IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01088 COA

HOSEA MINNIEWEATHER a/k/a HOSIE L.

MINNIEWEATHER APPELLANT

v.

STATE OF MISSISSIPPI APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOSEPH H. LOPER, JR.

COURT FROM WHICH APPEALED: MONTGOMERY COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): ROBERT T. LASTER, JR.

ATTORNEY(S) FOR APPELLEE(S): OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY(S): DOUG EVANS

KEVIN HORAN

NATURE OF THE CASE: MANSLAUGHTER

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO FIFTEEN (15) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

BEFORE THOMAS, P.J., DIAZ, KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Hosea Minnieweather was convicted of manslaughter in the death of Wyatt Pearson. The trial court sentenced him to serve fifteen years in the custody of the Mississippi Department of Corrections. The court denied Minnieweather's motion for JNOV or, in the alternative, a new trial. The question on appeal is whether he received a fair and impartial jury trial. We find that Minnieweather was denied a fair trial and therefore reverse and remand for a new trial.

FACTS

The facts of this case can be summarized briefly because they do not specifically determine the outcome of Minnieweather's appeal. Instead, this appeal turns on a procedural issue. The case involves the death of an individual arrested for public drunkenness and disorderly conduct in Winona. Wyatt Pearson had been arrested and taken to jail. Minnieweather, a deputy jailer who was accompanied by two other jail personnel, attempted to search Pearson while in his cell. The events that occurred after the search were recalled somewhat differently at trial by Minnieweather and the two jail personnel who were present. Verbal exchanges and physical blows to and from Pearson and Minnieweather apparently transpired. However, the details of what actually happened varied according to each witness. Although unimportant regarding guilt or innocence for the crime charged, the one detail on which all three witnesses apparently agreed was the fact that Pearson hit Minnieweather first. Pearson subsequently hit his head on the concrete cell floor, causing him to lose consciousness. He died from a cerebral hemorrhage en route from the Winona city jail to Jackson. Minnieweather was subsequently arrested, indicted, tried, and convicted of manslaughter. The court sentenced him to serve fifteen years in the Mississippi Department of Corrections. Minnieweather now argues on appeal that: (1) the court erred in allowing the testimony of State's witness Fred King; (2) the court erred when it allowed State's jury instruction S-3; (3) the court erred when it allowed State's jury instruction S-4; and (4) two jurors failed to properly respond to voir dire questioning. He requests that his case be remanded for a new trial.

ANALYSIS

I. DID THE TRIAL COURT ERR WHEN IT ALLOWED THE TESTIMONY OF STATE'S WITNESS FRED KING?

Minnieweather contends that the trial court denied him a fair trial because it allowed Fred King to testify against him. King ultimately testified that Minnieweather had bought him whiskey and persuaded him to tell the sheriff that King had seen the Alston boys beating up Pearson prior to Pearson's arrest and incarceration at the jail. King stated that he later called the sheriff back and told him that he had lied about his prior story. Prior to trial, Minnieweather moved to prohibit the State from calling King as a witness under Mississippi Rules of Evidence 403 and 404(b), but the motion was overruled. Minnieweather renewed his objection at trial when King testified and argued that his testimony was irrelevant, misleading, confusing, and prejudicial. He argues that King's testimony had no probative value but, assuming that it did, the court erred in two more respects: (1) it failed to

conduct a Rule 403 balancing of probative value against prejudicial effect and (2) it failed to give the jury, in conjunction with the Rule 403 balancing test, a required limiting instruction regarding King's testimony. As a result, Minnieweather requests a new trial.

Mississippi Rule of Evidence 404(b) states:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

M.R.E. 404(b). Additionally, Mississippi Rule of Evidence 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403.

The Mississippi Supreme Court has held that trial evidence must be limited to the crime charged in the indictment, and evidence of other crimes must be excluded with certain exceptions. *Davis v. State*, 660 So. 2d 1228, 1251 (Miss. 1995) (citations omitted). Evidence of another crime is admissible when the offense charged and the one to be proved are so interrelated that they could be considered a single transaction or occurrence or a closely-related series of transactions. *Id.* (citation omitted); *see also Duplantis v. State*, 644 So. 2d 1235, 1248 (Miss. 1994) (court held that probative value of other crimes evidence outweighed any prejudicial value because other crimes evidence was not similar to the charge in the indictment so that risk of unfair prejudice was minimal), *cert. denied*, 115 S. Ct. 1990 (1995); Wheeler *v. State*, 536 So. 2d 1347, 1352 (Miss. 1988) (evidence of another crime and of the crime charged were so interrelated that it was impossible for the State to have told the jury a complete story without referring to the other crime). "Even when other-crimes evidence is admissible under M.R.E. 404(b), it must pass through the 'ultimate filter' of M.R.E. 403." *Smith v. State*, 656 So. 2d 95, 99 (Miss. 1995) (citing *Jenkins v. State*, 507 So. 2d 89, 93 (Miss. 1987)). When Rule 404(b) evidence is admitted and an objection to the admission is overruled, that objection is to be considered an invocation to the right of a Rule 403 balancing analysis by the court. *Id.* at 100. If the evidence passes that hurdle, the court must give a limiting instruction unless the party objecting to the evidence objects to the giving of the limiting instruction. *Id.*; *see also Watts v. State*, 635 So. 2d 1364, 1368 (Miss. 1994) (once evidence is admitted under Rule 404(b), it must still pass through the Rule 403 filter that requires exclusion if its probative value is outweighed by the danger of unfair prejudice, confusion of issues, or mislead ing the jury).

