IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

L.D. FOXWORTH	**APPELLANT**
VS.	**K03-0277P**
STATE OF MISSISSIPPI	**APPELLEE**

APPEAL FROM THE CIRCUIT COURT
OF MARION COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

COUNSEL FOR APPELLANT:

BILL J. BARNETT
BARNETT LAW OFFICES
125 SOUTH CONGRESS ST. SUITE 1308
JACKSON, MS 39201
TELEPHONE NO: (601) 355-4114
FACSIMILE NO: (601) 355-4115
MSBA NO: [redacted]

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CERTIFICATE OF INTERESTED PARTIES

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 justice of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

I. L.D. Foxworth, Appellant

II. Honorable R.I. Prichard, III, Circuit Judge

III. Honorable Lauren J. Barnes, Attorney for Appellee

IV. Honorable Kurt Guthrie, Attorney for Appellee

V. Honorable Jim Hood, Attorney General, State of Mississippi

VI. Honorable Bill J. Barnett, Attorney for Appellant

This the 6th day of March, 2007

Bill J. Barnett

Bill J. Barnett, MSB #2050
Barnett Law Offices
Attorneys For The Appellant
Jackson, MS 39201
601-355-4114

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II. THE TRIAL COURT ERRED IN NOT CONDUCTING A POST TRIAL HEARING BASED UPON THE AFFIDAVIT AND SWORN TESTIMONY OF JUROR CAROLYN J. IRVIN THAT THE JURY WAS PRESSURED TO DELIVER A GUILTY VERDICT, AND ANOTHER JUROR DID NOT DISCLOSE TO THE COURT THAT SHE HAD BEEN MOLESTED AS A CHILD.

III. THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT IN THE INDICTMENT THAT L.D. FOXWORTH DID WILFULLY, UNLAWFULLY, FELONIOUSLY AND KNOWINGLY, FOR THE PURPOSE OF GRATIFYING HIS LUST, OR INDULGING HIS DEPRAVED LICENTIOUS SEXUAL DESIRES.

STATEMENT OF THE CASE

On October 3, 2003, L.D. Foxworth was indicted for two counts of child molestation in violation of Section 97-5-23(1) of the Mississippi Code. The case was originally tried on March 6th & 7th, 2006 but the jury was unable to reach a verdict, and a mistrial was declared. (Tr. 54) On August 30 & 31, 2006, Foxworth was tried by a jury in the Circuit Court of Marion County and found guilty of count one in the indictment. The jury did not reach a verdict on count two of the indictment. The Sentencing Hearing was conducted on September 8, 2006 in which Foxworth was sentenced to serve Fifteen (15) years on count 1 in the Mississippi Department of Corrections. The court required Foxworth to successfully serve twelve (12) years, with three years suspended in the Mississippi Department of Corrections. (Tr. 193-96)

The Motion for a Judgment Notwithstanding the Verdict or in the alternative a New Trial was heard on September 8, 2006. The court denied the motion on September 20, 2006. Foxworth filed the Notice of Appeal on September 26, 2006. It is from this judgment and sentence that Foxworth brings this appeal.

FACTS

On March 25, 2003, twelve (12) year old Tabinisha Varnado came home from school and like any other day, went next door to visit her cousin Kayla Johnson and watch television. Tabinisha was in the 6th grade in March 2003. At the time of trial, Tabinisha was 16 years old, having had her birthday on August 24, 2006. (Tr. 61-62) She testified that her mother got home around 4:00 pm, and that she went back to Kayla's house. Kayla was cleaning and watching television in the living from while other children played outside. (Tr. 74) Tabinisha testified that L.D. Foxworth is related to her through family and that she knew him and

considered herself to be close to him. Tabinisha stated that Foxworth came in Kayla's house and wanted to speak to her about an older boyfriend. Tabinisha and Foxworth went into the den of Kayla's house, which is a room off from the living room and one step down. In the den are a television and a window facing outside. At some point, Tabinisha and Foxworth began facing the television in the den at which point Foxworth allegedly touched her shoulder and then put his left hand down her shirt through the neck area and began touching her breast. Tabinisha testified that he put his right hand down her pants and touched her "private part". He then took his right hand out of her pants, pulled her shirt down and put his mouth on her breast. (Tr. 65-69) Tabinisha was wearing capri pants and a loose t-shirt. She then testified that her Uncle James, a.k.a. Chin, walked through the den, looked at Foxworth, and both men began laughing and then both went outside. As Tabinisha left to go home, she said that she saw Foxworth outside and he gave her two dollars and told her not to say anything. She said that she went home, told her mother what happened and her mother called the police. (Tr. 70-72)

