IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT DUBOSE — APPELLANT

VS. — NO. 2008-KA-1170-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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ROBERT DUBOSE **APPELLANT**

VERSUS **2008-KA-1170-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF APPELLEE

PROCEDURAL HISTORY:

On February 5, 2008, Robert Dubose,"Dubose" was tried for three counts of sexual gratification by fondling, M. C. A. Sec. 97-5-23(1) and sexual battery before a Jasper County Circuit court jury, the Honorable Robert G. Evans presiding. C.P. 3-4; R. 1. Dubose was found guilty of three counts of gratification of lust. He was given three ten year sentences in the custody of the M. D. O.C.. C.P. 200.

After a hearing, Dubose's post trial motions for a new trial or J. N. O. V. were denied. C.P. 232.

Dubose through counsel perfected his appeal to the Mississippi Supreme court. C.P. 207.

ISSUES ON APPEAL

I.
WAS A POST CONVICTION MOTION FOR A MISTRIAL FOR ALLEGED JUROR MISCONDUCT PROPERLY DENIED?

II.
WERE RACE NEUTRAL REASONS GIVEN FOR PEREMPTORY STRIKES?

III.

WAS THERE CREDIBLE SUBSTANTIAL EVIDENCE IN SUPPORT OF THE JURY'S VERDICT?

STATEMENT OF FACTS

On February 5, 2008, Dubose was tried for three counts of sexual gratification by fondling and sexual battery before a Jasper County Circuit court jury, the Honorable Robert G. Evans presiding. R. 1. Dubose was represented by Mr. Christopher Neyland. R. 1.

During voir dire, jurors were asked if they knew any of the attorneys, or proposed witnesses, which included Ms. Mary Dubose, the defendant's wife, and Ms. Yolanda Streeter R. 6-33. Dubose responded that he knew of or was acquainted with Streeter. R. 35. He knew her because she had married someone with whom he had attended school. He also indicated that knowing her would not influence his deliberations in this case. R. 36.

Mr. Dubose, being a black defendant, made a **Batson** challenge, and the prosecution made a **McCollum** challenge. R. 44-62. The record reflects that the prosecution used six peremptory strikes on black jurors, and the defense used six strikes on white jurors. R. 61.

The trial court asked for reasons for strikes which were provided by both the prosecution and the defense. R. 44-62. The trial court found that having members of a jurors' family investigated or charged for felonies was a race neutral reason. He found demeanor such as inattentiveness, and lack of eye contact as race neutral. He also accepted being acquainted with law enforcement for the defense, and being acquainted with Dubose from his being in someone's church as an organist race neutral. R. 44-62.

The record does not contain any formal statement or data about the race of the jurors that served on Dubose's jury to the best of the appellee's knowledge. C.P. 1-271.

Officer Jimmy Reynolds testified that Dubose was born in May, 1959 which made him some 46 years old at the time of trial. R. 76.

Ms. Lyrita Moffitt-Parker testified that she was employed by the Jasper County Department of Human Services. R. 79. She had received training and had experience in investigating child abuse charges. R. 80. She went to talk with Dubose's step children at their school. R. 81. After hearing of possible child abuse, she took them to a Child Advocacy's Center for an interview. They were also taken for an examination by a pediatrician, Dr. Patricia Tibbs, on April 5. R. 84.

Dr. Patricia Tibbs, a board certified pediatrician, testified that she interviewed Dubose's three step children. R. 95-117. They were Anthony, Chante, and Lakeisha Dubose. Dr. Tibbs testified that she took their medical history. All three children told her of being sexually abused by their step father. Dr. Tibbs testified that she examined the children and found physical evidence consistent with sexual abuse. R. 116.

