IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES HAROLD ROPER — APPELLANT

VS. — NO. 2006-KA-1791-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On September 5-7, 2006 , James H. Roper, "Roper" was tried for sexual battery as an habitual offender before a Grenada Circuit Court jury, the Honorable Kenneth L. Thomas presiding. Roper was found guilty and given a thirty year sentence in the custody of the MDOC. R. 374. From that conviction and sentence he appealed to this Court. C.P. 136-137

ISSUE ON APPEAL

I.

WAS THE JURY PROPERLY INSTRUCTED?

STATEMENT OF THE FACTS

On January 24, 2005, Roper was indicted by a Grenada County Grand jury for sexual battery of D.W. on November 3, 2003 in Grenada County. R. 7-8.

On September 5-7, 2006 , Roper was tried for sexual battery as an habitual offender before a Grenada Circuit Court jury, the Honorable Kenneth L. Thomas presiding. Roper was represented by Mr. David Tisdell. R. 1.

D. W. identified Roper as the person who sexually assaulted him. R. 66. D. W. was thirteen at the time of trial. R. 58. D. W. testified that Roper took him in his blue car to a church in Crowder. Once there he made him pull down his pants. He stated "licking it." which he referred to as "his peepee.". R. 65. D. W. then testified that he tried to put his "whatchcallit" in "my booty." R. 64. When the sexual assault was over, Roper threatened to kill him. He told him he would kill him if he should "ever" reveal what he had done to him. R. 64; 66. Roper left D. W. near the rail road tracks, where he was found around 1:00 in the morning. R. 49.

Mr. Jody Norwood testified that on the day in question, he was cooking barbeque and drinking beer. R. 308. Both Roper and D. W., a neighbor's child was present. Norwood thought D. W. left around dusk, and Roper did not leave until sometime after that. On cross examination, Norwood admitted that he did not really know when Roper left. R. 326. He just knew that he left after D W. Norwood thought he saw Roper's blue car at his house when he was out helping to search for the missing child. He thought this was around 10 to 10:30 . R.312.

However, Ms Pruitt, Norwood's girlfriend , who was at the barbeque, testified that she thought Norwood went in search of D. W. around 7:00 P.M. R. 28.

Ms. Pruitt, Norwood's girlfriend, was also present at the barbeque. Pruitt testified that she believed D. W. left the gathering around 4:00 or 4:30. R. 16. She thought Roper left around 5:00.

R. 22. He left in his blue car. R. 22.

After being advised of his right to testify based upon his own decision in consultation with his attorney, Roper decided not to testify. R. 328-329.

During jury instruction selection, the defense requested an alibi instruction. That instruction, D-3, included the language "Roper is asserting the defense of alibi by saying that he was at his home.." The defense argued that they had a basis for such an instruction based upon the testimony of Norwood. The trial court found a lack of record evidence for granting the instruction. R. 345; 350. There was no objection to the failure of the court to grant D-3. R. 350.

Roper was found guilty of sexual battery and given a thirty year sentence in the custody of the MDOC. R. 374. From that conviction and sentence he appealed to this Court. C.P. 136-137

SUMMARY OF THE ARGUMENT

1. The record reflects that this issue was waived for failure to object to the rejection of his instruction.. R. 350. It was also not raised in White's JNOV. C.P. 70. **Nicholson on behalf of Gollott v. State,** 672 So. 2d 744, 752 (Miss. 1996); **Haddox v. State,** 636 So. 2d 1229, 1240 (Miss.. 1994).

In addition, the record reflects that the jury was properly instructed. C.P. 103-115. Proposed jury instruction D-3 stated, " Roper is asserting the defense of alibi by saying that he was home." R. 119. Roper did not testify. R. 328-329. On cross examination, Norwood admitted that he did not know when Roper left. R. 326. On redirect, he admitted that he just knew that Roper left after D. W. R. 326.

While Norwood thought he saw Roper's blue car at his house , the record reflects that Roper had two blue cars. R. 44. Also Ms. Pruitt, Norwood's girlfriend, testified she thought Norwood looked for D. W. around 7:00. R. 28. The record reflects no testimony about anyone seeing Roper at his house during the relevant time frame.

D. W. identified Roper as the man who molested him. R. 67. He threatened to kill him if he "ever tell somebody." R. 66. D. W. was found around 1:00 or 2:00 A.M. He said he left the barbeque around dusk. Another witness, Ms. .Pruitt , said D. W. left around 4:00. Therefore the time frame for the sexual assault upon D W was somewhere between 4:00 P.M. and 1:00 A.M.

The Appellee would submit the trial court correctly found that there was insufficient evidence for granting an alibi instruction under the facts of this case. Roper did not testify in his own behalf. R. 328-329. Therefore, there was a lack of evidence for finding that Roper was "at home at the time of the alleged offense." C.P. 119.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT THE JURY WAS PROPERLY INSTRUCTED.

