IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LEE DARRELN NIX — APPELLANT

V. — NO. 2007-KA-2279-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LEE DARRELN NIX **APPELLANT**

V. **NO. 2007-KA-2279-SCT**

STATE OF MISSISSIPPI **APPELLEE**

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. Lee Darreln Nix, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Stephen B. Simpson, Circuit Court Judge

This the 8 day of May, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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V. — NO. 2007-KA-02279-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1 — TRIAL COUNSEL WAS INEFFECTIVE BY ALLOWING THE STATE TO ESSENTIALLY AMEND THE INDICTMENT BY PRESENTING JURY INSTRUCTIONS THAT VARY FROM THE INDICTMENT.

ISSUE NO. 2 — THE TRIAL COURT ERRED IN DENYING LEE DARRELN NIX'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, Mississippi, and a judgment of conviction for the crimes Count I, Touching of a Child for Lustful Purposes, and Count II, Kidnaping. Lee Darreln Nix was sentenced to ten (10) years for Count I, and ten

(10) years for Count II, with the sentences running consecutively. The convictions followed a jury trial on January 9-10, 2007, Honorable Stephen B. Simpson, presiding. Lee Darreln Nix is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On September 25, 2005, Franquilla Hill, who goes by a nickname of Shay, left the Beauvoir Manor apartment complex to go to Covenant Square Apartments. Tr. 7-9. She had left the Beauvoir Manor Apartments around nine or ten that night. Tr. 9. Shay testified that she had walked from Beauvoir Manor Apartments to Covenant Square Apartments many times. Tr. 10. Shay described that route she took and showed it to the jury by using a map. State's Exhibit 1, Tr. 25.

As Shay was walking through El Rancho's parking lot, a man approached her a green vehicle. Tr. 13. The man asked if she was that girl that was staying at Covenant Square. *Id.* Shay stated that she stopped and talked to the man in the vehicle because she thought that he knew her mom. Tr. 13-14. Shay did not recognize him and then kept walking toward the Covenant Square Apartments. Tr. 14.

Shay turned the corner around a building and saw somebody running across the street. *Id.* The man stopped to talk to her and asked her where she was going. Tr. 15. As they were walking, the man told Shay that he would give her fifty or five hundred dollars to put his hand up her skirt. Tr. 16. She told him no and attempted to leave but the man grabbed her and did put his hand up her skirt touching her private area. Tr. 16-17. Shay

stated that when the man reached for her, he grabbed the top part of her collar and it sounded like her shirt was ripping. Tr. 26.

The man was holding Shay's arms and kept telling her that he would pay her to stick his hands up her skirt. Tr. 17. Shay and the man ended up over by a ditch and the man was still begging to stick his hands up her skirt again. Tr. 18. Shay testified that she was real scared and then kicked him in the leg and ran. Tr. 19. Shay ran out of the parking lot of the Power Shack Complex and over to Covenant Square Apartments. *Id.* Shay was telling her friends what had happened and nobody believed her.

However, the man walks around the building and comes out the other side. Tr. 20. Shay then indicated to her friends that the man coming around the building was the same man. *Id.* Cory Robinson, hereinafter Cory, saw the man and began to chase after him. Tr. 42. The man is running towards Walgreens and Back Yard Burger. Tr. 43. Cory was not able to catch the man before he made it to his car, but the man got in his car and drove by Cory. *Id.* As the man turned and passed Cory in his car, Cory kicked the man's car. Tr. 44. The man got on Pass Road and drove off. *Id.*

According the to testimony of Lee Darreln Nix, hereinafter Nix, on September 25, 2005, he left around six p.m. to go meet Angela Fletcher, hereinafter Fletcher. Tr. 128. Nix met Fletcher around six-thirty p.m. at Hardy Court Shopping Center in Gulfport. Tr. 129. Nix and Fletcher were together for around one and one half hours before Nix left to come back to Biloxi. *Id.* Nix continued to state that he left Fletcher and Hardy Court Shopping Center around eight p.m. and arrived at his house at approximately eight-thirty p.m. Tr. 130.

