

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00620 COA**

**DONALD FLOWERS, KENNETH BLACKWELL,
JERRY STEWARD AND RICKY WHITE**

APPELLANTS

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:	05/20/94
TRIAL JUDGE:	HON. KEITH STARRETT
COURT FROM WHICH APPEALED:	COPIAH COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	M. A. BASS, JR. M. LAMAR ARRINGTON, JR. PRO SE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	JERRY RUSHING
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	EACH APPELLANT: CONSPIRACY TO COMMIT THE CRIMES OF AGGRAVATED ASSAULT, AGGRAVATED ASSAULT (FOUR COUNTS) AND FOR STEWARD ALSO SHOOTING INTO AUTOMOBILE; SENTENCES FOR EACH APPELLANT VARY
DISPOSITION:	AFFIRMED IN PART, REVERSED IN PART - 3/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/8/98

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

PAYNE, J., FOR THE COURT:

Donald Flowers, Kenneth Blackwell, Jerry Steward, and Ricky White were convicted in count I for conspiracy to commit aggravated assault and in counts II, III, IV, and V for aggravated assault. The trial court sentenced each appellant to five years in count I and fifteen years in each of counts II, III, IV, and V. The trial court ordered the sentences in counts I, II, and V to run concurrently and the sentences in counts III and IV to run consecutively. Additionally, Jerry Steward was convicted for shooting into an automobile and sentenced to serve a term of eight years. The complete sentence ordered for each appellant is as follows: Donald Flowers -- forty-five years with twenty years to serve and last twenty-five years suspended pending successful completion of five years probation upon release, get a GED, pay a \$5,000 fine and court costs; Kenneth Blackwell -- forty-five years with thirty years to serve and last fifteen years suspended pending successful completion of five years probation upon release, get a GED, pay a \$5,000 fine and court costs; Jerry Steward -- fifty-three years to serve, pay a \$6,000 fine and court costs; Ricky White -- forty-five years with thirty-five years to serve and last ten years suspended pending successful completion of five years probation upon release, obtain a GED, pay a \$5,000 fine and court costs. All sentences are to be served in the custody of the Mississippi Department of Corrections.

Appellants' motions for JNOV or, in the alternative, a new trial were overruled. Finding error as to Issue IV as it pertains to appellant Ricky White, we reverse and render. As to appellants Flowers, Blackwell, and Steward, we affirm the decision of the trial court in all issues.

Appellants Donald Flowers and Kenneth Blackwell appeal together. Appellants Jerry Steward and Ricky White each filed separate briefs. Some of the issues overlap. As to those issues, we will address the arguments of all appellants together. We will address all other issues individually. The issues will be addressed as follows:

Assignment of Error by Donald Flowers, Kenneth Blackwell, Jerry Steward, and Ricky White

I. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING A MISTRIAL WHEN THE DISTRICT ATTORNEY ELICITED TESTIMONY OF OTHER CRIMES IN CONTRAVENTION OF THE MOTION IN LIMINE.

Assignments of Error by Donald Flowers, Kenneth Blackwell, and Ricky White

II. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING A MISTRIAL DUE TO THE IMPLEMENTATION OF EXTRAORDINARY SECURITY MEASURES AND BRINGING THE APPELLANT INTO THE COURTROOM IN HANDCUFFS AND SHACKLES.

III. WHETHER THE TRIAL COURT ERRED BY SEQUESTERING THE JURY ON THE STATE'S MOTION IN VIOLATION OF UNIFORM CIRCUIT COURT RULE 10.02.

IV. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL BY DENYING APPELLANTS' MOTION FOR A DIRECTED VERDICT AND PEREMPTORY JURY INSTRUCTIONS AS THE VERDICT IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE.

V. WHETHER THE VERDICT OF THE JURY IS THE RESULT OF BIAS, PASSION, OR

PREJUDICE DUE TO IMPROPER CLOSING REMARKS OF THE STATE.

Assignments of Error by Donald Flowers and Kenneth Blackwell

VI. WHETHER THE TRIAL COURT ERRED BY NOT QUASHING THE INDICTMENT.

VII. WHETHER THE TRIAL COURT ERRED BY NOT SEVERING THE DEFENDANTS.

Assignments of Error by Jerry Steward

VIII. WHETHER THE TRIAL COURT ERRED, OR COUNSEL WAS INEFFECTIVE, FOR NOT ALLOWING STEWARD TO TESTIFY AT HIS TRIAL.

IX. WHETHER THE CHARGING OF APPELLANT FOR THE ACTUAL OFFENSES AND CONSPIRACY TO COMMIT THE SAME IDENTICAL OFFENSES VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

