IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COURTNEY HILL — APPELLANT

VS. — NO. 2006-KA-1966-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Juror misconduct for which there is no record support, evidence of an unrelated crime, and the denial of a continuance after the indictment was amended are the issues presented in this appeal from appellant's conviction of the sale of crack cocaine.

COURTNEY HILL, a twenty-seven (27) year old African American male and resident of Kilmichael (C.P. at 33), prosecutes a criminal appeal from the Circuit Court of Montgomery County, Mississippi, Joseph H. Loper, Jr., Circuit Judge, presiding.

Hill, in the wake of an indictment returned on September 6, 2006, was convicted of selling a single rock of crack cocaine to Kendrick Shelton, a not-so-confidential paid informant working for the sheriff's department in Montgomery County.

The indictment, in its original form and omitting its formal parts, alleged

> "[t]hat . . . Courtney Hill . . . on or about the 8th day of March, 2006, in Montgomery County[,] Mississippi[,] . . . did wilfully, unlawfully, feloniously, and purposely or knowingly sell, transfer, distribute or deliver to Kendrick Shelton, a human being, approximately 0.1 grams

> of a controlled substance, to wit: Cocaine, a Schedule II controlled substance as listed in Section 41-29-115(A)(a)(4) of the Miss.Code Ann. 1972, and did then and there receive therefor the sum of $20.00 in lawful United States money, in violation of Miss.Code Ann. §41-29-139(a)(1)(b)(1), . . . (C.P. at 7)

On the morning of trial, and over the objection of the defendant, the trial judge sustained the State's motion to amend the indictment so as to correct the weight or quantity of the cocaine to read 0.19 grams. (R. 2-3, 12, 24-25)

Following a trial by jury conducted on October 3, 2006, the jury returned a verdict of, "We the jury, find the defendant, COURTNEY HILL, guilty of "SALE OF COCAINE." (R. 125; C.P. at 29)

Judge Loper, immediately post-verdict, sentenced Hill to serve twenty (20) years in the custody of the MDOC and imposed a fine in the amount of $5,000. (R. 127)

Four (4) issues, articulated by Hill as follows, are raised on appeal to this Court:

1. "There was jury misconduct so as to deprive the appellant of his right to a fair and impartial jury."

2. "The mentioning of [appellant's] prior bad acts . . . was so prejudic[ial] to the appellant as to require reversal."

3. "The trial court should have sustained the [defendant's] motion for a continuance when he was given new evidence on the day of trial."

4. "Whether cumulative error . . . denied . . . Hill a right to a fair trial."

STATEMENT OF FACTS

On March 8, 2006, Chief Deputy David Johnson of the Montgomery County Sheriff's Office went to the home of Kendrick (Kenny) Shelton, a paid informant Johnson had used in the past, where he gave Shelton $20 and instructed him to telephone Courtney Hill and "order a rock of crack

cocaine." (R. 46)

Johnson's version of Shelton's subsequent videotaped encounter with Hillis found in the following colloquy:

> Q. [BY PROSECUTOR:] Okay. So you searched him and what happened next?
>
> A. Well, like I say, I turned the camera on and then, in just a few minutes, Courtney drove up in a little white Sentra, I believe it was. And Kenny - - well, Kenny walked out there. He was already standing there waiting for him.
>
> Q. Now, where were you during this series of events?
>
> A. I was in a window - - not as far, I think, from me to you - - watching the transfer.
>
> Q. Would it be fair to say that you could see the transaction?
>
> A. Saw it well.
>
> Q. Saw it well. Okay. Do you see the individual in the courtroom?
>
> Today that delivered what appeared to be cocaine to Kenny Shelton?
>
> A. Yes, sir.
>
> Q. Is he in the courtroom?
>
> A. Right there (indicating).
>
> BY MR. HOPPER: Let the record reflect that the witness has identified the defendant, Courtney Hill.
>
> BY THE COURT: I'll let it so reflect. (R. 44-45)

Two (2) witnesses testified on behalf of the State during its case-in-chief, including the State's not-so-confidential source, Kenny Shelton, who testified that after dark on March 8, 2006,

he purchased a single rock of crack cocaine from the defendant for a purchase price of $20. (R. 90) The transaction was videotaped, and according to both Chief Deputy Johnson and Shelton, the video accurately reflects what took place that night. (R. 52, 91)

The parties stipulated the substance sold by Hill contained cocaine. (R. 110) This dispensed with the testimony of Teresa Hickman, the State's forensic scientist who specialized in forensic drug analysis. (R. 109-110)

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal on the general ground " . . . the State has wholly failed to make the proof in the case." (R. 111-12) This motion was promptly overruled. (R. 112)

After being personally advised of his right to testify or not (R. 112-14), Hill elected not to testify in his own behalf. (R. 116) Nor did he produce any other witnesses in his defense.

