

IN THE COURT OF APPEALS 09/19/95
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00087 COA

JOHN GILNER

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. ELZY J. SMITH, JR.

COURT FROM WHICH APPEALED: CIRCUIT COURT OF COAHOMA COUNTY

ATTORNEYS FOR APPELLANT:

LAWRENCE M. MAGDOVITZ

THOMAS H. PEARSON

ATTORNEYS FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: FORCIBLE RAPE

TRIAL COURT DISPOSITION: SENTENCED TO EIGHTEEN (18) YEARS IN THE CUSTODY
OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE BRIDGES, P.J., BARBER, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

John Gilner was convicted of forcible rape. The trial court sentenced Gilner to eighteen (18) years in the custody of the Mississippi Department of Corrections. Gilner appeals his conviction and sentence to this court assigning the following issues: (1) Did the lower court err in overruling Appellant's motion to dismiss because of the failure of the State to produce physical evidence entrusted to its possession or to account for its absence?; (2) Did the trial court err in allowing the mother of the victim to testify as to her (the victim's) behavior long after the alleged incident?; (3) Did the trial court err in restricting Appellant from cross-examination of the prosecuting witnesses as to their financial interest in civil litigation arising out of the alleged assault herein?; (4) Did the lower court err in overruling Appellant's objection to the testimony of Dr. Davey?; (5) Did the trial court err in refusing Appellant's motion for a directed verdict?; (6) Did the trial court err in excluding the testimony of Dr. Harris as to the physical condition of the Appellant?; (7) Did the trial court err in refusing instructions D-1 and D-2?; (8) Did the trial court err in refusing instructions D-3 through D-7?; (9) Did the trial court err in sustaining objections to the closing arguments of Appellant?; (10) Did the trial court err in exhibiting favoritism for the State and in attempting to intimidate Appellant? Finding no reversible error, we affirm Gilner's conviction and sentence.

STATEMENT OF THE FACTS

Gilner was a 48 year old retired teacher who lived across the street from the the victim in this case, and her family. The victim was sixteen (16) years old at the time of the incident and occasionally babysat for Gilner's son. On August 29, 1991 between the hours of 11:00 p.m. and 12:00 p.m., Gilner advised the victim that he wanted her to babysit for him. At this point, the testimony is in dispute. The victim testified that Gilner knocked on her door and told her that it was an emergency and that he needed her to babysit for his son, Julian. The victim testified that Gilner did not explain his emergency. With her mother's permission, the victim went to Gilner's home and knocked on the door several times but no one answered. She then returned home for a few minutes and went back to Gilner's and knocked again. This time Gilner answered the door. The victim testified Julian (Gilner's son) was not at the house so she told Gilner that she was going home. He then asked her to fix his television, which she had done before by securing the cable wire. The victim testified that as she was attending to the television that Gilner was asking her questions about herself and her family. Gilner next asked the victim to pass him a jar of grease and a comb and she complied. Then he pulled her down on the bed and began to bump his head on her face "real hard." The victim testified that at that point she was pushing and screaming and that Gilner told her to shut up as he turned around, grabbed her hand, putting it behind her back and "was going up under my shirt." The victim testified that she brought her right hand around and was pushing Gilner away and said "No, Mr. Gilner." The victim testified that she was hollering and screaming and that Gilner told her not to call him Mr. Gilner, to call him "John."

The victim testified that Gilner put her hands behind her back and brought his hand under her shirt. The victim testified that she kept pushing him away and he was kissing her all over and "feeling on" her, and that Gilner next grabbed her hair and "kept running my head back and forth to the headboard

of the bed." Gilner was shouting and asked her if she wanted anything to happen to her little brother. Not only did he make that threat but also kept hitting her head on the headboard of the bed. The victim testified that she was screaming and crying and that Gilner kept telling her to shut up.

The victim testified that she calmed down somewhat when Gilner stopped and told her to get him a beer from the cooler in the bedroom and not to go anywhere; she complied. Gilner asked her if she wanted some beer to which she replied "No." Gilner next tried make her drink beer and poured beer into her mouth. The victim testified that Gilner threw her back on the bed and started squeezing her breasts and "feeling all over" her down between her legs. The victim stated that Gilner then tried to pull her panties and her pants down and that she kept moving while Gilner squeezed her breasts harder. Gilner himself did pull her pants and panties down and continued his course of action that resulted in sexual intercourse. The victim testified that she did not consent to any of the actions taken by Gilner and that she certainly did not consent to his placing his penis into her vagina. The victim testified that Gilner raped her. She testified that every time she tried to move up in the bed that Gilner would pull her down. When Gilner told her he was through, she, under the guise of going to the bathroom, ran out of the house, screaming and hollering. The victim stated that she was afraid of Gilner and that throughout the incident she "was pushing him with all the strength that I had."

