IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BENITO JO RUIZ, JR. — APPELLANT

VS. — NO. 2007-KA-2168

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On May 29, 2007, the Grand Jury of Coahoma County returned a True Bill against Benito Jo Ruiz, Jr. "that he did unlawfully, wilfully, feloniously and without authority of law, engage in sexual penetration with [G.W.], a child under the age of (14) fourteen, when he, the said Benito Jo Ruiz, Jr., was (40) forty years old." (C.P. 2) Ruiz was tried on August 15, 2007, and was found guilty of the crime of sexual battery. (C.P. 7) The Sentencing Judgment was filed on or about November 1, 2007, sentencing Ruiz to a term of twenty-five (25) years under the supervision and control of the Mississippi Department of Corrections. (C.P. 9) On or about November 8, 2007, Ruiz filed his Motion for Judgement Notwithstanding the Verdict or in the Alternative for New Trial. The Trial Court denied the Motion on November 16, 2007. On Novemver 29, 2007, Ruiz filed his Notice of Appeal.

STATEMENT OF THE FACTS

Jan Harbin testified that had know Benito Ruiz since 2001 and that she was his girlfriend at that time. She testified that on April 19, 2006, Ruiz called her at home and told her that he had something private to talk to her about that he could not talk about over the phone. He asked Harbin to come out to his house. When Harbin arrived at Ruiz' house he told her that he had done something and that she was going to hate him for it. He told Harbin that he had touched a little girl in a way he wasn't supposed to but denied that he had raped her. Harbin told Ruiz that they needed to call the sheriff's department, and she then made the call. Harbin stayed at Ruiz' house until officers arrived. Ruiz began to give the officers his statement, but they told him to stop. The officer's took Ruiz down town to the sheriff's department. Harbin followed and gave

her statement to the officers. Harbin testified that the officers Doss and Bee came to Ruiz' home. The officers did advise Ruiz of his rights.

Deputy Sheriff Chris Doss testified that on April 19, 2009, he received a call in reference to Ruiz when he was dispatched in reference to a child fondling. Ruiz told Doss that he wanted to turn himself in because he had been touching an eight year old girl. Doss stopped him and read him his Miranda rights. Investigator Bee arrived on the scene and they took Ruiz into custody. They took Ruiz and asked Ms. Harbin to come to the Coahoma County Sheriff's Office to give a statement. Doss testified that he took Ms. Harbin's statement and was present for Ruiz' questioning. Doss testfied that when he went to the home, Ruiz stated that he touched the child on the outside of her panties. However, when Ruiz gave his statement at the sheriff's office, he stated that the little girl was bent over the couch and he took his penis and rubbed it on her vagina. Doss testified that Ruiz did not appear to be under any kind of duress when he gave that statement .

Fernando Bee, and investigator with the Coahoma County Sheriff's Office testified that he was called to assist Doss at Ruiz' residence. He received a call about a rape and asked Doss to transport Ruiz to the sheriff's office, so that he could go assist Deputy Gwin Muskin with a situation where a young lady had been raped.

Bee then went to meet Muskin. Muskin had responded to a call that a young lady, G.W., had been raped. When Bee arrived he discovered that G.W., age 8, was the girl that Ruiz had admitted to molesting. Bee then went to the sheriff's office to talk with Ruiz. Bee advised Ruiz of his rights and then interrogated him.

Ruiz told Bee that he had gone to Geneva's (G.W.'s grandmother) house to drink some

beer . Ruiz' cousin Sylvia was also there. The two women wanted to go somewhere and needed a babysitter for the girl, G.W. Ruiz told Geneva and Sylvia that he would watch G.W. Ruiz stated that he then took G.W. to his house. Ruiz stated that his father was there and that he sat outside with his dad and drank a couple of beers. Ruiz stated that he sat on the love seat with the child and put his hands down on her private parts on the outside of her pants. He stated that he did this for a while and then got another beer. He stated that he asked the girl to bend over the arm of the love seat and he took his penis out and rubbed it against her – against the back of her down by her private area. He stated that he told the girl not to tell anyone what happened. Ruiz further stated that he sent the girl to his bed room and told her to lock the door. In his statement to Doss, Ruiz said that he never put his penis in the girl and did not ejaculate when he rubbed her with his penis. Bee testified that he set up a forensic interview for G.W. with the crisis center in Oxford.

