IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. DOCKET NO. 2006-KA-01792-SCT

DEANDRE DAMPIER **APPELLANT**

V.

STATE OF MISSISSIPPI **APPELLEE**

I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the Court of Appeals may evaluate possible disqualification or recusal.

1.	Deandre Dampier	Appellant
2.	Kelsey L. Rushing	Appellant Counsel
3.	Ramel L. Cotton	Appellant Counsel
4.	State of Mississippi	Appellee
5.	Jim Hood	Appellee Counsel
6.	Hon. William E. Chapman	Trial Judge

CERTIFIED this the 29th day of March, 2007.

KELSEY L. RUSHING, MSB[redacted]
RAMEL L. COTTON, MSP#[redacted]
SMITH RUSHING COTTON & ROBINSON, PLLC
POST OFFICE BOX 9366
JACKSON, MISSISSIPPI 39286
ATTORNEY FOR APPELLANT

II.

TABLE OF CONTENTS

III.

TABLE OF CASES, STATUTES AND AUTHORITIES

IV.

ISSUES PRESENTED

I. WHETHER THE DEFENDANT WAS ENTITLED TO HAVE A REPRESENTATIVE JURY VENIRE?

II. WHETHER THE CRIME SCENE PHOTOS WERE OVERLY PREJUDICIAL?

III. WHETHER THE COURT ERRED IN REFUSING TO GIVE THE LESSOR INCLUDED INSTRUCTION?

IV. WHETHER THE COURT ERRED IN DENYING THE DEFENDANT'S INFERENCE INSTRUCTION, D-4?

V. WHETHER THE TRIAL COURT'S GRANTING OF STATES INSTRUCTION S-5 AND DENYING DEFENDANTS INSTRUCTION D-10 WAS AN ABUSE OF DISCRETION?

VI. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING ONLY ONE JURY INSTRUCTION?

VII. WHETHER THE COMMENTS MADE BY THE PROSECUTOR IN CLOSING ARGUMENT WERE PLAIN ERROR?

V.
STATEMENT OF THE CASE
A. NATURE OF THE CASE

This is an appeal from a conviction by jury of Mr. DeAndre Dampier in the Circuit Court of the Rankin County, Mississippi, on September 1, 2006. Dampier was convicted of capital murder.

B. PROCEEDINGS BELOW

DeAndre Dampier was indicted on one count of capital murder on February 9, 2005, in the Rankin County Circuit Court. [CP 8, T. 74]. On August 29, 2006, Dampier was tried before a jury. [T 76]. Dampier moved for a change of venue. [CP 91, T 91]. He also moved, *ore tenus*, to have the venire disqualified because there was only one African American in the entire panel. [T 77]. Trial Court denied both motions. At trial, motions for directed verdict or dismissal were denied by the trial judge. [T. 559-562, T. 607]. The jury found DeAndre Dampier guilty of capital murder and he was sentenced to life without the possibility of parole.[CP. 202, 204, 205, T. 963]

Dampier appeals from the jury verdict and sentencing.

VI.

SUMMARY OF THE ARGUMENT

The Defendant was denied a fair trial of his peers. Mr. Dampier is an African American. However, there was only one African American in the entire venire. This was not a representative number of African Americans living in Rankin County. The Defendant asked that the venire be stricken, but was denied.

The trial court also committed reversible error in overruling the Defendant's objection to the crime scene photographs. The State was allowed to submit several photographs that were clearly cumulative and had no probative value. At least three different law enforcement agencies took crime scene photographs. However, the photos were all the same. Over Mr. Dampier's objections, the State was allowed to introduce the same photographs repeatedly.

Reversible error was also committed by the lower court when the trial judged denied a lesser included offense jury instruction.

The trial court committed reversible error by denying the D-5 and granting S-5 jury instructions. The jury was not properly instructed as it related to inference testimony.

The trial court committed reversible error by denying D-10 and granting S-6. The trial court improperly allowed the State to argue and direct the jury regarding how expert testimony is to be weighed. The end result of the denials of D-10 and D-5 was that only one jury instruction was given on behalf of the Defendant.

The court should have granted a mistrial when the prosecutor made improper

comments during his closing argument.

VII. ARGUMENT

I. WHETHER THE DEFENDANT WAS ENTITLED TO HAVE A REPRESENTATIVE JURY VENIRE?

The jury venire consisted of only one African-American. The Defendant objected and asked for a mistrial, or for the pool to be enlarged. The request was denied. The Circuit clerk testified that African Americans comprised approximately 18 percent of the county's population. [T.87]. However, the fact that there was only one African American in the jury venire was less than five percent, which was a cross section of the county.

