IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY BENNETT A/K/A
JOHNNY RENARDO BENNETT — APPELLANT

V. — NO.2008-KA-00153-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar N[redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for 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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi

2. Johnny Bennett

4 Honorable E.J. (Bilbo) Mitchell and the Wayne County District Attorneys Office

5. Honorable Lester F. Williamson, Jr.

THIS 30th day of May, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Johnny Bennett, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Wayne County, Mississippi, and a judgment of conviction for the crime of first degree arson against the appellant, Johnny Bennett. Bennett was subsequently sentenced to serve twenty (20) years in the custody of the Mississippi Department of Corrections, ordered to pay ten thousand dollars ($10,000.00) in restitution, and was fined of one thousand dollars ($1,000.00), along with court costs of two hundred ninety-four dollars and fifty cents ($294.50). Tr. 268, C.P. 53, R.E. 17. This sentence followed a jury trial on December 17-18, 2007, with sentencing on January 23, 2008, Honorable Lester F. Williamson, Jr., Circuit Judge, presiding. Bennett is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According the trial testimony, during the very early morning hours of November 25, 2006, Eddie Poole's and Sharlemeshia Arrington's Wayne County trailer burned to the ground. Tr. 122, 125. Mike Mazingo, a Wayne County Sheriff's Office Investigator, was later contacted by someone who told him he needed to investigate the fire as an arson. Tr. 143. Based on the call, he meet with Jameer Everett, the Appellant Johnny Bennett's son. Based on the conversation with Everett, Mazingo contacted the State Fire Marshal's Office and began an investigation. The investigation determined that the fire at the trailer was arson. Tr. 144, 138.

Edward O'Brian Williamson testified he knew Bennett since he lived in the same trailer park, Northgate. Williamson testified that on November 25, 2006,[1] he and Bennett hung out after he got home from work. Tr. 71. Later that evening, they were joined by Everett, Bennett's son, and Legarrian Blakley, Everett's cousin. They all drove around socializing and hanging out. Tr. 71-72. Williamson testified that Bennett told him that he had a problem with a guy and needed his help to burn down his trailer. Williamson also claimed Bennett threatened to hurt him if he did not help. Tr. 73.

The group of four then rode out to Everett's mother's house to obtain a gas jug. Tr. 74, 78. They then went to a gas station and Williamson put $4.00 worth of gas in his car, and $1.00 worth of gas in the jug. Bennett paid for the gas. Tr. 78. Williamson was not sure of

[1] The date would actually have been November 24, 2006, but the record reflects several witnesses continued to confuse the actual date of the fire since it occurred at about 1:00 a.m. on November 25, 2006. Tr. 131-32, 143.

the time this happened, but guessed it was around midnight or 1:00 a.m. Before leaving the gas station, Blakley's father called and they took Blakley home. Tr. 77, 79. Williamson claimed he told Bennett that Everett should not be involved in this because he was too young.[2] Everett was then dropped off at Bennett's residence. Tr. 80.

Williamson alleged that Bennett then directed him where to drive. They pulled up next to a trailer. Williamson testified Bennett got out and went to another trailer with the gas jug. He kicked in the front door and poured the gas and started the fire. He ran back to the car and directed Williamson to go back to their trailer park. Tr. 81. Williamson claimed his only involvement in the arson was to pump the gas and drive out there. He claimed he never left the car. Tr. 82. Williamson further alleged Bennett told him the following day that if he told anyone about the incident, Bennett would kill him, and further, to tell police, if asked, that the gas was for his girlfriend's car. Tr. 85.

Williamson admitted that when he did speak to police, he denied any knowledge about the burned trailer. Tr. 85. He claimed he was scared, and that he had received cell phone threats and had been shot at by an unknown person. He then went to police a second time and told them the truth. Tr. 86-87, 91. Williamson also admitted that he pled guilty to arson that very morning, but had no plea agreement. Tr. 70.

Jameer Everett was called as a witness for the State. He confirmed that he, Williamson, Blakley, and Bennett all rode around together on November 25, 2006. However,

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[2]Everett was 16 years old at the time of trial. Tr. 92. Blakley was 17 years old at the time of trial. Tr. 112.

contrary to Williamson's testimony, he alleged all four of them went to Eddie James' trailer. Tr. 94-95. No one appeared to be home, so they left. Tr. 96. They drove to Everett's house to get a gas jug. Everett claimed it was Bennett's idea to get the jug and that Everett actually went in and got it for Bennett. Tr. 97. He admitted he lied to his mother and said he needed the jug because his cousin ran out of gas. Tr. 98. After getting the gas and dropping Blakley off, they went to Bennett's residence. Tr. 99-100. Everett first testified that Williamson talked as if he was not satisfied that Poole was not home. (He later corrected himself and said it was Bennett who was not satisfied). Tr. 100, 108. After about ten minutes, Bennett and Williamson left. Everett stayed at the trailer and talked with Blakley on the phone. Tr. 101.

