

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00221 COA**

MARVIN LEWIS JONES

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

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

DATE OF JUDGMENT:	10/20/89
TRIAL JUDGE:	HON. DARWIN M. MAPLES
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RICHARD C. CONANT
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	GRAY BURDICK
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	DISTRIBUTION OF A CONTROLLED SUBSTANCE-HABITUAL OFFENDER/DOUBLE PENALTY: SENTENCED TO 30 YRS AND SUCH SENTENCE SHALL NOT BE REDUCED OR SUSPENDED NOR ELIGIBLE FOR PAROLE OR PROBATION; SENTENCE TO RUN CONCURRENT WITH SENTENCE PRESENTLY SERVING
DISPOSITION:	REVERSED AND REMANDED - 2/24/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

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

HINKEBEIN, J., FOR THE COURT:

Marvin L. Jones [hereinafter Jones] was convicted in the Jackson County Circuit Court of the unlawful distribution of a controlled substance. Aggrieved by his conviction, Jones makes the following assignments of error:

I. THE TRIAL COURT ERRED IN DENYING JONES' MOTION TO QUASH HIS ENTIRE JURY VENIRE BECAUSE PANEL MEMBERS WERE PRESENT IN THE COURTROOM DURING PRE-TRIAL MOTION ARGUMENTS.

II. THE TRIAL COURT ERRED IN OVERRULING JONES' MOTION TO PROHIBIT ADMISSION INTO EVIDENCE OF PRIOR, UNRELATED CRIMES AT HIS TRIAL.

III. THE TRIAL COURT ERRED IN FAILING *SUA SPONTE* TO PROVIDE THE JURY WITH A CAUTIONARY, LIMITING INSTRUCTION REGARDING THE USE OF PRIOR, UNRELATED CRIMES.

IV. THE TRIAL JUDGE ERRED IN DENYING JONES' MOTION FOR MISTRIAL DUE TO PROSECUTORIAL MISCONDUCT WHEN REPEATED QUESTIONS REGARDING NON-EXISTENT PRIOR CRIMES WERE ASKED BY THE PROSECUTOR IN THE PRESENCE OF THE JURY.

V. THE TRIAL JUDGE DEMONSTRATED PERSONAL BIAS TOWARD JONES AND ACTIVELY PARTICIPATED AS AN ADVOCATE FOR THE PROSECUTION IN ESTABLISHING AN INACCURATE RULE OF LAW.

VI. THE TRIAL COURT ERRED IN SENTENCING JONES AS AN HABITUAL OFFENDER WHEN THE INDICTMENT WAS INSUFFICIENT FOR THAT PURPOSE.

VII. JONES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Holding Jones' second and third assignments of error to be of merit, we must reverse his conviction and remand for a new trial. We hold the remainder of Jones' assignments to be without merit or irrelevant in light of our remand for a new trial, with the exception of his sixth assignment which we discuss so as to facilitate a re-trial on this indictment.

FACTS

On the morning of October 25, 1988 an undercover police officer working in Moss Point, Mississippi approached Jones and indicated that he would like to purchase some crack cocaine. Jones told the officer that he could help him obtain the desired controlled substance. Jones then got into the officer's pickup truck and the two drove to an area outside of Pascagoula, Mississippi known as Carver Village. Jones directed the undercover officer to stop the vehicle outside of an apartment complex. The officer gave Jones one hundred dollars, which Jones took with him into one of the apartments.

After remaining in the apartment for a few minutes, Jones allegedly returned to the officer's vehicle with a "rock" of crack cocaine. The officer put the piece of cocaine into his pocket and then proceeded to drive Jones back to Moss Point. After buying a few hamburgers for Jones at a Krystal restaurant, the officer returned Jones to the place where he had picked him up. The officer then met with other law enforcement officers who had been the "surveillance team" monitoring his alleged purchase from Jones. The officer turned the rock of crack cocaine over to these officers for cataloging into evidence. Jones was subsequently arrested, indicted, and convicted of the unlawful possession of a controlled substance. It is from this conviction that the instant appeal is taken.

