IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FRANCISUS ARNAZ ROBINSON — APPELLANT

VS. — NO. 2007-KA-1178

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. THE TRIAL JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

II. THE TRIAL JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL.

III. THE TRIAL JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR J.N.O.V. OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL.

IV. THERE IS NO CUMULATIVE ERROR AS THERE WERE NO INDIVIDUAL ERRORS.

STATEMENT OF THE FACTS

Around 3:00 a.m. on October 30, 2004, sixty-three year old Ruby Butler, awoke to go to the restroom. (Transcript p. 360 - 361). She returned to her bed to smoke a cigarette and heard a strange noise coming from the area near her window unit air conditioner. (Transcript p. 360). Ms. Butler tried to get to the phone to call 911 because she feared someone was breaking into her house. (Transcript p. 361). However, Ms. Butler did not have her glasses on and was unable to dial the phone. (Transcript p. 361). By this time, the man breaking in her home "was in on [her] before she could do anything." (Transcript p. 361). She grabbed a knife and tried to cut the man but he grabbed

the knife and threw it down to the floor. (Transcript p. 361). The man then threw her on the floor and pulled off her clothes. (Transcript p. 361). At trial, Ms. Butler described the attack as follows: "Well, he started raping me, and then he decided to pull it out and told me to suck his dick. And then he put it in my mouth. . . He put his penis in my vagina. . . . he crammed it in my mouth. . . Well, then when he went to ejaculate, he pulled it out of my mouth, and he ejaculated right in the palm of my hand." (Transcript p. 362). Ms. Butler put the seminal fluid in a tissue which she later gave to law enforcement. (Transcript p. 362 and 373). The man tore Ms. Butler's phone to pieces and left through the same window he climbed in earlier. (Transcript p. 362). Ms. Butler made her way to a neighbor's house and called police. (Transcript p. 362).

After becoming a suspect in this and a number of other burglaries, the defendant, Francisus Arnaz Robinson, was approached by police and asked to give a blood sample. (Transcript p. 436 and 441). He agreed and his blood was drawn and compared to the DNA in the tissue given to police by Ms. Butler. (Transcript p. 425, 441, 455, 457, and 480). The DNA was a match. (Transcript p. 481). Robinson was arrested and charged with rape, sexual battery, and burglary. He was tried and convicted of each count. He was sentenced to serve twenty-five years for rape, twenty-five years for sexual battery, and fifteen years for burglary.

SUMMARY OF THE ARGUMENTS

The trial court properly denied Robinson's motion to suppress as it was clear from the totality of the circumstances surrounding Robinson's consent that his consent was voluntarily and knowingly given. Also, the trial court acted within its discretion in denying Robinson's motion for a mistrial in that the court immediately instructed the jury to disregard the comment of a witness after an objection was made and as there is nothing in the record which evidences that the witness's comment prejudiced Robinson's case.

The trial court properly denied Robinson's Motion for J.N.O.V. as Robinson failed to specifically allege which elements of these crimes were not sufficiently established at trial. Furthermore, the State of Mississippi proved each of the essential elements of each of the crimes for which he was convicted. Lastly, as there were no individual errors, there can be no cumulative error.

ARGUMENTS

I. THE TRIAL JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

Robinson argues that "the trial court committed error when it denied the appellant's motion to suppress the consent form signed by the appellant." (Appellant's Brief p. 37). The Mississippi Supreme Court has held that "[i]n reviewing the denial of a motion to suppress, [the Court] must determine whether the trial court's findings, considering the totality of the circumstances, are supported by substantial credible evidence." *Moore v. State,* 933 So.2d 910, 914 (Miss. 2006). Further, the Supreme Court has held that "the trial judge has sole authority in determining witness credibility" and that "[s]uch a determination should not be overturned without a substantial showing that the trial judge was manifestly wrong." *Jones v. State ex rel. Mississippi Department of Public Safety*, 607 So.2d 23, 28 (Miss. 1991) (citing *Mullins v. Ratcliff*, 515 So.2d 1183, 1189 (Miss. 1987)).

