IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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COURT OF APPEALS

THOMAS LEE BROWN — APPELLANT

VS. — NO. 2006-KA-0979

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS THE INDICTMENT 5

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS THE APPELLANT'S CONFESSION 7

3. THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE 14

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

STATE CASES

Baker v. State, 930 So.2d 399 (Miss. Ct. App. 2005) 6, 11

Barnes v. State, 906 So.2d 16 (Miss. Ct. App. 2004) 7

Bryant v. State, 853 So.2d 814 (Miss. Ct. App. 2003) 10

Dabney v. State, 772 So.2d 1065 (Miss. Ct. App. 2005) 13

Dobbs v. State, 726 So.2d 1267, 1271 (Miss. Ct. App. 1998) 11, 12

Frei v. State, 934 So.2d 318, 326 (Miss. Ct. App. 2006) 6

Johnson v. State, 760 So.2d 33 (Miss. Ct. App. 2000) 11

Kiker v. State, 919 So.2d 190 (Miss. Ct. App. 2005) 15

Mason v. State, 440 So.2d 318 (Miss. 1983) 12

May v. State, 460 So.2d 778 (Miss. 1984) 14

Moses v. State, 795 So.2d 569 (Miss. Ct. App. 2001) 6

Skinner v. State, 751 So.2d 1060, 1066 (Miss. Ct. App. 1999) 10

Wilcher v. State, 697 So.2d 1087 (Miss. 1997) 16

STATE STATUTES

Miss. Code Ann. Section 99-7-21 6

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

THOMAS LEE BROWN **APPELLANT**

vs. **CAUSE No. 2006-KA-00979-COA**

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 DeSoto County, Mississippi in which the Appellant was convicted and sentenced for his felony of **GRATIFICATION OF LUST**.

STATEMENT OF FACTS

The victim testified that she was born on 30 December 1986 and that the Appellant is her stepfather's brother. She testified that when she was thirteen years of age the Appellant "touched her inappropriately."

The Appellant did this when the victim's parents were gone and when she stayed with her grandmother. The Appellant lived with his mother, who apparently was the victim's grandmother. The Appellant touched the victim's feet and sometimes touch other parts of her body while he masturbated. He occasionally touched her breasts while pleasuring himself. This occurred frequently.

The victim did not tell her parents or her grandmother because she was frightened of the Appellant. The Appellant was much older than she, and he told her that, if she ever told anyone and he went to jail, he would hurt her mother.

At some point after the Appellant began doing this to the victim, the grandmother died. The Appellant then came to live with the victim's family. The Appellant took every opportunity that presented itself to touch the victim and to masturbate while doing so. The Appellant continued this until the victim reached sixteen years of age. He stopped when she told him that she was going to turn him in.

The Appellant's conduct toward the victim came to light after the Department of Human Services had contact with the victim. In consequence of that contact, the victim told law enforcement of what the Appellant had been doing. It appears, however, that the victim told the employees of the Department of Human Services that the Appellant had not touched her in the ways she testified to. (R. Vol. 2, pp. 116 - 132). She said she told them that because they threatened to take her brothers and sisters away from her mother. (R. Vol. 3, pg. 134).

Michael Callender, an investigator with the Horn Lake Police Department, testified that an arrest warrant was issued for the Appellant on 12 January 2005. The Appellant was arrested and given his *Miranda* rights. The Appellant was read his rights and he affixed his initials next to each warning. The Appellant then indicated that he wished to waive his rights and cooperate with the police.

The Appellant was asked whether he had touched the victim in a sexual way. The Appellant initially denied having done so. The police indicated that they had some items of evidence, and the Appellant then recanted his denial and admitted his actions against the victim. The Officer admitted that the items of evidence they said they had did not exist. (R Vol. 3, pp.

136 - 151).

The evidence invented by the police was the result of a "Alternate Light Source Test." The result of that test, said the police, was that semen was found all over the walls and floors of the residence in which the victim and the Appellant lived. Upon being told that, the Appellant admitted what he had done with respect to the victim. He told the officers that he had indeed touched the victim's feet and masturbated. He told them that he had ejaculated in different parts of the house, that he thought he had touched her feet and masturbated between twelve and fifteen times, and that he had done nothing else to her. He told them that he had a foot fetish. (R. Vol. 3, pp. 152 - 173).

