Serial: **193000**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2012-CT-00374-SCT

TOMMIE LEE JONES a/k/a NINNOE ***Appellant***

v.

STATE OF MISSISSIPPI ***Appellee***

ORDER

The matter came before the Court en banc on the Court's own motion. The Petition for Writ of Certiorari filed by counsel, was granted February 11, 2014, in order to carefully review the issues and record in this matter. Having done so, the Court now finds that there is no need for further review, and that the Writ of Certiorari should be dismissed.

IT IS THEREFORE ORDERED that the Writ of Certiorari is dismissed.

SO ORDERED, this the 12th day of August, 2014.

/s/ Randy Grant Pierce

RANDY GRANT PIERCE, JUSTICE

TO DISMISS: WALLER, C.J., RANDOLPH, P.J., LAMAR, CHANDLER AND PIERCE, JJ.

DICKINSON, P.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KITCHENS, KING AND COLEMAN, JJ.

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TOMMIE LEE JONES a/k/a NINNOE

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STATE OF MISSISSIPPI

DICKINSON, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. The jury that convicted Tommie Lee Jones was not instructed on all the elements of the crime. According to the Court of Appeals, the trial judge committed error. But, finding the error was harmless, the Court of Appeals affirmed the conviction. Recognizing that the Court of Appeals' decision on this important point of law was error, six justices on this Court voted to grant certiorari review. Now, in a stunning about-face, five justices have decided simply to dismiss Jones's petition for certiorari without further comment. I oppose this order.

¶2. There are two reasons for my opposition. First, I believe a majority of the justices on this Court, including myself, hold the view that the circuit judge committed *no error at all*. We should say so and explain why. Second, in light of the cases discussed below, the majority's refusal to issue an opinion explaining the true reason for affirming Jones's conviction will surely leave the trial bench, the bar, and the Court of Appeals bewildered and understandably confused about the controlling law on instructing a jury as to all elements of the crime charged.

The Court of Appeals opinion

¶3. To support its view that the circuit judge was in error for failing to instruct the jury on all essential elements of Jones's crime, the Court of Appeals majority cited ***Bolten v. State***.[1] It is noteworthy that the Court of Appeals could have cited many other of this Court's decisions,[2] and many from its own precedent,[3] including cases from both courts holding that

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[1] ***Jones v. State***, No. 2012-KA-00374-COA, 2013 WL 3991816, *3 (Miss. Ct. App. Aug. 6, 2013) (citing ***Bolton v. State***, 113 So. 3d 542, 544 (Miss. 2013)).

[2] ***Williams v. State***, 134 So. 3d 732 (Miss. 2014) (jury must be instructed regarding the elements of the crime with which the defendant is charged); ***Nix v. State***, 8 So. 3d 141 (Miss. 2009) (instructions must accurately follow the requisite elements of the crime); ***Moore v. State***, 996 So. 2d 756 (Miss. 2008) (because State must prove each element of the crime beyond a reasonable doubt, then State also must ensure that the jury is properly instructed with regard to the elements of the crime); ***Goodin v. State***, 977 So. 2d 338 (Miss. 2008) (State must make sure jury is properly instructed with regard to the elements of the crime); ***Reddix v. State***, 731 So. 2d 591 (Miss. 1999) (because it is State's duty to prove every element of crime beyond a reasonable doubt, State also has duty to make sure jury is properly instructed with regard to essential elements of crime); ***Blue v. State***, 716 So. 2d 567 (Miss. 1998) (logical corollary of principle that State must prove each element of crime beyond reasonable doubt is that the State must ensure jury is properly instructed with regard to elements of crime); ***Hunter v. State***, 684 So. 2d 625 (Miss. 1996) (jury's verdict may not stand upon uncontradicted fact alone; facts must be found via jury instructions as to each element of the crime charged); ***Turner v. State***, 573 So. 2d 1340 (Miss. 1990) (regardless of facts produced at trial, verdict may not stand unless jury was properly instructed on elements of the offense); ***Yelverton v. State***, 191 So. 2d 393 (Miss. 1966) (jury must be instructed as to elements of the offense charged); ***Mabry v. State***, 248 Miss. 149, 158 So. 2d 688 (1963) (instructions must include elements of the offense); ***Ellis v. State***, 33 So. 2d 838 (Miss. 1948) (court's instruction must give the law as to the offense charged and the elements thereof); ***Martin v. State***, 163 Miss. 454, 142 So. 15 (1932) (jury instructions must set forth all elements of crime).

