IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ASHANTE NEWBERRY — APPELLANT

VS. — NO. 2007-KA-00875

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF DESOTO COUNTY

# BRIEF OF APPELLANT

ASHANTEE NEWBERRY

ORAL ARGUMENT IS REQUESTED

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STATE OF MISSISSIPPI — APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. Those representations are made in order that Justice of this Court may evaluate possible disqualifications or recusal.

1. Ashante Newberry (Defendant/Appellant)
2. Honorable Robert P. Chamberlin (Trial Judge)
3. Honorable Celeste Wilson (District Attorney)
4. Honorable Charlie Maris (Attorney General)

John M. Colette, MSB #6376, Attorney of Record for Ashantee Newberry

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## STATEMENT REGARDING ORAL ARGUMENT

Your appellant believes oral argument would be helpful to the Court in this case due to the unusual rulings below and facts herein.

## STATEMENT OF THE ISSUES

I. WHETHER THE STATE'S PURPOSEFUL EXCLUSION OF BLACK JURORS VIOLATED BATSON V. KENTUCKY AND THEREBY DENIED YOUR DEFENDANT A FAIR TRIAL?

II. WHETHER THE STATE VIOLATED YOUR DEFENDANT'S RIGHTS BY GOING INTO "OTHER" BAD ACTS NOT CHARGED IN THE INDICTMENT?

III. WHETHER THE STATE DENIED YOUR DEFENDANT A FAIR TRIAL BY IMPROPER COMMENTS, REMARKS, OPINIONS, AND BELIEFS IN ITS CLOSING ARGUMENT?

IV. WHETHER THE COURT ABUSED ITS DISCRETION IN ALLOWING HEARSAY INTO EVIDENCE?

## STATEMENT OF THE CASE

This is an appeal out of the Circuit Court of Desoto County from a trial and conviction of your defendant herein, Ashante Newberry, after having been indicted by the Grand Jury on September 7, 2006 for conspiracy to sell and the actual sale of cocaine on December 10, 2005, pursuant to the habitual offender statute Miss. Code Ann. § 99-19-81 (1972), as amended.

Count 1 charged your defendant and an un-indicted co-conspirator with conspiracy to sell cocaine, pursuant to Miss. Code Ann. § 97-1-1(A) (1972), as amended; and in Count 2, with the sale of cocaine on December 10, 2005, pursuant to Miss. Code Ann. §§ 41-29-147 and 99-19-81 (1972), as amended, due to defendant's two (2) prior convictions, for which he served over one (1) year in jail.

Prior to trial, the defense filed a Motion in Limine to prohibit the State from getting into his prior convictions, unless or until a Peterson hearing was held. The judge "granted" that Motion and informed the State to advise the court before going into those matters.

Jury selection began on April 26, 2007 with the defense raising a Batson issue, but, said "objection" was denied by the trial judge, finding that no "prima facie" case was proven by the defense.

Trial began that same day with the State calling three (3) witnesses, to-wit: (1) Agent Danny Williams; (2) his supervisor, Lt. Degan; and (3) the crime lab expert. Thereafter, the defense called two (2) witnesses, (the defendant's aunt and his mother).

After all testimony, both sides rested and the Court instructed the jury.

Closing arguments were held and the jury retired at 4:53 p.m. to deliberate and returned twenty-two (22) minutes later with a guilty verdict.

Defense counsel filed his Motion for New Trial and for Judgment Notwithstanding the Verdict (R.3/248-250), however, both were denied. (R.3/251).

Sentencing was held and your defendant received a sentence of sixty (60) years imprisonment and a one-thousand dollar ($1,000.00) fine. (R.3/251-275).

It is from this trial and sentence this appeal was filed.

## FACTS OF THE CASE

Prior to trial, the court held a hearing as to whether or not he should find the defendant in contempt for failing to appear as required. (R.2/3-6) Even after informing the court that the reason he didn't appear was because he was incarcerated (R.2/4), the judge found him in contempt anyway and sentenced him to four (4) days in jail, with credit for the four (4) days he was incarcerated. (R.2/5).

