IN THE SUPREME COURT OF MISSISSIPPI

NO. 2012-KA-01282-SCT

JASON HALL a/k/a JASON LADELL HALL a/k/a JASON L. HALL

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	07/10/2012
TRIAL JUDGE:	HON. ROBERT B. HELFRICH
COURT FROM WHICH APPEALED:	FORREST COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: JUSTIN TAYLOR COOK
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	PATRICIA A. THOMAS BURCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	REVERSED AND VACATED - 12/12/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RANDOLPH, PRESIDING JUSTICE, FOR THE COURT:

¶1. Jason Hall was indicted and tried on an indictment for burglary of a building. After both sides rested, the State requested and was granted a jury instruction for accessory after the fact to burglary (in addition to the burglary instruction). The jury acquitted Hall of burglary but convicted him of accessory after the fact to burglary. Because Hall was convicted of a crime for which he was not indicted, nor did he waive indictment, we reverse the judgment of conviction and vacate his sentence.

FACTS AND PROCEDURAL HISTORY

¶2. Hall was indicted for burglary under Mississippi Code Section 97-17-33. His indictment alleged that he "did willfully, unlawfully, feloniously, and burglariously break and enter a certain building . . . wherein there were kept goods, merchandise, or valuable things for use, sale, deposit, or transportation, with the intent to steal therein . . . ." His indictment did not contain a separate count for accessory after the fact to burglary.

¶3. After the State and the defense rested at trial, the State announced that it had a "supplemental instruction," S-9, for accessory after the fact that it needed to present to the court. Hall objected to S-9. The trial court granted the instruction. Then, the State offered S-10 which covered the elements of accessory after the fact. Hall did not object to S-10, specifically indicating that the lack of objection was due to the fact that S-9 already had been given.[1]

¶4. The jury acquitted Hall of burglary, but convicted him of accessory after the fact. Hall filed a post-trial motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial. He argued, *inter alia*, that he was convicted of a crime for which he was never indicted; therefore, the trial court should "set[] aside the jury verdict[.]" The trial court denied Hall's motion, and he filed this appeal.

ISSUE

¶5. On appeal, Hall raises the following issues, restated as follows:

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[1]The State takes issue with the form of Hall's objection to S-9 and lack of objection to S-10. The State's argument will be addressed *infra*, ¶¶9-10.

I. Whether the trial court erred in granting the State's requested instruction on accessory after the fact to burglary.

II. Whether the State presented sufficient evidence to convict Hall of accessory after the fact to burglary.

As Issue I is dispositive, we will address only that issue.[2]

ANALYSIS

¶6. Hall's contention that the State was not entitled to a lesser-offense instruction raises a question of law, which this Court reviews de novo. ***Downs v. State***, 962 So. 2d 1255, 1258 (Miss. 2007) (citing ***State v. Shaw***, 880 So. 2d 296, 298 (Miss. 2004)).

¶7. Mississippi Code Section 99-19-5(1) provides, in pertinent part, that "[o]n an indictment for any offense the jury may find the defendant guilty of the offense as charged . . . or may find him guilty of an inferior offense, or other offense, the commission of which is *necessarily included* in the offense with which he is charged in the indictment . . . ." Miss. Code Ann. § 99-19-5(1) (Rev. 2007) (emphasis added). While accessory after the fact is considered a lesser offense of the principal, it is well-established that it "is an entirely separate and distinct offense and *not . . . a lesser included offense*." ***Byrom v. State***, 863 So. 2d 836, 874 (Miss. 2003) (quoting ***Wilcher v. State***, 455 So. 2d 727, 734 (Miss. 1984) (overruled on other grounds) (emphasis added)). Thus, accessory after the fact "is a distinct crime for which a person cannot be punished unless indicted." ***Gangl v. State***, 539 So. 2d

[2]As we vacate Hall's conviction, we need not address Issue II, for to do so would be an exercise in futility. Would we not be required to set aside the verdict even if the State had presented overwhelming evidence of guilt of a crime not charged in the indictment?

