.2d 292, 293 (Miss. 1974).

The Court noted that the rule in this state is in accord with those of many other states. Citing 48 A.L.R.2d 1016 (1956). The Court reversed Ivy's conviction and remanded for a new trial. *Ivy v. State*, 301 So.2d 292, at 293 (Miss. 1974).

In *Henderson v. State*, the appellant Gable Henderson was charged along with his twin brother Michael Henderson, with armed robbery. *Henderson v. State*, 403 So.2d 139 (Miss. 1981). This appeal presented the question of whether the lower court should have declared a mistrial when the defendant's witness was improperly asked on cross-examination by the district attorney whether he had been indicted for burglary. Also presented on this appeal was the impropriety of the district attorney inquiring on cross-examination, of co-indictee, Michael Henderson, if the jury had convicted him for the same offense of armed robbery for which the defendant was being tried. Before an objection could be interposed the witness answered, "Yea, because of you..." Thereafter, objections and motions for a mistrial were immediately and timely made in both instances and the errors were properly preserved. *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981).

In the *Henderson* case, the trial judge very properly sustained the objection but overruled the motions for a mistrial, and in lengthy statements admonished the jury to disregard the improper questions asked by the district attorney and the answers thereto. *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981).

The Court stated, "In most cases, when an objection is made to improper questions by a district attorney and the court sustains the motion and admonishes the

jury to disregard the improper questions and evidence, we have held that any prejudice created by the questions was cured and the trial court properly overruled the motion for a mistrial. *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981); Citing *Reid v. State*, 266 So.2d 21 (Miss. 1972); *Thomas v. State*, 285 So.2d 148 (Miss. 1973).

The Court concluded as follows, “Under the circumstances, once the jury was apprised of the fact that Michael Henderson had previously been charged and convicted for his participation in the offense for which the appellant was being tried, the jury’s verdict of guilty was such a certainty as to deny the appellant a fair trial. *Henderson v. State*, 403 So.2d 139, 141(Miss. 1981). The Court reversed Henderson’s conviction and remanded for a new trial. *Id.* at 141.

In *Randall v. State*, the appellant asserted that the trial court committed reversible error by allowing the prosecution to repeatedly inform the jury that his co-indictee was convicted by a separate jury on the same capital murder charge. 806 So. 193, 194 (Miss. 2001). The State acknowledged that the jury was informed that Nomdray Stokes was convicted on the same capital murder charge for which Randall was on trial, and that normally this would be error as a matter of law. *Id.* at 195

However, the State responded by asserting that Randall’s trial counsel made no objection, and consequently waived this issue for appeal. Secondly, that comments by Randall’s attorney opened the door for the testimony.

As to the waiver issue, the Court said, “It is incumbent on defense counsel to raise a proper objection when the offensive language is uttered or waive appellate

review of the issue. This rule provides the trial court with the opportunity to sustain an objection and admonish the jury to disregard moments after the erroneous language it uttered. *Id.* at 195. Citing *Foster v. State*, 639 So.2d 1263, 1288-89 (Miss. 1994). "If no contemporaneous objection is made, the error, if any, is waived. Citing *Cole v. State*, 525 So.2d 365, 368 (Miss. 1988). "The defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal." *Foster*, 639 So.2d at 1288-89.

"This rule's applicability is not diminished in a capital case." *Cole*, 525 So.2d at 368. *Id.* at 195.

In *Randall*, the State asserted that not only did counsel for Randall fail to raise a contemporaneous objection, he offered to stipulate to it. When the State declined to accept the defendant's stipulation, counsel for Randall did not object to the admission of this evidence. *Randall v. State*, 806 So.2d 185, at 196 (Miss. 2001).

The Court further commented on the case of *House v. State*, where the Court said that "generally, this means that the matter must be presented to the trial judge in such a form that the trial judge has the opportunity to consider it with full knowledge of the respective contentions of the parties". *Id.* at 196. Citing *House v. State*, 445 So.2d 815 (Miss. 1984).

The Court further noted, "Assuming arguendo that Randall did not properly preserve this matter for appeal: This Court has recognized an exception to procedural bars where a fundamental constitutional right is involved. *Id.* at 196. Citing *Conerly v.*

State, 760 So.2d 737, 740 (Miss. 2000).

