IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RANDY LEONARD — APPELLANT

VS. — NO. 2006-KA-2160

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF MISSISSIPPI

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VERSUS **NO. 2006-KA-2160-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Randy Leonard was convicted in the Circuit Court of Winston County on a charge of sexual battery and was sentenced to a term of 15 years in the custody of the Mississippi Department of Corrections with five years to serve and ten years on post-release supervision. (C.P.36-38) Aggrieved by the judgment rendered against him, Leonard has perfected an appeal to this Court.

Pursuant to *Lindsey v. State*, 939 So.2d 743 (Miss. 2005), counsel for Leonard filed the Brief for Appellant, stating that counsel had diligently searched the record for any arguable good faith issues which could be presented but had found none. Counsel also confirmed that he had mailed a copy of this brief to his client and that he had advised him of his right to file a *pro se* brief.

Thereafter, the appellant did file a supplemental brief, in which he set out, but did not argue, several issues. This Court then directed counsel for the appellant to file a Second Supplemental Brief addressing these issues. That brief has been filed, and the state now files its brief in response.

Substantive Facts

THE STATE'S CASE

On August 13, 2005, 16-year-old J.H. was spending the night with her mother's sister, D.M.; and D.M.'s boyfriend, Randy Leonard. J.H. slept on the sofa, and awoke about 4:00 that morning when she felt the defendant's finger in her vagina. She told him to "get away" from her; he offered her "something to eat or some money," but she "didn't take it." The defendant then "went and got in the bed." Later that next morning, J.H.'s uncle came to pick her up to take her to her softball game. According to J.H., "When my mama came to get me, I told her."[1] J.H. said she waited until this time to report the incident because, in her words, "[M]y auntie was high, and then I didn't think they was going to believe me, so I wanted to tell my mama." (T.37-43)

J.H. elaborated that when she and her mother went to her grandmother's house after the softball game, her mother was walking "up the hall" as Leonard "was trying to come in." J.H. "closed the door in his face," walked her mother down to her father's room, and told her what had happened. J.H. and her mother then went to D.M.'s house, where they informed D.M. of Leonard's offense. D.M. "was mad"; all three women "jumped on

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[1]Leonard had ridden to the grandmother's house with J.H.'s mother. (T.43)

Leonard"; and they "put him out." J.H. and her mother went to the police department that day, but were told to come back another day so that the appropriate officer could take the report. (T.43)

J.H.'s mother, B.H., testified that on August 13, she had driven to her sister's house to get a skirt to wear to a funeral. Leonard asked if she would drive him to the store. On the way to the grandmother's house, Leonard told B.H., "I'm going to tell you now. [J.] thought I was trying to touch her this morning. Her leg was hanging off the couch. I picked her leg up and put it back on the couch." When they arrived at the grandmother's house, J.H. "came to the front door, and when she saw Randy come in behind" her mother, "she slammed the door in his face." When her mother told her to open the door for him, J.H. told her to "come down the hall." After the ensuing conversation, B.H. "ran Randy out of her grandmother's house." (T.53-54)

After J.H. and B.H. reported this offense, Investigator Greg Clark of the Louisville Police Department had Leonard picked up for questioning. Having waived his rights, Leonard told Investigator Clark that he had been asleep when one of his "partners" named "Charles" knocked on the door at 11:00 or 12:00. "Charles" came into the house. Leonard saw that J.H. was not dressed and that her leg was hanging off the couch. To protect her privacy, he put her leg on the sofa and "covered her up with a big towel." He could not provide the last name of this "Charles." (T.57-61)

THE DEFENDANT'S CASE

L.J., grandmother of J.H. and mother of B.H. and D.M., testified that she lived with D.M., Leonard, and their three children. According to L.J., J.H. "came in at 10:00" that night, took a bath, put on "some little shorts and stuff and went out on the porch." At about

midnight, L.J. got up from the sofa and went to bed in her room, across from the one shared by D.M. and Leonard. L.J. did not see J.H. again that night. J.H. did not report the incident to her maternal grandmother. L.J. learned about it later that day when her daughter B.H. told her "to get the other kids out of the house because Randy had molested" J.H. (T.65-69) On cross-examination, L.J. admitted that she did not know what happened in the living room at approximately 4:00 that morning. (T.71)

D.M. testified that around midnight, she and Leonard took a bath and went to bed. There was a knock on the door, and Leonard got up to answer it. Leonard and this caller talked for a few minutes; afterward, Leonard came back to bed at approximately 1:30. D.M. testified that he did not get out of the bed again until morning. (T.74-75)

Later that day, B.H. told her what Leonard had done, and D.M. asked him to leave the house. Two or three hours later, she asked him to return, and he did. (T.75-77)

On cross-examination, D.M. testified that she thought J.H. had fabricated this story because she was angry with Leonard for telling her to go inside that night. (T.79)

SUMMARY OF THE ARGUMENT

Appellate counsel originally certified to the absence of non-frivolous issues to present on appeal. Nothing has been shown to impugn this initial conclusion. Accordingly, the judgment entered below should be affirmed.

