IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CARL BRYAN JOHNSON — APPELLANT

VS. — NO. 2007-KA-0901-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT 12

ARGUMENT 13

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN ADMITTING THE TESTIMONY OF SELF-GRATIFICATION. 13

CONCLUSION 21

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Williams, 343 F.3d 423 (5th Cir. 2003), cert denied 124 S.Ct. 966, 540 U.S. 1093, 157 L.Ed.2d 800 (2003) 16

STATE CASES

Anderson v. State, 811 So2d 410 (Ct.App.Miss. 2001) 18

Anthony v. State, 843 So.2d 51 (Ct.App.Miss. 2002) 17

Ballenger v. State 667 So.2d 1242, 1257 (Miss. 1995) 18

Blanks v. State, 547 So.2d 29 (Miss. 1989) 13

Carter v. State, 310 So.2d 271 (Miss. 1975) 17

Collins v. State, 513 So.2d 877, 879 (Miss. 1987) 16

Davis v. State, 530 So.2d 694, 697 (Miss. 1988) 12, 15

Edwards v. State, 737 So.2d 275 (Miss. 1999) 19

Eskridge v. State, 765 So.2d 508 (Miss. 2000) 19

Eubanks v. State, 419 So.2d 1330, 1331 (Miss. 1982) 15

Hampton v. State, 910 So.2d 651, 655 (Ct.App.Miss. 2005) 17

Hemingway v. State, 483 So.2d 1335, 1337 (Miss. 1986) 16

Jackson v. State, 594 So.2d 20, 25 (Miss. 1992) 20

Johnson - Mitchell v. State, 539 So.2d 1366 (Miss. 1989) 15

Johnston v. State, 567 So.2d 237 (Miss. 1990) 19

Jones v. State, 740 So.2d 904 (Miss. 1999) 19

Kelly v. State, 783 So.2d 744 (Ct.App.Miss. 2000) 17

Knight v. State, 248 Miss. 850, 161 So.2d 521, 522 (1964) 20

Lambert v. State, 724 So.2d 392, 395 (Miss. 1998) 19

Leedom v. State, 796 So.2d 1010 (Miss. 2001) 17

Loeffler v. State, 396 So.2d 18 (Miss. 1981) 15

Massey v. State, 393 So.2d 472 (Miss. 1981) 15

McGowen v. State, 859 So.2d 320 (Miss. 2003) 16

Moore v. State, 921 So.2d 381 (Ct.App.Miss. 2005) 17

Neal v. State, 451 So.2d 743, 759 (Miss. 1984) 17

Newburn v. State, 205 So.2d 260, 265 (Miss. 1967) 21

Palmer v. State, 939 So.2d 792 (Miss. 2006) 16

Parker v. State, 606 So.2d 1132, 1136 (Miss. 1992) 19

Price v. State, 898 So.2d 641 (Miss. 2005) 16

Robinson v. State, 497 So.2d 440, 442 (Miss. 1986) 15

Sayles v. State, 552 So.2d 1383, 1387 (Miss. 1989) 20

Shanklin v. State, 290 So.2d 625, 627 (Miss. 1974) 21

Simmons v. State, 813 So.2d 710 (Miss. 2002) 17

Stevens v. State, 717 So.2d 311, 313 (Miss. 1998) 20

Tanner v. State, 216 Miss. 150, 157, 61 So.2d 781, 784 (1953) 16

Tanner v. State, 764 So.2d 385 (Miss. 2000) 19

Underwood v. State, 708 So.2d 18, 32 (Miss. 1998) 17

West v. State, No. 2006-KA-01353-COA decided November 20, 2007 (¶¶ 14-16) [Not Yet Reported] 12

Wheeler v. State, 536 So.2d 1347, 1352 (Miss. 1988) 17

Woods v. State, 393 So.2d 1319, 1324 (Miss. 1981) 16

Zoerner v. State, 725 So.2d 811 (Miss. 1998) **19**

STATE STATUTES

Mississippi Code Ann. §97-3-65(3)(a) **2**

STATE RULES

Miss.R. Evid. 404(b) **2, 12, 18**

Miss.R.Evid. 103(a) **19**

Miss.R.Evid. 401 ..... **19**

Miss.R.Evid. 403 ..... **12, 19**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CARL BRYAN JOHNSON **APPELLANT**

VERSUS **NO. 2007-KA-00901-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Following a two count indictment and a trial by jury, Carl Bryan Johnson was convicted of burglary of a dwelling with the intent to rape (Count I) and attempted rape (Count II).

Johnson argues vigorously on appeal that eyewitness testimony tending to prove that on the day of the house burglary and attempted rape and just four to five hours prior thereto he was masturbating on the roadside well within walking distance of the victim's home was inadmissible evidence of a prior bad sexual act.

