

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT MITCHELL HILLARD, APPELLANT

VS.

STATE OF MISSISSIPPI, APPELLEE

CAUSE NO. 2008-KA-02055-COA

APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

Latrice Westbrooks, Esq.
Mississippi Bar No. [REDACTED]
The Law Office of Latrice Westbrooks, PLLC
5269 Keele Street, Suite B (39206)
Post Office Box 14203
Jackson, Mississippi 39236
601-982-7884 (telephone)
601-982-7889 (facsimile)

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ARGUMENT

I. THE DENIAL OF THE CONTINUANCE AMOUNTED TO MANIFEST INJUSTICE AGAINST THE DEFENDANT, MR. HILLARD

¶1. Mr. Ganner certainly expressed his need to carefully review the new evidence conveyed to him the day prior to trial. He expressed the need to possibly enhance the video and review the audio tape given to him. He told the court he needed additional time to prepare. Additional time would have allowed the defendant to determine if there was any exculpatory information that would aid in his defense.¹ Moreover, while Guest explicitly told the court that the State did not plan to use or introduce the audiotape or the videotape in evidence, he referenced the discs throughout the direct examination of the confidential informant, Officer McMillan and Officer McAbee. Hence, using the discs in evidence making the witnesses' testimony more probable on the issue. He also referenced Hillard's failure to use the same in his closing argument. Use of the evidence had an impact on the credibility of the story told by the witnesses. *Jackson v. State*, 551 So.2d 132 (Miss. 1989).

II. THE PROSECUTOR'S COMMENTS COULD BE REASONABLY CONSTRUED AS A COMMENT UPON THE DEFENDANT'S FAILURE TO TAKE THE STAND. ORAL INSTRUCTION TO THE JURY WAS NOT SUFFICIENT WITHOUT A WRITTEN INSTRUCTION ON THE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION.

¶2. The state claims that the Prosecutor's comments were directed toward the confidential informant and not the defendant. The appellee also declares that upon a timely objection, the court sustained the objection and instructed the jury. However, the court neglected to give a written

¹ A defendant needs to show what would have been added to the defense had additional time been granted. *Stubbs v. State*, 845 So.2d 656, 666 (¶41) (Miss. 2003).

instruction on the defendant's right not to testify. The Court has opined that regarding comments on the failure of a defendant to testify or to remain silent, this Court has stated its position when an instruction is given by the trial court to cure this defect. *Birkhead v. State*, 2009 Miss. LEXIS 73. In *Blue v. State*, this Court held that the effect of a comment by the prosecutor on the failure of the defendant to testify "was corrected by the jury instructions." *Blue v. State*, 674 So. 2d 1184, 1215 (Miss. 1996). In *Strahan v. State*, this Court ruled the error of the prosecutor's comment on the defendant's right to remain silent was not reversible, as an instruction was given to the jury to ignore the comment. "This is a very close issue, which involves a fundamental right. . . . However, given the context of the comment and the content of the written instructions, there is no reversible error." *Strahan v. State*, 729 So. 2d 800, 807 (Miss. 1998).

¶3. While the Court gave an oral charge to the jury (T.rec. 200-201), there was no written instruction commenting on the Defendant's right not to testify (or his right against self-incrimination) given in the Court's instructions to the jury. No written instruction was given regarding the defendant's right to not testify. The judge cannot give instructions except in writing. *Weaver v. Grenada Bank*, 180 Miss. 876, 179 So.2d 564 (1938). Jury instruction C-2 mentioned that the defendant is not required to prove his innocence. However that is not tantamount to an instruction telling the jury that the defendant has an absolute right not to testify against himself.

