IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICHARD RAY TIMMONS — APPELLANT

VS. — NO. 2008-KA-0696

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICHARD RAY TIMMONS **APPELLANT**

vs. **CAUSE No. 2008-KA-00696-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Lauderdale County, Mississippi in which the Appellant was convicted and sentenced for his felony of **STATUTORY RAPE.**

STATEMENT OF FACTS

The victim's father operated a roofing business in Meridian in July of 2006. The Appellant began working for the victim's father in that month. At various times the Appellant spent the night with the victim's family when he was not staying with his mother in July and August of that year. The victim, a female born on 7 November 1991, lived with her father, mother and sister.

The victim and her sister shared a bedroom in the family home. The Appellant slept on a couch in the living room. The victim occasionally fell asleep on an ottoman in that room. On

the night of the 23rd or 24th of July, the victim's mother found the Appellant and the victim talking in the living room at around four o'clock in the morning. The victim's mother suspected that the Appellant was "involved" with her daughter. The Appellant lost his job on 8 August 2006, when the victim's mother found that the Appellant had been intimate with her daughter. She found a number of "love letters" from her daughter to the Appellant. In one letter, the victim noted 25 August as her wedding day.

The victim's mother and her other daughter had occasion to visit the Appellant's mother's home. The Appellant's mother granted them permission to enter the bedroom he used. The victim's mother found three letters from the victim to the Appellant. After the victim's mother found the letters, the victim gave her mother a photograph of the Appellant and the victim at a casino in Philadelphia.

After the Appellant was fired, he rang the victim's mother to discuss the letters. In the course of the conversation, he admitted to having had oral sex with her daughter on one occasion. He then admitted to having had sexual intercourse with her. The Appellant said he was sorry.

On the evening following that conversation, after the Appellant's wife had left the victim's home, the Appellant called the victim's mother again to say he was sorry. He indicated that he had been in love with her daughter, that her daughter had been in love with him, but he denied that there was a plan to marry her daughter. Later, though, he stated that he had discussed marriage with the victim. (R. Vol. 2, pp. 97 - 150; Vol. 3, pp. 151 - 155).

The victim testified. She stated that she was fourteen years of age in the summer of 2006. She worked for her father's business during that summer. Her father hired the Appellant, and she worked with the Appellant laying shingles. As they worked together, the Appellant began to compliment her on her clothing, appearance and actions. The victim and her family visited

Alabama at one point. The Appellant and the victim stayed in contact by telephone while she was away. She was beginning to have feelings for him. After the victim returned from Alabama, she went on a fishing trip with the Appellant, where she was kissed by him. She was quite flattered by the attention shown to her by the Appellant.

On the night of the 30th of July, the victim was in the livingroom with the Appellant. She went to sit with him on the couch. He gave her compliments and they began kissing. Ultimately, they had sexual intercourse. Two days later, she performed fellatio on the Appellant. She also had sexual intercourse with the Appellant. Her sister Rachael was in the room, asleep on the floor. On the night of the third of August, the Appellant again had sexual intercourse with the victim. She thought that all in all she performed fellatio three times on the Appellant. The victim had sexual intercourse with the Appellant on the fifth of August.

The victim testified that her sister had seen her kissing the Appellant during the fishing trip and had entered the living room and seen the victim and the Appellant kissing and hugging. The victim told her sister not to tell their parents. The Appellant also told the victim not to tell her parents.

The Appellant plied the victim and her sister with alcohol on one or two occasions. The victim admitted writing the Appellant a series of letters. She did not address the Appellant by name at his request. The victim thought she was in love with the Appellant and had formed the idea that they were going to marry. (R. Vol. 3, pp. 157 - 236).

A friend of the victim testified that she had occasion to see the Appellant and the victim together. The Appellant and the victim constantly flirted with each other, and she once saw the Appellant and the victim holding hands. The friend knew that the Appellant often spent the night at the victim's family home. At one point the Appellant asked this friend if she would participate

in a "threesome," but the friend thought that he was merely joking. The victim once told this friend that she had feelings for the Appellant. (R. Vol. 3, pp. 237 - 250).

