IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

VINCENT VAUGHN — APPELLANT

VS. — NO. 2010-KA-0172-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The targets in this criminal appeal from a conviction of manslaughter, *viz.*, "[t]he killing of a human being without malice, by the act . . . of another . . . while such other is engaged in the perpetration of any crime or misdemeanor not amounting to a felony . . . ," are the sufficiency and/or weight of the evidence and alleged "plain error" targeting un-objected to comments by the prosecutor touching tangentially upon appellant's invocation of his right to remain silent.

Two (2) previous trials for the same offense resulted in mistrials when the jury was unable to reach a unanimous verdict. (C.P. at 5-6, 7-8)

VINCENT VAUGHN, a 56-year-old African-America male, twice convicted felon (R. 144), and resident of Clarksdale (C.P. at 16), prosecutes a criminal appeal from the Circuit Court of Coahoma County, Albert B. Smith, Circuit Judge, presiding.

Vaughn, in the wake of an indictment returned on November 19, 2008, was convicted of manslaughter and sentenced to serve ten (10) years in the custody of the MDOC followed by five

(5) years of post-release supervision. (C.P. at 12)

The indictment, omitting its formal parts, alleged

> "[that] **VINCENT VAUGHN . . .** on or about September 13, 2008, . . . did unlawfully, wilfully and feloniously, without authority of law, and during the commission of a misdemeanor but without malice, did kill a human being, to-wit: Arthur Hughes, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi." (C.P. at 3)

Following a trial by jury conducted on November17, 2009, the jury returned a verdict of, "We, the Jury, find the defendant, guilty." (R. 138; C.P. at 24)

On January 11, 2010, following a presentence investigation and report (R. 140), the trial judge sentenced Vaughn to serve ten (10) years in the custody of the MDOC followed by five (5) years of PRS. (C.P. at 11-14)

Two (2) issues, articulated by Vaughn as follows, are raised on appeal to this Court:

Issue No. 1: "Whether the evidence was sufficient to support the verdict, or[,] in the alternative, whether the verdict was against the overwhelming weight of the evidence."

Issue No. 2: "Whether the trial judge committed plain error in allowing the State to comment on appellant's invocation of his right to remain silent." (Brief of the Appellant at 1, 4, 9)

STATEMENT OF FACTS

Linda Hughes is a registered nurse residing in Clarksdale. (R. 48) Although still married to him, she has been separated from her husband, Arthur Hughes, for two years. (R. 49, 59)

On the night of September 13, 2008, after receiving a telephone call from her son, Linda went to the home of Arthur Hughes. Upon pulling up to the curb in her automobile she observed " . . . two big spots of blood on the sidewalk" in front of her husband's house on Spruce Street. (R. 52) Mrs. Hughes testified she jumped out of the car and ran to the door of the house where she observed her

husband lying on the floor on his back in a pool of blood. Her husband had a hole in the back of his head. (R. 54)

Feeling no pulse, Mrs. Hughes administered CPR to no avail. She concluded her husband was dead, and indeed he was. (R. 56) Paramedics arrived and continued efforts to resuscitate him. Arthur Hughes was pronounced dead on arrival at the hospital. (R. 56)

Prior to the body being discovered on September 13th, Vincent Vaughn went to the police department in Clarksdale and informed patrol officer Nicholas Turner he wanted to file a complaint. (R. 70)

> Q. [BY PROSECUTOR CARR:] All right. And - - and walk the jury through what happened from the minute that you get the call onward. Go ahead.
>
> A. Mr. Vaughn came in, said he wanted to make a complaint. He and his friend had just been in a fight. Told me about how that he and Vaughn - - Mr. Hughes, Arthur Hughes - - had gotten in a argument because I believe Hughes was upset over somethin' Mr. Vaughn had said about one of his of girlfriends.
>
> So he explained how Hughes got mad, picked up a pipe, threatened to hit him with it, told him [to] get out of his yard, and that Hughes had pushed Mr. Vaughn, and then he - - when he came back and he was fixin' to push him again, or somethin' to that effect, he said - - Mr. Vaughn told me that he had hit him and knocked him down, and that Hughes then gotten up, threatened to kill him.
>
> He said he came to me because Hughes - - he - - he knew Hughes to own a gun, and in case somethin' else happened, he wanted it to be on report. (R. 70-71)

After Vaughn made his report, Turner received a call requesting that he apprehend Vaughn for investigatory purposes. Turner caught up with Vaughn and ordered him to return to the station house where they engaged in what Vaughn described as "mostly just idle talk." (R. 72) Vaughn told Turner that " . . . he and Mr. Hughes were just best friends in the world, but when they got to

drinkin', you know, he [Hughes] was violent . . ." (R. 72)

Officer Turner prepared a report containing what Vincent Vaughn told him that night.

> Q. And in that report did Vincent Vaughn admit to striking Arthur Hughes?
>
> A. He did. (R. 73)

Four (4) witnesses testified on behalf of the State during its case-in-chief, including the victim's wife, **Linda Hughes,** patrol officer **Nicholas Turner,** Investigator **Vincent Ramirez,** and **Dr. Adele Lewis**, the State's expert.