Everett testified Williamson and Bennett returned about 30 minutes later. Tr. 102. Bennett told him to tell police the gas was for his girlfriend's car. Tr. 103. A couple of days later, Everett did speak to police. Investigator Mazingo had him call Bennett while he listened in on the conversation. Bennett told Everett the police had nothing on him and to stick to the plan. Tr. 104-05, 146.

The State also called Legarrian Blakley, who also confirmed he and Everett and Bennett and Williamson went all together on November 25, 2006. Tr. 113-14. Contrary to Williamson, he also testified the four of them went to Poole's trailer. He remembers Williamson and Bennett wanting to see if Poole was home. Tr. 115. He did not hear any discussion of what Bennett was going to do. They went back to town and first went to

Everett's house to look for a gas jug. Tr. 116. After putting gas in the car and the jug, he had to go after getting a call from his father. Tr. 117.

Sharlemeshia Arrington testified and stated that she lived with Eddie Poole in his trailer with her four children. She said they both owned the trailer. She stated that she knew Bennett and never had a problem with him. Tr. 122. She also related that she was with her mother in Laurel when she received a call early in the morning on November 25, 2006, telling her that her trailer was on fire. Tr. 123-24. Arrington testified the trailer was a complete loss. Tr. 125.

A neighbor of Arrington's, Jennifer Reed, testified that she awoke very early on November 25, 2006, and while investigating falling noises she heard outside, saw flames coming from Arrington's trailer. Tr. 127-28. She did see a car parked outside earlier, but did not think anything of it since cars park out there all the time. Tr. 129. She believed it took the fire department about 20 minutes to get out there after she called 911. Tr. 131-32.

Bennett attempted to present an alibi defense through his girlfriend at the time, Amy Wilson.[3] Wilson confirmed she lived with Bennett during the month of November of 2006. Tr. 171. She was asked by counsel if she recalled the night of November 25, 2006. She testified that she did. She remembers arriving home around 8:00 p.m. after work. Tr. 172. She confirmed Bennett, his son, and another boy were present at the trailer. Tr. 173. Williamson was not present. Tr. 175. She stated she went to bed around 9:00 p.m., and all

[3] Wilson testified she recently married and she is therefore sometimes referred to as Amy Hollinghead in the record. Tr. 171.

three were still at the trailer. Tr. 174. Again, counsel confirmed this was the night of November 25th and early morning of November 26th. Tr. 174-75.

Wilson testified she did not see any of the three leave the trailer that night. She did wake up around 1:00 a.m. and confirmed Bennett and the two boys were still there. Tr. 175-76. Wilson admitted she was questioned by Investigator Mazingo about a fire, but told him she knew nothing about it. She remembers being asked about Bennett's whereabouts, and told Mazingo that Bennett was with her as far she knew. Tr. 177. She also confirmed she was almost completely out of gas after getting home from work. Although she did not remember when Bennett went to get some gas for her, she was able to drive the car the following day. Tr. 177-78.

SUMMARY OF THE ARGUMENT

The trial judge erred in denying Bennett's alibi instruction, as this was the only instruction outlining his theory of defense. It was abundantly clear that Bennett's alibi witness was confused about the actual date of the fire. Bennett was deprived of his right to a fair trial when this instruction was denied, especially since most of the State's witnesses also testified about the wrong date.

Furthermore, the trial judge erred in refusing to *sua sponte* grant a mistrial for ineffective assistance of counsel. Even if the court was not in error in denying the alibi instruction, trial counsel was clearly ineffective for failing to properly present the defense. In fact, counsel led the alibi witness with questions about the incorrect dates twice. Counsel was also ineffective for failing to object to irrelevant evidence of gang affiliation and other

bad acts evidence, including the illegal possession of an assault rifle. The record reflects this could not reasonably be considered trial strategy and the trial judge should have acted to protect Bennett's right to a fair trial. His case must be reversed and remanded for a new trial.

ARGUMENT

ISSUE NO. 1. THE TRIAL JUDGE ERRED IN DENYING AN ALIBI INSTRUCTION TO APPELLANT, DEPRIVING HIM OF ANY INSTRUCTION ON HIS THEORY OF DEFENSE.

Although it was clear from the beginning of trial that Bennett was relying on an alibi defense, the State objected when his proposed jury instruction was considered.