Next, a hearing to revoke his bond was held and bond was revoked. (R.2/9-19). After these hearings, jury selection began.

During the initial questioning by the court, two (2) jurors indicated they knew A.D.A.'s in that office and in-fact, juror number 22 stated that Ms. Brewer (ADA) had been her attorney. (R.2/27). The judge then asked for any jurors who were related to law-enforcement and at least seven (7) indicated they were, however, no follow up questions were asked. (R.2/32-33). Both sides were then allowed to conduct voir dire and the court met with the attorneys thereafter. (R.2/33-61). The court then announced which jurors it felt had to be excused for cause (R.2/65-66) without objection, and asked both parties if they had any additional cause challenges.

Your defendant challenged juror number 22, because ADA Brewer (who was employed in the D.A.'s office, but, not actually conducting the trial) had represented her about twenty (20) years ago. (R.2/67). The court "denied" that challenge.

After that, the defense alerted the judge to the potential for a Batson issue before selection began and stated that they only had thirty (30) potential jurors show up, and that only three (3) were African-American, which was the race of your defendant. (R.2/68-69).

Also, for the record, it appears that two (2) additional African American potential jurors had shown up late, and defense counsel requested that, due to the situation, they should be placed on the panel. (R.2/69-70). The court stated they had about 10% minorities available (3 out of 10) and he saw no need to move any member on the panel. (R.2/70-71), nor would he seat the late jurors!

Despite this concern, the State immediately struck two (2) jurors whom the defense perceived to be minorities (Juror 60 and 69) and raised a Batson challenge, (R.2/72), pointing out also that neither had made any responses during voir dire.

The court,first stated that Juror 60 appeared to be Oriental, but, that Juror 69 was a black female. (R.2/72)

The State said she'd explain, but the court stopped her and made the following finding, to-wit:

> **By The Court**:..... First, let me note...I don't know the decent of Juror No. 60 or the ancestry. I assume him to be of Asian descent...Sixty-nine obviously is a black female...I will note that of eight jurors we're talking about two (2) strikes so far, that with the right to reserve coming back to it after we have addressed any further strikes and issues, as to the issue of a prima facie case of racially motivated strikes, I will find that burden has not been met by the Defendant, but, as is my requirement for the record, I will, of course, require the State to state their race neutral reasons for the strike. (R.2/73-74).

The State claimed that because Juror No. 60 was an IT specialist and since they didn't have any audio or video...he might look at that negatively (R.2/74), and that according to her talking with ADA Brewer, this juror asked a lot of questions on a different panel. The defense argued that during this voir dire, Juror No. 60 made no response. (R.2/75). The court said it had no further ruling because he had found no prima facie case.

With regard to Juror No. 69, the State claimed she only lived in the County for twenty-two (22) months, whereby the defense stated there were no requirements to live in the County for a specific period of time, as long as your domicile is there. (R.2/76).

The State goes further and states, to-wit:

> **By Ms. Wilson:**..... Well, I wanted—I mean, I may not be able to do it, but, she also made no eye contact with me when I got up to speak, but, I was hoping, you know, somebody with a vested interest might be on the jury. (R.2/77).

The court reiterated its position, that he found no prima facie case. (R.2/77).

The selection process continued and a jury was seated, however, before opening statements, the defense re-raised the Motion in Limine regarding the defendant's prior conviction (R.2/82), and the judge took the motion "under advisement. (R.2/84).

Trial began with the State calling Agent Danny Wilkey, who testified he worked at the Desoto County Metro Narcotics Department for the past three (3) years and did undercover work. He further stated that on December 10, 2005, he received a call from Lt. Degan, his supervisor about meeting an informant (Ronnie Tunstall) and going out to try to and buy some drugs from 65 La Bauve St. (R.2/97-100).

Agent Wilkey and the informant walked up to the door and were met by an unknown black male. (R.2/101-102). They went inside to the kitchen and saw three (3) white males and another black male. (R.2/102). The unidentified black male asked the agent to follow him into

the living room and handed him some pills (R.2/104), then pulled out some crack rocks and handed them to the agent for $100.00. Thereafter, your defendant allegedly came in and gave the agent a clear plastic bag of what he felt was cocaine powder for $100.00 (R.2/106), the agent never charged anyone for the "crack" sale, only the defendant for the sale of powder. (R.2/110-111).

