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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREGORY BOONE

APPELLANT

VS.

NO. 2006-KA-0081

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREGORY BOONE

APPELLANT

vs.

CAUSE No. 2006-KA-00081-SCT

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Hinds County, First Judicial District, in which the Appellant was convicted and sentenced for his felony of

GRATIFICATION OF LUST

STATEMENT OF FACTS

The victim, thirteen years of age at the time of trial, testified that she was living with her mother, sister and a “godsister” on the weekend of 13 - 14 March 2004. The victim had a brother as well, but he was away from the house that weekend. The victim and her sister used the brother’s bedroom on that weekend since it was equipped with a television set.

The victim and her sister watched television that evening until their mother came home. She told them to go to sleep. They did so, though with the television set still playing.

During the night, the victim awoke to find that she was being touched. Her breast and buttocks were being rubbed. While this was being done, the man rubbed his member against her

legs. His legs were wrapped around hers. At that point the victim slipped out of bed and went to the livingroom, where her mother was sleeping. She told her mother what had just occurred; her mother turned on the lights and looked under the bed and around the bedroom. No one was found. The victim then went to the bedroom, woke her sister, and they stayed up the rest of the night with the lights on.

The next morning, a Sunday morning, the victim and her family went to church. Afterwards, the victim told her mother that "Cameo" was the one who touched her during the night. This "Cameo" was apparently in the house. (R. Vol. 2, pp. 59 - 70).

The victim's sister, Jamilla Densella Norwood, corroborated the victim's account of what they had been doing before they were told to go to sleep. She said that she asked her mother to let the television continue playing because she was scared. The girls had been watching a horror picture.

In the course of the night, Jamilla awoke and she saw "Cameo" walk past the television set. She knew it was he because of his head shape and his unusually shaped ears. She had known him for some two years and knew that he was a friend of her mother's. He was spending the night with the family because his house had burnt down.

Jamilla apparently thought nothing of the fact that "Cameo" was in the room at the time. She went back to sleep. She was later awoken by the victim, and the victim told her what had happened. The victim was frightened and shaking. "Cameo" is the Appellant. (R. Vol. 2, pp. 70 - 80).

The victim's mother testified. She stated that she came home from work at about half past eleven on the evening of March 13th. The victim and her sister were in their brother's bedroom, watching television. She told the children to go to bed, but she let them keep the

television on.

The Appellant rang the mother to ask her if he could stay the night, his house having burnt down. She agreed to let him do so. When he arrived, he made overtures to the victim's mother. She was tired, though, and she refused him.

The victim's mother fell asleep on the couch in the living room. The next thing she knew, the victim awakened her, telling the mother that someone was in her room. She told her mother that she had been touched. The victim was upset, was shaking like a leaf. The victim's mother went into the bedroom but did not find anyone in it, other than the other child. The mother then returned to sleep, thinking that perhaps the other child had touched the victim in her sleep.

The Appellant was in another bedroom, wrapped in a comforter. He was wearing no clothes.

The next morning, the mother found that the children had remained awake the rest of the night. The victim insisted that she had been touched and she was still upset. The Appellant was still in the house. The mother accused the Appellant of having molested the victim. The Appellant denied it. She refused to let him leave, telling him that she was calling the police. The Appellant dressed, gathered his things, but could not find his driver's license. (R. Vol. 2, pp. 87 - 113).

The Appellant was twenty eight years of age at the time he committed this felony. (R. Vol. 2, pg. 111). The victim was thirteen years of age at the time of trial, and, of course, younger than that at the time of the commission of the felony. (R. Vol. 2, pg. 59).

The Appellant presented one witness in an attempt to establish an alibi. This witness testified that he was a "rap artist." He testified that the Appellant was in a recording studio with

him on the weekend of 13 - 14 March. ~~The witness testified~~ that the recording session ended about three or four on Sunday morning. According to the witness, the Appellant stayed with him the remainder of the night. They returned to the studio at about ten o'clock Sunday morning. (R. Vol. 2, pp. 115 - 126).

STATEMENT OF ISSUES

- 1. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A CONTINUANCE?**
- 2. WAS THE VERDICT SUPPORTED BY THE EVIDENCE; WAS THE VERDICT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE?¹**

SUMMARY OF ARGUMENT

- 1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A CONTINUANCE**
- 2. THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE AND WAS NOT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE**

ARGUMENT

- 1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A CONTINUANCE**

The Appellant tells this Court that he was originally represented by the Hinds County Public Defender but that he later hired an attorney to represent him some two weeks prior to trial. He tells this Court that the retained attorney sought a continuance but that the trial court denied relief. (Brief for the Appellant at 3).

The record does indicate that the Appellant changed attorneys. (R. Vol. 2, pg.5). However, there is nothing in the record to show that the Appellant's substituted attorney sought a continuance or that, if there was such a motion, that relief was denied on such a motion. We also

¹ We have combined the Appellant's Second, Third, Fourth and Fifth Assignments of Error under this issue.

note that the Appellant has failed to cite to the record where such a motion was filed or made, or where relief on it was denied. In addition to being in violation of Rule 28(e) MRAP, this failure is especially noteworthy in view of the Appellant's otherwise scrupulous efforts to cite to the record. We find nothing in the record excerpts to support the Appellant's claim. On the other hand, we do find that the Appellant's attorney announced that he was ready for trial. (R. Vol. 2, pg. 5).

