IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LONI MARIE RUTLAND — APPELLANT

VS. — NO. 2008-KA-1544-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JEFF KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LONI MARIE RUTLAND **APPELLANT**

VS. **NO. 2008-KA-1544- COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Defendant, Loni Marie Rutland was indicted by the Grand Jury of Franklin County with two counts of Felonious Abuse of a Child in violation of *Miss. Code Ann.* § 97-5-39(2). (Indictment, c.p. 1-2). After a trial by jury, Circuit Judge Forrest A. Johnson, Jr., presiding, the jury found defendant guilty on Count II of the indictment (Felony abuse resulting in the fracture of the child's leg). The trial court had directed a verdict on Count I of the indictment at the close of the defense case on motion for directed verdict. Tr. 207-213. The trial court sentenced defendant to 20 years, ten suspended, with ten years to serve followed by probation. (Sentencing order, c.p. 100-103).

After denial of post-trial motions this instant appeal was timely noticed. C.p. 125.

STATEMENT OF FACTS

While in the care of defendant a 17-month old little girl had her leg broken in three places just above the ankle. Approximately two days later the mother took her to a hospital emergency room. Doctors and nurses became suspicious as the injury sustained could not have happened as explained by the mother. As required by law when child abuse is suspected, the incident was reported to State authorities.

At trial three doctors testified (one qualified as an expert) that such an injury was inconsistent with the explanation given by the mother. Tr. 62, 119, 121. Such an injury could only have come for a high energy impact. Tr. 115. Further a child could not 'inflict' such an injury on themselves by putting their leg through the slats of a crib. Testimony showed the child was in the care and custody of the defendant. Tr. 79, 87, 102, 132.

Defendant gave no explanation as to how the injury happened beyond conjecture. Defendant was identified as the child's caretaker and the one who gave the history of the injury to law enforcement, social workers and medical personnel. Tr. 66, 80, 105.

Based on the testimony and exhibits, including the testimony of the defendant, the jury found her guilty of Felonious Abuse of a Child (Indictment,

Count II, C.p. 1-2).

SUMMARY OF THE ARGUMENT

Issue I.

The Trial Court Did Not Error in Denying the Motion for Judgment Notwithstanding the Verdict.

The State provided evidence of abuse in the form of testimony, physical exhibits and an expert showing the injury was caused by abuse and not self-inflicted.

The trial judge and the jury was aware and instructed as to the standard of proof. At no time was defendant required to prove her innocence.

Issue II.

The Trial Court Was Correct in Denying the Motion for New Trial.

There was ample credible evidence that this small girl was injured, very seriously, by a violent action while in the care of defendant.

The looking up of a definition by a juror before deliberations began did not interject impermissible evidence before the jury. The jury was properly instructed on proof of abuse.

ARGUMENT

Issue I.

The Trial Court Did Not Error in Denying the Motion for Judgment Notwithstanding the Verdict.

In this initial allegation of error defendant raises two claims: 1) the State did not meet the burden of proving abuse; and, 2) improper shifting of the burden of proof to defendant.

As to the proof shown at trial for abuse leading to the broken leg of the 17-month old child victim the applicable standard of review has recently been reiterated and summarized, to wit:

> ¶ 20. This Court's review of the denial of a motion for directed verdict, or of a motion for a JNOV, is de novo. White v. Stewman, 932 So.2d 27, 32(¶ 10) (Miss.2006). In Stewart v. State, 986 So.2d 304, 308(¶ 12) (Miss.2008), our supreme court stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for a JNOV, the critical inquiry is whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." Id. at 308(¶ 12). However, the supreme court stated that:
>
> > this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. If there is sufficient evidence to support a guilty verdict, the motion for a directed verdict must be overruled.

> Johnson v. State, 950 So.2d 178, 182(¶ 13) (Miss.2007). If a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. Edwards v. State, 469 So.2d 68, 70 (Miss.1985).
>
> *Hill v. State,* 2009 WL 368542 (Miss.App. 2009).

