

**CERTIFICATE OF INTERESTED PERSON**

**DELYNN DELSHAE PITTMAN**

**v.**

**STATE OF MISSISSIPPI**

**NO. 2009-KA-00929-COA**

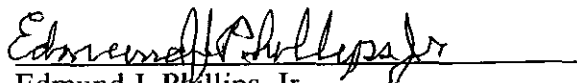
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

**Honorable Mark Duncan  
District Attorney  
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**Honorable Marcus D. Gordon  
Circuit Court Judge  
P.O. Box 220  
Decatur, MS 39327**

**Honorable Jim Hood  
Attorney General of MS  
P.O. Box 220  
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**Delynn Delshae Pittman  
APPELLANT**

  
Edmund J. Phillips, Jr.  
Attorney of Record for Delynn Delshae Pittman

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## **STATEMENT OF THE ISSUES**

1. The Court erred in allowing sheriff's office investigator Harper to testify as an expert in reading body language.
2. The Court erred in denying Appellant's objection to the prosecution's leading question.

## **STATEMENT OF THE CASE**

Delynn Delshae Pittman appeals his conviction from the Circuit Court of Leake County, Mississippi of the crime of aggravated assault and sentence of confinement for 8 years in the custody of the Mississippi Department of Corrections with four (4) years suspended.

Appellant and Roshea McCoy argued over approximately \$30.00 owed by Appellant to McCoy as the unpaid purchase price for some marijuana sold by McCoy to Appellant (T-25). The quarrel resurfaced at a party or social event at Bernard Denson's house in Leake County. After the party Appellant drove his car with Quincy Boyd and Adrian Calhoun as guest passengers to McCoy's home nearby apparently to buy some gin and stopped. Calhoun got out and began to fight with McCoy. Appellant got out and joined the fray on Calhoun's behalf. A pistol was pulled out by one of the parties [McCoy claimed that Appellant had brought the pistol, but Appellant's written statement introduced by the State (Exhibit 2) stated that McCoy pulled it from his waist]. Appellant grabbed it, they struggled over it and McCoy was shot.

McCoy's girl friend, Sally Nicole Boyd fired two firearms (she lived there in his mobile home). McCoy suffered three gunshot wounds (apparently largely superficial) was treated that night at the University Hospital after Sally drove him there and was released the next morning to return home.

### **SUMMARY OF THE ARGUMENT**

1. It is reversible error to allow expert testimony who has not been qualified and tendered as expert, subjecting him or her to voir fire on the issue of his or her expertise.
2. As a general rule leading questions are not permitted on direct examination.

### **ARGUMENT**

#### **I.**

#### **THE COURT ERRED IN ALLOWING SHERIFF'S OFFICE INVESTIGATOR HARPER TO TESTIFY AS AN EXPERT IN READING BODY LANGUAGE**

On direct examination by the State of Sheriff's Department investigator Michael Harper the following colloquy occurred (T-106):

- Q. After asking that question, tell us about his body language.
- A. After the question about the shot in the butt, of course, as we say, it let the air out of him. He kind of slumped down and at that point, that's when he told us he couldn't explain that.
- Q. What did his body language indicate to you?
- BY MR. SMITH: I object. It calls for pure speculation. This officer is not trained - -
- BY THE COURT: I'm going to sustain the objection.

On cross-examination Harper testified as follows (107):

- Q. Understood. And you are not a kinesthesiologist, are you?  
A. I am trained, yes.  
Q. You are - - a kinesthesiologist?  
A. I am trained in that technique as an interviewer in that technique, reading body language. I am trained.  
Q. So you have training in the way the joints and muscles interact and all of that?  
A. No, I'm trained in reading body language as part of an interview technique. I attended training at the Naval Station in Meridian for interview using body language.

