IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CALVIN GORDON AKA "CAL" — APPELLANT

VS. — NO. 2005-KA-0687

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The Grand Jury of Humphreys County indicted defendant with four counts of Capital Rape in violation of *Miss. Code Ann* § 97-3-65(1)(b). After a trial by jury, Judge Jannie M. Lewis presiding, defendant was found of all counts. The trial court sentenced defendant to 20 years on each count. The sentence in Counts 1 & II to run concurrent and the sentence in Counts III and IV to run concurrent, and the sentence in Counts 1 and II to run consecutive to the sentence in Counts III and IV.

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

At trial there was an eye-witness that testified:

> Well, Tracey (the mother of the 6 year old girl) came over to my house to visit, and she told me to go over and tell her little 6 year old girl to come here for a minute. I called the child, but didn't come out the back. And I stepped to the third bedroom and the defendant was on top of the little girl, having sex. Well, he had her legs in the air and he was on top of her having sex. Both of them in bed together, he was on top of her. Well, I tripped back over to the house and told Tracey (the girl's Mother) what was going on. We stepped back over to her house, and Tracey told me to give her a belt, and I gave Tracey a belt, and I thought she was going to hit the man, but she whupped her daughter, and asked her what was she doing messin' with her man. I stopped Tracey from beating on the girl, and I told her she ought to be hitting the guy, not the girl. And I ran over to my house and called the police and told the police what was going on, because I felt he had no business being on top of that little child.

[Narrative condensed & edited from the transcript pages 39 & 40.]

The jury heard this and other testimony including from the victim herself and found defendant guilty of all charges.

SUMMARY OF THE ARGUMENT

Issue I.

DEFENDANT WAS REPRESENTED BY CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Issue II.

THERE WAS AMPLE LEGALLY SUFFICIENT EVIDENCE TO SUPPORT ALL FOUR VERDICTS OF GUILTY.

Issue III.

THE INDICTMENT WAS LEGALLY SUFFICIENT.

ARGUMENT

Issue I.

DEFENDANT WAS REPRESENTED BY CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

As appellate counsel has corrected noted and cited:

> ¶19. . . . The Mississippi Supreme Court has adopted the Strickland v. Washington, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), test for determining ineffective assistance of counsel claims. Eakes v. State, 665 So.2d 852, 872 (Miss.1995). "A defendant must show that his attorney's performance was deficient, and that the deficiency was so substantial as to deprive the defendant of a fair trial." Johnson v. State, 753 So.2d 449, 452(¶ 5) (Miss.Ct.App.1999) (citing Eakes, 665 So.2d at 872). Both elements of the test must be proven by the defendant. Brown v. State, 626 So.2d 114, 115 (Miss.1993). "There is a strong, yet rebuttable, presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Cole v. State, 666 So.2d 767, 775 (Miss.1995) (citing Frierson v. State, 606 So.2d 604, 608 (Miss.1992)). To overcome this presumption, "[t] he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052(¶ 20).
>
> *Dawkins v. State,* 919 So.2d 92 (Miss.App. 2005).

Now, to the specific allegations of deficient performance, the State will address them in the approximate order mentioned in their brief.

To start it would appear the first claimed deficiency would be trial counsels decision not to make a *Batson* challenge. The reviewing court's of this State have heard this argument before, and even in the context of a death penalty with the 'heightened scrutiny' of review, have found it without merit, specifically:

¶ 20. Triplett is clearly distinguishable. There, the attorney was ill-prepared to go forward with trial and the defendant was prejudiced by his attorney's multiple deficiencies. The Court there found a "marked failure of counsel to fulfill his adversarial role" and under the totality of the circumstances, Triplett had not been afforded a fair trial. The failure to make a Batson motion was only one factor considered in the overall failure of the attorney to adequately represent his client. This Court has previously distinguished Triplett. See Le v. State, 913 So.2d 913, 953 (Miss.2005); Wilcher v. State, 863 So.2d 719, 741 (Miss.2004). Triplett is narrowly applied to cases alleging multiple instances of ineffective, deficient conduct by an attorney.

¶ 21. In Smith v. State, 877 So.2d 369, 383 (Miss.2004), this Court held that "[j]ury selection is generally a matter of trial strategy, and an attorney's decision not to make a Batson challenge does not amount to ineffective assistance of counsel absent a showing of prejudice to the defendant." (citing Burns v. State, 813 So.2d 668, 676 (Miss.2002)).