On cross-examination, she stated that Foxworth never unbuttoned her pants, yet acknowledging that Foxworth has very large hands, and there were no buttons lost nor any damage to her clothing. She testified that she never said anything to Uncle James when he came inside, she never asked Kayla for help, never called out for help, and she stated that she was the only person to witness these events. (Tr. 81, 84)

Kayla Johnson's testimony corroborates that Foxworth asked to speak to Tabinisha about her boyfriend(s), but said she did not see anything happening in her house, but did see Uncle James come inside. Kayla's other testimony is that Foxworth is her uncle, "I think it's my mama's brother", and that Foxworth tried to look out for her and was good to her family. (Tr. 94) She said that he and Tabinisha were not in the den any longer than ten (10) minutes

and further, that Tabinisha's mother wasn't at her house yet that afternoon, and did not get home until around 5:00 pm. (Tr. 94)

James Smith testified that he was incarcerated at the time of trial for a felony DUI. (Tr. 97) He testified that at the time of this incident he was working at Columbia Country Club and that he got home around 5:30 from Kayla's house, which was his regular schedule. (Tr. 98) On cross-examination, he stated that he got to Kayla's house between 5:00 and 5:35. (Tr. 108) He stated that he went into Kayla's house to use the bathroom, entering through the carport into the den to reach the bathroom. He said that there was no one in the den when he first came in, but on the way to the restroom he saw Foxworth who was leaning up against a table. Smith supposedly spoke saying "What's up, cousin." Foxworth replied; "Nothing much." (Tr. 99 - 100) Smith continues through the kitchen on his way to the bathroom. He saw Kayla and Tabinisha sitting on the couch in the living room watching television. (Tr. 100-101) When he left everything was the same except that he then sees Tabinisha and Foxworth in the den. Foxworth's back was facing the door and Smith states "He didn't know I came out." (Tr. 103) Smith testified that he and Tabinisha made eye contact and that he saw Foxworth's right hand on Tabinisha's breast, while her left hand was tuning the stereo. (Tr. 103) Smith testified that as he was leaving, Tabinisha and Foxworth were on his left. (Tr. 111) Smith testified that he didn't say anything to anyone because he was afraid of Foxworth. Smith supposedly went down the road, saw the Sheriff's department at Tabinisha's house, came back, went inside, heard the Sheriff asking his sister questions, sees Tabinisha sitting on the couch crying, and Smith said he just looked and got back in his car and left. He did not say anything to anyone although he supposedly witnessed a potential felony occur and never said anything to the authorities or Tabinisha's mother – his sister. (Tr. 112-13) He was eventually tracked down by

the district attorney's office nearly 17 months after this alleged incident, at which point he finally gave his statement because he "didn't want to get involved. I tried to stay out of it." (Tr. 106)

Over objection of defense counsel, Diana Varnado, Tabinisha's mother, testified that she worked at Columbia Cable and got off work around 3:30, arriving home around 3:45 – 4:00 pm. When she got home she saw her sister Janice, Foxworth and her other brother outside her house. Tabinisha came home for a few minutes, no conversation occurred at that point, and then Tabinisha went back to Kayla's house. (Tr. 120-21) At some point, Tabinisha comes back home and her mother testified that she saw her sitting on the couch crying. Varnado asked her what was wrong and after four to five inquiries, "she just bust out screaming that Uncle L.D. tried to rape me. And that's what she said." (Tr. 123) Varnado became angry, supposedly got a knife and looked for Foxworth, but instead called the police who then came and interviewed Tabinisha and her mother. (Tr. 124-25) Varnado did not notice any physical evidence concerning Tabinisha's clothing, nor did she have Tabinisha medically examined following this alleged incident. (Tr. 133 - 35)

