IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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STANLEY MORGAN — APPELLANT

VS. — NO. 2007-KA-0608-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The alleged hearsay testimony of a pediatrician, the denial of a cautionary instruction targeting the testimony of a child witness, and the sufficiency of the evidence demonstrating penetration form the centerpiece of this appeal from a conviction of sexual battery.

STANLEY MORGAN prosecutes a criminal appeal from the Circuit Court of Jasper County, Mississippi, Robert G. Evans, Circuit Judge, presiding. During a trial by jury conducted on February 13, 2007, Morgan, a 33-year-old African-American male, was convicted of sexually battering Candice Edmonson, the twelve (12) year old daughter of Shawanda Edmonson Pierce with whom Morgan had an on-going and intimate domestic relationship. (R. 50-52)

An indictment returned on the 1st day of August 2005, charged that Morgan, " . . . a male person over the age of eighteen years. . . from and about October of 2003 through and about September 17, 2004, did then and there willfully, unlawfully and feloniously engage in sexual penetration with Candice Edmonson, a female child under the age of fourteen years, in violation of Section 97-3-95(1)(d) of the Miss.Code of 1972 Annotated, . . ." (C.P. at 3)

On March 2, 2007, following a pre-sentence investigation and report, Judge Evans sentenced Morgan to serve a term of thirty (30) years in the custody of the MDOC. (C.P. at 93)

Three (3) issues are raised on appeal to this Court.

1. "Whether the trial court erred in allowing, contrary to an Agreed Order between the State and Defendant, the hearsay testimony of Dr.

Patricia Gibbs stating "the boyfriend of the mother molested her." (R. 92)

2. "Whether the trial court erred in denying the proffered Jury Instruction D-5."

3. "Whether the Jury Verdict of Guilty is the result of bias and passion on the part of the Jury and contrary to the credible evidence adduced at trial and the law of this State."

Wendell James, a practicing attorney in Bay Springs, represented Morgan quite effectively at trial. Mr. James's representation on direct appeal to this Court has been equally effective.

STATEMENT OF FACTS

Counsel for Morgan has articulated a fair and accurate "factual statement of the case" in his brief at page 3. Accordingly, there is no need to plow that ground again here.

It is enough to say that at the time of Stanley Morgan's trial for sexual battery, Candice Edmonson was a fifteen (15) year old female student and resident of Laurel in Jones County. (R. 64) Candice, the oldest daughter of Shawanda Edmonson Pierce, was a twelve (12) year old seventh grader at the time of the offenses which, according to Candice's testimony, took place from on or about October of 2003 and continued through September of 2004. (R. 65-75)

Stanley Morgan, who did not testify in this cause, was the thirty (30) year old live-in boyfriend and domestic partner of Shawanda Edmonson. (R. 86) From July of 2003 until his arrest in September of 2004, Morgan lived with Shawanda and her three (3) children in Heidelberg where she was gainfully employed. (R. 52-53) Morgan, who had no job, stayed at home and kept the kids

while Shawanda worked. (R. 57)

Four (4) witnesses testified for the State of Mississippi during its case-in-chief, including the victim, Candice Edmonson, the 12-year-old daughter of Shawanda Edmonson Pierce. who testified in great detail what Morgan did to her over a fourteen (14) month period of time. (R. 64-77)

Relevant portions of Candice's testimony are quoted as follows:

> Q. [BY DISTRICT ATTORNEY:] In the month of October of 2003, was the defendant Stanley Morgan living in the same house with you and your mother and your sisters and your brothers in Heidelberg?
>
> A. Yes, sir.
>
> Q. All right. In the month of October of 2003, how old were you?
>
> A. I was twelve.
>
> Q. Do you remember on the Wednesday of homecoming week in October of 2003?
>
> A. Yes, sir.
>
> Q. On that Wednesday did you see the defendant Stanley Morgan?
>
> A. Yes, sir.
>
> Q. And where did you see him?
>
> A. In my mama's bedroom.
>
> Q. Okay. That was your mother's bedroom in Heidelberg?
>
> A. Yes, sir.
>
> Q. Can you tell us what, if anything, Stanley Morgan did to you at that time?
>
> A. He had sex with me.