John Gilner, Appellant, testified that he wears a prosthesis below his knee on one of his legs. According to Gilner, he was arriving home when he noticed the victim and her brothers and sisters outside of their house playing and dancing to music. Gilner testified that he stopped to ask the victim to babysit his son the next night. Gilner stated that the victim's response was "Okay. I'll be on over." Gilner testified that he got back in his car, drove to his house, and went inside. The victim rang his door bell. Gilner testified that she came in, went to his bedroom and sat in the recliner as they talked about her keeping his son the next day. According to Gilner, when the victim moved from the recliner to the bed and started rubbing his back, he began to do "the same thing to her back," and that when he raised up, she got up and removed most of her clothing and got back into the bed. He then removed his shoes, pants and prosthesis and got into bed where he and the victim had intercourse. Gilner testified that when the intercourse was over the victim went into the bathroom. According to Gilner, he put on his prosthesis and pants and went to help her with the water faucets in the bathroom when he discovered that she was gone. Gilner stated that he looked for and called the victim but got no answer. Gilner returned to his bedroom and realized he was hungry so he got dressed and went out to have breakfast.

Gilner also testified that the victim had asked him to lend her money a number of times. He testified that he did not force himself on her and that she removed her own clothing. Gilner testified that he did not remember whether there was a cooler in his bedroom, that his refrigerator was broken and that he did not drink beer. Gilner admitted having been at the V.F.W. Club earlier that night drinking.

Georgia Clark, the victim's mother, testified that she gave her daughter permission to babysit because of an emergency situation. Mrs. Clark later heard a child screaming and the victim (her daughter) knocked at her bedroom door (at the rear of the house). Mrs. Clark testified that the victim was "in hysterics, screaming and hollering, 'He hurt me, he hurt me.'" Mrs. Clark also testified that when she asked her whom, the victim stated "Mr. Gilner." She testified that the victim was "in a rage" and "screaming and hollering," saying "I'm nasty, I'm nasty" and "He hurt me." Mrs. Clark testified that this was sometime around 12:15 a.m. Mrs. Clark testified that the victim was wearing only her

maroon tee-shirt and bra. Mrs. Clark testified that when the victim left to go to Gilner's, she was dressed in a maroon tee-shirt, plaid shorts, some white tennis shoes, panties and a bra. Mrs. Clark also testified that the victim had gone to Gilner's home twice, having gotten no answer the first time she arrived there. Mrs. Clark testified that she had to go across the street to use a neighbor's telephone to call the sheriff's office. When she returned, the victim was "up in a closet in a knot." The victim tried to take a bath, but her mother stopped her. Soon after a police officer arrived, Mrs. Clark and the officer took the victim to the emergency room. Mrs. Clark also testified that the victim now has nightmares.

Deputy Billy Webb of the Coahoma County Sheriff's Department testified that he responded to the Clark home on August 30, 1991 around 1:30 a.m. He testified that the victim told him Gilner had raped her. Webb testified that the victim was hysterical and crying as he transported her to the emergency room. Webb stated that prior to going to the emergency room he observed the Gilner home and noticed that Gilner's car was gone and that there were no lights on in his house. Webb also contacted Investigator Danny Hill who met him at the emergency room. Webb then returned to Gilner's home to see if he had returned. Webb had the dispatcher notify Hill of Gilner's return home and the two met at the Gilner home. Hill knocked on the door and Gilner answered. Gilner was informed of his Miranda rights, asked for permission to search the home, and informed that he had the right to refuse the search. Gilner consented to the search and the clothing described by the victim was located on a chair in the bedroom of Gilner's home; Webb testified that the clothes were neatly folded. Webb testified that Gilner made a statement to Officer Hill that he had had intercourse with the victim but that she had wanted to do it. Webb also testified that Gilner was cooperative with the officers and did not appear to have any scratches, blood or torn clothing.

