

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-KA-00952 COA**

**JOE NATHAN HARRIS**

**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:	05/05/95
TRIAL JUDGE:	HON. LARRY EUGENE ROBERTS
COURT FROM WHICH APPEALED:	WAYNE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	MARK S. HOWARD ROGERS J. DRUHET
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I AGGRAVATED ASSAULT: 20 YRS;CT II AGGRAVATED ASSAULT: 20 YRS; CT III CAPITAL MURDER: LIFE; CT IV ROBBERY WITH A DEADLY WEAPON: LIFE; HABITUAL OFFENDER; CT I THRU CT IV RUN CONSECUTIVELY AND CONSECUTIVE TO ALL OTHER SENTENCES NOW SERVING
DISPOSITION:	AFFIRMED - 1/13/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/23/98

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

Joe Nathan Harris has appealed his criminal conviction by a jury in the Circuit Court of Wayne County. He was tried and convicted on one count of capital murder, one count of armed robbery, and two counts of aggravated assault. According to the State's proof, Harris and an associate, Jeremiah

Patton, attacked a group of individuals with firearms, killed one of them, injured two others, and then fled the scene in a vehicle belonging to the mother of one of the victims, that vehicle being in the possession of the victim at the time. The taking of the car was the factual basis for the armed robbery count as there was no evidence that Harris or Patton took anything else of value from their victims. Harris has appealed his conviction and requests this Court to consider nine issues which he claims warrant reversal. We have considered the issues and, finding them to be without merit, affirm the conviction.

## I.

### Refusal of Defendant's Requested Jury Instructions

Harris complains in this appeal that the trial court committed reversible error by denying four jury instructions requested by the defense.

#### A.

##### Procedural Bar to Consideration

The State seeks to impose a procedural bar to consideration of these errors claiming that Harris failed to object to the trial court's decision to deny the instructions. The State cites *Nicholson on behalf of Gollott v. State*, 672 So. 2d 744 (Miss. 1996), which contains the statement:

Regarding the instructions Gollott claims the trial court erroneously refused, Gollott failed to object to the refusal of D-4. As a result, this Court is not bound to address the alleged error on appeal.

*Id.* at 752. However, the opinion in *Gollott* does not reveal exactly what preceded the rejection of that jury instruction by the trial court. We believe that the case of *Carmichael v. Agur Realty Co., Inc.*, 574 So. 2d 603 (Miss. 1990), is more applicable to the case now before us. In that case, the supreme court said:

[any error] is procedurally preserved by the mere tendering of the instructions, suggesting that they are correct and asking the Court to submit them to the jury. This in and of itself affords counsel opposite fair notice of the party's position and the Court an opportunity to pass upon the matter. When the instructions are refused, there is no reason why we should thereafter require an objection to the refusal unless we are to place a value upon redundancy and nonsense.

*Id.* at 613.

The record in this case indicates that the requested instructions were each actively reviewed and considered by the court. The court heard argument both in favor of and against granting the proposed instructions and then ruled by writing "refused" on the face of each denied instruction. Any further objection in order to preserve error would have been as useless as the discarded practice of requiring an attorney to take formal exception to the judge's adverse rulings on objections in order to preserve error. The issues were properly framed at the trial court level, decided by the trial court, and the rulings preserved on the record for review on appeal. Nothing further is required. We will, therefore,

consider these issues on the merits.

## B.

### Consideration of the Instructions on the Merits

Harris has assigned the trial court's ruling on the four instructions as four separate errors. However, he has combined his argument on the instructions into one discussion since, according to his theory, the trial court's error in each instance arose out of two closely related misconceptions of the applicable law. We will likewise dispose of the four issues in one discussion.

