IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN WILLIS GILBERT, JR. — APPELLANT

VS. — NO. 2009-KA-1539

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL AS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND AS THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL AS THE COMMENT IN QUESTION DID NOT CAUSE SUBSTANTIAL AND IRREPARABLE PREJUDICE TO THE APPELLANT'S CASE AND AS THE TRIAL COURT PROPERLY ADMONISHED THE JURY TO DISREGARD THE COMMENT.

III. THE APPELLANT WAS PROPERLY SENTENCED AS A HABITUAL OFFENDER UNDER MISS. CODE ANN. §99-19-83.

STATEMENT OF THE FACTS

The Appellant, John Willis Gilbert, Jr. and Alice Stapleton were involved in a romantic relationship and moved in together despite the fact that the Appellant was married to someone else. (Transcript p. 72, 73, 127, and 128). At some point during the relationship, Ms. Stapleton moved

into her own apartment and the romantic relationship ended. (Transcript p. 72). Despite ending the romantic aspect of the relationship, Ms. Stapleton and the Appellant continued to spend time together, normally at her apartment which she shared with her adult daughter, Jamie. (Transcript p. 72 and 128).

On the evening of December 18, 2008, the Appellant came over to Ms. Stapleton's apartment. (Transcript p. 53, 127, and 156). While Ms. Stapleton cooked spaghetti, the Appellant and Jamie played cards. (Transcript p. 156). Later all three watched a movie in the living room. (Transcript p. 53, 128, and 156). Jamie, pregnant at the time, lay on the couch. (Transcript p. 53 and129) The Appellant sat on one end of the love seat and Ms. Stapleton lay on the other end but rested her feet in the Appellant's lap. (Transcript p. 53, 74, and 129). At some point in the evening, both Ms. Stapleton and Jamie fell asleep. (Transcript p. 53 and156 - 157). While they were asleep, the Appellant continued to watch television going outside ever so often to smoke. (Transcript p. 156).

Late in the night, Ms. Stapleton, waking up, noticed the Appellant walk toward the kitchen and assumed he was leaving exiting through the back door. (Transcript p. 129). She continued to lie on the love seat, but suddenly noticed the Appellant standing over her. (Transcript p. 130). She saw that he had a knife and she panicked. (Transcript p. 130). While she was still on the love seat, the Appellant attacked her and managed to cut her ear. (Transcript p. 133). She fought back and was able to stand up. (Transcript p. 55, 66, and 134). He continued to attack her after she stood up, wounding her on the chest, behind the neck and twice on the left arm. (Transcript p. 135).

Before Ms. Stapleton was able to get off the love seat, Jamie woke up hearing her mother scream. (Transcript p. 54). Jamie saw her mom get off the love seat and saw the Appellant continue to attack her mom. (Transcript p. 55). Jamie did not want to get involved since she was pregnant,

but nonetheless, hit the Appellant from behind and yelled for him to stop hurting her mom. (Transcript p. 55 and 75).

The attack finally ended. Ms. Stapleton testified that she was not certain what caused the attack to begin nor did she know what made the Appellant stop attacking her. (Transcript p. 136 - 137). Jamie testified that she believed the Appellant stopped after injuring his own hand. (Transcript p. 55 - 56). Ms. Stapleton and Jamie immediately left the apartment and went across the hall to Ms. Stapleton's mother's apartment to call 911. (Transcript p. 56).

After an investigation, the Appellant was arrested, tried, and convicted of aggravated assault with a deadly weapon in Coahoma County, Mississippi. He was sentenced as a habitual offender to life without the possibility of parole or probation in the custody of the Mississippi Department of Corrections. From this conviction and sentence, he now appeals.

SUMMARY OF THE ARGUMENT

This Court should affirm the Appellant's conviction and sentence as the Appellant did not establish that there were any reversible errors committed during his trial. Additionally, there was sufficient evidence to support the verdict in that the State provided evidence establishing each element of aggravated assault with a deadly weapon. Also, the verdict was not against the overwhelming weight of the evidence and allowing it to stand would not sanction an unconscionable injustice.

