IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH SPEARMAN — APPELLANT

VS. — NO. 2008-KA1684-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

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VS. **NO. 2008-KA1684-COA**

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STATEMENT OF THE CASE

An indictment charging Keith Spearman with attempted burglary of a building did not allege that Spearman failed to consummate the commission of the crime attempted, admittedly an essential element of the offense. Spearman, until now, has never objected to his indictment, neither prior to trial, during trial, nor post-trial in a motion for new trial. This, we submit, should be fatal to his appellate complaint.

More importantly, the sufficiency of this indictment should be reviewed under the less stringent standards of Rule 7.06 of the Uniform Rules of Circuit and County Court Practice.

"The post-rules standard requires only that the indictment include the seven enumerated items of Rule 7.06 and provide the defendant with actual notice of the crime charged so that 'from a fair reading of the indictment taken as a whole the nature of the charges against the accused are clear.'" **Caston v. State,** 949 So.2d 852, 856 (¶9) (Ct.App.2007).

KEITH SPEARMAN, a multiple misdemeanant (R. 72), prosecutes a criminal appeal from

the Circuit Court of Bolivar County, Mississippi, Albert B. Smith, III, presiding.

During a trial by jury conducted on May 15, 2008, Spearman was convicted of attempted burglary of a building (C.P. at 39-40) following an indictment charging that

> " . . . KEITH SPEARMAN . . . on or about June 5, 2007, . . . did unlawfully, wilfully, feloniously and burglariously attempt to break and enter a certain building, commonly known as, called and being Pickled Okra, located at 301 South Sharpe Avenue in Cleveland, Mississippi, there situated of the property of Cleveland Restaurant Group, Inc., in which building there were then and there goods, merchandise, equipment or valuable things kept for use or sale, with the intent to steal therein, or to commit any felony an[d]/or the crime of larceny therein, by cutting the lock of the Pickled Okra walk-in cooler . . . * * * " (C.P. at 3)

Following his conviction of attempted burglary of a building, and after scrutiny of a presentence report, the trial judge sentenced Spearman to a term of five (5) years in the custody of the MDOC with three (3) years suspended " . . . after the defendant has served two (2) years in an institution under the supervision and control of the Mississippi Department of Corrections." (C.P. at 41-44)

Two (2) issues are raised on appeal to this Court.

I. "The trial court and trial counsel deprived Spearman of his constitutional right to testify."

II. "The indictment against Spearman was fatally defective, as it failed to charge an essential element of the crime charged," *viz.*, that Spearman failed to consummate the commission of the burglary. (Brief of Appellant at 1)

Boyd P. Atkinson, a public defender in Bolivar County, represented Spearman quite effectively at trial.

The representation on appeal of Hunter N. Aikens, an attorney with the Mississippi Office of Indigent Appeals, has been equally effective.

STATEMENT OF FACTS

Keith Spearman, the defendant, is a prior convicted misdemeanant. (R. 72) Until his conviction for attempted burglary of a building, Spearman had a clean felony record. (R. 72)

During the early morning hours of June 5, 2007, Charles White was engaged in a foot-patrol of downtown buildings in Cleveland when he "... heard the tin like it was coming off the building." (R. 21) At that point the security alarm sounded at the Pickled Okra restaurant building. White notified the station house ". . . that we had someone trying the break in the building there and I needed some backup down that way." (R. 21)

White went to the back of the building where he observed Spearman inside the fence at the door of a walk-in cooler using a set of bolt cutters to cut the lock off of the cooler. (R. 21, 26 24-25)

> BY MS. [PROSECUTOR] FLINT:
>
> Q. Officer White, when you had observed him, you observed him with bolt cutters in his hands?
>
> A. Yes, ma'am. He was cutting the lock as I got around the corner of the building.
>
> Q. Okay. What did you do then?
>
> A. I advised him to put his hands up, that he was under arrest. And when he did, he just put the bolt cutters up, walked to the back of the fence, which would be back south. He crossed the fence and threw the - - I mean, he threw the bolt cutters over and he crossed the fence and he came out to the parking lot area. (R. 26)

Officer White arrested Spearman and charged him with breaking and entering. (R. 27)

