IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHIRLEY ROSS — APPELLANT

VS. — NO. 2007-KA-1889

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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SHIRLEY ROSS **APPELLANT**

VERSUS **NO. 2007-KA-1889-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Shirley Ross was convicted in the Circuit Court of Yazoo County of aggravated assault and was sentenced to a term of ten years in the custody of the Mississippi Department of Corrections. (C.P.32) Aggrieved by the judgment rendered against her, Ross has perfected an appeal to this Court.

Substantive Facts[1]

On June 19, 2005, Walter Ross was living with this wife Shirley Ross (hereinafter "Ross") in Yazoo County. On that date, which was Father's Day, the couple went to Sunday school together. Afterward, Mr. Ross "went to Pickens " to visit his "family home church." When he returned home, Ross, "went off and left" her husband. "[W]hen she came back," Mr. Ross told her that he "was going to church out on Fifteenth Street." He asked her to accompany him, but she declined. (T.131-34)

After Mr. Ross returned home from the church on Fifteenth Street, he "noticed that she [Ross] had a pot of grease and a pot of water boiling." She told him that she intended to "cook some shrimp," but Mr. Ross knew that they did not have any shrimp at the time. Shortly afterward, Ross emptied the contents of the pots onto her husband. She also "grabbed" him "up by the throat." When he exited the house, she followed him in their truck and stated, "I'm going to get you." (T.134-35) Mr. Ross suffered extensive third degree burns and remained unconscious in the hospital for five to six weeks. (T.139)

Later on June 19, Deputy Edward Trotter of the Yazoo County Sheriff's Department was dispatched to the hospital to interview Mr. Ross. The victim, who was in terrible pain, was unable to talk for more than three minutes. (T.102-03) Deputy Trotter also saw Ross, who was being treated for "some burns." (T.106) Ross told Deputy Trotter that she and her husband had argued that afternoon; that she had been boiling water to take a bath; that he had verbally abused

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[1]Because Ross does not challenge the sufficiency or weight of the evidence supporting her conviction, the state presents an abbreviated statement of facts.

her and hit her; and that after he hit her a second time, she threw the hot water and grease on him. (T.108)

The next day, at the sheriff's department, Ross told Deputy Trotter that she had been boiling water to cook shrimp. (T.113) She reiterated that she had thrown these substances onto her husband because he was "ranting and raving," pushing and grabbing her. (T.119)

Two of Ross's children from a previous marriage testified that Mr. Ross had been violent with them and with their mother on occasions before June 19, 2005. (T.159-62, 168-72) Ross testified her husband was the aggressor on that date, verbally and physically abusing her and threatening to "put" her "in the hospital." She denied that she had told Mr. Ross, "I'm going to get you." (T.179-87)

In rebuttal, Adam Selby, Jr., testified that on the day in question, "a man who had been burned" appeared in his (Mr. Selby's) yard. Mr. Selby heard a person in a maroon truck say, "I'm going to get you." (T.205-06)

SUMMARY OF THE ARGUMENT

Ross's attack on the court's allowance of the state's challenges for cause is procedurally barred and substantively without merit. The defense objected to only two of these challenges, and the court's overruling of those objections is supported by the record.

Furthermore, Ross's failure to raise a *Batson* issue bars consideration of that proposition on appeal. The record leaves nothing for this Court to review.

Additionally, Ross's challenge to certain testimony by Mr. Ross is procedurally barred by her failure to interpose a contemporaneous objection. The state argues alternatively that the testimony was properly admitted. In any case, it was not so egregious as to require the trial court to declare a mistrial on its own motion.

The state submits Ross cannot establish on this record that her trial counsel rendered ineffective assistance. While she alleges unprofessional lapses, she cannot show that her counsel's performance was so deplorable as to have required the trial court to declare a mistrial *sua sponte*.

Moreover, the state contends Ross's issue with respect to the state's closing argument is procedurally barred by her failure to object. Alternatively, the state submits the prosecutor was properly arguing inferences from facts in evidence.

Finally, Ross's invocation of the cumulative error doctrine is procedurally barred. Because Ross's other allegations of error are unavailing, her final proposition lacks substantive merit as well.

