IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUNE ALLEN STARR, JR. a/k/a JUNE ALLEN STARR SR. a/k/a ALLEN JUNE STARR JR. — APPELLANT

VS. — NO. 2007-KA-1878-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

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUNE ALLEN STARR JR. a/k/a JUNE ALLEN STARR SR. a/k/a ALLEN JUNE STARR JR. — **APPELLANT**

VERSUS — **NO. 2007-KA-01878-COA**

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The admissibility of statements made to investigators several hours after a shooting in Jackson County is the centerpiece of this appeal from a conviction of aggravated domestic violence.

June Allen Starr, Sr. has been convicted of aggravated domestic violence after shooting his wife of twenty (20) years in the back with a 9 mm Derringer. (R. 94; C.P. at 69, 71; State's Exhibit 1)

Starr's conviction was based largely, but not entirely, upon the testimony of his wife, Brenda, who identified her former husband in court as the man who shot her during an argument over money. (R. 97-99, 101)

According to Brenda and her husband, both the defendant and the victim had been drinking intoxicants that day. (R. 94, 104, 129. 132)

Three (3) hours following the shooting, Starr, after being advised of his *Miranda* rights and in the wake of custodial interrogation, made oral statements to law enforcement authorities during

a twenty (20) minute interview. The defendant's statement, accurately described by appellate counsel as being replete with "rambling responses and peculiar syntax" (Brief of the Appellant at 15), was, nevertheless, largely exculpatory. It reflects that Brenda retrieved the gun while arguing with another woman "over $14 for a haircut." (State's Exhibit 1) The gun allegedly discharged accidentally after June Allen Starr grabbed Brenda's arm and wrestled her to the floor of the carport . (State's Exhibit 1)

Starr claimed in the statement: "I didn't shoot my wife."

The introduction (R. 119-20), without objection, of the sixteen (16) page transcription of June Allen Starr's interview (Exhibit 8) and the audio tape of that interview (Exhibit 7), allegedly conducted without a valid waiver of his rights under the *Miranda* decision, together with testimony describing the interview, forms the centerpiece of the present appeal.

JUNE ALLEN STARR, SR., a forty-one (41) year old African-American male and former resident of Escatawpa, prosecutes a criminal appeal from his conviction of aggravated domestic violence following trial by jury on August 14-15, 2007, in the Circuit Court of Jackson County, Kathy King Jackson, Circuit Judge, presiding.

Following the two day trial by jury, Starr was convicted of aggravated domestic violence in violation of Miss. Code Ann. §97-3-7(4). (C.P. at 6)

Immediately post-verdict, Starr was sentenced to serve twenty (20) years in the custody of the MDOC for the offense of aggravated domestic violence and ordered to pay $5,000 to the Victim's Compensation Fund. (R. 205-06; C.P. at 71)

Starr's indictment, omitting its formal parts, charged

> " . . . [t]hat **JUNE ALLEN STAR, JR. AKA ALLEN JUNE STARR, JR.** . . . on or about. April 8, 2006, did unlawfully, feloniously, willfully and [sic] cause bodily injury to Brenda Starr, his

> spouse, by shooting her in the back, with a deadly weapon, to wit: a firearm, . . . (C.P. at 6)

At the close of all the evidence, the jury returned a verdict of, "We, the jury, find the defendant, June Allen Starr, Sr., Guilty of Aggravated Domestic Violence." (C.P. at 69)

One (1) issue is raised by Starr on appeal to this Court: "Whether the appellant's Fifth Amendment rights were violated when police officers proceeded with a custodial interrogation having not obtained a *Miranda* waiver or, in the alternative, whether the appellant's waiver was made 'voluntarily, knowingly, and intelligently.' " (Brief of the Appellant at 1, 3-4)

Starr concedes in his brief there was no objection, contemporaneous or otherwise, to the statements under scrutiny here, and invites this court to rely upon plain error. (Brief of the Appellant at 4)

STATEMENT OF FACTS

Brenda Starr and June Allen Starr had been married over twenty (20) years when she was shot in the back around 8:00 p.m. the night of April 29, 2006, while in the carport of her home in Escatawpa. Brenda Starr testified at her husband's trial that as a result of the wound(s) received at his hands, she underwent eleven (11) surgeries, one of which resulted in the removal of her right kidney. (R. 98)

