

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIE LEWIS HODGES, JR.

APPELLANT

V.

NO. 2008-KA-1346-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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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 this court may evaluate possible disqualifications or recusal.

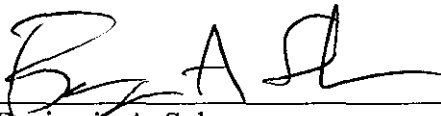
1. State of Mississippi
2. Willie Lewis Hodges, Jr., Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Joseph H. Loper, Jr., Circuit Court Judge

This the 1 day of December, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIE LEWIS HODGES, JR
a/k/a LIL WILLIE

APPELLANT

V.

NO. 2008-KA-01346-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1

WILLIE HODGES WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN CHARACTER EVIDENCE OF CHILD ABUSE, OTHER WRONGS, ACTS, OR OTHER UNRELATED CRIMES WERE REFERENCED BY THE PROSECUTION IN THE PRESENCE OF THE JURY.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING WILLIE HODGES MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Webster County, Mississippi, and a judgment of conviction for the crime of Statutory Rape of a Child Under Fourteen (14) years

and sentenced by the Court to life imprisonment in the custody of the Department of Corrections following a jury trial on June 5, 2008, Honorable Joseph H. Loper, Jr., presiding. Willie Lewis Hodges is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Around April 2006, Melinda Mulkey moved in with her father and his wife, Christina Mulkey in West Point, Mississippi. Tr. 124. Melinda previously had been living with Mary Hodges (her mother), two brothers, Willie Hodges, and Deborah Herrod (Willie's mother) in Eupora. Tr. 110-11. After Melinda moved in with her dad and step-mother, Melinda began to have medical problems. Tr. 124.

Melinda had painful urination. *Id.* She had discharges, her stomach was hurting constantly, and she had to go to numerous doctors numerous times. *Id.* Eventually, Melinda was referred to Doctor Tim Whittle. Tr. 98. Doctor Whittle first saw Melinda in August 2007. *Id.* After examining Melinda, Doctor Whittle determined that she had a mass in her pelvis. *Id.* Melinda was taken to surgery several days later with the opinion that she had an ovarian mass. Tr. 98-99. However, once in surgery, the mass was not an ovarian but a large abscess or pocket of pus in Melinda's left fallopian tube. Tr. 99.

Melinda was treated with an IV with antibiotics after her surgery for several days. Tr. 100. Melinda appeared to be doing well, until January 2008 when she had more abdominal pain and went back to see Doctor Whittle. *Id.* After an examination of Melinda, a CT scan revealed another mass on the right side. *Id.* The infection had returned and caused an abscess

on her right side. *Id.* Melinda had to have another surgery, and the doctor had to remove her uterus, right ovary, and right fallopian tube. Tr. 101.

Doctor Whittle stated that the cause of the abscesses was the recurrence of an infection that went untreated. *Id.* Doctor Whittle continued to testify that the infection Melinda developed, typically, is caused by sexual contact. Tr. 100. During the sexual contact, Doctor Whittle stated that Melinda probably obtained a sexually transmitted disease. *Id.* The most common is chlamydia and gonorrhea. *Id.*

Doctor Whittle testified that both chlamydia and gonorrhea are types of bacteria that can be obtained through sexual contact. If they are treated early, they can be cured. If they are not caught early and treated properly, then those two organisms will get into a lady's uterus and tubes and destroy those organs. Once the bacteria gets into those organs, then the inflammation or damage to those organs will cause other bacteria to get in also. Then that is what causes the abscesses or damage to the organs. Tr. 102.

Melinda testified that the doctor told her that she could have only gotten a sexually transmitted disease if she had sex with someone. Tr. 117. Melinda then stated that she did not tell what had happened to her until after her surgeries around January 2008.

Melinda decided to tell her stepmom (Christina Mulkey), grandmother (Helen Mulkey), and Donna Cooper Patterson about her sexual contact and how she developed a sexually transmitted disease. Tr. 118. Melinda testified that during the time she was living with her mom in Eupora that Willie Hodges¹ had sexual intercourse with her. Tr. 112.

¹ Willie Hodges is also known as Lil Willie

Melinda stated that one night her mother had allegedly taken some medicine and drank some whiskey and passed out in her bedroom. Tr. 113. Melinda was laying in bed and Willie came into her bedroom. *Id.* According to Melinda, Willie took off her pants and stuck his penis in her vagina. *Id.* He allegedly covered her mouth and told her that if she told anyone that he would kill her whole family. *Id.*

Melinda's mother, Mary Hodges, testified that she does not believe Melinda's story and that Melinda had never told her that Willie had done anything to her sexually. Tr. 164. She continued to state that Melinda was scared to tell the truth and to name the actual perpetrator. Tr. 165. Mary does admitted that she had a sexually transmitted disease, but it was trichomonis and not chlamydia and gonorrhea. *Id.* She does not have any knowledge of Willie having chlamydia and gonorrhea either.

