



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MANEY SIMMONS, JR.

FILED

APPELLANT

JUN 23 2010

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SUPREME COURT
COURT OF APPEALS

V.

NO. 2010-KA-0259-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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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.

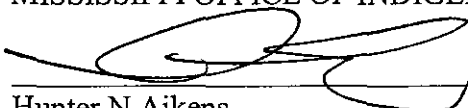
1. State of Mississippi
2. Maney Simmons, Jr., Appellant
3. Honorable Anthony Lawrence, III, District Attorney
4. Honorable Kathy King Jackson, Circuit Court Judge

This the 23rd day of June, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

- I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.**
- II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jackson County, Mississippi, and a judgment of conviction for sexual battery entered against Maney Simmons, Jr., following a jury trial, the Honorable Kathy King Jackson, Circuit Judge, presiding. (C.P. 77, 85, Tr. 287, R.E. 4-5). The trial court sentenced Simmons to thirty (30) years in the custody of the Mississippi Department of Corrections, with twenty-five (25) years to serve day-for-day, and the remaining five (5) years

suspended. (C.P. 85, Tr. 296-97, R.E. 5). The trial court denied Simmons's motion for J.N.O.V. or, in the alternative for a new trial. (C.P. 83-84, 96 Tr. 311, R.E. 6-8). Simmons now appeals to this honorable Court for relief.

STATEMENT OF THE FACTS

Manny Simmons Jr. ("Simmons") dated Kayesca Durr ("Durr") off and on for about ten years. (Tr. 165-67). Durr's children and Simmons had a good relationship; they regularly cooked out, took vacations, and celebrated holidays together. (Tr. 167-68, 190). According to Durr, on November 26, 2007, her son, her youngest daughter, ten-year-old K.D.,¹ and Simmons were at her house while she was at work, and K.D., called her and asked her to come home because Simmons was touching on her. (Tr. 169). When Durr arrived at her house, Simmons was sitting at the kitchen table, and Kandi was in the bathroom. Later that evening, Durr and Kandi went to the police station to report the incident. (Tr. 172). Durr testified that K.D. told her that Simmons was "touching on me," and she (K.D.) was in the bathroom. (Tr. 169-70). Durr left work, and when she arrived at her house Simmons was sitting at the kitchen table, and K.D. was in the bathroom. (Tr. 170). Durr asked Simmons what was going on, and he asked her what she was talking about. (Tr. 170). The two argued; and Durr told Simmons to leave, which he did. (Tr. 170-71).

Later that evening, Durr took K.D. to the police station. (Tr. 172). There, Officer David Richardson of the Moss Point Police Department interviewed K.D., and she told him that Simmons tried to get her to go into the bedroom with him; she refused; he grabbed her by the arm and/or waist; but she managed to escape, grab the phone, and lock herself in the bathroom and call her mother. (Tr. 62-63). She also told Officer Richardson that Simmons tried to force his way into the bathroom.

¹ Due to the sensitive nature of this case, the alleged victim's real name will not be used.

(Tr. 69). K.D. did not claim that Simmons performed any type of sexual act upon her or touched her privates. (Tr. 68-69).

The following day, Durr took K.D. to Singing River Hospital to be examined; on the way there K.D. told Durr that, when Simmons grabbed her the day before, he told her “we’re going to do what we (sic) been doing.” (Tr. 172). Durr asked K.D. what that was, and she said, “I don’t know.” (Tr. 172). At the hospital, Cynthia Horn, a SANE nurse (sexual assault nurse examiner) examined K.D. Horn testified that K.D. told her that she called her mother to come home because Simmons “tried to put his arms around my waist.” (Tr. 135). K.D. told Horn that Simmons did nothing with his penis; he never made her touch him; he never made any type of anal contact or penetration; and, he never inserted any “object” inside her. (Tr. 139-40). K.D. reported no pain or bleeding. (Tr. 140). According to Horn, K.D. told her that she sometimes woke up with her pants off and Simmons in her room, and, a couple weeks prior (in October), he put his hand in her pants and kissed her private part. (Tr. 135-37, 141-42). K.D. also told Horn that when she ran into the bathroom, she locked herself inside, and Simmons tried to get in. (Tr. 136, Ex. S-3).

Horn performed a physical exam, but found no injuries or evidence of abuse on K.D.’s body, including her genitals and arms and/or waist, where she indicated that Simmons grabbed her. (Tr. 149-156). Horn also collected two vulvar swabs, the results of which were provided to the Moss Point Police Department; however, the results of the swabs were not produced at trial and, therefore, remain unknown. (Tr. 119-20, 156-57).

