IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2014-KA-01478-COA

TIMOTHY ALLEN WILSON a/k/a Timothy Wilson — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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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. Timothy Allen Wilson
3. Randy Wilson (co-defendant)
4. Pauline and Randy Vessel (the alleged property crime victims)

THIS 3d day of April 2015.

Respectfully submitted,

TIMOTHY ALLEN WILSON

By: /s/ George T. Holmes
George T. Holmes, His Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Warren County where Timothy Allen Wilson was convicted of receiving stolen property. Timothy was charged and tried with his brother and co-defendant, Randy Charles Wilson, whose appeal is docketed separately under case number 2015-KA-00066-SCT.

A joint jury trial was conducted September 3-4, 2014, with the Honorable Isadore W. Patrick, Circuit Judge, presiding. Timothy was sentenced to ten (10) years as a non-violent habitual offender and is presently incarcerated with the Mississippi Department of Corrections. At trial, Timothy was represented by the Honorable Eugene Perrier of Vicksburg.

FACTS

Paul Powers, who lives near Edwards in rural Hinds County, testified that during the afternoon of April 2, 2012, he witnessed two men steal a utility trailer from the yard of his neighbors Mr. And Mrs. Randy Vessel. [T. 192, 194-201, 226, 229, 230-32, 239, 242, 252-54]. Although he was too far away to see the men's faces, Powers recalled one man wore a white shirt and the other a green shirt. *Id.* The men had backed, what Powers described as, a blue or black and white Ford F-250 "dually" pick-up truck into the Vessel's driveway. *Id.* Powers said he observed the man in the white shirt striking the trailer's coupler area with what was later determined to be an aluminum baseball bat. *Id.*

Powers telephoned Mrs. Vessel, who was not at home, and asked her whether anyone had been given permission to borrow their trailer. [T. 207, 231]. Based on Mrs. Vessel's negative response, Powers called law enforcement as the truck and trailer pulled away with Powers following in his own vehicle. [T. 207-08, 231-32].

The truck, with the two men inside, and trailer were traveled in a northerly direction on Miss. Hwy. 27 towards Warren County, so Powers, who remained on the line with 911 personnel, was put in touch with the Warren County Sheriff's Office as he continued following the truck and trailer into Warren County. [T. 209]. Powers provided authorities with a description of the truck and the truck's tag number. [T. 204-05, 223-24, 232, 244-48].

When the truck and trailer reached China Grove Road in Warren County it pulled

to the right side of Hwy. 27 onto the shoulder of the road to let Powers pass. [T. 210]. Powers said he tried to pull in behind the truck but it started up the road again as Powers advised authorities over the phone of his location at China Grove Road. *Id.* Powers was advised not to put himself in harm's way and not to confront the men. *Id.*

The truck and trailer traveled a short distance further and pulled over again before turning down a gravel driveway or road called China Grove Lane. [T. 210-11]. Powers drove past the truck and trailer and proceeded down Hwy. 27 a short distanced and turned around losing sight of the pursued truck and trailer in the process. [T. 211-15]. As soon as he passed the truck Powers saw an unmarked sheriff's vehicle headed to the scene. *Id.*

Warren County Investigator Randy Lewis responded to Power's call and was in the unmarked vehicle spotted by Powers. [T. 269-71]. From the information Powers communicated to authorities, which included the tag number, it was determined that the truck allegedly towing the trailer was registered to Timothy Wilson. [T. 244-46, 269-72].

Inv. Lewis stopped where the truck and trailer were last seen by Powers. *Id.* The road where the truck and trailer pulled down was a dead end. *Id.* Lewis testified that in a short while a Ford pickup truck driven by Timothy Wilson with his brother Randy Wilson as passenger came down the road without any trailer attached. [T. 272-73, 276-77, 284-85, 288-89, 294]. According to Lewis, Timothy Wilson was wearing a green work shirt and Randy Wilson was wearing a white shirt. [T. 272-75].

After that, Lewis testified the Vessel's trailer was located at the end of the dead

end road. *Id*. Timothy and Randy Wilson were arrested. [T. 274-75].

When Lewis asked Timothy and Randy about the trailer, they responded, "What trailer?" [T. 277-78]. Lewis said he did no other investigative work. [T. 279].

Powers returned to China Grove Lane after passing Inv. Lewis on Hwy. 27, he testified that he recognized Timothy and Randy Wilson, whom he identified in court, as the same two men who stole the trailer from the Vessel's yard and who had been stopped by Inv. Lewis. [T. 216-18, 226-27, 259-60]. Powers recognized the Vessel's trailer which he had borrowed several times and which he valued at more than $500. [T. 219-20, 222, 248, 254-55]. Powers identified the truck which towed the trailer off as the same one investigators photographed and which was said to be registered Timothy Wilson. [T. 245].

