IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LUTHER SHEFFIELD — APPELLANT

VS. — NO. 2009-KA-1635-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The issues raised in this criminal appeal from a natural father's conviction of fondling his teenage daughter deal with the weight of the evidence and the denial of a lesser offense instruction.

The victim testified at her father's trial for lustful touching that upon reaching her teens (R. 105) her father, over a period of several years, kissed her repeatedly on the lips, cheek, and neck (R. 68-69, 84, 88); caressed her hair (R. 101); rubbed her inner thighs near her crotch and private area (R. 74, 91); grabbed and squeezed her buttocks (R. 71, 84, 159-60); talked frequently about her breasts (R. 75, 83) and actually touched her breast on one occasion (R. 77-78, 95); discussed getting Breanna a vibrator so she would not have to have sex (R. 80, 98); told her he would like to have sex with several of her girlfriends (R. 80-82, 98-99); came into the bathroom frequently while she was naked and changing her clothing (R. 78) and would not leave when asked to do so (R. 78, 96); talked about having sex with Breanna's mother (R. 79), and frequently referred to Breanna as "ho," "slut,"

"bitch," "whore," and "cunt licker." (R. 69, 73, 89, 146, 160)

There were even times when Breanna was naked or partially naked that her father was kissing on her in the bathroom. (R. 104) Sheffield made Breanna feel very "uncomfortable" by doing things her friends repeatedly told her were inappropriate. (R. 85-86)

"[I]t wasn't normal." (R. 85-86)

Mr. Sheffield contends "[t]he state clearly failed to meet its burden of proof with regards to the element regarding 'for the purpose of gratifying his lust.' " (Brief of the Appellant at 4)

Obviously, not.

LUTHER WAYNE SHEFFIELD, JR., a thirty-six (36) year old Caucasian male, divorced father and non-testifying defendant, prosecutes a criminal appeal from the Circuit Court of Lauderdale County, Mississippi, Robert W. Bailey, Circuit Judge, presiding. During a trial by jury conducted on August 5-6, 2009, Sheffield, the natural father of 16-year-old Breanna Sheffield, was convicted of rubbing and touching her with his hand or other body parts for the purpose of, *inter alia,* gratifying his lust. (R. 210; C.P. at 38)

Following a presentence investigation and report, and at the close of a sentencing hearing conducted on September 18, 2009, Judge Bailey concluded that the "best sentence for Mr. Sheffield and for society" was fifteen (15) years in the custody of the MDOC with five (5) years suspended, ten (10) years to serve, followed by five (5) years of supervised probation. (R. 216; C.P. at 39-40)

An indictment returned on March 21, 2008, (C.P. at 2-3), charged

> " . . . that LUTHER WAYNE SHEFFIELD, JR., a male person above the age of eighteen(18) years . . . did then and there unlawfully, feloniously, and knowingly, for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, rub, touch, or handle Breanna Sheffield (DOB: 01-07-1993), a female child under the age of sixteen (16) years, with his hand or other body parts in Lauderdale County, Mississippi, in violation of Section 97-5-23, Mississippi

Code of 1972 . . ." (C.P. at 2)

Two (2) individual issues are raised on appeal to this Court.

ISSUE NO. 1. "The court erred in not granting a lesser included simple assault instruction as requested by the defendant at the trial, i.e., instruction D-3."

ISSUE NO. 2. "The trial court erred in denying Luther Sheffield's motion for a new trial because the verdict was against the overwhelming weight of the evidence."

David A. Stephenson and Rhae Darsey, practicing attorneys in Meridian, represented Sheffield very effectively at trial.

The representation on appeal by Benjamin Suber, an attorney with the Mississippi Office of Indigent Appeals, has been equally effective.

