

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00297 COA**

CLARENCE WARD

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

DATE OF JUDGMENT:	12/16/93
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	THOMAS M. FORTNER ROBERT M. RYAN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH VAUGHAN
DISTRICT ATTORNEY:	EDWARD PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	C/S POSS COCAINE: SENTENCED TO SERVE A TERM OF 3 YRS IN THE MDOC; DEFENDANT TO PAY A FINE OF \$5000.00. THIS CAUSE TO RUN CONSECUTIVE TO RANKIN COUNTY CIRCUIT CASE NO.2909
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

BEFORE THOMAS, P.J., KING, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

Clarence Ward appeals his conviction of possession of cocaine raising the following issues as error:

**I. THE PROSECUTOR COMMITTED PLAIN AND REVERSIBLE ERROR BY
ELICITING IN ITS CASE-IN-CHIEF EVIDENCE OF THE DEFENDANT'S CHARACTER**

AND INVOLVEMENT IN OTHER CRIMINAL ACTIVITY IN VIOLATION OF THE MISSISSIPPI RULES OF EVIDENCE.

II. THE TRIAL COURT COMMITTED PLAIN AND REVERSIBLE ERROR BY ALLOWING OFFICER CALVIN MATTHEWS TO RENDER EXPERT TESTIMONY BEFORE THE TRIAL JURY WITHOUT BEING OFFERED, TENDERED, OR ACCEPTED AS AN EXPERT IN ANY FIELD IN VIOLATION OF RULE 702, MISSISSIPPI RULES OF EVIDENCE.

III. THE TRIAL COURT COMMITTED PLAIN AND REVERSIBLE ERROR BY ALLOWING JOHN DIAL TO RENDER AN EXPERT OPINION BEFORE THE TRIAL JURY WITHOUT HIS HAVING BEEN OFFERED, TENDERED, OR ACCEPTED AS AN EXPERT IN ANY FIELD OF EXPERTISE IN VIOLATION OF RULE 702, MISSISSIPPI RULES OF EVIDENCE.

IV. THE PROSECUTOR COMMITTED PLAIN AND REVERSIBLE ERROR DURING CLOSING ARGUMENT BY HIS IMPROPER REMARKS TO THE TRIAL JURY AND AS A RESULT, WARD WAS DENIED A CONSTITUTIONAL AND FUNDAMENTALLY FAIR TRIAL.

V. THE VERDICT OF THE TRIAL JURY IS CONTRARY TO LAW AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE PRODUCED AT THE TRIAL.

Finding no error, we affirm.

FACTS

On July 8, 1992, Detectives Calvin Matthews and Shirley Williams, members of the Direct Action Response Team, were driving in an unmarked vehicle. They went to an apartment complex off Terry Road in the City of Jackson, Mississippi. The location was well-known to the officers as a high drug trafficking area.

Matthews testified that when they drove up he saw Clarence Ward and Tyrone Jones. Jones, upon seeing the officers, yelled "50," which Matthews testified meant police had arrived, so throw away your contraband and flee the area. Jones fled. Matthews testified that he saw Ward throw white objects behind a window frame with one hand and put his cigarette down with the other hand. After recovering what appeared to be crack cocaine from the window sill, Matthews asked Ward if he was the owner of the "Kool" brand cigarette. Ward denied ownership. After arresting Ward, Matthews found a pack of "Kool" cigarettes in Ward's pocket.

Williams testified that Ward was standing in front of a window when they pulled into the apartment complex. Thereafter, Williams stated Jones yelled "50" and ran and Ward, with his left hand threw some items in the window sill, and with the other hand put out a cigarette. Williams testified that at the police station, as a consequence of his arrest, Ward made a statement to the effect that he was not worried about staying in jail because he knew too many people.

John Dial, whom the Jackson Police Department employs as a criminalist, testified that in his expert opinion the white rocks recovered at the scene were a cocaine base.

