IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ERIC LAVON ROBERTS — APPELLANT

VS. — NO. 2008-KA-1707-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 Forrest County indicted defendant Eric Lavon Roberts for the crime of Burglary of a Dwelling in violation of *Miss. Code Ann.* § 97-17-23. After a trial by jury, Judge Robert B. Helfrich presiding, the jury found defendant guilty. (C.p. 52, Jury Verdict). The trial court sentenced defendant to Twenty-five years in the custody of the Mississippi Department of Corrections: Twenty to serve, five suspended and five years of post release supervision. Additionally defendant was fined, $5,000 and court costs. (C.p. 54-56 & Tr. 265).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

Defendant somehow managed to enter the apartment of three co-eds in the wee hours of the morning. One young woman saw his silhouette from the glow of her television. Not quite believing her eyes she cautiously searched her apartment. When she turned on the kitchen light she saw defendant, wearing a hooded sweatshirt crouched on the floor. In a bit of panic and fear she ran to a room with her roommates and locked the door and called 9-1-1. Police responded quickly and based upon the description given in the 9-1-1 call picked up defendant.

Defendant essentially admitted to the officer he was in the 'girls' room and apartment. Claiming he walked one or two of them home from a party, they invited him to sleep on the floor. Eventually he left the apartment, locking the door behind him.

The jury heard the testimony of the co-eds and law enforcement that apprehended and interviewed defendant.

While counsel for defendant presented a vigorous defense at trial no evidence or testimony was introduced in the defense case-in-chief.

The jury found defendant guilty beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

I.

The trial court did not err in denying the motion to suppress a statement of defendant made prior to his being *Mirandized.*

Statements made by defendant were no in response to any interrogation and/or made at his own peril after being *Mirandized.*

Issue II.

Comment by the prosecutor that "*They can subpoena any witness that we have here. They can subpoena them and have them here. They don't want the answer*" – is not a comment on defendant's right to remain silent.

The prosecutor's comment was in response to defense closing and comment on the lack of evidence offered by the defense to rebut evidence presented by the State.

Issue III.

There was ample evidence presented *at trial* for the court to deny the motions for judgement notwithstanding the verdict and new trial.

The State provided testimonial evidence and exhibits for defendant being inside a dwelling, uninvited, at night. Further, criminal intent may be presumed for those circumstances. Defendant offered no evidence in rebuttal to that presumption.

IV.

Defendant had Constitutionally effective assistance of counsel.

A diagnosis of mental illness alone is not enough to raise an insanity defense and will not support ineffective assistance of counsel.

V.

There were no errors at trial cumulative or singly that denied defendant of a fundamentally fair trial.

No error singly or cumulatively denied defendant of a fair trial.

ARGUMENT

I.

The trial court did not err in denying the motion to suppress a statement of defendant made prior to his being *Mirandized.*

In this initial allegation of error appellate counsel argues the trial court erred by not suppressing a statement or statements defendant made to law enforcement before he was *Mirandized.*

Looking to the record a pre-trial suppression hearing was held. Tr.2-62. Here is apparently what transpired: Law enforcement was called about a burglary in progress. Officers quickly converged on the scene and defendant was picked up and, detained and transported to headquarters to be interviewed by a detective. Defendant apparently, in response to an officers question "Where were you headed?" gave incriminating statements. The officer immediately, verbally gave defendant *Miranda* warnings. Defendant kept making statements after receiving the warning(s).

The reviewing Courts of Mississippi have heard this argument under similar factual situations:

> ¶ 11. Wilson's argument that he was subjected to custodial interrogation without proper *Miranda* warnings is also without merit. To be subject to custodial interrogation, one must be both in custody and undergoing interrogation. A subject is in custody when their right to freely leave has been restricted. Roberts v. State, 301 So.2d 859, 861 (Miss.1974). The accused is subject to interrogation when he is questioned by the police or the functional equivalent. Pierre v. State, 607 So.2d 43, 52 (Miss.1992). The functional equivalent is any sort of activity which the police reasonably believe would produce an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 301,

100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

> ¶ 12. It is clear that Wilson was in custody when he confessed; however, his confessions were not the product of interrogation. The police did not question Wilson until after he was given his *Miranda* warnings. The statements he made while being arrested, transported to the hospital, and receiving medical treatment were not prompted by police activities; rather, were the product of his own free will. The police did everything in their power to appraise Wilson of his rights. They even went so far as to shout at him, interrupting one of his confessions, to inform him of his rights. We conclude the use of these statements did not violate Wilson's rights.

