IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00695-COA

DAVID JACKSON WILLIAMS **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	09/27/2007
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	LAFAYETTE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID G. HILL
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JOHN R. HENRY
DISTRICT ATTORNEY:	BENJAMIN F. CREEKMORE
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF MURDER AND SENTENCED TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS
DISPOSITION:	AFFIRMED – 12/15/2009
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

IRVING, J., FOR THE COURT:

¶1. A Lafayette County jury found David Jackson Williams guilty of murder. Thereafter, the Lafayette County Circuit Court sentenced Williams to life in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Williams appeals and asserts that the circuit court erred when it: (1) refused his request for an assisted-suicide instruction; (2) allowed a priest to claim the priest-penitent privilege regarding conversations that the priest

had had with the victim; (3) allowed Dr. Steven Hayne to testify as an expert in the field of forensic pathology; and (4) denied his motion to dismiss based on the allegation that he had been denied his right to a speedy trial. Additionally, Williams claims that he received ineffective assistance of counsel.

¶2. Finding no reversible error, we affirm the judgment of the circuit court.

FACTS

¶3. This appeal centers on the untimely death of Demetria Bracey, who was a student at the University of Mississippi in Oxford, Mississippi. The events that led to Demetria's death were set into motion when Demetria met Williams on the Internet during January 2005.[1] Shortly after they met, Demetria and Williams formed a romantic relationship.

¶4. Demetria and Williams maintained their relationship throughout the early months of 2005. However, during the summer of 2005, Demetria left the United States for an opportunity to study abroad in Paris, France. Demetria and Williams broke up before she left and remained separated for the summer. Sometime after Demetria returned to Oxford, she and Williams resumed their romantic relationship. The events central to this appeal occurred during the second week of November 2005.

¶5. At the beginning of the week, Demetria uncharacteristically failed to report for band practice and failed to report for her duties as a dorm resident advisor. Later in the week, one of Demetria's close friends, Jessica Smith, became concerned for Demetria. Jessica called Williams on his cellular telephone and asked him whether he knew where she could find Demetria. Williams reported that Demetria's father was dying and that Demetria had gone

[1] Williams was also a student at the University of Mississippi.

home to Jackson, Mississippi, so that she could be with him. Jessica was not able to reach Demetria on her cellular telephone, so she asked Williams for Demetria's father's telephone number. However, Williams would not give Jessica a telephone number. Williams told Jessica that Demetria's father would not want Williams to give out his telephone number.

¶6. Undeterred, Jessica asked Williams whether he would set up a three-way conference call so she could at least speak to Demetria. Shortly afterward, Williams arranged a conference call, and Jessica was able to talk to Demetria for a short period of time. According to Jessica, Demetria sounded as though she had been crying. Jessica attributed Demetria's emotional state to her father's illness. However, Demetria was not at her father's house. She was not even in Jackson. Instead, Demetria was with Williams at his apartment in Oxford. She had been with Williams in his apartment since Sunday, November 6.

¶7. Sometime between late Thursday night and early Friday morning, Demetria died in Williams's apartment after a kitchen knife penetrated her chest and punctured her right ventricle. Demetria and Williams were the only people in his apartment at that time. During an interview with the Oxford Police Department, Williams claimed that Demetria had killed herself pursuant to a mutual suicide pact.

¶8. According to Williams, sometime between Thursday night and Friday morning, he and Demetria both went into one of his closets. During its case-in-chief, the prosecution introduced a transcript of Williams's interview with the police. In that interview, Williams claimed that he and Demetria each consumed substantial amounts of alcohol and that they each swallowed ten Klonopin tablets. Williams stated that Demetria then stabbed herself

with one of his kitchen knives.[2] Williams stated that he was supposed to stab himself at the same time. According to Williams, he tried to stab himself, but his knife did not go in far enough, and he lost consciousness because of the pain, alcohol, and prescription drug he had taken.

¶9. Williams claimed that he regained consciousness a couple hours later and discovered that Demetria was dead. Williams told authorities that he removed the knife from Demetria's chest and threw it across the room. Williams reported that he attempted to kill himself again when he discovered Demetria, but could not do so.

¶10. Williams spent the next few days holed up in his apartment drinking beer, watching television, and playing video games. According to Williams, he drank "a lot" during that time. Williams hoped the alcohol would help him find the courage to kill himself. On Saturday, Williams ordered pizza, and around the same time, he received a notice that apartment inspectors would be visiting his apartment. Williams pushed Demetria's legs into his closet and covered her body with clothes. He slept in another closet so he would not be easily discovered if an inspector entered his apartment.

¶11. On the following Tuesday, November 15, 2005, Williams decided to go to his parents' house in Olive Branch, Mississippi. Williams reportedly asked his parents what he should do. His parents consulted an attorney and subsequently contacted authorities and informed them that they should examine Williams's apartment. In any event, Williams's parents had Williams admitted to the Baptist-DeSoto Hospital in Southaven, Mississippi.

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[2] An autopsy revealed that the kitchen knife penetrated between five and six inches into Demetria's chest, which would have required "considerable" force.

¶12. On November 15, 2005, Lieutenant Wes Hatcher of the Oxford Police Department was dispatched to Williams's apartment. Lieutenant Hatcher went inside Williams's apartment and discovered Demetria's body. Lieutenant Hatcher secured Williams's apartment so that it could be examined by crime-scene investigators. The Oxford Police Department met with Williams the very next day.

¶13. On November 16, 2005, Williams was released from the hospital. Two members of the Oxford Police Department drove Williams to Oxford. Williams and his attorney met with Investigator Jimmy Williams of the Oxford Police Department and Master Sergeant John Marsh of the Mississippi Highway Patrol's criminal investigation bureau. Williams agreed to be interviewed with his attorney present.

¶14. During the interview, Williams claimed that Demetria had killed herself. Williams stated that he and Demetria had a suicide pact and that they had started discussing suicide during the summer.

¶15. Regarding the night that Demetria died, Williams presented the following version of events:

> We had kind of talked about committing suicide together and stuff like that and we decided we were going to do it last week and she came over, it was Sunday. We just hung out together, didn't go to class, she didn't work, um and we just hung out for a couple of days and decided that we were going to do it that night and she, we both drank a lot and took some pills but it wouldn't help the pain, you know. And we decided to do it in the closet so it would take longer for people to find us if somebody showed up looking for us and we got knives and went in there and we decided to do it at the same time and mine didn't go as far in.

Williams also said:

> I woke up later and saw that [Demetria] was already dead. And I got the knife

> out of her and checked if she was alive and she wasn't. I stabbed myself again with that knife and I just couldn't do it hard enough to make it work. The next few days I was drinking and trying to do it at every night but I couldn't do it.

¶16. Williams was indicted on March 2, 2006, by a Lafayette County grand jury on the sole charge of murder. He pleaded not guilty, and on September 24, 2007, he went to trial. The prosecution called nine witnesses. Three of those witnesses testified regarding Demetria's personality, Williams's personality, or the relationship between Demetria and Williams.

¶17. Jessica testified regarding Demetria's personality, Demetria's relationship with Williams, and the events that transpired during early November 2005. Demetria's mother, Glenda Hill, also testified regarding Demetria's personality and relationship with Williams. Enjoli Canankamp testified that, during the spring and early summer of 2005, she and Williams dated "off and on." Canankamp also testified that she had spoken with Williams about Demetria's death. According to Canankamp, Williams said that he and Demetria had a suicide pact.

¶18. The prosecution also called law enforcement witnesses who had participated in the investigation. Lieutenant Hatcher testified as to his participation in the investigation, as did Investigator Williams and Agent Marsh, who had left the Mississippi Highway Patrol's criminal investigation bureau and joined the Federal Bureau of Investigation. Dywana Broughton, an employee of the Mississippi Highway Patrol's criminal investigation bureau's crime scene unit, testified that she found twenty-three separate blood stains throughout Williams's apartment.

¶19. Dr. Hayne, a forensic pathologist, also testified for the prosecution. Dr. Hayne testified that on November 16, 2005, some five days after Demetria's death, he performed

an autopsy on Demetria. Dr. Hayne testified that at the time he performed his autopsy, it was his belief that Demetria had been dead for approximately three days. According to Dr. Hayne, the cause of Demetria's death was the stab wound to her heart. Dr. Hayne testified that the manner of her death was a homicide. Dr. Hayne went on to testify regarding why he did not believe that Demetria had committed suicide.

¶20. Dr. Hayne explained that he found bruises on the sternocleidomastoid muscles in Demetria's neck, soft tissue hemorrhaging in her neck, and bruising in the area of Demetria's larynx. Dr. Hayne opined that the injuries to Demetria's neck were consistent with strangulation that was not self-inflicted, but was sustained while she was alive. Dr. Hayne also found an abrasion on Demetria's right hand that he considered consistent with defensive posturing. Additionally, Dr. Hayne testified that "hesitation marks" are sometimes present when a person has committed suicide. "Hesitation marks" appear when one begins to commit suicide with a sharp object, but then hesitates to actually commit the mortal wound and instead slightly injures himself. Dr. Hayne found no hesitation marks on Demetria's body. Finally, Dr. Hayne explained that it would take a "considerable" or "significant" amount of force to commit suicide by stabbing through the cartilaginous portion of the rib cage.

¶21. On cross-examination, Dr. Hayne testified that "hesitation marks" do not always appear when someone commits suicide with a sharp object. Additionally, he admitted that Demetria could have sustained the abrasion to her right hand in a number of ways other than defensive posturing. However, he opined that Demetria sustained the abrasion shortly before her death.

¶22. The prosecution's final witness was Dr. Earnest Lykissi, an expert in the fields of clinical and forensic toxicology. Dr. Lykissi testified that, contrary to Williams's claim that Demetria took approximately ten Klonopin tablets before she died, there were no drugs detected in Demetria's system. Dr. Lykissi testified that Demetria had a substantial amount of alcohol in her system. To be precise, Dr. Lykissi testified that Demetria's blood-alcohol content was .6 percent. Dr. Lykissi explained that, when a person has a blood-alcohol content of .2, he or she is "commode hugging, floor crawling drunk." He further explained that someone with a blood-alcohol content of .3 is likely to be unconscious, and a person with a blood-alcohol content of .4 is "ready for the undertaker." According to Dr. Lykissi, some of the alcohol in Demetria's system could have been attributed to decomposition, but only as much as .14 percent. Dr. Lykissi "seriously" doubted that anyone would be able to function with a blood-alcohol content of .3 or higher.

¶23. After the prosecution rested its case-in-chief, Williams called Dr. R.W. Scales. Dr. Scales testified that he has a Ph.D. in immunology and that he was the director and owner of Scales Biological Laboratory, a DNA testing facility in Brandon, Mississippi. According to Dr. Scales, almost all of the blood stains in Williams's apartment were Williams's blood. However, Demetria's blood was found in the closet where she died, and in the left portion of Williams's kitchen sink.

¶24. Williams called Father Ollie Rencher as a witness. Father Rencher was the Assistant Rector at St. Peter's Episcopal Church in Oxford, which Demetria had attended. He was also the Episcopal Chaplain to the university. Father Rencher testified that he knew Demetria and that he had counseled her in religious matters. When Father Rencher first discovered that

Demetria had died, he voluntarily contacted the Oxford Police Department and provided a statement in which he disclosed information about Demetria. In his statement, Father Rencher indicated that, from his personal knowledge about Demetria, he thought that she may have committed suicide. At trial, however, Father Rencher declined to testify regarding his statement based on the priest-penitent privilege.

