IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIE WILLIAMS, JR. — APPELLANT

V. — NO. 2009-KA-0080-SCT

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

NO ORAL ARGUMENT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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STATEMENT OF THE ISSUES

I. WILLIAMS' OBJECTION TO THE COURT'S DENIAL OF PROPOSED JURY INSTRUCTION D-9 WAS PROPERLY PRESERVED FOR APPELLATE REVIEW.

II. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE THAT THE ALIBI WITNESS, CHEROKEE COX, WAS MORE ACCESSIBLE TO THE DEFENSE AND, AS SUCH, ERRED IN COMMENTING ON WILLIAMS' FAILURE TO PRESENT COX AS AN ALIBI WITNESS.

ARGUMENTS

I. WILLIAMS' OBJECTION TO THE COURT'S DENIAL OF PROPOSED JURY INSTRUCTION D-9 WAS PROPERLY PRESERVED FOR APPELLATE REVIEW.

The State argues that Williams is procedurally barred in this appeal from raising the issue of the improperly denied cautionary jury instructions. [Appellee's Brief, 9]. The State submits that Williams failed to object to the relevant jury instructions granted and that D-9 was a sufficient jury instruction to satisfy the defense's request for a cautionary jury instruction.

Williams's issue argues that the Court erred in failing to grant the cautionary jury instruction. Williams fails to see how the State's argument is relevant to this issue. The State cites *Barnett v. State*, 563 So. 2d 1377, 1380 (Miss. 1990), as support that Williams should have objected to the granted jury instructions. In *Barnett*, the defendant complained that the trial court granted an improper jury instruction submitted by the State. *Id.* In this case, Williams is arguing that the court failed to grant a jury instruction that was submitted by Williams, and not the State.

Furthermore, the State argues that Jury Instruction No. 8 (D-9), sufficiently instructed the jury on the law. To the contrary, D-9 instructed the jury to view with caution Montreal Veals' prior inconsistent statements. [R. 132]. This is quite different from William's request that the court instruct the jury to view both testimonies from Montreal Veal and Terrance Young with caution because they implicated themselves as accomplices in the crime. [Tr. 126-27]. Williams complains because the court did not grant the proper cautionary jury instructions regarding accomplice testimony, not because the court granted the instructions that dealt only with Montreal Veals' prior inconsistent statements.

Williams rests on the arguments supplied in his Appellant's Brief to address the issue of the court's failure to grant the proper cautionary jury instructions.

II. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE THAT THE ALIBI WITNESS, CHEROKEE COX, WAS MORE ACCESSIBLE TO THE DEFENSE AND, AS SUCH, ERRED IN COMMENTING ON WILLIAMS' FAILURE TO PRESENT COX AS AN ALIBI WITNESS.

The State argues that Cherokee Cox was "more accessible to Williams than she was to the prosecution." [Appellee's Brief, 16-17]. The State fails to cite any portion of the record that would support this assertion. As a general rule, both parties are prohibited from commenting on the failure of the other party to examine a particular witness, if that witness was equally accessible to both parties. *Morgan v. State*, 388 So. 2d 495, 497-98 (Miss. 1980). However, in cases where the particular witness was found to be more available and in a closer relationship to one party, the Courts have allowed the opposing party to comment on the witness's absence. *Brown v. State*, 764 So. 2d 484, 487 (¶11)(Miss. Ct. App. 2000). When there is no proof regarding the witness's accessibility, it is presumed that both parties had equal access to the witness. *Gayle v. State*, 743 So. 2d 392, 402 (¶39) (Miss. Ct. App. 1999).

Cherokee Cox is briefly mentioned as Williams' "friend" during Williams' cross-examination. [Tr. 120] There is no other mention of Cox's relationship to Williams or any other party in the case. This vague description of Cox as Williams' "friend" is not sufficient to support the State's claim that Cox was more accessible to the defense.

The Mississippi Supreme Court has previously addressed the issue of an absent witness's accessibility. In *Ross v. State*, 603 So. 2d 857, 864 (Miss. 1992), the Court explained that a witness's accessibility is not determined by whether or not a person merely could have been summoned by either party, rather whether or not the absent witness's testimony was equally available to both parties.

The test for a witness's availability has been defined as the following:

> The 'availability' of a witness to one of the other of the parties to an action depends either upon such party's superior means of knowledge of the existence and identity of the witness, or else upon the relationship of the witness to the party as the same would reasonably be expected to affect his personal interest in the outcome of the litigation and make it natural that he would be expected to testify in favor of the one party and against the other.