The victim's sister testified that she heard the Appellant refer to the victim as his girlfriend. During a fishing trip she saw the Appellant touch the victim "on her butt and stuff." The victim told her sister that she liked the Appellant. The Appellant was frequently an overnight guest in the family home. The sister saw the Appellant and the victim kissing on one night. The sister was present when her mother found letters written to the Appellant by her sister under the Appellant's bed at his mother's house. (R. Vol. 3, pp. 251 - 265).

The victim was of the age of fourteen years when she had commerce with the Appellant. The Appellant was thirty - two years of age at that time. (R. Vol. 3, pp. 265 - 274).

The Appellant's mother testified. She said that the Appellant was with her at her home on the day and night of 29 August 2006. On the following day, his mother went to church and then she and the Appellant went to a Wal - Mart. The appellant stayed with her the remained of the day and spent the night at her house that night.

On the following Monday the Appellant's mother woke him at six o'clock. When she returned from her work at eleven, the Appellant was still at her house. The Appellant then went to a casino. His mother did not know when he returned on that evening. The Appellant was at his mother's house on Tuesday morning. He was with his mother on Tuesday, Tuesday night, and Wednesday night. He spent the entire week with his mother. On the Tuesday of the following week, the Appellant was said to have left for the Coast to take a job there. The mother did not deny that the Appellant spent nights at the victim's home. Her testimony covered the period between 29 July 2006 through 5 August of that year. The mother claimed that the Appellant was not fired by the victim's family. She said he quit that job, and had quit the week

before 8 August 2006. The Appellant's mother was with the Appellant when he turned himself in. She did not tell law enforcement that the Appellant had been at her house during the time frame she testified about. (R. Vol. 4, pp. 308 - 331).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN LIMITING CROSS - EXAMINATION OF THE WITNESS LAWSON?

2. WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT LIMIT THE CROSS - EXAMINATION OF WITNESS LAWSON

2. THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

1. THAT THE TRIAL COURT DID NOT LIMIT THE CROSS - EXAMINATION OF WITNESS LAWSON

In the first assignment of error, the Appellant asserts that the trial court denied him his right to confront witnesses, in violation of the State and federal constitutions. While he has not troubled himself to be very specific in how this allegedly happened, it appears that his complaint concerns a ruling by the trial court concerning the extent he was permitted to question the victim about supposedly false allegations she made concerning the Appellant's conduct toward other girls.

In the course of cross examination, the Appellant brought out the fact that the victim told law enforcement that he was "sleeping with other girls." The victim then responded to several other questions on this subject. (R. Vol. 3, pp. 215 - 216). After having answered these

questions, the Appellant then attempted to question the witness about the timing of these reports – whether they were made in the initial interview or later. The State objected, alleging that the subject of whether the Appellant had had relations with other juveniles was irrelevant. The Appellant agreed that such a subject was irrelevant but stated that he was attempting to establish that the victim had made false reports concerning the Appellant vis a vis other girls. The trial court sustained the objection, holding that what may have been reported concerning other girls was irrelevant. The Appellant then asked to make a proffer of evidence, which was permitted. (R. Vol. 3, pg. 217).

The Appellant made his proffer. He stated that he expected the proof to show that the victim gave the names of two other possible victims. He further stated that the proof would show that the allegations were investigated and that the two girls involved each denied any sexual relations with the Appellant. This evidence went to the victim's credibility, according to the Appellant.

The trial court held that the victim never actually accused the Appellant of having had relations with the other girls, that the victim only stated that she suspected the Appellant of having done so. That was not a false report in the trial court's view. For that reason it stood by its previous ruling. (R. Vol. 3, pp. 226 - 229)

We do not find that the Appellant raised in the trial court a claim of a denial of the right to confrontation. An objection as to the area of enquiry the Appellant wished to explore was sustained. He made an offer of proof, and the trial court stood by its ruling. There was no allegation of a denial of the right to confront witnesses. This being so, that claim may not be raised here. *Rogers v. State*, 928 So.2d 831 (Miss. 2006).

