IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01179 COA

JOSEPH HORTON **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

DATE OF JUDGMENT:	07/28/95
TRIAL JUDGE:	HON. L. BRELAND HILBURN JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILLIAM O. TOWNSEND
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JOLENE M. LOWRY
DISTRICT ATTORNEY:	EDWARD J. PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I MURDER: CT II MURDER: CT I SENTENCED TO SERVE A TERM OF LIFE IN THE MDOC, CT I TO RUN CONSECUTIVE WITH CT II; CT II SENTENCED TO LIFE IN THE MDOC, CT II IS TO RUN CONSECUTIVE WITH CT I
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	12/29/97
CERTIORARI FILED:	2/25/98
MANDATE ISSUED:	4/30/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

Joseph Horton was convicted in the Hinds County Circuit Court on two counts of murder. For his crimes, Horton was sentenced to serve two consecutive life sentences in the custody of the

Mississippi Department of Corrections. Aggrieved by his conviction, Horton appeals to this Court of the following grounds:

I. THE COURT BELOW ERRED IN NOT ADVISING THE APPELLANT THAT JURY PANEL NUMBER FIVE WOULD BE USED AND BY NOT ALLOWING THE APPELLANT TO HAVE JURY PANEL NUMBER FIVE'S JUROR QUESTIONNAIRE.

II. THE COURT BELOW ERRED BY NOT ALLOWING TESTIMONY BEFORE THE JURY OF THE PRIOR CONDUCT OF THE VICTIM.

III. THE COURT ALLOWED THE APPELLEE TO COMMIT A DISCOVERY VIOLATION.

IV. THE COURT BELOW ERRED IN ALLOWING THE WITNESS CHARLES CRISCO TO TESTIFY.

V. THE COURT BELOW ERRED IN DENYING THE APPELLANT'S JURY INSTRUCTIONS ON SELF-DEFENSE.

VI. THE COURT BELOW COMMITTED ERROR BY NOT GRANTING THE APPELLANT A MISTRIAL DURING CLOSING ARGUMENTS.

VII. THE CUMULATIVE EFFECT OF ALL THE ERRORS MADE BY THE COURT BELOW RESULTED IN THE CONVICTION OF THE APPELLANT.

VIII. THE COURT BELOW ERRED IN NOT CORRECTING THE ERRORS THE COURT HAD MADE.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

On January 6, 1994 Troy Smith invited several friends to meet him at an Edwards, Mississippi nightclub to celebrate the recent birth of his child. Around 9:00 that evening, Smith, Clinton Harris, Walter Gray, Charlene White, and Charles Jefferson gathered at Joe's Disco for drinks and a game of billiards. Inside, the group discovered Patrick Turner who initiated a match between himself and Smith. Shortly thereafter, an argument regarding the game erupted between the pair. Although neither threatened the use of physical violence, the establishment's owner, Joseph Horton, asked them to leave. Patrick and Smith instead continued to quarrel. In frustration, Horton retrieved his .9 millimeter handgun from behind the bar and again demanded that the two vacate the premises. Although the quibbling ceased with Horton's exhibition of the weapon, neither man budged. Then, without further warning, Horton shot Smith in the abdomen. Since Patrick bolted in the midst of the commotion, Horton turned his attention toward the nearby Harris, whose only participation in the altercation had been to urge calm. Harris promptly dropped his pool cue, raised both hands, and backed away from Horton. But despite Harris's pleas for compassion, Horton stepped forward, placed the barrel of his gun within inches of his left cheek, and pulled the trigger. Horton then

advised the remaining on-lookers to vacate the premises and seated himself at the bar to await the arrival of law enforcement officials. Since Harris, and later Smith, both died as a result of these injuries, Horton was subsequently indicted, tried, and convicted on two counts of murder.

ANALYSIS

I. THE COURT BELOW ERRED IN NOT ADVISING THE APPELLANT THAT JURY PANEL NUMBER FIVE WOULD BE USED AND BY NOT ALLOWING THE APPELLANT TO HAVE JURY PANEL NUMBER FIVE'S JUROR QUESTIONNAIRE.

With his first assignment of error, Horton characterizes the trial court's failure to warn him of the planned utilization of jury panel number five and accompanying failure to allow for adequate review of that panel's jury questionnaires as reversible error. In response, the State argues that this contention is procedurally barred for purposes of review by this Court as Horton provides no authority in support of his claims. We agree with the State.

