

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

**WILLIAM HARRIS, SR.**

**APPELLANT**

**VS.**

**NO. 2008-KA-1731-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
PROPOSITION I.	
The trial court did not commit error in failing to declare a mistrial sua sponte based upon the State's remarks during closing argument. ....	4
PROPOSITION II.	
Harris was afforded effective assistance of counsel. ....	6
PROPOSITION III.	
The state did not commit any discovery violations and the trial court did not err in denying Harris a continuance. ....	7
CONCLUSION .....	10
CERTIFICATE OF SERVICE .....	11

## TABLE OF AUTHORITIES

### FEDERAL CASES

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	7
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### STATE CASES

Bailey v. State, 952 So.2d 225, 231 (Miss.Ct.App.2006) .....	4
Baskin v. State, 991 So.2d 179, 183 (Miss.Ct.App.2008) .....	4
Box v. State, 437 So.2d 19 (Miss.1983) .....	8
Brown V. State 986 So.2d 270, 276 (Miss. 2008) .....	5, 6
Colenburg v. State, 735 So.2d 1099, 1102 (Miss.Ct.App.1999) .....	6, 7
Ellis v. State, 952 So.2d 251, 253 (Miss.Ct.App.2006) .....	7
Evans v. State, 725 So.2d 613 (Miss. 1997) .....	4
Fulgham v. State, 386 So.2d 1099 (Miss.1980) .....	4
Harris v. State, 979 So.2d 721, 729 (Miss.Ct.App.2008) .....	6
Parham v. State, 229 So.2d 582, 583 (Miss.1969) .....	6
Sheppard v. State, 777 So.2d 659, 661 (Miss. 2000) .....	4
Sipp v. State, 936 So.2d 326, 331 (miss. 2006) .....	4
Spicer V. State, 921 So.2d 292 (Miss.2006) .....	5
Stack v. State, 860 So.2d 687, 691 (miss. 2003) .....	8
Coleman v. State, 697 So.2d 777, 780 (Miss. 1997) .....	7
West v. State, 969 So.2d 147 (Miss.App.,2007) .....	8
Turner v. State, 501 So.2d 350 (Miss.1987) .....	9
Williams v. State 522 So.2d 201 (Miss.1988) .....	4

<b>Wynn v. State, 964 So.2d 1196, 1200 (Miss.Ct.App.2008)</b> .....	<b>6</b>
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## **STATE STATUTES**

<b>Miss. Code Ann. § 41-29-139(a)</b> .....	<b>1</b>
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**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Sharkey County, Mississippi and a judgement of conviction for the sale of cocaine against William Harris, Sr. This case arose from a Mississippi Bureau of Narcotics (hereinafter "MBN") undercover operation in Sharkey County. Willie Cooper, acting as a confidential informant for the MBN purchased cocaine from William Harris, Sr. (hereinafter "Harris"). Harris was subsequently indicted for sale of cocaine, a violation of Miss. Code Ann. § 41-29-139(a). (CP 7).

At the commencement of a two-day trial, defense counsel moved for a continuance or in the alternative suppression of the informant's testimony based on what he claimed were discovery violations on behalf of the state. Defense counsel claimed the state failed to properly identify and produce relevant information regarding a state witness, the confidential informant. (Tr 11-35). After hearing argument of counsel, the Court denied the motion and permitted defense counsel an opportunity to interview the witness. The confidential informant was eventually allowed to testify. (Tr. 261-271). At the conclusion of the

State's case, defense counsel moved for a directed verdict based on an insufficiency of evidence, which the trial court denied. (Tr. 313).

After two days of trial the jury convicted Harris of the sale of cocaine. (Tr. 349). Circuit Court Judge Isadore W. Patrick, Jr. sentenced Harris to twenty years incarceration, with fifteen years to serve, five years on post release supervision, and payment of a \$5,000 fine. (CP 64; Tr. 388-392). After denial of post trial motions, Harris appealed.