At the motion hearing counsel argued that,

> "...decisions of the United States Supreme Court in effect qualify the rule by holding that there may have been discrimination notwithstanding the absence of such intention on the part of the jury official."[1]
>
> Paraphrase that, there may actually be some effect, some form of discrimination been though there is not anything intentional by the clerk of the court or by the court. But just the mere fact that at the end of the day when we have a – when we get the people in here for the venire, you have an African American defendant, but you only have one African American left on the panel.
>
> Essentially what I'm arguing is...its's almost like a Title 7 argument of disparity impact, where there may not be even be any intention, but the effect of it the fact that you have a jury panel which is not representative of the population of the county, or the prospective jurors, and it is going to I think prejudice my client. [T. 93-94].

While this may not on its face appear to be reversible, it should be pointed out that Deandre Dampier was a black male accused of killing a very well known white business

---

[1]Quoting *Craft v. State*, 380. So. 2d 251.

owner. Because of the nature of the crime and the parties involved, having only one African-American in the entire venire was prejudicial and the case should be reversed.

II. WHETHER THE CRIME SCENE PHOTOS WERE OVERLY PREJUDICIAL?

At trial, the State was allowed to introduce several photographs of the victim. The Defense argued that the photographs were prejudicial. Especially, in light of the fact that there were other means by which the testimony could be elicited. The photographs in question were photos of the victim's bloodied head.

This Court has " caution[ed] prosecuting attorneys that there can be a limit both in the number of photographs and the manner in which they are displayed to the jury...The discretion we have afforded circuit judges is by no means unlimited, and we strongly urge that they curtail excess." *Mannix v. State.*, 895 So.2d 167, 178 (Miss. 2005).

"One specific photograph of the victim's body may be probative, but ten similar photographs may be prejudicial. One photograph of the body may inform the jury about the crime; ten similar photographs may inflame their passions. Photographs that depict gruesome subject matter may be highly probative to a case and should continue to be admitted, continuing our decades-long practice. Yet multiple photographs of the same subject are successively less probative and simply fan the flames of the jury's passion. We caution trial courts to scrutinize this issue closely and to guard against inflaming the passions of the jury." *Id.*

In this case the State simply put on several photographs that depicted the bullet entry

wounds, only to followed by the autopsy photos that essentially told the same story. The photos were cumulative in were wrongly put before the jury.

"When deciding on the admissibility of gruesome photos, trial judges must consider: "(1) whether the proof is absolute or in doubt as to identity of the guilty party, [and] (2) whether the photos are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury." *McNeal v. State,* 551 So.2d 151, (Miss. 1989).

In deciding the admissibility of the photos, the trial judge stated that he performed a Rule 403 balancing test and found that the probative value outweighed the prejudicial effect. However, he did not say exactly what that test was. This is similar to *McNeal.* Simply put, there were other ways to elicit the same testimony.

In this case, the identity of the victim and the manner of death was not in dispute. In fact, the Defendant did not contest the manner in which the victim was killed. [T.281]. Nothing in those photos led to the identity of the party. As Dampier argued at trial, there were less gruesome photographs, other than the close up pictures of the victims bloodied head to illustrate the points[2].

Furthermore, the defense had stipulated prior to trial to the alleged murder weapon, and the bullet fragments found at the scene.[3] There was no real need, other than to inflame

---

[2] The State in its argument for the admissibility of the photos stated that there were over additional 40 photos of the crime scene.

[3] The stipulations were read into evidence. As this Court can ascertain from the record, there was no need for a ballistics expert to be called.

the jury, to show those photographs.

Because the gruesome photographs introduced at trial were overly prejudicial, this Court should reverse and remand for new trial.

