IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-KA-01707-COA

ERIC LAVON ROBERTS — DEFENDANT-APPELLANT

VS.

STATE OF MISSISSIPPI — PLAINTIFF-APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF FORREST COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Defendant/Appellant

State of Mississippi
Plaintiff/Appellee

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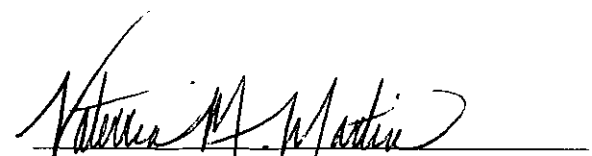
Honorable Robert B. Helfrich
Forrest County Circuit Court Judge



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STATEMENT OF THE CASE

On or about May 25, 2007, Eric Lavon Roberts (hereinafter referred to as "Roberts") was indicted by the Forrest County Grand Jury. (R. at 8). The indictment charged Roberts with the unlawful, willful and felonious burglary of the dwelling house of one LaDonna Ellis, pursuant to § 97-17-23 of the Mississippi Code of 1972, as amended. Id. The case was tried on or about August 27, 2008, and the jury found Roberts guilty of burglary of a dwelling. (Tr. at 256). Prior to sentencing on August 27, 2008, counsel for Roberts requested that the lower Court defer sentencing to allow Roberts to receive treatment for his mental illness or to at least have a pre-sentence evaluation. (Tr. at 257-261). Roberts underwent treatment and evaluation for paranoid schizophrenia in 1999 and 2000. (Tr. at 264). However, the relevant medical records and mention of this mental illness were not presented to the lower Court until the sentencing phase, and were therefore, found to be of no benefit to the Court at that time. (Tr. at 260-264). On or about August 28, 2008, the lower court proceeded to sentence Roberts to twenty-five (25) years in the Mississippi Department of Corrections, with twenty (20) years to serve, and the remaining five (5) years to be suspended on post-release supervision. (Tr. at 265). Roberts was also ordered to pay a fine in the amount of $5,000.00 and all cost of court. Id.

On or about September 8, 2008, Roberts filed his Motion for Judgment Notwithstanding the Verdict and in the Alternative, Motion for a New Trial. (R. at 57-59). On the same date, the lower Court entered its Order denying that Motion. (R. at 60). Roberts filed his Notice of Appeal to the Mississippi Supreme Court on or about October 7, 2008. (R. at 63).

STATEMENT OF FACTS

On or about February 2, 2007, Detective Michael Hall of the Hattiesburg Police Department received a call of a burglary in progress at an apartment complex on Ross Boulevard. (Tr. at 25-26). At that time, Detective Hall was with the patrol division of the Hattiesburg Police Department. (Tr. at 25). Detective Hall testified during the Pre-trial Motion Hearing held in this matter on August 25, 2008, that at the time of the aforementioned call, he was given the description of a black male wearing a blue hoodie. Id. After arriving at the scene, he observed a black male, now known to be Roberts, walking out of the parking lot of the apartment complex where the alleged burglary in progress was called in. (Tr. at 26). Detective Hall further testified that he directed Roberts to approach him, and he asked Roberts to state his name and where he was headed at the time. Id. After Roberts replied that he was leaving McDonald's, Detective Hall pat Roberts down, found a knife in Roberts' pants pocket, and placed Roberts into custody in the back of Detective Hall's patrol car. (Tr. at 27). Although Roberts had been determined to be a suspect and had been placed into custody, Detective Hall had not advised Roberts of his Miranda rights at that time. (Tr. at 32). It was not until Roberts was seated in Detective Hall's patrol car and stated that he had come out of this female's room, but realized that he forgot his phone, and returned to the room to get the phone, that Detective Hall then advised Roberts of his rights. (Tr. at 27).