At the close of all the evidence, Hill renewed his request for a directed verdict and requested peremptory instruction as well. (R. 114-15; C.P. at 18) Both were denied. (R. 114-15)

Following closing arguments, which were not transcribed, the jury retired to deliberate at 3:02 p.m. (R. 124) Eighteen (18) minutes later, at 3:20 p.m., it returned with a verdict of, "We, the jury, find the defendant, Courtney Hill, guilty of the sale of cocaine." (R. 124-25)

The jury was polled, individually, and it reflected the verdict returned was unanimous. (R. 125-26)

The record does not reflect that a motion for new trial was ever voiced or filed. A ground for relief conspicuously absent therefrom is the denial of a continuance.

Webb Franklin, a former prosecutor and circuit judge, now a practicing attorney in Greenwood, represented Hill very effectively during trial.

Antwayn Patrick, a practicing attorney in Canton, has been substituted on appeal. (C.P. at

35-36)

SUMMARY OF THE ARGUMENT

1. Juror Misconduct.

Conspicuously absent from the record is any proof or suggestion that Lou Ann Ervin, a petit juror selected to try Hill's case, withheld material information or misrepresented material facts concerning her kinship, if any, to the brother of Kendrick (Kenny) Shelton, the State's informant and star witness. This Court cannot rely on assertions made in Hill's brief alone; rather, there must be proof in the record of the facts relief upon for relief. The record under scrutiny here, much like the cupboard of old mother Hubbard, is bare.

2. Prior Bad Acts.

Any error ensuing when Kendrick Shelton, the state's star witness, testified he had purchased crack cocaine from the defendant "before" was neutralized, if not cured, when the trial judge succinctly admonished the jury to disregard the testimony, and each individual juror acknowledged, in open court under the trustworthiness of their oath, that he/she could do so.

3. Continuance.

The appellate record, consisting of the trial transcript with exhibits and clerks's papers, does not contain a motion for a new trial. The trial judge never had an opportunity to rule, post-verdict, on the subject matter involved here.

Accordingly, Hill's claim that a continuance should have been granted is not reviewable on appeal to this Court because the denial of a continuance was not assigned as a ground in a motion for a new trial. **Crawford v. State,** 787 So.2d 1236 (Miss. 2001).

In any event, this Court has repeatedly said that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance. The decision to grant or deny

a motion for a continuance will not be grounds for reversal unless it is shown to have resulted in "manifest injustice."

No abuse of judicial discretion has been demonstrated here.

4. Cumulative Error. There being no error in any individual part, there can be no error to the whole. **Genry v. State,** 735 So.2d 186, 201 (Miss. 1999).

ARGUMENT

1.

THE APPELLATE RECORD IS SILENT WITH RESPECT TO JUROR MISCONDUCT. IT FAILS TO SUPPORT A CLAIM THAT HILL WAS DENIED A FUNDAMENTALLY FAIR TRIAL AS A RESULT OF THE ALLEGED INACTION OF JUROR LOU ANN ERVIN.

Hill states in his brief that " . . . one of the jurors, Lou Ann Ervin, is *believed* to be related to the State's key witness[,] Kenny Shelton." (Appellant's Brief on the Merits at 5) [emphasis ours] According to Hill, "[j]uror Ervin was the fiancee and had children by the brother of Kenny Shelton, Kendrick Shelton and this information was withheld from the Court and the appellant." (Appellant's Brief on the Merits at 5-6)

Hill argues that " . . . undisclosed information, such as a prior personal relationship between jurors and defendant" was purposely concealed during voir dire. *Id.*

More specifically, Hill claims "[t]he juror in this case failed to notify the Court that she was a close kinship of the State's key witness, Kenny Shelton [and] . . . Kenny Shelton's brother is name[d] Kendrick Shelton [and] Kendrick had children by Lou Ann Irvin." (Appellant's Brief on the Merits at 10)

Confusion reigns supreme.

