IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

VINCENT VAUGHN — APPELLANT

V. — NO.2010-KA-00172-SCT

STATE OF MISSISSIPPI — APPELLEE

# REPLY BRIEF OF THE APPELLANT

**ORAL ARGUMENT NOT REQUESTED**

**MISSISSIPPI OFFICE OF INDIGENT APPEALS**
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## REPLY ARGUMENT OF THE APPELLANT

## 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.

### A. Sufficiency of the Evidence.

The State submits that the evidence shows Vaughn committed a simple assault under Miss. Code Ann. §97-3-7(1) (Supp. 2006). "Moreover, mere words are not enough to justify punching someone without incurring liability for any unforeseen and/or unintentional consequences." Appellee Brief at 9. However, not only does the State fail to cite any authority to support this claim, those are simply not the facts.

Taking the prosecution's case in its best light, Vaughn hit Hughes in self-defense when the Hughes threatened him with a pipe *and had pushed him.* Tr. 70. This is more than mere words. After knocking Hughes to the ground, Hughes got up and again threatened to kill Vaughn. *Id.* Hughes could not have possibly gotten up and continued to threaten Vaughn with the injury described by Dr. Lewis. Tr. 92-94. The fatal injuries had to have occurred after Vaughn's departure. The State's evidence was wholly lacking in showing that Hughes died as a result of any injury inflicted by Vaughn.

The jury had to find Vaughn was guilty of simple assault to find him guilty of manslaughter under Miss. Code Ann. §97-3-29 (1972). To be guilty of simple assault under Miss. Code Ann. §97-3-7(1), Vaughn must have attempted to cause or purposely, knowingly or recklessly cause bodily injury to Hughes. There was simply no evidence to prove beyond a reasonable doubt that Vaughn committed a simple assault. After giving this statement to

Corporal Turner, Vaughn was not arrested for assault, yet the State used this as the basis for the manslaughter charge.

Instruction S-2 did not even track the language of the manslaughter statute[1]. C.P. 33. The jury was not told it had to find Vaughn was engaged in a crime or misdemeanor when the killing occurred, much less that the killing was "by the act, procurement, or culpable negligence" of Vaughn. There is simply no culpable negligence involved in defending one's self from an attack with a pipe.

The State also cites to Vaughn's apparent lack of remorse or caring because he did not go to the hospital to see about Hughes. Tr. 56-57, 66, 120, 121. However, if the State's evidence is to be believed, Vaughn left while Hughes was still threatening him. He had no reason to even know Hughes was at the hospital or had been hurt after he left. There was also no testimony from Turner that Vaughn was covered by blood, even though the State suggested the evidence showed Hughes's body was moved. Tr. 65.

The State correctly notes that it was for the jury to decide if all the evidence and inferences therefrom showed Vaughn guilty beyond a reasonable doubt. However, the evidence failed to do so, and the trial court should have directed a verdict. There was no evidence to show any assault by Vaughn was the proximate cause of Hughes's fatal injuries. Given the evidence presented, a rational trier of fact could not have found all the elements

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[1] The State mentions that Vaughn does not contend that the jury was not properly instructed. Appellee Brief at 11. Vaughn does not concede the jury was properly instructed. The issue was not raised on appeal given, once again, the lack of a contemporaneous objection at trial. Tr. 107. The fact that the issue was not raised does not mean Vauhgn believes the jury was properly instructed, only that the issue would be procedurally barred.

of manslaughter beyond a reasonable doubt. *Bush v. State*, 895 So. 2d 836 (¶16) (Miss. 2005). Vaughn's conviction should be reversed and rendered.

**B. Weight of the Evidence.**

The State argues this issue should be procedurally barred, as the Motion for a New Trial is not included in the record. Appellee Brief at 13. The State submits that the order contained in the record overruling the Motion for New Trial is insufficient to preserve the claim. Contrary to the State's argument, the record clearly shows the motion was made and overruled. The order clearly states, "THIS CAUSE, having come on pursuant to Motion of the Defendant Vincent Vaughn, by and through his attorney, David L. Tisdell, for Judgment of Acquittal Notwithstanding the Verdict, or in the alternative, a New Trial, and the Court having reviewed the motion does hereby find that said Motion is not well-taken and is denied." C.P. 17. This was sufficient to preserve the issue.

There are countless cases which hold a motion for new trial challenges the weight of the evidence[2]. The fact that the actual motion is missing from the record, or that trial counsel failed to file the written motion should not be fatal to Vaughn's ability to argue this issue on appeal. The record is clear that the trial court considered the motion.

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[2]*See, e.g.*, *Derouen v. State*, 994 So.2d 748 (¶11) (Miss.2008); *Boone v. State*, 973 So.2d 237 (¶18) (Miss.2008); *Brown v. State*, 970 So.2d 710 (¶8) (Miss.2007); *Hodgin v. State*, 964 So.2d 492 (¶22) (Miss.2007); *Brown v. State*, 829 So.2d 93 (¶22) (Miss.2002); *Jefferson v. State*, 818 So.2d 1099 (¶34) (Miss.2002); *Edwards v. State*, 800 So.2d 454 (¶25) (Miss.2001); *Sheffield v. State*, 749 So.2d 123 (¶16) (Miss.1999).