The Appellant was thirty - four years of age at the time of trial. (R. Vol. 3, pg. 196).

The Appellant produced a case - in - chief. His first witness was one Viola Shenks, who testified that she had known the victim for a long time, that the Appellant had his own room, and that the victim told her that the allegations regarding the Appellant's conduct toward the victim were not true. The Appellant is one of her brothers. While she testified that she loved her brother, she also testified that she did not contact the police about what the victim supposedly told her. She had no explanation for having failed to notify the police, though she did somehow remember to tell the Appellant's attorney. (R. Vol. 3, pp. 179 - 187).

Another of the Appellant's sisters testified that the victim never seemed to be frightened of the Appellant. The victim never made any statements to this sister about the Appellant except once, when the victim was said to have been kicked out of her parents' home. At that time the victim said something to the effect that it was not her idea. This comment was prompted by the Appellant's sister's comment that it wasn't right that her children could not see the Appellant. This sister too failed to relate the victim's comment to the police, though she also managed to

remember to tell the defense attorney. (R. Vol. 3, pp. 188 - 196).

The Appellant testified. He said he did not touch the victim in an inappropriate manner. He said he never touched her at all. He said he did not masturbate on her.

He further testified that he could not read. He could write his name. He claimed to have only a sixth grade education. On the day he was given his *Miranda* rights, he said he had been drinking vodka and could not understand what was being said to him. He did not tell the police officers that he had been drinking. He did not recall telling the officers that he touched the victim's feet and masturbated over her. The Appellant adamantly denied having touched the victim's feet: He said he even refused to massage his mother's feet, even though she needed them massaged for health reasons. (R. Vol. 3, pp. 196 - 214).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING TO DISMISS THE INDICTMENT?

2. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS THE APPELLANT'S CONFESSION?

3. WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS THE INDICTMENT

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS THE APPELLANT'S CONFESSION

3. THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS THE INDICTMENT

In the First Assignment of Error, the Appellant alleges – tediously, we might say – that the indictment was insufficiently specific as the dates he was alleged to have fondled the victim.

The Appellant was indicted in a multi - count indictment. He was alleged to have fondled several children of both sexes. As to the victim in the case at bar, the acts of fondling were alleged to have occurred from 1 January 1994 to 31 January 2004. The count of the indictment concerning the victim was severed and tried separately. (R. Vol. 1, pp. 8 - 10). We do not find that the Appellant objected to the indictment at any time prior to trial.

After the jury was selected, the State moved to amend the indictment with respect to the victim in this case. Specifically, the State moved the trial court to amend the dates charged in the indictment to a period between January 1999 and 31 January 2004. The reason given for the motion was that the prosecutor, in talking with the victim, believed that the acts committed by the Appellant before 1999, while inappropriate, did not rise to the level of fondling. (R. Vol. 2, pp. 100 - 101).

Naturally, counsel for the Appellant objected. It was said that the indictment was defective for having failed to specify dates for the instances of fondling. However, he conceded that the amendment would not prejudice the defense. (R. Vol. 2, pp. 101 - 103).

The trial court allowed the amendment, finding that, if anything, the amendment was of some benefit to the defense. As for the claim that the indictment was defective for being insufficiently specific, the trial court denied relief on the Appellant's motion, holding that the law was clear that indictments in sex crime cases need not allege specific dates. (R. Vol. 2, pp. 104 -

105).

First of all, we think that the Appellant's motion to dismiss the indictment on account of its alleged insufficiency in alleging dates for the commission of the felony was too late. The jury had been selected. It was only then that the Appellant made this claim. In *Baker v. State*, 930 So.2d 399 (Miss. Ct. App. 2005), the Court noted that Miss. Code Ann. Section 99-7-21 requires objections to an indictment appearing on the face of the indictment to be raised, in non-capital cases, before the jury is impaneled. *Baker*, at 404. The Appellant did not raise his objection in a timely fashion. The issue is not properly before the Court.

Assuming for argument that the First Assignment of Error is before the Court, notwithstanding the foregoing reason why it is not, but not intending to waive that reason, there is no merit to the claim.

