

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DAVID ABERNATHY

APPELLANT

VS.

NO. 2008-KA-1457

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The Trial Court did not err in refusing the testimony of Dr. Katz as the testimony was irrelevant and Daubert did not apply.
- II. The Trial Court did not err in refusing to allow Dr. Katz' to testify since it was irrelevant and a trial court is not required to allow a proffered expert to testify solely because such testimony goes to a defendant's theory of the case.
- III. The evidence at trial was sufficient to support the jury's verdict of guilty and the jury's verdict and the rulings of the Trial Court should be upheld.

STATEMENT OF THE CASE

On or about November 30, 2005, David Abernathy was indicted by the Rankin County Grand Jury for the sexual battery of L.K. in violation of Section 97-3-95(1)(a) of the Mississippi Code Annotated of 1972 (as amended). (C.P. 6) Abernathy was tried on or about December 14, 2007. The jury found him guilty of one count of sexual battery as charged in the indictment. Abernathy was sentenced to 30 years in the custody of the Mississippi Department of Corrections with 20 years suspended. Abernathy was further sentenced to a term of five (5) years on supervised probation to commence on his release from the Mississippi Department of Corrections. Abernathy filed a Motion for New Trial which was heard on June 2, 2008. The trial court entered it's order denying Abernathy's Motion for new Trial on July 23, 2008. (C.P. 66) Abernathy filed his Notice of Appeal on August 8, 2008.

SUMMARY OF THE ARGUMENT

Clearly, before the trial court addresses the issues of whether the principles and methods of the expert witness are reliable, the trial court is first required to address the issue of relevance.

The trial court herein ruled that the evidence offered by Abernathy, the expert testimony of Dr. Katz regarding the general affect of migraines, was irrelevant to the case since it did not connect to the headache that the victim suffered. There was no medical evidence offered to show that L.K.'s headache on that evening was a migraine. Dr. Katz had not examined her or reviewed her medical record and therefore had no way of connecting his expert testimony to L.K.'s condition on that evening.

The Trial Court did not err in refusing to allow Dr. Katz' to testify since it was irrelevant and a trial court is not required to allow a proffered expert to testify solely because such testimony goes to a defendant's theory of the case. A trial court is not required to allow a proffered expert to testify solely because such testimony goes to a defendant's theory of the case. Turner v. State, 726 So.2d 117, 130 (Miss.1998). Mississippi Rule of Evidence 702 charges the trial court with the role of "gatekeeper" in determining whether an expert's testimony is both relevant and reliable prior to allowing it to be presented to a jury. M.R.E. 702 cmt.; Giannaris v. Giannaris, 960 So.2d 462, 469-70 (Miss.2007).

Viewing the evidence in the light most favorable to the State, there was sufficient evidence of the sexual penetration of L.K. to the exclusion of every reasonable hypothesis of Abernathy's innocence. The issue presented by Abernathy are without merit and the jury's verdict and rulings of the trial court should be affirmed.

ARGUMENT

I. The Trial Court did not err in refusing the testimony of Dr. Katz as the testimony was irrelevant and Daubert did not apply.

"The standard of review regarding the admission or exclusion of evidence is abuse of

discretion.” Morris v. State, 963 So.2d 1170, 1175 (Miss.Ct.App.2007). “[A]bsent an abuse of that discretion, the trial court’s decision will not be disturbed on appeal.” McCoy v. State, 820 So.2d 25, 31 (Miss.Ct.App.2002)

At trial the victim, L.K., testified that she had a headache on the night the sexual battery occurred. She characterized the headache as a migraine, but did not offer any scientific evidence regarding the nature of the headache. She testified that she threw up twice and that she went to bed early. She took some non prescription headache medicine given to her by her host, Jennifer Gordon. She testified that she had been diagnosed with a migraine headache condition by her gynecologist. L.K. testified that she sometimes got headaches around her menstrual period and that it was related to hormone levels. She testified that she later discovered that she was six weeks pregnant at the time Abernathy committed the sexual battery against her. She did not know about the pregnancy at the time. She testified that she was not on any daily medications. She testified that when Abernathy was on top of her, fondling her and penetrating her vagina with his fingers, she could see him and identify him and recognized his voice. She could feel him on top of her and could feel him penetrating her. (Tr. 206)

