IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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YASMINE HUGHES — APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS. — NO. 2007-KA-0209

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF MISSISSIPPI

YASMINE HUGHES, A/K/A YASMIN HUGHES — **APPELLANT**

VERSUS — **NO. 2007-KA-00209-SCT**

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Yasmine Hughes was convicted in the Circuit Court of Winston County on a one count of armed robbery and two counts of aggravated assault. (C.P.45-48) On the armed robbery conviction, he was sentenced to a term of 30 years in the custody of the Mississippi Department of Corrections. On the aggravated assault convictions, he was sentenced to two 20-year terms, to be served concurrently. Aggrieved by the judgment rendered against him, Hughes has perfected an appeal to this Court.

Substantive Facts

The night of May 2, 2006, Jack Warner, Jr., was at his house at 321 Ivy Avenue in Louisville with his wife Pat and their son Cody. At approximately 10:00, as he was doing some paperwork at a table, he heard a knock on the door. Mr. Warner walked to the carport door, "turned the light on in the carport," and observed two black males "standing there." He asked, in effect, "May I help you?" According to Mr. Warner, "The gentleman in the front said that they had run out of gas and needed to use the telephone."[1] Mr. Warner "just reached back, stepped back in the house" and retrieved his cordless telephone from his bedroom. (T.79-82)

When Mr. Warner walked back outside with the telephone, he "noticed the second person," as he "handed him the phone." He then observed that "both men were dressed in black, black sweats, tops and bottoms." At this point, Mr. Warner "had a bad feeling," which unfortunately turned out to be on the mark. He walked across the carport to the breezeway and "looked up and down the road." He was able to see a hundred or so yards down the road in both directions, but he did not observe a vehicle. His suspicion further aroused, he walked back across the carport and asked the men "how far down the road they were." He then asked them a trick question: "Are you past the bridge?" Webster answered, "Yeah we are down around the bridge." In fact, the bridge had been replaced by a culvert. (T.85-87)

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[1]At this time, the man doing the talking, Adrion Webster, was standing "[t]hree or four feet" from the door at which Mr. Warner stood; the second man, Yasmine Hughes, stood a couple of feet behind his companion. (T.81)

Still talking on the telephone, Webster asked Mr. Warner, "What is the name of this road that we are on?" Mr. Warner replied, "Well, where you are is Landfill Road." Webster "hung up the phone" and handed it back to Mr. Warner. At that point, Mr. Warner "noticed the man in back pulled a hood over his head."[2] Now experiencing "a sick feeling that something was fixing to go wrong," Mr. Warner said, "'Wait a minute, boys. I have got a gallon or two of gas somewhere in a can.'" He "commenced to look in the carport, and it wasn't right there in the front." Mr. Warner offered to go to the back porch to look for it, but Webster said, "'No, ...They are bringing us some gas. ... We will be all right ... '" At that point, he "acted like he was leaving, and he took a step back." Hughes was still about two feet behind Webster. As Mr. Warner turned to go back inside, he "heard a noise" which "sounded like a loud firecracker." When he turned around, "it went off again and again." Mrs. Warner ran "up in the door of the carport and hollered" for her husband. Upon looking at her and looking back at Webster, Mr. Warner saw that he was wielding a gun. (T.87-89)

Upon further questioning, Mr. Warner testified that after he "heard the first pow," he turned around immediately. He was struck by the second and third bullets fired. Afterward, he saw his wife standing in the doorway; when he "looked at her," he "heard another noise," and saw Webster shoot twice at her. Mr. Warner "cussed him" and ran "down the car toward him." Webster then shot him in the groin. According to Mr. Warner, "'At that point both men had went out of my carport and behind my house and go around.'" (T.89-90)

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[2]At trial, he identified this man as Yasmine Hughes. (T.87)

Mr. and Mrs. Warner were taken to "the Louisville hospital," where Mrs. Warner was treated and released. Anticipating that he might require surgery, doctors had Mr. Warner transported to Jackson for further observation and treatment. (T.92)

Michael Lynchard, corporate security manager for Bell South Telecommunications and the custodian of its records, testified that he had examined the records for the Warners' telephone number. He had determined that at "10:07 and 58 seconds" on the night in question, a call was made from the Warners' telephone to the listed number of one Talmadge Edwards at 584 Sinai Road in Louisville. "That call lasted 25.7 seconds." (T.101-05)

