

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TADARRYL REW

APPELLANT

V.

NO. 2009-KA-0646-COA

STATE OF MISSISSIPPI

APPELLEE

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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Tadarlyl Rew, Appellant
3. Honorable E.J. (Bilbo) Mitchell, District Attorney
4. Honorable Lester F. Williamson, Jr., Circuit Court Judge

This the 31<sup>st</sup> day of August, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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APPELLEE

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BRIEF OF THE APPELLANT

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**STATEMENT OF THE ISSUES**

- I. **THE TRIAL COURT COMMITTED PLAIN ERROR IN GRANTING INSTRUCTION S-1, AS AMENDED, WHICH CONSTRUCTIVELY AMENDED THE INDICTMENT AND RENDERED IT FATALLY DEFECTIVE.**
- II. **DEFENSE COUNSEL WAS INEFFECTIVE IN REQUESTING THE AMENDMENT TO INSTRUCTION S-1 THAT CONSTRUCTIVELY AMENDED THE INDICTMENT AND LESSENERED THE STATE'S BURDEN OF PROOF AND BROADENED THE GROUNDS ON WHICH THE JURY COULD CONVICT REW.**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi and four judgments of conviction entered against Tadarrryl Rew for the following: one count of burglary of a dwelling (Count I), two counts of kidnaping (Counts II and III), and one count of felon in

possession of a firearm (Count IV). (C.P. 46-50, Tr. 337, R.E. 14-19). Rew was adjudged a habitual offender under Mississippi Code Annotated Section 99-19-81, and sentenced to serve ten (10) years for burglary of a dwelling, ten (10) years for each kidnaping, to run concurrently, and one (1) year for felon in possession of a firearm. (C.P. 53-56, Tr. 362-64, R.E. 20-3). The trial court ordered the sentences in Counts II and III to run concurrently with each other, but consecutively with all other counts. (C.P. 53-56, Tr. 362-64, R.E. 20-3). The trial court denied Rew's motion for new trial and/or judgment notwithstanding the verdict. (C.P. 58-60, R.E. 24-6). Rew now appeals to this Honorable Court for relief..

### **STATEMENT OF THE FACTS**

In the early morning hours of May 21, 2008, Officer Sabanneo Terrell, of the Meridian Police Department, was called to the Village Apartments in response to a reported disturbance involving a gun. (Tr. 84-85, 87, 103). When he arrived, Officer Terrell noticed a broken window to the left of the apartment door. (Tr. 87). He also noticed what appeared to be blood, on the ground below the window. (Tr. 87, 106). According to Latasha Lewis, the resident of the apartment, the blood was Rew's; however, the incident causing this injury occurred two days before—on Monday, May 19, 2008. (Tr. 127).

Backup arrived, and Officer Terrell knocked on the door; but no one responded. (Tr. 87). Officer Terrell then walked around to the back of the apartment, where he noticed a “bent up” window screen lying on the ground next to an open bedroom window that had one broken glass pane. (Tr. 88, 105). He peered through the window and saw “[a man later identified as Rew] walking from the front of the house . . . past the entry to the bedroom on the right-hand side and he went to the rear bedroom.” (Tr. 89, 108). Officer Terrell testified that the light was off in the bedroom with the broken glass. (Tr. 105). Officer Terrell walked back around to the front to meet other officers,

when the front door opened, and a man later identified as Jermaine walked out with his hands up. (Tr. 90, 109). The man kept saying "I'm not the one you're looking for." (Tr. 90).

Officer Terrell and Officer John Griffith then entered the apartment, and Rew walked out of the bathroom. (Tr. 91, 111). The officers ordered Rew to lay down and put his hands out; he complied; and the officers secured him. (Tr. 92). In the rear bedroom, officers found two people on the bed; Officer Terrell noticed no physical injuries on them. (Tr. 94, 112).

Officer Terrell then went into the other bedroom—the bedroom with the broken window—where he found a cellular phone and a handgun underneath a chest of drawers. (Tr. 95, 106). He noticed a bullet hole in the door to this bedroom; however, he searched the bedroom and found no shell casing. (Tr. 99, 102-03, 106).

Officer Terrell patted Rew down for weapons and transported him to the police station; he noticed no cuts or blood on Rew (Tr. 102, 107, 114-15).

Latasha Lewis had a daughter with Rew, and Rew lived with Lewis at her apartment at The Village Apartment Complex until May 11, 2008, when Rew and Latasha had an argument about their daughter, and Latasha no longer allowed Rew in her apartment. (Tr. 123-25, 135).