Jim Ray was the investigator with the Marion County Sheriff's Office in Columbia, Mississippi. He went to Varnado's home upon being dispatched by the Sheriff's office. He stated that Tabinisha was upset, crying and that he did not get a statement from her that evening, on March 25, 2003. Further, Diane Varnado told him that Tabinisha had been molested and Tabinisha pointed to the areas of her body that Foxworth allegedly touched. (Tr. 139-40) Charges were filed on Foxworth the next day, March 26 at which point he was arrested. When asked why no statement had been taken from James Smith, Ray stated that while he didn't go out to the country club to locate Smith, "they kind of make themselves scarce", meaning that

little to no effort was made to contact Smith. (Tr. 143) Ray further testified that a formal statement was taken from Tabinisha the next day, March 26, so that Tabinisha would have time to calm down.

Foxworth's motion for a directed verdict was denied and the jury found Foxworth guilty of child molestation in Count One in the indictment, touching her breast, but could not reach unanimous agreement on Count Two, that Foxworth touched her vagina, at which point the court declared a mistrial as to Count Two in the indictment. (Tr. 184-86) Foxworth was sentenced to serve Fifteen (15) years on count 1 in the Mississippi Department of Corrections. The court required Foxworth to successfully serve twelve (12) years, with three years suspended in the Mississippi Department of Corrections. (Tr. 193-96)

SUMMARY OF THE ARGUMENT

L.D. Foxworth argues that the circuit court erred in not granting a judgment notwithstanding the verdict, or a new trial, and that the verdict was against the overwhelming weight of the evidence. ***Herring v. State,*** 691 So.2d 948, 957 (Miss. 1997). The lower court abused its discretion by allowing the hearsay testimony of Diana Varnado, mother of Tabinisha Varnado. The court, having determined that Tabinisha was a child of tender years, erred by determining that the out-of-court statement contains a "substantial indicia of reliability." ***Marshall v. State***, 812 So.2d 1068, 1075 (Miss.App. 2001); ***Veasley v. State,*** 735 So.2d 432, 436 (Miss. 1999); ***Hennington v. State,*** 702 So.2d 403, 415 (Miss. 1997).

The court erred in not conducting a hearing, as set forth in ***Fairman v. State,*** 513 So. 2d 910 (Miss. 1987), to permit the twelve jurors and bailiff be interrogated regarding misconduct by the bailiff or by anyone else not on the jury. The Court noted that "[t}his does not preclude

testimony as to the misconduct of others in the presence and hearing of the juror or as to outside influence brought to bear upon them." ***Id.*** at 916.

The court erred in denying the judgment notwithstanding the verdict as it was not determined at trial that the State proved the essential element of the indictment that L.D. Foxworth did willfully, unlawfully, feloniously and knowingly, for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires. In consideration of the standard of review, the jury's verdict is to be set aside if this Court is convinced by the evidence, that "as to the essential elements of the crime, the State's proof was so deficient that a reasonable and fair-minded juror could only find the defendant not guilty." ***McClain v. State***, 625 So.2d 774, 778 (Miss. 1993).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE A NEW TRIAL AS THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

This Court has also held that "only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." ***Pleasant v. State,*** 701 So.2d 799, 802 (Miss. 1997) ***see also Fisher v. State,*** 725 So.2d 226 (Miss. 1998) ***Mamon v. State,*** 724 So.2d 878 (Miss. 1998). This Court has stated, "[a] greater quantum of evidence favoring the State is required for the State to withstand a motion for a new trial, as distinguished from a motion for directed verdict." ***Vaughan v. State,*** 759 So.2d 1092, 1099 (Miss. 1999), citing ***May v. State***, 460 So.2d 778, 781 (Miss. 1984). The facts, testimony, and evidence presented in this issue illustrate that the trial court erred in overruling the judgment notwithstanding the verdict and

motion for a new trial. The trial court's error in that regard sanctioned an "unconscionable injustice".

