IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KIRK VINCENT MAYERS — APPELLANT

VS. — NO. 2008-KA-1722

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On or about October 16, 2006, Kirk Vincent Mayers was indicted by the Rankin County Grand Jury for two counts aggravated assault on an law enforcement officer; one count of possession of a stolen firearm; and, one count of possession of firearm by a convicted felon. (C.P. 250) Mayers was indicted as an habitual offender. (C.P. 250) Mayers was tried and convicted on August 28, 2008. He was sentenced on September 11, 2008, to 30 years for each count of aggravated assault of a law enforcement officer, 5 years for possession of a stolen firearm and 3 years for possession of a firearm by a convicted felon. The court further apply a ten year enhancement to each of counts 1 and 2 pursuant to **Mississippi Code Annotated § 97-37-37**.

SUMMARY OF THE ARGUMENT

The indictment, read as a whole, clearly charges Mayer with two counts of aggravated assault on a law enforcement officer. The indictment is unambiguous and the trial court was correct in refusing to grant a simple assault instruction.

On appellate review, the State is "entitled to the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991). The reasonable inferences from the evidence support the verdict and the trial court's denial of Mayers' post-trial motions. This issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

Mayers argues that the State did not prove that he knew that the pistol was stolen and that proof of guilty knowledge is required to prove possession of stolen property. However, scienter may be proved by evidence that a defendant "received the property under circumstances that would lead a reasonable man to believe it is stolen." *Ellett v. State*, 364 So.2d 669 (Miss. 1978). Further, there was testimony from Jonathan Shelly that Mayer knew the gun was stolen. "Self-defense is not a viable defense to possession of a firearm by a convicted felon. Possession of a firearm by a convicted felon is a criminal act void of a third party to defend against." *Williams v. State*, 953 So.2d 260, 263 (Miss.Ct.App.2006). The requested instruction incorrectly states the law, and as a result, it was properly denied. This issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

In the case at bar, Mayers asserts that the trial court incorrectly refused instruction D-8, that his prior conviction was not proof of commission of the offenses for which he was being tried. However, Mayers makes no argument that he was prejudiced in any way by the alleged

error. Without a showing of prejudice, any error is harmless. Therefore, this issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

Because the State introduced the evidence for the purpose of proving motive for the charges of aggravated assault pursuant to M.R.E. 404(b) and not merely to show the underlying conviction for the charge of possession of a firearm by a convicted felon, the state was not required to accept a stipulation to the conviction. The trial court correctly conducted the balanced test pursuant to M..R.E. 404(b) and the evidence was therefore correctly admitted. This error is without merit and the jury's verdict and the rulings of the trial court should be affirmed. Mayers was not entitled to a cautionary instruction regarding his prior convictions because his prior convictions were admissible to establish motive and to challenge his credibility as a witness. The trial court did not err in refusing to strike Juror 18 for cause. The trial court did not err in allowing the State to put on proof of Mayers' prior convictions. The trial court correctly allowed the testimony of Brian Ellis as lay opinion testimony. Mayers' sentence was constitutional.

ARGUMENT

I. The indictment was sufficient to charge Mayers of two counts of aggravated assault.

Mayers was indicted on October 16, 2006 on two counts of aggravated assault on a law enforcement officer, possession of a stolen firearm and possession of a firearm by a convicted felon.

The indictment states in Count I that:

> Kirk Vincent Mayers . . . did unlawfully feloniously, purposely and knowing, cause or attempt to cause bodily injury to Officer Jake Windham, a law enforcement officer with the Pearl Police Department, by shooting the officer in the leg with a gun, knowing the officer was acting within the course and cope of his official duties in violation of Mississippi Code Annotated § 97-3-7. . .

In Count II, the indictment reads, in pertinent part, that:

> . . . Kirk Vincent Mayers . . . did unlawfully, feloniously, purposely and knowingly cause or attempt to cause bodily injury to Officer Phillip Arrant, a law enforcement officer with the Pearl Police Department by shooting at the officer with a gun, knowing that the officer was acting within the course and scope of his official duties in violation of Mississippi Code Annotated § 97-3-7. . . .

Mayers requested a jury instruction on simple assault, arguing that since the indictment failed to use the term "deadly weapon," it did not properly charge aggravated assault. Mayers cites *Durr v. State*, 446 So.2d 1016 (Miss. 1984) for the proposition that there was a jurisdiction defect in the indictment and that said defect could not be waived. However, the indictment clearly charges Mayers with aggravated assault on a police officer and the element of the use of a deadly weapon is clearly and plainly contained in the indictment.

