IN THE SUPREME COURT OF MISSISSIPPI

HARVEY LAVELL REID

v.

STATE OF MISSISSIPPI

2007-KA-732-SCT

NO. 07-CR-004-NWG

Appeal from Circuit Court of Newton County, Mississippi

BRIEF FOR APPELLANT

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Oral Argument Not Requested.

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STATEMENT OF THE CASE

The Appellant, Harvey Lavell Reid, appeals his conviction by the Circuit Court of Newton County, Mississippi, of gratification of lust and was sentenced to Fifteen (15) years with the Mississippi Department of Corrections.

Pertinent facts will be referred to in the argument.

SUMMARY OF THE ARGUMENT

1. Jury instructions must be supported by the record evidence.

2. Leading questions should not be allowed on substantive matters during redirect examination.

3. Information or implying to an accused that his confession would result in leniency is improper persuasion and should result in rendering a subsequent confession inadmissible.

4. A child must be examined about her consciousness of her duty to speak the truth before he or she is permitted to testify in Court.

ARGUMENT

I.

THE COURT ERRED IN GRANTING JURY INSTRUCTION S-3

Over objection by Appellant (T-115), the Court granted (CT-116) jury instruction S-3 (C.P. 25), despite the fact that consent was not an issue.

The instruction read as follows:

> The Court instructs the Jury that where the act of gratification of lust is committed by a defendant, who is over the age of eighteen (18) years, upon a child under the age of sixteen (16) years, the Defendant is guilty of said crime without regard to whether or not the child consented to the act.
>
> Therefore, you are instructed that if you should find from the evidence beyond a reasonable doubt that the defendant committed the act complained of, then you should return a verdict of Guilty as to said act without regard to whether or not the child consented.

It addresses only the issue of consent to the act by the child.

There was nothing in the record to make consent an issue or to justify the instruction. The instruction was thus not supported by the evidence.

A jury instruction must be supported by the evidence. Lancaster v. State, 472 So. 2d 363, 365 (Miss. 1985); Dennis v. State, 555 So. 2d 679, 683 (Miss. 1989).

The Court's granting the instruction was error. The verdict should be overturned.

II.

THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO LEADING QUESTIONS ON REDIRECT EXAMINATION

During redirect examination by the prosecutor of prosecution witness former

Deputy Sheriff Donald Collins about Appellant's ability to understand an advice of rights form read by Deputy Sheriff Mark Spence to Appellant and a statement made by Appellant, the following colloquy occurred (T-113):

> Q. Harvey Lavell Reid did understand enough of it to ask for a lawyer when y'all asked him to write it down, didn't he?
> BY MR. COLLINS: Object to the form of the question as leading.
> BY THE COURT: Overruled.
> A. That's right.

MRE 611 generally prohibits the use of leading questions on direct examination. The official comment and case law extend this to redirect examination by prohibiting leading questions of witnesses identified with the party asking the questions. McDavid v. State, 594 So. 2d 12 (Miss. 1992); Larry v. State, 52 So. 2d 292; 211 Miss. 563 (Miss. 1967); Allison v. State, 724 So 2d 1014 (Miss. App. 1998).

In the case before the Court, the question was obviously leading and the witness, a former Deputy Sheriff, was certainly identified with the prosecution, the party asking the questions.

The Court's overruling the objection to a leading question on redirect examination was error. The verdict should be overturned.

III.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT

During a suppression hearing out of the presence of the jury on the admissibility of Appellant's statement, the following colloquy occurred on direct examination of Appellant (T-90, 91):

Q. I would like for you to tell the Court what happened, what was said and by who before you asked for a lawyer.

A. Okay. Not Don Collins, but Mark Spence was sitting in there and he asked me - - you know, he read all this here. And he asked me, you know, he said, "If you'd just go on and admit to it, " he said, "we had one in here that didn't want to admit to it. He didn't admit to it, so he's gone for a long time, doing a lot of time. We had on that admitted to it, and he's out on the streets."

A confession offered in evidence should not be admitted if there is any reasonable doubt as to whether it is freely and voluntarily made. Rhone v. State, 254 So. 2d 750 (Miss. 1971). To be considered voluntary, a confession cannot be the product of official overreaching, in form either of direct coercion or subtle forms of psychological persuasion. U.S. V. Scurlock, 52 F. 3d 531, C.A.5 (Miss) 1995.

In the case before the Court, Appellant was told that one person who confessed was free and another who failed to confess was still in prison, encouraging him to the idea that confession would result in leniency. This created reasonable doubt that the confession was voluntary.

The Court's denying Appellant's motion to suppress was error.

The verdict should be overturned.

IV.

THE COURT ERRED IN ALLOWING KAYLA GRIFFIN TO TESTIFY

The alleged victim, Kayla Griffin, was eleven years old at the time she testified and ten years old at the time of the incident testified about.

> **A youthful witness, in order to be competent, must be shown to possess the capacity and ability "to observe events and to recollect and communicate them, and ..... to understand questions and to frame and make intelligent answers, with a consciousness to the duty to speak the truth." .....**
>
> **"Testimony of a child of tender years should be admitted with great caution, however; and where there is doubt, it should be excluded."**

97 C.J.S. Witness Sec. 58, pp. 451-452 Robinson v. State, 108 So. 2d 583 (Miss. 959).

Kayla Griffin was the only witness to testify that Appellant put his hand on the outside of her vagina. No evidence was adduced about her consciousness of her duty to speak the truth.

Because of the failure of the prosecutor to so qualify her as a witness, her testimony should not have been admitted. Without that testimony she could not have been convicted.

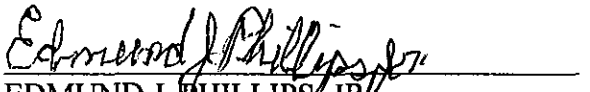
Appellant failed to object to the admission of this testimony, however the Court may notice this error as plain error. Signer v. State, 536 So. 2d 10, 12 (Miss. 1988).

The verdict should be overturned.

CONCLUSION

The verdict should be overturned.

RESPECTFULLY SUBMITTED,



EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Marcus D. Gordon, P.O. Box 220, Decatur, MS 39327, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: November 23, 2007.

EDMUND J. PHILLIPS, JR.
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