According to Johnson this prior bad act evidence was " . . . elicited for one purpose and one purpose only - to prejudice the jury by making it believe that Carl Johnson is a bad person, and therefore he must have committed the crimes for which he was on trial." (Brief of the Appellant at 7)

We contend, on the other hand, the misconduct was admissible, *first*, as a part of the *res*

gestae of the crime charged, i.e., the whole of the transaction under investigation and every part and parcel thereof - a relevant preliminary to the crime charged, if you please - and, *second*, because it fits one of the exceptions to Miss.R. Evid. 404(b), *viz.*, " . . . proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," particularly motive, plan, intent, and *state of mind and body.*

CARL BRYAN JOHNSON, a thirty-three (33) year old African-American male and resident of Carrollton, prosecutes a criminal appeal from the Circuit Court of Carroll County, Mississippi, Joseph H. Loper, Jr., Circuit Judge, presiding.

During a trial by jury conducted on November 28, 2006, Johnson was convicted of burglary of a dwelling house and attempted rape following a two count indictment charging in Count I that Johnson, ". . . on or about September 02, 2006, . . . did wilfully, unlawfully, feloniously, and burglariously break and enter the dwelling house of Willie B. Gomiller located at Rt. 1 Box 47 on County Road 142, Coila, Mississippi, with the wilful, unlawful and felonious intent to commit the crime of forcible rape against Willie B. Gomiller, . . ." (C.P. at 1)

The indictment charged in Count II that Johnson ". . . on or about September 02, 2006, . . . did wilfully, unlawfully, feloniously attempt to have forcible sexual intercourse with Willie B. Gomiller against her will and without her consent, by forcing his way into her home, having his private parts exposed, stating his desire to have sex with her and then assaulting her, forcibly holding her down and trying to pull her underwear down, but the defendant failed or was prevented in his attempt because Ms. Gomiller resisted, fought back and screamed for help until the said Carl Bryan Johnson gave up and ran away, in violation of Mississippi Code Ann. §97-3-65(3)(a) . . . " (C.P. at 1)

Johnson was thereafter sentenced by the trial court to serve twenty-five (25) years in the

custody of the MDOC for the burglary charged in Count I and to serve a term of ten (10) years with ten (10) years suspended for five (5) years for the attempted rape charged in Count II, the later to run consecutively to the sentence imposed in Count I with five (5) years of post-release supervision upon release from the MDOC. (C.P. at 2-3)

One (1) issue, is raised on appeal to this Court, *viz.*, whether Carl Johnson was irreparably and unfairly prejudiced when evidence of his alleged prior sexual misconduct was repeatedly admitted over the objections of his lawyer.

Ray Baum a practicing attorney and Carroll County Public Defender, represented Johnson quite effectively during the trial of this cause. The representation of Glenn S. Swartzfager, an attorney with the Mississippi Office of Indigent Appeals, has been equally impressive. (C.P. at 41-45)

STATEMENT OF FACTS

Willie B. Gomiller is a seventy-seven (77) year old resident of the Coila Community in Carroll County where she lives alone. (R. 53, 77) On September 2, 2006, around 3:30 p.m., Carl Johnson, who Gomiller had been knowing for a "long time," entered her dwelling house uninvited. Ms. Gomiller's rather descriptive version of Johnson's unauthorized entry is found in the following colloquy:

> Q. [BY PROSECUTOR HILL:] Ms. Gomiller, while you were sitting there playing cards at your kitchen table, or your dining-room table, whatever you call it, did something come to your attention, startle you?
>
> A. Yes, sir. Something came to my attention. I was looking down this-a-way, and I happen to look around, and I got up. I got up. I was playing cards. Nobody there but me.
>
> Q. Nobody's there but you?

A. Nobody but myself. My dogs.

Q. What did you see when you looked up from playing cards, Ms. Gomiller?

A. I saw Carl.

Q. You saw Carl?

A. Yes, sir.

Q. What was he doing?

A. Coming through - - coming straight down - - coming through [the] door and coming straight down to me.

Q. Now, Ms. Gomiller, tell the ladies and gentlemen of the jury what Carl Johnson was doing and what he was saying when you saw him.

A. He had his bird in his hand.

Q. Had his bird, - - let me stop you right there. We're going to take this just a little bit at the time. When you say he had his bird in his hand, what are you talking about, Ms. Gomiller? Are you talking about his private parts?

A. Yes, sir.

Q. His penis?

A. Yes, sir.

Q. Okay. Did he say something to you?

A. Yeah. He told me - - he raised his shirt up and told me he brought me something I ain't never had before.

Q. He raised his shirt up?

A. Yes, sir.

Q. What did you see when he raised his shirt up?

A. His bird.

Q. Okay. Ms. Gomiller, tell the ladies and gentlemen of the jury whether or not: when you say Carl Johnson there exposing himself, was his penis erect?