On the night in question, Latasha was staying at her mother's residence; Latasha's cousin, Jermaine Lewis (Jermaine), and his friends Darryl Franklin (Darryl) and Vanecia Middlebrook (Vanecia) were staying at Latasha's apartment with her permission. (Tr. 130, 145). In the early morning hours of May 21, 2008, Latasha had some phone calls from Rew's cell phone; however, she did not answer them. (Tr. 130-31). She also testified that she received a call from Jermaine's cell phone (made to her mother's house) at about 4:00a.m. (Tr. 131, 138, 143).

According to Latasha, she answered this call and discovered Rew on the other end of the line pretending to be Jermaine. (Tr. 131, 138). Latasha testified that Rew said "It's me Jermaine, why

don't you let Tadarlyl see the baby?" (Tr. 132, 138-40). The phone then hung up, and Jermaine's cell phone called her cell phone. (Tr. 138, 143). According to Latasha, she answered this call, but the phone hung up again. (Tr. 139-40, 141-43). Latasha then called Jermaine's cell phone from her cell phone and asked Rew how he got in her house, and Rew said "you must not love your cousin [Jermaine]. I got a gun to his head and I'll kill him." (Tr. 132, 140, 143). Latasha also testified that Jermaine said, "Tasha, let Tadarlyl see the baby. Don't listen to Stephanie and Tiffina because they ain't nothing but B words." (Tr. 132, 140, 143). According to Latasha, she heard one gun shot through the phone and she thought Rew shot Jermaine. (Tr. 132-33).

Latasha then woke up her sister, who called the police. (Tr. 132-33). Latasha testified that she stayed on the phone with Rew until the police arrived, at which point Rew hung up. (Tr. 134). According to Lewis, her back bedroom window was intact, and there was no bullet hole in her bedroom door before May 21, 2008. (Tr. 128-129). She also testified that she did not have a gun in her apartment. (Tr. 140-41).

Jermaine testified that he and his friends Darryl and Vanecia were staying at Latasha's apartment with her permission on May 21, 2008. (Tr. 144-45). Jermaine testified that he was asleep in Latasha's bedroom when he heard glass crack. (Tr. 147, 163-65). He then got up and checked the hallway; when he returned to the bedroom, he saw Rew coming through the window. (Tr. 147-48, 163-65). Significantly, Jermaine testified that, when Rew saw him he asked, "What are you doing in my mother fucking house?" (Tr. 149).

Jermaine went on to testify that Rew pointed a gun at him and told him to "get back." (Tr. 149). According to Jermaine, Rew then told Vanecia (who was in the bed) to get up, and he ordered Jermaine and Vanecia to get in the closet. (Tr. 149-50, 164). Jermaine testified that Rew was trying to call Latasha from his (Rew's) cell phone, but she did not answer. (Tr. 150, 164-65). He testified

that Rew then grabbed his (Jermaine's) cell phone and ordered Jermaine to call Latasha. (Tr. 150-51). Jermaine testified that, contrary to Latasha's testimony, neither he nor Rew dialed Latasha's mother's house-phone from his (Jermaine's) cell phone. (Tr. 165-66). Jermaine testified that Rew said to Latasha, "So you don't love your cousin," and then Rew fired a shot toward Jermaine and Vanecia. (Tr. 150-52).

About ten minutes later, Jermaine saw police lights ("The white lights, big bright light.") flashing through the back window. (Tr. 154-55). Contrary to Officer Terrell's testimony, Jermaine testified that the bedroom light were on at this time. (Tr. 167). According to Jermaine, Rew then panicked, said that he was a "three-time loser," and told him to say that they were all watching television. (Tr. 154-55). Jermaine then walked into the other bedroom where Darryl was, told him what was going on, and then walked to the front door. (Tr. 155-56).

Jermaine testified that, as he was walking to the front door to exit, he saw Rew "bending down like he was trying to hide a gun or something back towards [Latasha's] room." (Tr. 156). He also said that, as the police ordered him on the ground, he saw Rew walking to the bathroom. (Tr. 157). Jermaine also identified the gun admitted into evidence at trial (Exhibit S-2) as the gun Rew had on the night in question. (Tr. 158-59).