Wilson v. State, 936 So.2d 357 (Miss. 2006).

So, it is the position of the State that looking at the transcript of the pre-trial testimony of the officer, defendant gave a non-responsive answer to a question of the officer. While such a statement might be incriminating it was not part of an interrogation. Additionally, even after being *Mirandized* defendant kept making, essentially, the same statement and even put it down in writing. (St. Ex. 28).

Further, looking to the record it is also clear that defendant himself, even at the pre-trial hearing, (Tr. 54). claimed he knew his rights (as he said, he'd been arrested a 'couple' of times before).

The trial court made his ruling and there is ample credible testimony in the record to support his finding. Accordingly, no relief should be granted on this first allegation of trial court error.

Issue II.

Comment by the prosecutor that *"They can subpoena any witness that we have here. They can subpoena them and have them here. They don't want the answer"* – is not a comment on defendant's right to remain silent.

While it is true that trial counsel for defendant did present a 'defense' in that he was prepared for trial, filed pre-trial motions, cross-examined witnesses and made objections – there was no evidence or testimony presented in their case-in-chief at trial.

The State then presented it's initial closing argument. Defense then argued in closing that the State's police work was sloppy and the police should have interviewed more witnesses and done a better investigation.

Then, in the State's final closing, in response to defense arguments, the prosecutor stated – "They can subpoena any witness that we have here. They can subpoena them and have them here. They don't want the answer." Tr. 248.

Defense made a timely objection to the argument of the prosecutor, which was overruled by the trial court. Tr. 249.

It is the succinct position of the State the statement made was a comment on the lack of evidence presented by the defense. Such was not and is not a comment on defendant's right to remain silent. The trial court hearing the closing overruled the objection.

> ¶ 16. In this case, the prosecutor was asserting that all of the State's evidence was unrefuted. He did not single out any particular witnesses' testimony that only Epps could rebut. Thus, we conclude that, like the prosecutor in Weathersby, this prosecutor was not trying to stress by innuendo the fact that Epps elected not to testify. In fact, the defense could have refuted the

> prosecution's evidence with a ballistics expert or an alibi witness. See Logan v. State, 773 So.2d 338, 349 (¶¶ 41-42) (Miss.2000) (describing various types of rebuttal witnesses a criminal defendant can use). Therefore, we find no error.

Epps v. State, 984 So.2d 1042 (Miss.App. 2008).

The State was arguing that defendant could have called (using the power of the subpoena) witnesses to refute the State's evidence or produce an alibi witness.

There being no error in the ruling of the trial court no relief should be granted on this claim of error.

Issue III.

There was ample evidence presented *at trial* for the court to deny the motions for judgement notwithstanding the verdict and new trial.

Within this allegation of error counsel claims lack of evidence supporting the elements of burglary. Interestingly, counsel cites this court to numerous pages of the transcript, specifically pages 9-14, 23, 33-34 & 36. However, all those pages were pre-trial and no jury was present.

At trial, the State did present evidence that defendant was in the apartment of these girls. Tr. 121-22. There was the in-court identification of defendant. Tr. 123. Venue was established. Tr. 132, 180. And that defendant wasn't supposed to be there and there was the sound him plundering around in the apartment and opening and closing of doors. Tr. 162-63.

There was testimony that defendant could have gotten in through a sliding door, but went out the front door. There was testimony of an officer that defendant had himself stated he was in the girls room and left locking and closing the door behind him. Tr. 176, 195.

Now, defendant argues there was no proof his intent to commit a crime.

> ¶ 5. Since those committing burglary usually have no occasion to announce their intentions, evidence of the required intent usually arises only from inferences:
>
> > Some presumptions are to be indulged in against one who enters a building unbidden at a late hour of night, else the burglar

> caught without booty might escape the penalties of the law. People are not accustomed in the nighttime to enter homes of others, when asleep, with innocent purposes. The usual object is theft; and this is the inference ordinarily to be drawn in the absence of explanation from breaking and entering at night accompanied by flight when discovered, even though nothing has been taken.
>
> Brown v. State, 799 So.2d 870, 872 (Miss.2001) (quoting Nichols v. State, 207 Miss. 291, 296-97, 42 So.2d 201, 202-03 (1949)).