Officer Greg Clark of the Louisville Police Department testified that six shell casings and two projectiles had been recovered from the Warners' house. Officer Clark took this evidence to the crime lab. (T.105)

Officer Clark went on to testify that he had "requested a subpoena be issued to Bell South" for the Warners' telephone records. He determined that the call in question had been made to the residence of Talmadge Edwards, where Hughes had been living. He and Mr. Edwards also listened to Edwards' answering machine. According to Officer Clark,

> He [Mr. Edwards] listened to a couple of messages, and he said, "That is him right there. That's him right there." And it was the voice of what he said was Adrion Webster calling, and ... the phone call stated something about they were out of gas. You could hear him talking. You could hear him ask the person there, "Where are we at?"
>
> (T.106)

Officer Clark recognized the voice of Mr. Warner in the background. (T.107)

On May 5, 2006, Officer Clark and MBI Agent Clay Bain interviewed Hughes. After Hughes was given the *Miranda* warnings, he signed a waiver of his rights and made a

statement. In that statement, he said "[b]asically that he had been with Adrion, and Adrion had dropped him off at home. He cut grass, weeded, stayed around the house, cooked pork chops and just sat around the house, that he had no knowledge of what was happening or anything else." (T.107-10)

A few minutes later, Hughes gave a second statement, in which he admitted his and Webster's involvement in this crime. (T.111) The second statement, as recounted by Officer Clark, is set out below:

> [H]e advised that he and Mr. Webster were riding around talking about ways to make money. He said they discussed going to barber school, said then they got on to maybe they could hustle somebody, trying to come up with some way to, you know, some idea to hustle somebody. He said we even talked about, you know, maybe who we could rob. At that point he said that they were riding around and that they pulled into a dirt road and drove a ways down a little dirt road and parked the truck. He initially said that Mr. Webster had asked to use his phone, but he said he didn't have a phone. And then he said they pulled off down this logging road and Mr. Webster said, Come on; let's walk up to this house. So that's when they– he told us they walked up to the house right across the road from where they pulled in, and there was no one at home at that residence. They went up the street to the Warners' residence, and that's where the altercation took place.
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> * * * * *
>
> He advised that they went up to the house, knocked on the door. A white man came to the door. They told him they were out of gas and needed to use the phone. He said that Adrion took the phone, made a phone call. He said at the time Adrion made the phone call he talked for a few minutes. He asked the guy where, you know, where they were at. He told them where they were at, the name of the road and all they were at. He even advised that Mr. Warner offered to give them gas. He said that, you know, he told us, he said, you know, "I have got a couple of gallons of gas here I will give y'all if it'll help you." At that time he says he started backing away and that Adrion– he turned to walk away, and Adrion started

shooting.

(T.111-12)

Hughes admitted that he was wearing a black hooded sweatshirt at the time, but stated that he could not remember "whether he had his hood up or down or what." (T.112, 116) He went on to state that after the shooting started, he (Hughes) went back to the truck. "He said a few minutes later, Adrion came back and jumped in the truck. He said Adrion looked at him and said, 'Why did you run? That was our lick.'" Hughes answered, "'Well, it don't matter. Let's just get out of here before the law, before the cops show up.'" (T.116-17)

On redirect examination, Officer Clark testified that he was familiar with the term "hitting a lick," which was common jargon for robbing someone or stealing something. (T.134)

Barbara Warner testified that she and her husband, Jack Warner's first cousin, lived "two houses below" the victims of this crime. The night of May 2, 2006, she was watching television in her house with the lights off, but her yard was well lighted. Asked whether anything unusual had happened, she testified that at a few minutes before 10:00, "We had a truck to pull up in the driveway and stop." She described the vehicle as a dull red, "old style boxy, short wheel base truck."[3] She "could see two heads inside." At approximately 10:00 p.m., the truck pulled out of her driveway and headed toward Jack and Pat Warner's house. Seven or eight minutes after 10:00, Mr. Warner telephoned to tell her to lock her

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[3]Barbara Warner identified Webster's truck from photographs previously admitted into evidence. (T.138)

doors "and not let anyone in, that he had been shot." (T.135-40)

