IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-00606 COA

(Consolidated With NO. 92-KA-00909 COA)

DAVID GASTON MARSHALL

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. JAMES E. THOMAS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT:

JIM DAVIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: SANDRA McADAMS GILL

NATURE OF THE CASE: CRIMINAL - TWO COUNTS OF SEXUAL BATTERY AND ONE COUNT KIDNAPING

TRIAL COURT DISPOSITION: GUILTY ON ALL COUNTS - FOR EACH COUNT OF SEXUAL BATTERY, DEFENDANT SENTENCED TO SERVE THIRTY YEARS

INCARCERATION, SENTENCES TO RUN CONCURRENTLY; FOR THE COUNT OF KIDNAPING, DEFENDANT SENTENCED TO TWENTY-FIVE YEARS INCARCERATION, SENTENCE TO RUN CONSECUTIVELY TO THE SEXUAL BATTERY SENTENCES

BEFORE BRIDGES, P.J., BARBER, AND McMILLIN, JJ.

BARBER, J., FOR THE COURT:

David G. Marshall appeals from his convictions on two counts of sexual battery and one count of kidnaping. For the sexual battery convictions, Marshall received two concurrent prison sentences of thirty years duration. For the kidnaping conviction, Marshall received a twenty-five year prison sentence, to be served consecutively to the two thirty-year sentences for sexual battery. Finding all the grounds that Marshall raises in his appeal are without merit, we affirm.

I. FACTS

On January 19, 1991, the victim, a fourteen-year-old boy, was walking home from an amusement arcade located several blocks from his home. The time was approximately 10:15 p.m. A truck that was being driven by Marshall, a twenty-two-year-old man, pulled up near the victim. Marshall offered the victim a ride home. As Marshall's truck reached the victim's house, Marshall did not stop to let the victim out of the truck. Instead, Marshall drove past the house. Marshall then drove his truck around the block, passed the victim's residence a second time, and drove down to a secluded trail, surrounded by woods.

According to the victim's version of events, when the truck passed his house, he told Marshall that he needed to get home. Marshall refused to stop his truck so that the victim could be let off. Marshall drove on, and, in response to the victim's protestations, Marshall told the boy that he still had some time before he needed to get home. Marshall then drove his truck to the secluded trail. Once the truck had stopped, Marshall exited the driver's side of the truck, came around to the passenger side, and opened the victim's door. At that point, Marshall blocked off the victim's means of escape, allowing only enough room for the victim to stand up on the side board. Marshall then told the victim to pull down his pants while he simultaneously made a threatening gesture with his fist. After Marshall had had enough of the boy's refusals, Marshall unbuttoned and unzipped the victim's pants and performed fellatio on him. Marshall eventually stopped what he was doing, but, by way of continued intimidation, Marshall forced the victim to perform fellatio on him. After Marshall finished, he dropped the boy off at the boy's home and warned him not to tell anyone about what had happened.

According to Marshall's version of events, there had been at least three previous occasions when Marshall and the boy had gotten together and had engaged in consensual sexual relations. On the night in question, the boy approached Marshall about getting a ride home. Once the boy got into the truck, the two males drove around. As Marshall passed the boy's house, the boy informed Marshall that his parents were no longer awake. The two of them then drove to the secluded place and began drinking alcohol. As they engaged in conversation, the boy suggested that they engage in oral sex as they had done at other times in the past. Marshall accepted his offer, and the two males took turns

performing oral sex on one another. After Marshall and the boy were finished, Marshall drove the boy to the boy's house and told the boy that they must stop engaging in such immoral sexual practices and that the boy should keep their encounters a secret.

At trial, it was undisputed that around midnight on the night of January 19, 1991, after the boy entered his home, the his older brother and mother discovered him in an emotionally distraught state and he was crying. The boy told his family members that he had been molested by Marshall. The boy's mother then called the Harrison County Sheriff's Department, which subsequently arrested Marshall.

On August 15, 1991, a Harrison County grand jury returned a three-count indictment against Marshall. The first and second counts were for the crime of sexual battery under section 97-3-95 of the Mississippi Code. The third count was for the crime of kidnaping under section 97-3-53 of the Mississippi Code. Marshall made a petition for the trial court to appoint counsel for him. The trial court granted the petition, and Marshall was subsequently represented by Tom Sumrall.