The trial court was correct in its rulings. Specific dates are not required in indictments in sex abuse cases so long as the accused is fully and fairly informed of the charge against him. *Frei v. State*, 934 So.2d 318, 326 (Miss. Ct. App. 2006); *Baker v. State*, 930 So.2d 399 (Miss. Ct. App. 2005). While the Appellant complains on, and on, about lack of sufficient notice, the simple fact is that this Court and the Mississippi Supreme Court have consistently held that indictments like that at bar are sufficient to provide adequate notice.

The one decision cited by the Appellant that requires comment is *Moses v. State*, 795 So.2d 569 (Miss. Ct. App. 2001). In that decision, the indictment contained some twenty - two counts alleging rape, sexual battery and gratification of lust. There were different victims, and some of the counts did not allege a date of occurrence or a range of dates. However, it appears that the State was in possession of information that would narrowed the range of dates. For whatever reason, though, the indictment was not amended for this purpose. The defendant in that

case was tried on all counts.

The facts in *Moses* are easily distinguishable. In the case at bar, the Appellant was put to trial on only one count of the multi - count indictment. While the range of dates was originally a ten-year period, once the State discovered that the period involved was less than that it sought to amend the indictment. There is no indication here that the State had information that would have narrowed the range to a period less than five years. Furthermore, there was no confusion among the counts and the victims, as there was in *Moses*. The Appellant's reliance upon *Moses* is misplaced. *Barnes v. State*, 906 So.2d 16 (Miss. Ct. App. 2004).

The Appellant seeks to avoid this by complaining that the State should have discovered the lesser range of dates at the time the Grand Jury considered the case against the Appellant. That comment, of course, assumes that the State could have known of it at that time. In any event, we fail to see any prejudice to the Appellant. He was in fact benefitted by the amendment.

The Appellant claims that he was prejudiced by the lack of specific dates. However, he did not in the court below show specifically how he was prejudiced. He does not attempt to do so here. There is simply no indication of prejudice. The defense was a simple denial of having ever fondled the victim. The defense was available for any period of years. The Appellant does not suggest that some other defense might have been available.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS THE APPELLANT'S CONFESSION

In the Second Assignment of Error, the Appellant contends that the trial court erred in refusing to suppress his confession. While the Court will have to struggle through many unnecessary pages of argument, the Appellant claims that the trial court erred because: (1) the

Appellant was illiterate and drunk and did not understand the *Miranda* warning; and (2) because the police lied to the Appellant about evidence they claimed they were in possession of. Not surprisingly, though, the Appellant has not troubled himself to set out the evidence adduced during the suppression hearing.

In the suppression hearing, the Appellant testified that he was thirty-four years of age and illiterate, unemployed, and that he had been drinking when he was arrested and made his confession. He said that he did not read the statement the officers wrote out for him, after he confessed, because he could not read. The Appellant said that the statement he made was not true because he had been drinking and because he had Cheetos on his fingers.

The Appellant also stated that it was not unusual for people to read things to him. He had no trouble understanding what was read to him. (R. Vol. 2, pp. 21 - 27).

The police officers then testified. Michael Callender. He said that an Officer Zacharias and he read the Appellant the *Miranda* rights. The Appellant stated to them that he understood them and initialed the form. The Appellant then waived his rights.

The Appellant did not tell the officers that he could not read and write. He did tell them that he had difficulty in reading and writing. Each and every one of the *Miranda* rights was read to the Appellant, and the Appellant told the officers that he understood them.

Callender observed nothing about the Appellant's demeanor to indicate that the Appellant was drunk or under the influence of alcohol. He did not smell alcohol on the Appellant's person. The Appellant's speech was not slurred. The Appellant did not stumble. The Appellant was alert and answered questions put to him. The Appellant simply gave no indication at all of being intoxicated. Callender further testified that he would not have questioned the Appellant had he some indication that the Appellant was intoxicated.

Officer Zacharias wrote down the oral statement the Appellant made. Zacharias then went over the written statement with the Appellant. The Appellant initialed each statement Zacharias wrote down. The Appellant indicated that he understood what was being read to him and the correctness of it. He gave no indication of a problem in understanding what he was doing or saying.