¶25. Williams's final witness was Dr. Arthur Copeland, a forensic pathologist with a doctoral degree in medicine and a Ph.D. in molecular biology. Dr. Copeland testified that he reviewed Dr. Hayne's autopsy report and other records related to Demetria's death. Dr. Copeland disagreed with Dr. Hayne's conclusion that Demetria's body demonstrated signs of manual strangulation. Dr. Copeland noted that Dr. Hayne did not perform a "fancy neck dissection" by which one dissects the tissues around the neck and takes photographs for a more detailed examination. Dr. Copeland testified that what Dr. Hayne concluded was hemorrhaging in the neck tissues could have simply been changes that occur with decomposition. Dr. Copeland further noted that manual strangulation produces "petechia," which he described as "small minute pinpoint hemorrhages" that appear "[l]ike a little tiny dot." Dr. Copeland went on to testify that there were no other indications of manual strangulation, such as broken fingernails or "offensive" injuries to Williams.

¶26. Dr. Copeland also criticized Dr. Hayne for not presenting his findings to another pathologist before he concluded that the manner of Demetria's death was homicide. Additionally, Dr. Copeland stated that Dr. Hayne should have requested additional investigation into whether Demetria had a history of mental or emotional treatment and that he should have contacted a forensic psychologist or a forensic psychiatrist to discuss his

findings.

¶27. Dr. Copeland explained that a lack of hesitation marks does not necessarily rule out the possibility that someone committed suicide. In contrast to Dr. Hayne's testimony, Dr. Copeland testified that it is "not that difficult" to penetrate the cartilaginous portion of the rib cage. Dr. Copeland testified that he could not render a conclusion as to the manner of Demetria's death, but his observations were "consistent with suicide." Dr. Copeland went on to testify that Dr. Hayne "immediately jumped the gun [and] called this a homicide from the get[-]go." On cross-examination, Dr. Copeland agreed that it is not typical for someone to commit suicide by stabbing herself with a knife. Dr. Copeland also testified that "[s]uicide among minority groups is rare."[3]

¶28. After Dr. Copeland testified, Williams rested. During the conference on jury instructions, Williams requested an assisted-suicide instruction. The circuit court refused the instruction on the basis that assisted suicide is not a lesser-included offense of murder. As previously mentioned, the jury found Williams guilty of murder.

¶29. Additional facts, as necessary, will be related during our analysis and discussion of the issues.

ANALYSIS AND DISCUSSION OF THE ISSUES

1. Assisted-Suicide Instruction

¶30. Williams claims that the circuit court erred when it refused his proffered instruction designated as D-3, an assisted-suicide instruction. Instruction D-3 reads as follows:

> If you find from the evidence in this case that the defendant, DAVID

[3] Williams is Caucasian, and Demetria was African American.

> JACKSON WILLIAMS, is not guilty of the crime of murder, then you should continue with your deliberations to consider the elements of the lesser crime of assisting suicide. Assisting suicide is the willful, or in any manner, advising, encouraging, abetting, or assisting of another person to take, or in taking, the latter's life, or in attempting to take the latter's life.
>
> If you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. On or about November 13, 200[5][,] in Lafayette County, Mississippi;
>
> 2. That DEMETRIA BRACEY was a human being; and
>
> 3. That DAVID JACKSON WILLIAMS did willfully or in any manner, advise, encourage, abet or assist DEMETRIA BRACEY in taking her life;
>
> then you shall find the defendant guilty of assisting suicide.
>
> If the State has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find DAVID JACKSON WILLIAMS not guilty of assisting suicide.

¶31. The circuit court refused Williams's proffered instruction on assisted suicide. According to Williams, he was entitled to an instruction on assisted suicide because it was his theory of the case, it arose from a common nucleus of operative facts, and assisted suicide is a lesser non-included offense of murder.

¶32. We are mindful that the circuit court "enjoys considerable discretion regarding the form and substance of jury instructions." *Marbra v. State*, 904 So. 2d 1169, 1178 (¶35) (Miss. Ct. App. 2004). "All instructions are to be read together[,] and if the jury is fully and fairly instructed by other instructions[,] the refusal of any similar instruction does not constitute reversal error." *Id*.

¶33. A Lafayette County grand jury charged Williams with murdering Demetria pursuant to Mississippi Code Annotated section 97-3-19(1)(a) (Rev. 2006). Every person who shall

be convicted of murder shall be sentenced by the court to imprisonment for life in the state penitentiary. Miss. Code Ann. § 97-3-21 (Rev. 2006). Williams sought a lesser non-included instruction on assisted suicide. Mississippi Code Annotated section 97-3-49 (Rev. 2006) provides:

> A person who wilfully, or in any manner, advises, encourages, abets, or assists another person to take, or in taking, the latter's life, or in attempting to take the latter's life, is guilty of [a] felony and, on conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding one thousand dollars, and by imprisonment in the county jail not exceeding one year.

¶34. The circuit court refused Williams's assisted-suicide instruction on the basis that Williams was only allowed an instruction on his theory of the case if that theory involved a lesser-included offense. However, beginning in 1988 and continuing thereafter, the Mississippi Supreme Court has consistently held that a defendant is entitled to an instruction on a lesser "non-included" charge, if justified by the evidence. *Griffin v. State*, 533 So. 2d 444, 447-48 (Miss. 1988). Our supreme court has recently reiterated that a defendant is entitled to a lesser non-included offense instruction under certain circumstances. *Brooks v. State*, 2007-CT-00828-SCT, 2009 WL 3208682 *7 (¶36) (Miss. Oct. 8, 2009). The Mississippi Supreme Court has also held as follows:

> The defendant may request an instruction regarding any offense carrying a lesser punishment if the lesser offense arises out of a nucleus of operative fact common with the factual scenario giving rise to the charge laid in the indictment. . . . Therefore, if the evidence warrants it, *a defendant is entitled to a lesser-offense instruction the same as he would be entitled to a lesser-included-offense instruction.*

Moore v. State, 799 So. 2d 89, 91 (¶7) (Miss. 2001) (quoting *Gangl v. State*, 539 So. 2d 132, 136 (Miss. 1989)) (emphasis added). Mississippi law clearly holds that a defendant is

entitled to a lesser non-included offense instruction when the evidence at trial warrants such an instruction. However, we find that, in this case, there was no such evidence warranting an assisted-suicide instruction.

¶35. The dissent focuses on the existence of facts that may be consistent with a suicide or a suicide pact, but we respectfully find that those facts are not the proper focal point for determining whether Williams assisted Demetria to take, or in the taking of, her life. When the claim is assistance by another in effectuating a suicide, facts consistent with the commission of a suicide are irrelevant. It is axiomatical that many suicides are committed without any assistance. The dissent also focuses on matters that occurred between Williams and Demetria prior to Demetria's death and erroneously categorizes those matters as acts of assistance or encouragement to Demetria to commit suicide. Assisting one in the commission of suicide requires action on the part of the assistor that leads directly to the physical act of terminating life. None of the actions taken by Williams fall in this category.

¶36. As already stated, Mississippi Code Annotated section 97-3-49, which defines the crime of assisting suicide, provides:

> A person who wilfully, or in any manner, advises, encourages, abets, or assists another person to take, or in taking, the latter's life, or in attempting to take the latter's life, is guilty of [a] felony and, on conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year.

This section is commonly referred to as the assisted-suicide statute because it targets the actions of a person who assists another in the taking of the other's life. This statute has no relevance when dealing with a suicide pact where two or more persons have taken their own

lives without the aid of another.

¶37. In the case at bar, Williams did not testify, as was his constitutional right. Nevertheless, he contends that, at most, the evidence shows that he committed the offense of assisted suicide. The underpinning for his argument is the scripted statement that he gave to law enforcement officials. There are two reasons why we find that the statement was scripted: (1) Williams's counsel was present when Williams gave the statement, and (2) during the initial portion of the interview, an unidentified person prompted Williams to include information that Williams had not included on his own. It is logical to conclude that the unidentified person is Williams's attorney. After the prompt from the unidentified person, Williams made the following statement, which substantially forms the basis for Williams's request for an assisted-suicide instruction:

> We had kind of talked about committing suicide together and stuff like that and we decided we were going to do it last week and she came over, it was Sunday. We just hung out together, didn't go to class, she didn't work, um and we just hung out for a couple of days and decided that we were going to do it that night and she, we both drank a lot and took some pills but it wouldn't help the pain, you know. And we decided to do it in the closet so it would take longer for people to find us if somebody showed up looking for us and we got knives and went in there and we decided to do it at the same time and mine didn't go as far in.

Even a casual reading of this statement reveals that Williams did not claim to have advised, encouraged, abetted, or assisted Demetria to take or in the taking of her life. At most, the statement reveals that the two talked about committing suicide together. It may be that Williams encouraged or advised Demetria to commit suicide, but if so, that information is not contained in his statement. This Court is not warranted in reading more into the statement than is there. Had Williams truly believed that his only crime was assisting

Demetria in the taking of her own life, he could have taken the stand and laid his theory before the jury. Of course, as stated, he was not constitutionally required to do so; however, since he did not give a more detailed statement, he cannot now legitimately claim that the evidence shows what it does not, even though, in reality, he may very well have encouraged or advised Demetria to commit suicide. By so finding, we do not suggest that Demetria took her own life; rather, we affirm the jury's finding that Williams, in fact, murdered Demetria.

¶38. Later in the interview, Williams's counsel, Jim Franks, began to question Williams for the purpose of eliciting what counsel deemed relevant but which Williams had not included. Counsel got involved after Investigator Marsh got ready to close the interview. At that point, the following exchange occurred:

> Investigator Marsh: All right, to make sure I have got this right. I repeat stuff sometimes because that is how I remember it. Everybody has their own way. So y'all were pretty drunk and on pills. Y'all laid down and said I love you to each other and that is when you cut yourself and she had stabbed herself. Did you feel her moving at all or anything like that?
>
> Williams: I don't remember.
>
> Investigator Marsh: You don't remember that? Okay. All right. Is there anything, anything that I should have asked and didn't, anything else that you can think of that. . . .
>
> [Franks]: I have a couple of things to tell y'all about.
>
> Investigator Marsh: Sure.

At this point, Franks began questioning Williams. We quote verbatim from the transcript of the interview:

> [Franks]: Uh, first off, about 6 weeks ago and you were at home and the

Olive Branch Police came here. Can you tell them about that?

Williams: I was talking to Demetria on the phone and I was acting really suicidal and was scared that I was going to go ahead and do it and she tried to get me to stop and I didn't want to. She invited a friend over to talk to and she asked what to do. She called UPD. . . . .

Investigator Marsh: Who was her friend?

Williams: I don't know. I just heard about it.

[Franks]: Why do you think she would get him to call you?

Williams: I mean, he just called. . . .

[Franks]: Why do you think that she had somebody to call the police department and say that you were going to commit suicide?

Williams: I'm not sure why.

[Franks]: Okay. Uh, the day, the Thursday that all of this happened, Thursday leading into Friday, tell them about going to the bank.

Williams: She wanted to go to the bank and get her money out and put it in her purse so that her mom could get it. She said she wasn't sure that she could get access to the account. So we went by the bank and took out all of her money out. I don't know exactly how much it was.

[Franks]: It was an ATM?

Williams: Yes, it was an ATM.

[Franks]: And which bank was that?

Williams: Trustmark on West Jackson.

[Franks]: That was Friday?

Williams: Yes, that was Friday.

[Franks]: And who put the card in?

Williams: I did that. She told me the pin number and I punched it in. She searched on the [I]nternet to see how much to get because she didn't know what her balance was so she got pretty much all of it, I think. She told me how much it was, I don't remember.

[Franks]: Okay. Who wound up with the money?

Williams: She did. She just put it in her purse somewhere, in like a little coin purse thing. She put it in there.

[Franks]: Was the money still there when you left?

Williams: It should be, yeah.

[Franks]: Okay. Now, tell them about the phone call that you received from Jessica Smith.

Williams: Jessica had been trying to call um, Demetria on her cell phone and she had turned it off because she didn't want anybody to know where she was and she called me and I thought I should answer and do something. Because she said she was worried about where she is, that she had been missing work and not going to band and all that so, I decided to tell her that she had gone down to her dad's house and I said that her dad didn't want her number given out so I did the three way calling. I told her to turn her cell phone on real quick and she turned it on. I did a three way call to Demetria's cell phone and she answered and she said that she was down at her dad's place and that her dad wasn't doing too good.

