IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GEORGE LOMAX **APPELLANT**

VS. **NO. 2015-KA-00844-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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STATEMENT OF THE CASE

Excusing two African-American veniremen allegedly in violation of **Batson v. Kentucky** [citation omitted]; the excusal - as well as the failure to excuse - prospective jurors for cause; the introduction of unobjected to hearsay testimony referring to the victim's post-offense outcries; alleged prosecutorial misconduct in asking an improper question, and the trial court's refusal to allow DNA evidence demonstrating the presence of another male profile in the victim's panties, form the centerpiece of this appeal from a conviction of sexual battery.

GEORGE LOMAX, a non-testifying defendant at his trial for sexual battery, prosecutes a criminal appeal from the Circuit Court of Holmes County, Mississippi, Jannie M. Lewis, Circuit Judge, presiding.

During a trial by jury conducted on February 18-19, 2015, Lomax, a forty-two (42) year old African-American male employed as an Assistant Principal at Jacob J. McClain High School in Lexington, was convicted of sexual battery - vaginal penetration - against sixteen (16) year old S.D., a tenth grade student at McClain High. (R. 499; C.P. at 4, 26)

An indictment returned on February 10, 2014, charged that

> " . . . **GEORGE LOMAX,** did, on or about April 4, 2013, engaged [sic] in sexual penetration with [S. D.] by inserting his penis into [S.D.'s] vagina, at a time when [S.D.] was a child under the age of eighteen (18) years and a student at J. J. McClain High School and George Lomax was a person in position of trust and authority in that he was Assistant Principal at the said school. Said act of sexual penetration being in violation of Section 97-3-95(2) of the Mississippi Code of 1972, as amended . . ." (C.P. at 2)

Following a presentence investigation report and a sentencing hearing during which Lomax called several witnesses in extenuation and mitigation of sentence (C.P. at 25-32; R. 501, 503-70), the circuit judge sentenced Lomax to serve a term of thirty (30) years in the custody of the Mississippi Department of Corrections with ten (10) years suspended, twenty (20) years to serve, followed by five (5) years of supervised probation and five (5) years of unsupervised probation. (R. 569-70; C.P. at 4)

Six (6) individual issues are raised on appeal to this Court.

1. Whether the trial court erred in not requiring the prosecution to give race and sex neutral reasons for exercising its first two peremptory strikes on black males.

2. Whether the trial court erred in excusing for cause, at the request of the State, Mary Williams, a prospective juror who was excused for the reason that Lomax's attorney, Lisa Ross, had represented Williams's niece and nephew in a criminal trial.

3. Whether the trial court erred in failing to excuse for cause, at the defendant's request, a prospective juror who was a friend of the victim's father.

4. Whether the trial judge abused her judicial discretion in allowing into evidence unobjected to hearsay evidence referring to the victim's initial outcries and whether defense counsel was ineffective in the constitutional sense for failing to object.

5. Whether the prosecutor was guilty of prosecutorial misconduct when he asked the victim's

best friend whether Lomax had ever done anything inappropriate with her.

6. Whether the trial court abused its judicial discretion in refusing to allow DNA evidence found on the victim's panties that allegedly revealed the presence of another male profile.

Lisa Ross, a practicing attorney in Jackson, represented Mr. Lomax vigorously and effectively at trial.

Damon Stevenson has been substituted on appeal. His representation of Lomax has been equally effective.

STATEMENT OF FACTS

S. D., at the time of trial, was a sixteen (16) year old tenth grade student at Jacob J. McClain High School in Lexington, Mississippi.

Forty-two (42) year old George Lomax was an assistant principal at McClain. (R. 218; C.P. at 26)

Egregious conduct taking place unexpectedly during the 5th period class at McClain High is described by S.D. in the following colloquy:

> Q. [BY PROSECUTOR BEASLEY:] Ms. ["S.D."], I want to address your attention to April 4th, 2014. At that time were you a student at McClain High School?
>
> A. Yes, sir.
>
> Q. And what grade were you in at that time?
>
> A. Tenth.
>
> Q. How old were you?
>
> A. Sixteen.
>
> Q. Okay. On that particular day, did you encounter or see the Defendant, George Lomax?
>
> A. Yes, sir.

Q. How did you know George Lomax?

A. He was my assistant principal.

Q. When you saw the defendant Mr. Lomax, what transpired?

A. Well I had seen him at the beginning of fifth period and he had told me to go to the band hall during the fifth period. When I saw him again it was like when I was leaving out of lunch, it will [sic] still fifth period, but I didn't go to my class. I'd seen him in the hallway and he threw his hand up and like pointed at the band hall. So I knew to go to the band hall. I wasn't thinking nothing of it. So I went down there. And I as I went to the band hall I met DeWayne.

Q. DeWayne who?

A. DeWayne Jolly.

Q. And did you ever get to the band hall?

A. I did.

Q. Okay. So tell us what happened once you got to the band hall.

A. Once I got to the band hall the doors was locked. And Mr. Lomax was behind me. He had to unlock the doors. So he unlocked that door and I walked in and the detention room was locked too, so he had to unlock that door and the office and the detention room.

Q. Okay. And what transpired after that?

A. He told me to stay there until he came back So I stayed there until he came back.

Q. And once he came back, what happened?

A. He told me to pull my clothes down and pull my clothes off, and I did because I was scared.

Q. Okay. Well take your time. When you bent over what happened?

(Whereupon witness crying)

MR. BEASLEY: Your Honor, may I approach.

THE COURT: Ms. [S.D.] Ms. [S.D.] Ms. [S.D.] Take some Kleenex.

You okay[?]

MR. BEASLEY: We've got time.

THE COURT: She said she's okay.

MR. BEASLEY: Yes, ma'am.

