IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEVIN MOTON — APPELLANT

VS. — NO. 2007-KA-1389-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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PROCEDURAL HISTORY:

On July 9, 2007, Kevin Moton, "Moton" was tried for burglary of a dwelling , kidnaping and sexual battery before a Coahoma Circuit Court jury, the Honorable Charles E. Webster presiding. R. 1. Moton was found guilty and given a life and two concurrent twenty year sentences. R. 160-161. From these convictions, Moton filed notice of appeal to the Supreme Court. C.P. 25.

ISSUES ON APPEAL

I.

WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF DENYING ALL PEREMPTORY INSTRUCTIONS?

II.

WAS A NEGATIVE CRIME LAB REPORT ON A USED CONDOM RELEVANT FOR ADMISSION?

III.

WAS AN INJUSTICE INVOLVED IN DENYING A NEW TRIAL?

STATEMENT OF THE FACTS

On November 30, 2005, Moton was indicted by a Coahoma County Grand jury for burglary, kidnaping and sexual battery of Shamyia Wright,"S.W." a two year old female child, on or about September 17, 2004. C.P. 3-4.

On July 9, 2007 , Moton was tried for burglary of a dwelling, kidnaping and sexual battery before a Coahoma Circuit Court jury, the Honorable Charles E. Webster presiding. R.1. Moton was represented by Mr. Alan Shackleford. R. 1.

The trial court granted a motion in limine. R.7- 8. The motion was to exclude negative forensic testing of a used condom. C.P. 10-11. The used condom was found with "debris on it." It was found amidst debris and drug paraphernalia in an abandoned trailer with access to the people in the area. The trial court found that the condom and the testing results not connected to either Moton or S. W. not relevant, given the factual circumstances at the crime scene. R.7-8. Moton did not provide any reason for how this evidence might be relevant to his defense. R. 7-8.

Mr. Henry Wright was the father of S. W. , who was three years old at the time of trial. Wright lived with the child's mother, Ms. Shaneta Johnson, and two small children in a trailer at 137 Mosley Street, Jonestown, Mississippi. R. 59-60.

On September 17, 2004, Wright left his child sleeping in her bed room. He was going to meet Shaneta who was getting off work at around 11:00 P.M. R. 60. On his way to the road, he met some neighbors. Moton, who lived in the neighborhood and was well known by Shaneta, came by at the time on a bicycle. Moton was seventeen years old at the time. In answer to what he was doing, Wright told him he was going to meet "his old lady."R. 61. Moton knew that there were two children alone at his trailer. R. 93.

Wright testified that the windows and doors to the trailer were locked when he left. R. 60; 93.

The next morning when he looked carefully at the back door, he could tell someone had "tampered" with it. R. 69. The back door lacked steps to the ground. It was some three feet to the ground. This made it difficult for anyone to exit without assistance. Mr. Wright mentioned improvising a step by using some railroad ties leaning against the trailer's body. R. 84

Wright testified to finding S. W. missing. This was when he and Shaneta returned. R. 62. They searched the neighborhood for her, calling her name. When Wright heard a "huh" coming from an abandoned trailer, he jumped into the trailer through an open window. R. 63. He saw the face of S. W. He took her up in his arms and handed her to her mother outside the trailer. When she was out of the house, Wright heard the sound of breaking glass. He asked who was there, and heard someone say, "it's me."R. 75. When Wright went to investigate, he heard more sounds of crunching glass. He shouted to Shaneta that he thought someone was coming out of the trailer. Shaneta told Wright that she saw that the person running out was Moton, aka Little Wayne. R. 64.

Wright came out of the trailer and also saw Moton running off. R. 95 . When Wright challenged him, Moton replied, "Bring it ." R. 64. Wright saw the bicycle Moton had been riding earlier near the abandoned trailer. It was placed in his truck. However the next morning it was gone. R. 65.

Ms. Shaneta Johnson testified that she had known Moton since he was a seven year old child. R. 100. Moton and his family were neighbors. Moton, who was seventeen ,had been in Wright's trailer two days prior to the night S. W. disappeared. R. 111; 115. She identified him as the person she saw running from the trailer. R. 100. When S. W. had been rescued from the abandoned trailer, Ms. Johnson asked her how she got out of the trailer. She told her "that boy took me out." R. 102. Ms. Johnson also testified that Moton did not stop at the scene and talk to anyone. R. 116.

