IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BARRY WRIGHT — APPELLANT

VS. — NO. 2008-KA-0433

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. WRIGHT WAS NOT DENIED A FAIR AND IMPARTIAL JURY.

II. WRIGHT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE FACTS

Eleven-year old Victim spent the night at her aunt's house to visit with her eleven-year old cousin, B[1]. At some point after midnight, the Appellant Barry Wright (the forty-two-year old step father of B and uncle of Victim) asked if he could sleep in the bed with B and Victim. (Transcript p. 223 and 270). He crawled into bed and began rubbing their backs. (Transcript p. 226 and 271).

[1] The actual names of the minor children involved are not used here to protect their identities.

Victim testified as follows regarding what exactly happened while the three were in bed:

> Well, we're laying in bed. I'm on my side by the window, and [B] is in the middle on her stomach, and Barry is on his side on the edge of the bed. And we're trying to go to sleep, and [B] falls asleep and Barry is rubbing her back. And then he starts rubbing my hand, and I had my eyes closed. And then he is rubbing my arm and he goes back to my hand, and I said, "that tickles" and I open my eyes and I see that he is awake. And then he starts rubbing my back and my shoulder, and then he goes down my shirt into my bra and starts massaging my breasts.

(Transcript p. 271). Victim then got up out of the bed and ran through the bathroom to her aunt's room. (Transcript p. 271). Victim's aunt testified that between 1:00 a.m. and 1:30 a.m.:

> [Victim] coming into my room and she was crying, and I asked her what was wrong, and she said that she was scared. And I asked her what she was scared of, and she said that Barry had touched her breasts.

(Transcript p. 194).

Victim's aunt then confronted the Appellant. His response was "well, if I have, it was purely accidental, and I did not know that I had done that." (Transcript p. 299).

After an investigation, the Appellant was arrested, tried, and convicted of fondling. He was sentenced to serve fifteen years with ten years suspended and with post release supervision for ten years.

SUMMARY OF THE ARGUMENT

Wright was not denied a fair and impartial jury. First, he is procedurally barred from taking issue with the juror in question as he did not attempt to strike him for cause nor did he attempt to use a peremptory strike against him. Procedural bar notwithstanding, the juror was properly allowed on the panel, in part because he indicated that he would decide the case based on the law and evidence.

Wright was not denied effective assistance of counsel as he wholly failed to establish how the alleged deficiencies prejudiced his case. Additionally, there was sufficient evidence to support the verdict and the verdict was not against the overwhelming weight of the evidence.

ARGUMENT

I. WRIGHT WAS NOT DENIED A FAIR AND IMPARTIAL JURY.

Wright first argues that "Juror Number 2 having been seated on this Jury, having such a relationship with the victim and her family, casts doubt on the jury selection and subsequent verdict reached by that body." (Appellant's Brief p. 10). Wright is, however, procedurally barred from raising this issue on appeal as he did not attempt to strike Juror 2 nor did he use one of his peremptory strikes against him. *See Archer v. State*, 986 So.2d 951, 958 (Miss. 2008).

Regardless of the bar, Wright's argument is without merit. The Mississippi Supreme Court has held the following with regard to this issue:

> The trial judge whose duty is to see that a competent, fair, and impartial jury is empaneled, is empowered with broad discretion to determine whether a prospective juror can be fair and impartial - notwithstanding the juror's admission under oath that he or she will be. (*citations omitted*). This Court recognizes that the trial judge is in the best position to determine whether the jury as selected was fair and impartial, and therefore yields to a trial court's discretionary finding that a competent jury, under its oath to be fair and impartial, was empaneled to render judgment, and will not reverse absent clear abuse of that discretion. (*citations omitted*).

Archer, 986 So.2d at 958 - 959. During the trial court's voir dire of the potential jurors, the court asked whether anyone was related to or friends with any of the potential witnesses and the following exchange took place:

A: There is one other also. You said Angela Fears?
Q; Yes.
A: I am acquainted with her and have been for about a year. She periodically attends our church. I know who she is, but I'm not a close personal friend, but you need to know I am aware of who that person is.
Q: All right. Mr. Shannon, that's exactly the type of response we are need from each of the jurors, information about any type of knowledge or relationship. As far as Angela Fears, you've met her at church, I take it?
A: Yes, sir.
Q: And does she attend church with you at the present time, your church?
A: Yes, sir.
Q: Does her daughter [Victim] attend with her, to your knowledge?

A: I am not familiar with her at all.
Q: Okay. Is there anything about the fact that Ms. Fears attends the same church that you do that would influence your decision one way or the other in this case either for or against the position she may take?
A: No, sir.
Q: Mr. Shannon, are you telling the Court that you can set aside your knowledge of Ms. Fears, that you could decide this case based solely on the law and the evidence, and the fact that you attend church with her will not enter into your decision one way or the other?
A: That wouldn't be practical, no sir. I can be unbiased.
Q: Thank you, sir.

