IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RONALD DAVID WAY — APPELLANT

VS. — NO. 2007-KA-1270-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The sufficiency and weight of evidence proffered in a "he said! she said!" scenario form the centerpiece of this appeal from convictions of sexual battery (Count 1) and fondling (Count 4).

The victim, thirteen (13) years of age, testified the sexual activity was consensual (R. 154) while the defendant testified it never took place. (R. 293, 297) Guilty verdicts were returned with respect to two (2) of the counts contained in a five (5) count indictment.

RONALD DAVID WAY, a twenty-three (23) year old unmarried Caucasian male and young father (R. 22, 398) residing in Olive Branch with his sister, Mary Way, and her domestic companion, William Bannister, prosecutes a criminal appeal from the Circuit Court of DeSoto County, Mississippi, Robert P. Chamberlin, Circuit Judge, presiding.

During a trial by jury conducted on May 30-31, 2007, Way was convicted of sexually battering and fondling Cristen Bannister, the thirteen (13) year old daughter of William Bannister, the boyfriend at the time of the defendant's sister, Mary Way. (R. 365; C.P. at 102-06)

A multi-count indictment returned on January 18, 2007 (C.P. at 10-11), charged in Count 1 that between the 16th day of July and the 21st day of July, 2005, Way engaged in sexual penetration with Cristen Bannister, a child under fourteen (14) years of age, " . . . by placing his tongue in the vagina of Cristen Bannister, in direct violation of Section 97-3-95(1)(d) . . ." (C.P. at 10)

The indictment charged in Count 2 that between the 16th day of July and the 21st day of July, 2005, Way engaged in sexual penetration with Cristen Bannister, a child under fourteen (14) years of age, " . . . by placing his finger in the vagina of Cristen Bannister, in direct violation of Section 97-3-95(1)(d) . . ." (C.P. at 10)

The indictment charged in Count 3 that between the 16th day of July and the 21st day of July, 2005, Way engaged in sexual penetration with Cristen Bannister, a child under fourteen (14) years of age, " . . . by placing his penis in the mouth of Cristen Bannister, in direct violation of Section 97-3-95(1)(d) . . ." (C.P. at 11)

The indictment charged in Count 4 that Way, for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, did ". . . handle, touch, or rub with his hands or any part of his or her body or any member thereof, Cristen Bannister . . . in direct violation of section 97-5-23 . . . " (C.P. at 11)

The jury found Way guilty of sexual battery as charged in Count 1 and "not guilty" of the sexual battery charged in Counts 2 and 3. (R. 365; C.P. at 103, 104-05)

Count 5 charged Way with statutory rape, a crime for which the jury also found Way "not guilty." (C.P. at 107)

The victim's testimony reflects the sexual acts were all consensual. (R. 145, 154)

The defendant's testimony reflects the sexual acts never took place. (R. 293)

Following a hearing on sentencing and post-trial motions conducted on July 18, 2007, the

trial judge sentenced Way to serve a term of thirty (30) years for sexual battery, with ten (10) years to serve and twenty (20) years of post-release supervision, and to fifteen (15) years of post-release supervision for fondling, the latter to run consecutively to the sentence imposed in Count 1. (R. 33-34; C.P. at 133-34)

Two (2) issues are raised on appeal to this Court.

I. "The trial court erred in failing to grant Way's motion for a new trial as the verdict was against the overwhelming weight of the evidence."

II. "The trial court erred in finding Way's guilty verdict was based on the sufficiency of the evidence."

In short, Way assails both the sufficiency and the weight of the evidence used to convict him.

John Dolan, a practicing attorney in Olive Branch, represented Way very effectively at trial.

Erin Pridgen, an attorney with the Mississippi Office of Indigent Appeals, has interceded for Way in his appeal to this Court. Her representation has been equally effective.