G.W. testified that she stayed overnight at Ruiz house and that while she was there that night, she slept in Ruiz' bedroom. She testified that she did not have clothes on when she went to bed. G.W. also testified that Ruiz came into the bedroom and that he was undressed. She testified that he got on top of her and "hunch" her. She testified that he got on top of her and put his private part in hers. G.W. testified that it hurt and that it lasted a long time. She testified that she went to sleep after that happened. She G.W. testified that she told her grandmother what happened as soon as she got home.

G.W. testified that Ruiz got her to bend over the arm of the sofa before she went to bed, and that he "hunched" her there. She testified that he touched her while they sat on the love seat, but that he did not touch her private parts.

Patricia White testified that she is a Family Nurse Practitioner and a Certified Nurse Mid-Wife. She testified that on April 21, 2006, she saw G.W., age 8 at the clinic in the Aaron Henry Community Health Center. White testified that G.W.'s grandmother brought her in for an examination and said that someone had touched G.W. between her legs. White examined G.W. and noted breaks in the tissue around where the urine comes and break in in the hymen at 7:00 and 9:00. White testified that the hymen should be in tact in children unless there's some type of trauma. White testified that the results of her examination were consistent with what she had been told.

Geneva Moses testified that she is G.W.'s grandmother. Ruiz came to her home one morning and asked G.W. to go to the store with him. G.W. said "No," and put her head down. Moses asked her what was wrong. G.W. told Moses what had happened and Moses confronted Ruiz. Ruiz stated that he might have done something like that. Ruiz left and Moses called the sheriff's office. Moses testified that she then spoke with Officer Bee. She testified that she had know Ruiz for some years and that he was about 41 or 42 years old. (Tr. 112)

SUMMARY OF THE ARGUMENT

Looking at the evidence in the instant case in the light most favorable to the State, the testimony and evidence proved that Ruiz penetrated G. W. and committed sexual battery. Two incidents of sexual battery are clearly stated in the testimony. The evidence is therefore clearly sufficient to support Ruiz's conviction. Either of these incidents is alone sufficient to support Ruiz' conviction for sexual battery. This issue is without merit and the trial court's denial of Ruiz' Motion for JNOV or in the Alternative for a New Trial should be affirmed.

The evidence is sufficient to support the verdict and the verdict is supported by the overwhelming weight of the evidence; therefore, the trial court correctly denied Ruiz's Motion for a Judgment Notwithstanding the Verdict or for a New Trial. The verdict against Ruiz is supported by the overwhelming weight of the evidence.

ARGUMENT

PROPOSITION ONE The evidence is sufficient to support the verdict and the verdict is supported by the overwhelming weight of the evidence; therefore, the trial court correctly denied Ruiz's Motion for a Judgment Notwithstanding the Verdict or for a New Trial.

An appellant who challenges the sufficiency of the evidence supporting a jury verdict faces a formidable standard of review. The Mississippi Supreme Court has held that the standard of review for overruling a motion for JNOV based on the sufficiency of the evidence is as follows:

> A motion for JNOV challenges the legal sufficiency of the evidence. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993). A reviewing court must consider as true all credible evidence consistent with the defendant's guilt, and the State must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Id. The trial court will not set aside a verdict unless the verdict would constitute an "unconscionable injustice." *Groseclose v. State*, 440 So.2d 297, 300 (Miss.1983). *Stone v. State*, 867 So.2d 1032 (Miss. App. 2003).

Review of a motion for a directed verdict or judgment notwithstanding the verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So.2d 836, 843 (Miss.2005). The court must ask whether the evidence, taken in the light most favorable to the verdict, shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such

circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." Id. at 843 (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). In testing the sufficiency of the evidence, the reviewing court must take the evidence in the light most favorable to the verdict. The question then becomes whether a rational trier of fact, given the evidence regarded in the light most favorable to the verdict, could have found all the elements beyond a reasonable doubt. *Bush*, 895 So.2d at 844 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

G.W. testified that Ruiz penetrated her while she lay in his bed. She further testified that Ruiz "hunched" her over the arm of the sofa. She testified that Further, while Ruiz did not admit to penetrating G.W. while she lay in his bed, he did admit to rubbing his penis against her private parts while she was bent over the arm of the sofa. Nurse Practitioner Patricia White found tears in G.W.'s hymen which were consistent with those facts. White testified that there should be no tears in the hymen of a child unless there had been some sort of trauma.