Ms. Chante Dubose was eleven years old at trial, and in the fifth grade. She testified that she was adopted by Mary and Robert Dubose. R. 117. She testified that Dubose told her to come to his bed room. He told her to take off her underclothes. R. 121. Dubose pulled his pants down. R. 121. He put his hands on her "private part" and made her touch his exposed penis. She testified that he put his fingers on and inside her "private part."R. 120. She testified that Dubose told her he would "beat us to death if we tell." R. 123. Chante testified that she told her step mother about Dubose touching her. R. 134.

Ms. LaKeisha Dubose testified that she was ten years old at the time of trial. R. 136. LaKeisha testified that Dubose called her to his bed room. He touched her breast and her "private part."R. 139-140. He touched her private part with his fingers. R. 139-140. She also testified to seeing Dubose with her brother, Anthony. Dubose was on top of Anthony. R. 140-141.

Mr. Anthony Dubose, Robert Dubose, Jr., testified that he was eight years old at the time of trial. R. 150. Anthony testified that Dubose put his hand and his private part "in his butt." R. 153. Dubose kissed him, touched his private part and made he put my private part in his butt. R. 153.

The trial court denied a motion for a directed verdict. R. 161-167.

After being advised of his right to testify on his own behalf, Robert Dubose stated that he had decided, of his own volition, not to testify. R. 169-170.

However, his wife, Mary Dubose, testified on his behalf, denying that she had not heard any complaints of sexual abuse from the three adopted children living the home she shared with Dubose. R. 171-187.

Dubose was found guilty of three counts of gratification of lust and given three consecutive ten year sentences in the custody of the M.D.O.C.. C.P. 200.

Dubose filed motions for a New Trial and a J.N.O.V. C.P.180-183;195-197.

The motion for a new trial did not contain any affidavit from Mr. Streeter or anyone else knowledgeable about whether juror Thigpen's recognized his relationship with the ex- husband of Mary Dubose, Dubose's wife, prior to trial. R. 195-199.

The record includes notice of a hearing on these post conviction motions. C.P. 202. Juror number 8 , Thigpen, and defense witness, Yolanda Streeter were subpoenaed to testify at that hearing. C.P. 205-206. After apparently hearing their testimony, the trial court denied relief. C.P. 232.

Dubose through counsel perfected his appeal to the Mississippi Supreme Court. C.P. 207.

SUMMARY OF ARGUMENT

I.
THE TRIAL COURT PROPERLY DENIED POST CONVICTION MOTIONS.

The record reflects that the trial court correctly denied a motion for a J.N.O.V. and a New Trial. C.P. 232 . This was the first time issues related to juror number 8, Mr. Michael Thigpen, were raised with the trial court. C.P. 195-197. The record reflects that Thigpen stated that he could be fair and impartial in following the law as applied through jury instructions in this case. R. 6-33; 44-62.

There is a lack of evidence that Thigpen was asked an unambiguous question about which he had substantial knowledge. There is a lack of evidence that he recognized Mary Dubose, or remembered that he was possibly related to her ex-husband. Nor was there evidence that Thigpen's lack of a response to voir dire questions interfered with Dubose receiving a fair trial. **Doss v. State** 882 So.2d 176, 182 -183 (¶10) (Miss. 2004).

II.

THE PROSECUTION PROVIDED RACE NEUTRAL REASONS.

The record reflects that the trial court accepted as "race neutral" the reasons provided for peremptory strikes by both the prosecution, and the defense. R. 44-62. In addition, the Mississippi Supreme Court has accepted demeanor, such as inattentiveness, as well as having family members of a juror charged or convicted of a crime as possible race neutral reasons for a peremptory strike. **Perry v. State** 949 So. 2d 764, 767 -768 (Miss. App. 2006).

While the defense did disagree with strikes by the prosecution on some grounds, the prosecution provided multiple grounds for some of its strikes. The trial court also accepted as race neutral being acquainted with law enforcement officers which was offered by the defense. In

addition, the record does not contain any data on the racial composition of the jury to the best of the appellee's knowledge. C.P. 1-272. **Jackson v. State,** 672 So.2d 468, 479 (Miss. 1996).

