

IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KP-00623 COA

THOMAS YARBRO A/K/A TOMMY YARBRO 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. JOHN B. TONEY

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: PRO SE

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: JOHN KITCHENS

NATURE OF THE CASE: CRIMINAL: RAPE OF A CHILD

TRIAL COURT DISPOSITION: CTS 1 & 2 RAPE OF A CHILD: 37 YRS EACH CT; CT 4 SEXUAL BATTERY: 30 YEARS; CT 6 RAPE OF STEPCHILD: 10 YEARS; SENTENCES RUN CONSECUTIVELY; TOTAL OF 114 YEARS

MOTION FOR REHEARING FILED: 8/27/97

MANDATE ISSUED: 11/12/97

BEFORE THOMAS, P.J., HERRING, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Thomas Yarbrow, pro se, appeals his conviction of rape of a child, sexual battery, and rape of a stepchild raising the following issues as error:

I. WHETHER APPELLANT'S TRIAL COUNSEL WAS PREJUDICIAL AND INEFFECTIVE.

II. WHETHER TRIAL COUNSEL SUBJECTED APPELLANT'S TRIAL TO A FUNDAMENTAL MISCARRIAGE OF JUSTICE IN ALLOWING EVIDENCE OF OTHER CRIMES WITHOUT TIMELY OBJECTION.

III. WHETHER APPELLANT'S TRIAL WAS PREJUDICIAL AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE DUE TO COUNSEL'S ALLOWANCE OF A PROSECUTION'S EXPERT WITNESS BEING IN COURT WHILE THE VICTIM TESTIFIED.

IV. WHETHER APPELLANT'S CONVICTION AND SENTENCE UNDER COUNT III IS CONSTITUTIONALLY INVALID AND COUNSEL PREJUDICIAL AND INEFFECTIVE CAUSING A FUNDAMENTAL MISCARRIAGE OF JUSTICE IN ALLOWING APPELLANT TO BE CONVICTED AND SENTENCED UNDER COUNT III OF THE INDICTMENT WHEN APPELLANT WAS NOT TRIED UNDER SAID COUNT IV FOR RAPE.

V. WHETHER THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE PRESENTED AT TRIAL IN COUNT I, II, III, IV, AND VI.

VI. WHETHER THE APPELLANT'S COUNSEL WAS INEFFECTIVE BY ALLOWING EVIDENCE OF OTHER CRIMES TO BE INTRODUCED INTO EVIDENCE WITHOUT A CONTINUING OBJECTION AND WITHOUT A REQUEST FOR AN ADEQUATE AND SUFFICIENT CURATIVE INSTRUCTION.

Supplemental Briefing by Yarbro:

VII. APPELLANT CLAIMS HE WAS UNFAIRLY SENTENCED, DUE TO THE DISPARITY IN APPELLANT SENTENCE AND SENTENCE RECEIVED IN THE INSTANT CAUSE.

As issues I, II, III, IV, and VI allege that Yarbro's trial counsel was constitutionally ineffective, we will combine these issues for review. Finding no error, we affirm.

FACTS

On March 28 and 29, 1995, a jury trial was conducted in the Rankin County Circuit Court against Thomas Yarbro. The indictment presented by the Rankin County grand jury alleged that on or about September 16, 1992, Yarbro committed the crime of rape of a child, M.D., a child under the age of fourteen, under Mississippi Code Annotated Section 97-3-65(1) (Rev. 1994). The second count of the indictment indicated that on or about September 16, 1993, Yarbro committed the crime of rape of a child, M.D., a female under the age of fourteen, under Mississippi Code Annotated 97-3-65(1) (Rev. 1994). The fourth count of the indictment alleged that Yarbro on or about May 1, 1993 until September 16, 1993, committed the crime of sexual battery against M.D., a child less than fourteen years of age, under Mississippi Code Annotated Section 97-3-95(c) (Rev. 1994). The last count in the indictment alleged that Yarbro committed the crime of rape of a stepchild, M.D., a child greater than the age of fourteen years, under Mississippi Code Annotated Section 97-5-41 (Rev. 1994).

The first person to testify for the State was M.D., the stepdaughter of Yarbro and the victim in this instance. On the day of the trial she was fifteen. She testified that Yarbro began sexually abusing her around the age of four, when Yarbro forced her to perform oral sex and have sexual intercourse with him. She stated that when she turned seven her stepfather started giving her drugs; first he gave her marijuana, and then later he started giving her crack cocaine and crystal methamphetamine. She testified that at first her mother would hold her arms down and her stepfather would inject the crystal methamphetamine. She eventually became addicted to drugs and testified that her stepfather would give her drugs in exchange for sexual favors.

