IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DAVID PAUL ANDERSON — APPELLANT

VS. — NO. 2009-KA-1614-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Harrison County indicted defendant for the crimes of Statutory Rape (Two Counts) and Sexual Battery in violation of *Miss. Code Ann.* §§ 97-3-65(1)(b) & 97-3-95(2). (Indictment c.p.11-12). After a trial by jury, the Honorable Lisa P. Dodson presiding, the jury found defendant guilty of all charges. (Jury Verdict, c.p.118). Subsequently, defendant was sentenced to Life on Count I; Life on Count II; and, 30 years in Count III, all sentences to run concurrently in the custody of the Mississippi Department of Corrections. (Sentencing order, c.p. 152).

After denial of post-trial motions this instant appeal was timely noticed. (C.p.161).

STATEMENT OF FACTS

Defendant had sex with his daughter repeatedly. The victim testified that one night (Count III, Dec. 2, 2006), he penetrated her with his penis, the only reason he stopped is when a relative walked on the scene. Tr. 346-348. (That relative testified also). Additionally, he did that on the day after Thanksgiving and the next day also. (Counts I & II). Tr. 349-352. Venue was established (Tr. 343). The age of the victim. Tr. 343. Defendant was identified as the man having sex with the child on December 2, 2006 Tr. 411, and defense and the State stipulated that the victim identified defendant as the perpetrator. Tr.515-516.

The jury heard the evidence and found defendant guilty as charged.

SUMMARY OF THE ARGUMENT

I.

THE ISSUE OF DEFENDANT'S COMPETENCY WAS NOT RAISED PRE-TRIAL AND WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

The issue of defendant's sanity and competency was never raised before the trial court pre-trial or during trial. There was some mention during sentencing. Such is not ineffective assistance of counsel. Alternatively, the remedy is remand to the trial court for a nunc pro tunc competency hearing.

Issue II.

THE TRIAL COURT PROPERLY APPLIED THE TENDER EXCEPTION RULE IN THIS CASE.

The trial court followed the correct law and applied it correctly to the case.

Issue III.

THE STATE DID NOT ASK IMPROPER LEADING QUESTIONS.

The questions were not leading but open-ended.

Issue IV.

THE TRIAL COURT CONDUCTED A 'DAUBERT HEARING' AND PROPERLY APPLIED THE LAW IN ALLOWING THE EXPERT TESTIMONY.

The Daubert analysis is flexible and tends toward admission.

Issue V.

THE INDICTMENT WAS LEGALLY SUFFICIENT AS TO COUNT I TO SURVIVE THE MOTION TO QUASH.

A date range of one month for one count is legally sufficient to charge statutory rape.

Issue VI.

THERE WAS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICTS IN COUNT I & II OF THE INDICTMENT.

The trial court ruled there was legally sufficient evidence as to Counts I & II to submit the issue to the jury.

Issue VII.

TRIAL COUNSEL FOR DEFENSE OBJECTED DURING CLOSING WHICH WAS SUSTAINED BY THE TRIAL COURT.

A comment by the prosecution during closing which objected and sustained is not error.

Issue VIII.

THE PROSECUTOR DID NOT MAKE A COMMENT ON DEFENDANT RIGHT TO REMAIN SILENT.

The prosecution commented on the defense argument or lack of argument.

Issue IX.

THE MISSING EXHIBIT IS NOT GROUNDS FOR REMAND.

Trial courts should not be held in error for a misplaced exhibit which went to the jury and then disappeared.

Issue X.

THERE IS NO 'CUMULATIVE ERROR'.

Defendant had a fundamentally fair trial

Issue XI.

THERE IS AMPLE CREDIBLE EVIDENCE SUPPORTING THE JURY VERDICTS OF GUILTY OF TWO COUNTS OF STATUTORY RAPE AND SEXUAL BATTERY.

While there were inconsistencies in the testimony such were for the jury to decide. There was evidence to support all the elements of all three charges.

ARGUMENT

I.

THE ISSUE OF DEFENDANT'S COMPETENCY WAS NOT RAISED PRE-TRIAL AND WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

In this first allegation of error defendant seeks remand for retrial claiming trial counsel was ineffective for not raising defendant's 'competency' and 'sanity' at trial. Specifically, now on appeal, appellate counsel points to evidence ascertained and contained in the record from the pre-sentence investigation.

