IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH SPEARMAN **APPELLANT**

V. **NO. 2008-KA-1684-COA**

STATE OF MISSISSIPPI **APPELLEE**

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. Keith Spearman, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 13th day of July, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Hunter N Aikens
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V. — NO. 2008-KA-1684-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. **THE TRIAL COURT AND TRIAL COUNSEL DENIED 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.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Boliver County, Mississippi, and a judgment of conviction for attempted burglary of a building entered against Keith Spearman. (Tr. 68-69, C.P. 39-40, R.E. 3-4). The trial court sentenced Spearman to a term of five (5) years with three (3) years suspended. (Tr. 71, C.P. 41-44, R.E. 5-8). The trial court denied Spearman's motion for JNOV or, in the alternative, for a new trial. (C.P. 49-51, R.E. 9-11). Spearman now appeals to this Court for

relief.

STATEMENT OF THE FACTS

In the early morning hours (about 4:30 a.m.) of June 5, 2007, Officer Charles White of the Cleveland Police Department was walking downtown on Sharpe Street, and, as he approached the Pickled Okra restaurant, he heard what he described as tin coming off of the building followed by the ringing of an alarm. (Tr. 21, 25). Officer White walked to the back of the building and saw a man, whom he later identified as Spearman, attempting to cut the lock off of walk-in cooler with bolt cutters. (Tr. 21-22, 25). The cooler was situated outside against the back of the building, and it was enclosed by a chain-link fence, about six (6) feet in height. (Tr. 30-31, Ex. S-1, S-2). According to Officer White, Spearman threw the bolt cutters over the fence, crossed the fence himself, began walking away, and Officer White and another officer arrested Spearman. (Tr. 26-28). The bolt cutters were recovered where Spearman allegedly discarded them. (Tr. 35-36). And a subsequent inspection of the scene revealed that the locks on both the fence and the cooler were intact; although, the latch on the cooler (to which the lock connects) was cut. (Tr. 32-36). .

Van Colotta, the owner of the Pickled Okra, testified that the cooler was not attached to the building and had no door or other access the restaurant's interior: "it's just kind of sitting on a concrete slab behind that building." (Tr. 39-40, 44). Colotta had an alarm installed on the cooler after a previous break-in; the alarm would sound when contacts on each side of the cooler door were separated. (Tr. 40-42). He also testified that nothing was taken from the cooler on the night in question. (Tr. 45).

At trial, the State called Officer White and Colotta as its only two witnesses, then rested. Defense counsel moved for a directed verdict, arguing that the evidence showed that cooler was not

a part of the Pickled Okra building and that indictment charged Spearman with attempted burglary of a building; more specifically, "a building called and being the Pickled Okra." (Tr. 47-48). The trial court denied Spearman's motion for a directed verdict. (Tr. 48).

Defense counsel then requested a few minutes to talk with Spearman regarding his right to testify. (Tr. 49). Defense counsel returned and announced to the trial court that Spearman did not wish to testify. (Tr. 49). However, upon inquiry by the trial court, Spearman unequivocally stated that he wanted to testify:

THE COURT:	Mr. Spearman, do you understand you have a right to get on this witness stand and testify?
SPEARMAN:	Yes, sir.
THE COURT:	I'm sorry?
SPEARMAN:	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?
SPEARMAN:	Yes, sir.
THE COURT:	Your lawyer can advise you, but you will be the one to make your ultimate decision. Do you understand?
SPEARMAN:	Yes, sir.
THE COURT:	And your lawyer has indicated y'all have discussed this matter. Have you made a decision?
SPEARMAN:	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?
SPEARMAN:	Yes, sir. I'll take it.

[DEFENSE COUNSEL]: Which one?

SPEARMAN: I'll take the stand.

(Tr. 49-50).

Defense counsel then requested a few more minutes to talk to Spearman, returned, and again announced to the trial court that Speaman did not wish to take the stand. (Tr. 50). The trial court again questioned Spearman as to his decision, and Spearman again stated unequivocally that he wanted to exercise his right to testify on his own behalf:

THE COURT: Mr. Spearman, this [is] a question I have to ask everybody that is on trial and doesn't take the stand. . . . Now, you should listen to your attorney but he's not the final say-so. You are.

. . .

THE COURT: [W]hat are you going to do?

DEFENDANT: I'm going to testify.

(Tr. 50-51).

After a short conference concerning jury instructions, the trial court asked the defense to call its first witness; however, notwithstanding Spearman's repeated assertions that he wished to exercise his right to testify, defense counsel announced to the trial court that the defense would rest. (Tr. 51-53). The trial court, without further inquiry or discussion, accepted defense counsel's decision to rest without honoring or re-addressing Spearman's decision to testify. (Tr. 53).

