IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS

SHIRLEY ROSS — APPELLANT

VS. — NO. 2007-KA-01889-COA

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant Shirley Ross certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

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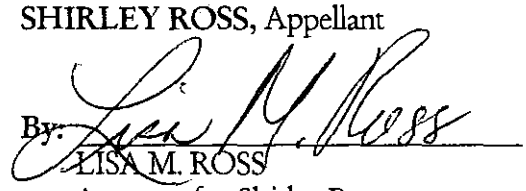
SHIRLEY ROSS, Appellant

By: 
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REQUEST FOR ORAL ARGUMENT

COMES NOW, the Appellant, Shirley Ross and requests oral argument. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the issues raised in this appeal.

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PROCEDURAL HISTORY

Shirley Ross was indicted on October 6, 2005 and charged with two counts of aggravated assault.[1] (C.P. 3).

Prior to trial, defense counsel filed a Motion to Dismiss count two of the indictment. (C.P. 10). The trial court dismissed count two of the indictment on March 31, 2006. (C.P. 10)

The only other motions defense counsel filed before trial was a Motion for Discovery and a Motion for Continuance. (C.P. 6-9, C.P. 1). In its response to the Motion for Discovery, the State provided defense counsel with copies of the medical records of the victim. (See, Exhibit A, medical records of Walter Ross). Walter Ross' medical records were not entered into evidence.

Defense counsel did not file a Motion for Mental Examination and/or Competency prior to Shirley Ross' trial. (C.P. 1-2). Defense counsel did not ask the Court to appoint a battered woman's expert to assist the jury. (C.P. 1-2).

The one day trial began and concluded in the Circuit Court of Yazoo County, Mississippi on April 11, 2006 and culminated the same day. (T. p. 1-241). Within fifteen minutes of being dismissed by the Court to deliberate, the jury returned a verdict of guilty on the charge of aggravated assault. (T. p. 238, l. 15-22).

On April 13, 2006, the Honorable Jannie Lewis sentenced Shirley Ross to ten years in the custody of the MDOC. (C.P. 32). It is from the guilty verdict and sentence that Shirley Ross appeals.

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1 Neither Shirley Ross nor Walter Ross is related by blood or marriage to Lisa M. Ross.

CHALLENGES FOR CAUSE

At issue in this appeal are three of the State's challenges for cause. Specifically, the defendant challenges the removal for cause of Krystal Levill Morton, Juror No. 7, Bobbie Hubbard, Juror No. 22, and Roger Smith, Juror No. 31.

After voir dire, the State challenged Juror No. 7, Krystal Levill Morton, an African-American female, for cause. (C.P. 64). The prosecutor, who is white, told the court "Juror Number 7, Ms. Morton, has a paper due or some work due today; hasn't done any work on it, says that would be on her mind and would interfere with her ability to pay attention." (T. p. 75-76). Defense counsel objected to the granting of a challenge for cause as to Ms. Morton. (T. p. 76, l. 4-8). The trial court granted the cause challenge. (T. p. 76, l. 9-10).

The State also challenged Juror No. 22, Bobbie Hubbard, an African-American female, for cause. (C.P. 64). The prosecutor stated "I've got 22, because of, I guess, both the relationship that she said her daughter, that the defendant's daughter used to date her son, and then Mr. Clay also brought out additional stuff how she had been in the victim's household and been friends with the family, and I just think she's too close to the case." (T. p. 76, 21-28). Even though Juror No. 22 stated during voir dire she could lay aside and try the case based on the law and evidence, defense counsel did not object. (T. p. 77, l. 1-3), (T. p. 43, l. 9-12), and (T. p. 43, l. 13).

Roger Smith, Juror No. 31, an African-American male, also was challenged for cause by the State. (C.P. 64), (T. p. 77, l. 11-18). During voir dire, Roger Smith told the court that his brother was married to Shirley Ross' cousin. (T. p. 27, l. 17-18). Juror

No. 31 stated that there was nothing about that relationship that would prevent him from being fair and impartial. (T. p. 27, l. 21-24).

When the jury was being selected, the prosecutor stated: "I don't know what his problem is, but he raised his card one time, and when I went back and talked to him, he laid completely back in his chair, wouldn't respond to the question, and I couldn't get anything out of him. He was just acting odd." (T. p. 77, l. 11-18). Defense counsel did not object. (T. p. 77, l. 19-22).

The record reveals that Juror No. 31 was quite forthcoming in responding to the questions posed by the court and prosecutor. In addition to the conversation with the court outlined above, the following colloquy took place between the prosecutor and Roger Smith.

> "Mr. Smith, you indicated that your brother married the defendant's cousin? Is that right?
>
> A. Yes, sir.
>
> Q. How well would you know, based on that relationship, your brother's relationship with her cousin, how much contact did you have with Ms. Ross, the defendant?
>
> A. Not too much.
>
> Q. So you don't see her on a regular basis or have much contact with her on a regular basis?
>
> A. No, sir.
> Q. Okay. Is there anything at all about that relationship or that, I guess, because by marriage, kind of part of an extended family, is that going to have any bearing on your decision in this case?
>
> A. No, sir.
>
> Q. It won't?
>
> A. No. (T. p. 46, l. 7-26).

PEREMPTORY CHALLENGES

The defendant in this case also objects to the racially discriminatory manner in which the State exercised its peremptory challenges to jurors, particularly African-American females from the jury panel.

The State struck Gwen Allen, Juror No. 1, Jo Ann Jones, Juror No. 13, Vanessa Bullock, Juror No. 16, and Julie Robinson, Juror 21, all African-American females. (C.P. 64), (T. p. 81-83). Defense counsel did not raise any Batson challenges. (T. p. 81-85). No African-American females were seated on the jury. (C.P. 64), (T. p. 85, l. 1-18). The jury that was seated included three African-American males, Lee Young Jr. Melvin Collins and John E. Clark, seven white women, two white men, and three African-American men. (C.P. 64), (T. p. 85, l. 1-18).

The State exercised its first peremptory challenge against Gwen Allen, an African-American female. (C.P. 64), (T. p. 81, l. 21). The State exercised its third peremptory challenge against Jo Ann Jones, an African-American female. (C.P. 64), (T. p. 82, l. 1-2). The State exercised its fourth peremptory challenge against Vanessa Bullock, an African-American female. (C.P. 64), (T. p. 82, l. 7). The State exercised its fifth peremptory challenge against Julie Robinson, an African-American female. (C.P. 64), (T. p. 83, l. 4). Defense counsel did not challenge the State's peremptory challenges regarding any of its strikes against African-American women. (T. p. 81-83).

STATEMENT OF FACTS

Walter Ross says he's done something that no other man including Jesus Christ and Lazarus have done. By his account, Walter Ross died twice and lived to talk about it. (T. p. 139, l. 17-18). "I died two times. I died two times. (T.p. 139, l. 17-18).

Despite Walter Ross' incredulous claim of having given up the ghost twice, on April 11, 2006, he took the witness stand to testify against his wife Shirley Ross on the charge that she committed an aggravated against him on June 19, 2005. (T.p. 130-156). But it was the prosecutor who drove the nail into the coffin for Shirley Ross. At the end of Shirley Ross' trial, he argued "It's a miracle that he's living and she's not charged with murder. A miracle. What she did to him could have and probably should have killed him. It didn't, and for that reason, she's got all she deserves, and that being charged with aggravated assault instead of murder. She's got more than she deserves in benefiting from him not dying from her act, because that's what she intended. (T. p. 235, l. 11-19).

WALTER ROSS MARRIES SHIRLEY ROSS

Shirley Ross and Walter Ross were married on July 24, 1999. (T. p. 177, l. 6). No children were born of that union. (T. p. 132, l. 17-20). Shirley Ross, however, had five children. (T. p. 132, l. 21-29). All of Shirley Ross' children, except one, lived with Shirley Ross and Walter Ross at some point during the course of their marriage. (T. p. 132, l.21-24).