M.D. testified about an incident where her mother, Martha Yarbro, her stepfather, and a man named Michael Cape were in the bedroom smoking crack cocaine. Yarbro called her to the back bedroom, and she smoked crack cocaine. She testified that her stepfather told her to perform oral sex on both her stepfather and Michael Cape and in exchange Yarbro promised to give her another "hit" of crack cocaine.

M.D. was taken away from her stepfather and mother in November of 1993, at the age of fourteen.

M.D. testified that she still loved her stepfather because he was the only father she had ever had and that she did not want to testify against him.

The second witness to testify for the State was Michael Cape. He testified that in the summer of 1993 he visited the home of Tommy and Martha Yarbrow. He stated that the three of them were smoking crack cocaine in the bedroom when Tommy Yarbrow called M.D. to come back to the bedroom. Cape testified that once M.D. got back to the bedroom, she performed oral sex on Tommy Yarbrow. He stated that instance was the first and only time he had seen Tommy Yarbrow and his stepdaughter engage in sexual activity.

The last person to testify for the State was Dr. Catherine Meeks Dixon, a psychologist. After being accepted as an expert in the field of child abuse, Dr. Dixon testified that she had performed a psychological evaluation on M.D. to help determine the appropriate placement of M.D. Dr. Dixon testified that M.D. was experiencing symptoms consistent with a child that had been sexually molested over a long period. Some of these symptoms included feelings of powerlessness, betrayal and stigma at the time of the abuse, and a sense of responsibility about the abuse. Dr. Dixon stated that M.D. had developed psychological defenses to enable her to cope with the ongoing trauma and that there were indicators that she may have developed dissociative features, if not multiple personality disorder. Dr. Dixon testified that M.D. was very depressed and was considered a risk for suicide.

Thomas Yarbrow testified in his own defense. Yarbrow denied any sexual involvement with his stepdaughter and testified that she was lying because she was addicted to drugs.

The jury returned a verdict of guilty on all four counts against Yarbrow.

ANALYSIS

I.

WAS YARBROW'S TRIAL COUNSEL CONSTITUTIONALLY INEFFECTIVE?

Yarbrow cites numerous reasons why his counsel was ineffective. The Mississippi Supreme Court adopted the *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984), standard for evaluating ineffective assistance of counsel claims. *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995). A defendant has to show that his attorney's performance was deficient, and that the deficiency was so substantial as to deprive the defendant of a fair trial. *Eakes*, 665 So. 2d at 872. We require that the defendant prove both elements. *Brown v. State*, 626 So. 2d 114, 115 (Miss. 1993); *Wilcher v. State*, 479 So. 2d 710, 713 (Miss. 1985). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689.

[T]here is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Schmitt v. State, 560 So. 2d 148, 154 (Miss. 1990) (quoting *Strickland*, 466 U.S. at 694).

Yarbro complains that he was denied effective assistance of counsel for several separate transgressions. In his assignments of error he cites five, but in his submitted brief, as far as this Court can tell, he complains of nine separate occasions in which his trial counsel was ineffective.

First, he argues that his attorney, Mr. Jimmie D. Marshall, was deficient in failing sufficiently and adequately to review the indictment and research the laws and facts concerning the indictment. Other than the bold allegation itself, Yarbro fails to cite to any instance where his counsel failed to research the law and how this was deficient. A defendant "must prove that, under the totality of the circumstances, prejudice resulted from a deficiency in [trial] counsel's performance." *Earley v. State*, 595 So. 2d 430, 433 (Miss. 1992). In addition, such deficiencies must be presented with specificity and detail. *Perkins v. State*, 487 So. 2d 791, 793 (Miss. 1986). Having failed this standard, we will not address this argument further.

Next, Yarbro charges that Mr. Marshall was ineffective because he failed to object timely to the prosecuting attorney's "prejudicial, irrelevant, harmful, and inflammatory" opening argument. During opening argument assistant district attorney, Ms. Rebecca Wooten, began her argument by making statements that she did not couch in terms of what the State felt they were going to prove. Ms. Wooten had barely gotten out half a page of trial transcript before Yarbro's attorney objected. The circuit court judge, the Honorable John B. Toney, sustained the objection. This Court cannot fathom how much sooner Yarbro expected his attorney to object to this opening argument. No prejudice flowed from Mr. Marshall's extremely timely objection. Yarbro's argument is wholly without merit.

