IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-KA-00456-COA

CHARLES JOHNSON **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	12/19/2011
TRIAL JUDGE:	HON. JEFF WEILL SR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	DENNIS C. SWEET III WILLIAM ROLAND TERRIS CATON HARRIS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ELLIOTT GEORGE FLAGGS
DISTRICT ATTORNEY:	ROBERT SHULER SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF POSSESSION OF A FIREARM BY A CONVICTED FELON, AND SENTENCED, AS A HABITUAL OFFENDER, TO TEN YEARS, AND AN ADDITIONAL TEN YEARS AS AN ENHANCEMENT FOR THE USE OF A FIREARM IN THE COMMISSION OF A FELONY, WITH THE SENTENCES TO RUN CONSECUTIVELY TO EACH OTHER, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITHOUT ELIGIBILITY FOR PAROLE OR PROBATION
DISPOSITION:	AFFIRMED IN PART; REVERSED AND RENDERED IN PART – 12/10/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

IRVING, P.J., FOR THE COURT:

¶1. A Hinds County grand jury indicted Charles Johnson for murder, unlawful possession

of a firearm by a convicted felon, and two counts of armed robbery. The indictment also provided that Johnson was a habitual offender and sought an enhancement of the sentence based on Johnson's use of a firearm. After a two-day trial, a Hinds County jury acquitted Johnson of murder and both armed-robbery charges. The jury, however, convicted him of being a convicted felon in possession of a firearm. The circuit court sentenced Johnson, as a habitual offender, to ten years in the custody of the Mississippi Department of Corrections and also sentenced him to an additional ten years pursuant to the firearm-enhancement statute.

¶2. Feeling aggrieved, Johnson appeals and argues that the circuit court improperly restricted voir dire of the jury panel regarding pretrial publicity, erred by allowing a juror to return to deliberations after an allegation of misconduct, erred by prohibiting Johnson from introducing evidence regarding events related to the voluntariness of his confession, erred in finding that he was a habitual offender, and erred by using the firearm-enhancement statue to enhance his sentence.

¶3. Finding no merit to Johnson's first four issues, we affirm the circuit court's judgment as to those issues. However, we find that the circuit court erred in enhancing Johnson's sentence without having allowed the jury to determine whether the facts justified an enhancement in accordance with the firearm-enhancement statute. Therefore, we reverse and render the enhanced portion of Johnson's sentence.

FACTS

¶4. On February 15, 2011, Johnson shot Eugene "Boosie" Roberts as Roberts sat in the

passenger seat of a car parked at a home located on Culbertson Avenue in Jackson, Mississippi. As Johnson fled the scene of the shooting in his vehicle, he collided with a vehicle driven by Brenda Davis. He then aimed his gun at her and attempted to take her car, but the car would not start. A FedEx driver, Glen Coleman, witnessed the collision and stopped to see if he could help. As he stopped to offer assistance, Johnson approached him, aimed his gun at Coleman, and demanded the FedEx truck. Coleman complied. Johnson drove the truck to Clinton, Mississippi, where he abandoned it outside the home of Charles and Gabrielle Wells.

¶5. The next morning, Johnson turned himself in to Deputy Danny Johnson (no relation to the appellant) of the Hinds County Sheriff's Department. Deputy Johnson transported Johnson to Jackson and released him into the custody of the Jackson Police Department (JPD). JPD Detectives Eric Smith and Felix Hodge interviewed Johnson at JPD headquarters. Detective Smith informed Johnson of Johnson's rights, and Johnson confessed to killing Roberts but insisted that he did so in self-defense because Roberts and his friends, allegedly members of a local gang, were planning to kill him after robbing him of his drugs and money. He denied trying to take Davis's car at gunpoint. He also denied that he used a gun to take the FedEx truck from Coleman. He stated that he only wanted to get back to Clinton, where he thought that he would be safe. Johnson then led Detective Smith and other JPD officers to the gun that he used during the incident. Thereafter, JPD transported Johnson to the Hinds County Detention Center in Raymond, Mississippi, where he was allegedly assaulted by several officers from the Hinds County Sheriff's Department.

¶6. Prior to trial, the circuit court conducted a suppression hearing, where both detectives testified. Each of them testified that Johnson was informed of his rights prior to giving his confession and that neither of them threatened Johnson before, during, or after his confession. The court denied Johnson's suppression motion, and his confession was admitted during the trial.

¶7. During the State's case-in-chief, Baraka Buckley, who witnessed the shooting, testified that on the day of the incident, she and Roberts were sitting in her car talking. She saw Johnson arrive in his truck. He exited the truck, approached the home and talked with people who were standing around, and thereafter walked to the passenger side of Buckley's vehicle where he spoke briefly with Roberts. Johnson then pulled out a gun and shot Roberts several times. After the shooting began, Buckley grabbed her son, who was sitting in the backseat of the vehicle, and ran to an abandoned house down the street and remained there until she felt that it was safe to return to her vehicle. She later positively identified Johnson as the shooter.