BY MR. BEASLEY:

Q. So when you took your clothes and bent over what happened then?

A. He put his penis inside of me.

Q. Would you repeat that again?

A. He put his penis inside of me.

Q. Okay. I know this is tough, but did he ever ejaculate?

A. Not to my knowledge.

Q. How long would you say this transpired, that the sexual act took place?

A. About seven minutes.

Q. And what happened after the defendant finished?

A. He told me to stay there until he came back. So he left, I sat down and I looked at my phone and I got up and I ran out. (R. 264-66)

S.D. immediately ran into Don Dixon who asked her why she was crying.

"At first I didn't say anything." (R. 26)

Dixon persisted with his questioning "[s]o I told him Mr. Lomax raped me. And he was like you got to tell your momma and I was like, I can't." (R. 267)

During sixth period S.D. talked to her best friend Chanica Henderson. (R. 268) S.D. also talked to Arthur Thompson, a school security officer. (R. 268)

Q. [BY MR. BEASLEY:] Do you see the man in the courtroom who put his penis in your vagina on April 4, 2013?

A. Yes, sir.

* * * * * *

Q. Would you point to him please?

A. Yes.

Q. Could you describe what he has on?

A. A pink bow tie and a button down shirt and a jacket.

Q. And what color is the sweater?

A. Navy blue.

MR. BEASLEY: Okay. Your Honor I would ask at this time that the record reflect that the witness has identified the defendant.

THE COURT: The record may reflect. (R. 268-69)

* * * * * *

Q. [BY PROSECUTOR BEASLEY:] And just for clarification because we have to establish this, where did the defendant stick his penis?

A. In my vagina. (R. 270)

Defense counsel's vigorous cross-examination of S.D. thereafter took place for the next thirty-one (31) pages of the trial record. (R. 271-302)

Eighteen (18) witnesses testified for the State of Mississippi during its case-in-chief, including the victim, S. D., who testified Lomax instructed her to go to the band hall during fifth period and wait there until he returned. Upon his return Lomax instructed S.D. to remove her clothing at which time he "put his penis inside of me," i.e., "[i]n my vagina." (R. 265-66, 270) At the close of the State's case-in-chief, the defendant's motion for a directed verdict based on alleged insufficiency of evidence was overruled. (R. 441-42)

After being advised of his right to testify or not (R. 441-43), Lomax elected to remain silent and produced no witnesses in his own defense. (R. 443)

At the close of all the evidence, peremptory instruction was denied. (R. 447; C.P. at 41)

Following closing arguments the jury retired to deliberate at a time not reflected by the record. (R. 498) It subsequently returned with a verdict of, "We, the jury[,] find the defendant, George Lomax[,] guilty of sexual battery as charged in the indictment." (R. 499; C.P. at 36)

A poll of the jury, individually by name, reflected the verdict was unanimous. (R. 499-500)

Lomax's motion for a new trial or for judgment of acquittal notwithstanding the verdict was filed on March 11, 2015. (C.P. at 101-06) Following a brief hearing conducted on May 12, 2015 (R. 570-603), during which the trial judge heard argument from both litigants, the motion was overruled. (C.P. at 588)

Mr. Lomax seeks a reversal of his conviction and sentence. (Brief of Appellant at 25)

SUMMARY OF THE ARGUMENT

1., 2., and 3. We agree with the district attorney who opined, "[i]t's the State's position that the defense never made a *prima facie* case." (R. 578)

We agree with the circuit judge as well who explained "the Court did the **Batson** analysis and found that there was no *prima facie* case of the **Batson** violation." (R. 587)

In short Lomax failed to make out a *prima facie* case of purposeful discrimination under **Batson**.

4. By failing to object, Lomax waived any objection to the alleged hearsay testimony from witnesses testifying to the victim's initial outcries. The failure to timely object is fatal to Lomax's complaint. **Smith v. State,** 925 So.2d 825, 835 (¶26) (Miss. 2006).

The failure to object might well have been a product of defense counsel's trial strategy.

Because (1) the record fails to show ineffectiveness of constitutional dimensions and because (2) *both* parties have not stipulated the record is adequate to allow the appellate court to make the necessary findings of fact, this Court need not rule on the merits of Lomax's ineffective assistance of counsel claim. **Wynn v. State,** 964 So.2d 1196 (Ct. App. Miss. 2007); **Jones v. State,** 961 So.2d 730 (Ct. App. Miss. 2007). *See also* **Drummond v. State,** 33 So.3d 507, 511-12 (¶¶14 and 15) (Ct. App. Miss. 2009); **McLaurin v. State,** 31 So.3d 1263, 1266-67 (Ct. App. Miss. 2009), and the cases cited therein.

5. Any error committed when the prosecutor asked an allegedly improper inquiry to Chanica Henderson, a witness for the State, was cured when the circuit judge promptly sustained the State's objection.

Moreover, Judge Lewis instructed the jury in jury instruction C-CR-1 as follows:

> The production of evidence is governed by rules of law, and from time to time during the trial the Court may have ruled on the admissibility of evidence. You are to disregard all evidence excluded by the court and must not concern yourself with the reasons for the Court's rulings since they are controlled by rules of law. You should not speculate as to possible answers to questions which the Court did not require be answered, and you should not draw any inference from the content of those questions. (C.P. at 50)

In short, any prosecutorial misconduct was cured and/or rendered harmless beyond a reasonable doubt by curative admonishments from the court.

6. The trial judge did not abuse her judicial discretion in refusing to allow expert testimony that certain DNA testing of S.D.'s panties revealed, in addition to Lomax's profile, the presence of another male profile.

"The Supreme Court has consistently held that "'[t]he relevancy and admissibility of evidence

are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." **Fulks v. State,** 110 So.3d 764, 769 (¶19) (Miss. 2013), quoting from **Johnson v. State**, 567 So.2d 237, 238 (Miss. 1990).

ARGUMENT

1.

THE TRIAL JUDGE DID NOT ABUSE HER JUDICIAL DISCRETION IN DENYING LOMAX'S *BATSON* OBJECTION BECAUSE THE RECORD FAILS TO REFLECT THAT LOMAX MADE OUT A *PRIMA FACIE* CASE OF PURPOSEFUL DISCRIMINATION.

