IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BENJAMIN ROBERSON — APPELLANT

VS. — NO. 2009-KA-0847-COA

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

STATE STATUTES

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STATEMENT OF THE CASE

The Grand Jury of Washington County indicted police officer, Benjamin Roberson for the crime of Sexual Battery in violation of *Miss. Code Ann.* ¶ 97-3-95(2). (C.p.)After a trial by jury, the Honorable Richard A Smith presiding, the jury found defendant guilty. (C.p. 181). Subsequently, defendant was sentenced to 25 years, 20 to serve with 5 years of post-release supervision and costs of court. (Sentencing order, c.p. 191-192).

The trial court overruled the motion for JNOV and motion for new trial on July 16, 2009. (C.p. 234) The notice of appeal appears to have been filed two months earlier on May 22, 2009 (C.p. 188).

STATEMENT OF FACTS

The defendant, a police office while on duty had sexual intercourse with a runaway child (14 year old girl) before transferring her back to her Mother's custody.

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION TO SUPPRESS STATEMENTS OF DEFENDANT.

Defendant voluntarily went to the police station to answer some questions and freely left a couple of hours later. The officer was *Mirandized* and waived his right to counsel.

II.

THE TRIAL COURT CORRECTLY APPLIED RULE 412 IN GRANTING THE STATE'S MOTION IN LIMINE ABOUT PAST SEXUAL CONDUCT OF VICTIM.

Past sexual of a sexual assault victim is irrelevant and inadmissible.

III.

THIS ISSUE IS PROCEDURALLY BARRED AS NOT HAVING BEEN PRESENTED TO THE TRIAL COURT AND WAIVED.

Youth court records are generally not available and the Circuit Court does not have authority to compel production.

IV.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant was hopelessly guilty and could not satisfy the prejudice prong of *Strickland*, or alternatively, this issue should be deferred to a properly pleaded post-conviction proceeding.

V.

CONTRADICTIONS IN THE EVIDENCE ARE DECIDED BY THE JURY.

Contradictions in the testimony and evidence are decided by the jury.

ARGUMENT

I.

THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION TO SUPPRESS STATEMENTS OF DEFENDANT.

In this initial allegation of trial court error defendant seeks a new trial – without his confessions to police for the jury to consider.

Officer Roberson made statements to police that he had intercourse with the child. Defense made a pre-trial motion to suppress those statements. (Motion to Suppress C.p. 39-44), the State filed a response, (C.p. 109-116), a hearing was had, (Tr. 5-93), and the trial judge issued an order outlining findings of fact and conclusions of law. (C.p. 121-123).

> ¶ 12. The standard of review concerning a trial judge's ruling on a motion to suppress evidence is well established:
>
> > When reviewing a trial court's ruling on the admission of evidence, [an appellate court] must assess whether there was substantial credible evidence to support the trial court's findings. The admission of the evidence lies within the discretion of the trial court and will be reversed only if that discretion is abused.

Ellis v. State, 21 So.3d 669, 673 (Miss.App. 2009).

This is one of those records that is very complete and the facts and rationale of the trial courts ruling are amply documented. (Order denying motion to suppress c.p. 121-123).

Defendant claims in his brief that he tried to call his attorney during the

questioning at the police department. The trial judge noted the attorney (Mitchel Creel) did not get any calls from defendant on that date, during the time of the questioning. Tr. 43-46.

The trial court specifically found the questioning was non-custodial and did not implicate *Miranda*.

> ¶ 30. . . . To determine whether a person is considered to be "in custody[,]" we consider whether "a reasonable person would feel that they were going to jail and not just being temporarily detained." Keys v. State, 963 So.2d 1193, 1197 (¶ 9) (Miss.Ct.App.2007) (citation omitted). "A subject is in custody when his right to leave freely has been restricted." Bell v. State, 963 So.2d 1124, 1134 (¶ 25) (Miss.2007) (citing Roberts v. State, 301 So.2d 859, 861 (Miss.1974)). The Mississippi Supreme Court has stated that:
>
> > Whether a reasonable person would feel that she was "in custody" depends on the totality of the circumstances, and may include factors such as: (a) the place of interrogation; (b) the time of interrogation; (c) the people present; (d) the amount of force or physical restraint used by the officers; (e) the length and form of the questions; (f) whether the defendant comes to the authorities voluntarily; and (g) what the defendant is told about the situation.

