IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SEAN ANTONIO KING — APPELLANT

VS. — NO. 2005-KA-0916

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2005-KA-0916**

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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO ASK LEADING QUESTIONS OF VARIOUS HOSTILE WITNESSES OR IN ALLOWING THE STATE TO USE THE PRIOR INCONSISTENT STATEMENTS OF THOSE WITNESSES FOR IMPEACHMENT PURPOSES.

II. THE PRIOR INCONSISTENT STATEMENTS OF VARIOUS WITNESSES WERE NOT ADMITTED AS SUBSTANTIVE EVIDENCE.

III. KING IS PROCEDURALLY BARRED FROM ARGUING ON APPEAL THAT THE TRIAL COURT DID NOT GIVE A LIMITING INSTRUCTION REGARDING THE PRIOR STATEMENTS OF CERTAIN WITNESSES AT THE TIME THOSE WITNESSES WERE CONFRONTED WITH SAID STATEMENTS AS HE DID NOT REQUEST THE INSTRUCTION AT THAT TIME.

IV. KING IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF PROSECUTORIAL MISCONDUCT; HOWEVER, NOTWITHSTANDING THE BAR, THE PROSECUTION'S CONDUCT AT TRIAL DID NOT RESULT IN SUBSTANTIAL AND IRREPARABLE PREJUDICE TO THE DEFENDANT'S CASE; THEREFORE A MISTRIAL WAS NOT WARRANTED AND THERE IS NO REVERSIBLE ERROR.

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NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW EVIDENCE OF VARIOUS WITNESSES' PENDING CRIMINAL CHARGES.

VII. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

VIII. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S SENTENCE AS A HABITUAL OFFENDER.

STATEMENT OF FACTS

Andrew Brooks (A.K.A. "Q.P.") was shot five times outside Boyz on the Main on Terry Road on November 20, 2001. After a police investigation, Sean Antonio King was arrested and convicted of deliberate design murder. He was sentenced as a habitual offender to life without the possibility of parole in the custody of Mississippi Department of Corrections.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in allowing the State to ask leading questions of various hostile witnesses or in allowing the State to use prior inconsistent statements of those witnesses for impeachment purposes. The proper predicate was laid, the State was clearly surprised by the witnesses' testimony, a cautionary instruction was given, and the statements were not admitted as substantive evidence.

The Defendant is procedurally barred from arguing on appeal that the trial court did not give a limiting instruction regarding the prior statements of certain witnesses at the time those witnesses were confronted with said statements as he did not request the instruction at that time. The Defendant is also procedurally barred from raising the issue of prosecutorial misconduct as he did not raise the issue in his motion for new trial. Notwithstanding the bar, the prosecution's conduct at trial did not result in substantial and irreparable prejudice to the Defendant's case.

The State's comments during its final closing argument do not constitute plain error as they

were made in response to comments made by the Defendant during his closing argument.

The Defendant is also procedurally barred from raising his final evidentiary issue as it was not addressed in his motion for new trial. Notwithstanding the bar, the trial court did not abuse its discretion in refusing to allow evidence of various witnesses' pending criminal charges.

The verdict was not against he overwhelming weight of the evidence and there was sufficient evidence to support the Defendant's sentence as a habitual offender.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO ASK LEADING QUESTIONS OF VARIOUS HOSTILE WITNESSES OR IN ALLOWING THE STATE TO USE THE PRIOR INCONSISTENT STATEMENTS OF THOSE WITNESSES FOR IMPEACHMENT PURPOSES.

A. Leading Questions

"The decision to allow leading questions is one that rests within the discretion of the trial court, and we will reverse such a decision only upon a showing of abuse of discretion." *Bailey v. State*, 952 So.2d 225, 236 (Miss Ct. App. 2006) (citing *Hughes v. State*, 735 So.2d 238, 278 (Miss. 1999)). Mississippi Rule of Evidence 611(c) states as follows:

> (c) *Leading Questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. <u>When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.</u>

(*emphasis added*). In the case at hand, three of the State's witnesses were declared hostile by the trial judge because their testimony at trial greatly differed from the statements previously given to police. (1. Willie McCarty a/k/a "Cash Money" - Transcript p. 415 - 416; 2. Derrick Fields - Transcript p. 561-562, 565, and 593; and 3. Clifton Summers a/k/a "Little Bay Bay" - Transcript p. 646 - 647). Each of the referenced witnesses' testimony differed from the statements they

previously gave police; therefore, the trial court properly determined that each of the witnesses was hostile. *See Wilkins v. State*, 603 So.2d 309 (Miss. 1992); *Craft v. State*, 764 So.2d 1253 (Miss Ct App. 2000); *Brassfield v. State*, 905 So.2d 754 (Miss. Ct. App. 2004); and *Bailey v. State*, 952 So.2d 225 (Miss. Ct. App. 2006). Accordingly, the trial court did not abuse its discretion in allowing the State to use leading questions.

B. Prior Inconsistent Statements

"The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal." *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)). "When the trial court stays within the parameters of the Rules of Evidence, the decision to exclude or admit evidence will be afforded a high degree of deference." *Id.*

The State sought to impeach each of the three hostile witness' testimony and the testimony of witness James Russell with prior inconsistent statements. Mississippi Rule of Evidence 607 states that, "[t]he credibility of a witness may be attacked by any party, including the party calling him." This Court has previously held the following regarding the use of prior inconsistent statements for impeachment purposes:

> Mississippi Rule of Evidence 613 allows the impeachment of witnesses with their prior inconsistent statements in two ways. The first is by reading the statement to the witness and asking whether that statement accurately reflects the testimony given on the occasion when the statement was recorded. M.R.E. 613(a). On the other hand, a party may use extrinsic evidence. M.R.E. 613(b). This can be done by putting on other witnesses who will introduce facts discrediting the previous witness's testimony. Rule 613(b) states:
>
> > Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposing party is afforded an

> opportunity to interrogate him thereon, or the interests of justice otherwise require. . . .

