IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HARVEY LAVELL REID A/K/A HARVEY LEAVE REID APPELLANT

VS. NO. 2007-KA-0732-SCT

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2007-KA-0732-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The grand jury of Newton County indicted defendant, Harvey Lavell Reid for Gratification of Lust Fondling in violation of *Miss. Code Ann.* § 97-5-23(1). (Indictment, C.p.2). After a trial by jury, Judge Marcus D. Gordon, presiding, the jury found defendant guilty. (C.p.31). Defendant was sentenced to 15 years. (Sentence order,C.p. 52-53).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

While in the company of several children defendant took his child victim (10 years old) of in a room and fondled her as described in the indictment. The victim exhibited social and personal problems subsequent to the fondling. Upon closer questioning as to the possible cause of her fears the victim told her story.

SUMMARY OF THE ARGUMENT

I.

THE PROFFERED INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW AND THE ELEMENTS OF THE OFFENSE.

Issue II.

THE TRIAL COURT DID ERR IN OVERRULING THE SINGLE OBJECTION TO A LEADING QUESTION.

Issue III.

THERE WAS AMPLE EVIDENCE SUPPORTING THE TRIAL COURT ALLOWING ADMISSION OF DEFENDANT'S CONFESSION.

Issue IV.

THE CHILD VICTIM WAS ELEVEN AND COMPETENT TO TESTIFY.

ARGUMENT

Issue I.

THE PROFFERED INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW AND THE ELEMENTS OF THE OFFENSE.

In this initial allegation of error counsel for defendant asserts that the instruction given as S-3 was improper as it referred to consent – which he contends was not an issue.

Consent is not an issue because the law clearly defines the crime regardless of the consent of the victim. Consequently it is part of the definition of the crime and is necessary to instruct the jury on the law. *Dupuis v. State*, 872 So.2d 724 (Miss.App. 2004).

Therefore it being a proper statement of the statute under which defendant was charged it cannot be error and no relief should be granted on this first allegation.

Issue II.

THE TRIAL COURT DID ERR IN OVERRULING THE SINGLE OBJECTION TO A LEADING QUESTION.

Specifically counsel for defendant asserts that on re-direct of the Sheriff's deputy it was error to overrule defense objection to leading questions.

Looking to the record re-direct of the Sheriff's deputy consisted of exactly and only two questions. Defense objected to the last question, being overruled. Tr.113.

The state rested.

Defense rested..

An appropriate standard of review for this issue would be:

> ¶ 33. Brown further argues that the State was allowed to improperly bolster Watts's testimony by asking multiple leading questions throughout redirect. She cites McDavid v. State, 594 So.2d 12, 16-17 (Miss.1992) for the proposition that allowing repeated leading questions on material issues is reversible error. **However, our supreme court has stated that, "trial courts are given great discretion in permitting the use of such questions, and unless there has been a manifest abuse of discretion resulting in injury to the complaining party, we will not reverse the decision."** Whitlock v. State, 419 So.2d 200, 203 (Miss.1982). We do not believe that allowing the State to ask leading questions regarding Watts's written statement caused any harm to Brown. As previously stated, the statement had already been admitted into evidence, and the State's line of questioning only verified whether the contents of that document were in fact correct.

Brown v. State, 2007 WL 4234638 (Miss.App. 2007)(emphasis added).

With redirect being so short and no claim of prejudice and under the manifest abuse of discretion – no relief should be granted on this allegation of error.

Issue III.
THERE WAS AMPLE EVIDENCE SUPPORTING THE TRIAL COURT ALLOWING ADMISSION OF DEFENDANT'S CONFESSION.

Counsel for defendant now seeks to challenge the trial courts ruling on the admissibility of defendant's confession. Specifically claiming his confession was not voluntary and not as a result of inducement, threats or promises.