ANALYSIS

II. THE TRIAL COURT ERRED IN OVERRULING JONES' MOTION TO PROHIBIT ADMISSION INTO EVIDENCE OF PRIOR, UNRELATED CRIMES AT HIS TRIAL.

At trial Jones elected to testify on his own behalf. Prior to testifying, however, Jones made a motion asking the court to order the State to refrain from making any reference to his prior convictions for the unlawful possession/distribution of controlled substances. The State contended that Jones' prior crimes were admissible under Mississippi Rule of Evidence 609 to attack his credibility. Jones' motion was denied. Jones' counsel then proceeded with direct examination of his client. Jones' testimony was limited to detailing his version of the events in question. Jones did not make any exculpatory statements or deny having prior involvement with illegal drugs or drug trafficking so as to "open the door" for the State to use his prior convictions to rebut the testimony he gave on direct examination. The trial court, however, allowed the State on cross-examination to ask Jones if he had previously been convicted of the unlawful sale of heroin and cocaine. We hold that the trial court committed reversible error in allowing this line of questioning. The trial court's ruling that under Rule 609 "whenever you take the stand the State has the right to ask those questions" and that because "[Jones] has taken the stand in his own behalf . . . [the State] has a right to ask him about his convictions" was simply wrong in this case. Although Rule 609 does allow those questions in certain instances, that is not applicable here.

A. Admissibility of Jones' Prior Convictions under Rule 609.

Jones raises several points concerning the trial court's admission of his prior convictions under Rule 609. First, Jones contends that the trial court failed to have the State satisfy its burden of making a *prima facie* case that the prior convictions were relevant to his propensity for truthfulness. Second, Jones strenuously argues that the trial court erred in failing to make an on-the-record factual finding that the probative value of admitting the evidence of his previous convictions outweighed its prejudicial effect upon him. Third, Jones alleges that the trial court committed error in allowing the prior convictions into evidence because some of them were more than ten years old, and that the State did not provide him with advance notice that the old convictions would be used at trial. We hold all of Jones' points to be worthy of discussion.

In order for evidence of prior convictions to be admissible under Rule 609 the State must first make a *prima facie* showing that "the conduct giving rise to the prior conviction . . . bears upon the witness's propensity for truthfulness," before a prior conviction may be admitted to impeach under Rule 609. ***Tillman v. State*, 606 So. 2d 1103, 1107 (Miss. 1992)**. Once the State has met its threshold burden of establishing *prima facie* that the defendant's prior conviction is relevant to his propensity for

truthfulness, the trial court must make an on-the-record determination that this probative value outweighs the prejudicial effect of the prior conviction. *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987). The *Peterson* analysis entails an on-the-record balancing of the following five factors: (1) impeachment value of the prior offense; (2) date of the prior conviction; (3) similarity between the past and presently charged offenses; (4) importance of defendant's testimony; and (5) whether credibility is central. *Peterson*, 518 So. 2d at 636. Additionally, if the State intends to introduce evidence of prior convictions more than ten years old, Rule 609 (b) requires that it provide the defendant with advance written notice of its intent to introduce such evidence. Because the trial court followed none of these steps required by Rule 609, we hold that its admission of Jones' prior drug trafficking convictions was reversible error.

B. Admissibility of Jones' Prior Convictions as "Normal Impeachment" or Rebuttal

In addition to arguing that Jones' prior convictions were admissible under Rule 609 to attack his credibility in general, the State contends that Jones' denial on cross-examination of having engaged in the trafficking of illegal drugs "made his credibility a central issue in his defense." Accordingly, the State argues that evidence of his prior convictions was admissible as "normal impeachment" to rebut Jones' denial of the fact that he had previously been involved in the illegal trade of controlled substances. Jones' contends that because he did not make any exculpatory statements or deny having prior involvement with illegal drugs or drug trafficking, he did not "open the door" for the State to use his prior convictions to rebut the testimony he gave on direct examination.

