

2008-KA-00099-SCT Tr

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TABLE OF CASES STATUTES AND AUTHORITIES

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I. WHETHER THE MARITAL PRIVILEGE MADE MELISSA HOOD INCOMPETENT TO TESTIFY

The State apparently must concede that it has no basis argument regarding the fact that the marital privilege is applicable in this case. The defense raised the marital privilege and asked the trial court to dismiss the case because Melissa Hood was incompetent to testify. The prosecution, as admitted by the state, told the trial judge that a crime against the person of a minor child was involved in this case. Appellee's brief at page 3. R.73. The prosecution was misinformed regarding whether the exception was for crimes "involving children" as opposed to whether the crime is a "crime against the person" which is a term of art, and applicable to crimes which are specifically delineated at Title 97, Chapter 3 of the Mississippi Code Annotated. Exploitation of Children is found in the next chapter, entitled "Crimes Involving Children", at Title 97, Chapter 5, Mississippi Code Annotated.

The State never addresses this point. Instead, the State tries a "bait and switch" argument to try to convince the Court that the issue is one of the conflict between Rule 601 and Rule 504. The issue is, and always has been, whether there was a violation of Rule 504, said violation being the basis upon which the prosecution built its entire case.

Assuming *arguendo* that the State is correct and the issue was not properly preserved for appeal, the issue still is not waived. The ruling is subject to the Plain Error Doctrine. In State Highway Commission v. Hyman, 592 So.2d 952, 957 (Miss.1991), the Mississippi Supreme Court stated that it would "ignore the requirement for preservation on appeal where a substantial right is affected. This Court retains the power to notice

plain error. See Hobson v. State, 516 So.2d 1349, 1354 (Miss.1987). The Plain Error Doctrine Reflects a policy to administer the law fairly and justly. A party is protected by the Plain Error Rule where he (1) has failed to perfect his appeal and (2) when a substantial right is affected.” Hyman at 957.

Again, assuming, for the sake of argument that the pre-trial motion regarding the marital privilege should have encompassed an argument that Rule 504 trumps Rule 601, the Court’s ruling allowing Melissa Hood to testify against Ronald Hood was plain error. Ronald Hood was put on trial as an habitual offender and sentenced to twenty years in the custody of the Mississippi Department of Corrections, therefore, it is beyond doubt that a substantial right is affected by the decision to allow Melissa Hood’s testimony.

Because Melissa Hood was, at all times relevant, married to Ron Hood, not only should her testimony be stricken, but the first tape given by her to Detective Larry Davis should have been suppressed, as well as the warrant for the search of the storage facility which yielded the second tape. Additionally, any testimony by Larry Davis which references Melissa Hood, the search warrant, or either tape should likewise be stricken, and this case reversed and rendered.

The State also tries to sway the court by stating that some of Melissa Hood’s testimony referred to pre-nuptual admissions against interest regarding tapes shown to her by Ron Hood prior to their marriage. The problem with the State’s position is that the “admission” would affect a tape allegedly viewed prior to the marriage, not the tape which the Defendant was tried for possessing. There is no evidence in the record that the tape was one and the same as the tape that he was indicted and tried for being in constructive possession.

The State has not advanced an argument which would make the marital privilege inapplicable. The Court should uphold Rule 504 and strike the entire case as being the Fruit of the Poisonous Tree.

II. WHETHER THE MALES IN THE VIDEO WERE ENGAGED IN “SEXUALLY EXPLICIT CONDUCT”

Ronald Hood does not argue that the photographs which he was convicted of being in constructive possession are intended to provide “scientific or anthropological information” to any potential viewer. See Brief of the Appellee at page 12. The Appellant’s argument is that the material depicted is not pornographic.

The wording of Miss.Code Ann. §97-5-33 does not allow for the trier of fact to guess the intent of the viewer or the maker of the film. The statute requires that the trier of fact find that the “models” must be engaged in sexually explicit conduct, defined as “lascivious display of the genitals.”

The models make no overt acts to themselves or to others. They do not touch themselves or others. They are not in a state of erection or arousal which could be considered “incipient” sexual conduct. They are, however, shown in a state of full frontal nudity. The State argues that this is the “sexually explicit behavior”.

The State’s argument that the camera focused on the genitals is an invitation to the trier of fact and to this Court to focus on the perception of the viewer, not the act of the model. The statute requires an intent on the part of the model to arouse the sexual passion of the viewer by engaging in sexually explicit conduct. The models are not posing for the videographer who focuses the video camera on the genitals. The models posed for a photographer or photographers in collections of still photographs, which were then videoed and distributed by a videographer who focused the camera on the genital

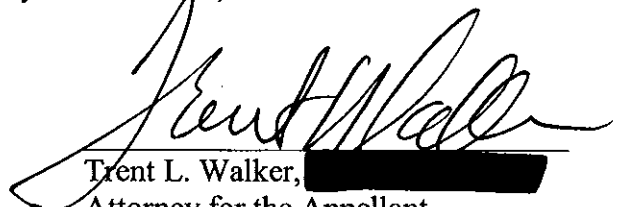
area of the models in the still photographs. The original photographer put no focus whatsoever on the genital area of the models. Therefore the argument that the models engaged in sexually explicit conduct because of the actions of a videographer who, presumably, none of the models ever met is particularly misplaced.

The Court should also be mindful that nude photography, including nude photography depicting children, has been part of the artistic landscape of civilization since time immemorial. Ronald Hood should not be subjected to imprisonment for allegedly constructively possessing tapes which could, and probably should constitute art in many other situations.

CONCLUSION

Because of the manifest errors and injustices in this case, including the prosecution of the appellant based upon an unconstitutionally vague statute and upon testimony and evidence which was wholly inadmissible under M.R.E. 504 and the doctrine of the Fruit of the Poisonous Tree, this conviction in this case should be reversed and rendered, and the appellant should be freed.

Respectfully Submitted, this the 18th Day of November, 2008.


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CERTIFICATE OF SERVICE

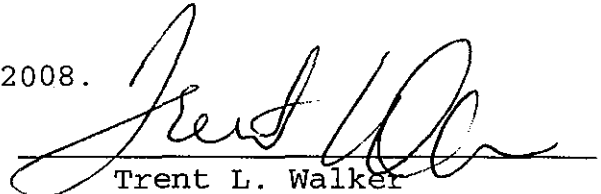
I, the undersigned counsel of record, do hereby certify that I have this day served, by first-class U.S. Mail, postage-prepaid, a true and correct copy of the attached and foregoing document to the following persons:

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This the 21 day of November, 2008.


Trent L. Walker