IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT MICHAEL HILLIARD — APPELLANT

VS. — NO. 2008-KA-2055-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR [redacted]

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

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STATEMENT OF THE CASE

The grand jury or Rankin County indicted defendant, Robert Mitchell Hilliard for the crime of sale of a controlled substance (cocaine), subject to enhanced penalty in violation of *Miss. Code Ann.* §§ 41-29-139 & 42-29-142. (Indictment, c.p.5). Additionally the indictment was amended to allege defendant as a subsequent offender subject to enhanced sentencing pursuant to *Miss. Code Ann.* § 41-29-147. (Amendment to Indictment, C.p. 45)After a trial by jury the Hon. William E. Chapman, III, presiding defendant was found guilty beyond a reasonable doubt. The trial court sentenced defendant to 45 years, 15 suspended, with a subsequent period

of supervised post-release supervision of 5 years. In addition defendant was ordered to pay a fine, court costs, fees and assessments. (Sentencing order, c.p. 48-49).

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

STATEMENT OF FACTS

Defendant sold cocaine to a confidential informant for $200 cash. Two officers witnessed the transaction. Immediately after the buy officers initiated to pull defendant over. None of the 'buy money' ($200 cash) was found on defendant. Further investigation found the money about 100 yards for the point of sale.

The confidential informant testified as did the officers and an expert from the crime lab regarding the analysis of the substance – which was cocaine. The jury heard the evidence and found defendant guilty.

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN DENYING THE REQUESTED MOTION FOR CONTINUANCE.

The State updated discovery with two exhibits just prior to trial. The State stated they were not going to use the exhibits at trial. The judge found one of the exhibits was irrelevant and denied the motion for continuance. There was no prejudice to defendant and no error.

II.

THE STATE MISTAKENLY CLAIMED THAT DEFENDANT HAD LIED (DEFENDANT DID NOT TESTIFY). THE JURY WAS INSTRUCTED TO DISREGARD AND THERE WAS NO MANIFEST INJUSTICE.

The prosecutor mis-spoke in closing and referred to the confidential informant as 'defendant'. The defense promptly objected, the judge sustained the objection and instructed the jury. No error as it was not done, nor did it have the affect, of unjustly prejudicing defendant.

III.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING DEFENSE'S PROFFERED INSTRUCTION TO VIEW THE CONFIDENTIAL INFORMANT'S TESTIMONY WITH SUSPICION AND CAUTION.

Defendant was denied an instruction that would have informed the jury to view the confidential informants testimony with "care, caution and suspicion." The problem is that the instruction averred the confidential informant was either an accomplice or co-defendant. Additionally, the trial court found the Court's instruction adequately instructed the jury on the weighing of witness testimony.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN DENYING THE REQUESTED MOTION FOR CONTINUANCE.

In this initial allegation of trial court error defendant argues the trial court erred in denying a motion for continuance to study evidence produced the day before trial.

> ¶6. . . . Trial judges have wide latitude in deciding whether to grant continuances and that decision is left to the sound discretion of the trial judge. *McFadden v. State*, 929 So.2d 365, 369(¶ 16) (Miss.Ct.App.2006). Denial of a continuance is not reversible unless manifest injustice appears to have resulted from the denial. *Atterberry v. State*, 667 So.2d 622, 631 (Miss.1995). Merely claiming that there might be other witnesses to support Johnson's theory of the case is insufficient to amount to a manifest injustice. The trial judge's refusal to grant a continuance here was not an abuse of discretion, nor is there any indication of manifest injustice resulting from the denial of a continuance. This issue is without merit
>
> *Johnson v. State,* 964 So.2d 1207, 1209 (Miss.App. 2007).

Prior to trial the State produced an audio disc of the confidential informant buy cocaine from defendant. The disc was pretty much inaudible (Tr. 7-9). Also, after the buy defendant was arrested at a later time. There was a police video of the car stop and arrest of defendant. (Tr. 7-9).

The State had provided trial counsel with the name of the confidential informant and his statement. Further, this witness testified at trial (Tr. 73, et seq.) And, the State did not use either piece of evidence at trial. (Tr. 7-9, as stated pre-trial).

It is the position of the State there was no prejudice to defendant. Further, appellate counsel has made no showing or allegation of substantial prejudice or a manifest injustice.

Accordingly, the State would ask that no relief be granted based upon this first allegation of error.

II.

