IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SPARKY DARNEZ WATSON — APPELLANT



V. — NO. 2007-KA-1747-COA

STATE OF MISSISSIPPI — APPELLEE

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# BRIEF OF THE APPELLANT

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NO ORAL ARGUMENT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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| **SPARKY DARNEZ WATSON** | **APPELLANT** |
| **V.** | **NO. 2007-KA-1747-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. Sparky Darnez Watson, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Clarence E. Morgan, III, Circuit Court Judge

This the 20th day of March, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

## STATEMENT OF THE CASE

Sparky Darnez Watson was indicted by a Grenada County Grand Jury in a two count indictment for sale of a controlled substance. In Count I, he was indicted for unlawfully, willfully, feloniously, knowingly or intentionally selling, transferring, distributing or delivering less than 30 grams of marihuana, a Schedule I controlled substance, to agent Terry Peeples, a human being, and receiving a sum of lawful United States money, in violation of Miss. Code Ann. Section 41-29-139(a)(1)(b)(3).

In Count II, he was indicted for wilfully, unlawfully, feloniously, knowingly or intentionally selling, transferring, distributing or delivering a quantity of cocaine, a Schedule II Controlled Substance, to Agent Terry Peeples, a human being and receiving a sum of lawful United States money, in violation of Miss. Code Ann. Section 41-29-139(a)(1)(b)(1).

After a jury trial, Mr. Watson was convicted in both Counts I and II. In Count I, he was sentenced to serve a term of three years to run concurrent to the sentence in Count II. In Count II, he was sentenced to serve a term of twelve (12) years with eight (8) years suspended and five (5) years on supervised probation. Feeling aggrieved, Mr. Watson filed this appeal.

## STATEMENT OF FACTS

Terry Peeples, an undercover agent with the Central Narcotics Task Force in Greenwood, Mississippi, decided to go out and purchase drugs under cover. Buying drugs undercover by using confidential informants is his job. On February 19, 2004, after having received funds supplied by North Central Narcotics Task Force for the pre-buy meeting, he met with confidential informant Brenda Wade for the pre-buy meeting in Grenada County. Ms. Wade had been a confidential informant for Agent Peeples over twenty (20) times. **T. 45.** The day of the pre-buy, Agent Peeples

searched the car he was going to use for drugs, prior to installation of the undercover surveillance equipment. He also pat searched Ms. Wade prior to the pre-buy to make sure she did not have drugs on her. T. 46. He did not strip search her because it is against policy of narcotics task forces and M. B. N. for a male agent to strip search a female confidential informant. **T. 62.** He and Ms. Wade then traveled on Boone Alley in Grenada County to purchase drugs. They saw Sparky Watson and stopped to talk to him. Agent Peeples informed him he had been looking for him to purchase "green", a street name for marijuana. **T. 47.** Mr. Watson got in the undercover vehicle on the back passenger side and gave Agent Peeples street directions to find some narcotics. Mr. Watson asked him what did he want and he told him twenty (20) dollars worth of green. **T. 48.** Also, they had a conversation about getting some "hard" a street name for crack cocaine. Agent Peeples gave Mr. Watson twenty ($20.00) dollars of North Central Narcotics Task Funds money. Then, he dropped him off and approximately one minute and a half later, Mr. Watson came back and handed the C.I., Ms. Wade, the alleged crack cocaine. **T. 55.**

During trial, Agent Peeples identified a tape which was admitted into evidence as State's Exhibit 1. The tape was of the drug transaction in the undercover vehicle. He testified that it fairly and accurately represented the events of the drug transactions for the marijuana and cocaine on February 19, 2004. **T. 56.** On cross-examination, Agent Peeples admitted that the1.2 grams of cocaine in State's Exhibit 3 was worth at least one hundred dollars instead of the twenty (20) dollars that he paid Mr. Watson for it. **T. 77.** Agent Peeples further testified that it would be fair to say that the 1.2 grams of cocaine in State's exhibit 3 could have been kept on Ms. Wade in a number of places that he did not have the ability to search her on that date. **T. 74.** Ms. Wade was not present to testify during trial because she died of cancer. **T. 45.**

Chief of Police, Noah Coffee, was the second witness called by the State. He logged the marihuana and cocaine in on an evidence log and placed it in a vault until he delivered it to the Mississippi Crime Lab for analysis. **T. 81.** He also testified that it was normal procedure for a female agent or law enforcement officer to search a female C.I. before they send her out to protect the integrity of any evidence. If it wasn't done in the present case, that would compromise the integrity of this case.