In his case-in-chief, Abernathy offered the testimony of Dr. Katz “not to offer any kind of expert opinion or conclusion on what David Abernathy may or may not have done . . . but merely to describe for the jury the migraine headache and what it means as far as its affect or possible effects on suffering and such.” (Tr. 208) Abernathy contended that migraine headaches are responsible for “misperceived events” by sufferers. (Tr. 208-09) The State noted that it was not certain that L.K.’s headaches were migraine headaches or, if so, what type they might be, and argued that the evidence was irrelevant. (Tr. 209-10)

The trial court ruled that (1) there had been no testimony of a scientific nature that would classify the headache that L.K. had that night as a migraine headache other than a lay persons's description; and, (2) there was no testimony to indicate that L.K. had ever suffered from any hallucinations with or without a headache. The trial court further noted that Dr Katz did not know the medical history of the victim and had not examined the victim (Tr. 211) The trial court therefore ruled that if Dr. Katz was going to testify generally as to case histories and the general affect of migraine headaches to sufferers, it would not tell the jury anything about the victim's headache. The trial court held that unless there was something to tie Dr. Katz' testimony to the victim, the testimony was not relevant. (Tr. 211)

For expert testimony to be admissible, it must be both relevant and reliable. Miss. Transp. Comm'n v. McLemore, 863 So.2d 31, 38 (Miss. 2003). The testimony is relevant if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." M.R.E. 702. In determining whether the principles and methods used are reliable, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-94 (1993) provides "an illustrative, but not exhaustive list of factors that trial courts may use in assessing the reliability of expert testimony." McLemore, 863 So.2d at 38. (citations omitted).

Clearly, before the trial court addresses the issues of whether the principles and methods of the expert witness are reliable, the trial court is first required to address the issue of relevance. The trial court herein ruled that the evidence offered by Abernathy, the expert testimony of Dr. Katz regarding the general affect of migraines, was irrelevant to the case since it did not connect to the headache that the victim suffered. There was no medical evidence offered to show that L.K.'s headache on that evening was a migraine. Dr. Katz had not examined her or reviewed her

medical record and therefore had no way of connecting his expert testimony to L.K.'s condition on that evening.

This issue is without merit and the jury's verdict and the ruling of the trial court should be affirmed.

II. The Trial Court did not err in refusing to allow Dr. Katz' to testify since it was irrelevant and a trial court is not required to allow a proffered expert to testify solely because such testimony goes to a defendant's theory of the case.

It is within the sound discretion of the trial court whether to allow expert testimony. Miss. Transp. Comm'n v. McLemore, 863 So.2d 31, 34 (Miss.2003). Its decision will not be disturbed unless this Court finds "that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion." Id. (citation omitted).

It is certainly a correct statement of law that defendants have a fundamental right to present his or her theory of the case to the jury. Chinn v. State, 958 So.2d 1223, 1225 (Miss.2007). **However, a trial court is not required to allow a proffered expert to testify solely because such testimony goes to a defendant's theory of the case.** Turner v. State, 726 So.2d 117, 130 (Miss.1998). Mississippi Rule of Evidence 702 charges the trial court with the role of "gatekeeper" in determining whether an expert's testimony is both relevant and reliable prior to allowing it to be presented to a jury. M.R.E. 702 cmt.; Giannaris v. Giannaris, 960 So.2d 462, 469-70 (Miss.2007).

Nelson v. State, 995 So.2d 799 (Miss.Ct.App.2008) [emphasis added].

Further, the Mississippi Supreme Court has held that while a defendant is entitled to a jury instruction that presents his theory of the case, this entitlement is limited by the court's ability to refuse a defense instruction that incorrectly states the law or lacks a foundation in the evidence. Howell v. State, 860 So.2d 704, 745 (Miss.2003).