When Shirley Ross and Walter Ross first married, they lived in her apartment at 1137 Prentiss Street, Yazoo City, Mississippi. (T. p. 133, l. 4-8). Three or four years later, Shirley Ross and Walter Ross moved to 26 Graball Road in Yazoo City, Mississippi. (T. p. 133, l. 9-12).

Walter Ross worked for Mississippi Chemical for twenty-six years. (T. p. 142, l. 18-19). After he was laid off from Mississippi Chemical, he went to work for "the County,

going around and doing clean-up with some inmates." (T. p. 142, l. 15-16). Shirley Ross also held a number of jobs, including but not limited to her job with Lextron Corporation. (T. p. 176, l. 22-29). In June of 2005, Shirley Ross did not have a vehicle to travel to her job. (T. p. 179, l. 27-29), (T. p. 180, l. 1-4). This also was a source of contention between the couple because Walter Ross told Shirley Ross "'you ain't going to be burning the motor up in my car, running up and down to work in Canton. You ain't going to be burning the motor up in my truck.'" (Id.)

Money also was an issue in the marriage of Walter Ross and Shirley Ross. (T. p. 144, l. 13-16). The gas at the house at 23 Graball Road was turned off in March of 2005, and was still off on June 19, 2005, more than three months later. (T. p. 144, l. 21-29). That was not the only issue between the couple. By June 19, 2005, "she [Shirley Ross] wouldn't even sleep with me [Walter Ross]." (T. p. 144, l. 11-12).

VIOLENT ENCOUNTERS BEFORE JUNE 19, 2005

At her trial, Shirley Ross recounted for the jury a fight she had with Walter Ross three years prior to Father's Day of 2005. (T. p. 182 - 83). Shirley Ross testified:

> "I had asked Quinton to go to the store one day, and evidently, Ross was out on his route or whatever, and he saw Quinton, and he just got firey hot, just firey hot. And he came back to the house and wanted to know, 'Why you let Quinn drive the car? I just saw Quinn so, so, and so and so.' I'm just 'so what?' You know, he just went a short piece. He just went a short piece. Then fussing and cussing again, Just fussing and cussing again. On, and on and on and on, you this, you that. I had the keys in my hand. We started going around and around in circles. Around and around in circles, tussling with the keys, tussling for the keys. Oh, yeah, he hit me." (T. p. 182 - 83).

Quinton Austin, the son of Shirley Ross, also told the jury about his violent encounter with Walter Ross. (T. p. 159-168). Quinton Austin described the altercation this way:

> "Well, one evening my mother sent me to the store to get some food, and when I come back, Mr. Ross was there. And they had an argument about

whether I was supposed to drive the car or not. And they had a fight. And in-between that fight, he was trying to get the keys or whatever, and he punched her, he hit her. And from there, I broke in-between. I stopped the fight. I grabbed a hold of him. And then from then on out, it was me and him. My mother left out the front door. I think she went to get help or something, and he went to grab a knife. And he cut me up. I had like four stitches maybe; four or five stitches in my finger. And he left. He finally got up off of me, and that was the end of the situation." (T. p. 159, l. 17-29). "He proceeded to the back room after she ran out. After she went out the front door, he proceeded to the back room and grabbed something. He went and grabbed a knife, and he came back out, right there, and he got at me, I'm like, 'No, sir, please don't kill me, please don't kill me, please don't kill me. I had a couple of cuts over my eye, I had a couple of cuts on my arm, and that was it." (T. p. 161, l. 22-29).

On direct examination during the State's case-in-chief, Walter Ross testified that he was the victim in the fight, not Shirley Ross or Quinton Austin. (T. p. 137). Walter Ross stated that Shirley Ross said, "'Quint, let's beat his ass.' And she clubbed me with an iron. She was at the ironing board, so she clubbed me with an iron. She was standing in front, she slapped me in the face with that iron, and I stumbled back like that, and then Quint hit me in the eye, and I had a concussion. Only thing I could do to get them off of me, I reached in my pocket and pulled out a little pocket knife and went to swinging it." (T. p. 137, l. 19-27).

Jurrie Austin, Shirley Ross' daughter, also described to the jury violent encounters that she had with Walter Ross. "On the first occasion, it was back in March, I didn't to go to church with Mr. Ross because I had just, Mr. Ross and my mama, because I have just went to church Saturday with my grandmother, and I was in the room getting dressed, and Mr. Ross had came in and asked me why wasn't I going to church, and I told him I had already talked to my mom about it, and she said that it was okay, and he got irate, and, in the process of getting dressed, he started hitting on me and stuff.... He started hitting me. When I was trying to get away from him, he grabbed by arm and caused me to have a lot of bruises." (T. p. 169, l. 13-22).

"The second incident was before I graduated, his church was giving a program for us, and again, I did not choose to go to church with him because I was going to another church. And he came back in the room saying I was trying to be grown, and I wasn't being respectful, and again, I was getting dressed at that time, as well, and he came in the room and did the exact same thing, placing his hands on me by hitting me. " (T. p. 170, l. 18-26).

"..I remember on the second incident, before I had left, my mom had came in the house, and she was asking what was going on, and he was telling my mom how I needed to get the hell out of his house, and she was like, 'What happened? What's going on?' I said, 'Mr. Ross is getting mad because I won't go to church with him.' Like that. She said, 'We had already discussed it.' I said, 'I know. You need to tell him that.' Like that. And he said he didn't want to hear nothing; I just need to get the hell out of his house, she needed to get me the hell out of his house." (T. p. 171, l. 6-17).

WALTER ROSS PORTRAYAL OF HIMSELF

At Shirley Ross' trial, Walter Ross portrayed himself as gentle as *Mary's Little Lamb.* "You know, because I was trying to live a Christian life. I never wanted to argue with my wife. I wanted for my marriage to work out. I loved that woman. I loved her with my heart. I never did anything to her." (T. p. 136, l. 13-19). "I never assaulted her, sir." (T. p. 136, l. 23). "I have never cursed her. Now, I have been in arguments, but as far as me cursing her, I have never hit my wife, because I thought that woman was everything in the world." (T. p. 139, l. 7-11). "I never hit her in my life... Never hit her in my life. I worshipped that woman." (T. p. 148, l. 10-13).

Shirley Ross and her children paint a different picture of Walter Ross. (T. p. 159-168), (T.p. 169-171), (T.p. 182-83). Walter Ross, they say, is a wolf in sheep's clothing. Consider Shirley Ross' testimony:

"This stuff just didn't happen just Father's Day like all in the blue. Me and Ross was already not speaking to one another. It had got so bad until I started calling him Satan, And he would answer to it. I was like, 'Good morning, Satan. How you doing, Satan?' 'How was your day, Satan?' We was already angry with each other. We was not speaking with one another. We was not speaking to one another." (T. p. 185, l. 3-12).

While Walter Ross claims that he thought the world of Shirley Ross, his feeling obviously stopped short of providing hot water to bathe in there at 26 Graball-Freerun Road. (T. p. 139, l. 7-11), (T. p. 176, l. 16-17). When Shirley Ross bathe at the house she shared with Walter Ross, it was in cold water. (T. 188, l 21-25). Walter Ross says there had been no gas in the home for at least two to four months. (T. p. 144, l. 21-28).

Walter Ross testified that he and Shirley Ross started arguing a lot when he lost his job with the Mississippi Chemical Corporation. (T. p. 147, l. 16-17). "That's when I started asking her to help me pay the bills... .And I said, "Baby, why don't you get a job?' I said, 'The folks at the school called me,' and I said, 'Why don't you get a job to help me out?' I said, 'If you can make $500 a month, that will help.' And she always said, "I ain't working.' Always said she wasn't working. And wasn't going to work." (T. p. 147, l. 16-28).

