

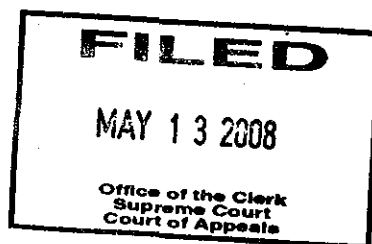
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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**SYLVESTER BRANCH**

**APPELLANT**

**VS.**



**NO. 2007-KA-0579-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**PROCEDURAL HISTORY:**

On March 6 and 7, 2006, Sylvester Branch, "Branch" was tried for statutory rape and fondling before a Hinds County Circuit Court jury, the Honorable Tomie Green presiding. R. 1. Branch was found guilty on both counts. R. 214; C.P. 48. Branch was given a thirty with ten years suspended sentence for rape and a concurrent fifteen with five years suspended sentence for fondling in the custody of the Mississippi Department of Corrections. C.P. 49-52. From that conviction he appeal to the Mississippi Supreme Court. C.P. 59.

**ISSUES ON APPEAL**

**I.**

**WAS TESTIMONY FROM MR. BRYAN  
IRVING PROPERLY RECEIVED?**

**II.**

**WAS COUNT II FOR FONDLING A SECOND  
SEPARATE OFFENSE?**

## STATEMENT OF THE FACTS

In September, 2003, Branch was indicted by a Hinds County Grand Jury for statutory rape and fondling of his biological daughter, Ms. Breon Branch, "B.B." C.P. 5.

On March 6 and 7, 2006, Sylvester Branch was tried for statutory rape and fondling before a Hinds County Circuit Court jury, the Honorable Tomie Green presiding. R. 1. Branch was represented by Ms. Brenda Jackson Patterson and Mr. Adam Powers. R. 1.

An objection to the testimony of Mr. Bryan Irving was overruled by the trial court. R. 142. This was on grounds that testimony about the credibility of the child witness would be a jury question. R. 142. The trial court ruled that Irving would be allowed to testify to the credibility of B. B. based upon his forensic interview. It would be up to the jury to decide if she were telling the truth, based upon all the testimony and evidence presented before them.

Mr. Bryan Irving testified that he was a forensic interviewer. R. 144. He worked with the Mississippi Children's Advocacy Center in Jackson. Irving testified to having been trained in interview techniques, and to have previously conducted interviews with "over 400" child victims of sex abuse. R. 144. He had a Master's degree and over 300 hours of forensic interview training. R. 144.

Irving testified that he interviewed B. B. on June 23, 2003. Irving testified to using a non-suggestive protocol. This involved allowing a child to talk without making suggestions or correcting him or her. Irving testified that B. B. consistently gave the same account of what happened to her. Irving did not suggest information to her. B. B. also used available anatomic dolls to show how she was sexually assaulted from her rear.

Irving testified that he found B. B.'s demeanor and behavior to be consistent with that of other child abuse victims. He also found her account of what happened to be credible in the sense

logical and coherent. R. 146-150.

2 B.B. testified that she was fourteen at the time of trial, but eleven when the events at issue occurred. Her birthday was October 2, 1991. R. 103. Her mother left early for work. Her father, Branch, woke her up. He asked her to come to his bedroom. He told her to take off her clothes. She was then told to get in the bed with him. When she was beside him, he penetrated her vagina with his finger. R. 107. This lasted for "about five to ten minutes." R. 107.

He then had her get down on her elbows and knees. He put Vaseline on her vagina. B.B. testified this was when he entered her vagina with his penis. R. 108. He told her not to tell anyone about this. R. 110. B.B. was afraid, but told her mother some five days later. R. 110. Her mother took her to see the police. She was then taken to a hospital for examination. R. 111.

On a previous occasion, when B. B. was about eight or nine, she testified that Branch had placed his finger inside her vagina. R. 111. This was when her mother was out of town. R. 111.

B. B. testified that neither her mother nor anyone else told her to testify to anything that was not true. R. 112. She identified Branch as her sexual assailant. R. 112-113.

3 Mrs. Nicole Branch, B.B.'s mother, testified that B. B. told her "her father stuck his thing in her." R. 117. She went to see her pastor. She then went to a CMMC hospital for an examination. R. 118. The Doctor told her that "the hymen was broken." R. 118.

Mrs. Nicole Branch then took B. B. to a rape victim interview specialist. R. 119.