> When he moves for a new trial, a defendant in a criminal case necessarily invokes Rule 5.16 [3]of our Uniform Criminal Rules of Circuit Court Practice which in pertinent part provides:
>
> > The court on written notice of the defendant may grant a new trial on any of the following grounds:
> >
> > (1) if required in the interest of justice;
> >
> > (2) if the verdict is contrary to law or the weight of the evidence;
> > ....
>
> As distinguished from the j.n.o.v. motion, here the defendant is not seeking final discharge. He is asking that the jury's guilty verdict be vacated on grounds related to the weight of the evidence, not its sufficiency, and may be retried consistent with the double jeopardy clause. *Tibbs v. Florida*, 457 U.S. 31, 39, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652, 659-60 (1982).

*May v. State*, 460 So.2d 778, 781 (Miss.1984).

The majority of the cases cited by the State stand for the correct proposition that the trial judge must be given an opportunity to first rule on an issue before it is ripe for appeal. That was accomplished in this case. The State, however, cites no case holding that a motion for a new trial in and of itself is insufficient to preserve a weight of the evidence claim unless it is specifically stated in an enumerated ground in a written motion. Accordingly, this Court should address this issue on the merits.

**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.**

The State's brief spends several pages outlining the well-established law on the contemporaneous objection rule. Appellee Brief 18-23. As stated in our original brief,

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[3] Now URCCC Rule 10.05.

Vaughn concedes that this issue is procedurally barred for failure to contemporaneously object. However, Vaughn's contention has always been that this is plain error.

The State asserts that the evidence and comments on Vauhgn's post-arrest silence were not plain error, as "silence was the heart of his defense." Appellee Brief at 24. To the contrary, the "heart" of Vaughn's defense was the State's lack of evidence to prove his guilt beyond a reasonable doubt. Regardless, even if "silence" was his defense, that did not give the State to right to comment on his constitutional right to remain silent.

First, the State insists that because there was no contemporaneous objection, the trial judge did not have the opportunity to rule, therefore there was no error to review. That is precisely the point of the plain error doctrine. Additionally, the State argues none of the criteria of the plain error doctrine appears in this case. Vaughn would assert, however, that commenting on post-arrest silence is a violation of a substantial right. It is fundamentally unfair and a deprivation of due process to allow an arrested person's silence to be used against him. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).

Second, the State contends that there was only "a mere mentioning" of Vaughn's post-arrest silence. Appellee Brief at 25. The prosecution first brought out evidence on Vaughn's post-arrest silence through Investigator Ramirez. States's Ex. S-4, Tr. 69. The defense never opened the door to this evidence. Trial counsel simply asked Ramirez during cross-examination whether or not Vaughn *voluntarily* came to the police station *the night of the incident*. Tr. 67. This did not give the prosecution permission to comment on Vaughn's later silence, *after* he was arrested and read his rights days later.

If that were the only "mere mention" of Vaughn's silence, it could be argued that the violation of *Doyle* was harmless error. However, the State went on to further comment about Vaughn's silence during its opening closing argument, actually implying Vaughn's silence showed consciousness of guilt. Tr. 121. The defense presumably felt to need to concede what the evidence by then showed, that Vaughn declined to give a statement to Investigator Ramirez. Tr. 126, 131. These are the only mentions of Vaughn's post-arrest silence by the defense. These subsequent concessions by the defense during argument, do not render the violation harmless. See *Robinson v. State*, No. 2007-CT-02202-SCT (¶17-18) (Miss. May 13, 2010) (defendant's subsequent discussion of the prejudicial evidence did not cure the error or render it harmless).

To bolster's its claim that the prosecution's comments were harmless, the State again infers that Vaughn's silence was part and parcel to his defense. Appellee Brief at 25. However, it is clear the defense was only commenting on the lack of evidence presented by the State. Corporal Turner testified Vaughn told him he hit Hughes, knocking him to the ground. Tr. 70. Yet, the State failed to memorialize these statements in writing or on tape. Tr. 77. Trial counsel was simply pointing out the lack of evidence, not using Vaughn's silence as a defense.

Further, the State seems to be arguing that because Vaughn signed a waiver of his rights, that somehow rendered the State's comments on his post-arrest silence harmless. "No harm, no foul." Appellee Brief at 26. The evidence of Vaughn's silence was not being used by the State to impeach Vaughn's testimony, but to prove his guilt. The error was clear and

obvious, and the trial judge erred in failing to take some action, even without an objection from trial counsel.

Just recently, the United States Supreme Court reiterated the criteria for the plain error doctrine in reviewing Fed. Rule Crim. Proc. 52(b)[4].

> Rule 52(b) permits an appellate court to recognize a"plain error that affects substantial rights," even if the claim of error was "not brought" to the district court's "attention." Lower courts, of course, must apply the Rule as this Court has interpreted it. And the cases that set forth our interpretation hold that an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

*United States v. Marcus*, 560 U.S. ___, 2010 WL 2025203, 3 (May 24, 2010), citing *Puckett v. United States*, 556 U. S. ___, 129 S.Ct. 1423, 1429 (2009).

Vaughn submits he has shown plain error in this case and the error can not be considered harmless. Simply put, this Court can not say the error did not contribute to the verdict beyond a reasonable doubt. *Brown v. State*, 995 So.2d 698 (¶25) (Miss. 2008). Accordingly, Vaughn is entitled to a new trial with a jury untainted by the evidence and comments concerning his post-arrest silence.

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[4]Fed. Rule Crim. Proc. 52(b) is very similar to Miss. Rule Evid. 103(d).

## CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, Vincent Vaughn, contends that he is entitled to have his conviction reversed and rendered, or at the very least, that he should be granted a new trial. The appellant would stand on his original brief in support of issues not responded to in this reply brief.

Respectfully submitted,
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## CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 15th day of June, 2010, mailed a true and correct copy of the above and foregoing Reply Brief of Appellant, by United States mail, postage paid, to the following:

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