Pursuant to a psychiatric evaluation, the trial court determined that Marshall was mentally competent to stand trial. At trial, Marshall's sole defense to the charges was consent. Specifically, Marshall did not deny that he and the victim had gotten together or that they had engaged in sexual relations. Rather, Marshall denied that he had forced the victim to do anything against the victim's will.

Trial was held on April 28-29, 1992. At its conclusion, the jury found Marshall guilty on all three counts. The court then sentenced Marshall to two concurrent, thirty-year terms of incarceration for the sexual battery convictions. For the crime of kidnaping, Marshall was sentenced to a twenty-five year term of incarceration to run consecutively to the two thirty-year sentences for the sexual battery convictions. Marshall then filed a motion for a new trial, which was overruled by the trial court. Marshall now appeals.

II. DISCUSSION

A) Was Marshall Deprived of the Effective Assistance of Counsel?

The trial court appointed Tom Sumrall to represent Marshall. On appeal, Marshall makes numerous allegations in an attempt to persuade us that Sumrall's performance was deficient such that Marshall was deprived of his Sixth Amendment right to the effective assistance of counsel.

Before we turn to each of these allegations, we think it appropriate to set forth the well-established standards governing ineffective assistance of counsel claims. With respect to such claims, the Mississippi Supreme Court has stated:

> In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), the United States Supreme Court established a two-prong test, required to prove the ineffective assistance of counsel: the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense . . . . The burden of proof then rests with the movant . . . . Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." . . . In short, defense counsel is presumed competent. Under the

> second prong, even if counsel's conduct is "professionally unreasonable," the judgment stands "if the error had no effect on the judgment." . . . Consequently, *the movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.* A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Handley v. State, 574 So. 2d 671, 683 (Miss. 1990) (quoting *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988)) (emphasis added). Even if the attorney's conduct is professionally unreasonable, the judgment will still stand if the error had no effect on the judgment. *Johns v. State*, 592 So. 2d 86, 91 (Miss. 1991).

Applying the two-pronged *Strickland* standard, we find that all of Marshall's assertions of defective performance are without merit and therefore fail.

(i) Did Marshall's Counsel Err in Allowing Marshall to Be Examined by the Court as to the Specifics of His Defense?

After the twelve members of the jury were empaneled, but before the trial actually began, the judge held a hearing, outside of the presence of the jury, on Marshall's motion to allow the defense to present evidence pertaining to the history of past sexual encounters between Marshall and the victim. During the course of this hearing, Marshall took the stand and testified as to the specific details of this history. Marshall was also questioned by the court and cross-examined by the prosecution. Marshall contends that Sumrall's performance was deficient because Sumrall did not first file a pre-trial motion on this issue such that Marshall would not have had to testify in open court to the details of his consent defense. Marshall further contends that Sumrall failed him because, before Marshall took the stand, Sumrall did not advise Marshall of his constitutional privileges against self-incrimination. We find both of these contentions without merit.

Rule 412 of the Mississippi Rules of Evidence allows a defendant to admit evidence of:

> Past sexual behavior with the accused . . . offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the sexual offense is alleged . . . .

M.R.E. 412(b)(2)(B). The procedure to be followed in such instances is set forth in subdivision (c):

> If the person accused of committing a sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior or evidence of past false allegations made by the alleged victim, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, *except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case*.

M.R.E. 412(c)(1) (emphasis added).

The record discloses that the reason that the motion to delve into past sexual history was presented on the morning that trial was set to begin was that Sumrall had just discovered that Robert Percevel, Marshall's friend, would be available to testify as to past history of encounters between Marshall and the boy. In view of the fact that Rule 412(c)(1) makes it permissible for a motion to delve into past sexual history to be made at a time later than fifteen days before trial if the court determines that newly discovered exists, we hold that there was no error in Sumrall making the motion on the morning of trial.