Two (2) witnesses testified for the State of Mississippi during its case-in-chief, including **Charles White**, a patrolman with the Cleveland Police Department who interrupted the attempted burglary in progress after observing Spearman using the bolt cutters to cut the lock securing the door to the walk-in cooler. The cooler, a free standing structure, was sitting atop a concrete slab at the

back of the main building. (R. 21, 44) The roof over the cooler was attached to the main building. (R. 30)

According to White, "[t]he lock itself, I don't think he could cut it. But you can see the imprints where he tried. The mechanism where - - that holds the lock was cut." (R. 33) The cooler could be opened even though the lock itself was not cut. (R. 33)

Van Clotta, the owner of the Pickled Okra restaurant, testified the walk-in cooler/freezer contained frozen meat and some produce that required refrigeration. (R. 40) An alarm went off when the door to the cooler was opened. (40-41) While the lock itself was still in tact (R. 32), the locking latch had been cut around the lock and opened. (R. 41-42)

According to Clotta, " . . . the door had to have been opened for the alarm system to go off." (R. 42)

Clotta testified nothing was taken from the cooler. (R. 45)

At the close of the State's case-in-chief, the defendant's motion for a directed verdict of acquittal with regard to attempted burglary was overruled. (R. 48)

After consulting with his attorney at the close of the State's case-in-chief, the defendant, although twice stating to the judge he didn't mind testifying and was going to testify (R. 50-51), apparently changed his mind.

Insofar as we can tell, peremptory instruction was never requested. (R. 55-58)

The jury retired to deliberate at 1:39 p.m. and returned a verdict of guilty of "attempted burglary of a building" twelve (12) minutes later at 1:51 p.m (R. 67-68; C.P. at 39) A poll of the jury, individually by number, reflected the verdict returned was unanimous. (R. 69)

At the close of a sentencing hearing conducted on June 18, 2008, Spearman was sentenced to serve a term of five (5) years in the custody of the MDOC, with three (3) years suspended and two

(2) years to serve. (R. 70-73; C.P. at 39-40)

On July 1, 2008, Spearman filed a motion for J.N.O.V. or, in the alternative, for a new trial alleging the verdict of the jury was against the overwhelming weight of the evidence and "[a]ny and all other errors apparent on its face in the record." (C.P. at 49)

SUMMARY OF THE ARGUMENT

It does not appear that Spearman ever entered the cooler. Thus, the completed offense of burglary - a breaking *plus entry* - never materialized.

Insofar as the sufficiency of the evidence, as opposed to the sufficiency of the indictment, is concerned, the facts in this case are not unlike those found in **Watson v. State,** 822 So.2d 294 (Ct.App.Miss. 2001), where the security system alerted law enforcement authorities who, upon arriving at the scene, interrupted a burglary in progress.

Admittedly, there are decisions by the Supreme Court supporting Spearman's position that an indictment must include the essential elements of the crime charged. **Hawthorne v. State,** 751 So.2d 1090, 1092 (Ct.Appeals Miss. 1999) quoting from **Hennington v. State,** 702 So.2d 403, 407 (Miss. 1997). However, since the enactment of Rule 7.06 of the Uniform Rules of Circuit and County Court Practice, the rules for evaluating the sufficiency of an indictment have been relaxed. **Caston v. State,** *supra*, 949 So.2d 852 (Ct.App.Miss. 2007).

The failure to consummate the criminal act attempted is an essential element of an attempt. Miss.Code Ann. §97-1-9; **Thompson v. State,** 226 Miss. 93, 83 So.2d 761 (1955). Nevertheless, by virtue of the less stringent standard such failure to consummate need not be averred in the indictment so long as the indictment otherwise contains a statement of the "essential facts" constituting the offense charged and fully notifies the defendant of the nature and cause of the

accusation as well as include the seven (7) enumerated items of Rule 7.06.

In the case at bar, the ends of justice will best be served by affirmation of Spearman's conviction of attempted burglary of a building because the indictment met the requirements found in Rule 7.06 of the Uniform Rules of Circuit and County Court Practice.

And while it is true the cooperation between Spearman and Mr. Atkinson, Spearman's lawyer, left something to be desired, one thing is certain. There is no proof or fair inference from colloquy found in the record, that Spearman was deprived of his constitutional right to testify in his own behalf. The truth of the matter is that Spearman, after stating initially he intended to testify, simply changed his mind. When defense counsel announced to the court the defense rested, there was no protest by Spearman, contemporaneous or otherwise, advising the trial judge that he wanted to testify. Outcry by Spearman was non-existent, i.e., it was excruciatingly lacking.

