

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 OPENING BRIEF

ORAL ARGUMENT REQUESTED

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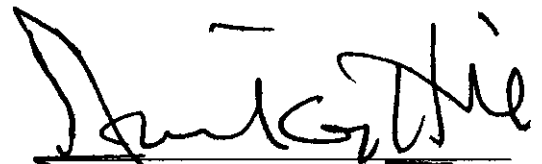
I.

CERTIFICATE OF INTERESTED PERSONS

This 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 this Court may evaluate possible disqualification or recusal.

Honorable Henry L. Lackey, trial judge
Mr. Ben Creekmore, district attorney/prosecutor
Mr. Kelly Luther, ADA, prosecutor
Ms. Lisa Mosely, defendant/appellant
David G. Hill, Esq., trial counsel/appellant's appeal counsel
David L. Minyard, Esq., trial counsel/appellant's appeal counsel

DATED this 18th day of January, 2008.

A handwritten signature in black ink, appearing to read "David G. Hill", written over a horizontal line.

David G. Hill, MS Bar No. [REDACTED]
Attorney of Record for Appellant

II.

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III.

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IV.

STATEMENT REGARDING ORAL ARGUMENT

Defendant believes that oral argument would assist the Court in reaching a just decision in this case because of the specific facts of this case and Defendant's allegation of this insufficiency to sustain a verdict for the state. Accordingly, Defendant requests that oral argument be granted.

V.

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.

VI.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This appeal proceeds from the Circuit Court of Tippah County, Mississippi, and a judgment of conviction for the crime of sale of a controlled substance. Lisa Ann Mosley was arrested on July 27, 2006, and indicted by the Tippah County Grand Jury on October 18, 2006, for violating Miss. Code Ann. §41-29-139(a), Sale of a Controlled Substance (cocaine). (RE 3). Mosley entered a plea of not guilty and proceeded to trial by jury commencing on May 8, 2007, with Honorable Henry L. Lackey, Circuit Judge, presiding. (RE 4); (TR Vol. 2 p. 5).

During the course of the trial, defense counsel made two motions for a continuance based on a discovery violation committed by the State for failing to properly identify and produce relevant information regarding Malcolm Yancy. (TR Vol. 2 p. 6-13, 70-74). The Court denied both motions. (TR Vol. 2 p. 12, 74). Also, defense counsel made two motions for directed verdict based on insufficiency of the evidence presented, both of which the Court also denied. (TR Vol. 3 p. 263-265). Lastly, during the trial, defense counsel made several motions for mistrial based on varying points of error; one specifically relating to repeated improper comments made by the prosecutor during his final closing argument. (TR Vol. 3 p. 185, 235, 263, 265, 292-296). All motions were denied by the Court. (TR Vol. 3 p. 187, 236, 264, 266, 295).

On May 10, 2007, the jury returned a verdict finding Mosley guilty as charged. (RE 6, TR Vol. 3 p. 299). The conviction resulted in imprisonment for a term of twenty (20) years in an institution, with five (5) of those years suspended upon good behavior, and post-release supervision for a period of five (5) years. (TR Vol. 3 p. 307). Mosley timely filed her Notice of Appeal of her conviction on June 19, 2007. (RE 7).

B. STATEMENT OF THE FACTS

Malcolm Yancy, an admitted crack cocaine addict, supported his addiction by fraudulently writing bad checks, which resulted in several criminal cases against him in Tippah and Union Counties. (TR Vol. 3 p. 189, 214). At some point, Yancy became involved with law enforcement as a confidential informant, assisting the facilitation of undercover drug busts. With the aid of law enforcement recommendations, Yancy received only probation for his conviction(s)¹ of the fraudulent check charges-- a total suspension of his original six (6) years prison sentence. (TR Vol. 3 p. 157, 159). Unfortunately, throughout his entire period of

¹ It is unclear from the record precisely how many charges Yancy originally had against him and how many were dropped. It is similarly unclear how many checks were actually prosecuted, resulting in conviction.

cooperation with law enforcement as a confidential informant, Yancy remained addicted to crack cocaine and even continued to write numerous bad checks to support his addiction. (TR Vol. 3 p. 194).

On March 24, 2006, law enforcement officers, Chris McCallister and Mac Lowery, had assigned Yancy to an undercover controlled drug transaction. Yancy stated he would attempt to purchase crack cocaine from Lisa Mosley. (TR Vol. 2 p. 88). The officers met Yancy at the pre-buy location at 12:26 p.m. (State's Exhibit S-4, p. 3). Yancy was given \$140 in cash-- \$40 to go towards a previously owed debt and \$100 to purchase the drugs. (TR Vol. 3 p. 197).