The Appellant was not threatened or coerced into making the statement; neither was he promised lenity. The Appellant had been in custody for several hours before he gave his statement. (R. Vol. 2, pp. 9 - 22).

Officer Zacharias then testified. He corroborated Callender's statement. He also testified that the Appellant gave no evidence of intoxication. He said that he wrote down the questions asked of the Appellant and the Appellant's answers, and then read them back to the Appellant. The Appellant initialed each response. The Appellant did not state that he had a problem in understanding what he was doing, and he never asked for an attorney.

Zacharias also testified that before the Appellant made his confession, the officers told the Appellant that his semen had been found in the house after the house was subjected to a "Alternate Light Source test". This statement to the Appellant was in fact untrue. After the Appellant was told that, he admitted "to everything else, except for the boys and an animal." (R. Vol. 2, pp. 22 - 31).

In argument to the trial court, the defense asked the court to suppress the Appellant's confession because the Appellant did not know what he was doing and because the Appellant was lied to. (R. Vol. 2, pp. 32; 34 - 35). The trial court denied relief on the Appellant's motion to suppress in a detailed finding of fact. (R. Vol. 2, pp. 35 - 38)

Once a trial court has determined, at a preliminary hearing, that a confession is

admissible, an appellant bears a heavy burden in attempting to reverse that decision here. So long as the trial court applied the correct legal standards, it decision will not be disturbed here unless its decision is contrary to the overwhelming weight of the evidence or is manifestly wrong. Where the evidence is in conflict, this Court will generally affirm the trial court's ruling. *Skinner v. State*, 751 So.2d 1060, 1066 (Miss. Ct. App. 1999).

It is true that the Appellant said he was intoxicated. However, it is likewise true that the Officers indicated that they observed nothing to indicate to them that the Appellant was drunk or impaired. Beyond that, even if it were believed that the Appellant might have had something to drink on the day of his arrest, the interview in which he gave his confession did not occur for until several hours had passed from the time of arrest. The testimony from the officers was that the Appellant was alert and responsive to their questions. The trial court's decision to reject the Appellant's testimony on this point is neither contrary to the great weight of the evidence nor manifestly incorrect. *Bryant v. State*, 853 So.2d 814 (Miss. Ct. App. 2003).

As for the claim that the Appellant was illiterate, it appears that he told the officers this. What they did then was write down the questions they put to him and his answers to them. Then they went over the written statement, question by question. The Appellant acknowledged the accuracy of the statement by initialing each one. The apparent fact of the Appellant's illiteracy was not used to his disadvantage.

It was not demonstrated that the Appellant was mentally retarded. While he here attempts to make that claim, by saying that he had only a sixth grade education, that is no proof that he was simply incapable of understanding what he was doing. Illiteracy is, of itself, no certain evidence of mental impairment. The officers testified that the Appellant knew what he was doing, understood what was said to him. The trial court observed the Appellant as he testified,

both during the suppression hearing and the trial. The Appellant's testimony gives no indication of mental incapacity. The trial court's decision concerning that claim is not erroneous. *Johnson v. State*, 760 So.2d 33 (Miss. Ct. App. 2000).

As for the fact that the Appellant was lied to by the officers, it is well established that the fact that an accused is lied to is no ground to suppress a confession. *Baker v. State*, 930 So.2d 399, 408 (Miss. Ct. App. 2005). Given the totality of the circumstances – the facts that the Appellant was given his *Miranda* rights and appeared to understand them, that he waived them, that he was alert and responsive and understood what was happening – it cannot be said that the trial court was manifestly in error for refusing to suppress the confession on account of the fib told by the police.

Now here, though the efforts of the Criminal Appeals Clinic at the University of Mississippi School of law, the Court is treated to a number of diversions from the facts and law of this case.

The Appellant first claims that the trial court did not "enumerate on the record the factors in which (*sic*) the State had proven beyond a reasonable doubt. . . ." (Brief for the Appellant at 20). Actually, the trial court gave a detailed finding of fact, addressing the three reasons advanced by the Appellant for suppression of his confession. Beyond this, the Appellant cites no authority for the proposition that a trial court is required to "enumerate" factors. On the other hand, it seems clear that there is no such requirement for an explicit finding. *Dobbs v. State*, 726 So.2d 1267, 1271 (Miss. Ct. App. 1998).

