IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-KA-00157-COA

RUNDELL JAMES, JR. A/K/A RUNDALL JAMES, JR. — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	11/17/2011
TRIAL JUDGE:	HON. CHARLES E. WEBSTER
COURT FROM WHICH APPEALED:	BOLIVAR COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GEORGE T. HOLMES WILBERT LEVON JOHNSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: STEPHANIE BRELAND WOOD
DISTRICT ATTORNEY:	BRENDA FAY MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF MURDER AND SENTENCED TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH THE SENTENCE TO RUN CONSECUTIVELY TO ANY PRIOR SENTENCES
DISPOSITION:	REVERSED AND REMANDED: 04/30/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

FAIR, J., FOR THE COURT:

¶1. Rundall James was convicted of murdering his great aunt, Zelphia Ivory, by pouring hot cooking oil on her as she slept. Ivory died before she could give a statement to the authorities. The State built a case against James showing that he had threatened to "burn"

Ivory for making his dog sick and that he had been in the house a short time before the attack. However, the State's key witnesses – James's brother and his girlfriend – suggested James had left before the attack and testified that Ivory could not identify her attacker. The prosecution then impeached its own witnesses with unsworn prior statements that James had been identified as the assailant and that he was seen outside the house shortly after the attack.

¶2. We find that the impeachment was improper without the required predicate of surprise or unexpected hostility. We also conclude the error was prejudicial enough to deny James a fair trial, and we therefore reverse James's conviction and remand for a new trial.

FACTS

¶3. In September 2009, Rundall James and his brother Zacherius James ("Zach") were living with Ivory, their great aunt, at her home in Mound Bayou. Ivory was ninety-five years of age, and over the years she had allowed many family members to stay in her home.

¶4. James allegedly came to believe Ivory had sickened his Rottweiler by feeding it table scraps. The dog ended up at the vet and may or may not have died. James was upset and demanded that Ivory pay for the dog and its veterinary expenses, but she was unable or unwilling to do so. This made James angrier, and multiple witnesses testified that in the weeks before her attack he had alternatively threatened to kill her, burn her house down, or "burn" her if she did not compensate him for the dog. Ivory made a report to the police about James approximately one week before the attack. The day before the attack James apparently waited for Ivory at the Senior Citizen Complex in Cleveland, Mississippi. Ivory appeared to be afraid of James and refused to go with him when he insisted. James repeatedly said:

"You know what you're supposed to be doing. You're going with me." James eventually relented and left.

¶5. Sometime after midnight Zach and his girlfriend, Samantha Jackson, returned to Ivory's home. Zach was drunk, but Samantha had had only one drink. Zach had forgotten his key to the house, so he had to knock on Ivory's window for her to let them in. They, along with two of Zach's small children, retired to one of the bedrooms.

¶6. Lewon Payne testified that he and James had spent the evening at a high school football game. They went drinking afterwards, and when they got back to the Payne home, James was drunk. James wanted to sleep there, but he apparently was not ready to call it a night, so Crystal James – James's sister and Payne's then-wife – insisted Payne take James home. Payne complied, dropping James off at Ivory's house between 2:00 and 3:00 a.m.

¶7. Samantha and Zach testified that sometime after they went to bed, James came into the house. He knocked on the door to their bedroom and asked for a cigarette. Zach awoke but did not respond; Samantha told James they did not have one. James then told Samantha he was going to his cousin's house, and he closed the door. Three to five minutes later, Samantha saw a shadow move past the doorway, and a few minutes after that she smelled grease and heard cracking sounds. Then a shadow came back and forth across the doorway again, and she heard Ivory scream. Both Samantha and Zach got out of bed and rushed to Ivory's bedroom, where they found her covered in grease. According to Samantha, she said, "I'm burning. He came through the window. Dear Lord, why am I burning so bad?" Zach testified Ivory told him someone had tried to come in through the window, but he found all

the windows closed and locked. The front door, however, was either cracked open or "wide open," depending on the testimony. Zach got dressed, retrieved a pistol, and went outside where he saw a man he described as "[n]o one in particular. Tall male, brown skin." Zach initially "just assumed" the man was James because he appeared to be walking toward the house, but when Zach came out the man veered away. Zach denied the man looked like his brother. At some point, Zach fired a shot, though it is unclear from his testimony whether he was trying to shoot the man or just frighten him away. Zach and Samantha called the authorities and various family members. Diane James (Zach and James's mother) arrived before the ambulance. She testified for the defense that Ivory said she did not know who had burned her.

¶8. Ivory suffered second- and third-degree burns to approximately forty percent of her body. She was taken by ambulance to the Bolivar County Medical Center and shortly thereafter flown to a burn center in Augusta, Georgia. She died of sepsis about one week after the attack. Ivory was sedated and intubated during her treatment and was never able to speak to the authorities.

¶9. The prosecutor repeatedly questioned Samantha and Zach about prior statements they had made to investigators. The duo denied critical assertions supporting the prosecution's case that were never established with admissible substantive evidence: that they would have heard James leave if he had left the house before the attack, that Ivory had identified James as the assailant, and that James was seen outside the house immediately afterwards. The prosecutor also sought to impeach their testimony on other critical points, including: whether

and to what degree James was angry with Ivory over the dog, whether he had threatened her, and how many people had a key to the house. Zach and Samantha denied many of the alleged prior statements.

