

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	iii
TABLE OF CASES	iv
STATEMENT OF ISSUES	v
STATEMENT OF THE CASE	vi
SUMMARY OF ARGUMENT	viii
ARGUMENT	1
CONCLUSION	7
CERTIFICATE OF SERVICE	7

Appellants Brief

2006-K17-01117-SCT

TABLE OF CASES

<u>Adams v. State,</u> 772 So.2d 1010 (Miss.1991)	7
<u>Britt v. State,</u> 520 So. 2d 1377 (Miss. 1988)	4
<u>McFee v. State,</u> 511 So.2d 130 (Miss. 1987)	4, 5
<u>Forkner v. State,</u> 902 So.2d 615 (Miss. Ct. App. 2004)	3, 4
<u>Harper v. State,</u> 478 So.2d 1017 (Miss. 1985)	7
<u>Hester v. State,</u> 602 So.2d 869,(Miss.1992)	7
<u>Ladnier v. State,</u> 878 So.2d 926 (Miss. 2004)	7
<u>State v. Shaw,</u> 880 So.2d 296 (Miss. 2004)	7

STATEMENT OF THE ISSUES

- I. WHETHER THE COURT ERRED WHEN IT ALLOWED THE STATE TO AMEND THE INDICTMENT TO HABITUAL STATUS ON THE MORNING OF TRIAL AND UNFAIRLY SURPRISED THE DEFENDANT AND DID NOT AFFORD THE DEFENDANT A FAIR OPPORTUNITY TO PRESENT A DEFENSE**
- II. WHETHER THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO GRANT A DIRECTED VERDICT.**
- III. WHETHER THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ALLOW THE DEFENSE TO CALL MARY REED TO IMPEACH THE CREDIBILITY OF THE CONFIDENTIAL INFORMANT MIKE JERNIGAN**
- IV. WHETHER THE COURT SHOULD HAVE ALLOWED THE LESSER JURY INSTRUCTION OF POSSESSION OF COCAINE IN THE ABOVE REFERENCED MATTER**

STATEMENT OF THE CASE

This case comes before the Court as an appeal from the jury verdict and final judgment entered by the Circuit Court of the Rankin County, Mississippi on July 6, 2006.

The appellant was charged by indictment on September 22, 2004, with the crime of Sale of Cocaine. Said indictment charged that on or about May 11, 1997 Randy Dale Jackson "did willfully, unlawfully, feloniously, knowingly, intentionally sell, deliver, or transfer a quantity of cocaine. . ." (R. at 1).

The trial was commenced in this action on February 23, 2006 in the Circuit Court of Rankin County, Mississippi. The Honorable Samac Richardson was presiding. On the morning of trial, the State sought to amend the indictment to charge Stella Spann, a 52 year old grandmother, as a habitual offender pursuant to Miss. Code Ann. § 99-19-81 (1972, as amended) which would have subjected Stella Spann to a sentenced of thirty (30) year without possibility of parole. (R. at 26). The State alleged that Stella Spann was convicted of the crimes of grand larceny and uttering a forgery in 1975, almost (30) thirty years ago. Appellant's counsel had no opportunity to consult with Stella Spann about these possible convictions until the morning of trial. Frankly, the appellant found it difficult to remember what happened thirty years ago. The defense objected to the late amendment and requested a continuance, another trial date and a status conference to decide whether or not Stella Spann should go to trial. (Tr. at 6). The Trial Court granted the State's motion. (Tr. at 6). Subsequently, the trial commenced.

The State called Mike Jernigan, a paid Confidential Informant. Jernigan testified that he met with Brandon Police Officers and was told to go to Cherry Hill Lane in Brandon and purchase crack cocaine. He met with a black male, called "Bo", a.k.a. Willie Holmes. Willie Holmes offered to get Jernigan crack cocaine at a crack house. However, Willie Holmes did not possess a car. He caught a ride from Stella Spann, a local crack addict, who did have a car. (Tr. at 44). Mike Jernigan followed Willie Holmes and Stella Spann in a separate car. While giving Willie Holmes a ride to the crackhouse, Stella Spann's car runs out of gas. After getting gas, they get to the crackhouse and Willie Holmes hands Mike Jernigan two rocks of crack cocaine. Jernigan testified that he saw Stella Spann hand Willie Holmes crack cocaine. After receiving crack cocaine from Willie Holmes and giving him money, Stella Spann requests a rock to smoke from Mike Jernigan. He admitted he was a cocaine user. On cross, Jernigan testified he "volunteered" to work with the Brandon Police Department as an informant. He admitted on cross examination that he did not put in a signed statement at he saw Stella Spann handle or hand Willie Holmes Cocaine. Jernigan testified under oath he did not personally know Stella Spann and did know a defense witness named Mary Reed. He testified under oath that he had never previously smoked crack cocaine with Stella Spann. Mary Reed was prepared to testify that Jernigan knew Ms. Spann and smoked with her crack cocaine on several occasions.