The caselaw rules regarding admissibility and Rules 404(b) and 403 are distinguishable from caselaw rules regarding admissibility of evidence of certain prior convictions under Mississippi Rule of Evidence 609(a)(1). Prior conviction evidence under Rule 609 is admissible only after "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party . . . ." M.R.E. 609(a)(1). Rule 609 requires the trial court to affirmatively conduct the balancing, on the record, under a five-factor weighing procedure. *Peterson v. State*, 518 So. 2d 632, 636-37 (Miss. 1987) (citations omitted). However, regarding a standard Rule 403 objection, the trial court is subject to being reversed if it abuses its discretion. *Berry v. State*, 575 So. 2d 1, 9-10, 12-13

(Miss. 1990), *cert. denied*, 500 U.S. 928 (1991). We believe that this type of reversible error is based on an abuse of discretion and not on the failure to recite, on the record, the details that led to the ruling of admissibility under Rules 404(b) and 403. While authority clearly exists for placing a Rule 609 balancing on the record, a similar on-the-record balancing analysis under Rule 403 is not required.

In the present case, King testified at trial that he had lied to the sheriff when he initially told him that he had seen the Alston boys beat up Pearson immediately prior to Pearson's arrest, incarceration, and death. He also testified that Minnieweather bought him whiskey and took him to the sheriff. King stated that Minnieweather told him that he needed some help. The State argued that King's testimony was relevant to show Minnieweather's state of mind when he contacted King about going to the sheriff. Prior to King's in-court testimony, the court ruled that what King might say would be relevant and that it was confident that the jury could "sift it out" and not be confused.

We believe that King's testimony was relevant and allowed the jury to get a clear picture of what and when various events took place. King's testimony against Minnieweather was rebutted by the latter's testimony that he did not bribe King. Minnieweather admitted buying whiskey for King and another individual. He testified that he told them not to drink it and that he only asked them to tell the sheriff what they knew about Pearson's being beaten up prior to his arrest, incarceration, and death. Minnieweather also stated that Pearson's death was an accident. He testified that his hand made contact with Pearson's arm and cheek as Minnieweather tried to block a swing from Pearson. He said that the contact resulted in Pearson's head hitting the concrete floor. King's testimony of his involvement was relevant so that the jury could determine for themselves whether or not Minnieweather's conduct regarding King was believable evidence of consciousness of guilt for bribery or perjury. King's version of the events clearly constituted opposing testimony to Minnieweather's version of merely asking King to tell the sheriff the truth. The trial court properly allowed the State to tell the jury about closely-related, post-incident events that could not only form a complete and coherent story of what may have happened, but that could also indicate evidence of consciousness of guilt. We find that the trial court properly admitted the testimony under Rule 404(b) because it indicated both a possible motive or opportunity and a possible absence of accident. Although the trial court did not state for the record, under Rule 403, that the probative value of King's testimony outweighed its prejudicial effect, this conclusion was implicit in its finding of relevancy. Moreover, the court was under no duty to recite on-the-record findings of a Rule 403 balancing analysis for later review on appeal. This assignment of error does not afford Minnieweather relief.

