

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHELBY LEROY CHISHOLM

APPELLANT

VS.

NO. 2009-KA-0913

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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SHELBY LEROY CHISHOLM

APPELLANT

VERSUS

NO. 2009-KA-0913-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Shelby Leroy Chisholm was convicted convicted in the Circuit Court of Amite County on a charge of sexual battery and was sentenced to a term of 30 years in the custody of the Mississippi Department of Corrections. (C.P.31-32) Aggrieved by the sentence imposed, Chisholm has perfected an appeal to this Court.

Substantive Facts¹

D.S. testified that she adopted her granddaughter C.S. “[r]ight after” the child’s birth. Subsequently, the child’s mother married Shelby Chisholm. On November 8, 2008, nine-year-old C.S. stayed with her natural mother and stepfather while D.S. was in the hospital.² The following January, D.S. and C.S. went to visit D.S.’s parents. During that visit, C.S. told her adoptive mother/grandmother that “daddy” had “sexed” her. D.S. notified the authorities and took the child to the hospital to be examined. Thereafter, while Chisholm was incarcerated, he admitted this offense to D.S. (T.42-47)

C.S. testified during the November 8 visit with her natural mother and Chisholm, she and her siblings made cards for D.S.’s birthday. At one point, Chisholm told her to come into his bedroom. After she complied, he “hurt” her by putting his “dick” into her “[h]iney and butt.” He then “said get out of the room and don’t tell nobody.” (T.52-56)

The defense rested without presenting evidence. (T.90)

SUMMARY OF THE ARGUMENT

Chisholm’s challenge to his sentence is procedurally barred and substantively without merit.

¹Chisholm does not contest the sufficiency or weight of the evidence undergirding the verdict. The state therefore submits an abbreviated statement of facts.

²November 8 was D.S.’s birthday.

PROPOSITION:

**CHISHOLM'S CHALLENGE TO HIS SENTENCE IS PROCEDURALLY
BARRED AND SUBSTANTIVELY WITHOUT MERIT**

For the first time on appeal, Chisholm argues that in sentencing him, the trial court unconstitutionally punished him for exercising his right to trial. The state counters that Hughes is procedurally barred from raising this issue because he failed to object on this or any other basis at the time of sentencing. (T.106-10) *Jackson v. State*, 935 So.2d 1108, 1117 (Miss.App.2006).

Alternatively, the state contends Chisholm's argument lacks substantive merit as well. We recognized that the trial judge did remind Chisholm that he had admitted his guilt to law enforcement and to D.S., and did state it would have been preferable for him to have saved the child from the ordeal of testifying. However, the trial judge also acknowledged three times during sentencing that Chisholm had a right to a public trial by jury. (T.106-10)

In *Dunigan v. State*, 915 So.2d 1063, 1072 (Miss.App.2005), this Court held that where, as here, the trial judge had recognized the defendant's "absolute right to a trial," he did not err in telling the defendant "that he wished he would have come forward and admitted his involvement." Furthermore, the Mississippi Supreme Court has held that "[w]hether the defendant takes responsibility for his or her actions is a fair consideration for the trial court in sentencing." *Hersick v. State*, 904 So.2d 116, 127-28 (Miss.2004).³

³The trial judge did consider this factor. He also took into account that the child had provided "compelling and powerful" testimony of a "despicable act." (T.109-10)

In light of *Dunigan* and *Hersick*, the state submits Chisholm cannot show that the trial court committed error, much less plain error, in its imposition of sentence. For these reasons, Chisholm's proposition should be denied.

CONCLUSION

The state respectfully submits that the argument presented by Chisholm has no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**


BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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This the 21st day of December, 2009.


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