IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANIEL BANKS — APPELLANT

VS. — NO. 2008-KA-1523

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On or about October 22, 2007, Daniel Banks was indicted for aggravated assault against George Palmer by stabbing him with a knife. (C.P. 3) On or about March 17, 2008, the indictment was amended to show that Daniel Banks was an Habitual Offender. (C.P. 30) Banks was tried on August 14, 2008. He was convicted and sentenced to a term of 20 years in the custody of the Mississippi Department of Corrections without the benefit of parole. (Tr. 287, 293)

SUMMARY OF THE FACTS

Adlean Johnson testified that she was at George Palmer's trailer on the morning of May 19, 2007. She testified that she had been living with Palmer for about five or six months and that she drank heavily at that time. She testified that she was drinking on that day. (Tr. 120) Danny Banks' mother lived in a trailer next door to Palmer. There were people at Ms. Banks' house and everyone was in the yard drinking and socializing. (Tr. 122) Johnson testified that she and

George broke up and George put her out of the house on the morning of May 19, 2007. (Tr. 122) Johnson testified that she and Danny went in Ms. Banks' house and had sex in a bedroom. (Tr. 123) She testified that while she was with Danny Banks, George Palmer opened the door to the bedroom they were in and then closed it. (Tr. 124) Johnson and Banks then went outside to Ms. Banks' yard. (Tr. 124) Palmer had gone back to his trailer. (Tr. 125) Johnson testified hat Palmer kept asking her to come back to his house and that he had company over there. Johnson told him that she was not coming back. Palmer then walked over to Ms. Banks' yard. Danny Banks and Palmer exchanged words. Banks asked Palmer to get out of his yard. (Tr. 126) Johnson testified that Banks was much bigger than Palmer. She testified that she did not see Palmer get stabbed and did not know that he had been stabbed until the ambulance came. (Tr. 126) Johnson testified that Banks was trying to make Palmer get out of his yard and that she lost sight of Danny Banks he ran around to the other side of the trailer out of her view. (Tr. 126)

Johnson testified that is was midday and that she had drank about six beers that by that time. Johnson testified that after Palmer left in the ambulance she went back in his house to get her clothes out of his closet. (Tr. 127) The police stopped her and told her that she was not supposed to go over there. (Tr. 127) Johnson stayed and talked with the policemen and told them they she had stabbed George Palmer. (Tr. 128) She testified that she was intoxicated at the time she talked to the officers. (Tr. 128) She testified that she told the police officers that she had stabbed Palmer because she was mad at him for throwing her stuff in the yard and because she did not want Banks to get in trouble because she knew he had a prior record. (Tr. 128) At this point in the testimony, the defense objection and the jury was instructed to disregard the testimony. (Tr. 129) Johnson testified that she saw Banks with a knife after the stabbing and

that his mother washed the knife. (Tr. 130)

Johnson testified that she was taken into custody that night. (Tr. 130) She testified that she gave a statement to police a couple of days later, on May 21, 2007. (Tr. 130) She testified that the statement she gave to the police on that day was the same as her testimony at trial. She could not recall whether she told the police that she had seen Banks take the knife into the house and that she had seen his mother wash the knife. (Tr. 131) Johnson testified that at the time of the stabbing she was drinking heavily and that she was not working. (Tr. 131) She testified that she is now employed at King's Daughters Hospital and works 40 hours per week. (Tr. 131)

Officer Jason Bright testified that he is Captain with the Yazoo City Police Department. (Tr. 154) Officer Bright testified that he was called out to 907 White Street on May 19, 2007. (Tr. 155) When they arrived, they found the victim, George Palmer, stabbed and laying in the doorway of his trailer home. (Tr. 155) They secured the scene and called for an ambulance and a detective. (Tr. 155) The officers spoke with Palmer and with Kenny Langston and Quincy Langston. (Tr. 156) They then began looking for Danny Banks. (Tr. 157) Officer Bright testified that he spoke with Adlean Johnson during his first trip to the location, but did not arrest her at that time. Officer Bright and Detective Collins then apprehended Danny Banks at a trailer house on 549 Bell Road. (Tr. 158) Banks was in the back room under a mattress when the officers found him. (Tr. 158)

Later that night, the officers were again called to 907 White Street. They received a call from Martha Banks, George Banks mother, in reference to a woman who was saying that she had done the stabbing. (Tr. 159) When they arrived, Ms. Banks directed them to Adlean Johnson. Officer Bright testified that Johnson appeared to be very intoxicated. (Tr. 159) Officer Bright

picked up Ms. Johnson and took her to the police department where she was held for investigative detention. (Tr. 160) Bright testified that the detective could not get a statement from her because she was intoxicated and therefore she was held in custody for her own safety and to allow the detective to get a statement when she was not intoxicated. (Tr. 161)