¶10. The State then called Investigator Charles Griffin, who testified to prior statements by both witnesses. The State also introduced and played for the jury a tape recording of Griffin's interview with Zach that confirmed the investigator's account of what Zach had said. Another investigator testified Zach had given him a similar statement about a year after the first interview. The State also called Lewon Payne, James and Zach's former brother-in-law, who testified that Zach had, in a teary confession, told him Ivory identified James as her attacker. Zach also told Payne it was James he had fired upon outside the house. Payne described Zach as wracked with guilt for shooting at his brother and for implicating him to the authorities. Several times during the trial, the judge admonished the jury that it could not consider the impeachment as substantive evidence.

¶11. Zach and Samantha either denied making the prior statements or attempted to explain them. When confronted with his prior statement to Investigator Griffin, Zach testified he had not told the truth. He explained that after the attack, he and Samantha were arrested for the crime and booked into the Bolivar County Jail. Zach was told they would not be released until he gave a statement implicating James, who he was told had already confessed. Zach also claimed to have been threatened with prosecution for "buying too many guns" if he did not implicate his brother.

¶12. The jury convicted James of murder and he was sentenced to life imprisonment.

James appeals from that judgment.

DISCUSSION

¶13. James raises several issues on appeal, but we find one dispostive: whether the circuit court erred in permitting the State to impeach its own witnesses without first showing surprise or unexpected hostility. Because this error requires a new trial, we will not address the other issues presented in James's brief.

¶14. The leading Mississippi case on this issue is *Wilkins v. State*, 603 So. 2d 309 (Miss. 1992). Our supreme court had promulgated the Mississippi Rules of Evidence some years before, in 1985, and in *Wilkins* the court addressed whether Rule 607 changed the pre-rules practice of allowing a party to impeach its own witness only if it was surprised by his testimony at trial. Rule 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him." The court considered the conflict between the apparent broadness of Rule 607 and other rules of evidence prohibiting hearsay, as well as the danger of a defendant being convicted based on testimony that was supposed to have been considered only for impeachment. *See Wilkins*, 603 So. 2d at 318-22. The decision was unanimous in result, and eight of the nine justices agreed on an opinion authored by Justice Hawkins.

¶15. Our supreme court recognized that most other courts considering their analogues of Rule 607 had not explicitly required surprise or unexpected hostility. *See id.* at 321. However, in the supreme court's view, they had achieved essentially the same result with a different justification: other courts forbid a party from using a prior inconsistent statement

"under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible." *See id.*[1] The *Wilkins* court found this impractical because of its subjectivity, as well as unnecessary: "The trouble with this rationale is first . . . it makes admissibility of evidence depend on what is in the attorney's head, a rather difficult undertaking; and second, if there is in fact no surprise, the only possible motive for attempting to impeach one's own witness is to get otherwise inadmissible testimony into evidence." *Id.* (citation omitted). The court concluded that a bright-line rule requiring a showing of surprise or unexpected hostility was the better course, expressly rejecting exclusion only in the case of prosecutorial subterfuge, an improper purpose, or the like. *Id.* *Wilkins* has been reaffirmed by the Mississippi Supreme Court as recently as 2011. *See Osborne v. State*, 54 So. 3d 841, 845 (¶14) (Miss. 2011).

¶16. In today's case, the prosecution never claimed surprise or unexpected hostility. However, perhaps because we review a trial court's decision on the admissibility of evidence for an abuse of discretion, *Young v. State*, 106 So. 3d 775, 777 (¶9) (Miss. 2012), appellate courts will sometimes search the record for a post-hoc justification for admitting the contested evidence. *See, e.g., Wharton v. State*, 734 So. 2d 985, 986-87 (¶7) (Miss. 1998). None is forthcoming in this case. Instead, from what we can glean from the record, the prosecution appears to have had good reason to anticipate hostility. Zach and Samantha

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[1] That rule was also adopted in Mississippi, though it is most frequently cited in the context that a prosecutor may not ask impeachment questions without a good faith basis. *See, e.g., Flowers v. State*, 773 So. 2d 309, 326 (¶58) (Miss. 2000).

moved out of state after the attack on Ivory, and the trial had to be continued several times because they could not be found. Even before they testified, the State felt it necessary to have them held in jail to ensure their appearance. Exactly what the prosecutors knew was never disclosed on the record. However, when the trial judge explained his decision to allow the impeachment, he described neither surprise nor unexpected hostility:

> The Court did find – although the Court did make a ruling at that time – the Court did find that the testimony of Zacherius James had – his testimony had become hostile to the State, although he was a State's witness, and, of course, the Court had some background with this case. The Court is aware, and I think several months ago the Court was made aware of the difficulty the State was having securing the attendance of [Zach] as well as Ms. Samantha Jackson, and so *the Court was well aware of the potential that those witnesses may – their versions of events may change from those given to the trial*, and for that reason, the Court felt that the tape would be admissible for purposes of impeachment, but the Court has taken caution to advise the jury that it's for use of impeachment and impeachment only.

Given this record, on appeal the State does not argue surprise or unexpected hostility. It simply asserts that Zach and Samantha were hostile to the prosecution, which is undoubtedly true but not in and of itself sufficient. A party may call a hostile witness and ask him leading questions. *See* M.R.E. 611. But impeachment with a prior inconsistent statement is no ordinary leading question, and it carries the additional requirement that the hostility be unexpected. *See Wilkins*, 603 So. 2d at 322. And the State did not simply ask Zach and Samantha whether they had made the prior statements, it called three other witnesses to testify to detail the prior statements and introduced a tape recording of Zach's statement into evidence. Absent the proper foundation for impeachment, all of that was rank hearsay.