According to McCallister's testimony, while at the pre-buy location, the officers conducted a search of Yancy's person and vehicle, installed the hidden video and audio equipment, and instructed Yancy on his duties. (TR Vol. 2 p. 86, 87). McCallister instructed Yancy to show the drugs to the camera sometime after the purchase, and also to return to the post-buy location directly after the transaction. (TR Vol. 3 p. 155, 160). Yancy departed the pre-buy location at 12:33 p.m., approximately 7minutes after arriving. (State's Exhibit S-4, p. 3); (TR Vol. 2 p. 145).

According to the hidden video camera, Yancy walked up to someone's house and a female came to the door and let him into the house. (State's Exhibit S-2, p. 1), at approx. 8:00). The camera was not positioned well and it pointed upwards for the most part, making it difficult to discern what was happening and with whom he was speaking.

After Yancy entered, he offered the female \$40 dollars on his debt. She mumbled that he still owed her \$30, and he said "Can I owe you that, and buy a hundred?" She agreed; he counted out \$100 and found a seat in the living room. Moments later, the female reappeared and handed him something. The camera view of the alleged exchange was somehow obstructed; therefore,

the actual identity of the object(s) handed to Yancy is indeterminable. Yancy left shortly thereafter and never showed the drugs to the camera as instructed.

Despite instructions to return immediately and directly to the post-buy location, Yancy made two unauthorized stops. First, Yancy pulled his car to the side of the road to speak to someone. (State's Exhibit S-2, p. 1), (TR Vol. 3 p. 204). A female voice, later identified during testimony as Jeanie, asked, "Find out anything about my ring?" and she and Yancy engaged in a conversation about a ring for a couple minutes.

Yancy testified that Jeanie had previously given him a ring to pawn for money to purchase cocaine for her. (TR Vol. 3 p. 205). He had smoked the cocaine acquired with her ring and fabricated a story that he saw the police and threw the cocaine out of the window. (TR Vol. 3 p. 206). Yancy did not attempt to video of any part of this entire impermissible stop.

Yancy's second unauthorized detour was to his own house to talk to his wife Patty, also a crack cocaine addict. (TR Vol. 3 p. 231). He told the camera he was going to stop by his house to inform his Patty that Jeanie was on her way over. He pulled into his driveway and talked to Patty for a minute. (State's Exhibit S-2, p. 1). As with the first stop, Yancy did not adjust his body position or the camera position to enable the camera to video anything during this stop.

After his second stop, Yancy finally returned to the post-buy location. The officers arrived shortly after Yancy, at 12:58 p.m. (State's Exhibit S-4, p. 3). Yancy then showed the drugs to the camera for the first time since the alleged transaction with Mosley, and indicated the contents were five \$20 pieces of crack cocaine, costing a total of \$100 dollars. For his services as an informant, for this transaction Yancy was paid \$100 in cash. (TR Vol. 2 p. 149, Vol. 3 p. 152).

On the date of the transaction, March 24, 2006, Officer McCallister recorded surveillance notes and interestingly noted County Road 848 as the location of the transaction. (TR Vol. 2 p.

146). Malcolm Yancy never told McCallister an address of the location; McCallister claims he just mistakenly believed that Lisa Mosley lived on County Road 848. (TR Vol. 2 p. 147; TR Vol. 3 p. 161). Approximately 30 days later, McCallister used his surveillance notes to generate a report to be copied and turned into the Grand Jury. (TR Vol. 2 p. 139). Although he used his surveillance notes to generate the report, he still listed the location of the transaction on March 24, as County Road 641, as opposed to County Road 848. (TR Vol. 2 p. 141).

Finally, right before Lisa Mosley's trial began, someone brought to McCallister's attention the fact that there were discrepancies between the reports he generated and Mosley's address, which is County Road 710. (TR Vol. 2 p. 142). On the morning of the first day of trial, McCallister supplied the defense with the latest version of the report, which cites Mosley's address as the location of the incident for which she is charged. (TR Vol. 2 p. 142). It is important to note that McCallister did not follow Yancy to any of his stops that day and did not actually see where Yancy went not what Yancy did. (TR Vol. 2 pp. 137, 138).

VII.

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 State's evidence was plainly insufficient and no rational jury could have found her guilty beyond a reasonable doubt.

The State's informant, Malcolm Yancy, had numerous incentives to falsify his sources for his drug transactions: he was crack addict in legal trouble; his cooperation with law enforcement secured him a deal with the State granting him probation for his criminal convictions, in lieu of his original six (6) year prison sentence; the officers paid him in cash, which allowed him to purchase more drugs; and most importantly, he was only paid if he actually produced drugs, which is a very tempting incentive for Yancy to produce drugs to the officers, even if he must lie about their source.