After arriving at the police station, Detective Jon Douglas Traxler interviewed Roberts. (Tr. at 5). During the Pre-trial Motion Hearing on August 25, 2008, Detective Traxler testified that he was informed by Roberts that he had a college level of education. Id. Detective Traxler advised Roberts of his Miranda rights prior to interviewing him. Id. Detective Traxler further testified that Roberts signed the Miranda warning, as well as the Waiver of Rights. Id. The Waiver was not witnessed by anyone other than Detective Traxler. Id. Detective Traxler then gave Roberts a blank

form, in which Detective Traxler wrote that he was speaking with Roberts in reference to a residential burglary that occurred at 105 Ross Boulevard. (Tr. at 9). The following statement was written by Roberts and read into evidence by Detective Traxler at the Pre-trial hearing:

> The individual at a party ask (sic) me to walk a girl home from the little party. I walked her home. I overheard her talking over the phone or to the roommate, so I walk (sic) out to Ross Street and officers were there! They informed me that something had happened that I wasn't authorized to control "on my own," so I cooperated with the officers!
>
> I walk (sic) someone home but I was not wearing or fit the description the (sic) said, (sic) it (sic) may have been a totally different place, but I had been drinken (sic), but not driven (sic) after the party!

(Tr. at 9, 10 and Exhibit 2 to the Motion Hearing).

Detective Traxler then testified that he asked Roberts a series of questions, which are also in the statement as follows:

> Q. Do you know anyone that lives at 105 Ross Blvd?
>
> A. On my way to Quiznos (sic), so I stopped at the the (sic) party, but I didn't know anyone personally!
>
> Q. Do you know the name the of the girl you walked home?
>
> A. Don't know her name (sic) I was drinking, (sic) she may have been drinking!
>
> Q. Do you know what apt. she lives in ?
>
> A. I dont (sic) know the apt. number, because we was (sic) walking and being loud!
>
> Q. Do you remember what she was wearing?
>
> A. I cant (sic) exactly remember what she was wearing! Was talking & being loud!

Q. How many people were with you when you walked her home?

A. It started out as me, and 2 girls! One went to an apt. and the othe (sic) went to another!

Q. Do you know the other girls (sic) name and what she was wearing?

A. No

Q. Do you know what her apt # is?

A. No sir

Q. Did one of the girls ask you to come in her apt (sic)?

A. No, but one informed me that their (sic) were blankets an (sic) you could sleep on the floor (sic)

Q. How did you go in the apt (sic)?

A. I walk (sic) through a door "drunk" with the next male's so called girlfriend!

Q. What do you mean the next male's so called girlfriend?

A. Not meaning the word "drunk"! but (sic) she possibly could have been involved in an (sic) relationship because she told me she had blankets!

Q. What did she do when she went in the apt (sic)?

A. She was quite (sic), (sic) I (sic) just left, (sic) I realize (sic) my phone was drrop (sic) on the floor with blankets. Went back their (sic) got (sic) the phone off the floor. Lock (sic) them in by twisting the knob and the (sic) I talk (sic) to officers! When she went into the apt! (sic)

After telling me there were blankets, she went into the back room!

Q. Did you go in her bedroom?

A. Whe (sic) I left, ! (sic) I didn't go into the bedroom (sic) I yelled, Im (sic) leaving, (sic)

Q. Did you go in the kitchen?

A. I'm unsure where the kitchen is! But no.

Q. Did you lock the door when you left?

A. After I walked back and yelled where is my phone (sic) I lock (sic) the door behind me!

Q. Was there anyone else in the apt (sic)?

A. I'm not sure!

Q. What is your address?

A. P. O. Box 1063, 3703 Mable Ave. (sic) Hattiesburg (sic) MS!

Q. Is that a house or apt (sic)?

A. House with 2 sides!

Q. Have you changed clothes since you left home?

A. No! Sir!

Q. What time did you leave home?

A. I left home after 12:30 am (sic)! Sir!

Q. Is there anything else you want to tell me?

A. The night before I had to get a guy to pull my car out of the hole at the same apt. complex!

Q. Is this statement the truth?

A. Some is the truth, but may be interpreted the wrong way (sic)

Q. Will you sign your statement?

A. Yes sir!

(Tr. at 10-14 and Exhibit 2 to Motion Hearing).

During the Pre-trial Motion Hearing, Roberts testified that there were a few apartments open at the apartment complex, and people were mingling. (Tr. at 50). He did not remember which apartment he had walked the girls to on the night of the alleged burglary. Id.

