

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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GILBERTO HILARIO CHIM

APPELLANT

FILED

VS.

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NO. 2006-KA-1839-SCT

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: W. GLENN WATTS
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

TABLE OF AUTHORITIES	ii
STATEMENT OF THE FACTS	2
ARGUMENT	9
PROPOSITION I	
THE MOTION TO SUPPRESS WAS PROPERLY DENIED.....	9
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

STATE CASES

Agee v. State, 185 So. 2d 671, 673 (Miss. 1966)	7, 13
Alexander v. State, 736 So.2d 1058, 1062 (Miss. Ct. App.1999)	14
Baldwin v. State, 757 So. 2d 227, 231 (Miss. 2000)	8, 14
Balfour v. State, 598 So.2d 731, 742 (Miss.1992)	14
Dancer v. State, 721 So.2d 583, 587 (Miss.1998)	14
Holmes v. State, 211 Miss. 436, 51 So. 2d 766 (1951)	14
Hunt v. State, 687 So.2d 1154, 1160 (Miss.1996)	14
Lee v. State 913 So.2d 913, *933 (Miss. 2005)	15
Lee v. State, 236 Miss. 716, 112 So. 2d 254 (1959)	14

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BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On October 10, 2006, Gilberto Hilario Chim, “Chim” was tried for rape and sexual battery of J. C., a female child under fourteen years of age, before a Scott County Circuit Court jury, the Honorable Marcus Gordon presiding. R.1. Chim was found guilty of both counts and given a life plus twenty year sentence in the custody of the Mississippi Department of Corrections. R. 114. From that conviction, Chim, through appellant counsel, filed notice of appeal. C.P. 32.

ISSUE ON APPEAL

I.

WAS THE MOTION TO SUPPRESS PROPERLY DENIED?

STATEMENT OF THE FACTS

On August 1, 2006, Chim was indicted by a Scott County Grand jury for statutory rape and sexual battery of J. C., a female child under the age of fourteen, and Chim was more than 24 months older than the female child. This was under M. C. A. §97-3-65(1)(b) and 97-3-95(1)(d). C.P. 1.

A suppression hearing was held by the trial court. R. 48-82. After hearing from all the officers present during the interrogation, from Chim, his ex-wife, and from Chief of Police Mike Lee in rebuttal, the trial court denied the motion to suppress. R. 82.

Officer Will Jones testified that Chim was questioned about the charges on September 8, 2005. This occurred at the Forrest Police Department. Present with Officer Jones was Officer Robert Roncolli and Chief Mike Lee. R. 48.

Jones testified that based upon his interaction and communication with Chim, both prior to and during the interview, he believed that he understood the English language. Chim seemed to understand what was being said and he responded appropriately to questions in English. R. 48. Jones testified that there was no coercion or promises made to Chim.

Jones testified that when exhibit S-1, the **Miranda** waiver of rights form, was read to Chim, and he was allowed to read it for himself, "he seemed to understand" what was being asked of him. R. 48. Officer Will Jones testified that it was Officer Mike Lee who read Chim his **Miranda** rights. R. 48. Chim signed the **Miranda** waiver which was witnessed. Chim did not request an attorney

and never asked for the interview to stop. R. 50. Chief Mike Lee wrote down Chim's incriminating statements. Chim was given an opportunity to read over the statement and to make changes. He made none. R. 51.

Officer Robert Roncolli testified that he was present when Chim was read his rights. R. 54. Roncolli testified that no threats or promises were made. Chim communicated with Office Lee in English. R. 55. Roncolli testified that based upon his experience he believed that Chim "understood" his rights. R. 55. Chim did not request an attorney or ask for the interview to stop. He signed the **Miranda** statement and made his inculpatory statement. He was given an opportunity to correct it if he wished. R. 56

Mr. Mike Lee, Chief of Police for the city of Forrest, testified that he read Chim his **Miranda** rights. He gave him an opportunity to read them himself. R. 59. Lee believed that Chim "understood" these rights, including his right to an attorney. R. 59. There were no promises made and no threats. Chim signed the waiver and made his incriminating statement. He was given an opportunity to read over the statement and make any changes. He made none. R. 61.

An interpreter was made available during the suppression hearing. R.66. Ms. Jevelin Ferragut was sworn in to assist Chim should he need assistance in responding to questions in English. R. 67. Chim testified that although originally from Guatemala he had been in the United State since 1998. He studied English during his last two years of education in Guatamala. R. 67. He testified that he understood and could speak English. R. 68. Chim admitted he signed the **Miranda** waiver, but claimed he did not understand "all of the words." R. 68. Chim said he signed because "they told me I have to sign." R. 68. He claimed he indicated that he wanted an interpreter, but was told that he could communicate well enough not to need one. R. 69.