At the time of the incident in question, Shirley Ross was employed at Lextron Corporation in Canton, Mississippi. (T. p. 176, l. 22-29). The day before the incident in question, Shirley Ross and Walter Ross had an argument. (T. p. 186, l. 12-15). Walter Ross told Shirley Ross that she was not going to stop him from being with his family on the weekend. (T. p. 186, l. 17-20).

FATHER'S DAY OF 2005

On Father's Day, Shirley Ross and Walter Ross went to Sunday School together. (T. p. 177, l. 12-13), (T. p. 144, l. 17-20). When Sunday School was over, Shirley Ross went home. (T. p. 177, l. 15-16). Shirley Ross stopped by her mother's house for a few minutes.

(T. p. 178, l. 6-7). Then, Shirley Ross went to the local Taco Bell. (T. p. 178, l. 8-9). From there, Shirley Ross went home. (T.p.189, l. 9). Shirley Ross testified "I sat down at the table. I started to eat my food; started to unwrapping the paper, whatever. And then he dumped my tea into my food. And my food and my tea ran all in my lap. He started ranting and raving, "Did you pay the light bill? Did you pay the light Bill?" (T. p. 178, l. 12-17).

Shirley Ross told Walter Ross that she did not pay the light bill. "The lights should have already been paid, like three or four weeks ago." (T. p. 178, l. 18-20).

Walter Ross testified that when Shirley Ross came home after Sunday School, she did not have any food from Taco Bell with her. (T. p. 146, l. 5-8). Walter Ross testified that he and Shirley Ross did not have an argument. (T. p. 146, l. 9-21). Walter Ross testified that "when she came in the house from her church, I left right back out." (T. p. 146, l. 25-28).

After that argument, Walter Ross left his home presumably to attend his family church in Pickens. Walter Ross asked Shirley Ross to accompany him. (T.p. 177, l. 14-15)"I didn't even want to go. But he left and he went to the program. And I stayed there at the house with the mess, and I was hungry." (T. p. 178, l. 25-28). Walter Ross and Shirley Ross were also scheduled to attend a Youth Day program at Shirley Ross' church at 3 p.m. that afternoon. (T. p. 177, l. 16-21). Walter Ross was late returning home so Shirley Ross decided to attend the Youth Day program at her church without him. (T. p. 177, l. 18-21). When Shirley Ross returned home after the Youth Day program, Walter Ross was ranting and raving and wanted to know why I left him. He already knew why I left him, because he was late picking me up. And he started to fussing and starting to arguing. " (T. p. 178. l. 1-5). Walter Ross left to attend another church service. (T. p. 146, l. 25-28).

While Walter Ross was away from the house, Shirley Ross decided she wanted to fry some shrimp. (T.p. 178, l. 28-29). Shirley Ross also wanted to bathe in preparation for work that night. (T.p. 179, l. 14-16). At some point, Shirley Ross put some grease in the deep fryer.

Shirley Ross was in the kitchen when Walter Ross returned home. (T. p. 180, l. 6-7). Shirley Ross was heating water to take a bathe before getting ready for work. (T. p. 183, l. 28-29). Walter Ross told her "Shirley, I will beat your ass and put you in the hospital." (T.p. 186, l. 27-28). Shirley Ross also was heating grease in a deep fryer to fry shrimp. (T. p. 183, l. 27-28). The argument escalated when Walter Ross came into the kitchen and struck Shirley Ross. (T. p. 180, l. 6-12). "He hit me. He did hit me. He did hit me, and that's when I put that grease on him, and he turned, made a quick turn. I saw that roasting pan on my counter-top, and that's when I put that water on him." (T. p. 180, l.8-12). Shirley Ross testified that she had no reason not to doubt Walter Ross. She testified, "Now, I don't know about nobody else, but when somebody tells you that, I'm thinking that he's going to do it, because I know the man is able and capable to do it. So yes, I was scared." (T.p. 186-187).

The grease and water did not keep Walter Ross off of Shirley Ross. "Mr. Ross still had strength enough to fight. We was falling all down in the kitchen on the floor, falling around in the grease and water. He still had strength enough to do that. I didn't have no object in my hand. I couldn't put my arm, my hand around Ross' neck if I tried to, this day or any other day. That is not true. I was trying to push him off, pushing him off of me, pushing him off of me. And to this day, I don't know how Ross got off of me. I don't know if he just decided he was going to get up off of me or if I pushed him off of me. I don't know. All I know is that he went out my front door, our front door, and down the street. I went to my front door. I didn't see him anywhere. I walked out in the yard to the

edge of the street, and there he was, in a neighbor's yard. I don't know who that neighbor was. I don't know who the neighbor was. So I go back in the house and I got my keys. I saw him in the neighbor's yard. I saw the neighbor. I'm yelling out the window, 'Call 9-1-1,' because I did not call 9-1-1 before I left the house.'" (T. 180, l. 13-29).

Shirley Ross testified that she was defending herself. (T. p. 187, l. 16-17). "Yes, I was defending myself. I had nobody else around to defend myself. I know my husband better than anybody in here, because I lived with my husband, I slept with my husband, I dealt with my husband. I know that my husband is capable of doing. I know my husband would have hurt me that day, because he was furious. I have never in my life met evil on that kind of level before. Never. And I have come across it, sir. But I have never met evil on that level before. And like I said, before that day, the man already told me that he was going to do to me. He spoke to me words on himself, he was going to put me in the hospital." (T. p. 187, l. 16-29).

INVESTIGATION BY THE SHERIFF'S DEPT.

At trial, Deputy Edward Trotter testified that he interviewed Walter Ross at King Daughter's Hospital on June 19, 2005. (T. p. 102, l. 19-20). Deputy Trotter testified Walter Ross said that when he returned home, they were arguing about the bills, and that's when she threw the hot grease and water on him, and that it seemed that she was waiting on him to get home." (T. p. 128, l. 12-19).

Deputy Trotter also interviewed Shirley Ross at the hospital. (T. p. 122). Shirley Ross was nervous and upset. (T. p. 122, l. 12-18). Deputy Trotter claims that he read Shirley Ross her Miranda rights, but she did not sign a statement waiving her Miranda rights. (T. p. 122, l. 22-25). According to the statement taken by Deputy Trotter, Shirley Ross told him, "This ain't nothing, this ain't something that just happened yesterday. This has been

building and building with me and Ross, me and Ross, and I really ain't told nobody about nothing. I just kept everything to myself. I really didn't want anybody to know what was going on in my house." (T. p. 124, l. 25-29, p. 125, l. 1-2).

At trial, Walter Ross testified that "no words were passed" between him and Shirley Ross on June 19, 2005. (T. p. 148, l. 23-27). "She didn't say a harmful word to me, if she said anything... .I knew she was mad, because she had been acting crazy all the week, and I didn't say nothing to her ... Unh-Uunh. We weren't speaking. We were on bad terms. We weren't speaking. She wasn't even sleeping with me." (T. p. 152, l. 14-27).

COLLECTION OF EVIDENCE

Though aware of the confrontation between the couple, on June 19, 2005, Deputy Trotter did not go to the scene of the alleged crime until a couple of days later. (T.p. 115, l. 6-8) When Deputy Trotter finally went to the house, he took photographs of the deep fryer and the roaster Shirley Ross used to heat water. (T.p. 115, l. 15-20). The fryer and roaster operated on electricity. (T. p. 117, l. 19-21).

