IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID JOHNSON — APPELLANT

VS. — NO. 2008-KA-1010-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The lone issue raised in this criminal appeal from a conviction of fondling focuses squarely upon the propriety of granting a jury instruction not objected to.

The issue presented is controlled fully, fairly, and finally by the Mississippi Supreme Court's decision in **Killen v. State,** 958 So.2d 172, 186 (¶56) (Miss. 2007), reh denied, which held, *inter alia*, that " . . . in order to preserve a jury instruction issue for appellate purposes, a defendant must make specific, on-the-record objections to proposed instructions." *See also* **Cooper v. State,** 977 So.2d 1220 (Ct.App.Miss. 2007), reh denied, cert denied, which is equally controlling.

DAVID JOHNSON, a testifying 32-year-old African-American male and unmarried resident of Byhalia, Mississippi (R. 131; C.P. at 20, 84), at the time of the fondling incident, prosecutes a criminal appeal from the Circuit Court of DeSoto County, Robert P. Chamberlin, Circuit Judge, presiding.

Johnson, in the wake of an indictment returned on February 11, 2008, (C.P. at 6), was convicted of fondling Lisa Johnson, a female child under the age of sixteen (16) years, in violation

of Miss.Code Ann. §97-5-23. (C.P. at 6)

Johnson seeks a reversal and a remand for a new trial. (Brief of the Appellant at 7)

The defendant's indictment, omitting its formal parts, alleged

> " . . . [t]hat DAVID JOHNSON, on or about the 3rd day of October . . . 2007 . . . did wilfully, unlawfully and feloniously, for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, handle, touch or rub with his hands or any part of his body or any member thereof, Lisa Johnson, a child under the age of sixteen years; and the said DAVID JOHNSON being at that time a person above the age of eighteen (18) years, in direct violation of Section 97-5-23, Mississippi Code 1972 Annotated, . . . " (C.P. at 3)

Following a one (1) day trial by jury conducted on May 22, 2008, the jury returned a written verdict of, "We[,] the Jury, have found the Defendant Guilty as charged." (R. 184; C.P. at 71) A poll of the jurors, individually by number, reflected the verdict was unanimous. (R. 184-85)

At the close of a brief hearing during which the defendant testified in extenuation and mitigation of sentence (R. 186-87), Judge Chamberlin sentenced Johnson to serve a term of ten (10) years in the custody of the MDOC with five (5) years of post-release supervision. (R. 190-91; C.P. at 79-82)

One (1) issue is raised on appeal to this Court: "Whether conflicting instructions, arguably shifting the burden of proof to the defendant to prove his innocence, denied appellant a fair trial." (Brief of the Appellant at ii, 1)

STATEMENT OF FACTS

Lisa Johnson is a twelve (12) year old fifth grader who lives with her mother, Margaret Johnson, in Olive Branch. (R. 66, 86)

David Johnson is a thirty-two year old resident who testified he came to Olive Branch to take care of some personal business. (R. 130) Johnson is Margaret Johnson's half brother (R. 86-87) and

an uncle to the victim, Lisa Johnson. (R. 67, 79)

On October 3, 2007, Johnson was visiting in Margaret's home in Olive Branch. (R. 79) During the afternoon hours of the 3rd, Lisa returned to her home from school at which time she was fondled by David Johnson who grabbed her between her legs with his hands. (R. 68-70, 72-73) Johnson reached for her breasts a few minutes later. (R. 74-75) Lisa stopped Johnson by stabbing him in the hand with a rattail comb. (R. 75, 82)

Lisa testified Johnson had asked her on prior occasions for "my cat." (R. 76) Lisa interpreted this as a request for sex because she owned neither a dog nor a cat. (R. 76-77)

Four (4) witnesses testified for the State during its case-in-chief, including the victim, Lisa Johnson, and her mother Margaret Johnson. (R. 86)

Margaret testified that Johnson was present when Lisa got home.

