IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHRISTINE WILSON — APPELLANT

VS. — NO. 2005-KA-02136-SCT

STATE OF MISSISSIPPI — APPELLEE

****

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

****

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

JULIE ANN EPPS; MSB #[redacted]
504 E. Peace Street
Canton, Mississippi 39046
Telephone: (601) 407-1410
Facsimile: (601) 407-1435

Cynthia H. Speetjens; MSB#[redacted]
PO Drawer 2629
Madison, MS 39130-2629
Telephone: (601) 856-0515
Facsimile: (601) 856-0514

ATTORNEYS FOR APPELLANT

BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 refusal:

1. Christine Wilson, Defendant-Appellant;
2. Julie Ann Epps and Cynthia H. Speetjens, counsel for Appellant on appeal;
3. Bentley E. Conner, counsel for Appellant at trial;
4. The State of Mississippi; the office of David Clark, D.A., Jim Hood, AG.;
5. Thomas L. Kesler, ADA, and Scott Rogillio, ADA, prosecutors at trial;
6. Honorable Samac S. Richardson, Circuit Judge;

This, the 27th day of November, 2006.

s/Julie Ann Epps

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

BRIEF OF APPELLANT

STATEMENT OF ISSUES

1. 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.

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

STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

Christine Wilson [hereinafter Christine to avoid confusion with Steve Wilson, a witness] was indicted along with Timothy Harris in the Circuit Court of Madison County for felony shoplifting at Dillard's Department Store in Ridgeland, Mississippi, on November 4, 2002. RE 10. Harris pled guilty two weeks prior to Christine's trial. Tr. 41.

On October 5, 2005, nearly three years later, Christine was tried by jury before the Honorable Samac S. Richardson, presiding. She was convicted and sentenced to serve a term of five years in the custody of the Mississippi Department of Corrections, with four years to serve and one year suspended on five years probation. In addition, she was fined $1000.00 and costs. RE 6.

Christine timely appealed her conviction and sentence to this Court. C.P. 40.

(ii) Statement of Facts:

Steve Wilson, the loss prevention officer at Dillard's Department Store in Ridgeland, Mississippi, testified that on November 4, 2002, he observed three black women and one black

man removing items from various parts of Dillard's and placing them in one spot. His suspicions aroused, he watched while "they" stuffed merchandise into two bags. Tr. 29-30. One bag was carried by a man, who subsequently turned out to be Timothy Harris. According to him, Christine and Harris exited Dillard's mall exit and were arrested in the mall after the arrival of Ridgeland Police Department officers. Harris had the bag. Christine was not carrying any of the stolen merchandise. Tr. 30-31, 84.

The other two women dropped the second bag and exited the street exit of Dillard's and were never apprehended. Dillard's recovered all of the merchandise which consisted of men's clothing and leather jackets valued at $1,100.50. Tr. 31, 33.

Steve Wilson testified that Christine held the bag open while merchandise could be put in the bag; however, he could not say that Christine could have known that the others had not paid for the merchandise. Tr. 37, 39-40. Significantly, although cameras were positioned throughout the store where everything that went on could be recorded, the footage of the incident in question had been lost. Tr. 29.

Furthermore, in the report he prepared shortly after the incident, Steve Wilson did not specify which of the girls put the clothing in the bag or when. Tr. 84. In fact, Mr. Wilson's report mirrors his testimony which relies heavily on the indefinite pronoun, "they." He states "**they** carried the clothing and placed it all on one rack in the girl's department. Once **they** had the clothing in one place, **they** started concealing the merchandise into large shopping bags. The black male and one of the black females held the bags while the other girls stuffed it in the bags." Tr. 84.

Timothy Harris, the co-defendant, testified that he and two other women and Christine went to the mall to shoplift. Tr. 42. He had never met Christine before, but believed she knew about the plan to shoplift because she "went in the store with us" and "everybody know that we

work together like that, you know." Tr. 42, 48. There is no evidence, however, that Harris or the girls ever discussed the plan in front of Christine.

