

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MELVIN ALESICH

APPELLANT

V.

NO. 2008-KA-00875

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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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.

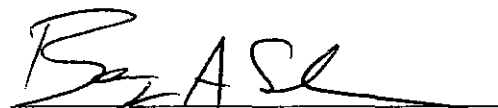
1. State of Mississippi
2. Melvin Alesich, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Stephen B. Simpson, Circuit Court Judge

This the 19th day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MELVIN ALESICH

APPELLANT

V.

NO. 2008-KA-00875-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO OFFER JURY INSTRUCTION S-1, EFFECTIVELY ALTERING THE INDICTMENT

THE TRIAL COURT ERRED IN DENYING ALESICH'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, Mississippi, and a judgment of conviction of Burglary. Melvin Alesich was sentenced to twenty-five (25) years as a habitual offender with the custody of the Department of Corrections, following a jury

trial on May 7, 2008, Honorable John H. Whitfield, presiding. Alesich is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to trial testimony of Eva Stephens, Stephens claimed that Melvin Alesich entered her home through her bedroom window at approximately 4:00 a.m. on or about August 10, 1996. Tr. 74. Stephens testified that she met Alesich at the Wet Willies water slide in Gulfport, Mississippi, and gave him her phone number. *Id.* The first contact she had with Alesich, after their initial meeting, was when she invited him over to one of her girlfriend's homes. After spending some time there, Alesich took Stephens back to her house. Tr. 71. After speaking with Alesich on the phone, Stephens met with Alesich a second time, inviting him to a cook out. She stated she was having a barbeque with her neighbors and asked Alesich to attend. Alesich accepted the invitation and spent the evening with Stephens talking. Tr. 72. She testified that the third time she came into contact with Alesich was when he showed up to her home unannounced. Stephens testified she was preparing to go to her girlfriend's house on this occasion as well. She says she invited Alesich to join her. She says they stayed at her girlfriend's home for a while before returning to her home. *Id.* At this time she testified that she told Alesich she was not interested in seeing him anymore based on the things he had shared with her from his past. *Id.* Stephens stated that was the last time she spoke with Alesich and that he said he was okay with her decision. *Id.*

inside and outside the home, and from a chair found outside Stephens bedroom window, but was unable to do so. Tr. 97, 101.

Officer Lynette Woodard, another patrolman with the Gulfport Police Department, received a despatch giving the name of the Appellant and a description of his vehicle. She testified that she spotted a truck fitting that description and ran the tag. Tr. 106. When the tag came back, it was registered to the name Melvin Alesich. Tr. 107. She says she spotted the truck parked on 41st Avenue just north of 8th Street. *Id.* Although no one was in the truck, Officer Woodard says the keys were still in the ignition. Officer Woodard removed the keys and began walking south down the block. Tr. 114. She says it was at this point she heard a noise and then saw a man coming from behind a house walking towards his truck. Tr. 108. She testified that when she asked the man his name he said "Melvin Alesich". According to Officer Woodard's testimony, as she was handcuffing Alesich, he stated that he was "just trying to get Miss Eve's attention." Tr. 110. At this point Officer Woodard put the Appellant in the back of her patrol car and took him to the victim's house. When they arrived to Stephen's house, she identified Alesich as the man who had come through her window. *Id.*

When Detective Claud Guinn with the Gulfport Police Department took the stand, he testified that he arrived to the scene and spoke with Stephens. He then says he met Officer Parrish at the back of the house to observe the entry and exit point. He says around this time he received a call that Alesich had been located. Tr. 118. Detective Guinn explained he went to the station to speak with Alesich. According to Detective Guinn, Alesich did not want to

make a statement so after he was processed, they put him in the Adult Detention Facility. *Id.* Detective Guinn also testified that when he observed Stephens, her left eye was bruised and was swelling. He says he took pictures. *Id.* It was Detective Guinn's testimony that no fingerprints or footprints were lifted from the house, nothing from the house was stolen, and there was no indication any crime was committed inside the house. Tr. 125.

On May 5, 1997, the jury in this case found Melvin Alesich guilty of burglary of a dwelling. As a result, Alesich was sentenced as a habitual offender to 25 years in the custody of the Mississippi Department of Corrections without the possibility of parole or early release. Tr. 171.

SUMMARY OF THE ARGUMENT

The Appellant, Melvin Alesich submits that jury instruction S-1 was an indirect amendment to the indictment. The amendment at issue was substantive in nature, materially changed an element of the original offense charged, materially altered the defense to the indictment and was reversible error as it circumvented the authority of the grand jury.

Alesich, is entitled to a reversal of his case and a new trial. The evidence presented did not warrant a verdict of guilty. No scientific or physical evidence was presented at trial linking Alesich to the alleged burglary on the night in question. The only evidence identifying Alesich was from the victim Stephens. The verdict was against the overwhelming weight of the evidence and Alesich is entitled to a new trial.

ARGUMENT

ISSUE NO. 1

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO OFFER JURY INSTRUCTION S-1, EFFECTIVELY ALTERING THE INDICTMENT

In reviewing a claim of error in whether the indictment is defective is a question of law, and the standard of review for a question of law is a de novo standard. *Spears v. State*, 942 So.2d 772, 773 (Miss. 2006). “The rule concerning indictments is that they cannot be amended to change the nature of the charge, except by the grand jury.” *Jones v. State*, 798 So.2d 1241, 1250 (Miss. 2001), *Miller v. State*, 740 So.2d 858, 862 (Miss. 1999) (citing *Greenlee v. State*, 725 So.2d 816, 819 (Miss. 1998)). “Any amendment not approved by the grand jury must be of form only and must not affect the substance of the charge pending.” *Jones*, 798 So.2d at 1250, *Rhymes v. State*, 638 So.2d 1270, 1275 (Miss. 1994). “[A] change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant’s case.” *Id* (quoting *Shelby v. State*, 246 So.2d 543, 545 (Miss. 1971)).