¶8. After closing arguments, the State reported that it had been contacted by Patricia Stamps, Roberts's aunt, who informed the State that juror Vivian Manning had a preexisting relationship with a member of Roberts's family. However, the State was not informed of the identity of the family member or the details of the possible relationship with the family member. Johnson requested a mistrial based on juror Manning's alleged misconduct, which the circuit court denied.

¶9. The court allowed the State and Johnson's counsel to question Stamps. Stamps

testified that she knew juror Manning as Vivian Green and that they had spoken to each other outside of the courthouse. According to Stamps, the two only greeted each other. Stamps further testified that Manning did not know Roberts, but had come to Roberts's grandmother's house to offer her condolences approximately two months after the incident.

¶10. Manning testified that she did not know Roberts. She admitted that she had visited Roberts's aunt Michelle[1] and Michelle's mother several months before Roberts's death, but claimed that she was unaware at the time that either woman was related to Roberts. Manning denied visiting Michelle's mother, who was also Roberts's grandmother, after Roberts's death. Manning also testified that she did not know Stamps. Even though both Manning and Stamps testified during the investigative hearing, neither Johnson's counsel nor the State requested that Stamps appear in the presence of Manning to resolve the question of whether Stamps and Michelle were the same person.

¶11. Manning further testified that even though she knew members of Roberts's family, she had not discussed the case with any of them before the trial or during the trial; had been a fair and impartial juror throughout the trial; and would continue to be fair and impartial throughout deliberations. The circuit court allowed Manning to return to deliberations. Shortly afterwards, the jury returned with not-guilty verdicts on the murder and armed-robbery charges, and a guilty verdict on the felon-in-possession-of-a-firearm charge.

¶12. Additional facts, as necessary, will be related during our analysis and discussion of the issues.

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[1] The record does not inform us as to Michelle's last name.

ANALYSIS AND DISCUSSION OF THE ISSUES

I. Voir Dire

¶13. Johnson contends that the circuit court violated his constitutional right to a fair and impartial jury by improperly restricting voir dire of the jury panel regarding pretrial publicity. At trial, Johnson's counsel requested individual sequestered voir dire of each potential juror that had heard or read information about Johnson's case or the subsequent assault of Johnson by Hinds County law enforcement officials. According to Johnson, the court's limitation on voir dire led to impaneling a biased jury.

¶14. "[T]he decision of whether to allow individual sequestered jury voir dire should be left to the sound discretion of the [circuit] court." *Le v. State*, 913 So. 2d 913, 923 (¶14) (Miss. 2005); *see also* URCCC 3.05. Therefore, "[w]hen reviewing the conduct of voir dire, [appellate courts apply] an abuse of discretion standard." *Jordan v. State*, 995 So. 2d 94, 102 (¶11) (Miss. 2008) (citing *Jackson v. State*, 791 So. 2d 830, 835 (¶21) (Miss. 2001)). An "abuse of discretion will only be found where a defendant shows clear prejudice resulting from undue lack of constraint on the prosecution or undue constraint on the defense." *Id.* (quoting *Jackson*, 791 So. 2d at 835-36 (¶21)). The jury-selection process is proper if it gives the defendant "a fair opportunity to ask questions of [the potential] jurors which may enable the defendant to determine his right to challenge that [potential] juror[.]" *Stevens v. State*, 806 So. 2d 1031, 1062 (¶139) (Miss. 2001) (quoting *McLemore v. State*, 669 So. 2d 19, 25 (Miss. 1996)) (internal quotation marks omitted).

¶15. During voir dire, Johnson's attorney opined to the court that the case was "well

publicized for two reasons. One, it was about the FedEx truck. It was all over the news. And, two, Charles Johnson was beaten[,] and there were [thirteen] officers fired in relation to his beating." The State agreed that the case received some publicity for a couple of weeks, but could not say that the general public would connect the FedEx-truck case to the "jail-beating case." Johnson's attorney suggested that the parties be allowed to individually voir dire the venire members who indicated that they had "read or heard about this case." In response, the State suggested filtering the venire by asking those members that had heard about the case if they could "disregard anything [they] read in the media and decide this case solely on what you see and hear in this courtroom." The State was not opposed to individual voir dire if some extraordinary response necessitated it. The court agreed by stating, "I [am] sure a good number have heard about it, but that [does not] exclude them or even mean that they [cannot] be a fair and impartial juror." Although Johnson's counsel disagreed with the process, he agreed to ask the general question and then request individual voir dire of venire members based on their responses.

