

SUPREME COURT OF MISSISSIPPI

Fulks v. State

110 So. 3d 764 (Miss. 2013) · Decided April 11, 2013

SUMMARY

The Mississippi Supreme Court affirmed Tomarcus Monte Fulks’s conviction for armed robbery following his second trial. The court held that the trial court properly admitted Fulks’s prior testimony, denied his motion for judicial recusal, permitted the State to disclose a coindict’s guilty plea during voir dire, and admitted the former testimony of an unavailable witness. The court found no abuse of discretion or plain error.

CASE DETAILS

COURT	Supreme Court of Mississippi
WRITING FOR THE COURT	Chandler, Justice; Waller, C.J.; Dickinson, P.J.; Randolph, P.J.; Lamar, J.; Pierce, J.; Coleman, J.; Kitchens, J.; King, J.
JURISDICTION	Mississippi
DECIDED	April 11, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a second jury conviction for armed robbery and a thirty-five-year sentence after the Mississippi Supreme Court had reversed Fulks's conviction and sentence from his first trial and remanded for a new trial.
STANDARD OF REVIEW	Evidentiary rulings and determinations of witness unavailability were reviewed for abuse of discretion; the recusal ruling was reviewed for manifest error; and the unpreserved challenge to the prosecutor's comments was reviewed under the plain-error doctrine.
PRECEDENTIAL VALUE	Published Mississippi Supreme Court opinion
PARTIES	Tomarcus Monte Fulks v. State of Mississippi

TOPICS

- criminal procedure
- evidence
- hearsay
- appellate procedure
- preservation of error

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the trial court properly admitted Fulks's testimony from the first trial as a statement by a party-opponent.
2. Whether the trial judge committed manifest error by denying Fulks's motion for recusal based on remarks concerning the reversal of the first trial.
3. Whether the prosecutor's remarks during voir dire concerning Joshua Glenn's guilty plea and sentence constituted plain error.
4. Whether the trial court properly found Sherry Franks unavailable and admitted her former testimony under Mississippi Rule of Evidence 804.

HOLDINGS

1. A defendant's voluntarily given testimony from a prior criminal trial may be admitted in a subsequent trial as the defendant's own statement under Mississippi Rule of Evidence 801(d)(2), even when the defendant does not testify at the later trial.
2. The trial judge did not have to recuse himself because the record did not create a reasonable doubt about his impartiality, and Fulks failed to show manifest error.
3. The prosecutor's unobjected-to comments during voir dire concerning Glenn's guilty plea and sentence did not constitute plain error.
4. The trial court properly found Sherry Franks unavailable under Mississippi Rule of Evidence 804(a)(4) and admitted her former testimony under the former-testimony exception.

KEY QUOTATIONS

“The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused.” (at 769)

“It is clear that the standard for recusal is a reasonable person knowing all the circumstances. It is also clear that judges are presumed to be qualified and unbiased.” (at 771)

“The finding of plain error requires the trial court to deviate from a legal rule, that error be obvious, and that the error be prejudicial.” (at 772)

FACTUAL BACKGROUND

Fulks was prosecuted for an armed robbery at the Frankses' home in July 2005. Coindictee Joshua Glenn testified that Fulks accompanied several women to the home and kicked in the door, while Fulks's former testimony claimed that he remained in the vehicle. The State also sought to use former testimony from Billy Joe Franks, who had died, and Sherry Franks, who had suffered a stroke and significant memory and cognitive impairments. After a second trial, the jury convicted Fulks of armed robbery and acquitted him of aggravated assault.

PROCEDURAL HISTORY

The Mississippi Supreme Court reversed Fulks's first conviction and sentence in 2009 because the trial court had denied a continuance based on the State's untimely disclosure of a key witness. On remand, a Lowndes County jury reconvicted Fulks of armed robbery and acquitted him of aggravated assault. The circuit court denied Fulks's motions for judgment notwithstanding the verdict and a new trial, and Fulks appealed, challenging the admission of his former testimony, denial of recusal, prosecutorial comments concerning a coindictor's guilty plea, and admission of Sherry Franks's former testimony.