STATEMENT OF FACTS

At the time of Ronald Way's trial for sexual battery and fondling, Cristen Bannister was a fifteen (15) year old testifying female living with her father in Memphis. (R. 137, 198)

At the time of the criminal offenses for which Way was on trial, Cristen was thirteen (13) years of age and living with her mother, Pamela Bannister, in Joplin, Missouri, (R. 138) Cristen's mother was divorced from Cristen's father, William Bannister (R. 304), who was sharing a house in Olive Branch with his companion, Mary Way, the defendant's sister, when the offenses took place the week of July 16th - 21st, 2005, while Cristen was visiting her father. (R. 95, 142)

During this time Cristen began to have sexual contact with Ronald Way who was living with his sister, Mary, in Olive Branch. (R. 143)

Way, who testified in his own behalf, claimed he never had any appropriate or inappropriate sexual contact with Cristen. (R. 293-94)

Cristen, on the other hand, testified this contact, which included oral sex by Way (R. 149-50), took place six (6) or seven (7) times while Bannister and Mary Way were either at work or inside their own bedroom. (R. 145-46, 172) She also testified that before she returned to Joplin from Olive Branch, she noticed a "cold sore" on Ronald Way's upper lip. (R. 151) Way later tested positive for the herpes simplex virus 1 (HSV1). (R. 254-55)

After her return to Missouri Cristen developed blisters near her vagina. (R. 151 A single blister erupted into many painful blisters. (R. 151-52) Cristen sought medical attention at St. John's Regional Medical Center in Joplin. She was seen in the emergency room by Dr. Barbara Gene Chilton, a pediatrician who diagnosed Cristen's condition as genital herpes. According to Dr. Chilton, it was "[t]he worst outbreak of genital herpes I'd ever seen in a child." (R. 207)

Cristen denied she had ever had any kind of sex with anyone else prior to having contact with Way (R. 141-42) , and she testified her outbreak of herpes was the first of its kind as well. (R. 153)

Five (5) witnesses testified for the State of Mississippi during its case-in-chief, including the victim, **Cristen Bannister**, the 13-year-old who identified Ronald Way in court as the man who inserted his tongue and finger inside her vagina, placed his penis inside her mouth, and fondled her body. (R. 140, 154)

> Q. [BY PROSECUTOR:] Cristen, you were not physically forced to have these oral sex acts and sexual intercourse with Ronnie Way, were you?
>
> A. [BY CRISTEN:] No, sir I was not forced.
>
> Q. During that week before you went back, did Ronnie Way, in fact, stick his tongue inside your vagina?

A. Yes, sir. He did.

Q. Did Ronnie Way, in fact, stick his finger inside of your vagina?

A. Yes. sir.

Q. Did he, in fact, stick his penis in your mouth?

A. Yes, sir.

Q. And did you, in fact, have him physically enter you with his penis into your vagina?

A. Yes, sir.

Q. And as a result of this week long interaction between the two of you, did you develop Herpes?

A. Yes, sir. I did. (R. 154)

Michael Gurley, a detective with the DeSoto County Sheriff's office, testified he was the investigating officer in Mississippi. He received from the Joplin, Missouri, police department a VHS audio and video tape of Cristen Bannister's forensic interview in the state of Missouri. The video tape was admitted into evidence without objection (R. 114-15) and later played for the benefit of the jury during the cross-examination of Cristen by the defendant. (189)

Gurley executed a "human specimen warrant" on the defendant, Ronald Way, pursuant to which two penal swabs and two blood samples were taken for analysis. (R. 116)

Dr. Barbara Chilton, a pediatrician tendered as an expert in the field of sexual assault, testified that Cristen had "[t]he worst outbreak of genital Herpes [she'd] ever seen in a child." (R. 207) Cristen did not have any previous medical history of genital herpes. (R. 210) Cristen was positive for the herpes simplex virus, type I, as was the defendant. (R. 208)

We find the following colloquy during Way's cross-examination of Dr. Chilton:

> Q. [BY DEFENSE COUNSEL:] And Herpes 1 can show up in the genital area of a female if the transmitter has got Herpes 1 on the mouth and performs oral sex upon the female.
>
> A. Yes, sir. (R. 218)

Margaret Cashion, a nurse employed by the DeSoto County Sheriff's office, testified that in August of 2005, at Detective Gurley's request, she collected a blood sample from Ronald Way for the purpose of testing for the

herpes virus. (R. 243-44)

