

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00743 COA**

MATTHEW DREW FAIRCONNETUE

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

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| DATE OF JUDGMENT: | 03/23/95 |
| TRIAL JUDGE: | HON. ROBERT H. WALKER |
| COURT FROM WHICH APPEALED: | HANCOCK COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | THOMAS D. BERRY, JR. |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL BY: JOLENE M. LOWRY |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| TRIAL COURT DISPOSITION: | CAPITAL RAPE: SENTENCED TO LIFE IMPRISONMENT IN CUSTODY OF MDOC |
| DISPOSITION: | AFFIRMED - 12/16/97 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 2/4/98 |

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

HINKEBEIN, J., FOR THE COURT:

In March of 1995 Matthew Fairconnetue [hereinafter Fairconnetue] was convicted in the Circuit Court of Hancock County of having carnal knowledge of a child under the age of fourteen years. For his crime Fairconnetue was sentenced to life imprisonment in the custody of the Mississippi Department of Corrections. Aggrieved by his conviction, Fairconnetue raises the following assignments of error:

I. THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL AND TO QUASH THE JURY VENIRE AFTER THE PROSECUTION'S COMMENTS DURING VOIR DIRE.

II. THE COURT ERRED IN REFUSING TO SUPPRESS THE IDENTIFICATION OF THE DEFENDANT BY THE VICTIM.

III. THE COURT ERRED WHEN IT DENIED THE DEFENDANT THE RIGHT TO INDIVIDUALLY VOIR DIRE THE JURY ON EXPOSURE TO MEDIA COVERAGE DURING THE TRIAL.

IV. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED EFFECTIVELY DENIED DEFENDANT HIS RIGHTS OF DUE PROCESS AND DEPRIVED HIM OF A FAIR TRIAL.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

In May of 1994 thirteen-year-old S.W. [hereinafter victim] was visiting her adult friends in Waveland, Mississippi. At approximately 1:00 a.m the victim was sitting by herself on the front steps of her friends' apartment. While sitting on the steps the victim observed a brown four-door car pull to the side of the road in front of the apartment. A black male [hereinafter perpetrator] exited the vehicle and approached her, stating that he was looking for his fiancée. The perpetrator then engaged in conversation with the victim, telling her that he knew several people who lived in the apartment complex, including her friends. The perpetrator soon asked the victim if she would like to ride with him to a nearby store so that he could "pick up something." The victim agreed, but first went inside her friends' apartment to tell them where she was going.

Readily accepting the perpetrator's offer to let her drive his car, the victim and the perpetrator drove off with the thirteen-year-old victim at the wheel. As they were driving away the victim's friends came out of their apartment to see who she was leaving with. Observing the victim driving a stranger's car the friends yelled for her to stop, but she sped away, allegedly because the perpetrator told her that she "better keep going." At trial the victim stated that she "kept going" because she "got scared." Alarmed by the victim's sudden departure with a stranger, the victim's friends gave chase in another automobile but were unable to catch up with the victim. The victim and the perpetrator drove to a store near the apartment complex, where they stopped to exchange places so that the perpetrator could drive the car. The perpetrator then drove to a wooded area where he stopped the car and walked into the woods to "go to the bathroom." At trial the victim testified that during her ride with the perpetrator she continually informed him that she wanted to go back to the apartments or else she would "get in trouble."

When the perpetrator returned from the woods and re-entered the car, he allegedly told the victim that he would take her back to the apartments. His next move, however, was to put a jacket over the victim's face, remove her pants, and to engage in sexual intercourse with her. Once the sexual act was completed the perpetrator drove the victim back to the apartments and let her out at the street corner. The victim immediately went to her friends' apartment and told them what had happened. The victim's friends then informed local law enforcement authorities that a child had been raped. The victim was subsequently transported to a hospital where she was examined by a physician.

