

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDERICK MILLER

APPELLANT

V.

NO. 2008-KA-00810-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF INTERESTED PERSONS

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 disqualifications or recusal.

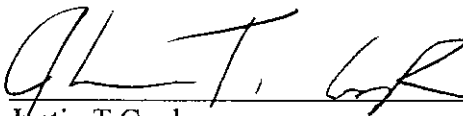
1. State of Mississippi
2. Frederick Miller, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Joseph H. Loper, Jr., Circuit Court Judge

This the 12th day of November, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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STATEMENT OF THE ISSUES

ISSUE ONE

WHETHER JURISDICTION IN CIRCUIT COURT WAS PROPER WHEN THE MISSISSIPPI YOUTH COURT ACT CLEARLY PROVIDED THAT YOUTH COURT WAS THE APPROPRIATE JURISDICTION FOR CRIMES WITH WHICH THE APPELLANT WAS CHARGED.

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ISSUE EIGHT

WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED APPELLANT OF HIS RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

STATEMENT OF INCARCERATION

Frederick Miller, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101**.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Attala County, Mississippi, and a judgment of conviction on one count of accessory after the fact to murder against Frederick Miller, following a trial on March 17th, 2008, the honorable Joseph H. Loper, Circuit Judge, presiding. Miller was subsequently sentenced to five years in the custody of the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, on October 31, 2006, and the early morning hours of November 1, 2006, Jerry Montez Winters (Winters) told Jeremy Stewart (Stewart) that he had been in a wreck. (T. 59). Jerry Winters, Josh Cox, Akeem Miller, and Stewart went to where they were told there was a wreck. (T. 59). Stewart testified that they simply went to the scene and left. (T. 59). Stewart testified that the group then went to Winters' girlfriend's house when Frederick Miller arrived. (T. 60). Winters then asked if someone would take him back to the scene, and Frederick Miller agreed that he would go. (T. 60).

Stewart testified that Winters and Frederick Miller both had gloves. (T. 60). According to Stewart's testimony, Winters, Frederick Miller, and Stewart went back to the scene, and Miller and Winters got out, looked around, and got back in. (T. 61). Stewart admitted on the stand to "not really" knowing what they were going out there to find the second time, ultimately concluding "I think it was the gun." (T. 62).

During cross examination, however, it was revealed that Stewart had never mentioned anything about gloves in his interview with law enforcement officers one week after the incident in question. (T. 63). Stewart further admitted that both times Jerry Winters never mentioned why the group was going to the scene. (T. 64).

Stewart further testified that after the night in question, he drove Jerry Winters to the bus station in Jackson, Mississippi. (T. 66). On cross examination, Stewart again testified that he never knew that he was going to the scene for a gun. (T. 67). Stewart also admitted to facing criminal charges as a result of his actions that night. (T. 67).

Kay Robertson, the coroner for Attala County, testified that when she arrived to the scene on Highway 19, she saw a Chevrolet SUV crashed into the woods. (T. 69). Robertson testified that

there was a victim inside who was identified as Chadwick Jackson. (T. 69). Robertson determined that a gunshot wound to the right side of the head was Jackson's cause of death. (T. 70).

Akeem Miller, Frederick Miller's brother, testified that he overheard a conversation between Winters and the Appellant concerning Winters being shorted in a drug transaction. (T. 74). Winters, according to Akeem Miller's testimony, showed him (Miller) a pistol. (T. 74). Akeem testified that he and a few others went with Winters to find Frederick Miller's cell phone, but that Frederick Miller did not go. Akeem testified that the second time they went to the scene, everyone had gloves except for Frederick Miller. (T. 79-80).

On cross-examination, Akeem testified that he never heard Winters tell Frederick Miller they were going to the scene to retrieve the gun. (T. 81). Akeem further testified that nobody had told Frederick Miller what happened or where they were going when he got into the vehicle. (T. 82). Akeem testified that Frederick Miller did not have any of the victim's belongings when they returned and did not participate in the burning of any of the belongings. (T. 83).

Martin Roby ("Investigator Roby"), the chief investigator for the Attalla County Sheriff's Office testified that he found a firearm at the scene of the crime. (T. 91). Investigator Roby determined that the weapon belonged to Winters. (T. 95)

On cross-examination, Investigator Roby admitted that Frederick Miller never said he knew what was going on before he went to the scene with Winters. (T. 105). Miller, during questioning, stated that he and others were only there for a short while. (T. 110). Investigator Roby also testified that Frederick Miller made no statements that in any way indicated he knew that Winters had killed Jackson. (T. 117). Investigator Roby further testified that there was no physical evidence that Frederick Miller had tampered with anything at the scene. (T. 119).

After calling Investigator Roby, the State rested its case and the defense moved for a directed

verdict. (T. 125). After some consideration, this motion was ultimately denied, and the defense began its case.

The defense called Frederick Miller to the stand to testify on his own behalf. Frederick Miller testified that he had just turned seventeen (17) at the time of the incident. (T. 134). Miller testified that, after he got off work from the Sunflower Grocery Store, he went home and Winters was in his yard. (T. 135). Winters asked him if he could borrow his (Frederick Miller's) cell phone and Miller agreed. (T. 135). Miller then went and checked on his sister and let Winters use his bike. (T. 135).

Miller testified that Winters never told him what he was doing. (T. 136). Miller testified that when Winters returned he looked as if he had seen a ghost, and Winters told him that he had dropped Miller's cell phone. (T. 137). Miller then went inside and when he came back out Winters and his brother, Akeem, were gone. (T. 138). Miller testified that he then went looking for his brother at Winters' girlfriend's house and found them there. (T. 139). No one told Miller anything concerning where they had been, and Winters asked Miller if he wanted a ride. (T. 139). Miller got in the car, and the group rode up Highway 19. (T. 140). Winters pulled off to the side of road and, when they got out of the vehicle, Miller testified he saw a vehicle in the bushes. (T. 140). Miller saw the body in the vehicle and was shocked, because nobody had told him anything. (T. 140). Miller was frightened and returned to the car. (T. 140)

Miller testified that he carried no gloves, and that no one asked him to look for a gun. (T. 141). Miller testified that he did not riffle through the SUV and that he was only at the scene for approximately three (3) minutes. (T. 141). Miller testified that he asked no questions because he feared for his life. (T. 142).

After Miller's testimony, the defense rested its case. The jury deliberated, and returned a

guilty verdict against Miller. (C.P. 48-49, R.E. 6-7). Miller was sentenced to five years in the custody of the Mississippi Department of corrections (C.P. 48-49, R.E. 6-8).

On March 28, 2008, the Appellant filed a Motion for JNOV, Alternatively, New Trial. (C.P. 51-54, R.E.8-11). The motion was denied by the trial court on April 9, 2008. (C.P. 55, R.E. 12). On May 6, 2008, feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 56, R.E. 13).

