

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIE WILLIAMS, JR.

APPELLANT

V.

NO. 2009-KA-0080-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

On Appeal from the Circuit Court of Sunflower County, Mississippi

MISSISSIPPI OFFICE OF INDIGENT APPEALS

Erin E. Pridgen, MS Bar No. [REDACTED]

301 North Lamar Street, Suite 210

Jackson, Mississippi 39201

Telephone: 601-576-4200

Counsel for Willie Williams, Jr.

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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.

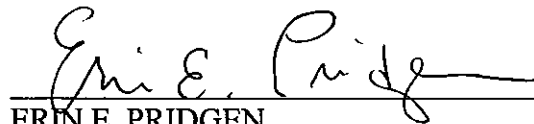
1. State of Mississippi
2. Willie Williams, Jr., Appellant
3. Honorable Dewayne Richardson, District Attorney
4. Honorable Richard A. Smith, Circuit Court Judge

This the 8th day of July, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



ERIN E. PRIDGEN

COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF THE ISSUE

I. THE TRIAL COURT IMPROPERLY REFUSED THE CAUTIONARY JURY INSTRUCTION CONCERNING THE ACCOMPLICES' TESTIMONY.

II. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO GRANT A MISTRIAL, SUA SPONTE, DUE TO THE STATE'S IMPROPER COMMENTS ON WILLIAMS' FAILURE TO PRESENT ALIBI WITNESSES

STATEMENT OF THE CASE

A Sunflower County, Mississippi grand jury indicted Willie Williams, Jr., along with Montreal Veal and Terrance Young for attempted armed robbery. Veal and Young filed motions to sever from this case. The Honorable Richard A. Smith, Circuit Court Judge, presided over Williams' trial, which was held November 12 & 14, 2008. The jury returned a guilty verdict and the

court sentenced Williams to serve fifteen (15) years in the custody of the Mississippi Department of Corrections, with ten (10) years to serve without the possibility of parole, followed by five (5) years on post-release supervision.

On November 21, 2008, Williams filed his motion for JNOV, or alternatively, motion for a new trial. The court denied this motion and, on December 19, 2008, Williams timely noticed this appeal.

FACTS

Stephanie Cannon owned and operated Stephanie's Discount Store in Ruleville, Mississippi. [Tr. 47]. According to Stephanie, on March 22, 2007, she was busy in her store when a young man entered and asked for her assistance. Moments later, another male, his face covered by a polo shirt, entered the store and pointed a gun at her. [Tr. 48]. Stephanie immediately grabbed her gun and shot at the man while she took cover behind the store's sales counter. The young men fled the scene and Stephanie noticed that there was a gun left lying inside of the store, near the door. As Stephanie neared the door to retrieve the weapon, one of the young men returned and Stephanie shot him. [Tr. 49] The young man ran across the street, leaving a trail of blood behind him. [Tr. 50]

The Ruleville Police Department arrived shortly following the shooting. [Tr. 55] Stephanie informed both Officer Ward and Captain Amos Mitchner that there were two men who were involved in the attempted robbery. [Tr. 43,62]

After speaking with Stephanie, Officer James Lewis Ward followed the blood trail from Stephanie's store to the location where the young man lay across the street. [Tr. 39] There, he found Terrance Young lying on the ground. [Tr. 40] Days after the shooting, while still at the hospital, Captain Amos Mitchner questioned Terrance about his involvement in the shooting. Terrance

implicated three people in the attempted robbery – Montreal Veal, Willie Williams, Jr., and himself. [Tr. 59]

When the police questioned Montreal Veal, he told the authorities that there were only two people involved in the attempted armed robbery of the store – Terrance Young and Willie Williams, Jr. [Tr. 75-76] At a court proceeding held prior to this trial, Montreal reiterated that he was not present at Stephanie's store. [Tr. 77-78] However, when Montreal testified at Willie's trial, he implicated three people - Terrance, Willie, and himself in the attempted armed robbery. [Tr. 68-71]

