

IN THE MISSISSIPPI COURT OF APPEALS

No. 2006-KA-02100-COA

MICHAEL GOLDMAN

APPELLANT

Vs.

FILED

DEC 10 2007

STATE OF MISSISSIPPI

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLEE

REPLY BRIEF OF APPELLANT

Appeal from the Circuit Court of Madison County, Mississippi

Julie Ann Epps [REDACTED]
504 East Peace Street
Canton, MS 39046
(601) 407-1410
facsimile (601) 407-1435

TABLE OF CONTENTS

Table of Authorities.	ii
Law and Argument.	1
Conclusion.	8
Certificate of Service.	9

TABLE OF AUTHORITIES

<i>Benbow v. State</i> , 614 So.2d 398 (Miss. 1993)	1
<i>Caston v. State</i> , 823 So.2d 473 (Miss. 2002)	6
<i>Clinkscale v. Carter</i> , 375 F.3d 430 (6th Cir.2004)	5
<i>Crane v. Kentucky</i> , 476 U.S. 683 106 S.Ct. 2142 (1986)	5
<i>Davis v. State</i> , 743 So.2d 326 (Miss. 1999)	6
<i>Fleming v. State</i> 604 So.2d 280 (Miss. 1992)	2
<i>Government of Virgin Islands v. Jacobs</i> , 634 F.Supp. 933 (D.V.I.1986)	4
<i>Gray v. Lynn</i> , 6 F.3d 265 (5 th Cir. 1993)	2
<i>Hawthorne v. State</i> , 751 So.2d 1090 (Miss. 1999).	3
<i>Johnson v. State</i> , 246 S.E.2d 363 (Ga. 1978)	4
<i>Lucas v. O'Dea</i> , 179 F.3d 412 (6 th Cir. 1999)	1
<i>Owens v. State</i> , 666 So.2d 814 (Miss. 1995).	6
<i>Quimby v. State</i> , 604 So.2d 741 (Miss. 1992)	6
<i>State v. Helou</i> , 857 So.2d 1024 (La. 2003)	3
<i>Stewart v. Wolfenbarger</i> , 468 F.3d 338 (6 th Cir. 2006)	5
<i>Tome v. United States</i> , 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995).	7

LAW AND ARGUMENT

1. **The trial court erred in allowing the jury instruction on count three to constructively amend the indictment to change not only the method of the assault but also the necessity of proving any injury.**
2. **Trial counsel was ineffective for failing to object to the constructive amendment of the indictment.**

The State contends that Goldman is procedurally barred from raising the issue of the constructive amendment to the indictment by which Goldman went from being charged with causing or attempting to cause **serious** bodily injury by “striking and choking” Ebony Beal to merely attempting to cause her injury with “a knife, a deadly weapon.” Goldman, the State points out, did not make a contemporaneous objection. The fact that Goldman’s trial counsel failed to object to the jury instruction’s amending the indictment is further evidence of trial counsel’s ineffectiveness. *See, e.g., Lucas v. O'Dea*, 179 F.3d 412, 419 (6th Cir. 1999) (trial defense counsel's failure to object to the jury instructions which resulted in fatal variance and rendered murder defense meaningless constituted ineffective assistance); *Benbow v. State*, 614 So.2d 398 (Miss. 1993) (defendant denied effective assistance of counsel in plea to aggravated assault where he was represented by a law student under supervision of counsel and neither counsel nor student questioned potential defects on the face of the indictment).

A reasonably competent lawyer is expected to object to a jury instruction that not only constructively amends the indictment but especially when that instruction allows the jury to convict the defendant on a theory not found in the

indictment. For instance, in *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993), the defendant was charged with attempted murder. The jury instructions, however, allowed the jury to convict the defendant of attempted murder if they found that he had either the intent to kill or the intent to inflict great bodily harm even though the latter, intent to inflict great bodily harm, was not an element of attempted murder. *Gray*, 6 F.3d at 269. Trial counsel for the defendant failed to object to the instruction. The Fifth Circuit granted the defendant's petition for habeas corpus finding that trial counsel's failure to object to the instruction amounted to ineffective assistance of counsel. *Gray*, 6 F.3d at 271.

