

**IN THE COURT OF APPEALS 04/23/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-KA-01317 COA**

**STANLEY BRADLEY**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. RICHARD W. MCKENZIE

COURT FROM WHICH APPEALED: PERRY COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

SARA GALLASPY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: DEWITT ALLRED III

DISTRICT ATTORNEY: GLENN L. WHITE

NATURE OF THE CASE: CRIMINAL- ESCAPE AND SIMPLE ASSAULT ON POLICE  
OFFICER

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF LIFE IN THE MDOC  
AS AN HABITUAL OFFENDER ON EACH COUNT, PURSUANT TO SECTION 99-19-83 OF  
THE MISSISSIPPI CODE, TERMS TO RUN CONSECUTIVE WITH EACH OTHER

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

Stanley Bradley was indicted and convicted for escape from jail and assault on a police officer. Having two prior felony convictions, Bradley was sentenced as an habitual offender pursuant to section 99-19-83 of the Mississippi Code and ordered to serve two consecutive terms of life imprisonment. Feeling aggrieved, Bradley appeals both the convictions for escape and simple assault on a police officer as well as his sentences to two consecutive life terms in prison. Bradley asserts the following in support of his appeal:

I. WHETHER THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT BRADLEY HAD A PRIOR CRIMINAL RECORD OF TWO FELONIES BASED UPON CHARGES SEPARATELY BROUGHT AND ARISING OUT OF SEPARATE INCIDENTS AT DIFFERENT TIMES WITH ONE OF WHICH BEING A CRIME OF VIOLENCE AND HAVING BEEN SENTENCED TO AND HAVING SERVED SEPARATE TERMS OF ONE (1) YEAR OR MORE THAT WOULD SUSTAIN HIS SENTENCE TO TWO CONSECUTIVE LIFE TERMS WITHOUT THE BENEFIT OF PROBATION OR EARLY RELEASE UNDER SECTION 99-19-83 OF THE MISSISSIPPI CODE.

II. WHETHER BRADLEY'S TWO CONSECUTIVE LIFE SENTENCES WITHOUT BENEFIT OF PAROLE OR EARLY RELEASE WERE UNDULY HARSH AND DISPROPORTIONATE SO AS TO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT WHICH WAS PROHIBITED BY THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO QUESTION THE APPELLANT ON AN UNRELATED, UNINDICTED, AND UNCONVICTED CHARGE OF BURGLARY WITHOUT CONDUCTING A HEARING ON ADMISSIBILITY AWAY FROM THE JURY AND IN FAILING TO GIVE THE JURY A LIMITING INSTRUCTION TO DISREGARD SUCH CHARGE IN DETERMINING BRADLEY'S GUILT OR INNOCENCE.

IV. WHETHER THE TRIAL COURT ERRED IN REFUSING INSTRUCTIONS D-1 AND D-3 OR IN FAILING TO REFORM OR CORRECT THOSE INSTRUCTIONS OR IN FAILING TO POINT OUT THE DEFICIENCIES THEREIN TO BRADLEY'S COUNSEL.

We find no merit in Bradley's argument that he was wrongfully convicted. Bradley's claim that he

was erroneously sentenced as an habitual offender, however, is compelling, and we remand for sentencing in accordance with the findings herein.

## FACTS

Stanley Bradley was arrested on a *capias* for burglary and, on December 30, 1992, was being held in the Perry County Jail. On that date, Bradley and two other inmates, Ralph Dan Walker and Michael Bradley, effected an escape by sawing the bars of their prison cell and overpowering the jailer, Verdean Neal.

During the escape, Bradley grabbed Neal, the police officer on duty, and wrestled her to the floor. She fell on her back, and Bradley sat on top of her chest. Next, Bradley directed another inmate to sit on the officer in order to restrain her. Then Bradley asked Neal where the keys to the jail cells were. Bradley retrieved the keys, unlocked the cell, and released a fellow inmate, Dan Walker. As a result of the assault on her, Neal suffered a serious disc injury to her lower back.

The three escapees proceeded to the Town of Richton, which is approximately eleven miles from the location of the jail at New Augusta, Mississippi. Richton authorities, having been alerted to the escape and aware that the escapees had ties to Richton, were on the alert for the arrival of the three men. Later on the same day as the escape, Richton authorities located the escapees at an apartment building. At this time, Bradley decided to surrender and was taken into custody by the city and county law enforcement officers.

