

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES ROY GRIMES

APPELLANT

FILED

V.

JUN 2⁰ 2008

NO. 2007-KA-0646-COA

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

Erin E. Pridgen, MS Bar No. [REDACTED]

301 North Lamar Street, Suite 210

Jackson, Mississippi 39201

Telephone: 601-576-4200

Counsel for James Roy Grimes

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES ROY GRIMES

APPELLANT

V.

NO. 2007-KA-0646-COA

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. James Roy Grimes, Appellant
3. Honorable Joyce I. Chiles, District Attorney
4. Honorable Margaret Carey-McCray, Circuit Court Judge

This the 26th day of June, 2008.

▪ Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Erin Pridgen
Erin E. Pridgen
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
FACTS	2
SUMMARY OF THE ARGUMENT	6
ARGUMENTS	6
I. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF THE PROSECUTRIX INTO EVIDENCE UNDER THE “TENDER YEARS EXCEPTION”	6
II. THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE	8
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES

Allred v. State, 908 So. 2d 889, 892 (Miss. Ct. App. 2005)	7
Bush v. State, 895 So. 2d 836, 844 (Miss. 2005)	9
Idaho v. Wright, 497 U. S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)	7
Lambert v. State, 462 So. 2d 308, 322 (Miss. 1984)	9
Marshall v. State, 812 So. 2d 1068, 1075 (Miss. Ct. App. 2001)	7
Ross v. State, 954 So. 2d 968, 1016 (Miss. 2007)	9
Veasley v. State, 735 So. 2d 432, 437 (Miss. 1999)	7

STATUTES

Mississippi Code Annotated Section 45-33-25 (Rev. 2004)	2
Mississippi Code Annotated Section 97-3-65 (Supp. 2007)	1

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES ROY GRIMES

APPELLANT

V.

NO. 2007-KA-0646-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF THE PROSECUTRIX INTO EVIDENCE UNDER THE “TENDER YEARS EXCEPTION”

II. THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Washington County, Mississippi, where James Roy Grimes was convicted of statutory rape, in violation of Mississippi Code Annotated Section 97-3-65 (Supp. 2007). The Honorable Margaret Carey - McCray, Circuit Judge, presided over the jury trial that was held on December 18-20, 2006.

Following the verdict, James filed a motion for an evidentiary hearing, requesting that the trial court investigate the *ex parte* presentation of James's youth court records on the evening prior to the sentencing. The trial court denied the motion.

James was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections (MDOC). He was also ordered to registered as a sex offender, pursuant to Mississippi Code Annotated Section 45-33-25 (Rev. 2004). The Court also provided James with an itemized amount of money he would be required to pay towards court costs, fines, and to the Crime Victims Compensation Fund.

James filed his motion for a new trial on February 8, 2007. The trial court denied the motion and Cole timely noticed this appeal on March 16, 2007.

FACTS

In January 2004, L. O., a ten -year- old female, and her mother, Karen Owens, lived with James Roy Grimes at his residence at 2401 Old Leland Road in Washington County, Mississippi. Karen and her daughter had lived with James for about four years at this time. L. O. was not happy that her mother lived with James and wanted her mother to reunite with L.O.'s father, who currently lived in Alabama.

The previous year, when L.O. was nine years old, she made a false claim that James Grimes had anal intercourse with her so that her mother and father would reunite, and so that she would not have to live with James. While in Alabama visiting her father, L. O. told the falsehood that James had sexually assaulted her. This untruth was later discovered after L.O.'s father took her to be examined at the emergency room and there was no evidence of sexual assault. L.O. confessed to fabricating the story.

On Saturday, January 3, 2004, L. O. and her best friend, Megan Worbington , spent the night at James's house. The girls attended the same church, Bethel Assembly, in Greenville, Mississippi and planned to ride the church bus together the next morning. Megan was about a month older than L.O. in age.

That evening, Karen went to work and left the girls with James. Karen often left L.O. in James's care while she was at work. There is conflicting testimony as to what happened after Karen left the home. At trial, L.O. testified that, at some point when her mother was at work, James had sexual intercourse with both Megan and her. Megan, however, testified that James only attempted to kiss both of the girls and tugged at their clothes. She testified that he did not touch the girls' private areas.