FACTS

In the early morning hours of June 6, 1993, Timothy Wilson, John Jordan, Willie Robinson, and five friends went to Stewart's Club (Appellant Jerry Steward is not connected to the ownership or naming of Stewart's Club) in Hazlehurst after leaving a graduation party at another club. Upon entry into Stewart's Club, Timothy Wilson was confronted by a group of guys wearing khaki pants, white tee shirts, and blue bandanas. One of these guys accused Wilson of "perpetrating a gangster." At trial, eyewitness Mecha Pickens identified Kenneth Blackwell as the person who confronted Wilson. Wilson, however, testified that he was initially confronted by Donald Flowers. Wilson indicated that he denied being in a gang but Flowers continued to harass him. Fearing an altercation may result, the bouncer for Stewart's Club asked Wilson and his friends to leave the club. Once outside, Wilson and his friends were attacked by Blackwell and other members of his gang known as the Gangster Disciples. Specifically, the testimony indicated that Blackwell was seen hitting John Jordan in the ribs and that Flowers punched Robinson and cut him about the face with a knife. None of the victims or eyewitnesses could testify any further to who caused specific injuries. Following a brawl in the parking lot and numerous gunshots, Wilson, Jordan, and Robinson ended up in the hospital. Dr. Terry Brantley, the emergency room doctor, testified that he treated Robinson for a stab wound to the back and multiple cuts to the face and ear. Dr. Brantley testified that Jordan had incurred a gunshot wound to the left testicle. At another hospital, Wilson was attended by Dr. Kenneth Whittington and treated for several lacerations about his head and arm. Dr. Whittington indicated that the most serious of Wilson's injuries was a four inch laceration to the head which was most likely caused by a "great deal of force" with a "blunt object."

The testimony indicated that Jerry Steward was the leader of the Gangster Disciples and was the person who shot into the vehicle in which Jordan was riding in his attempt to escape. The evidence indicated that this same vehicle had been shot a total of eleven times.

As to the conspiracy charge, the State presented the testimony of confidential informant Daniel Gardner that Steward had conducted a meeting at his home attended by all of the appellants in

addition to numerous other alleged gang members. Gardner stated that at this meeting on June 5, 1993, the topic of discussion was protecting the Gangsters' turf at any cost. Gardner indicated that there was further discussion about a previous altercation with some guys from Lincoln County and that Steward stated that the tires on any Lincoln County cars would be cut and that the owners of these cars would be "beat down." The State presented further evidence that another meeting had taken place prior to the June 5th meeting and that the same discussion took place.

All four appellants were tried together. Following a trial on the merits, the jury found all four appellants guilty of count I conspiracy to commit aggravated assault, count II aggravated assault on John Jordan with a knife and a bottle, count III aggravated assault on Tim Wilson with a knife, count IV aggravated assault on Willie Robinson with a bottle, and count V aggravated assault on John Jordan with a gun. Additionally, Jerry Steward was convicted of shooting into an automobile. Feeling aggrieved, the appellants filed this appeal asserting a total of nine issues.

ANALYSIS

Assignment of Error by Donald Flowers, Kenneth Blackwell, Jerry Steward, and Ricky White

I. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING A MISTRIAL WHEN THE DISTRICT ATTORNEY ELICITED TESTIMONY OF OTHER CRIMES IN CONTRAVENTION OF THE MOTION IN LIMINE.

In support of the prosecution's conspiracy case, confidential informant Daniel Gardner testified that he attended a Gangster Disciples' meeting which was being conducted by Jerry Steward. During the direct examination of Gardner, the prosecutor asked what his purpose was for being at the meeting. Gardner replied, "My purpose was locating narcotics or" Before Gardner could finish his answer, the defense objected and subsequently moved for a mistrial. The judge sustained the objection stating that the prosecution had violated the motion in limine order⁽¹⁾ by eliciting information about narcotics from Gardner. The trial judge, however, denied the motion for a mistrial stating that Gardner's statement was harmless in light of the fact that the prosecution had already established that Gardner was an informant for the Bureau of Narcotics. The trial judge indicated further that he would admonish the jury if the defense so desired. The defense declined the offer to admonish, fearing the admonishment would bring more attention to Gardner's statement.

The appellants argue that the prosecution intentionally interjected irrelevant prejudicial material concerning narcotics and that this intentional move is evident by the fact that Gardner's testimony in no way helped establish the existence of a conspiracy or the appellants' involvement in a conspiracy. Appellants argue that the violation of the motion in limine order was prejudicial to the defense and that an admonishment would not have cured the impact of Gardner's statement. Appellants argue further that there is no reason to have a motion in limine order if the prosecution can avoid it under the auspices of harmless error.

The State responds that the prosecution established without objection that Gardner was an informant for the Bureau of Narcotics. The State argues that this information was elicited prior to Gardner's objectionable statement and that the trial judge was correct in ruling that the testimony was harmless.

