IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JEREMY DANIEL ROGERS, SR. APPELLANT

V. NO. 2010-KA-1790-SCT

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. Jeremy Daniel Rogers, Sr., Appellant
3. Honorable John W. Champion, District Attorney
4. Honorable Robert P. Chamberlin, Jr., Circuit Court Judge

This the 15th day of August, 2011.

Respectfully Submitted,

MISSISSIPPI OFFICE OF THE STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION

BY: _____

Hunter N Aikens
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to fifteen (15) to be served as follows: two (2) years incarceration followed by thirteen (13) years post-release supervision; the trial court ordered Rogers' sentence under Count III to run consecutive to his sentences under Counts I and II. (C.P. 175-76, Tr. 319-20, R.E. 8-11). Rogers now appeals to this honorable Court for relief.

STATEMENT OF THE FACTS

Jeremy Daniel Rogers ("Rogers") was charged in a multi-count indictment with the crimes of statutory rape, sexual battery, and fondling; the statutory rape count was alleged to have occurred on or about September 8, 2009 and the sexual battery count and fondling count were alleged to have occurred between May 1, 2009 and September 8, 2009. (C.P. 10). All three counts alleged that the charged acts were committed against his stepdaughter, Mary.[1] (C.P. 10). During the time(s) alleged in the indictment, Rogers lived in DeSoto County, Mississippi, with his wife, Margaret Rogers ("Margaret"), and his step-daughter, Mary. (Tr. 125-26, 154-56). Rogers was born on December 23, 1978, and Mary was born on September 26, 1996, making her twelve years old at the time of the alleged incident(s). (Tr. 155-56).

At trial, Margaret testified at length about a troublesome Friday night that occurred prior to the incident(s) at issue. (Tr. 169-173). Margaret told the jury that she and Rogers had been drinking in Tunica and, on their way home, Margaret rode on the back of Rogers' motorcycle, and "he was "really, really, really, really way to drunk to even be driving" and ran off of the road. (Tr. 169-70). She testified that Rogers wanted to go to Waffle House and, as they pulled into the parking lot, "he thought it would be funny to whiz by [several guys standing in the parking lot] and act like he was going to hit them. . . ." (Tr. 170). Margaret told the jury that she was "scared to death" because

[1] Due to the young age of the alleged victim and the sensitive nature of this case, and in accordance with the general practice of this Court, the alleged victim's real name will not be used.

"when [Rogers] gets to drinking that much, it can not end well sometimes." (Tr. 170). Margaret and Rogers then got into an argument and she told him to go apologize.

While he was outside, some teenagers sitting nearby gave Margaret a cigarette. (Tr. 171). When Rogers returned, he turned to the teenagers and said, "Well if you're going to give my wife a cigarette, how about giving me the whole fucking pack?" Margaret testified that Rogers then told the teenagers that they talked "like niggers, and then proceeded to try and educate them on how to be white. . ." (Tr. 171). When they went outside to leave Waffle House, Rogers screamed at Margaret–telling her a she was a "nigger lover" because she "take[s] care of niggers at the hospital"–and Rogers then pushed her. (Tr. 172). Margaret testified that Rogers drove home really fast, threw his helmet in the yard, went inside, and blocked the door so she couldn't get in. (Tr. 172). After she finally got inside, Rogers "picked [her] up all the way to the ceiling, and then he let [her] drop." (Tr. 172). Margaret testified that he then "started to become more and more violent" and she "balled up and begged him to stop." (Tr. 172-73). Margaret testified that she got in bed, and Rogers then "picked up [a] lawn chair and started beating [her] with it." (Tr. 173). According to Margaret, Rogers left the house after he stopped beating her with the lawn chair. (Tr. 173).

Mary testified that, on the evening of September 8, 2009, Margaret left the house for work at about 6:30 p.m.; she (Mary) watched television in the living room for about an hour; "and then [Rogers] started touching me." (Tr. 127). Mary said that Rogers "touched me on my butt or on my legs with his hands." (Tr. 128). She testified that she and Rogers then went to Roger's bedroom and had sex. (Tr. 128).

Mary testified that Margaret came home about that time, and Mary hid under the covers and Rogers ran to the bathroom. (Tr. 134). According to Mary, Margaret knocked on the bathroom door; Rogers told Margaret that he was about to take a shower and he led Margaret outside to look

for Mary, and Mary then grabbed a towel and ran into the bathroom. (Tr. 134-35). Margaret returned to the bathroom, and Mary told her that she was about to take a shower. (Tr. 136).

On the way to school the next day, Margaret asked Mary about the incident and Mary told Margaret that she and Rogers had sex. (Tr. 137, 164). Margaret then took Mary to Margaret's mother's house, called the police, and took Mary to the police station. (Tr. 165). Police then escorted Mary and Margaret to the Sexual Assault Resource Center in Memphis Tennessee, where nurse Nina Sublette examined Mary. (Tr. 165, 210-11).

