

IN THE SUPREME COURT OF MISSISSIPPI

RONALD HOOD

APPELLANT
[REDACTED]

VERSUS

CASE NO.: 2008-KA-00099-SCT

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Ronald Hood, Defendant

Trent Walker, Attorney for the Defendant

The Honorable Janie Lewis, Circuit Judge of Yazoo County, Mississippi

James Powell, District Attorney of Yazoo County, Mississippi

Steven Waldrup, Assistant District Attorney for Yazoo County, Mississippi

Deborah Nelson, Court Reporter

Susie Bradshaw, Circuit Clerk of Yazoo County, Mississippi

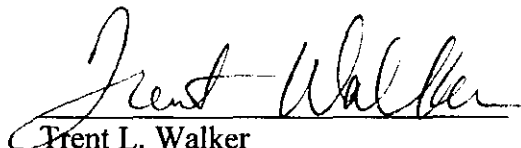

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STATEMENT OF ISSUES

- I. **WHETHER THE MARITAL PRIVILEGE MADE MELISSA HOOD INCOMPETENT TO TESTIFY**
- II. **WHETHER THE MALES IN THE VIDEO WERE ENGAGED IN "SEXUALLY EXPLICIT CONDUCT"**
- III. **WHETHER THE STATUTES IN QUESTION ARE UNCONSTITUTIONALLY VAGUE**
- IV. **WHETHER THE PROSECUTION MADE IMPROPER ARGUMENTS WHICH TENDED TO INFLAME THE PASSIONS AND PREJUDICES OF THE JURY AGAINST THE DEFENDANT**

STATEMENT OF THE CASE

This case arises from the conviction of the appellant, Ronald Hood, in the Circuit Court of Yazoo County, Mississippi, on December 11, 2008, on the charge of Exploitation of Children under Miss.Code Ann. §97-5-31 and §97-5-33(5) (1972). Appellant was convicted of being in possession of two videos consisting of still photographs of naked males who were allegedly under the age of eighteen years old.

On or about March 13, 2006, Detective Larry Davis of the Yazoo City Police Department was contacted by Melissa Hood, wife of the Appellant, regarding video she claimed to have found allegedly depicting young naked males engaging in sexually explicit conduct. (Excerpt from the Record at Pages 91-93). After viewing the videotape, Melissa Hood further directed the Yazoo City Police Department to a storage unit allegedly owned and controlled by Ronald Hood (Record at pages 95 and 96). After obtaining a warrant, for the storage facility, there, the police confiscated a multitude of tapes, and after randomly checking some of the tapes, found a second tape also similarly containing pictures of naked young males (Record, Page 110-113). Thereafter, the appellant was arrested and indicted for Exploitation of Children. After a trial by jury, appellant was convicted and sentenced to twenty (20) years in the custody of the Mississippi Department of Corrections as an habitual offender. Having timely noticed his appeal, the appellant now stands before this Honorable Court.

SUMMARY OF THE ARGUMENT

Ronald Hood, Appellant herein, was arrested and charged with Exploitation of Children as per Miss.Code Ann. §97-5-31 and §97-5-33(5) and so indicted on July 10, 2006. Specifically, Ronald Hood was charged with possession two videotapes which each showed one or more series of still photographs all depicting naked males who were all allegedly under the age of eighteen years old, in Yazoo County, Mississippi, gathered by the state as a result of information supplied by Appellant's wife. The indictment alleges that the models depicted in the still photographs were engaging in sexually explicit conduct. (See Record, Vol. 1, Page 3). Appellant denied possession of the videos, and there was insufficient proof shown at trial that the males portrayed were engaging in sexually explicit conduct.

The primary witness against the appellant in this case was his current wife, Melissa Hood, whose testimony should have been stricken as incompetent or subject to the marital privilege as set out in M.R.E. 504. See Record, Vol.1, pages 14-15 and Vol. 2, Transcript, pages 73 and 74).

The conviction of the appellant also hinged on a specific finding that the naked males in the video were (1) over the age of eighteen years, when no proof of age of anyone depicted in the video was shown at trial (Record Transcript, Vol.2, Pages 103-04; Pages 122-23); and a showing that the naked males were specifically engaging in "sexually explicit conduct" as required by the indictment and under Miss.Code Ann. §97-5-31 and §97-5-33. Appellant contends that the males depicted in the video were not engaged in any act that could be construed as sexually explicit conduct.

