

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HENRY LINDSEY

APPELLANT

VS.

NO. 2008-KA-1717-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. LINDSEY'S ARGUMENT THAT THE TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.
- II. LINDSEY'S ARGUMENT REGARDING THE ALLEGED PREJUDICIAL EFFECT OF TESTIMONY ELICITED ON CROSS-EXAMINATION IS PROCEDURALLY BARRED FOR FAILURE TO REQUEST A CORRECTIVE ACTION FROM THE TRIAL COURT.

STATEMENT OF FACTS

On February 21, 2008 at approximately 7:00 p.m., Lieutenant James Dotson at the Walnut Grove Correctional Facility went to Henry Lindsey's cell to serve Lindsey with a rule violation report. T. 22, 40. Dotson noticed a large metal object sticking up from Lindsey's pants and asked Lindsey to hand it over. T. 22. Lindsey complied, and turned over a 22" shank. T. 22, 25, 35. He was subsequently indicted and a Leake County Circuit Court jury found Lindsey guilty of possession of contraband in violation of Mississippi Code Annotated §47-5-193.

SUMMARY OF ARGUMENT

Lindsey's claim that the trial court judge should have recused himself is procedurally barred. Lindsey never moved the trial judge to recuse. Additionally, Lindsey's claim that the trial judge was biased against him is without merit. When reading the trial court's comments as a whole, no reasonable person would harbor doubts about the judge's impartiality. Lindsey has failed to overcome the presumption that the trial judge was unbiased.

Lindsey is also barred from claiming that certain testimony elicited during his cross-examination was prejudicial. Defense counsel failed to object when Lindsey replied that he was incarcerated on an armed robbery charge. Further, to the extent that the prosecutor's question asking Lindsey what he had done to earn a rules violation report was improper, defense counsel failed to request corrective action after his objection was sustained. This Court has repeatedly stated that a party's failure to request corrective action in the trial court after a sustained objection bars that party from complaining on appeal of the alleged prejudicial effect of the comment or testimony.

ARGUMENT

I. LINDSEY'S ARGUMENT THAT THE TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

Because Lindsey failed to move the trial court judge to recuse, he is procedurally barred from arguing the issue for the first time on appeal. *King v. State*, 821 So.2d 864, 867 (¶11) (Miss. Ct. App. 2002). Not only did defense counsel fail to file a motion or make an *ore tenus* motion for recusal, but also defense counsel failed to include the issue of recusal in Lindsey's motion for new trial. "A trial judge will not be put in error on a matter which was not presented to him for his decision." *King v. State*, 857 So.2d 702, 720 (¶40) (Miss. 2003) (quoting *Parker v. Miss. Game & Fish Comm'n*, 555 So.2d 725, 730 (Miss. 1989)). Without abandoning its position that Lindsey's first issue is procedurally barred, the State would also show that the claim is without merit.

As noted by Lindsey, there is a presumption that the trial judge is unbiased. *Jackson v. State*, 1 So.3d 921, 927-28 (¶17) (Miss. Ct. App. 2008) (citing *Bryan v. Holzer*, 589 So.2d 648, 654 (Miss. 1991)). In order to overcome this presumption, the appellant must provide evidence which shows beyond a reasonable doubt that the judge was biased. *Id.* "In determining whether a judge should have recused himself, this Court uses an objective test: 'A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.'" *Shumpert v. State*, 983 So.2d 1074, 1078 (¶14) (Miss. Ct. App. 2008) (quoting *King v. State*, 821 So.2d 864, 868(¶ 13) (Miss. Ct. App. 2002)).

The appellant selectively quotes seven sentences from four pages of introductory remarks to the jury. When read as a whole, it is clear that the trial judge was merely cautioning the jury to reach its decision based on the evidence presented rather than through passion or prejudice. Because the appellant creatively edited the trial judge's remarks in an attempt to show bias, the following shows

the context in which the complained of statements were actually made.

I'll stress to you again the importance of a fair and impartial jury. I really believe in the justice system. I really believe it's no good if it's not properly handled here in this courtroom. Trial of cases involve young people a lot of times. It involves situations, and you as jurors, you understand, of course, that depending upon your verdict, a person's liberty could be taken from them. You should not ever be concerned with that, because I know that you will read in the paper and I know that you hear it on the news, and if you'll listen to me sometimes, I'm very, very critical of the Department of Corrections system in releasing prisoners when they've not served the times that the Judge has pronounced. **So, don't be concerned with how much punishment is involved in a case. You be concerned with the facts of the case and you be concerned with the law.** Then there's others, like myself, who will have the responsibility of passing judgment after you've made your judgment.

You have to understand that the decisions you make are sometimes very difficult because you're sympathetic with the person that's being tried oftentimes. You have to understand that the Judge has the same problem. I look at a person standing before me, 20 years old, and I look at their mother and father in the background, and they're good people. But, yet, the decision has got to be done; otherwise, you're not going home safely when you leave this courthouse, and you're not going to have the rights that you have. One right that people never talk about, which I consider and I say it all the time, is probably the most important right that you can ever have, and that's the right to be free from fear. You'll never have that right unless people ante up to their responsibility. It's your responsibility. **This what we're doing here is of no consequence unless you do what you're supposed to do: make a decision based upon evidence and law and nothing else. There is no place in this room for prejudice, racial issues, economic issues, person's place in life.** It doesn't matter.

