

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2008-TS-01434**

**JERMORRIS PILCHER**

**APPELLANT**

**VS.**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**APPEAL FROM THE FOURTH JUDICIAL DISTRICT,  
CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI  
HONORABLE MARGARET CAREY-MCCRAY, CIRCUIT JUDGE**

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**BRIEF OF THE APPELLANT**

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***ORAL ARGUMENT NOT REQUESTED***

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**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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Margaret Carey-McCray  
Circuit Court Judge, Fourth Judicial District  
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2. Honorable Dewayne Richardson  
District Attorney, Fourth Judicial District  
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3. Honorable David M. Holly  
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4. Marvell Gordon  
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5. Jermorris Pilcher, Appellant  
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## **STATEMENT OF THE ISSUES**

- I. THE TRIAL COURT ERRED BY FAILING TO DECLARE A MISTRIAL DURING THE OPENING STATEMENT OF THE PROSECUTION IN WHICH THE ASSISTANT DISTRICT ATTORNEY WAS ALLOWED TO MAKE SEVERAL MISTATEMENTS OF LAW REGARDING THE WEIGHT OF THE EVIDENCE THE JURORS COULD PLACE ON DONTAY WILLIAMS'S TESTIMONY AND ALLOWED TO MAKE IMPROPER ARGUMENTS DURING HIS OPENING.
- II. THE TRIAL COURT ERRED BY FAILING TO DECLARE A MISTRIAL DURING THE TESTIMONY OF CORDELL PHAMS IN WHICH HE TESTIFIED TO NEW INFORMATION PREVIOUSLY UNHEARD AND NOT PROPERLY INSTRUCTING THE JURY WHAT PARTS OF PHAM'S TESTIMONY TO DISREGARD.

## STATEMENT OF THE CASE

### NATURE OF THE CASE/LOWER PROCEEDINGS AND DISPOSITION

The Defendant/Appellant, Jermorris Pilcher (hereafter referred to as Pilcher) is presently requesting relief from his conviction of murder in the Circuit Court of Leflore County on April 4, 2008 before the Honorable Margaret Carey-McCray. Pilcher was indicted for murder by the Grand Jury of Leflore County on or about April 17, 2007 and the actions in that case were recorded as Cause Number 2007-0087. Pilcher was represented at trial by the Honorable David M. Holley and the State was represented by the Honorable Dewayne Richardson, District Attorney of the Fourth Judicial District, and Assistant District Attorney Marvin Sanders. Attorney Holley filed a *Motion for a New Trial or in the Alternative, Judgment of Acquittal Notwithstanding the Verdict* on Pilcher's behalf on April 15, 2008, which was denied by the trial court on June 29, 2008. However, the trial Court's order denying Pilcher's motion was not entered until July 21, 2008. Attorney Marvell Gordon made an entry of appearance on Pilcher's behalf and filed a timely *Notice of Appeal* on August 20, 2008.

### STATEMENT OF FACTS

On June 14, 2006, the Leflore County Sheriff's Office responded to a call of a shooting at the Delta Apartments in Greenwood, Mississippi. (TR- p. 309: Ln.14-29). When officers arrived, they discovered that Michael Taylor (hereafter referred to as Taylor) had been shot at that location and later died. (TR- p. 309: Ln.28-29). The Leflore County Sheriff's Office located several individuals who were in the area at the time of the shooting and one, Dontay Williams, who claimed to be an eyewitness. (TR- p. 309: Ln. 1-9). Based on the information gathered by deputies, Pilcher was arrested and charged with killing Michael Taylor. (TR- p. 316: Ln.23-24). This case proceeded to trial on April 2, 2008, and concluded on April 4, 2008. (TR- p. 1: Ln.8-10).

