IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2016-KA-01404-COA

ADAM CHISM — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

(ORAL ARGUMENT REQUESTED)

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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 disqualification or recusal:

Adam Chism, Appellant;

William Coon, Esq., trial attorney;

Kaeley Gemmill, Schuyler K. Kinneman, and Phillip W. Broadhead, Esq., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Brad McCullouch, Gwen Agho, Esqs., Assistant District Attorneys, Office of the Hinds County District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable Jeff Weil Sr., presiding Circuit Court Judge; and

City of Jackson Police Department, investigating/arresting agency.

Respectfully submitted,

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STATEMENT OF ISSUES

ISSUE ONE:

Whether the trial judge erred in allowing the admission before the jury at the end of trial of the Appellant's prior House Burglary conviction into evidence after previously excluding it *under Mississippi Rule of Evidence 609*, and whether admission of the appellant's prior conviction was a *per se* violation of *Mississippi Rule of Evidence 404(b)*, Prior Bad Acts.

ISSUE TWO:

Whether the trial court erred when it denied the Appellant's motion to set aside the jury's verdict (J.N.O.V.) for legal insufficiency in the prosecution's case or, alternatively, to grant the Appellant a new trial where the verdict was against the overwhelming weight of the evidence.

ISSUE THREE:

Whether the trial judge erred in refusing defense proposed jury instruction D-7, which correctly stated the law in circumstantial evidence cases, and was supported by the evidence presented at trial.

STATEMENT OF INCARCERATION

The Appellant is presently in the custody of the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2001)***.

STATEMENT OF ASSIGNMENT

The Appellant respectfully submits that this is not a case that should be retained by the Supreme Court pursuant to the provisions of ***Mississippi Rule of Appellate Procedure 16(b)***, nor does this appeal present issues governed by ***Rule 16(d)***, which would require the appeal to be retained by the Supreme Court. Therefore, it is respectfully submitted that this is an appeal which presents issues which may properly be decided by either the Supreme Court or the Court of Appeals.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous. Oral argument will help the Court understand why the factors in this case weigh in favor of the Appellant and will allow both parties a chance to respond to the Court's inquiries.

STATEMENT OF THE CASE

Adam Chism (hereinafter "Mr. Chism") is a man who started his day trying to do his best to get to work and ended his day as a victim of circumstance. On a cold January morning, Mr. Chism was on his way to work when he had a fight with his wife. Wanting to avoid trouble with his wife, he got out of the truck and what started with hearing a house alarm, ended with him in handcuffs. Mr. Chism's shortcut on the way to work resulted in a life sentence to be served without parole.

This story began early Saturday morning on January 16, 2016, in Jackson, Mississippi. It was usual for Mr. Chism to spend his Saturdays at work with his father, and this Saturday was no different. Mr. Chism woke up early in the morning and his wife, Mary Chism (hereinafter "Mrs. Chism"), drove him to work. (T. II. 199) Mr. and Mrs. Chism left home at 6:45-6:50 that morning, and while on the way to work in the family truck, Mr. Chism and his wife began to argue. *Id.* Mr. Chism asked his wife to pull over so he could walk the rest of the way to his father's house. At that moment, Mr. Chism wanted to get out of the truck to avoid the fight because he was already on probation for an automobile burglary conviction. Mrs. Chism stopped on State Street, Mr. Chism got out of the truck, and then she "burned rubber" as she sped off. (T. II. 199, 129) Once Mr. Chism got out of the truck, he became less concerned about getting to work and more concerned about getting to a telephone to make sure his wife was alright. (T. II. 200) Since he did not have a cellphone, Mr. Chism tried to think of the nearest residence he knew with a telephone so he could call his wife. He knew his friend's aunt lived around the corner on Northview Drive, so he headed in that direction. (T. II. 201)

Mr. Chism knew there was a park the next street over from State Street, and right behind

the park was his friend's aunt's house. With this in mind, Mr. Chism cut through a big field pathway to make his journey to a telephone shorter. This field happened to be Kenneth Gray's (hereinafter "Mr. Gray") backyard. As Mr. Chism walked by, he paid no attention to Mr. Gray's house because he needed to check on his wife. He kept his head down as he walked, but while walking up Kenneth's driveway, he heard an alarm. (T. II. 202) Mr. Chism was caught off-guard by the sound of an alarm, so he stopped and saw the basement door standing wide open. The first thing he noticed was a bike sitting outside the door standing up on the kickstand. (T. II. 203) Mr. Chism was worried about someone inside being hurt, so he approached the basement door, hollered into the doorway, and then saw a bag sitting just inside the doorway. When he got to the door no one made a sound, so he walked in and picked up the bag. (T. II. 204-205) As soon as he walked in and picked up the bag, Mr. Chism felt Officer Angela Nichols (hereinafter "Officer Nichols") right behind him. (T. II. 206) Only seconds after entering the doorway, Officer Nichols told him to drop the bag and back out of the house. (T. II. 224) Mr. Chism immediately complied, never resisted, then he was arrested and taken to jail. (T. II. 207) Mr. Chism did not want to put himself in more trouble and honestly believed once he got to the police station the misunderstanding would be worked out.

However, this was not the case. Mr. Chism was indicted as a habitual offender by the Grand Jury of Hinds County for the crime of House Burglary on February 26, 2016. (CP. 4, RE. 9) A jury in Hinds County Circuit Court subsequently tried Mr. Chism on July 18-20, 2016. During pre-trial proceedings, defense counsel made a motion to exclude Mr. Chism's prior criminal convictions based on ***Mississippi Rule of Evidence (MRE) 609.*** (CP. 28-30; T. I. 8) In response to the motion,

the prosecutor stated, "...should it arise in court, and 404(b) give an exception, we would approach [the bench] before trying to get this evidence in." (T. I. 8) The trial court took defense counsel's motion to suppress under advisement, but held, "I'm granting in part your motion to prevent the State from mentioning [the convictions] either in voir dire or opening statement or in cross examination and so forth, until such time as I've ruled otherwise." (T. I. 8-9, RE. 14-15)

After opening statements the State called Officer Nichols as its first witness. (T. I. 132) Officer Nichols testified that she had responded to a house alarm and upon approaching the house in question, encountered and arrested Mr. Chism. (T. I. 132-138) On cross-examination Officer Nichols testified that she had not fingerprinted the crime scene or examined the basement door for signs of forced entry, such as footprints on the door. (T. I. 140) Officer Nichols also admitted that she had not examined the house for additional missing items, nor contacted the owners of the residence to identify any missing items. (T. I. 141-142)

The State then called Detective Michael Pugh (hereinafter "Detective Pugh") who gave testimony regarding the general procedures by which officers deal with an in-progress burglary and his observations about his examination of the house. (T. II. 147-155) On cross-examination, Detective Pugh stated that Mr. Chism had not given a statement to police and invoked his ***Miranda*** rights. (T. II. 159) When asked about the condition of the basement door, Detective Pugh answered, "The door was already properly sealed up. When I made it on scene, someone had already put the door back in place. As the picture showed, somebody had already nailed the door back in place." (Exh. S-2, T. II. 160) Detective Pugh further testified that the lower door had been repaired, but the upper door was damaged. (T. II. 161-162)

At this point the State approached the bench and requested that Mr. Chism's prior convictions be allowed into evidence through the detective's testimony under ***MRE 404(b)***. (T. II. 162) Defense counsel objected, and the trial court removed the jury from the courtroom. After argument by both sides and a recess to consider the motion, the trial judge sustained defense counsel's objection to the admission of the Appellant's prior conviction of house burglary. (T. II. 162-167, RE. 16-21)