STATEMENT OF FACTS

At the time of Luther Sheffield's trial for fondling her, Breanna Sheffield, Luther's natural daughter, was a sixteen (16) year old female high school student (R. 76-77) and resident of a home located on Highway 19 South in Lauderdale County where she lived with her mother and father, her two brothers, and her grandparents. (R. 67, 92, 94)

Breanna was born on January 7, 1993. (R. 67, 111)

Breanna's father, Luther Sheffield, was thirty-five (35) years of age. (R. 67) According to Kandi Sheffield, Luther's ex-wife, he was born on September 5, 1973. Luther and Kandi were divorced in 1997 but Kandi continued to have a relationship with Luther by "mov[ing] back in together." (R. 108)

Five (5) witnesses testified for the State of Mississippi during its case-in-chief, including the victim, **Breanna Sheffield**, the 16-year-old daughter of Luther Sheffield, who testified her father began hitting on her " . . . when I hit my teens." (R. 105) She had been living with all this for years

but became more aware it was inappropriate as she got older. (R. 105)

Q. [BY PROSECUTOR:] How long had this been going on to the best of your knowledge?

A. [BY BREANNA:] I'm not really sure, but for a while.

Q. For a while. Well, you mean - - I mean, are we talking about years; are we talking about months? What?

A. Years.

Q. Okay. Now during that period of time, what other kind of touching has he done on you other than what you've already described?

A. He's touched my breasts before.

Q. In what way and where would that have happened?

A. At the - - it was at our house. I got pushed at school and I had a knot in my breast, and he asked to see it.

Q. Did you tell him that you didn't want him to look?

A. Yes, sir.

Q. And what did he do?

A. He told me that I was his daughter, so it didn't matter.

Q. And when he touched your breast, how did he touch your breast?

A. I'm not sure. He was checking to make sure there wasn't any lumps. (R. 77-78)

* * * * * *

Q. Now, did - - when, if ever, during that period of time did you have him interrupting your - - or coming into the bathroom when you were naked or dressing or changing?

A. He did that frequently.

Q. Frequently?

A. (Witness nods head affirmatively.)

Q. Have you asked him not to do that?

A. Yes, sir.

Q. What does he say about that when you ask him not to?

A. He told me that it was fine because I was his daughter. (R. 78)

* * * * * *

Q. Other than the incident on February the 23rd, 2008, how often if at all would he touch you in a way that made you feel uncomfortable?

A. He did that very often.

Q. Like how often?

A. I guess it was an everyday thing.

Q. Everyday thing?

A. Yes, sir.

Q. And how would he touch you that made you feel uncomfortable?

A. He would just grab my butt and kiss me and stuff.

Q. Kiss you on the lips and kiss your neck?

A. Yes, sir.

Q. Not just fatherly kisses on the cheek?

* * * * * *

A. Yes, sir. (R. 83-84)

* * * * * *

Q. Now the touching that went on by him with you, how did it make you feel?

A. Uncomfortable.

Q. How - - uncomfortable why?

A. Because it wasn't normal.

Q. How do you know it wasn't normal?

A. Because I've seen my friends' relationships with their dad.

Q. Okay. You never saw another father touch his child that way?

A. No, sir.

Q. Did it feel sexual to you?

A. Yes, sir.

Q. Very uncomfortably sexual?

A. Yes, sir. (R. 85-86)

Heather Johnson testified Breanna's father would call Breanna "ho, a slut, a bitch, a whore, a cunt licker, just stuff like that." (R. 146) She overheard Sheffield tell Breanna " . . [he didn't approve of Breanna going out with boys and that he'd much rather just buy her a vibrator and show her how to use it." (R. 146)

Brad McNair testified to the same thing. (R. 160) He observed Sheffield " . . . grab onto Breanna and slap her on the butt at least five times, kiss her all over the neck and run her - - run his fingers through her hair." (R. 159-60) McNair heard Sheffield say that when Breanna turns 15 she's going to be competition for her mother. (R. 160) McNair also observed Sheffield rub Breanna's legs in a sexual way. (R. 162-63)

Caitlyn Douglas testified Sheffield " . . . would touch [Breanna] on the behind and rub her

thighs, and he would constantly just kiss her down her face and down her neck and just mess with her ears and her hair in a seductive way." (R. 169)

Moreover, ". . . he would call her names and certainly names that you wouldn't call your own daughter. He would call her flat-chested. He would call her a bitch, a slut, a loser, a whore; and then he would start kissing on her again and slap her and say, No boys." (R. 169)

