

**COPY**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**JAMES EARL HOLMES**

**APPELLANT**

**VS.**

**FILED**  
**MAR 05 2008**  
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SUPREME COURT  
COURT OF APPEALS

**NO. 2007-KA-1344-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: W. GLENN WATTS**  
**SPECIAL ASSISTANT ATTORNEY GENERAL**  
**MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL**  
**POST OFFICE BOX 220**  
**JACKSON, MS 39205-0220**  
**TELEPHONE: (601) 359-3680**

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**NO. 2007-KA-1344-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**PROCEDURAL HISTORY:**

On July 10, 2007, James Holmes, "Holmes" was tried for sexual battery before a Clay County Circuit Court jury, the Honorable James T. Kitchens presiding. R. 1. Holmes was found guilty and given a thirty year sentence in the custody of the Mississippi Department of Corrections. R. 231. From that conviction, Holmes appealed to this Court. C.P. 66-67.

**ISSUE ON APPEAL**

**I.**

**WAS THERE CREDIBLE, SUBSTANTIAL CORROBORATED  
EVIDENCE IN SUPPORT OF HOLMES' CONVICTION?**

## **STATEMENT OF THE FACTS**

On October 6, 2006, Holmes was indicted for sexual battery of Ms. Reva Lenoir, a mentally retarded female, on or about June 4, 2006 by a Clay County Grand jury. C.P. 10.

On July 10, 2007, Holmes was tried for sexual battery before a Clay County Circuit Court jury, the Honorable James T. Kitchens presiding. R. 1. Holmes was represented by Mr. Thad Buck. R.1.

Ms. Brenda Lenoir, the mother of the victim, testified that Holmes came to West Point for his sister's funeral. After the funeral, Ms. Lenoir allowed Holmes to visit in her house before he returned to his home in Jackson. R. 101-103. That evening, Lenoir testified that she awoke from a nap to check on her mentally retarded daughter, Reva. Brenda testified that she and her younger daughter "took turns watching Reva, because Reva don't understand." R. 115. When Brenda arrived in her kitchen she testified to seeing Holmes "having sex with her." R. 104. She testified she "caught him having sex with my daughter." R. 112. Brenda testified that her daughter's face was down, and "her butt all out in the open." R. 113.

Brenda saw that Reva's clothes were "at her knees." R. 105. Reva was "all bent over." R. 105. Holmes was "having sex with her from behind". R. 106. Brenda testified more than once that Holmes was "having sex with her." R. 103-106. She showed the jury the position of her daughters' body when she was bent over with her panties down. R. 105.

Ms. Reva Lenoir testified that she was twenty one years old. She testified that she had attended "special education" classes in her local public school. She knew Holmes whom she referred to as James. R. 130. B. She had known him since she was a "baby." R. 130. She testified that she tried to hide from Holmes but he "grabbed me." R. 136. She testified that he "touched her," but did not state where. R. 136. Reva testified to being "afraid" of telling what happened to her. R. 137.

Ms. Shelly Story testified that Reva attended special education classes for “the trainable mentally retarded.” This was for children with I. Q. s ranging from 25 to 50. R. 141. Ms. Story was a school psycho-metrist with the West Point School District. She was a custodian for the public school records of the school district. Ms. Story testified that Reva could explain “very, simple things.” However, she would have trouble explaining to others “what happened to her.” This would be true if she were “nervous or scared.” R. 143-144.

Ms. Shelly Thomas, an emergency room nurse at the Clay County Medical Center, testified to examining Reva Lenoir. Thomas testified that she took a medical history. This was when Reva was brought to the hospital by her mother. Reva told her that James “touched me back here.” She pointed to her “rectal area.” R. 153.

Holmes was found guilty and given a thirty year sentence in the custody of the Mississippi Department of Corrections. R. 231. From that conviction, Holmes appealed to this Court. C.P. 66-67.