On cross examination, Chim indicated that although his rights to remain silent and to have

an attorney present were read and explained to him that he did not understand them very well. R. 69-71.

Chim's ex-wife, Mrs. Kimberly Chim testified. She was an native American Indian. R. 73. She testified that her English was better than his. However, she admitted that she spoke to him in English and he understood her and would respond to her in English. This was in the home they shared while married. R. 74.

Officer Lee testified in rebuttal. Lee testified that no one told Chim he had to sign the **Miranda** waiver or his incriminating statement. R. 76. Chim never indicated that he did not understand the language being used on the waiver, and he never requested an interpreter. R. 76.

After hearing testimony from the officers present and from Chim, the trial court found that there was sufficient evidence for concluding that Chim "understood" English well enough to make an intelligent and voluntary waiver of his **Miranda** right to counsel. R. 82.

On October 10, 2006, Chim was tried for rape and sexual battery before a Scott County Circuit Court jury, the Honorable Marcus Gordon presiding. Chim was represented by Mr. Shawn Harris. R. 1.

Officer Joey Hall testified to investigating an incident at 1108 East 5th Street in Forrest. This was the residence of Mr. Hilario Cantillio. This was on September 7, 2005. Hall found a small female child wrapped up in a comforter on a sofa. She was with her father. The comforter wrapped around the child was blood soaked. Blood was dripping from the comforter onto the floor. R. 30.

Mr. Hilario Cantillio testified that he was a neighbor of Chim's in Forrest, Mississippi. They had been friends for several years and visited in each other's homes. He and Chim sometimes shared drinks together after work. Their children played together.

J. C. was a six year old child at the time of trial. She was born on March 04, 2000. R. 33.

Mr. Cantillio and the child's mother were separated. R. 33 Mr. Cantillio was raising her. R. 34. J. C. was handicapped, and could not speak very well although she understood some English and Spanish. R. 38.

J.C. had been with Chim in his home shortly before Mr. Cantillio discovered that his daughter was bleeding between her legs. R. 36. J. C. told her father that she and Chim - "they were taking a shower together." R. 36. Mr. Cantillio wrapped her in a comforter. He called the police, believing that she had been sexually assaulted. R. 37-38.

Dr. Gayle Harrell, a board certified family practitioner physician, testified that she practiced family medicine in Forrest. R. 40. She was accepted as an "expert witness." R. 41. Dr. Harrell testified that she examined J. C., at that time a five year female child. Dr. Harrell found that the child was actively bleeding from her vagina area. R. 42-43. Her physical examination found she had bruises and abrasions on her inner thighs and buttocks. R. 43. J. C. also had a laceration between her vagina and her rectum. R. 43. She was bleeding and "in a lot of pain." R. 43. Dr. Harrell testified that the child's injuries were consistent with a tear that would have been produced by a hard object such as a penis or a finger. R. 43.

Chim's incriminating statement was read to the jury. R. 90. See State's Exhibit 2 referred to in manila envelop. In that statement, Chim admitted that he "took her short pants off and her underclothes." After removing the female child's clothing, he stated . "I stuck my two fingers in her." He also tried to place "my dick in her. But it would not go all the way in." R. 90.

Chim was given an opportunity to testify in his own behalf. Chim decided not to testify. R. 93-94.

Chim was found guilty of both counts and given a life plus twenty year sentence in the custody of the Mississippi Department of Corrections. R. 114. From that conviction, Chim, through

appellant counsel, filed notice of appeal. C.P. 32.

SUMMARY OF THE ARGUMENT

1. After a full suppression hearing, the trial court found that Chim's incriminating statements were voluntarily and intelligently made. R. 80-82. The record reflects that after Chim was read his **Miranda** rights, and allowed to read them for himself, he indicated that he understood them, and signed the waiver. The record also reflects there was also sufficient corroborated evidence for concluding that Chim "understood" English well enough to have intelligently waived his right to an attorney or to remain silent.

There is credible, substantial corroborated evidence in support of the trial court's ruling. This included corroborated testimony from all the Forrest Police officers present, Officers Lee, Jones and Roncolli. Chim testified in his own behalf at the suppression hearing. R. 67-71. He admitted to signing the **Miranda** waiver. He did not claim any promises induced his statements. However, he did claim he was told "he had to sign" the **Miranda** waiver. He claimed that he could not understand "all the words" on the **Miranda** waiver. R. 68. He also claimed to have asked for an interpreter. R. 69.