With regard to this issue, Robinson first argues that his consent to having his blood drawn was not knowing and voluntary. (Appellant's Brief p. 40). The Mississippi Supreme Court has held the following in that regard:

> Whether a person voluntarily consents to a search 'is a question of fact to be determined by the total circumstances.' (*citation omitted*). Those considerations include:
>
> > whether the circumstances were coercive, occurred while in the custody of law enforcement or occurred in the course of a station house investigation. The court must also look to the individual's

> maturity, impressionability, experience, and education. Further, the court should consider whether the person was excited, under the influence of drugs or alcohol, or mentally incompetent. If the consent occurred while the defendant was being generally cooperative, the consent is more likely to be voluntary; however, if the defendant agreed and then changed his mind, the consent should be suspect.

Moore v. State, 933 So.2d 910, 916-17 (Miss. 2006) (quoting *Graves v. State*, 708 So.2d 858, 863 (Miss. 1997)) (*emphasis added*). Accordingly, the analysis should begin with the circumstances surrounding the consent. In this case, Officer George Chaix and Officer Heather Dailey went to Robinson's house at 10:45 a.m. on January 28th and knocked on his door. (Transcript p. 48- 49). Officer Chaix informed Robinson that they were there to speak with him about "some burglaries that were similar to the one that [he] encountered him on [previously]." (Transcript p. 49). Officer Chaix testified that the following took place when they arrived at Robinson's house:

> Well, I told him, I said: we've collected some evidence in some of these - - you know, some of these burglaries. I said, you know, we'd like you to, you know, accompany us and talk to us about this. And some of the evidence is some biological evidence. Would you mind if we got some blood from you? And he agreed to it. We then traveled to the hospital, Memorial Hospital at Gulfport. . .

(Transcript p. 49). Robinson was told that he did not have to agree to have his blood drawn. (Transcript p. 49). When asked if he explained to Robinson why was drawing his blood, Officer Chaix responded:

> Yes. I told him, I said, you know, I'll use this blood against you. You know, I'm up front with him about it. I said, if you didn't do anything, you don't have anything to fear. I said, but if you did, you know, we're going to use this as evidence against you. And he said, I didn't do anything, so I'll accompany you. And we said okay.

(Transcript p. 50). Officer Chaix also testified that he gave Robinson a consent form to sign which he read verbatim to Robinson and which Robinson signed.[1] (Transcript p. 49 - 50). The form reads

[1] The Consent Form signed by Robinson was not the normal "Voluntary Consent for Body Search" form normally used in these circumstances. Officer Chaix did not have the form with him and instead used a "Consent to

as follows[2]:

> I, *Francisus Robinson,* having been informed of my constitutional right to not have a search made of the premises hereinafter mentioned without a search warrant, and of my right to refuse to consent to such search, hereby authorize *Det. Sgt. Chaix and Det. Heather Dailey,* Police Officers of the Gulfport Police Department, City of Gulfport, County of Harrison, State of Mississippi, to conduct a complete search of my *body* located at *for blood sample at MHG.* These officers are authorized by me to take from my premises any letters, papers, materials, or other property which they may desire.
> This written permission is being given by me to the above named Police Officers voluntarily and without threats or promises of any kind.

(Exhibit S-5 from Motion Hearing). Accordingly, there is absolutely no evidence that Robinson was coerced to give the consent[3], he was not in custody[4], and did not give consent at the police station.

With regard to Robinson, himself, the record is clear that he was, at the time of the hearings, a twenty-five year old adult man. (Transcript p. 183). He could read and write. (Transcript p. 154, 177, and 218). He had previously held jobs. (Transcript p. 179, 185, and 208). He understood the court process. (Transcript p. 211). The officers both testified that Robinson appeared to be sober and was very cooperative with them. (Transcript p. 51, 109, and 111). As set forth above, "[i]f the

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Search" form and marked out the term "premises" and hand wrote the term "body" in its place. (*See* Exhibit S-5 from Motion Hearing). Officer Chaix and Officer Dailey testified that Officer Chaix made the change before reading the form to Robinson and having him sign the form. (Transcript p. 119 and 442).

[2] The sections of the consent form which were hand written are shown in *italics.*

[3] While Robinson testified at the motion for reconsideration hearing that he did not give consent for his blood to be drawn, he also testified that he did sign the consent form in question. (Transcript p. 153 and 156). However, Officer Dailey's testimony reflects that Robinson did, in fact, give both verbal and written consent for his blood to be drawn. (Transcript p.118).

