IN THE COURT OF APPEALS FOR THE STATE 0F MISSISSIPPI

NO. 2006-KA-01260-COA

LORENZO TARVER — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S REPLY BRIEF

APPEAL FROM THE CIRCUIT COURT OF LEFLORE COUNTY
CAUSE NO. 2005-0044

ORAL ARGUMENT REQUESTED

IMHOTEP ALKEBU-LAN [redacted]
P.O. BOX 31107
JACKSON, MISSISSIPPI 39286-1107
601-353-0450 TELEPHONE
601-353-2818 TELECOPIER

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENTS

I. THE PROSECUTOR'S CLOSING ARGUMENT INSINUATING CRIMINAL CONDUCT BY TARVER'S JACKSON LAWYERS IN STEALING THE MISSING MARIJUANA EVIDENCE AND THEN APPEALING TO JURY PREJUDICE THAT COUNSEL THINKS THEY'RE IGNORANT CONSTITUTES MISCONDUCT THAT DEPRIVED TARVER OF A FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL TRIAL.

Prosecutors are prohibited from insinuating criminal conduct unsupported by any proof.[1] While remark may not by itself constitute reversible error, but were erroneous and could be considered with other such errors for their commutative prejudice.[2]

The supreme court has said that an appellate court can order a new trial when it finds a "send a message" argument was improper and affected the accused's rights. The supreme court has repeatedly condemned the use of "send a message" arguments and warned prosecutors accordingly.[3] The function of the jury is to weigh the evidence and determine the facts. When the prosecution wishes to send a message they should employ Western Union. Mississippi jurors are not messenger boys.[4] While this is not per se reversible, a "send a message" argument may on its own constitute reversible error.[5]

The supreme court recently clarified this issue, i.e., when a "send a message"

---

[1] *Smith v. State,* 457 So. 2d 327 (Miss. 1984). (citing *Stewart v. State,* 263 So. 2d 754 (Miss. 1972).

[2] Id.

[3] See e.g., *Payton v. State,* 785 So. 2d 267, 270 (¶¶11-12) (Miss. 1999); *Evans v. State,* 725 So. 2d 613, 673 (Miss. 1997); *Wicker v. State,* 697 So. 2d 1123, 1139 (Miss. 1997); *Hunter v. State,* 684 So. 2d 625, 637 (Miss. 1996); *Williams v. State,* 522 So. 2d 201, 209 (Miss. 1988).

[4] *Williams,* 522 So. 2d at 209.

[5] *Payton,* 785 at 271 (¶14).

argument will constitute reversible error.[6] In order to find reversible error, the court must determine (1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights.[7]

As the highest court has observed "where sufficient evidence exists to show that a prosecutor is persistently ignoring our admonitions against use of the 'send a message' argument, we will not hesitate to sanction him with the cost of a new trial where necessary." "If a prosecuting attorney, who is presumed to know better, persists in making erroneous and prejudicial remarks in his argument before the jury, then the trial court should deal harshly with him to the extent of sanctions, reprimands and contempt." [8] "One time is too much. This means any time in any case, after the first time."[9] "In the future, where sufficient evidence exists to show that a prosecutor is persistently ignoring our admonitions against use of the "send a message" arguments, we will not hesitate to sanction him with the cost of a new trial where necessary."[10]

In cases where an appellant cites numerous instances of improper and prejudicial conduct by the prosecution, this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no

---

[6] *Spicer v. State,* 921 So. 2d 292 (Miss. 2006).

[7] Id. at 318 (¶55).

[8] *Livingston v. State,* 525 so. 2d 1300, 1308 (Miss. 1988).

[9] Id. at n.3.