¶16. Johnson's attorney then asked if any of the members of the venire had heard or read anything about "a shooting[,] . . . a man fleeing in [a] FedEx truck, . . . [and] Mr. Johnson being beaten by law enforcement officials." Out of the forty-six members of the venire, twenty-five responded affirmatively to the compound question. The court did not prevent Johnson's counsel from asking those twenty-five members of the venire which of the three incidents they were familiar with. When Johnson's counsel requested individual voir dire of those twenty-five venire members, the circuit court denied the request. However, the court

allowed counsel to ask whether any of the twenty-five venire members had formed an opinion regarding Johnson's guilt or innocence, and if they had formed an opinion, whether they could set that opinion aside. Johnson's counsel continued:

> Ladies and gentlemen of the jury - - potential jury, for anybody who raised their hand, have any of you all formed an opinion as to Mr. Johnson's guilt or innocence from what you've heard? Anyone here?
>
> (NO RESPONSE)
>
> I take it by your silence your answer's no.

¶17. Johnson relies on *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), to insist that the circuit court should have allowed his attorney to individually voir dire the venire members. We fail to see how *Stuart* provides support for Johnson's position, as *Stuart* focused on restricting "reporting or commentary on judicial proceedings held in public" rather than on restricting voir dire. *Id.* at 570.

¶18. Johnson also suggests that this Court adopt the "acceptable procedure" described by the United States Court of Appeals for the Fifth Circuit in *United States v. Davis*, 583 F.2d 190, 197 (5th Cir. 1978). In *Davis*, the district court noted that the crimes and the circumstances surrounding the trial were the subject of extensive publicity, and every venire member had heard about the case. *Id.* at 196. The media had sensationalized the crimes by focusing on the violence of the crimes, the purpose behind the crimes, the crimes' repercussions, and the defendants' backgrounds. *Id.* Although the Fifth Circuit ultimately determined that the district court erred in not conducting in-depth voir dire when faced with those circumstances, the court also noted that "[t]hough separate examination of jurors is

sometimes preferable, it is not necessarily required." *Id.* at 196-97. The court later noted that "[a] juror's impartiality is not necessarily destroyed when he is exposed to pretrial publicity. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 197 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)) (internal quotation marks omitted).

¶19. Finally, we note that the United States Supreme Court specifically addressed individualized voir dire in the face of pretrial publicity in *Mu'Min v. Virginia*, 500 U.S. 415 (1991). In *Mu'Min*, sixteen out of twenty-six members of the venire revealed that they "had acquired . . . information about the alleged offense or the accused from the news media or from [another] source[.]" *Id.* at 419. The defendant requested that all of the potential jurors who had been exposed to pretrial publicity be excused from the venire. *Id.* at 420. The court denied the defendant's request and asked the potential jurors who indicated that they "had read or heard something about the case . . . whether [they] had formed an opinion, and whether [they] could nonetheless be impartial." *Id.* None of the members of the venire who eventually served as jurors indicated that they had "formed an opinion or gave any indication that [they were] biased or prejudiced against the defendant." *Id.* at 421.

¶20. In approving the trial court's procedure, the Supreme Court stated that

> [u]nder the constitutional standard, . . . the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. Under this constitutional standard, answers to questions about content alone, which reveal that a juror remembered facts about the case, would not be sufficient to disqualify a juror. It is not required that the jurors be totally ignorant of the facts and issues involved.

Id. at 430 (internal citations and quotation marks omitted). As such, the trial court's voir dire examination was sufficient. *Id.* at 431-32.

¶21. Like the trial court in *Mu'Min*, the circuit court here allowed defense counsel to ask the members of the venire if they had formed an opinion based on the information that they had heard. Just as was the case in *Mu'Min*, none indicated that they had formed an opinion based on the information that they had read or heard. Thus, there was no need to engage in individual voir dire. The dissent states, "The jury misconduct that came to light during deliberations showed the actual harm and prejudice resulting from the circuit court's refusal of individual voir dire." Dis. Op. at (¶42). Apparently, the dissent has misread the record because, as we discuss later, the circuit court found that, notwithstanding Johnson's allegations, no misconduct occurred. The record is clear that the members of the venire indicated that they had not formed an opinion about Johnson's guilt or innocence. The members of the venire also assured the circuit court on more than one occasion that, despite whatever information they had received, they could render a fair and impartial verdict. "This Court gives great deference to such statements of impartiality." *Speagle v. State*, 956 So. 2d 237, 242 (¶14) (Miss. Ct. App. 2006) (citing *Le*, 913 So. 2d at 923 (¶14)). Johnson has failed to identify any evidence that demonstrated the need for individual voir dire. The court agreed to allow individual voir dire when an extraordinary response necessitated it. However, none of the members of the venire gave any such response. There is no evidence in the record indicating that the procedure followed by the circuit court was improper or prejudicial to Johnson. Furthermore, Johnson has not demonstrated that his inability to

individually voir dire the members of the venire— to probe them about the information that they had received and from whom—resulted in prejudice.

II. Juror Misconduct

¶22. When the circuit court learned during the jury's deliberations of the possibility that Manning had engaged in improper conduct as a juror, it immediately held a hearing on the matter and took testimony from Stamps and Manning. After the hearing, the court determined that there was no clear evidence of impropriety, denied Johnson's motion for a mistrial, and allowed Manning to return to deliberations.

