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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KA-1375-COA

**FILED**

JAMAR AMIN MOORE

APPELLANT

VS.

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SUPREME COURT  
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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## ARGUMENT

- I. **The trial court committed reversible error when it denied Moore's theory of the case instruction.**

### The Law

A defendant is entitled to submit instructions that present his theory of the case to the jury, while a trial judge is entitled to refuse instructions that incorrectly state the law, are without foundation in evidence or are stated elsewhere in the other instructions. *Manuel v. State*, 667 So.2d 590 (Miss. 1995) citing *Hester v. State*, 602 So.2d 869, 872 (Miss. 1992) (citing *Murphy v. State*, 566 So.2d 1201, 1206-07 (Miss. 1990); *Sayles v. State* 552 So.2d 1383, 1390 (Miss. 1989)).

In *Manuel v. State*, 667 So.2d 590 (Miss. 1995), citing *Brister v. State*, 231 Miss. 722, 97 So.2d 654 (1957), cert. Denied, 356 U.S. 961, 78 S.Ct. 1000, 2 L.Ed.2d 1069 (1958) the supreme court held that **the presence of evidence tending to prove facts mentioned in an instruction does not mean that the jury has to believe what the "evidence shows" where there is also evidence to the contrary. Had the instruction started with [I]f you believe from the evidence that the deceased...,** the instruction would be proper. *Id* at 726-27, 97 So.2d 654.(emphasis added).

### The Facts

Moore's proposed jury instruction provided that:

Jamar Moore's theory of the case is that he would not have been stopped and charged with these offenses if Jeremy Jurden had not put the marijuana in his car and called the police and **if you so find** you must find Jamar Moore not guilty.<sup>1</sup> (Emphasis added).

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<sup>1</sup> R.E. 87. In this Brief, R.E. refers to the Record Excerpts Pages(s). The record page is cited as Volume:Page:Line(s).

In addition to arguing Moore's proposed instruction was a comment on the evidence, the State, in its brief, asserts the trial court refused the instruction because the instruction state that the informant put the marijuana in the car, as though that was an uncontested fact.

Jeremy Jurden denied putting marijuana in Moore's Carr. Officer Joseph Wide ("Wide") testified that Moore could have been stopped and cited for not using his turn signal. Moore was found not guilty of possession of marijuana and guilty of possession of hydrocodone.

### **Analysis**

The State, like the trial court, asserts Moore's proposed theory of the case instruction was a comment on the evidence. Additionally, the State asserts the trial court refused the instruction because the instruction stated that the informant put the marijuana in the car, as though that was an uncontested fact. While the trial court may not have readily known the law on a defendant's right to a theory of the case instruction, the State surely knew from reading Moore's brief

The proposed instruction was not peremptory-like in fashion because it allowed the jury to make a determination based upon the law and what they believed from the evidence. The proposed instruction attempted to tell the jury that they should act upon what they believed from the evidence. Additionally, the instruction correctly asked the jury that if they so found that Moore would not have been stopped and charged with these offenses if Jeremy Jurden had not put the marijuana in his car and called the police they must find Jamar Moore not guilty.

Moore's theory of the case instruction was not required to state that there was

evidence to the contrary. In truth, the fact there was evidence to the contrary is reason why the instruction was proper and should have been given.

Moreover, it is reasonable to conclude that since Moore was acquitted of the marijuana charge without the requested instruction, Moore would have been acquitted of the possession of hydrocodone charge if the requested instruction, to which he was entitled, had been given.

Finally, the proposed instruction was not telling the jury what the facts are in the case. The proposed instruction was the only instruction that presented Moore theory of Moore's defense to the jury. Moore was entitled to give the jury his theory of the case instruction. Reversible error resulted when the trial court failed to give the jury Moore's theory of the case instruction.

