

IN THE SUPREME COURT OF MISSISSIPPI

COPY

MICHAEL PALMER

APPELLANT

VS.

NO. 2005-KA-01503-COA

STATE OF MISSISSIPPI

FILED

APPELLEE

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SUPREME COURT
COURT OF APPEALS

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of this Appeal. These representations are submitted that the Judges of the Court may evaluate possible disqualifications or recusal.

Michael Palmer, appellant

Stephen Nick, defense counsel

Joyce Chiles, District Attorney

Carol White-Richard, attorney

Matthew Eichelberger, attorney

William LaBarre, Attorney


Stephen Nick

TABLE OF AUTHORITIES

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STATEMENT OF ISSUES

1. Whether the trial court erred in denying the defendant's motion to continue the trial to obtain the services of an expert witness to assist with the defendant's preparation of his defense?
2. Whether the trial court erred in its' determination in applying the tender years exception to the hearsay rule for alleged sexual abuse victims pursuant to the Rules of Evidence., Rule 803 (25), specifically, its application regarding the alleged victims, Kendra McNeil and Kandice McNeil?
3. Whether the trial court erred in instructing the jury on the form of the verdict?
4. Whether the trial court erred in instructing the jury on the elements of attempted sexual battery?
5. Whether the trial court erred in instructing the jury on the elements of fondling?

Statement of Case

The appellant was indicted on four counts of sex offenses accusing the appellant of committing same against his step-daughters. He was convicted on three of the charges and the jury could not reach a verdict on one count. He appeals his convictions claiming error by the trial court. He further asserts the error was such that he is entitled to a reverse and remand of the matter on each of the three counts.

Summary of the Argument

The defendant filed a motion to continue the trial for the purpose of securing an expert witness to assist with his defense. The trial court denied the motion and the defendant argue that he was denied a fair trial because of the denial and same violated his constitutional right to a fair and impartial trial. The appellant argues that the trial court improperly instructed the jury in this matter. The trial court improperly instructed the jury on the form of the verdict wherein the trial court incorrectly charged that the defendant was charged with a crime that was not found in the indictment and said instruction was not simply harmless error, but, was of a serious prejudice to the defendant during jury deliberations.

The trial court held a hearing to ascertain the appropriate age of victims pursuant to the requirement found in Rule 803 (25) of the Rules of Circuit Court. Said hearing did not properly follow the mandate of the Supreme Court wherein the trial court is required to ascertain , not only, the chronological age, but, the emotional and mental age of the child.

The trial court did not properly instruct the jury on what constitutes an attempt to commit a crime. Further the trial court did not instruct the jury that the child victim was not required to give any consent to the alleged activity deemed to be a violation of law. The trial court did not properly instruct the jury what constitutes the crime of fondling. The statute specifically described the conduct and the type of intent required to be guilty of the crime of fondling.

ARGUMENT

ISSUE NO. 1

Whether the trial court erred in denying the defendant's motion to continue the trial to obtain the services of an expert witness to assist with the defendant's preparation of his defense?

The defendant executed a waiver of arraignment and same was filed on January 7, 2005. Thus, the requirement that the trial commence no later than two hundred seventy (270) days after the accused has been arraigned was tolled. See, 99-17-1 of the Mississippi Code of 1972 as amended.

The defendant filed his motion for discovery on January 10, 2005. The Office of District Attorney filed its notice of compliance and its intention to promptly supplement same on January 13, 2005.

The defendant filed a motion to continue on February 4, 2005 to secure the services of an expert witness and the trial court granted same on February 8, 2005.

The defendant filed a motion to continue trial on May 12, 2005 and subsequently filed three amended motions on May 16, 2005 setting forth his grounds to continue the trial set for May 18, 2005.

On May 18, 2005 defense counsel argued his motions before the trial court with opposition from the Office of the District Attorney. Argument appears at pages 2-8 of the trial record. The trial court denied the requested continuance, ruling appears at page 8 of the trial record.