SUMMARY OF ARGUMENT

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE PROSECUTOR TO STRIKE MEMBERS OF THE VENIRE FOR CAUSE IN THE ABSENCE OF SHOWING THAT THE JURORS WERE INCOMPETENT AND WOULD NOT FOLLOW THE INSTRUCTIONS OF THE COURT

2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GAVE THE STATE MORE PEREMPTORY CHALLENGES THAN ALLOWED BY LAW AND DID NOT FIND *SUA SPONTE* THAT THE PROSECUTOR VIOLATED *BATSON* BY USING HIS PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN FEMALES FROM THE VENIRE

3. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO DECLARE A MISTRIAL WHEN WALTER ROSS TESTIFIED THAT HE DIED TWICE

4. SHIRLEY ROSS' TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION

5. TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN SHE DID NOT *SUA SPONTE* DECLARE A MISTRIAL AND/OR INSTRUCT THE JURY TO DISREGARD THE PROSECUTOR'S ARGUMENT

6. THE CUMULATIVE ERRORS IN THIS CASE DENIED SHIRLEY ROSS A RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE PROSECUTOR TO STRIKE MEMBERS OF THE VENIRE FOR CAUSE IN THE ABSENCE OF SHOWING THAT THE JURORS WERE INCOMPETENT AND WOULD NOT FOLLOW THE INSTRUCTIONS OF THE COURT

In the case *sub judice*, the trial court erroneously allowed the prosecutor to strike jurors for cause where the record lacked proof that the jurors in question were incompetent and/or refused to follow the instructions of the court. While defense counsel did not object to the exclusions of all of the jurors in question, this Court should review this error under the plain error rule because it affected Shirley Ross' constitutional right to a fair and impartial jury. *Williams v. State,* 794 So.2d 181, 187 (¶ 23) (Miss. 2001) (stating that this Court may apply the plain error rule to an error not properly preserved for review if the error affects a prisoner's substantive or fundamental rights).

The right to a jury trial is protected by Article 3, § 31 of the Mississippi Constitution. In addition, Article 3, § 14 of the Mississippi Constitution guarantees due process of law, including a fair and impartial trial. *Johnson v. State*, 476 So.2d 1195, 1208 (Miss. 1985).

The Mississippi Supreme Court has repeatedly stated circuit judges have wide discretion "in determining whether to excuse any prospective juror, including one challenged for cause. The circuit judge has an absolute duty, however, to see that the jury selected to try any case is fair, impartial and competent." *Haggerty v. Foster*, 838 S.2d 948, 957 (Miss. 2003) 'Trial judges must scrupulously guard the impartiality of the jury and take corrective measures to insure an unbiased jury." *Brown v. Blackwood*, 697 So.2d 763, 769 (Miss. 1997).

The right to challenge for cause is without limit as to number so long as the cause therefore is sufficient. *Smith v. State*, 198 So.2d 562. Generally, a juror who may be

removed for cause is one against whom a challenge exists that the juror's impartiality at trial is likely affected. *Fleming v. State*, 732 So.2d 172, 180 (Miss. 1999). If a juror on voir dire states clearly that, at either phase of trial, he or she would refuse to follow the instructions of the court, a sufficient basis exist for that juror to be removed for cause. *Jones v. State*, 461 So.2d 686, 692 (Miss. 1984).

In death penalty cases, the United States Supreme Court held "that a defendant may not constitutionally be sentenced to death by a jury from which the trial court has excluded those persons with general objections to the death penalty of (sic) conscientious scruples against its use." *Jones*, 461 So.2d at 691, *quoting Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), the supreme court refined its decision in *Witherspoon*. 461 So.2d at 691. In *Davis*, the United States Supreme Court held that the "exclusion of just one prospective juror in violation of *Witherspoon* is sufficient to vitiate a death sentence."

Although *Jones*, *Witherspoon* and *Davis* are death penalty cases, and the case *sub judice* is a non-capital case, the cases are instructive to the extent that they stand for the proposition that a juror should not be excluded for cause unless the juror indicates that s/he is not competent and will not follow the instructions of the court. "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 (Miss. 1997).

In *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), the court held erroneously striking jurors for cause infects the entire process. More importantly, the Court in *Gray* rejected the notion that a *Witherspoon-Witt* error may be cured by reference to

the fact that the prosecutor has peremptory challenges remaining to strike the juror in question. In fact, the *Gray Court* stated that "the nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror harmless." Id. at 665, 107 S.Ct. at 2055.

Here, the State challenged Juror No. 7, Krystal Levill Morton, an African-American female, for cause. The prosecutor, who is white, told the court "Juror Number 7, Ms. Morton, has a paper due or some work due today; hasn't done any work on it, says that would be on her mind and would interfere with her ability to pay attention." (T. p. 75-76). Defense counsel objected to the granting of a challenge for cause as to Ms. Morton. (T. p. 76, l. 4-8). The trial court granted the cause challenge. (T. p. 76, l. 9-10). In the absence of proof that Krystal Levill Morton could not be fair and would not follow the instructions of the court, there was not a sufficient basis in the record to support the trial court overruling defense counsel's objection to the exclusion of Juror No. 7 for cause. Consequently, this Court should hold that Krystal Levill Morton should not have been removed for cause.

In addition, there is not sufficient proof in the record to support the trial court granting the State's cause challenge of Juror No. 22, Bobbie Hubbard, an African-American female. The prosecutor stated "I've got 22, because of, I guess, both the relationship that she said her daughter, that the defendant's daughter used to date her son, and then Mr. Clay also brought out additional stuff how she had been in the victim's household and been friends with the family, and I just think she's too close to the case." (T. p. 76, 21-28). Defense counsel did not object. (T. p. 77, l. 1-3).

In *Fleming*, the Court has held that a prospective juror who was related to a witness should have been removed for cause. 732 So.2d at 182. Juror No. 22 was not

related to the defendant and/or any witnesses in this case. The court has accepted the use of a peremptory challenge against a juror who was acquainted with the defendant's family. See, *Govan v. State*, 591 So.2d 428, 430 (Miss. 1991), *Porter v. State*, 616 So.2d 899, 907 (Miss. 1993). This Court has not held that mere acquaintance with a defendant and/or a member of a defendant's family is grounds to exclude prospective juror for cause. Obviously, mere acquaintance could not disqualify a prospective juror as there would be many counties throughout the state where trials could not occur.

During voir dire, the prosecutor said to Ms. Hubbard: "You have already told us that that wouldn't make any difference, you can lay all of that aside and try this case solely on what I've talked about, the law and the evidence." (T. p. 43, l. 9-12). Ms. Hubbard replied, "Yes." (T. p. 43, l. 13). Because Juror No. 22 stated that she would lay aside her relationship with the defendant's daughter and "try this case solely on what I've talked about, the law and the evidence," the trial court should not have allowed the State to exercise a challenge for cause against Ms. Hubbard. Instead, the State should have been forced to use one of its six peremptory challenges against Ms. Hubbard.

The trial court also erred when it allowed the State to challenge Roger Smith, Juror No. 31, an African-American male, for cause. (T. p. 77, l. 11-18). The prosecutor, claimed during jury selection: "I don't know what his problem is, but he raised his card one time, and when I went back and talked to him, he laid completely back in his chair, wouldn't respond to the question, and I couldn't get anything out of him. He was just acting odd." (T. p. 77, l. 11-18). Defense counsel did not object. (T. p. 77, l. 19-22).

The record during voir dire does not support the State's contention. The record shows that Roger Smith told the court that his brother was married to Shirley Ross'

cousin. (T. p. 27, l. 17-18). Roger Smith stated that there was nothing about that relationship that would prevent him from being fair and impartial. (T. p. 27, l. 21-24). Consider the following colloquy between the prosecutor and Roger Smith.

> "Mr. Smith, you indicated that your brother married the defendant's cousin? Is that right?
>
> A. Yes, sir.
>
> Q. How well would you know, based on that relationship, your brother's relationship with her cousin, how much contact did you have with Ms. Ross, the defendant?
>
> A. Not too much.
>
> Q. So you don't see her on a regular basis or have much contact with her on a regular basis?
>
> A. No, sir.
>
> Q. Okay. Is there anything at all about that relationship or that, I guess, because by marriage, kind of part of an extended family, is that going to have any bearing on your decision in this case?
>
> A. No, sir.
>
> Q. It won't?
>
> A. No.

