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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-00581-COA

LESLIE J. CORTEZ — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPELLANT BRIEF

RESPECTFULLY SUBMITTED,

/s/ Leslie Cortez

LESLIE J. CORTEZ, #61455
DELTA CORRECTIONAL FACILITY
3800 COUNTY Rd. 540
GREENWOOD, MS. 38930

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CERTIFICATE OF INTERESTED PERSONS

The undersigned pro se Appellant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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x Leslie Cortez
LESLIE J. CORTEZ, PRO SE

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STATEMENT OF CASE

On or About the 31st day of January, 2008, Appellant Leslie Cortez, did file into the Circuit Court of Rankin County, Mississippi, his Motion to Vacate Judgment and Sentence of his Conviction for Burglary of a Dwelling House pursuant to Mississippi Code Ann. Section 97-17-23 (1972), and his subsequent sentence of Twenty-Five (25) years with the Mississippi Department of Corrections as an habitual offender pursuant to Mississippi Code Ann. Section 99-19-81 (2000), being Cause No. 2008-46-C.

On or About the 19th day of February, 2008, the Circuit Court of Rankin County, Mississippi, denied relief and dismissed the Motion pursuant to Mississippi Code Ann. Section 99-39-11(2) (As Amended). Appellant did file a timely Notice of Appeal and the Circuit Court of Rankin County, Mississippi, granted Appellant leave to proceed in forma pauperis on appeal to this Court.

This Appeal stems from the denial of the Circuit Court of Rankin County, Mississippi, of Appellant's Motion to Vacate Judgment and Sentence in Cause No. 2008-46-C.

SUMMARY OF THE ARGUMENT

Appellant, Leslie Cortez, (hereinafter known as Appellant), raised in his Motion to Vacate Judgment and Sentence, that the trial court did abuse its discretion in the failure to instruct the jury on the lesser-included offense of trespassing. Appellant's trial counsel had sought the lesser-included offense instructions over the objections from the State. But this defense theory was lost, then, misconstrued during the trial court's and State's discussion of whether this was a proper lesser-included offense

Trial counsel in his proffer to the Court for the lesser-included-offense instruction, did fail to properly prepare the lesser-include offense instructions for the trial court's consideration. This deficient performance of trial counsel caused the trial court to have only one option in the consideration of a lesser-included offense instruction on trespassing, and that was the state's Instruction S-1-A.

This deficient performance of trial counsel did prejudice the appellant as, the State's Instruction S-1-A was confusing and misleading on the lesser-included offense of trespassing. Also, S-1-A was not a proper lesser-included offense instruction because of its inaccurate and confusing nature. Trial counsel was deficient in the failure to raise an objection to it being given.

Trial counsel should have requested that the trial Court present its own lesser-included offense instructions, or Allow trial Counsel to prepare

such instructions on this defense theory for the jury's consideration. In trial counsel's failure to make this request to the trial court, did deny Appellant of his due process right to have his defense theory presented to the jury.

The trial court once the question of the lesser-included defense instruction was presented, should have sua sponte Allowed trial counsel to prepare and proffer such instructions for the jury's consideration. As this was the only defense that the Appellant had to offer to the charge of burglary. So that, the trial court's failure to Allow the jury to be properly instructed on this defense theory, did deny the Appellant of his due process rights to A fair trial. This lesser-included offense instruction of trespassing was A proper instruction as, the State had failed to prove the prerequisite element of larceny, which must be proved for A conviction of burglary.

The problem with the giving of Instruction S-1-A as the lesser-included offense instruction, was that the offending instruction appears to give the jury an Additional option of finding the Appellant guilty if he committed only one element of the crime, even without the finding that the crime was completed.

Even if the jury read All the instructions together, they could still mislead the jury into believing that instruction S-1-A was merely another option in Addition to the choice that Appellant, (Absence the State's failure to prove the larceny element), was guilty of burglary.

The trial court's failure to properly instruct the jury on the lesser-included offense of trespassing was plain error, as, there was sufficient evidence that was presented to support this defense theory. So that the trial court's failure to properly instruct the jury on the lesser-included offense of trespassing, seriously impaired the appellant's ability to effectively present a given defense.

Appellant asserts that he has been denied his due process right to a fair trial, and that the judgment and sentence imposed by the Circuit Court of Rankin County, Mississippi should be vacated as a matter of law. So that, upon the vacation of the judgment and sentence, this Court should find that the jury verdict of guilty on the crime of burglary was outside the weight of the evidence, and this Court should reverse and render on the conviction of burglary, and remand this case back to the circuit court for resentencing on the crime of malious trespassing.