Michael Mann testified that Jernigan was in a high cocaine area when he was stopped and he was later induced to be a confidential informant. At the close of the State's case, the appellant moved for directed verdict, which was denied. (Tr. at 117).

The defense moved to call Mary Reed testify about Mike Jernigan's prior relationship with Stella Spann and her witnessing him smoking crack with Stella Spann, in direct contradiction of his testimony on cross examination. (Tr. at 117). The Trial Court held that the defense could not call Mary Reed to testify. (Tr. at 120). The defense therefore rested.

The jury entered a verdict of guilty on February 23, 2003. (R. at 58). Sentencing was set for June 29 2006. The defense filed Objection to Amendment of Indictment as Habitual Offender and/or In the Alternative Objection to Sentencing Defendant as Habitual Offender. (R. at 86). The Appellant filed a Motion for a New Trial and Motion for a Judgment Notwithstanding the Verdict, which were denied on June 29, 2006. On June 29, 2006, a Notice of Appeal was filed in the above referenced action. (R. at 94). On June 29, 2006, Stella Spann was sentenced to a term of thirty years, with release after service of fifteen years.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error by allowing the State of Mississippi to amend the indictment for Sale of Cocaine to habitual offender status on the morning of trial and unfairly surprise the defendant and did not afford the defendant a fair opportunity to present a defense. Further, the trial court should have granted the appellant's motion for directed verdict. There was not enough evidence to sustain a conviction for sale of cocaine. There was no evidence Ms. Spann participated directly or benefitted from the sale transaction between the Confidential Informant and Co-defendant Willie Holmes. Also the court should have allowed the defense to call defense witness Mary Reed who testify for impeachment purposes concerning the credibility of the Confidential Informant Mike Jernigan. The lesser jury instruction of possession of cocaine should have been considered for the jury's consideration.

I. **WHETHER THE COURT ERRED WHEN IT ALLOWED THE STATE TO AMEND THE INDICTMENT THE MORNING OF TRIAL TO HABITUAL OFFENDER STATUS IN VIOLATION OF THE DUE PROCESS CLAUSE AND IT OWN STANDING RULES.**

The trial court committed reversible error when it allowed the State of Mississippi to amend the indictment the morning of trial on February 23, 2006 to habitual offender status in violation the Fifth and Fourteenth Amendments to the United States Constitution. Rule 7.09 of the Uniform Rules of Circuit and County Court Practice allows for the amendment of an indictment in order to charge an offender as an habitual offender. Rule 7.09 reads:

*All indictments may be amended as to form but not as to the substance of the offense charged. **Indictments may also be amended to charge the defendant as an habitual offender** or to elevate the level of the offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement (e.g., driving under the influence, Miss.Code Ann. § 63-11-30). **Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.***

U.R.C.C.C. 7.09 (emphasis added). Thus, an indictment may be amended to charge an offender as an habitual offender only if the offender is given a "fair opportunity to present a defense and is not unfairly surprised." U.R.C.C.C. 7.09. Stella Spann was scheduled to go trial on February 23, 2006 in the Circuit Court of Rankin County on a charge of Sale of Cocaine. Pursuant to the Local Rules of the Rankin County Circuit Court, Stella Spann and the State had a Pre-trial Conference on February 10, 2006 and Status Conference on February 13, 2006 for the purpose of handling any pre-trial motions. Both the State and the defendant were ordered by the Trial Court to present any pre-trial motions on the aforementioned dates. (R. at 19). In violation the Trial

Court's own local rules, the Trial Court allowed the State to amend the indictment the morning of trial on February 23, 2006. The defense attorney strenuously objected to the amendment.

THE COURT: Cause number 16,345, state of Mississippi versus Stella Spann the state has filed a motion in this case to amend the indictment to charge Ms. Spann as an habitual offender. Okay. On the record, Mr. Emfinger, your motion?

MR. EMFINGER: Yes, sir.

THE COURT: Okay.

MR. EMFINGER: Your Honor, we filed this yesterday. When we found these old cases, we determined that she was, in fact -- did, in fact, have two or more prior felony convictions. They were old cases. They were not still housed here in the county courthouse. It was difficult -- we couldn't ascertain from the computer records whether they were felonies or misdemeanors. They were able to be found yesterday and we did find that at least two of these convictions were felony convictions. So we filed a Motion to Amend. We've got the bases all covered in the motion, there. We think that under the law that we're entitled to amend this indictment, this time, to charge Stella Spann as an habitual offender. I have faxed copies of everything that was in the file -- or copies of the indictments -- the convictions, sentence, transcript, and those supporting documents to Mr. Evans yesterday. And we have no objection, Judge, that if we obtain a conviction today to set off sentencing for such a period needed that will allow Mr. Evans time to review the files, himself, and prepare whatever defense as will be necessary. He's not going to be prejudiced by this late delay -- late amendment at this point. And we think that, under the law, we're entitled to amend the indictment.