Harris first contends that the State's evidence was capable of two alternate interpretations by the jury, one of which would support, at best, a conviction of grand larceny and not armed robbery. Harris's further argument is that if the jury concluded that Harris was only guilty of grand larceny, he could not be convicted of capital murder since grand larceny is not one of the felonies listed in this state's capital murder statute. **Miss. Code Ann. § 97-3-19(2)(e) (1994)**. Specifically, Harris suggests that the jury could have reasonably found that the shootings were carried out for reasons unrelated to robbery (though he does not tell us what these reasons were) and that the intention to take the vehicle arose only after the victims had been injured. Harris urges that the denial of his requested instructions prevented the jury from considering this alternate construction of the State's proof that could have resulted in his conviction for simple murder, aggravated assault, and grand larceny instead of the greater crimes for which he now stands convicted.

As his second and related proposition, Harris claims that, even if the subsequently-formed intent to take the car could constitute robbery, the robbery could not have commenced until the intent to rob was formed. Since the actual shooting preceded in time the formation of the intent to rob, the killing could not have been done "in the commission of the crime of . . . robbery" as required by the capital murder statute, according to his reasoning. **Miss. Code Ann. § 97-3-19(2)(e) (1994)**. With this broad overview of the theory of Harris's argument, we will now consider the individual instructions complained of on appeal.

Instruction D-1, refused by the trial court, advanced the idea that Harris and Patton must have conspired and agreed, in advance of the incident, that they would, if necessary, use deadly force for the specific purpose of taking the car in order to convict Harris of capital murder. Without reaching the merits of Harris's overall theory, we reject any claim of error in this instance. Instruction D-1 was a conspiracy instruction. Conspiring to commit a crime is a separate offense from the crime itself and neither Harris nor Patton were charged with criminal conspiracy. This instruction would have required the State, in order to convict of capital murder, to prove Harris and Patton guilty of a separate crime for which they were not charged and the elements of which were not necessary elements of either armed robbery or capital murder.

Instruction D-2 proposed to inform the jury that if it found the taking of the vehicle was an afterthought, then that taking constituted an act of grand larceny and not armed robbery. It concluded with the proposition that, in the event the jury so decided, a verdict of guilt of capital murder could not be returned. Harris appears to be incorrect, as a matter of law, in his assertion that proof that he formed the intent to steal the car only after incapacitating his victims changes the character of the crime from robbery to grand larceny. This State's armed robbery statute provides that

"[e]very person who shall feloniously take . . . from . . . the presence [of the victim] the personal property of [the victim] and against his will by violence to his person . . . shall be guilty of robbery . . ." **Miss. Code Ann. § 97-3-79 (1994)**. Determining whether the intention to take the victim's property arose before or after the force that made the taking possible does not appear material if the force, in fact, facilitated the taking.

Though the Mississippi Supreme Court has not directly answered this question, other jurisdictions considering the matter appear to agree with this proposition. By way of example, the Court of Special Appeals of Maryland has stated that "if a person commits an act of force that causes the death of the victim and then forms the intent to deprive the victim permanently of his property, the taking of the property with that intent may constitute robbery . . ." ***Higginbotham v. State*, 655 A.2d 1282, 1288 (Md. Ct. Spec. App. 1995)**. The only additional limit the Maryland court put on its holding was that the taking occur as a part of the "same general occurrence or episode" as the infliction of the injury. *Id.* That requirement appears logical and is certainly met in the case now before this Court. We, therefore, hold that the essentially undisputed facts of this case would not, as a matter of law, permit the jury to reduce the crime of robbery to grand larceny based upon a finding that Harris formed the intent to steal the car after the shooting. That being the case, it was not error to refuse instruction D-2 in the form proposed.

Refused Instruction D-3 would have told the jury that the intent to steal the vehicle must have consciously existed in Harris's mind at the time he shot the deceased victim in order to convict him of capital murder. This presents a somewhat closer question than Instruction D-2--that question being whether, when the intent to rob the victim is not formed until after the use of force, the act causing death can be said to have occurred while the defendant was "engaged in the commission of the crime of . . . robbery" within the meaning of this state's capital murder statute. **Miss. Code Ann. § 97-3-19(2)(e) (1994)**. In other words, (a) can the subsequently-formed intent to rob be made to relate back to the time that the force was used and thereby change the character of the offense, or (b) must the State prove that the intent to rob actually existed at the time the force was used?