We also find no merit to the contention that Sumrall's failure to advise Marshall of the constitutional protections against self-incrimination prejudiced Marshall as he testified in connection with the motion to present evidence of past sexual encounters. Marshall asserts that because he had not been warned, he "took the stand and gave detailed facts, under oath, concerning the charges against him, and the specific facts concerning these charges, and made direct admission under oath that he was guilty of . . . performing oral sex on the victim." While these assertions are true, we perceive no prejudice flowing to Marshall as a result of his taking the stand and making the admissions and statements that he made. During trial, Marshall took the stand in his own defense and gave substantially the same testimony in front of the jury that he gave during the hearing on the motion to present evidence of past sexual history. Marshall even concedes that "the general rule is that a Defendant's statements made during pre-trial Motions cannot be used to impeach him at an upcoming trial." Further, Marshall points to nothing in the record showing that the prosecution used anything that he said during the course of the pre-trial hearing against him during the actual trial. In short, we see no reasonable probability that, had Marshall not testified in connection with the hearing on the pre-trial motion as to the essentials of his consent defense, that the final outcome of the trial would have been any different.

Marshall's only remaining contention is he was prejudiced by testifying in connection with the motion because, by doing so, he was able to forewarn the prosecution by putting it on notice as to what the substance of his testimony and defense would be. Marshall contends that this gave the prosecution an unfair advantage during trial. He makes this contention, however, without specifically showing what unfair advantage the prosecution gained by being privy to this testimony. Without having the benefit of this explanation, we again cannot fathom how the ultimate outcome of the trial would have been any different had Marshall not testified at the pre-trial hearing. Put more succinctly, Marshall has failed to demonstrate that but for counsel's failure to advise him of his constitutional rights, the jury would not have convicted him. Accordingly, we find this contention without merit.

(ii) Was Counsel Deficient in Not Meeting With Marshall for the Three Weeks Prior to Trial?

Marshall contends that his counsel was deficient in not meeting with him during the three weeks preceding the trial. Assuming for the sake of argument the truth of this assertion, Marshall fails to persuade us how things would have been different for him had Sumrall met with him during this time. The closest that he comes to doing so is to argue that had Sumrall met with him earlier, Sumrall would have been apprised of the fact that Robert Percevel would be available to testify as to the history of past sexual encounters between Marshall and the boy at an earlier date. Marshall argues further that had Sumrall been apprised of this knowledge sooner, there would have been no need for

the trial court to hold a pre-trial hearing such that Marshall would have had to testify as to the details of the consent defense that he planned to present in front of the jury.

We find this contention without merit. As we have already discussed, we perceive no way in which the outcome of Marshall's trial would have been different had he not testified at the pre-trial hearing in connection with the motion to admit evidence of the past sexual history between Marshall and the victim. Because Marshall has failed to show sufficient prejudice as a result of his counsel's not meeting with him earlier, we find that this contention also fails.

(iii) Was Marshall's Counsel Derelict in Preparing a Defense?

Marshall contends that on the day that the trial began, Sumrall "stated . . . that he did not know exactly what defense he would go with at trial, but admitted . . . he was ready for trial." In essence, Marshall contends that Sumrall was derelict in his duty to prepare a defense. We find this contention without merit.

While the record indicates that Sumrall's strategy may have changed at a very late date as a result of Marshall's *own decision* to change his defense from one in which Marshall completely denied that he had ever had sexual contact with the victim to one in which he admitted the sexual contact but claimed that it was consensual, nothing on the record indicates that Sumrall did not effectively follow through with the consent defense. Indeed, the record discloses that Marshall's counsel called two witnesses, Marshall and Percevel, who offered testimony supporting the conclusion that Marshall and the victim had known each other and had engaged in consensual sexual relations prior to the night of January 19, 1991. Furthermore, Sumrall made a clear closing argument to the effect that the Marshall's and Percevel's testimonies raised significant doubts that the victim was telling the truth about not ever having had a sexual encounter with Marshall prior to the night of January 19, 1991, and about not having consented to the sexual acts. Most importantly, Marshall fails to inform us to exactly what facts or evidence Sumrall missed as a result of his supposedly being unprepared. We are unable, therefore, to conclude that the outcome of the trial would have been any different had Sumrall done things differently. Accordingly, we find that Marshall has not established that he was prejudiced by Sumrall's alleged lack of preparation.

iv) Did Counsel Fail in Not Moving to Suppress Evidence of Certain Out-of-Court Statements Marshall Made After He Invoked His Miranda Right to Counsel?

On January 22, 1991, while Marshall was in custody after he had been arrested by the police, Marshall gave a tape-recorded statement to Investigator Glenn LaPrairie and Deputy Malcolm Alexander of the Harrison County Sheriff's Department. In this statement, Marshall completely denied that he and the boy had sex or that he transported the boy to the secluded area against his will. The tape recording of this interview was played for the jury at trial.

