IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID PAUL WILSON — APPELLANT

VS. — NO. 2007-KA-1397

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL
[redacted]

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID PAUL WILSON — APPELLANT

VERSUS — NO. 2007-KA-1397-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

David Paul Wilson was convicted in the Circuit Court of the First Judicial District of Harrison County on one count of touching a child for lustful purposes and one count of sexual battery and was sentenced to terms of imprisonment of seven years and 20 years, respectively, to be served concurrently. (C.P.67-68) Aggrieved by the judgment rendered against him, Wilson has perfected an appeal to this Court.

Substantive Facts

C.B.L. testified that her birthday was April 19, 1996. She lived on Audubon Drive in Gulfport with her mother and father, R.L. and A.L. She attended Cedar Lake Christian Academy, where she had recently completed the third grade. She was a good student, having made A's and B's "almost the whole year." (T.106-08)

C.B.L. went on to testify that when she was in the first grade[1] at Convenant Christian School, "Miss Ellen" kept her and a few other children after school while her parents were still at work. Miss Ellen's son David Wilson was often present. When asked, "What kind of stuff did y'all do when you were at Miss Ellen's?" C.B.L. answered, "We would play games. Well, we would get tickled." Wilson frequently would tickle her "[i]n a ticklish spot," i.e., under her arm. She characterized this as "a good touch." Other times, however, Wilson would engage in "bad" touching of her, i.e., touching her "[i]n the tinkle," her "private part." He did this "[a] lot." This touching of her "tinkle" occurred in "[t]he living room, the bathroom, his [Wilson's] room, and Miss Ellen's room." According to C.B.L., "he touched my tinkle in the bathroom and he wanted me to touch his." This happened "more than once." (T.109-11)

On one occasion, C.B.L. was in the bathroom, weighing herself, when Wilson came into the room, locked the door, put his hand inside her pants, and put two fingers inside her "tinkle." He then had her touch his private part, which was "[h]ard and [w]arm." This act made her "feel weird." On more than one occasion, he put his hand inside her underwear

---

[1]C.B.L repeated the first grade. She testified that these events occurred while she was in after-school care at Miss Ellen's during her second year in first grade.

and tried to insert his finger into her "tinkle" while he was lying on his back on the couch and C.B.L. was lying "on his stomach." Other times, Wilson engaged in this behavior in his room and in Miss Ellen's room. When he was finished, he would tell C.B.L. that he would hurt her mother and father if she told anyone what he had done to her. He also promised to give her a toy if she would keep quiet about what had happened. (T.111-17)

Finally, C.B.L. informed her mother of this conduct. Her mother took her to the police and to a Dr. Matherne, and she told "both of them" what had occurred. (T.117-18)

On cross-examination, C.B.L. testified that she had an imaginary friend named Max. (T.126) On redirect, she indicated that she knew the difference between an imaginary person and a real person. (T.160)

R.L., testified that during the fall of 2003, she was employed at a printing business, where her hours were 8:00 to 4:30. C.B.L. routinely went to Ellen Wilson's house after school and stayed there from 3:00 until her mother or father picked her up after work. Initially, C.B.L. "loved going to Miss Ellen's." However, in November 2003, the child's attitude changed. On November 4, R.L "pulled up in front of Miss Ellen's and she [C.B.L.] said, 'Oh, good. He's not here,' and she ran into the house." The next day when her mother picked her up from school, C.B.L. asked, "'Do I have to go to Miss Ellen's today?'" (T.164-67) R.L described the ensuing exchange as follows:

> Il said, "Yes. We don't have any other place for you to go." And it was like bickering about it all the way there. And instead of driving up into their driveway, I drove into our driveway which is behind their house, and I said, "[C.B.L.], why don't you want to go to Miss Ellen's?" She said, "I just don't want to go today." I said, "Why don't you want to go? You've got to tell me why you don't want to go." She said, "I can't." I said, "Why can't you tell me?" And she says, "I swore I wouldn't tell." And I said, "You swore to who you wouldn't tell?" And she– after

> a few minutes, she said, "I swore to Uncle David," at that time she called him Uncle David, "that I wouldn't tell."
>
> (T.168)

