IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00234 COA

DWAYNE O'QUINN

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. ISADORE W. PATRICK

COURT FROM WHICH APPEALED: CIRCUIT COURT OF CLAIBORNE COUNTY

ATTORNEY FOR APPELLANT:

SORIE S. TARAWALLY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: GIL MARTIN

NATURE OF THE CASE: CRIMINAL -- MURDER

TRIAL COURT DISPOSITION: ADJUDGED APPELLANT GUILTY OF MURDER AND SENTENCED HIM TO LIFE IMPRISONMENT

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT

Dwayne O'Quinn appeals from his conviction for murder and sentence of life imprisonment. We find no reversible error, and thus we affirm.

I. FACTS

On the evening of January 31-February 1, 1992, Dr. Jimmy Smith, a college professor and administrator, was manning the front door of the After Dark Club, of which he and Tyrone Caldwell, a former athletic coach at Alcorn State University were the owners. The After Dark Club was a nightclub which catered predominantly to an eighteen-and-over clientele. The club was located adjacent to the campus of Alcorn State University in Claiborne County. Potential patrons paid a cover charge to enter the club, and when patrons left the club, someone would stamp their hands with ink that reflected fluorescent light in the event they decided to return later.

On the evening of January 31, 1992, Dwayne O'Quinn, a twenty-four-year-old male, entered and departed the club at least three times. During O'Quinn's second entry into the club, Jimmy Smith, who was standing near the door of entry to collect the cover charge, asked O'Quinn to show his hand stamp as proof that he had already paid the nightclub's cover charge. O'Quinn offered to show one hand and then the other in an uncooperative episode. Later, when O'Quinn again entered the club, he and Smith exchanged obscenities. Once more, O'Quinn left the club and went to a black van, from which he retrieved a .38 caliber handgun from this vehicle and placed it in a pocket in a brown trench coat that he was wearing.

For yet another time, O'Quinn entered the nightclub's front door, where again he came face-to-face with Dr. Smith. According to Fernandez Jordan, a twenty-two-year-old bouncer who was manning the door of the club along with Smith and who was an eyewitness to what transpired, O'Quinn pulled out his weapon and shot Smith twice. The first bullet entered Smith's skull on the left side of his forehead above his eye. The bullet broke into two parts, the larger of which penetrated through his brain and came to rest against the skull cap. The smaller fragment of the bullet failed to penetrate the cranial cavity. The second bullet entered the left side of Smith's shoulder and came to rest against a bony portion of his spine. Smith died very quickly from the bullet wound to his skull.

Shortly before the fatal encounter between Dr. Smith and O'Quinn, Caldwell had emerged from the club. After O'Quinn shot Smith, he ran out of the club. As he ran from the club, O'Quinn fired twice at Caldwell, who had directed his attention to the commotion inside the club when he heard the first two shots, and who was re-entering the club to help quell the disturbance. Both shots missed Caldwell. Nonetheless, O'Quinn managed to make a successful getaway from the grounds by having Ronnie Thompson, Jr., drive him away in the black van.

As they returned to O'Quinn's home in the Russom community in Claiborne County, O'Quinn instructed Thompson to stop on the side of the road so that he might dispose of the .38 pistol and Thompson's handgun. Neither weapon was ever recovered.

II. Trial

On May 4, 1992, the Claiborne County grand jury indicted both O'Quinn and Thompson for Smith's murder. On January 11, 1993, O'Quinn was tried on the charge. Several days before O'Quinn's trial began on January 11, 1993, Thompson had entered into a plea bargain with the State, pursuant to the terms of which he agreed to plead guilty to the reduced charge of accomplice-after-the-fact and to testify against O'Quinn in return for a sentence of five years to serve in the custody of the Mississippi Department of Corrections, with all five years suspended and to remain of supervised probation for the five-year period. O'Quinn's counsel did not learn of Thompson's plea bargain until the morning of the trial. That same morning, O'Quinn's counsel moved for a continuance on the ground that Thompson's new role presented a substantial surprise for which he needed time to adjust his mode and theory of O'Quinn's defense. The trial court overruled his motion for the continuance. After the conclusion of trial, the jury found O'Quinn guilty of murder, and the trial judge sentenced him to serve a sentence of life in the custody of the Mississippi Department of Corrections. O'Quinn appeals from the trial court's denial of his motion for a JNOV or in the alternative new trial.

