IN THE COURT OF APPEAL OF THE STATE OF MISSISSIPPI

JEROME BASKIN — APPELLANT

V. — NO. 2007-KA-1387-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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JEROME BASKIN **APPELLANT**

V. **NO. 2007-KA-1387-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Jerome Baskin, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 12th day of February, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING REPEATED ATTEMPTS BY THE PROSECUTOR TO SURREPTITIOUSLY DEFINE REASONABLE DOUBT.

ISSUE NO. 2: WHETHER THE COURT COMMITTED PLAIN ERROR BY NOT SUA SPONTE DECLARING A MISTRIAL WHEN THE DEFENDANT WAS IMPROPERLY SHACKLED WHEN THE PROSPECTIVE JURORS ENTERED THE COURTROOM.

ISSUE NO. 3: WHETHER APPELLANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED BY THE STATE'S MULTIPLE ACTS OF PROSECUTORIAL MISCONDUCT.

ISSUE NO. 4: WHETHER THE ABOVE DESCRIBED ERRORS WHEN VIEWED CUMULATIVELY RISE TO THE LEVEL OF REVERSIBLE ERROR?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Clay County, Mississippi. Jerome Baskin was charged with two counts of sale of cocaine. Following a jury trial beginning on January 1, 2007, Honorable James T. Kitchens, Jr., Circuit Judge, presiding, Mr. Baskin was found guilty of count 1, sale of cocaine, and a mistrial was ordered on count 2, sale of cocaine, following a deadlocked jury. At the sentencing hearing, Mr. Baskin was sentenced as a repeat offender. The result of the conviction for the crime of sale of cocaine against Jerome Baskin was a thirty (30) year sentence in the Mississippi Department of Corrections and five (5) years post release supervision.

FACTS

According to the trial testimony, during the afternoon of June 18, 2004, Agent Treddis Anderson and Agent Andrew Cotton of the Mississippi Bureau of Narcotics were preparing for a drug purchase. [T. 127 – 128] The agents were using a confidential informant, Bobby Gaston, to purchase drugs. [T. 126 – 128]

In preparation of the drug buy, Anderson and Cotton searched the person of Gaston and his vehicle for drugs. [T. 128] According to a statement written by Anderson and signed by Bobby Gaston, while performing a search the agents "found drugs." [T. 158 – 159, 174] However, at trial, both Gaston and Anderson refuted the statement and Anderson said it was a "misprint" and no drugs were found on Gaston. [T. 160, 173 – 174] Following the search, Anderson and Cotton placed a camera and microphone on Gaston. [T. 128] Anderson gave Gaston $20 for the buy and a bag for him to place any drugs he bought. [T. 128] Sometime after 1:00 p.m., Gaston was sent to Tom Bayne street, a known drug area, in West Point, Mississippi.

[T. 127 – 129] Anderson and Cotton were trailing at least a half-mile behind Gaston while watching and listening to him through the camera and microphone. [T. 130 – 131, 175]

When Gaston reached Tom Bayne, he approached some men and asked to purchase a $20 rock of crack cocaine. [T. 131] At this point, Jerome Baskin, ["Baskin"] the appellant, approached Gaston's vehicle. [T. 131] According to the trial testimony of Baskin, he was not certain the man alleged to have sold cocaine to Gaston in the video was him and he said "it looked like him," referring to himself. [T. 207] Baskin allegedly sold Gaston a $20 rock of crack cocaine, in which Baskin received $20 back from Gaston. [T. 133] After completing the first purchase, Gaston met up with Anderson and Cotton to turn over the drugs to them. [T. 135, 176]

At approximately 2:50 p.m., Bobby Gaston returned to the area on Tom Bayne to make another purchase. [T. 135] On this occasion, Gaston was approached by another man but he told this man that he wanted to purchase from the same person, Jerome Baskin, as he did on his last time. [T. 135 – 136] Gaston made another purchase of a $20 rock from Baskin. [T. 138]

Following this purchase, Gaston returned to the preparation area and gave these drugs to Anderson and Cotton. [T. 135] The video and microphone were retrieved from Gaston and he was searched again and no drugs were found. [T. 179] The "buy money" was not recovered. [T. 175] The cocaine from the first purchase weighed out at 0.22 gram of cocaine and the second buy had a weight of 0.23 gram of cocaine. [T. 193 – 194]

SUMMARY OF THE ARGUMENT

The trial court committed plain error when it allowed the prosecutor's repeated attempts to define reasonable doubt. Baskin suffered irreparable prejudice being seen wearing leg irons in front of the jury during voir dire. Baskin's right to a fair trial was violated by improper

argument, implying the juror's should send a message to Clay County. Even if the above errors individually do not mandate reversal, the Court should reverse based on the effect of the cumulative error.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING REPEATED ATTEMPTS BY THE PROSECUTOR TO SURREPTITIOUSLY DEFINE REASONABLE DOUBT?