Christine testified that she went to Dillard's with her friend, Shameka, in Shameka's car to shop. She did not know Harris or the other girl whom they picked up. Tr. 62. When they arrived at Dilllard's, she went her way, they went theirs. After she had shopped for a while, she told her friend she was going to go checkout. At that time, she learned from her friend for the first time that the others planned to shoplift. Christine put her merchandise down and left the store and sat on a bench waiting for the others to leave and take her home. Tr. 63.

SUMMARY OF THE ARGUMENT

The evidence against Christine was far from overwhelming. Error in the admission of Harris' opinion testimony that Christine knew the purpose of the trip was to shoplift and intended to assist contributed to her conviction and is reversible error. No foundation was given for his opinion, and for all it appears to the contrary, it could have been based on hearsay. The Court compounded the prejudice by granting the state's instruction allowing Christine's conviction based on her mere presence and unknowing assistance to the shoplifters. Finally, Christine, even if her conviction is affirmed, must be resentenced under the newly enacted misdemeanor penalty provisions of the shoplifting statute in effect at the time of her sentencing. The indictment did not charge a felony under the amended statute; nor did the jury find a felony amount was taken.

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.

This Court reviews the admission or refusal to admit evidence for an abuse of discretion.

The Court will reverse where the error resulted in prejudice and harm or adversely affected a substantial right of a party. *Hansen v. State,* 592 So.2d 114 (Miss.1991).

At the trial, Timothy Harris testified that he was arrested along with Wilson for shoplifting at Dillard's. Two weeks prior to Wilson's trial, he pled guilty. Tr. 41. He testified that Wilson, whom he did not know prior to that time, went with him and two other girls, Val and Kim, to the mall. Harris was in the habit of going to the mall with the other two girls to shoplift. Tr.42. While "the girls" were stuffing merchandise into the bags, he was outside the store. Tr.44. Actually, he did not know who stuffed the bags because he was outside at the time. Tr. 44. He later went back into the store and picked up one bag. No one handed it to him. Tr. 47. He admitted he did not see anyone, including Christine, take anything off the rack or put it in either of the bags. Tr. 49.

When asked by the prosecution "who made that plan" to shoplift, Harris, over a hearsay objection, responded that "[i]t was all our plan." Subsequently, over objection to the speculative nature of the question, Harris was allowed to testify that everybody knew about the plan "[b]ecause every – everybody knew that we work together like that, you know. They know—they know exactly what were going to the store to do. We wasn't going to watch no movie. We wasn't going to buy nothing." Tr. 51, RE 12-13. He knew Wilson knew "what we was doing" "[b]ecause she—she went in the store with us." Tr.42.

One of the fundamental tenants of due process is that a conviction may not be based on unreliable evidence. *Chambers v. Mississippi,* 410 U.S. 284, 289-90, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) [holding that Mississippi's application of its rules of evidence denied a petitioner a fair trial. "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

Moreover, it is a violation of a defendant's rights to confrontation and cross-examination

by introducing speculative evidence or hearsay evidence which cannot by its nature be the subject of cross-examination.[1] *Crawford v. Washington*, 541 U.S. 36, 62, 124 S.Ct. 1354, 1370 (2004) In *Lanier v. State*, 533 So.2d 473, 488 (Miss.1988), this Court stated the purpose of the confrontation clause is fulfillment of the "'mission . . . to advance the accuracy of the truth determining process . . . by assuring that the trier of fact has a satisfactory basis for evaluating the truth of a prior statement' [citations omitted]."

In the instant case, the admission of Harris' testimony implicates these constitutional rights as well as a number of evidentiary rules. First of all, evidence is not admissible if it is based on hearsay or is not based on personal knowledge. For example, 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).