After this case had been docketed in the Mississippi Supreme Court, O'Quinn's trial counsel filed a motion for leave to withdraw with that court on the ground that he was "retiring from the act of practicing law and relocating from Vicksburg, Mississippi, to Friday Harbor, Washington." The supreme court entered an order remanding the case to the trial court for "the limited purpose of appointment of substitute counsel on appeal." Upon remand, the trial court first appointed Sims Dulaney to represent O'Quinn on his appeal. Following Dulaney's appointment, Sorie S. Tarawally filed notice of entry of appearance and motion to substitute counsel for the Defendant, which the trial court sustained by order dated June 15, 1993. Mr. Tarawally remains as O'Quinn's counsel for this appeal.

III. Issues

In this appeal, O'Quinn presents five issues for this Court's review and resolution. We recite those issues as O'Quinn has composed them in his brief:

> 1. [O'Quinn] was denied his rights to effective assistance of counsel in violation of his Sixth and Fourteenth Amendment Rights, United States Constitution; and Article 3, Section 26, Mississippi Constitution.
>
> 2. The failure of two prospective jurors to fully and truthfully disclose all relevant facts that have a bearing on their qualification and or impartiality deprived [O'Quinn] of the right to a fair and impartial jury guaranteed to every criminal defendant.
>
> 3. The trial court erred in refusing to grant [O'Quinn's] motion for continuance when the State announced on the first day of the trial that the co-defendant would testify against [O'Quinn].

4. The verdict of the jury is against the overwhelming weight of the evidence and contrary to law.

5. Cumulative errors by the trial court in the admission of evidence and its rulings on other objections, timely interposed by defense counsel, tainted the trial as to deprive [O'Quinn] a fair trial as guaranteed to him by both the federal and state constitutions.

IV. Review and Resolution of the Issues

A. [O'Quinn] was denied his rights to effective assistance of counsel in violation of his Sixth and Fourteenth Amendment Rights, United States Constitution; and Article 3, Section 26, Mississippi Constitution.

O'Quinn asserts that his trial counsel's performance was ineffective and was therefore a violation of the Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. With respect to claims of ineffective assistance of counsel, the Mississippi Supreme Court has stated:

> When faced with a claim of ineffective assistance of counsel at trial or sentencing, this Court follows the test set down in *Strickland, supra*. . . . This Court set out the test and standards in *Cabello v. State*, 524 So. 2d 313 (Miss. 1988):
>
> > In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), the United States Supreme Court established a two-prong test, required to prove the ineffective assistance of counsel: the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense . . . . The burden of proof then rests with the movant . . . .
> >
> > Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." . . . In short, defense counsel is presumed competent.
> >
> > Under the second prong, even if counsel's conduct is "professionally unreasonable," the judgment stands "if the error had no effect on the judgment." ... Consequently, the movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." . . . There is no constitutional right then to errorless counsel . . . .

Handley v. State, 574 So. 2d 671, 683 (Miss. 1990) (quoting *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988)).

To support his proposition that his trial counsel rendered him ineffective assistance, O'Quinn's alleges, first, that his trial counsel failed to conduct adequate investigation of his case, and second, that his trial counsel failed to interview and call potential witnesses.

1. Failure to conduct an adequate investigation of O'Quinn's case

In *Cole v. State*, 666 So. 2d 767, 776 (Miss. 1995), the Mississippi Supreme Court explained that an allegation of failure to investigate without more is insufficient to establish that defense counsel rendered ineffective assistance:

> A defendant who alleges that trial counsel's failure to investigate constituted ineffectiveness must also state with particularity what the investigation would have revealed and specify how it would have altered the outcome of trial or "how such additional investigation would have significantly aided his cause at trial." *Merritt v. State*, 517 So. 2d 517, 518 (Miss. 1987).

O'Quinn alleges that his trial defense counsel "conducted no independent investigation of the facts surrounding his arrest, and relied almost exclusively on material furnished to him by the State during discovery. He accuses his trial counsel of limited interaction with him. Yet on January 11, 1993, the day before Appellant's trial began, his counsel served the State with a "may call" list of witnesses, a copy of which was filed with the clerk on January 12. Included in the list were the names of James Scott, Alice Patton, and Ethel Jackson, all of whom had addresses within Claiborne County. He suggests, although there is nothing in the record to support it, that there were other eyewitnesses who testified about a struggle between O'Quinn and Dr. Smith who apparently had testified during a preliminary hearing in which O'Quinn claims his trial defense counsel declined to participate. O'Quinn misnomers the record "an epitome of unpreparedness." He says that he went to court with "a phantom lawyer and a phantom defense."