> Q. [BY PROSECUTOR WILSON:] Okay. And what had he been doing while he was at your house?
>
> A. Drinking.
>
> Q. Okay. Drinking what?
>
> A. Beer. (R. 87-88)

It will serve no useful purpose to develop their testimony more fully because neither the sufficiency nor the weight of the evidence are under scrutiny in this appeal. It is enough to say that appellee does not take issue with any of the salient facts articulated by counsel opposite in his brief at pp. 1-5.

At the close of the State's case-in-chief, the defendant's motion for a directed verdict of acquittal was overruled by Judge Chamberlin who stated, *inter alia*, the following: "Clearly, taking the evidence in the light most favorable to the State, as is required at this part of the proceeding, they

have certainly clearly proven in that light a touching or grabbing of the child in the inappropriate area, being between her legs in this particular situation, as well as attempts to grab her in the breast area, and at the very least, more than one comment about having sex or requests or propositioning of the minor child at or prior to that date." (R. 126)

After being fully advised of his right to testify or not (R. 52-53), Johnson, at the close of the State's case-in-chief, elected to testify in his own defense. (R. 129-154)

Johnson's defense was a essentially a general denial. (R. 132-36)

> ". . . I ain't never had no sexual relation or touching or none of that because I know - - I got more respect than that not to do nothing like that. I'm 32 years old, and I know better than that. You know, I know right from wrong." (R. 131)

* * * * * *

> "I didn't touch her no kind of way. We didn't have no kind of argument over there saying she told him that, no kind of talk about that. No kind. No kind of talk about that. No kind of sexual talk or none of that." (R. 136)

At the close of all the evidence Johnson's motion for a directed verdict was not renewed. (R. 154-55)

Peremptory instruction was requested and denied. (R. 157; C.P. at 58)

Following closing arguments, the jury retired to deliberate at 2:45 p.m. (R. 182)

One hour and thirty-five (35) minutes later, at 4:20 p.m., the jury returned with the following verdict: "We, the jury, have found the Defendant guilty as charged." (R. 184)

A poll of the jury, individually by number, reflected the verdict was unanimous. (R. 185)

Judge Chamberlin thereafter sentenced Johnson to serve ten (10) years in the custody of the MDOC followed by five (5) years of post-release supervision. (R. 190; C.P. at 79-82)

On May 23, 2008, Johnson filed motions for a new trial and judgment notwithstanding the

verdict. (C.P. at 73-75, 76-78)

In separate orders signed June 9, 2008, both motions were overruled. (C.P. at 85-86)

David Clay Vanderburg, a practicing attorney in Hernando, represented Johnson very effectively during the trial of this cause and timely perfected Johnson's appeal to this Court. (C.P. at 88-93)

Leslie Lee of the Office of Indigent Appeals has been substituted on appeal. (C.P. at 96)

W. Daniel Hinchcliff, a highly proficient staff attorney for the Mississippi Office of Indigent Appeals, has filed, as always, an excellent brief on David Johnson's behalf. Mr. Hinchcliff's representation has been equally effective.

SUMMARY OF THE ARGUMENT

Appellate counsel is compelled to accept the official record of trial in the posture that he finds it.

Johnson failed to object, contemporaneously or otherwise, to the trial court's standard instruction criticized for the first time on appeal. Accordingly, he has waived any complaint and is procedurally barred from pursuing the issue on direct appeal.

Johnson does not argue "plain error" on appeal. Even if he did, there is no plain error before the appellate court because there was *(1)* no error at the trial level and *(2)* even if there was, the error did not result in a manifest injustice or the denial of a fundamental right. **Kelly v. State,** 910 So.2d 535, 538 (Miss. 2005); **Davis v. State,** 980 So.2d 951, 958 (Ct.App.Miss. 2007), reh denied, cert denied.

ARGUMENT

JOHNSON IS PROCEDURALLY BARRED FROM ASSAILING THE INTEGRITY OF JURY INSTRUCTION #5 BECAUSE THERE WAS NO OBJECTION, CONTEMPORANEOUS OR OTHERWISE, TO THIS INSTRUCTION.