## SUMMARY OF THE ARGUMENT

1. The record reflects there was credible, substantial partially corroborated testimony in support of Holmes' conviction for sexual battery. The trial court denied a motion for a directed verdict. R. 158-159. The record reflects credible, substantial evidence in support of that decision. Ms Brenda Lenoir, the mother of Reva Lenoir, testified to seeing Holmes "having sex" with her daughter. R. 103-106. He was having intercourse with her from her rear. Reva was standing, bent forward from her waist, exposing her anus and genitalia. Her underclothes were "at her knees." Having sex involves penetration of a female's anus or vagina with a erect penis. Brenda Lenoir was corroborated by Shelly Thomas , a registered nurse, who testified that Reva told her that "James touched me back here, and pointed to her rectal area." R. 153. Ms. Story also testified that if Reva was scared, she would have difficulty explaining what happened to her. R. 144. Reva testified that she was afraid to testify about what happened to her. R. 137.

While Reva did not explicitly testify that Holmes penetrated her anus with his penis, the record reflects that she implied it. The record reflects that Reva was twenty one year old woman with limited conceptual and communication skills. Her mother testified that Reva had to be "watched." She had to be watched by herself and her younger daughter because "she don't understand." R. 115. Reva was corroborated not only by her mother, but also by a registered nurse who testified that Reva pointed to her rectum when explaining where Holmes "touched her." R. 153. Sexual battery and penetration can be established by circumstantial evidence. **Lang v. State** 230 Miss. 147, \*158-159, 87 So.2d 265,\*\*268 (Miss.1956).

Holmes did not testify. The Appellee would submit that the trial court correctly allowed the jury to decide whether Holmes was guilty of sexual battery or not. There was credible, partially substantiated testimony in support of the jury's verdict.

## **ARGUMENT**

### **PROPOSITION I**

#### **THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF HOLMES CONVICTION FOR SEXUAL BATTERY.**

The Appellant argues that the trial court erred. He thinks he erred in denying him a directed verdict or a J.N.O.V. He believes there was no evidence that any sexual penetration actually occurred in the instant cause. He thinks testimony from the mother about Holmes "having sex" with her daughter was insufficient. It was not enough for showing that any sexual penetration actually occurred. Since the victim did not herself explicitly testify to any penetration, and there was no physical evidence, he thinks there was inadequate record support for finding that any such felonious penetration on his part occurred. Appellant's brief page 3-7.

To the contrary, the record reflects that the trial court denied a motion for a directed verdict. R. 158-159. This was at the conclusion of the state's case in chief. The trial court found that testimony from the mother, Ms. Brenda Lenoir, was sufficient for establishing that sexual penetration of Reva's exposed vagina or rectum had occurred. R. 158-159.

Ms. Brenda Lenoir, the mother of Reva Lenoir, testified that she saw Holmes "having sex with her", i.e. Reva, her mentally retarded twenty one year old daughter. She identified Holmes in the court room as the person she saw "having sex" with her daughter. R. 109. She testified that Holmes was "having sex from behind." She explained that the daughters pants were down "at her knees." R. 105. Her buttocks were exposed. As stated by Brenda, Reva had "her butt all out in the open." R. 113. Holmes was behind her. Holmes was "having sex with her" from her nude rear. Reva was bent over with her buttocks exposed and her face down. Brenda testified that Holmes had his "eyes closed" while having sex with Reva. When caught in the act, he "beat on his head",



and did not want Brenda to report his actions to the police. R. 103-106.

Q...What did you do?

A. I laid down for a minute, and I got back up. **And I tipped in the room, and there when I caught her in the kitchen with her pants down and he was behind her, having sex with her.** R. 103-104.

...

Q. Where were you?

A. I was in my room laying down, and I just got up you know... **And I --that's when I caught him with her clothes down, she was bent over, and looking back with her tongue hanging out her mouth.** R. 104

...

Q. Okay.

A. When you walk in my living room and the door is open, you can go straight through my kitchen. **And that's where I seen him and her at the door, with her clothes down, and he was having sex with her.** R. 104.

