

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2008-KA-01523-COA

DANIEL BANKS

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S BRIEF

APPEAL FROM THE CIRCUIT COURT OF YAZOO COUNTY
CAUSE NO. 27-0571

ORAL ARGUMENT 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 Court of Appeals may evaluate possible disqualification or recusal:

- (a) Daniel Banks a/k/a Danny Banks
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- (b) Judge Jannie Lewis
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- (c) Honorable Steven Waldrup
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This the 27th day of March, 2009.

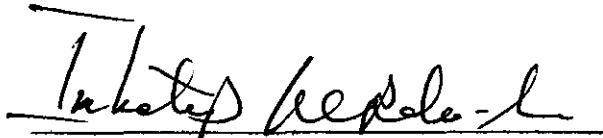

Imhotep Alkebu-lan

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED BANK'S THEORY OF THE CASE INSTRUCTION.
- II. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT NOT TO PERMIT BANKS TO IMPEACH THE COMPLAINING WITNESS WITH EVIDENCE OF 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.

STATEMENT OF THE CASE

Daniel Banks was indicted on October 22, 2007 for aggravated assault in violation of § 97-3-7(2) M.C.A. of 1972 as amended.¹ On March 5, 2008 the State filed a motion to amend the indictment to charge Banks as a habitual offender in accordance with §99-19-93 M.C.A. of 1972, as amended.² On March 17, 2007 the trial court entered its Order to Amend the Indictment.³

Banks's jury trial began on August 11, 2008. A jury was summoned, impaneled and sworn. On August 15, 2008, after a three day trial, the jury returned a verdict of guilty.⁴ The trial court determined Banks to be an habitual offender and sentenced him to serve twenty

¹ R.E. 3. In this Brief, R.E. refers to the Record Excerpts Page. The record page is cited as Volume:Page:Line(s).

² R.E. 28.

³ R.E. 30.

⁴ R.E. 56.

(20) years in the custody of the Mississippi Department of Corrections, without the possibility of parole.⁵

Banks timely filed his notice of appeal on September 13, 2008.⁶

STATEMENT OF THE FACTS

On May 19, 2007 George Palmer was stabbed outside his home in Yazoo City, Yazoo County, Mississippi. Later that day, Daniel Banks was arrested at his home and charged with aggravated assault. After arresting Banks, Yazoo City Police Officer Jason Bright returned to the scene of the stabbing. There he met Adlean Johnson. Johnson told Bright that they arrested the wrong person. Johnson said she stabbed Palmer and threw the knife in the river. As a result of Johnson's statement Bright took her to jail.

Banks' theory of the case was that Johnson stabbed Palmer and threw the knife in the river. Banks' theory of the case jury instruction requested the jury find him not guilty if they find Johnson stabbed Palmer and threw the knife in the river. There was evidential foundation for the requested instruction. The instruction did not mistate state the law. The instruction was not covered elsewhere in the court's instructions to the jury. The instruction was not covered elsewhere. The trial court denied the instruction finding it was a comment on the evidence.

On cross-examination Palmer denied having any bias toward Banks. When Banks attempted to impeach Palmer with evidence of his bias toward Banks the State objected to the evidence as hearsay. The trial court sustained the State's objection.

⁵ R.E. 57.

⁶ R.E. 64.

On two separate occasions, a State's witness and the prosecutor commented on Banks' prior criminal history. On two separate occasions the trial court sustained the objections but denied the motions for mistrial. Banks did not testify in his defense.

During the State's closing summation the prosecutor's argument shifted the burden to Banks to prove his innocence. Again the trial court sustained the objection but denied the motion for mistrial.

The commutative effect of the above errors denied Banks a fair and impartial trial.

SUMMARY OF THE ARGUMENT

Banks' was entitled to a theory of the case jury instruction. His requested instruction met all case law requirements. The trial court's characterization of the request was erroneous necessitating a reversal of Banks' conviction.