There was little physical evidence recovered from the attempted robbery. Police retrieved the weapon that was dropped in the store by the attempted robbers. [Tr. 65] The gun was later sent to the Mississippi Crime Lab for fingerprint analysis. [Tr. 64] Terrance testified that he owned the gun and gave it to Willie before the two entered Stephanie's store. [Tr. 86] The Lab, however, did not obtain any additional evidence after testing the weapon.¹ [Tr. 60]

According to Willie, he saw Terrance and Montreal the day of the robbery but he was not anywhere near them at the time that the two attempted to rob the store. [Tr. 111-12] Terrace and Montreal came to Willie's house earlier on March 22nd, because they had run out of gas in Terrance's car and they needed some money. [Tr. 110] Willie testified that his mother and father were at work during the shooting so he was the only person at home at the time. [Tr. 119]

Willie believed that, once Terrance and Montreal left his house on foot, they were headed to Terrance's cousin's house to get some money for gas. [Tr. 111] Willie remained at his house while Terrance and Montreal walked away from the house. [Tr. 112]

¹

Police also recovered two t-shirts from the scene that had holes cut out, which were used to function like masks. No recognizable prints were lifted from the t-shirts.

Willie told police that he did not know that Terrance and Montreal had been involved in a shooting until Montreal came and told him that Terrance had been shot. [Tr. 118] At the time of the shooting, Willie was talking with his friend, Cherokee Cox, outside of his house. [Tr. 120] Although Cherokee was identified, pre-trial, as a potential alibi witness, she was not called to the stand during the trial. [Tr. 8] Londerious Taylor was yet another witness that was expected to have testified that Willie was at home on March 22nd, but who was not called as a witness at the trial.

After Willie discovered Terrance had been shot, Willie called his mother. [Tr. 113] The police questioned Willie regarding the incident. Willie was later charged, along with Montreal Veal and Terrance Young, for the attempted armed robbery of Stephanie's Discount Store.

SUMMARY OF THE ARGUMENTS

On March 22, 2007, several young men attempted to rob Stephanie Cannon at her store in Ruleville, Mississippi. The attempted robbery quickly turned bad. Stephanie defended her store front by shooting at the would-be robbers. She was unable to identify any of the robbers because the gunman wore a mask over his face. However, Stephanie was able to shot and wound one of the robbers – Montreal Veal. Montreal and Terrance Young, the other accomplice, implicated Willie Williams in the robbery attempt. Based solely on the testimonies of Montreal Veal and Terrance Young, Willie Williams was tried and convicted of attempted armed robbery.

Although the defense requested a cautionary jury instruction regarding Montreal and Terrance's testimonies, the trial court denied such request. The jury should have been instructed to view these testimonies with caution. The trial court committed reversible error in denying the defense's proposed jury instruction D-11.

In addition to this grievous error, the trial court failed to grant a mistrial, sua sponte, following the prosecutor's improper and prejudicial comments during closing arguments. The prosecutor improperly commented on the absence of Willie's alibi witness, a witness who was accessible to both parties. The prosecutor's comments amounted to burden shifting and deprived Willie of his fundamental right to a fair trial. The trial court should have, sua sponte, granted a mistrial in this case.

ARGUMENTS

I. THE TRIAL COURT IMPROPERLY REFUSED THE CAUTIONARY JURY INSTRUCTION CONCERNING THE ACCOMPLICES' TESTIMONY.

i. Standard of Review

The Court reviews the grant or denial of jury instructions by reading the jury instructions as a whole, and not in isolation. *Collins v. State*, 691 So. 2d 918, 922 (Miss. 1997). Reversible error is found when, after reading the instructions, the Court determines that the instructions do not fairly state the law of the case and that the instructions create an injustice. *Hickombottom v. State*, 409 So. 2d 1337, 1339 (Miss. 1982).

ii. Montreal Veal and Terrance Young's testimonies required cautionary jury instructions², which the Court refused.