Darryl testified that he Jermaine and Vanecia were hanging out on the night in question until about 2:00a.m., when he went to sleep in a bedroom by himself. (Tr. 172). He testified that the light in his bedroom was on, but he was a "heavy sleeper." (Tr. 172). He testified that Jermaine woke him up and told him that "Tasha's boyfriend, he put them in the closet and stuff." (Tr. 172-73). Jermaine testified that he saw Rew come out of "the other bedroom" with a gun in his hand and walk "toward the living room and the bathroom." (Tr. 174). Rew told him to be quiet. (Tr. 175). Darryl testified that the police were outside the apartment by this time, and Jermaine told him and



Rew that he was going to walk outside. (Tr. 177). After Jermaine left, Vanecia came into the bedroom and sat on the bed. (Tr. 177). Darryl stayed in the room until the police walked in and discovered him. (Tr. 178-79). Darryl did not hear a gunshot that night. (Tr. 175).

Jamie Johnson, a forensic scientist with the Mississippi Crime Laboratory, testified that performed a gunshot residue analysis on Rew, and the results were negative—no gunshot residue on Rew. (Tr. 208). He also stated that washing one's hands could remove gunshot residue particles. (Tr. 209).

Jamie Bush, the regional laboratory manager of the Meridian facility of the Mississippi Crime Laboratory, testified that he tested the gun at issue as well as seven live .380 caliber cartridges for fingerprints, but found no prints sufficient to be used for identification. (Tr. 230-31, 239).

Vanecia Middlebrooks testified that she and Jermaine were asleep in Latasha's bedroom on the night in question when she heard the window shatter. (Tr. 247). She testified that Jermaine got up to check things out, and she saw a person she later identified as Rew in the room. (Tr. 247). Vanecia testified that Rew turned the lights, and she noticed a gun in his hand. (Tr. 249). According to Vanecia, he then ordered her to get in the closet. (Tr. 249). Vanecia also testified that she saw Rew point a gun at Jermaine, and she Rew shot the gun while she and Jermaine were in the closet. (Tr. 252). Vanecia testified that Rew "kept saying something about his baby and Tasha wouldn't let him see his baby." (Tr. 251). She heard Rew use the telephone but did not know whose phone he used. (Tr. 251-52). She testified that, when the police began knocking, Rew panicked and told them to act like nothing happened. (Tr. 253). Vanecia testified that she saw Rew hide the gun "under the bed." (Tr. 253, 264). She claimed that, at one point, she saw Rew put a sock on his hand, but she never saw him wipe the gun down. (Tr. 264). She also testified that she heard water running in the bathroom after police knocked on the door, but she did not know who was in the bathroom.

(Tr. 264-65). She also testified that the bedroom light was turned off when the police arrived. (Tr. 259). Vanecia did not see any cuts or blood on Rew. (Tr. 265). She testified that she was Rew take off a blue collared shirt, leaving an undershirt on his body. (Tr. 265-66).

Andy Havard, a detective of with the Meridian Police Department, arrived at the scene and took photographs and collected evidence. (Tr. 269). Detective Havard testified that he recovered a gun under the dresser where the cell phone was lying. (Tr. 272, 275). He also recovered the seven bullets from the gun—two were jammed in the chamber and five remained in the clip. (Tr. 273-74). Detective Havard searched for shell casings (empty shells) but found none. (Tr. 274). He testified that he tested the screen lying outside the bedroom window for fingerprints, but he found none. (Tr. 278).

At trial, the State offered Instruction S-1, which stated as follows:

The Court instructs the jury that, should you find from the evidence in this case, beyond a reasonable doubt that:

1. On or about the 21<sup>st</sup> day of May, 2008, in Lauderdale County, Mississippi;
2. The Defendant, Tadarrryl Rew, did willfully, unlawfully and feloniously break and enter the dwelling house of Latasha Lewis, with the intent to kidnap therein;

then it is your duty to find Tadarrryl Rew guilty of Burglary of a dwelling under Count I.

Should the State fail to prove any one or more of these essential elements beyond a reasonable doubt, then you shall find Tadarrryl Rew not guilty under Count I.

(Tr. 294, C.P. 34, R.E. 13). The trial court then asked if defense counsel had any objection to the instruction and the following exchange took place:

[Defense Counsel]: And the problem I have with it is: With the intent to kidnap. I understand the State's reasoning for putting that there because the definition of burglary is—

[Trial Court]: Do you want me to substitute with the intent to commit a crime

therein?

[Defense Counsel]: yes, sir.

[Trial Court]: Any objection to that?

[Prosecutor]: No, Your Honor. Just as long as it is in the record for the Supreme Court or whoever that it was at the defendant's request.

