IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2008-KA-00433-COA

BARRY WRIGHT — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
MONROE COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT

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BARRY WRIGHT **APPELLANT**

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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.

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant does not request oral argument in this case. The issues lend themselves to thorough briefing on the record before the Court, and the oral argument would not likely aid the Court in its disposition of this case.

ISSUES

I. WHETHER THE TRIAL COURT DENIED WRIGHT HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY?

II. DID WRIGHT RECEIVE INEFFECTIVE ASISTANCE FROM TRIAL COUNSEL?

III. DID THE TRIAL COURT ERR BY DENYING WRIGHT'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT OR, ALTERNATIVELY, A NEW TRIAL?

STATEMENT OF THE CASE

The Nature of the Case and Course of the Proceedings:

This is an appeal from the Circuit Court for the First Judicial District of Monroe County. Barry R. Wright, the Defendant below and the Appellant herein, was charged by way of a Monroe County felony indictment filed on February 2, 2005, of fondling of a child under the age of 14 on or about the 22nd day of March, 2004. Four years later, on the 25th day of February, 2008, the case went to trial before the Honorable Judge Paul S. Funderburk in the Monroe County Circuit Court located in Aberdeen, MS. On the 28th day of February, 2008, a Monroe County jury found the Defendant guilty of fondling and on the next day, the trial judge sentenced the Defendant to a term of Fifteen (15) Years with Ten (10) Years suspended and five (5) years to serve in the Mississippi Department of Corrections. On March 4th, 2008, the Defendant filed a Motion for Judgment of Acquittal JNOV or in the Alternative a New Trial and a Motion to Reconsider Sentence, which was denied. It is from said conviction and sentence that Barry Wright now appeals.

Statement of Facts Relevant to the Issues Presented for review

In March of 2004, Barry Wright resided at 50039 Sink Road in Becker Community in Monroe County Mississippi, with his former wife, Lisa Wright and his step children, Brittany and Jordan Brummitt. (T. 296) On or about the 22nd day of March, 2004, the alleged victim in this case Morgan Fears, the niece of his ex-wife, was spending the night at his home on Sink Road along with the rest of the family. (T. 298) Testimony shows that sometime during the night, Barry laid down in the same bed with Brittany and Morgan in order to help get them asleep. (T. 298, 310) That some time

during the night in question, Morgan Fears rose up, got out of bed and walked into her Aunt Lisa's room where she informed her of an alleged incident with Barry touching her chest. (T. 316) That Lisa then proceeded to go into Brittany's room, where she aroused Barry and confronted him about the incident. (T. 316) That Barry denied any intentional actions towards the child by explaining he had been asleep and "well, if I have, it was purely accidental, and I did not know that I had done that. (T. 299)

SUMMARY OF ARGUMENT

In February of 2008, Barry Wright had an opportunity in a Court of Law to face his accusers and assert his innocence before a jury of his peers. However, at the conclusion of this process, the Defendant believes that certain failures of his attorney and the Trial Court may have deprived him of the right to a fair trial. The Court allowed and the Defendant's attorney failed to object to the inclusion on the jury a friend and fellow church member of the victim in this case. He also failed to properly discover an alibi exhibit to the State resulting in this key piece of evidence being refused for admission at trial. If not for the Defendant's ineffective assistance of counsel, the outcome of the trial may have been very different.

The Defendant's motion for JNOV should have been granted or in the alternative the Defendant should have been given a new trial. The State never proved the final prong of the elements of the crime of fondling as found in Section 97-5-23 of the Mississippi Code Annotated. The State relied on conjecture by the Jury to place the requisite intent in order to prove the "purpose of gratifying his lust or indulging his depraved licentious sexual desires." The decision by the Jury was against the overwhelming weight of the evidence and for these reasons, the Defendant requests that his conviction be overturned and he be granted a new trial.

ARGUMENT

I. WHETHER THE TRIAL COURT DENIED WRIGHT HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.

During Voir Dire by the Trial Court, Juror Number 2, John Michael Shannon, self identified that he attended the same church as the victim and her mother. (T. 90) The Court questioned the juror about his ability to be fair and impartial, in which the juror replied that he could be "unbiased." (T. 91) No further questions were asked of this juror. Later, during the proceedings to strike jurors for cause, multiple potential jurors were discussed by the Defense and the Court, some of which were stricken for cause by the Court for various reasons including prior relationships with the State's witnesses. (T. 122-129) However, the Defendant's attorney, Mr. Ervin, failed to bring up for challenge Juror Number 2 and his relationship with the victim and her mother. This juror, who admitted to attending church services with the victim and her family, was allowed to be seated on the Jury without any objection by the Defense.

In the recent case of McGregory v. State, the Court espoused the standard for an appellate court to consider whether or not a member of the jury was improperly seated.

