IN THE SUPREME COURT OF MISSISSIPPI

CARLOS JACKSON
APPELLANT

VS.

CASE NO. 2009-KA-00173-COA

STATE OF MISSISSIPPI
APPELLEE

BRIEF FOR APPELLANT

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CARLOS JACKSON
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VS. **CASE NO. 2009-KA-00173-COA**

STATE OF MISSISSIPPI
APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
PIKE COUNTY, MISSISSIPPI

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this court may evaluate possible disqualification or refusal:

1. CARLOS JACKSON, Appellant
2. Honorable DANIEL E. MORRIS, Attorney for Appellant, CARLOS JACKSON
3. Honorable DeWitt "Dee" Bates, Attorney for Appellee
6. Honorable Jim Hood, Attorney General for the State

THIS, the 19th day of August, 2009.

/s/ Daniel E. Morris
DANIEL E. MORRIS, MSB[redacted]
Attorney for Appellant CARLOS JACKSON

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in the sentencing phase?
2. Whether the trial court erred in failing to grant the Appellant's objection to the testimony of Sunday Montague?
3. Whether the trial court erred in granting the state's Batson challenges?
4. Whether the Appellant received ineffective counsel?

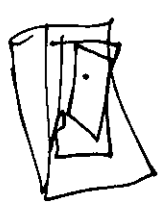
STATEMENT OF THE CASE[1]

A. Nature of the Case, Course of Proceedings and Disposition Below

This is an appeal by Appellant **CARLOS JACKSON** (hereinafter "**Carlos**") from the conviction and sentence of eighty (80) years to serve under the control and supervision of the Mississippi State Department of Corrections. The Appellant was convicted of Sexual Batter, Sexual Battery, Aggravated Assault, and Burglary of a Dwelling after being indicted for this offense on September 7, 2007 by the Pike County Grand Jury.

Carlos pled not guilty at arraignments and proceeded to trial on December 14, 2008 before Circuit Court Judge David Strong; and at the end of said trial, the jury returned a verdict finding the Appellant, **CARLOS JACKSON**, guilty as charged. Appellant filed his

[1] The appeal record in this cause consists of the transcript of the December 14, 2009 trial before the Honorable David Strong (T.__) and the record excerpts filed pursuant to M.R.A.P. 30 (r.e.__).



Notice of Appeal on January 16, 2009 and amended on March 12, 2009 and his Motion for Judgment Notwithstanding the Verdict or in the Alternative, New Trial on March 3, 2009.

B. Facts

On June 10, 2007 Carlos Jackson was at home with members of his immediate family, which included his Father, Mother, Brother, and Sister. Carlos called the mother of his three children. She came to his parent's home to pick him up to go the movie theatre in Hammond. On the way the couple stopped at the "Community Store" so Carlos could purchase cigarettes. Carlos stayed in the store for an extended period of time. The mother of his children left because of Carlos's long visit.

Carlos then caught a ride to Sunshine Apartments with Mr. Frank Tate. Carlos then went to Venisha Cleamons's apartment. Venisha Cleamons is Carlos's cousin. She was not home. Carlos then went to Sunday Montague's apartment. Sunday Montague is Carlos's ex-girlfriend. Sunday was not at home. Carlos then went to Deneycia Reynolds's apartment.

He looked for her boyfriend's car and did not see his car. He then knocked on the door but no one answered. He then went to the back door and wrapped his hand with his shirt. Carlos knocked out the side window to gain entry. Once inside Carlos put the shirt over his shoulder and started to look for the telephone. Carlos did not see a telephone so he tried to see if there was a phone in the bedroom but the door was locked. Carlos then went to the kitchen to get a knife to the bedroom door.

When Carlos opened the door Ms. Reynolds and Mr. Carol jumped out of the bed.