The Court has stated that "[a] motion for new trial challenges the weight of the evidence. A reversal is warranted only if the lower court abused its discretion in denying [the motion]." ***Edwards v. State***, 800 So. 2d 454, 464 (Miss. 2001). However, "the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005).

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, the Court, recognizing the high level of the standard of review in these cases stated that "'[t]his Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict.'" ***Dilworth v. State***, 909 So. 2d 731, 737 (Miss. 2005)

A. The Trial Court Erred In Allowing The Hearsay Testimony of Diane Varnado and Investigator Ray.

Diane Varnado, Tabinisha Varnado's mother was allowed to testify, over objection by defense counsel, as to what statement(s) her daughter made to her in private after the alleged incident, stating "she just bust out screaming that Uncle L.D. tried to rape me. And that's what she said." (Tr. 123)

The objection to hearsay testimony is defined in the Mississippi Rules of Evidence 803(25) as follows:

> (25) Tender Years Exception. A statement made by a child of tender years describing any sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside 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 Comment to Rule 803(25) clarifies additional factors the court uses as guidance in these situations:

> (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.

1. Whether there is an apparent motive on declarant's part to lie.

A 12-year-old girl is still a child, but children are not always truthful. In this case, the issue of whether Tabinisha was seeing older boys was at issue. Foxworth was concerned about that and that was the nature and reason of him confronting Tabinisha, and by doing so and bringing his concern forward, it most definitely placed Tabinisha square at odds with her mother if this were brought to light. On cross-examination, Tabinisha was asked:

> Q. Now, you said that L.D. said that he wanted to talk to you about a boyfriend; is that correct?
>
> A. Yes
>
> Q. Okay. He was concerned about you and your boyfriend?
>
> A. I don't know. I ain't had a boyfriend.
>
> Q. You hadn't been seeing other boys?
>
> A. Nuh-huh (indicating no).
>
> Tr. 76.

Kayla Johnson testified as follows:

Q. And let me ask you this: Have you known Tabinisha to have boyfriends or to know boys?

A. Yeah. Maybe, yeah.

Q. And how does she feel about telling her mom about these boys?

A. I wouldn't really know, because she ain't never talked about that like that.

Q. Have you ever known Tabinisha to tell stories?

A. Yeah. In a case, yeah, she could.

(Tr. 95)

(3) & (8) Whether more than one person heard the statements; Certainty that the statements were made:

Tabinisha's mother is the only person who supposedly heard Tabinisha claim that Foxworth tried to rape her. Further, when Tabinisha was interviewed the next morning with Investigator Jim Ray, there was no record, document, tape recording or any other method made available as to what Tabinisha said or did not say. The lower court has only the unfounded, undocumented and unreliable testimony of the mother and the investigator.

In the case of ***Idaho v. Wright***, 497 U.S. 805, 826 (1990), the U.S. Supreme Court upheld the Idaho State Supreme Court's stating "[w]e think the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which Dr. Jambura conducted the interview. Viewing the totality of the circumstances surrounding the younger daughter's responses to Dr. Jambura's questions, we find no special reason for supposing that the incriminating statements were particularly trustworthy."

In this case, Investigator Jim Ray produced only a written statement the taken the next day after the alleged event. There was no video or tape recorded conversation of Ray's discussion with Tabinisha. There is absolutely no way to know whether the statements given

are accurate, coerced or authentic. Unlike the facts in ***Idaho***, in which a medical exam revealed sexual abuse, there was no evidence of any nature taken with regard to Tabinisha. Hence, the testimony of both Diana Varnado and Investigator Ray should never have been allowed as they were only cumulative without any factual, recorded or trustworthy. There was no way for the court or the jury to know any more about Ray's investigation other than what he said that she said. The cumulative effect of allowing this testimony was highly prejudicial.

4 & 5. Whether the statements were made spontaneously: The timing of the declarations:

There is nothing in the record that supports the view that Tabinisha's statements were spontaneous. The timing of her statements is also at issue. Tabinisha had plenty of time to call out for help if this alleged incident was really taking place, yet she made no effort to call Kayla or James Smith. She never said a word to her uncle James when he supposedly walked in through the den area and made eye contact with Tabinisha. Instead, Uncle James says "What's up, cousin". Kayla, her cousin, who is in the next room, does not hear or see anything, and Tabinisha never said anything to her during the alleged incident. Her hearsay statement, whenever that really occurred, to her mother does not support any of the evidence presented at trial.