> BY THE COURT: Okay. All right. And then on the issue of the alibi, is that something that you would like to have presented here today, Mr. Evans?
>
> BY MR. EVANS: Yes, sir. And it was a mistake on the part of Mr. Bennett's attorney as far as the dates are concerned. The indictment says, On or about November the 25th, 2006. I asked Ms. Wilson or Ms. Hollinghead as to the whereabouts of Mr. Bennett on or about November the 25th and 26th of 2006. As the indictment says that it was on or about that time, my understanding as the indictment alleged that it was the date of the 25th. I think it –
>
> BY THE COURT: Which it was.
>
> BY MR. EVANS: Sir? Which it was. And it was my mistake as to the – and I didn't realize that until just now as to what occurred.
>
> BY THE COURT: Okay. What's the State's position here?
>
> BY MR. ANGERO: If it please the Court, I mean, that's not uncommon that there's a misunderstanding particularly between alibi witnesses and Defense attorneys when they think that they're talking about one period of time and they're not talking about that time. But the fact remains that there's no testimony in the record that would make an alibi instruction appropriate. There has to be a factual basis for any instruction to be given, and the fact that 24 hours after the fact Ms. Hollinghead may or may not have know the whereabouts of the Defendant is not a factual basis for an alibi instruction. It

just simply doesn't work. I mean – and quite honestly, Judge, I was a little bit leery about asking her those questions, but she didn't seem to know anything at all about the 24th. She'd never been questioned about the 24th. Everything she had to say was about the 25th, and I can understand how that's – how that could, you know, be misconstrued by Defense counsel. But the facts without any doubt show that at 1:01 a.m on the 25th of – the call – the 911 call came in as to the fire. Now, by no stretch of the imagination can you say that a jury could conclude from the testimony that we have here that she was actually talking about the 24th and 25th because without a doubt, she stated that it was not the 24th and 25th but the 25th and 26th; not only on Marcus' questioning of her but on my questions of her. So it's not appropriate for an alibi instruction to be given.

BY THE COURT: Any response?

BY MR. EVANS: But, your Honor, the thing I – and to preserve the record, I mean, if – I understand Mr. Angero's position, but I don't know if the alibi witness – I didn't ask her any questions as to Mr. Bennett's whereabouts on the 24th. She was under subpoena power today. I mistakenly ignored the fact that she was giving testimony as to the 25th and 26th. In my mind, I had it on the 25th and the 26th, and that's my mistake. It should have been the 24th and 25th. I think she thought that's what she was saying; but, you know, that ain't what I asked her.

BY THE COURT: It's not what you asked her –

BY MR. EVANS: And so –

BY THE COURT: – and she clearly stated that she was talking about the evening of the 25th and early morning hours of the 26th. That on cross-examination was confirmed, directly asked and – by Mr. Angero, and she again confirmed that she was talking about the evening of the 25th and the morning of the 26th, no question about it. There is no issue here made by her testimony that would – that will justify the Court giving D-8 in the opinion of this Court. And for whatever reason – I don't know – why, you know, her testimony was related to some other time, but the fact is her testimony creates no justification for an alibi here, D-8 is refused....

Tr. 193-195.

The Appellant concedes that Ms. Wilson did indeed testify concerning the evening of November 25th into the early morning of November 26th. Tr. 172, 174-75, 179, 180-81, 181-82. However, this was result of being given the date by defense counsel in a leading question. Ms. Wilson was there to give Bennett an alibi for the night of the fire. A reasonable juror could have inferred she was testifying about the night of the fire. In fact, several of the State's own witnesses testified to the wrong date of the fire. Williamson testified he first met up with Bennett when he got off of work on November 25th. Tr. 71. Clearly he meant to say November 24th. Only a later leading question by the State could clear up the confusion.

> Q. Now, are we talking about the late night of the 24th and the early morning of the 25th, or are we talking about the late night of the 25th and the early morning of the 26th?
>
> A. Whichever – it was the early morning, whatever day it was it burned down because – I'm guessing the 25th.
>
> Q. So the 25th. When we talk about the 25th, you are talking about the evening of the 24th and then –
>
> A. Uh-huh, early morning of 25th.
>
> Q. – early morning of 25th?
>
> A. Yes, sir.

Tr. 77-78.

Everett's testimony had the same flaw. When being questioned by the State, he remembered the day of November 25th when they all got together and rode around town. Tr. 94. He also clearly meant November 24th. Incredibly, the State also made the same mistake

with Blakley. He too was asked by the State if he remembered being with Everett and Bennett on November 25th. Tr. 113. Unlike with Williamson, the dates were never corrected as to Everett and Blakley.

The standard of review for the denial of jury instructions is well-known. When reviewing the denial of a proposed jury instruction, an appellate court must view the instructions as a whole. *Johnson v. State*, 926 So.2d 246 (¶7) (Miss.App. 2005).

> "When a defendant asserts the defense of alibi, and presents testimony in support of that defense, the defendant is entitled to a jury instruction focusing upon such a theory." *Cochran v. State*, 913 So.2d 371, 375(¶ 14) (Miss.App.2005). However, the instructions must be supported by the evidence. *Id.* "Where proof does not support an alibi defense, the instruction should not be granted." *Id.*

Roper v. State, No. 2006-KA-01791-COA (¶12) (Miss.App. January 8, 2008).

