IN THE MISSISSIPPI COURT OF APPEALS

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CASE NUMBER 2009-KA-1582-COA

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RACO PEARSON

Appellant

vs.

STATE OF MISSISSIPPI

Appellee

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# APPELLANT'S BRIEF

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LESLIE ROUSSELL,
ATTORNEY FOR APPELLANT,
RACO PEARSON

## 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 the justices of this Court may evaluate possible disqualification or recusal.

Mr. Raco Pearson - Appellant

Dan Angero - Assistant District Attorney

Katheryn McNair - Student intern with District Attorney

Judge Robert Bailey - Trial Judge

Stewart Parrish - Defense Attorney

William "Binky" Satcher - Task Force Officer, State Witness

Donnell Rutledge - Confidential Informant, State Witness

Keith McMahan - Crime Lab analyst, State Witness

Leslie Roussell - Attorney for the Appellant

**TABLE OF CONTENTS**

## CITATIONS

OTHER AUTHORITIES

## STATEMENT OF ISSUES

I. THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF "POWDER" COCAINE WHEN ALL THE REPORTS OF THE OFFICERS AND INFORMANT LISTED THE SUBSTANCE SOLD AS "CRACK" COCAINE.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE VERDICT OF THE JURY TO STAND WHEN THE EVIDENCE FROM THE STATE'S WITNESS WAS SO OVERWHELMINGLY CONFLICTING. THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR JNOV OR NEW TRIAL. AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AS WELL AS BEING INSUFFICIENT TO FIND THE DEFENDANT GUILTY

III. THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO SHIFT THE BURDEN OF PROOF TO THE DEFENDANT OVER THE OBJECTION OF THE DEFENDANT. The COURT COMPOUNDED THIS ERROR AND COMMITTED INDEPENDENT ERROR BY ALLOWING THE PROSECUTION TO COMMENT ON WHY THE DEFENDANT DID NOT CALL HIS WIFE AS AN ALIBI WITNESS.

IV: THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE DEFENDANT TO BE CONVICTED OF AN ENHANCED SALE WHEN THERE WAS NO EVIDENCE PUT ON TO PROVE THAT THE PARK IN QUESTION WAS EITHER PUBLIC OR THAT ANY SALE TOOK PLACE WITHIN 1500 FEET OF A PUBLIC PARK.

V: THE STATE OF MISSISSIPPI INCLUDED EXTRA ELEMENTS IN ITS INDICTMENT WHICH IT FAILED TO PROVE AT TRIAL. AS A RESULT, THE CONVICTION OF MR. PEARSON MUST BE REVERSED. AND FURTHER COMMITTED REVERSIBLE ERROR BY FAILING TO GRANT THE DEFENDANTS' MOTION FOR DIRECTED VERDICT AND J.N.O.V..

## STATEMENT OF THE CASE

William "Binky" Satcher is an officer with the South Mississippi Narcotics Task Force ®. 57). At some point prior to September 11, 2007, Mr. Satcher met Mr. Donnell Rutledge. Mr. Rutledge was out of work and asked if he could earn money by purchasing drugs as a confidential informant for the South Mississippi Narcotics Task Force. An agreement was reached and Mr. Rutledge was to become a confidential informant for the South Mississippi Narcotics Task Force and was to be paid $ 50.00 for any "pill" purchase and $ 100.00 for any "cocaine" purchase ( R. 61, 104, 141).

On September 11, 2007, Officer Satcher and Informant Rutledge met up at a predetermined location (along with Agent Will Peterson of the Mississippi Bureau of narcotics). The purpose of the meeting was to formulate plans to purchase illegal narcotics from individuals in Clarke County, Mississippi ( R. 62). When the three met, a decision was made by Informant Rutledge to attempt to make a purchase from a man named Raco Pearson ( R. 63). According to all testimony, Raco Pearson's name came up at the suggestion of Informant Rutledge ( R. 63). From this point on, There is a conflict in the testimony and the State's two fact witnesses tell differing stories.

Officer Satcher claims that Informant Rutledge used Informant Rutledge's cellular phone to call Raco Pearson to set up a drug transaction ( R. 63). However, Informant Rutledge claims that he used Officer Satcher's phone to make the call ( R. 167). Both men claim they did not have Mr. Pearson's telephone number in their phones, but if indeed Mr. Pearson was called, then his number had to be in the telephone of either Informant Rutledge or Officer Satcher. (Unless, of course, a call was never made to Pearson). It is alleged that a call was made to Pearson by

Informant Rutledge and that Rutledge talked to Pearson and set up a drug sale which was to take place at a place known as Summeral Park ( R. 60, 63, 144, 167).

At this point Officer Satcher claims he searched Informant Rutledge's vehicle and person to make sure there was no money or contraband on Informant Rutledge ( R 65-66). Officer Satcher specifically said he did not search Rutledge's shoes or crotch, but felt sure that the search was thorough enough to ensure that Informant Rutledge was holding no contraband ( R. 65-66). However, Informant Rutledge claims that Officer Satcher did search Rutledge's hat, socks, shoes and crotch ( R. 162). Subsequent to the search, Officer Satcher equipped Informant Rutledge with a body wire and video camera and gave him $ 50.00 to use to try and buy drugs ( R. 65-67). The video camera was recording activity as seen from Informant Rutledge's point of view and sending audio through a transmitter so that the audio could be monitored by Officer Satcher and Agent Peterson. The video was being recorded and was subsequently transferred to a DVD.