III.

THERE WAS CREDIBLE SUBSTANTIAL EVIDENCE IN SUPPORT OF DUBOSE'S CONVICTIONS.

There was credible, substantial partially corroborated evidence in support of the trial court's denial of a motion for a new trial. **McClain v. State,** 625 So. 2d 774, 778 (Miss. 1993). Anthony, Chante, and Lakeisha Dubose identified Dubose as the person who had touched and rubbed their genitals for his lustful purposes. R. 120-122; 140-141; 150-152.

There was record evidence in support of finding that they were under the age of sixteen and Dubose was over the age of eighteen. M. C. A. Sect. 97-5-23(1). R. 76;103. Dr. Tibbs found from her examination of the children that there was physical evidence that was consistent with child sexual abuse. R. 116.

The record reflects that the trial court did not abuse its discretion in denying a motion for a new trial. **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994).

ARGUMENT

PROPOSITION I

THE TRIAL COURT CORRECTLY DENIED A MOTION FOR A NEW TRIAL OR JNOV.

Dubose's counsel argues that the trial court erred in denying him a new trial. He thinks that juror 8, Mr. Michael Thigpen, did not answer relevant questions during voir dire about his relationship with the defendant's wife. He believes that juror Michael Thigpen's failure to disclose

during voir dire that he was related to the ex-husband of Dubose's wife, Mary Dubose, denied him a fair trial. Appellant's brief page 7-10.

To the contrary, the record reflects that Thigpen was not questioned during voir dire about his relationship with Mary Dubose's ex-husband, or any other extended family relationship with any proposed witnesses prior to trial. R. 6-33.

In addition, the record reflects that Thigpen responded to "recognizing" Ms. Yolanda Streeter who was a proposed defense witness. R. 35. The record also reflects that Thigpen indicated that he could be fair and impartial, and that he had no preconceived notions about the charges against Dubose in the instant cause.

The record reflects that both Streeter and juror Thigpen were subpoenaed to testify at the hearing on Dubose's motion for a new trial. C.P. 205-206. The record reflects that a hearing was held on these post trial motions. The trial court denied relief, finding that Dubose had not met his burden of proof in support of his charge of juror misconduct. C. P. 232.

Therefore, the appellee would submit that the record reflects that Dubose failed to provide any specific factual support for his motion about alleged juror misconduct. There is no factual basis for the motion other than what was or was not heard by the trial court at the hearing on the motion. Otherwise, factual claims about who specifically knew what about juror Thigpen's family relationships was merely hearsay.

In addition, during voir dire, Mr. Michael Thigpen, juror number 8, advised the trial court that he recognized Ms. Yolanda Streeter, who would be a defense witness. He indicated that he did not know her personally, but knew "of her." He knew of her since she had married someone with whom he had once attended school.

Q. Does the fact that you recognize her, does that influence you one way or the other?

A. (Indiscernible).

Q. Number 8?

A. Her husband is my classmate.

Q. Her husband is your classmate? Okay. Does that fact influence you one way or another? Do you know her personally, or do you just know her husband as your classmate?

A. I know of her. I don't know her personally. R. 35.

The record reflects that Thigpen was questioned by the trial court, and the defense as to whether he believed that he could be fair and impartial. The trial court asked the voir dire if the proposed jurors could decide the case to be presented solely upon the testimony they would hear and the exhibits that would be submitted for their review.

Q...Now, I told you that in order to ask you this: Can each of you decide this case based on those two things and those two things alone? (Oral testimony and exhibits, the law which will be read to you at conclusion of oral argument)

A. (No verbal response.)

Q. Is there anyone who cannot do so?

A. (No verbal response.) R. 19.

In **Doss v. State** 882 So.2d 176, 182 -183 (¶10) (Miss. 2004), the Supreme Court found a lack of evidence that the juror was asked an unambiguous relevant question during voir dire.

