IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIE JOE ROBINSON — APPELLANT

V. — NO. 2008-KA-0437-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE 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. Willie Joe Robinson, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Kenneth L. Thomas, Circuit Court Judge

This the 18th day of June, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

ISSUE NO. : WHETHER THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE ORDER A MISTRIAL WHERE THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT MADE MULTIPLE REFERENCES TO APPELLANT'S EXERCISE OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT AND TO NOT TESTIFY.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S PRIOR CONVICTION.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgment of conviction for the crime of burglary of a building and a resultant sentence of seven (7) years as an habitual offender following a jury trial commenced on February 8, 2008, Honorable Kenneth L. Thomas, Circuit Judge, presiding. Willie Joe Robinson is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Willie Joe Robinson, ["Robinson"], was indicted for the crime of burglary of a building belonging to Olga Bridgeworth, as an habitual offender. The morning of trial the State brought on a Motion in Limine asking to be allowed to introduce a prior conviction for the crime of attempted larceny to show intent. The State argued that this prior conviction was admissible under M.R.E. 609 and *Carter v. State*, 953 So. 2d 224 (Miss. 2007) (T. 2) The defense argued that by admitting the prior convictions would be more prejudicial and force the defendant to take the stand to "dispute" the prior conviction, thereby forfeiting his Fifth Amendment right to not be compelled to be witness against himself. (T. 9-10)

The trial court ruled that "this matter falls within the ramification of both 6.09 and 4.03, and it certainly is...relevant to show intent..." (T. 10) The Court agreed the prior conviction was prejudicial but found the probative value outweighed the prejudice. (T. 10-11)

The opening statement by the prosecutor advised the jury the State intended to prove that four police officers saw Robinson break a window at 655 Grant Place and enter through that broken window. That one officer, Ricky Bridges, attempted to stop Robinson from crawling through that window. The police surrounded the house, entered, and found Robinson on the upper floor. (T. 15-17) Electing to give its opening thereafter, the defense agreed what the upcoming proof would show, with three notable exceptions. The defense said the proofs would show that no-one could say who broke the window, that Robinson was inebriated and that there was no intent to commit a felony. (T. 18-20)

Joseph Wyatt, ["Wyatt"], a Clarksdale police officer, began testimony for the State. (T. 21) He and three other officers were patrolling on October 10, 2007 when he saw a person entering a house via a window. He told the other officers, and one Ricky Bridges, ["Bridges"], attempted to

apprehend the man in the window. (T. 22-24) The officers called for backup and surrounded the house. After their backup arrived, the four officers entered the house through the same window, and began a search while calling out "police, come out wherever you are.." (T. 26) Robinson was found upstairs, bleeding. He was near a broken ceramic cat .

Robinson's defense began with an elicitation that the house was in a high crime area, with frequent break-ins. The officer never got close enough to smell alcohol on Robinson's breath, but upon objection by the State, was not allowed to answer further questions on observations concerning intoxication. The State argued that a police officer could not testify concerning intoxication as he was not an expert.(T. 35-36)

Wyatt observed Robinson enter through a raised, broken window. No pictures were taken of the scene. They found no burglary tools, nothing was missing, and no stereotypical burglar's bags were recovered. (T. 38-41)

Bridges was the next officer to testify. The first thing he saw were two legs sticking out of the window of the house on Grant place. He attempted to grab the person entering the house. After backup arrived at the house, he was among the officers entering the house. When they found Robinson, Bridges used force to get him on the floor. Robinson was taken out of the same window.

The State offered the sentencing judgement from a previous conviction, a "proffer [of] evidence" made in the presence of the jury. (T. 51-52; C.P. Ex. S-1) The sentencing judgment was from a plea of guilty to the crime of attempted grand larceny and sentence of one year, followed by two years of post release supervision. Objections were made based on the prior arguments. The State again moved for admission premised on M. R. E. "609 as probative towards the defendant's intent to commit larceny." The trial court found "Rule 609...applicable" (T. 52) and admitted the document "under Rule 4.03." (T. 52) An objection to authentication was addressed by Bridges, who

ventured that it was a sentencing judgement against defendant Robinson.(T. 53-54)

Although Robinson had not hit anyone, Bridges did hit Robinson and "tussled" because Robinson was not responding to "loud verbal commands." (T. 57-58) Bridges did not detect alcohol on Robinson's breath. Whatever had been used to break the window had not been found nor recovered.