Sunday Montague on two fronts. On the first front the State did not disclose Sunday Montague's witness status to the Appellant before her testimony. In Moore vs. State of Mississippi 405 So.2d 97 (1981) this court held that this is a clear error that is can be the basis of a reversal. On the second front the court could not determine that Sunday Montague was not in the court room during testimony that was given in the trial by other witnesses. The Defense "Invoked the Rule". By invoking the rule, all witnesses that were to testify, excluding experts, were required to be absent during any testimony.

3. Whether the trial court erred in granting the state's Batson challenges?

Under Batson, the party objecting to the peremptory challenge must first make a prima facie showing that race was the criteria for the exercise of the peremptory strike, the burden then shifts to the party exercising the challenge to offer a race-neutral explanation for striking the potential juror, and finally, the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory strike Jackson v. State,962 So.2d 649, Miss.App.,2007 .

4. Whether the Appellant received ineffective counsel?

Appellant's counsel allowed the defense's expert witness whom the case stood on to take the stand in an altered state. The Appellant's first proof of ineffective counsel is based on the fact that the defense's expert witness was under the influence of mind altering medication. The expert misread the chart while on the stand is of no relevance. Dr. Sumner had to correct his mistakes he made on the witness stand. Appellant's counsel allowed the expert witness, the only witness who could show that Carlos Jackson did not know the difference between right and wrong, to take the stand in an intoxicated state.

ARGUMENT

I.

THE TRIAL COURT ERRED IN SENTENCING CARLOS JACKSON

The trial court erred when it used evidence in the sentencing phase that was not introduced during the trial and evidence that should not have been introduced by the state. The court did not perform a pre-sentencing investigation. If the pre-sentencing investigation had been ordered then the trial court would have been able to use all the information at his disposal. The court used information that it may have believed to have been true. The fact remains that believing and knowing are two completely different situations. If the information had been documented then there would not be a reason to contest the court's reasoning and basis for his sentencing. In this case what the trial court knew or believed he knew cannot be substituted for the facts. The pre-sentencing investigation would have given the court all the information needed to hand down a fair

sentence to Carlos Jackson.

The State erred in offered evidence that Carlos had been represented by Attorney Wayne Dowdy in previous criminal proceedings. Carlos Jackson was convicted of armed robbery in May of 1997. This trial was well after the 10 year period for introduction of prior convictions. This evidence should never have been introduced by the State.

Carlos Jackson had no history of being a habitual offender. The conviction and sentencing on the five counts against Carlos Jackson are violations of the Eighth Amendment of the Constitution of the United States. It does not matter that the sentences are all within the maximum amounts of time allowed by statute. It is a miscarriage of justice to sentence a legally mentally retarded young man of 28 years of age to serve 80 years in prison.

It was shown in the transcript that Carlos Jackson suffers from mental retardation. The Court ignored this fact in the sentencing of Carlos. The State and Defense both agreed to Carlos Jackson's mental defect. They merely disagreed on the M'naghten test. The Court completely ignored the fact that the State's own expert witness agreed that Carlos suffered from mental defects. The fact that Carlos suffered from mental defects was not addressed by the court during the sentencing phase. The trial court should have taken into account Carlos's mental state.

It does not matter that jury did not believe that Carlos did not know the difference between right and wrong when he allegedly committed these crimes. The court should have

taken into account Carlos's history of brain injuries chronicled by Rev. Jackson, Mrs. Jackson, Dr. Sumner, and the State's expert Dr. Loft.

The Appellant understands that the sentences were below the maximum penalties that can be applied by law. The Appellant, however, does not agree with the reasoning used by the trial court in imposing these sentences without taking into account Carlos's medical history and mental history.