Nevertheless, nowhere does O'Quinn suggest "how [his trial counsel's] investigation would have . . . altered the outcome of trial" or "how such additional investigation would have significantly aided his cause at trial." *See Merritt v. State*, 517 So.2d 517, 518 (Miss. 1987). For O'Quinn to succeed on this issue, he must demonstrate specifically that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Handley*, 574 So. 2d at 683. Specifically, O'Quinn has not shown this Court what evidence or facts a more thorough investigation would have uncovered that would have amounted to a probability that would undermine the jury's verdict that he was the person who shot and killed Smith. Thus, we find that O'Quinn's "failure to investigate" claim fails.

2. Failure to interview and call potential witnesses

For similar reasons, we find that O'Quinn's assertion that his counsel's failure to interview and call potential witnesses comprised ineffective assistance of counsel also must fail. Even though the record reveals that after the State rested, O'Quinn's attorney did not call any witnesses, we cannot make a simple conclusion that such a decision fell below minimal standards of competency. Besides, the record reflects that after the State had rested its case in chief, the trial court inquired of O'Quinn's counsel, "Who will you have as witnesses, Mr. Baughn?" Mr. Baughn replied, "Your Honor, before I can appropriately announce that to the Court, I need some time to confer with my client this morning." The record then reflects that Baughn conferred with O'Quinn and his family, during which a pause occurred in the proceedings. Following this pause, the trial court again asked of O'Quinn's trial counsel, "[W]ho will the defense have as its first witness?" Baughn replied, "Your honor, the defense rests." Thus, the record reflects that O'Quinn, his defense counsel, and perhaps a member of O'Quinn's family conferred before he rested. O'Quinn does not enlighten us about what happened during that conference. We can only presume that in the absence of any allegation by O'Quinn that his trial counsel mislead him in deciding to rest during their conference, O'Quinn acquiesced in his counsel's decision to rest without calling any witness, including any of the three whom his counsel had identified in his "may call" list of witnesses to which we earlier referred.

The following quotation taken from a concurring opinion in *Moore v. State*, 676 So. 2d 244, 246-47 (Miss. 1996) applies to this aspect of this issue:

> The record of the trial would not ordinarily reflect the existence of witnesses not called. Here, however, Moore has failed to support his claim sufficiently to allow him to proceed. He does not suggest that there were witnesses to the incident or its aftermath other than those called. He seems to believe that his lawyer could not effectively argue for the lesser included offense without putting on evidence other than that put on by the State. This, of course, is not the case. Even if that were the case, Moore is required to make some showing of the availability of additional probative evidence before he may claim ineffective assistance of counsel.

O'Quinn identifies Readell Greenwood, Stacy Harris, Marlon Little, who was O'Quinn's half-brother, and "someone called Dee" as witnesses whom his defense counsel did not call; but he fails to explain the nature of their testimony. Thus, O'Quinn also fails to show that the testimony of any of these witnesses would have made available " additional probative evidence" that "would have altered the outcome of trial" or "significantly aided his cause at trial." Had O'Quinn explained the manner in which their testimony "would have altered the outcome of trial" or "significantly aided his cause at trial," then his trial defense counsel's failure to call these witnesses might have been of such a magnitude that our confidence in the jury's guilty verdict would have been undermined. O'Quinn, however, has not done this. Accordingly, his second allegation of ineffective assistance of counsel must also fail.

In *Ward v. State*, 461 So. 2d 724, 727 (Miss. 1984), the Mississippi Supreme Court opined: "[a] fundamental reason why no prejudice can be demonstrated in this case is that it is clear from the record that Ward is hopelessly guilty. This overwhelming evidence of guilt makes the determination by the jury in this case thoroughly reliable." In the case *sub judice*, Fernandez Jordan testified that he

was within arms' reach of both Dr. Smith and O'Quinn when he testified as follows:

> [O'Quinn] came in, and he was looking at me. I was standing right in front of him . . . . And then he pulled the gun out, and I had moved over a little closer to Jimmy while he was walking in. But I still had both of them in view. I could still see both of them. When he -- O'Quinn -- pulled the gun out, that is when Jimmy reached for the bag. Jimmy reached for the bag; and something told me, "Just fall back." And when I fell back, and I saw O'Quinn look to the side and pull and before Jimmy could get the gun out of the bag, I saw him fire twice. I saw the bullet hit [Dr. Smith's] head, and I saw Jimmy fall to the ground. O'Quinn stood there for like a second, because he just looked, and he stopped. And I said, "Jimmy." I just looked because I thought that I was next. That is when him and Ronnie [Thompson] took to running . . . .