The record reflects that Kendrick Shelton, referred to as Ken or Kenny by Deputy Johnson

(R. 46-47, 60), was the informant and the State's star witness in this case. (R. 85) The record does not reflect the name of Kendrick Shelton's brother or that Kendrick even had a brother. Kendrick Shelton testified he was single and the father of a son who was attending Ole Miss. (R. 93)

The problem with Hill's argument, of course, is that the jury voir dire was not transcribed, and none of the facts relied upon by Hill can be found in the record. (R. i.-ii) Rather, they appear to have come straight out of the blue. This is fatal to Hill's position. Although the record does reflect that Lou Ann Ervin was selected as a juror (R. 37), and a handwritten notation on an unidentified jury list indicates that Ervin "knows Shelton" (C.P. at 30), this is all the record reflects. Lest we've overlooked it, Ervin's name is never mentioned again.

The name of Kendrick Shelton's brother, with whom juror Ervin allegedly had children, cannot be found in the record. Hill's brief does not contain any reference(s) to pages in the official record where the alleged relationship between Ervin and Shelton's brother is identified.

"The burden is on the defendant to make a proper record of the proceedings." **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999). "[T]o the appellant falls the duty of insuring that the record contains sufficient evidence to support his assignments of error on appeal." **Burney v. State,** 515 So.2d 1154, 1160 (Miss. 1987). *See also* **Truitt v. State,** 958 So.2d 299 (Ct.App.Miss. 2007); **Jones v. State,** 962 So.2d 571 (Ct.App.Miss. 2006),reh denied.

None - no, not one - of the facts asserted in Hill's appellate brief concerning the alleged misconduct of Irvin are found in the official record. This Court cannot consider those facts here. **Genry v. State,** *supra,* 735 So.2d 186, 200 (Miss. 1999) ["This Court 'cannot decide an issue based on assertions in the briefs alone; rather, issues must be proven by the record.' "]; **Wortham v. State,** 219 So.2d 923, 926-27 (Miss. 1969) ["We will not go outside the record to find facts and will not

consider a statement of facts attempted to be supplied by counsel in briefs."] *See also* **Schuck v. State,** 865 So.2d 1111 (Miss. 2003) [Consideration of matters on appeal is limited strictly to matters contained in the trial record.]

In **Pulphus v. State,** 782 So.2d 1220 (Miss. 2001), this Court stated the following:

> There is no record of this guilty plea, and this defendant is not a co-defendant of Pulphus's. This court will not consider matters that do not appear in the record, and it must confine its review to what appears in the record. *Robinson v. State,* 662 So.2d 1100, 1104 (Miss. 1995) (citing *Dillon v. State,* 641 So.2d 1223, 1225 (Miss. 1994)). Issues cannot be decided based on assertions from the briefs alone. The issues must be supported and proved by the record. *Robinson,* 662 So.2d at 1104 (citing *Ross v. State,* 603 So.2d 857, 861 (Miss. 1992)). In *Robinson* this Court stated, "we have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions." *Robinson,* 662 So.2d at 1104 (quoting *Mason v. State,* 440 So.2d 318, 319 (Miss.1983)).

See also **Gross v. State,** 948 So.2d 439 (Ct.App.Miss. 2006).

It is enough to say that Hill's brief is strong on the law but excruciatingly weak on the facts asserted which do not appear anywhere in the record.

Finally, Hill requests " . . . that the trial court conduct a hearing to determine whether the juror is related to the *defense counsel* and the nature of their relationship." (Appellant's Brief on the Merits at 10) [emphasis ours]

This request appears completely out of context and makes no sense at all. No hearing was required on this or any other matter because there was nothing to hear.

2.

ANY ERROR ENSUING WHEN KENDRICK [KENNY] SHELTON, THE STATE'S STAR WITNESS, TESTIFIED HE HAD PURCHASED CRACK COCAINE FROM THE DEFENDANT "BEFORE" WAS NEUTRALIZED, IF NOT CURED, WHEN THE TRIAL JUDGE SUCCINCTLY

ADMONISHED THE JURY TO DISREGARD THE TESTIMONY, AND EACH INDIVIDUAL JUROR ACKNOWLEDGED, IN OPEN COURT UNDER THE TRUSTWORTHINESS OF THEIR OATH, THAT HE/SHE COULD.