Everett v. State, 835 So.2d 118, 120-121 (Miss. Ct. App. 2003). The Mississippi Supreme Court has held the following with regard to the use of prior inconsistent statements specifically in light of Rule 607:

> To remove any doubt as to the meaning of Rule 607, we hold today that in its application, just as in our pre-rules decisions, before a party will be authorized to introduce for the impeachment purposes an unsworn pretrial inconsistent statement of his own witness, it will be necessary that he show surprise or unexpected hostility, and that such statement can never be used as substantive evidence. We also hold that under the 'unfair prejudice, confusion of the issues, or misleading of the jury' provision of Rule 403, the circuit judge should consider whether a cautionary instruction to the jury will be sufficient to keep the jury from treating the unsworn pretrial inconsistent statement as substantive evidence, and if not, the statement should not be introduced.

Wilkins v. State, 603 So.2d 309, 322 (Miss. 1992).

The requirements of Rule 613 and Mississippi case law were met with regard to each of the four witnesses in question.

1. Willie McCarty a/k/a "Cash Money"

Near the beginning of his direct testimony, Mr. McCarty was asked about the identity of the owner of Boyz on the Main. (Transcript p. 411). After claiming that he did not know, he was asked if he gave a statement to police on December 5, 2001. (Transcript p. 412). He admitted that he did. (Transcript p. 412). However, he claimed that during his statement he did not say that Boyz on the Main was Squirt's shop.[1] (Transcript p. 412). Then the following exchange took place:

Q: . . . would it help you to see your statement to refresh your memory?
A: You can show it to me. I don't remember saying it now.
* * *
Q: Is that your signature at the bottom of that page?

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[1] Marcus Collier a/k/a "Squirt" is the owner of Boyz on the Main.

A: Yes sir.
Q: What's the date on that?
* * *
A: 12/5/2001
* * *
Q: Is that correct?
A: Yeah. Yes sir.

(Transcript p. 412 - 413). Later, Mr. McCarty again testified differently from his statement. He testified that Clifton Summers did not go with him to Boyz on the Main on the day in question, that he drove there by himself, and that he did not ride in the truck with the victim. (Transcript p. 415). Shortly afterwards, the following exchange took place:

Q: Mr. McCarty, isn't it true that you told the police that you went to the shop on November the 20th and that you rode up there with Q.P. in the truck?
A: No, sir.
Q: You didn't tell them that?
A: No, sir.

(Transcript p. 417). He eventually admitted that he rode to the store with QP and Clifton Summers just as he did in the statement given to police. (Transcript p. 418). This type of testimony continued throughout Mr. McCarty's direct examination.

Mr. McCarty admitted that he talked to police and that he gave the prior statement in question. However, Mr. McCarty would testify differently from his previous statement, be confronted with his prior statement, and sometimes admit that the information in the statement was correct and sometimes deny that he gave some of the responses reflected in the statement. For example, the following exchange took place after Mr. McCarty relayed what he saw on the day in question, leaving out any information regarding seeing a black male coming toward the victim:

Q: Let me ask you a question. In your statement didn't you say that you saw a male, black male, walking at a fast pace from around the corner at the other business toward QP?
A: No, sir.
Q: You didn't say that?

A: No, sir.
Q: That's not in this statement?
A: I'm saying I didn't say it, sir.
Q: You didn't say it?
A: No, sir.
Q: You don't have any idea how it got in this statement?
A: No, sir.

(Transcript p. 419). Eventually, Mr. McCarty testified that "most of the stuff that's on there I didn't say" and that "some of it on there I said is true, yeah." (Transcript p. 426 and 427).

Mr. McCarty's initial testimony regarding what he saw on the day in question lacked many of the details given to police in his prior statement and he testified that parts of the statement he gave police were true and others were not even though he admitted signing the statement indicating that the statement was true and correct. Therefore, the assistant district attorney had to question Mr. McCarty regarding his prior statement in order to determine exactly what Mr. McCarty would testify that he did, in fact, see on the day in question. Further, the assistant district attorney was properly allowed to question Mr. McCarty about the statement in order to show the inconsistencies so that the jury could determine Mr. McCarty's credibility.

Clearly, the State was surprised by Mr. McCarty's testimony. It was quite different from the information he gave police and the information he gave the assistant district attorney and his investigator prior to trial. The State had no prior knowledge that Mr. McCarty's version of the events that transpired on the day in question had changed. Accordingly, the proper predicate was laid and Mr. McCarty was properly questioned regarding his prior statement.

2. Derrick Fields

Mr. Fields was an extremely reluctant witness. He initially gave police a fake name when he was first questioned about the murder and admitted that he kicked the subpoena off the steps when he received it and said that he was not taking it. (Transcript p. 550, 603, and 605). He also

admitted that he did not want to be served because he did not want to testify. (Transcript p. 607). Further, he was incarcerated for refusing to appear in court and testify in the case. (Transcript p. 549).