A. Yes. Yeah, I know.

Q. Okay. And what did he say besides - - what did he say to you at that time?

A. Said - -

Q. What did he say to you?

A. Said, "I bought you something."

Q. "I brought you something."

A. Yes, sir.

Q. And what did he indicate when he said, "I brought you something?"

A. He pulled his shirt up and let me see he had his bird out. (R. 56-57)

According to Gomiller, Johnson grabbed her by the arm, threw her on the couch and, while his private parts were exposed, got on top of her, spread her legs, and attempted to rape her. (R. 59-61)

Johnson instructed her to pull her drawers down. (R. 60, 62) Gomiller refused. Instead, she violently resisted Johnson's advances by "[f]ighting with this hand right here" and hitting Johnson around his head and face. (R. 61) Gomiller never gave in and told him " . . . to get the hell out of here and leave the hell of me alone before my [grand]son come." (R. 62) Johnson then left. Gomiller, who had three of her front teeth knocked out during her struggle with Johnson (R. 63, 93), was taken to the emergency room where an X-ray of her right arm was apparently negative for fractures. (R. 93-94)

Midmorning (R. 17), on the same day, Cassandra Blackmon, a resident of Coila living "less than a mile" and within "walking distance" of Ms. Gomiller's dwelling house, walked out on her front porch where she observed Carl Johnson unzip his trousers and masturbate by the roadside. (R. 17-18, 81-82, 85)

Blackmon could tell what he was doing because she had " . . . seen him do it before. . ." (R. 82)

> Q. [CROSS EXAMINATION BY DEFENSE COUNSEL:] And you say that you saw him in front of your house engaging in self-gratification?
>
> A. [BY BLACKMON.] Right. (R. 83)
>
> * * * * * *
>
> Q. [RE-EXAMINATION BY PROSECUTOR HILL:] Ms. Blackmon, what you told the jury during counsel's cross-examination was that you saw the defendant masturbating in front of your house.
>
> A. Right.
>
> Q. Is that right?
>
> A. Uh-huh. (R. 85)

On November 28th, the day of trial, Johnson filed a motion *in limine* asking, *inter alia*, "[t]hat the witnesses of the State be instructed not to mention any allegations that the defendant on the date in question exposed himself other than as relevant to the instant indictment . . . [because] [a]ny evidence of the defendant's exposing himself is violative of Rule 403 MRE and Rule 404(b) MRE." (C.P. at 12)

Testimony developed during a pretrial suppression hearing is quoted as follows:

> Q, [BY PROSECUTOR HILL:] How would you describe it, the motion you just made?

A. [BY BLACKMON]: He was laying back like this, doing like this (indicating).

Q. All right. Would it be fair to characterize that as putting his hand on his private parts - -

A. Right.

Q. - - and going up and down?

A. Right.

Q. Okay. How long was he engaged in that behavior?

A. It wasn't very long. It wasn't that long.

Q. Okay.

A. I'd say maybe about ten minutes, if it was ten minutes.

Q. And this was on the side of the road in front of your house?

A. Uh-huh.

Q. I take it this was a place there was no – wasn't any building or anything like that.

A. No.

Q. Just out there on the side of the road.

A. Just on the side of the road. (R. 18-19)

At the conclusion of the suppression hearing and following arguments by the litigants, Judge Loper ruled as follows:

BY THE COURT: This is a case, *Adams versus State*, 794 So.2d 1049, a Court of Appeals 2001 case, that's somewhat similar to this case where a woman was raped. And at the trial, the defendant that was accused of raping her, there was another individual who testified that, the night before, this individual had come to her home and attempted to rape her, and she got away and fought him off. The Court held that to be admissible for the purposes of showing opportunity, plan, preparation, and identity.

In this case, it's just very close in time frame where Mr. Johnson was alleged to have been out in a public place, standing outside of someone's home masturbating; and then with two or three hours time, he then shows up at someone's home, breaks in, allegedly, and allegedly attempts to rape them.

So the Court finds it to be highly probative. The Court is of the opinion that it is much more probative, and more probative than prejudicial, on the issue of his motive and what was going through his mind and his intent and his plan, and his design - - desire. So, for that reason, the court will allow the evidence and will deny the motion *in limine*. **If there's a limited instruction offered, the defense can submit that at the conclusion of the evidence, and the Court will take a look at giving a limiting instruction and limiting it to the purpose just stated by the Court.** (R. 26-27) [emphasis ours]

Paul Johnson, the defendant, testified in his own behalf and denied he was present at Ms. Gomiller's house at any time during the day on the day of the attempted rape. (R. 108-09, 113)

Johnson likewise denied that earlier in the day he was "basically playing with [him]self." We quote:

Q. [BY DEFENSE COUNSEL:] Now, [Ms. Blackmon] said that she saw you out there on the side of the road and that you were basically playing with yourself. Did you do that?