¶17. There is no clear evidence in the record of whether the State was surprised by Zach

and Samantha's testimony. The dissent contends that this absence of evidence requires us to affirm the trial court's decision, but it misconstrues the burden of production, which is on the State. The proponent of evidence "has the burden of laying the proper foundation." *Brown v. State*, 969 So. 2d 855, 867 (¶36) (Miss. 2007). "[B]efore a party will be authorized to introduce for impeachment purposes an unsworn pretrial inconsistent statement of his own witness, it will be necessary *that he show* surprise or unexpected hostility." *Wilkins*, 603 So. 2d at 322 (emphasis added); *see also Osborne*, 54 So. 3d at 845 (¶14) (proponent must show surprise or unexpected hostility); *Wharton*, 734 So. 2d at 987 (¶7) (same); *Whitehead v. State*, 967 So. 2d 56, 67 (¶21) (Miss. Ct. App. 2007) ("Based on *Wilkins*, we agree that the State was required to show surprise prior to impeaching its witness."). Without the proper foundation, we cannot reach any other conclusion but that the trial court erred in admitting the impeachment evidence.

¶18. Having concluded the trial court erred, we must next turn to the question of whether the error is prejudicial. We will reverse on the erroneous admission of evidence only where "a substantial right of a party is affected." *Young v. State*, 106 So. 3d 775, 777 (¶9) (Miss. 2012); *see also* M.R.E. 103(a). Errors in the admission of evidence are subject to a harmless error analysis because, as is often said, a defendant is entitled to a fair trial, not a perfect one. *Conners v. State*, 92 So. 3d 676, 688 (¶33) (Miss. 2012) (citing *Brown v. United States*, 411 U.S. 223, 231-32 (1973)). An error is harmless when "the same result would have been reached had it not existed." *Pitchford v. State*, 45 So. 3d 216, 235 (¶71) (Miss. 2010). We review the record de novo to determine the error's effect. *Richardson v. State*, 74 So. 3d 317,

328 (¶37) (Miss. 2011).

¶19. The State contends the admission of the impeachment evidence is harmless because its case against James was sufficient even if only the properly admitted substantive evidence is considered. That proof, however, is entirely circumstantial: James was angry with Ivory, he had threatened to kill and "burn" her, she was afraid of him, and he had been in the house before the attack and was gone afterwards. While this could sustain a conviction, the question before us is not sufficiency; to find harmless error, we look for proof of guilt that is overwhelming. *See, e.g., Rogers v. State*, 95 So. 3d 623, 629 (¶19) (Miss. 2012); *Stone v. State*, 94 So. 3d 1078, 1086 (¶21) (Miss. 2012); *States v. State*, 88 So. 3d 749, 758 (¶38) (Miss. 2012).

¶20. The dissent contends that Zach's naming his brother as the man he saw outside the house was nonhearsay under Mississippi Rule of Evidence 801(d)(1)(C), which provides that a statement is not hearsay if: "The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." If Zach had identified his brother, it would be admissible as substantive evidence under *Smith v. State*, 25 So. 3d 264, 272-73 (¶¶23-27) (Miss. 2009). However, Zach never made a "statement of identification" as contemplated by Rule 801(d)(1)(C). The rule uses identification in a technical sense, referring to a witness identifying the defendant in a line-up, show-up, photo array, preliminary hearing, or the like. *United States v. Kaquatosh*, 242 F. Supp. 2d 562, 566 (E.D. Wis. 2003). It does not include "statements unaccompanied by recognition of the defendant or his likeness." *Id.*; *see also*

2 Kenneth S. Broun et al., *McCormick on Evidence* § 251 n.35 (6th ed. 2006) ("A few courts have erroneously ignored the purpose and language of the rule as to testimony about an identification of the defendant through an out-of-court identification procedure and instead allowed testimony that a certain person, known to the witness, committed a crime."); 2 Michael H. Graham, *Handbook of Federal Evidence* § 801.13 n.2 (6th ed. 2006) ("The concept of 'after perceiving him' should be interpreted to refer to perceiving the individual or a representation of him once again after the event in question."). Rule 801(d)(1)(C) "was not intended to allow the introduction as substantive evidence of hearsay statements that 'the defendant did it.'" *Kaquatosh*, 242 F. Supp. 2d at 565.

¶21. The State also contends the harm was mitigated or abrogated entirely by the trial court's instructions to the jury that it could only consider the testimony for impeachment and not as substantive evidence. The trial court, sua sponte, instructed the jury on this point three times during the presentation of the impeachment evidence and once more when finally charging the jury. That the jury was properly instructed cannot be denied. Our concern, however, is the efficacy of the cautionary instructions.

