IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LUTHER WAYNE SHEFFIELD **APPELLANT**

V. **NO. 2009-KA-1635-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Luther Wayne Sheffield, Appellant
3. Honorable E.J. (Bilbo) Mitchell, District Attorney
4. Honorable Robert W. Bailey, Circuit Court Judge

This the 12 day of April, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Benjamin A. Suber
COUNSEL FOR APPELLANT

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THE COURT ERRED IN NOT GRANTING A LESSER INCLUDED SIMPLE ASSAULT INSTRUCTION AS REQUESTED BY THE DEFENDANT AT THE TRIAL, I.E. INSTRUCTIONS D-3.

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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.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi, and a judgment of conviction for the crime of lustful touching of a child against the appellant, Luther Sheffield. The trial judge subsequently sentenced the Appellant to serve 15 years with the Mississippi Department of Corrections of which five years will be suspended. The conviction and sentence followed a jury trial on August 5-6, 2009, Honorable Robert W. Bailey, Circuit Judge, presiding. Luther Sheffield is currently in the custody of the Mississippi Department of Corrections.

FACTS

February 23, 2008, Breanna Sheffield and Heather Johnson were at the Sheffield home watching a movie. Luther Sheffield, suggested that he drive the girls to a relatives house to pick up some games for them to play. As Mr. Sheffield entered the room he kissed Breanna on the cheek, lips, and neck. (Tr. 69). Upon exiting the room Mr. Sheffield grabbed Breanna's behind. (Tr. 71). Breanna asked Mr. Sheffield if she could drive and he agreed. All four of them, Breanna, Heather, Brad, and Mr. Sheffield proceed to the relatives home in a red Contour passenger car. (Tr. 71). Breanna and Mr. Sheffiled were in the front while Heather and Brad were seated in the back of the vehicle. Mr. Sheffield had Breanna pull into a gas station to change drivers as he did not want her driving in a certain area. Breanna testified that nothing inappropriate occurred during the ride to her relative home. (Tr. 73). Breanna testified on the ride home that Mr. Sheffield

rubbed her thigh. (Tr. 74). Heather Johnson decided herself that the comments and affection showed by Mr. Sheffield were inappropriate and she decided to inform a deputy at her school. On the Monday following the alleged incident, Heath and Brad gave notes to the Deputy regarding what they felt was inappropriate behavior. Breanna was called into the office to answer questions from the deputy. (Tr. 76). At first Breanna said there was nothing wrong, it wasn't until she was told that Heather and Brad has said something was wrong that she changed her story. (Tr. 77-78). Breanna went further to testify that the only time her father had touched her breast was when she was hurt. He checked to make sure there were no lumps. (Tr. 78). Breanna also testified that Mr. Sheffield never attempted to touch her under her clothing. At no time did Mr. Sheffield tell Breanna that she shouldn't talk about his action. (Tr. 84)

SUMMARY OF THE ARGUMENT

The Court erred in refusing and not allowing the jury instruction offered by the Defendant, D-3 regarding the lesser included unlawful touching of simple assault. Luther Sheffield requested and was denied a lesser included offense on Count I which charged Sheffield under **Mississippi Code Annotated** Section 97-5-23(1) (1972) with the touching of a child for lustful purposes on or before February 23, 2008. The testimony of Breanna was that Mr. Sheffield would kiss her on the neck and cheek. Further, Mr. Sheffield would rub her thigh and pinch her behind. D-3, touching for lustful purpose with the lesser included offense of simple assault instruction, was refused. The court

denied the instruction because of a lack of imminent fear of serious bodily injury. This is not the standard for determining whether a lesser included instruction should be granted and the court erred in refusing to grant the instruction.

Further, the evidence was insufficient to support the verdict of guilty. It is elementary that the defendant enters the courtroom cloaked with the presumption of innocence and the State with the weight of the burden of proof. That burden never shifts from the state. ***Brown v. State,*** 556 So.2d 338, 340 (Miss. 1990). In the present case, the testimony was insufficient under the law to convict Luther Sheffield, especially in light of the Court's refusal to instruct the jury regarding the lesser included offense. The state clearly failed to meet its burden of proof with regards to the element regarding "for the purpose of gratifying his lust."

ARGUMENT

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. INSTRUCTIONS D-3.

Luther Sheffield requested and was denied a lesser included offense on Count 1 which charged Sheffield under **Mississippi Code Annotated** Section 97-5-23(1) (1972) with the touching of a child for lustful purposes on or before February 23, 2008. The testimony of Breanna, Heather, and Brad was that Mr. Sheffield was inappropriately kissing Breanna and touching her inner thigh during a trip home from a relatives house.