Our supreme court has time and again reaffirmed the rule that we are "under no duty to consider assignments of error when no authority is cited." ***Hoops v. State*, 681 So. 2d 521, 526 (Miss. 1996) (citing *Hewlett v. State*, 607 So. 2d 1097, 1106 (Miss. 1992)); *see also Kelly v. State*, 553 So. 2d 517, 520 (Miss. 1989)** (holding that an appeals court is under no obligation to consider assignments of error when no authority is cited). "[I]t is the duty of an appellant to provide authority and support of an assignment [of error]," a duty that Horton has failed to fulfill. ***See Hoops*, 681 So. 2d at 526.** Since Horton neither argues this issue in a comprehensible manner nor cites any authority in support thereof, we decline to consider this issue on appeal.

II. THE COURT BELOW ERRED BY NOT ALLOWING TESTIMONY BEFORE THE JURY OF THE PRIOR CONDUCT OF THE VICTIM.

Because Horton admits killing both Smith and Harris, the theory he presented at trial was one of self-defense. To provide the jury with "a much better understanding of the victim[s] . . . at the time the shooting occurred" from which it might glean some justification for his actions, Horton attempted, unsuccessfully, to offer evidence regarding (1) Harris's blood alcohol level, (2) marijuana found on Smith's person, and (3) a previous confrontation between himself and Smith. On appeal, he claims that the trial court violated Rules 404 and 405(b) of the Mississippi Rules of Evidence when it unduly limited his opportunity to submit this character evidence because it establishes an essential factor in distinguishing between manslaughter and murder -- his own panic and resulting irrational actions. The State on the other hand discloses that contrary to Horton's present portrayal of the trial, the court, in fact, allowed him to testify regarding the incidence of, if not the motivation for, his previous altercation with Smith. Moreover, the State contends that Horton was also allowed to cross-examine the prosecution's forensic pathologist about Harris's elevated blood alcohol level. The State continues, arguing that Smith's possession of marijuana at the time of his death may not be characterized as probative of either his allegedly violent nature or Horton's professed apprehension. We agree with the State.

We begin by noting that the accuracy of the State's factual proposition is revealed by the record.

Because both Harris's post-mortem blood alcohol content as well as Horton's previous and somewhat acrimonious ejection of Smith from the nightclub were presented fully and fairly in the presence of the jury, Horton may not now raise their omission as an assignment of error. As a result, there is no merit to these contentions.

As for the narcotics in Smith's possession, the Mississippi Rules of Evidence generally prohibit the introduction of such character evidence. **M.R.E. 404.** However, Rule 404(a)(2) authorizes limited inquiry by a criminal defendant into a victim's character, enabling defendants to prove that the victim was the initial aggressor and that he acted in self-defense. **M.R.E. 404, cmt.** Specifically, the rule allows the introduction of "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor . . . ." **M.R.E. 404(a)(2).**

Therefore the question here is whether the marijuana was "pertinent" to some issue to be resolved at trial. Despite Horton's proffer of this evidence under the guise that the contraband might assist in explaining his own rash behavior, it is inconsequential. A victim's reputation for violence or, in the alternative, some specific act(s) evidencing such, has assisted juries for many years in determining whether defendants such as Horton had reasonable cause to apprehend danger. ***See Day v. State,* 589 So. 2d 637, 641 (Miss. 1991)** (citing a string of cases dating back to 1888). However, since applicable case law invariably concerns prior threats against the defendant and/or the habitual possession of weapons, such alleged violent aggression is virtually the only relevant character trait. ***See Day,* 589 So. 2d at 641.** We are unable to discern, and Horton fails to demonstrate, any logical route by which Smith's then-concealed illicit drugs might tend to make the claimed justification either more or less probable. Therefore, the exclusion of such could not have prevented the jury from being able to ascertain his mental status. Because the general prohibition against the use of character evidence applies, this assignment of error is without merit.