[10] *Payton,* 785 at 272 (¶15).

objections were made.[11]

As for the prejudice prong of the test, *Spicer* held that the appellate courts may only affirm if it is "clear beyond a reasonable doubt, that absent the prosecutor's comments, the jury could have found the defendant guilty. This goes beyond a finding of sufficient evidence to sustain a conviction."[12]

Here, the prosecutors's conduct was more egregious than in *Brown v. State*.[13] In *Brown* the prosecutor made repeated improper "send a message" arguments relating to concerns about crime in the community. Herein, the first improper argument insinuated criminal conduct by Tarver's lawyers. The closing argument insinuated that Tarver's lawyers stole the missing marijuana evidence. The argument insinuates that not only Tarver's a criminal but also his lawyers. The natural and probable effect of the improper argument is to create unjust prejudice against Tarver so as to result in a decision influenced by the prejudice so created. It was an improper attempt to arouse the jury's fear and indignation that his lawyers would go to any limits to free him from the charges. The argument was prejudicial and infringed on Tarver's 6th Amendment right to a fair and impartial trial.

This improper statement was followed and compounded by a "send a message" argument. The prosecutor aspired to prejudiced the jury against Tarver for retaining lawyers not from Greenwood. His assertion that "the people come up here from Jackson, big shot lawyers, I guess, I guess thinking Greenwood Mississippi, bunch of ignoramuses. We don't

---

[11] *Smith v. State,* 457 So. 2d 327 (Miss. 1984).

[12] Id.

[13] No. 2005-KA-00108-COA.

have any sense up here."[14] was intended to prejudice the jury against the lawyer of Tarver's constitutional choice and was highly prejudicial. Naturally, anyone would take offense when considered ignorant or without any sense. This improper argument was an improper attempts to arouse the jury's indignation and humiliation about the irrelevant issue of who and where an accuse retains counsel.

Tarver's 6th Amendment right to the counsel of his choice was violated by the prosecutor's improper "send a message" argument. The statements called on the jury to just say no to defendants whose attorneys are not from Greenwood rather than to vote on Tarver's guilt. The jury's job was to decide whether or not Tarver was guilty beyond a reasonable doubt. Any other matter was beside the point. Furthermore, the prosecutor encourage the jury to vote based on what the community will think, insinuating that a vote for Tarver was a vote against the community.

It should be no surprise to this Court that the closing arguments insinuating criminal conduct by Tarver's lawyers followed by an appeal to the jury's prejudice against defendants who get lawyers not from Greenwood, were made by the same prosecutor in *Brown* who this court recently sanctioned for inappropriate statements in closing argument. As this Court knows, the Mississippi Supreme Court is currently considering whether this prosecutor, Brad McCullouch, can be forced to pay the cost of an appeal for what was deemed by this Court as his inappropriate closing argument in an assault case.

The large quantity of marijuana herein was found in the back shed of Tarver's parents house. Besides his parents, other people lived and visit there. There were no

---

[14] 6:755:28-29; 6:756:1-2.

fingerprint evidence connecting Tarver to the marijuana. The jury could decide not to believe the officer who testified that Tarver said the marijuana in the bed room was his.

The error was not harmless. The marijuana evidence was missing. The implication that Tarver's lawyers stole the marijuana prejudiced Tarver's right to a fair and impartial trial by linking him and his attorneys in criminal conduct.

In the aggregate these errors deprived Tarver the right to a fair and impartial trial.[15] The arguments prejudiced Tarver's right not to be accused with criminal conduct not supported by the evidence and to be represented by retained counsel of his choosing.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN (1) EXCLUDING FOR CAUSE JURORS WHO EXPRESSED CONCERN ABOUT MISSING EVIDENCE (2) PERMITTING THE PROSECUTOR TO TALK ABOUT TWO TRIALS: TARVER'S AND WHOEVER STOLE THE EVIDENCE, AND (3) STRIKING AN IMPANELED JUROR.