THE COURT: Okay. Mr. Evans?

MR. EVANS: Yes, Your Honor. I would like to pose an objection to amending the indictment, at this time. Due to a timeliness and prejudicial effect it would have on the defense. Now, Your Honor, the court has an upstanding rule in Rankin County of having status conferences and procedural conferences so this case was continued from the last status conference almost two months ago. The State had plenty of time to initiate an investigation to see whether or not the defendant had any convictions. From the defense standpoint, this is a totally (Inaudible) -- priors based upon information from the defendant -- from defendant and family. There were no indications of any prior convictions or whether or not there's even a possibility. The reason the court has standing rules regarding pre trial motions is that any motions of designation should be filed on or upon that date to give the defense an opportunity to assess whether or not it's proper to go to trial or evaluate any plea bargain on the table. This morning I just got notice -- or yesterday evening, I got notice that the State intended to file a motion to amend the indictment and we have not had an

opportunity to evaluate whether or not it is, you know, proper for the defendant to go to trial this morning. Of course, it is a -- it ' s a different circumstance when you are facing the possibility of thirty years without parole, based upon the motion the State's filed. Due t o that , we would either ask that the state ' s -- rule this motion untimely or grant the defendant a continuance and another trial date and a status conference to evaluate whether or

not we should go to trial .

THE COURT: All right . we've already -- you've al ready had a conference with your client , this morning, about that . And your client should very well know whether or

not she's been in this court before and been convicted. So to me, it ' s a very simple issue. Either she's been convicted or she hasn't been convicted. She knows the answer to that. And that ' s the only information you need or she needs to be able to make an intelligent decision as to whether or not go forward with the trial. The evidence o f prior convictions will not go before the jury unless she assumes the witness chair; and, then, only f o r the limited purpose of attacking her credibility as a witness. And you had a conference with her this morning for ten or fifteen minutes to discuss this along with her family. And I understand that she still wants to go -- has made the decision to still go to trial . And the recommendation that Mr. Emfinger has made, or suggestion, is to continue sentencing if she is convicted t o allow enough time t o -- for you to investigate and verify her habitual offender status by this Court. So, I ' m going t o grant the motion.

(Tr. at 4-6).

The defense attorney was given ten to fifteen minutes to discuss the motion with Ms.

Spann. Stella Spann was unfairly surprised by the motion to amend the indictment.

UCCCR 7.09. In Mississippi, "[i]t is permissible to amend the indictment on the date of trial and to charge the defendant as a habitual criminal under Mississippi Code

Annotated § 99-19-83, **when defense counsel is aware of the State's intentions and the defendant is fully aware of the State's intentions during plea negotiations."**

Forkner v. State, 902 So.2d 615, 624 (¶28) (Miss. Ct. App. 2004) (citing Ellis v. State, 469 So.2d 1256 (Miss. 1956)). The Appellant contends that had she been given proper notice of the State's intention to charge her as a habitual offender, she may have

elected to plea rather than risk going to trial.

What is clearly distinguishable from Forkner, is that the State's motion to amend the indictment to habitual status in the case at bar was given clearly after plea negotiations had ceased on February 13, 2006 as required by the Trial Court's local rules. Stella Spann was never given proper notice of the State's intention to amend the indictment and was therefore, unfairly surprised. Defense Counsel only had ten minutes to consult with Ms. Span during jury selection. The actions of the State on the morning of trial violated all notions of fairness and due process.

II. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO GRANT A DIRECTED VERDICT.

When "considering whether or not the verdict is contrary to the overwhelming weight of the evidence, this Court must accept as true all the evidence which supports the State's position, together with all inferences reasonably flowing therefrom, in the light most favorable to the State's theory of the case." Britt v. State, 520 So. 2d 1377, 1379 (Miss. 1988), citing, Haymond v. State, 478 So. 2d 297, 300 (Miss.1985). The evidence in the case at bar showed the appellant acted in self-defense from an apparent threat to his life. Concerning challenges to the legal sufficiency of the evidence, this Court said in McFee v. State, 511 So.2d 130 (Miss. 1987):

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence - not just that supporting the case for the prosecution - in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable

doubt that he was guilty, reversal and discharge is required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb. See, e.g., Gavin v. State, 473 So.2d 952, 956 (Miss. 1985); May v. State, 460 So.2d 778, 781 (Miss. 1984).

McFee v. State, 511 So.2d at 133-34. (emphasis added).

The State did not prove that the appellant committed the crime of sale of cocaine. A reasonable person could not have found beyond a reasonable doubt that she was guilty of the crime of sale of cocaine. The evidence indicates the most Stella Spann could have been found guilty was the crime of possession, if the testimony of the confidential informant is to be believed.