You have to be concerned with one other thing. You cannot be concerned -- *you read about people who were convicted and later on, through DNA and other reasons, there is an overturn of that decision. Yes, it does happen. It happens when jurors make mistakes in finding a person guilty when they are really innocent. That's true. But, also, there's many a person -- and more people who are guilty that are never convicted than there are innocent people who are convicted.*

You have to think again. We're not talking about the laws in Jackson or anywhere else. We're talking about your law. Every case that you consider is a law of Leake County. Every case that will be presented is a case of Leake County -- nowhere else. And if you make a mistake, that's all right. And when you go home and you think about, well, did I do the right thing. **Judge Gordon told me to be fair and impartial** and I tried to be, but I may have made a mistake. And that's all right. That's just the way the system works. If a mistake is made, that's fine. That's just the way the system

works. **The system has worked whenever you do that.**¹

T. 2-4. When read as a whole, no reasonable person would think that the trial judge's remarks expressed a personal bias against Lindsey. In fact, the judge's remarks show quite the opposite. Furthermore, the appellant admits that the remarks did not show a bias against Lindsey. Appellant's brief at 10. Instead, Lindsey claims that the judge's remarks show a bias "towards aspects of the laws pertaining to the criminal justice system." Appellant's brief at 10. Surely Lindsey does not suggest then that Judge Gordon should recuse himself in every criminal case. In any event, Lindsey has failed to rebut the presumption that the trial judge was unbiased, as Lindsey has failed to put forth any evidence which would show beyond a reasonable doubt that the trial judge was in fact biased. As such, Lindsey's first issue is both procedurally barred and without merit.

¹The bolded and underline portions of the excerpt support the State's position that the judge was simply instructing the jury to render a decision based on the evidence and nothing else, while the italicized portions of the excerpt are the statements that the appellant has taken out of context.

II. LINDSEY’S ARGUMENT REGARDING THE ALLEGED PREJUDICIAL EFFECT OF TESTIMONY ELICITED ON CROSS-EXAMINATION IS PROCEDURALLY BARRED FOR FAILURE TO REQUEST A CORRECTIVE ACTION FROM THE TRIAL COURT.

Lindsey claims that the trial court erred in failing to instruct the jury to disregard inadmissible evidence after sustaining defense counsel’s objection. On direct examination, Lindsey testified that he had been incarcerated since 2006. T. 40. He also testified that on the date in question Dotson came to his cell to serve him paperwork, specifically, an “RVR.” T. 40. On cross-examination, Lindsey was asked why he was incarcerated, and Lindsey replied, without objection from defense counsel, that he was incarcerated for armed robbery. T. 41. Lindsey was then asked what an RVR is, and Lindsey informed, again without objection from defense counsel, that an RVR is a rules violation report. T. 41. It was not until the prosecutor asked what Lindsey had done to be served with an RVR that defense counsel objected. T. 42. The trial court sustained the objection before Lindsey answered. T. 42.

Lindsey claims that the trial court erred in failing to instruct the jury to disregard “inflammatory and prejudicial evidence solicited from Mr. Lindsey by the State.” Appellant’s brief at 16. To the extent that Lindsey is referring to his armed robbery conviction and rules violation, such evidence was alluded to on direct. “Our supreme court has held that a defendant cannot complain of evidence that he himself introduces by virtue of his own questions.” *Lane v. State*, 841 So.2d 1163, 1169 (¶19) (Miss. Ct. App. 2003) (citing *Hobson v. State*, 730 So.2d 20, 24-25(¶15) (Miss. 1998). Furthermore, Lindsey failed to make a contemporaneous objection regarding the armed robbery conviction. As such, he is barred from arguing on appeal that his testimony about the armed robbery conviction or RVR was prejudicial. *Spicer v. State*, 921 So.2d 292, 305(¶ 22) (Miss. 2006).

As to Lindsey's claim that the trial court should have instructed the jury to disregard after sustaining defense counsel's objection, the objection was made before Lindsey answered the question. Essentially, there was nothing to disregard. Additionally, defense counsel failed to request a corrective action. This Court has repeatedly held that a party's failure to request a corrective action after a sustained objection bars that party from complaining of the prejudicial effect of an improper remark. *Moffett v. State*, 938 So.2d 321, 327 (¶22) (Miss. Ct. App. 2006); *Gray v. State*, 831 So.2d 1221, 1222-23 (¶4) (Miss. Ct. App. 2002) (citing *Stevenson v. State*, 244 So.2d 30 (Miss. 1971)); *Minor v. State*, 831 So.2d 1116, 1123-24 (Miss. 2002) ("The failure to instruct the jury to disregard the objectionable comments rests with Minor who failed to move the trial court for such instruction."). Accordingly, Lindsey's second issue is also procedurally barred.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Lindsey's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script, appearing to read "La Donna C. Holland", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, La Donna Holland, 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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