Mr. Fields never denied that he made a statement to police and agreed that he signed and dated the statement. (Transcript p. 555). He did, however, deny that parts of the statement were correct. He first testified that all he remembered "is hearing shots." (Transcript p. 560). After being confronted with his prior statement, he remembered seeing a black Expedition or Explorer at Boyz on the Main and remembered that it had an Alcorn tag. (Transcript p. 563). When questioned further, he claimed that he just "told him [the officer] whatever he wanted to hear for I could go home." (Transcript p. 565). Eventually, in order to determine exactly what Mr. Fields saw on the day in question, the State went through his prior statement and questioned him regarding which of his responses were true. Mr. Fields admitted that he said everything reflected in the statement; however, he never testified that it was necessarily what happened that day. (Transcript p. 569 - 572).

Naturally, the State was surprised by Mr. Fields testimony. Again, his testimony differed from the statement he gave police even though he admitted telling police that his statement was true. (Transcript p. 586). Furthermore, he testified that he previously told the assistant district attorney that the statement he gave police was the truth (Transcript p. 555) and admitted that he failed to tell them that he said what the police wanted to hear so he could go home instead of being truthful. (Transcript p. 566). As such, Mr. Fields was properly questioned regarding his prior statements.

3. James Russell

Mr. Russell was also a reluctant witness and was incarcerated for refusing to appear in court and testify in this case. (Transcript p. 450). He indicated that "some folks on the street" told him not to testify. (Transcript p. 451).

Mr. Russell testified that at the time of the incident, he owned an upholstery shop next to Boyz on the Main. (Transcript p. 452). He also testified that he knows Sean King, that Sean King came in his store on the day in question, and that Sean King left his store approximately 15 - 20 minutes before he heard gunshots. (Transcript p. 453 and 455). He further testified that he gave two statements to police regarding what he witnessed on the day in question. (Transcript p. 454). However, Mr. Russell denied voluntarily going back to police to give a third statement even though Detective Keith Denson testified that he did. (Transcript p. 486 and 369-370). Additionally, Mr. Russell, while admitting that he told police that he received threatening phone calls, denied that he told police that he recognized the voice on the phone as that of Sean King. (Transcript p. 461). Again, this was a surprise to the State as it was contrary to the statement given to police and to them. Thus, Mr. Russell was properly questioned regarding his prior statements.

4. Clifton Summers a/k/a "Little Bay Bay"

The circumstances surrounding Mr. Summers testimony were slightly different. Defense counsel filed a motion in limine stating that while the prosecution produced a statement given by Mr. Summers implicating King's involvement in the murder, Mr. Summers gave a subsequent statement to defense counsel denying that King was involved in the murders. (Record p. 44 - 45). The motion further stated that the prosecution had been advised of this repudiation and requested that the State "be precluded from cross examining and impeaching its own witness as his expected testimony is no surprise to the State." (Record p. 45). A hearing was held on this motion and the trial court held the following:

> Well, it does happen from time to time that there are two statements that a witness has given. And the normal procedure in the past has been a witness takes the stand and testifies whatever the witness is going to testify to, and then somebody taking statement from that particular witness that is contrary to what the witness is testifying to, and that lawyer cross-examines and impeaches the witness or attempts to impeach

> the witness. So that is just the traditional way of doing it. And the jury, of course, needs to see what the witness is going to testify to and make their own determination of whether the original version was truthful or the second version was truthful. And of course, that is the ultimate goal of the Court and the jury is to base a verdict on whatever the truth is. But it's, of course, up to the jury to determine whether the witness is telling the truth or not telling the truth. They can't decide until they hear all the evidence from that witness, or testimony from the witness. As stated earlier, these two witnesses have given unsworn statements. And at this time, of course, we don't know what they're going to testify to, the original version starting out or the second version. And until they take the witness stand we don't know. . . So for these reasons the Court is of the opinion that the testimony should proceed in front of the jury, and we'll see what they testify to, and of course, the parties may impeach that witness.

(Transcript p. 87- 89) (*emphasis added*).

At trial, Mr. Summers testified to yet a different version of events including stating that he never told defense counsel that King gave him $140 outside the Picadilly after the murder even though the tape recorded statement he gave defense counsel indicated otherwise. (Transcript p. 643). After being declared a hostile witness, the State questioned Mr. Summers regarding his prior statements. During this time, Mr. Summers admitted to telling several different versions of what happened on the day in question and ultimately gave one final version which he claimed to be the truth. The State was certainly surprised by Mr. Summers' testimony as it differed from both the statement he gave police and the statement he gave defense counsel. As such, Mr. Summers was properly questioned regarding his prior statements.

The State properly questioned these witnesses regarding their prior statements as the State was clearly surprised by each of these witnesses' testimony because parts of their testimony were almost completely opposite of the information given to police during their investigation of the crime. The State had prior knowledge of the probability that only one of the witnesses had potentially changed their version of the events which occurred on the day in question and as the trial court pointed out, no one knew which version he was going to testify to until he took the stand. Moreover,

the judge gave a cautionary instruction which is discussed later in this brief and the prior statements were not used as substantive evidence as set forth in detail later in this brief. Thus, each of the requirements were met and the State was properly allowed to use the prior inconsistent statements for impeachment purposes. As such, King's first issue is without merit.