Ward did not testify in his defense; however, the defense called two witnesses. Howard Aaron testified that he was at the apartments on Terry Road the day of the arrest because Ward called him to come look at his automobile. While Aaron was talking to Ward, the officers arrived. Aaron stated that he recognized the police because of the patch on the arms of their long sleeved jackets. He testified that Ward was using the restroom when the officers arrived on the scene, so they could not have seen Ward throw any drugs down. He stated that he did not observe anyone with drugs that afternoon.

Next the defense called Isom Moses, who testified that he had been in a dice game at the apartments on the day of Ward's arrest. Moses stated that Ward had just driven up a few minutes before the officers arrived. He stated that Ward went inside an apartment and then was just exiting when Matthews and Williams pulled their car right behind Ward's car. Moses testified that he did not see Ward with drugs, nor did he see him put anything on or in the window sill.

In rebuttal, the State called Matthews to the stand. He testified that neither he nor Williams were wearing a uniform that day and that there was not a vehicle obstructing his view of the window where Ward had thrown the contraband.

After deliberations, the jury returned a verdict of guilty of possession of cocaine.

ANALYSIS

I.

THE PROSECUTOR COMMITTED PLAIN AND REVERSIBLE ERROR BY ELICITING IN ITS CASE-IN-CHIEF EVIDENCE OF THE DEFENDANT'S CHARACTER AND INVOLVEMENT IN OTHER CRIMINAL ACTIVITY IN VIOLATION OF THE MISSISSIPPI RULES OF EVIDENCE.

Ward argues that the prosecution unfairly and improperly elicited testimony touching on his veracity and involvement in other crimes, wrongs, or acts in violation of Mississippi Rules of Evidence 403 and 404.

The first alleged prejudicial error occurred when the prosecutor was questioning Officer Matthews on direct examination. The prosecutor asked Matthews what other items he found on the scene, besides the white rocks. Matthews responded that Ward had placed a burning Kool cigarette on the window sill. Matthews told the jury that Ward denied owning the cigarette on the window sill; however, a package of Kool cigarettes was found in Ward's pocket when they arrested him. Ward did not object to the admission of the statement at trial and is consequently procedurally barred on appeal from raising an argument not put before the trial court. *Handley v. State*, 574 So. 2d 671, 688 (Miss. 1990); *May v. State*, 569 So. 2d 1188, 1190 (Miss. 1990); *Dunaway v. State*, 551 So. 2d 162, 164 (Miss. 1989); *Marks v. State*, 532 So. 2d 976, 984 (Miss. 1988); *Burney v. State*, 515 So. 2d 1154, 1157 (Miss. 1987); *Sand v. State*, 467 So. 2d 907, 910 (Miss. 1985); *Woods v. State*, 393 So. 2d 1319, 1325 (Miss. 1981).

Ward also argues that his denial of ownership of the Kool cigarettes was a post arrest statement after *Miranda* rights were not administered. A close reading of the record does not make it clear whether

they arrested Ward and read his *Miranda* rights before or after he denied ownership of the cigarette. Again, however, the defense failed to object. We will not hold a trial court in error when it was not given an opportunity to rule on this matter at the lower level. We will presume that the lower court acted properly. *Moawad v. State*, 531 So. 2d 632, 635 (Miss. 1988).

Ward cites to four other instances in which he claims the prosecution elicited testimony about his character and evidence of other crimes in violation of Mississippi Rules of Evidence 403 and 404. However, the defense did not lodge an objection to any of these alleged prejudicial comments. "To obtain review of such remarks, the point ordinarily must be called to the court's attention when made, and corrections thereof requested, or proper objection made, at that time unless the court's conduct, on the entire record, was so reprehensible and prejudicial as to deny fair trial or due process." *Beckwith v. State*, Nos. 94-KA-00402-SCT, 91-IA-01207-SCT, 1997 WL 781301, at *42 (Miss. Dec. 22, 1997). We have held that the failure to make a proper objection waives any claim of error on appeal. *See Jackson v. State*, 551 So. 2d 132, 147 (Miss. 1989).

Ward does not mention that he failed to make contemporaneous objections to any of the comments, but asks this Court to hold any and all the comments as plain error. The defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal. *Gray v. State*, 487 So. 2d 1304, 1312 (Miss. 1986). It is only that rare case where we require reversal despite the failure of counsel to object. *Livingston v. State*, 525 So. 2d 1300, 1309 (Miss. 1988) (prosecutor's closing argument comment regarding rape defendant's failure to testify was fundamental error).