George Palmer testified that on May 19, 2007, he was living at 909 White Street. Adlean Johnson was his girlfriend at that time and was staying with him. (Tr. 167) He testified that he threw Johnson's belongings on that day out after he caught her with Danny. (Tr. 167) Palmer testified that His friends, Kenny and Quincy Langston were at his house that day and Kenny was cutting Quincy's hair out in the yard. (Tr. 168-9) It was mid-afternoon and Palmer and his friends had just gotten off work. (Tr. 169) Palmer testified that he had known Banks for a couple of weeks. (Tr. 169) Palmer testified that Banks, Johnson and Banks' mother were sitting in Banks' mother's yard. Palmer testified that he want over while they were sitting outside. He testified that he asked to go use the bathroom, but that he really went inside to tell Johnson that he was going back home. He didn't know where the bathroom was and opening the bedroom door and discovered Banks and Johnson in bed. Palmer testified that he closed the door and left. (Tr. 172) Johnson testified that he went home and locked the door. Johnson came over and Palmer testified that he threw her belongings out at that point. Palmer testified that he closed the door and locked it again. Palmer came back outside after Kenny Langston knocked on the door and stood talking to them until they finished cutting hair. Palmer testified that he went to the mailbox and that he hollered to Banks. Banks' girlfriend was sitting next to Danny and Johnson was still over there. Palmer hollered at Banks, "You got some kind of nerve. Just came out the room with my girl, and you called your girl to come over to your house." Palmer went to the

mailbox and about the time he turned about, Banks ran over and asked him, "What you said?" Banks stabbed Palmer with a knife so fast that Palmer did not see the knife. (Tr. 175) Palmer indicated that Banks had stabbed him just below the sternum. (Tr. 176) Palmer ran and feel and Kenny Langston came and helped him to the doorway. Palmer testified that he passed out several times before the ambulance came. He testified that he had not been drinking and that he was unarmed at the time of the stabbing. He testified that Banks was coming after him again after he stabbed him the first time. He testified that he did not know why Banks was unable to stab him a second time. (Tr. 177)

Kenny Langston testified that on May 19, 2007 he and his brother Quincy were at Palmer's house. (Tr. 206) He testified that he was cutting his brother's hair and Palmer was outside talking with them. He testified that Palmer went to the front yard and was calling his girlfriend. Langston testified that he heard Palmer call out, "Adlean, come here. I want to talk to you." (Tr. 207) He called Johnson for about 3 minutes. Langston looked down to cut his brother's hair, and then when he looked up again, he saw a man coming toward Palmer and the man appeared to hit Palmer. Langston identified the man as Danny Banks. (Tr. 208) Palmer then ran and fell. Banks continued to come after Palmer. Langston went to break it up and got half way to Palmer when he saw a bloody knife in Bank's hand. (Tr. 209). Langston looked at Palmer and another man was in front of Banks and held him back. Langston testified that Johnson was not around when Palmer was stabbed. (Tr. 212) Langston testified that as he was approaching Banks to break up the fight, Banks asked him, "Y'all got something to do with this?" Langston replied "No, just get off him. Get back." (Tr. 212) Langston testified that at the time this occurred he had been cutting his brother Quincy's hair. He testified that Quincy

was in a position to witness the stabbing. (Tr. 212)

Martha Banks testified on behalf of her son. (Tr. 224)

SUMMARY OF THE ARGUMENT

The trial court correctly refused Defense Instruction as an improper comment on the evidence. The trial court correctly disallowed Banks' mother's testimony regarding an alleged out-of-court statement by Palmer on the grounds that it was impermissible hearsay. Further, the testimony was on a collateral issue and was impermissible for that reason as well. The trial court correctly denied Banks' motions for mistrial after testimony that Banks "had a prior record." The trial court has the discretion to determine whether or not a statement is so prejudicial that it requires a mistrial and the trial court did not abuse it's considerable discretion in denying Banks' motions for mistrial. The trial court correctly denied Banks' motion for mistrial on the basis of the Prosecutor's closing argument. Banks received a fundamentally fair and impartial trial and as no errors occurred at trial, there can be no application of "cumulative error".