Defense counsel argues that the expert witness has been located and agreed to be a witness. Further, trial counsel argues that said witness is crucial to the defendant and his counsel to his defense.

The requirement that the trial commence within 270 days of arraignment was well within statutory limits to assure a prompt trial, thus, the requested continuance was certainly not a delaying tactic employed by the defendant and should have been granted.

Section 99-15-33 of the Mississippi Code of 1972 as amended provides:

In all cases of application for continuance, it shall be lawful for the state or the defendant to make any admission of any fact sought to be proved by the other party by any absent witness, and such admission shall have the same effect as if the absent witness or other evidence were present in court, and no more; but if compulsory process will probably obtain the attendance of the absent witness, and the defendant have not have had opportunity of obtaining such process, the cause shall be continued, unless the defendant desire a trial.

The defendant cited the following authority as same for his requested continuance.

See, Ake v. Oklahoma, 470 U. S. 68, 76 (1985); Harrison v. State, 635 So. 2d 894 (Miss.1994); Griffin v. Illinois, 351 U.S. 12,17-19 (1956).

This Court held in Harrison,

"This Court weighs on a case by case basis whether denial of expert assistance for an accused is prejudicial to the assurance of a fair trial and will grant relief only where the accused demonstrates that the trial court's abuse of discretion is so egregious as to deny him due process and where his trial was thereby rendered fundamentally unfair."

"Failure to provide defendant with funds to retain assistance of forensic pathology and forensic odontology experts in capital murder trial denied defendant due process and was fundamentally unfair where testimony of state's expert was only evidence on crucial issue of whether defendant raped the victim."

This Court has held that in a prosecution of a defendant accused of committing a sexual assault on a minor victim that it is of fundamental importance for the trial court to not only ascertain the chronological age of the minor, but also, the trial court must make a factual deter-

mination of the alleged victim's mental and emotional age. This was not done in this matter and the appellant argues that his expert witness could have rendered valuable assistance in ascertaining the mental and emotional ages of the alleged victims in this matter.

See, Veasley v. State, 735 So. 2d 432.

In Lambert v. State, 654 So. 2d 17, the Court held the following:

"Defendant's entitlement to trial continuance was established by defendant's expressed desire to hire different attorney, extremely short period of time between arraignment and first trial, new counsel's previous trial commitments, and failure of State to supply discovery prior to trial and, thus denying defendant's motions for continuance violated defendant's right to fair trial, requiring reversal."

The defendant argues that his constitutional right to a fair trial was denied. His request for a continuance for the opportunity to secure the services of Dr. Angela Herzog to provide guidance and expert testimony at the trial was a reasonable request and should have been granted. There was no attempt on the part of the defendant to frustrate the intent and the requirement to try this matter within the 270 day time period as required by statute. Further, before trial the defendant's counsel was denied a reasonable opportunity to review the taped interviews of the alleged victims and a reasonable opportunity to review the credentials of the state's expert witnesses.

Consequently, the defendant's right to a fair and impartial trial was denied. Thus, the defendant respectfully moves the Court to reverse and remand this matter for the foregoing reasons.

Whether the trial court erred in its' determination in applying the tender years exception to the hearsay rule for alleged sexual abuse victims pursuant to the Rules of Evidence., Rule 803 (25), specifically, its application regarding the alleged victims, Kendra McNeil and Kandice McNeil,?

The appellant argues that the trial court incorrectly applied the tender years exception to the hearsay rule, thus, the convictions in this matter should be reversed and remanded.

Rule 803 (25) provides:

- (25) Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either, (1) testifies at the proceedings; or (2) is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

This Court in the matter; Veasley v. State, 735 So.2d 432 the following:

There is a rebuttable presumption that a child under the age of 12 is of tender years, for purposes of tender years exception to hearsay rule for alleged sexual abuse victims; where an alleged sexual abuse victim is 12 or older, there is no such presumption and the trial court must make a case-by-case determination as to whether the victim is of tender years.