There is no answer to this question in the prior decisions of the Mississippi Supreme Court and a split of authority exists in other jurisdictions that have considered the matter. The State of Maryland, in *Higginbotham*, held that, when the events happened as a part of the same occurrence, "the robbery could also serve as the underlying felony supporting a first degree felony murder conviction." ***Higginbotham*, 655 A.2d at 1288**. Since the applicable Maryland code section defining felony murder "contains no explicit requirement that the intent to commit the underlying felony must exist prior to the commission of the act causing the death of the victim," the court said it would not write such a requirement into the statute. *Id.* at 1289. The Supreme Court of North Carolina reached the same result in ***State v. Handy*, 419 S.E.2d 545 (N.C. 1992)**. That court indicated that the only requirement was that the underlying crime and the homicide were part of one continuous chain of events. *Id.* at 553. The court specifically approved the trial court's instruction to the jury that "it is immaterial whether the intent to commit the theft was formed before or after the killing . . . provided that the theft and the killing are aspects of a single transaction." *Id.* at 552-53. The New Mexico Supreme Court rejected an argument that, if the felony is committed as an afterthought after the murder has been committed, there can be no conviction under that State's felony-murder statute. ***State v. Nelson*, 338 P.2d 301, 306 (N.M. 1959)**. That court said, "[w]e cannot accept this theory. If a killing is committed within the *res gestae* of the felony charged, whether the homicide occurred

before or after the felony, is not determinative." *Id.*

On the other hand, the Pennsylvania Supreme Court reached a different result in *Commonwealth v. Legg*, 417 A.2d 1152 (Pa. 1980). In that case, the court discussed the fact that one purpose of the statute was to deter the commission of certain violent felonies by imposing a substantial penalty if a death occurs during the commission of the crime. *Id.* at 1154. The court went on to say:

But, where an actor kills prior to formulating the intent to commit the underlying felony, we cannot say the actor knew or should have known death might occur from involvement in a dangerous felony because no involvement in a dangerous felony exists since the intent to commit the felony is not yet formulated. Also, the greater deterrent is not necessary, and the rule has no application.

*Id.* California has held that it was proper to instruct the jury "that intent to rob formed subsequent to the infliction of mortal wounds was not sufficient to support a finding of first degree felony murder." *People v. Gonzales*, 426 P.2d 929, 932 (Cal. 1967). The United States Court of Appeals for the District of Columbia has indicated that something more than "mere coincidence in time between the murder and the robbery" is necessary to convict for felony murder and that "[a] jury may therefore acquit where it finds that the robbery was merely an afterthought following the homicide." *United States v. Bolden*, 514 F.2d 1301, 1307 (D.C. Cir. 1975) (citations omitted).

This Court is of the opinion that the better reasoning lies with the proposition that a homicide committed for reasons unrelated to robbery may not reconstitute itself into capital murder by subsequent events. The statute provides that the death must be caused while the defendant is "engaged in the commission of the [underlying] crime. . . ." Miss. Code Ann. § 97-3-19(2)(e). In *Pickle v. State*, 345 So. 2d 623 (Miss. 1977), the Mississippi Supreme Court quoted with approval from a discussion in an American Jurisprudence article on homicide which stated that, in order to be a felony murder, the homicide must occur "within the *res gestae*" of the underlying crime and that "[t]he *res gestae* of the underlying crime begins where an indictable attempt is reached . . ." *Id.* at 626 (quoting 40 Am. Jur. 2d *Homicide* § 73 (1968)). Clearly, if the decision to rob did not arise until after the killing, there was not an indictable attempt at robbery before that point.

We are also of the opinion that, because of the rather fine distinctions that the jury must make if this defense theory is asserted, the defendant ought to be permitted an instruction that explains the concept if one is properly proposed. With that in mind, we turn to the specific language of proposed Instruction D-3:

In order to find Joe Nathan Harris guilty of capital murder you must find that he intended at the time of the murder to commit the crime of armed robbery and that he specifically intended to take the 1988 Lincoln by force at the time of the murder.

