

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

CLEVELAND HOPE

APPELLANT

VS.

NO: 2007-^{KX}TS-01156-COA

STATE OF MISSISSIPPI

FILED

APPELLEE

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BRIEF OF APPELLANT

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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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Honorable Richard Smith, Circuit Judge, Fourth Circuit Court District

Honorable Jim Hood, Attorney General, State of Mississippi

Honorable Dewayne Richardson, District Attorney, Fourth Judicial District

Mr. Cleveland Hope, Inmate, Mississippi Department of Corrections



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STATEMENT OF ISSUES

The following is a list of the issues presented for review and they include:

1. **Whether the trial Judge should have directed a verdict at the close of the case by the State of Mississippi.**
2. **Whether the trial Judge should have granted a mistrial when the victim stated Hope was on house arrest in answer to a non related question.**
3. **Whether the trial Judge should have granted a mistrial when the State's witness referred to Hope's refusal to make a statement about the case.**
4. **Whether the cumulative effect of these errors denied Hope a fair trial.**



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STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings and Disposition at Trial Court

This is a two (2) count felony case in which Cleveland Hope was charged with Third Offense Domestic Violence and House Burglary. The case was tried on June 14, 2006, Honorable Richard Smith president. Hope was convicted of the House Burglary charge and a mistrial was declared on the Domestic Violence charge after the Jury was unable to reach a verdict on that count. Judge Smith sentenced Hope to twenty (20) years with ten (10) years suspended and ten (10) years to serve. The suspended time was to be served as five (5) years of Post Release Supervision and five (5) years unsupervised Post Release Supervision. Hope was also ordered to pay a Three Thousand Dollar (\$3,000.00) fine, Five Hundred (\$500.00) to the Crime Victim Compensation Fund, Three Hundred (\$300.00) in attorney fees, costs of Court, to undergo domestic violence counseling while on probation and to refrain from contact with the victim.

The Third Offense Domestic Violence Charge was retried ~~resulting~~ resulting in another mistrial for failure of the jury to reach a verdict. That charge was eventually dismissed by the State of Mississippi.

Hope then appealed the conviction for House Burglary and remains incarcerated since the date of the trial.


Statement of Facts Relevant to the Issues with references to the Record

The Victim of the House Burglary charge, Etricia Mitchell, was the first to testify. Hope had lived at the home for about a year several years prior to the burglary and she and Hope had a child, who was at home when the incident happened. She stated that Hope came to her home in Indianola between 5:00 A.M. and 5:30 A.M. asking if he could come in. (T. 28) Mitchell refused to allow him in her home and turned her back to begin running through her home to her bedroom to get her cell phone when she heard someone kicking at the door. She saw Hope first in her home but there was also another male person with Hope who also came in her home. (T. 10) She did not know which of the people, Hope or the man who was with him, kicked the door in to her home. (T. 29, 30)

During the cross-examination of Mitchell, there were questions being asked to determine whether Hope was the father of the child who was present at the home. Counsel for Hope asked whether Hope was present at the time that the child was born. Mitchell responded, "No. He was on house arrest." A motion for mistrial was made in a timely fashion since the comment informed the Jury that Hope had a prior conviction and the Motion was overruled by the Court. (T. 22, 23)

Investigator Johnnie Bland also testified for the State. On direct examination of Bland, he was asked by the State's attorney whether he was able to determine who the other person was who accompanied Hope into Mitchell's home. In response to a question about this other person, Bland responded that "when we tried to talk to Cleveland Hope, he didn't want to comment about the case." A motion for mistrial was timely made since this was a comment on Hope's

constitutional right not to make a statement and the State's attorney suggested that the Court could instruct the Jury that Hope had a constitutional right not to make a statement. The Court refused to instruct the Jury saying that such an instruction would just draw attention to this issue. That Motion was likewise overruled.

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SUMMARY OF THE ARGUMENT

There can be little argument about the fact that Etricia Mitchell did not know who actually kicked the door into her home. Certainly Hope entered the home but that is not what he was charged with or convicted of doing. To say that Hope is guilty of the essential element of the “breaking” part of the burglary conviction is mere guesswork and conjecture. The evidence on the “breaking” element of the conviction was legally insufficient and a verdict should have been directed on the burglary charge.