(Tr. 294-95). The trial court went on to grant the defendant's request, and gave Instruction S-1 to the jury with the words "kidnap therein" interlined and substituted with the words "commit a crime therein." (Tr. 296, C.P. 34, R.E. 13).

### **SUMMARY OF THE ARGUMENT**

Defense counsel rendered ineffective assistance in requesting the amendment to Instruction S-1 and the trial court erred in granting Instruction S-1, as amended. The amendment in Instruction S-1 broadened the grounds upon which the jury could convict Rew. Therefore, the change to the instruction constituted a constructive amendment to the indictment, which is per se reversible error. Therefore, the trial court, in giving Instruction S-1 to the jury committed plain, reversible error, and Rew is entitled to a new trial.

Additionally, defense counsel was ineffective for requesting the change in the first place. There is no conceivable reasonable basis for requesting to relax the State's burden of proof and broaden the grounds upon which the jury could convict Rew for the crime charged to proportions which would render the indictment fatally defective. Thus, defense counsel's performance in this regard was deficient. The instruction, as amended, renders it impossible to know which crime the jurors, as a whole or individually, determined that Rew intended to commit at the time he broke and entered Lewis' apartment. Therefore, the result of trial was unreliable, and, but for the deficiency, there is a reasonable likelihood that the outcome would have been different. Accordingly, Rew is

entitled to a new trial.

## **ARGUMENT**

### **I. THE TRIAL COURT COMMITTED PLAIN ERROR IN GRANTING INSTRUCTION S-1, AS AMENDED, WHICH CONSTRUCTIVELY AMENDED THE INDICTMENT AND RENDERED IT FATALLY DEFECTIVE.**

Appellant concedes that the trial court amended Instruction S-1 at the behest of defense counsel. As argued *infra*, defense counsel was ineffective for requesting this change. However, as explained below, the trial court committed plain reversible error in granting Instruction S-1, as amended, because his doing so amounted to a constructive amendment of the indictment, which is per se reversible error.

“[T]he people of Mississippi have [, pursuant to the provisions of Article 3, Section 27 of the Mississippi Constitution,] ordained that they not be prosecuted for felonies except upon the indictment by a grand jury. It has been the law since 1858 that the court has no power to amend an indictment as to the matter of substance without the concurrence of the grand jury by whom it was found, although amendments as to mere informalities may be made by the court.” *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990) (citing *McGuire v. State*, 35 Miss. 366 (1858)).

The Mississippi Supreme Court has held that:

A constructive amendment of the indictment occurs when the proof and instructions broaden the grounds upon which the defendant may be found guilty of the offense charged so that the defendant may be convicted without proof of the elements alleged by the grand jury in its indictment.

*Bell v. State*, 725 So. 2d 836, 855-56 (¶58) (Miss. 1998), (citing *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811 (1985)). *Bell* also instructed that :

A constructive amendment of an indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. . . . In such cases, reversal is automatic because the

defendant may have been convicted on a ground not charged in the indictment. . . .”

*Bell v. State*, 725 So. 2d 836, 855-56 (¶58) (Miss. 1998) (quoting *United States v. Adams*, 778 F.2d 1117, 1123 (5th Cir. 1985)). As explained by the Court in *Bell*, “not all variances between the indictment and instructions constitute a constructive amendment, nor do they rise to plain error. The central question is whether the variance is such as to substantially alter the elements of proof necessary for a conviction.” *Bell*, 725 So. 2d at 855 (¶61) (Miss. 1998).

In the instant case, Rew was indicted for burglary of a dwelling house under Mississippi Code Annotated Section 97-17-23, which provides as follows:

Every person who shall be convicted of breaking and entering the dwelling house or inner door of such a dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such a dwelling house or not, with the intent to commit some crime therein, shall be punished by imprisonment in the Penitentiary not less than three (3) years nor more than twenty-five (25) years.

Miss. Code Ann. § 97-17-23 (Rev. 2006).

While the statute refers only to the “intent to commit some crime therein,” Mississippi case law provides that an indictment for burglary must specify the underlying crime the defendant is alleged to have intended. See e.g., *Lambert v. State*, 462 So. 2d 308, 311 (Miss. 1984) (“[A]n indictment for burglary that does not specify what crime the accused intended to commit is fatally defective.”) (citing *Newburn v. State*, 205 So. 2d 260 (Miss. 1967); *State v. Buchanan*, 75 Miss. 349, 22 So. 875 (1898)); *Irby v. State*, 4 So. 2d 881 (Miss. 1941) (“The defect is fatal and fundamental, and failure to file demurrer thereto does not preclude appellant from challenging its validity upon appeal.”).

