IN THE SUPREME COURT OF MISSISSIPPI

CURTIS LERNARD SEA — APPELLANT

VS. — NO. 2009-KA-1052-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR [redacted]

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

TABLE OF CONTENTS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CURTIS LERNARD SEA **APPELLANT**

VERSUS **NO. 2009-KA-1052-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Curtis Lernard Sea was convicted in the Circuit Court of the Second Judicial District of Yalobusha County on five counts of sexual battery and was sentenced to five terms of imprisonment of 25 years to be served concurrently. (C.P.195-97) Aggrieved by the judgment rendered against him, Sea has perfected an appeal to this Court.

Substantive Facts

Lashawn Joyner [hereinafter "Lashawn"] testified that she had four daughters: D.D., born October 28, 2003; B.J., born March 12, 2002; T.J., born November 23, 2000; and A.W., born November 8, 1998. In 2007, Ms. Joyner was living in Water Valley, working and attending college. Her aunt, Ollie May Joyner [hereinafter "Ollie May"], routinely

helped care for the children while Lashawn was at "work or school." At some point while this arrangement was in place, Curtis Sea moved into Ollie May's apartment. (T.57-60)

On January 21, 2007, Lashawn was living in Oxford and attending Concord Career College. Her sister and her two children, as well as Lashawn's children, were present. (T.60-61) Lashawn recounted a disturbing episode as follows:

> Well, the kids was back in the room playing and we seen one of the kids standing in the hall looking into the room. And my sister was, like, "What's going on?" She's, like, watching out. So we went back int the room and we were, like, "What are y'all doing?" And the kids were kind of on top of each other.
>
> And [B.J.] said, "We are doing nasty stuff."
>
> And I said, "What is nasty stuff?"
>
> And she said, "Nasty stuff."
>
> I said, "Who showed you how to do some nasty stuff?"
>
> And she said, "Curtis."
>
> And then I was, like, "Come here." I was telling my sister to come here listen to this.
>
> And after that, [B.J.] was like, "She did it too." She was talking about [A.W.] did it also. And so everybody started pointing fingers like "Well, she did it too. She did it too."
>
> (T.61-62)

Lashawn took the girls to Baptist Memorial Hospital in Oxford, where they were examined by a physician. A social worker and Officer A.J. Hernandez of the Water Valley Police Department were called to the scene. Lashawn consented to a forensic interview of each of the children. (T.62)

D.D., five years old at the time of trial, testified that when she was visiting at Aunt Ollie May's apartment, "Curtis" tried to put his "private" into her "private." (T.81)

B.J., six years old at the time of trial, testified that while she was at Aunt Ollie May's apartment, "Curtis" tried to put his "privates" into her "privates" and that he "[m]ove[d] up and down." (T.88)

T.J., who was eight years old at the time of trial, testified that while she was at Aunt Ollie May's apartment, "Curtis" tried to touch his "privates" to her "privates" and that he used his finger to try to do something with her "privates." (T.94-96)

A.W., ten years old at the time of trial, testified that "Curtis" put his "privates" inside her and "[m]oved up and down. He also put his finger into her "privates" and [m]ove[d] it around." (T.99)

Officer Hernandez testified that he met with Lashawn and her daughters at the emergency room and determined that further investigation was warranted. Upon his request, a social worker from the Department of Human Services came to the hospital. Later, a forensic interviewer conducted a videotaped interview of each of the children. These tapes were admitted into evidence. (T.106-13)

For the defense, J.C. Cooper, Jr., testified that he had known the defendant for two years, had visited with him every day, and had never seen any indication that the defendant was molesting any of Lashawn's children. (T.134-37) On cross-examination, he acknowledged that sexual abusers of children usually do not commit their offenses in the presence of other people. (T.139)

Latasha Hervey testified that she had known the defendant for approximately two years, that he routinely cared for Lawshawn's children, and that they "liked him" and did not appear to be afraid of him. (T.139-40)

Finally, the defendant took the stand and testified that during the time the children were staying at Ollie May's apartment, he routinely cooked meals and cared for them. He testified further that he had discovered two of the girls engaged in sexually provocative behavior with their cousin Marcus. He went on to testify that the girls were sexually "advanced" for their ages. Moreover, Lashawn and Ollie May had had several confrontations about finances and other issues. The defendant denied having had sexual contact with any of the girls. (T.147-55)

SUMMARY OF THE ARGUMENT

The tapes of the forensic interviews of the child victims were cumulative of their testimony, which was tested by cross-examination. Accordingly, the admission of these tapes does not require reversal of Sea's convictions.

Furthermore, the verdicts are not contrary to the overwhelming weight of the evidence. The victims testified that the defendant committed these crimes, and his evidence to the contrary simply created an issue of fact which was properly resolved by the jury.

Finally, the defendant cannot show on this record that he was deprived of effective assistance of counsel. His final proposition should be denied without prejudice to its being raised in a motion for post-conviction collateral relief.