[4] Both Officer Chaix and Officer Dailey testified that Robinson had not been arrested at the time he gave his consent. (Transcript p. 51 - 52, 235, and 245 - 246). The Mississippi Supreme Court has held that " the test for determining when a person is 'in custody' is whether a reasonable person would feel that they were going to jail and not just being temporarily detained." and further noted that "[u]ltimately this means whether a reasonable person felt they had the freedom to refuse police demands."*Culp v. State,* 933 So.2d 264, 272 (Miss. 2005) (citing *Godbold v. State,* 731 So.2d 1184, 1187 (Miss.1999)). Robinson, himself, testified that he did not feel that he was compelled to ride with the officers to the hospital. (Transcript p. 151).

consent occurred while the defendant was being generally cooperative, the consent is more likely to be voluntary." *Moore*, 933 So.2d at 917.

Robinson also argues that he had diminished capacity and "met the requirements for mild mental retardation." (Appellant's Brief p. 43). The burden is placed on the defendant to show impaired consent or diminished capacity. *Jones v. State ex rel. Mississippi Dept. of Public Safety*, 607 So.2d 23, 28 (Miss. 1991). While Robinson did tender an expert witness at his motion for reconsideration hearing who testified that it appeared to him from Robinson's testimony at the hearing that Robinson signed the consent form because he did not think he had a choice but to sign it, the State also tendered an expert witness who testified that Robinson should have been able to understand his rights including his right to refuse consent. (Transcript p. 182 and 211 - 212). As set forth above, the trial judge "has sole authority in determining witness credibility." *Jones,* 607 So.2d at 28. Furthermore, Robinson's own expert testified that Robinson could understand "something as simple as you don't have to do this if you don't want to." (Transcript p. 188). He further testified that Robinson's attention and concentration were adequate for all the tasks he asked him to perform and that his insight and judgment were fair. (Transcript p. 188). Moreover, the Mississippi Supreme Court has held that "the mental abilities of an accused are a factor-but only one factor-to be considered." *Neal v. State,* 451 So.2d 743, 756 (Miss. 1984). The Court further noted that a "per se involuntariness finding may be appropriate in the case of moderate or severe retardation. It clearly is not appropriate where, as here, the individual is mildly mentally retarded." *Id.* at FN 8.

Looking at the totality of the circumstances surrounding the consent, it is clear that Robinson knowingly and voluntarily consented to the drawing of his blood. *See Hughes v. State*, 735 So.2d 238, 261-62 (Miss. 1999). There was no coercion, Robinson was not in custody, and the consent

was not given at the police station. Robinson was not overly excited or under the influence of drugs or alcohol. Robinson was read a consent form which he later signed. Robinson can read and write and there was expert testimony that he understood the form he signed. Most importantly, there is nothing in the record to show that the trial judge was manifestly wrong in holding that Robinson voluntarily and knowingly consented to the drawing of his blood.

Secondly, Robinson argues that he should have been given his *Miranda* warnings prior to his consenting to have his blood drawn. (Appellant's Brief p. 45). However, the Mississippi Supreme Court has specifically held that "[w]e do not require that *Miranda* warnings precede a consent search." *Jones*, 607 So.2d at 29. The *Jones* Court held that "consent must be predicated on *Miranda* warnings being given prior to the search only when consent is given after a detention, illegal or otherwise, such as being taken to the police station." *Id.* In the case at hand, prior to giving his consent, Robinson had not been taken to the police station and had not been arrested. Robinson, himself testified that he went with the officers to the hospital voluntarily and that he did not feel that he was compelled to go with them. (Transcript p. 151). Thus, a *Miranda* warning was not required prior to Robinson giving consent to draw his blood. As such, the trial judge properly denied Robinson's motion to suppress.

