IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BENITO JO RUIZ, JR. — APPELLANT

V. — NO. 2007-KA-2168-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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BENITO JO RUIZ, JR.	**APPELLANT**
V.	**NO. 2007-KA-2168-COA**
STATE OF MISSISSIPPI	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Benito Jo Ruiz, Jr., Appellant
3. Honorable Laurence Y. Mellen and the Coahoma County District Attorney's Office.
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 11th day of July, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

LESLIE S. LEE
COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgment of conviction for the crime of sexual battery against the appellant, Benito Jo Ruiz, Jr. Tr. 147, C.P. 7-8, R.E. 11-12. Ruiz was subsequently sentenced to serve twenty-five (25) years in the custody of the Mississippi Department of Corrections. Tr. 151, C.P. 9-11, R.E. 13-15. This sentence followed a jury trial on August 15, 2007, with sentencing on October 30, 2007, Honorable Albert B. Smith, III, Circuit Judge, presiding. Ruiz is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the trial testimony, G.W.[1], testified that Benito Ruiz "hunch me" while she spent the night at his house. Tr. 96. Although G.W. did not testify to a time frame, Jan Harbin, Ruiz's girlfriend at the time, testified that on April 19, 2006 she received a call from Ruiz asking her to come over to speak about a private matter. Tr. 54-55. When she arrived, he put his hand on the Bible and said that he touched a little girl in a way he was not supposed to, but that he did not rape her. Harbin told him they needed to call the sheriff's

[1]The victim's name appears throughout the record, but will be referred to by her initials (G.W.) in this brief. She was nine years old at the time of trial. Tr. 94.

department. Harbin stayed until deputies arrived. She accompanied them to the sheriff's department and gave officers a statement. Tr. 55-56.

Ruiz told Deputy Chris Doss that he wanted to turn himself in for touching an eight year old girl. Tr. 59-60. He told Doss that he touched the girl on the outside of her pants. Tr. 63. Ruiz was taken into custody. Tr. 60. Investigator Fernando Bee did not interview Ruiz at his house, as he received a call to investigate another call regarding a young lady who was raped. Tr. 70. It turned out the call he responded to involved G.W. Tr. 72. Investigator Bee determined the two cases were connected and returned to talk to Ruiz. Tr. 73.

In Ruiz's statement, he admitted that he was drinking beer at G.M.'s[2] house, G.W.'s grandmother. He was drinking with G.M. and his cousin Sylvia. They mentioned they need to go somewhere but needed a babysitter for G.W. Ruiz volunteered to keep her. Ruiz then took G.W. to his house and drank more beer with his father, Benito Ruiz, Sr. After taking a bath, Ruiz was sitting on the love seat with G.W. when he put his hands down on her "private on the outside of her pants." Ruiz asked G.W. if he was hurting her and she responded that he was not. Ruiz then stated he had G.W. 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." Ruiz then told her not to tell anybody what he did and he said he was sorry. He told her to go bed and lock the door because he did not have a key to get in there. He then went outside and drank another beer and cried. Ruiz stated that he never put his penis

[2] The initials G.M. will also be used to refer to G.W.'s grandmother to further protect the identity of the parties. Tr. 72.

in her and he did not ejaculate when he rubbed her with his penis. Tr. 78-79, Ex. S-2.

G.M. testified that in April of 2006, Ruiz came to her house and asked G.W. if she wanted to go to the store with him. Tr. 110-11. G.W. declined and put her head down. G.M. asked G.W. what was wrong and G.W. told her what happened with Ruiz. G.M. confronted Ruiz, and he stated that he might have had done something like that. G.M. then called law enforcement. Tr. 111.

Patricia White, a family nurse practitioner and mid-wife, testified that G.M. brought in G.W. on April 21, 2006. Her records indicated that G.M. wanted to have G.W. examined because "someone had touched her between her legs." Tr. 104-05. During her examination, White observed breaks in the tissue, and found breaks in G.W.'s hymen. Tr. 106. White found no acid phosphatase present in G.W.'s during the examination. G.M. told White that the touching occurred two weeks prior to April 21, 2006. White agreed that one would expect injuries such as this to heal within less than two weeks. Tr. 108. Additionally, Officer Bee testified that G.W. was taken to a crisis center in Oxford for a forensic interview. Tr. 83. No forensic expert was called by the State. No hearsay testimony of what the child exactly said happened to her was presented by the grandmother, deputies, the nurse practitioner, or the forensic expert.

