IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TYSHUNNA COOPER ROSS — APPELLANT

VS.

NO. 2009-KA-0796
-CONSOLIDATED WITH-
2009-KA-0797

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TYSHUNNA COOPER ROSS** **APPELLANT**

**vs.**

**CAUSE No. 2009-KA-00796-COA**
**-consolidated with-**
**CAUSE No. 2009-KA-00797-COA**

**THE STATE OF MISSISSIPPI** **APPELLEE**

# BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

## STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Madison County, Mississippi wherein the Appellant was convicted and sentenced for her felonies of **SEXUAL BATTERY** and **GRATIFICATION OF LUST.**

## STATEMENT OF FACTS

B.W., a boy of fourteen years at the time of trial, testified that in July of 2007 he lived with his parents and brothers in Madison County. He knew the Appellant through the Appellant's daughter, who was a friend of his. On 3 July 2007 he saw the Appellant at the Appellant's roommate's house. The Appellant invited B.W. and two of his friends to "hang out" with her. B.W.

was twelve years of age at the time; his two friends were fourteen years of age. B.W. did not ask his parents for permission to "hang out" with the Appellant for fear that they would deny him permission.

After B.W. and his friends arrived at the Appellant's residence, B.W. and his friends began chatting with the Appellant and smoked a few cigarettes provided by the Appellant. After awhile, the Appellant brought out some glasses and offered the boys some vodka. This, we suppose, would not have surprised the boys since the Appellant had on one or two previous occasions bought them beer with their money. This occurred outside of the house, in the carport, because the Appellant had found herself locked out of the house. They then decided to go into a wood outside of B.W.'s neighborhood because the Appellant did not want to stay at the house, out in the carport, any longer.

B.W. and his friends and the Appellant went to the wood and there they drank more vodka and smoked more cigarettes. The wood would have been familiar to them all since that was where B.W. drank the beer the Appellant had bought him. While in this wood, B.W. and the Appellant kissed, and B.W. fondled the Appellant's breast. At some point the group left the wood, and one of B.W.'s friends took the Appellant to his house and managed to get the Appellant inside his bedroom.

A little later that evening, B.W. went to his friend's house. B.W.'s friend asked him, "What should I do with her?" The Appellant was sitting in a closet with a bottle of vodka. The Appellant had apparently called her boyfriend to come get her. At some point the boyfriend arrived and took the Appellant in tow.

After the Appellant left with her boyfriend, a man by name of Carter, B.W.'s friend, the one who had just given sanctuary to the Appellant, came to B.W.'s house. So did two girls, twelve and thirteen years of age respectively. This occurred at about half past nine in the evening. B.W. managed to get these girls to his room without his parents' knowledge. B.W. took one of the girls

into his bed; B.W.'s friend sat in a recliner, the other girl sitting on the floor next to him. B.W. and his girl talked and kissed for about forty -five minutes. Then B.W.'s mother showed up and broke up the party. After B.W.'s mother finished berating B.W., he showered and went to sleep, exhausted, no doubt, by the excitement of the day.

On the following day, the Fourth of July, B.W.'s parents were hosting a party. B.W. assisted his parents in preparing for the party, but at some point either he or the Appellant texted or called the other. The Appellant told B.W. that she had been beaten by her boyfriend. Later, the Appellant contacted B.W. again to say that she did not have a place to stay. The Appellant did not tell B.W. where she was, but she did allow that she was with someone named Martin. B.W. invited the Appellant to stay with him, telling her that he did not want her to be out in the cold on the night of July 4th. B.W. stated that he thought he was just helping out a friend. Of course, B.W. saw no reason to ask his mother if he could put the Appellant up.

The Appellant's friend Martin took the Appellant to a point near to B.W.'s home, B.W. having taken care to see to it that this Martin would not know exactly where he lived. This Martin dropped the Appellant off at a house near B.W.'s house. B.W. was there and shook Martin's hand. B.W. then escorted the Appellant to his home, to a window by his laundry room and told her to wait there. B.W. then managed to get the Appellant to his room, undiscovered by his parents, who were busy with their party. B.W. had previously managed to abscond with a package of twenty bottles of beer, taking that to his room as well. He put the beer in a gun cabinet in his room.

B.W. gave the Appellant a beer and the Appellant and he sat on the floor of his bedroom and talked. He could not remember what they talked about, but by and by, after they had gotten into bed and watched television for a bit, just as they were about to go to sleep, they began kissing and feeling of each other and "stuff." The Appellant fondled B.W.'s penis.