### **ISSUES**

- I. The trial court did not commit error in failing to declare a mistrial sua sponte based upon the State's remarks during closing argument.
- II. Defense counsel provided effective assistance of counsel.
- III. The state did not commit any discovery violations and the trial court did not err in denying Harris a continuance.

## **SUMMARY OF ARGUMENT**

The judgment of the Circuit Court of Sharkey County should be affirmed. The prosecutor's final closing remarks were not inflammatory nor meant to unjustly prejudice the jury but were in response to defense counsel's closing argument. There was no abuse of discretion in the trial judge's failure to declare a mistrial, sua sponte, based upon the remarks by the state's counsel.

Harris's attorney provided effective assistance of counsel. He was not substantially and irreparably prejudiced by the state's closing remarks.

There was no trial by ambush. The prosecution provided defense counsel with the required discovery information well in advance of the commencement of the trial and the court also provided defense counsel ample opportunity to question the confidential informant.

## ARGUMENT

### **PROPOSITION I. The trial court did not commit error in failing to declare a mistrial sua sponte based upon the State's remarks during closing argument.**

Harris claims that the State's remarks during closing argument were prejudicial and warranted a mistrial. Defense counsel failed to make any objection to the state's remarks and asked this court to find plain error. "[F]ailure to object to an allegedly improper statement made during closing arguments will bar appellate review of the issue unless it constitutes plain error." *Baskin v. State*, 991 So.2d 179, 183(¶ 18) (Miss.Ct.App.2008) (citation omitted). Therefore, Harris is procedurally barred from raising this issue on appeal. Regardless, this Court gives deference to a trial court's determination of whether a mistrial is warranted based upon any error in the proceedings that resulted in any "substantial and irreparable prejudice to the defendant's case." *Sipp v. State*, 936 So.2d 326, 331(¶ 7) (Miss.2006). Although attorneys are afforded "wide latitude in arguing their cases to the jury[,] ... [they] are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." *Bailey v. State*, 952 So.2d 225, 231(¶ 7) (Miss.Ct.App.2006) (citing *Sheppard v. State*, 777 So.2d 659, 661(¶ 7) (Miss.2000)). An appellate court reviews any comments made in opening statements or closing arguments to determine "whether the natural and probable effect of the improper argument [creates] unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Id.*

In *Fulgham v. State*, 386 So.2d 1099 (Miss.1980), *Williams v. State* 522 So.2d 201 (Miss.1988) and *Evans v. State*, 725 So.2d 613 (Miss. 1997), cited by Harris in support of his argument, the Mississippi Supreme Court held the prosecutor's closing remarks were close to being improper but did not warrant reversal. Any errors made by the trial court were harmless, did not prejudice Harris and therefore not reversible error.

In the event this Court should find the prosecutors' comments inappropriate, the State submits they



do not warrant reversal of the jury's conviction. Not every error and misstatement by a prosecutor during closing argument merits a mistrial. *Brown V. State* 986 So.2d 270, 276 (Miss., 2008).

In addressing this issue in *Spicer V. State*, 921 So.2d 292 (Miss.2006), the supreme court set forth two-threshold inquiries, followed by a two-pronged test. The first threshold question is whether defense counsel objected. We noted that, despite the absence of objection, we will not procedurally bar the issue where "the [send-a-message] argument is so 'inflammatory' that the trial judge should have objected on his own motion." *Id.* at 317 (internal citations omitted).

The second threshold inquiry is whether it appears, in examining the surrounding circumstances, that defense counsel invited the comment. If so, the issue may be waived. *Id.* at 318.

Once the two threshold questions are satisfied, *Spicer* provides that, for a finding of reversible error, "the court must determine (1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights." *Id.* (internal citations omitted).