When Etricia Mitchell informed the Jury that Hope was a convicted criminal and on house arrest, the Jury was more likely prejudiced by that knowledge. Her answer was unsolicited by defense counsel and the Jury was not instructed to disregard the statement or asked whether they could set aside their knowledge that he was a convicted criminal at the time of the birth of their child and at the trial of the case.

In addition to that error, another State’s witness told the Jury that he was not able to ascertain who the other person was who was with Hope since Hope decided to exercise a constitutional right and not give a statement to the police. Again, the Jury was not instructed to disregard the statement and told that he had a constitutional right not to talk to the police and his exercise of that right should not be held against him by the Jury.

The cumulative effect of information which the Jury had been told was surely prejudicial to Cleveland Hope and he was not afforded a fair trial.

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ARGUMENT

The Motion for Directed Verdict should have been sustained.

At the close of the State's case, Hope moved for a directed verdict and the issue was again raised in Hope's request for a Peremptory Instruction and Motion for a J.N.O.V. or New Trial. Both Motions and the Jury instruction directed the Court's attention to the fact that the State of Mississippi had failed to prove beyond a reasonable doubt an essential element of the crime of House Burglary, specifically that Hope had "broken" into the victim's home.

A Motion for directed verdict, peremptory instruction and judgment notwithstanding the verdict test the sufficiency of the evidence. Hogan v. State 755 So. 2d 57 (Miss. App. 1999)

In this case, the evidence was clear that the victim of the House burglary, Etricia Mitchell, did not know who actually "broke" into her home. (T. 29, 30) There was another person with Hope and either one of them could have been the one who kicked in the door. Ms. Mitchell, without doubt, testified that this was true.

Since who "broke" into the home was an essential element of the crime for which Hope was convicted, the Court should have directed a verdict for Hope for this charge.

The mistrial for the Jury being informed that Hope was on House Arrest should have been sustained.

The victim, Etricia Mitchell, was on cross-examination and was being questioned about who the father was of a child who lived in the home with her. A question was asked of her concerning whether Hope was present at the hospital when the child was born. Mitchell responded that Hope was not present since he was on house arrest. (T. 22) A motion for a mistrial was then made and overruled. (T. 23) The birth of the child was five (5) years before the trial (T. 5) and predated the previous domestic violence convictions (T. 17) by several years. This was evidence, therefore, then placed before the Jury of another conviction for a crime and that evidence was surely prejudicial to Hope. The Court gave no cautionary instruction.

This Court has stated in Hughes v. State 735 So. 2d 238 (Miss. 1999) that when a witness stated that the defendant had previously been in jail, a mistrial was not warranted since the trial court gave a cautionary instruction to the Jury. No such instruction was given in this matter.

This issue was again addressed by the Court of Appeals in Evans v. State 802 So. 2d 137 (Miss. App. 2001) where the Court stated that in instances where evidence of past crimes has been introduced, a mistrial should be granted unless the evidence had no harmful effect on the Jury. Whether there was any harmful effect in this case was not addressed by the Court since no cautionary instruction was given to the Jury nor was the Jury questioned about whether they could disregard the statement.

The Mistrial for the Jury being informed that Hope had chosen not to give a statement to the police should have been sustained.


Investigator Johnnie Bland was the last witness for the State of Mississippi. He was on direct examination and was asked by the State's attorney whether he was able to determine who the other person was who had accompanied Hope to Mitchell's home. He said he had asked the victim and she did not know who the person was. He then went on to say that Hope 'did not want to comment about the case'. An objection was made and a motion for mistrial was made. The Court overruled the motion and chose not to give a cautionary instruction to the Jury. (T. 47, 48)

There is not question but that a decision of whether to grant a mistrial lies within the sound discretion of the trial judge. However, there should at least be inquiry made and consideration given as to whether an admonition or curative instruction could remove any prejudicial effect that the inadmissible matter being place before the jury may have caused. McGilberry v. State 741 So. 2d 894 (Miss. 1999)

Again, no cautionary instruction was given to the Jury and the Jury was not questioned about whether they could disregard the statement made by the witness since Hope had a constitutionally guaranteed right not to give a statement to the police.

