

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

James Earl Holmes

FILED

APPELLANT

V.

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SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-1344-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

On Appeal from the Circuit Court of Clay County, Mississippi

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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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. James Earl Holmes, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This 4th day of February 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For James Earl Holmes, Appellant

BY:


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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 1

FACTS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

**The trial court erred in failing to grant Holmes’s motion for directed verdict,
in denying his request for a peremptory instruction of not guilty, and in denying
his motion for judgment notwithstanding the verdict as the sufficiency of the
evidence did not support a conviction of sexual battery** 3

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

CASES

Brady v. State, 722 So. 2d 151 (Miss. Ct. App. 1998) 7

Burks v. United States, 437 U.S. 1 (1978) 7

Coleman v. State, 926 So. 2d 205 (Miss. 2007) 3

Friley v. State, 879 So. 2d 1031 (Miss. 2004) 7

Jackson v. State, 452 So. 2d 438 (Miss. 1984) 4

Lang v. State, 230 Miss. 147, 87 So. 2d 265 (Miss. 1956) 4

McKnight v. State, 738 So. 2d 312 (Miss. Ct. App. 1999) 5

Morris v. State, 913 So. 2d 432 (Miss. Ct. App. 2005) 4

Pate v. State, 557 So. 2d 1183 (Miss. 1990) 3

Taylor v. State, 836 So. 2d 774 (Miss. Ct. App. 2002) 5

West v. State, 437 So. 2d 1212 (Miss. 1983) 4-5

Wilson v. State, 606 So. 2d 598 (Miss. 1992) 4

STATUTES

Miss. Code Ann. §97-3-95 (Rev. 2006) 3-4

Miss. Code Ann. §97-3-97 (Rev. 2006) 4

Miss. Code Ann. §97-5-23 (Rev. 2006) 7

STATEMENT OF THE ISSUES

The trial court erred in failing to grant Holmes's motion for directed verdict, in denying his request for a peremptory instruction of not guilty, and in denying his motion for judgment notwithstanding the verdict as the sufficiency of the evidence did not support a conviction of sexual battery.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Clay County, Mississippi, where James Earl Holmes was convicted of sexual battery. A jury trial was held on July 25-26, 2007, with the Honorable James T. Kitchens, Jr., Circuit Judge, presiding. Following the trial, Holmes was sentenced as a habitual offender to serve thirty years under the supervision of the Mississippi Department of Corrections and to pay a fine of \$10,000.00. Holmes is presently incarcerated with the Mississippi Department of Corrections.

FACTS

James Earl Holmes came to West Point, Mississippi the weekend of June 4, 2006, for the funeral of his sister. [T. 102-103] Holmes attended the funeral with his former live-in girlfriend, Brenda Lenoir, a person he had known for more than twenty years. *Id.* After the parties attended the funeral repast and visited with Holmes's family, they retired to spend the evening at Lenoir's home so that Lenoir could drive Holmes out of town the next morning. [T. 103, 110]

Lenoir lived with her two daughters - ages twenty years old and fifteen years old. [T. 100] The oldest daughter, R.L.¹, is trainable mentally retarded with an I.Q. somewhere between 25 and 50. [T. 141] Lenoir allowed Holmes to lie in the bed with her that evening while her daughters slept elsewhere in the house. [T. 112-113]

¹Given the sensitive nature of the allegations in this case, the prosecutrix will only be identified by her initials.

According to Lenoir, several times during the evening, Holmes asked her if she were asleep and, after she answered negatively, he proceeded to get out of the bed and leave the room. *Id.* Holmes repeated this behavior several times and Lenoir eventually got out of the bed to investigate. *Id.*

As Lenoir walked through the house, she passed her youngest daughter who had fallen asleep on the couch in the den, and into the open door of the kitchen. *Id.* According to Lenoir, when she entered the kitchen, she witnessed Holmes standing behind her daughter, R. L., “having sex with her.” [T. 104] R. L. was bent over with her pants down and her tongue hanging out and Holmes was behind her with his eyes closed. [T. 104]

Lenoir took R. L. to the hospital that same evening and the nurses performed a rape kit. [T. 108] One of the emergency room nurses, Shelly Thomas, testified that R. L. appeared nonchalant. [T. 147] When asked what happened to her, R. L. indicated that Holmes had touched her and signaled that the touching occurred in her rectal area. [T. 153]