Determination of whether alleged sexual abuse victim is of 12 or older is of tender years, for purposes of tender years exception to hearsay rule for alleged sexual abuse victims, should be made on the record and based on a factual finding as to the victim's mental and emotional age.

The following definitions appear in Random House, Unabridged Dictionary, pages 37,637 & 1201.

- age. 1. the length of time during which a being or thing has existed;
11. psychol. the level of mental, emotional, or educational development of a person, esp. a child, as determined by various tests and based on a comparison of the individual's score with the average score for persons of the same chronological age.

emotional.

1. pertaining to or involving emotion or the emotions.
2. subject to or easily affected by emotion.
3. appealing to the emotions.
4. showing or revealing very strong emotions.
5. activated, effected, or determined by often a wrong decision.
6. governed by emotion.

mental age, psychol.

the level of native mental ability or capacity of an individual, usually as determined by an intelligence test, in relation to the chronological age of the average individual at this level.

The alleged victims in this matter are Kendra McNeil whose date of birth is January 28, 1990, (page 327) and Kandice McNeil whose date of birth is May 13, 1992, (page 378).

The girls mother, Shreal Palmer testified that she first learned of the allegations on or about September 2, 2004 from a letter from Kendra. (pages 136,137). The mother testified that she reported the matter to the Leland Police Department on September 8, 2004. (Page 139)

The ruling of the trial court on the question raised by this issue appears at pages 248-254.

The appellant argues that the findings by the trial court regarding Rule 803 (25) are inconsistent with the directive of this Court as found in the Veasley case. Thus, the convictions should be reversed and remanded.

The alleged victims in this matter are sisters. At the time the mother was told of the situation, the oldest child was 14 years 7 months of age, the youngest child was 12 years three months of age.

The trial court ruled that the youngest child was of tender years and the oldest child was not. The finding of tender years as to the younger child is a rebuttable presumption. However, the trial court denied the defendant's request to continue the trial to secure the services of an expert witness to aid the defendant with the preparation of his defense. Consequently, the defendant was not able to present any evidence or testimony to rebut the trial court's finding that the younger child was a child of tender years, nor, was the defendant able to present any testimony or evidence of the mental and emotional age of the older child.

Further, the younger child was over the age of twelve at the time the allegations were made to the mother who acknowledged that she was not aware of the allegations before that date. I submit that the younger child should have been considered to be of age, 12, for the purposes of a determination of a tender years exception. As previously noted, this Court held:

"Where an alleged sexual abuse victim is twelve or older, there is no such presumption and the trial court must make a case-by-case determination as to whether the victim is of tender years. This determination should be made on the record based on a factual finding as to the victim's mental and emotional age. If the court finds that the declarant is of tender years, then it must still rule on the Rule 803(25)(a) and (b) factors before admitting the testimony."

See, Veasley v. State, 735 So. 2d 432

For the trial court to ascertain if a child is of tender years, the trial court must conduct a hearing that allows various tests to be performed with a comparison of the individual's score with the average score for a person of the same chronological age to ascertain the mental and emotional age of the declarant.

I submit a further consideration in this matter should be that the sisters are very close in age and the older sister made the allegations to their mother. Obviously, care should be exercised to ascertain the veracity of the allegations in the context of the sisters closeness in age.

Obviously, if the defendant had been given the opportunity to present expert testimony, his witness could have evaluated the family situation to assist with the evaluation of the credibility of the allegations.

The prosecution presented two expert witnesses regarding the allegations made by the sisters against their step-father in this matter. I do not find in the testimony of the witnesses any reference to the mental and emotional ages of the sisters. Nor is there any tests or other material to indicate that the experts attempted to ascertain the mental and emotional ages of the sisters related to the allegations and the status of a child of tender years as required by the Court's decision.

I submit the hearing as conducted by the trial court did not properly ascertain the mental and emotional ages of the two sisters in this matter. Thus, any testimony that was allowed by the trial court related to the allegations of the two sisters should not have been allowed and as a result the defendant was denied a fair trial and the convictions in this matter should be reversed and remanded.

