

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY MCINNIS

APPELLANT

V.

NO. 2008-KA-1576-COA

STATE OF MISSISSIPPI

APPELLEE

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. Johnny McInnis, Appellant
3. Honorable Anthony J. Buckley, District Attorney
4. Honorable Billy Joe Landrum, Circuit Court Judge

This the 28th day of April, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE ONE:

**WHETHER THE TRIAL COURT ERRED IN GRANTING JURY INSTRUCTION S-2
BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE INSTRUCTION**

ISSUE TWO:

**WHETHER THE TRIAL COURT ERRED IN NOT GRANTING DEFENSE
COUNSEL'S CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION.**

STATEMENT OF INCARCERATION

Johnny L. McInnis, the Appellant in this case, is presently incarcerated in the Mississippi
Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of the case pursuant to **Article 6, Section 146 of**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jones County, Mississippi, second judicial district and a judgment of one count of burglary of a dwelling against Johnny L. McInnis, following a trial on August 20, 2008, the honorable Billy Joe Landrum, Circuit Judge, presiding. Mr. McInnis was subsequently sentenced to twenty five (25) years of imprisonment in the custody of the Mississippi Department of Corrections under **Miss. Code Ann. § 99-19-81**.

FACTS

According to the testimony presented at trial, on October 8th, 2007, Officer Shannon Carraway (“Officer Carraway”), a Sergeant with the Laurel Police Department, responded to a dispatch concerning the burglary of a dwelling at 1438 32nd Street. (Tr. 71-72). When the call came in, Officer Carraway was just two (2) blocks away from the scene. (Tr. 72). Officer Carraway was given a description of the subject which was that of a black male wearing a white T-shirt. *Id.*

According to Officer Carraway, as she was heading towards the scene she saw a burgundy car being driven by a black male wearing a white T-shirt. (Tr. 72). She turned her patrol car around and began following the vehicle. *Id.* As she pulled behind the vehicle, it sped up, “at a high rate of speed.” (Tr. 73). However, Officer Carraway did not charge the driver with speeding and could not tell how fast the vehicle was actually going. (Tr. 80).

After the vehicle came to a stop in a driveway, Officer Carraway pulled in behind and approached the driver. (Tr. 73). Officer Carraway later identified the driver of the vehicle as Johnny McInnis (“McInnis”) and the passenger as Bonnie Armstrong (“Armstrong”). *Id.* Officer Carraway informed McInnis that he was being pulled over because he matched the description of

the suspect in a recent burglary. (Tr. 75). During the course of the stop, the officer assisting Officer Carraway noticed three (3) purses on the front seat between McInnis and Armstrong. (Tr. 76). Officer Carraway asked Armstrong about the purses. *Id.* Armstrong responded that only one of the purses belonged to her. *Id.*

Later, Officer Carraway determined that one of the purses belonged to Hillary Kissenger ("Kissenger"), whose house at 1438 32nd Street had been burglarized earlier that night. *Id.* After Officer Carraway discovered the purse belonged to Kissenger, she pulled both occupants out of the vehicle and patted them down for weapons or narcotics. (Tr. 77). Subsequently, Officer Carraway found two crumpled Trustmark Bank envelopes at the edge of the driveway which Kissenger later identified as belonging to her. *Id.* In addition to the Trustmark Bank envelopes Kissenger was able to identify the purse containing her identification as belonging to her.

According to Kissenger, on the night of October 8, 2007, she heard an unfamiliar noise in her home. (Tr. 62). She awoke to see a black male in a white T-shirt grabbing her purse. *Id.* Kissenger was unable to put on her prescription glasses or turn on her bedroom lamp. (Tr. 69). Kissenger testified that she was sure it was a male and not a female who grabbed her purse because, "he had a belt buckle around him." (Tr. 62). As the suspect exited her home, Kissenger picked up the phone and called 911. (Tr. 63).

The defendant, McInnis, took the stand in his own defense. McInnis testified that on the night in question he received a phone call from Armstrong asking him to come pick her up on 32nd Street. (Tr. 97,99-100). When he picked Armstrong up, he noticed she had multiple purses. (Tr. 100). According to McInnis, he believed Armstrong was on something that night. *Id.* Nevertheless, he helped her get her stuff. *Id.*

According to McInnis, after he picked up Armstrong, Officer Carraway turned around and

pulled him over. *Id.* After pulling them over, Officer Carraway stated she needed to search the car and then grabbed the purse from the vehicle. (Tr. 98). McInnis testified that the purses did not belong to him and that he did not break into Kissenger's house. (Tr. 98-99).