The Mississippi Supreme Court has held that a "trial court must declare a mistrial when there is an

error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case." *Gossett v. State*, 660 So. 2d 1285, 1290 (Miss. 1995) (citing the Uniform Criminal Rules of Circuit Court Practice 5.15).⁽²⁾ "The trial judge is permitted considerable discretion in determining whether a mistrial is warranted since the judge is best positioned for measuring the prejudicial effect." *Id.* In the present case, the judge sustained the objection, and we find that the judge acted appropriately in sustaining the objection and offering to admonish the jury. The trial judge was well within his discretion in determining that a mistrial was not warranted. We therefore find no merit in the appellants' argument.

Assignments of Error by Donald Flowers, Kenneth Blackwell, and Ricky White

II. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING A MISTRIAL DUE TO THE IMPLEMENTATION OF EXTRAORDINARY SECURITY MEASURES AND BRINGING THE APPELLANT INTO THE COURTROOM IN HANDCUFFS AND SHACKLES.

Appellants first take issue with the fact that during this trial and only during this trial, metal detectors were used at the back entrance of the courthouse. Appellants argue that the use of the metal detectors implied that the appellants were more violent than the normal defendant being tried in Copiah County. Appellants argue further that such an implication prejudiced the jury against the appellants from the beginning of the trial and created a level of suspicion against the appellants which could not be overcome.

Secondly, appellants argue that they were prejudiced by Ricky White's being brought into the courtroom in the presence of the jury venire in handcuffs and shackles. Appellants argue that exposing the jury to any vestige of the accused's incarceration impinges on his right to a fair trial. Appellants contend that the combination of the heightened security and the shackling of White unfairly and fatally prejudiced the jury against them.

With respect to the use of the metal detectors, the State responds that the appellants have cited no authority for the proposition that such measures create unfair prejudice against the defense. In support, the State relies on *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986), which held that the presence of four uniformed state troopers on the front row of the spectators' section during the trial did not indicate that the defendant was "particularly dangerous or culpable."

We agree with the argument presented by the State. There has been no showing by the appellants nor any citation to authority that the use of metal detectors unduly prejudices criminal defendants. We therefore find no merit to this portion of the appellants' argument.

In regard to appellants' second argument, the State contends that the appellants can show no more than a "technical violation of the rule prohibiting shackling." *See Rush v. State*, 301 So. 2d 297, 300 (Miss. 1974) (holding no prejudice inured to the defendant as result of the jury venire seeing the defendant in handcuffs). We agree.

In *Rush v. State*, 301 So. 2d 297, 300 (Miss. 1974), the deputy sheriff brought the defendant into the courtroom in handcuffs in the presence of members of the special venire. Upon the request of

defense counsel, the handcuffs were immediately removed. *Id.* The Mississippi Supreme Court stated:

It is a common-law right of a person being tried for the commission of a crime to be free from all manner of shackles or bonds, whether of hands or feet, when in court in the presence of the jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the prisoner. Whether that ought to be done is in the discretion of the court, based upon reasonable grounds for apprehension. But, if this right of the accused is violated, it may be ground for the reversal of a judgment of conviction.

Id. However, the court felt that "the failure, through an oversight, to remove handcuffs from a prisoner for a short time or any technical violation of the rule prohibiting shackling, not prejudicial to him, is not ground for reversal." *Id.*

Here, the venire saw White in handcuffs and shackles during the process of his coming into court. As in *Rush* above, it appears that this incident is not so egregious as to deprive the appellants of a fair trial. At the most, the appellants can show no more than a "technical violation of the rule prohibiting shackling." *Rush*, 301 So. 2d at 300. White's handcuffs were removed immediately and the sheriff's department explained that they decided to wait until a break in the proceeding to remove the shackles so as not to draw further attention to the fact that White was shackled. White's shackles were in fact removed at the first break, and he was permitted to remain unshackled throughout the rest of the trial. Thus, under the facts and circumstances of this case, we are of the opinion that the action of the deputy sheriff in bringing the appellant into the courtroom in the presence of the prospective jurors while handcuffed and shackled did not result in any prejudice to his right to a fair trial. Accordingly, the appellants' argument is without merit.

III. WHETHER THE TRIAL COURT ERRED BY SEQUESTERING THE JURY ON THE STATE'S MOTION IN VIOLATION OF UNIFORM CIRCUIT COURT RULE 10.02.

Following the direct examination of the State's first witness, the court outside the presence of the jury announced that a request had been made by the State to sequester the jury. The trial judge then announced that he would grant the State's request. The attorneys for White and Steward objected and were overruled. At the end of the day, the trial judge informed the jury that they would be sequestered at a local motel. Outside the presence of the jury, the attorney for Flowers and Blackwell informed the judge that they did not want the jury to be sequestered. At this point, the prosecutor informed the court that one of the State's witnesses had been approached and threatened the day before by Jerry Steward at a local grocery store and that was the reason the State now wanted to sequester the jury.