The State's final witness was Chris Wise, forensic scientist specializing in drug identification with the Mississippi Crime Laboratory in Jackson, Mississippi. **T. 93.** He testified that the green leafy substance in State's Exhibit 2 was marihuana in the amount of 3.6 grams and State's Exhibit 3, submission number one (1), contained cocaine in the amount of 0.1 grams. **T. 96-97.**

## STATEMENT OF ISSUES

I. **WHETHER MR. WATSON WAS DENIED A FAIR TRIAL BY INTRODUCTION OF A CRIME NOT CHARGED IN THE INDICTMENT?**

II. **WHETHER MR. WATSON WAS DENIED A FAIR TRIAL BY INTRODUCTION OF EVIDENCE OF A PC BUY DURING TRIAL?**

## SUMMARY OF THE ARGUMENT

I. **MR. WATSON WAS DENIED A FAIR TRIAL BY THE INTRODUCTION THROUGH THE VIDEO TAPE, OF EVIDENCE OF ANOTHER CRIME NOT CHARGED IN THE INDICTMENT.**

Mr. Watson contends that the trial court committed reversible error in allowing evidence of another crime in during his trial. Specifically, he asserts that his defense counsel raised the issue of Exhibit S-1, the video

tape, containing evidence of other crimes not charged in the indictment in a motion in limine. His counsel motioned the trial court to keep out any criminal activity exhibited on the tape prior to the marijuana sale because he was not charged with any crimes prior to that sale. He offers the following testimony in support of his position.

**TERRY PEEPLES DIRECT - JURY OUT T. 48**

**BY MR. HORAN:** Your Honor, at this time the Defendant would move in limine to, for this Court to enter an order instructing this witness not to make any comment of any evidence of any other crimes not charged in the indictment.

And in support of my motion, I would show unto the Court that the videotape that I anticipate this witness identifying, the drug transaction on there purports to show some type of bag, whether it be marihuana, cocaine or whatever, being handed to he and the confidential informant, and at some point in time they have a conversation about the contents of the bag. I anticipate that he is going to say that that was cocaine and that that cocaine was given back to my client at some point in time. That would constitute evidence of a crime that he is not charged with even though it's on this particular tape, Your Honor. He is not charged with that, and he is also - - there is no content in the report that states that he identified anything in the bag as cocaine. That would be prejudicial to my client.

Just to give the Court the sequence of events, my understanding based on what I anticipate - -

**BY THE COURT:** - - Well, is it on the - -

**BY MR. HORAN:** It's on the video, Your Honor. However, my point is he is not charged with that. Basically what I anticipate the witness to testify, that they had some conversation about cocaine. Then he handed a bag back to him. My client got out of the car after they did the marihuana sale and later did a cocaine sale. It's not relevant as to what happened until the point in time from the marihuana charge forward. Anything prior to the marihuana charge forward. Anything prior to the marihuana charge would be prejudicial to my client.

He has already identified my client as being there. That portion of the tape serves no purpose and has no probative value as to the charge in the indictment, Your Honor. And I would move in limine that that portion of the tape that shows that aspect or that evidence be precluded from being shown to the jury at this time.

**T. 50.**

**BY THE COURT:** And this happened prior to the sale of marihuana?

**BY MR. HORAN:** That's correct, Your Honor. That is my understanding. I understand that is what the State is going to intend to put before this jury. I think it is going to be necessary for the Court to view the videotape to make a ruling on it. It is not relevant until - - from the marihuana sale forward would be the only relevant proof that this jury needs to hear about.