The trial court did not abuse its discretion in denying the Appellant's motion for mistrial. First, the comment regarding the Appellant's post-arrest silence did not result in substantial and irreparable prejudice to the Appellant's case particularly in light of the fact that it was an isolated comment and the fact that it did not invite the jury to consider his post-arrest silence as evidence of his guilt. Secondly, the trial court immediately admonished the jury to disregard the comment. As

Mississippi law is clear that the trial court is in the best position to determine prejudice and as there is a presumption that jurors follow the instructions of the court, there is no reversible error. Additionally, there was no error in allowing a witness to refer to Ms. Stapleton as the "victim."

The Appellant was properly sentenced as a habitual offender under Miss. Code Ann. §99-19-83. An amendment to the habitual offender portion of the indictment was properly allowed during the sentencing hearing as it was one of form and not substance. Further, there was sufficient proof presented evidencing that the requirements for sentencing under §99-19-83 were met.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL AS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND AS THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The Appellant first questions "whether the trial court erred in failing to sustain the Appellant's Motion to Set Aside the Jury's Verdict (JNOV) because the evidence presented at trial was legally insufficient, or in the alternative, refusing to grant the Appellant's Motion for a New Trial, as the verdict of the jury was not supported by the overwhelming weight of the evidence." (Appellant's Brief p. 14). The State of Mississippi would respond to the Appellant's first question by unequivocally stating that the trial judge did not err in denying both motions in that there was sufficient evidence to support the verdict and the verdict was not against the overwhelming weight of the evidence.

A. The trial court properly denied the Appellant's Motion for New Trial as the verdict was not against the overwhelming weight of the evidence.

A motion for new trial challenges the weight of the evidence. *Vaughn v. State*, 926 So.2d 269, 271(Miss. Ct. App. 2006) (citing *Hawthorne v. State*, 835 So.2d 14, 21 (Miss. 2003)). When

reviewing a denial of a motion for new trial, appellate courts "will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Id.* (quoting *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)). As the Court of Appeals noted this Court has previously stated that

> . . . on a motion for new trial, the court sits as a thirteenth juror. The motion however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in *exceptional cases* in which the evidence preponderates heavily against the verdict.

Id. (*emphasis added*). The Appellant's case is not one of those exceptional cases where the evidence preponderates heavily against the verdict.

To support his claim that the evidence in this case "literally cries out" for this Court to "invoke its status as the thirteenth juror" and reverse this conviction, the Appellant first argues that the "physical evidence is diametrically opposed to and contradicts in material particulars Alice and her daughter's story." (Appellant's Brief p. 15 - 16). The State would first note with regard to this claim that "[t]he issue of weight and credibility accorded to evidence is a matter to be resolved by the jury, whose province is not invaded by this Court." *Alonso v. State*, 838 So.2d 309, 314 (Miss. Ct. App. 2002) (citing *Clay v. State*, 811 So.2d 477 (Miss. 2002)). Secondly, the State would assert that the physical evidence is NOT in conflict with the testimony of Ms. Stapleton and her daughter.

The Appellant notes as, an example of this alleged conflict in the evidence, "the presence of [the Appellant's] defensive wound and Alice's lack of any such wounds." (Appellant's Brief p. 16). However, there was no evidence presented classifying either Ms. Stapleton's wounds or the Appellant's wounds as defensive or otherwise. In this same vein, the Appellant asserts that the "types of wounds" Alice received somehow weigh against her testimony regarding how the incident occurred noting that the wounds, with one exception, are "cuts, not stabs." (Appellant's Brief p. 16).

He further argues that Alice's short stay in the emergency room weighs against her testimony as does the "random, sporadic, and spread out" placement of the wounds. (Appellant's Brief p. 17). He claims that these observations evidence a "reasonable inference" that Ms. Stapleton's wounds were not severe and were possibly self-inflicted "during and after the struggle rather than the result of a 'stabbing.'" (Appellant's Brief p. 17). However, the Appellant merely speculates as to these "inferences." While "[i]t is well-established in Mississippi that a jury, as the finder of fact, is entitled to consider not only facts as testified to by witnesses, but all inferences that may be reasonably and logically deduced from the facts and evidence," the inferences must be LOGICALLY AND REASONABLY deduced from the evidence. *McManis v. State*, 901 So.2d 648, 651 (Miss. Ct. App. 2004) (citing *Pryor v. State*, 349 So.2d 1063, 1064 (Miss. 1977)). There was absolutely no evidence whatsoever that Ms. Stapleton's wounds were self-inflicted. Additionally, Jamie's testimony that her mother tried "to fight [the Appellant] off," actually creates the inference that the wounds were less severe and on various parts of her body because of Ms. Stapleton's attempts to get away from the Appellant.