¶ 22. Turner has shown no prejudice resulting from his attorneys' decision not to make a *Batson* challenge, even if we presume a basis existed for the exercise of such a challenge.

Turner v. State, 953 So.2d 1063 (Miss. 2007).

It is the position of the State the jury selection and decision not to make a *Batson* challenge was part of trial strategy. Defendant does not make any claim of prejudice.

Continuing the trial strategy trial counsel for defendant did not ask for a continuance at trial.

¶ 29. We find that this issue is without merit. . . . Moreover, the *decision not to request a continuance* or a mistrial falls within the ambit of trial strategy.

Berry v. State, 882 So.2d 157 (Miss. 2004)(italics added).

Moving on counsel for defendant now assert lack of pre-trial investigation claiming there was no interviewing of witnesses the defendant wanted called.

> ¶ 24. . . . While counsel has a duty to make reasonable investigations, they do not, by any means, have to be completely exhaustive. Wiley v. State, 517 So.2d 1373, 1379 (Miss.1987). Counsel's decisions in this area along with *trial strategy* are given a large measure of deference.
>
> *Shorter v. State*, 946 So.2d 815 (Miss.App. 2007)(italics added).

Further, the strategic trial strategy on which witnesses to call or not call is with the gambit of trial strategy.

> ¶ 8. *First, we note that decisions of counsel to call or not to call certain witnesses fall within the ambit of trial strategy and are presumed reasonable.* Michael v. State, 918 So.2d 798, 805(¶ 13) (Miss.Ct.App.2005). ... Second, trial strategy falls within the discretion of counsel, and though we may sometimes disagree with the *trial strategy of counsel, the decisions will not ascend to the level of ineffective assistance of counsel* unless we find the error to be so serious that Fair's attorney was no longer acting as "counsel" under the Sixth Amendment. Colenburg v. State, 735 So.2d 1099, 1103(¶ 9) (Miss.Ct.App.1999). ...
>
> *Fair v. State,* 950 So.2d 1108 (Miss.App. 2007)(italics added).

Moving on, appellate counsel next claim deficiency in a partial quote from trial counsel's opening statement. The thing is, trial counsel then went on and did give an opening statement. And, as the reviewing court's of this State have held:

> ¶ 29. ... Failure to give an opening statement is not *per se* ineffective assistance of counsel. Branch v. State, 882 So.2d 36, 55 (¶ 42) (Miss.2004).
>
> *Bradley v. State*, 934 So.2d 1018 (Miss.App. 2005).

Now, considering it is not *per se* ineffective assistance to *not* give an opening statement, it is certainly not ineffective to give one. Further, there is not one claim of how this opening statement was prejudicial.

Continuing the claims defendant asserts error on the part of the trial court in letting the child testify without a 'competency' determination.

> ¶ 25. The determination of the competency of a witness is made at the discretion of the trial judge. *Burbank v. State*, 800 So.2d 540, 544 (¶ 6) (Miss.Ct.App.2001). Every person is assumed competent to testify. Barnett v. State, 757 So.2d 323, 328 (¶ 13)(Miss.Ct.App.2000). "Although the court did not conduct a preliminary investigation of the child to determine competency, it was not required to do so." Burbank, 800 So.2d at 544 (¶ 6). Therefore, we find Renfrow's argument that he was denied a fair trial because the child was allowed to take the stand without first having been qualified as a competent witness to be without merit. Further, Renfrow has not demonstrated that the trial judge abused his discretion. Without a demonstration of an abuse of that discretion, there is no basis for this Court to overturn that ruling. Id.
>
> *Renfrow v. State*, 882 So.2d 800 (Miss.App. 2004).

Further, it would appear trial counsel and defendant both wanted an opportunity to get the child witness on the stand. There does not appear in the record any request for a judicial determination of competency nor was there any objection. Such decisions appear to have been part of the trial strategy.

> ¶ 17. We also note that although Barnes requested a hearing to determine Brandi's competency to testify, the record does not indicate that he specifically objected to the child's testimony at trial on the basis of competency. "[F]ailure to make a contemporaneous objection at trial constitutes a waiver of any error subsequently assigned." Moawad v. State, 531 So.2d 632, 634 (Miss.1988), (citing Irving v. State, 498 So.2d

305 (Miss.1986)). Nevertheless, we do not find an abuse of discretion in the trial court's conclusion that Brandi was competent to testify. As a result, this issue lacks merit.