The jury was instructed, heard closing arguments, and, after deliberation, returned a verdict finding Spearman guilty of attempted burglary of a building. (Tr. 68-69). The trial court sentenced Spearman to a term of five (5) years imprisonment, with three suspended. (Tr. 71, C.P. 41-44, R.E.

5-8). The trial court denied Spearman's motion for JNOV or, in the alternative for a new trial. (C.P. 49-51, R.E. 9-11).

SUMMARY OF THE ARGUMENT

The trial court and trial counsel deprived Spearman of his constitutional right to testify in his own behalf. Spearman repeatedly, clearly, and unequivocally asserted that he wished to exercise his right to take the stand and testify in his own defense. The record makes abundantly clear that Spearman decided to exercise his right to testify in his own defense; trial counsel's apparent unilateral decision that the defense would rest and the trial court's acquiescence in or acceptance of trial counsel's decision without further discussion and in spite of Spearman's repeated unambiguous expressions of his desire to testify deprived Spearman of his constitutional right to testify. Accordingly, Spearman is entitled to a new trial.

Additionally, the indictment against Spearman was fatally defective as it failed to charge an essential element of the crime charged–attempted burglary of a building. One essential element of attempt, under Mississippi Code Annotated Section 97-1-7, is the failure to consummate or complete the commission of the particular crime attempted. The indictment against Spearman did not charge this essential element. Therefore, the indictment was fatally defective, and Spearman is entitled to have his conviction and sentenced reversed and a judgment of acquittal rendered in his favor.

ARGUMENT

I. THE TRIAL COURT AND TRIAL COUNSEL DEPRIVED SPEARMAN OF HIS CONSTITUTIONAL RIGHT TO TESTIFY.

Spearman was denied his right to testify as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article 3, Section 26 of the Mississippi

Constitution of 1890.[1] Mississippi precedent holds that the denial of a defendant's right to testify on his own behalf "is a constitutional violation regardless of whether the denial is a result of a refusal by the court or a refusal by the accused's counsel to allow the accused to testify." *Dizon v. State*, 749 So. 2d 996, 999 (¶12) (Miss. 1999) (citing *Culberson v. State*, 412 So. 2d 1184, 1186 (Miss. 1982)). In the instant case, Spearman's denial of his right to testify involves both.

In *Culberson v. State*, the Mississippi Supreme Court instructed that "a record should be made of this so that no question about defendant's waiver of his right to testify should ever arise in the future." *Culberson*, 412 So. 2d at 1186. In this case a record was made, and there was no question; Spearman repeatedly and unequivocally stated to the trial court on the record that he decided to exercise his constitutional right to testify in his own defense.

When defense counsel claimed that Spearman did not want to testify, and the trial court followed the Mississippi Supreme Court's holding in Culberson and questioned Spearman to ensure that this was his decision, Spearman clearly asserted his right to testify: "I'll take the stand." (Tr. 49-50). After defense counsel requested a short recess to again speak with Spearman, defense counsel again claimed that Spearman did not want to testify. However, the trial court again questioned Spearman as to what his decision was, and Spearman again clearly stated that he wanted to exercise his right to testify on his own behalf: "I'm going to testify." (Tr. 51).

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[1]Article 3, Section 26 of the Mississippi Constitution provides in part:

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself....

Despite Spearman's repeated assertions of his right to testify, trial counsel announced that the defense would rest when the trial court asked the defense to call its first witness (Spearman). (Tr. 53). And despite Spearman's repeated assertions of his right to testify, the trial court, without any inquiry or discussion on the subject, accepted trial counsel's decision that Spearman's defense would rest without Spearman's testimony. (Tr. 53). The record contains no indication that Spearman did not wish to testify on his own behalf. Instead, the record reveals only that Spearman wanted to exercise his right to take the witness stand; and the record supports no other conclusion.

Regardless of whether defense counsel's decision to rest without calling Spearman to testify was strategically sound and regardless of whether Spearman's decision to testify would have helped or hurt his defense, Spearman clearly desired to exercise his constitution right to testify and he repeatedly and unwaveringly asserted his decision to the trial judge on the record. Defense 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. Consequently, Spearman is entitled to a new trial.

II. THE INDICTMENT AGAINST SPEARMAN WAS FATALLY DEFECTIVE, AS IT FAILED TO CHARGE AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.

The indictment charging Spearman with attempted burglary was fatally deficient as it failed to allege an essential element of attempt; namely, that Spearman failed to consummate the commission of the crime attempted. It is acknowledged that Spearman did not object to the indictment at trial; however, "the omission in the indictment of an essential element of the crime charged is not waived by failure to demur." *Short v. State*, 990 So. 2d 818, 819 (¶3) (Miss. Ct. App.

2008) (citing *Durr v. State*, 446 So. 2d 1016, 1017 (Miss. 1984)).

