IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LESLIE W. SMITH — APPELLANT

VS. — NO. 2006-KA-1728

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LESLIE W. SMITH **APPELLANT**

VS. **NO. 2006-KA-1728**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The grand jury of Pontotoc County indicted defendant, Leslie W. Smith with three counts of sexual battery. (Indictment, cp.10-11). After a trial by jury, Judge Thomas J. Gardner III, presiding, the jury found defendant guilty on all three counts. (C.p.289). Defendant was sentenced to 30 years, with ten suspended (twenty to serve) on each count, consecutive to each other. (Judgments & sentence, cp. 291-298).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

Defendant performed oral sex upon a child less than ten years of age, and penetrated the child orally and anally. Defendant was over 15 years older than his victim.

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION TO DISMISS ON A CLAIM OF THE INDICTMENT BEING DEFECTIVE.

Issue II.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Issue III.

TESTIMONY ADMITTED UNDER THE TENDER YEARS EXCEPTION WAS PROPER.

Issue IV.

THIS ISSUE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Issue V.

THERE WAS AMPLE LEGALLY SUFFICIENT EVIDENCE TO SUPPORT EACH ELEMENT OF ALL THREE SEXUAL BATTERY CONVICTIONS.

Issue VI.

THERE DOES NOT APPEAR TO HAVE BEEN A REQUEST FOR MISTRIAL. EVIDENCE WAS PRESENTED IN MITIGATION AT SENTENCING.

Issue VII.

THE JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS AS CHARGE.

ARGUMENT

I.

THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION TO DISMISS ON A CLAIM OF THE INDICTMENT BEING DEFECTIVE.

In this initial allegation of error, the State's response will be very succinct. Defendant alleges with extensive, and accurate, citation to the transcript that the trial court erred in deny the motion to dismiss the indictment. The claim was it was insufficiently clear to give notice of which specific provision of the sexual battery statute under which he was being charged.

Looking to the record, ably noted by counsel, the State argued and the trial court agreed that the indictment, – which included the birth date of the victim and the defendant – gave notice of the crime in the charges.

Fortuitously, the Mississippi Court of Appeals recently decided at case, the rationale of which is equally applicable to the facts sub judice. *Poynor v. State*, 2007 WL 1248510, *4 (¶ 18) (Miss.App. 2007).

In *Poyner* the indictment included the birthdate of the victim and the date of the offense. The court concluded such gave sufficient notice to inform defendant (with other portions of the indictment read together) of the specific crime to which he was charged.

> ¶ 17. We must also note that the issue of whether an indictment is so flawed as to warrant reversal is a question of law and allows this Court

> a broad standard of review. Steen v. State, 873 So.2d 155, 161(¶ 21) (Miss.Ct.App.2004) (citing Peterson v. State, 671 So.2d 647, 652 (Miss.1996)). The primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense. See Lewis v. State, 897 So.2d 994, 996(¶ 9) (Miss.Ct.App.2004). All that is required is that the indictment provide "a concise and clear statement of the elements of the crimes charged." Williams v. State, 445 So.2d 798, 804 (Miss.1984).
>
> *Poynor* at ¶17.

Based upon the standard of review and rationale there is no merit to this allegation of error and no relief should be granted.

Issue II.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Continuing the challenge to his convictions defendant asserts he was denied ineffective assistance of trial counsel, citing the standard of *Strickland.*

Specifically defendant cites five claimed deficiencies.

First, defendant claims there was a failure to investigate. The State must point out at the point the extensive pre-trial filings, motions filed in this case by defendant's TWO attorneys. So essentially, defendant is claiming both were ineffective. As to the failure to investigate, the record, amply refutes that allegation.

> ¶ 39. Knight's claim also fails the second prong of Strickland, because he does not show that there was a reasonable probability, but for these alleged deficiencies, he would have insisted on going to trial. Additionally, "in order to establish that failure to investigate a line of defense constituted ineffective assistance, a petitioner must show that knowledge of the uninvestigated evidence would have caused counsel to vary his course." Thomas v. State, 881 So.2d 912, 918(¶ 18) (Miss.Ct.App.2004) (quoting King v. State, 503 So.2d 271, 275 (Miss.1987))

Knight v. State, 959 So.2d 598, *608 (Miss.App. 2007).