In addition to incentives, Yancy also had significant opportunity to falsify his sources for his drugs transactions, as exemplified by the circumstances surrounding the transaction in this particular case: 1) The times recorded for the pre-buy meeting suggest there was very little time to conduct a search of the informant and his vehicle prior to his transaction, and certainly not sufficient time for an adequately thorough search. 2) After the alleged transaction, but before returning to the post-buy location, Yancy made two unauthorized stops, both of which were to chat with fellow crack abusers, one of whom was his own wife. 3) Yancy failed to show the drugs on camera until the actual post-buy meeting after he had made two (2) unauthorized stops; therefore, the possibility that the drugs were obtained from another source is not only reasonable, but highly probable. 4) McCallister made three reports on this transaction and each one had a different address cited as the location of the alleged transaction; this variance arouses suspicion that the "corrected" report may have been composed to conform to the evidence, namely Lisa Mosley's address. Taking all of these circumstances into account, the evidence is not sufficient to sustain a guilty verdict; therefore, the lower court should have granted the defense's motion for directed verdict, and failure to do so constitutes reversible error.

Mosley's second assignment 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. Since the defense made a proper Rule 9.04 request for such discovery (RE 5), the State's failure to comply constituted a substantial discovery violation.

The lower court allowed the defense to interview Yancy the morning of trial, but the defense still felt unduly prejudiced because they did not have reasonably sufficient time to prepare for cross-examination of such an important witness. If, after an opportunity to interview the newly discovered witness, the defense still feels unduly prejudiced, Rule 9.04 states the court should grant a continuance in the interest of justice. Here, the defense should have been granted a continuance for a reasonable period of time to adequately familiarize themselves with the newly identified witness, Malcolm Yancy. Therefore, it was prejudicial error for the court to deny the defense's request for continuance, and warrants reversal.

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. As the party with the burden of proof, the State is required to bring forward all of its substantive evidence in its case-in-chief. Therefore, if the State's witness's 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 because the State committed a highly prejudicial discovery violation by failing to properly disclose him to the defense.

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. A proper closing argument for the State sums up the facts and evidence presented at trial which the State contends would support a guilty verdict. Also, the trial judge should intervene when the prosecutor departs entirely from the evidence of the case and the sole purpose of his closing argument is to inflame the jury's passions and prejudices.

In Mosley's case, the prosecutor's sole purpose of his closing argument was to unduly influence and inflame the jury. For example, when he invited the jury to write down names of people who they thought could be a confidential informant, besides "the Mike Yancy's of the world," he was improperly influencing the jury to feel as if they should overlook the State's lack of sufficient evidence because there is no one else to do the job.

He continuously exceeded the bounds of a proper closing argument. His sole strategy was to improperly appeal to the jury's emotions. The jury's verdict finding Mosley guilty was a product of this highly improper influence. The defense made several objections and motions for new trial, to no avail. Therefore, the defendant, Lisa Ann 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.

VIII.

ARGUMENT

- 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.

The lower court erred in denying both of Mosley's motions for directed verdict because the State did not present evidence sufficient to allow a verdict finding Mosley guilty beyond a reasonable doubt. When a defendant appeals an overruled motion for directed verdict, he is challenging the sufficiency of the evidence. Pratt v. State, 870 So.2d 1241, 1246 (Miss. Ct. App. 2004) (quoting Noe v. State, 616 So.2d 298, 302 (Miss. 1993)). If there is insufficient evidence to support a guilty verdict, a motion for directed verdict must be sustained. Smith v. State, 646 So.2d 538, 542 (Miss. 1994).

When considering whether the evidence is sufficient to sustain a conviction in the face of directed verdict, the relevant question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". Bush v. State, 895 So.2d 836, 843 (Miss. 2005) (citing Jackson v. Virginia, 443 US 307, 315 (1979)). On review, all evidence supporting the verdict must be accepted as true, and the State must be given the benefit of all reasonable inferences that could be drawn from the evidence. Bell v. State, 910 So.2d 640, 646 (Miss. Ct. App. 2005). Should these facts and inferences considered "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, then the reviewing court should reverse and render. Bush v. State, 895 So.2d 836, 843 (Miss. 2005) (quoting Edwards v. State, 469 So.2d 68, 70 (Miss. 1985)).

The standard of proof in criminal cases is extremely important. In criminal cases, our law requires proof beyond a reasonable doubt because, "more so than in any other setting, we find conviction of the innocent intolerable". Ashford v. State, 583 So.2d 1279, 1281 (Miss. 1991). Unfortunately, while upholding this standard, the guilty may be set free. Id. at 1281. "The point for the moment is that we must enforce the standard consistently lest we enhance the risk the constitutional mandate seeks to avoid, namely, conviction of the innocent. Id. at 1282.

Lisa Mosley was charged with the sale of controlled substances under Mississippi Code §41-29-139(a), which would require the jury to examine all of the evidence and determine whether the drugs that Malcolm Yancy eventually produced to Officer McCallister were, in fact, sold to him by Lisa Mosley. The evidence produced at trial was plainly insufficient to convict Lisa Mosley of the sale of cocaine, and no reasonable jury could have been convinced, beyond a reasonable doubt, that she was guilty.