¶23. Johnson contends that Manning purposely hid her relationship with Roberts's family from the attorneys during voir dire. He also argues that the circuit court erred by allowing Manning to return to jury deliberations following the investigation of her alleged misconduct, because allowing her to continue to deliberate with the other jurors tainted the verdict.

¶24. The circuit court's determination that "the jury was fair and impartial will not be disturbed on appeal unless it appears clearly that the decision is wrong." *Williams v. State*, 35 So. 3d 480, 490 (¶36) (Miss. 2010) (citing *Fleming v. State*, 687 So. 2d 146, 148 (Miss. 1997)). In *Gladney v. Clarksdale Beverage Co.*, 625 So. 2d 407, 418-19 (Miss. 1993), the Mississippi Supreme Court stated:

> Once an allegation of juror misconduct arises, then the next step is to consider whether an investigation is warranted. In order for the duty to investigate to arise, the party contending there is misconduct must make an adequate showing to overcome the presumption in this state of jury impartiality. Juror polling shall only be permitted by an attorney, outside the supervision of the court, upon written request.
>
> At the very minimum, it must be shown that there is sufficient evidence to

> conclude that good cause exists to believe that there was in fact an improper outside influence or extraneous prejudicial information.

"Further, [Rule 3.12 of the Uniform Rules of Circuit and County Court] allows the judge to declare a mistrial only when the harm done would render the defendant without hope of receiving a fair trial." *Moore v. State*, 52 So. 3d 339, 343 (¶14) (Miss. 2010) (quoting *Reed v. State*, 764 So. 2d 511, 513 (¶7) (Miss. 2000)) (internal quotation marks omitted).

¶25. In *Williams*, our supreme court stated that

> [a] juror's failure to respond to a question in voir dire does not warrant a new trial unless the [circuit] court determines that the question propounded to the juror was (1) relevant to the voir dire examination, (2) unambiguous, and (3) such that the juror had substantial knowledge of the information sought to be elicited. If all three questions are answered in the affirmative, the court then determines if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond.

Williams, 35 So. 3d at 490 (¶36) (quoting *Odom v. State*, 355 So. 2d 1381, 1383 (Miss. 1978)) (internal citations and quotation marks omitted).

¶26. Here, once the State revealed the possibility of misconduct, the circuit court questioned Stamps to determine the extent of her alleged conversation with Manning. Both the State and Johnson's attorney were then allowed to question Stamps. The court also questioned Manning regarding her alleged relationship with Roberts's family. After the court finished with its questions, both sides were allowed to question Manning. Manning stated that she did not know Stamps and denied Stamps's allegations that Manning had visited Roberts's grandmother after his death and that she had discussed the case with Roberts's family prior to serving as a juror. She declared that she had been fair and impartial throughout the trial and would continue to be fair and impartial throughout the rest of

deliberations. There is no evidence that Manning behaved improperly or that Manning was not a fair and impartial juror.

¶27. Additionally, while Johnson contends that Manning intentionally hid her preexisting relationship with Roberts's family, the record reveals that the members of the venire were never asked whether they knew or were acquainted with members of Roberts's family. Also, it is undisputed that Manning did not know Roberts prior to serving as a juror in this case.

¶28. The dissent submits that the circuit court erred in allowing Manning to return to deliberations after "discovery of her knowledge of pretrial, extraneous information from the family of the victim," and erred in not declaring a mistrial "due to Manning's undisclosed pretrial knowledge of the case from Roberts's family received during her visit to the family upon Roberts's death." Dis. Op. at (¶43). With respect, we must say again that the dissent apparently has misread the record or refuses to accept that it was the responsibility of the circuit court judge to determine the credibility of the testimonies of Stamps and Manning. We note again that the circuit court judge determined that there was no "clearly substantiated showing of a specific impropriety[.]" To find, as does the dissent, that Manning obtained "undisclosed pretrial knowledge of the case from Roberts's family during her visit upon Robert's death" is to substitute the dissent's judgment for the judgment of the circuit court judge. Such an undertaking is without foundation in our jurisprudence. Accordingly, we cannot say that the circuit court erred in allowing Manning to return to jury deliberations after finding that the allegations of her misconduct were unsubstantiated. As such, this issue is without merit.

III. Voluntariness of Confession

¶29. Johnson argues that he was not allowed to present testimony relevant to the circumstances surrounding his confession to Detectives Smith and Hodge and the subsequent discovery of the weapon. Specifically, Johnson challenges the circuit court's exclusion of testimony regarding Johnson's post-confession assault by Hinds County law enforcement officials.

