IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MANEY SIMMONS, JR. — APPELLANT

VS. — NO. 2010-KA-0259

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MANEY SIMMONS **APPELLANT**

vs. **CAUSE No. 2010-KA-00259-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Jackson County, Mississippi in which the Appellant was convicted and sentenced for his felony of **SEXUAL BATTERY**.

STATEMENT OF FACTS

On the night of 26 November 2007, David Richardson, then a patrolman with the Moss Point, Mississippi police department, was summoned to the police station to take a complaint. When he arrived, at about half past eleven that evening, he spoke with the victim and her mother. Richardson was told by the victim that the Appellant had attempted to "entice her for sex." The victim stated that the Appellant had tried to get her to go into a bedroom with him, that she refused, that the Appellant then picked her up by the waist and grabbed her arm, but that she had managed to free herself of his embrace and take refuge in a bathroom. The Appellant's attempt to force the bathroom door failed. Richardson was told or determined that the Appellant was born on 15 July 1950. (R.

Vol. 2, pp. 61 - 72).

Detective Joycelyn Craig, a detective sergeant with the Moss Point police department, was on 25 September 2008 assigned to investigate the allegations made by the victim against the Appellant, the matter having previously been assigned to another investigator in November, 2007.

On the date the case was assigned to her, Craig interviewed the victim. The victim told her that she and her brother had been at home alone with the Appellant. The Appellant sent her brother to a store. After her brother left, the Appellant attempted to drag her into a bedroom. The Appellant grabbed her by the arm and waist. The victim said she had managed to escape the Appellant's clutches and take sanctuary in a bathroom, where she was able to ring her mother. When her mother arrived at their residence, the victim was yet within the bathroom.

In the course of the interview, part of which was recorded by an audio recorder, the victim stated that the Appellant had not performed cunnilingus upon her. After the audio tape recorder had been turned off, the victim told Craig that the Appellant performed cunnilingus upon her person. Craig wrote down what the victim told her. The victim and her mother read what Craig had written and signed the statement. The Appellant had been living with the victim and her mother at the time of the incident and was said to have been romantically involved with the victim's mother. (R. Vol. 2, pp. 72 - 78; 84 - 128).

Cindy Horn, a registered nurse with Singing River Hospital, was permitted to testify in the field of sexual assault assessment. She stated that she saw the victim on 27 November 2007. The victim told Horn that the Appellant had grabbed her by the waist earlier that evening and that she had run to a bathroom. The victim told the nurse that she called her mother and reported what the Appellant had done and that the Appellant was trying to touch her all over. The victim also told the nurse that the Appellant had put his mouth on her privates some two weeks before and that the

Appellant had begun such actions toward in October. The victim stated that the Appellant touched her when her mother was at work, and that the Appellant disposed of her brother by having him go to the store for him.

The victim went on to relate that she had sometime wakened in her bed to find that her pants were off and that the Appellant was in the room. She said that the Appellant tried to touch her all over and that he had put his hand into her pants. (R. Vol. 2, pp. 129 - 150).

The victim's mother then testified. She said she had been with the Appellant for some ten years, excluding the times she caught him doing something. The Appellant and her children got on well.

On 26 November 2007, the victim's mother was working a night shift at a VFW post. The Appellant was at her home with the victim and the victim's brother. At some point while the victim's mother was to her work, the victim rang her. The victim was crying and told her mother to come home. The victim told her that the Appellant was touching her. The victim's mother left her work to drive to her home.

While the victim's mother was on her way to her home, the victim rang her again and told her that she was in a bathroom. The victim's mother told the victim to stay there. The victim's mother then called her father, reported what the victim had told her, and asked her father to meet her at her house and to bring his gun.

When the victim's mother arrived at her home, she parked her vehicle in such a way as to block the Appellant's truck. The victim's mother went into the house and found the Appellant sitting at a kitchen table. The victim's mother asked the Appellant, "What the hell is going on up in here?", to which the Appellant replied, "What the hell you mean? What you talking about, what's going on up in here? I don't know what you're talking about." At that point, the victim opened the

bathroom door. She was soaking wet. The victim's mother went to her daughter, and at about that time the victim's mother's father arrived and went to the victim and hugged her.