PROPOSITION ONE:

THE ADMISSION OF THE TAPES OF THE FORENSIC INTERVIEWS OF THE VICTIMS DOES NOT REQUIRE REVERSAL OF SEA'S CONVICTIONS

When the state sought to introduce the tapes of the forensic interviews with the children, the defense objected on the ground of hearsay. The court overruled the objection and allowed the tapes to be admitted into evidence and played for the jury. (T.11-12)

At this point, all four victims had testified that the defendant had sexually abused them, and they had been subjected to cross-examination. Accordingly, the record contained corroborated evidence and the tapes were merely cumulative. Their admission into evidence was therefore harmless. *Young v. State*, 679 So.2d 198203 (Miss.1996); *Eakes v. State*, 665 So.2d 852, 866-67 (Miss.1995). Sea's first proposition should be denied.

PROPOSITION TWO:

THE VERDICTS ARE NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Sea argues additionally that he is entitled to a new trial on the ground that the verdicts are against the overwhelming weight of the evidence. To prevail, he must satisfy the following formidable standards of review:

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

Moreover, "[t]his Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine

> the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As the Mississippi Supreme Court reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted] Accord, *Wood v. State*, 19 So.3d 817, 820 (Miss.2009).

The state submits the children's testimony, corroborated by their mother's account of their "acting out" sexually, supports the trial court's submission of this case to the jurors and refusal to disturb its verdicts. The defendant's testimony to the contrary simply created a straight issue of fact which was properly resolved by the jury. No basis exists for disturbing the verdicts. Sea's second proposition should be denied.

PROPOSITION THREE:

SEA'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE DENIED AT THIS JUNCTURE

Sea finally contends his trial counsel rendered ineffective assistance by eliciting evidence of his prior offenses and by failing to submit an instruction authorizing the jury to find him guilty of the lesser-included offense of gratification of lust. It is well-settled that to prevail on such a claim, the defendant bears the burden of proving that his counsel's performance was so deficient as to cause prejudice to the defense. *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss.App.1999), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defense must overcome the strong presumption that counsel's performance fell within the broad parameters of reasonable professional assistance. Furthermore, "[t]here exists a 'strong presumption that the attorney's conduct falls within the wide range of reasonable professional conduct and .... that all decisions made during the course of trial were strategic.'" *Crosby v. State*, 16 So.2d 74, 79 (Miss.2009), quoting *Jones v. State*, 970 So.2d 1316, 1318 (Miss.App.2007). To satisfy the prejudice prong, the defendant must show a reasonable probability that, but for his counsel's lapses, the outcome of the trial would have been different. *Colenburg*, 735 So.2d at 1102-03. Indeed, "[h]aving a trial strategy negates an ineffective assistance of counsel claim, regardless of counsel's insufficiencies." *Hall v. State*, 735 So.2d 1124, 1127 (Miss.App.1999), cited in *Michael v. State*, 918 So.2d 798, 804 (Miss.App.2005).

Because this point is raised for the first time on direct appeal, son encounters an additional obstacle: the pertinent question

is not whether trial counsel was or was not ineffective but

> **whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.** "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430 So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**
>
> (emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Ross v.* State, 16 So.3d 47, 58 (Miss.App.2009)..

Sea has not shown that his lawyer's performance was so deplorable as to require the court to declare a mistrial on its own motion. Accordingly, his third proposition should be denied without prejudice to the raising of this issue in a motion for post-conviction collateral relief.

For the sake of argument, the state addresses Sea's particular claims. With respect to trial counsel's inquiry into Sea's previous convictions, the state submits Sea has failed to show a reasonable probability that the outcome would have been different had this testimony not been introduced. B.J., T.J., and A.W. all gave eyewitness testimony to the effect that Sea committed these offenses against them. Accordingly, we contend Sea cannot establish *Strickland* prejudice on this point on this record.

Sea contends additionally that his trial counsel was ineffective in failing to request an instruction on the lesser-included offense of gratification of lust. The state counters that Sea's defense was that he never made any sexually inappropriate contact at all with these children. Thus, Sea's theory of the case was inconsistent with a finding of guilt of gratification of lust.

Addressing a similar issue, this Court held in *Long v. State*, 934 So.2d 313, 318 (Miss.App.2006), that the appellant had failed to overcome the presumption that trial counsel's failure to request a lesser-included offense instruction was strategic. In *Long*, as in this case, the defendant's "theory and defense were that the State did not prove its case," not that the defendant had merely committed the lesser-included offense. "Therefore, this was proper trial strategy, either all or nothing– guilty or acquittal." *Id.* The same rationale should apply here. Accord, *Ravencraft v. State*, 989 So.2d 437, 443 (Miss.App.2008) (appellant failed to overcome presumption that trial counsel acted strategically in declining to submit a manslaughter instruction in a murder case). See also *Neal v. State*, 15 So.3d 388, 406 (Miss.2009), quoting *Smiley v. State*, 815 So.2d 1140, 1148 (Miss.2002) (trial counsel's decision not to request a jury instruction falls within the realm of trial strategy and therefore is not subject to review).

A finding of guilty of gratification of lust would have been inconsistent with Sea's defense. Under these circumstances, Sea cannot overcome the presumption that his trial counsel's decision on this issue was tactical.

For these reasons, Sea's final proposition should be denied.

CONCLUSION

The state respectfully submits the arguments advanced by Sea have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Andrew C. Baker
Circuit Court Judge
Post Office Drawer 368
Charleston, Mississippi 38921

Honorable John Champion
District Attorney
101 Eureka Street
Batesville, Mississippi 38606

George T. Holmes, Esquire
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the first day of March, 2010.

DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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