Q. And when you say "he had sex with you" - -

A. He raped me.

Q. Okay. Well, when you say he had sex with you or he raped you, would you tell us exactly what he did to you?

A. He put his penis in my vagina.

Q. Did he do anything else?

A. He put his tongue in my vagina and made me put my mouth on his penis.

Q. Okay. So you had oral sex with him?

A. Yes, sir.

Q. You also had physical sex with him?

A. Yes, sir.

Q. Okay. And I believe you said that he raped you. Would you tell us how he raped you?

A. He put his penis in my vagina.

Q. I can't understand you.

A. He put his penis in my vagina.

Q. Okay. Did you want him to do that?

A. No, sir.

Q. Do you remember about what time of day that happened?

A. At night.

Q. Do you remember where your mother was when that happened?

A. At work.

Q. Where were your brothers and your sisters?

A. In my room asleep. (R. 65-67)

Around Halloween of 2003, Morgan did the same thing in the same bedroom. (R. 67-69)

> Q. [BY DISTRICT ATTORNEY:] Did he tell you or did he threaten you in any way if you told anybody about just having sex with you?
>
> A. Yeah, right along that time.
>
> Q. What did he say?
>
> A. He told me if I don't [do] nothing with him, that he might rape my mama. And she was pregnant.
>
> Q. Okay. And what did you think about that?
>
> A. I was scared, and I just let him go through with it.
>
> Q. So your mother was pregnant with his twins at that time?
>
> A. Yes, sir. (R. 67-69)

Candice described in graphic detail four (4) or five (5) other specific instances where Morgan abused her sexually, both vaginally and orally, including an incident in October of 2004 when he showed her a pornographic video while engaging in both "[o]ral sex and physical sex." (R. 69-74, 76)

At the close of the State's case-in-chief, Morgan moved to dismiss the charges and for a directed verdict on the ground " . . . there were no tests done on the defendant" and State failed to meet its burden of proof. (R. 97)

The circuit judge overruled this motion with the following observation:

> [T]he State has met their burden of making a *prima faci[e]* case. DNA reports and other significant evidence is not required by law. It's an evidentiary matter. These motions [are] overruled. (R. 98)

After being advised of his right to testify or not to testify, the defendant personally told Judge

Evans he did not desire to testify in his own behalf. (R. 100) The defense rested without producing any witnesses in defense of the charge. (R. 99-101)

Peremptory instruction, insofar as we can tell, was not requested. (R. 101-03)

Following closing arguments, the jury retired to deliberate at a time not reflected by the record. (R. 115) It subsequently returned with the following verdict: "We, the jury, find the defendant guilty of sexual battery." (C.P. at 87)

A "Motion for J.N.O.V. or in the alternative, Motion for New Trial," was filed on February 15, 2007, and denied on March 12, 2007. (C.P. at 90-91, 96)

On March 2, 2007, following a PSI (pre-sentence investigation) and report (C.P. at 88-89), Judge Evans sentenced Morgan to serve thirty (30) years in the Mississippi State Penitentiary. (C.P. at 93)

Morgan seeks reversal of his conviction and sentence and invites discharge but, if not, at least a new trial. (Brief of Appellant at 13-14)

SUMMARY OF THE ARGUMENT

1.

The trial judge did not commit reversible error, if error at all, in overruling the defendant's objection to the innocuous testimony of Dr. Patricia Tibbs. It was non-hearsay, but even if not, the testimony was cumulative and harmless beyond a reasonable doubt.

2.

The trial judge did not err in denying jury instruction D-5.

Jury instruction D-5, a cautionary charge targeting the testimony of a child witness, was properly denied because "[a] child's testimony should not be viewed with a jaundiced eye as to whether or not the child is truthful - a child may be presumed to be as truthful as any other witness."

Bandy v. State, 495 So.2d 486, 492 (Miss. 1986).

3.

The evidence was sufficient to support a conviction for sexual battery, and the verdict of the jury was not against the overwhelming weight of the evidence.

Accepting as true the testimony proffered by the State, together with all reasonable inferences to be drawn therefrom, it is clear there was sufficient testimony from the victim, her mother, and Dr. Patricia Tibbs and other witnesses to demonstrate "penetration" of both the victim's mouth and genital opening.

It is elementary " . . . that slight penetration to the vulva or labia [is] sufficient penetration to constitute the offense of rape [and] *[s]exual battery is no different.*" **Morris v. State,** 913 So.2d 432, 435 (Ct.App.Miss. 2005) citing **Jackson v. State,** 452 So.2d 438 (Miss. 1984).