When Mrs. Branch confronted Branch about his assault on his daughter, he initially denied it. However, he admitted to having inserted his finger into her vagina. R. 120. Nichole testified that on a previous occasion, B. B. told her that Branch had "touched her." R. 121. As she state it: "He put his hand in her panties and touched her." R. 121.

4 Detective Cornell Kitchens with the Jackson Police Department testified that he interviewed

B. B. B. told him of being molested by Branch. Her father called her into his bedroom. He put Vasoline on her vagina. He then penetrated her. R. 137. Kitchens testified that B. B. was eleven, and Branch was forty years old. R. 137.

Note: could also be caused by other things (with bikes??) Dr. William Sorry, M.D., professor of pediatrics at the University Medical Center, testified that he examined B. B.. He also arranged to have a "colposcopic camera" photograph B. B.'s hymen. This was on June 27, 2003. R. 161. It showed "a notch" on her hymen. This would be consistent with the history taken from B B.. R. 162. It would indicate evidence of penetration. R. 163.

At the conclusion of the prosecution's case, the trial court denied a motion for a directed verdict. R. 166. The court denied a motion to dismiss the fondling charge because it was "part of the rape itself." R. 166. The Court found that there was evidence that the fondling was separate from the rape.

Branch admitted to being forty two at the time of trial. R. 179. Branch testified that he had neither touched B. B. inappropriately nor raped her. R. 180-181. He testified that his ex-wife encouraged B. B. to fabricate the charges against him. R. 183. She did so because she was "a very vindictive devious type of a woman." R. 183; 188..

Mr. Branch was found guilty on both counts. R. 214. Branch was given a thirty with ten years suspended sentence and a concurrent fifteen with five years suspended sentence in the custody of the Mississippi Department of Corrections. R. 215; C.P. 49-52. From that conviction he appealed to the Mississippi Supreme Court. C.P. 59.

See also *Shlearer*, 423 So. 2d 824, 826 (Miss. 1982)

## SUMMARY OF THE ARGUMENT

### PROPOSITION I

#### **TESTIMONY FROM MR. IRVING WAS PROPERLY RECEIVED.**

The record reflects that the trial court did not abuse its discretion in admitting Mr. Irving's testimony. Moody v. State, 841 So 2d 1067, 1094 (Miss. 2003). Mr. Irving testified as a trained and experienced forensic interviewer with the Mississippi Child Advocacy Center. He testified to the results of his interview with B. B. based upon established protocols. This included not making suggestions, looking for consistency and coherence in B.B.'s account of the abuse, as well as assessing the behavior and demeanor of the child compared to other child victims. R. 143-154.

Credibility within the confines of a forensic interview does not equate to credibility as to what allegedly actually happened. The jury were instructed that this was ultimately their responsibility. C.P. 33-35.

Both the Court of Appeals and the Supreme Court have accepted expert testimony from forensic interviewers of child sex abuse victims. Elkins v. State 918 So.2d 828, 831 -832 (¶ 9) (Miss. App. 2005), and Hobgood v. State 926 So. 2d 847, 854 (¶ 21-¶23) (Miss. 2006) → very fact similar

Issues about Irving's testimony being unqualified expert opinion under M. R. E. 702 were waived for failure to object on the same basis being raised on appeal. R. 142-152. Haddox v. State, 636 So. 2d 1229, 1240 (Miss. 1994).

Haddox: See also: 955 So. 2d 386 (23).  
Baine, 600 So. 2d 1090 (Miss. '92)  
Willie, 585 So. 2d 609 (Miss. '91)  
Crawford, 515 So. 2d 936, 938 (Miss. '88)

Elkins  
See also: Jones, 600 So. 2d 1051, 1057-58 (Miss. '92)  
Griffith, 584 So. 2d 383 (Miss. '91)  
U.S. v. Whitted, 11 F.3d 782, 785-86 (8th Cir. '93)

Hobgood  
See also: Griffith  
Goodson, 566 So. 2d 1142, 1153 (Miss. '90)  
Jackson, 743 So. 2d 1008 (Miss. Ct. App. '99)



## PROPOSITION II

### **COUNT II WAS FOR A SEPARATE PENETRATION BY FINGER OFFENSE.**

The record reflects that there was corroborated testimony about a "fondling" of B.B.. This was separate and apart from the rape charge in count I. R. 106-107. B. B. testified that Branch inserted his finger into her vagina for "about five to ten minutes." R. 107. This was prior to his allegedly raping her with his penis from the rear. R. 108.