The Mississippi Supreme Court has addressed this situation on several occasions. In *Johnson v. State* the court held that "where the State 'initiate[s] the matter by eliciting from the defendant the response it later [seeks] to impeach by showing the defendant's prior criminal . . . activities,' the impeachment is impermissible and cause for reversal and remand." *Johnson v. State*, 666 So. 2d 499, 503 (Miss. 1995) (citing *Quinn v. State*, 479 So. 2d 706, 708 (Miss. 1985)). The *Johnson* holding was based upon the principle that before the State may impeach or rebut the defendant's testimony via prior convictions, the defendant must first have made exculpatory statements so as to give the State something to rebut. *See Spraggins v. State*, 606 So. 2d 592, 597 (Miss. 1992) (holding that defendant must "open the door" on direct examination by making exculpatory statements before State will be allowed "to launch an attack on his credibility and parade the prior conviction and arrest before the jury"). The court has held it "wholly unfair that the State may circumvent our well established rule "by eliciting a response from the defendant on cross-examination for the purpose of impeachment." *Spraggins*, 606 So. 2d at 596-97. In *Spraggins* the court concluded that responses elicited by the State on cross-examination were "not the sort of 'door opening' testimony which permissibly triggers the State's use of a prior drug conviction . . . to impeach his credibility." *Id.* at 597.

Accordingly, before the State may attempt to impeach a defendant's testimony by referring to his prior convictions, the defendant must have made statements "on direct examination which could 'set up' the State's impeachment." *Id.* Even, however, in cases where the defendant has "opened the door" to impeachment by making exculpatory statements, the State "may not exceed the invitation extended." *See Johnson*, 666 So. 2d at 503 (holding that State's use of prior convictions should be limited to impeaching credibility of statements made by defendant on direct examination; State may not use cross examination to elicit "other details of the prior [conviction which] were beyond the

invitation extended by the defendant"). Because Jones' testimony did not include any exculpatory statements or denial of having prior involvement with illegal drugs or drug trafficking, we hold that the State's assertion on this point is without merit. Even a cursory inspection of the trial transcript reveals that it was not until the State began its cross-examination and asked Jones about his prior involvement in the unlawful trafficking of controlled substances that this matter was raised. At that point Jones strongly protested the State's questions, claiming that he could not understand what "something that happened seventeen years ago ha[d] to do with the facts of this case here." Jones then reluctantly admitted to having prior convictions for illegal drug trafficking.

In light of the authority discussed *supra*, we hold that the trial court committed reversible error in allowing the State to introduce evidence of Jones' prior convictions. Such evidence was not properly admitted under Rule 609 nor was it proper "normal impeachment" to rebut assertions made by Jones. The trial court's conclusion that "whenever you take the stand the State has the right to ask those questions" and that because "[Jones] has taken the stand in his own behalf . . . [the State] has a right to ask him about his convictions," was an erroneous statement of the law. Although there are exceptions regarding the examination of a witness about prior convictions under Rule 609, in this case that does not apply. Accordingly, we must reverse Jones' conviction and remand for a new trial.

III. THE TRIAL COURT ERRED IN FAILING *SUA SPONTE* TO PROVIDE THE JURY WITH A CAUTIONARY, LIMITING INSTRUCTION REGARDING THE USE OF PRIOR, UNRELATED CRIMES.

Jones alleges that under Mississippi law the trial court was required to, *sua sponte*, give the jury a limiting instruction telling them that the evidence of his prior drug trafficking was admissible solely for impeachment purposes, in order to minimize the risk that the jury would infer guilt in the present case based upon his previous conduct. Jones is correct.

