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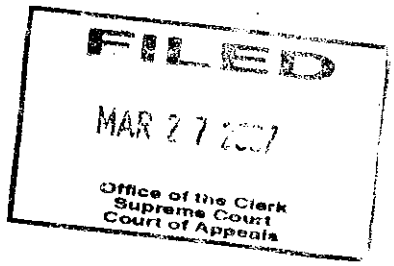
JAMES HAROLD ROPER — APPELLANT

V. — NO. 2006-KA-1791-COA



STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
W. DANIEL HINCHCLIFF, MS BAR NO. [redacted]
301 NORTH LAMAR STREET, SUITE 210
JACKSON, MISSISSIPPI 39201
TELEPHONE: 601-576-4200

COUNSEL FOR APPELLANT

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES HAROLD ROPER **APPELLANT**

V. **NO. 2006-KA-1791-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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 justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. James Harold Roper, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Kenneth L. Thomas, Circuit Court Judge

This the 27th day of March, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
W. DANIEL HINCHCLIFF
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED WHEN IT DENIED THE REQUESTED JURY INSTRUCTION ON DEFENDANT'S THEORY OF THE CASE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Grenada County, Mississippi, and a judgement of conviction for the crime of sexual battery as an habitual offender (Miss. Code Ann. § 99- 19-81) against James Harold Roper and the resulting thirty year sentence following a jury trial beginning September 6, 2006, Honorable Kenneth L. Thomas, presiding. James Harold Roper is presently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

The following proofs were admitted at trial. Teresa Pruitt lives in Lambert ,Mississippi. Her house in located across from the home of "D.W.", the alleged victim in this case. The alleged

perpetrator, James Harold Roper,["Roper"], lived down the street. On the night D.W. "went missing" she, with her family and boyfriend, were grilling chicken in the rear of her home. Roper and D.W. were also there. At some point D.W. left and later D.W.'s "sister or aunt" came by looking for him. (T. 13-17)

Angela Jarrett knew D.W. and was the person who found him that night walking on the railroad tracks. He was acting scared and bit her on the arm. A "cousin or uncle" came and retrieved D.W. from the tracks on a bicycle. She thought the time of the incident was one or two in the morning. (T. 48-52)

D.W. testified that he is presently thirteen years of age. He has lived at the afore mentioned house in Lambert all his life. On the day of the barbeque, after the group at the barbeque began to enter Jarrett's house, D.W. claimed that Roper "snatched me up", put him in his car and drove away. (T. 58-60) He described the car as blue and cracked on the side. He was driven to a church in Crowder, where Roper told him to pull down his pants. (T. 62-63) Roper pulled down his pants. According to D.W. "[h]e started playing with me and stuff." "He tried to put his 'watchcallit' in my booty." (T. 64) D.W. testified that Roper performed oral sex on him. (T. 65)

Upon completion, Roper threatened to kill D. W. if he told anyone. Roper then returned D.W. to Lambert, dropping him off at the railroad track around one in the morning. D.W. identified Roper as his assailant and described the scars on his arms, his "raggedy" teeth and his dark brown hair. (T. 66) His booty hurt from that night. (T. 68) It was not till nine months later that he told his mother (Katherine Addison) about the incident. (T. 69) The trial court allowed into evidence, D.W.'s testimony of Roper's statement that he preferred little black boys. (T. 72-73)

On cross examination, D.W. admitted that he did not know the date this happened. He admitted that Roper's "peepee" didn't fit and didn't go in. (T. 96-97) On redirect, he said his "butt" "was wide." (T. 104)

Before Katherine Addison ["Addison"] testified, a hearing was held outside the presence of the jury to determine if she could testify to statements made to her by D.W. under the tender years exception. The trial court made a finding on the record of the indicia of reliability under *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed. 2d. 638 (1990) (T. 120-121)

Addison then testified that she was the adoptive mother of D.W. That somewhere around September 14, 2003, around 3:00 to 3:30 p.m., D.W. left his house. Around 6:30 p.m. she noticed he was missing. She began looking for him and called the police around 9:00 p.m. At 12:45 she found him at the tracks with two girls. He was "squalling and kicking." (T. 129) He acted different from that date on. When she asked him to tell what happened, he refused. But he did complain that his posterior hurt. (T. 130-132) On June 12, 2004 she told D.W. she would take him to the Bishop of their church to find out what happened. On that date he burst out crying and told her that a "white man snatched him up and raped him." (T. 132) He said the man sucked him "down there." and that the man bit him when he tried to disengage. (T. 136-137)