“The right to a fair trial by an impartial jury is fundamental and essential to our form of government. It is a right guaranteed by both the federal and state constitutions.” *Id.* at 196-7. Citing *Johnson v. State*, 476 So.2d 1195, 1209 (Miss. 1985).

In closing, the *Randall* court stated, “While this is admittedly a close call as to whether the questions by defense counsel actually suggested the outcome of the Stokes trial was unsuccessful, the rule in this State is clear: death is different. In capital cases, all bona fide doubts are resolved in favor of the defendant. It was reversible error to allow Thomas to testify as to the outcome of the Stokes trial. This error was compounded by the egregious exploitation of the improperly admitted information during closing arguments. While the door may have been opened, the screen door was still closed. The State should not take the bait. This error alone warrants reversal. *Id.* at 200.

The Court went on to state that “The law is analogous with respect to a co-indictee as well as an accomplice in this respect. In the case sub justice, the jury became aware through the testimony of Smith and the agent that she had been tried and convicted of a felony. It was apparent from the testimony that the offense for which she was convicted occurred the same day as the offense for which Johns was on trial.” Continuing the Court stated, “Although no contemporaneous objection was made, in these circumstances, as in *Henderson and Griffin v. State*, 293 So.2d 810 (Miss. 1974), the testimony was error, and the defendant was, as a result, denied a fair trial. Therefore,

the error can be addressed on appeal absent a contemporaneous objection. *Johns v. State*, 592 So.2d 86, 90 (Miss. 1991)(Citing *Griffin v. State*, 557 So.2d 542, 551-54 (Miss. 1990).

The Court in *Johns* went on to state that “the admission of the testimony regarding Smith’s conviction denied Johns a fair trial and is reversible error. *Johns v. State*, 592 So.2d 86, 90 (Miss. 1991).

At Foxworth’s trial, Fairley’s testimony was critical for a conviction. The prosecution did not have any physical evidence that linked Foxworth or anyone else to the murder of Turner. The prosecution’s case rested squarely on the in-court testimony of Fairley and Tavares. Although Tavares made an in-court identification of Foxworth at trial in November of 2007, Tavares’s initial photo identification in July of 2005 was far less than positive. Tavares’s out-of-court and in-court identification testimony was suspect on several points. This is why the improper bolstering of Fairley by the state’s prosecutor is so grave and prejudicial to Foxworth. If the jury believed Fairley had admitted his guilt to the extent of causing him to be serving time in the penitentiary at the time of Foxworth’s trial, the jury could only be led to believe if Fairley’s guilty then the one he’s accusing here today (Foxworth) in court must also be guilty.

2. That the trial court erred in refusing to grant defendant's motions for continuance.

The trial court is vested with broad discretionary powers in granting or refusing to grant trial continuance. *Pitts v. State*, 832 So.2d 1281 (Miss.App. 2002). The decision to grant or deny a continuance is left to the sound discretion of the trial court. *Gray v. State*, 799 So.2d 53 (Miss. 2001).

The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be grounds for reversal unless shown to have resulted in manifest injustice. *Smiley v. State*, 815 So.2d 1140 (Miss. 2002).

When faced with a discovery violation, technical or otherwise, the trial court should follow the following procedure, as in *Box*:

- (1) Upon defense objection, the trial court should give the defendant a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witness, inspecting the physical evidence, etc.
- (2) If, after this opportunity for familiarization, the defendant believes he may be prejudiced by lack of opportunity to prepare to meet the evidence, he must request a continuance. Failure to do so constitutes a waiver of the issue.
- (3) If the defendant does request a continuance, the State may choose to proceed with trial and forego using the undisclosed evidence.

Box v. State, 437 So.2d 19, 23-24 (Miss. 1983).

Failure to follow the *Box* guidelines is prejudicial error. *Darghty v. State*, 530 So.2d 27, 32 (Miss. 1988).

In *Inman v. State*, the Mississippi Supreme Court noted that there is no hard and fast rule determining how much time is reasonable time for the defense to assimilate unexpected and previously undisclosed evidence offered by the State. *Inman v. State*, 515 So.2d 1150, 1153 (Miss. 1987).

