IN THE COURT OF APPEALS 12/12/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00516 COA

CHRIS ROGERS

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. THOMAS J. GARDNER

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOSEPH C. LANGSTON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: ROWLAND H. GEDDIE, JR.

NATURE OF THE CASE: CRIMINAL: SEXUAL BATTERY

TRIAL COURT DISPOSITION: SENTENCED TO TWENTY (20) YEARS IN MDOC WITH FOUR (4) YEARS SUSPENDED

BEFORE BRIDGES, P.J., KING, AND SOUTHWICK, JJ.

BRIDGES, P.J., FOR THE COURT:

Chris Rogers was convicted of sexual battery and sentenced to twenty (20) years in the Mississippi Department of Corrections with four (4) years suspended pending good behavior. He argues on appeal that he was denied effective assistance of counsel, that the lower court erred in failing to grant him a directed verdict, a JNOV, or a new trial. He also argues that he was convicted contrary to the overwhelming weight of the evidence and that the court erred in failing to grant certain instructions. Finding that his issues are without merit, we affirm the decision of the lower court.

THE FACTS

Chris Rogers and his wife, Mary, lived in a trailer home with their infant daughter in Saltillo, Mississippi. Both he and Mary worked at Day-Brite Lighting. Rogers worked the night shift while his wife worked the day shift. He usually slept during the day while his wife was at work and their daughter was at the "sitters."

The Rogers lived two houses away from Mary's relatives, the Putt family, who had recently moved from Texas. In the fall of 1986, the Putt children, a daughter (D.P.) 14 years old, and a son (R.P.) nine years old, would often go over to the Rogers' home and play croquet with Rogers while Mary was at work.

In June of 1987, D.P. told her mother that sometime in the fall of 1986, Chris Rogers had sexual intercourse with her. Specifically, she stated that sometime during September or October she and R.P. were walking past the Rogers' trailer when Rogers asked the children if they wanted to play croquet with him. They both agreed to play croquet with Rogers, but R.P. was told he had to go home and put on some shoes first. While R.P. was gone to get his shoes, D.P. and Rogers walked around to the back yard to get the croquet set. Rogers grabbed D.P. and began to kiss her. He then picked her up and carried her to the backdoor of his trailer and pushed her inside. He removed their clothing, shoved her on the floor, and had sexual intercourse with her. D.P. also stated that during this time she was trying to push Rogers off of her.

D.P. claims to have not told her mother of the incident because she was scared Rogers would hurt her if he found out. She told her mother about this incident in June of 1987. Rogers was arrested in August. Shortly after his arrest, Rogers and his wife separated. Rogers was convicted of sexual battery and now appeals from his conviction raising several issues for review.

ARGUMENT AND DISCUSSION OF THE LAW

I. INEFFECTIVE ASSISTANCE OF COUNSEL

In determining whether or not counsel's error undermined Rogers' right to a fair trial, Rogers must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985) . In making this determination, we must find that Rogers' counsel was both deficient and prejudicial

based upon the totality of the circumstances. *Moody v. State,* 644 So. 2d 451, 456 (Miss. 1994). This is a very stringent standard to meet because trial counsel is presumed to be competent. *Brooks v. State,* 573 So. 2d 1350, 1353 (Miss. 1990). Further, if the counsel is reasonably effective, he meets constitutional standards, irrespective of the client's evaluation of his performance. *Id.*

Rogers cites several examples of how his counsel "repeatedly failed to adhere to the 'prevailing professional norms and reasonableness.'" However, he fails to explain or to justify the contention that his representation was deficient and prejudicial. The United States Supreme Court has held that when "a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 693 (1984).

The *Strickland* case set the test to be applied stating:

> (a) The petitioner must show that counsel's conduct was so deficient that he was not functioning as counsel guaranteed by the Sixth Amendment, and
>
> (b) If the petitioner can show that his counsel was ineffective, then he must show that he was prejudiced by counsel's mistakes.

Id.; Gilliard v. State, 462 So. 2d 710, 714 (Miss. 1985).

Rogers has not shown how he was prejudiced by any errors that he claims on appeal. Thus, this issue is without merit.

> II. ERROR IN FAILING TO GRANT MOTION JNOV, DIRECTED VERDICT, OR MOTION FOR A NEW TRIAL

Rogers maintains that the lower court committed reversible error when it denied the motion for a new trial, judgment of acquittal, or JNOV. He also argues that the verdict was against the overwhelming weight of the evidence.