Pat Warner testified that on the night of May 2, she was "sitting on the love seat watching the news" while her husband did paperwork at the kitchen table. Their son "had already gone to bed." Mrs. Warner "heard a loud noise coming down the road." About five minutes later, she "heard just a light tapping on the carport door ... " Her husband went to the door, "and it was a boy standing at the door and said, 'We are out of gas, and we need to use your phone.'" Mr. Warner went to the bedroom, picked up the cordless telephone, and went outside with them. Mrs. Warner "could hear several people talking out there." When she arose from the couch and started walking toward the back of the house, she heard several gunshots. She ran to the carport door, screaming her husband's name. She then saw "a black guy running backwards." He shot twice. One bullet hit her in the leg, and the other barely missed her neck and shoulder area. Mrs. Warner managed to find her cellular telephone to call for help. (T.144-47)

The parties stipulated to these facts:

> The doctor [Dr. Michael Allen Henry, the emergency room doctor who saw the Warners initially after they were shot] would testify that Jack Warner was shot four times. One shot entered the small of his back and was lodged in his hip. Another shot went through his shoulder. Another shot went through his side, and the final shot went into his groin area and was lodged, also was lodged in the other side of his hip. The doctor would also testify that Pat Warner was shot in the leg and that the bullet went through her leg.
>
> (T.149-50)

The defense rested without presenting evidence. (T.158)

SUMMARY OF THE ARGUMENT

The verdicts are based on legally sufficient proof and are not contrary to the overwhelming weight of the evidence.

The trial court did not err in giving a supplemental instruction in response to the jury's note.

Hughes's challenge to the state's final closing argument is procedurally barred. Alternatively, the state contends this proposition lacks substantive merit as well.

Moreover, Hughes's challenge to his sentences is procedurally barred and substantively without merit.

Finally, Hughes's invocation of the cumulative error doctrine is procedurally barred and substantively meritless.

PROPOSITION ONE:

THE VERDICTS ARE BASED ON LEGALLY SUFFICIENT PROOF AND ARE NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Under his first and second propositions, Hughes contends the proof is legally insufficient to sustain the verdicts and that they are contrary to the overwhelming weight of the evidence. To prevail on the former claim, he must satisfy the formidable standard of review set out below:

> In reviewing the sufficiency of the evidence, the standard of review is quite limited. *Clayton v. State*, 652 So.2d 720, 724 (Miss.1995). All of the evidence is to be considered in the light most consistent with the verdict. *Id*. The prosecution is given the benefit of "all favorable inferences that may reasonably be drawn from the evidence." *Id*. This Court will not reverse unless the evidence with respect to one or more of the elements of the offense charged is such that reasonable and fairminded jurors could only find the accused not guilty. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993).

Brown v. State, 796 So.2d 223, 225 (Miss.2001).

This rigorous standard applies to the claim that the defendant is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App.2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

In this case, "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). Indeed, Hughes's failure to take the stand or to put on any evidence left the jury free to give "full effect" to "the testimony of the witnesses against him." *Rush v. State*, 301 So.2d 297, 300 (Miss.1974).

At the close of the state's case, the defense moved for a directed verdict. In response to that motion, the district attorney made an argument set out in pertinent part below:

> In this case I think it is clear that we have got people that, two people that are riding around. They are talking about ways of making money such as robbing people. They hide a car about 200 yards down a dark road, walk to the house, fake being out

of gas. This Defendant pulls this hood up over his head before anything happens, so he had to know what was going on and was trying to hide his identity.

When they do run, as he says in his statement, they ran, he ran back toward the road. He did not. They ran back toward the back of Bubba Warner's house. And on top of that, he admits that when they got back in the truck and left, that Adrion asked him, "Why did you run? That was supposed to be our big lick." That by itself shows that they had planned to go there to rob someone.

So all of these elements taken together, I think it is very clearly a jury issue to determine whether or not he was involved in the robbery by helping talk about it, going there, and then them leaving together.

(T.153-54)

The trial court overruled the motion with the following findings and conclusions:

At this point in the trial, I must take the facts of the case in the light most favorable to the State. And what we have is we have the statement of the Defendant where he and the co-defendant were riding around, and among other things, they talked about getting money from some source. And among other things they talked about was robbing somebody. So at 10 o'clock at night they go down a dirt road. They pull off the side of the road in a hidden position from the house where they were going, and they walk back to the house with a fake story about being out of gas, which obviously wasn't true because they fled in the vehicle. And they walked up to the house, and in the ensuing shots occurred, and these people get shot.

The jury certainly can reasonably infer that the purpose– there is no indication that they went to the house to kill somebody. They went– and the jury naturally could assume that based on what their conversations were, what the Defendant said their conversations were and what their acts showed, that they were going to the house for one purpose, and that was the purpose of robbing these people. When the shooting started, then they apparently got cold feet on the robbery, but that does not– they are charged with attempted to do it. And in light of his statement and in light of the fact that he was there present with a hood on at that time, the jury could reasonably infer that he was there for the purpose of assisting

in a robbery.