[3] *See e.g.* ***Heidelberg v. State***, 976 So. 2d 948 (Miss. Ct. App. 2007) (prosecution, not the defendant, bears burden of instructing the jury on all the essential elements of the crime charged); ***Pollard v. State***, 932 So. 2d 82 (Miss. Ct. App. 2006) (prosecution's responsibility to make sure jury is instructed on the essential elements of the crime); ***Roberson v. State***, 838 So. 2d 298 (Miss. Ct. App. 2002) (State has duty to make sure jury is properly instructed with regard to essential elements of crime); ***Johnson v. State***, 744 So. 2d 833 (Miss. Ct. App. 1999) (instructions must plainly instruct the jury as to those essential elements that it must find to exist in order to convict).

a trial court's failure to instruct the jury on all essential elements of the crime charged rises to the level of fundamental error.[4]

¶4. The Court of Appeals majority found it compelling that the State produced ample proof of the missing element and distinguished the present case from ***Bolton*** on that basis.[5] The majority reasoned that "the jury was presented with both documentary evidence and testimony [concerning the missing element of the crime]," so "any error would be harmless."[6]

¶5. Four Court of Appeals judges dissented, believing the case should have been reversed. Judge Roberts, writing for the dissent – and believing he was relying on this Court's opinion in ***Bolton*** – stated that "failure to instruct the jury on the essential elements of the crime is plain error."[7] And responding to the majority's reliance on the quantum of proof of the missing element of the crime, the dissent astutely pointed out that, "although the [element of the crime missing from the jury instructions] was obvious to the jury, the fact remains that the jury was not instructed on all the necessary elements that the State must prove before the jury could find Jones guilty of sexual battery."[8]

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[4] *See, e.g.,* ***Gray v. State***, 728 So. 2d 36 (Miss. 1998) (failure to submit to the jury the essential elements of the crime is fundamental error); ***Duplantis v. State***, 708 So. 2d 1327 (Miss. 1998) (every instruction need not cover every point of importance, so long as the point is fairly presented elsewhere; but trial judge's failure to present jury with all essential elements of the crime is fundamental error); ***Lyles v. State***, 12 So. 3d 532 (Miss. Ct. App. 2009) (failure to instruct jury on the essential elements of the crime is fundamental error).

[5] ***Jones***, 2013 WL 3991816, at *3.

[6] ***Id.*** at *4.

[7] ***Id.*** at *10 (citing ***Bolton***, 113 So. 3d at 544 (Roberts, J., dissenting)).

[8] ***Jones***, 2013 WL 3991816, at *10 (Roberts, J., dissenting).

¶6. Not fully satisfied with the Court of Appeals majority opinion, Judge Maxwell issued still another opinion that he believed was supported by our precedent. In addressing our opinion in ***Bolton***, he stated that "despite its broad language about plain error, [it] is apparently limited to its unique circumstances . . . ."[9] Three other Court of Appeals judges joined Judge Maxwell.

¶7. Given the sharp difference in opinion on the Court of Appeals as to what our precedent actually means (four judges going so far as to discuss our precedent in terms of what it "apparently" holds); and given that six justices on this Court (at one time) believed we should grant certiorari; I am disappointed that five among us now have decided to reverse our previous decision without explanation and dismiss the writ of certiorari by issuing today's order. This perplexing order leaves intact the Court of Appeals decision that wrongly holds the trial judge in error, and does nothing to provide the clarity and stability in the law to which the members of our bench and bar are entitled.

Harrell v. State

¶8. Despite the numerous cases from this Court and the Court of Appeals proclaiming that failure to instruct the jury on every essential element of the crime charged is fundamental error, requiring reversal, this Court occasionally has strayed, finding the error to be harmless.[10] This inconsistency was not helped when, in 1999, the United States Supreme Court held in ***Neder v. United States*** that failure to instruct the jury on an essential element

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[9] ***Id.*** at *7 (citing ***Bolton***, 113 So. 3d at 542) (Maxwell, J., concurring).