The State then called Mr. Gray, the owner of the house in question. Mr. Gray testified extensively about his career in the church, his wife's career, their educational backgrounds, moving to the City of Jackson, and, finally, his feelings about the City of Jackson. (T. II. 170-173) The State then asked about the condition of his home, both before and after the burglary. (T. II. 175-176) Mr. Gray described the condition of the basement door and testified that his father-in-law had fixed it "within 3 to 4 hours" after it had been broken down. (T. II. 178) On cross-examination, Mr. Gray answered questions about a previous burglary and the timing of the call from the alarm company. (T. II. 184-187)

At the end of the State's case, defense counsel made a motion for a directed verdict on the grounds that the State had failed to prove a *prima facie* case that Mr. Chism was in fact the individual who broke into Mr. Gray's residence. (T. II. 190) Defense counsel argued that no one had seen Mr. Chism anywhere but the basement area, there was no showing of damage to the door, and the time the alarm went off had not been established. (T. II. 190-191) The State responded that they had proved the elements of burglary, that Mr. Chism was the burglar, and that they had met their burden. The trial court refused to direct a verdict in favor of the defense

(T. II. 191-192, RE. 22-23), and then informed Mr. Chism of his right to testify and his right not to testify. (T. II. 193)

Mr. Chism testified in his own defense. (T. II. 196) Mr. Chism told the jury what his morning was like on January 16, 2016, and told them how he wanted to do his best to stay out of trouble since he was on probation. When he woke up that Saturday morning, Mr. Chism's intention was to go to his father's house, which was, coincidentally, near the Gray residence. (T. II. 207) Mr. Chism explained to the jury that he got out of the truck that morning because he did not want to fight with his wife about coming home late the night before. He believed once the police got to the Gray home and investigated the scene, he would be cleared. (T. II. 207) He stated that a probation violation was the least of his worries because the policemen would figure out pretty quickly he was not the one who had broken into the house.

At the end of Mr. Chism's direct, the State explained to the trial judge that it was their contention to cross-examine Mr. Chism vigorously about his testimony on direct, including what he was on probation for, issues involving domestic abuse, and why he is prone to be violent. (T. II. 208) Using the ***Peterson*** factors to analyze the State's argument, the trial judge excluded Mr. Chism's prior House Burglary conviction, but allowed the prosecution to use the prior auto burglary conviction for impeachment purposes on cross-examination. (T. II. 217, E. 24) The trial judge gave the jury a verbal limiting instruction, "The jury is hereby instructed that any evidence of a prior conviction of the defendant shall be considered for impeachment purposes only and not as substantive evidence against the defendant in this trial." (T. II. 218, RE. 25)

The defense's next witness, Mrs. Chism, testified that she and Mr. Chism had been married

almost a year. (T. II. 229) Mrs. Chism testified that she left the house at 6:45-6:50 that Saturday morning to take her husband to work. Mr. Chism got out of the truck on State Street, and the next time she heard from him, he was in jail. (T. II. 229)

After the testimony of Mr. Chism, Mrs. Chism, and his father, Freddy, the defense rested. (T. II. 233) At the end of the first day of trial, defense counsel renewed the motion for directed verdict without further argument. (T. II. 236) After an objection from the State, the trial court denied the renewed motion without further analysis, stating, "I believe the jury should decide the case." (T. II. 236-37, RE. 26-27) Before the trial court recessed, the State indicated its plan to make one last rebuttal argument the following day.

The next day, before the charge conference on the jury instructions even began, the State moved once again to enter Mr. Chism's prior House Burglary conviction into evidence before the jury in their rebuttal case. The State cited ***Jones v. State***, 904 So. 2d 149 (Miss. 2005), as support and argued that the defense put Mr. Chism's intent, an essential element of proof in burglary on the day in question "directly in dispute..." on direct. (T. II. 239) The State also proposed to admit the prior House Burglary conviction as a self-authenticating judgment of conviction. (T. II. 240) In response, defense counsel argued the prior House Burglary conviction was more prejudicial than probative under ***MRE 403***, and under the terms of ***MRE 404*** the House Burglary conviction should not be admitted to the jury because the conviction would "clearly be offered...to prove that my client [Mr. Chism] acted in conformity therewith, and should be excluded." (T. II. 241, 264) However, the trial judge ruled the ***Jones*** case was controlling, and "the defendant's vigorous assertion of lack of intent made the admission of a previous burglary conviction extremely

relevant and appropriate." The trial judge overruled defense counsel's objection and held a self-authenticating copy of the prior House Burglary conviction would be allowed into evidence for the jury's consideration. (T. II. 265; RE. 28) Once the jury was called back into the courtroom, the State then formally requested the trial court to allow a judgment of conviction for House Burglary against Adam Chism from April 15, 2009, into evidence. (Exh. S-3, RE. 29) Defense counsel re-raised the objection for the record, which the trial judge overruled, and the Appellant's prior House Burglary conviction was admitted into evidence. (T. II. 267-68, RE. 30-31)

At the charge conference, the trial judge submitted C-10, which instructed the jury that any evidence of a prior conviction of the defendant shall be considered for impeachment purposes only and not as substantive evidence against the defendant in trial. (T. II. 238, RE. 32) Defense counsel objected on the grounds that this instruction might be confusing to the jurors on the issue of exactly what constituted substantive evidence of guilt and what constituted impeachment evidence. (T. II. 245) The trial judge overruled the objection and gave C-10A to the jury. (CP. 49, RE. 33; T. II. 24-45)

Defense counsel submitted D-7, a circumstantial evidence instruction, the State objected on the ground that the case was not wholly circumstantial and the instruction would be improper. (CP. 59, RE. 34; T. II. 258-259) Defense counsel argued the evidence presented by the State was circumstantial: the house being broken into, its state of disarray, and then the circumstances of Mr. Chism being on the premises. The trial judge disagreed, "I believe that instruction is only appropriate in a wholly circumstantial evidence case. The defense [sic] was inside the house he did not have permission to be in. There was testimony the door had been kicked in, the alarm

was sounding. I believe all that was direct evidence of a house burglary. He was caught by an officer in the house. And the jury is free to disbelieve the, that fact scenario was consistent with a house burglary. But I think D-7 is not supported." (T. II. 259-60, RE. 35-36) (emphasis added) The trial judge refused D-7.

