

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**LESTER DARRELL MOORE**

**APPELLANT**

**V.**

**NO. 2015-KA-00207-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**Hunter N. Aikens, MS Bar No. 102195  
INDIGENT APPEALS DIVISION  
OFFICE OF STATE PUBLIC DEFENDER  
Post Office Box 3510  
Jackson, Mississippi 39207-3510  
Telephone: 601-576-4290  
Fax: 601-576-4205  
Email: [haike@ospd.ms.gov](mailto:haike@ospd.ms.gov)**

**Counsel for Lester Darrell Moore**

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**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 disqualifications or recusal.

1. State of Mississippi
2. Lester Darrell Moore, Appellant
3. Honorable Joel Smith, District Attorney
4. Honorable Lisa P. Dodson, Circuit Court Judge

This the 15th day of June, 2015.

Respectfully Submitted,

INDIGENT APPEALS DIVISION  
OFFICE OF STATE PUBLIC DEFENDER

BY: /s/Hunter N. Aikens  
Hunter N. Aikens  
COUNSEL FOR APPELLANT

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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE ISSUES**

- I. THE TRIAL COURT ERRED BY FAILING TO APPLY THE AMELIORATIVE PUNISHMENT PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 97-23-93 THROUGH THE GRANT OF INSTRUCTION S-1 AND DENIAL OF INSTRUCTION D-8.**
- II. THE TRIAL COURT ERRED IN ALLOWING OFFICER OWENS TO TESTIFY AS TO THE PRICE OF THE WALLETS.**

**STATEMENT OF THE CASE**

This case proceeds from the Circuit Court of Harrison County, Mississippi, Second Judicial District, and a judgment of conviction for one count of felony shoplifting entered against Lester Darrell Moore following a jury trial held on November 12, 2015, the Honorable Lisa P. Dodson, Circuit Judge, presiding. (C.P. 72, 74-75, R.E. 5-7). Moore was represented at trial by Charlie Stewart, Esq. and Wilton McNair, Esq. The trial court adjudged Moore a habitual offender under

Mississippi Code Annotated Section 99-19-81 and sentenced him to serve five (5) years in the custody of the Mississippi Department of Corrections, without the possibility of parole or early release. (C.P. 74-75, R.E. 6-7). The trial court denied Moore's motion for judgment notwithstanding the verdict or new trial. (C.P. 79-82, 85; R.E. 8-12). Moore now appeals to this Honorable Court for relief.

### **STATEMENT OF THE FACTS**

On March 5, 2013, Andre Correa was working as a security supervisor at Dillards when an associate alerted him that a black male wearing a jean jacket—later identified as Lester Moore—was suspiciously “shuffling around stuff.” (Tr. 23-24). Using security cameras, Correa located Moore and watched him walk to the accessory area in the men's department, grab several wallets, stuff them in his “jeans and jacket area,” and exit the store. (Tr. 24). Correa contacted management, Dillards' security officer, David Shoemaker, and police. (Tr. 24). Correa made a recording of the security camera footage, which was admitted into evidence at trial. (Tr. 29-30, Ex. S-1). The video shows Moore only in the men's department; it does not show him in the women's department, and Correa admitted that he had no video of Moore in the women's department and did not see Moore take wallets from the women's department. (Tr. 48-49).

Shoemaker followed Moore outside into the parking lot and apprehended and handcuffed him after a brief struggle. (Tr. 59-60). According to Shoemaker, he recovered nine men's wallets from the ground near their struggle. (Tr. 60-61, Ex. S-3). Shoemaker testified that he handed the wallets to Dillards' store manager, Drew Sturgis, and they escorted Moore through the store to the dock area. (Tr. 61). Shoemaker claimed that he did not search Moore. (Tr. 62).

Officer James Owens of the Biloxi Police Department arrived at the dock area momentarily and transported Moore to the police station for processing. (Tr. 62, 65-66). Correa documented

the SKU numbers from the wallets' price tags, photographed the wallets, and completed a report documenting the items recovered. (Tr. 26, 33, 38, Ex. S-2, S-3). According to Correa's report and trial testimony, the combined value of the nine men's wallets was \$926. (Tr. 36-37, Ex. S).