- II. The trial court erred when it failed to grant Moore a mistrial after Officer Wide testified Moore said he did not want to return to prison.**

### **THE LAW**

Absent unusual circumstances, where objection is sustained to improper questioning or testimony, and the jury is admonished to disregard the question or testimony, the appellate court will not find error. *Hill v. State*, 4 So.3d 1063 (Miss.Ct.App. 2009) citing *Wright v. State* 540 So.2d 1, 4 (Miss. 1989).

### **THE FACTS**

As the State concedes, Officer Wide's non responsively testified that after Moore was arrest Moore stated that he had previously been in trouble and did not want to go back to prison.<sup>2</sup> Though the jury was instructed to disregard the testimony, the motion for mistrial

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<sup>2</sup> 1:99-9-14.

was denied.<sup>3</sup>

Though the trial court rejected Moore's theory of the case instruction, Moore was found not guilty of possession of marijuana. After the trial court rejected Moore's theory of the case instruction, Moore was found guilty of possession of hydrocodone.

### **ANALYSIS**

Admittedly, at the time of Wide's non responsive testimony, no unusual circumstances existed for the appellate court to find error in the denial of Moore's motion for mistrial. Nonetheless, considering the totality of the circumstances, what must be considered at this stage of the appellate process, Moore submits, is the prejudicial effect of the trial court's ruling denying the motion for mistrial.

Though motion requested jury instructed was denied by the trial court, Moore was found not guilty of possession of marijuana. After Moore's theory of the case instruction was rejected, Moore was found guilty of possession of hydrocodone.

The alleged statement was prejudicial and incriminating. The statement implied guilt. More so, the statement implied that because Moore was guilty, Moore would do anything not to return to prison.

Moore was prejudiced by the non responsive statement. Considering the totality of the circumstances this court must grant Moore a new trial.

### **III. The cumulative effect of errors denied Moore a fair rial**

### **THE LAW**

Where there is merit to any of the specific errors alleged the appellate court can find

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<sup>3</sup> 1:99:17-23.

cumulative error. *Jones v. State*, 956 So.2d 310, 315 (Miss.Ct.App. 2006).

### **THE FACTS**

The trial court denied Moore his following theory of the case instruction as a comment on the evidence:

Jamar Moore's theory of the case is that he would not have been stopped and charged with these offenses if Jeremy Jurden had not put the marijuana in his car and called the police and **if you so find** you must find Jamar Moore not guilty.<sup>4</sup> (Emphasis added).

### **ANALYSIS**

There is merit to Moore's claim that the trial court reversibly erred when it denied his theory of the case instruction. The requested instruction correctly stated the law, was not covered fairly elsewhere in the instructions, and there was foundation in the evidence for the requested instruction. Moreover, there was contrary evidence in the record the jury could have also so found. The trial court reversibly erred when it denied Moore's his theory of the case instruction.

### **CONCLUSION**

Moore was found not guilty of possession of marijuana. Moore was found guilty of possession of hydrocodone. It is reasonable to conclude Moore would have been found not guilty of hydrocodone if his theory of the case instruction, to which he was entitled, had been given.

Moore was prejudiced when the jury did not consider his theory of the case

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<sup>4</sup> R.E. 87. In this Brief, R.E. refers to the Record Excerpts Pages(s). The record page is cited as Volume:Page:Line(s).

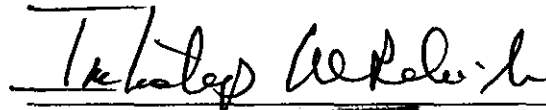


instruction he was entitled to. Additionally, Moore was prejudiced when a mistrial was denied after the jury learn Moore had previously been to the penitentiary and did not want to go back. The cumulative effect of the errors denied Moore a fair trial. In the interest of justice, this Court must grant Moore a new trial on the possession of hydrocodone count of the indictment.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the forgoing was hand delivered and/ or mailed first class, postage prepaid, to the following individual

Judge Charles Webster  
P.O. Drawer 998  
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John R. Henry  
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This the 1<sup>st</sup> day of October 2010.

  
Imhotep Alkebu-lan