III. THE COURT ALLOWED THE APPELLEE TO COMMIT A DISCOVERY VIOLATION.

Horton also claims that multiple violations occurred while the State cross-examined Nancy Duren, a character witness offered by Horton. Following Duren's testimony on direct regarding his reputation for peacefulness, the prosecutor inquired as to whether her opinion might be altered if she were aware of his previous misdemeanor assault conviction. Although Horton remained silent during the relevant exchange, he asked to approach the bench following Ms. Duren's dismissal. The district attorney's office (much like the Attorney General's office on appeal) in no way disputed defense counsel's factual assertion that the prior misdemeanor conviction had not been disclosed. Therefore, the trial court sustained Horton's forthcoming claim that he had been "broadsided by the unknown discovery" and warned the jury "not to imply or infer anything from that question which would be detrimental to the defendant." However, because his request for a mistrial was denied, Horton now claims that the prosecution simultaneously violated Rule 609(b) of the Mississippi Rules of Evidence and (then) Rule 4.06(a)(3) of the Uniform Criminal Rules of Circuit Court Practice. The State initially responds by characterizing Horton's argument as procedurally barred due to his somewhat delayed objection. The State then addresses the merits of Horton's claim, citing the curative effect of the judge's instruction to disregard. Although we arrive via an alternate route, we agree with the

State's conclusion.

First, we feel compelled to comment on the State's erroneous contention that Horton is procedurally barred from raising this issue for lack of contemporaneous objection. While Horton did not immediately interrupt the prosecutor, the court nevertheless considered and sustained his delayed objection. Despite the State's claims to the contrary, such was well within the trial judge's discretion. ***See Kettle v. State,* 641 So. 2d 746, 748 (Miss. 1994) (citing *Uptain v. Huntington Lab. Inc.*, 723 P.2d 1322, 1330-31 (Colo. 1986))**, and stating that the reason belated errors are deemed to be waived, and therefore barred from appellate review, is "to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error.") Because we view the State's contention as incorrect, we continue by addressing the merits of Horton's assignment of error.

Our legal context is provided by **Rule 9.04(A)(3) of the Uniform Circuit and County Court Rules** (formerly Rule 4.06(3) of the Uniform Criminal Rules of Circuit Court Practice) which, in pertinent part, provides:

> The prosecution shall disclose to each defendant or to his attorney, and permit him to inspect, copy, test and photograph upon request and without further order the following:
>
> * * *
>
> (3) copy of the criminal record of the defendant, if proposed to be used to *impeach*;

(emphasis added). Our supreme court has stressed time and again that this obligation must be taken seriously since the rule is designed to avoid "ambush" or unfair surprise at trial. ***Holland v. State*, 587 So. 2d 848, 866-67 (Miss. 1991).** ***See also Cooley v. State,* 495 So. 2d 1362, 1365 (Miss. 1986)** (citations omitted). In fact, as Horton's brief indicates, the court has developed specific guidelines for the proper handling of apparent violations once they arise. ***See Davis v. State*, 530 So. 2d 694, 698 (Miss.1988)** (citing *Box v. State*, 437 So. 2d 19, 22-26 (Miss. 1983) (requiring that the defendant be given a reasonable opportunity to become familiar with the evidence and, if necessary, a continuance so that he might make additional preparation to meet it). In that vein, Horton urges that this Court follow a string of Mississippi cases wherein similar prosecutorial behavior required reversal.

Although not specifically cited by Horton, ***Cooley v. State,* 495 So. 2d 1362,** illustrates his point best. There, as in the case sub judice, Cooley's attorney filed a formal request for discovery designating for production her criminal records and/or any summaries reflecting such. ***Id.* at 1365.**And much like this case, the prosecution delivered to defense counsel an incomplete "rap sheet" without any attempt at explanation. The Mississippi Supreme Court held the trial judge in error for having refused to sustain Cooley's objection to impeachment based on the undisclosed misdemeanor convictions, some of which ranged in age from twelve to sixteen years old. ***Id.* at 1366.**

Though many factual similarities among the cases are apparent, the variances are crucial to the determination of Horton's claim. In *Cooley*, as in the cases cited by Horton, the ultimate outcome resulted directly from attempted prosecutorial *impeachment* of a defendant while testifying in his own behalf. And in each instance, the supreme court's determination was driven by the reasoning on which the disclosure requirement of Rule 4.06 was based. For example, in *Cooley* the court wrote, "If one

on trial for her liberty is going to be subjected to *impeachment* of her credibility on grounds of prior convictions, fairness dictates that she be advised of those prior convictions in advance of trial." ***Id.***(emphasis added). This end is not met in a case such as this where there quite simply was no attempt to impeach Horton. In this instance, the prosecution merely tested Ms. Duren's knowledge and qualification to give the character evidence provided on direct. ***See Lanier v. State,* 533 So. 2d 473, 487 (Miss. 1988).** ***See also Hansen v. State,* 592 So. 2d 114, 147-8 (Miss. 1991)** (finding no error where defense witnesses testified to the defendant's peaceful nature during his trial's sentencing phase, and then were cross-examined regarding his penitentiary records).