Dr. Vickie Baselski, a professor in the pathology department at the University of Tennessee Health Science Center and board certified in the field of microbiology, testified the herpes simplex virus is a lifelong infection. (R. 250)

> Q. [BY PROSECUTOR MURPHY:] So HSV1 that's typically an oral lesion, can it be transferred to another individual's genital region and it show up in that new host of the virus as HSV1 in a genital area?
>
> A. [BY BASELSKI:] Definitely. HSV1 as an active replicating lesion, a cold sore if you will, if in contact with a genital surface and a susceptible individual can result in genital lesions.
>
> Q. So somebody with a cold sore - - if a male had a cold sore and performed oral sex on a female and that male had HSV1, he could transfer HSV1 to the genital area of the female upon whom he performed oral sex?
>
> A. Yes. (R. 251-52)

At the close of the State's case-in-chief, Way declined to move for a directed verdict. (R. 269-273)

Three (3) witnesses, including **Ronald Way**, testified on behalf of the

defense. (R. 273-301)

After being advised of his right to testify or not, the defendant testified in his own behalf and

asserted a general denial in defense of the charges.

> Q. [BY DEFENSE COUNSEL:] At any time while Cristen Bannister was at the house east of Olive Branch with you alone, did you ever have any inappropriate sexual contact with her at all?
>
> A. No, sir.
>
> Q. Did you ever have any sexual contact with her, appropriate or inappropriate?
>
> A. None at all.
>
> Q. Did you ever supply marijuana or any drugs of any type to Cristen Bannister?
>
> A. No, sir.
>
> Q. Did you ever supply alcohol of any type or sort to Cristen Bannister?
>
> A. No, sir.
>
> Q. Did you ever see her exhibit any symptoms of intoxication other than that Friday night that you talked about?
>
> A. Other than that night, no, sir. (R. 293-94)

The State produced one witness, **William Bannister**, Cristen's father, in rebuttal. (R. 303)

At the close of all the evidence Way, for whatever reason, failed to move for a directed verdict of acquittal. (R. 315-18)

Insofar as we can tell, peremptory instruction was never requested. (R. 205)

Following closing arguments, the jury retired to deliberate at 3:11 p.m. (R. 361) After two written inquiries submitted to the court were answered in writing by the trial judge (R. 361-64;C.P. at 99-101), the jury, at 9:34 p.m., returned verdicts of guilty of one (1) count of sexual battery and one (1) count of fondling. (R. 364-65)

The jury found Way "not guilty" of sexual battery as charged in Count 2 and Count 3 (R.

365; C.P. 104-05) and "not guilty" of statutory rape charged in Count 5. (R. 365; C.P. at 107)

A poll of the jury was neither requested nor taken. (R. 365-66)

During the hearing conducted for the purpose of adjudicating the merits of Way's post-trial motions and imposing his sentence, Pamela Bannister, the victim's mother, and Gary Atkinson, the victim's grandfather, gave victim impact statements. (R. 376-90)

The defendant produced his sister, Mary Way, in mitigation, and the defendant himself made a statement in the form of allocution. (R. 21-23, 28-29)

Following the hearing on post-trial motions and sentence, Judge Chamberlin, after taking the matter under advisement for a few moments in order to study the file (R. 400-02), sentenced Way to serve thirty (30) years for the sexual battery charged in Count 1 with ten (10) years to serve followed by twenty (20) years of PRS and to fifteen (15) years of post-release supervision for fondling as charged in Count 4. (R. 403-04)

Way never requested judgment notwithstanding the verdict. (R. 265-67; C.P. at 112-13)

Way did, on the other hand, file a "Motion for New Trial" which alleged that the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 112-13)

Way invites this Court to reverse and render but, if not done, to at least grant him a new trial. (Brief of the Appellant at 10)

SUMMARY OF THE ARGUMENT

Sufficiency of the Evidence - Directed Verdict, Peremptory Instruction, J.N.O.V.

