

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CA-00663 COA**

**ERMA DOE**

**APPELLANT**

**v.**

**CIRCLE K CORPORATION**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	04/03/96
TRIAL JUDGE:	HON. BRELAND HILBURN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	TYLVESTER GOSS WILLIAM WALKER, JR.
ATTORNEYS FOR APPELLEE:	MARK CARLSON BYRON HANSBRO DERRICK JONES
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	JURY VERDICT FOR APPELLEE
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

Erma Doe<sup>(1)</sup> [hereinafter Doe] brought a negligence claim against Circle K Corporation [hereinafter Circle K] alleging that it breached its duty to provide her, as an invitee to Circle K's property, with reasonable security from criminal acts committed by third parties on Circle K's business premises. Also named as a defendant was the individual who assaulted Doe outside of a Circle K store. This case was tried before a jury in the Hinds County Circuit Court in March of 1996 at which time the jury returned a verdict in favor of Circle K. With the instant appeal Doe argues that the circuit court committed the following reversible error:

**I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GIVING INSTRUCTION D-7 AND BY REFUSING TO GIVE INSTRUCTION P-8?**

**II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY TO ASSESS COMPENSATORY DAMAGES AGAINST DARREN L. COLEMAN?**

**III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, SINCE (A) THE DEFENDANT CIRCLE K'S PREMISES SECURITY EXPERT ADMITTED THAT THE CRIME OF ROBBERY BEING COMMITTED ON THE CIRCLE K STORE PREMISES WAS FORESEEABLE, AND (B) THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?**

**FACTS**

On October 24, 1992 at approximately 7:00 a.m. Doe walked from her home to the Circle K convenience store on the corner of West Capitol Street and Longino Avenue in Jackson, Mississippi. Doe went inside the store and made a purchase. After exiting the store Doe was accosted by a fourteen-year-old assailant, Darren L. Coleman [hereinafter Coleman]. Coleman forced Doe to go with him behind the Circle K store, at which time he made her perform oral sex on him. Coleman also raped Doe and robbed her of \$37 in cash. Doe reported this incident to the Jackson Police Department who, using information she supplied, apprehended Coleman. Coleman was subsequently indicted and convicted of several criminal offenses arising out of this incident. At the time of Doe's civil action against Circle K and Coleman, Coleman was in the custody of the Mississippi Department of Corrections.

**ANALYSIS**

**I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GIVING INSTRUCTION D-7 AND BY REFUSING TO GIVE INSTRUCTION P-8?**

Doe asserts that the circuit court committed reversible error in refusing to give her proposed jury instruction P-8 and in giving Circle K's instruction D-7. According to Doe the circuit court erred because "[i]nstruction D-7 only allowed the jury to consider the crimes that had occurred on the premises [of the Circle K store] in determining foreseeability[,] which is an incorrect statement of the current law in the area of premises security." Doe argues that her proposed instruction P-8 should have been given because it "allows the jury to look at the overall pattern of criminal activity in the general vicinity of the [Circle K] business premises . . . in determining the foreseeability of crimes." Doe concludes by asserting that none of the instructions given in this case "allowed the jury to properly consider the crimes in the general vicinity of the [Circle K] business premises . . ."

Circle K argues that Doe's proposed instruction P-8 was "an incorrect statement of Mississippi law regarding premises liability, and furthermore as written it would have confused the jury." Circle K contends that P-8 was an incorrect statement of the law because of its language concerning the

reasonableness of Circle K not having taken specific security measures, i.e. armed guards and/or surveillance cameras to monitor activity outside its store. Circle K argues that under Mississippi law there "is no affirmative duty imposed on the owner of a business to take specific measures to protect its customers . . . ." Circle K also takes issue with the language of P-8 which would have allowed the jury to base the foreseeability of a third party assault on one of its customers on "the overall pattern of criminal activity in the general vicinity of the Circle K store . . . ." It is Circle K's position Doe failed to put on "statistics of incidents and frequency of occurrences" of crimes in the general area of its store, so that giving P-8 would have amounted to "instructing the jury to consider evidence not introduced [at trial]." Circle K concludes by asserting that Doe's instruction P-9, along with Circle K's instruction D-7, "taken together properly instructed the jury on the Mississippi law regarding the duty owed by a business to its invitees." Circle K argues that because Doe failed to lodge an objection to instruction D-7 at the circuit court level she is barred from raising the issue for the first time on appeal.