> And therefore, the [sic] I think the State has been [sic] met its burden, and a prima facie case has been shown.

(T.155-56)

The state contends the court's ruling embodies a correct application of the controlling law to the evidence presented. First, the proof and the reasonable inferences therefrom support a finding– properly made by the jury– that Hughes was acting in concert with Webster who ultimately committed armed robbery and aggravated assault. As the court noted in its ruling, the proof, including Mr. Warner's testimony and the defendant's statement, established that Hughes and Webster had been "riding around" and discussing ways to make money, including robbing someone; and that shortly after this discussion, Webster parked the truck on a dark dirt road. Hughes and Webster then walked together to the Warners' residence, where Webster lied about being out of gas, and Hughes pulled the hood of his black sweatshirt over his head. After the inferable plan was aborted, Webster asked Hughes, "Why did you run? That was supposed to be our lick." All of this proof supports the reasonable inference that Hughes shared a community of intent with Webster, that he was not "merely present" or simply a knowing spectator, and that he therefore was acting as an aider and abettor, as defined by Instruction 3. (C.P.37) See *Mangum v. State*, 762 So.2d 337, 342 (Miss.2000).

Additionally, the fact that nothing was actually taken is of no legal consequence. "[O]nce a person commits an act of violence or brandishes a deadly weapon in an effort to deprive another of property, an armed robbery has been committed without regard as to whether the culprit is successful in obtaining the property." *Irons v. State*, 886 So.2d 726, 732 (Miss. App. 2004). Accord, *Houston v. State*, 811 So.2d 371, 372 (Miss. App.

2001), citing *Harris v. State*, 445 SO.2d 1369, 1370 (Miss. 1984).

Regarding the question of the sufficiency of the proof of intent to take, the state reiterates that Hughes and Webster had been discussing ths commission of a robbery. Shortly afterward, Webster parked the truck in a dark, deserted area, and he and Hughes entered the curtilage of the Warners' residence, where Hughes stood by as Webster summoned Mr. Warner and fabricated a story about being out of gas. All of these facts support an inference– again, properly entrusted to the determination of the jury– of larcenous intent.

Perry v. State, 435 So.2d 680 (Miss.1983),[4] is instructive here. In that case, the evidence showed that the defendant entered a bank and pointed a gun at an employee while his partner assaulted the other employees. Although the perpetrators had made no demand for cash, this Court rejected as "frivolous" the argument that the state had failed to prove a specific intent to take money. 435 So.2d at 681-82. Moreover, the fact that the mission was aborted did not defeat the state's proof of intent to take. *Perry*, 435 So.2d at 681-82; *Broomfield*, 878 So.2d at 213. In light of *Perry*, the defendant's challenge to the state's proof of intent should be rejected.

Having cited *Perry*, the Court of Appeals in *Broomfield* went on to analyze several Mississippi Supreme Court cases in which the sufficiency of proof of larcenous intent was considered. 878 So.2d at 214. The Court noted a long line of cases recognizing that

> [s]ome presumptions are to be indulged in against one who

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[4] cited in *Broomfield v. State*, 878 So.2d 207, 213 (Miss. App. 2004), *cert. denied*, 878 So.2d 66 (Miss.2004),

> 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.
>
> *Broomfield*, 878 So.2d at 214, citing *Brown v. State*, 799 So.2d 870, 872 (Miss.2001), and *Nichols v. State*, 207 Miss. 291, 296-97, 42 So.2d 201, 202 (1949).

Although Hughes stands convicted of armed robbery rather than burglary, the analysis of intent is the same. *Broomfield*, 878 So.2d at 214. Moreover, although Webster and Hughes did not actually enter the Warners' house, they did enter the adjoining carport rather late at night and summon Mr. Warner to the door. It is reasonable to indulge the same presumptions against them. This conduct, considered with the previous discussion about robbing someone and the various instances of subterfuge, is sufficient to support a reasonable inference of intent to take. The jury properly made this inference and the court correctly refused to disturb it.