Dr. Katz' testimony was offered to show "the possibility that a migraine could cause a

person to inaccurately recollect events that unfolded during that period of time that the person was suffering from migraine headaches.” (Tr. 301) However, there was not a sufficient basis in the testimony to support Abernathy’s theory of the case. Dr. Katz had not examined the victim or viewed her medical records. There was no testimony from her doctor regarding the victim’s diagnosis or symptoms. There was nothing in the record to show that the victim had ever had any sort of hallucination or mis-perceptions during a migraine. Further, Abernathy’s counsel did not ask her on cross examination what her symptoms were. In short, there was nothing in the record to connect Dr. Katz’s testimony to the victim’s condition and therefore, the trial court correctly ruled both at trial and in the hearing on Abernathy’s motion for new trial that Dr. Katz’s testimony was properly excluded as irrelevant.

A defendant’s is entitlement to present his theory of the case is limited where it lacks a foundation in the evidence. The trial court correctly excluded Dr. Katz’ testimony as irrelevant. The jury’s verdict and the rulings of the trial court should therefore be upheld.

III. The evidence at trial was sufficient to support the jury’s verdict of guilty and the jury’s verdict and the rulings of the Trial Court should be upheld.

The standard of review for the legal sufficiency of evidence is well settled. The reviewing court must, with respect to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. The credible evidence which is consistent with the guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. The court may 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. Thorson v. State, 895 So.2d 85, 98 (Miss.2004) (quoting Sheffield v. State, 749 So.2d 123, 125 (Miss.1999)).

The verdict in this case was supported by the victim's testimony that Abernathy came into the bedroom where she was sleeping, pinned down her arms and proceed to commit sexual battery against her. She testified that she was clearly able to see him and to identify his voice. She testified that she could feel him on top of her and could feel his fingers penetrating her vagina. She testified that she faked a seizure in order to get Abernathy to stop his battery against her.

Further testimony established that Abernathy continued to make unwelcome advances to the victim over the course of the evening before she retired to the bedroom. He entered her room without permission to "check on her" and then after being told to leave her alone and stay out of her room by both the victim and the host, Abernathy again went unbidden to her room. He repeated through the course of the evening that he was going to sleep in the bed with her and that there was room in the bed and he should not have to sleep on the couch. The only reason there is no physical evidence against Abernathy is because the victim was able to prevent Abernathy from penetrating her with his penis.

Abernathy does not argue that he did not enter the victim's room that night, but that he did enter her room and that she tried to kiss him. It is no surprise that the jury did not believe this defense, since, according to three witnesses, Abernathy had been repeatedly been warned that his attention to the victim was unwanted.

Abernathy was charged with the sexual battery of L.K. pursuant to Mississippi Code

Annotated section 97-3-95(1)(a) (Rev.2006), which reads in pertinent part: “(1) A person is guilty of sexual battery if he or she engages in sexual penetration with ... (a) another person without his or her consent.” Sexual penetration has been defined as the essential element of sexual battery. Johnson v. State, 626 So.2d 631, 632 (Miss.1993) (citing Thompson v. State, 468 So.2d 852, 853 (Miss.1985)). “Penetration, however slight, is sufficient to establish the penetration element of sexual battery.” Burrows v. State, 961 So.2d 701, 706 (Miss.2007) (citing Johnson, 626 So.2d at 633). Sexual penetration includes “cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.” Miss.Code Ann. § 97-3-97(a) (Rev.2006). Penetration does not need to be established by actual medical evidence. Wilson v. State, 606 So.2d 598, 600 (Miss.1992). Additionally, penetration, “need not be proved in any particular form of words, and circumstantial evidence may suffice.” Lang v. State, 230 Miss. 147, 158-59, 87 So.2d 265, 268 (1956).

Viewing the evidence in the light most favorable to the State, there was sufficient evidence of the sexual penetration of L.K. to the exclusion of every reasonable hypothesis of Abernathy's innocence. This issue is without merit and the jury's verdict and rulings of the trial court should be affirmed.

CONCLUSION

The assignments of error presented by the Appellant are without merit and the jury's verdict and rulings of the trial court should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Laura H. Tedder, 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 29th day of May, 2009.


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