[Franks]: Okay. When was this?

Williams: I think it was um, Thursday or Wednesday.

[Franks]: Wednesday or Thursday?

Williams: Yeah.

* * * *

Detective Williams: You said, let me verify this. You stated that Demetria wanted to take her money out of her account to make sure that her mother got the money is [sic] she went

through with the suicide.

Williams: Right?

Detective Williams: And actually killed herself and said her mother would get the money and cut through all the red tape from having to go through the banking system to get the money.

Williams: Right. I don't know if she could get access to it through the bank, the account. I think it was tied through her school account somehow. I don't know if she could get access to it.

Detective Williams: But you are the one that took the money out?

Williams: Right. Basically it was her idea. She wanted to do it.

¶39. As the above colloquy shows, the only actions taken by Williams were (1) driving Demetria to the bank so that Demetria could withdraw most of her money, (2) punching in the PIN that Demetria had given him, and (3) answering a telephone call and telling an unsolicited lie about Demetria's whereabouts. We cannot see how these actions constitute advising, encouraging, abetting, or assisting in the taking of Demetria's life within the meaning of section 97-3-49, as that section targets actions calculated to effectuate the death of another. For thoroughness's sake, we will discuss each action in turn.

¶40. First, it is important that Williams does not say that Demetria asked him to take her to the bank or that he advised her to remove the money to make it easier for her mother to get after Demetria's death. According to Williams, it was Demetria's idea, without any coaching or encouragement from him. Even if he had advised or encouraged her to withdraw her money from the bank, we would still find that action insufficient to constitute assistance within the meaning of the assisted-suicide statute, because neither of those actions was advice regarding or encouragement to commit suicide, and they certainly were not actions

that led to, or assisted in, the physical death of Demetria.

¶41. The matter of the telephone call with Jessica does not fare any better with respect to satisfying the requirements for assisted suicide. Again, according to Williams's statement, preventing Jessica from learning the truth of what was going on was his idea. It was Williams, without any coaching from Demetria, who decided to lie about Demetria's whereabouts. There is no evidence that Demetria needed or asked for his assistance in this regard. In fact, according to Williams, Demetria had turned her cellular telephone off and was not answering any calls. It was Williams who decided to answer the telephone and engage Jessica in conversation. It was Williams who told Demetria to turn her cellular telephone on. Rather than advising, encouraging, assisting, or abetting Demetria to take her life, these actions look more like an attempt to create a ruse in hopes of delaying the discovery of what Williams was planning to do. When this conversation occurred, Demetria was not in the process of taking her life. Unsolicited help by Williams in creating a situation where Demetria chose to lie about her whereabouts is not advising, assisting, encouraging, or abetting Demetria to take her life. If she had already turned her telephone off, she apparently was content with letting people, including Jessica, think what they wanted to about her unavailability.

¶42. We return to Williams's statement before his counsel got involved in the questioning process. As noted, Williams said that he and Demetria had talked over the summer about committing suicide together. It is important that he did not give any details regarding the conversations that they had. We do not know, for example, whether Demetria was reluctant to do so, and he convinced her to do it. How then can it be said that he advised, encouraged,

or assisted her to commit suicide? Because suicide carries a tremendous social stigma, it is tempting to assume that if two lovers decide to commit suicide, one of them has to advise or encourage the other to do so. That may be the case in some instances, but that is by no means a logical inference that an appellate court may take notice of in determining whether there is sufficient evidence to entitle a defendant to an instruction on assisted suicide, especially when assisted suicide is not the charged offense. The law is well settled in this state that a jury is entitled to draw all reasonable inferences from the evidence that supports a verdict of guilty or not guilty of the charged offense. However, we know of no jurisprudence that authorizes an appellate court, in determining whether an instruction was properly denied, to speculate regarding actions that the proponent of the instruction may have taken that would justify granting the instruction. This is especially true where the evidentiary basis for the instruction is dependent upon some overt action on the part of the defendant. There must be a showing from the evidence that the overt action was taken. In this case, there must be a showing that Williams provided some advice, encouragement, or assistance to Demetria that caused or helped her to commit the physical act of taking her own life. There is no such showing in the record.

¶43. Finally, we find little persuasion in the fact that Demetria's death occurred in Williams's apartment after she and Williams had "hung out" in his apartment for several days, where they engaged in a drinking binge. There is little doubt that this occurred, as numerous beer cans were found in the apartment. We simply do not find this fact helpful or relevant to the resolution of the issue that is before us. We must respectfully disagree with the dissent's apparent conclusion that this activity in some way constitutes advising,

encouraging, or assisting Demetria to commit suicide, especially when there is no evidence that she stated or, in any way, intimated or suggested that she needed to get drunk to commit suicide. The evidence is undisputed that she and Williams were lovers. We cannot find that two lovers sharing a weekend together and engaging in excessive drinking is evidence that one them is advising, encouraging, or assisting the other to commit suicide. Again, this is especially true when there is no evidence of what was said during the ordeal by the one who is found dead after the drinking had ended. We also note that scientific evidence completely refutes part of what Williams said occurred, as he stated that he and Demetria equally shared twenty pills that belonged to him. The toxicology report proves that Williams lied about the pills, because none were found in Demetria's system.

¶44. We find that the circuit court did not err in denying the assisted-suicide instruction. However, his reasoning for denying the instruction does not find support in the jurisprudence of this state. While the circuit judge correctly held that assisted suicide is not a lesser-included offense of murder, that is not a prerequisite for granting a lesser, non-included-offense instruction such as was requested here. Our supreme court has held that a defendant is entitled to a lesser non-included-offense instruction for a non-indicted offense if the non-indicted offense arises out of a common nucleus of operative facts with the indicted offense. *Delashmit v. State*, 991 So. 2d 1215, 1221 (¶18) (Miss. 2008) (citing *Green v. State*, 884 So. 2d 733, 737 (¶11) (Miss. 2004)). But this entitlement is circumscribed by the familiar evidentiary requirement of the existence of a factual basis that supports the granting of the instruction. *Id.* (citing *Griffin*, 533 So. 2d at 447). Here, the evidence does not support the granting of an assisted-suicide instruction. Therefore, we

affirm the decision of the circuit judge on the basis that the requested instruction lacks evidentiary support in the record, as an appellate court is authorized to affirm a decision of a trial judge if the judge reached the right result, although for the wrong reason. *Green v. Cleary Water, Sewer & Fire Dist.*, 17 So. 3d 559, 572 (¶42) (Miss. 2009) (citing *Cucos, Inc. v. McDaniel*, 938 So. 2d 238, 247 (¶26) (Miss. 2006)).

2. Priest-Penitent Privilege

¶45. In this issue, Williams claims the circuit court committed reversible error when it allowed Father Rencher to refuse to testify to certain matters pursuant to the priest-penitent privilege. We are mindful of our standard of review. We review "the trial court's decision to admit or exclude evidence under an abuse of discretion standard of review." *Valmain v. State*, 5 So. 3d 1079, 1082 (¶9) (Miss. 2009). "Where such error is found, this Court 'will not reverse unless the error adversely affects a substantial right of a party.'" *Tate v. State*, 912 So. 2d 919, 924 (¶9) (Miss. 2005) (quoting *Ladnier v. State*, 878 So. 2d 926, 933 (¶27) (Miss. 2004)).

¶46. As previously mentioned, after Father Rencher discovered that Demetria had died, he voluntarily contacted the Oxford Police Department and gave a statement. Williams sought to have Father Rencher testify regarding that statement. Williams argued that Father Rencher waived the priest-penitent privilege when he gave his statement. Outside of the jury's presence, the circuit court allowed Father Rencher's attorney and the "Vice Chancellor of the Episcopal Diocese of Mississippi," Wayne Drinkwater, to advance his position that Father Rencher lacked the authority to waive the privilege on Demetria's behalf. The circuit court agreed and held that Father Rencher could not waive the privilege

belonged to Demetria or her personal representative. The circuit court then held that Father Rencher could claim the privilege on a question-by-question basis.

¶47. In the presence of the jury, Father Rencher testified regarding his background and how he came to know Demetria. After some brief introductory questions, Williams's attorney asked Father Rencher whether he remembered seeing Demetria on Good Friday 2005. Father Rencher responded affirmatively. Williams's attorney then asked Father Rencher whether he advised her "to seek medication" at that time. Father Rencher responded, "I'm not comfortable with this." At that time, the circuit court sent the jury out of the courtroom.

¶48. Outside of the jury's presence, the circuit court asked Father Rencher whether he was of the opinion that his response would be subject to the priest-penitent privilege. The following exchange then transpired:

> A. I do. We did not have a confidential conversation on that day. I did see her that day as do many people pass through [sic] the church property on that day but we did not have any sort of counseling as it were as Priest Penitent like other people who made their confession on that day in a Priest Privilege way.
>
> Q. But you did advise her to seek medication on that day did you not?
>
> A. When I saw her in passing she was very anxious as she had been on occasion and I asked her[, "]are you seeing a counselor["] and she said she was at times and I said[, "]I hope that that continues to improve.["]
>
> Q. But that doesn't answer my question. I asked if you told her, let me quote you. . . . Did you state to the investigator Mr. Moore[, "]I think I even asked her are you taking medication and she said no, I'm not. I said, you might look into it.["]
>
> A. That sounds like something I would have said based on that moment, yes.
>
> BY MR. FRANKS: And, judge, I did not ask him what she said to him and

the [R]ule 505 says it applies to confidential communication by the person to a clergy man. [sic]

BY THE COURT: Did this occur at the church let me ask you that question, were you at the church[?]

A. In a hallway at the church.

BY THE COURT: I'm going to allow the witness not to answer that question any further and instruct you not to ask him about it in the presence of the jury as falling within the confidential relationship.

¶49. The circuit court then allowed Williams's attorney to proffer any additional testimony from Father Rencher to determine whether that testimony would also be privileged. Williams's attorney asked whether Demetria ever told Father Rencher that she had considered committing suicide "in circumstances that did not involve religious counseling." Father Rencher responded, "[n]o." Next, Williams's attorney asked, "[d]id she advise you at any time that she had considered suicide?" Father Rencher answered, "I cannot under privilege disclose that." The circuit court allowed Father Rencher to claim the privilege.

¶50. Father Rencher went on to testify that he had advised Demetria to "go to counseling services," and that Demetria appeared "stressed out" when he spoke to her on Good Friday 2005. When asked whether that was the same time that he advised Demetria to "seek medication," Father Rencher testified that he said he "hoped she would get some help." Williams's attorney again asked whether Father Rencher advised Demetria to seek medication. Father Rencher answered: "It is possible as I stood there and we all say get some help. Be on meds. It was very loosely said but not in the way as a professional, no." At that time, the circuit court stated, "[h]e said she looked stressed out[;] that is observation [sic] that

he made. The rest of it took place at the church on Good Friday[,] and I believe it falls within that confidential relationship."

¶51. The final line of questioning during the proffer involved Father Rencher's opinion of Demetria's self-esteem. Father Rencher testified that, in his opinion, he would describe Demetria as having low self-esteem "[o]n occasion." Father Rencher also testified that he said that Demetria "was clearly in a controlling situation [regarding her relationship with Williams] mixed with her self[-]esteem being low [and] that there was a cloud of uncertainty that hung over [Demetria]." Williams's attorney then stated that he had no additional questions for Father Rencher.

