IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.2006-KA-00799-COA

ANTHONY ROBINSON — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY

BRIEF OF APPELLANT ANTHONY ROBINSON

Oral Argument Is Not Requested

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I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

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5. Honorable Samac S. Richardson (Trial Judge)
   Circuit Judge
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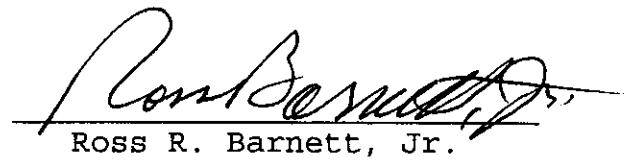

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2. There Was Insufficient Proof of Forcible Rape.

B. THE SENTENCE IMPOSED BY THE TRIAL COURT WAS EXCESSIVE.

V. STATEMENT OF THE CASE

A. PROCEEDINGS BELOW.

Anthony Robinson [Robinson] was indicted July 1, 2001, by a Grand Jury of Madison County for forcible sexual intercourse with Sheila Lacey [Lacey] in violation of Miss. Code Ann. § 97-3-65 (a).[1] CP 5, RE 13. Robinson was tried February 1, 2006, [CP 79, RE 16] convicted of forcible rape "as charged in the indictment," [CP 79, RE 16] and sentenced to 25 years in the state penitentiary. CP 80-81, RE 17-18. Robinson's motion for judgment not withstanding the verdict and for new trial [CP 82-83] and his motion to reduce or suspend his sentence [CP 89-90] were denied. CP 91, RE 23, CP 92, RE 24.

B. FACTS OF THE CASE.

Sheila Lacey called the sheriff's office during the early hours of Sunday, April 29, 2001. Deputy Otha "Jaybird" Brown was dispatched to her apartment in response to her call. T 51. Upon Deputy Brown's arrival, Lacey told him she had heard a knock on her

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[1]This statute deals with statutory rape, not forcible rape. This issue will be discussed below.

door and opened it, thinking it was her brother. She told Deputy Brown the visitor turned out to be Robinson, who lived in the same apartment complex. T 77. Lacey had known Robinson for "four of five" years. T 44. Robinson, she said, entered the apartment and raped her on the living room couch. T 77.

Deputy Brown took Lacey in his car to University hospital where a rape kit was collected from her. T 79. About an hour and a half later, Deputy Brown took Lacey back to her apartment. T 80. Brown then went to the apartment identified by Lacey as Robinson's and knocked on the door. T 82. Brown told Robinson he was being arrested for the rape of Lacey. T 83. Robinson denied the charge, saying that he'd been "nowhere near [Lacey] that night." T 101.

Brown took Robinson to Lacey's apartment and asked her if Robinson was the man who raped her. T 83. Lacey identified Robinson as her assailant. T 83. Brown was subsequently indicted for the rape of Lacey. CP 5, RE 13. As noted above, he was tried on that indictment, [CP 79, RE 16] convicted, [CP 79, RE 16] and sentenced. CP 80-81, RE 17-18.

VI. SUMMARY OF THE ARGUMENT

A. EITHER THE MOTION FOR DIRECTED VERDICT OR THE MOTION TO SET ASIDE VERDICT OR FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

1. There Was No Proof of the Violation Charged.

Robinson was charged with "forcible sexual intercourse with Sheila Lacey" in violation of Miss. Code Ann. § 97-3-65 (a). The Jury convicted Robinson of "forcible rape as charged in the

indictment." Yet, the code section recited in the indictment is about statutory rape, not forcible rape. This case must be reversed and judgment rendered acquitting Robinson.

2. There Was Insufficient Proof of Forcible Rape.

Where the evidence is such that on one or more elements of the offense charged no reasonable hypothetical juror could have resolved the issue against the defendant beyond a reasonable doubt, the Supreme Court has no authority to affirm and must order the defendant discharged. A reasonable jury could not have concluded beyond a reasonable doubt that the appellant, Anthony Robinson, raped Sheila Lacey. Robinson stipulated that he had consensual intercourse with Lacey around the date Lacey said she was raped. When Lacey's testimony is viewed in the light of Robinson's evidence, one can only conclude that Robinson should have been acquitted. At minimum, reasonable doubt existed as to the charge. A reasonable juror could not have determined otherwise.

While Lacey said Robinson had never been in her home prior to the night she said she was raped, Robinson had an intimate knowledge of her family and of the layout and furnishings of her home consistent with his testimony that the two had an ongoing relationship. Robinson's elderly aunt confirmed Robinson's testimony that Lacey had given him gifts.

A reasonable jury could only have concluded that, at minimum, there existed reasonable doubt that Anthony Robinson was guilty of the rape of Sheila Lacey. No reasonable hypothetical juror could have found otherwise. For that reason, this case must be reversed.