The appellants argue that the State's request to sequester the jury after the trial had begun was in violation of **Rule 10.02 of the Uniform Rules of Circuit and County Court Practice**, which states in pertinent part as follows:

In all other criminal cases, the jury may be sequestered upon request of either the defendant or the state made at least 48 hours in advance of the trial. The court may, in the exercise of sound judicial discretion, either grant or refuse the request to sequester the jury. In the absence of a request, the court may, on its own initiative, sequester a jury at any stage of a trial.

The appellants contend that the trial court erred in granting the State's request to sequester the jury on the ground that the State failed to make its request forty-eight hours prior to the commencement of the trial.

The State points out that URCCC 10.02 also permits the court to sequester a jury at any stage of the trial on its own initiative. The State argues that due to the alleged contact by Jerry Steward with one of the State's witnesses, the trial judge was well within his discretion to sequester the jury.

We agree. It is clear that the need for sequestration did not come up until the State became aware of Jerry Steward's alleged contact with a State witness. Here, the State properly brought this information to the court's attention and also wisely requested that the jury be sequestered. The fact that the State made a request for sequestration of the jury and that the request did not come forty-eight hours prior to trial does not change the fact that the judge was authorized under URCCC 10.02 to sequester the jury at any stage of the trial if there was a need to do so. Clearly, there was a need in this case. We therefore find no merit in the appellants' argument.

IV. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL BY DENYING APPELLANTS' MOTION FOR A DIRECTED VERDICT AND PEREMPTORY JURY INSTRUCTIONS AS THE VERDICT IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE.

Flowers, Blackwell, and White challenge both the sufficiency and the weight of the evidence as to the convictions of conspiracy to commit aggravated assault and the convictions of four counts of aggravated assault. A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled the appellants' motions for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with the [appellants'] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are 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.

Id. (citations omitted).

The appellants also complain that the jury verdict was against the overwhelming weight of the evidence, and they request a new trial. The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *Id.* at 781; *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (holding that witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (holding that witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the

weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.* Keeping in mind this standard of review for both the sufficiency and the weight of the evidence, we turn to the arguments of the appellants and the State.

As to the conspiracy conviction, the appellants argue that the State provided no proof that Flowers, Blackwell, and White consented to any plan to commit aggravated assault. Appellants argue that the only evidence the State had was that there were possibly two meetings at Jerry Steward's house in which Steward discussed slashing the car tires on vehicles with Lincoln County plates that came to Stewart's club. The appellants argue that there was nothing said about assaulting people. Appellants argue further that the testimony indicated that there were twenty or more people at these meetings and that the State's testimony is contradictory as to whether Flowers, Blackwell, and White were even present at the meetings. Appellants contend that even if they had been present at the meetings, their mere presence is not enough to sustain a conviction for conspiracy to commit aggravated assault. Appellants argue that there was absolutely no evidence of a common plan much less an agreement thereto by Flowers, Blackwell, and White.

As to the aggravated assault convictions, Flowers, Blackwell, and White argue that there was no evidence tying any one of the appellants to the assault on John Jordan with a knife or broken bottle, or to the assault on Tim Wilson with a knife, or to the assault on Willie Robinson with a bottle. Appellants contend that the only evidence of physical contact with any of the victims was testimony that Donald Flowers got into a fist fight with Willie Robinson which does not rise to the level of aggravated assault. Finally, the appellants argue that there was absolutely no testimony that Flowers, Blackwell, or White shot John Jordan.

The State responds that the testimony of confidential informant Daniel Gardner placed all three at the meeting on June 5, 1993, at which the group agreed to do "whatever they had to do" to defend their turf. Furthermore, the State argues that Fredrick Hamilton's testimony places all three appellants at a second meeting at Stewart's house at which it was specifically agreed that as a group, the Gangsters would "beat down" anyone from Lincoln County that they saw at Stewart's Club. The State contends that the evidence proved that a plan for group action was articulated at the meetings and that no one voiced an objection.

Likewise, the State argues that the proof amply sustains the jury determination that the appellants in fact carried out their plan to commit aggravated assault. The State contends that contrary to the appellants' argument, each appellant's specific acts against each individual victim is immaterial, in light of the strong proof that they were acting in concert.

The Mississippi Supreme Court has dealt with the issue of conspiracy. The conspiracy law provides:

For there to be a conspiracy, "there must be recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purpose." The conspiracy agreement need not be formal or express, but may be inferred from the

circumstances, particularly by declarations, acts, and conduct of the alleged conspirators. Furthermore, the existence of a conspiracy, and a defendant's membership in it, may be proved entirely by circumstantial evidence.

***Franklin v. State*, 676 So. 2d 287, 288 (Miss. 1996)** (quoting *Nixon v. State*, 533 So. 2d 1078, 1092 (Miss. 1987)). The supreme court has stated further that "absent evidence of purposeful behavior, mere presence at the scene of the crime, even when coupled with the knowledge that a crime is being committed, is insufficient to establish membership in a conspiracy; and mere association with conspirators is similarly insufficient." ***Davis v. State*, 485 So. 2d 1055, 1058 (Miss. 1986)**. However, "[c]ommission of an offense is admissible as showing the conspiracy, since what the defendants actually did is evidence of what they intended to do." ***Gray v. State*, 487 So. 2d 1304, 1306 (Miss. 1986)**.

