IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHRISTINE WILSON — APPELLANT

VS.

NO. 2005-KA-02136-SCT

STATE OF MISSISSIPPI — APPELLEE

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APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

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REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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2. THE COURT COMMITTED PLAIN ERROR IN GRANTING THE STATE'S REQUESTED INSTRUCTION ON AIDING AND ABETTING WHICH ALLOWED CHRISTINE TO BE CONVICTED WITHOUT A FINDING THAT SHE SHARED THE INTENT OF THE PRINCIPAL TO COMMIT THE CRIME IN VIOLATION OF HER RIGHTS TO DUE PROCESS AND A FAIR TRIAL

3. THE TRIAL COURT ERRED IN SENTENCING CHRISTINE TO FIVE YEARS IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS

SUMMARY OF THE ARGUMENT

On the issue of whether or not Christine had any knowledge that her friends were shoplifting and intended to assist them came from a witness who had no personal knowledge on the question. The instruction on knowledge and intent issues allowed Christine to be convicted if she "consented" to the shoplifting and even inadvertently did something to assist the shoplifters. Christine's sentence was based on facts not found by the jury beyond a reasonable doubt.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY FROM TIMOTHY HARRIS THAT CHRISTINE KNEW THAT THE PURPOSE OF THE TRIP TO DILLARD'S WAS TO SHOPLIFT BECAUSE EVERYBODY KNEW THAT HE AND THE OTHER GIRLS SHOPLIFTED TOGETHER.

The State counters Christine's argument that it was error to admit the hearsay testimony of Timothy Harris that Christine was there to shoplift with the others. The State justifies the admission of Harris' testimony because statements made by one co-conspirator to another during the course of a conspiracy are admissible. The State, however, misses the point. The prosecution, as proponent of the evidence, failed to put on any evidence whatsoever that demonstrated that

Harris' opinion that Christine was there to shoplift was based on any statement by Christine during the course of the conspiracy or at any other time, a prerequisite to admission under the state's theory. The prosecution moreover failed to show that a statement was made by any other co-conspirator in Christine's indicating that the purpose of the trip was to shoplift.

A review of Harris' testimony shows that his belief that Christine knew they were going to shoplift is totally speculative—he believed it because "everybody knew that we work together like that, you know." Tr. 51. She knew "what we was doing "[b]ecause she—she went in the store with us." T. 42. The proper question to Harris would have been what, if anything, did Christine say indicating her knowledge; or what, if anything, did anyone else say in her presence about the plan to shop, which would indicate she knew shoplifting was in the offing.

If, as the State now claims, Harris' testimony was based on what Christine told him, that fact could have been established at trial by asking what Christine told him. Asking the Court to infer that based on questioning which does not establish that fact goes too far in asking the Court to pile inference onto inference.

What Harris believed Christine knew is totally irrelevant. Where a witness does not testify as an expert, his opinions, which are not based on personal knowledge, are inadmissible. Rules 602 and 701, M.R.Evid., as does Rule 602. Rule 602, M.R.Evid. states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he had personal knowledge of the matter." The burden is on the prosecution, as the proponent of the evidence, to demonstrate its reliability. *Harveston v. State*, 798 So.2d 638, 641 (Miss.App. 2001), *citing Jolly v. State,* 269 So.2d 650, 654-655 (Miss. 1972).

The State, of course, contends that any error was harmless. The State makes no attempt whatsoever to demonstrate why the error was harmless in this case. Each case, of course, requires a specific inquiry into the quantum of evidence supporting the conviction and how the

particular error had an impact on the jury's decision. Here, absent Harris' testimony, there was no direct evidence of Christine's knowledge or intent to shoplift. Without Harris's direct evidence, the jury had to infer Christine's guilt from the ambiguous testimony of the store security guard, Steve Wilson.

Wilson could not even identify Christine without refreshing his memory from the file. Tapes of the incident made by the store had been lost. Tr. 29. The most that he could testify to was that Christine or someone he now believed after refreshing his memory was Christine, held open the bag for the others while they put in merchandise. He admitted that there was no way for Christine to tell if the merchandise she was putting into the bag had not been paid for. Tr. 37, 39-40. Without some evidence that Christine knew the merchandise was not paid for, the evidence is insufficient to support knowledge or purpose. Harris' testimony supplied the missing link supporting that knowledge and intent.