Besides the fact that no claim of a constitutional violation in this regard was raised in the

trial court, there is no need to reach such a claim. The trial court simply ruled on an objection made by the State, the objection being that the area the Appellant wished to explore was not relevant. The issue in the first assignment of error may be resolved by considering the rules of evidence concerning relevancy and of scope of cross - examination under M.R.E. 401 and 611. This being so, the confrontation issue need not be reached. *Hood ex rel State Tobacco Litigation*, 958 So.2d 790, 812 (Miss. 2007).

The standard of review concerning the admission or exclusion of evidence is an abuse of discretion standard. Abuse of discretion will only be found here where an appellant demonstrates clear prejudice resulting from an undue constraint placed upon the defense. This Court will not disturb a trial court's evidentiary ruling unless it is clearly wrong. *Terrell v. State*, 952 So.2d 998, 1005 (Miss. Ct. App. 2006).

We note, first of all, that the Appellant did put into evidence the fact that the victim had expressed her suspicion that the Appellant was sexually involved with other girls and that she had not reported those suspicions in the initial interview, this prior to the State's objection. (R. Vol. 3, pp. 215 - 216). The jury had this information for purposes of weighing her credibility. It is not correct, then, to see this as a case in which some potential inconsistency in the victim's account was not brought to the jury's attention.

Beyond this is the fact that the victim merely suspected that the Appellant was sexually involved with other girls. This was at best a mere opinion by the victim, if even that, rather than a representation of fact which turned out to be unfounded. If regarded as an opinion of a sort, it would not be admissible under M.R.E. 701 since it would not have been helpful to a clear understanding of a fact in issue. There is, on the other hand, no support to be found for the Appellant's claim that the victim was deceptive in this regard or that she made recklessly false

accusations. The victim suspected that the Appellant might be sexually involved with other girls. This was investigated and found to have been unfounded. There was very little, if anything, in this to amount to a false allegation. A suspicion is not the same thing as a wilfully false report.

In the event, though, that this Court should find that the trial court erred in refusing to permit the Appellant to go further with his examination of the witness on this point, any such error should be considered harmless. It would be harmless because the Appellant, in fact, did bring out information about the victim's erroneous suspicion that the Appellant had been sexually involved with other girls.

It would be harmless, too, because the exclusion of this evidence would have made no difference in the outcome of the trial. The victim's testimony was clear. It was corroborated by the letters she wrote to the Appellant, corroborated by her sister's testimony, and corroborated by the fact that the Appellant admitted to the victim's mother of having had sexual relations with the victim. In light of this testimony and evidence, it is hardly likely that the fact that the victim erroneously surmised that the Appellant might be involved with other girls would have made any difference in the trial. Whether the victim was incorrect about whether the Appellant had relations with those girls is insignificant in light of his admission that he did have relations with the victim. Since the Appellant cannot be reasonably said to have been substantially prejudiced by the exclusion of this evidence, there is no basis for reversal of this case. *Harper v. State*, 887 So.2d 817 (Miss. Ct. App. 2004).

As we have said, the confrontation issue is not properly before the Court. In the event, however, that this Court should find that it is before it, and further find that the trial court improperly limited the Appellant's right of confrontation, any such error would most certainly be harmless under *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed. 674 (1986).

This Court has recognized the availability of a harmless error analysis in the context of alleged violations of the confrontation clause. *Singleton v. State*, 1 So.3rd 930 (Miss. Ct. App. 2008).

Under *Van Arsdall*, there are several factors to be taken into consideration when determining whether a said - to -be violation of the confrontation clause is harmless. 89 L.ed. 2d 686.

In the case at bar, the victim's testimony was important, and it was not cumulative. However, there was evidence that corroborated the victim's testimony in its essentials, not the least of which was the Appellant's admission. In view of that admission, and in view of the testimony of the victim's sister and in view of the letters written to the Appellant, whether the victim was under a misapprehension that the Appellant was also involved with other girls was a small point. Whether the victim thought that the Appellant might have been intimate with other girls was not important at all.

The Appellant was not otherwise restricted in his cross - examination of the child, and the record shows that it was a lengthy cross - examination.