The verdicts are based on legally sufficient proof and are not contrary to the overwhelming weight of the evidence. Hughes's first and second propositions should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN GIVING A SUPPLEMENTAL INSTRUCTION IN RESPONSE TO THE JURY'S NOTE

Approximately 35 minutes after retiring to deliberate, the jury sent the court a handwritten note asking, "Is Yasmin being charged with armed or attempted robbery?" (T.188-89) (C.P.42) Defense counsel asserted, "I think the only thing you can tell them is

they have got the instructions." The prosecutor proposed, "[Y]ou could tell them what instruction to look at, because the Court has already instructed them on that." When the court indicated that it was amenable to that suggestion, defense counsel objected, pointing out that the jury was required to consider instructions as a whole, and asking the court not to "highlight a specific instruction." The court posited, "All right, but the only two, other two instructions that they have, not counting the form of the verdict, is the accomplice instruction and the fact that he did not testify." The state then set out its position as follows: "I don't see how the Court could have a problem with just specifically answering the question and say, The Court has already instructed you on the charges. You should refer to instruction, whatever it is." (T.188-90)

Ultimately, the court proposed, "How about, 'You must consider all the instructions I have given you. The elements of the offense are defined in Instruction S-2.'" The district attorney stated, "I think that will cover it." Defense counsel agreed: "That's fine." However, after the trial judge dictated the supplemental instruction as he was writing it, the defense counsel retracted its acquiescence as follows, in pertinent part: "Why did you put 2 on there? ... See, number 2, you are highlighting 2 again." The state countered, "That can't be a problem." (t.193) After the defense formally objected, the court issued this ruling:

> Well, I don't believe it is prejudicial. ... I don't think that singles out any instruction to the prejudice of the jury in light of the fact that the only other two instructions we have are an accessory instruction and the failure to testify instruction. And I think in light of this note, I'm going to give this.
>
> (T.194)

The court then sent this instruction to the jury: "You must consider all of the instructions the Court has given to you. The elements of the crimes charged are contained in Instruction

#2." (C.P.43)

"[T]here is no doubt that the trial court had the authority" to give a supplemental instruction to the jury. *Payton v. State*, 897 So.2d 921, 956 (Miss.2003), citing URCCC 3.10. Indeed, "[n]othing in our law provides that once the jury retires the trial judge should become a mute." *Wright v. State*, 512 So.2d 679, 681 (Miss.1987). The court's decision to do so is reviewed under an abuse of discretion standard. *Woods v. State*, ___ So.2d _(Miss. App., decided August 21, 2007) (2007 WL2367102).

In this case, before advising the jurors that the elements were contained in Instruction 2, the trial court reminded them that they were to consider all of the instructions given by the court. The court already had instructed the jurors that there were "not to single out one instruction alone as stating the law," but that they "must consider these instructions as a whole."[5] (C.P.30) Thus, "[t]he problem normally attendant upon supplemental instructions" was obviated. *Wright*, 512 So.2d at 681. See also *Williams v. State*, 928 So.2d 867 (Miss. App. 2005). In the second and final sentence of the supplemental instruction, the court simply informed the jurors that the elements of the crime charged were contained in Instruction 2.

The state contends that under these circumstances, the court's supplemental instruction did not create an injustice. Thus, no error occurred. *Payton*, 897 So.2d at 856. Again, the state submits that the supplemental instruction reminded the jury to consider all of the instructions before it simply pointed out that the elements were contained in

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[5] Of course, the jury is presumed to have followed these instructions. *Payton*, 897 So.2d at 856.

Instruction 2. It is difficult to envision how this instruction could have confused the jury or prejudiced the defense. Hughes's third proposition should be denied.

PROPOSITION THREE:

HUGHES'S CHALLENGE TO THE STATE'S FINAL CLOSING ARGUMENT IS PROCEDURALLY BARRED; ALTERNATIVELY, THE STATE CONTENDS THIS PROPOSITION LACKS SUBSTANTIVE MERIT AS WELL

Hughes argues additionally that prosecutorial misconduct requires reversal of the judgment rendered against him. He challenges several comments made during the state's final closing argument, contending that they violated his right to a fair trial.

The initial flaw in this argument is that it is unpreserved for review. A review of the state's rebuttal argument reveals that the defense failed to interpose even a single objection. His failure to object bars consideration of this issue on appeal. *Rubenstein v. State*, 941 So.2d 735, 779 (Miss.2006); *Moore v. State*, 938 So.2d 1254, 1265 (Miss.2006), citing *Thorson v. State*, 895 So.2d 85, 112 (Miss.2004); *Rushing v. State*, 711 So.2d 450, 455 (Miss.1998).