In disposing of this assignment of error we first note that Circle K is correct in its assertion that Doe failed to lodge an objection to the circuit court's granting of instruction D-7. Accordingly, Doe may not now complain of the circuit court's actions for the first time on appeal. *See* Miss. R. Civ. Pro. 51(b)(3) (stating that objection to instruction not made before instruction is delivered to jury is waived). Therefore, the only issue posed by this assignment of error is whether the circuit court erred in refusing instruction P-8 and (assuming error was committed) whether such error was so prejudicial as to necessitate a reversal and remand for new trial.

In order to be entitled to a jury instruction the proponent must show that the proposed instruction is supported by the evidence at trial and is a correct statement of the law. *Turner v. Temple*, 602 So. 2d 817, 823 (Miss. 1992); *see also Pevey v. Alexander Pool Co.*, 244 Miss. 25, 35, 139 So. 2d 847, 852 (Miss. 1962) (holding that all instructions must be based upon testimony introduced in the case). A party may not complain of a refused jury instruction on appeal if the other instructions granted adequately instructed the jury. *Turner*, 602 So. 2d at 823. In granting jury instructions circuit courts enjoy considerable discretion as to the form and substance of the instruction. *Splain v. Hines*, 609 So. 2d 1234, 1239 (Miss. 1992). If the jury instructions, taken together, properly instruct the jury, no reversible error will lie in error of one instruction. *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938, 943 (Miss. 1992); *see also Splain*, 609 So. 2d at 1239 (stating that appellate courts' overarching concern in reviewing refusal to give jury instructions is that jury was fairly instructed and that each party's proof-grounded theory of case was placed before it.)

Doe's proposed instruction P-8 read as follows:

[t]he [c]ourt instructs the [j]ury that while it is not an insurer of its customers' safety, a business owner owes its customers the duty to maintain its premises, including the parking lot, in a reasonably safe condition. This duty includes taking reasonable precautions against reasonably foreseeable violent crimes being committed against its customers by others. In determining whether it is foreseeable that a violent crime against its customers is likely, you should look at such factors as the overall pattern of criminal activity in the general vicinity of the business premises before the crime in question occurred, as well as the frequency of criminal activity on the premises itself. The [c]ourt instructs the [j]ury that, if you believe from a preponderance of the evidence in this case:

(1) that the overall pattern of criminal activity in the general vicinity of the Circle K store in question, as well as the frequency of criminal activity on the Circle K premises showed that it was reasonably foreseeable that any kind of violent crime, including rape and robbery of its customers, was likely to occur; and

(2) that hiring an armed security guard to patrol the premises, and having surveillance cameras on the outside of the premises were reasonable precautions that defendant Circle K Corporation could have taken to keep its premises reasonably safe; then defendant Circle K was negligent.

We have reviewed the trial transcript and agree with Circle K's position that the jury was presented with no credible evidence regarding an "overall pattern of criminal activity in the general vicinity of the Circle K store in question." The only evidence put on at trial concerning any pattern of criminal activity was testimony about previous crimes that had occurred on the Circle K store premises. The only testimony that could remotely be considered evidence of a pattern of other crimes in the general area was the statements of three witnesses who expressed their opinion that the general area around the Circle K store had a "higher than average" crime rate. In *Lyle v. Mladinich* our supreme court stated that in determining whether an assault was foreseeable "[c]ourts have relied on such factors as the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises . . . ." *Lyle v. Mladinich*, 584 So. 2d 397, 399 (Miss. 1991). Courts allowing juries to consider the "overall pattern" of criminal activity in the general area surrounding a defendant's business premises, however, do so only where there is evidence at trial detailing specific crimes or types of crimes that have occurred in the area in the general area at issue. *See generally Lyle*, 584 So. 2d at 399 (allowing jury to consider general area's level of criminal activity where there was specific evidence of crimes against the person).