132, 137 (Miss. 1989) (citing ***Wilcher***, 455 So. 2d 727 (Miss. 1984) (overruled on other grounds); ***Johnson v. State***, 477 So. 2d 196 (Miss. 1985)).

¶8. As an exception, the Court has provided that "[a]n *accused* is entitled to a lesser-offense instruction only where there is an evidentiary basis in the record." ***Thomas v. State***, 48 So. 3d 460, 472 (Miss. 2010) (citing ***McGowan v. State***, 541 So. 2d 1027, 1028 (Miss. 1989)) (emphasis added). In this case, the State requested the lesser-offense instruction. Because the defendant's request of a lesser-offense instruction operates as a waiver of indictment, only the defendant, and not the State, may request a lesser-offense instruction. *See* ***Griffin v. State***, 533 So. 2d 444, 448 n.2 (Miss. 1988).

¶9. The State was not entitled to S-9 or S-10, which allowed the jury to convict Hall of the lesser offense of accessory after the fact. However, the State argues that Hall waived this issue because he failed to object to S-9 at trial on the same ground as he raises on appeal, and because he failed to object to S-10.[3] Hall's counsel objected to S-9 and argued, "[i]sn't that covered basically in the definition of accomplice? . . . . There's an instruction on being an accomplice, an aider, an abettor, a presumption of theft, accessory after the fact." Hall's objection at trial does not reflect that raised on appeal (that the State was not entitled to the instruction because he was never indicted for accessory after the fact). Thus, the trial court

[3]*See* ***Morgan v. State***, 741 So. 2d 246, 253 (Miss. 1999) (citing ***Watson v. State***, 483 So. 2d 1326, 1329 (Miss. 1986)) ("In order to preserve a jury instruction issue on appeal, a party must make a specific objection to the proposed instruction in order to allow the lower court to consider the issue."); *see also* ***Gillett v. State***, 56 So. 3d 469, 520 (Miss. 2010) (citing ***Howell v. State***, 860 So. 2d 704, 756 (Miss. 2003)) ("[T]his Court repeatedly has held that failure to object contemporaneously at trial waives any claim of error on appeal.")

was not called upon to determine whether S-9 was improper for want of indictment on the lesser offense.[4]

¶10. Notwithstanding Hall's inartful objection, the trial court committed plain error when it granted S-9 and S-10. "To constitute plain error, the trial court must have deviated from a legal rule, the error must be plain, clear or obvious, and the error must have prejudiced the outcome of the trial." ***Keithley v. State***, 111 So. 3d 1202, 1204 (Miss. 2013) (quoting ***Cox v. State***, 793 So. 2d 591, 599 (Miss. 2001)). Based on this Court's precedent that accessory after the fact is a lesser (nonincluded) offense of the principal offense and that only the defendant may obtain a jury instruction on a lesser unindicted offense, the trial court "deviated from this legal rule." The error was "plain, clear or obvious" and "prejudiced the outcome of the trial[,]" for the instructions allowed Hall to be convicted of an offense which the State never secured the right to prosecute.

¶11. The result – a defendant convicted of a crime for which he was not indicted – is not new. More than 130 years ago, in ***Scott v. State***, 60 Miss. 268 (1882), Scott was indicted and tried for murder, but was convicted by a jury of "assault and battery with the intent to murder." On appeal, this Court held that Scott was unlawfully convicted of assault and battery, as she was not indicted for that crime, nor is assault and battery a lesser *included* offense of murder. ***Id***. The ***Scott*** Court reversed the judgment and set aside the verdict. ***Id***.

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[4]*See* ***Parker v. Miss. Game & Fish Comm'n***, 555 So. 2d 725, 730 (Miss. 1989) ("A trial judge will not be put in error on a matter which was not presented to him for his decision.")

