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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.2006-KA-02160-COA

RANDY LEONARD — APPELLANT

V.

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STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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"V. Improper selection of Gender netural [sic] Jurors more women than men in this particular case (R vol 1, page 29)."

DISCUSSION

ISSUE: "I. 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 cannot not locate anything in the record to discuss any discovery violation.

ISSUE: "II. THE TRIAL COURT erred in Allowing Amendment of Indictment after trial (R vol 1 pg 24) (1 thru 24) 99-17-15 in violation thereby."

In Mr. Leonard's case, the state moved pretrial to amend the indictment to change the offense date from August 13, 2005 to August 14, 2005 [T. 24] The trial court granted the motion over objection after taking it under advisement. [T. 64] There was never an order entered amending the indictment. The following topics will be discussed: First whether the state was entitled to amend the indictment; and, if it was, secondly, was the amendment effective due to a lack of an order being entered. Thirdly, if the amendment was not effective and there is a variance between the date of the offense in the indictment and the date of the offense from the trial evidence, whether such variance is fatal?

Regarding the amendment:

> [A] change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. Givens v. State, 730 So.2d 81, 87 (MS App.1998), citing Shelby v. State, 246 So.2d 543, 545 (MS 1971).
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> * * *
>
> [The test for] determining whether the defendant is prejudiced by the amendment depends on whether a defense under the original indictment would be equally available under the amended indictment." Id. (citations omitted). If both the defense and the evidence remain unhindered after amending the indictment, then the amendment is considered to be an amendment of form rather than substance. Id. See also Reed v. State, 506 So. 2d 277, 279 (MS 1987).

Here, if any defense in this case was prejudiced by a change in the date, the amendment would not have been proper. Accordingly, if time is not an essential element

of the particular crime charged in an indictment, amendments and corrections of dates are liberally allowed. Wilson v. State, 515 So. 2d 1181, 1182 (MS 1985). See also Reed v. State, 506 So. 2d 277, 279 (MS 1987)

In Wilson, supra, the court pointed out that when alibi is a defense, it may be prejudicial to allow an amendment as to the time or date of an offense. In the case at bar, Mr. Leonard did not assert an alibi defense; rather, he had purportedly given a statement which was introduced by the state at trial that his contact with the complaining witness did not involve any misappropriate touching or violation. At trial the defendant presented testimony to support a position that the prosecutrix's accusations were fabricated. [T. 59-61; Ex. 1] If either of these defenses were time dependent, then, amendment would not have been proper.

Regarding the amendment of the indictment not being reduced to a written order and entered on the record, MCA §99-17-15 (1972) reads:

> The order of the court for amendment of the indictment, record or proceedings provided in Section 99-17-13 shall be entered on the minutes, and shall specify precisely the amendment, and shall be a part of the record of said case, and shall have the same effect as if the indictment or other proceeding were actually changed to conform to the amendment; and wherever necessary or proper for the guidance of the jury, or otherwise, the clerk shall attach to the indictment a copy of the order for amendment.

It would appear that the attempted amendment in the present case was, therefore, ineffective. This does not end the analysis.

In Reed v. State, 506 So. 2d 277, 279 (MS 1987), there was an amendment to the indictment; but, no order was entered regarding the amendment. The Reed court found that under MCA §99-17-15 (1972), "the State is required to make sure that such an order appears in the record"; however, the ineffective amendment was not reversible error in Reed, because, the charges involved were severable.

In Mahfouz v. State, 303 So.2d 461, 463 (MS 1974), similarly, an indictment was not properly amended. The court ruled that if a variance is not fatal, quashing of the indictment is not necessarily the remedy. In Mahfouz, a variance resulted, but it was not fatal. Id.

From Mahfouz and Reed it is clear that where an amendment to an indictment fails to effectively amend the indictment because it was not put on the minutes of the court as required by MCA §99-17-15 (1972), the analysis turns to whether a fatal variance results between the indictment and the proof.

For the present set of facts, the issue as to whether a temporal variance between the indictment and trial proof is fatal, appears to be governed by statute and rule.

MCA § 99-7-5 (1972) provides:

> An indictment for any offense shall not be insufficient for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for the want of a proper or perfect venue

Rule 7.06 ¶5 of the Uniform Circuit and County Court Rules also controls. The

rule requires that an indictment include the date and, if applicable, the time, on which the offense was alleged to be committed, but states, "[f]ailure to state the correct date shall not render the indictment insufficient." See also, McCullen v. State, 487 So. 2d 1335 (MS 1986).

So, a resolution of this issue in favor of Mr. Leonard depends on whether the court deems a defense became unavailable to Mr. Leonard after the amendment.

Issue: "III THE TRIAL COURT erred in overuling [sic] his Motion To Dismiss and or Judgement NOV (R vol 1 pg 40-41)."

