

**IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI**

**CASE NO. 2007-KA-01079-COA**

**LISA ANN MOSELY  
DEFENDANT/APPELLANT**

**VS.**

**STATE OF MISSISSIPPI  
APPELLEE**

---

**APPEAL FROM THE CIRCUIT COURT  
OF  
TIPPAH COUNTY, MISSISSIPPI**

---

**APPELLANT'S REPLY BRIEF**

---

**ORAL ARGUMENT REQUESTED**

**DAVID G. HILL, MS BAR NO [REDACTED]  
HILL & MINYARD, P.A.  
1210 OFFICE PARK DRIVE, 3<sup>RD</sup> FLOOR  
POST OFFICE BOX 429  
OXFORD, MS 38655-0429  
(662) 234-4315**

I.

TABLE OF CONTENTS

|      |   |    |
|------|---|----|
| I.   | TABLE OF CONTENTS .....   | i  |
| II.  | TABLE OF CASES, STATUTES AND OTHER AUTHORITIES .....  | ii |
| III. | STATEMENT OF THE ISSUES .....   | 1  |
| IV.  | SUMMARY OF THE ARGUMENT .....   | 2  |
|      | A.    THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT<br>A CONVICTION OF THE DEFENDANT; THEREFORE,<br>THE LOWER COURT COMMITTED ERROR BY<br>REFUSING TO GRANT DEFENDANT’S MOTION<br>FOR DIRECTED VERDICT ..... | 4  |
|      | B.    THE LOWER COURT COMMITTED REVERSIBLE<br>ERROR BY DENYING DEFENDANT’S MOTION FOR<br>CONTINUANCE REQUESTED BASED ON U.R.C.C.C.<br>9.04 DISCOVERY VIOLATIONS .....                                     | 6  |
|      | C.    THE LOWER COURT COMMITTED ERROR BY<br>OVERRULING THE DEFENSE’S OBJECTION TO<br>TESTIMONY OF MAC LOWERY AS A REBUTTAL<br>WITNESS DURING THE STATE’S CASE-IN-CHIEF .....                              | 8  |
|      | D.    THE LOWER COURT COMMITTED REVERSIBLE<br>ERROR BY DENYING THE DEFENSE’S MOTION FOR<br>MISTRIAL BASED ON THE STATE’S HIGHLY<br>IMPROPER FINAL CLOSING ARGUMENT .....                                  | 9  |
| V.   | CONCLUSION .....  | 11 |
| VI.  | CERTIFICATE OF SERVICE .....  | 13 |

## II.

### TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

#### Cases

|   |           |
|---|-----------|
| <u>Brown v. State</u> , 2006 WL 3593199 (Miss.Ct. App. 2006).....                           | 9         |
| <u>Bush v. State</u> , 895 So.2d 836 (Miss. 2005) .....                                     | 5         |
| <u>Edwards v. State</u> , 469 So.2d 68 (Miss. 1985).....                                    | 5         |
| <u>Evans v. State</u> , 725 So.2d 613 (Miss.1997).....                                      | 9         |
| <u>Hosford v. State</u> , 525 So.2d 789, 791 (Miss. 1988) .....                             | 8         |
| <u>Hunter v. State</u> , 684 So.2d 625 (Miss.1996) .....                                    | 9         |
| <u>Payton v. State</u> , 785 So.2d at 267 (Miss. 1999).....                                 | 9, 10, 11 |
| <u>People v. Liner</u> , 356 Ill.App.3d 284, 292 Ill.Dec. 838, 826 N.E.2d 1274 (2005) ..... | 10        |
| <u>Shanks v. State</u> , 951 So.2d 575 (Miss.Ct. App. 2006) .....                           | 10        |
| <u>Slaughter v. State</u> , 752 So.2d 1092, 1094 (Miss. Ct. App. 1999) .....                | 8         |
| <u>Spicer v. State</u> , 921 So.2d 292 (Miss. 2006) .....                                   | 10, 11    |
| <u>Wilcher v. State</u> , 697 So.2d 1123 (Miss.1997) .....                                  | 9         |
| <u>Williams v. State</u> , 522 So.2d 201 (Miss.1988).....                                   | 9, 10     |

#### Other Authorities

|  |                         |
|--|-------------------------|
| Mississippi Uniform Rules of<br>Circuit and County Court Rule 9.04 ..... | i, 1, 2, 3, 6, 7, 8, 12 |
|--|-------------------------|

III.

