IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CEDRIC CATCHINGS — APPELLANT

VS. — NO. 2008-KA-1260

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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C. The statement made by Kent Daniels in his testimony that Catchings did not make a statement to police did not constitute prosecutorial misconduct and did not prejudice Catchings.

D. The prosecutor's reference to phone records did not constitute prosecutorial misconduct.

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II. The trial court did not err in ruling inadmissible testimony of witness Daniel Jeanty's previous felony convictions.

III. Any and all points of error in the trial were harmless.

IV. There was no error at trial and therefore there can be no cumulative error.

SUMMARY OF THE ARGUMENT

The State's counsel did not engage in prosecutorial misconduct and the defendant was not deprived of his fundamental right to a fair trial. The prosecutor's comments did not constitute a forbidden "send a message" argument. The trial court sustained defense counsel's objection in opening argument and instructed the prosecutor to re-phrase. This was a complete and appropriate remedy and there is no error. The trial court correctly overruled the objection made by the defense during the closing argument. Further, assuming *arguendo* that the statements in opening or closing argument were improper "send a message" argument, the error was harmless because the evidence was so overwhelming in favor of guilt that even without those statements, Catchings would clearly have been convicted. Defense counsel objected to the prosecutor's question posed to Daniel Jeanty and the objection was sustained. There is no error. The statement made by Kent Daniels in his testimony that Catchings did not make a statement to police did not constitute prosecutorial misconduct and did not prejudice Catchings. The prosecutor's reference to phone records did not constitute prosecutorial misconduct. The trial court did not err in ruling inadmissible testimony of witness Daniel Jeanty's previous felony convictions and correctly held that the convictions were more prejudicial than probative. Any and all points of error in the trial were harmless. There was no error at trial and therefore there can be no cumulative error. Catchings was not entitled to a perfect trial, but a fair one.

ARGUMENT

I. The State's counsel did not engage in prosecutorial misconduct and the defendant was not deprived of his fundamental right to a fair trial.

A. The prosecutor's comments did not constitute a forbidden "send a message" argument and the trial court correctly overruled the objection made by the defense during the closing argument.

"Trial courts are allowed considerable discretion to determine whether or not the conduct of an attorney in argument is so prejudicial that an objection should be sustained or a new trial granted." *Harvey v. State*, 666 So.2d 798, 801 (Miss.1995) (citing *Edmond v. State*, 312 So.2d 702, 705 (Miss.1975)). "The test to make such determination is whether the natural and probable effect of improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by prejudice." *Harvey*, 666 So.2d at 801 (citing *Johnson v. State*, 596 So.2d 865, 869 (Miss.1992)).

While the trial court did sustain the defense attorney's objection and order the prosecutor to re-phrase, the prosecutor's comment during opening argument that "[t]he only just verdict for the City of Jackson, for Hinds County, for the State of Mississippi, the Untied States of America, and Mr. Redmond, who is no longer here . . ." does not constitute a forbidden "send a message" argument on behalf of the State. This statement does not ask the jury to send a message to the public or other potential criminals. It identifies that the government is the opposing party and that the government is advocating for a verdict of guilty. It further identifies the victim. There is no language that suggests "sending a message" to the public or potential criminals.

Further, the trial court sustained the objection and ordered the prosecutor to rephrase the

statement. This was a complete remedy for any potential prejudice to Catchings. Furthermore, where a trial judge sustains an objection to testimony interposed by the defense in a criminal case and instructs the jury to disregard it, the remedial acts of the court are usually deemed sufficient to remove any prejudicial effect from the minds of jurors. *Vickery v. State*, 535 So.2d 1371, 1380 (Miss.1988). Assuming, for purposes of argument only, that the prosecutor's comment was indeed a "send a message" argument, Catchings is not prejudiced and received an adequate remedy as the trial judge sustained defense counsel's objection. Furthermore, prior to deliberations the trial judge specifically instructed the jury, "you are to disregard all evidence which was excluded by the court from consideration during the course of the trial." (C.P. 20) The jury is presumed to follow the instructions of the judge. *Id.* This argument is without merit.