She told the police that D.W. had seen the man behind his home. She drove by and identified the man. She noticed the scars on his arms described by D.W. Addison identified roper in court. (T. 138-142)

Deputy Robert Mabry testified that he arrested Roper. At the time of the claimed incident, Roper was 41 years of age and D.W. was 10. He also authenticated photographs of Roper that were admitted into evidence. (T. 156-168) On cross examination he admitted that no corroborative evidence had been collected. (T. 175-180)

Dr. Tanya King, a pediatrician, testified as an expert. During medical treatment, D.W. said he had been raped. There was no physical trauma observable. (T. 192-197)

Jan Samples, a forensic examiner, was examined in chambers. Her methodology and the basis of indicia of reliability were all examined. The court found her proposed testimony to be trustworthy. She was accepted as an expert, then testified that D.W. told her about the incident, that Roper put his "peepee' in his 'behind." (T. 239) Her opinion was that he had been assaulted.

The State then rested, and the defense moved for a directed verdict, which was denied.

The defense began with Sherria Jefferson who testified that she was with Angie Jarrett when they found D.W. by the track. Neither Roper nor his vehicle were present. (T. 266) Rena Wade was called, but not allowed to testify as to the varying dates given as the date of the incident. Officer Elaine Thompson contradicted who reported D.W. missing and when, calling into question Addison's testimony.

Jody Norwood was present at the barbeque. He testified that Roper was still present at the barbeque after D.W. left for around an hour and that Roper's blue car was parked at Roper's residence at the time of the search. Roper aided in the search, confirming his testimony was concerned the night in question. This testimony placed Roper at different locations during the time of the purported assault. (T. 309-311) He admitted he was Roper's friend.

The defense rested. The Court then proceeded with jury instructions. Instruction D-3 was an alibi instruction, which was denied by the trial court, ultimately ruling an alibi instruction would allow Roper to testify without testifying. The State's errant form of the verdict instruction was given, wrongfully informing the jury that it could fix the penalty at life. (R.E. 7, CP. 124)

A verdict of not guilty was returned as to the charge of kidnapping (C.P. 120) and guilty as to sexual battery. The jury could not fix the penalty at life, but recommended the court impose

"the stiffest penalty." (C.P. 124) The court, at sentencing, found Roper to have a life expectancy of 32.5 years and sentenced him to 30, as an habitual offender. Thus the right result was reached, but for the wrong reason.

Counsel for Roper filed his Motion for JNOV or in the Alternative, Motion for a New trial, specifically including the error addressed herein, the refusal of the alibi instruction. Timely designation of record and notice of appeal followed.[1]

SUMMARY OF THE ARGUMENT

The trial court committed reversible error when it denied the defendant's proposed jury instruction on its theory of the case. Evidence of alibi existed, and the accepted instruction thereon was tendered. The court errantly held that the phrasing "Roper is asserting the defense of alibi by saying that he was at his home..." allowed Roper to "testify" without taking the stand, thus denying Roper an instruction on his theory of the case. Thus Roper's fundamental right to a fair trial was denied.

ARGUMENT

ISSUE NO.1: WHETHER THE TRIAL COURT ERRED WHEN IT DENIED THE REQUESTED JURY INSTRUCTION ON DEFENDANT'S THEORY OF THE CASE

There is no single right and protection afforded a criminal defendant under our Constitution than the right to a defense and to present his theory of the case. In order to exercise this right it is paramount that the jury be given an instruction of the law on the particular defense that is the defendant's theory. Without such an instruction, the jury is uninformed on the law, thus effectively nullifying any facts or argument presented by the defendant.

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[1]The designation of the record include all the record. The transcripts indicate that Voir Dire and Opening and Closing Statements were omitted per attorney's request. Counsel for Roper has confirmed and indicates that no objections nor error occurred during these events.

