IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-01761-COA

TIMOTHY JORDAN — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S REPLY BRIEF

George T. Holmes, MSB No. [redacted]
MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

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TABLE OF AUTHORITIES

CASES:

STATUTES

none

OTHER AUTHORITIES

REPLY ARGUMENT

ISSUE NO. 1: *Co-Defendant's Lawyer Called to Testify*

The state failed to offer a valid argument or legal authority to disprove the fact that details of Krystal Jordan's plea negotiations and opinions of her lawyer were admitted for any other purpose than a surreptitious attempt to persuade the jury that since Krystal Jordan was guilty, so was Tim Jordon. This was an improper purpose under our rules of law.

The state's position is that the testimony of Krystal's lawyer, Camelia Fondren, concerned plea negotiations and "were not statements" and not hearsay; but, if the testimony involved "statements," the testimony was offered as rehabilitative rebuttal evidence to the impeached state witness Krystal Jordan. [States. Brief. P 22.]. To this end, the state cites *Hendrix v. State,* 957 So. 2d 1023, 1030-31 (Miss. Ct. App. 2007), which is inapplicable to the facts of this case.

Primarily *Hendrix* does not involve plea negotiations. In *Hendrix,* an out of court statement of a testifying co-defendant was offered to corroborate possible impeachment. On cross-examination specific inconsistencies were pointed out between the witnesses prior statement and his trial testimony. *Id.* The prosecutor was allowed to introduce the co-defendant's entire statement into evidence over objection in rebuttal. *Id.*

The *Hendrix* court found that the statement was properly admitted under Miss. R. Evid. Rule 801(d)(1)(B), which provides:

> A statement 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 ... consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive... . *Id.*

However, the *Hendrix* court was very careful to explain that:

> Admission of a prior consistent statement of a witness where the veracity of the witness has been attacked is proper but *should be received by the court with great caution and only for the purpose of rebuttal* so as to enable the jury to make a correct appraisal of the credibility of the witness. [Emphasis added]. [Citing *Caston v. State*, 823 So. 2d 473, 489 (¶ 43) (Miss .2002)]

The present case is a prime example of admission of purported 801(d)(1)(B) evidence for the wrong reason. Evidence of negotiation is not admissible. *Harness v. State*, --- So. 3d ----,(2007-KA-01415-COA)(Miss. Ct. App. 2009), Miss. R. Evid. 408.[1] In *Harness*, the defendant was charged with DUI homicide. The defendant sought to introduce evidence of settlement negotiations in a civil action arising from the same incident. *Harness*, ¶26. Specifically, the offered testimony concerned the alleged negligence of a third party in the accident with whom Harness had reached a settlement where Harness received $50,000 and wherein "the insurance company's representative informed [Harness] that the company was paying the money because it had determined that [the victim in the criminal case] was at fault in causing the accident." *Id.* The *Harness* court found that the settlement negotiations was not only inadmissible under Miss. R. Evid. Rule 408, but was irrelevant as well, stating the evidence

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Rule 408. Compromise and Offers to Compromise
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

"neither adjudicates nor proves anything" and would "not assist the jury in determining" the material issues in the case. *Harness,* ¶¶30-31.

Here the state sought to show through the negotiation evidence and legal opinion of her attorney that Krystal Jordan was justified in pleading guilty because she was guilty. Problematic, however, and prejudicial to Tim Jordan, is the fact that, since Krystal and Tim were co-defendants, aiders and abettors of each other, the negotiation evidence and legal opinion impugned Tim Jordan; because, to aid and abet, one must "do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime .... [or] participate ... in the design of the felony." *Hughes v. State* 983 So. 2d 270, 276-77 (Miss. 2008).

Therefore, the state offered a legal opinion, through negotiation evidence, that Tim Jordan was guilty. "Questions which simply allow the witness to tell the jury what result to reach are impermissible, as are questions asking the witness for a legal conclusion." *Alexander v. State*, 610 So. 2d 320, 334 (Miss. 1992).

The Court in *Crimm v. State*, 888 So. 2d 1178, 1185 (¶32) (Miss. Ct. App. 2004), recognized that under Miss. R. Evid. Rule 101 the Rules of Evidence "are applicable to both civil and criminal cases." The comments to Rule 408 also state that "[e]vidence of an offer to compromise a claim is not receivable in evidence as an admission of either the validity or the invalidity of the claim." However, "[i]n a criminal prosecution the claim is the charge brought, and therefore evidence of the offer to compromise it is not admissible to prove the validity or invalidity of a claim." *Id.*

Here in Jordan's case, the state argues that the lawyer's discussions with her client were merely offered to corroborate the state witness. Even though, in a general sense, hearsay may be

admissible to corroborate an impeached witness, when that hearsay involves settlement negotiations, the rules preventing the admission of negotiation should prevail.

ISSUE NO. 2: *Amendment of the Indictment*

Jordan stands on his original argument under this issue; because, the state failed to distinguishing the present case from the controlling authority of *Moses v. State*, 795 So.2d 569, 570-73 (Miss. Ct. App. 2001). The amendments here were of substances, not form, and made the indictment vague, and should have been left to the consideration of a grand jury rather that a motion to the trial court.

ISSUE NO. 3: *Severance of Defendants*

The state's argument does not rend this case from the controlling authority of *Tillman v. State,* 606 So.2d 1103, 1105-06 (Miss. 1992) and *Usry v. State*, 378 So.2d 635, 637 (Miss.1979).

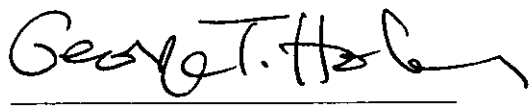
ISSUE NO. 4: *Tender Years Exception*

The state's arguments are unpersuasive that the prerequisite linchpin of reliability for the questionable evidence was adequately established at the trial of the present case. Likewise, the state failed to show that the child witness was unavailable and could not overcome the fact that the trial court made a finding of unavailability initially without any testimony to that issue. [T. 197-201]. Nor did the state show that Jordan's confrontation rights were not violated by the wrongful admission of the evidence allowed under the tender years exception to the hearsay rule under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

ISSUE NO. 5. *Weight of the evidence*

Jordan relies on his arguments initially briefed for the court.

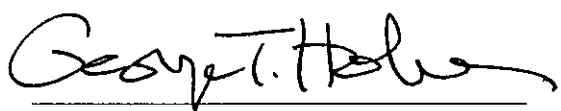
Respectfully submitted,
TIMOTHY JORDAN

BY: 

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 9th day of November, 2009, mailed a true and correct copy of the above and foregoing Reply Brief to Brief Of Appellant to Hon. Andrew K. Howorth, Circuit Judge, 1 Courthouse Square, Ste. 101, Oxford MS 38655, and to Hon. Ben Creekmore , Dist. Atty. , P. O. Box 1478, Oxford MS 38655, and to Diedre McCrory, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid. all by U. S. Mail, first class postage prepaid.



George T. Holmes

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