

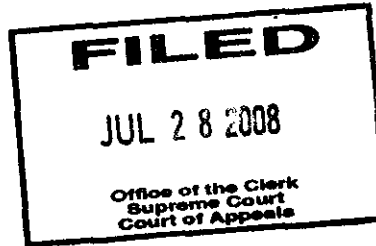
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GUS WILKINS, JR.

APPELLANT

VS.



NO. 2007-KA-1643-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Gus Wilkins told a police officer following Wilkins's arrest for sexual battery he did not have sexual intercourse with Marquita Brooks. (R. 163)

At trial Wilkins, a non-testifying defendant, stipulated he was the source of semen found inside the victim's vagina after DNA testing positively identified him as the source. (R. 173-74)

Wilkins claims in his appeal to this Court the State failed to offer sufficient evidence proving beyond a reasonable doubt the intercourse, both oral and vaginal, was without the victim's consent. (Brief of the Appellant at 5-6)

The weight and sufficiency of the evidence demonstrating that certain sexual acts were not consensual form the centerpiece of this appeal from a conviction of sexual battery.

GUS WILKINS, a prior convicted felon (R. 153-54, prosecutes a criminal appeal from the Circuit Court of Lowndes County, Mississippi, Lee J. Howard, Circuit Judge, presiding. During a trial by jury conducted September 4-6, 2007, Wilkins, a 30-year-old African-American male and

non-testifying resident of Columbus (C.P. at 6, 68), was convicted of sexually battering Marquita Brooks, a sixteen (16) year old female and lifelong resident of Lowndes County. (R. 94)

A two count indictment returned on October 31, 2006, charged in Count #1 that “ . . . on or about the 27th day of July, 2006, Wilkins “ . . . did unlawfully, wilfully, and feloniously, engage in sexual penetration with Marquita Brooks, without her consent, contrary to the form of the statutes in such cases made and provided . . . ” (C.P. at 3)

The charge contained in Count #2, burglary, is not implicated in this appeal.

Following a presentence investigation (C.P. at 54-58), the trial judge sentenced Wilkins to serve twenty (20) years in the custody of the MDOC. (C.P. at 52-53)

Two (2) issues are raised on appeal to this Court.

“Whether the trial court erred in denying defendant’s motion for judgment notwithstanding the verdict.” (Brief of the Appellant at 1)

“Whether the trial court erred in denying defendant’s motion for a new trial.” (Brief of the Appellant at 1)

Stated differently, Wilkins assails both the sufficiency and weight of the evidence used to convict him.

Michael R. Farrow, a practicing attorney in Columbus, represented Wilkins effectively at trial.

The appellate representation by W. Daniel Hinchcliff of the Mississippi Office of Indigent Appeals has been equally effective and challenging.

STATEMENT OF FACTS

Marquita Brooks was a seventeen (17) year old resident of Terre Haute, Indiana, at the time

Gus Wilkins was tried and convicted of sexual battery. (R. 94) When the offense took place inside an abandoned house in Columbus, Brooks was a sixteen (16) year old lifelong resident of Lowndes County. (R. 94)

Gus Wilkins, according to Marquita Brooks, was introduced to Brooks by his mother "... saying that he was my cousin." (R. 94) On the night of July 27, 2006, around 9:30 or 10:00 p.m. Marquita Brooks was walking alone at the Sims Scott Park in Lowndes County when she was approached by Wilkins who introduced her to two other guys as "his little cousin." (R. 97-98) Wilkins said he was on his way to his mother's house and would walk with Brooks. Marquita thought she would be safe because she trusted Wilkins's mother. (R. 98)

Marquita Brooks is 5'2" tall and weighs 137 pounds. (R. 99) Gus Wilkins is 6'1" and weighs 180 pounds. (R. 99)

After crossing some railroad tracks and emerging onto Cherry Street, Wilkins "... grabbed [Brooks] by my neck and told me if I made a sound that he would snap my neck." (R. 99)

Q. [BY PROSECUTOR ALLGOOD:] Now he told you that he would snap your neck if he did what?

A. If I made any noises or said anything. (R. 99)

She didn't.