Finally, Spearman has yet to tell us by way of a profert or otherwise what he would have testified to. This observation simply detracts from the validity of his complaint.

ARGUMENT

I. NEITHER THE TRIAL COURT NOR TRIAL COUNSEL DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE.

Jury instruction C-25 told the jury the defendant was not required to testify in this case, and the failure of the defendant to testify was not an inference of guilt. (C.P. at 35)

Spearman claims he was denied his right to testify in his own defense. Specifically, he argues that "[d]efense counsel's apparent unilateral decision to rest Spearman's case-in-chief without honoring Spearman's right to testify[,] and the trial court's acceptance of defense counsel's decision in spite of Spearman's clearly stated decision to testify and without a waiver on his part[,] denied Spearman's constitutional right to testify." (Brief of the Appellant at 7)

In this posture, Spearman requests a new trial.

We argue, on the other hand, the record fails to affirmatively reflect, or to even suggest by reasonable inference, that Spearman was denied his right to testify. Interestingly enough, up until now there has not been so much as a whimper of protest on these grounds, not during trial when counsel announced the defense rested nor in a motion for a new trial.

In view of Spearman's outspoken demeanor both prior to trial (C.P. at 20-22) and during trial wherein he expressed his inability to meaningfully communicate with his lawyer, i.e., "zero talk" (R. 8), had Spearman wanted to testify but was improvidently prevented from taking the witness stand, it is reasonable to presume that some form of protest would have been forthcoming (R. 10-19)

Applicable colloquy with respect to this issue is quoted as follows:

> MR. ATKINSON: If I may have just a few minutes to talk with my client and determine whether or not he's going to take the witness stand, your Honor?
>
> THE COURT: Sure.
>
> (Court recessed: 10:47 a.m.)
>
> (Court convened: 10:50 a.m.)
>
> THE COURT: Let's get back on the record.
>
> Mr. Spearman, come here a minute.
>
> MR. ATKINSON: Your Honor, I have been advised by my client that he does not wish to take the witness stand, and so I need for the Court to have a - -
>
> THE COURT: Mr. Spearman, do you understand you have a right to get on this witness stand and testify?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I'm sorry?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And your lawyer may have explained this to you, but I want to make sure that you understand independently that that right is yours and yours alone?

THE DEFENDANT: Yes, sir.

THE COURT: Your lawyer can advise you, but you will be the one to make your ultimate decision. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: And your lawyer has indicated y'all have discussed this matter. Have you made a decision?

THE DEFENDANT: I'll take the stand. I don't mind.

THE COURT: Well, it's up to you. Do you want to take the stand or do you not want to take the stand?

THE DEFENDANT: Yes, sir, I'll take it.

MR. ATKINSON: Which one?

THE DEFENDANT: I'll take the stand.

MR. ATKINSON: Okay. Well, I need a few more minutes with him.

(Court recessed: 10:51 a.m.)

(Court convened: 10:57 a.m.)

MR. ATKINSON: Mr. Spearman now goes back to his original position advising me he does not wish to take the witness stand.

Now, your Honor, Mr. Spearman has kept asking me repeatedly what did I want him to do. And I tried to impress on him that is not a decision that I make. If I told him to take the witness stand and he didn't want to take it, he doesn't have to take it. And if he wanted to take the witness stand and I told him not to take it, he could still take it. It is not my decision to make.

THE COURT: Mr. Spearman, this [is] a question I have to ask everybody that is on trial and doesn't take the stand. And their decision, you know, before they do is the same question I ask - - you know, I've asked hundreds of people before. And really the point of it, I think, is to make sure you have the right and are the one that ultimately make[s] the decision. Now, you should listen to your attorney but he's not the final say-so. You are.

THE DEFENDANT: Yes, but you know, Mr. - - every time I talk to him about how we going to get this situation resolved, you know, we get on the same page of like zero talk.

THE COURT: Well, that may be true and I'm sure it's the same situation a lot of lawyers and clients have had. But the point of this discussion at present is whether or not you are going to testify. What are you going to do?

THE DEFENDANT: I'm going to testify.

THE COURT: And you understand that's your decision?

THE DEFENDANT: Yes, sir.