On cross-examination the defense asked if it was on December 10, 2005 or December 15, 2005 that the agent dealt with your defendant. (R.2/111). After this, he inquired about a December 14, 2005 report to which the State objected.

The State claimed this December 14, 2005 date was not an error, but, another case they had pending against your defendant, not charged in the indictment herein, and that they now should be allowed to go into this matter claiming the defense "opened the door." (R.2/114-115). After argument the judge said he wasn't going to have a "mini-trial" on that issue and that the agent didn't have to respond any further. (R.2/116-122).

The State then called Lt. Degan, who stated he was the supervisor of the DeSoto County Metro Narcotics Department and that he monitored the December 10, 2005 deal. He further stated that the "wire" they had on the agent quit working so he called him on his cell phone and heard two (2) male voices and what they were saying. (R.3/144-153). Defense counsel objected to "hearsay" and the court "overruled" said objection. (R.3/147).

Thereafter, Mr. Erik Frazure from the Mississippi Crime Lab testified as to Exhibit 2, being 2.9 grams of cocaine. (R.3/154-160).

The State rested (R.3/160) and the defense moved for a directed verdict, which was denied. (R.3/161-162).

The defense called the defendant's aunt, Ms. Millon and his mother as alibi witnesses then rested. (R.3/166-198)(R.3/202-203).

The court instructed the jury on the law, then both sides conducted closing arguments (R.3/220-225)(R.3/236-238).

The jury retired at 4:53 p.m. (R.3/239) and reached a guilty verdict at 5:15 p.m.

Your defendant filed and argued his Motion for New Trial and Judgment Notwithstanding the Verdict, both of which were denied. (R.3/248-251).

Sentencing was held and your defendant received a prison term of sixty (60) years and a one-thousand dollar ($1000.00) fine.

## SUMMARY OF THE ARGUMENT

It is well settled that a defendant need not be given a perfect trial, only a fair one, however, what happened below was not "fair" by any stretch of the imagination!

If there were ever a case of starting out on the wrong foot and finishing with both feet kicked out from underneath you, your defendant's trial surely qualifies. Defendant Newberry's day started with being held in contempt by the trial judge, for not appearing in court when he was supposed to appear, despite his being incarcerated. And that was just the beginning of what could be described as a *tragedy of errors*, resulting in your defendant being sentenced to serve sixty (60) years in prison.

First, your defendant raised a potential Batson claim as a result of the State using two peremptory challenges on minorities. After erroneously ruling that your defendant had not made a prima facie case sufficient to support the Batson claim, the court decided to go ahead and ask the State to give their race-neutral reasons for striking the minorities from the panel. After the

reasons were given, which are arguably not reasons at all, the trial court failed to follow the Batson procedure as required by This Court, by failing to make on-the-record factual findings as to the merits of the State's proffered race-neutral reasons. The State's challenges were allowed by the court.

Because your defendant feels that a prima facie case was made, showing that the State had used race as a basis for their peremptory challenges, reversible error was committed by the trial court. Notwithstanding the issue regarding whether a prima facie case was made or not made, pursuant to Mississippi precedent, at a minimum your defendant's case should be remanded so that the trial court can make on-the-record factual findings as to the merits of each of the State's proffered race-neutral reasons.

Second, reversible error was committed by the trial court by allowing evidence into the record of two other "bad acts" of your defendant that were not charged in the original indictment. The State's undercover agent was allowed to testify, over objection, that he had met with the defendant on two other occasions, and the agent's description of these two meetings inferred to the jury that these encounters were hardly friendly in nature, and were in fact two other drug deals in addition to the one alleged in the indictment!