Brooks testified that Wilkins led her "to an old abandoned house" where she observed pieces of glass smaller than her fingernails on the floor. (R. 101) After opening the side door Wilkins "... took off my pants and lift[ed] up my shirt and laid me in the glass." (R. 101)

Q. [BY PROSECUTOR ALLGOOD:] Now what did you do while he was doing that?

A. [BY BROOKS:] Nothing.

Q. Why not? Tell the ladies and gentlemen of the jury why you didn't try to run. Tell them why you didn't scream. Tell them why you didn't.

A. Because he's bigger than me. (R. 101)

Wilkins thereafter raped Brooks and penetrated her both vaginally and orally. (R. 102-03)

A written stipulation signed by both parties reflected that known samples of blood drawn from Wilkins and semen removed from the vaginal vault of Marquita Brooks were sent to Scales Laboratories where " . . . upon said DNA testing, it was determined that Gus Wilkins, Jr., the defendant, was the source of the semen found in the vaginal vault." (R. 171-72; State's Exhibit 6)

Four (4) witnesses testified for the State of Mississippi during its case-in-chief, including the victim, Marquita Brooks, who testified she was raped by Wilkins on the floor of an abandoned house in the Frog Bottom community in Columbus. Wilkins, after unbuckling Brooks's pants and removing them, licked her chest, licked between her legs, licked her neck, and then inserted his penis inside her mouth and later between her legs. (R. 102-03)

Q. [BY PROSECUTOR ALLGOOD:] Okay. What happened when you got inside the building?

A. [BY BROOKS:] He took off my pants and lift[ed] up my shirt and laid me in the glass.

Q. All right. Now, you said he took off your pants. How did he do that, Marquita? Explain that, please, What did he do?

A. He unbuckled my pants and took them off.

Q. Now, what did you do while he was doing that?

A. Nothing.

Q. Why not? Tell the ladies and gentlemen of the jury why you didn't try to run. Tell them why you didn't scream. Tell them why you didn't.

A. Because he's bigger than me.

Q. All right. You say he lifted your shirt up; is that right?

A. Yes, sir.

Q. But he left it on?

A. Yes, sir.

Q. Then what did you do? What did he do then, Ms. Brooks?

A. He started licking on my body.

Q. Where about did he lick you, Marquita?

A. On my chest, between my legs, and on my neck.

Q. What was he saying while he was doing this?

A. The only thing I can remember him saying is that he had been watching me for a while.

Q. What were you telling him?

A. Nothing.

Q. Now you said he licked you on your chest, and your neck, and between your legs. What did he do at that point? What did he do then, Marquita? Can you tell us what he did next?

A. He made me put my mouth on his private part.

Q. He **made you** put your mouth on his private part? How did he do that, Marquita. Explain that for us. What did he do?

A. He had his hands around my neck.

Q. Had his hands around your neck? After you put your mouth on his private parts, what did he do then? What did he do then, Marquita?

A. After that he took - - he took his private part out and stuck it between my legs.

Q. Stuck it between your legs?

A. Uh -huh.

Q. Did he actually get inside of you?

A. Yes, sir. (R. 101-03) [emphasis supplied]

Brooks thereafter walked to a nearby apartment complex where she told her cousin, Demetrius Palmer, what had happened to her.

Q. [BY PROSECUTOR ALLGOOD:] Now, what happened as Demetrius Palmer was taking you home?

A. [BY BROOKS:] He asked what was wrong with me and I wouldn't say anything. And then the last time he asked me, I had told him what had happened and he took me to [my] house. (R. 104-05)

Brooks, at her request, was taken to her home by Demetrius Palmer, where she immediately bathed "[b]ecause I felt dirty." (R. 105) She tossed her clothing in the trash "[b]ecause I didn't want them anymore." (R. 105)

Later that same night Brooks was taken to the Baptist Hospital where she was examined by Amy Riley, a registered nurse. (R. 105-06, 139-40) A white substance was observed inside Brooks's vaginal vault. It, along with several other specimens, was collected for further analysis. (R. 142-43)

Demetrius Palmer, Brooks's eighteen (18) year old cousin, testified that when Brooks walked into the apartment, "she [Brooks] wasn't herself." (R. 134)

Q. [BY PROSECUTOR ALLGOOD:] All right. Tell us what you mean by that. How does she normally act? And what was she doing that night?

