IN THE MISSISSIPPI COURT OF APPEALS

No. 2006-KA-01787 -COA

FERLANDO ESCO — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

Appeal from the Circuit Court of Madison County, Mississippi

Julie Ann Epps (MS Bar No[redacted])
504 East Peace Street
Canton, MS 39046
(601) 407-1410
facsimile (601) 407-1435

A. Randall Harris
P.O. Box 2332
Madison, MS 2332
(601) 454-7242

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LAW AND ARGUMENT

1. The trial court erred in allowing the prosecution to introduce Michael Johnson's prior statement.

The State argues that Johnson's thirty-two page plea colloquy was admissible, in its entirety, pursuant to the rule of completeness. Since Esco was able to use parts of the colloquy to impeach Johnson, the State contends, the prosecution was allowed to have the entire statement admitted.

First of all, this argument ignores the fact that Esco merely used parts of the plea to impeach Johnson and not as substantive evidence. In other words, Esco was not able to have discrete parts of the colloquy given to the jury with the rest of it left out. By giving the jury the entire plea colloquy and introducing it into evidence without a cautionary instruction, the prosecution was allowed to have the prior consistent statement admitted as substantive evidence which, of course, it is not permitted to do.

The State's completeness argument still fails to correct the problem of allowing the jury to use Johnson's colloquy as substantive evidence. A prior consistent statement, even when offered to rebut a challenge to the witness's veracity, is never to be used as substantive evidence of the defendant's guilt. *Smith v. State*, 792 So.2d 343, 347 (Miss.App. 2001).

2. The trial court erred in failing to instruct the jury that Johnson's statement could not be considered as substantive evidence.

The State contends that the trial court cannot have erred in failing to give a cautionary instruction where the defense never requested one. But as Esco pointed out in his initial brief, the failure to give a cautionary instruction when a witness's prior statement is used for impeachment is **plain error.** *Moore v. State*, 755 So.2d 1276 (Miss.App. 2000).

3. The trial court erred in allowing the prosecution to introduce a 1991 conviction of strong arm robbery when Esco was 16 without first determining whether this evidence was more prejudicial than probative.

The State argues that the 1991 conviction was admissible to prove an element of the crime of felon in possession – namely, the felon part. Since it was admissible for this reason, the Court need not apply Rule 609, *Peterson*, 403 or *Old Chief* in determining admissibility.

The problem with this argument is that the prosecution need only prove a **single** prior felony. Esco had several prior felonies in addition to the juvenile strong arm robbery conviction that could be used to prove that he was a felon at the time of the current offense. The prosecution's insistence on using the fourteen-year-old strong arm robbery was because it was similar to the facts of the current offense and because it showed that Esco had a long criminal history. But prior crimes are not admissible for the purpose of proving the case at bar.

The State argues that *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644 (1997), is inapplicable because its holding "was based on the specific language of 18 U.S.C. § 922." *State's brief p. 12.* Of course, what the State doesn't reveal is that the holding in *Old Chief* has been followed by the overwhelming majority of courts and every state court of last resort to have considered the matter. See *Brown v. State,* 719 So.2d 882 (Fla.1998); *State v. Lee,* 977 P.2d 263 (Kan. 1999); *Carter v. State,* 824 A.2d 123 (Md. 2003); *State v. James,* 583 S.E.2d 745 (S.C. 2003); *State v. James,* 81 S.W.3d 751, 762 (Tenn.2002); *State v. Alexander,* 571 N.W.2d 662, 668-672 (Wis.1997); *State v. Root,* 873 P.2d 1203 (Ariz.Ct.App. 1998); *State v. Johnson,* 950 P.2d 981, 985-986 (Wash.Ct.App.1998); *People v. District Court,* 953 P.2d 184, 190-191 (Colo.1998)(*dicta*); *People v. Swint,* 572 *N.W.*2d 666, 677 (Mich.Ct.App.1997) (*dicta*); *State v. Harvey,* 723 A.2d 107, 109 (N.J.Super.A.D. 1999). All of these courts concluded that, in light of an offer to stipulate the status element of the charged offense, the prejudicial effect of the disclosure of the nature of the prior conviction substantially outweighed its probative value.

The admission of the strong-arm robbery for which Esco was convicted in 1991 was highly prejudicial. The trial court erred when it failed to conduct a Rule 403 analysis of this prior and in failing to hold evidence of the prior inadmissible.

4. The trial court erred in not giving a limiting instruction regarding the proper use of evidence of Esco's prior convictions.

The State claims that the failure of the trial court to give the jury a limiting instruction regarding the use of Esco's prior conviction was not error inasmuch as the defense never requested a limiting instruction. However, the Mississippi Supreme Court has stated that "the better practice is that a limiting instruction be granted by the trial judge *sua sponte* when proper request is not made by defense counsel." *Peterson v. State,* 518 So.2d 632, 638 (Miss.1987). *See also, Robinson v. State,* 735 So.2d 208 (Miss.1999) (holding that the trial judge has a responsibility to give *sua sponte* a limiting instruction when prior convictions are sought to be admitted under M.R.E. 609(a)(2)).

5. The trial court erred in overruling Esco's objection to being cross-examined by asking him whether the law enforcement witnesses were lying.

