IN THE COURT OF APPEALS 02/13/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00016 COA

KEITH LAMAR MEEKS

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. GRAY EVANS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LEFLORE COUNTY

ATTORNEY FOR APPELLANT:

RICHARD A. SMITH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL: SEXUAL BATTERY

TRIAL COURT DISPOSITION: GUILTY VERDICT AND SENTENCED TO 30 YRS IN M.D.O.C. WITH 5 YRS CONTINGENTLY SUSPENDED

BEFORE THOMAS, P.J., COLEMAN, McMILLIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Keith Meeks was convicted of sexual battery and sentenced to thirty years in prison by the Circuit Court of LeFlore County. He appeals contending that evidence of a shooting was improperly admitted, that a jury instruction was defective, and challenging the weight and sufficiency of the evidence. We affirm.

FACTS

On February 25, 1994, Meeks and a teenager broke into the house of Meeks' former girlfriend and sexually assaulted her. Having already pled guilty to raping the victim, the teenager later testified against Meeks, corroborating the victim's testimony that she had been forcibly raped by both men. A bed sheet was introduced in evidence bearing punctures consistent with the victim and teenager's testimony that Meeks had stabbed the bed around the victim during the assault. Because the victim bathed following the assault, a rape test kit was inconclusive. No fingerprints were taken at the scene and there was no physical evidence in the form of hairs or seminal fluid placing either male at the scene of the crime. Essentially, the prosecution rested its case solely on the testimony of the victim and the teenage accomplice.

DISCUSSION

1. Evidence of the Victim's Retribution

At trial the victim testified that Meeks came to her house three days following the rape and threatened her with further harm should she say anything about the incident. Over Meeks' objections, the victim testified that she became so scared that she shot him. Meeks contends that the testimony should have been excluded since it is impermissibly prejudicial and constitutes improper character evidence. We disagree.

Our analysis of Meeks' contention that the evidence was unduly prejudicial necessarily must include a consideration of its relevance. Meeks' subsequent threats at the victim's residence is akin to evidence of other crimes. Such evidence is not generally admissible, having been deemed irrelevant by the rules of evidence. *Duplantis v. State*, 644 So. 2d 1235, 1246 (Miss. 1994), *cert. denied*, 115 S. Ct. 1990 (1995); *Ladner v. State*, 584 So. 2d 743, 758 (Miss. 1991), *cert. denied*, 502 U.S. 1015 (1991); *Rose v. State*, 556 So. 2d 728 (Miss. 1990); *see Ballenger v. State*, No. 93-DP-00081-SCT, slip op. at 12-14 (Miss. Sept. 21, 1995) (en banc) (setting forth the analysis followed here). However, Mississippi Rule of Evidence 404 provides important applicable exceptions to the rule making such evidence relevant and admissible. For purposes of the discussion here, only two are relevant—other crimes evidence offered as proof of intent and the absence of mistake or accident. M.R.E. 404(b). Moreover, the evidence gives the jury the whole story of what transpired in late February 1994.

The supreme court has instructed that where another crime or act is "so interrelated [to the charged crime] as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences," proof of the other crime or act is admissible. *Wheeler v. State*, 536 So. 2d 1347, 1352 (Miss. 1988) (citation omitted). Such proof is also admissible to identify the defendant, to prove motive or to prove scienter. *Wheeler*, 536 So. 2d at 1352 (citations omitted). In addition, evidence of other crimes is admissible to tell the complete story so as not to confuse the jury. *Brown v. State*, 483 So. 2d 328, 330 (Miss. 1986).

Here, the prosecution bore the burden of demonstrating that Meeks perpetrated the crime charged. The evidence of Meeks' encounter with the victim within days of the crime therefore falls within the scope of other crimes evidence permitted by the rules. It is identification evidence. It was highly probative of Meeks' guilt—especially on the issue of the victim's lack of consent. The evidence did not suggest to the jury that Meeks had a propensity for engaging in sexual assaults.

As to whether the probative nature of the evidence was outweighed by its prejudicial effect, we conclude that it was not. Meeks fails to explain what prejudice he suffered as a consequence of the admission of the testimony. The only prejudice that we can posit is that Meeks would be portrayed as menacing the victim and that violence resulted. However, the testimony offered against Meeks concerning the previous sexual assault already accomplishes this purpose. If anything, the testimony of the subsequent shooting had a mixed impact since he was wounded by a woman portrayed as the innocent victim, yet she was capable of firing a potentially fatal gunshot.