Vincent Ramirez testified that after arriving at the site of the September 13th altercation he photographed the scene, including the heavy concentration of blood observed on the sidewalk as well as the blood saturating adjacent sod. (*See* exhibits S-1-D and S-1-C)

According to Ramirez, he read Vaughn his *Miranda* rights at 2:00 p.m. on September 15th at which time Vaughn signed a waiver of those rights. (R. 68-69, exhibit 4) Vaughn at no time appeared to be injured. (R. 66)

During re-examination of Ramirez by the prosecution, the following colloquy assailed on appeal took place:

> BY MR. CARR:
>
> Q. Now, you said that you read Mr. Vaughn his *Miranda* rights. But Mr. Vincent - - when you read him his *Miranda* rights, was this - - at this point was Mr. Vaughn placed under arrest? Was he under arrest at this point?
>
> A. Yes, sir.
>
> Q. All right. And he didn't agree to speak to you at this point, did he?
>
> A. No, sir. (R. 68-69)

Ramirez, who photographed the crime scene, testified it appeared to him from the photographs of the bloodstains that " . . . possibly the subject was moved from one area to another." (R. 65)

The State also produced **Adele Lewis,** the State's expert in the field of forensic pathology, who had reviewed the autopsy report prepared by another pathologist who was unavailable for Vaughn's third trial.

Dr. Lewis testified that she " . . . agreed that the cause of death was blunt-force injuries to the head, and that the manner of death is homicide." (R. 94) There was no reason she would have to disagree with the initial findings made by Dr. Staci Turner. (R. 94)

The autopsy report prepared by Dr. Turner and introduced through Dr. Lewis as State's exhibit S-3 reflects a final anatomic diagnosis of forehead contusion, scalp laceration, subcutaneous scalp hemorrhage, subdural hemorrhage, subarachnoid hemorrhage, and brain contusions.

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal on the ground, *inter alia,* " . . . that the State has failed to establish a *prima facie* case of manslaughter against Vincent [Vaughn.] In particular, the State has failed to show or put any evidence or critical evidence of a misdemeanor, in more particular an assault, at the hands of Mr. Vaughn that caused the death of Mr. Hughes, and for that reason we would ask for a directed verdict of acquittal." (R 105)

The trial judge overruled the motion with the observation that the " . . . statement to the police department is the - - the part that's gonna get us past the directed verdict [and] [o]n that point I'm gonna deny." (R. 105)

After being advised of his right to testify or not (R. 106-07), Vaughn personally elected not to testify. (R. 107)

Peremptory instruction was subsequently denied. (R. 107; C.P. at 36)

The jury retired to deliberate at 2:29 p.m. (R. 137) Less than an hour later, at 3:26 p.m., the jury returned with the following verdict: "We, the jury, find the defendant guilty." (R. 138; C.P. at 24)

A poll the jury, individually by number, reflected the verdict returned was unanimous. (R. 138-39)

Following a presentence investigation and report, Vaughn was sentenced on January 11, 2010, to serve ten(10) years in the custody of the MDOC followed by five (5) years of post-release supervision. (R. 144-47)

There is no motion for a new trial or motion for JNOV found within the four corners of the official appellate record.

An order signed on January 14, 2010, and filed on January 15th, 2010, reflects the denial of a motion styled "Judgment of Acquittal Notwithstanding the Verdict, or in the alternative, a New Trial." Notice of appeal was filed on January 27, 2010. (C.P. at 18)

David Tisdell, a practicing attorney in Tunica, provided effective assistance of counsel during Vaughn's three (3) trials, two of which ended in a mistrial when the jury could not unanimously agree. (C.P. at 5-6, 7-8)

Leslie Lee, a skilled, experienced attorney and former prosecutor who is presently the Director of the Mississippi Office of Indigent Appeals, has provided equally effective assistance on appeal.

SUMMARY OF THE ARGUMENT

ISSUE NO. 1 (a). Sufficiency of the Evidence.

Accepting as true Vaughn's statement to Officer Turner that during an argument he hit

Hughes and knocked him down, and accepting as true the testimony of Dr. Lewis that Hughes had a bruise to his forehead and a hole in the back of his head and that the cause of death was blunt force trauma to the head, any rational trier of fact could have found beyond a reasonable doubt that Vincent Vaughn, without malice, did kill Arthur Hughes by striking him in the face with his fist. (C.P. at 33) Indeed, no other conclusion could be reached from this evidence.

Hughes was found lying on his back in a pool of blood on the floor inside his home. Blood was photographed on the sidewalk and adjacent grass. There was trauma to Hughes's forehead - a one-inch purple bruise or contusion - as well as " . . . a full-thickness laceration, which is like a cut, to the back of the head." (R. 91)

A fair inference from all the testimony is that Vaughn struck Hughes in the forehead with a closed fist and knocked him to the pavement where he struck the back of his head with sufficient force to produce fatal injuries in the form of brain contusions and hemorrhage. *Cf.* **Durr v. State,** 722 So.2d 134 (Miss. 1998) [Prosecution for manslaughter predicated upon simple assault where victim received 12 hard strikes directly over his heart which caused cardiac failure.]

According to Dr. Lewis there was no way both the wound to Hughes's forehead and the wound to the back of his head were caused by a single blow; rather, it would have to be two separate impacts. (R. 102)

ISSUE NO. 1 (b). Weight of the Evidence.

Vaughn's weight of the evidence argument has no appeal on appeal because the appellate record does not contain a copy of the motion for a new trial. Nor does it reflect that such a motion was made *ore tenus.*

This is fatal to Vaughn's weight of the evidence argument.

"A claim that the jury's verdict is against the overwhelming weight of the evidence must be

raised in a motion for new trial in order to be considered on appeal." **Howard v. State,** 2 So.3d 669, 672 (Ct.App.Miss. 2008), reh denied, cert denied, citing **Smith v. State,** 716 So.2d 1076, 1078 (¶13)(Miss. 1998) (citing **Colson v. Sims,** 220 So.2d 345, 346-47, n. 1 (Miss. 1969).