The victim's mother asked the victim what had happened. The victim told her that the Appellant had been touching her and trying to get her on a bed. Upon hearing that, the victim's mother turned to the Appellant and said, "Let me tell you something. Don't nobody mess with my babies. Those are mines. Those are my babies. Don't nobody mess with my babies. Y'all come a dime a dozen. Now you get the &*%^ out of my house. Don't you never ever come back here no more. I mean it." The Appellant denied having done anything to the victim and implored the victim to tell the truth. The victim replied, "Well, you did it." At that point, the victim's mother's father told the Appellant he should leave. The Appellant began to do so and did so after the victim's mother moved her vehicle.

After the Appellant left, the victim's mother and her mother's father consoled the victim. The victim was crying and shaking. The victim's mother put the victim in bed with her, but the victim was still upset.

The victim's mother's mother advised the victim's mother to take the child to a hospital. As the victim and her mother were getting out of the victim's mother's car, to go into the emergency room of the hospital, the victim told her mother, "Mama, he did say we're going to do what we been doing." When the victim's mother asked her daughter what the Appellant had been doing, her daughter told her, "I don't know." In the course of the examination by the SANE nurse, the victim told the nurse that the Appellant had performed oral sex on her. The nurse told the victim's mother of what the victim said. (R. Vol. 3, pp. 165 - 179).

The victim then testified. She said that the Appellant was in her house on the night of 26 November 2007, as was her brother, her mother being at work. At some point, the Appellant sent

the victim's brother to a store for snacks. The Appellant began looking out of a window as soon as the boy left the house. After a few minutes, the Appellant told the victim, "Come on and do what we been doing." The Appellant grabbed her arm. The victim thought that what was going to happen was what usually happened. The victim freed herself, ran to a bathroom and rang her mother and asked her to return home. The bathroom door did not have a lock. The Appellant stood outside the door and told her to come out. The victim pushed against the door to keep the Appellant out.

After a few minutes, the Appellant left the house. The victim ran to her mother's bathroom. When she heard the sound of the Appellant's vehicle, she ran back to the bathroom in which she had first taken refuge. She then thought the sound was not from the Appellant's vehicle, so she went back to her mother's room, and back to the bathroom again when she thought she did hear the Appellant's truck. The victim's mother arrived and put the Appellant out of the house.

The victim testified that the Appellant had previously touched her vaginal area. Specifically, the Appellant had licked her vaginal area. She stated that the Appellant had done this some five or six times. These instances occurred at night, in October of 2007, in the victim's bedroom. The Appellant came into her room, pulled her shorts aside, and violated her in the manner she described. The victim did not call out to her mother during these times because her mother was at work.

The victim stated that the reason she initially failed to tell the truth to the police officer was because she was frightened. She denied having annoyed the Appellant by having changed television channels while he was watching football. She stated that she did not earlier report what the Appellant had done to her mother because she was scared. (R. Vol. 3, pp. 186 - 229).

STATEMENT OF ISSUES

1. WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT?

2. WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE[1]

The Appellant asserts that the evidence was insufficient to support the verdict, or, alternatively, that the trial court erred in refusing to grant a new trial on the ground that the verdict was contrary to the great weight of the evidence. In considering the Appellant's claims, we bear in mind the standards of review applicable to those claims. *May v. State*, 460 So.2d 778 (Miss. 1984).