THE TRIAL JUDGE DID NOT ABUSE HER JUDICIAL DISCRETION IN EXCUSING, AT THE STATE'S REQUEST, MARY WILLIAMS FOR CAUSE.

THE COURT DID NOT ABUSE HER JUDICIAL DISCRETION IN DECLINING TO EXCUSE FOR CAUSE, AT THE DEFENDANT'S REQUEST, A PROSPECTIVE JUROR WHO WAS A FRIEND OF S.D.'S FATHER.

Lomax claims that certain rulings made by the trial court denied him his fundamental right to a fair trial by an impartial jury and demonstrated " . . . unfair favorable treatment of the prosecution over the defense." (Brief of Appellant at 4, 12)

Peremptory strikes S-1 and S-2.

Lomax contends the trial court abused its judicial discretion when it failed to require the State to give race-neutral reasons for striking peremptorily two African-American males, S-1 and S-2. (R. 131-32)

"There must be 'a *prima facie* showing of discrimination before the party exercising the strike is required to provide an explanation for the basis of the peremptory strike.' " **Scott v. State,** 981 So.2d 964, 967 (Miss. 2008) quoting from **Ryals v. State,** 794 So.2d 161, 165 (Miss.2001).

The burden is on the defendant to establish a *prima facie* case of purposeful racial discrimination in the State's exercise of peremptory strikes. **Kolberg v. State,** 829 So.2d 29 (Miss.

2002), reh denied.

We respectfully submit the trial judge was correct when she failed to find the S-1 and S-2 strikes sufficient to make out a *prima facie* case of purposeful discrimination by the State.

Applicable colloquy is quoted as follows:

> THE COURT: And your challenge on S-1 and S-2 is because they are black male.
>
> MS. ROSS: Your Honor, both of them indicated, they both responded to questions they were asked on voir dire, they gave no reason that could be used to exclude either one of them and both of them said under oath, Your Honor, that they could be fair and impartial in this case.
>
> THE COURT: Well the Court does not find a *prima facie* case of a *Batson* violation. You've got a panel that has been tendered that consist of all blacks with the exception of number 12, which is a white male. The Court finds no *Batson* violation in that. S-1 and S-2 will be accepted. The panel is tendered to the Defense. (R. 133)

No further explanation is really necessary.

Lomax suggests the case at bar is the proper case to find that a combination of characteristics such as "male combined with black," i.e., race-gender identity, may constitute a cognizable group. (Brief of Appellant at 7)

Heaven forbid that we manufacture additional *Batson* issues.

We concur with Lomax's observation that the case of **Ross v State,** 16 So.3d 47, 59 (¶¶ 31-32) (Ct. App. Miss. 2009), recognized that Mississippi courts have not yet addressed this question which is presently a non-issue. There is no compelling need to address it now.

We respectfully submit that Lomax's trifurcated **Batson** bark is much more intense than his **Batson** bite. Indeed, the questions presented here are not even close.

There is no inference of purposeful racial discrimination, and the trial judge did not abuse her judicial discretion in finding as a fact and concluding as a matter of law that Lomax had failed to make

out a *prima facie* case of purposeful discrimination.

Our authority for this conclusion is found in **Scott v. State,** 981 So.2d 964, 969-70 (¶¶ 17-22) (Miss. 2008), where the Supreme Court, citing and relying on **Strickland v. State**, 980 So.2d 908, 917 (Miss. 2008) and **Ryals v. State,** 794 So.2d 161, 166 (Miss. 2001), held that "[b]ecause neither Scott nor his trial counsel provided enough facts, either during the trial or on appeal, to support a *prima facie* **Batson** objection, the trial court was correct in overruling the objection."

In **Scott** the State used nine (9) peremptory strikes against African-American venire persons. The use of these nine (9) strikes against African-Americans was the sole basis for Scott's position that he had established a *prima facie* case of purposeful discrimination under **Batson**. The composition of the jury convicting Scott of robbery consisted of three (3) African-Americans or 25% of the petit jurors selected to try the case. The alternate juror was also a member of the black race.

Scott's conviction had been reversed by the Court of Appeals which had agreed with Scott's claim of purposeful discrimination. On certiorari, the Supreme Court reversed, agreeing with the State's position that the Court of Appeals erred by failing to grant proper deference to the lower court's decision on the **Batson** issue. **Id.,** 981 So.2d at 966.

In **Strickland** and **Ryals** the State exercised seven (7) and nine (9) peremptory strikes against African-American venire persons, respectfully. Those numbers were the sole basis for a **Batson** objection in each case. This Court opined:

> * * * Still, under **Strickland** and **Ryals**, that factor alone is not enough to support an inference of discriminatory intent. *When weighed with the totality of the evidence, the trial judge was not clearly erroneous in overruling the **Batson** objection.*
>
> This Court also examines other factors mentioned in **Ryals**. First, the court in **Ryals** noted that the state tendered three female venire persons. **Ryals**, 794 So.2d at 166. In the instant case, the empaneled jury included three African-Americans. The alternate juror was also African-American. Next, the **Ryals** Court noted that there was

> only one factor in favor of discriminatory intent but there were several factors against the inference of discriminatory intent, specifically, "nothing about the prosecutor's conduct, nothing about the habitual policies of the district attorney's office, and nothing about the nature of the case support an inference of discriminatory intent." **Ryals**, 794 So.2d at 166. Here, we find an identical situation. *The sole factor hinting at discriminatory intent, and the only factor pointed to by Scott or his counsel below, is that the prosecution used nine of its eleven peremptory strikes to exclude African-American venire persons.* As in both **Strickland** and **Ryals**, nothing about the prosecutor's conduct, the habitual policies of the district attorney's office, or the nature of the case supports an inference of discriminatory intent. (R. 969)
>
> * * * * * *
>
> These facts are all factors which were within the observation of the trial judge. The above-listed reasons are findings of fact. This Court does not sit as a finder of fact and must review findings of fact with great deference. **Robinson v. State**, 761 So.2d 209 at 211 (Miss. 2000). "This deferential standard of review reflects 'confidence that trial judges experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination against black jurors.' " **Strickland**, at 916 (quoting **Batson**, 476 U.S. at 97, 106 S.Ct. 1712). When the totality of the evidence is weighed, the trial judge was not clearly erroneous in overruling the **Batson** objection. (R. 969-70)

The same is equally true here.