Officer Lee testified in rebuttal. R. 76-77. Lee testified that no one told Chim he had to sign the **Miranda** waiver. Chim never indicated that he did not understand the English used in the waiver. And Chim never requested an interpreter for assistance. R. 76-77.

Mrs. Kimberly Chim, Chim's ex-wife, testified in rebuttal that they communicated in English when they were married. Although her English was better than his, he, nevertheless, for the most part, could communicate with her in English in their household. R. 72-75.

Therefore, the Appellee would submit there was evidence that the trial court used the correct legal standard, and did not commit manifest error in his finding of fact. **Agee v. State**, 185 So. 2d

671, 673 (Miss. 1966)

There is a “heavy burden” to overcome a trial court’s ruling denying a motion to suppress. **Baldwin v. State**, 757 So. 2d 227, 231 (Miss. 2000). The Appellee does not believe Chim met that burden.

ARGUMENT

PROPOSITION I

THE MOTION TO SUPPRESS WAS PROPERLY DENIED.

Counsel for Chim believes that the trial court erred in denying a motion to suppress. He believes there was sufficient evidence for concluding that Chim did not understand English well enough. He thinks that Chim, a Spanish speaker originally from Guatemala, was unable to understand his **Miranda** rights, as stated in English. Both Chim and his wife testified that he was a native speaker of Spanish, not English. There was evidence that he needed relatives to assist him even in communicating with his wife. Therefore, the Appellant believes there was sufficient evidence for finding that Chim did not “knowingly understand his **Miranda** rights.” He should have been given an interpreter when he was questioned. Appellant’s brief page 1-8.

To the contrary, the Appellee would submit that there was credible, corroborated evidence sufficient for concluding that Chim understood English well enough to communicate with the officers who read to him his **Miranda** rights. He admitted to understanding English. R. 68. He was able to understand English well enough to communicate with the trial court and his counsel, as shown by the record transcript of the instant cause. The record also reflects that while a translator was provided for him, Chim answered most of the questions for himself without any assistance. R. 67-71.

The trial Court denied a motion to suppress. R. 81-82. This was after a full suppression hearing. R. 47-82. The trial court found that there was sufficient evidence for concluding the Chim “understood” English well enough to make a knowing and voluntary waiver. As stated:

So your objection to the statement for the reason that he did not sufficiently understand English well enough to understand the **Miranda** rights, and that the statement that he gave was not-he did not sufficiently understand English enough to

give that type of statement, so your objection's overruled. R. 82.

Officer Will Jones testified that Officer Mike Lee read Chim his **Miranda** rights. R. 48. Jones testified that based upon his communication with Chim, both prior to and during the interview, he believed that Chim understood the English language. He "seemed to understand perfectly" what was being said and he responded appropriately to questions in English. R. 48. Jones testified that there was no coercion or promises made to Chim.

Jones believed that when exhibit S-1, the **Miranda** waiver of rights form, was read to Chim, and he was allowed to read it for himself, he "understood" the rights he was waiving by talking with them. R. 49. Jones saw Chim sign the **Miranda** waiver which was witnessed.. Chim did not request an attorney and never asked for the interview to stop. R. 50. Chief Mike Lee wrote down Chim's incriminating statements. Chim was given an opportunity to read over the statement and make any changes. He made none. R. 51.

Q. Now at that time, as far as the defendant is concerned, had you talked to him enough to determine whether he could understand English?

A. Yes, sir.

Q. And what was the results of that?

A. He seemed to understand perfectly what we were-the questions that we did ask on scene and as far as personal information, like what his name was and his-you know, he lived at this residence and so forth like that.

Q. **Is there any question in you your mind as to whether or not he could understand the English language?**

A. **We felt very comfortable that he could understand the English language.**

Q. **And what about his respond and speak the English language?**

A. **Yes, sir. He-he spoke and we understood quite well.** R. 48. (Emphasis by Appellee).

Officer Robert Roncolli testified that he was present when Chim was read his **Miranda** rights. R. 54. Roncolli testified that no threats or promises were made. Chim communicated with Office Lee in English. R. 55. He believed based upon his experience that Chim “understood” his rights. R. 55. Chim did not request an attorney or ask for the interview to stop. He signed the **Miranda** statement and made his inculpatory statement. He was given an opportunity to correct it if he wished. R. 56

Q. Now, he’s—it’s been indicated that he’s from Guatemala. What about his command of the English language at that particular time.