In Havard v. State, this Court stated an indictment is sufficient provided it contains the

following:

> The indictment is held to be sufficient if it contains the seven factors enumerated in URCCC 7.06.
> 1. The name of the accused;
> 2. The date on which the indictment was filed in court;
> 3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
> 4. The county and judicial district in which the indictment is brought;
> 5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;
> 6. The signature of the foreman of the grand jury issuing it; and
> 7. The words "against the peace and dignity of the state."
>
> *Havard v. State*, 928 So.2d 771, 801 (Miss.2006).

Mayers argues that the word "gun" is not synonymous with "handgun" and is not sufficient to identify a deadly weapon, since "gun" might refer to a "paint gun, staple gun, toy gun, squirt gun, grease gun, *et cetera*." Mayers cites *Garner v. State*, 944 So.2d 940 (Miss.Ct.App.2006) for the proposition that the omission of the words "exhibition of a deadly weapon" meant that the indictment in that case did not factually plead armed robbery, but only pled simple robbery. Mayers argues that he, therefore, was entitled to an instruction on simple assault.

The court in *Garner* opined that:

> "[a]n indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. URCCC 7.06. It must fully notify the defendant of the nature of the charge and the cause of the accusation. *Id.* Plainly, the Lee County indictment contains no explicit charge of the exhibition of a deadly weapon. *Nor did the indictment charge acts that would constitute the exhibition of a deadly weapon.*" *Garner* at 941. [emphasis added]

The *Garner* indictment pled only that Garner *represented* that he had a gun, and indeed did not state that he had a gun. Further, "[t]he indictment did not specify the statutory section under which Garner was charged or state that the crime charged was armed robbery; it merely stated that Garner's acts were 'contrary to the form of the statute in such cases made and provided.'" *Id.* In the instant case, Mayer's indictment stated in the heading that Mayer was charged with Aggravated Assault on a Law Enforcement Officer. Count I stated that Mayer "shot the officer in the leg with a gun." This is unequivocal and plain. This language clearly pleads aggravated assault, since in this context, there is no mistaking the "gun" for a squirt gun or grease gun. It was clearly a deadly weapon and was used to cause bodily injury to a law enforcement officer. The language "shot him in the leg" is clearly sufficient to clarify that the gun in question is a deadly weapon and, in the context of the indictment read as a whole, clearly charges the crime of aggravated assault.

In Count II of the indictment pled that Mayers caused or attempted to cause bodily injury to a law enforcement officer "by shooting at the officer with a gun." Again, the indictment reflects that the gun was a weapon that was actually discharged. There is no mistaking the gun with a squirt gun or grease gun. Further, the indictment heading clearly states that the offense is aggravated assault on a law enforcement officer. The language of the indictment is, again, clearly sufficient to clarify that the gun in question is a deadly weapon and, in the context of the indictment read as a whole, clearly charges the crime of aggravated assault.

Mayer argues that there is ambiguity in the indictment and that therefore he was entitled to a lesser offense instruction, simple assault. However, as argued above, the indictment clearly charges the assault on a law enforcement officer with a deadly weapon. As Mayer notes, Rule

7.06 states that the indictment must be read as a whole. In the context of this indictment, read a whole, there is no possible confusion regarding the nature of the gun as a deadly weapon, and no possible confusion that Mayer was charged with aggravated assault on a law enforcement officer. Mayer clearly

So long as a fair reading of the indictment, taken as a whole, clearly describes the nature and cause of the charge against the accused, the indictment is legally sufficient. *Farris v. State*, 764 So.2d 411, 421 (Miss.2000); see also *Sanderson v. State*, 883 So.2d 558 (Miss.2004). The indictment, read as a whole, clearly charges Mayer with two counts of aggravated assault on a law enforcement officer. The indictment is unambiguous. The trial court was correct in refusing to grant a simple assault instruction.

This issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

II. The State proved "knowing assault" of law enforcement officers under Counts 2 and 2.

Detectives Archie Bennett and Scott Kelly got a search warrant for apartments 77 and 78 of the Crestview Apartments in Pearl. The two apartments were directly in front of one another (Tr. 268) Both teams could not fit in the breeze way between the two apartments, so the teams planned for the first team to enter apartment 77 first and then the second team would enter apartment 78. (Tr. 269) The officers knocked an announced loudly and repeatedly, "Pearl Police. Search Warrant. Open the door." Bennett was the first officer to enter apartment 77. As he entered, he continued to yell, "Pearl Police, Search warrant. Get down. Get down." Bennet moved to the interior of the apartment and into the hallway. He encountered a black male. He

yelled to the man, "Pearl Police. Get down. Search warrant." The man did not comply even after a second warning. (Tr. 275) Officer Bennett and another officer placed the man on the floor and continued yelling "Pearl police. Pearl police." Another officer secured the rest of apartment 77. (Tr. 275) Bennett testified that he heard shots at this time. (Tr. 275) After Bennett was relieved at apartment 77, he went to cover apartment 78, where Officer Jake Windham had been shot. (Tr. 277)

Officer Mark Mooney testified that he was also on team one which entered apartment 77 and began yelling upon entry. The entire team began making the announcement and then the officers in apartment 78 also began yelling to announce that they were police entering the apartment. (Tr. 313) Mooney testified that they had time to clear the entire apartment before they heard the shots from apartment 78. (Tr. 315) Windham attempted to breach the door four or five times and could not get the door to open. Officer Arant motioned to Detective Windham to hit the door a little higher. The team was still yelling, "Pearl Police." Windham rammed the door once or twice more and they were able to breach the door and to attempt to make entry. Officer Arant then heard shots and was shot in the hand by a bullet that came through the wal Officer Scott Kelly, who also entered apartment 77, testified that the team members were wearing green flight suits with "Police" on the shoulders of their body armor and on the sides or front of their vests. Kelly testified that the officers yelled "Pearl Police Department. Search warrant." for about 15 seconds before breaching the apartment door. Deputy Bernard Gunter testified that the announcements could be heard 75 yards away. (Tr. 239)

Officer Phillip Arant testified that the flight suits and bullet proofs vest he and the other team members wore that night had very visible police markings. Officer Arant was on team two

which was assigned to enter apartment 78. Officer Arant testified that team one knocked and announced for about 15 minutes before they entered apartment 77. Then, while team one was in the process of clearing apartment 77, team two knocked and announced loudly and repeatedly on apartment 78, "Police. Search warrant. Police. Search warrant." After 25 to 30 seconds of announcing their entry, Detective Windham rammed the door four l. Shots continued coming through the wall and Officer Windham was shot in the leg. Windham was pulled out of the doorway and Sergeant Sarret went in with a shield. The officers took into custody Kirk Vincent Mayers and his girlfriend. Officer Arant testified that he was injured and had bullet fragments and wood splinters that cut and entered the back of his right hand. (Tr. 367)

Officers Tim Sarret, Farris Thompson, Greg Fagan, Hugh Johnston and Jerry Adair also testified that the team continually knocked and announced itself loudly before entering and continued to announce themselves as they breached the door. Upon breach of the apartment door, bullets began to fly, hitting Windham and injuring Arant. Officers Sarret and Thompson took Mayers into custody. (Tr. 426) A woman came from the back bedroom and was taken into custody in the hallway at the bedroom door. (Tr. 426.) No members of the teams fired any shots during the entry to either apartment. The Pearl Police Department executed the two search warrants without firing any shots. (Tr. 427)

Officer Jerry Adair was positioned outside the two apartments and testified that while the officers were yelling "Pearl Police" and "Search Warrant," and knocking on the doors of apartments 77 and 78, people were coming out of the adjacent building to find out what was going on. Adair testified that he heard 4 to 6 shots after Detective Windham started ramming the door. (Tr. 448) Officer John Chalk testified that he was positioned to ensure that no one escaped

through a window and could see the teams in the breeze way. He testified that the officers announced themselves, yelling loudly, "Police. Search warrant. Pearl Police. Search warrant."

Based on the foregoing facts, the jury was entitled to infer that Mayers was able to hear the teams announce themselves as law enforcement officers serving a search warrant. Based on their testimony, Mayers was clearly aware that he was shooting at officers who were serving a search warrant. An officer 75 yards away could clearly hear the announcements and individuals in another building heard and came out to investigate. It was reasonable for the jury to infer that Mayers could hear the announcements that the Pearl Police Department was serving a search warrant on him and that therefore he knew that he was shooting at law enforcement officers.

The State is entitled to the benefit of all inferences in its favor. On appellate review, the State is "entitled to the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991). The reasonable inferences from the evidence support the verdict and the trial court's denial of Mayers' post-trial motions. This issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

III. The State proved scienter under Count 3 beyond a reasonable doubt.

Mayers argues that the State did not prove that he knew that the pistol was stolen and that proof of guilty knowledge is required to prove possession of stolen property. However, scienter may be proved by evidence that a defendant "received the property under circumstances that would lead a reasonable man to believe it is stolen." *Ellett v. State*, 364 So.2d 669 (Miss. 1978). Further, there was testimony from Jonathan Shelly that Mayers knew the gun was stolen.