On August 23, 1991, Marshall petitioned the trial court to appoint an attorney to represent him. On August 26, 1991, the court granted Marshall's request and appointed Sumrall. Subsequently, on September 5, 1991, Marshall gave a statement to Officer Robby Cox of the Harrison County Sheriff's Department without Sumrall being present. Cox testified that Marshall had told him that he

wanted to get things "out in the open and get it over with." Cox testified that Marshall then admitted molesting the boy.

Marshall contends that Sumrall failed to move to suppress evidence of the two out-of-court statements made by Marshall to law enforcement authorities. Marshall argues that his attorney should have made such motions because the out-of-court statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny. Marshall contends that as a result of this failure to move to suppress, the prosecution was allowed to introduce the out-of-court statements to impeach Marshall's credibility. Marshall argues further that, because the case essentially turned on whether the jury believed Marshall's or the boy's versions of events, this impeachment was the factor that tipped the scales in favor of the prosecution.

Miranda holds that when an individual is taken into custody and is subjected to questioning, procedural safeguards must be employed in order to protect the individual's Fifth Amendment privilege against self-incrimination. *Miranda*, 384 U.S. at 478-79. These procedural safeguards usually take the form of warnings to the suspect advising him of his constitutional rights to remain silent and to have an attorney represent him. Absent such warnings, any self-incriminating statement made by the defendant is inadmissable against the defendant in the prosecution's case-in-chief. Further, once the warnings are given and the suspect invokes either his right to remain silent or his right to counsel, all interrogation must cease.

Notwithstanding these rules, *Miranda* also provides that "[a]fter such warnings have been given, and such opportunity afforded . . . , the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.* at 479. Any "statement given freely and voluntarily without any compelling influences is of course, admissible in evidence." *Id.* at 478.

We find Marshall's contentions regarding the failure to make a motion to suppress without merit. Bearing in mind that the second prong of *Strickland* requires that the defendant show a reasonable probability that, but for counsel's inaction, the outcome would have been different, we find that Marshall has failed to persuade us that any motion to suppress based upon alleged violations of *Miranda* would have succeeded. Quite simply, the transcript from the tape-recorded interview between Marshall and Officers LaPrairie and Alexander shows that Marshall acknowledged that he was given his *Miranda* warnings, that he understood his rights, and that he nevertheless chose to speak to the police. With respect to the confession that Marshall made to Deputy Cox, Cox testified at trial that after counsel had been appointed for Marshall, Marshall voluntarily initiated contact with Cox and that Marshall waived his rights to remain silent and to have his attorney present, *even though Cox reminded him of these rights before the interview began.* In short, the record provides ample evidence that neither of Marshall's out-of-court statements were obtained in violation of *Miranda,* that they were both obtained after warnings were given, and that Marshall freely and voluntarily waived his rights. Any contention, therefore, that Sumrall should have moved to suppress the out-of-court statements fails, for there would have been no reasonable probability that such a motion would have succeeded.

(v) Was Counsel's Performance Defective Because He Did Not Make an Opening Statement?

At trial, Marshall's counsel did not make an opening statement. Marshall asserts that this failure prejudiced him because Marshall's consent defense was not sufficiently highlighted to the jury. We find this contention without merit.

The defense's case consisted of an attempt to prove that Marshall and the victim had sex a number of times prior to January 19, 1991, and that the victim consented to going with Marshall in his truck and to having sex with him on that date. Marshall testified that he had consensual sex with the victim on three previous occasions. Percevel testified that he had seen the victim at Marshall's house on a previous occasion and that he had seen the two of them disappear together into another room. Finally, Sumrall's closing argument clearly attempted to convince the jury that the sexual relations between Marshall and the victim were consensual. Certainly, the jury understood that the essence of Marshall's defense was that the sex between the victim and himself was consensual. While we do not think that it is usually the wisest course of action for defense counsel not to make an opening statement, we do not perceive the existence of a reasonable probability that, but for the failure to make an opening statement, the jury would have believed the defense's version of events instead of the version presented by the prosecution. Put another way, we perceive no prejudice of the type contemplated by the second prong of *Strickland* flowing from Sumrall's not making an opening statement. This contention is therefore without merit.

(vi) Was Counsel's Performance Deficient in that He Failed to Request a Lesser Included Offense Instruction?