Long before the advent of the Mississippi Rules of Evidence, our supreme court held in ***White v. State,* 290 So. 2d 616, 618 (Miss. 1974),** that "under appropriate circumstances, character witnesses may be cross-examined to test their good faith and credibility by asking about reports or rumors of particular acts imputed to the defendant. . . ." Mississippi Rule of Evidence 405(b) now provides that, "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." And the comment to that rule provides:

> There are two sound reasons for permitting this type of cross-examination. If the witness on cross-examination professes no knowledge about specific acts, his qualifications to state opinion or reputation are impugned. If the witness admits knowledge of specific bad acts, then he has been impeached. *Magee v. State*, 198 Miss. 642, 22 So.2d 245 (1945).

M.R.E. 405(b), cmt.*; See also Hansen v. State,* 592 So. 2d at 148.

However, where it is manifest that the primary object of the cross-examination is not to discredit the character witness, but to prejudice the jury against the defendant by proving that he had on a former occasion actually committed a specific crime, then the evidence thus adduced is improper. ***Magee v. State,* 198 Miss. 642, 626-7, 22 So. 2d 245, 246-6 (1945).** Perhaps realizing that the prosecution had come dangerously close to committing such an error, this trial judge erred on the side of caution by first sustaining Horton's objection and subsequently instructing the jury not to imply or infer anything from the question. Only Horton's request for a mistrial was not honored. In that regard, we are mindful that the decision "[w]hether to declare a mistrial is committed to the sound discretion of the trial court." ***Brent v. State*, 632 So. 2d 936, 941 (Miss. 1994).**Accordingly, "[t]he failure of the trial court to grant a motion for mistrial will not be overturned on appeal unless the trial court abused its discretion." ***Bass v. State*, 597 So. 2d 182, 191 (Miss. 1992).** Because Horton has failed to direct this Court to any authority holding that the trial court's action failed to remedy any prejudice resulting from the prosecutor's question, we cannot hold that the trial court abused its discretion in denying his motion for a mistrial on that basis.

As for his Rule 609 contention, Horton is at once procedurally barred from raising it for the first time on appeal and incorrect as to its alleged applicability in the present context. It is fundamental to the principles of appellate review that a trial judge may not be put in error on a matter which was not presented to him for his consideration. ***Holland v. State,* 587 So. 2d 848, 868 n.18 (Miss. 1991).** As stated by the Mississippi Supreme Court, "before an issue may be assigned and argued here, it must first have been presented to the trial court. Where the issue has not been timely presented below, it is

deemed waived. The point is thus said to be procedurally barred when urged here [for the first time]." ***Read v. State,* 430 So. 2d 832, 838 (Miss. 1983).** Because the record reveals no previous mention of M.R.E. 609, this assignment of error need not be addressed further. We do, however, pause briefly to direct Horton's attention toward the introductory language of Rule 609, which reads: "For the purpose of attacking the credibility of a witness, evidence that *he* has been convicted of a crime shall be admitted . . . ." (emphasis added). Clearly the rule is only applicable in instances where a witness is impeached with his or her own conviction(s); not where it is the background of other individuals at issue. For these reasons, this assignment of error is without merit.

IV. THE COURT BELOW ERRED IN ALLOWING THE WITNESS CHARLES CRISCO TO TESTIFY.

Horton next asserts that the trial court erred in permitting the testimony of a witness who had violated the invoked rule of sequestration. During the course of the trial, Charles Crisco, an investigator with the district attorney's office, listened to defense witness Willie Bingham's testimony. Bingham, a witness to the killings, claimed under oath to have reported Smith's allegedly aggressive behavior to Crisco during his subsequent questioning about the incident. When the prosecution later called Crisco to rebut Bingham's testimony, Horton objected. It is the trial court's response to that objection which is the basis for this assignment of error. While Horton argues that Crisco should not have taken the stand at all, the State contends that limiting the scope of his testimony cured the violation. We agree with the State.