The Appellant also points to the lack of blood on the love seat and the proper placement of the pillows on the love seat as examples of the conflict between the physical evidence and Ms. Stapleton's testimony that the Appellant stabbed her while she was lying on the love seat. (Appellant's Brief p. 18). The State would counter that simply because there was no blood on the love seat does not mean that Ms. Stapleton was not stabbed while lying on the love seat. Jamie testified that the bloodstained sheet pictured in Exhibit S-9 is the sheet her mother was lying under on the love seat. (Transcript p. 63). The jury most likely inferred that any blood from the wound Ms. Stapleton received while on the love seat ended up on the sheet she slept under. Moreover, the Appellant's assertion that the pillow placement on the love seat after the attack evidences that the

Appellant could not have attacked Ms. Stapleton while she was on the love seat is a stretch to say the least. There is no way to know in what manner the pillows were placed on the love seat prior to the attack and certainly no way to infer what happened on the love seat by their placement after the attack.

The Appellant also argues that Ms. Stapleton could not have received a cut to her right ear if she were lying on the love seat in the manner she described at trial. (Appellant's Brief p. 18). However, the record does not fully disclose exactly how Ms. Stapleton was lying on the love seat. She testified that she was lying on her side facing the television but that she could not remember whether she was lying on her right side or left side. (Transcript p.133). She answered numerous questions during cross-examination about the placement of her head on the love seat based upon the picture in Exhibit S-8. (Transcript p. 139 - 140). Unfortunately, the record does not indicate where on the picture she pointed to as being the place she rested her head while lying on the love seat. Thus, there is no way to determine from the record exactly how she was lying on the love seat.

The Appellant also argues that "the sudden appearance of the knife" months after the attack supports his contention that the physical evidence is contradictory to the testimony of the State's witnesses. (Appellant's Brief p. 19). He argues that it is "highly improbable that [Ms. Stapleton and Jamie] could have lived in that apartment that long without ever having looked under the sink, the area where cleaning supplies and other modern necessities are normally stored." (Appellant's Brief p. 20). However, there is nothing in the record showing that the two kept anything at all under their sink or that they had any reason to look there prior to Jamie's finding the knife months later. Again, while jurors may consider inferences from the testimony, these inferences must be reasonably and logically based in the evidence. This inference, along with many of the other inferences argued by the Appellant, are not reasonable or logical in light of the record before the Court. Additionally, the

Appellant claims that Jamie "testified that the knife was found three months after the struggle" and the investigating officer testified that he received the knife five months later. (Transcript p. 19). Again the record evidences that there is no contradiction. Jamie did not testify that she knew for certain that the knife was found three months after the incident. In fact, when asked when she found the knife, her exact testimony was "I'm not sure actually." (Transcript p. 68). She was asked to give her best guess and responded that she thought it was "about three months later." (Transcript p. 68). Her "best guess" being off a bit does not prove anything.

Also in support of his contention that the physical evidence is opposed to the testimony of the State's witnesses, the Appellant argues that Jamie presented conflicting testimony. One alleged example is that she told police she hit the Appellant during the attack but testified that she was "scared of getting involved in the fight." (Appellant 's Brief p. 21). This is not a contradiction. At trial, when asked what she did when she noticed the attack, Jamie responded as follows:

> I got up, and I was telling him to stop. I was trying to get him up off her, but I was scared at the time because at the time I was pregnant, and I didn't want him to turn on me . . .

(Transcript p. 55). During cross-examination she agreed that the statement she previously gave investigating officers was accurate and further agreed that she told officers the following:

> I was hitting John in the back and telling him to stop fighting my mother, and then he ran out the back door of my apartment.

(Transcript p. 75). She testified, not that she was scared of getting involved and therefore, did not get involved, but rather testified that she was scared because she was pregnant and did not want him to turn on her. She later testified that she did hit the Appellant and tell him to leave her mother alone. These statements are clearly not contradictory.

The Appellant also argues that Jamie's testimony regarding when the Appellant left the

apartment is contradictory. Again, it is not. She testified that she gave the statement set forth above to the investigating officers indicating that after she hit the Appellant, he ran out the back door. (Transcript p. 75). During her direct testimony regarding the issue she testified as follows:

Q: Okay. And so what happened when he stopped?
A: I grabbed my mother and we went out the door and - - across the hall to my grandmother's house.
Q: Did you see where the defendant went, if anywhere?
A: No.