After a recess, the trial judge returned with further rulings on the jury instructions. "As far as S-2 is concerned: I believe S2 is more appropriately in line with the statement of law, and I'm going to give S-2." (CP. 52, RE. 37; T. II. 261) Defense counsel objected and requested for clarification as to the court's understanding of the law in regards to someone walking through an "open door," and what circumstances would constitute a burglary and what would not. The trial judge responded, "I don't think this is the appropriate format to get into a rhetorical discussion as far as that's concerned." (T. II. 261-62, RE. 38)

After deliberations, the jury returned a verdict of guilty. (CP. 69, RE. 10; T. II. 290, RE. 39) A sentencing hearing was held on September 6, 2016. (T. III. 1) After four witnesses spoke on behalf of the defense, Mr. Chism testified he should not have trespassed on Mr. Gray's property, but stressed again that he had not burglarized the house. (T. III. 32) The court then heard from the State, who emphasized Mr. Chism's status as a habitual offender. (T. III. 34) After invoking a Bible passage, Micah 6:8, the trial judge sentenced Mr. Chism to life in prison without the possibility of parole under ***Miss. Code Ann. 99-13-83*** (Supp. 2015). (CP. 76, RE. 11; T. III. 34-37, RE. 40-43) on September 27, 2016, the trial judge overruled the defense motion for a new trial, or in the alternative, JNOV. (CP. 83, RE. 12) Feeling aggrieved with the verdict of the jury and the sentence imposed by the trial judge, the Appellant herein perfected this appeal to the Mississippi Supreme

Court on October 3, 2016. (CP. 86, RE. 13)

SUMMARY OF THE ARGUMENT

Adam Chism is a victim of the circumstances of this case - a man who was convicted of House Burglary with no substantial evidence of guilt, just circumstantial evidence that he was there that day. Further, the jury took Mr. Chism's prior conviction for House Burglary as enough proof to find that he did it once, and he did it again. From the very start of the trial, the State pushed for the admission of Mr. Chism's prior House Burglary conviction, knowing full well its impact on the jury, and the trial judge erroneously allowed it into evidence *immediately before* the jury retired to deliberate the case.

Mr. Chism first contends the trial judge erred in allowing the admission of the Appellant's 2009 House Burglary conviction after preliminarily excluding it on a pre-trial defense motion under ***MRE 609***. The State argued before trial began, during the testimony of its witnesses, and after the defense rested its case that the prior House Burglary conviction was admissible to prove the essential element of "intent" under ***MRE 404(b)***. When the trial judge allowed the conviction into evidence as the prosecution's rebuttal, the jury was effectively allowed to improperly consider the prior House Burglary conviction as "propensity" character evidence, which left the jury little choice but to convict the Appellant. Therefore, the Appellant moves this Court to reverse and remand this case to the lower court with proper instructions for a new trial.

Mr. Chism next contends that the overwhelming weight of the evidence does not support the jury's guilty verdict for the crime of House Burglary, nor did the State present a legally

sufficient case. The State presented no evidence in its case-in-chief to establish intent to steal, nor eyewitness testimony establishing Mr. Chism broke into the house, and no additional credible evidence to provide proof beyond a reasonable doubt to show that Mr. Chism was responsible for entering the basement door with an intent to steal. Additionally, the weak circumstantial evidence, which certainly did not rise to the level of proof beyond a reasonable doubt, produced an erroneous verdict that was directly contrary to the overwhelming evidence produced in the case. Therefore, based on the absence of conclusive evidence of breaking and entering with an intent to steal, the Appellant moves this Court to reverse and render this case, or in the alternative, to reverse and remand this case for a new trial based on the proof produced before the jury, which was not overwhelming, to say the least.

Lastly, Mr. Chism contends that the trial judge erred in refusing defense proposed jury instruction D-7, which gave the jury the law governing cases based solely on circumstantial evidence. The trial judge's decision to reject the proposed defense instruction was based on the determination that the case was not wholly circumstantial, but the Appellant contends Officer Nichol's testimony amounted only to evidence by inference. The Appellant maintains it was an abuse of discretion for the trial judge to refuse the proposed jury instruction, and this Court should reverse and remand this case to the lower court with proper instructions for a new trial.

Mr. Chism was found guilty based on a circumstantial evidence that could not be described as overwhelming, and the jury reached a verdict based on the trial judge's decision to allow his prior House Burglary conviction into evidence at the very end of the trial. Therefore, for the above reasons, this honorable Court should reverse and render this case, thereby

discharging the Appellant from custody, or, in the alternative, reverse and remand this case for a new trial on the merits, with proper instructions to the lower court.

ARGUMENT

ISSUE ONE:

Whether the trial judge erred in allowing the admission before the jury at the end of trial of the Appellant's prior House Burglary conviction into evidence after previously excluding it *under Mississippi Rule of Evidence 609*, and whether admission of the appellant's prior conviction was a *per se* violation of *Mississippi Rule of Evidence 404(b)*, Prior Bad Acts.

The Appellant was at the wrong place at the wrong time and quickly became a victim of the circumstances in this case. Because the prosecution's entire case in this matter rested merely on the circumstantial evidence of Mr. Chism's presence inside the basement doorway of the house, the State argued before, during, and after the defense rested its case that the prior House Burglary conviction was admissible *to prove* "intent" under ***MRE 404(b).*** Since this issue involves a decision by the trial court to admit or exclude evidence, this Court must examine the trial court's decision under the abuse of discretion standard of review. ***Robinson v. State***, 42 So.3d 598, 603 (Miss. Ct. App. 2010). During the pre-trial conference, defense counsel made a motion to exclude prior convictions under ***MRE 609*** (CP. 28-30), and although the trial judge withheld ruling, a preliminary finding was issued that ruled the State would not be allowed to refer to the prior House Burglary conviction during voir dire, opening statement, and cross-examination phases of trial. (T. I. 8-9, RE. 14-15)

After the cross-examination of Detective Pugh, the State made the first ***MRE 404(b)***

motion regarding the Appellant's prior conviction to House Burglary in order for the prosecution to prove intent. The State argued, "We would offer it specifically under ***404(b)***... We're offering it to show identity of this defendant... to show his guilty knowledge... to show his opportunity, any kind of absence of mistake or accident. We feel like they've [defense counsel] put, by raising during cross examination, they've put in dispute whether or not it was this individual [Adam Chism]. And it's the State's argument that this is exactly the kind of stuff 404(b) calls for. Specifically identity but resting on all of the exceptions Your Honor. We would ask that this be allowed into evidence." (T. II. 162-164, RE. 44-46) (emphasis added) In response to the State's "shotgun approach" motion, the trial judge ruled, "I looked at the case law and I looked at 404(b). And I don't believe... that it would be appropriate at this time to admit the evidence of prior convictions sought by the prosecution, under rule 404(b)." (T. II. 166, RE. 47)

After Mr. Chism's direct examination during the defense case-in-chief, the State again argued ***MRE 404(b)*** in favor of the admission of the Appellant's prior House Burglary conviction: "...the Appellant put his character directly in dispute by testifying on direct that he had no intent to burglarize the dwelling." (T. II. 211) In response, the trial judge allowed the Appellant's prior automobile burglary conviction for "impeachment purposes," but again excluded the Appellant's prior House Burglary conviction. (T. II. 217-19) Therefore, it was clear from the pre-trial hearing all the way to the very end of the trial, the judge determined the Appellant's prior House Burglary conviction *was not admissible* under the ***Peterson*** restrictions of ***MRE 609***, nor the substantive proof circumstances of ***404(b)***. (T. I. 8-9, T. II. 215-19)

Then at the end of trial after the defense had rested its case, the State again sought to

use the Appellant's prior House Burglary conviction under ***MRE 404(b)***, this time as *substantive proof of intent*, a basic element of proof in house burglary. (T. II. 239-41, 264-68; RE. 48-50, 51-55) Instead of proving the Appellant burglarized the house in the crime charge, the State again offered the Appellant's prior House Burglary conviction as substantive proof of guilt, specifically citing ***Jones v. State***, 904 So. 2d 149 (Miss. 2005), as authority for using the prior conviction for substantive proof of the essential element of "intent." (T. II. 239) The Appellant submits by improperly relying on ***Jones***, the trial judge admitted the Appellant's prior House Burglary conviction in error before the jury. However, even though admitted as proof of the Appellant's "intent" under ***MRE 404(b)***, the trial judge ultimately instructed the jury, "...any evidence of a prior conviction of the defendant shall be considered <u>for impeachment purposes only</u> *and* <u>not as substantive evidence of guilt</u> against the defendant." (T. II. 275; CP. 49) (emphasis added) The trial judge's limiting instruction to the jury on impeachment/substantive evidence blurred the lines of the admission of the prior House Burglary conviction under ***MRE 609*** and ***MRE 404(b)***, and the Appellant contends this evidence unavoidably confused the jury as to its use of the prior conviction in their deliberations. The trial judge's reliance on the State's misuse of ***MRE 404(b)*** and the holding in ***Jones*** most certainly affected the jury's understanding of the purpose of the prior conviction and used it as *propensity evidence*, which is forbidden under ***MRE 404***, except in certain circumstances - here, specifically for substantive proof of guilt as to the essential element of "intent." The following discussion examines the question whether admission of the Appellant's prior House Burglary conviction was admitted in violation of two separate sections of the Mississippi Rules of Evidence.