During the prosecution's opening statements, Assistant District Attorney Marvin Sanders (hereafter referred to as Sanders) makes reference to a "code of silence" which according to him exists in certain neighborhoods that may cause individuals to ignore crime. (TR- p. 269: Ln.21-24). Pilcher's trial counsel, Attorney David Holly (hereafter referred to as Holly), objects to any reference of a "code of silence". (TR- p. 269: Ln.28-29). Outside the presence of the jury, the trial court inquired whether evidence of a code of silence would be introduced to which the prosecution responded that there would be evidence that some witnesses delayed coming forward for fear of being labeled "snitches". (TR- p. 270: Ln.1-9). The trial court allowed the prosecution to continue along that direction with the understanding that evidence must be introduced to substantiate the "code of silence" statements, but warned the prosecution not to make arguments during opening statements. (TR- p. 270: Ln.22-294). The prosecution then tells the jury that witness Dontay Williams (hereafter referred to as Williams) is a convicted felon and requested that they promise not hold that fact against Williams. (TR- p. 271: Ln.19-27). The prosecution proceeds to tell the jury that Williams witnessed Pilcher plotting to harm Taylor because he grew up in another part of Greenwood other than the Delta Apartments. (TR- p. 272: Ln.12-27). Pilcher's counsel objected to these statements as accusatory of some sort of gang activity, and in response the prosecution asserted that there would be evidence of a neighborhood rivalry as motive for the killing. (TR- p. 273: Ln.5-2). The trial court accepted the prosecution's explanation but admonishes the prosecution that this was the second time that the court had warned them about improper statements of law with regard to the weight the jury may place on Williams's conviction. (TR- p. 273: Ln.22-TR-p. 275; Ln. 28). Pilcher's trial counsel afterwards requests a mistrial which the court declined to grant but continued to try to explain the distinction between the proper standard of law with regard to convictions of witnesses and the statements made by the prosecution. (TR- p. 276: Ln.1-22).

During the prosecution's redirect of Cordell Phams (hereafter referred to as Phams), Phams indicates in open court for the first time that he actually witnessed an individual he knew only as "Fella" give Pilcher a gun. (TR- p. 389: Ln.17-TR - p. 390: Ln. 11). The prosecution realizes that Phams is testifying to something he has said prior and attempts to have the trial court strike the statement although the jury has already heard it. (TR- p. 390: Ln.12-24). Pilcher's counsel immediately requests a mistrial noting that the new information has already been heard by the jury, but the trial court only offers an opportunity to voir dire Phams about the new information. (TR- p. 391: Ln.5-27). Pilcher's counsel informs the trial court that at this point he has no opportunity to prepare to counter Pham's new information. (TR- p. 392: Ln.7-10). The trial court notes that she is not sure if it's something that she can just exclude but it sounds like it should be excluded. (TR- p. 392: Ln.25-29). Ultimately, the parties determine that the new information was unknown to both sides and the trial court decides to exclude it. (TR- p. 390: Ln.1-TR p. 402; Ln. 11). However, after the jury returned, the trial court allows the prosecution to continue it's redirect of Phams and only instructs the jury to disregard Pham's statement regarding the new information after the prosecution is finished with him. (TR- p. 406: Ln.3- TR 407: Ln. 12). Additionally, the trial court does not identify to the jurors specifically what statements they are supposed to disregard. (TR- p. 407: Ln.15-21).



## **SUMMARY OF THE ARGUMENT**

The Defendant, Jermorris Pilcher, has been aggrieved by the decisions of the trial court which should have granted a mistrial at the trial of this matter on at least two issues. First, the State was allowed to, at least on two occasions, to make improper statements to the jury about the weight that they would give to the testimony of Dontay Williams, a convicted felon. The weight that any jury places on the testimony of a witness is clearly the province of that juror and neither the State nor the Defense should be allowed to misinform the jury regarding their options. This is particularly harmful in this case because Dontay Williams was the only alleged eyewitness to the shooting which took the victim's life. The Defense countered Dontay Williams's testimony with that of Christine Taylor who alleged that he could not have seen the Defendant shoot the victim because he was in the bathtub at the time of the shooting. Thus, due to the disagreement of accounts between the two witnesses, the juror's assessment of Dontay Williams's truthfulness becomes even more important. That being said, they should have been correctly instructed by the trial court that that were free to consider Dontay Williams's status as a convicted felon I when considering what weight to give his testimony. At the very least, the trial court should have instructed them to disregard the erroneous statement of the prosecution. As a result, the trial court should have granted a mistrial in this matter.

Additionally, the defendant was severely prejudiced because the trial court failed to declare a mistrial after Corell Phams, a witness for the State, came forth with new information about the role of the defendant which was previously not known to the defense. The trial court refused to allow the defendant a continuance or a mistrial in order to sufficiently investigate Pham's new revelation or to see if there were witnesses that might counter Pham's new version of what he saw. The trial court's actions are tantamount to not allowing the defendant an opportunity to an adequate defense against his accusers. Clearly Pham's new information

changed the complexion of the case that the defendant would have to counter and to make the defense continue under the circumstances was manifestly unjust.

