IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HARVEY WILLIAMS, JR. — APPELLANT

VS. — NO. 2008-KA-0844-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF FACTS

On the evening of June 22, 2003 three cousins, Calvin Younger, Fletcher Watts, and Joe Pugh, were hanging out in the parking lot of Jay's Lounge on Medgar Evers Boulevard. T. 174. A blue Lincoln Town Car stopped in the middle of the road in front of the club, and its driver, Harvey Williams, Jr., also known as "Smokey," got out of the car. T. 175, 232. What happened next was disputed at trial. Watts and Pugh testified that no words were exchanged between Younger and Williams, nor did any type of altercation occur, and Younger was not armed. T. 178, 201, 235. Rather, as Younger walked toward Williams, Williams opened fire, shooting Younger numerous times. T. 177. Pugh testified that the last words Younger ever spoke before being shot to death were, "Let's go. There's Smokey. Get Fletcher." T. 260.

Williams admitted at trial that he armed himself prior to getting out of his car. T. 534. Williams claimed that as he approached the club, he heard Younger yelling at him, then saw Younger pull a gun from his back. T. 536, 542. Williams testified that Younger did not point the gun at him, but he nevertheless believed that Younger was going to kill him because of a prior dispute. T. 542-43, 588. Williams then shot Younger five times. Four of the five gunshot wounds entered the back of the victim's body. T. 423-34, 457.

Donte Hill is Williams' friend and was a passenger in his car on the night of the murder. Hill testified that when they pulled up to the club, Williams warned him to hold is head down in the car if anything happened. T. 294. Hill testified that he heard gunshots "a couple of seconds or a couple

of minutes" after Williams got out of the car. T. 297. Williams then got back in the car, and fled the scene. T. 305. Williams drove to a nearby neighborhood, and parked the car in front of his grandmother's house. T. 305, 566. At that point, Hill jumped out of the car and took off running because he was scared of Williams. T. 315. Specifically, Hill testified, "I was trying to get out of the car with him because I didn't know if he was going to turn on me thinking I was going to turn State on him and shoot and kill me right there or what he was going to do." T. 315.

Jackson Police Department Detective James Cornelius testified that he was at an apartment complex near Jay's Club when he heard shots fired. T. 261. Cornelius heard a BOLO for a blue Lincoln with a white top, and shortly thereafter saw a car matching that description drive by. T. 262. Cornelius then followed the suspect vehicle with his blue lights turned on. T. 263. The driver of the blue Lincoln, later determined to be Williams, turned his headlights off and sped away. T. 264. Cornelius lost Williams, but continued searching for the vehicle. T. 264. Moments later Cornelius spotted the blue Lincoln parked in front of Williams' grandmother's house, and saw the two occupants jump out of the car and take off running. T. 265. Jackson Police Officer Keith Dowd encountered Hill running from Williams' car. T. 280. Hill was taken in for questioning, and gave a statement implicating Williams in Young's murder.

At trial, Williams claimed self-defense, and the jury was fully and properly instructed on self-defense. A Hinds county circuit court jury found Williams guilty of Younger's murder. Accordingly, he was sentenced to serve a term of life in the custody of the Mississippi Department of Corrections.

SUMMARY OF ARGUMENT

The trial court properly refused to allow defense witness Anthony Herrington from testifying that he allegedly saw the victim with a gun on the day of the murder due to a wilful discovery violation. Defense counsel claimed that she only learned of this information on the morning of trial, even though Herrington had previously given a statement to the defense. The sole purpose of our discovery rules is to prevent trial by ambush. The trial court exercised its sounds authority and did not abuse its discretion in limiting Herrington's testimony based on the wilful discovery violation. In addition to following the law, the trial court used its common sense in realizing that there is something suspect about a defense witness who has been identified and interviewed by the defense who suddenly remembers on the day of trial that he saw the victim with a gun in a murder case where the defendant is pleading self-defense.

Williams fails to show prosecutorial misconduct. Williams' claim that the State should have considered inadmissible evidence and facts not in evidence in formulating its closing argument is absurd and certainly does not make out a case of prosecutorial misconduct. The State also did not commit prosecutorial misconduct by referring to Jay's Lounge as Killer Jay's, when even an employee of the club testified that the club was referred to as Killer Jay's. Questions regarding Williams' relationship with Cassandra Younger were asked only because Cassandra was listed as a defense witness and the State had a legitimate interest in showing her bias. Finally, the State did not mischaracterize Dr. Hayne's testimony. Even a cursory examination of Dr. Hayne's testimony reveals that the State fairly and accurately summarized his testimony during closing argument. Accordingly, Williams has failed to make out a case of prosecutorial misconduct.

Proof of an overt act in which the victim committed a violent act against the defendant is a condition precedent to offering evidence of a victim's alleged propensity for violence. Williams was not able to cross-examine Watts and Pugh regarding the victims' alleged propensity for violence because the condition precedent had not been fulfilled at that point in the trial. Watts and Pugh remained under subpoena and could have been recalled during the defense case-in-chief after Williams testified and interjected the victim's alleged propensity for violence in the record. In fact, the trial court explicitly invited defense counsel to do so after giving a sound reason for not allowing the line of questioning in case defense counsel did not "connect up" later in the case. Defense counsel's failure recall Watts and Pugh certainly cannot be attributed to trial court error.

Williams failed to proffer Freda Luckett's testimony. Without a proffer, Williams is procedurally barred from arguing that the exclusion of Luckett's testimony was error. Furthermore, defense counsel indicated that she understood that she could ask the trial court to reconsider its ruling regarding the exclusion of Luckett's testimony once proof of the victim's alleged propensity for violence was interjected. Again, defense counsel failed to do so. As such Williams assignment of error is both procedurally barred and without merit.

Williams claims that he was entitled to a continuance to locate absent witnesses and due to late discovery tendered by the State. Williams failed to provide an affidavit of what the absent witnesses' testimony would have been or show that it was impossible or impractical to secure the witnesses' attendance or affidavits. Accordingly, there has been no showing that a manifest injustice occurred due to the denial of the motion for continuance. Also, Williams was not entitled to a continuance due to the State's alleged untimeliness in turning over some discoverable material. Williams failed to show unfair surprise or prejudice to warrant the granting of a continuance.