Here, the prosecution introduced no evidence whatsoever to show how Harris came to his conclusion about Christine's knowledge. For example, there is no evidence that the four discussed the plan while en route to Dillard's. There is no evidence that Harris' conclusion is based on anything other than unsupported opinion or that it was not derived from what someone else, rather than Christine, told him.

If based on hearsay information, Harris' conclusions would clearly be admissible. It is well established that hearsay evidence is not ordinarily admissible in a criminal trial. *Quimby v.*

---

[1] The right to be confronted with witnesses is secured by the confrontation clause. Confrontation means more than being allowed to physically confront witnesses. A primary right secured by the confrontation clause is the right to cross examination. *Davis v. Alaska,* 415 U.S. 308 (1974). Furthermore, "hearsay rules are designed to secure to both prosecution and defense a fair trial." *Hall v. State*, 539 So.2d at 1348.

State, 604 F.2d 741 (Miss. 1992); *Miss.R.Evid.*, Rule 802 ["Hearsay is not admissible except as provided by law."].[2] Where "testimony was based entirely upon hearsay,[3] [it] is therefore inadmissible." *Clay v. State,* 821 So.2d 136, 138, (Miss.App. 2000). Again, the burden is on the prosecution to show that the evidence is reliable and not based on hearsay. *Harveston v. State, supra.* The prosecution made no attempt whatsoever to show that Harris did not reach his conclusion about Christine's knowledge based on what someone else had told him.

Furthermore, where a witness does not testify as an expert, his opinions based on hearsay are similarly inadmissible. Rule 701, M.R.Evid., as does Rule 602, also requires as a precondition for admissibility that the testimony be based on personal knowledge of the witness. In other words, such opinions cannot be based on hearsay. *Clay v. State, supra.*

In the case of *Turner v. State,* 726 So.2d 117 129 -130 (Miss. 1998), this Court found that an opinion by an officer that the defendant was driving was inadmissible under Rule 701 because it was based on what emergency personnel told him. It further invaded the province of the jury. *Id.* In Christine's case, the prosecution failed to sustain its burden of showing that Harris' opinion of Christine's knowledge was not based on hearsay and was therefore reliable and admissible. In *Turner*, however, the Court found that the erroneously admitted evidence was insufficient to warrant reversal.

---

[2] Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Miss.R.Evid.*, Rule 801(c). Hearsay evidence is inadmissible and is unreliable because it is not made under oath in the presence of the trier of fact, nor is it subject to cross-examination. All of these safeguards furnish guarantees of reliability. This Court has said, "[a]dmitting evidence which has not been cured in the crucible of cross-examination challenges the soul of the trial process." *Hall v. State*, 539 So.2d 1338, 1346 (Miss. 1989).

[3] Rule 801 of the Mississippi Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." It is well established that hearsay is not admissible in a criminal trial absent exceptional circumstances not present in this case. *See, Miss.R.Evid.*, Rules 801-805.

In Christine's case, however, the testimony was so prejudicial that its admission requires a new trial. Other evidence against Christine was not so compelling that it can be said that the admission of her co-defendant's opinion that she knew the purpose of the trip was shoplifting did not have a substantial impact on the jury. Steve Wilson's testimony was equivocal the exact nature of Christine's participation and failed to demonstrate that she necessarily had knowledge of the purpose of the others.

For example, the incident had occurred three years prior to the trial. Steve Wilson had to refresh his memory from the file photograph of Christine in order to identify her in court, and he admitted that he could not remember her face. Tr. 35. Tapes of the incident made by the store had been lost. Tr. 29.

The admission of unreliable evidence on a critical element of an offense violates the constitutional rights of a defendant to cross-examine and confront witnesses and further denies a defendant his constitutional rights to a fair trial based on reliable evidence. *Lanier v. State,* 533 So.2d at 488. [confrontation clause error in the prosecution's admission of a hearsay report from Whitfield constituted reversible error]. The error is similarly egregious here.

