IN THE COURT OF APPEALS 3/26/96

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-00870 COA

LEVESTER HICKMAN

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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NESHOBA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHRISTOPHER COLLINS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: CRIMINAL - BURGLARY OF INHABITED DWELLING/ATTEMPT RAPE/SEXUAL BATTERY/ESCAPE

TRIAL COURT DISPOSITION: COUNT I BURGLARY OF INHABITED DWELLING - 12 YEARS; COUNT II ATTEMPTED RAPE - 5 YEARS; COUNT III SEXUAL BATTERY - 18 YEARS; COUNT IV ESCAPE - 1 YEAR. SENTENCES IN COUNT I, II, & IV TO RUN

CONSECUTIVELY TO SENTENCE IMPOSED IN COUNT III.

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

KING, J., FOR THE COURT:

Levester Hickman is appealing his conviction for burglary of an inhabited dwelling, attempted rape, sexual battery, and escape and sentences of twelve years, five years, eighteen years, and one year, respectively in the Neshoba County Circuit Court. After thoroughly reviewing the record, we find that the issues raised by Hickman are without merit and affirm the judgment of the trial court.

I.

At approximately one o'clock in the morning on June 27, 1992, Polly Brumfield was awakened by noises in her house in Neshoba County, Mississippi. Before Polly could complete a 911 call, Levester Hickman ran across the bed and knocked the phone out of her hand. Hickman threw Polly on the bed, held a knife to her throat, and told her that he was going to sexually assault her."

In an attempt to stall for time, Polly began talking to Hickman and asking him what was on his mind. During the course of the conversation, Hickman related that he and his girlfriend were having problems. Thereafter, Hickman began to relax and asked Polly for a beer. Polly stated that she did not have a beer, but that she had a root beer. Polly and Hickman then went into the kitchen to get the root beer for Hickman, and a glass of ice water for Polly.

While in the kitchen, Polly told Hickman that she had to use the bathroom. At that point, Polly thought that if she went into the bathroom, she could escape through the window. However, Polly abandoned that idea after she entered the bathroom and realized that it was a long drop to the ground.

When Polly re-entered the kitchen, Hickman told Polly to get in the bed, but Polly told him that she wanted a cigarette. Hickman then took Polly by the arm, pulled her into the bedroom, and told her to take off her gown. After Polly asked him to take off his clothes first, Hickman took off his shirt. When Hickman told Polly to take off her gown, she asked him to take off his pants. After Hickman's pants fell down around his ankles, Polly threw ice water on him, and ran toward the front door. Hickman caught her in the living room, threw her to the floor, restrained her, and told her that if she tried to escape again, he would kill her.

Hickman then attempted sexual intercourse with Polly. After Hickman's attempt at sexual intercourse failed, he inserted his finger in Polly's vagina and engaged in oral sex with her. After approximately thirty minutes, Hickman laid down beside Polly and fell asleep. When Polly was satisfied that Hickman was asleep, she went to a neighbor's house and asked for help.

Officer Donnie Atkins arrived at the neighbor's house, received Polly's version of the crime and then went to the crime scene, Polly's house. When Officer Atkins arrived at Polly's house, he saw Hickman on the floor, asleep in his underwear. Officer Atkins arrested Hickman, put handcuffs on him, and placed him in the patrol car. Officer Atkins then went back into the house to continue the

investigation. When Officer Atkins returned to the patrol car, Hickman was gone.

Later that day, the officers received a tip that Hickman had been seen in a certain area of town. While in the vicinity of the area where Hickman had been seen, officers saw Hickman drive by in his Mazda pickup. The officers turned on the blue lights and the siren and tried to stop Hickman, but he did not stop. After a three-mile chase, Hickman was captured and placed in the Neshoba County jail.

In a statement given on June 27, 1992, Hickman gave an account of the events leading up to his arrest. His version of the events was almost identical to Polly's version. Additionally, Hickman admitted that he had used a ladder to take the screen off the window to enter Polly's house.

On July 9, 1992, a Neshoba County grand jury returned a multi-count indictment against Hickman, charging that Hickman committed the crime of burglary of the inhabited dwelling of Polly Brumfield on June 26, 1992, with the intent to commit rape. Hickman was also indicted for attempted rape, sexual assault, and escape.