III. WHETHER THE COURT ERRED IN REFUSING TO GIVE THE LESSOR INCLUDED INSTRUCTION?

The Defendant submitted a lessor included jury instruction of accessory after the fact. The Court denied the instruction stating that there had been no evidence that there was anything other than a capital murder and that there was no factual basis for a lessor included offense. [T. 630]

The proffered instruction read:

> The Court instructs the Jury that if you find the State had failed to prove any of the essential elements of capital murder, you must find the Deandre Damier not guilt of capital murder. You will then proceed with your deliberation to decide whether the State has proved beyond a reasonable doubt all of the elements of Accessory after the Fact.
>
> The Court instructs the Jury that if you find from the evidence in this case beyond a reasonable doubt that Deandre Dampier on or about June 08, 2004, assisted and aided Germaine Rogers by helping to fill out applications for title and driving a vehicle taken from 5 Star Auto, which is a crime under the laws of the State of Mississippi; and if you believe beyond a reasonable doubt that Deandre Dampier performed these actions with the intent of enabling Germaine Rogers avoid arrest after Germaine Rogers had committed the crime of capital murder, then you shall find Deandre Dampier guilty of Accessory after the Fact.
>
> If the State fails to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find Deandre Dampier not guilt of Accessory after the Fact.

The Defendant argued that the facts supported the lessor included offense. In fact

there was insufficient evidence to show that the Defendant was ever in the building. There was insufficient evidence to show that the Defendant had any knowledge of the actual murder and robbery. The sum of the evidence showed that the planning and commission of the crime was committed by the co-defendant who had pled guilty.

This Court has articulated the following test to determine whether there is an evidentiary basis for a lesser-included offense :

> "Lessor included offense instruction should be granted unless the trial judge-and ultimately this court-can say, taking the evidence in the light most favorable to the accused, and considering all reasonable references which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lessor included offense (and conversely not guilty of at least one element of the principal charge). *Spicer v. State*, 921 So.2d 292 ,313 (Miss. 2006).

There was clearly evidence brought out in the trial that would suggest that a lessor included offense of accessory after the fact would have been warranted. There was much evidence including the closing argument that discussed that preparation of the paperwork to make the vehicles look as if they were purchased. [T. 628-629].

Because of the aforementioned reasons, the trial court abused it's discretion by not granting the lessor included instruction.

IV. WHETHER THE COURT ERRED IN DENYING THE DEFENDANT'S INFERENCE INSTRUCTION, D-4?

Another irony in the trial court's ruling was demonstrated when the court denied Defendant's D-4, which addresses inference testimony. [T. 611]. But the next day the court gave an instruction in the form of S-5 that an inference can be drawn that Defendant

participated in a capital murder because he may have been in possession of a stolen vehicle. [T.638]

The trial court erred in granting S-5. S-5 stated:

> " The Court instructs the jury that the possession of property recently stolen is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt."

Defendant argued at trial that this instruction was incorrectly given.

The State argued, and the trial Court accepted, that if the Defendant was found in possession of stolen property that the jury could somehow infer that he "committed the armed robbery, they have inferred guilt to the capital murder." [T. 640]. Essentially, the State and the trial court reasoned if the Defendant was found in possession of the stolen vehicle then, the jury could infer that he was a part of the armed robbery, and therefore guilty of capital murder.

The trial court asked the question, "Because while they could infer guilt relative to the armed robbery, they may not necessarily be able to infer guilt relative to the capital murder." To which the State responded, "if they infer guilt to the armed robbery, they have inferred guilt to the capital murder." [T. 640]. The trial court essentially allowed the state to argue that possession of a stolen vehicle gives the inference, but did not allow the Defendant the opportunity to argue that all inferences have to be proven beyond a reasonable doubt.

Defense stated to the court:

> "Your Honor, this is the just the exact opposite of the argument he made in refusing my lesser included, that there must be some knowledge. If

my client is continuing to say there's no knowledge, then now he's going to have to show that he knew there was a stolen vehicle and being in possession of a stolen vehicle is going to infer guilt." [T. 639].

What makes this instruction problematic, is that it is an instruction concerning an inference. The trial court denied Dampier's instruction that stated that all inferences must be proved beyond a reasonable doubt. The trial court had previously rejected Defense's D-5 instruction which stated,

> "Each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." D5 instruction

The trial court committed reversible error by allowing the State to give an inference instruction, while denying the Defendant's instruction on the weight of inferences.

V. WHETHER THE TRIAL COURT'S GRANTING STATES INSTRUCTION S-5 AND DENYING DEFENDANTS INSTRUCTION D-10 WAS AN ABUSE OF DISCRETION?

There was a peculiar situation that occurred while discussing D-10. D-10 read :

> "The law permits evidence of certain persons who are termed expert. Experts may testify to their opinions derived from their knowledge of particular matters. However, the ultimate weight to be given to expert testimony is a question to be determined by you. The testimony of any expert, like that of any other witness, is to be received by you and given such weight only as you think it is properly entitled to receive. You are not bound by the opinion testimony of any witness, expert or otherwise."