**BY MS. DENLEY:** Your Honor, I would state that the way the events occur - - and certainly if you would like to view the tape, we could watch it; it's not that long. The way that the events occurred is that Agent Peeples comes up to the Defendant, asks him for some weed, some green, and he gets in the vehicle. At that point the Defendant does have, you know, after he has already asked for the marihuana, the Defendant does hand him a bag of a substance, which we have not charged him with, and we have not sent to the crime lab or anything because Agent Peeples did not purchase that at that point. He looks at it and hands it back. Then there is the exchange of the weed or the marihuana. Then he hands the marihuana up, and the money is given, and then there is a cocaine sale after that.

**BY THE COURT:** Well, is there a discussion about the bag?

**BY MS. DENLEY:** There is some discussion about the bag, about the amount of - -

**T. 51.**

**BY THE COURT:** - - Why don't y'all let me see it, and then I can better te...

**SKIP**

**BY THE COURT:** - - Are you objecting to what he is going to say or what is on the tape?

**BY MR. HORAN:** On the tape and what he is going to say about - -

**BY THE COURT:** I didn't hear anything on the tape about cocaine.

**BY MR. HORAN:** hear on the tape and - -

**BY THE COURT:** I didn't hear anything on the tape about cocaine.

**BY MR. HORAN:** I understand that. But he hands a bag - - allegedly, I assume he is going to testify from what they have told me, that what is in that bag was cocaine, before the marihuana sale. If he testifies that is what he handed me- -

**BY THE COURT:** - - Well, he is not charged with that. I don't have a problem about sustaining that motion.

**T. 53.**

**BY MR. HORAN:** That's what I, that is my concern.

**BY THE COURT:** As to what he testified to, but on that tape, there is nothing on that tape- -

**BY MR. DENLEY:** - - Agent Peeples is not going to testify to that.

**BY MR. HORAN:** If you will look at approximately 12- -

**BY THE COURT:** - - Well, I have seen them pass - - the passing of the bag without some explanation of what is in the bag is just not objectionable. I'm going to allow that part of the tape in. I'm going to allow that part of the tape in. I'm going to allow the whole tape in, and there is nothing in the language in there that anybody could understand that denotes that as cocaine. And I will prohibit him from testifying as to what was in the bag.

**BY MR. HORAN:** Okay. He can't testify that it appeared to be cocaine or anything like that.

**BY THE COURT:** It has got nothing to do with this case.

**BY MR. HORAN:** Thank you.

**BY MS. DENLEY: May I rewind this, Your Honor, before the jury comes back in?**

**BY THE COURT: Okay. Do you understand my ruling?**

**BY MS. DENLEY: Yes, sir, Your Honor.**

**BY THE COURT: Do you understand my ruling, Mr. Peeples?**

**BY THE WITNESS: Yes, sir.**

**BY THE COURT: As to just no conversation about the bag, okay?**

**BY THE WINTESS: Yes, sir.**

*M.R.E. 404 (b)* Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*M.R.E. 403* provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In *Walker v. State, 878 So.2d 913 (Miss. 2004)*, the trial court admitted into evidence over objection of the defense, a towel which was allegedly the source of semen from an attack on M.M. a 13 year old victim of capital rape. M.M. testified during trial that she had retrieved the towel after a sexual attack from Walker, after he used it to clean himself. The towel and blood samples from Walker were submitted to the Jackson Police Department Crime Lab, however, there were no test conducted to determine if the semen on the towel and the blood taken from *Walker* matched.

The Court in *Walker* provided, "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling." *Walker, 878 So.2d at 915*, citing *Jefferson v. State, 818 So.2d 1099, 1104 (Miss. 2002) (quoting Fisher v. State, 690 So.2d 268, 274 (Miss. 1996))*. See also *Hill v. State, 774So.2d 441, 444 (Miss. 2000); Crawford v. State, 754 So.2d 1211 (Miss. 2000); Gilley v. State, 748 So.2d 123, 126 (Miss. 1999); Hughes v. State, 735 So.2d 238, 269 (Miss. 1999).*

The Court further provided that though M.M. testified regarding how she retrieved the towel, the prosecution's failure to positively connect the semen on the towel to Walker rendered the towel inadmissible. The Court stated that to simply admit such a towel, without employing the available scientific means for authentication, fails the unfair prejudice standard set forth in M.R.E. 403, infringed upon Walker's right to a fair trial and served only to bolster the testimony of the prosecution's witnesses. *Walker, 878 So.2d at 915-916. Citing Crawford, 754 So.2d at 1220 (Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass).* With no direct link to the accused, a soiled towel would tend to mislead, confuse, and incite prejudice in the jury, especially in a capital rape trial involving a 13-year-old victim.

