IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MONTRELL JORDAN — APPELLANT

VS. — NO. 2007-KA-1177

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS — NO. 2007-KA-1177-SCT

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STATEMENT OF THE CASE

Procedural History

Montrell Jordan was convicted in the Circuit Court of Holmes County on a charge of murder and was sentenced to life imprisonment. Aggrieved by the judgment rendered against him, Jordan has perfected an appeal to this Court.

Substantive Facts

On April 27, 2005, Shaghana Simpson was a student at the Goodman campus of Holmes Community College. At this time, the college was engaged in a festival known as Spring Fling, which consisted of various activities such as barbecues and dances. On April 27, a dance was held in the student union, also called the canteen or "the Can." When asked whether "anything unusual" occurred during this dance, Ms. Simpson answered,

"Yes ... They basically got to fighting." She clarified that the altercation involved "[t]he football team against eight outsiders," i.e., people who did not attend the college.[1] The fight lasted 10 to 15 minutes inside the canteen before it moved outside. While Ms. Simpson was standing next to Toby Jordan, she "got hit in the face by one of the football players."[2] Afterward, she "heard two gunshots." (T.236-39)

Ms. Simpson went on to testify that the "flash" from the second shot "came from the main strip." She observed that the shooter was dressed in a "[w]hite shirt and jeans." After the shots were fired, this person ran between two vehicles. "One of the vehicles was Montrell's [Jordan's] truck, and another vehicle was right beside his truck."[3] Ms. Simpson observed the individual run to the driver's side of the Suburban; she then saw "a light come on in the truck. The Suburban sped away "behind the girls' dorm, past the football dorm, past [sic] the basketball and the girls' new dorm, passing the Coliseum." (T.241-47)

On the scene that night, shortly after the shooting, law enforcement officers asked

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[1]Ms. Simpson recognized four of these "outsiders" as Jason Thurmond, Randy Scott, Montrell Jordan, and Toby Jordan. (T.238)

[2]Ms. Simpson testified that the football player was trying to hit Toby Jordan when he struck her. (T.239-40) Later, she testified that the fight began when "one of the guys from Pickens" went over and hit "one of the football players in the back of the head with a plastic vodka bottle... " The victim, known as DeeDee, had not been engaged in the fight. (T.253)

[3]Ms. Simpson had known Montrell Jordan for many years and was familiar with his vehicle, a tan Suburban. (T.242-43)

Ms. Simpson if she knew "who drove the gold Suburban." She "told them yes," and identified the driver as "Montrell." She testified that at the time, she could not recall the driver's last name. (T.252-53)

The day after the shooting, Ms. Simpson told the authorities that she had "observed a gun in Montrell's truck that was kept under the seat," and that Montrell Jordan [hereinafter "the defendant"] referred to this weapon as "a .357." Ms. Simpson also knew that another gun was kept in the glove compartment. (T.247-48)

Shortly after the shooting, Officer Kenneth Wilson of the Holmes County Sheriff's Department was dispatched to the scene, where he and other officers secured it and "started talking to several people in the area about that they [had] seen." Acting on information provided by Ms. Simpson and security guard Joey Netherland, Officer Wilson and other officers began looking for the defendant and his vehicle. Officer John Newton provided backup in his own vehicle. Officer Coats met Officer Wilson at the defendant's residence, 1308 Lexington Road in Pickens, to provide assistance. When the officers "pulled up in front of the house," they "noticed two males go around the side of the house to the back entrance of the residence." Officer Wilson recognized these men was "Father, [Walter] Mr. Jordan, and the son, Montrell Jordan." When the officers "went around the house" they saw the Suburban "parked behind a shed behind the house." (T.285-88)

The officers knocked on the back door of the residence, went inside and told Mr. Jordan that they needed to speak with his son. Mr. Jordan "[b]asically... just called him out." Officer Wilson advised the defendant that he "was placing him under arrest for investigation of a shooting at Holmes Junior." Officer Wilson then gave the defendant the *Miranda* warnings. "On the way out of the house," the officers asked the defendant for

permission to search his vehicle, and "[h]e advised yes." Officers Newton and Coats "made a search of the vehicle" while Officer Wilson maintained custody of the defendant. Officer Newton also retrieved some clothing of the defendant's from Mr. Jordan. Officers Coats and Newton found "a leather holster and some bullets" in the Suburban. (T.288-92)

Officer Newton testified that after he arrived at the crime scene, he first "went to see how the subject was doing on the ground." According to Officer Newton, "[h]e wasn't doing too good," so the officer "taped off the crime scene" and "went to look for evidence." He was unable to find any hulls on the ground. He did obtain "a partial license plate" number for the suspect's vehicle. Officer Newton went on to corroborate Officer Wilson's testimony regarding the apprehension of the defendant. Officer Newton then testified that he had asked the defendant for permission to search the Suburban; the defendant "replied by saying that his key was in his front pocket." Upon doing so, Officer Newton found a brown holster "underneath the driver's seat." Officer Coats found four .357 bullets inside the console. (T.301-07)

Complying with a request by the sheriff, Officer Newton then "went back to Pickens to the residence of Walter Jordan and asked him where was the clothes that Montrell had on once he made it back home." Mr. Jordan gave Officer Newton a pair of blue jeans and a white tee shirt. (T.308-10)

Detective A.C. Hankins of the Mississippi Bureau of Investigation testified that he performed a gunshot residue test on the defendant's hands at 1:25 the morning after the shooting.[4] (T.368-70) Shortly afterward, Detective Hankins also participated in an

interview of the defendant. First, Captain Sam Chambers of the sheriff's department "read him his rights." After he was asked what he had been doing at the college that night, the defendant stated that he had attended "a little party at the canteen," and that a fight had broken out and "somebody started shooting." The defendant went on to state that he jumped into his truck, drove home and took a bath. When Detective Hankins "asked him what he did with the gun," the defendant denied having possessed one. Asked what he had worn that night, he answered, "a white tee shirt and some jabogs." (T.370-73)

