

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00696 COA

DAVID EDWARD PAYNE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GARY B. JONES

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: WAYNE SNUGGS

JOLENE M. LOWRY

DISTRICT ATTORNEY: BILBO MITCHELL

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: MURDER: SENTENCED TO SERVE A LIFE TERM WITH  
THE MDOC

MANDATE ISSUED: 6/10/97

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

David Edward Payne appeals his conviction of murder, raising the following issues as error:

**I. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH THE TESTIMONY OF HARVEY PAYNE BY THE USE OF A PRIOR INCONSISTENT STATEMENT GIVEN BY PAYNE.**

**II. WHETHER THE TRIAL COURT SHOULD HAVE EXCLUDED THE TESTIMONY OF PATRICK STAMPER AS CUMULATIVE AND UNFAIRLY PREJUDICIAL TO THE DEFENDANT.**

**III. WHETHER THE TRIAL COURT SHOULD HAVE GRANTED A MOTION FOR A NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

#### FACTS

Harvey Payne owned a trailer park on which Greg and Pat Gilbert parked their trailer home. On June 13, 1993, the Gilberts were celebrating a nephew's birthday. There were several adults and children present.

The defendant, David Payne, nephew of Harvey Payne, and a person named Teeny Tyrone arrived at the Gilbert's trailer, and as David drove up he nearly hit some children. This was the catalyst for a heated argument. Thereafter, David argued with Pat Gilbert over the tardiness of the Gilbert's rent payment. This argument continued over a long period, approximately an hour. During this time the decedent, Scott Stoddard, arrived. Scott went inside the trailer to check on the girls that David almost hit when he pulled up. Scott came outside and asked David to apologize to the children. David finally agreed and went in the trailer and apologized.

Greg Gilbert, Pat's husband, came out of the trailer and spoke with David privately. David and the Gilberts temporarily settled the dispute, after the Gilberts agreed to make the rent payments, and David Payne and Teeny Tyrone left.

Soon thereafter, David and Harvey Payne returned to the trailer. Harvey Payne was driving his truck. Harvey got out and stood by the driver's side of the truck, and David walked to the back end of the truck and placed his hands on the back rail. Harvey Payne stated that he had come prepared. Pat Gilbert approached Harvey and asked if they could discuss their problems the next day, after everyone had calmed down. Harvey responded by pushing Pat Gilbert to the ground. Scott Stoddard intervened and told Harvey to "pick on a man." Scott Stoddard removed his shirt and pushed Harvey Payne to the ground. David Payne, an observer at this time, got a shotgun from the back of his uncle's truck and fired and mortally wounded Scott Stoddard.

David Payne did not testify in his defense. Following deliberation, the jury returned a verdict of guilty.

## ANALYSIS

### I.

#### **WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH THE TESTIMONY OF HARVEY PAYNE BY THE USE OF A PRIOR INCONSISTENT STATEMENT GIVEN BY PAYNE.**

The State listed Harvey Payne as a potential witness in its case-in-chief, but never called upon him to testify. However, David Payne called Harvey Payne to testify for the defense. Upon cross-examination, the State used a prior inconsistent statement of Harvey Payne to impeach him. He gave this statement to police in a taped conversation which was not transcribed and delivered to the district attorney until the day he was called to testify. The State delivered a copy of the statement to the defense that same day it received it and prior to the testimony at issue.

Under Rule 9.04 of the Uniform Rules of Criminal and Circuit Court Practice, the prosecution is required to disclose the following:

Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement written, recorded or otherwise preserved of each such witness and the substance of any oral statement made by any such witness; . . . .

U.R.C.C.C. 9.04 (A)(1).

Since the State did not call Harvey Payne as a witness we could readily say there was no violation of Rule 9.04. However, since the State did list Harvey as a potential witness we will assume this was a potential discovery violation; even so, the issue is still without merit.

The statement had been given to the defense in time for it to review its contents, and it was incumbent upon the defense at that time to examine the statement before proceeding. It is important to note that it was the defense who called Harvey, *not* the State. The defense had Harvey's statement in hand before they called him as a defense witness and it can certainly be presumed that the State proceeded assuming the defense had inspected the information which the defense needed to know to protect its interests.

The defense is arguing a discovery violation even though they did not inspect the statement before they called Harvey as a witness. When a defendant alleges that the State has not complied with discovery, it is incumbent upon him to timely make an objection or request a continuance; Payne did neither. *Nathan v. State*, 552 So. 2d 99, 108 (Miss. 1989). Payne did not bring the alleged discovery violation to the trial court's attention before they called Harvey as their own witness. Failure to move for a continuance in the wake of an alleged belated disclosure is fatal to a claim of discovery violation. *Shook v. State*, 552 So. 2d 841, 850 (Miss. 1989).

Secondly, at no time during any of the State's questioning did the defense counsel object stating that he was unaware of Harvey's prior inconsistent statement. It was only after questioning had concluded and the court was in recess, that the defense asked that it be entered on the record that they did not

receive his statement until just before he started testifying.