Due process under the U.S. Constitution, (5th and 14th Amendments) requires that the State prove a defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307,324, 99 S.Ct.2781 (1979) The State of Mississippi has historically entrusted the jury to define for itself the meaning of beyond a reasonable doubt. Neither the trial court, nor counsel, has been permitted to instruct the jury on the definition of reasonable doubt, instead relying on the inherent common sense of a jury. *Colburn v. State*, ___So. 2d___, 2008 WL 223118 (Miss. App. Jan. 29, 2008) Any abrogation of this right must necessarily result in error of constitutional proportion, affecting "substantive rights" and thus be considered under the plain error doctrine. *Johnson v. State,* 904 So. 2d 162,170 (Miss. 2005)

Unless considered as "plain error," it is incumbent upon counsel for the defendant, when the State or Court tenders an overt instruction attempting to define reasonable doubt, to make an objection for the record . However, when the State slips covert suggestions as to the definition into various points of its voir dire and into its closing argument, counsel cannot be reasonably expected to object, or even realize the cumulative effect.

On several occasions during the trial, the prosecutor suggested the parameters of "reasonable doubt" to the jury in a manner that violated these rights enumerated to Mr. Baskin. Beginning during the voir dire of the jury panel, suggestions as to the limits of reasonable doubt were suggested to the jury. The State began early with the repeated suggestion that reasonable doubt does not require "certainty" thus implying that the jury need not feel certain in it's verdict and that uncertainty is not reasonable doubt. [T. 51] The multiple definitions of "certain" and "certainty" suggest that something certain, is no more than reliable. Shortly thereafter, the State said it would violate the juror's oath to not vote their belief. Clearly, this is an incorrect and misleading statement, as a juror could believe a defendant guilty, while finding the proofs were not beyond a reasonable doubt. The parameters of reasonable doubt were further narrowed by the State when it told the jurors that what they "thought" was sufficient, where their thoughts had "some evidence" to back that thought up. [T. 57]

Further, the jurors were told that they must resolve conflicts in testimony; i.e. decide who is telling the truth. Such a restriction clearly limits the juries role in finding guilt beyond a reasonable doubt. Now the jury would have to decide whether the defense or State's witnesses were either lying or telling the truth. Hence, reasonable doubt as to a witnesses' veracity would not be enough. [T. 68] Clearly, the defense is not charged with it's proofs being accepted as true to be found not be guilty beyond a reasonable doubt; nor is the defense charged with the burden of showing the State's witnesses as lying.

During closing arguments, the prosecutor made several attempts to define reasonable doubt to the jury. The jury is told they should view the evidence as a seamless whole, that they would be wrong to consider details ("pick a part.") [T. 238-239] Then, the prosecutor went on to state that "once again, what is the reasonable inference about what's going on out there?

Because it's a seamless whole. Bobby Gaston has told you what was going on out there. That's what this proof of beyond a reasonable doubt is all about. That's what we mean." [T. 243] The State, thereby, was telling the jury to disregard the details, those things which can give rise to reasonable doubt, and believe the State's witnesses.

Finally, the prosecutor used an analogy to push his point home as to what "reasonable doubt" is.

> In the unlikely event, in this day, that you went to bed at night and you woke up the next morning and snow was all over the ground outside the house, you might conclude any one of a number of things. You might conclude that a bunch of elves from the North Pole left over from Christmas flew over in a helicopter and dumped snow out in your front yard. You might conclude that they came down somebody, with a snowmaking machine and made a bunch of snow and blew it out there in the front yard for you. Or you might conclude that while you were sleeping it snowed, because that's the **reasonable** thing to do. Ladies and gentlemen, **that's what this reasonable doubt thing is all about**. When Mr. Stennett gets up here and starts talking about reasonable doubt, that's what you're talking about. You don't believe those other two things, ladies and gentlemen, because they're too incredible to believe. It doesn't make sense. It's not reasonable. [T. 250]

Actually, it would seem that the State's argument doesn't make sense. The use of an analogy explaining circumstantial evidence becomes very confusing and misleading to the jury when used to explain and illustrate reasonable doubt.