> Q. [BY PROSECUTOR ANGERO:] Now when he would rub on her or kiss on her, did you ever see Breanna try to break away from him?
>
> A. [BY DOUGLAS:] She would take a step back or just lean back or just say, Dad, stop. He wouldn't.
>
> Q. Now, did he ever get angry because of her refusal?
>
> A. He did.
>
> Q. Was that a regular thing?
>
> A. Yes. (R. 169-70)

At the close of the State's case-in-chief, Sheffield moved for a directed verdict on the ground that " . . . taking the evidence in the light most favorable to the State that no reasonable juror could find that he's guilty of this charge." (R. 174)

The circuit judge overruled this motion with the following rhetoric.

> [T]he test that the Court must use on motions such as this has been set out in many, many cases by the Supreme Court; that test being that all evidence which has been introduced by the State is to be accepted as being true together with all sound or reasonable inferences that may be drawn from that evidence, and if there is sufficient evidence to support the jury's verdict of guilty, then the motion for directed verdict must be denied. The Court finds that the State has met that burden, and the Defendant's motion for directed verdict will be denied. (R. 174)

After being advised of his right to testify or not to testify, the defendant personally elected

to remain silent. (R. 176-79)

Peremptory instruction was requested and denied. (R. 183; C.P. at 36)

Following closing arguments, the jury retired to deliberate at 9:53 a.m. (R. 208) A little over an hour later, at 11:01 a.m, the jury returned with the following verdict: "We, the jury, find the Defendant guilty of lustful touching of a child." (R. 210)

A poll of the jury reflected the verdict returned was unanimous. (R. 210)

On September 18, 2009, following a presentence investigation and report and at the close of a sentencing hearing (R. 211-17), Sheffield was sentenced to serve fifteen (15) years in the custody of the MDOC, with five (5) years suspended and ten (10) years to serve followed by five (5) years of supervised probation. (R. 216)

Sheffield's motion for judgment of acquittal notwithstanding the verdict (C.P. at 46-47) and his motion for a new trial (C.P. at 44-45) were filed on September 28, 2009. Both were overruled on September 28, 2009. (C.P. at 48)

On appeal Sheffield seeks reversal of his conviction and a remand for a new trial. (Brief of the Appellant at 6, 9)

SUMMARY OF THE ARGUMENT

ISSUE NO. 1. Jury instruction D-3, a lesser offense instruction authorizing the jury to find Sheffield guilty of simple assault, was properly refused because it lacked evidentiary support. **Goodnite v. State,** 799 So.2d 64, 69 (¶27) (Miss. 2001)["We hold that the evidence did not support an instruction for simple assault."]

ISSUE NO. 2. Accepting as true the testimony proffered by the State, together with all reasonable inferences to be drawn therefrom, it is clear there was sufficient testimony from the victim and other witnesses the repeated touching by Sheffield was for the purpose of, *inter alia*,

gratifying his lust.

Nor was the verdict of the jury against the overwhelming weight of the evidence. The jury was properly instructed it was " . . . the sole judges of the facts in this case [and its] exclusive province is to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case." (C.P. at 33)

The testimony of Breanna Sheffield, standing alone, was not outweighed by Sheffield's evidence because he introduced no evidence. Breanna's credibility, of course, was a question for the jury.

In **Crawford v. State,** 754 So.2d 1211, 1222 (Miss. 2000), this Court stated:

> "[O]ur case law clearly holds 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 crime." [numerous citations omitted]

It was not discredited, and it was consistent as well as corroborated. *See also* **McDonald v. State,** 816 So.2d 1032 (Ct.App.Miss. 2002).

Corroboration of Breanna's testimony was provided by her friends, Heather Johnson, Brad McNair, and Caitlyn Douglas.

Quite frankly, the question of guilt or innocence is not even close.