During the deliberations by the jury in the case sub judice, the jury did present a question to the trial court concerning Exhibit Number Four, which was a dual picture of the jimmied trailer door, and the gloves that were found in the closet of the alleged burglary victim. The following colloquy took place concerning this picture:

THE COURT: Okay, let's get the defendant back in here. There's a question. The jury has stepped out and handed the bailiff State's Exhibit Number 4, and asked the question, "Was this exhibit one or two pictures and what date was it taken?" The question they asked Mr. Sheffield was it one or two pictures and what was the date the picture was taken.

MR. EMFINGER (District Attorney): I would love to answer that, but I don't think you can.

MR. DUGGAN (Defense Counsel): I don't think you can.

MR. EMFINGER: Ken McBroome testified that that picture was taken on October 24th. I don't know whether that's one or two pictures. I guess they're looking at the door and seeing things separate and they're wondering if it's two pictures.

MR. DUGGAN: It's one picture.

MR. EMFINGER: It's one picture and it was taken on October 24th of 2000. Now, can you answer that?

THE COURT: What's the state's position relative to how I respond? And what's the defendant's position?

MR. EMFINGER: I've got no problem with you answering the question if the defense doesn't. That is it's one picture that was taken on October 24th.

MR. DUGGAN: No objection.

THE COURT: Do y'All want me to do that in writing, or Mr. Sheffield, tell them one picture, October 24, 2000.

MR. EMFINGER: We would Agree for the bAiliff to tell them. It's one picture, And it's October 24th of 2000.

THE COURT: Is that Agreeable by the defendant?

MR. DUGGAN: Sure.

THE COURT: All right, Mr. Sheffield, you Are Authorized to say to them that it's one picture And it WAS TAKEN ON October 24, 2000.

(Tr. 98-99)

This WAS AN improper comment by the trial court on specific evidence by the trial court. Also, in the trial court's interpretation of Exhibit Number Four to the jury, WAS A judicial comment on the evidence. In that the trial court's ANSWER to this question did Actually invade the deliberation process of the jury. The ipso facto Act of the trial court's interpretation of evidence, WAS A violation of Mississippi Code Ann. Section 99-17-35, which reads in pertinent part: "The judge in any criminal cause, shall not sum up or comment on the testimony or charge the jury As to the weight of evidence...."

Later on the trial court expressed its misgivings About the faux pas it had committed when the trial court WAS AGAIN CONFRONTED with ANother question from the jury. The trial court did refuse to ANSWER the second question by stating his misgivings on the trial court's ANSWER to their first question:

THE COURT: I think that it's appropriate for me to state or write a response that says, "You have been fully instructed on the law." Quite frankly, I wish I would have done similarly, even though I had two good counsel to get me to answer a question before. And maybe the Supreme Court will have mercy on me saying that that's harmless error. "You have been fully instructed on the law."

MR. DUGGAN: Yes, sir.

THE COURT: I will say that the question I answered previously is the one and only question I will answer because the feeling in my gut is not a good feeling. I guess my other comment relative to answering that question would be that it was the evidence presented on the witness stand the date and the picture.

(Tr. 99-100)

It is clear from this exchange, that, the trial court understood the real enormity of the error that that court had committed. But what the trial court did fail to inform the jury, was the fact that this was not in actuality one picture, but rather was two pictures placed together and then copied on a copying machine.

The failure of the trial court to properly interpret the evidence, only added insult to injury, as, the jury was misled on a crucial piece of evidence. So that, it was apparent from the jury's question, that, they were confused by the composition of the picture as, it was actually two pictures. When the trial court did state that it was actually one picture, the trial court made an interpretation of the evidence for the jury. This was plain error on the part of the trial court.

Trial counsel was deficient in allowing the trial court to comment on specific evidence to the jury. Trial counsel understood that this picture was actually a composite of two different pictures. Instead of raising objections to the trial Court's interpretation of Exhibit Number Four, trial counsel Agreed in Allowing the trial court to present a false impression to the jury on a crucial piece of evidence. This was deficient performance of counsel and was especially egregious as, it allowed the trial court to invade the province of the fact-finder in the deliberation process.

This deficient performance of counsel did prejudice this Appellant, as, it did deny him of his right to a fair trial by an impartial jury as guaranteed by Article 3, Section 26 of the Mississippi Constitution, and the Sixth Amendment to the United States Constitution.

It cannot be said with any certainty what affect this error had on the jury's decision to vote guilty on the charge of burglary. Also, this deficient performance was outside the wide range of professional conduct expected of an Attorney in a jury trial. As there is a reasonable probability that if not for Appellant's trial counsel's deficient performance, the outcome of the trial would have been different.

