

**IN THE COURT OF APPEALS 6/27/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-00563 COA**

**WILLIAM C. WEBB, a/k/a CHARLIE 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. ELZY J. SMITH

COURT FROM WHICH APPEALED: BOLIVAR COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): DANIEL J. GRIFFITH

ATTORNEY(S) FOR APPELLEE(S): OFFICE OF THE ATTORNEY GENERAL

BY PAT FLYNN

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL - SEXUAL BATTERY

TRIAL COURT DISPOSITION: SENTENCED TO SERVE TWO SEPARATE EIGHT (8) YEAR  
TERMS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO  
RUN CONCURRENT WITH FOUR YEARS OF EACH OF SAID SENTENCES TO BE  
SUSPENDED

BEFORE BRIDGES, P.J., BARBER AND DIAZ, JJ.

BRIDGES, P.J., FOR THE COURT:

William C. Webb was convicted on two counts of sexual battery and was sentenced to serve two separate eight (8) year terms in the custody of the Department of Corrections. The sentence was suspended for four (4) years, the suspension to commence after the defendant has served four (4) years in an institution under the supervision and control of the Department of Corrections, with a provision that the Department of Corrections provide the defendant with psychiatric and psychological evaluation and with such sentences to run concurrently, except that they shall run consecutively to any and all sentences previously imposed, if any, prior to the date of such sentences. Webb now appeals his convictions, contending that the Court erred in refusing to grant a mistrial following an improper question by the prosecution and contending further that the verdict of the jury was against the overwhelming weight of the evidence, as well as that the State of Mississippi failed to prove a prima facie case as charged in the indictment. Finding no error in the record to substantiate Webb's contentions, we affirm the judgment of the trial court.

### STATEMENT OF FACTS

On October 8, 1993, Isom Cameron, a spectator at a high school football game, reported to Detective Ollie White, that he had observed the defendant, Webb, aged 27, in a car with Chauncey Johnson, aged 13, in the parking lot at the game, doing something unusual. Upon investigation of the matter by Detective White, Webb was arrested for sexual battery.

Cameron testified at trial that, although he had not seen Webb do anything, he did notice him raising up and down while in the car with Johnson. Johnson testified that Webb approached him on the date in question and asked him to go to his car in the parking lot so that he could show him something. Johnson testified that once in the car Webb sat him on his lap, rubbed his legs and bit him on the jaw. Johnson stated that he was in the car with Webb for about thirty minutes before a policeman came.

Kevin Bryant, a security guard, testified that he and another security guard, Robert Robinson, were directed to Webb's car by Cameron and that, upon shining a light in the car, Bryant observed Johnson sitting in Webb's lap and being caressed by Webb who had his arm around Johnson's neck. Robinson stated that Webb had his hands between Johnson's legs, rubbing on his private parts and kissing him on the neck. Johnson denied this.

Johnson also testified that, on another date prior to October 8, 1993, he had ridden the bus driven by Webb to his home. Other children on the bus were taken home first and Johnson was the last to get off the bus on that day. This happened because he had fallen asleep and did not get off when the bus first went through his home community. He further testified that on the back roads going home, Webb pulled the bus over to the side and sat him on his lap and started rubbing him on his legs and putting his hand down his shirt. Johnson requested Webb to take him home immediately and Webb did so a short time later.

Webb testified and denied the bus incident. As to the football game incident, Webb testified that he was in the car outside the Eastside High School gate with Johnson, but only for the purpose of listening to the radio broadcast of a Cleveland High School game.

During the examination of one of its witnesses, the State's prosecutor, in identifying Webb, referred to Webb's tie as having a lot of colors, asked Webb on cross examination if he had ever married, and

asked another witness if Webb had ever been married. These questions were not objected to by Webb's attorney. The prosecutor again asked another defense witness if Webb had ever been married. Upon the latter question, Webb's attorney moved for a mistrial, based his motion on the claim that the State's question was an attempt to imply that Webb was a homosexual. Webb's motion was denied without any admonition to the jury to disregard such questions and remarks.

Webb was indicted April 11, 1994, on two counts of handling, touching and rubbing with his hands certain parts of the body of a male child under the age of fourteen (14) years and was convicted on both counts. He filed a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial, but both of said motions were denied.