6. The relationship between the declarant and the witness:

Again, Diane Varnado is Tabinisha's mother. This relationship is far different than a witness that has no interest in a matter, and whose testimony has no implication of bias. There is no certainty that Tabinisha's statement was even made. There is simply no other witness who heard her make the claim that Foxworth tried to rape her, and there again is no evidence with the investigator's interview.

12. Whether the declarant's age, knowledge, and experience make it unlikely that the declarant

fabricated.

Tabinisha was 12 and one-half years old at the time of the alleged incident. Maturity development in a young child is certainly subjective. On the one hand this is a young girl who comes home every afternoon and has to look after herself until her mother gets home, most of the time of which she is visiting with Kayla next door. She is not totally dependent upon her mother. On the other hand is the issue of her boyfriends. Based upon these facts, to accuse some one of attempted rape does not indicate an understanding of rape. By allowing the mother to testify as to what Tabinisha might have said, only causes prejudice and bias without a factual and evidentiary record to support her acvcusation.

The jury, without the allowed hearsay testimony, could have made a determination based upon weighing and analyzing the evidence entirely differently. The hearsay testimony did not allow that, rather it stacked the deck without the necessary legal standard to support its conclusion. The court, having determined that Tabinisha was a child of tender years, erred by determining that the out-of-court statement contains a "substantial indicia of reliability." ***Marshall v. State***, 812 So.2d 1068, 1075 (Miss.App. 2001); ***Veasley v. State,*** 735 So.2d 432, 436 (Miss. 1999); ***Hennington v. State,*** 702 So.2d 403, 415 (Miss. 1997).

II. THE TRIAL COURT ERRED IN NOT CONDUSCTIN A POAT TRIAL HEARING BASED UPON THE AFFIDAVIT OF JURY CAROLYN J. IRVIN THAT THE JURY WAS PRESSURED TO DELIVER A GUILTY VERDICT, AND ANOTHER JUROR DID NOT DISCLOSE TO THE COURT THAT SHE HAD BEEN MOLESTED AS A CHILD.

After the trial, juror Carolyn J. Irvin came forward to voice her concern that she, and other jurors, felt coerced to vote guilty, and that another juror related that she had been a victim of sexual abuse. In her affidavit, she testified to the following:

Q. During that conversation did you tell me that you felt as though you had been

coerced to vote guilty?

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. 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; it was told to us.

Q. Did that have any 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 of 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.

Q. Did you vote guilty because you believed Mr. Foxworth was guilty?

A. No.

Q. You believed he was not guilty?

A. Yes.

Q. That was based on the facts and evidence presented to you during the trial?

A. Yes.

Q. During the conversation that you and I had a few minutes earlier, you brought to my attention that there was a lady on the jury that indicated that she had possibly been a victim of some sort of abuse as a child?

A. Yes, she did.

Q. Would you tell me about that; please?

A. She said that she knowed it happened to her when she was a child and that she was saying it's possible for this to happen, but she didn't bring it out until we got to the second part of it, but she did make it – I don't know how she had it – I know this happened. Then when we got through almost the second part of it, that is when she really brought out that she was –

(Tr. 158-61)

Rule 606(b), Mississippi Rules of Evidence states in pertinent part:

(b) Inquiry into validity of verdict or indictment. 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 absent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a jury 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.

This Court has held that "after the verdict has been received and entered, testimony of jurors will not be received for the purpose of impeaching their verdict, and that jurors cannot impeach their verdict by testifying as to the motives and influences which affected their deliberations." ***Fairman v. State***, 513 So. 2d 910 (Miss. 1987) However, in ***Fairman***, the lower court conducted a hearing, permitting the twelve jurors and bailiff be interrogated regarding misconduct by the bailiff or by anyone else not on the jury. ***Id.*** at 915. The Court noted that "[t}his does not preclude testimony as to the misconduct of others in the presence and hearing of the juror or as to outside influence brought to bear upon them." ***Id.*** at 916.