First, the paid informant in this case, Malcolm Yancy, had ample incentive to lie to the officers about from whom and where he got the drugs which he produced to them. Yancy was an admitted crack addict and had numerous criminal cases in at least two counties against him for bad checks. (TR Vol. 3 p. 214). Upon law enforcement recommendation, he only received probation as punishment for these offenses, as opposed to his initial six (6) year prison sentence. (TR Vol. 3 p. 157).

However, even during Yancy's cooperation with law enforcement, he admitted to continuing to using crack and writing bad checks. (TR Vol. 3 p. 194). He was paid cash money, in this case \$100, for his cooperation, and he was only paid if he was able to produce narcotics to the officers at the "post-buy" meeting. (TR Vol. 3 p. 152, 158). According to Yancy, the agreement was "to purchase crack cocaine from whoever they designated". (TR. Vol. 3 p. 192). To be clear, not only did Yancy receive a reduction in his punishment for his continuing bad

check offenses, he was able to support his crack addiction with the cash he received, as long as he was able to produce the drugs. It is clear Yancy had significant incentive to return to the post-buy meeting with drugs, regardless of where and how he came across them. And how likely is it that Yancy was going to actually deliver up his personal sources of crack cocaine?

Also, in addition to Yancy's significant incentives to lie to the officers about his receipt of drugs, the circumstances surrounding this particular "controlled" transaction were unreliable, at best. First, there is no evidence other than McCallister and Yancy's testimonies that a search was conducted of Yancy's person and vehicle prior to his departure. Furthermore, according to McCallister's surveillance notes, they arrived at the pre-buy location at 12:26 p.m. and the time of departure was 12:33 p.m. (State's Exhibit S-3, p. 2). During this seven (7) minutes, allegedly Yancy's person and vehicle were supposedly searched, he was wired with audio and video equipment, and he was instructed on his duties. (TR Vol. 2 p. 86, 87). It is unrealistic to believe all of these procedures were accomplished in such a short amount of time. In fact, most likely there was a very limited search conducted, or no search at all.

The importance of the search of an informant prior to a transaction is to assure that the drugs produced by the informant are actually fruits of the controlled purchase. Without an adequate search, there is an unchecked possibility that Yancy already had drugs in his possession and he did not buy them from Lisa Mosley. Yancy was a continuing user the entire time he was working as a confidential informant and had ready access to cocaine from other sources. Therefore, a search of Yancy's person and vehicle is essential for the controlled transaction to be credible.

Next, Yancy made two unauthorized stops before finally returning to the post-buy location, ignoring McCallister's instructions to immediately return after the transaction. Even more importantly, Yancy admitted the two people he stopped to talk to were fellow crack

addicts; one, his wife, and the other, a woman with whom he had previous drug transactions. (TR Vol. 3 p. 231). Yet, Yancy makes no effort to ensure the camera captures any of this activity in order to guarantee the integrity of his supposed previous transaction with Mosley. Therefore, no one knows precisely what happened during these two stops.

Yancy could have reasonably gotten the drugs from either of these two people, or both. The possibilities of what may have transpired during the stops are infinite. But the fact that there exists a reasonable alternative possibility is what drives a stake through the heart of the transaction's credibility... not Yancy's veracity. These two unauthorized stops alone, given the circumstances, should have rendered the transaction faulty. Any reliance on its result is unreasonable and impractical.

Additionally, although instructed by McCallister to show the drugs to the camera after purchase, Yancy does not do so until arriving at the post-buy meeting at the very end. (TR Vol. 2 p. 106). There would have been little question about the appropriateness of the unauthorized stops had he displayed the drugs on camera prior to leaving the alleged transaction with the person the State claims to be Lisa Mosley. Performing this small task would have, at minimum, been evidence that the drugs were received at the time before the unauthorized stops and not later. However, his failure to do so reinforces the reasonable doubt that the drugs were not actually purchased from Lisa Mosley.

All of these circumstances combined – Malcolm Yancy's incentives to create a false transaction, the lack of evidence of a search his person and vehicle, the two unauthorized stops to visit with known crack addicts, no display of drugs on camera until the post-buy meeting - absolutely overthrow the integrity of this "controlled" transaction and permits inexcusable distortion in, or falsification of, the accuracy of the results, and defines this supposed undercover drug operation as uncontrolled or as completely out of control.

Last, there were several reports introduced that all contained a different address as the location of the transaction on March 24. First, Officer McCallister's surveillance notes, which were taken during the alleged transaction, indicate the location was County Road 848, although he admits Yancy did not tell him a county road number. (State's Exhibit S-3, p. 2); (TR Vol. 2 p. 147). Thirty or so days later, McCallister generated an official report from the surveillance notes; yet this report cites County Road 641 as the location for some reason. (TR Vol. 2 p. 140-141). Finally, on the first day of trial, the defense was given another report, which McCallister stated was a "corrected version" which indicates the location of the transaction was County Road 710. (TR Vol. 2 p. 142).