The cumulative effect of the errors should warrant a reversal.

Perhaps this Court would not consider either of the events that happened for which a Motion for Mistrial was made to have been egregious enough to warrant the Motion for Mistrial having been sustained. Even so, the cumulative effect of those errors can reach a level when considered together that a reversal can be ordered. Gentry v. State 735 So. 2d 186 (Miss. 1999) Their cumulative effect warrant a reversal in this case.

A handwritten signature in cursive script, reading "Frank Carlton", is positioned above a horizontal line.

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1 A. He is.

2 Q. Did he acknowledge being the father of your
3 child?

4 A. Yes, ma'am.

5 Q. And the child is how old?

6 A. He's five.

7 Q. When is his birthday?

8 A. May 5, 2001.

9 Q. So he's just turned five last month?

10 A. Yes, ma'am.

11 Q. And where does the child live?

12 A. With me.

13 Q. Was the child living with you on February 6th
14 of 2006?

15 A. Yes, ma'am.

16 Q. I want to call your attention to the early
17 morning hours of that day and ask you if anything
18 happened that morning?

19 A. Yes. It was around 5 o'clock, about 5:30. I
20 got a knock at the door from Cleveland, and he came to
21 the door and wanted to know whose car was in my yard.

22 Q. Let me stop you right here. Were you awake?

23 A. When he got started banging on the door.

24 Q. All right. He wanted to know what?

25 A. He wanted to know whose car was in my yard.

26 Q. Whose car was it?

27 A. It was my cousins.

28 Q. What did you tell him?

29 A. I told him it was my cousin's car. He told me

1 in with him, or did he come in later?

2 A. No, he came in first.

3 Q. Who came in first?

4 A. Cleveland.

5 Q. All right. Was the other guy in the house when
6 he kicked the bathroom door in?

7 A. No, ma'am.

8 Q. At what point did he come in?

9 A. He came in once I had made it into the kitchen,
10 and I sort of like got behind him to try and stop
11 Cleveland from hitting me.

12 Q. Did it stop him from hitting you?

13 A. No, ma'am.

14 Q. Did the other guy defend you in any way?

15 A. No.

16 Q. What happened next?

17 A. After maybe five minutes after we got in the
18 kitchen, and the guy kept telling him somebody had
19 called the police, then he left. They got in the car
20 and left.

21 Q. Did he take anything with him?

22 A. He took my cell phone so I couldn't call the
23 police because he knows that's what I was going to do
24 was call the police.

25 Q. About how many times did he hit you with his
26 hand?

27 A. About 20.

28 Q. And he also kicked you?

29 A. Yes, ma'am.

1 begin your deliberations. Just go back and
2 take about a ten-minute break. We'll be with
3 you in just a moment.

4 (RECESS TAKEN.)

5 (IN OPEN COURT: JURY OUT.)

6 BY THE COURT: Before we bring the jury
7 back in, have you had a chance to look over
8 these two document?

9 BY MR. KELLY: I have, your Honor, and I
10 have looked them over with my client. There
11 are two documents which are abstracts of court
12 records of the Indianola Municipal Court. One
13 of those documents -- let's see here. One of
14 those documents has a court date of May 23rd,
15 '05. My client recalls that particular
16 incident and is of the opinion that this
17 accurately depicts the conviction that he
18 received on that day in that court.

19 The other abstract has a court date
20 indicated of August 2nd, 2004. My client has
21 no independent recollection of that. I have no
22 serious objection to whether or not this is an
23 actual abstract of the court record, but I
24 can't admit that it's him when he doesn't
25 recall it. So that's the basis of my
26 objection.