Williams' claim that he should have been allowed to cross-examine Donte Hill about hearsay statements he communicated to a defense attorney is procedurally barred because Williams failed to proffer the out-of-court statements. Additionally, the statements in question are clearly hearsay and meet no exception which would have rendered them admissible. Williams also claims that the State used impeachment evidence as substantive evidence of guilt. Such a claim is contradicted by the record. The portion of the closing argument referenced by Williams alludes to Hill's direct testimony, not to the statement he gave to the police.

The record before this Court is insufficient to support Williams' claim of ineffective assistance of counsel. Williams can more effectively attempt to prove his claim in a petition for post-conviction relief where he will have the benefit of affidavits to support his claim.

There can be no question that the trial court correctly ruled that a video in which the defendant stated that he controlled Cassandra Younger would have been admissible to show Cassandra's bias if she chose to testify. Rule 616 of the Mississippi Rules of Evidence clearly and unequivocally allows such evidence to show a witness's bias.

Williams' claim that the trial court did not apply the rules evenhandedly is not supported by the record and is without merit.

The trial court properly granted the State's flight instruction because Williams offered no explanation of why he turned his headlights off and sped away when a police car with its blue lights on attempted to pull him over after the shooting. The circumstances of Williams' flight had considerable probative value. Therefore, the trial court properly granted the State's flight instruction.

Finally, Williams is not entitled to reversal based on cumulative error where he has failed to show even a single error committed by the trial court.

ARGUMENT

I. THE TRIAL COURT PROPERLY LIMITED DEFENSE WITNESS ANTHONY HERRINGTON'S TESTIMONY DUE TO A WILFUL RECIPROCAL DISCOVERY VIOLATION.

Prior to the defense putting on its case-in-chief, the State was alerted for the first time that the defense planned on calling Anthony Herrington, a bouncer at Jay's Lounge, as a witness. T. 470. Defense counsel insisted that Herrington's name and summary of his anticipated testimony was delivered to the Hinds County District Attorney's Office in the form of supplemental reciprocal discovery. T. 470. Defense counsel then produced a document which stated that supplemental discovery was hand delivered to Assistant District Attorney Marvin Sanders on March 29, 2007. T. 472-473. ADA Sanders insisted that no such supplemental discovery was ever delivered to him. T. 473. ADA Rebecca Mansell then asked the trial court to either exclude Herrington's testimony, or follow the *Box* procedure. T. 473. The trial court recessed and allowed the State to interview the undiscovered witness. T. 473. After interviewing Herrington, the State reported to the court that the summary of Herrington's anticipated testimony in the defendant's supplemental discovery provided only that he saw Younger yelling at Williams prior to the murder, but during the recess, Herrington claimed that he had denied Younger entrance into the club because he was carrying a gun. T. 476. Defense counsel then claimed that she had just spoken to Herrington for the first time that day, and just learned of this new piece of evidence. T. 481-82. The court ruled that the documentation provided by defense counsel sufficiently evidenced compliance with reciprocal discovery rules, and that Herrington's testimony would be limited to what was provided in the summary of his anticipated testimony. T. 484.

On appeal, Williams claims that the trial court violated his Sixth Amendment right to

compulsory process by prohibiting Herrington from testifying that the victim was allegedly carrying a gun prior to being shot to death. He further claims that the trial court should have considered lesser sanctions before excluding the testimony in question. Additionally, Williams claims that the State should have requested a continuance upon learning of the previously undiscovered testimony.

This Court has affirmed a trial court's decision to exclude or limit testimony of defense witnesses where defense counsel failed to meet reciprocal discovery rules on numerous occasions. In *Lindsey v. State*, 965 So.2d 712, 718-20 (¶¶18-25) (Miss. Ct. App. 2007), defense counsel provided the State with contact information for certain defense witnesses without providing a summary of their proposed testimony. The trial court limited the witnesses' testimony, and this Court upheld that decision, finding that defense counsel wilfully committed the discovery violation where defense counsel had taken statements from the witnesses, but failed to provide the substance of those statements to the State. The *Lindsay* Court also analyzed other cases in which our appellate courts have affirmed the trial court's decision to exclude defense witness' testimony due to defense counsel's failure to provide the State with a summary of anticipated testimony.[1] The same measure was properly applied by the trial court in the case *sub judice*. The record supports the State's assertion that defense counsel's failure to provide a summary of Herrington's testimony was a wilful violation. Although defense counsel claimed that she had only spoken with Herrington on the day of trial, Herrington had been interviewed by and gave a statement to Max Mayes, an investigator employed by defense counsel. T. 476-78. Mayes had been previously employed by the Hinds County District Attorney's office, and being intimately familiar with his work, ADA Sanders noted

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[1]Those cases are *Montgomery v. State*, 891 So.2d 179 (Miss.2004); *Scott v. State*, 831 So.2d 576 (Miss. Ct. App. 2002); and *Morris v. State*, 927 So.2d 744 (Miss.2006).

that Mayes takes notes on everything, implying that it was highly suspect for defense counsel to be unaware that Herrington allegedly saw the victim with a gun just moments prior to the shooting. T. 483-84. As both our State and U.S. Supreme Courts have stated, "It is 'reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed.'" *De La Beckwith v. State*, 707 So.2d 547, 575 (¶104) (Miss. 1997) (quoting *Taylor v. Illinois*, 484 U.S. 400, 414 (1988)). It is likewise reasonable to presume that there is something suspect about a defense witness who has been identified and interviewed by the defense who suddenly remembers on the day of trial that he saw the victim with a gun in a murder case where the defendant is pleading self-defense. Clearly, the failure to turn over this portion of Herrington's statement was a discovery violation that was both wilful and for the purpose of gaining a tactical advantage.