Third, numerous improper comments, remarks, opinions and beliefs of the prosecutor were allowed in the State's closing which served to prejudice the defendant to such an extent that the outcome of the case was influenced by same. The prosecutor, on several occasions, imparted to the jury her conclusion that her witness was credible and that the defendant's witnesses were not credible. Your defendant's case relied heavily, if not solely, on the jury not giving credibility to the State's evidence that he was present at the drug sale involved in the instant case, and further that his alibi witnesses were credible. Therefore, reversible error was committed because

the guilty verdict is a clear indicator that the jury was influenced by the prosecutor's improper influencing of the jury's determination of what testimony they should deem credible, and what testimony they should deem not credible.

Fourth, and finally, inadmissible hearsay testimony of one of the State's witnesses bolstering the testimony of another State witness was allowed into evidence; and thus the jury's independence in determining which testimony to give credibility to was tainted to such a degree that it prejudiced your defendant.

All your defendant wanted was a "fair trial," and he did not receive one below, therefore your defendant respectfully requests that the final judgment in his case be reversed.

## ARGUMENT

I. WHETHER THE STATE'S PURPOSEFUL EXCLUSION OF BLACK JURORS VIOLATED BATSON V. KENTUCKY AND THEREBY DENIED YOUR DEFENDANT A FAIR TRIAL?

The United States Supreme Court just ruled by a 7-2 vote, that a prosecutor cannot exclude jurors from serving on a jury because of their race! Snyder v. Louisiana, 128 S.Ct 1203, 1212 (2008). Furthermore, the Justices seem to direct that lower Courts closely examine the reasons given for excusing potential jurors when racial motives may be present but, not acknowledged!

In the case below, it's clear from the record, that you have an African-American defendant and thirty (30) potential jurors showing up for jury duty, with only three (3) of which (10%) were African-American[1]. This fact was pointed out to the trial judge before the actual selection process occurred [2].

Despite this concern, the State struck what the defense felt were two (2) minority jurors, in its initial strikes and raised a Batson v. Kentucky [3], issue.

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[1] Counsel notes there were at least two (2) additional African-American jurors who appeared late, but, were not seated with the panel nor allowed to be selected.

[2] Counsel submits the record isn't clear as to counsel's desire to either move the existing jurors on the panel or add the late jurors.

[3] Batson v. Kentucky, 476 U.S. 79 (1986).

The court, however, utilized a "modified" procedure below and ruled that the defense had not made a "prima facie" showing, but, required, as was his policy, for the State to proffer its purported race neutral reasons on the record, anyway.

Counsel submits the court erred here in at least two (2) respects, to-wit:

(A) Error—in court's purported ruling that he found no "prima facie" showing by the defense.

Both the United States Supreme Court and the Mississippi Supreme Court have ruled that the Constitution forbids striking even a single prospective juror for a discriminatory purpose. Snyder at 1208; McGee v. State, 953 So. 2d 211, 215 (Miss. 2007).

In addition, the trial court deviated from the rule concerning Batson challenges finding that the defendant had not made a prima facie showing, which is clearly erroneous.

A consistent pattern is not a necessary predicate for an Equal Protection Clause violation. Village of Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252, 266 (1977).

(B) Error—in court not making a "specific" on-the-record factual determination of the merits of the reasons cited by the State for its use of peremptory challenges against potential jurors. Walker v. State, 815 So. 2d 1209, 1215 (Miss. 2002), quoting Hatten v. State, 628 So. 2d 294, 298 (Miss. 1993).

Here, since requested by the court, the prosecutor was required to give a clear and reasonably specific explanation of her alleged legitimate reasons for the strikes. Miller-El v. Dretke, 545 U.S. 231, 239 (2005).

Once a defendant shows that he is a member of a cognizable racial group and that the State has exercised a peremptory challenge to remove from the venire persons of the defendant's race, an inference arises that the prosecutor has used that practice to exclude the venire men from

the petit jury on account of their race. Walker at 1214; *See also* Pearson v. State, 746 So. 2d 867 (Miss. 1998); Conerly v. State, 544 So. 2d 1370 (Miss. 1989). The record below clearly shows your defendant was a member of a cognizable racial group (African American male) and one of the challenged juror was also a member of that group (African American female).