The decision to grant or deny cautionary instructions lies within the trial court's discretion.

²

During pre-trial proceedings, the trial judge advised Williams' defense attorney to submit jury instructions regarding accomplice testimony. [Tr. 5]. The defense counsel submitted D-11, which would have instructed the jury to view Montreal Veal and Terrance Young's testimonies with caution. Although this jury instruction is not included in the clerk's papers, the instruction is thoroughly discussed in the transcript of the trial proceedings. [Tr. 126-27]

Burke v. State, 576 So. 2d 1239, 1242 (Miss. 1991). The trial court's discretion, however, is not absolute. *Id.* The trial court abuses its discretion in denying cautionary jury instructions in cases where the State's evidence rests solely upon the accomplice witness's testimony. *Williams v. State*, 729 So. 2d 1181, 1188 (¶31) (Miss. 1999). Likewise, the trial court has erred in denying the cautionary instructions in cases where there is some question regarding the reasonableness and consistency of the witness's testimony or in cases where the defendant's guilty is not clearly proven. *Slaughter v. State*, 815 So. 2d 1122, 1134 (¶65) (Miss. 2002).

In reviewing the trial court's denial of the cautionary instruction, the Court considers whether (1) the witness was, in fact, an accomplice, and (2) whether the witness' testimony was uncorroborated. *Holmes v. State*, 481 So. 2d 319, 322 (Miss. 1985); *Derden v. State*, 522 So. 2d 752, 754 (Miss. 1988). By their own admission, Terrance and Montreal were accomplices in the attempted armed robbery of Stephanie's store. This satisfies the threshold requirement of the cautionary instruction test. The Court must now decide: (1) whether the State's evidence rested solely on Montreal and Terrance's testimonies or, if not, whether Montreal and Terrance's testimonies were reasonable and consistent; and (2) whether Montreal and Terrance's testimonies were corroborated. *See Ferrill v. State*, 643 So. 2d 501, 507 (Miss. 1994).

a. The State's Evidence Rested Solely on Montreal and Terrance's testimonies

Terrance and Montreal's testimonies were the only evidence that linked Willie to the attempted armed robbery of Stephanie's Discount Store. Their testimonies were uncorroborated with any physical evidence or any independent testimony that identified Willie as the gunman.

Stephanie Cannon, the store clerk, never identified any of the men that attempted to rob her store on March 22, 2007. Likewise, there were no eyewitnesses in the store at the time. The

Mississippi Crime Lab tested the recovered weapon and t-shirts used to mask the identity of the robbers. The Lab did not discover any physical evidence that linked Willie to the scene of the crime. Law enforcement did not find any money or weapons on Willie when police came to his house. The police did not even find Willie in the vicinity of the store around the time of the attempted robbery. With a total lack of any corroborating physical evidence, Willie Williams' conviction was based solely on Montreal Veal and Terrance Young's testimonies that Willie was the gunman behind the masked t-shirt .

In *Wheeler v. State*, 560 So. 2d 171, 173-74 (Miss. 1990), one of the many factors the Court considered in reversing the case was that there was no physical evidence that corroborated the accomplices' testimony that Wheeler was the mastermind behind the robbery. In *Wheeler*, the two co-defendants, Neal Woodard and Franklin Holmes, robbed the victim, Bob Collier, at gunpoint. *Id.* at 172. Five years after the crime, the men confessed to their involvement in the robbery. However, the men testified that Wheeler orchestrated the entire robbery by first recruiting Woodard to complete the crime. Collier's testimony corresponded to Woodard and Holmes' versions of how the robbery occurred. Collier also identified Woodard and Holmes in a photographic line-up. The Court found that, without the testimonies of Woodard and Holmes, there was insufficient evidence to sustain Wheeler's conviction. *Id.* at 173. The Court reasoned that, in the interest of justice, the trial court should have granted Wheeler's cautionary jury instruction regarding Woodard and Holmes' accomplice testimony.