Brown v. State, 200 Miss. 881, 889-90, 27 So.2d 838, 841 (Miss. 1946) (citing *Huskey v. Metropolitan Life Ins. Co.*, 94 S.W.2d 1075, 1078 (Mo. Ct. App. 1936))

Stated plainly, the question becomes whether Cherokee Cox had such a close relationship with Williams that the relationship would have been expected to "affect [her] personal interest in the outcome" of the case, such that she would have naturally been expected to testify in favor of Williams and against the State. Often, the Court considers the witness and party's familial relationships as sufficient evidence that a party as more accessible to one party over the other. *Fox v. State*, 756 So. 2d 753, 762 (¶31) (Miss. 2000).

In this case, there is no evidence that Cherokee Cox and Williams shared a close familial relationship or that she stood in a "community of personal interest" with Williams. See *Ross v. State*, 603 So. 2d at 864-65.

This case is akin to the situation in *Burke v. State*, 576 So. 2d 1239, 1241 (Miss. 1991). Burke was charged with burglary of a dwelling. *Id* at 1239. One witness claimed that she saw Burke at the scene of the crime, while the other witness claimed she received the stolen property from Burke. *Id.* at 1240. Burke testified that he was not in the vicinity of the apartment during the burglary, rather he was at a friend's house during that time. *Id.* During the State's closing arguments, the prosecutor made several comments on Burke's failure to call his friend at the trial. *Id.* at 1241. The Court found these comments were improper before the jury, noting the following :

> There is no suggestion on this record that the witness in question was not equally

> available to the state. He is not identified as a person under the control of the defendant. Nor is he a close relative who would ordinarily be expected to be put in an unacceptable compromising position should he be called to testify as to the validity of Burke's alibi. Under the circumstances, we much conclude that the court erred in failing to sustain the objection to this argument.

Id.

The Court should reach the same just result in this case. After the Court finds that the statements were in error, however, the Court must then undergo a harmless error analysis. *Brock v. State*, 530 So. 2d 146, 154 (Miss. 1988). "Harmless error analysis requires this Court to consider the substantial evidence and determine whether the error by the State is so prejudicial that despite the substantial evidence, a reversal is warranted." *Fox v. State*, 756 So. 2d 753 at 763 (¶34).

Considering the close evidence in this case, a reversal of Williams' conviction is warranted. Terrance and Montreal's testimonies were the only evidence that identified Willie as the gunman in the attempted armed robbery of Stephanie's Discount Store. Neither Williams' fingerprints nor DNA was discovered at the scene of the crime. The store clerk was unable to identify anyone that was involved in the attempted robbery and law enforcement failed to discover any weapons on Williams when the police came to his house. The only evidence that link Williams to the crime are the contradictory testimonies of two biased and self-interested co-defendants to the attempted armed robbery.

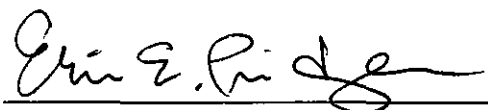
Additionally, the State argues that this issue is procedurally barred from appellate review. [Appellee's Brief, 13]. This issue should be considered by the Court under the plain error doctrine. Williams rests on the arguments set forth in his Appellant's Brief to support this assertion.

CONCLUSION

The denial of Williams' cautionary jury instructions regarding accomplice testimony, coupled with the State's impermissible statements during closing arguments are reversible errors. Williams respectfully requests this Court to reverse and render the trial court's decision or, in the alternative, that this Court reverse and remand this case to the trial court for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Willie Williams, Jr., Appellant

By: 

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CERTIFICATE OF SERVICE

I, Erin E. Pridgen, Counsel for Willie Williams, Jr., 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 **REPLY BRIEF OF THE APPELLANT** to the following:

Honorable Richard A. Smith
Circuit Court Judge
Greenwood, MS 38935

Honorable Dewayne Richardson
District Attorney, District 4
P.O. Box 426
Greenville, MS 38702

Honorable Jim Hood
Attorney General
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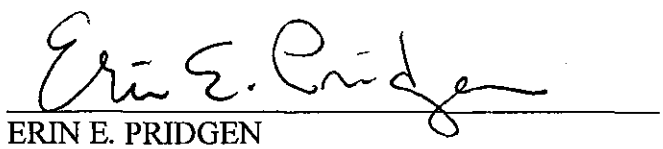
This the 14th day of August, 2009.



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