Mississippi Rule of Evidence 615 provides that at the request of a party, the court shall order witnesses excluded from the courtroom so that they cannot hear the testimony of other witnesses. Often called "the rule," the witness sequestration rule serves to discourage a witness' tailoring his testimony to what he has heard from the stand and the rule serves to facilitate exposing false testimony. ***Powell v. State,* 662 So. 2d 1095, 1097-98 (Miss. 1995).** Rule 615 does not discuss sanctions for violation of the resulting order. However, under existing Mississippi law the court may, among other remedies, properly limit the scope of direct while allowing a "full-bore" cross-examination. ***See Gerrard v. State,* 619 So. 2d 212, 217 (Miss. 1993).** And as with any determination of admissibility, it is within the trial judge's discretion to determine what remedy is appropriate. ***Wakefield v. Puckett,* 584 So. 2d 1266, 1268 (Miss. 1991); *Baine v. State,* 606 So. 2d 1076, 1083 (Miss. 1992).** More specifically, in *Douglas v. State,* our supreme court held that, "[w] hen [a] violation of the sequestration rule is assigned as error on appeal, the failure of a judge to order a mistrial or to exclude testimony will not justify reversal on appeal . . . absent a showing of prejudice sufficient to constitute abuse of discretion." ***Douglas v. State,* 525 So. 1312, 1318 (Miss. 1988).**

This matter was properly within the discretion of the trial judge, and he conducted the proceedings in accordance with the standards set forth by our supreme court, as enumerated in the Official Comment to M.R.E. 615. Because Horton fails to claim that his case was prejudiced by these few questions, we decline to consider the issue further. ***See Hoops*, 681 So. 2d at 526;*Kelly*, 553 So. 2d at 520** (impressing no duty to consider assignments of error when no authority is cited). Accordingly, this assignment of error is also without merit.

V. THE COURT BELOW ERRED IN DENYING THE APPELLANT'S JURY

INSTRUCTIONS ON SELF-DEFENSE.

In assignment of error, Horton begins by replicating several rejected jury instructions, each of which relate to his self-defense theory. He then immediately concludes with a lengthy quotation taken from ***Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995)**, which reads in part:

> In homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring the reversal of judgement of conviction. Where the instructions are in improper form *and are the only ones embodying a legally correct theory of the defendant's defense*, it is the duty of the trial court to see that the instructions are placed in proper form for submission to the jury.

(citations omitted). (emphasis added). Horton neither elaborates as to the precise nature of his complaint nor offers any additional authority from which this Court might glean an explanation. As previously noted, the duty to formulate a coherent argument falls upon Horton, not this Court. ***See Hoops v. State*, 681 So. 2d 521, 526 (Miss. 1996)**. We have reviewed each of the four self-defense related instructions ultimately given at trial and find that, in combination, they amply describe the grounds upon which Horton's actions might be justified. Because Horton fails even to suggest otherwise, we find the present reproduction of these instructions unnecessary and decline to consider this issue further. This assignment of error is without merit.

VI. THE COURT BELOW COMMITTED ERROR BY NOT GRANTING THE APPELLANT A MISTRIAL DURING CLOSING ARGUMENTS.

Next, Horton directs our attention to the following remarks made during the prosecutor's closing argument:

> But keep this in mind. If this is what you're gonna call self-defense, if this is the standard you're gonna set for self-defense in your community, if this what you're gonna call self defense, then Mr. Peters and I might as well go home and find new jobs, because anything goes. And let me tell you this. If you're gonna call what this defendant did to those two young men self-defense, and if that's what the standard you're going to set, you're gonna have to live by that standard. And the next time you go out in public with your family and your children . . . .

As the assistant district attorney uttered these words, counsel for the defendant made an objection and the trial court sustained it. The defense then immediately requested a mistrial, which the judge denied. On appeal, Horton assigns error to the court's initial failure to admonish the jury and subsequent refusal to grant a mistrial. Again, the State responds by claiming that the trial court's action sufficed to eliminate any prejudice created by the comments. We agree with the State.