Obviously, the record indicates the trial judge did not believe that Ms. Wilson's testimony provided a sufficient factual basis for the instruction. However, it should be noted that the State's elements instruction stated the crime occurred "on or about November 25, 2006." C.P. 26. Given the clear uncertainty from several witnesses concerning the actual date of the fire, a reasonable juror could have believed Wilson was off by one day. A defendant is entitled to jury instructions on his theory of the case whenever there is evidence that would support a jury's finding on that theory. *Jackson v. State*, 645 So.2d 921, 924 (Miss. 1994). Even the 'flimsiest of evidence' is sufficient to mandate a trial court's giving an instruction on the [defendant's] proposed theory, but there must be some 'probative value'

to that evidence. *Miller v. State*, 733 So.2d 846 (¶7) (Miss.App. 1998)." *Goff v. State*, 778 So.2d 779 (¶5) (Miss.App. 2000).

Again, Wilson did give evidence, at least in her mind, indicating Bennett was at another place at the time of the fire. Even though her memory (and counsel's memory) of the dates were off by 24 hours, Bennett was entitled to an alibi instruction.

> Where a party offers evidence sufficient that a rational jury might find for him on the particular issue, that party of right is entitled to have the court instruct the jury on that issue and through this means submit the issue to the jury for its decision.

Anderson v. State, 571 So.2d 961, 964 (Miss. 1990).

The weight and worth of the testimony, so long as it is more than a mere scintilla, is to be decided by the jury upon proper instruction:

> The defense is entitled to an instruction covering its theory of the case so long as there is evidence in the record that would support that theory without regard to the probative value of that evidence so long as it is more than a mere scintilla of proof. *E.g. McGee v. State*, 820 So.2d 700 (¶9) (Miss.Ct.App. 2000).

Lester v. State, 862 So.2d 582, 586 (Miss.App. 2004).

The Mississippi Supreme Court has found where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, it is reversible error to refuse it. *Hester v. State*, 602 So2d 869, 872 (Miss. 1992), citing *Murphy v. State*, 566 So.2d 1201, 1207 (Miss.1990), and *Sayles v. State*, 552 So.2d 1383, 1390 (Miss.1989). Even though *Hester* is going on sixteen years old, the

Supreme Court, just last year, reiterated the same principals in *Chinn v. State*, 958 So.2d 1223 (Miss. 2007), where the Court held:

> Furthermore, every accused has a fundamental right to have her theory of the case presented to a jury, even if the evidence is minimal. We have held that "[i]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. This Court will never permit an accused to be denied this fundamental right." " *O'Bryant v. State*, 530 So. 2d 129, 133 (Miss. 1988) (citing *Ward v. State*, 479 So. 2d 713 (Miss. 1985); *Lancaster v. State*, 472 So. 2d 363 (Miss. 1985); *Pierce v. State*, 289 So. 2d 901 (Miss. 1974)). This Court recently has stated that "[w]e greatly value the right of a defendant to present his theory of the case and 'where the defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error.'" *Phillipson v. State*, 943 So. 2d 670, 671–72 (Miss. 2006) (citing *Adams v. State*, 772 So. 2d 1010, 1016 (Miss. 2000)).

Chinn, 958 So.2d at ¶13.

The trial court, in failing to grant Bennett's alibi instruction, committed reversible error. Bennett properly preserved this issue at trial and in his Motion for a New Trial and/or Judgment Notwithstanding the Verdict. C.P. 47, R.E. 18.

ISSUE NO. 2: THE APPELLANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A. Counsel was ineffective for failing to adequately present an alibi defense.

As pointed out in Issue No. 1, counsel was woefully inadequate in presenting an alibi defense at trial. If this Court finds the trial judge did not err in denying the jury instruction on alibi, then there should be no question that Bennett was denied his Sixth Amendment right to effective assistance of counsel. Counsel noticed the State that an alibi defense would be

presented. C.P. 17, R.E. 12. However, even in this notice counsel stated the alibi would be for "the day of November 25, 2006." *Id.* Both sides conducted voir dire on alibi. Tr. 20-21, 39. Trial counsel told the jury doing opening statements that an alibi witness would be called. Tr. 66, 67. However, as evidenced above, counsel was clearly deficient in presenting this issue.

In arguing for the alibi instruction, counsel admitted he made "a mistake" and asked Wilson about the incorrect date. Tr. 193-95. The transcript confirms this, as counsel asked Wilson about the night of November 25th, not once, but twice. Tr. 172, 174-75. Furthermore, he interposed no objection when the State, during cross-examination, reiterated that Wilson was testifying about the wrong date. Tr. 179. This elementary failure to prepare both himself and the witness was devastating to Bennett's defense. The State promptly pointed this out to the jury during closing arguments. Tr. 208-09. Counsel exacerbated the error by completely ignoring it when giving his closing argument to the jury. Tr. 209-12. This allowed the State to again highlight the failure to present a sufficient alibi in rebuttal closing. Tr. 212-13. In fact, the State made a very good point about the failure to support the alibi defense once it was asserted.