Officer Owens testified that he found five Michael Kors women's wallets when he removed Moore's jacket at the police station. (Tr. 66-67, Ex. S-5). Correa testified that he recovered the five women's Michael Kors wallets from the police station the next day, photographed them, and completed a second report documenting the additional recovered items. (Tr. 28, 33-35, 40, Ex. S-5, S-6). According to Correa's report and trial testimony, the combined value of the five women's wallets was \$800, and the combined value of all fourteen wallets was \$1,726. (Tr. 38, 41, Ex. 6). Correa filled out a sworn justice court affidavit when he went to the police station to recover the five women's wallets. (Tr. 53). Correa first denied, then admitted that his sworn affidavit represented that all of the wallets (including the nine men's wallets) were Michael Kors wallets. (Tr. 45-47, Ex. D-1 ID). He agreed that Michael Kors wallets are more expensive than the nine men's wallets. (Tr. 47).

Over objection, Officer Owens was allowed to testify that the combined value of the fourteen wallets was over \$1,700. (Tr. 68-69). Officer Owens first claimed that he was present "when they wrote down the price for all 14 wallets;" however, he later admitted that he was not present and had no personal knowledge of the wallets' value. (Tr. 70-71). Officer Owens' report represented that, after Shoemaker "apprehend[ed] the suspect he was back to Dillard's holding area and the police were called. They recovered 14 stolen wallets with a value of \$1,726.00. These items were documented as evidence, photographed and returned to Mr. Correa. The suspect was identified as Lester Darrell Moore. Mr. Moore was taken to the Biloxi Police Department for processing." (Ex. D-2 ID). When confronted with this prior statement at trial, Officer Owens claimed that his report

“is not indicative to what happened. I recovered the five wallets at the PD. . . . it’s not written the way I meant it.” (Tr. 72).

Moore testified in his own defense at trial. (Tr. 82). Moore testified that he took only the nine men’s wallets, and he repeatedly denied taking the five Michael Kors women’s wallets. (Tr. 84, 88). Moore explained that he initially entered Dillard’s and went to the men’s department, stacked the nine men’s wallets “the way I wanted to get them,” and left the wallets and walked out through the “other side [the women’s department] because this lady look like she was watching me.” (Tr. 85). Moore testified that he then re-entered Dillard’s and “went back through there [the women’s department] and got those wallets [the nine men’s wallets] and tried to go out the door with them.” (Tr. 85). Moore testified that he saw the price tag on one of the men’s wallets, and the price was \$68 or \$69. (Tr. 90). He also testified that he saw something in Dillard’s indicating “a 60 percent discount.” (Tr. 84).

Moore testified that he was searched more than one time at Dillard’s: “I was patted down on the outside. They patted me down again on the inside, my jacket and everything. And I was searched a couple of times.” (Tr. 87). Specifically, Moore testified that he was searched outside in the parking lot when Shoemaker apprehended him, and no wallets were recovered. (Tr. 86). Moore testified that he was then handcuffed and walked back through the store to the dock area, where “they had a lot of other stuff on the desk,” including watches and other wallets. (Tr. 86-87). Moore testified that his jacket was removed and laid on a desk in this area when Shoemaker and Officer Owens swapped handcuffs. (Tr. 87). Moore testified that Officer Owens got the five women’s wallets, not from his person or jacket, but from a paper bag that was sitting near his jacket in the police station. (Tr. 94). According to Moore, Officer Owens said, “I guess these are yours too.” And I said, ‘no, they ain’t mine.’ He said, ‘yeah, they’re yours,’ and that’s when they came

up with it some hours later and charged me with them.” (Tr. 94). Moore denied that the five women’s wallets were in his jacket. (Tr. 95).