When asked if anything like this happened prior to September 8, 2009, Mary initially answered "no." (Tr. 128). However, she subsequently testified that Rogers had touched her on numerous occasions and had oral sex with her prior to September 8, 2009. (Tr. 129-32).

Nurse Nina Sublette ("Sublette"), testified as to her examination of Mary. Sublette testified that Mary reported genital and abdominal pain, and a physical exam of Mary's genitals revealed areas of excoriation (disruption to the skin) on Mary's labia minora, acute lacerations to Mary's vaginal opening and hymen, and an area of ectropion (disruption) to Mary's cervix. (Tr. 217-27, Ex. S-3). As to the cause of these injuries, Sublette testified, "My opinion is that her injuries were caused by blount, penetrating trauma from a sexual assault." (Tr. 228).

At the conclusion of trial, the jury returned a verdict finding Rogers guilty of all counts. (Tr. 292, C.P. 167, R.E. 5).

SUMMARY OF THE ARGUMENT

Rogers was denied his fundamental right to a fair trial by the extensive prior bad acts evidence introduced through the narrative testimony of Margaret. Margaret's testimony portrayed Rogers as a drunk-driving, wife-beating racist. This evidence was wholly unrelated and irrelevant to the charges in the instant case and served only to disparage Roger's character, paint him as a bad

person, and suggest to the jury that because he committed these past bad acts, it was more likely that he would/did commit the acts charged in the instant case. This evidence was severely prejudicial to Rogers' defense; it was clearly inadmissible under Mississippi Rules of Evidence 402, 403, and 404(b); and it denied him of his fundamental constitutional right to a fair trial as guaranteed under the Sixth and Fourteenth Amendments to the Constitution of the United States and Article 3, Section 14 of the Mississippi Constitution.

The introduction of this severely prejudicial bad acts evidence amounts to plain error, as it affected Rogers' fundamental right to a fair trial. Additionally, Rogers' trial counsel was ineffective for introducing this prejudicial testimony during Margaret's cross-examination, failing to stop or limit Margaret's testimony, and failing to request a limiting instruction. Accordingly, Rogers respectfully submits that he is entitled to a new trial.

ARGUMENT

I. ROGERS WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY THE INTRODUCTION OF EXTENSIVE PRIOR BAD ACTS EVIDENCE.

During Margaret's cross-examination, Rogers' trial counsel elicited from Margaret a lengthy story replete with prejudicial prior bad acts evidence that portrayed Rogers as a hot-tempered reckless drunk driver, a racist, and a violent wife-beater; this evidence is discussed above in the Summary of the Facts and attached as Record Excerpts pages 12-17. See infra at p. 2-3, R.E. 12-17). The introduction of this extensive bad acts evidence was clearly inadmissible under Mississippi Rules of Evidence 402, 403, and 404(b) and deprived Rogers of his fundamental right to fair trial. Additionally, trial counsel was ineffective for eliciting this evidence from Margaret on cross-examination. Accordingly, Rogers respectfully contends that he is entitled to a new trial.

Rogers acknowledges that the evidence at issue was introduced without objection and, in fact,

elicited by Rogers' trial counsel. Although, no challenge or objection was made at trial, this Court may review issues as plain error where a fundamental right of the defendant has been impacted. *Simmons v. State*, 805 So. 2d 452 (Miss. 2001) (citing *Sanders v. State*, 678 So. 2d 663, 670 (Miss.1996)). "The right to a fair trial by an impartial jury is fundamental and essential to our form of government. It is a right guaranteed by both the federal and the state constitutions." *Johnson v. State*, 476 So. 2d 1195, 1209 (Miss. 1985) (citing *Adams v. State*, 220 Miss. 812, 72 So. 2d 211 (1954)); U.S. Const. amend. VI and XIV; Miss. Const. of 1890, art. 3, §§ 14 and 26.

Trial counsel's elicitation of the evidence at issue, failure to interject and/or limit the prejudicial flow of evidence from Margaret, and failure to request a limiting instruction regarding the evidence deprived Rogers of his Sixth Amendment right to effective assistance of counsel.[2] 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 demonstrating a reasonable probability that, but for his trial attorney's errors, he would have received a different result in the trial court. *Stringer v. State,* 627 So. 2d 326, 329 (Miss. 1993).

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

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[2] Rogers would also point out that trial counsel filed no post-trial motions. (Tr. 302).

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.* "For a defendant to prevail on a claim of ineffectiveness, counsel's representation must have fallen 'below an objective standard of reasonableness.'" *Id.* at 780-81 (¶7) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). "The benchmark for judging any claim of ineffectiveness 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." *Strickland*, at 686, 104 S.Ct. 2052.