Where, as here, a substantial evidence of a material fact has been erroneously admitted, it "follows as the night the day that the defendant has been denied a fair trial." *Hall v. State*, 539 So.2d 1338, 1348 (Miss. 1989).

II. THE COURT COMMITTED PLAIN ERROR IN GRANTING THE STATE'S REQUESTED INSTRUCTION ON AIDING AND ABETTING WHICH ALLOWED CHRISTINE TO BE CONVICTED WITHOUT A FINDING THAT SHE SHARED THE INTENT OF THE PRINCIPAL TO COMMIT THE CRIME IN VIOLATION OF HER RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

It is well settled that the mere presence of a person at the crime scene is not sufficient for conviction of aiding and abetting **even though such person may have known of and approved of the crime**. *Griffin v. State,* 293 So.2d 810, 812 (Miss. 1974). For example, in *Bruce v. State,* 103 So.133, 133 (Miss. 1925), the Court reversed a murder conviction where the "most that could reasonably be inferred from the proof in this record is that the [defendant] was present *and*

approved the act [emphasis added]." The Court went on to say, "[b]ut mere approval is not sufficient to connect a person as a participant in the killing done by another." *Id.*

Furthermore, it is well established that mere presence at the time another suggests the possibility of future criminal conduct without more does not render one guilty as an accessory. *Clemons v. State*, 482 So.2d 1102, 1106 (Miss. 1985).

Finally, it is axiomatic that a defendant is not guilty of aiding and abetting unless any acts which were done by the defendant which may have aided, assisted or encouraged the crime were done knowingly **and** with the intent to make the crime succeed. *Id.* at 1104-05 [knowing participation required for guilt of accessory as principal]. As this Court has said, a conviction for aiding and abetting requires proof of

> A community of unlawful purpose at the time the act was committed. It involves some participation in the criminal act, **in furtherance of the common design** either before or at the time the criminal act is committed. *McNeer v. State*, Miss. 87 So.2d 568 [emphasis added].

Shedd v. State, 228 Miss. 381, 87 So.2d 899, 900 (1956).

It is clear, therefore, that in order to convict Christine, the prosecution had to prove more than just that she was present and knew that Harris and the other women intended to or were committing the crime of shoplifting. *Id.* Furthermore, the prosecution had to show that any acts of Christine that assisted the others in committing a crime were done with knowledge **and** the intent to further the crime. *Id.* In other words, it is not enough that the prosecution proved merely that Christine knew the others were committing the crime and even that she also may have committed some act which aided, assisted or encouraged the crime.

At trial, without objection, the Court granted an instruction reading:

> 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 that aided, assisted or encouraged the crime, is guilty to the same extent as if he committed the whole crime.

C.P. 26.

There is no requirement in the instruction that Christine **knowingly, intentionally or willfully** do an act to aid, assist or encourage the crime. Significantly, no other instruction does either. The obvious flaw in the instruction was particularly prejudicial in this case because of evidence that Christine might have "consented to the crime" and unwittingly committed an act that aided, assisted or encouraged the crime. However, consent and assistance alone are insufficient for conviction. *Griffin v. State*, supra; *Bruce v. State, supra.* Consenting to a crime and inadvertently doing an act which assists is not sufficient to constitute aiding and abetting, and the State cites no law that it is.

Given the Mississippi Supreme Court's clear mandate to give an instruction including the knowledge and intent elements as discussed in Christine's principal brief, the State has no excuse for its continued use of defective instructions which the Court has held prejudice the defendant.

Moreover, contrary to the State's contention that the error is not plain in this case, it is difficult to see how it could not be in view of the number of times the Court has condemned such instructions and the direct instructions to prosecutor's to give the Fifth Circuit's Pattern instruction which would have obviated the problem in this case. Moreover, this Court has repeatedly found plain error in aiding and abetting instructions despite an attorney's failure to object where the jury was misled about the essential elements of the crime. *E.g., Berry v. State*, 728 So.2d 568 (Miss. 1999) [Plain error where instructions allowed conviction as accessory without a finding that the crime was ever completed]; *Lester v. State,* 744 So.2d 757, 759 (Miss. 1999) [Reversing for instruction which allowed defendant to be convicted for doing any act which was an element of the offense without finding that was also present at the time, consenting to and encouraging crime even though issue not raised in briefs on petition for writ of certiorari].