> ¶ 6. Therefore, an inference of the intent to steal may arise from proof of the breaking and entering. Gillum v. State, 468 So.2d 856, 859 (Miss.1985). Crawford is permitted to counter this evidence which arises from an inference, just as he may counter other kinds of evidence presented to prove his guilt. The State met its burden of presenting evidence on each element of burglary.
>
> *Crawford v. State,* 839 So.2d 594 (Miss.App. 2003).

It is the position of the State that enough evidence was presented at trial, – direct evidence and reasonable inferences therefrom to support the jury verdict. Further the intent may be presumed from the circumstances. Defendant offered no evidence to overcome that presumption of criminal intent after being found in an apartment at night.

No relief should be granted on this allegation of error.

IV.

Defendant had Constitutionally effective assistance of counsel.

Here defendant claims ineffective assistance of trial counsel for failing to, apparently, raising a *M'Naghten* insanity defense.

It is clear that trial counsel was aware of defendant's prior mental history. It is also clear that trial counsel deemed it to be insufficient to raise a *M'Naghten* defense. Tr. 258 & 262.

It is the position of the State that a mere diagnosis (some seven years earlier) is insufficient to raise an insanity defense. The trial attorney, in his reasonable and professional judgment reasonable believed that such mental condition did not excuse the crime.

> ¶ 27. It is apparent from the above testimony that Epps suffered no prejudice because of his attorneys' actions. He could not fulfill the requirements of *M'Naghten* because he understood the consequences of his actions when he shot Eubanks. He admitted to Detective Daniels that he shot Eubanks once or twice because Eubanks was "messing with his mother's mind." We find this statement to be similar to the incriminating statement made by the defendant in Groseclose. Thus, Epps knew the consequences of his actions. Also like the defendant in Tyler, Epps understood the difference between right and wrong because he knew that shooting Eubanks would upset his mother, and he hid the gun as he was fleeing Eubanks's house. Further, Epps made the conscious decision to turn himself into the police. Therefore, this Court can only conclude that Epps knew that he committed a crime. We do not deny that Epps may suffer from some mental illness. However, *M'Naghten* requires more than a mere diagnosis of mental illness. From the above testimony and evidence, this Court can only conclude that Epps "did not come close to being so mentally deficient as to lack an appreciation of the consequences of his action." McLaughlin, 789 So.2d at 115(¶ 9). After reviewing the record, we

> are not convinced that Epps would have succeeded if he had properly asserted the insanity defense. Therefore, his attorneys' actions did not prejudice his defense, and Epps cannot fulfill the requirements of *Strickland*. Thus, we find this issue is without merit.
>
> Epps v. State 984 So.2d 1042, 1049 -1050 (Miss.App.,2008)

There being no deficient performance on the part of defendant's trial counsel there can be no ineffective assistance of counsel. Defendant had presumptively Constitutionally effective assistance of counsel and no relief should be granted on this allegation of error.

V.

There were no errors at trial cumulative or singly that denied defendant of a fundamentally fair trial.

It is the position of the State the errors raised on appeal were not supported by the facts in the record or the law as applied. While the State cannot argue the trial was 'flawless' (few, if any would be), the conduct of counsel, the trial process and the rulings of the court – singly or collectively do not put in doubt the jury verdict.

> ¶ 27. . . . It is true that "multiple, individual errors, not reversible in themselves, may have the cumulative effect of denying the defendant a fair and impartial trial, thus warranting a reversal." Hall v. State, 906 So.2d 34, 39(¶ 19) (Miss.Ct.App.2004). However, this is not the situation in Commodore's case. Careful review of the alleged errors show that they are either not factually substantiated through the trial record or were strategic decisions made by defense counsel. Any errors that were made were reasonable, and if any unreasonable errors were made, they were not sufficient enough to change the outcome of the trial. Thus, Commodore does not satisfy either prong of the Strickland test. This issue is without merit.

Commodore v. State, 994 So.2d 864 (Miss.App. 2008).

The State would ask this reviewing court to deny any relief based upon the cumulative error assertion.

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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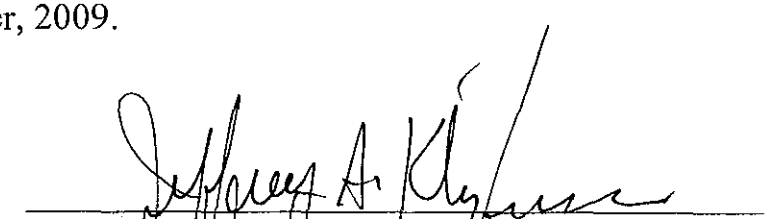
This the 12th day of November, 2009.



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