STATEMENT OF THE ISSUES

- I. The evidence was not sufficient to support a conviction of the Defendant; therefore, the lower court committed reversible error by refusing to grant the Defendant's motion for directed verdict.
- II. The lower court committed reversible error by denying the Defendant's motion for continuance requested based on U.R.C.C.C. 9.04 discovery violations.
- III. The lower court committed error by overruling the Defense's objection to testimony of Mac Lowery as a rebuttal witness during the State's case-in-chief.
- IV. The lower court committed reversible error by denying the Defense's motion for mistrial based on the State's highly improper final closing argument.

#### IV.

#### SUMMARY OF THE ARGUMENT

The defendant, Lisa Mosley, assigns four (4) errors necessitating the reversal of her conviction of sale of a controlled substance. First, the lower court committed reversible error by failing to grant Mosley's motion for directed verdict because the evidence in the case against her was insufficient to support a conviction. The test is whether, after viewing the evidence in the light most favorable to the State, any rational jury could have found the essential elements of the crime beyond a reasonable doubt.

The hidden video never showed Mosely's face or any drugs during the alleged transaction. In fact, the evidence is insufficient regarding any drug transaction at all. Also, the State's informant, Malcolm Yancy, had numerous incentives and significant opportunity to falsify his sources for his drug transactions, all of which were discussed at length in the Appellants original brief. Taking the circumstances of the transaction into account, the State's evidence was clearly insufficient and no rational jury could have found her guilty beyond a reasonable doubt; therefore, the lower court committed reversible error by denying the defense's motion for directed verdict.

Mosley's second point of error is that the lower court committed manifest error by denying the defense a continuance despite the State's substantial discovery violation of U.R.C.C.C. 9.04. The State must disclose the identity of all witnesses in chief who may testify at trial, including informants, along with any statements made by such witnesses, their criminal background, and any plea agreements. The State failed to disclose the identity and the criminal history of Malcolm Yancy, the informant and key witness in this case, which constituted a substantial discovery violation by the State.

If, after an opportunity to interview the newly discovered witness, the defense still feels prejudiced, Rule 9.04 states the court should grant a continuance. Here, the defense should have been granted a continuance after the interview for a reasonable period of time to adequately familiarize themselves with the newly identified witness and his substantial criminal history, not to mention his substantial drug addictions. Therefore, it was reversible error for the court to deny the defense's request for continuance.

Mosley's third point of error: the lower court should have sustained the defense's objection to Mac Lowery as a rebuttal witness during the State's case-in-chief. The State is required to disclose its rebuttal witnesses if their testimonies could have been introduced in the State's case-in-chief. If the State's witnesses testimony relates to the substantive evidence of the case, they are considered a witness in-chief, not rebuttal, and must be properly disclosed to the defense.

Here, the State failed to timely disclose Mac Lowery as one of its potential witnesses in-chief. Although the State argued his testimony was rebuttal in nature, they called him during their case-in-chief for purposes of eliciting substantive evidence. Therefore, it was reversible error for the lower court to allow Lowery to testify during the State's case-in-chief.

The fourth assignment of error is that the lower court should have granted the defense a mistrial based on the prosecutor's highly improper closing argument. "Send a message" comments during closing arguments have been repeatedly condemned by courts in Mississippi.

In Mosley's case, the sole thrust of the prosecutor's closing argument was to cajole or coerce a jury to reach a verdict for the purpose of meeting public favor and not based on the evidence. During his closing argument, the prosecutor continuously employed the use of a "send a message" argument and the jury's verdict finding Mosley guilty was a product of this improper influence. Therefore, Lisa Mosley submits to this Court that this assignment of error, and all

assignments previously mentioned, constituted prejudicial errors and independently, or especially in combination, warrant a reversal of her conviction.

A. THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT A CONVICTION OF THE DEFENDANT; THEREFORE, THE LOWER COURT COMMITTED ERROR BY REFUSING TO GRANT DEFENDANT'S MOTION FOR DIRECTED VERDICT.

In its brief, the State argues that the theory that Malcolm Yancy may have falsified the alleged drug transaction at issue is "ludicrous and totally unsupported by the evidence." (Appellee's Brief pg. 9). To support this claim, the State argues that the video of the alleged transaction shows Yancy purchasing drugs from Lisa Mosely, that the video shows Mosely's face several times, and Mosely handing something to Yancy "in a small clear bag to Yancy". (Appellee's Brief pg. 9). The State claims that upon viewing the video, there is no "elaborate scheme" by Yancy to falsify the alleged transaction.