The Court has stated that a juror is competent to testify whether extraneous prejudicial information was improperly brought to the jury's attention. ***Salter v. Watkins***, 513 So.2d 569, 571 (Miss. 1987). In ***Bickcom v. State***, 286 So.2d 823, 825 (Miss. 1973), the Court stated that cases "which prohibit jurors from impeaching their own verdict, do not require that jurors may not be permitted to testify as to the fact of the misconduct of others in their presence or hearing, or as to outside influences brought to bear upon them." In this case, the trial court could have easily resolved this issue by holding a hearing with the jury and bailiff to resolve the issue of whether there was unjust influence upon the jury to come forward with nothing less than a guilty verdict on the first count. Further, the court abused its discretion and erred by not

affording the opportunity to determine bias upon one member of the jury.

Further, this Court visited this issue concerning Mississippi Rules of Evidence 606(b) in ***Martin v. State***, 732 So.2d 847 (Miss. 1998). In ***Martin***, the Court recognized two exceptions to rule 606(b) that allowed jurors to testify whether "extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any jury. ***Id.*** at 851. The Court recognized that many federal courts "are now applying the rule that jurors may testify that the verdict actually rendered in court was not the true verdict that the jury actually and physically voted for in the jury room." ***Id.*** at 852. ***See also United Staves v. Dotson,*** 812 F.2d 1127 (5th Cir. 1987); ***University Computing Co. v. Lykes - Youngstown Corp.,*** 504 F.2d 518 (5th Cir. 1974); ***Fox v. United States*** 417 F.2d 84 (5th Cir. 1969).

In ***Gladney v. Clarksdale Beverage Co.,*** 625 So.2d 407 (Miss. 1993), the Court held that "in the absence of a threshold showing of external influences, an inquiry into the juror verdict is not required." In ***Gladney***, the lower court polled the three jurors who appeared before the court stating that they were pressured into making their decision in the verdict. The Court in ***Gladney*** set out the procedure in cases of juror misconduct:

> As a beginning to this inquiry, the trial court and opposing counsel must be made aware of any potential juror misconduct when this evidence is manifested. Thus, if a jury approaches an attorney for one of the parties of the court itself, or if either subsequently learns such through alternative means, all parties involved should be made aware of the allegation as expeditiously as possible.
>
> Once an allegation of juror misconduct arises, then the next step is to consider whether an investigation is warranted. In order for the duty to investigate to arise, the party contending there is misconduct must make an adequate showing to overcome the presumption in this state or jury impartiality. At the very minimum, it must be shown that there is sufficient evidence to conclude that good cause exists to believe that there was in fact an improper outside influence or extraneous prejudicial information.

> In the absence of a threshold showing of external influences, an inquiry into the juror verdict is not required. When the threshold showing is made under the standards previously outlined, the court should conduct a post-trial hearing. The scope of the hearing is, however, limited; the proper procedure is for the judge to limit the questions asked the jurors to determine whether the communication was made and what it contained. Once it is determined that the communication was made and what the contents were, the court is then to decide whether it is reasonably possible this communication altered the verdict.... We conclude that in the course of post-trial hearings, juror testimony is only admissible as to objective facts bearing on extraneous influences on the deliberation process.

Gladney,625 So.2d at 418-19. ***See also Hayes v. Entergy Mississippi, Inc.***, 871 So.2d 743, 747 (Miss. 2004).

In ***James v. State***, 777 So.2d 682 (Miss.App. 2000), the Court noted that the trial court followed the guidelines as set out in ***Gladney***. However, the Court held that the trial court abused its discretion in ruling that James did not present a threshold showing that warranted further investigation. ***Id.*** at 699. The Court stated that "[i]nquiry into a jury's decision is thus prohibited except to determine whether the jury was exposed to extraneous prejudicial information or outside influence. James contends that the testimony of prospective juror Conway regarding remarks made by trial juror Shawn Watson met the threshold requirements to trigger an investigation into the jury's conduct. We agree, and find the case of **Hickson v. State**, 707 So.2d 536 (Miss. 1997) instructive in resolving this matter." ***Id.***

These cases represent that the lower courts have a duty to follow in determining issues of juror misconduct.