(Transcript p. 89 - 91). This juror unequivocally stated that he would decide the case based on the law and evidence and that he could be unbiased. This Court has previously held that "jurors take their oaths seriously, and this promise is entitled considerable deference." *McDonald v. State*, 921 So.2d 353, 357 (Miss. Ct. App. 2005). In a later case, this Court also held that "when a circuit court declines to excuse a juror after that juror responded that he or she would be able to serve impartially, despite circumstances that raise some question of bias, we defer to the circuit court's discretion." Havard v. State, 986 So.2d 333, 336 (Miss. Ct. App. 2007). Furthermore, "mere acquaintance or even family relationships with parties or those related to parties is not sufficient to require that a juror be excused for cause." *Archer*, 986 So.2d at 957 (quoting *Bell v. State*, 725 So.2d 836, 846 (Miss. 1998)) (*emphasis added*).

As such, even if this issue were not procedurally barred, it was not reversible error for the trial judge to allow this juror on the panel as he clearly indicated that he merely knew the mother of the victim, was not a close personal friend of the mother of the victim, was not familiar with the victim at all, and, most importantly, indicated that he would decide the case based on the law and evidence. Thus, this issue is without merit.

II. WRIGHT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

While a defendant may raise the issue of ineffective assistance of counsel on direct appeal, "this Court may determine the merits of the claim only when '(a) ... the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by the trial judge able to consider the demeanor of witnesses, etc. are not needed.'" *Clayton v. State,* 946 So.2d 796, 803 (Miss. Ct. App. 2006). **"A conclusion that the record affirmatively shows ineffectiveness of constitutional dimensions is equivalent to a finding that the trial court should have declared a mistrial or ordered a new trial *sua sponte*."** *Id.* (citing *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. Ct. App.1999) (*Emphasis added*). The record in this case does not demonstrate that the trial court should have declared a mistrial or ordered a new trial *sua sponte* because of the quality of defense counsel's representation of Wright and, therefore, does not support a claim of ineffective assistance of counsel.

With regard to ineffective assistance of counsel claims, the Mississippi Supreme Court has held the following:

> In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney's overall performance was deficient and (2) that the deficient performance, if any, was so substantial as to prejudice the defendant and deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Furthermore, there is a "strong but rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Walters v. State*, 720 So.2d 856, 868 (Miss.1998). To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Schmitt v. State*, 560 So.2d 148, 154 (Miss.1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Only where it is reasonably probable that, but for the attorney's errors, the outcome of the trial would have been different will this Court find the counsel's performance was deficient." *Id.*

Smiley v. State, 815 So.2d 1140, 1146-47 (Miss.2002) (quoting *Gary v. State*, 760 So.2d 743, 753

(Miss.2000)) (*Emphasis added*). Moreover, this Court held that "[i]n addition to the presumption that counsel's conduct is reasonably professional, there is a presumption that counsel's decision are strategic in nature, rather than negligent." *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002).

Therefore, in order for a defendant to prevail on a claim of ineffective assistance of counsel raised on direct appeal, the defendant must show "from the record that his counsel's performance was deficient, and that the deficient performance prejudiced him." *Walker v. State,* 823 So.2d 557, 563 (Miss. Ct. App. 2002) (citing *Strickland*, 466 U.S. at 686) (*emphasis added*). This determination is made based on the "totality of the circumstances." *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995) (citing *Frierson v. State*, 606 So.2d 604, 608 (Miss. 1992)). "The target of appellate scrutiny in evaluating the deficiency and prejudice prongs of *Strickland* is counsel's 'over-all' performance." *Id.*

Accordingly, Wright must, not only show that his counsel was deficient in each of the areas he alleged, but he also must show how these alleged deficiencies prejudiced his case. In order to prove prejudice, Wright must show from the record that his counsel's "errors were of such a serious magnitude as to deprive the defendant of a fair trial because of a reasonable probability that, but for counselor's unprofessional errors, the results would have been different." *Cole*, 666 So.2d at 775 (quoting *Martin v. State*, 609 So.2d 435, 438 (Miss. 1992)). Wright has failed to meet this burden.