A few days after the rape the victim was again visiting with her adult friends. At this time one of her friends showed her a photograph and asked if she recognized the person in it. The victim immediately grabbed the photograph and started crying, exclaiming that "it's him." The photograph was of Fairconnetue and had been obtained by the victim's friends from Fairconnetue's girlfriend, who was a resident of the apartment complex. Apparently, based upon the victim's description of the perpetrator and the car used in the rape incident, the victim's friends suspected that Fairconnetue might be the rapist. The victim's friends informed the police, who subsequently allowed the victim to view a photographic lineup containing a different picture of Fairconnetue. The victim again identified Fairconnetue as the perpetrator. Fairconnetue was subsequently indicted and convicted of having carnal knowledge of a child under the age of fourteen years. It is from this conviction that the instant appeal is taken.

ANALYSIS

I. THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL AND TO QUASH THE JURY VENIRE AFTER THE PROSECUTION'S COMMENTS DURING VOIR DIRE.

Despite being characterized by Fairconnetue as a single assignment of error, this assignment raises two distinct points of alleged error. First, Fairconnetue contends that the trial court was in error for denying his motion for a mistrial. Second, Fairconnetue argues that the trial court's refusal to grant his proposed jury instruction "D-2" constitutes reversible error.

A. Denial of Motion for a Mistrial.

Regarding the denied motion for a mistrial, Fairconnetue complains that certain comments made by the State during voir dire had the effect of "plant[ing] in the prospective jurors' minds doubts about accepting the defendant's testimony" so that he was unable to receive a fair trial. The State responds to Fairconnetue's argument by contending that the complained-of remarks were "taken out of context" and were merely "a small part of a larger group of comments" The State also contends that Fairconnetue failed to make a contemporaneous objection to these allegedly improper remarks; therefore, any error based upon them is procedurally barred from appellate review.

Before addressing the merits of this issue we feel compelled to first dispose of the State's erroneous contention that Fairconnetue is procedurally barred from raising this issue on appeal for lack of a contemporaneous objection. During voir dire the prosecutor asked one question and made one comment that Fairconnetue subsequently used as the basis of his motion for a mistrial. On appeal the State takes the position that "[b]ecause the defense failed to timely object, this assignment of error is not properly before the Court for consideration" According to the State, "[s]uch [a] decision was incorrect and . . . came too late to preserve the trial court's ruling for appellate review."

While Fairconnetue did not contemporaneously object to the question/comment in the form of immediately interrupting the prosecutor's remarks as they flowed from his mouth, which the State implies is necessary, he did make a timely motion for mistrial based upon these remarks. The trial court ruled upon the merits of Fairconnetue's motion for mistrial and the court's ruling is contained in the trial transcript. To this Court, the State's position makes it clear that the State fails to understand the purposes behind the contemporaneous objection rule.

Simply stated, the primary purposes of the contemporaneous objection rule are "to permit the trial court to accurately evaluate the legal issues and to enable the appellate court to apprehend the basis of the objection" *Kettle v. State*, 641 So. 2d 746, 748 (Miss. 1994) (citing *Uptain v. Huntington Lab. Inc.*, 723 P.2d 1322, 1330-31 (Colo. 1986)). In *Kettle*, the Mississippi Supreme Court further explained the rule by stating that the requirement for making a contemporaneous objection at the trial court level "is to bring to the court's attention potentially inadmissible evidence so that the court may make a ruling on that question". *Kettle*, 641 So. 2d at 748 (citing *Wimer v. Hinkle*, 379 S.E.2d 383, 386 (W. Va. 1989)). The reason errors not contemporaneously objected to at trial are deemed to be waived, and therefore barred from appellate review, is "to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error." *Id.* So long as an objection is made at the trial court level and ruled upon by the trial court, the issue is properly preserved for appeal. *See Cole v. State*, 525 So. 2d 365, 369 (Miss. 1987) (holding contemporaneous objection was necessary to preserve error for appellate review).