¶22. We are well aware that under most circumstances, the jury is presumed to follow the instructions of the trial court. *Sanders v. State*, 63 So. 3d 497, 504 (¶19) (Miss. 2011). However, as the United States Supreme Court has observed, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). In

Wilkins, our supreme court addressed this concern in the context of prior inconsistent statements. The court pointed out the inherent difficulty in following the cautionary instruction: if the jury believes the prior statement, i.e., that Ivory identified James as her attacker, how can it then put that aside and adjudicate his guilt based only on the State's circumstantial case? The supreme court echoed a century-old observation that a jury attempting to comply with the instruction "might endeavor to do so, and believe they were doing so, and still be involuntarily and unconsciously influenced thereby." *Wilkins*, 603 So. 2d at 319 (quoting *Williams v. State*, 73 Miss. 820, 826, 19 So. 826, 827 (1896)). The court further observed: "permitting a jury to hear such testimony and then instructing it not to consider it except for 'impeachment' has been called by one scholar 'a pious fraud.'" *Id.* (citing Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 193 (1948)).

¶23. The facts underlying the *Wilkins* decision are instructive as to the whether the error in our case is harmless. Wilkins was accused of killing his brother-in-law. Admissible evidence included, among other things, testimony that a coconspirator had told his wife Wilkins had "done it" and that he was burning Wilkins's clothes because they were covered in "blood and brains." *See id.* at 312. The wife's testimony was admissible because the coconspirator had made the statements to her in furtherance of a conspiracy. *Id.* at 317. When called to the stand by the State, the coconspirator denied that Wilkins had committed the murder and that he had burned Wilkins's clothes. The prosecution then impeached him with unsworn statements he had made to a police investigator and a jailhouse snitch,

consistent with the wife's account. The *Wilkins* court found this to be error for reasons we have already discussed. Even though the improper impeachment was largely cumulative and the jury was properly instructed that it could not be considered as substantive evidence, the supreme court still found the error reversible. *See id.* at 316. Given that the case against Wilkins was much stronger than the case against James, we do not see how the error in James's case can be harmless.

CONCLUSION

¶24. The State spent nearly half of its case-in-chief impeaching its two most important witnesses. This impeachment was improper, yet it put in front of the jury the most damning evidence in an otherwise circumstantial case. We cannot say with any confidence that this error was harmless. *See Pitchford*, 45 So. 3d at 235 (¶71). We are therefore compelled to reverse James's conviction and remand for a new trial consistent with this opinion.

¶25. **THE JUDGMENT OF THE BOLIVAR COUNTY CIRCUIT COURT IS REVERSED, AND THIS CASE IS REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE ASSESSED TO BOLIVAR COUNTY.**

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, ROBERTS AND JAMES, JJ., CONCUR. MAXWELL, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY JAMES, J.; ROBERTS, J., JOINS IN PART. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING, P.J.

MAXWELL, J., SPECIALLY CONCURRING:

¶26. Justice Armis Hawkins, writing for the Mississippi Supreme Court in *Wilkins*, held that a party must still show surprise or unexpected hostility before impeaching its own witness, despite Mississippi's then-recent adoption of Rule 607, which does not require either

of these express showings. *See Wilkins v. State*, 603 So. 2d 309, 322 (Miss. 1992). Because our supreme court continues to adhere to these pre-Rule 607 requirements, I am compelled to agree with the majority that we are bound by *Wilkins* and must reverse James's conviction.

¶27. But I write separately to point out that—while the supreme court in *Wilkins* emphasized that "since the adoption of the Mississippi Rules of Evidence" it has "followed the rationale of the federal courts" and prohibited parties from impeaching their own witnesses absent surprise or unexpected hostility, *Wilkins*, 603 So. 2d at 322—this particular approach is not how federal courts have interpreted Rule 607. *See Walker v. State*, 798 A.2d 1219, 1231 (Md. Ct. Spec. App. 2002) overruled on other grounds (contrasting Mississippi with the score of federal and state jurisdictions that have held that Rule 607 does not require surprise or unexpected hostility).

¶28. Under Federal Rule of Evidence 607, "[a]ny party, including the party that called the witness, may attack the witness's credibility." This rule is almost identical to Mississippi's counterpart, which provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." M.R.E. 607. The reason these rules make no mention of either a showing of surprise or hostility is simple—these exceptions to the prohibition against attacking one's own witness were no longer necessary after the Federal Rules of Evidence retreated from the common-law "voucher rule."

¶29. Federal Rule 607 was promulgated to replace the common-law "voucher rule." *See Chambers v. Mississippi*, 410 U.S. 284, 296 n.9 (1973) ("The 'voucher' rule has been rejected altogether by the newly proposed Federal Rules of Evidence, Rule 607[.]"). The

"voucher rule" was based on the old idea that a party, by calling a witness on its behalf, "vouched" for the witness's credibility. *See Moffett v. State*, 456 So. 2d 714, 718 (Miss. 1984). Thus, the party was prohibited from attacking its own witness's credibility through impeachment evidence. *Id.* As this rule started to become disfavored, courts came up with exceptions to chip away at the "voucher rule." For example, if the party could show it was "surprised" by the testimony of its witness or that the witness was "unexpectedly hostile," then it could get around the voucher rule and impeach its own witness. *See id.* (noting that the voucher rule was no longer in favor and was "riddled with exceptions").

¶30. Rule 607 "was predicated on the modern reality that 'a party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them.'" *Walker*, 798 A.2d at 1231 (quoting F.R.E. 607, Advisory Committee Notes); *see Chambers*, 410 U.S. at 296 (criticizing Mississippi's common-law voucher rule because "in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them").