This Court employs the de novo standard of review in determining whether an indictment is fatally defective. *Gilmer v. State*, 955 So. 2d 829, 836 (¶24) (Miss. Ct. App. 2007) (citing *Peterson v. State*, 671 So. 2d 647, 652 (Miss. 1996)).

Spearman was indicted under the general attempt statute, Mississippi Code Annotated Section 97-1-7 of the attempt to commit a burglary of a building in violation of Mississippi Code Annotated Section 97-17-33. (C.P. 3, R.E. 12). The indictment against Spearman read in pertinent part as follows:

> Keith Spearman,
>
> late of the County and Judicial District aforesaid, on or about June 5, 2007, in the County, Judicial District and State aforesaid, and within the jurisdiction of this Court, did unlawfully, willfully, feloniously and burglariously attempt to break and enter a certain building, commonly known as, called and being Pickled Okra, located at 301 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,
>
> contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi.

(C.P. 3, R.E. 12).

Under Mississippi's attempt statute, Mississippi Code Annotated Section 97-1-7, the attempt to commit a crime has three elements: "(1) an attempt to commit a particular crime, (2) a direct ineffectual act done toward its commission and (3) the failure to consummate its commission." *McGowan v. State*, 541 So. 2d 1027, 1030 (Miss. 1989); *see also, e.g., West v. State*, 437 So. 2d 1212, 1214 (Miss. 1983) ("The attempt statute requires that, before one may be convicted of attempt,

he "shall fail therein, or shall be prevented from committing the same."); *Bucklew v. State*, 206 So. 2d 200, 202 (Miss. 1968) (citing 22 C.J.S. Criminal Law s 75(1) (1961)); *State v. Lindsey*, 202 Miss. 896, 899, 32 So. 2d 876, 877 (Miss. 1947) ("The gravamen of the offense of an attempt to commit a crime is fixed by the statutory requirement that the defendant must do an overt act toward the commission thereof *and be prevented from its consummation.*")(emphasis added).

The failure to charge an essential element of a crime renders an indictment insufficient and fatally defective. *See e.g., Hawthorne v. State*, 751 So. 2d 1090, 1092 (¶9) (Miss. Ct. App. 1999); *Hennington v. State*, 702 So. 2d 403, 407 (Miss. 1997); *Peterson v. State*, 671 So. 2d 647, 653-655 (Miss. 1996). It is acknowledged that this Court, in *Caston v. State*, 949 So. 2d 852, 855-56 (¶¶7-10) (Miss. Ct. App. 2007), abrogated the majority opinions of the Mississippi Supreme Court in *Peterson* and *Hawthorne*, to the extent that they held that an indictment must set forth every essential element of an offense. *Caston*, 949 So. 2d at 855-56 (¶¶7-10). In so doing the majority opinion of this Court in *Caston* relied on Justice Pittman's dissent to the majority opinion in *Peterson*, and held that, since the enactment of the Uniform Rules of Circuit and County Court, questions concerning the sufficiency of indictments have been analyzed under the less stringent requirements of U.R.C.C.C. 7.06. *Id.* at 856 (¶8).

However, Presiding Judge Lee authored a well-reasoned dissent in *Caston* which Chief Judge King joined. *Id.* at 863 (¶¶26-28). Judge Lee disagreed with the majority's reliance on a dissent and opined that *Hawthorne* was still the law. *Id.* Judge Irving also penned a dissent in which he stated that *Peterson* was still the law. *Id.* at 863-66 (¶¶29-35).

In *Caldwell v. State*, the Mississippi Supreme Court impliedly acknowledged this Court's holding in *Caston*. *Caldwell v. State*, 6 So. 3d 1076, 1080 (¶14) (Miss. 2009). However, the

Caldwell court did not squarely address the issue; it merely cited Peterson for another proposition and noted that this Court's abrogation of Peterson. *Id.* Spearman respectfully submits that *Peterson* and *Hawthorne* are still the law–the failure to charge an essential element renders an indictment fatally defective. Spearman also urges this Court to reexamine it's decision on this point in *Caston.*

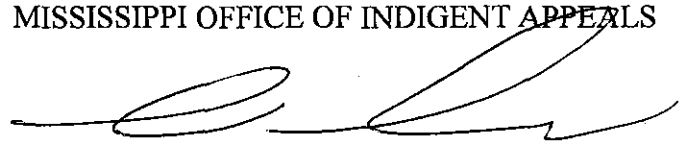
In sum, the indictment against Spearman did not charge an essential element of attempt–that he failed to consummate the commission of the burglary. Consequently, the indictment is fatally defective, and Spearman is entitled to have the judgment of conviction and sentence reversed and a judgment of acquittal rendered in his favor.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Spearman respectfully requests that this honorable Court reverse the conviction, sentence and fines entered against him in the trial court and render a judgment of acquittal in his favor or, in the alternative, reverse the judgment, sentence, and fines entered against him in the trial court and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Keith Spearman, 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 13th day of July, 2009.

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