In addition, B.B. testified that Branch had done this type of fondling on a previous occasion. R. 111. This occurred when she was eight or nine. Her mother was away. Her father asked her to get in the bed with him. He inserted his finger into her vagina.

On a motion for a directed verdict, Stevenson is not entitled to favorable inferences from conflicts in the testimony. R. 166. Rather the State was entitled to have the evidence presented taken as true with favorable inferences consistent with the verdict. Any conflicts in the testimony and evidence were for the jury to resolve. McClain v. State, 625 So. 2d 774, 778 (Miss. 1993).

*Ask:  
other rape cases-  
was "fondling" a  
separate offense?*

↓  
"matters regarding the weight & credibility of the evidence are to be resolved by the jury."

*See also:*

*Neal, 451 So. 2d 743, 758 (M. '84)  
Crathright, 380 So. 2d 1276, 1278  
(M. '80)*

## ARGUMENT

### PROPOSITION I

#### **TESTIMONY FROM AN INTERVIEWER FROM THE CHILD ADVOCACY CENTER WAS PROPERLY RECEIVED.**

Branch argues that the trial court erred in allowing testimony from a forensic interviewer from the Mississippi Child Advocacy Center. The court erred because Mr. Irving was allowed to testify about credibility which he believes invaded the province of the jury. He also believes Irving was allowed to testify as an expert and to introduce hearsay about what the alleged victim told him during his interview. Appellant's brief page 6-10.

The record reflects that there was no objection to the testimony of Mr. Irving on grounds of his not being an expert. R. 142. This issue was therefore waived. Haddox v. State, 636 So. 2d 1229, 1240 (Miss. 1994).

In addition, the record reflects that the trial court admitted Irving's testimony identifying her sexual assailant as her father under M. R. E. 803(4) which is for purposes of medical diagnosis and treatment. R. 149.

*See also Smith, 925 So. 2d 825, 838*

In Jones v. State 606 So.2d 1051, 1056-1057 (Miss. 1992), the Court stated that statements

by child victims' identifying the abuser as a member of their immediate household were admissible

“  
under the medical diagnosis exception to hearsay.”

However, M. J. did not simply indicate to Dr. Hampton what had happened to her but also identified who did it. Statements concerning who committed the act seldom sufficiently relate to the diagnosis or treatment. U.S. v. Iron Shell, 633 F.2d 77, 84 (8th Cir.1980). However, as stated above, statements by a child abuse victim that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment, as treatment encompasses treating emotional and psychological injuries \*1057 and is also relevant to prevention. U.S. v. Renville, 779 F.2d at 436-437.

The record also reflects that Mr. Irving's testimony was based upon his overall assessment

*OK. 2 part  
text for  
admitting  
hearsay  
under 803(4)*

*note:  
these cases  
are for  
8th Cir.  
civ. v.*

of B.B.'s credibility in the sense of consistency and coherence. This would be both consistency in terms of her account of what happened, as revealed to the interviewer, as compared to what was related to others on other occasions. Irving admitted to having no first hand knowledge as to what actually happened between B. B. and her father. R. 152.

He also testified on cross examination, that his overall assessment of B. B.'s credibility, based upon his interview, lead him to believe that her account of being sexually assaulted was not based upon someone's "coaching" her in what to say. R. 153.

The objection to Irving's testimony about credibility was as follows:

Powers: With respect to Mr. Irving, we believe that he should not be able to testify as to whether he thinks Breon is credible or not because that's obviously a jury question.

Nelson: Your Honor, he's not going to testify as to whether she's telling the truth. But at the Children's Advocacy Center, they do assess for credibility.

Court: In their own sense. Yes, that can come in. And the jury can make its own determination of credibility, but they can also look at other things in making their determination. So I'm not going to exclude him. But if you have any objections during it, you can certainly make them, and I'll rule on them. R. 142.

Mr. Byran Irving had a Masters Degree in psychology, as well as supervised training in the field of forensic interviewing. R. 144. He had "over 300 hours" of training in how to conduct interviews with child victims. R. 144. He also had training in interpreting the use the anatomical dolls to show body positions in relation to the verbal account by a child victim.

Mr. Irving testified that he conducted an interview of B. B. on June 23, 2003.

Q. And in your capacity as a forensic interviewer, have you had any special training?

A. Yes. I have at last count a little over 300 hours of postgraduate education in the field of forensic interviewing. Everything from assessing the needs of the child to profiling child molesters.