Moreover, "proof of contact, skin to skin, between a person's mouth, lips, or tongue and the genital opening of a woman's body, whether by kissing, licking, or sucking is sufficient proof of 'sexual penetration' through the act of 'cunnilingus' within the meaning and purview of §97-3-97(a) (Supp.1993)." **Johnson v. State,** 626 So.2d 631, 633-34 (Miss. 1993). *See also* **Williams v. State,** 757 So.2d 953 (Miss. 1999), reh denied.

Nor was the verdict of the jury against the overwhelming weight of the evidence. The jury was properly instructed it was " . . . the sole judges of the facts in this case [and its] exclusive province is to determine what weight and what credibility will be assigned the testimony and you are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case." (C.P. at 73)

The testimony of Candice Edmonson implicating Morgan was not outweighed by Morgan's general denial, if any. Her credibility, of course, was a question for the jury.

Candice's testimony was corroborated, at least in part, by the testimony of Dr. Tibbs that she was infected with chlamydia and the testimony of Candice's mother that she was infected as well.

But even if not, we find the following language in **Crawford v. State,** 754 So.2d 1211, 1222 (Miss. 2000), governing the sufficiency of uncorroborated testimony:

> "[O]ur case law clearly holds that the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized by a sex crime." [numerous citations omitted]

It wasn't, and it was. *See also* **McDonald v. State,** 816 So.2d 1032 (Ct.App.Miss. 2002).

Morgan claims the accusations were false. It is well settled, however, "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and *sincerity*." **Jones v. State**, 381 So.2d 983, 989 (Miss. 1990) [emphasis ours]. *See also* **Hill v. State,** 199 Miss. 254, 24 So.2d 737 (1946).

ARGUMENT

1.

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF DR. PATRICIA TIBBS THAT THE VICTIM TOLD HER "THE BOYFRIEND OF THE MOTHER MOLESTED HER."

Morgan argues the trial judge erred in allowing, over his objection, the testimony of Dr. Patricia Tibbs that "her mother's ex-boyfriend was sexually abusing her." (R. 92) Morgan claims this revelation violated an "agreed order concerning hearsay" which was issued on February 2, 2007, approximately ten (10) days prior to trial. (C.P. at 69-70)

The testimony criticized here is found in the following colloquy:

> Q. [BY DISTRICT ATTORNEY:] When Candice Edmonson first came to you or was brought to you as a patient, was a history taken at that time?
>
> A. Yes, sir.
>
> Q. And what was that history?
>
> A. Her mother's ex-boyfriend was sexually abusing her.
>
> MR. JAMES: Object, Your Honor, to hearsay.
>
> THE WITNESS: Okay. She was sexually abused.
>
> THE COURT: Wait. Just a minute Dr. Tibbs.
>
> THE WITNESS: I'm sorry.
>
> THE COURT: With the understanding that she's merely relating the history that was provided for her, then it's admissible. It's not a tender year exception situation. It's just a history that was related.
>
> MR. JAMES: Okay.
>
> THE COURT: All right. Go ahead. Overruled.
>
> THE WITNESS: Her mother's ex-boyfriend was sexually abusing her from October of 2003 until September of 2004. At this time her mother was pregnant, and she had twins in May of 2004. (R. 92)

The agreed order, signed by both parties, states, *inter alia*, "that as to any witnesses, including doctors and nurses, who may have treated Candice Edmonson, the State will not solicit from said witnesses, who Candice Edmonson told them that committed this alleged crime upon her." Also "[t]he medical related witnesses be allowed to testify as to what Candice Edmonson told them

happened to her, just that the medical related witnesses will not testify as to who committed the alleged crime upon her with the exception of any statement made in the presence of the Defendant." (C.P. at 69)

This claim, we believe, is devoid of merit for several reasons.

First, " 'hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Miss.R.Evid. 801 (c).

The testimony criticized here was non-hearsay because it was not offered for the truth of the matter asserted. Stated differently, it was not offered to prove or demonstrate that Stanley Morgan was the person who sexually abused Candice Edmonson. Rather, we agree with Judge Evans it was "merely relating to the personal history that was taken by Dr. Tibbs establishing the reason why the doctor was asked to perform her examination in the first place. (R. 92) In other words, it was offered to show why the doctor acted as she did. *Cf.* **Butler v. State,** 758 So.2d 1063 (Ct.App.Miss. 2000) [Testimony of police officer regarding victim's out of court explanation to officer of robbery was admissible to explain the steps the officer took to investigate the incident, where truth of victim's statements was not in issue.]

