IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY MCINNIS — APPELLANT

VS. — NO. 2008-KA-1576

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF MISSISSIPPI

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VERSUS **NO. 2008-KA-1576-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Johnny McInnis was convicted in the Circuit Court of the Second Judicial District of Jones County and was sentenced as an habitual offender to a term of 25 years in the custody of the Mississippi Department of Corrections. (C.P.29-31) Aggrieved by the judgment rendered against him, McInnis has perfected an appeal to this Court.

Substantive Facts

THE STATE'S CASE

Investigator Michael Reaves of the Laurel Police Department testified that at approximately 11:00 p.m. on October 8, 2007, he was called upon to investigate a reported burglary of a residence at 1435 32nd Street. Investigator Reaves went on to testify, "32nd Street is located off of Highway 15 North. It is a residential street that runs between Highway 15 North and Old Bay Springs Road Extension." In response to this call, Investigator Reaves initially went to College Drive, which ran "from Highway 15 North across from Bush Dairy," and which was about "a half a mile, six blocks" from 32nd Street. When he "first arrived at College Drive," he "made contact with Officer Shannon Carraway," who "briefed" him on "the stop." He also observed "a male and a female," Johnny McInnis and Bonnie Armstrong, "that they had taken into custody." They had been traveling in a "maroon Oldsmobile four-door car." (T.47-50)

When Investigator Reaves arrived at the scene, "the patrolman" had recovered "a purse" from the Oldsmobile. Another officer had found found a wallet under the seat of the vehicle. Inside the wallet was a driver's license and a social security card, both bearing the name of Hillary P. Kissenger. (T.51) Sergeant Carraway directed Investigator Reaves to the driveway at 24 College Drive, "where the suspect vehicle had been stopped." At that point, she had been informed by Mrs. Kissenger "that there was some cash in the purse and that that cash was in two Trustmark envelopes." Sergeant Carraway then directed Inivestigator Reaves's attention "to the driveway which would have been on the east side of the driveway on the driver side of the vehicle where there were two wadded up Trustmark envelopes." (T.54-55)

Mrs. Kissenger, who was 84 at the time of this offense, was asked to recount what had happened on the night in question. (T.61) She testified as follows:

> I was asleep at night, and I heard a little sound that was unfamiliar in my home. I turned over from my left side to my right, and my dresser was right there. My purse was on the dresser. And I saw this man, light clothing, I'm going to say colored, black, in a white T-shirt, no writing on it, a T-shirt like a man would wear as an under shirt. And all I did is holler, what in the world are you doing in here. And with that I just jumped out of the bed. And he grabbed my purse off the dresser and ran up the hall. And I'm trying to get out. I knew I couldn't catch him. He was going through my kitchen door. So I just turned my light on, went to the phone and called 911.
>
> (T.62)

Mrs. Kissenger stayed on the telephone until the police arrived. At that point, the dispatcher told her that "they caught the man" a few blocks from her house. (T.64)

The district attorney asked her, "[A]re you sure today that it was a male as opposed to a female that was in your house?" Mrs. Kissenger answered, "Definitely a male. He had a belt buckle around him." (T.63)

Mrs. Kissenger went on to testify that the burglar "got in" through the kitchen window. The next morning, she "went to open" that window, but found that "it was already open." (T.65)

Sergeant Carraway testified that she was "just on a routine patrol" when she received the report of a burglary "about two blocks away." The dispatcher told her to look for a "[s]tocky built black male wearing a white T-shirt." As she "was turning in on 33rd Street," Sergeant Carraway saw that "a burgundy car with a black male wearing a white T-shirt was turning off of 32nd Street heading north on Highway 15 North." She "immediately turned around and headed north also." As she followed the burgundy vehicle, it "sped up at a very high rate of speed and continued up north till it turned east onto Bush Dairy Road which crosses of Audubon to College Drive at a very high rate of speed." The car stopped "[i]n front of 24 College Drive." Sergeant Carraway "determine[d] that

he did not live there." (T.71-73) Asked to recount what happened subsequently, Sergeant Carraway testified as follows:

