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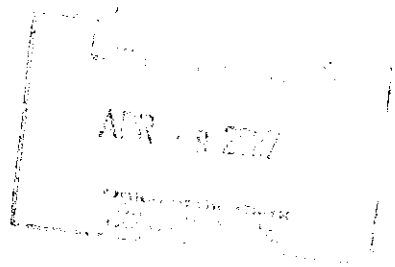
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

L. D. FOXWORTH — APPELLANT



VS. — NO. 2006-KA-1640-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2006-KA-1640-COA**

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STATEMENT OF THE ISSUES

I. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT. FURTHER, THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE "TENDER YEARS EXCEPTION" TO THE HEARSAY RULE APPLIED TO THE CHILD-VICTIM'S OUT-OF-COURT STATEMENTS.

III. M.R.E. 606(B) PROHIBITS JURORS FROM TESTIFYING ABOUT MATTERS AND STATEMENTS WHICH OCCURRED DURING JURY DELIBERATIONS, EXCEPT THAT JURORS MAY TESTIFY REGARDING EXTRANEOUS PREJUDICIAL INFORMATION BROUGHT TO THE JURY'S ATTENTION OR IMPROPER OUTSIDE INFLUENCES.

FACTS

Twelve-year-old T.V. customarily went to her aunt's house after school to wait on her mother to arrive home from work. On March 25, 2003, T.V. and her cousin, Kayla, were watching television and doing their homework in Kayla's living room. T. 63, 89. The girls were alone in the house, but other children were playing outside. T. 64. T.V. continued to watch television as Kayla began cleaning the kitchen. T. 64, 89. Fifty-one-year-old L.D. Foxworth, who T.V. and Kayla referred to as Uncle L.D., arrived at Kayla's house and told T.V. that he needed to speak with her in private. T. 64, 89. T.V. accompanied Foxworth to the adjacent den. T. 66. Foxworth asked T.V. if she had a boyfriend as he placed his hands on her shoulders and turned her so that her back was facing him. T. 66-67. Foxworth then pressed against the yong girl's body as he placed one hand down her shirt and another hand down her pants. T. 68-69. Foxworth then rubbed her breasts and "private part." T. 68-70. T.V. attempted to pull away, but Foxworth pulled her back toward him and continued to fondle her and put his mouth on her breasts. T. 70, 72. During this perverse act, James Smith, T.V.'s uncle, entered the house and saw Foxworth's hand on T.V.'s breast. T. 103. Rather than intervene, Smith left the house. He would later testify that he did not say anything because he was afraid of Foxworth and he just "didn't want to get involved." T. 103, 106.

After violating T.V., Foxworth gave her two dollars and told her not to tell anyone what he had done. T. 71. Shortly after the incident T.V. went home. As T.V. sat on the couch and watched television, she began to cry. T. 122. After her mother asked her several times what was wrong, T.V. stated that Foxworth had tried to rape her. T. 122-23. After T.V.'s mother contacted the Marion County Sheriff's Department, Investigator Jimmy Ray was dispatched to T.V.'s home. Ray took a verbal statement from T.V., but because she was extremely emotional, he asked her mother to bring her in the next day for a written statement. T. 140.

Foxworth was indicted and tried for two counts of child fondling. T.V., her mother, Kayla, Smith, and Ray testified for the State. A Marion County Circuit Court jury found Foxworth guilty of Count I fondling, but could not reach a unanimous verdict as to Count II fondling. C.P. 167. Foxworth was sentenced to serve a term of fifteen years in the custody of the Mississippi Department of Corrections. C.P. 168.

SUMMARY OF THE ARGUMENT

Foxworth claims that the State's evidence was legally insufficient to support the jury's verdict of guilt, and that the verdict was contrary to the overwhelming weight of the evidence. However, the essential elements of the crime of fondling were proven by the victim's testimony alone. The State also presented the eyewitness testimony of Smith who saw Foxworth fondling the twelve-year-old victim's breasts. T.V. and Smith's testimony was wholly consistent. Because Foxworth exercised his right not to testify or call any witnesses, defense counsel unsuccessfully attempted to create contradictions through cross-examination. Examining the evidence in the light most favorable to the State, any reasonable juror could have found that the State proved the elements of fondling beyond a reasonable doubt. Further, the verdict was entirely consistent with the overwhelming weight of the evidence.

