IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID LYNCH	APPELLANT
VS.	NO. 2008-KA-1874-COA
STATE OF MISSISSIPPI	APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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SUMMARY OF ARGUMENT

I.

CROSS EXAMINATION OF LYNCH WAS PROPERLY CONDUCTED GIVEN HIS DEFENSE BEFORE THE JURY?

While Lynch denied the telephones in his pants belonged to him, his testimony was contradicted by Deputies White and Davis. They both testified the phones were found in Lynch's clothing. R. 143 ;R. 146-147. Lynch's testimony contradicted their previous testimony on numerous factual issues.

When questioned about these discrepancies on cross examination, Lynch testified that law enforcement testimony against him was prefabricated. R. 160-161. He also reluctantly admitted that he had reviewed discovery in some manner prior to trial. R. 164.

This "opened up" questions about the officers' previous reports. This would be reports about the circumstances under which Lynch was found to have cell phones hidden under his prison clothes. **Gill v. State**, 485 So. 2d 1047, 1051 (Miss. 1986). It was relevant for the jury to know "when" the officers allegedly conspired against him, as he alleged before them in his testimony.

The record reflects insufficient grounds for a mistrial. The trial court did not abuse its discretion in denying this general non-specific motion for a mistrial. R. 164-168. **Alexander v. State**, 602 So. 2d 1180, 1182 (Miss. 1992).

The prosecutors' question was based upon Lynch's opening up issues related to the discovery provided by the state. When Lynch was questioned about whether he had read the discovery prior to trial, he admitted only to having "heard them." R. 164.

The question about what his counsel said earlier in his presence did not prejudice Lynch's defense. R. 10. Davis testified at length in his own defense. He contradicted the state's witnesses

in his direct testimony. His defense was that he allegedly did not know that there were cell phones in his pants. He allegedly had on someone's else's pants. R. 138-176.

Mr. Lynch had no corroboration from any other witness. And crucial for his defense, he had no corroboration from the inmate, allegedly inmate Cooper, who he claimed actually owned the pants at issue. R. 168.

The record reflects overwhelming evidence of guilt. The questioning of Lynch on cross examination about whether he received and submitted reciprocal discovery related to the charge was relevant for the jury to evaluate his credibility. R. 166.

ARGUMENT

PROPOSITION

THE TRIAL COURT PROPERLY OVERRULED A MOTION FOR A MISTRIAL.

Lynch argues that he was improperly impeached. He believes that he was impeached about statements made by his trial counsel that were made outside the presence of the jury. This was highly prejudicial to his defense. Lynch argues the trial court should have granted him a mistrial based upon this inappropriate question. He argues that this was an abuse of discretion by the trial court. Appellant's brief page 1-8.

To the contrary, the record indicates that Lynch testified fully about the circumstances under which two cell phones were found in his clothing. R. 138-176. His testimony contradicted the previous corroborated testimony of law enforcement eye witnesses. They were Deputies Davis and White. R. 79-127. Lynch's testimony included accusations of prefabrication by law enforcement. He testified that these officers were not being truthful about the circumstances under which the cell

phones were found on his person. R. 160.

During pre-trial motions, Lynch's attorney pointed out that Lynch was not happy with his representation. In explaining Lynch's complaints to the court, trial counsel Jordan pointed out that Lynch had been provided with the discovery prior to the trial date. He mentioned that Lynch admitted to him that "he had read his discovery." R. 10. Lynch was present and addressed his complaints against his counsel to the trial court. R. 7-10.

> Jordan: ...He thinks I have not done a very good job in representing him. **His complaint is that I only tell him what the state says and he's read his discovery and he's reviewed the videos that we have been furnished by the state.** I don't know if he wants to hire another attorney but he says there are witnesses that he wants subpoenaed on those sale cases. And, yes, he mentioned them to me, but in my opinion, they are not going to be fact witnesses. He wants to attack the credibility of the CI.. R. 10. (Emphasis by appellee).

On direct examination, Lynch testified that he was among the last group of four prisoners to come out of the cell. R. 143. This contradicted Deputy Davis's testimony that Lynch was the first person searched. R. 84. Lynch also testified that although cell phones were found inside his layered prison clothes, that they were not actually his pants. According to Lynch, he just happened to have put them on during an unforeseen emergency search. He allegedly had just gotten out of the shower. Before he had time to determine what was in the front of allegedly someone else's pants, he was being searched by the jail officials.

> A... So by the time I got the soap off of me or whatever, I heard them saying that the officers was in the cell....So as soon as he passed them to me, I stuck one foot in. So when I stuck the one foot in the pants, you know, I felt the object in them, but at the same time, they were coming in, Officer White had his tazer out and he was like, "Now, now, now." ..so I put my feet on in the pants, pulled them up and grabbed a shirt off. R. 142.