B. THE SENTENCE IMPOSED BY THE TRIAL COURT WAS EXCESSIVE.

This Court has said that unduly harsh sentences may not meet constitutional muster. The proof in this case was weak indeed. Mr. Robinson had no previous conviction. Yet, Robinson was given a sentence of 25 years. Appellant respectfully suggests that the sentence is manifestly disproportional, violative of the eighth amendment to the United States Constitution, and violative of the Mississippi Constitution of 1890, section 28. At minimum, this case should be remanded for resentencing.

VII. ARGUMENT.

A. EITHER THE MOTION FOR DIRECTED VERDICT OR THE MOTION TO SET ASIDE VERDICT OR FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

1. There Was No Proof of the Violation Charged.

Robinson was charged with "forcible sexual intercourse with Sheila Lacey" in violation of Miss. Code Ann. § 97-3-65 (a). CP 5, RE 13. The Jury convicted Robinson of "forcible rape as charged in the indictment." CP 78, RE 15. Yet, the code section recited in the indictment, § -65 (a), had nothing to do with forcible rape. Rather, it prescribed a penalty for statutory rape where the convict is between 18 and 21 years of age. In short, Robinson was convicted for a statutory violation for which he was not indicted. It has long been the law in Mississippi that a person cannot be indicted on one offense and convicted of another or convicted of a crime for which he was not charged. *See Talley v. State*, 174 Miss. 349, 164 So. 771 (Miss. 1936), and *Dees v. State*, 151 Miss. 46,

117 So. 369 (Miss. 1928). For that reason alone, this case must be reversed and judgment rendered acquitting Anthony Robinson of all charges.

2. There Was Insufficient Proof of Forcible Rape.

It is an ancient principle of law in Mississippi jurisprudence that, while a verdict of a jury should not be lightly set aside, a conviction cannot be permitted to stand where the verdict is clearly not supported by evidence. *Allen v. State*, 1 Miss. Dec . 126 (1885); *Conner v. State*, 632 So. 2d 1239 (Miss.), *cert. denied*, 115 S. Ct. 314, 130 L. Ed. 276 (1993). Moreover, the state must make its case to a moral certainty. An accused need only raise reasonable doubt of guilt to be entitled to an acquittal. *Cumberland v. State*, 110 Miss. 521, 531, 70 So. 695, 696 (1915). Where the evidence is such that on one or more elements of the offense charged no reasonable hypothetical juror could have resolved the issue against the defendant beyond a reasonable doubt, the Supreme Court has no authority to affirm and must order the defendant discharged. *Bullock v. State*, 447 So. 2d 1284, 1287 (Miss. 1984).

A reasonable jury could not have concluded beyond a reasonable doubt that the appellant, Anthony Robinson, raped Sheila Lacey. There is no question but that Robinson had intercourse with Lacey around the date Lacey said she was raped. He stipulated that his semen was found inside her. T 41, T 172. Robinson, though, testified that he had sexual relations with Ms. Lacey with her consent on the night of April 27 (Friday) or during the early morning hours of April 28 (Saturday) [T 172] and that he did not

rape her during the early morning hours of April 29 (Sunday), as she testified. When Lacey's testimony is viewed in the light of Robinson's evidence, one can only conclude that Robinson should have been acquitted. At minimum, reasonable doubt existed as to the charge. A reasonable juror could not have determined otherwise.

Robinson, who held a job with the Madison County School district [T 156] and had no previous convictions [T 238], testified that he had an ongoing relationship with Sheila Lacey. T 161. That Lacey knew Robinson prior to April 29 is unquestioned. She told investigating Deputy Eddie Clark that she knew Robinson from the Neighborhood. T 112. She apparently had known him for four or five years. T 44.

Robinson testified that he used to "go" with Lacey. He had met her at an establishment called "Dee's Nightclub" shortly after he had moved to the Canton area. T 161. The two, he said, were frequently intimate [T 166]. Lacey also would occasionally send him gifts, such as money and cigarettes. T 163. One Valentine's Day she sent him a "red bag with a heart in it" that contained "some Hershey's Kisses . . . and a card" signed "Love, Sheila Lacey," as well as "a little napkin with some perfume on it . . . ." T 162. Robinson's elderly aunt, Stella Washington, with whom he lived at the time of his arrest, verified that Lacey did indeed give Robinson such gifts. T 128. Robinson testified he'd been a guest in Lacey's home on numerous occasions. She had often cooked for him. T 166, T 168.