According to his hand written report, (see exhibit "8 for I.D.") which was written September 3, 2008 ( R. 74, 155), almost a full year after the alleged transaction, Informant Rutledge claims that he drove to a place called Summeral Park where met Raco Pearson ( R. 155). Rutledge claims he then bought **crack** cocaine from Pearson for $50.00 ( R. 155). He then returned to the prior meeting location and relinquished the purchased item to Officer Satcher. Informant Rutledge claims he made a written report that day which was about half as long as the written report he made almost a year later on September 3, 2008 ( R. 157). That original report was never supplied to the defense and according to Officer Satcher, Informant Rutledge never wrote a report on September 11, 2007. Even though Rutledge testified that he did ( R. 153). (In fact, Rutledge testified that he had to rewrite 14 reports for cases he had done a year earlier).

Interestingly, the official incident report drafted by Officer Satcher, the arrest warrant drafted by Officer Satcher and the evidence submission form given to the crime lab all indicate that this specific transaction involved **crack** cocaine ( R. 91, 93, 97-98). The substance introduced at trial was **powder** cocaine ( R. 134-135).

Mr. Pearson elected to testify in his own defense. During his cross examination of Mr. Pearson, Assistant District Attorney, Dan Angero, attempted to shift the burden of proof to the Defendant by asking him why he didn't file an alibi defense and asking questions regarding how he was going to prove he did not make this sale ( R. 194-199). The Court overruled the defenses objections and post trial motions regarding this tactic. After that tactic, Mr. Angero used his closing argument to call Mr. Pearson a liar saying that Mr. Pearson lied during his testimony ( R. 230). Mr. Angero then claimed there are four ways you can always tell when someone is lying ( R. 230-232). He applied those four reasons to Mr. Pearson ( R. 230-232). The defense objected that this was improper closing argument, but the Court overruled the objection claiming it was o.k., because it's just argument ( R. 230).

Even though all of the aforementioned discrepancies exist, and there are obvious conflicts between the State's two fact witnesses regarding who did what and when, and even though no drugs nor money can be seen switching hands on the video, and no "drug talk" can be heard on the audio, and even thought there is absolutely no discussion in the record concerning whether the location was a public park or within 1500 feet of the boundary of any park, a jury took 24 minutes to find Raco Pearson guilty of Sale of Cocaine within 1500 feet of a public park. Mr. Pearson was sentenced to serve fifteen (15) years with the Mississippi Department of Corrections with five (5) years suspended, leaving ten (10) years to serve followed by five (5) years of post-

release supervision, as well a fine of five thousand dollars ($5,000.00) and standard costs.

## SUMMARY OF THE ARGUMENT

After a jury deliberated for a mere twenty-four minutes, Raco Pearson was convicted of sale of cocaine within 1500 feet of a public park. The state presented two fact witnesses, Officer Satcher and Informant Rutledge. The only parts of their testimony that was consistent was that they met prior to the alleged transaction in this case taking place. After that, nothing in their testimony corroborates anything the other said. The Officer blamed the myriad of mistakes in the reports, arrest warrant and crime lab submission forms on cut and paste errors and simple oversight. (A simple reading of this transcript should be sufficient to shock the conscience, and I plead with this Court to read the entire transcript).

This case contains missing reports, reports that were not made until a year after the alleged transaction, inconsistencies about who called whom and from who's phone calls were made. There are conflicts even in the search of the informant prior to any alleged transaction. There are conflicts about the Informant's written statement. He says he made one that day. The Officer says he did not. The only report the Defense had from the Sate's informant witness was written a full year after any alleged transaction and the informant even admitted that when he wrote that report he couldn't remember if it was crack or powder and that informant Rutledge listed the alleged substance as crack in his report because that is what Officer Satcher's report claimed it was. This is clearly an admission of wrongdoing. The Informant is writing a sworn report that is drafted based on information he is given in another written report drafted by Officer Satcher.

This case was a total ambush, and it is an embarrassment to a just legal system. Up until the trial of this matter, all reports, with the exception of the Mississippi Crime Lab report

indicated that the substance for which Mr. Pearson would be standing trial was **crack** cocaine. The Crime Lab Report indicated that they tested a substance that came back as **powder** cocaine. Quite frankly this is a defense counsel's trump card. If the report had indicated the drug in question was lortab, and the crime lab report came back as methamphetamine, then this case would not be before this Court today. It should be no different simply because the substances in this case are cousins. Crack cocaine and powder cocaine are two entirely different substances. The weight and sufficiency of the evidence in this case does not support a conviction.

Further, there was no testimony presented that Summeral Park was an official city park or that it qualifies as a public park as defined by the Mississippi Code, and there was no testimony regarding the alleged park's boundaries or any discussion of how far away from the park any alleged transaction actually occurred.

