

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RONALD DAVID WAY

APPELLANT

FILED

V.

MAY 02 2008

NO. 2007-KA-1270-SCT

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COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RONALD DAVID WAY

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V.

NO. 2007-KA-1270-SCT

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.

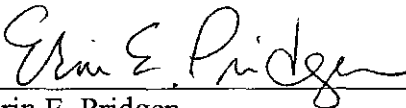
1. State of Mississippi
2. Ronald David Way, Appellant
3. Honorable John W. Champion, District Attorney
4. Honorable Robert P. Chamberlin, Jr., Circuit Court Judge

This the 2nd day of May, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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V.

NO. 2007-KA-1270-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF ISSUES

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.

STATEMENT OF THE CASE

On January 18, 2007, a DeSoto County, Mississippi grand jury indicted Ronald David Way on three counts of sexual battery, in violation on Mississippi Code Annotated Section 97-3-95 (1)(d) (Rev. 2006), one count of fondling, in violation of Section 97-5-23 (Rev. 2006), and one count of statutory rape, in violation of Section 97-3-65(1)(b) (Rev. 2007). On May 30, 2007, the Honorable Robert P. Chamberlain, Circuit Court Judge, presided over the two-day, jury trial. The jury returned guilty verdicts as to Count 1- sexual battery and Count 4 - fondling.

On July 18, 2007, the court sentenced Way to a total of (45) forty-five years. The court sentenced Way to serve (30) thirty years for Count 1 - sexual battery, with (10) ten years to serve

in the Mississippi Department of Corrections (MDOC), followed by (20) twenty years post-release supervision with (5) five years thereof reporting. As to Count 4 - fondling, Way was sentenced to serve (15) fifteen years post-release supervision, non-reporting in the MDOC, consecutive to Count 1. The court ordered Way to pay all court costs and fines and to register as a convicted sex offender.

Way filed his motion for a new trial on June 8, 2007 and the court denied all post-trial motions on July 18, 2007. Way timely noticed this appeal on July 23, 2007.

FACTS

In the summer of 2005, Ronald David Way lived with his sister, Mary Way, and her boyfriend, William Bannister, at Bannister's house in Olive Branch, Mississippi. [T. 119, 139, 279] At the time, Way was (23) twenty-three years old. [T. 113]

William Bannister was divorced from his wife, Pamela Bannister, so the couple's two daughters - Nona Catherine ("Catie") and C. B., lived mostly with their mom in Joplin, Missouri. [T. 304] In 2005, C.B., came to stay with her father in Olive Branch from the end of June until the end of July. [T. 306-07] C.B., born August 17, 1991, was thirteen years old at the time. [T. 113, 137]

At the end of July, William took C.B. back to Missouri. [T. 306-07] After returning home, C.B. began experiencing painful genital blisters and asked Catie to take her to the hospital [T. 151] She informed Catie that, while in Mississippi, she had a sexual relationship with Way and she believed she had contracted a sexually transmitted disease. [T. 151-152]. C.B. later testified at trial that she had sexual contact with Way approximately seven times during the week of July 16-21, 2005. [T. 142, State Exhibit 1]

Following that conversation, Catie informed her mother about the blisters and Pamela took C.B. to the St. John's Regional Medical Center in Joplin, Missouri. [T. 152, 206] Dr. Barbara

Chilton examined C.B. at the hospital on July 27, 2005. [T. 207, 211] After a visual, external examination, Dr. Chilton determined that C.B. experienced a genital herpes outbreak. [T. 207] According to Dr. Chilton, C.B. did not have any previous medical history of genital herpes. [T. 210]

After C.B. visited the hospital, the Joplin Police Department initiated an investigation. [T. 119-120]. On July 28, 2005, C.B. went to talk with Jeannie Stuart of the Missouri Children's Center about the alleged sexual encounters with Way. [T. 153] The interview was videotaped and recorded and later played before the jury during trial. [T. 113-14, 189, State's Exhibit 1]

At trial, C.B. testified that, during the week of July 16-21, 2005, she had approximately seven sexual encounters with Way. [T. 172, State Exhibit 1] C.B. testified these encounters were consensual, without her parents' knowledge, and usually happened while her dad and Mary were gone to work. [T. 150, State Exhibit 1] C.B. testified that she drank alcohol and smoke marijuana with Way and then the parties would engage in sexual activities. [T. 143, 146, 149, State Exhibit 1] C.B. testified that Way kissed and rubbed her body, performed oral sex on her, "fingered" her, and had sexual intercourse. [T. 142-150, State Exhibit 1] C.B., in turn, performed oral sex on Way. [T. 149-50].

