

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**LEANDER SMITH**

**APPELLANT**

**VS.**

**NO. 2008-KA-1573-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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NO. 2008-KA-1573-COA

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

Defendant, Leander Smith, appeals from the Circuit Court of Quitman County, Mississippi wherein he was indicted for the crime of **BUSINESS BURGLARY** in violation of *Miss. Code Ann. § 99-19-81*. (Indictment c.p.5). After a trial by jury, with the Honorable Kenneth L. Thomas presiding, the defendant was found **GUILTY** and sentenced to **SEVEN YEARS** incarceration as a habitual offender with Section 99-19-81 enhancement applicable in an institution under the supervision and control of the Mississippi Department of Corrections. (Sentencing Judgment c.p.30)

After denial of post-trial motions this instant appeal was timely noticed.

## **STATEMENT OF THE FACTS**

Defendant was indicted and convicted of burglarizing a business. At trial a witness, during cross-examination by the defense, stated that she had seen the defendant burglarize the business on a video surveillance tape. Neither the prosecution nor the defense had access to the tape, but both were aware of it. However, the evidence was introduced by the witness as a result of questioning by the defense. The defense moved for mistrial based on an improper discovery violation, but the trial judge denied the motion. The jury eventually found the defendant guilty of all charges brought against him. The defense is seeking a mistrial based on an alleged discovery violation by the prosecution.

## **SUMMARY OF THE ARGUMENT**

### **ISSUE I.**

There was no discovery violation on the part of the prosecution. The trial court did not err in allowing the witness's testimony, nor did it err in denying the grant of a mistrial to the defense. Furthermore, there is no evidence of any abuse of discretion by the trial judge.

## QUESTION PRESENTED

Did the trial court err by allowing testimony in violation of URCCCP 9.04?

## BRIEF ANSWER

In this case, there was no discovery violation on the part of the prosecution, therefore no mistrial was warranted. The grant of mistrial based on testimony lies within the discretion of the court. Only a serious showing that the court abused its discretion in overruling a request for mistrial will allow for a reversal at the appellate level, and that has not been shown in our case. Furthermore, the testimony error in question was not the fault of the prosecution, but of the defense. Objectionable statements are not error if they are the product of direct cross-examination by the defense council.

## DISCUSSION

### *A. The “Invited Error” Doctrine*

In our case, there was no discovery violation on the part of the prosecution. Smith, in his appeal, is making the argument that the trial court improperly denied his request for mistrial based on a discovery violation by the state, when in fact there was no such violation.

The testimony under review was, in fact, elicited in the questioning of the witness by the defense. The defense repeatedly questioned the witness about her certainty regarding the defendant’s role in the burglary, and her answer is what the defense is objecting to. [T.171-190]. The “invited error” doctrine provides that when injection of inadmissible evidence is attributable to the actions of the defense, the defense cannot later object to such “invited error.” *U.S. v. Marshall*, 283 Fed.Appx. 268, 2008 WL 2570733 (C.A.5 (Tex.)). Under this doctrine, a defendant cannot complain on appeal of alleged errors which he invited or induced, especially when the defendant may not have been prejudiced by the error. *Id.*

The defense, in our case, will not be able to receive a mistrial based on an alleged error that they induced. The repetitive questioning of the witness’s certainty about the defendant induced the admission of the testimony regarding the video surveillance tape, which is the material that the defense is objecting to. In looking at



the doctrine's definition, it should be inferred that the defense counsel "invited the error" in testimony through the nature of his questioning of the witness.

***B. If they are a direct result of the defense's actions, objectionable statements will not be considered error.***

Smith's appeal for mistrial should not be granted based on the claim of a discovery violation by the prosecution, for this simply did not happen. The prosecution made it known to the defense before the trial began that the video existed, but would not be offered into testimony due to the inability to acquire a copy. [T. 175-176]. When looking at the case facts, one will find that the prosecution, in no way, attempted to introduce the video into testimony or evidence.

