IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIE JOE ROBINSON — APPELLANT

VS. — NO. 2008-KA-0437-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Defendant, Willie Jo Robinson, appeals from the Circuit Court of Coahoma County, Mississippi wherein he was indicted for the crime of **BURGLARY OF A BUILDING**. (Judgment c.p.17) After a trial by jury, with the Honorable Kenneth L. Thomas presiding, the defendant was found **GUILTY** and sentenced to **SEVEN (7) YEARS** incarceration under the **SECTION 99-19-81 HABITUAL STATUTE**, in an institution under the supervision and control of the Mississippi Department of Corrections. (Judgment c.p.17) The sentence imposed in this cause shall run consecutively to any and all sentences previously imposed.

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF THE FACTS

At approximately midnight on October 11, 2007, four plain-clothes officers witnessed the defendant, Willie Jo Robinson, breaking and entering into a dwelling belonging to one Mrs. Olga Bridgeforth. (T. 24,69). The officers chased the suspect into the dwelling, and after receiving assistance from backup personnel, apprehended the defendant inside the dwelling shortly thereafter. (T. 57) After medical attention, the defendant was taken into police custody. (T. 63).

Defendant was indicted and convicted of the burglary of a building. Before trial, the prosecution was allowed to admit into evidence the defendant's record of prior conviction of grand larceny. This admission was for the purpose of establishing criminal intent on part of the defendant. The defense disputed the admission of the prior conviction, but the court ultimately allowed the evidence into trial.

After witnesses, cross-examination questioning, and jury instructions regarding the case, the prosecution and defense made their closing arguments. After jury deliberations, the defendant was found guilty of the charges brought against him. The defense is now seeking a reversal and remand of the case based on statements made by the prosecution during the closing arguments, and also the admission of prior convictions into evidence by the prosecution before trial.

SUMMARY OF THE ARGUMENT

ISSUE I.

There was no error by the trial court in not *sua sponte* ordering a mistrial based on statements made by the prosecution during closing arguments in relation to the appellant's Fifth Amendment rights.

ISSUE II.

There was no error by the trial court by admitting the appellant's prior conviction record in evidence based on the prosecution's request. There is no evidence of any abuse of discretion by the trial judge.

QUESTIONS PRESENTED

First, did the trial court err in failing to *sua sponte* order a mistrial where the prosecutor's comments during closing argument possibly violated the appellant's rights to remain silent and to not testify?

Second, did the trial court err in allowing the prosecution's request for the appellant's record of prior conviction into evidence?

BRIEF ANSWER

In our case, there was no error by the trial court in not ordering a mistrial regarding the prosecution's closing arguments. Although failure to testify may not be used against a party at trial, attorneys are given great latitude in making their closing arguments. Furthermore, the prosecution is allowed to comment on the defense counsel's failure to put on a successful defense. The prosecution in our case was not commenting on a lack of testimony by the appellant, but a lack of defense displayed by the appellant's counsel.

Secondly, there was no error by the trial court in admitting evidence of the appellant's prior convictions by request of the prosecution. Prior conviction records may be admitted for purposes such as proving intent, which is precisely what the prosecution was doing in our case. The court has the duty to determine whether or not the prior convictions establish a sufficient probative value to the case, and in our case the trial judge ruled that they certainly did. The defense must show that either the trial judge abused his discretion in admitting the evidence, or the appellant was unjustly prejudiced by the admission. There is no evidence of either of these occurring in our case.

DISCUSSION

A. There was no error made by the trial court in not granting a mistrial in relation to comments made by the prosecution during the closing arguments.

1) The prosecution used the language in question not as to comment on the failure of the appellant to testify, but as to comment on the failure of the appellant's counsel to present an adequate defense.

In our case, there was no reason for the trial judge to *sua sponte* grant a mistrial based on the prosecution's comments in question. There was not, as the defense is arguing, improper mention of the appellant's choice not to testify by the prosecution.