ARGUMENT

I. The trial court correctly refused Defense Instruction as an improper comment on the evidence.

Regarding jury instructions, the trial court possesses considerable discretion. *Bickham v. Grant*, 861 So.2d 299, 301 (Miss.2003) citing *Southland Enters. v. Newton County*, 838 So.2d 286, 289 (Miss.2003) (citing *Splain v. Hines*, 609 So.2d 1234, 1239 (Miss.1992)). A party is entitled to a jury instruction if it concerns a genuine issue of material fact and there is credible evidence to support the instruction. *Mariner Health Care, Inc. v. Estate of Edwards*, 964 So.2d 1138, 1156 (Miss.2007) (citing *DeLaughter v. Lawrence County Hosp.*, 601 So.2d 818, 824

(Miss.1992)). While a party is entitled to jury instructions that present his theory of the case, this entitlement is limited; the trial court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. *Ford v. State*, 975 So.2d 859, 863 (Miss.2008) (citing *Howell v. State*, 860 So.2d 704, 745 (Miss.2003)). "On the other hand, it would be error to grant an instruction which is likely to mislead or confuse the jury as to the principles of the law applicable to the facts in evidence." *Southland Enters.*, 838 So.2d at 289 (citing *McCary v. Caperton*, 601 So.2d 866, 869 (Miss.1992)).

On appellate review of the trial court's grant or denial of a proposed jury instruction, our primary concern is that "the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." *Splain*, 609 So.2d at 1239 (citing *Rester v. Lott*, 566 So.2d 1266, 1269 (Miss.1990)). Appellate courts ask whether the instruction at issue contained a correct statement of law and was warranted by the evidence. *Beverly Enters. v. Reed*, 961 So.2d 40, 43-44 (Miss.2007) (citing Hill v. Dunaway, 487 So.2d 807, 809 (Miss.1986)). Mississippi appellate courts will reverse based on the denial of an instruction upon a showing that the granted instructions, taken as a whole, do not fairly present the applicable law. *Mariner Health Care*, 964 So.2d at 1156 (citing *Whitten v. Cox*, 799 So.2d 1, 16 (Miss.2000)). Thus, "[i]f other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal." *Southland Enters.*, 838 So.2d at 289 (citing *Purina Mills, Inc. v. Moak*, 575 So.2d 993, 996 (Miss.1990)). In analyzing the aggregate jury instructions, "[d]efects in specific instructions will not mandate reversal when all of the instructions, taken as a whole fairly-although not perfectly-announce the applicable primary rules of law." *Beverly Enters.*, 961 So.2d at 43 (citing *Burton v. Barnett*, 615 So.2d 580, 583 (Miss.1993)).

Further, "[i]t is also well established that instructions to the jury should not single out or contain comments on specific evidence." *Crimm v. State*, 888 So.2d 1178, 1186 (Miss.Ct.App.2004) (quoting *Lester v. State*, 744 So.2d 757, 759 (Miss.1999)).

The instruction proposed by Banks as his "theory of the case" instruction read as follows:

> Daniel Banks's theory of the case is that Adlean Johnson stabbed George Palmer with a knife and then threw the knife in the river and told officer [sic] they arrested the wrong man and if you so find you must find Daniel Banks not guilty.
>
> (C.P. 49)

This is clearly a comment on the evidence. Banks submits that this theory is not covered elsewhere in the evidence. However, the instructions given instruct the jurors that they are to determine how much of each witness's testimony they believe and how much weight they will give that testimony. (C.P. 36) Further, they were instructed as to the elements of the crime, and that they must find beyond a reasonable doubt that Danny Banks committed the crime. (C.P. 38) They were further instructed, "If the prosecution has failed to prove any one or more of the listed elements beyond a reasonable doubt, then you shall find the defendant, Danny Banks, not guilty of aggravated assault as charged in the indictment." (C.P. 38) This is Danny Banks' theory of the case. Worded simply, Banks' theory is, "someone else did it." Instruction S-1 instructs the jury that they should reach a verdict of guilty if and only if, DANNY BANKS is shown to have committed aggravated assault on George Palmer beyond a reasonable doubt. This instruction clearly sets out that Banks' identity as the person who stabbed Palmer is essential to a conviction. Therefore, his theory of the case is addressed in the instructions as presented to the jury, since by instruction S-1, the jury was instructed that if they believed that someone else stabbed George

Palmer, they must find Banks "not guilty." Accordingly, the trial court did not abuse its discretion in refusing to grant a jury instruction that inappropriately commented on the evidence. This issue is without merit.