Accordingly, we must agree with Circle K's assertion that there was no credible evidence to support Doe's proposed instruction P-8. We also agree with Circle K's argument that proposed instruction P-8 posed a significant danger of confusing the jury into believing that Mississippi law requires businesses to maintain armed guards and security cameras to protect their customers. Circle K is correct in defining a business' legal obligation to protect its patrons as "a duty to exercise reasonable care to protect [its customers] from reasonably foreseeable injury at the hands of another." *Crain v. Cleveland Lodge 1532, Inc*, 641 So. 2d 1186, 1189 (Miss. 1994) (quoting *Grisham v. John Q. Long V.F.W. Post No. 4057, Inc.*, 519 So. 2d 413, 416 (Miss. 1988)). We feel that the other instructions given to the jury (particularly P-9 and D-7) correctly express this legal standard. Therefore, the circuit court was well within its discretion in denying proposed instruction P-8 for both lack of credible evidence to support it and the possibility of it confusing the jury. *See Splain v. Hines*, 609 So. 2d 1234, 1239 (Miss. 1992) (stating that circuit court enjoys considerable discretion regarding form and substance of jury instructions). Additionally, the portions of P-8 that did contain correct statements of the law merely duplicated those contained in the instructions that were given to the jury. *See Allen v. Blanks*, 384 So. 2d 63, 65 (Miss. 1980) (holding that trial courts need not

grant duplicitous instructions simply to satisfy each party's desire for emphasis). Even had the circuit court committed error in denying Doe this single instruction, under our standard of review such error would not necessitate a reversal, as the instructions that were given properly instructed the jury. *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938, 943 (Miss. 1992). This assignment of error is without merit.

## **II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY TO ASSESS COMPENSATORY DAMAGES AGAINST DARREN L. COLEMAN?**

Doe argues that because the jury did not follow the circuit court's peremptory instruction to return a verdict against Coleman "the entire verdict is tainted." In Doe's opinion "[t]he failure of the [circuit] court to require the jury to assess compensatory damages against [Coleman] constitutes reversible error." Circle K responds that any error with the jury's treatment of the peremptory instruction regarding Coleman had no impact on the validity of its verdict in favor of Circle K. Circle K concludes that it was "removed from the damage consideration by the jury's determination that [Circle K was] zero percent liable." Circle K also states that Doe did not raise the issue of the lack of a damage assessment against Coleman in her motion for JNOV or new trial.

It is uncontroverted that the jury returned a verdict finding Circle K not liable, and that this verdict made no reference to the co-defendant Coleman. Contrary to Circle K's representations to this Court, however, Doe's motion for JNOV or new trial did raise the issue of the jury's failure to return a verdict against Coleman. Accordingly, Doe's objection was properly raised before the circuit court, which denied her motion. Despite Circle K's misrepresentations to this Court appellate review of the circuit court's ruling is proper.

Although Doe properly preserved this alleged error for appeal, in her briefs to this Court she fails to cite any relevant authority in support of her contention that "the entire verdict is tainted." Doe offers no authority demonstrating that this alleged error could have had any impact upon the validity of the jury's verdict in favor of Circle K, or that she was in any manner prejudiced by this action. Because the burden of persuasion on appeal rests with the appellant and Doe has failed to cite any supporting authority to satisfy this burden, we will not consider this assignment of error. *See Sumrall v. Miss. Power. Co.*, 693 So. 2d 359, 368 (Miss. 1997) (holding that appellant bears burden of persuasion on appeal and that appellate courts will not consider issues on appeal for which no supporting authority has been cited). This assignment of error is without merit.

