IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SCOTT M. TANNER — APPELLANT

VS. — NO. 2008-KA-1540

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SCOTT M. TANNER — APPELLANT

VERSUS — NO. 2008-KA-1540-COA

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STATEMENT OF THE CASE

Procedural History

Scott M. Tanner was convicted in the Circuit Court of Jackson County on a charge of sexual battery and was sentenced to a term of 20 years in the custody of the Mississippi Department of Corrections with six years suspended. (C.P.118) Aggrieved by the judgment rendered against him, Tanner has perfected an appeal to this Court.

Substantive Facts

T.L. testified that at the time in question, he lived with his wife, I.L., and their four children on family property in Vancleave. His friend Scott Tanner, approximately ten years younger than T.L., also lived with the family. Tanner appeared to be well accepted in T.L's household and became something of a surrogate father to the children. Tanner often spent time with them, taking

them "to the mall and Wal-Mart and different places." T.L. and Tanner also enjoyed driving and working on race cars together. (T.69-73)

The morning of April 28, 2004, T.L. "got up about 5:45" and decided to wake his children up a few minutes earlier than usual. When he went into the girls' bedroom, he noticed that his oldest daughter, A.L., who had just turned 12, was not in her top bunk. Nor was she in the bathroom. T.L. then looked into the bedroom where Tanner and T.L's older son slept, but did not see her there either. At that point he "checked the bathroom again to make sure." When he "turned around and looked," he saw A.L. "coming out of the boys' bedroom."[1] When he "asked her what she was doing in there, ... she said she really didn't know. She woke up and she was asleep on the floor." Remembering that A.L. had not been on the floor when he looked for her initially, T.L. "got suspicious then." At that point he took her into his wife's bedroom, where he and his wife "started talking to her more ... " A.L. "kept sticking to the same story" at that time. Her father told her that he and her mother were going to have her "checked" to see if she had been "messed with," at that time they sent her to school. (T.75-78)

Later that morning, I.L. checked her daughter out of school, took her back to the family home and "started talking to her and got different answers out of her." I.L. then called her husband and advised him of what she had learned. T.L. "told her that she needed to have a certain party to get away from the house." In other words, he "told her to tell Scott he needed to leave for awhile until" they "figured everything out." (T.79)

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[1]Tanner shared this room with T.L.'s oldest son, who frequently stayed with his grandmother. T.L. was not sure whether this son was at home at this time, but he was sure that Tanner was. (T.76)

At this time, T.L. "had a house phone and a business line" as well at his residence. Both services were listed under his name. That day or the next, he installed a recording device "in case they [A.L. and Tanner] tried to contact each other." T.L. testified that he wanted to be "sure what really happened" before he accused Tanner of wrongdoing. Soon thereafter, using a cellular phone previously given to him by I.L., Tanner phoned A.L., and T.L. recorded the conversation and turned it over to law enforcement. (T.80-86)

Dr. Eric Lucas was accepted by the court as an expert in the field of emergency medicine. Dr. Lucas testified that he examined A.L., who was complaining of sexual assault, on May 13, 2004. The patient stated that a family friend had assault her "for the last month and a half," beginning on March 21, and that the assaults had "occurred four to five times thereafter," with the last incident occurring about a week previously. Ultimately, A.L was examined by a sexual assault nurse examiner (SANE), who provided her notes to and discussed the case with Dr. Lucas.[2] The nursing note stated that "the hymen was not intact." (T.96-101)

A.L. testified that her date of birth was April 20, 1992, which meant that she was between 11 and 12 years old at the time in issue. She had developed a close relationship with Tanner after he moved into the family's house. According to her, "He was like a dad." Tanner routinely slept in her brother's room, but he was usually alone because the brother spent most of his time at their grandmother's house. A.L. slept in the next room with her two sisters. (T.101-06) The parents'