DISPOSITION

affirmed

CASES CITED

- Fulks v. State, 18 So. 3d 803 (Miss. 2009)
- Johnston v. State, 567 So. 2d 237, 238 (Miss. 1990)
- Edmonds v. United States, 273 F.2d 108, 113 (D.C. Cir. 1959)
- Reed v. State, 523 So. 2d 62, 67 (Miss. 1988)
- Stringer v. State, 491 So. 2d 837, 841 (Miss. 1986)
- Scott v. State, 8 So. 3d 855, 859-60 (Miss. 2008)
- Dodson v. Singing River Hospital System, 839 So. 2d 530, 532-33, 582-83 (Miss. 2003)
- Randall v. State, 806 So. 2d 185, 194 (Miss. 2001)
- Williams v. State, 81 So. 3d 1165, 1170-71 (Miss. Ct. App. 2011)
- Gunn v. State, 56 So. 3d 568, 572 (Miss. 2011)
- Blanchard v. State, 55 So. 3d 1074, 1077 (Miss. 2011)
- Parker v. State, 30 So. 3d 1222, 1227 (Miss. 2010)
- McGee v. State, 953 So. 2d 211, 215 (Miss. 2007)
- Parker v. State, 514 So. 2d 767, 773 (Miss. 1986)
- De La Beckwith v. State, 707 So. 2d 547, 586 (Miss. 1997)
- Earl v. State, 672 So. 2d 1240, 1241 (Miss. 1996)

OPINION

CHANDLER, J.

CHANDLER, Justice, for the Court: ¶ 1. This Court reversed the conviction and sentence in the first trial in this case on July 23, 2009, and remanded the case to the trial court, finding that the defendant, Tomarcus Monte Fulks, had been entitled to a continuance based on the State's untimely disclosure of a key witness — Joshua Glenn. *Fulks v. State*, 18 So.3d 803 (Miss.2009).

On May 27, 2011, a jury reconvicted Fulks of armed robbery and acquitted him of aggravated assault in Lowndes County Circuit Court. He received a sentence of thirty-five years in the

custody of the Mississippi Department of Corrections (MDOC). ¶ 2.

On appeal, Fulks raises the following issues: (1) whether the trial court erred in allowing the State to introduce Fulks's prior testimony from his first trial; (2) whether the trial court erred in denying Fulks's motion for recusal; (3) whether the trial court erred in allowing the prosecutor to inform the jury that coindictee Joshua Glenn had entered a plea of guilty to a charge of aiding and abetting after the fact; and (4) whether the trial court erred when it allowed prior testimony of State's witness Sherry Franks, who was found to be "unavailable" for trial, into evidence.

Finding no error, we affirm. FACTS ¶ 3. Prior to the commencement of Fulks's second trial, several pretrial matters were before the court. On November 12, 2010, the court held a hearing regarding Fulks's motion for bond and request for discovery.

The court ultimately denied Fulks's request, stating that Fulks could access the first trial's transcript for the State's witness testimony. ¶4. On February 17, 2011, the State filed a motion to use the previous testimony of two witnesses from the first trial, Sherry Franks and Billy Joe Franks.

The Frankses were in then* home asleep on the night of the break-in that occurred in July 2005. The State urged the court to allow the testimony of the Frankses to be admitted into evidence based on Mississippi Rule of Evidence 804, explaining that Billy Joe Franks was deceased and that Sherry Franks was unable to remember the events surrounding the incident due to her failing memory.

In his earlier testimony, Billy Joe Franks had stated that a male held a chrome pistol to his head and that the male and a female with a towel around her head demanded money. He had stated that, although he could not identify the man, he was positive that a man had been holding a gun to his head. He had also stated that the female struck his arm with a baseball bat and broke his arm in two places.

He fired one shot from his pistol as the intruders left his home. In her *767former testimony, Sherry Franks had testified that when she jumped out of bed, she was confronted by a young black male with a gun. She also stated that she saw a female wearing a white turban and holding a baseball bat. ¶5.