C.B.L. went on to tell her mother in the van that day that Wilson "had been touching her private." (T.168)

Feeling "kind of stunned by everything," R.L. took C.B.L. "back to work" with her. She told her husband, who also worked for the printing business, what C.B.L. had told her. Ultimately they arranged for C.B.L. to tell the police what had happened. (T.169-71)

Finally, the prosecutor asked R.L. whether she had noticed any changes in her daughter's behavior just prior to her revelation of these events. (T.174) R.L. answered as follows:

> Yes, I did. She used to walk up from the Presbyterian Church, the back of the school up to the back door of the school, and she stopped doing that she wouldn't tell me why. This is before I found out. And I had to walk her up there every time we dropped her off. She had to have the doors locked. Even if we're in our van, she had to have the doors locked. She wouldn't– she didn't want to sleep in her room anymore and we couldn't figure it out why. And we finally put cardboard and stuff up in her windows so she didn't feel like someone was watching her. That was after she told us that part.
>
> We would all get ready, I don't know, about the same time to go to church, and– but she didn't ever want to go to Sunday school and children's church, you know. It was a thing we had to force her into going where she enjoyed it before... I'm trying to figure out if it was before or after. After she told us when we would send her to summer camp, she didn't want to stay anymore. And the summer camp, Bayou Elementary, just left their doors open and she didn't feel safe because people were coming in and out all the time. She didn't want to go to summer camp anymore.
>
> (T.174-75)

Detective Rosario Ing of the Gulfport Police Department testified that she had been investigating child abuse, sexual assaults and domestic violence cases for the past 15 years. She had a master's degree in psychology and was a licensed social worker, and she had received "ongoing training" in her field. (T.216-17)

On November 14, 2003, Detective Ing interviewed C.B.L. She found the child to be "very animated" and "very open to the discussion." During the interview, Detective Ing utilized an anatomical sketch of "a boy" and one of a young girl. C.B.L. "identified all of [the] body parts ... without hesitation until we got to the genital area on both the male and the female. She stated on both of those that she didn't ... have a name for them." (T.217-22)

Detective Ing went on to determine that C.B.L, knew the difference between healthy, affectionate touches and those which made her feel invaded and uncomfortable. C.B.L. indicated that hugs and kisses from her parents and even certain "tickles" from Wilson "felt good," but that there were other touches "that she didn't like" or that "she wanted somebody to stop doing." When Detective Ing asked her to describe these "bad" touches, "[s]he identified specifically on the female sketch," circling "the buttocks and also the genital area ... " She "indicated that she was touched with the fingers." She stated unequivocally "that it was touching and not tickling," and she clarified that she was touched in the genital area rather than on the buttocks. (T.222-24)

Detective Ing went on to recount information received from C.B.L. as follows:

> She described the incident in the living room as her sitting on the sofa next to Mr. Wilson; that she was on top of him and that he was tickling her and she was tickling him back. ... [A]t that time, it was his hands inside her pants but not inside her underwear.

She described an incident that happened in the bathroom where she indicated that she was weighing herself. Mr. Wilson entered the bathroom, the door is locked. Her pants are partially down. He touches her again on her vaginal area. She indicates nothing else happens at that point.

Another incident occurred in his bedroom where she indicated the door was locked to the bedroom. [T]hey go into the closet. Her clothes again are partially removed, which is her underwear and her pants at this time. She is again touched on the vaginal area with the use of his hands or his fingers. I asked her if his clothes were removed at any time. She indicated at that point that they had been; that his pants were dropped and that he was not wearing any underwear. I asked her if she noticed anything. She described that she had seen his private. She pointed to the private on the anatomical sketch that I have here, and she described that it was bigger and longer.

She then described the incident that occurred in Miss Ellen's bedroom. She said that they were in the bedroom; again, the door was locked. She initially stated or described that they were under the bed. I asked her if they were under the bed, on top of the bed or somewhere else, and she described that she was on the bed. Again, her clothing was partially removed. I inquired where Mr. Wilson was at that time. She described him as being in the bed as well.

At that point she said that she was going to show me. She laid [sic] down on the floor in my office and had one of her dolls laying [sic] next to her. She indicated again that she was touched on her genital area with the use of his hands. She stated that he was disrobed; that she was asked to touch him.