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[2]Because it was unlikely that any evidence remained a week after the final assault, Dr. Lucas elected not to have a rape kit performed. (T.100)

bedroom was on the other side of the house, separated from the children's area by the living room, dining room, and kitchen. (T.108)

A.L. did not remember the date that this incident occurred, but she remembered that it was a school day, and that her father had been looking for her while she was hiding behind the dresser at the end of Tanner's bed. Upon questioning by her father, she told him that she "had just fallen asleep in there." T.L. continued to question A.L. about whether someone had touched her inappropriately. She finally told him that one of her cousins had done so, although she knew that the time this was not true. When asked why she had lied, A.L. testified, "Because Scott had told me not to tell my parents. Whatever I did, not to tell them because he would get in a lot of trouble." (T.109-11)

A.L. went to school, but her mother picked her up shortly afterward and took her home, where A.L. told her the truth about what had happened. In other words, "I told her that it wasn't my cousin. That me and Scott did have intercourse." (T.112-13)

A.L. testified further about what had occurred that morning. Between midnight and 3:00 a.m., Tanner "had thrown something" at her to wake her up. She went into his room, where he had been alone. They went "[s]traight to the bed" where they "had intercourse." A.L. testified explicitly, "[H]e put his penis inside my vagina. ... He used his fingers too." He ejaculated. A.L. testified that this had happened "[f]our or five times" previously, with the first instance occurring about a month before this one. (T.113-15)

A.L. went on to testify that prior to this incidents, she and her family had no problems with Tanner, and they had no reason to "make up a story" about him. (T.118)

I.L testified at the time in question, Tanner had been living in the family's house for about five years. Before A.L.'s allegations, I.L. had enjoyed a good relationship with him. Neither she nor

A.L. had any reason to fabricate these allegations. (T.127-29)

The morning that T.L. had found their daughter in Tanner's bedroom, I.L. picked A.L. up from school and asked her "about what was going on." A.L. "came out and told" her what Tanner "had done to her." I.L. immediately demanded that Tanner move out of the house. (T.129-30)

Asked whether she remembered Tanner's suffering from kidney stones during this time period, I.L. testified that she had taken him to the hospital and stayed with him until his mother and sister arrived. After the problem resolved itself, Tanner returned to I.L.'s house and appeared to be "okay." I.L. finally testified that she asked Tanner to remove himself from her house on April 30, the same day that the "incident" occurred. (T.130-32)

On cross-examination, I.L. acknowledged that Tanner had gone to the hospital for treatment of kidney stones on April 27 and stayed there until April 29. (T.140-42)

Ruby Tanner, the defendant's mother, testified that her son went to the hospital, complaining of kidney problems, on April 27 and that he was at her house from that date at least until April 30. To her knowledge, he never returned to T.L.'s residence afterward. (T.156-63) On cross-examination, she wavered, stating, "I don't think he went back." (T.163)

Carla Waltman, the defendant's sister, testified that her brother went to the hospital on April 27, that he went to her mother's house on April 29, that he stayed there through April 30, and that he never returned to T.L.'s house. (T.166-68) On cross-examination, she admitted that while her brother had been arrested and accused of this crime four years ago, she had never given this account to the police. (T.168-71)

Tanner testified that he stayed on his mother's sofa for three days after he was released from the hospital. He also testified that he had treated T.L. and I.L.'s children as his own and that he "never thought about having sex with the kid ... " Finally, he testified that I.L. had told his sister that

she (I.L.) had told A.L that she would be thrown out of the house if she did not say that Tanner had sexually assaulted her. (T.172-77)

On cross-examination, Tanner acknowledged that T.L. and his wife and children had treated him like a member of their family; that they had all gotten along well; and that they had no motivation to accuse him falsely of this crime. He did continue to deny having touched A.L. (T.181-85) Finally, he admitted that when he spoke with A.L. on the telephone shortly after he was told to leave the house, she told him, "When my daddy come [sic] up there to talk to you, you should have just told him." Tanner did not deny the allegations at this point. Rather, he implicitly admitted them, saying, "I don't know. I just– I don't know, you know." At that point he ended the conversation. (T.188-90)

SUMMARY OF THE ARGUMENT

Having agreed to the amendment of the indictment, Tanner cannot be heard to complain about the court's ruling. His first proposition has no merit.