McCallister first reported County Road 848, then 641, then 710, but neither McCallister nor Mac Lowrey actually saw where Yancy went, for the supposed transaction nor the unauthorized stops. In addition, McCallister conducted no independent surveillance of Yancy's location to vouch for his truthfulness. All of the conflicting documents, at the least, present a question of whether Officer McCallister generated the "corrected" report in order to conform to Lisa Mosley's actual address, all of which was disclosed to the defense on the morning of trial. Moreover, the documents should create considerable doubt as to the location of the transaction and the identity of the person Yancy actually visited.

The only evidence presented by the State was a video of the transaction and Chris McCallister and Malcolm Yancy's testimonies. Even presuming the female on the video is Lisa Mosley, Yancy never comes out and requests any drugs. He tells the female he's giving her \$40 to pay down a prior debt, leaving him with \$30 left on the debt. Then he asks, "Can I owe you that and buy a hundred?"

There are never any drugs shown on the video. Granted, there is some type of an exchange; but it may or may not have been drugs. This shortfall could have been ameliorated had

Yancy shown the fruits of the alleged transaction to the camera after leaving. The State fully relies on Yancy's testimony that he did in fact purchase drugs from Lisa Mosley. Given the surrounding circumstances of the transaction previously mentioned and Yancy's undeniable incentives to produce drugs regardless of their source, the evidence is undeniably insufficient for reasonable jurors to find Lisa Mosley guilty beyond a reasonable doubt.

Even if there is evidence pointing to a defendant's guilt, "it matters not that the defendant may be guilty or even that he is probably guilty... the law demands that no jury may convict unless the defendant be guilty beyond a reasonable doubt". Ashford v. State, 583 So.2d 1279, 1282 (Miss. 1991). (See Murphy v. State, 566 So.2d 1201, 1206 (Miss. 1990); Hemphill v. State, 304 So.2d 654, 655-56 (Miss. 1974); Matula v. State, 220 So.2d 833, 836 (Miss. 1969)).

An informant with a motive and opportunity to lie, a "controlled" transaction gone irrefutably awry, and blatant inconsistencies in reports regarding the location of the transaction, are some just some of the elements that suggest the evidence in this particular case is fatally deficient. Even viewing the evidence in a light favorable to the State, the facts and inferences point strongly in favor of not just reasonable doubt, but undeniable doubt, of Lisa Mosley's guilt. Reasonable jurors could not have justly convicted Mosley. The evidence presented was wholly insufficient to support the verdict and Mosley's motion for directed verdict should have been granted by the trial judge; 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.

It was an abuse of discretion for the lower court to deny defense counsel's request for a continuance based on the State's prejudicial discovery violations. According to Uniform Circuit and County Court Rule 9.04(A), "the prosecution must disclose to each defendant or to defendant's attorney... the existence of which is known or by the exercise of due diligence may

become known to the prosecution... 1. Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statement made by such witness". Rule 9.04(A) also states that the court may require other discovery to the defense attorney, upon showing how the discovery is material to the preparation of the defense. U.R.C.C.C. 9.04.

Next, Rule 9.04(B)(2) states that an informant's identity must be disclosed if "the confidential informant is to be produced at a hearing or trial... or... the informant was or depicts himself/herself as an eyewitness to the event or events constituting the charge against the defendant". U.R.C.C.C. 9.04(B)(2).

The Mississippi Supreme Court has stated if a confidential informant is an eyewitness to the crime for which the defendant is charged, then the informant is a material witness and the State is required to identify the witness, upon the defense's request. Bradley v. State, 562 So.2d 1276, 1279 (Miss. 1990) (citing Middlebrook v. State, 555 So.2d 1009, 1010 (Miss. 1990); Pinkney v. State, 538 So.2d 329, 348 (Miss. 1988); Arnett v. State, 532 So.2d 1003, 1008 (Miss. 1988); Breckenridge v. State, 472 So.2d 373, 377 (Miss. 1985)). Furthermore, where disclosure of the identity of an informant is required, the State has the burden to make a good faith effort to disclose all information in its possession, including the informant's location. Barrett v. State, 482 So.2d 239, 240 (Miss. 1986) (citing Copeland v. State, 423 So.2d 1333 (Miss. 1982)).

The defense was never provided the name of the State's informant and key witness, Malcolm Yancy. On November 27, 2006, the defense made a Rule 9.04 request for discovery. (RE 10). Prior to trial, the defense learned through independent investigation, the name "Mike Yancy", as being the name of the informant in the video. Defense counsel then attempted to investigate the witness under that name, to no avail. Finally, late afternoon the day before trial,

defense finally learned from the State that the name of the State's key witness was "Malcolm", not "Mike". (TR Vol. 2 p. 7).

Upon questioning that afternoon, the State told the defense that Yancy's cooperative relationship with law enforcement stemmed from a conviction for writing bad checks, for which Yancy received probation. (TR Vol. 2 p. 7). Defense located Yancy's Tippah County criminal file; however, there was nothing in the file indicating any criminal activity prior to the incident with which Lisa Mosley is charged.