See also ***Bell v. State***, 115 So. 896, 897 (Miss. 1928). The Court reached a substantially similar result in ***Woodson v. State***, 48 So. 295 (Miss. 1909), and ***Morris v. State***, 79 So. 811 (Miss. 1918). In both ***Woodson*** and ***Morris***, the Court reversed a judgment of conviction and dismissed the prosecution where no charging document was shown in the record.

¶12. In ***Hailey v. State***, 537 So. 2d 411, 412 (Miss. 1988), Hailey was indicted for "forcible rape" of a thirteen-year-old. "[T]he trial court . . . granted an instruction to the jury that it could find Hailey guilty of the lesser included offense of child fondling." ***Id***. at 413. The jury convicted Hailey of child-fondling. ***Id***. However, because Hailey was not indicted for child-fondling and "child fondling could not be a necessarily *included* offense of forcible rape[,]" this Court found that "[t]he trial court erred in granting an instruction allowing the jury to consider child fondling . . . ." ***Id***. at 416-17 (emphasis added). Hailey's conviction was "vacated . . . [and] remanded for further proceedings not inconsistent with this opinion." ***Id***.

¶13. ***Scott***, ***Woodson***, ***Morris***, and ***Hailey*** establish that, upon conviction of a crime for which the defendant was not indicted, the judgment of conviction must be reversed and either set aside (***Scott***), dismissed (***Woodson*** and ***Morris***), or vacated and remanded (***Hailey***). The case *sub judice* is no different, as Hall was convicted of a lesser offense, for which he was not indicted.

¶14. The dissent would acquit Hall by reversing and rendering judgment. The fountainhead of this error can be traced to ***Harris v. State***, 723 So. 2d 546 (Miss. 1998), in which the Court substantially departed from its historical precedent and acquitted Harris by reversing and rendering his conviction for an unindicted lesser offense, without citation of authority or

overruling ***Scott***, ***Woodson***, ***Morris***, or ***Hailey***. Harris was indicted for three counts of deliberate-design murder. ***Id***. at 547. Based on the evidence presented, the trial court granted Harris a directed verdict as to the murder charges, "but . . . allowed the State to proceed on three counts of aggravated assault." ***Id***. The jury convicted Harris of aggravated assault. The ***Harris*** Court opined that the "apparently unqualified" directed verdict as to the murder charges served as a "judgment of acquittal of the charged offense . . . [and] acquittal on *all uncharged lesser included* felony offenses." ***Id***. at 548-49 (emphasis added). The basis of this flaw is quite apparent – aggravated assault is not a lesser-*included* offense of murder. *See* ***Johnson v. State***, 512 So. 2d 1246, 1251 (Miss. 1987) (overruled on other grounds). Whether the flaw in ***Harris*** was the result of paralogism, or otherwise, is of no import – the error vitiates the holding.[5] A "judgment of acquittal [for murder]" should not have served as an acquittal on an uncharged lesser nonincluded felony offense, *i.e.*, aggravated assault.

¶15. The dissent also cites ***Gause v. State***, 65 So. 3d 295 (Miss. 2011). Gause was indicted for capital murder with the underlying felony of burglary. ***Gause***, 65 So. 3d at 299. At the

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[5]The dissent relies on the following ***Harris*** dicta,"[t]he State cannot be allowed to charge only the highest offense and then test the evidence as it goes along until the burden of some lesser offense is met." ***Harris***, 723 So. 2d at 549. The ***Harris*** opinion in this regard reflects what has been described by Professor Michael Hoffheimer as "[the justice's] personal belief that when the [S]tate charges a serious crime, it should not be able to win a conviction of a less serious one." Michael H. Hoffheimer, *Lesser Included Offenses in Mississippi*, 74 Miss. L. J. 135, 143 (2004). Without speculating as to a justice's "personal beliefs[,]" the same justice continued unsuccessfully to advance a similar position in other cases. *See* ***Wolfe v. State***, 743 So. 2d 380, 388 (Miss. 1999) (McRae, J., concurring in part and dissenting in part); ***Arthur v. State***, 735 So. 2d 213, 221 (Miss. 1999) (McRae, J., concurring in part and dissenting in part); ***Shields v. State***, 722 So. 2d 584, 590 (Miss. 1998) (McRae, J., dissenting).