The jury received instructions on felony shoplifting and the lesser-included offense of misdemeanor shoplifting; these instructions listed the felony/misdemeanor threshold amount as \$500. (C.P. 56, 61-62, R.E. 13-16). The jury returned a verdict finding Moore guilty of felony shoplifting. (Tr. 143, C.P. 72, R.E. 5).

### **SUMMARY OF THE ARGUMENT**

The trial court erred in refusing to apply the ameliorative provisions of Mississippi Code Annotated Section 97-23-93(5) and (7), which became effective after the date of the alleged offense but before Moore’s trial and sentencing. Section 97-23-93(1) defines the elements of the crime of shoplifting without regard to the price of the items taken. The punishment provisions Section 97-23-93, i.e., subsections (5) and (7), determine whether the offense is punishable as a misdemeanor or felony; those subsections make punishment dependant on the price of the goods taken. At the time of Moore’s trial and sentencing, subsections (5) and (7) had been amended to preclude felony punishment for the crime of shoplifting unless the price of the goods taken exceeds \$1,000. Ameliorative punishment statutes are applied retroactively when the amendments become effective after the offense but before a defendant’s conviction and sentencing. Miss. Code Ann. §99-19-33. In this case, the trial court erred by failing to apply the ameliorative punishment provisions of subsections (5) and (7), as amended, in granting instruction S-1 (setting the amount at \$500) and denying instruction D-8 (setting the amount at \$1,000). Moore was therefore improperly adjudged guilty and punished for felony shoplifting. Accordingly, Moore requests this Court to remand for re-sentencing for misdemeanor shoplifting or, alternatively, remand this case for a new trial.

The trial court erred in allowing Officer Owens to testify as to value of the wallets. Officer

Owens had no personal knowledge of the wallets value. Moreover, Officer Owen’s testimony of value falls outside of the statutorily-enumerated sources of proof of value. Further, Officer’s Owens’ testimony of the wallets’ value constituted inadmissible hearsay, as he was only aware of the value as represented to him by the Dillard’s employees. Because Moore’s guilt of misdemeanor shoplifting or felony shoplifting (and thereby, the maximum sentence he could receive) turned on the wallet’s value, the error was not harmless, and Moore is entitled to a new trial.

### ARGUMENT

#### **I. THE TRIAL COURT ERRED BY FAILING TO APPLY THE AMELIORATIVE PUNISHMENT PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 97-23-93 THROUGH THE GRANT OF INSTRUCTION S-1 AND DENIAL OF INSTRUCTION D-8.**

##### Factual and Procedural Background

At both the time of the offense (March 2013) and the time of Moore’s trial and sentencing (November 2014), our statute defining the crime of shoplifting provided in pertinent part that:

(1) Any person who shall wilfully and unlawfully take possession of any merchandise owned or held by and offered or displayed for sale by any merchant, store or other mercantile establishment with the intention and purpose of converting such merchandise to his own use without paying the merchant’s stated price therefor shall be guilty of the crime of shoplifting and, upon conviction, *shall be punished as is provided in this section.*

Miss. Code Ann. §97-23-93 (1) (Supp. 2013) (emphasis added); Miss. Code Ann. §97-23-93(1) (Rev. 2014).

After the date of the offense but before Moore’s trial and sentencing, the statutes proscribing the punishment for the crime of shoplifting—subsections (5) and (7)—were amended. The pre-amendment version of subsection (5) provided that a first shoplifting offense is punishable as a misdemeanor subject to a fine up to \$1,000, imprisonment up to six (6) months, or both where “[t]he merchant’s stated price is less than or equal to Five Hundred Dollars (\$500.00). . . .” Miss. Code

Ann. §97-23-93 (5) (Supp. 2013). The pre-amendment version of subsection (7) provided that shoplifting was punishable as a felony where “[t]he merchant’s stated price exceeds Five Hundred Dollars (\$500.00). . . .” Miss. Code Ann. §97-23-93 (7) (Rev. 2013).