Barnes v. State, 906 So.2d 16 (Miss.App. 2004).

Additionally claimed as a deficiency of trial counsel is that he did not have defendant retested for chlamydia.

¶ 25. . . .[defendant] has shown no evidence that had his attorney interviewed the phantom alibi witness, or ordered a gun powder residue test, the outcome would have been different. Considering the totality of the circumstances, the performance of Sanders' trial counsel was not deficient, nor did it prejudice Sander's case in any way. Therefore, Sanders has failed to meet his burden of proof under the two-part test set out in Strickland, and his claim of ineffective assistance of counsel fails.

Sanders v. State, 939 So.2d 842 (Miss.App. 2006).

The fact that defendant was asymptomatic is nothing new. In point of fact some studies for chlamydia have found over 90% asymptomatic infections in males. There would only be confirming proof of two positive tests to use at trial. It was clearly part of trial strategy to keep that from happening. No prejudice, no merit. *Id.*

Again, defendant next brings up the calling of witnesses, and again the State would respond such decisions are within the ambit of trial strategy. *Fair, supra.*

And, lastly, counsel for defendant avers trial counsel failed to adequately prepare defendant to testify on his own behalf.

¶ 36. Hodges argues that counsel was ineffective for failure to prepare him as a witness for his sentencing hearing once Hodges decided to testify. Hodges states that because of this lack of preparation, he was

> "opened up on cross-examination to all prior charges because defense counsel failed the explain the difference between a 'charge' and a conviction." On direct appeal this Court found that, even assuming defense counsel was deficient in not making sure Hodges knew this difference, Hodges still had not shown prejudice. Hodges, 912 So.2d at 768-69 [¶¶ 85-87].
>
> *Hodges v. State,* 949 So.2d 706 (Miss. 2006)(see specifically decision in direct appeal at 912 So.2d 768-69 (¶¶ 85-87)).

Defendant had a right to testify and has not really shown any deficiency. Does defense counsel need to advise their client on etiquette or social graces? If a defendant is rambling and incoherent, no amount of preparation will make them cogent and concise. There is no showing of actual prejudice.

Further it would appear that counsel on appeal seeks to fault trial counsel by essentially claiming ineffective assistance of appellate counsel for filing a brief pursuant to *Lindsey v. State*, 939 So.2d 743 (Miss. 2005)(The LEXIS citation given in the brief of appellant would appear to be incorrect). It is the position of the State that such a filing is done to specifically to fulfill the Constitutional requirements of appellate counsel. *Id.*

> ¶ 9. Finally, . . . "a defendant has clearly failed to satisfy the prejudice test of Strickland" when it is clear from the record that the defendant is "hopelessly guilty."
>
> *Fair v. State*, 950 So.2d 1108 (Miss.App. 2007).

There is no merit to this first allegation of error and no relief should be granted.

Issue II.
THERE WAS AMPLE LEGALLY SUFFICIENT EVIDENCE TO SUPPORT ALL FOUR VERDICTS OF GUILTY.

> Our case law clearly holds that the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized. The victim's physical and mental condition after the incident, as well as the fact that the incident was immediately reported is recognized as corroborating evidence.
>
> *Klauk v. State*, 940 So.2d 954 (¶8)(Miss.App. 2006).

Looking to the record we have the testimony of the victim. Compelling and frightening in the straightforward unemotional delivery. We have the incredibly graphic testimony of an eye-witness that witnessed one of the acts charged. (Ct.I). There was the testimony of this child having a sexually transmitted disease that corroborates that she did, in fact, have sexual relations. There is evidence that defendant, also, tested positive for the same disease. There was evidence of the child's age, the defendant's age and their relationship or lack of one. Testimony clearly established venue.

The child testified and was subject to cross-examination. Hearsay issues were addressed, in detail, by the trial court. The child stated he had sex with her four times.

There was an abundance of evidence supporting every element of all the crimes and no relief should be granted on this allegation of error.

Issue III.
THE INDICTMENT WAS LEGALLY SUFFICIENT.

As directed by the court appellate counsel has raised the issue regarding the sufficiency of the indictment.