There is no way to determine whether or not Vaughn presented a challenge to the weight of the evidence in the trial court because the motion for a new trial, if any, has not been included in the official record. Accordingly, Vaughn's weight of the evidence argument is procedurally barred. **Id.**

"The burden is on the defendant to make a proper record of the proceedings." **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999). "[T]o the appellant falls the duty of insuring that the record contains sufficient evidence to support his assignments of error on appeal." **Burney v. State,** 515 So.2d 1154, 1160 (Miss. 1987).

That has not been accomplished here.

ISSUE NO. 2. Plain Error. There being no contemporaneous objection at trial to the allegedly prejudicial comments complained about on appeal, Vaughn's belated challenge is procedurally barred.

The plain error doctrine is inapplicable here because in order to find "plain" error there must be "error" working to a defendant's disadvantage. Vaughn's silence was the heart of his defense. Vaughn's position was that he never struck Hughes and never made the statement attributed to him by Officer Turner. (R. 74, 127)

Even if this issue is evaluated under the plain-error doctrine, there is still no error plain and egregious enough to warrant reversal. This is because defense counsel twice said the same thing, once during his case-in-chief and again during closing argument. (R. 126,131) Any error was cured and rendered harmless.

Finally, any error was harmless beyond a reasonable doubt under the facts of this case. According to Investigator Ramirez, Vaughn did not agree to speak after receiving his *Miranda* rights. (R. 68-69) No harm was done. It is clear that Vaughn had already signed a waiver of those rights. (R. 68-69) *See* State's exhibit 4.

ARGUMENT

ISSUE NO. 1.

ANY RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT VINCENT VAUGHN, WITHOUT MALICE, KILLED ARTHUR HUGHES BY STRIKING HIM IN THE FACE WITH A CLOSED FIST.

VAUGHN'S WEIGHT OF THE EVIDENCE ARGUMENT IS PROCEDURALLY BARRED.

(a) Sufficiency of the Evidence.

Vaughn contends his motion for a directed verdict or request for peremptory instruction should have been granted because "[t[he State's evidence was wholly insufficient to show a misdemeanor occurred." (Brief of the Appellant at 5)

We disagree. Although Vaughn relies upon the correct standard of appellate review, we believe he reaches the wrong conclusion.

If Officer Turner is to be believed, an argument took place over something that Vaughn said. When Hughes attempted to shove Vaughn a second time, Vaughn hit him and knocked him down. Verbal threats notwithstanding, this is a simple assault. *See* Miss.Code Ann. §97-3-7 (1).

And while Vaughn's statement to Turner indicates that Hughes threatened to hit him with a pipe, there is no indication Hughes ever did. No one ever observed any injury to Vaughn. Moreover, mere words are not enough to justify punching someone without incurring liability for any unforeseen and/or unintentional consequences.

It was for the jury to determine whether or not Vaughn's conspicuous absence from the scene of the altercation as well as his absence from the hospital where Hughes was taken represented a consciousness of guilt or innocent neglect. (R. 56-57, 65-66) A reasonable and fair-minded juror could have found Vaughn's absence negated any suggestion the homicide was excusable as an accident.

It was for the jury to determine whether or not the complaint filed by Vaughn right after the altercation was simply a means of camouflaging his nefarious deed.

It was for the jury to determine whether or not the bruise to the victim's forehead was caused by a fist or some other object striking Hughes in the face as testified to by Dr. Lewis. (R. 102-03)

It was for the jury to determine whether or not the body of the victim was moved from an original location on the concrete outside the house to the floor inside the house.

It was for the jury to evaluate (1) an argument over the defendant's comments; (2) an ensuing fight or altercation fueled by violent tempers and the consumption of intoxicants; (3) a blow struck; (4) a knockdown to pavement; (5) two separate injuries to the head, one a bruise to the forehead, the other a more prominent laceration to the back of the head, and (6) fatal hemorrhaging around the victim's brain. (R. 93)

"In reviewing the sufficiency of the evidence, as opposed to its weight, " . . . all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence." **Jiles v. State,** 962 So.2d 604, 605 (¶ 5)(Ct.App.Miss. 2006). *See also* **McDowell v. State,** 813 So.2d 694, 697 (¶8) (Miss. 2002).

Even where the evidence is "slim," a reviewing Court will accept all reasonable inferences as true when reviewing the sufficiency of the evidence proffered in support of the verdict. *See*

Rainer v. State, 438 So.2d 290, 292 (Miss. 1983) ["Slim" evidence passed muster with respect to question of evidentiary sufficiency.]

A trial court can take the case from the jury only where there is no testimony that would warrant the jury, if the witnesses were believed, in finding a verdict. **Price v. State,** 207 So. 111, 41 So.2d 37 (1949). The present case does not exist in this posture.

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Bush v. State,** 895 So.2d 836, 843 (¶16) (Miss. 2005), quoting from **Jackson v. Virginia,** 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

"Should the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." **Bush v. State,** *supra*, 895 So.2d at 843 citing, *inter alia*, **Edwards v. State,** 469 So.2d 68, 70 (Miss. 1985).

The indictment alleged that Vaughn " . . . unlawfully, wilfully and feloniously, without authority of law, and during the commission of a misdemeanor but without malice, did kill a human being, to-wit: Arthur Hughes, . . ." (C.P. at 3) Vaughn does not contend the jury was not properly instructed on this issue. (C.P. at 33)

The crime charged is found in Miss.Code Ann. §97-3-29 which reads, in its entirety, as follows:

> ***The killing of a human being without malice, by the act,*** **procurement, or culpable negligence** ***of another, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to felony,*** **or in the attempt to commit any crime or misdemeanor, where such killing would be murder at common**

law, *shall be manslaughter.* [emphasis ours]

See e.g., **Wells v. State,** 305, So.2d 333 (Miss. 1974).