Despite our previous conclusions on the general law of the subject, we are of the opinion that this instruction was improper in that it too narrowly restricted the focus of the jury's deliberations by requiring the jury to find "*that he specifically intended to take the 1988 Lincoln by force at the time of the murder.*" Certainly, one may have a general intent to commit a robbery at the inception of the crime and not have the slightest idea as to what personal property will be produced for the taking when the victim is confronted with a threat of force. The State objected to the instruction on that

very basis, saying that it was not necessary to show that the defendant had "formed any intent to take that particular item when they began the robbery." The defendant did not propose to amend the instruction to remove the objectionable portion. The trial court refused to give the instruction as tendered, but went on to say that the general instruction on the elements of capital murder was sufficient to permit the defendant to argue that the killing did not take place in the commission of a robbery.

Thus, we are of the opinion that, had the defendant requested an instruction that more properly set out this aspect of the law of murder in the commission of a felony, he would have been entitled to have the instruction granted. However, we find that the instruction as proposed by the defense did not properly inform the jury of the law on this aspect of the defense for the reasons stated, and we decline to put the trial court in error for failing to correct or amend the instruction on its own motion. In doing so, we note the general proposition that it is the trial court's duty to ensure that the jury is properly instructed in the law, and that this duty may, in some cases, extend so far as to place an obligation on the trial court to assist defense counsel in correcting inaccuracies or errors in proposed instructions that would otherwise be proper. *Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995); *Hester v. State*, 602 So. 2d 869, 873 (Miss. 1992). However, this duty seems to have been invoked in the past only in those circumstances where the instruction was the only one presenting the defendant's theory. *Id.* In the case before us, the trial court affirmatively stated, during consideration of this instruction, that other instructions would permit the defense to argue that the killing preceded the commission of the underlying crime of robbery. The instruction defining the elements of capital murder did, in fact, specifically state that the killing must have occurred during the commission of the crime of a robbery. We have conducted a review of the summations of both the State and the defense and find that the defense argued at some length, without objection, that this was a case of simple murder rather than capital murder because there was every indication that the motive for shooting the victim was something other than robbery, even though it was conceded that the car was ultimately taken. The State, in its summation on the point, focused on the proposition that Harris and his associate were intent on stealing the car at the time of the shooting. The State did not seize on the trial court's refusal of the instruction to suggest that the jury must, as a matter of law, reject the defense argument on this point. We cannot say, therefore, that the failure to sua sponte amend the requested instruction to remove the objectionable portion deprived Harris of the right to have the jury consider this somewhat unique, but apparently valid, defense to the capital murder charge.

Finally, refused Instruction D-8 was a lesser-included offense instruction to the armed robbery count that would have permitted the jury to return a verdict of grand larceny. We have already resolved this issue against Harris in our earlier discussion. For purposes of the robbery charge, it does not matter at what point the intention to rob is formed so long as the use of force which facilitates a taking, and the actual taking of personal property occur in an essentially unbroken chain of events. Harris advances no argument to support this lesser-included offense instruction on grand larceny other than his now-rejected contention that the jury could reasonably conclude that his intent to take the vehicle was formed after he had injured his victims. Since that sequence of events, even if accepted by the jury, does not lessen the crime of robbery but merely postpones the inception of the commission of the crime, there was no basis for the trial court to give the instruction. If there is no rational basis for the jury to convict on the lesser crime while not convicting of the greater, there is no obligation on the part of the trial court to give a lesser-included offense instruction. *Graham v. State*, 582 So. 2d

1014, 1017-18 (Miss. 1991). Accordingly, there was no error in refusing to grant Instruction D-8.