On redirect examination, the following colloquy took place (109, 110):

- Q. Investigator Harper, based upon your training as reading body language in an interview - - -  
BY MR. SMITH: Your Honor, I would object to that.  
BY THE COURT: Overruled. You developed it. In your development he testified he has experienced training.  
BY MR. SMITH: Your Honor, he testified that he was an experienced kinesthesiologist - - - and I can't believe I said that word again - - and that is the study of muscles and joints and how they interact. That is no - - that's what he said he was, Judge.  
BY THE COURT: I don't even know what that means. I'm going to let him answer.  
Q. Investigator Harper, you've been trained in reading body language during an interview. Is that correct?  
A. That is correct.  
Q. Based upon your training and experience and observation of the Defendant in that interview, you stated that he had the air let out of him. Is that correct?  
A. That's correct.  
Q. Tell us what your opinion is as to what that body language indicated.  
BY MR. SMITH: I object to his opinion again.  
BY THE COURT: Overruled.  
A. What I saw in the interview room, in our line in an interview it's what we call the confession slump. He just dropped his head and acted as if he was not going to answer that question.

For two separate reasons, the Court's ruling was error.

On cross-examination Harper claimed expertise in the field of reading body language when he was asked a question about whether he was a kinesthesiologist, apparently mistaking a kinesthesiologist for a kinesiologist (he had once taken a course in reading body language). The trial court overruled Appellant's objection (T-109), because the Court believed Appellant had opened the door on cross by asking a question about kinesthesiology, a topic entirely different from reading body language.

The trial court had first sustained Appellant's direct examination objection to Harper testifying on this topic, because Harper had not shown expertise in the area (T-106). The Court's allowing him to testify on redirect as an expert was manifest error because the State did not first tender him as an expert in reading body language, subjecting him to voir dire on the issue of his expertise. It is reversible error to allow expert testimony from a witness who has not been qualified and tendered as expert. *Cotton v. State*, 675 So. 2d 308 (Miss. 1996); *Sample v. State*, 643 So. 2d 524, 530 (Miss. 1994); *Roberson v. State*, 569 So. 2d 691 (Miss. 1990); M.R.E. 702.

Nor is this testimony proper redirect examination, because the subject of interpretation of Appellant's body language was not broached on cross-examination. The witness, on cross, asserted that he was trained to read body language in response to a question about another topic, however Appellant's body language was not discussed.

It is error to allow redirect examination about matters not covered on cross examination. *Beech v. Leaf River Forest Products, Inc.*, 691 So. 2d 446 (Miss. 1997); *Weeks v. State*, 493 So. 2d 1280 (Miss. 1986); *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955 (1896). For both reasons the Court's ruling was reversible error.

## II.

### **THE COURT ERRED IN DENYING APPELLANT'S OBJECTION TO THE PROSECUTION'S LEADING QUESTION**

In the direct examination of prosecution witness Quincy Boyd, the following colloquy occurred (T-34, 35):

- A. I could kind of see him by Delynn right here and Roshea right here in the middle and Adrian on this side over here.
- Q. Was Adrian trying to grab hold of Roshea?
- BY MR. SMITH: Your Honor, I object to leading.
- BY THE COURT: Overruled.
- Q. What was Adrian doing? Were he and Mr. Roshea tussling?
- A. It was kind of dark and really you can't see nothing, but they say he was trying to get in his pocket.
- Q. That's Roshea and Mr. Calhoun.
- A. Uh-huh.


M.R.E. 611(c) prohibits leading questions on direct examination. Leading questions are those which suggest an answer to the witness and are not allowed on direct examination. *Stringfellow v. State*, 26 Miss. (4 Cush.) 157 (1853); *Parker v. State*, 378 So. 2d 662 (Miss. 1980).

The question objected to was leading, the ultimate answer was hearsay, the Court's overruling the objection was error and the verdict should be overturned.

**CONCLUSION**

The verdict should be overturned.


RESPECTFULLY SUBMITTED,

  
EDMUND J. PHILLIPS, JR.  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, Mississippi 39350, District Attorney, the Honorable Marcus D. Gordon, P.O. Box 220, Decatur, Mississippi 39327, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, Mississippi 39205, Attorney General for the State of Mississippi.

DATED: January 4, 2010.

  
EDMUND J. PHILLIPS, JR.  
Attorney for Appellant