It is the position of the State counsel exercised trial strategy as to testimony to be elicited. Such is within trial strategy and not ineffective.

The second claimed deficiency was failure to present evidence in mitigation at sentencing. A look to the transcript show exactly the opposite to be true, the attorney

did present evidence in mitigation as to defendant. Tr. 609-612. There was a pre-sentence investigation which was before the judge additionally, defendant Grandmother, Step-father, Wife and Mother gave statements on his behalf at sentencing.

Third & Fourth deficiencies asserted as ineffective were calling of expert and character witnesses. The reviewing courts of Mississippi have consistently held the decision for the calling of witnesses, experts to refute testimony and character witnesses are considered part of trial strategy and not ineffective. *Nichols v. State,* 868 So.2d 355, *362 (¶ 27)(Miss.App.2003)(specifically as to character). It is the position of the State trial counsel planned their strategy and were not ineffective.

As his fifth and last claim of ineffectiveness defendant asserts failure to cross-examine witnesses with specific questions or evidence.

> ¶ 45. Her counsel vigorously participated in the voir dire of the jury, tested the veracity of the State's witnesses on cross-examination, called witnesses on her own behalf and participated in challenging jury instructions. Under such a fact situation we cannot say that counsel was ineffective.
> *Lyle v. State*, 908 So.2d 189 (Miss.App. 2005).

Looking to the record we have a similar situation. Further, there is no argument on how the cross-examinations were not proper, effective or flawed. Accordingly, it is the position of the State such was not ineffective.

Moreover, there is essentially no claim of prejudice. Oh, to be sure, there is the

requisite citation to the second prong, requiring prejudice, – but no argument or claim of prejudice or how the outcome might have been different.

Defendant was ably represented by two attorneys, and, while defendant may not have liked their style, or strategy, there were Constitutionally effective at his trial.

No relief should be granted on this allegation of error.

Issue III.

TESTIMONY ADMITTED UNDER THE TENDER YEARS EXCEPTION WAS PROPER.

Next, defendant challenges testimonial evidence admitted under the tender years hearsay exception.

Pre-trial a hearing was held to determine the admissibility of several witnesses testimony under the tender years exception to hearsay. M.R.E. 803(25).

After conducting such a hearing the trial court ruled the testimony would be admissible Tr. 127-28.

> ¶ 9. We find that the circuit judge followed the proper procedure required by Rule 803(25) of the Mississippi Rules of Evidence. Therefore, the circuit judge did not abuse his discretion and the ruling did not adversely affect a substantial right owed to Pryer. Accordingly, we find this issue to be without merit.

Pryer v. State, 958 So.2d 818, *822 (Miss.App. 2007).

The State will rely upon the fully articulated record and with no showing of abuse of the trial court's discretion. Further, the State will assert no error and no relief should be granted.

Issue IV.

THIS ISSUE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

In looking to the record defendant now asserts the trial court erred in failing to dismiss certain jurors for cause. Counsel just blithely lists the names and claims error. Looking to the record, the trial court granted some of defendant's cause strikes and not others.

The standard of review is:

> ¶ 159. Kolberg next tells us one juror was improperly excluded for cause. The standard of review for the decision to grant or deny a challenge for cause is abuse of discretion. Sewell v. State, 721 So.2d 129, 135-36 (Miss.1998).

Kolberg v. State, 829 So.2d 29, *84 (Miss.,2002)

The judge stated reasons for each into the record. The State will stand by those findings.

Further, there is nothing in the record, nor averred by defendant that he could not have struck the juror's peremptorily.

Consequently, the State would argue there is no abuse of discretion in the rulings and findings of the trial court and no relief should be granted.

Issue V.

THERE WAS AMPLE LEGALLY SUFFICIENT EVIDENCE TO SUPPORT EACH ELEMENT OF ALL THREE SEXUAL BATTERY CONVICTIONS.

This allegation of error challenges the sufficiency of the evidence to support the convictions.

The citations in the argument are to evidence adduced, pre-trial, during the hearing on the tender years exception. That issues has been briefed above.

Consequently, there being no real citation to anything in the record being legally insufficient, the State will argue the trial courts rulings regarding all motions relating to the sufficiency of the evidence are presumptively correct.