The evidence from which a reasonable and fair-minded juror could find guilt was fully and fairly summarized by the State prosecutor during his closing argument. We quote:

> "Vincent Vaughn came in and admitted - - admitted - - that he punched Arthur Hughes in the face. And that's the best evidence you guys have, ladies and gentlemen. You have an admission from the defendant himself sayin', 'I came in, and I struck Arthur Hughes in the face, and he fell to the ground.' " (R. 121-22)

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667 So.2d 599, 612 (Miss. 1995); **Clemons v. State,** 460 So.2d 835 (Miss. 1984); **Forbes v. State,** 437 So.2d 59 (Miss. 1983); **Bullock v. State,** 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]

The jury was properly instructed with respect to the issue of guilt. *See* jury instruction S-2 which required the jury to find, *inter alia*, that Vaughn killed Hughes without malice by striking him

in the face with his fist. (C.P. at 33)

Needless to say, the jury, as was its exclusive prerogative, resolved this issue in favor of the State.

Finally, Vaughn points out that "[t]oxicology tests showed that Hughes's blood-alcohol content was .166% at the time of his death." (Brief of the Appellant at 3)

No matter.

We find in **Dickerson v. State,** 441 So.2d 536, 538 (Miss. 1983), the following language applicable to this state of affairs:

> Contributory negligence is not a defense to manslaughter. All that the state must prove with respect to the victim is that he was prior to the incident a live human being. **The homicide laws of this State protect all living beings within the jurisdiction, sinners as well as saints, drunks as well as deacons.** (emphasis ours]

(b) Weight of the Evidence.

Vaughn seeks a new trial on the ground the jury verdict was against the overwhelming weight of the evidence. (Brief of the Appellant at 6-8) Vaughn correctly states that a motion for a new trial tests the weight of the evidence presented at trial. (Brief of the Appellant at 6-8, 15) However, a motion for a new trial, in and of itself, does not automatically preserve the weight of the evidence issue. Rather, the weight of the evidence must be distinctly assigned as a ground for relief.

Regrettably, Vaughn's weight of the evidence argument is procedurally barred because the record does not contain a motion for a new trial. Nor does it reflect that such a motion was made *ore tenus*. The record before this Court contains an order consisting of four (4) lines overruling a motion for judgment notwithstanding the verdict or, *in the alternative,* a new trial. That is not enough to preserve the issue.

The weight of the evidence must be distinctly assigned as a ground for relief in a motion for

a new trial else the issue is barred on appeal. **Howard v. State,** 507 So.2d 58, 63 (Miss. 1987); **Wooten v. State,** 811 So.2d 355 (Ct.App.Miss. 2001).

The "weight" of the evidence is not a viable issue on appeal unless the defendant has included as a ground in a motion for a new trial a claim the verdict of the jury is against the overwhelming weight of the evidence. **Howard v. State**, *supra*, 507 So.2d 58, 63 (Miss. 1987); **Jackson v. State**, 423 So.2d 129, 131 (Miss. 1982), quoting with approval "the proper procedure and rule" found in **Colson v. Sims**, 220 So.2d 345, 346, fn. 1 (Miss. 1969).

Because the record in this cause does not contain a motion for a new trial, we do not know if the weight of the evidence was first presented for the trial court's consideration. "A trial judge cannot be put in error on a matter which was not presented to him for decision." **Howard v. State,** *supra*, 507 So.2d at 63.

The rules are very clear.

"On a motion for a new trial, certain errors must be brought to the attention of the trial judge so that he may have an opportunity to pass upon their validity before this Court is called upon to review them." **Metcalf v. State**, 629 So.2d 558, 561 (Miss. 1993). A post-trial denial by the trial judge of a "weight" of the evidence argument is one of those errors.

In **Howard v. State**, *supra*, 507 So.2d 58, 63 (Miss. 1987), Howard, much like Vaughn contended "the verdict of the jury was contrary to the overwhelming weight of the evidence." This Court asserted, i.e., it stated positively, that

> ". . . this assignment of error is procedurally barred because it was not assigned as a ground for a new trial in the lower court. See: *Ponder v. State*, 335 So.2d 885, 886 (Miss. 1976); *Freeland v. State*, 285 So.2d 895, 896 (Miss. 1973). A trial judge cannot be put in error on a matter which was not presented to him for decision. *Cooper v. Lawson*, 264 So.2d 890 (Miss. 1972)."

See also **Wooten v. State,** *supra*, 811 So.2d 355 (Ct.App.Miss. 2001); **Colson v. Sims,** *supra*, 220 So.2d 345, 346 (Miss.1969), fn 1.

More recently, the Court of Appeals revisited and reaffirmed this rule in **Wilson v. State,** 904 So.2d 987, 994-95 (Ct.App.Miss. 2004), as follows:

> A motion for new trial challenges the weight of the evidence. *Sheffield v. State*, 749 So.2d 123, 127 (Miss. 1999). A reversal is warranted only if the trial court abused its discretion in denying a motion for a new trial.
>
> * * * * * *
>
> It is true that, if an "[a]ppellant's contention that the verdict of the jury was contrary to the overwhelming weight of the evidence was not assigned as a ground for new trial in the lower court, and it may not be raised [on appeal] for the first time. A trial judge cannot be put in error on a matter which was not presented to him for decision."

The Court of appeals fully concurs.