Ultimately, the defendant should have been allowed a mistrial on either of the above listed issues and request that this Court render a verdict of not guilty or in the alternative remand this case to the Circuit Court of Leflore County for a new trial.

## ARGUMENT

- I. THE TRIAL COURT ERRED BY FAILING TO DECLARE A MISTRIAL DURING THE OPENING STATEMENT OF THE PROSECUTION IN WHICH THE ASSISTANT DISTRICT ATTORNEY WAS ALLOWED TO MAKE SEVERAL MISTATEMENTS OF LAW REGARDING THE WEIGHT OF THE EVIDENCE THE JURORS COULD PLACE ON DONTAY WILLIAMS'S TESTIMONY AND ALLOWED TO MAKE IMPROPER ARGUMENTS DURING HIS OPENING.

The trial court abused its discretion by failing to declare a mistrial after the prosecution repeatedly made improper statements of law in the presence of the jury regarding the weight of evidence that the jurors could place of Dontay Williams's testimony. The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created. Baker v. State, 991 So.2d 185, 187. (Miss. App. 2008). 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. Wright v. State, 958 So.2d 158, 161 (Miss.2007). Attorneys are allowed a wide latitude in arguing their cases to the jury. However, prosecutors are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. Hiter v. State, 660 So.2d 961, 966 (Miss. 1995).

During the State's opening statements, the prosecution speaks to the jury about the testimony of Dontay Williams, the only eyewitness to the shooting of the victim, Michael Taylor, and reveals that he is actually a convicted felon. (TR- p. 271: Ln.19-27). The State then reminds the jurors that during *voir dire* no one raised there hands when asked whether or not they would hold such a conviction against a witness when considering their testimony. The trial court accepted the prosecution's explanation but admonishes the prosecution that this was the

second time that the court had warned them about improper statements of law with regard to the weight the jury may place on Williams's conviction. (TR- p. 273: Ln.22-TR-p. 275; Ln. 28). Pilcher's trial counsel afterwards requested a mistrial which the court declined to grant but continued to try to explain the distinction between the proper standard of law with regard to convictions of witnesses and the statements made by the prosecution. (TR- p. 276: Ln.1-22). As stated by the trial court, the jury is free to consider a witness's convictions, if any, and place whatever weight upon a jurors testimony that they deem proper taking into consideration that each person that testifies puts his credibility into question. The State's misstatements of law severely prejudice the defendant in that he is the only witness to claim to have seen the defendant shoot the victim. The trial court acknowledges the State's improper statements and informs the State that the jurors may consider Dontay Williams's conviction when determining the credibility of his testimony but must not simply disregard his testimony cause of it. Thereafter, the Court took no actions to remedy the State's actions but rather warns the State that the Court was just trying to save the trial. Id. Clearly, under the circumstances, the trial court abused its discretion by not informing the jury of the correct statements of law and allowing them to continue throughout the course of the trial to operate under and erroneous understanding of their duties as jurors. Moreover, the jurors understanding of how they may perceive Dontay Williams's testimony is doubly important because he is the only witness to actually claim to see the Defendant shoot the victim. The Defendant presented witness to counter much of the state's case including an alibi witness and a witness that claimed that Dontay Williams could not have seen what he claimed to. Thus, Dontay Williams is the most important witness to testify during the trial of this matter and having the jury be fully informed regarding how they may receive his testimony is an issue to important to disregard. As a result of the State and the trial court's actions, the Defendant has been severely prejudiced, and the trial court should have declared a

mistrial as requested by defense counsel or at the least corrected the prosecutions statements to the jury.

II. THE TRIAL COURT ERRED BY FAILING TO DECLARE A MISTRIAL DURING THE TESTIMONY OF CORDELL PHAMS IN WHICH HE TESTIFIED TO NEW INFORMATION PREVIOUSLY UNHEARD AND NOT PROPERLY INSTRUCTING THE JURY WHAT PARTS OF PHAM'S TESTIMONY TO DISREGARD.

The trial court abused its discretion by failing to declare a mistrial when requested during the testimony of Cordell Phams in which he testified to new information previously unheard and not properly instructing the jury to disregard his testimony to said new information. As stated earlier, the standard of review for denial of a motion for mistrial is abuse of discretion. Wright v. State, 958So.2d 158, 161 (Miss.2007). Rule 9.04(A) of the Uniform Circuit and County Court Rules requires prosecutors to disclose evidence which is known or may become known to the prosecution. Specifically, prosecutors must disclose the names and addresses of all witnesses and the contents of any statement, whether oral or written, made by any such witness. Id. When a party fails to adhere to this rule, "the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances. Payton v. State, 897 So.2d 921, 942 (Miss.2003). The question presented here brings into direct conflict two important interests. First, there is the prosecution's interest in presenting to the jury all relevant evidence and the accused's interest in knowing reasonably well in advance of trial what the prosecution will try to prove and how it will attempt to make its proof which. Snelson v. State, 704 So.2d 452, 458 (Miss.1997).