The post-amendment version of subsections (5) and (7), effective July 1, 2014, provided that a first shoplifting offense is punishable as a misdemeanor where “[t]he merchant’s stated price is less than or equal to One Thousand Dollars (\$1,000.00) . . . .” Miss. Code. Ann. § 97-23-93 (5) (Rev. 2014). The post-amendment version of subsection (7) provided that the crime of shoplifting is punishable as a felony where “the merchant’s stated price exceeds One Thousand Dollars (\$1,000.00). . . .” Miss. Code. Ann. § 97-23-93 (7) (Rev. 2014).<sup>1</sup>

At trial, the State offered instruction S-1, which proposed to instruct the jury to find Moore guilty of felony shoplifting if it determined that the merchant’s stated price for the wallets was “the total value of more than Five Hundred and 00/100 Dollars (\$500).” (C.P. 56, R.E. 13). Moore objected, arguing that instruction S-1 was an incorrect statement of the law and that, under the amended statute, “it has to be a thousand dollars or more” to warrant a felony. (Tr. 99). Citing *Wilson v. State*, 967 So. 2d 32 (Miss. 2007), the trial court granted instruction S-1, stating that “on the date of this crime. . . it was a felony if it was more than \$500.” (Tr. 100).

In light of this ruling, the trial court denied instruction D-8, which would have instructed the jury to find Moore guilty of misdemeanor shoplifting if it determined that the price of the wallets was \$1,000 or less, and Moore was required to request a lesser-included instruction for misdemeanor shoplifting, which stated the value of the wallets at \$500 or less. (C.P. 69, 61-62, R.E. 14-16).

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<sup>1</sup> Both the pre-amendment and post-amendment versions of subsection (7) refer to Mississippi’s grand larceny statute (Section 97-17-41) for the sentencing range for felony shoplifting. *See* Miss. Code Ann. §97-23-93 (7) (Rev. 2013); Miss. Code. Ann. § 97-23-93 (7) (Rev. 2014).

### Standard of Review

“The interpretation of a statute presents a question of law which [this Court] review[s] de novo.” *Coleman v. State*, 947 So. 2d 878, 880 (¶9) (Miss. 2006) (citing *Sykes v. State*, 757 So. 2d 997, 999 (Miss. 2000)). This Court reviews jury instructions “as a whole ‘to determine if the jury was properly instructed,’ giving abuse-of-discretion deference to the trial judge’s decision.” *Flowers v. State*, 51 So. 3d 911, 912 (¶5) (Miss. 2010) (quoting *Rubenstein v. State*, 941 So. 2d 735, 787 (Miss. 2006)). “When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found.” *Newell v. State*, 49 So. 3d 66, 73 (¶20) (Miss. 2010) (quoting *Rubenstein*, 941 So. 2d at 784-85). Conversely, “[w]here the jury had incorrect or incomplete instructions regarding the law, our review task is nigh unto impossible and reversal is generally required.” *Henderson v. State*, 660 So. 2d 220, 222 (Miss. 1995) (quoting *Neal v. State*, 451 So. 2d 743, 757 n. 9 (Miss. 1984)).

### Discussion

The trial court erred in failing to apply the ameliorative provisions contained in the amendments to Section 97-23-93(5) and (7), which pertain to punishment for the crime of shoplifting. “A principle deeply imbedded in our law requires us to construe criminal statutes strictly, resolving all doubts and ambiguities in favor of the accused.” *Brown v. State*, 102 So. 3d 1087, 1089 (¶7) (Miss. 2012) (citing *Coleman*, 947 So. 2d at 881) (additional citations omitted); *see also, e.g., McLamb v. State*, 456 So. 2d 743, 745 (Miss. 1984) (This Court recognizes “the long standing rule that penal statutes are to be interpreted strictly against the state and construed liberally in favor of the accused. Where a statute is patently ambiguous, it must be interpreted in favor of the accused.”) (citations omitted).