To determine whether an argument constitutes error, the Mississippi Supreme Court uses a formula consisting of two threshold inquiries and a two-part test to determine if such an argument constitutes reversible error. *Brown v. State*, 986 So.2d 270, 275-76 (Miss.2008). The threshold inquiries ask: (1) if the defense counsel objected, and (2) if the defense counsel appeared to have invited the remark in light of the surrounding circumstances. *Id.* at 276. The two-part test then requires the court to evaluate: "(1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights." *Spicer v. State*, 921 So.2d 292, 318 (Miss. 2006).

Reviewing the argument under the standard set forth by the supreme court, we find that the State's argument did not constitute reversible error. The first inquiry is satisfied because the defense properly objected. We next ask if it appears that the defense counsel invited the prosecutor's comments, and "[i]f so ... the issue may be waived." *Brown*, 986 So.2d at 276.

Analyzing this statement under the two-prong test, there is no error. To qualify as "improper" under the first prong, a statement must "tend to cajole or coerce a jury to reach a verdict for the purpose of meeting public favor and not based on the evidence." *Spicer*, 921 So.2d at 318. The prosecution, but its statement, did not appeal to the jury to send a message to the public or to meet public favor by convicting Catchings. The prosecution did not ask the jury to send a message to anyone but the defendant, and such message is based on his guilt under the evidence presented. The second prong is met when it is "clear beyond a reasonable doubt that, absent the prosecutor's inappropriate comments, the jury would have found the defendant guilty. *Brown*, 986 So.2d at 276. The statement was not inappropriate argument, however, the evidence against Catchings is so overwhelming that it is indeed clear that the jury would have found Catchings guilty without this statement by the prosecutor. Catchings was identified standing beside the victim's car where he was found dead. The witnesses heard shots fired immediately before they saw Catchings beside the victim's car. The proof showed that Catchings used the victim's credit card to go on a shopping spree immediately after the victim's death. Upon searching Catching's house, police discovered several weapons including the nine millimeter gun Catchings used to murder Redmond. This issue is without merit and the rulings of the trial court should be upheld.

B. Defense counsel objected to the prosecutor's question posed to Daniel Jeanty and the objection was sustained. There is no error.

At trial, defense counsel objected to the prosecutor's question to Daniel Jeanty, "Can you tell us if that suspect who, shot, murdered, and robbed Mr. Redmond, is he in the courtroom today." (Tr. 66-67) Defense counsel immediately interposed an objection to the form of the

question. The trial court sustained the objection and directed the prosecutor to rephrase his question, whereupon the prosecutor asked Mr. Jeanty, " The person you saw running from the scene that day, do you see him in the courtroom." (Tr. 66-67) Mr. Jeanty then identified Catchings as the person he saw running from the vehicle where the victim's body was found. (Tr. (66-67) Defense counsel did not ask for any further relief.

Where a trial judge sustains an objection to testimony interposed by the defense in a criminal case and instructs the jury to disregard it, the remedial acts of the court are usually deemed sufficient to remove any prejudicial effect from the minds of jurors. *Vickery v. State*, 535 So.2d 1371, 1380 (Miss.1988). While the testimony regarding Bradley's prior arrest for kidnaping was improper, the trial judge sustained the objection and instructed the jury to disregard the testimony. Furthermore, prior to deliberations the trial judge specifically instructed the jury, "you are to disregard all evidence which was excluded by the court from consideration during the course of the trial." The jury is presumed to follow the instructions of the judge. Id. This argument is without merit.

C. The statement made by Kent Daniels in his testimony that Catchings did not make a statement to police did not constitute prosecutorial misconduct and did not prejudice Catchings.