¶ 10. The **Odom** test provides that the trial court should, on a motion for new trial, determine whether the question propounded to the juror was relevant, unambiguous and whether the juror had substantial knowledge of the information sought to be elicited. The court then determines whether prejudice can be inferred from the juror's failure to respond. The record shows that the second requirement,
that of the questions being unambiguous, was not met in Doss's trial. The judge may have been only interested in jurors who had contact with D.A. Evans in his official capacity, or he may also have been trying to elicit information about contacts that jurors may have had in other aspects of Evans's legal practice. It is impossible to tell, from the circuit court's questions, or from the judge's failure to clarify the matter, as

he had done earlier in the Bell trial. Since all the relevant questions from the **Odom** test cannot be answered in the affirmative, we do not reach the question of whether prejudice to the defendant can reasonably be inferred. "If prejudice reasonably could be inferred, then a new trial should have been ordered. It is, of course, a judicial question as to whether a jury is fair and impartial, and the court's judgment will not be disturbed unless it appears that it is clearly wrong." **Odom**, 355 So.2d at 1383. This issue is without merit.

The appellee would submit that Dubose, as found by the trial court, did not meet his burden of proof for showing any unambiguous question, or substantial knowledge much less any prejudice to his defense based upon voir dire. C.P. 232. **Odom v. State**, 355 So. 2d 1381 (Miss. 1978).

This issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS RACE NEUTRAL REASONS WERE GIVEN FOR PEREMPTORY STRIKES BY BOTH PROSECUTION AND DEFENSE.

Dubose argues that the trial court erred in accepting the prosecution's alleged race neutral reasons for peremptory strikes of black jurors. Dubose believes that the prosecution used all six strikes on black jurors, and that striking jurors because they supposedly had family members with possible criminal charges was pre-textual and discriminatory. The trial court by accepting these reasons as grounds for strikes denied him the possibility of a fair trial.

Dubose believes there was no showing that the jurors had actual pending charges as opposed to just members of their family facing criminal charges. He also does not believe there was any showing as to the basis of the alleged knowledge about criminal activity in jurors families. Appellant's brief page 10-15.

The record reflects that the racial composition of the jury was not made in the instant cause to the best of the appellee's knowledge. C.P. 1-272.

The record also reflects this is case where the defense used all of its strikes on white jurors and the prosecution all of its on black jurors. R. 61. Dubose was a black defendant.

The trial court accepted as race neutral strikes on black jurors the following: that members of a juror's family were investigated or charged with crimes, and or with sexual abuse, as well as demeanor or admitted community contact with the defendant. There were no specific claims of disparate treatment based upon racial composition by Dubose during voir dire. R. 45-61.

Likewise, the trial court accepted demeanor, inattentiveness, as well as being acquainted with law enforcement officers as race neutral strikes by the defense on white jurors. R. 57-61.

The record reflects that counsel for Dubose used all its strikes against white jurors. R. 61. In addition, defense counsel used inattentiveness and knowing law enforcement witnesses as his reasons for striking white jurors. These reasons were accepted as race neutral by the trial court. R. 57-61.

In **Berry v. State** 802 So. 2d 1033, 1040 (Miss. 2001), the Supreme Court found the trial court's acceptance of race neutral reasons by the prosecution was not "clearly erroneous." In that case, as in the instant cause, the prosecution used more than one reason for striking various jurors. The court found a lack of disparate treatment where more than one reason was used and those reasons were shown to have been applied to jurors of a different race.

> Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pre-textual. **Manning v. State**, 726 So.2d 1152, 1186 (Miss.1998), overruled on other grounds, **Weatherspoon v. State**, 732 So.2d 158 (Miss.1999)(citing **Moore v. Keller Indus., Inc.**, 948 F.2d 199, 202 (5th Cir.1991)). See also **Lockett v. State**, 517 So.2d at 1352. Accordingly, the trial court's ruling accepting the State's articulated race-neutral reason for striking Juror Mosley was neither clearly erroneous nor against the overwhelming weight of the evidence.