Wright first alleges that his counsel failed to object during jury selection to a sympathetic potential juror. (Appellant's Brief p. 11). Wright also suggests that his counsel was deficient in failing to "conduct proper reciprocal discovery, have introduced into evidence an alibi exhibit and make an offer of proof for the record." (Appellant's Brief p. 12). Both these alleged deficiencies fall under the ambit of trial strategy. The Mississippi Supreme Court in *Smiley v. State*, first noting

that attorneys were given "wide latitude" regarding trial strategy, held that:

> This Court gives much deference to an attorney's trial tactics. As this Court has stated: Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134 [102 S.Ct. 1558, 1574-75, 71 L.Ed.2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Lambert v. State*, 462 So.2d 308, 316 (Miss.1984), citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. **The right to effective counsel does not entitle the defendant to have an attorney who makes no mistakes at trial. The defendant just has a right to have competent counsel**.

815 So.2d at 1148 (quoting *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991)) *(Emphasis added)*. The Court "will only under exceptional circumstances, second guess counsel on matters of trial strategy." *Shorter v. State*, 946 So.2d 815, 819 (Miss. Ct. App. 2007).

With regard to counsel's failure to object to juror number 2, there is no evidence that defense counsel was deficient. The law set forth above regarding issue one clearly establishes that juror number 2 was properly allowed on the jury. Moreover, the Mississippi Supreme Court has held that decisions regarding whether to "make certain objections falls within the ambit of trial strategy and **cannot give rise to an ineffective assistance of counsel claim.**" *Howard v. State*, 945 So.2d 326, 357 (Miss. 2006) (quoting *Powell v. State*, 806 So.2d 1069, 1077 (Miss.2001)) (*Emphasis added*). Furthermore, Wright provided no insight as to how the results would have been different had these alleged errors not been made by counsel. In other words, Wright wholly failed to address the second prong of *Strickland* with regard to this alleged error other than to say that "another outcome may have occurred." (Appellant's Brief p. 12). Mere speculation that another outcome *may* have occurred does not meet the burden required by *Strickland*. *See Mohr v. State*, 584 So.2d 426, 430

(Miss.1991) (holding that in order to determine the second prong of prejudice to the defense, the standard is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and further holding that this means a "probability sufficient to undermine the confidence in the outcome.")

With regard to counsel's second alleged deficiency, Wright wholly failed to show how this alleged deficiency caused prejudice to his case. Wright was allowed to testify that he was in Augusta, Georgia on March 22, 2004, the day the incident in question took place. (Transcript p. 297). He was further allowed to testify that he knew this because of his daily log book. (Transcript p. 297). However, he was not allowed to introduce the daily log book into evidence. Wright alleges in his brief that this was because the evidence was not properly discovered to the State. (Appellant's Brief p. 13). Wright then stated that his counsel "dropped this theory of the defense and proceeded to try to show reasonable doubt through other means." (Appellant's Brief p. 13). First, as noted above, Wright's counsel's decision not to proceed with this theory was clearly trial strategy to which the Court gives great deference. Second, and most importantly, Wright fails to show how this affected the outcome of his trial. He alleges that the log book proves that he was in Georgia on March 22, 2004. (Appellant's Brief p. 13). However, this does nothing to prove his innocence as he further asserts that the district attorney "placed the date of the crime correctly on the 22nd day of March, 2004." (Appellant's Brief p. 13). He then asserts that the events discussed at trial occurred on the night of the 21st and the crime occurred on the morning of the 22nd, but that the witnesses were incorrectly asked questions about the night of the 22nd. (Appellant's Brief p. 13). These allegations and assertions show only that the attorneys mistakenly phrased questions to include the night of the 22nd instead of the night of the 21st. Thus, even if Wright's log book established that he was, in fact, in Georgia on the 22nd, it could do nothing to prove that he did not commit the crime for which he

was convicted. The events occurred in the early morning hours of the 22nd thereby leaving him plenty of time to get to Georgia during the latter hours of the 22nd. Moreover, Wright never denied getting into bed with his step-daughter and niece. (Transcript p. 299 and 311). He also never denied touching the victim's breast. (Transcript p. 317). He also admitted to apologizing to the victim for touching her breast. (Transcript p. 300). As such, his whereabouts at some unknown time on the 22nd of March are inconsequential to whether he is guilty of this crime. Therefore, the failure to have this log book introduced into evidence did not in any way affect the outcome of this trial.

Failure to establish "a reasonable probability that he would have had a better result but for counsel's errors" is failure to satisfy the second prong of *Strickland* and is therefore a failure to establish that he was denied effective assistance of counsel. *See Dahl v. State*, 989 So.2d 910, 914 (Miss. Ct. App. 2007). Accordingly, Wright was not denied effective assistance of counsel. Thus, his second issue is without merit.

