

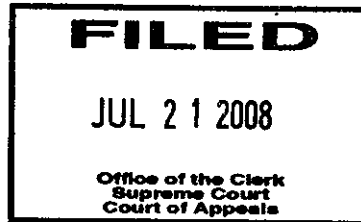
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LEE DARRELN NIX

APPELLANT

VS.



NO. 2007-KA-2279-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, Mississippi, and judgment of conviction for the following crimes: Count I, Touching of a Child for Lustful Purposes, and Count II, Kidnapping. The defendant Lee Darreln Nix was sentenced to ten (10) years for Count I and ten (10) years for Count II, with the sentences running consecutively. The convictions followed a jury trial on January 9-10, 2007, Honorable Stephen B. Simpson, presiding. Lee Darreln Nix is currently imprisoned with the Mississippi Department of Corrections.

FACTS

On September 25, 2005, 14-year old Franquilla Hill, whose nickname is Shay, left the Beauvoir Manor Apartments to return home to Covenant Square Apartments around 9:00 p.m. Tr. 7-9. She frequently used the same route as described on a map to the jury. State's Exhibit 1, Tr. 25.

As Shay crossed El Rancho's parking lot, a man in a green vehicle approached and asked if she stayed at Covenant Square. Tr. 13. Shay stopped to talk to the man because she thought he knew her mother since he was older. Tr. 13-14. Shay did not recognize him and continued to walk home. Tr. 14.

Shay rounded the corner and saw somebody running across the street. *Id.* The same man who was in the green vehicle stopped to talk to her and asked where she was headed. Tr. 15. The man told Shay that he would give her fifty or five hundred dollars to put his hand up her skirt. Tr. 16. She told him no and attempted to leave. *Id.* At that moment, the man grabbed her and reached his hand up her skirt touching her private area. Tr. 16-17. As the man put his hand up her skirt, he grabbed her shirt collar which made a ripping sound. Tr. 26. Shay testified that the man was wearing a jersey. Tr. 21. Later in the evening, Shay identified defendant Lee DarrelN Nix in a photo lineup. Tr. 22.

The man held Shay and kept telling her that he would pay to stick his hands up her skirt. Tr. 17. The man grabbed Shay and took her towards a ditch and held her while he proceeded to urinate. *Id.* Shay kicked the man in the leg and ran out of the Power Shack complex. Tr. 19. She saw her friends at Covenant Square and told what happened. Tr. 20.

Shay pointed out the man as he came out the other side of the building. *Id.* Cory Robinson saw the man and chased after him. Tr. 42. The man ran towards the Walgreens and Back Yard Burger. Tr. 43. Cory was not able to catch the man as he was able to get in his car and drive away.

Tr. 43. However, as the car passed, he was able to kick the rear passenger side. Tr. 44. Cory testified that the man was wearing a Kobe Bryant jersey. Tr. 47.

Nix testified that on September 25, 2005, he left around 6:00 p.m. to meet Angela Fletcher. Tr. 128. Nix met Fletcher around 6:30 p.m. at Hardy Court Shopping Center in Gulfport. Tr. 129. Nix testified that he was with Fletcher for about one and one half hours before returning to Biloxi. *Id.* Nix stated that he left the center around 8:00 p.m. and arrived home at approximately 8:30 p.m. Tr. 130. Fletcher testified that Nix left around 7:30 p.m. or 8:00 p.m.

Officer Kit Manning was dispatched to Covenant Square at approximately 8:50 p.m. Tr. 66. Officer Manning took Shay's statement and issued a "be on the lookout" for a mid-90s green Plymouth type vehicle with a square body rear. Tr. 70. A vehicle matching the description was reported to be located at 1626 Perry Drive. Tr. 72. The vehicle tag matched the same address. *Id.* The vehicle had a footprint on the rear passenger side. Tr. 71. Manning questioned Nix, who was at the address, about his whereabouts and Nix said he returned home around 6:00 – 6:30 p.m. Tr. 72. Manning also questioned Dianne Mayfield, Nix's girlfriend, who said he returned home at 8:30 p.m. Tr. 74. Mayfield told Manning that Nix was wearing his Kobe Bryant jersey. *Id.*

SUMMARY OF THE ARGUMENT

The appeal to reverse and remand for ineffective assistance should be denied because a failure to object to jury instruction does not satisfy either prong of the *Strickland* test. First, a failure to object does not constitute ineffective counsel because the right to counsel is for competent and not perfect assistance. Second, the defendant was not prejudiced by the instruction because he would have received the same verdict and he was hopelessly guilty. Third, the jury instruction was proper because it appropriately followed the elements of the crime.