There is further evidence of inappropriate action by the court in that the court used knowledge that it should not have used to base its sentencing on. The court stated Trial Court:

> "You know Mr. Jackson you had other chances to correct you behavior, to modify our behavior. You've been to RID. You got arrested for possession of cocaine and assaulting a law enforcement officer a year before this happened. You know if you would have entered a plea of not guilty by reason of insanity in that case you would not have ever done this because you would not have been out on bond.
>
> Apparently you were a victim of being let out of jail every time you went and when you chose to do the things you did on the night in question, you simply leave me no choice except to sentence you, give you the appropriate sentence and one which almost certainly

guarantees that you will not be a part of society again. So, good luck to you, Mr. Jackson. That will be your sentence." (T. p 459 l.15-p 460 l. 1)

This long drawn out statement shows that the Court used evidence and knowledge that was not entered into the record or presented to the court to sentence Carlos Jackson. The court was only to use what the state or defense had brought into the court's knowledge at trial. The arrest the court spoke of was never testified to by any of the State's witnesses or the Defense's witnesses. The court could not use his prior knowledge of the Appellant when he made his sentence.

If the court had not expressed its reasoning in open court then this argument would have no merit. But in this instance there is merit because the court used everything it had knowledge of to make this unjust and cruel sentence.

II.

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF SUNDAY MONTAGUE

The following is an excerpt from Cole v. State which states: Under the facts of this case we believe reversal is warranted. Although we are not hide-bound to reverse every case in which there was some failure by the State to abide by a discovery rule, this case should be reversed and remanded for a new trial. Prosecuting attorneys, as well as defense attorneys,

must recognize the obligation to abide by discovery rules. A rule which is not enforced is not rule.

> The State might also have informed defense counsel that Mrs. Pope would not be called as a witness in chief, but that she would be called in rebuttal if Cole pursued his alibi defense before the jury. The Rule makes no requirement of the State to furnish the names of rebuttal witnesses. While Mrs. Pope's testimony would ordinarily be considered as part of the State's case in chief, under these peculiar circumstances, the State could have asked the circuit judge to permit them to call her as a rebuttal witness if Cole pursued an alibi defense. In this event, at least the defense would not have been surprised and the defense could have avoided the untenable situation in which it found itself.
>
> I would hold, therefore, that the trial court committed reversible error in permitting Mrs. Pope to testify over the defense counsel's objection.
>
> I would not hold that in every case the State is restricted to using only witnesses it discloses to the defense prior to trial. There may be cases in which the State can properly use a witness whose identity the State

suddenly discovers during the course of trial. But the State's acts must not unfairly prejudice the accused.

In the case at bar, the State discovered a prospective witness was material to the State's case, yet they failed to disclose the witness's name to the defense when the State knew the witness's identity. Under these circumstances I would hold the State should, at the very minimum, immediately notify defense counsel and give him an opportunity to interview the witness as well. Then, before offering such person as *381 a witness to the jury, the circuit judge should be informed of the situation. The judge should then conduct a hearing in chambers and determine whether the defense will be prejudiced because of the failure to know of the witness's identity, and did not have an opportunity to interview the witness prior to trial. If the circuit judge satisfies himself that the mere *delay itself* in learning this person's identity would cause no harm, he may in his discretion permit the State to offer the person as a witness before the jury. Alternatively, if the judge finds the defendant will be unfairly prejudiced by the State's failure to identify the witness, the judge should not allow him to testify. Cole v. State 525 So.2d 365 Miss., 1987

The trial court erred in failing to grant the Appellant's objection to the testimony of Sunday Montague on two fronts. On the first front the State did not disclose Sunday

Montague's witness status to the Appellant before her testimony. In Moore vs. State of Mississippi (1981) this court held that this is a clear error that can be the basis of a reversal. Exclusion of testimony of defense witness, who was prepared to testify was appropriate sanction in murder prosecution for defense counsel's failure to provide prosecution with witness's name in writing until after state rested its case-in-chief De La Beckwith v. State 707 So.2d 547 (Miss.,1997). The Appellant was sufficiently prejudiced by the testimony of Sunday Montague. The Appellant was prejudiced on three counts.