Deborah Herrod stated that she stayed in the room with Melinda. Tr. 172. Herrod also claimed that she could ever remember Willie being alone with Melinda. *Id.* Herrod continued to testify that she had witness Melinda telling things that were not true and think Melinda made up stuff because she wanted to go live with her daddy. Tr. 173.

Willie testified that he and Mary only drank when the kids were gone and that Mary had not taken any medicine and passed out. Tr. 147. Willie stated further that he and Melinda had gotten along, until she started staying with her daddy. Tr. 147-48. Willie declared that he had never had a sexually transmitted disease; however, he had taken antibiotic for one. Tr. 150-51. He continued to say that his wife, Mary, had been diagnosed with trichomonis and the doctor told both of them to take the antibiotic as a precaution. Tr.

151. Willie was adamant that he had never had chlamydia or gonorrhea. Tr.152. Willie stated numerous times that he never touched any of the kids and did not have sexual intercourse with Melinda. Tr. 146, 149, 157, 160.

SUMMARY OF THE ARGUMENT

The trial court improperly allowed the prosecution to reference evidence and photographs of alleged prior bad acts of Willie Hodges. The evidence of a crime other than that charged in the indictment is not admissible evidence against the accused. Mississippi also follows the general rule that proof of a crime distinct from that alleged in the indictment should not be admitted in evidence against the accused. *Eubanks v. State*, 419 So.2d 1330, 1331 (Miss. 1982), *see Loeffler v. State*, 396 So.2d 18 (Miss.1981); *Massey v. State*, 393 So.2d 472 (Miss.1981). This evidence was unduly prejudicial and therefore Willie's conviction should be reversed and remanded for a new trial excluding the reference to the alleged prior bad acts.

The verdict was also against the overwhelming weight of the evidence. Other than the statements made by Melinda, no evidence is present to show that there was in fact any sexual contact between Melinda and Willie. Even though the doctor stated that Melinda's infections had arose from chlamydia or gonorrhea, no evidence was presented that Willie in fact ever had chlamydia or gonorrhea. The prosecution never offered any medical records showing that Willie was ever infected with a sexually transmitted disease. The verdict was against the overwhelming weight of the evidence and this was reversible error. Willie Hodges is entitled to a new trial.

ARGUMENT

ISSUE NO. 1

WILLIE HODGES WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN CHARACTER EVIDENCE OF CHILD ABUSE, OTHER WRONGS, ACTS, OR OTHER UNRELATED CRIMES WERE REFERENCED BY THE PROSECUTION IN THE PRESENCE OF THE JURY.

The prosecution attempted to admit photos into evidence that depicted bruises and scars of some children to allege child abuse by Willie and Mary Hodges. Tr. 178. The prosecution alleged that the children in the photos were Mary's children, including Melinda. *Id.* The court *sua sponte* objected to the introduction of the photos. Tr. 179. The trial court stated that the photos did not have any relevance to the case at hand. *Id.* However, the prosecution previously made references of child abuse to the jury and referenced pictures that allegedly depicted child abuse by the defendant, Willie Hodges.

"Generally, evidence of a crime other than that charged in the indictment is not admissible evidence against the accused." *Duplantis v. State*, 644 So.2d 1235, 1246 (Miss. 1994); *Ladner v. State*, 584 So.2d 743, 758 (Miss. 1991). "However, where another crime or act is 'so interrelated [to the charged crime] as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences,' proof of the other crime or act is admissible." *Duplantis*, 644 So.2d at 1246 (*quoting Wheeler v. State*, 536 So.2d 1347, 1352 (Miss. 1988)); *Neal v. State*, 451 So.2d 743, 759 (Miss. 1984).

The statements and references about Willie's alleged prior bad acts fall within the area of bad acts as contemplated by M.R.E. 404(b). Mississippi Rule of Evidence 404(b) provides:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

Mississippi Rules of Evidence 404(b).

A two-part analysis is conducted in order to determine whether to admit evidence under Rule 404(b). "The evidence offered must (1) be relevant to prove a material issue other than the defendants's character; and (2) the probative value of the evidence must outweigh the prejudicial effect." *Crawford v. State*, 754 So.2d 1211, 1220 (Miss. 2000).