SUMMARY OF THE ARGUMENT

The circuit court of Attala county did not have proper jurisdiction over the Appellant's case. The Appellant was seventeen (17) at the time of his alleged offense. Because the maximum sentence that can be imposed for being an accessory after the fact to any crime is five years, Youth Court has original jurisdiction. There is nothing in the record to indicate that this matter was transferred from youth court to circuit court. Therefore, it was improper for the Appellant to be tried in circuit court.

The trial court erred when it failed to grant the Appellant's motion for judgment notwithstanding the verdict. The State failed to meet its burden of proof in establishing evidence of the elements of accessory after the fact. Further, the State presented no evidence that there was an actual murder – only that there was a killing. The state presented no evidence that the Appellant in any way knew that Winters had committed the murder. Beyond all this, the State failed to prove that the Appellant intended to render some aid or assistance to Winters when he allegedly went to the scene.

The verdict reached by the jury was also against the overwhelming weight of the evidence. The only evidence that the Appellant committed any wrong act was testified to by Jeremy Stewart,

who admitted he was also charged with being an accessory after the fact in the same matter. The State's own witnesses contradicted the story told by Stewart, rendering his testimony incredible.

The trial court erred in failing to instruct the jury as to the elements of murder. In order to find that the Appellant had committed the crime of accessory after the fact to murder, the jury must have found that a murder occurred. Without an instruction as to the elements of murder, the jury was left to assume that, just because there had been a killing, the killing was a murder.

The indictment was fatally defective in that it failed to name the alleged victim of the crime of murder. The failure in including a victim left an open indictment with no victim to anchor the Appellant's alleged crime of accessory after the fact to murder.

Statements given to police officers by the Appellant were taken in violation of Mississippi's Youth Court Act. Police officers did inform the Appellant that he had a right to have a parent or guardian present. Furthermore, there is nothing in the record to indicate that law enforcement agents attempted to contact the Appellant's parent or guardian. These statements were also taken in violation of the Appellant's rights under the Fifth Amendment of the United States Constitution and Article 3, Section 26, of the Mississippi Constitution

Furthermore, the Appellant was denied his fundamental constitutional right to effective assistance of counsel. Trial counsel's representation fell well below the standards allowed by *Strickland*; therefore, reversal is

Lastly, there was cumulative error that deprived the Appellant of his fundamental right to a fair trial. This cumulative error analysis is greatly affected by the fact that the verdict was against the overwhelming weight of the evidence.

ARGUMENT

ISSUE ONE

WHETHER JURISDICTION IN CIRCUIT COURT WAS PROPER WHEN THE MISSISSIPPI YOUTH COURT ACT CLEARLY PROVIDED THAT YOUTH COURT WAS THE APPROPRIATE JURISDICTION FOR CRIMES WITH WHICH THE APPELLANT WAS CHARGED.

i. Standard of review.

Whether the Circuit Court of Attala County had jurisdiction over the Appellant, Frederick Miller, is a question of law. Where questions of law are raised, the applicable standard of review is *de novo*. ***Lambert v. State***, 941 So. 2d 804, 807 (Miss. 2006).

ii. The Appellant was a child for the purposes of the Youth Court Statute.

"Child" and "youth" are synonymous, and each means a person who has not reached his eighteenth birthday." **Miss. Code Ann. § 43-21-105(d)**. The Appellant, as indicated by the record, was born October 13, 1989. (C.P. 50). The alleged crime committed in this matter occurred on October 31, 2006. This means, at the time of the alleged crime, the Appellant was seventeen (17) years old, and therefore, was a "child" for the purposes of Mississippi's Youth Court statute.

iii. Youth Court had proper original jurisdiction.

When looking at the record it becomes clear that there is nothing indicating that jurisdiction in the Circuit Court of Attala County was appropriate. The Mississippi Youth Court Acts sets forth the standards by which jurisdiction in cases involving children is based. The Mississippi Youth Court Act provides;

(1) The youth court shall have exclusive original jurisdiction in all proceedings concerning a delinquent child, a child in need of supervision, a neglected child, an abused child or a dependent child except in the following circumstances:

(a) Any act attempted or committed by a child, which if committed by an adult would be punishable under state or federal law by life imprisonment or death, will

be in the original jurisdiction of the circuit court;

(b) Any act attempted or committed by a child with the use of a deadly weapon, the carrying of which concealed is prohibited by Section 97-37-1, or a shotgun or a rifle, which would be a felony if committed by an adult, will be in the original jurisdiction of the circuit court.

Miss. Code Ann. § 43-21-151.

Where the youth court has exclusive original jurisdiction, juveniles may not be tried as adults in circuit court unless the youth court, in its own discretion, decides to “transfer jurisdiction of the alleged offense or a lesser included offense to the criminal court which would have trial jurisdiction of such offense if committed by an adult.” *Blue v. State*, 674 So. 2d 1184, 1230 (Miss. 1996), *overruled on other grounds*, by *King v. State*, 784 So. 2d 884 (Miss. 2001).

The Mississippi Supreme Court has long recognized that “when a juvenile is charged with an offense carrying a potential life sentence, such as rape or murder, jurisdiction is vested exclusively in the circuit court and the Youth Court Act is inapplicable.” *Smith v. State*, 534 So. 2d 194, 196 (Miss. 1988), citing *Johnson v. State*, 512 So. 2d 1246, 1250 (Miss. 1987). Hence, the determinative question for this court is whether the Appellant, as an adult, could possibly be sentenced to life in prison for committing the crime of accessory after the fact to murder.

In the case *sub judice*, the Appellant was charged with being an accessory after the fact under **Mississippi Code Annotated § 97-1-5** which provides that, on conviction a person “ shall be imprisoned in the penitentiary not exceeding five years, or in the county jail not exceeding one year.” **Miss. Code Ann. § 97-1-5.**

Because the crime of being an accessory after the fact and the punishment for which it entails does not fall under the exceptions provided within **§ 43-21-151**, youth court should have original jurisdiction of the instant case.

iv. Conclusion.

The circuit court did not have jurisdiction over the Appellant. The Appellant was seventeen (17) years old at the time of his alleged crime. The crime of accessory after the fact to murder is not one which can result in a sentence of life imprisonment if committed by an adult. Therefore, youth court was the court of original jurisdiction in the instant case. There is nothing to indicate that the charges against the Appellant were properly transferred to circuit court, nor is there any indication that there would be a basis for such a transfer. Therefore, the circuit court of Attala County was without jurisdiction over the Appellant's trial. Consequently, this honorable Court should reverse the Appellant's conviction as improper.