In **Perry v. State** 949 So. 2d 764, 767 -768 (Miss. App. 2006), the Appeals Court found that it would owe "great deference" to a trial court's acceptance of race neutral reasons for peremptory strikes. Among the reasons accepted for strikes were demeanor, living in a high crime rate neighborhood and criminal history of juror or a juror's relative.

> In reviewing the trial judge's decision on the gender/race-neutral reasons offered by the party exercising the peremptory strike, this Court will give the decision great deference. **Lynch**, 877 So.2d at 1271(¶ 50) (citing **Walker v. State**, 815 So.2d 1209, 1215(¶ 12) (Miss.2002)). We give such deference to the trial court's findings because the trial judge is in the best position to evaluate the demeanor and credibility of the attorney offering the gender/race-neutral explanation. Id. Our supreme court has set out a non-exhaustive list of valid race-neutral reasons for the exercise of peremptory challenges, which includes "living in a 'high crime' area, body language, demeanor, [distrust of a juror by the party exercising the strike], inconsistency between oral responses and juror's card, criminal history of juror or relative, social work and other types of employment, and religious beliefs." **Walker**, 815 So.2d at 1215(¶ 12) (citing **Lockett v. State**, 517 So.2d 1346, 1356-57 (Miss.1987)).

In **Chambers v. State** 878 So.2d 153, 157 (Miss. App. 2004), the Court found that the trial court was not "clearly erroneous." In that case, the trial court accepted the fact that family members had pending felony charges as race neutral.

> ¶ 17. Chambers asks this Court to reverse the trial court's rulings as to the four prospective jurors. Therefore, the facts and circumstances must raise an inference that the prosecutor used his peremptory challenges for a discriminatory purpose. Even though the State used only four of the six strikes available, African Americans remained as prospective jurors. As finally selected, the jury panel included Caucasians and African Americans.
>
> ¶ 18. The defendant failed to show the State used the challenges in a discriminatory manner. The facts reveal two of the individuals were excluded because they had a pending felony charge or a family member who had a felony charge that involved drugs. The other person was struck because Chambers' counsel had represented her daughter in an earlier proceeding.

The appellee would submit that the record indicates that the trial court accepted as race neutral reasons the fact that a family member had been investigated for criminal prosecution along

with demeanor. It also accepted the fact that a juror knew law enforcement officers in their community was race neutral. The appellee also has not found any record of the racial composition of the jury in the record. C.P. 1-272.

In **Jackson v. State**, 672 So.2d 468, 479 (Miss. 1996), the Supreme Court found that a failure to make a record was fatal to his argument about racial discrimination in jury selection.

> The record, however, does not reflect the racial composition of the jury as seated. The race of prospective jurors is not indicated on questionnaires, which were designed by the defense and completed prior to trial, and is noted only where specifically requested by the defendant in several instances during the jury selection process, when those individuals were struck from the venire by either party. In **Hansen v. State**, 592 So.2d 114 (Miss.1991), where the record likewise did not indicate the race of the jurors, this Court rejected the appellant's **Batson** challenges, noting that it " 'must decide each case by the facts shown in the record, not assertions in the brief ...' " **Hansen**, 592 So.2d at 127, citing **Burney v. State**, 515 So.2d 1154, 1160 (Miss.1987), and further that, the burden is on the appellant to make sure that the record contains " 'sufficient evidence to support his assignments of error on appeal.' " Id.

In **Thorson v. State**, 721 So.2d 590, 596 -597 (Miss.1998), the Supreme court pointed out that **Batson** inquiries were not intended to provide a defendant with "a mini–trial." He is not entitled to cross examine the prosecution about its reasons for peremptory strikes. He has no right to in depth testimony or cross examination about how reasons for strikes are supported by beliefs, or conjecture from himself or others. He is only entitled to have a statement of specific reasons and the judge's ruling on it.