Eddie Calvin who lives on China Grove Lane testified that on April 2, 2012, he was at his mother's when his wife called and said police were at their house. [T. 307-08]. So, he went home and the investigators there showed him a trailer in his back yard that was not there when he left that morning around 8:30. [T. 309-13]. Calvin said he knows Timothy and Randy Wilson but had not given them permission to put a trailer behind his house. *Id*. Calvin did not know who put trailer in his yard and said that he was not involved. *Id.*

Timothy Wilson called as a witness Willie Dotson of Vicksburg who worked with Timothy Wilson. [T. 333-34]. Dotson first testified that on April 2, 2012, he and Timothy

were working on Fort Hill Street since about 8:00 a.m. cutting trees and bushes around a house. *Id*. Dotson was shown a photograph of a man wearing a red shirt, who he identified as Timothy Wilson, on a ladder working on a tree. [*Id*.; Ex. D-1]. Dotson said the photo was taken on April 2nd or 3d but he was not sure. [T. 335]. Dotson said that Timothy left around noon on April 2, 2012, for lunch and never came back. *Id*. Dotson later found out that Timothy had been arrested [T. 335-36]. When pressed about the date of the photo of Timothy in the tree, Dotson said he knew it was on the 2nd. [T. 337]. However, when asked if he was saying "2nd or the 7th," Dotson said, "I think it was the 7th, I believe what it was" the 7th of April. [T. 340]. But then Dotson testified that the photo was taken between the 1st and 2nd of April. [T. 341].

Timothy also presented the testimony of Mr. Henry Ray Hunter also of Vicksburg. [T. 346-48, 355-56]. Hunter testified that he was working with Timothy on April 2, 2012, and they were repairing a house on Feld Street. *Id*. They had gotten to work about 7 or 8 that morning and that Timothy left for lunch, he did not come back. *Id*. Hunter said that it was possible that Timothy was working at two places that day doing tree work because Timothy "would go back and forth between jobs." [T. 348; Exs. D-2, D-3].

Randy Wilson testified that on the day in question, his brother Timothy gave him a ride at 6:30 a. m. to China Grove Lane to see Randy's friend Shirley Jenkins. [T. 364-66, 372-74, 376, 383-85, 387, 389]. Randy said he stayed at Shirley's until about 12:45 p. m. at which time Timothy came to pick him up and, as they were leaving, they were stopped

by Inv. Lewis. *Id*. When Lewis asked them about the trailer, Randy and Timothy said they knew nothing about any trailer. *Id.* Randy told officers about going to see Shirley. *Id*. According to Randy, Shirley was no longer in Mississippi and would not be willing to testify anyway since she was married. *Id*. Timothy told officers that he was there to pick up his brother: [T. 400, 402].

Randy also testified that there was no way his brother's truck would have been able to tow the Vessel's trailer because the trailer had a two inch coupler and Timothy's truck was only equipped with interchangeable balls of three inches or greater. [T. 369-70, 376]. Randy testified that he never went to Hinds County April 2nd and had no knowledge of a stolen trailer and that when Timothy picked him up there was no trailer on Timothy's truck. [T. 375-76].

SUMMARY OF THE ARGUMENT

The jury was improperly instructed as plain error or as a result of ineffective assistance of counsel. Timothy Wilson's sentence is illegal.

ISSUE NO. 1: WAS IT ERROR TO INSTRUCT THE JURY REGARDING PRIMA FACIE PROOF, OR WAS COUNSEL INEFFECTIVE?

The trial court gave instruction S-4 without objection from Timothy Wilson's trial counsel, as follows:

> The Court instructs the Jury that proof that a defendant stole the property that is the subject of the charge against him, or her, shall be prima facie evidence that the defendant had knowledge that the property was stolen. [R. 24; RE 14; T. 408-09].

The language for Instruction S-4 was lifted from subsection 3(b) of Miss. Code Ann. §97-17-70 (Rev. 2014) which provides:

> Proof that a defendant stole the property that is the subject of a charge under this section shall be prima facie evidence that the defendant had knowledge that the property was stolen.

It is pertinent to note that, according to *Elliott v. State*, 61 So. 3d 950, 958 (¶ 27) (Miss. Ct. App. 2011), under section 97–17–70(1) and (3)(a) (Rev. 2014)[1], "a person who

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[1] A person commits the crime of receiving stolen property if he intentionally possesses, receives, retains[,] or disposes of stolen property knowing that it has been stolen.... [and] [e]vidence that the person charged under this section stole the property that is the subject of the charge of receiving stolen property is not a defense to a charge under this section; however, dual charges of both stealing and receiving the same property shall not be brought against a single defendant in a single jurisdiction. [This language is the same as in the 2007 version of the statute for subsections (1) and (3)(a).]

has stolen property may now be charged with either receiving or stealing the property, but not both." This is a change in the law from the rule stated in *Hentz v. State*, 489 So. 2d 1386, 1389 (Miss. 1986), that "[w]here defendant was convicted of receiving stolen goods, on evidence showing that he was guilty of larceny, the conviction cannot be sustained."