Because the State's evidence rested solely on Montreal and Terrance's identification, the question becomes whether or not their testimonies were self-contradictory or substantially impeached.

b. The accomplice testimony was self-contradictory and substantially impeached

Even after the Court finds that the accomplices' testimony was uncorroborated, the Court's analysis does not end. While an accused may be convicted based on the uncorroborated testimony of an accomplice, such testimony must be viewed with "great caution and suspicion." *Moody v. State*, 371 So. 2d 408, 410 (Miss. 1979). Such uncorroborated testimony must be reasonable, probable, and not self-contradictory or substantially impeached. *Mister v. State*, 190 So. 2d 869, 870 (Miss. 1966).

Montreal Veal's trial testimony was riddled with self-contradictions and his testimony was substantially impeached during cross-examination. Prior to trial, Montreal told police that Willie and Terrance were involved in the incident, but he was nowhere near Stephanie's store during the attempted robbery. Even at a court hearing, held prior to Willie's trial, Montreal maintained that he was at home, playing games, at the time Terrance and Willie were at Stephanie's Discount. It was not until Willie's trial, where Montreal recounted that day's events for a third time, that Montreal testified that he was actually at Stephanie's Store, along with the other young men, when they attempted to rob the store owner.

Numerous cases have been reversed because the accomplice testimony was based on "inconsistent...and almost completely uncorroborated" evidence. *See Catchings v. State*, 394 So. 2d 869, 870 (Miss. 1981); *Feranda v. State*, 267 So. 3d 305, 307 (Miss. 1972) (reversing trial court's decision because appellant's burglary conviction was based on the extremely weak and contradicted accomplice's testimony). Such is the case here where Montreal Veal told inconsistent accounts not once, not twice, but over three different times. Montreal and Terrance's testimonies were the State's sole proof of Willie's involvement in the attempted armed robbery. Given Montreal's uncorroborated

and inconsistent statements, the court erred in failing to grant the cautionary jury instruction regarding the accomplices' testimonies.

II. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO GRANT A MISTRIAL , SUA SPONTE, DUE TO THE STATE'S IMPROPER COMMENTS ON WILLIAMS' FAILURE TO PRESENT ALIBI WITNESSES

During the State's closing arguments, the prosecutor made the following remarks:

[Willie, Montreal, and Terrance] made an absolute attempt to commit an armed robbery and nothing different. [Willie] was not at home along with his dog. What I keep asking myself is: If [Willie's alibi] is true, you know, we heard him say it, **but where is Cherokee Cox? This is the one person who could have absolutely verify (sp) the existence of that story and his participation of not even being there,** standing outside his house in shorts and no shirt, in his socks. **Where is she today?** For all I know, she is sitting right out here (indicating). **But she didn't sit up here** (indicating). **Because that didn't happen.** Because Willie was not at his house....

[Tr. 133] (Emphasis added).

During the pre-trial proceedings, the defense identified Cherokee Cox as one of the potential alibi witnesses. [R.E. 11] According to Willie, at the time of the attempted robbery, he was outside speaking with Cherokee. Willie's alibi placed him at his house, and not at the store, during the time of the robbery. For reasons unknown, Cherokee was not called during the defense's case-in-chief.

Generally, neither party may comment of the failure of the other party to examine a witness, if the witness in question was accessible to both parties. *Brown v. State*, 200 Miss. 881, 887, 27 So. 2d 838, 840 (Miss. 1946); *Holmes v. State*, 537 So. 2d 882, 883-84 (Miss. 1988). In the absence of proof that the witness was accessible or inaccessible, it is presumed that both parties had equal access to the witness. *Madlock v. State*, 440 So. 2d 315, 318 (Miss. 1983).

Where there is substantial evidence that supports the accused's guilt, the prosecutor's comment about the absence of a potential witness will not amount to reversible error. *Brock v. State*,

530 So. 2d 146, 155 (Miss. 1988) . However, in cases where the evidence is close or where the prosecutor's comments are coupled with other errors, the trial court's decisions should be reversed based on the denial of the accused's right to a fair trial. *Burke v. State*, 576 So. 2d 1239, 1241 (Miss. 1991).

