IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GARY TUBBY, II

APPELLANT

VS. NO. 2009-KA-0596-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2009-KA-0596-COA**

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STATEMENT OF THE ISSUES

I. THE AMENDMENT TO THE INDICTMENT TO CORRECT THE PROPERTY OWNER'S SURNAME WAS ONE OF FORM, NOT SUBSTANCE, THEREFORE IT WAS PROPERLY SUSTAINED BY THE TRIAL COURT

II. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING ANY ISSUE WITH REGARD TO ALLEGED PROSECUTOR MISCONDUCT; ALTERNATIVELY, AND WITHOUT WAIVING ANY PROCEDURAL BAR, THE PROSECUTOR DID NOT COMMIT MISCONDUCT

III. THE JURY VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

STATEMENT OF THE CASE

Nature of the case, course of the proceedings, and disposition in the court below

The grand jury of Neshoba County indicted defendant, Gary Tubby, II, on August 8, 2008 for burglary, in violation of Section 97-17-23 of the Mississippi Code. (Trial Tr. vol. 1, 5). A co-defendant, Willie Wayne Tubby was also indicted the same, but received a directed verdict during the course of their trial. (Trial Tr. vol. 2, 114). At trial, Judge Marcus D. Gordon, presiding, defendant was found guilty of the charge against him by a reasonable jury of his peers, and subsequently sentenced to serve 11 years in the custody of the Mississippi Department of Corrections. (Trial Tr. vol. 2, 137).

During the testimony of the owner of the burglarized trailer, it was learned that his surname, "Hames," had been incorrectly known to the parties as "Haynes." (Trial Tr. vol. 2, 51-53). In accordance with Section 99-17-13 of the Mississippi Code, and case law on the subject, the prosecutor successfully moved to amend the indictment to insert the correct name of the victim. (Trial Tr. vol. 2, 100-101; Trial Tr. vol. 1, 17).

STATEMENT OF FACTS

Defendant was arrested after he and his co-defendant were found by a witness, Mr. Richard Hamilton, a neighbor of the victim, to be in the process of burglarizing the trailer of Mr. Jeff Hames. (Trial Tr. vol. 2, 27-46). Mr. Hamilton's daughter, Denise Goodin, contacted Mr. Hamilton because the car that defendant and co-defendant were riding in was operating very suspiciously. (Trial Tr. vol. 2, 18-20). During Mr. Hamilton's confrontation with these men he discharged his firearm a few times into the air in an attempt to stop them. (Trial Tr. vol. 2, 43-44). While his co-defendant was captured by Mr. Hamilton, defendant was able to evade capture until the Neshoba County Sheriff's Department apprehended him down the road from the trailer later that same afternoon. (Trial Tr. vol. 2, 54).

Now in custody, Investigator Ralph Sciple proceeded to read defendant his Miranda rights and after defendant affirmed his understanding of them, Investigator Sciple questioned him about the burglary. (Trial Tr. vol. 2, 80-82). At no time did defendant invoke his right to counsel or to remain silent, nor did Investigator Sciple perceive him to be under the influence of alcohol or narcotics. (Trial Tr. vol. 2, 81-82). Defendant made an oral statement that he convinced his co-defendant to assist him in "break[ing] into something and to steal something to sell." (Trial Tr. vol. 2, 83).

Following his Friday arrest, Investigator Sciple questioned defendant at the

Neshoba County Jail on Monday, August 11, 2008. (Trial Tr. vol. 2, 83). Prior to this interview, defendant was again apprised of his Miranda rights, verbally and in writing on a waiver of rights form, which he signed. (Trial Tr. vol. 2, 85). Defendant made a statement to Investigator Sciple, which was written down by him (Investigator Sciple). (Trial Tr. vol. 2, 87). Investigator Sciple also verified with defendant that the statement he had written was correct, and defendant signed the statement attesting to this. (Trial Tr. vol. 2, 87).