Jury instruction #5 (CR-5), which was granted without objection, reads, in its entirety, as follows:

> The Court instructs you that it is just as much your duty under the law and upon your oaths as jurors to free an innocent person by your verdict of not guilty as it is for you to convict a guilty person. (C.P. at 64)

Johnson assails the integrity of jury instruction #5, a standard instruction originating with the trial court. Although acknowledging, if not conceding, "no objection was made to this instruction," Johnson, nevertheless, claims the granting of #5 denied him a fundamentally fair trial because it required Johnson to prove his innocence. (Brief of the Appellant at 5) In this posture says Johnson, ". . . the instruction shift[ed] the burden of proof to the defendant to prove his innocence." (Brief of the Appellant at 5)

First, this argument is procedurally barred because the instruction was not the target of an objection at trial.

Second, if neither the learned trial judge nor trial defense counsel recognized any potential for confusing or misleading the jury with respect to the burden of proof, we can conclude beyond a reasonable doubt no reasonable and fair-minded juror could have been misguided, confused or mislead.

This is especially true in light of instruction #7 (CR-7) which reads, in its entirety, as follows:

> The court instructs you that the defendant(s) at the start of the trial is presumed to be innocent. **The defendant(s) is not required**

> **to prove his/her innocence or to put in any evidence at all upon the subject.** In considering the evidence in this case you must look at the evidence and view it in the light of that presumption. This presumption of innocence stays with the defendant through the trial of the case until the evidence convinces each and every one of you of the defendant's guilt beyond a reasonable doubt. (C.P. at 66) [emphasis ours]

See also instruction #8 (CR-8) which states, in part, that "[y]ou are to presume the defendant is not guilty unless and until the defendant is proven guilty beyond a reasonable doubt." (C.P. at 67)

There was no objection, contemporaneous or otherwise, to jury instruction #5, a standard instruction originating with the court. We quote:

> BY THE COURT: Ms. Wilson, have you reviewed the Court's standard instructions, 1 though 10.
>
> BY MS WILSON: Yes, sir.
>
> BY THE COURT: Any objection to any of those?
>
> BY MS WILSON: No, sir.
>
> BY THE COURT: Mr. Vanderburg, have you reviewed the Court's standard instructions, 1 through 10?
>
> BY MR. VANDERBURG: Yes, sir.
>
> BY THE COURT: Any objection to any of those?
>
> BY MR. VANDERBURG: No, sir.
>
> BY THE COURT: Those instructions will be given as Jury Instructions 1 through 10. (R . 155)

Applicable here is the following language found In **Moawad v. State**, 531 So.2d 632, 635 (Miss. 1988):

> The record reflects that no objection was made to any of the three instructions set forth above. Therefore, the points are procedurally barred and are not properly before the Court for

> consideration. Rule 42, Miss.Sup.Ct. Rules. *Lockett v. State*, 517 So.2d 1317 (Miss. 1987); *Gray v. State*, 472 So.2d 409 (Miss. 1985); *Billiot v. State*, 454 So.2d 445 (Miss. 1984); *Gilliard v. State*, 428 So.2d 576 (Miss. 1983). [other citations omitted.]

The contemporaneous objection rule as applied to jury instructions is alive and well. "Errors based on the granting of an instruction will not be considered on appeal unless specific objections stating the grounds are made in the trial court." **Stevens v. State,** 808 So.2d 908, 924-25 (Miss. 2002), quoting from **Oates v. State,** 421 So.2d 1025, 1030 (Miss. 1982) citing **Collins v. State,** 368 So.2d 212 (Miss. 1979).

"[I]n order for [an appellate] Court to consider a jury instruction issue on appeal, the defendant must have made a specific objection to the jury instruction in question at the trial level." **Cooper v. State,** *supra*, 977 So.2d 1220, 1224 (¶14) (Ct.App.Miss. 2007), citing **Harris v. State,** 861 So.2d 1003, 1013 (¶18) (Miss. 2003). *See also* **Killen v. State,** *supra*, 958 So.2d 172, 186 (¶56) (Miss. 2007) ["This Court has strictly enforced the rule that, in order to preserve a jury instruction issue for appellate purposes, a defendant must make specific, on-the-record objections to proposed instructions."], citing and quoting from **Morgan v. State,** 741 So.2d 246 (Miss. 1999); **Lattimer v. State,** 952 So.2d 206, 223 (¶50) (Ct.App.Miss. 2006), reh denied, cert denied 951 So.2d 563 (2007) [Appellate court will not consider assertions regarding jury instruction where appellant " . . . acknowledges that his attorney did not object to any jury instructions whatsoever."]; **Gross v. State,** 948 So.2d 439, 444 (¶17) (Ct.App.Miss. 2006), reh denied ["Failure to object to an instruction generally bars complaints regarding the instruction on appeal."]