Certainly Robinson demonstrated an intimate knowledge of Lacey's apartment and family life that he could not have gained from barging into her apartment on one occasion, raping her on the living room couch, and leaving, as Ms. Lacey alleged. For instance, Robinson knew Lacey had three girls and a little boy. T 163. He knew she had a brother named Leon, [T 165] and that she had a sister named Greta. T 165. He knew where her children slept in the apartment. T 164. Robinson also knew the layout of the apartment and provided a detailed description of Lacey's bedroom. T 164-65. Robinson also testified that he knew and talked with Lacey's children. T 168. His knowledge of her home situation proved he had been in her apartment more than the one time to which Lacey testified.

Lacey did not deny the truth of the details to which Robinson testified concerning her home and family. Neither did the state offer any witnesses other than Lacey to dispute what Robinson said about his relationship with Lacey.

Other aspects of Lacey's testimony didn't fit the facts, either. For example, Lacey testified that on the night of the alleged rape she opened the door to Robinson because the person knocking identified himself as Junior, her brother. T 49. Are we to believe that Lacey had known her brother all his life--over thirty years--yet couldn't recognize his voice? Before he raped her, Lacey said, Robinson hit her in the face with his fist "maybe about four" times. T 50. Deputy Jaybird Brown tried to bolster that allegation with his vague testimony concerning a supposed "scar mark" or "skin mark" on her face the night he investigated,

but he was never very clear about the nature of the supposed injury. T 77. Moreover, neither he nor anyone at the hospital took any photos of her to document the alleged "scar mark" or "skin mark." T 86.

In all probability, such a bruise never existed. It is hard to imagine that both the hospital and the sheriff's office would have failed to photograph a bruise on a woman who said she was raped. What is more, Deputy Eddie Clark, who interviewed Lacey three days later, testified that he remembered no marks on Lacey. T 112. Anyone who has been bruised knows that bruises usually look their worst about three or four days after they are sustained.

Lacey also said that when Deputy Brown brought Robinson by her apartment the Deputy pulled a piece of her hair from Robinson's beard. T 54-55. Yet the Sheriff's department did not have the alleged hair analyzed. The Sheriff's department, in fact, did not even collect and preserve the hair. T 83.

No one should be convicted of a crime as infamous as rape on such flimsy evidence. Plainly, Robinson gave a reasonable account for the physical evidence before the Court: he had an ongoing intimate relationship with Lacey. Plainly, Robinson knew details about Lacey, her apartment, and her family he could not have known from barging in for a few minutes and forcing himself on an unwilling victim. Clearly there was reasonable doubt that Anthony Robinson was guilty of the rape of Sheila Lacey. No reasonable hypothetical juror could have found otherwise. For that reason, this case must be reversed. *Bullock v. State*, 447 So. 2d 1284, 1287 (Miss. 1984),

B. THE SENTENCE IMPOSED BY THE TRIAL COURT WAS EXCESSIVE.

Appellant recognizes that the general rule in this state is that a sentence should not be disturbed on appeal so long as it does not exceed the maximum term allowed by statute, *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992), and Anthony Robinson's sentence herein does not exceed that maximum. This Court, though, has also held that unduly harsh sentences may not meet constitutional muster. *Clowers v. State*, 522 So. 2d 762, 764 (Miss. 1988).

In the instant case, the proof of rape against Anthony Robinson was weak indeed. Mr. Robinson had no previous conviction. T 238. Yet, Anthony Robinson was given a sentence of 25 years. Appellant respectfully suggests that the sentence is manifestly disproportional, violative of the eighth amendment to the United States Constitution, and violative of the Mississippi Constitution of 1890, § 28. At minimum, this case should be remanded for resentencing. *See Davis v. State*, 724 So. 2d 342 (Miss. 1998).

VIII. CONCLUSION.

The foregoing considered, appellant Anthony Robinson prays that this Court will reverse the judgment of the court below and render judgment acquitting him of the charge of rape herein. In

the alternative, appellant prays that this Court will reverse this case and remand it for a new trial or resentencing.

Respectfully submitted,

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IX. PROOF OF SERVICE

I, the undersigned counsel of record for the Appellant certify that I have this day caused to be served by United States Mail, postage prepaid, a copy of the foregoing to the following persons:

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2. Honorable David Clark
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   Honorable Jamie McBride
   Honorable Scott Rogillio
   Assistant District Attorneys and Prosecutors
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3. Honorable Samac S. Richardson (Trial Judge)
   Circuit Judge
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This the 27th day of December, 2006.

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X. APPENDIX

§ 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

(i) Is at least fourteen (14) but under sixteen (16) years of age;

(ii) Is thirty-six (36) or more months younger than the person; and

(iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

(i) Is under the age of fourteen (14) years;

(ii) Is twenty-four (24) or more months younger than the person; and

(iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under paragraph (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars ($5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under paragraph (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars ($10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under paragraph (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years.

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under paragraph (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4) (a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6) 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.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 28. Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed.

SOURCES: 1817 art I § 16; 1832 art I § 16; 1869 art I § 8.