The court has stated that "when evidence of other crimes is admitted for a specific purpose, the judge should instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered." *McLemore v. State*, No. 92-CT-00463-SCT, 1996 WL 42235, at *3 (Miss. Feb. 5, 1996) (citing *Smith v. State*, 656 So. 2d 95, 100 (Miss. 1995) (discussing this issue in the context of Rules 404(b) and 403); *Peterson v. State*, 518 So. 2d 632, 638 (Miss. 1987) (discussing this issue in the context of Rule 609)). A limiting instruction must be given to minimize the possibility that the jury will infer guilt for the charged crime from the previous conduct. *Id.* (citations omitted). This rule protects against a jury convicting a defendant because he has committed other crimes and not because the State proved him guilty of the crime for which he was charged. *Id.*

The court has also addressed the limiting instruction issue, as it relates to Rules 404(b) and 403, regarding admission of crimes *subsequent* to the crime charged. *Watts v. State*, 635 So. 2d 1364, 1368-69 (Miss. 1994). The *Watts* court, in analyzing the decision rendered in *Ford v. State*, 555 So. 2d 691 (Miss. 1989), stated that "[t]he *Ford* court was mainly concerned, however, with 'whether the trial judge properly instructed the jury that the evidence of another subsequent crime had a limited purpose.'" *Id.* at 1368. In *Ford*, the defendant was on trial for grand larceny. *Id*. The lower court allowed testimony of a subsequent crime, a similar robbery that took place the day after the robbery for which he was on trial. *Id.* The court gave the jury the following cautionary instruction:

> The Court instructs the jury that the testimony of Gloria Carter regarding an alleged incident at the First National Bank in West Memphis, Arkansas, was offered in an effort to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, regarding this Defendant, John Wiley Ford. You may give this testimony such weight and credibility as you deem proper under the circumstances. However, you cannot and must not consider this testimony in any way regarding whether or not this Defendant is guilty or not guilty of the charge for which he is presently on trial.

Id. at 1368-69 (quoting *Ford*, 555 So. 2d at 695-96). The *Ford* court affirmed the conviction after finding that: (1) the jury was properly issued a limiting instruction regarding testimony of a subsequent offense and (2) that the lower court did not err in determining that the admission of such evidence was not overly prejudicial under Rule 403. *Id*. at 1369. The *Watts* court found that a proper limiting instruction was never submitted to the jury, so that the testimony of another possible crime was considered for impermissible purposes--that on this particular occasion, the defendant was acting in conformity with his established character. *Id.*

The *Watts* court clearly analyzed the requirement of a limiting instruction following admission of evidence of a *prior* crime (burglary), of which the defendant had not been convicted, similar to the crime charged (attempted burglary). The court in *McLemore* discussed that same requirement regarding evidence of *prior* criminal acts, which were not necessarily similar to the charged crime. However prior to both of these decisions, the *Ford* court reached the same conclusion regarding a crime *subsequent to* the crime charged, albeit of the same type. We believe that a limiting instruction must be given after evidence of other criminal conduct is properly admitted under Rules 404(b) and 403. It is immaterial whether that other criminal conduct occurred prior to or subsequent to the crime charged and whether it was similar or dissimilar to the type of crime charged. The limiting instruction must clearly inform the jury that the other crimes testimony cannot be used to determine the defendant's guilt or innocence of the crime for which he or she is presently on trial.

In the present case, the court instructed the jury regarding testimony of alleged subsequent criminal conduct as follows:

> Evidence that a defendant attempted to persuade a witness to testify falsely by offering a sum of money, or by other means to be considered by you, along with other evidence in the case, is a circumstance tending to show defendant's consciousness of guilt.
>
> Such evidence, however, is not sufficient in itself to prove guilt. It is for you to determine

whether you believe the evidence and, if you do, what weight and significance you accord it.

The State argues on appeal that this instruction should be construed as a limiting instruction. We disagree. This instruction properly told the jury to weigh this evidence as it thought necessary. However, it wholly failed to clearly inform the jury that evidence of possible subsequent criminal conduct (bribery or perjury) could not and must not be considered in determining whether Minnieweather was guilty or innocent of the crime of manslaughter. Without the limiting instruction, we cannot be certain that the court minimized the risk that the jury inferred guilt from the subsequent conduct. Moreover under *Smith*, Minnieweather's objection to the admission of evidence under Rule 404(b) was overruled. Therefore, his objection should be deemed an invocation of his right to a Rule 403 balancing analysis and a limiting instruction. We believe that the trial court properly admitted King's testimony under Rule 404(b). Although questionable as to its basis, the court's Rule 403 balancing seems to have been carried out by its determination that King's testimony would be relevant and by its belief that the jury could "sift it out." Although a Rule 403 balancing is not required to be on the record, a trial court may well be advised that it should be as clear as possible on this issue, particularly because it constitutes the ultimate filter, following analysis under Rule 404(b), for admissibility of other crimes, wrongs, or acts evidence.

We believe that the trial court's omission of a limiting instruction constitutes reversible error and therefore remand for a new trial.

II. DID THE TRIAL COURT ERR WHEN IT ALLOWED STATE'S JURY INSTRUCTION S-3?

Minnieweather contends that the trial court erred by giving the jury a consciousness of guilt instruction based on evidence that he had attempted to persuade King to testify falsely for him in exchange for whiskey. On the other hand, the State argues that the instruction was properly given. The State compares instruction S-3 to a flight instruction and contends that sufficient evidence existed (of Minnieweather's bribery for King's false testimony) to justify the instruction.