According to B.W., one thing led to another. He happened to have a condom on his night stand, a gift from some fellow he did not know. B.W. grabbed the condom and held it up. The Appellant looked at it and nodded yes. B.W. went to his bathroom and put the condom on. When he returned to the bedroom, the Appellant was sitting on his bed. B.W. told the Appellant that his bed squeaked badly, so the Appellant laid down on the floor. At this point, the Appellant had a shirt and her "scrubs" on. She pulled her "scrubs" down to her knees or ankles; B.W. pulled his pyjama bottoms down to his knees. The couple then proceed to have sexual intercourse, B.W. on top, the Appellant whispering "f____ me" repeatedly in his ear. According to B.W., this went on for some ten or fifteen minutes, and then he ejaculated.

After B.W. disposed of the condom and was about to go to sleep, the door to his bedroom opened and a light came on. B.W.'s mother was at the door. The Appellant threw a cover over her head, but her hair was hanging out. B.W.'s mother called B.W. out and asked him what he was doing, telling him that she could not believe he had done "this" again. It seems that the night before young B.W. had a male friend and two female friends in his bedroom. B.W.'s mother apparently assumed that the Appellant was one of this young Lothario's age appropriate playmates.

B.W. told his mother that she did not really understand. His mother merely responded that she could not believe that he had done this kind of thing again as they went downstairs in the house. B.W.'s mother thought that the woman in the bed was one of the girls B.W. had been with the night before. When B.W. got her attention, his mother went back to his bedroom, where she found the Appellant sitting in the recliner. The Appellant and B.W.'s mother went downstairs and talked while B.W.'s mother washed dishes. Afterwards, B.W.'s mother prepared a guest room for the Appellant and permitted the Appellant to stay in it that night. B.W.'s mother and the Appellant then went outside to have a cigarette. B.W.'s father was asleep through it all.

The next day, B.W.'s mother then asked B.W. is anything of a sexual nature had occurred. B.W., not surprisingly, told her no. B.W. and his family then went to Chattanooga. At some point the Appellant contacted B.W. to see if his family was going to "press charges" When B.W. responded in the negative, the Appellant told him that he could tell no one because it would mean that she would go to jail.

After their return, B.W.'s mother took B.W. to the Madison police department. B.W. told them what he described as the "partial truth," leaving out the fact that he had engaged in sexual intercourse with the Appellant. B.W. was afraid that he was going to get in trouble, did not feel comfortable talking with the police, and did not think his mother knew about it at that point. When taken to a children's advocacy center, he did not reveal the truth there either. He apparently did relate the fact that the Appellant had plied him with alcohol and cigarettes. At the advocacy center, he apparently stated that the Appellant had touched his penis and that he touched her vagina while they were in the woods.

B.W.'s mother continued to question B.W. about what had happened. B.W. and his mother had been close and he felt that he could not hide it from her anymore. So he finally broke down and told her what had happened. His mother took him back to the police, and there he told the "full truth."

When the press found out about the case, it apparently caused quite a sensation in Madison County. Many of his young friends asked him about it, much to his dismay. B.W. ended up at Chamberlain - Hunt. ( R. Vol. 3, pp. 75 - 160).

B.W.'s mother then testified. She stated that she knew the Appellant, having met her when B.W. went to a birthday party for the Appellant's daughter at the Appellant's house in 2006. B.W. socialized with the Appellant's daughter on a number of occasions afterwards.

On 4 July 2007, B.W.'s parents had a pool party. B.W. was there part of the day. He was also with the Appellant during the day. After the party, B.W.'s family went to see a fireworks display.

Later on that night, B.W.'s mother had reason to check on B.W. She heard a noise and, in light of what her son had gotten into the night before with the two girls of his age, she decided she had better see what her son was about. So she went to his room and picked the lock on the door with a toothpick.

When she opened the door, the room was dark. She turned on the light and saw her son in bed with someone. She could not see that person's face because there was a cover over the head. All she could see was a leg and some "scrubs." B.W.'s mother was confused because the person under the cover did not look like the same girl who was in B.W.'s bed the night before. The one she observed under the cover was darker complected.

B.W.'s mother told B.W. to go downstairs and to get rid of the girl. As B.W. went down the stairs, he told his mother, "But mom, you don't understand!" When his mother asked him what she did not understand, B.W. told her that "she had no place to go." B.W.'s mother expressed considerable doubt that a teenager would have no place to go. B.W. kept on and told his mother that the person in his bed had been kicked out and beaten by her boyfriend. As that point, B.W. called for the Appellant to come downstairs.

B.W.'s mother was astounded and not a little upset to see the Appellant, a woman twenty five or more years older than B.W. The Appellant apologized and told B.W.'s mother that she had nowhere to go, that her roommate and locked her out and had gone on a date. The Appellant further stated that her sister was out of town and had no one to call to come get her. B.W.'s mother paced the kitchen, wondering what it was she should do. She could not herself take the Appellant

anywhere because she had been drinking.