David Whitehead was accepted by the court as an expert in the field of forensic science, including analysis of gunshot residue. (T.346) Mr. Whitehead testified that gunshot residue kits from the defendant's hands and the interior of his vehicle were negative. (T.353) On redirect examination, Mr. Whitehead was asked, "Just because residue is not discovered, does that exclude the person from having fired a weapon?" (T.366) He answered as follows, in pertinent part:

> No, sir. The absence of residue does not mean the person did not discharge the weapon ... It's just a piece of the puzzle ...
>
> [T]here is no [so?} many factors. If more than four hours have past [sic] between the time of discharge and the time of collection, probably not going to be any residue there. Anything a person does in that four hours, that person is removing residue. ...
>
> (T.366-67)

Detective Lacarus Oliver of the Mississippi Highway Patrol testified that he joined the team of investigators the day after the shooting. First, Detective Oliver contacted his

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[4]This test was made some four hours after the shooting, which occurred at approximately 9:30 the previous night.

lieutenant, Detective Hankins, who "was already up in this area... working on the case." Thereafter, Detectives Oliver and Hankins "reviewed the information, ... the statements they had already obtained, ... [and] a attempted to get more detailed statements ... from people that they had talked to." (T.407-09)[5]

Detective Oliver went on to testify that Carlton Brown and security guard Joey Netherland identified the defendant as the shooter from a photographic lineup. (T.412-15)

Next, Detective Oliver was "involved in running a trace" on the type of weapon used in this case. He and fellow officers "developed information that Mr. Jordan had purchased a handgun from Big Dog Pawnshop." Detective Oliver then "filled out ... an ATF form to trace the history of the gun." (T.415) Regarding the results of that trace, Detective Oliver testified as follows, in pertinent part:

> It shows the purchasing information, which was Montrell Demond Jordan. It listed his address as 1308 Lexington Road, Pickens, Mississippi, 39146. It also lists his birthdate, which is 3-16-80. His race, his sex, what ID he used when he purchased it. It also listed height and weight and puts the social security number on there. It also shows that it was purchased, shows the dealer information, which was Big Dog Super Pawn at 1203 Peace Street in Canton.
>
> (T.419-20)[6]

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[5]At this point the prosecutor asked, "Who all was charged in this case, and what were they charged with?" Detective Oliver answered, "We had Montrell Jordan was charged with murder. We had– his last name is Oliver. I can't remember his first name. He was charged accessory after the fact." Catori Jordan and Randy Scott also were charged with accessory after the fact. (T.409-10)

The social security number listed on the form matched that of the defendant. (T.420)

Detective Oliver corroborated Detective Hankins' testimony about the defendant's statement, adding that the defendant stated that he took a bath both immediately prior to the dance and directly after it. The defendant initially denied knowing Randy "Peanut" Scott but later admitted that he did. (T.423-27)

Terry Wade, a student at Holmes Community College, testified that he was acquainted with both the victim, Dwaentre Davis, and the defendant, whose brother was married to Wade's aunt. Wade, who had attended the dance on the night in question, testified that the altercation was essentially one between football players and some people from Pickens. The fight spilled out of the canteen. The victim was not participating in it. Wade heard two shots "from off the hill" and saw the victim fall. He also saw the defendant "[u]p on the hill" immediately after he "got out of the fight." (T.457-62)

The day after the shooting, Wade gave a statement to Goodman Chief of Police Oliver Williams. (T.462) At trial, he acknowledged that he had given this information in his own handwriting:

> I saw Montrell Jordan fire a gun two times. I was next to DeeDee when he got shot. Peanut is one of the guys with him. Peanut went to the truck and got the gun and gave in to Mon. Mon got the gun, turned his head, and started shooting. Toby was driving a– a gray Kia.
>
> (T.463)

Wade acknowledged that in a statement to Detective Oliver, he had given the same information. (T.465-66) That statement contained more detail, as shown by the following:

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[6]This testimony corroborated that previously given by Meredith, Jr., president and majority stockholder of Meredith Enterprises. That corporation owned Big Dog Super Pawn, which was "physically managed every day" by Mr. Meredith. (T.324-36)

> I know his last name. His last name is Jordan. I know him as Mon, so when he decided he wanted to push around and play around with Mon, Mon hit him, the fight broke out, so everybody started running. So after they came out they started fighting again, and Mon told Peanut to run to the truck and get my pistol, man I'm tired of this ... shit. Peanut went to the truck and got the pistol. Mon got the pistol. That's when DeeDee, the boy that got shot, we tore out running, so Mon turned his head shooting. I don't know if he was trying to shoot him or not, but on the second shot he fell down. I thought he was ducking, so I ducked down with him, so I did. Then I got up, everybody else got up. He was still laying on the ground, and his hands kept moving, so I went over there by him. That's when I called 911 for the ambulance.
>
> (T.466-67)

When Detective Oliver asked, "Mon fired the shot from up on the hill?" Wade answered, "Yeah, on the hill right there." (T.468)

On April 25, 2006, almost a year after the shooting, Wade told defense counsel that while he had heard the defendant tell Peanut "to go get the pistol," he "didn't see Peanut go get the gun... [or] see him hand him a gun, nothing like that." This was the first time he had made a statement contradicting the ones given to law enforcement officers. On cross-examination, Wade testified that he "didn't actually see" the defendant shoot the gun. (T.472-73)

Bryon McIntire was accepted by the court as an expert in the field of forensic science, including firearms identification. (T.495) McIntire had "examined ... a projectile from autopsy" and concluded that it could "be classified as either a .38 caliber ... or ... a .357 caliber." (T.498-500) The prosecutor then conducted this colloquy:

> Q. Do you have an opinion, to a reasonable degree of scientific certainty, as to whether or not the slug that Dr. Hayne gave you is consistent with the slug that has not been fired out of that particular cartridge in front of you right now?

A. Yes, sir.

Q. What is that?

Q. The projectile that's in State's Exhibit 2, in my opinion, is a different bullet than the bullet that's loaded in these cartridges in State's Exhibit 11.

Q. Okay. Question was, was it consistent with it, and you said yes, sir?

A. Oh, well it is consistent in the fact that the physical characteristics of this bullets, with the weight and the caliber of the bullet, this would be a .38 or a .357 caliber bullet.