The foregoing account of O'Quinn's shooting Dr. Smith was clear and direct. Whether Jordan's eye witness version of O'Quinn's shooting is overwhelming, it establishes a formidable bulwark for O'Quinn to breach to persuade this Court that his trial counsel's representation during his trial was ineffective. O'Quinn fails to breach this bulwark, and we therefore resolve his first issue adversely to him.

> **B.** 2. The failure of two prospective jurors to fully and truthfully disclose all relevant facts that have a bearing on their qualification and or impartiality deprived [O'Quinn] of the right to a fair and impartial jury guaranteed to every criminal defendant.

O'Quinn asserts that during his defense counsel's voir dire, two of the members of the venire whom the State and he later selected to serve on the jury, Sandra Faye Lipscomb and Ernest Lee Brown, failed to disclose the fact that they were related to Smith by blood. He alleges that they failed to do so even though his counsel asked pointed questions on that subject. Thus, he now argues that Lipscomb and Brown's failure to disclose such a relationship casts such doubt on the jury's verdict that now a new trial is warranted.

It is true that in *Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990), the Mississippi Supreme Court explained:

> Following a jury's verdict, where a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for challenge for cause, the trial court must grant a new trial, and, failing that, we must reverse on appeal. We presume prejudice.

However, in the case *sub judice*, this Court has only O'Quinn's allegation in his brief that Lipscomb and Brown were related to Smith by blood. He does not specify the degree of this relationship nor does he submit anything which substantiates the truth of this allegation. In *Vinson v. Johnson*, 493 So. 2d 947, 950 (Miss. 1986), the Mississippi Supreme Court reiterated the necessity of the record's including the basis for the allegation of error in the following language:

> What we have said in this opinion about the necessity of making a record of any alleged error is a belabored repeat of the obvious. Because attorneys continue to allege in briefs facts on which a record is blank, we are constrained to once again make the point. If something happens in a trial court about which a party feels aggrieved, he will not be allowed to complain of it on appeal unless he gets it in the record.

Because the record in the case *sub judice* contains no evidence that there was a kindred relationship between Dr. Jimmy Smith and either of the jurors, Sandra Faye Lipscomb and Ernest Lee Brown, we resolve this second issue against O'Quinn. We decline to place the trial judge in error for something which the record does not include and thus does not support.

> **C.** 3. The trial court erred in refusing to grant [O'Quinn's] motion for continuance when the State announced on the first day of the trial that the co-defendant would testify against [O'Quinn].

As his third assignment of error, O'Quinn states the following:

> On the day of the trial, Appellant discovered that the co-defendant in this case, Ronnie Thompson, Jr., had entered into a plea bargain with the prosecution in exchange for a lenient sentence and his testimony. Counsel for O'Quinn made a motion for continuance, which the trial court denied and this denial, we contend, was prejudicial error.
>
> . . . .
>
> The denial of the motion for continuance severely prejudiced Dwayne O'Quinn. Thompson's plea radically affected the nature and strength of the case against O'Quinn. Overnight, the case changed from a case of weak circumstantial evidence to a case with detailed testimony including what could be interpreted as an admission by Mr. O'Quinn from his alleged accomplice.

The denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground. *Metcalf v. State*, 629 So. 2d 558, 562 (Miss. 1993). O'Quinn did not raise the trial judge's denial of his motion for continuance as an error in his motion for a new trial. Thus, this issue is procedurally barred from our review. Nevertheless, we will consider this issue. In *Morris v. State*, 595 So. 2d 840, 844 (Miss. 1991), the Mississippi Supreme Court explained an appellant's burden on this issue as follows:

> The trial judge is vested with broad discretionary powers in granting or refusing to grant a continuance. To prevail, the defendant must show not only abuse of this discretion, but also that the abuse actually worked an injustice in his case.