The first prejudice suffered is based on the fact that the evidence had little probative value. The reason Sunday Montague was on the stand was to rebut expert testimony. The testimony that Sunday Montague gave had already been taken care of on the cross examination of the defense's expert witness. Dr. Sumner, "Well, in my report, if you look at the last page, he said he finally stopped using cocaine because it was causing him to hear and see things."(T. p. 335 l. 26 – l. 28) The Appellant did not claim that he was involuntarily intoxicated at the time of the alleged commission of the crime. Whether Carlos was high at the time of the alleged commission was not at issue. Sunday Montague's testimony that she had seen Carlos Jackson use cocaine at some point in time well before this alleged crime has nothing to do with June 10, 2007. The issue for the jury to decide was whether or not Carlos knew the difference between right and wrong at the time of the alleged commission of the crime.

The testimony Sunday Montague gave was highly prejudicial and had nothing to do

with the alleged commission of the crime. If Carlos Jackson took cocaine three weeks before the alleged commission of the crime it had nothing to do with Saturday June 10, 2007. Carlos Jackson could have snorted a ton of cocaine but that has nothing to do with this case. Sunday Montague's testimony was highly prejudicial and had no bearing on this case other than to prejudice the jury against the Appellant.

The second prejudice suffered deals with the fact that Sunday Montague's testimony was the last testimony heard at Carlos Jackson's trial. The damage was done when the trial court erred in allowing her testimony. The closing statements were short and concise. The testimony of Sunday Montague rang loud and long when the jury went in to deliberate *Quinn v. State*, 479 So.2d 706, 708 (Miss.1985) and its progeny hold that the State may inquire into past acts *only* if the defense first opens the issue to paint the defendant in an innocent light.

The defense did not open the door to paint the defendant in an innocent light. The defense always claimed that Carlos had a substance abuse problem. The parent's testimony revealed that he had been taken to a recovery program on Mr. Jackson's cross-examination. The doctor's report from St. Dominic confirmed that Carlos admitted to using cocaine within the last 10 days.

The third prejudice is based on the fact that Appellant's counsel did not have an opportunity to interview the State's rebuttal witness. Appellant's counsel was not sufficiently prepared to cross examine the State's witness. He was told what her testimony would be minutes before the rebuttal witness took the stand.

The second front occurred because the court could not determine that Sunday Montague was not in the court room during testimony that was given in the trial by other witnesses. The Defense "Invoked the Rule". By invoking the rule, all witnesses that were to testify, excluding experts, were required to be absent during any testimony. The state cannot account for the whereabouts of Sunday Montague during any of the testimony that was given prior to her testimony. This Court has addressed this issue by holding when a violation of the sequestration rule is assigned as error on appeal, the failure of the judge to order a mistrial or to exclude testimony will not justify a reversal on appeal absent a showing of prejudice sufficient to constitute an abuse of discretion Gerrard v. State, 619 So.2d 212, 217 (Miss.1993).

III.

THE TRIAL COURT ERRED IN GRANTING THE STATES BATSON CHALLENGES

In the case of Jackson v. State,962 So.2d 649,Miss.App.,2007 the court stated: Under Batson, the party objecting to the peremptory challenge must first make a prima facie showing that race was the criteria for the exercise of the peremptory strike, the burden then shifts to the party exercising the challenge to offer a race-neutral explanation for striking the potential juror, and finally, the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the

, strike.

The state did not make a prima facie case to prove that race was the controlling issue in the challenge. The state merely stated that he believed that race was the only reason for the peremptory challenges of the Appellant. The State must do more than merely state the race of the person. The state must make a real case for the court to uphold a Batson challenge.

Appellant's counsel did give a good reason for challenging Juror 23, Mr. Vibrock. Counsel gave his own personal opinion of the juror. Mr. Vibrock's occupation coupled with counsel's life experiences with mail carriers should have been enough to defeat the Batson challenge. Once this court takes into account Appellant's counsel had accepted white jurors on the panel before this Juror, it is obvious that the challenge was race-neutral. The Batson challenges are not to be used by either counsel just to keep a person of a certain race on the jury. It must be based on fairness to our judicial process not just to have a jury of predominated by one race.