> Whether you believe these – these witnesses or not, the stated defense was alibi; that is, I was someplace else and could not have done the crime because I was someplace else. And we – and they said they had a witness to say that. Well, they didn't. That's significant. At least in my mind that's significant because, you know, if you say you're going to prove something – you say you're going to prove something – you say you're going to show that your were someplace else and then you don't, it's like, Well, you know, you – it's like the bell rung, you know. You can't unring that bell. That's out there. You

know, they can't distance themselves by not mentioning it on closing argument....

Tr. 213.

Bennett would further note that even the proposed alibi instruction (D-8) also cited "the night of November 25, 2006." Counsel never attempted to specify it was the evening of November 24th and the early morning hours of November 25th. Counsel's failure to adequately investigate and/or prepare this defense and his witness, mandates that this cause be reversed.

B. Counsel was ineffective for failing to prevent irrelevant and highly prejudicial evidence of Appellant's alleged gang affiliation.

Throughout the trial, the State repeatedly introduced unnecessary and prejudicial evidence concerning Bennett's alleged connection with the Insane Vice Lords street gang. It began with the questioning of Williamson. Apparently, the State's theory was that Williamson was brought along on this crime as some sort of gang initiation. However, there was never any evidence admitted to support this.

Q. Was there any other reason why you might have been afraid of Johnny Bennett and gone through this with him because of anything that you know about Bennett?

A. No, sir.

Q. Were you being recruited by him for any purpose?

A. Okay. Organization?

Q. Yeah.

A. Yeah, he was – *I heard he was in a gang. Now me, I don't know personally* because I never went to any of the – if they had any meetings or anything, I never was present. *But I was told.* And he really is – wanted me to be around him. *But he never just asked me to join the gang, no, sir.* He just wanted me to –

Q. *Did you think you were being recruited?*

A. *No, sir.* Because the way I was told, to be recruited, I mean, you had to go through certain stages and different exercises.

Q. Was this a stage or exercise that you were involved in that evening?

A. No, sir, not to my knowledge.

Tr. 75-76 [emphasis added].

Based on this testimony, counsel should have immediately objected and then asked for a mistrial. At a minimum, counsel should have asked that the jury be instructed to disregard any references to Bennett being a member of a gang. Williamson had no personal knowledge of Bennett's gang affiliation.[4] The trial judge should have taken matters into his own hands when counsel did nothing after this testimony and *sua sponte* instruct the jury. The court's failure to do so severely prejudiced Bennett. This, by not means, was the only reference to gang membership.

After Everett stated in cross-examination that he did not know if his father belonged to a gang, the State questioned him further about Bennett's alleged gang membership on re-direct.

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[4]Williamson further confirmed on cross-examination he did not know if Bennett was in a gang. Tr. 89-90. Jameer Everett also testified he had no personal knowledge of Bennett's affiliation with a gang. Tr. 107.

Q. Jameer, is your dad involved in any kind of gang?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Do you know what the Insane Vice Lords are?

A. No, sir.

Q. Do you know why you dad would have had a handbook for the Insane Vice Lords gang in the trailer there?

A. No, sir.

Q. Was there anybody – well, let me ask you this: You stayed there from time to time, right?

A. Yes, sir.

Q. Then if there was a manual that supposedly has all the rules and regulations of this gang in that trailer, was it yours?

A. No, sir.

Q. Do you know whether or not Amy was involved in a gang?

A. No, sir.

Q. Do you know whether or not that would have been hers or your dads?

A. No, sir.

Q. You have no idea?

A. No, sir.

Tr. 110-11.

Furthermore, Investigator Mike Mazingo was asked about the search of Bennett's trailer and the photographs he took during the search, which included a picture of gang literature.

> A. That is the literature to the Vice Lords. It is like all the literature that it takes to join the Vice Lords, what the Vice Lords is all about, all their rules and regulations.
>
> Q. It looks like it says Constitution of the Vice Lords?
>
> A. Yes.
>
> Q. And that was located where?
>
> A. That was located on the countertop there in the trailer.
>
> Q. On what countertop, what room?
>
> A. That's going to be in the – I guess the living room area of the residence.

Tr. 151

The State was allowed to admit these photographs with no objection from the defense. Tr. 152, Ex. 4. Mazingo also testified he asked Amy Wilson about the Vice Lord's handbook found in the trailer. Mazingo testified that Wilson denied the handbook was hers. Tr. 154-55. Again, there was no objection to this testimony. Finally, during the cross-examination of Amy Wilson, although it was not brought up during direct examination, the State asked Wilson about her statement to Mike Mazingo about Bennett's alleged gang membership.

> Q. And I believe you told him that you were aware that he was a member of the Vice Lords?
>
> A. Yes, sir.