She eventually told me that she had touched him for just a short while. I asked her to describe what she felt. She stated that it was hard like a bone.

She indicated– I asked her if she had ever felt anything else other that just his hands. She said that she had felt his private against her legs or under her– against her underwear.

(T.224-26)

C.B.L. went on to tell Detective Ing "that she was asked to keep this a secret; that she was asked to swear" and that Wilson "had promised that she would get something if he allowed her to do this." When Detective Ing asked her how many times this had occurred, C.B.L "stated that it was a lot of times." (T.226-27)

Approximately a week after this investigation began, Detective Ing interviewed Wilson in her office. Wilson stated that C.B.L. "liked to engage" in tickling games, that he had tickled her, and "[t]hat if anything had happened, that it would have been accidental ... " Detective Ing ascertained that Wilson's date of birth was September 6, 1963. (T.229-31)

A few days later, Wilson telephoned Detective Ing and

> inquired whether a T-shirt that he had in the bottom of his dresser drawer, which was a Big Johnson T-shirt that were pretty popular back in the '90's, if [C.B.L.] could have actually picked that up and looked at it and gotten her details from the T-shirt itself. The T-shirt he described had a male and a female, and the female had her pants partially down to where you could see her buttocks area.
>
> (T.231-32)

On cross-examination, Detective Ing testified that C.B.L. had described an attempted penetration, but she clarified that C.B.L. had described that the finger "was sort of inside." (T.232-33)

Ellen Wilson testified that one of her house rules was that the children in her charge did not "go further than the toy room" in the front part of the house. From June to November of 2003, her son David Wilson, who lived with her, was working for Hoyt's Construction Company in Bay St. Louis. He typically would leave the house at 6:30 a.m. and return about 4:10 p.m., "every day except Saturday and Sunday." Upon returning

home, he would "usually get him something to drink, a glass of tea or a Coke and sit down for a few minutes, and then he would go get his shower." While she was in her care, C.B.L. was always under Mrs. Wilson's supervision. She had observed her son and C.B.L. tickling each other on the couch. From the chair in which she regularly sat, she had a clear view of the hall; she had never seen C.B.L. and Wilson coming out of bedrooms or the bathroom together. (T.255-62)

The defendant took the stand and denied that he had ever touched C.B.L. inappropriately or exposed himself to her. He also testified that he had never been alone with C.B.L. in his mother's bedroom. (T.277)

SUMMARY OF THE ARGUMENT

Wilson's challenge to the multi-count indictment is procedurally barred and substantively without merit. Wilson's claim that the jury was not properly sworn is without merit. Wilson's claim that his indictment was "too vague to defend" is procedurally barred and substantively without merit.

The trial court did not err in granting Instructions S-3, S-4 and S-6.

The trial court did not abuse its discretion in excluding evidence of the defendant's voice stress test results.

The verdicts are based on legally sufficient proof and are not against the overwhelming weight of the evidence.

PROPOSITION ONE:

WILSON'S CHALLENGE TO THE MULTI-COUNT INDICTMENT IS PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Wilson first contends that his convictions must be reversed because he was tried on a multi-count indictment. He did not raise this issue below and may not be heard to do so for the first time on appeal. In *Patrick v. State,* 754 So.2d 1194, 1196 (Miss.2000), the Mississippi Supreme Court held unequivocally that the appellant, having failed to raise the issue at trial, was procedurally barred from asserting that he was prejudiced by having been put to trial on a multi-count indictment. Having failed to move the court to quash the indictment or sever the counts, Wilson likewise is procedurally barred from asserting this argument on appeal.

Solely in the alternative, without conceding the necessity for doing so, the state responds to the merits of this argument. MISS. CODE ANN. § 99-7-2 (1) (b) (Rev.2000), provides that

> [t]wo (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: ... the offenses are based on two (2) or more acts or transactions **connected together or constituting parts of a common scheme or plan.**
>
> (emphasis added)

The proof presented by the state showed that defendant engaged in a pattern of sexual offenses, over a period of months, at the same location and against the same victim. These offenses clearly were "interwoven," i.e., "connected together from a common scheme of sexual misconduct," and thus were properly chargeable and triable on a multi-count indictment. *Broderick v. State*, 878 So.2d 103, 105 (Miss.App.2003), *rehearing*

denied, certiorari denied, 878 So.2d 66.[2] Accord, *Eakes v. State*, 665 So.2d 852, 861-62 (Miss.1995) (charges of two counts of sexual battery and one count of attempted sexual battery were properly combined in indictment).