Officer Bernard Gunter testified that Les Kershner reported to the Sheriff's Department that his house had been burglarized. (Tr. 236) Officer Gunter went to conduct an investigation.

Kershner told he that Jonathan Shelly had lived with him two weeks prior and was asked to leave. He further told Gunter that whoever had burglarized his house had to be familiar with his dogs. Kershner gave Gunter a telephone number for Shelly. Shelly was read his Miranda rights and gave a voluntary statement that he had, in fact, broken into Kershner's home and had stole the items and sold them in some apartments in Pearl, Mississippi. (Tr. 237) Shelly offered to help get the goods back. The Sheriff's Department requested help from the Pearl Police Department in recovering the stolen items. Shelly then told Officer Archie Bennett exactly which two apartments the items were in. (Tr. 238)

Jonathan Shelly testified that he and Derrick Thomas stole guns, a computer and a TV from Kershner's house. (Tr. 246) He and Thomas then went to the Crestview Apartments in Pearl to sell the items. Shelly testified that he sold a .22 pistol to Mayers for crack cocaine. (Tr. 247) Shelly reported that he was unable to get ride of all the items and that the TV, guns and computer were still there in another apartment. (Tr. 247) He testified that he was picked up by the Pearl Police the next day. Shelly testified that Mayer knew that the .22 pistol was stolen because he was trying to sell it quickly. Further, Shelly made an additional statement that the people he was with knew that the items were stolen and that Mayer come over and also knew that the .22 pistol was stolen. (Tr. 257)

The evidence clearly established that Mayer received a stolen gun, the .22 pistol, from Shelly, under circumstances that would lead a reasonable man to know that it was stolen. First, it was a used item being sold at an apartment complex. Second, the buyer was willing to trade it for a rock of crack. It is typical for those who smoke crack to steal and use the stolen goods to procure crack. Third, the seller was trying to get rid of the items quickly. As cited above,

"scienter may be proved by evidence that a defendant "received the property under circumstances that would lead a reasonable man to believe it is stolen." *Ellett v. State*, 364 So.2d 669 (Miss. 1978).

This issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

IV. The trial court correctly refused a self defense instruction offered by Mayers.

"A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Byrom v. State*, 863 So.2d 836, 874 (Miss.2003) (quoting *Heidel v. State*, 587 So.2d 835, 842 (Miss.1991)). Jury instructions are within the sound discretion of the trial court. *Goodin v. State*, 787 So.2d 639, 657 (Miss.2001).

A trial judge may properly refuse requested instructions on defense theory of the case if the judge finds them to incorrectly state the law or to repeat a theory fairly covered in another instruction or to be without proper foundation in the evidence of the case. *Blake v. Clein*, 903 So.2d 710 (Miss. 2005). The assertion that self defense is a legal defense to the charge to felon in possession of a firearm is an incorrect proposition of law and therefore Mayer was not entitled to a self defense instruction to a charge of felon in possession of a firearm. "Self-defense is not a viable defense to possession of a firearm by a convicted felon. Possession of a firearm by a convicted felon is a criminal act void of a third party to defend against." *Williams v. State*, 953 So.2d 260, 263 (Miss.Ct.App.2006). The requested instruction incorrectly states the law, and as a result, it was properly denied. This issue is without merit and the jury's verdict and rulings of

the trial court should be affirmed.

V. Mayers was not entitled to a cautionary instruction regarding his prior convictions because his prior convictions were admissible to establish motive and to challenge his credibility as a witness.

A trial judge enjoys a considerable amount of discretion as to the relevancy and admissibility of evidence. Unless his judicial discretion is so abused as to be prejudicial to the accused, this Court will not reverse his ruling. *Shearer v. State*, 423 So.2d 824, 826 (Miss.1982) (citing *Page v. State*, 295 So.2d 279 (Miss.1974)). Mississippi Rule of Evidence 103(a) instructs that a trial court's error in admitting otherwise inadmissible evidence or excluding otherwise admissible evidence *is not reversible error unless a substantial right of a party is affected.*

In the case at bar, Mayers asserts that the trial court incorrectly refused instruction D-8, that his prior conviction was not proof of commission of the offenses for which he was being tried. However, Mayers makes no argument that he was prejudiced in any way by the alleged error. Without a showing of prejudice, any error is harmless. Therefore, this issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