A. **He seemed to understood us well. He could speak English.**

Q. **He was able to communicate with you in English?**

A. **Yes, sir.** R. 55. (Emphasis by Appellee).

Chief of Police Mike Lee testified that he read Mr. Chim his **Miranda** rights. He also allowed him to read the **Miranda** rights form for himself. Chim signed it in his own handwriting. He testified that he did not threaten him or promise him anything. He also testified that based upon his observations and experiences , he believed that Chim “understood” the **Miranda** rights he was waiving by pleading guilty. R. 58-63. Officer Lee also testified that he had dealt with many other Hispanics whose native language was Spanish but were currently residing in Scott County. R. 62; 76.

Q. **And based on your experience and observations of him, is it your opinion that he understood those rights?**

A. **Yes, sir.** R. 59. (Emphasis by Appellee).

...

Q. **Chief Lee, during your work at the police department, you’ve encountered many Hispanic gentlemen and ladies in the Scott County area. Have you not?**

A. **Yes, sir. Yes, sir.** R. 76. (Emphasis by Appellee).

A translator was provided for Chim at the suppression hearing. R. 65-66. Chim testified that he was from Guatamala. He had been in the United States since 1998. He had received nine years of education in Guatamala. R. 67. He studied English for his last two years. R. 68. He admitted that he signed the **Miranda** waiver of rights form. R.68. However, he claimed he did not understand “all the words” on the waiver. He claimed that although he asked for an interpreter, one was not provided. The officers told him “they understood what he- he was saying.” R. 69. He believed the officers told him he had to sign the papers. R. 68.

Officer Mike Lee testified in rebuttal. R. 76-77. He testified that no one told Chim he had to sign the **Miranda** waiver or his incriminating statement. He testified that Chim never indicated that he did not understand the English used in the **Miranda** waiver. And Chim never requested an interpreter or attorney at any time. R. 76-77.

Q. Now, Chief Lee, during the time you and Officer Jones and Officer Roncolli had the defendant here in interview on September 8, 2005, as to these two documents here, exhibit one to the motion, exhibit two, did you or the other officers at any time tell him that he had to sign either of those documents? Tell him he had to sign?

A. No, sir.

Q. During the time that you were interviewing him, did he at any time ask for an interpreter?

A. No.

Q. Did he at any time indicate he didn't understand any of the language of what you were saying or what was written down?

A. No, sir. R. 76. (Emphasis by Appellee).

The prosecution called Chim's ex-wife to testify in rebuttal. Mrs. Kimberly Chim testified

that she was an American Indian. She claimed that while she was married to Chim he understood what she was saying to him, and that she could understand him. Although his vocabulary was limited, she could understand what he was saying to her in their household.

Q. When you're talking he understands what you're saying?

A. Uh-huh.

Q. And you're talking in English, right?

A. Yes, sir.

Q. Now when he's talking, is he talking back to you in English?

A. Little.

Q. And you understand what he's saying?

A. Uh-huh.

Q. And you don't understand Spanish do you?

A. Unh-unh. R. 74 (Emphasis by Appellee).

Consequently, the record reflects the trial court heard from all those present when Chim was interrogated at the Forrest Police Department. This was Officers Lee, Jones and Roncolli. R. 54. They testified that he did not request an attorney or an interpreter. Chim did not claim that he was promised anything in exchange for his incriminating statement. However, he believed he as told "I have to sign." R. 68.

In rebuttal, Officer Lee testified that Chim neither indicated that he did not understand any of the English in the **Miranda** waiver or requested an interpreter. And no one told Chim he had to sign anything. R. 76-77.

In **Agee v. State**, 185 So. 2d 671, 673 (Miss. 1966), the Court stated that when the accused offers testimony about threats of violence, or promises, the State must present all the officers present

when the accused were questioned. As stated:

The State has the burden of proving the voluntariness of a confession. This burden is met by the testimony of an officer, or other person having knowledge of the facts, that the confession was voluntarily made without any threats, coercion, or offer of reward. This makes out a prima facie case for the State on the question of voluntariness. **Lee v. State**, 236 Miss. 716, 112 So. 2d 254 (1959). When objection is made to the introduction of the confession, the accused is entitled to a preliminary hearing on the question of the admissibility of the confession. This hearing is conducted in the absence of the jury **Lee v. State, supra**, is also authority for the proposition that when, after the State made out a prima facie case as to the voluntariness of the confession, the accused offers testimony that violence, threats of violence, or offers of reward induced the confession, then the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or given an adequate reason for the absence of any such witness. See also **Holmes v. State**, 211 Miss. 436, 51 So. 2d 766 (1951).