Additionally, the statutes in question are unconstitutional since they do not give adequate notice as to the conduct which is proscribed so that a reasonable person would be aware that they are breaking the law.

During opening and closing arguments, the prosecution made arguments which were improper and which had no basis in the law, therefore inflaming the passions of the jurors against the appellant (See Transcript at pages 83, 84; 154-55; 156, 158, 159, 161, 173, 176.)

ARGUMENT

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

M. R. E. 504(b) states that “in any proceeding civil or criminal, a person has a privilege to prevent that person’s spouse, or former spouse, from testifying as to any confidential communication between that person and that person’s spouse.” Subsection (d) of that same rule lists as an exception if one spouse is charged with a **crime against the person** of any minor child.

Under M.R.E. 601(a)(2), an exception is listed for crimes against any child. Putting aside for the moment the fact that no individual child was ever identified by name or age during the entirety of this case and trial, the testimony of Melissa Hood, and any evidence gained through her contact with the Yazoo City Police Department should have been suppressed in this instance, since she was incompetent to testify against her husband, Ronald Hood, or to give evidence to the police against him.

It is a basic rule of statutory interpretation that where there is a conflict between a general statute and a statute specific to a subject matter, the specific statute controls and is to be preferred over the general statute. Lenoir v. Madison County, 641 So.2d 1124, 1128-29 (Miss.1994); Townsend v. Estate of Gilbert, 616 So.2d 333 (Miss.1993). As such Rule 504 is to be preferred over Rule 601 since Rule 504 deals specifically with the Spousal privilege, whereas Rule 601 deals with the general competency of witnesses.

This distinction is important because under Rule 504, Melissa Hood could testify under the exception if the subject of her testimony was a **crime against the person** of a

child. See M.R.E. 504(d). On the other hand, Rule 601 allows testimony where there is any crime against a child.

A Title 97, chapter 3 of the Mississippi Code, Annotated provides a specific list of all crimes against persons in Mississippi. Neither Exploitation of Children statute, Miss.Code Ann. Section 97-5-31 or Section 97-5-33, is listed as a crime against persons. Further, Miss.Code Ann. Section 13-1-5 is a direct restatement of Rule 601, and is thus subject to the same interpretation of and priority of preference as is Rule 601.

In Fisher v. State, 690 So.2d 268, 272 (Miss.1996) this Court stated that Miss.Code Ann. §13-1-5 (1972) (Supp.1995) excepts from spousal incompetence a spouse's testimony in the criminal prosecution of the other spouse for a criminal act against a child. However, the Court noted that "This statute essentially states the same rule as M.R.E. 601 (a)(2) which the state maintains is in conflict with M.R.E. 504." The Court noted the conflict and went on to rule that it was prejudicial error to allow the wife to testify regarding the husband's previous statement to her regarding his sexual contact with a child, since such a statement and testimony by the wife thereto was a violation of Rule 504.

The case at bar is on all fours with the Fisher case. Melissa Hood testified against her husband in a crime which is not listed as a crime against persons as required by Rule 504. As such, that testimony should have been barred. Furthermore, since the State's entire case against the Appellant was the result of Melissa Hood's contact with the Yazoo City Police Department, including the warrant for the tape subsequently found at the storage unit, the entire case should have been barred under the doctrine of the Fruit of the Poisonous Tree.

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

The State has indicted the Defendant in this case under Miss.Code Ann. Section 97-5-33, charging that he “willfully, knowingly and feloniously possess[ed] a video of naked white male children under the age of eighteen(18), engaging in sexually explicit conduct, in violation of Section 97-5-31 and Section 97-5-33(5) of the Mississippi Code of 1972, as amended, against the peace and dignity of the State of Mississippi.”

Miss.Code Ann. Section 97-5-33(5) reads “No person shall, by any means including a computer, possess any photograph, drawing, sketch, film, videotape or other visual depiction of an actual child engaging in sexually explicit conduct.”

This case brought by the State is fatally defective in that the children involved in the video at issue in this matter, while photographed in their naked state, are not engaged in sexually explicit behavior. The videos at issue show children who grew up in a nudist family in the 1970's involved in various activities, including the following: a dirt fight; fixing a roof; playing sports; football; an Easter egg hunt; karate; swimming; a nudist convention; mowing the lawn; tree climbing; playing shuffleboard; and playing volleyball. A second series of films shows males in a state of full frontal nudity. A third series shows an antique set of photographs of young males in a rural setting engaging in activities such as skinny-dipping, also shows full frontal nudity.