When asked "did he hurt you, did he touch you," the child pointed to her mouth and her

"privates." R. 102. Ms. Shaneta Johnson looked at the child's genitalia and found that her vagina was "reddish , bloody and had a scratch on it." R. 102. She then took her to see an emergency room physician, Dr. Rodney Baine. R. 103.

She testified that Moton did not have permission to enter her house, or to take her two year old child. R. 103.

Dr. Rodney Baine, an emergency room physician at Northwest Regional Medical Center, testified that he examined S. W.. He found that her vagina was "red and irritated." He also found that there was no evidence of either infection or of diaper rash. R. 127-129.

Although Moton did not testify, his post-**Miranda** statement to investigators was admitted into evidence as defense exhibit 1. See manila envelop marked "exhibits." In that statement, he claimed to have found a little girl in the trailer. Before he could return her to "Junior," Mr. Wright, he was interrupted by the child answering Junior's call. He also claimed to have told Junior that "I just had walked in the house and saw the little girl."D-1 page 2.

Moton chose not to testify in his own defense.

Moton was found guilty and given a life and a concurrent twenty year sentence. R. 160-161. Moton's motion for a new trial was denied. C.P. 22-24. From these convictions, Moton filed notice of appeal to the Supreme Court. C.P. 25.

SUMMARY OF THE ARGUMENT

1. The trial court did not abuse its discretion in denying peremptory instructions. R. 139. The record reflects there was credible, substantial partially corroborated evidence in support of the trial court's decision. When the evidence presented by the prosecution was taken as true along with reasonable inferences, there was more than sufficient evidence for denying all peremptory instructions. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

The missing two year child was found in an abandoned trailer. R. 63-64. It was reasonable to infer that she was alone with Moton in that trailer. Moton admitted this fact. See defense exhibit 1. It was reasonable to infer that she did not leave her bed and home on her own volition. There was testimony that the doors and windows to the trailer were locked. R. 60; 93. The back door lock had been tampered with by someone. R. 69. The back door had no step connecting it to the ground. R. 84. Moton's bicycle was found at the abandoned trailer. R. 65. This was where he was seen running from the trailer by both Ms. Johnson and Mr. Wright. R. 95;100.

Moton knew that the child was alone in the trailer. R. 93. When Moton was challenged by an angry father, he said, "bring it." R. 64. The child's vagina was "red, bloody and scratched." R. 102. The physician who examined her found that she had neither an infection or a diaper rash. R. 127-128. Moton's bike which was taken as possible evidence disappeared in the morning prior to police having an opportunity to examine it. R. 65.

Moton, who was seventeen at the time, had been in the child's home within two days of her being found in the trailer. R. 115. He and his family were well known by Ms. Johnson, the child's mother. It is reasonable to infer that when the two year old child referred to her abductor as "that boy", she was referring to Moton. R. 102.

Moton is not entitled to have his account taken as true along with inferences from gaps or

ambiguities in the evidence presented against him on a motion for a peremptory instruction. **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993).

2. The record reflects that this issue was waived. It was waived for failure of Moton to present any reasons for why the negative forensic results were relevant to his defense. R. 7-8; C.P. 22. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994).

In addition, the trial court did not abuse its discretion. **Gilley v. State**, 748 So. 2d 123, 126 (Miss. 1999). There was sufficient evidence for supporting the trial court's exclusion of negative DNA analysis results. R.7- 8. The record reflects that the DNA analysis excluded both Moton and the child as donor's for any DNA found on a used condom. It was found amidst drug paraphernalia and debris in an abandoned trailer. C.P. 10-11.

There was record evidence sufficient for inferring that Moton was alone with the two year old female child in the trailer on the night of September 17, 2004. The trailer was searched and no one else was present at the time the child was found inside. R. 63-64. After she had been removed from the trailer through a window, Moton was seen running from the trailer. R. 64; 95.

The time frame in which Moton and the child could have been together in the trailer was roughly one hour. The trailer was abandoned. See photograph evidence showing exterior of the abandoned trailer with two open windows. It was accessible to anyone looking for shelter or a place for clandestine activities in the area.