> When I pulled up behind the vehicle that pulled into College Drive, I approached the driver, and it was a black male who I later identified as Johnny McInnis. The passenger in the vehicle was identified as being Ms. Bonnie Woods Armstrong. She's a black hispanic [sic] female.
>
> (T.73-74)

Sergeant Carraway asked McInnis "why was he driving so fast and where was he going." Ms. Woods answered "[t]hat she needed to use the restroom and they were in a hurry." Sergeant Carraway pointed out that "Mr. McInnis had just passed two service stations ... " She then told him that "based on the description that central dispatch had given out," he was a suspect in the burglary of a dwelling in the area, but she did not name the street in question. McInnis responded that he had just been "on 32nd Street trying to hustle some Mexicans." (T.75-76)

Another officer on the scene observed three purses "on the front seat of the vehicle in between Mr. McInnis and Ms. Woods." Ms. Woods "just replied that one of the purses was hers" and that she had no knowledge of the ownership of the other handbags. (T.76)

From the contents of one of the purses, which included a driver's license and credit cards, officers determined that it belonged to Mrs. Kissenger. Furthermore, in Sergeant Carraway's words, "At the edge of the driveway where they actually pulled into the driveway on College Hill Drive it was two balled up Trustmark Bank envelopes that Ms. Kissenger stated were hers with money she had gotten from the bank." While Sergeant Carraway was on the scene, Mrs. Kissenger arrived and identified the purse and the Trustmark Bank envelopes. Finally on direct examination, Sergeant Carraway testified that Ms. Woods was not wearing a white T-shirt at the time. (T.77-78)

THE DEFENDANT'S CASE

The defense first called Investigator Reaves, who testified that Bonnie Woods Armstrong's hair was either "short" or "pulled back" when he interviewed her shortly after this offense. On cross-examination, he testified that Mrs. Kissenger never stated that the intruder had blonde hair. Furthermore, he testified that he had attempted to obtain fingerprints from the scene of the crime but that he had been unable to "find any" of use. (T.85-86)

Next, Sergeant Carraway testified that did not recall and had not documented whether McInnis had been wearing a belt buckle at the time he was stopped. On cross-examination, she testified that she remembered that he was wearing a plain white T-shirt. (T.89)

The defendant testified that Bonnie Woods Armstrong telephoned him "about 10:00, 10:30, somewhere in there," that night, and asked him to pick her up on 32nd Street. McInnnis found her "in the driveway with something right down her side like somebody had done kicked her out or something." McInnis "stepped out the car and helped her put her belongings in the car," and then "pulled out of the driveway. Shortly thereafter, Sergeant Carraway stopped him, and in short order a male officer "pulled up" to take him and Ms. Armstrong out of the car. McInnis testified that he did not break into Mrs. Kissenger's residence. (T.96-99)

SUMMARY' OF THE ARGUMENT

The trial court did not err in granting Instruction S-2, which authorized the jury to find the defendant guilty if he acted as an accomplice. A reasonable juror, accepting in part and rejecting in part the testimony of the state's and the defendant's witnesses, could have concluded that the defendant did so act. The instruction was supported by the evidence; the court did not err in granting it.

The state's case was not based solely upon circumstantial evidence. Therefore, the trial court did not err in denying the defendant's two-theory instruction.

PROPOSITION ONE:

THE TRIAL COURT DID NOT ERR IN GRANTING INSTRUCTION S-2

McInnis first contends the trial court committed reversible error in granting Instruction S-2, set out below:

> The Court instructs the jury that each person present at the time, and consenting to and encouraging the commission of a crime, and knowingly, willingly and feloniously doing any act which is an ingredient to the crime, or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense; and if you believe from the evidence, beyond a reasonable doubt, that the defendant, Johnny L. McInnis, did willfully, knowingly, unlawfully, and feloniously do any act which is an ingredient of the crime of burglary of a dwelling or immediately connected with it, or leading to its commission, then and in that event, you should find the defendant guilty as charged.
>
> (C.P.15)

