IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-02140-COA

PATRICK WILLIAM COX — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BY APPELLANT

Oral Argument is requested

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Patrick William Cox v. State of Mississippi

Cause No. 2008-KA-02140-COA

Given the unique factual posture of this case, counsel for Mr. Cox respectfully requests oral argument.

By the use of jury instructions which used language from the statute as amended the year *after* the incident allegedly occurred, the right of Mr. Cox to be free from *ex post facto* law was violated. In addition, both testimony and documentary evidence weave a tangled and incoherent trail of the crucial physical evidence collected as part of the rape kits performed on both parties. A reliable chain of custody goes to the very essence of authenticity and relevance, issues deserving of additional discussion.

Counsel for Mr. Cox would be privileged to appear before this Court to offer oral argument on these issues, should the Court deem it appropriate and helpful to disposition of this matter.

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Assistant Public Defender

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REPLY BY APPELLANT

I. The trial court erred in giving Instruction S-4 and denying Instructions D-6 and D-7, which were a proper statement of law existing in 2006. Instruction S-4, concerning an essential element of the offense of forcible rape, was based on a 2007 legislative amendment to the definition of "sexual intercourse," thereby impermissibly subjecting Mr. Cox to an ex post facto law in violation of ART. I, SEC. 9-10, U.S. CONST.

Respectfully, the Mississippi Supreme Court unanimous decision May 26, 2010 in *Raphael Flowers v. State*, 2009-KA-00387-SCT is dispositive of this issue and requires reversal.

As the Court notes in the *Raphael Flowers* opinion, in November 11, 2006, the date the events in the instant case were alleged to have occurred, the state of Mississippi defined sexual intercourse to "mean a joining of the sexual organs of a male and female human being in which the *penis of the male is inserted into the vagina of the female*." MISS. CODE ANN. § 97-3-65(6) (1972). [emphasis added].

In reversing the conviction of Flowers for statutory rape of a child, the Mississippi Supreme Court held that Flowers was wrongly indicted under the amended statute, not the statute as it existed in April 2006. "It is fundamental that the statute in effect at the time an offense is committed is the one that must control prosecution of the offense." *Raphael Flowers*, ¶ 5. [internal citations omitted]. The Court ruled Raphael Flowers was thereby impermissibly convicted under an *ex post facto* law, specifically banned under U.S. Const., art. I, §9, cl. 3 and art. 3, § 16, Miss. Const. *Id.*

And while the issue here is jury instructions, not the validity of the charging instrument, "[w]e have consistently held that instructions in a criminal case which follow the language of a pertinent statute are sufficient." *Crenshaw v. State*, 520 So.2d 131, 135 (Miss. 1988). In that case, the Court found that the instruction offered by the prosecution properly followed the

language of the statute and upheld the conviction for fondling over the challenge of Crenshaw to the instruction.

As the Court noted in *Raphael Flowers*, the Mississippi Legislature amended MISS. CODE ANN. § 97-3-65(6) in 2007 and significantly broadened the definition of sexual intercourse. "For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female *or* the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female." 2007 MISS. LAWS ch. 335. The language of this later statute is what was offered by the prosecution in jury instructions defining sexual intercourse. (S-4 – CP 96).

Mr. Cox offered the following instructions, D-6 and D-7, which tracked the language of Miss. Code Ann. § 97-3-65(6) (1972) as it was existed in 2006.

Instruction D-6

> The Court instructs the jury that in order to find the defendant guilty of rape under the statue [sic] for which is charged, the jury must find that Patrick William Cox engaged in forcible sexual intercourse with the complainant and that sexual intercourse is defined by law as:
>
> "a joining of the sexual organs of a male and female human being in which the penis of the mail is inserted into the vagina of the female." CP 76.

Instruction D-7

> The Court instructs the jury that if the jury does not find that "the penis of the [sic] Patrick Cox was inserted into the vagina of the [sic] Jenna Ross" beyond a reasonable doubt then the jury must find that Patrick William Cox is NOT GUILTY of forcible sexual intercourse. CP 73.