Way is procedurally barred from assailing the sufficiency of the State's evidence, or the evidence in toto, because he never at any time sought a directed verdict, requested peremptory instruction, or moved for judgment notwithstanding the verdict. (R. 269-73, 301-03, 315-17, 325-26, 365-69, 372-409; C.P. at 112-13)

In short, the trial judge was never asked to rule on the sufficiency of the evidence. This, we submit, is fatal to Way's complaint.

In any event, 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 and other witnesses to demonstrate lingual "penetration" of the victim's vagina by Way and the fondling, i.e., touching, handling or rubbing, of her body and private parts.

The posture of Way's sufficiency and weight of the evidence arguments is controlled by the case law found in **Ivy v. State,** 949 So.2d 748 (2007), which involved similar crimes - sexual battery and fondling - and, save for the consensual nature of the present acts, very similar facts, i.e., a thirteen (13) year old victim as well as a "he said! she said!" scenario.

The **Ivy** case requires the reaching of a similar result in the case at bar.

"[P]roof 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.

In **Crawford v. State,** 754 So.2d 1211, 1222 (Miss. 2000), this Court stated:

> "[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).

There was ample testimony from experts as well as others, including the victim, that would have led a reasonable and fair-minded juror to reasonably infer, if not find directly, that Ronald Way transmitted the herpes virus to Cristen when his lips came in contact with her vagina and that Cristen contracted genital herpes through the oral sex with Way. When the entire herpes simplex scenario is factored into the equation, it is clear the evidence was sufficient to sustain a guilty verdict.

Weight of the Evidence - New Trial.

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 [and] [y]our duty is to determine what weight and what credibility will be given the testimony and supporting evidence of each witness in this case." (C.P. at 87)

The testimony of Cristen Bannister that she had multiple sexual contacts and encounters with Way, even if consensual in the factual, as opposed to the legal sense, was not outweighed by Way's general denial. Cristen's credibility, of course, was a question for the jury.

Way, who has failed to specifically point out just where the evidence preponderates against the verdict, complains about testimonial inconsistencies and the allegedly faulty recollection of the victim. The same argument was made and rejected in **Collier v. State**, 711 So.2d 458, 462 (Miss. 1998), where we find the following:

> "We are asked to reverse this case on the grounds that there are inconsistencies and contradictions in her testimony. If this be true, it would still be a question for the jury." *Blade*, 240 Miss. at 188, 126 So.2d at 280; *e.g. Allman*, 571 So.2d at 253. In the instant case, any inconsistencies found in C.H.'s testimony go [to] the weight and credibility of her testimony, clearly a jury question. In addition, C.H.'s testimony was not at all inconsistent on the issue at the heart of this matter - Collier's fondling of her. This contention is without merit.

It is well settled that "[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* **Hill v. State**, 199 Miss. 254, 24 So.2d 737 (1946).

The sequestration aspect of Way's weight of the evidence argument is controlled by the case law found in **Douglas v. State,** 525 So.2d 1312 (Miss. 1988), and **Harris v. State,** 937 So.2d 474 (Ct.App.Miss. 2006).

In the final analysis, no unconscionable injustice has been demonstrated here.

ARGUMENT

WAY IS PROCEDURALLY BARRED FROM ASSAILING ON APPEAL THE SUFFICIENCY OF THE EVIDENCE BECAUSE IT WAS NEVER CHALLENGED IN THE COURT BELOW.

IN ANY EVENT, ACCEPTING AS TRUE THE TESTIMONY OF THE WITNESSES FOR THE STATE, INCLUDING THE VICTIM, TOGETHER WITH ALL REASONABLE INFERENCES TO BE DRAWN THEREFROM, THERE EXISTS EVIDENCE OF SUFFICIENT WEIGHT AND CHARACTER TO PROVE THE OFFENSES OF SEXUAL BATTERY AND FONDLING BEYOND A REASONABLE DOUBT.