> ¶ 4. In criminal appeals, a presumption of correctness attaches to any ruling by the trial court. Carr v. State, 770 So.2d 1025, 1027(¶ 7) (Miss.Ct.App.2000) (citing Hansen v. State, 592 So.2d 114, 127 (Miss.1991)). When reviewing a trial court's ruling on a suppression hearing, we must assess whether substantial credible evidence supports the trial court's finding, considering the totality of the circumstances. Price v. State, 752 So.2d 1070(¶ 9) (Miss.Ct.App.1999) (citing Magee v. State, 542 So.2d 228, 231 (Miss.1989)). The admissibility of evidence lies within the trial court's discretion and will only be reversed if this discretion is abused. Crawford v. State, 754 So.2d 1211, 1215(¶ 7) (Miss.2000).

Jaramillo v. State, 950 So.2d 1104, *1106 (Miss.App. 2007).

Therefore, being nothing to overcome the presumption of corrections the State would argue there was no error and no relief is warranted.

Issue VI.

THERE DOES NOT APPEAR TO HAVE BEEN A REQUEST FOR MISTRIAL. EVIDENCE WAS PRESENTED IN MITIGATION AT SENTENCING.

Penultimately, defendant asserts the trial court should have granted a mistrial 'sua sponte' because of a strained relationship with his trial counsel. Just to note, it does not appear that the trial counsel ever asked or sought a mistrial – for any reason. So, if this is a claim in the nature of ineffective assistance for failing to make such a claim the State would argue it was strategy and/or there was no prejudice.

> ¶ 23. Harrell asserts his counsel should have asked for a mistrial. "This Court reviews motions for mistrial under an abuse of discretion standard." Parks v. State, 930 So.2d 383, 386 (Miss.2006) (citation omitted). "The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case, however, the trial judge is permitted considerable discretion in determining whether a mistrial is warranted because the judge is best positioned to measure the prejudicial effect." Id. (citations omitted). Since the trial court found that no prejudice resulted from counsel's failure to move for a mistrial, this failure does not constitute ineffective assistance by counsel. We cannot say the trial court abused its discretion.
>
> *Harrell v. State*, 947 So.2d 309 (Miss. 2007).

And, lastly, there was evidence presented in mitigation at sentencing. *See above.*

Again, no error, no relief required.

Issue VII.
THE JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS AS CHARGE.

Lastly, defendant challenges the form of the verdict instruction for each count of the indictment, to be found in the record at clerk's papers 280-282.

Interestingly, counsel cites California and West Virginia law in support of his assertions of error.

The State would argue the instructions followed the indictment, and more importantly the statute. Additionally, at trial the judge turned to defense counsel and specifically asked if there was an objection to these very instructions. The response was "None by the defendant, Your Honor." Tr. 559

> ¶ 36. In the present case, not only did Jones fail to object to the jury instruction, he agreed with the revised instruction. During the discussion of instructions, the trial court expressed some concern regarding the wording in the second paragraph of jury instruction S-1. The court subsequently struck through some of the wording. Jones's only response was, "I would not object to that, Your Honor." The present case is similar to Butler v. State, 544 So.2d 816, 818 (Miss.1989), where Butler, in addition to not objecting to the jury instruction at trial, acquiesced in the giving of the instruction. In Butler, this Court held the defendant's failure to object at the trial level, coupled with this assent to the giving of the instruction, barred him from raising such an error upon appeal. Accordingly, Jones waived any objection by not objecting to the jury instruction at trial, and this Court declines to address this issue upon appeal.
>
> *Jones v. State,* 776 So.2d 643 (Miss. 2000).

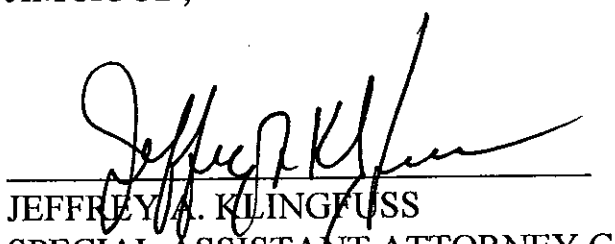
This issue is procedurally barred and without merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdicts and sentences of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680