ISSUE NO. 3

Whether the trial court erred
in instructing the jury on the
form of the verdict?

The appellant argues that the trial court erred in instructing the jury on the form of the verdict regarding each count of the four count indictment.

The form of the verdict instruction is number 15 found at pages 26, 27 and 28 of the Clerk's Papers in this matter.

The Mississippi Supreme Court held in Duvall v. State of Mississippi, 634 So. 2d 524, the following:

"A circuit judge has a responsibility to see that the jury is properly instructed."

The trial judge as to Count I incorrectly instructed the jury that the defendant was charged with Rape in Count I. Actually, the defendant was charged in Count I of the indictment with Sexual Battery pursuant to Section 97-3-95 1 (d) and 97-3-101 (3).

Further, the appellant argues that the crimes of sexual battery and rape are not synonymous inasmuch as each crime has different elements that must be proved beyond a reasonable doubt before a defendant can be found guilty. The appellant argues that to incorrectly instruct the jury as to the crime charged in the indictment is unfairly prejudicial to the defendant.

The jury stated the following at page 34 of the Clerk's Papers.

"We, the Jury, find that we cannot reach a unanimous verdict against the Defendant on Count I of the indictment.

The trial court as to Count II incorrectly instructed the jury that the defendant was charged with Attempted Rape as charged in Count II. The defendant was charged in Count II of the indictment with Attempted Sexual Battery pursuant to Sections 97-1-7 and 97-3-95 1 (c) of the Mississippi Code of 1972 as annotated.

The appellant argues that the crimes of attempted sexual battery and attempted rape are not synonymous inasmuch as each crime has different elements that must be proved beyond a reasonable doubt before a defendant can be found guilty. The appellant argues that to incorrectly instruct the jury as to the crime charged in the indictment is unfairly prejudicial to the defendant.

The jury stated the following at page 34 of the Clerk's Papers.

"We, the Jury, find the defendant guilty of Attempted Rape as charged in Count II of the indictment."

Obviously, the jury found the defendant guilty of a crime that he was not charged with and thus his conviction on Count II of the indictment should be reversed.

Further, the jury stated the following at page 34 of the Clerk's Papers.

"We, the Jury, find the defendant guilty of Fondling as charged in Count III of the indictment."

"We, the Jury, find the defendant guilty of Fondling as charged in Count IV of the indictment."

The defendant argues that inasmuch as the jury was improperly instructed that the defendant was charged with rape and attempted rape was so prejudicial that the verdicts in Counts III and IV are tainted and require reversal.

I cite the following cases as examples how confusing these matters can be regarding the indictment and the instructions as presented to a jury for consideration.

See:

McBrayer v. State, 467 So. 2d 467 (Miss 1985).

Hailey v. State, 537 So. 2d 411 (Miss 1988).

ISSUE NO. 4

Whether the trial court erred in
instructing the jury on the elements
of attempted sexual battery?

The defendant was indicted on a multi (4) count indictment alleging certain sexual offenses perpetrated by him on his step-daughters.

Section 97-1-7 provides in the part the following:

"Every person who shall design and endeavor to commit an offense,
and shall do any overt act toward the commission thereof, but
shall fail therein, or shall be prevented from committing same,..."

This Court has held that a failure to properly instruct the jury in a case alleging an attempt to commit a sex offense must be reversed, if, the jury is not adequately instructed on all the elements of what constitutes an attempt.

Instruction no. 8 (page 31 of the Clerk's Papers) purports to instruct the jury on the elements of the crime of attempted sexual battery. I submit the instruction fails for two reasons.

The instruction states in part:

"...he did unlawfully, willfully, and feloniously attempt to engage
in sexual penetration with Kendra McNeil, a female person,..."

the instruction fails to allege the following as required by statute and case law,

..., but shall fail therein, or shall be prevented from committing
same,...