A. The Trial Judge Improperly Applied *MRE 404(b)* at the End of the Trial, After Properly Applying *MRE 609* Throughout the Trial.

Under ***MRE 609***, evidence of a prior conviction punishable by death or in excess of one year in prison is allowed under certain circumstances to impeach the "credibility" of the defendant. ***MRE 609(a)***. At the beginning of trial, the trial judge, in preliminary rulings, signaled to the State that the ultimate admissibility of the Appellant's prior conviction under ***MRE 609*** would probably not be in the State's favor. (T. I. 8-9, RE. 14-15) This preliminary ruling prompted the State to argue in favor of admissibility of the prior House Burglary conviction *under all* of the "exceptions"[1] of ***MRE 404(b)***. (T. II. 162-164) Only under certain specific circumstances is proof of a prior conviction admissible under ***MRE 404(b)***. ***MRE 404(b)*** provides as follows:

> **(1) Prohibited Uses.**
> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> **(2) Permitted Uses.**
> This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

MRE 404(b) (emphasis added).

In response to the Appellant's direct testimony, the State moved that "a judgment of conviction for burglary of a house and burglary of an auto be allowed into evidence and the State allowed to cross-examine the defendant about these. He's put his character directly in dispute by saying he had no intent to burglarize the dwelling." (T. II. 211, RE. 56) In ruling on the State's

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[1] The Appellant would argue ***MRE 404(b)*** is not a list of "exceptions" to ***MRE 404(a)***, but rather a list of "circumstances" in a case where "Prior Bad Acts" may be considered by the jury for *specific* purposes, such as in this case, substantive proof of "intent." *See generally*, ***Cole v. State***, 126 So. 3d 880 (Miss. 2013).

motion, the trial judge analyzed the Appellant's prior auto and House Burglary convictions through the lens of ***Peterson v. State***, 518 So.2d 632 (Miss. 1987), and ***MRE 609.*** The trial judge allowed the Appellant's auto burglary for "impeachment purposes" and excluded the Appellant's prior House Burglary conviction. Using the ***Peterson*** factors, the trial judge found 1) the remoteness of when the conviction occurred and 2) the similarity of the two crimes *to be more prejudicial than probative*, and correctly excluded the prior House Burglary conviction. (T. II. 215-223) The trial judge responded to defense counsel's request for a clarification of the ruling by saying, "I guess I would have assumed that my ruling would have been clear on that... he's not going to be allowed to be impeached with the use of the house burglary. But he will be allowed to be impeached with the auto burglary conviction. I had hoped that I was clearer than that in my 15-minute oration. But apparently I wasn't." (T. II. 219-220) (emphasis added)

The Appellant submits the trial judge should have ultimately ruled the State's argument that the prior conviction fell under ***MRE 404(b)*** was incorrect and denied the last-minute admission of the 2009 House Burglary conviction immediately before the jury retired to deliberate. Instead of admitting the prior House Burglary conviction after excluding it throughout the trial, the Appellant maintains the judge should have continued *to properly apply and exclude* the prior conviction under ***MRE 609*** and the ***Peterson*** factors.

B. *Jones* vs. *Robinson*

Then after the defense rested their case, the State moved once again to enter Mr. Chism's prior House Burglary conviction into evidence before the jury in their rebuttal case. The State cited to ***Jones v. State***, 904 So. 2d 149 (Miss. 2005), as support for its admission and argued the

defense put Mr. Chism's intent, an essential element of proof in burglary on the day in question "directly in dispute..." on direct examination. (T. II. 239, RE. 57) The State also proposed to put the prior House Burglary conviction before the jury through a self-authenticating judgment of conviction. (Exh. S-3, RE. 29; T. II. 240) In response, defense counsel argued the prior House Burglary conviction was *still* more prejudicial than probative under the balancing factors of ***MRE 609***, and under the terms of ***MRE 404(b)*** it should be excluded because the prior House Burglary conviction would "clearly be offered...to prove that my client [Mr. Chism] acted in conformity therewith, and should be excluded." (T. II. 241, 264) However, the trial judge ruled the ***Jones*** case was controlling, and "the defendant's vigorous assertion of lack of intent made the admission of a previous burglary conviction extremely relevant and appropriate." The trial judge overruled defense counsel's objection and held a self-authenticating copy of the prior House Burglary conviction would be allowed into evidence for the jury's consideration as proof of his intent to burglarize the Gray residence. (T. II. 265, RE. 28)

Some resemblances do exist between the case at hand and ***Jones v. State***, 904 So.2d 149 (Miss. 2005), the case law cited by the State to allow the Appellant's prior House Burglary conviction, but the factual differences between the two cases are key in the analysis by this Court of the trial judge's erroneous decision to admit the 2009 House Burglary conviction as proof of "intent." Furthermore, the Appellant submits the trial judge's reliance on ***Jones*** overlooked a critical aspect of the application of ***MRE 404(b)***, which this Court articulated in ***Robinson v. State***, 42 So.3d 598 (Miss. Ct. App. 2010).

In ***Jones***, the defendant was charged with attempted burglary of a dwelling. The defendant

admitted to knocking on the door of the victim to obtain water for his overheated vehicle. ***Id.*** at 152. At trial, the victim claimed to have seen the defendant at the door with a knife and called 911 instead of opening the door. ***Id.*** at 151-152. Despite the defendant's denial of having kicked the door, an investigating officer found physical evidence of dents and scratches in the front door, items on the floor on the interior of the house, and found the peephole of the door, apparently having been shaken off by the force of the knocking or kicking. ***Id.***

The ***Jones*** record indicated that each of the defendant's prior guilty pleas dealt with the intent to commit "larceny." ***Id.*** The Supreme Court found the underlying facts of each conviction irrelevant, but instead found the admission by the trial judge of the prior convictions to prove the essential element of intent to commit *larceny* was not error, and tended to prove (without undue prejudice) the defendant's purpose for being at the house, kicking on the door. ***Id.*** *at* 153. These admissions of a previous larcenous intent sufficiently refuted Jones' claim that he was only attempting to seek aid for his broken-down vehicle and was substantive proof of Jones' intent to commit a burglary. ***Id.***

While there are some similarities between the facts of ***Jones*** and the facts in the present case, the Appellant submits these differences should have prevented the change in the trial judge's prior rulings to exclude the 2009 House Burglary conviction. First, the breaking evidence against the defendant in ***Jones*** was much stronger than the evidence against the Appellant in this case. The ***Jones*** defendant was allegedly armed and shook, banged, and/or kicked the door of a dwelling with such force that it hurled objects off the wall. In the present case, there was *no evidence* Mr. Chism used any force against the door of the residence. In fact, the only evidence

was the circumstantial testimony of Officer Nichols that she saw the Appellant standing *inside the basement door* with a bag in his hand. Unlike the victim who provided direct testimony in ***Jones***, no one was in the residence in the present case at the time of the alleged burglary to prove similar "breaking" evidence and testimony.