A. [BY BROOKS:] Normal Marquita, she's the type of person that's energetic. She may always be the baby, but she's always energetic and always just her.

Q. All right. And how was she acting that night?

A. When she walked in the door, she - - she wasn't herself. She was sitting there looking all sad, had little tears in her eyes. It looked like she wanted to cry.

Q. So what happened? What did you do?

A. As soon as she had came in, she came to me and she asked me could I take her home. And then - -

Q. What did you do then when she asked to go home?

A. When I did, I said okay. I kept on asking her what was wrong? What was wrong? She didn't tell us until actually we started driving off and was almost at the house.

Q. And what did she tell [you] when you almost got to the house?

A. She told me that she had got raped.

Q. Did she tell you by who?

A. She told me by Gus. (R. 134)

* * * * *

Q. Now, when she was telling you this, what [was] she doing?

A. She was crying. Sometimes, I mean when she was talking, I could barely even understand her. I kept on having her to repeat it. (R. 134-35)

Amy Riley, a registered nurse at the Baptist Hospital, testified she examined Marquita Brooks in the emergency room around 12:30 a.m., and after assessing the situation Riley collected specimens for further testing. (R. 139-40, 45)

Q. [BY PROSECUTOR ALLGOOD:] Did you, in fact, take a history, what y'all refer to as a history, from Marquita Brooks?

A. [BY NURSE RILEY:] Yes, I did.

Q. What did she relate to you as far as what occurred to her that night?

A. She said that she had been sexually assaulted on her way home.

Q. And how did she describe that as occurring?

A. She said that she was walking home with a man named Mr. Wilkins, that she had found out was her cousin. And that he, on the way home, kind of had walked behind her and put his arm around her neck and told her to be quiet or that he would snap her neck if she didn't - - if she was loud.

So, then he proceeded to take her pants off and continue with the sexual assault. She said that he had licked her all over and then he penetrated her vaginally, and then took it out and placed his penis in her mouth at that time. And then went back to having vaginal intercourse with her until he was finished. (R. 140-41)

Riley did not observe any bleeding or tearing of Brooks's private parts. (R. 141).

Gray Moore, a detective with the Columbus police department, testified he was the chief investigating officer in this case. (R. 161-62) During the booking process conducted post-arrest, Wilkins told Moore he did not have sex with Marquita Brooks.

Q. [BY PROSECUTOR ALLGOOD:] Now, explain for the ladies and gentlemen of the jur[y] what happened while you were processing this defendant?

A. During the processing of Mr. Wilkins, he asked if he could smoke a cigarette. And I took him out back outside behind the police department to let him smoke.

While we were standing out back, Mr. Wilkins just made the statement to me that he did not have sex with Marquita Brooks. (R. 163)

Wilkins agreed to submit to a DNA test and signed a consent form authorizing a nurse to

draw his blood. (R. 163, 171) According to Moore, if Wilkins had admitted having sex with Brooks, Moore “ . . . would not have drawn this blood for the simple fact the DNA testing is so expensive and the police department has to pay for it every time we have DNA done.” (R. 164)

Finally, Moore testified the clothing discarded by Brooks was recovered from a garbage can by Detective Louis Alexander. (R. 164)

Following Moore’s testimony, the parties stipulated the DNA testing “ . . . determined that Gus Wilkins, Jr., the defendant, was, in fact, the source of the semen found in[side Marquita Brooks’s] vaginal vault.” (R. 173)

At the close of the State’s case-in-chief, Wilkins moved for a directed verdict on the ground there had been no resistance, no immediate outcry, and the State had failed to prove the acts were non-consensual. (R. 175)

The circuit judge overruled the motion without comment. (R. 175)

After being personally advised of his right to testify or not to testify (R. 176-77), the defendant elected not to testify. He did, on the other hand, produce three (3) witnesses who testified in his defense, including Gloria Wilkins, the defendant’s mother. (240-41)

Louis Alexander, a police officer with the Columbus Police Department, testified he videotaped an interview with the victim. (R. 179) During the interview she said the defendant had told her while at Sims Scott Park that he loved her. (R. 189) Both Brooks and Demetrius Palmer declined to give Alexander a written statement about the events that took place. (R. 183-84)