During its investigation into C.B.'s claims, the Joplin Police Department discovered that the alleged incidents occurred in Mississippi, outside of its Missouri jurisdiction. [T. 112] The police department transferred the case file, C.B.'s medical information, and the copies of the interview at the Missouri Children's Center to the DeSoto County Sheriff's Department. [T. 113-115]

Detective Michael Gurley of the Sheriff's Department investigated the case and obtained a human specimen warrant to test Way for the presence of on any kind of viral disease. [T. 243] Way was examined by Nurse Margaret Cashion. [*Id.*] Cashion took blood samples and two penal swabs from Way. [T. 116, 244] She then turned the samples over to the Memphis Pathology Lab for

examination [T. 117, 244, R.E. 13] The lab received the swabs on August 10, 2005 and reported the results on August 17, 2005. [T. 214, R.E. 13]

At trial, Dr. Vicki Baselski, expert in microbiology – specifically herpes, testified that there are two strands of genital herpes – HSV1, which is usually found in oral or vaginal infections and HSV2, which is usually found in anal or genital infections. [T. 251] Way tested positive for Herpes Simplex Virus 1 (HSV1) and **negative** for Herpes Simplex Virus 2 (HSV2). [R.E. 13] There was **no** HSV isolated on Way's penal swabs. [T. 217, R.E. 14]

At trial, the defense, concerned of the sensitive nature of the case and the young age of the prosecutrix, presented a motion in limine to require strict and separate sequestration of the State's witnesses. [T. 90-92, R.E. 7] The court declined to require that the prosecutrix be sequestered from going home with her parents, however, the court agreed to inform C.B., out of the presence of the jury, that her testimony could not be discussed with any other witnesses to the case. [T. 92] At the close of the first day of trial testimony, the court informed both C.B. and her parents that the trial testimonies were not be discussed between each other until the end of the trial. [T. 221-22]

On the second day of trial, the defense presented the court with allegations that C.B. had disregarded the court's admonishments and that Mary Way witnessed C.B. discussing her testimony with other witnesses. [T. 223. R. E. 9-10]. According to Mary, she was sitting outside of the courtroom on May 30, 2007, when she noticed that C.B. came out of the courtroom and discussed her testimony with her mother and her sister, Catie. [T. 227, R.E. 9-10] Mary claimed that Pamela later discussed the conversation with Detective Gurley and C.B.'s father, William. [*Id.*]

The court recessed and allowed the State and defense attorneys to discuss with the witnesses the alleged incident.[T. 229]. C.B. admitted that she discussed some aspects of the testimony with her mother [T. 231]. At this point, William, Catie and Pamela Bannister had not testified before the

court. [T. 233] The court marked Mary Way's allegations for identification purposes and allowed the defense the opportunity to extensively cross-examine the remaining State's witnesses regarding any conversations they had with C. B. after her trial testimony. [T. 238-39] The court state that it would allow the defense counsel, if it desired, to call Detective Gurley and C.B. to testify about the conversation after the court had heard the testimony of the people who may have been involved in the conversation. [T. 240]

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in denying Way's motion for a new trial and in finding that the verdict was based on the overwhelming weight of the evidence. At trial, C.B. prejudiced Way's defense by blatantly disregarding the court's admonishment to adhere to Mississippi Rule of Evidence 615. This required C.B. not to discuss her trial testimony with any witnesses prior to the conclusion of the trial. C.B. disregarded this instruction and irreparably prejudiced the defendant's case.

Likewise, the trial court should not have found that the evidence was based on the overwhelming weight of the evidence. The jury's finding was likely based on the expert suggestion that C.B. contracted Herpes through oral sex with Way. However, the State's expert testified that as many as fifty percent on the individuals, between the ages of twelve and twenty-five years old, are infected with the Herpes virus. The State did not adequately prove that Way was guilty of the crimes of sexual battery or fondling.

ARGUMENT

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.

The Mississippi Supreme Court reviews the denial of a motion for a new trial under an abuse

of discretion standard. *Coleman v. State*, 697 So. 2d 777, 788 (Miss. 1997) . In *Chambliss v. State*, 919 So. 2d 30, 33, (¶10) (Miss. 2005) (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997)), the Court relied on the following:

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, [the Court] will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.

Way requested that the trial court grant his motion for a new trial based, in part, on C.B.'s blatant violation of the witness sequestration rule found in Mississippi Rule of Evidence 615. M. R. E. 615 provides that, "[a]t the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own." M. R. E. 615. The Mississippi Supreme Court has announced that M. R. E. 615 is imposed to restrain witnesses from conforming their testimonies to those of earlier testifying witnesses and to assist in detecting unreliable or non-credible testimony. *Douglas v. State*, 525 So. 2d 1312, 1316 (Miss. 1988) (citing *Geders v. U.S.*, 425 U.S. 80, 87, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976)).

Way's defense counsel filed a motion in limine to required the strict compliance with M. R. E. Rule 615. As a result, the trial court instructed C.B. , prior to and following her testimony, that she was not to have any conversations with any of the witnesses regarding her testimony until the conclusion of the trial. C.B. violated the court's concise and very clear instructions by discussing parts of her testimony with her family, prior to her father's trial testimony.