THE COURT: Well, let's take our seats, and bring the jury out.

Oh, wait a minute. Wait a minute. Let's don't bring the jury out.

You go ahead and take a seat.

(Defendant seated at defense table.)

THE COURT: Let's see, do y'all have any instructions? Let's do the instructions.

It's now 11:00. I think we ought to wait till - - do you think we ought to wait till – let the jury go; bring them back at 1:00 **and do the closing then**.

* * * * * *

THE COURT: We have the leisure to do it. We've got an hour. That's what we are going to do.

Let's see, first, let's bring the jury back out. I'm going to ask you to put your case in chief on, for the record. Then, I'm going to ask you if you have any - - no, you won't have any rebuttal, **because he didn't put a case in chief on.**

MS. FLINT: Right.

MR. ATKINSON: Then, you are going to dismiss them until 1:00?

THE COURT: Yes, sir.

(Jury seated: 10:59 a.m.)

THE COURT: All right. Let's get back on the record.

Mr. Atkinson, if you would call your first witness.

MR. ATKINSON: The defense rests at this time, your Honor.

THE COURT: Defense rests.

(Defense rested: 11:00 a.m.) [emphasis ours]

At this point in the proceedings, the jury was sent out for lunch with instructions to return at 1:00 p.m. (R. 54-55) In the meantime, the judge and both litigants were going over the jury instructions.

Court reconvened at 1:14 p.m. The jury was seated at 1:16 p.m., and the jury instructions were read to the jury. (R. 58-59)

Not a peep was heard from this defendant who had been "flip flopping" from the beginning with respect to whether or not he wanted to testify. Spearman appeared to be playing a cat and mouse game with both his lawyer and the trial judge.

According to the record the defense rested at 11:00 a.m. (R. 53)

At 10:57 a.m., after having a discussion with his client at 10:51 a.m., defense counsel announced to the Court that "Mr. Spearman now goes back to his original position advising me he does not wish

to take the witness stand." (R. 50) Thus, only three (3) minutes ensued from the time Spearman's lawyer announced Spearman's return to his "original position" and the time that Spearman rested his case.

Admittedly, the record reflects that at some point during these three (3) minutes Spearman told the court, "I'm going to testify." (R. 51) The jury was reseated at 10:59 a.m., and at 11:00 the defense rested.

There is a fair inference from the record that Spearman actually said: "I'm *not* going to testify." This is because Judge Smith, moments after Spearman's declaration, stated the following:

> THE COURT: * * * Let's see, first, let's bring the jury back out. I'm going to ask you to put your case in chief on, for the record. Then, I'm going to ask you if you have any - - **no, you won't have any rebuttal, because he didn't put a case in chief on.**
>
> **MS FLINT [THE PROSECUTOR]: Right.**
>
> **MR. ATKINSON: Then, you are going to dismiss the [jury] until 1:00?**
>
> **THE COURT: Yes, sir.**
>
> (Jury seated: 10:59 a.m.)
>
> THE COURT: All right. Let's get back on the record.
>
> Mr. Atkinson, if you would call your first witness.
>
> MR. ATKINSON: The defense rests at this time, your Honor.
>
> THE COURT: Defense rests.
>
> (Defense rested: 11:00 a.m.) [emphasis supplied]

Obviously, it was the understanding of the court and both litigants as well that the defense would rest without calling any witnesses, including the defendant, who at least twice told his lawyer and the court that he was not going to testify.

If the defendant was going to testify, why, at this point in the proceedings, would the judge elect to approve jury instructions during the lunch hour? (R. 52)

If the defendant was going to testify, why would the judge release the jury for lunch and " . . . bring them back at 1:00 and do the closing [arguments]?" (R. 52)

In the end, no error ensued. Spearman received the benefit of the requirements found in the *Culberson* case and, insofar as this record reflects, was not denied his right to testify in his own behalf. Rather, he appears to have made a conscious, informed, and tactical decision to sit tight after having no fewer than two private conversations with his lawyer and being fully advised on no fewer than three separate occasions that whether to testify or not was a decision that was his alone to make. It must be presumed from this record that Spearman himself made the decision to not take the witness stand.

More importantly, upon resting, the vociferous Spearman made no protest.

In short, his silence was quite deafening.

Finally, Spearman has yet to tell us by way of a profert or otherwise what he would have testified to. This observation simply detracts from the validity of his complaint.