This issue is properly before the court. Trial counsel did object to the composition of the jury. When he learned he was exercising Tarver's peremptory challenges from the wrong jury list he expressed concern that Tarver was not receiving competent counsel and would be denied a fair trial.[16] Tarver also expressed concerns to the court that his trial counsel was not prepared for trial.[17]

The state's brief asserts that it relies on the rulings of the trial court. Absent a clear showing that a prospective juror would be unable to follow the court's instruction and obey

---

[15] *Howell v. State,* 411 So. 2d 772, 776 (Miss. 1982).

[16] In this Brief, the record page is cited as Volume:Page:Line(s). R.E. refers to the Record Excerpts Page. 3:375: 12-29; 3:376:1-11; 3:377:2-23; 3:382:2-11; 3:382:26-29; 3:383:1-5; 3:383:21-29.

[17] 3:382:19-25.

juror's oath, juror's feelings do not constitute grounds for challenge and granting of such challenge is reversible error.[18]

Here, Tarver was clearly prejudiced by the prosecutor's mentioning in voir dire that there would be two trials: Tarver's and whoever stole the marijuana. This argument also insinuated that once Tarver was found guilty, the person(s) who stole the marijuana would also be put to trial and found guilty. Considering also the prosecutor insinuated that Tarver's lawyers stole the marijuana, there was the insinuation that immediately after Tarver was put to trial his lawyers would be put to trial for stealing the missing marijuana evidence. The jury was left with the impression that Tarver was being represented by criminals. This is highly prejudicial and deprived Tarver of a fair and impartial trial.

In improperly striking an impaneled juror, the record shows the court instructed the jurors not to talk about the evidence when they're s together before the end of trial and not to talk to family members about the evidence.[19] The record reflects that the court failed to instruct the jury that they are to avoid all contacts with the attorneys, parties, witnesses or spectators.[20] To then arbitrarily strike an empanel juror on conflicting testimony without first providing such instructions and without an explanation from the juror, was an abuse of discretion. It was also evidence of the court's biased against Tarver and further reason why the motion to recuse should have been granted.

Finally, any absence of objection by trial counsel should be considered as Tarver

---

[18] *Fuselier v. State,* 468 so. 2d 45 (Miss. 1985).

[19] 3:388:4-23.

[20] U.C.C.C.R. 3.06.

being denied a fair trial due to ineffective assistance of counsel.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION TO SEVER THE GUN COUNT OF THE INDICTMENT.

Wright v. State provides authority on how prejudicial evidence can be handled in a multi count indictment.[21] It does not address when multiple counts in an indictment should be severed.

Herein, the marijuana charge and the gun charge were not (a) offenses based on the same act or transaction, or (b) based on two (2) or more acts or transactions connected together or constituting part of a common scheme or plan.

The trial court's refusal to sever the gun count of the indictment is further evidence of the court's bias against Tarver and reason the motion to recuse should have been granted.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION FOR CONTINUANCE.

Prior to trial Tarver filed a motion for continuance. The motion was not filed seven days before trial in part because counsel was not retained by Tarver nor paid to representing Tarver at trial. He simply argued motions filed with the court while retained counsel was suspended from the practice of law.

The court denied the motion and told his counsel to be ready for trial in two (2) days. When Tarver announced ready at trial it was not an acknowledgment that he was ready but an acknowledgment that he was present for trial as the court ordered. Counsel was not Tarver's retained counsel and had not represented Tarver throughout the proceedings. He

---

[21] *Wright v. State,* 797 So. 2d 1028 (¶8) (Miss. App. 2001).

had not scene any of the evidence that would be used against Tarver. He had simply volunteered to assist the defendant and the court in arguing pre-trial motions while Tarver's retained counsel was suspended from the practice of law.

Moreover, counsel announcement that he was ready for trial could/should be viewed as further evidence that Tarver received ineffective assistance of counsel. This view is supported by the fact that counsel had only two (2) days to prepare for trial. After announcing ready for trial, he soon recognizes he was not ready as he had not scene any of the evidence that would be introduced at trial. After the wrong jury list was used to exercise peremptory challenges, he quickly came to the sobering conclusion that Tarver would/could not receive affective assistance of counsel These resulting realities belies the announcement of ready for trial.

