

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

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**CRIMINAL CAUSE NO.: NO. 2008-KA-01081-COA**

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**CHRISTOPHER THOMAS  
APPELLANT**

**VS.**

**STATE OF MISSISSIPPI  
APPELLEE**

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**APPELLANT'S REPLY BRIEF**

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## REPLY

### **I. The Indictment Was Defective and Violated Defendant's Due Process Rights.**

The State contends that the Defendant is barred from raising this issue on appeal because it was not presented below. Although Defense counsel did not object to the indictment at the trial level, the Court should address the issue under the plain error doctrine. In Debrow v. State, 972 So.2d 550, 553 (Miss.2007), the Court held:

Generally, issues not presented to the trial court are procedurally barred on appeal. *Williams v. State*, 794 So.2d 181, 187 (Miss.2001) (citing *Foster v. State*, 639 So.2d 1263, 1288-89 (Miss. 1994)). However, this Court will proceed under the plain error doctrine and review errors which affect a defendant's fundamental, substantive rights in order to prevent a manifest miscarriage of justice. *Williams*, 794 So.2d at 187 (citing *Gray v. State*, 549 So.2d 1316, 1321 (Miss.1989)).

Clearly, the Defendant has a fundamental right to a clear and concise statement of the essential facts constituting the offense charged Quang Thanh Tran v. State, 962 So.2d 1237, 1241 (Miss.2007). As such, this issue should be addressed under the plain error doctrine.

The Mississippi Supreme court has stated the following;

The government may not prosecute a criminal defendant "for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." U.S. Const. amend. V. The purpose of an indictment is to satisfy the constitutional requirement that a "defendant be informed of the nature and cause of the accusation . . ." U.S. Const. amend. VI; Miss. Const. art. 3, § 26. *See also* U.R.C.C.C. 7.06 (indictment must include a "plain, concise and definite written statement of the essential facts constituting the offense charged and *shall fully notify the defendant of the nature and cause of the accusation.*" (emphasis added). The purpose of these requirements is to ensure that criminal defendants have a fair and adequate opportunity to prepare for and defend against the charges brought against them by the government. Therefore, in order for an indictment to be sufficient, "it must contain the essential elements of the crime charged." *Peterson*, 671 So.2d at 652-53 (citing *May v. State*, 209 Miss. 579, 47 So.2d 887 (1950)).

*Id.*

In the present case, the failure of the indictment to state justification for the multi-count

indictment deprived Mr. Thomas of due process.

**II. The Trial Court Erred by Allowing the Indictment to be Amended on the Day of Trial.**

On the day of trial, the prosecution made an oral motion to amend Count III of the indictment to change the name of the alleged victim from Arthur Jones to Arthur James. Defense counsel objected . Said objection was overruled and the motion was granted. (Tr. 10-11; R.E. 16-17).

In Carter v. State, 965 So.2d 705, 709 (Miss.Ct.App.2007), the Mississippi Court of Appeals stated that the name of the victim is an essential element to the crime of robbery. The Court went on to state that where the name of the victim is an essential element of the crime, failure to state it or a material variance is fatal. *Id.* the following:

The State contends that the trial court gave Mr. Thomas an opportunity to show that his defense would be compromised by the amendment. The trial court asked Mr. Thomas if he had any proof that there was an Arthur Jones as opposed to Arthur James. (Tr.10-11; R.E. 16-17). However the Court failed to give Mr. Thomas a chance to investigate the existence of Arthur Jones. As such, the trial did not give Mr. Thomas ample opportunity to show that his defense would be compromised by the name change.

**III. The Trial Court Erred by Allowing the Jury to Observe the Defendant in Restraints.**

During voir dire examination of the jury, a short recess was taken by the Court. After the brief recess, Mr. Thomas' leg restraints were not removed prior to the jury being brought into the court room.

The State contends that this argument was waived because Defense counsel did not

request a mistrial at the trial level. Mr. Thomas adequately addressed this issue in his Appellant's Brief and would briefly state that this issue should be addressed under the plain error doctrine as being free from restraints in the presence of the jury is a fundamental right. Hickson v. State, 472 So.2d. 379, 383 (Miss.1985).