¶30. Appellate courts apply the following standard when reviewing a circuit court's ruling on a motion to suppress:

> Since the [circuit] court sits as the fact-finder when determining the issue of whether an accused's confession has been intelligently, knowingly[,] and voluntarily given, [appellate courts] will only reverse the [circuit] court's determination of this issue when such determination is manifestly wrong. [Appellate courts] will not disturb the [circuit] court's determination on the admissibility of a confession unless the [circuit] court applied an incorrect legal standard, committed manifest error, or rendered a decision which was contrary to the overwhelming weight of the evidence. A confession is admissible if the State has proven beyond a reasonable doubt that the accused's confession was voluntary by showing that such confession was not the product of promises, threats[,] or inducement. With regard to the [circuit] court's findings on the admissibility of a confession, . . . where, on conflicting evidence, the [circuit] court makes such findings, [appellate courts] generally must affirm.

Richardson v. State, 74 So. 3d 317, 322 (¶14) (Miss. 2011) (internal citations and quotation marks omitted). After a lengthy suppression hearing, the circuit court determined that Johnson voluntarily confessed. Nevertheless, "[o]nce a confession is admitted into evidence, a defendant is entitled to submit evidence and have the jury pass upon the factual issues of its truth and voluntariness and upon its weight and credibility." *Wilson v. State*, 451 So. 2d 724, 726 (Miss. 1984) (citation omitted).

¶31. While Johnson contends that the assault upon him by sheriff deputies, which occurred after his confession to Detectives Smith and Hodge, influenced the confession, he has failed to present any evidence to support this contention. The record reveals that the assault occurred hours after Johnson confessed to Detectives Smith and Hodge. Furthermore, there is no evidence that Detective Smith, Detective Hodge, or any other member of JPD was involved in Johnson's assault. Detectives Smith and Hodge testified that they had not threatened or coerced Johnson into giving a confession and that Johnson was aware of his rights prior to giving his confession. Johnson did not testify. Based on these facts, we cannot find that the circuit court erred in not allowing Johnson to present testimony regarding his post-confession incident with Hinds County law enforcement officers. Accordingly, this issue is without merit.

IV. Habitual Offender

¶32. Johnson argues that the circuit court erred in sentencing him as a habitual offender under Mississippi Code Annotated section 99-19-81 (Rev. 2007), which states:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon *charges separately brought and arising out of separate incidents at different times* and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

(Emphasis added). In 1998, Johnson was charged, in a multi-count indictment, with three counts of selling cocaine. The sales occurred on January 23, 1997; February 6, 1997; and March 4, 1997. Johnson pleaded guilty to the first two counts. The State dismissed the third

count as part of its plea agreement with Johnson. Since he was charged in a multi-count indictment, Johnson argues that those crimes cannot be used to adjudicate him as a habitual offender, because the requirements of section 99-19-81 are not satisfied.

¶33. In *Kolb v. State*, 568 So. 2d 288 (Miss. 1990), our supreme court examined the effect that a multi-count indictment has on an offender's status under section 99-19-81. The defendant in *Kolb* was convicted in the State of Nebraska of two burglary charges. *Kolb*, 568 So. 2d at 288-89. The Nebraska charges were presented against the defendant in a multi-count indictment. *Id.* The defendant argued that the charges could not satisfy the requirements of Mississippi's section 99-19-81. *Kolb,* 568 So. 2d at 288-89. The court stated that

> the mere form of presenting two charges as separate counts of a single information (or indictment) in no way merges those charges except for the limited purpose of judicial economy and procedure. The prosecution is still required to prove each and every element of each charge the same as if each had been proceeded upon in a separate trial. For aught that appears, charges such as this[,] which arise out of wholly separate occurrences at different times and places, quite likely would have been severed for trial had [the defendant] not entered pleas of guilty. Separation of these charges into separate counts rendered them sufficiently separate to satisfy [s]ection 99-19-81's mandate that they be "separately brought."

Kolb, 568 So. 2d at 289.

¶34. The charges in Johnson's indictment were separated into separate and distinct counts; the sales clearly occurred at different times; and Johnson served ten years for each crime. As such, Johnson's previous crimes, even though listed in a single indictment, were properly considered as separate crimes for purposes of habitual-offender sentencing. This issue is without merit.

V. Firearm Enhancement

¶35. Johnson alleges that the circuit court erred by failing to submit for the jury's consideration the elements that would justify the enhancement of his sentence. We first note that Johnson's challenge on appeal to this portion of his sentence is different from the challenge that he made to his sentence in the circuit court. Prior to sentencing, Johnson argued that the firearm enhancement did not apply because his only conviction was the felon-in-possession charge. As stated, on appeal, Johnson argues that the enhancement portion of his sentence is illegal because the jury was not allowed to consider the elements that would justify enhancement of his sentence.