Williams insists that the trial court should have considered lesser sanctions, such as ordering a continuance, rather than imposing the harsh penalty of limiting Herrington's testimony. A similar argument was made in a case recently affirmed by this Court. *McGregory v. State*, 979 So.2d 12, 17 (¶9) (Miss. Ct. App. 2008). In *McGregory*, the Court stated, "The trial court has the discretion to either give the offended party an opportunity to evaluate the discoverable material, grant a continuance, exclude the evidence, or grant a mistrial." *Id.* at (¶11). Additionally, in *De La Beckwith*, the supreme court stated that a request for a continuance is not a prerequisite to the exclusion of evidence due to a discovery violation. 707 So. 2d at 574. Because the State raised an inference that the defendant's discovery violation was wilful, the trial court acted within its discretion in limiting Herrington's testimony rather than ordering a continuance.

As for Williams' claim that the limitation of Herrington's testimony amounted to a sixth amendment violation, the right to compulsory process is not absolute. *Hentz v. State*, 542 So.2d 914, 916 (Miss. 1989). Although the trial court cannot arbitrarily deny the defendant the right to present relevant testimony material to his defense, "the right to present relevant testimony ... may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* (quoting *Roussell v. Jeane*, 842 F.2d 1512 (5th Cir. 1988)). Without question, the right to prevent trial by ambush is a legitimate interest in the criminal trial process. In *Hentz*, the supreme court found that the defendant's right to compulsory process was violated because he was unable to present his defense of duress without the witnesses he intended to call. *Id.* at 917. In the case *sub judice*, Williams acknowledges that his own testimony sufficiently placed the issue of self-defense before the jury, but complains that the jury may have discounted his testimony as self-serving. However, this Court held in *McGregory*, that a defendant's theory of self-defense is not "shut down" where witnesses who would support his theory are excluded due to a discovery violation, where the defendant puts forth his own testimony to establish self-defense. 979 So. 2d at17-18 (¶¶9-11).

The trial court did not abuse its discretion in limiting Herrington's testimony based on defense counsel's wilful discovery violation. Williams was not precluded from presenting his claim of self-defense to the jury. Accordingly, his first assignment of error must fail.

II THE APPELLANT HAS FAILED TO PROVE HIS CLAIM OF PROSECUTORIAL MISCONDUCT.

Williams claims that the prosecutor committed reversible error during closing arguments by pointing out that two State witnesses testified that the victim did not have a gun on the night of the murder, while no witness other than the defendant claimed that the victim pulled a gun on him.

Defense counsel failed to object to the prosecutor's statements. T. 698, 706. Accordingly, Williams is procedurally barred from arguing that the prosecutor's statements amounted to prosecutorial misconduct. *Havard v. State*, 928 So.2d 771, 791 (¶34) (Miss. 2006). Should this honorable Court choose to discuss Williams' procedurally barred claim, the State would also show that Williams' claim of prosecutorial misconduct is also without merit.

Specifically, Williams claims that the State's summation was improper because the State knew that Herrington saw the victim with a gun. Wrong. The State knew that on the day of a murder trial where the defendant is claiming self-defense, after the State rested, Herrington, who had been previously interviewed by the defense, suddenly remembered seeing the victim with a gun. As previously discussed, Herrington's testimony was properly limited by the trial court due to defense counsel's wilful discovery violation. The sole purpose of a closing argument is to sum up the evidence for the jury. *Strohm v. State*, 845 So.2d 691, 700 (¶32) (Miss. Ct. App. 2003). Surely the appellant does not contend that the prosecutor was obliged to discuss alleged facts not in evidence, or even consider facts not in evidence in formulating closing arguments. There can be no question that the prosecutor fairly summarized the admissible evidence presented to the jury.[2]

Williams also claims that the prosecutor committed error in rebutting Williams' characterization of the victim. During closing arguments, the prosecutor stated,

> Think about this: If Calvin Younger were such a bad person, he'd been shooting at people and robbing people and handling guns all his life, how hard would it have

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[2]Counsel opposites's discussion of previous cases Ms. Mansell has tried serves no legitimate purpose and is nothing more than an improper attempt to prejudice the Court. The sole purpose of an appellate brief is to persuade a reviewing court to find, or dissuade a reviewing court from finding, that the trial court committed reversible error in the case at hand. The Appellant's discussion of matters outside the record is irrelevant to a determination of whether the trial court committed reversible error in the present case.

> been to get a conviction of that? If it's so widely known, why didn't they put on one person that . . . .

T. 698-99. At this point, defense counsel objected, and the trial court sustained the objection. T. 699. "When a trial court sustains an objection, it cures any error." *Williams v. State*, 964 So.2d 541,551 (¶36) (Miss. Ct. App. 2007) (quoting *Holland v. State*, 705 So.2d 307, 335 (Miss. 1997)). Because the trial court sustained defense counsel's objection, any potential error in the prosecutor's statement was cured. The prosecutor went on in her closing argument to note that no one other than Williams testified about the victim's alleged bad character. T. 699. Defense counsel then moved for a mistrial, which was overruled. T. 699. On appeal, Williams claims that the prosecutor's argument was inappropriate because she either knew or should have known of Younger's alleged conviction. Again, this information is not part of the record, and as such cannot be consider on appeal, nor should it have been considered by the prosecutor in formulating closing arguments. Once again, attorneys cannot go outside the record during closing arguments. Finally, Williams claims that the State cannot successfully prevent the defense from putting on certain evidence then argue about the lack of that evidence to the jury. Because Williams cites no authority for this proposition, the suggestion should not be entertained by this Court. *Glasper v. State*, 914 So.2d 708, 726 (¶40) (Miss. 2005) (citing *Byrom v. State*, 863 So.2d 836, 863 (¶84) (Miss.2003)); *Jones v. State*, 740 So.2d 904, 911 (¶22) (Miss. 1999).

Williams goes on to cite the professional rules of conduct and persuasive authority regarding prosecutors arguing facts or inferences which the prosecutor knows are false. The only facts in a case are the facts in evidence. Williams acknowledges in his brief that an attorney cannot go outside the confines of the record during closing arguments, yet his entire argument is based on "facts" not

in evidence which he claims the State should have acknowledged during closing arguments. Williams' conclusion that "The prosecution's lying to the jury requires that Harvey's conviction be reversed and remanded," is contrary to both the record and the law.