The rape kit was a twenty-one-step process that included such tasks as collecting pubic hairs, head hairs, clothes for DNA analysis, vaginal specimens, vulvar specimens, rectal specimens, and drawing blood for testing to distinguish the victim’s DNA from the assailants. [T. 154] Because R. L. had to urinate before the start of the rape kit, the nurses were also able to collect urine specimens, fluid from the toilet, and some type of drainage that was left on the toilet. [T. 154-155]

The Mississippi Crime Lab analyzed R.L.’s rape kit, as well as Holmes’s suspect kit that he submitted. [T. 164] The suspect kit included samples taken from Holmes for the purpose of having comparison evidence when analyzing the rape kit. [T. 170-171] William Jones, the DNA section chief of the bioscience division, examined both kits and found there was no evidence that biologically linked Holmes to the evidence contained in R. L.’s rape kit. [T. 169-170] Of all the

materials tested in the kit, there was no presence of seminal fluid on any of the samples. [T. 170] These samples taken from R. L. included, but were not limited to, two rectal swabs, four vaginal swabs, and two vulvar swabs. [T. 167]

SUMMARY OF THE CASE

The trial court committed reversible error in finding there was sufficient evidence to sustain Holmes's conviction of sexual battery. Sexual penetration is the essence of sexual battery and, in this case, there was no evidence of sexual penetration provided. The Mississippi Crime Lab found no seminal fluid present on any of the evidence tested in the victim's rape kit. The case rests on the testimony of Brenda Lenoir, who testified that she witnessed Holmes "having sex" with her daughter. Even if Lenoir's testimony is accepted as true, her testimony fails to establish any sexual penetration. Absent testimony on the matter, no reasonable jury should have found sexual penetration existed.

ARGUMENT

The trial court erred in failing to grant Holmes's motion for directed verdict, in denying his request for a peremptory instruction of not guilty, and in denying his motion for judgment notwithstanding the verdict as the sufficiency of the evidence did not support a conviction of sexual battery.

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 or more of the elements of the offense charged, reasonable and fair-minded jurors could only find the accused not guilty. *Coleman v. State*, 926 So. 2d 205, 208 (¶9) (Miss. 2007).

The State failed to prove that Holmes sexually penetrated R. L., a necessary requirement in

establishing sexual battery under Section 97-3-95 of the Mississippi Code Annotated (Rev. 2006). For this reason, the trial court erred in finding there was sufficient evidence to support Holmes's conviction.

Holmes was convicted of sexual battery of a mentally defective person, pursuant to Section 97-3-95 (1)(b), which states: "[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." Miss. Code Ann. §97-3-95 (1)(b) (Rev. 2006). [R.E. 6-7] Sexual penetration is defined as including "cunnilingus, fellatio, 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." Miss. Code Ann. §97-3-97 (Rev. 2006).

Sexual penetration is an essential element in establishing sexual battery². *West v. State*, 437 So. 2d 1212, 1213 (Miss. 1983). Mississippi courts have not required a showing of a particular degree of penetration in order to establish sexual battery. *Jackson v. State*, 452 So. 2d 438, 440 (Miss. 1984); *Morris v. State*, 913 So. 2d 432, 435 (¶12) (Miss. Ct. App. 2005). Penetration may be proven by circumstantial evidence but the State, however, carries the burden of proving penetration beyond a reasonable doubt. *Lang v. State*, 230 Miss. 147, 159, 87 So. 2d 265, 268 (Miss. 1956).

There was no physical evidence presented at trial that Holmes sexually penetrated R. L. William Jones, of the Mississippi Crime Lab, examined R. L.'s rape kit, along with Holmes's suspect evidence collection kit. [T. 169-170] Jones testified that the materials tested were all

² Distinguishable from the general requirement of showing sexual penetration are cases involving sexual battery of a child under the age of fourteen years old. In those cases, proof of penetration is not required where the evidence shows that the victim's private parts have been lacerated or torn. *Wilson v. State*, 606 So. 2d 598, 599 (Miss. 1992).

negative for the presence of seminal fluid. In particular, tests run on two rectal swabs, four vaginal swabs, and two vulvar swabs taken from R. L. indicated that there was no seminal fluid present. [T. 170] Jones testified that there was nothing in the sex crime kit that biologically linked Holmes to the evidence contained in R. L.'s rape kit. [T. 169-170]

In addition to the lack of physical evidence, there is also a lack of circumstantial evidence to prove sexual penetration. In cases where there has been no scientific evidence of sexual penetration, the courts have relied, at the very least, on the testimony of the prosecutrix. *See Taylor v. State*, 836 So. 2d 774, 777 (¶¶13-15) (Miss. Ct. App. 2002) (totally uncorroborated testimony of prosecutrix sufficient to support a guilty verdict where testimony not discredited or contradicted by other evidence); *McKnight v. State*, 738 So. 2d 312, 316 (¶10) (Miss. Ct. App. 1999).