In view of Marshall's admission at trial that he and the victim engaged in oral sex, and also in view of his defense that this sex was consensual, Marshall contends that his counsel failed to request a lesser included offense instruction under section 97-29-59 of the Mississippi Code. Specifically, Marshall contends that had his counsel asked for an instruction on the crime of "unnatural intercourse," then "a compromise verdict may have been reached, and he would not be facing a sentence nearly as long as he is currently serving." We find this contention without merit.

Section 97-29-59 of the Mississippi Code states:

> Unnatural Intercourse
>
> Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punishable by imprisonment in the penitentiary for a term of not more than ten years.

Miss. Code Ann. § 97-29-59 (1972).

Marshall's contentions to the contrary notwithstanding, he has failed to cite to us any Mississippi case authority construing section 97-29-59 as proscribing oral sex between two men. Put another way, Marshall has failed to cite any Mississippi cases that consider fellatio between two consenting men to be "unnatural intercourse." While he does cite *Contreras v. State*, 445 So. 2d 543 (Miss. 1984), as supporting this proposition, a close reading of that decision reveals that Contreras was convicted on charges of having mutual oral sex with his 19-year old daughter. Nothing in the decision

suggests that it stood for the proposition that oral sex between two *unrelated* members of the same sex was proscribed under the statute. While it may have been a novel and creative strategy for Sumrall to argue that an act of oral sex between two consenting males qualified as an act of unnatural intercourse under section 97-29-59, without more solid case authority showing that such conduct is truly a lesser included offense to the crime of sexual battery, we will not hold that Sumrall's performance was deficient.

(vii) Did Counsel Fail in Not Making a Motion to Quash the Multi-Count Indictment? Marshall contends that his counsel failed him in not moving the court to quash the multi-count indictment because multi-count indictments are "patently unconstitutional." In support of this proposition, Marshall argues that section 99-7-2 of the Mississippi Code, the provision authorizing a grand jury to return multi-count indictments, is an enactment by the legislature that infringes upon the exclusive judicial power of our supreme court to make rules of practice and procedure for our courts.

The Mississippi Supreme Court has stated that, although section 99-7-2 of the Mississippi Code addresses a matter of practice and procedure in criminal prosecutions, the statute enjoys enforceability "not because of any legal validity conferred . . . by the legislature," but because *the court has adopted and enforced the statute in prior proceedings before it*. *McCarty v. State*, 554 So. 2d 909, 914 (Miss. 1989). The only requirement that a multi-count indictment must meet in order to be valid is that the different counts charged must emerge from a common transaction or occurrence. *Id.* at 915. These pronouncements effectively mean section 99-7-2 should properly viewed as having been promulgated by the Mississippi Supreme Court. Any argument, therefore, that this Code provision infringes upon judicial authority fails. Had Sumrall attempted to further this particular challenge, he undoubtedly would have made no headway. We cannot therefore state that his performance was ineffective for his failure to put it forth.

(viii) Should Counsel Have Filed a Motion to Merge the Two Counts of Sexual Battery Into One Charge or Incident?

Marshall contends that his counsel failed him in not filing a motion to merge the two sexual battery counts into one incident. We disagree.

Section 97-3-95 of the Mississippi Code states in pertinent part:

> (1) A person is guilty of sexual battery if he or she engages in sexual penetration with (a) Another person without his or her consent . . . .

Miss. Code Ann. § 97-3-95 (1972). Section 97-3-97 of the Mississippi Code defines the term "sexual penetration" in section 97-3-95 as including:

> [C]unnilingus, fellatio, buggery or pederasty, penetration of the genital or anal openings of another person's body by any part of person's body, and insertion of any object into the genital or anal openings of another person's body.

Miss. Code Ann. § 97-3-97(a) (1972). Certainly, Marshall's performing oral sex on the victim without the victim's consent and Marshall's intimidating the victim into performing oral sex upon

Marshall without the victim's consent qualify as two separate and distinct acts of sexual battery. We therefore hold that Marshall's counsel did not fail in not filing a motion to merge the two sexual battery counts into one charge.

(ix) Did the "Cumulative Effect" of Counsel's Individual Deficiencies Deprive Marshall of Effective Representation?