Nix denies that his car was in Covenant drive and denies that he ever touched Shay. Tr. 129-30.

The police responded to a call at the Covenant Square Apartments. Tr. 65. Officer Kit Manning was dispatched to the apartments about ten minutes till nine. Tr. 66. Officer Manning took Shay's statement and issued a BOLO (be on the lookout) for a mid-90's, green plymouth type vehicle with a square body rear. Tr. 70. A few hours later another officer spotted a vehicle matching the description. Tr. 71. The vehicle had a footprint in the side of the door where Cory stated that he had kicked the vehicle. *Id.* The vehicle was located at 1626 Perry Drive, and the vehicle's tag came back to the address 1626 Perry Drive, where the officers located and talked to Nix. Tr. 72.

SUMMARY OF THE ARGUMENT

Trial counsel was ineffective for not objecting to jury instruction S-1. The State attempted to amend the indictment by offering a jury instruction that was different from the indictment which resulted in Nix being convicted of touching a child for lustful purposes under a lesser burden of proof than that required by the initial indictment.

The evidence that was presented was against the overwhelming weight of the evidence. The girl did not have any bruises or scratches on her body. Shay indicated that she had ripped clothes but no one collected or even saw any clothes that appeared to be ripped. Evidence was presented that Cory kicked Nix's car, and Nix's car had a footprint on the side of his car. However, Cory testified that he went to Nix's house that night, and it is possible that he could have kicked the car at that time.

ARGUMENT

ISSUE NO. 1 TRIAL COUNSEL WAS INEFFECTIVE BY ALLOWING THE STATE TO ESSENTIALLY AMEND THE INDICTMENT BY PRESENTING JURY INSTRUCTIONS THAT VARY FROM THE INDICTMENT.

The Appellant's position is that trial counsel should have objected to the State offering jury instruction S-1. C.P. 30, R.E.14. The State attempted to amend the indictment by offering a jury instruction that was different from the indictment which resulted in Nix being convicted of touching a child for lustful purposes under a lesser burden of proof than that required by the initial indictment.

"When a defendant raises an ineffective assistance claim on direct appeal, the question before this Court is whether the judge, as a matter of law, had a duty to declare a mistrial or order a new trial *sua sponte*, on the basis of trial counsel's performance." ***Roach v. State***, 938 So.2d 863, 870 (Miss. Ct. App. 2006)(citing ***Colenburg v. State***, 735 So. 2d 1099, 1102 (Miss. Ct. App. 1999).

The benchmark for judging any claim ineffectiveness of trial counsel is whether counsel's conduct undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to successfully claim ineffective assistance of counsel, the Appellant must meet the two-pronged test set forth in ***Strickland*** and adopted by the Mississippi Supreme Court. ***Stringer v. State***, 454 So. 2d 468, 476 (Miss. 1984).

Strickland 2-part test →

Under the ***Strickland*** test, the Appellant must prove that (1) his attorney's performance was defective and (2) such deficiency deprived him of a fair trial. ***Id.*** at 477.

Such alleged deficiencies must be presented with "specificity and detail" in a non-conclusory fashion. ***Perkins v. State***, 487 So. 2d 791, 793 (Miss. 1986).

The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. ***Hiter v. State***, 660 So. 2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney and there is a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. ***Id.*** The Appellant must show that there is a reasonable probability that, but for his trial attorney's errors, he would have received a different result in the trial court. ***Stringer v. State,*** 627 So. 2d 326, 329 (Miss. 1993). With respect to the overall performance of the attorney, "counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy." ***Cole v. State***, 666 So. 2d 767, 777 (Miss. 1995). In order to find for the Appellant on the issue of ineffective assistance of counsel, this Court will have to conclude that his trial attorney's performance as a whole fell below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial below. ***Coleman v. State***, 749 So. 2d 1003, 1012 (Miss. 1999).