Hill claims the trial judge should have sustained his motion for a mistrial after Kendrick Shelton, the State's informant, testified during direct examination he had purchased crack cocaine from the defendant before. (R. 87) Hill insists he was irrevocably prejudiced.

Given the prejudicial effect of the so-called "forbidden inferential sequence," were it not for the prompt corrective action taken by the trial judge, Hill's argument might have merit.

The incident complained about is found in the following colloquy:

> Q. [BY PROSECUTOR:] How do you know Courtney Hill?
>
> A. Because he lives in Kilmichael. I mean, I know him through there.
>
> Q. How long have you been knowing Courtney Hill?
>
> A. About 10 years, 10 or 12 years.
>
> Q. All right.
>
> A. Or since I've lived in Kilmichael.
>
> Q. How did you know what his telephone number was?
>
> A. Because I had purchased crack cocaine from him before.
>
> BY MR. FRANKLIN: Your Honor, may we approach the bench?
>
> (BENCH CONFERENCE WAS HELD ON THE RECORD, AS FOLLOWS:)
>
> BY MR. FRANKLIN: Based upon that, we move for a mistrial. Obviously, evidence of a crime not charged and so prejudicial in the minds of the jurors.
>
> BY MR. PHILLIPS: He said it.

BY THE COURT: I think I can individually question each juror and advise them to disregard this.

BY MR. FRANKLIN: Your Honor, there is absolutely no way that whatever you say to this jury can ever erase it from their minds that he said that he purchased a [rock of] crack cocaine from him before.

BY MR. PHILLIPS: Of course, I don't know if the jury understood that because the testimony's been that he's made other buys. He's made other buys with Mr. Johnson at his house.

BY THE COURT: I'm going to question each juror and have them state whether they can disregard this, and if they can, I think we can proceed and the mistrial will be denied; **but if one juror says this is going to affect them in any way, I will declare a mistrial.**

BY MR. FRANKLIN: Is this en [sic] camera, one on one? I think - - can we sit here and do it with them in open court?

(BENCH CONFERENCE CONCLUDED)

BY THE COURT: Ladies and gentlemen of the jury, that last statement is something that you're to disregard the last question and answer, and I'm going to ask each one of you individually if you will assure me that you will disregard that and not have that influence you or be a factor in your decision.

So on the first row, ma'am will you disregard that?

BY THE JUROR: Yes, sir.

BY THE COURT: And, ma'am, will you?

BY THE JUROR: (Nodding head).

BY THE COURT: And, ma'am, will you?

BY THE JUROR: Yes, sir.

BY THE COURT: Sir, will you?

BY THE JUROR: (Nodding head).

BY THE COURT: And, ma'am, will you?

BY THE JUROR: (Nodding head).

BY THE COURT: Sir, will you?

BY THE JUROR: (Nodding head).

BY THE COURT: And, ma'am will you?

BY THE JUROR: (Nodding head).

BY THE COURT: And, ma'am will you?

BY THE JUROR: (Nodding head).

BY THE COURT: Ma'am will you?

BY THE JUROR:(Nodding head).

BY THE COURT: Ma'am will you?

BY THE JUROR: (Nodding head).

BY THE COURT: Ma'am, will you?

BY THE JUROR: (Nodding head).

BY THE COURT: Ma'am, will you?

BY THE JUROR: (Nodding head).

BY THE COURT: Let the record reflect that all 12 jurors have stated affirmatively that they are not going to consider the last question and answer and will not have that be a factor in their determination in rendering a verdict in this case.

You may proceed. (R. 88-89) [emphasis ours]

In addition to the curative action taking place at the time of the testimony concerning an unrelated crime, Judge Loper, at the close of all the evidence, instructed the jury, both orally and in writing via jury instruction C-1, as follows:

"You should not speculate as to possible answers to questions which the Court did not require to be answered. Further, you should

> not draw any inference from the content of those questions. You are to disregard all the evidence which was excluded by the Court from consideration during the course of the trial." (R. 119-20; C.P. at 22)

The circuit judge did not feel this incident warranted a mistrial. (R. 87-88)

Neither do we.

No abuse of judicial discretion has been demonstrated because it must be presumed the jury followed the directions of the trial judge to disregard the questionable testimony.

The admonishment to disregard the testimony was definitely in the mix of remedial measures. It was delivered in plain and ordinary English and was succinct and to the point. (R. 88-89)

It is clear to us the admonishment from the circuit judge neutralized, if not cured, any error.