¶52. Williams claims the circuit court committed reversible error when it did not allow Father Rencher to be questioned regarding his entire statement. The record does not indicate that Williams proffered a transcript of Father Rencher's statement to the Oxford Police Department.[4] Additionally, Father Rencher's statement is not listed among the exhibits. However, a transcript of Father Rencher's statement appears in Williams's record excerpts. Merely including the statement in the record excerpts when it was not introduced at trial does not place the statement "in the record." *Qualls v. State*, 947 So. 2d 365, 370 (¶12) (Miss. Ct. App. 2007). Because Williams did not question Father Rencher on every topic and

[4] The transcript reflects that, prior to the proffer, Williams's attorney stated his intent to submit Father Rencher's entire statement during the proffer. Williams's attorney also indicated that he had Father Rencher's statement designated as D-7 for identification purposes only. However, Williams's attorney did not submit Father Rencher's statement during the subsequent proffer. Father Rencher's statement is not included among the trial exhibits under any designation or for any purpose, and the exhibit list contains absolutely no document listed as D-7.

occurrence that was discussed in Father Rencher's statement, we address only those matters that were discussed during Williams's trial and the proffer of Father Rencher's testimony. Additionally, we address only those matters that the circuit court considered subject to the priest-penitent privilege.

¶53. "A person has a privilege to refuse to disclose and prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser." M.R.E. 505(b). The circuit court allowed Father Rencher to claim the privilege regarding two lines of questioning: (1) the events that transpired on Good Friday 2005, including whether Father Rencher advised Demetria to seek medication at that time; and (2) whether Demetria had ever mentioned to Father Rencher that she had considered committing suicide. We address each line of questioning in turn.

a. Good Friday 2005

¶54. Williams claims that the circuit court erred when it allowed Father Rencher to claim the priest-penitent privilege regarding his encounter with Demetria on Good Friday 2005. According to Williams, Father Rencher could not claim the privilege because nothing about their encounter was confidential. We disagree, but also find that, even if the encounter was not confidential, any error in allowing Father Rencher to use the priest-penitent privilege was harmless at worst.

¶55. As previously mentioned, one of the qualifiers for operation of the privilege is that a communication must be confidential. M.R.E. 505(b). Pursuant to Mississippi Rule of Evidence 505(a)(2), "[a] communication is 'confidential' if made privately and not intended for further disclosure except in furtherance of the purpose of the communication." During

the proffer, Father Rencher was asked about the events that transpired on Good Friday 2005. Father Rencher testified that he encountered Demetria in a hallway at the church. Additionally, he expressly stated that "[w]e *did not have a confidential conversation on that day*." Despite Father Rencher's statement, we find that the circuit court was entitled to find that the conversation was confidential based on the circumstances under which it occurred. Namely, Demetria sought the advice and counseling of a priest at her church, and she did so after Good Friday services while still at church. However, even if we were to accept Father Rencher's characterization of his encounter with Demetria on Good Friday 2005, we find that any error in allowing Father Rencher to claim the privilege regarding his conversation with Demetria was harmless.

¶56. This Court will not reverse a circuit court's decision regarding the admissibility of evidence unless the circuit court's abuse of discretion was "prejudicial to the accused." *Hughes v. State*, 735 So. 2d 238, 270 (¶134) (Miss. 1999). Nothing in the proffer of Father Rencher's testimony indicated that Demetria mentioned suicidal thoughts during her encounter with Father Rencher on Good Friday 2005. Father Rencher merely stated that Demetria appeared "stressed out" at that time. Based on that observation, Father Rencher advised Demetria to seek counseling and medical treatment, including the possibility of prescription medication. That evidence did not tend to prove that it was more likely that Demetria committed suicide more than six months later. We find that, based on the record at trial, Williams was not prejudiced by the circuit court's decision to allow Father Rencher to claim the priest-penitent privilege regarding the events that transpired on Good Friday 2005. Accordingly, any error in allowing Father Rencher to claim the priest-penitent

privilege was harmless.

b. Whether Demetria had Ever Considered Suicide

¶57. Williams's attorney asked Father Rencher whether Demetria had ever advised him "at any time that she had considered suicide." Father Rencher answered, "I cannot under privilege disclose that." During the proffer, Williams's attorney did not ask Father Rencher any follow-up questions regarding whether Demetria had ever mentioned suicidal thoughts. Presumably, Demetria had mentioned suicidal thoughts at some point, and Father Rencher considered that discussion to be covered by the privilege. However, the record does not contain any details regarding the circumstances of that discussion. Accordingly, we cannot determine whether that discussion was confidential or whether it took place while Father Rencher was acting in his "professional character as a spiritual adviser" at the time. It is the appellant's duty to provide an adequate record on appeal. *Juarez v. State*, 965 So. 2d 1061, 1065 (¶12) (Miss. 2007) (citing *Acker v. State*, 797 So. 2d 966, 971 (¶19) (Miss. 2001)). Moreover, we "must decide each case by the facts shown in the record, not assertions in the brief . . . . Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, we cannot know them." *Beamon v. State*, 9 So. 3d 376, 379 (¶10) (Miss. 2009) (quoting *Mason v. State*, 440 So. 2d 318, 319 (Miss. 1983)). Because Williams did not fulfill that obligation, we find no merit to his contention of error.

3. Expert Testimony

¶58. Williams claims the circuit court erred when it allowed Dr. Hayne to testify as an expert witness. As there was no objection to Dr. Hayne's testimony at trial, any error in allowing his testimony must rise to the level of plain error. Williams bases his claim largely

on Justice Diaz's concurring opinion in *Edmonds v. State*, 955 So. 2d 787, 802 (¶¶44-45) (Miss. 2007). In *Edmonds*, Justice Diaz attacked Dr. Hayne's qualifications to testify because Dr. Hayne was not certified in forensic pathology by the American Board of Pathology. Regardless, a majority of the *Edmonds* court found that Dr. Hayne was certified to testify as an expert in forensic pathology. *Id.* at 792 (¶8). Therefore, we find no merit to the contention that Dr. Hayne was not properly certified to testify as an expert in forensic pathology.

¶59. Williams also contends that his own expert refuted the propriety of the procedures used by Dr. Hayne in conducting his autopsy and coming to his conclusions regarding Demetria's death. Dr. Hayne testified that there were four reasons that led him to exclude suicide as the manner of Demetria's death: (1) the angle and depth of the fatal wound, (2) the presence of injuries to Demetria's neck, (3) the absence of "hesitation" marks, and (4) the abrasion on the back of Demetria's hand. We review each of these conclusions. In so doing, we reiterate several facts that have already been related in this opinion.

¶60. Although Dr. Hayne testified that the angle and the depth of the fatal wound were inconsistent with suicide, Dr. Copeland contradicted Dr. Hayne's conclusion. As for the angle of the fatal wound, according to Dr. Copeland, the angle was "consistent with suicide." Dr. Copeland testified that "a person could take a knife themselves [sic] and inflict it into their body this way." Dr. Hayne's inclusion of the depth of the fatal wound seems to have been linked to the force required to inflict that wound. Dr. Hayne testified that it would have taken "considerable" or "significant" force to cause the injury that killed Demetria. Dr. Copeland contradicted Dr. Hayne's characterization of the force required to inflict the fatal

wound. Dr. Copeland noted that the fatal wound did not go through bone. Instead, the fatal wound passed through the "cartilaginous" tissue between Demetria's ribs. Dr. Copeland elaborated that such tissue is "not all that difficult for a knife to get into." Dr. Copeland further testified that such tissue is "not all that difficult to penetrate."

¶61. As for the small injuries to Demetria's neck, as previously mentioned, Dr. Hayne testified that he found bruises on the sternocleidomastoid muscles in Demetria's neck as well as soft tissue hemorrhaging in her neck and bruising in the area of her larynx. Dr. Hayne opined that the injuries to Demetria's neck were consistent with strangulation that was not self-inflicted, but was sustained while she was alive. However, Dr. Copeland vigorously contradicted Dr. Hayne's findings. Dr. Copeland testified that he reviewed Dr. Hayne's autopsy report and that he disagreed with Dr. Hayne's conclusion regarding the suggestion of manual strangulation. Dr. Copeland testified that Dr. Hayne failed to dissect the tissues around Demetria's neck. Dr. Copeland also testified that what Dr. Hayne concluded was hemorrhaging could have been changes that occur with decomposition. Dr. Copeland further noted the absence of other indications of strangulation, such as "petechia," which he described as "small minute pinpoint hemorrhages" that appear "[l]ike a little tiny dot." Dr. Copeland went on to testify that there were no other indications of manual strangulation, such as Demetria having broken fingernails or "offensive" injuries suffered by Williams. According to Dr. Copeland, the evidence that Dr. Hayne attributes to strangulation was likely caused by decomposition.

¶62. As for the third basis for Dr. Hayne's conclusion regarding the manner of Demetria's death, Dr. Hayne noted that the absence of "hesitation" marks on Demetria's body

contradicted the possibility that she committed suicide. However, on cross-examination, Dr. Hayne testified that hesitation marks do not always accompany deaths by suicide. Dr. Copeland also testified that the lack of hesitation marks did not rule out the possibility of suicide as the manner of Demetria's death.

¶63. Finally, as stated, Dr. Hayne testified that the presence of an "abrasion" on the back of one of Demetria's hands could have been a defensive wound, meaning a wound that one sustains while defending against an attack. However, Dr. Hayne also testified that the abrasion injury to the back of one of Demetria's hands was not necessarily a defensive wound – it was only consistent with a defensive wound. Dr. Copeland testified that Demetria could have sustained the abrasion in other ways aside from defending herself from Williams.

¶64. "[U]nder the plain-error doctrine, [an appellate court] can recognize obvious error which was not properly raised by the defendant on appeal, and which affects a defendant's 'fundamental, substantive right.'" *Neal v. State*, 15 So. 3d 388, 403 (¶32) (Miss. 2009) (quoting *Smith v. State*, 986 So. 2d 290, 294 (¶10) (Miss. 2008)). To prove plain error, a defendant must show an error that "seriously" affected "the fairness, integrity or public reputation of judicial proceedings." *Id.* (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)).

¶65. We do not find that allowing Dr. Hayne's testimony affected the "fairness, integrity, or public reputation" of Williams's trial. From the record, it appears that Dr. Hayne and Dr. Copeland merely disagreed regarding methodology and conclusions. As the jury heard testimony from both doctors, there is no merit to any contention that Dr. Copeland's testimony invalidated Dr. Hayne's testimony.

¶66. This contention of error is without merit.

4. Speedy Trial

¶67. Williams was arrested on November 17, 2005. He was indicted on March 2, 2006. He waived arraignment the same day. On July 24, 2007, the circuit court entered an order setting Williams's trial date for September 24, 2007.

¶68. Five days before his trial, Williams filed a "motion to dismiss for violation of [the] 270-day rule." Within that motion, Williams claimed that the circuit court should dismiss the indictment against him because the State failed to try him within 270 days of the date he waived arraignment. Williams's motion was based solely on Mississippi Code Annotated section 99-17-1 (Rev. 2007). Williams did not raise his constitutional right to a speedy trial.

¶69. On the day of trial, after jury selection, the parties met in the circuit judge's chambers. The circuit judge subsequently denied Williams's motion to dismiss. Williams went to trial approximately 571 days from the date that he waived arraignment. According to Williams, the circuit judge erred when he denied the motion to dismiss.

a. Constitutional Right

¶70. As previously mentioned, Williams's motion to dismiss was based solely on his statutory right to a speedy trial. Williams did not raise his constitutional right to a speedy trial. In his brief on appeal, however, Williams appears to invoke his constitutional right to a speedy trial in noting that "[a] defendant is guaranteed the right to a speedy trial according to the Sixth Amendment of the United States Constitution, as well as [Article 3, Section 26 of] the Mississippi State Constitution." In addressing similar circumstances, this Court has held as follows:

> We agree with the suggestion of the United States Supreme Court that not every defendant, though entitled under the constitution to a speedy trial, is anxious to have that right vindicated. *See Barker v. Wingo*, 407 U.S. 514, 521, 92 S.Ct. 2182, 33 L. Ed. 2d 101 (1972). As the Supreme Court observed, a defendant may be perfectly content to endure multiple and prolonged delays in bringing his case to trial. *Id*. The defendant may be in hopes that time will result in the unavailability of potential witnesses, will cloud the memory of those still available, will result in the loss of other available evidence, or will simply remove some of the urgency from the facts so that jurors may take a more benign view of the matter. We conclude, therefore, that [the] failure to affirmatively raise the issue at the trial level works as a bar to our consideration of the issue on appeal under the well-known principle that the primary purpose of an appellate court is to correct erroneous rulings by the trial court and not to rule on alleged errors that were not presented to the trial court for decision in the first instance. *Sanders v. State*, 678 So. 2d 663, 670-71 (Miss. 1996). Because delays in bringing a matter to trial may work to the defendant's advantage, we do not consider a claim that the defendant was denied a speedy trial to be a matter of plain error or fundamental error that may be raised for the first time on appeal. Therefore, we find . . . this issue to be procedurally barred.