¶36. It is a well-settled principle of law that "an objection on one or more specific grounds constitutes a waiver of all other grounds." *Spicer v. State*, 921 So. 2d 292, 316 (¶49) (Miss. 2006) (citation omitted) (modified by *Brown v. State*, 986 So. 2d 270, 286 (¶16) (Miss. 2008), and partially abrogated by *O'Connor v. State*, 120 So. 3d 390, 399-401 (¶¶23-29) (Miss. 2013)). Because Johnson objects to his sentence enhancement on a ground not raised in the circuit court, he "must rely on plain error to raise the issue on appeal[;] . . . otherwise it is procedurally barred." *Parker v. State*, 30 So. 3d 1222, 1227 (¶14) (Miss. 2010) (citing *Walker v. State*, 913 So. 2d 198, 216 (¶45) (Miss. 2005)). Our supreme court has "held that defendants have a fundamental, constitutional right to be free from illegal sentences, and plain error exists when an error affects a defendant's substantive or fundamental right." *Harris v. State*, 99 So. 3d 169, 172 (¶15) (Miss. 2012) (internal citations omitted). Therefore, we will address Johnson's sentence-enhancement argument. In doing so, we first note that

the State has conceded that it was error to enhance Johnson's sentence pursuant to the firearm-enhancement statute without first presenting the enhancement elements to the jury.

¶37. According to Mississippi Code Annotated section 97-37-5(1), (2) (Supp. 2013), it is a felony for a convicted felon to possess a firearm. The jury convicted Johnson of this crime. Mississippi Code Annotated section 97-37-37(2) (Supp. 2013) provides:

> *Except to the extent that a greater minimum sentence is otherwise provided by any other provision of law*, any convicted felon who *uses or displays* a firearm during the commission of any felony shall, in addition to the punishment provided for such felony, be sentenced to an additional term of imprisonment . . . of ten (10) years[.]

(Emphasis added).

¶38. The circuit court sentenced Johnson to an additional ten years in prison pursuant to the firearm-enhancement statute. In *Brown v. State*, 995 So. 2d 698, 703 (¶20) (Miss. 2008) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)), our supreme court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." It cannot be denied that one can *possess* a firearm without *using or displaying* it. Although there is evidence that Johnson used and displayed a firearm, he was not convicted of any charge involving the use and display of the firearm. Before the court could enhance Johnson's sentence above the ten-year statutory maximum for possession of the firearm by a convicted felon, the jury was required to determine if Johnson had used or displayed the firearm that he possessed in the commission of a felony. As the jury was not instructed to make that determination, the circuit court erroneously used a fact that had not

been determined by the jury to enhance Johnson's sentence beyond the statutory maximum. Accordingly, the enhancement portion of Johnson's sentence is reversed and rendered.

¶39. **THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF POSSESSION OF A FIREARM BY A CONVICTED FELON, AND SENTENCE, AS A HABITUAL OFFENDER, OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT ELIGIBILITY FOR PAROLE OR PROBATION, IS AFFIRMED. THE SENTENCE OF TEN YEARS AS AN ENHANCEMENT FOR THE USE OF A FIREARM IN THE COMMISSION OF A FELONY IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED ONE-HALF TO HINDS COUNTY AND ONE-HALF TO THE APPELLANT.**

LEE, C.J., GRIFFIS, P.J., ROBERTS, MAXWELL AND FAIR, JJ., CONCUR. BARNES AND JAMES, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY ISHEE, J.

CARLTON, J., DISSENTING:

¶40. I respectfully dissent. I respectfully submit that fundamental fairness was violated and that the substantial right of Johnson to an impartial jury was prejudiced by the following errors that occurred in the circuit court: (1) the limiting of the questioning of potential jurors as to the content and the sources of their pretrial knowledge of the case after the record established that twenty-five jurors possessed pretrial knowledge of the case; and (2) the resulting prejudice and harm that occurred in the contamination of the juror deliberations due to the misconduct of a juror in concealing both her relationship with the victim's family and that the victim's family was the source of her pretrial knowledge of the case.[2] I would

[2] *See Odom v. State*, 355 So. 2d 1381, 1382-83 (Miss. 1978) (remanding for a new trial where a juror failed to respond to a question during voir dire and to disclose that his brother was a police officer involved in the investigation of the crime with which the defendant was charged).

therefore reverse and remand Johnson's conviction of being a convicted felon in possession of a firearm for a new trial due to such errors affecting his fundamental right to an impartial jury. *See* Miss. Const. art. 3, § 26.[3]

¶41. During voir dire Johnson's attorney asked potential jurors the following:

> There was an issue about a shooting and then a person taking a FedEx truck from a man and fleeing in the FedEx truck. After that, there was a whole news story about him being beaten by some law enforcement officials. . . . But first I want to ask you, either part of that, anything about that, did anybody read or hear anything about it?