Defendant's written statement was that he had been drinking the morning of the burglary, that he and his co-defendant were going to break into something to steal something to sell, that after finding a trailer to break into he used his knife to open its door in furtherance of that goal, and after being confronted by someone, ran off. (Trial Tr. vol. 2, 88).

SUMMARY OF THE ARGUMENT

I.
THE AMENDMENT TO THE INDICTMENT TO CORRECT THE PROPERTY OWNER'S SURNAME WAS ONE OF FORM, NOT SUBSTANCE, THEREFORE IT WAS PROPERLY SUSTAINED BY THE TRIAL COURT

During trial, it was determined that the victim's surname was incorrect. The prosecution rectified this by filing a motion to amend the indictment to insert the correct name of the victim, and the court granted this motion. As settled Mississippi jurisprudence holds, this was merely a change in form to the indictment, not substance, and was completely proper. Contrary to what defendant asserts, this change did not prejudice him.

II.

DEFENDANT IS PROCEDURALLY BARRED FROM RAISING ANY ISSUE WITH REGARD TO ALLEGED PROSECUTOR MISCONDUCT; ALTERNATIVELY, AND WITHOUT WAIVING ANY PROCEDURAL BAR, THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Since the defendant failed to contemporaneously object to any of the alleged instances of prosecutor misconduct, or even mention them in his motion for a new trial, he is procedurally barred from raising this issue on appeal. Alternatively, and without waiving any procedural bar, all of the alleged instances of prosecutor misconduct were, in fact, proper.

III.
THE JURY VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

Defendant's sole contention on this point of error is that because an eyewitness did not actually see defendant inside the trailer, his testimony that the defendant came from inside the trailer should have been ignored by the jury. The credibility of this witness, and his testimony that the defendant was inside the trailer prior to being seen by him, was for the jury to weigh. Accordingly, the jury believed that the only place defendant could have been prior to being seen by this witness was inside the trailer. It did not believe that defendant was just standing outside of the door he just forcibly opened.

ARGUMENT

I.
THE AMENDMENT TO THE INDICTMENT TO CORRECT THE PROPERTY OWNER'S SURNAME WAS ONE OF FORM, NOT SUBSTANCE, THEREFORE IT WAS PROPERLY SUSTAINED BY THE TRIAL COURT

As the determination of whether to grant the indictment was within the sound discretion of the trial judge, the proper standard of review is abuse of discretion, not *de novo* as defendant states. Regardless, the granting of the amendment to the indictment was proper under any standard of review.

During the testimony of the owner of the burglarized property, it was learned that his surname was incorrectly known to the parties as "Haynes," rather than "Hames." (Trial Tr. vol. 2, 51-53). To remedy this mistake, the prosecutor properly moved to amend the indictment after the close of its case, which the court granted through an order to amend the indictment. (Trial Tr. vol. 2, 100-101; Trial Tr. vol. 1, 17). In granting the motion, the trial judge noted that it was one of form, not substance and would not prejudice the defendant in any way. (Trial Tr. vol. 1, 101). Defense counsel's objection to the motion was overruled. *Id.*

Defendant's argument, much like the amendment to the indictment is one of form, not substance. For all of defendant's quotations, citations and assertions, settled Mississippi jurisprudence on this exact matter has apparently been ignored by him.

"Mountains of case law out of our Mississippi courts speak to the issue of

amending indictments to reflect the true names of parties." *Stradford v. State*, 771 So.2d 390, 395 (Miss. Ct. App. 2000) (citing *Evans v. State*, 499 So.2d 781 (Miss. 1986); *Bingham v. State*, 434 So.2d 220 (Miss. 1983); *Jones v. State*, 279 So.2d 594 (Miss. 1973); *McDole v. State*, 229 Miss. 646, 91 So.2d 738 (1957); *Gillespie v. State*, 221 Miss. 116, 72 So.2d 245 (1954); *Burson v. State*, 756 So.2d 830 (Miss. Ct. App. 2000)). Indeed, this was settled by the Supreme Court of Mississippi as far back as 1876. *Miller v. State*, 53 Miss. 403, 1876 WL 5102 (Miss. 1876) (holding that order to amend indictment to correct the victim's name was proper; *rev'd* because not every instance of victim's name was amended).