Where the State is tardy in furnishing discovery which it is obligated to disclose and after initial objection is made by the defense, the defendant is entitled upon request to a continuance postponement of the proceedings reasonable under the circumstances. *Inman*, 515 So.2d at 1153 (quoting *Foster v. State*, 484 So.2d 1009 (Miss. 1986)). Before this procedure can be followed, it is incumbent upon the defendant to make a timely objection. *Nixon v. State*, 533 So.2d 1078, 1090 (Miss. 1987).

Foxworth contends that his trial counsels did make a timely objection and motion for a continuance, as contemplated in *Box*. The defense believes that the trial court did not follow those procedures as outlined in *Box*, and therefore, Foxworth's conviction and sentence should be reversed and remanded for a new trial.

The defense's request for a continuance from the trial date of November 13, 2007, to the first part of January of 2008, the next term of court the then presiding judge would be back on the bench in the same courthouse and in the same courtroom would have been reasonable and should have been granted.

CONCLUSION

Foxworth asserts that the state's prosecutor committed reversal error informing the jury, over defense objection, during his opening statement that state's witness Steven Lamar Fairley, a co-defendant and co-indictee in this case, had been charged with this crime, and who had pled to an armed robbery charge, and was serving in the penitentiary. The trial judge erred in overruling the contemporaneous defense objections and defense motions for a mistrial. The state's prosecutor further compounded this error in the second or final part of the state's closing argument in referring to state's witness Steven Lamar Fairley, as being "guilty". The state's prosecutor's comments and remarks regarding co-defendant and co-indictee Steven Lamar Fairley were violative of this state's longstanding and general rule that where two or more persons are jointly indicted for the same offense, but are separately tried, a judgment of conviction or a plea of guilty 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, which warrants and mandates the reversal of Foxworth's conviction of capital murder and the remanding of Foxworth's case for a new trial.

Secondly, the trial judge committed reversal error in failing to grant Foxworth a continuance of the trial date upon the Foxworth's trial counsel's first or second motion

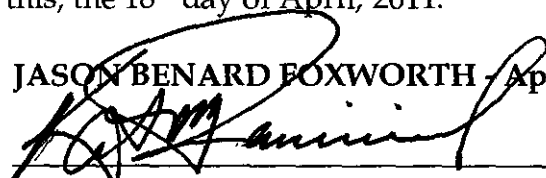
for a continuance of the trial date and that the trial judge did not follow the proper procedure and criteria set forth in *Box* in assessing the propriety of granting Foxworth's motion for a continuance of the trial date. The trial judge's error in not granting Foxworth a reasonable continuance of the trial warrants and mandates in and of itself a reversal of Foxworth's conviction of capital murder and a remanding of Foxworth case for a new trial.

ORAL ARGUMENT REQUESTED

Foxworth's appellate counsel respectfully requests the opportunity to address this Court in oral argument. For his conviction in this case, Foxworth received a life sentence without the possibility of parole. Foxworth has asserted grave errors at his trial which warrant a reversal of his conviction and the remand for a new trial. Foxworth believes that oral argument will give this Court the best opportunity to fully explore and then be completely informed as to the legal and factual issues of this case which should necessitate reversal.

RESPECTFULLY SUBMITTED, this, the 18th day of April, 2011.

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CERTIFICATE OF SERVICE

That I, Keith Pisarich, attorney for the Appellant **JASON BENARD FOXWORTH**, do hereby certify that I have this mailed, *via* U.S. first-class mail, postage prepaid, a true and correct copy of the above and foregoing "**REPLY BRIEF FOR APPELLANT**" to the following named individuals at the addresses so stated herein, to-wit:

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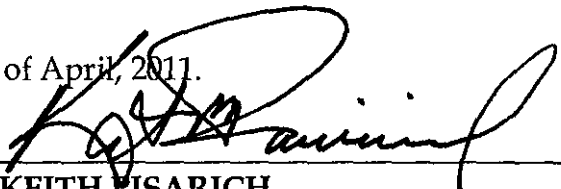
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SO CERTIFIED, this, the 18th day of April, 2011.



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