

IN THE COURT OF APPEALS 4/23/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01432 COA

LENNEL CLARK A/K/A LENNELL CLARK

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. ISADORE PATRICK

COURT FROM WHICH APPEALED: CIRCUIT COURT OF SHARKEY COUNTY

ATTORNEY FOR APPELLANT:

ROBERT L. MORAN

ATTORNEY FOR APPELLEE:

ATTORNEY GENERAL MIKE MOORE

BY: JEFFREY A. KLINGFUSS

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF MOLESTATION OF A MINOR UNDER
FOURTEEN YEARS OF AGE AND SENTENCED TO SERVE EIGHT YEARS IN THE
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Lennel Clark was convicted under Mississippi Code section 97-5-23, of molestation of an eleven-year-old female "by touching and rubbing hands or other parts of his body for the purpose of gratifying his lust or indulging his depraved, licentious sexual desires." From this conviction he appeals to this Court asserting three alleged errors. Finding no merit in his appeal, we affirm.

FACTS

L.T., an eleven-year-old girl, saw Lennel Clark, her next door neighbor, at her house as she was walking back from a friends house. Clark told L.T.'s friend that she had to go home because L.T.'s mother did not allow any children in her house when she was not there. After L.T.'s friend left, L.T. entered the house with Clark.

L.T. testified that at that time Clark told her to lay down on the floor and when she refused Clark picked her up and laid her down. L.T. stated that Clark started "playing with my breast" and "pulled my pants down and he got on top of me and started wiggling around."

Clark, a thirty-four-year-old male, testified that he saw his neighbor's back door open and went to see if everything was alright. After finding nobody at home he went back outside where he saw L.T. walking down the street with her friends. He told L.T. to come home and that her friends could not come inside because L.T.'s mother did not like children to be in her home when she was not there.

When L.T.'s friends left, Clark told L.T. to go over to his mother's house and get him a cigarette. When L.T. returned, Clark stated that he sat down on the porch and smoked his cigarette. After finishing his cigarette he told L.T. to go inside, lock the door, and to not let anyone enter the house until her mother got home. Clark testified that at that point he left.

DISCUSSION

I.

Clark's first argument is that the jury's verdict was against the overwhelming weight of the evidence and was the product of bias and passion. Our scope of review is limited and has been stated many times before and need not be restated here. Suffice to say that an eleven-year-old child's testimony that Clark molested her, coupled with the deputy sheriff's, a neighbor's, and the mother's testimony provided ample evidence to support the conviction. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *McFee v. State*, 511 So. 2d 130, 133-34 (Miss. 1987); *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987).

II.

Next, Clark argues that the trial court erred in admitting hearsay statements made by L.T. to a social worker and to a deputy sheriff. In particular, he argues that the trial court did not properly apply Mississippi Rule of Evidence 803(25) in determining the reliability of the statements. Rule 803(25) lists the following as an exception to the hearsay rule:

Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible if: (a) the court finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testified at the proceedings; or (2) is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

M.R.E. 803(25).

The trial court, outside the presence of the jury, held a hearing pursuant to the requirements contained in the Tender Years Exception to the hearsay rule. After an in depth analysis the trial court ruled that the testimony properly fell under this exception. Rule 803(25) affirmatively provides that if certain conditions are met "statement[s] made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence. . . ." *Id.*

The trial court made the following ruling:

The Court finds that the statements given by -- the statements given, as I say before, by Mr. Ronnie - - to Mr. Ronnie Jones, the Deputy Sheriff had enough in the issue of reliability that the Court could find that it was a reliable statement, even though hearsay, and the Court will allow it in as out of court statement made to -- by the Declarant, Loretta Tate to Mr. Ronnie Jones.

Also, Ms. Stewart, however, the -- Ms. Sammie Stewart, the Court finds that there is sufficient in issue to -- for the Court to find that the statement is also reliable and that there has been no proof offered of being coercion on the part of anyone to get this child to say anything. And the child is a child of eleven (11) years of age at the time of this incident, and according to the witnesses she is able to relate what happened to here [sic] in a cohesive manner that you can understand. Therefore, the reliability factor is there. The Court finds that there is a sufficient issue of reliability to admit these statements even though they are statements of hearsay.

The Court does, however, have problems with some statements that were made and I will make the rulings on them now so that we won't get into that during the trial. The statement that was made to - - specifically referring to Ms. Phillips, Ms. Tate-Phillips, statements made to her by the child witness who was there -- statements that were made to her that Loretta admitted to her, which is third-tier hearsay, I would call it, would not be admissible, and to advise her that she can only testify that the child may have told her that something happened but not exactly what happened.