Bell v. State, 733 So. 2d 372, 376 (¶11) (Miss. Ct. App. 1999). Accordingly, we find that Williams is procedurally barred from raising his constitutional right to a speedy trial for the first time on appeal.

b. Statutory Right

¶71. Mississippi Code Annotated section 99-17-1 provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." "However, we have held that if a defendant fails to raise the statutory right to a speedy trial within 270 days of his arraignment, he acquiesces to the delay." *Roach v. State*, 938 So. 2d 863, 867 (¶9) (Miss. Ct. App. 2006). Williams filed his motion to dismiss 566 days after he waived arraignment. Accordingly, Williams "waived

his right to complain about not being tried within 270 days, because he neither requested nor asserted his right to a speedy trial" within that time. *Guice v. State*, 952 So. 2d 129, 140 (¶23) (Miss. 2007). We find no merit to this issue.

5. Ineffective Assistance of Counsel

¶72. Williams claims that he received ineffective assistance of counsel. Williams asserts that his counsel was deficient in several respects, namely in: (1) not moving for a change of venue, (2) not calling Michael Presnell as a witness, (3) not introducing a transcript of an online chat between Williams and Demetria, (4) failing to obtain Demetria's mental health or prescription records, (5) failing to object to the admission of a death certificate into evidence, and (6) failing to further develop Williams's medical history in support of Williams's defense. We will address each of these in turn.

¶73. There is a two-part test that must be used to determine whether counsel is ineffective:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Doss v. State, 19 So. 3d 690, 694-95 (¶7) (Miss. 2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

a. Motion for Change of Venue

¶74. Williams claims that his attorney should have moved for a change of venue because of the "abundance of pretrial publicity regarding the case." During voir dire, three potential jurors indicated that they had heard or read something about the case that might influence

their opinions. The circuit court dismissed all three jurors after questioning them about their abilities to set aside what they had heard or read. On April 14, 2008, at a posttrial hearing on Williams's motion for a new trial, Franks, Williams's trial counsel, testified regarding his reasons for doing or not doing certain things during his representation of Williams. Regarding a change of venue, Franks testified that a "[c]hange of venue was discussed with the defendant as well as his family at my office well in advance of trial." Franks went on to testify that he thought that jury panels in Oxford tend to be: more educated, more liberal, and less likely to judge someone for being involved in a romantic interracial relationship. Franks stated that Williams and his family "expressed no objection to handling it that way . . . ."

¶75. "There is a strong but rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Neal*, 15 So. 3d at 405 (¶40) (quoting *Holly v. State*, 716 So. 2d 979, 989 (¶37) (Miss. 1998)). Here, counsel gave numerous reasons for his decision to not request a transfer of venue. Furthermore, he stated that he discussed that strategy with Williams and his family. Williams failed to show that his counsel was deficient for not requesting a change of venue.

b. Presnell

¶76. Franks was also questioned about his failure to call Presnell as a witness and his reasons for not doing so. We quote from his response at length:

> Michael Presnell gave a statement to a police officer . . . that was kind of antagonistic toward David on a personal level; but it did add something of value to us, which was that about two years prior[,] Demetria had confided in him that she had considered suicide. We have a remoteness issue there, but we would have been dealing with that had I been able to call him.
>
> We were not able to find Michael Presnell. We did an [I]nternet search

> looking for him, could not find him. The Thursday before trial[,] David's father contacted me and told me that he thought there was some evidence on the 911 tape which had been made to Olive Branch about a month or so prior to Demetria's death when David had attempted suicide in Olive [B]ranch a previous time.
>
> . . . I went over and reviewed the 911 tape; and there was nothing of value on that tape except we found a phone number, a cell phone number, from Michael Presnell where he had called 911.
>
> This was on the Thursday before the trial. We called that number. I called that number and was never able to receive an answer and was not able to leave a voice message.
>
> On Tuesday of the trial the first witness that the State called was a Jessica Smith, who was friends of the various participants in this. During the course of my cross-examination of her, I asked her if she knew where Michael Presnell was. She said, Yes, he is back at school; and this was, as you will recall, shortly after the school year had begun again.
>
> She said he is back at school. He is in the engineering department, and she said that he [sic] had seen him the previous week.
>
> I discussed that later that afternoon after we had broken [sic] with Charles Williams, David's father; and Charlie said that he had a friend, who I knew, and I've forgotten first name [sic], Sandridge, who used to be a detective with [the] DeSoto County Sheriff's Department; and Charlie said between him and Mr. Sandridge, that they would be able to find Michael Presnell over that night, which would have been Tuesday night and on into Wednesday morning.
>
> When we came back on Wednesday morning, Charlie said something to the effect that we do not need him as a witness; and which I thought was odd; but I didn't ask him why.
>
> At any rate[,] he had not found Presnell; or if he had, he did not want to bring him forward as a witness.

In other words, Franks had relied on Williams's father's assertion that Presnell would not be useful as a witness. Additionally, as far as Franks knew, the only evidence that Presnell could offer that might be of any use to Williams was that Demetria had contemplated suicide

a significant period of time before her death. During cross-examination, Franks testified that the sheriff's department had subpoenas for Presnell, but was unable to locate him.

¶77. Williams's father also testified at the posttrial hearing. Regarding Presnell, Williams's father testified that he "was able to find an address for [Presnell], the street address. That was all, but not able to find him at that time." Williams's father went on to testify about how he found Presnell approximately two weeks after the trial. Williams's father testified that he met with Presnell at that time, although he did not testify about anything that Presnell might have testified to in Williams's defense. Under all the circumstances, Williams has failed to show that his trial counsel was deficient. He has further failed to show that any deficiency prejudiced his case. Despite contacting Presnell after trial, there was no evidence to show that Presnell had anything to contribute to Williams's case.

c. Introduction of Online Chat Transcript

¶78. The transcript of the online chat at issue contained a statement by Williams that he was going to kill himself, and a response by Demetria that when she thought that he had killed himself, she wanted to kill herself as well. The transcript shows that Williams then invited Demetria over to commit suicide, and Demetria responded that she could not do that. Demetria did not expound on why she could not join Williams at that time. Franks testified that he did not introduce the online chat transcript because:

> What she says in this is that she could not kill herself. It does at least imply, I think fairly specifically implies that there was a, that it was discussed, the suicide was discussed; but she specifically says, I cannot do that; and my concern was if you bring this in, I think it really is [a] double-edged sword; and I think it cuts more against the defendant than it does . . . against the State.

Franks testified that he discussed whether to introduce this transcript with Williams and Williams's family. Based on all the evidence, we cannot find that Franks was deficient in not introducing the online chat transcript.

d. Failure to Obtain Demetria's Mental Health Records

¶79. Franks provided the following explanation for why he did not seek out any of Demetria's medical records:

> Sometime prior, a couple of months prior to trial[,] David Williams's family paid me . . . money for a forensic pathologist and a private investigator. During the course of my investigation, there came to light no indication that Demetria had any type of psychiatric treatment. The most telling example of this was the defendant, who said to his knowledge she had no psychiatric treatment and had not been on any medication. He was the [sic] probably the closest person to her other than perhaps her mother who later on the witness stand testified that she had not been under any psychiatric treatment or under in my [sic] medication.
>
> That being said, I discussed with David and with the family that our money was better spent bringing in the forensic pathologist where we actually had a doctor who was saying that Steven Hayne, the medical examiner, was wrong.
>
> I felt like it was better to spend that money on that forensic pathologist than hiring an investigator to do what appeared to be a wild goose chase. I discussed that with the family. The family agreed with that, and we moved on. When I say the family, the family and the defendant.

There is no merit to Williams's contention that his trial counsel was deficient for failing to seek out Demetria's medical records. To date, no medical records have been produced; therefore, there is also no showing that the records would have provided anything of use to Williams.

e. Admission of Death Certificate

¶80. Although Williams asserts that his counsel erred in allowing a death certificate to be

admitted, Franks testified that he could not recall a death certificate being admitted into evidence. He testified that he reviewed a list of exhibits in the case, but that he still could not find where a death certificate had been entered into evidence. This Court has also searched the record, including the exhibits provided on appeal as well as the lists of exhibits provided in the record. Having done so, we have not found any indication that a death certificate was entered into evidence. Therefore, this contention of error is without merit.

f. Admission of Williams's Medical Records

¶81. Franks explained his reason for not further developing evidence of Williams's medical history:

> We had the defendant's medical records with us. I am the attorney for Baptist DeSoto who held those records. If we had needed to introduce them into evidence, all I would have to have done is call the supervisor at Baptist and tell him to send their records person down[,] and we could have introduced it.
>
> I don't know what his extensive medical history would have added to the suicide defense. It wasn't about, his medical history had nothing to do with her medical history. It's not an issue of insanity on his part, and there didn't seem to be any serious suggestion that David's five suicide attempts were anything other than legitimate suicide attempts, so that one I'm a little lost on what was being suggested that we should have done.
>
> I brought in the evidence throughout the course of this. I brought in the evidence I thought was most favorable to David. I presented it in the light most favorable to David, and that's what you do in a criminal trial.

This Court agrees with Williams's trial counsel. The issue at trial was whether Williams killed Demetria. To date, nothing has been introduced to show what Williams's medical records would have shown in his defense. Given the facts in this case, this contention of ineffectiveness of counsel is also without merit.

¶82. **THE JUDGMENT OF THE LAFAYETTE COUNTY CIRCUIT COURT OF**

CONVICTION OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

LEE AND MYERS, P.JJ., BARNES, ISHEE AND CARLTON, JJ., CONCUR. KING, C.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS, J. MAXWELL, J., NOT PARTICIPATING.

ROBERTS, J., DISSENTING:

¶83. The first issue in this case requires that this Court determine whether there was enough evidence to require granting David Jackson Williams's request for a lesser non-included instruction on assisted suicide. The majority finds that there was insufficient evidence to justify instructing the jury on Williams's defense theory that he assisted in Demetria Bracey's suicide. But for the Mississippi Supreme Court's clearly-established precedent to the contrary, I would agree with the majority. However, this Court is an intermediate appellate court, and as such, we have no authority to overrule or ignore the Mississippi Supreme Court's prior decisions which require granting lesser non-included-offense instructions under circumstances similar to the facts present in this case. I would follow the clearly-established precedent on the issue, reverse Williams's conviction, and remand this matter for a new trial. Accordingly, I respectfully dissent.

¶84. At the outset of my analysis, it is necessary to appropriately frame the issue on appeal. Williams claims the circuit court erred when it refused his request for a lesser non-included-offense instruction. Williams does not argue that the verdict is contrary to the weight of the evidence. Nor does he argue that there was insufficient evidence to support the jury's verdict of guilt.

¶85. The necessary review on appeal is not complicated. A criminal defendant is entitled to a lesser-offense instruction where there is an evidentiary basis for it in the record. *McGowan v. State*, 541 So. 2d 1027, 1028-29 (Miss. 1989). In other words, an instruction must be submitted to a jury if there is credible evidence to support it. *Anderson v. State*, 571 So. 2d 961, 964 (Miss. 1990). "Where a party offers evidence sufficient that a rational jury might find for him on the particular issue, that party of right is entitled to have the court instruct the jury on that issue and through this means submit the issue to the jury for its decision." *Id*.