The State next argues that the instruction did not materially amend the indictment. But the indictment required the jury to find that Goldman caused or attempted to cause serious bodily injury by striking and choking her and the instruction only required the jury to find that Goldman caused or attempted to cause mere bodily injury with "a knife, a deadly weapon." As pointed out in Goldman's opening brief, "serious bodily injury" has a legal definition. Serious bodily injury is that "which creates a substantial risk of death or which causes serious, permanent disfigurement, **or protracted loss or impairment of the function of any bodily member or organ.**" *Fleming v. State* 604 So.2d 280, 292 (Miss. 1992) (emphasis supplied). "By definition, 'serious bodily injury' would require that the victim suffer an injury which is more severe than mere 'bodily injury.'" *State v. Helou*, 857 So.2d 1024, 1030 (La. 2003).

The Mississippi Court of Appeals has held that where the indictment charges mere “bodily injury” but the prosecution is allowed to amend the indictment to instruct the jury that it must find “serious bodily injury”, the indictment has been materially amended and the conviction must be reversed. *Hawthorne v. State*, 751 So.2d 1090, 1094 (Miss. 1999).

The instruction in this case changed the theory of the prosecution’s case and was clearly a substantive amendment to the indictment. Because such amendments made be made only the grand jury, and that was not done here, the conviction and sentence for aggravated assault must be reversed. Furthermore, trial counsel’s failure to object to the amending of the indictment via instruction constituted ineffective assistance of counsel and this, too, requires reversal.

3. The trial court erred in refusing to allow the defendant to cross-examine Ebony Beal about her past sexual relations with the defendant.

The State argues that the trial court is allowed considerable latitude in determining the admissibility of the evidence and will be reversed only for an abuse of discretion. No such abuse occurred here, the State contends.

Furthermore, the State contends, any such evidence would be irrelevant on the issue of whether the act for which Goldman was being tried was rape or, as Goldman contends, consensual. The problem with these arguments is that Ebony was allowed to testify that she had not had previous sexual relations with Michael. T. 115. If the issue of prior encounters was really irrelevant, then Ebony should

not have been permitted to testify that there had been none. And, if Ebony was allowed to testify on this issue, then Goldman was also entitled to introduce evidence on the subject. Moreover, to the extent that Goldman's evidence showed that Ebony was lying about whether she had previously had sex with Goldman, the evidence was admissible on the issue of Ebony's credibility. *See, e.g., Government of Virgin Islands v. Jacobs*, 634 F.Supp. 933, 938 (D.V.I.1986) (allowing the accused in a rape trial to cross-examine the victim on her statement that she had been a virgin prior to the charged rape because it went to credibility of the victim).

To be sure, M.R.E. Rule 412 prohibits evidence of a victim's previous sexual encounters. However, the Rule violates a defendant's right to confrontation if it applies only to the defendant. *Jacobs*, 634 F.Supp. at 937; *United States v. Gavigan*, 330 N.W.2d 571, 576 (Wis. 1983); *Johnson v. State*, 246 S.E.2d 363, 365-66 (Ga. 1978). When Ebony testified that she had not had any previous sexual encounters with Goldman, Goldman was entitled to present evidence to the contrary. The trial court's refusal to allow Goldman to rebut Ebony's testimony was error requiring reversal.

4. **Trial counsel was ineffective in failing to give proper notice so as to allow the Defendant to put on evidence of a previous sexual encounter with Ebony Beal.**

The State argues that trial counsel's failure to follow the rules regarding admission of the victim's prior sexual encounters was not ineffective assistance of counsel because the trial court would not have allowed such evidence even if counsel had complied with the notice required under the Rule. The State's argument is wrong. The trial court's ruling that the evidence was not admissible was premised on the court's erroneous opinion that the 911 tape was **conclusive** on the issue of Goldman's guilt and, thus, that evidence of previous consensual encounters between Ebony and Goldman would not be relevant. But not even a **confession** is conclusive evidence of guilt. *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

Where trial counsel's failure to follow the rules results in the exclusion of the defendant's evidence, trial counsel is ineffective. *Clinkscale v. Carter*, 375 F.3d 430, 443 (6th Cir.2004); *Stewart v. Wolfenbarger*, 468 F.3d 338, 355 (6th Cir. 2006).