Twenty-five of the potential jurors responded affirmatively. This question was a compound question, and Johnson's attorney was denied the opportunity to conduct individual voir dire to ascertain whether the jurors heard about the shooting, the beating, or both. The denial of individualized voir dire also prevented questioning of the potential jurors on an individual basis regarding the source of their pretrial, extraneous information. *See* Miss. Code Ann. § 13-5-69 (Rev. 2012) ("[T]he parties or their attorneys in all jury trials shall have the right to question jurors who are being impaneled with reference to challenges for cause, and for peremptory challenges, and it shall not be necessary to propound the questions through the presiding judge . . . .").

¶42. Johnson's attorney lacked the ability to ascertain the source of the twenty-five jurors' pretrial knowledge, such as whether the information was the firsthand account of a witness;

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[3] Regarding juror misconduct and extraneous information, see *Gladney v. Clarksdale Beverage Co.*, 625 So. 2d 407, 418-19 (Miss. 1993), and *James v. State*, 912 So. 2d 940, 950-51 (¶¶17-18) (Miss. 2005), for a discussion of the threshold showing required before a post-verdict juror inquiry is granted and the method to be used to inquire into juror verdicts.

the extent of that information received; or whether the information merely amounted to public media information heard in passing. The discovery of such information during voir dire would have allowed the defense to determine any existing potential bias due to such exposure or relationships. Rule 3.05 of the Uniform Rules of Circuit and County Court allows a circuit court, in its discretion, to utilize individualized voir dire, and the Mississippi Supreme Court requires a showing of actual prejudice or harm to reverse a circuit court's limitation on voir dire. *See King v. State*, 857 So. 2d 702, 724 (¶66) (Miss. 2003) (citation omitted). The jury misconduct that came to light during deliberations showed the actual harm and prejudice resulting from the circuit court's refusal of individual voir dire.

¶43. Jurisprudence reflects that if "prejudice to [the defendant] in selecting the jury might reasonably be inferred," then a new trial should be ordered. *Odom v. State*, 355 So. 2d 1381, 1383 (Miss. 1978). The juror misconduct in the present case shows clear prejudice resulting from the undue constraint of refusing Johnson's attorney the opportunity to conduct individual voir dire after it had already been established that twenty-five jurors received pretrial information from some unknown sources about either the shooting or Johnson's beating by law enforcement. The clear prejudice, as acknowledged, was demonstrated by the evidence received during the post-trial hearing involving Manning, one of the jurors in Johnson's case. I respectfully submit that the circuit court erred in allowing Manning to return to deliberations after discovery of her knowledge of pretrial, extraneous information from the family of the victim, Roberts, and that the circuit court erred in failing to declare a mistrial at that juncture due to Manning's undisclosed pretrial knowledge of the case from

Roberts's family received during her visit to the family upon Roberts's death.[4]

¶44. Once the twenty-five jurors had been identified on the record as possessing knowledge of either the shooting or the beating, Johnson's attorney was entitled to explore on individual voir dire which pretrial offense the knowledge pertained to; the source of the knowledge, i.e., personal accounts or witness or media information in the public domain; and the extent of such knowledge. Johnson's attorney, as well as the State, should have had the opportunity to explore those matters to ensure an impartial jury and to competently exercise peremptory challenges or challenges for cause.[5]

¶45. With respect to the resulting juror misconduct, the victim's family constituted the source of the pretrial knowledge conveyed to and possessed by Manning. The prior denial of individual voir dire prevented Johnson's attorney from discovery of this information, and Johnson was therefore denied a fair opportunity to ask jurors questions that were necessary for him to determine his right to challenge the individual jurors and to ensure an impartial jury. *See Stevens v. State*, 806 So. 2d 1031, 1062 (¶139) (Miss. 2001) (citations omitted); *cf. Hickson v. State*, 707 So. 2d 536, 541-42 (¶¶21-25) (Miss. 1997) (discussing a defendant's right to a fair trial before an impartial jury). Such questioning regarding the source of pretrial

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[4] *See James*, 912 So. 2d at 950-51 (¶¶17-19); *Winters v. State*, 473 So. 2d 452, 457 (Miss. 1985) ("In reviewing the assigned error that a trial judge has abused his discretion . . . , we look to the completed trial, particularly including the voir dire examination of the prospective jurors, to determine whether the accused received a fair trial.") (citations omitted); *see also Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990) ("Our law further provides that a juror is 'disqualified' within [the meaning of Mississippi Code Annotated section] 13-5-67 where on voir dire examination he or she has withheld information or misrepresented material facts."); *Odom*, 355 So. 2d at 1383.

[5] *See* Miss. Code Ann. § 13-5-69.

knowledge and information is a matter appropriate for individual voir dire because of the risk of contaminating other potential jurors with revelations of previously unknown facts or sources, such as accounts of eyewitnesses, involved law enforcement, victims, defendants, or family members. *See also James v. State*, 912 So. 2d 940, 951 (¶19) (Miss. 2005) (finding that evidence regarding the introduction to the jury of extraneous information satisfied the minimum requirements of *Gladney v. Clarksdale Beverage Co.*, 625 So. 2d 407 (Miss. 1993)).