On the morning of the trial, defense counsel requested a continuance on the basis that he had learned the name of the informant only the day before and review of his file failed to disclose any criminal activity predating the incident with Mosley. (TR Vol. 2 p. 6-12). The lower court denied defense counsel's request for continuance, stating that an opportunity to interview Yancy should be sufficient. (TR Vol. 2 p. 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. (TR Vol. 2 p. 69-74). The State admitted it was not aware Yancy's correct name was Malcolm, and not Mike. (TR Vol. 2 p. 72). The lower court denied defense counsel's request stating that the State had disclosed all the information they were required to disclose. (TR Vol. 2 p. 74). However, the defense is entitled to all relevant and pertinent information regarding Yancy's charges, his deal with the State, and his disposition for impeachment purposes, under Brady v. Maryland, and Hentz v. State. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Hentz v. State, 489 So.2d 1386 (Miss. 1986).

Because the defendant made a Rule 9.04 discovery request, the State was required to disclose the confidential informant's identity. Although the State claims it, too, was unaware of Yancy's correct name, this information was easily obtainable with a good faith effort. In fact,

according to Harper v. State, an officer's knowledge will be imputed to the prosecutor, regardless of the good or bad faith of the prosecutor. Harper, 853 So.2d 1286 (Miss. Ct. App. 2003) (citing State v. Blenden 748 So.2d 77 (Miss. 1999)). Therefore, the State committed a substantial discovery violation by not only failing to identify Malcolm Yancy until late in the afternoon the day prior to trial, by failing to give full disclosure of his legal problems and his deal with the State.

When the State violates the rules of discovery, the trial court should abide by the rules set out in Box v. State, which is now reflected in Rule 9.04. McCullough v. State, 750 So.2d 1212, 1217 (Miss. 1999); Box v. State, 437 So.2d 19, 23-24 (Miss. 1983); Powell v. State, 925 So.2d 878, 881 (Miss. Ct. App. 2005). In McCullough, the Mississippi Supreme Court held that failure to follow the Box guidelines is prejudicial error, requiring reversal and remand. McCullough, 750 So.2d at 1217.

Following are the procedures for trial courts to follow when faced with a discovery violation, as set out in Rule 9.04:

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).

The State's discovery violation was prejudicial to the defense because Malcolm Yancy was the key witness in the case against Mosley, and, had information about the witness been timely discovered, the defense may have altered its trial strategy accordingly and certainly would have intensified the cross-examination preparation of Yancy. Had Yancy's identity been timely disclosed as requested by the defense, there would have been no need for a continuance. The defense should have been allowed time to become familiar with the previously undisclosed witness and his criminal background, and the defense could have prepared for a much more thorough cross-examination of this key witness. Therefore, the trial court committed reversible error by not allowing the defense a continuance in the face of the State's extremely prejudicial discovery violation.

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.

Uniform Circuit and County Court Rule 9.04 requires the disclosure of the names and address of all of the witnesses for the State's case-in-chief, along with any statements of the witnesses, oral, written, or otherwise. U.R.C.C.C. 9.04(1). In other words, Rule 9.04 requires disclosure of rebuttal witnesses if their testimony could have been offered during the State's case-in-chief. Slaughter v. State, 752 So.2d 1092, 1094 (Miss. Ct. App. 1999). The party bearing the burden of proof must offer all substantive evidence relating to guilt or innocence in its case-in-chief. Hosford v. State, 525 So.2d 789, 791 (Miss. 1988). Additionally, when a rebuttal witness's identity is known before trial and the substance of the testimony could have been introduced in the State's case-in-chief, the Mississippi Supreme Court has held it is error to allow the witness to testify. Slaughter, 752 So.2d at 1094 (citing Nicholson v. State, 704 So.2d 81, 88 (Miss. 1997)).

Despite objections by the defense, the trial court erroneously allowed the State to call Mac Lowery to testify during its case-in-chief. The basis for the defense's objection was that the State had made no pretrial disclosures regarding their intentions of calling Lowery as a witness to testify, nor were any of his statements disclosed. (TR Vol. 3 p. 238). Lowery never made any sort of statement as a potential witness prior to trial and the defense did not receive any notice as to the substance of his potential testimony.

After the objection, the State argued the purpose of Lowery's testimony was to provide "rebuttal-type information" regarding the defense's cross-examination of Officer McCallister on the issue of whether the residence shown on the video was Lisa Mosley's residence on County Road 710. (TR Vol. 3 p. 240). However, the State had ample opportunity on redirect of McCallister to address this particular issue, and in fact did so:

Q: Based on your observation of the tape, where did that transaction take place at?

A: County Road 710.

Q: In whose house?

A: Lisa Mosley's.

(TR Vol. 3 p. 181).