Also the statements made by, the substantial stagnation statements that were made by Ms. Sammie Stewart -- that also will be as hearsay and if those witnesses are available they should be coming into Court and make whatever statements but not through Ms. Stewart saying that she talked to them and they told her a particular thing.

Alright, with that the Court finds, of course, this Court's ruling is all dependent upon this child testifying. Is this child going to testify?

After examining the witnesses extensively, outside the presence of the jury, the court found that the statements made by L.T. to them were reliable. We hold that the above finding by the trial court satisfies the requirements needed to admit the testimony under the Tender Years Exception to the hearsay rule.

III.

Clark's last argument is that the trial court erred in going beyond the *Sharplin* instruction in informing the jury what to do during deliberations. He argues that once the *Sharplin* instruction is given the jury should be immediately sent back to the jury room, and any further instruction by the trial court is erroneous.

In *Sharplin v. State*, 330 So. 2d 591, 596 (Miss. 1976), our supreme court approved a jury instruction that is to be given by the trial court in the event of a "hung jury." The instruction states:

I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but if it is possible to reconcile your differences of opinion and decide this case, then you should do so.

Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

After reading the above instruction the court went on to further explain to the jury what its responsibilities were during deliberations. In asserting that the trial court committed error, Clark does not cite to this Court any relevant case nor make any meaningful argument as to how or why the comments made by the trial court were in error, and this Court can find no case which prohibits the trial court from explaining to the jury what its duties are.

The trial court stated:

Now, after I have read that to you, do you feel that you, as I said before, that you are able to consult with one another and listen to one another as to the facts of the case and the law that is presented by this Court. Are you still able to do that?

BY JURORS: I don't know if I understand exactly what you are asking.

BY THE COURT: The question is whether or not you are exchanging ideas. Basically that is it, or have you gotten into something that everyone has pretty much drawn the battle ground to speak, and there is no movement at all as to the exchange of ideas. That is the only way that I can put it.

BY JUROR: Do you want me to answer that?

BY THE COURT: Yes, ma'am.

BY JUROR: Well, when we went back we had had a time of -- we deliberated and we talked and then we said we will take this and this will be our final vote. You know, this is what we are going to do. And we took the 11 to 1 vote and we went around and we polled and said, "Are you satisfied with this vote. This is what you feel that your conviction is and everyone said, yes." And we ended it at that.

BY THE COURT: I noticed that you asked for a chart board.

BY JUROR: Yes.

BY THE COURT: Did that help in putting the issues down or before the jury?

BY JUROR: We had so many things that we just felt like we need to, you know, to list what we, the facts that we were talking about. So that we wouldn't forget everything that we had discussed.

BY THE COURT: So I guess that what I am trying to get at is that you had some agreement is or some disagreement in as to -- obviously there is an area of disagreement since there is not an area -- a unanimous way one way or the other. Have you went over those areas again, those areas of disagreement again?

BY JUROR: I guess -- when we discussed the last time and we put everything on the board and the vote prior to that was 7 - 5. After we went back and talked and we rehashed everything and wrote everything down and we said that this was going to be our final vote and the vote was 11 to 1.

BY THE COURT: And you have had no discussion Since then?

BY JUROR: Since that vote. only to say -- to go around to everyone and say when to Come back told you that we were where we were to be sure that everybody was satisfied with their vote. We had not [sic] discussion. We just asked is everyone was satisfied with their vote.

BY THE COURT: I'm going to ask that you, so that the Court can be satisfied, that you do have one final discussion over the issues and let that -- at least that, as I said before, that you have discussed with one another. What you have told me now is that you have taken one vote since the last time that I called you out here. I would ask that you have follow-up discussions and that it is not necessary that you have one, two, or - - whatever amount of votes that you have is not counted by the Court, that is only -- only gives me Some idea of where you [sic] movement is,

BY JUROR: Right.

BY THE COURT: And I want you to understand that this Court has no opinion one way or the other as to how this case is to come out, I thought that I made that clear to you, one way or the other. There is the interest, as I said before, that if it is possible that you can reconcile your differences and agree upon a verdict in this case, then you should do so. If not, then that is the way that it is. But if it is possible, I ask that you try. And I am going to ask that you go back at this time for further discussions and further deliberations.

We hold that the comments made by the trial court after reading the *Sharplin* instruction were not erroneous, but merely an explanation of the jurors' duty during deliberations. This issue is without merit.

THE CONVICTION OF THE CIRCUIT COURT OF SHARKEY COUNTY OF MOLESTATION OF A MINOR UNDER THE AGE OF FOURTEEN AND SENTENCE OF EIGHT YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY \$1,000 RESTITUTION ARE AFFIRMED. COSTS ARE TAXED TO APPELLANT.

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