¶31. In light of this reality, under both the federal and state rules, any party, including the sponsoring party, may attack the witness's credibility. F.R.E. 607; M.R.E. 607. And because Rule 607 did away with the voucher rule, federal courts have recognized Rule 607 also did away with the exceptions *used to get around* the voucher rule. *See Walker*, 798 A.2d at 1231 (citing *United States v. Ienco*, 92 F.3d 564, 568 (7th Cir. 1996); *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991); *United States v. Webster*, 734 F.2d 1191, 1193 (7th Cir. 1984); *Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 740 (1st Cir. 1982); *United*

States v. DeLillo, 620 F.2d 939, 946-47 (2d Cir. 1980); *United States v. Dennis*, 625 F.2d 782, 795 n.6 (8th Cir. 1980); *Scholz Homes, Inc. v. Wallace*, 590 F.2d 860, 863 (10th Cir. 1979); *United States v. Palacios*, 556 F.2d 1359, 1363 (5th Cir. 1977); *United States v. Long Soldier*, 562 F.2d 601, 605 n.3 (8th Cir. 1977)).

¶32. Following the adoption of Rule 607, federal courts shifted from honing on surprise to focusing on the actual purpose for impeachment, asking whether the government is abusing Rule 607 by calling a witness who otherwise has no useful, admissible evidence for the purpose of admitting prior inconsistent testimony suggesting the defendant's guilt. *See Kane*, 944 F.2d at 1411 (citing *Webster*, 734 F.2d at 1192; *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)). So interpreting Rule 607 to have done away with the voucher rule *and* its exceptions of surprise and unexpected hostility does not ignore Justice Hawkins's concerns in *Wilkins*—that the abolishment of the voucher rule may lead to the inappropriate use of inadmissible hearsay evidence under the guise of impeachment. *Compare Webster*, 734 F.2d at 1193, *with Wilkins*, 603 So. 2d at 321-22. Indeed, while Rule 607 does not require surprise, it also does not permit subterfuge. *See United States v. Miller*, 664 F.2d 94, 97 (5th Cir. 1984) ("Of course, the prosecutor may not use such a statement under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible."). That is why the federal courts, when faced with the government seeking to impeach its own witness, look for *subterfuge*—the abuse of Rule 607—and not surprise—the exception to the abolished voucher rule. *See, e.g.*, *DeLillo*, 620 F.2d at 946-47.

¶33. The *Wilkins* court claimed it was following "the rationale of the federal courts." *Wilkins*, 603 So. 2d at 322. But by still mandating surprise or unexpected hostility, Mississippi actually clings to the old disfavored mechanical approach that in fact led to the creation of Rule 607. *See Walker*, 798 A.2d at 1232 (citing 4 Joseph M. McLaughlin, *Weinstein's Federal Evidence* § 607.02[2][c] (2d ed. 1997)). Judge Posner, on behalf of the United States Court of Appeals for the Seventh Circuit, summed up why the more flexible approach under Rule 403's balancing test is preferable:

> Webster [(the defendant)] urges us . . . to go beyond the good-faith standard and hold that the government may not impeach a witness with his prior inconsistent statements unless it is surprised and harmed by the witness's testimony. But we think it would be a mistake to graft such a requirement to Rule 607, even if such a graft would be within the power of judicial interpretation of the rule. Suppose the government called an adverse witness that it thought would give evidence both helpful and harmful to it, but it also thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement. As there would be no element of surprise, . . . the introduction of the prior statements [would be forbidden]; yet we are at a loss to understand why the government should be put to the choice between the Scylla of forgoing impeachment and the Charybdis of not calling at all a witness from whom it expects to elicit genuinely helpful evidence.

Webster, 734 F.2d at 1193.

¶34. Mississippi's approach places parties in both civil and criminal cases between the very "rock and a hard place" our federal courts have rejected. By requiring surprise or unexpected hostility, Mississippi harkens back to the former hard-line position that a party cannot legitimately impeach one of its witnesses with an unsworn statement if, prior to calling the witness, it suspects the witness may go south. But the very reason Rule 607 was adopted was the modern recognition that neither the State, nor most any party, has the luxury of picking

its fact witnesses and should not have to vouch for everything they testify about.

¶35. The reality is that our lawyers and judges are all too aware that a witness who initially came forward with helpful evidence during an investigation may for various reasons—threats, intimidation, close relationship, and a host of other conceivable reasons that pop up in criminal and civil cases—make a conscious decision to not be quite so honest or forthcoming once on the witness stand. But that should not mean—and does not mean in most courts—that absent a showing of surprise or unexpected hostility, if the party decides to call that witness, and the witness does indeed begin to give harmful evidence that must be impeached, the prosecutor, criminal defendant, plaintiff, or civil defendant, *as a rule,* was trying to subvert the rules of evidence.

¶36. Simply put, lack of surprise does not always equal subterfuge. And the mountain of federal and state authority from other courts undermines the suggestion that requiring surprise or unexpected hostility is the only workable method of ensuring impeachment evidence is properly admitted. *See Wilkins*, 603 So. 3d at 321.

¶37. As Judge Posner noted in *Webster*, "[t]he good-faith standard strikes a better balance." *Webster*, 734 F.2d at 1193. Under Federal Rule of Evidence 403, and its nearly identical counterpart, Mississippi Rule of Evidence 403, the defendant can always "argue that the probative value of the evidence offered to impeach the witness is clearly outweighed by the prejudicial impact it might have on the jury, because the jury would have difficulty confining use of the evidence to impeachment." *Webster*, 734 F.2d at 1193.