Regarding the other minority struck, an inference may be raised that the prosecutor has used peremptory challenges in order to strike minorities, even if those struck are not of the same race of the defendant. Puckett v. State, 737 So. 2d 322, 334 (Miss. 1999) citing Bush v. State, 585 So. 2d 1262, 1267-8 (Miss. 1991) and Powers v. Ohio, 499 U.S. 400 (1991).

Despite the above, the judge found no "prima facie" case, but, as previously stated, required reasons from the Sate anyway, and counsel submits once he installed that requirement, the focus shifts to the validity of the proffered reasons and his findings therein, which was not done below. (Why make a record with no ruling?)

However, the court below made no ruling and/or factual determination whatsoever as to the reasons proffered.

In the case at hand, no clear and reasonably specific explanation was offered as to why the black female juror was struck. The prosecution said, well, she's only lived in the County for twenty-two (22) months, and well, I'm not sure I can do it...but, she didn't make eye-contact. (R.2/76).

Counsel submits that as this Court stated in similar cases, "...even if that explanation is considered "clear and reasonably specific" (which we submit it is not), the trial court had a "duty", to make an on-the-record, factual determination, of the merits of the reason cited by the State. Walker at 1214; Hatten at 298.

In addition, based on the record your defendant submits that the trial judge, did in fact, at least as to one (1) juror, make a ruling on the race-neutral explanation where he says, to-wit:

> **BY THE COURT:** "I have no further ruling because I've noted that with the right to revisit the issue, there's no prima facie...However, ...Is a legitimate reason, and I will note..."

In Brawner v. State, 872 So.2d.1, 9 (Miss. 2004) this Court stated, to-wit:

> Where a trial judge finds that there is no prima facie showing...but, then allows the opposite party to make a record...the trial judge must ensure that the record is complete by allowing rebuttal and by making specific, on-the-record factual judges for each strike as required by Hatten.

Counsel feels that the burden has been met to make a prima facie case that the prosecution made race-based peremptory challenges, which is basis for reversal, Snyder v. Louisiana. However, notwithstanding that position, this Court has held that where, as in the instant case, the trial court fails to make on-the-record factual findings after race-neutral reasons are offered by the State, **even if no prima facie case has been made**, remand is required so that the trial court can make on-the-record factual findings as to the merits of the race-neutral reasons given. Puckett at 337.

II. WHETHER THE STATE VIOLATED YOUR DEFENDANT'S RIGHTS BY GOING INTO "OTHER" BAD ACTS NOT CHARGED IN THE INDICTMENT BELOW?

Before the trial began, the defense filed a Motion in Limine asking that the State be prohibited from getting into the defendant's prior convictions for drug charges, especially since this was a drug case. The court, after hearing arguments and agreement by the State not to get into it, unless, identity was an issue and/or unless the defense opened-the-door, agreed and granted the Motion.

This position taken by the State may be somewhat misleading because (A) they knew there was another, unknown black male who actually sold the "crack" to Agent Wilkey, at the same address, to the same agent on the same day; and (B) your defendant claimed alibi, in that, he was in Memphis according to his mother and aunt, so to say OK, unless identity is an issue is misleading.

The other issue the Court needs to be aware of is that the State in its discovery apparently provided the defense with not only relevant discovery in this case, but also discovery in another (later) case they made against your defendant. (December 14, 2005 and December 20, 2005).

Furthermore, it's clear in the record that without a hearsay response Agent Wilkey did not know who the defendant was on December 10, 2005 as is seen in the following, to-wit:

Q: Okay, and who was—do you know who that was that was standing in the kitchen?

A: I know now!

Q: Okay. Who is that?

A: Ashante Newberry

Obviously, based on that response, "I know now," it's clear the agent learned of the defendant's identity later than the December 10, 2005 date.

On cross-examination, the defense asked the agent if the incident happened on December 15th or December 10, to which the Agent said December 10, 2005, and the next question was, to-wit:

Q: Okay. And that was the only day that—that was the day you dealt with who you say was Ashante Newberry, right? (R.2/111-112).

A: I dealt with him that one day, yes, Sir.

Q: And that began—you said you talked to him on the phone?

