

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-1523

DANIEL BANKS

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

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## **ISSUES PRESENTED ON APPEAL**

- I. The trial court committed reversible error when it denied Banks' Theory of the Case Instruction.
- II. It was error for the trial court not to let Banks impeach the complaining witness with evidence of his bias toward Banks.
- III. The trial court should have granted a mistrial after two separate references to Banks' criminal history.
- IV. The trial court should have declared a mistrial after the prosecutor argued that Banks had no defense to the charge.
- V. The cumulative effect of errors denied Banks a fair and impartial trial.

## **ISSUES**

- I. **The trial court committed reversible error when it denied Banks' Theory of the Case Instruction.**

With all due respect to the State, its citation appear to be overwhelmingly composed of civil case authorities as apposed to the more burdensome standards of this criminal case. In that regard, and contrary to the State's, contention, surely the purpose of the defendant being entitled to a theory of the case instruction in composes more than the jury being instructed that if they do not find him guilty beyond a reasonable doubt then find him not guilty.

With all due respect to the trial court, the reasoning that Banks' requested theory of the case instruction was a comment on the evidence is in fact clear evidence the trial court has a dearth of experience in being presented with a theory of the case instruction and what it entails.

The instruction was not a comment on the evidence. The operative word in the requested instruction was *if* the jury so found then the jury was required to find Banks not guilty. *If* the jury did not so find, it could find Banks guilty. This is the basis tenet of a theory

of the case instruction. There has to be evidence in the record to support such a theory. The State did not argue that this evidence was lacking. Furthermore, the requested instruction was not a comment on the evidence, it merely ask the jury to find Banks not guilty *if* it found Banks theory of the case plausible. Banks' theory of the case instruction concerned a genuine issue of material fact and there was credible evidence to support the instruction.<sup>1</sup>

The trial court did not deny Banks' theory of the case instruction because the instruction incorrectly stated the law, was covered fairly elsewhere in the instructions, or was without foundation in the evidence<sup>2</sup>. Banks' requested theory of the case instruction was not misleading or confusing as to the principles of the law applicable to the facts in evidence. Moreover, the State did not object to Banks' theory of the case instruction as misleading or confusing to the jury as to the principle of the law applicable to the facts in evidence. Likewise, the State did not and has not indicated how Banks' requested theory of the case instruction was misleading or confusing as to the principles of the law applicable to the facts in evidence. A defendant is entitled to a jury instruction expressing his theory of the case no matter how meager or unlikely the evidence is in support of the defense theory.<sup>3</sup>

The denial of Banks' requested theory of the case instruction resulted in the jury not

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<sup>1</sup> *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).

<sup>2</sup> *Ford v. State*, 975 So. 2d 859, 863 (Miss. 2008) (citing *Howell v. State*, 860 So. 2d 704, 745 (Miss. 2003)).

<sup>3</sup> *Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995).

being not being fairly presented the applicable law. The jury was not fairly instructed because the instructions taken as a whole did not instruct the jury on Banks' theory of the case to which Banks was entitled. Banks' proof-grounded theory of the case instruction was erroneously denied by the trial court and not placed before the jury<sup>4</sup>. This was reversible error.

**II. It was error for the trial court not to let Banks impeach the complaining witness with evidence of his bias toward Banks.**

Martha Banks proposed testimony was not impermissible hearsay as the State contends but impeachment evidence. The proper foundation for the testimony had be laid. Palmer had been asked on cross examination about his bias toward Banks. Palmer denied any bias toward Banks. Palmer further denied making a statement of bias toward Banks. Martha Banks proposed testimony was proffered to impeach Palmer by showing his bias pursuant to M.R.E. 616, Bias of Witness. With all due respect to the State's contention, M.R.E. 801(d)(1) has no applicability to this argument.

What is applicable to this argument is the credibility of a witness which is always relevant<sup>5</sup>. A witness credibility or bias is not a collateral matter and is admissible. Once a witness takes the stand, his credibility for truthfulness is at issue and is not collateral. It was reversible error for the trial court to deny the admissible evidence of the witness bias.

**III. The trial court should have granted a mistrial after two separate references to Banks' criminal history.**

Herein, it can be argued that the prosecutor's question to its witness on direct

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<sup>4</sup> *Splain v. State*, 609 So. 2d 1234, 1239 (Miss. 1992).

<sup>5</sup> *Mason v. State*, 917 So.2d 618 (Miss.Ct.App. 2007).

examination was an attempt to get before the jury Banks' prior criminal history. The question of why the witness did what she did elicited this prejudicial and inadmissible evidence before the jury. This prejudicial evidence was compounded and highlighted when the prosecutor immediately made mention that Banks' prior criminal history was a totally different case. The fact that the prosecutor was not worried about Banks' record was a second, impermissible comment on Banks' prior criminal history. Both prejudicial statements, back to back, warranted a mistrial. The trial court committed reversible error when it denied both of Banks' motion for a mistrial.

**IV. The trial court should have declared a mistrial after the prosecutor argued that Banks had no defense to the charge.**

The prosecutor's closing argument was so prejudicial that no cautionary instruction by the court could repair the damage. The implication of the argument shifted the burden to Banks. It bespoke of Banks' burden to provide a defense which Banks failed to do. As this Court well knows, Banks has no burden. To imply that he has such a burden defeats the fundamental principles of American criminal justice. The motion for mistrial should have been granted. It was reversible error not to do so.

**V. The cumulative effect of errors denied Banks a fair and impartial trial.**

The cumulative effects of the above described errors denied Banks a fair trial<sup>6</sup>. Banks was prejudiced by not putting before the jury his theory of the case. At another time, Banks was denied the admission of evidence of the complaining witness' bias toward him. Successive inadmissible comments about Banks' prior criminal history was prejudicial. Finally, the State's closing argument placed an impermissible burden of proof on Banks

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<sup>6</sup> *Byrom v. State*, 863 So.2d 836, 847 (Miss. 2003).

to prove his innocence. This argument was so prejudicial that it could not be overcome and resulted in a verdict that is against the interest of justice.

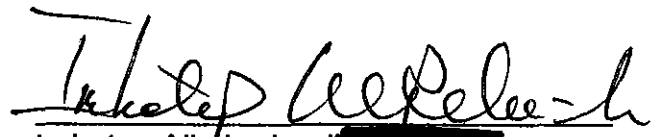
**.CONCLUSION**

Banks theory of the case instruction was erroneously denied. This was reversible error. With the added inability to show the bias of the complaining witness, coupled with the back to back reference to Banks' prior criminal history along with the prosecutor shifting the burden to Banks to prove his innocence, warrants this Court granting Banks a new trial in the interest of justice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on the below date a true and correct copy of the foregoing was mailed first class, postage prepaid, to the following individuals:

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This the 17<sup>th</sup> day of August 2009.

  
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