¶38. For these various reasons, our modern rules of evidence sufficiently protect against

inadmissible hearsay testimony being admitted under the ruse of "impeachment." So there is really no reason for Mississippi to continue to graft on to Rule 607 the requirements of surprise or unexpected hostility—exceptions meant to soften the very common-law rule Rule 607 did away with.[2]

¶39. Instead of looking for surprise or unexpected hostility, perhaps Mississippi's Rule 607 analysis should focus on (1) whether the primary purpose of the State's impeachment was indeed impeachment, and (2) whether the probative value of the impeachment evidence was outweighed by the unfair prejudice that may result if the jury were to use the impeachment evidence as substantive evidence. But with this said, as a member of our intermediate appellate court, I am certainly cognizant of my duty to apply Rule 607 as interpreted by the Mississippi Supreme Court. And because our supreme court still says that the State cannot

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[2] In holding that Maryland's Rule 607 does not require a party to show surprise or unexpected hostility in order to impeach its own witness, Maryland's Court of Special Appeals relied on the following state cases that "have also refused to engraft the requirement of surprise": *Burgin v. State*, 747 So. 2d 916, 919 (Ala. Crim. App. 1999); *Eubanks v. State*, 516 P.2d 726, 728 (Alaska 1973); *State v. Acree*, 588 P.2d 836, 838 (Ariz. 1978); *State v. Graham*, 509 A.2d 493, 498 (Conn. 1986); *Morton v. State*, 689 So. 2d 259, 262 (Fla. 1997), *overruled on other grounds by Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000); *State v. Gonzalez*, 458 N.E.2d 1047, 1055 (Ill. App. Ct. 1983); *State v. Farley*, 587 P.2d 337, 341 (Kan. 1978); *Thurman v. State*, 975 S.W.2d 888, 893 (Ky. 1998); *State v. Cousin*, 710 So. 2d 1065, 1070 (La. 1998); *State v. Dodge*, 397 A.2d 588, 592 n.6 (Me. 1979); *Smith v. State*, 766 P.2d 1007, 1009 (Okla. Crim. App. 1988); *State v. Warren*, 745 P.2d 822, 824 (Or. Ct. App. 1987); *State v. Kimbell*, 759 A.2d 1273, 1279 (Pa. 2000); *State v. Collins*, 409 S.E.2d 181, 188 (W. Va. 1990); *State v. Hancock*, 748 P.2d 611, 612 (Wash. 1988). *Walker*, 798 A.2d at 1231, *overruled on other grounds by Walker v. State*, 818 A.2d 1078, 1089 (Md. 2003) ("We hold that the trial court and Court of Special Appeals properly found that proof of surprise is not a necessary prerequisite under Md. Rule 5-607 analysis.").

Only Mississippi was cited as "still" requiring surprise or unexpected hostility. *Walker*, 798 A.2d at 1231 (citing *Wilkins*, 603 So. 2d at 322).

impeach its witness without showing either surprise or unexpected hostility, I concur with the majority opinion.

JAMES, J., JOINS THIS OPINION. ROBERTS, J., JOINS THIS OPINION IN PART.

CARLTON, J., DISSENTING:

¶40. I would affirm the conviction and the judgment of the trial court in this case; thus, I respectfully dissent from the decision of the majority. An abuse-of-discretion standard of review applies to our review of a trial court's decision to admit or exclude evidence, including the decision to admit a prior inconsistent statement to impeach a witness. *See* M.R.E. 607.[3] Additionally, if appellate review discerns any error, then the harmless-error analysis should be applied to the review of the totality of the evidence.[4] In this case, I respectfully submit that the record supports the decision of the trial judge as to the admission of the prior inconsistent statements at issue as impeachment evidence, and I submit further

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[3] The comment to Rule 607 explains that Rule 607 repudiates the old voucher rule. *See* John Strong, *McCormick on Evidence* § 38, at 142 (5th ed. 1999) (inflexible insistence on showing surprise and affirmative damage before the government can impeach its witness would mean a return to the unsatisfactory mechanical approach that helped lead to the adoption of Rule 607); Joseph M. McLaughlin, *Weinstein's Federal Evidence*, § 607.02[2][c] (2d ed. 1997) (the balancing test of Rule 403 now applies and is more flexible); *see also* M.R.E. 613.

[4] *See Smith v. State*, 25 So. 3d 264, 273 (¶25) (Miss. 2009). In *Smith*, the supreme court provided that the mere fact that trial court committed error does not alone mean that such error constituted reversible error. The *Smith* court found that the trial court admitted evidence improperly under a particular rule of evidence. *Id*. at 272 (¶22). The court then reviewed the record to determine if the evidence was admissible under another rule of evidence. *Id*. at (¶23).

that the record reflects no abuse of discretion, particularly in light of the limiting instruction to the jury and findings by the trial judge.[5]

¶41. Upon my review, the record shows no abuse of discretion or error in this case since James provides no showing of an improper purpose by the State in seeking to admit the inconsistent impeaching statements. An improper purpose cannot be inferred without supporting evidence. The record displays the reluctance of the witnesses to attend the trial against James. The trial judge determined the witnesses provided testimony differing from their pretrial statements, with no notice to the State that they would be changing their prior statements to law enforcement. The trial court also gave a limiting instruction to the jury as to how to consider the impeaching prior inconsistent statements. The trial court followed the case law and the rules of evidence in admitting the prior inconsistent statements of Zach and Samantha as impeachment evidence. *See* M.R.E. 607; *Bush v. State*, 667 So. 2d 26, 28 (Miss. 1996).