Before this Court can hold that a constitutional error is harmless, the prosecution must shoulder the burden of proving that it is harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 21-25 87 S.Ct. 824, 827-28 17 L.Ed.2d 705 (1967); *United States v. Alexius,* 76 F.3d at 646 [Sixth Amendment error addressed under constitutional harmless error standard of *Chapman*]. In view of the extraordinary lengths the prosecution went to introduce Harris' testimony and its reliance on it at trial, it would be disingenuous for the prosecution to now argue the evidence was not important. Because the error in this case provided the only "direct" evidence of knowledge and intent, both essential elements of the offense, the admission of the evidence is reversible error.

Because of any of the reasons detailed, either individually or cumulatively, this Court should reverse Christine's conviction. Where, as here, 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 at 1348.

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). In other words, an aider and abettor must possess the same intent as the principal--specifically where the offense requires that the principal have knowledge and intent, the crime must be knowingly and intentionally committed by the aider and abetter. *Welch v. State*, 566 So.2d 680, 684 (Miss. 1990); *Gray v. State*, 487 So.2d 1304 (Miss. 1986) [holding instruction to be error, albeit harmless because of other instructions, where it failed to require that an act be done knowingly in furtherance of the crime and with the intent to further it].[4]

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 which 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 may have committed some act which aided, assisted or encouraged the crime.

Notwithstanding these legal requirements for conviction, the prosecution requested and was granted an instruction (Instruction #5, S-4) that allowed the prosecution to convict Christine merely because she knew the others were shoplifting and may have committed some act, however

[4] Federal law is also instructive on the intent required for accessory liability. *See also*, *United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed.2d 328 (1940) [conspirator must do more than just perform acts which further the aims of the conspiracy, he must commit acts with knowledge of the conspiracy and with intent to further its aims]; *United States v. Gaviria*, 740 F.2d 174, 184 (2nd Cir. 1984) ["[A]bsent evidence of . . . purposeful behavior [to further the aims of the principal], mere presence at the scene of a crime, even coupled with knowledge that at that moment a crime is being committed, is insufficient to prove . . . membership in a conspiracy' [citation omitted]"].

unwittingly, which assisted the others to commit a crime. Specifically, the instruction in pertinent part read:

> 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.

The obvious flaw in the instruction is that it does not require that Christine **knowingly, intentionally or willfully** do an act to aid, assist or encourage the crime. Rather, it allows the jury to convict her if the others committed the crime, she knew of it but was merely present and did an act which incidentally assisted or encouraged the crime even though she may have had not intent to further the crime.

In *Lester v. State,* 744 So.2d 757 (Miss. 1999), the trial court granted the following instruction which read in pertinent part:

> The Court instructs the Jury that each person present at the time, and consenting to and encouraging the commission of a crime, knowingly, wilfully, and feloniously doing any act which is an element of the crime, or immediately connected with it, or leading to its commission, is as much a principal as if he or she had with his own hand committed the whole offense.
>
> Therefore, if you believe from the evidence, beyond a reasonable doubt, that the Defendant, Stanley Lester, did wilfully, knowingly, unlawfully and feloniously do any act which is an element of the crime of capital rape or immediately connected with it, or leading to its commission, then and in that event, you should find the Defendant, Stanley Lester, guilty as charged in Count 1.

Id. at 759. This Court held that instruction to be insufficient because it allowed conviction even though the defendant willfully, knowingly, unlawfully and feloniously did an act with regard to only one element of the crime, but it did not also require that he be present, consenting and encouraging the crime.