The indictment against Rew charged that he intended to commit the crime of kidnaping. However, the jury was instructed that Rew could be convicted for burglary if he intended to break an

entered Lewis' dwelling with the intent to commit a crime therein. This change clearly permitted broadened the grounds upon which the jury could have found Rew guilty of the offense charged such that he may have been convicted on a ground not charged in the indictment by the grand jury. Therefore, Instruction S-1, as amended, constituted an impermissible constructive amendment to the indictment; the trial court committed reversible error in granting it; and Rew is entitled to a new trial.

**II. DEFENSE COUNSEL WAS INEFFECTIVE IN REQUESTING THE AMENDMENT TO INSTRUCTION S-1 THAT CONSTRUCTIVELY AMENDED THE INDICTMENT AND LESSENE THE STATE'S BURDEN OF PROOF AND BROADENED THE GROUNDS ON WHICH THE JURY COULD CONVICT REW.**

Although this Court ordinarily does not, it may address a claim of ineffective assistance of counsel on direct appeal if "the record affirmatively shows ineffectiveness of constitutional dimensions." *Fannings v. State*, 997 So. 2d 953, 965 (¶37) (Miss. Ct. App. 2008) (quoting *Wilcher v. State*, 863 So. 2d 776, 825 (¶171) (Miss. 2003)). To establish a claim of ineffective assistance of counsel, the defendant must show that: (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *Ravencraft v. State*, 989 So. 2d 437, 443 (¶31) (Miss. Ct. App. 2008). The defendant bears the burden of proving both prongs and faces a rebuttable presumption that trial counsel's performance "is within the wide range of reasonable conduct and that his attorney's decisions were strategic." *Id.* (citing *Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993)). The defendant may rebut this presumption, however, by "demonstrat[ing] that, but for his attorney's unprofessional errors, the outcome of his trial would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

Under the first prong, "the errors of counsel's performance must be so serious that they prevented counsel from functioning as the Sixth Amendment guarantees." *Havard v. State*, 928 So.

2d 771, 781 (¶8) (Miss. 2006) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). Under the second prong, “the errors of counsel must have been so serious that they deprived the defendant of a fair trial, that being a trial with a reliable result.” *Id.*

Defense counsel’s decision to request the amendment to Instruction S-1 (and thereby the indictment) is simply inexplicable. There is no logical or strategic justification for broadening the grounds upon which the jury could convict Rew. Moreover, from the evidence, Rew’s only reasonable defense to the burglary charge was that he did not intend to commit a kidnaping at the time he broke and entered the bedroom. To this end, there was evidence that Rew did not know that anyone was in Lewis’ apartment until the breaking and entering was complete. Jermaine testified that, when Rew saw him he asked, “What are you doing in my mother fucking house?” (Tr. 149). And Lewis testified that she did not talk to Rew (or have the opportunity to inform him that others were at her apartment) until he called her from Jermaine’s phone. (Tr. 130-32). Accordingly, defense counsel’s performance was deficient.

Defense counsel’s deficiency was also prejudicial, in that, it eliminated (or rendered moot) Rew’s best defense, and at the same time broadened the grounds upon which the jury could convict him and constructively amended the indictment the extent that it was fatally defective. There is no way to know what crime the jurors, as a whole or individually, determined that Rew intended to commit at the time he broke and entered Lewis’ apartment. For this reason there is a reasonable likelihood that a different result would have attained, but for defense counsel’s deficiency. Therefore, defense counsel’s deficiency resulted in prejudice to Rew’s defense, as it deprived Rew of a fair trial with a reliable result. Accordingly, Rew is entitled to a new trial.

### **CONCLUSION**

Based on the propositions briefed and the authorities cited above, together with any plain

error noticed by the Court which has not been specifically raised, Rew respectfully requests that this honorable Court reverse the conviction, sentence and fines entered in the trial court and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

A handwritten signature in black ink, appearing to read 'Hunter N Aikens', written over a horizontal line.

Hunter N Aikens  
COUNSEL FOR APPELLANT



### CERTIFICATE OF SERVICE

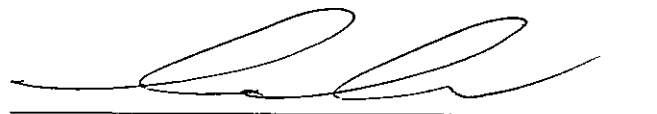
I, Hunter N Aikens, Counsel for Tadarryl Rew, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 31<sup>st</sup> day of August, 2009.



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