> **United States v. Garrison**, 849 F.2d 103, 106 (4th Cir.1988). The Garrison Court noted that a **Batson** inquiry was not meant to be an intrusion on the trial proceedings, but rather an opportunity for the prosecutor to articulate a race neutral reason for striking a juror in the particular case. **Garrison**, 849 F.2d at 106. Although adversarial, the nature of a **Batson** hearing does not rise to the level of a mini-trial, and the defendant is not entitled to cross-examine the prosecutor. **United States v.Roan Eagle**, 867 F.2d 436, 441 (8th Cir.1989).
> ¶ 19. In the case sub judice, the state presented a race-neutral reason for each venire

> person it struck. Thorson was even given a limited opportunity to cross-examine the prosecutor regarding the notes on which he based his testimony. This opportunity was more than he would have been entitled to if the prosecutor had been required to enumerate his race-neutral reasons at trial and the case had not been remanded for a **Batson** hearing. It was never intended that a Batson hearing be a full blown evidentiary hearing, and we choose to follow the majority of jurisdictions that have already held that a defendant is not entitled to cross-examine the prosecutor at a Batson hearing FN8. Thus, we find that the trial court was correct in not allowing a full-blown cross-examination of the prosecutor.

The appellee would submit that the reasons provided for peremptory strikes in this cause have been previously accepted by the Supreme Court as "race neutral." In addition, Dubose did not meet his burden of proof for showing either disparate treatment or any pattern of racial discrimination in jury selection. There is a lack of record evidence in support for such claims on appeal.

This issue is also lacking in merit.

PROPOSITION III

THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF DUBOSE'S CONVICTIONS.

Mr. Dubose argues that there was insufficient credible evidence in support of his convictions for gratification of lust. He believes that the testimony from the three child victims, Anthony, Chante, and LaKeisha was unreliable and conflicting in their different accounts of the facts. Since the jury did not find him guilty of sexual battery, he thinks there was also insufficient grounds for holding him guilty of fondling. Appellant's brief page 15-18.

To the contrary, the record reflects that Chante, LaKeisha and Anthony all identified Dubose, their step father, as the person who had sexually abused them. R. 120-122; 140-141; 150-152.

He abused them by touching and rubbing their genitals, "private parts," and by requiring them to touch by hand or mouth his penis. In addition, Dr. Patricia Tibbs, a certified pediatrician, testified

that she took the medical history of these children. R. 95-117. They told her of sexual abuse by their stepfather, who had access to their bed rooms. She also testified that her examination of the children provided physical evidence "consistent with" such alleged abuse. R. 116. This testimony was more than sufficient for supporting Dubose's conviction for child sexual abuse.

The record reflects that Dubose was some forty six years old at trial. R. 76. The record reflects that the children were all under sixteen years of age. R. 103. Chante was born in July, 1996. Lakeisha in October ,1997. Anthony was born in January, 2000. R. 103. See M. C. A. Sect. 99-5-23(1).

Dr. Patricia Tibbs, a board certified pediatrician, testified that she examined and interviewed Dubose's three step children. R. 95-117. They were Anthony, Chante, and Lakeisha Dubose. Dr. Tibbs testified that she took the children's medical history. All three children told her of being sexually abused by their step father. Dr. Tibbs testified that she examined the children and found physical evidence consistent with sexual abuse. R. 116.

She found evidence of a healed tear on Lakeisha's vagina which would be consistent with some type of vaginal penetration. R. 105. She found evidence of an anal fissure on Robert Dubose, Jr.. This would be consistent with anal sexual abuse, as he stated to Dr. Tibbs verbally. R. 107, 109. She also found that her physical examination of Chante was consistent with her vagina having been penetrated. R. 107-108.