Mississippi Rules of Evidence permits evidence of a witness' bias. By permitting Banks to cross-examine Palmer about his bias toward Banks but preventing Banks from impeaching Palmer with the bias defeated Banks' right to show the bias of a witness.

The back-to-back statement of a State's witness and the prosecutor of Banks' prior criminal history was prejudicial and implied Banks acted in conformity therewith. The prosecutor's closing argument shifted the burden to Banks to prove his innocence. The commutative effect of the foregoing errors deprived Banks of a fundamental fair and impartial trial.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED BANK'S THEORY OF THE CASE INSTRUCTION.

A defendant is entitled to have a jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instruction, or is without foundation in the evidence.⁷ Upon appellate review, jury instructions should be read together as a whole when determining whether the court erred in granting or denying the jury instruction in questions.⁸ 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.⁹

The decisions of state courts mirror the federal rule.¹⁰ A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.¹¹

Herein, on direct examination, the State's first witness, Adlean Johnson, testified

⁷ *Dear v. State*, 966 So. 2d 218, 219-20 (¶ 5) Miss. Ct. App. 2007).

⁸ *Id.* at 220 (¶ 5).

⁹ *Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995).

¹⁰ *See, e.g., Bolls v. Smith*, 594 So. 2d 864, 864 (Fla. Ct. App. 1992) ("Florida case law is well settled that once a trial judge has recused himself, further orders of the recused judge are void and have no effect").

¹¹ *Jones v. State*, 912 So. 2d 501 (Miss. Ct. App. 2005).

that on the night George Palmer was stabbed she told the police she stabbed Palmer.¹² Again on cross-examination Johnson admitted she told the officer she stabbed Palmer.¹³ Expounding further, Johnson testified she also told the officer that after stabbing Palmer she took the knife and threw it in the river.¹⁴ Johnson could not refute the assertion she told the officer they arrested the wrong person.¹⁵ Johnson was arrested in part because she said she stabbed Palmer.¹⁶

The State's second witness, Yazoo City Police Officer Jason Bright, confirmed on direct examination Johnson told him she stabbed Palmer.¹⁷ Again on cross-examination Bright testified Johnson told him she stabbed Palmer.¹⁸ Johnson also told Bright she threw the knife in the river.¹⁹

Based on this evidence, Banks submitted his theory of the case instruction.²⁰ Banks theory of the case instruction was not covered elsewhere in the courts instructions to the jury.²¹ There was foundation in the evidence from both Johnson and Bright to support

¹² 1:128:5-10.

¹³ 1:139:28-29; 1:140:1.

¹⁴ 1:140:10-12.

¹⁵ 1:140:26-29; 1:141:1-27.

¹⁶ 1:144:13-15.

¹⁷ 2:160:23-29; 2:161:1-4.

¹⁸ 2:162:17-21.

¹⁹ 2:162:22-24.

²⁰ R.E. 63.

²¹ R.E. 36-48.

Banks theory of the case instruction. The requested instruction was not a misstatement of the law.

The trial court did not deny Banks' requested theory of the case instruction because there was no foundation in the evidence or because it was covered elsewhere. Nor was the instruction denied because it was a misstatement of the law. The trial court erroneously denied the instruction because it found the instruction was a comment on the evidence.

The requested theory of the case instruction was not a comment on the evidence. It simply required the jury to find Banks not guilty if the jury found Johnson stabbed Palmer then threw the knife in the river and told officers they arrested the wrong man. Banks was entitled to his theory of the case instruction no matter how meager or unlikely of his defense theory. The trial court committed reversible error when it denied the requested instruction. This Court must, in the interest of justice, reverse Banks' conviction and grant him a new trial.

II. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT NOT TO PERMIT BANKS TO IMPEACH THE COMPLAINING WITNESS WITH EVIDENCE OF BIAS TOWARD BANKS.

The standard of review regarding the admission or exclusion of evidence is abuse of discretion.²² Furthermore, this Court will affirm the trial court's ruling unless it can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case.²³

Mississippi Rule of Evidence 616 permits a party to inquire into a witness's bias,

²² *Mason v. State*, 971 So. 2d 618, 620 (¶ 11) (Miss. Ct. App. 2007).