On February 18, 2011, the State filed a motion for continuance, or, in the alternative, a motion for the introduction of Joshua Glenn's earlier testimony. Fulks's coindictee Joshua Glenn had testified at Fulks's first trial and previously had entered a guilty plea to a charge of accessory after the fact. He was sentenced to a term of five years in the custody of the MDOC.

At some point after his sentencing, Glenn's probation was transferred to Texas. Claiming that Glenn was a necessary and material witness, the State requested that the court either grant a

continuance or admit Glenn's earlier testimony pursuant to Mississippi Rule of Evidence 804 (unavailability of witness).

The State contended that, if Glenn were to testify, he would state that he and Fulks had ridden in a vehicle with several others to the Frankses' home in the middle of the night, that all of the occupants of the vehicle had gotten out of the car and walked to the Frankses' door, that one of the occupants had possessed a firearm, and that Fulks had kicked in the door to the Frankses' home.

Glenn also would have testified that he never had entered the home. ¶ 6. In April 2011, Fulks filed a motion for recusal of Judge James T. Kitchens Jr. Judge Kitchens had presided at the first trial and was set to preside at Fulks's second trial.

In this motion, Fulks asserted that, in light of Judge Kitchens's comments from the 2009 bond hearing, he could not be fair or impartial if he presided over Fulks's second trial. The motion contained excerpts from the 2009 bond-hearing transcript, which included the judge's remarks on the reversal of the first trial. ¶ 7.

The trial court ultimately denied the motion, explaining that the court's remarks were not directed toward Fulks or his counsel. In its order, the court stated the following: The Court was instead commenting on its concern that the appellate court might not have received the complete record of proceedings in the trial court since the main reason for the reversal and remand was the trial court's failure to grant a continuance based on discovery issues though three continuances had already been granted and trial counsel had received full discovery. ¶ 8.

The court dealt with the Frankses' testimony and Glenn's testimony at the preliminary hearing on May 23, 2011. With regard to the Frankses' testimony, Dr. Adam Smith, Sherry Franks's physician from Columbus, testified that Billy Joe Franks was in his eighties when he died. He also testified that Sherry Franks, then seventy-two, had suffered a stroke in February 2009, and had trouble with her memory and her ability to think rationally.

Teresa Spencer, Sherry Franks's daughter, also testified that her mother had memory loss, and that, in her opinion, her mother would not be able to handle the stress of a new trial. Fulks presented testimony from his investigator, Irvin Bradley, who stated that Sherry Franks was ambulatory and able to respond to questions. Fulks also argued that Billy Joe Franks's testimony should be excluded, because his prior defense counsel did not have the opportunity to properly develop the cross-examination of Franks.

The court found that both Billy Joe Franks and Sherry Franks were unavailable for purposes of Mississippi Rule of Evidence 804, and that they had been subject to thorough cross-examination, *768thereby ruling their testimony admissible for trial. See M.R.E. 804(b)(1). ¶ 9.

The final phase of the hearing concerned Joshua Glenn's statement from Fulks's first trial and a second statement that he had made after the trial. The hearing revealed that the first written statement was taken in November 2006, and it was provided in discovery in February 2007. Carrie Jourdan, a public defender and the attorney for Fulks in his first trial, testified that the first trial was continued several times because Glenn had changed his statement during trial.

The court ultimately admitted both of Glenn's statements into evidence. ¶ 10. After the preliminary hearing, the court began voir dire of the jury. During voir dire, the State commented on how Glenn had pleaded guilty to accessory after the fact and had received a suspended sentence. No objection was made to the prosecutor's remarks. ¶ 11.

The trial commenced on May 24, 2011, with Billy Joe Franks's doctor as the first witness. The State produced Glenn as a witness and introduced the former testimony of the Frankses into evidence. The State also introduced the former testimony of Fulks into evidence. All the former testimony was read to the jury from the first trial's transcript. ¶ 12. Glenn explained to the jury that he was on probation after pleading guilty to accessory after the fact to the armed-robbery charge.