SUMMARY OF THE ARGUMENT

Ruiz was charged by indictment with sexual battery, in that he did "engage in sexual penetration" with G.W. The indictment did not allege the specifics of the penetration, nor did G.W. give any details of the penetration, only responding to leading questions and stating

that Ruiz "hunch me." She never stated exactly what happened to her, nor was there any hearsay statements admitted by those she spoke with after the incident. The evidence is insufficient to support a verdict of sexual battery. The evidence clearly shows an unlawful touching occurred, but no penetration. Even the nurse practitioner could not specify how the trauma to G.W.'s hymen occurred. The verdict was also was clearly against the overwhelming weight of the evidence. The evidence failed to establish beyond a reasonable doubt that Ruiz sexually penetrated G.W. G.W. was not examined immediately, but at least two weeks after she reported the incident to her grandmother. Any trauma Ruiz would have caused by his touching would have healed prior to the examination.

ARGUMENT

ISSUE NO. 1: THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

Ruiz raised the issue of sufficiency of the evidence in his motion for a directed verdict and the submission of jury instruction D-1, as well as his Motion for a JNOV. Tr. 113-14. C.P. 12, C.P. 34, R.E. 16. "The Supreme Court will reverse the lower court's denial of a motion for new trial only if, by denying, the court abused its discretion." *Esparaza v. State*, 595 So.2d 418 (Miss. 1992)(citing *Wetz v. State*, 503 So.2d 803, 812 (Miss. 1987); *Crenshaw v. State*, 520 So.2d 131, 135 (Miss. 1988); *Leflore v. State*, 535 So.2d 68, 70 (Miss. 1988); *Neal v. State*, 451 So.2d 743, 760 (Miss. 1984), *cert. denied*, *Neal v. Mississippi*, 469 U.S. 1098 (1984)). "Under this standard, this Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may

be reasonably drawn from the evidence." *Jefferson v. State*, 818 So.2d 1099, 1111 (Miss. 2002)(citing *Coleman v. State*, 697 So.2d 777 (Miss. 1997)). "If the facts so considered point so overwhelming in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render." *Id.* "On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required." *Id.*

Generally, the unimpeached word of a rape victim is sufficient to sustain a conviction of rape. *Grant v. State*, 913 So.2d 316 (¶33) (Miss. 2005). "[W]here a victim's testimony is not so discredited or contradicted by other evidence that it becomes unbelievable, that testimony alone is sufficient to sustain a guilty verdict." *Musgrove v. State*, 866 So.2d 483, 486 (Miss.App. 2003)(citing *Collier v. State*, 711 So.2d 458 (Miss. 1998); *Mabus v. State*, 809 So.2d 728 (Miss.App. 2001); *Riley v. State*, 797 So.2d 285 (Miss.App. 2001).

However, the Mississippi Supreme has stated that such uncorroborated testimony of the prosecutrix should be scrutinized with caution. *Rogers v. State*, 36 So.2d 155, 158 (Miss. 1948)(citing *Monroe v. State*, 13 So. 884, 885 (Miss. 1893)). In the case at bar, the victim either could not or would not give a detailed description of what Ruiz actually did to her. The prosecution never attempted to have her define "hunch."

> Q. Okay. Just tell me, in your own words, what the bad things were that happened. It's okay. Did you sleep in that house?
> A. Yes.
> Q. Did Benito ever come to where you were sleeping?
> A. Yes.

Q. And what room in the house was that?
A. His room.
Q. And were your clothes on when you went to bed?
A. No.
Q. And when you saw Benito, did he have clothes on?
A. No.
Q. And did he come into the room where you were at?
A. Yes.
Q. And did you see him at a time when he was undressed, didn't have any clothes on?
A. Yes.
Q. And when you saw him like that, what did he do?
A. Hunch me.
Q. Say that one more time?
A. Hunch me.
Q. Hunched you. Did he get on top of you?
A. Yes.
Q. And do you know – well, can you stand up for me just a second.
MR. MALLETTE: Judge, could she stand?
THE COURT: If she wants to.
Q. Okay. Can you stand up. Just come right over here.
(Witness leaves stand.)
Q. And right around this thing right here. Just right here at the end. Can you – just step out just a little bit. Can you point to me on your body where the private areas of your body are.
A. Yes, sir.
Q. Show me were they are, what part of your body?
A. Here.
Q. And do you know where the private parts of a man are?
A. Yes.
Q. Where at?
A. Right here.
Q. In the same area?
A. Yes.
MR. MALLETTE: Your Honor, for the record, she's making a hand motion between her legs.
BY MR. MALLETTE: Is that right?
A. Yes.
Q. Okay. You can come back and sit in the chair.
MR. SHACKELFORD: I believe she made the hand motion sideways across the lower part.