Detective Danny Hill is a detective for the Clarksdale Police Department who formerly worked for the Coahoma County Sheriff's Department. Hill testified that he received a call about 1:00 a.m. on August 30, 1991 to investigate a rape. Hill stated that when he first arrived at the hospital and entered the room where the victim was being taken care of, he observed that she was sitting, crouched down in the corner of the room with her head down and hands clasped between her legs, rocking back and forth and crying. Upon receiving the second call from Officer Webb, Hill met Webb at Gilner's home. Hill testified that after knocking at the door of Gilner's home, Gilner answered the door and invited Webb and Hill into his home. Hill testified that he advised Gilner of their reason for being at his home, advised Gilner of his Miranda warnings and asked Gilner's permission to search his home, advising him that he had the right to refuse. With Gilner's permission, the officers searched Gilner's home finding the victim's panties, bra, shorts and shoes on a chair in Gilner's bedroom. Gilner was then arrested. Hill testified that Gilner made a statement that anything that happened between him and the victim was her doing, that he did have sex with her but that it was her idea and that she consented. Gilner was then transported to the Sheriff's Department by Deputy Webb, while Hill returned to the hospital. Hill also testified that Gilner was 5'9", weighed 220 pounds and was 48 years old. Hill testified that upon his return to the hospital he received the rape kit performed on the victim and another from Gilner. Hill also testified that Gilner was cooperative with the officers and did not appear to have any scratches, blood or torn clothing. Glenda Swann was the emergency room nurse on duty when the victim was brought into the emergency room. Swann testified that the victim was rocking and crying and that it took her 15-20 minutes to calm her down enough so that she could treat her. In Swann's attempt to identify the victim's condition and any necessary treatment,

the victim told her that she had been held down and raped. Swann also testified regarding her participation in the preparation of the rape kit and the various samples collected from the victim.

Paul A. Davey, a psychotherapist, testified as an expert on sexual assault. Davey testified that he treated the victim on September 17, 1991 at Region I Mental Health Center in Clarksdale. Davey testified that he diagnosed the victim with post traumatic stress disorder which is caused by some significant, traumatic event that would produce marked distress in virtually anyone. Davey testified that such a person re-experiences that event through reliving it through flash backs where the person feels as if she is actually being subjected to the event again. Davey testified that on his first appointment with the victim "she had a very high arousal, she cried and sobbed during the interview, she reported that she was having nightmares." Davey also testified that in his opinion that a non-consensual act without the use of some force would not produce post traumatic stress disorder.

Lisa Lilly, a psychotherapist at the Region I Mental Health Center, testified that she also had occasion to treat the victim having also diagnosed her with post traumatic stress disorder. Lilly also testified that the victim told her that she had been held down and raped, that she had struggled, cried and asked her perpetrator to let her up.

The State and Gilner stipulated to the testimony of a witness from the Mississippi Crime Lab that there was a sexual penetration of the victim resulting in the deposit of seminal fluid in her vagina which was consistent with the blood type of Gilner without any determination as to the consensual or non-consensual nature of the sexual penetration.

Sheriff Andrew Thompson, Jr. of the Coahoma County Sheriff's Office, testified that he and his office were unable to locate the victim's clothing which was evidence obtained from Gilner's home. He also testified that neither he nor anyone under his direction intentionally destroyed, misplaced, or discarded any evidence involved in Gilner's case. Thompson testified that there had been some incidents where the jail had flooded and it was possible the clothes got wet and were discarded.

ARGUMENT AND DISCUSSION OF THE LAW

I. DID THE LOWER COURT ERR IN OVERRULING APPELLANT'S MOTION TO DISMISS BECAUSE OF THE FAILURE OF THE STATE TO PRODUCE PHYSICAL EVIDENCE ENTRUSTED TO ITS POSSESSION OR TO ACCOUNT FOR ITS ABSENCE?