This is a case of sexual battery involving lingual penetration of the victim's vagina, i.e., cunnilingus (Count 1); alleged digital penetration of the victim's vagina (Count 2) for which Way was acquitted; oral sex, i.e., fellatio (Count 3) for which Way was also acquitted, and fondling, i.e., touching, handling, or rubbing of the victim's genitalia and body parts by Way's body parts. (Count 4). (C.P. at 10-11)

It is also a typical case of "He said! She said!" (She -R. 154; He - R. 293-94)

Way contends, first of all, "the verdict of the jury is against the overwhelming weight of the evidence." (Brief of the Appellant at 5-7) He argues his motion for a new trial should have been granted. (Brief of the Appellant at 5-6)

Way's primary complaint is that Cristen's violation of the witness sequestration rule prejudiced his defense and, " . . . as such, the trial court should have ordered a mistrial or excluded witness testimony." (Brief of the Appellant at 7)

The trial judge's ruling on this aspect of the case is quoted, in part, as follows:

> "As regards William Bannister, Catie Bannister and Pamela Bannister, I will certainly allow Defense Counsel **full cross-examination** in regard to whether they have discussed this testimony with Cristen Bannister after Cristen Bannister took the stand. If there is an issue that comes up during their testimony and I don't foresee it, and that's [hearing] the argument of Mr. Dolan [defense counsel], and hearing the - - what we know so far might or might not be testified, but it also includes my consideration of the issue if Cristen had gone out there and recounted every last thing she had testified to as relates to those three witnesses. I'm going to allow the Defendant to **cross-examine them fully** on this issue if he so desires. I will address the other issues if it comes up during the testimony. Other than that, I will certainly allow those three to testify as I would any other witness." (R. 238-39) [emphasis ours]

Neither Pamela Bannister nor Catie Bannister testified at any time on May 30-31st during the trial of this cause. William Bannister testified as a rebuttal witness for the State but was not cross-examined about the matter. (R. 311-14) We wonder, therefore, whose testimony was allegedly tainted. (Brief of the Appellant at 7)

In denying Way's motion for a new trial, the trial judge stated the following which we rely upon here:

> BY THE COURT: All right. Regarding the Motion for New Trial, first and foremost, regarding the weight of the evidence, the Court finds there is no merit to the argument regarding the verdict being against the overwhelming weight of the evidence. Obviously,

> as in many cases, there were jury issues that were brought forth during the testimony. Basically, we had the testimony of the victim in this case and the testimony of the Defendant. Of course, each with certain corroborating testimony as to their version of the events and then, of course, we had the medical testimony and information in that regard. Certainly, as in any case, there were issues upon which the jury could have gone either way, and they made their decision beyond a reasonable doubt. The Court certainly finds that has merit.
>
> Regarding the argument involving the witnesses: while as always such actions are troublesome after being specifically admonished not to do so, just simply ignoring the Court's direction, the Court will stand by the manner in which that issue was dealt with at trial. Part of this is from memory, but if my memory is correct, **some of the witnesses were not called, and the testimony of William Bannister was, in this Court's opinion, of minimal importance to the actual merits of the case.** I know some of his testimony revolved around some of the timing regarding the girlfriend and some other matters, but in that regard, the Court will stand by the actions taken at trial. The court feels that those actions properly and sufficiently dealt with the concerns of the accusing witness, Cristen Bannister, violating the Court's direction not to discuss her testimony. (R. 375-76) [emphasis ours]

Judge Chamberlin found correctly that William Bannister's testimony to be largely inconsequential. No probable prejudice has been demonstrated by Way. Neither has an abuse of judicial discretion.

The trial judge, in our opinion, handled the witness sequestration violation with a great deal of wisdom and circumspection. He called for a recess and allowed the parties to discuss the incident with the various witnesses. (R. 229-33)

Cross-examination of any witness(es) that had yet to testify would be permitted "full bore," thus comporting with the requirements found in **Douglas v. State,** *supra*, 525 So.2d 1312 (Miss. 1988) and **Harris v. State,** *supra*, 937 So.2d 474 (Ct.App.Miss. 2006).