ISSUE TWO

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE STATE FAILED TO MEET ITS BURDEN OF PROOF AND ESTABLISH THE ESSENTIAL ELEMENTS OF THE CRIME OF ACCESSORY AFTER THE FACT BY LEGALLY COMPETENT EVIDENCE.

i. Standard of Review

The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in *Bush v. State*, 895 So. 2d 836 (Miss. 2005). In *Bush*, the Court restated that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush*, 895 So. 2d at 843 (citing *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). The Court emphasized that "[s]hould the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." *Id.*

(emphasis added) (citing *May v. State*, 460 So. 2d 778, 781 (Miss. 1984)).

ii. The Appellant was indicted and convicted as an accessory after the fact to murder.

Mississippi Code Annotated 97-1-5 (Supp. 2003) defines accessories after the fact as follows:

Every person who shall be convicted of having *concealed, received, or relieved any felon* or *having aided or assisted any felon*, knowing that such person had committed a felony, *with intent* to enable such felon to escape or to avoid arrest, trial, conviction or punishment, after the commission of such felony, on conviction thereof shall be imprisoned in the penitentiary not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both; and in prosecution for such offenses it shall not be necessary to aver in the indictment or to prove on the trial that the principal has been convicted or tried.

Miss. Code Ann. § 97-1-5 (Supp. 2003) (emphasis added).

As the language of the statute indicates, for a person to be convicted of being an accessory after the fact, three elements must be met: (1) that a completed felony has been committed; (2) the person concealed, received, relieved, aided, or assisted a felon, knowing that such person had committed a felony; and (3) that such assistance was given with the intent to allow such felon to avoid arrest or trial. In the case *sub judice*, there is no dispute that there was an actual killing. The nature of the killing, however, was not sufficiently proven by the State's evidence. Furthermore, there is no evidence which shows beyond a reasonable doubt, or even anything remotely close to it, that the Appellant's actions met the second and third elements of the crime.

The indictment charging the Appellant as an Accessory After the Fact to Murder was crafted as follows:

FREDERICK B. MILLER, JR. On ore about the 1st day of November, 2006, in Attala County, Mississippi, and within the jurisdiction of this Court, did wilfully, unalwfully, and feloniously aid JERRY MONTEZ WINTERS to avoid arrest, trial, conviction of Murder, by assisting him in attempting to locate the murder weapon and other incriminating evidence left at the scene, and that the said FREDERICK B.

MILLER, JR. rendered such assistance with the unlawful and felonious intent to enable said felon to avoid arrest, trial, conviction or punishment after the commission of such felony, and against the peace and dignity of the State of Mississippi.

(CP. 1, RE. 5).

When the State finished its case in chief, the defense moved for a directed verdict. After argument from both sides, the trial court made its ruling on the defense's motion;

BY THE COURT: Well, at this point, the – I'll say this, the State's case is extremely weak. But I have to consider all the evidence in the light most favorable to the State. All inferences that are favorable to the State have to be considered at this point.

If you consider all the evidence in the light most favorable to the State, I think they have made – they have – even if they have a mere scintilla of proof, their proof is barely above merely scintilla, but I think at this point it is enough proof there...”

(T 132-33)(emphasis added).

The trial court's conclusion was erroneous. The hesitance and doubt in the trial court's opinion of the sufficiency of the evidence presented by the State speaks volumes on this issue.

iii. The State did not provide sufficient evidence to show there was a murder.

In the instant case, the jury was not instructed adequately in that, in order to find the Appellant guilty of accessory after the fact to murder, the State must prove that a murder actually occurred and that the Appellant was the actual accessory after the fact to a murder.¹

With respect to proving the element of murder, the State provided no evidence that an actual murder occurred. The only evidence that the State had was that there was an actual killing. Evidence that there was a killing is not sufficient to support that there was a murder.

Murder requires either deliberate design or depraved heart. **Mississippi Code Annotated**

2. See Issue Two, *supra*.

§ 97-3-19 defines murder as follows;

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.

Miss. Code Ann. § 97-3-19(1).

Furthermore, there are justifiable homicides. **Mississippi Code Annotated § 97-3-17** provides in which cases homicide is excusable in Mississippi;

The killing of any human being by the act, procurement, or omission of another shall be excusable:

(a) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;

(b) When committed by accident and misfortune, in the heat of passion upon any sudden and sufficient provocation.

(c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

Miss. Code Ann. § 97-3-17.

Mississippi Code Annotated § 97-3-15 allows for justifiable homicide with use of defensive force;

“(e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling, in any occupied vehicle, in any place of business, in any place of employment or in the immediate premises thereof in which such person shall be;

(f) When committed in lawful defense of one’s own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a

felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished;”

Miss. Code Ann. § 97-3-15.

As noted by § 97-3-17 and § 97-3-15, the fact that a killing occurred is not, alone, sufficient to support that a murder actually occurred.

In the case *sub judice*, the State provided no evidence that the crime committed by Jerry Montez Winters was done with either deliberate design or depraved heart as required by **Miss. Code Ann. § 97-3-19.**

iv. The State failed to show that the Appellant knew that Winters had committed a murder.

The record is barren of any evidence that the Appellant was aware that Winters had committed a murder at the time that he went to the scene of the incident. Jeremy Stewart testified that Winters never mentioned why the group was going to the scene. (T. 63). Akeem Miller testified that he never heard Winters tell the Appellant that they were going to the scene to retrieve a gun. (T. 81). Akeem Miller further testified that nobody had ever told the Appellant what happened or where they were going when they got into the vehicle to go to the scene. (T. 82). The investigator in the case admitted on the stand that the Appellant made no statements that in any way indicated that he knew that Winters had killed Jackson. (T. 117).

The State failed to provide any evidence that the Appellant knew that Winters had murdered Jackson. In fact, the only evidence admitted shows that the Appellant did not know. Therefore, the State’s evidence was insufficient as to the element of knowledge.

v. The Appellant did not conceal, receive, aid, or assist.

In order to prove the second element of accessory after the fact, the State had to show that the appellant “concealed, received, relieved, aided or assisted” Winters and knew that Winters had

committed a felony.

The Mississippi Code does not provide statutory definitions for the words “conceal,” “receive,” “aid,” or assist.” Therefore, this honorable court is to construe those words according to their common meanings. **Miss. Code Ann. § 1-3-65.**

Black’s Law Dictionary defines the word “conceal” as “[t]o hide, secrete, or withhold from the knowledge of others,” **Black’s Law Dictionary** (6th ed. 1990). “Aid” means “[t]o support, help, assist or strengthen.” *Id.* “Assist” is defined as “[t]o contribute effort in the complete accomplishment of an ultimate purpose intended to be effected by those engaged.” *Id.* “Receive” means “[t]o take into possession and control; accept custody of; collect.” *Id.*

There is no evidence that the Appellant helped to “conceal” anything. If conceal means “to hide, secrete or withhold from the knowledge of others,” it is beyond dispute that the word “conceal” does not apply to the Appellant’s actions. The State’s allegation to support the accessory charge was that the Appellant helped look for a gun at the scene. However, it is clear from the evidence presented at trial that law enforcement officers discovered the weapon in question when they arrived at the crime scene. Therefore, by definition, nothing was concealed.