Q. Okay.

A. And then these are .357 bullets. I was describing the actual physical characteristics of this bullet versus this one.

Q. As it looks now?

A. As it looks now, yes, sir.

Q. The one you've got is deformed and those are not?

A. Correct. ... I can't determine if the gun that fired State's Exhibit 2 is a .38 caliber firearm or if it was a .357 caliber firearm, because all I have is the bullet.

Q. What would you need to make that determination?

A. I would need the firearm.

Q. But regardless, the live rounds that you have in front of you, as well as the round that was removed from the victim, in your opinion are they both .38 caliber projectiles?

A. Yes, sir, that's true.

(T.502-03)

Oliver Williams, at the time the Chief of Police of Goodman, testified that he took a voluntary statement from Terry Wade the day after the shooting. Wade had come in to

the police department and offered to give a statement, which he then wrote entirely by hand. (T.513-14) When he was asked, "Why did you allow Mr. Wade to make a statement there that day?" the officer answered, "He wanted to give one." After the prosecutor inquired, "But he walked in on his own and told you he wanted to give a statement about what happened?" the officer replied, "He did." (T.519)

At the time of trial, Carlton Brown was attending Jackson State University on a football scholarship. He previously had been a member of the football team at Holmes Community College, where he was a student at the time of the shooting. On April 27, 2005, he attended the Spring Fling dance. He observed, "[T]here was some guys there I never seen before, causing a lot of confusion, jumping around a lot ... stuff like that." Soon, a "[f]ight broke loose" between a teammate named Herbert and the "other guys." After security officers began spraying mace, "another fight broke loose on the street." Mr. Brown acknowledged that he "was involved in the fight." After "[s]ecurity came out of the Can," Mr. Brown "started running toward the hill." As he "got on the hill," he saw "a guy standing up to the side" of him. This man "started shooting" as Mr. Brown "got closer to him."[7] (T.520-23)

From a photographic lineup presented by Detective Oliver, Mr. Brown later identified the shooter as Montrell Jordan. On the day of trial, as Mr. Brown "was sitting there talking to the defense attorney," the defendant "walked in." After the defendant "left out of the room," Mr. Brown "told Terry, all right, that was the guy right there." Mr. Brown stated that

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[7]When he was asked, "How close was he to you when he fired the shots?" Mr. Brown answered, "As close as me and you are, right here." (T.523)

he "knew him off the bat." Finally, he made an in-court identification of the defendant. (T.523-25)

Joey Netherland was employed at the college as the "head of maintenance. On the night in question, he was "working fo Capital Security," providing security for the dance. The fight which began in the canteen resumed outside, and as Mr. Netherland worked to quell that altercation, he "heard a gunshot." He "looked up the hill where the gunshot was, and ... saw the flash of the second gunshot" approximately ten feet above the spot where he was standing. Mr. Netherland then "started toward the person with the gun, followed him to his vehicle," a "light brown Suburban." Mr. Netherland got "[v]ery close" to the vehicle; he "stepped in front of it" trying "to stop him when he left the parking lot." Driving around Mr. Netherland, the shooter grinned at him as he departed. Mr. Netherland identified the defendant from a photographic lineup as well as in court. (T.552-58)

Dr. Steven Timothy Hayne was accepted by the court as an expert in the field of clinical and forensic pathology, including the subfield of terminal ballistics. (T.221) Having performed the autopsy on the body of the victim, Dr. Hayne concluded that the cause of death was a gunshot wound to the right chest; the manner of death was homicide. "The gunshot wound to the aorta, as well as the gunshot wound to the heart, would have produced death in a relatively short period of time ... " (T.222-24) Dr. Hayne went on to testify that the bullet entered the body, traveled downward at approximately 15 degrees, and traveled back at approximately 30 degrees. Dr. Hayne's expert opinion was that "[w]ith the decedent in a standing position and erect, head forward, the weapon would have been above aiming downward into the body." (T.232-33)

The defense called one witness, Arlena Shaw, who testified that she saw the

shooter get into a car, not a Suburban, and depart the scene with three or four other people. (T.601)

SUMMARY OF THE ARGUMENT

Jordan has failed to show that the trial court committed error with respect to the voir dire and impaneling of the jury.

Jordan's second proposition is unsupported by authority and plainly without merit.

Jordan's third proposition is unsupported by authority and procedurally barred.

The verdict is based on legally sufficient evidence.

The trial court did not err in overruling the motion to suppress the defendant's statement.

The trial court properly overruled the motion to suppress the fruits of the search of the defendant's vehicle.

Jordan is not entitled to a new trial on the ground that the verdict is against the overwhelming weight of the evidence.

Jordan's eighth proposition is patently devoid of merit.

Jordan's challenges to the state's opening statement and closing arguments are procedurally barred and substantively without merit.

Jordan's tenth proposition is without merit.

Jordan has failed to show that the trial court erred in granting Instructions 2, 3 and 5.

Jordan has failed to demonstrated that his trial counsel was constitutionally ineffective.

Jordan's thirteenth proposition is not properly before this Court.

Jordan's invocation of the cumulative error doctrine is procedurally barred and substantively without merit.

