Serial: **221229**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2016-CT-01567-SCT

DONTE SHEPARD A/K/A DONTE MEVALONE SHEPARD A/K/A DONTE M. SHEPARD ***Appellant***

v.

STATE OF MISSISSIPPI ***Appellee***

ORDER

This matter is before the Court, en banc, on the Petition for Writ of Certiorari filed by Donte Shepard. The petition was granted by order of the Court on August 9, 2018. Upon further consideration, the Court finds that there is no need for further review and that the writ of certiorari should be dismissed.

IT IS THEREFORE ORDERED that the writ of certiorari is hereby dismissed on the Court's own motion.

SO ORDERED, this the 1st day of November, 2018.

/s/ James D. Maxwell II

JAMES D. MAXWELL II, JUSTICE

TO DISMISS: RANDOLPH, P.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ.

KING, J., DISAGREES WITH THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KITCHENS, P.J.; WALLER, C.J., JOINS IN PART, ISSUE II.

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v.

STATE OF MISSISSIPPI

KING, JUSTICE, DISAGREEING WITH THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. After unanimously granting Donte Shepard's petition for certiorari review of his capital-murder conviction, this Court now summarily dismisses his case by order. Because Shepard's sufficiency-of-the-evidence argument has merit and because the trial court erred in denying Shepard's circumstantial-evidence instruction, I disagree with dismissing Shepard's case.

I. Sufficiency of the Evidence

¶2. The State contended that Shepard had been acting as a lookout for two men who, while in the commission of a burglary, allegedly had shot Tony Brown. Shepard argues that the evidence was insufficient to support his conviction. When considering a motion for acquittal or judgment notwithstanding the verdict (JNOV), the circuit court must "view all of the credible evidence which is consistent with the defendant's guilt in the light most favorable to the State." ***Knight v. State***, 72 So. 3d 1056, 1063 (Miss. 2011). If 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," this Court will not disturb the circuit court's ruling. ***Id.***

¶3. Shepard was found guilty of capital murder after the State alleged that Shepard had aided and abetted two men who had committed a burglary resulting in Brown's death. This Court previously has defined aiding and abetting as follows:

> Any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an 'aider and abettor' and is equally guilty with the principal offender. However, the defendant's mere presence when another person suggests possible future criminal activity does not create criminal liability as an aider and abettor.

Pace v. State, 242 So. 3d 107, 119 (Miss. 2018) (internal citations omitted). Thirteen-year-old Willie Thomas, the State's key witness, identified both Lucious Perkins and Jordan Johnson as having been in Brown's house, and Thomas identified Perkins as the one who had shot Brown. Thomas stated that he had seen Shepard on November 17, 2013, the night of the burglary, and that Shepard had been standing across the street in a pathway by an abandoned house. Thomas said that Shepard had started running after the gunshots sounded. He did not, however, state that Shepard had been running with or toward Johnson or Perkins, the men who had committed the burglary and the murder. Thomas affirmatively testified at trial that when Perkins and Johnson ran out of the victim's house, Shepard had not run with them.

¶4. When the police asked what Thomas had seen Shepard doing that night, Thomas responded that after hearing gunshots, Shepard at first ran and then came back to the pathway. When he returned to the pathway, Thomas stated that Shepard had been on the phone. The police asked, "so, he was pretty much looking out for the other guys that was in

the house?" Thomas at first gave no verbal response and then stated yes. Therefore, the interviewing detective was the first person to suggest that Shepard had been "looking out" for Perkins and Johnson.

¶5. Had Shepard been the "look-out" for Johnson and Perkins, testimony that he had been on the phone *after* Johnson and Perkins had committed a crime does not further that theory. Both Johnson and Perkins testified at trial that they were not friends with Shepard and that he was not involved in the crime. Johnson testified that he had committed the burglary with someone named "Little John" and stated that Shepard did not participate in the commission of the crime in any way. Perkins additionally testified that he did not see or speak to Shepard that day. In addition, the night that the crime was committed, Shepard had been staying on Randall Street, the same street on which the victim had lived. It was not, therefore, unusual that Shepard had been seen in that location.

¶6. Shepard's mere presence at the scene was insufficient to create criminal liability. Because Thomas's testimony essentially indicated that Shepard had been standing across the street, had started running upon hearing gunshots, and had been talking on the phone when he came back to the cut-through, I would find that the State presented insufficient evidence to support Shepard's conviction and would reverse and render Shepard's conviction.

II. Circumstantial-Evidence Instruction

¶7. I would also find that the trial court reversibly erred in denying Shepard's proposed circumstantial-evidence jury instruction. "Circumstantial evidence is 'evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that

such fact does exist.'" ***McInnis v. State***, 61 So. 3d 872, 875 (Miss. 2011). This court reviews a grant or denial of a jury instruction under an abuse-of-discretion standard. ***Id.***

¶8. Three months after the Court of Appeals affirmed Shepard's conviction, this Court handed down ***Moore v. State***, 247 So. 3d 1198 (Miss. 2018), in which the State had produced no confession or eyewitness to a shooting. The defendant was convicted of second-degree murder for the shooting and killing of Norris Smith, a man accused of having an affair with the defendant's wife. ***Id.*** at 1199. Smith had been shot in his car shortly after the defendant had appeared at Smith's workplace and had exchanged words with Smith. Although the State presented evidence of the defendant's fingerprints on Smith's car, video evidence of the vehicles, broken glass and a shell casing, a witness who had observed the defendant's driving past him at a high rate of speed, and other videos, the Court reasoned that "evidence that implicates the defendant by inference is circumstantial evidence, without regard to how persuasive the inference appears to be." ***Id.*** at 1202. Because the State failed to produce direct evidence of the gravamen of the offense charged, this Court found that the trial court erred in denying the circumstantial-evidence instruction and reversed and remanded for a new trial. ***Id.***

¶9. Similarly, the trial court abused its discretion in denying the circumstantial-evidence instruction in Shepard's case. As stated above, the State presented evidence that Thomas had seen Shepard standing across the street before the shooting and talking on the phone after the shooting. No phone records were introduced showing that Shepard had been on the phone with Perkins or Johnson or with anybody involved in the crime. In addition, the investigating

detective was the first person to suggest that Shepard might have been "watching out" for Perkins and Johnson. The State's supposition that Shepard had been watching out for Johnson and Perkins does not equate to direct evidence. The State produced no direct evidence that Shepard had aided, counseled, or encouraged Perkins or Johnson in the commission of the crime. Because the State failed to present any direct evidence of the gravamen of the offense charged, I would find that Shepard was entitled to a circumstantial-evidence instruction.

III. Ineffective Assistance of Counsel

¶10. Shepard additionally raised two claims of ineffective assistance of counsel on direct appeal. I would find that Shepard's defense counsel was ineffective by introducing prior-bad-acts evidence at trial. Although the Court of Appeals found the record insufficient to address the issues and dismissed the claims without prejudice, I believe the record is sufficient to address the claims on direct appeal. However, no error results from the Court of Appeals' decision to save the claims for another day.

Conclusion

¶11. Because Shepard's sufficiency-of-the-evidence argument, circumstantial-evidence instruction argument, and ineffective-assistance-of-counsel argument have merit, I disagree with this Court's order dismissing Shepard's case after granting certiorari.

KITCHENS, P.J., JOINS THIS SEPARATE WRITTEN STATEMENT. WALLER, C.J., JOINS THIS SEPARATE WRITTEN STATEMENT IN PART, ISSUE II.