In **Knight v. State,** 601 So.2d 403, 406 (Miss. 1992), this Court explained that a statement is not considered hearsay if it is offered merely to show its effect on someone else. *See also* **Alexander v. State,** 759 So.2d 411 (Miss. 2000).

Dr. Tibbs, we note, did not identify the sexual abuser by name, only as the "mother's ex-boyfriend." (R. 92)

Second, we also agree with Judge Evans "it's not a tender years exception situation." (R. 92) Candice Edmonson, the victim, was available to testify. She did, in fact, testify and was cross-examined at great length. (R. 77-82) Needless to say, she identified Stanley Morgan as the man who

had moved in with her mother and the person who had sex with Candice at the times and places testified about.

Third, there was no intent by the district attorney to violate the agreed order. His question was certainly innocuous enough.

The testimony of Dr. Tibbs was also innocuous and harmless beyond a reasonable doubt. As stated previously, Dr. Tibbs did not identify Stanley Morgan by name. Moreover, she later testified as follows:

> Q. [BY DISTRICT ATTORNEY:] Okay, Now, doctor, you're not here to tell us who penetrated her because you don't know, do you?
>
> A. No, sir. (R. 95)

Both Shawanda Pierce, the mother, and Candice Edmonson, the victim, had already identified Stanley Morgan as Candice's abuser. We quote:

> Q. [BY DISTRICT ATTORNEY:] Now, when your daughter told you about this sexual misconduct, was the defendant Stanley Morgan present at that time?
>
> A. Yes, sir.
>
> Q. How did he react when she told you that in front of him?
>
> * * * * * *
>
> Q. Did he say anything?
>
> A. He said, "No."
>
> Q. He said what?
>
> A. He said, "No." He screamed "No."
>
> Q. Okay. So Stanley Morgan was still living with you in your home at the time she told you this?

A. Yes, sir.

Q. And what did she say in the presence of Stanley Morgan that he had been doing to her?

A. She told me that he had been raping her. (R. 54-55)

The alleged hearsay testimony of Dr. Tibbs added nothing to what was not already before the jury.

2.

THE TRIAL JUDGE DID NOT ERR IN DENYING JURY INSTRUCTION D-5, A CAUTIONARY CHARGE TARGETING THE TESTIMONY OF A CHILD WITNESS.

Morgan argues " . . . the trial court effectively denied him the ability to present to his jury the underlying basis of his defense" when it denied proffered jury instruction D-5. He suggests " . . . there is authority for cautionary instructions." (Brief of Appellant at 8)

Jury instruction D-5 reads, in its entirety, as follows:

> The court instructs the jury that the uncorroborated testimony of a victim should be examined closely and be scrutinized with caution. (C.P. at 84)

Judge Evans refused D-5 on the ground he was unaware of any legal authority for the granting of this instruction, and Morgan had not shown him any. (R. 102)

We concur. D-5 was properly refused for no fewer than two reasons.

First, the testimony of the 12-year-old victim - 15 years of age at the time of trial - was not totally uncorroborated. Rather, there was testimony from the victim's mother and from Patricia Tibbs, a pediatrician, reflecting that Shawanda Pierce and Candice Edmonson both contracted chlamydia, a venereal infection. (R. 51-52, 93) Neither, Candice nor her mother had sex with anyone other than Stanley Morgan during the time of their relationship. (R. 51) This is certainly partial

corroboration of the victim's testimony.

Moreover, Dr. Tibbs testified that during her examination she observed some physical trauma in the area of the perineum, including an "eroded hymen with only a residual rim left." (R. 93)

If this is not substantial corroboration of Candice's testimony, we don't know what is.

Second, while there is persuasive authority for cautionary instructions targeting the testimony of accomplices and co-defendants, we have found no authority whatever requiring a cautionary charge for a child witness or a victim of rape or other sexual offenses.

In **Bandy v. State,** 495 So.2d 486, 492 (Miss. 1986), this Court held that a defendant is not entitled to an instruction telling the jury " . . . to receive with [great] caution the testimony of a child of tender years." 495 So.2d at 492. We find therein the following language controlling the posture of Morgan's present complaint:

> "[T]he language of the [defendant's] instruction, in telling the jury to view L.H.'s testimony 'with great caution,' sets out the same standard given to the jury for evaluating the testimony of accomplices and co-defendants. The instruction is given in those cases because of the inherent mistrust of those witnesses' veracity. *That is not necessarily the case with a child witness.* * * * A child's testimony should not be viewed with a jaundiced eye as to whether or not the child is truthful - a child may be presumed to be as truthful as any other witness." [emphasis ours]

In **Bergtholdt v. State,** 288 So.2d 839, 841 (Miss. 1974), we find this language:

> "It is next argued that the [trial] court erred in refusing to grant the defendant an instruction advising the jury that the testimony of a prosecutrix in a rape case should always be received and considered with great caution since the accusation is easily charged but difficult to disprove by the accused party."