Sheffield points to certain inconsistencies in the testimony, e.g., (1) he never attempted to touch Breanna underneath her clothing; (2) at no time was Breanna instructed by her father not to talk about his behavior, and (3) Breanna's mother, Kandi, did not think Sheffield's behavior was inappropriate. (Brief of the Appellant at 8)

Somewhat similar arguments were made and rejected in **Collier v. State**, 711 So.2d 458, 462 (Miss. 1998), where we find the following:

> "We are asked to reverse this case on the grounds that there are inconsistencies and contradictions in her testimony. If this be true, it would still be a question for the jury." *Blade*, 240 Miss. at 188, 126 So.2d at 280; *e.g. Allman*, 571 So.2d at 253. In the instant case, any inconsistencies found in C.H.'s testimony go [to] the weight and credibility of her testimony, clearly a jury question. In addition, C.H.'s testimony was not at all inconsistent on the issue at the heart of this matter - Collier's fondling of her. This contention is without merit.

It is well settled that "[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." **Jones v. State**, 381 So.2d 983, 989 (Miss. 1990). *See also* **Hill v. State**, 199 Miss. 254, 24 So.2d 737 (1946).

ARGUMENT

ISSUE NO. 1.

THE TRIAL JUDGE DID NOT ERR IN DENYING JURY INSTRUCTION D-3 BECAUSE THE EVIDENCE DID NOT SUPPORT AN INSTRUCTION FOR SIMPLE ASSAULT.

Sheffield contends the trial judge erred in denying jury instruction D-3 which reads, in its entirety, as follows:

> The court instructs the jury that if the State of Mississippi has failed to prove any one or more of the elements of the offense of lustful touching beyond a reasonable doubt, then you must find the Defendant not guilty of lustful touching. If you find the Defendant not guilty of lustful touching, you may continue your deliberations to determine whether or not the Defendant is guilty of simple assault.
>
> If you find from the evidence in this case beyond a reasonable doubt that:

> 1. On or about February 23, 2008[,] in Lauderdale County, Mississippi;
>
> 2. The Defendant, Luther Sheffield, did attempt by physical menace to put Breanna Sheffield in fear of imminent serious bodily harm;
>
> Then you shall find the Defendant guilty of simple assault.
>
> If you find that the State of Mississippi has failed to prove any one or more of the elements of simple assault beyond a reasonable doubt, you must find the Defendant not guilty of simple assault. (C.P. at 35)

The trial judge did not err in denying D-3 on the ground it lacked evidentiary support.

> BY THE COURT: All right. I agree with the State. I don't think there's any evidence to support this instruction. And it's certainly not a lesser and included offense, but primarily there's just no evidence to support the instruction; so I'm going to refuse it which means the form of the verdict will be refused, D-4. Which brings us back to S-2, form of the verdict. * * * (R. 185)

A handwritten notation apparently penned by the circuit judge is present at the bottom of D-3. It reads as follows: "No evidence to support this instruction. This is not a lesser included offense." (C.P. at 35)

According to Sheffield, "[t]he evidence was such that the jury could have found that Sheffield's rubbing of the thigh and kissing of the neck was merely an assault and not a touching for lustful purposes." (Brief of the Appellant at 6)

This issue is controlled by the following language found in **Goodnite v. State,** *supra*, 799 So.2d at 68, 69 (¶¶ 20, 24, 25), an appeal from convictions of fondling and sexual battery where a similar issue was addressed by the Supreme Court:

> Goodnite asserts that it was error for the trial court to refuse proffered instruction D-6 which provided for a lesser-included offense of simple assault. * * *

* * * * * *

> Our law is well-settled that jury instructions are not given unless there is an evidentiary basis in the record for such. *Turner v. State,* 732 So.2d 937 (Miss. 1999). This Court has also held that instructions must be warranted by the evidence and should not be indiscriminately granted. *Mease v. State,* 539 So.2d 1324, 1330 (Miss. 1989). To warrant the lesser included offense instruction, a defendant must point to some evidence in the record from which a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of a lesser-included offense. *Toliver v. State,* 600 So.2d 186, 192 (Miss. 1992).
>
> Applying the test provided in *Harper,* to the evidence before the jury, we conclude that this argument is without merit. *Id.* at 1021. Even if the jury could conclude that Goodnite pinched C.E. between the legs, that **none of the evidence appears to have warranted finding Goodnite guilty of simple assault which involves an attempt to cause bodily harm.**
>
> * * * * * *
>
> * * * This Court must make a determination of whether the evidence in the record is such that a fair-minded juror could harbor a reasonable doubt whether the pinch was for something other than a lustful purpose.
>
> C. E.'s testimony indicated that Goodnite attempted and succeeded in pinching her in her "private parts." We conclude that a reasonable jury viewing the evidence favorable to Goodnite could not harbor a doubt that the pinch was for anything else other than a lustful purpose. We hold that the evidence did not support an instruction for simple assault. [emphasis ours]

The same is true here.

