IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00050 COA

WENDELL FARMER, JR.

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. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PAUL G. SWARTZFAGER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: MICHAEL C. MOORE, WAYNE SNUGGS, JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: JEANNENE T. PACIFIC

NATURE OF THE CASE: CRIMINAL - CAPITAL RAPE

TRIAL COURT DISPOSITION: CAPITAL RAPE: SENTENCED TO SERVE A TERM OF LIFE IMPRISONMENT IN THE MDOC

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

BRIDGES, P.J., FOR THE COURT:

Wendell Farmer was convicted of the capital rape of a child under the age of fourteen and sentenced to life in prison. Farmer appeals arguing: (1) that the trial court erred in allowing the examination of the eight-year-old victim in the presence of the jury, and that the prosecution was allowed to ask leading questions during this examination, (2) that the verdict was against the overwhelming weight of the evidence, and (3) that the court erred in not granting the instructions offered by Farmer. Finding no merit in the issues raised, we affirm.

THE FACTS

The victim in this case is the natural daughter of Farmer and was seven years old when she was raped by her father. Farmer lived with, but was not married to, the victim's natural mother. The couple lived near Ellisville, Mississippi. On March 3, 1992, upon returning home, the mother discovered the victim in the bathroom bleeding between her legs. Farmer had been alone in the house with the victim. The mother did not report the rape because she was fearful of either losing her child or being harmed by Farmer. After watching a puppet show at school that was intended to deal with issues of abuse, the victim notified school officials that she had been sexually molested by her father. After school officials noticed that the victim was walking differently, the incident was reported to social services in early April of 1992.

Farmer was arrested and indicted for capital rape in Jones County, Mississippi. At trial, the prosecution was allowed to ask leading questions of the eight-year-old victim. The victim testified that her father raped her.

ARGUMENT AND DISCUSSION OF THE LAW

> I. WHETHER THE COURT ERRED IN ALLOWING THE PROSECUTION TO ASK THE VICTIM LEADING QUESTIONS AND WHETHER IT WAS ERROR TO ALLOW THE VICTIM TO BE QUESTIONED IN FRONT OF THE JURY.

Farmer's first issue actually combines two issues. We shall address them in order. Farmer first questions the court's allowing the State to ask the victim leading questions. The victim in the case sub judice was eight years old at the time of the trial. Mississippi Rule of Evidence 611(c) has recently been interpreted to allow the use of leading questions during the direct examination of a child. *Eakes v. State*, 665 So. 2d 852, 869 (Miss. 1995). In *Eakes*, the child who was on the stand was seven years old, nearly the same age as the victim in the case sub judice. *Eakes*, 665 So. 2d at 858. The court summarized its analysis of this issue saying:

> M.R.E. 611 provides that the use of leading questions on direct examination should be limited to circumstances where necessary to develop the witness' testimony. However, the "classic example" of a situation ripe for leading questions on direct is where the witness is

a child.

Id. at 869. The trial court was correct in allowing the use of leading questions during the direct examination of the victim by the State. We find no merit in this portion of Farmer's first issue.

In the second part of Farmer's first issue, he alleges that the tender aged victim was improperly allowed to testify in front of the jury. The thrust of Farmer's argument, however, is that the witness was not qualified to testify. Farmer's discussion of his first issue focuses entirely on whether it was error to ask leading questions of the victim. Because Farmer fails to cite any authority in support of his contention that the victim was not qualified to testify, consideration of that issue is precluded on appeal. *See Grey v. Grey*, 638 So. 2d 488, 491 (Miss. 1994). We find no merit in either portion of Farmer's first issue.

II. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In Farmer's second issue, he argues that the verdict was against the overwhelming weight of the evidence. Once again, he fails to direct this Court to even the slightest authority in support of his argument. The supreme court has treated similar failures as a procedural bars and has instructed that we are not required to consider the assignment. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). In light of the foregoing, and in addition to the fact that the jury's verdict was supported by the evidence, we will not consider Farmer's argument and therefore, affirm the verdict of the jury.