The Mississippi Supreme court has held where the record lacks evidence of incompetence it was not held to be ineffective assistance of counsel:

> ¶ 44. Parker also argues that his trial counsel rendered ineffective assistance by failing to raise the issue of competency at trial. The record is devoid of any evidence to show that the trial court had reasonable grounds to order a mental examination pursuant to Mississippi Uniform Circuit and County Court Rule 9.06. Because the record lacks any evidence that would suggest Parker was incompetent, we cannot conclude that Parker's counsel acted ineffectively under this assignment of error. See Jordan v. State, 995 So.2d 94, 110 (Miss.2008) (citing Conley v. State, 790 So.2d 773, 784 (Miss.2001)); Miss. R.App. P. 28(a)(6).

Parker v. State, 30 So.3d 1222 (Miss. 2010).

As the Mississippi Supreme Court has also held, "...The pertinent question is whether "the trial judge receive[d] information which, objectively considered, should reasonably have raised a doubt about defendant's competence and alerted him to the

possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense?'" *Goff v. State,* 14 So.3d 625, 644 (Miss. 2009).

It would appear, by negative reference, that nothing in the record, or in appearances before the court raised the question of either defendant's sanity or competency. Consequently, the trial court should not be put in error for what was not observed or brought to the Court's attention.

The State would ask that no relief be granted. Alternatively, if this Court finds error, the State would ask for the relief of remand for a *nunc pro tunc* competency hearing. *Miller-El v. Johnson*, 261 F.3d 445, 453 (C.A.5 (Tex.) 2001) under the rationale of *Conner v. Wingo,* 429 F.2d 630, 639-640 (C.A.Ky. 1970). The federal courts have held that such *nunc pro tunc* determinations are Constitutionally valid.

Accordingly, the State would assert trial counsel was not ineffective in raising insanity or competency issues at the trial court, or alternatively, as remedy remand for a *nunc pro tunc* competency determination.

Additionally appellate counsel also asserts ineffective assistance by:

1) waiving defendant's presence at pre-trial hearings,
2) waiving in-court identification by victim,
3) waiving defendant's right to testify at trial.

Looking at the last claim first, the record is replete with a lengthy exchange between the trial judge, defendant, and counsel specifically regarding defendant and

the exercise of his right to testify. Tr. 510-515. With such a record it is the position of the State there is no deficient performance. See, *Le v. State,* 913 So.2d 913, (¶137) (Miss. 2005).

As to the claims of defendant's waiver to being present at pre-trial hearings and the stipulation that the victim identified the defendant are within the gambit of trial strategy.

> ¶ 8. The standard of review for a claim of ineffective assistance of counsel is the familiar two-part test articulated by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was defective and (2) the deficiency deprived the defendant of a fair trial. This review is highly deferential to the attorney, and there is a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. Hiter v. State, 660 So.2d 961, 965 (Miss.1995). With respect to the overall performance of the attorney, "counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy" and do not give rise to an ineffective assistance of counsel claim.
>
> *Pruitt v. State,* 807 So.2d 1236 (Miss. 2002).

Consequently, it is the position of the State defendant had constitutionally effective assistance of counsel.

Issue II.

THE TRIAL COURT PROPERLY APPLIED THE TENDER EXCEPTION RULE IN THIS CASE.

In this next allegation error counsel avers the trial court erred in the admission of hearsay testimony as to statements of the young victim.

Looking to the record a separate pre-trial hearing was held. (Tr. 142, et seq). The trial court heard testimony and argument of counsel. After which the judge made extensive on the record findings of fact and conclusions of law. (Tr. 235-248).

Specifically hold that at the time of some of the statements the child was eleven or twelve years old. (Tr. 239-240)(as to Det. Clarite & Ms. Boller). As to Dr. Matherne, the trial judge found his testimony admissible as an expert (MRE 702)(Tr. 235) and as statements made by the victim for medical purposes and treatment (Tr. 246-47).

The trial court correctly applied the following cases in her analysis of the tender years exception question: *Elkins v. State*, 918 So.2d 828 (Miss.App. 2005); *Davis v. State*, 878 So.2d 1020 (Miss.App. 2004); *Byars v. State*, 835 So.2d 965 (Miss.App. 2003); *Lawler v. State*, 770 So. 2d 586 (Miss. 2000); and, *Veasley v. State*, 735 So. 2d 432 (Miss. 1999).

The trial court limited the witnesses the State could have and the defense was aware well before trial as to who they would be. Tr.248.

It is the succinct position of the State the trial court meticulously applied the correct law to the facts and no error was committed.

No relief should be granted based upon this allegation of error.

Issue III.
THE STATE DID NOT ASK IMPROPER LEADING QUESTIONS.