During his testimony, Detective Kent Daniels was asked by the prosecutor "And what did you find when you went inside the defendant's home?" (Tr. 113) Daniels replied, "This I believe was our first visit on March the 6th. We found a gun holster, an empty box where bullets were in, and a couple more items. So this particular day Mr. Catchings was carried to police headquarters where he was interviewed but he refused to give a statement. (Tr. 113) Defense counsel

objected and asked to approach the bench. (Tr. 114) The trial judge conducted a conference at the bench which is not included in the record. (Tr. 114) Daniels' examination continued. (Tr. 114) The State presented the testimony of Carl Fullilove, Jr., and then tendered Fullilove for cross examination. (Tr. 139) At this time, defense counsel made a motion for mistrial based on the testimony of Kent Daniels. (Tr. 139) The trial court ruled that Daniels testimony did not prejudice Catchings, overruled the objection and denied the motion for mistrial. (Tr. 141)

Further, there is nothing in the record to show that Catchings was Mirandized. In his brief, Catchings asserts that he "was afforded the full protection of his right to remain silent." (Appellant's brief at 13) However, he does not show that Catchings was Mirandized. Further, at trial, there was no testimony or proffer that Catchings had been Mirandized at the time he was transported to police headquarters and declined to make a statement. Catching's relies on *Quick v. State*, 569 So.2d 1197, 1199 (Miss. 1990) for the proposition that " [i]t is improper and, ordinarily, reversible error to comment on the accused's post-Miranda silence." With no testimony in the record to establish that Catchings had been Mirandized, there is no showing that Catchings refusal to make a statement was "post-Miranda silence" and therefore that Detective Daniels' statement was improper. Therefore, this issue is without merit.

Assuming, *arguendo*, that Detective Daniels statement wa s a comment on Catching's "post-Miranda silence", it is important to note that Daniels testimony was not elicited by the prosecutor but was offered almost as an aside. In ruling on Cathing's motion for mistrial, the trial court noted that Daniels' testimony did not prejudice Catchings. (Tr. 141) Whether to grant a mistrial is within the sound discretion of the trial court. *Shelton v. State*, 853 So.2d 1171, 1183 (Miss.2003). The standard of review for denial of a motion for mistrial is abuse of

discretion. *Pulphus v. State*, 782 So.2d 1220, 1222 (Miss.2001)." *Wright v. State*, 958 So.2d 158, 161 (Miss.2007) (emphasis added).

D. The prosecutor's reference to phone records did not constitute prosecutorial misconduct.

Catchings argues that the prosecutor's failure to rephrase a question regarding telephone calls made between the defendant and the victim just prior to the murder was prosecutorial misconduct. Catchings testified that officers came to his door asking his phone number. He gave them a number. After questioned by the prosecutor, Catchings testified that it was a new number. He testified that he changed his number on Monday, March 5th. The victim was murdered on March 3rd. Catchings confirmed the victim's number during his testimony on cross examination. The prosecutor that asked, "And your number appears in his number nine times. Did you know that?" (Tr. 168) Defense counsel objected and the trial court sustained the objection, stating, " You can just ask a question, but don't refer to the phone records. Sustained." (Tr. 168) The prosecutor repeated "Are you aware your number appears in there five times?" Counsel for the defense interjected. The prosecutor asked, "Did you call him nine times?" The trial judge asked the lawyers to approach and a bench conference was held. (Tr. 169) Because the bench conference is not on the record, it is impossible to tell exactly what occurred. There is nothing in the record to indicate that this was prosecutorial misconduct. Further, there was testimony admitted earlier in the trial that the respective numbers of Catchings and the victim, Redmond, showed up on each others bills. That testimony was elicited without objection from Sergeant Perry Tate. Clearly, since the information was already in evidence, there was no prejudice to Catchings from the later reference to the phone bills by the prosecutor. This issue is

without merit.

E. The trial court correctly ruled that the prosecutor's statement during closing argument did not constitute a "send a message" argument.

"Trial courts are allowed considerable discretion to determine whether or not the conduct of an attorney in argument is so prejudicial that an objection should be sustained or a new trial granted." *Harvey v. State*, 666 So.2d 798, 801 (Miss.1995) (citing *Edmond v. State*, 312 So.2d 702, 705 (Miss.1975)). "The test to make such determination is whether the natural and probable effect of improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by prejudice." *Harvey*, 666 So.2d at 801 (citing *Johnson v. State*, 596 So.2d 865, 869 (Miss.1992)).