The record does not endorse O'Quinn's contention that Thompson's decision to testify against him in return for the State's acquiescence in his plea of guilty to the lesser offense of accessory after the fact to the crime of murder and a much less severe sentence changed the character of the State's case against him "overnight" from one of "weak circumstantial evidence" to a case of detailed testimony against him. We have already commented on the powerfully incriminating testimony of Fernandez Jordan, the bouncer who was working within arm's reach of Dr. Smith when he was twice shot. We recall that Jordan testified that he actually saw O'Quinn enter the club wearing a brown trench coat with his hand in the coat's pocket, come face-to-face with Dr. Smith, and then shoot Smith at nearly point-blank range. This testimony was part of the prosecution's case against O'Quinn even before Thompson consummated his plea bargain with the State.

When O'Quinn's defense counsel, who practiced in Vicksburg, argued his motion for continuance before the trial judge on the morning the trial began, his reasons to support his motion included: (1) an opportunity to associate local counsel to assist him in defending his client, (2) an opportunity "to prepare for totally different aspects" which the case then presented, which included "an adversary relationship" with Ronnie Thompson, Jr., with whom O'Quinn had previously shared "certain strategies" in common, and (3) as a matter of fairness. To quote O'Quinn's counsel, "We got ambushed."

In response to the trial judge's inquiries during the argument by the State and O'Quinn's counsel on the motion for continuance, O'Quinn's counsel stated that he had been able to confer with O'Quinn and his family before they began to select the jury. O'Quinn's counsel also advised the court that he was arranging to interview Thompson that evening. This Court finds O'Quinn's assertions of prejudice which resulted from the trial judge's denial of his motion for continuance unpersuasive, and it therefore holds that O'Quinn has not shown the trial judge's abuse of his discretion in denying the motion. Furthermore, in view of Fernandez Jordan's "eyewitness" testimony, we can find no injustice that the trial judge's denial of O'Quinn's motion for continuance worked in this case. Thus, this Court resolves this issue adversely to O'Quinn and affirms the trial judge's denial of O'Quinn's motion for continuance.

> **D.** 4. The verdict of the jury is against the overwhelming weight of the evidence and contrary to law.

Among the facets of the evidence and testimony which O'Quinn attacks in his assertion that the jury's verdict was against the overwhelming weight of the evidence are the following: (1) The lack of Ronnie Thompson, Jr.'s, credibility created, first, by his admission on cross-examination that he had lied to the sheriff about the events of that fatal night, and, second by his plea bargain with the State. (2) The State's failure to produce the murder weapon at trial. (3). The lack of Fernandez Jordan's objectivity because of his "admitted antagonism" toward O'Quinn and his "interest in his job at the club." (4) The darkened atmosphere inside the club and the pandemonium that erupted inside the club when its patrons heard gunfire. In addition to these arguments, O'Quinn tediously analyzes certain discrepancies and apparent inconsistencies in the testimony of some of the State's other witnesses.

In *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss. 1989), the Mississippi Supreme Court explained its standard of review on the issue of whether the jury's verdict was against the overwhelming weight

of the evidence in the following language:

> In determining whether or not a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when it is convinced that the circuit court has abused its discretion in failing to grant a new trial.

Fernandez Jordan testified that he saw O'Quinn shoot Smith twice. His testimony was so graphic that he claimed to see the hole form in Dr. Smith's skull above his eye as the bullet entered his skull. Tyrone Caldwell testified that he was standing outside the club when he heard the shots and then walked toward the entrance to investigate. As he reached the entrance and exit doors of the club, Caldwell saw O'Quinn fire two shots at him as O'Quinn ran out of the nightclub to make his escape. Ronnie Thompson, Jr., whom O'Quinn would totally discredit but whose testimony the jury apparently found believable, testified that O'Quinn retrieved a .38 caliber revolver from Thompson's van before the shooting and that after the shooting, O'Quinn told him that he had shot Smith in the leg.

Thompson also testified that after both he and O'Quinn had driven away from the club, O'Quinn had Thompson stop the van so that he could take his weapon, as well as Thompson's weapon, and hide them in the woods. Police officers who investigated the scene of the crime testified that they could find no spent shells in the club and that the absence of spent shells was consistent with a revolver's being used to shoot Dr. Smith. The absence of spent shells indicated the use of a revolver because, unlike semi-automatic weapons which eject spent casings, revolvers do not eject their empty shells after they are fired. Finally, the State's forensic pathologist testified that he recovered the bullet that penetrated the left side of Dr. Smith's back and lodged in the bony tissue of the backbone. He opined that this projectile was a .38 caliber bullet. Thompson had placed a .38 caliber pistol in O'Quinn's possession before he entered the club on the occasion when Dr. Smith was shot and killed.