III. WILLIAMS FAILS TO MAKE OUT A CASE OF PROSECUTORIAL MISCONDUCT.

Williams claims that the prosecutor asked numerous improper questions that amounted to prosecutorial misconduct. Williams' laundry list of alleged improper questions include the following subject matters: the prosecutor's reference to Jay's Lounge as "Killer Jay's," and questions posed to the defendant regarding whether he had ever abused his girlfriend, how many children they had, whether he was flamboyant and liked money, and whether he had attended the Pimp and Ho ball. In order to reverse based on prosecutorial misconduct, this Court must determine that the prosecutor's statements in question were in fact improper and that the improper statements prejudicially effected the defendant's rights. *Spicer v. State*, 921 So.2d 292, 318(¶ 55) (Miss. 2006). There is simply nothing improper about the State's reference to Jay's Lounge as Killer Jay's because the club was in fact known as Killer Jay's, as acknowledged by a bouncer at the club. T. 500.

Regarding the prosecutor's cross-examination of Williams, prior to his taking the stand, it was established that Cassandra Younger, the victim's sister and Williams' girlfriend and mother to several of his children, would testify on his behalf. The trial court had also ruled that if Cassandra testified, the State would be allowed to question her about a videotape from a "Pimp and Ho ball" in which Williams states in her presence that he controls her, in order to show bias. T. 630. Anticipating that Cassandra would testify, the State appropriately questioned Williams about his relationship with Cassandra. Only after Williams testified did he instruct his attorney not to put

Cassandra on the stand. T. 643. Questions concerning Williams' relationship were in no way improper. The State was merely setting the stage to show that Cassandra was a biased witness and had an undeniable interest in having the father of her several children not go to jail. As for any questions about whether Williams was flamboyant and liked money, Williams had already indicated such on direct. Such questions were not improper, and Williams fails to even articulate how his former love of money and flamboyancy could have possibly prejudiced the jury against him.

Williams next argues that the State mischaracterized Dr. Hayne's testimony during closing argument when the State noted that four of the five gunshot wounds the victim suffered were to the back of the victim's body. This allegation is clearly contradicted by the record. The victim suffered one gunshot wound to the chest. T. 423, 433. The remaining four gunshot wounds were described as follows.

- One gunshot wound entered above the left back and exited the upper left chest. T. 423. Exhibit 14 shows "the exit gunshot wound over the upper left chest wall that would correspond to the entrance gunshot wound to the back . . . ." T. 431. "He was shot in the back." T. 431. See also Exhibit 29, an autopsy diagram showing the entrance, path, and exit of the bullet.

- One gunshot wound to the left thigh "entered the body at a point 39.5 inches below the top of the head traveling upward at approximately 30 degrees, forward at approximately 30 degrees and from left to right and then exited out the top surface of the left thigh." T. 424. The entrance wound is on the back left thigh, and the exit wound is on the top front of the left thigh. T. 451. See also Exhibit 30.

- One gunshot wound entered the upper back of the right arm and came to rest under the chest wall. T. 425. The bullet entered from behind. T. 428. "The weapon would be behind and to the right of the decedent's right arm." T. 428. He was shot from behind to achieve this gunshot wound. T. 431. Exhibit 12 shows the gunshot wound to back of the right arm, and Exhibit 13 shows the exit wound on the front of the body.[3] See also Exhibit 26.

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[3]The prosecutor mistakenly referred to Exhibit 12 as Exhibit 11. T. 427. However, he was clearly referring to Exhibit 12, as Exhibit 11 was a wallet, and Exhibit 12 depicts the wound Dr. Hayne was describing.

- A gunshot wound to the right arm produced a graze wound. T. 242-25. "That bullet traveled across the arm grazing the skin surface and exiting towards the front of the right arm. It was traveling from back to front at approximately 50 degrees." T. 424-25. Exhibit 19 shows the graze wound that Dr. Hayne again opined was from back to front. T. 434. See also Exhibit 28.

Finally, on redirect, Dr. Hayne was asked if it is true that four of the five bullet wounds were from back to front. Dr. Hayne responded, "They're all going back to front with the exception of the gunshot wound to the chest." T. 457. Accordingly, the State fairly and accurately summed up the evidence during closing by stating that four of the five gunshot wounds entered the back of the victim's body. Williams' claim that the State mischaracterized Dr. Hayne's testimony is patently false. As such, this allegation of prosecutorial misconduct must also fail.

IV. THE TRIAL COURT DID NOT PROHIBIT WILLIAMS FROM OFFERING EVIDENCE OF THE VICTIM'S ALLEGED PROPENSITY FOR VIOLENCE.

Rule 404(a)(2) of the Mississippi Rules of Evidence provides,

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . . Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor . . . .

MRE 404(a)(2). In *Robinson v. State*, 566 So.2d 1240, 1241 (Miss. 1990), the supreme court clarified that proof of an overt act in which the victim committed a violent act against the defendant is a condition precedent to offering evidence of a victim's alleged propensity for violence.

> In *McDonald v. State*, 538 So.2d 778, 779 (Miss.1989), this court acknowledged that it has long been the law in this state that proof of the victim's bad reputation for violence or threats against the defendant is competent when the question of who was the aggressor is at issue, but that such evidence is not competent until there has first been some evidence that the victim had been the aggressor. See also 1 Warton's Criminal Evidence § 137 (14th ed. 1985) (After the defendant has laid a proper

> foundation by adducing some evidence tending to show that he acted in self-defense, he may introduce evidence of the turbulent and dangerous character of the victim).

Id. See also *Gates v. State*, 936 So.2d 335, 339-40 (Miss. 2006) (trial court properly excluded evidence of previous altercation between victim and defendant because defendant failed to show that victim was initial aggressor in the aggravated assault for which defendant was tried); *Hodge v. State*, 823 So. 2d 1162, 1165 (¶9) (Miss. 2002) ("In order to introduce [evidence of a pertinent character trait of the victim] a defendant must introduce evidence of an overt act of aggression by the victim."); *McGilberry v. State*, 797 So.2d 940, 945 (¶21) (Miss. 2001) (evidence that victim allegedly beat defendant with iron pipe two months prior properly excluded where defendant failed to offer proof that victim was initial aggressor prior to his murder).