In addition, Roberts testified that he had been drinking alcohol all day prior to the time he was arrested in this case. (Tr. at 33-34). Both Detective Hall and Detective Traxler testified that Roberts was not under the influence of alcohol or drugs, and nor did either of them smell any odor of alcohol on Roberts at the time of his arrest and questioning. (Tr. at 15, 21, 29). However, Roberts testified that not only had he been drinking all day prior to his arrest but he had a cup of alcohol in his hand when he was stopped by Detective Hall, when leaving the apartment complex. (Tr. at 34). Roberts further testified that Detective Traxler told him that he could smell alcohol coming through Roberts' pores at the time of his interrogation and written statement. (Tr. at 36). Although Detective Traxler testified that Roberts' handwriting appeared to be normal in Roberts' written statement, the above-cited statement clearly shows otherwise. (Tr. at 21).

Roberts testified that Detective Traxler threatened to charge him with burglary if he did not cooperate and give a statement. (Tr. at 35). Detective Traxler also called Roberts a couple of names and told Roberts he was stupid for his behavior. Id. When asked whether the interrogation had been recorded, Detective Traxler admitted that it had not been, although the interrogation room had video and audio capabilities. (Tr. at 208). Prior to trial, Roberts' defense counsel moved to suppress both

the statements given to Detective Hall and Detective Traxler due to Miranda violations, intoxication, undue influence and inducement, but those Motions were denied by the Trial Court. (R. at 26-30, Tr. at 61-62).

There was no evidence of tampering or forced entry at either of the doors of the apartment in question. (Tr. at 23). There were also no pry marks that could be compared to a tool or any other device. Id. In addition, there were no fingerprints lifted from the apartment's doors. (Tr. at 171). Moreover, nothing whatsoever was stolen from the apartment. (Tr. at 139).

Roberts underwent treatment and evaluation for paranoid schizophrenia in 1999 and 2000. (Tr. at 264). However, the relevant medical records and mention of this mental illness were not presented to the lower Court until the sentencing phase of Robert's trial in this matter. (Tr. at 257-264). At that time, Robert's defense counsel requested that the Court defer sentencing to allow Roberts to receive treatment through the State or at least to have a pre-sentence investigation. (Tr. at 261). Just one day prior to sentencing, defense counsel further stated that Roberts' mental health records would not have been appropriate for a McNaughten defense. Although defense counsel made this statement, counsel did not retrieve and review Roberts' medical records until the morning of the sentencing. (Tr. at 258, 261). After retrieving and reviewing those medical records, the records revealed that Roberts, without his medications, has delusions of grandeur. (Tr. at 261). Roberts has auditory hallucinations, which he believes those voices speak to him and help him and keep him from making mistakes. Id. Roberts is paranoid. Id.

Roberts did not testify at the Trial of this case, and nor did he call any witnesses to testify on his behalf. (Tr. at 219). During the State's closing argument, one of the prosecutors made a statement that Roberts did not call or subpoena witnesses on his behalf, because "they don't want the answer." (Tr. at 248). Defense counsel moved for a mistrial, which was denied by the Court. Id.

SUMMARY OF THE ARGUMENT

The Trial Court erred in denying both the statements given to Detective Michael Hall and Detective Jon Douglas Traxler, as the statements were in violation of Miranda.

In addition, the Trial Court erred in denying the Appellant's Motion for Mistrial, as one of the prosecutors commented on the Appellant's failure to testify at the Trial of this case, and the statements were inflammatory, highly prejudicial and reasonably calculated to unduly influence the jury.

The Trial Court erred in denying the Appellant's Motion for Judgment Notwithstanding the Verdict and in the Alternative, Motion for New Trial. In viewing the evidence presented by the State in a light most favorable to the State, the State failed to establish a prima facie case for the crime of burglary against the Appellant.

Further, the Appellant was denied his right to the effective assistance of counsel at Trial. The Appellant underwent treatment and evaluation for paranoid schizophrenia in 1999 and 2000, but his defense counsel made no attempt whatsoever to investigate the issue of Appellant's mental illness until the sentencing phase of Trial. Therefore, the issue of Appellant's mental illness was never presented to the jury, and Appellant was convicted for the crime of residential burglary, in which intent is an essential element for conviction.

Moreover, cumulative errors deprived the Appellant of his constitutional right to a fair Trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO SUPPRESS STATEMENTS.