PROPOSITION ONE:

JORDAN HAS FAILED TO SHOW THAT THE TRIAL COURT COMMITTED ERROR WITH RESPECT TO THE VOIR DIRE AND IMPANELING OF THE JURY[8]

Jordan's first proposition is set out below:

> Defendant's Constitutional Rights to a Fair Trial were Violated Materially and Continuously from the Qualification of the Jury, Voir Dire Examination, and the Seating of a Panel of Twelve to Try the Case in that the Court, the Prosecution and Defense Counsel Failed to make a Proper Inquiry as to the Opinions, Biases, or Prejudicial Feeling Toward the Defendant Arising out f the Homicide of a Freshman Football Player at Holmes Community College.
>
> (Brief for Appellant 4)

The argument under this proposition reads as if the defense were challenging the trial court's denial of a motion for change of venue. Of course, no such ruling was made; no such motion was filed. It is axiomatic that the defendant has a constitutional right to have his trial conducted in the county where the offense was committed. *State v. Caldwell*, 492 So.2d 575 (Miss.1986). It follows that the state may not be heard to request a change of venue, and the trial court may not grant one *sua sponte*. The reasonable inference from

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[8]At the outset, the state submits the determination whether jurors can try the case fairly is within the discretion of the trial court. *Pierre v. State,* 607 So. 2d 43, 49 (Miss.1992). The court's determination of this judicial question is entitled to great deference on appeal; it will not be set aside unless it is "clearly wrong." *Hervey v. State*, 764 So.2d 457, 460 (Miss.App.2000)., quoting *Taylor v. State*, 672 So.2d 1246, 1264 (Miss.1996). Jordan has failed to show an abuse of judicial discretion with respect to the impaneling of this jury.

the defendant's failure to file a motion to have his trial moved to another county is that he made the tactical decision to go to trial in Holmes County. See *Le v. State*, 967 So.2d 627, 631 (Miss.2007) (decision whether to seek a change of venue is deemed strategic). The defendant gambled and lost, and he may not transfer the burden of that decision to the state or to the trial court. *Lancaster v. State*, 472 So.2d 363, 366 (Miss.1985). This issue is procedurally barred. *Roche v. State*, 913 So.2d 306, 314 (Miss.2005)

A reading of the transcript of the voir dire in this case fails to show that the defendant was restricted in his examination of the venire, that he moved to quash the venire, or that he objected to the actual jury impaneled. Having failed to object or in any way bring this issue to the attention of the trial court, he is unable to establish that the trial court committed any error with respect to the voir dire and ipaneling of the jury. The judgment of the trial court is presumed correct; the appellant has the burden to demonstrate reversible error to this Court. *Juarez v. State*, 965 So.2d 1061 (Miss.2007). Jordan clearly has failed to sustain this burden.

His first proposition should be rejected.

PROPOSITION TWO:

JORDAN'S SECOND PROPOSITION IS UNSUPPORTED BY AUTHORITY AND PLAINLY WITHOUT MERIT

Jordan's second proposition is an elaboration of his first, and, again, he has failed to point to any objection by the defense and/or ruling of the trial court which would constitute reversible error. Rather, the argument consists of an academic narrative of the voir dire, without a specific allegation of error on the part of the trial court. Moreover, he has failed to cite supporting authority for this proposition. The onus uty is on the appellant, who has the burden of showing error, to provide authority in support of an assignment of

error, and when he fails to do so, his proposition will be considered abandoned. *Duncan v. State*, 939 So.2d 772, 779 (Miss.2006). For these reasons, this proposition should be denied.

PROPOSITION THREE:

JORDAN'S THIRD PROPOSITION IS UNSUPPORTED BY AUTHORITY AND PROCEDURALLY BARRED

Once more, Jordan has failed to point to a specific ruling by the trial court which would constitute reversible error. He asserts that the "demeanor" of Juror Marcus Turner "during the course of this trial reflected his inability to concentrate or focus..." The record, however, does not reflect this point. Nor does the record support the assertion that Juror Loretta McGee was "forced" to vote for conviction, or that Juror "female dressed in red" *continuously* cried and made emotional gestures during the trial.[9] (Brief for Appellant 10-11) The appellate court may act only on the basis of the official record before it, and these allegations are not supported by the record. *Smith v. State*, 942 So.2d 308, 319 (Miss.App.2006); *Saucier v. State*, 328 So.2d 355, 357 (Miss.1976). Moreover, this proposition is not supported by authority. For the reasons cited under Propositions One and Two of this brief, Jordan's third proposition should be rejected.

PROPOSITION FOUR:

THE VERDICT IS BASED ON LEGALLY SUFFICIENT EVIDENCE

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[9]During the testimony of Detective Oliver, defense counsel approached the bench and informed the trial court that the "juror over there in the red" had "basically had some kind of breakdown," but added that she simply wanted to "mention" this fact to the trial judge. Defense counsel did not ask the court to take any action. (T.429) Furthermore, there is no indication that this conduct was continuous, or anything more than an isolated incident.

Jordan asserts next that the evidence is legally insufficient to sustain the verdict rendered against him. To prevail on this point, he faces the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"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."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the

state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss.2000).

In *Harveston v. State*, 493 So.2d 365, 372 (Miss.1986), this Court expounded that resolution of this issue

> turns not upon how we see the evidence, for our institutionally mandated and self-imposed scope of review is quite limited. That limitation is premised upon our candid recognition that the jury system is at best the least imperfect way we have of determining guilt or innocence. We cannot help but be aware that a rational, fair-minded juror could well have found Harveston not guilty. Nevertheless, were we to substitute our view for the jury's, one thing could be said with certainty: the chances of error in any findings we might make would be infinitely greater than is the case where those findings have been made by twelve citizens, peers of the defendant, who are on the trial scene and have smelled the smoke of the battle.

Finally, the state points out that "[d]epraved heard murder evidences a greater degree of recklessness than manslaughter.* *Conley v. State*, 948 So.2d 462, 464-65 (Miss.App.2007). "Whether homicide is classified as a murder or manslaughter is ordinarily an inquiry to be made by the jury." *Hodge v. State*, 823 So.2d 1162, 1166 (Miss.2002). The court properly allowed the jury to decide this issue and correctly refused to disturb its verdict.

Incorporating by reference the facts set out under the Statement of Substantive

Facts, the state submits the trial court did not abuse its discretion in submitting this count to the jury and refusing to overturn its verdict. The evidence and the reasonable inferences flowing therefrom are such that reasonable jurors could have returned no verdict other than not guilty, or such that to allow it to stand would be to sanction an unconscionable injustice. Rather, the proof amply supports the jury's finding that the defendant committed depraved heart murder by firing a deadly weapon willfully indiscriminately into a crowd of people, i.e., committing an act eminently dangerous to others and evincing a depraved heart.[10] Jordan's fourth proposition should be denied.