The trial court, however, refused the proffered instructions of Mr. Cox in favor of an instruction offered by the state which used the more broad definition of sexual intercourse from 2007, the year *after* the crime was alleged to have taken place. T. 1295; RE 23; CP . Instruction S-4

> The Court instructs the jury that in order to sustain a conviction for the offense of forcible rape, that sexual intercourse must be proved beyond a reasonable doubt. That is that some penetration of the sexual organ of the female by the sexual organ of the male must be proved. However, it need not be full penetration. Proof of the slightest penetration of the sexual organ of the female by the sexual organ of the male is proof of sexual intercourse. It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia by the male sex organ is sufficient. CP 96; T. 1257.

The state's reliance upon *Horton v. State* is unavailing for two substantive reasons. First, it deals with sexual battery of a 10-year-old child under a different statute and second, the statute used general language ["private parts"] rather than the specific anatomical terms used in the law in effect in 2006. The reliance by the state on *Lang v. State* is also misplaced, primarily because the statute then in effect referred to "penetration of the private parts" not the specificity of the 2006 version of the statute, which required direct penis-vagina contact.

Finally, Mr. Cox respectfully asserts that counsel for the state failed to accurately represent the testimony of Katherine Moyse, the analyst who performed the last minute DNA testing for the prosecution. Examination of the record shows unequivocally that Moyse testified no DNA material related to Mr. Cox was found on the vaginal swab; only Y profile material associated with Mr. Cox was found on the *vulvar* swab, <u>not</u> the internal *vaginal* swab, as the 2006 statute required. T. 1009.

If the state had DNA proof showing penis-to-vagina contact, why would prosecutors seek an instruction with the more broad definition of sexual intercourse from a later amendment to the

statute? The prosecutors' request for S-4 proves the point of Mr. Cox more affirmatively than any other argument offered in support of this assignment of error.

Alternatively, Mr. Cox submits the trial court sought to substantively amend the indictment by instructing the jury with use of wording from the later-amended statute. See *Edwards v. State*, 737 So.2d 275 (Miss. 1999) (Reversal of capital murder conviction for numerous reversible errors, including attempt to substantively amend the statute with jury instructions).

Under either theory, Mr. Cox argues the trial court committed reversible error by depriving him of the fundamental constitutional right to fair trial through use of an impermissible jury instruction.

II. The trial court erred in refusing to suppress rape kits from both Jenna Ross and Mr. Cox as both kits were incomplete and crucial evidence was lost by police. Furthermore, the record demonstrates substantial contradiction among law enforcement officers responsible for ensuring proper chain of custody, raising serious questions of tampering or contamination.

Testimony regarding the chain of custody of the clothing and other crucial evidence, including swabs taken from Ross, resemble more the erratic efforts of a toddler's drawings then the logical evidentiary foundation our law requires to admit relevant evidence. Respectfully, esteemed counsel for the state simply ignores the facts of this record and ignores the comprehensive *Motion to Suppress* filed pre-trial by Mr. Cox, which the trial court denied. CP 49-59; RE 14; 19; 20; T. 67; 923; 971.

Regarding the "red herring" waiver issue, Mr. Cox would point out that under the authority of *Kettle v. State*, 641 So.2d 746 (Miss. 1994), no contemporaneous objection to admission of disputed evidence at trial is required once the motion in limine or motion to suppress has been denied. The filing and hearing on such motions is considered sufficient to

preserve the point for appeal, unless radically different grounds are argued. *Id.*, 641 So.2d at 748-749. In addition, counsel for Mr. Cox objected at trial to introduction of the rape kit blood samples based on records produced by Scales Biological Laboratory, thereby preserving those grounds for appellate review as well. See *Exhibit 25; 27;* T. 950; 951. In his comprehensive *Motion to Suppress*, Mr. Cox raised fundamental due process grounds, as well as authentication and other issues demonstrating the complete inability of the state to establish a reliable chain of custody on clothing worn by Mr. Cox and Ross (both lost) and the swabs taken from Ross, breaks which at trial the prosecutor ultimately conceded to the judge. T. 909.