A. I don't know about that.

Q. Did you do that?

A. No, sir. (R. 106)

During cross-examination of Johnson by the State, the following colloquy took place:

Q. [BY PROSECUTOR HILL:] Now, Ms. Blackmon, you saw what she said.

A. Yeah.

Q. She said you had come to her house that

Saturday morning and you were masturbating out there in front of her

house.

A. That's what she said.

Q. That's your cousin, isn't she?

A. Yeah. She kin to me.

Q. And she fed you, didn't she?

A. Yeah. I stayed over at her house, like, three hours after that.

Q. Yeah.

A. Yeah. Yes, sir.

Q. That's what she said. She ain't lying about that - -

A. I don't know.

Q. - - is she?

A. Yes. She's - - huh. I had my back turned. I don't know what - - she probably thought I was doing that.

Q. Oh, she mistook what you were doing?

A. She had to? (R. 117-18)

Also testifying in the defendant's behalf was his sister, Portia Smith. During cross-examination by the State, Smith testified she had known Cassandra Blackmon "most all my life." (R. 127) Smith was thereafter asked, over the objection of the defendant, if she know that Blackmon has seen her brother masturbating out in front of her house. (R. 127) Smith answered, "No. I don't talk to her like that. I speak and that's it." (R. 127)

Following repeated objections, arguments of counsel, and the overruling of the Johnson's repeated objections (R.128-30), the following colloquy also complained about on appeal took place:

Q. [BY PROSECUTOR HILL:] Of your personal knowledge,

did you know that your brother would often expose himself in public?

A. No, I didn't.

Q. You didn't know that?

A. I've never heard of it. (R. 130)

Five (5) witnesses testified for the State of Mississippi during its case-in-chief, including **Willie B. Gomiller**, the victim, who testified that Paul Johnson entered the front door of her house uninvited and attempted to rape her. (R. 52-64)

(1) Robert Vail , a Carroll County Deputy Sheriff, was dispatched to Ms. Gomiller's home in Coila at 3:35 p.m. on September 2, 2006. (R. 35) Ms. Gomiller was "excited and angry" and told Vail

> " . . . that Carl Johnson had come to her house and snatched the front door open; when he came in, that he had his bird out.
>
> And I asked her, "Ms. Gomiller, what do you mean by 'his bird'?"
>
> And she said, "His thing down there."
>
> And I said, "Do you mean his penis?"
>
> And she said, "Yes sir."
>
> And I said, "Well what did he do to you?"
>
> And she said that she was sitting at her table, which would be in her - - like, I guess , dining room of the residence, playing cards; and that when he jerked the door open and came in, that she met him in the living room and that he had thrown her down on the couch and pinned her arms back and hit her in the mouth and tried to pull her underwear down. (R. 37-38)

(2) Willie B. Gomiller identified Paul Johnson in court as the man who had entered her home uninvited and attempted to rape her. (R. 54)

(3) Cassandra Blackmon, Johnson's cousin, testified that during the midmorning hours on the day in question, she observed from her front porch Paul Johnson get out of a car, walk to the side of the public road, unzip his trousers and masturbate. (R. 81-82) She could tell what he was doing because "I've seen him do it before." (R. 82)

(4) Michael Spellman, a Carroll County deputy sheriff, testified he located the defendant several days after the incident and questioned him after advising him of his constitutional rights. (R. 87) Johnson told Spellman that on the day of the assault, he had been in the area of Ms. Gomiller's dwelling house. Spellman observed "fresh scratch marks" on the side of Johnson's face. (R. 88)

(5) Melissa Vega, a registered nurse at Greenwood LeFlore Hospital, testified that on the evening of September 2nd she triaged Ms. Gomiller who showed up in the ER complaining about pain in her shoulder after being "assaulted and attempted rape." (R. 93) Gomiller " . . . was missing her three front teeth." (R. 93)

At the close of the State's case-in-chief, the defendant's motion for a directed verdict of acquittal targeting both the burglary and attempted rape was overruled. (R. 96-98)

The defendant testified in his own behalf and produced his sister, Portia Smith, in support of his general denial. (R. 100-131)

The State had no rebuttal. (R. 132)

At the close of all the evidence, peremptory instruction was denied. (R. 138; C.P. at 32)

It does not appear that a limiting instruction was requested by the defense. (R. 133-140

The jury retired to deliberate at 4:12 p.m. (R. 150) and returned thirty (30) minutes later at 4:42 p.m. (R. 150) with the following verdicts:

"We, the jury, find the defendant, Carl Johnson, guilty of burglary of a dwelling house in Count 1."