Q. Okay. What happened when you got there?

A. **I seen him having sex with my daughter with her--**

Q. Explain it to the jury what you saw, when you said she had her head turned.

A. She had her--she had her head turned with her mouth hanging out like this, and all of this was out. **And he was having sex from behind, like he was--she was--I don't know how he felt about it, but he had his eyes closed and he was just having sex with her. And I caught him and he jumped--jumped and Brenda please, Brenda please, don't do this, Brenda, please let me talk to you. I said, I don't have nothing to talk to you about. Then he fell on his knees, started beating his head.** R. 106. (Emphasis by Appellee).

...

Q....what time of night did this happen?

A. It was in the evening. It was getting ready to get dark. And so I--I was--I was woken-- I was asleep, but some--the good Lord came in my room and got me up, **and I caught him having sex with my daughter.** R. 112.

...

Q. Okay. When you--

A. ...So I tipped in the room. I didn't even put on my cap or my house shoes, **and he was in the kitchen, she face down, and her butt all out in the open.** R. 113.

...

Q...You said he was going to stay the night but things got out of control?

A. Yes. He asked me to take him home. I was doing out of the goodness of my heart to take him home, he wanted to go home. **And when I cleaned out my trunk of my car, Queta was asleep. And I thought she was woke, but she wasn't. We take turns watching Reva, because Reva don't understand.** R. 115. (Emphasis by Appellee).

M. C. A. § 97-3-65(6) defines sexual intercourse as the joining of the sexual organs of a male and female human being.

(6) For the purpose of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female.

In **Puckett v. State** 737 So.2d 322, \*355 (Miss. 1999), the Mississippi Supreme Court defined sexual battery as sexual penetration in a variety of forms of either anal or genital openings of another person's body.

Sexual Battery occurs when a Defendant engages in sexual penetration with another person without his or her consent. Sexual penetration includes cunnilingus, fellation, buggery, or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body

Ms. Reva Lenoir, the mentally challenged daughter victim, testified that she ran from James, the appellant. She tried to hide from him but he caught her. She testified that he "touched her" but did not say where.

Q. You tried to run from James?

A. Yeah.

Q. What happened when you tried to run from James?

A. Tried to hide.

Q. What did James do?

A. Pulled my arm.

Q. Where were you when you tried to run?

A. I was in the kitchen, locked the door.

...

Q. Okay. Did James touch you?

A. Yeah.

Q. Where?

A. I don't know. R. 136.

...

Q. Are you afraid to tell me?

Q. Yeah. R. 137. (Emphasis by Appellee).

Ms. Shelly Story testified that Reva attended special education classes for "the trainable mentally retarded." This was for children with I.Q.s ranging from 25 to 50. R. 141. Ms. Story was a school psycho- metrist with the West Point School District. She was a custodian for the public school records of the school district.

In other words, while Reva had the body of a twenty one year old woman, she had the mind of a child.. She believed Reva was capable of explaining "very simple things." However, if Reva was nervous or scared, she could probably not explain "something that had happened to her." R. 144.

Q. Does Reva have the ability to explain things?

A. Yes, ma'am. They would have to be very, very, simple things that sh would be able to explain.

**Q. And if she was to get nervous and scared, would she be able to tell you something that happened to her?**

A. **Probably not.** R. 143-144. (Emphasis by Appellee).

Ms. Shelly Thomas, an emergency room nurse at the Clay County Medical Center, testified to examining Reva Lenoir. Thomas testified that she took a medical history when Reva was brought to the hospital by her mother. Reva told her that James touched her "back here." She also pointed to her "rectal area."

**Q. Okay. And was Reva able to give you any information as far as what happened when you were asking her questions at the hospital that night in order to treat her?**

A. Correct. **She told me, James touched me back here, and pointed to like her rectal area.** R. 153. (Emphasis by Appellee).

The trial court denied a motion for a directed verdict. The Court found that the testimony of the mother, Ms. Brenda Lenoir, was sufficient for establishing that sexual penetration had occurred. Brenda Lenoir testified that Holmes was "having sex", i.e. sexual intercourse with Reva Lenoir. He was doing so with her rectum and genitals exposed from bending forward with her face down. Her panties were pulled down. Holmes was having intercourse with her with her orifices opened at her rear.