There is no showing that the circuit court so abused its discretion in the premises, nor does any plain error appear in the record. These points were waived in the lower court when Ward failed to object, and they are deemed forfeited on appeal to this Court.

II.

THE TRIAL COURT COMMITTED PLAIN AND REVERSIBLE ERROR BY ALLOWING OFFICER CALVIN MATTHEWS TO RENDER EXPERT TESTIMONY BEFORE THE TRIAL JURY WITHOUT BEING OFFERED, TENDERED, OR ACCEPTED AS AN EXPERT IN ANY FIELD IN VIOLATION OF RULE 702, MISSISSIPPI RULES OF EVIDENCE.

Ward argues that this Court should recognize as reversible error the testimony of Officer Matthews. He asserts that the officer's testimony was violative of Mississippi Rule of Evidence 702, in that the lower court allowed Matthews to give his expert opinion without first having been qualified. The prosecution asked Matthews, a member of the DART team, about the street use of the term "50" from the perspective of a person who is on the street doing something he or she should not be doing. Matthews responded that the term "50" means "heads up, police arriving." Matthews testified that when he arrived on the scene, Tyrone Jones, a man standing next to Ward, yelled "50."

First, we again note that Ward failed to object to Matthews's testimony. Ward did not allege this as error in his motion for new trial. As held in the first issue, we hold that failure to raise the issue at the trial court level bars Ward from raising the issue of the alleged prejudicial error on appeal.

Second, Ward has failed to demonstrate that he was harmed from the alleged error of Matthews testifying that *someone else* yelled "50." Matthews did not testify that Ward yelled "50," nor did he testify that Ward understood the meaning of the term "50." Even if we were to relax the contemporaneous objection rule in this instance, we cannot find any prejudice that resulted to Ward by allowing Officer Matthews to testify as to his understanding of the term "50" and how another man at the scene screamed the term. This issue is without any merit.

III.

THE TRIAL COURT COMMITTED PLAIN AND REVERSIBLE ERROR BY ALLOWING JOHN DIAL TO RENDER AN EXPERT OPINION BEFORE THE TRIAL JURY WITHOUT HIS HAVING BEEN OFFERED, TENDERED, OR ACCEPTED AS AN EXPERT IN ANY FIELD OF EXPERTISE IN VIOLATION OF RULE 702, MISSISSIPPI RULES OF EVIDENCE.

The State called John Dial to testify as to the substance recovered from the window of the apartment building. The State began laying the foundation for Dial as an expert witness, establishing that he was employed as a criminologist. Laying the foundation was interrupted by trial counsel for Ward, who stated "we would stipulate to his qualifications, that he is an expert in this area, and he is qualified to voice opinions in this area." Thereafter, the State did not tender nor did the circuit court accept Dial as an expert. Undoubtedly the better and safer practice would have been that the State follow these procedures and tender Dial as an expert. However, since there was a stipulation by Ward as to Dial's qualifications and no objection to Dial's testimony as an expert, we hold that again Ward is procedurally barred from raising this alleged error on appeal.

IV.

THE PROSECUTOR COMMITTED PLAIN AND REVERSIBLE ERROR DURING CLOSING ARGUMENT BY HIS IMPROPER REMARKS TO THE TRIAL JURY AND AS A RESULT, WARD WAS DENIED A CONSTITUTIONAL AND FUNDAMENTALLY FAIR TRIAL.

Ward argues that during the closing argument portion of the trial, the prosecutor made numerous improper remarks before the trial jury. Ward claims the remarks included, but are not limited to, misstating and arguing facts not in evidence, indirect comments on Ward's failure to testify, assertions that the jury paid the salary of the detectives involved in the case, argument suggesting Ward was involved in other criminal activity, a requested showing of the jury's hands in response to an inquiry by the prosecutor, attacks directed at the veracity of witnesses, and an improper bolstering of the testimony presented by law enforcement at the trial.