Nor can Tanner show error in the court's denial of his motion to suppress the audio-taped telephone conversation. For the reasons stated in the prosecution's response to the motion to suppress, his second proposition likewise has no merit.

Finally, the verdict is not against the overwhelming weight of the evidence. Rather, the proof created a straight issue of fact which was properly resolved by the jury.

PROPOSITION ONE:

TANNER CANNOT PUT THE TRIAL COURT IN ERROR FOR AMENDING THE INDICTMENT AFTER HE AGREED TO THE AMENDMENT

At the conclusion of its case in chief, the prosecution moved to amend the indictment to show that the crime was committed between March 21 and April 30. The defense objected, and the court reserved ruling on the question. (T.154-56)

After both parties had finally rested, and the following was taken:

> THE COURT: Let me go back to the issue of the amendment of the indictment. **I think everybody has agreed to amend it to read "on or about April 30th," is that correct?**
>
> MR. KNOCHEL: 2004.
>
> THE COURT: 2004.
>
> **MR. SHADDOCK: I would like to say the 27th through the 30th.**
>
> THE COURT: Through the 30th. That time span?
>
> **MR. SHADDOCK: Yes.**
>
> THE COURT: That's what I thought it should be, based on the testimony.
>
> (emphasis added) (T.191)

The state pressed its case for keeping the "on or about" language, but the court maintained its ruling, stating that "to amend it to conform to the proof would be between the 27th and the 30th." (T.192)

Tanner now contends the court's ruling constitutes reversible error. The state counters that he may not be heard to do so because he not only acquiesced in the amendment, he affirmatively told the court which dates he wanted to be included. *Watts v. State*, 828 So.2d 835, 842 (Miss.App.2002). The court acted exactly as he asked. Apparently, the defense had a tactical basis

for this request and it was granted. Tanner has no basis for complaint at this point. His first proposition plainly lacks merit.

PROPOSITION TWO:

THE COURT DID NOT ERR IN OVERRULING THE MOTION TO SUPPRESS THE AUDIO-TAPED TELEPHONE COVERSATION BETWEEN TANNER AND A.L.

Prior to trial, Tanner filed a motion to suppress the audio-taped telephone conversation on the grounds that the minor could not consent to the taping, and that the conversation was privileged.[3] (C.P.78) The prosecutor filed a response, well-supported by a authority, which fully rebutted the defendant's assertions. (C.P.79-82) That response is appended hereto as Exhibit "A." The state incorporates it by reference to support its position that the trial court properly denied the motion to suppress. (T. 9) See also *Lee v. Lee*, 798 So.2d 1284, 1293 (Miss.2001). Tanner's second proposition lacks merit.

PROPOSITION THREE

THE VERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Tanner argues finally that this case should be reversed because the verdict is against the overwhelming weight of the evidence. He faces a heavy burden, which the state contends he has not met. To prevail, he must satisfy the following standard of review :

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[3]These were the only issues raised by the defense below and therefore are the only questions properly before this Court at this juncture. "It is elementary that different grounds than the objections presented to the trial court cannot be presented for the first time on appeal." *Thornhill v. State*, 561 So.2d 1025, 1029 (Miss.1989), cited in *White v. State*, 809 So.2d 776, 779 (Miss.App.2002).

> "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Collins v. State*, 757 So.2d 335, 337(¶ 5) (Miss. Ct. App.2000) (quoting *Dudley v. State*, 719 So.2d 180, 182(¶ 9) (Miss.1998)). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Collins*, 757 So.2d at 337(¶ 5) (citing *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992)). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Collins*, 757 So.2d at 337(¶ 5) (quoting *Dudley*, 719 So.2d at 182).
>
> *Carle v. State*, 864 So.2d 993, 998 (Miss. App. 2004).

