IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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CHRISTINE WILSON — APPELLANT

VS. — NO. 2005-KA-2136

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF MISSISSIPPI

CHRISTINE WILSON **APPELLANT**

VERSUS **NO. 2005-KA-02136-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

Procedural History

Christine Wilson was convicted in the Circuit Court of the Madison County on a charge of felony shoplifting and was sentenced one term of five years in the custody of the Mississippi Department of Corrections with one year suspended. (C.P.29-32) Aggrieved by the judgment rendered against her, Wilson has perfected an appeal to this Court.

Substantive Facts

In November 2002, Steve Wilson was working as a loss prevention officer at Dillard's Department Store in Ridgeland. On November 4, 2002, he was "working the floor" at the store when he "witnessed three females and a male gathering merchandise and

carrying it to one location."[1] The merchandise included "quite a few items– lots of leather coats, etc." This suspicious behavior caused Mr. Wilson "to start watching them." When "they got ready to actually take the stuff, they were looking around trying to make sure nobody was watching them; and, then, they brought out two bags– two large bags stuffed and stuffed all the merchandise into two bags." (T.28-30) Asked what transpired after "the bags came out," Mr. Wilson testified as follows, in pertinent part:

> I started going toward them whenever I saw them actually start lifting the bags. One of the girls grabbed one of the bags and the gentleman grabbed the other bag. As I started going toward them, whenever they realized that I was actually coming toward them, they split up. Two of the females went out toward the parking lot door and one of the males and the other female went toward the mall.
>
> * * * * *
>
> The two that went toward the outside door, they dropped their bag. So I made the decision to go after the two that went toward the mall. I'd already called PD on my cell phone; so, I figured they were coming probably in that door, and had given them a description. Then I apprehended the female [the defendant] in the mall.
>
> (T.30-31)

Fifteen items, with a value totaling $1,100.50, were recovered. (T.33)

When asked what he had seen this defendant do during this episode, Mr. Wilson testified, "Hold the bag open so the merchandise could be taken and put in the bag." When she was apprehended, "[s]he didn't produce a receipt for the merchandise" that Mr. Wilson recovered. (T.39-40)

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[1]Mr. Wilson identified the defendant, Christine Wilson, as one of these women. (T.30)

Timothy Harris had pleaded guilty to a charge of shoplifting with regard to his participation in this crime. Harris testified that on the day in question, Ms. Wilson and two other women identified as "Val" and "Kim" had "stuffed the bags and had the bags ready" to take out of the store. According to Harris, "they called me back in there to tote them [the bags] out. I toted one of them out." Asked about Ms. Wilson's role in this episode, Harris testified that he had observed her "[p]ulling the clothes" with the other women. Harris was stopped as he "was going up the elevator," still inside the store. When asked, "Who actually stuffed the bags with the clothes?" Harris answered, "Well, they was– they was in there to stuff the bags. All three of them was in there. They pulled and stuffed the bags." He testified that he had no intention of paying for this merchandise. When asked whether he was "getting anything" in exchange for his testimony, Harris replied, "No, sir." (T.41-45)

On cross-examination, Harris testified that he did not actually see the three women taking clothes off the rack or stuff the bags. (T.49) On redirect examination, he testified that his role was "to wait outside until they [the three women] told him to come get the bags." According to Harris, "It was all our plan." (T.50)

Wilson testified that on the day in question, she and her friend Shameka Davis "went and picked up Mr. Harris and the other lady" and "went to the mall." They all "went into Dillard's" and went their separate ways. When she finished shopping, she told Davis that she "was about to checkout," and Davis told her "what was going to go on," i.e., that Harris and "the other lady" were "about to steal." At that point, Wilson put her merchandise back on the rack, walked out of the store, and sat down on a bench. About 20 minutes later, she was arrested for shoplifting. (T.63-65) Wilson denied that she had stolen or attempted to steal anything. (T.67)

In rebuttal, Mr. Wilson contradicted the defendant's assertion that she had told him about Shameka Davis when she was arrested. He testified that at this point the defendant was not seated on a bench, but was "[w]alking out into the mall." (T.82)

