IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-TS-00209

YASMIN HUGHES — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF WINSTON COUNTY

REPLY BRIEF OF THE APPELLANT YASMIN HUGHES

ORAL ARGUMENT IS REQUESTED

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ARGUMENT.

I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE HUGHES GUILTY OF ARMED ROBBERY OR AGGRAVATED ASSAULT.

The State's Characterization of the Substantive Facts.

The state's recitation of what it considers to be the "Substantive Facts" of this case devotes six pages to its explanation of the shootings of Mr. and Mrs. Warner. Brief of Appellee at 2-7. Those pages recount in detail Webster's actions: his out-of-gas lie to Mr. Warner; his pretend call; his shooting of the Warners; his asking Hughes[1] why he ran; *etc.* What is plainly missing from the state's lengthy description of that tragic night is any evidence that Hughes did anything other than accompany Webster to the Warner home and turn to leave even before Webster began shooting. The only way Hughes possibly could be guilty would be as an accessory.

To prove Hughes aided and abetted Webster the prosecution was bound to prove "*beyond a reasonable doubt and to the exclusion of every reasonable hypothesis*" that (1) a crime was committed; (2) that the accused was present at the scene of the crime; (3) that he consented to the crime; and (4) the he actually aided and abetted the principal in the commission of such crime(s). *Brooks v. State*, 763 So. 2d 859, 861 (Miss. 2000). The state completely failed in establishing criterion (1), as regard to armed robbery, and failed to establish criteria (3) and (4) as to Hughes's role in general.

No Evidence of Armed Robbery.

Citing *Irons v. State*, 886 So. 2d 726, 732 (Miss. App. 2004), the state argues that "once a person commits an act of violence or brandishes a deadly weapon in an effort to deprive another of property," the offense of armed robbery has been committed. Brief of Appellee at 11. *Irons*,

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[1]Appellant used the first names of Adrion Webster and Yasmin Hughes in his intial brief. The state has chosen to use the last names. For the sake of the consistency, and in hopes of minimizing confusion, Appellant will use last names in this his reply brief.

however, involves the obtaining of a prescription by fraud, and there was no question but that the appellant did in fact pick up the prescription.

Neither was there any question of criminal intent in the other cases cited by the state. In *Houston v. State*, 811 So. 2d 317, 372 (Miss. App. 2001), the appellant, already had pled guilty to armed robbery. He was appealing the trial court's refusal to permit him to withdraw his plea, a fact situation entirely different than the one now before this Court. *Harris v. State*, 445 So. 2d 1369, 1370 (Miss. 1982), involved a lone, masked gunman who entered the back of a restaurant where money was being counted and fled after his mask fell off, the money was hidden, and it appeared the police had been called. In *Perry v. State*, 435 So. 2d 680 (Miss. 1983), the appellant had "pointed a gun at an employee while his partner assaulted the other employees" of a bank. Brief of Appellee at 12. Moreover, the bandits in that case ordered the teller not to press the alarm button and fled only after it appeared the alarm had been sounded. Hughes, on the other hand, did nothing and, in fact, turned to leave the scene even before Webster initiated his crimes.

The state also cites *Broomfield v. State*, 878 So. 2d 207, 213 (Miss. App. 2004), *cert. denied*, 878 So. 2d 66 (Miss. 2004), for the proposition that one may assume one who breaks and enters a building at a late hour of the night is a burglar. That case has no application to Hughes's situation. Moreover, in the *Anderson* case, *supra*, this Court has authority directly on point that establishes that under the circumstances of this case it cannot be assumed that Hughes intended to commit an armed robbery.[2]

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[2]Hughes's case contains even less evidence of criminal motive than the *Anderson* case. In that case the assailants actually asked for something--cigarettes--though they apparently did not take them. Hughes asked for nothing. *Anderson*, 168 Miss. 424, 151 So. 558 (1934)

The state, in any event, is presenting this Court with a straw man. Hughes never said something must be taken in order to establish an armed robbery. What Hughes said is that there was no evidence on anyone's part, his *or* Webster's, that any effort or attempt was made to deprive the Warners of *anything*. Neither Mr. Warner nor his wife ever claimed that anything was taken from them by either Adrion or Yasmin, or that either of them attempted to take anything. T 132. Whatever Webster's purpose (if he even had one[3]) may have been, evidence of robbery simply does not exist in the record. To assume a motive of robbery on the part of Hughes, even if one might be inferred from Webster's actions, would be, as this Court has said under similar circumstances, "the merest speculation." *Anderson v. State*, 168 Miss. 424, 151 So. 558 (1934).