The Appeals Clinic then says that it is "undisputed" that the Appellant has "a very low intellectual capacity." Actually, this is disputed by the State. There was no testimony by an expert in the area about the Appellant's IQ, or whether he suffered from defect of mind. Once

again, illiteracy and the failure to succeed academically do not necessarily establish low intellectual capacity. In fact, the Appellant himself testified that it was not low mental function that caused his poor academic performance. He said it was on account of the fact that he was not interested in school. (R. Vol. 3, pg. 200).

The Appeals Clinic then suggests that the *Miranda* warnings were given in a merely ceremonial way. This is nothing more than the Clinic's opinion. There is nothing to support this claim, and it should be ignored. Likewise, the claim that the trial court was being "deferential' to law enforcement finds no support.

The Clinic then says the Appellant was coerced by "subtle" tactics. These tactics included the wearing of police uniforms and badges – and guns even! First of all, coercion was not the basis for suppression of the confession. It was the claim that the Appellant was drunk, dumb and lied to. The Appellant may not add to those claims here a further claim that he was "coerced." Beyond this, contrary to the alternative universe of facts the Clinic is inhabiting, it was by no means established that the Appellant was drunk and mentally retarded.

The Clinic then goes on to complain that the interview with the Appellant was not recorded. It even goes so far as to cite a said - to - be American Bar Association report concerning the use of recording devices. As for the report and argument thereon, the report is not a part of the record, and in no way did the Appellant advance this argument at trial. It may not be considered here. *Mason v. State*, 440 So.2d 318 (Miss. 1983). As for the argument, since it was not advanced at trial, it may not be advanced here. In any event, there is no authority – and the Clinic cites none – to the effect that law enforcement must record interviews. There is, on the other hand, authority that no such requirement exists. *Dobbs v. State*, 726 So.2d 1267, 1270 fn.2 (Miss. Ct. App. 1998).

Given *Dobbs*, there is no need to consider the decisions cited by the Clinic from other jurisdictions concerning the necessity to record interviews. Those decisions, in any event, carry no weight as authority here. The United States Supreme Court has not required it as a matter of constitutional law; if it should become a requirement of State law, that will be a decision left to the legislature or the Mississippi Supreme Court.

The Clinic, continuing on with its endless brief, then says that the trial court erred by employing the wrong standards. This is manifestly untrue. It is true that the trial court stated that it might have been a good thing to have had a video recording, but, given the context of the statement, it is simply untrue that the court was expressing doubt about the sufficiency of the State's evidence.

The Clinic apparently believes that because the Appellant was functionally illiterate, he was retarded. This is simply a false conclusion. There was no evidence of low mental function on the part of the Appellant; only that he did not like to study. In any event, the fact that an accused is of low intelligence is not a fact requiring suppression of his confession. *Dabney v. State*, 772 So.2d 1065 (Miss. Ct. App. 2005).

As for the claim that the court did not state what legal standard was being employed, there was no requirement for this. It is evident that the court was making findings of fact concerning the issues raised by the Appellant. This was entirely sufficient.

The rest of the Clinic's argument is an oratorical flourish and needs no response.

The Second Assignment of Error is without merit.

3. THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In the Third Assignment of Error, the Appeals Clinic natters on at great length as to why the trial court should have ordered a new trial. Most interesting about the claim of many and great inconsistencies, is the amusing attempt by the Clinic to whistle past the fact that the Appellant confessed to having fondled the victim. They do not even mention it. But we will.

In considering the Third Assignment of Error, we bear in mind the standard of review applicable to the claim. *May v. State*, 460 So.2d 778 (Miss. 1984)

The evidence in this case was that the Appellant, a foot fetish fondler, touched the victim's feet from time to time over the space of years while he masturbated. On at least one of those occasions, he also touched the victim's breasts. The Appellant confessed to this. There is no claim that this evidence was insufficient to support the verdict.

The Appellant says, though, that there were inconsistencies and contradictions in the testimony. He also says that the victim admitted that she lied about what he had done to her on one occasion. In an effort to demonstrate his claim, he examines the testimony on a molecular level.