Glenn stated that, in July 2005, Fulks was living with him on Ben Morgan Drive. On July 18, 2005, Glenn and Fulks went to Demetric Lowe's apartment in Cypress Park in Glenn's father's car. At that time, Lowe was present and Glenn's girlfriend was on her way. Glenn stated that a woman named Leah Lafayette called his phone and asked for Fulks. Some time later, Lafayette arrived in a black Altima with two other women— Katherine Williams and Allegra Young.

Glenn and Fulks got into the car with the three women, and they dropped off Williams's baby on their way to Young's grandmother's home. Glenn stated that Young was waving a gun in the air. ¶ 13. Glenn testified that they pulled up to the house and that everyone got out of the car. According to Glenn, Fulks kicked in the door. Glenn said that he froze when the others ran into the Frankses' home, but then he ran into the woods.

After he came out of the dark, congested, wooded area, he saw the three women with Fulks running from the side of the house. Lafayette apparently was carrying some sort of electrical device. Glenn drove them away from the crime scene, and Lafayette told him to pull over right after they left so that she could drive.

The group then returned to Cypress Park Apartments. Glenn and Fulks went back to Glenn's home. ¶ 14. Glenn stated that, the day following the robbery, he was afraid to tell law enforcement officials what had happened. He further explained that he had lied to police in his first statement because Fulks had told him to say that he and Fulks had remained in the car during the robbery.

Glenn's revised statement was taken in September 2006. In the revised statement, Glenn said that Fulks had accompanied the women into the Frankses' home. On cross-examination, Fulks's attorney thoroughly questioned Glenn on his two different versions of the facts in his separate

statements. He further questioned Glenn about his reason for changing his story to state that he and Fulks had not remained in the car.

In doing so, he addressed the fact that Glenn had changed his story after he was allowed to plead guilty to accessory after the fact and received five years' probation. *769¶ 15. The State then put on the prior trial testimony of Sherry Franks, with Kim Hood, an employee of the district attorney, reading the part of Sherry Franks from the first trial's transcript.

Jonathan Buckner, also an employee of the District Attorney, read the previous testimony of Billy Joe Franks. ¶ 16. The State then proceeded to admit the previous testimony of Fulks. The defense objected, claiming it was given no notice that Fulks's testimony would be used in the second trial. Ultimately, the court ruled that the evidence was admissible. Fulks's testimony revealed that, at the invitation of Glenn, he had accompanied Glenn and the three women to the Frankses' home.

He stated that the women had gone inside while he and Glenn had remained in the vehicle. Fulks claimed that he did not want to be a part of anything that was going on and that he and Glenn were dropped off at his girlfriend's apartment. His earlier testimony also revealed that, on the evening after the incident, two detectives had questioned Glenn. Fulks stated that he had turned himself in at that time because, "if they're looking for [Glenn], they're going to be looking for me because we was in the car." ¶ 17.

At the close of the State's case-in-chief, Fulks's motion for mistrial was denied, as was his motion for a directed verdict. After being advised concerning his right to testify, Fulks chose not to testify. The defense presented two witnesses to refute Fulks's charges. Ultimately, the jury found Fulks guilty on the charge of armed robbery and not guilty on the charge of aggravated assault.

On June 15, 2011, Fulks filed his motion for judgment notwithstanding the verdict (JNOV) and a new trial. Judge Kitchens denied this motion on June 17, 2011. Fulks filed this appeal. ANALYSIS I. THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN ALLOWING THE STATE TO INTRODUCE FULKS'S PRIOR TESTIMONY. ¶ 18. Fulks claims that the trial judge erred in allowing the State to introduce Fulks's testimony from his previous trial.

At the second trial, Fulks's prior testimony was read into evidence from the transcript of his first trial. Fulks says that his testimony is inadmissible because it was not disclosed during discovery and was coerced by the State. ¶ 19. This Court consistently has held that "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Johnston v. State*, 567 So.2d 237, 238 (Miss.1990).

In ruling on Fulks's prior testimony, the judge stated that, in the first trial, he "had given [Fulks] time to make that decision, and he made the decision to testify." The judge also ruled that Fulks's

prior testimony was admissible as a statement by a party-opponent. ¶20. Mississippi Rule of Evidence 801(d)(2) states the following: 2) Admission by Party-Opponent.