The state offers its "Hughes-and-Webster-had-been-discussing-the-commission-of-a-robbery" argument as proof of robbery.[4] But the state mischaracterizes that conversation. According to Hughes's, written statement, the two were

> riding around town [Louisville]. We got into a conversation about money and ways to make money. We were talking about hustling, robbing and even right ways to make money.

Office Greg Clark, one of the investigators, testified, based on the above, that Webster and Hughes were "riding around talking about robbing somebody." T 130. Clearly, that is a mischaracterization of Hughes's statement. Such foolish, generalized, acting-tough, teen-ager talk on Hughes's part cannot make him complicit in Webster's specific crime against the Websters. Moreover, Hughes said in that same statement that Webster asked him if he had his cell phone. When Hughes said no,

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[3]A frequent characteristic of the violence of our times is that it often makes no sense.

[4]Argument, of course, is not proof.

Webster said he was going to stop and ask to borrow a phone. That is entirely consistent with the victim's testimony. RE 38.

Certainly the prosecution did not believe it had a case for robbery. It dropped the armed robbery charge against Webster and permitted him to plead guilty to aggravated assault, only. T 209, T 213.

There was no evidence that Hughes consented to any crime by Webster.

The state suggests that defendant's failure to testify justifies the inference by the jury that Hughes was involved in Webster's criminal conduct. The cases cited by the state, though, have no application to the situation before this Court. In *White v. State*, 722 So. 2d 1242, 1247 (Miss. 1998), for example, the testimony established that the appellant had made two cocaine sales. In *Rush v. State*, 301 So. 2d 297, 300 (Miss. 1974), the victim testified that the appellant raped her. He did not deny intercourse, only that the victim failed to resist. In *Mangum v. State*, 762 So. 2d 337, 342 (Miss. 2000), there was direct testimony that the appellant participated in planning the robbery, picked the store to be robbed, and drove the getaway car.

Hughes's situation is entirely different. There is no direct testimony establishing that Hughes committed or assisted in any crime. Mr. Warner hardly even noticed Hughes and certainly did not testify that Hughes threatened any harm to him in any way. Mrs. Warner saw but one "black guy [Webster] running backwards, . . . and he shot twice," T 146, T 148, hitting her in the leg. T 92. Mrs. Warner only saw Webster because, as her husband testified, Hughes turned to leave when Webster concluded his phone call.

The law requires something more to establish criminal intent on the part of a person who takes no active role in a crime. The state has scant support for its position: the argument of the District attorney; the court's statements overruling the motion for directed verdict as support for

its position; its repeated recitations of the evidence against Webster and Webster's post-crime statements to Hughes. None of that establishes the unproved "shared . . . community of intent . . ." the state says existed between Hughes and Webster. Brief of Appellee at 9-11. None of that is evidence implicating Hughes.

Even if the record contained evidence of consent to Webster's felonious conduct by Hughes, Hughes plainly neither aided nor abetted Adrion in his crimes. While it is certainly true that such assistance may be manifested by demonstrations of support as insubstantial as "acts, words, signs, [or] motions," any such actions must "*unmistakenly* [evince] *a design to incite or approve*" the crime. *Lynch v. State*, 877 So. 2d 1254, rehearing denied, certiorari denied, 543 U. S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122 (Miss. 2004). There is no evidence of any such "acts, words, signs, [or] motions" before this Court. The evidence establishes only that Hughes followed Webster to the Warner home so that Webster could use the phone. *See* Hughes statement, RE 38. By Warner's own testimony, when Webster finished using the phone, Hughes turned to leave, clearly indicating he believed Webster had finished his business.