Appellant has been denied his due process right to a fair trial and the effective assistance of counsel. As it was plain error for the trial court to comment on specific evidence, and did invade the province of the jury to interpret the evidence.

During the course of the Appellant's trial, trial counsel would Not sit at the defense table, rather trial counsel sit at the table with the prosecutor. This was unprofessional conduct on the part of trial counsel, as, it projected an idea to the jury that trial counsel wanted to distant himself from the appellant. Furthermore, the actions of trial counsel made it impossible for appellant to communicate with his trial Counsel.

Article 3, Section 26 of the Mississippi Constitution, And the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. Also the Mississippi Rules of Professional Conduct, 1.1, states the following:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Trial counsel's unprofessionalism was apparent, as any Attorney with skills in criminal trials would know what impression the jury would draw by him sitting at the prosecution's table during the trial. The jury would most likely conclude that Appellant's trial counsel did Not want to be seen at the same table with the Appellant. Also the jury more likely than Not could assume that trial could thought the Appellant guilty.

Then, when you couple this with trial counsel's closing Argument, where trial counsel did state that the Appellant was stupid and dumb, then it becomes Apparent the chilling effect that trial counsel's actions must have had on the jury. (Tr. 88, 89).

The antics of appellant's trial counsel were outside the wide range of professional competent assistance. As, trial counsel's conduct gave the jury the impression that trial counsel had a partisan attitude for the cause of the prosecution. This caused the appellant to be denied his right to only be tried by an impartial jury.

Appellant asserts that he was denied his right to the effective assistance of counsel by the deficient performance of counsel, and that, trial counsel's errors were so egregious that he was prejudiced in his defense, to the extent that, he has been deprived a fair trial.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN THE FAILURE TO GRANT DEFENSE INSTRUCTION ON LESSER-INCLUDED OFFENSE OF TRESPASSING

The trial court in the case sub judice, abused its discretion in the failure to instruct the jury on the lesser-included offense of trespassing. Trial counsel had sought to have the jury instructed on this lesser-included offense over the objections of the state. The Mississippi Supreme Court held that a defendant is entitled to have his theory of defense presented to the jury. See, Drake v. State, 800 So.2d 508, 518 (Miss. 2001) (citing Triplett v. State, 672 So.2d 1184, 1186 (Miss. 1996)). This defense theory was lost to the appellant when the trial court failed to properly instruct the jury on the lesser-included offense of trespassing.

The lesser-included offense instructions were merited by the evidence presented at trial, and did pass the test as setforth in Harper v. State, 478 So.2d 1017 (Miss.1985), for the giving of the lesser included offense instruction. The Mississippi Supreme Court held:

> "[A] lesser included offense instruction should be granted unless the trial judge - and ultimately this Court - can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge.)." Id.

In the case of the Appellant, the lesser-included offense instruction was merited, as there was an evidentiary basis in the record. The State had failed to proue the constitute element of larceny, of the which has to be proved to make one guilty of burglary. The trial court should have instructed the jury on the lesser-included offense of trespassing. See, Ruffin v. State, 444 So.2d 839, 840 (Miss.1984).

Trial counsel in his proffer to the trial court of the lesser-included offense instruction, did fail to properly prepare such lesser-included instruction for that court's consideration. This deficient performance of counsel did cause the court to have only one option in its consideration on a lesser-included instruction on trespassing. And that was the state's instruction S-1-A. See, e.g., United States v. Span, 75 F.3d 1383, 1390 (9th Cir.1996) (Counsel's failure to request jury instructions was ineffective assistance because was only defense available to the defendant).

This deficient performance of counsel did prejudice the appellant, as the state's instruction, S-1-A, was confusing and misleading on the lesser-included offense of trespassing. As the Mississippi Supreme Court pointed out in Kidd v. State, 258 So.2d 423, 429 (Miss. 1972), that one problem with confusing and unclear instructions is they make it "possible to have twelve different interpretations of the abstract principles of law, assuming that the jurors understood and were sufficiently skilled in determining legal questions to apply the instructions correctly." See also, Film Transport Co. v. Crapps, 214 Miss. 126, 135, 58 So.2d 364 (1952).

Trial counsel was further deficient in the failure to object to state's instruction S-1-A, and in the failure in not requesting that the trial court present its own lesser-included offense instruction. See, Gray v. Lynn, 6 F.3d 265, 269-70 (5th Cir. 1993). The trial court also should have allowed trial counsel time to prepare such instructions on this defense theory for the jury's consideration.