Solely in the alternative, the state addresses the merits of Hughes's assertion that the prosecutor impermissibly argued facts not in evidence. At the outset, the state submits that "'[t]he purpose of a closing argument is to fairly sum up the evidence,'" and the prosecutor is not only permitted but required to "'point out those facts upon which the prosecution contends a verdict of guilty would be proper.'" *Strohm v. State*, 845 So.2d 691, 700 (Miss. App. 2003), quoting *Rogers v. State*, 796 So.2d 1022, 1027 (Miss.2001). "In general, parties may comment upon any facts introduced into evidence, **and may draw whatever deductions and inferences that seem proper from the facts.**" (emphasis added) *Ross v. State*, 954 So.2d 968, 1002 (Miss.2007), citing *Bell v. State*, 725 So.2d

836, 851 (Miss.1998). Counsel "may draw upon literature, history, science, religion, and philosophy as material for his argument." *Manning v. State*, 929 So.2d 885, 906 (Miss. 2006). "So long as counsel in his address to the jury keeps **fairly within the evidence** and the issues involved, wide latitude of discussion is allowed . . ." (emphasis added) *Clemons v. State*, 320 So.2d 368, 371-72 (Miss.1975), cited in *Havard v. State*, 928 So.2d 771, 797 (Miss.2006).

First, Hughes contests the district attorney's use of "beyond-the-record anecdotes about supposed crimes ..." (Brief for Appellant 22) (T.184-85) The state counters that this anecdote was simply illustrative and was not objectionable. *Clemons v. State*, 320 So.2d 368, 371 (Miss. 1975).

Hughes faults the district attorney primarily for using the plural pronoun "they" when referring to actions committed by Webster. He contends that because there was no proof that Hughes personally performed these acts, e.g., wielding the gun and making the telephone call, the prosecutor was arguing facts not in evidence. The state counters that the prosecution's theory of the case against Hughes was that he was acting in concert with Webster. If Hughes did indeed aid and abet Webster in the commission of these offenses, Hughes was criminally responsible for the acts personally committed by Webster. Evidentiary support for this theory was found in Hughes's own statement and his conduct at the scene of the crime.[6] Successful prosecution of Hughes did not depend upon

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[6]That evidence was discussed under Proposition One of this brief. We incorporate that discussion by reference in contending that the district attorney remained within the evidence and the rational inferences flowing therefrom in making these arguments.

proving that he personally committed the acts in question. The state did not have to prove and did not try to prove that Hughes personally displayed or fired the gun or made the telephone call. The district attorney's use of the pronoun "they" simply bespoke his attempt to prove Hughes guilty as an aider and abettor; it was not and could not reasonably be construed as an argument that Hughes personally performed these acts. Accordingly, these remarks were not objectionable.

Hughes also challenges the district attorney's argument to the effect that Hughes had admitted that before he and Webster went to the Warners' residence, they had talked about "robbing somebody," among other things. (T.185) Hughes's argument to the contrary, this statement has a valid basis in the evidence. Recounting Hughes's second statement, Officer Clark testified on direct examination, "He [Hughes] said we even talked about, you know, maybe who we could rob." (T.111) The district attorney was free to argue this point to the jury.

In light of the foregoing analysis, the state submits Hughes has failed to show that the remarks in question were objectionable, much less that they were "so egregious as to rise to the level of a fundamental denial of a constitutionally-mandated fair trial." *Bell v. State*, 725 So.2d 836, 851 (Miss.1998). Hughes's fourth proposition is procedurally barred and substantively meritless.

In conclusion, the state points at that the court instructed the jury as follows, in pertinent part:

> Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence then you should disregard that argument, statement or remark.

(C.P.31)

This Court has held that reversal is not required when such instruction is given. E.g., *Burns v. State*, 729 So.2d 203, 229 (Miss.1998); *Ormond v. State*, 599 So.2d 951, 961 (Miss.1998).

For these reasons, the state respectfully submits Hughes's fourth proposition should be denied.

PROPOSITION FOUR:

HUGHES'S CHALLENGE TO HIS SENTENCES IS PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Hughes contends additionally that in sentencing him, the trial court unconstitutionally punished him for exercising his right to trial. He also argues that the sentences are disproportional to the crimes. The state counters that Hughes is procedurally barred from raising this issue because he failed to object on this or any other basis at the time of sentencing. (T. 212-14) *Jackson v. State*, 935 So.2d 1108, 1117 (Miss.App.2006).