(Transcript p. 56). She maintained throughout cross-examination that she remembered leaving before the Appellant left and believes he went out the back door. (Transcript p. 76 - 77). She also clarified her statement to the investigating officer testifying to the following:

Q: Well, did he run out the back door when you started hitting on him and telling him to stop hitting your momma?
A: He didn't run out right then, no.
Q: How long did he stay in there after you started hitting on him?
A: I don't know.
* * *
Q: Okay. He ran out the back door before y'all went out the front door, didn't he?
A: No.
Q: Y'all went out the front door before he left?
A: Yes.
Q: Well, how did you know he went out the back door?
A: Because when I went back in, the back door was open.

(Transcript p. 75 - 76). Her statement to investigating officers did not state that as soon as she hit the Appellant he ran out. It simply stated that at some point after she hit him, he ran out. She clarified that fact in her testimony at trial. Further, any slight inconsistencies in details are to be dealt with by the jury. "It is the jury's province to resolve such conflicts, and the jury is free to accept the testimony of some witnesses and reject that of others, in whole or in part." *Shorter v. State*, 888 So.2d 452, 454 (Miss. Ct. App. 2004) (quoting *Montana v. State*, 822 So.2d 954, 966 (Miss. 2002)) (*emphasis added*).

The Appellant also asserts that "the forensic examination of the physical evidence gathered by police also greatly weighs in favor of [the Appellant's] testimony" noting that of the eight blood stains on the Appellant's pants, seven matched the Appellant's DNA sample and only one matched Ms. Stapleton's DNA sample. (Appellant's Brief p. 23). This assertion proves nothing other than the Appellant got more of his own blood on his pants than that of Ms. Stapleton's. It offers nothing in support of his testimony.

Not one of the Appellant's assertions or contentions evidence that the verdict was against the overwhelming weight of the evidence. Additionally, many of the assertions are not grounded in the evidence. The record does not indicate that this case is one of those exceptional cases where the evidence preponderates heavily against the verdict. In fact, the record fully supports the trial court's denial of the motion for new trial.

B. The trial court also properly denied the Appellant's Motion for Judgment Notwithstanding the Verdict as there was sufficient evidence to prove each element of the crime charged.

The standard of review concerning sufficiency of the evidence requires that the trial judge "accept as true all of the evidence favorable to the State, including any reasonable inferences that may be drawn therefrom." *Hoye v. State*, 867 So.2d 266, 266 (Miss. Ct. App. 2004) (*Wall v. State*, 718 So.2d 1107 (Miss. 1998)). "The relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Vaughn v. State*, 926 So.2d 269, 271(Miss. Ct. App. 2006) (quoting *Bush v. State*, 895 So.2d 836, 843 (Miss. 2005)). "The court will only reverse when reasonable and fair-minded jurors could only find the accused not guilty." *Hoye*, 867 So.2d at 266. With this standard in mind, there is sufficient evidence in the case at hand to prove each and every required element of aggravated assault.

Mississippi Code Annotated §97-3-7(2)(b)states that "[a] person is guilty of aggravated assault if he . . . (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm." Thus, the State had to prove that the Appellant knowingly caused bodily injury to another with a deadly weapon. The State met this burden. First, there was evidence that Ms. Stapleton was cut and/or stabbed receiving at least five different wounds on her body. (Transcript p. 108, 133, and 135). Second, there was evidence that Ms. Stapleton's injuries were caused by a knife, which is a deadly weapon. (Transcript p. 54, 79, 130, and 132 - 134). Finally, there was evidence that the Appellant knowingly caused, with the use of a knife, Ms. Stapleton's injuries. (Transcript p. 54, 79, 130, and 132 - 134). Accordingly, there was sufficient evidence to support the verdict.

