IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00889 COA

CLINT TRACE HUNT A/K/A CLINTON TRACE HUNT **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:	07/10/95
TRIAL JUDGE:	HON. RICHARD WAYNE MCKENZIE
COURT FROM WHICH APPEALED:	FORREST COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GEORGE S. SHADDOCK CALVIN DANIEL TAYLOR
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	E. LINDSAY CARTER
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	RAPE HABITUAL OFFENDER: SENTENCED TO SERVE A TERM OF 45 YRS IN THE MDOC WITHOUT THE BENEFIT OF PAROLE
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	2/10/98
CERTIORARI FILED:	
MANDATE ISSUED:	4/28/98

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

Clint Trace Hunt has appealed his conviction of rape returned by a jury in the Circuit Court of Forrest County. He raises four issues in this appeal, three of which attack the finding of guilt and one attacking the sentence as being unduly severe. We find none of these issues to have merit. We, therefore, affirm the conviction and judgment of sentence.

I.

Facts

The State's proof indicated that Hunt came to his victim's apartment in Hattiesburg in the early morning hours and knocked on her door, claiming he was trying to find a friend who resided at the complex. After using several subterfuges in an attempt to be voluntarily admitted to the apartment, Hunt finally forced his way in and raped his victim. Scientific evidence was presented by the State that linked DNA material found on the victim's clothing to Hunt with a match testified to be one in five hundred million.

Hunt, testifying in his defense, claimed that the sexual encounter had, in fact, occurred two days earlier when the two had met in a local bar and had engaged in consensual intercourse in his vehicle. He claimed that he knew the prosecuting witness only by a fictitious first name she had used during their encounter, and that he had picked her up from the apartment parking lot on instructions she gave him before she left the bar. He claimed never to have been in the victim's apartment or even to have seen the woman before or after their encounter in the bar.

The jury returned a verdict of guilty but declined the opportunity to set Hunt's sentence at life. The trial court set the sentence at forty-five years, and because Hunt was also adjudicated to be a habitual offender under section 99-19-81 of the Mississippi Code of 1972, the judgment ordered the sentence to be served without the possibility of parole.

We will now consider Hunt's four issues raised on appeal in the order in which they were presented in his brief.

II.

Pre-Trial Lineup and In-Court Identification of Hunt

Hunt complains of the trial court's refusal to suppress evidence that the victim had identified him as her assailant in a photographic lineup. The proof showed that the lineup was repeated on three separate occasions during the course of the investigation of the crime and the subsequent preparation for trial. The victim selected Hunt from among the photographs in each instance. Thereafter, the victim was permitted to make an in-court identification of Hunt before the jury as her assailant.

In actuality, the State did not put on proof of the photographic lineup in its case in chief. Rather, Hunt's counsel raised the issue of the lineup during cross-examination of the victim. Therefore, Hunt's issue as set out in his brief is technically defective. Evidence of a witness's ability to pick the defendant in an out-of-court line-up, on the one hand, and permitting that witness to make an in-court identification of the defendant, on the other, raise two separate evidentiary considerations. In the proper case, the trial court may suppress the out-of-court identification as being unduly suggestive, yet nevertheless permit an in-court identification. ***See Neil v Biggers,* 409 U.S. 188, 197-98 (1972)**. Thus, the actual issue raised should have been whether the pre-trial lineup procedure was

so impermissibly suggestive that the victim's in-court identification was tainted to the extent that it should have not been allowed. Such a ruling would, in this case, have to be based upon the theory that the victim's in-court identification was founded on her recollection of Hunt's likeness in the photographs repeatedly viewed by her, rather than on the proper basis of her opportunity to view her assailant on the night of the alleged crime.

Though we find the error raised on appeal to be improperly drawn, both the defendant and the State address the merits of the issue, and we will, in the absence of a procedural objection from the State, do the same.

This Court has reviewed the photographs used to constitute the photographic lineup and does not find them improperly suggestive. It cannot be fairly argued, in our opinion, that Hunt stands out due to distinctive characteristics not shared by others in the lineup. All six of the photographs are of young white males appearing to be of approximately the same physical build. Nothing in Hunt's photograph, in terms of manner of dress, hair style, or even the photographic background, strikes the viewer as being substantially different from any of the others.

Neither do we find the fact that the victim was shown the photographs on a number of separate occasions a basis to cast doubt on the victim's ability to identify her assailant. The reasons for each lineup was explained by the investigating officers, and those reasons appeared plausible and reasonable. We, therefore, reject any claim of prejudicial error in the conduct of the photographic lineups viewed by the victim.