Although trial counsel insisted "there is absolutely no way that whatever you say to this jury can ever erase it from their minds that he said that he purchased a [rock of] crack cocaine from him before," each juror indicated to the court he/she could disregard the last question and the witness's answer. (R. 88-89)

Implicit in defense counsel's motion for a mistrial made at the bench, is counsel's objection and disapproval of the other crime testimony. The trial judge went further than merely sustaining any objection. Following Hill's motion for a mistrial, he instructed the jury to disregard both the question and its answer. Judge Loper then ascertained, on the record, that each juror could do so.

The following rules apply here.

"Absent unusual circumstances, where objection is sustained to improper questioning or testimony, and the jury is admonished to disregard the question or testimony, we will not find error." **Wright v. State**, 540 So.2d 1, 4 (Miss. 1989). *See* **Wheeler v. State,** 826 So.2d 731, 740-41 (Miss. 2002); **Strahan v. State**, 729 So.2d 800, 808 (Miss. 1998); **Dennis v. State**, 555 So.2d 679, 682-83 (Miss. 1989), and the cases cited therein; **Marks v. State**, 532 So.2d 976, 982 (Miss. 1988). *See*

also **Madere v. State,** 794 So.2d 200, 217 (Miss. 2001) [If sustaining objection alone is considered inadequate to remove alleged prejudicial effect of objected to testimony from the minds of the jury, the court must be requested to instruct the jury to disregard the objectionable matter.]; **Allen v. State,** 826 So.2d 756 (Ct.App.Miss. 2002); **Lewis v. State,** 814 So.2d 819 (Ct.App.Miss. 2002) [When an objection is sustained and the jury is admonished to disregard the objectionable testimony, no prejudicial error results.]; **Pearson v. State,** 790 So.2d 879 (Ct.App.Miss. 2001) [Error cured via judicial admonishment].

This is especially true where, as in the case at bar, the jury, at the close of all the evidence, was re-admonished in a written jury instruction which was also read by the judge to the jury as follows: "You are to disregard all evidence which was excluded by the Court from consideration during the course of the trial." (R. 119-20)

Hill, of course, argues the action of the trial judge was insufficient to remove the taint, i.e., the stink still lingered. (Appellant's Brief on the Merits at 6) The "skunk in the jury box" argument has been made and rejected time and again. It must be presumed the prompt action of the trial judge neutralized, if not removed, the odor created by an inadvertent error.

"The rule is well established that when an isolated prejudicial question or comment by the prosecution [or a witness] is promptly objected to and the objection is sustained, and particularly when the circuit judge instructs the jury to disregard the incident, there is a presumption the action on the part of the trial court cured the error." **King v. State**, 580 So.2d 1182, 1189 (Miss. 1991); **Smith v. State**, 530 So.2d 155, 161 (Miss. 1988).

This Court has repeatedly held that when a trial court instructs the jury, it is presumed the jurors follow his direction. **Moore v. State,** 787 So.2d 1282 (Miss. 2001); **Puckett v. State**, 737

So.2d 322 (Miss. 1999); **Hobson v. State,** 730 So.2d 20 (Miss. 1998); **Crenshaw v. State,** 520 So.2d 131 (Miss. 1988); **McFee v. State,** 511 So.2d 130 (Miss. 1987); **Johnson v. State,** 475 So.2d 1136 (Miss. 1985); **Wilson v. State,** 797 So.2d 277 (Ct.App.Miss. 2001) [Jury is presumed to have followed the admonition of the trial judge to disregard an objectionable remark made during trial by either the prosecutor or a witness.]; **Pearson v. State,** 790 So.2d 879 (Ct.App.Miss) [It is presumed that admonishments to the jury concerning improper remarks from a state's witness eradicate the prejudicial effect from the minds of the jurors.]

Stated differently, "[a]ppellate courts assume that juries follow the instructions." **Clemons v. State**, 535 So.2d 1354, 1361 (Miss. 1988). "Our law presumes the jury does as it is told." **Williams v. State,** 512 So.2d 666, 671 (Miss. 1987). "To presume otherwise would be to render the jury system inoperable." **Johnson v. State**, *supra*, 475 So.2d at 1142.