Even had the lower court been presented with a motion to quash the indictment or sever the counts, it would have been well within its discretion in denying relief and ordering the trial to proceed on the multi-count indictment. For these reasons, Wilson's first proposition should be denied.

PROPOSITION TWO:

WILSON'S CLAIM THAT THE JURY WAS NOT PROPERLY SWORN IS WITHOUT MERIT

Wilson argues additionally that the verdicts are a nullity because the "jury was not sworn with either the capital oath or the general oath as is statutorily required for all juries." (Brief for Appellant 20) The state counters that Wilson has "procedurally waived his claim" because he "did not object to the issue of the unsworn jury until his trial was completed and a verdict was rendered." *Stewart v. State*, 881 So.2d 919, 923 (Miss. App. 2004). Accord, *Golden v. State*, 968 So.2d 378, 385 (Miss.2007); *Woulard v. State*, 823 So.2d 561, 5467 (Miss. 2002).

In the alternative, the state acknowledges that, as in *Dunagin v. State*, 915 So.2d 1063, 1071 (Miss. App. 2005) "the transcript does not include the actual giving of the juror oath." However, the cover page of the transcript recites that this case was heard before

---

[2]In *Broderick,* the Court of Appeals upheld an indictment charging two counts of lustful touching and two counts of sexual battery against two different girls. Certainly, then, the indictment in this case is proper.

"a jury of twelve men and women, duly impaneled." Furthermore, Instruction C-1, given without objection, reads in pertinent part as follows: "When you took your places in the jury box, you made an oath that you would follow and apply these rules of law to the evidence in reaching your verdict in this case." (C.P.37) (T.294) Finally, the judgment also sets out that the jury was "empaneled, chosen and accepted ... " In light of *Dunagin*, these factors are sufficient to sustain the presumption that the trial court performed its duties in administering the proper oath to the jury. For these reasons, Wilson's second proposition should be denied.

PROPOSITION THREE:

WILSON'S CLAIM THAT HIS INDICTMENT WAS "TOO VAGUE TO DEFEND" IS PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Under his third proposition, Wilson contends that his indictment failed constitutionally because it was "too vague to defend." Specifically, he claims that he "could not defendant against an indictment alleging that either or both of the two separate crimes charged could have occurred at any time over a period of approximately six months."[3] (Brief for Appellant 24) Regarding the claim of "overbroad dates," the state submits that this alleged defect was waived by the failure to demur or otherwise challenge the indictment below. Wilson never indicated to the trial court that he required a more definite time frame in order to present a defense, and he may not be heard to do so for the first time on appeal.

---

[3]The indictment charged that these offenses were committed "on or between June, 2003, to November, 2003." (C.P.7)

In *Moses v. State*, 795 So.2d 569, 572 (Miss. App. 2001), to the contrary, the defendant filed a motion to quash. Accord, *Morris v. State*, 595 So.2d 840, 841 42 (Miss.1991). Therefore, the defendant's reliance on *Moses* is misplaced. This belatedly-alleged flaw has been waived.

Although no further discussion is necessary, the state submits for the sake of argument that "a specific date in a child sexual abuse indictment is not required so long as the defendant is fully and fairly advised of the charges against him." *Morris*, 595 So.2d at 842, cited in *Davis v. State*, 760 So.2d 55, 59 (Miss. App. 2000). Accord, *Eakes v. State*, 665 So.2d 852, 860 (Miss.1995).

For these reasons, the state respectfully submits Wilson's third proposition should be denied.