"We, the jury, find the defendant, Carl Johnson, guilty of attempted rape in Count 2." (R. 151)

A poll of the individual jurors reflected the guilty verdicts were unanimous. (R. 151-52)

Judge Loper thereafter sentenced Johnson to serve a term of 25 years in the custody of the MDOC for the burglary charged in Count 1 and to serve a term of ten (10) years for the attempted rape charged in Count 2 with ten (10) years suspended for a period of five (5) years to run consecutively to the sentence imposed in Count 1. (R. 155; C.P. at 2-3)

Johnson filed a motion for new trial on December 5, 2006, which was overruled on April 16, 2007. (C.P. at 34-36)

SUMMARY OF THE ARGUMENT

The trial judge did not abuse his judicial discretion in admitting the testimony objected to at trial and criticized on appeal. This is true for several reasons.

First, the evidence was admissible as a part of the *res gestae* of the crime charged. i.e., the whole of the transaction under investigation and every part of it. The prior act was integrally related in time and place and fact to the act charged. It was a preliminary act shedding light upon the motive of Johnson for the commission of the crimes charged as well as his intent and state of mind and body. **Davis v. State,** 530 So.2d 694, 697 (Miss. 1988). *See also* **West v. State,** No. 2006-KA-01353-COA decided November 20, 2007 (¶¶ 14-16) [Not Yet Reported].

Second, the testimony was admissible by virtue of Miss.R.Evid. 404(b) for the purpose of demonstrating Johnson's " . . . motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," particularly his motive, intent, and state of mind. **Adams v. State,** 794 So.2d 1049, 105-56 (¶¶8-15) (Ct.App.Miss. 2001).

Third, the evidence was strained by Judge Loper through the filter provided by Miss.R.Evid.

403. (R. 26-27) The trial judge balanced on the record the probative value of the criticized prior bad act testimony with its potential for prejudice and found the evidence should be allowed under 403. A trial judge enjoys a great deal of discretion with respect to the relevancy and admissibility of evidence and unless that discretion is abused to the prejudice of the accused, the Supreme Court will not reverse his ruling. **Adams v. State**, *supra*, 794 So.2d at 1054-55 (¶¶ 8. 14-15).

Fourth, although an invitation was given by Judge Loper for a limiting instruction (R. 27), it does not appear this invitation was accepted. Insofar as we can tell, there was no request for a limiting instruction.

This observation simply detracts from Johnson's claim he was fatally prejudiced.

Fifth, in view of Ms. Gomiller's rather graphic "b in h" testimony, any error in admitting the prior act testimony assailed here was harmless beyond a reasonable doubt.

ARGUMENT

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN ADMITTING THE TESTIMONY OF SELF-GRATIFICATION.

On the day of trial Johnson filed a "Motion in Limine" requesting, *inter alia*, the following:

> 2. That the witnesses for the State be instructed not to mention allegations that the defendant on the date in question exposed himself other than as relevant to the instant indictment and otherwise admissible as any evidence unrelated to the instant indictment would be unduly prejudicial evidence of other crimes, wrongs or acts and is not necessary to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Any evidence of the defendant's exposing himself is violative of Rule 403 MRE and Rule 404(b) MRE. *Blanks v. State*, 547 So.2d 29 (Miss. 1989).

Judge Loper found as a fact and ruled as a matter of law that

> **In this case, it's just very close in time frame where Mr. Johnson was alleged to have been out in a public place, standing**

> **outside of someone's home masturbating; and then with two or three hours time, he then shows up at someone's home, breaks in, allegedly, and allegedly attempts to rape them.**
>
> **So the Court finds it to be highly probative. The Court is of the opinion that it is much more probative, and more probative than prejudicial, on the issue of his motive and what was going through his mind and his intent and his plan, and his design - - desire.** So, for that reason, the court will allow the evidence and will deny the motion *in limine*. **If there's a limited instruction offered, the defense can submit that at the conclusion of the evidence, and the Court will take a look at giving a limiting instruction and limiting it to the purpose just stated by the Court.** (R. 26-27) [emphasis ours]

Johnson argues with great vigor Judge Loper erred in his ruling and that testimony of prior sexual misconduct was erroneously admitted into evidence over the contemporaneous objection of Johnson's attorney. (R. 81-86, 117-18, 128-30)

Testimony of self-gratification in a public place was elicited from Cassandra Blackmon, an eyewitness for the State, during direct examination. (R. 81-86)

During cross-examination, Carl Johnson, the defendant, and Portia Smith, the defendant's sister and a defense witness, were both questioned about their knowledge of these prior acts. (R. 117-18, 128-30)

Johnson, citing and relying upon a line of cases limiting testimony of substantially similar prior sexual acts to acts with the same person or victim, argues that " . . . the evidence was elicited for one purpose and one purpose only - to prejudice the jury by making it believe that Carl Johnson is a bad person, and therefor he must have committed the crimes for which he was on trial." (Appellant's Brief at 7)

Johnson, we respectfully submit, is overly optimistic.