Looking to the record, venue was established. Tr. 132. The age of the victim as being a 17-month old girl was before the jury. Tr. 59. The injury was proved by testimony of two doctors and additionally refined and explained by the expert testimony of a specialized surgeon. Both bones in the child's lower leg were broken by three fractures (two to the fibula and one to the tibia) Tr. 61. Not consistent with an injury by a child putting her leg through the slats of a crib. Tr. 62 & 121. The injury was from a singular violent, high energy event. Tr. 115. A child couldn't do that injury to themselves. The injury was inconsistent with the explanation and history given by defendant. Tr. 119. One treating doctor explained that the examination and history of this child's injuries were consistent with 5 signs as being abused. Tr. 62. The mother asserted she was responsible for her care twenty-four seven. Tr. 79, 87, 102, 132. Defendant gave no explanation as to how the injury happened beyond conjecture. Defendant was identified as the child's caretaker and the one who gave the history of the injury to law

enforcement, social workers and medical personnel. Tr. 66, 80, 105.

It is the position of the state that every element of the crime was shown by legally sufficient evidence. Based upon the standard of review and rationale of *Hill* the State would submit the trial court was correct in denying the motion for judgment notwithstanding the verdict.

The State would ask that no relief be granted on this sub-claim of trial court error.

As to the second claim that the trial court improperly shifted the burden of proof to the defendant – such is just not the case.

Ruling from the bench the trial court was weighing the evidence on each element of each count. The trial court found the evidence presented had been a legally sufficient to survive a motion for directed verdict at the close of the State's case on Count I (head injury). However, further testimony during the defense case, in the trial court's opinion, sufficiently rebutted the element of 'serious bodily injury' and causation as to how the injury occurred. The trial court found a failure on the part of the State as to the 'weight' of the evidence. Tr.211-212. Such was within the discretion of the trial court and did not show a 'burden' shift to the defendant to prove her innocence.

It must be noted this ruling was at the close of all the evidence and

testimony. The defendant had finished her case. The jury was out they did not hear this ruling or weighing of the evidence. The jury was then instructed as to the State's burden of proof beyond a reasonable doubt as to each element of the offense. (C.p. 80). The jury was also instructed that "The defendant is not required to prove her innocence." (C.p. 73).

Again, there is no merit to this subpart of this first claim of trial court error. The trial court knew the standard applicable to the motion, applied it within his discretion. Then, there being sufficient evidence of such weight and credibility to be a remaining jury question the trial court sent Count II to the jury. The jury was properly instructed as to the applicable standard the State was must prove and that defendant was not required to prove her innocence.

Such was not error and no relief should be grated in whole or part on this first allegation of error.

p. 237 of record

Issue II.

The Trial Court Was Correct in Denying the Motion for New Trial.

In this second allegation of trial court error defendant asserts the trial judge erred in denying the motion for new trial when the State failed to produce *any evidence* that defendant did an act, thus abusing the child.

The record shows otherwise. As noted in the issue above, there was evidence that the child was in her care and she was responsible for her. There was evidence and expert testimony that while in her care she received a high energy impact or injury breaking two bones in her leg in three places. All, while in the custody, care and under supervision of defendant. Further there was evidence by inference that there was a delay, perhaps of two days, from the time of injury until medical attention was sought.

Now, applying those facts (and more) that were before the trial court for his consideration to the applicable standard of appellate review:

> ¶ 27. In reviewing a motion for a new trial, the question is whether the jury verdict is against the overwhelming weight of the evidence. Montana v. State, 822 So.2d 954, 967-68(¶ 61) (Miss.2002) (citing Dudley v. State, 719 So.2d 180, 182(¶ 8) (Miss.1998)). This court must accept as true any evidence supporting the verdict, and we may only reverse if the trial court abused its discretion in failing to grant a new trial. Montana, 822 So.2d at 967-68(¶ 61). However, a verdict that is so contrary to the overwhelming weight of the evidence that it creates an unconscionable injustice warrants reversal.