And to top it all off, the State attempted to shift the burden of proof to the defendant, asking him why he didn't file an alibi defense, asking him where his witnesses were that would support his statements, and asked why the defendant didn't call his wife to back his story.

This is the most offensive conviction I have personally seen in 17 years of practice.

## ARGUMENT

I. THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF "POWDER" COCAINE WHEN ALL THE REPORTS OF THE OFFICERS AND INFORMANT LISTED THE SUBSTANCE SOLD AS "CRACK" COCAINE.

Although there was no objection at the moment the alleged powder cocaine was admitted into evidence in this case, the Judge should not have allowed its entrance into evidence when there were so many questions regarding the nature of the substance and whether or not the substance allegedly purchased from the defendant was the same substance that was ultimately introduced into evidence by the Court.

This Court has held that a party who fails to make a contemporaneous objection at trial must rely on plain error to raise the issue on appeal, because it is otherwise procedurally barred. *Foster v. State,* 639 So.2d 1263, 1288-89 (Miss.1994). The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice. *Gray v. State,* 549 So.2d 1316, 1321 (Miss.1989). Further, this Court applies the plain error rule only when it affects a defendant's substantive/fundamental rights. *Grubb v. State,* 584 So.2d 786, 789 (Miss.1991).

The Court's introduction of the "powder" cocaine in this case was plain error. All of the reports in this case, with the exception of one crime lab report, drafted by the Mississippi Crime Lab, indicated that the substance purchased in this case was "crack" cocaine ( R. 91,93, 97-98). The substance introduced into evidence at the trial of this matter was "powder" cocaine ( R. 134-135). The testifying officer's explanation for this error was "oversight" and "cut and paste" errors he made because he used a form. Yet the "mistake" was made on the Officer's incident report, the informant's incident report, on the affidavit for an arrest warrant and on every other

essential document provided to the defendant in discovery ( R. 91,93, 97-98) with the exception of one crime lab report that stated that "powder" cocaine was the substance brought to the crime lab by Officer warrick ( R. 78-79)(who did not testify in this case at all). There is certainly a presumption here that the evidence submitted to the Mississippi Crime Lab was not the same substance that the confidential informant claims to have purchased from Mr. Pearson.

In this case, the State has failed to establish a solid chain of custody to show that the evidence submitted to the Mississippi Crime Lab is the same substance that the confidential informant claims to have purchased from Mr. Pearson. The State tried to explain it away by claiming that it was just laziness, oversight, typographical errors and cut and pate mistakes. This argument may be o.k. if it were just one document, but they made those classification mistakes on every document and statement given to the defendant in discovery. With regard to failures to establish a valid chain of possession, this Court has said:

The evidence established that a " 'vital link in the chain of possession is not accounted for, because ... it is as likely as not that the [substance] analyzed was not the [substance] originally received.' " *Robinson v. Commonwealth,* 212 Va. 136, 138, 183 S.E.2d 179, 180 (1971) (citation omitted).

[I]nconclusive and unsatisfactory evidence cannot be said to establish beyond a reasonable doubt that the [substance] analyzed was in fact the [substance taken from the] defendant. Such an analysis is important evidence in a trial of this sort, and care must be exercised to establish the essential links in the chain of evidence relied on to identify the [substance] analyzed as the [substance] taken. *Rodgers v. Commonwealth,* 197 Va. 527, 530-31, 90 S.E.2d 257, 259-60 (1955).

In Mr. Pearson's case, it cannot be said that all vital links to ensure the substance tested was the same as the substance obtained on the date in question are indeed the same substance. The Court should have taken it upon itself to see to it that a chain of custody which established all vital links in the chain was present before it allowed introduction of the evidence. The Court did not do so and that constitutes plain error.

This Court has found plain error in failing to instruct the jury properly and failing to properly evaluate evidentiary matters. *Berry v. State,* 728 So.2d 568, 570 (Miss.1999)(finding plain error because failure to fully instruct the jury on the elements of the crime infringes on the fundamental rights of a defendant); *Signer v. State,* 536 So.2d 10, 12 (Miss.1988) (plain error when the trial judge failed to make threshold finding as required under Miss. Rule of Evid. 609(a)(1), that the probative value of admitting evidence of the appellant's prior convictions outweighed the prejudicial effect on the appellant). Williams v. State 794 So.2d 181, 187 -188 (Miss.,2001). Likewise, failing to properly ensure a valid chain of custody and ensuring the correct substance is tested constitutes plain error that fundamentally affects the rights of this defendant.

Mississippi law states that Judges have a duty to protect the rights of defendants even if no objections are made. The Court is responsible for making sure that the Defendant receives a fair and impartial trial. This is the type of situation where a Trial Judge should have stepped in and protected the defendant's rights. This Court has stated in *Livingston v. State*,

> Of course the general rule is that this Court will not consider issues which are not properly raised at trial. Our holding today is not novel or innovative. We have consistently considered errors affecting fundamental rights even in the absence of a contemporaneous objection. In Brooks v. State, 209 Miss. 150, 46 So.2d 94 (1950), Justice Percy M. Lee stated: "Constitutional rights in serious criminal cases rise above mere rules of procedure. . . . Errors affecting

> fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal . . . .

*Livingston v. State*, 525 So. 2d 1300 (1988).

The decision to introduce evidence or not introduce evidence, when that evidence is the central evidence of the case is a decision that affects the fundamental rights of a defendant and the view of whether or not his trial was a fair and impartial trial. In this situation the Trial Judge must step in an make sure that the evidence being entered is reliable. Even if there is no objection.

Mississippi Rule of Evidence 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." M.R.E. 901(a). The Mississippi Supreme Court has held that the test for chain of custody is "whether there is any indication of tampering or substitution of evidence." Wells v. State, 604 So.2d 271, 277 (Miss.1992). The state's obligation in establishing chain of custody of evidence is to satisfy the trial court that there is no reasonable inference that the evidence has been tampered with or other material substituted in its place. Peyton v. State, 796 So.2d 243,(Miss.App. 2001).

Using these standards, there is certainly a reasonable inference that the evidence in this case was substituted or otherwise confused with items from other transactions. There is no way that a "crack" cocaine can magically become "powder" cocaine. There is certainly some question whether the evidence tested at the crime lab in this case is the same evidence allegedly obtain from Mr. Pearson by the confidential informant. This means that Rule 901 discussed above was not followed by the Trial Court and that translates into an abuse of discretion. Thus this Court should reverse.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE VERDICT OF THE JURY TO STAND WHEN THE EVIDENCE FROM THE STATE'S WITNESS WAS SO OVERWHELMINGLY CONFLICTING. THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR JNOV OR NEW TRIAL. AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AS WELL AS BEING INSUFFICIENT TO FIND THE DEFENDANT GUILTY

This argument is somewhat similar to the argument above in that it discusses the same mistakes and inconsistencies regarding the introduction into evidence of the "powder" cocaine tested by the crime lab, when all the reports in this case indicate that the substance allegedly obtained from Mr. Pearson was "crack" cocaine. This argument will also address the inconsistent statements of Officer Satcher and the confidential informant, Donnell Rutledge, concerning calls made, the search of the confidential informant prior to any alleged "buy", as well as the issue of statements that disappeared and statements that were approximately a year later.

In addressing this Issue, I think it is important to list some of the important inconsistencies and conflicts of evidence that occurred in this case:

Officer Satcher claims that the "target" (Mr. Pearson) was determined by the confidential informant ( R.. 60). He claims that the confidential informant already new the number of Mr. Pearson ( R. 63) and that the confidential informant made the call to Mr. Pearson from the confidential informant's cellular phone which already had Pearson's number in it ( R. 63-64). The Officer claims he did not have any knowledge of Pearson's telephone number ( R. 63). However, the confidential informant claims that the Officer already had Pearson's number in the officer's phone and that it was the officer's phone that was used to call Pearson ( R. 167).

The substance obtained was never field tested by Officer Satcher or any other officer( R.

71). Even though Officer satcher testified that they normally do field tests ( R. 72)

The confidential informant made a written statement on September 3, 2008 ( R. 74), nearly a full year after the alleged drug buy occurred, and in that statement he claimed the substance in question was "crack" cocaine.

Brad Warrick was the officer who delivered the substance to the Mississippi Crime Lab to be tested ( R. 78-79). He did not testify.

Officer Satcher admits that the crime lab submission form and the receipt for the substance given to Brad Warrick by the Mississippi Crime Lab do not match ( R. 80). The crime lab submission form (which is a document used by Officer Satcher to indicate what he is delivering to the Mississippi Crime Lab) indicates that the substance delivered is "one evidence bag sealed with evidence tape containing the off-white, rocklike substance, substance believed to be crack cocaine" ( R. 80). However, the receipt given by the Mississippi Crime Lab to Officer Warrick indicated the substance delivered to be a powder substance. ( R. 80-84). And the crime lab logged the substance in as "powder" ( R. 81).

Paragraph number four of Officer Satcher's case report indicates the substance to be "crack" cocaine ( R. 85). Officer Satcher testified that it was merely a typographical error ( R. 85).

Paragraph number six of the same report claims that the officers involved in this particular transaction are officers Satcher and Agent Purcell, when in fact the officer involved was Satcher and Agent Peterson ( R. 86-87). This time Officer Satcher claims it was just a "cut and paste" error ( R. 86-87)

When applying to the Justice Court Judge for an arrest warrant in this case, Officer Satcher listed "crack" cocaine as the substance for which he sought an arrest warrant for Mr. Pearson ( R. 94-95).

The report of the confidential informant in this case lists the substance purchased as "crack" cocaine ( R. 96-97) (see also Evidence submission # 8).

Interestingly enough, the Assistant District Attorney asked Officer Satcher if the substance had come back from the crime lab as hydrocodone, would you have charged the defendant with sale of cocaine? ( R. 118). The Officer replied that he would not have ( R. 118). Well then why should this case be any different, the substance tested was clearly not the "crack" cocaine that was referred to repeatedly by both the officer and the confidential informant in this case. There is a difference between "crack" cocaine and "powder" cocaine as evidenced by the testimony of Aaron McMahan, crime lab analyst at the Mississippi Crime Lab. He testified that "powder" is Cocaine Hydrochloride ( R. 136), and that "crack" cocaine is Cocaine Base ( R. 136). These are two distinct and different substances.