²³ *Id.* (quoting *Jones v. State*, 918 So. 2d 1220 (Miss. 2005)).

prejudice, or interest in a case for the purpose of attacking a witness's credibility. Moreover, wide latitude is allowed in cross-examination when the chosen form of impeachment is by proof of bias, prejudice, or motive.²⁴

Mississippi evidence rules provides that for the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.²⁵

M.R.E. 616, Bias of Witness, provides

For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

Herein, on cross-examination, Palmer denied he had any bias or animosity toward Banks.²⁶ Palmer denied disliking Banks because Banks, in his Cadillac, passed him by as he was walking in the rain.

On direct examination, Banks attempted to elicit testimony from his mother, Martha Banks, of Palmer's bias and dislike for Banks.²⁷ The State's objection to the testimony as hearsay was sustained by the trial court.²⁸ When the trial court prevented evidence of Palmer's bias the resulting impermissible impression was that Palmer was telling the truth.

Every witness that takes the stand in a case and testifies puts their character for

²⁴ *Fort v. State*, 752 So. 2d 458, 462 (¶ 17) (Miss. Ct. App. 1999).

²⁵ M.R.E., 616, Bias of Witness.

²⁶ 2:197:22-29; 1198:1-25.

²⁷ 2:238:1-6.

²⁸ 2:238:7-29; 2:239:1-2.

truthfulness in issue. By permitting Banks to cross-examine Palmer about his bias toward Banks but preventing Banks from showing the bias defeats Banks right to inquire into the bias of a witness. The trial court abused its discretion in not permitting Banks to show Palmer's bias. This error was not harmless. Banks should be granted a new trial to present evidence of the bias of the complaining witness.

III. THE TRIAL COURT SHOULD HAVE GRANTED A MISTRIAL AFTER TWO SEPARATE REFERENCES TO BANKS' CRIMINAL HISTORY.

M.R.E. 404(b), Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes. Other Crimes, Wrongs, or Acts, provides in its pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

The State's first witness, Adelean Johnson, testified Banks has a prior criminal record.²⁹ The testimony was objected to.³⁰ Though the court sustained the objection, the request for a mistrial was denied.³¹

Next, the prosecutor's inflammatory comment that this trial did not involve Banks criminal history was intended to send a message to the jury. That message was to reinforce the fact that Banks has a criminal history and he acted in conformity therewith.³² Though the objection to this comment was also sustained the trial court again denied the

²⁹ 1:128:22-28.

³⁰ 1:128:29; 1:129:1.

³¹ 1:129:2-9.

³² 1:129:10-13.

motion for a mistrial.³³

The trial court should have granted Banks' motion for mistrial. The back-to-back comments were not only prejudicial they were not harmless. They denied Banks the right to a fair and impartial trial by implying he acted in conformity therewith. As a result, this Court should grant Banks a new trial.

IV. THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL AFTER THE PROSECUTOR ARGUED THAT BANKS HAD NO DEFENSE TO THE CHARGE.

The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing argument 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.³⁴ In deciding the propriety of allegedly improper comments, they are considered in the context of the case.³⁵

Attorneys are afforded wide latitude in arguing their cases to the jury, but they are not allowed to employ tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury.³⁶ Counsel may not state facts which are not in evidence and which the court does not judicially know, in aid of his evidence.³⁷

The State has the burden to prove Banks guilty, Banks has no burden to prove his

³³ 1:129:14-21.

³⁴ *Caston v. State*, 823 So. 2d 473, 495 (Miss. 2002), (quoting *Sheppard v. State*, 777 So. 2d 659, 661 (Miss. 2001).

³⁵ *Admad v. State*, 603 So. 2d 843, 846 (Miss. 1992).