This deficient performance of counsel was clearly ineffective assistance of counsel within the meaning of the United States Supreme Court's definition in Strickland v. Washington, 466 U.S. 668 (1984). This failure to properly instruct the jury on the defense theory of trespassing denied the appellant of his due process right to a fair trial. Such instructions were legally correct, did represent a theory of defense with basis in the record which would lead to acquitted on the charge of burglary,

AND, such theory WAS NOT presented elsewhere IN the CHARGE. SEEON, United States v. Rubio, 834 F.2d 442, 447 (5th Cir. 1987).

Furthermore, the problem with the giving of INSTRUCTION S-1-A AS the lesser-included offense instruction, WAS that the offending INstruction APPEARS to give the jury AN additional option of finding the APPELLANT guilty if he committed only ONE element of the crime of burglary.

It is hornbook criminal law that before conviction MAY stand the state must prove each element of the offense charged. Not only is this A requirement of the law IN the STATE of Mississippi, Also due process requires that the state prove each element of the offense beyond A REASONABLE doubt. SEE, NEAL v. STATE, 451 So.2d 743, 757 (Miss. 1984). A logical corollary of this principle is that, because the State has to prove EACH element of the crime beyond A REASONABLE doubt, then the STATE also has to ENSURE that the jury is properly INSTRUCTED with regard to the elements of the crime. SEE, Hosford v. State, 525 So.2d 789, 792 (Miss. 1998).

It has been found that when AN ESSENTIAL element of the offense is omitted, it fails to inform the jury that they could consider the lesser-included offense. SEE, BAYNES v. STATE, 118 Miss. 621, 79 So. 815 (1918). It has Also been found that INSTRUCTIONS which cut off the defendant's right to consider A lesser-included offense, ARE so prejudicial to A fair trial that they ARE plain error. SEE, e.g., McMullin v. State, 291 So.2d 537, 541 (Miss. 1974).

Such was the case of Instruction S-1-A. The instruction that were presented to the jury were so confusing that, during deliberations the jury sent a note asking the Court to clarify the instructions. The jury asked whether "would breaking in establish intent?" (Tr.99). It goes without saying, that, the jury instructions, especially S-1-A, did not instruct the jury on an essential element of the crime of burglary. Appellant asserts that he was denied his due process right to a fair trial by the giving of S-1-A.

This Court should vacate the judgment and sentence, also the Court should find the jury verdict outside the weight of the evidence, and in doing so, this Court should direct a verdict of guilty on the crime of malious trespassing. The Mississippi Supreme Court held in Wells v. State, 305 So.2d 333, 338 (Miss. 1974) the following:

> "[T]respassing is necessarily a component of every burglary. Implicit in the verdict finding defendant guilty of burglary is the finding that he was guilty of the constituent offense of trespass, Section 91-17-87, Mississippi Code Ann. (1972). Inasmuch as the jury has found the defendant guilty of the greater crime, and the evidence of defendant's guilt of trespass is conclusive, the judgment is affirmed as a conviction of trespass, and the case is remanded for sentencing on that charge." See, Washington v. State, 222 Miss. 782, 77 So.2d 260 (1955).

2. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT INSTRUCTED THE JURY ABOUT EXHIBIT NUMBER FOUR, AND THE COURT'S INSTRUCTION WAS AN IMPROPER COMMENT ON THE EVIDENCE. TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING THE COURT'S IMPROPER CONDUCT

During the jury deliberations, the jury did present a question to the trial court concerning Exhibit Number Four. The trial court after having discussions about the jury's question with the State's Attorney and trial counsel, made an impermissible comment on the evidence by giving the jury an interpretation of Exhibit Number Four.

In the trial court doing this was plain error as, the Mississippi Supreme Court admonishes trial judges that they are not to comment on the evidence to the jury. In Hansen v. State, 592 So.2d 119 (Miss.1991), the Court stated: "Our criminal procedure has long perceived dangers in comments upon the evidence, and in that regard we have for years had a statute, Mississippi Code Ann. Section 99-17-35, which reads in pertinent part: 'The judge in any criminal cause, shall not sum up or comment on the testimony or charge the jury as to the weight of evidence....'" Hansen, 592 So.2d at 141.

It has long been established in the Courts of the State of Mississippi, that instructions to the jury should not single out or contain comments on specific evidence. See, Voyles v. State, 362 So.2d 1236 (Miss. 1978). In the case sub judice, the trial court not only made a comment on a specific piece of evidence, but also gave the jury an interpretation of that evidence.