II. THE INDICTMENT AGAINST SPEARMAN FOR ATTEMPTED BURGLARY OF A BUILDING WAS NOT FATALLY DEFECTIVE.

IN THIS CASE, THE FAILURE TO OBJECT TO ANY DEFECT PRIOR TO, DURING, OR AFTER TRIAL, WAIVED ANY DEFECT.

Spearman contends his indictment was fatally defective because it ". . . did not charge an essential element of attempt, *[viz.,]* that he failed to consummate the commission of the burglary." (Brief of the Appellant at 10)

"The question of whether an indictment is fatally defective is an issue of law and deserves

a relatively broad standard of review by this court." **Spears v. State,** 942 So.2d 772, 773 (¶5) (Miss. 2006) citing **Peterson v. State,** 671 So.2d 647, 652 (Miss. 1996).

First of all, we agree with Spearman the indictment filed in his prosecution for an "attempt" does not allege that Spearman failed to consummate the commission of the crime attempted. Neither did the indictment found in **Short v. State**, 990 So.2d 818(Ct.App.Miss. 2008), which was reversed only because the indictment failed to set out an over act.

Second, we agree with Spearman that the failure to consummate the commission of the offense is one of the three elements the State must prove in a prosecution for attempt. **Edwards v. State,** 500 So.2d 967 (Miss. 1986) citing **Bucklew v. State,** 206 So.2d 200 (Miss. 1968). The reason for this is that " . . . an attempt to commit a crime is an indictable offense separate and distinct from the crime itself." **Harden v. State,** 465 So.2d 321 (Miss. 1985). By virtue of Miss.Code Ann. §97-1-9, "[a] person shall not be convicted of . . . any other attempt to commit an offense, when it shall appear that the crime intended or the offense attempted was perpetrated by such person at the time . . . of such attempt."

"It is not competent under this statute to indict for an attempted offense and then stand upon proof of a completed offense." **Williams v. State,** 178 Miss. 899, 174 So. 47 (Miss. 1937).

Spearman's indictment does, on the other hand, specifically describe Spearman's overt act " . . . of cutting the lock of the Pickled Okra walk-in cooler." (C.P. at 3) The cases are legion that indictments filed under the general attempt statute - Miss.Code Ann. § 97-1-7 - " . . . must set forth an overt act toward the commission of the offense." **Durr v. State,** 446 So.2d 1016 (Miss. 1984), and the cases cited therein. An "overt act" is an essential element of the offense. **Bucklew v. State,** *supra*, 206 So.2d 200 (Miss. 1968).

In an indictment for attempt " . . . words specifically describing the overt acts are mandatory." **Watson v. State,** 483 So.2d 1326, 1328 (Miss. 1986), citing **Maxie v. State,** 330 So.2d 277, 278 (Miss. 1976). *See also* **Hawthorne v. State,** 751 So.2d 1090 (Ct.App.Miss. 1999).

Not so, we respectfully submit, with regard to the element of proof that the defendant failed to consummate the commission of the offense. Such need not be included so long as the overt act is sufficiently described and the indictment otherwise conforms to the requirements set forth in Rule 7.06 of the Uniform Rules of Circuit and County Court Practice.

In this case, it is enough that the indictment contains the phrase "attempt to break and enter." The word "attempt," by its plain and ordinary meaning, implies the act "attempted," i.e., "breaking and entering," was not completed. Such is sufficient, together with the overt act of cutting the lock, to advise Spearman of the nature and cause of the accusation against him and the essential facts constituting the offense charged. This burglary was not consummated because Spearman never entered the cooler.

Third, we agree with Spearman there is precedent standing for the proposition that the failure to charge in the indictment an essential element of the offense renders the indictment insufficient and fatally defective. *See e.g.*, **Hawthorne v. State,** *supra*, 751 So.2d 1090, 1092 (¶9) (Ct.App.Miss. 1999), cited and relied upon by Spearman; **Hennington v. State,** 702 So.2d 403, 407 (Miss. 1997).

Nevertheless, since the enactment in 1979 of Rule 7.06 of the Uniform Rules of Circuit and County Court Practice, formerly Rule 2.05 of the Uniform Criminal Rules of Circuit Court Practice, indictments have been analyzed under less stringent rules.