Next, Yarbro suggests that his counsel's failure to give an opening statement demonstrates his overall ineffectiveness, yet provides no argument, authority, or evidence of how this alleged lapse on his counsel's part constituted ineffectiveness. The option for defense counsel to deliver an opening statement immediately after the State makes its opening statement is entirely discretionary. *See* URCCC 10.03. Few matters during a criminal trial could be more imbued with strategic connotations than the exercise of this option. Yarbro has failed to demonstrate that there is a reasonable probability that had counsel made an opening statement, the result of the trial would have been different. This was a matter of trial strategy and will not support an ineffective assistance of counsel claim.

In his fourth assignment of ineffective assistance of counsel argument, Yarbro states that Mr. Marshall was ineffective when he did not ask the trial court to poll the jury after its return from recess on March 29th, 1995 to determine whether the jury had read any newspapers or watched any television with information regarding the case. The trial of Yarbro started on March 28, 1995, and after all the arguments were heard, the jury retired for the day. However, before they left the circuit court judge admonished the jury not to try to get information from another source and asked that if the jurors read the paper to have someone else read it first to make sure that there was no information regarding Yarbro's trial. The judge also admonished the jury not to discuss the case with anyone else. The jury is presumed to follow the judge's instructions. *Walker v. State*, 473 So. 2d 435, 440 (Miss. 1985); *Fairley v. State*, 467 So. 2d 894, 899 (Miss. 1985). Accordingly, Yarbro's fourth assignment of error holds no merit.

Yarbro alleges in his fifth example that his trial attorney was ineffective in not asking for a continuous objection or asking for a curative instruction when evidence of other crimes was elicited through the trial. The other crimes, acts, or wrongs to which Yarbro refers, are his giving M.D. illegal drugs and

his two prior convictions: one for sale of marijuana and one for burglary of a store building.

First, we will address his other wrongs, specifically his giving illegal drugs to his minor stepdaughter. The Mississippi Supreme Court has stated that "[e]vidence of another offense is admissible when the offense is so clearly interrelated to the crime charged as to form a single transaction or closely related series of transactions." *Mackbee v. State*, 575 So. 2d 16, 27 (Miss. 1990) (citations omitted). "[T]he State has a 'legitimate interest in telling a rational and coherent story of what happened. . . .' Where substantially necessary to present to the jury 'the complete story of the crime' evidence or testimony may be given even though it may reveal or suggest other crimes." *Mackbee*, 575 So. 2d at 28 (quoting *Brown v. State*, 483 So. 2d 328, 330 (Miss. 1986)). Clearly, it was important for the State to address the issue of Yarbrow giving M.D. illegal drugs. Yarbrow gave the drugs to M.D. first when she was a young child to make her complacent, and later, when M.D. became addicted to drugs, Yarbrow would use the drugs as an incentive to have M.D. engage in sexual activity. It is clear to this Court that the evidence of Yarbrow giving illegal drugs to his victim helped the State tell "a rational and coherent story of what happened."

Next, this Court considers the information of his two prior convictions. During his testimony, Yarbrow's trial counsel asked him if he had ever been convicted of a felony. Yarbrow told of his two prior convictions. It is clear to this Court that there were two very good reasons why trial counsel wanted to have this information before the jury. First, during his second incarceration, Yarbrow met the victim's mother and married her. Most people do not choose Parchman as the perfect wedding spot, so trial counsel probably wanted the jury to understand why he was there. Second, it is a well-known trial technique for the defense to anticipate the introduction by the prosecution of previous convictions, and there is nothing to indicate the present testimony of Yarbrow was introduced for any other purpose than to gain a favorable reaction as to such a frank disclosure. Mr. Marshall was not ineffective in this situation.

Next Yarbrow argues that Mr. Marshall was ineffective because his sentence and conviction under Count III of the indictment was constitutionally invalid. However, it is clear from the record that Yarbrow was neither tried nor convicted under Count III of the indictment; in fact, no mention of Count III appears in the record before this Court. From what this Court can surmise, we believe that Yarbrow is simply confused that he was found guilty under Count III. The jury returned its verdict on four separate sheets of paper and labeled its third finding "Count III" and wrote, "We the jury, find the defendant, Thomas Yarbrow, guilty of sexual battery." Yarbrow was indicted under Count I, rape of a child under the age of fourteen between the dates of September 17, 1991 and September 17, 1992 and, Count II, rape of a child under the age of fourteen between the dates of May 1, 1993 and September 16, 1993, Count IV, sexual battery, and Count VI, rape of a stepchild. The jury merely mislabeled its third verdict as Count III. In reality the sexual battery count was actually Count IV. It is apparent to this Court that this was merely an innocent mistake made by the jury. In any event, the clerical error was corrected by the circuit court's sentencing papers and commitment papers sent to Parchman.

