IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01266 COA

BOBBY RAY ANDERSON 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 H. WHITFIELD

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: JAMES G. TUCKER III

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL: SEXUAL BATTERY

TRIAL COURT DISPOSITION: SEXUAL BATTERY: SENTENCED TO SERVE 24 YRS IN THE CUSTODY OF THE MDOC

MOTION FOR REHEARING FILED:9/9/97

MANDATE ISSUED: 11/25/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

HERRING, J., FOR THE COURT:

Bobby Ray Anderson was convicted of the crime of sexual battery by judgment of the Circuit Court of Hancock County, Mississippi, dated August 2, 1995. He was sentenced to serve a term of twenty-four years in the custody of the Mississippi Department of Corrections. Anderson now appeals to this Court and assigns the following error as justification for his request that his conviction be set aside and remanded to the trial court for further proceedings:

THE INDICTMENT FAILS TO LIST AN ESSENTIAL ELEMENT OF THE CRIME IN THAT IT FAILS TO ALLEGE A "SEXUAL PURPOSE" OR "LIBIDINAL GRATIFICATION" ELEMENT.

After thorough consideration of the record, as well as the legal arguments and authorities presented by counsel, we affirm the conviction rendered by the trial court.

I. THE FACTS

The incident which led to the criminal charge against Bobby Ray Anderson occurred at approximately 5:30 a.m. on September 26, 1994, at the home of Anderson and his wife, Charlotte Anderson. The Appellant was married and had two living children, a son, age eighteen, and a daughter, A. A., age fourteen. They all lived together in Bay St. Louis, Mississippi.

At some point during the evening prior to September 26, A. A. entered her parents' bedroom because she was cold and spent the rest of the evening in their bed. At approximately 5:00 a.m. the next morning, Mrs. Anderson and her son, Timothy, left the house while Anderson and his daughter, A. A., were still asleep. When the Appellant awoke, he attempted to rouse his daughter from her sleep but had difficulty in doing so. Finally, he told her that if she did not wake up by the count of ten she would be "spanked."

A. A. stood up when her father had counted to two or three, but he grabbed her and threw her on the bed. At this time, she was wearing a shirt, blue jean shorts, and panties. He grabbed for her shorts, but she resisted. He then pinned her down by sitting on her stomach while she was on her back and he was facing her feet. At this point, Anderson removed A. A.'s shorts, turned her over on her stomach and spanked her. He then turned her over on her back once again, opened her legs, and put his head between her legs. According to A. A., Anderson then inserted his tongue in her vagina.

Anderson asserts that he became angry when A. A. would not get out of bed, and that he grabbed

her, pulled her pants down, straddled and spanked her. He admits that he told her that he was going to bite her playfully, and that when he attempted to do so, she squirmed. Thus, he may have accidently put his mouth on her vagina. Anderson then apologized to his daughter and told her not to tell her mother. He further stated that they would talk about the incident when they got home that evening.

A. A. did not follow her father's instructions and reported the event, first to a girlfriend at school, and then to her brother, mother, and others in authority. Anderson was subsequently indicted and convicted for sexual battery in violation of section 97-3-95(1)(a) of the Mississippi Code of 1972. The indictment read, in pertinent part, as follows:

BOBBY RAY ANDERSON, in Hancock County, Mississippi, on or about September 26, 1994,

did wilfully, purposefully, unlawfully and feloniously commit Sexual Battery upon A. A., without the consent of the said A. A., by engaging in the act of sexual penetration, to-wit: by performing cunnilingus upon the said A. A.,

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

Anderson's trial began on August 1, 1995. The jury returned a verdict of guilty on the following day.

II. ANALYSIS

"Sexual penetration" is defined in section 97-3-97(a) of the Mississippi Code as amended. It states:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a 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) (Rev. 1994). "Cunnilingus" was defined for the jury without objection in jury instruction S-2 as follows: "Cunnilingus is defined as an act of sex committed with the mouth and the female organ."

There is ample evidence to support the jury's verdict that Anderson performed some sort of sexual act upon A. A., resulting in cunnilingus and sexual penetration. In fact, Anderson does not seriously contest A. A.'s claim that such an act occurred. He merely claims that it may have occurred accidentally. Furthermore, the Appellant concedes that the language of the indictment "tracks the language of the statute," referring to sections 97-3-95 and 97-3-97 of the Mississippi Code as amended. Thus, the only question remaining for the Court's consideration is Anderson's claim that the language of the indictment fails to set forth all of the material elements of the offense of sexual battery. While acknowledging the general rule that the language of an indictment is sufficient if it substantially follows the language of the statute, Anderson correctly points out that there are instances where the statutory language does not in itself fully set forth all of the material elements of

an offense. See *Peterson v. State*, 671 So. 2d 647, 655 (Miss. 1996) where our supreme court stated that Peterson's indictment for sexual battery was insufficient because it failed to notify him that he was being charged with sexually penetrating Wright without her consent.