When a prosecutor reveals evidence on the eve of trial that should have been disclosed earlier, and when that evidence completely undercuts the defense's theory of the case and renders most of its trial preparations worthless, then the only effective remedy is a continuance. McCullough v. State, 750 So.2d 1212, 1217. (Miss. 1999). Otherwise, the defense attorney is left with inadequate time and opportunity to investigate the newly arisen evidence, evaluate its

trustworthiness, discuss its implications with his client, allow time for due consideration thereof, and, if necessary, to develop a new trial strategy. Id.

In *Fulks v. State*, the Supreme Court ordered that the defendant receive a new trial because the trial court failed to give the defendant a continuance after the prosecution disclosed on the eve of trial that a key witness had revised his testimony. Id. at 2009WL 2183064. (Miss. 2009). The trial court in *Fulks*, treated the witness's changed story as an opportunity which could be remedied by impeaching the witness from his earlier statement, but the defense objected, requested a continuance, and asserted that a continuance would allow the necessary time to determine the truth of the witnesses new statements and/or to acquire additional witnesses that could have helped Fulks's defense. Id. at 3. It is worth noting however that in *Fulks*, it remained unanswered as to when the prosecution became aware of the new information offered by the witness who revised his testimony. Id. In the case *sub judice*, it is in fairness clear that the State appeared to be blindsided by Cordell Pham's new information. Thus, it would be disingenuous to allege any sort of malicious discovery violation on the part of the State. Rather, it is very clear that the defense was not privy to how damaging Pham's testimony would be and should have been offered an opportunity by the trial court to investigate the matter.

In this present case, Cordell Phams announced for the first time that he actually witnessed the Defendant acquire a gun from another individual on the night of the shooting. Defense counsel quickly requested a mistrial but is denied by the trial court. Pilcher's counsel informs the trial court that at this point he has no opportunity to prepare to counter Pham's new information. (TR- p. 392: Ln.7-10). The trial court notes that she is not sure if it's something that she can just exclude but it sounds like it should be excluded. (TR- p. 392: Ln.25-29). Ultimately, the parties determine that the new information was unknown to both sides and the trial court decides to exclude it. (TR- p. 390: Ln.1-TR p. 402; Ln. 11). However, after the jury returned, the trial

court allows the prosecution to continue it's redirect of Phams and only instructs the jury to disregard Pham's statement regarding the new information after the prosecution is finished with him. (TR- p. 406: Ln.3- TR 407: Ln. 12). Additionally, the trial court does not identify to the jurors specifically what statements they are supposed to disregard. (TR- p. 407: Ln.15-21).

The trial court's decision regarding the new information of Cordell Pham is clearly an abuse of discretion and resulted in great prejudice to the defendant. Had the defendant been aware of the new statements of Cordell Pham, he would have been allowed to possibly find witnesses that may have countered Mr. Pham's new information, which, although excluded by the trial court, was heard by the jury. The Defense found witnesses to counter all of the State's other witnesses. The additional knowledge of Mr. Phams new information could may have drastically changed the way the defense presented its case or the defendant's decision to proceed to trial at all, depending on what may have been discovered while investigating Mr. Pham's new information. Moreover, the trial court allowed the State to continue questioning Mr. Pham without immediately identifying what statements of Mr. Pham that they were to disregard. Without specific instructions from the trial court, it is impossible to determine what effect Mr. Pham's new information may have had on the jury's reasoning or if they even realized what statements the trial court was instruction them to disregard.

### **CONCLUSION**

Accordingly, Jermorris Pilcher asks that you reverse his conviction in the Circuit Court of Leflore County and render a verdict of not guilty or in the alternative remand this case to the Circuit Court of Leflore County for a new trial to be carried out in a manner consistent with the ruling of this Court.

Respectfully submitted, this the 9<sup>th</sup> day of October, 2009.

JERMORRIS PILCHER, APPELLANT

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that a true and correct copy of the above *Appellant's Brief* has been served via U. S. Mail, postage prepaid, to the following:

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