SUMMARY OF THE ARGUMENT

PROPOSITION ONE:
THE TRIAL COURT DID NOT ERR IN ADMITTING HARRIS'S TESTIMONY ABOUT THE PLAN TO SHOPLIFT CLOTHES FROM THE DEPARTMENT STORE

PROPOSITION TWO:
WILSON'S CHALLENGE TO THE GRANTING OF INSTRUCTION S-4 IS PROCEDURALLY BARRED AND SUSTANTIVELY WITHOUT MERIT

PROPOSITION THREE:
WILSON'S CHALLENGE TO HER SENTENCE IS PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

PROPOSITION ONE:

THE TRIAL COURT DID NOT ERR IN ADMITTING HARRIS'S TESTIMONY ABOUT THE PLAN TO SHOPLIFT CLOTHES FROM THE DEPARTMENT STORE

Wilson contends first that the trial court committed reversible error in overruling her hearsay-based objection to Harris's testimony to that "[i]t was all our plan" to steal clothes from the department store. (T.50-51) The state counters that the following language disposes of this argument:

> Jones next asserts the court erred in allowing the hearsay testimony of co-defendant Diane Coleman. Jones contends the circuit court erred by allowing Coleman to testify as to what was said in the car on the way to the pool hall. Once again, as noted above, Coleman's testimony that Martin said he was going to "straighten out his business" and asked Jones if he was willing to help is not hearsay. M.R.E. 801(d)(2)(E) provides that a statement is not considered hearsay if it is an admission by a party-opponent, offered against a party, and is a statement by a co-conspirator of a party during the course

> and in furtherance of the conspiracy. See *Wilkins v. State*, 603 So.2d 309, 317 (Miss.1992). Coleman's testimony about the plans made by Jones, Martin and her in the car on the way to kidnap Steve was not hearsay. Consequently, the circuit court did not err in admitting Coleman's testimony, and this issue is also without merit.
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> *Jones v. State*, 776 So.2d 643, 651 (Miss.2000).

Likewise, to the extent Harris's testimony about the plan established that a statement was made by Wilson, it was not hearsay. M.R.E. 801(d)(2)(E). The objection was properly overruled.

Alternatively, the state points out that M.R.E. 803(3) "allows the admission of a statement that would otherwise be excluded as hearsay, when it is 'a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).'" *Bougon v. State*, 883 So.2d 98, 105 (Miss. App. 2004). Accord, *Bogan v. State*, 754 So.2d 1289, 1293 (Miss. App. 2000).

Moreover, "[t]he comments to Rule 803 state that statements which indicate an intention to do something in the future are admissible to prove that the act intended took place." *Bougon*, 883 So.2d at 105. The court did not abuse its discretion in allowing this testimony.

Solely for the sake of argument, although no further discussion is necessary, the state submits that Harris's testimony about the plan was cumulative to Mr. Wilson's testimony about his observations of the defendant. Thus, "[e]ven if there had been a hearsay violation here, it would have been harmless error." *McBride v. State*, 784 So.2d 271, 272 (Miss. App. 2001), citing *Melton v. State*, 723 So.2d 1156, 1160

(Miss.1998). The state maintains that no such violation occurred. Wilson's first proposition should be denied.

PROPOSITION TWO:

WILSON'S CHALLENGE TO THE GRANTING OF INSTRUCTION S-4 IS PROCEDURALLY BARRED AND SUSTANTIVELY WITHOUT MERIT

Wilson argues additionally that the trial court committed reversible error in granting Instruction 5, set out below:

> The Court instructs the jury that if you find from the evidence that the crime of shoplifting was committed in this case; each person who was present, consenting to the commission of the crime and doing any act which aided, assisted or encouraged the crime, is guilty to the same extent as if he committed the whole crime.
>
> (C.P.26)

When this instruction was tendered, defense counsel stated affirmatively that he had no objection to it. (T.91) It follows that the defense failed to preserve this issue for appeal. Wilson's second proposition is procedurally barred. *Wells v. State*, 849 So.2d 1231, 1237-38 (Miss.2003).