This Court may not and will not consider facts not contained in the appellate record. *Mason v. State*, 440 So.2d 318 (Miss. 1983). There is nothing in the record to show that a continuance was sought or that one was denied. This being so, the trial court simply cannot be put in error for having allegedly denied a continuance.

Since the record does not indicate that a continuance was sought or denied, there is nothing further we can say about the issue other than to note that the Appellant's argument in support of the First Assignment of Error is not supported by argument and citation of authority. (Brief for the Appellant at 10). While it may be that the Appellant has cited the Sixth Amendment, he in no way attempts to demonstrate that the trial court abused its discretion in denying the alleged motion for a continuance. The First Assignment of Error should be deemed abandoned for this reason. *Wall v. State*, 883 So.2d 617 (Miss. Ct. App. 2004).

The First Assignment of Error is without merit.

2. THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE AND WAS NOT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE

In considering the Appellant's Second Assignment of Error, we bear in mind the standards of review applicable to claims that the evidence was insufficient to support the verdict and that the verdict was opposed to the great weight of the evidence. *May v. State*, 460 So.2d

778 (Miss. 1984). Preliminarily, though, we note that the Appellant's motion for a directed verdict made at the conclusion of the State's case - in - chief was waived upon his presentation of a defense case - in - in chief. *Hubbard v. State*, 938 So.2d 287 (Miss. Ct. App. 2006). Since the Appellant did present a case - in - chief, his motion made at the conclusion of the State's case was waived, and it may not be considered here.

The evidence presented by the State, stated in summary form, was that the victim awoke to find a man in bed with her. This man was groping her breasts and buttocks, and his penis was touching her leg. While the victim could not identify this man, her sister, who was also in that bed, saw him by the light of the television. She knew it was the Appellant because the light from the television outlined his distinctive head and ears. The mother of the victim testified that the Appellant was the only man in the house that night. She further testified that the Appellant had previously pestered her for sexual favors on the night of the crime. The mother further testified that she found the Appellant in a bed but wearing no clothing. The Appellant was twenty - eight years of age at the time of the felony; the victim less than thirteen.

It is true that the Appellant presented an alibi defense, but for purposes of analyzing whether the evidence in support of the verdict was sufficient to permit the jury to find guilt, this evidence, as well as any other evidence opposed to the verdict of guilty, is to be ignored. The evidence in support of the verdict plainly would have allowed a reasonable juror to find that the Appellant touched the victim's breasts and buttocks for the purpose of gratifying his lust, in violation of Miss. Code Ann. Section 97-5-23.

We turn now to the claim that the trial court erred in denying relief on the Appellant's motion for a new trial.

It is true that the Appellant presented a case in alibi. The witness for the defense testified

that the Appellant was with him the entire night on the night that the crime occurred, as well as the day after. Whether this was to be believed was, of course, a matter for the jury to determine. That the jury rejected this testimony is no surprise.

There are several reasons this is so. First, the Appellant, in his desperate attempt to leave the victim's home, left his driver's license there. This fact surely shows his presence at the home, notwithstanding the alibi testimony. No attempt was made by the defense to explain away this fact. Secondly, the victim's mother and the children all testified that the Appellant was present at the home on the night of the crime, directly contradicting the alibi witness. No attempt was made by the defense to explain why the victim and her mother and sister would perjure themselves.

Given these considerations, it simply cannot be said that the verdict constitutes and unconscionable injustice. It was for the jury to determine whether to believe the improbable testimony for the defense. The State's evidence was not, as claimed here by the Appellant, full of contradictions and lack of corroboration. The trial court did not err in denying the Appellant's various motions for a directed verdict or for judgment notwithstanding the verdict and motion for a new trial. *Weathersby v. State*, 919 So.2d 1146 (Miss. Ct. App. 2005).

The Second Assignment of Error is without merit.

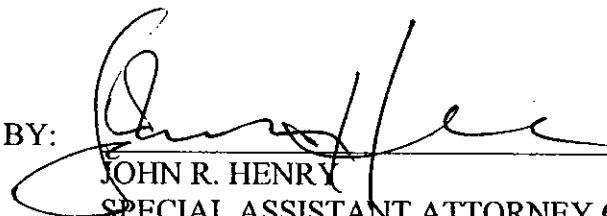
CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

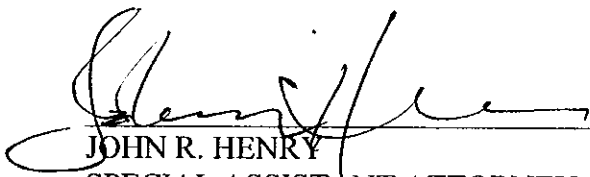
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 11th day of June, 2007.


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