Admittedly, the testimony describing Johnson's prior misconduct is graphic and disgusting.

The prior act could not have been more sordid and distasteful even if Johnson had been observed streaking through the neighborhood wearing nothing but a pair of sneakers and a light coat of oil.

Nevertheless, this "intrinsic" evidence and testimony was admissible under the unique and singular facts of this case.

The cases relied upon by Johnson - **Mitchell v. State,** 539 So.2d 1366 (Miss. 1989), and its progenies - have no applicability here because there is no second victim. Jones did not expose himself within the context of a victim other than the victim of the charged offenses; rather, he exposed himself on a public road only 4-5 hours prior to the attempted rape and within walking distance of the victim's house. This is not a case involving evidence of other acts of sexual relations or misconduct between the defendant and a second victim. It is a prior act relevant and probative with respect to a sexual assault committed against his one and only victim, seventy-seven (77) year old Willie B. Gomiller.

"Generally, evidence of crimes other than the one for which the accused is on trial is inadmissible in a criminal prosecution. * * * The reason for the rule is to preclude the State from raising the 'forbidden inferential sequence,' that the accused has committed other crimes and is therefore more likely to be guilty of the offense charged." **Robinson v. State,** 497 So.2d 440, 442 (Miss. 1986). There are, however, exceptions to the general rule.

The following language found in **Davis v. State,** 530 So.2d 694, 697 (Miss. 1988), is applicable to Johnson's complaint:

> Mississippi follows the general rule that proof of a crime distinct from that alleged on the indictment should not be admitted in evidence against the accused. *Eubanks v. State*, 419 So.2d 1330, 1331 (Miss. 1982); *Loeffler v. State*, 396 So.2d 18 (Miss. 1981); *Massey v. State*, 393 So.2d 472 (Miss. 1981). However, there are certain well established exceptions to this rule. **Where the other crime admitted into evidence is connected with the one charged**

> **in the indictment, and proof of such other crime sheds light upon the motive of the defendant for the commission of the crime charged in the indictment, or where the fact of the commission of such other crime forms a part of a chain of facts so intimately connected that the whole must be heard in order to interpret its general parts, then evidence of other crimes is admissible.** *Tanner v. State*, 216 Miss. 150, 157, 61 So.2d 781, 784 (1953).
>
> **The trial judge committed no error because the other crimes mentioned were part of the *res gestae* of the crime in the appellant's indictment and therefore admissible.** This assignment of error is without merit. [emphasis supplied]

See also **Collins v. State,** 513 So.2d 877, 879 (Miss. 1987), where this Court said:

> On a different note, this Court has also held that evidence may be introduced as part of the *res gestae* /2 of a crime if it was an inseparable part of the entire transaction. *Woods v. State*, 393 So.2d 1319, 1324 (Miss. 1981).
>
> The admission of *res gestae* evidence is largely left to the sound discretion of the trial judge. *Hemingway v. State*, 483 So.2d 1335, 1337 (Miss. 1986).

> /2 The whole of the transaction under investigation and every part of it.

See also **United States v. Williams,** 343 F.3d 423 (5th Cir. 2003), cert denied 124 S.Ct. 966, 540 U.S. 1093, 157 L.Ed.2d 800 (2003) [Evidence of another act is considered "intrinsic," and thus does not violate the rule governing evidence of other crimes, wrongs, or acts, if it and evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.]; **Palmer v. State,** 939 So.2d 792 (Miss. 2006) [Where substantially necessary to tell the complete story of the crime charged, evidence of other crimes or prior bad acts is admissible so as to not confuse the jury.]; **Price v. State,** 898 So.2d 641 (Miss. 2005), reh denied [Prior act admissible to show defendant's state of mind and/or motive at time rape took place.]; **McGowen v. State,** 859 So.2d 320 (Miss. 2003), reh denied [Other