Horn concluded that her findings and the medical exam were consistent with the history reported by K.D. (Tr. 159). However, because Horn discovered no physical evidence of abuse, her stated reason(s) for suspecting abuse consisted only of K.D.’s statements: “All I had was the history that the child gave me. . . .” (Tr. 157-59). To this end, Horn admitted that her findings from the

medical exam were likewise consistent with a child that had not been sexually abused at all. (Tr. 159). She further acknowledged that, on her report, she marked “can neither confirm nor negate sexual abuse” underneath the heading “interpretation of anal/genitalia findings,” and she admitted at trial that this was correct—she could neither confirm nor negate sexual abuse. (Tr. 163-64, Ex. D-4).

According to Durr, a police officer came to the hospital, took a report, and told her that she would put in the file. (Tr. 174). However, the Moss Point Police Office did not contact her about the case. (Tr. 174). Durr went to the police station several times, and the police told her that they were working on it. (Tr. 174). She also called and left messages, but the police did not call her back. (Tr. 174). Finally, Durr went to the police station and asked to speak to the chief. (Tr. 175). She explained why she was there, and the chief tried to locate the file but could not find it. (Tr. 175). Durr testified that the chief took her number and said she would call back but never did. (Tr. 175). So, Durr went back to the station, and the chief told her that the file did not have any documents related to Horn’s examination. (Tr. 175). Durr then went to the hospital and picked up Horn’s report and took it to the chief. (Tr. 85, 175-76, 179-80).

Finally, almost one year after the incident, Joycelyn Craig of the Moss Point Police Department was assigned to the case. (Tr. 73). Officer Craig conducted a video-taped interview of K.D., during which K.D. told the same story that she told Officer Richardson initially. (Tr. 99-101, 106-115, Ex. D-2, D-3). On the video, K.D. repeatedly denied that Simmons touched her or performed any type of sexual act on her. (Ex. D-2, D-3). On the video, Officer Craig specifically asked K.D. if Simmons ever felt on her, touched her, or licked her, and K.D. said, “no.” (Tr. 110, 112, 115, 122, Ex. D-2, D-3). Officer Craig also asked K.D. several times if she ever woke up and felt wet between her legs, and she responded “no” each time. (Tr. 115, Ex. D-2, D-3).

However, notwithstanding K.D.'s video-taped statement(s), Officer Craig claimed at trial that K.D. told her that Simmons performed oral sex on her three times; curiously, this alleged statement was contained in a written report prepared by Officer Craig on the day of the video interview. (Tr. 75-76, Ex. S-2). Officer Craig claimed that K.D. made this statement to her either before or after the video interview. (Tr. 108-111).

At trial, K.D. testified that on November 26, 2007, she, her brother, and Simmons were at Durr's house. (Tr. 189). She testified that Simmons sent her brother to the store, and, a few minutes later, told her "come on and do what we been doing (sic)." (Tr. 191). When asked what that was, K.D. responded that he had been touching/licking her in her private area, being her vaginal area. (Tr. 194-95). She stated that he licked her private area "a couple of weeks before," and it happened five or six times at night in her bedroom (Tr. 196-97). K.D. stated that this happened with her pajamas (shorts) on but pulled to the side. (Tr. 197-98).

According to K.D., Simmons grabbed her arm in the kitchen, and she "snatched away," ran to the restroom, and called Durr; she also testified that she called her mother three times. (Tr. 191-92, 217). She testified that Simmons was "pushing to get in;" however, she admitted that the bathroom that she retreated to did not have a lock on it, as she reported to Officers Richardson and Craig, and nurse Horn. (Tr. 193, 212-13). When asked why she told Officer Richardson and nurse Horn that she locked herself in the bathroom, K.D. claimed that she meant that she was pushing against it and Simmons was unable to overpower her and get in. (Tr. 213, 217).

K.D. testified that Simmons left the house a few minutes later, and she went into another bathroom, but he came back, and she ran into "the main bathroom again." (Tr. 194). K.D. recalled that Simmons left after Durr returned and the two argued for a little while. (Tr. 194).

At trial, the above-mentioned evidence was adduced during the State's case-in-chief, at the

conclusion of which, the defense moved for a directed verdict, which was denied, and then rested its case. After deliberation, the jury returned a verdict of guilty. (Tr. 287, C.P. 77, R.E. **).

SUMMARY OF THE ARGUMENT

The evidence was insufficient to support the verdict. There was no physical evidence to substantiate the allegation(s) that Simmons licked K.D.'s vagina, thus the State's case against Simmons rested on K.D.'s statements/testimony. However, as explained in more detail in the argument section, K.D.'s testimony was substantially impeached by her own prior inconsistent statements. Accordingly, the evidence was insufficient to support the verdict, and Simmons submits that he is entitled to have this Honorable Court reverse his conviction and sentence and render a judgement of acquittal in his favor.

