IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-[redacted]-00216

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JD GULLY APPELLANT

VS.

STATE OF MISSISSIPPI APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Comes now, the Appellant, J.D. Gully, and requests oral argument. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the issues raised in this appeal.

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REPLY ARGUMENT

I. REPLY TO STATE'S ARGUMENT ON ISSUE I

ISSUE I: WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S FIRST MOTION FOR A MISTRIAL AFTER THE PROSECUTION VIOLATED OF THE TRIAL COURT'S RULING ON THE DEFENDANT'S MOTION IN LIMINE.

Prior to the start of the trial in this case, the Defendant, through his Attorney, made a Motion in Limine to prevent the Prosecution from bringing up or asking a question that would elicit a response that referred to other charges against the Defendant, and the motion was granted. (R.E. 14; R. 2/12-13). During the Prosecution's direct examination of the East Mississippi Drug Task Force (hereinafter EMDTF) agent, Daniel Boyd [hereinafter Agent Boyd], the Prosecution asked whether the informant used in this case has been used to make any other cases. (R.E. 15; R. 2/97). Agent Boyd replied: "[y]es, sir. He did make cases on [the Defendant] once more, but we had a technical difficulty on that case." *Id.* The Defense made a timely objection, and the jury was excused from the courtroom. (R.E. 15; R. 2/97-98). The Defendant, through his attorney, made a Motion for a Mistrial based on the Prosecution's violation of the trial court's ruling on the Motion in Limine, but the trial court denied this Motion for a Mistrial, and instead gave a curative instruction to the jury. (R.E. 15; R. 2/99-100, 102-104).

The standard of review for the denial of a motion for a mistrial is abuse of discretion, and a "harmless error" standard is also employed. *Tate v. State*, 912 So.2d 919, 932 (¶ 41) (Miss. 2005) (citing *Gossett v. State*, 660 So.2d 1285, 1290-91 (Miss. 1995)). "A violation of a motion in limine should not result in the costly and time-consuming penalty of a new trial unless it affirmatively appears from the whole record that a miscarriage of justice has resulted." *Mills v.*

State, 763 So.2d 924, 929 (¶ 17) (Miss. Ct. App. 2000) (citing *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981)).

In its Reply Brief, the State contends "that the question was in no way intended to elicit any reference to any subsequent charges against [the] defendant." (Apellee Br. at 6). The State further contends that:

> [I]t is clear that the prosecution's goal in asking the question was merely to lay a foundation and explain that the defendant was not apprehended at the time of sale to protect the informant's identity as an informant to assist in that capacity in further operations such as the one in question. This question also served to show that the informant, Parker, had no particular bias towards the defendant because he intended to help bring down other distributors in future operations. When questioned, the witness, upon his own volition, went beyond the scope of the question in his answer. This was in no way coerced or elicited from the witness by the prosecution.

Appellee Br. at 6-7.

While these contentions may have held some merit if the witness who responded to the question was the informant—or practically any other party—in this case, the person providing the offending testimony was EMDTF Agent Boyd, an agent of the State. Also, saying this testimony was beyond the scope of the question is definitely not supported by the question asked by the Prosecution, which was "After September the 27th, 2006 and this particular buy, did he make cases after that for you?" (R. 2/97). This question did not include any caveat such as "not involving the Defendant in this case" or "and this particular Defendant," and thus, whether or not the Prosecution was aware of the "other case" to which Agent Boyd was referring, since the "other case" had occurred according to Agent Boyd, it was well within the scope of the question that was asked.

Further, the fact that the Prosecution did not intend for EMDTF Agent Boyd to refer to the "other case" against the Defendant—a fact which is undisputed by the Defendant—has no effect on the standard upon which the review is based. The test is not abuse of discretion unless

the Prosecution did not intend for the Defendant to be prejudiced. Further, the witness was not just any witness, it was the Prosecution's primary witness who is a fellow agent of the State. Thus, even if the witness had exceeded the scope of the question on his own volition, as contended by the State; this was the State's witness and agent, making his volition the volition of his principal, the State.

In support of its proposition that this error was harmless, the State cites the holding in *Jones v. State*, 962 So.2d 1263, 1277 (¶ 53) (Miss. 2007), without providing any facts from that case. (Appellee Br. at 8). This omission was likely because *Jones* dealt with a different issue, since in *Jones*, the defendant's motion for mistrial arose because during its closing argument, the prosecution made improper remarks reflecting his personal opinions that were not very specific to the defendant's case. 962 So.2d at 1275-76 (¶ 48). Further, the Court in *Jones* prefaced the holding quoted by the State with, "under the limited situation of his case, the prosecutor's remarks were sufficiently insignificant in the overall context of the case before us that any error was harmless." *Id.* at 1276 (¶ 51).