The next morning, on January 4th, 2004, Megan and L. O. went to Bethel Assembly for Sunday School. During church, L.O. handed a pink note to Diane Paulette Cooper, her Sunday School teacher and church bus driver. Cooper testified that L.O. appeared very distraught and upset at the time. The note read the following, "Mrs. Paulett [I] have to talk to you about James and what he did to us when my moma [*sic*] went to work and [I] just need to talk to some one. Please can you."

At the time L. O. handed the note to Cooper, the two were in the church's restroom. After reading the note, Cooper asked L.O. if there was anything L.O. wanted to tell her. According to Cooper, L.O. relayed to her that James had sexually assault her on several occasions while her mother was gone to work. L.O. alleged that James would insert his penis into her vagina and kiss and touch her in different places. According to Cooper, L.O. told Cooper that she could verify the story with L.O.'s best friend, Megan Worbington. Megan testified that L.O. did not tell her about any sexual contact between L. O. and James until the night of January 3, 2004.

At some point, Megan spoke with Cooper but, during the trial, the court sustained the defense's objections to Cooper testifying about any statements Megan made regarding James contact with her. The court acknowledged that this was hearsay but the state argued that such statements should fall under the tender years exception to the hearsay rule. The court paused the proceedings

in order to conduct an evidentiary hearing on the tender years exception. At the conclusion of the hearing, that took place outside the presence of the jury, the court determined that it would not allow other witnesses to testify as to Megan's statements, but that the tender years exception did apply to those statements made by L.O.

The next day at trial, Cooper relayed to the jury that she summoned Deacon Glenn Cleveland to speak with L.O. immediately after hearing L.O.'s accusations. Cooper listened in as L.O. relayed the information to Cleveland. Cooper and Cleveland testified that they avoided asking L.O. leading questions, but rather allowed her to tell them what had happened to her. They also testified that L.O. was visibly upset and crying during the conversation. Cleveland testified that, at the time he spoke with L.O., Megan was present.

Cleveland called the sheriff's department and Sergeant Evan Smith of the Washington County Sheriff's Department arrived to investigate the claims. Sgt. Smith spoke with L.O. at the church and contacted Karen and the Department of Human Services. L.O. and her mother were the only people present during this questioning. L. O. told Smith that James would play with her breast and lick her vagina and make L.O. touch his penis. According to Sgt. Smith, L.O. said she was very scared of James because he threatened her if she told anyone. At trial, however, L. O. testified that James never threatened her.

After speaking at the church, Sgt. Smith took L. O. to Delta Regional Medical Center and met with social worker, Danette Clark. L. O. related her story to Clark, making an effort to assure Clark that she was not lying this time. L.O. told Clark that the sexual encounters started during Christmas break in 2003. This contradicted L.O.'s statements at trial, that the sexual encounters began in November 2003. She later testified that the encounters began around January 5th or 6th, 2004.

L. O. told Clark that James, at times, would use some "pink stuff" on her or he would use his spit and put his private parts into her private parts. L. O. relayed to Clark that this happened at least once a day while her mother was at work.

While at the hospital, Dr. Marily McLeod examined L. O. Dr. McLeod was the director of the Emergency Department at Delta Regional and she performed the rape kit on L. O. Dr. McLeod noted that L.O. had a ruptured hymen. She acknowledged that there were several reasons that a hymen could rupture without being indicative of sexual activity. Dr. McLeod also noted that L. O.'s vaginal vault was open. According to Dr. McLeod, this was unusual in a ten-year-old child, so much so that she used an adult examining tool - the speculum - given the size of L. O.'s vaginal vault. According to Dr. McLeod, the size of L. O.'s vaginal vault indicated that the child had been sexually active more than once.

Finally, Dr. McLeod discovered that L. O. had a vaginal infection known as Gardnerella. Although she testified that she has only diagnosed this infection in sexually active women, she did acknowledge that there is no scientific proof that this infection is a sexually transmitted disease. According to Dr. McLeod, the report indicated that Megan had not been sexually active, although no rape kit was performed on her. Dr. McLeod acknowledged that there was no way to determine how L. O. contracted Gardnerella and she would not state, as a scientific fact, that James had sex with L.O.