Instruction S-4 is prejudicially defective for three reasons: First, the instruction *does not indicate* that the proof that the defendant stole the property must be *beyond a reasonable doubt* to be prima facie evidence that the defendant had guilty knowledge. The missing language unconstitutionally reduced the state's burden of proof on a statutory element of the offense charged.

In *Reith v. State*, 135 So. 3d 862, 865 (¶ 6) (Miss. 2014), the Court found that jury instructions which allow juries to presume or infer the existence or proof of an essential element of an offense from the finding of a particular fact, which may or may not prove the element, conflicts with the simplest principles of due process, for "due process requires that the State prove each element of the offense beyond a reasonable doubt." *Id.*

It follows, therefore, as a matter of law that an instruction which allows a jury to accept the existence of one fact based on another fact, such as S-4 here, without deliberation using a beyond-a-reasonable-doubt standard on the second fact is a per se denial of due process.

Secondly, the legal term "prima facie evidence" is confusing to the jury. This

statutory language was clearly inserted in the statute to guide trial judges on deciding the sufficiency of the evidence when challenged by a motion for directed verdict.

In *Booker v. Pettey*, 770 So. 2d 39, 44 (¶ 30) (Miss. 2000), it was said by the Court:

> We have admonished the trial courts on many occasions to avoid giving instructions which simply quote statutes or cases. *Freeze v. Taylor*, 257 So. 2d 509, 511 (Miss. 1972)(We admonished attorneys against taking language from our opinions and creating jury instructions.); *Gulf, M & N.R. Co. v. Weldy*, 193 Miss. 59, 8 So. 2d 249, 251 (1942). See also *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F. 2d 479, 487 (3rd Cir. 1965)("An academic recitation of the language of a statute without any direction as to how it may be applied to the disputed facts before the jury is too general to furnish guidance to them."). (See also, *Wood v. State*, 20 So. 2d 661, 662, 197 Miss. 657, 660 (1945)).

Concerning use of legal phrases in jury instructions, the court in *Graves v. Hamilton*, 184 So. 56, 58, 184 Miss. 239 (1938), said :

> We have heretofore cautioned against the use of excerpts from opinions in the drawing of instructions. [Citation omitted]. Language which is apt in a judicial opinion and which is plainly to be understood by members of the legal profession in the connection with which it is used, may not be so to the laymen on the jury, particularly as they have not the advantage of the entire context.

It is suggested that the average lay juror even if they knew what prima facie means would not know that a prima facie case is rebuttable.

Thirdly, the instruction is clearly a forbidden comment on the evidence. *Duckworth v. State*, 477 So. 2d 935, 938 (Miss. 1985); *Voyles v. State*, 362 So. 2d 1236 (Miss. 1978); *Williams v. State*, 354 So. 2d 266 (Miss. 1978).

Therefore, Instruction S-4 should not have been given and it prejudiced Timothy Wilson, so, a new trial is respectfully requested.

If the Court finds that it was Timothy's trial counsel's obligation to lodge an objection to preserve this error and that he failed to do so, then Timothy ask the court to review this issue as plain error or as a claim of ineffective assistance of counsel.

In *Blunt v. State*, 55 So. 3d 207, 211 (¶ 16) (Miss. Ct. App. 2011), the Court of Appeals found that Blunt's trial counsel was ineffective, under a plain error analysis, for not requesting a proper instruction which accurately stated the applicable rules of law on self-defense.

In *McTiller v. State,* 113 So. 3d 1284, 1291-92 (¶¶ 22-24) (Miss. Ct. App. 2013), the defendant's trial counsel did not request an instruction on certain defenses available to the defendant upon which his whole defense rested. *Id*. The Court of Appeals reversed finding that McTiller's counsel was prejudicially ineffective.

Timothy stipulates that the record is adequate and that no further development of the issue is required for the court to consider the alternative ineffective assistance of counsel aspect of this important issue.

ISSUE NO. 2: WAS THE JURY PROPERLY INSTRUCTED ON TIMOTHY WILSON'S ALIBI DEFENSE, OR WAS COUNSEL INEFFECTIVE?