Looking at the facts of the present case, we find that there was evidence that Flowers, Blackwell, and White were present at at least one of the meetings held by Steward. The testimony at trial indicated that Steward discussed protecting the Gangsters' turf by any means necessary. The testimony also pertained to the fact that the Gangsters would resort to violent actions if necessary especially if people from Lincoln County were to return to Hazlehurst. While the victims in this case were not from Lincoln County, the evidence shows that the Gangsters perceived them as a threat to their "turf" in that Tim Wilson was confronted and harassed in regard to the cap he was wearing. The testimony indicated that the colors of the cap and the direction it was turned signified to the alleged members of the Gangsters Disciples that Tim Wilson was a member of another gang. Despite Wilson's insistence that he did not belong to a gang, his subsequent removal of the cap, and Wilson and his friends' departure from the club, the evidence is clear that both Flowers and Blackwell played an active part in starting and participating in the brawl that resulted in serious injury to the victims. Flowers and Blackwell argue that their mere presence at Steward's meetings was not sufficient to prove that they conspired to commit aggravated assault. We agree. However, Flowers and Blackwell's subsequent involvement in the brawl at Steward's Club is admissible to show the existence of a conspiracy since what they actually did is evidence of what they intended to do.

Because we find that Blackwell and Flowers were part of the conspiracy to commit aggravated assault, the fact that the State could not specifically show that Flowers and Blackwell injured each victim as charged in the indictment is immaterial. The law is well established that "[t]he act of any conspirator is the act of all of the conspirators" ***Norman v. State*, 381 So. 2d 1024, 1029 (Miss. 1980)**. Thus, Flowers and Blackwell are equally responsible for the injuries to Wilson, Robinson, and Jordan regardless of which injury they actually inflicted. As to Flowers and Blackwell, keeping in mind the standards of review mentioned above, we find no merit in their challenge to the weight and sufficiency of the evidence.

As to Ricky White, we find that the evidence for conspiracy as well as the evidence for the four counts of aggravated assault was insufficient to support a guilty verdict. The only evidence that the State could provide in regard to White was that he was present at Steward's meetings and that he was present at the club on the night of the brawl. There was absolutely no evidence that White participated in the fight at the club. As a matter of fact, the testimony indicated that White was employed as a bouncer at Steward's Club, therefore justifying his presence at the club for a reason other than furthering the conspiracy. Thus, absent his involvement in the fight, we are unable to

connect White to the conspiracy to commit aggravated assault. *See King v. State*, 580 So. 2d 1182, 1188 (Miss. 1991) ("Mere presence at the scene of the crime, even when coupled with knowledge that a crime is being committed, is insufficient to establish membership in a conspiracy. Moreover, 'mere association with conspirators is similarly insufficient.'" (citations omitted)). Absent a finding that White was a conspirator, we can also not hold him responsible for the acts of the conspirators. As such, the finding by the jury that White was guilty of conspiracy to commit aggravated assault and the finding that White was guilty on each of four counts of aggravated assault is reversed and rendered.

V. WHETHER THE VERDICT OF THE JURY IS THE RESULT OF BIAS, PASSION, OR PREJUDICE DUE TO IMPROPER CLOSING REMARKS OF THE STATE.

During closing arguments, the prosecutor made the following remarks:

You've got three guys who were beaten, stabbed with bottles and knives and ultimately shot. Now, is that where we live? Is that where we're coming to? You know, talk about turf war, this is a turf war when those who perpetrate fear and violence on the rest of us, and those of us who want a decent society with some hope for our children, want a good education, and want to walk on the streets without fear of violence. You know, people always talk about what we're doing about crime. Well, we're here. This is what we're doing about crime. That's why we have juries that are brought in before the bar of justice. It's only a matter of time if we don't start doing something about it---

At this point, one of the defense attorneys interjected an objection which was sustained. The prosecutor then stated, "We've got to let people know, this has got to stop." The defense again objected and this objection was also sustained. The trial judge then admonished the jury as follows:

Ladies and gentleman, your purpose is to determine the guilt or innocence, it's plain and simple. That is your purpose for sitting as jurors. You look at the facts, look at the evidence and render a verdict, irrespective of who it hurts or doesn't hurt, who it does good or doesn't do good, your job is simply to look at the facts and render a verdict.

The appellants argue that the above argument was improper and resulted in a verdict influenced by bias and prejudice despite the fact that the objections were sustained and the jury admonished. The appellants contend that the argument did not stay within the boundaries of this particular case but, instead, encouraged the jury to do something about gangs in general. It is well settled that a prosecutor is allowed considerable latitude within which he may argue:

The right of argument contemplates liberal freedom of speech and range of discussion confined only to bounds of logic and reason; and if counsel's argument is within the limits of proper debate it is immaterial whether it is sound or unsound, or whether he employs wit, invective and illustration therein. Moreover, figurative speech is legitimate if there is evidence on which it may be founded. Exaggerated statements and hasty observations are often made in the heat of debate, which, although not legitimate are generally disregarded by the court, because in its opinion they are harmless.

