IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TADARRYL REW — APPELLANT

VS. — NO. 2009-KA-0646-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Defendant Tadarryl Rew, was indicted by the grand jury of Lauderdale County for the crimes of Burglary of a Dwelling, Kidnaping, Felon in Possession of a Firearm, and Kidnaping all as an habitual offender. After a trial by jury, Judge Lester F. Williamson, Jr., presiding defendant was found guilty of all four counts. In a separate hearing defendant was adjudged to be an habitual offender within the statutory provision of *Miss. Code Ann.* § 99-39-81 and sentenced to wit: Burglary of a dwelling - 15 years; Kidnaping- 10 years; Possession of Firearm - 1 year; Kidnaping 10 years.

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

STATEMENT OF FACTS

Interestingly, the Statement of Facts given by appellate counsel starts with the arrival of the police.... it is the position of the State the facts and crimes involved took place before the police arrived.

It all started when a young woman (Latasha) had a disagreement with this defendant and changed the locks on her apartment to prevent him from gaining access. (Tr.123-25, & 135). Defendant got angry and broke into the apartment by prying off a screen and breaking a pane of the window to gain access and crawl into the apartment. Defendant was a previously convicted felon (arson & statutory rape) and entered the apartment – which was being occupied by three friends of the woman who rented the apartment. She had taken to spending nights elsewhere in fear of defendant's actions.

Anyway, defendant entered the apartment and encountered some of the occupants (Jermaine, Darryl and Vanecia). Defendant showed a gun, herded two of them into a closet, threatened them, fired a shot to show his willingness and capability to commit additional felonies. (Presumably).

Defendant then took one of his victim's cell phone and tried to call the woman with whom he really had the beef... she immediately recognized the number (as that of her friend, staying at her apartment) and answered. She recognized defendant's

voice and realized, he must be in her apartment. Defendant essentially confirmed this an threatened the life of his victims. (tr. 132, 140, 143).

Latasha then had the police contacted and sent to the apartment...

The jury heard all the testimony, consistent, inconsistent, physical exhibits and photographs and found defendant guilty of burglary, two counts of kidnaping and felon in possession of a firearm.

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN GRANTING AN AMENDMENT TO THE INSTRUCTION THAT WAS REQUEST BY THE DEFENSE. ADDITIONALLY DEFENSE WAIVED ANY INCONSISTENCY BETWEEN THE INSTRUCTION AND THE INDICTMENT.

Defendant sought to have mention of the specific felony of kidnaping eliminated as the crime defendant intended to commit upon his burglarizing the apartment. The trial court agreed, and trial counsel waived any potential conflict as to the wording of the burglary offense in the indictment. The State too acquiesced in the amendment, as long as the record was clear it was at the request and behest of the defense.

The trial judge nor the State should be held in error for giving an instruction that adequately instructed the jury on the offense for which he was indicted.

II.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Trial counsel's performance was not deficient as there was a strategic reason to seek the amendment to the State's instruction to eliminate any mention of specific felonies consistent with other stipulations of the defense.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN GRANTING AN AMENDMENT TO THE INSTRUCTION THAT WAS REQUEST BY THE DEFENSE. ADDITIONALLY DEFENSE WAIVED ANY INCONSISTENCY BETWEEN THE INSTRUCTION AND THE INDICTMENT.

In this initial allegation of error defendant argues the trial court erroneously instructed the jury by the giving of Jury Instruction S-1, as amended. (C.p. 34).

Looking to the transcript it was the defense, as a part of trial strategy, that requested the change in the jury instruction. Tr. 294-296. The judge agreed, the State agreed with the caveat that the record reflect it was at the request of defense counsel. Also, the trial court specifically asked the defendant if he was waiving any inconsistency that such an instruction would present as it related to the language of the indictment. Again, trial counsel waived any objection.

> ¶ 47. Notwithstanding the fact that Vickers now argues against the sufficiency of his own instruction, it has been consistently held that when reviewing the adequacy of jury instructions they are to be read and considered as a whole.

Vickers v. State, 994 So.2d 200, 213 (Miss.App. 2008).

Interestingly, appellate counsel realizes this claim of error is attenuated in favor of the State – because defense counsel got exactly what he asked for. The trial court can hardly now be called in error when every effort was made to make defense

counsel aware of, and waive the same, potential claims. Neither should the State be held in error for defendant's waiver of having the jury instructed as to which specific crime defendant intended to commit as an element of the burglary.

So the State will argue that even with the amendment (which is now claimed as error) the jury was adequately instructed on the elements of the offense. This nearly said same factual and legal argument was heard by the Mississippi Court of Appeals and found wanting. *Alesich v. State*, 2009 WL 1856660 (¶¶ 8-4-15)(Miss.App. 2009).

The instructions, read together adequately followed the statutory language for the offenses. In this case, as in *Alesich*, defendant did not present any defense.... oh, to be sure he attorney argued about the lack of evidence, conflicts in the evidence, but the instruction as amended did not affect this defendant's case. In fact it made him easier to argue the witnesses were not credible and there was just confusion and he was caught up in it... This is not, and cannot be held error.