The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course *770and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

M.R.E. 801(d)(2). In analyzing the law and facts of this case, Fulks's statement was admissible under Mississippi Rule of Evidence 801(d)(2) because the statement offered against him was "[Fulks's] own statement, in either an individual or a representative capacity." M.R.E. 801(d)(2). "The fact that the defendant does not take the stand at the second trial does not prevent the use of his testimony given at the former trial, if it would otherwise be admissible." *Edmonds v. United States*, 273 F.2d 108, 113 (D.C.Cir.1959). ¶ 21.

Fulks also argues that his statement was not an admission but, rather, a statement wrongfully compelled by the State. We disagree. "[F]ormer testimony, voluntarily given in a criminal trial, may be introduced in a subsequent trial upon remand or where the first trial ended in a mistrial." *Reed v. State*, 523 So.2d 62, 67 (Miss.1988) (citations omitted). At the first trial, Glenn willingly took the stand.

Fulks was then informed of his right to remain silent and chose instead to testify. Fulks voluntarily took the stand, stating that he did not take part in the robbery at all, but instead remained inside the vehicle with Glenn. His testimony was not compelled by the State. ¶22.

We have held that a defendant's testimony at a former trial that constitutes an admission under the laws of evidence may be presented in a later trial of the defendant. *Stringer v. State*, 491 So.2d 837, 841 (Miss.1986). Fulks's statement was "an admission, as that concept is understood in our law of evidence." *Id.* As such, that testimony "may be presented as evidence at a subsequent trial of that same defendant." *Id.* Therefore, we find that the judge did not abuse his discretion in allowing Fulks's former testimony into evidence.

II. THE TRIAL JUDGE DID NOT COMMIT MANIFEST ERROR IN DENYING FULKS'S MOTION FOR RECUSAL. ¶ 23. Fulks claims that Judge Kitchens should have recused himself

based on comments that he made during the course of the second trial.

In his motion for recusal, Fulks included the following statements from the judge: “This — that— this opinion may very well be subject to a judicial performance complaint against the Supreme Court on that ground”; “That information was not supplied to the Supreme Court, and this case was reversed on a reason that was, in fact, false”; and “But, yeah, this is — that’s the only reason this case was reversed, and you have seen the continuance orders where I continued it a number of times because the co-defendant was given as a witness against Mr. Fulks.” In his order denying Fulks’s motion for recusal, Judge Kitchens stated that the court’s remarks were not directed at Fulks or his counsel.

He clarified that the court instead was commenting on its concern that the Supreme Court may not have received the entire record from the first trial on appeal. Judge Kitchens further explained that he was commenting on the discovery issues from the first trial. ¶ 24. “The standard of review to which this Court is bound on the issue of recusal is manifest error.” *Scott v. State*, 8 So.3d 855, 859 (Miss.2008) (citations omitted).

This Court provided a detailed *771 explanation of the standard for judicial recusal in *Dodson v. Singing River Hospital System*, 839 So.2d 530, 582-83 (Miss.2003): The rule concerning disqualification of a judge in effect at the trial of this case was Canon 3, subdivision C, of the Code of Judicial Conduct. It states, “ ‘A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned....’ ” In conjunction with this canon, we have held consistently that the objective “ ‘reasonable person knowing all of the circumstances’ ” is the proper standard by which we determine if a judge should have recused himself.

Dodson, 839 So.2d at 532-33 (citations omitted). Therefore, “[i]t is clear that the standard for recusal is a reasonable person knowing all the circumstances. It is also clear that judges are presumed to be qualified and unbiased.” *Id.* at 533. ¶ 25.

The record does not produce a reasonable doubt as to the judge’s impartiality. Judge Kitchens presided over both trials. At the first trial, Fulks was found guilty of armed robbery and aggravated assault. At the close of the second trial, the jury returned a verdict of guilty of armed robbery but found Fulks was not guilty of aggravated assault. During the trial, Judge Kitchens granted several motions in favor of Fulks, including two motions for continuances.