## ANALYSIS

I. BRADLEY'S SENTENCE TO TWO LIFE TERMS TO RUN CONSECUTIVELY AS AN HABITUAL OFFENDER EXCEEDED THE MAXIMUM SENTENCE ALLOWED BY LAW BECAUSE THE LEGAL PREDICATE FOR SECTION 99-19-83 OF THE MISSISSIPPI CODE WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

Section 99-19-83 of the Mississippi Code provides as follows:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime *upon charges separately brought and arising out of separate incidents at different times* and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Miss. Code Ann. § 99-19-83 (1972) (emphasis added).

Bradley argues that there is insufficient proof that he was twice previously convicted for felonies

which arose from separate incidents at different times. Bradley asserts that the previous charges against him arose out of one incident and one time.

Bradley had a previous criminal history of two felony convictions in the Circuit Court of Perry County for aggravated assault and shooting into an occupied dwelling. Both of these felonies were based on charges of an incident that occurred on February 3, 1989, involving the shooting of Martha Rylee and the shooting into the dwelling of Rylee while she was present. There is no evidence to suggest that these felonies did not arise from one incident occurring at the same time. Mississippi subscribes to the ideology that "penal statutes are to be interpreted strictly against the state and construed liberally in favor of the accused. Where a statute is patently ambiguous, it must be interpreted in favor of the accused." *McLamb v. State*, 456 So. 2d 743, 745 (Miss. 1984). Furthermore, in order to sentence the defendant pursuant to the habitual offender statute, the State must "prove, beyond a reasonable doubt, all of the elements of the defendant's habitual offender status. This is not a truncated proceeding. It is a separate and full trial." *Hentz v. State*, 542 So. 2d 914, 918 (Miss. 1989) (citations omitted).

The State's exhibit No. 2 in fact, contains this statement from Bradley:

"I was target practicing with a 22 automatic rifle when one of the bullets accidentally entered a house hitting one occupant in the mouth."

The proof offered by the State does not attempt to refute, or even address this issue. Consequently, the State does not establish beyond a reasonable doubt that Bradley had been twice previously convicted of felonies based upon charges *separately brought* and arising out of *separate incidents at different times*.

In response to this assertion of error, the State argues that because Bradley made no objection and did not previously raise this issue, he is procedurally barred from doing so on appeal. However, in *Smith v. State*, the Mississippi Supreme Court held that "errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal." *Smith v. State*, 477 So. 2d 191, 195 (Miss. 1985). The court in this case found that the defendant had been erroneously sentenced pursuant to section 99-19-83 and held that "[t]he comparison of a seven year sentence, as opposed to a life sentence, without probation or parole is too significant a deprivation of liberty to be subjected to a procedural bar." *Id*; see also *Davis v. State*, 477 So. 2d 223, 224 (Miss. 1985) (failure to raise this issue on direct appeal is not a procedural bar).

Therefore, we are compelled, as was the court in *Smith*, to address the plain error of the sentencing order. In doing so, we find that the State did not prove beyond a reasonable doubt that Bradley's two prior felony convictions arose from different incidents at different times. We accordingly reverse the sentencing portion of this case and remand it to the trial court for resentencing.

II. APPELLANT'S CONVICTION TO TWO LIFE SENTENCES UNDER SECTION 99-19-83 OF THE MISSISSIPPI CODE VIOLATED THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA WHICH PROHIBITS CRUEL AND UNUSUAL PUNISHMENT.

Because we have already decided that section 99-19-83 has been erroneously applied in this case, it is not necessary that we address this issue.

III. THE CIRCUIT COURT JUDGE ERRED IN PERMITTING THE DISTRICT ATTORNEY TO QUESTION BRADLEY CONCERNING OTHER CRIMINAL ACTS THAT WERE UNRELATED TO THE INDICTMENT AND THE JUDGE

ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION SUA SPONTE CONCERNING SUCH OTHER CRIMINAL ACTS.

Bradley contends that the State's questions revealed "other crimes" in violation of Rule 404(b) of the Mississippi Rules of Evidence and that the evidence should have been excluded under Rule 403 because any probative value was outweighed by prejudicial effect.