Gilner argues that the trial court should have granted his motion to dismiss because the State failed to produce the victim's clothing which was found at Gilner's home. The United States Supreme Court has held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process law." *Arizona v. Youngblood*, 488 U.S. 51, 58, (1988). The failure of the police to properly preserve the clothing of the victim can at worst be described as negligent. *Id.* Here there has been no suggestion of bad faith on the part of the police. Additionally, the State admitted into evidence a photograph of the clothing as they were found in Gilner's bedroom and the State offered to stipulate that the clothing did not appear to have been torn or ripped. Gilner wanted a stipulation that the clothing was tight-fitting, a

stipulation to which the State would not agree. The trial court correctly noted that even had the clothing been produced, the court could not require the victim to try on the clothing so as to determine how it fit. Furthermore, Gilner was free to question the victim and her mother regarding the fit of the clothing, an alternative available to Gilner regardless of whether or not the clothing was produced. Gilner has failed to show any bad faith on the part of the State in failing to preserve the clothing. The testimony by Sheriff Thompson indicated that the clothing may have been discarded after a flood of the jail. As in *Youngblood*, it follows that absent bad faith, that there is no due process violation. *Id.*

II. DID THE TRIAL COURT ERR IN ALLOWING THE MOTHER OF THE VICTIM TO TESTIFY AS TO HER (THE VICTIM'S) BEHAVIOR LONG AFTER THE ALLEGED INCIDENT?

Gilner argues that the victim's mother should not have been allowed to testify as to her behavior for the two years between the incident and trial arguing that such statements were prejudicial, inflammatory, and irrelevant. The standard of review is clear, "[r]elevancy and admissibility are largely within the discretion of the trial court and this Court will reverse only where that discretion has been abused." *Hentz v. State*, 542 So. 2d 914, 917 (Miss. 1989) (citing *Burt v. State*, 493 So. 2d 1325, 1326 (Miss. 1986); *Carter v. State*, 310 So. 2d 271, 273 (Miss. 1975); M.R.E. 103(a)). Gilner's defense at trial was that the sexual act was consensual between him and the victim. Certainly a victim's change in behavior and demeanor are relevant to show that something occurred. Furthermore, Gilner was free to cross-examine Mrs. Clark (and even the victim herself) regarding the degree of any behavior change as well as to inquire as to any alternative cause of such a behavior change. We do not find that the trial court abused its discretion in admitting the testimony. Thus, this issue is without merit.

III. DID THE TRIAL COURT ERR IN RESTRICTING APPELLANT FROM CROSS-EXAMINATION OF THE PROSECUTING WITNESSES AS TO THEIR FINANCIAL INTEREST IN CIVIL LITIGATION ARISING OUT OF THE ALLEGED ASSAULT HEREIN?

Gilner argues that he should have been allowed to question the victim as well as her mother regarding any financial interest they might have in the outcome of the criminal case in that there was a pending civil suit regarding the same incident. "Questions regarding the scope of cross examination rest with the sound discretion of the trial court and are subject to reversal only upon a clear abuse of discretion." *Ward v. State*, 479 So. 2d 713, 716 (Miss. 1985) (citing *Shanklin v. State*, 290 So. 2d 625, 627 (Miss.1974)). The trial court judge did allow Gilner to show that a lawsuit had been filed, but did not allow any questioning as to amounts sought therein. Gilner's reliance on *Milner v. State*, 68 So. 2d 865 (1954), is not persuasive on this issue in that Gilner was allowed to show that a potential financial interest did exist. Here Gilner was merely limited by the trial court in admitting evidence as to the amount. Therefore, the jury was well informed of the existence of a civil suit and of the potential financial interest in the outcome of the criminal case. The trial court did not abuse its discretion in restricting Gilner from pursuing the matter any further. This issue is without merit.

IV. DID THE LOWER COURT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE TESTIMONY OF DR. DAVEY?

Gilner objected to the testimony of Dr. Davey, who talked with the victim seventeen (17) days after the incident. Admissibility and relevancy of evidence are largely within the trial court's discretion, and this court will not reverse unless it finds that the trial court abused its discretion and prejudice resulted. *Century 21 Deep S. Prop., Ltd. v. Corson*, 612 So. 2d 359, 369 (Miss. 1992). First Gilner argues that Dr. Davey should not have been allowed to testify as an expert witness under Mississippi Rule of Evidence 702 because "this is clearly a case wherein the jury did not need 'scientific, or other specialized knowledge' to determine the facts in issue." Dr. Davey testified that he diagnosed and treated the victim for post traumatic stress disorder which is clearly an area in which expert testimony is necessary. Next Gilner cites Mississippi Rule of Evidence 706 which is plainly inapplicable in that nothing in the record indicates that a court appointed expert was requested or called to testify in this case.