Precedent in this jurisdiction hold that the unsupported word of the victim of a sex crime if sufficient for conviction unless it is substantially contradicted by other credible testimony or physical facts. *McKnight v. State*, 738 So.2d 312 (Miss.Ct.App. 1999). In *Otis v. State*, 418 So.2d 65,67 (Miss. 1982), the court found that the word of a fifteen year old retarded girl who was raped was sufficient for conviction where there was no physical evidence. *Id.* In *Christian v. State*, 456 So.2d 729 (Miss. 1984), the court affirmed a conviction where there was no evidence of a weapon or a sign of external injury. *Id.* The word of the prosecutrix was sufficient to prove guilt. *Id.*

Further, it is well establish that the credibility of witnesses is a matter for the jury, and

clearly the jury found G.W. to be credible when she testified that Ruiz put his private part inside her private part while she was on the bed in his bedroom. *Billiot v. State*, 454 So.2d 445, 463 (Miss. 1984).

In *Wilson v. State*, 606 So.2d 598, 599 (Miss. 1992), the court held that the State must prove that there was "some" penetration. Also, the court in *Jackson v. State*, held that only "slight" penetration was needed for conviction. G.W.'s testimony that Ruiz "hunched" her while she was bent over the sofa arm taken together with Ruiz statement that he rubbed his penis on her private parts in that way is sufficient to show penetration. While it appears from the testimony that at that time G.W. still had on her panties, the testimony is sufficient to show penetration. The slightest penetration of the labia, even with an object is sufficient to show penetration for the purposes of proving sexual battery. Panties are not a shield of armor and it is certainly within the jury's right to make inferences to conclude that a degree of penetration took place when Ruiz rubbed his penis against her private parts while G.W. was bent over the arm of the sofa. It is entirely possible for the jury to infer that tears in G.W.'s hymen and between her labia occurred in this manner.

Ruiz argues that G.W.'s hymen would have healed within the two weeks between the incident and the examination by the nurse practitioner. However, the nurse practitioner clearly testified that her findings were consistent with the information given to her prior to the examination. There is no testimony that even if healing had occurred that telltale signs of the penetration would not have still been present.

Looking at the evidence in the instant case in the light most favorable to the State, the testimony and evidence proved that Ruiz penetrated G. W. and committed sexual battery. The

evidence is therefore clearly sufficient to support Ruiz's conviction. Either of these incidents is alone sufficient to support Ruiz' conviction for sexual battery. This issue is without merit and the trial court's denial of Ruiz' Motion for JNOV or in the Alternative for a New Trial should be affirmed.

PROPOSITION TWO The verdict against Ruiz is supported by the overwhelming weight of the evidence.

In reviewing a motion for a new trial, the question is whether the jury verdict is against the overwhelming weight of the evidence. *Montana v. State*, 822 So.2d 954, 967-68 (Miss .2002) (citing *Dudley v. State*, 719 So.2d 180, 182 (Miss.1998)). This court must accept as true any evidence supporting the verdict, and we may only reverse if the trial court abused its discretion in failing to grant a new trial. *Montana*, 822 So.2d at 967-68. However, a verdict that is so contrary to the overwhelming weight of the evidence that it creates an unconscionable injustice warrants reversal. *Id.*

G.W. testified to two incidents where penetration was clear. The first, was the incident in Ruiz' bedroom, and G.W. clearly testified that Ruiz put his private part inside her private part. This is penetration. There is no doubt about it. G.W.'s testimony is further supported by the testimony of the nurse practitioner who testified that G.W.'s hymen and other tissue between her labia was torn. In the second incident G.W. testified that Ruiz "hunched" her over the arm of the sofa. Ruiz admitted this incident in his second conversation with officers Bee and Doss. Although his statement suggests that G.W. was still wearing her panties, "he took out his penis and rubbed it against her down by her private area." The slightest penetration is sufficient for proof of sexual battery. As noted earlier, panties are not armor and cannot protect from

penetration sufficient to support a conviction for sexual battery. The jury is entitled to make reasonable inferences from the evidence and to infer that penetration occurred when Ruis rubbed his penis against her private parts is certainly reasonable. Further, this is supported by the testimony of the nurse practitioner who found tears in G.W.'s hymen and between the labia.

This issue is without merit and the verdict of the jury and the decision of the trial court should be affirmed.

CONCLUSION

The evidence and facts in this case, with all favorable inferences which can be reasonably drawn from that evidence, are sufficient to support Ruiz's conviction for sexual battery. The State respectfully submits that arguments Ruiz's arguments are without merit. Accordingly, the trial court's judgment entered against Ruiz should be affirmed.

Respectfully submitted,

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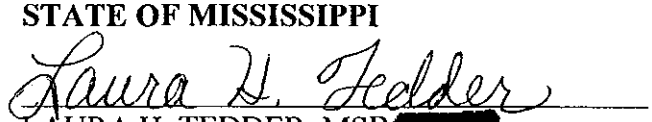

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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