This was plain error on the part of the trial court as defined by the Mississippi Supreme Court in Williams v. State, 794 So.2d 181 (Miss. 2001). The Williams Court stated that the plain error doctrine has been construed to include anything that "seriously affects the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732 (1993)." The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." Williams, 794 So.2d at 187.

It cannot be said with certainty what affect the trial court's intruction to the jury had on their evaluation of the evidence. But, it goes without saying that in the trial court's interpretation of Exhibit Four to the jury did seriously affect the integrity and public reputation of the judicial proceeding.

Trial counsel was deficient in allowing the trial court to make a comment on the evidence. This deficient performance of trial counsel was especially egregious, as, it allowed the trial court to invade the province of the fact-finder in the deliberation process.

Appellant has been prejudiced by this deficient performance of counsel, as, he has been denied his right to a fair trial by an impartial jury. And does meet the two-prong standard setforth in Strickland v. Washington, 466 U.S. 668 (1984), and this Appellant was denied his right to the effective assistance of counsel.

3. APPELLANT WAS DENIED A FAIR TRIAL BY THE UNPROFESSIONAL ACTIONS OF TRIAL COUNSEL

Appellant has been denied his right to a fair trial by an impartial jury by the unprofessional actions of his trial counsel during his trial. Trial counsel refused to sit at the defense table with the Appellant. Rather, trial counsel did array himself with the prosecution by sitting at the table of the prosecution.

What affect the action on the part of trial counsel had on the jury is anybody's guess. But, it can be said that these actions of trial counsel, could be said to fall below the wide range of professional conduct expected of attorneys in criminal trials.

These actions on the part of trial counsel, could be said to render the adversarial testing process to become a farce. See, Strickland v. Washington, 466 U.S. 668, 689 (1984).

The United States Supreme Court held in McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), that, the Sixth Amendment right to counsel is a right to the effective assistance of counsel. But, in the case sub judice, when trial counsel did separate himself from the Appellant by sitting at the table of the prosecution, not only made it impossible for the Appellant to communicate with his trial counsel, but it also projected the idea to the jury that trial counsel was on the side of the prosecution.

The Mississippi Supreme Court stated in SANDERS V. STATE, 440 So.2d 278 (Miss. 1983) that:

"The relationship of the Accused to his lawyer provides a critical factual context here. As he stands before the bar of justice, the indicted often have few friends. The one person in the world, upon whose judgment and advice, skill and experience, loyalty and integrity that defendant must be able to rely, is his lawyer. This is as it should be."

SANDERS, 440 So.2d at 286.

The actions on the part of his trial counsel was unprofessional, and, it can be presumed to have had a prejudicial affect on the jury. Appellant was denied his right to counsel and a fair trial that is guaranteed by Article 3, Section 26 of the Mississippi Constitution.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, Appellant moves this Court to reverse and remand his case back to the Circuit Court of Rankin County, Mississippi with directions to vacate the sentence on the charge of burglary, and resentence him on the charge of trespassing. And for what other relief this Court deems just and proper.

Respectfully Submitted this the 19th day of JUNE, 2008.

x Leslie Cortez

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, that I, Leslie J. Cortez, Appellant, have caused to be delivered this day, via United States Postal Service, postage prepaid, A true and correct copy of the foregoing Appellant Brief to the below listed person:

Honorable Jim Hood
Attorney General, Mississippi
P.O. Box 220
Jackson, MS. 39205-0220

This the 19th day of JUNE, 2008.

x Leslie Cortez
Leslie J. Cortez, pro se

STATE OF MISSISSIPPI)
)
) -SS-
COUNTY OF LeFlore)

"AFFIDAVIT OF OATH"

Personally appeared before me, the undersigned authority in and for the aforesaid jurisdiction, Leslie Cortez, who after first being duly sworn, did state under oath as follows:

1) I, Leslie Cortez, do hereby affirm that I am a citizen of the State of Mississippi, and do hereby state that the information contained in the foregoing Civil Action is true and correct. I state these facts under the penalty of perjury.

2) I bring this action in good faith and I believe that I am entitled to the relief, which I seek, by same.

Leslie Cortez
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME, THIS THE 19th **DAY OF** June, 2008.

Augusta Anderson
NOTARY PUBLIC

STATE OF MISSISSIPPI NOTARY PUBLIC ID # 86916 AUGUSTA R. ANDERSON Commission Expires Sept. 9, 2011 HOLMES COUNTY

MY COMMISSION EXPIRES

Subscribed and sworn to before me in my presence, this 19th day of June, 2008, a Notary Public in and for the County of Holmes State of Miss.
Augusta Anderson
(signature) Notary Public
My Commission Expires 9/9, 2011