The conversation regarding this instruction concerned the stipulation by experts.[4] When D-10 was offered the following discussions took place:

MR. EMFINGER: What are we going to do about the stipulations?

Mr. Rushing: What's that?

Mr. Emfinger: We tell them in the stipulations we've got two experts and then tell them the stipulations are considered conclusively proven.

The Court: Do what now?

Mr. Emfinger: We were just talking about the stipulations, and in those stipulations we've got the stipulations of two experts. And I was just telling you that the law says that those stipulations should be considered as conclusively proven.

The Court: Right.

***

Mr. Emfinger: Right. So if we determine that this is appropriate for those experts who testified live, then we need to do something else to those stipulations.

Mr. Rushing: I would change it up to say the experts who testified live, just add language in here somewhere to differentiate between the stipulated experts and the testifying experts.

Mr. Emfinger: Let's see if we can come up with something that resolves that.

****

The Court: Or "except those stipulated to by the parties which are deemed conclusively proven." So you want to pass it to see–is there

---

[4]The parties stipulated to forensic testimony that the blood spatter on the co-defendant's shoe was that of the victim and that the ballistics expert would state that the bullet fragment was consistent with the caliber of the alleged murder weapon.

something about the wording of this you've got a problem with?"

But on the following morning after court had recessed for the day the following discussion took place as it regarded D-10:

Mr. Emfinger: Judge, I submitted an instruction this morning that is S-6. I was trying to find some authority to give an instruction as to expert testimony, and that instruction that I submitted as S-6 comes of Jones versus State, 918 So. 2d 1220, a 2005 Mississippi Supreme Court case. I basically took that language in that case.

Mr. Rushing: Your Honor, I'm going to object to S-6, primarily because I think that D-10 actually covers this. What he is adding in here is just about expert education and experience. D-10 says experts may testify and derive from their knowledge. However, you may give–giving the ultimate weight to the expert testimony is a question to be determined by you, and as to the weight of it that you think it should properly receive.

****

Mr. Rushing: We were discussing D-10, and S-6 is just a cumulative matter of D-10

The Court: Where is the authority for D-10?

Mr. Rushing: The only question we had about D-10 was about the stipulation. That was the objection to D-10 was just the stipulation, and we agreed to put the "except as those being stipulated by the parties" at the end. I didn't know that D-10 was actually up for discussion this morning. I thought we resolved that yesterday.

Mr. Emfinger: Actually we didn't, Judge. Actually I asked for the authority to give them an instruction as it relates to expert testimony. Assuming that if such an instruction would be appropriate, I said I was concerned about how we would handle an instruction worked like D-10 in light of the stipulations that we've got in

there with the expert witnesses. So actually what I said, Judge, was that I wanted to see some authority for the Court to instruct the jury relative to expert opinions and how they should wiegh that . And then further we need to address if an instruction like this I given, what we were going to do concerning the experts that testified live and the experts that testified by stipulation.

Mr. Rushing: No, Your Honor, I don't remember it that way. I remember that the issue we actually had with D-10 was how are we going to address it in the terms of the stipulated–

***

The Court: My question is, and it's hard for me up here when I'm just seeing these things for the first time here in the last few minutes, what's the difference between D-10 and S-6?

Mr. Emfinger: The S-6 instruction is talking to them about the expert opinion and whether or not you should believe it. The S-6 from the case says in addition to give it such weight, it says "If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you should decide that the reasons given support of the opinion are not should or that the opinion are outweighed by other evidence, the you may disregard that opinion entirely," So the S-6 instruction is telling them how according to that court they should consider and expert's testimony. Here its's just saying you're just deciding whether or not you think it's education or lack of experience or other reasons outweigh.

The Court: Let me do this. Do you have the case that support S-6. And Mr. Rushing, do you have the case that supports D-10.

Mr. Rushing: Your Honor, I don't have the case that supports D-10 because there was a misunderstanding with me. I thought the reason why we were setting this aside was just to deal with the stipulation part.

The Court: Are you telling me you've submitted jury instructions and you don't have the authorities with you?

Mr. Rushing: Not this one. I went to the ones that we had issues with, and I didn't think that we had an issue with this one, that it was just dealing with the stipulation.

***

Mr. Emfinger: Your Honor, I'm wondering–while I was researching, I'm wondering if that instruction is not in someway with the change in rules and with Daubert, that's why that instruction is drafted as it is.