While there is testimony that Sheffield grabbed and slapped Breanna's behind, rubbed her thigh, and kissed her neck (Brief of the Appellant at 6), none of this behavior can be reasonably related to four (4) of the elements recited in instruction D-3, viz,. "(1) fear of (2) imminent (3) serious (4) bodily harm."

Assuming Sheffield's behavior amounted to "physical menace," there is no evidence that

Breanna actually feared bodily harm or even if she did that the "bodily harm" was "serious" as well as "imminent." It was true in **Goodnite**, and it is equally true here, " . . that [no] fair-minded juror could harbor a reasonable doubt whether the [defendant's acts] were for something other than a lustful purpose." *Id.*, 799 So.2d at 69.

It was also true in **Goodnite** and, again, it is equally true here, " . . . that none of the evidence appears to have warranted finding Goodnite guilty of simple assault which involves an attempt to cause bodily harm."

This Court should " . . . hold that the evidence did not support an instruction for simple assault." **Goodnite,** 799 So.2d at 69.

The denial of D-3 was not error.

ISSUE NO. 2.

ACCEPTING AS TRUE THE TESTIMONY OF THE WITNESSES FOR THE STATE, TOGETHER WITH ALL REASONABLE INFERENCES TO BE DRAWN THEREFROM, THERE WAS AMPLE EVIDENCE OF SUFFICIENT WEIGHT AND CHARACTER TO PROVE THE OFFENSE OF FONDLING BEYOND A REASONABLE DOUBT.

The essential elements of fondling are found in **Brady v. State,** 722 So.2d 151, 159 (¶32) (Ct.App. 1998), as follows:

> Thus, the elements of fondling or unlawful touching are:
>
> 1) a handling or touching or rubbing with *any* part of the assailant's body or any member thereof,
>
> 2) of a child under the age of 14 years
>
> 3) by a person above the age of 18 years
>
> 4) for the purposes of gratifying the lust or indulging

licentious sexual desires of the assailant.

By virtue of a subsequent amendment in 1998 to Miss.Code Ann. §97-5-23(1), the crime is complete if the child is "under the age of 16 years." *See also* **Weathersby v. State,** 919 So.2d 1146 (Miss. 2005).

The jury was properly instructed that in order to convict it had to find from the evidence beyond a reasonable doubt " . . . that Luther W. Sheffield, Jr., a male person over the age of eighteen (18) years, did wilfully and unlawfully touch or rub with his hands or some other part of his body the person of Breanna Sheffield, a child under the age of 16 years; [f]or the purpose of gratifying his lust or indulging his depraved licentious sexual desires; . . ." (Jury instruction S-1 at C.P. 27)

The testimony of Breanna and her three friends satisfies the first element. There can be no mistake about the handling, touching, and rubbing by Sheffield of various parts of Breanna's anatomy.

The testimony of both Breanna and her mother satisfies the second element that Breanna was under 16 years of age at the time of the contact which had been going on for several years. (R. 67, 111)

The testimony of Kandi Sheffield that her husband was born on September 5, 1973, satisfies the third element that the offender be above the age of 18 years. (R. 111-12)

Finally, the testimony of Breanna and her three friends satisfies the fourth element which requires a touching for the purpose gratification of Sheffield's lust and/or indulgence in a licentious sexual desire. A fair and accurate summary of Breanna's testimony is found in the second paragraph of this brief as well as our Statement of Facts. We respectfully decline to plow that ground again here.