An appropriate standard of review was recently reiterated for just such an analysis, to wit:

> ¶10. The circuit court judge sits as the fact-finder in determining whether a confession was freely and voluntarily given. McCarty v. State, 554 So.2d 909, 911 (Miss.1989). Initially, the judge must determine whether the defendant was adequately warned and "whether there has been under the totality of the circumstances a knowing and voluntary waiver of the accused's privilege against self-incrimination." Gavin v. State, 473 So.2d 952, 954 (Miss.1985); see, e.g., Porter v. State, 616 So.2d 899, 907-08 (Miss.1993); Pierre v. State, 607 So.2d 43, 50 (Miss.1992).
>
> ¶ 11. To be admissible, confessions must be given voluntarily and must not be the product of inducements, threats or promises. Morgan v. State, 681 So.2d 82, 86 (Miss.1996). The State bears the burden of proving, beyond a reasonable doubt, the voluntariness of a statement and its admissibility. Id. The prosecution can meet this burden and establish a prima facie case by presenting the testimony of an officer or other person with personal knowledge regarding whether the statement or confession was made voluntarily. Chase v. State, 645 So.2d 829, 838 (Miss.1994). To rebut the State's prima facie case, the defendant must offer testimony that coercion, threats or offer of reward induced the confession. Tolbert v. State, 511 So.2d 1368, 1376 (Miss.1987) (quoting Agee v. State, 185 So.2d 671, 673 (Miss.1966)). If the defendant is able to rebut this prima facie case, the State is obligated to bring forth all witnesses to the confession. Lesley v. State, 606 So.2d 1084, 1091 (Miss.1992).
>
> ¶ 12. Once a statement has been found admissible in a preliminary hearing

> pursuant to the correct legal standard, its admission into evidence will be upheld on appeal unless the appellate court finds that the trial court manifestly erred or that the trial court's decision to admit the statement was against the overwhelming weight of the evidence. Hunt v. State, 687 So.2d 1154, 1160 (Miss.1996); Hunter v. State, 684 So.2d 625, 633 (Miss.1996); Frost v. State, 483 So.2d 1345, 1350 (Miss.1986).
>
> *Brown v. State,* 2007 WL 4234638 (Miss.App. 2007).

The officers involved testified as did defendant and the trial court made specific findings of fact and conclusions of law. Tr. 96.

It is the position of the State that based upon the record on appeal the trial court was correct and not manifestly in error.

Consequently, no relief should be grated on this claim of trial court error.

Issue IV.
THE CHILD VICTIM WAS ELEVEN AND COMPETENT TO TESTIFY.

Lastly, defendant asserts the child witness was not properly qualified as a witness.

There does not appear to be any objection in the record or in pre-trial motions or in the motion for new trial. Consequently this issue is procedurally barred as having been waived. *Rowlett v. State*, 791 So.2d 319 (¶ 11)(Miss.App. 2001).

Without waiving any procedural bar to review it is the contention of the State that from the record the witness was competent to testify.

She knew her age, birth date, her age at the time of the offense, relationships, venue, etc. The trial judge saw her and would have been able to rule had there been an objection.

> ¶ 24. The question of whether a witness is competent to testify is left to the sound discretion of the trial court. Barnes v. State, 906 So.2d 16, 20(¶ 15) (Miss.Ct.App.2004). A child is competent to testify if the court ascertains that the child possesses "the ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness." Mohr v. State, 584 So.2d 426, 431 (Miss.1991). "The trial court is afforded great deference in its determination that a child witness is competent to testify." Williams v. State, 859 So.2d 1046, 1049(¶ 14) (Miss.Ct.App.2003). In order to prevail, Penny "must show that at the time the court made its initial decision that it was apparent that the witness did not meet the criteria for testifying, not that the subsequent testimony was flawed or that the initial determination was possibly erroneous." Id.
>
> *Penny v. State,* 960 So.2d 533 (Miss.App. 2006).

If this issue were not procedurally barred it would also be without merit as the record is replete with evidence this child victim was competent to comprehend, observe and be

truthful.

No relief should be granted on this allegation of trial court error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 25th day of February, 2008.

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