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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOSEPH ANTWAN GLENN,
CRYSTAL DANIELS, ET AL. — APPELLANT

VERSUS — NO. 2005-KA-01149-COA

STATE OF MISSISSIPPI — APPELLEE

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COURT OF APPEALS

REPLY BRIEF OF APPELLANT CRYSTAL DANIELS

APPEALED FROM
THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI
ELEVENTH JUDICIAL DISTRICT
CAUSE NO. 2004-0074-CR2

RICHARD B. LEWIS
CHAPMAN, LEWIS & SWAN
P.O. BOX 428
CLARKSDALE, MS 38614
(662) 627-4105
ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS

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

Hon. Laurence Y. Mellen
Assistant District Attorney
P.O. Box 848
Cleveland, MS 38732

Hon. Albert B. Smith, III
Circuit Court Judge
P.O. Drawer 478
Cleveland, MS 38732

Hon. Jim Hood
Assistant Attorney General
P. O. Box 220
Jackson, MS 39205

Ms. Crystal Daniels
P.O. Box 88550
Pearl, MS 39208

This the 27 day of February, 2008.

RICHARD B. LEWIS

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ARGUMENT

I. APPELLANT CONTENDS THE DEFENDANT'S INDICTMENT WAS DEFECTIVE AND MOVES TO VACATE CONVICTION BASED ON STATE'S FAILURE TO SET OUT WITH CERTAINTY WITHIN THE INDICTMENT THE SPECIFIC CONDUCT THAT THE STATE ASSERTS TO BE THE OVERT ACT UNDERTAKEN BY DEFENDANT.

The Attorney General, the Appellee in this case, argues in its brief that Appellant waived the issue of the defective indictment for failure to raise the issue with the trial court. In support of this argument, the Appellee cites **Griffin v. State, 918 So.2d 882 (Miss. App. 2006)** and **Miss. Code Ann. § 99-7-21 (Rev.2000)**. However, in Griffin the indictment was defective as a matter of form and not a matter of substance as in **Durr v. State, 446 So.2d 1016, 1017 (Miss.1984). Brewer v. State, 351 So.2d 535 (Miss. 1977).** In the Appellant's indictment, the failure by the State to set out with certainty in the indictment the specific conduct that the State asserts to be the "overt act" undertaken by the defendant was an omission which went to the very heart of the indictment and was defective as a matter of substance. See **Brewer v. State, 351 So.2d 535 (Miss. 1977).** Thus this type of defective indictment was not waived by failure to demur.

Additionally the State concedes by not denying that The Mississippi Supreme Court has firmly established that, in order to indict for an attempt, the indictment must set out with certainty the specific conduct that the State asserts to be the "overt act" undertaken by the defendant. **White v. State, 851 So.2d 400, 403 (Miss. App. 2003).** The evident purpose for this rule is the underlying

general principle that one accused of a crime is entitled to know the specific nature of the allegations against him so that he can prepare his defense, rather than be left guessing as to what specific activity the State contends is a violation of the criminal statute. However, even though the necessity for a plain statement of the facts relied upon by the State has its foundation in the concept of adequate notice to the defendant of the nature of the allegations against him, the State may not avoid the requirement by showing that the defendant had actual notice from some other source of the specific nature of the State's allegations. **Id.** There is no acceptable substitute or cure in the law for an indictment that omits the essential charging information. Therefore since the Appellee concedes, Appellant contends that her conviction for attempted armed robbery should be vacated based on the State's failure to set out with certainty within the indictment the specific conduct that the State asserts to be the overt act undertaken by Defendant.

II. APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND SUBSEQUENT MOTIONS FOR JUDGMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIAL SINCE THE VERDICTS ARE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

The Attorney General's argues as to their belief that evidence was sufficient in support of the Appellants' conviction. The argument is that the State produced witnesses that stated that Crystal Daniels was present at the scene, moving her "head", walking around the bank and dressed "like a man". Appellee's brief pages 16-24. All other testimony as to the Appellant being "in control", giving "signals" and head movements "coast is clear" by witnesses argued by Appellee is speculative and opinion based as to the witnesses' interpretations of the Appellant's movements. Appellee's brief pages 16-24. Ms. Daniels did not commit any overt act to further the crime of armed robbery and the Appellee failed to show that the State proved any overt act on her part to attempt such a

