IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01323 COA

GREGORY WELLS A/K/A ONE O'CLOCK 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 M. MONTGOMERY

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: ARMSTRONG WALTERS

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: RODNEY RAY

NATURE OF THE CASE: CRIMINAL: BURGLARY, RAPE, SEXUAL BATTERY

TRIAL COURT DISPOSITION: BURGLARY OF AN OCCUPIED BUILDING, 7 YRS; RAPE, 25 YRS, CONSECUTIVELY WITH COUNT I; SEXUAL BATTERY, 20 YRS, CONCURRENTLY WITH COUNT II.

MOTION FOR REHEARING FILED: October 30, 1997

MANDATE ISSUED: 5/27/98

BEFORE McMILLIN, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Gregory Wells was convicted of one count of burglary, one count of rape, and one count of sexual battery. The trial court sentenced Wells to serve a term of seven years for burglary, a term of twenty-five years for rape, and a term of twenty years for sexual battery in the custody of the Mississippi Department of Corrections with the sentence in Count II to run consecutively to the sentence in Count I, and the sentence in Count III to run concurrently with the sentence in Count II. The trial court denied Wells's motion for JNOV or, in the alternative, a new trial. On appeal, Wells asserts two issues: (1) Did the trial court err by failing to order the State to produce potentially exculpatory evidence? and (2) Did the trial court err when it refused to grant Defendant's jury instruction D-2 over objection of defense counsel? We find that none of Wells's issues on appeal has merit and therefore affirm.

FACTS

Gregory Wells was indicted on the charges of burglary of an occupied dwelling, rape, and sexual battery. The victim, a seventeen-year-old mother of one child, testified that on November 19, 1994, she was asleep on a couch at a friend's house when she awoke to find a hooded man standing over her with a knife. The victim testified that the man took her into an empty bedroom where she was raped and sexually assaulted. The victim indicated that Wells fell asleep, and she went into another bedroom in the house to tell her friends what had happened. The victim, along with her friends, Roosevelt Walker and Angelique Gardner, then went to a neighbor's house and reported the incident. The neighbor immediately called the police from a pay phone across the street. Upon arrival at the crime scene, the police found Wells asleep on the bed where the incident allegedly occurred with his pants down around his ankles, a torn bra in one hand and a knife in the other hand. Police officers testified that Wells was awakened and then placed under arrest. An investigation revealed that a milk crate had been placed beneath a window in the house, and the screen had been removed.

Thereafter, the victim was taken to the hospital where she submitted to a rape kit examination and was also examined by Dr. Thomas Aycock. Dr. Aycock testified that his examination revealed no evidence of vaginal trauma or seminal fluids and that he found nothing out of the ordinary. The rape

kit was sent to the crime lab where it remained unexamined at the time of the trial over one year later.

Following a two day trial, the jury returned a verdict of guilty on all charges. Feeling aggrieved, Wells now appeals.

ANALYSIS

I. DID THE TRIAL COURT ERR BY FAILING TO ORDER THE STATE TO PRODUCE POTENTIALLY EXCULPATORY EVIDENCE?

Wells argues that the State violated discovery rules by failing to produce the crime lab results of the rape kit. Wells contends that this test was potentially exculpatory and should have been introduced into evidence.

The law pertaining to discovery is clear in that "remedies available under [URCCCP] 4.06 are not self-executing." *McCaine v. State*, 591 So. 2d 833, 836 (Miss. 1991). "The party alleging a discovery violation 'must affirmatively request it on pain of waiver.'" *Id.* (citations omitted). A review of the record reveals that Wells made no objection to the trial court regarding the State's failure to provide the results of the rape kit test to the defense in discovery. The only mention of the rape kit results by Wells occurred during closing argument in which Wells's attorney implied that the State purposely failed to introduce the rape kit results into evidence because the State knew that the results would not support its case. In response to this argument, the prosecution explained during their closing argument that the crime lab was backlogged and had not processed the rape kit by Wells's trial date. The prosecution further explained that they saw no need to ask for a continuance in order to await the crime lab's processing of the results because the evidence against Wells was overwhelming without the rape kit analysis.