In closing argument, the prosecution stated the following, referring to Catchings:

> Now, he says he's from New Orleans. Now that may do that in New Orleans but he didn't need to be bringing that mess here to Jackson, Mississippi. And it is up to the jury to find him guilty of capital murder to let him know that we're not going to put up with that mess. (Tr. 211)

Counsel for the defendant objected that the argument was "showing a message." The trial court ruled that the statement was directed at the defendant. The argument was not to send a message to criminals or to the general public, but to send a message to this defendant who was on trial for murdering Kareen Redmond.

To determine whether an argument constitutes error, the Mississippi Supreme Court uses a formula consisting of two threshold inquiries and a two-part test to determine if such an argument constitutes reversible error. *Brown v. State*, 986 So.2d 270, 275-76 (Miss.2008). The

threshold inquiries ask: (1) if the defense counsel objected, and (2) if the defense counsel appeared to have invited the remark in light of the surrounding circumstances. *Id.* at 276. The two-part test then requires the court to evaluate: "(1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights." *Spicer v. State*, 921 So.2d 292, 318 (Miss. 2006).

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Analyzing this statement under the two-prong test, there is no error. To qualify as "improper" under the first prong, a statement must "tend to cajole or coerce a jury to reach a verdict for the purpose of meeting public favor and not based on the evidence." *Spicer*, 921 So.2d at 318. The prosecution, but its statement, did not appeal to the jury to send a message to the public or to meet public favor by convicting Catchings. The prosecution did not ask the jury to send a message to anyone but the defendant, and such message is based on his guilt under the evidence presented. The second prong is met when it is "clear beyond a reasonable doubt that, absent the prosecutor's inappropriate comments, the jury would have found the defendant guilty. *Brown*, 986 So.2d at 276. The statement was not inappropriate argument, however, the evidence against Catchings is so overwhelming that it is indeed clear that the jury would have found Catchings guilty without this statement by the prosecutor. Catchings was identified standing beside the victim's car where he was found dead. The witnesses heard shots fired immediately before they saw Catchings beside the victim's car. The proof showed that Catchings used the

victim's credit card to go on a shopping spree immediately after the victim's death. Upon searching Catching's house, police discovered several weapons including the nine millimeter gun Catchings used to murder Redmond. This issue is without merit and the rulings of the trial court should be upheld.

II. The trial court did not err in ruling inadmissible testimony of witness Daniel Jeanty's previous felony convictions.

The standard of review we employ regarding the admissibility of evidence is well settled: 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. *Robinson v. State*, 940 So.2d 235, 238 (Miss.2006) (quoting *Turner v. State*, 732 So.2d 937, 946 (Miss.1999)).

M.R.E. 609 provides in pertinent part that "evidence that a non-party witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted." The McJeanty's prior convictions were offered to impeach McJeanty's credibility. The trial court made a finding on the record, pursuant to Rules 609 and 403 that the convictions were more prejudicial than probative as to McJeanty's credibility. (Tr. 75) The trial court stated that after hearing the witness's testimony on direct and on cross and after having reviewed the matter, "the convictions of this witness are not relevant and that they would be more prejudicial than probative as to his credibility. Therefore his convictions will not be admissible." (Tr. 76)

Further, as the prosecution noted at trial burglary and fleeing from law enforcement are not *crimen falsi*. (Tr. 73) The Mississippi Supreme Court has held that theft crimes are not in

the nature of *crimen falsi*.

> On the precise question of whether theft crimes fit within M.R.E. 609(a)(2), one authority has noted that while the majority of federal courts considering the question have found that such crimes do not fit within the meaning of crimes of dishonesty or false statement contemplated by the rule, the state courts have split about evenly on the issue. Joseph & Saltzburg, Evidence in America, Ch. 43, p. 14 (1987). The Fifth Circuit Court of Appeals has strictly construed the Rule to crimes of the type listed in the comment to our Rule. It has held, for example, that shoplifting is not the type of crime in the nature of crimen falsi covered by the Rule. *United States v. Ashley*, 569 F.2d 975 (5th Cir.1978), rh'g. denied, 573 F.2d 85, cert. denied, 439 U.S. 853, 99 S.Ct. 163, 58 L.Ed.2d 159. We hold, in accordance with the majority of federal courts, that a burglary conviction is not ordinarily admissible under M.R.E. 609(a)(2) and that convictions under that rule should be limited to crimes in the nature of crimen falsi. Accordingly, the trial court should not have allowed Willie's conviction under that rule.
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> *Townsend v. State*, 605 So.2d 767, 770 (Miss. 1992).