### **Ameliorative statutory changes regarded punishment are applied retroactively**

“[I]n litigation between the state and an individual, where the operative statute has been repealed or amended and the litigation arises out of a pre-repeal, pre-amendment transaction or occurrence, the individual may claim and be given the benefit of the prior law in effect at the operative time where he regards it more favorable to him.” *State ex rel. Pittman v. Ladner*, 512 So. 2d 1271, 1277 (Miss. 1987). As to the application of ameliorative statutory changes in punishment, Mississippi Code Annotated Section 99-19-33 provides in part that, “If any statute shall provide a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law, then such milder punishment may be imposed by the court . . .” Miss. Code. Ann. § 99-19-33. This Court has interpreted Section 99-19-33 to mean that “[t]he trial court judge does not have discretion to sentence a defendant under the law in effect at the time of the commission of the crime where the sentencing statute has been amended to provide for a lesser penalty and the amended statute is in effect at the time of the conviction.” *Daniels v. State*, 742 So. 2d 1140, 1145 (¶17) (Miss. 1999) (citing *West v. State*, 725 So. 2d 872 (Miss. 1998)).

In *Daniels*, this Court held that “[w]hen a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence *according to the statute as amended*.” *Daniels*, 742 So. 2d at 1145 (¶17) (emphasis added). According to Section 97-23-93 as amended, one who commits the crime of shoplifting, first offense, is subject to felony punishment only if he or she takes “merchandise for which the merchant’s stated price exceeds One Thousand Dollars (\$1,000.00). . . .” Miss. Code. Ann. § 97-23-93 (7) (Rev. 2014). Under the statute as amended, a person who commits the crime of shoplifting is subject to only punishment as a misdemeanor if he or she takes “merchandise for which the merchant’s stated price is less than or equal to One Thousand Dollars (\$1,000.00) . . . .” Miss. Code. Ann. § 97-23-93 (5) (Rev. 2014).

Accordingly, Moore submits that the changes to the punishment provisions of our shoplifting statute—raising the misdemeanor/felony threshold amount from \$500 to \$1,000—are ameliorative in nature, the trial court was required to apply them at trial in order to properly sentence Moore for felony shoplifting. Because the proper sentence as either a misdemeanor or felony hinged on whether the price of the wallets Moore took exceeded \$1,000, the trial court should have included the amended amount of \$1,000 in the jury instructions.

***Wilson* should not control**

The case of *Wilson v. State*, 967 So. 2d 32 (Miss. 2007) should not control. In *Wilson*, the Court addressed a prior change to our shoplifting statutes that increased the misdemeanor/felony threshold amount from \$250 to \$500. *Wilson v. State*, 967 So. 2d 32, 41-42 (¶¶20-22) (Miss. 2007). The *Wilson* decision first noted that (1) “[t]his amendment effectively made the charge of shoplifting merchandise over \$250 in value but not more than \$500 in value to be a misdemeanor rather than a felony[,]” and (2) “section 99-19-33 and *Daniels* stand for the proposition that when the statutory penalty for a particular crime is legislatively reduced after the date of the commission of the crime but before the date of sentencing, the trial court must sentence the defendant under the amended statute.” *Wilson*, at 42 (¶¶21, 22). However, the *Wilson* decision then stated that Section 99-19-33 and *Daniels* were “totally irrelevant” because “[w]e are not dealing with an amended sentencing statute, but instead an amended statute as it relates to the elements of the criminal offense.” *Id.* at (¶22).

In dissent, Presiding Justice Diaz argued that the *Wilson* majority incorrectly attempted to distinguish Section 99-19-33 and *Daniels* because “the amendment has everything to do with sentencing. . . .” *Id.* at 47 (¶40) (Diaz, P.J., Dissenting). Moore submits that Justice Diaz was correct.