II. The trial court correctly disallowed testimony of Martha Banks on the grounds that it was impermissible hearsay.

Banks argues the he should have been allowed to elicit hearsay testimony from Martha Banks in order to impeach Palmer's testimony that he was not angry with Banks for passing him by in a Cadillac when Banks was caught in the rain. This testimony was correctly excluded by the trial court. While the testimony Banks sought to include might theoretically be admissible pursuant to M.R.E. 616, it is clearly inadmissible pursuant to M.R.E. 801, the rule against hearsay. Pursuant to M.R.E. 801 (d)(1), a prior statement by a witness is not hearsay if:

> [t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express of implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . ."

Further, there is no exception to the rule against hearsay under which the defendant can travel regarding the admissibility of this evidence. The trial court correctly excluded this testimony as a violation of the rule against hearsay.

Banks cites *Mason v. State*, 971 So.2d 618 (Miss.Ct.App.2007) as authority for the proposition that this hearsay testimony by Bank's mother should have been allowed and that the trial court abused it's discretion in excluding the testimony. However, *Mason* turns on relevance

as factor in determining whether evidence offered for impeachment is admissible. *Id.* at 621. The Court of Appeals noted that a collateral matter is a matter that is not directly relevant to the case at hand. *Id.* The testimony of C.G. was inadmissible because it would not rebut the charge in the indictment. The testimony in the instant case is not only hearsay testimony, but as in *Mason*, it is collateral. As such, this testimony was properly excluded by the trial court.

In *Williams v. State*, 73 Miss. 820, 19 So. 826 affirmed 120 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1896), an eyewitness to the shooting which was the subject of the case testified for the defendant. On cross-examination, she was asked by the State whether or not she said at the scene of the shooting that "they made up a plot to kill him three weeks ago." She denied making the statement, and the State called in a rebuttal witness who testified that she did make such statement at the scene. The Mississippi Supreme Court reversed the conviction holding that it was error to allow the witness to testify to the alleged contradictory statement made out of court. The Supreme Court noted that the testimony was, in effect, hearsay. The Court further held that whether or not the witness made the statement was irrelevant and a collateral matter and that therefore she could not be contradicted as to her statement. *Williams*, 73 Miss. At 829-30, 19 So. at 829. Mississippi Courts have consistently followed the rule in *Williams*. *Carlisle v. State*, 348 So.2d 765 (Miss. 1977).

Based on the forgoing authority, the trial court correctly excluded the testimony in question as hearsay. The testimony was further inadmissible as a collateral matter. This issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

III. The trial court correctly denied Banks' Motions for Mistrial after testimony that Banks "had a prior record."

Banks argues that the circuit court erred in denying his motions for a mistrial. Those motion arose from a question asked by the prosecution of a witness in the following colloquy:

Q: Okay. Now did you make any statements about who stabbed George Palmer when those police were there?

A: Yes, I did.

Q. And what did you say?

A. I said I did it.

Q. Did you?

A. No, sir.

Q. Okay. Could you tell this jury if you have ever stabbed George Palmer?

A. Me?

Q. Yes.

A. No, I haven't.

Q. Well, what we want to know, why did you say that? At first, were you intoxicated when you were saying that?

A. Just about it.

Q. Why were you trying, why were you telling the police officers that?

A. Because, I was, one thing, mad with George for throwing my stuff out in the yard. And I really didn't want Danny to get, I knew he had a prior record, and I didn't want him to

get in deeper trouble.

Mr. Alkebu-Lan: Objection, Your Honor.

The Court: Objection sustained.

Mr. Waldrup: I move to strike that, Your Honor.

Mr. Alkebu-Lan: We move for a mistrial, Your Honor.

The Court: Denied

Q. (Mr. Waldrup) That's not important. This is a totally different case. Okay? So we're not worried about any – we're just worried about what happened that night. Okay?

Mr. Alkebu-Lan: I am going to object, Your Honor, to the comments made by the prosecutor.

The Court: Sustained. Ask the jury to disregard.

Mr. Alkebu-Lan: Again, Your Honor, we move for a mistrial.

The Court: Denied.

(Tr. 128-129)

In all cases, "[t]he judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared." *Carpenter v. State*, 910 So.2d 528, 534 (Miss.2005) (quoting Roundtree v. State, 568 So.2d 1173, 1177 (Miss.1990)). Furthermore, in the absence of any evidence to the contrary, there is a presumption that the jury followed all of the trial court's instructions in reaching its verdict. *Reid v. State*, 266 So.2d 21, 28 (Miss.1972).