Next defendant asserts the trial court erred in allowing the State to lead the witness. Specifically an exchange that takes place at page 393 in the transcript.

First of all, the State would point out this exchange was on re-direct and the question asked: "Did anytime before Thanksgiving did your dad have sex with you, and when I say before I mean...." [Objection made, not as leading, but improper redirect, which was overruled] – "Ashley, did your dave have sex with you anytime before Thanksgiving in that month? And you don't have to point to a day, just did he. I'm asking you if he did." (Tr. 393).

> ¶ 33. Brown further argues that the State was allowed to improperly bolster Watts's testimony by asking multiple leading questions throughout redirect. She cites McDavid v. State, 594 So.2d 12, 16-17 (Miss.1992) for the proposition that allowing repeated leading questions on material issues is reversible error. However, our supreme court has stated that, "**trial courts are given great discretion in permitting the use of such questions, and unless there has been a manifest abuse of discretion resulting in injury to the complaining party, we will not reverse the decision.**" Whitlock v. State, 419 So.2d 200, 203 (Miss.1982). We do not believe that allowing the State to ask leading questions regarding Watts's written statement caused any harm to Brown. As previously stated, the statement had already been admitted into evidence, and the State's line of questioning only verified whether the contents of that document were in fact correct.
>
> *Brown v. State,* 981 So.2d 1007, 1017 (Miss.App. 2007)(emphasis added).

The question as asked is arguably not even leading ... it was open ended.

Further it helped elicit and clarify events that were questioned during cross-examination as to specific dates or just one date. Such questioning for the limited purpose on re-direct was not improper and the judge did not abuse discretion in overruling the objection whether it be improper redirect *or* leading questions.

No relief should be granted on this allegation of error.

Issue IV.
THE TRIAL COURT CONDUCTED A 'DAUBERT HEARING' AND PROPERLY APPLIED THE LAW IN ALLOWING THE EXPERT TESTIMONY.

This claim of error seeks to challenge the ruling of the trial court in allowing the expert testimony of Dr. Matherne.

> As counsel has pointed out and the trial court applied:
> ¶ 62. In McLemore, this Court adopted the " Daubert/Kumho " rule-in other words, the U.S. Supreme Court's standard set forth in Daubert, 509 U.S. 579, 113 S.Ct. 2786, and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)-as the standard for assessing the reliability and admissibility of expert testimony. McLemore, 863 So.2d at 35.
>
> *Gillett v. State,* 2010 WL 2609432 (¶¶62-66)(Miss. 2010)(decided July 1, 2010).

A "Daubert Hearing" was conducted pretrial. (Tr. 176-226.) Applying the rartionale of "Dauber/Kumho" the trial judge made extensive on the record findings of fact and conclusions of law. (Tr. 235-239.) It is apparent the court was familiar with the requirements and flexibility allowed in the application of the law to the particular facts in this case.

As the Mississippi Supreme court recently reiterated in *Gillett*, the analysis is flexible and allows for admission with possible limitation by instruction or testimony. Further, as to the claim that Dr. Matherne's diagnostic technique he uses with patients, – known as the "fist technique" – standing alone, does not satisfy "Daubert."

The trial court addressed this specific claim as had been previously addressed by the Court of Appeals of the State of Mississippi, holding:

> ¶ 10. We agree with the trial court that the "fist technique" referred to by Dr. Matherne was only a form of information gathering. In his testimony, Dr. Matherne testified that the "fist technique" is a demonstration in which he asks a child to make a fist with one hand, to assume that the fist represents her private area, and to use a finger of the other hand to demonstrate what type of contact was made to her private area. He explained that he uses this procedure to assist in making a determination as to whether a physical examination of the child will be of any benefit. He testified that it was important to know whether digital penetration occurred and, if so, how deeply. He further explained that if the penetration was slight, a physical examination would not necessarily detect any trauma. We find nothing improper with the trial judge's decision to allow this testimony. This issue is without merit.
>
> *Davis v. State,* 878 So.2d 1020, 1024 (Miss.App. 2004).

Accordingly, the trial judge did the proper analysis and correctly applied it to the facts of this case. No relief should be granted based on this claim of error.

Issue V.

THE INDICTMENT WAS LEGALLY SUFFICIENT AS TO COUNT I TO SURVIVE THE MOTION TO QUASH.

This issues goes to the indictment and the specific claim that Count I was vague for having a date 'range' for the offense of ' November, 2006.' Count II, had a specific date – November 25, 2006.