¶42. As stated, James fails to show an intended purpose of subterfuge by the State in

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[5] *See Morgan v. State*, 818 So. 2d 1163, 1171-72 (¶17) (Miss. 2002) (allowing admission of inconsistent statement to impeach State witness); *Wharton v. State*, 734 So. 2d 985, 986-87 (¶7) (Miss. 1998) (acknowledging that the language of *Wilkins v. State*, 603 So. 2d 309 (Miss. 1992), is disjunctive and that a showing of surprise or unexpected hostility would suffice; the court did not mechanically require only a showing of surprise); *see also United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985) (opinion withdrawn in part by *United States v. Hogan*, 771 F.2d 82, 83 (5th Cir. 1985)) (prior inconsistent statement may be used to impeach government's own witness even if the impeachment evidence directly inculpates the defendant).

offering the impeaching prior inconsistent statements.[6] Our appellate standard of review prevents us from rendering the factual finding of an improper purpose of subterfuge with no evidence of such. The record shows an evidentiary basis for the trial court's factual findings determining the admission of these prior inconsistent statements for the purpose of impeachment as proper. The mere admission of a prior inconsistent impeaching statement, inculpating the defendant, fails to alone constitute evidence of an improper purpose.[7] The case law and rules of evidence both allow the State to use prior inconsistent statements to impeach prosecution witnesses, even though the inconsistent prior statements directly inculpate the defendant. M.R.E. 607 & 613; *see Wells v. State*, 849 So. 2d 1231, 1235-36 (¶8) (Miss. 2003) (impeachment of uncooperative witness with prior inconsistent statement); *Harrison v. State*, 534 So. 2d 175, 179 (Miss. 1988);[8] *Bush*, 667 So. 2d at 28 (prior

[6] The supreme court has not found subterfuge or abuse of discretion where the trial judge provided findings that witness was hostile, aligned with an adverse party, or feigned memory loss. *Harrison v. State*, 534 So. 2d 175, 179-80 (Miss. 1988).

[7] *Franklin v. State*, 72 So. 3d 1129, 1138 (¶40) (Miss. Ct. App. 2011); *Lafayette v. State*, 90 So. 3d 1246, 1256 (¶¶23-24) (Miss. Ct. App. 2011) (reversed on other grounds); *Bailey v. State*, 956 So. 2d 1016, 1025 (¶25) (Miss. Ct. App. 2007) (abuse-of-discretion standard of review applicable to admission or exclusion of evidence); *Quinn v. State*, 873 So. 2d 1033, 1039 (¶26) (Miss. Ct. App. 2003).

[8] In *Harrison*, 534 So. 2d at 179, the supreme court held that prior inconsistent statements used for the purpose of showing unreliability to impeach the credibility of a witness may be used by any party, including the party calling the witness, to attack the credibility of a witness. The court explained that the State may impeach the credibility of its own witnesses. *Id*. at 179-80. Additionally, the prior inconsistent statement can be used to impeach even if the statement also directly inculpates the defendant. *Id*. at 178. The court provided that it is proper for the trial court to give the jury a limiting instruction as to consideration of the prior inconsistent statement for impeachment purposes and not as substantive evidence of guilt. *Id*. at 179.

inconsistent statement inculpating defendant properly used to impeach uncooperative witness feigning memory loss). Here, the record and the law supports the admission of the prior inconsistent statements in dispute as impeachment evidence. Also, the record and the trial judge's findings reflect the witnesses were reluctant to attend trial, and the witnesses testified at trial in conflict with their pretrial statements, with no prior notice to the State of changing their prior statements to law enforcement.

¶43. Precedent allows unwilling witnesses to be impeached with their prior inconsistent statements with no refuge in perjury. As acknowledged, the record shows that these witnesses at issue were closely related to James and Ivory, who was so severely burned that she died. Zach is James's brother, and Samantha is Zach's girlfriend. They both lived with Ivory, Zach and James's great aunt. The record shows that James threatened Ivory over the food she fed his dog. The record further shows Ivory feared James and his threats, and indicates that Zach and Samantha knew James had threatened Ivory and knew Ivory feared James. Zach and Samantha also saw the burns Ivory received.

¶44. Nothing in the record shows Zach and Samantha notified the State before trial of a change to their prior statements to law enforcement, and the State cannot be expected to know that a witness is willing to commit perjury. Without evidence of such, we cannot on appeal assume that the trial court's findings reflecting the reluctance of Zach and Samantha to attend the trial meant a change in their prior statements to law enforcement. Reluctance to attend trial to testify against a relative, or other person with whom the witness has a close relationship, does not impute some knowledge to the State that the witness will commit

perjury or change his or her testimony during trial, particularly here where the witnesses were also close to Ivory. The State takes its witnesses as it finds them with respect to their knowledge and relationship to the charged offenses and the parties. Zach and Samantha initially cooperated with law enforcement after Ivory was burned, and no indication in the record points toward Zach or Samantha as suspects in this case. No evidence indicated that they would later change their prior statements to law enforcement during trial, even though they may have been fearful and reluctant witnesses.[9]