Blakeney v. State, 2009 WL 4591083 (Miss.App. 2009).

The trial court in its order listed enumerated facts support the questioning was non-custodial.

Consequently, the trial court correctly concluded it was non-custodial and did not implicate the 5th or 6th amendment right to counsel.

> ¶ 16. "[T]he judge should ascertain, under a totality of the circumstances and beyond a reasonable doubt, that the defendant's statement was freely and voluntarily given, and was not the result of force, threat, or intimidation." Baldwin v. State, 757 So.2d 227, 234-35(¶ 28) (Miss.2000). "Determining whether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied *1104 an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence." Hicks, 812 So.2d at 191(¶ 32).
>
> *Dixon v. State,* 17 So.3d 1099 (Miss.App. 2009).

It is the succinct position of the State the transcript fully and sufficiently supports with credible testimony each fact to support the trial court order denying relief.

Consequently, no relief should be granted based on this allegation of error.

II.
THE TRIAL COURT CORRECTLY APPLIED RULE 412 IN GRANTING THE STATE'S MOTION IN LIMINE ABOUT PAST SEXUAL CONDUCT OF VICTIM.

The State filed a motion in limine regarding the victim's past behavior pursuant to Rule 412. (C.p. 126-127). The trial court conducted a hearing on March 6, 2009.. (Tr. 94-106). The trial court granted the State's motion by written order incorporating findings of fact and conclusions of law. (March 25th, 2009, C.p.130). Further, the trial court made specific findings that defendant had not followed the requirements of the rule specifically paragraph 'c' sub-sections (1) or (2) that the defense intended to offer evidence of the victim's past behavior.

Subsequently, in May of 2009 trial counsel did file a notice of intent to use prior sexual history. (C.p. 152). The trial court ruled from the bend on the matter on the day of trial. Tr. 140-141. At trial such questions were not allowed, i.e., Tr. 351-52.

> ¶ 25. Besides being irrelevant to the charge at hand, there is also nothing in the record indicating that Ladd complied with the requirements of Rule 412(c)(1). Under Rule 412(c)(1), a party intending to offer evidence of a victim's past sexual behavior must submit a written motion to offer that evidence no later than fifteen days before trial. We have previously ruled that it was proper to disallow impeachment of a victim of a sexual offense when the defendant *147 failed to follow such procedures. Aguilar v. State, 955 So.2d 386, 393(¶ 22) (Miss.Ct.App.2006).
>
> *Ladd v. State,* 969 So.2d 141, 146 -147 (Miss.App. 2007).

Basically within this allegation of error appellate counsel seeks to hold the trial court in error because he 'substantially' complied with the requirement of the rule. (Def. Br. P. 14, last paragraph).

The State will rely upon the terse rational of *Ladd*, ... besides being irrelevant defendant did not comply. Additionally even at this late juncture counsel seems to misconstrue apparently arguing that 'prior sexual activity' is equivalent to "having made unfounded allegations of sexual misconduct against other persons."

The trial court was absolutely correct and in the interest of justice sustained the State's motion in limine.

No relief should be granted on this allegation of trial court error.

III.
THIS ISSUE IS PROCEDURALLY BARRED AS NOT HAVING BEEN PRESENTED TO THE TRIAL COURT AND WAIVED.

Continuing to challenge his conviction defendant now assert quite boldly that the trial court should have done more to get the youth court records of the victim to help in his defense.

First, the State will posit this issue is procedurally barred as not having been presented to the trial court, nor mentioned in the motion for new trial. (Motion for New Trial, Tr. 186-187).