Trial counsel's elicitation of Margaret's testimony, failure to interject and/or limit the prejudicial flow of evidence from her mouth, and failure to request a limiting instruction regarding the evidence constituted deficient performance; it cannot be considered reasonable trial strategy. Under no circumstances should evidence of this type be placed before the jury by the defense.

The testimony at issue was irrelevant and, thus, inadmissible under Mississippi Rule of Evidence 402.[3] "[E]vidence in criminal trials must be 'strictly relevant to the particular offense charged.'" *United States v. Jackson*, 339 F.3d 349, 354 (5th Cir. 2003) (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083 (1949)). Margaret's testimony that Rogers was driving drunk, assaulted bystanders with a motorcycle, told teenagers they talked "like niggers," called Margaret a "nigger lover," pushed her, and beat her with a lawn chair was wholly unrelated to the charges in the instant case, and it did not make it more or less probable that Rogers committed the

[3] Rule 402 provides that, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible." M.R.E. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E 401.

charged sexual acts against Mary. Assuming for the sake of argument that Margaret's testimony could in some way be considered relevant, it was still inadmissible under Rule 403.[4] Because the incident Margaret testified about was wholly unrelated to the charges at issue, this evidence possessed extremely little, if any, probative value. The evidence at issue in the instant was patently prejudicial. Informing the jury that the defendant is a drunk driving, racist, wife-beater is severely prejudicial, and heavily outweighs any probative value that the evidence may be said to possess.

The evidence was also inadmissible under Rule 404(b).[5] As this Court has explained, "proof of a crime distinct from that alleged in an indictment is not admissible against an accused." *Flowers v. State*, 773 So. 2d 309, 322 (Miss. 2000) (citing *Tobias v. State*, 472 So. 2d 398, 400 (Miss. 1985)). Although "other acts" evidence is admissible in limited circumstances,[6] none of these apply in the instant case. Margaret's testimony concerning Rogers reckless, racist, and violent acts only served to paint Rogers as a bad person who has done bad things in the past and suggested to the jury that it is, thus, more likely that he committed the charged acts. This is precisely the danger that Rule 404(b) seeks to prevent. Even if Margaret's testimony could be considered admissible under Rule 404(b), it would still be subject to Rule 403's probative value vs. prejudicial effect balancing test. *See Flowers* , 773 So. 2d at 318 (¶25) ("Where proof of other crimes or acts of the defendant is offered into evidence pursuant to Rule 404(b), it is still subjected to the requirement that evidence

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[4] Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . ." M.R.E. 403.

[5] Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." M.R.E. 404(b).

[6] Under Rule 404(b) prior bad acts evidence is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[,]" M.R.E. 404(b),

may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."). As explained above, Margaret's testimony was far more prejudicial than probative.

The admission of Margaret's testimony prejudiced Rogers' case. As this Court has recently explained in the ineffective assistance context: "'[e]vidence which is incompetent and inflammatory in character carries with it a presumption of prejudice.'" *Sea v. State*, 49 So. 3d 614, 619 (¶20) (Miss. 2010) (quoting *Gallion v. State*, 469 So. 2d 1247, 1249-50 (Miss. 1985)). The evidence at issue is patently prejudicial. The impact of Margaret's testimony, especially Rogers' repeated use of the word "nigger" and the testimony that he beat her with a lawn chair, undoubtedly prejudiced the jury's ability to fairly decide the case. As this Court has explained in remanding a case for the introduction of such evidence:

> At issue here is a question of fundamental fairness. Hughes was charged in an indictment with the sale of more than one ounce of marijuana. He was entitled to have his right to retain his liberty judged by reference to whether he be proven guilty beyond a reasonable doubt of that offense, and of that offense only. When proof of a wholly unrelated drug offense plus proof that Hughes was having an illicit relationship with a woman without benefit of marriage were placed before the jury, the chance that Hughes would be found guilty by reason of factors extraneous to the charge in the indictment was substantially increased in a legally impermissible way. We reverse and remand for a new trial."

Hughes v. State, 470 So. 2d 1046, 1048-49 (Miss. 1985).

Rogers submits that the jury's exposure to inadmissible, extensive and inflammatory bad acts evidence so prejudiced his defense that it can not be said with confidence that he received a fair trial. Accordingly, Rogers respectfully submits that he is entitled to a new trial.

CONCLUSION

Based on the propositions and authorities argued above, together with any plain error noticed by the Court which has not been specifically raised, Rogers requests that this Court reverse the convictions and sentences entered in the trial court and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens, MS Bar #[redacted]
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Jeremy Daniel Rogers, Sr., 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:

Honorable Robert P. Chamberlin, Jr.
Circuit Court Judge
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Honorable John W. Champion
District Attorney, District 17
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This the 15th day of August, 2011.

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