

IN THE COURT OF APPEALS 11/14/95
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00145 COA

McARTHUR McCULLY

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. JOSEPH LOPER, JR.

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

G. JYLES EAVES

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: DOUG EVANS AND KEVIN HORAN

NATURE OF THE CASE: CRIMINAL - RAPE

TRIAL COURT DISPOSITION: GUILTY - SENTENCED TO THIRTY (30) YEARS IN THE
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

McArthur McCully was convicted in the Circuit Court of Winston County of the crime of rape and files this appeal. For this conviction, McCully received a thirty year sentence in the custody of the Mississippi Department of Corrections. Finding no reversible error in the proceedings below, we affirm.

I. BACKGROUND

On the night of September 26, 1992, McArthur McCully and four male friends were at an establishment known as Willie Earl's Cafe. Jane Doe was also at Willie Earl's. Doe asked McCully to give her a ride so that she could catch up with Patricia Cooper, a friend of Doe's who had left Willie Earl's immediately before. McCully, Doe and McCully's four friends then left Willie Earl's in McCully's pick-up truck in an attempt to find Cooper. They never succeeded in catching up with her.

After McCully dropped off his four friends at their various destinations, only he and Doe were left in the pick-up truck. Doe claims that McCully then raped her. In direct contradiction to this charge, McCully testified that Doe consented to have sex with him. Specifically, McCully claims that he and Doe had entered into an agreement whereby she would exchange sex for crack cocaine. After they had the sex, McCully had to admit to Doe that in fact he had no crack and that he had deceived her. McCully claimed that Doe then became angry and brought the rape charge against him in retaliation for this deception.

On November 12, 1994, McCully was tried in the Circuit Court of Winston County. The jury found him guilty and the trial judge sentenced him to a term of incarceration of thirty years. A hearing on McCully's motion for a new trial was held on March 8, 1994. The trial judge denied the motion.

On appeal, McCully raises four assignments of error. These are:

- a) The trial court erred in not granting McCully's motion for directed verdict in view of the fact that the State failed to prove a prima facie case of rape.
- b) The trial court erred in not requiring the jury to follow its instruction as to the form of the verdict.
- c) The trial court erred in preventing McCully from delving into Doe's past history of drug use during his cross-examination of her.
- d) The trial court erred in not granting McCully's motion for a new trial in view of the fact that during voir dire, one of the jurors failed to disclose the fact that she had at one time been married to one of McCully's relatives and because this juror later admitted that she did not give McCully a fair and impartial hearing.

Finding that none of these assignments of error possess any merit, we affirm McCully's conviction.

II. DISCUSSION

a) Did the Trial Court Err in Refusing to Grant McCully's Motion for Directed Verdict?

At the conclusion of the State's case, McCully moved for a directed verdict and the motion was denied. After he concluded his case, he renewed this motion and it was again denied. McCully now asserts that it was error for the trial court to deny this motion.

Like a motion for a directed verdict, a motion for judgment notwithstanding the verdict tests the sufficiency of the evidence supporting a guilty verdict. *Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989). To test the sufficiency of the evidence of a crime,

[W]e must, with respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty.

Wetz v. State, 503 So. 2d 803, 808 (Miss. 1987) (citations omitted).

After examining the record, we are of the opinion that the evidence presented by the State that McCully raped Doe was sufficient to support a prima facie case of rape. Moreover, we find no merit to McCully's assertion that denial of the motion was error because Doe's testimony that she was raped was uncorroborated by any other testimony. In *Christian v. State*, 456 So. 2d 729, 734 (Miss. 1984), the Mississippi Supreme Court stated that it "recognizes as corroborating evidence [to the charge of rape] the victim's physical and mental condition after the incident." Here, Luwanda Shed, Doe's sister, testified that later in the afternoon of the day of the alleged rape, Doe visited Shed's residence. Shed testified that she knew something was wrong with Doe because Doe "wasn't talking" and she was "just out of it." Shed also testified that after she asked Doe what happened, Doe broke down and started crying and told her what had happened. Clearly, this testimony supports the inference that when Shed encountered Doe, Doe had been emotionally traumatized by a terrible occurrence. Thus, there is sufficient evidence on the record corroborating Doe's story that she was raped and McCully's assertion to the contrary is without merit.

b) Did the Trial Court Err In Failing to Require the Jury to Follow Its Instructions Regarding the Form of the Verdict?