D-3, touching for a lustful purpose with the lesser included offense of simple assault instruction, was refused. (Tr. 185) The court denied the instruction because there was no evidence of imminent fear or serious bodily injury. (Tr. 185)

Lesser included offense instructions should be given. ***Perry v. State,*** 637 So.2d 871 (Miss. 1994) "A lesser included offense instruction should be given on request, 'if a "rational" or a "reasonable" jury could find the defendant not guilty of the principal offense charged in the indictment yet guilty of the lesser included offense." ***Mease v. State,*** 539 So.2d 1324, 1329-30 (Miss. 1989).

The test for presenting a lesser-included jury instruction was set out in ***Harveston v. State,*** 493 So. 2d 365 (Miss. 1986):

> We recognize in certain cases, as a matter of trial strategy, defense counsel may wish to have the case put to the jury on all or nothing bases, the jury's alternatives being to find the defendant guilty as charged in the indictment or acquitted. Our law, however, allows the prosecution to request and obtain lesser-included offense instructions, as it does the defense. The test for whether such an instruction should be granted is the same: is it warranted by the evidence? Where the answer is affirmative, the defendant has no right to complain of the circuit court's submission to the jury of a properly phrased lesser-included offense instruction, either at the request of the prosecution or on its own motion.

See ***Cole v. State,*** 405 So.2d 910, 913 (Miss. 1981); ***Jackson v. State,*** 337 So.2d 1242, 1255 (Miss. 1976); ***Dover v. State,*** 227 So.2d 296, 301 (Miss. 1969); ***Hufman v. State,*** 192 Miss. 375, 378, 6 So.2d 124, 125 (1942). 493 So.2d at 375.

The test was further clarified by ***Harper v. State,*** 478 So.2d 1017 (Miss. 1985):

[A] lesser included offense instruction should be granted unless the trial judge-and ultimately this Court – can say, taking the evidence in the light most favorable to the accused, and considering all favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge). 478 So.2d at 1021.

Here the defendant requested the lesser included offense instruction of simple assault. The 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. Clearly simple assault is a lesser included offense of touch a child for lustful purposes. The missing element is the purpose of the touching.

The fact that the state and the Court believed that there was no imminent fear or serious bodily injury is irrelevant on these facts. A defendant is entitled to instructions that have any foundation in the facts and are correct statement of the law.

This error requires reversal of Luther Sheffield's conviction.

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.

"When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the

overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997)). In reviewing such claims, the Court "sits as a thirteenth juror." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000)(footnote omitted)).

"[T]he evidence should be weighed in the light most favorable to the verdict." ***Herring***, 691 So.2d at 957. "A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, 'unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.'" ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)). It means that "as the 'thirteenth juror,' the court simply disagrees with the jury's resolution of the conflicting testimony," and "the proper remedy is to grant a new trial." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)(footnote omitted)).

Here the defendant was charged with the touching of a child for lustful purposes. The evidence presented against him was taken out of context as was done during these proceedings may be misunderstood for a violation of the law. However when viewed at the time all alleged actions took place neither the victim nor her mother felt the actions were inappropriate.

The victim's mother stated that Mr. Sheffield would lay down with his daughter, all piled up in the bed. (Tr. 113). He would rub her thigh, rub her hair and the mother at the time did not think that the behavior was inappropriate. *Id.*

Furthermore, Breanna went further to testify that the only time her father had touched her breast was when she was hurt. He checked to make sure there were no lumps. (Tr. 78). Breanna also testified that Mr. Sheffield never attempted to touch her under her clothing. At no time did Mr. Sheffield tell Breanna that she shouldn't talk about his action. The 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. The evidence presented to the court was not sufficient for a guilty verdict for lustful touching of a child.

There is simply not enough competent evidence to support the jury's verdict. This verdict was contrary to the law and should be reversed.

CONCLUSION

Luther Sheffield contends that the Court erred in denying his request for a jury instruction including the lesser included offense of simple assault. Further, Mr. Sheffield contends that the evidence was insufficient to support the verdict of guilt as to lustful touching of a child as a result of the state failing to provide any evidence of the actions being lustful in nature. Therefore the Court should reverse and remand for new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Luther Sheffield, Appellant

BY: _____

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Luther Wayne Sheffield, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 12 day of April, 2010.

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