The Mississippi Supreme Court has yet to address the issue of a consciousness of guilt *jury instruction* per se concerning bribery or perjury. However, it has addressed the *admissibility* of consciousness of guilt *evidence* regarding bribery or perjury. *Mattox v. State*, 137 So. 2d 920 (Miss. 1962). Moreover, it has on numerous occasions reaffirmed the well-established principle that flight is admissible as evidence of consciousness of guilt. *Williams v. State*, No. 92-KA-00761-SCT, 1996 WL 10053, at *8 (Miss. Jan. 11, 1996) (citations omitted). The court has also held that an instruction that flight can be a circumstance of guilt or guilty knowledge is warranted only when flight is unexplained and probative of guilt or guilty knowledge. *Holly v. State*, No. 93-DP-00263-SCT, 1996 WL 49159, at *4 (Miss. Feb. 8, 1996) (quoting *Reynolds v. State*, 658 So. 2d 852, 856 (Miss. 1995) (quoting *Fuselier v. State*, 468 So. 2d 45, 57 (Miss. 1985))). The court has stated that in deciding whether a flight instruction is appropriate, two considerations must be made: (1) only unexplained flight merits a flight instruction and (2) a flight instruction is to be given only where that circumstance

has considerable probative value. *Id.* (citing *Banks v. State*, 631 So. 2d 748, 751 (Miss. 1994) (quoting *Pannell v. State*, 455 So. 2d 785, 788 (Miss. 1984))).

Regarding the flight instruction issue, the court has also identified what constitutes unexplained flight. *Reynolds v. State*, 658 So. 2d 852, 856 (Miss. 1995). In *Reynolds*, the court said that Reynolds's explanation of flight was contradicted and unsupported by the rest of the evidence. *Id*. The *Reynolds* court compared the similarities of the explanation and testimony regarding flight in *Reynolds* to that of *Brock v. State*, 530 So. 2d 146 (Miss. 1988). *Id*. The *Reynolds* court said that Reynolds, like Brock, had attempted to explain his flight at trial, but his explanation had been contradicted and had no support outside his own testimony. *Id.* The court determined that Reynolds's flight was therefore unexplained, so that the first flight instruction prong had been met. *Id.* Likewise, the court has stated that a defendant's explanation of flight is unexplained when it is uncorroborated and contradicted by another witness. *Banks*, 631 So. 2d at 751 (citing *Evans v. State*, 579 So. 2d 1246, 1249 (Miss. 1991)). The *Banks* court also said that the evidence of guilt in *Evans* was probative of the defendant's knowledge of guilt. *Id.* A flight instruction is appropriate where the defendant's explanation has been contradicted and is unsupported by other than his own testimony. *Id.* (citing *Brock v. State*, 530 So. 2d 146, 153 (Miss. 1988)).

In the present case, King's testimony implied that Minnieweather had attempted to persuade King to talk to the sheriff. The evidence showed also that Minnieweather bought King whiskey to influence the latter to talk to the sheriff about what Minnieweather believed would help his case--that King had seen Pearson being beaten up prior to being arrested and taken to jail. Minnieweather did not deny buying King whiskey or asking him to talk to the sheriff. We believe the jury instruction S-3 was proper based on an analogy to the typical flight instruction. We find that both prongs of the test for giving flight instructions can also be applied to instruction S-3 in the present case. First, Minnieweather's explanation of his conduct--that he did buy King whiskey, but only to persuade him to go tell the sheriff the truth (that King had seen some Alstons beating up Pearson)--was contradicted by King's testimony that the latter lied when he told the sheriff he had seen Pearson being beaten up. Minnieweather's explanation was unsupported and uncorroborated by the remaining evidence. His testimony was the only evidence tending to support the explanation for his conduct with King. Prior caselaw directs us to find that Minnieweather's conduct was therefore unexplained.

The second prong of the test is also satisfied. The fact that Minnieweather bought King whiskey to persuade him to go talk to the sheriff, whether for relating to him a complete lie or for telling him he had actually seen Pearson being beaten up, is quite probative of any possible guilt or guilty knowledge. The jurors would clearly find this useful in making a decision regarding Minnieweather's guilt or innocence. The trial court was correct in determining that this information had considerable probative value under Mississippi Rule of Evidence 403, even though it failed to state that fact on the record. Therefore, Minnieweather's post-incident conduct regarding the purchase of whiskey and gift to King, along with Minnieweather's request to tell the sheriff what he knew, was both unexplained and probative of possible guilt or guilty knowledge. The trial court therefore properly gave the jury a valid consciousness of guilt instruction. Moreover, the court qualified the instruction to state that evidence of Minnieweather's conduct, by itself, was not sufficient to prove guilt, but was only to be given what weight and significance each juror felt it deserved. There was no error here.