There can be no doubt that the central issue in this case is whether or not Christine knew of and so knowing intended to commit the crime. The State's argument that the error was not harmful is insupportable.

Finally, counsel was clearly ineffective in failing to object to an instruction that dispensed with a finding on an essential element. *See, Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir. 1991).

For the foregoing reasons, this Court should reverse Christine's conviction.

III. THE TRIAL COURT ERRED IN SENTENCING CHRISTINE TO FIVE YEARS IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

The State makes the argument that the penalty was the same for Christine's offense both before and after her offense, so the error in this case was harmless. The State's argument fails to pass muster because the penalty is not the same. Christine's indictment charged her with shoplifting $250 or more. RE 10. When Christine was tried, the maximum she could receive for that offense was a fine of not more than One Thousand Dollars and jail time of not more than six months. In order for Christine to receive the sentence of five years, the jury had to make a finding that she shoplifted merchandise in excess of $500.00. *Apprendi v. New Jersey,* 530 U.S. 466, 490 120 S.Ct. 2348, 2348, 147 L.Ed.2d 435 (2000), ["[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The jury made no such finding. CP 23.

Christine is entitled to be sentenced under the law in effect at the time of her trial because it carries a lesser penalty. *Daniels v. State,* 742 So.2d 1140, 1145 (Miss.1999) ["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"] and other cases cited in Christine's principal Brief.

In *West v. State,* 725 So.2d 872 (Miss.1998), this Court interpreted Miss.Code Ann. 99-19-33 (1994) to mandatorily require that when a statute is amended before sentencing and provides for a lesser penalty, the lesser penalty must be imposed. *Accord, Tompkins v. State,* 759 So.2d 471, 476 -478 (Miss.App. 2000). Consequently, there can be no doubt that the sentence should have been imposed under the new statute because the penalty is less.

Although not objected to by counsel, errors affecting fundamental constitutional rights, such as the right to a legal sentence, are excepted from procedural bars which otherwise would prevent this Court from considering them. *See, Luckett v. State,* 582 So.2d 428, 430 (Miss.1991); *Smith v. State,* 477 So.2d 191, 195-96 (Miss.1985); *Ivy v. State*, 731 So.2d 601, 603 (Miss. 1999) [all three cases exempt review of illegal sentences from procedural bars].

Furthermore, where an increase in sentence results because counsel failed to object to the error, the United States Supreme Court has indicated that counsel would be ineffective in violation of the Sixth Amendment. *Glover v. United States*, 531 U.S. 198, 200, 121 S.Ct. 696, 698 (2001).

This Court, therefore, should reverse and remand for resentencing. The State cites no authority to the contrary.

CONCLUSION

Christine's case should be reversed due to errors in the admission of evidence and the granting of instructions. Should this Court conclude that none of the errors are reversible when standing alone, reversal should be granted because the errors taken together denied Christine's constitutional right to a fair trial. *Russell v. State*, 185 Miss. 464, 469, 189 So. 90, 91 (1939). *See, also, Collins v. State*, 408 So.2d 1276, 1380 (Miss. 1982); *Forrest v. State*, 335 So.2d 900, 903 (Miss. 1976); *Tudor v. State*, 229 So.2d 682 (Miss. 1974). Alternatively, Christine should be resentenced for misdemeanor shoplifting.

RESPECTFULLY SUBMITTED,
CHRISTINE WILSON, APPELLANT

s/Julie Ann Epps

BY: _____
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellants, do hereby certify that I have this date mailed by first class mail, postage prepaid, the original and three copies of the foregoing to the Clerk of this Court at PO Box 117, Jackson, Mississippi 39205-0117 and one copy to the Honorable Samac S. Richardson, Circuit Judge of Madison County, Mississippi, at PO Box 1885, Brandon, Mississippi 39043, Deidre McCrory, Special Assistant Attorney General, P. O. Box 220, Jackson, Mississippi 39205 and David Clark, District Attorney of Madison County, at PO Box 121, Canton, Mississippi 39046.

This, the 8th day of March, 2007.

s/Julie Ann Epps

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