It is clear the Appellant did not “aid” Winters in any way either. The Appellant’s alleged conduct in no way helped, supported, assisted or strengthened Winters. The gun was still there at the crime scene.

It is also clear that the Appellant did not “assist” Winters. The Appellant’s efforts certainly did not “contribute effort in the complete accomplishment of an ultimate purpose intended to be effected by those engaged.” *Id.* There was no “complete accomplishment” of an ultimate purpose intended by those engaged. The gun that State alleged the Appellant was allegedly looking for was found at the scene by police officers, not Miller and Winters.

Furthermore, there is no evidence that the Appellant “received” anything. He never took control, accepted custody of or collected anything. Again, the gun the State alleged the Appellant was looking for was found at the scene. No act was completed.

vi. There was no intent.

In order to satisfy the third element of the offense of accessory after the fact, the State must show that the Appellant *intended* to enable Winters “to escape or avoid arrest, trial, conviction or punishment” after the crime. Restated, this means that the prosecution then has the added hurdle of proving that an act was committed with the intent to protect the principal. In this case, the facts do not support the charge that the Appellant possessed the requisite intent required by statute to sustain the accessory after the fact charge.

The determination of intent has often been described by the courts as a “troublesome task.” *Duplantis v. State*, 708 So. 2d 1327, 1341 (Miss. 1998). It has widely been held that “[a]bsent a confession, intent necessarily must be established by circumstantial evidence.” *Voyles v. State*, 362 So. 2d 1236, 1242-43 (Miss. 1978). “Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent.” *Shanklin v. State*, 290 So. 2d 625 (Miss. 1974)(emphasis added). From the case law, it is clear that “[u]nless one expresses his intent, the only method by which intent may be proven is by showing the acts of the person involved at the time in question, and by showing the circumstances surrounding the incident.” *Thompson v. State*, 258 So. 2d 448 (Miss. 1972).

In the instant case, there is nothing in the Appellant’s interrogation by police officers to indicate that he intended to render some aid in his alleged actions. Furthermore, there is no

reasonable inference that can be drawn from any circumstantial evidence that the Appellant in any way intended to aid Winters. Quite simply, the State failed to provide any evidence of the Appellant's intent as required by the statute.

vii. Conclusion.

For the above reasons, the State failed to prove the legal sufficiency of its case against the Appellant. Therefore, this honorable Court should reverse and render a verdict of not guilty in favor of the Appellant and release said Appellant from the custody of the Mississippi Department of Corrections.

ISSUE THREE

WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

i. Standard of Review.

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. *Dilworth v. State*, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. *Dilworth*, 909 So.2d at 737. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. *Id.* When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a thirteenth juror, but the motion is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Id.* The evidence should also be

weighed in the light most favorable to the verdict. The **Bush** Court stated:

“A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the “thirteenth juror,” the court simply disagrees with the jury’s resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.”

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. **Thomas v. State**, 92 So. 225, 226 (1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. **Dilworth**, 909 So.2d at 737.

ii. The only evidence that the Appellant was in any way involved in being an accessory after the fact came from a far more substantive co-accessory after the fact.

Stewart admitted on the stand to going to the scene of the alleged crime both times. He further admitted to taking Winters to the bus station in Jackson, several days after the incident in question.

The general rule in Mississippi is that the uncorroborated testimony of an accomplice or a co-conspirator may be sufficient to sustain a conviction. **Doby v. State**, 532 So. 2d 574, 591 (Miss. 1988). However, the general rule is inapplicable in those cases where, as here, the testimony is unreasonable, self-contradictory or substantially impeached. **Flanagan v. State**, 605 So. 2d 753,

758 (Miss. 1992).

In *Flanagan*, the only evidence presented by the State was the testimony of alleged co-conspirators which was conflicting, self-serving and unworthy of belief. *Id.* at 758.

iii. Stewart's testimony was inconsistent with his previous statements and therefore unreliable.

On cross-examination, Stewart revealed that he never mentioned anything about gloves whatsoever in his interview with law enforcement officers one week after the incident in question.

Defense counsel questioned Stewart;

“Q. In your original interview on November 8th, a week after this – after Chad Jackson was killed, you make no mention of gloves whatsoever. Why is that?

A. I thought I did.

Q. You thought you did?

A. Yes, Ma'am.

Q. That's – do you feel like that's an important fact?

A. Well, at the time I was just – I ain't never been put in that situation before, and I was just panicked and I was just trying to tell them everything that I knew. You know, I might have forgotten some things and I told them later.

Q. In your statements to law enforcement, you failed to mention gloves at all. You don't make any mention of it. I've read your whole transcript from front to back. There's nothing in it.

This statement that you make to the district attorney's office is the first time you've ever mentioned gloves in this whole event. Why is that?

A. I told them whatever happened, that I remember happened.”

(T. 63-64).

The fact that Stewart failed to tell police officers about gloves, but, over time, and in an interview with the district attorney's office recalled gloves being involved in the incident is severely suspect. This inconsistency raises further doubts concerning the truthfulness and veracity of his

testimony.

As indicated above, Stewart was charged with the same crime as the Appellant and, at the time of his testimony, had charges pending against him. This, and his inconsistency raise significant concerns as to his testimony's truthfulness and veracity.

iii. The State's evidence was substantially impeached by its own witnesses.

The evidence presented by the State's own witnesses show that the verdict is against the overwhelming weight of the evidence. All of the State's witnesses' testimony show that the Appellant did not have any knowledge that a murder had been committed, nor did the Appellant participate in any action which could reasonably be construed as being an accessory after the fact.

Jeremy Stewart himself testified that Jerry Winters never mentioned why the group was going to the scene. (T. 62) Accordingly, the only witness the State provided that showed that the Appellant, in any way, was an accessory to the crime admitted on the stand that the Appellant was never told why he was going to the crime scene.

Akeem Miller, the Appellant's brother, who was called by the State, testified that his brother did not have any gloves when he went to the scene. (T. 79-80) Akeem further testified that he never heard Winters tell the Appellant that they were going to the scene to retrieve a gun. (T. 81). Akeem further testified that nobody had ever told the Appellant what had happened or where they were going when they got into the vehicle. (T. 82). Furthermore, Akeem testified that his brother did not participate in the burning of any of Jackson's belongings. (T. 83).

