IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00264 COA

KENNETH CHARLES MOXON **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

DATE OF JUDGMENT:	03/01/95
TRIAL JUDGE:	HON. BARRY W. FORD
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOSEPH C. LANGSTON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS JR.
DISTRICT ATTORNEY:	ROLAND GEDDIE
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	SEXUAL BATTERY: SENTENCED TO SERVE A TERM OF 30 YRS IN THE MDOC; SENTENCE SHALL NOT BE REDUCED OR SUSPENDED NOR SHALL HE BE ELIGIBLE FOR PAROLE OR PROBATION; DEFENDANT IS ORDERED TO PAY COURT COSTS
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	October 13, 1997
CERTIORARI FILED:	12/16/97
MANDATE ISSUED:	3/18/98

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

Kenneth Charles Moxon was convicted in the Circuit Court of Lee County on March 1,1995, of sexual battery of a child under the age of fourteen under Mississippi Code Annotated Section 97-3-95(c) (Rev. 1994). He was sentenced to a term of thirty years in the custody of the Mississippi

Department of Corrections as a habitual offender. Aggrieved, Moxon appeals the following issues: 1) the court erred in denying his motion for a directed verdict, 2) the court erred in denying his motion for a judgment notwithstanding the verdict, 3) the variance between the language of the indictment and the proof presented at trial was fatal, 4) he was denied his constitutional right to a fair and impartial trial due to prosecutorial misconduct, and 5) he was denied his constitutional right to a fair and impartial trial due to ineffective assistance of counsel. Finding no merit to the issues raised, we affirm the jury's verdict.

FACTS

The defendant, Kenneth Charles Moxon, met Lisa Moore in February 1991, and he moved in with her shortly thereafter. Ms. Moore is the mother of J.D., the ten year old victim in this case. Although J.D.'s father, Doyle Moore, had custody of the two children, they went to live with Ms. Moore and Moxon in November 1993 when Mr. Moore sought treatment for a drug addiction. It was during this time that Moxon sexually abused J.D.

On or about February 1994, J.D. found blood on her toilet paper. Ms. Moore took J.D. to the doctor where lesions were discovered on her rectum. These lesions later reappeared and a biopsy was performed. Although testing of the second occurrence proved inconclusive as to sexual transmission of a disease, both parents questioned J.D. about sexual abuse. Additionally, J.D. was questioned by a gynecologist, but J.D. denied that any improper conduct had occurred.

Approximately five months later, J.D. wrote a note to her father stating that Moxon had sexually abused her. J.D. testified that she did not tell anyone initially because she was scared Moxon would hurt her or her mother. Mr. Moore contacted his private attorney who referred him to the district attorney's office. Moxon was subsequently indicted and convicted of sexual battery.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE COURT ERRED IN DENYING MOXON'S MOTION FOR A DIRECTED VERDICT AT THE CLOSING OF THE STATE'S CASE AND AT THE END OF THE TRIAL.

II. WHETHER THE COURT ERRED IN DENYING MOXON'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT IN THAT THE VERDICT WAS SO CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Since Moxon's issues I and II deal with sufficiency of the evidence, we shall discuss them together. In questioning the court's denial of his motion for a directed verdict and his motion for judgment notwithstanding the verdict (JNOV), Moxon argues that the State did not make out its prima facie case as required. Specifically, Moxon argues that the State did not prove beyond a reasonable doubt that Moxon engaged in sexual penetration with J.D. We disagree.

In *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993), the Mississippi Supreme Court stated that since a motion for directed verdict, a request for peremptory instruction, and a motion for JNOV each challenge the legal sufficiency of the evidence, the Court properly reviews the ruling on the last

occasion the challenge was made in the trial court. The standard of review applied when the assignment or error turns on the sufficiency of evidence has been stated as:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, this Court's authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give the prosecution the benefit of all inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered points in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is beyond our authority to disturb.

Brooks v. State, 695 So. 2d 593, 594 (Miss. 1997).

"Sexual penetration" is defined under Mississippi Code Annotated Section 97-3-97(a) (Rev. 1994). 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.

We have recognized that only slight penetration need be shown. *Wilson v. State*, 606 So. 2d 598, 599 (Miss. 1992). According to Mississippi Code Annotated Section 97-3-65(1) (Rev. 1994), proof of penetration is not necessary if there is evidence that the private parts of the child have been lacerated or torn. Absent such evidence, proof of penetration is required. However, actual medical evidence of penetration is not necessary. *Wilson*, 606 So. 2d at 600. In *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (Miss. 1956), the prosecutrix did not specifically state that her private parts were penetrated. The Mississippi Supreme Court has held that such direct evidence should be adduced in these types of

cases if possible. *Wilson*, 606 So. 2d at 600. Our review of the record indicates that the proof of penetration was sufficient to take this case to the jury.

J.D. testified that Moxon performed some sort of anal sexual penetration. The following exchange between the district attorney and J.D. occurred at trial:

BY MR. GEDDIE: Where--would he put his hands where else on you?

BY J.D.: In my boodie.

BY MR. GEDDIE: He put his hands in your boodie?

BY J.D.: Yes, sir.

BY MR. GEDDIE: Did anybody ever tell you what the word vagina means?

BY J.D.: Yes, sir.

BY MR. GEDDIE: Do you know what it means?

BY J.D.: Yes, sir.

BY MR. GEDDIE: Did he ever put his hand in there?

BY J.D.: No, sir.

BY MR. GEDDIE: Did he ever put his finger in there?