¶86. The Mississippi Supreme Court has also held that a trial court must grant the instruction if, viewing the evidence *in the light most favorable to the accused, and considering all reasonable favorable inferences that may be drawn from the evidence in favor of the accused*, a hypothetical, reasonable jury could find in favor of the proponent of the instruction. *Anderson*, 571 So. 2d at 964. In other words, in analyzing this issue, this Court is to review the evidence in the light most favorable to the defendant – and not in the light most favorable to the verdict.

¶87. Accordingly, our task in analyzing this issue is *solely* to determine whether there was sufficient evidence to justify a jury instruction. We are not asked to weigh the evidence. We are not asked to determine whether, in the light most favorable to the verdict, no juror could find that Williams was guilty of assisted suicide. Any inclusion of those matters in an analysis is entirely inappropriate and contrary to the necessary review on appeal.

¶88. Williams requested a lesser non-included-offense instruction on assisted suicide. If the requested instruction meets certain qualifications, the defendant is "*entitled to a lesser-*

offense instruction the same as he would be entitled to a lesser-included-offense instruction." *Moore v. State*, 799 So. 2d 89, 91 (¶7) (Miss. 2001) (quoting *Gangl v. State*, 539 So. 2d 132, 136 (Miss. 1989)) (emphasis added). The Mississippi Supreme Court has recently reiterated that a defendant is *entitled* to a lesser non-included offense instruction under certain circumstances. *Brooks v. State*, 2007-CT-00828-SCT, 2009 WL 3208682 *7 (¶36) (Miss. Oct. 8, 2009).

¶89. As mentioned, there are qualifiers to the requesting defendant's entitlement. The lesser offense must arise out of a "nucleus of operative fact common with the factual scenario giving rise to the charge laid in the indictment." *Moore*, 799 So. 2d at 91 (¶7) (quoting *Gangl*, 539 So. 2d at 136). That qualifier is not at issue. However, the majority bases its position on the second qualifier. That is, the evidence must warrant the instruction. *Id*.

¶90. A criminal defendant is entitled to a lesser-offense instruction where there is an evidentiary basis for it in the record. *McGowan*, 541 So. 2d at 1028-29. In *Williams v. State*, 797 So. 2d 372, 378 (¶20) (Miss. Ct. App. 2001), a defendant had been indicted for simple assault, and the trial court granted a lesser non-included offense instruction of disorderly conduct.[5] This Court found no error in the trial court's decision to grant the lesser non-included-offense instruction. *Id*. at 379 (¶25). In so doing, this Court stated that "[i]nstructions should be granted or refused based on whether there is *any* evidence to support the requested instruction." *Id*. at 379 (¶24) (emphasis added). Accordingly, not only are such instructions appropriate if there is *any* evidence to support an instruction, as

[5] The author of the relevant portion of the *Williams* decision is the author of the current majority opinion.

previously mentioned, in determining whether a lesser non-included-offense instruction is warranted by the evidence, the trial court was required to review the evidence in the light most favorable to Williams.

¶91. Williams sought a lesser non-included-offense instruction on assisted suicide. Mississippi Code Annotated section 97-3-49 (Rev. 2006) provides:

> A person who wilfully, *or in any manner*, *advises*, *encourages*, abets, or *assists* another person to take, or in taking, the latter's life, or in attempting to take the latter's life, is guilty of [a] felony and, on conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding one thousand dollars, and by imprisonment in the county jail not exceeding one year.

(Emphasis added). The circuit court refused Williams's assisted-suicide instruction on the basis that Williams was only allowed an instruction on his theory of the case if that theory involved a lesser-included offense.

¶92. Neither the prosecution nor defense counsel argued that the instruction was inappropriate due to any lack of evidence in the record justifying a jury conclusion that Williams had assisted in Demetria's suicide. It is well-settled law that a party's failure to state specific grounds for an objection to a jury instruction operates as a procedural bar to consider that issue on appeal. "In order to preserve a jury instruction issue on appeal, a party must make a specific objection to the proposed instruction in order to allow the lower court to consider the issue. Further, an objection on one or more specific grounds constitutes a waiver of all other grounds." *Morgan v. State*, 741 So. 2d 246, 253 (¶15) (Miss. 1999) (citations and internal quotations omitted). However, the majority declines to apply the procedural bar in this case, and gives no basis for its refusal to apply the well-established

procedural bar.

¶93. In any event, the majority finds absolutely no evidence to support Williams's requested instruction. I respectfully disagree with the majority's characterization of the evidence. In my opinion, there was sufficient evidence to trigger the entitlement to a lesser non-included-offense instruction. To find otherwise is to ignore the precedent established by the Mississippi Supreme Court – and it is contrary to our mandate as an intermediate appellate court.

¶94. Williams consistently maintained that Demetria committed suicide. In his statement, which was admitted into evidence during the prosecution's case-in-chief, Williams claimed that he and Demetria had discussed suicide since the summer of 2005. He stated that Demetria had him drive her to her bank so she could withdraw the entire balance of her checking account. He even entered Demetria's PIN number at the ATM machine at Demetria's request so that Demetria could withdraw all of her money. He claimed that Demetria withdrew her money so her mother, Glenda Hill, would not have any difficulties obtaining Demetria's money after Demetria's suicide. Glenda testified that, shortly before Demetria's death, Demetria told her that she was keeping all of her money in her checkbook. Glenda further testified that it was very unusual for Demetria to reveal where she was keeping money. Law enforcement personnel recovered Demetria's money from her purse. Dr. Arthur Copeland criticized Dr. Steven Hayne's conclusion that Demetria's death was a homicide. Dr. Copeland went on to testify that he could not precisely determine the manner of Demetria's death, but his findings were "consistent with suicide."

¶95. Jessica Smith, a friend of Demetria's, testified that Demetria had missed band practice

and that she had received calls from "the housing director and area coordinator" because Demetria could not be reached for work. Smith testified that it was not typical for Demetria to neglect her responsibilities. Williams told Agent John Marsh about talking to Smith because Smith was worried because Demetria "had been missing work and not going to band and all that." During Agent Marsh's interview, Williams said that he and Demetria did not go to class the week before she died.

¶96. Smith testified that she had spoken to Demetria days before Demetria died. According to Smith, Demetria sounded as though she had been crying. Demetria's mother, Glenda, testified that she talked to Demetria on the Tuesday before Demetria died. Glenda testified that Demetria was "kind of sniffling" and that the "conversation didn't feel right." Demetria's atypical behavior and her crying could have been interpreted as indicative of her depressed mental state and/or her intent to fulfill her suicide pact with Williams. Additionally, Dr. Copeland testified that scars on Demetria's arms were consistent with self-inflicted cuts seen in "cutters," which occur when "one practices cutting themselves [sic] to get attention or [when] they are [sic] definitely in the need of psychological help."

¶97. Additionally, Williams told Agent Marsh that Demetria "wanted to go to the bank and get her money out and put it in her purse so that her mom could get it." Demetria "wasn't sure that [her mother] could get access to the account." Demetria's mother, Glenda, stated: "something strange [was] going on but I didn't know what and [Demetria] said[,] 'I'm saving money to buy my first car and I'm saving it in my checkbook[,]' and that is not like her. She usually doesn't tell anybody where she keeps her money at all[,] and I thought it was strange[,] but I overlooked it." Demetria's withdrawal of all of the money in her checking

account, and notifying her mother where it could be found, could have been interpreted as Demetria's plan to fulfill the suicide pact she and Williams had formed.

¶98. What is more, the concept that Williams and Demetria had a suicide pact permeated the trial. Agent Marsh testified that Williams told him and Detective Jimmy Williams that he and Demetria had "a suicide pact where they decided they were going to commit suicide." Detective Williams also testified that Williams said he and Demetria had a suicide pact. Enjoli Canankamp also repeatedly testified that Williams had told her that he and Demetria had a suicide pact.

¶99. Williams told Agent Marsh and Detective Williams that Demetria had "stabbed herself" and that he had "attempted to stab himself." Agent Marsh then reiterated that Williams "said that [Demetria] had stabbed herself." Later during the interview, Williams did not correct Agent Marsh when Agent Marsh attempted to clarify that Demetria "had stabbed herself." During redirect, Agent Marsh testified that Williams said Demetria had stabbed herself and that "[t]hey were going to stab themselves simultaneously." Detective Williams also testified that Williams said Demetria had stabbed herself.

¶100. In fact, the prosecution introduced a transcript of Agent Marsh's interview of Williams. During that interview, Williams said:

> We had kind of talked about committing suicide together and stuff like that and we decided we were going to do it last week and she came over, it was Sunday. We just hung out together, didn't go to class, she didn't work, um and we just hung out for a couple of days and decided that we were going to do it that night and she, we both drank a lot and took some pills but it wouldn't help the pain, you know. And we decided to do it in the closet so it would take longer for people to find us if somebody showed up looking for us and we got knives and went in there and we decided to do it at the same time and mine didn't go as far in.

Canankamp testified that she and Williams had discussed the events surrounding Demetria's death. Canankamp testified as follows:

> we went to the park and we talked over the phone the whole entire time. I asked him exactly, I just wanted some answers for myself. Some closure to have some kind of idea. And asked him exactly what happened. Was it where they did each other? Was it like Romeo and Juliet? What was the deal? At the time he explained that she was going to do him - - and that *he was going to do himself and she was going to do herself* and they had drank a lot of alcohol and took several pills to do that. And that after taking all the pills, he didn't feel, he felt weak and passed out from it and woke up several days later, off and on he would see her.

(Emphasis added). The following exchange also occurred during Canankamp's testimony:

> Q. So he described how they were to perform this suicide pact[?]
>
> A. Yes.
>
> Q. And tell the, ladies and gentlemen of the jury, what he said how that happened?
>
> A. That they took a lot of medications and that they had drank and *she was going to do herself and he was going to do himself.*
>
> . . . .
>
> Q. Did he describe how this was going to be carried out?
>
> A. From me asking him, from the times the day that I asked him *he said that he was going to do himself and she was going to do herself* and he showed me like several wounds to himself that he inflicted he said on himself.
>
> . . . .
>
> Q. What did he say about how they were going to accomplish the suicide pact?
>
> A. My question to him was, was he going to do her was she going to do him was it Romeo and Juliet style. What was it and his exact statement was, *I was going to do myself and she was going to do herself.*

(Emphasis added).

¶101. There was conflicting testimony from the experts called at trial. Dr. Hayne concluded that the manner of Demetria's death was a homicide, rather than a suicide. However, Dr. Copeland emphatically testified that Dr. Hayne "[i]mmediately jumped the gun [and] called [Demetria's death] a homicide from the get[-]go." Dr. Copeland repeatedly testified that the manner of Demetria's death was "consistent with suicide."

¶102. Dr. Hayne testified that it would have taken "considerable" or "significant" force to cause the injury that killed Demetria. However, Dr. Copeland contradicted Dr. Hayne's characterization. Dr. Copeland noted that the fatal wound did not go through bone – it went through the "cartilaginous segment" between Demetria's ribs. Dr. Copeland elaborated that such tissue is "not all that difficult for a knife to get into." Dr. Copeland further testified that such tissue is "not all that difficult to penetrate."

¶103. There was no testimony from Dr. Hayne, Dr. Earnest Lykissi, or Dr. Copeland that Demetria would have been too intoxicated to stab herself. Likewise, no expert testified unequivocally that Demetria was incapacitated by alcohol consumption at the time of her death. The evidence indicated that Demetria's blood-alcohol content was approximately .4 when she died. Dr. Lykissi testified that people with a blood-alcohol content of .4 would generally be "ready for the undertaker," but he also testified that there were exceptions to that general statement. Dr. Lykissi testified that he personally experienced a case in which a sailor had a blood-alcohol content of .7. According to Dr. Lykissi, that sailor had a cup of coffee and then walked out of the emergency room.