A: No, Sir, I didn't talk with him on the phone that day.

Other questions as to what happened that day were asked about amounts and quantity then he showed the witness Agent Henning's report and asked, to-wit:

Q: All right. Correct me if I'm wrong. Doesn't that report say on December 14, 2005, Agent Danny Wilkey called Ashante Newberry? Doesn't it say that?

A: Yes, Sir, it does, but, this is the wrong case file number. (R.2/113)

The State "objected" and the court excused the jury to take up the matter.

This perceived error could have been corrected, if it needed to be at all, without the State going into other drug sales.

The State argued that she instructed the Agent not to mention anything about any other sales that came up, ...however, that the door had been opened by defense...regarding the December 14, being at 65 LeBauve Street because Agent Wilkey...did purchase narcotics from this defendant, twice at that location and at a motel...so there are three (3) total buys.....(R.2/114).

The court asked if the State provided that report and she said they had, but, not in this case...it was a subsequent case. (R.2/115)...and that it just doesn't apply to this case we're here on today! (R.2/117).

The defense said, based on the agent's response, since it's not in this case—he won't ask anymore about it. (R.2/118). The State disagreed and wanted to go into it in more detail. (R.2/119).

Confronted with this problem, the court says, to-wit:

**BY THE COURT**: That's obviously an exhibit that's not going to the jury...And I will note that based on the court's prior ruling...I am not going to allow a separate mini-trial on the issue of what this is all about, I think the defense has absolutely opened the door...to allow Officer Wilkey explain where there was a later date on the report...That will be done...during Ms. Wilson's redirect...will be limited...but we're not going into the whole in-depth explanation. That part would not be fair to Mr. Newberry...so I'm not going to require any response. (R.2/120-121).

Further, the judge says...I would certainly ask Ms. Wilson, if she feels that we're going to find our self in tenuous grounds to stop and approach the bench so we can deal with it. (R.2/122). That should have been the end of it, but, wasn't.

Despite that warning, the State stayed in and plowed those "tenuous grounds" extensively on redirect and even in closing arguments. (R.3/220).

Counsel submits that this matter, of new charges, was not covered earlier nor raised in any Motion in Limine, nor similar Motion, and the confusion is apparent, when the State asked, to-wit:

**BY MS. WILSON**: So it's okay for Agent Wilkey to testify as to why there was a different report number on the 14th and you know...

**BY THE COURT**: Yes, Ma'am.

However, despite this ruling and comments about fairness, the State goes into the December 14, 2005 undercover operation and even another deal on December 20, 2005 that never came up, until elected by the State!

On redirect, one of the first questions was, "When did you see him again?", and the Agent, despite hearing what the judge said, responds, I saw him on the 14th of December and also on the 20th of December, 2005. (R.3/139-141).

When the Agent was asked by the State if he could see the defendant's face on the other two occasions, the descriptions of the encounters given by the Agent clearly indicated to the jury that the December 14 and December 20 encounters were undercover drug operations. (R.3/139-141).

Generally an appellate court applies an "abuse of discretion" standard when reviewing a trial court's ruling on a matter of evidence, Brown v. State, 970 So. 2d 1300, 1307 (Miss. App. 2007), but, there is an inquiry as to whether the trial court employed the proper procedure and/or standard as to the admissibility of this additional drug sales on December 14, 2005 and December 20, 2005.

This was an abuse of discretion to allow the State to raise the inference to the jury that the Agent made additional buys after December 10, 2005, as there was no other reason for the agent to come in contact with the defendant.

Under the "totality of circumstances," it's clear from the record, especially with the prosecutor going into detail as to how long the agent saw the defendant on December 14, 2005 and December 20, 2005, that the "inference" was he was selling drugs on these occasions. There was no evidence of any other reason, in-fact, his testimony on direct was that at the December 10, 2005 sale, the Agent requested and got defendant's cell phone number!