Finally, at about two in the morning, the Appellant apparently was able to reach her roommate. Her roommate came for her at that time. B.W.'s mother had been prepared to permit the Appellant to stay in a guestroom, going so far as to prepare a bed for her. B.W.'s mother made B.W. sleep on a pallet in her's and her husband's bedroom. B.W. 'S mother asked him whether anything had happened between himself and the Appellant. B.W. denied the existence of any impropriety. B.W. and his family went to Chattanooga the next day.

On the following Monday, B.W.'s mother contacted the Madison police department. She did this because she had received a call from a friend of hers to the effect that the Appellant had given vodka to her son and B.W. B.W.'s mother intended to press a charge of contributing to the delinquency of a minor. B.W. continued to maintain that there had been nothing inappropriate between himself and the Appellant.

When B.W. got to the police station, though, he told the police that the Appellant had touched him and that he had touched the Appellant's breast. Still, B.W. denied that anything more had occurred. His mother continued to question him about it. Finally, on the following Friday, B.W.'s mother called him from his room and asked him again whether anything had happened while the Appellant was in his bedroom. At that time the child broke into tears and told his mother what had happened. B.W. then told his mother that he had seen how upset she was at the police station on that Monday. He said nothing more because he did not want to upset her anymore. A Sergeant Davenport of the Madison police department took a statement from B.W. that afternoon.

B.W.'s mother also stated that her housekeeper found two empty condom wrappers in B.W.'s room. B.W.'s mother took the wrapper B.W. identified as being his and took it to the police department, along with an empty bottle of beer found in B.W.'s room. B.W. did not say to whom

the other wrapper belonged.

B.W. was said to have suffered emotionally on account of his evening with the Appellant. ( R. Vol. 3, pp. 161 - 176).

Martin McRae was then called to testify. He stated that he had known the Appellant since 1995. He saw her on July 4, 2007. The Appellant was living with a roommate and he went by to see the Appellant. The Appellant expressed an interest in seeing a fireworks display that night, so he took her to see the display. The Appellant managed to see her daughter at the fireworks display.

After the fireworks show was over, McRae intended to take the Appellant back to her roommate's house. However, the Appellant asked to be taken to someone else's house and gave him directions as to how to get to that house. The Appellant told McRae that there was some lady at that house that she knew. The Appellant had been talking to several people by cellphone during the fireworks display. McRae took the Appellant to the house she wanted to visit and dropped her off at the driveway.

As McRae was dropping the Appellant off, a young person came down the road and up to McRae's truck. The young person was still there with the Appellant when McRae drove off.

McRae had helped the Appellant out in the past when she did not have a place to stay, going so far as to let her stay with him. The Appellant did not tell him that she had no place to stay that night. McRae stated that he did not talk with the kid who came up to his truck. He thought the kid might have had a tee shirt on, or some other kind of shirt. ( R. Vol. 3, pp. 176 - 181).

Dennis Davenport of the Madison police department interviewed B.W. and his friend at the police station on 9 July 2007. He did so in consequence of a complaint by their mothers to the effect that the boys had been given alcohol. B.W. told him that the Appellant had called him at about noon on 3 July 2007. The Appellant told B.W. that she had been locked out of her house. B.W. and his

friend walked to the house where the Appellant was located.

When B.W. and his friend arrived, they found the Appellant and found that she was drinking vodka. She offered the boys some vodka. B.W. took some vodka. While they were drinking and discussing where the Appellant was going to stay, they decided to sneak the Appellant into B.W.'s friend's house. They then left the house and went to a wood near the friend's house.

B.W. told Davenport that they continued to drink while they were in the woods. B.W. told him that both he and his friend kissed the Appellant and felt of her breast. At some point they got the Appellant and four bags of luggage into B.W.'s friend's home.

B.W. told Davenport that on 4 July 2007 the Appellant was dropped off in B.W.'s neighborhood. B.W. went to meet her and managed to sneak her into his bedroom. They were lying in B.W.'s bed, kissing. B.W. fondled the Appellant's breast and she fondled his penis. B.W. did not tell Davenport at that interview that he had engaged in sexual intercourse with the Appellant. As for the condom wrapper, B.W. told Davenport that he had opened it to see how to use a condom.

In light of this disclosure, Davenport set up an interview at a children's advocacy center, which occurred on 12 July 2007. On the following day, B.W.'s mother contacted Davenport and told him that her son had admitted that he had engaged in sexual intercourse with the Appellant. B.W. was interviewed again that afternoon.

The Appellant's date of birth was 21 January 1970 and she was thirty - seven years of age on 4 July 2007. ( R. Vol. 3, pp. 181 - 191).

Mike Magee was in the employ of the Madison police department in July, 2007 and was involved in the investigation concerning the Appellant. He had the opportunity to speak with the Appellant after her arrest and after she had been given and waived the *Miranda* rights. The Appellant admitted having plied B.W. with vodka and beer, but she denied having had sexual

relations with him. She admitted that B.W. knew her daughter. She admitted having shared shots of vodka with B.W. in the wood.