request of the State, the jury was instructed on the lesser-included offenses of murder and manslaughter, and, "if [the jury] found him guilty of manslaughter, then they were to consider whether he was also guilty of burglary . . . ." ***Id***. The jury convicted Gause of manslaughter and burglary. ***Id***. But because burglary is not a lesser-included offense of capital murder and Gause was not separately indicted for burglary, the Court reversed his conviction. ***Id***. at 302. Without explanation or citation (like ***Harris***), the Court acquitted Gause of burglary by rendering judgment. ***Id***. The disposition to render was likely the result of the inconsistent verdicts in that case. Gause was convicted of two lesser offenses – one included, one not included – which together constitute capital murder, but the jury acquitted him of capital murder. The paradoxical verdict is readily apparent because of the burglary conviction. ***Gause*** is an outlier resulting from an anomalous jury verdict – quintessential jury nullification. This atypical scenario limits ***Gause***'s precedential value to the context of capital murder and the nullification verdict in that case.

¶16. We focus on two errors in this case. First, the trial court erred in granting instructions S-9 and S-10. Second, the trial erred in denying Hall's motion for JNOV, which requested that the jury verdict of guilty for accessory after the fact be set aside. *See supra* ¶ 4. Hall argues that, should this Court find instructions S-9 and S-10 in error, we should "reverse the conviction [and] void the judgment of the circuit court . . . ." After a careful review of prior cases, we are of the opinion that Hall has made the appropriate request. We reverse the judgment of conviction and vacate his sentence. We discern no benefit in remanding this case to the circuit court for further proceedings. As Hall was acquitted of burglary, and there is

no charging document (indictment) in the record, no further action is necessary by the trial court.[6] However, we find no legal authority to acquit Hall by reversing and rendering judgment and reject that ***Harris*** and ***Gause*** require us to do so.

CONCLUSION

¶17. As Hall was convicted of a crime for which he was not indicted, we are duty bound to reverse the judgment of conviction and vacate Hall's sentence.

¶18. **REVERSED AND VACATED.**

WALLER, C.J., DICKINSON, P.J., LAMAR, CHANDLER, PIERCE AND COLEMAN, JJ., CONCUR. KING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, J.; CHANDLER, J., JOINS IN PART.

KING, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶19. While I concur with the majority's determination that Hall's conviction for accessory after the fact to burglary was improper given that Hall was not indicted for accessory after the fact to burglary, I believe that the proper disposition is to reverse and render Hall's conviction; therefore, I respectfully dissent from the disposition.

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[6] *See* ***Hailey***, 537 So. 2d at 419 (Robertson, J., concurring) ("I concur in the majority's directive that the case be reversed and remanded 'for further proceedings not inconsistent with this opinion'– so long as it be understood clearly that there are no further proceedings that may be had consistent 'with this opinion.'"). Justice Robertson recognized the same principle we do today – that, absent an indictment, there is no need for further proceedings in *this* case. Contrary to the suggestion of the dissent, Justice Robertson did not call for reversing and rendering the judgment of conviction.

¶20. On September 1, 2010, Hattiesburg police were called to the Spanish Oaks Apartments due to the suspicions of the apartment manager, Douglas Ralson, and his wife, Eulis Irene Cochran, that a burglary was occurring. Cochran and Ralson testified that they saw two men, later identified as Tommy Moore and David Pryor, enter a vacant apartment[7] at about 8:30 or 9:00 p.m. They witnessed a third man, later identified as Jason Hall, the defendant, sitting in an SUV parked near the next building over.[8] Hall remained in the SUV for the duration of the alleged burglary.[9] The police arrived, and Moore and Pryor began running toward the vehicle. One of them threw something. All three men were then apprehended by police. A Smith and Wesson handgun was found approximately ten yards from the vehicle. A window pane in the vacant apartment was found to be displaced, and the door to the apartment may have been "messed up." The record contains no evidence that any items were taken from the apartment, and Ralson testified that "there was really nothing in there for them to steal."