The confidential informant testified that he made a written statement of what transpired the same night of the transaction, September 11, 2007, ( R. 153). He further testified that he always made a statement immediately after every buy he did ( R. 154-155). But he was later asked by Officer Satcher to come back and make a new statement nearly a full year later ( R. 154). In fact the confidential informant indicated that he had to come back and write a statement on every one of the 14 cases he had worked for Officer Satcher ( R. 158). When asked why, he said he did not know why ( R. 154), but that he knew his original statement was about half as long as the one he made nearly a year later ( R. 156). Office Satcher stated that the confidential

informant never wrote a statement on September 11, 2007, that was half as long as the September 8, 2008 statement ( R. 178).

Amazingly, the confidential informant testified that when he came back to write the report a year after the incident, that he could not remember if the substance obtained was "crack" or "powder", so he just read Officer Satcher's report and copied the substance from it ( R. 155-156). "I looked at the paper and I wrote crack cocaine because that is what the charge said ( R. 158). This kind of evidence should not be allowed when during his own testimony the witness is indicating that he has no independent recollection of the facts surrounding the incident.

It is also interesting to note that the confidential informant indicated that this was the second "buy" he had performed that day ( R. 152).

Officer Satcher and the confidential informant could not even agree on the safety search performed on the confidential informant by Officer Satcher prior to any alleged transaction. Officers routinely search confidential informants prior to sending them out to make controlled substance purchases. This is done to ensure that the evidence brought back to the officer is the same evidence purchased from a suspect, and to ensure that the confidential informant did not already have some contraband somewhere on his person or in his vehicle. Presumably, if there is no contraband on the confidential informant nor in his vehicle, then it had to come from the person he made contact with.

In this case Officer Satcher was asked if he performed a search of the confidential informant ( R. 65-66). He responded that he did and that he felt it was a thorough search ( R. 65-66). He did admit that he did not search the informant's shoes, nor his crotch area, ( R. 162). However, the confidential informant would have the jury believe he was practically strip

searched. The confidential informant stated that Officer Satcher did in fact search his hat, shoes, socks and crotch area ( R. 162).

Officer Satcher weighed 0.3 grams of crack cocaine ( R. 85). The Mississippi Crime Lab analyst testified that the substance he tested was 0.3 grams of powder cocaine ( R. 134). This just doesn't add up. Why do we have all of these inconsistencies?

The Supreme Court is to sit as a 13th juror in weighing on requests for new trials. This Court has said:

> We are mindful that, as we review the circuit court's decision to deny a motion for a new trial, this Court "will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State,* 895 So.2d 836, 844 (¶ 18) (Miss.2005). The supreme court has further instructed that, when reviewing a circuit court's decision to deny a motion for a new trial:
>
> the [appellate] court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. However, the evidence should be weighed in the light most favorable to the verdict. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Thompson v. State L 1664934, 7 -8 (Miss.App.,2010)

III. THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO SHIFT THE BURDEN OF PROOF TO THE DEFENDANT OVER THE OBJECTION OF THE DEFENDANT. The COURT COMPOUNDED THIS ERROR AND COMMITTED INDEPENDENT ERROR BY ALLOWING THE PROSECUTION TO COMMENT ON WHY THE DEFENDANT DID NOT CALL HIS WIFE AS AN ALIBI WITNESS.

Mr. Pearson elected to take the stand and testify in his own defense. While on the stand, Assistant District Attorney, Dan Angero, asked Mr. Pearson if he was at the Summeral Park on the day in question and what time he left ( R. 193). Mr. Pearson answered by saying he left before 4:00 p.m., because that is what time his wife gets home and he intended to be home before she got home from work ( R. 193). Angero then asked Mr. Pearson if he was at the Summeral Park at 6:00 p.m. to which Mr. Pearson responded, "no" ( R . 194). Angero then asked who was at Pearson's home ( R. 194). Mr. Pearson responded by claiming his wife and kids were there at home with him ( R. 194). Mr. Angero then said, "So you have an alibi"? ( R. 194). The following is a reproduction of the transcript on this issue:

what you said?
A. About four miles.
Q. All right. Now, so at 6:00 p.m. on September the 11th, 2007, you were not at Summerall Park; right?
A. Say that again.
Q. At 6:00 p.m. -- 6:00 in the afternoon on September the 11th, 2007, you were not at Summerall Park?
A. No, sir.
Q. Were you there later on?
A. No, sir.
Q. All right. So where were you then?
A. At home.
Q. With who?
A. My kids.
Q. And -- just your kids?
A. Yeah, and my wife.
Q. Your wife was there?
A. (Witness nods head affirmatively.)
Q. Okay. So you have an alibi?
A. I know what time I go home every day.
Q. Sir, you -- so you have an alibi; that is, you have other witnesses who can testify that at -- well, I believe the testimony was that at 6:35 p.m., that's when Mr. Rutledge says that he met you at Summerall Park. And at 6:35 p.m., you claim that you were at home with your wife; right?
A. Yes, sir.
Q. And she can verify that; right?
A. She should.
Q. Did you file a notice of alibi?