The Appellant also admitted that she had gone to B.W.'s bedroom after the fireworks display. She claimed that she had fallen asleep in his bed after having drunk a bottle of beer and having watched television. She admitted that B.W.'s mother had found B.W. and she in B.W.'s bed. The Appellant did not give an explanation for having been in bed with B.W. though she did say that she was hiding from her boyfriend. She stated that her boyfriend's name was David Carter Sessions. The Appellant told the officer that she had been locked out of her roommate's house on 3 July 2007. The Appellant denied having had sexual relations with B.W. or any other juvenile. ( R. Vol. 3, pp. 192 - 198).

## STATEMENT OF ISSUES

**1. DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT; DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A NEW TRIAL?**

**2. WAS COUNSEL FOR THE APPELLANT INEFFECTIVE; DID THE TRIAL COURT VIOLATE M.R.E. 611**

## SUMMARY OF ARGUMENT

**1. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT; THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A NEW TRIAL**

**2. THAT THE RECORD BEFORE THIS COURT DOES NOT DEMONSTRATE THAT COUNSEL FOR THE APPELLANT WAS INEFFECTIVE; THAT THE TRIAL COURT DID NOT VIOLATE M.R.E. 611**

## ARGUMENT

**1. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT; THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A NEW TRIAL**

In the First Assignment of Error, the Appellant asserts that B.W.'s testimony was implausible, contradictory and discredited, and that for that reason the trial court should have granted the defense motion for a directed verdict or, alternatively, a new trial. She also attempts to say that B.W.'s testimony was uncorroborated. In the course of nitpicking nearly every line of testimony, the Appellant seems to think she has exposed the case at bar as a mass of lies, not bothering to coherently explain why it should have been that B.W. would have perjured himself about the Appellant. As the Court will see, though, the Appellant's attempt to show these claims rests largely upon the fact that B.W. initially lied to his mother and to the police about the fact that the Appellant had sexual intercourse with him. What the Appellant forgets, though, or never knew, is that in cases of this kind it is common, quite common indeed, to find that child victims of sexual offenses are reluctant to disclose what was done to them, an understandable thing when one considers that there is scarcely anything people are more reluctant to discuss than their personal sexual history. As for the so - called contradictions so ballyhooed by the Appellant, those few the Appellant has managed to find are niggling ones at best, and easily explained. As for the Appellant's constant claims that B.W. was mendacious and that he was a prevaricator in his trial testimony, these insulting allegations are merely the Appellant's opinion. While we are happy to see that the Appellant (or the law school) has been consulting a dictionary, an unusual thing these days, the boy was no dissembler. In fact, the boy's testimony was corroborated in many respects by the Appellant herself.

Standards of review

In considering the claims that the evidence presented by the State was insufficient to support the verdict or that the verdict was opposed by the great weight of the evidence, we bear in mind the applicable standards of review:

> [T]he standard for reviewing the denial of a motion for a directed

> verdict as follows: "all evidence supporting a guilty verdict is accepted as true, and the prosecution must be given the benefit of all favorable inferences that can be reasonably drawn from the evidence." *Cortez v. State,* 876 So.2d 1026, 1030(¶ 11) (Miss.Ct.App.2003) (citing *Nelson v. State,* 839 So.2d 584, 586(¶ 3) (Miss.Ct.App.2003)). "A motion for a directed verdict challenges the sufficiency of the evidence." *McMillan v. State,* 6 So.3d 444, 446(¶ 8) (Miss.Ct.App.2009) (citing *Bush v. State,* 895 So.2d 836, 843(¶ 16) (Miss.2005)). In *Bush,* the Mississippi Supreme Court expressed that "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.' " *Id.* (citing *Carr v. State,* 208 So.2d 886, 889 (Miss.1968)). If any rational trier of fact, when viewing the evidence in the light most favorable to the State, could have found that the essential elements of the crime existed beyond a reasonable doubt, this Court "will affirm the denial of a motion for a directed verdict." *McMillan,* 6 So.3d at 446(¶ 8). "If we find that reasonable, fair-minded jurors could have concluded that the defendant was guilty of the accused crime, the evidence will be deemed sufficient." *Id.* "The standard of review for peremptory instructions and directed verdicts are the same." *Wall v. State,* 718 So.2d 1107, 1111(¶ 15) (Miss.1998). In *Ross v. State,* 954 So.2d 968, 1016 (¶ 127) (Miss.2007) (citing *Bush,* 895 So.2d at 844(¶ 18)), the supreme court set forth the standard of review for a motion for a new trial as follows:
>
> A motion for new trial challenges the weight of the evidence[;][w]hen reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will disturb a verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.
>
> When weighing the evidence, the Court, sitting as a thirteenth juror, views the evidence in the light most favorable to the verdict. *Id.*

*Moten v. State*, 20 So.3rd 757, 759 - 760 (Miss. Ct. App. 2009).