PROPOSITION FIVE:

THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION TO SUPPRESS THE DEFENDANT'S STATEMENT

During the hearing on the motion to suppress the defendant's statement, the state first called Detective Oliver, who testified that he took and this statement on April 28, 2005. Prior to questioning the defendant, Detective Oliver advised him of his *Miranda* rights. Jordan stated that he did not want to sign the waiver-of-rights form, but that he was willing to talk to the officers. (T.81K-L) Detective Oliver went on to testify that Jordan was not threatened or coerced in any way. (T.81R) He never said outright that he wanted an attorney or that he desired to stop the interview. (T.81Z) Agent Milton Williams of the Mississippi Bureau of Investigations, who was present during this interview, corroborated Detective Oliver's testimony. (T.81AAA-BBB) Agent Williams testified unequivocally that

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[10]For the sake of brevity, the state incorporates by reference the prosecution's summary of the evidence presented in closing arguments. (T.627-38, 676-86)

Jordan did not ask for an attorney. (T.81FFF)

Later that afternoon, Officer Sam Chambers of the Holmes County Sheriff's Department and Detective Hankins took another statement from Jordan. At the outset, Officer Chambers advised the defendant of his *Miranda* rights. Officer Chambers testified that Jordan did not request counsel, and that he was not coerced or threatened in any way. (T.81-EE-II) Detective Hankins corroborated this testimony. (T.81RR-SS) He added, "If he had asked for an attorney, I wouldn't have talked to him." (T.81ZZ)

Jordan testified that he had told Officer Chambers that he wanted an attorney, but that the officer told him that his statement would not be used against him. (T.81MMM)

At the conclusion of the hearing, the trial court ruled as follows:

> The Court has listened to the statement, and I find that the defendant was advised of his Miranda rights before making both statements, that there was no coercion, no force, nor was there any promises made to Mr. Jordan before making his statements. Therefore, the Motion to Suppress is denied.
>
> (T.81TTT-UUU)

Whether the defendant waived his rights and made a voluntary statement and whether he invoked his right to counsel were questions of fact entrusted to the trial court.[11] *Davis v. State*, 551 So.2d 165, 169 (Miss.1989). The court's ruling is entitled to great deference; it will not be reversed unless it is manifestly wrong, or against the overwhelming weight of the evidence. *Id.* The state submits the following language from *Taylor v. State*,

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[11]In *Taylor*, infra, this Court held that waivers need not be signed by the accused to be effective. 789 So.2d at 793. In this case, the testimony showed that although the defendant declined to sign the form, he was "willing" to talk. The court did not abuse its discretion in finding this an effective waiver.

789 So.2d 787, 792 (Miss.2001), is pertinent here:

> This Court in *Baldwin v. State*, 757 So.2d 227 (Miss.2000), discussed the heavy burden that must be met for a trial court's decision regarding a motion to suppress to be overturned. This Court stated:
>
> A trial court is also given deference in the admissibility of an incriminating statement by a criminal defendant. In *Hunt v. State*, 687 So.2d 1154, 1160 (Miss.1996), this Court held that the defendant seeking to reverse an unfavorable ruling on a motion to suppress bears a heavy burden. The determination of whether a statement should be suppressed is made by the trial judge as the finder of fact. Id.
>
> * * * * *
>
> "Where, on conflicting evidence, the lower court admits a statement into evidence this Court generally must affirm." *Dancer v. State*, 721 So.2d 583, 587 (Miss.1998).

Here, the court found that the testimony of the officers was credible. Jordan has not sustained his "heavy burden" of showing that the trial judge abused her discretion is admitting this statement. His fifth proposition should be denied.

PROPOSITION SIX:

THE TRIAL COURT PROPERLY OVERRULED THE MOTION TO SUPPRESS THE FRUITS OF THE SEARCH OF THE DEFENDANT'S VEHICLE

Prior to trial, the defense moved the court to suppress the evidence seized during the search of the defendant's vehicle. After a hearing, the court granted the motion. (T.77) Thereafter, the prosecution filed a Statement of Facts, Memorandum of Law and Argument in Support of the State's Motion to Reconsider Suppression of Holster, Cartridges and Other Evidence.[10] (T.174-80)

Having considered the state's motion, the court ruled as follows:

> The Motion to Reconsider asking this Court to look at another issue, which is whether or not there was probable cause to search the car owned by Montrell Jordan, which this was not an issue raised in the first motion. This Court, after reading the memorandum of law attached to the ... State's motion and reading of the defendant's response to the motion, and this Court's decision is based on the case of **McNeil v. State**, [617 So.2d 999 (Miss.1993)] the Court found that there was probable cause to search the motor vehicle in that there was evidence in that vehicle was probably used in the crime.
>
> The case before the Court, the evidence is that there were a couple of witnesses who ... identified the defendant as a suspect, who identified the defendant's motor vehicle, who, and there was one witness who stated that she saw the defendant running with something that appeared to be a weapon ... and describing the motor vehicle in which he left.
>
> The Court further finds that it is alleged that when the officers arrived at the house, the motor vehicle was parked in an area that was somewhat hidden from view behind a shed, and that the defendant was in the area of the motor vehicle, although by the time the officers had gotten out of their car, the defendant was in the house.
>
> Based on that testimony, and based on the **McNeil v. State** case, the Court finds that there was probable cause for them to search the car, based on that evidence. Therefore, this Court will reconsider the Motion to Suppress the Evidence found in the Motor Vehicle and allow the State to use that evidence in the trial of this matter.
>
> (T.86)

The state submits the court's ruling was factually and legally correct. Jordan's sixth proposition should be denied.

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[10]Because of the high number of issues presented and in light of page constraints, the state incorporates by reference the District Attorney's statement of facts and memorandum of law on this issue. We also incorporate by reference the state's closing argument at the conclusion of the initial hearing on this issue. (T.71-72, 77-78)

PROPOSITION SEVEN:

JORDAN IS NOT ENTITLED TO A NEW TRIAL ON THE GROUND THAT THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

Under his seventh proposition, Jordan contends that the court erred in overruling his motion for new trial inasmuch as the verdict is contrary to the overwhelming weight of the evidence. The pertinent standard of review of this issue is set out below:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his 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." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss.App.2004).