27 BY THE COURT: All right. Anything else
28 from the State?

29 BY MS. BRIDGES: Judge, they are what they

1 A. My mother has him.

2 Q. -- in the courthouse today?

3 A. Yes.

4 Q. And that child was born five years ago
5 obviously. Where was the child born?

6 A. What county?

7 Q. Yes, ma'am.

8 A. Sunflower County.

9 Q. Sunflower County. Was Cleveland Hope present
10 at the time that the child was born?

11 A. No. He was on house arrest.

12 BY MR. KELLY: May I approach the bench?

13 BY THE COURT: Yes, sir.

14 (CONFERENCE AT THE BENCH WITHOUT THE
15 HEARING OF THE JURY.)

16 BY MR. KELLY: Well, that answer was
17 nonresponsive to my question. The jury knows
18 he was on house arrest. What was he on house
19 arrest for?

20 BY MS. BRIDGES: Drugs. He wasn't
21 selling. I think it was a possession charge
22 back then.

23 BY MR. KELLY: They've now been informed
24 that he's got a previous conviction, and I
25 would move for a mistrial.

26 BY MS. BRIDGES: Judge, they know he's got
27 prior convictions for these domestic violence
28 charges. They don't necessarily know that
29 that's not part of what this was.

1 BY THE COURT: I'm going to overrule the
2 objection and overrule the mistrial.

3 BY MR. KELLY: All right. Thank you.

4 (BENCH CONFERENCE CONCLUDED. IN OPEN
5 COURT:)

6 BY MR. KELLY:

7 Q. But he wasn't there at the hospital when the
8 child was born; is that correct?

9 A. He didn't come.

10 Q. I understand. But yes or no.

11 A. No.

12 Q. He wasn't there. Now, when you were at the
13 hospital, having had children myself, I recall that
14 they come around and ask you what needs to go on that
15 birth certificate, right?

16 A. Right.

17 Q. And when you put his name down as the father on
18 that birth certificate, you were the one that told that
19 to the nurse, not him, right?

20 A. No, that's incorrect.

21 Q. That's incorrect. Tell me what's correct.

22 A. He was there the day before I had him, and he
23 give that information before the child was born.

24 Q. So he was not able to come the day of, but he
25 was there the day before?

26 A. He got a pass.

27 Q. He had a what?

28 A. He had a pass. He got a pass.

29 Q. Okay. Did he sign the birth certificate?

1 Q. Okay. Now, on the day in question, that is
2 February 6th, '06, early morning hours on that day, you
3 heard knocking or banging on the door. Is that the
4 first indication you had that he was there?

5 A. Correct.

6 Q. Did you look out and see him?

7 A. Looked out my window, yes, the door.

8 Q. Your door has a window on it?

9 A. Glass window.

10 Q. Glass window on it?

11 A. Yes.

12 Q. And you looked out the window and you saw his
13 face or -- is that correct?

14 A. Correct.

15 Q. And he was beating on the door?

16 A. Not at that time.

17 Q. Tell us what he was doing.

18 A. He came to the door and asked could he come in,
19 and I asked him why did he want to come in. He said he
20 just wanted to come in, and he proceeded to ask me
21 whose car was that in my yard, and I told him that was
22 my cousin's car.

23 Q. Y'all are talking through the door at this
24 time?

25 A. Correct.

26 Q. Go ahead. What happened then?

27 A. After I told him that was my cousin's car, he
28 told me that was not my cousin's car, and I told him he
29 needed to leave before I called the police. He told me

1 to fuck the police and let him in. And I kept telling
2 him to just leave before I call the police, and by the
3 time I could go get the phone, he had broke in the
4 house.

5 Q. So you went back to get your cell phone?

6 A. I was going to go get it.

7 Q. Where were you headed to?

8 A. In my bedroom down the hall.

9 Q. Had you gone down the hall?

10 A. No.

11 Q. How far did you get?

12 A. I made it in the living room.

13 Q. In the living room. You had your back turned
14 to the door?

15 A. Right.

16 Q. And you heard it?

17 A. I heard him start kicking it.

18 Q. Heard him start kicking it. What did you do?

19 A. I ran down the hall.

20 Q. Ran down the hall. Went to your --

21 A. Bedroom.

22 Q. -- bedroom. Closed the door?

23 A. Bathroom door.

24 Q. Bathroom. Closed the bathroom door?

25 A. Correct.

26 Q. So when that door was kicked in, that could
27 have been him or the guy that was with him?

28 A. No. The guy that was with him never came in
29 the house until after.

1 Q. Okay. I'm not suggesting that he did. What
2 I'm suggesting is when he kicked the door in, it could
3 have been either one of them.