Given these considerations, we conclude that the trial court did not abuse its discretion in admitting the evidence.

2. Denial of Requested Instruction

At trial, Meeks offered and was granted an instruction concerning the testimony of his accomplice in the sexual assault. However, the court deleted language from the instruction requiring the jury to view the accomplice's testimony with distrust and suspicion. Meeks contends that this deletion constitutes reversible error. We disagree for two reasons. First, the cautionary instruction was not required by the evidence because the accomplice's testimony was amply corroborated by the victim's testimony and the physical evidence. Second, even if the testimony is viewed as having been uncorroborated, the instruction appropriately informs the jury of its obligation to scrutinize carefully the accomplice's credibility.

Cautionary instructions relating to the testimony of an accomplice must be given only when that testimony is uncorroborated. Assuming that the teenager was an accomplice, there is only one important consideration for determining whether the cautionary instruction is necessary—whether his testimony is without corroboration. *Ferrill v. State*, 643 So. 2d 501, 506-07 (Miss. 1994) (citation omitted); *Wheeler v. State*, 560 So. 2d 171, 173 (Miss. 1990) (citations omitted). If it is corroborated, then the trial court does not abuse its discretion in refusing to grant the instruction. *Wheeler*, 560 So. 2d at 173. Corroboration also may not be enough to sustain a conviction in the absence of a correct cautionary instruction when "there is some question as to the reasonableness and consistency of the testimony, or the defendant's guilt is not clearly prove[d]." *Id.*

In this case, there is corroboration of critical facts in the teenager's testimony. Consistent with the teenager's testimony, the victim testified that she was pushed onto her bed and that Meeks and the teenager pulled her clothes off and forcibly raped her. While the teenager testified that he believed that Meeks had ejaculated onto the bed sheets, the police failed to develop such evidence. However, the teenager's testimony that Meeks stabbed a knife into the bed was supported by evidence found at the scene. Contrary to Meeks' position, there need not be complete agreement between the teenager's testimony and other evidence presented. This is especially so where, as here, the teenager's testimony is reasonable and consistent and the evidence of guilt is strong. Accordingly, Meeks was not entitled to the cautionary instruction granted by the trial court at all. *See Miller v.*

State, 636 So. 2d 391, 396 (Miss. 1994) (citation omitted).

Even setting aside the propriety of giving the instruction, the language it contains was legally correct. In his argument to this Court, Meeks fails to acknowledge that the instruction does appropriately instruct the jury that "the law looks with suspicion and distrust upon the testimony of an accomplice and requires the Jury to weigh such testimony with great care and caution." This is a correct statement of the law. *Ferrill*, 643 So. 2d at 506-07. It is not error for an instruction to omit a mandate that the jury view the evidence specifically with distrust and suspicion. Accordingly, the trial court did not err in redacting the language from the offered instruction.

3. Weight and Sufficiency of the Evidence

Meeks contends that "the legal sufficiency of the evidence is not sufficient to uphold the jury verdict of sexual battery, and the Lower Court erred in its denial of Appellant's Motion for Judgment [N] otwithstanding the Verdict." We assume that Meeks challenges both the weight and the sufficiency of the evidence. Our review of the record demonstrates that, viewed in the light most favorable to the verdict, the evidence overwhelmingly supported the charge and the verdict of guilty.

On a charge of sexual battery, the prosecution faced the burden of proving (1) venue; (2) sexual penetration; and (3) the absence of consent. Miss. Code Ann. § 97-3-95 (1972). Here, the victim testified that she was forced by Meeks to perform oral sex in her LeFlore County residence. This testimony was supported by the accomplice's testimony. The term sexual penetration encompasses such conduct. *Id.* § 97-3-97(a). While Meeks argues that the testimony given by the victim and the accomplice was "so contradictory as to not be believable," our review does not reveal any significant contradiction in the testimony that Meeks orally penetrated the victim. Whether the testimony is worthy of belief is a matter for the jury to decide. The testimony of the victim herself could have been enough to support the charge and conviction. *Christian v. State*, 456 So. 2d 729 (Miss. 1984). In this case, there was sufficient evidence of guilt on each element of the offense and the jury's verdict was well-supported.

THE JUDGMENT OF CONVICTION OF THE LEFLORE COUNTY CIRCUIT COURT OF SEXUAL BATTERY AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH FIVE (5) YEARS SUSPENDED CONTINGENT UPON MEEKS' ENTRY INTO A PRISON WORK PROGRAM IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LEFLORE COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.