> The proper standard for excluding a venire member from the jury is to determine whether the "juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.' " Davis v. State, 660 So.2d 1228, 1244 (Miss.1995) (quoting Balfour v. State, 598 So.2d 731, 755 (Miss.1992)). This standard does not require that a potential juror's bias be proven with "unmistakable clarity." *Id.* Because of the trial judge's ability to see and hear the potential juror's

responses during voir dire, he is in a much better position to determine whether or not the potential juror should be struck for cause. *Taylor v. State,* 672 So.2d 1246, 1264 (Miss.1996). Thus, the "determination of whether a juror is fair and impartial is a judicial question." *Id.* Unless the decision to seat a particular jury is clearly wrong, then this Court will not disturb that decision. *Id.* Further, we must keep "in mind that jurors take their oaths seriously, and this promise [of fairness and impartiality] is entitled to considerable deference." *McDonald v. State,* 921 So.2d 353, 357(¶ 15) (Miss.Ct.App.2005). McGregory v. State, 979 So. 2d 12, (Miss.App.2008)

The Court showed through other challenges, such as the case with Juror Number 49 where the juror knew the victim's father, that he would strike them for cause saying, "I know that he said he could be - - that would not influence him, but I'm not going to put him in that position where he would be influenced." (T. 128-129) The Court should have stricken this juror for cause, much like the similar jurors. Even though, the Defendant's attorney failed his client by not asking for Juror Number 2 to be struck for cause or by not using one of his available peremptory challenges on the juror, the Court should have known from his prior answers of the potential for this juror to be unduly influenced by this prior relationship. It is common knowledge that church association lends credibility to a witness and victim. 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.

II. DID WRIGHT RECEIVE INEFFECTIVE ASISTANCE FROM TRIAL COUNSEL?

"There is a two part test for ineffective assistance of counsel from Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, a

Defendant must show (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defendant. Leatherwood v. State, 473 So.2d 964, 968 (Miss.1985). There is a strong but rebuttable presumption that counsel's decisions were sound trial strategy. Id. at 969. To overcome the presumption, the defendant must show that but for counsel's deficiency, a different result would have occurred. Id. at 968. The reviewing court must examine the totality of the circumstances. McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990).

The Supreme Court established the procedure for addressing claims of ineffective assistance of counsel on direct appeal in *Read v. State,* 430 So.2d 832, 841 (Miss.1983). This Court reiterated this procedure in *Colenburg v. State,* 735 So.2d 1099, 1102(¶ 5) (Miss.Ct.App.1999). In order for the appellate court to review a claim of ineffective assistance of counsel on direct appeal, the record must affirmatively show that the defendant has been denied effective assistance of counsel. If the record does not affirmatively demonstrate that the defendant has been denied effective assistance of counsel, this Court should proceed to decide the case on other issues. *Read,* 430 So.2d at 841. If the case is reversed on other grounds, the ineffective assistance claim is moot. *Id.* If the case should be otherwise affirmed, we do so without prejudice to the defendant's rights to raise the ineffective assistance of counsel claim via post-conviction proceedings. *Id.* McGregory v. State, 979 So. 2d 12, (Miss.App.2008)

The defense counsel in this case was the Honorable Tim Ervin. Mr. Ervin, a former Chancellor, is a well respected attorney practicing in North Mississippi. (T. 119) The Defendant, however, feels that on this case, his counsel was ineffective for several reasons.

A. Failure to object during jury selection to a sympathetic potential juror.

The circumstances of Juror Number 2 arriving to the jury panel for this trial were discussed at length in a previous paragraph, so they will not be repeated here. However, the Court may decide to relieve the Trial Court of any error since the attorney

for the defendant never raised to strike Juror Number 2 either for cause nor with a peremptory strike. That failing to properly object to the inclusion of this juror using any means available to the Defense, constituted ineffective assistance of counsel. The defense was present, heard the admissions of association by the juror and heard the Court strike other jurors for similar reasons, yet remained silent when the opportunity presented itself. The Defendant was greatly prejudiced by the inactions of his defense counsel in this case and if not for that ineffective assistance of counsel another outcome may have occurred.

B. Failure to conduct proper reciprocal discovery, have introduced into evidence an alibi exhibit and make an offer of proof for the record.

During the direct examination of the Defendant, Mr. Ervin asked the Defendant the following questions:

Q. All right, sir. And I'll ask you first, where were you on the 22nd day of March, 2004. (T. 297)

A. Augusta, Georgia.

Q. How do you know you were in Augusta, Georgia?

A. From my daily log book, sir.

Q. Alright, sir. Do you have that with you?

A. Yes, sir.

MR. ERVIN: Let me show it to counsel opposite, please sir.

MR. BAKER: Your Honor, may we approach?

THE COURT: Yes, sir.

(DISCUSSION HELD AT BENCH OUTSIDE HEARING OF THE COURT REPORTER.)