PROPOSITION ONE:

ROSS'S ATTACK ON THE COURT'S ALLOWANCE OF THE STATE'S CHALLENGES FOR CAUSE IS PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Ross first contends the trial court erred in granting the state's challenges for cause. At the outset, the state submits Ross may not be heard to contest those challenges for cause to which the defense stated it had no objection. (T.75-79) Her failure to object to those challenges bars her "from doing so now on appeal." *Bennett v. State*, 933 So.2d 930, 941 (Miss.2006). The trial court will not be put in error on a point not presented to it for decision. *Id.*

The defense did object to the challenge to Juror Number 7, a Ms. Morton, and to Juror Number 34, a Ms. Sibley. (T.75, 79) The state attempted to strike Ms. Morton because she had stated during voir dire that she was employed during the day, that she attended night school, that she was working on a research paper which was due soon, and that the looming deadline would distract from her ability to pay attention to the proceedings. (T.56-57) Under questioning by

defense counsel, that she was "supposed to have some work done on it [the paper]" that night, and that she was allowed to miss only two classes. She did state that she "probably could" obtain an extension. (T.74-75) The court ultimately granted the state's challenge for cause to Ms. Morton. (T.76)

Ms. Sibley had stated that was taking various medications, one of which made her "drowsy" during the day. (T. 53-54) The court granted the state's challenge for cause to Ms. Sibley as well. (T.78)

"A juror who may be removed on a challenge for cause is one against whom a cause for challenge exists that would likely affect his competency or impartiality at trial." *Berry v. State*, 703 So.2d 269, 292 (Miss.1997). The determination of this issue is within the discretion of the trial court. *Pierre v. State,* 607 So. 2d 43, 49 (Miss.1992). "Because the trial judge hears and sees the individual jurors, he is in the better position to evaluate their responses and determine whether or not they should be excluded for cause." *Hervey v. State*, 764 So.2d 457, 460 (Miss.App.2000). 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." *Id.*, quoting *Taylor v. State*, 672 So.2d 1246, 1264 (Miss.1996).

The record amply supports the state's arguments and the court's acceptance of them. The court was not "clearly wrong" in concluding that these potential jurors would be unable to devote sufficient attention to the proceedings. Accordingly, the trial court did not abuse its substantial discretion in granting the state's challenges for cause to Jurors Number 7 and 34. The other issues raised under this proposition are procedurally barred. Accordingly, Ross's first proposition should be denied.

PROPOSITION TWO:

ROSS'S *BATSON*, CHALLENGE IS PROCEDURALLY BARRED

Although she failed to raise the issue in any form at trial, Ross now contends the prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by purposely using its peremptory challenges to remove African-American females from the venire. The record shows that *Batson* was never put into issue during the jury selection process.[2] (T.75-85) "Therefore, the State was not given the opportunity to advance reasons as to why specific veniremen were excused. This claim was not raised at trial; therefore it is barred upon appeal." *Rosenthall v. State*, 844 So.2d 1156, 1159 (Miss.2003), citing *Williams v. State*, 684 So.2d 1179, 1203 (Miss.1996).

An appellate court may act only on the basis of the official record. It does not act on assertions in briefs. *Page v. State*, 987 So.2d 1035, 1038 (Miss.App.2008). Here, the record does not reflect the race of the members of the venire. The state might well have had neutral reasons for exercising its peremptory strikes, but those reasons do not appear in the record because the prosecution was not required to provide them. It follows that Ross's failure to raise this issue during the jury selection process leaves this court with nothing to review. In light of *Rosenthall,* this issue is barred.

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[2]Indeed, there was no objection in any form to the process of jury selection.

PROPOSITION THREE:

ROSS'S OBJECTION TO CERTAIN TESTIMONY BY WALTER ROSS IS PROCEDURALLY BARRED

Near the conclusion of his direct examination of Walter Ross, the district attorney asked, "Where all were you injured as a result of the water and grease thrown on you?" Mr. Ross answered that he had suffered third degree burns on his head, chest and back; that he had been unconscious for five to six weeks; and that he had "died two times." (T.139) Having failed to interpose an objection to this testimony, Ross contends on appeal that the trial court erred in failing to grant a mistrial *sua sponte* after Mr. Ross made this last statement.

"It is axiomatic that a litigant is required to make a timely objection." *Washington v. State*, 957 So.2d 426, 429 (Miss.App.2007), quoted in *Harris v. State*, 979 So.2d 721 (Miss.App.2008). Ross's failure to make a contemporaneous objection procedurally bars any allegation of error. Id.

Solely in the alternative, the state submits Ross has failed to show that this testimony was so egregious as to require the court to declare a mistrial on its own motion. First, we contend any objection would have been properly overruled. The state was required to prove, *inter alia*, that Ross caused bodily injury to the victim with a means likely to produce serious bodily harm. (C.P.14) Walter Ross's testimony was relevant to establish this point. Moreover, the prosecution was entitled to present evidence of the complete story of the offense, including the injuries suffered and treatment received by the victim. See generally, *Ford v. State*, 975 So.2d 859 (Miss.2008). Had Ross made an objection to this testimony, the trial court would not have erred in overruling it.

