

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**MARIO RUCKER****APPELLANT****v.****No. 2015-KA-147-COA****STATE OF MISSISSIPPI****APPELLEE****MOTION FOR REHEARING**

COMES NOW the Appellant, Mario Rucker, by and through counsel, pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, and moves this Court to grant rehearing of its decision handed down in this matter on June 21, 2016. In support thereof, Rucker would show unto this Court the following:

ARGUMENT

This Court erred when it found no error in the trial court *sua sponte* instructing the jury on the unindicted lesser offense of aggravated assault. (Op. ¶¶6-7). This Court's opinion frames this issue by noting "Ultimately, Rucker submitted instruction D-7D, which instructed the jury on manslaughter and aggravated assault." (¶6). This Court then notes "The trial court *also* provided instruction C-10, which instructed the jury on the elements of aggravated assault." (¶6). Rucker respectfully contends that this is not an accurate portrayal of the facts as they occurred at trial. First, D-7D was not an elements instruction. It was a form of the verdict instruction trying to accommodate for the trial court's *sua sponte* instruction on aggravated assault. Rucker contends that is not the same thing as asking for a aggravated assault instruction.

The path to which the jury was improperly instructed on the unindicted charge of aggravated assault is substantially winding and much more complex than this Court addresses in its opinion. Rucker's trial counsel offered instruction D-7, which was a form of the verdict instruction containing aggravated assault. (Tr. 562, C.P. 71). Defense counsel never, however, offered an elements instruction for manslaughter or aggravated assault. The State objected to the aggravated assault instruction. Instruction D-7 was ultimately withdrawn by trial counsel.

Rucker's trial counsel offered D-14, a simple assault instruction, which contained a typo, and was withdrawn. (Tr. 558, C.P. 84). Instruction D-14A was also withdrawn. (Tr. 570-71, C.P. 85). The State objected to Rucker's simple assault instruction. (Tr. 574). The trial court ultimately granted D-14B, a simple assault instruction. (C.P. 86, Tr. 577-78).

The next morning, the trial court, on its own motion, instructed on aggravated assault, without a request or offered instruction from either the State or the defendant. (Tr. 587, Instruction C-10, C.P. 53). Rucker's trial counsel was placed in a difficult position. The trial court granted the requested simple assault in tandem with the trial court's *sua sponte* aggravated assault instruction. This Court's opinion, however, conflates elements instructions and form of the verdict instructions as well as withdrawn instructions with those instructions that are finally offered and given. This was in error.

This Court's opinion in this matter overlooks binding supreme court precedent. To be clear, aggravated assault is *not* a lesser-included offense of murder. In *Harris v. State*, 723 So.2d 546 (Miss.1997), Harris was convicted on an unindicted charge of aggravated assault following a directed verdict of acquittal on charges of deliberate

design murder. The Mississippi Supreme Court reversed the case, finding that the State should not have been allowed to proceed on the theory that aggravated assault was a lesser included offense of deliberate design murder. *Id.* at 547. The Court held that once a trial court determines that the State has failed to prove its burden on the indicted charge and, therefore, grants a directed verdict, the State's case is concluded and the State is prevented from trying the defendant on the unindicted offense. *Id.* at 547–48. Notably, the *Harris* Court observed, “The difference between a directed verdict and a jury verdict lies only in the source; the effect of the acquittal is the same in either case.” *Id.* (citing *State ex rel. Robinson v. Blackburn*, 367 So.2d 360, 362–63 (La. 1979)).

This Court also refused to consider *Hye v. State*, 162 So. 3d 750 (Miss. 2015) and its application to this case. (Op. ¶7). Last year, however, this Court unanimously applied *Hye*’s ruling to preclude a defendant offering a lesser offense instruction in a trial that occurred prior to the Supreme Court’s ruling in *Hye*. See *McCoy v. State*, 2014-KA-1253-COA (Miss. Ct. App. November 24, 2015). *McCoy* and the instant case cannot be reconciled.

WHEREFORE, PREMISES CONSIDERED, Rucker respectfully requests this honorable Court grant this Motion for Rehearing.

Respectfully submitted,

s/ Justin T. Cook
Justin T. Cook
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Counsel for Mario Rucker

CERTIFICATE OF SERVICE

I, Justin T. Cook, counsel for the appellant, hereby certify that I have this day filed by means of the electronic case filing system the foregoing Motion for Rehearing, pursuant to Mississippi Rule of Appellate Procedure 25 by which immediate notification to all ECF participants in this cause is made including:

Lisa L. Blount
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This, the 5th day of July, 2016.

s/ Justin T. Cook
Justin T. Cook, Miss Bar #102622

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