As this Court reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

Jordan's argument is essentially a reprise of his challenge to the sufficiency of the

evidence.[10] Accordingly, the state incorporates by reference its response under Proposition Four of this brief in contending that the verdict is not so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice. Rather, the state presented substantial credible proof, including eyewitness testimony, of Jordan's guilt. The credibility of that testimony was properly resolved by the jury. Indeed, "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). It follows that the jury was free to give "full effect" to "the testimony of the witnesses against him." *Rush v. State*, 301 So.2d 297, 300 (Miss.1974). The fact that the jurors did so gives Jordan no valid basis for complaint on appeal. His seventh proposition should be denied.

PROPOSITION EIGHT:

JORDAN'S EIGHTH PROPOSITION IS PATENTLY DEVOID OF MERIT

Jordan's eighth proposition is that "the indictment charges the wrong crime and is fatally defective. It was error for the court not to require the state to amend the indictment to charge only manslaughter before the trial started or after the state rested." (Brief for Appellant 32)

First, the state counters that the indictment clearly was sufficient. In compliance with Uniform Rule of Circuit and County Court Practice (URCCCP) 7.06, it contained the name of the accused; the date on which the indictment was filed in each court; a statement

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[10]Jordan's assertion to the contrary, the jury *was* authorized to find the defendant guilty of manslaughter if it found the state had failed to prove him guilty of murder. (C.P.298-99)

that the prosecution is brought in the name and by the authority of the State of Mississippi; the county and judicial district in which the indictment was brought; the date on which the offense was alleged to have been committed; the signature of the foreman of the grand jury issuing the indictment; and the words "against the peace and dignity of the state." Further, it provided "a plain, concise and definite written statement of the essential facts constituting the offense charged" and fully notified "the defendant of the nature and cause of the accusation against him." *Carroll v. State*, 755 So.2d 483, 487 (Miss.App.1999), citing *Gatlin v. State*, 724 So.2d 359, 366 (Miss.1998)). Moreover, it tracked the language of MISS.CODE ANN. § 97-3-19 (1)(b) (1972) (as amended). See *Ford v. State*, 911 So.2d 1007, 1012-13 (Miss.App.2005), citing *Stevens v. State*, 808 So.2d 908, 919 (Miss.2002) ("as a general rule, an indictment which tracks the language of a criminal statute is sufficient to inform the defendant of the charge against him). This indictment clearly put the defendant on notice that he was charged with depraved heart murder.

Furthermore, the indictment for murder was sufficient to charge the lesser offense of manslaughter without a specific allegation of the lesser crime. *Chandler v. State*, 946 So.2d 355 (Miss.2006). In any case, this point is moot, as Jordan stands convicted of murder.

In response to the contention that the indictment charged the "wrong crime," the state submits the following:

> This argument is nothing more than a red herring. The State, in the exercise of its prosecutorial discretion, opted to indict Crump under the embezzlement under contract statute. The law is clear that
>
> > [i]t is a fundamental principle of our criminal justice system that a prosecutor is afforded prosecutorial discretion over what charge to

> bring in any criminal trial. See *United States v. Batchelder*, 442 U.S. 114, 124, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) ("Whether to prosecute and what charges to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").
>
> *Watts v. State*, 717 So.2d 314, 320(¶ 14) (Miss.1998). See also *Welch v. State*, 830 So.2d 664, 669(¶ 24) (Miss.Ct.App.2002). The State exercised its discretion in indicting Crump on charges of embezzlement under contract rather than larceny. As discussed, supra, the State met its burden of proof on those charges, and the evidence was sufficient to convict Crump of embezzlement under contract. Accordingly, what the State could have done is of no consequence. This issue is without merit.
>
> *Crump v. State*, v. State, 962 So.2d 154, 158 (Miss.App.2007).

The prosecution enjoyed the discretion to indict Jordan for depraved heart murder.

To the extent Jordan's argument can be taken as an attack on the sufficiency of the evidence supporting his conviction, we submit this proposition has been rebutted under Proposition Four of this brief.

Finally, the state takes exception to certain extraneous comments casting aspersion on the District Attorney's motives and tactics. (Brief for Appellant 32) These asides have no basis in the record and should be disregarded by this Court. *Saucier v. State*, 328 So.2d 355, 357 (Miss.1976) (appellate court may act only on the basis of the official record, not upon statements in briefs or arguments of counsel which are not reflected in the record).

We respectfully submit Jordan's eighth proposition should be denied.

PROPOSITION NINE:

JORDAN'S CHALLENGES TO THE STATE'S OPENING STATEMENT AND CLOSING ARGUMENTS ARE PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Jordan argues additionally that certain comments made by the prosecutors during opening statement and closing arguments require reversal of the judgment rendered against him. He challenges several comments made during the state's final closing argument, contending that they violated his right to a fair trial.

The fatal flaw in this argument is that it is procedurally barred. A review of the state's opening statement and initial and final closing arguments reveals that the defense interposed only one objection– and a general one, at that.[11] (T.679) His failure to object bars consideration of this issue on appeal. *Rubenstein v. State*, 941 So.2d 735, 779 (Miss.2006); *Moore v. State*, 938 So.2d 1254, 1265 (Miss.2006), citing *Thorson v. State*, 895 So.2d 85, 112 (Miss.2004); *Rushing v. State*, 711 So.2d 450, 455 (Miss.1998).

While no further discussion should be required, the state briefly addresses the merits of the defendant's challenges. First, the defense faults the prosecutor for making this remark during opening statement: "The evidence is going to show you, ladies and gentlemen, that this defendant, as stupid as it was, chose to discharge that weapon. ... [I]f you do an act like that, it's murder in the state of Mississippi." (T.211-12) He also challenges the comment, "You can find him guilty of murder ... We've proven that ...

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[11]That objection was overruled, and the defendant does not challenge that particular comment ruling on appeal.

