IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00649 COA

LEON FORSHEE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. FRANK ALLISON RUSSELL

COURT FROM WHICH APPEALED: MONROE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

JAMES O. FORD

JAMES D. MINOR

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: ROBERT COLEMAN ASST. D.A.

NATURE OF THE CASE: SEXUAL BATTERY

TRIAL COURT DISPOSITION: FOUND GUILTY AND SENTENCED TO TEN

YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

Leon Forshee was convicted of sexual battery and sentenced to ten years in prison by the Monroe County Circuit Court. He appeals challenging the weight and sufficiency of the evidence, as well as the trial court's exclusion of a witness's prior felony record. We affirm.

FACTS

On August 30, 1990, nineteen-year-old CS was in the Monroe County Jail under a civil commitment order awaiting transfer to Whitfield for testing. Her mother wanted her committed because she was suicidal.

At that time, Forshee was the jail administrator and, as such, was in complete control of the jail and all of its operations. Forshee asked CS and her cellmate, Ether, to assist in cleaning the jail. They agreed to help clean because this enabled them to leave their cell.

CS testified that she was asked to clean Forshee's office while Ether cleaned the nearby bathroom. While cleaning Forshee's office, CS told Forshee that Ether liked him. He responded that he would rather be set up with CS and implied that he would like to have sexual intercourse with her. He told CS that he had a condom. CS testified that she told Forshee she was not interested.

CS continued cleaning around the radio station and in the hall. While cleaning, CS saw David Fears, a trusty, and told him about Forshee's statements, and that the statements had upset her. CS asked Fears to stay up with her; however, he was tired and went to sleep. CS was dusting desks in a back office when Forshee found her. He complained to her of not being able to sleep. CS asked him why. Forshee responded with a gesture indicating that he was sexually aroused. Forshee asked CS if he could look at her naked. She refused. Whenever CS refused to allow Forshee to proceed with his illicit designs he would remind her that he was her jailor and had been good to her. As jail administrator, he reminded CS that he could be "easy on her or he could be hard on her." CS testified that she took this as a threat that she must comply or Forshee would use his position to make things "hard on her." Forshee persisted asking her to show herself until she lifted her shirt exposing herself. Forshee tried to touch her but she avoided him. CS testified that the jail administrator harassed her until she complied with his demand to be allowed to touch her vagina. Forshee told CS to lay down and have intercourse with him. She refused. Forshee then made her turn around and face the wall. He exposed his penis and asked her to touch it. Again she refused. Forshee had a condom on his penis. He then touched CS and had intercourse with her.

When asked why she did not resist or scream CS responded:

> I wanted to, but I was afraid to, because of him telling me that he could make it easy or hard on me. I was afraid that if I did holler that he might do something to hurt me. And

> there wasn't nothing that I [could] do about it because I was going to Whitfield anyway and I was considered crazy.

After Forshee was finished, CS saw him put the used condom in his pocket. He told her not to tell anyone what had happened. When CS returned to her cell, she was upset and scared, but Ether convinced CS to tell her what happened.

The next day CS told Sheriff Frank Patterson what had happened. The sheriff took CS to see Dr. Coghlin who performed a rape kit on her, which found no semen. Dr. Coghlin opined that if Forshee wore a condom there would be no semen. Thus, the rape kit proved inconclusive.

DISCUSSION

> I. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT

Where a defendant asserts that evidence was insufficient for a conviction and thereby challenges the legal sufficiency of that evidence, the authority of an appellate court to interfere with the jury's verdict is quite limited. *Williams v. State*, 667 So. 2d 15, 23 (Miss. 1996) (citation omitted). "The standard for reviewing a denial of a directed verdict and a peremptory instruction is the same as that for a denial of a judgment notwithstanding the verdict." *Tait v. State*, 669 So. 2d 85, 88 (Miss. 1996) (citing *Alford v. State*, 656 So. 2d 1186, 1189 (Miss. 1995)). "On appeal, this Court reviews the lower court's ruling when the legal sufficiency of the evidence was last challenged." *Id.* (citing *Smith v. State*, 646 So. 2d 538, 542 (Miss. 1994)); *see also McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) (sufficiency challenges require consideration of the evidence before the court when made, so that the appellate court must review the ruling on the last occasion the challenge was made at the trial level). This occurred when the trial court overruled Forshee's motion for j.n.o.v. The Mississippi Supreme Court has stated that the standard of review regarding a challenge to the sufficiency of the evidence is well established:

> [T]he [sufficiency of the evidence] as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [the defendant's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Jones v. State, 669 So. 2d 1383, 1388 (Miss. 1995) (quoting *McClain*, 625 So. 2d at 778); *see also Tait*, 669 So. 2d at 88; *Williams*, 667 So. 2d at 23.

On a charge of sexual battery, the prosecution faces the burden of proving (1) venue; (2) sexual penetration; and (3) the absence of consent. Miss. Code Ann. § 97-3-95(A) (1)(1972). In his brief,

Forshee limits his challenge to the sufficiency of the evidence that CS did not consent. Here, CS testified directly that she did not consent. In cases involving sexual battery by intimidation, the only evidence of a lack of consent is usually the word of the victim. The Mississippi Supreme Court has held that the testimony of the victim alone, even though contradicted by the testimony of the defendant, is legally sufficient to support a conviction of rape. *Christian v. State*, 456 So. 2d 729, 734 (Miss. 1984).