*Walker 878 So.2d at 916.*

The *Walker* Court went on to cite M.R.E. 901(a) and stated that under this provision authentication and identification are conditions precedent to admissibility. The Court provided that generally these serve simply to establish that a matter is what it is claimed to be. Id. citing *Jones v. State, 798 S.2d 592, 593 (Miss.Ct.App.2001); See also Robinson v. State, 733 So.2d 333,335 (Miss.Ct.App.1998)*("Testimony that a particular material is a controlled substance is of no relevance unless the State also proves the defendant's connection to that particular substance.") The Court said that without confirming whether the semen on the towel indeed belonged to Walker, the prosecution submitted the towel as a towel stained with his semen. *Walker, 878 So.2d at 916.*

The Court held that because the prosecution failed to link the semen on the towel to Walker, the admission of the towel violated M.R.E. 403 and they reversed the trial court finding further scientific testing was necessary.

In the present case, Mr. Watson contends that his case is synonymous with the Walker case and therefore, should be reversed. He asserts that at approximately 12:32:14 on the tape, which is Exhibit S-1, Mr. Watson passes a bag to the driver. It was this incident in the tape that his lawyer objected to as evidence of other crimes. Even though there is not a statement that cocaine is in that bag, all the circumstances surrounding the transaction leads a reasonable person to know it is cocaine in that bag. First, after the driver takes the bag from Mr. Watson, the driver says is this $120.00 worth? Mr. Watson says yes, they put it on a scale to weigh it and it weighed what it was suppose to weigh. Then he put some more in there and wanted to charge $130.00 for it, but will take $120.00.

Approximately 12:32:48, Agent Peeples passes the bag to the CI and the CI says, I ain't got no money. Told you what I had. I Told you what I had. I Ain't got but forty dollars.

Agent Peeples then says, I can tell you one thang man that Got Damn Weed is bad. Mr. Watson replied, "I got some of that too." "I got two bags on me now." Then Agent Peeples says, Say you got two on you now? Mr. Watson says, "Yes". Then Mr. Watson and CI exchanges money for weed. CI says, "Damn, smell good.. Oh yea it's good."

Clearly, the statement by Mr. Watson, "I got some of that too" in response to the CI talking about weed would lead any reasonable juror to believe that the drugs in the bag was cocaine. Cocaine and Marihuana were the only two drugs mentioned on the tape.

Mr. Watson also contends that after the motion hearing to prohibit the portion of the tape with the transferring of the bag, the trial court ruled that the transaction with the bag could not be referred to as cocaine, it instructed the State and its witnesses not to refer to the bag as cocaine. Agent Peeples was the witness on the stand at the time of the ruling and was specifically instructed not to refer to the substance in the bag as cocaine. **T. 53.** Despite the trial court's ruling Agent Peeples further prejudiced Mr. Watson's right to a fair trial by referring to the substance in the bag as cocaine. The following testimony is offered:

**T. 70-71.**

Q. All right. Later on, I believe in your report you said - correct me if I am wrong - that you asked him for some hard, and he said no, he didn't have any; right?

A. Well, yes, he did say that.

Q. He said no, I don't have any?

A. Whenever he first got in, yes, he did. But he had it in his pocket anyway.

Q. Okay. I'm talking about later on after, when you got in the car after the 1238 time frame, he told you then he didn't have any cocaine; correct?

A. He showed us the cocaine before 1238.

Defense counsel objected to this testimony as referring to the substance in the bag and the trial court overruled the objection. **T. 71 and 73.** However, Mr. Watson argues that the only unidentified substance before the 1238 time frame was the contents in the bag. So Agent Peeples had to be referring to the substance in the bag as cocaine.