Taylor v. State, 672 So. 2d 1246, 1269 (Miss. 1996) (quoting *Monk v. State*, 532 So. 2d 592, 601

(Miss. 1988)). "The test to determine if an improper argument by the prosecutor requires reversal is whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Id.* at 1270 (citation omitted). Furthermore, as the State correctly points out, when the State presents an objectionable comment in closing argument, and the court sustains the objection and instructs the jury to disregard the comment, an appellate court should presume that the jury followed the court's instructions and that the instructions dissipated any prejudicial effect. *Crenshaw v. State*, 520 So. 2d 131, 134 (Miss. 1988); *see also Williams v. State*, 512 So. 2d 666, 671 (Miss. 1987) ("Our law presumes the jury does as it is told.").

We therefore find that any prejudicial effect the prosecution's closing argument may have had was cured by the trial judge's actions.

Assignments of Error by Donald Flowers and Kenneth Blackwell

VI. WHETHER THE TRIAL COURT ERRED BY NOT QUASHING THE INDICTMENT.

Prior to trial, Flowers and Blackwell each filed motions to quash the indictment, alleging that the indictment was vague and ambiguous. The appellants contend that the count I conspiracy charge is especially vague and ambiguous. Appellants assert that count I does not adequately notify them of the elements surrounding when and where the conspiracy took place and therefore fails to allege the essential facts constituting the crime of conspiracy. Appellants argue that without knowing when or where the alleged conspiracy took place, they were blind-sided with evidence of two separate meetings for which they were unprepared to defend. Appellants rely on *Peterson v. State*, 671 So. 2d 647, 655 (Miss. 1996), for the proposition that "[t]he essential elements of the offense must be alleged in order for an indictment to be sufficient. The right of the accused to be informed of the nature and cause of the accusation against him is essential to the preparation of his defense."

The State responds that the indictment complies with Rule 2.05 of the Mississippi Rules of Criminal Circuit Court Practice.⁽³⁾ The indictment reads in pertinent part that Kenneth Blackwell, Donald Flowers and other named defendants known as the Gangsters

on or about the 6th day of June, 1993, in Copiah County, Mississippi, and within the jurisdiction of this court, did wilfully, unlawfully, feloniously and knowingly conspire and agree, each with the other, and with [named unindicted co-conspirators and others] then and there to wilfully, unlawfully, feloniously and knowingly commit the crime of aggravated assault, contrary to and in violation of Sections 97-1-1 and 97-3-7 of the Mississippi Code of 1972, this being count one of the indictment;

The State contends that the indictment gave the defendants fair notice that they were being charged with conspiracy to commit aggravated assault, four counts of aggravated assault, and shooting into an automobile. Specifically, the State argues that count I's identification of the date of the alleged conspiracy as "on or about the 6th of June, 1993," was sufficient. The State relies on *Morris v. State*, 595 So. 2d 840, 842 (Miss. 1991), for the proposition that "time and place have been viewed as not requiring considerable specificity because they ordinarily do not involve proof of an element of crime. The time allegation can refer to the event as having occurred 'on or about' a certain date and within reasonable limits." (citations omitted).

Flowers and Blackwell correctly state that "[t]he essential elements of the offense must be alleged in order for an indictment to be sufficient." *Peterson*, 671 So. 2d at 655. This proposition, however, does not help their argument as the indictment in question contains the "essential elements" of the offenses for which the appellants have been charged. There is no question that Flowers and Blackwell were adequately notified of the crimes for which they were being charged. As for the generality of the date and failure of the indictment to specify a location of the conspiracy, the State is correct that our case law does not require such specificity as to time and place. *Morris*, 595 So. 2d at 842; *see also Fisher v. State*, 690 So. 2d 268, 271 (Miss. 1996). Furthermore, in addition to case law, this issue is governed by UCRCCP 2.05 which states in pertinent part as follows:

The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation against him. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:

....

(5) The date and if applicable the time, on which the offense was alleged to be committed. Failure to state the correct date shall not render the indictment insufficient.

In sum, neither UCRCCP 2.05 nor any case authority or statute requires more than was alleged in the indictment here. We therefore find no merit in the appellants' argument.