On cross examination, Lynch was questioned about the discrepancies between his testimony and that of Deputies Davis and White. He was confronted with differences between his testimony

and their testimony and the investigative reports made after the cell phones were found. Lynch testified that the officers who reported the cell phones belonged to him had "got together"about this, or lied. R. 160.

Cross examination about the differences between the officers initial investigatory reports and their testimony at trial were relevant as to focusing on "when" exactly, according to Lynch's testimony, the officers had decided to fabricate. The early reports about the circumstances under which the phones were found had been provided in discovery to Lynch and his counsel. This much Lynch admitted. However, when questioned about when the conspiracy occurred, Lynch testified that the officers "had gotten together" on their alleged false testimony not in the past, but in the present. This was "today" or during the trial.

> Q. So it is your testimony that these officers got together on December 23rd, 2007, and agreed to lie about what happened in this incident; is that what you are saying?
>
> A. No, they didn't get together on that then they got together today.
>
> Q. **They got together when?**
>
> A. **Today.**
>
> Q. Do you know when they wrote their reports out?
>
> A. Well, they said they wrote them on the 23rd.
>
> Q. **Well, let me ask you this, you are saying that all of that was fabricated today; is that right?**
>
> A. **I mean, as far as the incidents. Yes, sir.**
>
> Q. Okay. Can you explain then why it was that the statements that your lawyers questioned these officers about–
>
> A. Uh-huh.
>
> Q. **–that are dated December 23rd of 2007, can you explain why if those were fabricated today that they were provided to your attorneys on April 3rd of 2008?**

A. **I don't know nothing about it.**

Q. You don't?

A. No.

Q. **Your lawyers didn't show you those statements before now?**

A. **No, they did not**. R. 160-161.

. . .

Since Lynch initially denied having received discovery, he was questioned about this further. He denied having read the discovery. Rather he testified that "he heard them."

Q. **You are telling a completely different story from the two officers–**

A. **Correct**.

Q. **You got to read them, didn't you?** (Discovery)

A. **I heard them.**

Q. Listen to my question. You read these statements.

A. No, I haven't read these statements. R. 164. (Emphasis by appellee).

...

Q. Now, earlier today, not with the jury here, but Mr. Jordan had made a comment with you present that you had read over all the discovery, is that not true?

A. The discovery–I didn't know I was even coming to trial here today for the cell phones, sir.

Jordan: We move for a mistrial, Your Honor.

...

The trial court denied the motion for a mistrial. The court found that these questions were appropriate for allowing the jury to evaluate Lynch's credibility.

> Court: **So, I mean, if–it is an unusual matter for cross examination; however, under the facts here presented, I don't think it is an inappropriate matter for cross examination and your motion for a mistrial under those circumstances and under these circumstances here present is overruled.** I don't think there was any inappropriate question, and I'm going to instruct the jury that there was. I will allow you to pursue the matter, if you wish, Mr. Angero. R. 166. (Emphasis by appellee).

In **Alexander v. State**, 602 So. 2d 1180, 1182 (Miss. 1992), the Court stated the trial court was in the best position to determine if a mistrial should be granted. As stated:

> Case law unequivocally holds that the trial judge "is in the best position for determining the prejudicial effect" of an objectionable comment. See, e.g. **Alexander v. State**, 520 So. 2d 127, 131 (Miss. 1988). Thus, the judge is vested with discretion to determine whether the comment is so prejudicial that a mistrial should be declared. **Edmond v. State**, 312 So. 2d 702, 708 (Miss. 1975). Where "serious and irreparable damage" has not resulted, the judge should "cure" or remedy the situation by "admonish[ing] the jury then and there to disregard the improp[riety,]." **Johnson v. State** , 477 So. 2d 196, 210 (Miss. 1985). See also **Gray v. State**, 549 So. 2d 1316, 1320 (Miss. 1989);...

The record reflects that Lynch on cross examination claimed that he had not read the reports of the officers made on the date of the offense charging him with possession of cell phones while in jail. R. 164. However, he admitted that their account of the circumstances under which the phones were found were "a completely different story" from his testimony. R. 164. Lynch also went on to testify that these same officers, who had previously testified, had also tried to charge him with possession of marijuana.

> Q. Again, the reason that you say that Elton Davis and Barry White got together this morning and made up this–
>
> A. Accusations.
>
> Q. Let me finish my question. Made up this same statement, which is totally false about you, the reason you said that earlier is because you didn't realize that on December 23rd of 2007 they made those statements and then in April your attorney picked up those statements, you didn't know about that, right?

> A. No. But also here–I mean, he just sat here and said they charged me with marijuana. But did they find marijuana on me? No. I mean, boo-boos are going to happen.
>
> Q. Okay. Nobody said they charged you with marijuana.
>
> A. Well they tried. They took me to the court house and tried it until they got it right, they found who was who. You understand what I'm saying? R. 174-175.