This Court held in ***Robinson v. State***, 42 So.3d 598 (Miss. Ct. App. 2010), that the admission of a defendant's prior conviction into evidence constituted reversible error where the State failed to provide "any probative interconnecting evidence" to support its admission for a proper purpose under ***MRE 404(b)***. ***Robinson***, at 601. This Court further found the State impermissibly used the defendant's prior conviction for attempted grand larceny as evidence of a "predisposition to steal" in order to substantively prove the element of "intent." ***Id.*** at 602. The case language ultimately held that using evidence for such a purpose violated the prohibition on the use of *predisposition evidence* in ***MRE 404***: "Ironically, Robinson's intent constituted the critical evidentiary difference distinguishing trespass from burglary. Intent also constituted the element of the indicted offense the prosecutor proved by use of prohibited predisposition character evidence, Robinson's six-year-old prior conviction for a crime involving a lack of trustworthiness." ***Id.*** at 606 (emphasis added).

Similar to ***Robinson***, the outcome of Mr. Chism's trial turned on whether the prosecution could prove beyond a reasonable doubt that the Appellant had the intent to steal when he was found inside the basement doorway. Despite arguing to the trial judge that the evidentiary purpose of admitting Mr. Chism's prior House Burglary conviction into evidence was to show evidence of intent, the State's obvious purpose was to advocate to the jury the prior House

Burglary conviction was proof that the Appellant committed House Burglary again in this case. The Appellant urges to this Court that the State's "intent" argument resulted in the erroneous admission of the prior House Burglary conviction as "predisposition" character evidence in violation of the Court's interpretation of ***MRE 404(b)***.

Also in the present case, the State offered ***Jones*** as support for their argument to allow the Appellant's prior conviction into evidence for *substantive evidence* purposes of proving an essential element in burglary cases, intent to steal. The State obviously used ***Jones*** to attempt introduce the Appellant's prior House Burglary conviction for the purpose of *establishing* substantive evidence of Appellant's guilt for the crime charged. However, the trial judge admitted the Appellant's prior conviction under ***Jones*** with a limiting instruction for the jury to use the evidence for purposes of impeachment of the Appellant's credibility *only*, rather than substantive proof of the element of "intent." (T. II. 275; CP. 49) This further ruling only compounded the error underlying the admission of the House Burglary conviction and seriously calls into question the basis and the propriety of the trial judge's decision to allow the House Burglary conviction as proof of substantive proof of intent to steal under the ***Jones*** case.

While the ***Jones*** and ***Robinson*** cases are factually similar, the outcome of each case is completely different. The Appellant contends ***Robinson*** controls here instead of ***Jones*** because the State's desire to use the House Burglary conviction as substantive proof of guilt was clear from the very start of the trial.[2] The Appellant also submits the trial judge committed compound

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[2] "As previously noted, the record herein reflects no such probative link, proper inference, or connecting evidence between the past crime and the charged offense other than for the purpose of impermissibly arguing that Robinson acted in conformity with his past crime. In sum, not even a scintilla of connecting

error in the decision to admit the prior House Burglary conviction on the State's specific ***MRE 404(b)*** motion and then contradicted the ***404(b)*** ruling ostensibly based on the holding in the ***Jones*** case by then instructing the jury to consider the Appellant's prior House Burglary conviction for impeachment purposes *only*.

The ***Jones*** case certainly provides ***MRE 404(b)*** can be used *in the proper circumstances* to prove substantive evidence of guilt. However, this principle is at odds with how the trial judge in the case at hand reconciled ***Jones*** as seen through the facts of this case: "I had an opportunity to carefully study ***Jones vs. State***, 904 So.2d 149, and this case would have been enormously helpful earlier in the trial, or at least a couple of days ago so that I could have reviewed it as it related to the State's motion...I believe given the defendant's vigorous assertion of lack of intent that the admission of a burglary conviction previously is extremely relevant and appropriate, in the State's effort to rebut the defendant's assertion that he did not intend to burglarize the house. So I'm going to overrule the defendant's objection, and I'm going to allow the admission of the certified document, which the State has offered." (T. II. 265, RE. 28)

As demonstrated by the ***Jones*** case, ***MRE 404(b)*** can be used to prove intent, but the Appellant contends the way the trial judge ruled based on the facts in the case at hand was improper. There was no "opening of the door" in the Appellant's testimony since his testimony only provided an explanation of his presence in the doorway of the basement, and nothing more. Additionally, the limiting instruction by the trial judge to the jury instructed that they could not

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probative evidence exists to link the prior conviction with the indicted offense. Significantly, the only link between the two crimes is the shared character trait of trustworthiness." ***Robinson v. State***, 42 So. 3d 598, 605 (Miss. Ct. App. 2010) (emphasis added).

consider the prior conviction for the purpose for which it was offered by the State, to prove the essential element of "intent." (T. II. 275, RE. 58) The State offered the Appellant's prior conviction to prove intent, but the trial judge allowed it in only for purposes of impeachment, which reversed the trial judge's previous analysis of the prejudice that would be created by the prior House Burglary conviction and resulted in this irreconcilable, erroneous ruling.

C. CharactCr for TruthfulnCss, CrCditability ImpCachmCnt, and *MRE 403* Balancing.

As provided in ***MRE 404(a)(1)***, evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. Further, ***MRE 404(b)(1)*** provides that evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

In the present case, the State offered and used the Appellant's prior conviction to attempt to prove intent, and not to impeach the Appellant's testimony about his intentions. The trial judge misapplied ***Jones*** because in the case at hand there was no proof of the Appellant's guilt other than a small amount of circumstantial evidence. The State incorrectly argued ***MRE 404(b)(2)***, and the Appellant contends jury was ultimately allowed to improperly consider the Appellant's prior House Burglary conviction as "propensity" character evidence in violation of ***MRE 404(a)(1)***. The Appellant also submits the trial judge improperly adopted the State's misuse of ***MRE 404(b)(2)***, and the jury was considered evidence of the Appellant's House Burglary conviction to prove the Appellant acted in "conformity with his past crime." ***Robinson*** at 605.

Evidence of prior convictions that pass muster under ***MRE 404(b)***, must also satisfy the

probative/prejudicial balancing test imposed by ***MRE 403***. "Even when other-crimes evidence is admissible under ***MRE 404(b)***, it must pass through the 'ultimate filter' of ***MRE 403***." ***Flowers v. State***, 842 So. 2d 531, 540 (Miss. 2003). ***MRE 403*** *requires* the trial court to weigh the "danger" of a prejudicial effect against the offered evidence's probative value. Weighing "propensity" character evidence like a prior House Burglary conviction in a House Burglary prosecution against the *danger* that the jury will find the Appellant guilty of the same crime simply by insinuation leads to the conclusion that the prior conviction had *zero* probative value. Further, it is clear from the facts of both cases "prejudicial evidence that has no probative value is always inadmissible." ***Roberson v. State***, 595 So. 2d 1310, 1315 (Miss. 1992) (emphasis added).