In order to reverse Way's convictions based upon his motion for new trial and weight of the evidence complaint, this Court would have to find that Judge Chamberlin abused his judicial

discretion. "A reversal is warranted only if the trial court abused its discretion in denying a motion for new trial." **Ivy v. State,** *supra*, 949 So.2d 748, 753 (Miss. 2007) citing **Sheffield v. State,** 749 So.2d 123, 127 (Miss. 1999).

Moreover, allowing the convictions to stand would have to work an unconscionable injustice. **Bush v. State,** 895 So.2d 836, 844 (Miss. 2005), Such has not been demonstrated here.

A secondary complaint is that "[Cristen's] trial testimony was filled with various inconsistencies." (Brief of the Appellant at 8) Way points to testimony from Cristen that the sexual contacts began on Friday and ended on Wednesday. Cristen subsequently acknowledged that an encounter also took place on Thursday. (Brief of the Appellant at 8-9)

This is a classic example of majoring on the minors.

Our retort to this claim is found in **Collier v. State,** *supra*, 711 So.2d 458, 462 (Miss. 1998), where the same argument was made and rejected.

> "We are asked to reverse this case on the grounds that there are inconsistencies and contradictions in her testimony. If this be true, it would still be a question for the jury." *Blade*, 240 Miss. at 188, 126 So.2d at 280; *e.g. Allman*, 571 So.2d at 253. In the instant case, any inconsistencies found in C.H.'s testimony go [to] the weight and credibility of her testimony, clearly a jury question. In addition, C.H.'s testimony was not at all inconsistent on the issue at the heart of this matter - Collier's fondling of her. This contention is without merit.

Lest we forget, "[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,** *supra*, 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,** *supra*, 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."].

In short,"impeachment value" is a question for the jury and not for a trial judge called upon during trial to address the matter of weight and/or legal evidentiary sufficiency.

Way, we note, invites this Court to "reverse and render" but, if not, to at least remand for a new trial. (Brief of Appellant at 8)

In seeking, alternatively, reversal and discharge, Way desires to assail the "sufficiency" of the evidence. He claims ". . . the trial court erred in finding Way's guilty verdict was based on the sufficiency of the evidence." (Brief of the Appellant at 7)

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).

In reviewing the sufficiency of the evidence "[t]his Court properly reviews the ruling on the last occasion the challenge was made in the trial court." **Ivy v. State,** *supra,* 949 So.2d 748, 751 (Miss. 2007), quoting from **McClain v. State,** 625 So.2d 774, 778 (Miss. 1993).

In the case at bar, there is nothing to review.

Insofar as we can tell, Way never requested a directed verdict, peremptory instruction, or judgment notwithstanding the verdict. Thus, the trial judge never had an opportunity to pass on this question. In this posture, Way is procedurally barred from raising this issue on appeal.

Stated differently, the question of "sufficiency," as opposed to "weight," has not been preserved for appellate review.

"This Court will not place a trial court in error on a matter which was not placed before it." **Perry v. State,** 904 So.2d 1122, 1125 (Ct.App.Miss. 2004). Put another way, "[t]he trial court will not be held in error on a legal point that was not presented for the court's consideration." **Goree v.**

State, 750 So.2d 1260, 1262 (Ct.App.Miss. 1999), citing **Chase v. State,** 645 So.2d 829, 846 (Miss.1994).

Assuming, on the other hand, we have misapprehended the record and are wrong, we respectfully submit the evidence, together with all reasonable inferences to be drawn therefrom, was of sufficient weight and worth to support Way's convictions of both sexual battery and fondling. A reasonable, fair-minded hypothetical juror could have found from the testimony and reasonable inferences to be drawn therefrom that Ronald Way, at the time(s) and place(s) testified about, did what Cristen said that he did.

This is not a case where the facts and inferences ". . . point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty." **Bush v. State,** *supra*, 895 So.2d 836, 843 (Miss. 2006).

We rely upon Cristen's testimony quoted in our statement of facts as well as the accurate summary of Cristen's testimony found in Way's brief at page 3. We need not repeat it all here.

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 standing alone. 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]

As stated in our summary of the argument, "It wasn't, and it was." *See also* **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."