**IV. The Trial Court Erred by Not Making On the Record Findings that the Race Neutral Reasons for State's Peremptory Challenges Were Non Pretextual.**

During the jury selection process made in chambers, Defense counsel made an objection to the States use of preemptory challenges. After reviewing the make up of the possible jury, the Court found that there was a prima-facie case of a Batson violation. At that point the State was asked to give race-neutral reasons for its challenges. However, the States inquiry ended there. The Court did not give the Defense an opportunity to rebut the States race neutral reasons nor did the Court give any meaningful on the record factual determination of the States offered reasons. (Tr.87-92; R.E. 22-27).

In Hatten v. State, 628 So.2d 294, 298 (Miss.1993), our Supreme Court Stated that it was "necessary that trial courts make an on-the-record, factual determination, of the merits of the reasons cited by the State for its use of peremptory challenges against potential jurors."

In the present case, the trial court properly found that a prima facie case of purposeful discrimination was present and allowed the State to give race-neutral reasons for each of the peremptory strikes. However, the inquiry ended there and the trial court accepted the State's reasons without providing the Defense with an opportunity to rebut such proffered reasons, nor did the trial judge make a meaningful on the record factual determination as to the merits of the State's race-neutral reasoning for the challenges. As such, the Defendant was denied his fundamental right to a fair and impartial jury.

**V. The Defendant was Denied a Fair Trial Due to Prosecutorial Misconduct.**

**A. The Trial Court Erred by Allowing the Prosecution to Comment On the Firing of the Firearm.**

Christopher Thomas was indicted for five (5) counts of armed robbery. All five counts stated that Mr. Thomas put the victims in fear “by exhibition of a deadly weapon, to-wit: by exhibiting a gun.” All five counts track the same language. The indictment is void of any language charging the Defendant with firing a firearm. (C.P.3-4; R.E. 3-4).

The State contends that it was proper for the State to comment on the firing of the weapon because that is what the proof showed at trial. However, the prosecution’s comments concerning the firing of the weapon were made only to prejudice the jury. In Sheppard v. State, 777 So.2d 659, 661 (Miss.2000), the Supreme Court stated “prosecutors are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury.” The Prosecution’s comment concerning the firing of the firearm were highly prejudicial and calculated to unfairly influence the jury and violated his fundamental right to a fair trial.

**B. The Trial Court Erred by Allowing the Prosecution to Define “Exhibiting” During Opening Statement.**

During opening statements, the prosecution inappropriately attempted to define “exhibiting a weapon.” The law is clear that it is the court, not the prosecution’s job to instruct the jury as to the law. Uniform Rules of Circuit and County Court Practice, Rule 3.05 states that “[a]ttorneys will not offer an opinion on the law.” In Edge v. State, 393 So.2d 1337, 1340 (Miss.1981), the Mississippi Supreme Court stated that “[i]n the case of *Clemons v. State*, 320 So.2d 368 (Miss.1975), this Court reaffirmed the principle that it is the trial court, and not the prosecutor, who advises the jury on the law.” In the present case, the prosecution gave his



opinion and insight as to the meaning of exhibiting a weapon. As such, Mr. Thomas was denied a fair trial.

**C. The Trial Court Erred by Allowing the Prosecution to Comment on Facts Not in Evidence.**

In Ross v. State, 954 So.2d 968, 1002-03 (Miss.2007), the Court found that “[a]rguing statements of fact which are not in evidence or necessarily inferable from facts in evidence is error when those statements are prejudicial.” In the instant case, the State argued at trial that the robber’s face was not completely covered during the commission of the crime, however, such facts were not presented as evidence during the course of the trial. Such statement was prejudicial to the Defendant as the eyewitness’s identification of the Defendant as the robber is the sole evidence linking the Defendant to the crime in questions. As such, by allowing the State to comment on facts not in evidence concerning the eyewitness’s identification of the robber was highly prejudicial.