Lest we forget, "the trial court has no authority to initiate a *Batson* hearing without a *prima facie* showing of discriminating." **Hughes v. State,** 735 So.2d 238, 250 (Miss. 1999).

In the case at bar Lomax "did not establish a *prima facie* case that the State excluded jurors on the basis of race, thus there was no need for the State to present race-neutral reasons for its peremptory strikes." **Moore v. State,** 914 So.2d 185, 191 (¶ 17) (Ct. App. Miss. 2005).

Our response to appellant's **Batson** complaint is that George Lomax, like Terun Moore, was unsuccessful with his *prima facie* showing of purposeful or intentional discrimination. *See* **Moore v. State,** *supra*, (¶17) at 191. Stated differently, the totality of the relevant facts and circumstances failed to raise the necessary inference the prosecutor used his peremptory challenges for the sole

purpose of striking black Americans.

In **Puckett v. State,** 788 So.2d 752, 758 (Miss. 2001), the Supreme Court pointed out that it is only after " . . . the defendant has established a *prima facie* case, [that] the burden shifts to the prosecution to articulate race-neutral reasons for each challenged strike." *See also* **Puckett v. State,** 737 So.2d 322, 337 (Miss. 1999) (**Puckett** I) which held that "before the trial court is required to conduct a *Batson* hearing, it must first be shown that a *prima facie* case of purposeful discrimination exists.]; **Mack v. State**, 650 So.2d 1289, 1297 (Miss. 1994).

The trial judge found as a fact and ruled as a matter of law that Lomax had failed to present a *prima facie* showing of intentional discrimination. She applied the correct standard during jury selection. Lomax was not denied a meaningful opportunity to make a *prima facie* showing of intentional discrimination; rather, Lomax simply failed to make the required showing.

The truth of the matter is this. When all facts and "relevant circumstances" are considered, it is clear the striking of S-1 and S-2, standing alone and even under all circumstances appearing here, failed to raise a reasonable inference of purposeful discrimination based upon race and gender.

Mary Williams.

Lomax claims the trial judge abused her judicial discretion in excusing, at the State's request, Mary Williams for cause on the basis of her attorney/client relationship with William's niece and nephew. (Brief of Appellant at 8) It appears that Lisa Ross, attorney for Mr. Lomax in the instant criminal trial, had represented the niece and nephew of Williams in a former criminal trial. Lomax argues that Williams stated she did not attend the trial of her relatives, had never met Lisa Ross, and stated to the court she could be fair and impartial.

No matter.

Applicable colloquy resolving this issue is quoted as follows:

Q. [BY PROSECUTOR MALONE-OLIVER:] Mary Williams?

A. Hmm hmm.

Q. Ms. Williams, you indicated that you knew the defendant's attorney?

A. Hmm hmm.

Q. How do you know her?

A. She represented my niece and nephew.

Q. On what crime?

A. My niece, she was charged. My nephew was accused of armed robbery.

Q. When I asked a question earlier about anybody being charged with a crime about a family member, did you answer to that question?

A. I may haven't. But my back is hurting so bad because my sugar is trying to drop.

Q. So you didn't answer to that question when I was asking you about close family being charged with a crime.

A. Like I say, I may have not.

Q. Were you intimately involved in that trial?

THE COURT: Don't shake your head, give a verbal response.

A. I just knew about it by talking to them, but as far as going to it, no.

BY MS. ROSS:

Q. Who is your niece and your nephew?

A. Anderson and Natasha.

Q. Okay. And I did represent them in Madison County. But I never met - -

A. No, I never met her. I didn't go.

Q. Did you form any opinion or the fact that I represented your niece and nephew?

A. No, ma'am.

Q. Would [that] cause you not to be fair to the state?

A. No.

Q. Or cause you to be unfair to Mr. Lomax. Could you be fair and impartial in this case?

A. Yes. (R. 88-89)

Lomax suggests he rehabilitated the prospective juror by determining that despite the legal representation by Ms. Ross, Williams could still be "fair and impartial" and "[t]his was not a valid basis for excusing her." (Brief of Appellant at 9-10)

Tis true that Williams acknowledged she could be fair and impartial in this case. (R. 69) But Mary Williams was also either inattentive to questions propounded during voir dire or was intentionally silent when the venire was asked if any family member had been charged with a crime. (R. 88)

Lest we forget, Mary also had a back that was at the moment "hurting so bad because my sugar is trying to drop." (R. 88) A prosecutor would certainly not want a juror to sit though a two day trial with a bad back and low blood sugar. That is a recipe for disaster.

We agree with Lomax's observation that a juror may be removed for cause where there is a reason to suspect his/her competency or ability to be fair and impartial. *See* **Billiot v. State,** 454 So.2d 445, 457 (Miss. 1984).

A trial judge has broad discretion to determine whether a prospective juror can be impartial -- notwithstanding the juror's admission under oath that he or she can be impartial." **Ross v. State,** *supra,* 16 So.3d 47, 55 (Ct. App. Miss. 2009). This discretion would extend also to Williams's health and well being and require consideration of Williams's ability to concentrate and evaluate the

testimony.

No abuse of judicial discretion has been demonstrated here.

Marvin Simpson.