The state submits additionally that the most rational deduction from the statement "I died

twice" is that while he was being treated, Mr. Ross's heart stopped and/or that he had to be resuscitated on two occasions. The jurors obviously could see that he was in fact still alive and therefore had not actually "died" even once. The state fails to see how this statement could have prejudiced the jury. By no stretch of the imagination was this testimony, under these circumstances, so egregious as to require the trial court to declare a mistrial on its own motion. Any arguable error– and we maintain that there was none– should be considered harmless. *Lofton v. State*, 818 So.2d 1229, 1237 (Miss.2002).

For these reasons, Ross's third proposition should be denied.

PROPOSITION FOUR:

ROSS HAS NOT SHOWN THAT HER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

Ross contends next that her trial counsel rendered constitutionally ineffective assistance. To prevail, she must satisfy the following standard:

> 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 for the first time on direct appeal, Ross 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, *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).

Ross has not begun to show that her trial counsel's performance was so deplorable as to require the court to declare a mistrial on its own motion. Because she has not attempted to sustain the particular burden she faces when raising this issue on direct appeal, the state submits her fourth proposition should be denied without prejudice to its being advanced in a motion for post-conviction collateral relief.

For the sake of argument, the state addresses Ross's particular claims. First, she asserts her counsel was ineffective in failing to conduct an adequate voir dire, failing to make proper objections to the state's challenges for cause, and failure to raise a *Batson* issue. The state counters that conducting jury selection, including the decision whether to make a *Batson* objection, is "generally a matter of trial strategy." *Turner v. State*, 953 So.2d 1063, 1070 (Miss.2007). Accord, *Price v. State*, 749 So.2d 1188, 1199 (Miss.App.1999). Furthermore, we incorporate by reference our response under Proposition Two of this brief in contending that these issues cannot be decided within the four corners of this record.

Ross next asserts that her trial counsel was ineffective in failing to object to Walter Ross's testimony that he "died two times." Incorporating by reference our response under Proposition Three of this brief, we submit that Ross can show neither an unprofessional lapse nor prejudice within the meaning of *Strickland*. The testimony was not objectionable, and no prejudice can be shown inasmuch as the jury clearly was aware that Mr. Ross was not dead.

Finally, Ross claims her lawyer was ineffective in failing to request that she undergo a mental evaluation and failing to conduct an adequate investigation. Again, the state asserts the record obviously does not show what the results of such evaluation and investigation would have been. It follows that these claims cannot be decided on the basis of this record.

For these reasons, the state submits Ross's fourth proposition should be rejected without prejudice to its being raised in a motion for post-conviction collateral relief.

PROPOSITION FIVE:

ROSS'S CHALLENGE TO THE STATE'S CLOSING ARGUMENT IS PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Ross next takes issue with the following argument, made by the district attorney during final closing: "It's a miracle that he's living and that she's not charged with murder. A miracle. What she did to him could have and probably should have killed him." (T.235) The challenge to this argument is procedurally barred by Ross's failure to interpose a contemporaneous objection to it. *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). Ross's fifth proposition should be denied on that basis.

In the alternative, the state contends the argument in question set out rational conclusions from facts properly admitted into evidence. The prosecutor "may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts." *Bell v. State*, 725 So.2d 836, 851 (Miss.1998), cited in *McGowen v. State*, 859 So.2d 320 (Miss.2003). Moreover, attorneys are afforded "broad latitude" in making their closing arguments. *Garrett v. State*, 956 So.2d 2296 (Miss.App.2006).

The state had properly admitted proof that Mr. Ross nearly had died from his injuries.

Thus, it cannot be concluded rationally that the district attorney departed from the broad range allowed him.

In conclusion, the state points out that the court instructed the jury in pertinent part as follows:

> [T]he attorneys will make closing arguments. These arguments are intended to help you understand the evidence and apply the law. But, the arguments are not evidence. Therefore, if a statement is made during the argument which is not based upon evidence, you should disregard that statement entirely.
>
> (C.P.13)

Of course, the jury is presumed to have followed this instruction. *McGilberry v. State*, 741 So.2d 894, 919-20 (Miss.1999). "Assuming arguendo the prosecutor's comments were improper, such error would be harmless beyond a reasonable doubt in light of the instruction by the trial court that such comments did not constitute evidence and should be disregarded." *Walker v. State*, 913 So.2d 198,

241 (Miss.2005).

For these reasons, Ross's fifth proposition should be denied.

PROPOSITION SIX:

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

Ross finally contends that the cumulative errors of the trial court mandates reversal of the judgment rendered against her. She did not present this argument below (See Motion for New Trial or JNOV, C.P. 33-34) 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). Her sixth proposition is procedurally barred.

In the alternative, the state incorporates its arguments under Propositions One through Five in asserting that the lack of merit in Ross's other arguments demonstrates the futility of her 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"). Ross's invocation of the cumulative error doctrine lacks substantive merit as well.

CONCLUSION

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

Respectfully submitted,

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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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