The Mississippi Supreme Court stated that in order to pass muster under Rule 404(b), evidence must "be such that it satisfies some other evidentiary purpose beyond simply showing that [the defendant] is the sort of fellow likely to commit the crime charged." *Watts v. State*, 635 So.2d 1364, 1368 (Miss. 1994) (quoting *Jenkins v. State*, 507 So.2d 89, 91 (Miss. 1987)). Even if the evidence does pass muster under Rule 404(b), it must still pass the test of Rule 403. *Watts*, 635 So.2d at 1368. The Court in *Jenkins* also stated:

To be sure, evidence admissible under Rule 404(b) is also subject to the prejudice test of Rule 403; that is, even though the Circuit Court considered the evidence at issue under Rule 404(b), it was still required by Rule 403 to consider whether its probative value on the issues of motive, opportunity and intent was substantially outweighed by the danger of unfair prejudice. In this sense Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass. *Watts*, 635 So.2d at 1368 (Miss. 1994) (quoting *Jenkins*, 507 So.2d at 93 (Miss. 1987)).

Mississippi also follows the general rule that proof of a crime distinct from that alleged in the indictment should not be admitted in evidence against the accused. *Eubanks v. State*, 419 So.2d 1330, 1331 (Miss. 1982), *see Loeffler v. State*, 396 So.2d 18 (Miss.1981); *Massey v. State*, 393 So.2d 472 (Miss.1981). In *Massey*, the Mississippi Supreme Court cited *Floyd v. State*, 166 Miss. 15, 148 So. 226 (1933), which set forth the reason for this rule. “The reason and justice of the rule is apparent, and its observance is necessary to prevent injustice and oppression in criminal prosecutions. Such evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them, and, while the accused may be able to meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him.” *Eubanks*, 419 So.2d at 1331. “To permit such evidence . . . would be to put a man's whole life in issue on a charge of a single wrongful act, and crush him by irrelevant matter, which he could not be prepared to meet.” 1 Bish.Crim.Proc. § 1124. (*Floyd*, 166 Miss. at 35, 148 So. at 230); *Massey*, 393 So.2d at 474.

The Mississippi Supreme Court stated that they were mindful of that general rule, but it has many exceptions. *Tanner v. State*, 216 Miss. 150, 61 So.2d 781 (1953). However in *Eubanks*, the State's contention that the testimony complained of was admissible as part of the *res gestae* and was necessary to prove Officer Farlow was making a lawful arrest within the scope of his duty was without merit in the Court's opinion. The separate alleged crimes and misconduct of June 21, 1980, are not so connected that they form a single criminal transaction and cannot be separated.

The Court continued to state that they are of the opinion that Farlow's testimony concerning the warrant for reckless driving on state property, possession of alcoholic beverages on state property, failing to yield to a blue light and resisting arrest, was admissible to prove Farlow was acting within his authority to arrest Eubanks. However, it was error for the trial court to allow Farlow and Shoemake to testify as to the details of the incident at Lake Perry on June 21, 1980. There was no connection between the facts surrounding that incident and the charge of simple assault for which Eubanks was tried. *Eubanks*, 419 So.2d at 1331-32.

Eubanks was reversed and remanded for reasons enumerated in *Spears v. State*, 253 Miss. 108, 175 So.2d 158, 167 (1965), wherein the Supreme Court quoted from *Scarborough v. State*, 204 Miss. 487, 37 So.2d 748 (1948), stating:

“This is not one of those cases for the application of the rule that a conviction will be affirmed unless it appears that another jury could reasonably reach a different verdict upon a proper trial than that returned on the former one, but rather it is a case where the constitutional right of an accused to a fair and impartial trial has been violated. When that is done, the defendant is entitled to another trial regardless of the fact that the evidence on the first trial may have shown him to be guilty beyond every reasonable doubt. The law guarantees this to one accused of crime, and until he has had a fair and impartial trial within the meaning of the Constitution and Laws of the State, he is not to be deprived of his liberty by a sentence in the state penitentiary.” 204 Miss. at 497, 37 So.2d at 750).

The Court in *Eubanks* also stated that by “[e]xcluding the prejudicial testimony complained of we are aware there was ample evidence to convict Eubanks for simple assault. However, the State, by continuously placing before the jury throughout the trial evidence designed to show Eubanks guilty of other and former misconduct, constituted prejudicial

error. The combination of all this prejudicial testimony being introduced before the jury in a prosecution for simple assault, in our opinion, precluded the possibility of a fair trial upon the charge in the indictment.” *Eubanks*, 419 So.2d at 1332 (quoting *Sumrall v. State*, 272 So.2d 917 (Miss.1973)).