We also bear in mind that matters concerning the weight and credibility of testimony and evidence are for the jury to determine. When considering whether the evidence was sufficient to support the verdict, the evidence and testimony and reasonable inferences therefrom in support of the verdict are assumed to be true. *Wetz v. State*, 503 So.2d 803, 808 (Miss. 1987).

Sufficiency of the evidence

Preliminarily, we will point out that the Appellant did not assign the reason or reasons assigned here in support of his motion for a directed verdict. ( R. Vol. 3, pg. 199). The post - trial motion judgment notwithstanding the verdict or for a new trial did not allege the reason or reasons either. That being so, the Appellant is in no position to assert these reasons here. *Hoyne v. State*, 1 So.3rd 946, 957 (Miss. Ct. App. 2009). Nonetheless, assuming the First Assignment of Error is before the Court, there is no merit in it.

The evidence in support of the verdict, taken as true, together with all reasonable inferences therefrom, showed that on 4 July 2007, the Appellant, secreted in B.W.'s bedroom, gratified her lust by handling, rubbing or touching B.W.'s penis. The testimony demonstrated that B.W. was under the age of sixteen years at the time, and that the Appellant was thirty - seven years of age. The Appellant's statement, while it does not corroborate the boy's testimony that she fondled him, does corroborate his testimony that she was in his bedroom on the night of 4 July 2007, that she was in his bed, that she had previously given him alcoholic beverages, that she had been in the wood near his house with him, and in other aspects of his testimony. The evidence clearly demonstrated a violation of Miss. Code Ann. Section 97-5-23 (Rev. 2006).

Likewise, the boy's testimony was completely sufficient to show that the Appellant engaged in sexual penetration of B.W. While it may be that there was no corroborating testimony as to the acts of sexual intercourse or fondling themselves, this is hardly unusual given that in most instances the only witnesses are the participants themselves. Nonetheless, that the Appellant was in B.W.'s bed and bedroom is a fact corroborated by the Appellant's statement and B.W.'s mother's testimony. This was corroboration. *Goodnite v. State*, 799 So.2d 64 (Miss. 2001)(Testimony by one child victim that the appellant in that case was in a bedroom alone with the other child victim for a

few minutes served to corroborate the other victim's testimony that the appellant committed fellatio upon him). Clearly, a reasonable juror could easily find from this evidence that sexual battery and fondling occurred.

The Appellant, though, points to several minor points, and asserts that in light of them the jury could not have reasonably believed the boy.

Specifically, the Appellant claims that the boy, during his testimony, initially told the jury that he went home and went to sleep after his encounter with the Appellant on the night July 3rd, and then corrected himself and testified to the encounter with the two girls. This did occur at trial, yet given the context it is clear that the boy, who was fourteen years of age at the time, simply neglected or forgot to testify to what occurred, or was nervous or confused. There is no reasonable ground to suppose that he was lying. In any event, it was for the jury to consider what effect, if any, that had on his credibility.

It is certainly true that the boy did not at first tell his mother or the police about what had happened between the Appellant and himself. The Appellant suggests that B.W. made up a story on account of his mother's prompting. However, what the Appellant does not do is to suggest why B.W.'s mother would have had a reason to influence her son to lie about the Appellant and then commit perjury. On the other hand, we think any mother who was concerned for the welfare of her young son would indeed have been curious and worried about the fact that a thirty - seven year old woman had been found in her son's bed. It would have been quite natural for her to worry that something of a sexual nature had occurred, and ask questions.

The Appellant then complains that there was a discrepancy as to whether B.W. touched the Appellant's breast on their first or second visit in the wood. This is a complaint about nothing considering the fact that, regardless of whether it was a first or second visit, the boy did touch the

Appellant's breast.

The Court is then told that there was discrepancy as to whether B.W. and his mother went back to the bedroom to roust the Appellant, or whether B.W. called up the stairs. This surely is a silly point, especially given the fact that even the Appellant admitted that she was in the boy's room.

The Appellant then points out that two empty condom packages were found in B.W.'s bedroom, whereas B.W's testimony tended to indicate that he had only one condom, that there was something of a discrepancy as to whether a maid found the packages or whether B.W. gave the package to his mother. The Appellant claims that it is "logical" to assume that the two packages were opened on the night of July 3rd, when the two young girls were in the B.W.'s bedroom. She also claims that the discrepancy as to whether there was one or two packages amounts to a contradiction in the evidence.