¶104. To be clear, the testimony regarding Demetria's level of intoxication and her capacity

to commit suicide at that time contradict the likelihood that Demetria committed suicide, but that evidence does not unequivocally exclude the possibility that suicide was the cause of Demetria's death. It bears repeating that, in analyzing this issue, we are not to weigh the evidence. We are merely required to determine whether there was substantial evidence to require the circuit court to grant Williams's request for an assisted-suicide instruction. The evidence of Demetria's level of intoxication did not unequivocally contradict the evidence that Demetria had committed suicide. It is noteworthy that, under the circumstances, substantial evidence has been described as more than a scintilla of evidence. Even when viewed alongside evidence that Demetria was intoxicated, there is still more than a scintilla of evidence that Demetria could have committed suicide because the intoxication/incapacity evidence merely suggested that it was less likely that Demetria could have committed suicide – it did not exclude the possibility.

¶105. Dr. Hayne testified that there were four reasons that led him to exclude suicide as the manner of Demetria's death: (1) the angle and depth of the fatal wound, (2) the presence of injuries to Demetria's neck, (3) the absence of "hesitation" marks, and (4) the abrasion on the back of Demetria's hand. It is noteworthy that Dr. Hayne did not include Demetria's intoxication level among those reasons.

¶106. Although Dr. Hayne testified that the angle and the depth of the fatal wound were inconsistent with suicide, Dr. Copeland contradicted Dr. Hayne's conclusion. As for the angle of the fatal wound, according to Dr. Copeland, the angle was "consistent with suicide." Dr. Copeland testified that "a person could take a knife themselves [sic] and inflict it into their [sic] body this way."

¶107. Dr. Hayne's inclusion of the depth of the fatal wound seems to have been linked to the force required to inflict that wound. Dr. Hayne testified that it would have taken "considerable" or "significant" force to cause the injury that killed Demetria. Again, Dr. Hayne did not testify that Demetria was too intoxicated to muster the force necessary to inflict the fatal wound. In any event, Dr. Copeland contradicted Dr. Hayne's characterization of the force required to inflict the fatal wound. Dr. Copeland noted that the fatal wound did not go through bone. Instead, the fatal wound passed through the "cartilaginous" tissue between Demetria's ribs. Dr. Copeland elaborated that such tissue is "not all that difficult for a knife to get into." Dr. Copeland further testified that such tissue is "not all that difficult to penetrate."

¶108. As for the small injuries to Demetria's neck, as previously mentioned, Dr. Hayne testified that he found bruises on the sternocleidomastoid muscles in Demetria's neck as well as soft tissue hemorrhaging in her neck and bruising in the area of her larynx. Dr. Hayne opined that the injuries to Demetria's neck were consistent with strangulation that was not self-inflicted, but was sustained while she was alive.

¶109. However, Dr. Copeland vigorously contradicted Dr. Hayne's findings. Dr. Copeland testified that he reviewed Dr. Hayne's autopsy report and that he disagreed with Dr. Hayne's conclusion regarding the suggestion of manual strangulation. Dr. Copeland testified that Dr. Hayne failed to dissect the tissues around Demetria's neck. Dr. Copeland also testified that what Dr. Hayne concluded was hemorrhaging could have been changes that occur with decomposition. Dr. Copeland further noted the absence of other indications of strangulation, such as "petechia," which he described as "small minute pinpoint hemorrhages" that appear

"[l]ike a little tiny dot." Dr. Copeland went on to testify that there were no other indications of manual strangulation, such as Demetria having broken fingernails or "offensive" injuries to Williams. According to Dr. Copeland, the evidence that Dr. Hayne attributes to strangulation was likely caused by decomposition.

¶110. As for the third basis for Dr. Hayne's conclusion regarding the manner of Demetria's death, Dr. Hayne noted that the absence of "hesitation" marks on Demetria's body contradicted the possibility that she had committed suicide. However, on cross-examination, Dr. Hayne testified that hesitation marks do not always accompany deaths by suicide. Dr. Copeland also testified that the lack of hesitation marks did not rule out the possibility of suicide as the manner of Demetria's death.

¶111. Finally, Dr. Hayne implied that the presence of an "abrasion" on the back of one of Demetria's hands could have been a defensive wound, meaning a wound that one sustains while defending against an attack. However, Dr. Hayne also testified that the abrasion injury to the back of one of Demetria's hands was not necessarily a defensive wound – it was only *consistent with* a defensive wound. Dr. Copeland testified that Demetria could have sustained the abrasion in other ways aside from defending herself from Williams.

¶112. The position advocated by the majority is based on the conclusion that no evidence supports the concept that Williams advised, encouraged, abetted, or assisted Demetria in committing suicide. Respectfully, the majority's position ignores the substantial evidence that Williams and Demetria had a suicide pact. By agreeing to commit suicide together, each member of the pact was *encouraged* to commit suicide because they no longer had to face the possibility of committing suicide alone. Williams and Demetria were lovers. The suicide

pact could easily be interpreted as an agreement between them that "if you are going to kill yourself, I do not want to continue to live without you, so I will likewise kill myself." Williams's statement indicated that he had attempted to commit suicide, but could not muster the courage to do so. A photograph that was introduced into evidence showed that Williams had cuts on his chest, and the testimony at trial demonstrated that Williams's blood was found in numerous places in his apartment. Based on Williams's statement, he and Demetria both drank a substantial amount of alcohol to gain the courage to commit suicide. Viewed in the light most favorable to Williams, by drinking together, he and Demetria were each *encouraged* to commit suicide. It bears repeating that the statute that prohibits assisting suicide includes language that encouragement or assistance "in any manner" may be a punishable act.

¶113. Additionally, there was other evidence that Williams encouraged Demetria to commit suicide. During Agent Marsh's interview of Williams, Williams stated that he and Demetria had been discussing suicide since the previous summer. According to Williams, he talked about committing suicide more than Demetria did, "but she wanted to do it with me." Williams also stated that he "probably brought it up in her mind." Additionally, a reasonable person could have also concluded that, by providing the place to commit suicide and the kitchen knives to accomplish the task, Williams assisted Demetria in committing suicide. It is necessary to remember that our task in analyzing this issue is solely to determine whether there was sufficient evidence to justify a jury instruction – not to weigh the

evidence.[6] Again, a criminal defendant is entitled to a lesser-offense instruction where there is an evidentiary basis for it in the record. *McGowan*, 541 So. 2d at 1028-29.

¶114. Contrary to the substance of the majority's opinion, the assisted-suicide statute does not require that the contemplated assistance or encouragement be persuasive, direct, or significant. Assistance or encouragement "in any manner" is sufficient to constitute the crime. As previously mentioned, a defendant is entitled to a lesser non-included-offense instruction "where there is evidentiary support that a defendant is guilty of a lesser charge arising from the same nucleus of operative facts." *Green v. State*, 884 So. 2d 733, 737 (¶12) (Miss. 2004) (citing *Mease v. State*, 539 So. 2d 1324, 1329 (Miss. 1989)). "In fact, proposed instructions should generally be granted if they are correct statements of law, are supported by the evidence, and are not repetitious." *Id*. at (¶13).

¶115. In essence, assisted suicide is synonymous with being an accessory-before-the-fact to self-murder. "Any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an 'aider and abettor[.]'" *Swinford v. State*, 653 So. 2d 912, 915 (Miss. 1995). "[S]uch aiding and abetting may be manifested by acts, words, signs, motions, or any conduct which unmistakably evinces a

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[6] Assuming that Williams had been indicted for and convicted of assisting in a suicide and had appealed, challenging the sufficiency of the evidence, this Court would, in all likelihood, find the evidence legally sufficient to support that conviction under the same facts. However, the majority's position is that there is no evidence to support granting an assisted-suicide instruction. Accordingly, by extension, the majority implicitly suggests that a trial court faced with the same facts must grant a directed verdict in favor of the defendant. If there is insufficient evidence to support an instruction as the majority finds, then it would defy logic to find sufficient evidence to support a conviction under the same facts. To hold otherwise would be intellectually dishonest.

design to encourage, incite or approve of the crime, or even by being present, with the intention of giving assistance." *Id*. (citation omitted). "A person who wilfully, *or in any manner*, *advises*, *encourages*, abets, or *assists* another person to take, or in taking, the latter's life, or in attempting to take the latter's life, is guilty of" assisting a suicide. Miss. Code Ann. § 97-3-49 (emphasis added).

¶116. There are numerous cases regarding the participation necessary to qualify as an accessory-before-the-fact. *See Turner v. State*, 573 So. 2d 1340 (Miss. 1990); *Gowdy v. State*, 592 So. 2d 29 (Miss. 1991); *Bolton v. State*, 831 So. 2d 1184 (Miss. Ct. App. 2002). In *Swinford*, the Mississippi Supreme Court affirmed a conviction for murder as an accessory-before-the-fact under the following facts:

> There is no dispute that George Johnson killed Jamie Medlin. Nor is there any dispute that defendant [Darla Jo] Swinford was present at the time of the killing and also arranged for Jamie Medlin to be at the place where the killing took place. Swinford testified that she suspected trouble when she saw Johnson arrive with a gun. She readily admitted that she did nothing, knowing that Johnson stood armed talking with Medlin for approximately thirty minutes. She neither tried to stop the discussion or leave for help. There is also no dispute that she subsequently traveled with Johnson and Branum to Florida with packed bags.
>
> Swinford testified that she only thought that Johnson wanted to talk to Medlin on the day of the murder and that she traveled to Florida with the boys out of fear. However, this testimony does not support the verdict and is in fact refuted by [another witness's] testimony that Swinford knew of the plan to kill Medlin. There exists ample evidence in support of Swinford's murder conviction. Swinford's actions met the requirements for aiding and abetting, and therefore her conviction for murder stands affirmed.

Swinford, 653 So. 2d at 915. Viewing the evidence in the light most favorable to the verdict, the defendant in *Swinford* knew about the plan to kill the victim, arranged for the victim to be present, and was present during the crime. That evidence was sufficient to find beyond

a reasonable doubt that the defendant in *Swinford* aided, assisted, or encouraged the commission of murder. Stated differently, knowledge of the planned crime, indirect participation in the planned crime, and presence during the commission of the planned crime is sufficient evidence to convict a defendant beyond a reasonable doubt as an accessory-before-the-fact. It follows that the facts in the case sub judice, which must be viewed in the light most favorable to Williams, must qualify as sufficient evidence to trigger Williams's entitlement to a lesser-non-included offense instruction. This is especially true where, according to Williams's own statement, he talked about committing suicide more than Demetria did, "but she wanted to do it with [him] . . .[and he] probably brought it up in her mind."

¶117. To be entirely clear and forthcoming, my opinion is not based on the premise that I agree with the merits of a legal entitlement to lesser non-included-offense instructions. Mississippi Code Annotated section 99-19-5(1) (Rev. 2007) provides:

> On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose.

Accordingly, section 99-19-5(1) permits a jury to convict an individual for a lesser-included offense, but it does not address lesser non-included offenses. No Mississippi statute authorizes a jury to convict a defendant for a lesser non-included offense.

¶118. The United States Supreme Court has unequivocally rejected the concept that a defendant is entitled to a lesser non-included-offense instruction. *Hopkins v. Reeves*, 524

U.S. 88, 97 (1998). The Supreme Court held that such an entitlement would be "not only unprecedented, but also unworkable. Under such a scheme, there would be no basis for determining the offenses for which instructions are warranted." *Id*. In *Schmuck v. United States*, 489 U.S. 705 (1989), the United States Supreme Court resolved whether it would utilize an "elements test" or an "inherent-relationship approach" in interpreting Federal Rule of Criminal Procedure 31(c)(1), which provided, in part, that a "defendant may be found guilty of . . . an offense necessarily included in the offense charged[.]" Adopting the more stringent "elements test," the *Schmuck* Court noted as follows:

> Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy. Specifically, if, as mandated under the inherent[-]relationship approach, the determination whether the offenses are sufficiently related to permit an instruction is delayed until all the evidence is developed at trial, the defendant may not have constitutionally sufficient notice to support a lesser[-]included[-]offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment. Accordingly, under the inherent[-]relationship approach, the defendant, by in effect waiving his right to notice, may obtain a lesser[-]offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction.