The question of whether an indictment is fatally defective is an issue of law. *Id.* at 652. As stated in *Holloman v. State*, 656 So. 2d 1134, 1139 (Miss. 1995), the indictment must provide:

a plain, concise and definite written statement of the essential facts constituting the offense charged, and shall notify the defendant of the nature and cause of the accusation against him.

In addition, Rule 7.06 of the Mississippi Uniform Rules of Circuit and County Court Practice[(1)] lists

several technical requirements for indictments:

1. The name of the accused;

2. The date on which the indictment was filed in court;

3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;

4. The county and judicial district in which the indictment is brought;

5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;

6. The signature of the foreman of the grand jury issuing it; and

7. The words "against the peace and dignity of the state."

Finally, as stated in *Peterson,* 671 So. 2d at 652, the indictment must contain all of the elements necessary to state a criminal offense. This is the requirement with which Anderson takes issue in the case *sub judice.* He asserts that the indictment should have alleged that the Appellant penetrated A. A. for some "lustful or sexual purpose" or for the purpose of "libidinal gratification."

In support of his position, Anderson cites *Roberson v. State*, 501 So. 2d 398 (Miss. 1987) where the Mississippi Supreme Court upheld the sexual battery statute in the face of a vagueness challenge. *Roberson* claimed that section 97-3-97 of the Mississippi Code as amended was vague because the prohibition against "sexual penetration" did not distinguish between lustful conduct based upon sexual desire and any innocent penetration by a physician or a child's parents. In response to *Roberson's* claim, the supreme court stated:

Although, on its face, the definition of sexual penetration announced in § 97-3-97 encompasses any penetration, the Court holds the parameters of the definition of sexual penetration are logically confined to activities which are the product of sexual behavior or libidinal gratification, not merely the

product of clinical examination or domestic, parental functions.

Id. at 400. Anderson contends that as a result of the *Roberson* decision, any indictment charging sexual battery should include the allegation that the purpose of the sexual penetration was sexual or lustful desire or for "libidinal gratification." Thus, Anderson contends, the indictment rendered against him failed to fully inform him of the criminal charge which he faced, and his conviction should be set aside. We disagree. The *Roberson* court merely clarified what facts were necessary to prove sexual penetration. See *People v. Kimball*, 749 P.2d 803, 816 (Cal. 1988) which states: "the mere act of 'clarifying' the scope of an element of a crime or a special circumstance does not create a new and separate element of that crime or special circumstance."

The indictment charging sexual battery in the case *sub judice* substantially follows the sexual battery statute, which is generally sufficient to inform the accused of the charge against him. In *Cantrell v. State*, 507 So. 2d 325, 329 (Miss. 1987), the supreme court applied this rule in a similar sexual battery case with a similar indictment and held that the indictment was valid. *Cantrell* made reference to the *Roberson* case, but did not hold that sexual behavior or libidinal gratification were elements of the crime of sexual battery. In *Peterson v. State*, 671 So. 2d 647, 654 (Miss. 1996), the supreme court reviewed once again our sexual battery statutes in light of *Roberson* but failed to mention sexual behavior or libidinal gratification as being elements of the crime. Moreover, it is logically difficult to envision an act of cunnilingus as anything less than sexual behavior. Thus, we hold that Anderson was fully informed of the charges against him, and the assignment of error raised by Anderson has no merit. His conviction is therefore affirmed.

One other issue needs to be disposed of in this case. Anderson, citing *Maxie v. State*, 330 So. 2d 277 (Miss. 1976), contends that where an indictment omits an essential element of a crime the error may be raised for the first time on appeal, as he did here. This is a correct statement of the law. On the other hand, as pointed out by the State, a mere formal defect in an indictment is subject to waiver if no effort is made at the trial court level to dismiss the indictment. *Brandau v. State*, 662 So. 2d 1051, 1054-55 (Miss. 1995). We have held that no essential element of the crime of sexual battery was omitted from the indictment, and no other objection was raised to the indictment before the trial court. This issue is now moot.

THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY OF CONVICTION OF SEXUAL BATTERY AND SENTENCE OF TWENTY FOUR YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HANCOCK COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.

1. Rule 7.06 was formerly Rule 7.05 of the Uniform Criminal Rules of Circuit Court Practice.