In **Beckum v. State,** 917 So.2d 808, 813 (Ct.App.Miss. 2005), we find the following:

> "The contention that the verdict is against the overwhelming weight of the evidence must first be raised in the defendant's motion for a new trial." *Carr,* 774 So.2d at (¶15) citing URCCC 10.05).
>
> "The trial court has substantial discretion in ruling on a motion for a new trial and should only grant the motion where allowing the verdict to stand would result in an unconscionable injustice." *Carr,* 774 So.2d at 813)
>
> * * * * * *
>
> Beckam's motion for a new trial simply stated that "the jury's verdict. . .[was] against the overwhelming weight of the evidence." Beckum's challenge of the weight of the evidence merely concluded that the verdict was against the overwhelming weight of the evidence. Unquestionably, this is a vague and general statement. Beckum's brief, generalized, and conclusory argument failed to distinguish any particular deficiency in the proof, or to assert how the verdict is contrary to the overwhelming weight of the evidence. Accordingly, this issue is procedurally barred. *Stack,* 860 So.2d at (¶20). **That**

> **being the case, we will not consider the merits of Beckum's claims.** [emphasis supplied]

Nor should this Court do so here.

Vaughn's weight of the evidence complaint is procedurally barred. Appellee respectfully declines to waive the bar.

We will say, however, that Vaughn's claims are devoid of merit on the merits.

We find in **Smoot v. State,** 780 So.2d 660, 664 (Ct.App.Miss. 2001), a prosecution for aggravated assault, the following language:

> * * * Basically, Smoot calls into question his whole ordeal before the trial court. Still, he has not shown how an unconscionable injustice has resulted, as all the evidence points to the guilty verdict. The evidence consisted primarily of Clark's testimony positively identifying Smoot as one of his assailants, but also included Williams's eyewitness testimony which implicated Smoot. Smoot presented no evidence whatsoever, called no witnesses, and offered no proof to contradict the State's convincingly made case. The jury verdict reflected the facts presented and no unconscionable injustice resulted in Smoot's being convicted. This issue is without merit.

Vaughn, like Smoot, did not testify. Thus, the evidence certainly does not preponderate in favor of Vaughn because his version of the incident is not in the form of testimony, only in the words of trial counsel, *viz.*, "Mr. Vaughn's denyin' that he told you this, so that's why it's important that we get to the bottom of it." (Officer Turner cross-examination at R. 74; 127)

The following observations made in **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983), are worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Hilliard v. State,** 749 So.2d 1015, 1016 (Miss. 1999); **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983).

Contrary to any suggestion by Vaughn, the case at bar simply does not exist in this posture.

ISSUE NO. 2.

THERE WAS NO OBJECTION, CONTEMPORANEOUS OR OTHERWISE, TO THE PROSECUTOR'S REFERENCES TO VAUGHN'S POST-ARREST, POST-*MIRANDA* SILENCE; RATHER, THE *MIRANDA* ISSUE IS RAISED FOR THE FIRST TIME ON APPEAL.

ACCORDINGLY, VAUGHN IS PROCEDURALLY BARRED FROM ASSAILING THE PROSECUTOR'S COMMENTS AT THIS BELATED HOUR.

THE PLAIN ERROR RULE SHOULD NOT BE APPLIED HERE BECAUSE ANY ERROR WAS CURED AND CLEARLY RENDERED HARMLESS BEYOND A REASONABLE DOUBT WHEN DEFENSE COUNSEL SUBSEQUENTLY SAID THE SAME THING.

Vaughn argues for the first time the prosecutor impermissibly pointed out during his re-examination of Investigator Ramirez that after Vaughn's arrest and at some point following the reading of Vaughn's *Miranda* rights, Vaughn did not agree to speak. (R. 69) (Brief of the Appellant at 9) Defense counsel's question and Ramirez's negative response, both of which are criticized here, was not the target of a contemporaneous objection. (R. 68-69)

Vaughn also claims, again for the first time, this error was compounded during closing argument when the prosecutor pointed out anew that Vaughn, although willing to discuss the

incident with Officer Turner *prior* to Vaughn's arrest, did not "speak" to Officer Ramirez *after* Vaughn's arrest and the reading of his *Miranda* rights. (Brief of the Appellant at 12)

Vaughn seeks discharge but, if not discharge, at least a fourth trial. (Brief of the Appellant at 15)

Procedural Bar. The Contemporaneous Objection Rule.

One of the problems with these arguments is that the prosecutor's comments complained about here and now failed to generate an objection, contemporaneous or otherwise, then and there. Rather, they are complained about for the first time on appeal.

Regrettably, there is no ruling by the trial judge to review. *Cf.* **Williams v. State,** 971 So.2d 581, 590 (Miss. 2007), where we find the following:

> Williams claims that he was questioned by Agent Umfress prior to being informed of his constitutional rights as required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This argument is presented for the first time on appeal. No motion was made at the trial level to suppress the statements made by Williams to the agents at his home. Agent Umfress testified that he orally advised Williams of his rights during the execution of the search warrant. Further, Williams signed a waiver of his rights after being taken into custody. "As a general rule, constitutional questions not asserted at the trial level are deemed waived." *Pinkney v. State,* 757 So.2d 297, 299 (Miss. 2000). This issue is procedurally barred.

Vaughn candidly and correctly admits that no objection was made. He claims, however, the failure to object should not preclude a reviewing court from finding plain error.

We respectfully point out the abbreviated comments - a mere "mentioning," if you please - complained about "here and now" were not so obviously egregious and prejudicial "then and there." In other words, any comment on Vaughn's invocation of his right to remain silent did not stand out like the proverbial sore thumb.