The Fifth Amendment of the United States Constitution states that no person may be compelled to take the witness stand against himself. Furthermore, the failure of the accused, in any case, to testify shall not operate to his prejudice or be commented on by counsel. *Jimpson v. State*, 532 So.2d 985 (Miss. 1988). This is a right and custom that are not in dispute, and should be upheld with the utmost care. Balanced against this important rule, however, is the rule that attorneys are given wide latitude in making their closing arguments. *Id.* The appellant is arguing that an error was made by the prosecution by mentioning his lack of testimony. What constitutes such an error, however, is to be determined from the facts and circumstances of each case. The question in our case is whether or not the comment of the prosecutor can reasonably be construed as a comment upon the failure of the defendant to take the stand. *Ladner v. State*, 584 So.2d 743 (Miss. 1991)

In our case, the prosecution made reference to the lack of a "statement" from the defense, while attempting to prove the intent of the defendant. (T. 120). However, the State is allowed to comment on the lack of any defense, and such comment will not be construed as a reference to a defendant's failure to testify by innuendo and insinuation. *Ronald Jones v. State*, 669 So.2d 1383 (Miss. 1995). Our case relates heavily to the situation presented in *Ladner* in the sense that the prosecution, during the closing arguments, went through each element of capital murder, emphasizing the successful proving of each. *Ladner v. State,* 584 So.2d 743 (Miss. 1991). In *Ladner*, not only was the prosecution found to have been well within proper discretion, but the word "testimony" was directly mentioned. *Id.* The court ruled in favor of the prosecution in *Ladner*, finding that the reference to the testimony was made precisely to show that the State had proven the five elements set forth in the instruction, rather than a comment on the failure of *Ladner* to testify. *Id.*

Our case falls directly within the scope of the *Ladner.* Our prosecutor was doing exactly the same thing as the prosecutor in *Ladner*, in the sense that he was laying out and reestablishing the elements of burglary of a building, and more specifically pointing out the element of intent. (T. 118-124). Mentioning the absence of a statement from the appellant was not to use the lack of testimony from the appellant against him, but to show that the defense had not successfully established

a defense to criminal intent.

2) Even an improper argument from the prosecution requires a significant prejudice toward the defendant for reversal to be warranted.

The second issue to look at in our case, if there was indeed an erroneous comment by the prosecution, is whether or not the appellant was unjustly prejudiced by the comment. In our case, we can conclude that the appellant was simply not prejudiced in any significant way.

The test to determine whether an improper argument by a prosecutor requires reversal is whether the natural and probable effect of the argument is to create an unjust prejudice against the accused as a result. The prosecutor in our case had no such intent, as can rightly be inferred by the context of the closing argument. *Davis v. State*, 530 So.2d 694 (Miss. 1988). The prosecutor was doing nothing more than attempting to prove a lack of defense from the appellant's counsel. (T. 118-124). As found in *Sanders v. State*, when the comments reasonably flow from the facts and evidence presented, even if there was an erroneous comment, it is harmless because there does not appear to be any resulting unjust prejudice against the appellant from the statements. *Sanders v. State*, 801 So.2d 694 (Miss. 2001). The statements in *Sanders*, like in our case, were no more than deductions and conclusions that could readily be made by simply observing the facts and evidence presented in the case, and when there is no prejudice, the court may find the error harmless. *Id.*

Furthermore, the trial judge is vested with discretion to determine whether a comment is so prejudicial that a mistrial be declared. *Lane v. State*, 841 So.2d 1163 (Miss. 2003). The judge is not required to grant a mistrial if there is not a showing of true prejudice against the appellant, and in this case the trial judge was correct in his conclusion. Also, there was absolutely no objection during the closing arguments when the statement was made. *Sanders* also suggests that an argument of the appellant's nature in our case is procedurally barred because the defense counsel failed to make a contemporaneous objection at trial. *Sanders v. State*, 801 So.2d 694 (Miss. 2001). Once again, the court in *Sanders* found this to be true, and rightfully ruled for the State. *Id.*

B) There was no error made by the trial court in allowing the appellant's record of prior conviction into evidence through the request of the prosecution.

1) The admittance of prior conviction records, if used to prove intent, are acceptable.

The appellant in our case now moves that the trial court erred in allowing his record of prior conviction into evidence before the commencement of the trial. (T. 2-11). According to the Mississippi Rules of Evidence, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Miss. R. Evid. 404. This is an indisputable and necessary rule to uphold in the interest of the accused. However, the Rule continues

on to say that it may be admissible for other purposes such as "proof of motive, opportunity, intent...or accident." *Id.* This sentence puts our case into proper context, for the prosecution made it very clear that proving the appellant's intent was the specific reason for admitting the prior conviction record. (T. 2)

In the case of *Cater v. State*, admitting evidence of the defendant's prior felony convictions for the limited purpose of showing intent was determined by the trial court, given the facts in that particular case, that intent was greatly an issue, therefore the admittance of prior conviction records was necessary. *Carter v. State*, 953 So.2d 224 (Miss. 2007). The court in our case simply did not abuse its discretion in allowing the evidence into trial. As in *Carter*, our case clearly illustrates that the appellant's intent was the key and premier issue in question, and that the appellant's character was not being attacked with the introduction of his prior conviction. Proving intent was paramount in gaining a conviction, and since there was indeed no statement from the appellant, the prior conviction record was even more necessary. The prior conviction record was admitted strictly to prove the intent element of burglary, and the prosecution made this clear to all parties involved.