Finally, Lomax complains he was forced to use, unnecessarily, a peremptory strike against Marvin Simpson, juror number 8, because the court declined to accept his challenge for cause voiced on the ground that Williams was a friend of S.D.'s father. (Brief of Appellant at 11) The prosecutor responded that Simpson, a black male, stated he could be fair and impartial. (R. 127, 132)

Lomax used all six of his peremptory strikes. (R. 134) Nothing in this record suggests that the use of one of those strikes against Simpson left an undesirable on the jury. To the contrary both litigants appeared to be satisfied with the composition of the jury that was selected. (R. 135-36)

The final composition of the jury reflects the seating of no fewer than two (2) black males - number 16 and 36 - and four (4) black females - numbers 21, 31, 37 and 39. (R. 132, 135)

Lomax's disparity of treatment argument has no appeal on appeal because Mary Williams had an aching back and low blood sugar while Marvin Simpson did not.

Nothing in this record affirmatively reflects, or even suggests, that Mr. Lomax was denied his right to a fair trial by a panel of impartial and indifferent jurors.

When a *Batson* challenge is made, the trial judge sits as finder of fact. **Robinson v. State**, 726 So.2d 189 (Ct. App. Miss. 1998). Judge Lewis did not find from the totality of the relevant facts and circumstances a *prima facie* case of intentional discrimination against black jurors, whether male or female.

No abuse of judicial discretion has been demonstrated by George Lomax.

4.

BY FAILING TO OBJECT, CONTEMPORANEOUSLY OR OTHERWISE, LOMAX WAIVED ANY OBJECTION TO THE ALLEGED HEARSAY TESTIMONY COMPLAINED ABOUT.

ANY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM MUST AWAIT A NEW HORIZON.

George Lomax claims he was denied a fair trial because of alleged hearsay evidence in the form of S.D.'s allegations made during her initial outcry to others that Lomax had sex with her.

He candidly admits there was no objection to this testimony and claims that trial counsel was ineffective in the constitutional sense for failing to object. The identical arguments were made and rejected in **Green v. State,** 89 So.3d 543, 553 (¶24) (Miss. 2012).

Hearsay Testimony.

While at the Holmes County hospital S. D. told chief investigator *Sam Chambers,* the State's first witness, what had happened, including the fact "that [Lomax] had sex with me." (R. 170)

There was no objection to this testimony, contemporaneous or otherwise.

Anne Manning, a registered nurse who treated S.D. at the Holmes County hospital, read from her nurses notes that S.D., her patient, stated to Manning that the assistant principal came in, locked all the doors, told her to remove her clothing, and then came up behind her, instructed her to bend over and "he started doing it." (R. 330)

Manning's notes were admitted without objection. (R. 331)

S. D.'s close friend, *Chanica Henderson,* testified her first interaction with S.D. took place at the beginning of sixth period. Chanica described S.D. as "shaking really bad like she was hyperventilating." When Chanica asked S.D. what was wrong, "she just started crying." (R. 361) S.D. said "she was told to go to the band hall where Mr. Lomax had sex with her." (R. 361)

S. D. then told Chanica that when she got to the band hall " . . . Mr. Lomax told her to pull her pants down and she was like she was just holding the butt of her pants, she was confused and she said he told her again." (R. 362)

Again, there was no objection to this testimony.

Lomax argues " . . . the state was allowed to elicit hearsay evidence that S.D. was accusing Lomax of raping her from three people; her friend Chanika, a law enforcement officer [Chambers] who interviewed S.D. the evening of the alleged incident, and a nurse [Manning] who saw S.D. at Holmes County Hospital that [same] evening. (Brief of Appellant at 15)

S.D. had already testified at trial by the time nurse Manning and Chanika Henderson took the stand. Her testimony implicating Mr. Lomax is congruent with the testimony elicited from the three witnesses.

Lomax's cross-examination of S.D. consisted of thirty (30) pages during which her testimony did not deviate one whit from her revelations on direct. (R. 271-301) Of particular interest is the testimony brought out by defense counsel identifying exactly what Mr. Lomax did to S. D. (R. 280-81, 285-86)

> Q. [BY DEFENSE COUNSEL:] Now you said that Mr. Lomax told you to pull your pants down?
>
> A. Yes, ma'am.
>
> Q. And to bend over?
>
> A. Yes, ma'am.
>
> Q. You didn't ask any questions?
>
> A. I was scared. (R. 280-81)

* * * * * *

Q. [BY DEFENSE COUNSEL:] Isn't it true that you did not tell Officer Thompson that Mr. Lomax put his penis inside your vagina.

A. When you said that I told him that Mr. Lomax tried to rape me. I didn't tell him he tried to I told him that he did. (R. 285-86)

Any pre-existing error was rendered harmless by testimony from the victim elicited by the defense.

In any event, the criticized outcry testimony was admissible for various and sundry reasons, but even if it was not, there was no objection to any of it. Accordingly, Lomax has failed to preserve these matters for appellate scrutiny. *See* **Green v. State,** *supra,* 89 So.3d 543, 553 (¶24) (Miss. 2012) which is directly on point. *See also* **McNulty v. State,** 158 So.3d 1179 (Ct. App. Miss. 2014), reh denied, cert dismissed [Issues raised for the first time on appeal are procedurally barred from appellate review as they have not been presented to and addressed by the trial court.]

An appellate court " . . . will not hold the trial court in error for a matter not presented to it for consideration." **Cook v. State,** 161 So.3d 1057, 1064 (¶20) (Miss. 2015).

The same rule is found in the federal courts. *See* **United States v. Dotson,** 799 F.2d 189 (5th Cir. Miss. 1986). The federal government should require no more from the individual states than it requires from itself.

It is elementary that a contemporaneous objection is required in order to preserve an error for appellate review. **Christmas v. State,** 10 So.3d 413 (Miss. 2009), reh denied. **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied; **Logan v. State,** 773 So.2d 338 (Miss. 2000); **Florence v. State,** 755 So.2d 1065 (Miss. 2000); **Jackson v. State,** 766 So.2d 795 (Ct. App. Miss. 2000); **Goree v. State,** 750 So.2d 1260 (Ct. App. Miss. 1999).