However, appellate counsel now argues, the action of trial counsel in asking for this amendment to the instruction should be analyzed as an ineffective assistance of counsel claim, which take us to our next response.

II.
DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Lastly, appellate counsel succinctly argues trial counsel's performance was deficient by amending the jury instruction for burglary to allow the State to offer proof of intent to 'commit any crime' within. (S-1, as amended, c.p. 34). (*See rationale of Alesich, supra.)*

Appellate counsel has correctly and succinctly cited the appropriate standard of *Strickland* to be applied in analyzing and ineffective assistance claim. Now on appeal it is argued there was no logical or conceivable for submitting the instruction as amended – thereby, as they now claim, broadening the ground upon which the jury could convict defendant. (Def.br. p.12).

> ¶ 31. We cannot fathom what additional instructions McKee believes should have been offered. Taking the instructions given as a whole, the jury was correctly informed of the State's obligation to prove the elements of the crime beyond a reasonable doubt. That is sufficient. Heidel v. State, 587 So.2d 835, 842 (Miss.1991). Trial counsel
>
> *McKee v. State,* 878 So.2d 232, 240 (Miss.App. 2004).

It would appear, arguably, that defense counsel at trial was trying to argue that defendant didn't know there were people in the apartment and that in the darkness and confusion much was mis-construed and he (maybe) didn't force Jermaine and Vanecia into the closet – there them being no kidnaping.

Further, this concept pressed by trial counsel was to limit or eliminate any mention of 'felony' crimes. Trial counsel, very specifically in a motion in limine sought to eliminate or diminish the mention of the number and type of previous convictions defendant had – a necessary element for the crime of felon in possession of a firearm.

So, the defense strategy, was to eliminate any mention of specific crimes in the charging, description, or elements of an offense. That he essentially was breaking into his own apartment... Well, such is a clear trial strategy and does not constitute deficient performance.

> ¶ 21. There is a presumption that a trial attorney's performance is competent. Edwards v. State, 615 So.2d 590, 596 (Miss.1993). To succeed on a claim of ineffective assistance of counsel, therefore, an appellant must prove that counsel's overall performance was deficient and that his defense was prejudiced by his attorney's inadequate performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Whether the elements of the Strickland test are satisfied is determined by looking at the totality of the circumstances. Cole v. State, 666 So.2d 767, 775 (Miss.1995).
>
> ¶ 22. Under Strickland, it further is presumed that the conduct of a trial attorney is reasonable and that decisions made during trial are strategic. Edwards, 615 So.2d at 596. This presumption includes decisions about whether to object to proffered testimony. Cole, 666 So.2d at 777. As discussed in Issues I and II, supra, ***there was no error in admitting the deputy clerk's testimony or in stipulating to the handwriting expert's testimony.*** Therefore, there is no merit to Waldon's *269 complaint with these aspects of his attorney's performance.
>
> *Waldon v. State*, 749 So.2d 262 (Miss.App. 1999)(emphasis added).

Having failed to me to show deficient performance defendant is not entitled to any relief under the *Strickland* analysis.

> ¶ 23. There is no constitutional right then to errorless counsel. Mohr v. State, 584 So.2d at 430; Cabello v. State, 524 So.2d 313, 315 (Miss.1988) (right to effective counsel does not entitle defendant to have an attorney who makes no mistakes at trial; defendant just had right to have competent counsel). ***If the post-conviction application fails on either of the Strickland prongs, the proceedings end.*** Neal v. State, 525 So.2d 1279, 1281 (Miss.1987); Mohr, 584 So.2d at 430.
>
> *Walker v. State*, 863 So.2d 1 (Miss. 2003)(emphasis added).

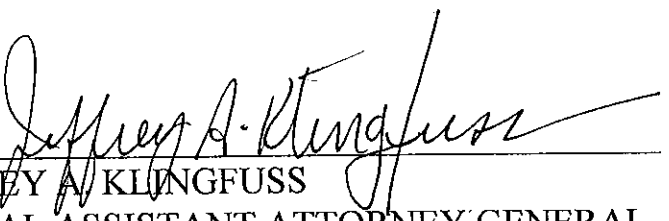
Consequently, no relief should be granted based upon this claim of ineffective assistance of trial counsel.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdicts of the jury and sentences 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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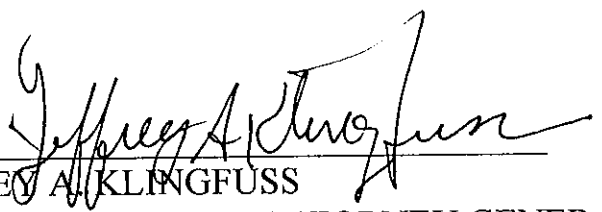
This the 3rd day of December, 2009.



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