McCully asserts that error occurred in the proceedings below in that the verdict was not completely written out on a separate sheet of paper but instead consisted of a pre-printed sheet of paper listing three different possible verdicts along with spaces by these verdicts for the jury to mark an "X" designating which one they chose. We find this assignment of error without merit. Rule 3.10 of the Mississippi Uniform Circuit and County Court Rules requires that when a jury has agreed on a verdict, the foreman or any member of the jury shall "deliver the verdict in writing to the clerk or the court." In the present case, this is precisely what was done; the fact that the sheet of paper on which

the jury's verdict was communicated consisted of a pre-printed form containing spaces for the jury to indicate their choice, does not make it any less a "writing." Clearly, Rule 3.10 was complied with and to require that the verdict be completely written out in longhand is to require an extra degree of formalism without rhyme, reason or justification in the law of our State.

c) Did the Trial Court Improperly Limit McCully's Cross-Examination of Doe by Not Allowing Him to Delve Into the Subject of Her Past Drug Use?

McCully's only defense to the rape charge was that Doe had agreed to have sex with him in exchange for crack and that when he did not fulfill his end of the agreement, she became angry and brought a rape charge against him as an act of retaliation. There were no other eyewitnesses to the events that transpired during the time that McCully and Doe were alone together in his pick-up truck and, apart from corroborating witnesses who testified as to events which occurred before and after the alleged rape had taken place, the trial essentially consisted of a contest in which Doe and McCully gave two conflicting versions of the events and the jury was left to decide who was telling the truth. Thus, the crucial factual issue that the jury had to decide was whether the sex was consensual or whether it was obtained as a result of the use of force or the threat of the use of force.

During the cross-examination of Doe, the following exchange occurred:

Q. Isn't it a fact that you consented to the sexual relationship with Mr. MacArthur McCully?

A. Consented?

Q. That you--that you agreed to have sex with Mr. MacArthur McCully.

A. No. I did not agree.

Q. Did you while you were in the truck ask Mr. McCully if he had any crack cocaine?

A. No. I did not.

Q. Did you while you were in the truck offer to have sex with Mr. MacArthur McCully in exchange for some crack cocaine?

A. No. I did not.

Q. Miss Doe, have you ever smoked crack cocaine?

BY MR. HORAN: Your Honor, that is irrelevant.

A. I have never--

By MR. HORAN: She already answered, but that is improper for Mr. Liddell to ask that question.

BY MR. LIDDELL: Why is that?

BY MR. LIDDELL: It's relevant.

BY MR. HORAN: She answered the question but it's still not relevant. Your Honor, that has absolutely no bearing on her credibility. That is just a character assassination.

BY MR. LIDDELL: No. It has bearing on whether or not there was an agreement to give sex for crack cocaine.

BY MR. HORAN: She has already answered but I still object. It needs--

BY THE COURT: That is not proper questioning of the witness, and I will sustain the State's objection. And so I will ask the jury to disregard any responses she might have given to that answer.

BY MR. LIDDELL: The Court's indulgence one minute. No more questions, Your Honor.

McCully contends that the trial judge erred in refusing to admit testimony pertaining to any previous drug use by Doe when his principal defense was that she had requested him to trade sex for drugs. In response, the State argues that this issue is not proper for consideration because McCully did not attempt to show the trial court or this Court that he had any information of prior drug use by Doe and that he did not proffer any such evidence to the trial court.

The State's argument that this assignment of error is not proper for consideration because McCully did not make a proffer on the record is without merit. It is well established in Mississippi that a party improperly denied cross-examination is not required to make a proffer of the witness' testimony such as would otherwise be required. *Suan v. State*, 511 So. 2d 144, 147 (Miss. 1987); *Horne v. State*, 487 So. 2d 213, 216 (Miss. 1986). Thus, the question we must face us is whether McCully's cross-examination of Doe was improperly limited.