As stated above, while mere acquaintance has been recognized as a racial neutral reason to exercise a peremptory challenge, this Court has not held that mere acquaintance is a valid reason to strike a juror for cause. Where Roger Smith informed the court of his marriage to the defendant's cousin, indicated that he could be fair and impartial, this Court should find that the trial judge should not have allowed the State to strike Roger Smith for cause. Again, the State should have been required to use one of its six peremptory challenges against Roger Smith.

Because prospective jurors were removed for cause in the absence of a sufficient record, this court should find that the jury selection process was contaminated and cannot be allowed to stand. Moreover, this Court should hold that the challenges for cause at issue in this case were actually peremptory challenges. If this Court accepts the defendant's argument that the challenges of either Jurors No. 7, 22 and 31 were really peremptory challenges, this Court should find that it was plain error for the trial court to grant the State more peremptory challenges than allowed by law. Rule 10.01 of the Uniform Circuit and County Court Rules provides in part that "in felony cases not involving the possible sentence of death or life imprisonment, the defendant and prosecution shall have six (6) peremptory challenges for the selection of the twelve regular jurors. These challenges may not be used in the selection of an alternate juror or jurors."

Because the trial court erroneously allowed the prosecutor to strike jurors for cause in the absence of sufficient proof to support the challenges for cause, this Court should find that the entire jury selection process was contaminated and that reversible error occurred in violation of the 6th and 14th Amendments to the United States Constitution, sections 14 and 26 of the Mississippi Constitution and MCA § 13-5-2.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GAVE THE STATE MORE PEREMPTORY CHALLENGES THAN ALLOWED BY LAW AND DID NOT FIND *SUA SPONTE* THAT THE PROSECUTOR VIOLATED *BATSON* BY USING HIS PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN FEMALES FROM THE VENIRE

In the instant case, defense counsel did not object to any of the State's peremptory challenges. However, this Court should nevertheless examine this matter under the plain error rule because Shirley Ross' substantive and fundamental rights were affected.

To establish a *Batson* violation, the party who objects to the peremptory strike "must first make a prima facie showing that race/sex was the criteria for the exercise of the peremptory strike." *Flowers v. State*, 2006 WL 1767334 (Miss.). A defendant can make a prima facie case of discrimination by showing (1) that he is a member of a cognizable racial/gender group; (2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race/gender; and (3) and the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities.

This Court has recognized five indicia of pretext that are relevant when analyzing the race/gender neutral reasons offered by the proponent of a peremptory strike, specifically:

1. disparate treatment, that is presence of unchallenged jurors of the opposite race/gender who share the same characteristic given as the basis for the challenge;
2. the failure to *voir dire* as to the characteristic cited;
3. the characteristic cited is unrelated to the facts of the case;
4. lack of record support for the stated reason; and group-based traits.

As stated above, defense counsel did not object to any of the State's peremptory challenges. The prosecutor struck Gwen Allen, Juror No. 1, Jo Ann Jones, Juror No. 13, Vanessa Bullock, Juror No. 16 and Julie Robinson, Juror No. 21. All of those jurors are African-American females. Had defense counsel objected, the prosecutor would have been required to supply racially/gender neutral reasons for using peremptory challenges on minority members. *Bush v. State*, 585 So.2d 1262, 1268 (Miss. 1991), *aff'd* 597 So.2d 656 (Miss. 1992). The defendant may then rebut the reasons offered by the prosecutors.

A review of the record demonstrates that the State would have not been able to establish that the State was not discriminating against Jurors No. 1, 13, 16 and 21 on the basis of their race and sex. Like seven of the white jurors, who were selected to serve on the jury, Julie Robinson did not respond to any questions asked during voir dire. So, if the prosecutor accepted white jurors who did not respond to any questions asked on voir dire, the prosecutor should not have been able to strike Juror No. 21 for failure to respond to questions during voir dire.

Juror Nos. 12 and 16 stated during voir dire that they had seen Shirley Ross around town. White jurors, Wendy Perry and Caley Wayne Creel stated that they knew Adam Selby, one of the prosecution's witnesses. Yet, the prosecutor moved to exclude the African-American jurors and did not move to exclude the prospective white jurors.

In the instant case, Shirley Ross contends that because there is not a sufficient basis in the record to support the prosecution's exclusion of Jurors No. 7, 22, and 31, this Court should treat those challenges for cause as peremptory challenges. In *Pinkney v. State*, 538 So.2d 329, 347 (Miss. 1989), the Mississippi Supreme Court held that a proper Witherspoon challenge for cause is a "racially neutral reason" to strike a prospective juror. Implicit in the Pinkney's Court holding is that an improper *Witherspoon* challenge for cause is not a racially neutral reason to strike a juror. If that is so, and this Court finds that there was not sufficient proof in the record to support the exclusion of Jurors 7, 22, and 31, for cause, this Court should examine the exclusion of those jurors under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

If the challenges of Jurors No. 7, 22, and 31 are evaluated under *Batson* along with the prosecutor's peremptory challenges of Jurors No. 1, 13, 16, and 21, there is no question that Shirley Ross can establish that the prosecutor in this case had a mind to

discriminate against African-Americans, and more particularly African-American females.

Specifically, Shirley Ross calls this Court's attention to the manner in which the prosecutor treated Juror No. 7, Krystal Levill Morton, and Juror No. 12, Wendy Perry, who is white, during voir dire. Both Jurors No. 7 and 12 answered affirmatively when the prosecutor asked how many prospective jurors had school-age and small children. The prosecutor went to great lengths to put information in the record to strike Juror No. 7. In sharp contrast, when Wendy Perry, Juror No. 12, who is a white female, told the prosecutor "I have two kids that I'm responsible for after school, so I wouldn't, if I have a chance to let my husband know that he has to get them, then I'll be fine, but I would be worried if I wasn't, if it was getting close to that time and I haven't talked to him to be able to pick them up." (T. p. 57, l. 14-21). The prosecutor responded: "okay. When we take a break, would you be able to do that during the course of the break?" (T. p. 57, l. 22-23). The prosecutor stated, "And as long as you do that, it wouldn't be any problem?"

In the exchange between the prosecutor and the prospective jurors, it is clear that the prosecutor had a predisposition toward seating white women on the jury as opposed to African-American women. When the prospective white juror, Juror No. 12, revealed that she would be worried about her children, the prosecutor improperly instructed her to call her husband during the break to inform him that he would need to pick up their children after school.

The prosecutor did not challenge Juror No. 12, Wendy Perry, who is white, for cause. On the other hand, the prosecutor challenged Juror No. 7 for cause. In addition, the prosecutor challenged Juror No. 42, Juanesha Luckett, who is an African-American

female, because "she said she had two school-aged daughters that got out at 3:30 and nobody else to care for them, and her mind would be on that this afternoon." The prosecutor did not suggest that Juanesha Luckett telephone her grandmother or any other relative or friend during the break to inform them that they needed to pick up her children from school as the prosecutor did when it came down to Juror No. 12, Wendy Perry, who is white.

The prosecutor's conduct toward Wendy Perry was improper and it demonstrates that the prosecutor was engaging in racially discriminatory pre-selection of jurors. At the time the prosecutor instructed Juror No. 12 to telephone her husband during the break, how did the prosecutor know that Juror No. 12 would be seated on the jury? The prosecutor's instructions to Juror No. 12 shows that the prosecutor knew at that moment that he was predispositioned to exclude African-American women and to stack the jury with white women. In the end, no African-American females were selected to sit on the jury. The jury was composed of six white females, three African-American males, and three white males. Two white females were seated as alternates.

In addition, this Court should infer that the prosecutor had a mind to discriminate, and did in fact engage in racial discrimination, in light of the reason that he offered for challenging an African-American male, Roger Smith, Juror No. 31. That is, the prosecutor claimed that Juror No. 31 had been unresponsive while the record reveals that Juror No. 31 was forthright with the court and the prosecutor.