First, the issue of the use of the 'Capitol Rape' as to the crime charged. A point is made that the U.S. Supreme Court held that the death penalty is forbidden in the cases of rape. *Coker v. Georgia*, 433 U.S. 584 (1977)(not, as cited in defendant's brief, to be found in the Southern Reporter). However that is not the holding of *Coker*. The *Coker* case held that the death penalty is not available for the rape of an *adult*. It did not address the issue as applicable to the rape of a child. As a point of interest, the Supreme Court of Louisiana has just upheld the death penalty for the rape of a child. *State of Louisiana v. Patrick Kennedy* (No. 05-KA-1981, May 22, 2007). So the question may be addressed by the U.S. Supreme in the near future.

Be that as it may, *sub judice*, defendant was charged for the crime as set in *Miss. Code Ann.* § 97-3-65(1)(b). The maximum potential sentence for the crime as charged was life imprisonment. *Miss. Code Ann.* § 97-3-65(3)©).

Accordingly the indictment was correct. Our statutory provision would allow such a description of the rape with a potential sentence of life imprisonment.

> The terms "capital case," "capital cases," "capital offense," "capital offenses," and "capital crime" when used in any statute shall denote criminal cases, offenses and crimes punishable by death or imprisonment for life in the state penitentiary. The term "capital murder" when used in

> any statute shall denote criminal cases, offenses and crimes punishable by death, or imprisonment for life in the state penitentiary.
>
> *Miss. Code Ann.* § 1-3-4.

Technically, defendant was subject to indictment for crimes that were, potentially, punishable by a life sentence, hence a 'capital' offense. So the indictment was not in error

Now as to the second contention that an essential element was missing, specifically that the indictment didn't include the language about the 24 month age difference. It is the succinct contention of the State the citation in the indictment (four times) to *Miss. Code Ann.* § 97-3-65(1)(b) was more than specific enough to give notice of the offense charged and the elements thereof.

> ¶ 13. ... Third and most importantly, counts two and three specifically charge Caston under Mississippi Code section 97-3-7(2)(a), a specific subsection of the code outlining the crime of aggravated assault. In Roberson v. State, 595 So.2d 1310, 1318 (Miss.1992), our supreme court found that an indictment which had been amended to **include the specific subsection under which the accused was being charged sufficiently provided actual notice of that crime.** Here, as in the case of Roberson, **the inclusion of the specific subsection under which the accused was being charged provided actual notice to the defendant sufficient to satisfy the post-rules standard.** Finally, the indictment does not reference the misdemeanor charge of simple assault by title or citation to the code, and there is simply no support for Caston's argument that when he entered his guilty plea, he had no way of knowing whether he was being charged with felony aggravated assault or misdemeanor simple assault.
>
> *Caston v. State*, 949 So.2d 852 (Miss.App. 2007).

The indictment cited, repeatedly, to the specific code, section and subsection.

And, lastly, defendant asserts the dates were not specific enough for him to build a defense. His defense was that he just didn't do it, never would.

In *Baker v. State*, 930 So.2d 399 (Miss.App. 2005) the reviewing court looked at a factually similar situation. The time range in *Baker* was over a two year span of time. In this indictment we have Count I, being a date specific; Count II, a range of one year; Counts III & IV each the same 10 month period. This dates were chosen based upon where defendant was living to narrow the time.

It is the position of the State that under the rationale of *Baker* the indictment was legally sufficient as the time was not an essential element of the offense.

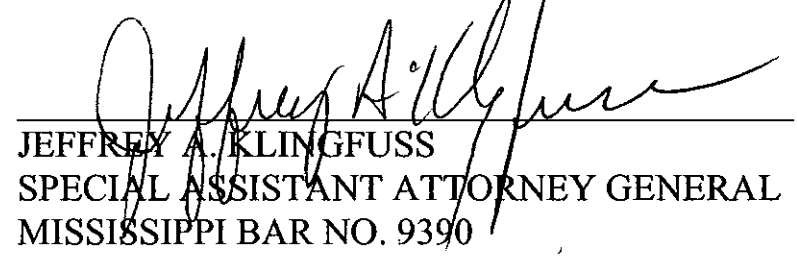
No relief should be granted on this allegation of error.

CONCLUSION

Based upon the arguments presented herein as supported by the concise record on appeal the State would ask this reviewing Court to affirm the verdicts of the jury and the sentences of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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