IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEVEN EASON — APPELLANT

V. — NO. 2006-KA-1067-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF

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In its brief, the State argues that the record is replete with evidence supporting the verdicts in this case. The State additionally argues that Count IV of the indictment was proven because the alleged penetration occurred with an object – a third person's body. With all due respect, the Appellant disagrees with the State's position.

As to Count IV, the State specifically argues that the defendant "ordered, caused and directed the penetration. . ." (Appellee's Brief at p. 5). The State then goes on to surmise, without citation to any authority other than the statute itself, that a third person's body is an object within the meaning of the sexual battery statute, and thus the evidence was sufficient to prove penetration in Count IV.

In its brief, the State fails to recognize the clear and plain meaning of the pertinent statutes. Miss. Code Ann. § 97-3-95, the statute making sexual battery a crime and under which Eason was charged, provides in pertinent part, "(1) A person is guilty of sexual battery if **he or she engages in sexual penetration**. . . ." (Emphasis added). Miss. Code Ann. § 97-3-97(a) defines sexual penetration as "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."

When a statute is not ambiguous, "the court should interpret and apply the statute according to its plain meaning without the aid of principles of statutory construction." ***Harrison County School Dist. v. Long Beach School Dist.***, 700 So.2d 286, 288-89 (Miss. 1997)(citing ***Mississippi Power Co. v. Jones***, 369 So.2d 1381, 1388 (Miss.1979)). "When a statute is unambiguous,[1] this

[1]Neither the Appellant nor the Appellee have alleged that the sexual battery statute at issue here is ambiguous.

Court applies the plain meaning of the statute and refrains from the use of statutory construction principals." ***Gilmer v. State***, 955 So.2d 829, (Miss. May 10, 2007)(citing ***Pinkton v. State***, 481 So.2d 306, 309 (Miss.1985)). "The court may not enlarge or restrict a statute where the meaning of the statute is clear." ***Gilmer v. State***, 955 So.2d 829, (Miss. May 10, 2007)(citing ***State v. Traylor***, 100 Miss. 544, 558-59, 56 So. 521, 523 (1911)).

Clearly Miss. Code Ann. § 97-3-95 contemplates the charged defendant as the person who performs the penetration with either an object or his own body. Here, the State contorts and twists the sexual battery statute in an attempt to bring this case within its strictures. However, in so doing, the State impermissibly ignores the plain and unambiguous language of the statute.

In the present case, even if the testimony of the alleged victims is believed [2] regarding Count IV, the Appellant cannot be guilty of sexual battery because he did not personally engage in sexual penetration within the meaning of the statute. With regard to Count IV, neither of the victims testified that the Appellant touched them with any object or part of his body. Rather, they alleged that the Appellant ordered and forced them to engage in the conduct, and such conduct does not equate to the Appellant engaging in sexual penetration under the plain meaning of the statute.

In the case *sub judice*, the State had the option of prosecuting the Appellant as, *inter alia*, an aider and abettor.[3] "Any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an 'aider and abettor' and is

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[2]The Appellant in no way concedes that the testimony of the alleged victims should be believed regarding this or any of the other counts, and simply makes this assumption for the purpose of argument only.

[3]The State also had the option of charging the Appellant under Miss. Code Ann. §97-1-6 for allegedly directing or causing a felony to be committed by person under age of seventeen years, but did not for reasons which do not appear in the record.

equally guilty with the principal offender." ***Hoops v. State***, 681 So. 2d 521, 533 (Miss. 1996)(citing ***Sayles v. State***, 552 So. 2d 1383, 1389 (Miss.1989); ***Bullock v. State***, 391 So. 2d 601 (Miss.1980), *cert. denied*,452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed.2d 432 (1981)). One can be found guilty as an aider and abettor even if it is not alleged in the indictment. ***Hollins v. State***, 799 So.2d 118, 123 (Miss.App. 2001); ***Brassfield v. State***, 905 So.2d 754, 758 (Miss.App. 2004).

For whatever reason, however, the State chose not to prosecute the Appellant as an aider and abettor. The State not only failed to charge the Appellant as an aider and abettor, but critically, it failed to include any aiding and abetting language in State's jury instruction S-6 which was its substantive jury instruction as to Count IV. (C.P. 37; R.E. 6). The fact that the jury was not given an aiding and abetting instruction is fatal to the State's case on Count IV because there was no evidence that the Appellant personally engaged in sexual penetration.

With regard to the remaining points, issues and other arguments, the Appellant rests on his initial brief and authorities therein.

CERTIFICATE OF SERVICE

I, Glenn S. Swartzfager, Counsel for Steven Eason, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF** to the following:

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This the 19th day of June, 2007.

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