The appellant's position is that the trial court committed plain error when it allowed the prosecution to limit and attempt to define "reasonable doubt" during his voir dire and closing arguments, thus, violating appellant's due process rights. In *Stigall v. State*, 869, So.2d 410 (Miss. 2003), the Mississippi Court of Appeals ruled on a case similar to the case *sub judice*. In *Stigall*, the appellant asserted that the prosecutor made statements during voir dire and closing argument that were attempts to define reasonable doubt. *Stigall*, 869 So.2d at 413. The Court of

Appeals did not agree and affirmed the judgment. *Id.* at 414. The Court did not find this argument meritorious because in *Stigall* the prosecutor told the jury "I cannot define the term reasonable doubt to you, because I'm prohibited by law." Also, the court found that the prosecutor was not defining reasonable doubt and compared "reasonable doubt" to "all doubt" and "a shadow of a doubt." *Id.* at 413. The Court of Appeals cited *Heidelberg v. State*, 584 So.2d 393, for the proclamation that distinguishing between "reasonable doubt," "all possible doubt," "beyond a shadow of a doubt," and the like are permissible during trial counsel's closing argument. *Id.*

The record in the case at bar, however is different, the prosecutor made multiple attempts at defining "reasonable doubt." He made several mentions of how he would not be able to provide certainty and then went back into describing what is and what is not "reasonable doubt." The Supreme Court of Mississippi has stated that the purpose of a closing argument is to fairly sum up the evidence. *Rogers v. State*, 796 So.2d 1022, 1027. The State should point out those facts upon which the prosecution contends a verdict of guilty would be proper. *Id.* While attorneys are afforded wide latitude in arguing their cases to the jury, they are not allowed to employ tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. *Id.* The beyond a reasonable doubt standard is a requirement of due process and although the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course this Court has held that, "reasonable doubt defines itself; it therefore needs no definition by the court." *Barnes v. State*, 532 So.2d 1231, 1235 (Miss. 1988). When the prosecutor began to define "reasonable doubt" and went so far as providing analogies as to what "reasonable doubt" is, he overstepped the bounds of zealous advocacy and reached the point of diluting the juror's minds as to what "reasonable doubt" is.

"Reasonable doubt" is not defined by courts because it is an individualistic idea. It means one thing to one person and something else to someone else. This idea is supported by the holding of the Mississippi Supreme Court in *Barnes* when the Court held that "reasonable doubt defines itself; it therefore needs no definition by the court." *Barnes*, 532 So.2d at 1235 (Miss. 1988). Thus, the Court gave us the idea that "reasonable doubt" is defined by each juror individually.

Although in each of the instances the defense failed to timely object, this does not bar the appellant from raising this issue on appeal. This Court has stated that "Constitutional rights in serious criminal cases rise above mere rules of procedure...Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal." *Brooks v. State*, 46 So.2d 94 (1950). A contemporaneous objection is made at trial so that the trial judge can have the opportunity to cure the error. However, the Mississippi Rules of Evidence allows this Court to take notice of plain errors that affect substantial rights even though they were not brought to the attention of the lower court. Miss. R. Evid. 103(d) (2004). In fact, silence by the court likely strengthened the prosecution's position asserted by the improper comments. The absence of any cure resulted in Mr. Baskin's constitutionally protected rights being violated, those affected rights which we must say are substantial.

ISSUE NO. 2: **WHETHER THE COURT COMMITTED PLAIN ERROR BY NOT SUA SPONTE DECLARING A MISTRIAL WHEN THE DEFENDANT WAS IMPROPERLY SHACKLED WHEN THE PROSPECTIVE JURORS ENTERED THE COURTROOM.**

One of the most common axioms in our society is "you only have one chance to make a first impression." Though a cliché, the saying has proven infallible time after time. The first impression of Mr. Baskin to the jury was one where he was wearing leg irons.