4 A. Correct.

5 Q. So, now, you turn around -- or you get in the
6 bathroom to protect yourself?

7 A. Correct.

8 Q. And what happens here? He comes down the hall;
9 is that right?

10 A. He was at the door by the time I had shut the
11 bathroom door.

12 Q. When you shut the bathroom door, what did he
13 do?

14 A. He kept telling me to open the door, and I told
15 him I wasn't going to open the door. The next thing I
16 know he had busted in the bathroom door.

17 Q. Busted the bathroom door?

18 A. Uh-huh.

19 Q. And that's when he started to hitting you or
20 slapping you?

21 A. He grabbed me out of the bathroom by my hair.

22 Q. By your hair?

23 A. Uh-huh.

24 Q. Pulled you out?

25 A. Correct.

26 Q. And hit you?

27 A. He pushed me against the door to my bedroom.

28 Q. And hit you approximately -- I believe you said
29 20 times?

1 attempting to fix it. I told him to hold up because I
2 needed to take some pictures.

3 Q. Did you examine the bathroom door?

4 A. Yes, I examined the bathroom door also.

5 Q. What did you observe about it?

6 A. That door had been damaged also.

7 Q. What about the overall condition of the bedroom
8 and the kitchen areas?

9 A. It was okay. I believe she had started
10 straightening up, because like I said, she had gotten a
11 guy to try to fix the door. There wasn't any
12 furniture or anything out of place that I seen to
13 really take a picture of.

14 Q. Do you remember about what time it was that you
15 went over there?

16 A. I can't exactly remember. It was some time in
17 the early morning I believe.

18 Q. Were you able to find out who this other person
19 was who had come to the house?

20 A. No. I did get a chance -- I spoke with Etricia
21 Mitchell. She stated that she didn't know the guy.
22 When we tried to talk to Cleveland Hope, he didn't want
23 to comment about the case.

24 BY MR. KELLY: Object to that. I need to
25 approach the bench.

26 BY THE COURT: All right.

27 (CONFERENCE AT THE BENCH WITHOUT THE
28 HEARING OF THE JURY.)

29 BY MR. KELLY: My client chose not to make

1 a statement, which I believe to be --

2 BY THE COURT: I thought he said he didn't
3 want to come in.

4 BY MS. BRIDGES: He didn't want to
5 comment.

6 BY THE COURT: Oh, okay.

7 BY MR. KELLY: Based on his statement
8 about my client exercising a constitutional
9 right not to testify, I move for a mistrial.

10 BY THE COURT: Anything from the State?

11 BY MS. BRIDGES: Yes, sir. The State
12 would object to it. I think he has a right to
13 say the defendant gave no statement, and the
14 Court can certainly instruct the jury that he
15 has a constitutional right to do that, and it
16 cures that problem.

17 BY MR. KELLY: I don't think it does cure
18 it, but I --

19 BY THE COURT: I'm going to deny the
20 motion. I'm not going to instruct them. I
21 think it just draws attention to it at this
22 point. I'll deny the motion.

23 (BENCH CONFERENCE CONCLUDED. IN OPEN
24 COURT:)

25 BY MS. BRIDGES:

26 Q. Officer Bland, did you observe Etricia Mitchell
27 when you were at the house?

28 A. Yes, I did.

29 Q. And what did you observe about her?

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CERTIFICATE OF SERVICE

I, the undersigned attorney for Appellant, do hereby certify that I have this day,
forwarded a true and correct copy of the foregoing Brief of Appellant to the following:

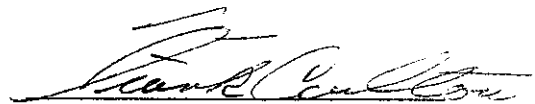
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Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205-3441;

Mr. Cleveland Hope, Inmate, Mississippi Department of Corrections

This the 31st day of January, 2008.



Frank Carlton