Marshall contends that the "cumulative effect" Sumrall's failures resulted in Marshall being deprived of effective representation. However, as our previous discussion of each of the individual allegations of counsel's failures have demonstrated, at the most, counsel may have shown poor judgment in not meeting with Marshall for three weeks prior to trial and in not making an opening statement. Nonetheless, because we cannot say that these failures prejudiced Marshall, they do not add up to deficiencies sufficient to make out ineffective assistance of counsel claims under *Strickland*. The rest of Marshall's other contentions of deficient performance we have rejected as completely invalid. Accordingly, we find that this last contention also must fail.

B) Was the Evidence Sufficient to Convict Marshall for the Crime of Kidnaping?

Marshall contends that the trial court erred in not granting his directed verdict because there was insufficient evidence to support the kidnaping charge as it was stated in the indictment. Specifically, Marshall contends that there was no evidence presented by the prosecution supporting a finding that he forcibly seized and confined the boy against his will.

We note that at the conclusion of the prosecution's case, the defense moved for a directed verdict. In doing so, however, it did not state any specific ground upon which the motion was made. Thus, the issue of whether there was sufficient evidence to support the kidnaping charge was not specifically raised before the court. "A trial judge cannot be put in error on a matter which was not presented to him for decision." *Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991) (quoting *Pruett v. Thigpen*, 665 F. Supp. 1254, 1262 (N.D. Miss. 1986)). We therefore hold that the issue is waived and refuse to address it.

Even if such issue were not waived, there is sufficient evidence on the record to show that from the time Marshall refused the boy's request to stop and let him out of the truck at his home and Marshall's transporting the victim to the secluded area where the sexual batteries occurred, the boy was forcibly seized, confined, and imprisoned against his will, all pursuant to the indictment in this case. *See, e.g., Haymond v. State*, 478 So. 2d 297, 299 (Miss. 1985) (sexual assault victim "forcibly detained" when defendant took control of motor vehicle in which they were driving and refused to let victim out).

C) Did the Trial Court Err in Not Sustaining the Motion for Directed Verdict or New Trial on One of the Counts of Sexual Battery?

Marshall argues that the trial court erred in not granting a directed verdict on at least one of the sexual battery counts since both counts were in actuality one offense. We note, however, that in

making the motion for a directed verdict, Marshall's attorney did not state any specific ground upon which he was relying. Nor did he did not bring up this argument. As we stated earlier, when an issue is not presented to the trial court, we treat it as waived.

Even if we did not consider this issue waived, however, we would still find that it has no merit. As we have already mentioned within the context of our discussion of the alleged ineffective performance of Marshall's counsel, there was adequate evidence on the record to support two separate counts of sexual battery and we reject any notion that they should have been count as one offense.

D) Did the Trial Court Err in Not Instructing the Jury on the Lesser Included Offense of Unnatural Sexual Intercourse?

Marshall contends that the trial court should have instructed Marshall on the lesser included offense of unnatural sexual intercourse. However, defense counsel never requested such an instruction. The general rule is that no error may be predicated upon the trial court's refusal to give an instruction defense counsel never requested. *Williams v. State*, 566 So. 2d 469, 472 (Miss. 1990). Accordingly, this assignment of error is without merit.

E) Should the Multi-Count Indictment Against Marshall Be Declared Unconstitutional Because It Was Returned Pursuant to an Unconstitutional Legislative Provision?

Marshall asserts that his multi-count indictment should be considered unconstitutional since section 99-7-2 of the Mississippi Code infringes upon the exclusive domain of the Mississippi Supreme Court to make rules governing court practice and procedure. Apart from the fact that this issue was not presented to the trial court and is therefore deemed waived, we have already rejected the proposition that section 99-7-2 infringes upon the judicial authority of the Mississippi Supreme Court. Accordingly, this assignment of error also fails.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF COUNT I SEXUAL BATTERY AND SENTENCE OF THIRTY YEARS, COUNT II SEXUAL BATTERY AND SENTENCE OF THIRTY YEARS TO RUN CONCURRENTLY WITH SENTENCE IN COUNT I, AND COUNT III KIDNAPING AND SENTENCE OF TWENTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY TO THE SENTENCE IN COUNT I IS AFFIRMED. COSTS ARE ASSESSED TO HARRISON COUNTY.

FRAISER, C.J., BRIDGES, P.J., COLEMAN, DIAZ, KING, McMILLIN, AND

SOUTHWICK, JJ., CONCUR. THOMAS, P.J., AND PAYNE, J., NOT PARTICIPATING.