Here, the court abused its discretion by not calling the jurors back to determine whether or not there was a misunderstanding, coercion, bias and even worse, whether a juror has misled the court by leaving out a material fact that would ultimately affect the judgment of the verdict. The jury could not find Foxworth guilty of one of the essential elements in the incdictment, calling the jury back for further inquiry into the extraneous matters that obviously affected the

outcome of the verdict was required to resolve the issue as noted in the cases of ***Gladney*** and ***James.***

III. THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT IN THE INDICTMENT THAT L.D. FOXWORTH DID WILFULLY, UNLAWFULLY, FELONIOUSLY AND KNOWINGLY, FOR THE PURPOSE OF GRATIFYING HIS LUST, OR INDULGING HIS DEPRAVED LICENTIOUS SEXUAL DESIRES.

Count One in the Indictment, for which L.D. Foxworth was convicted, reads in part as follows:

> Said defendant, L.D. Foxworth, being over the age of eighteen (18) years, to wit: fifty-one (51) years of age...did willfully, unlawfully, feloniously and knowingly, for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires, touched with his hand the breasts of T.V., a female child under the age of sixteen years...."

(R.E. 15)

The evidence presented at trial never proved that L.D. Foxworth touched Tabinisha's breast or any other part of her body, or that Foxworth held her captive during the so-called molestation. Even worse, the testimony presented by the State's star witness contradicted Tabinisha Varnado's testimony and presented an entirely different picture. Tabinisha testified that Foxworth had his left hand down her shirt and his right hand down her pants. (Tr. 65-66) Jury Q

She testified that her uncle James walked through the den, sees Foxworth and both men laugh and go outside. Both Tabinisha and James testified that they made eye contact, yet nothing was said. In other words, a potential felony was supposedly taking place and nothing is said? James testified that when he first entered the house he saw Foxworth leaning up against a table and he spoke to Foxworth saying, "What's up, cousin." Foxworth replies; "Nothing much." (Tr. 99-100) Yet, he comes back through a few minutes later, he makes eye contact with Tabinisha and he saw Foxworth's right hand on Tabinisha's breast. (Tr. 103) Yet, James

doesn't say anything to Foxworth the second time because he said he was afraid of Foxworth? This presents a troubling issue. How long was James in the bathroom? If this act took place, then given these facts it does not make sense that Foxworth and Tabinisha go into another room and this alleged incident takes place with two people in the house within an extremely short distance from each other. To further complicate matters, Uncle James disappears for ***seventeen*** (17) months and doesn't come forward because he "didn't want to get involved." I tried to stay out of it." (Tr. 106) Yet, James worked at the local country club in Columbia, which would make it very easy to find him.

During the entire time, Kayla testified that Tabinisha and Foxworth could not have been in the den no more than ten minutes. She did not see nor hear anything happen, and further testified that Foxworth was good to her and her family. (Tr. 94) In other words, the State did not produce substantial, rock solid, uncontradicted testimony and evidence to support the indictment that Foxworth even touched Tabinisha, and more importantly, that he did so "for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires...." §97-5-23 Miss. Code Ann. (Rev. 1994).

In the case of ***Bradford v. State,*** 736 So.2d 464 (Miss.App. 1999), Bradford, like Foxworth, was a long-time friend of Temeica Hayes and her family, a frequent guest, but not related. He was convicted for two counts of gratification of lust on the grounds that when he was alone in a car with two younger children, who later told their mother that something had occurred in the car. The children related a sequence of events in which Bradford would pinch the younger girls on their buttocks when not looking. One child said that Bradford kissed the younger girls on their jaw, yet another witness did not corroborate the same testimony. ***Id.*** at 465. In that case, the State's proof on the gratification of lust counts was determined by the

testimony of the ten and eleven year old children.