crimes admissible so long as evidence is integrally related in time, place, and fact to the crime for which the defendant is being tried.]; **Leedom v. State,** 796 So.2d 1010 (Miss. 2001) [Integration of the charged offense into the prior incident renders prior offense admissible.]; **Wheeler v. State,** 536 So.2d 1347, 1352 (Miss. 1988), and the cases cited therein; **Moore v. State,** 921 So.2d 381 (Ct.App.Miss. 2005), reh denied, cert denied 926 So.2d 922 (2006)[Prior bad act evidence admissible for the purpose of telling the complete story so as not to confuse the jury, and to show the defendant's intent and motive for being at the scene of the burglary.]; **Anthony v. State,** 843 So.2d 51 (Ct.App.Miss. 2002), reh denied, cert denied 842 So.2d 578 (2003) [Evidence of earlier act admissible if interrelated with evidence of the crime charged so as to be a continuing occurrence.]; **Kelly v. State,** 783 So.2d 744 (Ct.App.Miss. 2000), reh denied, cert denied 2000) [Prior crime or act is admissible where it is so interrelated to the crime charged as to form a "closely related series of transactions."]

The admissibility of *res gestae* evidence is largely within the discretion of the trial judge. **Carter v. State**, 310 So.2d 271 (Miss. 1975). No abuse of judicial discretion has been demonstrated by Johnson. This Court has recognized that evidence of a defendant's other crimes or misconduct is admissible where, as here, it is "integrally related in time, place and fact." **Hampton v. State,** 910 So.2d 651, 655 (Ct.App.Miss. 2005) quoting from **Neal v. State,** 451 So.2d 743, 759 (Miss. 1984). This Court has further recognized the State's legitimate interest in telling "a rational and coherent story" with respect to the crime charged. **Neal v. State,** *supra,* 451 So.2d at 759. *See also* **Simmons v. State,** 813 So.2d 710 (Miss. 2002) [Evidence of other crimes admissible to tell complete story so as not to confuse jury.]; **Underwood v. State**, 708 So.2d 18, 32 (Miss. 1998) ["Evidence of other crimes or bad acts is also admissible in order to tell the complete story so as not to confuse the

jury."] quoting from **Ballenger v. State** 667 So.2d 1242, 1257 (Miss. 1995); **Anderson v. State,** 811 So2d 410 (Ct.App.Miss. 2001) [State has a legitimate interest in telling the complete story of the crime.]

Accordingly, Blackmon's testimony describing the acts and conduct of Johnson several hours prior to the attempted rape and taking place well within waling distance of the victim's dwelling house which Johnson entered with erection in hand, were within the *res gestae* of the assault itself. Stated differently, there was an apparent relation or connection between the act proposed to be proved - self-gratification - and the act charged - attempted intercourse. Each was a part and parcel of the "whole story" of the crime charged.

But even if not, the criticized testimony would have been admissible under Miss.R.Evid. 404(b) to demonstrate motive, opportunity, intent, preparation, plan, and absence of mistake or accident, especially motive, intent, preparation, plan as well as state of mind.

The rule reads, in its pertinent parts, as follows:

> **Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes**
>
> * * * * * *
>
> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of **motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.**

Without this evidence the jury would have had a "distorted view" of the entire picture which involved preliminary acts similar to Johnson's conduct upon entering Gomiller's living room several hours later. Johnson was certainly predisposed to lustful and lascivious behavior. A reasonable and fair-minded juror could have found that Johnson's predisposition for lust carried over to a sexual

assault several hours later at Gomiller's home. Testimony describing the prior incident had considerable relevancy and probative value with respect to Johnson's motive for assaulting Gomiller as well as Johnson's state of mind and intent from the get-go.

Miss.R.Evid. 401 defines relevant evidence as " . . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." If the evidence has any probative value at all, Rule 401 favors its admission. *See* Comment to Rule 401.

This Court has held time and again that the "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." **Parker v. State,** 606 So.2d 1132, 1136 (Miss. 1992), citing numerous cases. *See also* **Eskridge v. State,** 765 So.2d 508 (Miss. 2000) reh denied; **Tanner v. State,** 764 So.2d 385 (Miss. 2000); **Jones v. State,** 740 So.2d 904 (Miss. 1999); **Edwards v. State,** 737 So.2d 275 (Miss. 1999); **Johnston v. State,** 567 So.2d 237 (Miss. 1990); Miss.R.Evid. 103(a). That discretion, although "considerable," [**Edwards,** *supra*], must be exercised within the boundaries of the Mississippi Rules of Evidence. **Zoerner v. State,** 725 So.2d 811 (Miss. 1998), reh denied.

We note that defense counsel cross-examined Blackmon in great detail with respect to the prior incident and actually re-emphasized the acts of the defendant before the jury. (R. 83-84) Blackmon's testimony that she had seen Johnson "do it before" was brought out by the defendant during cross-examination. This is yet another reason why the evidence assailed here was more probative than prejudicial.