Mississippi Rule of Evidence 404(b) prohibits admission of evidence of other crimes, wrongs, or acts in order to show that the defendant acted in conformity therewith

This Court has consistently held the admission of evidence of unrelated crimes to show that the defendant acted in conformity thereby is reversible error. Palmer v. State, 939 So.2d.792, 795 (Miss. 2006), but, the mere fact that the trial court committed an error in an evidentiary ruling does not by itself warrant reversal, unless it affected a substantial right of the defendant.

Jackson v. State, 645 So. 2d 921 (Miss. 1994); Newsome v. State, 629 So. 2d 611 (Miss. 1993); and Hanson v. State, 592 So. 2d 114 (Miss. 1991).

In the case below, your defendant submits it was error to allow the State to continue questioning the Agent about "subsequent" meetings with the defendant, and that the court failed and refused to do, that which the Rules required him to do. Even if in a remote fashion the State was attempting to prove "identity", the court was required, despite its statement that he wasn't going to allow a "mini trial"...to do just that, to a degree.

If arguably, this matter comes under a M.R.E. Rule 404(B) exception, then the court should have conducted a M.R.E. Rule 403 "balancing test" before admitting the damaging evidence, and this it did not do. White v. State, 842 So. 2d 565, 574 (Miss. 2003); Smith v. State, 656 So. 2d 95, 100 (Miss. 1995).

This Court has held that whenever M.R.E. 404 (B) evidence is offered and there is an objection which is overruled, the objection shall be deemed an invocation of the right to a M.R.E. 403 balancing analysis. Palmer at 795; *See also* Brown at 330.

You can call it a "mini trial" or not, but, a balancing analysis was required and not done, therefore, due to not complying with the Rules, it was error, on the record herein, to allow that continued testimony and use in closing arguments by the State below requiring reversal.

III. WHETHER THE STATE DENIED YOUR DEFENDANT A FAIR TRIAL BY IMPROPER COMMENTS, REMARKS, OPINIONS, AND BELIEFS IN ITS CLOSING ARGUMENT?

During the State's closing arguments, the prosecution repeatedly injected her opinions, beliefs and interpretations as to the credibility of her and the defense witnesses, denying your defendant a fair trial.

Furthermore, several of the statements amounted to an improper bolstering of her key witness when she stated, to-wit:

(1) "Agent Wilkey, he appeared honest! (R.3/221).

(2) "I think it's pretty good the Agent could identify him." (R.2/238).

However, with regard to the defense witnesses (your defendant's mother and aunt), she said this, to-wit:

(3) "I will tell you that I listened to the alibi witnesses just like you did, and I had some questions after they got off the stand" (R.3/222-223).

Your defendant submits that's improper and if she had any questions, she should have asked these witnesses on cross-examination, not wait and argue to the jury about it.

Also, she continuously stated, I found it interesting (R.3/224); I sincerely believe (R.3/236); I imagine he changed clothes (R.3/237). These were all improper.

On appeal this Court reviews the propriety of closing arguments with discretion to the trial court. Stevens v. State, 806 So. 2d 1031, 1057 (Miss. 2001).

When, as in the instant case, a prosecutor has made an impermissible comment, this Court requires a showing of prejudice to warrant reversal. Ormond v. State, 599 So. 2d 951, 961 (Miss. 1992). Where a prosecutor has made an improper argument, the question on appeal is whether

the natural and probable effect of the improper argument creates an unjust prejudice against the accused resulting in a decision influenced by the prejudice so created. Wells v. State, 698 So. 2d 497, 507 (Miss. 1997) *citing* Davis v. State, 530 So. 2d 694, 701 (Miss. 1988).

Your defendant believes that the prosecutor's impermissible comments to the jury did create an unjust prejudice against the accused resulting in a decision influenced by that prejudice. Instead of allowing the jury, as the fact finder, to determine what testimony to give credibility to, the prosecutor chose to tell the jury what testimony to give credibility to by telling them that witnesses for the state were credible, and that the witnesses for the defendant were not credible.

It is obvious that the jury's decision was influenced by the prosecutor's prejudice from the resulting guilty verdict and your defendant submits that reversal is required, especially in light of the fact that your defendant's case basically hinged upon whether the jury would give credibility to his two alibi witnesses, or give credibility to the undercover agent's testimony that he had identified the defendant at the time of the drug sale.