Foxworth also claims that T.V.'s mother should not have been allowed to testify about T.V.'s out-of-court statements made immediately after Foxworth molested her. The trial court conducted a hearing outside the presence of the jury to determine whether T.V. was a child of tender years, and whether her statements bore substantial indicia of reliability. The trial court followed the proper procedure required by M.R.E. 803(25). Accordingly, the trial court did not abuse its discretion, nor were any of Foxworth's rights violated by the admission of the testimony in question.

Finally, Foxworth claims that he was entitled to a new trial based on alleged improper jury conduct. However, the unsworn statements he presents to support this claim are strictly prohibited by M.R.E. 606(b) and do not meet either of the exceptions to the rule.

ARGUMENT

I. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT. FURTHER, THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In reviewing the sufficiency of the evidence in the light most favorable to the State, the relevant question is whether any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. **Bush v. State**, 895 So.2d 836, 843 (¶16) (Miss. 2005). A verdict will not be overturned based on a claim that it is against the overwhelming weight of the evidence unless allowing the verdict to stand would sanction an unconscionable injustice. **Id.** at 844 (¶18).

Foxworth was charged with violating Mississippi Code Annotated § 97-5-23(1), which prohibits persons above the age of eighteen years from handling, touching, or rubbing any child under seventeen years of age for the purpose of "gratifying his or her lust, or indulging his or her depraved licentious sexual desires." Foxworth claims that the State failed to present legally sufficient evidence that he ever touched T.V. at all, much less for the purpose of gratifying his lust. In **Ladnier v. State**, our supreme court held,

> Our case law clearly holds that the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized. The victim's physical and mental condition after the incident, as well as the fact that the incident was immediately reported is recognized as corroborating evidence.

878 So.2d 926, 930 (¶14)(Miss. 2004). In the case *sub judice*, not only did the victim testify that Foxworth rubbed her breasts and vagina, but also another witness saw Foxworth rubbing the victim's breasts. T. 67-70, 103. According to **Ladnier**, further corroborating evidence includes the fact that T.V. immediately reported the incident to her mother, who in turn contacted local authorities. T. 123-

24, 140.

Foxworth also claims that even if the State proved that he touched T.V., no evidence was presented to prove that he did so for the purpose of gratifying his lust. He relies on the case of **Bradford v. State**, 736 So.2d 464 (Miss. Ct. App. 1999), in which this honorable Court reversed a fondling conviction because insufficient evidence was presented to prove that the defendant's actions were for the purpose of gratifying his lust. However, **Bradford** is easily distinguishable from the case *sub judice*. In **Bradford**, the Court characterized the defendant's actions as follows,

> [T]he only evidence of Bradford's activities consisted of testimony that, in a car crowded with children, Bradford was engaged in a game involving contact of only the briefest duration consisting of a pinch that was followed by a laughing attempt to place the blame for the contact on one of the other children. There is no evidence of any attempt to grope or rub either of the children in a sexually suggestive manner. There is no evidence that Bradford was unnaturally aroused or sexually excited by this seemingly prankish behavior. We can, after a thorough review of the record, discover no evidence that would suggest that Bradford's behavior on this particular afternoon was the kind of deviant behavior toward a child that the statute on gratification of lust was intended to punish.

Id. at 466 (¶10). Foxworth's actions certainly cannot be construed as "prankish behavior." A fifty-one year old man rubbing and placing his mouth on the breasts of a twelve-year-old girl while rubbing her vagina is clearly the type of deviant behavior that our fondling statute proscribes. Accordingly, Foxworth's reliance on **Bradford** is misplaced to say the least. Any rational juror could have found that the State proved the essential elements of the crime of fondling beyond a reasonable doubt. Foxworth's challenge to the sufficiency of the evidence is without merit.