In this case, the prosecutor asked an appropriate question, but received an answer from

the witness which referenced the defendant's prior criminal record without any specificity as to the content of that record. The circuit judge sustained defense counsel's objection and the *prosecutor* asked that the inappropriate response be stricken from the record. The trial court then instructed the jury to disregard. Defense counsel made a motion for mistrial and the trial court correctly denied the motion. Immediately following that exchange, and clearly in an attempt to confine the witness to the case at hand, the prosecutor inadvertently and obliquely referenced a previous case and asked the witness to attend specifically to the case at hand. Again, defense counsel objected and the trial court instructed the jury to disregard. Defense counsel then moved for a mistrial once again, and the trial court correctly denied the motion.

The initial testimony by Johnson was offered by her to show her reasoning for giving a false statement immediately after the stabbing and was not presented to suggest propensity on the part of the defendant. The prosecutor's diligence in requesting that offending testimony be stricken from the record was a clear communication to the jury that it was not applicable to the case and should not be considered. The comments by the prosecutor to the witness to asking her to restrict her testimony to the case at hand were clearly not intended to prejudice the defendant and did not create a suggestion of propensity. Therefore, trial judge correctly denied defense counsel's motions for mistrial.

The circuit court correctly instructed the jury to disregard the content of the improper references. There is no evidence to indicate that the jurors failed to heed the circuit judge's instruction. Further, it was well within the court's discretion to determine that the remarks were not so prejudicial as to warrant a mistrial. Therefore, the circuit judge did not abuse her discretion in denying Banks' motions for mistrial. Accordingly, this issue is without merit.

IV. The trial court correctly denied Banks' Motion for Mistrial on the basis of the Prosecutor's closing argument.

Parker argues that the circuit court erred in denying his motion for a mistrial. In all cases, "[t]he judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared." *Carpenter v. State*, 910 So.2d 528, 534(¶ 23) (Miss.2005) (quoting *Roundtree v. State*, 568 So.2d 1173, 1177 (Miss.1990)). Furthermore, in the absence of any evidence to the contrary, there is a presumption that the jury followed all of the trial court's instructions in reaching its verdict. *Reid v. State*, 266 So.2d 21, 28 (Miss.1972).

In closing, the prosecutor made the following argument:

> I got up this morning to put a suit on. I've got two suits. Both pin-striped – one double-breasted and one single breasted. I couldn't remember if I had worn it previously. I couldn't remember if I had worn it earlier this week. I didn't know. I asked my wife, "What did I have on, Baby?" Hey, that's life. But he wants to demonize her because she had a drinking problem. But that's – use your common sense. They don't have a defense in this.
>
> (Tr. 284)

Defense counsel objected, stating, "Your Honor, I'm going to object to the argument that we don't have a defense. We have no burden. We don't have to have a defense. The circuit judge sustained the objection and took the appropriate remedial step and asked the jury to disregard the comment. There is no evidence to indicate that the jurors failed to heed the circuit judge's instruction. The circuit judge did not abuse her discretion in denying Bank's motion for a mistrial.

The Mississippi Supreme Court has held that trial judge is in the best a position to determine if an alleged objectionable remark has a prejudicial effect. *Roundtree v. State*, 568 So.2d 1173, 1177 (Miss.1990). "The judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared." *Id.* at 1778. If serious and irreparable damage has not occurred, then the trial judge should direct the jury to disregard the remark. *Id.* at 1778. Applying the law to the facts in the case *sub judice*, the trial judge did not abuse her discretion by denying Banks' request for a mistrial. The trial judge sustained the objection to the closing comments in open court and directed the jury to disregard the remarks, thus curing any harm to Banks. The trial judge was well within her discretion to deny the request for a mistrial. Accordingly, this issue is without merit and the jury's verdict and the rulings of the trial court should be upheld.

V. Banks got a fundamentally fair and impartial trial.

Banks argues that errors occurred that, considered cumulatively, denied him the right to a fair and impartial trial. In cases in which Mississippi appellate courts find harmless error or error that is not reversible in and of itself, the court has the discretion to determine on a case-by-case basis whether the errors, considered cumulatively, require reversal due to the resulting cumulative prejudicial effect. *Byrom v. State*, 863 So.2d 836, 847 (Miss.2003). However, this case is not susceptible to cumulative-error analysis because no errors occurred. *Ruffin v. State*, 992 So.2d 1165, 1179 (Miss.2008). Therefore, this issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

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

Respectfully submitted,

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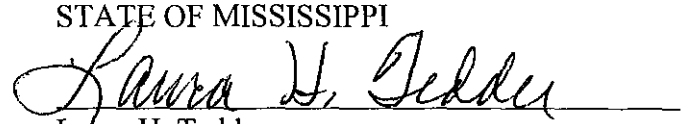

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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