Mr. Rushing: Your Honor, the difference is he added a sentence in there about education, and here is "you can give it such weight as you think it's entitled to receive." It's the same thing. It's just merely restating what D-10 states.

***

The Court: D-10 is going to be refused. S-6 will be given.

As this Court can obviously see from the record, the discussion regarding D-10 changed from simply adding language to address the stipulated testimony, to discussion on Daubert. However, what needs to be pointed out specifically is that issue of the stipulations were never addressed. S-6 reads:

> "You will recall that individuals have testified as experts in this case. You should considcr cach expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, of if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence then you may disregard the opinion entirely."

The overriding issue with the substitution of this instruction is that instead of allowing the jurors to simply weigh the testimony of each expert and give it weight they think it

deserves, it instructs them in part that they may disregard expert testimony because of education and experience. This is crucial because this trial rested heavily on the testimony of the video experts. The Defendant's expert was a professional photographer and videographer who had done consulting work that was mostly civil. The State's expert worked for NASA.[5] By being allowed to substitute the instructions, the State was able to suggest to the jury that Dampier's expert's testimony could be disregarded because of training and experience. However, still, there was no mention of how to handle the expert stipulations. The trial court abused it's discretion in denying D-10 and substituting if for S-6, causing the jury to not be properly instructed.

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING ONLY ONE JURY INSTRUCTION

The trial court denied all but one of the Dampier's jury instructions, while at the same time granting every instruction submitted by the State, including S-5 which was submitted after all of defenses instructions were denied. The only instruction granted to the Defendant was D-1 which stated,"Because Deandre Dampier need not prove anything to you, he has a constitutional right not to testify. No presumption of guilt may be raised, and no inference of any kind may be drawn from the fact that Deandre Dampier did not testify." D-1

Defendant's instruction 6 was denied. This instruction went to the sufficiency of the

---

[5]The trial centered around the identification of the two stolen vehicles. The vehicles were seen passing by a store neighboring the crime scene. The State's theory was that the vehicles only passed the store once. The defense theory was that it passed twice. The identification of the vehicles was subjected to the experts opinions.

evidence. It stated, "A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge." D-4. Because there was discussion about the last sentence of the instruction it was passed until the following morning. [T. 613].

On the next morning, the Defense offered this instruction in it's place, "The Court instructs the jury that a reasonable doubt may arise from the whole of the evidence, the conflict of the evidence, the lack of evidence, or the insufficiency of the evidence; but however it arises, if it arises, it is your sworn duty to find Deandre Dampier Not Guilty."

The trial court asked for authority for offering there new instruction, Defendant pointed out that the instruction ... "was a Mississippi Model Jury instruction," the trial judge stated that the model instructions "leaves a lot to be desired."[T.631][6]

At the end of the day, the Defendant was only granted **one** of the eleven jury instructions offered.

"The standard of review for reviewing challenges to jury instructions is as follows: "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found."

---

[6] The trial court had asked for authority for D-6 instruction. Defense counsel responded that the instruction was from the model jury instructions. D-6 stated that "a reasonable doubt may arise from the whole of the evidence, lack of evidence, or insufficient evidence..." at [T.631-632]. The instruction was refused.

Coleman v. State, 697 So.2d 777, 782 (Miss.1997) ." The court did not properly instruct the jury. They were allowed to consider inference testimony as it relates to the possession of the a vehicle but did not allowed an instruction that explains the burden regarding inferences. The trial court also failed to properly instruct the jury in that it stated that an experts testimony can be disregarded based on education and experience, while denying the instruction which discussed the weight of the testimony.

VII. WHETHER THE COMMENTS BY THE PROSECUTOR IN CLOSING ARGUMENT WAS PLAIN ERROR?

In closing argument, the Prosecutor made this assumption:

> So I suspect that sometime that afternoon, whenever they came back up from Magee, Clarissa, Jermaine, and Deandre to Tamesha's apartment, and Clarissa and Jermaine went back south, I suspect if they had not done it before, that there was a conversation that "I'm going to say you were over there, and I'll say I drove the Toyota over here and you weren't even involved, Tamesha. I'll just say I drove the Mustang. That gets you off the scene and takes me off the scene while the man is being killed. I'll say we don't know nothing about it. Okay? Is that the defense? Well, we have something to prove that that's a lie." [T.656].

