

**IN THE COURT OF APPEALS 3/25/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-01041 COA**

**BILLY DANIELS**

**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. MARCUS D. GORDON**

**COURT FROM WHICH APPEALED: NESHOBIA COUNTY CIRCUIT COURT**

**ATTORNEY FOR APPELLANT:**

**SAMUEL H. WILKINS**

**ATTORNEY FOR APPELLEE:**

**OFFICE OF THE ATTORNEY GENERAL**

**BY: JEFFREY A. KLINGFUSS**

**DISTRICT ATTORNEY: KEN TURNER**

**NATURE OF THE CASE: CAPITAL RAPE, SEXUAL BATTERY, AND GRATIFICATION OF  
LUST**

**TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED ON ONE COUNT OF  
CAPITAL RAPE, THREE COUNTS OF SEXUAL BATTERY, AND ONE COUNT OF  
GRATIFICATION OF LUST**

MANDATE ISSUED: 7/8/97

BEFORE BRIDGES, C.J., DIAZ, AND KING, JJ.

KING, J., FOR THE COURT:

The Appellant was convicted and sentenced in the Circuit Court of Neshoba County on multiple counts of capital rape, sexual battery, and gratification of lust. Aggrieved by the conviction and sentence, the Appellant appeals contending the following:

- I. The trial court erred when it denied Appellant's demurrer to the indictment;
- II. The trial court erred when it denied Appellant's motions for continuance and for an independent medical examination.

We find no error and affirm the convictions and sentences.

## **FACTS**

On March 2, 1994, the Appellant was arrested pursuant to a warrant, which alleged that on or about February 20, 1994, Appellant engaged in the capital rape of a female child under fourteen years of age. Counsel was appointed for the Appellant and a preliminary hearing was held. Thereafter, Appellant filed an application for writ of habeas corpus, which was denied by the trial court.

On July 8, 1994, the grand jury issued a multi- count indictment, which charged the Appellant with one count of capital rape, three counts of sexual battery, and one count of gratification of lust. Appellant was arraigned the same day the indictment was issued. During the arraignment proceedings, Appellant's court-appointed counsel was allowed to withdraw from the case. The court allowed substitution of counsel hired by the Appellant, and the court scheduled trial of the cause for July 14, 1994.

On July 12, 1994, counsel for the Appellant simultaneously filed a demurrer, request for special venire, a motion for a continuance, and a motion for independent medical examination. The court denied each motion.

Trial commenced on the scheduled date, and the ten-year old victim testified at trial. The victim explicitly described numerous sexual encounters with the Appellant, which covered a span of approximately fourteen months. In addition to describing the encounters, the victim testified that the Appellant had a mole on his thigh near the genital region. Photographs depicting the mole described by the victim were introduced into evidence.

The jury convicted Appellant of the five counts charged in the indictment, and the court sentenced Appellant as follows:

Count I, capital rape-life imprisonment

Count II, sexual battery-twenty-five years consecutive to the sentenced imposed in Count I

Count III, sexual battery-fifteen years consecutive to the sentence imposed in Counts I and II

Count IV, sexual battery-twenty years concurrent with the sentences imposed in Counts I, II, and III

Count V, gratification of lust - ten years concurrent with the sentences imposed in Counts I,II,III, and IV.

## **ANALYSIS OF THE ISSUES AND LAW**

### **I.**

#### **DID THE TRIAL COURT ERR WHEN IT DENIED Appellant’S DEMURRER TO THE INDICTMENT?**

The indictment charging the Appellant alleged that the offenses were committed between December 1992 and February 1994. Appellant contends that he was unable to prepare a defense because the indictment failed to allege specific dates for the occurrence of the offense; therefore, the court should have sustained his demurrer to the indictment. Moreover, Appellant argues that the indictment was fatally defective because it did not comply with Section 99-7-5 of the Mississippi Code.