First, an "elaborate scheme", as the State puts it, is not necessary to enable Yancy to falsify the source of the drugs allegedly purchased during the undercover buy, nor is the possibility that Yancy did so refuted by the video of the transaction at issue here. Also, Mosely's face is never clearly and distinctly shown on the video as the State claims, much less several times, nor is "something in a small clear bag" ever shown in the video being passed between Mosely and Yancy. In fact, the video does not reveal evidence of a drug transaction at all.

In the conversation that is cited as the drug transaction Yancy asks the individual he is visiting if he can owe her \$30 "and buy a hundred". (State's Exhibit S-2, p. 1) However, this exchange does not necessarily evidence a crack cocaine transaction. This conversation could have been about any number of things other than a cocaine buy. It is also notable that although Yancy is aware the video will be used as evidence for this undercover transaction, he never makes an explicit reference to any drugs. Nor does Yancy ever show the drugs he allegedly bought from Lisa Mosely to the camera he is wearing until after he makes two unauthorized

stops to visit two individuals not cleared or planned with the narcotics agent responsible for this supposedly “controlled” drug buy.

The State then argues there is no evidence disputing Mosely is the person in the video. The opposite is also true – there is no evidence suggesting that the person in the video *is* Mosely. While the video does somewhat show a few images of the individual Yancy is visiting, the person’s face is not completely discernable and never clearly revealed on camera. While in her presence, Yancy never calls the individual by name on the video or makes any other reference that would confirm her identity. To conclude, based on such insufficient evidence, that the individual in the video is Lisa Mosely and that a drug sale definitely took place is, to borrow the phrase from the State, “ludicrous and totally unsupported by the evidence”.

Next, the integrity of the controlled buy is questioned, not because of one specific factor alone, but because several factors surrounding the transaction combine to create such reasonable doubt as to Mosely’s guilt that reversal is warranted. On review, the Court should reverse and render when the facts and inferences drawn from the evidence, in a light most favorable to the State, “point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found, beyond a reasonable doubt, that the defendant was guilty”. Bush v. State, 895 So.2d 836, 843 (Miss. 2005) (quoting Edwards v. State, 469 So.2d 68, 70 (Miss. 1985)).

As the State points out in its brief, the officers are not required to strip search a drug informant or his automobile. This fact, along with the fact that Yancy made two unauthorized stops to known drug users and that he never showed the drugs to the camera until arriving at the post-buy meeting, after the two unauthorized stops create an undeniable *opportunity* for Malcolm Yancy to possess the surrendered drugs either prior to or after the supposed undercover buy. The other factors – that Yancy was an admitted drug user; that he received a reduced sentence for his



criminal charges for cooperating with law enforcement; that he was paid cash when he produced drugs to the officers, allowing him to support his drug habit and giving him incentive to produce drugs from some other source – all support the *likelihood* that Yancy would falsify the undercover transaction to serve his own interests.

Even if any one of these elements surrounding the undercover buy alone would not render the transaction sufficiently faulty to warrant reversal, certainly the combined effect is such that reliability and integrity are completely absent from the transaction. Even viewing the evidence in the light most favorable to the State, no reasonable jury could have found all of the elements of the crime beyond a reasonable doubt. The evidence presented was unreliable and wholly insufficient to support the verdict against Mosely and the defense's motion for directed verdict should have been granted; therefore, reversal is appropriate.

**B. THE LOWER COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S MOTION FOR CONTINUANCE REQUESTED BASED ON U.R.C.C.C. 9.04 DISCOVERY VIOLATIONS.**

When the State violates a discovery rule, the trial court should abide by the rules set out in Uniform Circuit and County Court Rule 9.04, which provides:

If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:

1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.
3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the

prosecution withdraws its efforts to introduce such evidence.

U.R.C.C.C. 9.04(I).

Although Malcolm Yancy was the State's key witness, as he was the confidential informant and only eyewitness to the alleged undercover drug buy, his identity was not disclosed to the defense until the day prior to trial. The defense then proceeded to investigate the newly discovered witness; however, nothing in Yancy's Tippah County file indicated any criminal activity prior to the drug sale for which Lisa Mosely is charged. On the morning of trial, the defense requested a continuance, which the trial court denied stating that an opportunity to interview Yancy should be sufficient to become familiar with the newly discovered witness. (TR Vol. 1 pgs. 6-12). That same afternoon, after interviewing Yancy and discovering his substantial criminal history, defense counsel again requested a continuance on the basis that the case was not ready to be defended in light of the new information; once again, the request was denied because the trial court felt the State had disclosed all required information. (TR Vol. 1 pgs. 69-74).