As Mr. Cox argued in his *Brief on the Merits*, p. 19, "the test of whether there has been a proper showing of the chain of possession of evidence is whether there is any indication or reasonable inference of probable tampering with the evidence of substitution of the evidence." *White v. State*, 722 So.2d 1242, 1244 (¶ 12) (Miss. 1998). As noted above, the prosecutor conceded at least one break in evidence regarding the transmission of the critical swabs to Scales Biological Laboratory. T. 909. Bear in mind that two previous DNA tests *failed* to show any DNA material from Mr. Cox on vaginal, vulvar and rectal swabs taken from the body of Ross. T. 625 (Mississippi Crime Laboratory); 675 (Jackson Police Department).

Consider that:

- Despite testimony that all clothing and other critical evidence was collected from both Mr. Cox and Ross at the University Medical Center, *only* the blood swabs made it to the Jackson Police Department evidence locker. T. 677.
- That Officer Reginald Craft testified he retrieved the rape kit performed on Ross by Nurse Patty Welch and that it was only *one* envelope. T. 353-354; *Exhibit 11*;
- Evidence indicates that Craft received the rape kit done on Mr. Cox by Nurse Garrett Whiddon, who testified unequivocally that the kit consisted of *two* envelopes. T. 500;
- *No documentation* exists to show which officer retrieved the rape kit conducted on Ross, although Nurse Welch testified she gave *three* evidence packages to the officer, including the blood swab evidence. T. 465;
- Officer Keith Dowd testified vehemently he transported the rape kit collected on Mr. Cox and that he received only *one* envelope. T. 221-222; 233;

- Detective Kimberly Brown testified that Reginald Craft retrieved the rape kit done on Mr. Cox, for which a signature form exists. T. 500. Officer Dowd allegedly took the rape kit done on Ross, but the usual documentation was *not* introduced at trial to corroborate that assertion. T. 865.
- At trial, both Wayne Monroe and Kenny Lewis testified each took the rape kits to Scales Biological Laboratory for testing. Lewis went so far as to testify in cross-examination that the rape kit sample of Ross he transported felt cold to him. T. 693. Scales laboratory records show that Monroe took the blood sample of Ross to Scales (*Exhibit 25)* and Lewis ferried the sample of Mr. Cox. *Exhibit 27.*
- Nurse Patty Welch was *not* SANE (Sexual Assault Nurse Examiner) certified as she represented herself to be when she performed the rape kit on Jenna Ross. In fact, Welch only took the certification examination the week prior to trial, some two years *after* she conducted the rape kit of Ross. T. 460.

Given that the first two examinations of oral and blood swabs from Mr. Cox and Ross failed to show vaginal penetration and the third showed only marginal chromosomal material on a vulvar or exterior sample collected from Ross, and the absolute unaccounted-for disappearance of potentially exculpatory clothing and other evidence, the record clearly demonstrates the trial court abused its discretion in the admission of any part of these two rape kits. The prejudicial nature of the evidence cannot be overstated; juries have come to expect scientific corroboration of witness claims in cases such as these. The integrity of the scientific corroboration here, however, is highly suspect due to the lackadaisical manner in which investigators collected and maintained – or lost - evidence.

For these factual and legal reasons, this cause should be reversed and remanded.

III. The trial court erred in admitting testimony by a social worker under MISSISSIPPI RULE OF EVIDENCE 803(4); the testimony was inadmissible hearsay as the witness clearly testified she was not a diagnostician, nor did she seek to provide immediate treatment to Ross.

The issue Mr. Cox raised with regard to admission of testimony by Martha Pentecost is that it fails to the meet the requirements established by MISS.R.EVID. 803(4). T. 396; RE 17. The issue is not trustworthiness; the issue is whether her testimony met the dictates of the rule.

"[S]tatements may be made either to a physician or to *diagnostic medical personnel.*" *Comment*, MISS.R.EVID. 803(4). [emphasis added].