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[7]The apartment the two men allegedly entered was being renovated and contained items such as tile, mortar, and mud.

[8]Witnesses testified that the SUV was parked near the dumpster. Photos introduced at trial show that the dumpster (and thus the area in which the SUV was located) was not directly adjacent to the apartment that was allegedly burglarized. The photos demonstrate that the SUV was over one building's length away from the vacant apartment. In fact, based on the photos, which have vehicles in them, it appears that the SUV was located at least seven or eight car lengths away from the road in front of the vacant apartment, with the road being another several feet away from the door of the vacant apartment.

[9]The testimony was that Hall was in the SUV the entire time. Cochran did testify that Hall "did step out but then stepped back in." There is no allegation by the State that Hall ever entered or even went near the vacant apartment with the other two men.

¶21. Hall was indicted for burglary, and the case went to trial.[10] At trial, after the State and the defense both rested, the court and counsel reviewed the jury instructions. At the outset, the State announced that it had a "supplemental instruction" for accessory after the fact that it needed to present to the court.[11] When the instruction, S-9, for accessory after the fact, was presented, Hall objected, and the State indicated that the instruction was warranted in the event the jury believed the defense:

> THE COURT: S-9?
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> MR. ROSE: We would object to that. Isn't that covered basically in the definition of accomplice? It seems at this point we're hitting everything. We would object.
>
> THE COURT: And the basis of your objection is it's covered under the accomplice instruction?
>
> MR. ROSE: There's an instruction on being an accomplice, an aider, an abettor, a presumption of theft, accessory after the fact. We object.
>
> THE COURT: Why are we adding instructions at this time?
>
> MR. VAUGHN: Judge, I just got to thinking when the proof was coming through that if the jury happened not to believe – if they happened to believe Katie Jones, that this man went over there with just the knowledge that he was going over

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[10]At trial, Katie Jones testified on behalf of Hall. Jones testified that she was living in Spanish Oaks Apartments on September 1, 2010. Jones testified that her sister, Constance Davis, lived with her, and that Pryor was Davis's boyfriend. She testified that Hall gave Pryor a ride to Spanish Oaks for the purpose of Pryor visiting Davis.

[11]In his post-trial motions, Hall noted that the State's jury instructions violated Uniform Rule of Circuit and County Court 3.07, which forbids jury instructions that are not prefiled, absent good cause. URCCC 3.07.

there to drop a buddy off that would certainly – and I would contend if they believe he's not guilty of burglary. But when two of his buddies come back, a gun is thrown out, it's pretty obvious that a burglary has taken place. It's just if the jury happens to believe that he wasn't guilty of the burglary because he had no knowledge that his friends were going over there to do wrong, they became an accessory after the fact when they returned to the vehicle running, throwing guns with the police in [sic] route.

THE COURT: Response?

MR. ROSE: That's –

MR. VAUGHN: I'm sorry, Judge. I do have a case that's very similar to this if the Court wishes to see it.

THE COURT: Is this where you came up with this theory to match the proof that was –

MR. VAUGHN: Well, yes, sir. I wasn't sure if Katie Jones would indeed testify. I was not sure if she would or not, and I waited until she gave testimony. I had this ready. I just didn't know if she would testify or not.

¶22. The jury returned a verdict of guilty of accessory after the fact to burglary. In his appeal, Hall first argues that the trial court erred by instructing the jury that it could find Hall guilty of accessory after the fact to burglary, given that the indictment did not charge him with this crime, nor did he request the instruction. Hall also argues that the evidence at trial was insufficient to support the guilty verdict for accessory after the fact to burglary.