The Mississippi Supreme Court has stated that "one accused of a crime has the right to broad and extensive cross-examination of the witnesses against him, and especially this is so with respect to the principal prosecution witness." *Suan*, 511 So. 2d at 148. Not only is this right secured by Mississippi's Rules of Evidence, but it is also a function of the confrontation clauses of the federal and state constitutions. *Id.* "This right, which is the cornerstone of American justice, was designed 'not merely to insure punishment to the guilty, but to insure protection of the innocent, [for without it] every one would hold his liberty at the mercy of the government.'" *Foster v. State*, 508 So. 2d 1111, 1114 (Miss. 1987) (quoting *Beckwith v. Bean*, 98 U.S. 266, 297 (1879)).

The right to cross-examine witnesses, however, is not unbounded and its contours are shaped to accommodate other legitimate interests. *Foster*, 508 So. 2d at 1114. Thus, the right is "always subject to the trial court's inherent power to limit cross-examination to *relevant* factual issues." *Foster*, 508 So. 2d at 1114 (emphasis added). "The right of confrontation and cross-examination . . . extends to and includes the right to fully cross examine the witness *on every material point relating to the issue to be determined that would have a bearing on the credibility of the witness and the weight and worth of his testimony.*" *Horne*, 487 So. 2d at 216 (quoting *Myers v. State*, 296 So. 2d 695, 700 (Miss. 1974)).

In addition to these foundational principles, Rule 404(a)(2) of the Mississippi Rules of Evidence

states in pertinent part:

Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

....

(2) . . . Evidence of a pertinent trait of character of the victim of the crime offered by an accused

M.R.E. 404(a)(2).

In the present case, the State's principal witness against McCully was Doe. McCully's only defense to the charge of rape was that he did not use force in having sex with Doe and that sex from her was consensually obtained in exchange for crack cocaine. Although Doe denied that any such agreement existed, we think that the question of any previous involvement in the use of crack is relevant because it bears directly upon the likelihood of whether the agreement existed and, in turn, whether a rape actually occurred as Doe charged. Thus, it bears upon the weight, worth and credibility of both Doe's and McCully's testimony. The trial court therefore erred by not allowing McCully to delve into the issue of Doe's previous use of crack during his cross-examination of her.

Where the trial court has improperly limited the scope of a criminal defendant's cross-examination of the principal witness against him, the Mississippi Supreme Court has found reversible error. *Hewlett v. State*, 607 So. 2d 1097, 1100-01 (Miss. 1992); *Suan*, 511 So. 2d at 148; *Foster*, 508 So. 2d at 1115; *Horne*, 487 So. 2d at 218. In the present case, however, even though the trial judge improperly limited the scope of McCully's cross-examination of Doe, we will not reverse McCully's conviction. Even though Doe was the principal witness against him and the trial essentially came down to a contest between his and her testimonies as to whether force was used in obtaining sex, the record discloses that there was sufficient evidence on the record to convince the trier of fact of McCully's guilt. McCully's own testimony was impeached by prior inconsistent statements he made to the police regarding how many times he and Doe had sex on the night of the rape. Furthermore, Doe's story about being raped was corroborated by her sister's testimony regarding the disturbed and distraught mental state in which she found Doe later that day. Even though McCully was able to present the testimony of Terry Hughes (one of the occupants of the pick up truck who initially left Willie Earl's with McCully) to the effect that he heard a conversation between Doe and McCully in which the subject of sex for drugs was discussed, this testimony is not worthy of credence because Hughes also claimed that he could not remember any other detail of the conversations which occurred between McCully and Doe prior to the time that McCully dropped him off at his destination. Also, Hughes' credibility as a witness was impeached during his cross-examination by his admission that he had been convicted of the crimes of grand larceny and simple robbery, crimes which, by his own admission, involve at least "just a little bit of dishonesty." Finally, Dewayne Smith, another occupant of McCully's pick up truck when McCully initially left Willie Earl's with the group and was later dropped off by McCully at a gas station prior to the time that rape would have occurred, testified that the following morning McCully came to him and told him to tell the police that he had been with McCully all "all the way home that night." In view of these factors, McCully's story regarding an agreement to exchange sex for drugs appears completely lacking in credibility. We therefore find no reversible error and thus rule that a new trial is not in order.

d) Did the Trial Court Err in Refusing to Grant McCully's Motion for a New Trial When It Was Revealed After Trial That a Juror Failed to Disclose a Previous Marital Relationship With One of McCully's Relatives and When This Juror Also Later Admitted That She Did Not Give McCully a Fair and Impartial Hearing?