He also granted Fulks’s request for additional time for his closing argument. ¶ 26. This Court explained in *Scott* that: The judge, while properly acting as gatekeeper, was the trier of fact as to admissibility of the evidence; however, the trial judge was not the ultimate trier of fact.

The jury rendered the verdict based on substantial evidence, including [the defendant’s] testimony. The presumption of impartiality remains with nothing to rebut it. The standard of manifest error is

not met, and there is no showing that the trial judge's failure to recuse herself had any effect on the jury's deliberations or verdict.... Scott, 8 So.3d at 860.

Fulks claims that Judge Kitchens was preoccupied with the Supreme Court's reversal of the first verdict and was determined to obtain a conviction in the second trial. Similar to the jury in Scott, Fulks's jury was not aware of Judge Kitchens's remarks from the pretrial hearing, at which the alleged prejudicial comments were made. Further, Fulks was acquitted of the second charge of aggravated assault in the second trial.

Therefore, we find Fulks's argument regarding his conviction to be without merit. ¶ 27. "This Court entrusts our judges with great discretion. Our trial judges are confronted daily with evidence that would tend to make defendants appear more culpable than not.

We presume that our trial judges are aptly equipped to handle these issues and apply the law without fear of undue prejudice." Scott, 8 So.3d at 860 (citation omitted). We find that the judge did not commit manifest error and that Fulks did not overcome the presumption of impartiality. III. THE TRIAL COURT DID NOT ERR IN ALLOWING THE PROSECUTOR TO INFORM THE JURY THAT JOSHUA GLENN HAD ENTERED A PLEA OF GUILTY TO A CHARGE OF AIDING AND ABETTING AFTER THE FACT. ¶ 28.

Fulks argues that plain error resulted from the prosecutor's comments to the jury regarding Glenn. During voir dire of the jury, the prosecutor stated that Glenn had entered a plea of guilty to accessory after the fact to armed robbery and assault, that he had received probation, and that he would testify at trial. Fulks made no objection to any of these remarks.

In addition, on cross-examination, Fulks's attorney sought to impeach Glenn with this information. He also addressed Glenn's plea in his closing argument. He specifically attacked Glenn's credibility and his motive for testifying against Fulks. ¶ 29. Fulks argues that, although no objection was entered, the trial court should have recognized plain error. He refers to the Court's analysis in *Randall v. State*, 806 So.2d 185 (Miss.2001), to support his reasoning.

However, the Court in *Randall* dealt with the issue of two defendants who were jointly indicted for the same offense but were separately tried. In *Randall*, the Court was concerned that the jury's knowledge that the codefendant had been tried and convicted for the same charge as the defendant inhibited the jury from being objective. *Id.* at 194. That is not the issue in this case.

Glenn was never tried by a jury. Rather, the present case is analogous to the Court of Appeals' recent decision, *Williams v. State*, 81 So.3d 1165 (Miss.Ct.App.2011). In *Williams*, the trial court allowed into evidence the fact that the accessories after the fact had entered guilty pleas. *Id.* at 1170.

The Court of Appeals held that this did not amount to plain error: Several factors undermine Williams's claim of reversible error in this case. First, the testimony in question was not objected to by Williams at trial.

In general, issues that were not raised at trial are barred from our consideration on appeal. *Gunn v. State*, 56 So.3d 568, 572 (Miss.2011). However, Williams will still be entitled to relief if he can show that any of his complaints rise to the level of plain error. *Blanchard v. State*, 55 So.3d 1074, 1077 (Miss.2011). "Plain error exists where such error affects the defendant's substantive/fundamental rights, even though no objection was made at trial." *Parker v. State*, 30 So.3d 1222, 1227 (Miss.2010).

Id. The court ultimately concluded that the "issue [was] procedurally barred because it was not raised below and does not rise to the level of plain error. Williams's code-fendants were available for questioning, they testified about their involvement in the crime, and their factual basis for their pleas was different..." *Id.* at 1171. ¶ 30. "However, if there is a finding of plain error, a reviewing court may consider the issue regardless of the procedural bar.

A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice." *McGee v. State*, 953 So.2d 211, 215 (Miss.2007). The finding of plain error requires the trial court to deviate from a legal rule, that error be obvious, and that the error be prejudicial. *Id.* (citations omitted).