The fact that the condom was found with debris on it amidst drug paraphernalia would indicate that the abandoned trailer had been used by others in the past. Moton did not present no reason for why the negative results were relevant to his defense. R. 7-8. In his statement to police prior to trial, he claimed that he had "just" found the child in the building, and told her father, aka Junior "That I just had walked in the house and saw this little girl." Defense exhibit 1 page 2.

Given his own statement, there would have been no time for any sexual activity or use of a condom based upon his statement.

Finally, Moton provided no specific grounds to the trial court for showing how the negative results were relevant to his defense in his motion for a JNOV. C.P. 22.

3. There was no "unconscionable injustice" involved in denying a motion for a new trial. C.P. 24. **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994). When the evidence presented by the State was taken as true with reasonable inferences, there was more than sufficient credible evidence in support of trial court's decision. It is the prosecution and not the appellant who is entitled to have the evidence taken as true with reasonable inferences. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

Moton's complaints about the lack of evidence depends upon accepting his own self serving statements as true even though he was contradicted by evidence presented by the prosecution. See defense exhibit 1 for Moton's statement to investigators.

Moton's argument, based solely upon his own uncorroborated statement, is flawed. It assumes the two year old female child left her bed and trailer on her own. She would have had to have gotten out through a back door which had no steps, and then entered an abandoned trailer. Moton's account is contradicted by the child telling her mother "that boy took her out" of her bed and home. R. 102. It is also contradicted by the child pointing to her genitalia and mouth when asked by her mother "did he touch you." R. 102. The physicians testimony indicated that the child's red and irritated vagina was not caused by either an infection or a diaper rash. R. 127-128.

Moton's statement merely created issues the jury was responsible for resolving. **Williams v. State** 512 So. 2d 666, 670 -671 (Miss.1987)

ARGUMENT

PROPOSITION I

THERE WAS SUBSTANTIAL, CREDIBLE EVIDENCE IN SUPPORT OF THE DENIAL OF PEREMPTORY INSTRUCTIONS.

Moton argues that there was insufficient evidence in support of denying his peremptory instructions. He does not believe that there was sufficient evidence for showing any forcible entry. Nor does he believe there was sufficient evidence for establishing that he had any intent to commit any crime. Rather Moton told investigators he was inside the abandoned trailer because he heard a voice, found a child, and was going to take her home. Appellant's brief page 6-13.

To the contrary, the record indicates credible, partially corroborated evidence in support of the trial court's denial of a directed verdict or a J.N.O.V. R. 137-139; C.P. 24.

The trial court denied motions for directed verdicts. R. 137-139; C.P. 24. He found Mr. Wright testified that the doors to the trailer were locked. He testified that it appeared that someone had been tampering with the back door lock. And Moton admitted to being alone in the abandoned trailer with the missing child. See defense exhibit 1 for Moton's statement to investigators. There was testimony and photographic evidence indicating that there was no back door step and the distance from the door to the ground was more than a child would have been able to reach. State's photographic exhibit 7 and 8. The child vagina was red and irritated. When asked "did he touch" you, S. W. pointed to "her mouth" and "her privates." State's photographic exhibit 16 shows the child's red and irritated vagina.

As stated by the trial court in denying a motion for a directed verdict.

> There is evidence from Henry Wright, as I recall it and my notes reflect, that both doors were locked prior to his leaving. That although he did not notice anything unusual when he returned that evening, the next morning he examined the back door

> and , in his own words, found it appeared that someone had been picking at the back door. I think he used the word tampered with it. And then you've got the circumstance somewhat later where the defendant, apparently by his own admission, was found or was in the abandoned trailer with the child. Frankly, I almost view it as a recent possession of stolen property type situation...I am going to deny the motion on the burglary charge. R. 137-138.
>
> Likewise, and essentially for the same reasoning, I'm going to deny the motion on the kidnaping charge. There is testimony that a reasonable juror could find that a child of this age may not be able to traverse the height difference between the trailer down to the ground. There are photographs of that. And, again, we have testimony that the defendant had no consent from either of the parents to have custody or possession of the child. Yet he did have–was in the company of the child, again by his own admission through the statement. I'm going to deny the motion on the kidnaping. R. 138
>
> There is testimony as to the observation of the child when asked that she patted between her legs and patted or pointed to her mouth....There is evidence though that the redness, I think Dr. Baine described it as redness and swollen area and I think the nurse Ms. Robertson also described it as redness and swollen area of the child's vagina area, her vagina. Again, under the burden that the court must consider this motion, I'm going to deny that motion also. R. 139.