Court: -trainable mentally retarded. Ms. Lenoir's mother, **Brenda Lenoir, did testify that she saw Mr. Holmes and her daughter engaging in sexual intercourse, as she described it as her daughter bent over backwards and Mr Holmes behind her, performing a sexual act, and that his pants were down and her pants were down. I think it is a jury issue at this point in time.** Your motion is not well taken at this point in time, but I will review it again if you decide to call any witnesses. R. 158-159. (Emphasis by Appellee).

The appellant makes much over the lack of any “seminal fluid” in the instant cause. Holmes called an employee from the crime lab to testify to the negative results from an examination of Reva’s rape assault kit. On cross examination, he testified that not having seminal fluid found does not mean that no penetration or sexual assault occurred. One of the possibilities for negative results would fit the facts as determined in the instant cause. This occurs when a sexual act on another person is interrupted prior to any ejaculation by a male aggressor.

**Q. Okay. If the—if the person was in the middle of performing a sexual act, asexual assault, and was interrupted by someone coming into the room and didn’t finish, it’s possible you wouldn’t find any seminal fluid, correct?**

**A. That’s possible.** (Emphasis by Appellee).

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not this court.

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain’s motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain’s guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808, **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);.. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher**

**v. State**, 481 So. 2d 203, 212 (Miss. 1985).

The Appellee would submit that when the evidence summarized above was taken as true with reasonable inferences there was sufficient credible, partially corroborated evidence in support of denying a directed verdict. There was sufficient evidence for allowing the jury to judge the credibility of the witnesses and resolve any differences in the facts.

Holmes was indicted for sexual battery under M. C A. §97-3-95(1)(b)(Rev. 2006). That statute states that ...”a person is guilty of sexual battery if he or she engages in sexual penetration with... a mentally defective, mentally incapacitated or physically helpless person.”

Ms. Brenda Lenoir testified, more than once, to seeing Holmes “having sex” with her daughter. R. 103-106. She described as well as showed the jury how Reva was bent over with her buttocks exposed and her “face down.” R. 105. Holmes was “having sex with her” from her rear. She testified that she “caught him having sex with my daughter.” R. 112.

While Reva did not testify where Holmes touched her, she testified that he did “touch” her. Ms. Thomas, a registered nurse, corroborated Reva by testifying that Reva told her that Holmes “touched me back here”, and pointed to her rectum. R. 153. This was Reva’s way of showing “where” Holmes touched her.

In addition, Ms. Story corroborated Ms. Brenda Lenoir in testifying that Reva would have difficulty explaining events that happened to her if she was “nervous or scared.” R.143-144. . Her mother testified that she had to be “watched” to prevent her from harming herself or others in her own home. This was because he “don’t understand.” R. 115.

In **Lang v. State** 230 Miss. 147, \*158-159, 87 So.2d 265, \*\*268 (Miss.1956), the Mississippi Supreme Court stated that penetration could be established through circumstantial evidence. It does not have to be established conclusively by the victim.

‘It is not indispensable that the penetration be proved by the testimony of the prosecutrix; it may be established by circumstantial evidence.’ 44 Am.Jur., Rape, Sec. 100, p. 965 . Also ‘In order to sustain a conviction of rape the fact of penetration must be established beyond a reasonable doubt, but it need not be \*159 proved in any particular form of words, and circumstantial evidence may suffice.’ 75 C.J.S., Rape, § 71, p. 547. Thus the proof on penetration was sufficient to take that issue to the jury, and the requested peremptory was properly overruled.

In **Winters v. State**, 473 So. 2d 452, 460 (Miss. 1985), the Court found there was sufficient evidence for denying Winters’ peremptory instructions. In that case, the victim testified that she “had been raped.” Winters confessed that he “had sex” with the victim. Winters was never questioned about any “penetration” of the victim’s vagina. Yet penetration is required for establishing rape. Likewise, the victim stated she was not sure about the degree of penetration prior to trial. There was no physical evidence obtained from a rape kit. Nevertheless, the Mississippi Supreme Court found there was sufficient evidence for establishing rape even without explicit testimony about penetration from the victim or the perpetrator.