Rule 7.06 reads, in part, as follows:

> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant

> of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following: [Items 1-7 intentionally omitted]

All that is required is that the indictment contain "the essential facts constituting the offense charged" which are sufficient to "fully notify the defendant of the nature and cause of the accusation." Rule 7.06. Spearman was not left to guess at what specific activity violated the statute; rather, his indictment contained a plain statement of the facts relied upon by the State and gave Spearman adequate notice of what to defend.

The indictment in the present case, we respectfully submit, passes the 7.06 test with flying colors.

The posture of Spearman's complain is controlled, at least in part, by the following language found in **Caston v. State,** *supra*, 949 So.2d 852, 856 (Ct.App.Miss. 2007), where we find the following language:

> Under the Rules, the standard under which the sufficiency of an indictment is analyzed is decidedly less stringent. The post-rules standard requires only that the indictment include the seven enumerated items of Rule 7.06 and provide the defendant with actual notice of the crime charged so that "from a fair reading of the indictment taken as a whole the nature of the charges against the accused are clear." *Id.* at 661 (quoting *Henderson v. State*, 445 So.2d 1364, 1368 (Miss. 1984)) The rule makes clear that "[f]ormal and technical words are not necessary . . . if the offense can be substantially described without them. *Wilson v. State*, 815 So.2d 439, 443 (¶10) (Ct.App.Miss. 2002). This post-rules standard for determining the sufficiency of indictments has, with the exception of holdings of *Peterson* and *Hawthorne*, been repeatedly followed by our supreme court, most recently in *Spears v. State*, 942 So.2d 772, 774 (¶9) (Miss. 2006), and by this Court, most recently in *Wilson*, 815 So.2d at 443 (¶10) (citing *Harbin v. State*, 478 So.2d 786, 799 (Miss. 1985)).
>
> Although the law may have differed in former days, it is clear that our starting point today for determining the validity of an

> indictment is Rule 7.06 of the Uniform Rules of Circuit and County Court. Harbin, 478 So.2d at 798-99. * * *

At no place in Rule 7.06 is there a requirement the indictment allege *each and every* element of the offense committed or attempted, only "the essential facts." Here the defendant was well aware of the specific overt act constituting the offense and was caught red handedly with a set of bolt cutters during the attempted burglary.

Spearman, we note, has not cited a case directly condemning an indictment for an attempted offense that fails to allege a failure to consummate or prevention of the offense.

Moreover, Spearman strongly suggests the **Caston** majority erred in relying upon a dissenting opinion found in **Peterson v. State**, 671 So.2d 647 (Miss. 1996).

Ironically, Spearman, as authority for his own position, relies upon the dissenting opinion of Presiding Justice Lee in **Caston**.

Finally, we agree with Spearman the cases hold generally that a failure to demur prior to trial to an indictment that does not allege an essential element of the offense is not waived by a failure to object. **Durr v. State,** *supra*, 446 So.2d 1016, 1017 (Miss. 1984), and the cases cited therein. *See also* **Milano v. State,** 790 So.2d 179, 186 (Miss. 2001), para. 28.

But here the situation is quite different because the indictment was good without the "failure to consummate" language. Any defect should be considered a formal defect, as opposed to one of substance, and, by virtue of Miss.Code Ann. §99-7-21, subject to amendment upon proper objection.

It is well settled that failure of an accused to interpose a demurrer to a formal defect in the indictment which can be remedied by amendment constitutes a waiver. **Brandau v. State,** 662 So.2d 1051 (Miss. 1995) [failure of indictment to conclude with the words "against the peace and dignity of the State of Mississippi," curable by amendment]; **Jones v. State,** 383 So.2d 498 (Miss.

1980); **Langford v. State,** 123 So.2d 614, 616 (Miss. 1960) ["If the insufficiency of the indictment was due to a defect which could have been remedied by an amendment, then the point is waived by the accused if he fails to interpose a demurrer"]; **Griffin v. State,** 918 So.2d 882 (Ct.App.Miss. 2006); **Forkner v. State,** 902 So.2d 615 (Ct.App.Miss. 2004), cert. denied, 901 So.2d 1273 (Miss. 2005).

It would seem appropriate that a failure to demur at the proper time should, under the circumstances existing here, be considered a waiver of one's right to have the failure to consummate the act set out in the indictment.