Diane DeGraffenreid, a resident of Apple Street in the Frog Bottom Community (R. 194), testified that on a typical summer evening people don’t go inside early; rather, “people just [are] standing out doing different things.” (R. 194)

Gloria Wilkins, a/k/a “Patsy” (R. 94, 205), the defendant’s mother, testified she was the one who introduced Marquita Brooks to Gus Wilkins. (R. 206) On the evening of July 27th Marquita “ . . . didn’t appear to be nervous or upset or anything. She kept her head down. She never looked at me when she was talking.” (R. 206)

The defendant personally announced to the Court he was not going to testify. (R. 210)

Peremptory instruction was requested and denied. (R. 214; C.P. at 43)

Following closing arguments, the jury retired to deliberate at a time not reflected by the record. (R. 259-60) It subsequently returned with the following verdict: “We, the jury, find the defendant guilty as charged.” (R. 261; C.P. at 42, 50)

A poll of the jury, individually by name, reflected the verdict returned was unanimous. (R. 262-63)

On September 6, 2007, following a presentence investigation (C.P. at 54-58), Wilkins was sentenced to serve a term of twenty (20) years in the custody of the MDOC. (R. 264; C.P. at 52-53)

Wilkins’s motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial was filed on September 7, 2007, and overruled the same day. (C.P. at 69-71)

Wilkins seeks a reversal and discharge but, if not granted, a reversal and remand for a new trial. (Brief of the Appellant at 8)

SUMMARY OF THE ARGUMENT

The defendant requested and received jury instruction D7 which instructed the jury the State “must prove,” *inter alia*, beyond a reasonable doubt that

“(2) [t]he sexual penetration was without the consent of Marquita Brooks.” (C.P. at 41)

The jury so found.

“[T]he [Supreme] [C]ourt is bound by the jury findings upon an issue presented by the instruction requested by appellant.” **Kinney v. State**, 336 So.2d 493, 496 (Miss. 1976).

It is a fundamental principle of law that a jury verdict will not be disturbed except in the most extreme of situations. **Young v. State**, 962 So.2d 110 (Ct.App.Miss. 2007) citing **Sheffield v. State**, 749 So.2d 123, 128 (¶17) (Miss. 1999). The case at bar does not exist in this posture.

Accepting as true the testimony proffered by the State via the victim, together with all reasonable inferences to be drawn therefrom, it is clear there was sufficient testimony from the victim to convince a reasonable and fairminded juror the sexual acts committed by Wilkins were without her consent.

This is especially true where, as here, there is no testimony, not one whit, that sexual penetration was consensual. Lest we forget the defendant did not testify in this cause.

Wilkins told Detective Moore, post-arrest, he did not have sexual intercourse with Marquita Brooks. The physical evidence, on the other hand, demonstrated beyond a reasonable doubt that he did.

Nor was the verdict of the jury against the overwhelming weight of the evidence which fails to preponderate in favor of Wilkins. The jury was properly instructed it was “. . . the sole judges of the facts in this case [and its] exclusive province is to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case.” (C.P. at 30)

The testimony of Marquita Brooks implicating Wilkins in a non-consensual sexual encounter was not outweighed by any other evidence. As stated previously, Wilkins did not testify. Accordingly, there was no direct testimony or evidence suggesting consensual sex.

Marquita Brooks’s credibility, of course, was a question for the jury.

In **Crawford v. State**, 754 So.2d 1211, 1222 (Miss. 2000), this Court stated:

“[O]ur case law clearly holds that the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony *is not discredited or contradicted* by other credible evidence, especially if the conduct of the victim *is consistent with the conduct of one who has been victimized by a sex crime.*” [numerous citations omitted]

It wasn't, and it was. *See also McDonald v. State*, 816 So.2d 1032 (Ct.App.Miss. 2002).