Ward complains that the following is a bolstering of the testimony of the two detectives who testified: "Now, I wish in every case I tried I had two trained narcotics' detectives as eyewitnesses to the crime that the defendant is charged with, and that's what we've got in this case."

Next Ward states that the following statements are a misstatement of law and facts of the case before the jury: "For you to find Clarence Ward not guilty, you have to believe they came in here and told

you a lie. Now, that's the bottom line. . . ." "Yet, they want you to believe they told a lie. . . . They even have their own witnesses get up here and suggest to you that the detectives lied about somebody hollering 50. You think about the motivation to tell a lie about that. I didn't hear anything like that. . . ." "When they took him downtown, the man had the unmitigated arrogance, the gall to tell those detectives, Nothing is going to happen to me because I know too many people."

Ward argues that the following are comments on his failure to testify: "You can believe that had there been any evidence that those detectives had an axe to grind with that man over there, you can believe it would have been brought out on cross examination and through the evidence and testimony somehow." "[W]ho put the cocaine there? Who knows? I know who put it there. Detective Matthews knows who put it there. Detective Williams knows who put it there. And Clarence Ward knows who put it there. There sits the man that dropped the cocaine right there."

Next Ward complains that the following was a improper statement by the prosecution, implying that the detectives were employees of the jury: "Clarence Ward was fooling with his drugs, and Detective Matthews and Williams are doing their job, doing what y'all pay them to do. . . ."

Ward cites to the following in the prosecution's closing argument: "How many of y'all on this jury tonight believe that there is a shortage of crack cocaine in Jackson, Mississippi, that these detectives have got to go out and fabricate a case against an innocent man Any of you believe we've got a shortage of cocaine in this city? Let me see your hands."

Ward submits that each error, standing alone, is representative of plain error and warrants the reversal of his conviction and the vacation of the sentence imposed.

The problem with Ward's argument is that he failed contemporaneously to object to any of the prosecutor's remarks. We require a contemporaneous objection to the allegedly prejudicial remarks. ***Handley*, 574 So. 2d at 688; *May*, 569 So. 2d at 1190; *Dunaway*, 551 So. 2d at 164; *Marks*, 532 So. 2d at 984; *Burney*, 515 So. 2d at 1157; *Sand*, 467 So. 2d at 910; *Woods*, 393 So. 2d at 1325.**

It is now well settled that when anything transpires during the trial that would tend to prejudice the rights of defendant, he cannot wait and take his chances with the jury on a favorable verdict and then obtain a reversal of the cause in this Court because of such error, but he must ask the trial court for a mistrial upon the happening of such occurrence when the same is of such nature as would entitle him to a mistrial.

***Box v. State*, 610 So. 2d 1148, 1154 (Miss. 1992)** (quoting *Blackwell v. State*, 44 So. 2d 409, 410 (Miss. 1950)).

[I]t is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial. The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment.

Johnson v. State, 477 So. 2d 196, 209-10 (Miss. 1985).

In this case, the lower court instructed the jury that any arguments, statements, or remarks by counsel were not evidence and if any statement were made that had no basis in the evidence, then the jury should disregard the remark. Clearly, any error that occurred was not so extensive or prejudicial as to constitute fundamental error. We hold Ward waived this issue in the court below and is forfeited any error on appeal to this Court.

V.

THE VERDICT OF THE TRIAL JURY IS CONTRARY TO LAW AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE PRODUCED AT THE TRIAL.

Ward argues that the verdict of the trial jury is contrary to law, against the overwhelming weight of the substantive evidence produced at the trial and manifestly wrong as a matter of law. The evidence presented by the State was more than sufficient to allow the jury to pass judgment. Our scope of review is limited and has been stated many times before and need not be restated here. Suffice to say that the evidence here was sufficient to convict. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) ; *McFee v. State*, 511 So. 2d 130, 133-34 (Miss. 1987); *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). Ward's last assignment has no merit.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF COCAINE AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SENTENCE TO RUN CONSECUTIVE TO RANKIN COUNTY CIRCUIT CASE NUMBER 2909 AND FINE OF \$5,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

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