MR. ERVIN: May I proceed, your Honor?

THE COURT: You may.

The Defendant had in his possession a log book showing official records that he was

out of the State during the night the prosecution said that he was in Mississippi. (T. 138, 165, 176, 193, 219, 266) However, due to the ineffective assistance of counsel, this evidence was not properly discovered to the State and, thus, the resulting ruling by the Court, made outside the presence of the court reporter, was that the log book was inadmissible. After this side bar conversation, Mr. Ervin completely dropped this theory of the defense and proceeded to try to show reasonable doubt through other means. Because he did not take the time to make an offer of proof of this evidence for the record, this Court does not have the opportunity to examine the impact this evidence would have had on the outcome of this trial. The ironic truth of this situation is that this evidence was proof that the Defendant was, in fact, not in the State of Mississippi the night of the 22nd of March, 2004. He was, in fact, in Georgia that night. The District Attorney that indicted this crime placed the date of the crime correctly on the 22nd day of March 2004. The events discussed at trial actually occurred on the night of the 21st and the alleged crime occurred during the early morning hours of the 22nd, thereby necessitating the correct date of March 22nd, 2004 in the indictment. Neither trial counsel for the State nor the Defense picked up on the fact that every single witness by the State was asked an incorrect statement about "the night of the 22nd." (Id.) The defense counsel at the close of the State's case, had all of the State's witnesses testifying to a period of time in which the Defense could have shown where he was in Georgia. Due to the ineffective assistance of counsel, this theory of the defense was abandoned when the Court denied the exhibit and Mr. Ervin went on to other things.

The trial court suppressed this evidence from what we can see in the transcript. It is obvious that a piece of evidence that can help prove the theory of the defense that the Defendant was out of the State on the evening of the crime would be material. In the Malone case, the Court found that if the information is material "its suppression undermines the confidence of the outcome of the trial," and if that information has been suppressed, then the judgment must be vacated and a new trial granted. Malone v.

State, 486 So.2d 367, 369 (Miss.1986). This material fact was suppressed due to the ineffective assistance of counsel and an entire theory of the defense was abandoned. If the Jury had been allowed to hear evidence of the defendants true whereabouts that night, it could of cast the shadow of reasonable doubt and likely would of led to a different conclusion.

III. DID THE TRIAL COURT ERR BY DENYING WRIGHT'S MOTION DIRECTED VERDICT, (286) FOR JUDGEMENT NOTWITHSTANDING THE VERDICT OR, ALTERNATIVELY, A NEW TRIAL?

A motion for JNOV challenges the legal sufficiency of the evidence. McClain v. State, 625 So.2d 774, 778 (Miss. 1993). A reviewing court must consider as true all credible evidence consistent with the defendant's guilt, and the State must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Id.* This Court may only reverse where, with respect to one or more of the elements of the offense, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. Wetz v. State, 503 So.2d 803, 808 (Miss.1987).

The trial court should only grant a new trial motion when the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. Wetz, 503 So.2d at 812. The Court, on appeal, will reverse and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the state. *Id.* The standard of review for a denial of a directed verdict and a Judgment Notwithstanding the Verdict (JNOV) are the same. Coleman v. State, 697 So.2d 777, 787 (Miss. 1997). A motion for JNOV and a motion for a directed verdict both challenge the legal sufficiency of the evidence. McClain v. State, 625 So.2d 774, 778 (Miss. 1993).

The Supreme Court has held that a new trial will not be given unless the verdict is contrary to the overwhelming weight of the evidence that an unconscionable injustice

would occur by allowing the verdict to stand. Groseclose v. State, 440 So.2d 297, 300 (Miss. 1983). However, if a jury verdict is determined to be against the overwhelming weight of the evidence, then the remedy is to grant a new trial. Collier v. State, 711 So.2d 458, 461 (Miss. 1998).

In the case at hand, the State failed to meet their burden of proof and the Trial Court should have sustained the Defendant's motion for directed verdict and/or their motion for Judgment Acquittal JNOV or in the Alternative a New Trial, which was submitted at the close of the State's case and at the close of the trial. A jury could not find beyond a reasonable doubt that the fondling, as described in the indictment against Barry Wright, ever took place or that the facts are such that the verdict was against the overwhelming weight of the evidence.