Actually, this Court finds a more fundamental error of logic in the defendant's pursuit of the issue of an impermissibly suggestive lineup. According to his theory of the defense, he was intimately acquainted with the victim, having engaged in extended conversation with her at a local bar, followed by an occurrence of consensual sex, all just a few days prior to the incident for which he was charged. He testified that at the end of the their sexual interlude, the victim began to behave in a bizarre manner that he could not understand. The evident purpose of this testimony was to place before the jury the idea that the alleged victim, for unexplained reasons, was maliciously and falsely accusing him of rape. In such a scenario, it could be expected that the victim would, based on her prior acquaintance with Hunt, be fully prepared to select the defendant from any lineup in which the defendant appeared without any consideration of the suggestiveness of the procedure. When the victim is accused, in essence, of purposely using the criminal process to falsely accuse a person known to the victim of engaging in criminal conduct, there is no logical basis for an allegation that the defendant was improperly selected from a lineup based on defects in the lineup process itself. In such a situation, the identification of the victim would be a foregone conclusion, and the actual manner in which the lineup was conducted would be completely irrelevant.

While we concede a defendant's right to pursue mutually contradictory defenses **(*see Love v. State*, 441 So. 2d 1353, 1356 (Miss. 1983))**, we also acknowledge our obligation to assess the impact of any errors argued on appeal and to reverse only if we conclude the defendant has been denied his right to a fundamentally fair trial. ***Wilburn v. State*, 608 So. 2d 702, 705 (Miss. 1992)**. Even were we to concede for sake of argument that there was some error in the manner the lineup was conducted, on the facts of this case, we conclude that we would be bound to find that error harmless.

III.

Granting Instruction S-2

Hunt raises as error on appeal the trial court's granting of the State's requested Instruction S-2. He claims the instruction is erroneous in that (a) it refers to the wrong subsection of the rape statute and (b) it fails to require a determination by the jury that penetration occurred in order to convict. Hunt failed to object to S-2 at trial on either of these grounds. In fact, no objection on any ground was offered to the instruction. Hunt's counsel, during deliberation on jury instructions, actually withdrew one defense instruction in reliance upon the fact that S-2 was being given. We do not normally consider issues raised for the first time on appeal, declining to put the trial court in error for matters on which it was not permitted to rule. ***Butler v. State,* 544 So. 2d 816, 818 (Miss. 1989).** The two bases for the alleged error in regard to this instruction, even if accepted as valid, would not appear to be so egregious as to warrant recognition as plain error. We, therefore, decline to consider this issue.

IV.

The Verdict was Against the Weight of the Evidence

Hunt's third issue attacks the weight of the evidence supporting his conviction. The thrust of his argument is that his version of the events was more credible than the one related by the victim. Such matters are left to the jury, as the trier of the facts, to resolve. On appeal, we must view the evidence in the light consistent with the verdict of guilt. ***Strong v. State,* 600 So. 2d 199, 204 (Miss. 1992).** Only if we are convinced that a manifest injustice has occurred, are we authorized to reverse. ***Burrell v. State,* 613 So. 2d 1186, 1191 (Miss. 1993).**

The jurors heard both versions, and by their verdict, indicated that they accepted as true the version related by the victim. Her story was neither incredible, improbable, nor substantially impeached. The victim's testimony, standing alone, is enough to sustain a conviction of rape. ***Barker v. State,* 463 So. 2d 1080, 1082 (Miss. 1985)**. This issue is without merit.

V.

The Severity of the Punishment

Hunt, having been adjudicated a habitual offender under section 99-19-81 of the Mississippi Code of 1972, was sentenced to forty-five years imprisonment without parole. He raises as his final issue that this sentence was so unduly harsh that it constitutes cruel and unusual punishment in violation of his rights under the Eighth and Fourteenth Amendments.

The punishment for rape, in the event the jury does not set the penalty at life in prison, is a term set by the trial court, the only restriction being that it be less than life. **Miss. Code Ann. § 97-3-65 (Rev. 1994).** The sentence imposed in this instance is within the statutory guidelines. There is no assertion that it is, because of its length in comparison the defendant's age, a *de facto*life sentence. The only argument advanced by Hunt as to the undue severity of the sentence is an assertion that the court abused its discretion in imposing what was "perhaps a politically correct sentence." We are uncertain as to exactly what Hunt's counsel would have us conclude from this assertion, but it seems to imply a charge that the trial court let improper considerations enter into its sentencing decision. We find nothing in the record that would support such a position. This Court, therefore, concludes that the

sentence imposed was within the discretion granted to the trial court in such matters. It is, therefore, beyond our authority to disturb.

THE JUDGMENT OF THE CIRCUIT COURT OF FORREST COUNTY OF CONVICTION OF RAPE AND SENTENCE AS A HABITUAL OFFENDER TO SERVE FORTY FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.