Owner of the property, Olga Bridgeforth, told the jury that no one had been occupying the house at that time. She had been called at the time of the incident. When she arrived she observed the window broken (she was not asked when she had last seen the window intact) and related that the house was "ram shacked." (T. 71) Though she found things in disarray, she couldn't pinpoint anything missing. (T. 74-75)

Thereupon, the State rested. The defense motion for a directed verdict was denied and Robinson was advised under *Culberson.* The defense rested and the State finally rested.

SUMMARY OF THE ARGUMENT

The State's closing argument impermissibly made a direct and incurable reference to defendant's exercise of his Fifth Amendment right to not make a statement to police and further his exercise of his right not testify.

The trial court erred in admitting evidence, including a copy of the sentencing judgment, of Robinson's prior conviction to prove Robinson's character. This error was amplified during closing argument of the State, where the State argued that the prior conviction shows that he was acting in conformity with the prior crimes, that his character was that of a "thief."

ARGUMENT

ISSUE NO. : WHETHER THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE ORDER A MISTRIAL WHERE THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT MADE MULTIPLE REFERENCES TO APPELLANT'S EXERCISE OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT AND TO NOT TESTIFY.

For the framers of the Constitution of the United States of America, as well as for The Constitution of The State of Mississippi, no right of the citizenry enumerated was held more inviolable than the right to remain silent, to not be compelled to be a witness against ones-self. Mississippi has historically forbidden the prosecutor from commenting on a defendant's decision to exercise this fundamental right. And more recently, in *Dora v. State*, 986 So2d 917 (Miss. 2008) clarified the constitutional prohibition to bar exactly the kind of comments found in this case. *Dora, Id., at* 923, distinguished fair prosecutor commentary on the lack of a defense from the use of a defendant's denial to imply an admission of guilt. "Taken in context with Dora's theory of the case, this Court finds that the prosecutor's statement was a permissible comment on the absence of evidence to support Dora's defense. The prosecutor's statement neither referred to Dora's failure to testify, nor by masked implication suggested Dora's silence was evidence of guilt. See id. "Such a comment was not addressing, or even alluding to, the defendant's failure to testify.... "

The comment herein complained of can only be fairly interpreted as a direct argument that Robinson did not take the stand to deny he intended to commit a burglary and thereby he concedes his guilt. The State's closing argument addressed the "four elements" of the crime of burglary, arguing the defense in its opening statement had conceded these points. The fourth element, that of having an intent to commit a crime once within the building was argued as follows:

> And finally, No. 4, that the defendant, Willie Joe Robinson, had the intent to steal once inside the building.

> Well, how do you prove intent? How do we do that? How do you prove what's inside of someone's head? You know **if you don't have a statement from them**, you might say that's difficult. (T.120)

This argument, viewed in its context is simply, the defense has admitted being there by not contesting it, breaking and entering by not contesting it and, as Robinson did not take the stand or make any other statement to explain or to deny it, the defense thereby confesses that Robinson had the requisite intent to commit the crime of larceny. This one argument tells the jury that where a defendant neither makes a post arrest statement, nor testifies, that such silence equates to an inference of guilt. As such, it is precisely the kind of comment enjoined by the U.S. Supreme Court:

> We... hold that the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233 (U.S.Cal. 1965)

In the present matter, two of the four officers present testified. Their testimony covered not only their actions and what they observed but accounted for the other two officers. In the testimony of both officers, an account was given of Robinson entering a house through a broken window and then being apprehended within that structure. The only other person present from the inception of this cause was the defendant. Their testimony created an inference of the crime of burglary being committed, in fact Officer Bridges told the jury that a felony was being committed. (T. 48-49) However, Robinson's intentions, once in the house, were an essential element of the crime. His silence should not be used as proof of guilt or intent. He is not required to have mad a "statement" of his intent.

> As the record showed that all of the eyewitnesses, except the defendant, had testified, this comment upon a failure to deny the facts of the homicide as testified to by the witnesses necessarily directed the attention of the jury to the fact that the defendant had not availed himself of the personal privilege of testifying in his own behalf; the impression irresistibly conveyed by such statement being that a failure to deny should be construed as a silent admission. The very thing which the law is intended to guard against. As long as the law stands as now written, it prohibits any comment upon the failure of a defendant to testify. And this is true without regard to the character of the comment, or the motive or intent with which it is made.