"If a person **in custody** is to be subjected to interrogation, he must be informed in clear and unequivocal terms that he has the right to remain silent." Miranda v. Arizona, 384 U.S. 436, 467-

468 (1966)(emphasis added). A defendant may waive effectuation of right to counsel and to remain silent, provided that the waiver is made voluntarily, knowingly and intelligently. Id. at 444. "In order to permit a suspect in custody to make a knowing and intelligent waiver of rights during interrogation, an explanation of those rights must first be given. Luckett v. State, 797 So.2d 339, 345 (Miss. Ct. App. 2001)(citing Miranda, 384 U.S. at 444-45). Where the interrogation is part of the "general on the scene investigation," Miranda warnings are not a prerequisite to the admissibility of defendant's statements. Luckett, 797 So.2d at 345 (citing Tolbert v. State, 511 So.2d 1368, 1375 (Miss. 1987)).

However, once in custody, a confession is only admissible after the State has proven beyond a reasonable doubt that the accused's confession was voluntary by showing that such confession was not the product of promises, threats or inducements. Glasper v. State, 914 So.2d 708, 717 (Miss. 2005)(citing Manix v. State, 895 So.2d 167, 180 (Miss. 2005); Miranda, 384 U.S. at 444-45; Dancer v. State, 721 So.2d 583, 587 (Miss. 1998); Morgan v. State, 681 So.2d 82, 86 (Miss. 1996); Chase v. State, 645 So.2d 829, 838-39 (Miss. 1994)).

First, in the case *sub judice*, Roberts' statement to Detective Hall should have been suppressed by the Trial Court. Roberts had been taken into custody by Detective Hall, as Detective Hall found Roberts to be the suspect described at the scene of the alleged burglary. (Tr. at 26-27). As Roberts at that time had been deemed a suspect and placed into custody in Detective Hall's patrol car, the police clearly intended to subject him to interrogation. However, no Miranda warnings were read to Roberts until after Roberts started speaking about his presence in an apartment at the complex in question. (Tr. at 27). Detective Hall had already performed general on the scene questioning when he initially approached Roberts. (Tr. at 26-27). Once in custody, Roberts' Miranda warnings should have been read to him to allow him full notice of his rights and the

opportunity to make a knowing and intelligent decision as to whether to make any statement to Detective Hall about Roberts' presence at the apartment complex. Detective Hall admitted that Roberts was in custody when the statements were made, and no Miranda rights had been given until after the statements were made. (Tr. at 32). Again, as Roberts at that time had been deemed a suspect and placed into custody in Detective Hall's patrol car, the police clearly intended to subject him to interrogation, and yet, Roberts' Miranda rights were not timely given to him.

Second, Roberts' statement to Detective Traxler should have also been suppressed by the Trial Court. Neither of the statements made to Detective Hall nor to Detective Traxler were knowingly and voluntarily given as Roberts was under the influence of alcohol at the time of his arrest and interrogation. During the Pre-trial Motion Hearing, Roberts testified that he had been drinking alcohol all day prior to the time he was arrested in this case. (Tr. at 33-34). Roberts further testified that not only had he been drinking prior to his arrest but he had a cup of alcohol in his hand when he was stopped by Detective Hall, when leaving the apartment complex. (Tr. at 34). In addition, Detective Traxler told Roberts that he could smell alcohol coming through Roberts' pores at the time of his interrogation and written statement. (Tr. at 36). Moreover, it is clear from Robert's written statement given to Detective Traxler that his state was not normal. Several simple words were chopped and misspelled. There were also several incomplete phrases and exclamation marks used quite consistently. (Tr. at 10-14 and Exhibit 2 to Motion Hearing). It must be noted that this is a statement that was given by a college student. (Tr. at 5).

Roberts was clearly under the influence of alcohol at the time of the statements given to Detective Hall and Detective Traxler. Roberts was not capable of comprehending the gravity of the situation, nor was he able to understand his rights, and was vulnerable to undue influence and inducement. Also, the statements to Detective Traxler and interrogation were not recorded to

provide any evidence contrary to Roberts' testimony. Detective Traxler admitted that the interrogation room had video and audio capabilities. (Tr. at 208). Furthermore, the Waiver of Rights signed by Roberts was not witnessed by anyone other than Detective Traxler.

Third, Roberts' statements to Detective Traxler should have been suppressed by the Trial Court as the statements were the products of promises, threats and inducement. Roberts testified that Detective Traxler threatened to charge him with burglary if he did not cooperate and give a statement. (Tr. at 35). Detective Traxler also called Roberts a couple of names and told Roberts he was stupid for his behavior. Id. It is important to again note that the interrogation had not been recorded, although the interrogation room had video and audio capabilities. (Tr. at 208). As such, Roberts' statements to Detective Traxler were not freely and voluntarily given as required by Miranda.