In the case at bar Fairconnetue's objection was timely; it was not belatedly made. The contemporaneous objection rule, however, does not empower the party opposite to the objection to somehow "object" to the trial court's decision to address the merits of a belated objection, as the State would apparently have us believe. Even if Fairconnetue had been tardy in making his objection, it was within the trial court's discretion to ignore the fact that it was belatedly made and to go ahead and address its merits. The State would have no standing to lodge any "objection" to the trial court's decision to address the merits of the defenses's objection.

We are at a loss as to how the State arrived at its conclusion that the contemporaneous objection rule somehow precludes this Court from reviewing a trial court's ruling that is accurately recorded in the trial record. Merely because the State did not like the precise timing of Fairconnetue's objection does not alter the fact that the trial court nonetheless ruled upon it; to say that the objection was "waived" and "not properly preserved for appellate review" due to the contemporaneous objection rule is without basis in law or fact. It is this Court's holding that the trial court's disposition of Fairconnetue's objection was absolutely correct, notwithstanding the State's grossly misplaced argument to the contrary.

Turning to the substance of this assignment of error, the question Fairconnetue based his motion for a mistrial upon was asked during voir dire, when the prosecutor asked the potential jurors "[d]o any of you feel like that you couldn't find the defendant guilty based on the testimony of one witness, no matter how believable they might be? Anybody feel they need more than one witness?" A few minutes later the prosecutor commented to the prospective jurors that "[y]ou know, nobody is going to stand up in the audience during this trial and say 'I did it' like they do on Perry Mason." These remarks were the sole basis of Fairconnetue's motion for a mistrial.

In reviewing this portion of Fairconnetue's assignment of error we are mindful that the decision of "[w]hether to declare a mistrial is committed to the sound discretion of the trial court." *Brent v. State*, 632 So. 2d 936, 941 (Miss. 1994). Accordingly, "[t]he failure of the trial court to grant a motion for mistrial will not be overturned on appeal unless the trial court abused its discretion." *Bass v. State*, 597 So. 2d 182, 191 (Miss. 1992). Because Fairconnetue has failed to direct this Court to any authority holding that the prosecutor's question or his subsequent comment was improper, or that

he was in any way prejudiced by these remarks, we cannot hold that the trial court abused its discretion in denying his motion for a mistrial.

B. Rejection of Proposed Jury Instruction D-2

Fairconnetue argues that he was entitled to an instruction informing the jury that his testimony "should be considered as that of any other witness you have heard in this case" Fairconnetue acknowledges the existence of controlling authority holding that a defendant is not entitled to instruct the jury that he is a competent witness on his own behalf. Fairconnetue nonetheless contends that his request for such an instruction should have been granted because of the particular "circumstances of this case" and the "importance of the testimony of the defendant." In Response to Fairconnetue's argument that the denial of his proposed jury instruction D-2 constitutes reversible error, the State contends that the authorities Fairconnetue acknowledges in his brief clearly hold that he was not entitled to the requested instruction. The State points out that Fairconnetue cites no authority upon which to hold the trial court in error for refusing to grant his proposed instruction.

Regarding Fairconnetue's assertion that the trial court was in error for not granting his proposed jury instruction D-2, we hold that the trial court committed no error. Proposed jury instruction D-2 stated that "[t]he [c]ourt instructs the [j]ury that the testimony of the [d]efendant should be considered as that of any other witness you have heard in this case and given such weight, faith[,] and credit as you think proper." As noted earlier in this opinion, Fairconnetue acknowledges the existence of controlling authority that undermines his assignment of error. While citing no relevant authority in support of his position, Fairconnetue steadfastly maintains that his proposed instruction should have been granted because of the particular "circumstances of this case" and the "importance of the testimony of the defendant." We cannot agree.