Wilkins complains largely about testimonial inconsistencies, contradictions, and an allegedly faulty recollection of the victim. The same argument was made and rejected in *Collier v. State*, 711 So.2d 458, 462 (Miss. 1998), where we find the following:

“We are asked to reverse this case on the grounds that there are inconsistencies and contradictions in her testimony. If this be true, it would still be a question for the jury.” *Blade*, 240 Miss. at 188, 126 So.2d at 280; *e.g. Allman*, 571 So.2d at 253. In the instant case, any inconsistencies found in C.H.'s testimony go [to] the weight and credibility of her testimony, clearly a jury question. In addition, C.H.'s testimony was not at all inconsistent on the issue at the heart of this matter - Collier's fondling of her. This contention is without merit.

It is well settled that “[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity.” *Jones v. State*, 381 So.2d 983, 989 (Miss. 1990). *See also Blocker v. State*, 809 So.2d 640, 644-45 (Miss. 2002); *Hill v. State*, 199 Miss. 254, 24 So.2d 737 (1946).

ARGUMENT

ACCEPTING AS TRUE THE TESTIMONY OF THE WITNESSES FOR THE STATE, INCLUDING THE VICTIM, TOGETHER WITH ALL REASONABLE INFERENCES TO BE DRAWN THEREFROM, THERE WAS EVIDENCE OF SUFFICIENT WEIGHT AND CHARACTER TO PROVE THE OFFENSE OF SEXUAL BATTERY BEYOND A REASONABLE DOUBT.

This is a case of sexual battery involving lingual and genital penetration.

Wilkins, who did not testify, suggests the sex was consensual.

“Lack of consent is an essential fact necessary to constitute the crime of sexual battery.”

Peterson v. State, 671 So.2d 647, 655 (Miss. 1996), reh denied.

The victim’s testimony and actions, and inferences drawn therefrom, if true and if believed, were sufficient to convince a reasonable and fairminded juror the acts were both forceful and unwanted, e.g., “[h]e made me put my mouth on his private part.” (Testimony of victim at R. 102)

“[F]orce or violence are elements that a jury [can] consider in determining whether the victim [of an alleged sexual battery has] consented to the act.” **Sanders v. State**, 586 So.2d 792, 796 (Miss. 1991).

Who other than the jury could resolve this pivotal issue?

Wilkins first complains that the testimony of Marquita Brooks was “substantially impeached” and, when viewed as a whole, “simply incredible.” (Brief of the Appellant at 5) In this posture, says Wilkins, the evidence, even when viewed in a light most favorable to the State, was insufficient to sustain a conviction for aggravated assault.

Wilkins cites the correct standard of review but reaches the wrong conclusion.

Pointing to various inconsistencies such as whether or not Wilkins told Brooks he loved her

(Brief of the Appellant at 6), Wilkins claims the testimony and evidence was insufficient to support a guilty verdict because the victim's testimony was "substantially impeached." (Brief of the Appellant at 5)

Wilkins, we think, majors on the minors.

First, for whatever reason, Brooks did not see the man she knew as Gus Wilkins sitting in the courtroom at the time she testified. (R. 95) Perhaps Marquita's eyesight was poor. Maybe Wilkins had changed his appearance or turned his head or covered his face. We shall never know. Brooks had been introduced to Wilkins for the first time only the week before the incident (R. 94-95, 205-06), and the sexual activity took place late at night inside the darkness of an abandoned house. A reasonable and fairminded juror could have found that Brooks never got a good look at Wilkins. In addition, over a year separated the date of the offense in July of 2006 from the date of trial in September of 2007. In the meantime, Brooks had moved to Indiana. Given these facts and circumstances her inability to make a courtroom identification of Wilkins as her tormentor is not altogether surprising.

In any event, no matter.

Identity is a nonissue in this case. A DNA stipulation was proof beyond a reasonable doubt that Wilkins was the source of the semen found inside Brooks's vagina. (*See* state's exhibit 6)

Second, although Brooks never testified directly the sexual acts were forceful, unwanted, and committed without her consent, the facts and circumstances surrounding her encounter with Wilkins are sufficient to lead a reasonable and fairminded juror that the penetration of her mouth and private parts was neither consensual nor welcome.

Facts and circumstances leading a reasonable and fairminded juror to this conclusion are proffered as follows:

(1) The difference in age and size of the defendant and his victim. Wilkins was 37 years old while Brooks was only 16. Wilkins was 6'1" tall and weighed 180 pounds while Brooks was 5'2" and 137 pounds. Brooks testified she was scared and made no immediate outcry because Wilkins was a bigger person and had threatened to "snap her neck."