Smith v. State, 40 So. 229, 230 (Miss. 1906)

The complained of language is not an example of permissible argument on the failure to put on a defense, as explained in *Dora, Id.* The word used here by the State is "statement" and only Robinson was in a position to make such a statement. Only he could take the stand. Only he could have given a post arrest statement.

It is argued here that once this improper comment occurred, it should have resulted in the court, *sua sponte*, declaring a mistrial. Comment on the exercise by a defendant of his right to remain silent and to not testify is "incurable." *Davis v. State*, 970 So. 2d 164,171 (Miss. App. 2006) Whether an objection is interposed or not is immaterial. *Fears v. State*, 779 So. 2d 1125, 1129 (Miss. 2001) It is by definition, plain error. It involves a fundamental right. *Davis v. State*, 891So. 2d 256, 259 (Miss. App. 2004)

Accordingly, Robinson is entitled to a reversal of the judgement of conviction in the lower court.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S PRIOR CONVICTION.

Evidence of Robinson's prior conviction for attempted grand larceny was the sole non-speculative evidence of the requisite intent to commit a crime after entering a premises, the critical

element that distinguishes burglary from simple trespass. As evidence of another crime it should never be admitted as character evidence, that is , to show that a defendant acted in conformity with his prior criminal behavior. Yet, as evidenced by the State's closing argument, that is precisely what happened here. While on one hand the state tell the jury the jury they cannot use his prior conviction as proof of guilt, only intent, it then refutes this subtle distinction entirely when it argues:

> It allows you to come to a decision that, yeah, he broke in there with the intent to steal. **He's stolen before. He is in fact a thief.** (T. 121)

The importance of this abuse of the use of a prior conviction under the exceptions enumerated under Miss. R. Evid. 404 is that it illuminates the prejudice and harm to Robinson's trial.

Two errors were committed in the admission of this evidence; one, that it was allowed originally under the auspices of Miss. R. Evid. 609 (T. 2-10), which allows evidence of other crimes to be introduced to impeach a defendant who has testified. Counsel for defendant pointed out that the only way to refute such evidence would be for Robinson to take the stand. This begs the question, how can such evidence be admissible as impeachment where defendant does not take the stand?

The trial court ruled that the probative value outweighed the prejudicial nature of the evidence of a prior conviction and that it was relevant to show intent. Under the law, as was submitted to the trial judge, *Carter v. State*, 953 So. 2d 224, 230-231, (Miss. 2007), evidence of another crime used to show an intent to steal is admissible, but *Carter, Id.,* suggests, the scope must be limited to intent. Instead, the evidence became classic evidence of character; once a thief, always a thief.

Another complication is the document itself. Rather than just enter the fact that Robinson had a prior conviction for attempted larceny, the judgement of that plea of guilty and conviction was

entered. (T. 51-53, C.P. Ex. S-1, R.E. 16-18) The problem with this document is that it contained evidence of further unspecified crimes committed by Robinson. Specifically, the judgement imposed a sentence to "run consecutive to any and all sentences previously imposed" and it placed the defendant not on probation, but on post release supervision, a form of probation reserved for convicted felons only.

Thus we have a pretrial granting admission of evidence of Robinson's prior conviction, that was offered under an inapplicable (at the time) authority, specifically, under Miss. R. Evid 609, governing impeachment. Then, at trial, the State offered into evidence the judgment, which contained evidence of additional crimes. Such evidence could have been handled via stipulation. In the spirit of and as suggested by the decision in *Sawyer v. State*, 2 So. 3d 655, 661 (Miss. App. 2008) (Cert. Denied Feb 26, 2009) given the preference for stipulations of prior crimes as set forth in *Old Chief v. United States*, 519 U.S. 172 (1997) , it is urged here that the trial court, of its own motion, should have refused the sentencing judgement into evidence and required the parties to formulate a stipulation pursuant to *Old Chief, Id.* Particularly in light of the danger of the jury not being able to put aside the notion of "once a thief, always a thief."

Appellant therefore respectfully urges this Court to find that the Sentencing Judgment allowed into evidence should be deemed to constitute error and that therefore, this cause should be reversed and remanded.

CONCLUSION

Upon the foregoing argument it is respectfully submitted that the judgement of the lower court be reversed and rendered, or in the alternative, that this cause be remanded for a new trial thereon.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. [redacted]

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Willie Joe Robinson, 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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This the 18th day of June, 2009.

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