Q. Matter of fact, I think you told him that he was like the head Vice Lord; right?

A. Yes, sir.

Tr. 180

The State never offered any basis for the relevance of the evidence suggesting Bennett was a member of a street gang. It appears the State was attempting to show that the arson was some sort of gang initiation test for Williamson. Tr. 75-76. Presumably, the State believed this was the motive behind the arson, and would be admissible under MRE 404(b). However, there was never any evidence admitted to support this. Since counsel never objected, the court was never required to rule on the issue or conduct the required balancing test under MRE 403. Even without the court's ruling, based on the record, the evidence was clearly inadmissible and greatly prejudiced the defense.

The United States Supreme Court in *Dawson v. Delaware*, 503 U.S. 159, 165 (1992), held that the admission of evidence of a defendant's gang membership in certain instances amounts to constitutional error. "Although we cannot accept Dawson's broad submission, we nevertheless agree with him that, in this case, the receipt into evidence of the stipulation regarding his membership in the Aryan Brotherhood was constitutional error." *Id.*

The Court went on to state that "Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson's part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible. Because Delaware

failed to do more, we cannot find the evidence was properly admitted as relevant character evidence." *Id.* at 166-67.

The *Dawson* Court gave an indication of the foundation required in order to make the evidence admissible. "Before the penalty hearing, the prosecution claimed that its expert witness would show that the Aryan Brotherhood is a white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates. If credible and otherwise admissible evidence to that effect had been presented, we would have a much different case." *Id.* at 165.

To be sure, street gang evidence is not *per se* inadmissible, and under the proper circumstances, it can be used as both impeachment and substantive evidence. "[T]he government could impeach a defense witness by showing that both the defendant and the witness were members of the Aryan Brotherhood, and that members were sworn to lie on behalf of each other." *Dawson*, 503 U.S. at 164, (citing *United States v. Abel*, 469 U.S. 45 (1984)). See also *Hoops v. State*, 681 So.2d 521, 530 (Miss. 1996). However, in the case at bar, there was absolutely no relevance to this gang affiliation evidence. The Mississippi Supreme Court has held that unless a proper foundation is laid that would make gang membership relevant, there is not reason for the jury to hear it. "Standing alone, any alleged gang membership or affiliation is not relevant." *Randall v. State*, 806 So.2d 185 (¶98) (Miss. 2001).

Here, this evidence was not admitted to impeach the credibility of a witness or to show bias. See *Dao v. State*, No. 2006-KA-01170-COA (¶19-31) (Miss. App. December 17,

2007)(allowing evidence of gang affiliation to show bias of a witness). No witness admitted to belonging to a gang. Bennett did not testify, so his credibility was never in issue. There was not a shred of evidence to suggest Bennett's alleged problem with Poole was gang-related. This was admitted solely so show Bennett was a bad person. In fact, the State made sure to tell the jury that Bennett not just belonged to the Insane Vice Lords, but was the leader of that gang. Tr. 214-15. This evidence would have clearly by ruled inadmissible had defense counsel objected to it. Most enlightening was the prosecutor's additional comment about Bennett's gang connection during closing argument.

> ....And the truth of the matter is that for some reason or another, the head Vice Lord had a problem with Eddie Poole. Was it gang-related? I don't know. Does it really matter why?....

Tr. 215.

As a matter of fact, it does matter. *Goree v. State*, 748 So.2d 829 (Miss.App. 1999), is almost directly on point. In *Goree*, this Court found:

> The indictment charged that Goree had committed an aggravated assault against Horne in what appears, as was noted by the trial court, to have been a senseless act without any clear rationale or meaning. . . However, the State failed to produce any testimony, except by innuendo, to support its theory that the crime against Horne was in some way correlative to Goree's gang affiliation.

Goree, 748 So.2d at ¶16.

This Court further found that a proper foundation had not been laid to make the gang evidence admissible.

> We recognize that a witness's affiliation with a gang could be relevant, under appropriate circumstances, to establish potential bias, particularly in situations

> involving crimes committed between rival gang members. However, that is not the case in the matter before us today or at least not the case as is indicated in the record. In addition, we fail to see how being a member of a gang ipso facto challenges that witness's credibility as was also argued by the State at trial.

Id. at ¶17.

This Court went on to find that street gang evidence is highly prejudicial, and then reversed and remanded because the prosecution did not lay a proper foundation to make the evidence admissible.

> ...We note that the State did, however, succeed in establishing a strong probability that Goree was in fact an active gang member of the Black Gangsters or at the very least had strong affiliations with them, but that, standing alone, has no connection to the crime.
>
> Much more is required when such highly prejudicial evidence is sought to be admitted against an accused. . . .The key issue remains whether Goree's gang affiliation was in some way related or linked to the crime charged. We note that the State could produce no witnesses or evidence with which to directly link Goree's gang affiliation to the crime as it was committed against Horne. Therefore, without more, any linkage between Goree's gang affiliation and the crime committed is the result of pure speculation and innuendo. We reverse and remand.