Roper argues that the trial court erred in denying him an alibi instruction. The trial court erred because his counsel believes there was "more than a scintilla" of evidence in support of his theory of the case. His counsel believes support for this instruction came through the testimony of Mr. Norwood. Norwood claimed that Roper was at his barbeque after D. W. left. R. 310-311. He also claimed that he saw Roper's blue car at his house when he helped search for D. W., the missing child in the neighborhood. Since D W's testimony indicated that he was taken in Roper's blue car to an isolated church, he believes there was a basis for the instruction. Appellant's brief page 5-8.

To the contrary, this issue was waived for failure to make an objection to the failure of the trial court to grant proposed jury instruction D-3, the so called alibi instruction. R. 350. Nor was this mentioned in White's motion for a JNOV. C.P. 70.

In **Nicholson on behalf of Gollott v. State**, 672 So. 2d 744, 752 (Miss. 1996), the Court stated that where there was no contemporaneous objection to the failure to grant an instruction, the court need not consider that issue on appeal.

> This Court does not review jury instructions in isolation. **Malone v. State**, 486 So. 2d 360, 365 (Miss. 1986). If the instructions given provide correct statements of the law and are supported by the evidence, there is no prejudice to the defendant. **Sanders v. State**, 313 So. 2d 398, 401 (Miss 1975). This Court has fully examined the instructions granted by the trial court in the case sub judice and finds that, taken together, the jury was correctly and completely charged.
>
> Regarding the instructions Gollott claims the trial Court erroneously refused, Gollott failed to object to the refusal of D-4. As a result, this Court is not bound to address the alleged error on appeal. **Lockett v. State**, 517 So. 2d 1317, 1332-33 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed 895 (1988).

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994),

the Court stated that issues argued on appeal on different grounds from those raised at trial were waived.

> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State**, 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); Crawford v. State, 515 So. 2d 936,938(Miss. 1987);...

Without conceding that it was waived, I will also address the merits. The record reflects that while Norwood testified on direct examination that Roper left the barbeque before D. W., on cross examination he admitted he did not know when Roper left. R. 310; 326. The record reflects that the period of time in which Norwood thought he saw a blue car at Roper's house was supposedly around 10 to 10:30. R. 312. However, Ms. Pruitt testified he searched around 7:00 P.M. R. 28.

On redirect, Norwood admitted that he only knew that Roper left after D. W. but he did not know when. Roper did not chose to testify in his own defense. R. 328-329.

> Q. At the time, from the time that the child left, how long had he left before or went by before Mr. Roper left?
>
> A. Maybe a hour, a couple of hours, something around in there. I really don't.
>
> Q. So they did not leave at the same time?
>
> A. No, sir. R. 310.

On cross examination, Norwood admitted that he did not know when Roper left the barbeque.

> Q. You don't remember when he felt that night, that is, Roper?
>
> A. **I just know it was, it was, I don't know. I don't know.** He always kind of left early on Sunday because he had to got to work Monday. But it was, it was dark when he left. R. 326.

On redirect Norwood admitted that all he knew was that Roper left after Danny.

Q. You do know that James left after Danny; is that correct?

A. Yes, sir.

Q. And you do know that when you was out searching for Danny, Roper's car was at home?

Mellen: Your Honor, this is leading. I'm sorry. It's leading, Your Honor.

Court: Sustained.

Tisdell: I have no further questions of this witness. R. 327.

D. W. identified Roper as the person who sexually assaulted him. R. 67. D. W. also testified that Roper "snatched him up" into his car. He was taken against his will to a isolated church. He was told to take off his pants. He refused. Roper forced his pants down. Roper then proceeded to sexually molest D. W. D. W. knew the car he was forced into was blue, had a scratch on the side, and made a lot of noise.

Q. Okay. When you say, "he snatched you up," what do you mean by that?

A. He snatched me up and just put me in the car and he drove it off.

Q. Okay. What kind of car was it?

A. It was blue but I can't pronounce, just say the name, but it was blue. It was making a lot of noise when he would turn, when he was driving. R. 61.

Q. Do you know what time of day, I mean, what time it was? (When Roper who he identified in the court room left him by the railroad track.)

A. Going on 1:00. R. 67.

On redirect, Ms. Teresa Pruitt testified that she recognized the car in photograph exhibit 2 as being another car that Roper owned. However, she was not sure when he owned it.

Q. Ms. Pruitt, do you recognize this photograph or what it contains?

A. He has owned this vehicle also.

Q. Okay.

A. Jamie Roper.

Q. Do you know when that was?

A. No, ma'am. R. 44.

See exhibits 1 for photograph of light blue car. This exhibit was admitted into evidence. Exhibit 2 is photograph of another darker blue car. It was admitted for identification but not into evidence because of an ambiguity as to when Roper owned this second car.

It was brought out in a bench conference that the defense had been provided with discovery. In that discovery, there were photographs showing that Roper owned more than one car. Both of these cars were blue, as shown by the inclusion of the two photographs in the record. R. 31-33.

Jury instruction D-3 stated that Roper was "claiming an alibi defense by saying that he was home at the time of the alleged offense."

> Alibi means elsewhere or in another place. In this case, James Roper is asserting the defense of alibi by saying that he was at his home at the time of the alleged offense. C.P. 119.