This issue was heard by the court in separate pre-trial hearings. Tr. 12-24 & Tr. 39-48. The ultimate decision by the judge being the range of dates and with the State being limited to statements that were in discovery, were sufficient to support Count I.

This ruling by the trial court is consistent with prior cases and found to be legally sufficient. *Price v. State*, 898 So.2d 641, 654 (Miss. 2005).

Therefore, there being sufficient facts alleged in the indictment the trial court was correct in denying the pre-trial motion to quash Count I of the indictment for lack of a more specific date.

Issue VI.

THERE WAS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICTS IN COUNT I & II OF THE INDICTMENT.

Counts I & II, were both statutory rape charges. Defendant asserts there was legally insufficient evidence to support the charges.

This question was presented to the trial court after the State rested. The trial judge made specific findings as to the testimony being legally sufficient as to each offense. Tr. 507-510. The trial court found the evidence to be legally sufficient at that point.

During the defense case-in-chief one witness testified, which defendant now offers up as evidence challenging the legal sufficiency of the evidence.

However, such recitation of contradictory testimony does not go to the sufficiency of the evidence but to the weight and credibility of the evidence.

The State will rely upon the ruling of the trial court at the close of the State's case in chief on the sufficiency of the evidence on Counts I & II (statutory rape).

> ¶ 26. In Price, Price argued that his conviction should be reversed because of inconsistencies in the victim's statements to family members and investigators. Price, 898 So.2d at 651(¶ 23). The victim had, during two separate interviews with her DHS social worker, insisted that Price had not touched her in any inappropriate way. Id. at 646(¶ 6). Price further argued that the State had presented no corroborating medical or physical evidence to support the statutory rape charges against him. Id. The supreme court held that "the unsubstantiated and uncorroborated testimony of a victim is sufficient to support a guilty verdict if that

> testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with conduct of one who has been victimized by a sex crime." Id. at 651(¶ 23) (citations omitted). The supreme court further held that any questions regarding the credibility of the victim's testimony were to be resolved by the jury. Id. at 652(¶ 25) (citing *Schuck v. State*, 865 So.2d 1111, 1124(¶ 37) (Miss.2003)).
>
> *Stevenson v. State,* 13 So.3d 314, 319 (Miss.App. 2008).

It is the position of the State there was legally sufficient evidence as to each element of statutory rape in Counts I & II of the indictment to present to the jury. Additionally the defense evidence, with regards to only one of the counts was a question for the jury to decide.

No relief should be granted on this claim of error.

Issue VII.
TRIAL COUNSEL FOR DEFENSE OBJECTED DURING CLOSING WHICH WAS SUSTAINED BY THE TRIAL COURT.

During the State's final closing counsel for the State, for reasons unknown, drifted a bit and was trying to make a connection to some of the questioning that had transpired during jury selection and voir dire. Tr. 557. Counsel for defendant objected and the trial judge sustained the objection. Tr. 557. There were no further objections.

The law is clear in Mississippi:

> ¶ 23. "It is the rule in this State that where an objection is sustained, and no request is made that the jury be told to disregard the objectionable matter, there is no error." Minor v. State, 831 So.2d 1116, 1123 (¶ 22) (Miss.2002) (citing Perry v. State, 637 So.2d 871, 874 (Miss.1994)).

Otis v. State, 853 So.2d 856, 864 (Miss.App. 2003).

The defense counsel and the trial judge's sustaining the objection cured the problem. Such a minor partial comment, quickly abandoned is not error.

No relief should be granted based upon this allegation of error.

Issue VIII.
THE PROSECUTOR DID NOT MAKE A COMMENT ON DEFENDANT RIGHT TO REMAIN SILENT.

After defense had made their closing argument and in the State's final closing argument the prosecutor was commenting on the "arguments" being made by the defense counsel and specifically what was NOT being heard in those arguments. That being "that he didn't do it." Tr. 555.

Defense objected that it was acomment on the non-testimony of the defendant. The trial judge overruled the objection with a specific comment that the prosecution comment referred to "the argument." Tr. 555.

> " There is a difference ... between a comment on the defendant's failure to testify and a comment on the defendant's failure to put on a successful defense." [Jimpson v. State, 532 So.2d 985, 991 (Miss.1988)] (emphasis in original). The state is entitled to comment on the lack of any defense, and such comment will not be construed as a reference to the defendant's failure to testify by innuendo and insinuation. Shook v. State, 552 So.2d 841, 851 (Miss.1989) (emphasis added). The question is whether the prosecutor's statement can be construed as commenting upon the failure of the defendant to take the stand. Ladner v. State, 584 So.2d 743, 754 (Miss.1991
>
> *Tate v. State* 20 So.3d 623 (¶ 16)(Miss. 2009).