Id. at ¶18.

Finally, Appellant would submit that the failure to object could not be considered trial strategy, as counsel mentioned during sentencing that the court allowed admission of gang evidence over his objection. Tr. 229. However, appellate counsel can find no references to any objection or motion in limine on gang evidence in the record. The results of Bennett's trial can not be deemed fair given the voluminous amount of inadmissible evidence allowed in without objection by counsel.

C. Counsel was ineffective for failing to object to irrelevant and prejudicial evidence of other crimes or bad acts.

In addition to the gang evidence admitted, the jury was also told that Bennett was in possession of an assault rifle, even though no evidence was admitted connecting the rifle in any way to the arson. Williamson was asked if a weapon was in the car when he and Bennett rode around with Everett and Blakley. Williamson stated there were no weapons in the car at the time, but further testified Bennett put a rifle in the car later.

> Q. Were there any weapons later on in the car?
>
> A. Yes, sir.
>
> Q What kind of weapon?
>
> A. Some kind of rifle. It looked like a rifle, but it's not your ordinary rifle. It looked like something on TV.
>
> Q. Did it look like something that people call assault rifles nowadays?
>
> A. Yes, sir.
>
> Q. Where did it come from?
>
> A. Northgate.
>
> Q. I mean, whose weapon was it?
>
> A. Johnny Bennett's.
>
> Q. *And what was the purpose of having that in the car?*
>
> A. *I'm not sure. I just know he said that if I didn't help him, he was going to hurt me. I figured that was for intimidation maybe.*

Tr. 75 [emphasis added].

Bennett's possession of an assault weapon had absolutely nothing to do with this arson. Williamson could not even definitely state the weapon was carried in the car to intimidate him. In fact, he testified the rifle was never used to threaten him. Tr. 83. There was no direct evidence or testimony that Bennett intended to use the rifle against Poole. The best the State could do was elicit testimony from Williamson that the rifle was in the car at the time Bennett complained about Poole. Tr. 77. Williamson did testify, however, that Bennett threatened to kill him the following day, and was allowed to testify, over objection, that he was shot at and threatened on his cell phone. Tr. 86-87. It should be strongly noted that absolutely no evidence was presented that the shot was fired by Bennett or that Bennett left any cell phone threats. Williamson did not know who shot at him. Tr. 90.

Conflicting with Williamson's testimony, Everett testified that Bennett's rifle was in the car when all four were riding around. Tr. 95-96. However, he never testified Bennett used the weapon or threatened to use it against Poole. Without any objection, Everett was allowed to speculate about Bennett's motives.

> Q. Well, I mean, he went out there to see Eddie James, right?
>
> A. Yes, sir.
>
> Q. With a gun, right?
>
> A. Yes, sir.
>
> Q. And what I'm saying is that while you were there or while you were leaving, did he say anything about Eddie James or what he planned to do, what he wanted to do?
>
> A. *I guess he was going out there to get him.*

Q. No, no. I'm talking about after –

A. After he left?

Q. I'm talking about when you realized that Eddie James wasn't there and Eddie James didn't show up while you were there.

A. Yeah.

Q. Did you dad say anything about Eddie James after that?

A. We rode back to town then. We went to my house and got gas jug.

Tr. 97 [emphasis added].

Although counsel did object later when Everett was asked if the gun stayed in the car when he was dropped off, this evidence was already before the jury. Tr. 101-02. Blakley stated he did not see a weapon in the car, and did not remember telling police that. Tr. 115, 120. Investigator Mike Mazingo testified he found a fully loaded assault weapon under a mattress in Bennett's living room while executing a search warrant. Tr. 150. Photographs of the rifle were admitted into evidence in Exhibit 4. Tr. 152. When Williamson, or any of the other witnesses, provided no support for the State's theory that Bennett intended to shot Poole, counsel was obligated to request that the evidence be stricken as irrelevant. The State finally connected the rifle to the arson through the hearsay testimony of Mike Mazingo.

Q. Now, the gun I think that you described is a mini 30, this is a Ruger gun; is that right?

A. Correct.

Q. Was that gun ever used in any way to ask any of the witnesses to identify it?

A. Yes.

Q. Who?

A. Jameer.

Q. And was he able to identify that gun?

A. Yes.

Q. How?

A. *He said that was the gun that his daddy had, which is Johnny Bennett, when they went to Eddie Poole's trailer the first time before the fire was set. They had the gun out there to shoot Eddie Poole.*

Tr. 155 [emphasis added].

Everett was never questioned first by the State on whether or not Everett told police this. As stated above, Everett only testified it was his "guess" that Bennett was going to use it to get Poole. Tr. 97. Using the hearsay from Mazingo was highly improper and should have been objected to by counsel.[5] Evidence concerning this weapon, where there was no direct evidence of its purpose, was highly prejudicial. The admission of this evidence, especially combined with the inadequate alibi defense and the irrelevant gang evidence, requires reversal.