## II.

### Anticipatory Rulings on the Evidence as Constituting Error

At trial, Harris announced an intention to call two witnesses in his defense, both of whom were jail inmates at the same time Jeremiah Patton was in jail. These witnesses were prepared to testify that Patton had made statements to them that implicated Patton as the one who actually shot the victims. Defense counsel asserted that, because Patton could be expected to invoke his Fifth Amendment rights against testifying, he was an unavailable witness under Mississippi Rule of Evidence 804(a). Because of his unavailability, evidence of Patton's statements would be admissible as an exception to the hearsay rule under Rule 804(b)(3) since they exposed Patton to criminal liability and therefore, "a reasonable man in his position would not have made the statement unless he believed it to be true." **Miss. R. Evid. 804(b)(3)**. There was some discussion, once the defense announced its intention to call these witnesses, as to whether the State would be allowed to counter these witnesses' testimony by introducing a confession given by Patton naming Harris as the actual shooter. The trial court, in the discussion, indicated that it was "inclined" toward permitting the introduction of this other statement.

Defense counsel went so far as to make a proffer of the testimony of these two witnesses outside the presence of the jury. This was apparently being done in order to permit the trial court to determine whether the proposed evidence met the provision of Rule 804(b)(3) that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible *unless corroborating circumstances clearly indicate the trustworthiness of the statement.*" **Miss. R. Evid. 804(b)(3)** (emphasis supplied). However, prior to permitting the trial court the opportunity to rule on the admissibility of Patton's out-of-court statements, defense counsel announced that the witnesses would not be called.

Now, on appeal, Harris seeks to argue that the trial court's announcement of its inclination to permit the State to rebut this evidence with a contrary statement made by Patton at another time prevented the defense from putting valuable exculpatory evidence before the jury. This, according to Harris's argument, formed the basis for the decision not to call these witnesses. We reject this argument for a number of reasons. We are unconvinced that the statements could, in any event, meet the test of "trustworthiness" established by "corroborating circumstances." **Miss. R. Evid. 804(b)(3)**. The trial court was never permitted to rule on the question and we can only speculate as to what its ruling might have been. For our part, we find little in the proffer that would suggest that "the corroborating circumstances clearly indicate the trustworthiness of [Patton's] statement." *Id.* Thus, we are inclined toward the proposition that, had the trial court been permitted to rule and held the statements of Patton's jailmates untrustworthy, the trial court's refusal to admit the statements would not be error. Secondly, had the trial court admitted the statements, we are not convinced that it would have been error if the court had, indeed, followed its "inclination" and permitted the State to introduce an inconsistent statement for purposes of impeachment. Mississippi Rule of Evidence 806 states that if a hearsay statement is admitted, "the credibility of the declarant [Patton] may be attacked . . . by any evidence which would be admissible for those purposes if the declarant had testified as a witness." **Miss. R. Evid. 806**. A witness may be impeached by his prior inconsistent statements and we can

think of no reason why, under Rule 806, Patton's hearsay statements could not have been impeached in the same manner. Finally, and most fundamentally, we think it inappropriate for defense counsel to "test the waters" by soliciting from the trial judge a tentative ruling on some hypothetical scenario, formulate his trial strategy accordingly, and then seek to put the trial court in error based on nothing except the musings of the court as to how it might respond if actually confronted with the situation. That is not the concrete error for which reversal on appeal is appropriate.

### III.

#### **Other Evidence of Patton's Out-of-Court Statements**

Harris asserts that the trial court committed reversible error by permitting one of the investigating police officers to testify, over a hearsay objection, as to certain information that he obtained from statements given by Harris's co-defendant, Patton. Aside from the hearsay considerations, we can discover no relevance in the inquiries. It appears that the purpose of the interrogation was to demonstrate that there was probable cause to charge Harris in the crime. Typical of the questions being pursued was this inquiry: "My question is, when you testified to the grand jury and when you testified in this preliminary hearing . . . regarding probable cause was part of your testimony based on what the co-defendant had told you?" We can perceive no purpose for such an inquiry. Once an indictment has been returned and a case brought to trial, there is no legitimate issue for the jury to resolve as to what factual information led to the initial charge against the defendant or what information was given to the grand jury that resulted in the indictment. Nevertheless, while we find these inquiries improper, we conclude that they were not so prejudicial as to require reversal. The questions were, at times, convoluted and confusing, and the State would have better served its case by resisting the temptation to try to let the jury know that Patton had given statements that incriminated Harris in this manner. Much of the dispute about the evidence revolved around whether Harris or Patton actually inflicted the fatal wounds, and these particular statements by Patton only served to make it more likely that Harris was the shooter. Nevertheless, under the State's theory of the case, these two men were acting in concert so that the ability to prove Harris to be the actual trigger man was not essential to a conviction. We do not find that this relatively short and often confusing inquiry of this one witness, when considered in the context of the entire trial, so adversely impacted the course of the proceeding as to deny Harris a fundamentally fair trial. Absent such a finding, there is no basis to reverse the conviction on this issue. *See Doby v. State*, 557 So. 2d 533, 542 (Miss. 1990).