The leg irons restraining Baskin were first noticed by the trial judge following the introduction of Mr. Baskin to the potential jurors. After Baskin stood up, the trial judge asked the jury pool to exit the courtroom without giving them a reason. Once the jury pool was outside the courtroom, the trial judge told the sheriff to take Baskin "out of here and take those leg irons off him." [T. 16.] Following this, the trial judge told the court reporter that while Baskin still had his leg irons on he was seated in a position where the jury could not see them. However the trial judge noticed the leg irons when Baskin stood to be introduced. Not only did trial counsel not object to Baskin being in leg irons, but trial counsel did not even notice that Baskin had them on. [T. 17.]

> It is a common-law right of a person being tried for the commission of a crime to be free from all manner of shackles or bonds, whether of hands or feet, when in court in the presence of the jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the prisoner. Whether that ought to be done is in the discretion of the court, based upon reasonable grounds for apprehension. But, if this right of the accused is violated, it may be ground for the reversal of a judgment of conviction. Marion v. Commonwealth, 269 Ky. 729, 108 S.W.2d 721 (1937).

Rush v. State, 301 So.2d 297, 300 (Miss. 1974)

Even though, the trial judge stated that Baskin was seated where the jury could not see the leg irons, this remains in doubt. First, the trial judge was looking from a different vantage than the jury and could not be sure if any of them could see the leg irons. Further, the trial judge was able to notice the leg irons when Baskin stood so the jury could also have noticed them. Also, Baskin may have been seen by a potential juror prior to being seated at the defense table. Although there is no way to know whether or not any juror saw the leg irons, there is the distinct possibility that a juror did and this is highly prejudicial in the minds of the juror.

The first vision of Baskin the jury saw when entering the courtroom was that of a man who had been in jail. "Generally, a defendant has the right to appear before his jury free of shackles or handcuffs." *Smith v. State*, 877 So.2d 369, 379 (Miss. 2004)

This is highly prejudicial. Even though, Baskin was wearing civilian clothes, nonetheless, the jurors' first encounter with him was while he was wearing leg irons. It would be impossible for a juror to eliminate this first image of Baskin from their head. Furthermore, Baskin was not a flight risk and had not been charged with a violent crime, thus, there was not any reason for Baskin to have been wearing leg irons. This is further validated by the fact that the trial judge, after noticing the leg irons, had the sheriff remove them.

It is anticipated that, because there was no objection at the lower level, the State will argue the issue is procedurally barred. However, the afore cited case of *Smith, Id.,* at 379 suggest otherwise. In that case, the Supreme Court noted the issue of leg irons in Smith's post conviction relief motion "could have been raised at the trial and again on direct appeal."

Accordingly, again Baskin has been deprived a fair trial and this cause should be reversed and remanded.

ISSUE NO. 3: **WHETHER APPELLANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED BY THE STATE'S MULTIPLE ACTS OF PROSECUTORIAL MISCONDUCT.**

The District Attorney made a couple of references that were highly prejudicial to the Appellant. In this case, during voir dire, the District Attorney asked the jury, "**Do any of you believe...that Clay County, Mississippi, does not have a drug problem?**" [T. 60.] There was no objection contemporaneous to this question. Additionally, during his closing argument, the District Attorney told the jury that "**it's your community...You live here.**" [T. 258] Following this statement Baskin's trial counsel objected. Subsequent to the objection, the trial court told the District Attorney to move along in his argument. [T. 258.] These statements by the prosecution could reasonably be calculated to exert undue prejudice on the jury. The Supreme Court of Mississippi has held that the objective of controlling prejudicial statements is to keep the focus of jurors on the evidence and discourage appeals to jurors to vote as members of the community, the effect of which is to create a reluctance to acquit even if the evidence is weak. *Walker v. State*, 913 So.2d 198 (Miss. 2005).

The Supreme Court has cautioned prosecutors from using these "send a message" arguments on several occasions. *See Wells v. State*, 698 So.2d 497 (Miss. 1997); *Williams v. State*, 522 So.2d 201 (Miss. 1988) More recently, such argument has been deemed error, even without an objection. In a remarkably similar factual situation, it was held:

> Randolph contends that this case should be reversed because of the following statements made by the prosecutor:
>
> This crap, this cocaine is in your community. If you want people like him to keep on doing it, you can turn him loose.

