IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

VINCENT VAUGHN — APPELLANT

V. — NO. 2010-KA-00172-SCT

STATE OF MISSISSIPPI — APPELLEE

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. Vincent Vaughn

4. Laurence Y. Mellen, Brenda F. Mitchell, and the Coahoma County District Attorney's Office

5. Honorable Albert B. Smith, III

THIS 26th day of March, 2010.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For VINCENT VAUGHN, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgment of conviction for manslaughter against the appellant, Vincent Vaughn. Tr. 138, C.P. 9-10, R.E. 13-14. Vaughn was subsequently sentenced to ten years to serve and five years post-release supervision. Tr. 145, C.P. 11-14, R.E. 15-18. This sentence followed a jury trial on November 17, 2009, with a sentencing hearing on January 11, 2010, Honorable Albert B. Smith, III, Circuit Judge, presiding[1]. Vaughn is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, on September 13, 2008, the body of Arthur Hughes (Hughes) was found in his house by his wife, Linda Hughes (Linda)[2]. Tr. 48, 52. After seeing two "big spots" of blood on the sidewalk, she ran up to the door and saw Hughes laying on his back with blood all over the floor. It appeared to her like he had a hole

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[1]It should be noted that this was Vaughn's third trial. Two other trials ended in a hung jury. Tr. 34-35, C.P. 5-6, 7-8, R.E. 9-10, 11-12.

[2] Although married, Linda testified they had been separated for about 2 years. Tr. 49.

in the back of his head. Tr. 52. As a registered nurse, she could tell that Hughes was not breathing and was dead. Tr. 54, 56. Linda knew the appellant, Vincent Vaughn, through his friendship with her husband. Tr. 49-50. She was not present at the time Hughes was injured. Tr. 60.

Shortly before Hughes was discovered, Vaughn walked into the Clarksdale Police Department to make a compliant. According to Corporal Nicholas Turner, Vaughn told him that he and a friend had just been in a fight. Vaughn explained that Hughes was upset about something Vaughn said and picked up a pipe, told him to get out of his yard, and pushed Vaughn. When Hughes was about to push him again, Vaughn stated that he hit Hughes, knocking him down. Vaughn stated Hughes got up and threatened to kill him. Vaughn said he wanted to make a complaint because he knew Hughes owned a gun. He wanted to report this to the police in case something happened. Tr. 70

Corporal Turner testified that not a minute after Vaughn left, he received a call about a body being found. Police were looking for someone who matched Vaughn's description. Corporal Turner then went out to catch-up with Vaughn. Tr. 71. He had Vaughn follow him back to the police station where they waited for detectives to arrive. Corporal Turner did not take a statement from Vaughn, but just engaged in idle "chitchat." He did remember Vaughn saying that he and Hughes were best friends, but when Hughes got to drinking, he would become violent. Tr. 72. Although this conversation was apparently taped, the recording was evidently erased or lost. Tr. 72-73. Corporal Turner also testified he did not remember

Vaughn being intoxicated. Tr. 76. He also did not remember seeing any cuts or bruises on him. Tr. 77.

Investigator Vincent Ramirez was the detective called to Hughes's home to investigate an altercation there. Tr. 62. He spoke to the officers present and started taking pictures of the scene. State's Ex. S-1A, S-1B, S-1C, S-1D. Investigator Ramirez speculated that the blood indicated that Hughes had been moved from one area to another. Tr. 65. He also testified that he read Vaughn his rights on September 15, 2008, after Vaughn was arrested, but that Vaughn refused to speak to him. Tr. 68-69, Ex. S-4.