The prosecution's case, given the admission and the other corroborating evidence was a strong one. As the Court knows, it is not unusual to find that there is not corroborating evidence in a sex crime case. The case at bar is a strong case, in terms evidence, for this species of crime.[1]

The first assignment of error is without merit.

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[1] It is true that the jury did not convict the Appellant on the other charges levied against him. Why it did not must remain a mystery, but its decision with respect to those other charges cannot be on account of insufficient evidence with respect to them or on account of confusion on the part of the victim. The jury may well have decided that one conviction was sufficient in view of the fact that the acts between the Appellant and the victim were entirely consensual and in view of the fact that the victim was enthralled by the Appellant. The trouble for the Appellant was that he could not legally have consensual sexual relations with the child.

2. THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In the second assignment of error, the Appellant claims that the verdict is contrary to the great weight of the evidence because, it is said, the testimony concerning what the Appellant did on 30 July 2006 was confusing. The Appellant does not challenge the sufficiency of the State's evidence with respect to the elements of Miss. Code Ann. Section 97-3-65 (Supp. 2008). We bear in mind the standard of review appurtenant to a claim that a verdict is contrary to the great weight of the evidence. *May v. State*, 460 So.2d 779 (Miss. 1984).

Count 1 of the indictment alleged that the Appellant engaged in sexual intercourse with the victim on 30 July 2006 and that the Appellant was at the time thirty - six or more months older than the victim. (R. Vol. 1, pg. 2). There were other counts in the indictment, but the Appellant was convicted only of this count 1. (R. Vol. 1, pp. 45 - 48).

The testimony concerning what occurred on 30 July 2006 was that the Appellant had sexual intercourse with the victim on the night of that day. (R. Vol. 3, pp. 172 - 173; 198; 205). This occurred after the Appellant and the victim returned to Meridian after a visit to a casino. (R. Vol. 3, pg. 215). The testimony is quite clear as to what occurred late on the night of 30 July 2006.

The Appellant says there is a discrepancy in that the victim testified that the Appellant was at her house the whole of the day of 30 July 2006 and then testified that he and she spent some part of the day at a casino. How this is of much importance is difficult to see. The Appellant was with the victim the whole day, whether at her house or with her at a casino. The testimony does not call into question what she said happened on the night of that day. In any event, it was for the jury to resolve any conflicts in the evidence. *Brown v. State*, 995 So.2d 698

(Miss. 2008).

The fact that the Appellant's mother testified and attempted to establish an alibi for the Appellant simply created an issue of fact to be resolved by the jury. That there is conflicting evidence in a case is no ground to grant a new trial. *Brown, supra*; *Bell v. State*, 767 So.2d 1055 (Miss. Ct. App. 2000).

The Court should bear in mind that the victim's testimony was corroborated, not least of all by the admission the Appellant made to the victim's mother that he had indeed had sexual intercourse with the victim. There was also the testimony of the victim's sister. There were the letters written by the victim to the Appellant. The verdict simply was not contrary to the great weight of the evidence. The verdict simply does not represent an unconscionable injustice.

That the jury evidently engaged in an act of jury nullification with respect to the other counts of the indictment is no evidence of weakness in the State's proof. The plain fact of the matter is that the State's evidence was more than sufficient to permit a verdict of guilty on all counts. That the jury elected to improperly exercise a kind of leniency in favor of the Appellant, perhaps because of the fact that the relations between the victim and the Appellant were entirely consensual, is no basis to find the verdict of guilty as to count 1 contrary to the great weight of the evidence.

The second assignment of error should be denied.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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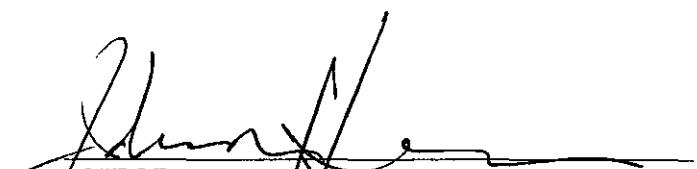
This the 12th day of May, 2009.



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