Berry v. State, 980 So.2d 936, 943 (Miss.App. 2007).

It is the measured and firm conviction of the State the trial court was correct in denying the motion for new trial based on the evidence presented. There was proof of an exceedingly violent injury that could not have happened under circumstances forwarded by defendant. Defendant herself testified she was responsible for her care.

As has been noted before in similar circumstances:

> ¶ 28. We do not find the jury verdict to be against the overwhelming weight of the evidence; therefore, the trial court was not in error in denying Lydia's motion for a new trial. The State put on evidence of the extensive injuries suffered by B.F. and expert testimony as to how the injuries occurred. Testimony also revealed that Lydia did not seek medical attention for B.F., who was clearly in a very serious condition. At the very minimum, the jury could have found that Lydia completely failed to provide medical attention for injuries that all happened while B.F. was being cared for by Lydia.
>
> ¶ 29. As the evidence provides for the seriousness of the injuries and because Lydia's inaction could give rise to felonious child abuse under Buffington and Scarbough, the jury's verdict was supported by the weight of the evidence. This issue is without merit.

Berry v. State, 980 So.2d 936, 943 (Miss.App. 2007).

It is the succinct position of the State the trial court was correct and no relief should be granted on this claim of error,

Now, as to the next claim that the jury was improperly influenced by reference to a dictionary definition of neglect and/or abuse.

First, it was not until after trial that this issue was brought to the attention of the trial court in the motion for new trial. C.p. 104-105. In a response filed by the State it was further shown that a juror, before deliberations and final jury instructions were given to the jury, had looked up definitions of "abuse" and "neglect" and brought that information into the jury room. (State response, c.p. 107-109). Additionally, the trial court specifically, and at length, addressed this issue in his order denying the motion for new trial. C.p. 122-124.

As the trial court noted, the jury did send out a note regarding whether "negligence was the same as abuse". The court, with agreement of defense counsel, responded that – "You must rely on the Court's instructions on the law already given to you". Tr. 237.

It is the position of the State that such clarified any question by referring them to the instructions which properly instructed them as to the charge of "abuse" and the elements necessary for the State to prove. Such clarification and reference to the jury instructions has happened before where a possible confusing definition of abuse got mixed in with neglect.

> While some confusion may have resulted from Dr. Blumenthal's medical definition of child abuse as including child neglect, the trial court properly instructed the jury on the definition of child abuse. A jury is presumed to follow the instructions of the trial judge, so any confusion which may have been caused by Dr. Blumenthal's testimony was effectively cured by the court's instructions.

Lester v. State, 692 So.2d 755, 790 (Miss. 1997)(reversed on other grounds).

Additionally as the State argued in it's response for the trial court and which the trial court adopted such was the rationale of *Wilcher v. State*, 863 So.2d 719 (Miss. 2003). The trial court did not refer the jury to the dictionary. It would appear a juror just explored the definition on his own. But, upon instruction of the court any possible prejudice was cured.

In conclusion, no relief should be granted on this second claim of trial court error regarding the ruling on the motion for new trial.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220

CERTIFICATE OF SERVICE

I, Jeff Klingfuss, 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 Forrest A. Johnson, Jr.
Circuit Court Judge
P. O. Box 1372
Natchez, MS 39121

Honorable Ronnie Harper
District Attorney
P. O. Box 1148
Natchez, MS 39121

Leslie Lee, Esquire
Attorney at Law
Mississippi Office of Indigent Appeals
301 N. Lamar St., Ste. 200
Jackson, MS 39201

Phillip W. Broadhead, Esquire
Attorney at Law
P. O. Box 1848
University, MS 38677-1848

This the 3rd day of July, 2009.

JEFF KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680