In Count One of the indictments the grand jury returned the indictment against Nix that stated Nix "did unlawfully, wilfully and feloniously handle, touch or rub with his hands, the vagina of F.N.H., a child who was at the time in question under the age of sixteen (16) years. . . ." C.P. 7, R.E. 12.

The State, without attempting to amend the indictment, offered jury instruction S-1 which stated that Nix, "did unlawfully, willfully and feloniously handle, touch or rub with

his hands, the body of F.N.H., a child who was at the time in question under the age of sixteen (16) years. . . ." C.P. 30, R.E. 14.

Article 3, Section 27 of the Mississippi Constitution "requires an indictment before the prosecution for felonies." ***Quick v. State***, 569 So.2d 1197, 1199 (Miss. 1990). "It is clear that, from the beginning, the people of Mississippi have ordained that they not be prosecuted for felonies except upon the indictment by a grand jury. It has been law since 1858 that the court has no power to amend an indictment as to the matter of substance without the concurrence of the grand jury by whom it was found, although amendments as to mere informalities may be made by the court." *Id. See* ***Mcquire v. State***, 35 Miss. 36 (1858); ***Miller v. State***, 53 Miss. 403 (1876); ***Peebles v. State***, 55 Miss. 434 (1877); ***Blumenburg v. State***, 55 Miss. 528 (1878).

"An indictment may not be amended to change the nature of the charge, except by action of the grand jury which returned the indictment." ***Spann v. State***, 771 So.2d 883, 898 (Miss. 2000); ***Miller v. State***, 740 So.2d 858, 862 (Miss. 1999)(citing ***Greenlee v. State***, 725 So.2d 816, 819 (Miss. 1998)). "To amend an indictment without action of the grand jury, the amendment must be of form and not of substance." *Id.* (citing ***Greenlee***, 725 So.2d at 821). "It is well settled in this state . . . that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." ***Spann***, 771 So.2d at 898 (quoting ***Miller***, 740 So.2d at 862)(quoting ***Shelby v. State***, 246 So.2d 543, 545 (Miss. 1971)). "The test for whether an amendment to the indictment will prejudice the defense is whether the defense

as it originally stood would be equally available after the amendment is made." ***Spann***, 771 So.2d at 898 (quoting ***Greenlee***, 725 So.2d at 822); ***Griffin v. State***, 584 So.2d 1274, 1276 (Miss. 1991).

In ***Quick***, this Court held that the change of the indictment was one of substance and not of form. ***Quick***, 569 So.2d at 1200. The defendant, in ***Quick***, was indicted for aggravated assault in violation of Mississippi Code Annotated Section 97-3-7 (2)(b), specifically charging that he "did willfully, unlawfully, feloniously, purposely and knowingly commit an aggravated assault . . . ." ***Quick***, 569 So.2d 1198.

However, on the morning of trial, the State moved to amend the indictment to charge, after the word knowingly, the following: intentionally or recklessly under circumstances manifesting extreme indifference to the value of human life contrary to § 97-3-7(2)(a) and (b) . . . ." *Id.* The court record did not reflect an order indicating that indictment had been amended. This Court held that the additional language in the jury instructions essentially constituted an amendment of substance to the indictment. *Id* at 1200. "The amendment in ***Quick*** allowed the defendant to be convicted of aggravated assault under a lesser burden of production than that required by the initial indictment." "That is, recklessness became an element of the crime charged, and though the defendant may have defended against the elements of purposely and knowingly, he was caught off guard by not having been put on notice that he must also defend against the element of recklessness." This is very analogous to the case involving Nix.

Nix was prejudice when the State offered jury instructions that differed from the indictment. According to the indictment, the State was required to prove that Nix did touch

or rub with his hands, the vagina of F.N.H. When the State knew that they did not prove this fact beyond a reasonable doubt, they offered the jury instructions that said Nix did touch or rub with his hands, the body of F.N.H. By changing this language from the indictment, Nix was unable to defend this change. At no point during the trial did Shay, ever state that Nix touched her vagina. Shay did testify that this guy reached up her skirt and touched her private area. Tr. 16. She even indicated to the police officers that the man was tugging at her skirt and reached up her skirt to touch her private area. Tr. 68, 86. It was never indicated that Shay was talking about her vagina. Her private area could have also been the lower part of her back, her bottom, or even her inner thigh. The defense for Nix was able to defend the charges as to the touching of the vagina, but was prejudice when the State offered the jury instruction regarding the touching of the body of F.N.H., which differed from the indictment.