Judge Loper strained the testimony through the Miss.R.Evid. 403 filter and found as a fact and concluded as a matter of law it was more probative than prejudicial. Judge Mills said it best in his dissenting opinion in **Lambert v. State,** 724 So.2d 392, 395 (Miss. 1998), where we find the

following:

> The trial judge balanced the probative value of the testimony with its prejudice on the record and found the evidence should be allowed under M.R.E. 403. "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses his discretion so as to be prejudicial to the accused, the Court will not reverse this ruling." *Stevens v. State*, 717 So.2d 311, 313 (Miss. 1998)(citing *Fisher v. State*, 690 So.2d 268, 274 (Miss. 1996)).

In the case *sub judice* the prior act testimony was both relevant and probative. As stated previously, it had a tendency to prove Johnson's motive, intent, plan, preparation, and state of mind and body.

It does not appear that Judge Loper's invitation to defense counsel to request a limiting instruction was accepted by Johnson. (R. 27, 138-40) This observation simply detracts from Johnson's appellate complaint that he was unfairly prejudiced by the prior act testimony.

The descriptive nature of Ms. Gomiller's testimony concerning Johnson's appearance and demeanor when he entered her living room uninvited renders testimony of the prior act harmless beyond a reasonable doubt. The weight and sufficiency of the evidence is not an issue in this appeal nor could it be. The evidence preponderates heavily in favor of conviction.

In **Jackson v. State,** 594 So.2d 20, 25 (Miss. 1992), this Court opined:

> "By virtue of Rule 103(a), Miss.R.Evid., '[b]efore error can be predicated at all upon an adverse evidentiary ruling it must appear that a substantial right of the party is affected.' " *Sayles v. State*, 552 So.2d 1383, 1387 (Miss. 1989) Put another way, "the admission or exclusion of evidence must result in prejudice and harm, if a cause is to be reversed on that account." *Knight v. State*, 248 Miss. 850, 161 So.2d 521, 522 (1964). Any error in sustaining the objections made by the State was either cured or rendered harmless beyond a reasonable doubt.

In the final analysis, no abuse of judicial discretion or prejudice to Johnson has been demonstrated here. Accordingly, this assigned error is devoid of merit.

What was Johnson's intent at the time he entered Gomiller's living room uninvited?

In **Newburn v. State**, 205 So.2d 260, 265 (Miss. 1967), this Court stated:

> "Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. **The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances."** [emphasis ours]

In **Shanklin v. State**, 290 So.2d 625, 627 (Miss. 1974), this Court further opined:

> **Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case.** The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent. [citations omitted; emphasis ours]

Here Johnson's intent, which was relevant to both the burglary and the attempt to rape, could be read from direct expressions from the actor himself, *viz.*, "I brought you something [you ain't never had before]" (R. 56-57), *as well as the prior misconduct and surrounding circumstances "integrally related in time, place and fact" when Johnson was observed engaged in the act of self-gratification on a public road within walking distance of the victim's dwelling house.*

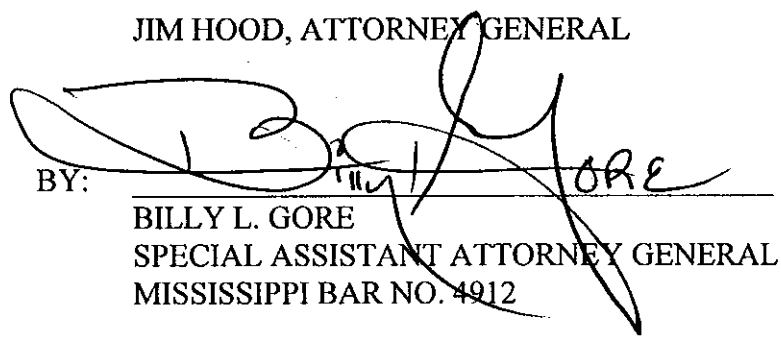
CONCLUSION

While Johnson presents a legitimate argument on appeal to this Court, scrutiny of the official record reflects his claim, while interesting and sincere, is devoid of merit.

Appellee respectfully submits that no reversible error, if error at all, took place during the trial of this cause and that the judgments of conviction for burglary of a dwelling house and attempted rape, as well as the twenty-five (25) year and the ten (10) year suspended sentence with five (5) years of post-release supervision imposed by the trial judge, should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



BY: _____

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF FOR THE APPELLEE to the following:

Honorable Joseph H. Loper, Jr.
Circuit Court Judge, District 5
Post Office Box 616
Ackerman, MS 39735

Honorable Doug Evans
District Attorney, District 5
Post Office Box 1262
Grenada, MS 38902-1262

Glenn S. Swartzfager, Esquire
Attorney At Laq
301 North Lamar St., Ste. 210
Jackson, MS 39205

This the 16th day of January, 2007.

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680