Nonetheless, the Appellant asserts that "the State did not meet its burden of proof in their case-in-chief in presenting credible evidence to the jury that would allow them to 'infer' the guilt of John Gilbert 'beyond a reasonable doubt' on an essential element of the crime of aggravated assault, namely that the Appellant was the person who actually was the assailant in this case." (Appellant's Brief p. 29). Contrary to this assertion, the record does evidence that the Appellant was actually the assailant. Jamie testified that she did not see her mom with a weapon at any time. (Transcript p. 66 - 67 and 79). When asked at trial what she saw her mom doing during the incident, Jamie replied that "she was screaming and trying to fight him off." (Transcript p. 66). Jamie further testified that she saw the knife in the Appellant's hand and that there was no one else in the apartment with a knife. (Transcript p. 77 and 79). Alice also testified that the Appellant had a knife and that he was the person who stabbed her. (Transcript p. 130). As to the credibility of this evidence, Mississippi law is clear that "this Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not

the most credible." *Brown v. State*, 934 So.2d 1039, 1044 (Miss. Ct. App. 2006) (quoting *Langston v. State*, 791 So.2d 273, 280 (Miss. Ct. App. 2001)).

Furthermore, as set forth above, there were no major discrepancies in the testimony and evidence presented by the State. Thus, the credibility of the State's witnesses is not actually a factor. The only real conflict in all the evidence presented was the version of events presented by Ms. Stapleton and her daughter as compared to the version of events presented by the Appellant. The jury chose to believe Ms. Stapleton and Jamie and not to believe the Appellant. As noted above, "it is the jury's province to resolve such conflicts [in the testimony], and the jury is free to accept the testimony of some witnesses and reject that of other, in whole or in part." *Shorter v. State*, 888 So.2d 452, 454 (Miss. Ct. App. 2004).

Moreover, "if the jury finds the testimony worthy of belief, the uncorroborated testimony of the victim of a crime *alone* is sufficient evidence to sustain a conviction." *Wilks v. State*, 909 So.2d 1252, 1255 (Miss. Ct. App. 2005). In the case at hand, the jury was presented with not only Ms. Stapleton's testimony but also that of her daughter. Such evidence, notwithstanding the other evidence presented, is certainly sufficient to sustain the verdict in this case. This is especially true in cases like that of the Appellant and that of *Wilks v. State*, wherein a review of the record evidences "the absence of any indication that the jury abandoned its duty by basing its determination of guilt on some alternate, and impermissible, basis such as bias, passion or prejudice." *Id.*

The appellate courts are "not at liberty to direct that the defendant be discharged short of a conclusion on our part that given the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt the defendant was guilty." *Bobo v. State*, 953 So.2d 282, 285 (Miss. Ct. App. 2007) (quoting *Ashford v. State*, 583 So.2d 1279, 1281 (Miss. 1991)). Viewing the evidence in this case in the light most favorable to the verdict as

required by law, a reasonable juror could have, and in fact twelve reasonable jurors did find, beyond a reasonable doubt that the Appellant was guilty.

Accordingly, the trial court did not abuse its discretion in denying either of the Appellant's post-trial motions. This issue is without merit.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL AS THE COMMENT IN QUESTION DID NOT CAUSE SUBSTANTIAL AND IRREPARABLE PREJUDICE TO THE APPELLANT'S CASE AND AS THE TRIAL COURT PROPERLY ADMONISHED THE JURY TO DISREGARD THE COMMENT.

The Appellant next questions "whether the trial court erred when it failed to grant the Appellant's Motion for a Mistrial after a State's witness testified, in violation of Appellant's constitutional rights, that the Appellant did not want to give a formal statement or speak with police after being arrested, then *Mirandized*. . ." (Appellant's Brief p. 29 - 30). The testimony at issue occurred when the prosecutor asked the investigating officer "what, if anything, did you do" after locating the Appellant. (Transcript p. 84). The officer responded:

> Well, I knocked on the door of the residence, and a gentleman opened the door which was not Mr. Gilbert. I asked him if Mr. Gilbert was at the residence. He said that he was. He kind of went back further into the residence. Mr. Gilbert came to the door. He had bloodstained clothing. He had a large cut on his hand. At that time, I placed him under arrest, took him to the Clarksdale Police Department, and read him his *Miranda* rights and attempted to interview him, and he refused to speak with me about the incident.

(Transcript p. 84). Immediately after this testimony, defense counsel objected and the following exchange took place at the bench:

> DEFENSE COUNSEL: The officer says that he - - I'm objecting to the fact that the officer is testifying that the defendant refused to talk to him. He had no obligation to talk to him.
>
> COURT: Counsel (sic) is expanding some of his answers. He needs to restrict his answers to the questions that are asked. You know, he simply asked - - I mean he advised him of his *Miranda* rights. That answers the question.