¶23. Hall argues that the State's accessory-after-the-fact-to-burglary jury instruction was improper, given that he was not indicted for accessory after the fact and the instruction deprived him of his right to notice of the crimes charged. The State argues that the evidence,

indeed Hall's own defense witness's testimony, supports such an instruction. Clearly, allowing the State to hear the accused's defense at trial, and then tailor a jury instruction with a new, unindicted charge to the defense's evidence, which is what the State admits and declares it did here, is highly prejudicial to any defense to the indictment. No defense is ever safe if the State can then use the defense itself to instruct the jury on an entirely new charge for which the defendant has no notice.

¶24. Because Hall was acquitted of the indicted offense and convicted of an offense for which he was not indicted and never received notice, in violation of both Section 26 and Section 27 of Article 3 of the Mississippi Constitution, and Hall did not waive indictment or notice, this Court should reverse and *render* Hall's accessory-after-the-fact conviction. ***Gause v. State***, 65 So. 3d 295, 299-302 (Miss. 2011) ("[T]here is a crucial difference between a jury instruction on a lesser-included offense, which either the State or the accused may request, and an instruction on a lesser offense, which only the accused may request.") ("Gause's indictment did not charge him with the elements of burglary. . . . The trial court clearly erred by granting the State's request for an instruction on burglary, because burglary is not a lesser-included offense of capital murder, and because the State was not entitled to a lesser-offense instruction. We reverse and render Gause's conviction of burglary."); ***Harris v. State***, 723 So. 2d 546, 549 (Miss. 1997) (trial court's decision to enter directed verdict of acquittal, but to allow State to proceed to trial on lesser-included offenses found to be in error and conviction reversed and rendered; stating "[t]he State cannot be allowed to charge only the highest offense and then test the evidence as it goes along until the burden for some lesser

offense is met"). ***Gause*** is virtually indistinguishable from the present case, since, in Hall's case, at the *request of the State*, the jury was instructed on lesser-included offenses to burglary, as well as the lesser offense of accessory after the fact to burglary.[12] The prosecution advocated for an improper conviction for a crime for which it never even attempted to indict Hall.

¶25. The majority believes that Hall's conviction should be reversed and vacated, despite the precedent to the contrary, giving the State the option to indict Hall for accessory after the fact. When we make a determination regarding the disposition in a case, we must consider what such a disposition accomplishes. In this case, reversing and vacating the conviction

[12]The majority attempts to distinguish ***Gause*** from the present case by stating that the case was "quintessential jury nullification." Maj. Op. at ¶15. Nothing in the analysis of the issue in ***Gause*** mentioned any analogy to jury nullification. Rather, the entire analysis of the issue was based on the fact that the State requested a lesser-offense, rather than a lesser-included-offense, jury instruction above the objection of the defendant. ***Gause***, 65 So. 3d at 299-302 ("[T]here is a crucial difference between a jury instruction on a lesser-included offense, which either the State or the accused may request, and an instruction on a lesser offense, which only the accused may request.") ("Gause's indictment did not charge him with the elements of burglary. . . . The trial court clearly erred by granting the State's request for an instruction on burglary, because burglary is not a lesser-included offense of capital murder, and because the State was not entitled to a lesser-offense instruction. We reverse and render Gause's conviction of burglary."). ***Gause*** is virtually indistinguishable from the present case, since (as the majority emphasizes in describing the ***Gause*** case) in Hall's case, "[a]t the *request of the State*, the jury was instructed on" lesser-included offenses to burglary, as well as the lesser offense of accessory after the fact to burglary. Maj. Op. at ¶15 (emphasis added).

would accomplish nothing but a waste of judicial resources[13] and injustice to Hall, especially in light of the serious double jeopardy concerns that arise in this case, as discussed below.

¶26. In addition to complaining about being convicted for a crime for which he was not indicted, Hall also challenges the legal sufficiency of the evidence in support of his conviction for accessory after the fact to burglary. *See* ***Taylor v. State***, 110 So. 3d 776, 782 (Miss. 2013). This Court "must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Id.*** When the evidence viewed in the light most favorable to the State fails to show 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," the evidence is insufficient to support the conviction and the appellate court must reverse and render. ***Id.*** (emphasis added); ***Johnson v. State***, 81 So. 3d 1020, 1023 (Miss. 2011).