In arguing that the jury's verdict is against the overwhelming weight of the evidence, Foxworth asks this honorable Court to impermissibly re-weigh the facts presented at trial and reassess witness credibility. These tasks are within the sole province of the jury. **Doe v. Stegall**, 757 So.2d 201, 205 (¶12) (Miss. 2000). Defense counsel already had the opportunity to point out to the jury that

T.V. testified that Foxworth's left hand was on her breast, while Smith testified that he saw Foxworth's right hand on her breast. T. 170-71. Defense counsel already had the opportunity to point out to the jury that at the time of trial Smith was incarcerated for driving under the influence. T. 165. Defense counsel already had the opportunity to demonize T.V. for not telling Kayla or any of the children outside of Kayla's house what Foxworth had done to her. T. 168. As this Court has repeatedly stated,

> The duty of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed is charged to the jury. It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as being worthy of belief.

White v. State, 796 So.2d 269, 272 (¶9) (Miss. Ct. App. 2001). The jury clearly believed the version of events relayed by the victim, her mother, Kayla, Smith, and Deputy Ray. The jury's verdict is entirely consistent with the overwhelming weight of the evidence, and the verdict does not represent an unconscionable injustice. Accordingly, Foxworth's assignment of error necessarily fails.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE "TENDER YEARS EXCEPTION" TO THE HEARSAY RULE APPLIED TO THE CHILD-VICTIM'S OUT-OF-COURT STATEMENTS.

The standard of review for the admission or denial of evidence is abuse of discretion. **Flake v. State**, 948 So.2d 493, 496 (¶7)(Miss. Ct. App. 2007). A judgment of conviction will not be reversed based on the erroneous admission of evidence unless it affects a substantial right of the defendant. **Singleton v. State**, 948 So. 2d 465, 472 (¶14) (Miss. Ct. App. 2007).

The trial court held an M.R.E. 803(25) hearing out of the presence of the jury to determine whether T.V.'s mother could testify about the out-of-court statements T.V. made immediately after being molested by Foxworth. Foxworth argues on appeal that T.V.'s statements to her mother did not bear substantial indicia of reliability.

MRE 803(25) provides,

> 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: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

The official comment to the rule lists twelve factors the trial court should consider in determining whether the out-of-court statements bear substantial indicia of reliability. They are:

> (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability.

M.R.E. 803(25) cmt. The trial court considered these factors before finding that T.V.'s statements bore substantial indicia of reliability. Accordingly, T.V.'s mother was allowed to testify that after she asked a very upset T.V. what was the matter, T.V. responded that Foxworth had just attempted to rape her. T.V.'s mother also testified that T.V. told her that Foxworth touched her breasts and "had his hands off in her pants." T. 124-25.

On appeal, Foxworth essentially asks this court to apply the twelve factors anew to determine whether T.V.'s statements were reliable. However, the applicable standard of review requires this Court only to determine whether the trial court abused its discretion in determining the admissibility of evidence. Because the proper procedure required by M.R.E. 803(25) was followed, the trial court cannot be said to have abused its discretion. Further, the ruling did not affect any substantial right belonging to Foxworth.

For the sake of argument only, the State notes that even if the two hearsay statements were erroneously admitted, a harmless error analysis would apply in light of the victim's testimony and the eyewitness testimony of Smith. See **Klauk v. State**, 940 So.2d 954, 956-57 (¶¶7-8) (Miss. Ct. App. 2006).

III. M.R.E. 606(B) PROHIBITS JURORS FROM TESTIFYING ABOUT MATTERS AND STATEMENTS WHICH OCCURRED DURING JURY DELIBERATIONS, EXCEPT THAT JURORS MAY TESTIFY REGARDING EXTRANEOUS PREJUDICIAL INFORMATION BROUGHT TO THE JURY'S ATTENTION OR IMPROPER OUTSIDE INFLUENCES.

Subsequent to Foxworth's conviction, juror Carolyn J. Irvin communicated to defense counsel that she and three other jurors had reasonable doubt that Foxworth was guilty of Count I fondling, even though they voted in favor of guilt. This information was relayed via a transcribed interview between Irvin and a private investigator. C.P. 156-65. Foxworth used this information as a ground for a new trial, which was denied by the trial court.