In his seventh argument based upon ineffective assistance of counsel, Yarbrow claims that Mr. Marshall was deficient in not insisting that Dr. Meeks, the State's expert witness, not be present in the courtroom while the victim testified. Yarbrow's argument has no merit. "In the criminal cases, it is permitted that a psychiatrist may sit in the courtroom and listen to testimony and then testify."

French Drug Co. v. Jones, 367 So. 2d 431, 435 (Miss. 1978). "It is . . . recognized in this State that an expert witness may remain in the courtroom during the other witnesses' testimony and base his opinion upon the prior testimony of other witnesses." *Collins v. State*, 361 So. 2d 333, 334 (Miss. 1978) (citing *Providence Washington Ins. Co. v. Weaver*, 242 Miss. 141, 133 So. 2d 635 (1961); *Smith v. State*, 95 Miss. 786, 49 So. 945 (1909)). Accordingly, Yarbrow's argument is meritless.

Next Yarbrow contends that Mr. Marshall was ineffective because he failed to object timely to testimony introduced into the evidence by the prosecution concerning the victim's mother. Yarbrow does not state how the information elicited from the victim about her mother prejudiced him. Secondly, Yarbrow's trial counsel objected to the relevancy of such testimony, and the objection was sustained. Since any alleged deficiencies of trial counsel must be presented with specificity and detail we will not address this argument further. *Perkins*, 487 So. 2d at 793.

Based on the foregoing, there is no proof that Mr. Jimmie Marshall was deficient in his representation of Yarbrow. Absent any evidence of deficiency or misrepresentation, this entire argument must fail.**II.**

WHETHER THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE PRESENTED AT TRIAL.

On appeal, this Court does not retry the facts, but must take the view of the evidence most favorable to the State and must assume that the fact-finder believed the State's witnesses and disbelieved any contradictory evidence. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). On review, we accept as true all evidence favorable to the State, and the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin*, 607 So. 2d at 1201 (citations omitted). The Court will reverse such a ruling only for an abuse of discretion. *McClain*, 625 So. 2d at 781.

It is clear that there was abundant evidence of each crime clearly and logically presented at trial. Reviewing the record, it is evident that the State first established the dates and venue for each count. M.D. testified as to her date of birth, from which came the evidence of her age for each count of rape or sexual battery. It was also abundantly clear from the record that sexual intercourse and sexual battery occurred.

This Court has said many times that the uncorroborated testimony of a rape victim is sufficient evidence for conviction. *Wilson v. State*, 606 So. 2d 598, 600 (Miss. 1992). In this case, however, the testimony of sexual battery was also corroborated by an eyewitness. Based upon the evidence elicited at trial, there was ample, credible evidence supporting each count for which Yarbrow was convicted.

III.

APPELLANT CLAIMS HE WAS UNFAIRLY SENTENCED, DUE TO THE DISPARITY IN APPELLANT'S SENTENCE AND SENTENCE RECEIVED IN THE INSTANT CAUSE.

Yarbrow filed a supplemental brief after the State had completed its briefing. In this brief, Yarbrow

complains that he was sentenced too harshly by the trial judge. Yarbrow was incorrectly sentenced, but not in the way Yarbrow argues. The circuit court gave Yarbrow thirty-eight years on Count I, thirty-seven years on Count II, thirty years on Count IV, and ten years on Count VI. The mandatory sentence under Mississippi Code Annotated Section 97-3-65(1)(Rev. 1994), carnal knowledge of a child under the age of fourteen, is life imprisonment. Yarbrow was found guilty of having carnal knowledge of a child under the age of fourteen, under Count I. Accordingly, Yarbrow's sentence on Count I should have been life imprisonment, but since the State did not have an opportunity to address this issue, we will affirm the lower court.

THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I OF RAPE OF A CHILD UNDER THE AGE OF FOURTEEN AND SENTENCE OF THIRTY-SEVEN YEARS; COUNT II OF RAPE OF A CHILD UNDER THE AGE OF FOURTEEN YEARS AND SENTENCE OF THIRTY-SEVEN YEARS; COUNT IV OF SEXUAL BATTERY AND SENTENCE OF THIRTY YEARS; AND COUNT VI OF RAPE OF A STEPCHILD AND SENTENCE OF TEN YEARS, WITH SENTENCES TO RUN CONSECUTIVELY FOR A TOTAL OF ONE HUNDRED FOURTEEN YEARS, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS ARE ASSESSED TO RANKIN COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.