This Court held in Armstead v. State, 716 So. 2d 576, 582 and 583, the following:

"Armstead correctly points out that this instruction does not mention the requirement that he either failed or was prevented from completing the act, which is a separate element of the offense."

"We do not consider it an inordinate burden on the state to include such an instruction."

Thus, I submit the instruction fails inasmuch as the jury was not properly instructed regarding the elements of what constitutes an attempt to commit a crime.

The defendant was indicted for attempted sexual battery in Count II of the indictment. Section 97-3-95 1 (c) of the Mississippi Code of 1972 as amended defines sexual battery as follows:

- (1) A person is guilty of sexual battery if he or she engages in sexual penetration with:
- (c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or

Section 97-3-97. Sexual battery, definitions

For purposes of sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:

- (a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body."

The subject instruction was amended in part by the trial court substituting the word (intercourse) with the word (penetration), but, the trial court failed to substitute the word (intercourse) with the word (penetration) subsequent to the phrase "the attempted".

Section 97-3-65 (5) of the Mississippi Code of 1972 as amended defines the term "sexual intercourse".

"For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female."

Obviously, the instruction states a conflict with the element of the type of sexual contact to be considered by the jury; whether same is sexual penetration or sexual intercourse. Each activity has a separate definition, thus, I submit the instruction fails to properly instruct the jury as to what constitutes attempted sexual battery.

For the foregoing reasons, the appellant respectfully moves the Court to reverse his conviction on Count II of the indictment.

ISSUE NO. 5

Whether the trial court erred in instructing the jury on the elements of fondling?

The appellant was indicted on Counts III and IV of violating the following statute, 97-5-23 (1) of the Mississippi Code of 1972 as annotated.

Section 97-5-23 provides in part the following:

- (1) "Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child under the age of sixteen (16) years, with or without the child's consent,..... shall be guilty of a felony and,....."

The defendant was found guilty by the jury of Counts III and IV of the indictment and argues that the jury was not properly instructed by the trial court on the elements of the statute, thus, his convictions on these two counts should be reversed.

As previously noted, the Court held in Armstead v. State, 716 So. 2d 576 that a conviction must be reversed if an instruction fails to instruct the jury on an essential element of the crime as charged in the indictment.

The instructions regarding this charge as found in Counts III and IV of the indictment can be found at pages 32 and 33 of the Clerk's Papers and are noted as Jury Instruction No. 9 and No. 10.

The instructions fail to instruct the jury that the alleged activity was (with or without the child's consent). Further, the charge is noted as fondling a child, however, the term, fondling (present participle of the verb, fondle: to stroke or handle in a tender and loving way; caress)

does not in and of itself describe a crime. Thus, the terms; (lust or depraved licentious) are elements of the crime and should be defined to properly instruct the jury of the elements of the crime.

lust... a strong sexual desire.

depraved.... corrupt; perverted; heinous.

licentious.... lacking or ignoring moral or legal restraint, esp.
in sexual activity.

The appellant would argue that the instructions fail to adequately describe the alleged criminal behavior that is charged in the indictment. A proper understanding of the legislature's intent to define the crime of fondling can only be understood by providing a definition of these terms. The statute is divided by the conjunction, or, which denotes that there are two possibilities. Thus, each possibility should be defined.

CONCLUSION

The defendant did not receive a fair trial inasmuch as his motion to continue the trial was denied depriving the defendant an opportunity to secure the services of an expert witness to assist with his defense.

The trial court did not properly ascertain the mental and emotional ages of the alleged child victims to ascertain their status as children of tender years, thereby, properly allowing hearsay testimony regarding their alleged statements to others.

The jury was not properly instructed on the form of the verdict, the elements of the crime of attempt and the elements of the crime of fondling.

CERTIFICATE

I, Stephen Nick, do hereby certify that I have this day mailed a true and correct copy of the foregoing, postage prepaid, to the following:

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This the 23 day of February, 2007.



Stephen Nick