The record reflects no plain error. Judge Kitchens did not deviate from a legal rule nor did the testimony prejudice the outcome of the trial. Therefore, the trial court did not err in allowing the prosecutor to comment on Glenn's plea and sentence. IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT SHERRY FRANKS WAS "UNAVAILABLE" FOR TRIAL. ¶ 31.

The trial court, at the request of the State, declared victim Sherry Franks "unavailable" for trial. Fulks argues that the trial court erred when it allowed the State to admit Franks's former testimony into evidence. ¶ 32. "The foremost requirement of the former testimony exception to the hearsay rule is that the witness or declarant be unavailable." *Parker v. State*, 514 So.2d 767, 773 (Miss.1986).

Further, "[t]he party offering the former testimony bears the burden of proving the unavailability of the witness, and the determination of unavailability is a judicial exercise reviewable on appeal only for abuse of discretion." *De La Beckwith v. State*, 707 So.2d 547, 586 (Miss.1997). ¶ 33. Mississippi Rule of Evidence 804(a)(4) states that a witness may be declared unavailable when a witness "[i]s unable to be present to testify at the hearing because of death or then existing physical or mental illness or infirmity..." M.R.E.

804(a)(4). During the pretrial-motions hearing, the State produced a medical witness and a caregiver to illustrate Franks's mental impairments and loss of memory. Judge Kitchens heard from Dr. Adam Smith, who testified that Sherry Franks was seventy-two years old and had suffered a stroke in February 2009. Dr. Smith specifically stated that Franks suffered trouble with her memory and her cognitive ability.

When asked about Franks's mental abilities, Dr. Smith replied that, "[t]he stroke, as I've said, has effected [sic] her memory and her ability, you know, to think clearly in certain situations." The State also presented testimony from Teresa Spencer, Franks's daughter, who testified that her mother had suffered a stroke and would often "get things confused." Spencer stated that, in her opinion, her mother would not be able to handle the stress of another trial.

Fulks rebutted this testimony with Investigator Irvin Bradley, who stated that, when he spoke to Franks, she was able to respond to questions. ¶ 34. After hearing the testimony from Dr. Smith, Teresa Spencer, and Investigator Bradley, Judge Kitchens determined that Franks was unavailable pursuant to Mississippi Rule 804.

The judge relied on the Court's decision in *Earl v. State*, 672 So.2d 1240 (Miss.1996), in his ruling. The Court in *Earl* faced the issue of whether a witness, who was unable to attend the trial due to a doctor's appointment, had an "existing physical illness" and could be declared "unavailable" for purposes of Mississippi Rule of Evidence 804(a)(4), when there was no medical witness or affidavit to support the claim.

Id. at 1241. While the judge in *Earl* allowed similar testimony into evidence without medical testimony, Judge Kitchens heard medical testimony and stated that it was not an issue in the present case. ¶ 35. It is uncontested that Sherry Franks had suffered a stroke.

The judge based his ruling on the testimony from Franks's doctor, along with testimony from her daughter, Teresa Spencer, explaining how the stroke had affected Franks's memory and ability to think clearly. Therefore, the judge did not abuse his judicial discretion in finding that the State had met its burden of proof for Franks's "existing physical or mental infirmity." M.R.E.804.

CONCLUSION ¶ 36. We find that Judge Kitchens did not abuse his discretion in allowing into evidence the earlier testimony of Fulks and Sherry Franks. We also find that the trial court did not err in denying Fulks's motion for recusal.

We find that the court did not err in allowing the prosecutor to comment on Glenn's plea and sentencing. Therefore, we affirm Fulks's conviction and sentence. ¶ 37. AFFIRMED. WALLER, C.J., DICKINSON AND RANDOLPH, P.JJ., LAMAR, PIERCE AND COLEMAN, JJ., CONCUR. KITCHENS, J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN *774OPINION JOINED BY KING, J.; WALLER, C.J., DICKINSON AND RANDOLPH, P.JJ., LAMAR AND COLEMAN, JJ., JOIN IN PART.