PROPOSITION FOUR:

THE TRIAL COURT DID NOT ERR IN GRANTING INSTRUCTIONS S-3, S-4 AND S-6

Wilson argues next that the trial court committed reversible error in granting Instructions S-3, S-4 and S-6, set out below. The first of those challenged charges is set out as follows: "The Court instructs the Jury that 'sexual penetration' is any penetration of the genital openings of another person's body by any part of a person's body." (C.P.49) When S-3 was tendered, defense counsel stated affirmatively that he had no objection to it. (T.296) It follows that Wilson's challenge to this instruction "is not properly before this Court. An appellate court may only review those matters properly preserved for appeal during trial." *Kearley v. State*, 843 So.2d 66, 69 (Miss. App. 2002). Solely in the alternative, the state submits that this instruction is a correct statement of the law. *McKnight v. State*, 738 So.2d 312, 318 (Miss. App. 1999). Moreover, because penetration

is not an element of the offense of touching a child for lustful purposes, S-2 could not have confused the jury in its determination of Wilson's guilt of that crime.

Instruction S-4 is reprinted as follows:

> The Court instructs the Jury that in order to sustain a conviction for the crime of Sexual Battery some penetration must be proven beyond a reasonable doubt. However, it need not be full penetration. Even the slightest penetration is sufficient to prove the crime of Sexual Battery.
>
> (C.P.50)

This instruction, too, is a correct statement of the law. As the prosecutor pointed out during argument on this point, an identical charge was approved in *McKnight*, 738 So.2d at 318. (T.297) Moreover, in *Morris v. State*, 913 So.2d 432, 435-36 (Miss. App. 2005), the Court of Appeals rejected the argument that a similar instruction placed undue emphasis on the testimony of the minor victim.[4] The trial court did not err in granting Instruction S-4.

Finally, Instruction S-6 informed the jury that "a child under the age of fourteen (14) years cannot legally consent to the act of sexual penetration, however slight." (C.P.51) The defense objected, apparently on the ground of the absence of an evidentiary basis for this charge. The court then ruled as follows:

> Well, I don't know about that. I don't think there has been either, but I'm going to give it because from the testimony of the child, the jury might get the idea that the child consented to the touching by her participating in tickling and touching and so forth. And they should be aware that a child cannot give consent to anything, so I'm going to give it.

---

[4]In this case, as in *Morris*, the court instructed the jurors that they were "not to single out one instruction alone as stating the law" but were required to "consider these instructions as a whole." (C.P.37)

(T.298-99)

For the first time on appeal, Wilson asserts that Instruction S-6 was improper because it instructed the jury peremptorily as to C.B.L.'s age. Wilson may not be heard "to assert grounds other than those on which his trial objection was based." *Bates v. State*, 952 So.2d 320, 324 (Miss. App. 2007). His appellate argument was not made below and therefore is not preserved for review.

Alternatively, the state submits for the sake of argument that Instruction S-2 included the finding that C.B.L. was a child under the age of 14 as an element of the crime of sexual battery and required the jury to find this fact in order to return a verdict of guilty of sexual battery. (C.P.48) Moreover, Instruction S-6 is a correct statement of the law. See *Reese v. State*, 879 So.2d 505. 510 (Miss. App. 2004). Wilson's challenge to Instruction S-6 lacks substantive as well as procedural merit.

For these reasons, Wilson's fourth proposition should be denied.

PROPOSITION FIVE:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF THE DEFENDANT'S VOICE STRESS TEST RESULTS

Under his fifth proposition, Wilson contends that the trial court committed reversible error in excluding evidence of his voice stress test without first conducting a *Daubert*[5] hearing. This issue arose when the state moved *in limine* to exclude this evidence. During the hearing on this motion, the following was taken

MR. SMITH: ... Secondly, urge Your Honor, in the

---

[5]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

investigation of this case, there was a polygraph investigation of this case, there was a polygraph investigation submitted to the defendant. Voluntarily he took a– it was not a polygraph.

MR. WITTMAN: Voice analysis.

MR. SMITH: – voice stress analysis test. And it was a test where the detective who gave him the voice stress analysis test deemed that his answers were truthful and that he was not being deceptive in his denials of those allegations. We would offer that under very Court in the United States, including the Witherspoon case, which was a 1999 case from Mississippi, that evidence of a polygraph test, the results of it, even offering to take a polygraph test would be inadmissible, and we would ask the Court to so direct.

THE COURT: That will be sustained.