Solely in the alternative, the state argues that the trial court's comments during sentencing, taken in the context in which they were made, do not support an inference that the court was penalizing Hughes for exercising his right to trial. During the sentencing hearing, defense counsel made an extensive plea for leniency.[7] (T.208-11) The state submits that the trial judge was answering defense counsel's plea, and explaining his sentences in general, when he made these comments:

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[7]Defense counsel also stated affirmatively, "I know that this Court does not penalize anybody for exercising their constitutional rights." (T.210)

Well, the facts clearly dispute that he didn't know what was going on. In his own statement, he stated that they had discussed robbing somebody, and here we are in the middle of the night, 10 o'clock in Winston County, and these two go and park their car on a concealed, in a concealed position and walk down the road until they found a house with lights on and go up there with a fictitious story that they are out of gas. I mean to insinuate or so that Mr. Hughes was just along for the ride and had no idea what was going on just does not match the facts in this case. He obviously was a participant.

Whether or not he knew about the gun or whether he knew that Webster was going to kill these people before he robbed them, or there again we will never know that. But we do know he was an active participant in this matter.

There has been another request for leniency, of mercy in this case. You know, when you are offered leniency and mercy, sometimes you have got to pick it up. And Mr. Hughes was offered a sentence of ten years on aggravated assault, which would have been with the possibility of parole. The most he would have had to serve would have probably been 85 percent of that. That is eight and a half years, and after discussions with his father and everybody, the other people involved in this thing, he decided he didn't want that. He wanted to take his chances and go to trial. And of course, when he did, the jury found that he was just as culpable as Mr. Webster. And by doing that, by taking that gamble, he, unlike Mr. Webster, is now convicted of three charges.

Well, not only did he get that offer of leniency, he got one extended to him that he didn't even ask for. The State and the victims in this case agreed for this matter to not go to the jury on sentencing on the armed robbery and left it up to me. Again, had it gone to that jury, my observation is that he would have been, they would have sentenced him to life without parole. And so he is not going to get that, and so he was received leniency on two occasions, one of which he picked up and one he didn't ask for and got. So it's a bad situation for everybody involved in this.

But one of the things people in the country are entitled to, they are entitled to be at their house and be left alone. They are entitled to folks not to come to their house in the middle of the night and shoot them and rob then, and when

> *people do that to other people, then they have to get what they deserve.*
>
> Mr. Hughes, you weren't the shooter. I'm going to give you some, some slight benefit for that but not much. The jury found that you should get as much as the other, as Mr. Webster.
>
> Therefore, on the armed robbery, I sentence you to thirty (30) years with the Mississippi Department of Corrections. On the aggravated assault charges, I sentence you to two (2) years each and order that those sentences run concurrent with the armed robbery charge.
>
> (T.212-14)

Again, the state points out the absence of an objection, even after defense counsel had acknowledged that this trial judge did not punish defendants for exercising their constitutional rights. The state would submit that defense counsel did not object because he did not interpret the court's comments as an indication of that the court was imposing a penalty on Hughes for insisting on going to trial. Rather, considered in the context of the previous arguments and in the context of the court's other remarks, the language in bold most reasonably may be taken as an explanation of the court's disposition of the post-conviction request for leniency. The most compelling reason appears to be that these were heinous offenses which violated the right of innocent citizens to be secure in their own homes.[8] (See the language emphasized in italics).

Moreover, had the trial judge desired to "punish" Hughes, he could have imposed

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[8]For the record, the state submits that these were senseless, reprehensible crimes. The perpetrators invaded Mr. Warner's property late at night and took advantage of his charitable nature. They very nearly left innocent people dead, widowed or orphaned.

a sentence of more than 30 years on the armed robbery conviction. He also could have ordered that all sentences be served consecutively; yet he did not.

An argument similar top the one advanced by Hughes was rejected as follows in *Hersick v. State*, 904 So.2d 116, 127-28 (Miss.2004):

> This Court has repeatedly held that the imposition of a sentence, if it is within the limits prescribed by statute, is a matter left to the sound discretion of the trial court, and that the appellate courts will not ordinarily disturb a sentence so imposed." *King v. State*, 857 So.2d 702, 731 (Miss.2003). **Whether the defendant takes responsibility for his or her actions is a fair consideration for the trial court in sentencing.** We find nothing in the record that demonstrates the trial court imposed the maximum sentence to punish Hersick for exercising his right to a jury trial. Thus, this claim is without merit.
>
> (emphasis added)

Accord, *Dunigan v. State*, 915 So.2d 1063, 1072 (Miss.App.2005). If the Court reaches the merits of this argument, it should meet the same fate.