The State's final witness was Dr. Adele Lewis. She was a pathologist who reviewed Hughes's autopsy, but did not actually perform the procedure[3]. Tr. 89. Dr. Lewis indicated Hughes had a bruise to his forehead and to the back of his head. Tr. 92-93. She agreed with the original pathologist that the cause of death was blunt-force trauma to the head. She also agreed that the manner of death was homicide. Tr. 94. However, she admitted that her conclusion that Hughes's death was the result of a homicide was based on hearsay. Apparently, police told the coroner Hughes was hit and fell. The coroner told the original pathologist the same facts, and Dr. Lewis had no way to disagreed. Tr. 96. Had she been told that Hughes was intoxicated and fell and hit his head, she would have opined that his death was an accident. Tr. 98. Toxicology tests showed that Hughes's blood-alcohol content was .166% at the time of his death. Tr. 100-101.

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[3] The pathologist who actually performed the autopsy was unavailable for trial. Tr. 35-37.

SUMMARY OF THE ARGUMENT

The evidence in this case was simply insufficient to support a conviction for manslaughter against Vincent Vaughn. Vaughn was indicted for manslaughter under Miss. Code Ann. §97-3-29 (1972). The State failed to prove beyond a reasonable doubt that Vaughn actually committed a misdemeanor assault. Furthermore, the evidence was also lacking in proof that even if an assault occurred, the blow by Vaughn was the proximate cause of Hughes's death.

Furthermore, Vaughn was prejudiced by the prosecution's introduction of evidence that Vaughn invoked his right to remain silent after he was read his *Miranda* rights. The State compounded the error by commenting on it again during closing arguments. With such little evidence to begin with, telling the jury that Vaughn refused to talk was a clear violation of his fundamental constitutional right that his silence would not be used against him. The failure to object should not procedurally bar this issue as it constitutes plain error.

ARGUMENT

ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT, OR WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

A. Sufficiency of the Evidence

The standard of review regarding the sufficiency of the evidence is well-established. Review of a motion for a directed verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So. 2d 836, 843 (¶15) (Miss. 2005). The court must determine whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged and that he

did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* at ¶16 (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. *Bush*, 895 So. 2d at 844 (¶16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

Vaughn's trial counsel made the proper motion for a directed verdict at the conclusion of the State's case.[4] He specifically argued that the State failed to show or put on any evidence that Vaughn committed a misdemeanor assault. Tr. 104-05. The court overruled the motion, finding Vaughn's statement to the police that he hit Hughes was sufficient. Tr. 105. However, even taking the State's evidence in its best light, Vaughn admitted to hitting Hughes in necessary self-defense after being threatened with a pipe. Tr. 70. Using a fist in self-defense against a pipe is not a misdemeanor. There was no evidence admitted that contradicted Vaughn's statement. The State's evidence was wholly insufficient to show a misdemeanor occurred. The trial judge erred in failing to grant a directed verdict.

Miss. Code Ann. §97-3-29 (1972), states in part that a person is guilty of manslaughter if, by the act, procurement, or culpable negligence, he kills another without malice while

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[4] Counsel also renewed his challenge to the sufficiency of the evidence in a peremptory instruction (D-2), which was also denied. C.P. 36. Furthermore, although the actual motion for a JNOV or new trial is not contained in the record, there is an order denying said motion. C.P. 17. The motion was presumably made *ore tenus.*

"engaged in the perpetration or any crime or misdemeanor not amounting to a felony, or in the attempt to commit any crime or misdemeanor." The sole evidence the State presented to show Vaughn was engaged in the commission of a crime was his alleged statement to police that he hit Hughes, knocking him to the ground after he was threatened with a pipe. Tr. 70. According to Corporal Turner, Vaughn also stated that after hitting him, Hughes got up and threatened to kill him. These statements were not contradicted by the physical evidence found at the scene or the testimony of the pathologist. Even assuming, *arguendo*, that Vaughn did hit Hughes, and further that that particular blow caused the injury which eventually killed him, the blood stains found on the sidewalk and the blood found inside the house supports Vaughn's statement that after knocking him down, Hughes got up and threatened to kill him.

The evidence presented was wholly insufficient to convict Vaughn of a misdemeanor assault had Hughes lived. Again, no other witnesses to the alleged assault were presented by the State. Even the pathologist could not definitively state that the bruise to Hughes's forehead occurred immediately before the blow to the back of his head, only that it occurred within 24 hours of his death. Tr. 95. Even taking Vaughn's statement to police as true, his actions clearly did not amount to culpable negligence much less a simple assault. The trial judge erred in not granting the directed verdict.