According to Brenda, "I have to go every two months and get two pints of blood [a]nd every month I have to go get shots in my stomach and in my back because they say I still have a lot of tore up tissue on the inside." (R. 98)

Officers from the Jackson County Sheriff's Department responded to a "shots fired" communique shortly after the shooting. Upon their arrival, they observed a pool of blood in the center of the carport and found Brenda moaning and lying virtually unconscious on her stomach on

the floor of the kitchen. (R. 75-76, 85) The officers observed "drag marks" leading from the floor of the carport to the floor of the kitchen where Brenda was found.

The State produced five (5) witnesses during its case-in-chief.

Edward Lavern Clark, a patrolman with the Jackson County Sheriff's Department, testified that at some point Brenda became conscious. (R. 75-76)

> Q. [BY DISTRICT ATTORNEY:] At some point, did she become conscious?
>
> A. [BY CLARK:] Yes, she did.
>
> Q. And what did you say or do at that point?
>
> A. I asked her who shot her.
>
> Q. What did she tell you?
>
> A. She stated "Allen" twice and "He knows." (R. 75-76)

Steven Chambers, also employed as a patrolman with the Jackson County Sheriff's Department, testified he found inside the carport a 9 mm two-shot derringer pistol " . . . laying up on a shelf right above the washing machine and the dryer . . ." (R. 87, 91) Chambers also found a projectile inside the carport next to the pool of blood. (R. 90) Only one shot had been fired from the two-shot derringer. (R. 92)

Brenda Starr, the defendant's wife, working mother of his three children, and the victim in this case, testified her husband, June Allen Starr, shot her. (R. 97-98) She was absolutely certain of this. (R. 99)

> Q. [BY PROSECUTOR:] Did you ever have that gun in your hand that day?
>
> A. No ma'am. I never did touch it.
>
> Q. And you're absolutely certain who shot you?

A. Yes, ma'am.

Q. And that was your husband?

A. Yes, ma'am. (R. 99)

Daryl C. Leggins, who lived across the street from the Starrs, testified he was awaken by his sister who informed him she had heard a gunshot. Leggins went across the street and called for Starr who came out and talked with Leggins.

Q. [BY DISTRICT ATTORNEY:] What did you and Allen talk about?

A. [BY LEGGINS:] I asked him was everything all right and he said yeah.

Q. How was he acting?

A. He was acting normal.

* * * * * *

Q. Did you see into his garage?

A. Yeah.

Q. Did you see anything?

A. I saw blood in his carport. (R. 108)

Michael Wright, a sergeant in the criminal investigations division of the Jackson County Sheriff's Department, testified he arrived at the scene of the shooting around 9:00 p.m. (R. 112) The victim had already been transported by ambulance to the Singing River Hospital. (R. 112)

At 11:54 p..m. Wright took a statement from the defendant that was recorded on audiotape and later transcribed. (R. 117-18) Prior to interviewing Starr, Wright advised Starr of his rights under the *Miranda* decision.

Q. [BY DISTRICT ATTORNEY:] Can you hear you read

those rights to him on the tape?

A. [BY WRIGHT:] Yes.

Q. Did he indicate to you, sir, that he understood those rights.

A. Yes, I asked him if he understood those rights and he nodded his head in a yes motion. And then I continued on with my interview. (R. 118-19)

Both the audiotape and the sixteen (16) page transcription were thereafter introduced into evidence without objection. (R. 119-20) The audiotape of the interview was then played for the benefit of the jury, likewise without objection. (R. 120)

At the close of the State's case-in-chief, Starr's general motion for a directed verdict was denied. (R. 124-25)

The defendant, **June Allen Starr**, testified in his own behalf he was "under the influence" at the time of his interrogation by law enforcement authorities. (R. 129)

He also gave the following version of the shooting incident:

Q. [BY DEFENSE COUNSEL:] And now, in this court, to the best of your memory, tell us what happened that day, starting as early in that day as you can remember. (R. 129)

* * * * *

A. So, then. by that time, she said no. And, by that time, that's when we got in that tussle, right there, right by my deep freezer in the middle - - in the center of my kitchen. And my leg give out and we fell on that floor. At that time, yes, I was intoxicated. And she said, I am sick of it. And, so, she straddled me and set her behind on my stomach and had me pinned down on the floor.