THE STATE MISTAKENLY CLAIMED THAT DEFENDANT HAD LIED (DEFENDANT DID NOT TESTIFY). THE JURY WAS INSTRUCTED TO DISREGARD AND THERE WAS NO MANIFEST INJUSTICE.

Next, defendant asserts the State made an improper comment on his right to remain silent.

Here's how it happened: during closing argument the prosecutor mis-spoke and said defendant when he meant confidential informant. Defense counsel timely objected, the court sustained the objection and, again, instructed the jury. Tr. 199-201.

> ¶ 38. The trial judge held that the prosecutor was presenting his closing argument and therefore overruled the objection. "The often-stated general rule is that wide latitude is given attorneys in making closing arguments." Robinson v. State, 733 So.2d 333(¶ 13) (Miss.Ct.App.1998). "Where a prosecutor has made an improper argument, the question on appeal is 'whether the natural and probable *208 effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created.' " Howell v. State, 860 So.2d 704 (¶ 206) (Miss.2003). Given the evidence presented, this Court cannot say that the verdict was occasioned by unjust prejudice.
>
> *Davis v. State*, 914 So.2d 200, 207 -208 (Miss.App.,2005)

It is the succinct position there was never any intention on the part of the prosecution to create unjust prejudice by his comment. It was a mistake of speech and the jury was promptly instructed regarding the State's mistake.

Consequently, there being no prejudice there was no error and no relief should be granted.

III.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING DEFENSE'S PROFFERED INSTRUCTION TO VIEW THE CONFIDENTIAL INFORMANT'S TESTIMONY WITH SUSPICION AND CAUTION.

During the trial court's ruling on jury instructions defense proffered an instruction that would have instructed the jury to regard the confidential informant's testimony with "...great care, caution and suspicion." (D-6, refused, c.p. 37). Tr. 187-190.

Trial counsel for defendant strongly argued that the confidential informant was involved, as an accomplice or co-defendant, with defendant. The reviewing courts of this State have heard this argument before and found it wanting. If it is an accomplice or co-defendant the, the court may grant such a cautionary instruction. But, denying such an instruction for a confidential informant's testimony is not error.

> ¶ 19. We would also decline to grant relief on this issue because Steen has failed to provide any authority to support the argument that a confidential informant's testimony by itself mandates a cautionary jury instruction. Steen directs our attention to Edwards v. State, 630 So.2d 343, 344 (Miss.1994), but we find that case distinguishable from the case sub judice. In Edwards, the court held that a cautionary instruction was mandatory because the State's case was based solely on an accomplice's testimony and corroborated*161 only by the confidential informant. Id. In the instant case, we have no accomplice or co-defendant and the State's evidence consisted of more than the confidential informant's testimony. We find no merit to this issue

Steen v. State, 873 So.2d 155, 160 -161 (Miss.App. 2004).

Additionally, the trial court found the courts instruction (presumably C-1, para.

3, c.p. 27-28), to adequately instruction the jury on weighing witness testimony and giving such credibility based on common sense and sound honest judgment. As such the proffered instruction was duplicitous.

¶ 8. The Mississippi supreme court has stated that:

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. 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.

Johnson v. State, 2009 WL 2502124 (Miss.App. 2009).

In conclusion, the trial court did not err as the instruction offered implied the confidential informant was 'an accomplice or co-defendant' and was repetitive, and fairly covered by a previously granted instruction about the weigh and credibility of witness testimony. (Instruction C-1, *supra*).

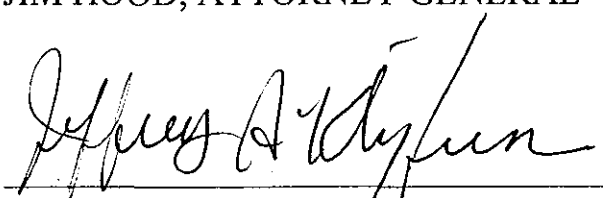
It is the position of the State there was no error in denying the proffered instruction and no relief should be given.

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 verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JEFFREY A. KLINGFUSS
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, 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:

Honorable William E. Chapman, III
Circuit Court Judge
Post Office Box 1885
Brandon, MS 39043

Honorable Michael Guest
District Attorney
Post Office Box 68
Brandon, MS 39043

Latrice Westbrooks, Esquire
Attorney at Law
5269 Keele Street, Suite B
Jackson, MS 39236

This the 2nd day of November, 2009.

JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

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