The defenses available for Nix were not equally applicable by the change in indictment. The State can only prosecute only on an indictment returned by the grand jury and the court has no authority to modify or amend the indictment in any material respect. In this case, the changing of the words vagina that was in the indictment to body that was in the jury instructions were a substantive change and only the grand jury could have amended the indictment. The Appellant Lee Darreln Nix asked that this Court reverse this conviction and remand for a new trial.

ISSUE NO. 2 THE TRIAL COURT ERRED IN DENYING LEE DARRELN NIX'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

"When reviewing a denial of a motion for a new trial based on an objection to the

weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997)). In reviewing such claims, the Court "sits as a thirteenth juror." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000)(footnote omitted)).

"[T]he evidence should be weighed in the light most favorable to the verdict." ***Herring***, 691 So.2d at 957. "A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, 'unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.'" ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)). It means that "as the 'thirteenth juror,' the court simply disagrees with the jury's resolution of the conflicting testimony," and "the proper remedy is to grant a new trial." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)(footnote omitted)).

In the present case, Nix is entitled to a new trial as the verdict was against the overwhelming weight of the evidence. Shay claimed that the person that grabbed her, gripped the top part of her collar. Tr. 26. She stated that she could hear the ripping of her shirt and he pulled the hair bow tied on the side of her shirt. *Id.* However, Cory, Shay's boyfriend, did not see any torn clothing that night. Tr. 59. Officer Kit Manning nor Investigator Susan Kimball gathered or claimed to see any torn clothing on Shay on the night of the alleged incident. Tr. 77, 94.

Shay also contended that the man was grabbing and pulling her. Tr. 17. She stated that the man was holding her arms and pulling on her wrists. *Id.* However, her boyfriend Cory, did not see any bruising or scratching on her arms or her body. Tr. 59. During Officer Kit Manning's interview with Shay, he did not see any bruising or scratches on Shay. Tr. 77. Investigator Susan Kimball testified that she did not notice and bruises or scarring, nor did Shay indicate that she was bruised or scarred in any way. Tr. 95.

Furthermore, Cory testified that he had seen Nix's car on the night of the incident. Tr. 45. Photographic evidence was presented that Cory kicked the car that was in Nix's driveway. Tr. 58. Cory did state that he went to Nix's house that night of the incident. Tr. 45. The possibility does exist that Cory kicked the car while he was a Nix's house, instead of trying to kick a car as it is moving? Cory could have very well, seen a car that was similar to the car he saw earlier. Nix stated that he did not know that anyone had even kicked his car. Tr. 130.

Nix did present an alibi for his whereabouts on the day in question. Nix offered Angela Fletcher who stated that Nix was with her from around six p.m. to somewhere around eight p.m. Tr. 113-14. Nix also testified that he was with Ms. Fletcher till around eight p.m. that evening and walked through the door of his home around eight-thirty p.m. Tr. 130. Nix also vehemently denies touching Shay and his car was not on Covenant drive on September 25. Tr. 129-30.

The verdict was against the overwhelming weight of the evidence. Lee Darreln Nix therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against

the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

CONCLUSION

Lee Darreln Nix asserts that his trial counsel was ineffective for failing to object to the jury instruction that essentially made a substantive amendment to the indictment. The court has no authority to modify or amend the indictment in any material respect. For this reason Lee Darreln Nix requests that this Court reverse and remand his case back to the trial court. Lee Darreln Nix also contends that the verdicts were against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Lee Darreln Nix, do hereby certify that 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 and foregoing **BRIEF OF THE APPELLANT** to the following:

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