¶4. Moreover, after Guess' alleged "slip up", the district attorney went further commenting on the defendant's failure to produce or introduce evidence (T.rec. 211-212). The State/Appellee completely failed to respond to this contention in the appellant's brief. As stated before, After being cautioned on the previous error, Mr. Guest made direct comments on the Defendant's failure to introduce evidence in his defense. The prosecutor stated that the defendant could have introduced

“those tapes in evidence just as we could”. He went on to state that if the “photocopy bills didn’t match up, that *they* would have introduced those in evidence? *They* had access to those just as we did”. (*emphasis added*). Specifically, the district attorney put an obligation/burden on the defendant, the same as the State, to present evidence and not remain silent, which is his constitutional right. This comment of the prosecutor can reasonably be construed as a comment upon the failure of Mr. Hillard, the accused, to take the stand. *Whigham v. State*, 611 So.2d 988 (Miss. 1992).

III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GRANT AN INFORMANT INSTRUCTION THAT HILLARD REQUESTED?

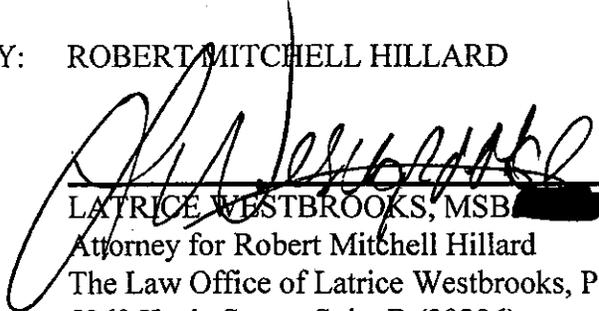
¶5. The State does not contend that the confidential informant was not an accomplice or a co-defendant in the case at bar. According to the State’s own brief if the witness meets the description above, the Court may grant a cautionary instruction. Unlike *Steen v. State*, 873 So.2d 155 (Miss.Ct.App. 2004), Hillard’s case was based entirely upon the cooperation and testimony of the confidential informant. See *Edwards v. State*, 630 So.2d 343, 344 (Miss. 1994). The confidential informant’s testimony regarding the events was uncorroborated. In that situation, the cautionary instruction is mandatory and not permissive. Inasmuch, failure to give the cautionary instruction was error on the part of the trial court.

CONCLUSION

¶6. Appellees respectfully pray that this Court reverse the verdict of the Rankin County jury and remand the case back to the Rankin County Circuit Court. The Appellant also requests any relief under the principals of law and equity to which he may be entitled.

Respectfully Submitted this the 21st day of December, 2009.

BY: ROBERT MITCHELL HILLARD



LATRICE WESTBROOKS, MSB
Attorney for Robert Mitchell Hillard
The Law Office of Latrice Westbrook, PLLC
5269 Keele Street, Suite B (39206)
Post Office Box 14203
Jackson, Mississippi 39236
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601-982-7889 (facsimile)

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CERTIFICATE OF SERVICE

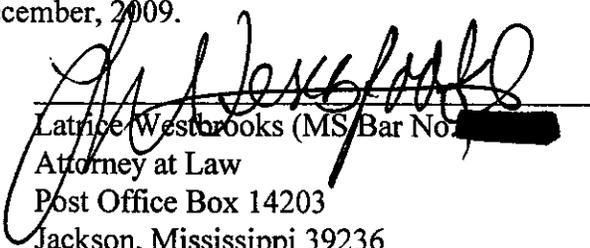
I, LATRICE WESTBROOKS, do hereby certify that I have this day forwarded, via facsimile and U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing the Reply Brief of the Appellant to all parties concerned as listed below:

Michael Guest, District Attorney
Rankin County, District 20
P.O. Box 68
Brandon, Mississippi 39043

Honorable William E. Chapman, III
Rankin County Circuit Court Judge
Post Office Box 1626
Canton, Mississippi 39046

Jim Hood, Attorney General
State of Mississippi
450 High Street, Suite 1200
Jackson, Mississippi 39201

THIS the 21st day of December, 2009.



Latrice Westbrook (MS Bar No. [REDACTED])

Attorney at Law
Post Office Box 14203
Jackson, Mississippi 39236
Telephone: 601-982-7884
Facsimile: 601-982-7889