By contrast, here, the instruction requires that Christine be present and consenting to the crime, but does not require that she encouraged **the crime** ore require that any act which aided, assisted or encouraged the crime be done willfully, knowingly, unlawfully or feloniously. In short, the instruction given in Christine's case requires that **the act** aid, assist or encourage **the crime**, but does not require that **Christine** knowingly intend to aid, abet, assist or encourage **the crime by her act**. Therefore, it is deficient in that it does not require both intent and knowledge on the part of Christine that the act would assist the crime. It bears repeating that merely being present and consenting to the crime and unknowingly assisting it, as stated in the instruction, is not sufficient to constitute a crime. *Crawford v. State*, 97 So. 534 (Miss. 1923).[5]

The instructional error in the instant case was prejudicial because Christine admitted that she learned of the intent of the others to shoplift once she was in the store but declined to assist. Although Steve Wilson testified that he saw Christine help the other two girls put merchandise into a shopping bag, he admitted that he actually had no way of knowing if at the time she did so, Christine knew that the others had not paid for the merchandise. With the defective instructions, however, Christine was guilty if she was merely present and assisted, even though she may not have known at the time she did so that the girls were shoplifting or that the merchandise had not been paid for.

Christine Wilson is a young mother who has no prior criminal history. The evidence against her is based largely on Wilson's admittedly sketchy memory of the incident. For example, the offense had occurred three years earlier, and Wilson could not identify Christine without being shown her photograph prior to the trial. Wilson's report is extremely vague and

[5] In *Crawford,* the Court held that in order for one to aid and abet the commission of a crime, a defendant must do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime; hence being present, even with the intention of assisting in the commission, if necessary, does not make one an aider and abettor thereof, unless his intention to render assistance was known to the perpetrator of the crime.

refers to the participants by the general pronoun "they." Tr. 84. Christine did not know Harris or one of the girls prior to the time of the crime, and her story that she was merely shopping with her friend is not so inherently incredible that it could not be true. At the very least, without the defective instruction, Christine's version might have otherwise raised a reasonable doubt.

This Court has been repeatedly called upon to consider the propriety of aiding and abetting instructions. *See, Milano v. State,* 790 So.2d 179, 185 (Miss. 2001) discussing some of the checkered fate of various instructions. Finally, in *Milano,* this Court, no doubt exhausted with repeated challenges to defective instructions, provided the following jury instruction from the federal model jury instructions which the Court strongly suggested be given from that time forward:

> The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through the direction of another person as his or her agent, by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise. If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct. Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.
>
> Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.
>
> Fifth Cir. Pattern Jury Instructions (Criminal) 2.06 (Aiding and Abetting) (Agency) (1998).

Specifically, this Court stated: "To avoid any further confusion, today, we prospectively

adopt the Fifth Circuit's Pattern Jury Instruction on Aiding and Abetting due to continuing litigation and confusion over this issue. ***The use of this instruction should cure future problems regarding this issue*** [emphasis added]." *Milano,* 790 So.2d at 185.

As can readily be seen, the Fifth Circuit's instruction requires knowing and intentional participation and also makes it clear that mere presence and even assistance are insufficient for conviction. Notwithstanding the clear mandate of this Court to utilize the Fifth Circuit's instruction, the State asked for and was granted an instruction which does not contain the missing elements of knowledge and intent which would have been included had the prosecution adhered to this Court's directions and asked for the Fifth Circuit's instruction.

In a case similar to the one here, the court in *Martinez v. Borg*, 937 F.2d 422 (9th Cir. 1991) found constitutional error in a California state court's aiding and abetting instruction which failed to require an intent to aid the principal's crime because the jury could have found the defendant guilty without finding facts necessary to find intent.[6] Such acts of assistance, however, are an insufficient basis for conviction unless both knowledge and intent are simultaneously present, along with the defendant's actual presence. *Id.* Not only was the erroneous instruction error, it was error of constitutional magnitude.