At the trial, which commenced on July 14, 1992, Hickman admitted that he broke into Polly's house. However, he explained that he broke into her house so that she could shoot and kill him. Hickman admitted that he touched Polly, but denied that he tried to rape her. Hickman also denied threatening Polly or physically restraining her.

After deliberation, the jury found Hickman guilty as charged.

II.

> WHETHER THE TRIAL COURT ERRED IN INDICTING HICKMAN FOR ESCAPE UNDER SECTION 97-9-49 OF THE MISSISSIPPI CODE OF 1972?

Hickman contends that his motion for a directed verdict should have been granted since the evidence in the instant case does not conform to the crime of escape under section 97-9-49 of the Mississippi Code of 1972. Hickman explains that because he had not been tried, convicted, or sentenced, nor was he under any other sentence, section 97-9-49 was inapplicable.

A motion for directed verdict challenges the legal sufficiency of the evidence, and requires an assessment of all evidence available when the motion is made. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). In considering the motion for a directed verdict, the trial court was obligated to view the evidence in the light most favorable to the State. *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987). If it found that a prima facie case had been established, the trial court was obligated to deny the motion. *Id.*

Section 97-9-49, which is in question in the instant case, provides, in pertinent part:

> (1) Whoever escapes or attempts by force or violence to escape from any jail in which he is confined, or from any custody under or by virtue of any process issued under the laws of the state of Mississippi by any court or judge, *or from the custody of a sheriff or other peace officer pursuant to lawful arrest, shall, upon conviction, if the confinement or*

> *custody is by virtue of an arrest on a charge of felony*, or conviction of a felony, be punished by imprisonment in the penitentiary not exceeding five (5) years to commence at the expiration of his former sentence, or, if the confinement or custody is by virtue of an arrest of or charge for or conviction of a misdemeanor, *be punished by imprisonment in the county jail not exceeding one (1) year to commence at the expiration of the sentence which the court has imposed or which may be imposed for the crime for which he is charged.*

Miss. Code Ann. § 97-9-49 (Rev. 1994) (emphasis added). It is evident by the wording of the statute that in addition to applying to those situations where defendants escape after being tried, convicted, and sentenced, section 97-9-49 also applies to those instances where, as in the instant case, the defendant has escaped "from the custody of a sheriff or other peace officer pursuant to lawful arrest," where that the custody was by virtue of an arrest on a felony charge.

At the time Hickman's motion for a directed verdict was made in the instant case, the testimony had established that: (1) Officer Atkins had placed Hickman under arrest at the scene for a felony; (2) Officer Atkins had handcuffed Hickman and placed him in a patrol car; (3) Hickman escaped from the patrol car in his handcuffs; and (4) Hickman was later captured and placed in jail. This evidence, taken in the light most favorable to the State, was clearly sufficient to create a question for the jury and to avoid a directed verdict at the close of the State's case.

III.

> WHETHER HICKMAN WAS IMPERMISSIBLY PREJUDICED BY BEING TRIED AND SENTENCED ON THE BURGLARY, ATTEMPTED RAPE, AND SEXUAL BATTERY CHARGES DURING THE SAME TRIAL?

Hickman argues that the trial court erred in trying him on the burglary, attempted rape, and sexual battery charges in the same trial. Hickman relies on *Thomas v. State*, 474 So. 2d 604, 604 (Miss. 1985), to argue that the burglary, attempted rape, and sexual battery arose out of the same set of operative facts and constituted a common scheme or plan.

Hickman's reliance on *Thomas* is misplaced. While *Thomas* does hold that two or more offenses should not be charged in a single indictment, *Thomas* was superseded by statute in 1986. Section 99-7-2 provides in pertinent that:

> (1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.

> (3) When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction.
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> . . . .

Miss. Code Ann. § 99-7-2 (Rev. 1994); *see Corley v. State*, 584 So. 2d 769, 772 (Miss. 1991); *Allman v. State*, 571 So. 2d 244, 248 (Miss. 1990); *McCarty v. State*, 554 So. 2d 909, 913-15 (Miss. 1989).