Moreover, while the prosecutor challenged Roger Smith and Bobbie Hubbard for cause because they presumably had ties to the defendant, the prosecutor did not challenge all prospective jurors who had ties with the defendant and the victim. Both Bobbie

Hubbard and Catherine Green stated during voir dire that they knew Shirley Ross' daughter Jurrie Austin, the state did not challenge Juror No. 45 Catherine Green for cause, presumably because Catherine Green was so far down on the jury list that the prosecutor knew that there was no way that Catherine Green would be seated.

When the State's challenges for cause at issue in this case are juxtaposed to the defendant's challenges for cause, it is clear that the prosecutor held prospective jurors who knew the defendant to one standard and prospective jurors who knew the defendant to another standard. For example, when defense counsel challenged Anita Lewis, Juror No. 40 and Juror No. 11, Norman Harris Davis, for cause, the prosecutor was quick to point out respectively that "she said she could lay that aside and be fair," and ""he said it wouldn't make any difference, he could be fair and impartial." (T. p. 80, l. 10-11, p. 81, l. 2-3). In addition, the stated selected Juror No. 12, Wendy Perry, who is white and Caley Wayne Creel, who is white, even though they stated that they knew one of the prosecution's witnesses, Adam Selby Jr.

This Court should not allow the prosecutor to talk out of both sides of his mouth. More importantly, this Court should require the State, the defendant, and the Court to treat similarly situated jurors similarly. Because the record is replete with proof that similarly situated jurors were not treated similarly, this Court should find the State violated *Batson* and Shirley Ross' Equal Protection rights and her right to a fair trial. In the alternative, this Court should remand this matter to the trial court and require the prosecutor to state his race/gender neutral reasons for excluding all African-American women from the jury.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO DECLARE A MISTRIAL WHEN WALTER ROSS TESTIFIED THAT HE DIED TWICE

In *Anderson v. State*, 332 So.2d 420, 425 (Miss. 1976), the Mississippi Supreme Court stated that under some circumstances, the trial judge of his own motion should direct a mistrial. In *Anderson*, a witness, who was a co-defendant of Anderson and represented by the same defense counsel, testified when called by the State that Anderson's counsel destroyed evidence that incriminated Anderson. 332 So.2d at 424. The Supreme Court noted that "when the attorney representing the appellant was branded a conspirator to destroy the evidence of armed robbery by Princess Smith, also his client, his effectiveness as an attorney ceased." Id. More importantly, the Supreme Court held that the citation of authority was not needed for it to reach the conclusion that Anderson was not accorded due process of law, a fair trial. Id.

In *Stokes v. State*, 484 So. 2d 1022, (Miss. 1986), the Mississippi Supreme Court reversed a guilty conviction and remanded the matter to the trial court for a new trial. The defendant in *Stokes*, the defendant was accused of forcible rape. During voir dire, the state revealed that the victim had undergone an abortion. Id. at 1023. Defense counsel moved for a mistrial. Id. at 1024. The trial judge overruled the motion for mistrial. Id. On appeal, the Mississippi Supreme Court stated that informing the jury that the victim had undergone an abortion was prejudicial and should never have been mentioned. Id. at 1025. The *Stokes Court* stated "elementary to all trial proceedings is the proposition that the occurrence of any prejudicially incompetent matter of misconduct before a jury, the damaging effect of which cannot be removed by admonition or instructions, necessitates a mistrial." Id. The Mississippi Supreme Court in *Stokes* also cited *Anderson v. State*. Id.

During Walter Ross' testimony, the prosecutor asked him about the nature of his injuries. While testifying about the nature of his injuries, Walter Ross stated that he died twice after Shirley Ross threw grease and water on him. There is no question that Walter Ross' statements were prejudicial on their face. Despite the detrimental effect of such testimony, defense counsel did not object. In addition, the trial judge did not interrupt Walter Ross and instruct the jury to disregard the testimony of Walter Ross. (T. p. 139, l. 17-18). The trial court did not instruct the jury to disregard Walter Ross' statements about having died twice. (T. p. 139, l. 17-18).

The testimony elicited from Walter Ross was tantamount to the witness' testimony in *Anderson* and the prosecutor's statement during voir dire in *Stokes*. Shirley Ross' defense was eviscerated when Walter Ross testified that he had died twice. This was suppose to be a trial about whether Shirley Ross caused serious bodily injury to Walter Ross, not whether Walter Ross died twice and lived to tell about it. Because this was an aggravated assault trial as opposed to a murder trial, no one should have mentioned death. This prejudicial testimony left unchallenged was so devastating that the damaging effect could not be removed by admonition or instructions and necessitated a mistrial.

In *Stokes*, the Mississippi Supreme Court stated that when the prosecutor revealed that the victim had undergone an abortion, the jury very well could have concluded that the defendant not only raped the victim, but the defendant impregnated the victim as well. 484 So.2d at 1025. In the case *sub judice*, the jury very well could have concluded that Shirley Ross killed Walter Ross twice, but he miraculously lived to testify about his two encounters with death.

This Court should find that the trial court *sua sponte* should have directed a mistrial when Walter Ross testified that he had died twice because there was no way to remove the

taint once Walter Ross stated two times that he died twice. *Anderson v. State*, 332 So.2d at 425. If this Court finds that the trial court should not have directed a mistrial, this Court should find that at a minimum, the trial judge should have *sua sponte* instructed the jury to disregard the testimony of Walter Ross that he died twice, and should have given a limiting instruction on the matter.

More importantly, this Court should find that defense counsel's failure to object does not waive this error because this error goes to the heart of Shirley Ross' constitutional right to a fair trial by an impartial jury.

SHIRLEY ROSS' TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF THE 6TH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS AND MISSSISSIPPI LAW

The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). That is, the defendant must allege with specificity and details that his trial counsel's performance was deficient and that deficient performance prejudiced his defense. *Stringer v. State*, 454 So.2d 468 (Miss. 1984), *Brooks v. State*, 573 So.2d 1350 (Miss. 1990). See also, *Hymes v. State*, 703 So.2d 258 (Miss. 1997).

In the instant case, defense counsel forfeited defendant's right to be tried by a fair and impartial jury when defense counsel failed to voir dire the jury to determine whether the prospective jurors and/or any of the prospective jurors family members or close friends had been accused of aggravated assault and/or were victims of aggravated assault and/or domestic violence.

The right to a fair trial by an impartial jury is guaranteed by both the federal and state constitutions. *Johnson v. State*, 476 So.2d 1195, 1208 (Miss. 1985). This Court has held "a jury selection procedure which gives the defendant 'a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge that juror' is proper." *McLemore v. State*, 669 So.2d 19, 25 (Miss. 1996), *quoting Peters v. State*, 314 So.2d 724, 728 (Miss. 1975). In fact, "[v]oir dire examination is often the most crucial crucible in forging our primary instrument of justice: the fair and impartial trial." *Myers v. State*, 565 So.2d 554, 558 (Miss. 1990). In *Burroughs v. State*, 767 S.2d. 246, (Miss. App. 2000), the court stated "[l]ike a fine suit of clothes, a jury must be tailored to fit, and court and counsel examine prospective jurors under settled rules tending toward that fit."

"No right ranks higher than the right of the accused to a fair trial." *In re Garnett River States Publishing Co. v. Hand*, 571 So.2d 941, 942 (Miss. 1990), quoting *Press-Enterprise Company v. Superior Court*, 464 U.S. 505, 508 (1984). Thus, one of the most important functions of a court is to ensure that a defendant receives a fair trial. In sitting a jury to try any case, the trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors. *Howell v. State*, 860 So.2d 704, 727 (Miss. 2003).

