IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY SHELLEY	APPELLANT
V.	NO. 2008-KA-1284-COA
STATE OF MISSISSIPPI	APPELLEE

REPLY BRIEF OF THE APPELLANT

NO ORAL ARGUMENT REQUESTED

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ARGUMENT

THE STATE'S CLOSING ARGUMENT CONTAINED HIGHLY PREJUDICIAL AND INFLAMMATORY "SEND A MESSAGE" STATEMENTS.

The State argues that the three statements made by the prosecution in its closing arguments were not improper "send a message" statements, but merely statements "revolving around prosecution's successful proof of its case and the jury's corresponding duty to convict." (Appellee's Brief, p.7). That would have been the case had the prosecutor refrained from telling the jury three times to help it clean up the streets. (Tr. 144, 147, 159). Three times the prosecution improperly went outside the scope of arguing the facts presented in order to inflame the jury's prejudices and passion.

The prosecutor went beyond merely mentioning the success of the prosecution when he said, "[w]e did our part as the State . . . and now it is time for you to do your part. It's time for you to help us get drugs off our street." (Tr. 144). The prosecutor stepped over the line again when he stated,

"it's time to do your part, and this may be the only opportunity that you have to play a part, to play a definite part in cleaning the drugs off our streets, and not only the cleaning the drugs off our streets, but the defendants who sell drugs." (Tr. 147). In addition, the prosecution stated, "I'm upholding mine. I'm not letting drug dealers get away with it. What are you going to do." (Tr. 159). These statements, while couched in terms of meeting the burden on the State, clearly reference a wider duty of the jury to help the State clean up the streets. The duty of a jury is to listen to the evidence presented and render a verdict, period. *Brown v. State*, 986 So. 2d 270 (Miss. 2008). The jury is an arm of the State but it is not an arm of the prosecution. *Williams v. State*, 522 So. 2d 201, 209 (Miss. 1988).

The statements referenced above are akin to those made in *McCoy v. State*, 954 So. 2d 479 (Miss. Ct. App. 2007). In *McCoy*, the prosecution told the jury it was their job to protect the community from people who sell drugs. *McCoy*, 954 So. 2d at 479 (¶29). In the instant case, the prosecution made a similar remark by repeatedly referencing the part or duty of the jury to help clean up the streets. This can only be seen as an attempt to impose upon the jury the feeling that their job is to protect the community. Jurors are the representatives of the community, but must vote based on the evidence shown at trial and not in their representative capacity. *Spicer v. State*, 921 So. 2d 292, 318 (¶53) (Miss. 2006) (*citing Williams v. State*, 522 So. 2d 201, 209 (Miss. 1998)). This kind of statement was held improper in *McCoy* and should be held improper here as well.

The statement that the jury should help the prosecution "get drugs off our street" and that it should do its part in, "cleaning the drugs off our streets" is very similar to the improper comments made in *Brown v. State*, 986 So. 2d 270 (Miss. 2008). In *Brown*, the prosecutor told the jury to, "walk away from our oppression and prejudice and make the types of decisions that make us heroes and rid crime from our streets." Id. at 273 (¶4) (emphasis in original). The prosecutor went on to

make several other improper "send a message" statements, even arguing with the trial judge that such statements were proper. Id. at 273-274 (¶4). The Court in *Brown* found his statements to be improper. Id. at 276 (¶18). The statements made in the instant case can hardly be distinguished from *Brown*. Both statements encourage, demand even, that the jury take into consideration the effect their verdict will have on the community and the safety thereof. Closing arguments are for summarizing the evidence. *Rogers v. State*, 796 So. 2d 1022, 1027 (¶15) (Miss. 2001). Closing arguments should be focused on the facts in evidence and not the broader problems of crime in society, "lest the remediation of society's problems distract jurors from the awesome responsibility with which they are charged." *Spicer v. State*, 921 So. 2d 292, 318 (¶55) (Miss. 2006) (citing *People v. Liner*, 826 N.E. 2d 1274, 1287 (2005)). In the instant case, the prosecution improperly went outside the scope of closing arguments by focusing on the need to clean up the streets. The statements focused on extrinsic circumstances unrelated to the matter at hand. These statements prejudiced the defendant by inflaming the jury.

In the Appellee's brief the State improperly argued the statements made by the prosecution were not "send a message" statements. The record shows the statements were in fact "send a message" statements. The State also argues that, in the alternative, if the they are indeed improper "send a message" statements, the statements are procedurally barred because there was no contemporaneous objection. (Appellee's Brief, p. 8).

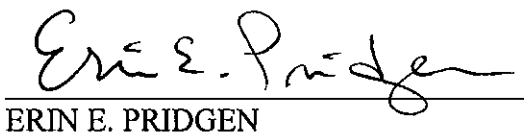
The Appellant respectfully submits that the improper comments were highly inflammatory and required the trial court to object, *sua sponte*. The comments were highly inflammatory because they were meant to improperly influence the jury with unessential elements not within evidence. Therefore, the court should have objected *sua sponte* and by not doing so, committed reversible error.

CONCLUSION

Based on the reversible errors at trial, Shelley requests that this Honorable Court reverse and render the trial court's decision in this case. In the alternative, Shelley requests that this Court reverse the trial court's decision and remand this case to the lower court for a new trial.

RESPECTFULLY SUBMITTED,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Jeffrey Shelley, Appellant

BY: 

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CERTIFICATE OF SERVICE

I, Erin E. Pridgen, Counsel for Jeffrey Shelley, 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 **REPLY BRIEF OF THE APPELLANT** to the following:

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This the 11th day of August, 2009.

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