In **Bergtholdt** the Supreme Court reaffirmed it's prior ruling in a 1962 case " . . . that a jury should weigh the testimony of a prosecutrix with great caution, but nevertheless . . . there is no good reason why such fact should be emphasized by an instruction since this would go to the weight of the

evidence and [i]s argumentative." *See also* **Austin v. State,** 784 So.2d 186, 192-93 (Miss. 2001) ["The policy behind granting a cautionary informant instruction, however, is based on the fact that [an] informant or accomplice testimony by its very nature, is looked upon with suspicion and distrust. This rationale does not extend to police officer testimony."] *Cf.* **Hansen v. State,** 592 So.2d 114, 140-41 (Miss. 1991); **Washington v. State,** 341 So.2d 663, 664 (Miss. 1977), both of which stand for the proposition that a defendant is not entitled to an instruction telling the jury that in no event should it give "either greater or lesser credence to the testimony of any witness merely because he or she is a law enforcement officer." The same reasoning applies to a child witness.

Morgan suggests the denial of D-5 compromised his defense of the charge and " . . . what was left was a jury not fully instructed by the trial court's instructions and guided only by its speculation and bias and passion from the non-relevant circumstances of the case." (Brief of Appellant at 9-10)

Although Morgan did not testify and no witnesses were summoned in his defense, we surmise the defense of which he speaks was simply a general denial viewed in harmony with Morgan's perception of the victim's credibility.

We do not share Morgan's concern about speculation, bias, and passion. The jury was succinctly told via jury instruction C-1 that "[y]ou should not be influenced by bias, sympathy or prejudice. Your verdict should be based on the evidence and not upon speculation, guess work or conjecture." (C.P. at 73)

"Appellate courts assume that juries follow the instructions." **Clemons v. State**, 535 So.2d 1354, 1361 (Miss. 1988). "Our law presumes the jury does as it is told." **Williams v. State,** 512 So.2d 666, 671 (Miss. 1987). "To presume otherwise would be to render the jury system inoperable." **Johnson v. State**, 475 So.2d 1136, 1142 (Miss. 1985).

Finally, Miss.Code Ann. §99-17-35 entitled "Instructions [to jury]" reads, in part, as follows: "The judge in any criminal cause, shall not . . . charge the jury as to the weight of evidence. . ."

The granting of D-5 would have been in contravention of the proscription found in §99-17-35.

Jury instructions are within the sound discretion of the trial court. **Shumpert v. State,** 935 So.2d 962 (Miss. 2006); **White v. State,** 919 So.2d 1029 (Ct.App.Miss. 2005). No abuse of judicial discretion has been demonstrated here.

3.

ACCEPTING AS TRUE THE TESTIMONY OF THE WITNESSES FOR THE STATE, TOGETHER WITH ALL REASONABLE INFERENCES TO BE DRAWN THEREFROM, THERE WAS EVIDENCE OF SUFFICIENT WEIGHT AND CHARACTER TO PROVE THE OFFENSE OF SEXUAL BATTERY BEYOND A REASONABLE DOUBT.

This is a case of sexual battery involving penetration achieved both vaginally and orally.

It is not a typical case of "He said! She said!" because the defendant, i.e., the "He" part of the equation, did not testify. Evidence of Morgan's general denial, if any, is found in the testimony of Shawanda Pierce, the victim's mother, who testified that when she confronted Morgan with her daughter's accusations, "[h]e screamed, 'No.' " (R. 54)

Morgan assails both the sufficiency and the weight of the evidence used to convict him. (Brief of Appellant at 10-14)

The gist of his complaint is that **(a)** the testimony of Candice, the victim, was uncorroborated; **(b)** the presence of chlamydia in both the mother and daughter was insufficient proof of sexual battery, and **(c)** the lack of physical evidence, viewed in toto, did not equate to proof beyond a reasonable doubt and furnishes viable grounds for reversal and discharge. (Brief of Appellant at

10,13)

Morgan recites the right standard of review, but reaches, in our opinion, the wrong conclusion. The standard of review is found in **Pryor v. State,** No. 2005-KA-02014-COA decided March 6, 2007 ¶10,11, slip opinion at 6-7 [Not Yet Reported].