The jury is the sole judge of the credibility of witnesses. *Torrey v. State*, 891 So.2d 188, 192 (Miss. 2004). As this Court repeated in *Price v. State*, 892 So.2d 294, 297-98 (Miss. App. 2004),

> We invite the attention of the bar to the fact that we do not reverse criminal cases where there is a straight issue of fact, or a conflict in the facts; juries are impaneled for the very purpose of passing upon such questions of disputed fact, and we do not intend to invade the province and prerogative of the jury.
>
> quoting *Evans v. State*, 159 Miss. 561, 566, 132 So. 563, 564 (1931).

The state incorporates by reference the evidence set out under its Statement of Substantive Facts in contending that the evidence is not such that to allow the verdict to stand would be to constitute an unconscionable injustice. T.L. found his 12-year-old daughter in the defendant's room early in the morning under suspicious circumstances. That same morning, she admitted that she had had sexual intercourse. While she initially attempted to protect Tanner, she almost immediately acknowledged that he had sexually penetrated her, and she never wavered from that account afterwards. When she confronted him on the telephone, Tanner did not deny the allegations, but simply stated he did not know why he had not admitted these events to A.L.'s father.

Before this incident, T.L., I.L. and their children enjoyed a good relationship with Tanner. They all appeared to be fond of one another, and T.L. and I.L. entrusted Tanner with their children and property. A.L. in particular appeared to have a special friendship with Tanner before the sexual episodes began. It is difficult to imagine why, under these circumstance, anyone would fabricate such charges against him.

The evidence presented by the defense created a straight issue of fact which was properly resolved by the jurors. No basis exists for disturbing their verdict. Tanner's third proposition should be denied.

CONCLUSION

The state respectfully submits the propositions made by Tanner have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

FILED

MAY 09 2008

JOE W. MARTIN, JR. CLERK
BY _____ D.C.

STATE OF MISSISSIPPI — PLAINTIFF

VS. — CAUSE NO. 2004-10,857(2)

SCOTT MCKINNLEY TANNER — DEFENDANT

RESPONSE TO DEFENDANT'S
MOTION TO SUPPRESS AUDIO-TAPED CONVERSATIONS

On May 7, 2008 Defendant, Scott McKinnley Tanner (Tanner) filed his "Motion to Suppress Audio-Taped Conversations" (Bates Stamp 77-84) in the above-referenced case. Tanner, while citing no authority, states that (1) "State can not obtain permission from minor child to tape her conversation." and (2) "Said conversation is privileged." Tanner has been indicted for committing Sexual Battery on a child under the age of fourteen (14) years, and being at least twenty-four (24) months older than the victim. The subject of Tanner's Motion to Suppress is a telephone conversation between Tanner and the victim, Angela Land, which took place some time after the incident.

I. Permission to Record Phone Conversation

Apparently, Tanner is relying on Miss. Code Ann. § 41-29-503 to suppress said conversation. The relevant statute states:

> ***The contents of an intercepted wire, oral or other communication and evidence derived from an intercepted wire, oral or other communication may not be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States or of this state or a political subdivision of this state if the disclosure of that information would be in violation of this article.*** The contents of an intercepted wire, oral or other communication and evidence derived from an intercepted communication may be received in a civil trial, hearing or other proceeding only if the civil trial, hearing or other proceeding arises out of a violation of the criminal law of this state.

EXHIBIT
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(Emphasis added). Tanner is arguing that, since the victim is a minor, she is unable to give consent to her phone calls being recorded.

Assuming Tanner has standing to raise this issue, which he does not, Miss. Code Ann. § 41-29-535 allows exceptions to Mississippi's wire-tap statute:

> This article shall not apply to a person who is a subscriber to a telephone operated by a communication common carrier and who intercepts a communication on a telephone to which he subscribes. This article shall not apply to persons who are members of the household of the subscriber who intercept communications on a telephone in the home of the subscriber.