A reasonable, fair-minded juror could have found beyond a reasonable doubt the defendant's

behavior toward his teenage daughter went far beyond innocent and or "prankish" touching or affectionate behavior. Stated differently, the contact was much more than affectionate, lawful caresses of a child. *See e.g.*, **Foxworth v. State,** 982 So.2d 453 (Ct.App.Miss. 2007). Breanna and her friends were well aware the touching was inappropriate even for a father/daughter relationship. An intent to gratify his lust could easily be inferred from the defendant's actions. *See* **Donald v. State,** 976 So.2d 942 (Ct.App.Miss. 2007).

This is not a typical case of "He said! She said!" because the "He" involved in this case never "said." Rather, Sheffield's conviction of fondling rests entirely upon the testimony of Breanna and the corroborating testimony elicited from three of her friends, Heather Johnson, Brad McNair, and Caitlyn Douglas, each of whom were ear and eyewitnesses, at least in part, to the defendant's behavior.

Although perhaps blurring the distinction between "weight" and "sufficiency," Sheffield opines that the trial judge erred in denying his motion for a new trial because the verdict of the jury was against the overwhelming weight of the evidence. (Brief of Appellant at ii, 1, 6)

The gist of Sheffield's complaint is that "[t]he evidence presented against him was taken out of context as was done during these proceedings may be misunderstood for a violation of the law" because, *inter alia,* " . . . neither the victim nor her mother felt the actions [of the defendant] were inappropriate." (Brief of the Appellant at 7)

Sheffield argues "[t]he actions of Mr. Sheffield, which might have been excessive, show to be that of an overly affectionate father, not for the purpose of gratifying lust." (Brief of the Appellant at 8)

The jury, of course, found otherwise as was its exclusive prerogative.

The rules of law governing the standards of appellate review for both "weight" and

"sufficiency" are found in **Weathersby v. State,** 919 So.2d 1146, 1149-50 (¶¶ 12-20)(Ct.App.Miss. 2005), an appeal from a conviction of fondling brought under Miss.Code Ann. §97-5-23(1). It is unnecessary to repeat those standards here which we rely upon by reference thereto as articulated in **Weathersby**.

It is enough to say that the verdict returned in this case is not " . . . so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." Weighing, as this Court is invited to do, the evidence in the light most favorable to the verdict, it is clear the testimony and evidence fails to preponderate in favor of Sheffield and that the State produced enough credible evidence to prove beyond a reasonable doubt that Sheffield touched his daughter for lustful purposes. Indeed, there can be no question about it.

Our retort to any claim of inconsistencies in the testimony of the victim and her witnesses is found in **Collier v. State,** *supra*, 711 So.2d 458, 462 (Miss. 1998), where the same argument was made and rejected.

> "We are asked to reverse this case on the grounds that there are inconsistencies and contradictions in her testimony. If this be true, it would still be a question for the jury." *Blade*, 240 Miss. at 188, 126 So.2d at 280; *e.g. Allman*, 571 So.2d at 253. In the instant case, any inconsistencies found in C.H.'s testimony go [to] the weight and credibility of her testimony, clearly a jury question. In addition, C.H.'s testimony was not at all inconsistent on the issue at the heart of this matter - Collier's fondling of her. This contention is without merit.

Lest we forget, "[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." **Jones v. State,** *supra*, 381 So.2d 983, 989 (Miss. 1990). *See also* **Blocker v. State,** 809 So.2d 640, 644-45 (Miss. 2002); **Hill v. State,** 199 Miss. 254, 24 So.2d 737 (1946), and **Collier v. State,** *supra*, 711 So.2d 458, 462-63 (Miss.1998) [Any inconsistencies and contradictions found in testimony of

child witness went to " . . . the weight and credibility of her testimony, clearly a jury question."].

In short,"impeachment value" is a question for the jury and not for a trial judge called upon during trial to address the matter of legal evidentiary sufficiency.

In the case at bar, unlawful fondling was established by the victim's testimony alone. The following language found in **Crawford v. State,** *supra*, 754 So.2d 1211, 1222 (Miss. 2000), is *apropos* to the facts presented here:

> "[O]ur case law clearly holds 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 crime." [numerous citations omitted]

Breanna's testimony was not discredited; rather, it was entirely consistent with the conduct of one victimized by a sex crime. *See also* **McDonald v. State,** 816 So.2d 1032 (Ct.App.Miss. 2002). Moreover, it was corroborated by the testimony of her three friends.