As set forth above, witness Jody Norwood provide testimony of alibi, placing Norwood at the barbeque and at home at the time of the crime:

> Q. Now, at the time the child (D.W.) Left going home, was James Roper still there or had he gone ?
>
> A. He was still there at the time.
>
> Q. At the time, from the time 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 there. I really don't know. (T. 310-311)

Norwood joined the search for D.W. (T. 310-311), searching somewhere from 10:00 to 10:30 p.m.. During his participation in the search, he placed Roper's blue car at his residence. This was the same car allegedly used to transport D.W. at the time the crime was supposedly transpiring. By D.W.'s own testimony he was "snatched" on his way home. (T.60, 85) Yet Norwood places Roper as still at the barbeque for an hour or two after D.W. left. D.W. says he was found shortly after he was returned to the railroad track. (T. 67) The incident had lasted a long time. (T. 96) D.W. was missing from 6:00 p.m. to 6:30 p.m. He was reported missing around 9:00 p.m. (T. 125 -128) Norwood had joined the search around 10:00 p.m. and it was after that time he saw Roper's car at home. Again, there is evidence indicating Roper was at another place at the time of the crime Roper was entitled to an alibi instruction.

> Where a party offers evidence sufficient that a rational jury might find for him on the particular issue, that party of right is entitled to have the court instruct the jury on that issue and through this means submit the issue to the jury for its decision

Anderson v. State, 571 So.2d 961, 964 (Miss. 1990) The weight and worth of the testimony, so long as it is more than a mere scintilla, is to be decided by the jury upon proper instruction:

> The defense is entitled to an instruction covering its theory of the

> case so long as there is evidence in the record that would support that theory without regard to the probative value of that evidence so long as it is more than a mere scintilla of proof.

Lester v. State, 862 So.2d 582, 586 (Miss. App. 2004) The trial court, in failing to grant Roper's alibi instruction, has committed reversible error.

> In a homicide case, as in other criminal cases, the court should instruct the jury as to theories and grounds of defense, justification, or excuse supported by the evidence, and a failure to do so is error requiring reversal of a judgment of conviction. O'Bryant v. State, 530 So.2d 129, 133 (Miss.1988); Young v. State, 451 So.2d 208, 210 (Miss.1984), cert. denied, 469 U.S. 860, 105 S.Ct. 192, 83 L.Ed.2d 125 (1984); 40 Am.Jur.2d § 514, 765 (1968). Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court. O'Bryant at 133. Where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error. Murphy v. State, 566 So.2d 1201, 1207 (Miss.1990); Sayles v. State, 552 So.2d 1383, 1390 (Miss.1989).

Hester v. State, 602 So.2d 869, 872 (Miss. 1992)

The only remaining concern, is, did the instruction properly state the law. This is the accepted form of the instruction. The proffered instruction is standard. In a recent case, this same language was reiterated in the opinion of the Court of Appeals. No error was noted in this wording. (The case was affirmed as the court found insufficient evidence to merit the instruction.)

> Michael attempted to instruct the jury according to the following instruction:
>
> "Alibi" means elsewhere or in another place. **In this case, the Defendant is asserting the defense of alibi by saying that he was at home with his family.** (emphasis added)

> "Alibi" is a legal and proper defense in law. The Defendant is not required to establish the truth of the alibi to your satisfaction, but if the evidence or lack of evidence in this case raises in the minds of the jury a reasonable doubt as to whether the Defendant was present and committed the crime, then you must give the Defendant the benefit of any reasonable doubt, and find the Defendant not guilty.

Cochran v. State, 913 So.2d 371, 374 (Miss. App. 2005) Even if such language were errant, Counsel for the defense offered to amend the offending language. (T. 350, R.E. 30) The question asked by the trial court, "[c]an another person make the assertion for the defendant?"is answered in the following case. "Parks' defense was presented through Demond Howard, an alibi witness." *Parks v. State*, ___So.2d___, 2006 WL 1604129,3 (Miss. App. June 13, 2006) To hold otherwise would violate an inviolate Constitutional Right, the right to not "be compelled in any criminal case to be a witness against himself..." 5th Amendment to the U.S. Constitution.

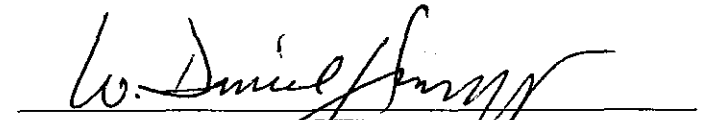
The failure in this matter to allow Roper to present a defense is reversible error.

CONCLUSION

James Harold Roper was denied a fair trial and is entitled to have his conviction of sexual battery reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. [redacted]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for James Harold Roper, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Kenneth L. Thomas
Circuit Court Judge
Post Office Box 548
Cleveland, MS 38732-0548

Honorable Laurence Y. Mellen
District Attorney
Post Office Box 848
Cleveland, MS 38732-0848

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 27th day of March, 2007.

W. DANIEL HINCHCLIFF
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200