Williams claims that the trial court prevented him from presenting evidence of the victim's alleged propensity for violence, thereby diminishing his ability to successfully argue self-defense. This claim is contrary to the record. Citing *Heidel v. State*, 587 So. 2d 835 (Miss. 1991)[4], defense counsel argued that she should be allowed to first present evidence of the victim's alleged character for violence, then "connect up" later with evidence that the victim may have been the initial aggressor. T. 269-70. The trial court acknowledged the *Heidel* holding and ruled as follows.

> THE COURT: Well, just a moment. There are two ways the Court can authorize this. The first procedure is the one you suggested where the Court is allowed to go ahead and let evidence in in anticipation of you bringing in the evidence at a later time which connects up the dots and then would make the evidence relevant.
>
> The other method by which the Court obtains the same level of latitude to the defendant is that the witnesses are required to remain under subpoena and then you're entitled to have those witnesses reappear and you develop that evidence at the time

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[4]In *Heidel,* the supreme court, citing MRE 104(b), held that the trial court has **discretion** to admit evidence of the victim's propensity for violence first and allow defense counsel to connect up later and show an overt act of the victim which indicates he was first aggressor.

that you also establish the overt act by the victim against the defendant.

I understand the theory about the Court can instruct the jury [] to disregard certain evidence but that's a very poor way of preventing the jury from hearing admissible [sic] evidence. Most of the time the Court has allowed evidence to proceed out of sequence is during the presentation of the defendant's case in chief not during the presentation of the prosecution's case.

It's my understanding the rules of self-defense does place into issue the character of the victim once the issue of self-defense is raised. That's just Part 1. Part 2 of it is that there also must be an overt act of aggression by that victim before that character ever becomes relevant. The reason for that being is the most violent man on the face of the earth can be sitting in his car and somebody walk up behind him and shoot him in the back of his head. His character has absolutely no relevance to what happened to him. So there has to be something that puts in motion the aggression by the defendant. Since you're trying to develop this case during the course of the prosecution's case, the objection will be sustained; however, these witnesses will remain under subpoena and available to you for you to call and develop that witness during your case in chief. So that objection at this point is sustained.

T. 271-72. The trial court's ruling was correct, well-reasoned, and in accordance with controlling law. Although defense counsel may have been prohibited from attempting to show the victim's alleged propensity for violence through Watts and Pugh during the State's case-in-chief, these witnesses remained under subpoena and could have been called after Williams testified that the victim allegedly pulled a gun on him prior to being shot to death. For whatever reason, defense counsel did not recall Watts and Pugh. This omission is clearly not an error committed by the trial court. Accordingly, Williams' claim must fail.

V. THE TRIAL COURT PROPERLY EXCLUDED FREDA LUCKETT'S TESTIMONY.

Defense counsel anticipated that Freda Luckett, one of Williams' girlfriends, would testify that an incident between she and the victim occurred where the victim allegedly grabbed her in a sexual manner, and upon her stating that she was involved with the defendant, the victim allegedly said, "Forget about it. You know, I'll kill him, whatever." T. 20-23. The trial court sustained the

State's motion to exclude this testimony, but indicated that the ruling could be reconsidered if the defendant later established that the victim was the initial aggressor. T. 23, 271-72, 467-68. Williams now claims that the exclusion of Luckett's testimony was reversible error.

Rulings on the admission or exclusion of evidence are reviewed for abuse of discretion. *Ladnier v. State*, 878 So.2d 926, 933 (¶27) (Miss. 2004). Error will not be predicated on such a ruling unless a substantial right of the defendant has been violated. *Id.* Williams is correct in asserting that there are some cases where a victim's uncommunicated threats are admissible in a murder case where the defendant claims self-defense. In *Gates v. State,* 484 So.2d 1002 (Miss. 1986), Gates sought to elicit the testimony of a witness who claimed the victim had bragged to her about fathering a child with Gate's wife, and further stated that if Gates said anything to him about it, he would kill him. *Id.* at 1007. The trial court excluded the hearsay statement. *Id.* The supreme court found that although a victim's uncommunicated threats may be admissible in a murder case where the defendant claims self-defense and there is a question as to who was the initial aggressor, the uncommunicated threat must still be relevant. *Id.* at 1008. The Court found that the testimony regarding the victim's alleged relationship with the defendant's wife was "not relevant to the victim's state of mind concerning the self-defense claim," and therefore properly excluded. *Id.* However, the Court found that the alleged threat that the victim would kill Gates would have been admissible after Gates testified that the victim was the initial aggressor. *Id.* at 1009. However, the witness was never recalled after the evidentiary foundation was established, nor did defense counsel make a proffer of the witness's testimony regarding the alleged threat. *Id.* Without a proffer, the supreme court refused to accept as true that the witness would have testified in accordance with Gates' claim. Accordingly, the supreme court ruled that the issue had not been properly preserved

for review.

In the case *sub judice*, defense counsel stated on the record that she understood that she could ask the court to reconsider its prior ruling excluding Luckett's testimony if any defense witness indicated that the victim was the initial aggressor. T. 467. However, after Williams testified that the victim pulled a gun on him, defense counsel never asked the court to reconsider its motion regarding Luckett's testimony, nor did defense counsel proffer Luckett's testimony. Accordingly, Williams failed to preserve the issue for appellate review.

VI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR A CONTINUANCE.

Williams' trial commenced nearly four years after Younger's murder. On the morning of trial, defense counsel moved for a continuance. T. 8. The basis for defense counsel's motion was that she needed to locate two potential witnesses and that she needed time to review discovery material that was untimely provided by the State. T. 8. The decision to grant a motion for continuance lies within the sound discretion of the trial court. *Shelton v. State*, 853 So.2d 1171, 1181 (¶35) (Miss. 2003). A reviewing court will not reverse a conviction based on the denial of a motion for continuance unless the ruling resulted in a manifest injustice. *Id.* This honorable Court has stated the following regarding the denial of a motion for continuance where the defendant claims that the continuance is necessary to find witnesses.