The Mississippi Supreme Court has held that it is reversible error for a trial court to not instruct the jury that evidence of prior crimes admitted under Rule 609(a) is to be considered only for the purpose of attacking the witness' credibility, where the prior convictions are identical to the charge on which the defendant is currently being tried. *Pugh v. State*, 584 So. 2d 781, 786 (Miss. 1991). The purpose of such a limiting instruction is "to protect against a jury convicting a defendant just because he has committed other crimes and not because the prosecution has proven that he is guilty of the crime for which he is accused." *McLemore v. State*, 669 So. 2d 19, 22 (Miss. 1996). This limiting instruction must be given regardless of whether it is requested by the parties. *See McLemore*, 669 So. 2d at 22 (holding that limiting instructions should be given *sua sponte* when evidence of prior crimes is admitted pursuant to Rule 609). Failure of a court to, *sua sponte*, give a limiting instruction when evidence of prior criminal convictions is admitted under Rule 609 has been held to be reversible error. *McLemore*, 669 So. 2d at 22-23. In the event this issue is implicated at Jones' new trial, the trial court must give a limiting instruction if evidence of prior drug trafficking convictions is admitted under Rule 609 solely for the purpose of attacking Jones' credibility.

VI. THE TRIAL COURT ERRED IN SENTENCING JONES AS AN HABITUAL OFFENDER WHEN THE INDICTMENT WAS INSUFFICIENT FOR THAT PURPOSE.

Jones alleges that the portion of the indictment which charged him as a habitual offender was defective in that it failed to satisfy Article 6, Section 169 of the Mississippi Constitution, and Rules

2.05 and 6.04 of the Uniform Criminal Rules of Circuit Court Practice.⁽¹⁾ Jones argues that each page of the indictment must conclude with the phrase "against the peace and dignity of the State of Mississippi" in order to pass constitutional muster. It is Jones' contention that because only the first and last pages concluded with this phrase, the portion of the indictment in between the first and last pages was defective. It is the middle portion of the indictment that charges him as a habitual offender.

While Jones is correct in asserting that the second page of the indictment does not conclude with the phrase "against the peace and dignity of the State of Mississippi," this does not run afoul of the Mississippi Constitution or Rules 2.05 and 6.04. Article 6, Section 169 of the Mississippi Constitution provides that "all indictments shall *conclude* 'against the peace and dignity of the state.'" **Miss. Const. of 1890, art. 6, § 169** (emphasis added). Our supreme court addressed this issue in the case of *McNeal v. State*, where it held that "the word 'conclude' is neither ambiguous nor vague. It simply means 'to bring to an end.'" ***McNeal v. State*, 658 So. 2d 1345, 1351 (Miss. 1995)**. In *McNeal* the habitual offender portion of an indictment was invalidated because "the habitual offender portion of the indictment came *after* the words 'against the peace and dignity of the state.'" ***McNeal*, 658 So. 2d at 1350** (emphasis added).

In the case at bar the phrase "against the peace and dignity of the state" was placed at the conclusion of the indictment, rather than preceding the language which charged the defendant as a habitual offender (as happened in *McNeil*). Therefore, it is this Court's holding that Jones' indictment complied with Article 6, Section 169 of the Mississippi Constitution, along with Rules 2.05 and 6.04 of the Uniform Criminal Rules of Circuit Court Practice. While Rule 2.05 requires that "[a]n indictment shall also include . . . [t]he words 'against the peace and dignity of the state,'" it does not mandate that this phrase appear at any particular point in the indictment, as does our constitution. Rule 6.04 makes no mention whatsoever as to the words "against the peace and dignity of the state." Jones' argument that each page must contain this phrase is not only unsupported by any legal authority, it runs directly afoul of the authority Jones cites in his own brief. This assignment of error is absolutely without merit and poses no obstacle to Jones being re-tried upon this same indictment.

THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR A NEW TRIAL. COSTS ARE ASSESSED AGAINST JACKSON COUNTY.

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

1. Although the Uniform Criminal Rules of Circuit Court Practice were superseded effective May 1, 1995 by the Uniform Rules of Circuit and County Court Practice, they were in effect at the time of Jones' trial and therefore govern the disposition of this issue.