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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CARL BRYAN JOHNSON**

**APPELLANT**

**FILED**

**V.**

**NOV 27 2007**

**NO. 2007-KA-0901-COA**

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COURT OF APPEALS**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**NO. 2007-KA-0901-COA**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Carl Bryan Johnson, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Joseph H. Loper, Jr., Circuit Court Judge

This the 27<sup>th</sup> day of November, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE CASE**

Carl Johnson was indicted for burglary of a dwelling pursuant to Miss. Code Ann. § 97-3-23, and attempted rape pursuant to Miss. Code Ann. § 97-3-65(4) and Miss. Code Ann. § 97-1-7. (C.P. 1; R.E. 5). The jury found him guilty on both counts, and he was sentenced to twenty-five years in the custody of the Mississippi Department of Correction on Count I, ten years suspended on Count II, and five years post-release supervision. (C.P. 2-3; R.E. 13-15). Carl Johnson is presently in the custody of the Mississippi Department of Corrections.

**SUMMARY OF THE ARGUMENT**

Over the repeated objections of defense counsel, the prosecution elicited evidence that

the Appellant had allegedly engaged in prior sexual misconduct which was not with the alleged victim in this case. Unquestionably such evidence is inadmissible, and the admission of such evidence constitutes per se reversible error pursuant to M.R.E. 404(b), M.R.E. 403, *Mitchell v. State*, 539 So.2d 1366, 1372 (Miss. 1989), and *Lambert v. State*, 724 So.2d 392, 395 (Miss. 1998).

### **FACTS**

The alleged victim in this case, claims that someone broke into her house and attempted to rape her on or about September 2, 2006. (Tr. 35; 53). Carl Johnson denied being present at the alleged victim's house that day or attempting to rape the alleged victim. (Tr. 109; 112; 119). Johnson testified that he had been over at the alleged victim's house the night before and a verbal altercation ensued when she would not sell him liquor. (Tr. 104; 116). He further testified that the scratches on his face which law enforcement took photos of were received as a result of his employment at the mill. (Tr. 120). Carl's sister confirmed that he frequently has scratches and marks on his face and body as a result of his work at a sawmill. (Tr. 124). During the trial, the prosecution, over the objections of defense counsel, repeatedly elicited evidence that Carl Johnson had been seen masturbating in public earlier on the same day, but away from the purported victim. (Tr. 81-86; 117-118; 128-30).

The jury found Carl guilty on both counts, and he was sentenced to twenty-five years in the custody of the Mississippi Department of Correction on Count I, ten years suspended on Count II, and five years post-release supervision. (C.P. 2-3).

## ARGUMENT

### **I. CARL JOHNSON WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN EVIDENCE OF HIS ALLEGED PRIOR SEXUAL MISCONDUCT WAS REPEATEDLY ADMITTED OVER THE OBJECTIONS OF HIS ATTORNEY.**

#### **A. Standard of Review.**

In setting forth the standard of review regarding the admission of evidence, the Courts have stated that the admissibility and relevance of evidence “is within the discretion of the trial court and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal.” *Ellis v. State*, 856 So.2d 561, 565 (Miss.Ct.App. 2003)(citing *Reynolds v. State*, 784 So.2d 929, 932 (Miss. 2001). “As long as the trial court remains within the confines of the Mississippi Rules of Evidence, its decision to admit or exclude evidence will be accorded a high degree of deference.” *Johnston v. State*, 567 So.2d 237, 238 (Miss.1990). And “the admission or exclusion of evidence must result in prejudice or harm, if a cause is to be reversed on that account.” *Jackson v. State*, 594 So.2d 20, 25 (Miss.1992).

#### **B. Admission of Evidence Regarding Prior Alleged Sexual Misconduct of Carl Johnson Was Irrelevant and Prejudicial Because There Was No Reason for the Prosecution to Elicit Such Evidence.**

At trial, testimony regarding the alleged prior sexual misconduct of Carl Johnson was brought up on numerous occasions over the objection of Carl's attorney. (Tr. 81-86; 117-118; 128-30). The Mississippi appellate courts have long held that the admission of such evidence is clearly erroneous and constitutes reversible error.

In *Elmore v. State*, the Mississippi Supreme Court quoted the law as set forth in *Coates v. State*. “In summarizing our precedent in *Coates*, this Court stated: ‘In the context of sexual crimes, however, we have long recognized a relaxation of that rule [prohibiting evidence of other crimes].... [W]e have regarded that substantially similar prior sexual acts with *the same person*, that is, sexual acts of the same general type as those charged in the indictment,’ are probative and admissible.” *Elmore v. State*, 510 So.2d 127, 131 (Miss. 1987)(citing *Coates v. State*, 495 So.2d 464 (Miss.1986)(emphasis in original). The Court in *Elmore* went on to hold, “Any attempt by Elmore to commit sexual battery on the rest of his family, while arguably relevant, is far less probative and at least equally, if not more, prejudicial. We hold that the admission of evidence of remote instances of sexual misconduct with someone other than the prosecutrix was reversible error.” *Elmore v. State*, 510 So.2d 127, 131 (Miss. 1987).

In *King v. State*, the Mississippi Supreme Court held, “Consequently, if the evidence of prior bad acts concerns acts committed upon victims other than the one involved in the instant case, the prior bad acts evidence is inadmissible on direct under our rules of evidence.” *King v. State*, 857 So.2d 702, 734 (Miss. 2003)(citing *Elmore v. State*, 510 So.2d 127, 131 (Miss.1987)). See also *Lattimer v. State*, 952 So.2d 206, 216 (Miss.Ct.App. 2006). Moreover, the Court has held that such evidence is not proper rebuttal evidence either. “The admission of evidence of alleged sexual acts with a third party not contained in the indictment, over objection of the defendant constituted reversible error, and we reverse and remand for a new trial on this issue.” *Nicholson v. State*, 704 So.2d 81, 88 (Miss. 1997).