[10] *See e.g.* ***Lannom v. State***, 464 So. 2d 492 (Miss. 1985); ***Blakeney v. State***, 82 So. 2d 174 (Miss. 1955); ***Hatten v. State***, 116 So. 813 (Miss. 1928).

of the crime charged is subject to harmless-error analysis.[11] Three years later, this Court handed down ***Kolberg v. State***, which adopted the ***Neder*** view.[12]

¶9. Then, earlier this year, we determined to abandon our inconsistent ways and address the issue straight on. In ***Harrell v. State***, we pointed out that Section 31 of the Mississippi Constitution[13] differs from the federal constitution on the right to trial by jury,[14] and that

> [s]o important is the right to a jury trial to our democratic form of government; so clear is the mandate from Section 31 of the Constitution of the State of Mississippi; that we overrule ***Kolberg*** to the extent that it provides harmless error analysis when the trial court fails to instruct a jury as to the elements of a charged crime.[15]

¶10. Then, in an attempt to make our view perfectly clear to the bench, the bar, and the Court of Appeals, we went on to state:

> We hold that it is ***always and in every case reversible error*** for the courts of Mississippi to deny an accused the right to have a jury decide guilt as to each and every element [of the crime charged].[16]

¶11. Much in the Court of Appeals' reasoning appears to contradict our holding in ***Harrell***. But to be fair, the Court of Appeals affirmed Jones's conviction before we handed down ***Harrell***. Unfortunately, today's majority – by dismissing, without comment, Jones's petition for certiorari – does nothing to clear up the contradiction.

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[11] ***Neder v. United States***, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

[12] ***Kolberg v. State***, 829 So. 2d 29 (Miss. 2002).

[13] Miss. Const. art. 3, § 31.

[14] U.S. Const. amend. VI.

[15] ***Harrell v. State***, 134 So. 3d 266, 275 (Miss. 2014).

[16] ***Id.*** (emphasis added).

¶12. So one wonders what the bench and bar are supposed to make of the majority's silence. Would the Court of Appeals have decided the case differently, had it had the advantage of reading our opinion in ***Harrell***? Would it have made a difference here? If the majority had not dismissed Jones's petition for certiorari (after granting it), how would ***Harrell*** have affected our opinion? Is ***Harrell*** still controlling law?

¶13. In my view, by issuing this sharply divided order and sitting silently by while the trial bench, the bar, and the Court of Appeals struggle with these questions, the majority causes this Court to fail in its important duty to bring clarity and consistency to the law. But because I do not wish there to be confusion on where I stand, below is the opinion I would have issued, and with which I believe a majority of this Court agrees.

MY PROPOSED OPINION

¶14. In this sexual-battery case, the jury never found Tommie Lee Jones guilty of each essential element of the crime for which he was charged because the jury instructions omitted one of the essential elements. The incompletely-instructed jury convicted Jones, and the Mississippi Court of Appeals affirmed, finding the omission of the element was harmless error. We granted Jones's petition for *certiorari*, and we now affirm the trial court, but for reasons different from those expressed by the Court of Appeals.

Facts and Procedural History of my Proposed Opinion

¶15. A Yazoo County grand jury indicted Jones for sexual battery and he proceeded to trial. The trial judge instructed the jury on only the first two elements of the crime, omitting the third. Interestingly, and possibly as a trial strategy, Jones had proposed an alternative

jury instruction that included all three elements, but he withdrew that instruction voluntarily in favor of the State's instruction.

¶16. The jury convicted Jones and he appealed, claiming the trial judge's failure to instruct the jury on all of the essential elements of sexual battery was reversible error. The Court of Appeals affirmed, finding first that Jones was procedurally barred from raising the issue because he made no objection at trial;[17] and further finding that, although the trial court committed error, the error was harmless because any fair-minded juror would have concluded from the evidence that Jones was more than twenty-four months older than the victim.[18] Shortly after the Court of Appeals affirmed, we handed down ***Harrell v. State***, which held that:

> it is ***always and in every case reversible error*** for the courts of Mississippi to deny an accused the right to have a jury decide guilt as to each and every element [of the crime charged].[19]

¶17. In light of ***Harrell***, we granted Jones's petition for *certiorari*, and we now affirm Jones's conviction, but for reasons different from those stated by the Court of Appeals.

Analysis of my Proposed Opinion

¶18. Mississippi Code Section 97-3-95(1)(d) – the statute under which Jones was indicted – has three essential elements: (1) there must be sexual penetration; (2) the victim must have been under the age of fourteen; and (3) the accused must be at least twenty-four months older

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[17] ***Jones***, 2013 WL 3991816, at *2.

[18] ***Id.*** at **3-4.

