IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GEORGE LEE BUTLER — APPELLANT

VS. — NO. 2008-KA-0883-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Tunica County indicted defendant, George Lee Butler for Burglary of a Dwelling as an Habitual Offender in violation of *Miss. Code Ann.* §§ 97-17-23 & 99-19-81. (Indictment, cp.4-5). After a trial by jury, Judge Charles E. Webster, presiding, the jury found defendant guilty. (C.p.44). During a separate sentencing hearing defendant was found to be an habitual offender. Consequently defendant received the maximum sentence of 25 years in the custody of the Mississippi Department of Corrections without benefit suspension, reduction, probation or parole eligibility. After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

COUNSEL FOR DEFENDANT HAS PROVIDED AN ACCURATE AND CAREFULLY CITED STATEMENT OF THE FACTS SUFFICIENT TO DECIDE THE ISSUE ON APPEAL.

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT DID NOT ERROR CONDUCTING A PETERSON HEARING AS TO PRIOR FELONY CONVICTIONS. AND ANY EVIDENCE OF PRIOR BAD ACTS WAS NOT PREJUDICIAL.

Defense counsel mentioned the multiple and varied convictions which defendant had. The State, legitimately explored the type and scope and frequency to impeach defendant's credibility. This was permissible and not error. Further mention of a previous attempted burglary of the same house was not error nor prejudicial to the point of denying defendant a fair trial.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERROR CONDUCTING A PETERSON HEARING AS TO PRIOR FELONY CONVICTIONS. AND ANY EVIDENCE OF PRIOR BAD ACTS WAS NOT PREJUDICIAL.

In this claim of error counsel for defendant alleges to errors of similar ilk. First that the trial court erred in failing to conduct a proper balancing or *"Peterson Hearing"* before the introduction of his prior convictions.

As appellate counsel so candidly and correctly pointed out this issue is procedurally barred for lack of contemporaneous objection. *Ratliff v. State*, 906 So.2d 133, 136 (¶7)(Miss.App. 2004).

Without waiving the procedural bar to review the State would argue this claim is without merit in fact and law.

First, it is the position of the State the rationale of *Peterson v. State*, 518 So.2d 632 (Miss. 1987) is not even applicable in this case. *Peterson* is limited to when the State seeks – on cross-examination – to 'impeach' the testimony of the defendant with prior convictions. *Sub judice* it was trial counsel for defendant who first broached the subject of prior convictions. Presumably as part of trial strategy (since one of the convictions was admissible without any balancing test) defense counsel sought to get the prior out in the open and before the jury. In fact immediately after identifying himself defense counsel brought the subject up immediately. (Tr.101). In fact much

of the direct examination was to create the impression that he was an 'honest' crook. He had lots of convictions but if he did the crime, he'd admit it and do the time. The problem is, -- he just can't do the 25 for this burglary. (Tr.104).

The law on impeach with priors, convoluted though its history be, has settled on may points. One applicable to this case is regarding the use of priors when brought up or mentioned in direct examination.

> ¶ 16. "[W]here an accused, on direct examination, seeks to exculpate himself, such testimony is subject to normal impeachment via cross-examination, and this is so though it would bring out that the accused may have committed another crime." Stewart v. State, 596 So.2d 851, 853 (Miss.1992). **It is well established that if a defendant opens the door to the admission of otherwise inadmissible evidence, the State then may proceed to question further into the matter**. Crenshaw v. State, 520 So.2d 131, 133 (Miss.1988); Washington v. State, 726 So.2d 209, 216(¶ 34) (Miss.Ct.App.1998). But, "[t]he impeachment evidence is admissible only for the purpose of impeaching credibility and may not be used for the purpose of establishing its truth." Bush v. State, 895 So.2d 836, 848(¶ 31) (Miss.2005) (citing Johnson v. State, 666 So.2d 499, 503 (Miss.1995)). "The State is further limited in that its 'impeachment privilege may not exceed the invitation extended.' " Bush, 895 So.2d at 848(¶ 31) (quoting Stewart, 596 So.2d at 853). However, "if a defendant opens the door to line of testimony, ordinarily he may not complain about the prosecutor's decision to accept the benevolent invitation to cross the threshold." Kolberg v. State, 829 So.2d 29, 56(¶ 56) (Miss.2002) (citing Randall v. State, 806 So.2d 185, 195 (Miss.2001)).
>
> *Moss v. State,* 977 So.2d 1201, 1210 (Miss.App. 2007).

So, in the manner in which these prior were brought out on direct and the State is permitted to proceed further into the matter there was no need for a *Peterson*

hearing.

If this issue were not procedurally barred it would also be without merit as the trial court did not err. No relief should be granted on this claim of error.

Next, the State during cross-examination asked if it wasn't true that defendant had previously attempted to break into this same home. (Tr. 112). Defendant denied the same. The defendant being the only witness the defense then rested. The State called the homeowner, the victim, to the stand as a rebuttal witness (Mr. Otis Whalen, tr. 115). This calling of the rebuttal witness and the reason for calling him and what the State hoped to elicit was made in the presence of the judge and trial defense counsel. There is no objection noted in the record. It is the position of the State this issue, too, is procedurally barred for lack of contemporaneous objection. *Jackson v. State*, 962 So.2d 649, 673 (Miss.App. 2007).

Without waiving the procedural bar to review, this issue is alternatively without merit. It is clear from the cross-examination of the State's rebuttal witness the defense tried to show that the victim never did see this defendant commit any crime. The victim admitted he saw nothing. He was just making assumptions based on what others told him.

> ¶ 22. We find that Jones is unable to show that the outcome of his case would have been different if his counsel had objected to the State's introduction of bad acts evidence or the State's leading questions. The evidence proves that Jones shot Ray in the back while Ray was walking

> away from the truck. The jury's verdict was thoroughly reliable. "[I]t is impossible to imagine a Mississippi jury that would not have convicted [Jones]. He is hopelessly guilty." Woodward v. State, 635 So.2d 805, 809 (Miss.1993). It is unnecessary for us to reverse and remand.
>
> *Jones v. State*, 911 So.2d 556, 561 (Miss.App. 2005).

Looking at ALL the evidence and ALL the convictions that were mentioned by defense in order to make this defendant readily admitted to crimes he committed the mention of, perhaps, a prior attempted break in was not prejudicial. As noted in *Jones,* the decision of the jury is thoroughly reliable.

Therefore, it is the position of the State defendant got a fundamentally fair trail and no relief should be granted on this allegation of error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

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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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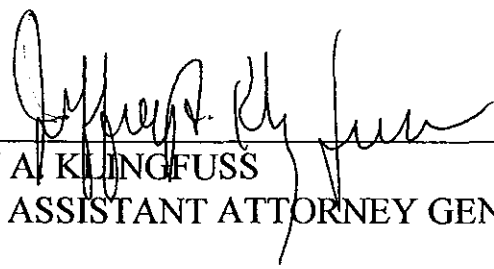
This the 23rd day of January, 2009.



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