Furthermore, in rebuttal, the State made the following comment, "is there the possibility that they were giving Clarissa that Jeep to satisfy her to keep here from going to the police?" [T.681]..."That paperwork wasn't going anywhere. He was trying his best to calm down Clarissa so that she wouldn't go to the police right then." [T. 689]

Neither comments made by the prosecutor had any basis in the record. The prosecutor injected his own personal view of the set of circumstances. The comments went beyond a reasonable inference.

"The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State,* 777 So.2d 659, 661 (Miss.2001).

The Defendant expects the State to argue that a timely objection was not lodged and therefore he is barred from a raising this issue for appeal. However , this comment was plain error. There was no evidence supporting this conclusion, or making the inference. This Court has stated that a "conviction should be reversed despite the fact that he did not object at trial pursuant to *Williams v. State,* 445 So.2d 798, 810 (Miss.1984), in which this Court stated that improper remarks by a prosecutor warrant reversal even without a defense objection when there is a "most extreme and intolerable abuse of his privilege." *Brown v. State*, 907 So.2d 336, 341 (Miss. 2005).

A contemporaneous objection must be made in order for this Court to consider claims of improper or erroneous comments by a prosecuting attorney during closing arguments or the objection is waived. *Lanier v. State,* 533 So.2d 473, 478 (Miss.1988); *Livingston v. State,* 525 So.2d 1300, 1307 (Miss.1988). Although, "if a comment is so inflammatory that the trial court should have objected on his own motion, the point may be considered." *Livingston,* 525 So.2d at 1307.

The comment made by the prosecutor was without any foundation at all. It was

"The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State,* 777 So.2d 659, 661 (Miss.2001).

The Defendant expects the State to argue that a timely objection was not lodged and therefore he is barred from a raising this issue for appeal. However, this comment was plain error. There was no evidence supporting this conclusion, or making the inference. This Court has stated that a "conviction should be reversed despite the fact that he did not object at trial pursuant to *Williams v. State,* 445 So.2d 798, 810 (Miss.1984), in which this Court stated that improper remarks by a prosecutor warrant reversal even without a defense objection when there is a "most extreme and intolerable abuse of his privilege." *Brown v State*, 907 So.2d 336, 341 (Miss. 2005).

A contemporaneous objection must be made in order for this Court to consider claims of improper or erroneous comments by a prosecuting attorney during closing arguments or the objection is waived. *Lanier v. State,* 533 So.2d 473, 478 (Miss.1988); *Livingston v. State,* 525 So.2d 1300, 1307 (Miss.1988). Although, "if a comment is so inflammatory that the trial court should have objected on his own motion, the point may be considered." *Livingston,* 525 So.2d at 1307.

The comment made by the prosecutor was without any foundation at all. It was

completely made for the sole purpose of inflaming the sentiments of the jury. It had no basis in facts presented at trial. While the defendant did not make an objection at trial, the comments were so outrageous that the trial court should have objected on its own motion. Because the comment was so inflammatory, this case should be reversed.

VIII. CONCLUSION

The conviction of DeAndre Dampier should be reversed. The Defendant was denied his Constitutional right to fair trial by a fair an impartial jury. There was only one African-American in the venire, which was not a fair representation of the county.

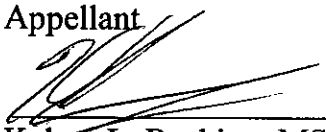
The lower court committed reversible error in denying Defendant's lessor included instruction. There was sufficient evidence in the record that a reasonable jury could infer that DeAndre Dampier was guilty of count less than capital murder.

The lower court committed reversible error in allowing the State inference instruction to be given to the jury, while denying the Defendant's instruction on the weight of inferences.

The lower court committed reversible error in allowing gruesome photos the are overly prejudicial and without probative value to be submitted before the jury.

For the above reasons, DeAndre Dampier, pray this Court reverse his conviction of capital murder.

Respectfully submitted,
DeAndre Dampier
Appellant



Kelsey L. Rushing, MSB[redacted]
Ramel L. Cotton, MSB#

Smith, Rushing, Cotton & Robinson, PLLC
P. O. Box 9366
Jackson, MS 39286

CERTIFICATE OF SERVICE

This is to certify that I, Kelsey L. Rushing, Attorney for Appellant, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal Service, first class postage prepaid, to Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205.

This, the 9th day of April, 2007.

Kelsey L. Rushing
Smith, Rushing, Cotton & Robinson, PLLC
P. O. Box 9366
Jackson, MS 39286