The Mississippi Supreme Court has repeatedly held that a defendant is not entitled to instruct the jury that he is a competent witness on his own behalf. *Coleman v. State*, No. 95-KA-00670-SCT, 1997 WL 333155, at *6 (Miss. June 19, 1997) (citing *Baker v. State*, 391 So. 2d 1010, 1012 (Miss. 1980)); see also *Johnson v. State*, 452 So. 2d 850, 854-55 (Miss. 1984) (holding defendant not entitled to instruction stating that defendant's "testimony should be treated in the same manner as the testimony of any other witness"). This authority, openly acknowledged by Fairconnetue, is extremely clear in its holding that he was not entitled to the requested instruction. Because Fairconnetue has failed to direct this Court to any authority creating an exception to the rule as pronounced in *Coleman*, *Baker*, and *Johnson*, we must hold this assignment of error to be without merit.

II. THE COURT ERRED IN REFUSING TO SUPPRESS THE IDENTIFICATION OF THE DEFENDANT BY THE VICTIM.

Fairconnetue argues that the trial court committed reversible error in refusing to suppress the victim's pre-trial and at-trial identifications of him as being the man who raped her. Fairconnetue contends that the victim's identification of him at a pre-trial photographic line up conducted by the police was "irreparably tainted" by an earlier identification conducted by the victim's friends, without police involvement. It is Fairconnetue's conclusion that because of the initial identification conducted by private citizens, plus the subsequent police lineup which "further bolstered [the] improper and questionable identification of the defendant," the "entire process of identification [was] tainted and

should not have been allowed."

The State responds that, considering the totality of the circumstances, the victim's identification of Fairconnetue as the perpetrator was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. The State contends that the trial court's ruling was supported by substantial credible evidence, therefore, rendering it beyond this Court's authority to disturb.

Under the facts of this case there were two out-of-court identifications made by the victim, in addition to the subsequent in-court identification. The first identification occurred a few days after the rape when the victim's adult friends showed her a photograph of their neighbor's boyfriend, whom they suspected might be the perpetrator. When the victim saw the photograph she immediately grabbed it and started crying, exclaiming that "it's him." The photograph was of Fairconnetue and had been obtained by the victim's friends from Fairconnetue's girlfriend, who was a resident of their apartment complex. Apparently, based upon the victim's earlier description of the perpetrator and the car used in the rape incident, the victim's friends suspected that Fairconnetue might be the rapist. This identification process was in no way connected to law enforcement authorities; the victim's friends formulated their theory that Fairconnetue might be the rapist and obtained a photograph of him entirely of their own volition.

The second out-of-court identification occurred subsequently to the informal photograph viewing conducted by the victim's friends. Once their suspicions about Fairconnetue were confirmed by the victim's reaction to the photograph, they related these events to the police and gave them the photograph. Based upon this tip the police obtained a second photograph of Fairconnetue from another law enforcement agency. The police used this second photograph to construct a lineup containing the photographs of six men, consisting of those of Fairconnetue and five other men of the same race as he. The victim was brought to the police station where she was allowed to view the photographs. Without any coaching or suggestion by the police the victim again identified Fairconnetue as the perpetrator.

At the pre-trial suppression hearing Fairconnetue sought to bar the State from entering either of the out-of-court identifications into evidence at trial. Fairconnetue's motion was denied. Fairconnetue subsequently used the trial court's denial of his motion to suppress as part of the basis for his motion for JNOV/new trial. On appeal, Fairconnetue does not argue that the photographic line up conducted by the police was the product of improper suggestion or coercion, but rather argues that it was "improper" because the informal identification, conducted by the victim's friends without police knowledge or assistance, was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." On appeal Fairconnetue does not cite any relevant authority to support his proposition that the actions of private parties can "taint" the subsequent actions of law enforcement officers, thereby rendering an otherwise admissible police lineup inadmissible at trial. In support of his position Fairconnetue merely offers his own conclusion that "[t] his process is just too suggestive to be accepted, especially in light of the age and suggestibility of the victim." Fairconnetue does not suggest that the victim's friends used their photograph of him to "coach" the victim into identifying him as the rapist.