### IV.

#### **Evidence of Patton's Unrelated Bad Acts**

Harris asserts that the trial court committed reversible error in several of its rulings excluding evidence about Patton's previous conduct. In each case, the evidence was apparently being offered to show that it was more likely that Patton, not Harris, was the trigger man who actually did the shooting. In one instance, the trial court refused to permit a testifying officer to respond, on cross examination, to the inquiry, "[A]nd you're telling the jury that [Patton] is not violent?" In the other instances cited to the Court, defense counsel unsuccessfully sought to interject an allegation that Patton had previously assaulted a woman with a knife, that another person had obtained a gun out of fear of being assaulted by Patton, and a report that Patton had threatened to "kill somebody before

the year was out." We find that the trial court properly exercised its duty to limit the introduction of evidence to that relevant to the issue being tried. The rejected evidence consisted of a conglomeration of facts unrelated to the crime and apparently offered solely to show Patton's propensity to commit crimes of this nature. This evidence was irrelevant under Mississippi Rule of Evidence 401 and runs directly afoul of Mississippi Rule of Evidence 404(b), which provides that "[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." **Miss. R. Evid. 404(b)**. This Court holds that the evidentiary rulings complained of in this issue were not error.

## V.

### **Denial of Investigative Assistance**

Harris also raises the issue that he was prejudiced by the trial court's refusal to provide him with an investigator to assist in his defense. However, he does not address this issue in his brief with any supporting argument or citations of authority other than to allege that the court refused to hear his motion. We find this assertion to be factually inaccurate. Harris's counsel moved, *ore tenus*, on January 9, 1995, for the appointment of an investigator. The court declined to appoint one because counsel did not offer any specific showing of need for one. No subsequent effort was made to establish a factual basis for the necessity of an investigator until a belated motion was filed just three days before trial was scheduled to begin. The supreme court has said that there is no unequivocal right to an investigator in every case and consideration of these requests must be on a case-by-case basis. *Billiott v. State*, 454 So. 2d 445, 453 (Miss. 1984) (quoting *Davis v. State*, 374 So. 2d 1293, 1297 (Miss. 1979)). In the absence of any factual support for the motion at a time when it could have been meaningfully considered by the trial court, we have no basis to find that the trial court erred in its ruling.

## VI.

### **Refusal to Consider Pre-trial Motions**

Harris complains that the trial court refused to consider a number of pretrial motions filed by his attorneys after a motion deadline imposed by court order. The trial court entered an order requiring all pretrial motions to be filed by March 31, 1995 and to be heard and disposed of no later than April 14, 1995.

Harris filed three motions on the day of the filing deadline and more than twenty motions after the motion deadline. The court disposed of the three timely-filed motions but declined to consider the remaining motions except for one, that being a motion for continuance that will be discussed separately. On this appeal, Harris does not single out any one or more of these motions and demonstrate how he was prejudiced at trial by the court's refusal to consider them. These motions ranged widely in subject matter. Such topics were addressed in the motions as a requirement that the court adjourn at a reasonable time each day, that the defendant not be shackled in the presence of the jury, that a daily transcript of trial proceedings be furnished, and a number of motions intended to limit the admissibility of evidence.