And I said, Brenda, why you doing that? Let me up, Baby. Let me up. And I said, You see my food on. Now, let me up. She said, No, I am sick of this. I said, sick of what? Let me up. Please. And I tried to bench press her up. And I couldn't bench press her up.

So, by that time - - I had them little short pants, that's how the

> gun came up about. And then, when the gun slipped out, outside of my short pants, that's when she reached at the gun. My hand is bigger than her hand and I - - when the gun hit the butt of the floor, she reached at it. And, by that time, I tried to get it. And, if you look at her arm right now, she's got a fingernail right there where I tried to get the gun from her. So, we tussled and tussled and tussled. So, at that time, she said no - - she got up and made a turn. I tried to get up.
>
> By that time, that's when I had the gun in custody. And I tried to pull up, when she was getting up - - when she pulled up, I lost balance on her. I fell back down. I got the scar here on my elbow. That's where the blood was. And that's when the gun discharged. That's right.
>
> I didn't know she had got hit. At that moment in time, all I remember was she fell. That's right. That's the truth. And then I immediately went there to her. I set the gun down up there. I said, Lord have mercy. I said, Baby - - so, when I peeled her up on my chest, I said, Baby - - she said, Allen, Baby, I've been shot. I said, Well, Brenda, of all the stupidness and clowning. Why Baby? I said, Help me. Help me get you up, Baby, Please.
>
> And I had a butane tank and that pressure washer was sitting where she fell at. And I immediately - - she tried to help me. I had my arms up under her arms, trying to lift her up, trying to get her inside the house. But, as far as I made it, over the little step by my kitchen door, and that's where we collapsed there. And I said, Well, Brenda - - Lord, Baby, just hold on. Baby, just hold on. And she was pouring with sweat. (R. 135-36)

The State produced one witness in rebuttal. (R, 165)

Starr's request for peremptory instruction was denied. (R. 164-65; C.P. at 56)

Following closing arguments, the jury retired to deliberate at 9:58 a.m. (R. 199) An hour and a half later at 11:30 a.m., it returned with a verdict of, "We, the jury. find the defendant, June Allen Starr, Sr., guilty of aggravated domestic violence." (R. 199; C.P. at 69)

A poll of the jury, individually by name, reflected the verdict was unanimous. (R. 200-01)

On August 22, 2007, Starr filed his motion for J.N.O.V. and/or a new trial, listing eight (8) individual grounds, none of which had anything at all to do with Starr's in-custody exculpatory

statements to law enforcement authorities. (C.P. at 75-77)

The motion was denied by Judge King on August 31, 2007. (C.P. at 78)

Edmund J. Walker, a practicing attorney in D'Iberville, did an excellent job of representing Starr during the trial of this cause.

Justin Cook, a lawyer with the Mississippi Office of Indigent Appeals, has interceded on Starr's behalf in Starr's appeal to this Court. Mr. Cooks's representation has been equally effective.

SUMMARY OF THE ARGUMENT

Miss.R.Evid. 103(a) (1) reads, in part, as follows: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) , , , [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . ."

There was no objection, contemporaneous or otherwise, either before or during trial, to the introduction of Starr's in custody and largely exculpatory statements to patrolman Michael Wright. Rather, Starr's *Miranda* complaint, as Starr concedes, is raised for the first time on appeal. Consequently, Starr has waived and/or forfeited his right to have the issue of voluntariness in the *Miranda* sense reviewed by an appellate court. Stated differently, "[t]his issue is procedurally barred." **Williams v. State,** 971 So.2d 581, 590 (Miss. 2007).

The plain error rule is inapplicable here because there was no error.

If otherwise, any error was neither "plain," "clear," nor "obvious."

Finally, even assuming, as Starr contends, there was constitutional error, it was harmless beyond a reasonable doubt given the exculpatory nature of the defendant's statements and the overwhelming evidence pointing to his guilt. Starr's in custody statements were largely exculpatory

and did not constitute a "confession" or even an "admission." *See* **Reed v. State,** 229 Miss. 440, 91 So.2d 269, 272 (Miss. 1956).