In our case, the defense invited the testimony by his questioning of the witness on cross-examination. In the case of *Triggs v. State*, the facts relate to ours in the sense that although the defense may not have intended for the witness to testify that she had seen the defendant on video, the defense continually asked her "how she knew" that the defendant was the burglar. The witness simply answered the question in a direct fashion. [T. 174, 177-190]. Generally, an appellant cannot complain of damaging testimony if the testimony is in response to his questioning. *Triggs v. State*, 803 So.2d 1229 (Miss. 2002). Furthermore, the defense elicited the response and therefore cannot complain simply because the answer was one he did not want. *Hoops v. State*, 681 So.2d 521 (Miss. 1996).

***C. The prosecution did not solicit the objectionable statements made by the witness.***

In our case, we see that not only was there no discovery violation, but the prosecution did not bring the objectionable material into the trial. It was brought in through the questioning of the witness by the defense. The statements were not solicited by the prosecution, but by the defense. Objectionable statements are not error if they are the product of direct and cross-examinations by the defense counsel. *Lane v. State*, 841 So.2d 1163 (Miss. 2003).

In *Lane*, the trial court ruled that the trial judge is vested with discretion to determine whether a comment is so prejudicial that a mistrial should be declared. Furthermore, the court ruled that if a testimony is responsive to the question asked, then the defendant cannot complain of evidence that he himself introduced by virtue of his own questions. *Id.* Also in *Lane*, as is similar to our case, the witness was the State's and was on cross-examination when the testimony arose. The judge in *Lane* did not abuse discretion in ruling that the answer was responsive to the question and denying the mistrial. *Id.*

***D. The trial judge has the discretion to rule the case a mistrial.***

In regard to the actual testimony, the trial judge did not abuse his discretion in our current case. The trial judge is vested with discretion to determine whether a comment is so prejudicial that a mistrial should be declared. *Id.* The trial judge not

only handled the request for mistrial well within his discretion, but he also offered that the testimony be stricken from the record if necessary. [T. 174-179]. The defense denied the offer, and continued on with the witness, asking many more questions about the video. [T. 179]. Also, the defense knew of the video, so surprise is not an argument is this situation either. Finally, the court in *Bass v. State* held that it would not grant a mistrial unless the trial court abused its discretion in overruling the motion for a mistrial. *Bass v. State*, 597 So.2d 182 (Miss. 1992). Our judge did no such thing, and in fact, could be said to be very lenient in offering to admonish the testimony without request from the defense. [T. 179].

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## CONCLUSION


In conclusion, the trial court did not err in allowing the testimony pursuant to URCCCP 9.04, nor did it err in denying the defense's request for mistrial. There is no evidence in our case that the judge abused his discretion. Furthermore, there is no evidence that the defendant was unjustly prejudiced by the testimony.

The objectionable testimony was entered by the witness in direct response to a series of questions from the defense counsel. The judge offered to have the testimony admonished from the record, and the defense not only declined, but continued with rigorous questioning in relation to the video surveillance.

The issue under review has no merit. The defense invited the testimony through his cross-examination of the witness, and there is no evidence of an abuse of discretion on part of the judge. We respectfully ask that both the jury's and judge's rulings and decisions be upheld.

Respectfully submitted,  
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BY:

  
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## **CERTIFICATE OF SERVICE**

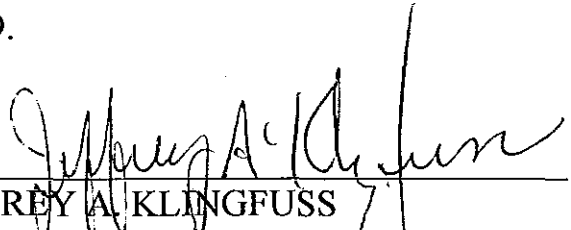
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 29th day of July, 2009.

  
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