2009-KA-005-96-COART

REPLY BRIEF OF APPELLANT

REQUEST FOR ORAL ARGUMENT

Appellant Tubby requests oral argument becausae the facts and law are sufficiently complicated that oral argument would benefit the Court.

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STATEMENT OF THE CASE

Significantly, Tubby was not charged with attempted burglary. The issue, therefore, was whether he broke **and** entered the trailer. The investigators never recovered fingerprints from the inside of the trailer. R.II/91. Moreover, the door of the trailer opens to the outside toward the south where the witness who testified that he saw Tubby inside the trailer was. Furthermore, Gary Tubby never said he went inside the trailer. R.II/92.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in allowing the state to amend the indictment as to the name of the owner of the property. Cumulative prosecutorial misconduct requires reversal. The jury verdict is against the overwhelming weight of the evidence.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE STATE TO AMEND THE INDICTMENT AS TO THE NAME OF THE OWNER OF THE PROPERTY.

A. Standard of Review:

The State says that whether or not to amend an indictment is reviewed for an abuse of discretion. However, the state cites no cases in support. In fact, whether an indictment is

defective is an issue of law requiring de novo review. *Conley v. State,* 790 So.2d 773, 781 (Miss. 2001). This is so because the issue here is whether a court has the legal authority to amend an indictment without action of the grand jury.

B. The Merits:

In his initial brief, Tubby argued that an amendment of an essential element of the offense requires action of the grand jury. In support, he cited numerous federal and state cases so holding. The State counters that "mountains of case law out of our Mississippi courts speak[s] to the issue of amending indictments to reflect the true names of parties." Appellee's Brief,, p. 9. The State then cites a number of cases which do not directly address the question here, which is the amendment of an essential element of the crime.

For example, *Stradford v. State,* 771 So.2d 390. 395 (Miss.App. 2000), cited by the State, is a grand larceny case where the larceny victim's name was amended. *Evans v. State,* 499 So.2d 781 (Miss. 1986) is an armed robbery case. *Bingham v. State,* 434 So.2d 220 (Miss. 1983) is a manslaughter case. *Jones v. State,* 279 So.2d 594 (Miss. 1983) is a manslaughter case. In *McDole v. State,* 229 Miss. 646, 91 So.2d 738 (1957), the indictment was for breaking and entering with intent to rape. There the court allowed the rape victim's name to be amended. It did not allow the description of the house or its ownership to be amended. *Gillespie v. State,* 221 Miss. 116, 72 So.2d 245 (1954) is a murder case. *Burson v. State,* 756 So.2d 830 (Miss. App. 2000) is a manslaughter case.

Not one of the State's cases involves a situation where the amendment involved an essential element of the offense as here. The name of the victim is not an element of larceny, rape, murder or manslaughter. There can be no doubt, however, that the ownership or a precise description of the property broken into is an essential element of burglary. For example, 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. *Crosby v. State*, 191 Miss. 173, 2 So.2d 813 (1941). Moreover, the Court has held that the ownership of the dwelling is an essential element of the offense of burglary which must be pled and proved as charged by the grand jury. *Wright v. State,* 94 So. 716, 717 (Miss. 1923).[1]

In Tubby's case, the grand jury charged only that the property was situated in Neshoba County and was a "mobile home of the property of Jeff Haymes." C.P.I/5. Thus, the only description by the grand jury was that the mobile home belonged to Haymes. The description/ownership, unlike the name of a victim of a homicide, rape or larceny, is an essential element, the factual elements of which cannot lawfully be amended without grand jury action. In other words, it is not an amendment of form only, it is one of subtance. *Quick v. State*, 569 So.2d 1197, 1199 (Miss. 1990).

Here, the indictment was amended as to the factual basis of an essential element. Such amendments are reversible without inquiry into prejudice because it means that the defendant was convicted on a charge not made by the grand jury. *Lester v. State,* 692 So.2d 755, 775 (Miss. 1997) [quoting "*Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)(in which the Supreme Court held that amending the essential facts in the indictment was reversible

[1] The State argues that both *Crosby* and *Wright* cited initially by Tubby are distinguishable. *Crosby* is distinguishable, according to the state, because it lacks a statement of ownership and therefore lacks an essential element. *Crosby,* however, clearly stands for the proposition that ownership is an essential element. The State cites dicta from *Crosby* stating that the indictment could have been amended if the name had been merely wrong; however, this statement is dicta only, not the holding of the case. The State attempts to distinguish *Wright* by saying that the defect was that it gave only the partnership, not the individuals owning the partnership. The point of *Wright,* however, is that the property must be identified by its owner. The case, therefore, supports Tubby's argument, not the state's.

error per se without any inquiry into prejudice"], overruled on other grounds in *Weatherspoon v. State*, 132 So.2d 158 (Miss. 1999).[2]

As this Court held in *Rhymes v. State,* 638 So.2d 1270, 1275 (Miss. 1994):

> It is well settled in this state ... that a change in the indictment is permissible if it does not materially **alter facts which are the essence of the offense on the face of the indictment** as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. *Wilson v. State,* 574 So.2d 1324 (Miss.1990) citing *Ellis v. State,* 469 So.2d 1256, 1258 (Miss.1985), quoting from *Shelby v. State,* 246 So.2d 543, 546 (Miss.1971) [emphasis added].