Gilner also argues that he should have been allowed to elicit testimony regarding the victim's prior sexual history. As the trial court duly noted, the sexual history of any alleged rape victim is generally inadmissible and only allowed under specific exceptions. M.R.E. 412. Mississippi Rule of Evidence 412 and section 97-5-68 of the Mississippi Code provide the procedures through which such evidence may be admissible. Here Gilner failed to establish that evidence of the victim's prior sexual history fell within the exceptions outlined in Rule 412. *See* M.R.E. 412. Additionally, Gilner failed to follow the necessary procedures to introduce such evidence.

Finally, Gilner argues that the testimony of Dr. Davey should not have been admitted under Mississippi Rule of Evidence 403. Gilner's defense was that the sexual act was consensual. Certainly testimony regarding post traumatic stress disorder resulting from a traumatic event in the victim's life is relevant to determine whether or not forcible rape occurred. The probative value of Dr. Davey's testimony is not substantially outweighed by its prejudicial impact.

Thus, finding no abuse of discretion by the trial court, we find this issue is without merit.

V. DID THE TRIAL COURT ERR IN REFUSING APPELLANT'S MOTION FOR A DIRECTED VERDICT?

Gilner argues that at no time did the victim testify that she resisted Gilner's sexual advances to the utmost of her abilities or that she succumbed because of threats, concluding that forcible rape was not proven and the trial court should have granted his motion for directed verdict. Gilner is wrong both factually and legally.

First, the victim testified she "was pushing him with all the strength that I had." This statement was elicited by Gilner's own counsel on cross-examination. Assuming *arguendo* that the testimony of the victim up to that point was not sufficient to satisfy the force element of the crime charged, the words of the victim herself leave little doubt the extent to which she resisted Gilner's attack.

Second, Gilner argues in his brief, argued at oral argument, and argued at trial that the law of this state required the victim to resist to the utmost of her abilities. A history of the developments in rape law in Mississippi in regard to the victim's duty to resist might be instructive here. In 1949, the Mississippi Supreme Court recognized that:

[A]bsence of resistance on account of fear caused by an assailant does not prevent attack

from being rape. Indeed, an attack may be rape, notwithstanding absence of resistance, where failure to resist, as testified, positively by the female, was on account of fear, in which she was put by her strange assailant.

McGee v. State, 40 So. 2d 160, 171 (Miss. 1949) (citation omitted). In *McGee*, the victim ceased her resistance when her attacker threatened to cut her throat and her infant's throat. *Id.* In *Johnson v. State*, 76 So. 2d 841, 842 (Miss. 1955), the appellant argued that the victim did not offer sufficient resistance. There the court stated:

[w]here the act is accomplished after the female yields through fear caused by immediate threats of great bodily injury, there is compulsive force and the act is rape. Actual physical force or actual physical resistance is not required where the female yields through fear under a reasonable apprehension of great bodily harm.

In *Johnson*, the threats were made through the production of a deadly weapon (a knife) and the threat by the attacker to use the weapon. *Id.* The court held that "[a]ctual physical resistance by the female is not required in such circumstances." *Id.* (citations omitted). The court noted in *Wilson v. State*, 221 So. 2d 100, 103 (Miss. 1969) that "[f]orce has always been an essential element of the crime of rape where the female was physically and mentally capable of resistance. The force necessary to constitute the crime of rape did not necessarily mean actual force but could be constructive or implied force." In *Wilson*, the Court recognized that where the victim is not mentally capable of consent, actual resistance was not necessary. *Id.* In *Rush v. State*, 301 So. 2d 297, 299 (Miss. 1974) "the appellant did not make any verbal threats or utterances of any kind nor did he exhibit a deadly weapon." There the court recognized that the severity of the attack and force and pressure placed upon the victim's throat presented a circumstance where the victim had "good reason to believe that she and perhaps her child were in danger of great bodily harm if she physically resisted, as the appellant had amply demonstrated his ability and willingness to inflict bodily harm upon her by choking her into a state of grogginess." *Id.* In 1984, the court recognized that "the presence or absence of threats by the defendant is a factor of equal importance with the presence or absence of bruises or the presence or absence of a deadly weapon." *Clemons v. State*, 460 So. 2d 835, 838 (Miss. 1984). In *Clemons*, there was no deadly weapon nor did the attacker threaten the victim with death. *Id.* at 837. However, the victim did fear for her life and the lives of her children. *Id.* The victim testified that Clemons verbally threatened to harm her, that he pried her legs apart, and that he covered her mouth and applied pressure when she would struggle. *Id.* at 838. The court concluded that the evidence presented was legally sufficient to show that the victim submitted to her assailant because of fear arising out of a reasonable apprehension of great bodily harm. *Id.* The extent of resistance required by the victim is set forth in *Stewart v. State*, 466 So. 2d 906 (Miss. 1985) where the court again recognized that:

[T]he well-settled rule is that in a prosecution for rape, physical force on the part of the assailant or physical resistance on the part of the victim is not necessary if the proof shows beyond a reasonable doubt that the victim surrendered because of fear arising out of a reasonable apprehension of great bodily harm.

Id. at 909 (citations omitted). In *Stewart*, the victim had polio and walked with a considerable limp. *Id.* The appellant argued that no weapon was used and that the victim testified that he would not harm her. *Id.* There the victim never tested her strength because she did not believe that she could fight a man and the conviction of rape was affirmed. *Id.*

In the present case, Gilner argues that the State failed to show that the victim provided sufficient resistance. The victim testified that she did resist by pushing him, kicking and screaming, and telling him "No," all while Gilner held one of her arms behind her back. Additionally, the victim testified that Gilner threatened her, and specifically he asked her if she wanted anything to happen to her little brother. She also stated that she was afraid of Gilner. Gilner argues that the sexual act was consensual.

As to the standard of review on a motion for directed verdict, the Court has stated:

[T]he standard of review in judging the sufficiency of the evidence on a motion for directed verdict requires that we accept as true all the evidence favorable to the state, together with reasonable inferences arising therefrom, to disregard the evidence favorable to the defendant, and if such evidence would support a verdict of guilty beyond a reasonable doubt, the trial court's denial of the motion must be affirmed.

Christian v. State, 456 So. 2d 729, 734 (Miss. 1984) (citing *Carroll v. State*, 396 So. 2d 1033, 1035 (Miss. 1981)). As in *Christian*, the conflict between the testimony of the victim and defendant was properly resolved by the jury. *Id.* at 734 (citing *Lee v. State*, 322 So. 2d 751, 753 (Miss. 1975)). We find that the State produced ample evidence for the case to go to the jury including the victim's own testimony which was supported by medical testimony. This issue is without merit.

VI. DID THE TRIAL COURT ERR IN EXCLUDING THE TESTIMONY OF DR. HARRIS AS TO THE PHYSICAL CONDITION OF THE APPELLANT?

Gilner argues that he should have been allowed to have Dr. Harris testify to Gilner's alleged back disability. Dr. Harris was discovered to the State as a character witness. At trial, Appellant informed the State that Dr. Harris was Gilner's personal physician and that Gilner intended to have Dr. Harris also testify as to an alleged back disability, the fact that Gilner has part of a leg missing and the doctor's experience with rape victims in that they were usually beat up. Upon a timely objection by the State to such testimony, the matter was taken up in chambers. The trial court ruled that the medical testimony was to be excluded because of Gilner's discovery violation. Gilner failed to adequately preserve this issue for appeal in that he made no proffer as to the anticipated testimony by Dr. Harris regarding any physical disability. The record before us is not sufficient for this court to make a determination on this issue. Particularly fatal to our resolution on the merits of this issue was Gilner's failure to offer any proof as to the expected testimony of Dr. Harris. The Mississippi Supreme Court has made it very clear that "a record proffer of excluded testimony must be made to preserve the point for appeal." *Thompson v. State*, 602 So. 2d 1185, 1188 (Miss. 1992). Thus, this issue is without merit.