As Horton's brief concedes, "not only should the State and defense counsel be given wide latitude in their arguments to the jury, [this] court should also be very careful in limiting free play of ideas, imagery and personalities of counsel in their closing argument to the jury. ***Johnson v. State*, 477 So. 2d 196, 209 (Miss. 1985).**" Such is the case especially in instances, such as the one at hand, where the questioned comments do not pertain to such impermissible factors as the defendant's failure to testify. ***Monk v. State*, 532 So. 2d 592 (Miss. 1988).** And even if a prosecutor strays outside these

broad limits, where the isolated prejudicial prosecutorial statement is promptly objected to and that objection sustained, a presumption arises that the trial judge's action has cured the error, eliminating the necessity for a mistrial. ***See Hubbard v. State,* 437 So. 2d 430 (Miss. 1983)**(emphasizing the preeminence of a pattern of prosecutorial misconduct as well as clear prejudice to the defendant in situations calling for reversal). ***See also, Wideman v. State,* 339 So. 2d 1378 (Miss. 1976)** (holding such improper remarks to have fallen short of reversible error). This presumption is particularly strong when the court goes on to instruct the jury to disregard the incident. ***See Edwards v. State,* 413 So. 2d 1007, 1009 (Miss. 1982)** (noting that absent a showing to the contrary, jurors are presumed to follow the court's direction with regard to testimony). However, such is not necessarily required where no request is made that the jury be instructed so. ***See Reddix v. State,* 381 So. 2d 999, 1007 (Miss. 1980)** (finding no error in a trial court's refusal to grant a mistrial due to prosecuting attorney's references to a defendant's prior trial where defendant did not request that jury be instructed to disregard the statements). ***See also Clanton v. State,* 279 So. 2d 599, 601 (Miss. 1973)** (finding no error with the State's consistently incompetent, irrelevant and prejudicial questions because the trial judge sustained the defendant's objections).

Despite the relative freedom enjoyed by litigants during closing arguments, this trial judge sustained Horton's objection based on the assistant district attorney's allegedly inflammatory design. While we need not review the correctness of this action, the above-mentioned case law suggests that under the circumstances, it eliminated any prejudice to Horton. Because he never requested that the jury be admonished, the lower court's failure to do so of its own accord was not reversible error as Horton claims. Likewise, since Horton fails even to suggest that the trial judge's allegedly misapplied discretion resulted in prejudice, we find no basis for reversing his denial of Horton's motion for mistrial either. With that in mind, we find no merit in this assignment of error.

VII. THE CUMULATIVE EFFECT OF ALL THE ERRORS MADE BY THE COURT BELOW RESULTED IN THE CONVICTION OF THE APPELLANT.

Horton further argues that each of the foregoing alleged errors, even if not reversible when reviewed in isolation, operated in combination to deprive him of a fundamentally fair trial. The State responds by arguing that Horton's cumulative effect claim is misplaced since there were no errors at all, harmless or otherwise, committed at trial. We agree with the State.

Our supreme court has held that individual errors, not reversible in themselves, may combine with other errors to make up reversible error. ***Hansen v. State,* 592 So. 2d 114, 142 (Miss. 1991)*; Griffin v. State,* 557 So. 2d 542, 553 (Miss. 1990).** However, those cases are rare. ***Wilburn v. State,* 608 So. 2d 702, 705 (Miss. 1992).** The question is whether the cumulative effect of all such errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. ***Wilburn,* 608 So. 2d at 705.** And where there is "no reversible error in any part, . . . there is no reversible error to the whole." ***McFee v. State,* 511 So. 2d 130, 136 (Miss. 1987).**

While this court declines to endorse the State's claims of virtual perfection below, we note that such is not required. ***Doby v. State,* 557 So. 2d 533, 542 (Miss. 1990)**. It suffices that none of Horton's purported errors was such as to deny him a fundamentally fair trial. ***See* M.R.E. 103(a); *Williams v. State,* 595 So. 2d 1299, 1310 (Miss. 1992)**. Some of the alleged errors were not errors at all while the remaining irregularities individually assigned involved minor infractions which were rendered

innocuous by the sustaining of the defendant's objections and by timely admonitions issued from the bench. ***See Wilburn,* 608 So. 2d at 705** (upholding a rape conviction on like grounds). As such, this assignment of error is without merit.

VIII. THE COURT BELOW ERRED IN NOT CORRECTING THE ERRORS THE COURT HAD MADE.

Finally, Horton contends that the trial court committed reversible error by denying his request for directed verdict/peremptory instruction and subsequent motion for judgment notwithstanding the verdict or in the alternative, new trial. However, since he finds fault not so much with the jury's verdict but with the evidentiary rulings which shaped the facts before it, the thrust of his contention is that the trial court let pass yet another opportunity to correct its previous mistakes. As such, his argument primarily reiterates the previously addressed claims of error. Nevertheless, the State addresses Horton's substantive, albeit inarticulate, claim by arguing that there is in the record substantial evidence of such quality and weight that reasonable jurors in the exercise of impartial judgment might have found Horton guilty of murder. We agree with the State.