The indictment of the Monroe County Circuit Court Cause No. CR 05-012 against the Defendant Barry Wright, reads as follows:

> That
>
> BARRY RAY WRIGHT
>
> In said County and State on the 22nd day of March, AD., 2004, being a person above the age of eighteen (18) and whose date of birth is the 13th day of April 1962, did willfully, unlawfully and feloniously, for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, handle, touch or rub with his hands or other parts of his body, the breast of Morgan Fears, whose date of birth is the 22nd day of December 1992, a child under the age of fourteen (14) years; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi. (R. 11)

The indictment, based on Section 97-5-23 of the Mississippi Code, clearly indicates one of the elements of this crime is an act of intent must have occurred by the Defendant. 97-5-23, Miss Code Ann. The evidence must have been such that a reasonable jury

could have concluded that Barry Wright did the act for the "purpose of gratifying his lust or indulging his depraved licentious sexual desires." The State's case was noticeably absent of any evidence that led a reasonable juror to conclude that Barry Wright had lustful or indulging purposes when this act occurred. In fact, only during the closing arguments by the State, was the element of intent ever brought to the attention of the Jury, when Mr. Gault said,

> "Ladies and gentlemen, it must be shown that the defendant did this to indulge his depraved sexual desires or his lusts. I ask you why else would you do that? Because it was intentional. So I ask why else? No other reason. It was, in fact, for his indulgence. He knew exactly what he was doing. Barry Wright knew exactly what he was doing when he reached across his stepdaughter, when he reached down Morgan Fears' shirt, under her bra and rubbed her breasts. He knew exactly what he was doing." (T. 349)

None of the State's actual witnesses commented on the purpose of the contact by the Defendant on the victim. Most of the evidence that came close to the subject broached on the topic of accidental vs. intentional touching and not for what purpose, if any, the Defendant touched the victim. The Defendant admitted that he did not know whether or not he touched the victim since he was asleep at the time of the occurrence. (T. 317) Therefore according to Mr. Gault's closing argument, if the Jury believes that he intended to touch her breast, the remaining elements of the crime are simply understood. (Id.) The Jury was left with a very easy decision. If they believed the Defendant touched the victim's breast, even though there was no actual evidence that he did it for lustful or lascivious purposes, the Defendant must have done it for an evil purpose.

In the Bradford case the Court said,

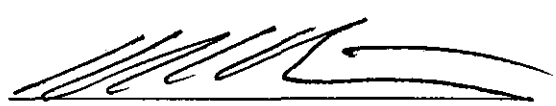
> ... we are of the opinion that there must be evidence of some nature that is probative on the issue; otherwise, every demonstration of affection or playful act directed by an adult toward a child would expose the adult to potential criminal charges, the outcome of which would depend solely on the jury's unsubstantiated subjective assessment of the purposes of the encounter. Certainly, such evidence could arise from a description of the circumstances of the encounter itself. For example, touching in inappropriate parts of the child's body, overly demonstrative acts of affection, events occurring when the child is not fully clothed, or some evidence of sexual arousal by the defendant during the encounter, might be sufficient to permit the jury to draw a reasonable inference as to the improper purpose of the defendant's act. We do not intend, by the foregoing, to exhaust the possibilities of the avenues of proof available to the State. We only mean to demonstrate that a jury's determination of the motivation underlying a defendant's actions in regard to physical contact with children must be based upon something other than pure conjecture. Bradford v. State, 786 So. 2d 464 (Miss Ct. App.1999)

The case at hand relied on absolute conjecture by the Jury to decide the Defendant's intent, an essential element of the crime. The recent Foxworth case distinguishes Bradford in that the defendant reached down the shirt of the victim and touches her bare breast. Foxworth v. State, 982 So. 2d 453 (Miss.Ct.App.2007). The Court in that case found additional factors such as the Defendant preventing the victim from moving away was helpful. Id. Also, in the Ladnier case, the Defendant reached under the victim's

shirt over a period of time and massaged the victim's nipples, along with other factors that described the intent of the Defendant. Ladnier v. State, 878 So. 2d. 926, (Miss. 2004) These cases show that the analysis of the intent of the victim is important and if it is not properly shown, as in the Bradford case, the Court should overturn the verdict. Id.

CONCLUSION

The Defendant had his day in Court after several long years of waiting for the opportunity. Unfortunately, at the end of that day, the actions of the Defendant's counsel were such that the defendant was denied a fair trial. The Trial Court and defense attorney should not have allowed a possibly biased juror to sit on the jury. Their inaction prohibited the Defendant from having an impartial jury that day. The problems with reciprocal discovery of an alibi exhibit on behalf of the defense, led to that crucial piece of evidence being refused admission. Without that evidence, the Defendant was left arguing only one of his pre-trial theories of defense. The Court should have granted the Defendant's Motion for JNOV or a New Trial because the Jury made a decision based upon pure conjecture of the intent of the Defendant and not based on testimony that exhibited sufficient indicia of reliability. For the foregoing reasons, Appellant respectfully requests this Court to overturn the final verdict of the Trial Court and order that the Defendant receive a new trial.



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CERTIFICATE OF SERVICE

KELLY L. MIMS, counsel for the appellant, hereby certifies that he served a copy of the foregoing Brief of the Appellant on all parties to this matter by first class mailing to the attorneys and on the date listed below:

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This the 22nd day of August, 2008.

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