BY MR. PARRISH: Your Honor, we object --

A. File a notice of --

BY MR. PARRISH: -- to that. That's an attempt to improperly shift the burden of proof. Obviously, alibi is an affirmative defense which hasn't been raised and therefore cross-examination into that is improper.

BY MR. ANGERO: Judge, it is not improper. If he gets on the witness stand and claims he was someplace else, it doesn't make any difference whether they filed an alibi defense or not. I'm entitled to question him about it.

BY THE COURT: All right. I'm going to overrule the objection.

Q. Did you file a notice of alibi?

A. No, sir.

Q. Why not?

A. Well, why do I need to file a notice when I'm going home?

Q. Why do you need to file a notice of alibi?

A. Yeah, because I'm going --

Q. Because the rules of court say that if you're going to tell this jury or you've got witnesses that are going to tell this jury that you were at another place at the time the crime was committed, then you have to notify us because your lawyer asked for all of our evidence which we gave him. You understand that?

BY MR. PARRISH: Your Honor, that's a mischaracterization of the rules. If we're going to

V. THE COURT

bring in other persons, then we would have to give notice of alibi. Obviously that's a legal decision. This man has no training in the law. He doesn't know a legal decision. He's asked for a legal conclusion.

BY THE COURT: Well, under the rules, you have to give -- you have to file a notice of alibi and give that to the State. All right. Let's move on.

Q. So -- well, let me ask you this: Are you planning on calling your wife as a witness to testify you were at home?

A. Do what now?

Q. Are you planning on having your lawyer call your wife to take this witness stand and testify that you were at home when this sale occurred?

A. No, I don't plan on calling her.

Q. Why not?

A. If she want to come on the stand, she can come.

Q. I'm sorry?

A. If she want to come up here, she can come. But what am I going to call her for?

Q. Call her as a witness in your defense to convince this jury that you were someplace else at the time the sale occurred.

A. Yeah, I'll call her.

Q. You will?

A. Yeah.

Q. Well, then were you sitting here in the courtroom earlier when the Judge said that the rule of sequestration has been invoked and that any witnesses who are in the courtroom

who might testify need to get out because they're not going to get to testify otherwise? Did you hear that?

A. Yeah, I heard it, but I didn't understand it.

BY MR. PARRISH: Judge, this is improper cross. These are legal decisions that attorneys make. Clearly there has been no alibi notice filed.

BY THE COURT: Well, there has been no alibi notice filed. It's required to be filed. It hasn't been, so there is no alibi in this case.

Q. So you let her stay in the courtroom; you didn't tell her to get out; right?

A. I didn't even really understand what you're saying.

Q. Your wife has been sitting here in the courtroom for the entire trial; right?

A. Yes, sir.

Q. So the only person that this jury could possibly rely on to give them information that you were someplace else at the time this crime was committed is somebody who was here, ready, available; but you let her stay in the courtroom so she couldn't testify; right?

BY MR. PARRISH: Objection, your Honor. It calls for a legal conclusion on the part of the witness, and it's been asked and answered multiple times. There's no alibi.

BY THE COURT: All right. Well, I'm instructing the jury there is no alibi.

Q. Is that right?

A. What's right?

Q. My question. Is it true that the only other person

in this world that could testify that you were at home at the time this crime occurred has been sitting here the whole time and would have been available if you had just asked her to step out of the courtroom and not listen to the testimony? Isn't that right?

A. Let me ask you a question.

Q. No, sir. I'm asking the questions.

BY THE COURT: You can't ask the attorneys questions. You have the answer the questions.

Q. Is that right?

A. What's right?

Q. Is it true that the only witness that you have other than yourself that could tell this jury where you were, that you weren't at Summerall Park on September 11, 2007, has been here in the courtroom, was available to be a witness for you; and yet you're not going to call her as a witness because you let her stay in the courtroom for all the testimony; right?

BY MR. PARRISH: I object. Calls for a legal conclusion. He's not a lawyer. These are legal decisions.

BY THE COURT: All right. I assume -- has your wife been sitting in the courtroom during the whole trial?

BY THE WITNESS: Yes, sir.

BY THE COURT: Okay. Thank you. All right. Let's move on.

Q. Now, so the only person that we have here to testify as to where you were at 6:35 or so p.m. September 11, 2007 is you; right?

A. Yes, sir, I know where I was.
Q. But you're the only one that can testify to that; right?
A. She can testify for it.
Q. Okay. Now, did you talk to Mr. Rutledge on September the 11th, 2007?
A. I don't know. I don't know if I did talk to him. I can't remember all that. I just know him through school. When he see me, he always talk to me. And we talk to each other. We went to school forever together. As long as I stayed in school.
Q. Well, that's you talking to him right there on the video, isn't it?
A. Yeah, that's me talking to him.
Q. So you did -- the answer is, yes, you did talk to him that day; right?
A. I don't know what day it was. I talk to him every time I see him.
Q. Well, all right. Let me change the way I'm asking these questions. On the DVD there that you've listened to and seen, that's you talking to Mr. Rutledge; right?
A. Yeah, that's me talking to him, but I don't know what day it was.
Q. Okay. And what was it that you handed to him?
A. Nothing.
Q. Well, why did you say, Here you go, as your arm went out?
A. I ain't never told him, Here you go. Here nothing go.