Otherwise the error, if any, is waived for appeal purposes. **Caston v. State,** *supra*, 823 So.2d

473 (Miss. 2002), reh denied; **Hill v. State,** 17 So.3d 1092, 1095 (¶7) (Ct. App. Miss. 2009) ["An appellate court is not required to address issues that are not objected to at trial and preserved on appeal."] The contemporaneous objection rule is in place in order to enable the trial judge to correct error with proper instructions to the jury whenever possible. **Slaughter v. State,** 815 So.2d 1122 (Miss. 2002), reh denied.

Put another way, a trial court cannot be put in error unless it had an opportunity to first pass on the question. **Ronk v. State,** 172 So.3d 1112 (Miss. 2015), reh denied; **Cook v. State,** 161 So.3d 1057 (Miss. 2015); **Palm v. State,** 748 So.2d 135 (Miss. 1999); **Fulgham v. State,** 770 So.2d 1021 (Ct. App. Miss. 2000). *See also* **Mallard v. State,** 798 So.2d 539, 542 (Miss. 2001), where this Court held that Mallard's complaint that she was tried in her absence was waived, for the purposes of appeal, since she failed to object to her trial *in absentia.*

Miss. Code Ann. § 99-35-143 is precisely in point. It reads, in its pertinent parts, that

> [a] judgment in a criminal case **shall not be reversed** because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, **or because of any error or omission in the case in the court below, except where the errors or omission are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court.** [emphasis added]

The underlying bases for the existence of a contemporaneous objection rule are contained in **Oates v. State**, 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

> There are three basic considerations which underlie the rule requiring specific objections. It avoids costly new trials. Boring v. State, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. Heard v. State, 59 Miss. 545 (Miss. 1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932). These rules apply with equal force in the instant case; accordingly, we hold

that appellant did not properly preserve the question for appellate review.

In **Leverett v. State**, 197 So.2d 889, 890 (Miss. 1967), this Court, quoting from **Collins v. State**, 173 Miss. 179, 180, 159 So. 865 (1935), penned the following language:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

In **Sumner v. State,** 316 So.2d 926, 927 (Miss. 1975), we find the following language concerning the time for making an objection:

> The rule governing the time of objection to evidence is that it must be made as soon as it appears that the evidence is objectionable, or as soon as it could reasonably have been known to the objecting party, unless some special reason makes a postponement desirable for him which is not unfair to the proponent of the evidence. *Williams v. State*, 171 Miss. 324, 157 So. 717 (1934) and cases cited therein. See also cases in Mississippi Digest under Criminal Law at 693.

We reiterate. "A trial judge will not be found in error on a matter not presented to him for decision." **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995) citing numerous cases. *See also* **McNulty v. State,** *supra,* 158 So.3d 1179 (Ct. App. Miss., 2014), reh denied, cert dismissed. Given the facts found in this case, no violation of fundamental rights is involved here, and the procedural bar/waiver/forfeiture rule is applicable to George Lomax.

Ineffective Assistance of Counsel.

Lomax's alternative argument is also devoid of merit for the reasons expressed in **Green v. State,** *supra,* 89 So.3d 543, 553-54 (¶26) (Miss. 2012) [A defendant must prove counsel's deficiency was so substantial as to deprive the defendant of a fair trial.] Neither criteria has been met here. Counsel's failure to object, of course, might well have been a product of defense counsel's trial strategy.

It is well settled that complaints concerning counsel's failure to file certain motions, call certain witnesses, ask certain questions, and make certain objections fall within the amorphous zone and gambit of trial strategy. **Murray v. Maggio,** 736 F.2d 279 (5th Cir. 1984). A trial court has no duty to *sua sponte* second-guess decisions by defense counsel. **Pitchford v. State,** 45 So.3d 216 (Miss. 2010), reh denied.

Moreover, "[i]n order [t]o successfully prove [a claim of] ineffective counsel, the defendant must first prove that counsel had an obligation to object to the admittance of the evidence." **Williams v. State,** 819 So.2d 532 537 (¶14) (Ct. App. Miss. 2001). In several instances, no such obligation existed in the present case.

The record, in our opinion, is factually inadequate for a determination by a reviewing court that trial counsel was ineffective for failing to object. Without addressing each individual lapse of counsel, we respectfully defer to the cases which have declined to address the issue without prejudice to the appellant's right to raise the matter *de novo* in a post-conviction environment. *See* **Wilson v. State,** 21 So.3d 572 (Miss. 2009), reh denied; **Neal v. State,** 15 So.3d 388 (Miss. 2009), reh denied; **Brown v. State,** 965 So.2d 1023 (Miss. 2007).

Because (1) the record fails to show ineffectiveness of constitutional dimensions and because (2) *both* parties have not stipulated the record is adequate to allow the appellate court to make the necessary findings of fact, this Court need not rule on the merits of Lomax's ineffective assistance of counsel claim but may dismiss the claim without prejudice. **Love v. State,** *supra,* 121 So.3d 952, 956 (¶22) (Ct. App. Miss. 2013); **Wynn v. State,** 964 So.2d 1196 (Ct. App. Miss. 2007); **Jones v. State,** 961 So.2d 730 (Ct. App. Miss. 2007). *See also* **Drummond v. State,** 33 So.3d 507, 511-12 (¶¶ 14 and 15) (Ct. App. Miss. 2009); **McLaurin v. State,** 31 So.3d 1263, 1266-67 (Ct. App. Miss. 2009),

and the cases cited therein.

At best, any scrutiny of trial counsel's omissions must await a new horizon in a post-conviction environment where trial counsel will have an opportunity to explain the reasons for her actions and/or inactions. It is a rare case indeed where an appellate court will find constitutional ineffectiveness in trial counsel without granting to counsel a meaningful opportunity to be heard.

Our position, in a nutshell, is that Lomax has failed to demonstrate on direct appeal that any aspect of his lawyer's performance was deficient in the constitutional sense and that the deficient performance, if any, prejudiced the defense. Started differently, the record, in its present posture, fails to affirmatively reflect ineffectiveness of constitutional dimensions.