Certainly there is no evidence of Hughes's communication of an "unmistakeable" design to aid or encourage Webster in his criminal act, and the term "unmistakenly" means exactly that, as this Court made clear in *Crawford v. State*, 133 Miss. 147, 151, 97 So. 534 (1923). There, the accused was convicted of manufacturing intoxicating liquor. The Supreme Court found evidence "that the appellant was present when liquour was being manufactured and participated therein." 97 So. at 534. The appellant admitted his presence but denied participation. *Id.* The trial court instructed the jury that "abetting may be manifested by being present with the intention of giving assistance if necessary though such assistance may not be called into requisition." *Id.*

This Court reversed and remanded. "The instruction [permitting the jury to convict on the basis of presence with intent to assist] should not have been given." 133 Miss. 147, 151, 97 So. 534 (1923). "Mere presence, *even with the intention of assisting in the commission of a crime*," this Court said, "cannot be said to have incited, encouraged, or aided the perpetrator thereof *unless the intention to assist was in some way communicated* to [the principal] (emphasis added)." *Id.*

The record is devoid of any evidence of any unmistakeable design or communication by Hughes to incite or approve Webster's conduct. Hughes's turning and leaving after Webster finished his call and before Webster began shooting could hardly indicate consent to any crime, much less encouragement.

Hughes cited numerous cases on this point in his initial brief which have been neither rebutted nor distinguished by the State, *e. g.*, *United States v. James*, 528 F. 2d 999 (5th Cir. 1976) ("Mere presence at the scene of a crime or mere association with the members of a conspiracy is not enough to prove participation in it."); *Cochran v. State*, 191 Miss. 273, 2 So. 2d 822 (Miss. 1941) (Proof that one has stood by at the commission of a crime without taking any steps to prevent it does not alone indicate such participation or combination in the wrong done as to show criminal activity, *although he approves of the act.*); *L. M., Jr., v. State*, 600 So. 2d 967 (Miss. 1992) (reversing adjudication of delinquency for carrying concealed weapons where the defendants at issue knew the weapons were present, but played no role in the crime of concealing them).

Hughes also noted just as clearly the state's failure to prove Hughes assisted Webster in any way. Hughes further cited for this Court the principle that an aider and abetter must, at the

time the crime was committed, and not just before and after, have the same intent as the principal and must intend to commit the crime charged.

Again, the state neither rebutted Hughes's arguments nor distinguished his cases. This case must be reversed.

The Jury Was Required to Accept a Reasonable Hypothesis Consistent with Yasmin's Innocence.

In order to convict a defendant of aiding and abetting a felony, the prosecution must prove "*beyond a reasonable doubt and to the exclusion of every reasonable hypothesis.*" *Brooks v. State*, 763 So. 2d 859, 861 (Miss. 2000). It cannot in good conscience be said that the prosecution at trial met that burden. Hughes's statement set out exactly what happened, *i.e.*, that he was accompanying Webster who claimed to need to use a telephone. That statement presents an hypothesis that is entirely consistent with Hughes's innocence. Not only did the prosecution not disprove that hypothesis, its own witness, the victim, Mr. Warner, confirmed it by testifying that Webster asked to use the phone. The jury verdict cannot be sustained from the evidence in the record.

II. EVEN IF THE EVIDENCE IS CONSIDERED SUFFICIENT, IT IS OF SUCH A NATURE AS TO CREATE A SERIOUS DOUBT AND THE CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

As Hughes noted in his initial brief, even if this Court concludes that the evidence meets the threshold of sufficiency, there should be a reversal for a new trial because of serious doubt about the weight of the evidence. *Quarles v. State*, 199 So. 2d 58 (Miss. 1967), *citing*, *Mister v. State*, 190 So. 2d 869, 871 (1966). *See also*, *Edwards v. State*, 736 So. 2d 475, 483 (Miss. App. 1999).

III. THE COURT ERRED IN ITS COMMUNICATION WITH AND INSTRUCTION OF THE JURY.

The state argues that the trial court acted properly in giving the contested instruction to the jury over half an hour into deliberations. *Payton v. State*, 897 So. 2d 921, 956 (Miss. 2003), cited by the state, underscores Hughes's point to the contrary, however, for it clearly says that the guidelines to follow are set down in *Girton v. State*, 446 So. 2d 570, 572-73 (Miss. 1984). Those guidelines are simple: first, "[u]nless it is necessary to give another instruction for clarity or to cover an omission it is necessary that no further instruction be given." Second, if such an instruction must be given, the court must first make absolutely certain what question is being asked before responding. As Hughes pointed out in his initial brief, the trial judge did neither of those things.