See also *Turnage v. State*, 752 So.2d at 1053 (Miss.Ct.App. 1999).

In the present case, the prosecution asked no less than three separate witnesses about Carl's alleged act of self-gratification. (Tr. 81-86; 117-118; 128-30). Indeed, the prosecution even went so far as to call Cassandra Blackmon as a witness specifically for the purpose of testifying that she had seen the Appellant masturbating in public. (Tr. 79-86).

*Mitchell v. State*, 539 So.2d 1366, 1372 (Miss. 1989) is almost directly on point.

There, the Mississippi Supreme Court reversed Mitchell's conviction, and in so doing held:

In this case, evidence was admitted of Mitchell exposing himself to children other than Shannon. The state would have this Court expand the holding in these cases to include testimony that shows a defendant's character of lustful behavior toward children in general, not just toward Shannon. Such an expansion would not be consistent with the purposes of M.R.E. 404(b), nor consistent with the notion that a defendant is on trial for a specific crime and not for generally being a bad person.

Therefore, we reverse and remand on this aspect of Mitchell's assignment of error, as well.

*Mitchell v. State*, 539 So.2d 1366, 1372 (Miss. 1989).

Indeed, the Courts have determined that *Mitchell* established a per se rule of reversal in cases where sexual conduct other than with the accused is admitted into evidence because the evidence is so highly prejudicial. "While the argument could be made that the evidence in question fits one of the 404(b) exceptions (proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident), the evidence which was admitted is extremely prejudicial under M.R.E. 403. **Admission of such evidence would amount to the exception that negates the rule.**" *Lambert v. State*, 724 So.2d 392,

394 (Miss. 1998)(citing *Nicholson v. State*, 704 So.2d 81 (Miss.1997)(emphasis added)).

The *Lambert* Court discussed *Mitchell* in detail, and recognized the per se rule of reversal enunciated by the Court in *Mitchell*. In fact, in *Lambert*, Justice Mills wrote a strong dissent which recognized the per se rule of reversal. “I would overrule *Mitchell* since it arbitrarily instructs that admission of evidence of a sexual offense against one other than the victim is per se reversible. Astonishingly, *Mitchell* calls for reversal even when the evidence comes under one of the exceptions of M.R.E. 404(b).” *Lambert v. State*, 724 So.2d 392, 395 (Miss. 1998)(Mills, J., dissenting).

The Mississippi Court of Appeals in *Earnest v. State*, 805 So.2d 599, 603-04 (Miss.Ct.App. 2002), observed that in *Lambert*, the “Mississippi Supreme Court granted certiorari and affirmed this Court's interpretation of the holding in *Mitchell*.” The Court of Appeals in *Lambert* held that *Mitchell* mandated reversal.

Thus, the rule learned from all of the aforementioned cases is that evidence of other acts of sexual relations between the defendant and victim are admissible to show “the lustful, lascivious disposition of the defendant toward that particular victim.” *Mitchell*, 539 So.2d at 1372 (emphasis added). However, such inquiries are “specifically limited [to] evidence of other sexual relations . . . between the defendant and the particular victim.” *Id.* Evidence of sexual conduct of the defendant other than with the victim is inadmissible, and if such evidence is admitted, it is per se reversible error. *Mitchell v. State*, 539 So.2d 1366, 1372 (Miss. 1989); *Lambert v. State*, 724 So.2d 392, 395 (Miss. 1998).

In the present case, the prosecution inquired into the alleged conduct by Carl Johnson

numerous times with numerous witness. (Tr. 81-86; 117-118; 128-30). However, the prosecution did not stop there. During cross-examination of Portia Smith, Carl Johnson's sister, the prosecution asked, "Let me say this. Did you know that your brother was prominent into exposing himself in public? Did you know that?" (Tr. 129). After the trial court overruled defense counsel's objections, the prosecution re-asked the question, "Of your personal knowledge, did you know that your brother would often expose himself in public?" (Tr. 130). Thus, any argument by the State that the alleged conduct by Carl Johnson was related to the crimes for which he was charged, was part of a single transaction involving the charged crimes, or was a part of a series of events involving the charged crimes would be disingenuous, as it asserted that Carl "would often expose himself in public." (Tr. 130).

The foregoing questions by the prosecution make it clear 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 therefore he must have committed the crimes for which he was on trial. Such conduct is specifically prohibited by M.R.E. 404(b), M.R.E. 403, as well as *Elmore*, *Mitchell*, *Coates* and their progeny. Accordingly, the Court should reverse Carl Johnson's conviction and remand for a new trial where all evidence of any alleged prior sexual misconduct is excluded.

**CONCLUSION**

For the foregoing reasons, Carl Johnson prays that this Honorable Court will reverse his conviction and remand this case to the Carroll County Circuit Court for a new trial where all evidence of any alleged prior sexual misconduct is specifically excluded.

Respectfully submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



\_\_\_\_\_  
GLENN S. SWARTZFAGER  
MISSISSIPPI BAR NO. [REDACTED]

COUNSEL FOR APPELLANT

**CERTIFICATE OF SERVICE**

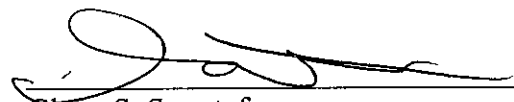
I, Glenn S. Swartzfager, Counsel for Carl Bryan Johnson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Joseph H. Loper, Jr.  
Circuit Court Judge  
Post Office Box 586  
Ackerman, MS 39735

Honorable Doug Evans  
District Attorney, District 5  
Post Office Box 1262  
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This the 27<sup>th</sup> day of November, 2007.

  
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