> The refusal of a motion for a continuance on the ground of the absence of a witness will not be overturned on a motion for a new trial unless the witness, or his affidavit showing what his testimony would be, is offered on the hearing of the motion, or it is shown that it was impossible or impracticable to secure the attendance of the witness or to secure his affidavit.

Muise v. State, 997 So.2d 248, 255 (¶26) (Miss. Ct. App. 2008) (quoting *Hardiman v. State*, 776

So.2d 723, 727(¶ 19) (Miss. Ct. App. 2000)). To this day, Williams has offered nothing more than his own bare assertions that Jacomy Hodge and Anthony Ray Dixon were victims of Younger's alleged propensity for violence. Because Williams has failed to provide an affidavit of what Hodge and Dixon's testimony would have been or to show that it was impossible or impractical to secure Hodge and Dixon's attendance or affidavits, there has been no showing that a manifest injustice occurred due to the denial of the motion for continuance. *Id.* at 255-56 (¶¶27-28). Williams has failed to meet his burden in showing that the trial court's denial of his motion for continuance to locate absent witnesses amounted to reversible error. Additionally, even if Williams' claims were accepted as true, he placed those allegations before the jury when he testified that Younger had allegedly shot Hodge and kidnaped and shot Dixon. T. 556. Accordingly, even if Williams had shown that it was error for the trial court deny his motion his motion for continuance to locate Hodge and Dixon, he suffered no prejudice since he successfully placed before the jury the information which the missing witnesses would have allegedly testified.

Williams also claims that a continuance was necessary due to tardy discovery furnished by the State. Williams complains that crime scene photos and a transcript and tape of Freda Luckett's statement to police was not provided until the week prior to trial. Williams fails to even articulate why a continuance was necessary with regard to the crime scene photos and Luckett's statement. "Before there will be manifest injustice in the denial of a continuance, an accused must have suffered unfair surprise or prejudice." *Hudderson v. State*, 941 So.2d 221, 223 (¶6) (Miss. Ct. App. 2006). Additionally, our supreme court has stated that defense counsel has a good faith obligation to review tardy discovery evidence so that "surprise may be cured and the evidence used." *Galloway v. State*, 604 So. 2d 735, 739 (Miss. 1992). Because Williams has not shown that he was unfairly surprised

or prejudiced by the photos or Luckett's statement, no manifest injustice resulted from the denial of the motion for continuance with respect that evidence.

With respect to the ballistics report, the State noted during the hearing on the motion for continuance that it provided the results of the ballistics report immediately after receiving such from the crime lab on March 15, more than two weeks prior to trial. T. 12. On appeal, Williams argues that the autopsy report showed that three large caliber, copper-jacketed projectiles were removed from Young's body, and Hayne opined in the report that these projectiles were .357 caliber, but the ballistics report showed that the bullets were actually .9 mm. Williams argues that if the ballistics report had been turned over in a timely manner, defense counsel would not have wasted time trying to prove that the autopsy report was incorrect in this regard. Again, this argument simply does not show what a continuance would have accomplished. What type of bullet that killed Young was not in issue. Williams admitted that he shot Younger to death. Quite simply, no prejudice resulted from the fact that neither the State nor defense had the result of the ballistics report until the week before trial.

Under this assignment of error, Williams mentions in one sentence that the results of the gunshot residue test were not provided until after the trial had commenced. He makes no argument concerning this fact. Out of an abundance of caution, the State would simply note that although Dr. Hayne utilized a gunshot residue kit during the autopsy, no one requested that the kit be tested. T. 12, 379. A forensic scientist with the Mississippi Crime Lab testified that the gunshot residue test is not performed unless the State or defense counsel requests that the test be performed. T. 462-63. The State explained that it had not requested that the test be performed because there was no indication that the victim fired a gun prior to the murder. T. 12. Even Williams did not claim such

in arguing self-defense. Accordingly, Williams cannot claim prejudice from the denial of a continuance based on this evidence.

Williams claims that the case *sub judice* is similar to *Tanner v. State*, 556 So. 2d 681 (Miss. 1989). Williams ignores one glaring and critical difference. The undiscovered evidence in Tanner clearly prejudiced the outcome of Tanner's case. As previously and repeatedly stated, Williams has failed to even articulate any resulting prejudice. Tanner was convicted for receiving stolen property. *Id.* at 682. At trial, the victim testified that Tanner approached him and told him that he knew where the stolen property was, that he had heard some young men discussing the fact that they had stolen the property, and that he would retrieve the property for a small fee. *Id.* Tanner testified and affirmed the portion of the victim's testimony just described. *Id.* at 683. Tanner also testified that he enlisted a friend to help him retrieve the stolen property from the city dump. *Id.* The friend, however, testified that Tanner offered to pay him ten dollars to help retrieve the stolen property from Tanner's house. *Id.* During the cross-examination of a police officer, it was determined that the State failed to provide in discovery an offense report in which Tanner's friend stated that Tanner had in fact asked him drive to the city dump, and the city dump was where they received the stolen property. *Id.* Clearly, had the police report been discovered in a timely manner, defense counsel could have impeached the only witness to place the stolen property in the defendant's possession. In the present case, Williams argues nothing more than defense counsel needed more time to prepare. He fails to show how the denial of his motion for continuance resulted in manifest injustice. As such, his assignment of error must fail.

VII. THE TRIAL COURT PROPERLY EXCLUDED HILL'S HEARSAY STATEMENTS MADE PRIOR TO TRIAL TO A DEFENSE ATTORNEY.

Prior to trial, the trial court granted the State's motion to prohibit the introduction of Hill's tape-recorded statement given attorney Cynthia Stewart.[5] T. 24. The trial court properly excluded this statement, because it is clearly hearsay and there is no indication that the statement meets a hearsay exception. Furthermore, Williams failed to preserve this issue for appeal by failing to proffer the excluded statement. *Murray v. State*, 849 So.2d 1281, 1289 (¶32) (Miss. 2003). In addition to this issue being procedurally barred, to the extent that the excluded statement may have contradicted his statement to police, Hill testified at trial and could have been cross-examined regarding the accuracy of his statement to police. Hill did testify on direct that although he was scared when he gave the statement to police, the statement to police was truthful. T. 300-301.