II. THE TRIAL JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL.

Robinson also argues that "the trial court committed error when it denied the appellant's motion for mistrial." (Appellant's Brief p. 48). Whether to grant a motion for mistrial is within the sound discretion of the trial court. *Johnson v. State,* 914 So.2d 270, 272 (Miss. Ct. App. 2005) (citing *Caston v. State*, 823 So.2d 473, 492 (Miss. 2002)). The standard of review for denial of a motion for mistrial is abuse of discretion. *Id.* In the case at hand, Robinson points to the following

exchange during Officer Chaix's testimony:

> **Q:** . . . Tell me about the contact on January 28, 2005 with Mr. Robinson.
> **A:** Contact him at his residence at 2018 29th Street. Told him he was suspected in a series of crimes - - in a crime, rather. I'm sorry, a crime.
> **Defense Counsel:** Objection.
> **The Court:** Sustained. Jury will disregard "a series." Proceed.
> **Defense Counsel:** Judge, I'm sorry, Based on the objection, I have a motion.
> **The Court:** All right. Take the jury out please.

(Transcript p. 438 - 439). In that regard, this Court has previously held:

> When an objection is sustained and the trial court admonishes the jury to disregard the statement, this Court will usually find no error, absent unusual circumstances. *Spann v. State*, 771 So.2d 883(¶ 13) (Miss.2000). Furthermore, when a court has properly instructed a jury, the presumption is that jurors will follow the court's instructions. *Crenshaw v. State*, 520 So.2d 131, 134 (Miss.1988).

Ledford v. State, 874 So.2d 995, 997 (Miss. Ct. App. 2004). In the case at hand, the trial court immediately sustained the objection and admonished the jury to disregard the comment at issue. As in Ledford, there is "no reason to find that the jury did not do so." *Id.* As such, the trial court did not abuse its discretion in denying Robinson's motion for mistrial.

Moreover, there is nothing in the record which evidences that this particular comment prejudiced Robinson's case. "An error is only grounds for reversal if it affects the final result of the case." *Vardaman v. State,* 966 So.2d 885, 891 (Miss. Ct. App. 2007).

III. THE TRIAL JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR J.N.O.V. OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL.

Robinson further argues that "the trial court committed error when it denied the appellant's motion for J.N.O.V as to counts III, IV, and V of the indictment" (Appellant's Brief p. 51). However, a motion for J.N.O.V. must be specific. *Davis v. State,* 891 So.2d 256, 258 (Miss. Ct. App. 2004) (citing *Banks v. State*, 394 So.2d 875, 877 (Miss.1981)). As previously held by this Court, "[w]ithout specificity, a trial court will not err by denying the motion." *Id. See also Beckum*

v. State, 917 So.2d 808, 813 (Miss. Ct. App. 2005) and *Hicks v. State,* 812 So.2d 179, 195 (Miss. 2002). Neither Robinson's Motion for JNOV or the Appellant's Brief specifically state exactly which elements of the crimes for which Robinson was convicted were not sufficiently established by the State at trial. Thus, he is procedurally barred from raising this issue.

Notwithstanding, the trial court properly denied Robinson's Motion for J.N.O.V. in that the State established each of the elements required of each of the crimes for which Robinson was convicted. In this regard, this Court has previously held that

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence - not just that supporting the prosecution - in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts and the inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, reversal and discharge are required. On the other hand, if there is in the record such substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb. *Moody v. State*, 841 So.2d 1067, 1092 (Miss. 2003) In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part that given the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty. *May v. State*, 460 So.2d 778, 781 (Miss. 1984) (citing *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983)

Phinisee v. State, 864 So.2d 988, 992 (Miss. Ct. App. 2004) (*emphasis added*).

Robinson was convicted of rape under Mississippi Code Annotated §97-3-65(4)(a), sexual battery under Mississippi Code Annotated §97-3-95, and burglary under Mississippi Code Annotated §97-17-23. In order to establish that Robinson was guilty of rape, the State had to prove that he had "forcible sexual intercourse" with the victim. Mississippi Code Annotated §97-3-65(4)(a). The State sufficiently established that Robinson had forcible sexual intercourse with Ms. Butler:

a. Ms. Butler testified that a man came into her house through a window, threw her down, and removed her clothes. (Transcript p. 361).
b. Ms. Butler testified that this man then "put his penis in [her] vagina." (Transcript p. 362).
c. Ms. Butler testified that he ejaculated in the palm of her hand and that she saved the seminal fluid in a tissue which she later gave to law enforcement. (Transcript p. 362 and 373).
d. Ms. Butler testified that she did not invite this man into her house and that the sexual acts were not voluntary. (Transcript p. 363).
e. Ms. Butler testified that she could not fight the man off because he was holding her hands together. (Transcript p. 363).
f. The DNA from Robinson's blood sample was a match to the seminal fluid in the tissue Ms. Butler gave law enforcement. (Transcript p. 480 - 481).