It is permissible to comment on the argument of defense counsel. *Banks v. State,* 2010 WL 610595, (¶ 34)(Miss.App. 2010).

In summary, the comment was on the lack of argument by defense and permissible, consequently no relief should be granted on this claim of trial court error.

Issue IX.
THE MISSING EXHIBIT IS NOT GROUNDS FOR REMAND.

After the jury deliberated, returned its verdicts and went home it was discovered (the next day) that Defense Exhibit 1, was missing.

The trial court held a hearing later that day (tr. 566-574) to make a record.

Two times in that hearing the trial judge noted that it would appear everyone agreed Defense Ex. 1, went to the jury. (Tr. 571, 574)

Interestingly, the jurors where questioned about the exhibits (there were only four total) that they viewed in the jury room. Many remembered the exhibit but did not look at it – just as they did not look at or consider some of the other exhibits.

> The jury may accept the testimony of a witness in whole or in part, may reject a witness's testimony altogether, and may accept in part and reject in part the evidence on behalf of the State or on behalf of the accused.
>
> *Moffett v. State,* 938 So.2d 321, 329 (¶27)(Miss.App. 2006).

The important thing is that the evidence was at least submitted to the jury to consider or not at their will. It is the position of the State based upon the hearing held on the day the exhibit was discovered missing there is no doubt the exhibit went to the jury. Tr. 571 & 574.

There is also no doubt the exhibit is missing. The question then becomes is such a missing or lost exhibit error requiring some remedy of this reviewing Court.

> ¶ 60. [. . .] ***This Court cannot hold trial judges in error because an exhibit has been misplaced.*** This Court finds that this argument is without merit.
>
> *Blake v. Clein,* 903 So.2d 710 (Miss. 2005)(emphasis added).

The State would ask this Court to apply the same rationale and not grant any relief.

Issue X.
THERE IS NO 'CUMULATIVE ERROR'.

In this penultimate claim it is argued that though not reversible in themselves the above claimed errors, collectively and cumulatively require reversal and remand. No further relief is sought.

With the exception of the first allegation of error regarding competency and sanity the State would argue such was not trial court error as the issues were never put before the trial court (until sentencing). Additionally, the State would argue in the alternative that if relief were granted it should be remand with instructions for a *nunc pro tunc* competency hearing under the rationale of *Conner v. Wingo, supra.*

Additionally, as to all other claims, it is the clear position of the State none of the errors were reversible and no cumulative error should be found as defendant had a fundamentally fair trial.

Therefore, the State would ask this Court to adopt the rationale:

> ¶ 37. As all of the foregoing assignments of error have been found to be without merit, we find there is no cumulative error. *Branch v. State*, 882 So.2d 36, 58 (Miss.2004). Wright's argument that reversal
>
> *Wright v. State,* 958 So.2d 158 (Miss. 2007).

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

Issue XI.
THERE IS AMPLE CREDIBLE EVIDENCE SUPPORTING THE JURY VERDICTS OF GUILTY OF TWO COUNTS OF STATUTORY RAPE AND SEXUAL BATTERY.

Lastly, defendant claims the verdicts are against the overwhelming weight of the evidence claiming there are inconsistencies and the victim's testimony was uncorroborated.

However, looking to the testimony of the witnesses and the victim herself there was evidence for the jury to consider. That evidence was corroborated by time location and consistency.

> ¶ 13. This Court has held that the "unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized by a sex *67 crime." Collier v. State, 711 So.2d 458, 461 (Miss.1998).

Goodnite v. State, 799 So.2d 64 (¶ 12)(Miss. 2001).

Further,"[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." *Simmons v. State,* 722 So.2d 666 (¶57)(Miss. 1998).

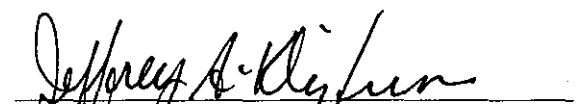
No relief should be granted on this allegation of error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

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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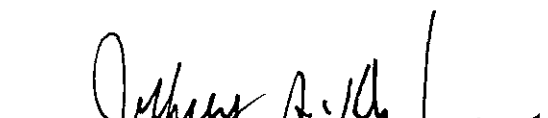
This the 2nd day of August, 2010.



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