The appeal to reverse and remand for a verdict against the overwhelming weight of evidence should be denied because the verdict did not render an unconscionable injustice. Sufficient evidence, which included the testimonies of the victim, a witness, and law enforcement officers, was presented to the jury who returned a guilty verdict.

ARGUMENT

I. THE APPEAL TO REVERSE AND REMAND FOR INEFFECTIVE ASSISTANCE SHOULD BE DENIED BECAUSE A FAILURE TO OBJECT TO JURY INSTRUCTION DOES NOT SATISFY THE *STRICKLAND* TEST.

The standard for measuring a claim of ineffective assistance is whether the counsel's conduct undermined the proper function of the adversarial process that the trial cannot be relied on as having a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to successfully claim ineffective assistance of counsel, the Appellant must satisfy the two-pronged test established in *Strickland* and adopted by the Mississippi Supreme Court. *Stringer v. State*, 454 So. 2d 468, 476 (Miss. 1984). [REDACTED] *Id.* at 477.

[REDACTED] *Hiter v. State*, 660 So. 2d 961, 965 (Miss. 1995). The review is highly deferential and there is a strong presumption that the counsel's conduct fell within the range of reasonable professional assistance. *Id.* In order to find for ineffective assistance, the Court will have to conclude that the trial attorney's performance as a whole fell below the standard of reasonableness and that the mistakes were serious enough to erode confidence in the outcome of the trial below. *Coleman v. State*, 749 So. 2d 1003, 1012 (Miss. 1999).

The Appellant argues the trial counsel should have objected to jury instruction S-1 because it differed from the language of the indictment. The indictment stated "[f]or the purpose of gratifying his lust or indulging his depraved licentious sexual desires, did unlawfully, willfully and feloniously handle, touch or rub with his hands, the *vagina* of F.N.H., a child was at the time in question under the age of sixteen (16) years." (emphasis added). C.P. 7, R.E. 12. Conversely, the instruction stated "for the purpose of gratifying his lust or indulging his depraved licentious sexual

desires, did unlawfully, willfully and feloniously handle, touch or rub with his hands, the *body* of F.N.H., a child who was at the time in question under the age of sixteen (16) years then you shall find the defendant guilty as charged in Count I.” (emphasis added). C.P. 30, R.E. 14.

The appeal to reverse and remand should be denied because (1) failure to object to jury instruction does not constitute ineffective counsel; (2) the Appellant was not prejudiced by the instruction; and (3) the jury instruction appropriately followed the elements of the crime;

A. Failure to object to jury instruction does not constitute ineffective counsel.

Strickland is not so stringent as to require that all reasonable objections be made in order for counsel to be deemed effective. *Lattimore v. State*, 958 So. 2d 192 (Miss. 2007). The right to effective counsel entitles only competent counsel and not perfect counsel. *Id.* (citing *Davis v. State*, 897 So. 2d 960, 966-67 (Miss. 2004)). An attorney’s decision not to request a specific jury instruction falls under trial strategy and is given much deference by the court. *Fair v. State*, 950 So. 2d 1108, 1111 (Miss. Ct. App. 2007) (finding that failing to provide an instruction defining “possession” did not deprive defendant of a fair trial). *Smiley v. State*, 815 So. 2d 1140, 1148 (Miss. 2002). “Counsel’s choice whether to make certain objections fall within the ambit of trial strategy and cannot give rise to an ineffective assistance of counsel claim.” *Bell v. State*, 879 So. 2d 423, 440 (Miss. 2004).

B. Appellant was not prejudiced by the instruction.

The *Strickland* test requires the Appellant to show that the attorney’s performance was sufficiently deficient to constitute prejudice to the defense. *Colenburg v. State*, 735 So. 2d 1099, 1102 (Miss. Ct. App. 1999) (citing *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990)). The Appellant must demonstrate that but for his counsel’s errors, there is a reasonable probability that he would have received a different outcome in the trial. *Nicolau v. State*, 612 So. 2d 1080, 1086 (Miss. 1992).