It is well settled that the jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed. *See, e.g., McClain v. State,* 625 So. 2d 774, 781 (Miss. 1993); *Burrell v. State,* 613 So. 2d 1186, 1192 (Miss. 1993); *Kelly v. State,* 553 So. 2d 517, 522 (Miss. 1989). In *Noe v. State,* 616 So. 2d 298, 302-03 (Miss. 1993), the Mississippi Supreme Court held:

> In judging the sufficiency of the evidence . . . the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant.

Id. at 302. (citations omitted).

Further, in *Pinkney v. State*, 538 So. 2d 329, 353 (Miss. 1988), the court held that it may reverse only where "the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty."

In *Williams v. State*, the court held that jurors may accept or refuse testimony of witnesses stating "it is not for this Court to pass upon the credibility of witnesses and where the evidence justifies the verdict, it must be accepted as having been found worthy of belief." *Williams v. State*, 427 So. 2d 100, 104 (Miss. 1983). Here, Rogers and D.P. were the only witnesses to the incident. The jury weighed the evidence, believed D.P., and convicted Rogers of sexual battery. Conflicts in the testimony between two witnesses are for the jury to resolve. *Benson v. State*, 551 So. 2d 188, 193 (Miss. 1989). Moreover, this Court may only reverse a trial court's refusal to grant these motions where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Moore v. State*, 617 So. 2d 272, 274 (Miss. 1993). Accordingly, we find the verdict was not against the overwhelming weight of the evidence and the lower court did not abuse its discretion by overruling the motions.

III. NEWLY DISCOVERED EVIDENCE

Rogers next argues that the lower court erred in failing to grant his motion for a new trial based on newly discovered evidence. However, Mississippi law requires that affidavits be attached to this motion asserting that neither the defendant nor his attorney knew of the newly discovered evidence at the time of trial. *Pierce v. State*, 289 So. 2d 901, 903 (Miss. 1974). Neither Rogers' motion for a new trial nor his motion for a JNOV contained attached affidavits to this effect. As such, this assignment of error will not be reviewed by this Court.

IV. ERROR IN THE JURY INSTRUCTIONS

Rogers argues that the court erred by refusing to grant Instruction D-5, a reasonable doubt instruction. However, Instruction C-4 instructed the jury that a presumption of innocence attended the defendant and prevailed at the close of the trial unless overcome by evidence which satisfies the jury of the guilt of the defendant beyond a reasonable doubt. It also instructed the jury that the State had the burden of proving every material element of the crime beyond a reasonable doubt. Additionally, Instruction C-4 charged the jury that if the State failed to prove any material element beyond a reasonable doubt, they were to find the defendant not guilty.

The Mississippi Supreme Court has held that when read together, if jury instructions adequately inform a jury of the law, then there is no error in denying an instruction. *Hornburger v. State*, 650 So. 2d 510, 515 (Miss. 1995); *Gray v. State*, 487 So. 2d 1304, 1308 (Miss. 1986); *Roberts v. State*, 458 So. 2d 719, 721 (Miss. 1984). Jury instructions are to be received as a whole, not individually, and are to be read together as a whole with no one instruction taken out of context. *Wilson v. State*, 592 So. 2d 993, 997 (Miss. 1991); *Heidel v. State*, 587 So. 2d 835, 842 (Miss. 1991). "[I]f the jury is fully and fairly instructed by other instructions the refusal of any similar instruction does not constitute reversal error." *Laney v. State*, 486 So. 2d 1242, 1246 (Miss. 1986); *Billiot v. State*, 454 So. 2d 445, 461 (Miss. 1984). Thus, the trial court's refusal to grant Instruction D-5 was not error.

Lastly, Rogers argues that Instruction D-2, a circumstantial evidence instruction, should have been granted. A court should only grant a circumstantial evidence instruction when the prosecution can produce neither an eyewitness nor a confession by the defendant. *Chase v. State*, 645 So. 2d 829, 850 (Miss. 1994). Here, D.P. testified as an eyewitness to the incident. Thus, this instruction was properly refused.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT OF CONVICTION OF SEXUAL BATTERY AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH FOUR (4) YEARS SUSPENDED IS AFFIRMED. ROGERS IS TAXED WITH ALL COSTS OF THIS APPEAL.

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