The State argues that this assignment of error is procedurally barred in light of the failure by the defense to enter a timely objection. The State bases its argument on *Shook v. State*, 552 So. 2d 841, 850 (Miss. 1989), which held that failure to make a timely objection to a discovery violation or to move for a continuance bars the introduction of the issue on appeal. During the recess, Payne did not raise an objection, but merely noted for the record that he had not received the statement being used to impeach the witness until just prior to testimony. Since the defense made neither a timely objection nor a motion for a continuance in order to review the statement, this assignment of error is procedurally barred.

The defense does not assert that the trial judge treated the notation for the record as an objection and overruled it as such. Assuming that he did, and preserved the issue for appeal, Payne's argument is no stronger. The State made a good faith effort to comply with the mandates of Rule 9.04 by supplying the defense with the statement of Harvey Payne as soon as it was received, even though the State no longer planned to call him as a witness. The purpose underlying Rule 9.04 is to avoid a situation of "trial by ambush" where one side could withhold information from the other side in order to spring a trap later in the trial.

As the record shows, the State did not have the statement until the day it was handed over to the defense. As stated earlier, the defense presumably did not make an inspection of the statement before it called Harvey as a witness and did not seek a continuance to review the material. Since the State turned over the statement when it came into its possession and immediately turned a copy over to the defense, coupled with the fact that the defense neither objected nor requested a continuance, this assignment of error is without merit.

## II.

### **WHETHER THE TRIAL COURT SHOULD HAVE EXCLUDED THE TESTIMONY OF PATRICK STAMPER AS CUMULATIVE AND UNFAIRLY PREJUDICIAL TO THE DEFENDANT.**

As the State correctly points out, Payne objected to the testimony of Patrick Stamper, the decedent's nine-year-old son, at trial on the grounds of an alleged discovery violation, competency, and that it was offered merely to inflame the jury at the expense of the defendant.

The question of whether the testimony of Patrick Stamper should have been excluded as merely cumulative was not raised at trial and, as such, is procedurally barred on appeal. *Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991) (citing *Pruett v. Thigpen*, 665 F. Supp. 1254, 1262 (N.D. Miss. 1986); *Read v. State*, 430 So. 2d 832, 838 (Miss. 1983); *Stringer v. State*, 279 So. 2d 156, 157-58 (Miss. 1973)). "A trial judge cannot be put in error on a matter which was not presented to him for decision." *Holland*, 587 So. 2d at 868.

The question of whether the testimony of Patrick Stamper should have been excluded because it was offered merely to inflame the jury at the expense of the defendant, however, was raised at trial and is not procedurally barred. However, we "will not reverse an evidentiary ruling of the trial court unless

there has been a clear abuse of discretion." *Shamblin v. State*, 601 So. 2d 407, 413 (Miss. 1992).

Patrick was an eyewitness to the decedent's murder and his testimony was clearly relevant on that basis. Allowing Patrick to testify, as another eyewitness to the murder, can hardly be found to have been an abuse of discretion. In light of the highly deferential standard of review allowed the trial court, the second assignment of error is without merit.

### III.

#### **WHETHER THE TRIAL COURT SHOULD HAVE GRANTED A MOTION FOR A NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

Payne next submits that the trial court erred by not granting his new trial or judgment notwithstanding the verdict motion. Motions for directed verdict and JNOV challenge the sufficiency of the evidence supporting a guilty verdict. *Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989). We review the evidence on the last occasion when the sufficiency of the evidence was challenged before the trial court, at the time of Payne's motion for JNOV. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987).

A motion for a new trial challenges the weight of the evidence rather than its sufficiency. *Butler*, 544 So. 2d at 819. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994); *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). On review we accept as true all evidence favorable to the State, and the State is given the benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Id.*; *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). The Court will reverse such a ruling only for an abuse of discretion. *McClain*, 625 So. 2d at 781.

The jurors were confronted firsthand with the evidence which Payne claims was insufficient to sustain a guilty verdict. They obviously resolved the fact questions in favor of the State. In light of the fact that the jurors were in the best position to judge the demeanor and credibility of the witnesses firsthand, and an appellate court is allowed only the cold record, this Court is not in a position to determine that "reasonable and fair minded jurors" could not have found Payne guilty in the absence of evidence to the contrary. The trial judge was not in error when he denied the motion for judgment notwithstanding the verdict.

The jurors resolved fact questions reasonably in favor of the State and the verdict in the case *sub judice* is not so contrary to the evidence as to impose an unconscionable injustice. The jury may choose to believe or disbelieve any testimony presented and attach as much or as little weight to a particular piece of evidence as they wish. Accordingly, the verdict of the trial court should not be reversed.

**THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.**

**ALL COSTS OF THIS APPEAL ARE ASSESSED TO LAUDERDALE COUNTY.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING,  
PAYNE, AND SOUTHWICK, JJ., CONCUR.**