IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLEVELAND HOPE — APPELLANT

VS. — NO. 2007-KA-1156

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLEVELAND HOPE **APPELLANT**

vs. **CAUSE No. 2007-KA-01156-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Sunflower County in which the Appellant was convicted and sentenced for his felony of **BURGLARY OF AN OCCUPIED DWELLING**.

STATEMENT OF FACTS

Etricia Mitchell resided at 8 Kim Herman Cove, Indianola, Sunflower County, Mississippi along with her son on 6 February 2006. The Appellant is the father of her son.

In the early morning of that day, at about five in the morning, the Appellant banged on Mitchell's back door. He was at her residence because he wanted to know whose automobile was in her yard. Mitchell told him that the car belonged to her cousin; the Appellant told her that she was lying. She told him to leave the property or she would summon the police. The Appellant then kicked the door in, came into the house, and began to assault Mitchell. There was

no one in the house besides Mitchell and her son.

There was another individual with the Appellant. He came into the house after the Appellant entered, but he did not participate in the Appellant's assault on Mitchell. At some point this other person told the Appellant that the police had been summoned. The Appellant broke off his assault and left the house, taking Mitchell's cell telephone with him. The other person left with the Appellant. (R. Vol. 2, pp. 90 - 121).

Officer Irish Johnson arrived at Mitchell's home. He observed the kicked - in door and the physical injuries suffered by Mitchell. He also noticed that toys and figurines had been disturbed, indicating that there had been an altercation within the house. (R. Vol. 2, pp. 121 - 125).

Johnnie Bland, an investigator with the Indianola police department, went to Mitchell's home on the day the Appellant broke into her home and assaulted her and made photographs of the damage to the home. Photographs were also made of Mitchell's injuries. Mitchell did not know the identify of the other man who was with the Appellant. (R. Vol. 2, pp. 128 - 136).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A DIRECTED VERDICT?

2. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL ONCE THE VICTIM TESTIFIED THAT THE APPELLANT HAS BEEN ON HOUSE ARREST AT THE TIME HER CHILD WAS BORN?

3. DID THE TRIAL COURT ERR IN REUSING TO GRANT A MISTRIAL ON ACCOUNT OF THE FACT THAT A POLICE OFFICER TESTIFIED THAT THE APPELLANT TOLD HIM THAT HE DID NOT WANT TO COMMENT ABOUT THE CASE?

4. WERE CUMULATIVE ERRORS COMMITTED SUCH THAT THE APPELLANT WAS DENIED A FAIR TRIAL?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR A DIRECTED VERDICT

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL ON ACCOUNT OF THE FACT THAT, IN RESPONSE TO A QUESTION BY THE APPELLANT, THE FACT THAT THE APPELLANT WAS ON HOUSE ARREST AT THE TIME HIS CHILD WAS BORN WAS TESTIFIED TO

3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL ON ACCOUNT OF THE FACT THAT A WITNESS TESTIFIED THAT THE APPELLANT TOLD HIM THAT HE DID NOT WISH TO COMMENT ON HIS CASE

4. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR A DIRECTED VERDICT

In his First Assignment of Error, the Appellant contends that the trial court erred in failing to grant a directed verdict on the charge of burglary of an occupied dwelling. The Appellant specifically asserted in the trial court, as he does here, that the State failed to proved that he broke into the victim's house by kicking the door in. In considering this assignment of error, we bear in mind the standard of review appurtenant to sufficiency of the evidence issues. *May v. State*, 460 So.2d 778 (Miss. 1984).

Briefly restated, the evidence in this case in support of the verdict, taken as true, together with all reasonable inferences arising therefrom, was that the Appellant wakened the victim at an early hour by banging on her back door. The Appellant demanded to know whose motor car was without the house. When the victim told him to whom the car belonged, the Appellant did not believe her; when she threatened to call the police, and went to get her phone, the door was kicked in and the Appellant came into the house and assaulted the victim.