III. DID THE TRIAL COURT ERR WHEN IT ALLOWED STATE'S JURY

INSTRUCTION S-4?

Minnieweather argues that he deserves a new trial because the court erred by giving Jury Instruction S-4, which dealt with self-defense. He contends that, although he maintained throughout the trial the defense of accident/misfortune and not self-defense, the instruction placed more emphasis upon and deflected the jury's attention toward self-defense rather than accident/misfortune. He cites to *Taylor v. State*, 597 So. 2d 192 (Miss. 1992). He argues that his case is not unlike *Taylor* because: (1) that defendant maintained that the killing was accidental; (2) the jury was instructed on self-defense such that its attention was diverted toward that defense and away from accident; and (3) neither party raised the issue of self-defense. The *Taylor* court reversed and remanded for a new trial.

In the present case, Jury Instruction S-4 read as follows:

> The Court instructs the jury that to make an assault justifiable on the ground of self defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this, he must have reasonable grounds to apprehend that there is imminent danger in such design being accomplished. It is for the jury to determine the reasonableness of the grounds upon which the defendant acts.
>
> The Court instructs the jury that you are not to judge the actions of HOSEA MINNIEWEATHER in a cool, calm light of after-developed facts, but instead you are to judge the defendant's actions in the light of the circumstances confronting the defendant at the time, as you believe from the evidence that those circumstances reasonably appeared to the defendant on that occasion.

Both parties, within their respective appellate arguments, utilize the case of *Wadford v. State*, 385 So. 2d 951 (Miss. 1980). *Wadford* is clearly instructive toward the resolution of this issue. That case dealt with a defendant, who only put on evidence of accident but who stated at the close of cross-examination that he had shot the victim in self-defense. *Id.* at 954-55. Wadford requested a self-defense instruction, which the trial court refused. *Id.* The *Wadford* court upheld the trial court's decision not to give that instruction. *Id.* It held that self-defense, in order to be available to a defendant, must be supported by evidence. *Id.* at 955. A defendant's statement that he killed the victim in self-defense cannot, by itself, raise that factual issue for the jury. *Id.* Evidence of facts and circumstances must support a plea of self-defense. *Id.* In *Wadford*, the court determined that no evidence appeared in Wadford's testimony or elsewhere that the killing was in self-defense, notwithstanding that he stated on cross-examination that he killed the victim in self-defense. *Id.*

In the present case, Minnieweather testified on cross-examination as follows:

> Q You're telling this Jury that you did not hit him in self-defense?
>
> A I was trying to block his lick.
>
> Q Well, are you saying that you hit him in self-defense or not?

A I was trying to block his lick.

Q What lick?

A His hand was coming up.

Q How was his hand coming up, which hand?

A He was coming up to hit me.

Q With which hand?

A With his right hand.

Q How was he coming up?

A With his fist up.

Q With his fist up like this?

A (NO AUDIBLE RESPONSE)

Q How were you going to block him?

A I threw up my left hand.

Q Did you block his arm?

A I come across his arm and across his cheek.

Q Was he reaching up that high?

A I don't know how high he was reaching, but it was coming up.

Q Did you mean to hit him or not?

A No, sir, I did not mean to hit him.

Although Minnieweather never actually stated that his conduct was in self-defense, testimonial evidence existed that he acted in self-defense. While *Wadford* dealt with the *defendant's* request for a self-defense instruction, we believe that the same rule applies equally to the less-often situation where the *prosecutor* requests the instruction. Evidence, testimonial or otherwise, must exist to support a plea, or a jury instruction, of self-defense.

Finally, *Taylor* can easily be distinguished from the present case. *Taylor* was reversed and remanded for a new trial on the basis that, not only did Taylor fail to make any claim of or raise the issue of self-defense, but *neither party offered any evidence of self-defense.* Here, Minnieweather provided testimonial evidence of self-defense when he stated at least twice on cross-examination that he tried to block Pearson's "lick." The two other jail personnel that were present testified that Pearson struck

the first blow. We believe that Minnieweather's avoidance of the term "self-defense" did not preclude the State from presenting the jury with a self-defense instruction. The jury was properly instructed on the elements of self-defense in this case.

> IV. DID TWO JURORS FAIL TO PROPERLY RESPOND TO VOIR DIRE QUESTIONINGAND WAS MINNIEWEATHER THEREFORE DENIED A FAIR AND IMPARTIAL JURY?