2) Probative Value v. Prejudice Toward the Accused

Secondly, Mississippi Rule of Evidence 403 states that although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of "unfair prejudice. . .misleading the jury. . .or needless presentation of cumulative evidence." Miss.R. Evid 403. Once again, there is absolutely no argument with this rule or the purpose it serves for the benefit of the accused. However, the Rule does not say that the evidence "must" be excluded, but that it "may" be excluded. *Id.* Where a trial court determines that potentially prejudicial evidence possesses sufficient probative value, it is within the courts sound discretion whether or no to admit the evidence. *Jessie Jones v. State*, 904 So.2d 149 (Miss. 2005). Furthermore, since Rule 403 does not mandate exclusion, but merely provides that the evidence may be excluded, the court is granted the opportunity to handle the situation on an appropriate case-by-case basis. *Id.* In our case, the trial court rightly weighed the evidence, discussing the matter throughly with both the prosecution and the defense. (T. 2-11) The trial judge felt as though there was a sufficient amount of probative value to the prior conviction record, and that the reasoning for admitting the evidence was more than fair. Lastly, there is again no evidence of the court abusing its discretion in our case. The evidence was admitted strictly for the purpose of establishing intent, and was probatively necessary for proper trial.

CONCLUSION

In conclusion, the trial court did not err in failing to *sua sponte* grant a mistrial in favor of the appellant. There was no attack on the character of the appellant, nor was there an attack on the failure of the appellant to testify. The statements that the defense now objects to were merely used to establish an element of burglary. Attorneys are granted much latitude in closing arguments, and in this case the prosecution did not abuse the latitude he is rightfully granted. Furthermore, the attorney is allowed to comment on the failure of the defense counsel to establish a solid defense. The prosecutor did exactly that, and nothing more.

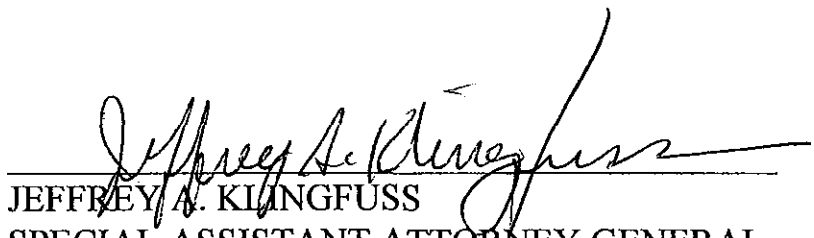
Also, there was no error by the trial court in allowing the prior conviction evidence into trial. Not only was the evidence being introduced solely for proving the appellant's intent, but the evidence also had much more probative value than prejudicial effect. The judge fairly weighed the necessity of the prior conviction evidence in our case, and was well within his discretion to allow it into trial.

The issues brought under review by the appellant have no merit. There is no evidence of any unjust action or abuse of discretion on the part of the trial judge. We

respectfully ask that both the jury's and judge's rulings and decisions be upheld as stated.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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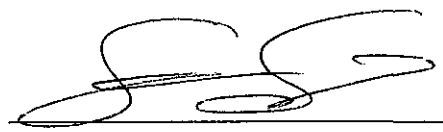

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CERTIFICATE OF SERVICE

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

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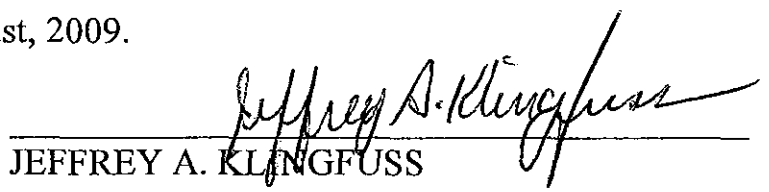
This the 4th day of August, 2009.



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