Here, the prosecution, over the Defendant's objection, was allowed to alter facts which are the essence of the offense. Such an amendment was one of substance and prejudiced the defense by requiring them to comb the countryside for a non-existent owner of the dwelling in order to identify the property. The State counters that eventually the defense must have found the trailer because they had a photograph. Moreover, the State says that the defendant could have utilized the Internet to find the property. R.II/101. The State's argument, however, misses the point. The defendant is not required to guess that he has taken a photograph of the right place; nor is he required to comb the land records of the Internet to find out what property the state is alleging is the site of the particular offense. The duty is on the State to properly charge the crime, a task which the **State** could have fulfilled by checking the Internet or court land records.

Attorneys who represent criminal defendants should not have to bear the burden of figuring out what the crime is. It is easy enough for the State to simply present its case to the grand jury with the appropriate facts. If the facts as to an essential element are discovered to be different from those presented to the grand jury, then the State must bear the burden of amending the indictment by submitting those facts to another grand jury. Here there is no way of knowing

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[2] *Lester* also holds that failure to request a continuance does not bar the Court from considering the issue because the "trial court would still have lacked the authority to amend the indictment,

what facts the grand jury actually heard. Neither the State nor this Court should substitute its judgment for that of the grand jury.

II. CUMULATIVE PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

A. Standard of Review:

Because no objection was made to the complained of errors, review is under the plain error standard. The state in arguing this Court cannot review the errors fails here to distinguish between waived errors and those which are merely forfeited. An error is deemed to be waived and thus insulated from review where the defendant affirmatively, intelligently and knowingly waives an issue. Where it is merely forfeited by failure to object, the Court has the discretion to review the error for plain error. *See for example, the discussion in United States v. Lewis*, 492 F.3d 1219 (11th Cir. 2007) [Forfeiture of right allowing for plain error review under federal criminal rules is failure to make timely assertion of a right; whereas, waiver, precluding review, is intentional relinquishment or abandonment of a known right].

B. The Merits:

Mississippi case law plainly allows this Court to notice plain error where the prosecution's argument is so prejudicial that it could not be cured by timely objection and instruction by the court to ignore the faulty argument and the argument may have led the jury to decide the case on an improper basis. As Tubby pointed out in his initial brief, review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State*, 794 So.2d 181, 187-88 (Miss.2001). To determine if plain error has occurred, this Court must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the

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even if a continuance had been granted." *Id.*, 692 So.2d at 775.

error has prejudiced the outcome of the trial." *Cox v. State*, 793 So.2d 591, 597 (Miss. 2001) (relying on *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991).

Obviously credibility was the determining issue in the case. Tubby contended he did not actually enter the building. The witness, Richard Hamilton, a neighbor, said he saw Tubby inside the building.

It should be obvious that the principal issue with regard to the jury's decision was witness credibility. More specifically, the jury had to decide if Tubby was telling the truth about whether or not he entered the building or if Hamilton was telling the truth or was mistaken about whether or not he saw Tubby inside the building. This is so because no person other than Hamilton put Tubby inside the building; nor did Tubby's own statements to the Investigator do so. Moreover, **Willy** Tubby's statement does not place Tubby in the house but only on the porch attempting to open the door.

In order to explain why Mr. Hamilton might have had a motive to shade his testimony to put Tubby in the house, Tubby pointed out that Hamilton had fired a gun at Tubby. If Hamilton placed Tubby inside the house, then he would not be subject to criminal charges himself. R.II/125-26. In order to counter this argument, the prosecutor without any evidentiary support argued that "[Gary Tubby] didn't steal anything. Do you know why? Thank God for good neighbors. **Mr. Hamilton isn't facing any charges and he never will face any charges stemming from this incident** [emphasis added]." R.II/130.

The state now says that the prosecutor was merely responding to the defense argument. The problem with that argument, however, is that a prosecutor is not allowed to argue facts not in evidence in order to do so. *E.g., Walker v. State*, 740 So.2d 873 (Miss. 1999) [error to interject facts not in evidence]; *Tubb v. State*, 217 Miss. 741, 64 So.2d 911 (1953) [vouching, facts not in evidence, personal experience and opinion]. The State cites no authority for such a novel

CONCLUSION

The trial court erroneously allowed the indictment to be amended on an essential factual element of the crime. Therefore, this Court should reverse Mr. Tubby's conviction.

Furthermore, because the prosecution committed errors which had the cumulative effect of prejudicing the jury on the major issue in the case—witness credibility, the Court should reverse.

Finally, the Court should reverse because the evidence fails to support Mr. Tubby's guilt.

RESPECTFULLY SUBMITTED,
GARY TUBBY, APPELLANT

BY: _____
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellant, do hereby certify that I have this date mailed, by first class mail, postage prepaid, the original and three copies of the foregoing to the Clerk of this Court in Jackson, Mississippi at PO Box 249 Jackson, Mississippi 39205 have mailed by United States Mail, first class postage prepaid, a true and correct copy to the Honorable Marcus D. Gordon, Circuit Judge, at PO Box 220, Decatur, Mississippi 39327, Jim Hood, Attorney General, PO Box 220, Jackson, Mississippi 39205 and Mark Duncan, PO Box 603, Philadelphia, Mississippi 39350.

This, the 2nd day of June, 2010.

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