IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDDIE LAMONT HENDERSON — APPELLANT

VS. — NO. 2008-KA-0551

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDDIE LAMONT HENDERSON **APPELLANT**

vs. **CAUSE No. 2008-KA-00551-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Panola County, Second Judicial District, in which the Appellant was convicted and sentenced for his felony of **BURGLARY OF A DWELLING.**

STATEMENT OF FACTS

The Appellant brings no challenge to the sufficiency or the weight of the evidence of his guilt. It is thus unnecessary to set forth that evidence in detail. It is sufficient to note that the evidence clearly showed that the Appellant, on 1 January 2007, broke and entered into a dwelling occupied by a Linda Jefferson. The Appellant knocked on Miss Jefferson's door. She opened the door slightly and the Appellant forced his way inside, grabbing Jefferson and telling her that "We ain't going nowhere". After a struggle, Miss Jefferson managed to escape from the

Appellant and sought assistance from a neighbor. Miss Jefferson, though she did not at the time know the Appellant's name, did recognize his face. A policeman was summoned; upon his arrival he found that the Appellant was still in Miss Jefferson's flat. The Appellant then attempted his own escape but was apprehended in the attempt. (R. Vol. 2, pp. 11 - 19).

The policeman testified that he entered Miss Jefferson's apartment, saw the Appellant within it, and saw the Appellant placing a candle into his coat pocket. The Appellant was told to put the candle down and to step outside. The Appellant put the candle down and went to the door, but then he attempted to run. He was apprehended and arrested. The Appellant was very drunk. (R. Vol. 2, pp. 31 - 36).

At trial, the Appellant testified that he knew Miss Jefferson prior to 1 January 2007, and that he had engaged in sexual relations with her. He said that, when he came to her apartment on the morning of 1 January 2007, she opened the door, then walked off, and the next thing he knew he was being arrested. (R. Vol. 2, pp. 47 - 51).

STATEMENT OF ISSUES

DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S OBJECTION DURING THE STATE'S CROSS-EXAMINATION OF HIM AS TO WHY THE APPELLANT DID NOT TELL LAW ENFORCEMENT WHY HE WAS AT THE VICTIM'S APARTMENT AT OR AFTER HIS ARREST

SUMMARY OF ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S OBJECTION TO THE STATE'S CROSS - EXAMINATION OF HIM ON THE POINT AS WHY THE APPELLANT DID NOT TELL THE POLICEMAN AT THE TIME OF ARREST HIS REASON FOR BEING AT MISS JEFFERSON'S APARTMENT

ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S OBJECTION TO THE STATE'S CROSS - EXAMINATION OF HIM ON THE POINT AS WHY THE APPELLANT DID NOT TELL THE POLICEMAN AT THE TIME OF ARREST HIS REASON FOR BEING AT MISS JEFFERSON'S APARTMENT

In the Assignment of Error presented to this Court, the Appellant contends that the trial court erred when it permitted the prosecutor to cross - examine the Appellant as to why he did not tell the police officer of the reason he testified to at trial for his presence at the victim's apartment. It is claimed that this questioning violated the Appellant's privilege against self - incrimination.

The police officer testified that, when he first encountered the Appellant, while the Appellant was inside the victim's apartment, the Appellant just stood there and did not say anything. The Appellant was not under arrest or in custody at that time. (R. Vol. 2, pg. 35). The Appellant was placed in custody only after he was apprehended after having run away from the officer. (R. Vol. 2, pg. 36)

The officer did later testify that the Appellant did not tell him that he had permission to be in the apartment or that he was in a relationship with the victim, though it is unclear whether the officer was referring to the time prior to or subsequent to arrest. (R. Vol. 2, pg. 41). In any event, there was no objection by the Appellant to this testimony.

The Appellant testified. He stated that he had met the victim some two and a half years prior to trial. He claimed that he socialized with her and, on one occasion, she let him dry himself off when he was soaking wet at her apartment. He claimed that he talked to her all of the time and that on one occasion he had sexual relations with her.

On 1 January 2007, at about half past five in the morning, he said he showed up at her

apartment. She opened the door and spoke to him. Then she walked off, leaving him at the door, and the next thing he knew he was being arrested. He said he asked the arresting officer, "What did I do?". (R. Vol. 2, pp. 48 - 51).

On cross - examination, relevant to the issue here, the prosecutor went over the Appellant's story of how well - acquainted he supposedly was with the victim. (R. Vol. 2, pp. 51 - 56). He then asked the Appellant why he did not explain to the police why he was at the victim's apartment, if he had such a perfectly good reason for being there. The Appellant objected to this question, asserting that he did not have to explain why he did not give a statement to the police, and he moved for a mistrial. The objection was overruled. (R. Vol. 2, pp. 57 - 58).