In order to prove that Robinson was guilty of sexual battery the State of Mississippi had to establish that Robinson "engaged in sexual penetration with (a) another person without his or her consent." Mississippi Code Annotated §97-3-95(1)(a). The indictment specifically charged that Robinson "insert[ed] his penis into the mouth of the said Ruby Butler, without the consent of the said Ruby Butler." (Record p. 14). The Mississippi Supreme Court has previously held that "[c]ontact between a person's mouth, lips, or tongue and genitals of a person's body, whether by kissing, licking, or sucking, is sexual penetration." *Williams v. State*, 757 So.2d 953, 956-57 (Miss.1999) (citing *Hennington v. State*, 702 So.2d 403, 408 (Miss.1997)). The State met this burden:

a. Ms. Butler testified that the man who broke into her house "started raping [her] and then he decided to pull it out and told [her] to suck his dick. And then he put it in [her] mouth." (Transcript p. 362).
b. Ms. Butler testified that he "crammed it in [her] mouth." (Transcript p. 362).
c. Ms. Butler testified that she did not invite the man into her house and that the sexual acts were not voluntary. (Transcript p. 363).
d. The seminal fluid from the man who raped Ms. Butler, forced her to put his penis in her mouth, and ejaculated in her hand matched the DNA of Robinson. (Transcript p. 480 - 481).

"The crime of burglary requires proof of (1) an unauthorized entry (or breaking), and (2) the intent to commit a crime after the unauthorized entry." *Cortez v. State*, 876 So.2d 1026, 1030 (Miss. Ct. App. 2003) (citing Miss. Code Ann. §97-17-23 (Rev. 2000)). The State of Mississippi

sufficiently proved each of the requisite elements of burglary as well:

a. Ms. Butler testified that a man pushed out her window unit air conditioner and entered her house through the window. (Transcript p. 360 - 361).
b. Ms. Butler testified that "this guy broke into my house and raped me." (Transcript p. 360).
c. Ms. Butler testified that she did not invite the man into her house and that the sexual acts were not voluntary. (Transcript p. 363).
d. The seminal fluid from the man who raped Ms. Butler, forced her to put his penis in her mouth, and ejaculated in her hand matched the DNA of Robinson. (Transcript p. 480 - 481).

As Robinson failed to specifically allege which elements of these crimes were not sufficiently established at trial and as the State of Mississippi proved each of the essential elements of each of the crimes, the trial court properly denied Robinson's Motion for J.N.O.V. Thus, Robinson's third issue is without merit.

IV. THERE IS NO CUMULATIVE ERROR AS THERE WERE NO INDIVIDUAL ERRORS.

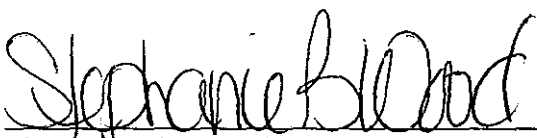
Lastly, Robinson argues that this "court should find that the cumulative error committed by the trial court mandates the reversal of the appellant's conviction." (Appellant's Brief p. 53). However, it is well established that "there being no error, harmless or otherwise, upon which a reversal may be predicated, it necessarily follows that there is no cumulation of error." *Poindexter v. State,* 856 So.2d 296, 303 (Miss. 2003). As there were no errors, reversible or otherwise, there is no cumulative error.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Francisus Robinson as the trial judge properly denied his motion to suppress, motion for mistrial, and motion for J.N.O.V. or in the Alternative Motion for New Trial.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Stephanie B . Wood, 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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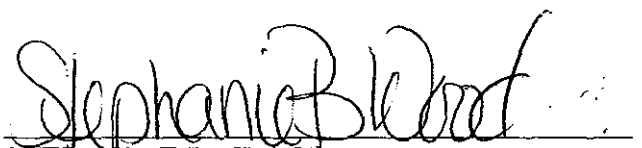
This the 31st day of March, 2008.



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