The testimony in support of the verdict, taken as true together with all reasonable inferences therefrom, was that the Appellant, had, on at least one occasion some two weeks prior to 27 November 2007, committed an act of cunnilingus upon the victim, the victim being some ten years of age at the time and the Appellant being some fifty-seven years of age. There was no evidence to contradict or impeach the testimony of the victim. The act committed by the Appellant upon the victim, in view of the ages of the victim and the Appellant, constituted a violation Miss. Code Ann. Sections 97-3-95(1)(d); 97-3-97(a) (Rev. 2006). The victim's testimony was sufficient to support a verdict of guilty. *Parramore v. State*, 5 So.3rd 1074 (Miss. 2009). Nonetheless, the Appellant claims that certain aspects of the victim's account of the events of the night of 27 November 2007 require the conclusion that the verdict was not supported by the victim's testimony or that a new trial should have been granted him.

Other than the victim and the Appellant, there were no witnesses to the act committed by the

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[1] We will respond to the Appellant's two assignments of error in this response.

Appellant against the victim. This is hardly unusual in cases of this kind, of course. There was no biological evidence to corroborate the victim's testimony, but this was hardly surprising given the nature of the act committed against the victim and given the fact that some two weeks went by before the victim was examined by a SANE nurse. Evidence of this nature would not likely have been found in view of these considerations.

The victim testified as to what the Appellant attempted to have her do on the evening of 27 November 2006. The Appellant sent the victim's brother away, and the Appellant tried to get the victim to get into bed with him, to do what they had been doing, to use the words the victim testified the Appellant used, after the Appellant satisfied himself that the victim's brother had actually left the house. The victim took refuge in a bathroom and rang her mother. When the victim's mother returned home, the victim was in the bathroom and was very upset when she came out of the bathroom.

The Appellant claims that there was no physical evidence to substantiate the allegation. It is true that there was nothing found by the SANE nurse to substantiate the victim's account, but, as we have said, that it hardly surprising. The nature of the act committed by the Appellant and the amount of time between the commission of that act and the examination by the nurse made it highly unlikely any physical evidence or symptoms of sexual battery would have been found. The lack of physical evidence is not fatal to the conviction. *Pierce v. State*, 2 So.3rd 641 (Miss. Ct. App. 2008).

The Appellant then contends that the child's testimony was substantially contradicted by the fact that she had initially denied that the Appellant committed cunnilingus against her to the police officer. It is true that the victim did initially tell the investigator that the Appellant had not committed a sexual act against her. The victim explained this by the fact, hardly unreasonable, it might be said, that she was scared. It should be recalled, though, that the victim did tell the SANE

nurse what had occurred and that she reported this prior to speaking to the investigator. It should also be recalled that law enforcement did not interview the victim for some time after the victim's initial report to the nurse.

It is not uncommon to find that child victims are reticent to tell adults, particularly those who are unknown to them, of sexual crimes committed against them. It is not uncommon to find that these victims initially lie about what was done to them. *Ross v. State*, 2009-KA-00796-COA, Slip Op. at 5 (Miss. Ct. App., Decided 15 June 2010, Not Yet officially Reported). In the case at bar, while it may be that the victim did initially lie to the investigator, she did report what the Appellant had done to the nurse, and, when she told the police officer the truth, that statement was fully consistent with what she told the nurse. Her testimony at trial was consistent with these reports. It was a matter for the jury to consider, in considering what weight and credibility to give to the victim's testimony. The fact that the victim did not tell the patrol officer of what the Appellant had done some two weeks before is not so surprising: at the time, the victim's mother was unaware at the time of what had occurred two weeks prior, and the purpose of meeting with the patrol officer was to report what the Appellant had done on the night of 27 November 2007.

The Appellant then tells this Court that the victim's testimony was contradicted by the physical facts of the case. According to the Appellant, the bathroom door was not equipped with a lock; thus, the child was wrong about having locked the door. The Court is further told that the child could not have physically resisted the Appellant, if the Appellant was indeed attempting to force the door. It is true that there was testimony that there was not, in fact, a lock on the bathroom door and that the victim testified that she locked herself inside the bathroom. However, this discrepancy seems to us a piddling one in view of the fact that there was no discrepancy concerning the fact that the victim did take sanctuary in the bathroom and the in view of the fact that she was in that

bathroom when her mother returned home, a fact that certainly corroborated the victim's testimony. While it may be supposed that the child would not have been able to physically resist a grown and reasonably fit man, had he brought his strength full to bear against the door, it is evident that he did not do so. There was no indication that the door was in any way damaged, and there was no testimony that he forced his way into the bathroom. That the Appellant exerted some force, made some attempt, does not require the conclusion that he used all the force he might have used. His attempt in this respect was consistent with the amount of physical force he used when he grabbed the child.