Our supreme court has held that in reviewing trial courts' suppression hearing findings in pre-trial

identification cases, we may "disturb such a finding only where there is an absence of substantial credible evidence supporting it." *Nicholson v. State*, 523 So. 2d 68, 71 (Miss. 1988). Accordingly, our task here is to review the record for substantial credible evidence to support the trial court's finding that the photographic lineup conducted by the police was not impermissibly suggestive. We need not, however, factor the initial identification conducted by private citizens into our analysis, as they were not state actors. Because scrutiny of identification proceedings is conducted in order to ensure that the criminal defendant's Fourteenth Amendment due process rights are protected, only the actions of the state are relevant. *See Nicholson*, 523 So. 2d at 71 (holding impermissibly suggestive identification of criminal defendant violated his Fourteenth Amendment right to due process). The United States Supreme Court has repeatedly held that "the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities." *Rednell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982) (citing *Civil Rights Cases*, 109 U.S. 3, 11 (1883)). Because the conduct of the victim's friends was not endorsed, condoned, or associated in any manner with law enforcement, it was not a state action; therefore, the protections afforded by the Fourteenth Amendment were not implicated.

Regarding the identification procedure utilized at the police station, we hold the trial court's conclusion that it was not improperly suggestive to be supported by substantial credible evidence. The testimony at both the pre-trial suppression hearing and at trial indicates that the photographic lineup was conducted in a fair and impartial manner. Importantly, the photograph of Fairconnetue used in the police lineup was different from the one shown to the victim by her friends. Fairconnetue was black. All of the other photographs in the lineup were of black males approximately the same age as Fairconnetue. All of the photographs show the subjects standing in front of the same white concrete block wall. All of the photographs depict the upper chest/head area of the suspects, rendering other distinguishing characteristics such as height and weight virtually imperceptible. In sum, basically all that the victim could see from the photographs used in the police lineup was the suspects' faces.

At trial the officer who showed the lineup to the victim testified that he did not coerce or otherwise suggest to her that she should pick the photograph of Fairconnetue. The officer stated that he merely told the victim that "she was going to view a photograph lineup of six pictures, and that if she observed the person that was the perpetrator in this crime that she should point him out, if she did not, then she should not." Based upon the officer's uncontroverted testimony and the other facts discussed *supra*, we hold that the trial court's decision to deny Fairconnetue's motion to suppress the identifications, and to deny his subsequent motion for JNOV/new trial was supported by substantial credible evidence. This assignment of error is without merit.

III. THE COURT ERRED WHEN IT DENIED THE DEFENDANT THE RIGHT TO INDIVIDUALLY VOIR DIRE THE JURY ON EXPOSURE TO MEDIA COVERAGE DURING THE TRIAL.

Fairconnetue argues that the trial court committed reversible error in not questioning each member of the jury regarding a newspaper article, published during the course of his trial, that he perceived to be prejudicial to his case. While Fairconnetue acknowledges that the trial court did make inquiry of the jurors regarding their exposure to media coverage in general, he apparently is aggrieved by the fact

that the court's inquiry was made to the jurors only as a group and did not focus on the specific article he was concerned about. Fairconnetue maintains that "the only accurate method to obtain candid remarks from the jurors concerning their exposure to the article would have been to conduct individual voir dire," and that "[t]he best way to obtain candid remarks from the jurors concerning the article would have been to ask them individually." Fairconnetue, however, does not allege that the newspaper article in question actually resulted in prejudice to his case; he merely concludes that it is "unquestionable" as to what effect such "possible exposure" to this article "would have" had on the jurors "if" they had been exposed to it.

The State responds to Fairconnetue's argument by stating that because the jury is presumed to follow the instructions given by the court, and the jury in this case had been instructed to avoid all media coverage, there is a presumption that the jury was not exposed to the article in question. The State argues that Fairconnetue has the burden of overcoming this presumption by supporting his assignment of error with plausible argument and relevant authority. The State then directs this Court to the fact that Fairconnetue fails to cite any relevant authority holding that the court was obligated to question each juror individually and to focus that questioning upon a particular piece of media coverage.