Minnieweather believes that two jurors' failure to answer voir dire questioning denied him a fair jury. First, he argues that juror Heath failed to respond to a question intended to reveal racial bias. Second, he argues that juror Shivel failed to respond to a question intended to reveal prior knowledge about the case. We will discuss separately Minnieweather's arguments regarding each juror's unfitness for jury duty.

A. Juror Heath

Minnieweather bases his argument here on the test set out in *Odom v. State*, 355 So. 2d 1381 (Miss. 1978). *Odom* discussed the cure to the situation where a prospective juror has failed to respond to a relevant, direct, and unambiguous voir dire question. *Id.* at 1383. The *Odom* court stated that a trial court should determine: (1) whether the question was relevant to the voir dire examination; (2) whether the question was unambiguous; (3) whether the juror had substantial knowledge of the information sought to be elicited; and (4) if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond, assuming the answers to the previous three questions were in the affirmative. *Id.* Minnieweather argues that the answers to all four prongs of the *Odom* test should be in the affirmative.

The test to resolve this issue, initially set out in *Odom*, was more recently cited with approval in *Tolbert v. State*, 511 So. 2d 1368, 1377 (Miss. 1987), *cert. denied*, 484 U.S. 1016 (1988). *Tolbert* stated that the voir dire question, to which a prospective juror fails to respond, can be asked either by the defense, the State, or the court. *Id.* at 1377 n.6. If prejudice reasonably can be inferred, then a new trial should be ordered. *Id.* (citing *Odom*, 355 So. 2d at 1383). A jury's fairness and impartiality is a judicial question, and the court's judgment will not be disturbed unless it appears that it is clearly wrong. *Id.* Each case must be decided on an ad hoc basis using the facts then before the court. *Id.* In the present case, voir dire by the State proceeded as follows:

> BY MR. EVANS: One other issue that I want to cover. The Courtroom is no place for any type of racial problems.
>
> BY PERSON UNKNOWN TO COURT REPORTER: That's right.
>
> BY MR. EVANS: Now, the Defendant in this case is a black male. The victim is a white male. That has nothing to do with this case whatsoever. But the reason I want to bring that out is if there's anyone here in this Courtroom today that would base an opinion on a racial reason then they don't need to sit as a juror.
>
> Q Is there anyone here today that for whatever reason feels that they could not be fair and

> impartial in this case because of racial reasons? I know that's a very difficult question, but it's also a very important question. If there is anyone here that feels that that would be a problem, please raise your hand and let us know.
>
> A (NO RESPONSES.)

Applying the *Odom* rule, we find that prong one must be answered in the affirmative. The question asked was clearly relevant to the voir dire examination. Prong two must also be answered affirmatively because the question was certainly clear and unambiguous--whether anyone present could not be fair and impartial because of racial reasons. Prong three--whether the juror had substantial knowledge of the information sought to be elicited--must be answered in the negative. The information sought to be elicited was the existence of any racial prejudice borne by anyone present. This is a personal, subjective fact, not an objective fact like "Do any of you know the defendant?" or "Has anyone in your family ever been involved in law enforcement?" The information sought by the question in the present case is purely personal and subjective in nature. We cannot say that Heath did or did not have substantial knowledge that he was racially-prejudiced against persons of the black, or any other, race when he failed to raise his hand. We must assume that he did not and that he answered the question based on his own conscience--both by not raising his hand at voir dire and by his answers to questioning at the post-trial hearing on Minnieweather's motion for a new trial.

We certainly do not condone any form of racism in any of its various manifestations. A post-trial newspaper article in *The Winona Times* contained racial language that was later attributed to Heath. Minnieweather subsequently included an additional argument in his motion for a new trial--that Heath was biased and failed to properly answer the voir dire question regarding racial bias. However, whether the subsequent newspaper article's racial language was or was not attributable to Heath is immaterial. Moreover, whether or not Heath was, or is, racially-prejudiced is also irrelevant. The relevant fact is this: we must accept the truth of Heath's answer at the time to the relevant, unambiguous voir dire question that he could be unbiased regarding this particular case, just as we must accept the other jurors who answered the same by not raising their hands when asked the identical unambiguous question. We believe that there exists a clearly distinct difference between answering an objective question falsely, i.e. Do you know the defendant?, and a subjective, personal question falsely, i.e. Are you racially-prejudiced?. The former, if also found to be prejudicial, requires reversal and a new trial. The latter does not require reversal because it must be assumed the answer was truthfully given at that time and under those circumstances. The latter cannot, by any stretch of the imagination, necessarily be considered false information, whereas the former certainly should be labeled false. We must assume, as all trial courts must, that Heath and the other eleven jurors selected were truthful at that particular time when they effectively said they could be fair and unbiased regarding race and listen only to the facts of the case in determining guilt or innocence.