The record clearly indicates that neither Deputies Davis and Deputy White testified that Lynch had any marijuana in his possession. Rather their testimony was that the individual found with marijuana was a Mr. Antoine Thomas. R. 88 ; 121. Thomas was a cell mate along with Lynch in the cell M-1. Thomas was not listed as a witness for Lynch and did not testify.

In **Gill v. State**, 485 So. 2d 1047, 1051 (Miss. 1986), the court found that cross examination "opened up" questions related to other wrongs. The defense by inquiring on cross-examination about a conversation between Mary Gill and the prosecutrix, Lynn Gill, opened the door. It was relevant for the jury to get an understanding of the context in which the conversation had occurred. As stated:

> Moreover, the objectionable testimony was a continuation of a conversation brought in by the defense in an attempt to show the prosecutrix's hostility toward her father and once having allowed a partial view of the circumstances, the prosecution was rightly allowed to include the remainder of the mother's conversation with the daughter, including accusations against the father of prior sexual assaults. The trial court told the appellant that he could not "shut the door". Where one side opens the door, the other may come in and develop that point in greater detail. See **Jefferson v. State**, 386 So. 2d 200, 202 (Miss. 1980); Cf. **Simpson v. State**, 366 So. 2d 1085, 1086 (Miss. 1979).

In **Walker v. State** 729 So.2d 197, 201 (Miss. 1998), relied upon by Lynch, the court pointed out that cross examination was "centered almost entirely" on comments made during opening argument.

> ¶ 14. In essence the prosecutor was allowed to use the statements made by Marshall's counsel in his opening as substantive evidence against Walker. The cross-examination of Walker was centered almost entirely around the comments made by his co-defendant's counsel during opening statements. The prosecutor's questions were phrased in such a manner to import to the jury that Marshall, himself, had made the statements against Walker. In fact, Marshall never testified at trial.

As shown with cites to the record, this was not the case in the instant cause. In the instant cause, Lynch waffled between denying having read discovery, as opposed to having had it read to him. In addition, Lynch accused law enforcement of conspiring against him before the jury. R. 162-170.

The appellee would submit that the record cited above indicates that the trial court did not abuse its discretion in denying a motion for a mistrial. Cross examination about the information provided Lynch in discovery was relevant given his testimony about the "accusations" allegedly being made against him at the time of trial. Lynch's testimony indicated that he defended himself against the charges in accordance with his own accusatory defense. R. 139-176.

This accusatory defense opened up questions about when the alleged unfounded accusations were made against him.

In **Morgan v. State**, 793 So.2d 615, 617 (Miss. 2001), the Supreme court found that unless there were errors so egregious as to result in a fundamental miscarriage of justice they would be considered plain error.

> ¶ 9. The plain error rule is codified in Miss. R. Evid. 103(d). It provides that nothing precludes the Court from taking notice of plain errors affecting the substantial rights of a defendant, even though they were not brought to the attention of the trial court. If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See **Edwards v. Sears, Roebuck & Co.**, 512 F.2d 276 (5th Cir.1975). "Only an error so fundamental that it generates a miscarriage of justice rises to the level of plain error," however. **Gray v. State**, 549 So.2d 1316, 1321 (Miss.1989); **Kuehne & Nagel (AG & Co.) v. Geosource, Inc.**, 874 F.2d 283, 292 (5th Cir.1989).

The record cited above reflects that Lynch defended himself against the charges. His accusatory defense opened up issues related to when he had received the investigative reports provided in discovery. The prosecution's cross examination of Lynch was directed at his credibility before the jury. Since he claimed the police were conspiring against him, the questions probed the issue of when Lynch believed the conspiracy against him occurred.

As shown with cites to the record, Lynch's defense was not just to contradict law enforcement on relevant factual issues but also to accuse them of conspiring against him. When questioned further about the time of the conspiracy, given his having received state's discovery, Lynch testified the conspiracy was created "today" or at the time of trial. While Lynch's testimony is somewhat evasive, he admitted that he received discovery in some form. As he stated, "I heard them."

Lynch knew the Deputies testimony was that the phones were found in his pants. Their reports, like the officers testimony at trial, provided no basis for thinking that the pants Lynch was wearing belonged to anyone else. Both Deputies Davis and White's testimony was that there was also a lack of evidence that Lynch had just come from taking a shower when he was taken out of the cell for a search. The person mentioned as allegedly owning the pants was not listed as a defense witness and did not testify. R. 168.

The appellee would submit that the trial court correctly denied a mistrial. When the prosecutor's question about Lynch's admission of having reviewed state discovery was viewed in the context of his testimony, the appellee would submit that this issue can be seen as lacking in merit.

CONCLUSION

Lynch's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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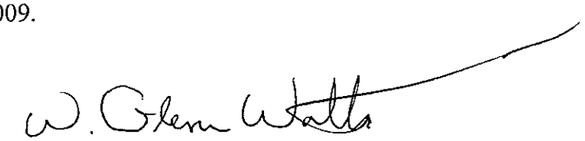
This the 28th day of May, 2009.



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