> ¶ 70. . . . We conclude, therefore, that [the] failure to affirmatively raise the issue at the trial level works as a ***bar to our consideration of the issue on appeal under the well-known principle that the primary purpose of an appellate court is to correct erroneous rulings by the trial court and not to rule on alleged errors that were not presented to the trial court for decision in the first instance.*** *Sanders v. State*, 678 So.2d 663, 670-71 (Miss.1996). Because delays in bringing a matter to trial may work to the defendant's advantage, we do not consider a claim that the defendant was denied a speedy trial to be a matter of plain error or fundamental error that may be raised for the first time on appeal. Therefore, we find ... this issue to be procedurally barred.
>
> *Williams v. State*, 2009 WL 4808181 (Miss.App. 2009)(dec. 12-15-2009).

Additionally, without waiving any procedural bar to review, this issue is without merit. Again, for strategic reasons trial counsel dutifully filed a motion for youth court records with the youth court, (ex parte), and consequently did not serve it on the prosecution or the child victim's court appointed guardian ad litem. (C.p.

158-159). It would also appear such filings were done just three days before the trial start date of May 7, 2009. (C.p. 154-157).

There is an extensive discussion regarding the youth court records and efforts to obtain same. Tr. 141-153. It does not appear to have been any further effort to obtain the records or appeal the ruling of the trial court.

The only authority cited within the brief is *In re J.E.*, 726 So.2d 547 (Miss. 1998).

> ¶ 7. We do not think that In re J.E. answers the issue before us. The statutory provisions relating to the confidentiality of youth court records are not absolute by any means. The statute itself provides that the confidentiality requirement may be overridden by a determination that disclosure would advance the child's best interests or the public safety. *Miss.Code Ann.* § 43-21-261 (Rev.2000). ***The authority to release records is vested in the discretion of the youth court judge.*** The Mississippi Supreme Court, in ordering the provisional release of the records for possible evidentiary use on a showing of need by the defendant, did not decide the case on the basis that the defendant's constitutional rights had trumped provisions of a state statute that required a different result. Rather, the court simply determined that the youth court judge had abused his discretion in flatly denying the defendant's request for access on the ground that "where the issues are weighty, as here, the best interest of the child, as well the proper and just functioning of our youth court system, demands that [the defendant] have limited access to the materials he seeks." In re J.E., 726 So.2d at 553 (¶ 22).
>
> *Windham v. State* 800 So.2d 1257 (Miss.App. 2001)(emphasis added).

However, it would appear this issue was not pursued and the trial court cannot be held in error. This was clearly a 'fishing expedition' – the trial court asked defense

if there was a proffer of what might be in the youth court records that would be evidence of previous false accusations of sexual misconduct. (Tr. 149.)

> ¶ 37. . . . [Defendant] has not indicated the existence of additional evidence, which he was not allowed to offer. In the absence of such indication, and of a proffer of the evidence, this Court finds this issue lacks merit. Baldwin, 732 So.2d at (¶ 35); Smith v. State, 737 So.2d 377 (¶¶ 12, 13) (Miss.Ct.App.1998).
>
> *Cannon v. State,* 918 So.2d 734 (Miss.App. 2005).

This issue is procedurally has having been waived and, alternatively, without merit it law. No relief should be granted based upon this allegation of error.

Oh, and as far as defendant's lastly tacked on ineffective assistance of counsel claim such is just not amenable to be decided based upon this record. *Fluker v. State,* 2010 WL 610704, (¶ 13)(Miss.App. 2010)(dec. 2-23-2010).

IV.
DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Now comes the ineffective assistance of counsel claim for 1) failure to get impeach evidence of the victim's prior sexual behavior; 2) failure to obtain Youth Court records.

First, the State would posit the record is insufficient to address this issue. Within the argument there is not any showing of what evidence there was that had it been obtained, was found to be relevant, introduced would have changed the outcome of the trial. There is nothing presented to present a counter- argument.

Second, it would appear the reviewing Court's of Mississippi are deferring such decisions to post-conviction proceedings.

¶ 13. The Mississippi Supreme Court has previously held that:

> It is unusual for this [c]ourt to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal. This is because we are limited to the trial court record in our review of the claim[,] and there is usually insufficient evidence within the record to evaluate the claim. The Mississippi Supreme Court has stated that, where the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief. This Court will rule on the merits on the rare occasions where (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge.