The record clearly discloses that during the voir dire of the jury, Bessie Love disclosed to the trial court that some twenty years earlier she had been married to McCully's first cousin. Thus, McCully's assertion that this relationship was not disclosed during voir dire is plainly contradicted by the record and clearly without merit.

McCully also asserts that it was error for the trial judge not to grant his motion for a new trial in view of the fact that at the evidentiary hearing held in connection with that motion, Love testified that at the time she voted on the verdict, she did not understand the verdict, she was distracted by other pressing personal business, she wanted to get the deliberations over with so that she could attend to that personal business and that she did not give McCully a fair and impartial trial. This assignment of error is also without merit.

Rule 606(b) of the Mississippi Rules of Evidence states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

M.R.E. 606(b). In addition, prior to the adoption of this Rule, the Mississippi Supreme Court affirmed the rule that jurors cannot testify to impeach a verdict rendered by them. *Ratliff v. Nail*, 231 So. 2d 798, 800 (Miss. 1970). In view of this legal authority, we hold that the trial judge did not commit error by refusing to grant a new trial on the grounds of Love's testimony.

III. CONCLUSION

In view of the foregoing discussion, we affirm the judgment of the Circuit Court of Winston County.

THE JUDGMENT OF THE CIRCUIT COURT OF WINSTON COUNTY OF CONVICTION OF RAPE AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED TO WINSTON COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., DIAZ, MCMILLIN AND PAYNE, JJ., CONCUR. COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED

BY KING AND SOUTHWICK, JJ.

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COLEMAN, J., DISSENTS:

The basis of this dissent rests in the majority's discussion of McCully's third issue, "Did the trial court improperly limit McCully's cross-examination of Goss by not allowing him to delve into the subject of her past drug use?" In that discussion, the majority states:

"[W]e think that the question of any previous involvement in the use of crack is relevant because it bears directly upon the likelihood of whether the agreement existed and, in turn, whether a rape actually occurred as Goss charged. Thus, it bears upon the weight, worth, and credibility of both Goss' and McCully's testimony, *The trial court therefore erred* by not allowing McCully to delve into the issue of Goss' previous use of crack during his cross-examination of her." (Emphasis added.)

I agree that the trial court erred when it did not allow McCully to delve into the issue of the victim's previous use of crack during his cross-examination of her. The majority's discussion of the Mississippi Supreme Court's recognition of the value of the broad latitude of cross-examination to which a criminal defendant is entitled, particularly as "a function of the confrontation clauses of the federal and state constitution," is the foundation on which I rest my agreement that the trial court erred when it thwarted McCully's interrogation of the victim on this issue.

The State objected because, "that has absolutely no bearing on her credibility. That is just a character assassination." From the phrase "character assassination," we conclude that the State objected to the question because it violated Mississippi Rule of Evidence 404(a)(2). The victim's use of crack was a trait of character pertinent to the McCully's defense of Goss' consent to her sexual intercourse with him. Therefore, I opine that the questioning of Goss about whether she used crack was no violation of M. R. E. 404(a)(2) but was instead anticipated and permitted by it. Therefore, the trial court erred when it both sustained the State's objection to McCully's question on cross-examination, "Miss Goss, have you ever smoked crack cocaine?" and instructed the jury to disregard her answer to that question.

A second reason for my dissent is the apparent basis on which the majority rest their finding that this was not reversible error. Rather than citing case, rule, or other legal precedent on which to conclude that the error was harmless as a matter of law, the opinion engages in the jury's function of weighing the evidence to conclude that "McCully's story regarding an agreement to exchange sex for drugs appears completely lacking in credibility." This maneuver of descending from the bench to enter the jury box to resolve this issue hopelessly contradicts the precedents which the majority cite to hold that the court erred. Because of the worth and power of confrontation and meaningful cross-examination of the accuser, I would reverse the judgment of conviction and remand for a new trial because of the trial court's error when it both sustained the State's objection to McCully's question on cross-examination and instructed the jury to disregard her answer to that question.

KING AND SOUTHWICK, JJ., JOIN THIS SEPARATE WRITTEN OPINION.