It is certainly true that a person in custody has the right to refuse to make a statement to law enforcement. It is certainly true that an accused may not be compelled to testify at trial. However, it is equally true that, where an accused elects to testify in his defense, his election to do so operates as a waiver of the privilege against self - incrimination. Where an accused testifies, he is subject to a cross- examination as broad as any other witness might be subject to. Once the cloak of the privilege against self - incrimination is set aside, it may not be reclaimed, unless, of course, the answers might suggest that the accused be guilty of some other, separate and independent crime. *Hentz v. State*, 496 So.2d 668 (Miss. 1986); *Autry v. State*, 230 Miss. 421, 92 So.2d 856 (1957); *See also Lenard v. State*, 828 So.2d 232, 235 (Miss. Ct. App. 2002)(Where an accused elects to testify at his trial, he places his credibility in issue, and the State may test it through an examination of his prior words and acts)

In the case at bar, the question put by the prosecutor was clearly an attempt call into question the veracity of the Appellant's testimony to the effect that he was a good acquaintance

of the victim. This was perfectly legitimate. While it may be true that the Appellant had no duty to explain anything to the police officer, this point misses the point. The Appellant was on cross - examination, had waived his privilege against self - incrimination, and, regardless of whether at the time or just before his arrest he was possessed of the privilege against self - incrimination, he had no such right after electing to testify. An accused who chooses to testify at his trial does not have a privilege to choose what questions relevant to the issues in the case he will and will not answer on cross - examination.

The Appellant cites a "Lenard v. State" in support of his contention. Yet, nowhere does the Appellant provide a proper citation for this alleged decision. (R. Vol. 2, pg. 82; Brief for the Appellant at iii and 8. We will assume that his obscure reference is to *Lenard v. State*, 828 So.2d 232 (Miss. Ct. App. 2002), which we have cited above.

In *Lenard*, the arresting officer testified that that defendant, other than indicating where his gun was located, made no other statements. Because the officer was pointing his gun at that defendant at the time, the Court found that that defendant was under arrest, and that for that reason it was improper for the State to question the officer about the fact that that defendant made no other statements. However, the error in admitting this testimony was found to be harmless error because the defendant, when he chose to testify, placed his credibility in issue. Consequently, the State properly tested his credibility by questioning whether his prior words and actions were consistent with his testimony. *Lenard*, at 235 - 236.

Here, first of all, the officer's testimony about the Appellant's silence was put into evidence without objection by the defense. (R. Vol. 2, pg. 41). Because the defense did not object, no issue can be made of the matter here. The significance of this is that it was already in evidence that the Appellant had made no statement at the time the prosecutor cross - examined

the Appellant. Since it was in evidence, the prosecution properly questioned the Appellant about the fact that he did not tell his trial story to the officer.

Secondly, unlike the facts in *Lenard*, the Appellant was not under arrest when the officer first encountered the Appellant. When the officer first saw the Appellant, the Appellant was standing in the apartment and said nothing. The arrest occurred after the Appellant tried to run away. In *Lenard*, by way of contrast, the defendant there was held at the point of a gun. It was while he was in custody that the officer said he made no statement.

Nonetheless, even if this Court were to find error in the cross - examination complained of, as in *Lenard* any such error would be harmless. The Appellant testified. By doing so, he waived his privilege against self - incrimination. Again, an accused cannot have it both ways: He may not elect to testify and then invoke the privilege should he find himself confronted with uncomfortable questions in consequence of his testimony.

The Appellant further relies upon *Sacus v. State*, 956 So.2d 329 (Miss. Ct. App. 2007). In that case, the accused refused to give or sign a written statement, though he gave a voluntary oral statement. It was argued that to comment upon the accused's refusal to give a written or recorded statement was no different than commenting on his invocation of his privilege against self - incrimination. The issue went against the accused in that case, but what relevance the issue has here is obscure at best. There was no oral statement, no refusal to give a written or recorded statement. Also, unlike *Sacus*, the Appellant never invoked his privilege against self - incrimination. In the case at bar, the Appellant simply did not say anything to the officer as to his reason for being in the victim's apartment. There was no comment by the prosecutor in the case at bar concerning an invocation of that privilege.

The Appellant also cites *Bogard v. State*, 624 So.2d 1313 (Miss. 1993). That decision,

however, concerns the propriety of the use of a voluntary statement for impeachment purposes, allegedly made after that defendant invoked his privilege against self - incrimination. There was no statement made by the Appellant before or after his arrest, and there was no invocation of the privilege.

In the case at bar, it was established during the State's case - in - chief that the Appellant made no statement just before or after his arrest, without objection That being so, the State properly questioned the Appellant on cross - examination about the fact that he did not tell the police officer what he told the jury as it concerned his reason for being at the victim's apartment. In any event, because the Appellant elected to testify, he waived his privilege against self - incrimination. The prosecutor's questions about his silence at or before his arrest were perfectly proper questions. Consequently, the trial court did not err in overruling the Appellant's objection to the prosecutor's questions on the point, and did not err in refusing to declare a mistrial.

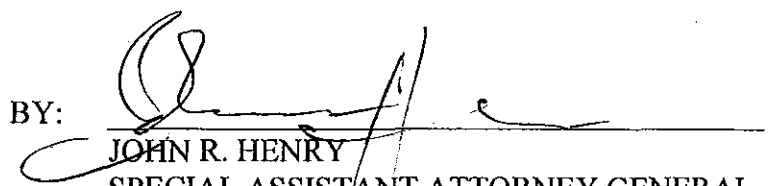
The Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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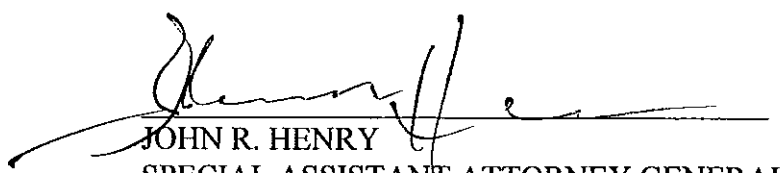
This the 10th day of October, 2008.



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