Schmuck, 489 U.S. at 718.

¶119. Additionally, in the context of a prosecution of a felony, the entitlement to a lesser non-included offense instruction is contrary to Article 3, Section 27 of the Mississippi Constitution of 1890, which provides that: "No person shall, for any indictable offense, be proceeded against criminally by information except in cases . . . where a defendant represented by counsel by sworn statement waives indictment." The record contains no evidence that Williams waived formal indictment on assisted suicide and proceeded on a bill

of information.

¶120. Further criticism of the concept of an entitlement to a lesser non-included-offense instruction has been raised on the basis that "[a]n accused should not have the unrestricted right to search the statute books for some other related but not lesser-included offense with a lesser punishment, and insist upon an instruction on that crime." *Barber v. State*, 743 So. 2d 1054, 1059 (¶19) (Miss. Ct. App. 1999) (Southwick, P.J., dissenting). "In effect an accused can indict himself for an offense that is not within the actual indictment but is potentially within the facts and carries a lesser sentence." *McDonald v. State*, 784 So. 2d 261, 266 (¶20) (Miss. Ct. App. 2001) (Southwick, J., concurring). In other words, "this court-created right to a lesser non-included[-offense] instruction effectively allows a defendant to choose the crime for which he is indicted." *Brooks v. State*, 18 So. 3d 859, 876 (¶48) (Miss. Ct. App. 2008) (Carlton, J., dissenting) (overruled in part). Yet another important consideration regarding the merits of awarding a defendant an entitlement to a lesser non-included instruction has been stated as follows:

> In the original case that unleashed us on [the] journey into non-included[-]offense instructions, the [supreme court] said "whether simple assault is formally a lesser included offense to rape is not the point." *Griffin v. State*, 533 So. 2d 444, 447 (Miss. 1988). With respect for the [supreme court] and the author of that opinion, that should be and had before then been exactly the point. If the elements on the lesser offense are all in the greater offense, then what is in the lesser[-]offense instruction will necessarily have been examined fully in the trial.

McDonald, 784 So. 2d at 269-70 (¶40) (Southwick, P.J., concurring).

¶121. Other jurisdictions have shared Judge Southwick's concerns. In 1984, the California Supreme Court adopted the lesser non-included-offense-instruction doctrine in *People v.*

Geiger, 674 P.2d 1303 (Cal. 1984). After fourteen years' experience, California reversed course and joined the majority of jurisdictions that do not permit such jury instructions. *See People v. Birks*, 960 P.2d 1073, 1074 (Cal. 1998). In rejecting the concept of a defendant's entitlement to lesser non-included-offense instructions, the California Supreme Court stated as follows:

> The rule [prohibiting lesser non-included-offense instructions] also accords both parties equal procedural treatment, and thus benefits and burdens both to the same degree. Neither party is unfairly surprised by instructions on lesser necessarily included offenses because, by definition, *the stated charge gives notice to both that all the elements of any such offense are at issue*. By the same token, neither party has a greater right than the other either to demand, or to oppose, instructions on lesser necessarily included offenses. Finally, if lesser offenses are necessarily included in the charge the prosecution has chosen to assert, instructions on the lesser offenses, even when given over the prosecution's objection, cannot undermine the prosecution's traditional authority to determine the charges.

Id. at 1074 (emphasis added). The California Supreme Court also noted that the entitlement to lesser non-included-offense instructions "gives the defendant a superior trial right to seek and obtain conviction for a lesser uncharged offense whose elements the prosecution has neither pled nor sought to prove." *Id*. at 1075. Finally, the California Supreme Court expressed its concern that "[b]y according the defendant the power to insist, over the prosecution's objection, that an uncharged, non[-]included offense be placed before the jury, the [entitlement to a lesser non-included-offense instruction] may usurp the prosecution's exclusive charging discretion, and may therefore violate the Constitution's separation of powers clause." *Id*. In other words, the "entitlement" to a lesser non-included-offense

instruction affords the defense a tactic that the prosecution may not itself utilize.[7]

¶122. To best illustrate the point, if Williams had been indicted for murder as a habitual offender pursuant to Mississippi Code Annotated 99-19-83 (Rev. 2007), and the prosecution had sought a jury instruction on the lesser non-included offense of assisted suicide, defense counsel would most certainly have strenuously objected on the basis that Williams had not been charged with assisted suicide. Defense counsel would have also argued that assisted suicide was not a lesser-included offense of murder, and that he was not prepared to defend an assisted-suicide charge. Defense counsel would have been correct on all three grounds, and the circuit court would have properly sustained defense counsel's objections to such an instruction requested by the prosecution.

¶123. However, beginning in 1988 and continuing thereafter, the Mississippi Supreme Court has consistently held that a defendant is entitled to an instruction on a lesser "non-included" charge. *Griffin*, 533 So. 2d at 447-48. In so doing, Mississippi has rejected the majority approach and has joined the *minority* of jurisdictions that allow lesser non-included-offense instructions. *See State v. Corliss*, 721 A.2d 438, 443 (Vt. 1998) (holding that the practice of allowing lesser non-included-offense instructions "is followed in only a minority of jurisdictions"). The supreme court has recently reiterated that a defendant is entitled to a lesser non-included-offense instruction under certain circumstances. *Brooks*, 2007-CT-

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[7] The Mississippi Supreme Court first adopted the entitlement to a lesser non-included-offense instruction in *Griffin v. State*, 533 So. 2d 444 (Miss. 1988). We continue to follow that doctrine despite its rejection by the United States Supreme Court and the vast majority of state jurisdictions. It is ironic that, in this area of jurisprudence, Mississippi could be considered more "liberal" in its treatment of accused defendants as compared to California's treatment of the same.

00828-SCT, 2009 WL 3208682 *7 (¶36). The Mississippi Supreme Court has also held as follows:

> The defendant may request an instruction regarding any offense carrying a lesser punishment if the lesser offense arises out of a nucleus of operative fact common with the factual scenario giving rise to the charge laid in the indictment. . . . Therefore, if the evidence warrants it, *a defendant is entitled to a lesser-offense instruction the same as he would be entitled to a lesser-included-offense instruction.*

Moore, 799 So. 2d at 91 (¶7) (quoting *Gangl*, 539 So. 2d at 136) (emphasis added). This Court has recognized the Mississippi Supreme Court's prerogative to conclude that a defendant is entitled to a lesser non-included-offense instruction when such an instruction is supported by the evidence and stated that:

> It seems to us that [there are] two competing interests: a defendant's right to have the jury instructed on his theory of defense and the State's interest in prohibiting the jury from returning what the State perceives as being a compromised verdict in cases where the evidence might be insufficient to support the greater charge but sufficient to support a lesser offense which is not a lesser-included offense of the greater charge. As between these two competing interests, it is clear the defendant should prevail.

Williams, 797 So. 2d at 379 (¶23).

¶124. It is noteworthy that Williams could have submitted a jury instruction that included the substance of his assisted-suicide theory of the case without the option to convict Williams for assisted suicide. There can be no doubt that a defendant is entitled to an instruction on his theory of the case. *Williams v. State*, 953 So. 2d 260, 263 (¶6) (Miss. Ct. App. 2006). Such an instruction would have presented Williams's theory of the case to the jury, but it would not have invited the jury to compromise its verdict by returning a guilty verdict for assisting suicide. Had Williams submitted such an instruction, and the jury still found that

Williams was guilty of murder, there would be no controversy on appeal. This Court would have simply held that the jury, in its discretion, rejected Williams's theory of the case. However, Williams did not request such an instruction. Williams specifically wanted an instruction that would have allowed the jury to reach a compromised verdict finding him guilty of assisted suicide. The only difference is the lack of an optional conviction component. In my opinion, Williams's insistence, through his proposed instruction, of presenting to the jury the invitation of convicting him for assisted suicide, is tantamount to allowing a defendant to unilaterally determine the crime for which he wants to be tried. Such a decision should be determined solely by the prosecution – not the accused.

¶125. Although the jury could have reasonably found that Williams murdered Demetria, there was evidence that suggested that Demetria died due to suicide. There was also evidence that Williams, in any manner, assisted, advised, or encouraged Demetria to commit suicide. That evidence, viewed in the light most favorable to Williams, triggered the supreme court's line of cases that a defendant is "entitled" to a lesser non-included-offense instruction. Notwithstanding the previous discussion, as for the merits of granting a defendant an entitlement to a lesser non-included-offense instruction, my personal opinion on the matter is irrelevant. Our mandate is to follow the precedent of the Mississippi Supreme Court, and it has consistently held that a defendant is *entitled* to a lesser non-included-offense instruction if the evidence supports one. Contrary to the substance of the majority opinion, the assisted-suicide statute does not require that the contemplated assistance or encouragement be persuasive, direct, or significant. Assistance or encouragement "in any manner" is sufficient to constitute the crime. As previously

mentioned, a defendant is entitled to a lesser non-included-offense instruction "where there is evidentiary support that a defendant is guilty of a lesser charge arising from the same nucleus of operative facts." *Green*, 884 So. 2d at 737 (¶12) (citing *Mease*, 539 So. 2d at 1329). "In fact, proposed instructions should generally be granted if they are correct statements of law, are supported by the evidence, and are not repetitious." *Id*. at (¶13).

¶126. In my opinion, our mandate as an intermediate appellate court requires that we find that the circuit court erred when it refused Williams's request for a lesser non-included-offense instruction on assisted suicide. Although I too think the jury got it right when they found Williams guilty of murder, that should play no part in the actual analysis of the issue. We should not attempt to invent some justification to avoid the application of the law regarding lesser non-included-offense instructions in an effort to obtain the result we desire. When the evidence supporting conviction of the greater offense is quite strong, as is true in this case, the application of this court-created right to a lesser non-included-offense jury instruction is problematic at best.

¶127. Be that as it may, we do not sit as some hypothetical thirteenth juror in determining whether the evidence justified the requested instruction. Likewise, we are prohibited from reviewing the evidence in the light most favorable to the verdict. Instead, we are directed to review the evidence in the light most favorable to Williams. In my opinion, any review of the evidence in that light necessitates granting the requested instruction as directed by the Mississippi Supreme Court. But for the clearly established precedent, I would join the majority. The record is simply populated with abundant evidence, viewed in the light most favorable to Williams that: (1) Demetria and Williams were lovers; (2) they had a mutual

suicide agreement; (3) Williams planted the idea in Demetria's mind; (4) Williams actively assisted Demetria's plans by helping her to liquidate her bank account so her mother would have access to that money after Demetria's death; (5) Williams actively assisted Demetria by acquiring a large quantity of beer so they could dull their senses before they acted pursuant to their agreement; (6) Williams and Demetria hid out at Williams's apartment incognito for days before the event; (7) Williams assisted Demetria by providing kitchen knives from his kitchen to carry out their suicide agreement; (8) Williams and Demetria were depressed individuals who could be considered particularly susceptible to such unimaginable lovers' entanglement; and (9) expert testimony was presented that Demetria's death was consistent with suicide. In my opinion, to say that such evidence is insufficient and too indirect and inconsequential to constitute encouragement or assistance is to ignore the obvious.

¶128. I cannot ignore our mandate to act as an intermediate appellate court. Because the majority finds no evidence to support Williams's request for a lesser non-included-offense instruction, I collegially and respectfully dissent.

GRIFFIS, J., JOINS THIS OPINION.