The indictment charged Stella Spann with “unlawfully. . .sale of cocaine,”. (R. at 3). There was no evidence produced at trial that Stella Spann ever exchanged money or transferred cocaine for money from Mike Jernigan. At most, looking at the evidence most favorable to the State, the evidence would only show that Stella Spann, a crack addict, sought to receive cocaine for her own personal use, based on Mike Jernigan’s testimony that Ms. Spann asked to smoke some of Jernigan’s crack.

III. WHETHER THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ALLOW THE DEFENSE TO CALL MARY REED TO IMPEACH THE CREDIBILITY OF THE CONFIDENTIAL INFORMANT MIKE JERNIGAN

The trial court committed reversible error when it refused to allow the defense to call defense witness Mary Reed to impeach the credibility of the Confidential Informant Mike Jernigan which impacted on Stella Spann’s right to a fair trial. Under Rule 616 of the Mississippi Rules of Evidence, for the purpose of the impeaching the witness, evidence of bias , prejudice, or interest of the witness for or against the party to a case

is admissible. Further, under Rule 608 of the Mississippi Rules of Evidence, Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The second exception of Rule 608 goes further than pre-rule Mississippi practice. This exception allows for impeachment by specific acts which are something other than criminal convictions when the character trait of truthfulness of the witness being cross-examined is under attack. The second exception also allows the witness to be cross-examined regarding specific acts involving the truthfulness of another witness about whom he has testified.

The Confidential Informant Mike Jernigan testified that he did not personally know Stella Spann and had never met her. Defense witness Mary Reed was prepared to directly challenge the veracity of the State's witness by testifying under oath that she was with Mike Jernigan when he was smoking crack with Mike Jernigan. Mike Jernigan and denied under oath he even knew Mary Reed or Stella Spann. Mike Jernigan's credibility as witness and confidential informant were highly relevant to the defense in this matter. The trial court's refusal to allow the defense to call Mary Reed to directly impeach the credibility of Mike Jernigan violated Stella Reed's right to a fair trial under

the Mississippi and United States's Constitution.

IV. WHETHER THE COURT SHOULD HAVE ALLOWED THE LESSER JURY INSTRUCTION OF POSSESSION OF COCAINE IN THE ABOVE REFERENCED MATTER

The Trial court erred when it refused instructions D-10 and D-11 was a lesser-included offense instructions, which advised that if the State failed to prove one or more elements of sale of a controlled substance, the jury may find Stella Spann guilty of possession of cocaine. (R. at 55-56). A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. Adams v. State, 772 So.2d 1010 (quoting Heidel v. State, 587 So.2d 835, 842 (Miss.1991) (citations omitted)). Further,[e]ven though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court. Where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error. Hester v. State, 602 So.2d 869, 872 (Miss.1992). Possession of Cocaine is the lesser included offense to the crime of Sale of Cocaine. The Rankin County should have been allowed to consider the lesser included instruction. Confidential Informant Mike Jernigan testified that Stella Spann may have momentarily possessed the cocaine before he completed the transaction with Willie Holmes. He further testified that Stella Spann, a crack addict requested Jernigan give her some of

his crack cocaine so she could smoke it.

MR. EVANS: I think -- I think the State is taking a confidential position . I think the evidence would bear out in front of jury to conclude that possession would be the proper charge. There was testimony, at least, according to the state' s position, that she was interested in getting what is called quote "a crumb" for her personal use. A jury can conclude, based upon the state's theory, that there was a momentarily handling of the drugs for the purpose of her trying to, you know, for personal use. The testimony was that, according to some of witnesses here, she momentarily possessed the drugs then she handed it t o Holmes. And their position was that she wanted to use the drugs for personal use or get a crumb of it also.

(Tr. at 126).

A jury instruction on a lesser-included offense is to be given when a defendant "point[s] to evidence in the record from which a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of the lesser included offense." Ladnier v. State, 878 So.2d 926, 932 (Miss. 2004) (citing Toliver v. State, 600 So.2d 186, **192 (Miss. 1992)**).

The Supreme Court has held that the "essential elements of a lesser-included offense are among the elements of the superior offense." State v. Shaw, 880 So.2d 296, 301 (Miss. 2004) (citations omitted). Stated differently, if an accused is guilty of the offense for which she was indicted, the accused is also guilty of any crime considered to be a lesser-included offense. Harper v. State, 478 So.2d 1017, 1021 (Miss. 1985).

CONCLUSION

For the above listed reasons the Appellant respectfully requests that the Court reverse her conviction and grant her a new trial in the above referenced matter.

Respectfully submitted,

Stella Spann, APPELLANT

BY: _____

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CERTIFICATE OF SERVICE

I, Wesley T. Evans, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to the following addresses:

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