The *Wilson* majority overlooked that the elements of the crime of shoplifting are provided for in Section 97-23-93(1), and the punishment for the crime of shoplifting is addressed in subsections (5) and (7). Both prior to and after the 2005 and recent 2014 amendments, subsection (1) defined/defines the elements of the crime of shoplifting without regard to the value of the items taken and specifies that the punishment is provided elsewhere in that section:

(1) Any person who shall willfully and unlawfully take possession of any merchandise owned or held by and offered or displayed for sale by any merchant, store or other mercantile establishment with the intention and purpose of converting such merchandise to his own use without paying the merchant's stated price therefor shall be guilty of the crime of shoplifting and, upon conviction, *shall be punished as is provided in this section.*

Miss. Code Ann. §97-23-93(1) (emphasis added).

As alluded to in subsection (1), punishment for the crime of the shoplifting is addressed in subsections (5) and (7), which make the punishment—i.e., whether the crime is a misdemeanor or felony—dependent on the value of the merchandise. Thus, contrary to the *Wilson* majority, the legislative changes to the shoplifting punishment statutes—subsections (5) and (7)—do not “relate[] to the elements of the criminal offense.” *Wilson*, at (¶22). Instead, the changes relate to amended punishment statutes. “[T]he amendment has everything to do with sentencing. . . .” *Id.* at 47 (¶40) (Diaz, P.J., Dissenting), and Section 99-19-33 and *Daniels* should control.

Also, this Court has subsequently cited *Wilson* for the general rule that the statute in effect at the time of the offense controls and explained that “[t]his rule helps to ensure the constitutional proscription against an ex post facto law.” *Flowers v. State*, 35 So. 3d 516, 518 (¶5) (Miss. 2010) (citing U.S. Const. art. I, § 9, cl. 3; Miss. Const. art. 3, § 16). The persuasiveness of the *Wilson* decision is further weakened in light of this because retroactive application of the statutory change in the shoplifting punishment statutes (at issue in *Wilson* and this case) do not violate ex post facto

protections, as the change were/are clearly ameliorative. The *Daniels* Court accurately noted that ameliorative changes to punishment statutes are properly applied retroactively, whereas, “[t]o apply a statute that has been amended after the criminal act, which provides for a stricter punishment than the statute in effect at the time of the criminal act, would be an ex post facto application of the law and is not allowed in this judicial system.” *Daniels*, 742 So. 2d at 1145 (¶17) (citing *Puckett v. Abels*, 684 So. 2d 671, 673 (Miss. 1996)).

Moore submits that this Court’s decision in *Daniels* represents the better-reasoned approach, and that *Daniels* and Section 99-19-33 should control over the *Wilson* decision. Accordingly, Moore contends that the trial court erred in failing to apply the ameliorative punishments provisions of subsections (5) and (7) in its instructions to the jury. In light of the amended statute, instruction S-1 incorrectly stated the law by requiring the jury to find that the price of the wallets was more than \$500 instead of \$1,000. In turn, the trial court erred in sentencing Moore for felony shoplifting.

Finally, the error was not harmless. If the jury believed Moore’s testimony that he took only the nine men’s wallets—which, according to the State’s evidence was priced at \$926—he was guilty of the crime of shoplifting, but he was subject to only misdemeanor punishment under subsection (5)(a). The jury was entitled to make this determination. *Gathright v. State*, 380 So. 2d 1276, 1278 (Miss. 1980) (“[W]hen the evidence is conflicting, the jury will be the sole judge of the credibility of witnesses and the weight and worth of their testimony.”). And Moore defense was prejudiced by the trial court’s failure to apply the law as amended in this case. Consequently, Moore requests this Court to remand this case for re-sentencing for misdemeanor shoplifting or, alternatively, to remand this case for a new trial.

**II. THE TRIAL COURT ERRED IN ALLOWING OFFICER OWENS TO TESTIFY AS TO THE PRICE OF THE WALLETS.**

The trial court erred by allowing Officer Owens to testify as to the price of the wallets. During direct examination, the State asked Owens about the wallets' stated price, and Moore objected on the basis that Owens lacked personal knowledge. (Tr. 68-69). The trial court overruled the objection, stating "He can testify to what he knows . . . If he knows, he may answer, [Mr. Prosecutor]. If not, he will have to say he doesn't know." (Tr. 69). Owens then testified that the total value of the fourteen wallets was "over \$1,700." (Tr. 69).