¶46. The record reflects that Johnson was acquitted of the more severe charges of murder and two counts of armed robbery, and the majority credits those favorable verdicts as evidence that no prejudice resulted due to any undue restraint upon Johnson's right to voir dire. However, once Manning faced the accusation of failing to disclose her pretrial contact with the victim's family, the circuit court allowed her to return to deliberations. The majority finds that no prejudice occurred by Manning's return to deliberations and that the result obtained after her return to deliberations evidenced her impartiality. Respectfully, this conclusion lacks foundation.[6]

¶47. The verdicts in Johnson's favor as to the charges of murder and two counts of armed robbery could be attributed to Manning's fear of the juror-misconduct accusations raised against her and to her efforts to vindicate herself upon her return to deliberations.[7] We shall

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[6] *See* 75B Am. Jur. 2d *Trial* § 1405, at 190 (2007) (explaining that courts use an objective standard to determine whether the use of extraneous information poses a reasonable possibility of prejudice to the defendant).

[7] *See id.* ("In determining the effect of outside influence . . . , the relevant factors are the nature and source of the prejudicial matter, the number of jurors exposed to the influence,

never know since Mississippi Rule of Evidence 606(b) prohibits jurors from discussing their deliberations. *See James*, 912 So. 2d at 950-51 (¶¶17-18). "Thus, a . . . court must ignore a juror's comment regarding how a particular piece of material disposed the juror toward a particular verdict, and the . . . court must make an independent determination of the likely effect of the extraneous material." *United States v. Berry*, 92 F.3d 597, 601 (7th Cir. 1996) (citations omitted). The influence impacting Manning after she was questioned about failing to disclose her contact with the victim's family constituted an extraneous influence that was introduced into the jury deliberations by the court. "Because the extraneous influence was introduced into the jury's deliberations by the court and not by accident or some outside party, . . . a presumption is raised that prejudice flows from the injection of such extraneous influence." *Rutland v. State*, 60 So. 3d 137, 144 (¶27) (Miss. 2011) (citing *Collins v. State*, 701 So. 2d 791, 796 (¶17) (Miss. 1997)).

¶48. The acquittals obtained fail to evidence a lack of prejudice as to the conviction rendered herein. The charges determined by the acquittals are not at issue here and are forever extinguished by the Fifth Amendment double-jeopardy protections. If Manning had not returned to the deliberation room, perhaps the jury's verdict would have been different on the greater charges. However, such speculation is of no assistance in resolving the issue now before us as to whether Johnson's substantial rights to due process and an impartial jury were prejudiced with respect to his conviction for the charge of being a convicted felon in

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the weight of evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice.").

possession of a firearm.[8]

¶49. As acknowledged, the record shows that during voir dire twenty-five jurors admitted to possessing pretrial knowledge of either the shooting or the beating. Upon establishing this record, fundamental fairness entitled Johnson to conduct individual voir dire to determine the source of the information and the extent of the information or knowledge obtained by each potential juror without contaminating other potential jurors.[9] The juror misconduct alleged herein evidenced a potential bias by juror Manning against Johnson as well as possibly extraneous information and association with Roberts's family before the trial in this case. Johnson met his burden to show juror misconduct in that Manning possessed substantial knowledge of this case but failed to answer affirmatively when questioned on the subject. *See Morris v. State*, 843 So. 2d 676, 680 (¶16) (Miss. 2003) (citation omitted).

¶50. Where a juror withholds information and the evidence reflects "that a fuller and more complete response or any response at all would have provided a legitimate basis for challenge, the [circuit] court must grant a new trial[,] and if it does not, this Court must reverse on appeal." *Langston v. State*, 791 So. 2d 273, 281 (¶18) (Miss. Ct. App. 2001)

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[8] *See Perkins v. State*, 244 So. 2d 414, 415 (Miss. 1971) (holding that a conversation between a juror and a material witness constituted reversible error); *but cf. Jackson v. State*, 962 So. 2d 649, 667 (¶52) (Miss. Ct. App. 2007) (finding the defendant's claim that the jurors returned a guilty verdict because they were tired was mere speculation and not reversible error).

[9] *Cf. Merchant v. Forest Family Practice Clinic*, 67 So. 3d 747, 756-57 (¶¶20-23) (Miss. 2011) (holding that a potential juror's failure to honestly respond to voir dire questions and his refusal to follow the circuit court's instruction to avoid references during deliberations to a different lawsuit prejudicially compromised the due-process right of a patient's estate to a fair trial).

(citing *Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990)).

¶51. Based upon the foregoing, I must respectfully dissent from the majority's opinion. I would reverse and remand Johnson's conviction of being a convicted felon in possession of a firearm for a new trial due to the abuse of discretion and errors that affected Johnson's fundamental right to an impartial jury.[10]

ISHEE, J., JOINS THIS OPINION.

[10] *See* U.S. Const. amend. VI; Miss. Const. art. 3, § 26.