When this instruction was tendered, the district attorney stated that

> [it]'s a short instruction that says that obviously his defense is that Bonnie Armstrong did it. In the instruction is says that if they believe that he acted along with her, they're both as guilty as if he'd of [sic] done it, that they're both in it together.
>
> (T.106)

The defense countered that the instruction had no evidentiary support. The court then concluded, "They're taking a precautionary instruction here to cover what your evidence was in that he testified that she did it." The court then granted the instruction. (T.106-07)

McInnis contends on appeal that this instruction was improperly given as it was not supported by the evidence. The state counters at the outset that the testimony presented provided a sufficient

basis for this instruction. First, the state submits that "the jury may accept the testimony of some witnesses and reject that of others, and that they may accept in part and reject in part the evidence on behalf of the State or on behalf of the accused." *Yarbrough v. State*, 996 So.2d 804, 809 (Miss.2008), quoting *Scott v. State*, 796 So.2d 959, 968 (Miss.2001). The defendant himself put on evidence to the effect that Bonnie Armstrong committed this crime. However, a reasonable juror, accepting in part and rejecting in part the evidence put on by the state and the defense, well could have determined that the defendant and Ms. Armstrong acted in concert.[1]

McInnis relies primarily on *Brazile v. State*, 514 So.2d 325 (Miss.1987), which is distinguishable. The reversal in *Brazile* turned primarily on the fact that the the case against the appellants was based solely on circumstantial evidence.[2] As the state will show under Proposition Two, this was not true in the case at bar.

In conclusion, the state submits that a reasonable juror, accepting in part and rejecting in part the testimony presented by the prosecution and the defense, could have concluded that the defendant and Ms. Armstrong acted in concert in committing this offense, and that the defendant was therefore guilty as an accomplice. Therefore, the trial court did not err in granting Instruction S-2. Accordingly, McInnis's first proposition should be denied.

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[1]The state was not required to affirmatively advance this theory in order to be entitled to an accomplice instruction. *See Johnson v. State*, 956 So.2d 358, 364 (Miss. App. 2007).

[2]The Court in *Brazile* also noted that the instruction in issue was "awkward and misleading" on two points. 514 So.2d at 326. The instruction at issue here is not challenged on this basis.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN DENYING THE TWO- THEORY INSTRUCTION

McInnis finally contends that the trial court committed reversible error in denying his proffered two-theory instruction. (C.P.19) Initially, the state responds that it is well-settled that such instruction "should be given only when the prosecution is without a confession or eyewitness to the gravamen of the offense charged." Jones v. state, 930 So.2d 465, 477 (Miss.2006), citing *Leedom v. State*, 796 So.2d 1010, 1020 (Miss.2001).[3]

The "gravamen of a burglary is 1) breaking and entering of a dwelling 2) with felonious intent to commit a crime." *Price v. State*, 749 So.2d 1188, 1197 (Miss.App.1999), citing *Mack v. State*, 481 So.2d 793, 795 (Miss.1985). Mrs. Kissenger provided direct evidence that a black male wearing a white tee shirt appeared in her bedroom late at night and took her purse from her dresser. (T.62)

While Mrs. Kissenger could not positively identify the defendant as the burglar, the state presented strong corroborating proof of his identity as the perpetrator, i.e. that he was apprehended a few minutes later in the vicinity, matching her description and in possession of her purse. See *Price,* 749 So.2d at 1197.

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[3]In other words, the two-theory instruction "is appropriate only in wholly circumstantial evidence cases." *Rowland v. State*, 531 So.2d 627, 631 (Miss.1988).

Mrs. Kissenger's testimony presented direct evidence of the gravamen of a burglary. Therefore, the state's case was not based solely on circumstantial evidence. The trial court did not err in refusing the two-theory instruction. McInnis's second proposition should be denied.

CONCLUSION

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

Respectfully submitted,

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BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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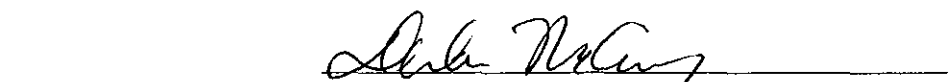
This the 4th day of August, 2009.



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