II. THE PRIOR INCONSISTENT STATEMENTS OF VARIOUS WITNESSES WERE NOT ADMITTED AS SUBSTANTIVE EVIDENCE.

As set forth above, the State of Mississippi agrees that prior inconsistent statements are not to be used as substantive evidence. However, there is no indication in the record that they were used as such in the case at hand. First, the trial judge gave the cautionary jury instruction set forth below:

> You have heard evidence that some of the witnesses made statements prior to trial that may be inconsistent with the witnesses' testimony at this trial. If you believe that inconsistent statements were made, you may consider the inconsistency in evaluating the believability of the witnesses' testimony. You may not, however, consider the prior statements as evidence of the truth of the matters contained in the prior statements.

(Jury Instruction S-5, Record p. 73). Mississippi law is clear that "jurors are presumed to follow the instructions of the court." *Long v. State*, 934 So.2d 313, 316 (Miss. Ct. App. 2006) (citing *Grayson v. State*, 879 So.2d 1008, 1020 (Miss. 2004)). "To presume otherwise would be to render the jury system inoperable. *Id.*

Second, there was substantial evidence of King's guilt without the use of the prior inconsistent statements as substantive evidence. King was convicted of deliberate design murder. Thus, the State was required to prove King killed Brooks without the authority of law but with the deliberate design to effect death. Miss. Code Ann. §97-3-19(1)(a). The following facts were established through the testimony elicited at trial and not from any prior statements:

a. King left Russell's store 10 - 15 minutes prior to shots being fired. (*See* testimony of James Russell - Transcript p. 453-455).
b. The person who shot Brooks came from the direction of Russell's store. (*See*

testimony of Derrick Fields - Transcript p. 563, Clifton Summers - Transcript p. 730).

c. Clifton Summers identified King in a photo line-up as the man he saw come around the building with a gun pointed toward Brooks. (*See* testimony of Sergeant Ricky Richardson of the Jackson Police Department - Transcript p. 944 and Exhibit 56).

d. The shooter approached Brooks with a gun asking him "who did it?" (*See* testimony of Clifton Summers - Transcript p. 723).

e. Brooks received three gunshots to the left thigh, one gunshot to the lower part of his right shin, and one gunshot to the left back. (*See* testimony of Dr. Steven Hayne - Transcript p. 531).

f. Brooks' death was ruled a homicide. (*See* testimony of Dr. Steven Hayne - Transcript p. 547).

g. A black Expedition with an Alcorn tag was at the scene of the crime at the time of the crime. (Willie McCarty testified that he saw a black Expedition at the scene of the crime. Transcript p. 425). (Derrick Fields also saw a black Expedition or Explorer with an Alcorn tag at the scene. Transcript p. 563).

h. A black Expedition with an Alcorn tag registered to King's wife was found outside his house. (*See* testimony of Sergeant Ricky Richardson of the Jackson Police Department - Transcript p. 947- 48)

i. The only black Expedition with an Alcorn tag registered in Hinds county was registered to King's wife. (*See* testimony of Beverly Hughes, Hinds County Data Processing - Transcript p. 985 - 86).

j. Projectiles and cartridges were found at the scene. (*See* testimony of Detective James Roberts of the Jackson Police Department - Transcript p. 326-27).

k. Russell was reluctant to give information regarding the murder because he was afraid of the suspects. Summers was also reluctant to give information because of "intimidation of the suspect." (*See* testimony of Detective Keith Denson of the Jackson Police Department - Transcript p. 365-70 and 376).

l. King's uncle was killed prior to the murder of Brooks. (See testimony of Rodney Clark - Transcript p. 905-06).

Not one of the facts listed above was taken from the prior statements given by the witnesses unless they specifically testified at trial that the fact was true. As the jury was properly instructed regarding the use of the prior inconsistent statements and as there was sufficient evidence to support the verdict without the use of the prior inconsistent statements, it is clear that the statements were not used as substantive evidence.

III. KING IS PROCEDURALLY BARRED FROM ARGUING ON APPEAL THAT THE TRIAL COURT DID NOT GIVE A LIMITING INSTRUCTION REGARDING THE PRIOR STATEMENTS OF CERTAIN WITNESSES AT THE TIME THOSE WITNESSES WERE CONFRONTED WITH SAID STATEMENTS AS HE DID NOT REQUEST THE INSTRUCTION AT THAT TIME.

King argues that "the trial court committed reversible error in denying King's request for a jury instruction at the time the impeaching statements were admitted." (Appellant's Brief p. 35). However, King did not specifically request that a limiting instruction be given at the time the witnesses were confronted with their prior statements. King's brief cites to page 53 of the transcript after his statement that "King requested that the trial judge instruct on the proper use of the prior inconsistent statements at the time they were admitted. The judge declined to do so." However, the only mention of jury instructions on that page is in a quote from a case defense counsel is reading to the judge. The first time King requested a limiting instruction was at the close of all testimony while jury instructions were being discussed. (Transcript p. 1054). As stated in *Russell v. State*, "no limiting instruction regarding the impeachment testimony was granted [at the time the witnesses were confronted with their prior statements] in the case sub judice because no limiting instruction regarding the impeachment testimony was requested [at that time]." 607 So.2d 1107, 1117 (Miss.1992) *See also Field v. State*, 856 So.2d 492, 493(¶ 5) (Miss.Ct .App.2003) (holding that "[i]ssues not raised at the trial court level may not be raised for the first time on appeal"). Thus, King is procedurally barred from this argument on appeal.