## IV. WHETHER THE COURT ABUSED ITS DISCRETION IN ALLOWING HEARSAY INOT EVIDENCE?

Your defendant submits that in addition to all of the foregoing issues, the court erred in allowing "hearsay" into evidence without any possible exception and/or justification, thereby, further denying him a "fair trial."

During the direct examination of Lt. Degan, he stated that his role was to monitor the drug deal, by a wire, but, for some unknown reason, the wire quit working when the agent entered the residence. (R.3/145-146). Therefore, Lt. Degan called Agent Wilkey on his cell phone and asked Agent Wilkey to keep his phone activated so he (Degan) could hear what was

going on, ...mainly listening to see if there was any form of distress from the undercover, (R.3/146), but, he begins to also testify about hearing two (2) male voices...and the context of the conversation, to which the defendant "objected" claiming hearsay. (R.3/147). The State responds, to-wit:

> **BY MS. WILSON**: Your Honor, I think he can tell what he listened to. It's nothing Agent Wilkey hasn't already testified to.
>
> **BY THE COURT**: You may proceed. I'll note at this point the objection is overruled...(R.3/147).

Thereafter, the court allowed Lt. Degan to testify about what these two (2) males allegedly said, despite repeated objection. (R.3/147-149).

Your defendant submits that the prosecutors "opinion" that the Lt. could tell what he listened to is not nor ever has been an exception to the hearsay rule. Furthermore, there was no foundation for same as apparently Lt. Degan never said he'd heard the defendant speak before, nor that he could recognize his voice. Furthermore, the mere fact that Lt. Degan seems to be saying what his Agent (Wilkey) already testified to doesn't help either.

This Court, as with most all other issues involving evidence, reviews a trial court's decision regarding the admission of evidence for abuses of discretion. Burton v. State, 875 So. 2d 1120, 1122 (Miss. App. 2004). An abuse of discretion, and thus reversible error, will be found if a party shows clear prejudice resulting from an undue lack of constraint on the opposing party. *Id.*

In the instant case, clear prejudice, and thus reversible error, against your defendant resulted from the trial court's lack of constraint exhibited by allowing the State to offer the hearsay testimony into evidence. The hearsay evidence served to bolster Agent Wilkey's

testimony that your defendant was present at the time of the sale, and thus tainted the independence of the jury to decide whether Agent Wilkey's testimony regarding his identification of your defendant was credible or not.

## CONCLUSION

It is well settled that a defendant need not be given a perfect trial, only a fair one, however, what happened below was not "fair" by any stretch of the imagination!

Defendant Newberry's day started with being held in contempt by the trial judge, for not appearing in court when he was supposed to appear, despite his being incarcerated; then his bond was revoked; then he went to trial where a black female juror was struck by the State, for no other reason than her race, hearsay evidence admitted, and testimony about "other" crimes presented, all of which resulted in an eventual sixty (60) year jail sentence!

Clearly under the unique facts below, after being advised of a potential Batson issue, the court elected to go forward, not seat/qualify the additional African American jurors who showed up late and not even rule or make findings on the State's purported race-neutral reasons as to why they struck these jurors. [1]

Couple that problem with the admissibility of the "other bad act" testimony from Agent Wilkey about seeing the defendant on December 14, 2005, and December 20, 2005, in addition to the deal on December 10, 2005 that was the only matter charged in the indictment, and the "hearsay" testimony from Lt. Degan, the defendant was denied a fair trial.

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[1] Counsel notes that the Desoto County Circuit Clerk's office has indicated that there were at least two (2) African-Americans on the jury panel seated to hear the trial.

Lastly, to allow the prosecutor to inject her beliefs, her opinions, and her views as to the credibility of both her and the defense's witnesses and to argue the December 14, 2005 and December 20, 2005 dates in closing, require reversal of the conviction and sentence below.

All you defendant wanted was a "fair trial" and he did not receive one below, therefore your defendant respectfully requests that the final judgment in his case be reversed.

Respectfully submitted:

ASHANTE NEWBERRY

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