The Appellant submits that the admission of the prior-felony conviction substantially prejudiced the jury as to deny him a fair trial under our Rules of Evidence. The trial judge's adoption of the State's misuse of ***MRE 404(b)*** and the admission of the 2009 House Burglary conviction was clearly an abuse of discretion, both in the admission of the propensity evidence and in the contradictory instruction regarding "impeachment" evidence. Further, in failing to properly balance the probative value of the prior House Burglary conviction against the danger of prejudicial effect of this conviction in a prosecution for House Burglary, the trial judge violated the "ultimate filter" rule, which clearly weighed in favor of exclusion of the evidence. Finally, ***MRE 403*** also forbids otherwise admissible evidence to be admitted to the jury in order to (1) prevent "confusing the issues" and (2) "misleading the jury," which were also violated due to the admission of the conviction as substantive proof of guilt under ***Jones***, coupled with the puzzling limiting instruction given by the trial judge at the very end of the trial.

Therefore, the Appellant contends the trial judge erred by allowing improper character evidence as substantive evidence of "intent" against the very terms of its own previous rulings to the contrary. The Appellant submits trial judge's admittance of the Appellant's prior House Burglary conviction into evidence at the end of the trial was clearly an abuse of discretion and, therefore, this honorable Court should reverse the verdict of the jury and the sentence of the trial court, thereby remanding this case to the lower court with proper instructions for a new trial.

ISSUE TWO:

Whether the trial court erred when it denied the Appellant's motion to set aside the jury's verdict (J.N.O.V.) for legal insufficiency in the prosecution's case or, alternatively, to grant the Appellant a new trial where the verdict was against the overwhelming weight of the evidence.

Further illustrating the lower court's error, the evidence against the Appellant in this case fails with respect to both the State's burden under the requirement of legal sufficiency and the jury's verdict in light of the whole record. The manifest errors that occurred at trial legitimize the State's lack of direct evidence, ignore Mr. Chism's testimony and timeline of events, and, ultimately, have caused a grave injustice.

Although legal sufficiency and weight of the evidence are analytically distinct evaluations under the jurisprudence of this State, the two standards jointly reveal the aforementioned errors and, therefore, will be treated herein as two separate issues in a single issue argument.

A. Legal Sufficiency

The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in ***Bush v. State,*** 895 So. 2d 836 (¶17) (Miss. 2005) (*citing* ***Jackson v. Virginia***, 443 U.S.

307, 315 (1979)). In ***Bush***, the Court restated "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Id.*** The Court also emphasized that "[s]hould the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." ***Id.*** (emphasis added) (citing ***May v. State***, 460 So. 2d 778, 781 (Miss. 1984)).

Reasonable jurors could not have found that the crime of House Burglary occurred in the facts presented because the State's contention that one did occur rests solely on inferences full of doubt. First of all, neither of the officers proffered by the State during the trial could testify to the key elements of House Burglary as required by ***Miss. Code Ann. § 97-17-23***, which requires the breaking and entering of another's dwelling with the intent to commit a felony. The Appellant does not contest the accusation that Mr. Chism was on the property of Mr. Gray, but serious doubt exists whether Mr. Chism was the person who broke down the door and whether the State proved by legally sufficient evidence there was intent to commit a felony.

The testimony of Officer Nichols and Detective Pugh was inferential at best in its relation to the essential elements of House Burglary. Officer Nichols was able to identify Mr. Chism as the individual who she found inside the basement door of Mr. Gray's home. (T I. 133-134) She simply gave testimony that the door to the house had been broken down and items belonging to Mr. Gray had been scattered about in a manner, "Typically [common] in house burglaries." (T. I.

136) On cross-examination she repeatedly stated she did not see Mr. Chism kick down the door, nor examined the door for footprints or other features of breaking. (T. I. 138, 140) Officer Nichols also testified she had not contacted the Grays to ascertain what, *if anything*, was missing from the home. (T. I. 141-142) Detective Pugh on cross-examination also stated he had not seen Mr. Chism break into the residence. (T. II. 158) The detective also admitted the door that had been broken down had been repaired by the time he arrived at the scene. (T. II. 159) He also admitted that the photos entered into evidence by the State of the condition of the door were taken after the repairs, not before. (T. II. 160)

The Appellant contends the two officers' testimony presents a reasonable doubt to the elements of breaking and intent necessary to be proven in a House Burglary prosecution. Neither officer saw Mr. Chism break into the house, and the reasons Mr. Chism gave for his presence was consistent with the inadequate evidence presented at trial. Mr. Chism testified, uncontradicted, he heard a house alarm, went to investigate, saw the basement door "wide-open," called out to see if anyone was home, and then spotted a bag inside of the basement door. (T. II. 205) He said he bent down to examine the bag at that very moment Officer Nichols arrived on the scene. (T. II. 205-206) Further, since the officers failed to properly preserve the scene, there was no conclusive evidence or testimony Mr. Chism was the person who broke the door. The door was repaired before officers took photos and no forensic data was collected that pointed to Mr. Chism causing the damage to the door. Compounding further doubt is the fact that neither officer could testify that Mr. Chism was the one who broke down the door. The State, at best, offered circumstantial evidence that simply implied a crime had taken place, but certainly did not prove

the elements of burglary beyond a reasonable doubt. Even viewing the facts in "the light most favorable to the prosecution" standard of ***Bush***, the Appellant urges this Court that the State miserably failed to sufficiently prove the essential element of a "breaking" by Mr. Chism. ***Bush v. State,*** 895 So. 2d 836 (¶17) (Miss. 2005). As defense counsel stated in the directed verdict motion, "There has been no testimony other than the Defendant was in the basement area of the home...there has been no showing of damage to the door or anybody that saw him personally break-in to the home." (T. II. 190-92)

Secondly, the evidence presented at trial was legally insufficient as to the issue of proof of whether Mr. Chism's presence in the house was with the intent to commit a felony. Although Officer Nichols did discover Mr. Chism with a bag containing a video game console, the Appellant contends that this was consistent with Mr. Chism's account of the events of that morning. Officer Nichols also testified that things had been scattered around in the residence "Typically [common] in house burglaries" (T. I. 136), but she never contacted the Gray family to check if *any* of their belongings were missing. The State then used these facts to *imply* that Mr. Chism's presence in the house was for the purpose of theft. It is no coincidence that after their witnesses failed to establish the element of intent that the State sought to bring in Mr. Chism's previous convictions to infer this intent to steal. But the limiting instruction was clear the ***MRE 404(b)*** evidence of the Appellant's prior conviction to House Burglary was not admitted as conclusive proof of intent, but only as impeachment evidence. (T. II. 265, RE. 28) Once again, there is no doubt the State failed to present *any evidence* that proved beyond a reasonable doubt that Mr. Chism was there with the purpose to commit a felony, and the Appellant asserts "intent" was simply *never* proved

at trial, and he was entitled to have the directed verdict, the peremptory instruction, and/or the post-trial JNOV motion sustained in his favor.