Also, important is that the prosecutor informed the trial court that the substance in the bag was not sent to the crime lab for testing and Mr. Watson was not charged with selling the substance in the bag because Agent Peeples gave it back to him. **T. 50**. However, from a review of the tape it is not clear that the drugs in the bag were given back to Mr. Watson. It appears to be a complete sale. The prosecutor further informed the court that the sale of marihuana and cocaine, for which Mr. Watson was indicted, is shown after the passing of the bag.

To simply admit the drug transaction beginning at 12:32:14, knowing that Mr. Watson was not charged with sale at that time and also knowing that the drugs in the bag had not been retrieved nor tested, fails the unfair prejudice standard set forth in M.R.E. 403 and infringed upon Mr. Watson's right to a fair trial. There is absolutely no way a reasonable person would not confuse the passing of the bag as being what Mr. Watson was charged with. It is clearly evidence of a crime and because the jury saw the tape one time, it is impossible for a juror not to have been confused and mislead and unreasonable to believe that some body on that jury did not find him guilty of sale of cocaine for the passing of the bag. Not only was Mr. Watson not charged with that crime, but that substance was not tested and therefore it is impossible for a crime to have been committed. Even if there possibly could be an argument made that the passing of the bag may be relevant to show intent, the probative value is outweighed by unfair prejudice to Mr. Watson. As this Court has previously stated, *M.R.E. 901(a),* authentication and identification are condition precedent to admissibility. These serve simply to establish that a matter is what it is claimed to be. *Walker, 878 So.2d*

*at 916.* (The substance in the bag was not retrieved and never tested and therefore identification and authentication is impossible and as such that evidence was not relevant or admissible. Because the substance was not retrieved or tested there is no probative value and the prejudice to Mr. Watson is substantial, warranting reversal.)

Further, at approximately 12:39:16 on the tape, Mr. Watson exited the vehicle and the CI and Agent Peeples had a conversation about the cost of the drugs in the bag. One said it cost $120.00 and the other says, "It was worth it. Did you see how big that stuff was. Yea it was worth it." This conversation served only to further confuse, mislead and prejudice the jury.

Mr. Watson offers a list of other cases to further support his argument that he received an unfair trial because the trial court abused its discretion by the admission of the evidence of a sale during the 12:32:11 transaction.

In *Elmore v. State, 510 So.2d 127 (Miss. 1987)*, the defendant was convicted for sexual battery of V.E., his 13 year-old stepdaughter. The Supreme Court found the trial court committed reversible error by admitting evidence of remote instances of sexual misconduct by the defendant with the complainant's sister. The Court stated that because Elmore was charged only with committing sexual battery upon V.E., it was Elmore's alleged criminal act toward V.E. which the state attempted to prove. Any attempt by Elmore to commit sexual battery on the rest of his family, while arguably relevant, is far less probative and at least equally, if not more, prejudicial. The Court stated that the question was whether the jury was improperly diverted from the only issue in this case that being, did Elmore commit sexual battery on August 6, 1983. The Court thought the likelihood that the jury was distracted was too great to allow Elmore's conviction to stand. The Court held that the admission of evidence of remote instances of sexual misconduct with someone other than the complainant was reversible.

The Court in Elmore cited *King v. State, 6 So. 188, 189 (1889)*, where the defendant was indicted for illegally selling liquor. During trial the state proved distinctly one unlawful sale of liquor. Afterwards, the trial court admitted testimony of other and different sales. The Mississippi Supreme Court found it was error for the trial court to admit testimony of other and different sales. That Court stated that,

"The general rule is, that the issue on a criminal trial, shall be single, and that the testimony must be confined to the issue, and that on the trial of a person for one offense, the prosecution cannot aid the proof against him, by showing that he committed other offenses. Whart.Cr.Ev.§ 104; Bish.Cr.Pro., § 1120 et. Seq. The reason and justice of the rule is apparent, and its observance is necessary to prevent injustice and oppression in criminal prosecutions. Such evidence tends to divert the minds of the jury from the true issue, and while the accused may be able to meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him." *Elmore, 510 So.2d at 130.*

The Court in Elmore went on to provide that "It is well settled in this state that proof of a crime distinct from that alleged in an indictment is not admissible against an accused. There are certain recognized exceptions to the rule. Proof of another crime is admissible where the offense charged and that offered to be proved are so connected as to constitute one transaction, where it is necessary to identify the defendant, where it is material to prove motive and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge." Id.

