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 & II.

DEFENDANT'S INDICTMENT WAS NOT DEFECTIVE NOR DID IT CONTAIN A FALSE STATEMENT.

Issue III.

DEFENDANT WAS REPRESENTED BY CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Issue IV.

THERE WAS NO DOUBLE JEOPARDY VIOLATION.

Issue V.

[There is a gap in the Roman Numerals of the Brief and no issue is presented]

Issue VI.

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

ARGUMENT

Issue I & II.

DEFENDANT'S INDICTMENT WAS NOT DEFECTIVE NOR DID IT CONTAIN A FALSE STATEMENT.

Within these first two allegations of error defendant has raised issues regarding the sufficiency of the indictment. Specifically, the indictment referred to the offense as that of capital rape.

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(2)©).

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.

The indictment was clear, sufficiently pleaded to notify exactly for the crimes he was charged. There was no need to amend and there were no 'false' statements in the indictment. See also, *Evans v. State*, 916 So.2d 550 (Miss.App. 2005)(Mislabeling of charge).

There being no error in the language of the indictment no relief is deserved.

Issue III.

DEFENDANT WAS REPRESENTED BY CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

> ¶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).

Essentially, the only issue raised with specificity and much detail is the argument regarding the insufficiency of the indictment for including the word 'capitol' [sic] in the charges of the indictment. That issue was adequately covered above.

Based on the facts of this case there is no probability the outcome would have been different. Plus, the word capital was removed from the jury instructions.

There being no deficiency in trial counsel's performance no relief is warranted.

Issue IV.

THERE WAS NO DOUBLE JEOPARDY VIOLATION.

Counts three and four of the indictment are identical in language. They are done in that manner to charge the defendant with different instances of conduct.

The victim was six and testified she had sex four times with defendant. Once when the neighbor called police (Count I). Then she testified that there had been an instance at her Grandmother's House. (Count II). Further, that defendant had sex with her at twice out at his house (in the County). (Counts III & V).

So the indictment delineated them factually by location and time. Albeit Counts three & four are for the same conduct there is sufficient testimony that it occurred twice within that time period at that location.

The State would ask this Court to use the rationale, below:

> ¶ 7. Section 99-7-5 of the Mississippi Code provides that "stating the time [for an offense] imperfectly" does not render an indictment insufficient "where time is not of the essence of the offense...." Miss.Code Ann. § 99-7-5 (Rev.1994). We have nothing before us that would suggest that time was an essential element of this crime, nor is there any indication that the lack of specificity struck a critical blow to Little's defense, such as might be the case were Little attempting to establish an alibi defense. In Morris v. State, the Mississippi Supreme Court, suggesting some "employment of common sense" was in order, sustained a conviction on three counts of various forms of sexual abuse of a teenage girl by her stepfather even though the only proof as to time was that the events occurred on weekends or nights when the child's mother was not at home over a period from May to March of 1986. Morris v. State, 595 So.2d 840, 841-42 (Miss.1991). The court said:
>
> In this case, the victim's testimony amply illustrates the fact

> that the State could not narrow the time frame any more than it did. Defendant was fully and fairly advised of the charge against him. This assignment of error is without merit.

Little v. State, 744 So.2d 339 (Miss.App. 1999).

Further, defendant in his time of the stand appears to have admitted that he had the opportunity and was in contact with the victim. Otherwise it was a denial of having sexual contact with the child.

It is the position of the State there was no way to further define the date of the last two contacts other than by a general period of time at a specific location.

Under the rationale of *Little* where there was a basis for the charges in that manner and testimony by the girl of two separate incidences at that different location there is no double jeopardy violation.

Consequently, no relief should be granted on this allegation of error.

Issue V.

[There is a gap in the Roman Numerals of the Brief and no issue is presented]

Issue VI.

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

> ¶ 30. In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the trial court has abused its discretion in failing to grant a new trial. Montana v. State, 822 So.2d 954, 967(¶ 61) (Miss.2002). Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. Id. at 967-68."[W]e do not reverse criminal cases where there is a straight issue of fact, or a conflict in the facts; juries are impaneled for the very purpose of passing upon such questions of disputed fact, and we do not intend to invade the province and prerogative of the jury." Thomas v. State, 812 So.2d 1010, 1014(¶ 19) (Miss.Ct.App.2001) (quoting Evans v. State, 159 Miss. 561, 566, 132 So. 563 (Miss.1931)). 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. McKinney v. State, 521 So.2d 898, 899 (Miss.1988). "It is well settled in this State that a conviction of rape may be upheld with the uncorroborated testimony of the victim." Id.
>
> *Lee v. State*, 2005 WL 3111989 (Miss.App. 2005).

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). We have testimony of social workers regarding other times and locations. 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.

There was an abundance of evidence supporting every element of all the crimes and 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,

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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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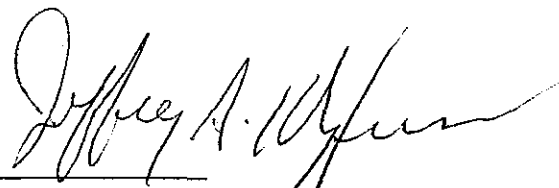
This the 22 day of May, 2006.



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