5.

THE CIRCUIT JUDGE PROMPTLY SUSTAINED DEFENSE COUNSEL'S OBJECTION TO THE PROSECUTOR'S ALLEGEDLY IMPROPER QUESTION. THUS, ANY ERROR WAS EITHER CURED OR RENDERED HARMLESS BEYOND A REASONABLE DOUBT.

During the State's direct examination of Chanica Henderson the following colloquy took place:

BY MS. MALONE-OLIVER:

Q. Did [S.D.] tell you how this made her feel with kids talking making fun of her and talking about her?

A. Yes, she said. She said it made her feel bad. Because she wasn't lying. She was telling the truth, I mean.

Q. As far as your personal knowledge had Mr. Lomax done anything inappropriate around you?

MS. ROSS. Objection, Your Honor.

THE COURT: Sustained. Sustained.

MS. MALONE-OLIVER: Tender the witness, Your Honor. (R. 367)

Because the question was never answered we will never know whether or not the response would have been, as Lomax contends, 404(b) objectionable.

Interestingly enough, during defense counsel's cross-examination of S.D., Ms. Ross asked the identical inquiry to the victim. We quote:

> Q. [BY MS. ROSS]: Before this incident or before you claim that Mr. Lomax assaulted you, had you had any contact with Mr. Lomax?
>
> A. No, ma'am.
>
> Q. Had he ever acted inappropriate with you in any manner?
>
> A. I mean he'll try to have a conversation while I wait on the bus, "hey, how you doing." He asked me where I stay. But I never did answer.
>
> Q. He never touched you?
>
> A. No, ma'am. (R. 294)

Counsel's identical inquiry to S.D. rendered harmless the prosecutor's later inquiry to Chanica Henderson.

In any event, Lomax's objection was promptly twice "sustained."

"Absent unusual circumstances, where objection is sustained to improper questioning or testimony, and the jury is admonished to disregard the question or testimony, we will not find error." **Wright v. State,** 540 So.2d 1, 4 (Miss. 1989).

"The rule is well established that when an isolated prejudicial question or comment by the prosecution is promptly objected to and the objection is sustained, and particularly when the circuit judge instructs the jury to disregard the incident, there is a presumption the action on the part of the trial court cured the error." **King v. State,** 580 So.2d 1182, 1189 (Miss. 1991); **Smith v. State,** 530 So. 155, 161 (Miss. 1988).

Any error committed when the prosecutor asked an allegedly improper inquiry to Chanica

Henderson, a witness for the State, was cured when the circuit judge promptly sustained the State's objection. When a trial judge sustains an objection to a litigant's question before an answer is given, jurors are well aware the court disapproves of the inquiry.

Judge Lewis also instructed the jury as follows in jury instruction C-CR-1:

> The production of evidence is governed by rules of law, and from time to time during the trial the Court may have ruled on the admissibility of evidence. You are to disregard all evidence excluded by the court and must not concern yourself with the reasons for the Court's rulings since they are controlled by rules of law. **You should not speculate as to possible answers to questions which the Court did not require be answered, and you should not draw any inference from the content of those questions.** (C.P. at 50) [emphasis supplied]

The jury was told in plain and ordinary English it " . . . was not to speculate as to possible answers to questions which the Court did not require be answered" and it was not to " . . . draw any inference from the content of those questions."

The Court of Appeals presumes that jurors follow the trial court's instructions. **Campbell v. State,** 164 So.3d 519 (Ct. App. Miss. 2015). *Cf.* **Branch v. State,** 882 So.2d 36, 75 (Miss. 2004) [Harmless error in light of the court's instructions.]

"Appellate courts assume that juries follow the instructions [of the court.]" **Clemons v. State,** 535 So.2d 1354, 1361 (Miss. 1988). *See also* **Thames v. State,** 5 So.3d 1178 (Ct. App. Miss. 2009).

"Our law presumes the jury does as it is told." **Williams v. State,** 512 So.2d 666, 671 (Miss. 1987).

"To presume otherwise would be to render the jury system inoperable." **Johnson v. State,** 475 So.2d 1136, 1142 (Miss. 1985). *See also* **Neal v. State,** 15 So.3d 388 (Miss. 2009), reh denied.

"Our trial system proceeds on the assumption that jurors are possessed of sufficient

intelligence and integrity that, once sworn, they may be counted upon to follow instructions given by the [trial] court." **Birkley v. State,** 750 So.2d 1245, 1255 (Miss. 1999).

There is a presumption that jurors follow the court's instructions, " . . . are fair-minded and conscientious and will do the duty the constitution devolves upon them." **Gleeton v. State,** 716 So.2d 1083, 1089 (Miss. 1998).

The Court of Appeals " . . . presume[s] that the jury takes seriously what it is told by the [trial] court." **Kelly v. State,** 735 So.2d 1071, 1088 (Ct. App. Miss. 1999), appeal after new trial 838 So.2d 314, reh denied, cert denied.

"The jury as fact finder is presumed as a matter of 'institutional imperative' to follow the law as they are instructed by the trial court." **Flowers v. State,** 726 So.2d 185, 188 (Ct. App. Miss. 1998).

"It is presumed that the jurors followed the instructions of the court as they solemnly promised both the defendant and the State that they would do. Verity is imputed to the jury's verdict." **Alexander v. State,** 250 So.2d 629, 633 (Miss. 1971).

All of the above should put to rest any notion by an appellate court that the jury relied upon the so-called "forbidden inferential sequence" in convicting Lomax of the crime charged.

In short, any prosecutorial misconduct was cured and/or rendered harmless beyond a reasonable doubt by the prompt sustaining of counsel's objection and curative admonishments from the court in the form of jury instruction C-CR-1.

Finally, the prosecutor's inquiry was not so egregious and inflammatory in light of the overwhelming evidence of guilt that the trial judge should have taken corrective action on her own motion.