BY J.D.: No, sir.

BY MR. GEDDIE: Did he ever put anything in your vagina?

BY J.D.: No, sir.

BY MR. GEDDIE: In your boodie. You mean your back? Your bottom?

BY J.D.: Uh-huh. (Indicating yes.)

BY MR. GEDDIE: What did he put in there? Do you know?

BY J.D.: His penis and his fingers maybe twice.

BY MR. GEDDIE: In your bottom?

BY J.D.: (Witness nods head.) Yes, sir.

Her testimony, standing alone, was sufficient to take this case to the jury.

Additionally, Moxon argues that the testimony of J.D. was contradictory and seriously lacked any indicia of reliability. The Mississippi Supreme Court has held that the jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity. *Noe v. State*, 616 So. 2d 298, 302 (Miss. 1993) (citing *Jones v.*

State, 381 So. 2d 983, 989 (Miss. 1980)). In *Evans v. State*, 159 Miss. 561, 132 So. 563 (1931), the Mississippi Supreme Court said:

We invite the attention of the bar to the fact that we do not reverse criminal cases

where there is a straight issue of fact, or a conflict in the facts; juries are impaneled

for the very purpose of passing upon such questions of disputed fact, and we do

not intend to invade the province and prerogative of the jury.

Accordingly, we find that the evidence in this case is sufficient to support the verdict of guilty and that Issues I and II are without merit.

III. WHETHER THE VARIANCE BETWEEN THE LANGUAGE OF THE INDICTMENT AND THE PROOF PRESENTED AT TRIAL WAS FATAL.

IV. WHETHER THE PROSECUTOR'S REMARKS CONSTITUTED MISCONDUCT AND DENIED MOXON A FAIR AND IMPARTIAL TRIAL.

Since Moxon's issues III and IV deal with objections not asserted at trial, we shall discuss them together. Moxon argues that the variance between the act charged in the indictment and the proof offered at trial was so great as to render it fatal. Specifically, Moxon argues that the statute was not tracked and that the indictment described two acts not contained in any one statute. We find Moxon's argument to be procedurally barred. The law is well settled in this state that the assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. *Ballenger v. State*, 667 So. 2d 1242, 1264 (Miss. 1995). Moxon raises objections on appeal that can be found nowhere in the record; therefore, his objections were not properly preserved on appeal.

In addition, Moxon contends that he was deprived of his fundamental right to a fair trial by the State introducing irrelevant and prejudicial evidence during the course of the trial and during the closing argument. We find this argument to be procedurally barred also. No objections were made by Moxon to the statements now challenged. Procedurally, contemporaneous objections "must be made to allegedly prejudicial comments during closing argument or the point is waived." *Dunaway v. State*, 551 So. 2d 162, 164 (Miss. 1989) (citing *Monk v. State*, 532 So. 2d 592, 600 (Miss. 1988)). In *Johnson v. State*, 477 So. 2d 196, 209-10 (Miss. 1985), the Mississippi Supreme Court stated that it is the duty of the trial counsel if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The circuit court judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury to disregard the improper comment. On the other hand, if the comments are so inflammatory that the trial court should have objected on his own motion, the point may be considered. *Dunaway,* 551 So. 2d at 164.

V. WHETHER MOXON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Moxon cites numerous reasons why his counsel was ineffective. The Mississippi Supreme Court adopted the standard for evaluating ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984). *See 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 the defendant to prove both elements. *Brown v. State*, 626 So. 2d 114, 115 (Miss. 1993). In any case presenting an ineffective assistance of counsel claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Foster v. State*, 687 So. 2d 1124, 1129 (Miss. 1996). This is measured by a totality of the circumstances and thus, the court must look at counsel's over-all performance. *Taylor v. State*, 682 So. 2d 359, 363 (Miss. 1996). There is no constitutional right to errorless counsel. *Foster*, 687 So. 2d at 1130. The Mississippi Supreme Court has stated as follows:

Judicial scrutiny of counsel's performance must be highly deferential. (citation omitted) . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. (citing *Stringer v. State*, 454 So. 2d 468, 377 (Miss. 1984)).

Moxon complains that he was denied effective assistance of counsel on nine separate occasions. He argues that his attorney, Mr. William C. Stennett, allowed the prosecution to ask leading questions throughout the trial by failing to object; he failed to file a motion to quash the indictment; he failed to pursue the inadmissibility of Moxon's prior convictions; he failed to challenge for cause several jurors; he failed to preserve the record for appeal regarding the challenges for cause that were disallowed; he failed to object to leading questions made by the prosecution; he failed to object to irrelevant and highly prejudicial argument made by the prosecution; he failed to try and obtain Moxon's treating physicians after the judge reversed his prior ruling that their testimony was inadmissible; and he failed to object to the prosecutor's closing argument. However, Moxon provides

no authority or evidence of how these instances constituted ineffectiveness. Moxon has failed to demonstrate that there was reasonable probability that had counsel done these things, 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. Generally, for purposes of ineffectiveness of counsel claims, counsel has the duty to make reasonable investigations or to make reasonable decisions that investigation is unnecessary. *Foster*, 687 So. 2d at 1132. Based on the foregoing discussion, there is no proof that Mr. William C. Stennett was deficient in his representation of Moxon. Accordingly, we find this claim to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY OF CONVICTION OF SEXUAL BATTERY AND SENTENCE OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER, WITH NO SENTENCE REDUCTION OR SUSPENSION NOR PAROLE OR PROBATION, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LEE COUNTY.

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