Furthermore, the error was compounded in Christine's case when the prosecution told the jury, quite erroneously, that "anybody who's aware of and takes any role in that plan [to steal], that's what that instruction is telling you, that they're guilty." Tr. 95. Plainly, as Wilson has

---

[6] In order to satisfy the constitutional requirements of due process, a criminal conviction must be supported by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It follows that "[I]t is axiomatic that unless the jury is informed as to each element of the offense it will not be in a position to make the requisite findings so required by the Supreme Court in W*inship. U.S. ex rel. Arena v. People of the State of New York*, 497 F.Supp. 494, 497 (E.D.N.Y 1980), *aff'd* 659 F.2d 1057 (2d Cir. 1981). *See also*, *Casella v. United States*, 449 F.2d 277, 283 (3rd Cir. 1971) [instruction which withdraws from consideration an essential element of an offense is

shown merely being aware of a crime and unknowingly committing an act which furthers it is insufficient unless the evidence also shows knowledge and an intent to further the crime.

This Court has repeatedly instructed prosecutors not to misinstruct the jury on applicable law. *Edge v. State*, 393 So.2d 1337, 1340 (Miss. 1981); *Clemons v. State*, 320 So.2d 360, 372 (Miss. 1975). The prosecution's argument underscored the importance of the erroneous instruction which means that the jury likely relied on the erroneous instruction in determining Christine's guilt. *See, United States v. Aitken*, 755 F.2d 188, 194 (1st Cir. 1985) [government argument emphasizing the instruction "underscored the importance" of the instruction demonstrating that jury likely considered erroneous instruction].

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 was not raised in briefs on petition for writ of certiorari].

Furthermore, counsel was clearly ineffective in failing to object to an instruction which dispensed with a finding on an essential element. In *Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir. 1991), the defendant was convicted of aiding and abetting. The instruction in question failed to require the defendant to have the specific intent to aid the principal's crime. The Ninth Circuit held this to be constitutional error. *Accord, Flowers v. Blackburn*, 779 F.2d 1115 (5th Cir. 1986) [Instruction which relieved state of burden of proving accomplice's intent was constitutional error].

"fundamental constitutional error in light of the Sixth and Fourteenth Amendments . . . [which

In fact, in a case not dissimilar to this one, the Fifth Circuit found that counsel rendered prejudicially ineffective assistance of counsel in failing to object to a jury instruction dispensing with intent. *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993). Here, too, the error was prejudicial because the jury might have convicted Christine because she did some unintentional act in furtherance of the crime.

In order to satisfy the constitutional requirements of due process, a criminal conviction must be supported by proof beyond a reasonable doubt off every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 10068, 25 L.Ed.2d 368 (1970). An instruction which withdraws from consideration an essential element of an offense, in this case the two elements of knowledge and intent, is "fundamental constitutional error in light of the Sixth and Fourteenth Amendments . . . [which goes] to the fact finding process." *Casella v. United States*, 449 F.2d 277, 283 (3rd Cir. 1971); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) [instruction must not shift or lessen the burden of proof]. This Court has made it abundantly clear that substantial error occurs where the jury is erroneously instructed that it can find the defendant guilty without first finding the requisite criminal intent. *Herring v. State*, 134 Miss. 505, 99 So. 270 (1924); *Earl v. State*, 168 Miss. 124, 151 So.172, 173 (1993). This Court, therefore, 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 offense with which Christine was charged occurred on November 4, 2002. At that time, the shoplifting statute, Miss. Code Ann. §97-23-93 made it a felony to take shoplift merchandise with a value greater than two hundred fifty dollars. Accordingly, Christine's

---

undermines] the fact finding process;" *Miss. Const.*, Art. 3, §14, 24, 16.

indictment charged her with taking "merchandise having a value greater than two hundred fifty dollars ($250.00)." RE 10.

Subsequently, however, prior to Christine's trial, the legislature amended the shoplifting statute to make it a felony to take merchandise with a value exceeding five hundred dollars. §97-23-93(5), Miss. Code Ann. Thus, when Christine was tried, the maximum Christine could receive for shoplifting $250.00 or more as charged in the indictment would be for misdemeanor shoplifting which carries a fine of not more than One Thousand Dollars, imprisonment not to exceed six months or by both such find and imprisonment. §97-23-93(5)(a), Miss. Code Ann.