Both motions for directed verdict/peremptory instruction and motions for JNOV challenge the legal sufficiency of the evidence. ***Noe v. State,* 616 So. 2d 298, 301 (Miss. 1993)** (stating that a motion for directed verdict tests legal sufficiency of the evidence); ***McClain v. State,* 625 So. 2d 774, 778 (Miss. 1993)** (stating the same test for motion for judgment of acquittal notwithstanding). ***See also Strong v. State,* 600 So. 2d 199, 201 (Miss. 1992)** (stating that the trial judge is bound by the same law whether addressing a motion for directed verdict or addressing a request for a peremptory instruction). Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling only on the last occasion that the challenge was made in the trial court. ***McClain,* 625 So. 2d at 778.** In this instance, that challenge occurred when the circuit court denied Horton's motion for JNOV/new trial. ***See, e.g., Wetz v. State,* 503 So. 2d 803, 807-8 (Miss. 1987).**

The motion for judgment of acquittal notwithstanding the verdict tests the legal sufficiency of the evidence supporting the verdict of guilty. ***McClain,* 625 So. 2d at 778.** Where the defendant has moved for JNOV, the trial court must consider all of the credible evidence consistent with the defendant's guilt. ***Id.*** The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from this evidence. ***Id.*** This Court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. ***Wetz,* 503 So. 2d at 808 n.3.**

Only a slightly greater quantum of evidence favoring the State is necessary to withstand a motion for new trial. As distinguished from the motion for JNOV, the defendant here is asking that the jury's verdict be vacated on grounds related to the weight of the evidence, not its sufficiency. ***May v. State,* 460 So. 2d 778, 781 (Miss. 1985).** The Mississippi Supreme Court has repeatedly held that the jury bears sole responsibility for determining the weight and credibility of evidence. ***May,* 460 So. 2d at 781.** Therefore, we are without the power to set aside a guilty verdict unless we are convinced it is the result of prejudice, bias, fraud, or is manifestly against the weight of the credible evidence. ***Pearson v. State,* 428 So. 2d 1361, 1364 (Miss. 1983).** We will reverse and order a new trial only

upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. ***McClain*, 625 So. 2d at 781.**

The use of a deadly weapon in the killing of a human being raises a presumption of malice which characterizes a homicide as murder. ***Dickins v. State*, 208 Miss. 69, 92, 43 So. 2d 366, 373 (1949)**. This presumption is especially strong where the accused brandishes his weapon even before any advances are made against him. ***Russell v. State*, 497 So. 2d 75, 76 (Miss. 1986)**(citing *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984); ***Smith v. State*, 205 Miss. 283, 38 So. 2d 725 (1949)); *see also* *Brown v. State*, 98 Miss. 786, 54 So. 305 (1911)**. Such a killing may be explained by the accused or eyewitnesses as an accident or justified as having been committed by the accused acting in lawful self-defense or mitigated manslaughter. ***Nicolaou v. State*, 534 So.2d 168, 172 (Miss. 1988).** However, without such an explanation, the presumption stands. ***Dickins*, 208 Miss. at 92, 43 So. 2d at 373.**

At trial, Horton suggested that his actions were justifiedly precipitated by both Smith's aggressive attitude and his display of a .22 caliber handgun subsequently found at the scene. However, Horton's claim was fully and fairly presented and was appropriately resolved against him. ***SeeSmith v. State*, 463 So. 2d 1102, 1103 (Miss. 1985); *Rush v. State*, 278 So. 2d 456 (Miss. 1973).** Neither fingerprint analysis nor registration records connected the abandoned pistol to either Smith or Harris. And more importantly, a stream of prosecution witnesses, including Gray, White, and Patrick each testified that neither of his victims threatened Horton with the weapon or in any other manner. Reasonable and fair-minded jurors might well have found Horton guilty on both murder counts beyond a reasonable doubt based on this testimony alone. As a result, this assignment of error is also without merit.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF MURDER ON COUNTS I AND II AND SENTENCE OF LIFE IMPRISONMENT ON EACH COUNT TO RUN CONSECUTIVELY WITH ONE ANOTHER IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.