Subsequent to the quoted exchange above, the defense requested to re-cross McCallister on his definitive statement that the transaction took place at Mosley's house on County Road 710. (TR Vol. 3 p. 182-183). The Court denied his request stating that to allow the defense to re-cross McCallister "would not be fair to the State". (TR Vol. 3 p. 183-184).

The State asserted that a specific focus of Lowery's testimony was to testify to the location and address of Mosley's residence on July 27, 2006, when he arrested her for the charge

at issue². (TR Vol. 3 p. 242, 252). Aside from the fact that the location and address of Mosley's arrest in July is irrelevant regarding whether she was present there on March 24, the location and address of her residence, by the State's own acknowledgment³, was one of the defense's issues, therefore Lowery's testimony consisted of substantive evidence relating to the case.

Mac Lowery's testimony was not rebuttal evidence. The location of the place of the supposed transaction and Lisa Mosley's address are matters of affirmative proof properly brought in-chief. According to Rule 9.04 and state law, Lowery should be considered one of the State's witnesses in their case-in-chief and his name as a witness, and any statements made by him, should have been disclosed to the defense at their request. The State's failure to properly disclose him constituted a material discovery violation.

The defense was prejudiced by this violation because, as with Yancy, a timely disclosure of Lowery may have altered the defense's trial strategy. The defense has a right to know the substance of any statements made by the State's witnesses. As it was, the defense was unaware of the substance of Lowery's testimony until immediately before he took the stand. Therefore, the defense did not have adequate time to prepare for a thorough cross-examination of the witness.

Moreover, the State's proffered purpose for introducing Lowery as a witness was most likely a pretense. The State's explanation that Lowery would testify "in nature of rebuttal" as to the defense's cross-examination of McCallister is questionable since the State had the opportunity during redirect to sufficiently address the issues.

What is evident is that the effect of the testimony was to bolster the previous witnesses' testimonies regarding the location of the transaction on March 24, 2006; and, quite frankly, these

² It should be noted that Lowery's testimony, which the lower court admitted, related to the same issues for which the defense requested re-cross of McCallister, and was denied.

³ (TR Vol. 3 p. 241-242).

witnesses' testimonies certainly needed bolstering. One witness, the informant, was hardly believable and the other witness had no first-hand knowledge of the location. Additionally, there were three separate documents introduced at trial, all indicating different County Road numbers as the location of the transaction. Obviously, the true purpose for calling Lowery as a witness was so the State could straighten out the messy location issue that should have been straightened out with the previous witnesses.

Regardless of the purpose of introducing Lowery, the State had a duty, pursuant to the defense's discovery request, to identify him prior to trial as a potential witness in-chief and disclose any statements made by him in that capacity. The State's failure to do so was a material and prejudicial discovery violation of Rule 9.04 and should have precluded the State from introducing him during their case-in-chief. The trial court committed substantial reversible error by allowing Mac Lowery to testify as a witness for the State without the proper disclosures.

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.

The purpose of a closing argument is to sum up the evidence and facts of the case presented by the State, which the State contends, would render a guilty verdict proper. Clemons v. State, 320 So.2d 368, 371 (Miss. 1975) (citing Welch v. State, 114 Miss. 708, 75 So. 548 (Miss. 1917)). In a criminal case, when the attorney departs entirely from the evidence in his arguments or makes statements with the sole intent to excite passion and prejudice in the jury, the trial judge should intervene to prevent unfair argument. Clemons at 372. Prosecutors can not use tactics "which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury". Bailey v. State, 952 So.2d 225, 231 (Miss. Ct. App. 2006) (citing Sheppard v. State, 777 So.2d 659, 661 (Miss. 2000)).

Whether a comment by an attorney during closing argument is so prejudicial that a new trial should be granted is within the sound discretion of the trial court. Henton v. State, 752 So.2d 406, 409 (Miss. 1999) (quoting Harvey v. State, 666 So.2d 798, 801 (Miss. 1995)). The applicable test 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 prejudice”. Henton at 409. Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the party, the party’s attorneys, or someone acting at the behest of the party or the party’s attorney, resulting in substantial and irreparable prejudice to the movant’s case. U.R.C.C.C. 3.12.

In this case, 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 Lisa Mosley’s case.

Closing by the State

BY MR. LUTHER:

I’m going to lay this sheet of paper here, and if any of y’all know of anybody, yourselves or family members or friends, that can do Mike Yancy’s job, I wish and appreciate y’all writing their name and number down.

BY MR. HILL: Your honor, I don’t believe that’s proper legal argument, and I object to it.

BY THE COURT: Overruled. You may continue.

BY MR. LUTHER: (Continuing)

If you know somebody. I know I’ve got an old buddy that works at the factory. He don’t use cocaine. He’s not a cocaine addict, but I bet he could buy it up like crazy and come up here and submit his self to cross-examination and the other things, the fear and the threat and the worries and all those things that go along with being a confidential informant. If you know somebody, write that name down.