(T.89-90)

The defense did nothing to counter the state's argument and indeed gave the court no indication that it desired to have this evidence introduced. "The burden of showing the admissibility of evidence is on the proponent of the evidence." *Harveston v. State*, 798 So.2d 638 (Miss. App. 2001). Having declined to offer any opposition to the state's attempt to exclude this evidence or any objection to the court's ruling,[6] Wilson may not put the trial

---

[6]The trial court enjoys discretion in admitting or excluding evidence. *Woods v. State*, 973 So.2d 1022, 1030 (Miss. App. 2008). To demonstrate reversible error in the court's ruling, the appellant must show that the trial court abused its discretion and that the admission or exclusion affected a substantial right. *Kidd v. State*, 793 So.2d 675, 681 (Miss. App. 2001). Even if this alleged error were preserved for review, the state submits Wilson would be unable to demonstrate abuse of discretion and prejudice. He has cited no authority approving the admission of evidence of voice stress test results. There is authority to the contrary. *State v. Gaudet*, 638 So.2d 1216, 1221-22 (La.App.1st Cir.1994) ("[t]he results of a voice stress analysis test are not admissible at trial").

court in error for excluding this evidence. See *University Medical Center v. Johnson*, ___ So.2d ___ (Miss. App., decided May 22, 2007) (2007 WL1470469) (certiorari granted).

The trial court will not be put in error on a point not presented to it. *Gonzales v. State*, 963 So.2d 1138, 1144 (Miss.2007). Having failed to raise *Daubert* below or to advocate in any way for the admission of evidence of the results of his voice stress test, Wilson has waived his fifth point. His fifth proposition should be denied.

PROPOSITION SIX:

THE VERDICTS ARE BASED ON LEGALLY SUFFICIENT PROOF AND ARE NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Under his sixth proposition, Wilson argues that the proof is legally insufficient to sustain the verdicts and alternatively that he is entitled to a new trial because the verdicts are against the overwhelming weight of the evidence. To prevail on his challenge to the sufficiency of the evidence, he must satisfy the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in

> the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss. 2000).

This rigorous standard applies to the claim that the defendant is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App. 2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight

issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

We incorporate by reference the proof set out in our Statement of Substantive Facts to support our position that the prosecution presented substantial credible evidence of Wilson's guilt on both counts. The victim's testimony was unequivocal and was supported by her demeanor, as described by her mother, and by her ability to describe the defendant's erection. The determination of her credibility, as well as that of the other witnesses for the state and for the defense, was the sole province of the jury.

Wilson argues specifically that the state presented insufficient proof of sexual penetration and lustful purposes, concerning the sexual battery and fondling charges, respectively. With regard to the first alleged defect, the state reiterates that proof of even slight penetration of the vulva or labia is sufficient to support a conviction of sexual battery.[7] *Pryer v. State*, 958 So.2d 818, 823-24 (Miss. App. 2007); *Morris*, 913 So.2d at 435. Thus, the testimony to the effect that Wilson put his finger "sort of inside" was sufficient. After the defendant challenged the sufficiency of the proof of lustful purposes in his motion for directed verdict, the court ruled that the testimony regarding the defendant's state of arousal, i.e., his erect penis, was "certainly sufficient to go to the nature of the touching, the reasons for it." (T.273)

Here, as In *Boykin v. State*, 941 So.2d 892, 896 (Miss. App. 2006), another case

---

[7]Physical evidence of penetration is not required. *Pryer*, 958 So.2d at 823-24 .

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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:

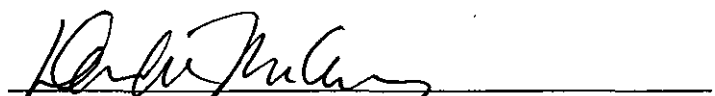
Honorable Jerry O. Terry, Sr.
Circuit Court Judge
421 Linda Drive
Biloxi, MS 39531

Honorable Cono Caranna
District Attorney
P. O. Drawer 1180
Gulfport, MS 39502

Doyle L. Coats, Esquire
Attorney At Law
1911 21st Avenue
Gulfport, Mississippi 39501

Ross Parker Simons, Esquire
Attorney At Law
P. O. Box 1735
Pascagoula, Mississippi 39568

This the 27th day of March, 2008.



DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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