The merit of any of these motions is not readily apparent and the appellant does not attempt to demonstrate that any of the motions were meritorious. There is, for example, no indication that Harris was prejudiced by unduly lengthy trial sessions or that he was ever brought into the presence of the jury in shackles. In all events, the need to restrain a defendant is a matter left to the discretion of the trial judge. *Brown v. State*, 690 So. 2d 276, 287 (Miss. 1996) (citing *Rush v. State*, 301 So. 2d 297, 300 (Miss. 1974)). There is also no indication that inadmissible evidence was presented at trial because of the trial court's refusal to consider the defendant's untimely motions in that regard. We offer these comments as illustrative of the fact that Harris has not made the barest attempt to show that he was actually prejudiced in his defense by his inability to bring these various matters to the attention of the trial court. We do not see the necessity of considering each of the motions and then embarking on an independent review of the record to see (a) whether the motion had merit, and (b) if so, whether anything prejudicial to the defendant's right to a fundamentally fair trial occurred that could have been avoided had the motion been considered.

## VII.

### Denial of a Continuance

One of Harris's untimely motions was for a continuance of his trial date. The court did consider that motion at the April pre-trial motion hearing. The court, noting that Harris had already been granted two previous continuances and further noting that Harris had filed a *pro se* motion for a speedy trial, refused to grant another continuance. The only basis for Harris's continuance motion was that his trial counsel claimed he had not had adequate time and resources to prepare for trial.

The trial court must be granted wide discretion in the management of its docket. This specifically includes consideration of requests for a continuance. *See Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995). We review the denial of continuance motions on an abuse of discretion standard and should interfere only if convinced that the denial of the continuance has resulted in a manifest injustice. *Id.* The trial court, in refusing a third continuance request, concluded that the defense had adequate time and resources, including the service of two attorneys, in order to properly prepare for the trial of the case. We are unable to discover an abuse of discretion in the trial court's ruling that would require this Court to intervene.

## VIII.

### Conclusion

Having considered all the issues advanced by the appellant, this Court concludes that the conviction must be affirmed.

**THE JUDGMENT OF THE WAYNE COUNTY CIRCUIT COURT ON CHANGE OF VENUE FROM LAUDERDALE COUNTY OF CONVICTION AS A HABITUAL OFFENDER ON COUNTS I AND II OF AGGRAVATED ASSAULT AND SENTENCES OF TWENTY (20) YEARS EACH, COUNT III OF CAPITAL MURDER AND SENTENCE OF LIFE IN PRISON, AND COUNT IV OF ARMED ROBBERY AND SENTENCE OF LIFE IN**

**PRISON, SENTENCES TO RUN CONSECUTIVELY TO EACH OTHER AND CONSECUTIVELY TO ANY PREVIOUSLY IMPOSED SENTENCE, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO WAYNE COUNTY.**

**BRIDGES, C.J., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. DIAZ, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BRIDGES, C.J., AND THOMAS, P.J.**

DIAZ, J., CONCURRING:

I concur with the majority. However, I do not agree that there is no duty upon a defendant to object to a refused jury instruction as the majority so holds in its discussion of that issue. I would hold that a defendant who does not interpose an objection to a refused jury instruction is barred from raising that issue on appeal. I base my reasoning upon *Nicholson on behalf of Gollott v. State*, 672 So. 2d 744 (Miss. 1996). *Gollott* states:

Regarding the instructions Gollott claims the trial court erroneously refused, Gollott failed to object to the refusal of D-4. As a result, this Court is not bound to address the alleged error on appeal.

*Id.* at 752. The majority relied on *Carmichael v. Agur Realty Co., Inc.*, 574 So. 2d 603 (Miss. 1990), which is in direct conflict with *Gollott*. Although neither case has been reversed, and both are considered to be "good law", *Gollott* is by far, the more recent statement of the supreme court on this matter. To ignore *Gollott* and to follow the dictates of *Carmichael* is to, in effect, overrule the most recent supreme court authority addressing this issue. I therefore, reach the same conclusion as that of the majority but through a different process.

**BRIDGES, C.J. AND THOMAS, P.J., JOIN THIS SEPARATE OPINION.**