Both a motion for JNOV and motion for directed verdict challenge the sufficiency of the state's evidence presented to a jury. McClain v. State, 625 So.2d 774, 778 (MS 1993). A reviewing court is required to accept the credible evidence supporting the guilty verdict as true. Id.

Under both motions, an appellate court should "reverse and render where the facts point overwhelmingly in favor of the appellant that reasonable men could not have found appellant guilty." McClendon v. State, 852 So.2d 43, 46-47 (MS App. 2002). Contrarily "where substantial evidence of such quality and weight exists to support the verdict and where reasonable and fair minded jurors may have found appellant guilty", the appellate court should affirm. Id. The evidence is required to be considered "in the light most favorable to the State, giving the State 'the benefit of all favorable inferences that may be reasonably drawn from the evidence.'" Id.

It is the jury's domain to determine the credibility of witnesses and resolve conflicts in the testimony and evidence. Evans v. State, 725 So.2d 613, 680-81 (MS 1997). A reversal is available "only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." Gleeton v. State, 716 So.2d 1083, 1087 (MS 1998).

The case of McKnight v. State, 738 So.2d 312, 315-16 (MS App.1999) appears to control this issue. Portions of the McKnight opinion read as follows:

> McKnight claims that the evidence was insufficient to sustain a conviction for the crime of sexual battery since the only evidence offered that showed that sexual penetration had taken place was the uncorroborated testimony of the victim, who admitted to the court that she had committed perjury during her testimony regarding her virginity at the time of the encounter with McKnight. Precedent in this jurisdiction holds that the unsupported word of the victim of a sex crime is sufficient for conviction, unless it is substantially contradicted by other credible testimony or physical facts. In Otis v. State, 418 So.2d 65, 67 (MS 1982), the court found that the word of a fifteen year old retarded girl who was raped was sufficient for conviction where there was no physical evidence. In Christian v. State, 456 So.2d 729 (MS 1984), the court affirmed a conviction where there was no evidence of a weapon or a sign of external injury. The word of the prosecutrix was sufficient to prove guilt. Id. at 734.
>
> In this case, there is no material contradiction of the victim's testimony concerning the attack by McKnight, neither is her testimony discounted by physical evidence. Though she did lie on the witness stand regarding her virginal status, she later explained that she did so because her parents were in the courtroom and she did not want them to know that she had been sexually active. Whether she had had consensual sex prior to this incident is not a relevant issue as to the charge that McKnight, without her permission and against her will, inserted his finger into her vagina on the

night of February 11, 1996. It is well established in this state that the credibility of a witness is a matter for the jury. [cites omitted]

In Allman v. State, 571 So.2d 244 (MS 1990), the defendant asked for a jury instruction that the uncorroborated word of the child victim was insufficient. The court upheld the trial judge's refusal of that instruction as an incorrect statement of law. *Id.* at 250. Numerous cases hold that a rape victim's uncorroborated testimony alone is sufficient where it is consistent with the circumstances. [cites omitted]

In Allman, the court said:

It is not our function to determine whose testimony to believe. [cites omitted] We will not disturb a jury's finding on conflicting testimony where there is substantial evidence to support the verdict. [cites omitted]

What distinguishes Mr. Leonard's case from McKnight, is perhaps, that in McKnight there was no testimony presented by which the jury could conclude a reason to fabricate the accusation as there was here, and other particular circumstances such as the number of other people in the home where the incident was supposed to have occurred. See also Seigfried v. State, 869 So.2d 1040, 1043 (MS 2004).

Issue "IV That there was prejudicial delay by his Fast & Speedy trial right under (6) Six Amendment right(s) (14th) Fourteenth Amendment right. (R vol 1 pg 22) 99-17-1."

The defendant was arraigned on November 5, 2005 [R. 1] and a docket setting for April 4, 2006. [R. 19] The docket sheet indicates an order of continuance was entered May17, 2006 [R. 1] with a docket setting notice for October 31, 2006. [R. 20] On November 1, 2006, the defendant, who was out on bail, failed to appear for trial and a

bench warrant was issued pursuant to which Leonard was taken into custody. [R. 21-23] . Trial proceeded thereafter on November 2, 2006. [T. 2]

For analysis of this issue, see Brunson v. State, 944 So. 2d 922 (MS App. 2006) wherein the court said:

> Allegations that a defendant's right to a speedy trial have been violated are fact specific and are examined and determined on a case-by-case basis. [cites omitted]. Criminal defendants have a constitutional right to a speedy trial, guaranteed by the Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. In addition, Mississippi Code Annotated section 99-17-1 (Rev.2000) provides, "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." We discuss the speedy trial issues in turn, first the statutory right and then the constitutional right.