In this case, the first threshold question must be resolved in favor of the prosecution. No objection was made by defense counsel. The second threshold question should be partially resolved in favor of the prosecution. The record indicates that defense counsel invited the comment by the district attorney. The state's final closing remarks were not inflammatory and were not meant to unduly influence the jury but were in response to defense counsel's closing argument. In the comments by the district attorney, he is directing the jury to look at the evidence "After you consider that after you see what the evidence is beyond a reasonable doubt don't let your decision be based on bias, on sympathy, you make your decision on the matter." The district attorney was responding to defense counsel's closing remarks about Harris being married and being a church going, working member of the community. (Tr. 331-32).

Once the two threshold questions are satisfied, *Spicer* provides that, for a finding of reversible error, "the court must determine (1) whether the remarks were improper, and (2) if so, whether the remarks

prejudicially affected the accused's rights." *Brown*, 986 So.2d at 277. *Id.* (internal citations omitted).

The State contends the prosecutors' remarks, while close to being inappropriate, were proper under the first prong of the *Spicer* test. To meet the second prong of the test, it must be clear beyond a reasonable doubt that, absent the prosecutor's inappropriate comments, the jury would have found the defendant guilty. *Brown*, 986 So.2d at 276. This, of course, amounts to a harmless-error analysis, and is the analysis to be used for the second prong of the *Spicer* test. *Id.* In the case *sub judice*, there was clear evidence beyond a reasonable doubt of Harris's guilt: the video, the testimony of Cooper and the MBN agents.

Any inappropriate comment by the prosecutor was harmless error. No statements made by the State's counsel in the closing arguments unjustly prejudiced Harris in any manner. This assignment of error is without merit.

**PROPOSITION II. Harris was afforded effective assistance of counsel.**

Harris claims that his trial counsel's performance was ineffective based on counsel's failure to object to statements made by the prosecution during closing arguments. In response, the State adopts its argument as set forth in Proposition I.

'Inadequacy of counsel' refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice." *Colenburg v. State*, 735 So.2d 1099, 1102(¶ 8) (Miss.Ct.App.1999) (citing *Parham v. State*, 229 So.2d 582, 583 (Miss.1969)). Considering "the merits of a claim of ineffective assistance of counsel[,] which has been "raised for the first time on direct appeal, ... is unusual" as this Court is "limited to the trial court record in our review of the claim and there is usually insufficient evidence within the record to evaluate the claim." *Harris v. State*, 979 So.2d 721, 729(¶ 23) (Miss.Ct.App.2008) (quoting *Wynn v. State*, 964 So.2d 1196, 1200(¶ 9) (Miss.Ct.App.2007)). "[I]f [we] can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty ... to declare a mistrial or order a new trial sua sponte." *Colenburg*, 735 So.2d at

1102(¶ 8).

“The standard of review for ineffective assistance of counsel claims is the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which requires a showing that (1) counsel's performance was deficient and (2) that the deficiency prejudiced the defense.” *Ellis v. State*, 952 So.2d 251, 253(¶ 9) (Miss.Ct.App.2006). Therefore, Harris must show that his trial counsel “made errors so serious that he was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment ... [and] that counsel's errors deprived [him] of a fair trial with reliable results.” *Colenburg*, 735 So.2d at 1103(¶ 9).

Harris fails on both parts of the *Strickland* test. As previously argued, the district attorney's argument was in response to defense counsel's statements about Harris being a church going, working member of the community. (Tr. 331-32). If there was no improper comment, there was no need for defense counsel to object. The State contends that by objecting to the two comments defense counsel would have directed the jury's attention to the comments thereby placing more emphasis on them. Also, the comments were not so egregious that they would unjustly prejudice the defendant or deny him a fair trial.

**PROPOSITION III. The state did not commit any discovery violations and the trial court did not err in denying Harris a continuance.**

In his final assignment of error, Harris contends the state failed to disclose the identity of Cooper, the confidential informant, and provide a taped telephone call until after the trial began. Harris contends the court's failure to grant him a continuance, and requiring him to begin trial and voir dire the panel without interviewing the witness prejudiced him and denied him a fair trial.