These observations, standing alone, are fatal to Vaughn's post arrest silence complaint raised

here for the first time on appeal. In short, any error was waived when Vaughn failed to object during trial. Accordingly, Vaughn has "forfeited" his right to raise this claim on appeal. *See* **United States v. Dodson,** 288 F.3d 153 (5th Cir. 2002), reh denied, cert denied 123 S.Ct. 32 [Forfeiture is the failure to make the timely assertion of a right, generally by failure to object to an error in the proceedings.]

It is well settled that a contemporaneous objection to allegedly prejudicial remarks of a prosecutor during opening or closing argument or to allegedly prejudicial questions propounded during trial is required in order to preserve these points for appellate scrutiny.

Failure to object operates to procedurally bar appellate review. **Rogers v. State,** 928 So.2d 831 (Miss. 2006); **Havard v. State,** 928 So.2d 771 (Miss. 2006), reh denied; **Spicer v, State,** 921 So.2d 292, as modified on denial of rehearing, cert denied 127 S.Ct. 493; **Edwards v. State,** 737 So.2d 275 (Miss. 1999); **Manning v. State,** 735 So.2d 323 (Miss. 1999); **Watts v. State,** 733 So.2d 214 (Miss. 1999); **Weatherspoon v. State,** 732 So.2d 158 (Miss. 1999); **Skinner v. State,** 726 So.2d 272 (Ct. App. Miss. 1998).

"Failure by defense counsel to contemporaneously object to a prosecutor's remark at trial bars consideration of prosecutorial misconduct allegations on appeal." **Brown v. State,** 936 So.2d 447, 453 (Ct.App.Miss. 2006), citing **Davis v. State,** 660 So.2d 1228, 1255 (Miss. 1995).

Stated differently, a contemporaneous objection to allegedly prejudicial remarks by the district attorney is required else the objection is waived. **Handley v. State,** 574 So.2d 671 (Miss. 1990); **Hill v. State,** 432 So.2d 427 (Miss. 1983); **Alford v. State,** 760 So.2d 48 (Ct.App.Miss. 2000); **Swindle v. State,** 755 So.2d 1158 (Ct.App.Miss. 1999) [Defendant waived any challenge to all but one of the prosecutor's remarks made during closing argument where he failed to make a

contemporaneous objection to all but one comment.]

In **Hill v. State,** *supra*, 432 So.2d 427, 439 (Miss. 1983), this Court opined:

> In this case, however, there was no objection to this argument. We have consistently held that contemporaneous objection must be made to improper argument by the state, and unless such objection is made, any claimed error for such improper argument will not be considered on appeal. [numerous citations omitted]

The absence of a contemporaneous objection is absolutely fatal to Vaughn's complaint. **Turner v. State,** 818 So.2d 1181 (Miss. 2002) [By failing to object to the state's closing argument during trial, defendant was precluded from raising any issues concerning the argument for the first time on appeal.]; **Hampton v. State,** 815 So.2d 429 (Ct.App.Miss. 2002) [A contemporaneous objection must be made in order for the Court of Appeals to consider claims of improper or erroneous comments by a prosecuting attorney made during closing argument.]; **Swindle v. State,** *supra.*

It is elementary that a contemporaneous objection is required in order to preserve an error for appellate review. **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied; **Logan v. State,** 773 So.2d 338 (Miss. 2000); **Florence v. State,** 755 So.2d 1065 (Miss. 2000); **Jackson v. State,** 766 So.2d 795 (Ct.App.Miss. 2000); **Goree v. State,** 750 So.2d 1260 (Ct.App.Miss. 1999).

Otherwise the error, if any at all, is waived for appeal purposes. **Caston v. State,** *supra*, 823 So.2d 473 (Miss. 2002), reh denied.

Stated differently, "[t]he failure to object at trial acts as a procedural bar in an appeal." **White v. State,** 964 So.2d 1181, 1185 (Ct.App.Miss. 2007), citing **Jackson v. State,** 832 So.2d at 579, 581(¶3) (Ct.App. Miss. 2002), citing **Carr v. State,** 655 So.2d 824, 853 (Miss. 1995).

A defendant is not entitled to raise new issues on appeal that he has not first presented to the

trial court for consideration. **Hodgin v. State,** 964 So.2d 492 (Miss. 2007). This rule is not diminished in a capital case. **Flowers v. State,** 947 So.2d 910 (Miss. 2007). Moreover, it also applies to constitutional questions. **Williams v. State,** 971 So.2d 581 (Miss. 2007) ["As a general rule, constitutional questions not asserted at the trial level are deemed waived."] *See also* **Ross v. State,** 954 So.2d 968, 987-88, 1015 (Miss. 2006); **Rogers v. State,** 928 So.2d 831, 834 (Miss. 2006).

In **Gonzales v. State,** 963 So.2d 1138, 1144 (Miss. 2007), the Supreme Court reaffirmed the rule with the following rhetoric:

> Where an argument has never been raised before the trial court, we repeatedly have held that 'a trial judge will not be found in error on a matter not presented to the trial court for a decision.' *Purvis v. Barnes,* 791 So.2d 199, 203 (Miss. 2001).

The contemporaneous objection rule has been applied to speedy trial violations, discovery violations, ***Batson*** violations, in-court identifications, admission of wrongfully obtained evidence, trial *in absentia,* and the like. *See* **Miller v. State,** 956 So.2d 221 (Miss. 2007) [speedy trial]; **Jackson v. State,** 962 So.2d 649 (Ct.App.Miss. 2007), reh den, cert den [discovery]; **Flowers v. State,** 947 So.2d 910 (Miss. 2007) and **Roles v. State,** 952 So.2d 1043 (Ct.App.Miss. 2007) [***Batson***]; **Black v. State,** 949 So.2d 105 (Ct.App.Miss. 2007) [in-court identifications]; **Gonzales v. State,** *supra,* 963 So.2d 1138 (Miss. 2007)[wrongfully obtained evidence]; **Mallard v. State,** 798 So.2d 539 (Miss. 2001) [trial *in absentia*].