The Trial court gave the following instruction, S-3, regarding alibi:

The Court instructs the jury that the State is not required to disprove an

> alibi. In other words, the State is not required to prove that any alibi defense is not true; the State is only required to prove, beyond a reasonable doubt, that the defendants, Randy Charles Wilson and Timothy Allen Wilson, are guilty, beyond a reasonable doubt, of Receiving Stolen Property as charged. [R. 23; RE 13]

There was no objection by Timothy's trial counsel. [T. 406].

A proper form of alibi instruction was provided by the court in *Holmes v. State*, 481 So. 2d 319, 321 (Miss. 1985):

> Alibi means elsewhere or in another place. In this case, the defendant, L.C. Holmes, Jr. is asserting the defense of alibi by saying that he was at home on Lewis Street in Marks, Mississippi, at the time when the state claims that he was somewhere else committing the crime of burglary.
> Alibi is a legal and proper defense in law. The defendant is not required to establish the truth of his alibi to your satisfaction, but, if the evidence or lack of evidence in this case raises in the minds of the jury a reasonable doubt as to whether the defendant was present and committed the crime, then you must give him the benefit of the doubt and acquit him.

The flaw in S-3 is that it shifted the burden of proof to Timothy to prove his alibi defense, which clearly is not the law. The jury did not know that Timothy was not required to establish the truth of his alibi. The lack of a proper alibi instruction prevented the jury from properly deliberating Timothy's alibi defense.

Based on the testimony of his two witnesses, Timothy was entitled to an alibi defense instruction. Where a defendant asserts an alibi defense and presents testimony or evidence in support of such a defense, he is entitled to a jury instruction relating to that theory of defense. *Cochran v. State*, 913 So. 2d 371, 375 (¶ 14) (Miss. Ct. App. 2005); *Young v. State*, 451 So. 2d 208, 210 (Miss. 1984).

If the Court finds that it was Timothy's trial counsel's obligation to submit a proper alibi instruction and he failed to do so, then Timothy ask the court to review this issue as one for ineffective assistance of counsel under the same authority as cited in the previous issue, *Blunt v. State*, 55 So. 3d 211 (¶ 16) and *McTiller v. State,* 113 So. 3d 1291-92 (¶¶ 22-24). Timothy stipulates that the record is adequate and that no further development of the issue is required for the court to consider the alternative ineffective assistance of counsel aspect of this important issue. A new trial is respectfully requested.

ISSUE NO. 3: IS TIMOTHY WILSON'S SENTENCE ILLEGAL?

The alleged offense in this case occurred April 2, 2012. Between 2012 and when Timothy was tried in September 2014, the Mississippi legislature changed the sentences allowable for receiving stolen property. Under the 2007 version of the statute, receipt of stolen property valued over $500 subjected a defendant to a maximum of ten years of imprisonment plus up to a $10,000 fine. 97-17-70 (4) (Rev. 2007). This is the version of the statute under which Timothy was charged.

Effective July 1, 2014, the legislature changed subsection (4) to provide that a conviction of receiving stolen property valued between $1000 and $5000 subjected a defendant to a maximum of five years imprisonment and a $5000 fine. 97-17-70 (4) (Rev. 2014). Here there was testimony that the subject trailer was worth between $500 and $1500. [T. 222-23, 298].

At sentencing, defense counsel pointed out to the learned trial court judge that the maximum sentence for receiving stolen property valued between $1000 and $5000 had been reduced by the legislature. [T. 511-13]. However, the judge stated that he would apply the sentencing statute that was in effect at the time of the offense. *Id*.

Miss. Code Ann. § 99-19-33 (1972) provides that:

> If any statute shall provide a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law, then such milder punishment may be imposed by the court.

In *Daniels v. State*, 742 So. 2d 1140, 1145 (¶17) (Miss. 1999), the Mississippi Supreme Court held "that when a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence according to the statute as amended." According *Daniels*, *supra*, the greatest period of incarceration Timothy could receive is five years. Therefore, Timothy's ten year sentence is patently illegal and resentencing is requested if a new trial is not granted.

CONCLUSION

For the forgoing reasons, Timothy Allen Wilson respectfully requests a new trial or resentencing.

Respectfully submitted,

TIMOTHY ALLEN WILSON

By: /s/ George T. Holmes
George T. Holmes, His Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 3d day of April, 2015, electronically filed the foregoing Brief with the Clerk of the Court using the MEC system which issued electronic notification of such filing to Hon. John R. Henry, Jr., Assistant Mississippi Attorney General; and, counsel also this day mailed a hard copy to the following persons not notified by the MEC system by U. S. Mail, first class postage prepaid: Hon. Isadore W. Patrick, Circuit Judge, P. O. Box 351,Vicksburg MS 39181, and to Hon. Angela Carpenter, Asst. Dist. Atty., P. O. Box 648, Vicksburg MS 39181.

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