¶27. A person is guilty of accessory after the fact if he "concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that such person had committed

[13]The majority quotes Justice Robertson's concurring opinion, which states that it should "be understood clearly that there are ***no*** further proceedings that may be had consistent 'with this opinion.'" ***Hailey v. State***, 537 So. 2d 411, 419 (Miss. 1988) (Robertson, J., concurring) (emphasis added). Justice Robertson affirms that nothing else may be done in such a case. Indeed, if the trial court is barred from conducting any further proceedings with regard to Hall and any accessory-after-the-fact charge arising from these allegations, it makes little sense not to simply render Hall's conviction.

a felony, with intent to enable such felon to escape or to avoid arrest, trial, conviction or punishment." Miss. Code Ann. § 97-1-5 (Rev. 2006).[14]

¶28. Hall argues that the State put forth no evidence supporting a conviction for accessory after the fact. He argues that the State presented no evidence that he concealed, received, relieved, aided, or assisted any felon, nor did it present any evidence of knowledge. The State argues that there "was sufficient credible evidence for *inferring* that Hall assisted the burglars by *attempting to assist* them in avoiding arrest after the burglary was accomplished." (Emphasis added). The State continues that "if the jury believed that Hall went to the apartment complex to *assist Pryor in visiting his girl friend*, then there would be a basis for *inferring* that Hall *possibly* assisted Pryor and Moore after knowing that they had *possibly* burglarized an apartment." (Emphasis added). It further argues that Lieutenant Bounds's testimony that he saw men running from the apartment, and saw one man throw a handgun, which was ultimately found approximately ten yards from the vehicle, proves knowledge beyond a reasonable doubt. It also argues that the photographs "show the distance between the burlgarized apartment and the vehicle." Thus, concludes the State, "[u]nder these facts, it could be inferred that Hall would have known that he was assisting the culprits in trying to avoid the police who were rapidly approaching."

[14]This version of the accessory statute is no longer in effect, as the accessory statute was amended in 2012, after Hall allegedly committed the crime; however, the elements of the crime remain the same. 2012 Miss. Laws Ch. 496.

¶29. The State put forth no evidence that Hall concealed, received, relieved, assisted, or aided Pryor and Moore. Indeed, the record is unclear as to how the three men were apprehended (and does not even reveal whether Hall started or moved the vehicle),[15] given that police were undisputably present before Pryor and Moore entered the SUV. Further, no evidence was presented that Hall had any knowledge that a felony occurred. It was nighttime, the vehicle was not parked very close to the apartment, and there is no evidence that Hall saw Pryor and Moore enter the apartment, no evidence that he knew that they were not authorized to be in that particular apartment, and no evidence that Pryor and Moore actually stole anything from the apartment (thus no evidence Hall saw them carrying stolen goods). No one even gave any testimony describing in which direction the vehicle was facing: toward or away from the apartment.

¶30. The State likewise failed to put forth evidence of the intent requirement. No evidence exists that Hall intended to assist Pryor and Moore in escaping or avoiding arrest. Indeed, the police were already present when Pryor and Moore exited the apartment. The State's closing argument recognizes the specious nature of the State's evidence to prove Hall guilty of accessory after the fact. The State argued:

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[15] Cochran testified that "When the police arrived – it's a double opened-end [sic] driveway, and they swarmed in. The two guys started running toward the vehicle, and at that time they were all three apprehended by the police." Ralston testified that when the police arrived, the three men were "By the 4-Runner. In the 4-Runner." Lieutenant Bounds testified that when the police arrived "[t]hey all broke and run towards the vehicle. . . . We approached the vehicle. There were three suspects inside the vehicle."