M.R.E. 615 rule violations do not automatically require that the witness testimony be excluded but exclusion is appropriate when probable prejudice would result to the other party. *Harris v. State*, 937 So. 2d 474, 479 (¶16) (Miss. Ct. App. 2006). The trial court chose to allow the defense counsel extensive cross-examination on the witnesses that may have been involved in the conversation. Way argues, however, that C.B.'s violation of the rule amounted to prejudice to his

defense and, as such, the trial court should have ordered a mistrial or excluded witness testimony. C.B.'s reckless and wilful disregard to the Court's instruction created irreversible consequences. Once C.B.'s testimony was discussed with the State's remaining witnesses, there was no way to erase or remove that discussion. Once the potential witnesses' testimony was tainted, there was no way to "un-taint" the testimony.

Way's guilty verdicts as to two counts of a five-count indictment are contrary to the overwhelming weight of the evidence and the trial court erred in failing to grant Way's motion for a new trial. The appellate court should reverse this guilty verdict as a failure to do so will "sanction an unconscionable injustice."

II. THE TRIAL COURT ERRED IN FINDING WAY'S GUILTY VERDICT WAS BASED ON THE SUFFICIENCY OF THE EVIDENCE.

The Court reviews challenges to the legal sufficiency of the evidence in the light most consistent with the verdict. *Pate v. State*, 557 So. 2d 1183,1184 (Miss. 1990). The prosecution is given the benefit of all reasonable inferences from the evidence. *Id.* However, reversal is required when the facts and inferences drawn from the evidence indicate that, as to one of more of the elements of the charged offense, reasonable and fair-minded jurors could only find the accused not guilty. *Coleman v. State*, 926 So. 2d 205, 208 (¶9) (Miss. 2007).

Sexual battery is defined in Mississippi Code Annotated Section 97-3-95 (1) (d) (Rev. 2006), which reads, in pertinent part, as follows:

- (1) A person is guilty of sexual battery if he or she engages in sexual penetration with: . . . (d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

Mississippi Code Annotated Section 97-5-23 (Rev. 2006) defines fondling, in pertinent part, as the following:

- (1) Any person above the aged of eighteen (18) years, who for the purpose of

gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child under the age of sixteen (16) years, with or without the child's consent. . . shall be guilty of a felony . . .

Mississippi courts have previously ruled that the uncontradicted and credible testimony of a victim of a sex crime is sufficient to support a guilty verdict, even if the testimony is unsupported by corroborating evidence. *Bradley v. State*, 921 So. 2d 385, 389-90 (¶14) (Miss. Ct. App. 2005). In this case, C.B.'s trial testimony is not only unreliable, the supporting evidence offered by the State should not be considered sufficient corroborating evidence.

As previously argued, C.B.'s willful violation of M.R.E. 615 supports Way's position that C.B. is an unreliable and non-credible witness. She disregard the court's direction and it likely follows that she would not honor her duty to testify truthfully and accurately under oath about the true source of her Herpes infection.

Likewise, her trial testimony was filled with various inconsistencies. The following exchange took place during cross-examination, when the Defense questioned C.B. about the time frame of the sexual contact:

Q. You testified that the events that took place between you and [Way] started on Friday night, July the 15th, and the last that my notes show was on Wednesday, the following Wednesday. Now that's your testimony and my notes about your testimony.

. . . .

Q. So it happened on Friday?

A. It happened on Friday

Q. Did it happen on Saturday?

A. No, sir. It didn't.

Q. Did it happen on Sunday?

A. No, sir.

Q. Did it happen on Monday?

A. Yes, sir. It did.

Q. Did it happen on Tuesday?

A. Yes, sir.

Q. Did it happen on Wednesday?

A. Yes.

Q. How about on Thursday?

A. Yes.

[T. 160-61] (*emphasis added*)

C.B.'s inconsistent nature should have been very apparent to the jury. The jury found Way not guilty of two counts of sexual battery and one count statutory rape. [R.E. 15-16]. However, the jury relied on the same testimony and same evidence presented on all counts and found him guilty of sexual battery and fondling. No reasonable juror could find that C.B. was both telling the truth and not telling the truth about the same sequence of events

The State relied on the theory that Way transmitted Herpes to C.B. through oral sex, therefore Way must be guilty of sexual battery. There was no evidence that C.B. contracted the herpes virus from Way. [T. 261] At trial, the State's own expert witness testified that she did not know whether C.B. had contracted the Herpes virus from Way. [T. 261] Dr. Baselski testified that approximately one in four people in the general population are infected with HSV 1 or 2. [T. 261] When asked to narrow the statistics, Dr. Baselski testified that as many as one in two (or 50%) of individuals between the ages of twelve to twenty-five (12-25) years old are infected with Herpes. [T. 262]

C.B.'s sole testimony should not have been sufficient enough to convict Way to prison for a total of forty - five years. Reasonable and fair-minded jurors should have found the evidence was insufficient for a guilty verdict on both counts.

CONCLUSION

Ronald David Way's conviction of sexual battery and fondling is both against the overwhelming weight of the evidence and not based on the sufficiency of the evidence. Way requests that this court, likewise, grant a reverse and render the case or, in the alternative, grant a new trial.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF SERVICE


I, Erin E. Pridgen, Counsel for Ronald David Way, 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:

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Honorable John W. Champion
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This the 2nd day of May, 2008.


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