A defendant's failure to object to instructions at trial constitutes a waiver on appeal. **Duvall v. State**, 634 So.2d 524 (Miss. 1994); **Smith v. State**, 572 So.2d 847 (Miss. 1990);

Hemphill v. State, 566 So.2d 207 (Miss. 1990); **Cunningham v. State,** 828 So.2d 208 (Ct.App.Miss. 2002), reh denied, cert denied 829 So.2d 1245.

"Should no objection appear in the record [of trial], [the Court of Appeals] will presume that the trial court acted properly." **Carlisle v. State,** 822 So.2d 1022, 1028 (¶18) (Ct.App.Miss. 2002), reh denied, cert denied 829 So.2d 1245.

Any suggested defect found in #5 was cured by other instructions, particularly #7 (CR-7) and #8 (CR-8) which explained in plain and ordinary English the defendant was not required to prove his innocence. (C.P. at 66-67)

Defects in specific jury instructions do not require reversal where, as here, the instructions taken as a whole fairly, even if not perfectly, announce the applicable and primary rule of law. **Kolberg v. State,** 829 So.2d 29 (Miss. 2002), reh denied. No one instruction should be taken out of context. **Ford v. State,** 975 So.2d 859 (Miss. 2008). Stated differently, jury instructions are to be read collectively and as a whole and are not to be read unto themselves or given individual consideration. **Kolberg v. State,** *supra*; **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied. *See also* **Goodin v. State,** 977 So.2d 338 (Miss. 2008); **Ford v. State,** *supra*, 975 So.2d 859 (Miss. 2008); **Carlisle v. State,** *supra*, 822 So.2d 1022, 1028 (Ct.App.Miss. 2002).

"It is a familiar rule that instructions must be taken as one body, and announce the law, not the law of the State or the defendant, but the law of the case." **Sample v. State**, 320 So.2d 801, 805 (Miss. 1975). Stated differently, "[i]nstructions granted both the state and the accused are to be read together. When considered together, if the instructions adequately instruct the jury there is no reversible error present." **Rush v. State**, 278 So.2d 456, 458

(Miss. 1973). *See also* **Wilson v. State,** 592 So.2d 993 (Miss. 1991) [Jury instructions are reviewed as a whole and not individually.]; **Morgan v. State,** *supra,* 741 So.2d 246, 253-54, (¶¶ 6-9 (Miss. 1999) [Jury Instructions are read as a whole in order to determine if the jury was properly instructed.]

When the totality of the jury instructions given to the jury are considered as a whole and this Court cannot say that the jury was misled by the granting of any or all of them, no reversible error ensues. **Ford v. State,** *supra,* 975 So.2d 859 (Miss. 2008); **Maroone v. State,** 317 So.2d 25, 27 (Miss. 1975); **Shannon v. State,** 321 So.2d 1 (Miss. 1975); **Rayburn v. State,** 312 So.2d 454 (Miss. 1975); **Smith v. State,** 981 So.2d 1025 (Ct.App.Miss. 2008); **Watts v. State,** 974 So.2d 940 (Ct.App.Miss. 2008).

Such, we respectfully submit, is the situation here.

We reiterate.

A contemporaneous objection is required in order to preserve an error for appellate review. **Caston v. State,** *supra,* 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, is waived for appeal purposes. **Caston v. State,** *supra,* 823 So.2d 473 (Miss. 2002), reh denied.

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.

Put another way, 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,** 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.

"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. Given the facts found in the case at bar, no violation of fundamental rights is involved here, and the procedural bar/waiver/forfeiture rules are applicable to David Johnson.

Under the circumstances, we fail to find harm that would warrant application of the "plain error" doctrine. "Plain error" is the exception, not the rule.

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:

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