The proof against Morgan consisted of **(1)** the victim's testimony which graphically described specific instances of misconduct and was practically self-corroborating; **(2)** the testimony of Dr. Patricia Tibbs that Candice had been infected with chlamydia; **(3)** the testimony of Shawanda Pierce that she also had been infected with chlamydia and that she had sexual intercourse with no one other than Morgan during the duration of their relationship, and **(4)** the findings of Dr. Tibbs which are *quoted as follows:*

> Q. What did your examination reveal?
>
> A. I did a full physical exam on her. And the only remarkable findings I found were in the examination of her perineum, where I found she had an eroded hymen with only a residual rim left of her hymen with evidence of some heel [sic] tears at 6:00 [o'clock] on the hymen and a reddish scar at that tissue area between 7:00 and 9:00 on the hymen.
>
> * * * * * *
>
> Q. What does a torn or eroded hymen indicate?
>
> A. It means it has been penetrated by a large object.
>
> Q. What, if any, diagnosis was made by you after you'd examined the patient?
>
> A. I made the diagnosis of - -
>
> Q. I'm sorry. I can't hardly hear you.
>
> A. I made the diagnosis of alleged sexual abuse with evidence of vaginal penetration. And subsequently when my test came back, I also made the diagnosis of chlamydia infection, which is an STD. (R.

93-94)

* * * * * *

Q. Based upon your education, your training, your experience, and further based upon your examination and treatment of Candice Edmonson, do you have an opinion, also based upon a reasonable medical certainly, as to whether or not Candice Edmonson's vagina was sexually penetrated?

A. I do have an opinion.

Q. And what is that opinion?

A. She was penetrated.

Q. Okay. Now, Doctor you're not here to tell us who penetrated her because you don't know, do you?

A. No, sir. (R. 95)

The testimony of Dr. Tibbs, coupled with the graphic description by Candice of the acts committed by Morgan at the times and places testified about was wholly sufficient to support a conviction for sexual battery. Add to the equation the presence of a chlamydia infection in both the mother and her daughter and it becomes clear that a reasonable and fairminded juror could have reached no other conclusion,

Morgan suggests in his brief at page 5 that Candice's accusations were "false accusations." (Brief of Appellant at 5) We are cognizant false accusations can at times occur. Lest we forget, however, "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and *sincerity*." **Jones v. State,** 381 So.2d 983, 989 (Miss. 1990). *See also* **Blocker v. State,** 809 So.2d 640, 644-45 (Miss. 2002); **Hill v. State,** *supra*, 199 Miss. 254, 24 So.2d 737 (1946), and **Collier v. State,** 711 So.2d 458, 462-63 (Miss.1998) [Any inconsistencies and contradictions found in testimony of child witness went to "

. . . the weight and credibility of her testimony, clearly a jury question."].

Morgan, in seeking reversal and discharge, assails the "sufficiency" of the evidence. While *"weight"* implicates the denial of a motion for a new trial, *"sufficiency"* implicates the denial of motions for directed verdict, peremptory instruction, and judgment notwithstanding the verdict. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

"[A] greater quantum of evidence is necessary for the State to withstand a challenge that the verdict is contrary to the overwhelming weight of the evidence, as distinguished from the legal sufficiency of the evidence argument." **Collier v. State,** *supra*, 711 So.2d 458, 462 (Miss. 1998).

Stated somewhat differently, "[a] greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for j.n.o.v." **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

"If the evidence is found to be legally insufficient, then discharge of the defendant is proper." **Collier v. State,** *supra*, 711 So.2d 458, 461 (Miss. 1998) citing **May v. State,** 460 So.2d 778. 781 (Miss. 1985).

On the other hand, " . . . if the verdict is against the overwhelming weight of the evidence, then a new trial is proper." **Collier v. State,** *supra*, 711 So.2d 458, 461 (Miss. 1998) citing **May v. State,** 460 So.2d 778, 781-82 (Miss. 1985).

In other words, the remedy for a defect in "weight" is a new trial while the remedy for a defect in "sufficiency" is final discharge from custody.

We respectfully submit the evidence, together with all reasonable inferences to be drawn therefrom, was, in our opinion, of sufficient weight and worth to support Morgan's conviction of sexual battery. A reasonable, fairminded, and hypothetical juror could have found from the testimony

and reasonable inferences to be drawn therefrom that Morgan, at the time(s) and place(s) testified about, did what Candice said that he did.