Manifest injustice resulted when the trial court denied the motion for continuance.[22] In the authority cited by State, the defendant's attorney was hired in January and attended a hearing in March. Counsel stated he had worked on the case every day since he received the State's discovery material. On the date of trial counsel announced ready for trial.

Herein, Tarver's trial counsel was not retained. He had appeared previously only to argue pre-trial motions while retained counsel was suspended. Two days before trial he argued the motion for continuance. Two (2) days later, when the court asked him if he was ready for trial, if is evident he announced ready because he had no alternative but to be present though not ready for trial. Its also apparent that if he had announced not ready the trial would have proceeded nonetheless.

---

[22] *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995).

Because peremptory challenges were exercised from the wrong jury list, the wrong jurors set in judgment of Tarver than those intended.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION TO SUPPRESS HIS CRIMINAL RECORD.

It is significant that Tarver's retained counsel, Chokwe Lumumba, argued the pre-trial motion to suppress Tarver's prior criminal record. The record is silent that Tarver's trial counsel was actually aware of this ruling and/or could prepare a defense appropriate to the ruling of the trial court.

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PERMITTED THE STATE TO AMEND THE INDICTMENT TO ALLEGE THE CRIME WAS COMMITTED WITHIN 1500 FEET OF A DAY CARE CENTER INSTEAD OF A PARK.

Herein, Tarver was not in a better position after the amendment than before the amendment. The Order granting the amendment was filed November 28, 2005. Again, it was Tarver's retained counsel who filed and argued this motion to suppress evidence of his prior crimean record.. The record is silent that his trial counsel was aware of or had sufficient notice of the change.

VII. TARVER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Again, it must first be recognized that Tarver's trial counsel had only two (2) days to prepare for trial. As a result and as the record reflects, he was prejudiced by his counsel's ineffective assistance. The prejudice of not being prepared for trial quickly became evident when the peremptory challenges were exercised from the wrong jury list. As a result, a different jury was impaneled and set in judgment than the one intended . This unintended jury found Tarver guilty of possession of marijuana. There is a reasonable probability that he would have received a different trial result from a different, intended jury.

Furthermore, as a result of not being prepared for trial, even trial counsel honestly expressed his earnest concern that he was not prepared for trial. He admirably expressed his concerns that he could not provide Tarver with effective assistance of counsel.

Tarver being found not guilty of the possession of the gun count is further evidence this count should have been severed. It is not evidence he received effective assistance.

VIII. TARVER IS ENTITLED TO A NEW TRIAL BECAUSE OF LOST OR DESTROYED EVIDENCE.

Tarver has the right to test other parts of the evidence than the ones tested by the State. It is not known if the evidence was intentionally destroyed, indicated fraud and a desire to suppress the truth.[23]

IX. TARVER RIGHT TO A SPEEDY TRIAL WERE DENIED.

The evidence showed that the marijuana was sent to the Mississippi Crime Laboratory for analysis on June 23, 2004. The results of the test were returned on June 25, 2004.[24] The core sample was returned to the Greenwood Police Department on July 22, 2004.[25]

When the test result were returned is significant for speedy trial purposes because it means that within a week of Tarver's arrest, the drug evidence had been submitted to the crime lab for analyzation and within a week the State had the test result. The State thereby

---

[23] *Murray v. State,* 849 So. 2d 1281, 1286 (¶19)(Miss. 2003) (quoting *Tolbert v. State,* 511 So. 2d 1368, 1372 (Miss. 1987)).

[24] 2:244:1-9. Tarver's Appellant's Brief incorrectly stated that the lab results were returned a year later on June 25, 2005. The correct chronology is that the test results were returned in two (2) days.

[25] 3:422:13-14.

knew of the lab results and was ready to provide Tarver with a speedy trial.

The change in counsel was not at Tarver's urging but instead was beyond his control. In fact he decried the court's order putting counsel to trial when it was apparent he was not prepared.

X. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION FOR RECUSAL.

Again, this motion was raised because of the fear the trial court animosity toward Tarver's retained counsel would be transferred to Tarver. Though retained counsel was not the same as trial counsel, the record is replete with the following examples where this fear bore fruits:

- the trial court denied the motion for continuance thereby giving trial counsel only two (2) days to prepare for trial;
- the trial court improperly excluded jurors who expressed concerns about missing evidence;
- after counsel used the wrong jury list to exercise Tarver's peremptory challenges, the trial court denied the motion for mistrial;
- the trial court improperly stroke an impaneled juror;
- the trial court failed to sever the gun charge with the marijuana charge;
- the court failed to admonish the jury to disregard the prosecutor's insinuation that defense counsel stole the missing marijuana evidence;
- the trial court failed to admonish the prosecutor on his "send a message" argument during closing argument and instruct the jury to disregard the statement;

- the trial court denied the motion for new trial after all the evidence was presented.

Some of the cited issues that occurred after the motion was denied is being cited as grounds why the motion should have been granted. The evidence produces a reasonable doubt as to the judge's impartiality.[26] Its abundantly clear that the record at hand does not pass the smell test. Only a remand for a new trial by this Court will dissipate the taint.

XI. TARVER'S SENTENCE WAS EXCESSIVE AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS.

Considering the court's animosity toward Tarver, this court should require the trial court to conduct a hearing to determine the proportionality of Tarver's sentence.

XII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION TO SUPPRESS EVIDENCE.

As admitted by a state witness, Chris Davis was the informant who provided the probable cause for the search warrant. He testified at the suppression hearing about his motivation for telling the law enforcement officers about Tarver's alleged marijuana possession. He also testified that what he told the officer about Tarver was not the truth.

Davis testimony showed that the officer knew there was not probable cause for the search warrant. Law enforcement officers provided the information Davis was regurgitating.

XIII. THE CUMULATIVE EFFECT OF ERRORS DEPRIVED TARVER OF THE RIGHT TO A FUNDAMENTAL FAIR AND IMPARTIAL TRIAL.

As enumerated above, the individual errors cited had the cumulative effect to deprived Tarver of the right to a fundamental fair and impartial trial. As a result, he should

---

[26] *Christine v. State,* 915 so. 2d 1073 (Miss. App. 2005).

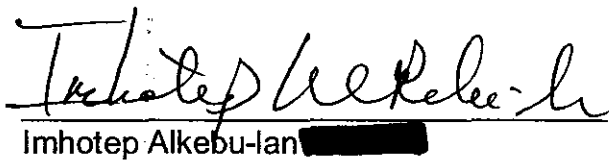
be granted a new trial.

CONCLUSION

For the foregoing reasons and authorities, Tarver request this Court enter an Order dismissing these charges. In the alternative, he prays for a new trial.

Respectfully submitted,

LORENZO TARVER

By: 

Imhotep Alkebu-lan [redacted]
P.O. Box 31107
Jackson, Mississippi 39286-1107
601-353-0450 Telephone
601-353-2818 Telecopier

ATTORNEY FOR APPELLANT

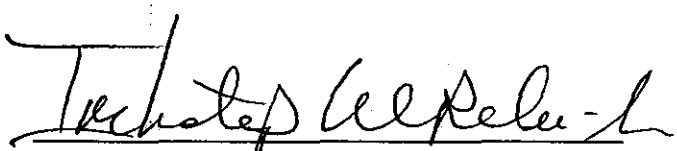
CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the foregoing was mailed first class, postage prepaid, to the following individuals:

Judge Ashley Hines
P.O. Box 1315
Greenville, MS 38702-1315

Jeffery Klingfuss
Special Assistant Attorney General
P.O. Box 220
Jackson, MS 39205-0220

This the 5th day of May, 2008.



Imhotep Alkebu-lan