This court has held that the trial court should allow counsel to ask questions which would enable a defendant to determine whether to challenge a particular juror. In *Havard v. State*, 928 So.2d 771 (Miss. 2006), this Court approved a trial judge's explanation of the purpose of voir dire examination. That trial judge told the venire men that the purpose of voir dire is " to discover anything that in all honesty would make it very difficult for you to be a totally fair and impartial juror." *Havard*, 928 So.2d at 780. See also, *Puckett v. State*, 737 So.2d 322, 332 (¶ 23) (Miss. 1999). The *Havard* Court stated that "[t]he answers, or lack of

answers, to the voir dire examination, regardless of who was asking the question, all served the same purpose." 928 So.2d at 782.

In the instant case, defense counsel failed to raise a critical question during voir dire even though the question had not been asked by the trial judge or the prosecutor. More specifically, defense counsel did not ask members of the jury pool whether they and/or any of their family members or close friends had been accused of aggravated assault and/or domestic violence and whether any of the prospective jurors and their family members or close friends was victims of an aggravated assault and/or domestic violence.

In *Havard*, the defendant complained about his counsel's performance during voir dire. The *Havard* Court came to defense counsel's side and pointed out that defense counsel asked members of the venire if they had been the victim of a crime. Here, the record is absent of questions posed by the trial judge, the State and/or defense counsel about whether any member of the jury pool and/or any of their family members or close friends had been accused of aggravated assault and/or domestic violence and whether any of the prospective jurors and their family members or close friends were victims of an aggravated assault and/or domestic violence. Defense counsel's failure to ask the questions outlined above was so serious that it deprived Shirley Ross of a fair trial with a reliable result.

In *Price v. State*, 749 So.2d 1188, 1199 (Miss. App. 1999), the Court rejected the defendant's contention that trial counsel was ineffective because he failed to conduct an adequate voir dire. Specifically, the defendant's counsel failed to ask jurors whether any of them or their immediate family members of friends had been the "victims of sexual assaults or crimes in general." In *Price*, the State during voir dire asked "Have any of you ever had family members who have been the victims of a crime of this type?" Because the State

inquired into the matter, the Court concluded that Price's counsel's questioning about the same matter would have been redundant.

What *Price* and *Havard* teach us is it is elementary in a sexual battery case that members of the jury panel must be asked whether they and/or any of their family members or close friends were victims of crime, and more specifically a sexual battery. Here, there is no way that this Court can say that a fair and impartial jury was seated in the absence of proof that prospective jurors were asked the questions outlined above.

In *U.S. v. Greer*, 968 F.2d 433, 441 (5th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1390 (1993), the Court stated that without an adequate foundation laid by voir dire, counsel cannot exercise sensitive and intelligent peremptory challenges. In fact, "voir dire is the only means by which the defendant can develop the information necessary to decide which jurors to challenge, either peremptorily or for cause." *U.S. v. Perkins*, 748 F.2d 1519, 1531 (11th Cir. 1984).

This Court should find trial counsel committed plain error when he did not inquire into whether any member of the jury pool and/or any of their family members or close friends had been accused of aggravated assault and/or domestic violence and/or the victim of an aggravated assault and/or domestic violence. There is no way that this Court can conclude that trial counsel was not ineffective when he failed to ask such a critical questions, especially when certain questions had not been posed by the trial court and/or the state. In the alternative, this Court should remand this matter to the Circuit Court of Yazoo County, Mississippi for a hearing to determine whether any member of the jury pool and/or any of their family members or close friends had been accused of aggravated assault and/or domestic violence and/or the victim of an aggravated assault and/or domestic violence.

In addition, this Court should find that defense counsel in this case rendered ineffective assistance of counsel because he failed to ensure that there was sufficient proof in the record to support the exclusion of prospective jurors for cause. Under § 13-5-69 Mississippi Code Annotated (1972((as amended), defense counsel has the right to ask question of jurors who the court purports to excuse for cause. *Mack v. State*, 650 So.2d 1289, 1304 (Miss. 1994). For the reasons stated above, this Court should find that defense counsel was deficient because he failed to point out to the judge that there was not sufficient proof to strike Jurors 7, 22, and 31 for cause, and/or defense counsel failed to object to the exclusion of those jurors for cause and did not seek to question those jurors to show that they were competent and would follow the instructions of the court.

In *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), the court held erroneously striking jurors for cause infects the entire process. In this case, the entire process was infected when the State was allowed to strike jurors for cause in the absence of sufficient proof in the record to show that the jurors were incompetent and/or stated that they could not be fair.

This Court also should find that trial counsel was ineffective because he did not object to any of the State's peremptory challenges even though he could see that African Americans, particularly African-American females, were being systemically excluded from the jury. The Sixth Amendment to the United States Constitution entitles a defendant to a presumption of innocence until he is found guilty by an "impartial jury." Mississippi insures this right through both statutory and case law. Miss. Code Ann. § 13-5-2 (Rev. 2002). " It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with is chapter to be considered for jury service

in this state and an obligation to serve as jurors when summoned for that purpose. A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status. This statutory policy has been reinforced by this Court, through its position that 'courts must make every reasonable effort to comply with the statutory method of drawing, selecting and serving jurors' to keep the jury system 'untainted and beyond suspicion.'" *Yarbrough v. State*, 911 So.2d 951, 954, (Miss. 2005) citing *Avery v. State*, 555 So.2d 1039, 1044 (Miss. 1990), *overruled on other grounds*, *Mayfield v. State*, 612 So.2d 1120, 1129 (Miss. 1992).

Upon seeing that the State had failed to put sufficient proof in the record to sustain challenges for cause, coupled with the State's exclusion of African-American females, defense counsel should have objected. Had defense counsel objected, the trial court would have been required to ask the state to state the non-discriminatory reasons for using four of its six peremptory challenges to remove African-American females from the jury. In the absence of such a record, there is no way that defense counsel could have concluded that the state's exercise of four of its six peremptory challenges were not mere pretexts for racial/gender discrimination. This Court should remand this matter to the Circuit Court of Yazoo County and order the trial judge to hold a hearing in open court and require the State of Mississippi to state its non-discriminatory reasons, if any, for excluding all African-American females, Gwen Allen, Juror No. 1, Jo Ann Jones, Juror No. 13, Vanessa Bullock, Juror No. 16, and Julie Robinson, Juror No. 21.

This Court also should find that Shirley Ross' trial counsel was ineffective when he failed to object and move for a mistrial when Walter Ross told the jury that he died twice. Defense counsel should have immediately objected to Walter Ross' testimony. Had defense counsel objected to Walter Ross' testimony that he died twice, the trial

judge would have had to decide whether to sustain the objection. If the trial judge had sustained the objection, defense counsel should have moved for a mistrial. Had the trial judge overruled defense counsel's request for a mistrial, defense counsel should have asked the trial judge to admonish the jury to disregard Walter Ross' testimony that he died twice. *See*, *Mark v. State*, 532 So.2d 976, 981 (Miss. 1988). Although it is elementary that failure to object and request a mistrial will result in a waiver, defense counsel simply sat on Shirley Ross' rights.

This Court should also find that defense counsel was ineffective because he left Walter Ross' incredulous testimony unchallenged even though defense counsel had in his possession medical records of Walter Ross. There is nothing in the record to support Walter Ross' testimony that he died twice. Defense counsel was deficient when he failed to object due to the prejudicial testimony and when he did nothing to contest the incredulous testimony even though he had documents in his possession that he could have used to impeach Walter Ross on this matter.

The right to impeach or to attack a witness' credibility is a right both secured by the Mississippi evidentiary rules and the confrontation clauses of the federal and state constitutions. *Sayles v. State*, 552 So.2d 1383, 1387 (Miss. 1989); *Suan v. State*, 511 So. 2d 144, 148 (Miss. 1987); *Valentine v. State*, 396 So.2d 15, 16-17 (Miss. 1981). In Mississippi, criminal defendants are allowed "wide-open cross-examination of any matters affecting the credibility of the witness." *Meeks v. State*, 604 So.2d 748, 755 (Miss. 1992); M.R.E. 611(b); *Sayles v. State*, 552 So.2d 1383, 1385 (Miss. 1989); *Miskelley v. State*, 480 So.2d 1104, 1111-12 (Miss. 1985). Cross-examination includes a witness' possible interest, bias, or prejudice in a case." *Meeks*, 604 So.2d 755; *Hill v. State*, 512 So.2d 883 (Miss. 1987); *Sayles*, 552 So.2d at 1386.