If Rule 9.04 is to have any meaning, the defense should be allowed a continuance for a sufficient period of time to familiarize itself with a key witness the State failed to disclose. Given the importance of the witness to the State's case and the effect his disclosure may have had on the defense's trial strategy, an interview on the morning of trial was not a reasonable time for the defense to familiarize itself with Yancy and his extensive criminal history. After interviewing Yancy, the defense felt it needed more time to investigate Yancy and his criminal history; therefore, to comply with Rule 9.04, the trial court should

have granted the defense's request for a continuance to meet this newly discovered information.

C. THE LOWER COURT COMMITTED ERROR BY OVERRULING THE DEFENSE'S OBJECTION TO TESTIMONY OF MAC LOWERY AS A REBUTTAL WITNESS DURING THE STATE'S CASE-IN-CHIEF.

Rule 9.04 requires the disclosure of the names of any rebuttal witnesses if their testimony could have been offered during the State's case-in-chief, along with any of the witness's statements. Slaughter v. State, 752 So.2d 1092, 1094 (Miss. Ct. App. 1999) (see also U.R.C.C.C. 9.04(l)). Over the defense's objections, the trial court erroneously allowed the State to call Officer Mac Lowery to testify during its case-in-chief although no pretrial disclosures had been made as to the State's intentions of calling Lowery as a witness or the substance of his potential testimony. (TR Vol. 3 pg. 238).

As stated in Mosely's opening brief, the party bearing the burden of proof must offer in its case-in-chief, all substantive evidence relating to guilt or innocence. Hosford v. State, 525 So.2d 789, 791 (Miss. 1988) (Appellant's Brief p. 18). The State admits Lowery's testimony was offered only to rebut the defense's issue of whether the undercover buy took place at Mosely's residence; therefore, since this was one of the defense's issues, Lowery's testimony consisted of substantive evidence relating to the case and the State committed a prejudicial discovery violation by not disclosing his identity as a witness and the substance of any testimony he may offer.

Mosely was prejudiced by the State's discovery violation because, according to Rule 9.04, she has a right to discover the substance of any statements made by the State's witnesses. Even if the defense can not claim complete

surprise about Lowery testifying, as the State claims in its brief, it can claim surprise as to the substance of his testimony. The defense was unaware of the substance of his testimony until immediately before he took the stand. Therefore, the defense did not have adequate time to prepare for a thorough cross-examination and Mosely was prejudiced as a result thereof.

The State's failure to disclose Mac Lowery's identity as a witness-in-chief was a prejudicial discovery violation which should have precluded the State from introducing him during their case-in-chief. The trial court committed error by allowing Lowery to testify absent disclosure and Mosely's conviction should be reversed.

**D. THE LOWER COURT COMMITTED REVERSIBLE ERROR BY DENYING THE DEFENSE'S MOTION FOR MISTRIAL BASED ON THE STATE'S HIGHLY IMPROPER FINAL CLOSING ARGUMENT.**

As set forth in the Mosely's original brief, the prosecutor made several improper comments during his final closing argument that were intended solely to appeal to the jury's emotions and were extremely prejudicial to Mosely's case. (Appellant's Original Brief, pgs. 22-24). The prosecutor's argument was clearly a "send the message argument" – rather than arguing the facts in evidence or issues presented at trial, he directed his argument to the public and their sense of responsibility for the crime.

Courts have repeatedly condemned the use of "send a message" arguments and warned prosecutors accordingly. See, e.g., Brown v. State, 2006 WL 3593199 (Miss. Ct. App. 2006); Payton v. State, 785 So.2d at 267 (Miss. 1999); Evans v. State, 725 So.2d 613, 675 (Miss.1997); Wilcher 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). The Court in Spicer v. State adopted a two-part test to determine whether the “send a message” argument will constitute reversible error. First, the Court must determine whether the remarks were improper. 921 So.2d 292, at 318 (Miss. 2006). Next, if the statements are found improper, the Court then determines whether the remarks were prejudicial to the defendant. Id.

Statements are improper when they “cajole or coerce a jury to reach a verdict for the purpose of meeting public favor and not based on the evidence”. Id. at 318. During its closing, the prosecutor should focus on the facts in evidence and not society’s crime problem “lest the remediation of society’s problems distract jurors from the awesome responsibility with which they are charged.” Id. (quoting People v. Liner, 356 Ill.App.3d 284, 297, 292 Ill.Dec. 838, 826 N.E.2d 1274, 1287(2005)). To grant reversal, the reviewing Court should determine that it is clear beyond a reasonable doubt that the jury could have found the defendant guilty, absent the prosecutor’s statements. Shanks v. State, 951 So.2d 575 (Miss.Ct. App., 2006). Accordingly, the Court in Payton v. State warns that “in the future, 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 costs of a new trial where necessary”. 785 So.2d 267, 272 (Miss. 1999).