Solely in the alternative, without abandoning its procedural position, the state submits Wilson's argument lacks substantive merit as well. Her reliance on *Lester v. State*, is unavailing. As this Court reasoned in *Robinson v. State*, 788 So.2d 98, 102 (Miss.2001),

> [i]n *Lester*, the instruction in question allows a jury to convict based upon a finding that he, Lester, did any act which was an element of the crime without requiring that the jury also find that Lester was "present at the time, and consenting to and encouraging the commission of the crime." Id. at (¶ 9). This is not the case in this instance. In this case the jury was given proper instructions on the elements of the crime, on the State's burden of proof, and on the requirement to prove every element of the crime beyond a reasonable doubt.

Robinson demonstrates the futility of Wilson's argument. Pursuant Instruction 5, and to Instructions 2 and 3 (C.P. 20, 23), the jury was fully advised of the elements of the crime of shoplifting, the state's burden of proof, and the requirement of a finding that this crime was committed before it could proceed to consider whether Wilson was guilty as an aider and abettor. Furthermore, an aider and abettor was defined as one who was "present, consenting to the commission of the crime and doing any act which aided, assisted or encouraged the crime... " These requirements and definitions obviated the instructional errors found in *Lester*. *Robinson*, 788 So.2d at 102. For these reasons, Wilson's second argument lacks substantive as well as procedural merit.

PROPOSITION THREE:

WILSON'S CHALLENGE TO HER SENTENCE IS PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Wilson finally contends the trial court committed reversible error in sentencing her to five years in the custody of the Mississippi Department of Corrections. The state responds initially that before imposing sentence, the trial court asked the defendant personally as well as her counsel whether they had "anything ... to say." Both replied in the negative. (T.108) Nor did counsel make any objection after the sentence was imposed. (T.109) The state therefore contends that Wilson's final argument is procedurally barred. *Sims v. State*, 775 So.2d 1291, 1294 (Miss.) (failure to object during sentencing waived claim that state had failed to prove existence of two prior convictions used to enhance sentencing status as habitual offender in felony shoplifting case).

Solely in the alternative, the state asserts that Wilson's argument also lacks substantive merit. The essence of her proposition is the following: The offense with which she was charged occurred on November 2, 2002. At that time, MISS. CODE ANN. Section

97-23-93 "made it a felony to take shoplift merchandise with a value greater than two hundred fifty dollars." (Brief for Appellant 15) Charging her with violation of this statute, the indictment alleged in pertinent part that she took "merchandise having a value greater than two hundred fifty dollars." (C.P.3) After indictment but before trial, the statute was amended "to make it a felony to take merchandise with a value exceeding five hundred dollars." (Brief for Appellant 16) The *penalty*, however, did not change.

At trial, the state's proof showed that the goods had a value of more than $1,000. The jury required to find that the merchandise had a value of more than $250.00 before returning a verdict of guilty. (C.P.23)

Wilson now cites *Daniels v. State*, 742 So.2d 1140, 1145 (Miss.1999), for the proposition that "when a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence according to the statute as amended." (Brief for Appellant 17) The state asserts that Wilson was indicted, tried and convicted of the offense of felony shoplifting as defined by the statute in effect at the time of the commission of the crime. The amendment to the statute did not change the penalty. Accordingly, the authorities cited by Wilson have no application in this case.

For these reasons, Wilson's third proposition should be denied.

CONCLUSION

The state respectfully submits the arguments presented by Wilson are without merit. Accordingly, the judgment entered against her should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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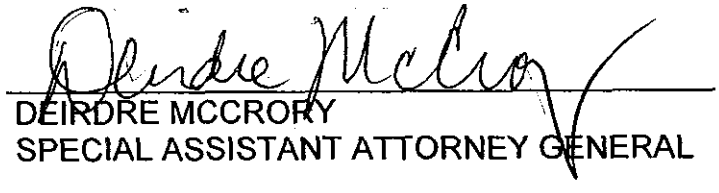
This the 5th day of March, 2007.



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