MR. MALLETTE: Yes, sir.
(Witness returned to stand.)
BY MR. MALLETTE:
Q. And that night, were you able to see the private parts of Benito? Did you see him undress?
A. Yes.
Q. And did he ever do anything to you with his private part?
A. Yes.
Q. Okay, what did he do?
A. Got on top of me.
Q. Did he put his private part in yours?
A. Yes.
MR. SHACKELFORD: I'm going to object to the – this much leading, your Honor. It's getting a little bit far afield.
MR. MALLETTE: I'll take this --
THE COURT: It is sensitive. I – so we can – we got rules of law, and – Sustained.
BY MR. MALLETTE: Q. When he got on top of you, can you tell me if it hurt or not?
A. Yes.
Q. And did it last very long?
A. Yes.
Q. Did it hurt the whole time?
A. Yes.
Q. And what did he do after he got off of being on top of you?
A. Laid down.
Q. What did you do?
A. Went to sleep.

Tr. 95-99.

As the above testimony indicates, the only time G.W. spoke about penetration was in response to a leading question that was objected to and sustained. There was no testimony that any part of Ruiz's body penetrated any part of G.W.'s body. She testified Ruiz never touched her between her legs on the couch, but then stated Ruiz bent her over the couch and "hunched" her. Tr. 101. It was therefore crucial for the State to define "hunch," especially

if it did not involve any touching between G.W.'s legs. This is reasonable doubt.

G.W. went on to testify that she told her grandmother about what happened the next day, "right then." Tr. 99. She was sure it was the next day. Tr. 102. G.M. testified she notified law enforcement after confronting Ruiz. Tr. 111. Deputies responded on April 19, 2008. Tr. 58. Yet, when G.M. took G.W. to be examined on April 21, 2006, she told the nurse the incident occurred two weeks before. The investigating officer even testified that nobody could actually state when the touching incident actually occurred. Tr. 81. Yet this type of trauma would have healed within two weeks. Tr. 108.

This Court has also held that the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict, however, the victim's testimony must be closely scrutinized, and if it is discredited or contradicted by other credible evidence, then the verdict must be set aside. *Maiden v. State*, 802 So.2d 134, 136 (Miss.App. 2001).

The Mississippi Supreme Court has identified some of the types of corroborating evidence to take into consideration, including a victim's physical and mental condition after the incident, as well as the fact that she immediately reported the rape as corroborating evidence. *Christian v. State*, 456 So.2d 729, 734 (Miss. 1984)(quoting *Brooks v. State*, 242 So.2d 865, 868 (Miss. 1971); *Lang v. State*, 87 So.2d 265, 268 (Miss. 1956).

In the present case, G.W. testified that after the incident, which she testified hurt for a long time, she simply went to sleep. Tr. 99. Her testimony was conflicting on whether or not Ruiz stayed and slept in the same bed with her. Tr. 99, 101, 102. She showed no signs of any emotional trauma, nor was there any testimony concerning any emotional trauma.

Although there was physical evidence of trauma to her hymen, no witness could testify this was caused by sexual penetration or when exactly the trauma occurred. Tr. 106. White stated her examination was consistent with what the victim told her, but the jury was never told exactly what G.W. told White. Tr. 106. White's examination showed no presence of acid phosphatase, which would indicate sexual intercourse. Tr. 107-08. See also *Dycus v. State*, 440 So. 2d 246, 250 (Miss. 1983). The presence of acid phosphatase is corroborating evidence that sexual intercourse has occurred. *Dixon v. State*, 519 So. 2d 1226, 1229 (Miss. 1988); *Hines v. State*, 472 So.2d 386, 388 (Miss. 1985)(acid phosphatase is not normally present in a nine-year-old girl's vagina, but is one of the specific things found in the semen or sperm of a male's ejaculate). This was especially crucial if the incident occurred only three days before she was examined.

Based on the testimony below, as well as Ruiz's free and voluntary admission to unlawful touching, the credibility and reliability of G.W.'s testimony, especially as to the uncertainty of the date of the incident, suggest grave doubts as to Ruiz's guilt to sexual battery. In *Friley v. State*, 879 So.2d 1031, 1035 (Miss. 2004), the Mississippi Supreme Court reiterated the definition of sexual penetration for purposes of Miss. Code Ann. § 97-3-97. There, the Court stated, "For purposes of this statute, 'sexual penetration' was, and continues to be, defined as 'any penetration of the genital or anal openings of another person's body by any part of a person's body...'" *Friley*, 879 So.2d at (¶14).

