IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-KA-00267-COA

MELVIN DARNELL RANSOM **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	8/15/2000
TRIAL JUDGE:	HON. L. BRELAND HILBURN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WEAVER E. GORE, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	ELEANOR FAYE PETERSON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	STRONG ARM ROBBERY - SENTENCED TO SERVE A TERM OF FIFTEEN YEARS IN THE CUSTODY OF MDOC.
DISPOSITION:	AFFIRMED-05/20/2003
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE MCMILLIN, C.J., BRIDGES, IRVING AND GRIFFIS, JJ.

IRVING, J., FOR THE COURT:

¶1. A Hinds County Circuit Court jury found Melvin Darnell Ransom guilty of strong-arm robbery. The trial judge sentenced Ransom to fifteen years in the custody of the Mississippi Department of Corrections and denied Ransom's post-trial motion for a judgment notwithstanding the verdict or in the alternative for a new trial. Feeling aggrieved, Ransom has appealed and argues that the trial court erred

in refusing to allow the testimony of certain alibi witnesses and that the assistance of counsel that was accorded him was ineffective.

¶2. Finding no reversible error, this Court affirms the trial court's judgment.

FACTS

¶3. Leigh White went into a post office where she was confronted by a person who snatched her handbag and ran away. White yelled at the robber and ran after him. The robber then turned around, came back toward White, hit her in the face, and knocked her down. White's boss, Lou Morlino, came outside when he saw White lying against the glass door of the post office. Morlino chased the robber and got as close as the driver's side of the robber's vehicle but was unable to detain him. Both White and Morlino witnessed the robber getting into the get-away vehicle. Each gave a physical description of the robber to the police. White was able to provide a description of the vehicle, while both White and Morlino were able to recall the license plate number. Morlino indicated that when he ran alongside of the robber's vehicle, there was no other person in the vehicle but the robber.

¶4. Detective Al Taylor testified that when he ran the tag number that was given to him by White and Morlino he learned that the vehicle was registered to Melvin Darnell Ransom. The description of the vehicle given by White also matched Ransom's vehicle. Taylor later contacted White and presented her with a photographic line-up of the potential suspects. She identified Ransom as the person who had robbed her. During the trial, White and Morlino both identified Ransom as the person who attacked and robbed White.

¶5. Ransom denied that he committed the robbery and stated that he had an alibi. Ransom alleged that his cousin, Vincent McGrew, committed the robbery. When McGrew took the stand, he asserted his Fifth

Amendment right against self-incrimination and refused to answer any further questions posed by Ransom's trial attorney. Ransom was not allowed to present any other alibi witnesses.

¶6. Other pertinent facts will be related during the discussion of the issues.

ANALYSIS AND DISCUSSION OF THE ISSUES

1. Refusal to Allow Testimony from Alibi Witnesses

¶7. Ransom's attorney did not give his witness list to the State until the morning of the trial. The list included Ransom's girlfriend, his sister and his mother. The State moved to exclude the testimony of these witnesses on the basis of unfair surprise. The court gave the State an opportunity to interview the witnesses. After the interviews, the State still insisted that the witnesses not be allowed to testify. The State explained that it had not had time to investigate certain things that had been disclosed by the witnesses. However, the State did not request a continuance, and based on the State's objection, the trial court refused to allow the witnesses to testify.

¶8. Ransom made no proffer of the excluded witnesses's testimony. However, we glean from the representations made by the State at trial, that each of the witnesses would have given alibi testimony had they been allowed to testify.

¶9. The record does not indicate that the State ever sought to discover whether Ransom would use an alibi defense. Our perusal of the record did not locate a submission by the prosecution under Rule 9.05 of the Uniform Rules of Circuit and County Court Practice. Had such a submission been made, Ransom would have been obligated to serve a notice of alibi defense on the prosecution within ten days of the submission by the prosecutor. URCCC 9.05. Indeed, during the hearing on Ransom's motion for a new trial, the State and counsel for Ransom stipulated that the State did not serve a request for notice of alibi

defense on Ransom. Therefore, it appears that Ransom violated the general discovery rule which requires reciprocal discovery rather than the specific rule requiring disclosure of the alibi defense.

¶10. Ransom argues that the trial court erred and abused its discretion in excluding the testimony of his defense witnesses and that this exclusion denied to him his constitutional right to compulsory process which consists of his right to call witnesses to aid in his defense. The State counters that Ransom's constitutional argument of denial of compulsory process is procedurally barred because it is being raised for the first time on appeal. The State also contends that the trial judge followed the rules and imposed a remedy available to him under the rules and thus did not abuse his discretion.

¶11. "[T]he standard of review when a trial court institutes sanctions for discovery abuses is 'whether the trial court abused its discretion in its decision.'" *Gray v. State*, 799 So. 2d 53, 60 (¶26) (Miss. 2001) (citing *Kinard v. Morgan*, 679 So. 2d 623, 625 (Miss. 1996)). "The trial court has considerable discretion in matters pertaining to discovery, and its exercise of discretion will not be set aside in the absence of an abuse of that discretion." *Id*. This Court must decide whether the trial court could have properly made the decision which it made. *Caracci v. Int'l Paper Co.*, 699 So. 2d 546, 556 (¶16) (Miss. 1997). Under this standard, an appellate court will affirm unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors. *Id*.