Whether there were two packages was a matter for the jury to consider. It was for the jury to determine what importance to give that possible discrepancy. As for the Appellant's "logical" conclusion, that is at most a possibility, not a "probability." It is merely speculation on the part of the Appellant. It may be that B.W.'s mother found the two girls in the Appellant's room, but she did not testify that she found the boys and girls *en flagrante delicto.* The Appellant, on the other hand, was found in B.W.'s bed with a cover thrown over her head. The most that can be said is that it was for the jury to consider whether the package or packages were opened on the night of July 3rd.

The Appellant claims that B.W. lied and misled everyone on numerous occasions. There is no support for this bold claim. Minor contradictions or inconsistencies that in no way impugn the important facts of the case are no evidence of lying. And, of course, other than suggesting that the boy committed perjury to please his mother, the Appellant advances no reason why the boy would have lied. It may be that the boy's mother wanted to get at the truth, but that was not unusual. On

the other hand, it is clear that she bore no ill - will against the Appellant, at least prior to the time she discovered that the Appellant had had sex with her son. B.W.'s mother went so far as to prepare a guest room for the Appellant's use, and this just after she had discovered the Appellant in her son's bed.

B.W. never wavered on the essential facts of this case. Those facts were that the Appellant and he arranged to meet at a place not far from his house; that he took care to see to it that he would be able to get the Appellant to his bedroom without his parent's knowledge; that he gave the Appellant a beer; that as the Appellant and he were watching television he sat on the bed with her; that they began kissing and feeling of each other; that the Appellant wanted sexual intercourse with him and that he used a condom; that B.W.'s mother found the Appellant in bed with her son; and that the Appellant attempted to hide under a cover. The Appellant corroborated all this, with the exception of the testimony about sexual acts. The said - to -be contradictions set out by the Appellant here are minor things.

It is not unusual to find inconsistencies in testimony. Inconsistencies do not require the jury to reject the entire testimony. *Duncan v. State*, 939 So.2d 772, 778 (Miss. 2009). It is for the jury to weigh the testimony. *Christmas v. State*, 10 So.3rd 413, 423 (Miss. 2009). It is certainly true, as noted by the Appellant, that the uncorroborated testimony of the victim of a sexual offense is sufficient to permit a finding of guilt where that testimony is not discredited or contradicted by other credible evidence. *Parramore v. State*, 5 So.3rd 1074, 1077 - 1078 (Miss. 2009). But B.W.'s testimony was not contradicted and was not discredited in any significant way. His testimony was not so discredited or contradicted as to be unbelievable. That being so, his testimony, had it not been corroborated, would have been sufficient to permit the jury to find guilt. *Musgrove v. State*, 866 So.2d 483, 485 (Miss. Ct. App. 2003).

B.W.'s testimony, though, was in fact corroborated in certain respects by the testimony of his mother and the Appellant's statement. In fact, the Appellant's statement corroborated B.W.'s testimony in many respects. The Appellant did not admit to having engaged in the sexual acts testified to by the Appellant, but this is not so surprising in light of the fact that she was aware, prior to the interview with the police, of the trouble she could find herself in.

The trial court committed no error in denying relief on the motion for a directed verdict and motion for judgment notwithstanding the verdict

Weight of the evidence

The Appellant points out that the Mississippi Supreme Court has recently declared itself a "thirteenth juror," when it comes to assaying a claim that a verdict is contrary to the great weight of the evidence such that a new trial should be granted. The Appellant need not suppose that this is a sea change in the law. As *Moten, supra*, points out, the appellate courts of this State will only order a new trial in an instance in which it finds that a verdict is so contrary to the great weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice. That the appellate courts say that they sit as a "thirteenth juror" is not to say that they may order a new trial upon a whim–or an appellant's wish. The requirement remains that there be a finding supported by the record that (1) the verdict under review is opposed by the great weight of the evidence and (2) that to allow such a verdict to stand would be to sanction an unconscionable injustice. *Moten* further points out that in considering such a claim, the evidence is viewed in the light most favorable to the verdict. *Bush v. State*, 895 So.2d 836 (Miss. 2005), cited by the Appellant, is in accord with *Moten* on the point. The language concerning the "thirteenth juror" does not indicate that a new trial may be ordered just because a majority of the Court does like the verdict. There must still be reasons supported by the record to demonstrate why the verdict constitutes an unconscionable injustice.

There are no such reasons in the case at bar.

The Appellant then goes on to assert that B.W. lied and contradicted himself as to how many people were in the carport and the wood with the Appellant and whether his friend also touched the Appellant's breast. We do not see that either point significantly and adversely affects B.W.'s testimony. He explained why he lied for the benefit of his friend; as to whether there was or was not another person present does not seem to be of any importance. It was, in any event, a matter for the jury to consider. The same is true for the supposed contradiction concerning who used a towel. These minor things do not case serious doubt upon the Appellant's essential testimony, which was the testimony about the sexual activity between the Appellant and himself.