Finally "[w]hether to declare a mistrial is committed to the sound discretion of the trial court." **Johnson v. State**, 666 So.2d 784, 794 (Miss. 1995), citing **Brent v. State**, 632 So.2d 936, 941 (Miss. 1994). *See also* **Hoops v. State**, 681 So.2d 521 (Miss. 1996); **Horne v. State**, 487 So.2d 213, 215-15 (Miss. 1986). "The failure of the court to grant a motion for mistrial will not be overturned on appeal unless the trial court abused its [judicial] discretion." **Bass v. State**, 597 So.2d 182, 191 (Miss. 1992).

We find in **Hampton v. State,** 910 So.2d 651 (¶9) (Ct.App.Miss. 2005), the following language summarizing our position:

> The authority to declare a mistrial is left largely to the sound discretion of the trial court. *Pulphus v. State,* 782 So.2d 1220 (¶10) (Miss. 2001). Within this authority is the discretion to determine whether the objectionable comment is so prejudicial that a mistrial should be declared. *Edmond v. State,* 312 So.2d 702, 706 (Miss. 1975). Furthermore,

> when the trial court instructs the jury, we must assume that the panel followed the instruction. *Puckett v. State,* 737 So.2d 322 (¶72) (Miss. 1999). In this case the trial court decided to eliminate all of White's testimony since White had only testified as to his pursuit and arrest of Hampton. The trial court admonished the jury to disregard White's testimony, and we find no abuse of discretion in doing so.

See also **Wright v. State,** 958 So.2d 158 (Miss. 2007), reh denied [Whether to declare a mistrial is within the sound discretion of the trial judge]; **Washington v. State,** 957 So.2d 426 (Ct.App.Miss. 2007) [Appellate courts assume that juries follow the instructions of the trial court.]

No abuse of judicial discretion has been demonstrated by Hill.

3.

HILL DID NOT SEEK A NEW TRIAL. THE DENIAL OF A CONTINUANCE IS NOT SUBJECT TO APPELLATE REVIEW BECAUSE SUCH WAS NOT ASSIGNED AS A GROUND FOR A NEW TRIAL.

IN ANY EVENT, THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN DENYING A CONTINUANCE.

Hill claims the State was tardy with discovery and that "[u]nder the Box [v. State, 437 So.2d 19, 21 (Miss. 1983)] standard, the Appellant should have been granted a continuance to investigate fully the reason why there was a mix up of the crack cocaine that was introduced at trial and the crack cocaine that was given during discovery." (Appellant's Brief on the Merits at 7)

It seems the State gave Hill's lawyer the wrong laboratory report, not the cocaine itself, during discovery. This report reflected a prior sale by Hill of .10 grams of crack cocaine base to another informant. Hill was not indicted for this prior sale; rather, he was

indicted for the subsequent sale of .19 grams of cocaine base to Shelton. The prosecution did not change the evidence by substituting a different rock from that identified in the indictment; rather, it simply gave Hill's lawyer the wrong report. *See* State's exhibits 1 and 2.

Hill objected to the amendment of the indictment to reflect the true weight or quantity of .19 grams (R. 2-3) and requested a continuance " . . . so that we could further look into this matter because it is delicate , as the Court says, as to how we should use it." (R. 21)

The motion for a continuance was implicitly overruled, and the amendment was allowed with the following rhetoric:

> BY THE COURT: I want the two copies of the crime lab report to be in the record. And I want a copy of it, both of them, to be provided to the court reporter so that she can make that as an exhibit to this motion.
>
> The Court's of the opinion that the changing of the weight is form and not substance. There's no difference between the sale of .1 grams and .19 grams of cocaine. There's not any difference whatsoever. The weight is surplus in the indictment because it did not even have to be contained in the indictment. And the Court has seen many cases that have been presented to this Court over the course of a number of years that didn't even have the weight in it. So I don't see how the weight has any bearing whatsoever on the charge. The charge was the same whether it was .1 or .19 grams. The Court is satisfied, based on what I have heard, that there were two submissions on two different sales that had been made by Courtney Hill. And simply, the State, when they were providing discovery, provided the discovery in the lab report on the indictment - - I mean, on the case that had not been indicted instead of the one that had been indicted. But the conclusions of the lab analyst are the same on both of them. The only difference at all is the weight of what was sold. And again, the Court does not see that the weight is material in the least bit. So again, I'm allowing the

amendment. (R. 12-14)