Montrell, through several eyewitnesses, shot DeeDee. Shot into a crowd. That's dangerous in itself. Irresponsible." (T.638) Contrary to Jordan's assertion, these remarks embody a correct statement of law. Shooting indiscriminately into a crowd of people is a "classic example" of depraved heart murder, as defined by MISS.CODE ANN. § 97-3-19(1)(b)(1972) (as amended),[12] and Instruction S-2. (C.P.296) *Lett v. State*, 902 So.2d 630 (Miss.App.2005). This argument was legally and factually appropriate. Had any objection been interposed, the court would have acted correctly in overruling it.

Furthermore, the state submits the prosecutor did overstep his boundaries in arguing to the jury that the evidence showed Jordan was guilty, and that Jordan had not lied about his involvement in the crime as well as about other things. We incorporate by reference our Statement of Substantive Facts in submitting that the evidence showed exactly that. Moreover, "'[t]he purpose of a closing argument is to fairly sum up the evidence,'" and the prosecutor is not only permitted but required to "'point out those facts upon which the prosecution contends a verdict of guilty would be proper.'" *Strohm v. State*, 845 So.2d 691, 700 (Miss.App.2003), quoting *Rogers v. State*, 796 So.2d 1022, 1027 (Miss.2001). "In general, parties may comment upon any facts introduced into evidence, **and may draw whatever deductions and inferences that seem proper from the facts."** (emphasis added) *Ross v. State*, 954 So.2d 968, 1002 (Miss.2007). There

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[12]That subsection defines depraved heart murder as "[t]he killing of a human being without the authority of law by any means or in any manner... [w]hen done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual... "

was no impropriety in this argument.

Finally, Jordan challenges the prosecutor's comment during final closing, "He [Jordan] ain't going to die as a result of this. He's going to get sentenced to some time in the penitentiary, where people who kill people need to be." (T.685) The state counters that this was a fair response to defense counsel's argument on closing, "This man's life is on the line." (T.675-76) The state was entitled to rebut this assertion with the legally and factually correct argument set out above. *Manning v. State*, 835 So.2d 94, 101-02 (Miss.2002).

The state reiterates that Jordan's ninth proposition is procedurally barred. Alternatively, we submit it lacks substantive merit as well.

PROPOSITION TEN:

JORDAN'S TENTH PROPOSITION IS WITHOUT MERIT

Under his tenth proposition, Jordan presents a plethora of alleged errors with respect to the trial court's admission of evidence. The state counters first that the court did not err in allowing the state to introduce two photographs of the decedent during the testimony of Dr. Hayne. (T.227-31) "Some 'probative value' is the only requirement needed to buttress a trial judge's decision to allow photographs into evidence." *Snow v. State,* 800 So.2d 472, 491 (Miss.2001). That decision lies within the sound discretion of the trial court. *Brawner v. State*, 872 So.2d 1, 14 (Miss.2004). It is "very difficult" to show an abuse of this discretion. *Id.* In fact, the "discretion of the trial judge runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value." *Simmons v. State*, 805 So.2d 452, 485 (Miss.2001).

Furthermore, in a homicide case, photographs of decedents may be admitted even

where there is no dispute as to cause of death, the place and time of death, the identity of the decedent, and at whose hands he died. *Spann v. State*, 771 So.2d 883 (Miss.2000). The court did not err in admitting these photographs.

After the prosecutor showed a photograph to Shaghana Simpson, he asked, "Does that fairly and accurately represent the vehicle you observed on the night of the shooting?" She answered, "Yes, sir." The state then offered the photograph into evidence, and defense counsel stated that he had no objection. (T.244) Accordingly, Jordan's challenge to the admission of this photograph is procedurally barred. *Smith v. State*, 729 So.2d 1191, 1205-06 (Miss.1998). "A trial judge will not be found in error on a matter not presented to him for decision." *Jones v. State*, 606 So.2d 1051, 1058 (Miss.1992), citing *Crenshaw v. State*, 520 So.2d 131, 134 (Miss.1988)).

Likewise, references to Ms. Simpson's prior statements were admitted without objection. (T.238-57, 271) The defendant's belated challenge to the admissibility of this evidence is procedurally barred.

Jordan goes on to argue that the trial court erred in allowing Kenny Wilson to give improper hearsay and opinion testimony. The defendant's sole objection on this ground was sustained, leaving him no basis for complaint on appeal. (T.295-96) *Walls v. State*, 928 So.2d 922, 927 (Miss.App.2006). All other challenges to Wilson's testimony are procedurally barred. The same rational applies to the testimony of Terry Wade, during which the defendant's single objection was sustained. (T.461) Furthermore, during the testimony of Joey Netherland, the defendant interposed one objection, which was sustained. (T.562)

Also barred is Jordan's assertion that the trial court erred in allowing certain

testimony by Officer Newton. (T.307-09) David Whitehead's testimony was taken without objection, as was the testimony of Detective Oliver.[13] (T.344-58. 407-23) These points, too, are unpreserved for review.

Furthermore, Jordan never asserted at trial that the identification procedures were tainted. See *Byrd v. State*, 834 So.2d 730, 733 (Miss.App.2003). Inasmuch as a collection of photographs is not a "statement," his objection on the ground of hearsay to the admission of the actual photographic array was properly overruled. (T.412) M.R.E.801(a).

When the prosecutor sought to admit the ATF document during the testimony of Detective Oliver, he outlined for the court the "indicia of trustworthiness," stating that "everything matches the document from the pawnshop man that testified." The defense objected on the ground that it was not properly authenticated. The state countered that the document had "indicia of trustworthiness" because "everything on here matches everything on the document." (T.418-19) The state submits the court did not abuse its discretion in admitting the document, implicitly finding that the state satisfied M.R.E. 901.[14] For the same reasons, the court properly overruled the defendant's objection to the admission of

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[13]Furthermore, Jordan may not be heard to challenge testimony which the defense brought out on cross-examination. (T.432-38) *Simpson v. State*, 366 So.2d 1085 (Miss.1979).

[14]That rule provides that generally that a document is authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims."

the document from the pawnshop. (T.324-31)

Finally, as the prosecutor asserted at trial, the defendant's statements to Detective Hankins were not hearsay. (T.371) M.R.E.801(d)(2).