Mr. Irving testified about the different factors used in assessing the credibility of an alleged

- cred. factors?

victim's account of an sexual assault. Among those factors were consistency, contextual details based upon personal experience, ability to provide coherent accounts of what occurred without the interviewer making suggestions, as well as the demeanor and behavior of the child in relation to the trauma they experienced.

Q. And what in particular did you note that made her credible?

A. What I referred to awhile ago is what we look for, for credibility. I talked about consistency. Throughout the interview she was consistent. Her story never changed. Her story was the same when she spoke to me as what I was later informed what she said when she left the hospital—or DHS, excuse me. Her story didn't change there. She gave numerous contextual details. She told me when it happened, where it happened, who did it, about what time in the morning it was and about exactly when it happened...

She gave information like Vaseline, like he used Vaseline to put on her to lubricate her before he penetrated her. She gave all those kinds of details. The logical sequence was there.

...She was not suggestible for a few reasons. One I really didn't have to ask her many questions. And once during the interview she did correct me...And her demeanor was consistent with what she was telling me. She seemed very saddened by it. She kept her head down practically the entire interview. She just really couldn't look at me while she was telling me what was going on because of her level of embarrassment and the trauma that she has experienced, too, you know, played a role in that. R. 151-152.

In Elkins v. State 918 So.2d 828, 831 -832 (¶ 9) (Miss. App. 2005), the Court found that testimony from a forensic interviewer was admissible. Testimony about the demeanor and behavior of the child victim, and the consistency of her account of the facts was permissible.

¶9. Notwithstanding the procedural bar, Elkins's argument is without merit. Mississippi Rule of Evidence 702 governs the admissibility of expert testimony. It is true that, in a child abuse case, a witness's opinion that the alleged victim was telling the truth is of dubious competency and, therefore, is inadmissible. Jones v. State, 606 So.2d 1051, 1057-58 (Miss.1992); \*832 Griffith v. State, 584 So.2d 383 (Miss.1991). However, Mackey never opined that P.B. was truthful during the interview. Rather, she opined that P.B.'s behavior and demeanor were consistent with those of children who had been sexually abused, that children who have been coached to lie generally are unable to keep their stories straight, and that P.B. related

Note:  
experience difference  
in the interviewers

the same facts consistently throughout the interview. While an expert may not opine that an alleged child sex abuse victim has been truthful, the scope of permissible expert testimony under Rule 702 includes an expert's opinion that the alleged victim's characteristics are consistent with those of children who have been sexually abused. U.S. v. Whitted, 11 F.3d 782, 785-86 (8th Cir.1993). Mackey's testimony was that P.B.'s behavior and story were consistent with those of child sex abuse victims. Therefore, the testimony of which Elkins complains was admissible. Id.

In Hobgood v. State 926 So. 2d 847, 854 (¶ 21-¶23)(Miss. 2006), the Mississippi Supreme Court found that Detotto's testimony about the consistency of the victim's account of what happened being credible did not deny the jury its role as judge of the facts. Hobgood like Branch argued that the forensic interviewer's testimony about the credibility of the victim's account of what happened improperly interfered with the jury's role as finder of fact. The Court found otherwise.

¶ 21. The Court of Appeals dealt with this issue in Jackson v. State, 743 So.2d 1008 (Miss. Ct. App.1999). In Jackson, a young girl reported being sexually abused by a neighbor. The child was taken to UMMC where she met with a therapist to describe the encounter. At trial the therapist testified that she assumed the child's statements were true unless they were disproved. Jackson, 743 So.2d at 1016. In that case the Court of Appeals held that the statement was not reversible error because it was not a direct comment on the child's veracity. Id. at 1016-17.

¶ 22. In the present case, Dettoto never stated that the victim was telling the truth. Rather she explained the consistency of the accounts he made to individuals, at different times, not in the presence of the others, and found them to be credible. Hobgood contends that Detotto's testimony denied the jury its role as judge of credibility. We disagree. The jury heard Dettoto's testimony along with that of five other witnesses. The trial court thoroughly and correctly instructed the jurors regarding their role as the sole judges of the credibility of the witnesses and the weight their testimony deserved. He specifically stated they "should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves."

¶ 23. We hold that allowing Detotto's comment regarding the victim's credibility was not error, when viewed in the totality of her testimony. She did not cross the line and say that he was telling the truth. This issue is without merit. (Emphasis by Appellee).

In addition, to the testimony of Mr. Irving, B.B., Detective Kitchens and the corroboration of B.B.'s mother, there was also testimony from an examining physician, Dr. William Sorey,

indicating "notching" of the child's vagina. R. 162-163. This provided physical evidence corroborating B. B.'s account of being fondled and raped.