It was also in evidence that there was another man with the Appellant. However, there was no testimony as to his identity or as to his connection with the Appellant. There was no testimony that he participated in the breaking of the door, though there was testimony that he entered into the house. He did not participate in the assault.

It may be, as the Appellant claims, that the victim could not definitely testify that the Appellant was the one who broke in the door. However, every reasonable inference arising from the Appellant's actions and words immediately prior to the breaking in of the door would support the conclusion that it was indeed the Appellant who did so. Given the fact that the other man on the scene did nothing beyond being present, given the fact that the victim did not know who he was, it is unreasonable and illogical to suppose that that other man did the Appellant the favor of kicking in the door and then nothing thereafter. There was nothing in evidence to show or suggest that this other man had some reason or motive to assist the Appellant in the burglary.

On the other hand, even if it be supposed that there was some evidence or inference to support the notion that the other man did kick the door in, this would avail the Appellant nothing. It would simply mean that the Appellant and the other man were confederates in the felony. This would mean that the other man was guilty of the burglary as well as the Appellant. But, given what the Appellant did, such evidence would hardly show that the Appellant was not guilty also. It would simply mean that the other man was an aider and abettor of the felony. One who is present at the commission of an offense and assists another in the commission of it is an aider and abettor, and equally guilty of it. *Nichols v. State*, 822 So.2d 984, 989 (Miss. Ct. App. 2002).

Burglary of a dwelling consists of a breaking and entering of an occupied dwelling with the intention to commit some crime therein. *Wright v. State*, 540 So.2d 1 (Miss. 1989). Here, it is beyond question that there was a breaking and an entry into the victim's domicile. Whether

the Appellant was the one who actually broke the door in, or whether it was the other man who did so, is a matter of no consequence. The Appellant did enter the home. His intent to commit a crime was proved by the act of domestic violence of committed against the victim. The evidence was overwhelmingly sufficient to support the verdict; the court thus committed no error in denying relief on the Appellant's motion for a directed verdict.

The first Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL ON ACCOUNT OF THE FACT THAT, IN RESPONSE TO A QUESTION BY THE APPELLANT, THE FACT THAT THE APPELLANT WAS ON HOUSE ARREST AT THE TIME HIS CHILD WAS BORN WAS TESTIFIED TO

During cross - examination of the victim, she was asked whether the Appellant was present at the time her child was born. The victim testified that he was not, that he was on house arrest at the time. There was a bench conference at that point. The Appellant, stating that the jury had been informed that he had a previous conviction, moved for a mistrial. The prosecutor pointed out that she had previously proven that the Appellant had been convicted of domestic violence and that the answer given by the victim did not indicate that the Appellant had been convicted of something other than domestic violence. The trial court then overruled the objection and motion for a mistrial. (R. Vol. 2, pp. 108 - 109). The prosecutor had indeed established that the Appellant had been convicted of domestic violence. (R. Vol. 2, pp. 104 - 105).

The trial court was correct in refusing to grant a mistrial. While so much of the answer given by the victim concerning house arrest might have been unnecessary, it was not prejudicial to the Appellant. The jury already knew that he had been convicted of domestic violence. For all they knew from the answer given, the house arrest related to those incidents.

In the event, however, that this Court shall find that the objection to the answer should have been sustained, there was no basis for a mistrial. The trial court was in the best position to determine where serious and irreparable prejudice had occurred. *Edwards v. State*, 856 So.2d 587 (Miss. Ct. App. 2003). This obscure reference to house arrest cannot reasonably be seen as having caused such prejudice.

The Appellant contends that the trial court should have given a cautionary instruction. However, the Appellant did not ask for one. He may not now complain of the lack of such an instruction. *Palmer v. State*, 939 So.2d 792 (Miss. 2006).