The statements given to Detective Hall and Detective Traxler were in violation of Miranda, and for the above and foregoing reasons, the Appellant, Eric Roberts, respectfully requests that this Court reverse this case.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON PROSECUTOR'S COMMENT ON APPELLANT'S FAILURE TO TESTIFY.

"The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." Forkner v. State, 902 So.2d 615, 622 (Miss. Ct. App. 2005)(citing Sheppard v. State, 777 So.2d 659, 661 (Miss. 2000)).

Although attorneys are allowed a wide latitude in arguing their cases to the jury, prosecutors are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated

to unduly influence the jury. Dora v. State, 986 So.2d 917, 921 (Miss. 2008)(citing Hiter v. State, 660 So.2d 961, 966 (Miss. 1995)). "The state is entitled to comment on the lack of *any* defense, and such comment will not be construed as a reference to the defendant's failure to testify by innuendo and insinuation." Dora, 986 So.2d at 923 (citing Shook v. State, 552 So.2d 841, 851 (Miss. 1989))(emphasis added). "What is prohibited is any reference to the defendant's failure to testify implying that such failure is improper, or that it indicates the defendant's guilt." Dora, 986 So.2d at 923 (citing Wright v. State, 958 So.2d 158, 161 (Miss. 2007)). A criminal defendant has the right to elect not to take the witness stand in his own defense. *See* The Mississippi Constitution of 1890, Art. 3, § 26; Fifth Amendment to the Constitution of the United States.

The standard of review for denial of a motion for mistrial is abuse of discretion. Wright, 958 So.2d at 161.

In the case *sub judice*, the prosecutor made the following statements during closing argument, "They can subpoena any witness that we have here. They can subpoena them and have them here. They don't want the answer." (Tr. at 248). Defense counsel moved for a mistrial, which was denied by the Court. Id. As Roberts did indeed put on defenses at Trial, it cannot be said that the prosecutor's statements were comments on the lack of *any* defense by Roberts. However, as Roberts did not call any witnesses on his behalf, and nor did he testify at Trial against himself, the prosecutor's statements were clearly intended to refer to the defendant's failure to testify, and to show that such failure indicated Roberts' guilt.

Further, the prosecutor's statements also fall outside of the wide latitude given to attorneys in arguing their cases to the jury, as in this case, the statements were inflammatory, highly prejudicial, and reasonably calculated to unduly influence the jury. Such is even more evident in a case such as this where the Defendant did not call any witnesses to testify on his behalf nor did he take the stand

to testify against himself. In addition, the statements clearly called attention to Roberts' failure to testify.

Roberts' Motion for Mistrial should have been granted. Accordingly, the Appellant, Eric Roberts, requests that the Court reverse this case.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE, MOTION FOR NEW TRIAL.

The standard for reviewing the denial of a judgment notwithstanding the verdict is as follows: "Once the jury has returned a guilty verdict, this Court is not at liberty to direct that the defendant be found not guilty unless viewed in the light most favorable to the verdict no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty." Cortez v. State, 876 So.2d 1026, 1029 (Miss. 2004)(citing Conners v. State, 822 So.2d 290, 293 (Miss. 2001)). This Court must consider as true all evidence consistent with the Defendant's guilt and the State must be given the benefit of all reasonable inferences. Cortez, 876 So.2d at 1029 (citing McClain v. State, 625 So.2d 774, 778 (Miss. 1993)). [Appellate courts] may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find that the accused was guilty. Gleeton v. State, 716 So.2d 1083, 1087 (Miss. 1998).

"A motion for a new trial concerns the weight of the relevant evidence. Cortez, 876 So.2d at 1030 (citing Conners, 822 So.2d at 293). Motions for new trial rest in the sound discretion of the trial court, and should not be granted except to prevent an unconscionable injustice. Id.

In viewing the evidence presented by the State in a light most favorable to the State in the instant case, the State clearly failed to establish a prima facie case for the crime of burglary against Roberts.