* * * * * *

> BY THE COURT: Well, no, you still would be in the same problem because the other sale, even if it was indicted, would not be something you'd want in front of the jury I don't think. But I don't see that there's a problem with chain of custody. The chain of custody on the unindicted case is going to be what – the very same - - it's not changed any. The chain of custody on the indicted case is a direct chain of custody. But I - - you know, I made my ruling and I'm going to allow the amendment of the indictment. **I don't see that anything would be changed – the defense would be changed if I continued this case.** The defense is going to be either he sold cocaine or he didn't sell cocaine. And the defense is going to be the same whether he sold .19 grams or .10 grams. So I'm going to write in a 9 on the indictment and allow that to stand as an amendment and we'll proceed. (R. 24-25) [emphasis ours]

The specific target of Hill's argument on appeal is the denial of a continuance, not the vitality of the amendment, the chain of custody, or a discovery violation,

Hill contends a continuance should have been granted because he " . . . was given new evidence five minutes before trial. (Appellant's Brief on the Merits at 7)

It is well settled that the denial of a continuance is not an issue capable of being reviewed on appeal where, as here, the denial of the continuance is not assigned as a ground for a new trial in a defendant's post-trial motion for a new trial.

Insofar as this record reflects, there was no motion for a new trial, either *ore tenus* or in writing post-verdict.

On motion for a new trial, certain errors must be brought to the attention of the circuit judge so that he may have the opportunity to pass upon their validity before the Supreme Court, a reviewing tribunal, is called upon to review them. **Shelton v. State,** 853

So.2d 1171, 1182 (Miss. 2003), citing **Metcalf v. State**, 629 So.2d 558 (Miss. 1993), and **Farris v. State,** 764 So.2d 411, 423 (Miss. 2000). One of those errors is the denial of a continuance in the trial court which is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground.

In **Crawford v. State,** *supra,* 787 So.2d 1236 (¶25) (Miss. 2001), we find the following language:

> The denial of a continuance is not an issue reviewable on appeal where the denial of the continuance is not assigned as a ground for a new trial in the defendant's post-trial motion for a new trial. On motion for a new trial, "certain errors must be brought to the attention of the trial judge so that he may have an opportunity to pass upon their validity before this court is called upon to review them." *Metcalf v. State,* 629 So.2d 558, 561-562 (Miss. 1993) (citing *Weyen v. Weyen,* 165 Miss. 257, 139 So. 608 (1932)) "For example, the denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground." *Metcalf* at 562 (citations omitted). *See also Morgan v. State,* 741 So.2d 246, 255 (Miss. 1999); *Jackson v. State,* 423 So.2d 129 (Miss. 1982); *Colson v. Sims,* 220 So.2d 345, 347 n. 1 (Miss. 1969).

We go no further than the following language found in **Pool v. State**, 483 So.2d 331, 336 (Miss. 1986), which is also dispositive of Hill's complaint:

> Finally, Pool is procedurally barred from raising this issue on appeal, as it was not listed as grounds in his motion for a new trial.
>
> > The denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground, making the necessary proof to substantiate the motion.
>
> *Colson v. Sims*, 220 So.2d 345, 347, n. 1 (Miss. 1969); *see*

also Jackson v. State, 423 So.2d 129 (Miss. 1982).

See also **Morgan v. State**, 741 So.2d 246, 255 (Miss. 1999)["Morgan's motion for new trial and for judgment notwithstanding the verdict made no mention of the denial of a continuance. Because the issue was not properly preserved, and because the trial court did not have the opportunity to rule on this claimed error, this issue is not properly before this Court and is procedurally barred."]; **Reeves v. State,** 825 So.2d 77 (Ct.App.Miss. 2002)[Denial of a continuance in the trial court is not reviewable in the appellate court unless the party whose motion for a continuance was denied makes a motion for a new trial on this ground.]

In the case at bar, no reference is made to the denial of a continuance in a motion for a new trial. This is because there was no motion for a new trial made post-verdict, either *ore tenus* or in writing. Thus, Hill has failed to demonstrate this issue was preserved for appellate review. Regrettably, all of this is fatal to his complaint. **Johnson v. State,** 926 So.2d 246 (Ct.App.Miss. 2005), reh denied.

Moreover, counsel for Hill has not stated how Hill's defense would have been any different had he had additional time to investigate the prior sale. No prejudice to Hill has been alleged or demonstrated.