To use this Court's previous reasoning on this subject,

> Mississippi Code Ann. §99-17-13...explicitly makes it possible for a party to amend an indictment where the change is to be an immaterial matter and the defendant will not be prejudiced in his defense. *Jackson v. State*, 450 So.2d 1081, 1082 (Miss. 1984); *Bingham*, 434 So.2d at 223; *Evans*, 425 So.2d at 1044-45. *See also Van Norman v. State*, 365 So.2d 644, 647 (Miss. 1978); *Jones*, 279 So.2d at 650-51; *Shelby v. State*, 246 So.2d 543, 545 (Miss. 1971); *Bennett v. State*, 211 So.2d 520, 522 (Miss. 1968); *Gillespie*, 221 Miss. At 118, 72 So.2d at 246. In other words, if an amendment is made in an indictment, it must be one of form, not substance, to be acceptable. *Rhymes v. State*, 638 So.2d at 785; *Akins v. State*, 493 So.2d 1321 (Miss. 1986); *Contreras v. State*, 445 So.2d 543, 545 (Miss. 1984); *Hannah v. State*, 336 So.2d 1317, 1321 (Miss. 1976); *Sanders v. State*, 313 So.2d 398, 401 (Miss. 1975). The test for whether the amendment is form or substance is "[w]hether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made." 42 C.J.S. Indictments and Information § 240, page 1250 (1944); *Bingham*, 434 So.2d at 223.

Stradford, 771 So.2d at 395-96.

In addition, section 99-17-13 of the Mississippi Code gives as an example of items that may be amended because they are of form and not substance, "the name or description of any person...therein stated or alleged to be the owner of any property, real or personal, which shall form the subject of any offense charged therein." *Id.* (quoting Miss. Code Ann. §99-17-13). Clearly this directs that the amendment in this case was proper under the statute and case law.

Defendant's brief cites to *Wright v. State*, 94 So.2d 716, 717 (Miss. 1923), to support the assertion that "ownership of the dwelling is an essential element of the offense of burglary," but the defect in the *Wright* indictment was that it only gave the name of a partnership that owned the building, not the individuals comprising the partnership. *Id.* Further, defendant broadly asserts that the ownership of the building is an essential element of burglary, but any outside support for this contention is conspicuously lacking. The burglary statute, section 97-17-23 of the Mississippi Code, only refers ownership in that the "dwelling house [be owned] by another." Frankly, it makes no difference whether a Mr. "Haynes" or a Mr. "Hames" owned the house; it would in no way prejudice the defendant or hinder the State from proving all elements of the offense charged.

Defendant also states that this Court "has held that it is not sufficient to charge merely that the defendant burglarized a dwelling; the indictment must charge the specific ownership of the building." (Def.'s Br. at 7) (citing *Crosby v. State*, 191 Miss.

173, 2 So.2d 813 (1941)). *Crosby* is readily distinguishable from this case in that there was no statement of ownership in that indictment, whereas in the case *sub justice* there was a statement of ownership, misspelled as it may have been. Defendant apparently missed the part of the opinion in *Crosby* wherein the Court stated that if there had been an incorrect statement of ownership, an amendment to the indictment would have sufficed to remedy the mistake. *Id.* at 814.