IV. KING IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF PROSECUTORIAL MISCONDUCT; HOWEVER, NOTWITHSTANDING THE BAR, THE PROSECUTION'S CONDUCT AT TRIAL DID NOT RESULT IN SUBSTANTIAL AND IRREPARABLE PREJUDICE TO THE DEFENDANT'S CASE; THEREFORE A MISTRIAL WAS NOT WARRANTED AND THERE IS NO REVERSIBLE ERROR.

King asserts that "prosecutorial misconduct either individual or cumulative requires reversal because King was denied his state and federal constitutional rights to due process, a fair trial, and the right to present and confront witnesses." (Appellant's Brief p. 39). However, King is procedurally barred from raising the issue on appeal as it was not raised in his motion for new trial. *See Alonso v. State,* 838 So.2d 309, 313 (Miss. Ct. App. 2002) (holding that the issue in question was procedurally barred even though an objection was raised at trial because the matter was not raised in the motion for new trial) and *Beckum v. State,* 917 So.2d 808, 813 (Miss. Ct. App. 2005) (holding that the issue in question was procedurally barred as it was not specifically raised in defendant's motion for J.N.O.V. or motion for new trial). Accordingly, the issue is barred.[2]

Notwithstanding the bar, King is not entitled to a reversal of his conviction and sentence as the prosecution's conduct at trial did not result in substantial and irreparable prejudice to his case. This Court set forth the standard of review with regard to allegations of prosecutorial misconduct as follows:

> "Trial courts are allowed considerable discretion to determine whether or not the conduct of an attorney in argument is so prejudicial that an objection should be sustained or a new trial granted." (*citations omitted*). "The test to make such determination is whether the natural and probable effect of improper argument is to

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[2] There are also several specific allegations of misconduct mentioned in King's Brief to which no contemporaneous objection was made including: 1. Prosecution's alleged mischaracterization of the evidence during closing (Transcript p. 1099 - 1101); 2. Multiple allegations of the prosecution acting as an unsworn witness (Transcript p. 434, 435, 451,459, 462 and 454 - objection made on other grounds); 3. Allegations of disparaging remarks regarding defense counsel (Transcript p. 1101, 1102, and 1128); and 4. Allegations of eliciting inadmissible opinion evidence (Transcript p. 948). *See Swington v. State,* 742 So.2d 1106, 1112 (Miss. 1999) (holding that "failure to make a contemporaneous objection waives the issue on appeal").

> create unjust prejudice against the accused so as to result in a decision influenced by prejudice." (*citations omitted*).

Millender v. State, 734 So.2d 225, 233 (Miss. Ct. App. 1999). "If a 'prejudicially incompetent matter or misconduct' occurs before a jury, a trial judge should declare a mistrial if the trial judge cannot cure the damaging effect with an admonition or an instruction." *Eason v. State,* 916 So.2d 557, 561 (Miss. Ct. App. 2005) (quoting *Davis v. State*, 530 So.2d 694, 698 (Miss.1988)) (*emphasis added*).

In the case at hand, the trial judge saw no damaging effect arising from the conduct of counsel as evidenced by the fact that not only did he not declare a mistrial, but he did not give counsel a warning that if their conduct continued that he would declare a mistrial. "[T]he trial judge is in the best position to determine if an alleged objectionable remark has a prejudicial effect." *Bailey v. State,* 956 So.2d 1016, 1035 (Miss. Ct. App. 2007)(citing *Steen v. State*, 873 So.2d 155 (Miss. Ct. App. 2004)). Furthermore, defense counsel apparently did not feel that the conduct of the assistant district attorneys was such that required a mistrial as he did not request one.

The case at hand was a hard fought case by both sides. Numerous objections were made, tensions were high, and passionate arguments were made. However, any improper comments made were insignificant when looking at the overall case before the court. For example, the Mississippi Supreme Court noted in *Monk v. State*, that "[e]xaggerated statements and hasty observations are often made in the heat of debate, which, although, not legitimate, are generally disregarded by the court, because in its opinion they are harmless." 532 So.2d 592, 601 (Miss.1988) *(overruled on other grounds*). Had the comments and arguments made by counsel at trial risen to the level of "resulting in substantial and irreparable prejudice to the defendant's case" the trial judge would have declared a mistrial. *See Jones v. State*, 962 So.2d 1263, 1276 -1277 (Miss. 2007) (citing *Sipp v. State*, 936

So.2d 326, 331 (Miss. 2006)) (holding that "the trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case"). "In considering whether a mistrial was warranted, this Court defers to the trial court's determination of whether the defendant suffered any prejudicial effect." *Id.*

Nonetheless, King asserts several examples of alleged prosecutorial misconduct.[3] For example, King states in his brief that "most egregious of all in terms of disingenuous legal arguments . . . was the prosecution's claim that the prior consistent statements had not been admitted as substantive evidence because the written document had not been entered into evidence." (Appellant's Brief p. 40). However, the case law in Mississippi clearly states that one of the two ways in which Mississippi Rule of Evidence 613 allows for the impeachment of witnesses with their prior inconsistent statements "is by reading the statement to the witness and asking whether that statement accurately reflects the testimony given on the occasion when the statement was recorded." *Everett v. State*, 835 So.2d 118, 120-121 (Miss. Ct. App. 2003). This is exactly what the prosecution was arguing that he be allowed to do (read portions of the prior statements to the witnesses to confront them with said statements but not to enter the transcript of the statements into evidence). Thus, the prosecutor's argument was not "disingenuous" or "egregious," and therefore, certainly does not give rise to prosecutorial misconduct.