Wells raises the issue of the rape kit results for the first time on appeal and asks this Court to hold the trial court in error for failing to compel the State to produce the crime lab report. This we cannot do. *See Brandau v. State*, 662 So. 2d 1051, 1053 (Miss. 1995) (holding that "[o]nly matters of jurisdiction may be raised for the first time on appeal."). If Wells believed that the results of the rape kit would have been exculpatory, he could have taken a variety of steps at trial to insure that the evidence was presented to the jury or, at the very least, preserved for appeal, i.e., objection on the grounds that the State failed to provide discoverable material, motion to compel discovery, motion for a continuance so that Wells could have the rape kit processed himself, etc. Instead, Wells did nothing and now, on appeal, asks this Court to reverse. For reasons already stated, we find no error and decline Wells's invitation to reverse.

II. DID THE TRIAL COURT ERR WHEN IT REFUSED TO GRANT DEFENDANT'S JURY INSTRUCTION D-2 OVER OBJECTION OF DEFENSE COUNSEL?

Wells takes issue with the court's refusal of his reasonable doubt instruction which reads as follows:

The Court instructs the jury that you are bound, in deliberating upon this case, to give the defendant

the benefit of any reasonable doubt of the defendant's guilt that arises out of the evidence or want of evidence in this case. There is always a reasonable doubt as to the defendant's guilt when the evidence simply makes it probable that the defendant is guilty. Mere probability of guilt will never warrant you to convict the defendant. It is only when on the whole evidence you are able to say on your oaths, beyond a reasonable doubt, that the defendant is guilty that the law will permit you to find him guilty. You might be able to say that you believe him to be guilty, and yet, if you are not able to say on your oaths, beyond a reasonable doubt, that he is guilty, it is your sworn duty to find the defendant "Not Guilty."

Mississippi law allows the trial judge to instruct the jury upon principles of law applicable to the case either at the request of a party, Miss. Code Ann. § 99-17-35 (Rev. 1994), or on the court's own motion, *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975). *See also* URCCC 3.07. The Mississippi Supreme Court has held that the failure of a court to give a requested instruction is not ground for reversal if the jury was "fairly, fully and accurately instructed on the law governing the case." *Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990); *see also Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990) (holding that the trial court may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions); *Calhoun v. State*, 526 So. 2d 531, 533 (Miss. 1988) (holding that a trial court is not required to instruct a jury over and over on the same point of law even though some variations are used in different instructions). The standard for reviewing jury instructions is to read all instructions together, not in isolation. *Townsend v. State*, 681 So. 2d 497, 509 (Miss. 1996).

Wells's argument is premised on the alleged need to define reasonable doubt. The supreme court, however, has held numerous times that "reasonable doubt defines itself and needs no further definition by the court." *Chase v. State*, 645 So. 2d 829, 850 (Miss. 1994); *Williams v. State*, 589 So. 2d 1278, 1279 (Miss. 1991). In the present case, the jury was given seven instructions in which the jury was told that Wells was not required to prove his innocence and that the burden was on the State to prove him guilty beyond a reasonable doubt of the crimes charged in the indictment. The instructions, when read together, fully and fairly instructed the jury on the presumption of Wells's innocence and the State's burden of proof. Therefore, Instruction D-2 was not necessary, and the refusal by the trial court to give the proffered instruction was not error.

We find that Wells's assignments of error are without merit and therefore affirm the judgment of the trial court.

THE JUDGMENT OF THE CIRCUIT COURT OF LOWNDES COUNTY OF CONVICTION ON COUNT I OF BURGLARY OF AN OCCUPIED DWELLING AND SENTENCE OF SEVEN (7) YEARS; COUNT II OF RAPE AND SENTENCE OF TWENTY-FIVE (25) YEARS TO RUN CONSECUTIVELY TO SENTENCE IN COUNT I; COUNT III OF SEXUAL BATTERY AND SENTENCE OF TWENTY (20) YEARS TO RUN CONCURRENTLY TO SENTENCE IN COUNT II, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LOWNDES COUNTY.

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