We have responded to the other reasons asserted by the Appellant as to why she thinks that the evidence was severely contradicted. We adopt those responses here. Beyond this, though, we will point out that there was no evidence at all that was contrary to the verdict. There was no case - in -chief by the defense. In the State's case, there was not the first word of testimony that could be reasonably seen to have put the verdict in doubt. There is no "great weight of evidence' contrary to the verdict, and no good reason to consider the verdict an unconscionable one.

The First Assignment of Error is without merit.

**2. THAT THE RECORD BEFORE THIS COURT DOES NOT DEMONSTRATE THAT COUNSEL FOR THE APPELLANT WAS INEFFECTIVE; THAT THE TRIAL COURT DID NOT VIOLATE M.R.E. 611**

The Appellant asserts that her counsel filed no pre-trial motions, made no objections in the course of the trial, called no witnesses, "allowed" witnesses to offer inconsistent testimony at trial, offered no jury instructions, and generally failed to put on a case for the defense at all.

It is said that the Appellant's trial attorney was ineffective.

No issue of ineffective assistance of counsel in this case was raised in the court below.

Consequently, the question presented here is not so much whether counsel was ineffective but whether trial counsel's performance, as demonstrated by the record here, was so inadequate that the trial court had the duty to declare a mistrial or grant a new trial. The phrase "inadequacy of counsel" means representation so lacking in competence that a trial court has the duty to take corrective action in order to prevent a mockery of justice. *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. Ct. App. 1999). The record is not sufficient to demonstrate that counsel for the Appellant was ineffective. In considering the Appellant's claim, we bear in mind the standard by which such claims are asseyed. *Id.*, 1102-1103.

The Appellant has merely pointed out what her counsel did not do. However, there is nothing in this record to show or suggest that pre-trial motions were necessary or desirable, nothing to show that there were witnesses for the defense who might have been called or should have been called, nothing to show what instructions might have been sought. The mere fact that the attorney did not do these things does not of itself demonstrate that his performance was inadequate or ineffective. There may well have been no witnesses for the defense, no instructions of law to be considered which were not already considered and granted. In view of this, it is not possible for this Court to conclude that counsel for the Appellant was inadequate. Beyond this, the Appellant acknowledges that decisions such as these are a matter of trial strategy.

The Appellant does attempt to shoehorn herself into the decision in *Bigner v. State*, 822 So.2d 342 (Miss. Ct. App. 2002). However, the many deficits in representation there were rather clearly demonstrated by the record. In that case, the record demonstrated that the attorney was unfamiliar with the law in several respects, abandoned pre-trial motions filed by the original defense attorney, failed to object to certain statements made in the prosecution's summation, failed to object to "other crimes" evidence despite a strong hint by the trial judge that he should do so, failed to

secure the attendance of a named witness who might have had important testimony for the defense because the attorney assumed that the State would call that witness, among other things.

There is no parallel here, and the Court in *Bigner* did recognize that the things the attorney in the case at bar is accused of having failed to do are things that fall into the ambit of trial strategy. The difference between *Bigner* and the case at bar, and it is a very significant difference, is that in *Bigner* the record clearly demonstrated that whatever the attorney in that case was doing or thought he was doing was not so much a matter of trial strategy as it was a matter of trial bumbling. It was not the simple fact that counsel in *Bigner* did not do certain things that caused the reversal there; it was the fact that the record affirmatively showed that the things he did and did not do were in consequence of ignorance of the law and faulty reasoning, together with a fairly clear demonstration of prejudice.

The Appellant, though, claims that there is at least one common feature between the case at bar and *Bigner*, that being that counsel in the case at bar did not object to the testimony concerning the provision of alcohol to B.W. Here, though, the evidence concerning the provision of alcohol was necessary to explain what B.W. was doing in the company of the Appellant–how and why he made contact with her and went into the wood with her, and also to explain why B.W. was taken to speak with the policemen. The State had the need and the right to present a coherent story of the crime. *Welde v. State*, 3 So.3rd 113 (Miss. 2009). However, even if the testimony concerning the provision of alcohol to B.W. was inadmissible, the failure to object to that testimony was not prejudicial to the Appellant in view of B.W.'s unequivocal testimony of what the Appellant did. *Carle v. State*, 864 So.2d 993, 997 (Miss. Ct. App. 2004). Finally, since the Appellant admitted in her statement to having provided alcohol to B.W., and error in the admission of the testimony was cured.

In *Bigner*, it is true that the trial court expressed a reservation about the admissibility of drug

and alcohol usage in that case. While this Court apparently thought it might have been ineffective to fail to object to many references to drug and alcohol usage, it did not squarely hold that such testimony was inadmissible under the facts of the case, and did not mention the State's argument for admissibility. In any event, it was not the failure to object to such testimony alone that resulted in the outcome of the case. That failure was one of many lapses, and not the most serious lapse, in that attorney's representation.