> Q. Mr. Neyland talked about the history that you've taken. I believe you already testified that they gave you a history of sexual abuse; is that correct?
>
> A. Yes, sir.
>
> Q. **And this history of sexual abuse and your physical findings were consistent with the history that these children gave you?**

A. **Yes, sir.** R. 116. (Emphasis by appellee).

Ms. Chante Dubose, who was eleven years old at trial, and in the fifth grade, testified that she was adopted by Mary and Robert Dubose.

She testified that Dubose told her to come to his bed room. Her step-mother was not present at the time. Dubose told her "to take off her bottom clothes." R. 121. He put his hands on her "private part" and made her touch his penis. She testified that he put his fingers inside her "private part."R. 113-135. She testified that Dubose told her he would "beat us to death if we tell." R. 123. Chante testified that she told her step mother about Dubose touching her. R. 134.

> Q. Tell the jury and the court what you mean by–or what are some of the things that Robert did to you?
>
> A... **Then he had put his hand on my private parts, and then he told me to put my leg on top of his–his leg. And then he told me to hold his penis.** R. 120.
>
> Q. **What part of Robert's body did he touch your private parts with?**
>
> A. **His fingers.**
>
> Q. Okay. Did his fingers enter or penetrate your private parts?
>
> A. Enter. R. 120-121.
>
> ...
>
> Q. And you said also that Robert took your–your bottom clothes off when you were in the bed with him?
>
> A. He told me to take my bottom clothes off.
>
> ...
>
> Q. Was he wearing pants at this time?
>
> A. He had his pants pulled down. R. 121.

Ms. Chante Dubose also testified to seeing Dubose with her brother. Dubose was on top of him. She saw him putting his penis into his bottom.

Q. What, if any, private parts of Anthony did you ever see Robert Dubose touch?

A. His-his bottom

Q. **All right. When you say touch his bottom, what do you mean by that?**

A. **I'm talking about putting his penis in his bottom.**

Q. **Putting Robert's penis in his bottom?**

A. **Yes, sir.** R. 122.

...

Q. Chante, what threats, if any, were ever made by Robert if you told anybody what Robert did to you?

A. He said that he would beat us to death if we tell. R. 123. (Emphasis by appellee).

Ms. LaKeisha Dubose testified that she was ten years old at the time of trial. R. 136. LaKeisha testified that Dubose called her to his room. He touched her breast and her "private part."R. 139-140. He touched her "private part" with "his fingers." R. 139-140. She also testified to seeing Dubose with her brother, Anthony. Dubose was on top of Anthony. R. 140-Anthony was less than ten years old at the time. 141. LaKeisha also testified that Dubose told her "to take your clothes off...". R. 141.

Q. **What did he touch your breast with?**

A. **His hand.**

Q. Beside your breast, what private parts, if any, did he touch?

A. Private part.

Q. And when you say "private part," are you referring to the front part, kind of middle ways of your body, that private part?

A. Yes, sir.

Q. **Okay. What did Robert touch that private part with?**

A. **His hand.**

Q. Did this hurt you?

A. Yes, sir. R. 139-140. (Emphasis by appellee).

...

Q. What did he (Dubose) tell you if you told anybody about this?

A. That we as going to get a beat down. R. 145.

Mr. Anthony Dubose, Robert Dubose, Jr., testified that he was eight years old at the time of trial. R.150. Anthony testified that Dubose put his hand and his "private part" in his butt. R. 153. He kissed him, touched his private part and made him put my private part in his butt. R. 153.

Q. **Beside the hands, did Robert ever touch any of your private parts with his mouth?**

A. **Yes, sir.**

Q. **With private parts did he touch with his mouth?**

A. **Mine.**

Q. **Did Robert ever make you touch any of his private parts with your mouth?**

A. **Yes, sir.**

Q. Did this hurt, Anthony?

A. Yes, sir. R. 154.

...