We find that from the totality of all of the foregoing evidence, all of which we must deem to be true that the jury's verdict was not against the overwhelming evidence and that therefore the trial judge did not abuse his discretion when he denied O'Quinn's motion for a new trial. Thus, we affirm the trial court's denial of O'Quinn's motion for new trial and decide this issue contra to O'Quinn's position on it.

> **E.** 5. Cumulative errors by the trial court in the admission of evidence and its rulings on other objections, timely interposed by defense counsel, tainted the trial as to deprive [O'Quinn] a fair trial as guaranteed to him by both the federal and state constitutions.

In this his final issue, O'Quinn does four things. First, he asserts that the cumulation of errors which he argues in his first four issues deprived him of his due process right to a fair trial. He then proceeds to assign three new errors beneath this fifth issue. We have already resolved the first four issues unfavorably to O'Quinn; so we need not consider the cumulative effect of four issues in which we found no error. Now, we proceed to discuss O'Quinn's three additional issues which he asserts in his

final issue.

1. The trial judge's failure to give an accomplice instruction

O'Quinn assigns error to the trial court's failure to instruct the jury to regard the testimony of Ronnie Thompson, Jr., an accomplice to the shooting and murder of Smith, with caution. He cites *Wheeler v. State*, 560 So. 2d 171 (Miss. 1990) to support his stance on this issue. There are at least three reasons for this Court to reject O'Quinn's argument on this issue. First, the record contains nothing to indicate that O'Quinn requested an accomplice instruction. We earlier noted that we can not consider a potential error if the record is devoid of any support for the allegation of error. *See Vinson v. Johnson*, 493 So. 2d 947, 950 (Miss. 1986). Second, O'Quinn fails to cite any authority to support the proposition that a trial court is under a duty to give *sua sponte* such an instruction.

Thirdly, while there is evidence in the record that Thompson and O'Quinn had been together off and on that night and that they entered the club at almost the same time when O'Quinn shot Dr. Smith twice, there is no evidence to support the proposition that Thompson was an accomplice to Dr. Smith's murder. The Mississippi Supreme Court defined the term "accomplice" in *Burke v.*

State, 576 So. 2d 1239, 1242 (Miss. 1991), a case in which that court dealt with the issue of whether the trial court erred when it refused to grant an accomplice instruction, as follows:

> An accomplice for these purposes is a person who is implicated in the commission of the crime. That is to say, that if the evidence admits a reasonable inference that the witness may have been a co-perpetrator or the sole perpetrator the cautionary instruction should be given.

Any one of these three reasons suffices to decide this issue against O'Quinn, and we do so accordingly.

2. Failure to Give Defense Instructions D-8, D-13, D-16, and D-23.

a. Instruction D-8

O'Quinn asserts that the trial court erred in refusing to give jury instructions D-8, D-13, D-16 and D-23. However, O'Quinn makes this assertion without explaining clearly why such a refusal was erroneous, much less citing any authority supporting his position. "The failure to cite any authority can be treated as a procedural bar," and we are under no obligation to consider such unsupported assignments. *Smith v. Dorsey*, 599 So. 2d 529, 536 (Miss. 1992). Moreover, Rule 5.03 of the Uniform Criminal Rules of Circuit Court Practice, which was in effect when this case was tried in January of 1992, requires that an attorney "shall dictate into the record . . . specific objections to the requested instructions and specifically point out the grounds for objection." In *Gray v. State*, 472 So. 2d 409, 416 (Miss. 1985) the defendant assigned as error the trial court's failure to instruct the jury defining the elements of the underlying felony (kidnaping) which elevated the murder to capital murder. The supreme court noted that Gray failed to object to the instructions offered by the State and, more importantly, failed to submit an instruction to the court on the elements of kidnapping. *Id.* The supreme court held that Gray's combined failure to object and to request an appropriate

instruction operated to waive Gray's assigned error on appeal. Id.

In the case *sub judice* the State objected to the trial judge's granting Instruction D-8 "as not a proper statement of the law." The trial judge responded to the State's objection as follows:

> Well, this is not a circumstantial evidence case and this basically says that there is two hypothes s that they must believe his side and that is basically what a circumstantial evidence case is; . . . but this is a direct evidence case. I'll refuse it.