Mr. Henry Wright was the father of S. W. who was two years old. Wright lived with the mother and his girl friend, Shaneta Johnson, S.W. and another small child in a trailer at 137 Mosley Street, Jonestown, Mississippi. R. 59-60.

On September 17, 2004, Wright left his children "sleeping" in their beds. R. 60. He went to meet Shaneta who was getting off work at around 11:00 P.M. R. 60. On his way to her work site, he met some neighbors. Moton, who lived in the neighborhood and was well known by Shaneta, came by on a bicycle. Moton was seventeen years old at the time. Wright told him he was going to meet "his old lady."R. 61. Moton knew that there were two children alone at Wright's trailer. R. 93.

Wright testified the windows and doors to the trailer were locked when he left. R. 60. The next morning when he looked more carefully at the back door, he could tell someone had "tampered" with it. R. 69. There was no back door step which made it difficult to exit without assistance. Wright

mentioned using railroad ties to connect the trailer floor with the ground. R. 84

Q. When you left the home, did you lock the doors?

A. Yes, ma'am.

Q. How many doors were in your home?

A. We had a front door and a back door. R. 60.

Wright testified to finding S. W. missing when he and Shaneta returned. R. 62. They searched the neighborhood for her, calling her name. When Wright heard a "huh" coming from an abandoned trailer, he jumped into the trailer through an open window. R. 63. He saw the face of S. W.. He took her up in his arms and got her out of the trailer. When she was out of the house, Wright heard the sound of crunching broken glass. He asked who was there, and heard someone say, "it's me."R. 75.

When he investigated, he heard more sounds of crunching glass. He shouted to Shaneta that he thought someone was coming out of the trailer. Shaneta told Wright that she saw that the person running out was Moton, aka "Little Wayne." R. 64.

Wright came out of the trailer and also saw Moton running off. R. 95 . When Wright challenged him, Moton replied, "Bring it ." R. 64. Wright saw the bicycle Moton had been riding earlier near the abandoned trailer. He put it in his truck. However the next morning it was gone. R. 65.

Mr. Wright testified to finding S. W. who was missing from her bed in an abandoned trailer.

Q. And where was she?

A. In the abandoned house in the back, you know, about a household from my house in the back yard in an abandoned house.

Q. How did you find her?

A...Until she said huh and I ran in the back of it and I jumped in the window, the best way I could get in to get to her. And when I jumped in the window I seen her face and

I reached in and cut my arms through the glass and she ran to my arms and I sent her down to my old lady.. .But anyway he got out and I told my girl, I said, "He's coming out the front door."...And so she saw him and she told me, "It's Wayne,' you know....So I come out the door, the same door he ran out; he left it open. And so I came out and I started talking, I said, "Man, when I catch you"–you know, I told him what I was going to do to him. And he said, "Bring it."

Q. **When you went through the window of the home, was there anyone, was there anyone else in there?**

A. **No one but him. And the baby. I got the baby out and wasn't nobody left but him.** R. 63-64. (Emphasis by Appellee).

Mr. Wright testified that his trailer's back door had been "tampered" with. The back door also had no steps. It was some three feet to the ground.

Q. Now what was the condition of the back door when you came home?

A. **Looked like somebody been, you know, snatching, beating on it or something, like they broke in. Been tampered with.** R. 69. (Emphasis by Appellee).

State photographic evidence, S-7 and S-8 , show the back door of the trailer with no back step with a gap or open distance to the ground. R. 69-70.

Q. **Are there any steps on that back door?**

A. **Not at that time.** R. 73. (Emphasis by Appellee).

Wright testified that he spoke to Moton. This was while he was going to meet Shaneta who was coming home from work. He told him where he was going. Moton who had been in the trailer recently knew there were two children who would be home alone.

Q. Mr. Wright, when you passed by or when Mr. Moton passed by you earlier that evening, did he get information that you were not going toward your home, that you were going to meet Shaneta?

A. He heard me–he saw me standing there. He know, you know. I told him. He said, "what y'all doing?" We said we were just chilling out to meet my girl." That's it.

Q. **Did he know you had two children?**

A. **Yes, sir. I mean yes, ma'am.** R. 93.

Wright testified that S. W. would not be able to leave the trailer through the back door.