Q. All right. Would you say this happened more than eight times?

A. Yes, sir. R. 155. (Emphasis by appellee).

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in

support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to resolve, not an appeal's court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); **Wetz** at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Wetz, at 808, **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); May at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. **Wetz** at 808; **Harveston** at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the identification testimony cited above was taken as true with reasonable inferences, there was more than sufficient credible, partially corroborated evidence in support of the jury's verdict as well as the trial court's denial of all peremptory instructions. Anthony identified Dubose as the person who had touched his penis, his private part, with both his hand and his mouth. He also testified that Dubose made him touch his penis with his mouth. R. 154.

Chante testified that Dubose touched her vagina, her private part, with his hand. R. 122. She also testified to seeing Dubose on top of her brother, Anthony. She testified that he touched his bottom with his penis. R. 122. This provided eye witness corroboration of Anthony's testimony about his step father touching and rubbing his penis with his hand and mouth.

Lakeisha testified that Dubose touched her vagina, private part, with his hand. R. 140. Lakeisha also corroborated Chante about Dubose threatening them not to tell what he had done. R.

145.

Dr. Patricia Tibbs testified that her examination of the children included physical findings consistent with sexual abuse. R. 116.

This provided credible, corroborated evidence in support of the trial court's denial of a directed verdict. R. 167.

In addition, Dubose informed the trial court that he had chosen not to testify in his own behalf. R. 169. However, his wife, Mary Dubose, testified on his behalf, denying that she had not heard any complaints of sexual abuse from the three adopted chidren living with her in her home. R. 171-187.

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any conflicts in the evidence created by testimony from defense witnesses was to be resolved by the jury. What the jury believes and who the jury believes as to what piece of evidence presented is solely for their determination. Conflicts in the facts can be resolved without any need for an exact explanation of how they did so in their deliberations. As stated:

> Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

The appellee would submit that the fact that the jury did not find Dubose guilty of sexual battery but did find him guilty of three counts of gratification of lust does not indicate a lack of evidence in support of his three convictions. All three child witnesses identified Dubose as the

person who sexually abused them by placing his hand, fingers and his mouth on their genitals. R. 120-122; 140-141; 150-152.

It can be inferred from their testimony, and the circumstances under which these actions occurred that it was done for Dubose's sexual gratification.

The children were corroborated by the pediatricians' physical findings which she testified were consistent with some type of child sexual abuse.

The record reflects that Dubose was well over eighteen years old, being and adult male over 46 years old at the time of trial. R. 76. His step children were all under the age of sixteen. R. 105. See M. C. A. Sect. 97-5-23(1) for over eighteen and under sixteen statutory age disparity provisions along with element of touching the victims for gratification of lust element .

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Supreme Court found that a motion for a new trial was left to the trial court's discretion. The motion should not be granted unless doing so would result in "an unconscionable injustice."

> Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987).We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State** , 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

The appellee would submit that this credible, corroborated evidence was sufficient for supporting Dubose's convictions. The record does not reflect any abuse of discretion by the trial court.

There was no "unconscionable injustice" involved in denying the motion for a new trial. C.P. 232. This issue was also lacking in merit.

CONCLUSION

Dubose's three fondling convictions should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Glenn Watts, 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:

Honorable Robert G. Evans
Circuit Court Judge
P. O. Box 545
Raleigh, MS 39153

Honorable Eddie H. Bowen
Simpson County District Attorney
Simpson County Courthouse
100 Court Avenue, Ste 4
Mendenhall, MS 39114

Benjamin A. Suber
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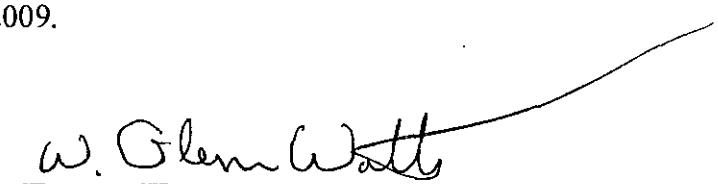
This the 13TH day of May, 2009.



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