Because trial counsel's failure to follow Rule 412 resulted in the defendant's inability to put on important evidence substantiating his defense that the sex was consensual, trial counsel's performance was ineffective and defendant's resulting convictions and sentences should be reversed.

5. The trial court erred in allowing the prosecution to admit Ebony's medical records.

The State argues that Goldman has waived the right to object to the prosecution's admission of Ebony's medical records because his trial counsel failed to object at trial. However, trial counsel's failure to object to this inadmissible evidence is another example of trial counsel's ineffectiveness. The Mississippi Supreme Court has held that an attorney who fails to object to inadmissible evidence renders constitutionally ineffective assistance of counsel. *Davis v. State*, 743 So.2d 326, 338 (Miss. 1999).

The State also contends that the medical records were not hearsay under M.R.E. 803(4) which specifies that statements made for the purposes of medical diagnosis or treatment are not excluded by the hearsay rule. The fact that the records are not hearsay pursuant to M.R.E. 803(4) does not mean that they are *ipso facto* admissible. There is still the rule that that a party cannot introduce a prior consistent statement as substantive evidence. *Quimby v. State*, 604 So.2d 741 (Miss. 1992); *Caston v. State*, 823 So.2d 473, 488-489 (Miss. 2002). It is well-established that a witness's prior consistent statement is inadmissible in that it improperly bolsters the witness's in-court testimony. *Owens v. State*, 666 So.2d 814, 816 (Miss. 1995). In the absence of exceptions to the rule, to refute the contention of recent fabrication of the in-court testimony or a motive to testify

falsely, bolstering a witness's testimony in this manner is reversible error. *Tome v. United States*, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995).

6. The trial court erred in meeting with the jury prior to sentencing.

Again, the State argues that this issue is procedurally barred because of trial counsel's failure to object at trial or to raise the issue in his Motion for New Trial. And, again, Goldman contends that this is further evidence of trial counsel's ineffectiveness.

The State also contends that there is no indication that the trial court discussed the case with the jurors. But if the trial court was planning to discuss something other than the case, why did it not take place in the courtroom? Many judges thank the jurors for their service after the verdict has been read, but this is normally done in an open courtroom. The fact that the trial court saw fit to "visit" the jury after the verdict and before sentencing indicates that the trial court was seeking the input of the jurors on sentencing.

Once the trial court talked to the jurors in this case off the record and prior to sentencing Michael Goldman, Goldman was entitled to know what was said and to respond accordingly. Because Goldman was denied this opportunity, the sentences imposed must be vacated and remanded.

Conclusion

For these reasons, Michael Goldman's convictions and sentences must be vacated or reversed and remanded for a new trial.

Respectfully submitted,

MICHAEL GOLDMAN

By: Julie Epps u JLT

Julie Ann Epps [REDACTED]

504 East Peace Street

Canton, MS 39046

(601) 407-1410

facsimile (601) 407-1435

CERTIFICATE OF MAILING AND SERVICE

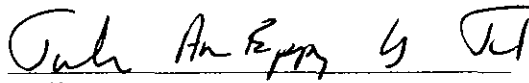
I, Julie Ann Epps, hereby certify that I have this day mailed by first-class mail, postage prepaid, the original and three copies of the Reply Brief of Appellant to the Clerk, Mississippi Supreme Court, P.O. Box 117, Jackson, MS 30205, and a copy of the same to the following:

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

District Attorney David Clark
128 West North Street
P.O. Box 121
Canton, MS 39046

Hon. William E. Chapman
Circuit Court Judge
P O Box 1626
Canton MS, 39046

This, the 10th day of December, 2007.


Julie Ann Epps