## ARGUMENT AND DISCUSSION OF THE LAW

### I. WHETHER THE COURT ERRED IN REFUSING TO GRANT A MISTRIAL OR ADMONISH THE JURY FOLLOWING AN IMPROPER QUESTION BY THE PROSECUTION REGARDING THE DEFENDANT'S MARITAL STATUS WHICH WAS ASKED FOR THE SOLE PURPOSE OF IMPLYING THAT THE DEFENDANT WAS A HOMOSEXUAL.

Not all improper questions constitute reversible error. M.R.E. 103(a); *Sayles v. State*, 552 So. 2d 1383, 1387 (Miss. 1989). Here the questions complained of were not objected to when first asked by prosecutor. The second time the question "if defendant had ever been married" was asked by the prosecutor the defense counsel objected to the question and requested that the court admonish the jury to disregard the question and the answer and the defense counsel further made a motion for a mistrial. The court denied the motion for a mistrial and did not admonish the jury to disregard the question and any answer to that question or the previous question.

The questions asked by the prosecutor were as follows:

QUESTIONS TO THE WITNESS ISOM CAMERON.

Q. And what color tie is he wearing?

A. Uh, looks like green -- purple or something like that.

Q. It has a lot of colors?

A. Yes.

This question and the answers thereto were not objected to by defense counsel nor were any motions

for request made in connection therewith.

QUESTIONS TO THE DEFENDANT WEBB.

Q. Have you ever been married?

A. No.

There were no objections made to this question or its answer nor were any motions or requests made in connection therewith.

QUESTIONS BY THE PROSECUTOR TO THE WITNESS GOODLOW.

Q. Has he ever been married?

A. No.

The defense attorney then asked the court if he could approach the bench and when given permission, and after a conference at the bench with the prosecutor and the judge, the defense counsel made this remark.

BY MR. GRIFFITH: Your Honor, that is counsel's second reference to that question. The first time, I let it go. That is talking about the issue of my client's sexual preference. It is obvious to the jury, and I must ask that this be stricken, or in the alternative for a mistrial.

BY THE COURT: In the order you are objecting, I will sustain your objection, but the motion for a mistrial is denied.

BY MR. GRIFFITH: Your Honor, I would ask that the jury be instructed to disregard that statement.

BY THE COURT: We are going to stop it right here. I am not going into it anymore. I am not going to instruct the jury to disregard it. I am just going to sustain the objection. But I don't want you to go into it any further.

Webb's attorney said that these questions implied that Webb was a homosexual.

First we must determine whether those questions asked were blatantly and clearly prejudicial and thus improper that the trial judge should have objected to on his own. The burden is upon the defense counsel to object when "offensive language" is spoken or appellate review of the issue is waived. *Foster v. State*, 639 So. 2d 1263, 1288-89 (Miss. 1994). If the defendant fails to make a contemporaneous objection, then the issue is proper for appellate consideration only if it is so "inflammatory" that the trial judge should have objected on his own. *Gray v. State*, 487 So. 2d 1304, 1312 (Miss. 1986). The first two questions asked by the prosecutor in the case at bar were not objected to by defense counsel; therefore, the issue is waived as to those questions. The third question asked by the prosecutor which was objected to was whether the defendant was married. We do not believe that such a statement is inflammatory or so prejudicial as to deny the defendant a fair trial. Although the defendant did not ask for a curative instruction, he did make a motion and request that the judge admonish the jury. However, where in the instance at bar, the question does not appear to be inflammatory or prejudicial, and the defendant fails to ask for a curative instruction, no reversal will occur. In such instance, it was not necessary that the judge object on his own. *Gardner v. State*, 455 So. 2d 796, 800 (Miss. 1984).

While we have no cases in the state of Mississippi on this point of an improper question asked by the prosecuting attorney to the defendant or other witnesses, we do have certain precedents applying to improper remarks made by the prosecuting attorney in the presence of the jury. Even in cases where the Supreme Court has found such improper comments to be error, that court has stated that standing alone the error did not require reversal. *Williams v. State*, 522 So. 2d 201, 208-09 (Miss. 1988); *Carleton v. State*, 425 So. 2d 1036, 1039 (Miss. 1983).

We find no reversible error in the prosecutor's making of such comments and find that this issue is without merit.