³⁶ *Flowers v. State*, 842 So. 2d 531 (¶ 13) (Miss. 2003) (citing *Sheppard v. State*, 777 So. 2d 659, 661 (Miss. 2001) and *Hillier v. State*, 660 So. 2d 961, 966 (Miss. 1995).

³⁷ *Ball v. State*, 725 So. 2d 836, 851 (Miss. 1998).

innocence. In its closing argument the State attempted to shift the burden to Banks to prove his innocence. The prosecutor argued that Banks had no defense to the charge.⁶ This argument was not only inflammatory but highly prejudicial. It highlighted the fact Banks only witness in his behalf was his mother. Banks did not testify in his defense.

Again, though the objection to the argument was sustained, the motion for mistrial was denied. This Court should find the trial court erred in not granting Banks a mistrial. Banks' conviction should be reversed and a new trial granted.

V. THE CUMULATIVE EFFECT OF ERRORS DENIED BANKS A FAIR AND IMPARTIAL TRIAL.

Error that do not require reversal themselves may require reversal if, when taken cumulatively, they deny the defendant the right to a fundamentally fair and impartial trial.⁷ In any case in which a court finds harmless error or an error not sufficient in itself to warrant dismissal, the court may, on a case-by-case basis, determine whether the errors taken cumulatively warrant dismissal based on their cumulative prejudicial effect.⁸ This court may reverse a sentence based upon the cumulative effect of errors that, by themselves, do not independently require a reversal.⁹

Each error enumerated above require reversal themselves. The denial of Banks' theory of the case instruction was clearly erroneous. The trial court's finding the instruction was a comment on the evidence was erroneous. The instruction was not, and the court did

⁶ 2:284:6-17.

⁷ *Byron v. State*, 863 So. 2d 836, 847 (¶ 12) (Miss. 2003).

⁸ *Id.* at 846 (¶ 13).

⁹ *Jenkins v. State*, 607 So. 2d 1171, 1183 (Miss. 1992).

not find, the instruction was a misstatement of the law, covered elsewhere in the instruction or that there was no foundation in the evidence. The law permits such an instruction. The instruction was requested and the instruction was warranted. The court denial of the instruction was error and prejudiced Banks.

Mississippi Rules of Evidence permits evidence of a witness' bias. By permitting Banks to question Palmer about his bias but prevent Banks from establishing the bias was prejudicial error. The resulting incorrect impression was that Palmer was telling the truth. It was reversible error for the trial court to deny evidence of Palmer's bias.

The damaging back-to-back references to Banks criminal history were highly prejudicial. A defendant's prior criminal history is admissible under certain circumstances. Neither of those circumstances were present here.

Finally, the prosecutor's closing argument that Banks had no defense to the charge against him impermissibly shifted the burden to Banks to prove his innocence. It also prejudicially highlighted the fact Banks only witness in his behalf was his mother.

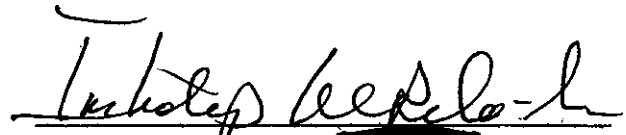
CONCLUSION

The commutative effect of the errors denied Banks a fundamental fair and impartial trial. Banks' requested theory of the case instruction met judicial standards. The reason for the denial was a mis-characterization. Mississippi Rules of Evidence permits Banks to present evidence of his accuser's bias. The denial of this evidence unjustly bolstered his accuser's testimony. The prosecutor summation argument impermissibly shifted the burden to Banks to prove his innocence. For the foregoing reasons and authorities, Banks' conviction should be reversed and a new trial ordered.

Respectfully submitted,

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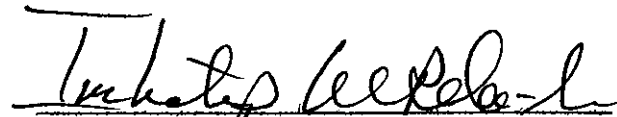
CERTIFICATE OF SERVICE

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 27th day of March 2009.


Imhotep Alkebu-lan