Jurors are prohibited from impeaching their own verdict by testifying about motives or influences which may have affected jury deliberations. **Boyles v. State**, 778 So.2d 144, 147 (¶7) (Miss. Ct. App. 2000) (citing **Lewis v. State**, 725 So.2d 183, 189 (¶34) (Miss. 1998)). Rule 606(b) of the Mississippi Rules of Evidence provides,

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Irvin made two allegations during the interview; (1) she and two other jurors did not believe that Foxworth was guilty, and (2) an unnamed mystery juror had allegedly been abused as a child. The following exchange between the private investigator and Irvin transpired regarding Irvin's first allegation.

Q. [D]id you tell me that you felt as though you had been coerced to vote guily?

A. Yes, because we had to -- we had to all come up with the same accord. And

like I said, a couple of us in there didn't feel like it was on the same accord.

Q. But you voted guilty instead?

A. Yes, we did.

Q. Would you tell me again the reason that you voted guilty instead of not guilty?

A. Because we had to come on our same accord and we was -- the information that we had, that's what we were basing it on, but we didn't feel like he was guilty. But on that information that was given to us, we took from that and said, It's possible he could be guilty; it's possible.

Q. Was there reasonable doubt in your mind?

A. Yes, there was some doubts in my mind.

Q. Did someone tell you in the jury room that if y'all were divided you would be there all day or be there until y'all made a decision?

A. Yes, it was told to us.

Q. Did it have some bearing on your reason for voting guilty?

A. Yes, because some of them wanted to hurry up and get through with it, because regardless of what I felt or what two or three others felt, it wasn't enough to say that we could hang the jury. We would have to be there. There are two or three of us that have some more opinions on this.

Foxworth claims that the trial court erred in not conducting a post-trial hearing to question the validity of the verdict based on Irvin's scant statements. However, when a party is alerted to potential jury misconduct, the party claiming misconduct must show that an investigation and hearing are warranted. **James v. State**, 912 So.2d 940, 950 (¶18) (Miss. 2005). "In order for the duty to investigate to arise, the party contending there is misconduct must make a threshold showing that there was in fact *an improper outside influence* or *extraneous prejudicial information.* When the threshold showing is made, the trial court *should* conduct a post-trial hearing." **Id.** (quoting **Gladney v. Clarksdale Beverage Co.**, 625 So.2d 407, 418-19 (Miss.1993)) (emphasis added).

Even a cursory understanding of M.R.E. 606(b) reveals that Irvin's statements are exactly the

type of testimony the rule seeks to prohibit. The rule lists only two exceptions in which a juror may testify about matters which occurred during jury deliberations. Those exceptions are "extraneous prejudicial information was improperly brought to the jury's attention" and "any outside influence was improperly brought to bear upon any juror." Irvin's unsworn statements made to the private investigator involve neither exception. Rather, she says nothing more than she felt that they had to agree on a verdict and that they did not want to deliberate all day. This is simply not extraneous prejudicial information or improper outside influence as contemplated by the rule.

Irvin's allegation that another juror allegedly revealed that she was abused as a child is also not extraneous prejudicial information or improper outside influence as contemplated by the rule. Furthermore, even if the mystery juror did make such a statement, Irvin claims that the statement was made after the jury had already reached a unanimous verdict of guilt on Count I, and possibly not until they concluded that they could not reach a unanimous decision as to Count II. C.P. 161. Accordingly, not only does the alleged statement not fall under the category of extraneous prejudicial information or improper outside influence, but it could have in no way influenced the jury's finding of guilt as to Count I, as it was made, if at all, after the jury reached a unanimous verdict of guilt on Count I.

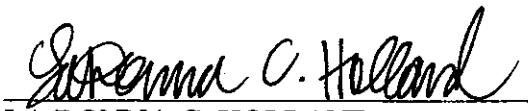
Foxworth's final contention is wholly without merit.

CONCLUSION

For the foregoing reasons, the Appellee asks this honorable Court to affirm the Appellant's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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