Finally, the State set forth, without any legal or factual support therewith, the following statement: "[t]here was sufficient testimony and evidence presented that played the major role in having the defendant found guilty." (Appellee Br. at 8). As was demonstrated in Appellant's Brief,[1] this is simply not the case. The State further contends that "[a]ny assertion by the defendant that the jury was extremely prejudiced by the statement is pure conjecture and has no factual basis." *Id.* If by that statement, the State means that neither the Defendant nor his attorney were present during any of the jury's deliberations and have not harassed the jurors to find out details of the deliberations, then the statement is a true assertion. However, if it means that Appellant's Brief provided no factual basis, or that all conjecture is baseless, then the State's

[1] *See* Appellant Br. at 22-26.

contention is completely meritless. Further, the State's baseless conclusion that the holding in *Jones* provides complete support for its assertion of harmless error does absolutely nothing to rebut the Defendant's arguments. Thus, the denial of the Defendant's Motion for Mistrial was an abuse of discretion by the trial court which resulted in substantial and irreparable prejudice to the Defendant's case.[2]

II. REPLY TO STATE'S ARGUMENT ON ISSUE II

ISSUE II: WHETHER THE TRIAL COURT ERRED BY RULING THAT THE DEFENDANT COULD NOT SUBMIT EVIDENCE IN SUPPORT OF HIS THEORY OF DEFENSE.

In its Brief, the State seems to at least partially misunderstand the argument on this issue, at least as it relates to the indictment amendments and discovery.[3] The argument regarding this issue is that the trial court erred because it failed to allow the Defendant to present evidence in support of his theory of defense, based largely on the Supreme Court's holding in *Alexander v. State*, 749 So.2d 1031 (Miss. 1999). The issues with the discovery were directed more at the Prosecution's reason for objecting, which was that the expected testimony of the Defendant's wife regarding the videotape was not provided in the discovery materials.

The reason that the discovery issues are involved in this case is because the Defendant provided the Prosecution with reciprocal discovery more than three months before the trial, while the Prosecution: knew of the existence of the video at the time it provided its initial discovery to the Defendant, did not allow the Defendant or the Defendant's attorney to view the videotape until two working days before the trial, and did not provide the videotape to the Defendant's attorney until the day before the trial. (R.E. 8, 14; R. 1/23-24, 2/9-10; Trial Ex. 13). Because of these facts, Defendant did not have time to review the video with the Defendant's

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[2] *See* Appellant Br. at 12-15 for discussion of Issue I.
[3] *See* Appellee Br. at 9-12; Appellant Br. at 16-22.

wife several times, allow her to develop her opinion and basis for her opinion of the identity of the person shown in the video, and then rewrite and resubmit its reciprocal discovery, all on the day before the trial began. Thus, objecting to the evidence based on the reciprocal discovery was improper under Mississippi's Uniform Circuit and County Court Rule 9.04.

The crux of the argument deals with the trial court's decision that the Defendant's wife would not be allowed to testify because her testimony would be cumulative, and whether this decision was proper, given the Defendant's right to present evidence in support of his theory of defense. (R.E. 16; R. 3/202-207). In this case, the trial court stated that it believed that allowing the Defendant's witnesses to testify would be cumulative, even though it had already allowed the Prosecution to call two alleged eyewitnesses to testify about the same alleged events. (R.E. 16; R. 3/202, 206). Thus, for Lorene Gully's testimony to have been disallowed, the trial court would have had to have found that its probative value was substantially outweighed by the danger of needless presentation of cumulative evidence, when applying the balancing test of Rule 403 of the Mississippi Rules of Evidence. This cannot have been the case.

Submitting evidence to support a mistaken identity theory of defense is not cumulative, particularly where the only other witness who could support the Defendant's theory of defense was the Defendant himself. Further, the Prosecution was allowed to do the exact same thing with its two alleged eyewitnesses. Also, the probative value of this testimony was very high because it would support the Defendant's own testimony, and would give the jurors the opinion of someone who has known the Defendant and observed his physical attributes and mannerisms for many years. The purported cumulative nature of this testimony, even if held to be cumulative, would not be enough to outweigh this probative value—particularly when compared to the Prosecution's presentment of two alleged eyewitnesses, both of whom had serious flaws as to their perception or veracity to minimize the probative value of their testimony.

Also, based on the Court's decision in *Alexander*, it is quite apparent that a criminal defendant is given more leeway with this test. In *Alexander*, the Court held that the Defendant should have been allowed to present his theory of defense, even where it was "admittedly weak and possibly farfetched." 749 So.2d at 1037 (¶ 21). The evidence in this case is much more probative than that in *Alexander*, and the purported cumulative nature of the testimony in this case is much less substantial than the risks in *Alexander*.[4]

Thus, the Defendant was substantially prejudiced by not being allowed to present witnesses in support of his theory of defense, because by not allowing him to call his wife to testify, the Defendant was left with only his own testimony to support his Theory of Defense. Because of this, the trial court abused its discretion by failing to grant a mistrial.[5]

III. REPLY TO STATE'S ARGUMENT ON ISSUE III

ISSUE III: WHETHER THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE PRESENTED AT TRIAL JUSTIFIED THE GUILTY VERDICT.