The Court reversed the lower court verdict in ***Bradford***, stating, "the sole legitimate disputed issue of fact was whether the State presented sufficient proof to support a finding by the jury that Bradford's actions were "for the purpose of gratifying his ... lust." ***Id.*** at 465. The Court stated that "we are of the opinion that there must be evidence of some nature that is probative on the issue; otherwise, every demonstration of affection of playful act directed by an adult toward a child would expose the adult to potential criminal charges, the outcome of which would depend solely on the jury's unsubstantiated subjective assessment of the purposes of the encounter." ***Id.*** The Court considered that "such evidence could arise from a description of the circumstances of the encounter itself. For example, touching in inappropriate parts of the child's body, *overly demonstrative acts of affection*, (emphasis by Appellant) events occurring when the child is not fully clothed, or some evidence of sexual arousal by the defendant during the encounter, might be sufficient to permit the jury to draw a reasonable inference as to the improper purpose of the defendant's act." ***Id.*** at 466. The Court noted that there was no evidence that Bradford was "unnaturally aroused or sexually excited by this seemingly prankish behavior." ***Id.***

In this case, the evidence was entirely conflicting and contradictory as to whether Foxworth touched Tabinisha. The jury wrongly relied upon bad testimony without considering the full intent of the statute. And even if Foxworth did touch Tabinisha, the essential element of the statute is not satisfied to proved that Foxworth committed the alleged act to gratify his lust, depraved licentious sexual desire as stated in the statute. There is no evidence to prove that Foxworth was even with Tabinisha long enough to get some kind of satisfaction as defined by the statute.

In consideration of the standard of review, the jury's verdict is to be set aside if this Court is convinced by the evidence, that "as to the essential elements of the crime, the State's proof was so deficient that a reasonable and fair-minded juror could only find the defendant not guilty." ***Bradford.*** at 465, citing ***McClain v. State***, 625 So.2d 774, 778 (Miss. 1993). The jury was split on count two of the indictment and that issue was not decided. A reasonable and fair-minded juror could most certainly find Foxworth innocent based upon the holding in ***Bradford.***

CONCLUSION

Based upon the facts and evidence presented at trial and now on this appeal, the court abused its discretion in allowing the hearsay testimony of Diane Varnado and Investigator Jim Ray. Having determined that Tabinisha was a child of tender years, the court erred by determining that the out-of-court statement contains a "substantial indicia of reliability." ***Marshall v. State***, 812 So.2d 1068, 1075 (Miss.App. 2001); ***Veasley v. State,*** 735 So.2d 432, 436 (Miss. 1999). ***Idaho v. Wright***, 497 U.S. 805 (1990)

The court erred in not conducting a hearing, as set forth in ***Fairman v. State,*** 513 So. 2d 910 (Miss. 1987), ***Gladney v.. Clarksdale Beverage Co.,*** 625 So.2d 407(Miss. 1993), and ***James v. State,***777 So.2d 682(Miss.App. 2000) to have a hearing with the jurors and bailiff to determine whether misconduct by the bailiff or by anyone elso not on the jury influenced the jury in its decision making. The Court stated that "[t}his does not preclude testimony as to the misconduct of others in the presence and hearing of the juror or as to outside influence brought to bear upon them." ***Fairman v. State***, 513 So.2d 910, 916(Miss. 1987).

The court erred in denying the judgment notwithstanding the verdict as it was not determined at trial that the State proved the essential element of the indictment that L.D. Foxworth did willfully, unlawfully, feloniously and knowingly, for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires. ***Bradford v. State,*** 736 So.2d 464(Miss.App. 1999).

Respectfully submitted,

L.D. Foxworth

By: Bill J. Barnett

Bill J. Barnett

CERTIFICATE OF SERVICE

The undersigned attorney of record hereby certifies that he has this day service via United States mail, postage prepaid, and a true and correct copy of the foregoing Brief of the Appellant upon the following listed parties:

This the 6th day of March, 2007

Bill J. Barnett

Honorable Lauren J. Barnes
Marion County District Attorney
203 Main St. Post Office Box 1208
Honorable
Jackson, MS 39286

Honorable Jim Hood, Attorney General
State of Mississippi
Post Office Box 220
Jackson, MS 39205

Honorable R.I. Prichard, III
Marion County Circuit Court Judge
Post Office Box 1075
Picayune, MS 39466

Bill J. Barnett
Barnett Law Offices
125 South Congress St.
Suite 1308
Jackson, MS 39201