IV.

INEFFECTIVE COUNSEL

The test for ineffectiveness of counsel is two-pronged: defendant must demonstrate that his counsel's performance was deficient, and that deficiency prejudiced defense of case. The Two-pronged test for ineffectiveness of counsel also requires showing that counsel's errors

He gave a long rambling explanation of covering his mouth and apologized for his conditions. Dr. Sumner's demeanor and incoherence were the basis for the jury's verdict. Pain killers are serious drugs that should not be taken while performing tasks that involve any kind of decision making. Pain killers definitely should not be in the system of the expert who is to determine a defendant's future. The mistake was not Dr. Sumner's but that of defense's counsel. The Appellant reiterates, Dr. Sumner admitted to the court that he was under medication. It was clear that he was not thinking clearly. He made mistakes that he would not have made had he not been under the influence of a prescribed mind altering medication.

The Appellant now turns to the defense chosen by his counsel. The Appellant has always stated his innocence. The alleged facts of this case were never challenged but merely agreed to by Appellant's counsel. The testimony that was contradictory by the State's two eye witnesses was never questioned because of the choice of defense by counsel. The Appellant is a mentally retarded individual who could not make an informed decision on what his defense should be.

The Appellant's parents did not agree with the defense but they were assured Insane by Reason of Insanity was the best defense. When persons lean to and trust the advice of an expert, The Appellant's attorney, that expert has a duty to advise the client of the best plan of action available. The Appellant's attorney used a defense used by another attorney. The Appellant's attorney did not anything that would aid his client to have justice prevail.

The Appellant's attorney never interviewed the witnesses the Appellant provided. The Appellant's attorney did not follow any leads that took into account the ongoing sexual relationship between Carlos Jackson and the alleged victim. The Appellant's attorney never followed up on the accusation by the alleged victim that Carlos Jackson is the father of her youngest child. The Appellant's attorney never questioned The Appellant's witness that verified The Appellant's sexual relationship with Deneycia Reynolds.

The Defense chosen by The Appellant's attorney did not allow him to attack the fact that Christopher Carol could not identify Carlos Jackson (T. p114-l.24-l.28). The defense chosen by counsel did not allow him to contest the fact that Christopher Jackson saw his alleged assaulter with a white t-shirt around his head and not a black t-shirt as claimed by Deneycia Reynolds (T. p 112 l.9 - l.12)

Appellant's counsel's voire dire lasted only seven (7) minutes. That amount of voire dire did not give Appellant's counsel adequate foundation for his preemptive challenges. Counsel's challenges could have been successful had he laid the proper foundation with his questions. Counsel merely asked convoluted questions that had to be explained numerous times in order for one witness to somewhat understand. Counsel asked blanket questions that did not allow further questions to ensure a quality and reliable jury. Counsel had ample opportunity to ask numerous questions of the potential jurors he had gut feelings about but he did not. Counsel did an ineffective job of voire direing potential jurors. This subjected Carlos Jackson to a jury that was not versed in the defense The Appellant was coerced into

relying on by his counsel.

V.

CONCLUSION

Although this Court may find that each error standing alone is insufficient to establish manifest error to award a new trial, when reviewing each error cumulative this Court has no choice but to reverse the conviction of CARLOS JACKSON and dismiss the charges against him or in the alternative, grant him a new trial. Not to do so, would be allowing a manifest injustice to continue.

SO BRIEFED, this the 19 day of August, 2009.

Respectfully submitted,

CARLOS JACKSON, *Appellant*

BY: /s/Daniel E. Morris

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CERTIFICATE OF SERVICE

I, DANIEL E. MORRIS, do hereby certify that I have this day mailed, by U.S. mail, postage prepaid, a true and correct copy of the Appellant's Appeal Brief to the following:

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THIS, the 19 day of August, 2009.

/s/Daniel E. Morris
DANIEL E. MORRIS