The Appellant would have the Court suppose that the victim's testimony in this regard was fabricated on the notion that the child would not have been reasonably expected to have been able to successfully physically resist the Appellant. Yet, there is no basis to conclude that, because the Appellant did not utilize all of his strength, he used none of it.

In cases involving children, one simply cannot reasonably expect the sort of detailed accuracy as to subordinate points of fact as one would expect of an adult. Nor can one reasonably expect a child to have the kind of maturity one would expect of an adult when it comes to discussing a sexual crime committed against him. And, of course, given the nature of this sort of crime, it is the rule rather than the exception that the only witnesses will be the victim and the accused, where the accused testifies. Corroborating evidence in the nature of DNA or biological evidence will not always be available, either because of the way in which the crime was committed or on account of the passage of time. In the case at bar, the jury heard the testimony and observed the victim. The jury was aware of what the victim told the law enforcement officers and what she told the nurse. The victim's account was not impeached and was not contradicted in material particulars. The testimony was sufficient to permit the jury to find guilt.

With respect to the Appellant's contention that the trial court erred in refusing to grant a new trial, we note, first of all, that there was no evidence contrary to the verdict, much less such evidence that might be said to be overwhelmingly so.

Beyond this, there is nothing to show that the verdict might be reasonably thought to be an unconscionable one. The victim testified as to the Appellant's act against her, and that testimony was fully sufficient upon which to permit the jury to found its verdict, as we have said above. There was no testimony or evidence to controvert the victim's account; nor was her testimony impeached in any material way. There is simply nothing shown here to demonstrate that the trial court abused its discretion in refusing a new trial to the Appellant.

Finally, we note that the Appellant suggests that this Court may find such an abuse for no better or other reason than a mere disagreement by it with the verdict. It is true enough that language exists in some decisions that seemingly would suggest that a mere disagreement by the Court with a verdict reached by a jury is a sufficient basis upon which to find error on the part of the convicting court in refusing a new trial, and, predictably enough, this language has been wrenched from its context by some appellants. As noted in *Ross v. State*, *supra*, ". . . the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." *Ross*, Slip Op. at 10. A rule that a mere disagreement with a verdict would be sufficient to require a new trial would be a rule that would effectively reduce juries to merely advisory bodies. Yet, juries are more than an advisory body, and more than a simple disagreement must exist, and be shown to exist, in order to upset the judgment of a jury.

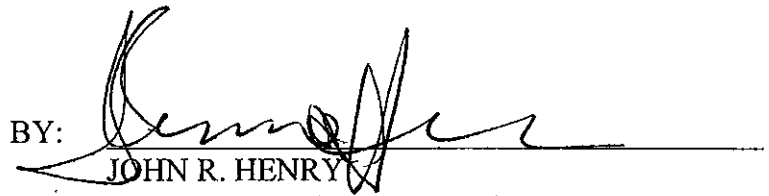
In the case at bar, it cannot be reasonably said that the evidence heavily preponderates against the verdict. In fact, there is no evidence set against the verdict. The trial court did not abuse its discretion in refusing a new trial.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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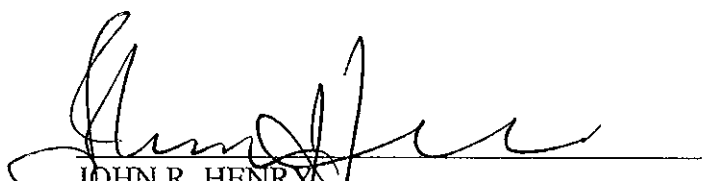
This the 24th day of September, 2010.



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