(2) Marquita Brooks reported the incident to her cousin, Demetrius Palmer, immediately after she arrived at the apartment. A reasonable and fairminded juror could have concluded that if the acts had been consensual Marquita would have kept silent and forever held her peace.

(3) Marquita immediately removed her clothing and bathed "[b]ecause [she] felt dirty." (R. 105)

(4) Marquita threw her clothing into the trash because she did not want it any more. (R. 105)

(5) Marquita "wasn't her normal self" when she spoke with Demetrius Palmer immediately after the incident. (R. 133-34) While telling Palmer about the assault and identifying her tormentor, Brooks was crying, and Palmer could barely understand her. (R. 135) It was obvious to Palmer from the get-go something was wrong with Marquita Brooks. (R. 134)

(6) Marquita shared with nurse Riley the sequence of events including the identity of Mr. Wilkins, her attacker, and his admonition to her that she keep quiet or he would "snap her neck." (R. 140) This was consistent with Marquita's testimony at trial.

(7) According to Riley, Marquita "... was anxious and a little bit nervous to be there." (R. 139)

(8) Of great evidentiary significance is the fact that Wilkins never claimed the sex was consensual. Rather, he claimed there was no sex at all.

Detective Moore testified that Wilkins told him during the booking process he did not have sexual intercourse with Marquita Brooks. This testimony would certainly convince a reasonable

and fairminded juror that any suggestion during trial the acts were consensual was grasping at the proverbial straw. Wilkins, in effect, was suggesting to the jury, "I didn't do it, but even if I did, it was with her consent."

(9) Also significant is the absence of any direct testimony that Marquita consented to the acts. Wilkins, whose semen was found inside Marquita's vagina, did not testify.

(10) While talking with Wilkins's mother after the incident Marquita kept her head down and "... never looked at me when she was talking." (R. 206) It was the equivalent of saying, "I trusted Gus because I trusted you. Shame on your son."

(11) The absence of abrasions on Marquita's back resulting from broken glass on the floor of the abandoned house can be explained by the size of the pieces which, according to Marquita, were smaller than her fingernails. (R. 101)

(12) A reasonable, fairminded juror could have accepted Marquita's explanation that she declined to give a statement to Detective Alexander because Alexander treated her like she was a criminal and implied that Wilkins had paid her money in exchange for sex. (R.126, 129-30)

(13) Finally, Wilkins's heavy hand on Marquita's neck and his threat to essentially "snap, crackle, and pop" her neck if she made any noise was evidence of a lack of consent to unwanted intercourse. (R. 128-29)

Q. [BY PROSECUTOR ALLGOOD:] When that man put his hand around your neck and he told you if you said anything he would snap your neck, how did you feel?

* * * * *

A. [BY BROOKS:] I felt scared because he's way bigger than me.

Q. And when he did that, and you were walking down the street, what were you thinking? Tell the ladies and gentlemen of the

jury what you were thinking.

A. If I - - I was thinking if I did say anything or if I made any noises that he probably would snap my neck. And then no one would be able to find me. So, therefore, I didn't make any noises. (R. 128-29)

The victim's silence in the wake of the threat to "snap" her neck was quite probative with respect to finding a lack of consent. A reasonable and fairminded juror could have found Brooks, out of fear, would not have told Wilkins to stop the assault under these circumstances.

Our retort to Wilkins's claims that inconsistencies and contradictions are fatal to the verdict is found in **Collier v. State**, *supra*, 711 So.2d 458, 462 (Miss. 1998), where the same argument was made and rejected. That language is worth repeating here.

"We are asked to reverse this case on the grounds that there are inconsistencies and contradictions in her testimony. If this be true, it would still be a question for the jury." *Blade*, 240 Miss. at 188, 126 So.2d at 280; *e.g. Allman*, 571 So.2d at 253. In the instant case, any inconsistencies found in C.H.'s testimony go [to] the weight and credibility of her testimony, clearly a jury question. In addition, C.H.'s testimony was not at all inconsistent on the issue at the heart of this matter - Collier's fondling of her. This contention is without merit.