Q. **What about the back door? Was there any way to get out the back door? Were there steps or was it just that you have to step off?**

A. **No, ma'am, wasn't no way out. You had to put some ties or something down. We didn't have anything at that time.**

Q. So would it have been difficult for Shamiya at her age to get out the back door?

A. Yes, ma'am. R. 95. (Emphasis by Appellee).

Wright testified to seeing the bike was riding when he spoke to him at the abandoned trailer.

Q. Was the same bike that you found at the abandoned house the same bike that you saw Mr. Moton on earlier?

A. Yes, ma'am. R. 95.

...

Q. **Did you see Mr. Moton after you exited that home at that time?**

A. **Yes, ma'am.**

Q. Where did you see him?

A. When he got out to the light on the next road. R. 95. (Emphasis by Appellee).

Ms. Shaneta Johnson testified that she had known Moton since he was a seven year old child. R.100. She identified him as the person she saw running from the trailer. R. 100.

Q. Is Kevin Moton in the courtroom today?

A. Yes, sir–yes, sir.

Court: The record will reflect she's identified the defendant.

Q. **Is that who you saw running from the building?**

A. **Yes, ma'am.** R. 100. (Emphasis by Appellee).

When S. W. had been rescued from the abandoned trailer, her mother asked her how she got

out of the trailer. She told her "that boy took me out." R. 102. When asked if he "hurt" her or "touched" her, the child pointed to her mouth and between her legs. Shaneta looked at the child's genitalia and found that her vagina was "reddish, bloody and had a scratch on it." R. 102. She then took her to see an emergency room physician, Dr. Baine. R. 103.

Q. **Did you ask her how she got out of the house that night?**

A. **Yes, Ma'am.**

Q. **And how did she respond?**

A. **She responded back that that boy took her out.**

Q. **And I asked her did he hurt you, did he touch her. She pointed her hand down at her privates and she pointed at her mouth.**

Q. Did you check out your daughter physically for any injuries?

A. Yes, ma'am.

Q. **Did you find any injuries on her?**

A. **In her vagina that I looked at, it was very reddish, bloody, had a scratch on it...I mean it didn't add up as the same as a normal two year old child.** R. 102. (Emphasis by Appellee).

She testified that Moton did not have permission to enter her house, or to take her two year old child. R. 103.

Q. Did you give Kevin Moton permission to enter your home that night?

A. No, ma'am.

Q. Did you give Kevin Moton permission to take Shamyia anywhere that night?

A. No, ma'am. R. 103.

Ms. Johnson corroborated Mr. Wright in testifying that someone in the trailer said, "It's me." After Wright had removed the child through a window, he heard sounds coming from inside, like

someone stepping on broken glass. After hearing the noise, he asked who was inside the trailer. When he heard, "It's me", Wright investigated. This was when Ms. Johnson saw Moton running away from the trailer.

Q. Who said that?

A. Henry responded, "Who is this? Who in here?" And he responded, "This is me." So the only thing, Henry eased his way back into the house. And after that, we heard a door close. **When the door closed I seen the defendant running to the next street, which was close to the house, and it was a pole light right there. So that's how I knew it was the defendant.** R. 109-110. (Emphasis by Appellee).

Ms. Johnson corroborated Mr. Wright in testifying that S.W. was not able to exit the trailer from the rear. The back door had no steps down to the ground. R. 116. She also corroborated Mr Wright both as to Moton's not speaking to anyone at the trailer and to his telling the child's father "to bring it." R. 116.

Dr. Rodney Baine testified that he examined S. W. . He found that her vagina was red and irritated. He also found that there was no evidence of either infection or of diaper rash. R. 127-129. See photographic evidence showing child's condition at the time.

Q. What were your observations after seeing the patient?

A. **On physical exam the only pertinent physical findings were an irritation of the vagina, a vaginitis type thing, red.**

Q. **Was that an infection, would you say?**

A. **Not that I know of. It was just red and irritated.** R. 127. (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).

When the evidence presented by the State, and summarized above, was taken as true with reasonable inferences, there was more than sufficient credible evidence in support of the denial of all peremptory instructions. Mr. Wright testified that the doors to the trailer were locked. R. 60; 93. Two year old S. W. was "sleeping" in her bed. R. 60. She was found in an abandoned trailer with Moton. R. 63-64; 99. She told her mother that "that boy took her out." This was in answer to the question, how did she get out of her home. R. 102.