Regarding Williams' second contention, the State did not use impeachment evidence as substantive evidence of guilt. Hill was asked on direct whether Williams said anything to him before getting out of the car. T. 294. When Hill could not remember, the State refreshed his memory with his statement, and Hill answered that Williams told him "if something goes on just hold your head down." T. 294. Hill further testified that when Williams got out of the car, he held his head down and shortly thereafter heard gunshots. T. 295-97. Hill also testified that although he was scared when he gave his statement to police, the statement was true, and that it was true when he told police that Williams told him to hold his head down. T. 300. Accordingly, when the State argued during closing arguments that Williams' statement to Hill to put his head down was evidence of premeditation, the State referenced Hill's direct testimony, not his statement to police. As such, the

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[5]Ms. Stewart apparently represented Williams at some point. T. 485-86.

State did not use impeachment evidence as substantive evidence of guilt.

Alternatively, if this honorable Court should find that the State used a prior inconsistent statement as substantive evidence of guilt, the present scenario is a far cry from the recently decided case of *King v. State*, 994 So. 2d 890 (Miss. Ct. App. 2008). In *King*, four eyewitnesses gave statements to police implicating King in a murder. *Id.* at 892 (¶4). However, the witnesses subsequently gave statements to defense counsel in which they recanted their statements. *Id.* at (¶5). At trial, after the four witnesses testified in contradiction to the statements given to police, the trial court erred in allowing the State to impeach the witnesses with their prior inconsistent statements because the State had not made the requisite showing that it was surprised by the testimony. *Id.* at 893-896 (¶¶7-19). The trial court compounded the error in allowing the State to use the out-of-court statements during closing argument as substantive evidence of guilt. *Id.* at 898-99 (¶¶29-31). This Court found the error in *King* to be reversible, but stressed the fact that the prior inconsistent statements were the only direct evidence of King's guilt, and the remaining circumstantial evidence was insufficient to prove King's guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. *Id.* at 899-900 (¶32). Again, the State stresses that in the case *sub judice*, the prosecutor's statements in closing referred to Hill's direct testimony that Williams told him to hold his head down before getting out of the car and shooting Younger to death. But if this Court finds that the references alluded to Hill's statement to police, the State otherwise provided overwhelming evidence of Williams' guilt. Watts and Pugh testified that they saw Williams shoot Younger, and Younger was not armed. Even Williams admitted to shooting Younger to death, but interjected his theory of self-defense. In the event that this Court finds that the State impermissibly used impeachment evidence as substantive evidence of guilt, the Court should utilize

a harmless error analysis in light of the State's overwhelming proof of Williams' guilt.

VIII. WILLIAMS DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Although this Court is not prohibited from considering claims of ineffective assistance of counsel on direct appeal, Williams' claim of ineffective assistance should be brought in a post-conviction relief proceeding where he will have the benefit of affidavits to support his claim. As it stands, the record does not show ineffective assistance of constitutional proportions, and the State will not stipulate that the record is adequate to support Williams' claim. *Fannings v. State*, 997 So.2d 953, 965 (¶37) (Miss. Ct. App. 2008). Williams claims that defense counsel was constitutionally deficient for failing to timely submit discovery, thereby preventing Herrington from testifying that he saw the victim with a gun on the evening he was murdered. As previously noted, Herrington's testimony was never proffered, so this Court can not be certain exactly what his testimony would have been. Furthermore, Herrington had already given a statement to the defense long before trial, and then suddenly remembered on the morning of trial that he remembered seeing the victim with a gun at some point on the day he was murdered. It is just as likely that Herrington fabricated his story at the last minute as it is that defense counsel simply left out this detail in discovery. In any event, on the existing record, this Court cannot find that the limitation on Herrington's testimony is attributable to defense counsel's failure to supplement discovery.

IX. THE TRIAL COURT CORRECTLY RULED THAT A VIDEOTAPE WOULD BE ADMISSIBLE TO SHOW CASSANDRA YOUNGER'S BIAS IF SHE CHOSE TO TESTIFY.

The trial court properly ruled that a video tape in which Williams stated that he controlled Cassandra Younger would be admissible to show bias if Cassandra testified. T. 630. On appeal, Williams claims that the video was not relevant because Williams and Cassandra were only role

playing as a pimp and prostitute. Williams also claims that the evidence would have been more prejudicial than probative.

It must first be noted that the court did not exclude Cassandra's testimony. Rather, the defendant made a strategic choice in not calling Cassandra Younger to testify. Therefore, Williams should not be allowed on appeal to argue that the exclusion of Cassandra's testimony prevented him from putting on his theory of the case, when her testimony was not excluded by the trial court.

Rule 616 of the Mississippi Rules of Evidence provides that evidence of a witness's bias for or against a party is admissible to attack that witness's credibility. MRE 616. Clearly, a tape in which Williams stated that he controlled Cassandra would be admissible under the rule to show bias. If the two were merely role-playing as Williams claims, Cassandra would have been free to testify to such on redirect. Regarding Williams' claim that the video would have been more prejudicial than probative, the trial court would have granted a limiting instruction informing the jury that the video could only be considered in determining the witness's possible bias. In the recent case of *Butler v. State*, this Court unanimously found that the State was permissibly allowed, under MRE 616, to show the defendant's mother's bias against the State by questioning her about the defendant's and another son's criminal records. 2007-KA-01915-COA (Mar. 24, 2009). Similarly, a unanimous Court found that under MRE 616 the State was permissibly allowed to attack the credibility of a defense witness by showing that he and the defendant were loyal to the same gang. *Dao v. State*, 984 So.2d 352, 361 (¶31) (Miss. Ct. App. 2007). Accordingly, there can be no question that in the case *sub judice* if Cassandra testified, the State could have attacked her credibility by showing her bias for Williams as evidenced by the tape in question.