The State argues that this issue is procedurally barred because Esco did not cite any Mississippi cases in his brief. *State's Brief p. 14.* This argument is specious. There is no rule that an appellant must direct the Court to Mississippi cases. If this were such a rule, an appellant could never win a case of first impression. Furthermore, Esco did cite to Mississippi cases in his opening brief.

The truth of the matter is that it is not proper for the prosecution to repeatedly ask the defendant to testify as to whether the officers who testified against him are lying. A majority of courts that have addressed this issue have

determined that such questioning is categorically improper. Payne, Rebecca, *Admissibility of Testimony Concerning the Truthfulness or Untruthfulness of a Witness*, 35 The Colorado Lawyer 37 (December 2006).

Mississippi law is in accord inasmuch as it prohibits the questioning of a witness about the veracity of another witness's testimony. *Hart v. State*, 637 So.2d 1329 (Miss. 1994).

6. Esco was denied a fair trial when the prosecution was allowed, on redirect, to ask the law enforcement witnesses to vouch for their own credibility.

The State argues that it is not error for the prosecution to ask law enforcement whether they testified truthfully. "Here, the defendant testified that the prosecution witnesses were lying and the prosecution had a right to rebut that testimony." *State's brief p. 15.* First of all, it was the prosecution that asked Esco whether he thought the police officers were lying and this questioning was, in itself, improper. But for the State to argue that the prosecution was allowed to ask the law enforcement witnesses to improperly vouch for themselves because the **prosecution** opened the door to such questioning is even further error.

The credibility of witnesses is for the jury. *Sturdivant v. State*, 745 So.2d 240, 248 (Miss.1999). The prosecution cannot ask the witness to vouch for his own credibility. Allowing the officers to do so in this case violated Esco's right to a fair trial and due process.

7. **The trial court erred in allowing the prosecution to introduce a document prepared by the police purporting to be a list of the incoming and outgoing phone calls present on State's Ex. 26, a cell phone, on June 14, 2005.**

The State argues that the trial court has wide discretion in determining the admissibility of evidence. Moreover, the State argues, the list at issue here was a regularly kept record of the police department and, thus, was admissible under the business record exception tot he hearsay rule. The State does not address Esco's argument that to be admissible as a summary, the originals must be made available to the defense for examination or copying. M.R.E. 1006.

The State cites the case of *Cabrere v. State*, 920 So.2d 1062 (Miss.App. 2006) in which the Mississippi Court of Appeals held that a handwritten radio log of an emergency call from a jewelry story was admissible as a business record. In that case, though, the proponent of the log testified that it was customary for the police to record emergency calls into a log book. *Cabrere*, 920 So.2d at 1064. There was no testimony in this case that officers regularly write down the incoming and outgoing phone numbers of all cell phones that they find during a criminal investigation.

The officer's handwritten list was not admissible under the business records exception and it was not even the best evidence of what it purported to relate. The State should have subpoenaed the actual business records of the cell phone company and introduced those. The shortcut the State took in having an officer

look at the cell phone and take notes, without also preserving the evidence on the cell phone, was error.

8. The trial court erred in consulting with the jury prior to pronouncing sentence.

The State argues that this issued is procedurally barred because Esco's counsel did not object. The State also contends, again, that the issue is barred because Esco cites no Mississippi authority on this issue. Moreover, there is no evidence that anything improper occurred when the judge visited the jury. The comments by the judge indicating that the jurors were fearful of Esco, the State claims, were caused by the jurors reactions during voir dire.

Of course, we can't know why the trial court said what it did about the jurors' fearing Esco or what it was that occurred when the trial court visited the jury prior to announcing sentence. This is precisely why any contact the trial court had with the jury should have been on the record.

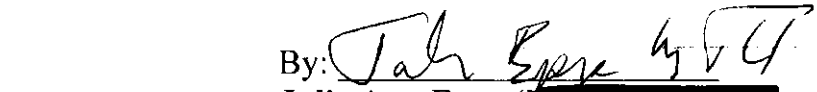
Under Mississippi law, a defendant has the right to review information used in determining his sentence. *Edwards v. State,* 615 So.2d 590, 598 (Miss.1993) (holding that defendant has no right to a presentencing report but does have a right to review it if one is used).[1] The trial court should not have talked to the jurors off the record and without letting Esco know what occurred during the trial court's "visit."

Conclusion

For the above and foregoing reasons, Ferlando Esco's conviction and sentence must be vacated or reversed and remanded for a new trial.

Respectfully submitted,

FERLANDO ESCO

By: 

Julie Ann Epps ([redacted]
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Canton, MS 39046
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facsimile (601) 407-1435

A. Randall Harris
P.O. Box 2332
Madison, MS 2332
(601) 454-7242
facsimile (601) 6283

[1] Esco cited this case in his initial brief. So much for the State's accusation that Esco failed to cite any Mississippi law.

CERTIFICATE OF SERVICE

I, Julie Ann Epps, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant to the following:

Hon. William E. Chapman, III
Madison County Circuit Court Judge
P.O. Box 1626
Canton, MS 39046

Michael Guest
Madison County District Attorney
P.O. Box 121
Canton, MS 39046

Hon. Jim Hood
Mississippi Attorney General
P.O. Box 220
Jackson, MS 39205

This, the 21st day of March, 2008.

Julie Epps

Julie Ann Epps