PROSECUTOR: I was trying not to lead, but with the Court's indulgence, I'll lead a little more.
COURT: I'll give you some limited latitude.
PROSECUTOR: I'm not trying - -
DEFENSE COUNSEL: I would like to again move for a mistrial.
COURT: I will sustain the objection, but I will overrule the objection for a mistrial.

(Transcript p. 85). The Court then admonished the jury to disregard the testimony:

> The jury will disregard the last comment with regard to the defendant's statement. The defendant can - - actually they have a constitutional right to speak or not to speak, and if a defendant exercises his constitutional right not to speak, that is his right.

(Transcript p. 85 - 86).

The standard of review for denial of a motion for mistrial is abuse of discretion. *Rollins v. State*, 970 So.2d 716, 720 (Miss. 2007). This Court has previously held the following with regard to the trial court's discretion in declaring a mistrial:

> The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case. Miss. Unif. Crim.R.Cir.Ct.Prac. 5.15. The trial judge is permitted considerable discretion in determining whether a mistrial is warranted since the judge is best positioned for measuring the prejudicial effect. *Roundtree v. State*, 568 So.2d 1173, 1178 (Miss.1990). When the trial judge determines that the error does not reach the level of prejudice warranting a mistrial, the judge should admonish the jury to disregard the impropriety in order to cure its prejudicial effect. *Perkins v. State*, 600 So.2d 938, 941 (Miss.1992); *Estes v. State*, 533 So.2d 437, 439 (Miss.1988).

Gossett v. State, 660 So.2d 1285, 1290-91 (Miss. 1995) (*emphasis added*). The trial court's response to the Appellant's motion for mistrial was not an abuse of discretion.

First, the comment did not result in substantial and irreparable prejudice to the Appellant's case. Contrary to the Appellant's contention in his brief that the prosecutor's question and the officer's response were "intentional" and "calculated tactic[s]," a reading of the record clearly evidences that the prosecutor did not intend to illicit testimony about the Appellant's post-*Miranda*

silence. It appears to be a more likely scenario that in response to an open-ended question, the officer got carried away with details. More important, unlike many cases involving comments on post-*Miranda* silence, there was no implication of guilt in either the question asked or the response thereto. *See Hope v. State*, 992 So.2d 666, 672 (Miss. Ct. App. 2008) (holding that a similar comment by an investigating officer "did not invite the jury to consider the fact that [the Appellant] did not give a statement as evidence of his guilt"). Thus, the trial court did not find that the comment caused substantial and irreparable damage and this Court has previously noted that a trial judge is in the best position to determine prejudice. *Weeks v. State*, 804 So.2d 980, 992 (Miss.2001)

Additionally, once the judge determined that the comment did not reach the level of prejudice which would require a mistrial, he admonished the jury to disregard the comment. "The better remedy for an improper comment or question that has been put before the jury is for the court to admonish the jury not to consider the improper statement." *Hughes v. State,* 735 So.2d 238, 256 (Miss. 1999)(citing *Criddle v. State*, 633 So.2d 1047, 1048 (Miss.1994)). It is well-settled Mississippi law that it is "presumed that the jury will follow the court's instruction to disregard any inadvertent comments or evidence and to decide the case solely based on the evidence presented" and that "to presume otherwise would be to render the jury system inoperable." *Lofton v. State*, 818 So.2d 1229, 1233 (Miss. Ct. App. 2002) (quoting *King v. State*, 772 So.2d 1076, 1078 (Miss. Ct. App. 2000)) (*emphasis added*). *See also Gossett v. State*, 660 So.2d 1285, 1292 (Miss. 1995) (holding that the trial court was within its authority in denying the defendant's motion for mistrial after testimony that the defendant exercised his *Miranda* rights as the trial judge gave a cautionary instruction and as "the jury is presumed to have followed the court's instructions"); *Higgins v. State*, 502 So.2d 332, 335 (Miss. 1987) (holding that "the court admonished the jury to disregard [the comments on the defendant's intention to remain silent] and it is presumed that the jury followed the

instruction of the law"); *Dixon v. State*, 519 So.2d 1226, 1229 (Miss. 1988) (holding that the Court found "no error where the jury is presumed, upon instruction, to disregard"); and *Long v. State,* 934 So.2d 313, 316 (Miss. Ct. App. 2006) (holding that "jurors are presumed to follow the instructions of the court" and that "to presume otherwise would be to render the jury system inoperable").