The issue of Walter Ross' credibility was for the jury to consider. In the instant case, defense counsel should have sought to impeach Walter Ross by presenting him with his medical records and asking him to find any notations in those records to show that he died twice. By failing to cross-examine Walter Ross on this matter, defense counsel left Walter Ross' incredulous testimony unchallenged. Not only was defense counsel's performance deficient, Shirley Ross was prejudiced because she was convicted of aggravated assault. Therefore, this Court should reverse this matter and grant Shirley Ross a new trial where Walter Ross can be fully cross-examined about matters that touch on his credibility.

This Court also should find that defense counsel's performance was deficient and that Shirley Ross was prejudiced where defense counsel failed to request a mental evaluation of Shirley Ross to determine if she was sane at the time of the incident in question. In a case where a defendant's sanity becomes "a significant factor at trial," the State must assure the defendant access to a psychiatrist who will assist the defense in its presentation of evidence. *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

In *Lentz v. State*, 604 So.2d 243, 247 (Miss. 1992), the Mississippi Supreme Court stated that the defendant, a battered woman, was afforded her constitutional rights in regard to her state of mind and competency to stand trial because she was examined by personnel at the Mississippi State Hospital in Whitfield.

In the instant case, Shirley Ross was not even afforded the opportunity to be examined by personnel at the Mississippi State Hospital in Whitfield. In the absence of an examination by the personnel at Whitfield, there is no way this court can say with certainty that Shirley Ross was afforded her constitutional rights in regard to her state of mind and competency to stand trial. This Court should find that defense counsel was ineffective where he failed to seek an order from the Court to examine Shirley Ross' state of mind and

competency to stand trial when defense counsel was aware that Shirley Ross was suffering from major depressive disorder and had been treated for depression but was not on her prescribed medication at the time of the incident in question.

In *Lentz*, the court stated that expert witness testimony is admissible where it "will assist the trier of fact to understand the evidence or to determine a fact in issue. The defendant in *Lentz* sought to introduce expert testimony of battered woman's syndrome to show that the killing of her husband was done in self-defense. The Court quoting its decision in *May v. State*, 460 So.2d 778 (Miss. 1984) stated "[w]hat has come to be known as the battered wife syndrome has important informational and explanatory power and is being accommodated by our law. It does not, however, supplant accountability. When a wife kills her husband under circumstances, objectively speaking, it was not reasonable necessary that she do so in her own self-defense, she should not expect acquittal at the hands of our law, no matter how long she may have been a battered wife."

The *Lentz Court* noted that it has not "issued a blanket prohibition against the admission of testimony regarding the battered women's syndrome; however, we have held that whether a killing is justified upon grounds of self-defense is to be judged by *objective standards*, that is, a killing is justified if the person who kills did so under circumstances which would lead a reasonable person under similar circumstances to conclude she was in imminent danger of death or great bodily harm." 604 So.2d at 246. In *Lentz*, because of the horrific nature of the victim's death, the court concluded expert testimony going to the battered women's syndrome would not have made the issue of whether the defendant reacted as a reasonable person clearer.

Unlike the defendant in *Lentz*, Shirley Ross did not kill her husband. According to Shirley Ross' testimony, Walter Ross was the aggressor on the day in question. Walter paints

a different picture of that day, claiming that he has never hit Shirley Ross. Expert testimony on battered women's syndrome would have made clearer whether Shirley Ross reacted as a reasonable person with her state of mind would have acted when she poured the water and grease on Walter Ross. Because defense counsel did not ask the court t o have Shirley Ross undergo a mental examination and did not seek funds to hire a battered woman's syndrome expert, Shirley Ross was unable to effectively advance position that she was a battered woman who acted in self-defense. Under the circumstances, this Court should conclude that Shirley Ross did not have the assistance from her attorney that was necessary to justify reliance on the outcome of the proceedings.

In addition, this Court should find that Shirley Ross' defense counsel provided ineffective assistance of counsel where he failed to conduct an adequate investigation. In *Foster v. State,* 687 So.2d 1124, 1132 (Miss. 1997), the court held that counsel has a duty to make reasonable investigation or to make reasonable decision that makes particular investigations unnecessary.

In the instant case, the so-called victim, Walter Ross, had been married twice before he wed Shirley Ross. Despite having knowledge of Walter Ross' previous marriages, defense counsel did not conduct any investigation to determine whether Walter Ross' marriages included violence against his former wives, and whether Walter Ross had been the aggressor in violence against his former wives. Given the nature of this case, defense counsel should have armed himself with information about same so that he could impeach Walter Ross when he claimed that he never hit Shirley Ross and that he was not the aggressor on the night of June 19, 2005.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DID NOT *SUA SPONTE* DECLARE A MISTRIAL WHEN THE PROSECUTOR STATED DEFENDANT GOT WHAT SHE DESERVED

The prosecutor's remarks were so prejudicial that it deprived Shirley Ross of her right to a fair trial. *Anderson v. State*, 332 So.2d 420, 425 (Miss. 1976). In closing argument, the prosecutor told the jury "It's a miracle that he's living and she's not charged with murder. A miracle. What she did to him could have and probably should have killed him. It didn't, and for that reason, she's got all she deserves, and that being charged with aggravated assault instead of murder. She's got more than she deserves in benefiting from him not dying from her act, because that's what she intended. (T. p. 235, l. 11-19).

When the prosecutor's argument is coupled with Walter Ross' prejudicial testimony that he died twice, it is clear that the prosecutor was capitalizing on testimony that never should have been heard by the jury. More importantly, since this was an aggravated assault case, the trial judge should not have allowed Walter Ross to testify that he died twice without giving a limited instruction and should not have allowed permitted the prosecutor to argue during closing argument that Shirley Ross, but for a miracle, should be on trial for murder.

THE CUMULATIVE ERRORS IN THIS CASE DENIED SHIRLEY ROSS HER RIGHT TO A FAIR TRIAL

When viewing the prejudicial impact of the errors set forth above denied, it is clear that Shirley Ross was denied her right to a fair trial. While "[i]t is true that not one of these errors, when considered separately and apart from the other is sufficient to justify a reversal of the case, but when they are considered as a whole it is our view that they resulted in the appellant being denied a fair trial. *Hansen v. State*, 592 So.2d 114, 142

(Miss. 1991). Due to all of the errors outlined above, there is no way that this Court can say that Shirley Ross enjoyed a fair trial as guaranteed by the Mississippi and United States Constitutions. Instead, this Court should find from the record before it, it is clear that Shirley Ross' defense counsel's errors, that there is a reasonable probability that she would have received a different result. *DeLoach v. State,* 977 So.2d 400, 404 (Miss. App. 2008).

WHEREFORE PREMISES CONSIDERED, Shirley Ross prays that after oral argument and this Court's consideration of her appeal that the Court of Appeals of Mississippi will reverse this matter, grant Shirley Ross a new trial or in the alternative that this court will remand this matter to the Circuit Court of Yazoo County, Mississippi for a *Batson* hearing as well as a hearing to determine whether any of the jurors who were seated and/or any of their family members or close friends had been accused of aggravated assault and/or domestic violence and whether any of the jurors who were seated victims of aggravated assault and/or domestic violence.

RESPECTFULLY SUBMITTED, this the _____ day of July, 2008.

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CERTIFICATE OF SERVICE

I, Lisa M. Ross, attorney for Shirley Ross, certify that a true and correct copy of the above and foregoing document has been forwarded to the following, via regular mail:

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SO CERTIFIED, this the 14th day of July, 2008.

Lisa M. Ross