Special exceptions under exceptional circumstances are not without precedent. This court recently carved a special exception to its prior rulings in a case involving trial *in absentia.* In **Jefferson v. State,** 807 So.2d 1222 (Miss. 2002)], the Supreme Court declined to overrule previous cases setting precedent but did create a special exception to the rule that felony trials *in absentia* are not allowed.

We quote:

> Recognizing this trend, we deem it prudent to carve out an exception to our holding in *Sandoval.* We find that under the facts presented by the case at bar that the trial court did not err in trying Jefferson *in absentia.* Jefferson was present for his arraignment, though it was waived, at which time his trial was set. He was again present at his omnibus hearing. Following this, Jefferson spoke directly with his attorney numerous times, and specifically just a week prior to his trial date. These facts demonstrate that Jefferson was well aware of the date his trial was set. Beyond that, the most glaring evidence of Jefferson's deliberate intent to evade justice was the
> unrefuted testimony of Andrea Dillon, his long-time acquaintance, that Jefferson had informed him of his plan to run and avoid trial. Thus, as the trial court found, Jefferson "knowingly, willingly, freely, voluntarily and intentionally . . . absented himself from a trial in this cause without reason or justification after receiving proper and direct notification of the date, place and time of his trial, all for the specific

purpose of escaping prosecution. Slip Opinion at 8-9, para. 14.

We invite this Court to use the case at bar as a vehicle to create an exception to the "no waiver" rule where, as here: (1) the record affirmatively reflects the defendant is aware prior to trial of the overt acts upon which the State intends to rely; (2) the indictment alleges the overt acts; (3) the defendant, with prior knowledge of any defect, bypasses his remedy, and (4) the defendant elects to take his chances with the jury on a favorable verdict.

If, under these circumstances, the defendant is found guilty beyond a reasonable doubt, he should not be allowed to obtain a reversal because of an alleged defect deliberately bypassed. Rather, the defendant has waived his right to complain.

We summarize.

An attempt to commit a crime is an indictable offense which is separate and distinct from the crime itself. **Mason v. State,** 430 So.2d 857 (Miss. 1983); Miss.Code Ann. Section 97-1-7.

Section 97-1-7, the general attempt statute, reads as follows:

> Every person who shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, on conviction thereof, shall, where no provision is made by law for the punishment of such offense, be punished as follows: If the offense attempted to be committed be capital, such offense shall be punished by imprisonment in the penitentiary not exceeding ten years; if the offense attempted be punishable by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, then the attempt to commit such offense shall be punished for a period or for an amount not greater than is prescribed for the actual commission of the offense so attempted.

An "attempt to commit a crime" consists of three elements: (1) an intent to commit a particular crime; (2) a direct ineffectual act done toward its commission; and (3) the failure to consummate its commission. **Bucklew v. State,** *supra*, 206 So.2d 200 (Miss. 1968).

In **Gibson v. State**, 600 So.2d 1268, 1270 (Miss. 1995), we find the following language:

> This Court has, on numerous occasions, defined "attempt" to mean "an attempt to do a certain thing, and some actual overt effort to put the intent into effect." [citations omitted]

The indictment now under scrutiny passes muster under this definition.

While Indictments brought under section 97-1-7 must set forth an overt act toward the commission of the offense [**Durr v. State**, *supra*, 446 So.2d 1016 (Miss. 1984)], the same does not hold true for the element of failure or prevention of consummation which need not be specifically charged.

Cases decided prior to the adoption in 1979 of the Mississippi Uniform Criminal Rules of Circuit Court Practice (now the Uniform Rules of Circuit and County Court Practice adopted May 1, 1995), were decided in an environment where indictments were scrutinized more strictly than they are scrutinized today under the uniform rules.

To be sure, it has been said, but we cannot remember by whom, that " . . . technical mechanisms or formalities under the law should not always triumph over substance."

CONCLUSION

Appellee respectfully submits that affirmation by this Court of Spearman's conviction for attempted burglary of a building will best serve the interests of justice because Spearman was caught red-handedly and was hopelessly guilty.

Spearman was given a fundamentally fair trial with a full awareness of the nature of the charge lodged against him. Indeed, there can be no doubt about it.

Accordingly, Spearman's conviction and five (5) year sentence with three (3) years suspended should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

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This the 20th day of August, 2009.

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