If it was error to have overruled the objection, any such error was surely harmless. The answer did not prejudice the Appellant. On the other hand, the evidence of his guilt was overwhelming. No reasonable jury could have returned a verdict other than guilty on the charge of burglary in view of the evidence presented by the State. Under such a circumstance, any error in the very brief mention of house arrest is harmless. *Triggs v. State*, 803 So.2d 1229 (Miss. Ct. App. 2002).

The Second Assignment of Error is without merit.

3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL ON ACCOUNT OF THE FACT THAT A WITNESS TESTIFIED THAT THE APPELLANT TOLD HIM THAT HE DID NOT WISH TO COMMENT ON HIS CASE

In the course of one police officer's testimony, the officer was asked by the prosecutor whether he had been able to identify and locate the man who was with the Appellant when the Appellant broke and entered and assaulted the victim. The officer stated that, when he attempted to talk with the Appellant, the Appellant stated that he did not want to comment about the case. Counsel for the Appellant objected and moved for a mistrial. The prosecutor noted that a mistrial was unnecessary and that the trial court could give a curative instruction to the jury. The

trial court refused to do so, it being of the opinion that such an instruction would simply draw attention to the comment. (R. Vol. 2, pp. 132 - 133).

This testimony by the witness did not invite the jury to consider the fact that the Appellant did not give a statement as evidence of his guilt. Instead, the witness was simply explaining why he had been unable to identify and locate the man who was with the Appellant. It is, of course, highly improper to point out to a jury or to argue to a jury that an accused invoked his privilege to remain silent at trial where the purpose for doing so is to invite the jury to use that fact against the accused. But, where, as here, the fact that an accused refused to speak to law enforcement is introduced simply and only to explain some matter, we do not believe that a foul is committed. This is entirely different from commenting upon an accused's failure to testify. It is that which is prohibited. *MiGilberry v. State*, 741 So.2d 894 (Miss. 1999). The Appellant, it will be noted, has not presented authority to demonstrate that what occurred here was reversible error. The one decision he has cited concerned an alleged comment on the failure of an accused to testify.

It may be that the trial court refused to grant an instruction at the time the testimony was given. However, the Court will find that the trial court did later instruct the jury that the fact that the Appellant declined to testify was a fact that could not be considered for any purpose. (R. Vol. 1, pg. 25). We think, that to the extent that the testimony complained of was improper and that some kind of instruction should have been granted, this instruction was sufficient for the purpose. *Blue v. State*, 674 So.2d 1184, 1215 (Miss. 1996).

The Third Assignment of Error is without merit.

4. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR

Since there is no merit to the foregoing claims of error, there can be no cumulative error. *Bright v. State*, 894 So.2d 590 (Miss. Ct. App. 2004).

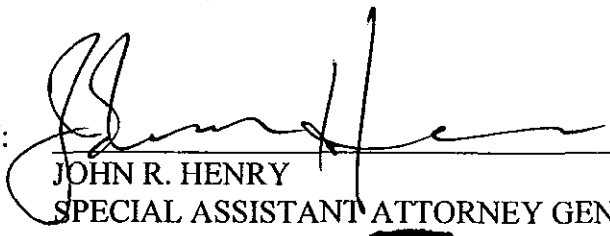
In the event, however, that this Court will consider the Fourth Assignment of Error, we adopt here our responses to the foregoing assignments of error.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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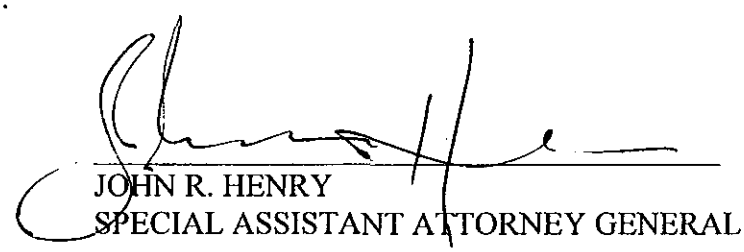
This the 5th day of May, 2008.



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