The indictment charged Roberts with the unlawful, willful and felonious burglary of the dwelling house of one LaDonna Ellis, pursuant to § 97-17-23 of the Mississippi Code of 1972, as amended. (R. at 8). The crime of burglary requires proof of (1) an unauthorized entry (or breaking), and (2) the intent to commit a crime after the unauthorized entry. Miss. Code Ann. § 97-17-23 (Rev. 2000). Each element of burglary must be proven at trial. Hunter v. State, 684 So.2d 625 (Miss. 1996). Where the underlying crime is not completed, the State has to offer sufficient facts to establish the necessary intent. Anderson v. State, 749 So.2d 283, 286 (Miss. Ct. App. 1999).

First, Roberts testified to walking girls home from a party and being invited to stay at one of the girl's apartments upon arriving at her apartment. (Tr. at 9-14). In addition, he had been drinking alcohol the entire day prior to the alleged incident. (Tr. at 33-34, 36). Further, Roberts testified that there were a few apartments open at the apartment complex, and people were mingling. (Tr. at 50). He did not remember which apartment he had walked the girls to on the night of the alleged burglary. Id.

Second, there was no evidence of tampering or forced entry at either of the apartment's doors. (Tr. at 23). There were also no pry marks that could be compared to a tool or another device. Id. In addition, there were no fingerprints lifted from the apartment's doors. (Tr. at 171).

Third, nothing whatsoever was stolen from the apartment. (Tr. at 139). Even if the first element of the crime, unauthorized entry, was proven, the State failed to offer sufficient facts to establish the necessary intent of Roberts to commit a crime after the unauthorized entry.

There is insufficient evidence to warrant a conviction for burglary. The trial judge should have granted Appellant's Motion for Judgment Notwithstanding the Verdict and in the Alternative, for a New Trial. Accordingly, this case should be reversed and remanded back to the Circuit Court for a new trial.

IV. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

The standard for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Woodward v. State, 843 So.2d 1, 7 (Miss. 2003)(citing Strickland v. Washington, 466 U.S. 668, 686 (1984)). "A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case." Id. (citing Strickland, 466 U.S. at 687). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. (citing Strickland 466 U.S. at 687 and Stringer v. State, 454 So.2d 468, 477 (Miss. 1984)). "The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id.

"Then, to determine the second prong of prejudice to the defense, the standard is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Woodward, 843 So.2d at 7 (citing Mohr v. State, 584 So.2d 426, 430 (Miss. 1991)). A defendant has a right to the effective assistance of counsel as secured by the Sixth and Fourteenth Amendments to the Constitution of the United States, as well as by the Mississippi Constitution of 1890, Art. 3, § 26. Read v. State, 430 So.2d 832, 837 (Miss. 1983)(citing Gideon v. Wainwright, 372 U.S. 335 (1963)). *See also* Stewart v. State, 299 So.2d 53, 55 (Miss. 1969).

During a one-day jury trial on or about August 27, 2008, the jury found Roberts guilty of burglary of a dwelling. (Tr. at 256). Roberts underwent treatment and evaluation for paranoid schizophrenia in 1999 and 2000. (Tr. at 264). Although § 97-17-23 of the Mississippi Code of 1972 makes it clear that **intent** to steal personal property within a dwelling house is a paramount element

to the crime of residential burglary, the relevant medical records and mention of Roberts' mental illness were not presented to the lower Court until the sentencing phase of the Trial. (Tr. at 257-264).

The M'Naghten test of insanity remains the law in this state. Laney v. State, 486 So.2d 1242, 1245 (Miss. 1986). "To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing of the act the accused was laboring under such a defect of reason from disease of the mind as (1) not to know the nature and quality of the act he was doing, or (2) if he did know it that he did not know that he was doing what was wrong." Id.

In Laney, Defendant was found to have suffered from schizophrenia, paranoid type. Id. During the trial of Defendant's case, expert witnesses were called to testify and expressed their views that Defendant was M'Naghten insane at the time he shot a police deputy. Id. However, their testimony before the jury did not bear that out. Id. This Court held that the jury, upon hearing the experts' testimony and upon being properly instructed as to M'Naghten, had ample evidence upon which to determine that the Defendant was not M'Naghten insane when he committed the crime. Id. "Furthermore, expert opinions of psychiatrists are not conclusive upon the issue of insanity but rather insanity is a question to be resolved by the jury." Id. (citing Lias v. State, 362 So.2d 198, 201 (Miss. 1978)). *See also* Billiot v. State, 454 So.2d 445, 463 (Miss. 1984).