VI. The trial court did not err in refusing to strike Juror 18 for cause.

The trial court enjoys substantial discretion in ruling on challenges for cause. *Berry v. State*, 703 So.2d 269, 292 (Miss.1997). Excusing jurors for cause is in the complete discretion of the trial court. *Pierre v. State*, 607 So.2d 43, 49 (Miss.1992). There is nothing in the record that would indicate that this ruling constituted an abuse of the discretion afforded the trial court in matters such as this. Further, the record reveals nothing to suggest that Tucker's inclusion as a juror worked any prejudice on Mayers. Accordingly, there is no merit to this assignment of error.

VII. The trial court did not err in allowing the State to put on proof of Mayers' prior

convictions.

The State offered the testimony of Chiquita Williams, an employee of the Mississippi Department of Corrections, to show that Mayer's was on probation at the time of the commission of crimes for which he was being tried. The State further offered as part of it's case in chief, the judgment of conviction and sentencing order of Mayers' prior convictions. (Tr. 101) Ms. Williams testimony was offered to show that at that time Mayers had sentences totally 13 years hanging over his head an that when law enforcement were executed the search warrant on the apartment where Mayers was staying, there was marijuana inside the apartment, along with a stolen gun and a stolen TV. Because Mayers was on probation and his was in possession of these items, Mayers had a motive to fire at law enforcement officers in order to keep them from coming in and finding the contraband and revoking his probation. Mayers motive was to avoid being sent back to prison for those 13 years. The Mississippi Court of Appeals has held that:

> "Relevancy and admissibility of evidence are largely within the discretion of the trial court, and reversal may be had only where that discretion has been abused." *White v. State*, 742 So.2d 1126 (Miss.1999). When examining issues of the admissibility of evidence, the Court must examine the purpose for admitting such information. *Hill v. State*, 797 So.2d 914, 917(Miss.2001). "Furthermore, the trial court's discretion must be exercised within the scope of the Mississippi Rules of Evidence, and reversal will be appropriate only when an abuse of discretion resulting in prejudice to the accused occurs." *Id.*
>
> *Jones v. State*, 913 So.2d 436 (Miss.Ct.App.2005)

Under M.R.E. 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive...." "One of the accepted

exceptions to the general disallowance of evidence of other crimes is where that evidence tends to prove motive." *Neal v. State*, 451 So.2d 743, 759 (Miss.1984). In applying Rule 404(b), Mississippi appellate courts have held that even though it may reveal other crimes, evidence or testimony may be given in order to tell a rational and coherent story of what happened and where it is substantially necessary to present a complete story. ***Mackbee v. State*, 575 So.2d 16, 27-28 (Miss.1990)** (citing *Brown v. State*, 483 So.2d 328, 330 (Miss.1986)). Such evidence of the other crime is also admissible if it sheds light upon the motive or if it forms a part of a chain of facts intimately connected so that in order to interpret its general parts, the whole must be heard. ***Davis v. State*, 530 So.2d 694, 697-98 (Miss.1988)**.

Mississippi appellate courts have held that the fact of parole or probation can provide a motive that is admissible pursuant to Rule 404(b). In ***Burns v. State*, 729 So.2d 203, 220-22 (Miss.1998)**, the defendant argued that the trial court erred by allowing a witness to refer to the defendant's own statements about a prior crime. The witness testified that Burns had committed the murder because he "did not want to go back to the pen." ***Id.* at 220**. Pursuant to M.R.E. 404(b), this Court concluded that the testimony was "admissible to show motive-that Burns killed [the victim] so that he could not be identified and be sent back to the penitentiary...." ***Id.* at 221-22**.

In the case at bar, the trial court made the requisite balance and found that the probative value of the conviction was not outweighed by the prejudicial effect. Because the State introduced the evidence for the purpose of proving motive for the charges of aggravated assault pursuant to M.R.E. 404(b) and not merely to show the underlying conviction for the charge of possession of a firearm by a convicted felon, the state was not required to accept a stipulation to

the conviction. The trial court correctly conducted the balanced test pursuant to M..R.E. 404(b) and the evidence was therefore correctly admitted. This error is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

VIII. The trial court properly admitted testimony by Investigator Brian Ellis regarding the trajectory of bullets at the crime scene.

The admissibility of evidence rests within the trial court's discretion. *Rash v. State*, 840 So.2d 774 (Miss.Ct.App.2003). We will not reverse unless an abuse of this discretion results in prejudice to a defendant. *White v. State*, 847 So.2d 886 (Miss.Ct.App.2002).