Once again, our position on this issue can be summarized in only three (3) words: "classic jury issue." A reasonable and fair-minded juror could have found Sheffield guilty of fondling and not simply lawful fatherly affection.

Of course, "[i]n any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

The law applicable to the disposition of this issue is stated in **Kelly v. State,** 910 So.2d 535,

540 (Miss. 2005), as follows:

> We have routinely held that the jury is the judge of credibility. *Schuck v. State,* 865 So.2d 1111, 1124 (Miss. 2003); *Harris v. State,* 527 So.2d 647, 649 (Miss. 1988). This court will not set aside a guilty verdict, absent other error, unless it is clearly a result of prejudice, bias, fraud, or is manifestly against the weight of credible evidence. *Drake v. State,* 800 So.2d 508, 517 (Miss. 2001) (citing *Maiben v. State,* 405 So.2d 87, 88 (Miss. 1981). Further, it is within the sound discretion of the jury to accept or reject the testimony of a witness, and the jury "may give considerations to all inferences flowing from the testimony." *Mangum v. State,* 762 So.2d 337, 342 (Miss. 2000) (quoting *Grooms v. State,* 357 So.2d 292, 295 (Miss. 1978)).

"[T]he scope of review on this issue is limited in that all evidence must be construed, i.e., "weighed," in the light most favorable to the verdict." **Herring v. State**, 691 So.2d at 957 citing **Mitchell v. State**, 572 So.2d 865, 867 (Miss. 1990). *See also* **Bush v. State,** 895 So.2d 836, 844 (Miss. 2005)**, citing Herring v. State,** *supra.*

Contrary to Sheffield's position, this is not a case where the evidence preponderates heavily against the verdict, or where allowing the verdict to stand would sanction or amount to an unconscionable injustice.

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis

supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, *supra*, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, *supra*, 440 So.2d 297, 300 (Miss. 1983).

Contrary to Sheffield's position, the case at bar does not exist in this posture.

We respectfully submit, for the reasons stated, the evidence was sufficient to demonstrate the elements of the crime charged within the meaning and purview of our statute, Miss. Code Ann. §97-5-23(1). The verdict of the jury was not against the overwhelming weight of the evidence. Accordingly, the trial court did not abuse its judicial discretion in overruling Sheffield's motion for a new trial.

CONCLUSION

Sheffield, who was well represented by two competent and effective attorneys, presents a legitimate complaint. Nevertheless, scrutiny of the official record reflects the claims presented for appellate scrutiny are devoid of merit.

Appellee respectfully submits that no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction for fondling together with the fifteen (15) year sentence with five (5) years suspended and ten (10) years to serve imposed by the trial judge, should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

HONORABLE ROBERT W. BAILEY
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HONORABLE E. J. (BILBO) MITCHELL
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P.O. Box 5172
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HONORABLE BENJAMIN A. SUBER
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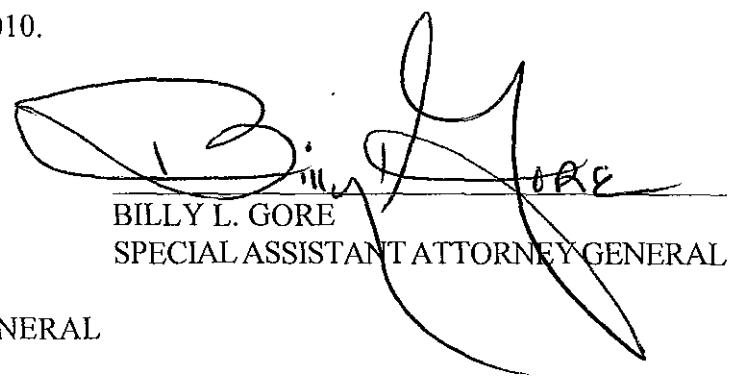
This the 18th day of June, 2010.



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