Mr. Chism's mere presence in the house is uncontested, but a reasonable, fair-minded juror could not say without a reasonable doubt, and certainly not a trial judge using this standard for legal sufficiency, that the State had proved Mr. Chism was the individual who broke into the Grays' residence with an intent to steal. Even in the face of the exclusion of the ***MRE 404(b)*** evidence at the directed verdict stage to substantively prove both breaking and intent, and no other evidence proven by the prosecution, the Appellant maintains it was error for the trial judge to refuse to direct a verdict in favor of the Appellant. (T. II. 191-92, RE. 22-23)

Because the State did not meet its burden of proof in their case-in-chief on credible evidence "beyond a reasonable doubt" on two essential elements of the crime of House Burglary, namely that the Appellant was the person who *actually* broke the door to the house with an intent to steal, the Appellant asks this honorable Court to reverse and render the judgment of the lower court denying counsel's motion for a directed verdict, peremptory instruction, and J.N.O.V., and order the Appellant be immediately discharged from the custody of the Mississippi Department of Corrections.

B. Weight of the Evidence

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. ***Dilworth,*** 909 So.2d at 737. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. ***Id.***

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a jury's verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an "unconscionable injustice." ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a "thirteenth juror," but the motion is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Id.*** The evidence should also be weighed in the light most favorable to the verdict. The ***Bush*** Court stated:

> A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226 (1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to

withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at 737.

The "tenuous" evidence presented by the State against the Appellant in the case at bar begs this honorable Court to invoke its status as the "thirteenth juror" and its power to reverse the verdict to allow a new jury to consider the prosecution's case in a new trial. As set out hereinabove, the State's paltry evidence, when considered against the Appellant's reasonable explanation of events on the morning of the event in question, weighs in favor of reversing the jury's verdict.

The State's case failed to establish that Mr. Chism broke and entered with the intent to steal, from which a reasonable, fair-minded juror could find him guilty beyond a reasonable doubt. The flimsy evidence put on by the State in this case centered on the testimony of Officer Nichols, whose claims are circumstantial and substantially called into question by Mr. Chism's testimony. Officer Nichols testified that: "I did not witness him [Mr. Chism] breaking into the house. I witnessed him coming out of the house with items in hand." (T. I. 138) Defense counsel inquired during Officer Nichols' cross-examination, "Did you witness him kick down and enter a door?" ***Id.*** Nichols answered, "No sir." ***Id.*** As defense counsel stated in the directed verdict motion, "There has been no testimony other than the Defendant was in the basement area of the home...there has been no showing of damage to the door or anybody that saw him personally break-in to the home." (T. II. 190-92)

In addition to the absence of evidence that Mr. Chism broke down the basement door, there was no evidence before the jury conclusively establishing the Appellant's intent to steal. The trial judge's limiting instruction regarding the Appellant's prior House Burglary conviction

was the *only* piece of evidence that might have established the element of intent, but the trial judge instructed the jury that the prior House Burglary conviction was used for impeachment purposes *only*, not for substantive evidence of guilt. Under the trial judge's limiting instruction there was no evidence of intent presented by the State. It is no coincidence that after their witnesses failed to prove intent the State sought to bring in Mr. Chism's prior convictions to infer his intent, but the limiting instruction given to the jury by the trial judge was clear that ***MRE 404(b)*** evidence of the Appellant's prior House Burglary conviction was not admitted as conclusive proof of intent, but only as impeachment evidence. (T. II. 265, RE. 28)

In light of the balance of the evidence that was before the jury in this case, the verdict reached in this matter is plainly repulsive to reason, inference, and conclusion. How the jury arrived at a verdict of guilty of House Burglary from the circumstantial evidence in this case can only be described as a "compromise verdict." The State's case was clearly not strong enough to cause them to vote guilty on the indicted charge, which they obviously were aware of by the State's vigorous attempts to offer the prior House Burglary conviction into evidence as proof of "intent." The inference under the standard of review in matters of weight of viewing the verdict in the light most favorable to the jury is directly rebutted by the trial judge's instruction to consider the prior House Burglary conviction as *impeachment* evidence only, and *not* as substantive proof of guilt. This incomprehensible action on the part of the jury creates the "exceedingly rare" situation described in the ***Bush*** standard of review of an "unconscionable injustice." Although the lower court allowed the verdict to stand in face of defense counsel's motion for new trial, it was clearly an abuse of discretion to refrain from exercising its prerogative

as the "thirteenth juror" on the trial level. The verdict is so contrary to the overwhelming weight of the evidence that this honorable Court can alleviate unconscionable injustice which has occurred if the verdict is allowed to stand, and the Appellant respectfully urges the Court to reverse the jury's verdict, thereby remanding this case with proper instructions to the lower court for a new trial.

ISSUE THREE:

Whether the trial judge erred in refusing defense proposed jury instruction D-7, which correctly stated the law in circumstantial evidence cases, and was supported by the evidence presented at trial.

Mr. Chism is a victim of the circumstances in this case, yet the trial judge refused to instruct the jury on the law of circumstantial evidence cases as it related to their duties to properly deliberate his guilt or innocence to the charge of House Burglary. The State, in its effort to convict, provided no direct evidence to prove all of the essential elements of burglary, but only facts the jury might use to *infer* guilt. Despite this deficiency of proof, the trial judge refused Appellant's circumstantial evidence jury instruction (hereinafter, "D-7") even though it was an accurate statement of the law regarding their deliberations and had support from the facts presented in the case. The law is clear, when there is no confession or direct eyewitness testimony, an instruction ordering the jury to "exclude every other reasonable hypothesis other than that of guilt before a conviction can be had." ***Mack v. State***, 481 So. 2d 793, 795 (Miss. 1985). The record showed without dispute Mr. Chism gave no confession and the testimony of the State's witnesses provided no direct evidence to the charge of house burglary, and the Appellant asserts the trial judge erroneously denied D-7 in holding the case was not, "wholly

circumstantial." (T. II. 259-60, RE. 35-36) The Appellant further contends that the entire testimony given by Officer Nichols in particular amounted to *evidence by inference* and nothing more. The following discussion examines whether the trial judge abused his discretion by denying jury instruction D-7.

The standard for a denial of a jury instruction is abuse of discretion. A jury instruction in Mississippi can be denied if the instruction inaccurately states the law, is covered elsewhere in the instructions, or is without foundation in the evidence. ***Taylor v. State,*** 137 So. 3d 283, 286 (Miss. 2014), *citing* ***Heidel v. State***, 587 So. 2d 835, 842 (Miss. 1991). "When serious doubt exists as to whether the instruction should be included, the doubt should be resolved in favor of the accused." ***Burelson v. State***, 166 So. 3d 499, 509 (Miss. 2015) (emphasis added) (citations omitted). In the present case, the Appellant was improperly denied D-7 as there is foundation in the evidence for a circumstantial jury instruction, despite the trial judge's finding to the contrary.

The difference between direct evidence and circumstantial evidence is clear as the Mississippi Supreme Court has defined circumstantial evidence as, "evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such a fact does exist." ***Id.*** (emphasis added), *citing* ***Keys v. State***, 478 So. 2d 266, 268 (Miss. 1985). Direct evidence is defined as evidence that, "must directly and not by inference implicate the accused *and not just show that there has been a crime."* ***Burelson***, at 509, *citing* ***Price v. State***, 749 So. 2d 1188, 1194 (Miss. Ct. App. 1999) (underline emphasis added, italics in original). In this case, the Appellant contends a circumstantial jury instruction under Mississippi law was warranted given the nature of the evidence presented by the State.