Investigator Brian Ellis was allowed to testify as a fact witness to what he saw and observed when he investigated the crime scene. Ellis testified that he found four shell casings in the living room area. He testified that he found a bullet fragment in apartment 77 lodged in a TV entertainment center. Ellis testified that the doors of the two apartments were exactly across from one another so that bullets fired from the 78 went straight into 77 and hit the door the entertainment center that was on the wall close to the door. Ellis further identified a picture of the door of apartment 77 with a bullet mark in it.

Mississippi Rule of Evidence 701 states that a lay witness is limited to opinions which are "(a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Rule 702 states that an expert witness may give opinion testimony if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Detective Ellis was not qualified by the court as an expert. He could only submit opinion testimony under Mississippi Rule of Evidence 701. Rule 701 provides for limited admissibility of lay opinion testimony. Such evidence is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to the clear understanding of his testimony or the determination of a fact in issue. M.R.E. 701. Rule 701 does not open the door to any and all opinion testimony. *Jackson v. State*, 551 So.2d 132, 144 (Miss.1989). A lay witness may not express an opinion on an ultimate issue. *Id.* A lay witness can only give an opinion that is based upon his personal perceptions, and that will help the jury fairly resolve a controverted, material fact. *Id.* (citing Dale v. Bridges, 507 So.2d 375, 378 (Miss.1987)).

The evidence presented by Ellis is nothing more than opinions and inferences based on his personal perceptions and observations. The doors were directly across from one another. Bullet holes were found in the door and in the TV stand near the door of apartment 77. The pistol was found in apartment 78 and the shells casings were found near the door in apartment 78. To state that the gun was fired from apartment 78 into apartment 77 is nothing more than observation and does not rise to the level of an expert opinion.

This issue is without merit and the jury's verdict and the rulings of the trial court should be upheld.

IX. Mayer's sentence was constitutional.

A. The plain language of Mississippi Code Annotated § 97-37-37 (2007)

Mississippi Annotated Section 97-37-37(2) (2007)provides that "[e]xcept to the extent that a greater minimum sentence is otherwise provided by any other provision of law, any convicted felon who uses or displays a firearm during the commission of any felony shall, in

addition to the punishment provided for such felony, be sentenced to an additional term of imprisonments in the custody of the Department of Corrections of ten(10) years, to run consecutively, concurrently, which sentence shall be reduced or suspended."

Mayer was convicted of two counts of aggravated assault on a law enforcement officer and was sentenced as an habitual offender. Mayer was further convicted of one count of possession of a firearm by a convicted felon and one count of possession of a stolen firearm. Mayer was sentenced to 30 years for each of the two counts of aggravated assault, 5 years for possession of a stolen firearm, and 3 years for possession of a firearm by a convicted felon. All sentences were ordered to run consecutively.

The trial court then determined to apply **Mississippi Code Annotated 97-37-37 (2007)** and sentenced Mayer to an additional ten years each for counts 1 and 2, to be served consecutively, according to the plain language of the statute.

Pursuant to **Mississippi Code Annotated § 97-3-7** the minimum sentence is 0 and the maximum sentence is 30 years. Pursuant to **Mississippi Code Annotated § 97-37-5**, the minimum penalty for possession of a firearm by a convicted felon is 0 years and the maximum is 3 years. Pursuant to **Mississippi Code Annotated § 97-37-35**, the sentence for possession of a stolen firearm is five years. The minimum sentences for each count are all less than ten (10) years, placing Mayers squarely within the enhancement range of **Mississippi Code Annotated § 97-37-37**. Therefore, by its plain language, **Mississippi Code Annotated 97-37-37 (2007)** applies to Mayers' sentencing. **While the Mississippi Code Annotated § 99-18-81** addresses enhanced penalties for habitual offenders, it does not set forth the range of minimum and maximum penalties for the offenses for which Mayers was convicted. It is a separate enhance for

habitual offender status, while Mississippi Code Annotated 97-37-37 (2007) is an enhancement for use of a firearm during the commission of a felony. There is no inherent prohibit to the application of both enhancements where both apply.