* * * *

> We don't need to allow that kind of mess to happen. You do what you think is right, not what me or him [sic], for community and we'll be satisfied.
>
> We agree with Randolph that the State's "send a message" argument was improper. However, in light of Randolph's admission, and his failure to object, we conclude that this error was harmless.

Randolph v. State,___So. 2d___, 2007 WL 2246055 (Miss. App. Aug. 7, 2007)

Perhaps more egregious was the State's argument that the informant would possibly be executed for testifying. [T.254] Of course this argument was outside the proofs, and was also extremely inflammatory and prejudicial. This kind of remark is improper and constitutes error. *Henton v. State*, 752 So. 2d 406, 410 (Miss. 2000)

The jury was told that there is a drug problem in Clay County and that this is their community and thus by implication, they should send a message to drug dealers in their community. These comments by the prosecutor, both the send a message comments and the assertion the informant was going to be executed for his testimony, biased the jury against the Appellant and deprived him of a fair trial. This matter should be reversed and remanded.

ISSUE NO. 4: WHETHER THE ABOVE DESCRIBED ERRORS WHEN VIEWED CUMULATIVELY RISE TO THE LEVEL OF REVERSIBLE ERROR?

Even should the Court find that the errors cited above by the Appellant by themselves do not mandate reversal, the Court should reverse based on the effect of the cumulative error. Appellant asserts that the cumulative effect of the errors in this case deprived him of a constitutionally fair and impartial trial and rose to the level of cumulative reversible error.

The cumulative effect of the prejudicial errors in this case warrants a reversal of Mr. Baskin's conviction. A conviction may be reversed based upon the cumulative effect of errors that independently would not require reversal. *Jenkins v. State,* 607 So.2d 1171, 1183-84 (Miss. 1992); *Hansen v. State,* 592 So.2d 114, 142 (Miss.1991). The Court has held that individual errors, which are not reversible in and of themselves, may combine with other errors and cumulatively may constitute reversible error. *Hansen*, 592 So.2d at 142 (Miss. 1991); *Griffin v. State*, 557 So.2d 542, 552-553 (Miss. 1990); *Flowers v. State,* 773 So.2d 309, 334 (Miss.2000).

The standard to be applied is whether the cumulative effect of all the errors committed during the trial was to deprive the defendant of a fundamentally fair and impartial trial. *Wilbur v. State,* 608 So.2d 702, 705 (Miss. 1992). "When the combination of specific errors, while harmless in each instance accrued to such an extent that a defendant was denied a fair trial, this Court will reverse for cumulative error." *Hughes v. State,* 735 So.2d 238, 280 (Miss. 1999). The question under these and other cases is whether the cumulative effect of all errors committed during the trial deprived the party defendant of a fundamentally fair and impartial trial. Thus where multiple errors have occurred at the trial level, their cumulative effect may constitute reversible error.

The Court has recently reaffirmed this principle in *Byrom v. State,* 863 So.2d 836 (Miss.2004). There, the Court stated that "upon appellate review of cases in which we find ... any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis as to whether such error or errors ... may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect." *Byrom,* 863 So.2d at 847.

In the case sub judice, the Appellant has demonstrated that the trial court committed plain error in allowing the prosecutor to define reasonable doubt to the jury. Additionally, the Appellant has shown that trial counsel was ineffective in not objecting to Mr. Baskin's wearing leg irons during voir dire, and the prosecutor committed misconduct when he used a "send a message" argument to the jury. Even if any one of the above described errors does not rise, by itself, to the level of reversible error, all of the errors taken cumulatively do. This Court has recognized that several errors not individually sufficient to warrant a new trial can require reversal when taken together. *Stringer v. State,* 500 So.2d 928, 946 (Miss. 1986); *Hickson v. State,* 472 So.2d 379, 385-86 (Miss. 1985); *Williams v. State,* 445 So.2d 798, 810 (Miss. 1984); *Collins v. State,* 408 So.2d 1376, 1380 (Miss. 1982). If this Court somehow finds that no single error in this cause calls out for reversal it should nonetheless grant a new trial based on the cumulative errors that prevented Mr. Baskin from obtaining a fair trial.

CONCLUSION

Jerome Baskin is entitled to have his conviction of sale of controlled substance reversed with remand for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

W. DANIEL HINCHCLIFF

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CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Jerome Baskin, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 12TH day of February, 2008.

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