Defendant argues that it was prejudicial because they had to "comb the countryside for a non-existent owner of the dwelling." (Def.'s Br. at 10). The defense apparently had no trouble finding the burglarized home since they were able to present a picture of it as an exhibit. (Def.'s Exhibit D-1). The defense knew the address of the home, and defendant himself admitted to being there in his own statements. (State's Exhibit 2; Trial Tr. vol. 2, 82-83). If knowing the correct surname of the owner were so crucial to the defense, they simply had to go to the Neshoba County Tax Assessor's website at http://www.neshobacounty.net/online-services/search-land-records.php, type in the address of the property, which they undoubtedly knew, or could have easily ascertained, and the owner's correct name would have appeared. All of this could have been done in less than a minute from anywhere in the world, and at no cost to defendant.

II.

DEFENDANT IS PROCEDURALLY BARRED FROM RAISING ANY ISSUE WITH REGARD TO ALLEGED PROSECUTOR MISCONDUCT; ALTERNATIVELY, AND WITHOUT WAIVING ANY PROCEDURAL BAR, THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Defendant's second point of error is that there was alleged prosecutorial misconduct. Aside from lacking any merit, this argument can be disposed of summarily as being procedurally barred. It is well-settled precedent in Mississippi jurisprudence that this exact issue is absolutely barred on appeal when no contemporaneous objections were made by defense counsel at trial, and when the alleged misconduct is not stated as a point for a motion for a new trial or directed verdict.

Once again defendant scours the case law from the federal first circuit to the ninth, desperately trying to match precedent to fit his needs. For relevant case law for this point of error, *Davis v. State* makes it clear that "[a] contemporaneous objection must be made to allegedly erroneous comments made during closing argument or the point is waived." 660 So.2d 1228, 1251 (Miss. 1995) (citing *Foster v. State*, 639 So.2d 1263, 1289 (Miss. 1994); *Monk v. State*, 532 So.2d 592, 601 (Miss. 1988); *Gray v. State*, 487 So.2d 1304 (Miss. 1986); *Shavers v. State*, 455 So.2d 1299 (Miss. 1984)). Defense counsel never objected to the prosecutor's alleged misconduct at trial, nor was this point raised in the Motion for New Trial. (Trial Tr. vol. 1-2; Trial Tr. vol. 1, 22). Defendant also admits that there were no contemporaneous objections regarding the

alleged misconduct. (Def.'s Br. at 10, 12, 16).

The Supreme Court of Mississippi has stated that "[a] prosecutor is forbidden from interjecting his personal beliefs regarding the veracity of witnesses during closing argument. By the same token, it is incumbent on defense counsel to raise a proper objection when the offensive language is uttered or waive appellate review of the issue." *Hunter v. State*, 684 So.2d 625, 637 (Miss. 1996) (quoting *Foster v. State* at 1288-89) (internal quotation marks omitted). The court reiterated this in *Weatherspoon v. State*, by holding that without a contemporaneous objection defendant waives appellate review of this matter, and is procedurally barred from raising it for the first time on appeal. 732 So.2d 158, 164 (Miss. 1999) (citing *Johnson v. State*, 477 So.2d 196, 209-10 (Miss. 1985); *Ratliff v. State*, 313 So.2d 386, 388 (Miss. 1975)).

Defendant is correct that if this point of error is not procedurally barred (which it is), the plain error standard would apply. *Foster* at 1289. However, this would only be the case "if [the prosecutor's] argument is so 'inflammatory' that the trial judge should have objected on his own motion the point may be considered." *Gray v. State*, 487 So.2d 1304, 1312 (Miss. 1986) (citing *Griffin v. State*, 292 So.2d 159, 163 (Miss. 1974)). For the sake of argument, and without waiving the procedural bar, the alleged misconduct did not rise to that level. Looking at each instance of alleged misconduct, this becomes apparent.