VII. WHETHER THE TRIAL COURT ERRED BY NOT SEVERING THE DEFENDANTS.

Appellants Blackwell and Flowers each filed motions to sever their case from that of appellants Steward and White. Blackwell and Flowers contend that trying all of the defendants together created a difficult task for the jury to distinguish between the alleged acts committed by Blackwell and Flowers and the alleged acts committed by Steward and White. Blackwell and Flowers also argue that the decision by Steward and White not to testify created an inference of guilt which reflected badly on them despite the fact that Blackwell and Flowers did testify. Finally, Blackwell and Flowers contend that evidence which was admissible against Steward and White but which would have been inadmissible against Blackwell and Flowers had the trial been severed was admitted to the detriment of their defense. Specifically, Blackwell and Flowers point to the admission into evidence of photographs of Steward's home where the conspiracy allegedly took place and the testimony by Banks that Steward had a gun on the night of the brawl and shooting at Stewart's Club.

The State responds that the evidence as a whole did not incline more toward the guilt of one defendant than the other nor did the proof tend to show Blackwell and Flowers guilty only by association.

The trial court has the discretion to grant a severance if it is necessary to promote a fair determination of the defendant's guilt or innocence. *Tillman v. State*, 606 So. 2d 1103, 1106 (Miss. 1992); *see also URCCC 9.03 (formerly UCRCCP 4.04); Miss. Code Ann. § 99-15-47 (Rev. 1994)*. Absent a showing of prejudice, there are no grounds to hold that the trial court abused its discretion. *Id.* The trial court abuses its discretion in not granting a severance if one of the co-

defendants tends to exculpate himself at the expense of the other defendant, or the balance of the evidence tilts more toward the guilt of one co-defendant than to the other. *Gossett v. State*, 660 So. 2d 1285, 1289 (Miss. 1995).

We have reviewed the record and do not find that the evidence tilts more toward the guilt of one co-defendant than to any other. We also find that neither Steward nor White tended to exculpate themselves at the expense of Blackwell and Flowers. As a matter of fact, Steward and White did not testify at the trial whereas Blackwell and Flowers each testified in his own behalf. Similarly, in *Hawkins v State*, 538 So. 2d 1204, 1207-08 (Miss. 1989), one defendant testified and the other did not. The supreme court ruled that the defendant who testified was not entitled to a severance, since he was allowed to set forth his case to the jury without any conflicting testimony from his co-defendant, regardless of the severance issue. *Id.* Therefore, there was no showing of prejudice to the defendant as a result of the trial court's failure to grant a severance. *See also Tillman*, 606 So. 2d at 1106.

We hold that the rationale employed in *Hawkins* is appropriate in the case *sub judice*. Both Blackwell and Flowers were able to put on their own defense regardless of the severance issue. Furthermore, because the events surrounding the offenses charged as well as the actions of the defendants were so interconnected, we would be hard pressed to find that evidence admissible against one defendant would not also be admissible against the other defendants. Accordingly, we find that the trial judge did not abuse his discretion in denying the motions to sever the trial.

Assignments of Error by Jerry Steward

VIII. WHETHER THE TRIAL COURT ERRED, OR COUNSEL WAS INEFFECTIVE, FOR NOT ALLOWING STEWARD TO TESTIFY AT HIS TRIAL.

Steward argues that because his attorney refused to permit him to testify at trial, he was denied effective assistance of counsel. Citing *Culberson v. State*, 412 So. 2d 1184 (Miss. 1982), Steward suggests further that the trial court erred in failing to make an on-the-record determination that he had waived his right to testify.

First of all, we find that Steward's reliance on *Culberson* in assigning error to the trial court is misplaced. The *Culberson* court, unlike the present case, was presented with this same issue by way of a petition for a writ of *error coram nobis*. *Id.* at 1186. There, the court granted the petition and remanded the case for an evidentiary hearing to determine whether Culberson was prevented from testifying by his attorney. *Id.* As an aside to this decision, the court suggested that trial judges should make an on-the-record determination as to whether the defendant in fact wanted to waive his right to testify. *Id.* This issue was revisited in *Shelton v. State*, 445 So. 2d 844, 847 (Miss. 1984). There, the court clarified that the suggestion in *Culberson* was just that--a suggestion. *Id.* The *Shelton* court stated very clearly that "while the suggestion [in *Culberson*] was certainly strong, it was not mandatory." *Id.* As such, the trial court cannot be held in error for its failure to make an on-the-record determination that Steward wished to waive his right to testify.

In addition to assigning error to the trial court, Steward also raises the issue of ineffective assistance of counsel arguing that his lawyer refused to let him testify despite his request to do so. The law is well established that "[t]o prove a claim of ineffective assistance of counsel, a petitioner must show

(1) deficiency of counsel's performance (2) sufficient to constitute prejudice to the defense." *Walker v. State*, No. 94-CA-00705-SCT at *2 (Miss. Nov. 20, 1997) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). It is also well established that the defendant carries the burden of proving both prongs of the *Strickland* test cited above. *Id.* As such, this issue fails on direct appeal as there is absolutely nothing in the record to indicate that Steward made it known to his attorney or the court that he wanted to testify much less any indication that Steward's attorney prevented Steward from testifying. *See Jaco v. State*, 574 So. 2d 625, 636 (Miss. 1990) ("As the point was not presented in any way, shape, form or fashion at trial, it is not available to the Jaco brothers on direct appeal."). Steward has clearly failed to carry his burden of proof on this issue. We therefore affirm as to this issue.