Certainly there are cases in which a trial judge's supplemental instruction to a jury would not constitute reversible error, but this is not one of them. The jurors were clearly confused as to exactly what the charge against Hughes was. "Is Yasmin [Hughes] being charged with armed or attempted robbery?" they asked. CP 42, RE 20. The court made no attempt to ascertain exactly what the jury wanted to know and did not answer the jury's question. Rather, the trial judge pointed to instruction no. 2 and, thereby, "may very well have accentuated an instruction even further, which was error." *Haynes v. State*, 451 So. 2d 227, 231 (Miss. 1984).

Hughes previously has pointed out the prejudice that resulted: by emphasizing the "elements of the crimes" in instruction no. 2, the court quite likely deflected the jury's attention from Instruction no. 3, an instruction that would have required a verdict of not guilty from an unbiased jury under the circumstances of this case. The emphasis on instruction no. 2 also drew attention from instruction no. 4 [CP 38, RE 19] (reasonable doubt), which likewise required

acquittal under the circumstances of this case. Clearly, the court's communication to the jury was prejudicial error and requires reversal.

IV. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

The state argues that Hughes's failure to object to the District Attorney's improper arguments bars consideration of the issue on appeal. Even if that were true, the prosecutor's inappropriate remarks would still serve as proof of Hughes's position that the verdict was not the result of sufficient evidence but based on bias, prejudice, or other non-evidentiary reasons. But, as even the state concedes, te failure to object to prosecutor misconduct does not necessarily waive the point for appeal. This Court can take notice of and correct on appeal plain error, whether or not a contemporaneous objection was made. *See* Brief of Appellee at 23, citing *Watts v. State*, 733 So. 2d 214, 233 (Miss. 1999), and *Williams v. State*, 794 So. 2d 181, 187 (Miss. 2001). That is especially true, this Court has said, where a remark is inflammatory or seriously deviates from the record to the point that the judge should have corrected the situation on his own motion. *See Gray v. State*, 487 So. 2d 1301, 1312 (Miss. 1986). As this Court stated *Clemmons v. State*, 320 So. 2d 368 (Miss. 1975) (cited by the state), when a prosecutor "makes inflammatory and damaging statements of fact not found in the evidence, the trial judge should intervene . . . ." *Clemmons*, 320 So. 2d at 372. "[T]his Court will not withhold a reversal when the judge fails in that duty."

In this case, the prosecutor's allusion to supposed past crimes in the county, and his repeated attribution of Webster's acts to Hughes, without supporting evidence, went far outside

the bounds of the record and was plain error.[5] Whether or not Hughes's trial counsel objected, the trial judge should have intervened. For these reasons, and given the authorites cited herein and in his intial brief, Hughes is entitled to a reversal on this point alone.

V. APPELLANT'S SENTENCE WAS UNCONSTITUTIONAL.

The state contends Hughes's failure to contemporaneously object to his sentence bars him from raising the issue on appeal. Again, as noted *supra*, this Court can take notice of plain error. The state justifies the significantly enhanced sentence meted out to Hughes after he went to trial instead of pleading guilty on the ground that Hughes supposedly did not "take responsibility for his . . . actions . . . ." *Hersick v. State*, 904 So. 2d 116, 127-28 (Miss. 2004). What the state seems to be saying is that contending one is innocent and refusing to plead guilty is somehow failing to "take responsibility" for one's actions. That turns the concept of innocent until proven guilty entirely upside down.

Recent news stories right here in Mississippi make it abundantly clear that some persons who maintain their innocence are in fact innocent. In this case, even the most hardened prosecutor would have to admit that the evidence against Hughes, even when the record is read in the light most favorable to the state, is marginal.

This Court has plainly said that a "sentencing court may consider only legitimate factors and cannot base the sentence, either in whole or in part, upon the defendant's exercising his

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[5]A plain error is one that results in a manifest miscarriage of justice, *Gray*, 549 So.2d at 1321, and affects a defendant's substantive/fundamental rights. *Grubb v. State*, 584 So.2d 786, 789 (Miss. 1991). Arguing facts outside the record is inherently unfair, *Cabello v. State*, 471 So. 2d 332, *certiorari denied*, 476 U. S. 1165, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (Miss. 1985), and, accordingly, is grounds for reversal under the plain error doctrine.

constitutional rights to a jury trial." *Fermo v. State*, 370 So. 2d 930, 932 (Miss. 1979). "[A]ny doubt, as to whether or not the exercise of such constitutional rights was considered by the lower court in determining the sentence, must be resolved in favor of the defendant." *Id.* at 932.