crime. Ms. Daniels did not enter into a common plan to attempt to commit an armed robbery nor did she have any knowledge or intentions to further a common purpose to commit such an act. Thus, the Appellee failed to show that the state proved beyond a reasonable doubt that the Appellant committed the crimes charged and that she did so under circumstances that indicated every element of the offenses charged. Where the state fails to meet this test it is insufficient to support a conviction. (See **Bush v. State** supra, quoting **Carr v. State, 208 So.2d 886, 889 (Miss. 1968).** The Appellee also failed to show that the state proved that Ms. Daniels committed any overt act that goes beyond mere planning and preparation. Ms. Daniels' mere presence with the other co-defendants at a bank and dressing up in the opposite sex does not constitute an overt act indicative of an attempted armed robbery. Finally, the Appellee failed to show that the state submitted proof of any conspiracy to commit armed robbery on that such common plan or scheme even ever existed between Ms. Daniels and any other co-defendant.

III. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE TRIAL STAGES OF THIS CASE.

The Attorney General's argument as to the issue of ineffective assistance of counsel in this case is that the Appellant failed to meet the two prong test set forth in **Strickland v. Washington, 466 U.S. 688, 687, 104, S.Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-695 (1984)** and adopted by this Court in **Stringer v. State, 454 So.2d 468, 476-477, (Miss. 1984).** That is Appellant must prove: (1) That his counsel's performance was deficient and, (2) that this supposed deficient performance prejudiced his defense. The Attorney General in rebuttal of this issue merely argues that the Appellant alleged prejudice and failed to prove any prejudice.

The Appellant contends under **Strickland v. Washington, 466 U.S. 688, 104, S.Ct. 2052,**

80 L. Ed. 2d 674 (1984) that his attorney committed substantial errors and or deficiencies in his representation which prejudiced his case and caused the Appellant to be convicted and therefore the Appellant's conviction should be overturned and/or he be granted a new trial. Appellant did more than allege prejudice.

Appellant would show that Appellant's trial counsel was ineffective and prejudiced the outcome of this case in the following respects:

1. Appellant's trial attorney failed to raise the issue of an obviously defective indictment at trial as well as in the Motion for J.N.O.V. or New Trial. Appellee's brief page 12.
2. Appellant's trial attorney failed object to speculative testimony by witnesses, Mary Ann Tribble, Donnell Hogan and Janet Free, as to their opinion in regards to the alleged "head movements" by the Appellant should be interpreted to mean "signals on what to do next" or "the coast is clear"as well as to the witnesses opinion that the Appellant was "in control" or that the Appellant was dressed "like a man". R. 226-227, R. 235

In making an ineffective assistance of counsel argument, the claim is judged by the standard set out in **Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984)**. The two inquiries under that standard are (1) whether counsel's performance was deficient, and if so (2) whether the deficient performance was prejudicial to the defendant in this sense. Our court has adopted this standard set out by our U.S. Supreme Court. As pointed out in several cases, the court has to make a determination as to whether the defendant has shown that an attorney's performance was deficient. This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. **Graves v. State, 872 So.2d 760, (Miss. App. 2004)**. Second, the defendant must show that the deficient performance

prejudiced his defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. **Id at 763.** The Appellant must make both showings to show the result was unreliable. **Finley v. State, 739 So.2d 425, (Miss. App. 1999)** The attorney's performance must be defective and the deficiency must deprive the defendant of a fair trial. **Richardson v. State, 769 So.2d 230, (Miss. App. 2000)** Appellant's trial counsel's performance was deficient and that the said Appellant was clearly prejudiced by trial counsel's performance in failing to make objections to the defective indictment and speculative witness testimony. That but for the Appellant's trial attorneys failing to make objections to the defective indictment and speculative witness testimony, the verdict would have resulted in a not guilty verdict. Failure to make objections to the defective indictment and speculative witness testimony at trial is error and in this case error that prejudiced the Appellant's defense thus meeting the two prong test of **Strickland**. This type prejudicial error when considering its cumulative effect, meets the test of **Strickland**.

Appellant beseeches this Court, after a thorough review of the record and legal arguments presented through briefs, to conclude that the Verdicts finding the Appellant guilty as to conspiracy and attempted armed robbery should be set aside and the Appellant should be granted a new trial as to both counts in the interest of justice.

CERTIFICATE OF SERVICE

I, Richard B. Lewis, Attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following persons:

Hon. Laurence Y. Mellen
Assistant District Attorney
P.O. Box 848
Cleveland, MS 38732

Hon. Albert B. Smith, III
Circuit Court Judge
P.O. Drawer 478
Cleveland, MS 38732

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This the 27 day of February, 2008.

RICHARD B. LEWIS