¶45. As discussed, the trial judge's findings show the reluctance of the witnesses to appear at trial. The trial court's findings reflect that the court feared from the difficulty in securing attendance of these witnesses that they may change their version of the events. However, the trial court found that nothing established that the State knew the witnesses would change their stories. Reluctance to attend the trial is not alone evidence that witnesses will perjure themselves. *See Wharton v. State*, 734 So. 2d 985, 986-87 (¶7) (Miss. 1998) (acknowledging that the language of *Wilkins v. State*, 603 So. 2d 309 (Miss. 1992), was in the disjunctive and that a sufficient predicate is shown by unexpected hostility or surprise; no requirement exists to mechanically show only surprise). Here, the record reflects a sufficient predicate for the admission of the prior inconsistent statements to impeach when considering the trial judge's factual finding of reluctance to attend trial; the witnesses' hostility during trial; and the

[9] *Bush*, 667 So. 2d at 28.

conflicting trial testimony.[10] The findings of the judge refute James's bare assertion of subterfuge for an improper purpose by the State, and James provides no indication or showing of an improper purpose by the State. Our jurisprudence allows the State to admit prior inconsistent statements to impeach its witnesses who changed their statements at trial out of fear or feigned memory loss.[11]

¶46. There are also other permissible purposes for the admission and use of the prior inconsistent statements at issue. Zach had provided a prior statement, inconsistent with his testimony at trial, that identified James as the attacker and asserted that James had been seen outside the house immediately after the attack. Such a statement constitutes a prior identification, and since Zach testified at trial subject to cross-examination, such a statement fails to constitute hearsay. M.R.E. 801(d)(1)(C).

¶47. The Mississippi Supreme Court has also recognized another purpose, distinct from impeachment, for admission of a prior inconsistent statement. In *Smith v. State*, 25 So. 3d 264, 272 (¶¶22-23) (Miss. 2009), after determining that the admission of evidence under one particular evidentiary rule constituted error, the supreme court evaluated other proper bases for admission under the rules before determining error. The supreme court reversed this Court's decision and affirmed that of the trial court, focusing not on the impeachment use of

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[10] *Morgan*, 818 So. 2d at 1171-72 (¶17); *Harrison*, 534 So. 2d at 179.

[11] *Bush*, 667 So. 2d at 28 (prior inconsistent statement of prosecution witness properly admitted after witness refused to cooperate); *Morgan*, 818 So. 2d 1171-72 (¶17); *Harrison*, 534 So. 2d at 179.

prior inconsistent statements, but instead on the admission of a prior identification. *Id*. at 271-274 (¶¶19-28). As acknowledged, the supreme court in *Smith* recognized that the trial court erred in admitting a prior inconsistent statement into evidence as substantive evidence of guilt via Mississippi Rule of Evidence 804(b)(5), after declaring the witness unavailable due to a lack of memory. *Smith,* 25 So. 3d at 271-72 (¶¶19-22). The supreme court found the prior unsworn inconsistent statement directly inculpated the defendant by identifying him as the perpetrator, and the supreme court held that the trial court erred in finding the witness unavailable on the subject matter of the statement.[12] *Id*. at 271 (¶21). However, the court did not stop with its review upon that determination.

¶48. The *Smith* court continued to evaluate whether the statement at issue was admissible under the rules upon another basis is for admissibility. *Id*. at 272 (¶23). The court found that regardless of whether the witness was impeached, the prior statements of the witness testifying at trial, subject to cross-examination, were admissible under Rule 801(d)(1)(C) as prior identification testimony. *Id*. at 273 (¶25). The witness previously had unequivocally identified the defendant as the shooter, but at trial, claimed that he did not see the defendant during the day of the shooting. *Id*. The court recognized that the witness's prior statements to investigators contained more than just the prior identification; these statements referred to motive, threats, and drugs. *Id*. The court continued to explain that "the mere fact that the trial court committed error in an evidentiary ruling does not by itself warrant a reversal," and

[12] *See* M.R.E. 607.

explained that the evidence as a whole must be evaluated. *Id*. Finding other evidence in the record supporting the finding of guilt, the supreme court then held any error in admitting statements beyond those identifying the defendant to be harmless. *Id*. at (¶26). The *Smith* court also provided that the admission of statements going beyond mere identification, relating to motive and threats, was harmless error. *Id.*; *see also Anderson v. State*, 811 So. 2d 410, 413 (¶11) (Miss. Ct. App. 2011) (State possesses "legitimate interest" in presenting rational and coherent complete picture of the crime, even though other crimes may be revealed or suggested); *Magness v. State*, 106 Miss. 195, 195, 63 So. 352, 353 (1913) (sufficient to show unwilling witness will not confirm or deny prior statement to impeach unwilling witness with prior inconsistent statement).

¶49. In this case, I respectfully submit that the trial court followed the rules of evidence in allowing impeachment of the witnesses' credibility via their own prior inconsistent statements as allowed under Rule 607. The record also shows that the trial court followed precedent in providing a limiting instruction. The trial court's finding that the prior inconsistent statements constituted proper impeachment of the witnesses, who were closely related to Ivory and James, shows no subterfuge by the State. The prior inconsistent statements were also admissible under our evidentiary rules for other proper purposes such as prior identification. I submit, therefore, that upon considering the record and evidence as a whole, the trial court committed no abuse of discretion in admitting the impeaching statements. The record shows no indication of subterfuge, and the trial court's findings contradict James's bare assertions of subterfuge. I therefore respectfully dissent, and would

affirm the trial court's judgment.

IRVING, P.J., JOINS THIS OPINION.