The victim did admit that she initially lied when she told a relative that the Appellant did not commit fondling of her. This state of affairs is not unusual in cases of this kind.

As for the lie, the victim explained why she did so. She was afraid that her brothers and sisters would be taken in by the Department of Human Services. When one examines the indictment in this case, one will understand that there was a chance this would happen. While the felony committed against the victim in the case at bar was tried separately, it is evident that the Appellant did not limit his sexual attention to her. It is understandable why the jury was not

informed of this. In any event, the fact that the victim lied and the fact of her explanation simply created a jury issue. The witness' credibility was for the jury to determine. *Kiker v. State*, 919 So.2d 190 (Miss. Ct. App. 2005).

It is not necessary to delve into each and every nitpicking point raised by the Appellant. The simple fact is that each and every point raised is a credibility matter. While the Appellant claims that he could not have done what he did, because of the presence of his grandmother in the bedroom, there was no testimony that the she was present when he committed his acts. The Appellant would have this Court assume she was. Even is she were present, and asleep, that would not prevent the Appellant from doing what he did.

The Appellant says that the victim's testimony was incredible because she at first stated that the sexual abuse started when she was eight years of age, but then stated that it started when she was thirteen years of age. When the prosecutor sought to amend the indictment to shorten the period of time alleged to be the date of occurrence, he stated that there was inappropriate behavior before the fondling began, behavior that did not constitute fondling. The victim, though, was as likely as not beginning to testify concerning the inappropriate behavior. So the prosecutor steered her to the applicable time frame. That the victim might have been initially confused is no great surprise. She was not a lawyer, and she might not have been aware of the effect of the amendment. Again, this was simply a jury issue.

The Appellant then goes on for pages about whether the Appellant did or did not have his own bedroom. The Appellant said he did; others said he did not. This is neither here nor there. The Appellant might or might not have had his own bedroom, but that hardly would mean that he used it every night. Whether this alleged inconsistency was significant was for the jury to decide. Whether to believe an accused or witnesses against him is a jury issue.

In the Appellant's attempt to make mountains out of molehills, he utterly fails to suggest some reason why the victim would have perjured herself by testifying about what he did. He did not at trial either. The Court is left to suppose, then, that for some reason or another, the victim just upped and decided to accuse the Appellant of fondling. This is the great weight of the evidence the Appellant would suppose is contrary to the verdict?

And then there is, of course, the confession. It is inconceivable to us that a verdict could be said to be against the great weight of the evidence where the evidence demonstrates that the accused admitted his crime.

Finally, buried in the Appellant mass of words, there is apparently a claim that the prosecutor used a "send a message argument". (Brief for the Appellant at 39). It is sufficient to say that the portion there quoted by the Appellant is simply not a "send a message" argument and cannot possibly be construed to be one. In any event, what the Appeals Clinic fails to tell this Court is that there was an objection to the comment, which was sustained. (R. Vol. 3, pp. 228 - 229). This was sufficient to cure such impropriety as there was in the comment. *Wilcher v. State*, 697 So.2d 1087 (Miss. 1997).

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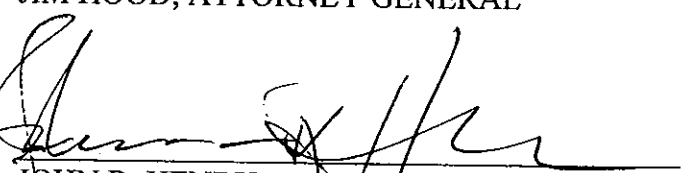
CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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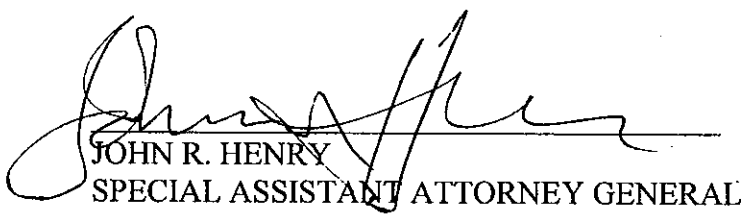
This the 29th day of June, 2007.



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