This line of questioning and suggestiveness by the Assistant District Attorney was totally improper. It is important to note that it appeared to be a calculated baiting by the Assistant District Attorney. It was designed to shift the burden of proof to the defendant by making the defendant offer proof of his innocence. It was also designed to illicit an answer from the defendant that his wife could have been an alibi witness. The whole time the State knew or should have known that the defendant did not intend to call anyone as an alibi because a notice of intent to use the alibi defense was never filed. On top of his impropriety in bringing it up in the first place, the Assistant District Attorney further compounded the error by claiming Pearson couldn't call his wife because she had sat in the courtroom during the trial, thus exempting her as a witness as a violation of the rule of witness sequestration ( R. 197-198). This whole line of questioning constitutes prosecutorial misconduct. And this conviction should be reversed and a new trial ordered because of it.

The prosecuting attorney as a representative of the State has an obligation to be fair in his prosecution. In *Adams v. State,* 202 Miss. 68, 30 So.2d 593 (1947), this court stated:

> The very nature of his functions as a prosecutor necessitates that the district attorney be a partisan in the case. Zeal in the prosecution of criminal cases is a praiseworthy and commendable trait in such an officer, and not to be condemned by anyone. A fearless and earnest prosecuting attorney, within the limitations upon his powers and prerogatives, is a bulwark to the peace, safety and happiness of the people. "If convinced of the defendant's guilt, he should, in an honorable way, use every power that he has to secure his conviction. At the same time, it is the duty of the prosecuting attorney, who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled, * * * *It is the duty of the prosecutor to see that nothing but competent evidence is submitted to the jury* ; * * * "42 Am.Jur., Sec. 20, p. 255. [Emphasis added]
> *Adams v. State,* 202 Miss. 68, 30 So.2d 593 (1947).

The Court also stated in that case:

> "In conducting a criminal case, the prosecuting attorney must be fair and impartial, *and see that defendant is not deprived of any constitutional or statutory right.*" [Emphasis original] 202 Miss. at 75; 30 So.2d at 596. "Neither the burden of production nor the burden of proof ever shifts to the defendant."

*Williams v. State,* 684 So.2d 1179, 1202 (Miss.,1996). See, also, *Stringer v. State,* 500 So.2d 928, 944 (Miss.1986). The prosecution committed prosecutorial misconduct and overstepped his bounds by asking the defendant why he did not have an alibi defense.

Further, this Court has long held that the prosecutor cannot call the defendant's wife to the stand to testify, thereby forcing the defendant to assert, before the jury, his right to have her testimony excluded. *Outlaw v. State,* 208 Miss. 13, 43 So.2d 661 (1949). Nor is the state entitled to an instruction regarding the defendant's failure to call his wife to the stand. *Johnson v. State,* 63 Miss. 313 (1885).

In *Johnson v. State,* 94 Miss. 91, 47 So. 897 (1909), the appellant characterizes the prosecutor's comments as a comment upon his wife's failure to testify. This Court has held that such a comment is improper. In *Cole v. State,* 75 Miss. 143, 21 So. 706 (1897), such a comment mandated reversal of the conviction, even though the defendant did not object to the prosecutor's remarks, the Court there holding that the comments denied the defendant "a fair and impartial trial." 75 Miss. at 144, 21 So. at 707. In *428 *Johnson v. State,* 94 Miss. 91, 47 So. 897 (1909), In *Johnson*, the prosecutor's closing argument contained the following language:

Gentlemen of the jury, there is another witness to this difficulty. Where is she? Where is the wife he says he loved so dearly? Where is the wife he called his baby? If the defendant had wanted a fair hearing of this case, if he had been willing that the circumstances of the fight be fairly investigated why did he not put her on the stand? *Johnson v. State,* 94 Miss. at 92, 47 So. at

897.

These comments were held to constitute reversible error. It should be no different in this case. See also, *Simpson v. State,* 497 So.2d 424, 427 -428 (Miss.,1986).

IV: THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE DEFENDANT TO BE CONVICTED OF AN ENHANCED SALE WHEN THERE WAS NO EVIDENCE PUT ON TO PROVE THAT THE PARK IN QUESTION WAS EITHER PUBLIC OR THAT ANY SALE TOOK PLACE WITHIN 1500 FEET OF A PUBLIC PARK.

At no point during this trial did anyone ever testify that a transaction of any kind occurred within 1500 feet of a public park. The only evidence offered with regard to the location was when the confidential informant claimed the transaction occurred in the driveway of the park ( R. 148-149). Officer Satcher testified that he did not go to the park after the alleged transaction ( R. 118). Officer Satcher also testified that he did not witness the alleged transaction ( R. 69). Officer Satcher even testified that he could not tell from the video tape where the alleged transaction actually took place ( R. 84). He relied completely on what the confidential informant told him with regard to location ( R. 84). In fact, there was no testimony at all regarding whether or not the park in question was even a public park.