There was no step on the back of the trailer at the time S. W. was found missing. R. 73. She was only two. She could not exit the rear door on her own. There was testimony of 'tampering" with the back door. R. 69. Mr. Wright inspected it and found these changes. When asked did he "hurt you" or "touch you," she pointed at "her privates" and "her mouth." R. 102. Her mother testified to seeing that her vagina was "reddish, bloody and had a scratch on it." R. 102.

Dr. Blaine testified that S. W. 's vagina was "red and irritated." R.127 . He also testified that there was no evidence that she had an infection or diaper rash. R. 127-128. See State's photographic

evidence 16 showing a red vagina on a two year old child.

There was also evidence that Moton knew from speaking to S. W.'s father that neither he nor her mother were going to be present at the trailer the night she was found missing. R. 93 . Moton was not given permission to enter the trailer or to take S.W. out of the trailer. R. 103.

When asked did Moton "touch you," S. W. pointed to her privates and her mouth. R.102. It is unreasonable to expect a two year female child to explicitly state that her vagina or mouth was penetrated by Moton's hand, mouth or penis. If there was no "contact" between S. W. 's vagina and Moton's hand, mouth or penis, then why was her vagina "reddish, bloody, and had a scratch on it", as indicated by the record. See photograph exhibit 16.

In **Hennington v. State** 702 So.2d 403, 408 (Miss.1997), the Court pointed out that contact between a person's mouth, lips or tongue and the genitalia of another person was sufficient for establishing penetration.

> ¶ 18. Sexual penetration was defined by the legislature in Miss. Code Ann. § 97-3-97 (1994) to include fellatio or any penetration of the genitalia by any part of a person's body. This Court specifically stated that fellatio does involve penetration. **Miller v. State**, 636 So. 2d 391, 396 (Miss.1994). The Court went on to say, "Fulfillment of the sodomy penetration requirement is not restricted to acts wherein the accused does the penetrating. We hold that an act of fellatio performed by the accused is an act proscribed by the statute." Id.
>
> ¶ 19. Hennington claims that there was no evidence that any portion of A.R.'s body was actually penetrated by Hennington. This argument is specious and simply without merit. The legislature has proscribed the act of fellatio by including it in the definition of sexual battery. **This Court has stated proof of skin to skin contact between a person's mouth, lips, or tongue and the genitalia of a person's body, whether by kissing, licking, or sucking, is sufficient proof of "sexual penetration."** (Emphasis by Appellee).

The Appellee would submit that the trial court correctly denied peremptory instructions under the facts of this case. We have cited and summarized sufficient, corroborated evidence in support of that decision.

Moton's appeal arguments are based upon using his own uncorroborated statement along with inferences from gaps, or ambiguities in the evidence presented. This would be his arguments about there being no witnesses to the actual breaking and entering, removing and confining of the child, and no evidence of any "penetration" of the child's body.

Whereas, on a motion for a peremptory instruction, it is the prosecution that is entitled to have all the evidence in support of an appellant's conviction taken as true with reasonable inferences. The trial court is to "disregard evidence favorable to the appellant." **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993). The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED. AND THE TRIAL COURT PROPERLY DENIED ADMISSION OF NEGATIVE FORENSIC EVIDENCE UNDER THE FACTS OF THIS CASE.

Moton argues that the trial court erred in granting the prosecution's motion to exclude forensic evidence. This was a used condom and a lab report showing no match to Moton or S. W.. He argues that this was relevant evidence for verifying his account of what occurred between himself and S. W. He thinks this evidence would supposedly show that he was not the person who was with the girl in the abandoned trailer. Appellee's brief page 13-14.

To the contrary, the record reflects that State filed a Motion To Exclude. C.P. 10-11. It pointed out that the used condom was found amidst debris and "used drug paraphernalia." This indicated that the abandoned building had been used in the past for "drug use and other activities." C.P. 10. The completed DNA analysis excluded both the victim and Moton as donors of any DNA found on or in the condom.

The prosecution pointed out that it was a used condom found on the floor "with debris on it." R. 4. It was found in "an abandoned building." R. 4. See State's exhibit 10 for photograph of abandoned building. The building was an old trailer with an open window. There was no window sash, covering or glass and an unlocked door which made it accessible to anyone wanting to enter. In addition, S. W. was a two year old female child at the time. She was born January 12, 2004.