(TR Vol. 3 p. 292-293)

The defense objected again and the judge overruled the objection, noting the defense had a continuing objection. The prosecutor kept going in much the same manner and a few moments later, he stated:

BY MR. LUTHER:

Some people say, Why are we here? Cocaine should be legal. If you legalize the stuff, it wouldn't be any problem. It's a victimless crime. I submit to you it's not a victimless crime. We're producing Mike Yancy's everyday, and each and every one of you will see the victim in this case all your life.

(TR Vol. 3 p. 294)

The defense objected and asked for a mistrial based on the extremely prejudicial nature of the comments. The judge overruled and the prosecutor kept going:

BY MR. LUTHER:

When we get through with this case, I'm going to get in my car and go back to Pontotoc. Mr. Creekmore is going to go back to New Albany. Mr. and Mr. Minyard are going to go back to Oxford, and y'all are going to be here and y'all are going to be the stopping point. The buck stops with y'all. I submit to you if you believe she committed this offense beyond a reasonable doubt, then you should vote her guilty; and if you believe she committed this offense beyond a reasonable doubt and you don't vote her guilty, you will be the ones left to deal with it.

(TR Vol. 3 p. 295)

The defense objected once again stating the comment was highly improper and prejudicial, and asked for a mistrial. The judge overruled once again. Afterwards, the prosecutor made another comment to the effect that the jurors would be the ones "to have to live with it," if they found Mosley not guilty, despite believing beyond a reasonable doubt that she was guilty.

(TR Vol. 3 p. 296). The judge never once admonished the jury to disregard the comments or did anything to correct the problem.

The prosecutor considerably exceeded the bounds of a proper closing argument. First, by inviting the jury to think of someone they knew who would be willing to work as a confidential

informant, he implied that, even though Malcolm Yancy may not be credible, nor his controlled transaction legally sufficient, the jury should blindly trust his testimony and the results of the transaction. He essentially implied that, because no one other than drug addicts will perform the task of confidential informants due to the dangerous nature of the job, the jury should just accept that the evidence is sometimes imperfect or insufficient because the "Mike Yancy's of the world" are the best they are going to get⁴.

He did not argue any facts in evidence, or issues that were presented at trial, but improperly tried to embitter the jury's sense of responsibility for Tippah County's copious drug problem. He intentionally provoked the jury into returning a guilty verdict by suggesting that if they found Mosley not guilty, they are permitting the drug problems in Tippah County to continue and they, as community members, will inevitably be left alone to deal with them.

The prosecutor's continuous efforts to inflame the jury during closing arguments were highly improper and prejudicial. His comments were reasonably calculated to unduly influence the jury by appealing to their emotions and sense of duty to protect their community. The prosecutor did not argue the facts or issues of the case. He did not help the jury apply the rules of law to the facts or issues. He effectively led the jury to believe that Lisa Mosley's guilt can be proven without regard to the facts and evidence presented during trial, because they - as responsible community members - have no other choice.

As Sumrall v. State put it, "the hideous nature of the drug traffic has aroused public feeling against pushers and dealers. But vigorous prosecution does not require, and fairness does not permit, that one charged with an offense in this area shall be loaded with prejudicial irrelevances". Sumrall, 272 So.2d 917, 919 (Miss. 1973). In Lisa Mosley's case, the only natural

⁴ "Until such time as I get my list there and get to use it, the State of Mississippi, the Tippah County Sheriff's Department will continue and be forced to continue to use the Mike Yancy's of the world[.]" (TR Vol. 3 p. 293).

and probable effect of the prosecutor's improper closing argument was to create a jury so tainted that Mosley suffered substantial and irreparable damage to her case. It was reversible error for the trial court to deny the defense's motion for mistrial because "the commendable zeal of the District Attorney to convict those he believes guilty must never be allowed to blind either him or the courts to the necessity of affording to every man a fair trial". Id. at 919. Therefore, the defendant respectfully requests a reversal of her conviction.

IX.

CONCLUSION

Lisa Mosley respectfully submits that based on the authorities cited herein, 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 and 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 prosecutor's continuous efforts to inflame the jury. Substantial and irreparable damage resulted when the jury returned a verdict which was unnecessarily influenced by prejudice. 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 18th day of January, 2008.

RESPECTFULLY SUBMITTED,

LISA ANN MOSELY, Appellant/Defendant

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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 Opening Brief by first class United States mail, postage prepaid, on the following:

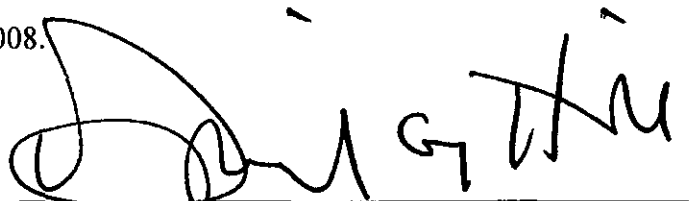
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