Even considering the State's case in the best light, there was absolutely no testimony that Ruiz touched the genital or anal openings of G.W.'s body. Indeed, the evidence the jury

heard regarding the location of the touching by Ruiz was simply G.W.'s wave around the lower part of her body. Tr. 97-98. The trauma apparently found in her hymen could not be linked to Ruiz. The State's case failed to prove the penetration, which is a required element of Miss. Code Ann. §97-3-95. See *Thompson v. State*, 468 So.2d 852, 853 (Miss. 1985)(penetration is the very essence of the crime of sexual battery).

It goes without saying that the State's failure to prove the required element of penetration was fatal to its case. For a conviction to stand, the State must prove each element of the offense. *Neal v. State*, 451 So.2d 743, 757 (Miss. 1984). Due Process requires that the State prove each element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). See also *Carlson v. State*, 597 So.2d 657, 659 (Miss 1992). "[T]here must be in the record evidence sufficient to establish each element of the crime." *Washington v. State*, 645 So. 2d 915, 918 (Miss. 1994)(citing *Fisher v. State*, 481 So.2d 203, 211 (Miss. 1985).

Again it is crucial to note that G.W. testified she told her grandmother about the incident immediately after it happened. Tr. 99. However, the record indicates it was only after she saw Ruiz sometime later that she told G.M. about the incident. Tr. 110-11. In *Bishop v. State*, 370 So.2d 238, 239 (Miss. 1979), the defendant allegedly raped the victim multiple times. However, when another person came into the room, she never complained to the witness that Bishop had raped her. The Supreme Court reversed and rendered Bishop's conviction, noting , "According to the doctor who examined her following the rape, no sperm was found, no bruises were found except a reddening around the vagina which the

doctor stated could be attributed to a number of things, including sexual intercourse." *Id.* The Court held that the "evidence not only fails to satisfy the mind of the guilt of the accused but suggest grave doubt of it." *Id.*

The evidence in the case at bar is similar. The evidence submitted in the record below is simply insufficient to sustain a conviction of sexual battery. Under the direct remand rule, this case should be returned to Coahoma County for sentencing on fondling. See *Jefferson v. State*, 977 So.2d 431 (¶17-18) (Miss.App. 2008); *Hill v. State*, 929 So.2d 338 (¶10) (Miss. App. 2005); *Clayton v. State*, 759 So.2d 1169 (¶14)(Miss. 1999).

ISSUE NO. 2: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Ruiz also contends the verdict was against the overwhelming weight of the evidence. This issue was raised in trial counsel's motion for a new trial. C.P. 12. R.E. 16. "In determining whether a jury verdict is against the overwhelming weight of the evidence, this 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." *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). "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." *Id.* See also *Benson v. State*, 551 So.2d 188, 193 (Miss. 1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss. 1987).

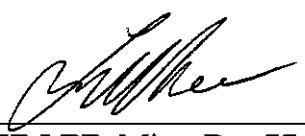
Even conceding for the sake of argument that the evidence was sufficient to submit

the case to the jury on sexual battery, the verdict was clearly against the overwhelming weight of the evidence. No reasonable juror could have found penetration beyond a reasonable doubt. G.W. failed to state she was penetrated and no other witness testified G.W. stated she was penetrated. Most importantly, the nurse only stated her physical examination was consistent with what G.W. told her. However, we are in the dark about what exactly G.W. said to her or to the forensic interviewer. To sentence a man to twenty-five years in prison on such evidence would certainly sanction an unconscionable injustice.

CONCLUSION

The jury in the case found Ruiz guilty of one of the most heinous crimes imaginable based purely on speculation, suspicion. and probable intense dislike of the appellant given his admission to fondling an eight year old girl. Given the evidence presented in the trial below, and the propositions cited and briefed above, together with any plain error noticed by the Court which has not been specifically raised, Benito Jo Ruiz, Jr. is entitled to have his conviction for sexual battery reversed. This court should remand this cause for resentencing under the direct remand rule for fondling. In the alternative, and at the very least, Ruiz is entitled to a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Benito Jo Ruiz, Jr., Appellant

BY: 

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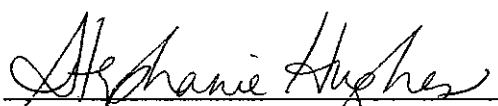
BY: 

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CERTIFICATE OF SERVICE

I, Leslie S. Lee, Counsel for Benito Jo Ruiz, Jr., do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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