IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00753 COA

JOE ROBERT MEESE, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MELVIN KEITH STARRETT

COURT FROM WHICH APPEALED: COPIAH COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

M. A. BASS, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: HONORABLE DUNN LAMPTON

NATURE OF THE CASE: KIDNAPPING, ARMED ROBBERY, AND RAPE BY HABITUAL OFFENDER

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE 35 YEARS IN THE CUSTODY OF THE MDOC FOR RAPE, 25 YEARS FOR ARMED ROBBERY AND 20 YEARS FOR KIDNAPPING

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

KING, J., FOR THE COURT:

Joe Robert Meese, Jr. was convicted of rape, armed robbery, and kidnapping in the Circuit Court of Copiah County. Meese was sentenced as a habitual offender to serve a thirty-five year term in the custody of the Mississippi Department of Corrections for the rape conviction and twenty-five year terms for the armed robbery, and twenty year term for kidnapping convictions. Aggrieved, Meese appeals and argues for the reversal of the convictions and sentences. We affirm each conviction and sentence.

FACTS

On the afternoon of December 7, 1992, the Defendant arrived at the residence of Mrs. V. in Hazlehurst and inquired whether his father was present. Mrs. V. advised the Defendant that his father was not on the premises, and the Defendant asked for permission to use the telephone. When Mrs. V. began to direct the Defendant to the telephone, the Defendant grabbed Mrs. V. about the neck, brandished a knife, and demanded money. Mrs. V. told the Defendant that she did not have any cash in the house, only checks. The Defendant then commanded Mrs. V. to write and tender unto him a check in the amount of $100.00. Pursuant to Defendant's instructions, Mrs. V. left the check's payee space blank.

After Mrs. V. had tendered the check, the Defendant bound Mrs. V.'s wrists with electrical tape and forced her into his vehicle. The Defendant drove Mrs. V to a remote location and raped her. The Defendant then drove within yards of Mrs. V.'s home and released her.

ANALYSIS OF THE ISSUES AND DISCUSSION OF LAW

I.

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR DIRECTED VERDICT AND REQUEST FOR PEREMPTORY INSTRUCTION?

Meese argues that the court erred in denying his motion for directed verdict and request for peremptory instruction because uncontroverted evidence established that it was physically impossible for him to gain access to Mrs. V.'s residence and commit the acts alleged.

When considering a motion for a directed verdict and request for peremptory instruction, we accept as true the prosecution's evidence, together with all reasonable inferences that may be drawn from that evidence. *Strong v. State,* 600 So. 2d 199, 201 (Miss. 1992) (citing *Lewis v. State,* 573 So. 2d 713, 714 (Miss. 1990)). If the evidence is sufficient to support the guilty verdict, then the motion for directed verdict or request for peremptory instruction must be overruled. *Strong,* 600 So. 2d at 201.

Mrs. V. was the key witness for the State. She testified that on December 7, 1992, Joe Meese Jr. came to her house, placed a knife at her throat, and demanded that she write and tender unto him a $100.00 check. Mrs. V. further testified that after she had given the Defendant the check, he forced her into his vehicle. The Defendant drove Mrs. V. to a remote location and had forced sexual intercourse. Thereafter, the Defendant drove Mrs. V. within yards of her home and released her.

In addition to Mrs. V.'s testimony, the State called Dr. Gary LaSala, M.D. Dr. LaSala testified that on December 7, 1992, Mrs. V. was admitted to the emergency room of Hardy Wilson Hospital at approximately 4:50 P.M. upon a rape complaint. Dr. LaSala's examination of Mrs. V. revealed bruises on her left arm, an inflamed vagina, and small bleeding lacerations on the left labia. Dr. LaSala testified that Mrs. V. was crying and hysterical upon admission.

The State also introduced into evidence a $100.00 check drawn on the account of Mrs. V. and her husband. The check had been cashed at a Piggly Wiggly in Crystal Springs at approximately 4:13 P.M. on December 7, 1992.

When we accept as true this evidence presented by the State, together with all reasonable inferences flowing therefrom, we find that there was sufficient evidence supporting the jury's verdict. Thus, the trial court was correct in denying Defendant's motion for directed verdict and request for peremptory instruction. This assignment of error has no merit.

II.

> DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL?

The Defendant contends that the trial court erred in denying his motion for new trial because the jury's verdict was against the overwhelming weight of the evidence. In support of his argument, the Defendant alleges that juror bias and passion influenced the verdict. The Defendant is cognizant that a guilty verdict will not be set aside unless it is clearly the result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence. *Burrell v. State,* 613 So. 2d 1186, 1191 (Miss. 1993) (citing *Maiben v. State,* 405 So. 2d 87, 88 (Miss. 1981)). We have previously determined that there was sufficient evidence supporting the jury's verdict; therefore, we do not find that the jury's verdict was the product of bias or passion. Thus, Defendant's assignment of error lacks merit.

III.

DID THE TRIAL COURT ERR IN NOT DECLARING A MISTRIAL?

Meese contends that the court should have declared a mistrial when the jury, subsequent to its deliberations, submitted to the court a note, which read:

> We the jury, after much agonizing analysis, consideration, and debate have agreed on the verdict furnished the court. However, this jury is very disappointed with the completeness

> of the evidence furnished, and would implore the State to seek more evidence in serious crimes such as this in the future.

Upon receipt of the note, the court called a bench conference and requested that the attorneys read the note. Defense counsel did not object or move for a mistrial after learning of the note.

On appeal, Meese suggests that the note calls the jury's verdict into question. If so, then it was incumbent upon defense counsel to bring the matter to the trial court's attention. It is well established that this Court will not consider issues which were not raised in the trial court. *Crenshaw v. State,* 520 So. 2d 131, 134 (Miss. 1988). We are reluctant to hold a trial judge in error for a matter not presented to him for decision. *Crenshaw,* 520 So. 2d at 134-35 (citing *Ponder v. State,* 335 So. 2d 885, 886 (Miss. 1970)). Because Meese did not provide the court with an opportunity to determine whether the note adversely affected the verdict, we cannot say that the court erred when it failed to declare a mistrial.

IV.

> DID THE TRIAL COURT ERR IN NOT DISMISSING THE MULTI-COUNT INDICTMENT?

For the first time, Meese raises as error, his trial and convictions on the three-count indictment. In doing so, he urges us to revisit the supreme court's holding in *Johnson v. State*, 452 So. 2d 850, 853 (Miss. 1984). The holding in *Johnson v. State* has been superseded by statute. Section 99-7-2 of the code provides:

> (1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.

Miss. Code Ann. § 99-7-2 (1972). The crimes alleged in the indictment arose from an unbroken series of violent acts by Meese against Mrs. V. Therefore, we are of the opinion that the offenses were connected pursuant to section 99-7-2(1)(b) and thus, properly tried in a single proceeding. This assignment of error also lacks merit.

In conclusion, we are unable to find any merit in Meese's appeal. Therefore, we affirm each

conviction and sentence.

THE JUDGMENT OF THE CIRCUIT COURT OF COPIAH COUNTY CONVICTING DEFENDANT OF KIDNAPPING, ARMED ROBBERY, AND RAPE AND SENTENCING HIM AS A HABITUAL OFFENDER TO SERVE SENTENCES OF TWENTY, TWENTY-FIVE, AND THIRTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS FOR EACH OF THE RESPECTIVE CONVICTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO COPIAH COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.