First, defendant asserts that the prosecutor improperly stated that one of the

witnesses would not face any prosecution stemming from his discharge of a firearm during the defendant's crime. (Def.'s Br. at 11). Defendant only states that this was prejudicial, and puts forth general arguments about how prosecutors should not discuss facts not in evidence, give personal testimony, or personal opinion. (Def.'s Br. at 11-18). During cross-examination of the witness, defense counsel inquired into the legality of the witness's discharge of his firearm. (Trial Tr. vol. 2, 37). When defense counsel made his closing argument he argued that the witness's credibility should be questioned because in his opinion it was illegal for him to shoot his weapon if defendant was not actually inside the home. (Trial Tr. vol. 2, 126). It makes no sense whatsoever that defendant would now find it prejudicial for the prosecution to address this during closing argument. This was the prosecutor's direct response to the line of questioning and the argument of defense counsel. It cannot now be argued that this proportionate response unjustly prejudiced defendant. In short, defendant made his bed; he must now lay in it.

Defendant next alleges that he was prejudiced because the prosecutor elicited testimony from him that he engaged in underage drinking on the day of his arrest, and stated the same during closing argument. (Def.'s Br. at 15). Of course, defendant fails to mention that defense counsel opened this door when he asked defendant questions regarding whether or not he had had any prior encounters with law enforcement. (Trial Tr. vol. 2, 110). In accordance with Mississippi Rule of Evidence 404(a)(1), the

prosecutor rebutted this line of questioning through recross examination. Miss. R. Evid. 404(a)(1); Trial Tr. vol. 2, 110-12. The prosecutor did not enter this line of questioning to prove defendant's conduct in this case, he was merely responding to defendant's attempt to portray himself as a law-abiding citizen, which is completely proper for him to do under the circumstances. According to the Supreme Court of Mississippi, to not allow the State to impeach defendant's assertion that he had never been in trouble would be unfair to the State, and to argue otherwise is "without merit." *Morgan v. State*, 741 So.2d 246, 254-55 (Miss. 1999) (police officer who testified to his good character opened the door to his being questioned regarding brutality allegations not resulting in arrest) (citing *Stewart v. State*, 596 So.2d 851, 853 (Miss. 1992)).

Finally, defendant takes issue with the prosecutor's questions of the defendant regarding the truthfulness of other witnesses. In support of this, defendant takes general principles from case law on this subject arising out of the Ninth Circuit Court of Appeals, Iowa, Minnesota, the Second Circuit Court of Appeals, New Mexico, New York, and a law journal article out of Colorado. (Def.'s Br. at 16-17). The only Mississippi case defendant offers is not even on point. The case, *Hart v. State*, only refers to expert testimony, and in fact, the defendant's conviction in that case was affirmed. 637 So.2d 1329 (Miss. 1994). Frankly, the State is unable to see *any* similarities between *Hart* and the case at bar. *Id.* Prior to citing the case in his brief,

defendant references Mississippi Rule of Evidence 608, but that rule is not mentioned once in *Hart*. *Id.*

During cross-examination of defendant, defendant's testimony was clearly not coinciding with what the other witnesses had testified, or with his own written statement to the police. (Trial Tr. vol. 2, 106-10) The only two reasonable conclusions one could draw from this was that either the defendant was lying or all of the other witnesses were lying. It is true that witness credibility is the domain of the jury. *Harris v. State*, 970 So.2d 151, 156 (Miss. 2007). Nonetheless, it made logical sense for the prosecutor to ask this of the defendant to provide the jury with the proper basis for determining witness credibility.

Indeed, when confronted with this issue before, this Court has stated that this type of questioning is proper, so long as the foundation for it has been laid by the defendant. *Esco v. State*, 9 So.3d 1156, 1165-68 (Miss. Ct. App. 2008) (prosecutor's questioning defendant as to whether other witnesses were lying was not prosecutorial misconduct)). In *Esco*, the defendant had been asked by the prosecutor whether he had made a particular statement to a police officer, and testified that he had not. *Id.* at 1168. In his response, Esco stated that the officer was lying, rather than simply mistaken. *Id.* It should also be noted that the defense in *Esco* made a contemporaneous objection to this line of questioning, which is lacking in this case. *Id.*

Here, defendant's testimony was in direct contradiction with his written

statement to police and with the sworn testimony of other witnesses. (Trial Tr. vol. 2, 106-10). Just as in *Esco*, it was proper for the prosecutor to elicit testimony from the defendant as to whether the other witnesses were mistaken, or lying. In fact, defense counsel interrupted the prosecutor's questioning to ask that the court instruct the prosecutor to give defendant an opportunity to answer the questions. (Trial Tr. vol. 2, 108).