Lest we forget, "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." **Jones v. State**, *supra*, 381 So.2d 983, 989 (Miss. 1990). *See also Blocker v. State*, *supra*, 809 So.2d 640, 644-45 (Miss. 2002); **Hill v. State**, *supra*, 199 Miss. 254, 24 So.2d 737 (1946), and **Collier v. State**, *supra*, 711 So.2d 458, 462-63 (Miss.1998) [Any inconsistencies and contradictions found in testimony of child witness went to "... the weight and credibility of her testimony, clearly a jury question."].

In **Ivy v. State**, 949 So.2d 748, 753 (Miss. 2007), an appeal from convictions of fondling and

sexual battery, the Supreme Court penned the following language applicable to the case at bar:

Ivy argues there were inconsistencies between A.B.'s statements made to law enforcement officials and her testimony at trial. Ivy states that no exhibits were introduced at trial to prove his guilt. Ivy argues that there were inconsistencies regarding the time that the alleged conduct occurred. The jury heard testimony from A.B. and the defendant, Ivy, as to the allegations. The jury also heard from A.B.'s mother, C.D. The defense had the opportunity to cross-examine A.B. as to any discrepancies in her statements and testimony.

Despite any discrepancies in the witnesses' testimony, the jury was left with the responsibility to weigh the credibility of these witnesses' testimony at trial. As this Court has repeatedly held, the jury is the final arbiter of a witness's credibility. **Morgan v. State**, 681 So.2d 82, 93 (Miss. 1996); *see also* **Spicer v. State**, 921 So.2d 292, 312 (Miss. 2006). In **Spicer v. State**, 921 So.2d at 311 (quoting **Franklin v. State**, 676 So.2d 287, 288 (Miss. 1996), this Court stated:

Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. [This Court] may 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.

Considering the evidence in the light most favorable to the State, there was sufficient evidence to convict Ivy of sexual battery and fondling. Accordingly, we find that the trial court did not err in denying Ivy's motion for J.N.O.V.

It's as simple as Ivy's "A.B.C.D.," *supra*. "Impeachment value" is a question for the jury and not for a trial judge called upon during trial to address the matter of legal evidentiary sufficiency.

Considering all the evidence in the light most favorable to the State's theory of the case, we respectfully submit there was sufficient evidence to support a conviction for sexual battery. **Bush v. State**, 895 So.2d 836, 843 (Miss. 2005);

Wilkins also contends “the verdict of the jury is against the overwhelming weight of the evidence.” (Brief of the Appellant at 7-8)

The gist of his complaint, once again, is that “. . . the element of lack of consent is lacking from the proof . . .” (Brief of the Appellant at 7) According to Wilkins, “[t]he weight of evidence supports consent.” (Brief of the Appellant at 7)

We think not. Had there been consensual intercourse Wilkins would have informed Detective Moore rather than denying intercourse with Brooks altogether.

Wilkins also states the following:

“If an inaccurate identification rises to the level needed to reverse, the facts of this case, including a total lack of recognition of the defendant in the courtroom, necessitates reversal.” (Brief of the Appellant at 8)

We need not re-plow the ground already plowed. It is enough the jury heard the testimony from all of the State’s witnesses, including the defendant’s cross-examination of those witnesses. Wilkins exercised his right not to testify in this cause, and the jury was instructed it was to draw no adverse inference from this state of affairs. (C.P. at 40)

It has been said, however, the testimony by the State's witnesses may be given “full effect” by the jury where, as here, an accused does not take the witness stand. **Reeves v. State**, 159 Miss. 498, 132 So. 331 (1931). Stated differently, “[t]he prohibition against adverse comment and inference does not protect a criminal defendant from the probative force of the evidence against him.” **Tuttle v. State**, 174 So.2d 345 (Miss. 1965).

This is especially true here where there is no testimony in the record the sexual acts were consensual.

In **Rush v. State**, 301 So.2d 297, 300 (Miss. 1974), we find these words applicable to this

observation.