¶12. Discovery is properly done prior to the commencement of a trial. *Robinson v. State*, 508 So. 2d 1067, 1070 (Miss.1987). Here, Ransom made no effort to comply with the discovery rules before his trial commenced. "[P]rosecuting attorneys, as well as defense attorneys, must recognize the obligation to abide by discovery rules. A rule which is not enforced is no rule." *Gray*, 799 So. 2d at 61 (¶ 28). Ransom failed to comply with the discovery rules.

¶13. Rule 9.04 of the Uniform Rules of Circuit and County Court allows the trial court, under certain circumstances, to exclude evidence as a sanction for discovery violations. The pertinent portion of subsection I of Rule 9.04 reads as follows:

> If during the course of the trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:
>
> 1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
>
> 2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

The court is required to follow the same procedure for discovery violations by the defense. URCCC 9.04 (I).

¶14. Here, the State, after interviewing the witnesses, did not seek a continuance or a mistrial as contemplated by the rule, although it did claim prejudice and unfair surprise. The rule does not address the situation where, as here, a claim of prejudice and unfair surprise is made, but a mistrial or continuance is not requested. The rule requirements for undertaking the action which the trial judge took were not met. Consequently, we are constrained to find that the trial court erred in excluding the testimony of the witnesses. Having made this finding, we hasten to say that we do not find the error to be prejudicial.

¶15. Ransom presents no argument of prejudice that he has experienced by the exclusion of the witnesses' testimony. Indeed, as we have already noted, Ransom made no proffer during the trial as to what the witnesses' testimony would be. During the hearing on his post-trial motion, Ransom did adduce testimony from one of the witnesses. This testimony essentially corroborated what Ransom testified to during the course of the trial. Hence, it would have been to a substantial decree cumulative of Ransom's

testimony. While the jury is always the final arbiter of all testimony, we doubt that the jury would have been more impressed with the testimony of Ransom's girlfriend, sister, and mother than it was with the testimony of Ransom himself. In other words, we cannot say that a different result would most likely have been reached had this testimony been allowed. This is particularly true in light of the fact that two of the State's witnesses identified Ransom as the robber.

¶16. Ransom contends that this discovery sanction was too harsh and that the trial judge abused his discretion in not allowing the testimony of Ransom's alibi witnesses since this disallowance violated his Sixth Amendment right to compulsory process for the benefit of his defense. Ransom cites to the Supreme Court repudiation of exclusion of substantial portions of a defendant's evidence in *Taylor v. Illinois,* 484 U.S. 400, 414-15 (1988). However, Ransom did not make this claim in the trial court. Therefore, he is barred from asserting this right now on appeal. *Fleming v. State,* 604 So. 2d 280, 292 (Miss. 1992).

2. Ineffective Assistance of Counsel

¶17. The next error that Ransom cites is the ineffectiveness of his trial attorney. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To successfully claim ineffective assistance of counsel, Ransom must meet the two-pronged test set forth in *Strickland* and adopted by the Mississippi Supreme Court. *Stringer v. State,* 454 So. 2d 468, 476 (Miss. 1984). Under the *Strickland* test, Ransom must prove under the totality of the circumstances, that (1) his attorney's performance was defective and (2) such deficiency deprived the defendant of a fair trial. *Id* . at 476-77. Such alleged deficiencies must be presented with "specificity and detail" in a non-conclusory fashion. *Perkins v. State,* 487 So. 2d 791, 793 (Miss. 1986). This review is highly deferential to the attorney and there is a strong

presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Hiter v. State*, 660 So. 2d 961, 965 (Miss. 1995).

¶18. Ransom must show that there is a reasonable probability that but for his attorney's errors, he would have received a different result in the trial court. *Stringer v. State*, 627 So. 2d 326, 329 (Miss. 1993). With respect to the overall performance of the attorney, "counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy" and do not give rise to an ineffective assistance of counsel claim. *Cole v. State*, 666 So. 2d 767, 777 (Miss. 1995). In order to find for Ransom on the issue of ineffective assistance of counsel, this Court will have to conclude that his trial attorney's performance as a whole fell below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial below. *Coleman v. State*, 749 So. 2d 1003, 1012 (¶ 27) (Miss. 1999).

¶19. Ransom points out that his trial attorney failed to follow the rules of the court by making reciprocal discovery and furnishing the State with the names of his witnesses. Ransom insists that his trial attorney was negligent in waiting until the morning of the trial to supply the State with a witness list.

¶20. Both prongs of the *Strickland* test must be met before the claim of ineffective assistance of counsel can be established. Ransom does show that his trial attorney was negligent in not meeting his obligations of reciprocal discovery but he does not show any prejudice as a result of this negligence. That certain defense witnesses were not allowed to testify because of this negligence is not enough to demonstrate prejudice if it cannot be reasonably determined that the testimony of those witnesses would have likely caused the jury to reach a different result. That cannot be said here, nor can it be said that Ransom's trial attorney's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686.

¶21. **THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF STRONG-ARM ROBBERY AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS THIS APPEAL ARE ASSESSED TO HINDS COUNTY.**

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, THOMAS, LEE, MYERS, CHANDLER AND GRIFFIS, JJ., CONCUR.