B. Weight of the Evidence

If this Court finds the evidence supporting the charge of manslaughter was at least sufficient to submit to the jury, in the alternative, Vaughn would assert that the verdict of

guilty was clearly against the overwhelming weight of the evidence. As noted above, counsel's post-trial motion for a new trial is not contained in the record. However, the court issued an order overruling counsel's motion for judgment notwithstanding the verdict or in the alternative, a new trial. C.P. 16. "A motion for new trial challenges the weight of the evidence." *Dilworth v. State*, 909 So.2d 731 (¶20) (Miss. 2005).

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id. See also Benson v. State*, 551 So.2d 188, 193 (Miss. 1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss. 1987).

As argued above, the sole evidence presented by the State to show Vaughn assaulted Hughes was his statement to police. In this statement, Vaughn stated that after being pushed and threatened by Hughes with a pipe, Vaughn hit him and knocked him down. Hughes then got up and threatened to kill him. Tr. 70. No reasonable juror could conclude Vaughn was guilty of an assault beyond a reasonable doubt based on this information alone. Furthermore, there was no evidence that this particular blow is what caused the fatal injury to Hughes's head. The pathologist's conclusion that this was a homicide was based on hearsay contained in the autopsy report. She could not conclude the bruise on Hughes's forehead was caused

by Vaughn or that this blow is what knocked him down causing the fatal injury. Tr. 96. She would have found this death to be accidental if she was informed Hughes fell. Tr. 97, 99.

It can not be ignored that two other juries could not unanimously find Vaughn guilty. C.P. 5-6, 7-8, R.E. 9-10, 11-12. The report Vaughn made to police was supported by the physical evidence. Vaughn never admitted to any crime when speaking with Corporal Turner, but was concerned for his own safety after Hughes threatened to kill him.

> Q. [By Defense Counsel] Mr. Vaughn said he had been in an altercation with his friend.
>
> A. [By Corporal Turner] Correct.
>
> Q. That he hit him. You don't know where he hit him. You don't remember Mr. Vaughn being intoxicated. You didn't see any evidence of altercation. There was a recording that we don't have. And Mr. Vaughn did not sign anything sayin' that he gave that statement was true and correct. Is that a – fairly and accurate summary of what you just said?
>
> A. That's correct.

Tr. 77.

Sitting as a thirteenth juror, this Court should find that the verdict was against the overwhelming weight of the evidence. *Jenkins v. State*, 947 So.2d 270 (¶24) (Miss. 2006). To allow this verdict to stand would sanction an unconscionable injustice. See *Hawthorne v. State*, 883 So.2d 86 (Miss. 2004). Vaughn at least deserves a new trial.

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.

During the testimony of Investigator Ramirez, the prosecutor admitted into evidence the rights waiver form signed by Vaughn. States's Ex. S-4, Tr. 69. This was after trial counsel asked Ramirez during cross-examination whether or not Vaughn voluntarily came to the police station the night of the incident. Tr. 67. However, the rights warning form was signed on September 15, 2008, after Vaughn had been arrested. The prosecutor went on to point out that Vaughn did not speak to Investigator Ramirez at that point.

> [BY THE PROSECUTOR]: 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.

Tr. 69.

Although trial counsel did not object to this question, this was clearly plain error. Trial counsel carefully asked the question pertaining to Vaughn's cooperation on the night of the incident. Counsel did not ask about subsequent attempts to get a statement from Vaughn *after his arrest.* The question did not open the door to re-direct on whether or not Vaughn exercised his right to remain silent after he was read his rights. Allowing Investigator Ramirez to testify that Vaughn refused to give a statement after he was arrested

and informed of his rights, violates the Fifth Amendment of the United States Constitution, as well as Article III, Section 26 of the Mississippi Constitution.