At trial, the jury was instructed to find Christine guilty of if the merchandise had "a total value over $250.00." C.P. 23. Conspicuously absent from the jury's verdict is a finding that the merchandise had a value over $500.00, which is required under the new statute for the offense to be a felony. C.P. 27.

Consequently, even if Christine's indictment had charged felony shoplifting of $500.00 or more under the new statute, the jury did not find $500.00 or more as required by the new statute for a felony conviction. Christine, therefore, must be sentenced for a misdemeanor because neither the indictment nor the jury finding authorize a sentence based on a finding that the merchandise had a value more than $500.00.

In *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court held that "[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." *Id.,* at 490, 120 S.Ct. 2348.

Subsequently, in *United States v. Booker,* 543 U.S. 220, 230-231, 125 S.Ct. 738, 748 (2005), the Court held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be

found by a jury beyond a reasonable doubt." *Id.*, at 602, 122 S.Ct. 2428. A defendant's Sixth Amendment rights are implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." *Id.*, at 303, 124 S.Ct. at 2537 (emphasis deleted). The Court in *Booker* explained that its precedents make it clear that "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Booker,* 543 U.S. at 231-232, 125 S.Ct. at 749.

Because the facts in the instant case as supported by the jury verdict reflect only that the amount exceeded $250.00, the maximum sentence that can be imposed under the Sixth Amendment is for a misdemeanor. The Sixth Circuit in *United States v. Hines,* 398 F.3d 713 (6th Cir. 2005) construed the effect of a similar verdict on the maximum sentence. In *Hinds,* the jury found that the defendant possessed 500 grams or more of methamphetamine. The Sixth Circuit held that the 500 grams amount determined the top amount of drugs for sentencing. *Id.*, at 721-22; *see also, Booker,* 125 S.Ct. at 747 (Stevens. J. for the Court) noting the jury's finding of "500 or more grams" of cocaine on the verdict form determines the amount of drugs for sentencing before the district court).

Christine, under the jurisprudence of this State, is entitled to be sentenced under the new statute because it carries a lesser penalty. In *Daniels v. State,* 742 So.2d 1140, 1145 (Miss.1999), this Court held 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." 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.

At trial, neither counsel for the defendant nor the prosecutor called the change in statute to the attention of the trial judge. However, 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].

In *Alexander v. State,* 879 So.2d 512, 514 (Miss.App. 2004), the Court of Appeals likewise noted that fundamental constitutional rights are exempt from procedural bars and that, "[a]ccording to the Mississippi Supreme Court, the reviewing court may address issues as plain error when the trial court has impacted upon a fundamental right of the defendant [citations omitted]." *See also, Davis v. State*, 933 So.2d 1014, 1022 (Miss.App. 2006). Other courts have similarly held that an illegal sentence is a due process violation subject to plain error review. *United States v. Padadino,* 401 F.3d 471, 483 (7th Cir. 2005) [violation of due process to give a defendant an illegal sentence and is a "serious error routinely corrected on plain-error review"].

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.

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 under the new version of the statute.

RESPECTFULLY SUBMITTED,
CHRISTINE WILSON, APPELLANT

BY: *s/Julie Ann Epps*
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, Jim Hood, 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 27th day of November, 2006.

s/Julie Ann Epps
JULIE ANN EPPS

JULIE ANN EPPS; MSB#[redacted]
504 E. Peace Street
Canton, Mississippi 39046
Telephone: (601) 407-1410
Facsimile: (601) 407-1435

Cynthia H. Speetjens; MSB#[redacted]
PO Drawer 2629
Madison, MS 39130-2629
Telephone: (601) 856-0515
Facsimile: (601) 856-0514

ATTORNEYS FOR APPELLANT