Pentecost clearly testified that she is *not* a diagnostician. T. 404. Pentecost testified she was present to provide a calming influence for Ross, who was close to hysterical, and to ask about follow-up counseling. T. 381; 383. Dr. Grace Ellen Santa Teresa, physician of record for Ross, testified that she relied upon information collected by the *nurse* in diagnosing and treating Ms. Ross. T. 525; 538. Therefore, by the unrebutted testimony of the treating physician, she did *not* rely upon information collected by Pentecost, thereby removing her from the ambit of the exception the rule contemplates. "In order to allow hearsay under M.R.E. 803(4), the declarant's motive in making the statement must be consistent with the purposes of promoting treatment and the content of the statement must be such as is reasonably relied on by a physician in treatment. *Madere v. State*, 794 So.2d 200, 213 (¶40) (Miss. 2001). [internal citations omitted] The Court affirmed the rape conviction of Madere, despite his challenge to the admissibility of the statement of Elizabeth Medina to the nurse, "I thought he was going to kill me." Counsel for Mr. Cox disagrees that "I thought he was going to kill me," qualifies as a statement consistent with the purposes of promoting treatment or that a physician would rely upon such statement for treatment. Nevertheless, the statements to *Pentecost*, a social worker, although part of the medical record, were by testimony of the treating physician *not* relied upon for diagnostic or therapeutic purposes.

Again, particularly when considered with the admission of arguably tainted DNA evidence and the absence of potentially exculpatory clothing worn by both Mr. Cox and Ross, this error can only be considered extremely prejudicial to Mr. Cox and requires reversal.

IV. The quality of the evidence adduced at trial lacks both sufficiency and the necessary weight to support the verdict of the jury, particularly in view of the prejudicial errors this record demonstrates.

Contrary to assertions by the state, this record indicates that events could not have happened as Ross testified they transpired. Was this an elaborate conspiracy designed as the foundation for a premises liability lawsuit against Sunrise Food Market?

The state argues that the use by Ross of her cellular telephone corroborates her assertions.

Mr. Cox begs to differ. The trial record fails to show either the necessary weight or sufficiency. The state failed to prove vaginal penetration and the state's own witnesses established a chronology which totally contradicts the version of events Ross sought to portray.

Consider that:

- It was 10:40 PM when authorities received the first call regarding the alleged carjacking and kidnapping via re-routing from the Hinds County Sheriff's Office in Raymond from Marie Wright at 10:40 PM; *twelve minutes* (10:52 PM) before a video surveillance tape showed Ross sauntering into the Sunrise Food Mart to pay for her gas. T. 250. (Officer Taafe Hughes [T. 262; 294]; Officer Keith Dowd [185]; Det. Kimberly Brown [T. 1202-1203]);
- Lt. Mary Riddley, supervisor of the JPD 911 Call Center, testified without contradiction that it received *no* frantic telephone call from the cellular phone Ross claimed to have used that night. T. 373; 1047.

Ross, running late for work, goes to fuel her car at a station that was in the *opposite* direction of work; a move that meant she passed over the well-lit station at Wal-Mart on Highway 18. T. 1083. At the time Ross alleges these events occurred, every Sunrise pump, except Pump No. 2 that Ross used, was full. T. 1041. At the time these events occurred, Sunrise clerk Naresh Kumar chatted with a customer at most two car lengths away. T. 1222. Store clerk LaQuisha Harris had a full view of Pump 2 and noticed nothing out of the ordinary; neither Kumar nor Harris remembered a car pulling off with the gas nozzle still attached. T. 1230; 1237 Finally, a store alarm system connected to the pumps to prevent non-paying customers from driving off never sounded, as it should have in such an instance. T. 877.

As it considers whether the verdict is against the overwhelming weight of evidence, the reviewing Court acts as a hypothetical "thirteenth juror." When a verdict "is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice," the proper remedy is to reverse and remand for a new trial. *Lamar v. State,* 983 So.2d 364, 367(¶ 5) (Miss.Ct.App.2008) (citing *Bush v. State,* 895 So.2d 836, 844(¶ 18) (Miss.2005)).

As for sufficiency, there was no proof of vaginal penetration as required by the statute, by testimony of Katherine Moyse. No DNA or other chromosomal material was detected on internal vaginal swabs taken from Ross; only vulvar swabs. T. 1009. Mr. Cox reiterates the test he argued in his *Brief on the Merits by Appellant*, in which "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." *Dilworth v. State*, 909 So.2d 731, 736; ¶ 17 (Miss. 2005) (internal citations omitted). The evidence is reviewed in the light most favorable to the prosecution "to determine whether a rational juror could have concluded *beyond a reasonable doubt* that all elements of the crime were satisfied. The proper remedy for insufficient evidence is for the Court to reverse and render." *Johnson v. State*, 2008-KA-01176-COA (¶ 14) (Miss. Ct. App., Nov. 3, 2009), (internal citations omitted) (emphasis in original).