Regrettably, there is nothing in the present record demonstrating that Judge Loper abused his broad discretionary powers in failing to grant a continuance. Stated differently, there is nothing in this record demonstrating the denial of a last minute continuance resulted in a "manifest injustice."

This Court has repeatedly said that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance. **Payton v. State,** 897

So.2d 921 (Miss. 2003) citing Rule 9.04, Uniform Circuit and County Court Rules; **Smiley v. State,** 815 So.2d 1140 (Miss. 2002), reh denied; **Richardson v. State,** 722 So.2d 481 (Miss. 1998); **Wilson v. State,** 716 So.2d 1096 (Miss. 1998), citing Miss.Code Ann. Section 99-15-29; **Greene v. State,** 406 So.2d 805 (Miss. 1981), citing section 99-15-29, Mississippi Code 1972 Annotated (1973); **Clay v. State,** 829 So.2d 676 (Ct.App.Miss. 2002), reh denied, cert denied 829 So.2d 1245; **Gilbert v. State,** 934 So.2d 330 (Ct.App.Miss. 2006), reh denied; **McFadden v. State,** 929 So.2d 365 (Ct.App.Miss. 2006), reh denied.

Unless the trial court abuses its discretion to the prejudice of the defendant, its action will not be held error. *See* **Carter v. State,** 473 So.2d 471 (Miss. 1985); **Greene v. State,** *supra*; **Woods v. State,** 393 So.2d 1319 (Miss. 1981); **Norman v. State,** 385 So.2d 1298 (Miss. 1980).

Moreover, the decision to grant or to deny a motion for a continuance will not be grounds for reversal unless it is shown to have resulted in "manifest injustice." **Coleman v. State,** 697 So.2d 777 (Miss. 1997); **Atterberry v. State,** 667 So.2d 622 (Miss. 1995); **Lambert v. State,** 654 So.2d 17 (Miss. 1995), appeal after remand 724 So.2d 392; **Johnson v. State,** 631 So.2d 185 (Miss. 1994); **McGee v. State,** 828 So.2d 847 (Ct.App.Miss. 2002); **Peters v. State,** 920 So.2d 1050 (Ct.App.Miss. 2006).

One of this Court's many expressions on the subject matter is found in **Jackson v. State,** 538 So.2d 1186, 1188-89 (Miss. 1989), where we find the following:

> The standards our courts employ when one criminally accused requests a continuance may be found in Miss.Code Ann. Section 99-15-29 (1972). [footnote omitted] The granting or denial of a continuance rests within the sound

discretion of the trial judge. [citations omitted]

> Our dispositive inquiry is whether denial of Jackson's motion for a continuance resulted in substantial prejudice to his right to a fair opportunity to prepare and present his defense. Indeed, the last line of Section 99-15-29 reads
>
> > [D]enial of continuance shall not be grounds for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom.

Hill has failed to demonstrate that a "manifest injustice" resulted from the denial of a last minute continuance the day trial was to begin.

4.

THERE BEING NO ERROR IN ANY INDIVIDUAL PART, THERE CAN BE NO ERROR TO THE WHOLE.

Our response to Hill's "cumulative error" argument is found in **Genry v. State,** 735 So.2d 186, 201 (Miss. 1999), where we find the following language:

> This court may reverse a conviction and sentence based upon cumulative effect of errors that independently would not require reversal. **Jenkins v. State,** 607 So.2d 1171, 1183-84 (Miss. 1992); **Hansen v. State,** 592 So.2d 114, 153 (Miss. 1991). However, where "there was no reversible error in any part, so there is no reversible error to the whole." **McFee v. State,** 511 So.2d 130, 136 (Miss. 1987).

See also **Wheeler v. State,** *supra*, 826 So.2d 731, 741 (¶ 39) (Miss. 2002)[Each alleged error discussed individually and no cumulative error found].

Contrary to Hill's suggestion otherwise, this is not a proper case for application of the doctrine of either "cumulative" error or "plain" error. It was true in the **Genry** case, and it is equally true here, that since the appellant failed ". . . to assert any assignments of error containing actual error on the part of the trial judge in this case, this Court finds that this

case should not [be] reverse[d] based upon cumulative error." 735 So.2d at 201.

CONCLUSION

Appellee respectfully submits no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction and twenty (20) year sentence imposed by the trial court should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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