Again, aside from being procedurally barred from bringing this point of error on appeal, defendant's claim is without merit.

III.
THE JURY VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

On this point of error, that the jury verdict was against the overwhelming weight of the evidence, the evidence is viewed in the light most favorable to the verdict. *Scott v. State*, 796 So.2d 959, 967 (Miss. 2001) (citing *Esparanza v. State*, 595 So.2d 418 (Miss. 1992)).

As defendant correctly states, the prosecution is required to prove defendant's guilt on each and every element of the offense. (Def.'s Br. at 18). The elements of burglary are "(1) the unlawful breaking and entering; and (2) the intent to commit some crime when entry is attained." *Parker v. State*, 962 So.2d 25, 27 (Miss. 2007) (quoting *Edwards v. State*, So.2d 454, 463-64 (Miss. 2001)). Since the only evidence with which defendant takes issue is the testimony indicating he was in the dwelling, presumably defendant's only point of error is that the prosecution failed to prove the first element, namely the "entering" element. (Def.'s Br. at 19).

"[The Supreme Court of Mississippi] has in numerous cases, too many to mention, said that when the evidence is conflicting, the jury will be the sole judge of the credibility of witnesses and the weight and worth of their testimony." *Parker*, 962 So.2d at 27 (quoting *Scott*, 796 So.2d at 968). "In other words, the credibility of witnesses is not for the reviewing court." *Scott*, 796 So.2d at 968. Additionally, "[the Supreme Court of Mississippi] has previously upheld testimony of a single

uncorroborated witness as sufficient to sustain conviction despite the fact that more than one person testified to the contrary." *Id.* (citing *Williams v. State*, 512 So.2d 666, 670 (Miss. 1987)).

In this case, defendant argues that Mr. Hamilton testified that he saw defendant in the trailer, but that the "laws of physics" would not allow him to have seen defendant inside the trailer because of how its door opens. (Def.'s Br. at 20). Mr. Hamilton did not testify that he saw defendant actually inside the trailer. (Trial Tr. vol. 2, 27-46). His testimony clearly stated that he came to the back of the trailer, and he saw defendant coming out of the trailer. (Trial Tr. vol. 2, 32, 39). Defendant's written statement says that he forcibly opened the door to the trailer. (State's Exhibit 2).

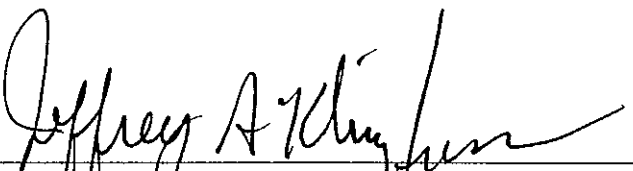
Looking at the picture of the back of the trailer, it is clear that, just as Mr. Hamilton testified, there was no where for defendant to be, but inside the trailer. (Def.'s Exhibit D-1) (Trial Tr. vol. 2, 32, 39). The way the door opens, and the small steps leading up to it, would make it impossible for defendant to have been anywhere but inside the trailer prior to Mr. Hamilton seeing him come out of the trailer. It was for the jury to decide whether to believe that Mr. Hamilton saw defendant coming out of the trailer, and to give it whatever weight it deemed proper. In doing so, the jury obviously believed Mr. Hamilton's testimony and that the only logical place for defendant to have been prior to Mr. Hamilton seeing him was inside the trailer.

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 the sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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