[19] ***Harrell***, 134 So. 3d at 275 (emphasis added).

than the victim.[20] Because the jury instructions omitted the third element, Jones now argues that this constitutes reversible error in light of this Court's recent opinion in ***Harrell v. State***.[21]

Harrell v. State

¶19. Earlier this year we decided ***Harrell v. State***, in which the trial judge instructed the jurors on the first five elements of capital murder but failed properly to instruct them on the sixth element.[22] As to the sixth element, the jurors were instructed that they were required to find that the defendant "Christopher Harrell was then and there engaged in the commission of the crime of robbery . . . ," but they were not instructed as to what they were required to find for a "robbery."[23]

¶20. The ***Harrell*** majority recognized that the United States Supreme Court has held that the failure to instruct on an essential element could be subject to harmless-error analysis consistent with the United States Constitution; and that this Court adopted that rationale in ***Kolberg v. State***, abandoning our then-existing rule requiring reversal.[24]

¶21. But after considering the issue in light of the Mississippi Constitution's absolute language on the right to a trial by jury, the ***Harrell*** Court overruled ***Kolberg***, stating:

> So important is the right to a jury trial to our democratic form of government; so clear is the mandate from Section 31 of the Constitution of the State of

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[20] Miss. Code Ann. § 97-3-95(1)(d) (Rev. 2006).

[21] ***Harrell***, 134 So. 3d at 266.

[22] ***Id.*** at 270.

[23] ***Id.***

[24] ***Kohlberg***, 829 So. 2d at 29.

> Mississippi; that we overrule ***Kolberg*** to the extent that it provides harmless error analysis when the trial court fails to instruct a jury as to the elements of a charged crime. We hold that it is *always and in every case reversible error* for the courts of Mississippi to deny an accused the right to have a jury decide guilt as to each and every element.[25]

¶22. Though we affirm, we do not reverse ***Harrell*** because that case has no application to the facts before us. ***Harrell*** stands for the proposition that it is reversible error for a court to "*deny an accused the right* to have a jury decide guilt as to each and every element" of the crime being prosecuted.[26] Because (as discussed below) that clearly did not happen here, we decline to address the merits of our holding in ***Harrell***.

The issue in the present case

¶23. The question before us today, not addressed in ***Harrell***, is whether an accused may waive the right to have a jury instructed on every essential element of the crime charged. It has long been settled that a defendant may knowingly, intelligently, and voluntarily waive most procedural rights.[27] Indeed, no one questions the constitutionality of a guilty plea where a defendant waives the right to have that jury instructed on the elements of the charged offense. Indeed, a defendant who pleads guilty waives the right to have a jury at altogether.[28] So we see no logical reason to support a rule that a defendant may not knowingly and intelligently waive the jury's consideration of a particular element. By doing so, the defendant, in essence, pleads guilty to that element.

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[25] ***Harrell***, 134 So. 3d at 275 (emphasis added).

[26] ***Id.***

[27] ***Thomas v. State***, 117 Miss. 532, 78 So. 147, 148-48 (1918).

[28] ***Id.***

¶24. It is undisputed that Jones prepared and submitted a proposed and correct jury instruction that included all the essential elements of sexual battery. And it is also undisputed that he withdrew that instruction. By doing so, we find that Jones waived his right to have the jury consider whether he was twenty-four months older than his victim.

¶25. Jones makes no assertion that his decision to withdraw the jury instruction was not knowingly, intelligently, and voluntarily made. And we find it quite plausible that Jones would not want the jury to focus on the dramatic and undisputed age discrepancy between himself and his victim. One can certainly understand how defense counsel might have concluded that Jones was better off not submitting that question to the jury. So, we conclude that Jones waived his right to have the jury instructed on the element at issue. And because of Jones's waiver, the trial court committed no error in failing to instruct the jury on that element. So, the Court of Appeals erroneously held that the trial judge committed harmless error. The trial judge committed no error at all.

Conclusion to my Proposed Opinion

¶26. Because Jones waived his right to have the jury instructed on every essential element of the crime, we hold that the trial judge committed no error. We affirm the judgment of the Court of Appeals, but for reasons different from those stated in its opinion, and we affirm the Yazoo County Circuit Court.

CONCLUSION TO MY OBJECTION TO THIS ORDER

¶27. While the above-proposed opinion would not clear up all the unanswered questions generated by ***Neder***, ***Kolberg***, ***Bolton*** and ***Harrrell***, at least it would not further confuse the

issue and leave intact the Court of Appeals decision which wrongly finds the trial judge in error. For these reasons, I object to this order.

KITCHENS, KING AND COLEMAN, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.