III. WHETHER THE COURT ERRED IN NOT GRANTING THE INSTRUCTIONS OFFERED BY THE DEFENDANT.

Farmer finally argues that the trial court committed reversible error by not granting his instruction D-8, which instructs the jury:

> You have heard that [the victim] made a statement prior to trial that may be inconsistent with the witness's testimony at this trial. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the believability of the witness's testimony.

The trial court refused the instruction on the basis that it was an improper comment on the testimony. This we conclude to be incorrect. The court in *Ferrill v. State* found it to be error to refuse to instruct the jury that "the testimony of a witness may be discredited or impeached by showing that on a prior occasion they have made a statement which is inconsistent... [with testimony given at trial]." *Ferrill v. State*, 643 So. 2d 501, 504 (Miss. 1994). That is essentially the nature of the instruction that was requested and refused in this case. Nevertheless, we have reviewed the testimony of the

victim, and, though we conclude that at times she may have been confused in her responses, we do not find her testimony on central issues to this case, when compared with previous statements made to investigating officers, to be necessarily inconsistent.

Therefore, though we respectfully disagree with the trial court's rationale in refusing the instruction, we conclude that the result was correct, and that there is no basis to disturb the verdict on this issue.

THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF JONES COUNTY OF CONVICTION OF CAPITAL RAPE AND SENTENCE TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO JONES COUNTY.

FRAISER, C.J., BARBER, DIAZ, McMILLIN, AND PAYNE, JJ., CONCUR. COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J. SOUTHWICK, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J. AND PAYNE, J.

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SOUTHWICK, J., concurring

I agree with the decision of the majority, but believe the resolution of Issue III should be based on the reasoning used by the trial court.

It is mandatory, as both the majority and the dissent state, to permit a jury instruction that addresses prior inconsistent statements of a witness. *Ferrill v. State,* 643 So. 2d 501, 505 (Miss. 1994). The refusal of an instruction is error only if it is "timely requested and correctly phrased. . . ." *Ferrill,* 643 So. 2d at 505, citing *Hill v. Dunaway,* 487 So. 2d 807, 809 (Miss. 1986). The objectionable part of the instruction in this case is the sentence "You have heard that [the victim] made a statement prior to trial that may be inconsistent with the witness's testimony at this trial." The trial court properly found that the instruction implied that there was reason to believe that inconsistencies existed in the victim's statements.

The instruction in *Ferrill* made no suggestion that a particular witness's testimony "may be inconsistent" with earlier statements. *Ferrill,* 643 So. 2d at 505. The supreme court has held that "instructions that tend to comment on the truthfulness of the child's testimony should be rejected." *Jones v. State,* 606 So. 2d 1051, 1060 (Miss. 1992). The trial court was within his discretion to find this an improper comment on and disparagement of the victim's testimony. Defense counsel was notified by the ruling of the error that the judge found in the instruction, and no corrected instruction was offered. I would affirm based on the trial court's own determination.

THOMAS, P.J., AND PAYNE, J., JOIN THIS SEPARATE OPINION.

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COLEMAN, J., DISSENTS:

With deference to my colleagues on the panel, I respectfully dissent to their resolution of Issue III, "Whether the court erred in not granting the instruction offered by the defendant." I find that *Ferrill v. State*, 643 So. 2d 501, 504 (Miss. 1994), and its predecessor, *McGee v. State*, 608 So. 2d 1129, (Miss. 1992), require not only that we recognize, as the majority opinion does, that the trial judge erred in choosing his ground for refusing to grant Instruction D-8, but also to reverse and to remand this case for another trial. I think that such an instruction was crucial to affording Farmer a fair trial, especially in view of the prosecuting witness's age of eight years and the apparent necessity for the State's resort to leading questions during its direct examination of her. Just as we appropriately apply *Eakes v. State*, 665 So. 2d 852, 869 (Miss. 1995), to affirm the State's use of leading questions to examine its prosecuting witness, I opine that we ought also

to apply *Ferrill* and *McGee* to reverse the trial judge's denial of Instruction D-8, and remand this case for a new trial.

KING, J., JOINS THIS SEPARATE WRITTEN OPINION.