In addition to CS's testimony, there is other reliable evidence that Forshee had sexual intercourse with CS by threat and not consent. Indirect evidence of a threat to the victim may prove a lack of consent. In *Bright v. State*, 916 P.2d 922, 926 (Wash. 1996), the Supreme Court of Washington held that a jury's verdict finding the defendant guilty of rape was sufficiently supported by evidence of an implied threat by a custodial officer to a female prisoner due to his position. In *State v. Bright*, officer Bright, not aptly named, was transferring a female prisoner from a mixed population prison to an exclusively female prison in his squad car. En route to the women's prison, officer Bright stopped his car and performed two "sex acts" on the prisoner. There was no testimony or physical evidence that the prisoner was compelled by force or resisted officer Bright's actions. However, the Washington Supreme Court upheld the jury verdict based on the implied threat of a police officer in whose custody the victim was held. *Id.* The court held that the officer's authority as a police officer, coupled with the fact that the prisoner was in his patrol car, that he was of greater strength than the prisoner, that he was armed (though he made no use of his weapons), and that he was in his squad car in a remote location all combined to create an implied threat to the prisoner's safety.

Forshee's position as jail administrator, his comparative strength, and his control over the jail were legally sufficient to imply a threat to CS. Forshee was the jail administrator. As such he controlled the inmates and was responsible for providing the prisoners' basic needs including food, water, medication, use of bathroom and shower facilities. On the night in question there were no other officers on duty at the jail, and there was no one to stop Forshee from treating CS or any other inmate as he pleased. Forshee had access to deadly weapons as well as the ability to legally confine CS to her cell. He was much larger and stronger than CS. CS was in the Monroe County Jail where Forshee was in complete control of her life. Finally, CS testified Forshee threatened her directly by saying that he could make it easy on her or he could make it hard on her, a threat which he could easily carry out. Reasonable jurors could conclude that Forshee's statement combined with his position and control over CS constituted a threat.

Whether the testimony of either CS or Forshee was worthy of belief was a matter for the jury to decide, as well as the proper inferences to be drawn from the existing circumstances. *Jones*, 669 So. 2d at 1388. The Mississippi Supreme Court has held that the testimony of the victim alone is legally sufficient to support a conviction of rape. *Christian*, 456 So. 2d at 729. Here we have both CS's testimony and other credible evidence that Forshee used his position to force CS into sexual intercourse. Even CS's testimony alone is sufficient evidence of lack of consent to support the jury's verdict. *Id.* Thus, we find the jury's verdict is undergirded with legally sufficient evidence.

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

Forshee claims the jury's verdict was against the overwhelming weight of the evidence. A challenge to the weight of the evidence via a motion for a new trial implicates the trial court's sound discretion. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for an abuse of discretion, and on review we accept as true all evidence favorable to the State. *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987). The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses. *Lewis v. State,* 580 So. 2d 1279, 1288 (Miss. 1991); *Benson v. State,* 551 So. 2d 188, 191 (Miss. 1989); *Dixon v. State,* 519 So. 2d 1226, 1228 (Miss. 1988); *Temple v. State,* 498 So. 2d 379, 382 (Miss. 1986).

Viewing the evidence in a light most favorable to the verdict, we cannot say that the jury reached the wrong verdict. The trial court did not abuse its discretion in denying Jones's motion for a new trial. We are not persuaded "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." *Wetz*, 503 So. 2d at 812; *Temple*, 498 So. 2d at 382; *Groseclose v. State,* 440 So. 2d 297, 300 (Miss. 1983).

III. WHETHER THE TRIAL COURT ERRED IN EXCLUDING WITNESS FEAR'S PRIOR CONVICTIONS

Forshee contends that the trial court committed reversible error when it ruled that Fear's (the inmate trusty who testified for the State) prior convictions for rape and kidnaping were not admissible under Mississippi Rule of Evidence 609(a)(1). We disagree. Under Rule 609, the party attempting to introduce the witness's prior convictions "must make a prima facie showing 'that the conduct giving rise to the prior conviction . . . bears upon the witness's propensity for truthfulness before the prior conviction may be admitted to impeach under M.R.E. 609(a)(1)." *Johnson v. State,* 666 So. 2d 499, 502 (Miss. 1995) (citing *Tillman v. State*, 606 1103, 1107 (Miss. 1992)). Absent a prima facie showing that the prior conviction has some probative value as to the witness's truthfulness, the trial court under Rule 609 may not permit the prior convictions admitted into evidence. *Id.* at 503, 505. The record is devoid of any attempt by Forshee's counsel to make this showing. We conclude that this assertion of error is without merit. It is the appellant's burden "to justify his arguments of error with a proper record." *American Fire Protection v. Lewis,* 653 So. 2d 1387, 1390 (Miss. 1995).

For the foregoing reasons the judgment of the trial court is affirmed.

THE JUDGMENT OF CONVICTION OF THE MONROE COUNTY CIRCUIT COURT OF SEXUAL BATTERY AND SENTENCE OF TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER,COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.