For these reasons, Jordan's tenth proposition should be denied.

PROPOSITION ELEVEN:

JORDAN HAS FAILED TO SHOW THAT THE TRIAL COURT ERRED IN GRANTING INSTRUCTIONS 3, 4 AND 5

Jordan next contends the trial court committed reversible error in granting Instructions 3, 4, and 5, submitted as S-2, S-3, and S-6. (C.P.296-99) At the outset, the state submits this proposition is completely unsupported by authority. It should be rejected on that basis alone. *Duncan,* 939 So.2d at 779. Accord, *Hewlett v. State*, 607 So.2d 1097, 1107 (Miss.1992).

Furthermore, this proposition is procedurally barred. Defense counsel stated that he had no objection to any of these instructions. (T.622-23) "The failure to offer a contemporaneous objection to an instruction waives the issue on appeal."

While disputing the need for doing so, the state submits alternatively that Jordan's belatedly-interposed objections have no substantive merit. Jordan cites no authority for the proposition that Instruction 3, which defined the offense charged– depraved heart murder– was required to contain a definition of the lesser offense of manslaughter. The latter offense was defined by Instruction 5, which the jurors were to consider *if* they found the state had failed to prove any essential element of the crime of murder.

Finally, the court was not required to instruct the jury on the element of malice. The defendant was being prosecuted for depraved heart murder, not malice murder.

For these reasons, Jordan's eleventh proposition should be denied.

PROPOSITION TWELVE:

JORDAN HAS FAILED TO DEMONSTRATE THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

Jordan argues additionally that he was denied his constitutional right to effective assistance of counsel at trial. He faces formidable hurdles, summarized follows:

> The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in determining whether a claim of ineffective assistance of counsel should prevail. . . . *Rankin v. State*, 636 So.2d 652, 656 (Miss.1994) enunciates the application of *Strickland*:
>
> > The *Strickland* test requires a showing that counsel's performance was sufficiently deficient to constitute prejudice to the defense. . . . **The defendant has the burden of proof on both prongs. A strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. . . . The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. . . .**
> >
> > Viewed from the totality of the circumstances, this Court must determine whether counsel's performance was both deficient and prejudicial. . . . Scrutiny of counsel's performance by this Court must be deferential. . . . If the defendant raises questions of fact regarding either deficiency of counsel's conduct or prejudice to the defense, he is entitled to an evidentiary hearing. . . . Where this Court determines defendant's counsel was constitutionally ineffective, the appropriate remedy is to reverse and remand for a new trial.
>
> **In short, a convicted defendant's claim that counsel's assistance was so defective as to require reversal has two components to comply with *Strickland*.**

> **First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors deprived him of a fair trial with reliable results.**
>
> (emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss.App.1999).

Because this point is raised on direct appeal, the defendant encounters an additional obstacle: the pertinent question

> **is not whether trial counsel was or was not ineffective but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.** "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430 So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**
>
> (emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Clayton v. State*, 946 So.2d 796 (Miss.796, 803 (Miss.App.2006); *Madison v. State*, 923 So.2d 252 (Miss.App.2006); *Jenkins v. State*, 912 So.2d 165, 173 (Miss.App.2005); *Walker v. State*, 823 So.2d 557, 563 (Miss.App.2002); *Estes v. State*, 782 So.2d 1244, 1248-49 (Miss.App.2000).

Jordan has not shown that his lawyer's performance was so deplorable as to require the court to declare a mistrial on its own motion. While he alleges numerous unprofessional lapses, he has not sustained his burden of establishing prejudice.[15] He clearly has failed to show that his trial counsel's overall performance mandated the declaration of a mistrial *sua sponte*. Because he has not shouldered the particular burden that he faces on direct appeal, his twelfth proposition should be denied without prejudice to the raising of this issue in a motion for post-conviction collateral relief.[16]

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[15]Indeed, he cannot do so within the four corners of this record. Moreover, he has failed to rebut the presumption that counsel's decisions were strategic.

[16]For the record, the state points out that the defense filed numerous pretrial motions, challenged potential jurors, conducted substantial and incisive cross-examinations of the state's witnesses, and made compelling arguments in support of its positions. (See T.707) By no stretch of the imagination was this a performance which should have motivated the court to declare a mistrial on its own motion.

PROPOSITION THIRTEEN:

JORDAN'S THIRTEENTH PROPOSITION IS NOT PROPERLY BEFORE THIS COURT

Jordan contends additionally that the state failed to disclose evidence favorable to the defense, and specifically that it "failed to provide the Defendant with all of the statements made by Shagunda Simpson and Randy Scott." (Brief for Appellant 67) The state counters that Jordan has failed to sustain his burden of citing to the record to show where he brought this issue to the trial court's attention an obtained a ruling. See *Conley* v. *State*, 790 So.2d 773 , 784 (Miss.2001), citing MRAP 28(A)(1)(6). Having been unable to locate the raising and/or disposition of this issue in the record, the state submits it is not properly before this Court.

PROPOSITION FOURTEEN:

JORDAN'S INVOCATION OF THE CUMULATIVE ERROR DOCTRINE IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS

Jordan finally contends that the cumulative errors of the trial court mandates reversal of the judgment rendered against him. He did not present this argument at any time in the trial court and may not raise it for the first time on appeal. *Maldonado v. State*, 796 So.2d 247, 260-61 (Miss.2001); *Gibson v. State*, 731 So.2d 1087, 1098 (Miss.1998). His seventh proposition is procedurally barred.

In the alternative, the state incorporates its arguments under Propositions One through Thirteen in asserting that the lack of merit in Jordan's other arguments demonstrates the futility of his final proposition. *Gibson*, 731 So.2d at 1098; *Doss v.* State, 709 So.2d 369, 400 (Miss.1997); *Chase v. State*, 645 So.2d 829, 861 (Miss.1994). See

also *Brown v. State*, 682 So.2d 340, 356 (Miss.1996) ("twenty times zero equals zero"). Jordan's invocation of the cumulative error doctrine lacks substantive merit as well.

CONCLUSION

The state respectfully submits that the arguments presented by Jordan have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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