The Fifth Amendment provides that "No person shall .... be compelled in any criminal case to be a witness against himself..." U.S. Const. Amend V. The Mississippi Constitution further provides that "In all criminal prosecutions the accused...shall not be compelled to give evidence against himself;...." Art. III § 26, Miss. Const. The privileges against self-incrimination are embedded in framework of both the State and Federal Constitutions, serving as bedrock constitutional principles under which our system of criminal justice functions.

Vaughn was penalized for exercising those rights after he was told his silent could not be used against him. It was improper for the trial judge to allow testimony about the Vaughn's silence after he was read his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 2244-45 (1976), clearly prohibits questioning about an accused's post-arrest silence.

In *Quick v. State*, this Court held that it is improper and, ordinarily, reversible error to comment on a defendant's silence after he has been read his rights. *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990).

> As this Court stated in *Quick*, "[i]t is improper and, ordinarily, reversible error to comment on the accused's post- Miranda silence." *Quick*, 569 So.2d at 1199 (emphasis added). Furthermore, as then Presiding Justice Hawkins pointed out "[i]n *Doyle* the U.S. Supreme Court held that if an accused under arrest was given a *Miranda* warning and told that he had a right to remain silent, and the accused did remain silent, that the government thereafter could not use his choice of remaining silent as a weapon during his trial testimony

> cross-examination to cast suspicion on his guilt or innocence. Simply put, the government cannot use an accused's exercise of a Constitutional right as a weapon to convict him...." *Johnson [v. State]*, 596 So.2d [865] at 869 [Miss. 1992] (Hawkins, P.J., dissenting) (emphasis added).

Puckett v. State, 737 So.2d 322, 351 (Miss. 1999)(citations omitted).

As argued above, with the scant evidence the prosecution presented in this case, the jury could have easily assumed Vaughn had something to hide by failing to speak to police. This Court has held it is not a violation to inquire into a defendant's post-arrest silence, as long as there was no evidence *Miranda* warnings had been given. *McGrone v. State*, 807 So.2d 1232 (¶10) (Miss. 2002). However, the State actually submitted evidence that Vaughn was read his rights. State's Ex. S-4. It is clear that only after Vaughn was arrested and read his rights did he decline to make a statement. Tr. 69. The jury should have never been informed that Vaughn declined to give a statement. The question was clearly prejudicial to Vaughn.

In a similar issue involving a prosecutor asking a detective about the defendant's silence after being read his rights, Justice Dickinson noted in *Birkhead v. State*:

> So long as Courts overlook such blatant violations of constitutional rights, prosecutors and investigators will have little incentive to refrain from committing those violations. Many argue that we should show more concern for the rights of the victim. I agree. But we do not show concern for victims by refusing to enforce the constitutional rights and protections required by the constitution. Instead, we increase the danger that the real perpetrator of a crime will walk free because some innocent person is wrongly convicted. Under such circumstances when the law is not judiciously followed, the victim's right to justice is certainly not perfectly protected, and society's demand for justice is just as certainly not met.

Birkhead v. State, No. 2007-KA-00666-SCT (¶63) (Miss. February 19, 2009), Dickinson, Justice, Dissenting.

To further compound the error, Vaughn's exercise of his right to remain silent was *again* commented on by the prosecution during its closing argument.[5]

> Then Vincent Vaughn was later arrested by Vincent Ramirez. And I asked him, "Investigator Ramirez, after you put him under arrest, you read him his Miranda rights – the right to remain silent, the right to counsel, et cetera – did he speak?"
>
> "No."
>
> He was under arrest at that point. He was willin' to speak when he was the first one there, when he could tell his story to Nicholas Turner before anybody knew there was a dead body layin' out there on Spruce Street.

Tr. 121.