The contemporaneous objection rule is in place in order to enable the trial judge to correct error with proper instructions to the jury whenever possible. **Slaughter v. State,** 815 So.2d 1122 (Miss. 2002), reh denied.

A trial court cannot be put in error unless it had an opportunity to first pass on the question. **Palm v. State,** 748 So.2d 135 (Miss. 1999); **Fulgham v. State,** 770 So.2d 1021 (Ct.App.Miss.

2000). *See also* **Mallard v. State,** *supra*, 798 So.2d 539, 542 (Miss. 2001), where this Court held that Mallard's complaint that she was tried in her absence was waived, for the purposes of appeal, since she failed to object to her trial *in absentia.*

Miss.Code Ann. § 99-35-143 is precisely in point. It reads, in its pertinent parts, that

> [a] judgment in a criminal case **shall not be reversed** because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, **or because of any error or omission in the case in the court below, except where the errors or omission are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court.** [emphasis added]

The underlying bases for the existence of a contemporaneous objection rule are contained in **Oates v. State**, 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

> There are three basic considerations which underlie the rule requiring specific objections. It avoids costly new trials. Boring v. State, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. Heard v. State, 59 Miss. 545 (Miss. 1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932). These rules apply with equal force in the instant case; accordingly, we hold that appellant did not properly preserve the question for appellate review.

In **Leverett v. State**, 197 So.2d 889, 890 (Miss. 1967), this Court, quoting from **Collins v. State**, 173 Miss. 179, 180, 159 So. 865 (1935), penned the following language:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

In **Sumner v. State,** 316 So.2d 926, 927 (Miss. 1975), we find the following language

concerning the time for making an objection:

> The rule governing the time of objection to evidence is that it must be made as soon as it appears that the evidence is objectionable, or as soon as it could reasonably have been known to the objecting party, unless some special reason makes a postponement desirable for him which is not unfair to the proponent of the evidence. *Williams v. State*, 171 Miss. 324, 157 So. 717 (1934) and cases cited therein. See also cases in Mississippi Digest under Criminal Law at 693.

We reiterate. "A trial judge will not be found in error on a matter not presented to him for decision." **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995) citing numerous cases. *See also* **McLendon v. State,** 945 So.2d 372 (Miss. 2006), reh den, cert den; **Howard v. State,** 945 So.2d 326 (Miss. 2006), reh den, cert den. "[The Supreme Court] cannot find that a trial judge committed reversible error on a matter not brought before him to consider." **Montgomery v. State,** 891 So.2d 179, 187 (Miss. 2004) reh den.

No egregious violation of a fundamental or substantial right is involved here, and the procedural bar/waiver/forfeiture rule is applicable to Vincent Vaughn.

Plain Error .

Vaughn argues that because the comments complained about were not objected to at trial, he must proceed under the doctrine of plain error. (Brief of the Appellant at 9, 13)

Miss.R.Evid. 103 (d) reads as follows: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

An in depth discussion of the "plain-error" doctrine and its application is found in the recent case of **Starr v. State,** 997 So.2d 262 (Ct.App.Miss. 2008).

We continue to adhere to our view that "plain error" is something for a reviewing court to notice and not a talisman available for an appellant to argue.

In any event, the plain error doctrine is inapplicable here because in order to find "plain"

error there must be "error" working to a defendant's disadvantage. Vaughn's defense was that he never, either prior to the warnings or thereafter, made a statement to law enforcement that he hit Hughes.

> "I just want - - of course Mr. Vaughn's denyin' that he told you this, so that's why it's important that we get to the bottom of it." (Defense counsel's comment made to Officer Turner during counsel's cross-examination at R. 74)
>
> "What is denied is that Mr. Vaughn, [Hughes's] friend, hit him and knocked him to the ground." (Defense counsel's closing argument at R. 127)

Counsel relied quite heavily on the fact that neither a video nor audio tape of Vaughn's statement to Turner was preserved and available. (R. 72-73, 74-76) Thus, Vaughn's silence was the heart of his defense. The failure to object may well have been a product of Vaughn's trial strategy.

Even if this issue is evaluated under the plain-error doctrine, there is still no error plain enough and egregious enough to warrant reversal of Vaughn's manslaughter conviction.

"The plain error doctrine requires that there be an error and the error must have resulted in a manifest miscarriage of justice." **Williams v. State,** 794 So.2d 181, 187 (Miss. 2001).

In **McGee v. State,** 953 So.2d 211, 215 (Miss. 2007), we find the following language dispositive of Vaughn's "plain error" argument:

> * * * However, if there is a finding of plain error, a reviewing court may consider the issue regardless of the procedural bar. A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State,* 794 So.2d 181, 187-88 (Miss. 2001). **To determine if plain error has occurred, we must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial."** *Cox v. State,* 793 So.2d 591, 597 (Miss. 2001) (relying on *Grubb v. State,* 584 So.2d 786, 789 (Miss. 1991); *Porter v. State,* 749 So.2d 250, 260-61 (Miss.Ct.App. 1999).

The Supreme Court applies the "plain error" rule " . . . only when it affects a defendant's substantial/fundamental rights." **Williams v. State,** *supra*, 794 So.2d at 187.

None of this criteria is found to exist in the case at bar.