We rely heavily upon the victim's testimony which is graphically detailed and virtually self-verifying. In addition to it all, there are the matters of a chlamydia infection in both mother and daughter and the trauma, including a torn or eroded hymen, described by Dr. Tibbs. This, we argue, was substantial corroboration of both Candice's injury and the identity of the person causing that injury. *See* **Pryor v. State,** No. 2005-KA-02014-COA decided March 6, 2007 [Not Yet Reported] [Doctor's examination of child victim of sexual battery revealed an "inflamed hymen."]

Penetration, of course, is the "very essence" and "basic premise" of sexual battery. **Vaughn v. State,** 759 So.2d 1092, 1098 (Miss. 1999), quoting from **Johnson v. State,** 626 So.2d 631, 632 (Miss. 1993); **Thompson v. State,** 468 So.2d 852, 853 (Miss. 1985). Penetration need not be established by actual medical evidence. **Wilson v. State,** 606 So.2d 598 (Miss. 1992).

In the case at bar, penetration was established by the victim's testimony as well as the testimony of Dr. Tibbs. Candice's testimony was not wholly uncorroborated, but even if it was, the following language found in **Crawford v. State,** *supra*, 754 So.2d 1211, 1222 (Miss. 2000), is *apropos* to the facts presented here:

> "[O]ur case law clearly holds that the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized by a sex crime." [numerous citations omitted]

It wasn't, and it was. *See also* **Miley v. State,** 935 So.2d 998 (Ct.App.Miss. 2006); **Bradley v. State,** 921 So.2d 385 (Ct.App.Miss. 2005); **McDonald v. State,** 816 So.2d 1032 (Ct.App.Miss. 2002).

It is true in a prosecution for rape, and equally true in a prosecution for sexual battery, that only "slight penetration" need be shown. In **Morris v. State,** 913 So.2d 432, 435 (Ct.App.Miss. 2005), we find the following language:

> * * * * * In *Jackson v. State*, 452 So.2d 438 (Miss. 1984), the Mississippi Supreme Court held that slight penetration to the vulva or labia was sufficient penetration to constitute the offense of rape. *Jackson*, 452 So.2d 440. **Sexual battery is no different.** *Johnson v. State*, 626 So.2d 631, 633 (Miss. 1993). [Emphasis in bold ours]

See also **Brown v. State,** 751 So.2d 1155 (Ct.App.Miss. 1999), reh denied. *Cf.* **Johnson v. State,** *supra,* 626 So.2d 631, 633 (Miss. 1993); **Pittman v. State,** 836 So.2d 779 (Ct.App.Miss. 2002); **Brady v. State,** 722 So.2d 151 (Ct.App.Miss. 1998).

In a typical case of rape the anatomical intruder is the penis while in a case of sexual battery an intruding tongue or finger will be enough to constitute the offense. A tongue, hand or finger need not actually penetrate the female's "genital opening. "Slight" penetration of the female anatomy is sufficient "penetration."

The following language found in **McGee v. State,** 452 So.2d 438, 440-41 (Miss. 1984), an appeal involving a prosecution for rape where penetration via penis, as opposed to tongue or digit, is required, controls the posture of any complaint targeting the degree of penetration:

> While it is the general law that in a rape case some penetration is required, only slight penetration of the private parts of the victim is required to constitute the offense. Jackson was seen on top of the child in the very act of committing the rape. The doctor's testimony showed penetration to the extent of causing traumatic injury to the child's major and minor labias. This was sufficient penetration within the meaning of the statute. [citations omitted]
>
> * * * * * *
>
> In *Williams v. State*, 53 Fla. 84, 43 So. 431 (1907), the victim was six years old and a life sentence was sustained. The medical examination found a bruised condition to the child's private parts and

> the medical examiner, when asked, " 'Was there entrance to the lips of the vagina?' He answered: 'Yes, sir; to the lips but not the vagina itself.' " Quoting English law, " . . . I shall leave to the jury whether at any time any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix; for if ever it was, no matter how little, that will be sufficient to constitute penetration . . . " *Regina v. Lines*, 1 Carr & K (47 E.C.L.) 393.
>
> Other courts upholding rape convictions where slight penetration to vulva or labia is shown: [citations of cases decided in no fewer than 13 states and one 5th Circuit case omitted]

Our position on this issue can be summarized in only three (3) words: "classic jury issue." A reasonable hypothetical juror could have found Morgan guilty of sexual battery.