We revisit the opinion in *Eakes v. State* for resolution of this issue. In *Eakes*, the court said, " If an indictment includes the seven enumerated items provided in Unif.Crim.R.Cir.Ct.Prac. 2.05, it is sufficient to provide the Appellant with notice of the charge against him." *Eakes v. State* 665 So. 2d 852, 860 (Miss. 1995) (citing *Roberson v. State*, 595 So. 2d 1310, 1318 (Miss. 1992)). Rule 2.05 provides:

The indictment upon which the Appellant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the Appellant of the nature and cause of the accusation against him. Formal or technical words are not necessary in an indictment, if the offense can be substantially described without them.

An indictment shall include the following:

(1)The name of the accused;

(2)The date on which the indictment was filed in each court;

(3)A statement that the prosecution is brought in the name and by the authority of the

State of Mississippi;

(4)The county and judicial district in which the indictment is brought;

(5)The date and if applicable the time, on which the offense was alleged to be committed. Failure to state the correct date shall not render the indictment insufficient.

(6)The signature of the foreman of the grand jury issuing it; and

(7)The words "against the peace and dignity of the state".

Unif. Crim. R. Cir. Ct. Prac. 2.05. Each of the seven items enumerated above was present in the indictment charging the Appellant. Though not specific, the indictment did allege that the offenses occurred between December 1992 and February 1994. This time period provided sufficient notice to the Appellant of the charges against him. *See Morris v. State*, 595 So. 2d 840, 841-42 (Miss. 1991) (court determined that Appellant was fully and fairly advised of the charge against him when victim alleged that stepfather molested her between March and May 1986, but could not specify exact dates of the molestation). This assignment of error lacks merit.

II.

**DID THE TRIAL COURT ERR IN DENYING Appellant’S MOTION FOR A CONTINUANCE?**

The Appellant argues that he lacked adequate time to prepare for trial; therefore, the court should have granted his motion for a continuance. In support of this contention, Appellant cites *Lambert v. State*, 654 So. 2d 17 (Miss. 1995). The decision to grant or deny a continuance is left to the sound discretion of the trial court. *Morris v. State*, 595 So. 2d 840, 844 (Miss. 1992). Even though factual similarities between *Lambert* and the instant case exist, the cases are distinguishable. Unlike the appellant in *Lambert*, the present Appellant had been in contact with court appointed counsel between the preliminary hearing and the arraignment. Indeed, court appointed counsel represented the Appellant at the habeas corpus hearing. Moreover, in *Lambert*, the State untimely disclosed discovery information on the day of trial. In the present case, the State’s discovery disclosure occurred two days prior to trial.

Notwithstanding the preceding distinguishing factors between *Lambert* and the present case, the Appellant has not demonstrated or explained to this Court the benefits that would have been derived from the continuance. The denial of a continuance is not grounds for reversal unless this Court is satisfied that an injustice has resulted therefrom. *Lambert*, 654 So. 2d at 22. Although Appellant suggests that the additional time would permit recollection of events and activities, which occurred during the fourteen month period, we note that Appellant’s capacity to recall events and activities which occurred within that fourteen month period may also be further diminished by the passage of time. Therefore, we do not find that the trial court abused its discretion by denying the continuance.

Appellant also assigned as error the trial court’s refusal to order an independent medical examination of the victim; however, no substantive argument on this issue appears in Appellant’s brief. Therefore, we assume that Appellant abandoned the issue. In conclusion, we find Appellant’s appeal meritless and affirm the convictions and sentences.

**THE JUDGMENT OF THE NESHOPA COUNTY CIRCUIT COURT CONVICTING DANIELS OF COUNT I, CAPITAL RAPE, COUNTS II, III, AND IV, SEXUAL BATTERY AND COUNT FIVE, GRATIFICATION OF LUST, AND SENTENCING DANIELS TO SERVE LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS FOR COUNT I, 25 YEARS CONSECUTIVE TO COUNT I FOR COUNT**

**II, 15 YEARS CONSECUTIVE TO COUNTS I AND II, FOR COUNT III, 20 YEARS CONCURRENT TO COUNTS I, II, AND III FOR COUNT IV AND 10 YEARS CONCURRENT TO COUNTS I, II, III, AND IV FOR COUNT V IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**