The record reveals that O'Quinn's counsel did not object to the trial judge's refusal of Instruction D-8. His counsel offered no argument to dissuade the trial judge from refusing the instruction. Thus, pursuant to Rule 5.03 of the Uniform Criminal Rules of Circuit Court Practice and *Gray v. State,* O'Quinn's argument on the trial judge's refusal to grant Instruction D-8 is procedurally barred.

b. Instruction D-13

The record reflects that O'Quinn's counsel timely and appropriately objected to the trial court's denial of Instruction D-16, which he requested. "Reasonable doubt" was the subject of this instruction. However, in his brief O'Quinn offers no authority on which this Court might rest its finding that the trial court erred when it refused to grant this instruction. In *Ellis v. Ellis*, 651 So. 2d 1068, 1073 (Miss. 1995) (citations omitted), the Mississippi Supreme Court advised the bar:

> The merits of this assigned error will not be reached for several reasons. First, [the Appellant] failed to cite any authority in support of this error and this Court has consistently held that an unsupported assignment of error will not be considered.

Because O'Quinn cites no authority to support this error, we decline to consider it.

c. Instruction D-16

O'Quinn can predicate no error on the trial judge's refusal to give Instruction D-16 because before the trial judge announced that he would refuse it, O'Quinn's defense counsel replied to the State's objection, "Okay, it may be circumstantial, and I'll withdraw it."

d. Instruction D-23

The record reflects that the State objected to Instruction D-23 because it was "another circumstantial evidence instruction, and this is not a circumstantial evidence case." When the trial judge refused to grant it, O'Quinn's counsel, as he had done with Instruction D-8, made no objection to the trial judge's refusal to grant it. Thus, for the same reasons that we rejected O'Quinn's arguments on the

trial judge's error in refusing to grant Instruction D-8, we reject his argument that the trial judge erred when he refused to grant Instruction D-23. We add further that O'Quinn has failed to cite any authority in his brief on which to predicate error on the trial judge's refusal to grant this Instruction D-23.

3. Inadmissible Hearsay Testimony

The trial judge allowed John Cupit, the Sheriff's Deputy who first investigated the shooting on the night that it occurred, to testify, over O'Quinn's counsel's objection, that the statements of those who were in the club established O'Quinn as a suspect. O'Quinn argues that the trial judge erred reversibly when he overruled his counsel's objection to this testimony because it was inadmissable hearsay. Mississippi Rule of Evidence 103(a) addresses this issue as follows: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, ..." M.R.E. 103(a). O'Quinn fails to suggest what substantial right was affected by the trial judge's allowing the deputy sheriff to testify that O'Quinn had become a suspect. Therefore, pursuant to Mississippi Rule of Evidence 103(a), we find this evidentiary ruling to be at best harmless error.

4. Prior bad acts

O'Quinn also faults the trial court for allowing Caldwell to testify about an incident that occurred two weeks previously to the shooting. About that incident, Coach Tyrone Caldwell testified as follows:

> [A]nything happens at the club, we try to report it to each other and the problem that we had had a couple of weeks prior and especially a kid or anybody walk into the club with a gun or open in his belt and talking about he is going to get some satisfaction or whatever and [says] "I'm a Port Gibson gangster, and I'll do this and this and whatever."

At that point, O'Quinn's counsel objected to this testimony, and the trial judge sustained his objection. The trial judge also instructed the jury "to disregard the comment by the witness."

In *Hoops v. State*, No. 93-KA-00530-SCT, slip op. at 12-13 (Miss. Aug. 22, 1996), the supreme court held, as it had done on many previous occasions:

> Clearly, the trial judge implicitly sustained Hoops's objection to Bell's remarks when he instructed the jury to disregard the statements. This Court has repeatedly and consistently held that such action is sufficient to remove any prejudice resulting from the improper testimony. *See Dennis v. State*, 555 So. 2d 679, 682-83 (Miss. 1989) (improper speculative testimony rendered non-prejudicial when trial court sustained objection and instructed jury to disregard it); *Wright v. State*, 540 So. 2d 1, 4 (Miss. 1989) ("Absent unusual circumstances, where objection is sustained to improper questioning or testimony, and the jury is admonished to disregard the question or testimony, we will not find error"); *Marks v. State*, 532 So. 2d 976, 982 (Miss. 1988) (refusal to grant mistrial was proper where trial court sustained objection and instructed jury to disregard improper testimony).

The trial judge's sustaining the objection of O'Quinn's counsel's objection to the foregoing testimony of Coach Caldwell and instructing the jury to disregard that testimony requires that we resolve this issue adversely to O'Quinn.