> You find him not guilty, that's your decision. But he is guilty of at least being an accessory. At least. He knew what they were doing. *Your life experiences tell you that.* That's the reason you've got to be at least 21 or so, so that way you can appreciate credibility. Things of that nature. He knew it and you know he knew it.
>
> If somebody comes to a car with a gun, they're up to no good. And then he tried to leave from the police, but they boxed him in. One went around the side and one came straight at him. Instead of pressuring these offices [sic], they need to be thanked. They went into a place where they knew guns were out. They were out numbered. They still beat them. They still got them.
>
> Ladies and gentlemen, it's your case and your decision, *but he's at least guilty of something*.

(Emphasis added). The jurors' life experiences certainly do not amount to proof beyond a reasonable doubt that Hall was guilty of accessory after the fact. Viewing the evidence in a light (very) favorable to the State, the State at the very most showed that one could infer that Hall saw two men running toward his car, he saw one throw a gun, and both men entered his vehicle. No reasonable factfinder could find *beyond a reasonable doubt* that Hall concealed, received, relieved, aided, or assisted felons with knowledge of the felony and the intent to help them avoid arrest. The evidence is simply not sufficient to support a conviction of accessory after the fact. It appears that the jury convicted Hall for, as the State urged, being guilty of "something."

¶31. Rather than go through the proper procedures of altering an indictment through the grand jury, the prosecution chose, and indeed advocated, over the objection of the defendant, to improperly place an unindicted charge before the jury, subjecting the defendant to a trial by ambush for accessory after the fact. The prosecution knew, or should have known, the extreme impropriety and unconstitutionality of this action due to the clear case law on the

matter, as well as the straightforward federal and Mississippi constitutional provisions expressly forbidding the actions taken by the prosecutor. Indeed, the majority admits that the legal rule in this case is absolute, and deviation therefrom is plain, clear, obvious error. Maj. Op. ¶ 10. The prosecutor's deliberate conduct chartered this improper course. Double jeopardy includes a "protection against a second prosecution for the same offense after conviction." ***Rowland v. State***, 98 So. 3d 1032, 1037 (Miss. 2012) (quoting ***Powell v. State***, 806 So. 2d 1069, 1074 (Miss. 2001)); *see also* ***United States v. Dinitz***, 424 U.S. 600, 611, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976). Double jeopardy protects "a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where bad-faith conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." ***Dinitz***, 424 U.S. at 611 (internal quotations and citations omitted). Thus, the prosecutor, who knew that a prosecution absent an indictment is unconstitutional, exercised his prerogative in a plainly unconstitutional manner, intentionally put Hall on trial for an unindicted charge, and obtained a conviction on evidence that was, at best, specious. Further, Hall appealed the sufficiency of the evidence against him, and it is obvious that the evidence was indeed woefully insufficient. Where a conviction is not supported by sufficient evidence, a subsequent trial is barred by double jeopardy. *See* ***Burks v. United States***, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the

prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." ***Id.*** at 11. The State may not make repeated attempts to convict Hall of accessory after the fact to burglary. ***Id.*** It would violate constitutional principles to allow the State to cause such a blatantly unconstitutional error, and then get a "second bite at the apple" to convict Hall. *See* ***id.*** at 17.

¶32. Reversing and vacating this conviction would cause an egregious waste of judicial resources and a serious injustice to Hall, who has been through an entire trial and was illegally convicted at the State's insistence. Allowing the State a "second bite at the apple" constitutes harassment of Hall and allows the State to commit a bad faith egregious error at Hall's expense, and then have the opportunity to reindict and retry Hall. Reversing and rendering is the only proper course, and it is in line with this Court's precedent. *See* ***Gause***, 65 So. 3d 295. To do otherwise, while suggesting that no other action can be taken in this case, embraces form over substance. Therefore, I disagree with the majority's disposition in this case, and believe it causes an unconstitutional injustice.

KITCHENS, J., JOINS THIS OPINION. CHANDLER, J., JOINS THIS OPINION IN PART.