The indictment stated that “on or about August 10, 1996, did unlawfully, wilfully, feloniously and burglariously break and enter the dwelling house of Eva Stephens, located at 4113 8th Street, Gulfport, Mississippi, with the intent to steal personal property therein.” C.P. 7, R.E. 13 Jury instruction S-1, which was objected to by trial counsel, stated that “the Defendant, Melvin Alesich intended once inside the dwelling to commit some crime therein.”

Tr. 137 C.P. 35 R.E. 17. Alesich originally had to prove that he did not commit a burglary because he had no intent to steal any personal property. However at trial, Alesich had to change his defensive strategy because the state changed the wording of the indictment in the jury instructions to commit some crime.

By allowing jury instruction S-1 to be given, the indictment was indirectly amended. By amending the indictment, Alesich was not allowed to defend himself against the charges that were charged in the indictment. In *Quick v. State*, 569 So.2d 1197 (Miss.1990), the Supreme Court held that “the state can prosecute only on the indictment returned by the grand jury and . . . the court has no authority to modify or amend the indictment in any material respect.” *Rushing v. State*, 753 So.2d 1136, 1145 (Miss. 2000).

Also, “[u]nder the holding of *Quick*, the trial court may not directly, or indirectly amend the indictment to alter the substance of the charges against the defendant. By giving jury instruction C-7, the trial court indirectly amended the indictment, by dropping the serious bodily injury element of [section] 97-3-7(2)(a), and substituting the deadly weapon element of [section] 97-3-7(2)(b).” *Rushing*, 753 So.2d at 1146; *Quick*, 569 So.2d at 1199.

In order to determine whether an amendment is one of form or of substance, and whether a party was prejudiced by the amendment, the court must determine:

[W]hether an accused is prejudiced by the amendment of an indictment or information has been said to be whether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made and whether or not any evidence [the] accused might have would be equally applicable to the indictment or information in the one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance.

Medina v. State, 688 So.2d 727, 730 (Miss.1996) (quoting *Griffin v. State*, 540 So.2d 17, 21 (Miss.1989) (quoting *Reed v. State*, 506 So.2d 277, 279 (Miss.1987))); Also see *Spears*, 942 So.2d at 775. The purpose of this rule is to protect the rights of the defendant by preventing unfair surprise after he has diligently prepared his defense strategy. See URCCC 7.09. The issue here is not the sufficiency of the indictment, but whether amending the indictment compromised the defendant's rights by prejudicing his defense. "Due Process requires the State to prove each element of the offense charged in the indictment beyond a reasonable doubt." *Hennington v. State*, 702 So.2d 403, 408 (Miss.1997).

Alesich submits that jury instruction S-1 was an indirect amendment to the indictment. The amendment at issue was substantive in nature, materially changed an element of the original offense charged, materially altered the defense to the indictment and was reversible error as it circumvented the authority of the grand jury.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING ALESICH'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C. P. 48, R.E. 18 The trial judge denied this motion. C. P. 61, R.E. 22

In *Bush v. State*, the Mississippi Supreme Court set forth the standard of review as follows:

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, “unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.” *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982). Rather, as the “thirteenth juror,” the court simply disagrees with the jury’s resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Alesich is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. Only the testimony of Stephens would suggest that Alesich was inside the house. Tr. 75. The evidence presented to the court showed that the alleged assailant did not take any money or property from Stephens. Tr. 125. No evidence was presented that Alesich had any intent to commit a crime if in fact he was inside the house. Tr. 125.

In addition to the fact that the assailant did not receive any money, no physical or scientific evidence was presented at trial to show that Alesich was in the house during this alleged burglary. Tr. 97, 101. Officer Parrish stated that he attempted to lift fingerprints

from inside and outside of the home. Tr. 101. No fingerprints of Alesich were found from either inside or outside of the window, nor from a chair found outside of the window. *Id.*

In viewing State's Exhibits S-1 thru S-5, no person could fit through the small opening of the window screen. Exhibits S-1-5. Stephens stated that her screens were nailed on the window. Tr. 82. The screens appear to be bent, but the size of the opening appears to be very small. Exhibits S-1-5. Stephens testified that she did not go outside and straighten the window screen that night the pictures were taken. Tr. 82, 83. She also stated that her children did not go outside and straighten the window screen either. Tr. 83. If the window screen was not straighten, then Alesich could not have fit through the screen and went inside the house.

It would be an injustice for this conviction to stand in that no reasonable jury could convict Alesich based on the testimony of the witnesses, the identification, and the lack of any other type of physical evidence implicating Alesich.

The verdict was against the overwhelming weight of the evidence. Alesich therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State*, 883 So.2d 86 (Miss. 2004).

CONCLUSION

Melvin Alesich submits that jury instruction S-1 was an indirect amendment to the indictment. The amendment at issue was substantive in nature, materially changed an

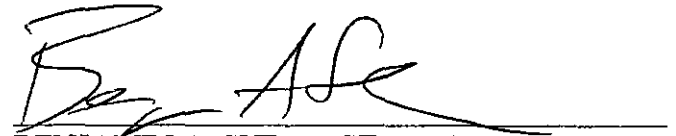
element of the original offense charged, materially altered the defense to the indictment and was reversible error as it circumvented the authority of the grand jury.

The verdict was also against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,

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BY:


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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Melvin Alesich, 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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