## **III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, SINCE (A) THE DEFENDANT CIRCLE K'S PREMISES SECURITY EXPERT ADMITTED THAT THE CRIME OF ROBBERY BEING COMMITTED ON THE CIRCLE K STORE PREMISES WAS FORESEEABLE, AND (B) THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?**

With her final assignment of error Doe asserts that "[t]he jury[s] verdict was against the overwhelming weight of the evidence" so that "the trial court committed reversible error in denying [her] motion for [JNOV or new trial]." It is Doe's position that the testimony of Circle K's security

expert that it was foreseeable that a robbery might occur on the store premises amounted to "an adverse admission against defendant Circle K." Doe concludes that "the facts and inferences point so overwhelmingly in favor of the plaintiff that reasonable persons could not have arrived at a verdict in favor of the defendant." Circle K responds that the circuit court's denial of Doe's motion for JNOV or new trial was correct as a matter of law because both parties had "presented evidence sufficient that a fair minded jury could have believed and rendered a verdict for either party." It is Circle K's position that the trial "involved a pure question of fact, which is left to the exclusive providence of the jury." We agree with Circle K.

Motions for JNOV challenge the legal sufficiency of the evidence. ***James v. Mabus*, 574 So. 2d 596, 601 (Miss. 1990)**. In reviewing the decision of a trial court to refuse to grant a motion for JNOV the Mississippi Supreme Court has stated that:

we examine all of the evidence . . . in the light most favorable to the party opposed to the motion. All credible evidence tending to support the non-movant's case and all favorable inferences reasonably drawn therefrom are accepted as true and redound to the benefit of the non-mover. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, the motion should be granted. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the jury verdict should be allowed to stand and the motion denied, and, if it has been so denied, we have no authority to reverse.

***Junior Food Stores, Inc. v. Rice*, 671 So. 2d 67, 76 (Miss. 1996) (quoting *C & C Trucking Co. v. Smith*, 612 So. 2d 1092, 1098 (Miss. 1992))**.

Examining all of the evidence in the light most favorable to Circle K, it appears to this Court that reasonable and fair-minded jury members could have reached different conclusions in this matter. At trial Circle K introduced the testimony of a premises security expert who has owned and managed a private security firm for several decades. This expert reviewed police reports of past crimes on the premises of the Circle K store in question and concluded that the rape of a customer by a third party was not foreseeable. Doe countered Circle K's evidence with the testimony of its own expert, an off-duty Jackson Police Department officer with approximately five years experience in law enforcement. Not surprisingly, Doe's expert concluded that the rape should have been foreseeable to Circle K and that Circle K should have employed armed guards and security cameras at its store. Given the conflicting expert testimony plus the evidence of prior criminal activity on the Circle K premises, we hold that reasonable men could have easily reached different conclusions regarding whether Circle K was negligent. The jury's verdict must be allowed to stand.

Motions for new trial challenge the weight of the evidence. ***Henson v. Roberts*, 679 So. 2d 1041, 1045 (Miss. 1996)**. In considering a motion for a new trial, the trial judge in exercising his sound discretion may grant the motion thereby overruling the jury's verdict only "where such verdict is against the overwhelming weight of the evidence or is contrary to the law." ***Junior Food Stores, Inc. v. Rice*, 671 So. 2d 67, 76 (Miss. 1996)**; *see also Green v. Grant*, 641 So. 2d 1203, 1207-08 (Miss. 1994) (holding that new trial motion should only be granted where trial judge is left with firm and definite conviction that the verdict, if allowed to stand, would work miscarriage of justice). Under the

facts at bar we are left with no conviction other than that each side had its "day in court" and a "fair shot" at the jury. Considering the varying quality of the expert testimony adduced at trial and the inferences that could have reasonably been drawn from the evidence of prior criminal activity around the Circle K store at issue, we can not hold that the circuit court abused its discretion in denying Doe's new trial motion. This assignment of error is without merit.

**THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED AGAINST DOE.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**

1. Erma Doe is a pseudonym under which the plaintiff brought this action.