The trial court found that although the used condom was found at the crime scene, it was not shown relevant to the charges in this case, given the facts of the case. As stated by the Court:

> It was part of a crime scene but not all evidence is relevant. The court does no see the relevance of the condom. The Court is going to grant the state's motion in limine with regard to the condom. Now there are photographs that have been introduced that depict the interior of the mobile home. The court is going to require that if that condom is depicted in any way in any of those photographs, those photographs will not be submitted and will not be introduced, nor will they be referred to in any way. R. 8.

The record also reflects that there was no reasons presented to the trial court about why the used condom was relevant to Moton's defense. R.7- 8. Nor was any such argument included with Moton's motion for a JNOV. C.P. 22. A trial court can not be faulted for an objection or issue not raised.

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994), the Court stated:

> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State**, 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); **Crawford v. State**, 515 So. 2d 936,938(Miss. 1987);...

In addition, the record reflects that Moton was inside the abandoned trailer with S. W.. The child's father, Mr. Wright, searched the trailer. He found there was no one else present. R. 95. The period of time in which Moton could have been with the child was limited to the night of September 17, 2004 for approximately one hour. This would contradict Moton's account of being with her just for a few minutes. See Defense exhibit 1 for Moton's statement.

In Moton's statement, D-1, page 2 he stated that "I just had walked in the house and saw the little girl." If we assume, as stated by Moton, that he was only alone with the child for a few minutes at the most, there would have been no possibility for sexual activity or use of a condom.

Finally, Moton's statement clearly indicates that he was with the child in the abandoned trailer. Therefore, this is not a case about Moton "not" being with the child, as he claims in his argument, but of how long he was with the child, how she got there and what he did to the two year old's body, given her small size. See state's exhibit 15 and 16 showing two year old S. W.

In **Gilley v. State**, 748 So. 2d 123, 126 (Miss. 1999), the Court stated a trial court's decision admitting evidence would be up held on appeal "absent an abuse of discretion."

This Court has held that 'a trial judge enjoys a great deal of discretion as to the

> relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.' **Turner v. State**, 732 So. 2d 937, 946 (Miss. 1999)(quoting **Fisher v. State**, 690 So. 2d 268, 274 (Miss. 1996). Similarly, the decision that an error is irreversible and a mistrial should be granted is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. **Snelson v. State**, 704 So. 2d 452, 456 (Miss. 1997).

The record indicates that evidence concerning a used condom found amidst drug paraphernalia and debris in an abandoned trailer was not shown relevant to issues before the trial court. The trial court correctly excluded such evidence, under the facts of this case.

There is record support for the trial court's decision. The trial court found that admission of the evidence, given the time frame in which the events at issue occurred, was not shown to be relevant. R. 8. Moton provided no rationale for showing how the negative results were relevant to his defense. In addition, its admission could have lead to "confusion of the issues," and been "misleading to the jury." Miss. Rule Ev. 403. The Appellee would submit that the trial court did not abuse its discretion. This issue is also lacking in merit.

PROPOSITION III

THERE WAS NO INJUSTICE INVOLVED IN DENYING A MOTION FOR A NEW TRIAL.

Moton argues that there was insufficient evidence for denying him a motion for a new trial. He believes the girl only identified her assailant as "that boy." There was no eye witnesses who actually saw him with the girl much less touching her or abusing her in any way. The medical evidence only established that the child's vagina was red, which could have been caused by other things, such as an infection. And there was no motive provided for why Moton would want to enter Wright's trailer and remove the female child. Appellant's brief page 14-18.

The Appellant would submit that Moton is not entitled to give himself the benefit of evidence or the lack of evidence favorable to his innocence on a motion for a new trial. Rather it is the State who is entitled to have the evidence presented taken as true along with reasonable inferences in support of the appellant's conviction. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987).

Although Moton did not testify, his account of what happened to investigators was presented to the jury. R. 132. See Defense exhibit 1 in manila envelop marked "Exhibits." His account was contradicted by the testimony of both Mr. Wright and Ms. Johnson. Moton provided no reasonable explanation for how he supposedly found a two year old child in an abandoned trailer along with debris and drug paraphernalia. Rather there was evidence that the child could not have gotten out of her trailer and into the abandoned trailer on her own. R. 73; 95 ; 116. She was not capable of leaving through her back door without adult assistance. There was no steps to the ground. It was some three feet to the ground. R. 73; 95; 116. See photographic evidence 7 .