VII. DID THE TRIAL COURT ERR IN REFUSING INSTRUCTIONS D-1 AND D-2?

Gilner argues that these instructions "correctly stated reverse principle of 'reasonable doubt.' Obviously, a reasonable doubt of guilt is a reasonable possibility of innocence." However, Gilner fails to provide this court with any support for this argument. Furthermore, Gilner fails to recognize the well-established law in Mississippi that an instruction attempting to define reasonable doubt is improper. *Foster v. State*, 508 So. 2d 1111, 1119 (Miss. 1987); *Gray v. State*, 351 So. 2d 1342, 1348 (Miss. 1977). The Mississippi Supreme Court has held numerous times that the term reasonable doubt is self-defining and "'reasonable' sufficiently modifies and restricts the word 'doubt'." *Pittman v. State*, 350 So. 2d 67, 71 (Miss. 1977). Continuing the court stated, "[w]e repeat, an instruction attempting to define the words 'reasonable doubt' should not be given, either for the prosecution or defense." *Id.* Both these instructions constitute Appellant's attempt to improperly define reasonable doubt. Mississippi simply does not allow reasonable doubt to be defined. *Id.*; see also *Chase v. State*, 645 So. 2d 829, 850 (Miss. 1994) (citing *Barnes v. State*, 532 So. 2d 1231, 1235 (Miss. 1988)); *Boutwell v. State*, 165 Miss. 16, 143 So. 479, 483 (1932)). Thus, this issue is without merit.

VIII. DID THE TRIAL COURT ERR IN REFUSING INSTRUCTION D-3 THROUGH D-7?

Gilner next argues that the trial court erred in failing to grant the instructions submitted by him. While not making it an assignment of error, Gilner also seems to be arguing that the trial court erred in granting Instruction C-25 which read:

The court instructs the jury that the victim of a rape has a duty to use all reasonable physical resistance available to her, under the circumstances then and there existing, and further that such physical resistance on the part of the victim is not necessary if the evidence shows beyond a reasonable doubt that the victim surrendered because of fear arising out of a reasonable apprehension of death or of great bodily harm to herself or a member of her immediate family.

The Mississippi Supreme Court has stated that jury instructions must be read together. *Hornburger v. State*, 650 So. 2d 510, 515 (Miss. 1995). There is no error if stated instructions as a whole adequately inform the jury of the law. *Id.* (citing *Gray v. State*, 487 So. 2d 1304, 1308 (Miss. 1988)); see also *Roberts v. State*, 458 So. 2d 719, 721 (Miss. 1984) (if instructions correctly state the law when read together as a whole, there is no error). "[I]f the jury is fully and fairly instructed by other instructions the refusal of any similar instruction does not constitute reversible error." *Laney v. State*, 486 So. 2d 1242, 1246 (Miss. 1986) (citations omitted); see also *Billiot v. State*, 454 So. 2d 445, 461 (Miss. 1984) (citations omitted). Here the jury was fully and fairly instructed on the law and this issue is without merit.

IX. DID THE TRIAL COURT ERR IN SUSTAINING OBJECTIONS TO THE CLOSING ARGUMENTS OF APPELLANT?

"One well established constraint upon the permissible parameters of closing argument is that counsel

must limit his remarks to the evidence presented." *Jones v. State*, 381 So. 2d 983, 990 (Miss. 1980) (citations omitted). The first objection made during Gilner's closing arguments that this Court found in the record was made when counsel for Gilner argued that the jury should decide the case "the way these citizens of Coahoma County did" referring to the character witnesses called by the defense and calling for the jury to base its decision on something other than the evidence in the case. The second instance where the State's objection was sustained during Gilner's closing argument occurred when counsel was speculating upon why the victim had sought the services of a mental health specialist. Both of these arguments had no basis in the record and were properly sustained upon the State's timely objection. Our review of the trial court's rulings on the State's objections during Gilner's closing argument reveals no error.

X. DID THE TRIAL COURT ERR IN EXHIBITING FAVORITISM FOR THE STATE AND IN ATTEMPTING TO INTIMIDATE APPELLANT?

Gilner assigns as error the trial court's treatment of defense counsel during trial claiming such treatment unfairly prejudiced counsel's ability to defend Gilner at trial. The record shows that the trial court's statements, with one exception, were outside the presence of the jury. They were admonitions to counsel to function within the rules. Upon complete review of the record before us, it is clear that the trial court was fair and impartial in trying this case. There was no prejudicial effect resulting from any of the comments made by the trial court. Furthermore, Appellant has failed to establish how it is that Gilner was prejudiced by the trial court's comments, especially in light of the fact that his comments were not within the presence of the jury. We find that this issue is without merit.

Upon careful consideration of the record before this court and Gilner's issues on appeal, we find that the conviction and sentence should be affirmed.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF RAPE AND SENTENCE OF EIGHTEEN (18) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED, SENTENCE TO RUN CONSECUTIVELY WITH ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. GILNER IS TAXED WITH ALL COSTS OF THIS APPEAL.

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