Investigator Roby, during cross-examination, admitted that the Appellant made no statements that in any way indicated that he knew Winters had killed Jackson. (T. 117). Roby further testified that there was no physical evidence that the Appellant had tampered with anything at the scene. (T. 119).

What little strength Stewart's testimony provided was significantly contradicted by the testimony by the State's own witnesses, rendering his testimony less than credible. The only evidence that State was able to produce against the Appellant came from the testimony of an individual who stood to benefit significantly from his testimony.

iv. Conclusion.

Flanagan holds that the uncorroborated testimony of an accomplice may not be the sole basis for a conviction when the testimony is substantially impeached, self-contradictory, or unreliable. The sole (and ultimately minute) evidence of the Appellant's guilt in the instant case comes from Jeremy Stewart, a co-accessory after the fact whose testimony was substantially unreliable and substantively contradicted and impeached by the State's own witnesses. Because the overwhelming weight of the evidence shows that the Appellant was not an accessory after the fact to the crime of murder, this honorable Court should reverse and remand for a new trial.

ISSUE FOUR

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE ELEMENTS OF MURDER.

i. Standard of Review.

Because there was no objection by trial counsel as to the failure to properly instruct the jury of the elements of murder, the Appellant must proceed under the doctrine of plain error. If a contemporaneous objection is not made, an appellant must rely on plain error to raise the argument on appeal. ***Watts v. State***, 733 So. 2d 214, 233 (Miss. 1999). "The 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)(citations omitted). Moreover, the plain error rule only is applied by Mississippi courts when the error effects an appellant's substantive/fundamental rights.

Id.

ii. The jury was not adequately instructed as to the elements of murder.

In *Wilson v. State*, the Mississippi Supreme Court found error when the jury was not instructed that it must find that the underlying crime to an accessory was committed as well as the statutory requirements outlined by the Mississippi Code. *Wilson v. State*, 592 So. 2d 993, 997 (Miss. 1991).

In *Wilson*, the defendant was charged as an accessory before the fact to murder. The jury was only instructed to determine whether the defendant was an accessory before the fact, “leaving the jury to assume that the occurrence of the crime was an established fact.” *Id.* at 997-98. The Court ultimately concluded that the jury must be convinced of both the accessory before the fact and the underlying crime of murder. *Id.* Subsequently, the Supreme Court reversed the conviction and remanded for a new trial.

In the instant case, the jury was not instructed that it had to find that a murder had occurred in order to find the Appellant guilty of the crime of accessory after the fact to murder. The sole instruction given to the jury as to the elements of the offense, S-1, provided,

“The defendant, Frederick B. Miller, Jr., has been charged by indictment in this case with the crime of Accessory After the Fact of Murder.

If you find from all the evidence in this case beyond a reasonable doubt that:

(1) the defendant, Frederick B. Miller, Jr., on or about November 1, 2006, in Attala County, Mississippi, did wilfully, unlawfully, and feloniously aid a felon, Jerry Montez Winters, knowing that he, the said Jerry Montez Winters, had committed a felony, to wit: Murder, and

(2) the he aided such felon with the intent to enable him to a void arrest, trial, conviction or punishment after the commission of such felony,

then you shall find the defendant guilty as charged.

If the State has failed to prove any one of the above elements beyond a reasonable doubt, then you shall find the defendant not guilty.

(C.P. 34).

In the instant case, the jury was never instructed that they had to conclude that Winters had committed murder. Given, the absence of such an instruction as well as the absence of any instruction as to what the elements of murder were, the trial court allowed the jury to merely presume that Winters had committed murder. This presumption is directly in violation of the holding in *Wilson* and warrants reversal.

As noted in Issue Two above, simply because there was a killing does not necessarily lead to the conclusion that there was, in fact, a murder. The statutes of the State of Mississippi distinguish several types of killings from murder. **Mississippi Code Annotated § 97-3-17** allows for homicide to be excusable in Mississippi when “committed by and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent”, “when committed by accident and misfortune, in the heat of passion upon any sudden and sufficient provocation” and “When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.” **Miss. Code Ann. § 97-3-17.**

Mississippi Code Annotated § 97-3-15 allows for justifiable homicide in the use of defensive force in resisting any attempt to unlawfully kill such person or commit a felony on such person as well as for defensive force in defense of one’s own person “where there shall be reasonable grounds do apprehend a design to commit a felony or do some great personal injury.” **Miss. Code Ann. § 97-3-15.**

In failing to instruct the jury as to the elements of murder, the jury was left to presume that

there was a murder simply because there was a killing. Just because there is a killing, does not make that killing a murder. Therefore, such a presumption is not appropriate.

iii. Conclusion.

In accessory prosecutions, it is impermissible for the jury to simply presume that the underlying crime has been committed. In failing to adequately instruct the jury as to the elements of murder, the Court allowed for the jury to simply presume that Winters had actually committed murder, when, as noted above, he could have committed any of the types of excusable homicides enumerated by the Mississippi Code. Therefore, the trial court committed reversible error.

ISSUE FIVE

WHETHER THE INDICTMENT WAS FATALLY DEFECTIVE IN FAILING TO NAME THE ALLEGED VICTIM OF THE CRIME OF MURDER AND THUS NOT ANCHORING THE ALLEGED CRIME OF BEING AN ACCESSORY AFTER THE FACT TO MURDER.

i. Standard of Review.

The existence of defects in indictments is a question of law. *Peterson v. State*, 671 So. 2d 647, 652 (Miss. 1996). An indictment must set forth all the elements of the criminal offense. *Id.* at 653. Where questions of law are raised, the applicable standard of review is *de novo*. *Lambert v. State*, 941 So. 2d 804, 807 (Miss. 2006).

ii. The indictment failed to name the victim of the alleged crime of murder.

In *Sanderson v. State*, the Mississippi Court of Appeals concluded that an indictment of conspiracy to commit aggravated assault was invalid because it failed to specifically mention the intended victim of that conspiracy. *Sanderson v. State*, 881 So. 2d 878 (Miss. Ct. App. 2004). In *Sanderson*, the Court reasoned that the merely including the date was not enough to make an indictment for conspiracy to commit aggravated assault valid. The Court held;

“The indictment only charged that on a certain date, Sanderson and Taylor conspired

to commit an aggravated assault. There is no anchor to that conspiracy that would keep it from then being used in a later indictment. The date is not enough, as more than one conspiracy may logically be entered into on one day.”

Id. at 882.

Just as it was reasonable for the Court of Appeals to conclude, in *Sanderson*, that there could be a conspiracy to commit more than one aggravated assault on any given day, so too is it conceivable, in the instant case, that a person might commit more than one murder on any given day. The failure to provide in the indictment the victim’s full name failed to provide the Appellant with sufficient notice of the charges against him.