Of course, "[i]n any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

The law applicable to the disposition of this issue is stated in **Kelly v. State,** 910 So.2d 535, 540 (Miss. 2005), as follows:

> We have routinely held that the jury is the judge of credibility. *Schuck v. State,* 865 So.2d 1111, 1124 (Miss. 2003); *Harris v. State,* 527 So.2d 647, 649 (Miss. 1988). This court will not set aside a guilty verdict, absent other error, unless it is clearly a result of prejudice, bias, fraud, or is manifestly against the weight of credible evidence. *Drake v. State,* 800 So.2d 508, 517 (Miss. 2001) (citing *Maiben v. State,* 405 So.2d 87, 88 (Miss. 1981). Further, it is within the sound discretion of the jury to accept or reject the testimony of a witness, and the jury "may give considerations to all inferences flowing from the testimony." *Mangum v. State,* 762 So.2d 337, 342 (Miss. 2000) (quoting *Grooms v. State,* 357 So.2d 292, 295 (Miss. 1978)).

"[T]he scope of review on this issue is limited in that all evidence must be construed, i.e., "weighed," in the light most favorable to the verdict." **Herring v. State**, 91 So.2d at 957

citing **Mitchell v. State**, 572 So.2d 865, 867 (Miss. 1990). *See also* **Bush v. State,** 895 So.2d 836, 844 (Miss. 2005), **citing Herring v. State,** *supra.*

Morgan complains about the absence of "hard physical evidence" such as the result of DNA testing or tests demonstrating the presence of sperm in the victim's reproductive tract. (Brief of Appellant at 6, 10, 12-13) He ponders "[w]hether the lack of credible physical evidence is grounds for reversal." (Brief of Appellant at 13)

It isn't.

First, Dr. Tibbs gave the jury a reasonable explanation for the absence of such tests. (R. 95)

Second, it is well settled that "[t]he absence of physical evidence does not negate a conviction where there is testimonial evidence." **Graham v. State,** 812 So.2d 1150 (Ct.App.Miss. 2002), cert denied 828 So.2d 200.

Contrary to Morgan's position, this is not a case where the evidence preponderates heavily against the verdict, or where allowing the verdict to stand would sanction or amount to an unconscionable injustice.

As noted previously, the defendant did not testify. It has been said the testimony by the State's witnesses may be given "full effect" by the jury where, as here, an accused does not take the witness stand. **Reeves v. State**, 159 Miss. 498, 132 So. 331 (1931). Stated differently, "[t]he prohibition against adverse comment and inference does not protect a criminal defendant from the probative force of the evidence against him." **Tuttle v. State,** 174 So.2d 345 (Miss. 1965).

In **Rush v. State**, 301 So.2d 297, 300 (Miss. 1974), we find these words applicable

to this observation.

> While it is the right and privilege of a defendant to refrain from taking the witness stand, and no presumption is to be indulged against him for exercising that right, still the testimony of the witnesses against him may be given full effect by the jury, and the jury is likely to do so where it is undisputed and the defendant has refused to explain or deny the accusation against him. *Reeves v. State,* 159 Miss. 498, 132 So. 331 (1931). * * * * * *

See also **Grant v. State,** 762 So.2d 800, 804 (Ct.App.Ms. 2000) ["We note that Grant presented no evidence which leaves the jury free to give full effect to the testimony of the State's witnesses. **Benson v. State,** 551 So.2d 188, 193 (Miss. 1989)."]

Finally, in **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, *supra*, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, *supra*, 440 So.2d 297, 300 (Miss.

Contrary to Morgan's position, the case at bar does not exist in this posture.

We respectfully submit, for the reasons stated, the evidence was sufficient to demonstrate the element of "penetration," the identity of Morgan as the "penetrater," as well as other conduct by the defendant establishing the offense of sexual battery within the meaning and purview of our statutes, Miss. Code Ann. §97-3-95(1)(d) and §97-5-23.

The verdict of the jury was not against the overwhelming weight of the evidence. Accordingly, the trial court did not abuse its judicial discretion in overruling Morgan's motion for a new trial.

CONCLUSION

Morgan, who was well represented by competent and effective counsel, presents legitimate complaints. Nevertheless, scrutiny of the official record reflects the claims presented for appellate review are devoid of merit.

Appellee respectfully submits that no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction of sexual battery, together with the thirty (30) year sentence imposed in its wake by the trial judge, should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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