The facts in the present case are similar to the facts in *Eubanks*. The prosecution repeatedly discussed with Mary Hodges, Willie Hodges, Deborah Herrod, and Christina Mulkey that Willie was abusing the children in his home, including Melinda. Tr. 157, 162-64, 173, 177-79. Whether Willie was abusing any of the children in the home is irrelevant to whether he has committed the crime of statutory rape. Even though the evidence presented indicated nothing that showed that the children were being abused. Furthermore, the evidence reference about the abuse of the children was only presented to inflame the jury and not for any other reason. As in the *Eubanks* case, the evidence referenced during Willie’s trial about the child abuse constituted prejudicial error because the prosecution was trying to show Willie was guilty of other conduct that had no relation to the charge of statutory rape. With the prejudicial testimony and photographs being referenced before the jury, Willie was precluded from receiving a fair trial upon the charge of the indictment. *Eubanks*, 419 So.2d at 1332; *Sumrall*, 272 So.2d at 917.

Even if evidence referenced to the court is relevant, Mississippi Rule of Evidence 403 provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,” *Watts*, 635 So.2d at 1368 (Miss. 1994). “Candor requires acknowledgment that, though

technically relevant in the sense just mentioned, evidence of the character of that at issue here is not of great probative value.” *Id.* However, “[i]f presented to the jury, it has great prejudicial effect and it would arguably inject collateral issues into the case. *Id.* See *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218-19, 93 L.Ed. 168, 173-74 (1948); *McCormick, The Law of Evidence*, Section 190. The evidence in the case at hand was given directly to the jury from prosecution. The possibility arises that the jury improperly inferred that Hodges “committed the crime for which he is on trial because he is a person who has displayed criminal propensities in the past.” *Watts*, 635 So.2d at 1368 (Miss. 1994) (quoting *Jenkins*, 507 So.2d at 92 (Miss 1987)); *McCormick, the Law of Evidence*.

It was reversal error for evidence of a possible prior bad act or a photograph to have been referenced in front of the jury. Reversal of the trial court judgment, and a remand for a new trial is the appropriate remedy in this instance. Therefore, the Appellant respectfully submits that the Court should reverse this case and remand to the Webster County Circuit Court for a new trial with the exclusion of the evidence of the alleged child abuse and references to the photographs of child abuse.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING WILLIE HODGES MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

“When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the

overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). In reviewing such claims, the Court “sits as a thirteenth juror.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(citing *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss.2000)(footnote omitted)).

“[T]he evidence should be weighed in the light most favorable to the verdict.” *Herring*, 691 So.2d at 957. “A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, ‘unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.’” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(quoting *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982)). It means that “as the ‘thirteenth juror,’ the court simply disagrees with the jury's resolution of the conflicting testimony,” and “the proper remedy is to grant a new trial.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(quoting *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982)(footnote omitted)).

In the present case, even if the Court finds that the evidence was sufficient to support the verdict, and the Appellant is not entitled to an acquittal as a matter of law, he is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence.

In the case *sub judice*, there was absolutely no evidence that Willie had sexual intercourse with Melinda, other than the statements made by Melinda. The testimony of Christina Mulkey, Helen Mulkey, and Nurse Donna Patterson was all the same the originated

from Melinda. Mary Hodges, Melinda's mom did not believe Melinda's story and did not think Willie was capable of committing such a heinous crime.

The facts that were presented to the court were that Melinda had a serious infection in her vagina that went into her uterus, fallopian tubes, and ovaries. Tr. 99-101. Because of the seriousness of the infection, abscesses developed in Melinda's fallopian tubes and Melinda had to have a complete hysterectomy. Tr. 101. According to Doctor Whittle, such infection was the result of a sexually transmitted disease, most commonly chlamydia or gonorrhea. Tr. 100.

No evidence was presented that Willie in fact ever had chlamydia or gonorrhea. The prosecution never offered any medical records showing that Willie was ever infected with a sexually transmitted disease. Evidence was revealed that Willie took antibiotics, but that was due to the fact the Willie's wife, Mary had contracted an different kind of sexually transmitted disease, trichomonis. Tr. 165.

No evidence suggests that Willie ever even had sexual relations with Melinda, other than her testimony. Willie had no prior or future incidents of having sexual relations with Melinda.

The verdict was against the overwhelming weight of the evidence. Willie Hodges therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

CONCLUSION

Willie Lewis Hodges is entitled to have his conviction of Statutory Rape of a Child
Under Fourteen (14) years reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Willie Lewis Hodges, Appellant

BY: _____

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CERTIFICATE OF SERVICE

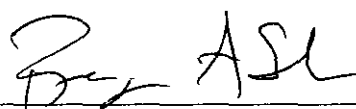
I, Benjamin A. Suber, Counsel for Willie Lewis Hodges, Jr., do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge
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This the 1 day of December, 2008.



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