At trial, R. L. did not provide testimony that sexual penetration occurred so this is not a situation in which the prosecutrix's testimony may be used to sustain a conviction. Even after the trial court allowed R. L.'s emergency room statements to enter through the testimony of Shelly Thomas, R. L. only indicated that Holmes had touched her in the rectal area. [T. 153] This testimony is far too vague and indefinite to sufficiently fulfill the penetration requirement of sexual battery.

In *West v. State*, 437 So. 2d at 1214, the Mississippi Supreme Court reversed and remanded West's conviction of attempted sexual battery, finding there was no evidence that West attempted to penetrate the victim. West inveigled his victim into an apartment, fondled her, placed his hands inside of her underwear, and exposed himself. *Id.* at 1213. Nonetheless, the Court found that, absent evidence of penetration or attempts to penetrate, West could not be convicted of the crime charged. *Id.* at 1214.

Given that there is no physical evidence and no relevant testimony by the prosecutrix, the State's case then rests solely on the testimony of Brenda Lenoir. Even if the jury were to accept

Lenoir's testimony as credible, her testimony still falls short of establishing the required showing of sexual penetration.

According to Lenoir, on the night of June 4, 2006, she entered the kitchen of her home and witnessed her daughter, R. L., with her pants at her knees, and Holmes behind her, "having sex." [T. 104] There was no testimony given to explain Lenoir's definition of "having sex." At the very least, the State should have elicited testimony regarding the position of Holmes's clothing when Lenoir entered the kitchen – whether Holmes was fully clothed, whether his pants were pulled up or down, or whether his genitals were exposed. Lenoir's testimony only indicated R. L.'s posture and the position of her clothes when Lenoir entered the room.

Statements regarding the position of Holmes's clothing and his actions toward R. L. were improperly introduced to the jury during the State's closing arguments. During closing arguments, the State made the following comments:

STATE: Mom [Brenda Lenoir] came in, she told you, I saw him [Holmes], his pants were down, he had her bent over, spread. And when I caught him, he pulled away and pulled his pants back up.

- - -

And all the things that her mom [Brenda Lenoir] saw, her pants were down around her knees and ankles, her bent over, him behind her, him with his own pants down, open, and I believe the way she described it, with his eyes closed, having sex with her, or attempting to have sex with her, that's for you to decide.

[T. 205-106]

Lenoir's testimony, however, did not include statements that Holmes's pants were down or open. The State's comments regarding the position of Holmes's clothing is vital because, essentially, the jury was presented with testimony from a non-witness regarding pivotal distinctions in the case.

At the very best, Lenoir's testimony might have been used to support a conviction of gratification of lust.³ However, as a general rule, the Courts have declined to find that gratification of lust is a lesser-included offense to sexual battery. *Brady v. State*, 722 So. 2d 151, 160 (¶36) (Miss. Ct. App. 1998); *But see Friley v. State*, 879 So. 2d 1031, 1035 (¶18) (Miss. 2004) (molestation was lesser-included offense to sexual battery based on particular facts of case involving child under age fourteen). Since the indictment charged Holmes with sexual battery and gratification of lust is not automatically considered a lesser-included offense, this Court is required to reverse and render this case based on insufficient evidence to sustain Holmes's conviction. *See Burks v. United States*, 437 U. S. 1, 10-11 (1978) (double jeopardy precludes new trial where the court has found evidence legally insufficient).

³Section 97-5-23 of the Mississippi Code Annotated (Rev. 2006) defines gratification of lusts as the following: "(1) Any person above the age of eighteen (18) years, who, for the purposes of gratifying his or her lusts, 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 . . . a mentally defective, mentally incapacitated or physically helpless person as defined in Section 97-3-97"

CONCLUSION

The evidence presented at trial was not legally sufficient to convict Holmes of sexual battery. Holmes requests that this Court reverse and render this case for lack of sufficient evidence to sustain a conviction. In the alternative, the case should be reversed and remanded to the trial court for further proceedings.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For James Earl Holmes, Appellant

By: Erin E. Pridgen

Erin E. Pridgen
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

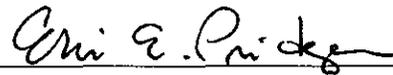
I, Erin E. Pridgen, Counsel for James Earl Holmes, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable James T. Kitchens, Jr.
Circuit Court Judge
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Honorable Forrest Allgood
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This 2/26 day of February, 2008.



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