In the instant cause, as shown above with cites to the record, Chief Lee rebutted Chim's three claims. R. 76-77. Lee testified that no one informed Chim he had to sign anything. Chim never indicated any lack of understanding of the English used on the waiver. And Chim never requested an interpreter. R. 76-77. The testimony of officers Jones and Roncolli were generally corroborative of Officer Lee, as shown above with cites to the record..

In **Baldwin v. State**, 757 So. 2d 227, 231 (Miss. 2000), the Supreme Court stated a defendant "bears a heavy burden" in seeking to overcome the admission of an incriminating statement after a suppression hearing.

The trial court is also given deference in the admissibility of an incriminating statement by a criminal defendant. In **Hunt v. State**, 687 So.2d 1154, 1160 (Miss.1996), this Court held that the defendant seeking to reverse an unfavorable ruling on a motion to suppress bears a heavy burden. The determination of whether a statement should be suppressed is made by the trial judge as the finder of fact. Id. "Determining whether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence." **Balfour v. State**, 598 So.2d 731, 742 (Miss.1992); **Alexander v. State**, 736 So.2d 1058, 1062 (Miss. Ct. App.1999). **Baldwin**, 757 So.2d at 231. 'Where, on conflicting evidence, the lower court admits a statement into evidence this Court generally must affirm.' **Dancer v. State**, 721 So.2d 583, 587 (Miss.1998) (citing

Morgan v. State, 681 So.2d 82, 87 (Miss.1996)).

In **Le v. State** 913 So.2d 913, *933 (¶59) (Miss. 2005), the Mississippi Supreme Court found that the Jackson County trial court did not abuse its discretion. The Court found, after a suppression hearing, that Mr. Thong Le, a Vietnamese involved in the shrimping industry on the coast, understood English well enough to understandably waive his Constitutional rights.

(¶ 59). Le contends that he did not understand his rights because of the cultural barriers and because, ‘in the shrimping community on the Gulf Coast, the Vietnamese can live their lives separate from the American community, separate in speech, separate in religion, and separate in culture.’ However, after observing Le and hearing his testimony, the trial judge concluded that Le knowingly, intelligently and voluntarily waived his right to remain silent. We find that the trial court did not apply an incorrect legal standard, did not commit manifest error, and his decision was not contrary to the overwhelming weight of the evidence. **Snow**, 800 So. 2d at 495-96. Thus, this issue has no merit.

The Appellee would submit that we have cited sufficient credible, corroborated evidence in support of the Forrest County trial court’s ruling denying a motion to suppress. There was more than sufficient credible evidence for finding the trial court used the correct legal standard, did not commit manifest error, and there was credible, corroborated evidence in support of his factual finding. As stated above, the trial court found that Chim “understood English.” He understood English well enough to communicate with others, including his ex-wife, in English. R.82.

He understood English well enough to waive his **Miranda** right to remain silent, and his right to have an attorney present when he made his incriminating statements.

Additionally, Dr Gayle Harrel testified that the injuries she observed on the female child victim were consistent with her vagina and anus having been assaulted with a hard object such as a finger or a penis. R. 43.

Eye witnesses at the scene of the crime , Officer Joey Hall and child victim’s father, Mr. Hilario Cantillio, saw massive bleeding between the child’s legs. R. 30-31;36.

These physical findings were consistent with Chim's statement. Chim was known to have been alone with the victim when she was sexually assaulted, injured and left bleeding from between her uppermost legs. R. 34.-37. J. C. told her father she and Chim were taking a shower together. R. 36.

The Appellee would submit for the reasons cited above, the trial court used the correct standard, and did not commit manifest error in admitting Chim's incriminating statement, See Exhibit 2 in manila envelop marked "Exhibits." His incriminating statement was not only admissible under the correct legal standard, it was also fully consistent with corroborating eye witness and forensic evidence also in the record.

The Appellee would submit that this issue is lacking in merit.


CONCLUSION

The trial court's denial of the motion to suppress should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



W. GLENN WATTS

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

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:

Honorable Marcus D. Gordon
Circuit Court Judge
Post Office Drawer 220
Decatur, MS 39327

Honorable Mark Duncan
District Attorney
Post Office Box 603
Philadelphia, MS 39350

Edmund J. Phillips, Jr., Esquire
Attorney At Law
Post Office Box 178
Newton, MS 39345

This the 3rd day of August, 2007.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

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