However, for the sake of argument only, if the trial court did err in excluding Jeanty's prior convictions for burglary and fleeing from law enforcement, this error was harmless. "[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party. Error is reversible only where it is of such magnitude as to leave no doubt that the appellant was unduly prejudiced." *Holladay v. Holladay*, 776 So.2d 662, 672 (Miss.2000). The Constitution does not guarantee a perfect trial, but it does entitle a defendant in a criminal case to a fair trial. *Clark v. State*, 891 So.2d 136, 141 (Miss.2004), citing *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

In light of the overwhelming evidence against Catchings, the alleged error was harmless. See *Clark*, 891 So.2d at 142; *Riddley v. State*, 777 So.2d 31, 35 (Miss.2000); *Kircher v. State*,

753 So.2d 1017, 1027 (Miss.1999). The Supreme Court has held that where there has been an improper restriction on a defendants' ability to impeach a witness, certain factors must be looked at to determine whether or not the error was harmless. *Delaware v. Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436. "These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1438. There was overwhelming evidence against Hammons to support the jury's finding and corroborating McJeanty's testimony.

III. Any and all alleged points of error in the trial were harmless.

"[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party. Error is reversible only where it is of such magnitude as to leave no doubt that the appellant was unduly prejudiced." Holladay v. Holladay, 776 So.2d 662, 672 (Miss.2000). The Constitution does not guarantee a perfect trial, but it does entitle a defendant in a criminal case to a fair trial. Clark v. State, 891 So.2d 136, 141 (Miss.2004), citing Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

In light of the overwhelming evidence against Catchings, any alleged error of the trial court was harmless. See *Clark*, 891 So.2d at 142; *Riddley v. State*, 777 So.2d 31, 35 (Miss.2000); *Kircher v. State*, 753 So.2d 1017, 1027 (Miss.1999). The Supreme Court has held that where there has been an improper restriction on a defendants' ability to impeach a witness, certain factors must be looked at to determine whether or not the error was harmless. *Delaware v. Van*

Arsdall, 475 U.S. at 681, 106 S.Ct. at 1436. "These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1438.

IV. There was no error at trial and therefore there can be no cumulative error.

Mississippi appellate courts may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal." *Sykes v. State*, 895 So.2d 191, 196 (Miss.Ct.App.2005) (citing Jenkins v. State, 607 So.2d 1171, 1183-84 (Miss.1992)). The Mississippi Supreme Court has established the standard by which appellate courts are to review the effect of cumulative errors on a defendant's right to a fair trial:

> upon appellate review of cases in which we find harmless error or 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, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect.
>
> *Byrom v. State*, 863 So.2d 836, 847 (Miss.2003).

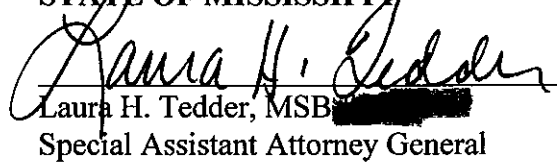
However, "[a] criminal defendant is not entitled to a perfect trial, only a fair trial." *Sykes*, 895 So.2d at 196 (quoting *McGilberry v. State*, 741 So.2d 894, 924 (Miss.1999)). In this case, Catchings fails to sufficiently articulate any errors committed by the trial court that amount to cumulative error. There is no merit to this assignment of error.

CONCLUSION

The Appellant's assignments of error are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

By: 
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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Counsel for the State of Mississippi, 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 APPELLEE** to the following:

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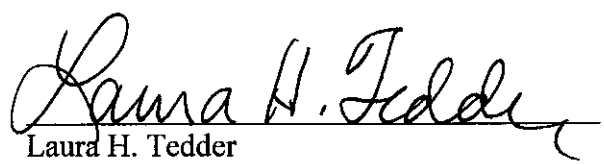
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