There was evidence of Moton's flight, and his defiance after he was sighted running and challenged by the child's angry father. R. 76-78; 95; 100; 116. There was also evidence of an effort

on the part of Moton or someone doing his bidding to remove evidence. His bicycle was removed from Mr. Wright's truck. It was placed there after it was found at the abandoned trailer. R. 65. It was the same bike he was seen using when Mr. Wright inadvertently let him know that he and Ms. Johnson would not be home with their two children. R. 61.

S. W. told her mother that "that boy took me." In the context of all the evidence presented, she was referring to Moton. R. 102. The record reflects that Moton had been visiting with Wright's family in his home within two days of the events at issue. R. 115. He admitted that he was with her in the abandoned trailer. He also admitted he knew the child's mother and father, aka "Junior." See Defense exhibit 1.

The mother saw her daughter vagina was "reddish, bloody and had a scratch on it." R. 102. An examining physician corroborated the mother concerning the child's red vagina. R. 127. Dr. Rodney Baine testified that he saw no evidence of either a diaper rash or of any infection. R. 127-128. When asked "did he hurt you, did he touch you," the child pointed to her "privates,"genitalia, and "her mouth." R. 102. See photographic exhibit 16 for anatomical exhibition of the child's genitalia.

In **Williams v. State** 512 So.2d 666, 670 -671 (Miss.1987), the Supreme Court found that the trial court did not err in denying a motion for a new trial. Where the record indicated testimony and circumstantial evidence in support of a conviction, this made the issue one "for jury resolution." In that case, the victim was a mentally retarded female who communicated with her family only through sign language.

> Continuing with a detailed explanation of the function of a jury, **Groseclose** states that "It is enough that the conflicting evidence presented a factual dispute for jury resolution," and reiterates the oft repeated phrase "the strength or weakness of the testimony is not measured by the number of witnesses." **Groseclose**, 440 So.2d at 300. See also **Spiers v. State**, 231 Miss. 307, 94 So.2d 803 (1957), and **Bond v. State**, 249

Miss. 352, 162 So.2d 510 (1964).

> Suffice it to say that the credible evidence in this case establishes that Ronald Williams was in the vicinity at the time and on the occasion in question. Shortly after his departure the previously locked door was found with a pane broken out and that Janice Bates was found inside in a beaten and semi-nude condition. The physical appearance of Janice Bates as described by the witnesses was more than sufficient to establish that Williams had broken into the apartment and was up to no good. Consistent with the limitations upon our scope of review, this assignment of error is denied.

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion challenging the weight of the evidence was in the trial court's discretion. However, it should be denied except to prevent "an unconscionable injustice."

> Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987).We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State** , 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

The Appellee would submit that there was sufficient credible, partially corroborated circumstantial evidence for determining that all the elements of burglary, kidnaping and sexual battery had been fulfilled. This made Moton's guilt or innocence a matter for the jury to decide. There was evidence, as cited under proposition I, of breaking and entering into a locked trailer by tampering with a back door lock. R. 60; 69; 90. There was evidence that the child did not exit on her own volition. R. 84; 116. It was reasonable to infer that she was taken by Moton from her bed and confined against her will. There was evidence from which it was reasonable to infer that there was contact between Moton's hand, mouth or penis with the mouth and/or vagina of the two year old child. R. 102; 127-128.

The jury was provided with Moton's account of innocently finding a child in a trailer. Defense exhibit 1. They did not find his self serving account, which was contradicted by prosecution's witnesses, convincing.

The Appellee would submit that the record cited in proposition I, and summarized here, was sufficient for supporting the trial court's decision to deny a motion for a new trial. C.P. 24. The trial court did not abuse its discretion. We have cited credible, substantial partially corroborated evidence in support of his decision. The record cited reflects no "substantial injustice" involved in denying that motion. The Appellee would submit that this issue is also lacking in merit.

CONCLUSION

Moton's convictions should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

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 Charles E. Webster
Circuit Court Judge
Post Office Drawer 998
Clarksdale, MS 38614

Honorable Laurence Mellen
District Attorney
Post Office Box 848
Cleveland, MS 38732

Benjamin A. Suber, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 9th day of April, 2008.

W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

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