Hughes received a sentence of thirty years without parole only after, in the judge's words, he took "his chances and [went] to trial." The judge explicitly told Mr. Hughes that "when you are offered leniency and mercy, sometimes you have got to pick it up." At best, there is a doubt here that *Fermo* requires to be resolved in Hughes's favor. Even if the convictions are affirmed, this case must be remanded for resentencing.

VI. CUMULATIVE ERROR REQUIRES REVERSAL.

There were several serious errors in this trial. To some, a contemporaneous objection was imposed, to others, no objection was made. Given the extremely scant amount of evidence in this trial that in any way could be construed as against Hughes, the cumulative effect of errors perhaps otherwise not grounds for reversal should not be ignored by this Court. Twenty times zero may be zero, as the state has said, citing *Brown v. State*, 682 So. 2d 340, 356 (Miss. 1996), but this is not a case of multiple harmless errors.

For instance, arguing facts outside the record is inherently unfair and is plain error. *Cabello v. State*, 471 So. 2d 332, *certiorari denied*, 476 U. S. 1165, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (Miss. 1985); *Craft v. State*, 226 Miss. 426, 84 So. 2d 531 (Miss. 1956); *Tubb v. State*, 217 Miss. 741, 64 So. 2d 911 (Miss. 1953); *Traxler v. U. S.*, 293 F. 2d 327 (5th Cir. 1961).

Instructing the jury in violation of *Girton* is likewise a serious matter. This Court has cited improper jury instruction, as occurred in this case, as a specific example of plain error that

can be reviewed without a contemporaneous objection. Although a contemporaneous objection was made, this is just one more instance of an error greater than zero in this case.

No, this is not a case of 20 times 0 equals zero. This is a case of multiple serious errors where the evidence against the defendant was, in the very best light favorable to the state, borderline at best. This is one of those cases of which this Court has spoken wherein "the issue of innocence or guilt . . ., the quantity and character of error, and the gravity of the crime charged" are such that the cumulative effect of all errors deprive[d] the defendant of a fair trial." *Ross v. State*, Supreme Court of Mississippi, No. 1998-DP-01038-SCT (April 26, 2007), ¶ 138, *citing Byrom v. State*, 863 So. 2d 836, 847 (Miss. 2003). At minimum, this case should be remanded for a new trial.[6]

CONCLUSION

There is no evidence whatseover that Appellant Yasmine Hughes did any act that could even remotely be construed as robbery or aggravated assault. To sustain the conviction in this matter, this Court must find that the evidence sustained his conviction as an accessory. To do that, this Court must find that the prosecution proved its case against Hughes to the exclusion of every reasonable hypothesis consistent with his innocence. Hughes respectfully submits that the evidence before this court cannot sustain that burden. Moreover, cumulative errors noted in this brief and Hughes's Brief of Appellant further place the validity of the verdict in question.

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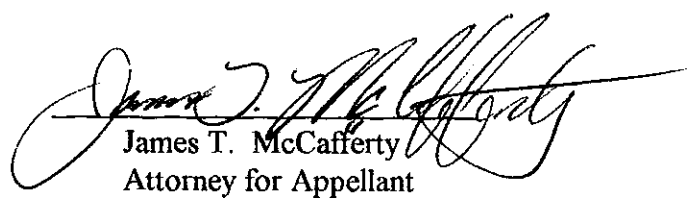
[6]In addition to the arguments made in this reply brief, appellant Hughes reiterates each and every argument and assertion made in its intial brief. Appellant waives no claims made in that brief whatsoever, but reasserts them here.

For the foregoing reasons, and on the basis of the authorities cited, the judgment below should be reversed and judgment of acquittal rendered. In the alternative, this case should be remanded for a new trial, or in the alternative, for resentencing.

This the 2nd day of November, 2007.

Respectfully submitted,



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PROOF OF SERVICE

I, James T. McCafferty, attorney for appellant, Yasmin Hughes, certify that I have this day, by United States mail with postage prepaid, filed the foregoing document with the clerk of this Court and have served a copy of the same upon the following persons at the addresses indicated below:

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