Lieutenant Percy Miles of the Washington County Sheriff's Department became involved in the case when Karen contacted him to find out if James had been arrested. Lt. Miles interviewed L. O. on January 6, 2004 and this interview was later transcribed and admitted into evidence. [RE] After the interview, the sheriff's department retrieved biological samples from James and sent the samples from L.O., Megan, and James to the MS Crime Lab. Examination on these samples was

complete on December 13, 2005.

Leslia Davis, from the Mississippi Crime Lab, testified about the results of the rape kit. Davis is a forensic biologist specializing in forensic serology, and was admitted as an expert. She examined the evidence submitted by the Washington County Sheriff's Department and did not find any seminal fluid present. On cross examination, Davis acknowledges that, if a rape kit is performed within the first 24 hours, there is a good chance that the lab would detect seminal fluid, where there had been ejaculation.

James was later arrested and charged with one count of statutory rape.

SUMMARY OF THE ARGUMENT

The trial court erred in allowing the hearsay testimony of the prosecutrix to enter into evidence under the 'tender years exception'. The declarant proved to be untrustworthy and unreliable and the court should have excluded all hearsay testimony regarding her statements. Likewise, no reasonable juror should have been able to find in favor of the guilty verdict. The verdict was based on extremely weak and tenuous evidence and to allow this verdict to stand would sanction an unconscionable injustice.

ARGUMENTS

I. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF THE PROSECUTRIX INTO EVIDENCE UNDER THE "TENDER YEARS EXCEPTION"

The trial court should not have allowed the hearsay testimony regarding L.O.'s statements as the tender years exception was not satisfied in this case. Mississippi Rule of Evidence 803 (25) states the following:

(25) Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provided substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is

unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

There is a rebuttable presumption that a child under the age of twelve is of tender years. *Allred v. State*, 908 So. 2d 889, 892 (¶11) (Miss. Ct. App. 2005). On January 4, 2004, at the time L.O. made the statements of abuse, she was ten years old. The inquiry, however, does not end with this presumption. Once the court finds that a declarant is of tender years, the court can not admit the testimony until it rules on the Rule 803 (25) (a) and (b) factors. *Veasley v. State*, 735 So. 2d 432, 437 (¶16) (Miss. 1999).

In assessing the “substantial indicia of reliability”, the courts have not announced a standardized test, but the factors that are generally consider are outline in the Comments to Rule 803 (25). They are as follows:

- (1) Whether there is an apparent motive on declarant’s part to lie;
- (2) The general character of the declarant;
- (3) Whether more than one person heard the statements;
- (4) Whether the statements were made spontaneously;
- (5) The timing of the declarations;
- (6) The relationship between the declarant and the witness;
- (7) The possibility of the declarant’s faulty recollection is remote;
- (8) Certainty that the statements were made;
- (9) The credibility of the person testifying about the statements;
- (10) The age or maturity of the declarant;
- (11) Whether suggestive techniques were used in eliciting the statement; and
- (12) Whether the declarant’s age, knowledge, and experience make it unlikely that the declarant fabricated

M.R.E. 803 cmt. 25 See *Idaho v. Wright*, 497 U. S. 805, 822, 110 S.Ct. 3139, 111L.Ed.2d 638 (1990).

After considering the evidence, the court must find that it was “particularly likely” that the declarant was telling the truth when the statements were made. *Marshall v. State*, 812 So. 2d 1068, 1075 (¶21) (Miss. Ct. App. 2001) (citing *Hennington v. State*, 702 So. 2d 403, 416 (¶54) (Miss. 1997).

At trial, the judge made a finding of fact, on the record, regarding each of the factors listed in the Comment 25 to M.R.E. 803. However, the court abused its discretion in finding, when considering the evidence as a whole, that L.O.'s statements contained a substantial indicia of reliability. Several times throughout the trial, L.O.'s statements were filled with inconsistencies. Also, L.O. had already established herself as an untrustworthy declarant.

L. O. provided inconsistent testimony regarding whether James had sexual intercourse with Megan and her on the night before church. During the Rule 803 hearing, L.O. testified that the Saturday night, January 3, 2004, James had sexual intercourse with both of the girls and that he had sex with L.O. on that Thursday, January 1, 2004 and on that Friday, January 2, 2004. However, according to Cleveland, L.O. did not mention any details regarding January 3rd, other than James tried to molest them. There is also no mention that she told Cleveland of any sexual intercourse that occurred that supposedly happened that Thursday or Friday. L.O., however, did tell Lt. Miles that the last time she had sexual intercourse with James was sometime during the Christmas break.