In *Morgan v. State*, 388 So. 2d 495, 498 (Miss. 1980), the prosecutor made the following comment: "*Where is this pie in the sky person named Pieshot? Why has the person named Pieshot not come forward to testify today for the defendant?*" Based on the prosecutor's prejudicial comments, coupled with the close evidence in the case, the Court held that the defendant's case demanded a reversal. Such is the case here, where Terrance and Montreal's weak and uncorroborated testimonies are the only evidence used to convict Willie of attempted armed robbery. The prosecutor's comments regarding Cherokee's absence were extremely prejudicial and amounted to reversible error.

The Court should have objected, sua sponte, to prosecutor's comments

Unfortunately, during closing arguments, the defense failed to object to the prosecutor's statements about Cherokee's absence at trial. However, based on the plain error doctrine, this Court may review the trial court's failure to grant a mistrial, sua sponte, due to the prosecutor's prejudicial statements. A party that fails to make a contemporaneous objection at trial must rely on the plain-error doctrine to raise the issue on appeal, otherwise the issue is procedurally barred. *Foster v. State*, 639 So. 2d 1263, 1289 (Miss. 1989). The plain error doctrine applies to violations of the accused's substantive or fundamental rights and the error must result in a "manifest miscarriage of justice." *Starr v. State*, 997 So. 2d 262, 266 (¶11) (Miss. Ct. App. 2008).

An accused has a fundamental right, as guaranteed by the Fourteenth Amendment to the US Constitution, to have a fair trial. *Hickson v. State*, 472 So. 2d 379, 384 (Miss. 1985). The prosecutor's comments regarding the absence of Cherokee Cox deprived Willie of this fundamental right to a fair trial. *See Burke*, 576 So. 2d at 124.

In *Hickson*, the Court held the following:

“ We have in a variety of contexts condemned conduct by the prosecuting attorneys that substantially deflected the jury's attention from the issues it has been called up to decide, that interjects appeals to bias, passion or prejudice. Where such conduct is so substantial that the accused's right to a fair trial is substantially impaired, the trial judge should declare a mistrial...Where the trial judge has abused his discretion in such matters, we unhesitatingly reverse.”
Hickson, 472 So. 2d at 384.

The prosecutor's comments on Cherokee's absence shifted the burden of proving the defendant's guilt from the State to the defense. After hearing the prosecutor's comments, the jury, undoubtedly began to question Willie's alibi since his alibi witness was not presented before the jury. A similar scenario occurred in *Matlock v. State*, 440 So. 2d 315, 318 (Miss. 1983), in which the Court reversed the trial court's ruling.

In *Matlock*, the prosecutor continually commented on the defense's failure to present an eyewitness at the trial who would have confirmed the defendant's allegations of threats made by the deceased prior to his death. *Id.* at 317. The Court overruled *Matlock*, in part, based on the “prejudicial and erroneously vigorous statements” made by the prosecutor. Justice requires the same result in this case.

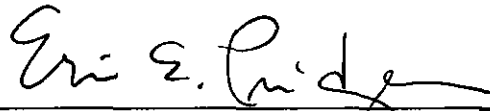
CONCLUSION

The trial committed reversible error in failing to grant the cautionary jury instructions regarding the uncorroborated and contradictory accomplices' testimonies. In addition to this error, Willie's right to a fair trial was further compromised when the prosecutor made improper and prejudicial comments regarding the absence of Willie's alibi witness. For these reasons, Willie requests that this Honorable Court reverse the trial court's decisions and render this case.

Respectfully submitted,

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

By:



ERIN E. PRIDGEN, MISS. BAR NO. [REDACTED]
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

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 **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
Post Office Box 220
Jackson, MS 39205-0220

This the 8th day of July, 2009.



ERIN E. PRIDGEN
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200