PROPOSITION ONE:

THE APPELLANT'S FIRST ISSUE IS FRIVOLOUS

The first issue submitted by Leonard is set out as follows: "THE TRIAL COURT erred because it was without jurisdiction to try and impose sentence according to 97-3-95(1)(a) (R.Vol.1 pg 3) Discovery Violation." Counsel for appellant asserted, "Counsel

cannot locate anything in the record to discuss any discovery violation." Clearly, this issue is frivolous. It should be rejected summarily.

PROPOSITION TWO:

THE APPELLANT'S SECOND ISSUE IS FRIVOLOUS

The second issue presented is whether the trial court erred in allowing the indictment to be amended. Counsel for appellant painstakingly analyzed this issue and concluded that "a resolution of this issue depends on whether the court deems a defense became available to Mr. Leonard after the amendment." (Appellant's Second Supplemental Brief 5) The state gathers that if a defense did indeed become available to Leonard after the amendment, appellate counsel would have asserted and argued it. Under the circumstances, the state relies on the presumption of correctness of the judgment entered below. E.g., *Beckum v. State*, 917 So.2d 808, 813 (Miss. App. 2005). Nothing has been shown to indicate that his issue is non-frivolous. It should be rejected summarily.

PROPOSITION THREE:

THE APPELLANT'S CHALLENGE TO THE SUFFICIENCY AND WEIGHT OF THE EVIDENCE SUPPORTING HIS CONVICTION IS FRIVOLOUS

Leonard's third proposition challenges the sufficiency and weight of evidence undergirding the verdict. To prevail on the contention that he is entitled to a judgment of acquittal, Leonard faces the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence.

> If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

With regard to the alternative argument, that he is entitled to a new trial, the state submits Leonard must meet the stringent standard of review summarized as follows:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. *Dudley v. State*, 719 So.2d 180, 182 (Miss.1998) (collecting authorities). 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. *Id.*
>
> *Montana v. State*, 822 So.2d 954, 967-68 (Miss.2002).

Here, "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss.1998).

Incorporating by reference the facts set out under the Statement of Substantive Facts, the state submits the trial court did not abuse its discretion in 0submitting this case to the jury and refusing to overturn its verdict. The evidence is not such that reasonable jurors could have returned no verdict other than not guilty, or such that to allow it to stand would be to sanction an unconscionable injustice. Indeed, appellate counsel has not argued affirmatively that this case should be reversed on these grounds. Accordingly, the

state relies on the presumption of correctness in submitting that his proposition plainly lacks merit.

PROPOSITION FOUR:

THE APPELLANT'S FOURTH ISSUE IS FRIVOLOUS

The fourth issue presented is whether the defendant was tried in violation of his constitutional and statutory right to speedy trial. This issue was not raised below and may not be raised for the first time on appeal. *Scott v. State*, 829 So.2d 688, 691 (Miss. App. 2002); *Walker v. State*, 823 So.2d 557, 567 (Miss. App. 2002), citing *Bell v. State*, 733 So.2d 372, 376 (Miss.1999). Moreover, appellate counsel has not argued affirmatively that Leonard's sight to speedy trial was violated. Nothing has been shown to discredit this conclusion. Accordingly, the state submits this issue is frivolous.

PROPOSITION FIVE:

THE APPELLANT'S FIFTH ISSUE IS FRIVOLOUS

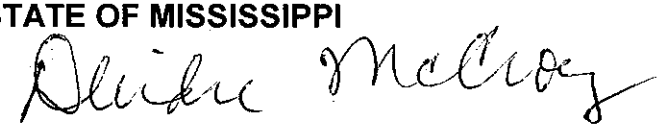
Leonard's fifth issue is set out as follows, verbatim: "Improper selection of Gender netural Jurors more women than men in this particular case (R vol 1, page 29)." Appellate counsel correctly pointed out that "defendants are not entitled to a jury of any particular composition." *Ryals v. State*, 791 So.2d 161, 165 (Miss.2001). (Appellant's Second Supplemental Brief, 9) This issue is frivolous. It should be rejected out of hand.

CONCLUSION

The state respectfully submits that nothing has been shown to impugn defense counsel's initial conclusion that this case contained no non-frivolous issues for presentation on appeal. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI



BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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This the 18th day of June, 2007.

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