L.O. also provided inconsistent reasons why she did not inform her mother of the alleged abuse. During her testimony in the Rule 803 hearing, she testified that James never threatened her, however, she was afraid that he might harm her. How is it possible to threaten someone without threatening them?

At trial, the judge held a Rule 803 hearing outside the presence of the jury to determine the reliability of the statements. The judge made a finding of fact, on the record, and determined that the hearsay statements should come in as to L.O. but not as to those statements made by Megan.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The Mississippi Supreme Court has compared the standard of review of motions for new

trials as being similar in nature to the Court sitting as a thirteenth juror. *Ross v. State*, 954 So. 2d 968, 1016 (¶127) (Miss. 2007). “A finding that the verdict was against the overwhelming weight of the evidence indicates that the Court disagrees with the jury’s resolution of conflicting evidence and requires a new trial.” *Id.*

The Court will order a new trial and allow the evidence to be placed before a second jury if the first jury’s guilty verdict was based on “extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict.” *Id.* (citing *Lambert v. State*, 462 So. 2d 308, 322 (Miss. 1984) (Lee, J., dissenting)). The Court will only disturb the jury’s verdict when the verdict is so contrary to the overwhelming weight of the evidence that it would cause an unconscionable injustice if the verdict were allowed to stand. *Bush v. State*, 895 So. 2d 836, 844 (¶18) (Miss. 2005).

James’s conviction was based on weak and tenuous evidence and the Court should have granted the defendant’s motion for a new trial. The State relied heavily on the contradicted and unreliable accusations of the declarant, L.O. L.O. had previously attempted to manipulate the justice system by falsely accusing James of anal intercourse, simply because she did not like living around him and because she wanted her family to be reunited. She had no appreciation for the gravity of the harm she could cause by falsely accusing James Grimes. Now, less than two years later, she again asserts that this defendant sexually abused her.

The State presented the medical testimony of Dr. McLeod, who testified that L.O. had an open vaginal cavity, ruptured hymen, and a vaginal infection. There was, however, testimony lacking to suggest that James Grimes was the person that sexually abused L.O. On the stand, Dr. McLeod admitted that there was debate in the medical field as to whether Gardenella was a sexually transmitted disease. Even more, Dr. McLeod gave several non-sexual reasons why a 10 year-old’s

hymen may be ruptured.

As far as biological evidence, the crime lab reported that was no seminal fluid found in the rape kit conducted on L.O. During the 803 hearing, L.O. told the court that she had sexual intercourse with James the previous night before she reported the encounters to the church members. However, on the stand before the jury, L.O. blatantly tells the jury that, as of January 4, 2004, it had been approximately two weeks since James had sexual intercourse with her. During cross-examination, L.O. admits that she did tell the court, previously, that the last encounter had been the night before January 4th.

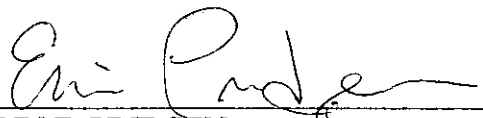
If the court were to disregard L.O.'s statements, the jury would have only been allowed to hear the testimony of Megan. Megan's testimony of the events that occurred on January 3rd are not sufficient to find L.O. guilty of statutory rape. No reasonable juror should have found in favor of conviction of statutory rape in this case.

CONCLUSION

James Grimes requests this honorable court to grant his relief by reversing and rendering this case, or in the alternative, by remanding this case to the trial court for a new trial. The defendant also requests that this Court take note of any plain error, not previously addressed in this brief.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


ERIN E. PRIDGEN
MISSISSIPPI BAR NO. [REDACTED]

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Erin E. Pridgen, Counsel for James Roy Grimes, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Margaret Carey-McCray
Circuit Court Judge
Greenville, MS 38072-1775

Honorable Joyce I. Chiles
District Attorney, District 4
Post Office Box 426
Greenville, MS 38702

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 26th day of June, 2008.



ERIN E. PRIDGEN
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200