For these reasons, Hughes's fifth proposition should be denied.

PROPOSITION FIVE:

HUGHES'S INVOCATION OF THE CUMULATIVE ERROR DOCTRINE IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS

Hughes finally contends that cumulative error requires the reversal of the judgment rendered against him. He did not present this argument at any time in the trial court and may not raise it for the first time on appeal. *Maldonado v. State*, 796 So.2d 247, 260-61 (Miss.2001); *Gibson v. State*, 731 So.2d 1087, 1098 (Miss.1998). His seventh proposition is procedurally barred.

In the alternative, the state incorporates its arguments under Propositions One

through Four in asserting that the lack of merit in Hughes's other arguments demonstrates the futility of his final proposition. *Gibson*, 731 So.2d at 1098; *Doss v.* State, 709 So.2d 369, 400 (Miss.1997); *Chase v. State*, 645 So.2d 829, 861 (Miss.1994). See also *Brown v. State*, 682 So.2d 340, 356 (Miss.1996) ("twenty times zero equals zero"). Hughes's invocation of the cumulative error doctrine lacks substantive merit as well.

Under his final proposition, Hughes asserts additionally Instruction C-5 (No.3) was incomplete and confusing. The state counters that Hughes "failed to raise a contemporaneous objection to this instruction, so the issue is procedurally barred." *Rubenstein v. State*, 941 So.2d 735, 793 (Miss.2006). (T.159) Under these circumstances, the appellant must rely on the plain error rule. *Watts v. State*, 733 So.2d 214, 233 (Miss.1999). Having failed to provide a rationale for application of that rule, Hughes has failed to sustain his burden of demonstrating error with respect to this issue. E.g., *Acker v. State*, 797 So.2d 966, 971 (Miss.2001) (judgment of trial court is presumed correct; appellant has burden to demonstrate reversible error).

Although no further discussion of this point should be required, the state submits "[t]he plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." *Williams v. State*, 794 So.2d 181, 187 (Miss.2001). Hughes has not shown error, much less plain error, in the granting of this instruction. His argument to the contrary, Instruction C-5 (No.3) did not authorize the jury to convict on the basis of mere presence with intent to assist. In fact, it expressly informed the jury, in part,

> Before any person 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.
>
> (C.P.37)

The trial court did not err in granting this instruction.

Finally, Hughes contends the trial court erred in denying his motion to quash the venire. This motion was made, outside the presence of the venire, after the court had ruled on the challenges for cause. Defense counsel argued the motion as follows:

> There was 34 out of 50 that indicated that they have heard something about the case, either rom TV, word or mouth or whatever. The word of mouth concerns me more than anything. There was 34 of 50. And then there was, I think, 12 of 50 that actually knew these two people. They were very well known to the community. And I would just ask the Court to consider pulling in new jurors who have not been exposed to the media with respect to knowledge of this case. **I realize other than the ones the Court struck for cause, most of them indicated that they have not formed an opinion or if they– I believe their answer was no, they had not formed an opinion.** That is just for the record, Judge.
>
> (emphasis added) (T.61)

The court overruled the motion with these findings:

> So out of all those excused for cause, there are only about three of them that were affected at all by what was stated in the community, and after extensive voir dire, the people that had a relationship with the Warners or knew people in this case said that they could listen to the evidence and be fair and impartial in this case and that they did, all acknowledged that they would not even feel embarrassed or have to explain their decision to anybody after consideration of the case. So that motion is overruled.
>
> (T.62)

"The decision to quash the venire is a matter entrusted to the sound discretion of the trial court." *Kolberg v. State*, 829 So.2d 29, 83 (Miss.2002). Jury impartiality is a judicial question, and the court's determination of it will not be reversed unless it is clearly wrong. *Taylor v. State*, 672 So.2d 1246, 1264 (Miss.1996). The state submits Hughes has not attempted to refute the court's findings, first, that most of the veniremen who had heard about the case had been excused for cause; and, second, that only "about three" of the remaining veniremen with prior knowledge had stated that the could try the case fairly and impartially. Under these circumstances, Hughes cannot show that the trial court abused its discretion in determining that this jury could be fair and impartial and that, accordingly, the motion to quash the venire should be overruled.

For these reasons, Hughes's final proposition should be denied.

CONCLUSION

The state respectfully submits that the arguments presented by Hughes have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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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