The constitutional right against self incrimination includes the right not to have the State comment on the exercise of that right. *Whigham v. State*, 611 So. 2d 988, 995 (Miss. 1992). This was especially crucial given Vaughn's decision not to testify at trial. Tr. 106-07. Vaughn did not make up some story while testifying that the State was trying to impeach by using his earlier silence. "The accused's right to be silent then is equally as strong as the right not to testify and it is error to comment on either. Certainly it is improper to inquire of the defendant as to whether he made any protest or explanation to the arresting officers." *Quick*,

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[5] The appellant clearly concedes these comments were not objected to at trial. In fact, trial counsel even commented on the fact that Vaughn gave no statement to police in the defense closing argument. Tr. 126. Given trial counsel's failure to object, there are potential claims of ineffective assistance of counsel that cannot be raised in this appeal because they are not "fully apparent from the record." MRAP Rule 22 (b). These potential claims include a failure to object to comments on Vaughn's right to remain silent, failure to submit a written motion for JNOV or new trial, as well as his failure to submit a self-defense instruction. Vaughn reserves these claims for post-conviction review if that is necessary. *Havard v. State*, 928 So.2d 771 (¶13) (Miss. 2006).

supra at 1199, citing *Austin v. State*, 384 So.2d 600, 601 (Miss.1980). Comments on the exercise of the right to remain silent are of such constitutional importance as to not require an objection. *Griffin v. State*, 557 So. 2d 542, 552 (Miss.1990).

Mississippi Rule of Appellate Procedure 28(a)(3) states that "the court may, at its option, notice a plain error not identified or distinctly specified." Additionally, Mississippi Rule of Evidence 103(d) authorizes a court to address "plain errors affecting substantial rights although they were not brought to the attention of the court." This Court may address an issue as plain error when the trial court's error has impacted a fundamental right. "It has been established that where fundamental rights are violated, procedural rules give way to prevent a miscarriage of justice." *Gray v. State*, 549 So.2d 1316, 1321 (Miss.1989). Finally, "[t]his Court has recognized an exception to procedural bars where a fundamental constitutional right is involved." *Conerly v. State*, 760 So.2d 737 (¶5) (Miss. 2000), citing *Maston v. State*, 750 So.2d 1234, 1237 (Miss.1999), and *Smith v. State*, 477 So.2d 191, 195 (Miss.1985).

Having established constitutional error, the Court must then decide whether or not the violation was harmless error. *Thomas v. State*, 711 So. 2d 867, 872 (Miss. 1998), citing *Chapman v. California*, 386 U.S. 18 (1967). "The *Chapman* test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Brown v. State*, 995 So.2d 698 (¶25) (Miss. 2008), citing *Thomas*, 711 So.2d at ¶25. A review of the facts in the case clearly shows the evidence of Vaughn's guilt was far

from overwhelming. This Court can not say, beyond a reasonable doubt, that the comment regarding Vaughn's silence did not contribute to his guilty verdict.

The prosecutors of this State are well-trained. Comments like this should never happen, even if the defense counsel is asleep at the wheel. Trial judges should step in when a defense counsel will not. As Justice Kitchens recently noted:

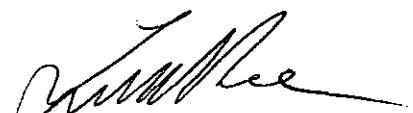
> And though, ultimately, any designation of error rests with the trial judge, we should not let this case pass from our chambers without also noting, with disapproval, the behavior of the prosecutor. A prosecutor "may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The Rules of Professional Conduct further establish that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Miss. R. Prof'l Conduct 3.8 cmt.

Roach v. State, 7 So.3d 911 (¶54) (Miss. 2009), Kitchens, Justice, Dissenting.

CONCLUSION

Given the evidence presented in the trial below, and based on the above argument, together with any plain error noticed by the Court which has not been specifically raised, Vincent Vaughn is entitled to have his conviction for manslaughter reversed and rendered, or at the very least, reversed and remanded for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For VINCENT VAUGHN, Appellant

By: 

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CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 26th day of March, 2010, mailed a true and correct copy of the above and foregoing Brief of Appellant, by United States mail, postage paid, to the following:

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