34 pg. case  
(7 print) ← In Moody v. State, 841 So. 2d 1067, 1094 (¶ 82) (Miss. 2003), found that the admission of evidence was "within the discretion of the trial court." Unless there was evidence of an abuse of discretion, the trial court's ruling will be upheld on appeal. In that case, testimony was received about the taking of vaginal swabs by Dr. Ward at an autopsy, even though the person testifying did not personally take the swabs.

✓ ¶ 82. The State correctly cites Parker v. State, 606 So.2d 1132, 1136 (Miss.1992), where we held: "The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." Johnston v. State, 567 So.2d 237, 238 (Miss.1990), citing Hentz v. State, 542 So. 2d 914, 917 (Miss.1989), Monk v. State, 532 So.2d 592, 599 (Miss.1988). Unless the trial judge's discretion is so abused as to be prejudicial to the accused, this Court will not reverse his ruling. Shearer v. State, 423 So.2d 824, 826 (Miss.1982), citing Page v. State, 295 So.2d 279 (Miss.1974). The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. Johnston, 567 So. 2d at 238.

Branch testified in his own behalf. R. 178-190. He denied ever having touched or raped B. B. His theory was that B.B.'s mother was the culprit. She believed that she "coached" B. B. to testify against him. This was allegedly because she was bitter and vindictive over their divorce and deteriorating personal relationship.

B.B. testified that neither her mother nor anyone else had told her to testify to something that wasn't true.

Q. Did your mom or anybody tell you to get up here and say something that wasn't true?

A. No.

Q. Would you get up here and tell a lie on your father if this was not—would you say something that wasn't true against your father?

A. No. R. 112. (Emphasis by Appellee).

Nicole Branch, the mother of B. B., testified that she did not tell her daughter to lie about what Branch had done to her, R. 122.

Q. Did you tell her to lie about this?

A. No. R. 122. (Emphasis by Appellee).

The Appellee would submit that the record cited above reflects that the trial court did not abuse its discretion in admitting testimony from Mr. Bryan Irving with the Mississippi Child Advocacy Center. Testimony about the "credibility" of a child victim's account of being abused, based upon established forensic interview techniques, is not a direct comment of a child's veracity. The jury was instructed to consider Irving's testimony along with all the other testimony and evidence in determining their verdict. C.P. 33-35. This issue is lacking in merit.

Review  
J. Int.  
- verify this

## PROPOSITION II


### **THE RECORD REFLECTS COUNT II WAS A SEPARATE CRIME NOT PART OF THE RAPE.**

Branch argues that count II should have been dismissed since in his interpretation of the facts it was part of count I. He believes that it was not a separate offense but rather part of count I, which was the rape charge. Branch thinks that the fondling was preparation for the actual rape rather than a second offense. Appellant's brief page 10-11 .

The record reflects that the trial court properly denied a motion for a directed verdict. The colloquy over the motion to dismiss count 2 with the trial court's ruling was as follows:

Mrs. Jackson-Patterson: And with respect to the gratification of lust, we heard testimony that he may have applied Vasoline before penetration. We feel like that's part of the rape itself and arises from the same nucleus effects. And we're not really sure how that's a separate charge. So we move to dismiss Count II of the indictment..

Court: Thank you counsel. Any response from the State?

 Ms. Nelson: Yes, Your Honor. In response to the two counts, the fondling took place when the defendant got in the bed with the daughter and felt of her vagina and stuck his finger in her. This was prior to him putting the Vasoline on her. So it is a separate act altogether. The fondling wasn't just putting the Vasoline on her. The State has proved each and every element of the rape and the fondling. And at this time it's in a position to go to the jury.

Court: The Court has heard testimony of fondling of the victim by the defendant and also the use of his finger at a time separate from when he asked her to turn over and used Vasoline. And from medical records indicate and the testimony is corroborating penetration of the vagina by his penis. And as such, the Court is going to deny the motion for directed verdict on both counts. R. 166-167.

M. C. A. §97-5-23 states that any person who touches any part of the body of a child under the age of sixteen to gratify his just shall be guilty of fondling. As stated:

(1) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child under the age of sixteen years, with or without the child's



consent...shall be guilty of a felony

B.B. testified that after his mother had left for work, Branch called her. He wanted her to come to their bedroom. When she entered the room, he told her to take off her clothes. She did this. He then told her to get under the covers with him. He took off his clothes. Once she was naked beside him under the sheets, he inserted his finger into her vagina. She testified that he did this for "about five to ten minutes." R. 107.

