

**COPY**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VICTOR LOWELL FRYOU

APPELLANT

**FILED**

V.

OCT 05 2007

NO. 2007-KA-0635-COA

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SUPREME COURT  
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

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REPLY BRIEF OF THE APPELLANT

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NO ORAL ARGUMENT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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REPLY ARGUMENT

**I. WHETHER MR. FRYOU IS PROCEDURALLY BARRED FROM RAISING ON APPEAL THE ISSUE OF A LESSER INCLUDED OFFENSE INSTRUCTION FOR SIMPLE MURDER AS IT WAS NOT RAISED IN HIS MOTION FOR A NEW TRIAL.**

In its brief, the State argues that Mr. Fryou is procedurally barred from raising on appeal the issue of a lesser included offense instruction for simple murder as it was not raised in his motion for a new trial.

“Where assignment of error is evidenced in pleadings and transcript, it is not necessary to make motion for new trial based upon that error in order to preserve the issue for appeal”. Underwood v. State, 708 So.2d 18 (Miss. 1998).

On appeal from conviction of the defendant for rape, the contention that the State's proof of element of penetration was elicited by a leading question was waived by failure to preserve the alleged error by either an objection by defendant's counsel or a motion for new trial. Smith v. State, 296 So.2d 678 (Miss. 1974). Defendant who did not object during trial or on motion for new trial to absence of order for indictment amendment, failed to preserve for review issue concerning validity of indictment amendment. Doby v. State, 532 So.2d 584 (Miss. 1988).

In Colson v. E. E. Sims and G. E. Sanders, d/b/a Jitney Jungle, 220 So.2d 345 (Miss. 1969), the Supreme Court set out specifically what is to be required in a motion for new trial.

FN1. Motion for a new trial. Since there seems to be some confusion as to what is required to be set out in a motion for a new trial in order to take advantage of the alleged error on appeal to this Court, it may be helpful for us to point out that it is not necessary to make a motion for a new trial grounded upon errors shown in the official transcript of the record, including the pleadings, transcribed evidence, instructions, verdict and judgement of the court. Miss. Code 1942. Ss 1639, 1644 (1956). Id. at 346.

The Court in Colson further cited errors that must be brought to the attention of the trial judge in a motion for a new trial, so that the trial judge may have an opportunity to pass upon their validity before the Supreme Court is called upon to review them. The following list was cited by the Court in Colson:

- (1). All new matters, not shown of record and not merely cumulative irregularities, mistakes, surprises, misconduct and newly discovered evidence may be set out in a motion for a new trial. Id. at 347 citing (Redmond v. Marshall, 137 So. 733 (1931); Miss. Code 1942. Ss 1536, 1537 (1956)).
- (2). Motion made upon the ground of inadequate or excessive damages must be made in a motion for a new trial. Colson v. E. E. Sims and G. E. Sanders, d/b/a Jitney

Jungle, 220 So.2d at 347 citing Watson v. Holeman, 153 So. 669 (1934); Standard Oil Co. V. Franks, 149 So. 798 (1933); Coccora v. Vicksburg Light and Traction Co., 89 So. 257 (1921).

(3). Motion for new trial must be made where it is contended that the verdict of the jury is against the overwhelming weight of the evidence. Colson v. E. E. Sims and G. E. Sanders, d/b/a Jitney Jungle, 220 So.2d at 347 citing Gilmer v. Gunter, 46 So.2d 447 (Miss. 1950).

(4). The denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground. Colson v. E. E. Sims and G. E. Sanders, d/b/a Jitney Jungle, 220 So.2d at 347 citing King v. State, 168 So.2d 637 (1964); Cherry v. Hawkins, 137 So.2d 815 (1962); Lamar v. State, 63 Miss. 265 (1885).

In the present case, Mr. Fryou requested a simple murder instruction and the trial court refused. RE-59, 60 and 62. The trial court refused the murder instruction without any specific reasoning behind its decision. T. 334. According to the above referenced authority, because Mr. Fryou filed his jury instructions for simple murder and there was a hearing in court which is evidenced in the transcript, it was not necessary for Mr. Fryou to specifically place in his motion for new trial the issue of a lesser-included murder instruction to preserve this issue for appeal. Id. at 18. It is in the transcript on T. 334, RE 60-62 and in jury instructions D-2, D-14 and D-15.

## **II. WHETHER MR. FRYOU IS PROCEDURALLY BARRED FROM RAISING ON APPEAL THE ISSUE OF A JURY INSTRUCTION BASED UPON THE WEATHERSBY RULE.**

In its brief, the State argues that Mr. Fryou is procedurally barred from raising on appeal the issue

of a weathersby jury instruction as it was not raised in his motion for a new trial. Mr. Fryou would make the identical argument in this issue as was just raised in Argument I. He filed a weathersby jury instruction and it was refused by the trial judge. RE-59. This issue was properly preserved for review by this Court.

### CONCLUSION

Based upon the above referenced law and arguments as well as the issues and arguments raised in his initial appellant brief, Victor Fryou, contends the trial court committed reversible error by denying his lesser-included offense instructions and the weathersby instruction.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Brenda Jackson Patterson, Counsel for Victor Lowell Fryou, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF OF THE APPELLANT** to the following:

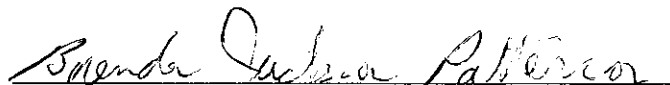
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