ARGUMENT

THERE WAS NO OBJECTION, CONTEMPORANEOUS OR OTHERWISE, TO THE ADMISSIBILITY OF STARR'S IN CUSTODY EXCULPATORY STATEMENTS; RATHER, THE *MIRANDA* ISSUE IS RAISED FOR THE FIRST TIME ON APPEAL.

ACCORDINGLY, STARR IS PROCEDURALLY BARRED FROM ASSAILING THE INTEGRITY OF HIS STATEMENTS AT THIS BELATED HOUR. STATED DIFFERENTLY, HE HAS WAIVED AND/OR FORFEITED HIS RIGHT TO HAVE THE ISSUE OF VOLUNTARINESS IN THE *MIRANDA* SENSE CONSIDERED ON APPEAL.

THE PLAIN ERROR RULE IS INAPPLICABLE HERE BECAUSE ANY ERROR WAS NOT "PLAIN." IN FACT THERE WAS NO ERROR AT ALL.

Starr argues for the first time his statements to Patrolman Wright were involuntary in the *Miranda* sense because " . . . there was no waiver of *Miranda* [and] police officers should have ceased questioning the Appellant." (Brief of the Appellant at 11)

He seeks discharge. (Brief of the Appellant at 16)

In the alternative, he argues that " . . . because there was no knowing, intelligent and voluntary waiver," his conviction should be reversed and the case remanded for a new trial. (Brief of the Appellant at 16)

Procedural Bar. The Contemporaneous Objection Rule.

The problem with these arguments is that Patrolman Wright's testimony failed to generate an objection, contemporaneous or otherwise, to the in custody statements complained about for the first time on appeal.

Regrettably, there is no ruling by the trial judge to review. No claim has been made by Starr that Judge Jackson should have suppressed the statements *sua sponte* based solely upon the content of the sixteen (16) page interview or the testimony of Patrolman Wright.

Starr's *Miranda* rights claim is controlled by the following language found in the recent case of **Williams v. State,** 971 So.2d 581, 590 (Miss. 2007).

> Williams claims that he was questioned by Agent Umfress prior to being informed of his constitutional rights as required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This argument is presented for the first time on appeal. No motion was made at the trial level to suppress the statements made by Williams to the agents at his home. Agent Umfress testified that he orally advised Williams of his rights during the execution of the search warrant. Further, Williams signed a waiver of his rights after being taken into custody. "As a general rule, constitutional questions not asserted at the trial level are deemed waived." *Pinkney v. State,* 757 So.2d 297, 299 (Miss. 2000). This issue is procedurally barred.

Tis true that Williams signed a waiver of his *Miranda* rights while Starr refused to do so.

No matter.

Starr candidly and correctly acknowledges, if not admits, that no objection was made. He claims, however, the failure to object should not preclude a reviewing court from finding a violation of his Fifth Amendment *Miranda* rights as a result of in custody statements which allegedly were involuntary in the *Miranda* sense as opposed to traditional voluntariness, i.e., threats, force, coercion *et cetera.*

We respectfully point out the testimony of Patrolman Wright complained about "here and now" was not so obviously egregious and prejudicial "then and there." There was no motion to suppress the statements prior to or during trial and no contemporaneous objection to Wright's testimony or to the audiotape. (R. 119-20)

These observation, standing alone, are fatal to Starr's *Miranda* complaint raised here for the

first time on appeal. In short, any error was waived when Starr failed to object during trial or move to suppress prior to trial. Accordingly, Starr has "forfeited" his right to raise this claim on appeal. *See* **United States v. Dodson,** 288 F.3d 153 (5th Cir. 2002), reh denied, cert denied 123 S.Ct. 32 [Forfeiture is the failure to make the timely assertion of a right, generally by failure to object to an error in the proceedings.]

It is elementary that a contemporaneous objection is required in order to preserve an error for appellate review. **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied; **Logan v. State,** 773 So.2d 338 (Miss. 2000); **Florence v. State,** 755 So.2d 1065 (Miss. 2000); **Jackson v. State,** 766 So.2d 795 (Ct.App.Miss. 2000); **Goree v. State,** 750 So.2d 1260 (Ct.App.Miss. 1999).