## II. WHETHER THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE; AND FURTHER THAT THE STATE OF MISSISSIPPI FAILED TO PROVE A PRIMA FACIE CASE AS CHARGED IN THE INDICTMENT.

Where the defendant in a criminal prosecution has requested a peremptory instruction or moved for a judgment notwithstanding the verdict, each element of the offense is tested for evidentiary sufficiency; in such a setting the trial court must consider all of the evidence, not just evidence which supports the state's case in the light most favorable to the state. *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985). The state must be given benefit of all favorable inferences that may reasonably be drawn from objective facts established by the evidence.

Regarding Webb's contention that the state failed to prove a prima facie case as charged in the indictment, we simply say that the requisite proof for the crime of sexual battery of a child under the age of fourteen (14) years in that 1) Webb was over the age of eighteen (18) years; 2) that Johnson was under the age of fourteen (14) years; and 3) that Webb, for the purpose of gratifying his lust, handled, touched or rubbed Johnson on two separate occasions between August 16 and September 30, 1993, and on October 8, 1993. Webb's age was established as 27 years; Johnson's age was established at 13, and the evidence was sufficient to prove beyond a reasonable doubt that Webb was

guilty of sexual battery. *Edwards v. State*, 594 So. 2d 587, 593 (Miss. 1992).

The Supreme Court of the State of Mississippi has held that the determination of whether a jury verdict is against the overwhelming weight of the evidence is viewed in the light consistent with the verdict and "we give the state all favorable inferences which may be drawn from the evidence." *Strong v. State*, 600 So. 2d 199, 204 (Miss. 1992).

In determining whether a peremptory instruction should be granted and whether the verdict is contrary to the overwhelming weight of the evidence, the court is required to accept as true all the evidence favorable to the state, together with reasonable inferences arising there from, to disregard that evidence favorable to the defendant, and if such evidence will support a verdict of guilty beyond reasonable doubt, the peremptory instruction should be refused. *See Jones v. State*, 635 So. 2d 884, 887, 890 (Miss. 1994). There is a presumption that the judgment of the trial court is correct. *Gates v. Gates*, 616 So. 2d 888, 890 (Miss. 1993); *Shelton v. Kindred*, 279 So. 2d 642, 644 (Miss. 1973). Our supreme court has stated it will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unscionable injustice. *Walton v. State*, 642 So. 2d 930, 932 (Miss. 1994); *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987).

The jury verdict was not so contrary to the overwhelming weight of the evidence so that to allow it to stand would have been to promote an unscionable injustice. The jury finding was adequately supported by the evidence and the verdict of guilty was not against the overwhelming weight of the evidence. Therefore, the verdict of the trial court is affirmed.

**THE BOLIVAR COUNTY CIRCUIT COURT CONVICTION OF TWO COUNTS OF FONDLING AND SENTENCE OF CONCURRENT EIGHT (8) YEAR TERMS, TO BE SUSPENDED FOR FOUR (4) YEARS OF SUPERVISED INSTITUTIONAL TREATMENT, IS AFFIRMED. BOLIVAR COUNTY IS TAXED WITH ALL COSTS OF THIS APPEAL.**

**FRAISER, C.J., COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. McMILLIN, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J., AND BARBER, J.**

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**McMILLIN, J., CONCURRING:**

I concur in the result reached in this case. I do, however, think that the insistent questioning of the defendant's marital status was an improper attempt to imply some general sexual perversion on his part. The trial court sustained an objection, which implies a finding of impropriety. Evidence that is improper must, by definition, carry some degree of prejudice with it, and I, therefore, disagree with the majority's conclusion that the questioning "does not appear to be inflammatory or prejudicial. . . ."

I further disagree with the majority that the defendant failed to ask for a curative instruction within the meaning of *Gardner v. State*, 455 So. 2d 796, 800 (Miss. 1984). The request for admonishment at the time the objection was sustained appears to me sufficient, and I do not read *Gardner* to require an additional formal request for a written instruction on the matter at the close of the case.

Based upon the foregoing, I am of the opinion that there was error in the trial court's failure to admonish the jury at the request of the defendant, but I would find the error harmless.

For that reason, I concur in the result, and join all aspects of the opinion not qualified by the foregoing considerations.

**THOMAS, P.J., AND BARBER, J., JOIN THIS CONCURRENCE.**