Despite this precedent, the Appellant describes the trial court's admonishment to the jury as a "straying, weak, totally ineffectual 'cautionary' instruction." (Appellant's Brief p. 35). However, the Appellant did not object to the admonishment nor did he offer a "clear, stronger, and more effective" alternative to the admonishment given. The Appellant "bore primary responsibility for ensuring" that the situation was "cured in the manner most advantageous" to his case. *Greer v. Miller*, 483 U.S. 756, 767, 107 S.Ct. 3102, 3109 (1987). As such, he cannot now complain about the wording of the admonishment.

Moreover, this Court's recent opinion in *Birkhead v. State*, bolsters the State's position that the trial court properly handled the comment in question. 2007-KA-00666SCT (February 19, 2009) (*motion for rehearing pending*). The *Birkhead* Court held that there was no abuse of discretion by the trial court nor was there reversible error in denying the motion for mistrial after an investigating officer testified about the defendant's post-*Miranda* silence, noting that it based that decision on "the precedent of this Court" and on "the trial court's instruction, to which the defense did not object." *Id.*

Similarly to the situation in *Greer v. Miller*, a United States Supreme Court case holding that there was no reversible error in a similar situation, after the initial comment, "no further questioning or argument with respect to [the Appellant's] silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained." 483 US at 764. Further, just as in *Greer*, there is "no reason to believe that the jury in this case was incapable of

obeying the curative instructions." *Id.* at 767. Accordingly, in the Appellant's case, the trial court did not abuse its discretion and no reversible error occurred.

The Appellant also raises a sub-issue within this issue noting that the alleged error in denying his motion for mistrial was "compounded" by the trial court allowing a witness to "prematurely refer to the accuser as the 'victim' after [he] filed for a Motion *in Limine* to prohibit the State from using such highly prejudicial references prior to proving a crime even occurred." (Appellant's Brief p. 30). However, the Appellant provided no controlling authority indicating that this is a reversible error but instead pointed out a Mississippi Court of Appeals case which held that it was not reversible error for the prosecutor to refer to the accuser as the "victim" even where, unlike the case at hand, the trial court granted a motion *in limine* on those grounds. *Taconi v. State,* 912 So.2d 154, 156 -157 (Miss. Ct. App. 2005). Moreover, no prejudice was caused by the use of the term "victim" by the State's witness as there was no emphasis on the term and as the jury was instructed that the Appellant was innocent until proven guilty. (Record p. 32). As noted above, there is a presumption that the jurors obey the instructions of the court.

Accordingly, the trial court did not abuse its discretion in denying the Appellant's motion for mistrial. This issue is without merit.

III. THE APPELLANT WAS PROPERLY SENTENCED AS A HABITUAL OFFENDER UNDER MISS. CODE ANN. §99-19-83.

Lastly, the Appellant questions "whether the trial court erred in ruling that the facts in the case met the criteria for sentencing the Appellant as a habitual offender under Section 99-19-83 of the Mississippi Code Annotated when the State failed to prove the Appellant's previous convictions beyond a reasonable doubt when it 'guessed' at the meanings of abbreviations and the indictment failed to list the correct conviction of a previous charge." (Appellant's Brief p. 41). In arguing this

issue, the Appellant divided the issue into two separate inquiries. First, he questioned "whether the State's amendment to the indictment in this case was of substance rather than form." (Appellant's Brief p. 42). Second, he questioned "whether the State and trial court's speculation and conjecture about the meanings of abbreviations satisfied the burden of proof beyond a reasonable doubt at the sentencing hearing." (Appellant's Brief p. 45 - 46).