In the case *sub judice,* Roberts was only afforded comment by his counsel just one day prior to sentencing that his mental illness did not qualify for a McNaughten defense. This comment was given without the benefit of a pre-trial or current evaluation to assess Robert's current mental state. (Tr. at 259, 261). In addition, the issue of Roberts' mental illness was never presented to the jury during Trial. Without such, the Court, as well as jurors, were left without a complete view and understanding of Roberts' mental state in which to base any determination in regard to an essential

element of burglary, which is intent. It cannot be said that this was just strategy by counsel, as this Court has made it clear that insanity is a question to be resolved by the jury. Laney, 486 So.2d at 1245 (citing Lias, 362 So.2d at 201).

In addition, there was simply no proof whatsoever of Roberts' intent to steal anything in the residence of Ladonna Ellis. There was no evidence of tampering or forced entry at either of the apartment's doors. (Tr. at 23). There were also no pry marks that could be compared to a tool or any other device. Id. Also, there were no fingerprints lifted from the apartment's doors. (Tr. at 171). Further, nothing whatsoever was stolen from the apartment. (Tr. at 139).

As such, Robert's defense counsel's performance was deficient, and the deficiency clearly prejudiced the defense of this case. Defense counsel's mention of Roberts' mental illness just one day prior to sentencing was not reasonable considering that Roberts was facing twenty-five (25) years in prison for a crime, in which intent is an essential element for conviction. Defense counsel found the mental issue to be of great importance during the sentencing phase, but made no attempt whatsoever to investigate the matter until that time. Counsel did not seek to retrieve and review the records until the morning of sentencing; and therefore, counsel had no idea whatsoever the records revealed until the time, well after the Trial, itself, had taken place. Counsel admitted that after retrieving and reviewing Roberts' medical records, those records revealed that Roberts, without his medications, has delusions of grandeur. (Tr. at 261). Roberts has auditory hallucinations, which he believes those voices speak to him and help him and keep him from making mistakes. Id. Roberts is paranoid. Id.

But for defense counsel's unprofessional errors, the result of the proceeding would have been different, if the Court, as well as jurors, were given a complete assessment of Robert's current mental

state and illness. Accordingly, the Appellant, Eric Roberts, respectfully requests that this Court reverse this case.

V. CUMULATIVE ERRORS DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

This Court may reverse a conviction and sentence based upon cumulative effect of errors that independently would not require reversal. Genry v. State, 735 So.2d 186, 201 (Miss. 1999)(citing Jenkins v. State, 607 So.2d 1171, 1183-84 (Miss. 1992); Hansen v. State, 592 So.2d 114, 153 (Miss. 1991)). However, where "there was no reversible error in **any** part, so there is no reversible error to the whole." McFee v. State, 511 So.2d 130, 136 (Miss. 1987).

In the Genry case, this Court held that that case should not be reversed based upon cumulative error, since the Appellant failed to assert any assignments of error containing actual error on the part of trial judge. Genry, 735 So.2d at 201. However, in the instant case, Roberts has asserted assignments of error containing actual error on the part of the trial judge as revealed in the preceding arguments of this Brief. In addition, even if the errors individually do not require reversal, this Court may reverse this case based upon the cumulative effect of the errors. As such, Roberts respectfully requests that this Court reverse his conviction and sentence based upon the cumulative effect of errors in this case.

CONCLUSION

For the above and foregoing reasons, the Appellant, Eric Lavon Roberts, respectfully requests that this Court reverse the Trial Court's denial of his Motions to Suppress Statements, Motion for Mistrial, as well as his Motion for Judgment Notwithstanding the Verdict and in the Alternative, Motion for New Trial, and remand the case for a new Trial.

In addition, the Appellant respectfully requests that this Court reverse this case, as Appellant was denied his right to the effective assistance of counsel at Trial, and remand the case for a new Trial accordingly.

Further, the Appellant respectfully requests that this case be reversed and rendered due to the cumulative effect of errors, which deprived Appellant of his constitutional right to a fair Trial.

The Appellant further requests any other relief which may be appropriate and just.

RESPECTFULLY SUBMITTED, this the 10th day of August, 2009.

BY: COUNSEL FOR APPELLANT

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CERTIFICATE OF SERVICE

I, VATERRIA M. MARTIN, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT to the following persons at these addresses:

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This the 10th day of August, 2009.

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