> Wilcher v. State, 863 So.2d 776, 825 (¶ 171) (Miss.2003) (internal citations and quotations omitted). Because Fluker's allegations of ineffective assistance of counsel do not fall within the exceptions for addressing this issue on direct appeal, we find that Fluker's allegations of ineffective assistance of counsel would be more appropriately raised in a petition for post-conviction relief. Therefore, we deny Fluker relief on this issue without prejudice to allow Fluker to pursue post-conviction relief if he desires to do so.
>
> *Fluker v. State,* 2010 WL 610704 (Miss.App. 2010)(dec. 2-23-2010).

Alternatively it is the position of the State that even with any supposed deficiencies by defense counsel the evidence was so clear and that the jury verdict is no undermined. Defendant merely claimed the victim was not telling the truth, which was contradicted by his own statements admitting the sexual contact....

> ¶ 18. . . . The court, in Henderson, held that the defense counsel's performance was not deficient as there was "not a reasonable probability that the jury would have acquitted [the defendant]" as the evidence of guilt "was overwhelming." Id. at 603. In cases where "it is clear from the record that the defendant is 'hopelessly guilty,' " making the jury verdict "thoroughly reliable," the prejudice test of *Strickland* is not satisfied. Jones v. State, 911 So.2d 556, 560 (¶ 18) (Miss.Ct.App.2005) (citing Ward v. State, 461 So.2d 724, 727 (Miss.1984)). In the matter before us, Williamson, an eyewitness and accessory to the crime, gave evidence which directly attributed the arson to Bennett. This testimony was corroborated by Everett and Blakley, who testified about going to Poole's trailer and the subsequent purchase of gasoline. We find that this constituted "overwhelming" evidence of guilt showing that Bennett committed the arson; therefore, the admission of evidence regarding gang affiliation was harmless.
>
> *Bennett v. State,* 18 So.3d 272 (Miss.App. 2009).

The State would ask this court to 1) either defer a determination to a properly

pleaded post-conviction proceeding, or 2) declare defendant "hopelessly guilty" and unable to satisfy the prejudice prong of *Strickland*, thus putting some finality to this conviction of a law enforcement officer for sexual battery of a 14 year old girl.

V.
CONTRADICTIONS IN THE EVIDENCE ARE DECIDED BY THE JURY.

As best as the State is able to determine even if the victim's testimony on whether she was assaulted on the ground, in the car, or on the hood, – it is a matter of credibility and not sufficiency of the evidence. The crime of sexual battery does not demand or require recitation of the location of the offense – beyond venue jurisdiction. And information concerning venue was provided by defendant's own statement to investigators as to the location of the offense. Tr. 255.

> ¶ 12. It is the jury's responsibility to evaluate the credibility of a witness. Smith v. State, 821 So.2d 908, 910(¶ 4) (Miss.Ct.App.2002). "The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity." Id. (quoting Ford v. State, 737 So.2d 424, 425(¶ 8) (Miss.Ct.App.1999)). The jury accepted and believed Emfinger's testimony.
>
> ¶ 13. We find that the verdict is not against the overwhelming weight of the evidence and allowing the verdict to stand will in no way result in an unconscionable injustice. Thus, this issue has no merit.
>
> *Green v. State*, 25 So.3d 1086 (Miss.App. 2010).

Defendant made a statement to two investigators that he had sexual intercourse with the child. Tr. 256. Further there was other testimony, that he had told someone he had sex – but it was consensual. Tr. 275, 277-79. Defendant's age was in the record, tr. 293 as was the age of his child victim, tr. 299. The victim identified her

assailant in court, Tr. 303-304, 308. There was graphic evidence of sex acts sufficient to fit the statutory provision under which he was charged. Tr. 309-311.

Many of the victim's facts were corroborated by defendant's own testimony. There was ample evidence to support the jury verdict.

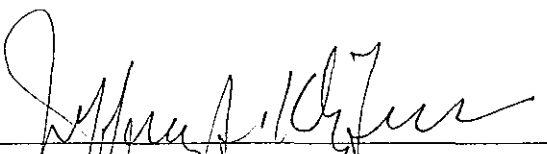
No relief should be granted based on this last allegation of error.

CONCLUSION

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

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. 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:

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