"The standard of review for admission of evidence is abuse of discretion." *Debrow v. State*, 972 So. 2d 550, 552 (¶6) (Miss. 2007) (citation omitted). "The discretion of the trial court must be exercised within the boundaries of the Mississippi Rules of Evidence." *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990).

Owens lacked personal knowledge of the wallets' value, as evidenced by his testimony given immediately after he was allowed to testify as to the value. Namely, Owens admitted that he was not present when Dillard's employees scanned the price tags and recorded their value on the report, and he specifically admitted that he had no personal knowledge of the wallets' value. (Tr. 70-71).

Officer's Owens' testimony as to the wallets' price was inadmissible under Rule 602 of the Mississippi Rules of Evidence, which provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." M.R.E. 602. Moreover, Owens' testimony related to his personal knowledge or lack thereof should have been first presented to the trial court outside of the jury's presence. To this end, Mississippi Rule of Evidence 103(c) provides that "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." M.R.E. 103(c).

Owens' testimony also improperly exceeded the bounds of Section 97-23-93(4), which provides that "Any merchant or his agent or employee may testify at a trial as to the stated price or ownership of merchandise." Miss. Code Ann. §97-23-93(4). Further, Owen's testimony as to the wallets' value was inadmissible hearsay. He was clearly regurgitating the Dillard's employees' representations of value. Officer Owens' testimony of the wallets' price impermissibly bolstered Correa's testimony on that point. *See, e.g., Bitner v. State*, 293 So. 2d 339, 341 (Miss. 1974); *Ellis v. State*, 254 So. 2d 902, 903 (Miss. 1971).

The wallets' stated price was perhaps the most important issue for the jury's determination. As argued above, the price was difference in a misdemeanor punishment versus punishment as a felony. The error in allowing Officer Owens to testify as to the wallets' value, therefore, prejudiced Moore's defense. Accordingly, Moore requests this Court to remand the case for a new trial.

### **CONCLUSION**

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Moore respectfully requests that this Honorable Court reverse his conviction and sentence for felony shoplifting and remand this case for re-sentencing for misdemeanor shoplifting or, alternatively, remand this case for a new trial.

Respectfully Submitted,

OFFICE OF STATE PUBLIC DEFENDER  
INDIGENT APPEALS DIVISION  
For, Lester Darrell Moore, Appellant

BY: /s/ Hunter N. Aikens  
Hunter N Aikens, MSB# 102195  
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER  
INDIGENT APPEALS DIVISION  
Post Office Box 3510  
Jackson, Mississippi 39207-3510  
Telephone: 601-576-4290  
Fax: 601-576-4205  
email: [haike@ospd.ms.gov](mailto:haike@ospd.ms.gov)

**CERTIFICATE OF SERVICE**

I, Hunter N. Aikens, Counsel for Lester Darrell Moore, do hereby certify that on this day I electronically filed the forgoing **BRIEF OF THE APPELLANT** with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable John R. Henry, Jr.  
Attorney General Office  
Post Office Box 220  
Jackson, MS 39205-0220

Further, I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above to the following non- MEC participants:

Honorable Lisa P. Dodson  
Circuit Court Judge  
P.O. Box 1461  
Gulfport, MS 39502

Honorable Joel Smith  
District Attorney, District 2  
Post Office Box 1180  
Gulfport, MS 39502

This the 15th day of June, 2015.

/s/Hunter N. Aikens  
Hunter N. Aikens  
COUNSEL FOR APPELLANT

Hunter N. Aikens, MS Bar No. 102195  
INDIGENT APPEALS DIVISION  
OFFICE OF STATE PUBLIC DEFENDER  
Post Office Box 3510  
Jackson, Mississippi 39207-3510  
Telephone: 601-576-4290  
Fax: 601-576-4205  
Email: haike@ospd.ms.gov