X. WILLIAMS MAKES NO SHOWING THAT THE TRIAL COURT FAILED TO APPLY "THE RULES" EVENHANDEDLY.

Williams complains that the trial court failed to apply discovery rules evenhandedly by permitting the State to introduce the tape from the Pimps and Hos Ball, but limiting Herrington's and Luckett's testimony. The State would incorporate its prior argument that the trial court correctly limited Herrington's testimony. Also, the trial court did not excluded Luckett's testimony due to a discovery violation. As previously stated, the trial court simply found that Luckett's testimony would not come in until the defense put on some evidence that the victim was the initial aggressor. On the other hand, the tape in question was only going to be used to attack the credibility of a defense witness. Impeachment evidence which is not used to bolster the State's substantive case is not discoverable material. *Ross v. State*, 954 So.2d 968, 999 (Miss. 2007). Regarding the timing of the disclosure of the GSR report, the State noted prior to trial that it had not requested that the crime lab run the test because there had been no indication that the victim fired a gun. T. 12. Nevertheless, due to defense counsel's complaint, it appears that the State thereafter contacted the crime lab and requested that the test be performed on the GSR kit.[6] When the results of the test were referenced the next day during forensic scientist David Whitehead's testimony, defense counsel made no objection. Furthermore, defense counsel could not have been surprised by the results of the test, as Williams himself admitted that the victim had not even pointed the gun at him, and certainly did not testify that Younger fired a gun.

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[6]This appears to be a reasonable inference because on the morning of the first day of trial the State noted that there had been no request for the crime lab to perform the gunshot residue test. Mississippi Crime Lab forensic scientist David Whitehead testified the next day regarding the results of the GSR test. It would appear that the test was requested at some point on the first day of trial.

The State committed no discovery violations. As such, Williams' claim that the trial court failed to apply the discovery requirements evenhandedly must fail.

XI. THE TRIAL COURT PROPERLY GRANTED THE STATE'S FLIGHT INSTRUCTION.

Williams relies on *Tran v. State*, 681 So. 2d 514 (Miss. 1996) for the proposition that it is reversible error to give a flight instruction where the defendant claims self-defense and gives a reasonable explanation for fleeing the crime scene. The *Tran* court laid out a two prong-test for determining whether a flight instruction should be granted. The court stated, "These prongs are: (1) Only unexplained flight merits a flight instruction; and (2) Flight instructions are to be given only in cases where that circumstance has considerable probative value." *Id.* at 519 (internal quotations omitted). In *Tran*, Tran and the victim had engaged in an argument, and the victim, who had a gun, and his friends jumped Tran in a restaurant parking lot. *Id.* at 515. Tran left the restaurant, but returned later to drop off a car. *Id.* The victim was in the parking lot and told Tran and his friend, "One of you are going to die," as he reached for a gun *Id.* Tran then grabbed a gun he saw in the car, and shot the victim to death. *Id.* Tran fled the scene to avoid retaliation by the victim's friends. *Id.* The supreme court held that the granting of a flight instruction was reversible error because Tran claimed self-defense and gave a reasonable explanation for his flight. *Id.* at 519.

The *Tran* court quoted language from *Banks v. State*, 631 So.2d 748, 751 (Miss. 1994), which could be read to stand for the proposition that a flight instruction is never warranted in a self-defense case. However, *Shumpert v. State*, 935 So. 2d 962 (Miss. 2006), a case decided ten years after *Tran,* establishes that there is no *per se* prohibition against granting a flight instruction in a case where the defendant claims self-defense . In *Shumpert*, the defendant claimed self-defense or defense of another

because he thought the victim was reaching for something in his pants. *Id.* at 965 (¶4). He also claimed that he fled the scene to avoid being harmed by the victim. *Id.* at 970 (¶26). The supreme court found that the trial court did not err in grating the flight instruction because, regardless of Shumpert's claim that he sough only to avoid retribution, "flight was not explained by any reason other than consciousness of guilt." *Id.* at 970 (¶28). In reaching this conclusion, the *Shumpert* court considered the following facts - at least one witness testified that the victim had not harmed Shumpert, a weapon was not found on the victim's body, and "Shumpert fled much further away than the parameter within which Collier, who was lying on the ground after being attacked, could have inflicted harm on him." *Id.* The Court concluded, "All of this evidence supports the contention that the flight was not explained by any reason other than consciousness of guilt." *Id.*

In the case *sub judice*, although Williams gave a reason for leaving the nightclub after shooting Younger to death, he gave an unreasonable explanation, amounting really to no explanation at all, for turning off his headlights and speeding away from Officer Cornelius. Cornelius testified that although there was approximately three car lengths between his car and Williams' car, there were no cars between them, and Cornelius's blue lights were on. T. 264-65. Williams simply denied at trial that a police car had followed him. T. 600. Williams' claim that he fled only because he was scared that Younger's friends may retaliate, is also contradicted by the fact that Williams refused to answer the door when police came to his grandmother's house after he evaded Officer Cornelius. Additionally, just as in *Shumpert*, this Court should consider that two eyewitnesses testified that Younger had not in any way attacked Williams, no weapon was found on Younger, and Williams fled much further away than the parameter within which Younger's friends could have inflicted harm on him. These facts lead to the unescapable conclusion that Williams' flight was not explained by any

reason other than consciousness of guilt, and the trial court properly granted the State's flight instruction.

XII. THE APPELLANT IS NOT ENTITLED TO REVERSAL BASED ON CUMULATIVE ERROR BECAUSE HE HAS FAILED TO PROVE EVEN A SINGLE ERROR.

"Where there is no error in any one of the alleged assignment of errors, there can be no error cumulatively." *Hughes v. State*, 892 So.2d 203, 213 (¶29) (Miss. 2004). Because Williams failed to show error in any of his individual assignments of error, his final issue necessarily fails.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Williams' conviction of capital murder and sentence of life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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