The Appellant then contends that the trial court unduly limited cross - examination, in violation of M.R.E. 611(a). How this allegation of error relates to a claim of ineffective assistance of counsel is obscure at best. In any event, what the Appellant is complaining about is that the trial court, during the cross - examination of the witness Wharton, called counsel to the bench, where an off - the - record conference occurred. The trial court then declared a recess in the trial for a few minutes. After a "short recess", the jury was returned to the courtroom, and the cross - examination of the witness continued. The Appellant did not object to the recess. ( R. Vol. 3, pp. 150 - 151). The Court is told that the trial court, be declaring a short recess, somehow or another managed to deprive the Appellant of his right to a full cross-examination of the witness, especially concerning the matter of the condom package. The Appellant, of course, contends that his right to confront witnesses against him was compromised.

This is a ludicrous complaint. While the record does not show why the trial court declared a short recess, one may reasonably surmise that a call of nature occasioned it. Or there may have been some other need for a short break. But to suggest that this somehow compromised the Appellant's ability to continue cross - examination on the matter of the condom packages is delusional. The Appellant continued her cross - examination, and there was absolutely no limitation placed on that cross - examination by the trial court. She could have picked up where she left off

after the recess. It was the Appellant's decision as to what areas of the witness' testimony to explore on cross - examination. While the Appellant cites *Miskelley v. State*, 480 So.2d 1104 (Miss. 1985), the facts here bear no resemblance to the facts in that case. There, the trial court did limit cross - examination as to certain matters. Here, there was no limitation at all by the trial court.

The trial court did not "cut off" cross - examination by declaring a recess. There is absolutely nothing in this record to even suggest that the trial court's recess was for the purpose of sabotaging cross -examination. In any event, since the Appellant did not object to the recess and did not object to any supposed limitation placed on her cross - examination of the witness by the trial court, she may not complain of it here.

The Appellant then asserts that the defense attorney should have objected to the recess. This is a silly thing to say, particularly if the reason for the recess was on account of a personal need. There was no need to object to the recess. The attorney could have resumed his cross - examination on the point after the recess. The trial court did not cut off testimony on the point.

Continuing on with this appeal, the Appellant then complains that the defense attorney failed to point out in summation that the second condom wrapper was intentionally suppressed from the police in order to implicate the Appellant. There was no evidence of intentional suppression. In any event, the defense attorney did present argument about the wrapper, noting the apparent discrepancy. ( R. Vol. 3, pg. 216).

The Appellant then states that it is unfortunate that a person he refers to as "C.D." was not called by the defense. There is nothing here to demonstrate how this person's testimony would have aided the defense. For all this Court knows, the defense attorney may have interviewed this person and decided that the last thing he wanted was to present that person as a witness. There is no basis on the record before this Court to find that the attorney was ineffective.

There was no "implication" that the condoms were used on the night of the 3rd of July. This is rank speculation by the Appellant. On the other hand, the defense attorney, in the course of his summation to the jury, did focus upon what he believed to be the contradictions in the victim's testimony, mentioning the condom wrappers in the process.

The Appellant then points out that her case was "inexplicably" re-assigned to another public defender. She also points out that there was no request for a sentencing hearing and no presentation of mitigating witnesses. There is, on the other hand, not the first suggestion in the record that there were such witnesses available to be called. As to the re-assignment, this might have occurred for any number of reasons. The fact of such reassignment alone is no basis to infer ineffective assistance of counsel on the part of the attorney.

As for a sentencing hearing, there is no indication that one was needed. There is no indication that there were any witnesses for the defense.

The Appellant then concludes with a statement to the effect that she was guilty of no more than poor judgment. We think it an understatement indeed to consider the seduction of a twelve-year old boy by a thirty-seven year old woman "poor judgement."

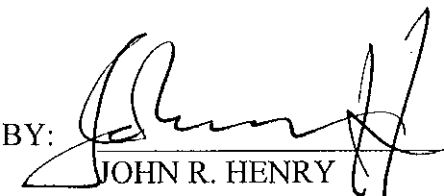
The Second Assignment of Error is without merit.

## CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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## CERTIFICATE OF SERVICE

I, John R. Henry, 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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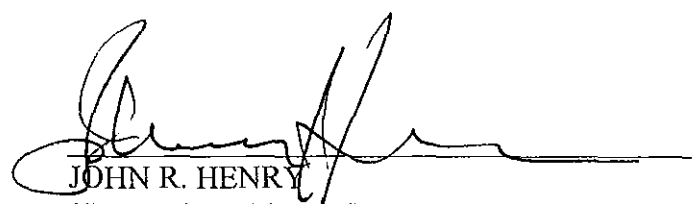
This the 26th day of February, 2010.



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