D. Standard of Review

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

[5] It is interesting to note that when trial counsel attempted to cross-examine Mazingo concerning what was in Everett's statement, the trial judge sustained the State's hearsay objection. Tr. 158-59.

cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In *Madison v. State*, 923 So. 2d 252 (¶10) (Miss. App. 2006), this Court reiterated that *Strickland* is the standard, as the Mississippi Supreme Court

> applies the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under *Strickland*, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). This Court must examine the totality of the circumstances in determining whether counsel was effective. *Id.*

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether: "(a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed." *Madison*, 923 So.2d at ¶11, citing *Read v. State*, 430 So.2d 832, 841 (Miss. 1983).

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed. "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.App. 2006)(citing *Colenburg v. State*, 735 So. 2d 1099, 1102 (Miss. App. 1999).

Unlike this Court's recent decision in *Epps v. State*, No. 2007-KA-00139-COA (Miss.App. February 19, 2008), the prejudice to Bennett is clear. In *Epps*, this Court found counsel to be deficient in failing to properly support an insanity defense, but since no evidence of insanity was produced, there could be no prejudice established from the record. *Id.* at ¶21-27. Here, the prejudicial evidence of gang affiliation was presented multiple times. There was absolutely no way for appellant to receive a fair trial after the jury heard he was the head of the Insane Vice Lords.

The prejudice to Bennett from counsel's deficient performance is apparent from the record, and the trial judge had a duty to act. The court's failure to do so is reversible error. Counsel even showed an ignorance of Bennett's prior conviction, first telling the court he believed it was a drug conviction. When told it was actually accessory before the fact to aggravated assault, counsel's only response was, "Oh." Tr. 166. Counsel also paraded several mitigation witnesses forward at sentencing who did not know Bennett very well. One witness, Pastor James Dean Buckley, Sr., was a convicted felon. Tr. 235. He did not believe Bennett was guilty, but conceded if he was, Bennett should not be walking on the streets. Tr. 229-30. Counsel also called Everett's mother, Frankie Everett Lacey. Counsel asked her about any changes in Bennett since he was incarcerated. She testified, "He talks more of a better person. But he really wasn't that bad of a person when he was out, just the things that

he did wasn't legal or whatever, but he really wasn't a bad person in life as I know. Tr. 252-53. None of these witnesses could have possibly helped Bennett in his sentencing.

The combination of all these deficiencies leaves no doubt that Bennett was denied his Sixth Amendment Constitutional right to effective assistance of counsel.[6] In summary, the jury was not instructed on alibi, Bennett's sole theory of defense, based on counsel's admitted mistake. The jury heard repeated references not only to inadmissible gang affiliation, but that he was the alleged leader of the gang, having the gang's constitution in his residence. Finally, the jury also was told that he carried around an assault rifle, implying additional crimes, the least of which was aggravated assault on Williamson to intimidate him. None of these actions can reasonably be considered trial strategy, and clearly evidenced counsel's lack of preparedness for trial. Given the conflicting testimony and the questionable nature of the witnesses against him, there is a reasonable probability that but for counsel's performance, the result of this trial would have been different. *Colenburg*, 735 So.2d at ¶27. Under the totality of the circumstances, Bennett is clearly entitled to a new trial. *Hiter v. State*, 660 So. 2d 961, 965 (Miss. 1995).

Finally, if this Court finds the record does not affirmatively show ineffective assistance of counsel, appellant respectfully requests the issue be dismissed without prejudice to allow Bennett to supplement the record with additional evidence on post-conviction. See *Walton v. State*, No. 2006-KA-01065-COA (¶15) (Miss.App. November 13, 2007).

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[6] See also Miss. Const., Art. 3, Section 26.

CONCLUSION

Given the evidence presented in the trial below, Johnny Bennett is entitled to have his conviction for first degree arson reversed and remanded for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Johnny Bennett, Appellant

By: 
Leslie S. Lee

CERTIFICATE

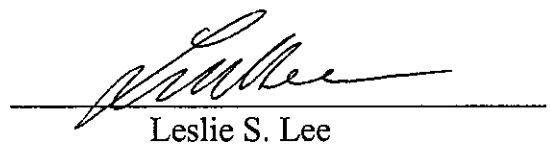
I, Leslie S. Lee, do hereby certify that I have this the 30th day of May, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

Honorable Lester F. Williamson, Jr.
Circuit Judge
P.O. Box 86
Meridian, MS 39302

Honorable E.J. (Bilbo) Mitchell
District Attorney
P. O. Box 5172
Meridian, MS 39302

Honorable Charlie Maris
Special Assistant Attorney General
P. O. Box 220
Jackson MS 39205

Mr. Johnnie Bennett, MDOC# 87694
South Mississippi Correctional Institution
P.O. Box 1419
Leakesville, MS 39451



Leslie S. Lee

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200