The decision to grant or deny a motion for continuance is entrusted to the sound discretion of the trial court. *Coleman v. State*, 697 So.2d 777, 780 (Miss. 1997). The appellate court will reverse such decisions only to prevent to prevent a manifest injustice. *Id.* The trial court is given wide discretion in admitting

evidence and granting continuances; an appellate court will not disturb the trial court's ruling unless there was a clear abuse of discretion. *Stack v. State*, 860 So.2d 687, 691(¶ 7) (Miss.2003).

Defense counsel was on notice that Cooper would testify. Cooper's name, address and statement of his testimony were provided to the defense the week prior to the commencement of trial. A written narrative from Cooper to an MBN agent which indicated the substance of the telephone call setting up the drug buy and the drug buy itself was provided to the defense months before trial along with the surveillance video of the drug buy. (Tr. 381).

In *West v. State*, 969 So.2d 147 (Miss.App.,2007) this Court ruled the trial court failure's to *sua sponte* grant defendant additional continuance to review evidence provided by the state for the first time on the morning of trial, was not error, where time given to defendant was reasonable and he was unable to show any prejudice resulting from the court's failure to *sua sponte* grant him additional time to review records.

Harris contends that the State's failure to disclose Cooper's identity and the taped telephone call until commencement of the trial interfered with the defense's ability to adequately prepare its case and denied him a right to a fair trial. Harris also contends that the procedure for the court's response to the discovery violation, as set forth in *Box v. State*, 437 So.2d 19 (Miss.1983) and Rule 9.04 of the Uniform Rules of Circuit and County Court, was not followed. Harris's claim that the "trial court's failure to offer a meaningful opportunity to interview the witness, or even know the identity of the witness until after the trial began" is wholly without merit and a misstatement of the facts. (Appellant's brief 11).

The State submits *Box v. State*, 437 So.2d 19 (Miss.1983) is not applicable. No discovery violation occurred; defense counsel was provided the name and address of the confidential informant and a written statement of his testimony on the Wednesday prior to the commencement of the trial on Monday and testimony on Tuesday. (Tr. 380). While defense counsel didn't receive a copy of Cooper's criminal history from NCIC until the first morning of trial and the criminal history revealed an arrest, Cooper was never

convicted of anything. Therefore, any information contained in the NCIC was of no relevance to him testifying and could not be used to impeach Cooper. While jury voir dire began on Monday, defense counsel knew the confidential informant's identity prior to voir dire.

The cases cited by Harris in support of his argument can be factually distinguished and are not applicable to the case *sub judice*. In *Turner v. State*, 501 So.2d 350 (Miss.1987) the prosecution failed to disclose the identity of a confidential informant until after commencement of the trial; the informant was not at trial and the court denied the defense a continuance in order to locate and question him. Such is not the case here, defense counsel was on notice that Cooper would testify; his name, address and expected testimony were provided to the defense the week prior to the commencement of trial; a narrative from Cooper to an MBN agent which indicated the substance of the taped telephone call setting up the drug buy and the drug buy itself; and the video of the drug buy were all provided to the defense months before trial. (Tr. 381).

There was no prejudice to defense and no trial by ambush. This issue is without merit.

## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's conviction of William Harris, Sr. for sale of cocaine and the sentence of the Circuit Court of Sharkey County.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Lisa L. Blount  
LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680

## CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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:

Honorable Isadore W. Patrick, Jr.  
Circuit Court Judge  
Post Office Box 351  
Vicksburg, MS 39181-0351

Honorable Richard Smith  
District Attorney  
Post Office Box 648  
Vicksburg, MS 39181

Michael R. Bonner, Esquire  
Travis T. Vance, Jr., Esquire  
Attorneys at Law  
914 Grove Street  
Vicksburg, MS 39183

This the 15th day of January, 2010.

  
\_\_\_\_\_  
LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205-0220  
TELEPHONE: (601) 359-3680