King also asserts that the "prosecution repeatedly interjected inflammatory inadmissible

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[3] For the sake of brevity, the State is not responding to each of King's allegations individually; however, the State is certainly not conceding that any instance of conduct asserted by King as being prosecutorial misconduct is such. The State is merely using a few of King's allegations of misconduct as examples to illustrate to the Court that the trial court cured any damaging effect with an instruction or other remedial act and/or that the allegations of misconduct made by King do not rise to the level of "resulting in substantial and irreparable prejudice to the defendant's case" which would have given the trial judge reason to declare a mistrial. *See Caldwell v. State,* 938 So.2d 317, 321 (Miss. Ct. App. 2006) (holding that "the remedial acts of the court are usually deemed sufficient to remove any prejudicial effect from the mind of the jurors"). Accordingly the trial judge did not commit reversible error in refusing to declare a mistrial *sua sponte* as required by the rule of law set forth above by *Eason v. State.*

hearsay into the proceedings" and specifically referred to the State's use of James Russell's prior inconsistent statements during his testimony. (Appellant's Brief p. 41). As set forth in detail previously in this brief, prior inconsistent statements may be used to impeach the testimony of a witness and the trial court instructed the jury regarding its proper use of these prior statements. As the jury is presumed to follow the instructions of the court, there can be no prejudicial effect.

A final example is King's argument that the prosecution misstated the evidence during closing arguments. (Appellant's Brief p. 40). However, the following is an excerpt of one of the jury instructions given by the court:

> Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement, or remark.

(Record p. 63). This same instruction was given in *Caldwell v. State*, a case in which the prosecutor was charged with mischaracterizing the evidence, and this Court held that:

> The remedial acts of the court are usually deemed sufficient to remove any prejudicial effect from the mind of the jurors. (*citations omitted*). The jury is presumed to have followed the directions of the trial judge. (*citations omitted*).

938 So.2d 317, 320 -321 (Miss. Ct. App. 2006). As such, any mischaracterization of the evidence during the State's closing arguments did not prejudice the defendant in light of the instruction given by the court.

When counsel's actions do not result in "unjust prejudice against the accused as to result in a decision influenced by the prejudice so created," they will be deemed harmless. *McGowen v. State,* 859 So.2d 320, 347 (Miss. 2003). Mississippi case law is clear that "[a] criminal defendant is not entitled to a perfect trial, only a fair trial." *Powers v. State,* 945 So.2d 386, 397 -398 (Miss. 2006). In this case, the defendant did receive a fair, albeit imperfect, trial. Not one of the alleged

instances of misconduct rose to the level that would cause the trial judge to declare a mistrial. Moreover, King failed to address the issue in his motion for new trial. Thus, King's fourth issue is without merit.

V. THE STATE'S COMMENTS DURING ITS FINAL CLOSING ARGUMENTS DO NOT CONSTITUTE PLAIN ERROR.

King argues that the State improperly referred to his wife's failure to testify during its final closing argument. (Appellant's Brief p. 46). However, King is procedurally barred from raising the issue on appeal as he did not make a contemporaneous objection nor did he raise the issue in his Motion for New Trial. King, however, asserts that the State's arguments constitute plain error. (Appellant's Brief p. 46). This Court has previously held the following in that regard:

> The law is well settled that if no contemporaneous objection is made, the error, if any, is waived. Procedural bar notwithstanding, an appellate court may review the merits of the underlying claim knowing that any subsequent review will stand on the bar alone. A defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal. The right of an appellate court to notice plain error is addressed in M.R.E. 103(d). The Mississippi Supreme Court applies the plain error rule only when a defendant's substantive rights are affected. "The plain error doctrine has been construed to include anything that 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice.

Stubbs v. State, 811 So.2d 384, 387 (Miss. Ct. App. 2001)(quoting *Dobbins v. State*, 766 So.2d 29, 31 (Miss. Ct. App. 2000)). Accordingly, an analysis of the issue "necessarily includes a determination of whether there is, in fact, "error," that is, some deviation from a legal rule; that error "plain" or "clear" or "obvious;" and it is prejudicial in its effect upon the outcome of the trial court proceedings." *Porter v. State*, 749 So.2d 250, 261 (Miss. Ct. App. 1999) (quoting *United States v. Olano*, 507 U.S. 725, 732-735, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

In the case at hand, there was no plain error as there was no error. While, under normal

circumstances it may be impermissible to comment on a wife's failure to testify, prosecutors are allowed to respond to statements by defense counsel. *Sumrall v. State*, 955 So.2d 332, 336 (Miss. Ct. App. 2006). *See also Gilliard v. State,* 428 So.2d 576, 584 (Miss. 1983) (*overruled on other grounds*) (holding that although the comments made were improper, the remarks of defense counsel were sufficient provocation to excuse the district attorney's response); *Booker v. State*, 511 So.2d 1329, 1332 (Miss. 1987) (holding that there is an exception "where the objectionable statement [made by the prosecution] was invited or responsive to the statement of defense counsel"); *Manning v. State*, 835 So.2d 94, 102 (Miss. Ct. App. 2002) (holding that certain types of "responsive reasoning do not overstep the bounds placed upon closing arguments"); *Holmes v. State*, 754 So.2d 529, 538 (Miss. Ct. App. 1999); *Malone v. State*, 486 So.2d 360, 366 (Miss. 1986); *Baker v. State*, 455 So.2d 770, 774 (Miss. 1984). During closing arguments, defense counsel made the following statements:

> Detective Richardson before mentioning anything about the murder to [the defendant's] wife, before she knew anything about the murder, said, I was driving the vehicle that week. And then he started talking about a murder. Said, wait a minute. Wait a minute. Of course, you're going to stop and say, wait a minute. You're suspecting me of a murder. She says, I was driving the vehicle that week. There is no evidence to dispute that.