The Appellant argues that Shay's testimony that a man reached up her skirt and touched her "private area" did not indicate her vagina. Moreover, Nix argues that her "private area" could have also been the lower part of her back, her bottom, or even her inner thigh. "The question in each case is whether the nature and character of the injury and the manner and means of inflicting it as proved are practically and substantially, though not identically, the same as that alleged." *Roney v. State*, 120 So. 445 (Miss. 1929) (quoting *Bowers v. State*, 111 So. 301). It is reasonable to infer that a 14-year old girl would deem her "private area" to mean her "vagina" when stating that a man put his hands up her skirt and touched her "private area."

Furthermore, the "defendant has clearly failed to satisfy the prejudice test of *Strickland* when it is clear from the record that the defendant is 'hopelessly guilty.'" *Fair*, 950 So. 2d at 1112 (quoting *Jones v. State*, 911 So. 2d 556, 560 (Miss. Ct. App. 2005)). The jury weighed the following: testimony of the victim who identified the defendant and his green car, the eyewitness who testified where he kicked the car, the footprint on the defendant's car, and the testimony that the assailant was wearing a Kobe Bryant jersey, which the defendant happened to be wearing on the night of the incident. From the evidence, the jury found Nix guilty of touching a child for lustful purposes and kidnaping.

C. Jury instruction S-1 appropriately followed the elements of the crime.

Jury instructions in a criminal case which follow the language of a pertinent statute have consistently been held as sufficient. *Crenshaw v. State*, 520 So. 2d 131, 135 (Miss. 1998). The applicable statute states "[f]or the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, *any child*" Miss. Code Ann. § 97-5-23. (2007) (emphasis added). Furthermore, jury instruction failing to track the language of the indictment is not necessarily fatally

defective. *Duplantis v. State*, 708 So. 2d 1327, 1344 (Miss. 1997) (finding that although the instructions did not accurately follow the indictment, no error existed because the instructions accurately followed the requisite elements of the crime). In determining whether error exists, the jury instructions must be read as a whole. *Martin v. State*, 854 So. 2d 1004, 1009 (Miss. 2003). “If the instructions fairly announce the law and create no injustice, no reversible error will be found.” *Id.*

II. THE APPEAL TO REVERSE AND REMAND FOR A VERDICT AGAINST THE OVERWHELMING WEIGHT OF EVIDENCE SHOULD BE DENIED BECAUSE THE VERDICT DID NOT RENDER AN UNCONSCIONABLE INJUSTICE.

A new trial will not be ordered unless the “verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction ‘unconscionable injustice.’” *Watson v. State*, 848 So. 2d 203 (Miss. 2003) (citing *Smith v. State*, 802 So. 2d 82 (Miss. 2001)). The state is given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* The testimonies of the victim, a witness, and law enforcement officers were presented to the jury. The jury considered the evidence and returned guilty verdicts on both counts.

The Mississippi Supreme Court has held that the “totally uncorroborated testimony of a victim is sufficient to support a guilty verdict if that testimony is not discredited or contradicted by other credible evidence if the conduct of the victim is consistent with conduct of one who has been victimized by a sex crime.” *Price v. State*, 898 So. 2d 641, 651 (Miss. 2005) (citing *Collier v. State*, 711 So. 2d 458, 462 (Miss. 1998)). The torn clothing is not required to corroborate the testimony. Nevertheless, the State’s witness corroborated the testimony by confirming that he saw the defendant, who was wearing a Kobe Bryant jersey, leave the area and that he kicked the rear passenger door. The law enforcement officers confirmed that the defendant’s green vehicle had a shoeprint on the rear passenger door.

CONCLUSION

There is no merit to this allegation and no relief should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

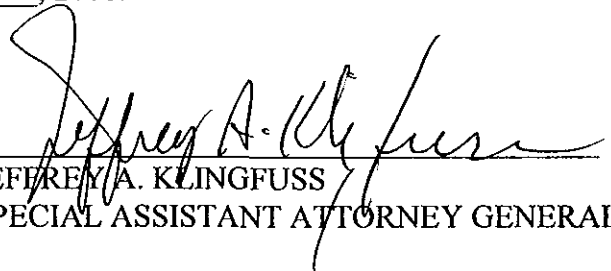
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 21st day of July, 2008.


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