The Appellant does, however, specifically note that the Mississippi Supreme Court reversed the Court of Appeals. *Sanderson v. State*, 883 So. 2d 558 (Miss. 2004). However, the grounds for reversing the Court of Appeals was that there was a second count of the indictment which provided the victim’s name, and, therefore, Sanderson was put on sufficient notice, as a whole, of the charges against him. *Id.* at 561.

The Court of Appeal’s reasoning still applies, however. Unlike in *Sanderson*, the indictment in question is only one count; therefore, there is nothing the Appellant could have gleaned from the indictment so as to determine the identity of the victim of the alleged crime he was charged with being an accessory after the fact to. Hence, there is no anchor that would keep the State from using this indictment at a later date, should evidence arise that Jerry Montez Winters committed another murder on or about November 1, 2006.

iii. Conclusion.

In failing to state the victim of the alleged murder, the indictment was impermissibly vague. There was no anchor to the alleged crime of being an accessory after the fact to murder. For this reason, this honorable Court should reverse the Appellant’s conviction so that he may be properly

indicted.

ISSUE SIX

WHETHER THE APPELLANT'S STATEMENTS TO POLICE OFFICERS WERE ADMISSIBLE UNDER THE MISSISSIPPI YOUTH COURT ACT, THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ARTICLE 3, SECTION 26, OF THE MISSISSIPPI CONSTITUTION.

i. Standard of Review

Because the admissibility of the Appellant's statements to investigators was not objected to at trial, the Appellant must proceed under the doctrine of plain error. If a contemporaneous objection is not made, an appellant must rely on plain error to raise the argument on appeal. *Watts v. State*, 733 So. 2d 214, 233 (Miss. 1999). "The 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)(citations omitted). Moreover, the plain error rule only is applied by Mississippi courts when the error effects an appellant's substantive/fundamental rights. *Id.*

ii. The statements taken by law enforcement officers were done so in violation of the Mississippi Youth Court Act.

At the time the Appellant was questioned, there is no evidence that he was informed that there were charges against him. There is nothing to indicate that the Appellant was ever told that he was a suspect.

Because the Appellant was not charged with any crime that would remove him from the Youth Court's jurisdiction, the statements taken from him do not satisfy the requirements of the Youth Court Act. As the Supreme Court stated in *Smith v. State*;

At the time Smith gave his confession he had not been charged with any crime that would remove e him from the Youth Court's jurisdiction. The crimes with which he had ben charged, burglary, resisting arrest and assaulting a police office, all fall within the youth Court's jurisdiction. Therefore, the circumstances surrounding Smith's confession must satisfy the Youth Court Act."

Smith v. State, 534 So. 2d 194, 195 (Miss. 1988).

In the instant case, the Appellant was not charged with a crime that would support a proper transfer from Youth Court to Circuit Court. **Mississippi Code Annotated § 43-21-303(3)** provides;

“Unless the child is immediately released, the person taking the child into custody shall immediately notify the judge or his designee. A person taking a child into custody shall also make continuing reasonable efforts to notify the child’s parent, guardian or custodian and invite the parent, guardian or custodian to be present during any questioning.”

Miss. Code Ann. § 43-21-303(3).

In *M.A.C. v. Harrison Cty. Family Ct.*, the Mississippi Supreme Court reversed a case where a parent was not present during interrogation. *M.A.C. v. Harrison Cty. Family Ct.*, 566 So. 2d 472 (Miss. 1990). The *M.A.C.* Court concluded that law enforcement officers excluding parents from interrogations of minors was “without a doubt” violative of **§ 43-21-303(3)** and that such violation “cannot continue nor be condoned.” *Id.* at 474.

In the instant case, there is no indication from the record that the Appellant was ever notified that he had a right to have his mother present. There is no evidence from the record that law enforcement officers ever attempted to contact the Appellant’s parent or guardian and invite that parent or guardian to be present during such interrogation.

Because the statement was taken in violation of **Miss. Code Ann. § 43-21-303(3)**, it is inadmissible.

iii. *Miranda is a constitutional rule.*

The Fifth Amendment of the United States Constitution provides in pertinent part; “No person shall. . . be compelled in any criminal case to be a witness against himself.” *U.S. Const. Amend. V*. The Fifth Amendment’s constitutional guarantee is mirrored in Article 3, Section 26 of the Mississippi Constitution which provides, in relevant part, “In all criminal prosecutions the

accused shall. . . . not be compelled to give evidence against himself.” *Miss. Const. Art. 3 § 26*.

The requirement that no person be compelled in any criminal case to give evidence or be a witness against themselves was embodied in the United States Supreme Court Case, *Miranda v. Arizona*, which outlined now-familiar rules for police officers to follow when questioning an accused who is in custody. *See, Miranda v. Arizona*, 384 U.S. 436 (1966).²

In *Miranda*, the Court noted several of its concerns regarding the advent of modern custodial interrogation by police. The Court noted that modern police interrogation brought increased concerns about confessions obtained by coercion. *Miranda*, 384 U.S. at 445-458. The *Miranda* Court found that custodial interrogation by police, by its very nature, isolates and puts pressure upon the individual; thus, “even without employing brutality, the ‘third degree’ or specific stratagems, custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.” *Id.* at 455.

The Court concluded that the coercion inherent in interrogations obfuscates the line between voluntary and involuntary statements, and therefore increases the risk that an individual will not be “accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.” *Id.* at 442. Because of the inherent coercion, the *Miranda* Court established “concrete constitutional guidelines for law enforcement agencies and courts to follow.” *Id.* at 442.

Those “concrete constitutional guidelines” established that the admissibility into evidence of any statement during custodial interrogation depends on whether police provided that suspect

2. Prior to *Miranda*, the United States Supreme Court evaluated the admissibility of a defendant’s confession under a voluntariness test. This test had its roots in the common law, as the courts of both England and the United States recognized that coerced confessions were inherently untrustworthy. *See, e.g., King v. Rudd*, 1 Leach 115, 117-18, 122-23, 168 Eng. Rep. 160, 161, 164 (K.B. 1783) (Lord Mansfield, C.J.)(concluding that the English courts excluded confessions obtained by threats or promises).

with four warnings. These warnings are that a suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” *Id.* at 479.

The constitutional underpinnings of *Miranda* were called into question in several Supreme Court cases. In *Michigan v. Tucker*, the court addressed the question of whether the fruits of a confession of a defendant not fully informed of his constitutional rights as mandated by *Miranda* were inadmissible as “fruit of the poisonous tree.” See, *Michigan v. Tucker*, 417 U.S. 433 (1974). In resolving the “fruit” issue, the Supreme Court, per then-associate Justice Rehnquist, asked a foundational question: “[W]hether the police conduct complained of directly infringed upon [a defendant’s] right against compulsory self-incrimination or whether it instead violated only prophylactic rules developed to protect that right.” *Id.* at 439.