In *Williams v. State,* 794 So.2d 181, 187 -188 (Miss.,2001), Williams argued that the evidence was insufficient to show that the transaction occurred within 1,500 feet of a school. The State argued the issue was procedurally barred because Williams did not raise it at trial. The Court said:

> In this case, the trial court sentenced Williams to one hundred and twenty (120) years. Williams has a fundamental right not to have his sentence enhanced based on ambiguous and elusive testimony. "The plain error doctrine has been construed to include anything that 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Olano,* 507 U.S. 725,

732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

*Williams v. State,* 794 So.2d 181, 187 -188 (Miss.,2001).

In Williams the state offered testimony that the transaction occurred one thousand one hundred and five (1,105) feet from the corner of Jefferson Middle School property. The Court argued that the distance was imprecise and fails to prove the transaction occurred within either of the distances provided by the statute (The statute in question enhanced the penalty for drug sale if done within 1500 feet of a school building or within 1000 feet of school property boundaries). Because the measuring point is not established, the proof fails. Thus, the sentence enhancement is not applicable. *Williams v. State* 794 So.2d 181, 187 -188 (Miss.,2001).

Further, there was no testimony at all that Summeral Park was a public park at all. I guess it was just assumed to be. For all we know from examining the evidence, it may have just been a field that was referred to as Summeral Park. The State is charged with proving all elements of an indictment and all elements of a crime, as well as enhancement elements, beyond a reasonable doubt in order to justify a conviction. The "within 1500 feet of a Public Park" issue should have never been submitted to the jury for consideration.

V: THE STATE OF MISSISSIPPI INCLUDED EXTRA ELEMENTS IN ITS INDICTMENT WHICH IT FAILED TO PROVE AT TRIAL. AS A RESULT, THE CONVICTION OF MR. PEARSON MUST BE REVERSED. AND FURTHER COMMITTED REVERSIBLE ERROR BY FAILING TO GRANT THE DEFENDANTS' MOTION FOR DIRECTED VERDICT AND J.N.O.V..

Mr. Pearson's indictment read as follows (in pertinent part):

RACO DANYELL PEARSON in said County and State, on or about the 11th day of September, 2007, did willfully, unlawfully, and feloniously and knowingly, sell, barter, transfer, distribute or dispense approximately 0.2 grams of cocaine, a schedule II controlled substance, within 1500

feet of Summeral Park, to a confidential source, in exchange for fifty dollars ($50.00) good and lawful currency of the United States of America...

The structure of the indictment is important. This indictment states that Raco Pearson (1) sold cocaine, (2) within 1500 feet of Summeral Park, (3) to a confidential source, (4) for fifty dollars. What is important here is that the State of Mississippi chose to include within 1500 feet of Summeral Park as an essential element of the indictment. By making it an element, instead of adding an enhancement provision at the end of the indictment, the State of Mississippi handcuffed itself to that additional element and made it a part of their burden of proof in order to obtain a conviction against the defendant. (The better practice would have been to list the elements of sell of cocaine, then add enhancement language after the charging language).

This case is akin to *Richmond v. State*, 751 So.2d 1038 (Miss. 1999). In the case of Richmond v. State, 751 So.2d 1038 (Miss. 1999), the defendant was charged with motor vehicle theft. The indictment included a dollar amount for the vehicle, which was not a necessary element under the statute. The Mississippi Supreme Court indicated that when the State of Mississippi creates an extra element by adding an unnecessary element to the indictment, they become burdened with proving that additional element beyond a reasonable doubt. The Court in Richmond stated as follows:

> Having specifically informed Richmond of the offense charged, as well as the detailed code section number, the State handicapped itself through this indictment by adding an unnecessary element of proof. Richmond's objection to the State's attempted deletion of this surplusage was sustained by the trail court. Judge Gibbs recognized that to allow an amendment such as striking the value of the car would be substantive change in the indictment. He therefore correctly required the State to prove the element of value pursuant to Richmond's objection.

*Richmond v. State*, 751 So.2d 1038 (Miss. 1999).

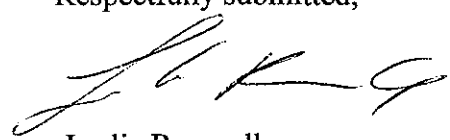
Although Richmond's case dealt with an entirely different set of facts, the case still stands for the position that if the State creates an unnecessary burden on itself by adding unnecessary elements to an indictment, those additional elements become additional burdens which the state must prove beyond a reasonable doubt.

Since there was absolutely no testimony regarding whether or not Summeral Park was a public Park and especially since there was no testimony with regard to the distance from the Park the alleged transaction actually occurred, there is no way that any reasonable juror could have concluded beyond a reasonable doubt that the alleged sale took place within 1500 feet of a public park. Since the distance was an element of the offense as indicted, the case must be reversed.

## CONCLUSION

Each of the above errors require a reversal of Raco Pearson's conviction of murder and sentence to life imprisonment.

Respectfully submitted,



Leslie Roussell,
Attorney for the Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the above and foregoing on the following:

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This 29 day of May, 2010.

Leslie Roussell