Otherwise the error, if any at all, is waived for appeal purposes. **Caston v. State,** *supra,* 823 So.2d 473 (Miss. 2002), reh denied.

Stated differently, "[t]he failure to object at trial acts as a procedural bar in an appeal." **White v. State,** 964 So.2d 1181, 1185 (Ct.App.Miss. 2007), citing **Jackson v. State,** 832 So.2d at 579, 581(¶3) (Ct.App. Miss. 2002), citing **Carr v. State,** 655 So.2d 824, 853 (Miss. 1995).

A defendant is not entitled to raise new issues on appeal that he has not first presented to the trial court for consideration. **Hodgin v. State,** 964 So.2d 492 (Miss. 2007). This rule is not diminished in a capital case. **Flowers v. State,** 947 So.2d 910 (Miss. 2007). Moreover, it also applies to constitutional questions. **Williams v. State,** 971 So.2d 581 (Miss. 2007) ["As a general rule, constitutional questions not asserted at the trial level are deemed waived."] *See also* **Ross v. State,** 954 So.2d 968, 987-88, 1015 (Miss. 2006); **Rogers v. State,** 928 So.2d 831, 834 (Miss. 2006).

In **Gonzales v. State,** 963 So.2d 1138, 1144 (Miss. 2007), the Supreme Court reaffirmed the rule with the following rhetoric:

> Where an argument has never been raised before the trial court, we repeatedly have held that 'a trial judge will not be found in error on a matter not presented to the trial court for a decision.' *Purvis v. Barnes,* 791 So.2d 199, 203 (Miss. 2001).

The contemporaneous objection rule has been applied to speedy trial violations, discovery violations, ***Batson*** violations, in-court identifications, admission of wrongfully obtained evidence, trial *in absentia*, and the like. *See* **Miller v. State,** 956 So.2d 221 (Miss. 2007) [speedy trial]; **Jackson v. State,** 962 So.2d 649 (Ct.App.Miss. 2007), reh den, cert den [discovery]; **Flowers v. State,** 947 So.2d 910 (Miss. 2007) and **Roles v. State,** 952 So.2d 1043 (Ct.App.Miss. 2007) [***Batson***]; **Black v. State,** 949 So.2d 105 (Ct.App.Miss. 2007) [in-court identifications]; **Gonzales v. State,** *supra*, 963 So.2d 1138 (Miss. 2007)[wrongfully obtained evidence]; **Mallard v. State,** 798 So.2d 539 (Miss. 2001) [trial *in absentia*].

The contemporaneous objection rule is in place in order to enable the trial judge to correct error with proper instructions to the jury whenever possible. **Slaughter v. State,** 815 So.2d 1122 (Miss. 2002), reh denied.

A trial court cannot be put in error unless it had an opportunity to first pass on the question. **Palm v. State,** 748 So.2d 135 (Miss. 1999); **Fulgham v. State,** 770 So.2d 1021 (Ct.App.Miss. 2000). *See also* **Mallard v. State,** *supra*, 798 So.2d 539, 542 (Miss. 2001), where this Court held that Mallard's complaint that she was tried in her absence was waived, for the purposes of appeal, since she failed to object to her trial *in absentia.*

Miss.Code Ann. § 99-35-143 is precisely in point. It reads, in its pertinent parts, that

> [a] judgment in a criminal case **shall not be reversed** because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he

> had anything to say why judgment should not be pronounced against him upon the verdict, **or because of any error or omission in the case in the court below, except where the errors or omission are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court.** [emphasis added]

The underlying bases for the existence of a contemporaneous objection rule are contained in **Oates v. State**, 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

> There are three basic considerations which underlie the rule requiring specific objections. It avoids costly new trials. Boring v. State, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. Heard v. State, 59 Miss. 545 (Miss. 1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932). These rules apply with equal force in the instant case; accordingly, we hold that appellant did not properly preserve the question for appellate review.

In **Leverett v. State**, 197 So.2d 889, 890 (Miss. 1967), this Court, quoting from **Collins v. State**, 173 Miss. 179, 180, 159 So. 865 (1935), penned the following language:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

In **Sumner v. State,** 316 So.2d 926, 927 (Miss. 1975), we find the following language concerning the time for making an objection:

> The rule governing the time of objection to evidence is that it must be made as soon as it appears that the evidence is objectionable, or as soon as it could reasonably have been known to the objecting party, unless some special reason makes a postponement desirable for him which is not unfair to the proponent of the evidence. *Williams v. State*, 171 Miss. 324, 157 So. 717 (1934) and cases cited therein. See also cases in Mississippi Digest under Criminal Law at 693.