The Court further provided that, "the question here is whether the jury was improperly diverted from the only issue in this case-that being, did Elmore commit sexual battery on August 6, 1983. We think the likelihood that the jury was distracted is too great to allow Elmore's conviction to stand." Id at 131.

In the present case, Mr. Watson contends as the Court provided in the Elmore case, that the jurors' minds were diverted from the actual charges in the indictment, by the admission of the part of the tape which included the passing of the bag. The likelihood that the jury was distracted is too great to allow his conviction to stand.

Mr. Watson further contends that the exception to the rule does not apply in his case because the passing of the bag was not connected to the marihuana sale and the cocaine sale, both at the end of the tape. They did not constitute one transaction. The part of the tape with the passing of the bag was not necessary to identify Mr. Watson because that part of the tape showing the marihuana and cocaine sale clearly identified him by his photo and voice. Had this portion of the tape been excluded the portion of the tape showing the indicted sale of marihuana and cocaine was clear to show motive, opportunity, intent preparation, plan, knowledge, and absence of mistake or accident. Both of those sales were independent and distinct sales and the evidence of the sale of the cocaine in the bag precluded the possibility of Mr. Watson's getting a fair trial upon the charges in the indictment.

In *Sumrall v. State*, 272 So.2d 917 (Miss. 1973), the Supreme Court reversed and remanded the case because of the prosecution's repeated interjection and repeated questioning concerning other criminal acts committed by the defendant not charged in the indictment. The Court found that the evidence of other crimes precluded the possibility of a fair trial upon the charge in the indictment In *Eubanks v. State*, 419 So.2d 1330 (Miss. 1982), the Court provided, "Mississippi follows the general rule that proof of a crime distinct from that alleged in the indictment should not be admitted in evidence against the accused." Citing, E.g., *Loeffler v. State, 396 So.2d18 (Miss. 1981); Massey v. State, 393 So.2d 472 (Miss. 1981).* The *Massey* Court cited *Floyd v. State, 148 So. 226 (Miss. 1933)*, which set forth the reason for this rule.

"The reason and justice of the rule is apparent, and its observance is necessary to prevent injustice and oppression in criminal prosecutions. Such evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them, and, while the accused may be able to meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him. "To permit such evidence," says Bishop, "would be to put a man's whole life in issue on a charge of a single wrongful act, and crush him by irrelevant matter, which he could not be prepared to meet." 1 Bish.Crim.Proc. § 1124. (148 So. at 230). *Massey, 393 So.2d at 474.*

The Eubanks Court found the error of admitting evidence of other crimes not charged in the indictment was prejudicial requiring reversal, though there was ample other evidence to convict the defendant.

Mr. Watson asserts that a reversal of his conviction is necessary to prevent injustice and oppression to him. The passing of the bag at the beginning of the tape diverted the minds of the jury from the true issue and prejudiced and mislead them. From a review of the tape, it is impossible for the jury not to have confused the charges and the evidence. Had the jury been instructed during the viewing of the tape to disregard the passing of the bag because Mr. Watson was not charged with a crime during that part of the tape, there arguably would be a possibility that they were not confused with the passing of the bag and the charged crimes.

## II. WHETHER MR. WATSON WAS DENIED A FAIR TRIAL BY INTRODUCTION OF EVIDENCE OF A PC BUY DURING TRIAL?

Mr. Watson was charged by indictment in Count II with selling cocaine on February 19, 2004. During trial, Agent Peeples testified on direct examination that on February 19, 2004 he along with CI Brenda Wade purchased cocaine from Mr. Sparky Watson. **T. 45, 55, 56.** While being questioned during cross-examination about the lab report, which was case number 051-04-04, Agent Peeples admits that there were two submissions of cocaine on two separate occasions. On redirect he testifies that one was from a PC buy. Mr.