The Appellant, McInnis, was convicted of one count of burglary of a dwelling house after a jury trial on August 20, 2008. (C.P. 29-3, R.E. 9-11). McInnis was subsequently sentenced to twenty five (25) years in the custody of the Mississippi Department of Corrections as a habitual offender. (C.P. 29-31, R.E. 9-11). On August 28, 2008, McInnis filed a Motion for J.N.O.V. or for a New Trial in the alternative. (C.P. 33-34, R.E. 12-13). The motion was denied on September 19, 2008. (C.P. 41, R.E. 15). Feeling aggrieved by the jury verdict and the sentence of the trial court, the Appellant filed a timely notice of appeal. (C.P. 35, R.E. 14).

SUMMARY OF THE ARGUMENT

The trial court erred in granting the State's accomplice jury instruction. The record is barren of any facts to support the granting of said instruction. Because the jury was improperly instructed as to the law, this honorable Court should reverse the Appellant's conviction and remand for a new trial consistent with the laws of the state of Mississippi.

The trial court further erred in denying the Appellant's circumstantial evidence jury instruction. There was no confession on the part of the Appellant and there was no eyewitness testimony that identified the Appellant as the person inside of Ms. Kissenger's house. Because the evidence presented at trial supported the giving of a circumstantial evidence jury instruction, the trial court committed reversible error.

ARGUMENT

ISSUE ONE: WHETHER THE TRIAL COURT ERRED IN GRANTING JURY INSTRUCTION S-2 BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE INSTRUCTION

i. Standard of Review

“In determining whether error lies in the granting or refusal of various of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found.” *Collins v. State*, 691 So. 2d 918, 922 (Miss. 1989) (quoting *Hickombottom v. State*, 409 So. 2d 1337, 1339 (Miss. 1982)).

The Mississippi Supreme Court follows the general rule that all instructions should be supported by the evidence in the record. *Brazile v. State*, 514 So. 2d 325, 326 (Miss. 1987). Furthermore, the Supreme Court has held that, “[t]o grant an instruction that is not supported by the evidence would be error.” *Lancaster v. State*, 472 So. 2d 363, 365-366 (Miss. 1985).

ii. The evidence was insufficient to support the accomplice instruction

During discussion on jury instructions, the State offered its accomplice jury instruction which stated:

The Court instructs the jury that each person present at the time, and consenting to and encouraging the commission of a crime, and knowingly, willfully 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, R.E. 7).

The State explained its reasoning as follows:

It’s a short instruction that says that obviously his defense is that Bonnie Armstrong did it. In the instruction it says 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.

Basically an accomplice in conjunction with instruction.

(T. 106).

Defense counsel promptly objected to the offering of the instruction: "I think the jury either believes that Mr. McInnis did it or Ms. Bonnie Armstrong. I don't think that they put on any evidence of evidence of AN (sic) accomplice. Therefore, I'd object to that being submitted." (Tr. 106).

The trial court granted the instruction, concluding: "They're not accusing them of having an accomplice. They're taking a precautionary instruction here to cover what your evidence was in that he testified that she did it." (Tr. 106).

Respectfully, the trial court's reasoning misses the point. Yes, the Appellant testified that Armstrong was the person who had the purses when he picked them up. (Tr. 100). That he testified that Armstrong did it has no bearing on the appropriateness of an accomplice instruction. Under the trial court's reasoning, any time a criminal defendant claimed that he or she did not commit the crime, and that someone else did, the State would be entitled to an accomplice instruction. Such a conclusion is not supported by the law of the State of Mississippi.

The record is void of any evidence to support giving the State's accomplice jury instruction. The State's theory of the case during its case in chief was that the Appellant was the person who burglarized the dwelling. The State made no argument that it was Bonnie Armstrong that committed the alleged burglary.

During the defense's case, no evidence was brought to light that support such a jury instruction. The Appellant simply testified that he did not rob the house and that when he picked up Armstrong that evening, she had multiple purses. (Tr. 98-99, 100). There was no evidence

that he in any way provided aid to Armstrong. The testimony was simple: The Appellant picked up Armstrong and shortly thereafter was pulled over by law enforcement. (Tr. 98, 100). Such meager evidence does not support the granting of the State's accomplice instruction.

In *Brazile v. State*, the Mississippi Supreme Court reversed two Appellant's convictions because the trial court gave an aiding and abetting jury instruction that was not supported by the evidence. *Brazile v. State*, 514 So. 2d 325, 326 (Miss. 1987). The Court held;

“[T]he instruction is not founded upon the evidence elicited at trial. The case against these appellants was built entirely on circumstantial evidence. The two defendants were found together in a car, stolen merchandise in hand, close to a burglary both in time and place. No evidence indicates that either man was not an actual participant in the burglary. There is no evidence that either of the defendants aided or abetted the other.”

Id. (emphasis added).