We reiterate. "A trial judge will not be found in error on a matter not presented to him for decision." **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995) citing numerous cases. *See also* **McLendon v. State,** 945 So.2d 372 (Miss. 2006), reh den, cert den; **Howard v. State,** 945 So.2d 326 (Miss. 2006), reh den, cert den. "[The Supreme Court] cannot find that a trial judge committed reversible error on a matter not brought before him to consider." **Montgomery v. State,** 891 So.2d 179, 187 (Miss. 2004) reh den.

No egregious violation of a fundamental or substantial right is involved here, and the procedural bar/waiver/forfeiture rule is applicable to June Allen Starr.

Plain Error .

Starr asserts that "[b]ecause the admissibility of the Appellant's statements to investigators was not objected to at trial, the Appellant must proceed under the doctrine of plain error." (Brief of the Appellant at 4)

Miss.R.Evid. 103 (d) reads as follows: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

We continue to adhere to our view that "plain error" is something for a reviewing court to notice and not a crutch for an appellant to argue.

In any event. the plain error doctrine is inapplicable here because in order to find "plain" error there must be "error."

"The plain error doctrine requires that there be an error and the error must have resulted in a manifest miscarriage of justice." **Williams v. State,** 794 So.2d 181, 187 (Miss. 2001).

In **McGee v. State,** 953 So.2d 211, 215 (Miss. 2007), we find the following language dispositive of Starr's "plain error" argument:

> * * * However, if there is a finding of plain error, a reviewing court may consider the issue regardless of the procedural bar. A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State,* 794 So.2d 181, 187-88 (Miss. 2001). **To determine if plain error has occurred, we must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial."** *Cox v. State,* 793 So.2d 591, 597 (Miss. 2001) (relying on *Grubb v. State,* 584 So.2d 786, 789 (Miss. 1991); Porter v. State, 749 So.2d 250, 260- 61 (Miss.Ct.App. 1999)).

The Supreme Court applies the "plain error" rule " . . . only when it affects a defendant's substantial/fundamental rights." **Williams v. State,** *supra*, 794 So.2d at 187.

None of this criteria is found to exist in the case at bar,

First, Judge King did not deviate from a legal rule. In the absence of a motion to suppress or contemporaneous objection, the trial judge never had the opportunity to rule on the admissibility of Starr's in custody statements. Thus, there is no error, plain or otherwise, to review.

Second, even if there is the spectre of error, it is neither "plain" nor "clear" nor "obvious." Starr's in custody statement, we submit, was neither a confession nor an admission; rather, it was exculpatory in nature: "I didn't shoot my wife." (State's Exhibit 1) Accordingly, admission of the statement did not prejudice the outcome of the trial where, as here, evidence of Starr's guilt was overwhelming. In other words, any error did not result in a "manifest miscarriage of justice."

Harmless Error.

Assuming, arguendo, there is "plain error," it was clearly harmless beyond a reasonable doubt because the evidence preponderates very heavily in favor of the guilty

verdict, and any error could not have contributed to the defendant's conviction. *See* **Chapman v. California,** 386 U.S. 18, 87 S.Ct.824, 17 L.Ed.2d 705 (1967), reh den 17 L.Ed.2d 705.

CONCLUSION

Appellee respectfully submits that no reversible error, if error at all, took place during the trial of this cause. Accordingly the judgment of conviction of aggravated domestic violence, together with the twenty (20) year sentence and $5,000 assessment imposed in its wake should be affirmed.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

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

HONORABLE KATHY KING JACKSON
HONORABLE DALE HARKEY
Circuit Judge District 19
P. O. Box 998
Pascagoula, MS 39568-0998

HONORABLE ANTHONY (TONY) LAWRENCE III
District Attorney District 19
P.O. Box 1756
Pascagoula, MS 39568-1756

HONORABLE JUSTIN T. COOK
MS Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 20th day of June, 2008.

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205