Finally, we do not reach prong four because the first three prongs were not all answered affirmatively. However considering prong four, we believe that prejudice cannot reasonably be inferred from Heath's failure to respond. We must assume that he told the truth, which is all that any voir dire examination question ever requires. We cannot infer prejudice from the *failure to respond* itself, although it could be inferred in conjunction with the after-the-fact newspaper article. But an

inference using after-the-fact information is irrelevant when looking strictly within the context of the timeframe of the voir dire itself. At the time of voir dire, Heath's failure to raise his hand was effectively his answer that he *could and would* be fair and impartial and that he would consider only the evidence presented, and not race, in his verdict.

We find that Minnieweather's argument regarding juror Heath's membership on the jury, although a valid concern, is therefore without merit. We must assume that Heath's answer was truthful and not false information. His membership on the jury did not affect Minnieweather's right to a fair and unbiased jury.

B. Juror Shivel

The next portion of this issue deals with juror Shivel, who was the mayor of Winona at the time of Pearson's death. The court conducted voir dire questioning as follows:

> Q Do any of you have any knowledge of this case that is being presented before us this morning? Any knowledge of the case?
>
> [Juror No. 32 answered in the affirmative.]

. . . .

> Q And so I'll ask again, do any of you have any knowledge of the case that's being tried this morning?
>
> A (NO RESPONSES.)

Minnieweather's counsel, during his voir dire questioning, asked the following:

> Q I'm sure it's been the topic at some of the coffee shops too, I imagine. Now, keeping all of that in mind about what you've heard discussed at the coffee shops and what you've read in the paper and what you've heard on the radio, have any of you formed an opinion, with the exception of Mr. Liston [Juror No. 32], have any of you formed an opinion about this case, right now at this point in time?
>
> [Some jurors answered in the affirmative.]

Juror Shivel did not answer affirmatively to any of the questions about knowledge of the case. She stated at the post-trial hearing that she had been informed that a subject named Wyatt Pearson had been picked up, placed in jail, and had later died. She testified that she knew nothing about the facts of the case when she served as juror.

Consideration of the *Odom* rules reveals that the answer to prong one is in the affirmative--the question regarding knowledge of the case was clearly relevant. Prong two must be also answered affirmatively because the question was clear and unambiguous. Prong three must be answered in the negative. The information sought to be elicited was whether anyone had knowledge of the case. Juror Shivel testified she had no knowledge of the facts of the case. This fact becomes even stronger when considering the requirement of prong three of *substantial* knowledge. It seems clear that Shivel had no knowledge, and certainly no substantial knowledge, of the case.

Prong four must be answered in the negative as well. Prejudice cannot reasonably be inferred from Shivel's failure to respond. In addition, Minnieweather has shown no prejudice from Shivel's membership on the jury. Most importantly, defense counsel knew, or should have known, that Shivel was the mayor of Winona at the time of the incident. At the post-trial hearing, Minnieweather's counsel never objected to the district attorney's statement that counsel knew, at trial, that Shivel was the mayor and still failed to challenge or remove her from the jury. Prejudice cannot reasonably be inferred, from the failure to respond, because counsel had the opportunity to remove Shivel but chose not to challenge her.

Although the trial court did not proceed through the *Odom* rules verbatim, it did find at the post-trial hearing that Shivel answered truthfully when she did not raise her hand in response to the question. Implicit in its finding is that the question was relevant (prong one) and that the question was unambiguous (prong two). The court directly found that Shivel lacked substantial knowledge of the information sought to be elicited (prong three). The court's denial of Minnieweather's motion for JNOV or new trial was a direct conclusion that no prejudice resulted from Shivel's failure to respond (prong four). It found that no evidence existed to prove that Shivel's verdict had been based on anything other than the evidence presented in open court. It found that anything she knew from the Winona police chief was immaterial and irrelevant to her decision in the jury room. The court also stated that defense counsel could have raised any questions of any juror at voir dire. It believed that everyone, including the defense attorney, the prosecuting attorney(s), the defendant, and the court knew Shivel had been mayor at the time of the incident. Finally, the court expressed its distaste for dissatisfied defendants bringing jurors into court post-trial to question them of their pretrial voir dire answers (or non-answers) and verdicts.