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Lastly, Wright questions whether there was sufficient evidence to support the verdict and whether the verdict was against the overwhelming weight of the evidence. The standard of review for these issues is well-established. This Court has previously noted that "[w]hen on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, [the court's] authority to interfere with the jury's verdict is quite limited." *Phinisee v. State*, 864 So.2d 988, 992 (Miss. Ct. App. 2004). The evidence which is consistent with the verdict must be accepted as true. *Lee v. State,* 469 So.2d 1225, 1229-30 (Miss.1985) (citing *Williams v. State,* 463 So.2d 1064, 1067 (Miss.1984); *Spikes v. State,* 302 So.2d 250, 251 (Miss.1974)). The State must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Id.* (citing *Glass*

v. State, 278 So.2d 384, 386 (Miss.1973)). Basically, "once the jury has returned a verdict of guilty in a criminal case, [the court is] not at liberty to direct that the defendant be discharged short of a conclusion on [its] part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty." *Id.* (citing *Fairchild v. State,* 459 So.2d 793, 798 (Miss.1984); *Pearson v. State,* 428 So.2d 1361, 1364 (Miss.1983)). With this standard in mind, there is sufficient evidence in the case at hand to prove each and every required element of fondling.

Mississippi Code Annotated §97-5-23 defines fondling as follows:

> Any person above the age of eighteen (18) years, who, for 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 under the age of sixteen (16) years, with or without the child's consent, or a mentally defective, mentally incapacitated, or physically helpless person as defined in Section 97-3-97, shall be guilty of a felony. . . .

In order for the State to prove fondling, it had to establish "(1) a handling or touching or rubbing with any part of the assailant's body or any member thereof; (2) of a child under the age of 14 years; (3) by a person above the age of 18 years 4) for the purposes of gratifying the lust or indulging licentious sexual desires of the assailant." *Brady v. State,* 722 So.2d 151, 159 (Miss. Ct. App.1998). The State successfully established each element.

First, it was undisputed that Wright touched Victim's breast. (Transcript p. 271 and 317). Second, the evidence clearly indicated that Victim was younger than the age of 14 as she was born on December 22, 1992. (Transcript p. 178 - 179). Third, the evidence also established that Wright was over the age of 18 as he was born on April 13, 1962. (Transcript p. 191). Wright appears to take issue with the State's evidence regarding the fourth element. (Appellant's Brief p. 16). However, the Mississippi Supreme Court stated in *Mingo v. State* that "[t]hough no direct evidence

was presented that [the Appellant] touched the victim specifically to satisfy his lustful desires, this Court had held that such recognition may arise from the circumstances of the encounter itself." 944 So.2d 18, 34 (Miss. 2006) (citing *Ladnier v. State*, 878 So.2d 926, 930 (Miss. 2004)). *See also McDonald v. State*, 976 So.2d 942, 945 (Miss. Ct. App. 2007) and *Weathersby v. State*, 919 So.2d 1146, 1150 (Miss. Ct. App. 2005). Whether there was lustful intent is a question of fact to be resolved by the jury. *Smith v. State*, 867 So.2d 276, 278 (Miss. Ct. App. 2004). Clearly, the jury believed that Wright acted with lustful intent based on the circumstances surrounding the incident. Wright's only defense was that he was asleep and thought he was touching his wife's breast. However, Victim testified that Wright was awake. (Transcript p. 271). Further, it is not reasonable to believe that Wright, in his sleep, reached across his step-daughter and down the shirt and inside the bra of his niece all the while believing he was reaching for his wife. He knew when he supposedly fell asleep that he was in the bed with his step-daughter and niece. The circumstances surrounding the incident are certainly sufficient to show that he acted with lustful intent. Accordingly, the State established each element of fondling.

The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

> [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. 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 an "unconscionable injustice."

Pierce v. State, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State. *McClain v. State,* 625 So.2d 774, 781 (Miss.1993). This Court has previously held that "factual disputes are properly resolved by the jury and do not mandate a new trial." *Smith*, 867 So.2d at 279.

The *Smith* Court further held that "the jury is the sole judge of the credibility of witnesses, and the jury's decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict." *Id.* In the case at hand there is ample substantial and believable evidence which supports the verdict, much of which is set forth above. As such, the verdict was not against the overwhelming weight of the evidence. Therefore, Wright's third issue is without merit.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Barry Ray Wright as he was not denied a fair and impartial jury and was not denied effective assistance of counsel. Additionally, there was sufficient evidence to support the verdict and the verdict was not against the overwhelming weight of the evidence.

Respectfully submitted,

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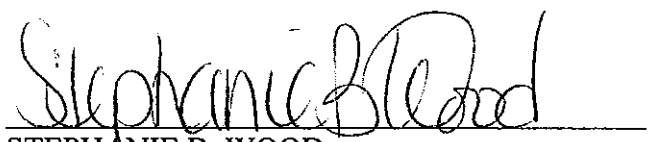
BY: 

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CERTIFICATE OF SERVICE

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