The Court’s answer was that “[c]ertainly no one could contend that the interrogation faced by [the defendant] bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed.” *Id.* at 444. The Court, therefore, concluded that “the police conduct here did not deprive [the defendant] of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*.” *Id.*³

3. The result of the *Tucker* Court’s holding, among many lawyers and scholars, was that the failure of police to properly warn a suspect prior to a custodial interrogation does not in and of itself render a confession involuntary due to a Fifth Amendment violation; Rather, the omission of the warnings only violates a judicially-created procedural safeguard that attempted to prevent an actual violation of the Constitution. As the Supreme Court stated in *Oregon v. Elstad*, “[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.” *Oregon v. Elstad*, 40 U.S. 298, 306 (1985)

This seemingly prophylactic rule was clarified, however, in *Dickerson v. United States*, where Chief Justice Rehnquist, the author of *Tucker*, clarified that *Miranda* was a “constitutional decision” with “constitutional origin” and “constitutional underpinning.” *Dickerson v. United States*, 530 U.S. 428, 431, FN3, FN5 (2000).

The *Dickerson* Court grounded its decision regarding the constitutional basis of *Miranda* in the language of *Miranda* and its progeny themselves. The Court concluded that there is language in some of the Court’s opinions that supports the view that *Miranda* is not constitutionally based. *Id.* at 438. Chief Justice Rehnquist, however, parsed the language of the *Miranda* opinion to show that it was “replete with statements indicating that the majority thought it was announcing a constitutional rule.” *Id.*

Chief Justice Rehnquist found further support for *Miranda* being a constitutional rule. He wrote for the Court, “[F]irst and foremost of the factors on the other side – that *Miranda* is a constitutional decision – is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts.” *Id.* That is to say, since the United States Supreme Court does not have non-constitutional supervisory authority over state courts, and since the United States Supreme Court enforced the rule it announced in *Miranda* in state cases, *Miranda* must be a constitutional decision.

The result of *Dickerson* is that *Miranda* is a constitutional rule. The constitutionality of *Miranda*, therefore, is essential in the instant case. Because this honorable Court must find plain error in order to support the Appellant’s assertions, it is necessary to note that the rule violated by the law enforcement agents is not one of a prophylactic nature, but, rather, a rule required by the United States Constitution. This certainly weighs in the Appellant’s favor, because the error effects the Appellant’s fundamental Fifth Amendment right.

iv. Miranda rights were not waived “voluntarily, knowingly and intelligently.”

In order for a defendant to waive his right against self-incrimination, the waiver must be knowing, intelligent and voluntary. *Id.* at 444. The State has the heavy burden to prove beyond a reasonable doubt that the confession was voluntary. *Cox v. State*, 586 So. 2d 761, 763 (Miss. 1991).

In order to be a valid waiver under *Miranda*, that waiver must be voluntary, *i.e.*, “the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986). In making a determination of voluntariness, the United States Supreme Court has stated that “[t]here is obviously no reason to require more in the way of a ‘voluntariness’ inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context.” *Colorado v. Connelly*, 479 U.S. 153, 169-70 (1986). As the Mississippi Court of Appeals has noted, in order for a waiver to be voluntary, a defendant must be aware of the nature of his self incrimination rights and the consequences of waiving them. *Brown v. State*, 839 So. 2d 591, 600 (Miss. Ct. App. 2003)

To be knowing and intelligent, a valid “waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran*, 475 U.S. at 421.

The proper method by which to determine whether a juvenile’s statement to police is voluntary, intelligent and knowing requires a totality-of-the circumstances test. See *Fare v. Michael C.*, 442 U.S. 707 (1979). The *Fare* Court noted;

“We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits-indeed, it mandates-inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.”

Id. at 725.

There is nothing in the record to indicate that the Appellant was ever told that there were charges against him. Further, there is nothing in the record to indicate that any parent or guardian was informed that there were charges against the Appellant.

There is no indication in the record that the Appellant had any experience with law enforcement. See *Morgan v. State*, 681 So. 2d 82, 88 (Miss. 1996)(holding a *Miranda* waiver valid where defendant “had a history of legal problems and has had an opportunity to become familiar with the criminal justice system.”); But see, *Blue v. State*, 674 So. 2d 1184, 1203 (Miss. 1996)(finding a valid waiver where defendant had been advised of his rights on at least five previous occasions).

The fact that the Appellant signed a *Miranda* waiver does not render any claims of involuntariness meritless. In *Neal v. State*, the Mississippi Supreme Court concluded that the signing of a waiver does not automatically make the subsequent statements voluntary, knowing or intelligent. *Neal v. State*, 451 So. 2d 743, 753 (Miss. 1984). The *Neal* Court said,

[T]he mere giving of the *Miranda* warnings, no matter how meticulous, no matter how often repeated, does not render admissible any inculpatory statement thereafter given by the accused.... When an accused makes an in-custody inculpatory statement without the advice or presence of counsel, even though warnings and advice regarding his privilege against self-incrimination have been fully and fairly given, the State shoulders a heavy burden to show a knowing and intelligent waiver.”

Id.

The Appellant was a youth when he was questioned by law enforcement agents. He was susceptible to persuasion or coercion. There is nothing in the record to indicate that he had any familiarity with law enforcement proceedings. The coercive and pressured atmosphere which resulted in the Appellant’s waiver of his *Mirdana* rights and his subsequent statements are precisely

the type of pressures the Youth Court Act intends to prevent by requiring that a youth be made aware of his or her right to have a parent present; therefore, the waiver and subsequent statements made by the Appellant should have been inadmissible against him at trial. The statements' admission warrants reversal.

v. Conclusion.

The custodial interrogation by law enforcement officers in the case *sub judice* was in violation of Mississippi's Youth Court Act. There is nothing in the record to indicate that the Appellant was informed of his right to have his parent or guardian present, nor is there anything in the record to indicate that a parent or guardian was contacted by law enforcement. Moreover, any purported waiver of the Appellant's *Miranda* rights was not done so knowingly, voluntarily and intelligently. Therefore, the statements made by the Appellant to law enforcement agents was inadmissible at trial and in violation of his fundamental rights under the Fifth Amendment of the United States Constitution as well as the constitution of the State of Mississippi.

ISSUE SEVEN

WHETHER THE APPELLANT WAS DENIED HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

i. Standard of Review

"When a defendant raises an ineffective assistance claim on direct appeal, the question before this Court is whether the judge, as a matter of law, had a duty to declare a mistrial or order a new trial *sua sponte*, on the basis of trial counsel's performance." *Roach v. State*, 938 So. 2d 863, 869 (Miss. Ct. App. 2006)(citing *Colenburg v. State*, 735 So. 2d 1099, 1102 (Miss. Ct. App. 1999).