Ms. Brenda Lenoir was corroborated by Ms. Shelly Thomas, who took her medical history. Thomas testified that Reva told her Holmes “touched her back here.” She pointed to her rectum. R. 153. Brenda testified that Holmes was “having sex” with Reva from her rear. R. 103-113. Reva’s pants were “at her knees,” and “her butt all out in the open.” R. 113. Holmes had his “eyes closed” while “having sex” with her. When Brenda interrupted the sexual act, Holmes “jumped” back. R. 106. Holmes “beat his head,” and asked Brenda to talk to him rather than have him exposed. R. 106. She refused and reported the incident to law enforcement.

While Reva did not testify explicitly to any penetration of her anus or vagina, there was corroborated testimony that she was “mentally retarded.” R. 141. She would have trouble explaining what happened to her if she were “nervous, or scared.” R. 143-144. Her mother testified that she

had “to be watched” in her home to prevent harm to herself other others. R. 115.

In **Green v. State** 887 So.2d 840, \*845 -846 (Miss. App. 2004), the Court found that the unsupported word of a victim of a sex crime is sufficient to support a guilty verdict. This is where the victim’s testimony is not discredited or contradicted by other evidence.

¶ 13. Green argues that there was no evidence offered regarding either the rape or the sexual battery, save for Mandy’s testimony. Our 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 \*846 victim is consistent with the conduct of one who has been victimized by a sex crime. **McKinney v. State**, 521 So.2d 898, 899 (Miss.1988); **Christian v. State**, 456 So.2d 729, 734 (Miss.1984); **Otis v. State**, 418 So.2d 65, 66 (Miss.1982) (“Although she was not corroborated as to the actual rape itself, there were other facts surrounding the incident which had corroboration. It is conceded that a person may be found guilty of rape on the uncorroborated testimony of the prosecuting witness”) (citing **Killingsworth v. State**, 374 So.2d 221 (Miss.1979); **Dubose v. State**, 320 So. 2d 773 (Miss.1975)); **Allman v. State**, 571 So.2d 244, 250 (Miss.1990); **Goss v. State**, 465 So.2d 1079, 1082 (Miss.1985)

As to complaints about statements made by the prosecution during closing argument, the record reflects there was no objection to those remarks. R.205-206. In addition, this issue was not raised in Holmes’ Motion For a J.N.O.V. C.P. 63. It was therefore waived. **Haddox v. State**, 636 So.2d 1229, 1240 (Miss.1994).

The Appellee would submit that sexual battery was established through circumstantial evidences. Holmes was charged with sexual battery of a mentally retarded female, which recognizes the vulnerability of such persons to the control of a sexual predator. Reva ,who has the mental capacity of a small child, could not conceptualize or verbally articulate exactly what had happened to her in explicit anatomical terms. However, she could testify that Holmes “touched her.” R. 136. She also could pointed to her rectum in showing a registered nurse “where” she was touched. R.153 . This corroborated the testimony of Reva’s mother that she saw Holmes “having sex” with Reva



from her rear. R. 106.

The Appellee would submit that this issue is lacking in merit.

**CONCLUSION**

Holmes' conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script, appearing to read "W. Glenn Watts", is written over a horizontal line.

W. GLENN WATTS

SPECIAL ASSISTANT ATTORNEY GENERAL

MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680

## CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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:

Honorable James T. Kitchens, Jr.  
Circuit Court Judge  
Post Office Box 1387  
Columbus, MS 39703

Honorable Forrest Allgood  
District Attorney  
Post Office Box 1044  
Columbus, MS 39703

Erin E. Pridgen, Esquire  
Attorney At Law  
301 North Lamar St., Ste. 210  
Jackson, MS 39201

This the 5<sup>th</sup> day of march, 2008.



W. GLENN WATTS  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205-0220  
TELEPHONE: (601) 359-3680