Watson offers the following testimony in support of this assertion.

**TERRY PEEPLES - CROSS**

**T. 74.**

Q. Okay. And according to your report that you submitted to the crime lab on case number 0404, there were almost 1.3 grams of cocaine submitted; correct ? On that case number?

A. 0.1 grams.

Q. All right. I will let you look at your report one more time. Does it not say what was submitted to the crime lab was two plastic bags? Where is your second page of this report?

A. (The witness gets his report.)

Q. All right, pull it on out. Let me find it for you. Submission number one was .1 grams of cocaine, and according to what I have been provided in discovery, submission number two was 1.2 grams of cocaine. You don't have that page with you?

A. No, sir.

Q. All right. Let me see if I can find it for you. All right. This is page 22 and 23 of the discovery package that I have. Do you have this lab report right here? It has got suspect's first name, unknown; last name, unknown. The person you said you knew was Sparky. That is FNU, LNU; right?

A. Yes, sir.

Q. All right. It says in evidence submission 001, and that is the case number we are here on today, one of the charges you have got is 0404; right?

A. Correct.

Q. All right. Submission one is a tenth of a gram of cocaine; right?

A. Correct.

Q. All right. It has got continued right here; right?

A. Correct.

Q. And this is submission two that was submitted. Where is your second page?

A. That is all I have got.

Q. All right, well, look at mine. Mine is different than what you have got in your file; right?

A. Correct.

Q. This lab reports says it's 1.1 gram of cocaine. So together it's about 1.2 grams of cocaine; right? That was submitted - -

A. - - right.

Q. - - on this case?

A. Correct.

Q. All right.

Admitted lab report into evidence without objection as Defendant's Exhibit D-1. T. 75-76.

**T. 76. Last question.**

Q. Tell me what you know about weights as far as - - normally, what would you buy for twenty dollars as far as cocaine? How much would you get for twenty dollars?

A. It all depends on the different people that you get it from. Some will give you two pieces. Some will give you one; some will give you three just to get your business.

Q. It's fair to say that you wouldn't be buying 1.3 grams. That is over a hundred dollars worth of cocaine; right? 1.3 grams?

A. I have bought more than that at one time.

Q. Okay. But the 1.3 grams that is in case number 0404 that you testified is submitted on this case is , in fact, over - - it would be fair to say, over a hundred dollars worth of cocaine; right?

A. Correct.

Q. Wouldn't be 20?

A. No, sir.

**REDIRECT EXAMINATION BY MS. DENLEY:**

**T. 77.**

Q. Okay. Mr. Horan was talking about the two submissions on your case number 051-0404, and if I may approach for a moment, Your Honor. I would like to show you what has been marked Defendant's Exhibit D-1, the lab report, and draw your attention to where it says, Evidence, where it shows the evidence was submitted. **You stated that the second evidence submission was a PC buy. Can you explain what that means?**

BY MR. HORAN: Your Honor, I have not been provided any PC discovery or anything like that in the materials that I have.

BY THE COURT: You admitted this thing into evidence.

BY MR. HORAN: I admitted that; I did, Your Honor, but I didn't go into anything about the contents of the PC- -

BY THE COURT: - - He can testify. Once you put it in there, he can testify as to what it says.

BY MR. HORAN: That is fine.

BY THE WITNESS:

A. Well, a PC buy is when we go in, make a purchase on someone to try to get inside an alleged drug house to confiscate dope or money or to see what else is in there.

Q. Okay. And there are two evidence submissions on this crime lab report. Now I call your attention to the dates at which these submissions were sent to the lab under the evidence section there. What date was evidence submission 1 taken to the lab?