**D. The Trial Court Erred by Allowing the Prosecution to Make Improper Comments Regarding an Alleged False Statement Made by a Defense Witness that Was Not Properly Impeached.**

The State first contends that this issue was not raised below and therefore was waived. However, Defense Counsel did object to the line of questioning and said objection was overruled. (Tr. 186-187; R.E. 64-65). Therefore, this issue was properly preserved for appeal.

In the alternative, the State contends that M.R.E. 613 (b) has no application here because the State did not introduce or attempt to introduce any statement of Rosie Thomas. The State clearly attempted to impeach the testimony of the Mrs. Thomas, through Mr. Thomas, using a time sheet that was never introduced into evidence.

The State finally contends that the Defendant is procedurally barred from arguing on appeal that the Prosecutor’s comments made at the bench were prejudicial because no such

argument was made below. This issue was addressed in the Defendant's main brief.

**E. The Trial Court Erred By Allowing the Prosecution to Request That the Defendant be Punished for Asserting His Right to a Jury Trial.**

The State clearly argued that the Defendant should be punished for asserting his right to a jury trial. This comment was clearly improper and violated the Defendant's fundamental right to a jury trial.

**F. The Numerous Acts of Prosecutorial Misconduct Amounts to Reversible Error.**

In *Ross*, 954 So.2d at 1001-02, the Court stated that "[a] series of otherwise harmless errors in a closing argument may be grounds for reversal where, in the aggregate, those errors violate a defendant's right to a fair and impartial trial." (citations omitted). In the present case, the prosecution engaged in numerous acts of misconduct, and taken as a whole, the Defendant was denied his right to a fair trial based on these numerous acts of misconduct.

**VI. The Trial Court Erred by Amending Jury Instruction D-5.**

The State agrees that the jury instruction, as submitted by the Defendant, was a correct statement of the law. As such, the Defendant was entitled to have the instruction given as submitted to the Court and said instruction should not have been amended.

**VII. The Trial Court Erred by Overruling Defendant's Objections.**

The State contends that this issue was not preserved for appeal because Defense's objection was a general objection and as such, insufficient to preserve for appeal. The Defendant would request this Court to address this issue under the plain error doctrine.

The State further contends that the State did not bring out proof that Mr. Collins had made prior consistent statements. The State clearly asked Mr. Collins if his story ever changed. (Tr. 122; R.E. 32). This was clearly a back door attempt to get Mr. Collins prior

consistent statements before the jury. In Woods v. State, 973 So.2d 1022, 1028

(Miss.Ct.App.2008), the Court held that a prior consistent statement can not be introduced in order to merely bolster a witnesses testimony. That is exactly what the State was attempting to in the case at hand. Clearly this was improper and said objection should have been sustained.

Secondly, Officer Jason Bright was asked if there were any other suspects in this matter. Officer Bright only secured the scene the night in question and was not the investigating officer. As, such, said testimony was speculative and prejudicial.

The final objection made by the Defense was during the cross examination of the Defendant upon which the State asked whether the Defendant had ever owned a firearm. Defense counsel objected on the grounds of relevancy. (Tr. 192; R.E. 66). The objection was in fact sustained and concedes that no error was made.

**VIII. The Trial Court Erred by Denying the Defendant's Motion for Directed Verdict and Defendant's Motion for JNOV or in the Alternative Motion for a New Trial.**

The Appellant fully addressed this issue in his main brief and would ask the Court to refer to the argument contained therein.

**IX. The Cumulative Errors Denied the Defendant a Fair Trial.**

The Appellant fully addressed this issue in his main brief and would ask the Court to refer to the argument contained therein.

## VI. CONCLUSION

Based on the foregoing, the Appellant prays that this Court will reverse the decision of the Yazoo County Circuit Court, granting the Appellant's request that this cause be remanded for a new trial.

Respectfully Submitted this the 18<sup>th</sup> day of February, 2009.

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**CERTIFICATE OF SERVICE**

I, Leigh Anne Cade, the undersigned counsel of record for the Appellant, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Reply Brief, via United States mail, postage prepaid, to the following:

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So Certified this the 18<sup>th</sup> day February, 2009.

  
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