Ironically, as asserted by Hickman, the testimony in the instant case clearly indicates that the burglary, attempted rape, sexual assault, and escape were part of a common design, scheme, and plan. The record contains the victim's testimony that Hickman broke into her house, attempted to have intercourse with her and that he sexually battered her with his finger. The record also includes Hickman's statement and testimony at trial, where Hickman admitted that he used a ladder to enter the victim's house and that after entering, he attempted intercourse with the victim, and penetrated her with his finger. As indicated above, under Mississippi's law, the indictment in the instant case was proper.

In addition, as the State correctly counters, Hickman waived this issue when he failed to object prior to trial. The record indicates that it was only at the conclusion of all the evidence that defense counsel made the following motion:

> By Mr. Lewis: Comes now the defendant, Levester Hickman, and moves the Court to dismiss the four count indictment against him, all four counts, and that the State has failed to meet the burden of proof to present an issue to the jury as to the guilt of the Defendant. The second part of the motion is that the Defendant moves that Count Two of the indictment and Count Three of the Indictment [sic], with reference to attempted rape, and/or fondling, are really, in truth and in fact, the same two crimes, and that one should be included into the other without the jury passing on two criminal offenses. Specifically to Count Four, we say that in order to be charged with felonious escape of the custody of the Neshoba County Sheriff, that first of all, he would have had to have been charged with a felony, and not just arrested, but, rather, it would be, at most, resisting arrest, but not felonious escape. For that reason, we respectfully submit these motions in all aspects should be sustained.

The trial court overruled the motion. Under the dictates of section 99-7-2, we cannot say that the trial court erred in trying Hickman on the burglary, attempted rape, and sexual battery charges in the same trial. *See McCarty*, 554 So. 2d at 915 ("The thread that weaves together all of the multi-count indictment cases is that the Court requires a common transaction or occurrence or when the occurrences are at different times then that time period is insignificant."). Furthermore, our examination of the record indicates that Hickman did not request a severance of the burglary, attempted rape, or sexual battery charges, nor did Hickman request a severance of the escape charge from the preceding three charges. This assignment of error is without merit.

IV.

WHETHER HICKMAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

Finally, Hickman argues that he was deprived of effective assistance of counsel since his counsel failed to raise the proper objections to the multi-count indictment. Hickman explains that after his trial, defense counsel was sanctioned, jailed, and disbarred for his misconduct particularly in his role as the public defender.

Hickman is procedurally barred from raising this issue on appeal since he failed to raise this issue in his motion for new trial. *Ahmad v. State*, 603 So. 2d 843, 847 (Miss. 1992) (citations omitted). However, we recognize that on occasion, procedural bars are ignored when the Defendant's assignment of error involves a substantive constitutional right. *See Roundtree v. State*, 568 So. 2d 1173, 1177 (Miss. 1990).

In order to succeed on the claim of ineffective assistance of counsel, Hickman has "the burden of proving not only that counsel's performance was deficient, but also that [he was] prejudiced thereby." *Moody v. State*, 644 So. 2d 451, 456 (Miss. 1994) (citations omitted).

In the instant case, Hickman asks us to find defense counsel's performance deficient since after his trial, counsel was sanctioned, jailed, and disbarred for misconduct in his role as the public defender. Hickman does not express how "but for" his attorney's conduct of the trial, the trial results would have been different. Neither does Hickman explain how the misconduct for which counsel was sanctioned was related to his particular case. We find that this assignment of error is without merit.

For the foregoing reasons, we affirm the conviction and sentence of the circuit court.

THE NESHOBA COUNTY CIRCUIT COURT CONVICTION IN COUNT I - CONVICTION OF BURGLARY OF AN INHABITED DWELLING, AND SENTENCE OF TWELVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY TO SENTENCE IMPOSED IN COUNT III; COUNT II - CONVICTION OF ATTEMPTED RAPE AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONCURRENTLY WITH SENTENCE IMPOSED IN COUNT I; COUNT III - SEXUAL BATTERY AND SENTENCE OF EIGHTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND COUNT IV- CONVICTION OF ESCAPE AND ONE YEAR SENTENCE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, SENTENCE TO RUN CONCURRENTLY WITH SENTENCES IMPOSED IN COUNTS I AND II ARE AFFIRMED. NESHOBA COUNTY IS TAXED WITH ALL COSTS OF THIS APPEAL.

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