Find law  
on  
this  
How long does  
"fondling"  
last?

Q. Okay. And once he got under the covers, what happened?

A. He started putting his finger in me.

Q. Where did he put his finger?

A. In my vagina.

Q. And how long did he do this?

A. About five or ten minutes.

Q. And how did that make you feel?

A. Uncomfortable. R. 107. (Emphasis by Appellee).

B. B. further testified that after the digital penetration was completed, Stevenson asked her "to bend over on her hands and knees." R. 108. She did as she was told. Branch placed Vaseline from a container on the dresser on her vagina. He then entered her vagina from the rear with his penis. This was a separate act of penetration with his penis rather than his finger.

Q. And then after he put the Vaseline on you, what happened?

A. He put his penis in me.

Q. And how did that make you feel?

A. Uncomfortable and mad. R. 108. (Emphasis by Appellee).

B.B. also testified to a prior fondling incident. This fondling occurred some two years prior to the fondling and rape at issue.

Q. Breon, was this the first time that your dad had done something like this to you?

A. No.

Q. Tell us about the other time.

A. The other time was when we was at our old house, he told me to sleep in his bed that night.

Q. Where was your mom?

A. Gone out of town.

Q. Okay.

A. He told me to sleep in his bed that night, and then he just started fingering me, putting his finger in my vagina.

Q. How old were you?

A. I think eight or nine. R. 111. (Emphasis by Appellee).

Mrs. Nicole Branch, the mother of B. B., testified that B.B. told her that Branch "touched" her inappropriately on a prior occasion. This corroborated B.B.'s testimony about a prior fondling by finger penetration.

Q. What happened the first time that he touched her?

A. The first time I was out of town I think on a church trip or whatever. I can't recall what I was doing, but I was out of town. When I came back, it was not Breon who told me. It was my son who came and told me that, "dad touched Breon." And I said, "well, what do you mean dad touched Breon." "Breon told me that dad touched her", you know what I'm saying. **So she stated that when I was out of town, he asked her to come in the bed and sleep with her that night and put his hands in her panties and touched her.** R. 121. (Emphasis by Appellee).

In McClain v. State, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the

Brother's  
version

sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not for an appellate court.

✓ The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. Wetz v. State, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. Esparaza v. State, 595 So. 2d 418, 426 (Miss. 1992); Wetz at 808; Harveston v. State, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. Spikes v. State, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Wetz, at 808, Hammond v. State, 465 So. 2d 1031, 1035 (Miss. 1985); May at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. Neal v. State, 451 So. 2d 743, 758 (Miss. 1984);.. We are authorized to reverse 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. Wetz at 808; Harveston at 370; Fisher v. State, 481 So. 2d 203, 212 (Miss. 1985).

When the testimony presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient, credible evidence in support of the trial court's denial of a motion for a directed verdict on fondling. As shown with cites to the record, B.B. testified that the initial finger penetration of her vagina occurred separate and apart from the penetration by penis. R. 107-108. The record reflects that prior to the penile penetration, B. B. had "to get up." She had to change her naked bodily position for easier access for sexual purposes. She testified that she had "to bend over on my hands and knees." R. 108. Stevenson also applied Vasoline to her vagina for lubrication. Then he had his way with her until he achieved his goal. The fondling was separated from the rape by time and space. It was also separate in terms of the type of sexual contact and results.

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B.B. testified that no one had coached her to testify about something that was not true. R. 112. She identified Stevenson as the person who had both fondled and raped her. R. 112.

In addition, as shown with cites to the record, B. B. testified to a previous fondling. This fondling also involved penetration of her vagina by Stevenson's finger. R. 111. This occurred when her mother was not at home.

On a motion for a directed verdict, Stevenson is not entitled to give himself the benefit of inferences from conflicts, ambiguities or gaps in the testimony consistent with his innocence. A fondling by use of one's hand is clearly distinguishable from a rape with one's penis even if the two events occur within a few minutes of each other.

The Appellee would submit that, based upon the record cited, this assignment of error is also lacking in merit.

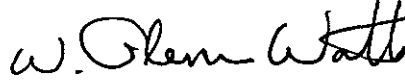
CONCLUSION

Branch's convictions should be affirmed for the reasons in this brief.

Respectfully submitted,

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BY:



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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:

Honorable Tomie T. Green  
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This the 13th day of May, 2008.



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