The facts in the instant case are part and parcel to *Brazile*. As noted above, there is no evidence whatsoever that the Appellant was an accomplice of Armstrong; therefore, the instruction was not supported by the evidence. This is axiomatic of Mississippi Law: “The general rule is that all instructions should be supported by evidence, citation of authority is not necessary.” *Id.*

Furthermore, the error in presenting the jury with an instruction not supported by the evidence cannot be deemed harmless. Absent some thaumaturgic soothsaying, there is no way to know whether the jury relied on the improperly given jury instruction to reach its ultimate conclusion as it relates to the Appellant's guilt. Without such knowledge, there is no way to be sure that the Appellant's conviction and sentence is based on an accurate and appropriate legal basis; consequently, the error in appropriately instructing the jury in accordance with the law and evidence cannot be deemed harmless.

ISSUE TWO: WHETHER THE TRIAL COURT ERRED IN NOT GRANTING DEFENSE COUNSEL'S CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION.

i. Standard of Review.

"[I]f the [jury] instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Williams v. State*, 803 So. 2d 1159, 1161 (Miss. 2001) (citing *Hickombottom v. State*, 409 So. 2d 1337, 1339 (Miss. 1982)). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." *Milano v. State*, 790 So. 2d 179, 1984 (Miss. 2001).

ii. A circumstantial evidence jury instruction was warranted.

During jury instruction deliberations, defense counsel offered D-3, a circumstantial evidence jury instruction. D-3 provided;

The Court instructs the jury that if the evidence in this case presents two reasonable theories, one trending to indicate that the Defendant, Johnny McInnis, is guilty and the other trending to indicate that he is innocent, it is your duty to accept the theory favorable to Johnny McInnis and to find him not guilty. (C.P. 19, R.E. 8).

Instruction D-3 was, without much explanation from the trial court, refused as being "cumulative with the Court's instructions." (T. 107).

When all of the evidence tending to prove the guilt of a defendant is circumstantial, the trial court must grant a jury instruction that every reasonable hypothesis other than guilt must be excluded in order to convict. *Manning v. State*, 735 So. 2d 323, 338 (Miss. 1999).

Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to logical inference that such fact does exist. *Id.*

A circumstantial evidence instruction must be given only when the prosecution can produce neither an eyewitness nor a confession/statement by the defendant. *Clark v. State*, 503

So. 2d 277, 279 (Miss. 1987).

Recently, the Mississippi Supreme Court affirmed a conviction where the Appellant alleged ineffective assistance of counsel in an attorney's failure to ask for a circumstantial evidence jury instruction. *Johnson v. State*, 2007-Ka-02018-SCT (Miss. 2008). The facts in *Johnson*, however, are easily distinguishable from the facts of the case *sub judice*. In *Johnson*, the Supreme Court was asked to reverse the conviction based on plain error. In the instant case, trial counsel offered a circumstantial evidence jury instruction, which was refused. Furthermore, in *Johnson*, the defendant was arrested in a vehicle with no other passenger. *Id.* ¶31. In the instant case, the Appellant was pulled over in a vehicle with another individual.

In the instant case there is no confession on the part of the Appellant, nor was there any eyewitness testimony from Ms. Kissenger that indicated the person who was in her house was, in fact, the Appellant. Ms. Kissenger's sole testimony as to the identity of the person inside of her house was that it was that she saw a black man with a white t-shirt. (T. 62).

The Appellant respectfully contends that such evidence is not sufficient to identify the Appellant as the person inside of the house. That Ms. Kissenger saw a black male in a white t-shirt is not an eyewitness identification. Ms. Kissenger did not identify the Appellant. Should this Court allow such testimony to excuse the trial courts of the State of Mississippi from providing a circumstantial evidence jury instruction, in any case in which a witness testifies to generic traits, the purpose for such an instruction will have been significantly gutted. The Appellant respectfully contends that such situations run afoul of the spirit of the law of the State of Mississippi.

iii. Conclusion.

Because the Appellant did not make an "admission on a significant element of the

offense,” and there was no adequate eyewitness identification, the trial court erred when it refused to grant the circumstantial evidence jury instruction. For this reason this honorable Court should reverse the Appellant’s conviction and remand for a new trial consistent with the findings of this Court.

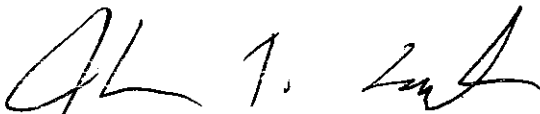
CONCLUSION

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, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on one charge of burglary of a dwelling, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. 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:



Justin T Cook
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Johnny McInnis, 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 Billy Joe Landrum
Circuit Court Judge
525 Central Avenue, Suite 1
Laurel, MS 39441

Honorable Anthony J. Buckley
District Attorney, District 18
Post Office Box 313
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Honorable Jim Hood
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This the 28th day of April, 2009.


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