While it is the right and privilege of a defendant to refrain from taking the witness stand, and no presumption is to be indulged against him for exercising that right, still the testimony of the witnesses against him may be given full effect by the jury, and the jury is likely to do so where it is undisputed and the defendant has refused to explain or deny the accusation against him. *Reeves v. State*, 159 Miss. 498, 132 So. 331 (1931). * * * * *

See also Grant v. State, 762 So.2d 800, 804 (Ct.App.Ms. 2000) ["We note that Grant presented no evidence which leaves the jury free to give full effect to the testimony of the State's witnesses. *Benson v. State*, 551 So.2d 188, 193 (Miss. 1989)."]

Our position on this issue can be summarized in only three (3) words: "classic jury issue." Was Brooks being truthful when she testified that Wilkins made her put her mouth on his private part? Reasonable and fairminded jurors who had the opportunity to observe the victim's demeanor and hear the tone and inflection of her voice could have found Wilkins guilty of sexual battery,

Of course, "[i]n any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." *Rainer v. State*, 473 So.2d 172, 173 (Miss. 1985).

The law applicable to the disposition of this issue is stated in *Kelly v. State*, 910 So.2d 535, 540 (Miss. 2005), as follows:

We have routinely held that the jury is the judge of credibility. *Schuck v. State*, 865 So.2d 1111, 1124 (Miss. 2003); *Harris v. State*, 527 So.2d 647, 649 (Miss. 1988). This court will not set aside a guilty verdict, absent other error, unless it is clearly a result of prejudice, bias, fraud, or is manifestly against the weight of credible evidence. *Drake v. State*, 800 So.2d 508, 517 (Miss. 2001) (citing *Maiben v. State*,

405 So.2d 87, 88 (Miss. 1981). Further, it is within the sound discretion of the jury to accept or reject the testimony of a witness, and the jury “may give considerations to all inferences flowing from the testimony.” *Mangum v. State*, 762 So.2d 337, 342 (Miss. 2000) (quoting *Grooms v. State*, 357 So.2d 292, 295 (Miss. 1978)).

“[T]he scope of review on this issue is limited in that all evidence must be construed, i.e., “weighed,” in the light most favorable to the verdict.” *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997), citing *Mitchell v. State*, 572 So.2d 865, 867 (Miss. 1990). *See also Bush v. State*, *supra*, 895 So.2d 836, 844 (Miss. 2005), citing *Herring v. State*, *supra*.

Contrary to Wilkins’s position, this is not a case where the evidence preponderates heavily against the verdict, or where allowing the verdict to stand would sanction or amount to an unconscionable injustice.

In *Maiben v. State*, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

... we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in *Groseclose v. State*, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [*Maiben v. State*, *supra*, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to

sanction an unconscionable injustice. **Groseclose v. State**, *supra*, 440 So.2d 297, 300 (Miss.

Contrary to Wilkins's position, the case at bar does not exist in this posture.

We respectfully submit, for the reasons stated, the evidence was sufficient to demonstrate a lack of consent to unwanted and forceful sexual intercourse. Nor was the verdict of the jury against the overwhelming weight of the evidence. Accordingly, the trial court did not abuse its judicial discretion in overruling Wilkins's motion for a new trial.

CONCLUSION

Wilkins, who was well represented by competent and effective trial and appellate counsel, presents a legitimate complaint based largely upon weight and credibility. Both, of course, are jury issues.

Appellee respectfully submits that no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction for sexual battery, together with the twenty (20) year sentence imposed in its wake, should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

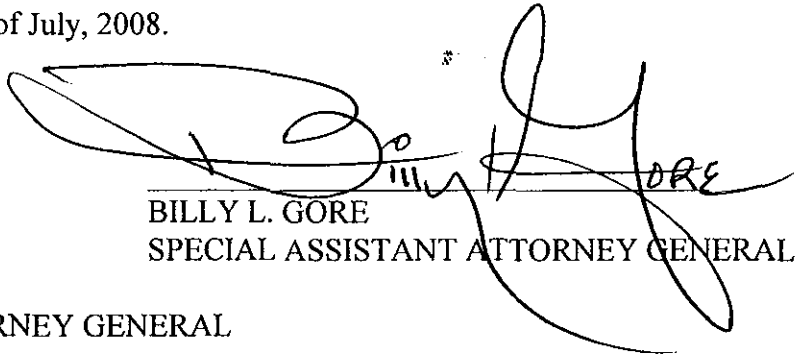
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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