Officer Nichols could only testify that Mr. Chism was inside the basement door of the dwelling. During cross-examination she explicitly stated, "I did not witness him breaking in the house." (T. I. 138) When asked if she had seen him break down the door, she stated, "No, sir." (T. I. 138) At best, she could only *surmise* that probable cause existed "*show that there* [had] *been a crime*" committed, but only a *trespass* was established under the beyond a reasonable doubt standard under the proof collected and presented at trial. ***Burelson***, at 509. The only way that an individual could then decide that Mr. Chism had broken the door down and entered the residence with intent to steal was *by inference*, making Officer Nichols' testimony wholly circumstantial. Another of the State's witnesses, Detective Pugh, also testified he had not seen Mr. Chism break the door down, that there had been no confession, and that the door had been repaired before he arrived. (T. II. 158-162) No photographs of the door in its post-break-in state were taken, but rather only after it had been repaired. The State once more attempted to prove an element of House Burglary exclusively by inference and *not* by direct evidence.

The State claimed the case was not "wholly circumstantial" and, therefore, D-7 was not appropriate. (T. II. 259) Why it was "wholly circumstantial" is unclear, as the State offered no further reasoning for its contention. *Id.* The trial judge decided instead to give the reasoning:

> The defendant was inside a house he did not have permission to be in. There was testimony the door had been kicked in, the alarm was sounding. I believe all that was direct evidence of a house burglary. He was caught by the officer in the house. And the jury is free to disbelieve the, that fact scenario was consistent with a house burglary. But I think D7 is not supported.

(T. II. 259-260, RE. 35-36)

The Appellant contends this is an incorrect interpretation and application of the law of circumstantial instructions, as applied to the testimony of Officer Nichols, who only said she said saw Mr. Chism inside the basement doorway of the house holding a bag, which simply raised an "inference [to] implicate the accused and *not just show that there has been a crime.*" ***Burelson***, at 509 (underline emphasis added, italics in original). The case law is clear, eyewitness testimony must *directly* incriminate the accused in the crime charged, and not simply raise an inference the accused committed the offense charged. All the trial judge did here was to conclude there was evidence a house burglary had *occurred*, and in doing so, the Appellant contends an incorrect interpretation of the law as applied to the specific facts of this case was made, and the denial of D-7 was erroneous.

Regardless of the trial judge's conclusion, the State cannot correctly claim on appeal the entire case was not "wholly circumstantial." An example of direct evidence would be a confession or an eyewitness testifying to the "*gravamen*" of the offense charged. ***Burleson***, 166 So. 3d 509 (Miss. 2015), *referencing generally,* ***Kirkwood v. State***, 52 So. 3d 1184 (Miss. 2011).[3] Mr. Chism made no "confession" and the *only* witness the State presented who could claim the

[3] "Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such a fact does exist. ***Alexander v. State,*** 749 So. 2d 1031, 1036 (Miss. 1999) (quoting ***Keys v. State,*** 478 So. 2d 266, 268 (Miss. 1985)). While evidence does not always fall neatly into one category, examples of direct evidence include an admission or confession by the defendant to 'a significant element of the offense,' or eyewitness testimony 'to the gravamen of the offense charged.'" ***Mack v. State,*** 481 So. 2d 793, 795 (Miss. 1985) (citations omitted). ***Kirkwood***, at 1187 (emphasis added).

title of "eyewitness" was Officer Nichols who did not give testimony to the *gravamen*[4] of the offense of house burglary. In Mississippi the essential elements of the criminal offense of House Burglary requires proof:

> ...of breaking and entering the dwelling house or inner door of such 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 dwelling house or not, with intent to commit some crime therein ...

Miss. Code Ann. § 97-17-23 (Supp. 2015) (emphasis added).

The trial judge compounded this error by allowing the jury to consider Mr. Chism's prior House Burglary conviction at the very end of the trial, which only highlights the problems with the State's circumstantial evidence case. It is no coincidence that directly after the defense crossed Detective Pugh the State sought once again to enter Mr. Chism's prior House Burglary conviction (T. II. 162), and then again after Mr. Chism testified in his own defense. (T. II. 196-208) The State failed to prove through direct evidence each and every one of the elements of House Burglary, so they attempted again to get their meager case to the jury through inference, conjecture, speculation, and predisposition by opposing the circumstantial evidence instruction.

The State will surely argue that the testimony of Mr. Chism's mere presence in the house is enough to *infer* breaking and entering, along with intent to commit a felony, which is the essential element of proof required of House Burglary. Once again, the Appellant maintains this testimony of his presence in the house is not "direct" evidence, but rather, in this set of facts,

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[4] "The material or significant part of a grievance or complaint." https://www.merriam-webster.com/dictionary/gravamen (last visited March 6, 2017).

purely circumstantial evidence. In ***Woods v. State***, the Court of Appeals ruled that, "intent may be inferred from the circumstances." ***Woods v. State,*** 192 So. 3d 347, 349 (Miss. Ct. App. 2015), *citing* ***Brown v. State,*** 799 So. 2d 870 (Miss. 2001). Specifically, in regards to circumstantial evidence used to inferentially prove House Burglary, the Mississippi Supreme Court found:

> Some presumptions are to be indulged in against one who enters a building unbidden at a late hour of night, else the burglar caught without booty might escape the penalties of the law. People are not accustomed in the nighttime to enter homes of others, when asleep, with innocent purposes. The usual object is theft; and this is the inference ordinarily to be drawn in the absence of explanation from breaking and entering at night accompanied by flight when discovered, even though nothing has been taken.

Id. (emphasis added)

The facts in ***Woods*** and ***Brown*** could not be more different than in the case at bar. In ***Woods,*** the appellant told the officers that he had just moved into the house and was moving furniture around. A witness claimed she heard loud thumping and noises related to heavy lifting. ***Woods,*** at 348. In ***Brown***, the accused was discovered by officers inside of the main part of the building with his legs sticking out of the window. ***Brown,*** 799 So. 2d 871, 871 (Miss. 2001). Also, in both ***Woods*** and ***Brown*** there was direct evidence the accused had broken into the buildings in question. No such evidence exists in Mr. Chism's case, and the Appellant again contends that Officer Nichols' testimony only raised *an inference of proof* that the Appellant had committed a House Burglary, and, therefore did not amount to "direct" evidence as required by case law.

The trial judge's finding that the evidence in this case was not "wholly circumstantial" is simply not supported by the totality of the evidence presented at trial. Even if the State could argue that some of the aforementioned circumstantial evidence was direct evidence, Mississippi

law is clear, "[w]hen serious doubt exists as to whether the instruction should be included, the doubt should be resolved in favor of the accused." ***Burelson***, *supra*, at 509. Even if it was not clear from the face of the record "serious doubt" was present in this case, the Appellant submits the trial judge should have ruled in the defense's favor and granted D-7 in an abundance of caution.

The trial judge's decision to deny D-7 was erroneous. It was a correct statement of law, and contrary to the State's position, the Appellant maintains the evidence presented at trial was "wholly circumstantial." The trial judge's reasoning that direct evidence a House Burglary had been committed was an incorrect application of the law regarding circumstantial evidence jury instructions. The standard requires direct, not inferential, evidence that the accused committed the elements of the crime. Mr. Chism was the victim of the circumstances of this case and nothing the State presented at trial contradicts that fact. As such, the Appellant moves this Court to reverse this case and remand it to the lower court with proper instructions for a new trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court with instructions to the lower court for a new trial. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should

be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The claims of error in this case are brought by the Appellant under ***Article 3, Sections 14, 23, and 26 of the Mississippi Constitution*** and the ***Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution***. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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I, Phillip W. Broadhead, attorney for the Appellant herein, hereby certify that on this day, I electronically filed the foregoing Brief of the Appellant with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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This the 10th day of April, 2017.

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