At trial Fairconnetue informed the court (out of the jury's presence) that a newspaper article appearing in a local newspaper that morning was prejudicial to him. After hearing argument from both sides as to how to deal with the article, the court called the jury in and the following exchange took place:

THE COURT: Good morning. Ladies and gentlemen, the [c]ourt has one brief question to ask you. Has any member of the jury either intentionally or accidentally been exposed to any media coverage in this case, be it radio, newspaper or TV, or has anyone attempted to discuss this case with any member of the jury or in the presence of any member of the jury? If any part of that question calls for a "yes" answer on your part, please raise your hand. So I take that the answer to that lengthy question is "no"? Is that correct? If that's correct, everybody raise your hand. Okay. All right. Call your next witness.

THE PROSECUTOR: State would call Dr. Robert Love.

THE COURT: Let the record reflect that everyone raised their hand.

We find no error in the trial court's disposition of this matter.

In cases where there is a question concerning outside influencing of a jury, "the trial judge himself ought to examine the jury carefully to ensure that the jury's deliberations are based on the evidence produced at trial and not extraneous matters." *Williamson v. State*, 512 So. 2d 868, 882 (Miss. 1987), implicitly overruled on other grounds by *Hansen v. State*, 592 So. 2d 114, 134 (Miss. 1991). This requirement of carefully examining the jury does not dictate any particular manner or technique that the trial judge is required to employ in satisfying himself that the jury has not been influenced by extraneous matters. Specifically, this Court is aware of no authority mandating that trial courts must question each juror individually about specific media reports, in the absence of evidence that the jurors were actually exposed to extraneous material. As discussed *supra*, Fairconnetue cites no authority in support of his contention and merely concludes on his own that "[t]he best way to obtain

candid remarks from the jurors concerning the article would have been to ask them individually." We cannot agree that the trial court was under such constraints. Accordingly, this assignment of error is without merit.

IV. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED EFFECTIVELY DENIED DEFENDANT HIS RIGHTS OF DUE PROCESS AND DEPRIVED HIM OF A FAIR TRIAL.

Fairconnetue alleges that "[t]he errors committed in this trial . . . build upon one another to deny him a fair trial and his due process rights." The State responds that "[c]onsidering [Fairconnetue's] points together, he has not experienced legally impermissible prejudice, nor have his rights to a fair trial been substantially compromised." We resolve this assignment of error by directing Fairconnetue's attention to the fact that all of his other assignments of error have been held to be without merit. Because none of his assignments of error have merit, they most certainly can not have a "cumulative effect" of denying his rights. This assignment of error presents nothing for this Court to review.

THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY OF CONVICTION OF HAVING CARNAL KNOWLEDGE OF A CHILD UNDER THE AGE OF FOURTEEN YEARS AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO HANCOCK COUNTY.

BRIDGES, C.J., COLEMAN, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., CONCURS IN PART. DIAZ, J., CONCURS IN RESULT ONLY. SOUTHWICK, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, P.J., AND PAYNE, J. THOMAS, P.J., NOT PARTICIPATING.

SOUTHWICK, J., Concurring

The result of the majority opinion is exactly correct. I write separately only to note a disagreement as to one small and nondispositive section of the opinion.

The majority criticizes the State's argument that the assignment of error regarding the motion for a mistrial was waived. As I view the record, two innocuous statements were made by the Assistant District Attorney to the jury venire. No objection was made at that time, but during the subsequent chambers discussion regarding jury selection an objection and a motion for mistrial were finally made. I find the State's position on waiver not only substantial, but accurate.

Though I believe that the State's argument in this case is correct, I also agree with the majority that appellate briefs by the State at times appear to raise waiver as a boilerplate argument instead of raising it only when there is a fair basis for that position. It would be more useful to this Court if the State injected waiver as an argument only when it fairly exists. My disagreement with the majority is

that this time I believe the State followed that preferable approach.

MCMILLIN, P.J. AND PAYNE, J. JOIN THIS SEPARATE OPINION.