The benchmark for judging any claim of ineffectiveness of trial counsel is whether counsel's conduct undermined the proper functioning of the adversarial process so that the trial cannot be

relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to successfully claim ineffective assistance of counsel, the Appellant must meet the two-pronged test set forth in *Strickland* and adopted by the Mississippi Supreme Court. *Stringer v. State*, 454 So. 2d 468, 576 (Miss. 1984).

Under the *Strickland* test, the Appellant must prove that (1) his attorney's performance was defective and (2) such deficiency deprived him of a fair trial. *Id.* at 477. Such alleged deficiencies must be presented with "specificity and detail" in a non-conclusory fashion. *Perkins v. State*, 487 So. 2d 791, 793 (Miss. 1986).

The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. *Hiter v. State*, 660 So. 2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney and there is a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id.* The Appellant must show that there is a reasonable probability that, but for his trial attorney's errors, he would have received a different result in the trial court. *Stringer v. State*, 627 So. 2d 326, 329 (Miss. 1993). With respect to the overall performance of the attorney, "counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy." *Cole v. State*, 666 So. 2d 767, 777 (Miss. 1995). In order to find for the Appellant on the issue of ineffective assistance of counsel, this Court will have to conclude that his trial attorney's performance as a whole fell below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial below. *Coleman v. State*, 749 So. 2d 1003, 1012 (Miss. 1999).

ii. Trial counsel was ineffective in failing to ask for the transfer of the Appellant's case from Circuit Court to its proper jurisdiction in Youth Court.

Should this honorable Court find that the error in Issue One above is insufficiently preserved for Appeal, the Appellant respectfully contends that trial counsel was ineffective in failing to assure that the Appellant was tried in the proper jurisdiction.

There can be no doubt that, as noted in Issue One above, the Appellant, at least according to the record, should have been tried in Youth Court. Had this issue been raised, the trial court would have, if acting in accordance to the law, removed this case from Circuit Court jurisdiction. Therefore, there can be no doubt that trial counsel was ineffective in not raising this issue before the trial court. Furthermore, because the removal from circuit court would have undoubtedly had an effect on the outcome of the Appellant's case, the second prong of *Strickland* is satisfied.

iii. Trial counsel was ineffective in failing to object to the admission of the Appellant's statement to law enforcement officers which was in violation of both Miranda and the Mississippi Youth Court Act.

As noted above, the statements taken by law enforcement officers were taken in violation of the Mississippi Youth Court Act. These statements, however, were not objected to by trial counsel. Trial counsel should have realized that there was no reason, at least according to the record, for the Appellant to be in circuit court. Furthermore, in noticing the Youth Court Act's applicability to the Appellant's case, trial counsel should have realized that the statements taken by law enforcement officers were taken in violation of the provisions of the Youth Court Act. Failure to adequately object to the admission of those statements constitutes ineffective assistance of counsel.

These statements were also taken subsequent to a *Miranda* waiver that, as noted above, was not given knowingly, voluntarily, and intelligently. Trial counsel failed to object to the statements' admissibility. Therefore, should the statements' admissibility be procedurally barred due to failure to raise an adequate objection at the trial level, the Appellant contends that trial counsel's failure to

adequately object constitutes ineffective assistance of counsel.

Absent the statements given by the Appellant, the sole basis for conviction would have been the testimony of Jeremy Stewart which, as noted above, has been substantially impeached and is sufficiently self-contradicted by his previous statements given to police officers. Therefore, the admission of the Appellant's statements undoubtedly had a consequential effect on the outcome at trial.

iv. Trial counsel was ineffective in failing to offer an elements instruction as to the crime of Murder, the underlying felony for which the Appellant was alleged to be an accessory after the fact to.

Should this honorable Court find that the issue of the trial court's failure to adequately instruct the jury as to the elements of murder is procedurally barred because of trial counsel's failure to offer an instruction as to the elements of murder, the Appellant respectfully contends that such failure constitutes ineffective assistance of counsel.

v. Conclusion.

Trial counsel was ineffective in failing to ensure that the Appellant was tried in the proper jurisdiction – youth court. Trial counsel was also ineffective in failing to object to the admissibility of the Appellant's statements to law enforcement officers. Trial counsel was further ineffective in failing to offer to a jury instruction as to the elements of murder. Because trial counsel's ineffectiveness surely had an adverse effect in the proceedings in circuit court, the Appellant respectfully contends that trial counsel's ineffectiveness warrants reversal.

ISSUE EIGHT

WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED APPELLANT OF HIS RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

The cumulative error doctrine stems from the doctrine of harmless error. *Ross v. State*, 954

So. 2d 968, 1018 (Miss. 2007). It holds that individual errors, not reversible in themselves, may combine with other errors to constitute reversible error. *Hansen v. State*, 582 So.2d 114, 142 (Miss. 1991); *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990). The question under a cumulative error analysis is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. *McFee v. State*, 511 So. 2d 130, 136 (Miss.1987).

Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charge. *Ross*, 954 So. 2d at 1018.

As noted above, there is very little, if any, credible evidence that the Appellant was an accessory after the fact to murder. As noted above, the sole evidence of the Appellant's guilt in the instant case comes from Jeremy Stewart, a co-accessory after the fact whose testimony was substantially unreliable and substantively contradicted and impeached by the State's own witnesses. The overwhelming weight of the evidence shows that the Appellant was not an accessory after the fact to the crime of murder. Therefore, the overwhelming evidence in support of a verdict of not-guilty weighs in the favor of the Appellant in this Court's cumulative error analysis.

Improper jurisdiction, constitutionally ineffective counsel, admission of the Appellant's statements in violation of both *Miranda* and Mississippi's Youth Court Act, the failure to adequately instruct the jury as to the elements of murder, and a defective indictment failing to properly anchor the alleged crime with, alone or when taken in concert, deprived the appellant of his right to a fundamentally fair and impartial trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. In the alternative, the Appellant herein would submit that the judgement of the lower court be reversed and vacated, respectively, and this matter remanded to the proper lower court for a new trial on the merits of the indictment on one charge of accessory after the fact to murder, with instructions to the proper lower court. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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CERTIFICATE OF SERVICE

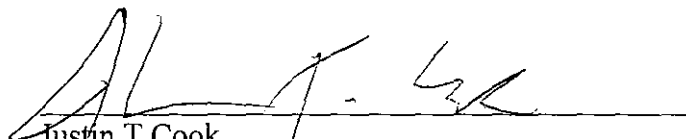
I, Justin T Cook, Counsel for Frederick Miller, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Joseph H. Loper, Jr.
Circuit Court Judge
117 E. Washington Street
Ackerman, MS 39735

Honorable Doug Evans
District Attorney, District 5
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Honorable Jim Hood
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This the 12th day of November, 2008.


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