A. September the 22nd, 2004.

Q. Let me show you where I am referring to. I am looking at the submission date.

A. Okay.

Q. Submission date.

A. Okay, it was February 25th, 2004.

Q. Okay, and what date was evidence submission two taken to the lab?

A. April the 6th, 2004.

Q. So they were taken approximately a month and a half to two months apart, if my math is correct?

A. Yes, they was.

From a review of the record Mr. Watson contends that the reference to a PC buy was never made until the State raised it to Agent Peeples. **T. 78.** The testimony referencing submission number (2) two being a PC buy was clearly evidence of another crime for which Mr. Watson was not charged in the indictment. **T. 77.** It appears that Mr. Watson's attorney was attempting to show that the amount of drugs could not have been purchased for $20.00 and thus implying that the CI planted the drugs. **T. 77.** It was not made clear that the amount of drugs totaling almost 1.3 grams was because submission (2) two, which was 1.1 Grams, was a PC buy. Even though Mr. Watson's attorney objected that he had not been provided any PC discovery or anything like that in the materials provided by the State, the trial court overruled allowing this evidence in. **T. 78.** It is clear that this was an issue for the jury because they sent a note to the trial court stating, **"We need the Results & Conclusions of test results on evidence marked #002. We have number 001." T. 139. Circuit Clerk Record 50. It is further obvious that there was a problem because the jury was unable to reach a verdict and sent the following note, "We Cannot Reach a decision on Count 2. What do we do?" Circuit Clerk Record 51.**

As argued in Defense Argument II, "the general rule is, that the issue on a criminal trial, shall be single, and that the testimony must be confined to the issue, and that on the trial of a person for one offense, the prosecution cannot aid the proof against him, by showing that he committed other offenses." *King, 6 So. at 189.* The exception to this rule does not apply because these two offenses are not so connected as to constitute one transaction, and it was not necessary to identify Mr. Watson, nor necessary to prove motive. Also, there is no relation or connection between these two crimes. *Elmore, 510 So.2d at 130.* These crimes were independent of each other. They were committed on two separate occasions. Submission (1) one was

submitted to the crime lab on February 25, 2004 and submission (2) two was submitted to the crime lab on April 6, 2004. As previously stated in Argument II, the evidence on the tape for the indicted cocaine charge, showing the sale of cocaine was sufficient to show motive, identity, opportunity, intent, preparation, plan, knowledge, and absence of mistake or accident. There was not offered in the record any facts of the PC buy. Mr. Watson asserts that the testimony and evidence of submission (2) two was so prejudicial as to prohibit his receiving a fair trial. It is obvious that the jury convicted him because of submission #002 because they requested that information and also the test result of submission (2) two was listed in Defendant's Exhibit 1 as, " Evidence Submission #002. Cocaine, Amount: 1.1 Grams".

## CONCLUSION

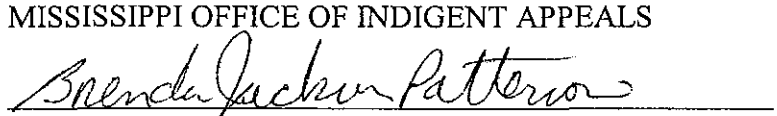
The trial court abused its discretion by allowing into evidence the 12:32:14 portion of the tape. This portion confused the issues, mislead the jury and prejudiced Mr. Watson. The substance in the bag was never retrieved, nor tested and therefore it is impossible for authentication and admissibility. Further, the passing of the bag was not necessary for identification of Mr. Watson because the portion of the tape showing the sale of marijuana and sale of the cocaine identified his photo and voice. It also did not constitute one transaction. The evidence was clear to show motive and it was not necessary to show to make out the indicted sale of marihuana and cocaine. The testimony of Agent Peeples was that the marijuana and cocaine, for which he was indicted was retrieved and presented to the crime lab for testing. Further, there was testimony by the crime lab that these substances were marijuana and cocaine. Because it is also impossible to ascertain that not one of these jurors convicted Mr. Watson based on the 12:32:14, passing of the bag portion of the tape, it is impossible for Mr. Watson to have received a fair trial.

Finally, the admitting of the evidence of a PC BUY was clearly prejudicial and the probative value was substantially outweighed by the prejudice to Mr. Watson.

Because the trial court committed reversal error in allowing evidence of other crimes in doing trial both Counts I and II showed be reversed and remanded for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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## CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Sparky Darnez Watson, 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 20th day of March, 2008.

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