IX. WHETHER THE CHARGING OF APPELLANT FOR THE ACTUAL OFFENSES AND CONSPIRACY TO COMMIT THE SAME IDENTICAL OFFENSES VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

Steward argues that the State violated the Double Jeopardy Clause of the United States Constitution by trying him for both conspiracy to commit aggravated assault and four counts of actually committing aggravated assault.

The State argues that the Double Jeopardy Clause "protects against multiple punishments for the same offense," *North Carolina v. Pierce*, 395 U.S. 711, 717 (1969), and that "[a] substantive crime and a conspiracy to commit that crime are not the 'same offense' for double jeopardy purposes." *United States v. Felix*, 503 U.S. 378, 379 (1992). We agree.

"Conspiracy is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose unlawfully, the persons agreeing in order to form the conspiracy." *Miss. Code Ann. § 97-1-1 (Rev. 1994)*. "Conspiracy is a complete offense in itself, distinct from the commission of the crime contemplated by the conspiracy and does not become merged with that crime." *State v. Thomas*, 645 So. 2d 931, 933 (Miss. 1994). We find that Steward was not placed in jeopardy twice for the same offense. Conspiracy to commit aggravated assault and aggravated assault⁽⁴⁾ are clearly two separate crimes. We find no merit in Steward's argument.

THE JUDGMENT OF THE COPIAH COUNTY CIRCUIT COURT OF CONVICTION OF DONALD FLOWERS IN COUNT I FOR CONSPIRACY TO COMMIT AGGRAVATED ASSAULT AND SENTENCE OF FIVE YEARS; COUNTS II, III, IV, AND V FOR AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN YEARS EACH WITH TWENTY YEARS TO SERVE AND THE LAST TWENTY-FIVE YEARS SUSPENDED AND PAY FINES IN THE AMOUNT OF \$5,000 IS AFFIRMED. SENTENCES IN COUNTS I, II, AND V SHALL RUN CONCURRENTLY; SENTENCES IN COUNTS III AND IV SHALL RUN CONSECUTIVELY TO ALL OTHER SENTENCES, WITH ALL SENTENCES TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

THE JUDGMENT OF THE COPIAH COUNTY CIRCUIT COURT OF CONVICTION OF KENNETH BLACKWELL IN COUNT I FOR CONSPIRACY TO COMMIT AGGRAVATED ASSAULT AND SENTENCE OF FIVE YEARS; COUNTS II, III, IV, AND V FOR AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN YEARS EACH WITH

THIRTY YEARS TO SERVE AND LAST FIFTEEN YEARS SUSPENDED AND PAY FINES IN THE AMOUNT OF \$5,000 IS AFFIRMED. SENTENCES IN COUNTS I, II, AND V SHALL RUN CONCURRENTLY; SENTENCES IN COUNTS III AND IV SHALL RUN CONSECUTIVELY TO ALL OTHER SENTENCES, WITH ALL SENTENCES TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

THE JUDGMENT OF THE COPIAH COUNTY CIRCUIT COURT OF CONVICTION OF JERRY STEWARD IN COUNT I FOR CONSPIRACY TO COMMIT AGGRAVATED ASSAULT AND SENTENCE OF FIVE YEARS; COUNTS II, III, IV, AND V FOR AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN YEARS EACH; COUNT VI OF SHOOTING INTO AN AUTOMOBILE AND SENTENCE OF EIGHT YEARS WITH FIFTY-THREE YEARS TO SERVE AND PAY FINES IN THE AMOUNT OF \$6,000 IS AFFIRMED. SENTENCES IN COUNTS I, II, AND V SHALL RUN CONCURRENTLY; SENTENCES IN COUNTS III, IV, AND VI SHALL RUN CONSECUTIVELY TO ALL OTHER SENTENCES, WITH ALL SENTENCES TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

THE JUDGMENT OF THE COPIAH COUNTY CIRCUIT COURT OF CONVICTION OF RICKY WHITE IS REVERSED AND RENDERED.

COSTS OF THIS APPEAL AS TO FLOWERS, BLACKWELL, AND WHITE ARE TAXED TO COPIAH COUNTY. COSTS OF THIS APPEAL AS TO STEWARD ARE TAXED TO THE APPELLANT.

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

1. The motion in limine order stated that no testimony should be elicited from any witness which implied the appellants were involved in crimes other than those crimes for which they are charged.
2. UCRCCP 5.15 has been replaced with Uniform Circuit and County Court Rule 3.12 as of May 1, 1995.
3. Rule 2.05 is now embodied in Rule 7.06 of the Uniform Circuit and County Court Rules.
4. A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

Miss. Code Ann. § 97-3-7(2) (Rev. 1994).