6.

THE TRIAL JUDGE DID NOT ABUSE HER JUDICIAL DISCRETION IN EXCLUDING EVIDENCE THAT CERTAIN MALE SPECIFIC DNA TESTING OF S.D.'S PANTIES ALLEGEDLY REVEALED THE PRESENCE OF ANOTHER MALE PROFILE.

Upon being asked by Captain Chambers if she was "sexually active," S.D. said in her statement she had "did it one [other] time." (C.P. exhibit volume at 45) This statement was introduced at trial as D-4 for identification only. (R. 278)

DNA testing of S.D.'s panties showed two profiles, one that matched Lomax and one that matched another. Lomax argues that "[t]o the extent that the presence of another male's DNA on S.D.'s panties might explain why S.D. would manufacture her claim against George Lomax[,] that evidence was admissible and the trial judge's ruling that it was not was error." (Brief of Appellant at 25).

We are not convinced.

In making evidentiary rulings trial judges enjoy "a great deal of discretion as to the relevancy and admissibility of evidence." **Love v. State,** 121 So.3d 952, 954 (¶11) (Ct. App. Miss. 2013) quoting from **Shaw v. State,** 915 So.2d 442, 445 (¶8) (Miss. 2005).

"Unless the judge *abuses his discretion so as to be prejudicial to the accused,* [an appellate court] will not reverse this ruling*."* **Green v. State,** *supra,* 89 So.3d 543, 549 (¶15) (Miss. 2012). [emphasis in original] quoting from **Gore v. State,** 37 So.3d 1178, 1183 (Miss. 2010).

During a pretrial hearing conducted on February 17, 2015, the trial judge ruled as follows on the defendant's motion to introduce evidence of the victim's prior sexual behavior:

> THE COURT: Before the Court is Defense's Motion to Introduce and the State's Motion to Prohibit Introduction of the Victim's Past Sexual Behavior. Pursuant to Uniform Circuit Court Rule 4.1.12 [sic] clearly states that a victim, alleged victim's sexual behavior should not be introduced into evidence unless there is a

> dispute as to whether the accused was or was not the alleged source of the semen, the pregnancy, the disease or the injury. In this case we are looking at a situation it appeared that the DNA profile shows that the defendant's DNA profile was found from the DNA testing. And this is a sexual battery case. Therefore as long as the defendant's DNA profile was found, there is no need for the past sexual behavior of the alleged victim to be introduced into evidence. Therefore the Motion to Introduce the Alleged Victim's Past Sexual Behavior is denied. Okay. (R. 34, Supp. Vol. 2 of 2)

The circuit judge did not abuse her judicial discretion in disallowing the evidence in question. *See* Miss.R.Evid. 412 which states, in its applicable parts, that "[n]otwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, reputation or *opinion evidence* of the past sexual behavior of an alleged victim of such sexual offense is not admissible."

Expert opinion testimony is implicitly subsumed in the above prohibition.

The excluded evidence also flunks the test of relevancy. So long as there is no question but that Lomax's male DNA profile was also found on S.D.'s panties, the presence of a second male DNA profile is irrelevant.

In the present case neither George Lomax nor any of his patrilineal male relatives could be excluded as being the contributor of the profile in S.D.'s panties. (R. 409) Stated differently, "[h]e cannot be excluded as being the potential source of the DNA that was found on the panties." (R. 409) While neither semen nor sperm cells were found to be present, Lomax's genetic material from some unidentifiable source such as, e.g., saliva or skin cells, was found to be present. (R. 411)

In her closing argument to the jury the district attorney made the following observations:

> * * * The main thing that [Katherine Rodgers] said 99.9 percent would be excluded in the world in population from that test. But George Lomax was not excluded. All his genetic markers lined up. 16 of them lined up in the crotch of S.D.'s underwear. Why is George Lomax's DNA genetic profile in S.D.' panties? Now we don't know if it's semen, we don't know if it's skin cells, we don't know what it is. But nothing from George Lomax should be inside the crotch of S.D.'s panties, nothing. 99.9

percent of the population can be excluded but George Lomax cannot be excluded. (R. 468)

Notwithstanding the trial court's initial pretrial ruling concerning the victim's past sexual history, the following reference to another person's contributions took place during cross-examination:

Q. [BY DEFENSE COUNSEL ROSS:] Okay. And going down to DYS90 where you have this 12 and you have this 14?

A. Yes. Those are the bracketed minor alleles.

Q. And these came from other individuals?

A. Correct, it had to be someone else. (R. 436)

Following an abbreviated conference at the bench, defense counsel, in obedience to the court's previous ruling, abandoned this line of inquiry. (R. 436-37)

The Supreme Court has consistently held that "'[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." **Fulks v. State,** *supra,* 10 So.3d 764, 769 (¶19) (Miss. 2013), quoting from **Johnson v. State**, 567 So.2d 237, 238 (Miss. 1990).

No abuse of judicial discretion has been demonstrated here. The DNA profile scenario found in the instant case does not fit any of the exceptions where such evidence of "past sexual behavior" is admissible.

CONCLUSION

Lomax presents legitimate complaints. Nevertheless, scrutiny of the official record reflects the claims presented are devoid of merit.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction for sexual battery and the thirty (30) year sentence with ten (10)

years suspended and twenty (20) years to serve followed by five (5) years of supervised probation and five (5) years of unsupervised probation imposed by the trial judge, should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: /s/ Billy L. Gore
BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, BILLY L. GORE, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Damon R. Stevenson, Esq.
Stevenson Legal Group PLLC
P.O. Box 1022
Jackson, MS 39255-1922

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Honorable Jannie M. Lewis
Circuit Court Judge
P.O. Box 149
Lexington, MS 39095

Honorable Akillie Malone-Oliver
District Attorney
P.O. Box 311
Durant, MS 39063

This the 5th day of August, 2016.

/s/ Billy L. Gore
BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE NO. 602-359-3680
FAX NO. 601-576-2420