In Mosely’s case, the prosecutor’s statements that the jurors would be the ones “to have to live with it” if they acquitted Mosely, were highly improper. He was appealing to jury’s sense of responsibility for the broad problem of crime in their community instead of arguing the facts and issues in evidence. In the brief of

the Appellee, the State admits that the prosecutor was urging the jury to keep in mind that if they acquit Mosely, "it is on their conscious". (Appellee's Brief pg. 16). This too is improper because the statement invites the jury to vote, not based on the facts and evidence with a rational mind, but on the basis that they would have a guilty conscious if they found her not guilty.

That Mosely was prejudiced by the improper comments is evidenced by the fact that the jury convicted her on the basis of such insufficient and unreliable evidence. In its closing argument, the prosecutor intentionally distracted the jurors from its weak case, and absent the comments, the jury could not have found Mosely guilty beyond a reasonable doubt.

The improper comments made by the prosecutor here exemplify the type of conduct which prosecutors often intentionally employ to incite and appeal to the jury's emotions knowing that a reviewing court will unlikely reverse the conviction. This is specifically the type of conduct that Payton warns against and Spicer and its brethren seek to eliminate. The defense's request for a mistrial should have been granted in the face of such improper conduct; therefore, Mosely respectfully requests a reversal of her conviction based on the trial court's error.

V.

#### CONCLUSION

For the reasons and authorities cited herein, Lisa Mosley respectfully submits that this Court should vacate the judgment entered below. The evidence was grossly insufficient to support Mosley's conviction; therefore, lower court abused its discretion by failing to grant a directed verdict in her favor at the close of the substantive cases-in-chief.

The lower court also abused its discretion by failing to grant defense counsel's motion for continuance in the face of an extremely prejudicial discovery violation of Rule 9.04. The State failed to timely disclose to the defense, the identity and criminal background of the key witness against Mosley, Malcolm Yancy. Additionally, the State violated Rule 9.04 again when it failed to timely disclose its intent to call Mac Lowery as a witness for their case-in-chief. These discovery violations caused substantial prejudice to the defense of Mosley's case and also warrant reversal of her conviction.

Last, the lower court erred by not failing to grant the defense's repeated requests for a mistrial based on the State's highly improper and prejudicial "send a message" argument to the jury during its closing arguments. Substantial and irreparable damage resulted when the jury returned a verdict which was unnecessarily influenced by improper comments. This error also necessitates the judgment of conviction be reversed.

Each error independently suggests reversal is necessary to alleviate the substantial injustice already suffered by Mosley from her unjust conviction, and she submits that this court should either reverse and render, or reverse and remand for a new trial.

DATED this 6th day of June, 2008.

RESPECTFULLY SUBMITTED,

MISA ANN MOSELY, Appellant/Defendant

By: 

DAVID G. HILL, MS Bar No. [REDACTED]  
HILL & MINYARD, P.A.  
Post Office Box 429  
Oxford, Mississippi 38655  
(662) 234-4315

VI.

CERTIFICATE OF SERVICE

I, David G. Hill, of Hill & Minyard, P.A., do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellant's Reply Brief by first class United States mail, postage prepaid, on the following:

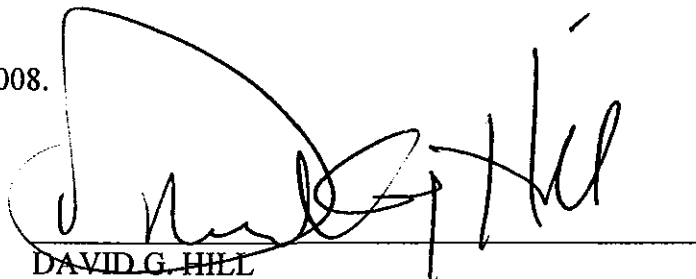
Mr. Jim Hood, Esq.  
Attorney General Office  
Post Office Box 220  
Jackson, MS 39205-0220

Honorable Henry L. Lackey  
Tippah County Circuit Court Judge  
Post Office Drawer T  
Calhoun City, MS 38916

Mr. Ben Creekmore, DA  
District Attorney's Office  
Post Office Box 1478  
Oxford, MS 38655

Mr. Kelly Luther, ADA  
District Attorney's Office  
Post Office Box 298  
New Albany, MS 38652-0298

DATED this 6<sup>th</sup> day of June, 2008.



DAVID G. HILL