At no time in the videotape is there any showing of any behavior which could be considered lewd or lascivious, as is required under Section 97-5-31. The videos are all of still photographs. The children depicted in the video are nude. They are not engaged at any time in sexual activity, and they are not engaged in activity which could be

considered masturbation or the touching of their own or anyone else's private parts for sexual gratification or otherwise.

A secondary problem for the state in this case is that no child was identified in the photographs. As such, there was no showing that any of the males depicted were under the age of eighteen, as is required by the statute.

A search of Mississippi case law does not define what behavior is considered lewd or lascivious. However, it is an old axiom of the law that statutes must be interpreted using their clear and apparent meaning. It is impossible to show that the defendant has violated the statute in this manner without a showing of sexually explicit conduct on the part of the children depicted in the videotape. Otherwise, anyone in possession of a copy of "National Geographic" Magazine would be in possession of child pornography and thus be guilty under the statute.

Because no child is engaged in sexually explicit behavior, the State's case must necessarily rest upon a finding that the possession of the pictures demonstrates the behavior to be intended to arouse sexual desire in the viewer. At trial, the prosecution went through great pains to argue that because the videographer panned in on the genitalia of the models depicted, the pictures were meant to arouse, and thus satisfied the meaning of the term lascivious. However, there are two problems with that argument. The first problem is that the statute is to be interpreted as written, and the words therein given their ordinary meaning so as to best put into effect the legislative intent. McMillan v. Puckett, 678 So.2d 652, 655 (Miss.1996). Whatever the legislature says in the text of the statute is considered the best evidence of the legislative intent. Isbrantsen Co. v. Johnson, 343 U.S. 779, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). The legislature clearly

stated that the models must be engaged in sexually explicit behavior. The legislature did not attempt to legislate what must go on in the mind of the viewer when viewing such photographs. Neither did the legislature attempt to define the intent of the videographer or the person in possession of the photographs.

The second problem is that because no age is identified, the males in the picture, if under age eighteen, cannot be shown to have formed the requisite intent to purposely arouse sexual desire in the viewer of the photograph. Only three witnesses testified at trial. None of the witnesses was able to personally identify any male in a photograph. No age was available for any child in a photograph.

Even if we take the argument of the prosecution at face value, and, by panning in or focusing on the genitalia of the models depicted in the photographs, there was an intent to spark sexual arousal, that intent speaks to the *mens rea* of the photographer and possibly the viewer, but not to the mindset of the model, which is the plain language required under Miss.Code Ann. §§ 97-5-31 and 97-5-33(5). At page 174 of the Transcript, during closing arguments, the prosecution went so far as to argue that "I am not saying that the kids are responsible for that. They were taken advantage of by a smut peddler somewhere and placed in the position to be posed in those videos!" (R.174).

The State cannot have it both ways. It cannot on the one hand argue that the models are not intending to arouse sexual desire or engage in lascivious behavior, and at the same time argue that the defendant is guilty under the statutes in question.

Because the *mens rea* which the state set out to prove was that of the videographer and/or that of the viewer, there was never any proof that the intent of the models was to arouse sexual desire.

III. WHETHER THE STATUTES IN QUESTION ARE UNCONSTITUTIONALLY VAGUE

The Statutes in question are also unconstitutionally vague because they do not give adequate notice as to what is meant by the term “lascivious.” The §97-5-33(5) specifically defines sexually explicit conduct as “lascivious” but fails to go on to show what conduct is lascivious. By definition, the display of the genitals must be “lascivious” as opposed to ordinary display of the genitals.

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential element of due process. Crawford v. State, 754 So.2d 1211 (Miss.2000); Generally speaking, a criminal statute is unconstitutional under the due process clause of the of the Fourteenth Amendment if it is so vague and uncertain that it does not inform those subject to it what acts it is their duty to avoid, or what conduct on their part will render them liable to its penalties. The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. State v. Roderick, 704 So.2d 49, 53 (Miss.1997).

Because the statutes failed to define “lascivious”, the appellant was left to determine for himself whether the photos fell within the definition, and whether possession of the material in question was proscribed. In these photos, there were no overt sexual acts; the models did not touch their own genitalia or the genitalia of anyone else; the models were not simulating sexual acts. As a result, the State prosecuted the Appellant by describing the photographs as “lascivious” in nature, thus using “lascivious” as a catch-all provision where nothing else fit.