5. Resolution of the "Cumulative" Argument

O'Quinn has designated two rulings of the trial judge on evidentiary matters which he argues were erroneous. This Court has resolved his first four issues against O'Quinn; and we have found that only one evidentiary ruling may have been harmless error. Thus, there is no cumulation of errors on which O'Quinn may base his fifth issue. In *Hansen v. State*, 592 So. 2d 114, 142 (Miss. 1991), in which the appellant was sentenced to death for the capital murder of a Mississippi State Trooper, the Mississippi Supreme Court noted three errors, only one of which involved a point of evidence. Nevertheless, the supreme court opined: "We hold the errors in this case, given their cumulative effect, harmless beyond a reasonable doubt." *Id.* This Court readily applies that determination in *Hansen* to O'Quinn's argument that all of the errors of which he complains accumulated to the point of denying him a fair trial. We resolve this issue adversely to O'Quinn.

V. Assessment of costs of appeal

The state of the record renders the question of whether to assess costs of this appeal to Claiborne County or to O'Quinn problematic. The record contains no order of the trial court adjudicating that O'Quinn be allowed to proceed *in forma pauperis* with his appeal, although by its order rendered on January 29, 1993, the trial court allowed O'Quinn's trial counsel the sum of $4,350.00 as his fee for representing him through the trial of this case. We earlier recited that after O'Quinn's trial counsel withdrew so that he could move to the State of Washington, the trial court first appointed Sims Dulaney "as substitute counsel for the Defendant, Dwayne O'Quinn. We then noted that Sorie S. Tarawally filed a motion of entry of appearance and motion to substitute counsel for the defendant. Tarawally stated in that motion, "Movant [Tarawally] was consulted and retained to prosecute the appeal now pending before the [s]upreme [c]ourt." In response to that motion, the trial court entered an order in which it ordered "that Sorie S. Tarawally be and is hereby substituted as counsel for the Defendant, Dwayne O'Quinn, and the Court hereby relieves Sims Dulaney of said representation."

From all of the foregoing, this Court remains in doubt about whether O'Quinn has appealed *in forma pauperis*. We resolve this doubt by finding that O'Quinn has not appealed *in forma pauperis*. We rest our finding on these factors: First, the record contains no order of the trial court which adjudicates that O'Quinn was entitled to appeal *in forma pauperis*. Second, O'Quinn's counsel for his appeal indicated in his motion that he had been "retained" to represent O'Quinn. Third, the trial court's order merely substituted Sorie S. Tarawally for Sims Dulaney, rather than formally appointing him to represent O'Quinn as an indigent in his appeal. Thus, we assess the costs of this appeal to the Appellant, rather than to Claiborne County.

VI. Summary

O'Quinn's trial counsel did not deny him effective assistance. The record is devoid of any evidence that his counsel failed to investigate adequately the case against him and to interview and to call

witnesses. O'Quinn has failed to suggest the manner in which a more thorough investigation or the calling of additional witnesses would have altered the outcome of trial or significantly aided his cause at trial. Especially is this correct in view of Fernandez Jordan's eyewitness testimony about O'Quinn's firing the fatal shot into Dr. Smith's head. The seating on O'Quinn's jury of two jurors who may have been related to Dr. Smith is a serious matter, but the record contains absolutely no basis to support such an allegation. Without that, this Court can find no error.

The issue of granting O'Quinn's motion for continuance rested in the sound discretion of the trial judge, and in the absence of the trial judge's abuse of that discretion which prejudiced O'Quinn's presentation of his defense to the crime of murder, this Court will not reverse the trial court's judgment of O'Quinn's guilt of that crime. We found neither abuse of discretion nor prejudice to O'Quinn on his third issue. Our review of the evidence and testimony elicited during the trial, especially Fernandez Jordan's testimony, satisfies this Court that the jury's verdict was not against the overwhelming weight of the evidence. Neither was there a cumulation of errors such as would deprive O'Quinn of a fair trial. Thus, we affirm the trial court's judgment of O'Quinn's guilt of the crime of murder and its sentence of O'Quinn to serve the remainder of his life in the custody of the Mississippi Department of Corrections.

THE CLAIBORNE COUNTY CIRCUIT COURT JUDGMENT OF APPELLANT'S GUILT OF MURDER AND ITS SENTENCE OF APPELLANT TO SERVE A TERM OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS ARE ASSESSED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.