Clearly, the record shows that *three* DNA tests failed to corroborate vaginal penetration of Ross by Mr. Cox. This is what the statute in effect at the time required. Therefore, Mr. Cox humbly argues that this assignment of error requires reversal and render of the forcible rape count and reversal and remand of the kidnapping and carjacking allegations.

V. The honorable trial Court committed reversible error when it granted the *motion in limine* of the prosecution to bar any mention of a civil suit the complainant currently had pending against Sunrise Food Mart regarding the incident. By preventing Mr. Cox from showing bias of Jenna Ross, the trial court thus violated confrontation and fair trial rights secured to Mr. Cox under the federal and state constitutions.

Both Mississippi statutes and evidentiary rules make bias always relevant and always material. MISS. CODE ANN. § 13-1-13 (1972) permits examination of a witness "touching his interest in the cause or his conviction of any crime." MISS.R.EVID. 616 is even more explicit: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."

The fact that jurors were kept ignorant of the lawsuit by Ross against the Sunrise Food Mart deprived them of crucial evidence with which to weigh her credibility. Given the irreconcilable contradictions between what computerized records and live witnesses all testified to (the 10:40 PM reports of kidnapping and carjacking) and the 10:52 PM video showing Ross paying for her gasoline, clearly not appearing as one who was being kidnapped, this piece of evidence had particular probative value.

Further, no proffer is required when probative value is apparent from the context and content of the offer or objection to exclusion of the evidence. *Suan v. State*, 511 So.2d 144, 147 (Miss. 1987).

As argued in his *Brief on the Merits*, success by the state in the criminal matter substantially increases her chances of success in her lawsuit against Sunrise. It is unknown what the jury would have thought of such information, given the factual contradictions apparent like geologic fault in this record. The trial court could have easily instructed the jury on the use they were to make of the testimony.

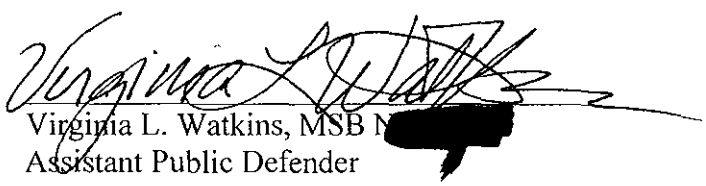
Finally, it was a denial of his right under both state and federal constitutions to deny him full confrontation of Ross, including questions regarding the lawsuit. Refusal to permit him to question Ross about the lawsuit she filed against Sunrise deprived jurors of crucial information with which to weigh her credibility, requiring reversal and remand.

CONCLUSION

Mr. Cox incorporates into this *Reply* all arguments and citation of authority in his *Brief on the Merits by Appellant* by asking this honorable Court to reverse and render his conviction for forcible rape for failure to prove vaginal penetration as required by the statute then in force. The trial court exposed Mr. Cox to an *ex post facto* law when it accepted jury instructions which mirrored language from a version of the forcible rape statute not in effect until 2007. The trial court also committed reversible error when it admitted into evidence portions of the rape kits collected on both Mr. Cox and Ross when there was a complete lack of any coherent chain of custody from hospital personnel who collected the evidence to law enforcement officers who allegedly received them. The prosecution even conceded to a break in the chain of custody of the swabs. It was also prejudicial error to limit cross-examination as to the inherent bias of Ross in the face of her pending lawsuit against Sunrise Food Mart over the incident and error to permit social worker Martha Pentecost to testify under MISS.R.EVID. 803(4), as she was provided no diagnostic services, as confirmed by Dr. Santa-Teresa, the doctor treating Ross.

Finally, the failure to prove vaginal penetration and the fatal contradiction in chronology demonstrate that the case of the prosecution lacked sufficiency as to the forcible rape and weight as the carjacking and kidnapping. Therefore, Mr. Cox humbly requests this honorable Court to reverse and render on the forcible rape charge and reverse and remand for a new trial on the carjacking and kidnapping counts.

Respectfully submitted,



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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be delivered via hand delivery a true and correct copy of the foregoing *Reply by Appellant*, to the following:

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