At trial, the defense called as its sole witness Paul Cartwright the director of the Ricks Memorial Library in Yazoo City, Mississippi. The witness was able to confirm that a book entitled Photographing Children was available in general distribution at the public library in Yazoo City, Mississippi. The defense entered into evidence several photographs available from that book (See Defense Exhibit 1, Record, Pages 130-141). None of the photographs entered on behalf of the defense were substantially different than those found on the videotapes in question. However, the appellant was not indicted and tried based upon the publicly available book, he was indicted for the photographs. The photography in the book was labeled "art" by Mr. Cartwright. However, the appellant was convicted for possession of videos which in another context would be considered art. It is highly doubtful that the appellant would have been indicted for possession of Photographing Children. It is also doubtful that he would have been indicted or convicted for possessing a copy of "National Geographic" magazine, with its ever-present photos of naked exotic peoples of foreign lands. However, he was convicted and sentenced for possessing videos which showed substantially the same materials. Using such a standard, how does a reasonable person differentiate between which materials are permissible, and which are not? Because that question is not susceptible to an answer, the statutes in question are unconstitutional for failing to adequately define the word "lascivious" in such a manner as to be understood by men of reasonable intelligence.

IV. WHETHER THE PROSECUTION MADE IMPROPER ARGUMENTS WHICH TENDED TO INFLAME THE PASSIONS AND PREJUDICES OF THE JURY AGAINST THE DEFENDANT

During opening and closing arguments, the prosecution sought to bolster its case by the inclusion of gratuitous remarks which were calculated to unduly inflame the bias, passion and prejudice of the jury against the appellant. Given the sensitive nature of the case, as well as the natural and justifiable predisposition of the populace toward the protection of children, the effect of these statements, both in opening remarks and in closing remarks had the cumulative effect of prejudicing the jury to the point that they were predisposed to find the defendant guilty without taking full regard of the evidence.

Specifically, the State made the following statements: "the genital areas are exhibited for the purposes of the cameras." (R.83); "In every instance, the camera drops down to the genital area. So you don't see the faces of the boys. You don't see anything but the genitals being shown. And this goes on for about thirty minutes (R.85)";

When Melissa Hood testified, she made a hearsay statement which was sustained upon objection, where the witness's sister alleged stated that "I have a four year old nephew (the step-son of the appellant) that I am worried about (R.92)." Although the statement was objected to as hearsay, taken in context with the other statements made by the prosecution, this statement further inflamed the passions of the jury against the appellant.

Further, because Melissa Hood's testimony should have been stricken, her statement of admission by the Appellant that he would return to California where the tapes were legal, if true, further unfairly prejudiced the jury against the defendant. This is especially relevant since the State repeated this phrase in its closing argument as he urged

the jury to “tear him (the appellant) up when you get back there (R.159).” Further, the State improperly argued that the appellant either made or knew who made the tapes in question (R.158). He state further argued that the appellant possessed tapes of the Little League World Series because “that’s his preferred age, and that’s his preferred gender (R.175).”

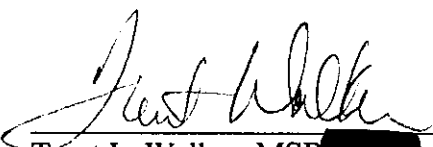
The cumulative effect of these arguments is that the appellant was unduly prejudiced in the eyes of the jury, and the case should at best be sent back for re-trial.

Attorneys have wide latitude in argument. Notwithstanding the wide latitude, the standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural or probable effect of the improper argument is to create unjust prejudice, so as to result in a decision influenced by the prejudice so created. Foley v. State, 914 So.2d 677 (Miss.2005); Eckman v. Moore, 876 So.2d 975, 994 (Miss.2004). Taken as a whole, that standard was met here.

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 27th Day of August, 2008.


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CERTIFICATE OF SERVICE

I, Trent Walker, do hereby certify that I have this day served, via U.S. mail, a copy of the foregoing document to the following attorney of record:

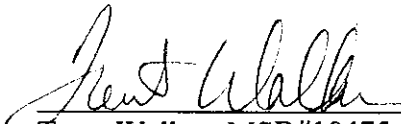
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