

IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00993 COA

VERNON H. THREADGILL A/K/A

VERNON HENRY THREADGILL 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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: ROBERT E. BUCK

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL-FELONY

TRIAL COURT DISPOSITION: CAPITAL RAPE: SENTENCED TO LIFE IN THE CUSTODY OF THE MDOC, AND ORDERED TO PAY ALL COURT COSTS \$192.50

MANDATE ISSUED: 8/19/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Vernon Threadgill was convicted in the Washington County Circuit Court of capital rape and sentenced to life in prison. He appeals, arguing the verdict was contrary to the overwhelming weight and sufficiency of the evidence, that the court erred in denying his motion for a mistrial, and that the court erred in its application of the tender years doctrine to the hearsay rule. We find no error and affirm.

FACTS

The Department of Human Services received a call concerning possible sexual abuse of a child, and investigated the allegations. A social worker interviewed the child, and after initially denying that she had been abused, the child admitted that her father had been having sex with her as long as she could remember, telling her that "that's what father's do." The child was examined by a physician, and the findings were consistent with past sexual activity.

Threadgill was charged with having carnal knowledge of a child under the age of fourteen, in violation of Section 97-3-65 of the Mississippi Code of 1972. At trial, the child and her mother testified that Threadgill sexually abused the child. The defendant testified and denied any such abuse. The jury agreed with the State's version of events, and found Threadgill guilty.

DISCUSSION

I. Weight of the Evidence

This court will not reverse a trial court's ruling based on the weight of the evidence unless it determines that, to allow the ruling to stand would be to sanction an unconscionable injustice. *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983).

In order to preserve the issue of weight of the evidence for appeal, the defendant must raise as a ground for his motion for new trial that the verdict is against the overwhelming weight of the

evidence. *Jackson v. State*, 423 So. 2d 129, 132 (Miss. 1982). Because Threadgill did not raise the issue in his motion for new trial, the issue is not properly before the court. Our review of the sufficiency of the evidence issue sets out the facts that amply support the verdict.

II. Sufficiency of the Evidence

This court will reverse a ruling based on insufficiency of the evidence only where the evidence is such that reasonable and fair minded jurors could only find the accused not guilty. *Harveston v. State*, 493 So. 2d 365, 372 (Miss. 1986).

There was testimony that Threadgill routinely had sexual relations with his daughter at a time when she was under the age of fourteen and when he was over eighteen. The girl stated her age, and Threadgill himself testified as to his age. To the extent the State failed to prove his age prior to resting their case, Threadgill's putting on testimony himself waives any insufficiency of the evidence that is rectified by his own case. *Wetz v. State*, 503 So. 2d 803, 807 n.3 (Miss. 1987). The physical examination of the child was consistent with past sexual activity. The child's mother and the child testified as to a specific instance when Threadgill got into bed with the mother and the child and tried to rape the child. She testified that she was about ten years old at the time. Though that incident may have been before the time period covered in the indictment, the girl also testified that after then, her father "two or three times a week or two or three times a month" would have sex with her. Though dates and time periods could have been stated more explicitly, the evidence was substantial that Threadgill's sexual relations with his daughter was ongoing until she was removed from the home by social workers.

Threadgill testified that he never raped the child and that the instance the mother and child testify relate never happened.

The jury heard the conflicting testimony and observed the witnesses. There was substantial evidence consistent with the verdict, evidence of such weight and quality that fairminded jurors in the exercise of impartial judgment could convict. *Bounds v. State*, 688 So. 2d 1362, 1372 (Miss. 1997). *III. Motion for Mistrial*

During the State's case in chief, a social worker for the Department of Human Services was asked how she first heard about the child in this case. The social worker replied as follows:

I was receiving calls on the day of January the 15th of 1993 when this female called there. She wanted to remain anonymous. But she had been told that her niece was being sexually abused by her father, and there was also a three-year old in the home that she suspected to be sexually abused.

Defense counsel objected and the trial court sustained the objection. Outside the presence of the jury, the defense moved for a mistrial, arguing that the witness had mentioned abuse against another child in violation of the court's earlier ruling on a motion in limine. After hearing argument, the trial court ruled as follows:

Well, it's not clear from the witness' testimony and whatever information she received about a three-year-old has anything to do with the defendant, so I'm going to deny the motion for mistrial.

The defense did not ask the court to instruct the jury to disregard the complained of testimony.

Where an objection is sustained and no request is made that the jury be told to disregard the objectionable matter, there is no error. *Marks v. State*, 532 So. 2d 976, 981 (Miss. 1988), citing *Simpson v. State*, 497 So. 2d 424, 431 (Miss. 1986). That is the case here.

IV. Tender Years Doctrine

Threadgill argues that the court erred in allowing a social worker to testify to statements made by the child regarding the sexual abuse by her father. He argues the testimony was inadmissible hearsay and not within the tender years exception of the evidentiary rules.

Mississippi Rule of Evidence 803(25) provides as follows:

A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child...testifies at the proceeding...

In a hearing outside the presence of the jury, the trial court made a finding on the record of substantial indicia of reliability. The child testified at the trial. The court complied with its obligations under Rule 803(25).

Threadgill makes more than just a procedural objection, but states that the girl was too old for the tender years doctrine to apply. There is no age stated in the rule itself. The comment to the rule indicates that some states specifically limit the exception to children under the age of fourteen. M.R.E. 803 (25), comment. The language of the rule, which applies to a "statement made by a child of tender years," makes evident that the court should focus on the age of the child when the out-of-court statement is made. M.R.E. 803(25). The United States Supreme Court pronouncements on the test to be applied for admissibility, also focus on events at the time of the statement. *Idaho v. Wright*, 497 U.S. 805, (1990).

At the time of the statements to the social worker, the victim was thirteen. Though she was fifteen by the date of trial, that is not the relevant date. Mississippi has no specific age limit for the tender years exception, but Threadgill is in error that the age of the victim here should be considered to be fifteen for purposes of the 803(25) analysis. We find no error in applying the tender years exception to the hearsay statements made to the social worker.

THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL RAPE AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WASHINGTON COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING,

HINKEBEIN, AND PAYNE, JJ., CONCUR.

KING, J., NOT PARTICIPATING.