

IN THE SUPREME COURT OF MISSISSIPPI, COURT OF APPEALS

JOHNNY McCULLOUGH

APPELLANT

V

CAUSE NO.: 2009-KA-01645-COA

STATE OF MISSISSIPPI

APPELLEE

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REPLY BRIEF OF APPELLANT, JOHNNY McCULLOUGH

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ON APPEAL FROM  
UNION COUNTY CIRCUIT COURT, CAUSE NO. CR2008-000192

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ORAL ARGUMENT IS REQUESTED

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## **TABLE OF CASES, STATUES AND OTHER AUTHORITIES**

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## ARGUMENT

**ISSUE NO. 1:      WHETHER THE JURY'S VERDICT IS AGAINST THE  
OVERWHELMING WEIGHT OF NOT ONLY THE  
EVIDENCE BUT THE OTHER FINDINGS OF NOT GUILTY  
ON FIVE COUNTS ALLEGING THE SAME CONDUCT.**

There was testimony, and more testimony from social workers, alleged victims, family, law enforcement, etc. But the bottom line is the jury heard horror stories from several minor children and yet only believed one. What makes Andrea Bond testimony any more credible than that of Amy Emiline McCullough, or Haley McCullough? Nothing, because the testimony was not credible.

The jury had heard so much testimony from alleged victims that they probably felt that they had to do something. So they found the Defendant, Johnny McCullough guilty on two counts of an original twenty-two (22) count indictment of which he went to trial on seven (7) counts.

The Appellee spends a great deal of effort quoting from the transcript revealing testimony that if true would convict the Defendant, Johnny McCullough on all counts. The only problem is that all of the alleged victims gave similar testimony not just Andrea Bond. Furthermore, there is no conflict in the victims testimony, yet the juror believed one witness out of all the others. That one witness was Andrea Bond. The testimony from law enforcement, social workers, and family members was believed by the jury insofar as it related to the conviction of the Defendant, Johnny McCullough on the counts involving the minor child Andrea Bond. The testimony from law enforcement and social workers and family members was false as it related to the counts related to Amy Emiline McCullough and Haley McCullough. Taken to the next logical conclusion, that would mean that the jury believed the Defendant, Johnny McCullough on five (5) counts and the jury

believed Andrea Bond on two (2) counts. This was a unanimous jury, 12-0, for guilt or for innocence.

The Appellee references the case of Ivy v. State, 949 So.2d 748, 754 (Miss. 2007). However, Ivy did not deal with a multitude of counts, 5 alleged victims, and a jury that voted 12-0 for guilty on two (2) counts (Andrea Bond) and 12-0 not-guilty on five (5) counts (Amy Emiline McCullough and Haley McCullough). Ivy has little or no bearing on this appeal.

This Court should, in fact, give the State the benefit of all reasonable inferences that may be drawn from the evidence. Smith v. State, 646 So.2d 538, 542 (Miss. 1994). All reasonable inferences, that would include the consistent testimony of the alleged victims and the inconsistent finding of the jury. This is an “exceptional case[s] in which the evidence preponderates heavily against the verdict” Amiker v. Drugs for Less, Inc., 97-CA-01493-SCT, 796 So.2d 942, 947 (Miss. 2000).

The jury was overwhelmed by the shear weight of the evidence and just as the Mississippi Supreme Court has stated that where “a verdict...is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” Herring v. State 691 So.2d 948, 957 (Miss.1997). This jury was certainly overwhelmed with evidence from all angles concerning the guilt of Johnny McCullough. Yet despite that overwhelming weight of evidence the jury found Mr. McCullough innocent on five of the seven counts of the indictment.

As stated in the Appellant’s primary brief there were no charges brought against Johnny McCullough until after the July 2, 2008 chancery matter was continued. After that date all the allegations came into light. To allow this verdict to stand would be an unconscionable injustice as contemplated by the Mississippi Supreme Court in Herring.

**ISSUE NO. 2:        WHETHER JOHNNY McCULLOUGH WAS DENIED  
EFFECTIVE ASSISTANCE OF COUNSEL**

The Appellant's basis for alleging ineffective assistance of counsel is based totally upon the absence of the submission of certain crucial evidence in the defense of Johnny McCullough. The Appellant makes no comment as to the Defense Counsel's conduct on other stages of the proceedings.

Trial Court Counsel for the Defendant, Johnny McCullough did not introduce a tape recording which was disclosed in discovery in which one of the minor children, Amy Emiline McCullough states that she was coached into making allegations against Johnny McCullough. Neither did the Trial Court Defense Counsel subpoena Billie Jean McCullough who is the natural mother of Andrea Bond and Amy Emiline McCullough. Both children were the subject of the Chancery Court proceeding which was continued from July 2, 2008, after which the allegations were made which lead to the twenty-two count indictment of Johnny McCullough.

Certainly, a tape recording of Amy Emiline McCullough stating that Cynthia "Cindy" (Chandler)(McCullough) Talley, her step-mother at the time, forced her and the other girls to allege that Johnny McCullough had touched them in an inappropriate manner would have had a great effect on the ultimate verdict concerning the minor child, Andrea Bond. Therefore, the failure of Trial Court Defense Counsel to offer the testimony of Billie Jean (McCullough) Maxie and the tape recording is clearly an error and rendered that portion of his counsel ineffective. Prejudicing his ability to receive a fair and impartial hearing and adversely effecting his Sixth Amendment Right to effective counsel.

### CONCLUSION

The jury reached a consistently inconsistent verdict by finding Johnny McCullough guilty on two of the ultimate seven count indictment. To reach that verdict the jury was forced to believe witnesses for five of the counts and disbelieve the same witnesses for two of the counts. The jury had to believe that Johnny McCullough was innocent and believe his testimony as it related to Haley McCullough and Amy Emiline McCullough and disbelieve his testimony as it related to Andrea Bond. The juries' verdict is contrary to the overwhelming weight of the evidence and credibly of the testimony is suspect at best.

The Appellant makes no comment concerning defense counsel while at trial on any issue other than whether the tape recording, which was delivered to the State/Appellee should have been admitted and whether the natural mother of Andrea Bond should have been called as a witness. Certainly, an audio recording in which the minor child states that she was coached would have greatly influenced the outcome of the trial. This Court should find that the jury verdict is contrary to the overwhelming weight of the evidence and that Johnny McCullough did not receive effective assistance of counsel, reversing the findings of the Circuit Court of Union County and remanding this matter for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Greg E. Beard, attorney for Appellant, do hereby certify that I have on this date \_\_\_\_\_ hand-delivered, \_\_\_\_\_ faxed, and/or X placed in the United States Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

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Honorable Robert William Elliott  
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This the 23<sup>rd</sup> day of June, 2010.

  
\_\_\_\_\_  
GREG E. BEARD