There was no violation of the evidence rules because the State was not offering evidence of the burglary to prove Bradley's character in order to show that he acted in conformity therewith. The "other purpose" for offering the evidence, as allowed by the rule, was to cross-examine Bradley on his claim that he did not understand any of the proceedings against him. This is clearly permissible under Rule 404(b). *See Hosford v. State*, 560 So. 2d 163, 165 (Miss. 1990).

The fact that Bradley had been arrested on a charge of burglary was relevant because he was on trial for escape from lawful custody. There is no Rule 404(b) error in permitting testimony of another offense when the offenses are intertwined and closely connected. *Davis v. State*, 611 So. 2d 906, 913 (Miss. 1992).

Furthermore, the trial court cannot be put in error for not giving a limiting instruction because none was requested. *Mallett v. State*, 606 So. 2d 1092, 1095 (Miss. 1992). This case is distinguishable from *Watts v. State*, 635 So. 2d 1364, 1369 (Miss. 1994), where the failure to give a limiting instruction was held to be error because of the substantial likelihood, given the facts of that case, that the evidence was considered by the jury as proof that he was acting in conformity with his established character. Bradley was being tried for escape and simple assault. Testimony regarding the fact that he was being held for burglary does not tend to show that he was acting in conformity with a particular character trait.

We therefore find this assignment of error to be without merit.

IV. THE CIRCUIT COURT JUDGE ERRED IN REFUSING JURY INSTRUCTIONS D-1 AND D-3 OR ALTERNATIVELY IN FAILING TO REFORM OR CORRECT THOSE INSTRUCTIONS.

Instruction D-1 stated as follows:

The Court instructs the jury that intent may be proved by circumstantial evidence. In deed it can rarely be establish by any other means. We simply cannot look into the head or mind of another person. It is impossible, physically to do that. So eye witnesses may see or hear and so be able to give direct evidence of what a Defendant does or fails to do. Of course, there can be no eye witness account of the state of mind, with which the Defendant operated at the time of the alleged commitment of this act.

What a Defendant does or fails to do may indicate intent, or lack of intent, to commit the particular offense charged.

In this case, you will have to use circumstance and evidence to determine if the Defendant intended to permanently evade the due course of justice or temporarily leave his entrusted area of confinement.

Instruction D-3 stated as follows:

If you find from the evidence that the Defendant lacked the necessary requisite intent to permanently evade the due course of justice but instead his departure was intended to be a temporary excursion you may find the Defendant guilty of the lesser included offense of breach of trust.

Instruction D-2, which was given, stated as follows:

Intent ordinarily may not be proved directly because there is no way of determining or scrutinizing the operation of the human mind, but you may infer the Defendant's intent from the surrounding circumstances. You may consider any statement made, done or admitted by the Defendant and all of the facts and circumstances and evidence which indicate a state of mind.

We find that the portion of instruction D-1 which addressed the element of intent was repetitive of instruction D-2 which was given. It was, therefore, properly refused. *Medley v. State*, 600 So. 2d 957, 962 (Miss. 1992). The remainder of instruction D-1 and all of instruction D-3 address the possibility of finding Bradley guilty of the lesser included offense of breach of trust. Section 97-9-

49(2) of the Mississippi Code provides in pertinent part that "Anyone confined in jail who is entrusted by any authorized person to leave the jail for any purpose and who willfully fails to return to the jail within the stipulated time, or after the accomplishment of the purpose for which he was entrusted to leave, shall be considered an escape . . . ." Miss. Code Ann. § 97-9-49(2) (1972). This is ostensibly the provision which Bradley refers to as "breach of trust"; however, no reference to any code section was made in his argument. After reviewing this provision, we find that it has no application to this set of facts because there is no evidence that Bradley was ever entrusted to leave the jail. A request for a lesser included offense instruction is correctly refused when there is no evidence to support it. *Porter v. State*, 616 So. 2d 899, 909 (Miss. 1993). This last assignment of error is without merit.

**THE JUDGMENT OF THE PERRY COUNTY CIRCUIT COURT IS AFFIRMED AS TO THE FINDING OF GUILT ON THE CHARGES OF ESCAPE AND SIMPLE ASSAULT ON A POLICE OFFICER, REVERSED AS TO THE SENTENCE OF TWO LIFE TERMS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND REMANDED FOR SENTENCING CONSISTENT WITH THE FINDINGS OF THIS OPINION. COSTS ARE ASSESSED TO PERRY COUNTY.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**