IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00486 COA

MITCHELL HOLLOWAY A/K/A "SNOT BROWN" **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:	04/09/96
TRIAL JUDGE:	HON. R. I. PRICHARD III
COURT FROM WHICH APPEALED:	JEFFERSON DAVIS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	MORRIS SWEATT
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
DISTRICT ATTORNEY:	DOUGLASS, RICHARD,
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	RAPE: SENTENCED TO SERVE A TERM OF 25 YRS IN THE CUSTODY OF THE MDOC (SEE OTHER RECORD INFORMATION)
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED: 12/12/1997	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

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

BRIDGES, C.J., FOR THE COURT:

Mitchell Holloway, a/k/a "Snot Brown", was convicted in the Circuit Court of Jefferson Davis County on April 12, 1996, of capital rape and was sentenced to serve a term of twenty-five years in the custody of the Mississippi Department of Corrections. Aggrieved, Holloway appeals raising the following issues: 1) that the court erred in denying the defendant's motion for a directed verdict by allowing the State to amend the indictment, and 2) that the court erred in denying the defendant's

motion for a directed verdict and a peremptory instruction because the proof presented at trial did not rise to the standard of proof beyond a reasonable doubt. Finding no merit to the issues raised by Holloway, we affirm the jury's verdict.

FACTS

On the afternoon of April 4, 1994, Holloway was at the local laundromat where he struck up a conversation with Tabitha Burkett. Holloway knew Burkett from school and because the two of them had been employed by Sanderson Farms. Holloway asked Burkett to give him a ride home and she agreed. After arriving at his house, Holloway went inside to get some money to pay Burkett for the ride. He came outside and told her that his mother wanted to talk to her. She went inside and proceeded to walk down the hallway. Burkett testified that she noticed in a bedroom that the bed was stripped and that it was obvious no one was there. She testified that as she started to turn around, Holloway grabbed her, knocked her down, and began to choke her. Burkett stated that she passed out, but that when she came to, she noticed that she had a tear in her pants and her vagina and panties were wet with apparent semen. Burkett testified that she quickly dressed and ran out to her car passing Holloway on the road. She went to the laundromat and told her mother what had happened, then went to the police station. The police sent Burkett to the hospital where a rape kit was administered to her. Holloway could not be located, but was eventually apprehended in Biloxi, Mississippi some two months later on a traffic offense. Holloway told the police that the sex had been consensual, and that Burkett only accused him of rape after he refused to pay her.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT BY ALLOWING THE STATE TO AMEND ITS INDICTMENT.

Holloway argues that the indictment alleged and charged him for the offense of rape of a female person under the age of eighteen years of previous chaste character. Furthermore, he alleges that the State failed to prove the elements of the indictment, and that the court erred in allowing the State to amend the indictment. Holloway's attorney argued that allowing the amendment "wiped out the defense on which Mitchell Holloway was relying." We disagree.

According to **Rule 7.06 Uniform Rules of Circuit and County Court Practice,** the indictment shall be a plain, concise and definite written statement of the essential facts constituting the charged offense, fully notifying the defendant of the nature and charge of the accusation against him. The indictment shall also include: (1) the name of the accused; (2) the date on which the indictment was filed in each 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 district where brought; (5) the date and time, if applicable, which the offense was committed; (6) the signature of the foreman of the grand jury issuing the indictment; and (7) the words "against the peace and dignity of the state." The

Mississippi Supreme Court has held that "[i]f an indictment reasonably provides the accused with actual notice and it complies with Rule 2.05 of the Unif.Crim.R.Cir.Ct.Prac., it is sufficient to charge the defendant with the crime." ***Reining v. State*, 606 So. 2d 1098, 1103 (Miss. 1992).** [(1)]

Additionally, the supreme court has stated:

> Section 99-17-13 of the Miss. Code Ann. (1972), provides for amendments to criminal indictments during the course of a trial in limited situations. However, any amendment, to be permissible, must be in form and not substance. We have adopted the following test to determine whether an amendment to an indictment results in prejudice to the defendant:
>
> The test of whether an accused is prejudiced by the amendment of an indictment or information has been said to be whether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made and whether or not any evidence accused might have would be equally applicable to the indictment or information in the one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance.

***Reed v. State,* 506 So. 2d 277, 279 (Miss. 1987)** (citations omitted).

In the case *sub judice*, Holloway's original indictment read that he "did wilfully, unlawfully, feloniously and forcibly, against her will and without her consent rape, ravish and carnally know one Tabitha Burkett, a female person above the age of twelve (12) years, contrary to and in violation of Section 97-3-67 of the Mississippi Code of 1972, as amended." The State contends that the section number was a clerical error and should have been Section 97-3-65, not 97-3-67. It is this Court's opinion that clearly Holloway and his attorney understood well in advance of trial that the charge was rape, as it was stated in the original indictment. No rule requires that a specific section number be cited in the indictment, and although the incorrect section number was cited, it was clear that the indictment charged Holloway with rape. As a matter of due process, a defendant is entitled to reasonable advance notice of the charges against him and a reasonable opportunity to prepare and present his defense to those charges. ***Jones v. State*, 461 So. 2d 686, 693 (Miss. 1984).** Holloway enjoyed these rights. Accordingly, we are of the opinion that the amendment was one of form and not one of substance. This issue is without merit.

II. WHETHER THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND A PEREMPTORY INSTRUCTION BECAUSE THE PROOF PRESENTED AT TRIAL DID NOT RISE TO THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT.

In questioning the court's denial of his motion for a directed verdict, Holloway argues that the State did not make out its prima facie case as required. Specifically, Holloway argues that the State's evidence failed to meet the burden of proof required in criminal prosecutions--proof beyond a reasonable doubt. 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).**

Holloway argues that Burkett showed no visible marks or bruises on her neck or around her internal or external genitalia. Furthermore, he contends that there was no evidence that Holloway penetrated Burkett's vagina or that he raped her. We disagree. A criminologist testified that Holloway was a possible source of the semen found in Burkett's vagina, pants, and on her body. Moreover, Burkett testified that it was Holloway that raped her. Accordingly, a reasonable juror could conclude that Holloway raped Burkett.

When we consider whether the jury's verdict is against the overwhelming weight of the evidence, we accept as true all evidence supporting the verdict. ***Ellis v. State,* 667 So. 2d 599, 611 (Miss. 1995).** Reversal is warranted only if there was an abuse of discretion in the circuit court's denial of a new trial. ***Id.*** Considering the above, we find no abuse of discretion. This issue is without merit.

THE JUDGMENT OF CONVICTION OF THE JEFFERSON DAVIS COUNTY CIRCUIT COURT OF RAPE AND SENTENCE OF TWENTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO JEFFERSON DAVIS COUNTY.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. Rule 2.05 of the Unif.Crim.R.Cir.Ct.Prac. has been replaced with Rule 7.06 of the U.R.C.C.C.