Alternatively, should this Honorable Court determine that the evidence was not insufficient to support the verdict, Simmons submits that the verdict was against the overwhelming weight of the evidence, and he is entitled to have this Honorable Court reverse his conviction and sentence and remand this case for a new trial.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

The State presented insufficient evidence to support the jury's verdict that Simmons was guilty of sexual battery against K.D. In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that

“reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense.” *Id.* (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where the evidence “point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty[.]” *Id.*

There was no physical evidence to substantiate the allegation. To this end, Horn testified that she discovered no physical evidence of abuse, and she admitted that only reason for suspecting abuse was K.D.’s statement(s): “All I had was the history that the child gave me. . . .” (Tr. 157-59). Horn further admitted that the medical exam findings were consistent with a child that had *not* been sexually abused, and she acknowledged that, on her report, she marked “can neither confirm nor negate sexual abuse” underneath the heading “interpretation of anal/genitalia findings.” Significantly, Horn admitted at trial that this was in fact correct—she could neither confirm nor negate sexual abuse. (Tr. 159, 163-64, Ex. D-4). Accordingly, as there was no physical evidence and no eyewitness(es) other than the alleged victim, the State’s case rested on K.D.’s word.

The testimony of an alleged victim of a sex crime may be sufficient unless it “is substantially contradicted by other credible testimony or physical facts” and/or “it is [in]consistent with the circumstances.” *McKnight v. State*, 738 So. 2d 312, 314 (¶¶8-10) (Miss. Ct. App. 1999); see also, e.g., *Green v. State*, 887 So. 2d 840, 845-46 (¶13) Miss. Ct. App. 2004) (quoting *Goss v. State*, 465 So. 2d 1079, 1082 (Miss. 1985)); *Seigfried v. State*, 869 So. 2d 1040, 1043 (¶9) (Miss. Ct. App. 2003).

In the instant case, K.D.’s testimony was substantially contradicted by her own prior inconsistent statements and physical facts. Although she claimed at trial that Simmons touched and licked her privates, K.D. did not report that Simmons had ever performed any type of sexual act upon

her or touched her privates to Officer Richardson on the night of the November 26, 2007, incident. (Tr. 62-63, 68-69). Additionally, on the video-recorded interview between K.D. and Officer Craig, K.D. repeatedly and explicitly denied that Simmons ever touched her or performed any type of sexual act on her. (Tr. 110, 112, 115, 122, Ex. D-2, D-3). Thus, K.D.'s testimony was severely contradicted/impeached by her own prior statements.

Additionally, K.D.'s testimony was contradicted by the physical facts. In this regard, K.D. told both Officer Richardson and nurse Horn that she locked herself in the bathroom, and Simmons tried to force his way in. (Tr. 62-63, 69, 136, Ex. S-3). However, she admitted at trial that the bathroom that she retreated to did not have a lock on it. (Tr. 193, 212-13). When asked why she told Officer Richardson and nurse Horn that she locked herself in the bathroom, K.D. claimed, incredibly, that what she meant was that she (a ten-year-old girl) was pushing against the unlocked door and Simmons (a grown man) was unable to overpower her and get in. (Tr. 213, 217). Therefore, K.D.'s testimony rendered her accusations "exceedingly improbable and unreasonable." *See generally, Cole v. State*, 217 Miss. 779, 786-87, 65 So. 2d 262, 264-65 (Miss. 1953) (conviction reversed where the State's main witness was unreliable because testimony made the accusations "exceedingly improbable and unreasonable.").

In sum, there was no physical evidence and no eyewitness other than K.D.; therefore, the State's case rested on her testimony. K.D.'s testimony was substantially contradicted by her very own prior inconsistent statements and the physical facts, and it was inconsistent with the circumstances she claimed to have occurred. Accordingly, Simmons submits that the evidence was insufficient to support the verdict, and he is entitled to have this Honorable Court reverse his conviction and sentence and render a judgement of acquittal in his favor.

II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Should this Honorable Court determine that the State presented sufficient evidence to support the verdict, Simmons argues, alternatively, that the verdict was against the overwhelming weight of the evidence.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed “when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Bush*, 895 So. 2d at 844 (§18). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court “sits as a hypothetical thirteenth juror.” *Lamar v. State*, 983 So. 2d 364, 367 (§5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (§18)). “If, in this position, the Court disagrees with the verdict of the jury, ‘the proper remedy is to grant a new trial.’” *Id.*

For the reasons identified and argued above pertaining to the sufficiency of the evidence, Simmons submits that the verdict was against the overwhelming weight of the evidence, and allowing it to stand on such weak evidence would sanction an unconscionable injustice. Accordingly, Simmons submits that he is entitled to have this Honorable Court reverse his conviction and sentence and remand this case for a new trial.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Simmons respectfully requests that this honorable Court reverse the conviction and sentence entered in the trial court and render a judgment of acquittal in his favor or, alternatively, reverse his conviction and sentence and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

A handwritten signature in black ink, appearing to read 'Hunter N Aikens', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Maney Simmons, Jr., 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 23rd day of June, 2010.



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