First, Judge Smith did not deviate from a legal rule. In the absence of a contemporaneous objection, the trial judge never had the opportunity to rule. Thus, there is no error, plain or otherwise, subject to review.

Second, even if there is the spectre of error, it is neither "plain" nor "clear" nor "obvious." Rather, it was a mere mentioning of Vaughn's post-arrest silence. Vaughn's alleged silence, both pre-arrest and post-arrest, appears to have been a part and parcel of his defense since defense counsel suggested to the jury Vaughn never told Officer Turner he hit Hughes and knocked him to the ground. In other words, any error did not result in a "manifest miscarriage of justice."

Harmless Error.

Assuming, arguendo, there is "plain error," it was clearly cured and rendered harmless beyond a reasonable doubt when defense counsel, during his closing argument, twice said the same thing.

We quote:

> [BY DEFENSE COUNSEL:]
>
> So let us talk about what we heard from the stand. First of all, the State, called Officer Ramirez, who's the investigator. He said that he went to the scene, took some pictures, and at some point he arrested or talked to Mr. Vaughn. He observed him. He asked him did he want to make a statement. He said no. (R. 126)
>
> * * * * * *
>
> He does not have to prove he didn't do it. The State has to prove that he did. No other evidence. They saw him immediately, so they say. No scars. And then when the detective talking to him, he

say, "I'm not talkin'. I need, you know . . ."

> So . . . and he brought that little statement where he signed. "So he talked earlier, but not talkin' now, but you don't have evidence of it?" (R. 131)

It is true that according to Investigator Ramirez, Vaughn did not agree to speak after receiving his *Miranda* rights. (R. 68-69) No harm, no foul. It is clear that Vaughn had already signed a waiver of those rights. (R. 68-69) *See* State's exhibit 4.

"*Miranda* violations are subject to the harmless-error standard." **Starr v. State,** *supra*, 997 So.2d 262, 268 (¶16) (Ct. App.Miss. 2008), citing **United States v. Paul,** 142 F.3d 836, 843 (5th Cir. 1998). By analogy, the same rationale would apply to a defendant's post-arrest silence in the wake of *Miranda* warnings.

In **Starr,** *supra*, 997 So.2d at 268 we find the following language applicable to a harmless error analysis:

> * * * A *Miranda* violation will be considered harmless error if the trial record shows beyond a reasonable doubt that the admission of the evidence "was without any substantial prejudicial effect under all of the facts and circumstances of the case." **Hopkins v. State**, 799 So.2d 874, 879 (¶10) (Miss. 2001) (quoting **Cooley v. State**, 391 So.2d 614, 623 (Miss. 1980)). This Court must determine whether "absent the . . . unconstitutional effect, the evidence remains not only sufficient to support the verdict but so overwhelmingly so as to establish the guilt of the accused beyond a reasonable doubt." **Paul**, 142 F.3d at 843 (quoting **United States v. Baldwin**, 691 F.2d 718, 723 (5th Cir. 1982)). Such a decision "requires an examination of the facts, the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of defendant's guilt." **United States v. Dixon**, 593 F.2d 626, 629 (5th Cir. 1979).

Given the overall context in which the prosecutor's comments appear, any error was later cured and rendered harmless beyond a reasonable doubt when Vaughn's own lawyer said the same thing during his closing argument as a part of Vaughn's defensive strategy. It was true in **Starr**, and

it is equally true here, that "[w]e cannot say that by looking at the facts, the trial context of the alleged error, and the prejudice created, that the alleged *Miranda* violation requires reversal." **Id.,** 997 So.2d at 268.

Finally, the evidence, even if slim, preponderates in favor of the guilty verdict, and any error could not have contributed to the defendant's conviction. *See* **Chapman v. California,** 386 U.S. 18, 87 S.Ct.824, 17 L.Ed.2d 705 (1967), reh den 17 L.Ed.2d 705.

CONCLUSION

Vaughn's sufficiency of the evidence complaint is without merit because any rational trier of fact could have found beyond a reasonable doubt that Vaughn, without malice, killed Hughes by committing a misdemeanor simple assault, *viz.*, striking him in the face with his fist.

Vaughn's weight of the evidence argument is procedurally barred.

But even if not, "[t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

In the case at bar it could, and he was.

Appellee respectfully submits that neither plain error nor reversible error, if any error at all, took place during the trial of this cause. Assuming otherwise, any error was harmless beyond a reasonable doubt.

Accordingly, the judgment of conviction of manslaughter and the ten (10) year sentence imposed by the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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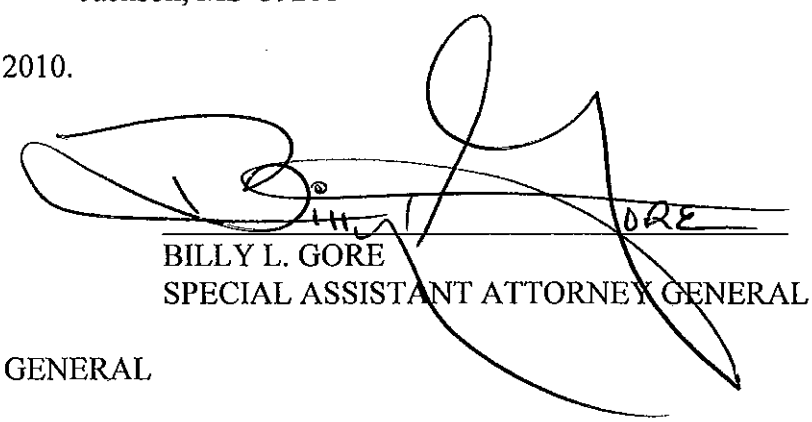
This the 1st day of June, 2010.



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