We find that Minnieweather not only failed to meet *Odom* rule's four prongs for justifying reversal and a new trial, but effectively waived his right to complain on appeal because he, or his counsel, knew or should have known that Shivel was the mayor of Winona at the time of the incident. As the *Odom* court stated, "[t]he failure of a juror to respond to a relevant, direct, and unambiguous question leaves the examining attorney uninformed and unable to ask any follow-up questions to elicit the necessary facts to intelligently reach a decision to exercise a peremptory challenge or to challenge a juror for cause." *Odom*, 355 So. 2d at 1383. While true, defense counsel in the present case knew or should have known that Shivel was the mayor of Winona when Pearson died. Minnieweather and his counsel were clearly able to ask any follow-up questions to determine if Shivel

could be unbiased, and they could have acted accordingly.

We find that Minnieweather was provided with a fair and impartial jury. We also find that the answers Heath and Shivel gave in response to voir dire questioning were answered as truthfully as each individual knew to answer at the time. This issue is without merit.

CONCLUSION

Although this Court finds that all but one of the issues raised on appeal are without merit, we still must reverse and remand this cause for a new trial due to the trial court's failure to provide the jury with a limiting instruction.

THE JUDGMENT OF THE CIRCUIT COURT OF MONTGOMERY COUNTY OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF FIFTEEN (15) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS REVERSED AND REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE TAXED TO MONTGOMERY COUNTY.

THOMAS, P.J., BARBER, COLEMAN, DIAZ, AND KING, JJ., CONCUR. SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., BRIDGES, P.J., AND McMILLIN, J.

IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01088 COA

HOSEA MINNIEWEATHER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEES

SOUTHWICK, J., dissenting in part

I concur with each section of the majority opinion except for the discussion of Mississippi Rules of Evidence 403 & 404. I would affirm the conviction.

As Rule 404 itself says, other crimes evidence cannot be admitted to prove a defendant's "character . . . in order to show that he acted in conformity therewith" at the time of the crime for which he is being tried. The need for a limiting jury instruction is to prevent such improper consideration by a jury. Evidence of other crimes can be admitted, though, "for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." M.R.E. 404(b). The present case does not fit any of the enumerated factors, but the majority agrees that "consciousness of guilt" is an appropriate use of other crimes evidence.

Where I think the majority begins to divert from the correct analysis is in failing to note that this evidence of another crime is being used to show the defendant's awareness that he was guilty *of the very crime for which he was charged.* This is not a case as *Smith v. State,* 656 So. 2d 95, 100 (Miss. 1995), in which the defendant was charged with cocaine distribution, and evidence of his intent was founded on the fact he had sold cocaine at other times, or as in *Watts v. State*, 635 So. 2d 1364 (Miss. 1994), charged with burglary and the evidence for motive or intent is that he was found in circumstances suggesting he had committed another burglary. An analogous situation is if the other crimes evidence against Minnieweather was that he had earlier beaten another prisoner and intent or motive was being shown. There an instruction would need to be given saying his possible guilt of that separate crime could not be considered as proof he was guilty of the charged manslaughter.

The semantic dance the trial judge is being asked to perform is to explain that even though the jury could properly consider the evidence as proof Minnieweather *knew* he was guilty of manslaughter, such evidence could not be used to prove he *was* guilty. The steps the judge did take in instructing the jury performed that as well as could be done, informing the jury that the evidence was not sufficient to prove guilt, but could be used as "a circumstance tending to show defendant's consciousness of guilt." I would find that was an adequate limiting instruction.

The majority may be saying instead that the necessary *sua sponte* instruction was that evidence of Minnieweather's interfering with the investigation could not be considered as substantive evidence of guilt of manslaughter. I do not think the jury had to be instructed in those words, and the instruction limiting the use as described above was adequate. That should end the issue. However, even if this separate instruction is the kind contemplated by the *Smith* rule, the absence of the instruction would be harmless error. The proper justification for requiring a trial judge to do anything *sua sponte* is that the prejudice to the defendant is so fundamental that we would have to notice the absence of an instruction as plain error. The trial court is the first line of defense for assuring fundamental fairness, and an appellate court then reviews the adequacy of the protections. The highly prejudicial impact of this evidence on Minnieweather's goal to be acquitted was in its proper use, i.e., as proof of consciousness of guilt. The probative power comes from the evidence being a quasi-admission of guilt. The fact the evidence also reveals a prior "bad act," criminal or otherwise, pales in significance. That Minnieweather's trial counsel saw no need for an additional instruction is certainly understandable. In fact, if Minnieweather's counsel was well-versed in these rules, he was wise to fail

to ask for the instruction and hope the trial court did not notice the technical need either. Unless harmless error analysis is allowed to work on the general rule of *Smith,* an automatic reversal issue is preserved for appeal without any risk to the possibility of an acquittal at trial.

I would hold the trial court gave a proper instruction and that nothing more was required. This conviction should be affirmed.

FRAISER, C.J., BRIDGES, P.J., AND MCMILLIN, JJ., JOIN THIS SEPARATE OPINION.