B. Application of Mississippi Code Annotated 97-37-37 (2007) does not violate the prohibition against double jeopardy.

Mayers argues that the penalty for his crime was erroneously raised by the state and therefore, the trial court violated the ex post facto clause of the Constitution by imposing ten year enhancements to Counts 1 and 2 of the indictment pursuant to Miss.Code Ann. § 97-37-37. First, Mayers waived this issue for consideration on appeal by not raising a constitutional challenge at trial. Mayers is now procedurally barred from raising this issue on appeal. Mississippi appellate courts have consistently held that constitutional questions not raised at the lower court will not be reviewed on appeal. *Stockstill v. State*, 854 So.2d 1017, 1023 (Miss.2003); *Ellis v. Ellis*, 651 So.2d 1068, 1073 (Miss.1995); *Patterson v. State*, 594 So.2d 606, 609 (Miss.1992). These constitutional questions are waived or forfeited if not asserted at the trial level. *Contreras v. State*, 445 So.2d 543, 544 (Miss.1984). As such, attacks on the constitutionality of a statute cannot be considered for the first time on appeal. *Colburn v. State*, 431 So.2d 1111, 1113 (Miss.1983); *Smith v. State*, 430 So.2d 406, 407 (Miss.1983).

By the plain language of its title, *Enhanced Penalty for the Use of Firearm During the Commission of a Felony*, Mississippi Code Annotated § 97-37-37 (2007) is an *enhancement* for the use of a firearm during a felony. It does not set out the separate elements of the felony to be charged, only that the penalty will be enhanced by 10 years if a firearm is used.

Mississippi appellate courts have consistently upheld the use of the underlying felony as

an aggravating factor during sentencing. *Goodin v. State*, 787 So.2d 639, 654 (Miss.2001) (citing Walker v. State, 671 So.2d 581, 612 (Miss.1995)). The argument is the familiar "stacking" argument. It contends that it is unconstitutional for the State to elevate murder to capital murder and then, using the same factor, elevate the sentence to death. The Mississippi Supreme Court has consistently rejected this argument. *Brawner v. State*, 947 So.2d 254 (Miss.2006) (citing *Lockett v. State*, 517 So.2d 1317, 1337 (Miss.1987); *Davis v. State*, 684 So.2d 643, 664 (Miss.1996)).

The use of Mississippi Code Annotated § 97-37-37 (2007) is a permissible enhancement and is not the same circumstance as the enhancement for habitual offenses found in Mississippi Code Annotated § 99-18-81. Therefore, there is no "impermissible doubling" in applying both enhancements. Both statutes contain the same mandatory requirement that the enhancement "shall" be imposed.

C. Apprendi

Mayer further argues that *Ring* and *Apprendi* require that the aggravating factor which the State intends to use at sentencing, as elements of the offense, must be set forth in the indictment. Mississippi Appellate Courts have repeatedly dealt with this argument finding it without merit. *Jordan v. State*, 918 So.2d 636, 661 (Miss.2005). A defendant is not entitled to formal notice of the aggravating circumstances to be employed by the prosecution and that an indictment for aggravated assault on a police officer puts the defendant on sufficient notice to what statutory aggravating factors will be used against him. The purpose of the indictment is to provide the accused reasonable notice of the charges against him so that he may prepare an adequate defense. *Brown v. State*, 890 So.2d 901, 918 (Miss.2004). Accordingly, all that is required in the

indictment is a clear and concise statement of the elements of the crime charged.

Further, each element of Mississippi Code Annotated § 97-37-37 is contained in the indictment against Mayers and was submitted to the jury. He was on notice of everything the State intended to prove against him and had ample information to prepare his defense. This issue is without merit and the rulings of the trial court should be upheld.

D. Ex Post Facto

Mayers argues that the penalty for his crime was erroneously raised by the state and therefore, the trial court violated the ex post facto clause of the Constitution by imposing ten year enhancements to Counts 1 and 2 of the indictment pursuant to Miss.Code Ann. § 97-37-37. First, Mayers waived this issue for consideration on appeal by not raising a constitutional challenge at trial. Mayers is now procedurally barred from raising this issue on appeal. Mississippi appellate courts have consistently held that constitutional questions not raised at the lower court will not be reviewed on appeal. *Stockstill v. State*, 854 So.2d 1017, 1023 (Miss.2003); *Ellis v. Ellis*, 651 So.2d 1068, 1073 (Miss.1995); *Patterson v. State*, 594 So.2d 606, 609 (Miss.1992). These constitutional questions are waived or forfeited if not asserted at the trial level. *Contreras v. State*, 445 So.2d 543, 544 (Miss.1984). As such, attacks on the constitutionality of a statute cannot be considered for the first time on appeal. *Colburn v. State*, 431 So.2d 1111, 1113 (Miss.1983); *Smith v. State*, 430 So.2d 406, 407 (Miss.1983).