The topics on this issue addressed by the State in its Brief were the Prosecution's failure to provide exculpatory evidence to the Defendant and the chain of custody of the evidence, as well as the general weight and sufficiency of the evidence.

The first major assertion by the State with regard to the weight and sufficiency of the evidence is that "the fact [that] the name 'Gloria Gordon' is on the white bag is not exculpatory evidence that the State failed to produce." (Appellee Br. 13). However, "[t]he final determination as to what constitutes exculpatory evidence is made by the court, not the prosecutor." *Curry v. State*, 939 So.2d 785, 788 (¶ 10) (Miss. 2006). The State further mentioned that Gloria Gordon is the Defendant's sister, and that because of this, the evidence is

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[4] *See* Appellant Br. at 20-22.
[5] *See* Appellant Br. at 16-22 for discussion of Issue II.

not exculpatory and supports the State's case. However, the fact that the name on the bag is the Defendant's sister was not recognized by the Defendant's attorney until after the Appellant's Brief was filed because the Defendant and Ms. Gordon have different last names, and the letters of recommendation submitted to the trial court were not pertinent enough to any of the issues on appeal to justify a thorough study for purposes of preparing the Appellant Brief. (Sentencing Hearing Ex. 2).

The Prosecution possessed this exculpatory evidence, while the Defendant did not have this information and had no way of obtaining this information through reasonable diligence, because this information was most likely inadvertently suppressed by the Prosecution. Had this evidence been disclosed to the Defendant, there is a reasonable probability that the outcome of the proceedings would have been different.[6]

The next item addressed by the State is the chain of custody of the evidence. State simply states that this is to be reviewed under the plain error standard of review, as no objection was made by the Defendant during the trial. (Appellee Br. at 13-14). This however is far from dispositive because, as quoted by the State, "[a]n error is deemed 'plain error' when the substantive rights of a defendant are affected." *Johnson v. State*, 904 So.2d 162, 170 (¶ 23) (Miss. 2005) (citing *Grubb v. State*, 584 So.2d 786, 789 (Miss. 1991)). Defendant simply provided the test for whether a "*Brady*[7] violation" occurred, which includes a requirement that: "had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Howard v. State*, 945 So.2d 326, 337 (¶ 11) (Miss. 2006). This is essentially the same test as the plain error test, because if this portion of the test for a "*Brady* violation" is met, it is clear that the substantive rights of the Defendant would have been affected, thus establishing plain error.

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[6] *See* Appellant Br. at 27-30 for discussion of the law regarding this issue.
[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

Finally, the State sets forth the Sections of the Mississippi Code which the Defendant was charged with violating, Miss. Code §§ 41-29-139(a)(1) and 41-29-142, and recites the evidence presented by the State at trial without substantially addressing the issues with this evidence raised by the Defendant.[7] (Appellee Br. at 14-16).

IV. REPLY TO STATE'S ARGUMENT ON ISSUE IV

ISSUE IV: WHETHER THE CUMULATIVE EFFECT OF THE ERRORS MADE BY THE TRIAL COURT REQUIRES THAT A NEW TRIAL BE ORDERED.

The State essentially declined to address this issue in its Brief, only providing the test for review and quoting the Court's holding in a case which is not even factually similar to this case, and without any reason or attempted argument, the State concludes: "[t]he ruling in the case sub judice should mirror the aforementioned holding in *Duncan* [*v. State*, 939 So.2d 772 (Miss. 2006)]." (Appellee Br. at 17). Thus, nothing is provided to which the Defendant can reply.[8]

CONCLUSION

Based on the Appellee's Brief and this Reply Brief, Defendant's Appellant Brief has not been sufficiently rebutted for the conclusion to change. The trial court abused its discretion by failing to grant both of the Defendant's Motions for a Mistrial. The "substantial and irreparable prejudice" from the Prosecution's violation of the trial court's ruling on the Motion in Limine caused a "miscarriage of justice" because the prejudicial effect of the violation could not be cured by a curative instruction after the damage had been done. Also, the Defendant was not allowed to present witnesses in support of his theory of defense, and by not allowing him to do so, the trial court caused a second "miscarriage of justice."

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[7] *See* Appellant Br. at 22-36 for discussion of Issue III.
[8] *See* Appellant Br. at 36-43 for discussion of Issue IV.

Further, based on the foregoing errors and the lack of sufficient evidence or evidence of enough weight, the trial court erred by failing to grant the Defendant's Motions for a Directed Verdict and for J.N.O.V., and abused its discretion by failing to give the jury a peremptory instruction and by failing to grant the Defendant's Motion for a New Trial. Also, the cumulative effect of all of the errors in this case can warrant no other conclusion than that a new trial should have been ordered in this case.

RESPECTFULLY SUBMITTED, this the 18th day of August, 2008.

J.D. GULLY, APPELLANT

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CERTIFICATE OF FILING

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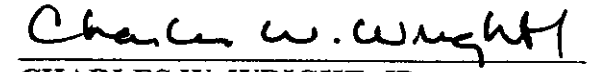
This the 18th day of August, 2008.



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