The record reflects that Roper did not testify. R. .328-329. Neither Norwood nor any other witness testified to checking to see if Roper was home during the time they were searching for the missing child. There was no testimony by any witness that they saw Roper at his home or in his home on the date in question.

The trial court found for these reasons that Roper was not entitled to a alibi jury instruction.

> Court: All right. Okay. **The Court finds that not only do we not have proper testimony to do so, we have a questionable evidentiary basis for giving the instruction since no one, in fact, saw the defendant at home.** But now we have a purported insertion that was not made by the defendant and the Court rescinds its previous ruling of giving the alibi instruction and now will not give it. D-3 will be

denied. R. 345.

...

> Court: All right. Well, to allow that instruction would be to allow the defendant to, to testify without testifying. The defendant has not taken the stand in this case. Therefore, he cannot, in the Court's opinion, effectively assert, make an assertion without testifying in that regard. For that one reason and for the other ones that I have previously cited of record, the Court continues to deny. However, it may be marked as an instruction and--what is that number?
>
> Tisdell: D-3, your honor. R. 350. (Emphasis by Appellee).

In **Cochran v. State** 913 So.2d 371, *375 (Miss. App.2005), relied upon by Roper, the Court of Appeals found that Cochran was not entitled to an alibi instruction. In that case, like the instant cause, the defendant did not testify. While Cochran's father claimed on direct examination that he thought Cochran spent the night at home, he admitted on cross examination that he spent the night at a friend's house. The father did not "disavow" this on redirect.

> ¶14. This Court reviews jury instructions as a whole, rather than individually. **Wilson v. State**, 592 So.2d 993 (Miss.1991). When a defendant asserts the defense of alibi, and presents testimony in support of that defense, the defendant is entitled to a jury instruction focusing upon such a theory. **Young v. State**, 451 So.2d 208, 210 (Miss.1984); **Thompson v. State**, 807 So.2d 471(¶ 9) (Miss.Ct.App.2001). However, jury instructions must be supported by the evidence. Id. Where the proof does not support an alibi defense, the instruction should not be granted. **Moore v. State**, 822 So.2d 1100(¶ 37) (Miss. Ct.App.2002).
>
> ¶ 15. During cross-examination, Michael's father testified that his son Michael Cochran spent the night at a friend's house on the date in question. Additionally, Robert did not disavow this on redirect examination. Accordingly, Robert's testimony indicated that he did not know where Michael spent the night of June 16, 2002. Because no other witness placed Michael at home at the time of the crime, the trial court was correct to deny Michael's alibi instruction because the alibi instruction had no foundation in the evidence. (Emphasis by Appellee)

In **Lester v. State**, 862 So 2d 582,586 (¶12 and 13) (Miss. App. 2004), relied upon by Roper, the Court found Lester was not entitled to an instruction requested where his own testimony did

not support such an instruction.

In **Hester v State**, 602 So. 2d 869, 872 (Miss. 1992), relied upon by Roper's counsel, the court found that Hester was entitled to an instruction on abandonment. However in that case, Roper's testimony provided a factual basis for his claim. Hester testified that he did not participate in requesting money from the sailor, never held the gun used by his companion, the actual shooter, and that he tried to pull the gun away from the shooter prior to him firing the shots at issue.

In **Parks v. State** 950 So. 2d 184, *187 (Miss. App.2006), relied upon by counsel for Roper, Demond Howard testified that he was with Parks "most of the night" and "never saw Luckett, the victim."

> Parks offered an entirely different account of the events. Demond Howard testified that Parks and Jones were with him most of the night, and he never saw Luckett.

In **Callahan v. State** 419 So.2d 165, *176 -177 (Miss.1982), the Court found that the trial court did not err in rejecting "an abstract jury instruction." An abstract instruction is one which does not relate a legal principle to a factual issue in the case.

> In addition to refusing Instruction No. 6 as being in the abstract and not related to other facts necessary for consideration by the jury, the instruction relates only to the controversy as to whether or not Jim Andrews had fully qualified as chief of police *177 on the night in question. As we have seen, this case does not involve an alleged attack on Andrews and is not determined by whether or not he was fully qualified by not performing the acts set out in the instruction

The Appellee would submit that the record cited indicates an insufficient evidentiary basis for granting Roper an alibi instruction. Roper did not testify. R. 328-329. There was no testimony that anyone saw Roper at home during the time at issue. The time frame in which the kidnaping and sexual assault occurred was from 4:00 to 1:00 or 2:00 in the morning. There was record evidence that Roper had more than one blue car. R. 44. Additionally, the record cited above indicates that the cross examination of Norwood revealed that he was not sure when Roper left his house. He merely

knew that he left after D. W.. R. 326-327.

Therefore, the record cited indicates this issue was waived. In addition, the record reflects the trial court had record evidence in support of his decision to deny the instruction. There was a lack of evidence in the record for finding a basis for thinking that Roper was "at home" during the time the sexual battery occurred. This issue is lacking in merit.

CONCLUSION

Roper's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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