Once again, our position on this issue can be summarized in only three (3) words: "classic jury issue." A reasonable and fair-minded juror could have found Way guilty of both sexual battery and fondling.

The fact the jury acquitted Way of Counts 2 and 3 charging him with sexual battery and Count 5 charging him with rape is of no consequence.

The jury could have found that the acts charged in Counts 2, 3, and 5 were completely subsumed in Count 4, the fondling charge. Any benevolence on behalf of the jury could have been a result of testimony from the victim that the sexual acts were consensual.

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).

Way's position is that "[Cristen's] trial testimony is not only unreliable, the supporting evidence offered by the State should not be considered sufficient corroborating evidence." (Brief of the Appellant at 8)

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**, 691 So.2d 948, 957 (Miss. 1997), citing **Mitchell v. State**, 572 So.2d 865, 867 (Miss. 1990). *See also* **Bush**

v. State, *supra*, 895 So.2d 836, 844 (Miss. 2005), **citing Herring v. State,** *supra*.

Contrary to Way'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.

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 Way'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 that a crime took place and that Way committed it. Assuming the State's evidence is true, it proved the element of "penetration" as well as other conduct by the defendant establishing the offenses of fondling and sexual battery within the meaning and

purview of our statutes, Miss. Code Ann. §97-3-95(1)(d) and §97-5-23.

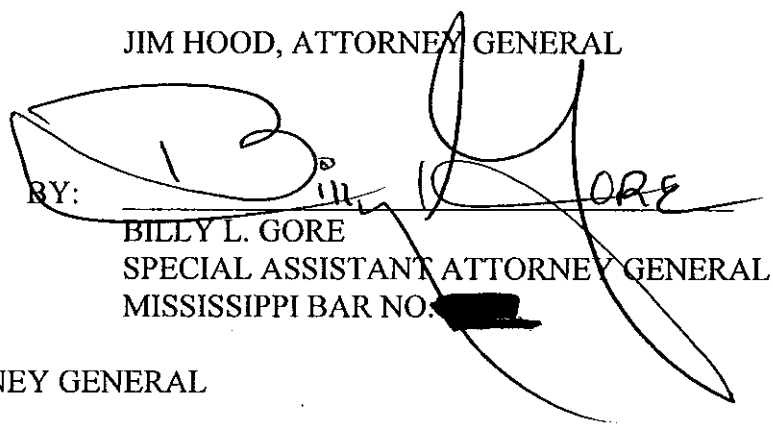
The verdict of the jury was not against the overwhelming weight of the evidence. No "unconscionable injustice" has been demonstrated by Way. Accordingly, the trial court did not abuse its judicial discretion in overruling Way's motion for a new trial.

CONCLUSION

Appellee respectfully submits that no reversible error took place during the trial of this cause. Accordingly, the judgments of conviction for sexual battery and fondling, together with the thirty (30) year sentence with ten (10) years to serve imposed for Count 1 and the fifteen (15) year consecutive PRS sentence imposed in Count 4 should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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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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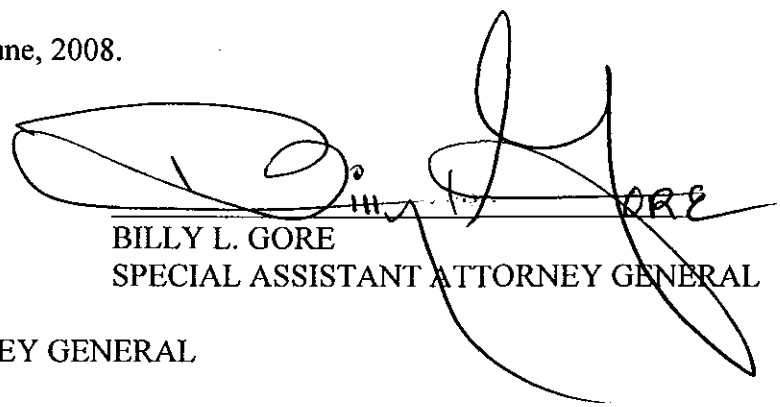
This the 5th day of June, 2008.



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