E. Disproportionality

Mississippi courts have long held that sentencing is within the discretion of the trial court and is not subject to appellate review if it is within the limits prescribed by statute. *Nichols v. State*, 826 So.2d 1288, 1290 (Miss.2002); *Hoops v. State*, 681 So.2d 521, 537 (Miss.1996). In

Stromas v. State, 618 So.2d 116 (Miss.1993), the Mississippi Supreme Court addressed those cases where the sentence is within the prescribed statutory limits:

> Though no sentence is "per se" constitutional, this Court, in the context of our habitual statutes, as well as in sentencing other offenders, has recognized the broad authority of the legislature and trial court in this area and had repeatedly held that where a sentence is within the prescribed statutory limits, it will generally be upheld and not regarded as cruel and unusual.
>
> Id. at 123-24.

However, where a sentence is "grossly disproportionate" to the crime committed, the sentence is subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment. *Hoops*, 681 So.2d at 537 (citing *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)); *Wallace v. State*, 607 So.2d 1184, 1188 (Miss.1992). This Court has held that apart from a sentence of life in prison without the possibility of parole or a sentence which is manifestly disproportionate to the crime committed, an extended proportionality analysis is not required by the Eighth Amendment when there is an allegation of cruel and unusual punishment. *Barnwell v. State*, 567 So.2d 215, 221 (Miss.1990).

The Mississippi Court of Appeals, in *Pittman v. State*, 2004 WL 2439694, (Miss.Ct.App.2004), cited some examples of sentences upheld by Mississippi courts including: *Braxton v. State*, 797 So.2d 826 (Miss.2000) (holding that thirty years was the maximum sentence within the statutory guidelines for unlawful sale of cocaine and, thus, was not excessive or cruel and unusual punishment); *Edwards v. State*, 615 So.2d 590 (Miss.1993) (holding that sentence of twenty-five years for possession of cocaine with intent to distribute was not grossly disproportionate where statutory maximum sentence was thirty years and fine of up to

$1,000,000); *Hart v. State*, 639 So.2d 1313 (Miss.1994) (holding that sentence of twenty years and fine of $250,000 was not disproportionate to conviction of possession of marijuana with intent to deliver or distribute where sentence was within statutory limits); *Rogers v. State*, 599 So.2d 930 (Miss.1992) (holding that sentence of twenty-five years in prison and fine of $500,000 was not excessive for conviction for distribution of crystal methamphetamine); *Bracy v. State*, 396 So.2d 632 (Miss.1981) (holding that trial court did not abuse its discretion by imposing sentence of twenty years and fine of $10,000 on defendant convicted of sale of phencyclidine (PCP)).

Mayers' sentence is within the statutory guidelines prescribed by the Legislature for the crime for which he was convicted. Under Miss.Code Ann. § 97-3-7 and Miss.Code Ann. § 99-19-81, and Miss. Code Ann. § 97-37-37, the trial court sentenced Mayers correctly.

In considering whether Mayers' sentence is grossly disproportionate to his crime, it is instructive to consider *Williams v. State*, 794 So.2d 181 (Miss.2001). There the defendant was convicted for the sale of cocaine under § 41-29-132 and sentenced to thirty years. This sentence was enhanced to sixty years by § 41-29-142, because the sale occurred near a school. Because Williams was a second and subsequent offender the sixty year sentence was again doubled to one hundred and twenty years pursuant to § 41-29-147. Next, the judge applying § 99-19-81, sentenced Williams to the 120 years without a possibility of parole or early release. Williams also alleged that the sentence of 120 years for the sale of $20 of cocaine was tantamount to a life sentence in prison, and that the sentence was disproportionate to the crime and, therefore, cruel and unusual punishment under the *Solem* analysis. Id. at 189. The Mississippi Supreme Court held: "[e]ven though this sentence is extremely lengthy, it does not exceed the maximum

sentence allowed by statute. Therefore, we find that the trial court did not abuse its discretion in sentencing Williams to the maximum without possibility of parole or early release." **Id. at 190**.

Though certainly harsh, Mayers' sentence is not "grossly disproportionate" to his crime. It is within the Legislature's prerogative to determine that three crimes such as those committed by Mayers can result in a sentence of eighty-eight years without parole or chance of early release. The Legislature has made its decision and absent a constitutional violation it is unassailable. This issue is without merit and the rulings of the trial court should be affirmed.

CONCLUSION

The issues presented by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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