At the time of the recorded phone conversation, the victim was a twelve (12) year old girl living in her parents' home. Out of concern for his daughter's well-being, Thomas Land installed a recording device on his home telephone, and the State of Mississippi had no involvement. The phone was in her father's name and the phone bill was paid by the victim's father. Clearly, Mr. Land is exempted by § 41-29-535 as he is "a subscriber to a telephone operated by a communication common carrier [ ] who intercept[ed] a communication on a telephone to which he subscribes." Members of the household are also exempted by the Statute.

According to the Mississippi Supreme Court, "[T]he prohibition of wiretapping does not apply to [the party recording the phone call] as she was a subscriber to a telephone operated by a common carrier who intercepted communications on her telephone." ***Wright v. Stanley***, 700 So. 2d 274, 280 (Miss. 1997). In upholding this right of a telephone subscriber to wiretap his own phone, the Mississippi Supreme Court, noted the similarities between Mississippi's wire-tap statute and the federal wire-tap statute, *18 USCS § 2511*. ***Id*** at 274. The Court pointed out that testimony in the United States House of Representatives it was stated, "I take it nobody wants to make it a crime for a

father to listen in on his teenage daughter or some such related problem." *Id* at 278. That is exactly the issue being presented in this case; a father is trying to protect his young daughter from further harm. The substance of this telephone conversation may be introduced into evidence as allowed under Mississippi law.

II. Privilege Assertion

Additionally, Tanner states that the phone conversation should be suppressed because said conversation is privileged, although Tanner does not expounded upon this assertion. There is no evidence that Tanner and the victim are subject to any privilege recognized by Mississippi Rules of Evidence 501-505: (1) Lawyer-Client Privilege, (2) Physician and Psychotherapist-Patient Privilege, (3) Husband-Wife Privilege, or (4) Priest-Penitent Privilege.

Assuming Tanner is arguing a self-incrimination privilege, arguments that Tanner's Fifth Amendment rights were violated by the recording of this phone conversation would also be misplaced. According to the Court of Appeals for the Fifth Circuit of the United States, "An individual's Fifth Amendment right against self-incrimination is implicated only during a 'custodial' interrogation. The Supreme Court defines 'custodial interrogation' as '**questioning initiated by law enforcement officers** after a person has been taken into custody.' A suspect is 'in custody' for these purposes either (1) when he is formally arrested or (2) 'when a reasonable person in the position of the suspect would understand the situation to constitute a restraint on freedom of movement to the degree that the law associates with formal arrest.'" ***Murray v. Earle***, 405 F.3d 278, 286 (5th Cir. 2005) citing ***Illinois v. Perkins***, 496 U.S. 292, 296 (1990) and

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United States v. Gonzales, 121 F.3d 928, 939 (5th Cir. 1997). See also *Miranda v. Arizona*, 384 U.S. 436 (2006).

(Emphasis Added).

Miranda and its progeny only apply to actions by law enforcement. As stated above, the recording of this telephone conversation was initiated by the victim's father. Law enforcement was not involved in (or aware of) the recording of the telephone conversation. Tanner initiated the telephone conversation with the victim; Tanner was not in police custody at the time he placed the phone call; and Tanner's statements were voluntary.

Finally, the statements made by Tanner in the recording are not hearsay as those statements are an "admission by party-opponent" as defined by M.R.E. 801(d) (2). The telephone conversation should be introduced into evidence as the recording was made by a private citizen on his own phone, which was located in his own home, and involved his twelve year old daughter.

WHEREFORE, the State moves to deny Defendant's Motion to Suppress Audio-Taped Conversation, Bates Stamp 77-84.

RESPECTFULLY SUBMITTED,

Robert A. Blackwell
Assistant District Attorney