(Transcript p. 1119- 1120). The State then responded to defense counsel's statements in its final closing arguments in part as follows:

> He talked about Latonya King saying, I was driving it all that week until he mentioned murder. Did she take the stand? I may have dozed off, but I don't recall her sitting in the this stand and saying anything.

(Transcript p. 1132). The prosecution was merely responding to defense counsel's comments regarding what the defendant's wife said by pointing out that she did not testify to those facts. Defense counsel claimed that there was no evidence to dispute that King's wife was driving the

vehicle in question at the time of the homicide. The prosecution simply pointed out that there was no direct evidence that she was, in fact, driving the vehicle on the day in question. "No reversible error results where a prosecutor's remarks are in response to defense counsel's previous argument." *Bailey v. State,* 956 So.2d 1016, 1034 (Miss. Ct. App. 2007)(citing *Brewer v. State*, 725 So.2d 106 (Miss.1998)). Furthermore, "[i]t is well settled that parties have latitude to argue in rebuttal to arguments raised by other parties." *Id.* at 1035.

Moreover, the alleged error was not "plain," "obvious," or "clear" in that not only did the trial judge not notice the alleged error during the trial, but neither did defense counsel. Additionally, defense counsel did not notice the error in retrospect while reviewing the trial in order to prepare his motion for new trial as evidenced by the fact that he did not mention the alleged error in his motion. As such, King's fifth issue does not merit reversal.

VI. KING IS PROCEDURALLY BARRED FROM RAISING THIS EVIDENTIARY ISSUE ON APPEAL; HOWEVER, NOTWITHSTANDING THE BAR, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW EVIDENCE OF VARIOUS WITNESSES PENDING CRIMINAL CHARGES.

King asserts that "the trial court committed reversible error in excluding evidence showing the bias of the witnesses. . . ." (Appellant's Brief p. 48). However, King is procedurally barred from raising the issue on appeal as it was not raised in his motion for new trial. *See Alonso v. State,* 838 So.2d 309, 313 (Miss. Ct. App. 2002) (holding that the issue in question was procedurally barred even though an objection was raised at trial because the matter was not raised in the motion for new trial) and *Beckum v. State,* 917 So.2d 808, 813 (Miss. Ct. App. 2005) (holding that the issue in question was procedurally barred as it was not specifically raised in defendant's motion for J.N.O.V. or motion for new trial).

Furthermore, the issue was never raised in the trial court. The State filed a motion in limine

requesting that there be no mention of the fact that the truck driven by the victim with two of the State's witnesses as passengers was stolen. (Record p. 57). A hearing was held on the motion during which King argued that the motion be denied on the grounds that "it was a part of a series of facts that would be before the jury. And I think the jury should have the opportunity to hear the facts of what occurred in totality and then make a decision." (Transcript p. 112). Defense counsel also expressed his concern regarding the witnesses incriminating themselves as they were involved with a stolen truck. (Transcript p. 113). In response, the State noted that the statute of limitations had run with regard to any charges involving the stolen truck. (Transcript p. 113). The trial court granted the motion. (Transcript p. 113). Then during King's cross examination of Officer Keith Denson the following exchange took place:

> Q: And all these witnesses that we're talking about have pending charges against them, didn't they.
>
> By Mr. Alexander: I'm going to object to that question, Your Honor. Pending charges do not come into evidence. Only convictions. I would ask that the jury disregard that question.
>
> By the Court: Sustained. The jury will disregard that last question.

(Transcript p. 394). At no point did defense counsel assert what he now asserts on appeal, that King had a right to show the witnesses' perception about the prosecution's ability to dismiss or reduce pending charges. Mississippi law is clear that "[a] trial judge cannot be put in error on a matter which was not presented to him for decision." *Ponder v. State*, 335 So.2d 885, 886 (Miss. 1976). With regard to this issue, the trial judge was not presented this issue either during trial or in King's motion for new trial. Moreover, the argument made during the hearing on the admission of evidence regarding the stolen vehicle is not the same argument made on appeal. Mississippi law is also clear that "[a]n objection on one specific ground waives all other grounds." *Swington v. State,* 742 So.2d

1106, 1110 (Miss. 1999). Thus, King is procedurally barred from raising this issue on appeal.

Notwithstanding the bar, the trial court did not abuse its discretion in excluding this evidence.

> "The standard of review regarding admission or exclusion of evidence is abuse of discretion. Where error involves the admission or exclusion of evidence, this Court 'will not reverse unless the error adversely affects a substantial right of a party.' " *Whitten v. Cox*, 799 So.2d 1, 13 (Miss.2000) (quoting *Floyd v. City of Crystal Springs*, 749 So.2d 110, 113 (Miss.1999)). *See also Jefferson v. State*, 818 So.2d 1099, 1104 (Miss.2002) (quoting *Hughes v. State*, 735 So.2d 238, 270 (Miss.1999)) ("[u]nless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.")