A. The amendment of the habitual offender portion of the indictment was proper as it was one of form and not substance.

The indictment charged the Appellant as a habitual offender under Miss. Code Ann. §99-19-81 and/or §99-19-83 with the following prior convictions listed:

> Cause No. 1993CF000229 Racine County, WI
> COUNT I Intimidate Witness, Convicted on 5-14-93, Sentenced to 3 years
> COUNT II Unlawful Use of Phone, Convicted on 5-14-93, Sentenced to 3 years
> COUNT III Obstructing Officer, Convicted on 5-14-93, Sentenced to 3 years
>
> Cause No. 1993CF000764 Racine County, WI
> Attempted Homicide, Convicted on 3-24-94, Sentenced to 15 years

(Record p. 3). The indictment further states that "the above specifics may be and shall be amended whether by addition, deletion, substitution, or in any other manner whatsoever as many times as necessary to correctly stated the specifics of any an all convictions, including, but not limited to the above, relevant to the above charge that the defendant shall be sentenced under MCA §99-19-83 and/or MCA §99-19-81." (Record p. 3).

At the sentencing hearing, various documents from the State of Wisconsin Department of Corrections were entered into evidence in order to establish that the Appellant was a habitual offender. (Transcript p. 208, Exhibit A at sentencing hearing). Those documents evidence that the Appellant was convicted in Cause No. 1993CF000229 in Racine County, Wisconsin, of violating W.S.A. 940.45(3) which makes intimidating the victim of a crime with express or implied threat of

force, violence, or injury a felony. He was convicted on May 14, 1993 and sentenced to serve three years with said sentenced stayed and probation ordered. The documents further indicate that his probation was revoked on September 21, 1993 and he was ordered to return to the Dodge Correctional Institute. The documents also evidence that he was convicted in Cause No. 93CF000764 in Raccine County, Wisconsin, of violating W.S.A. 941.30(1) which makes recklessly endangering another's safety under circumstances which show utter disregard for human life a felony. He was convicted on March 24, 1994 and sentenced to serve fifteen years with said sentence to run consecutive to his probation revocation. These documents also contain a parole commission action form dated October 24, 2002 noting that the Appellant had served ten and one half years of an eighteen year sentence and released him to parole supervision effective November 26, 2002.

After a review of the documents at the sentencing hearing, the trial court noted his concern that the indictment reflected that the crime in Cause No. 1993CF000764 was attempted homicide when the documents in Exhibit A evidence that the Appellant pleaded guilty to a reduced charge of first degree recklessly endangering safety. (Transcript p. 213 - 214). At which time, the State moved to amend the indictment to "reflect the proper charge under 'offense' as being 'first degree reckless endangerment,' as is reflected in the sentencing judgment in the documents provided by the Wisconsin Department of Corrections." (Transcript p. 214). The amendment was granted.

The Appellant argues that this amendment was improper as it was one of substance not form. However, an amendment regarding the habitual offender status of an indictment is permissible as it "affects only sentencing and not the substance of the offense charged." *Williams v. State*, 766 So.2d 815, 817 (Miss. Ct. App. 2000) (citing *Burrell v. State*, 726 So.2d 160, 162 (Miss.1998)). Furthermore, this Court has previously upheld a trial court's decision to allow an oral request to amend the habitual offender portion of an indictment during the sentencing hearing. *Nathan v. State*,

552 So.2d 99, 105-07 (Miss.1989). Additionally, this Court has upheld a trial court's decision to allow an amendment changing the date and nature of the charges listed as the defendant's prior convictions in the habitual offender portion of the indictment in order to conform with the proof presented. *Lacy v. State,* 629 So.2d 591, 594 - 95 (Miss. 1993). Accordingly, the trial court did not err in allowing the amendment.

B. There was sufficient proof that the Appellant was a habitual offender under Miss. Code Ann. §99-19-83.

Mississippi Code Annotated §99-19-83 reads as follows:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspected nor shall such person be eligible for parole or probation.

The State provided sufficient proof that the Appellant met these requirements. The trial court found that the documents from the Wisconsin Department of Corrections established that the Appellant was convicted of two prior felonies in the State of Wisconsin, felony intimidation of a victim in violation of WCA 940.45 and felony recklessly endangering the safety of another in violation of WCA 941.30. (Transcript p. 215 - 216). The trial court also found from the records that the Appellant served at least one year or more on each sentence. (Transcript p. 215 - 216). Finally, the trial court held that the crime of recklessly endangering the safety of another was a crime of violence stating on the record that the documents reflected that the crime was gang-related and involved the Appellant shooting a gun. (Transcript p. 207 - 208 and 215 - 216). Accordingly, the Appellant was properly sentenced under Miss. Code Ann. §99-19-83.

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm the Appellant, John Willis Gilbert, Jr.'s conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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