Regarding Leonard's statutory right to a speedy trial under MCA § 99-17-1 (1972), the so- called 270 day rule, "time commences to run at arraignment" Id. at 925 Here a total of 362 days transpired between the date of Leonard's arraignment and the date of his trial. [R. 1; T. 2] There was one continuance order covering 167 days of that time leaving 195 days without a continuance order. [R. 1]

There is also the U. S. Constitutional Right to a Speedy Trial under the Sixth and Fourteenth Amendments. From Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) there is a four part test to determine whether Mr. Leonard's constitutional right to a speedy trial has been violated, and the matters to consider are: "(1) length of delay, (2) reason for delay, (3) defendant's assertion of his right to a speedy trial, and (4) the prejudice

to the defendant. See also Fulgham v. State, 770 So.2d 1021, 1023 (MS App.2000). A Barker v. Wingo review of the matters relevant to Mr. Leonard's case are:

(A) Length of delay - 362 days from arraignment, with a continuance order for 167 days.

(B) Reason for delay - not clear from the record

(C) Defendant's assertion of his right to a speedy trial - nothing in the record, but it is the state's obligation to bring the case to trial

(D) Prejudice to the defendant - Under Spencer v. State, 592 So.2d 1382, 1387 (MS 1991), the court held that a delay of at least eight months presumptively prejudicial.

Issue: "V Improper selection of Gender netural [sic] Jurors more women than men in this particular case (R vol 1, page 29)."

The jury in this case consisted of nine (9) women and three (3) men. [T. 29]

According to Ryals v. State 791 So. 2d 161, 165 (MS 2001):

> This Court has specifically held, "[p]roportional representation of [members of cognizable groups] on a jury is not required." *Harris v. State,* 576 So.2d 1262, 1264 (MS 1991). We have further stated that defendants are not entitled to a jury of any particular composition.

What distinguishes Ryals is that it was a murder case and this is a sexual battery case where the gender makeup of the jury could be said to be prejudicial to the appellant's due process rights under the 5th and 14th Amendments to the U. S. Constitution.

Appellant's Pro Se Petition for Writ of Habeas Corpus

The appellant raised a claim for relief under a petition for writ of habeas corpus, that contains, *inter alia,* a request for bail pending appeal. Bail pending appeal is governed by MRAP Rule 9 and MCA§ 99-35-115 (1972), which states, "(1) A person convicted of felony child abuse, [or] sexual battery of a minor ... shall not be entitled to be released from imprisonment pending an appeal to the Supreme Court."

The appellant's position would be that he was prosecuted under MCA §97-3-95(1)(a) (1972) which does not mention age relying on lack of consent, and was not prosecuted under MCA §97-3-95(1)(c) (1972) which mentions age in the elements thus entitling him to bail pending appeal.

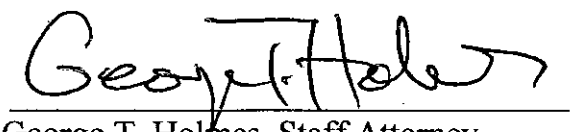
The elements under MRAP Rule 9 for Mr. Leonard are addressed as follows:

(1) the nature and circumstances of the offense charged: Sexual battery MCA §97-3-95(1)(a) with no injury
(2) the weight of the evidence: the evidence was challenged in this case with testimony
(3) family ties of the defendant: substantial
(4) defendant's employment status: incarcerated
(5) defendant's financial resources: indigent
(6) defendant's character and mental condition: good
(7) defendant's length of residence in the community: substantial
(8) defendant's record of prior convictions: not known
(9) defendant's record of appearances or flight: one failure to appear in this case [R. 21-23]
(10) a copy of the trial court's order regarding bail: none
(11) where available, a transcript of the trial court proceedings regarding bail: in the record
(12) such other matters as may be deemed pertinent: none

CONCLUSION

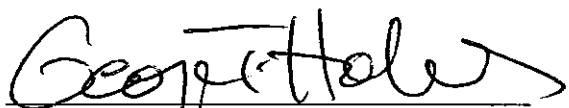
The above matters are presented, pursuant to the Court's direction, on Mr. Leonard's behalf regarding the issues raised in his pro se supplemental brief.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Randy Leonard, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 15th day of March, 2007, mailed a true and correct copy of the above and foregoing Second Supplemental Brief Of Appellant to Mr. Randy Leonard MDOC # 77533, LCCF, 399 C. O. Brooks Street, Dorm C-35,. Carthage MS 39051, Hon. C. E. Morgan, III Circuit Judge, P. O. Box 721, Kosciusko MS 39090, and to Hon. Mike Howie, Asst. D. A. , P. O. Box 1262, Grenada MS 38902, and to Hon. Diedre McCrory, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.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