Juarez v. State, 965 So.2d 1061, 1065 (Miss. 2007). First, there is nothing in the record indicating that any one of the State's witnesses were charged with or threatened with being charged with any crime related to the stolen truck. Second, as set forth above, King never indicated to the trial judge that he was trying to show the witnesses' perception about the prosecution's ability to dismiss or reduce pending charges. Third, there was testimony regarding the discussion of possible accessory after the fact charges if the witnesses were not truthful during the investigation and testimony regarding the witnesses's fear while talking with officers. (Transcript p. 393, 549, 550, 578, 616, 620, 732, 788, 932, 937, and 941). Fourth, it is well-settled that "a witness cannot be cross-examined regarding his involvement with crimes for which he has not been convicted." *Wilkins v. State,* 603 So.2d 309, 323 (Miss. 1992).

Finally, and most importantly, a substantial right of the defendant was not affected. King argues that his rights to "confrontation and cross-examination, right to present a defense, and right to a fair trial" were denied. (Appellant's Brief p. 48). However, as noted above, there was testimony regarding the discussions had between the investigating officers and the witnesses related to possible accessory after the fact charges if they were not truthful. Thus, while King did not have an opportunity to question the witnesses about their perceptions of what the prosecution could or could

not do with regard to possible charges because as set forth above he did not argue to the trial court that he should be able to do so, testimony was presented to the jury illustrating that the witnesses faced the possibility of charges for accessory after the fact and that some of those witnesses were scared. As such, King was allowed to sufficiently address the issues of bias with the witnesses, and therefore, was not denied his right to confront the witnesses, present a defense, or to have a fair trial. Accordingly, King's sixth issue is without merit.

VII. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

King next argues that "the evidence is so weak and unreliable that the court should reverse the conviction." (Appellant's Brief o. 49). The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

> [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. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice."

Pierce v. State, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State. *McClain v. State,* 625 So.2d 774, 781 (Miss.1993).

In support of his argument that the verdict was against the overwhelming weight of the evidence, King argues that "the only direct evidence adduced by the State showing King shot Brooks came from an unsworn prior inconsistent statement of Summers." (Appellant's Brief p. 50). As set forth in detail with regard to Issue 2, there was substantially more evidence that King was the person who shot Brooks including, but certainly not limited to, the testimony of Sergeant Ricky Richardson of the Jackson Police Department that Clifton Summers identified King in a photo line-up as the man

he saw come around the building with a gun pointed toward Brooks. (Transcript p. 944 and Exhibit 56).

Furthermore, the jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *House v. State*, 735 So.2d 1128 (Miss. Ct. App.1999) (citing *Noe v. State,* 616 So.2d 298, 302 (Miss.1993)). "It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief." *Id.* As set forth in detail with regard to Issue 2, the evidence justifies the verdict rendered in King's trial. Accordingly, King's argument that the verdict was against the overwhelming weight of the evidence is without merit.

VIII. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S SENTENCE AS A HABITUAL OFFENDER.

King argues that "the evidence is insufficient to prove that King was convicted and served separate sentences, and his sentence as an habitual must be reversed." (Appellant's Brief p. 52). King was convicted as a habitual offender under Mississippi Code Annotated §99-19-83 which reads as follows:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

King was convicted of two previous felonies which were separately brought and arose from separate incidents at different times. On July 24, 1997, King was sentenced to ten years for aggravated assault with two years suspended, eight years to serve, and five years supervised probation. (Exhibit 1 from Sentencing Hearing). On June 9, 1998, King was sentenced to ten years for the sale of

cocaine with seven years suspended, three years to serve, and two years supervised probation. (Exhibit 2 from Sentencing Hearing). The sale of cocaine sentence was to run concurrently with the aggravated assault sentence. (Exhibit 2 from Sentencing Hearing).

King argues that because the sentences ran concurrently, "the record fails to show a required element of §99-19-83, which is that King have 'served separate terms of one (1) year or more in any state and/or federal penal institution.'" (Appellant's Brief p. 53 - 54). However, this Court held in *Otis v. State* that:

> . . . for purposes of the habitual-offender sentencing statute, if the defendant has been convicted of at least two prior felonies separately brought and arising out of separate incidents, then habitual-offender sentencing is permissible even though only one year or more has been served as a result of concurrent sentencing. In other words, what is required are separate convictions for two prior felonies and separate sentences for two prior felonies; it is not a requirement that separate periods of time be physically served for the separate convictions.

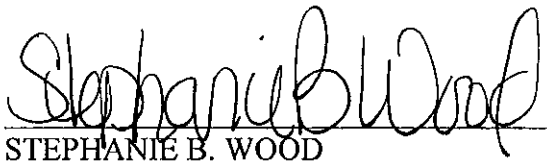
853 So.2d 856, 862 - 63 (Miss. Ct. App. 2003) (*emphasis added*). *See also Magee v. State,* 542 So.2d 228, 236 (Miss.1989) (holding that serving one year or more on concurrent sentences for separate convictions amounts to serving more than one year on each sentence.) Thus, King was properly sentenced as a habitual offender under Mississippi Code Annotated §99-19-83 and his eighth issue is without merit.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of the trial court as there was no reversible error.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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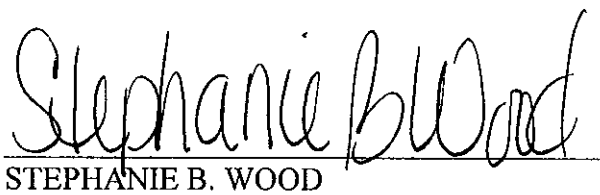

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