

IN THE COURT OF APPEALS 11/12/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00915 COA

MICHAEL HAYNES

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. KEITH STARRETT

COURT FROM WHICH APPEALED: LINCOLN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOSEPH A. FERNALD, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: CRIMINAL - SEXUAL BATTERY (4) COUNTS

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE A TERM OF 30
YEARS ON EACH COUNT TO RUN CONCURRENTLY WITHOUT BENEFIT OF PAROLE
OR EARLY RELEASE UNDER THE HABITUAL CRIMINAL STATUTE

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

BARBER, J., FOR THE COURT:

Michael Haynes was tried and convicted in the Circuit Court of Lincoln County of four counts of sexual battery in violation of section 97-3-95 of the Mississippi Code. Pursuant to section 99-19-81 of the Mississippi Code, he was sentenced as a habitual offender to serve a term of thirty years on each count in the custody of the Mississippi Department of Corrections. Aggrieved by the judgment rendered against him, Haynes appeals his conviction on the following grounds:

I. HAYNES WAS IMPROPERLY DENIED A PRELIMINARY HEARING IN THE PRE-INDICTMENT PHASE OF THIS CASE.

II. HAYNES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE INITIAL PHASE OF THE CASE.

III. THE COURT ERRED IN DIRECTING DR. HARRY MINCER TO PERFORM A SPONTANEOUS IN-COURT EXAMINATION OF THE VICTIM IN FRONT OF THE JURY.

IV. THE VERDICT OF THE JURY WAS MANIFESTLY ERRONEOUS BECAUSE IT WAS THE RESULT OF PREJUDICE, AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND WITHOUT SUFFICIENT EVIDENCE TO SUPPORT IT.

Finding no merit in the Appellant's arguments, we affirm.

FACTS

On or about the evening of November 20, 1992, Sandra Butler was walking home from a neighbor's house approximately one block away. Butler testified that while on her way home, Haynes grabbed her, dragged her to an isolated area, and then over an extended period of time committed at least four separate acts of sexual battery upon her. At the time of the attack, Butler knew and identified Haynes. The results of Butler's medical examination following the attack were consistent with her statement of events. Butler sustained multiple injuries as a result of the attack. Among these were what appeared to be a bite mark on her chest. Butler also stated that at the time of the attack, she had with her a two-pronged meat fork for the purpose of protection and had managed to strike Haynes with it.

ANALYSIS

I. HAYNES WAS IMPROPERLY DENIED A PRELIMINARY HEARING IN THE PRE-INDICTMENT PHASE OF THIS CASE.

Haynes asserts that because he requested a preliminary hearing and did not receive one, his conviction should be reversed. He argues that because he never executed a waiver of preliminary hearing, his due process rights were violated.

The Mississippi Supreme Court settled this issue in its opinion in *Thorson v. State*, 653 So. 2d 876, 893 (Miss. 1994). As in *Thorson*, Haynes requested a preliminary hearing before the indictment and renewed his request after the indictment. For various reasons, the State never had a preliminary hearing prior to Haynes indictment. The circuit judge found that there was no need for one following the indictment. The court in *Thorson* held that failure to afford the defendant a preliminary hearing was not reversible error, and failure to afford him a preliminary hearing after the indictment was also not error. *Id.* (citing *Mayfield v. State*, 612 So. 2d 1120, 1128 (Miss. 1992); *Addkison v. State*, 608 So. 2d 304 (Miss. 1992); *Hansen v. State*, 592 So. 2d 114, 122 (Miss. 1991); *Willie v. State*, 585 So. 2d 660, 669 (Miss. 1991)).

In accordance with *Thorson*, we also hold that in this case, the denial of a preliminary hearing is not reversible error. Therefore this assignment of error has no merit.

II. HAYNES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE INITIAL PHASE OF THE CASE.

Haynes asserts that because his first attorney was suspended from the practice of law after he was appointed as Haynes' counsel he did not receive effective assistance of counsel and was prejudiced thereby. Haynes correctly states the standard for determining whether an accused has received ineffective assistance of counsel. The two factors to consider are whether counsel's performance was deficient by professional standards and whether counsel's clients were prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, (1984). Haynes, however, falls short of establishing that the two prongs of this test are met.

The defendant bears the burden of proof on both issues. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under the first prong, there is a strong presumption "that trial counsel's conduct is within the wide range of reasonable conduct and that decisions made by counsel are strategic." *Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993). "Under the second prong of the test, the movant must show that there is a 'reasonable probability that, but for counsel's unprofessional errors,

the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Mohr v. State*, 584 So. 2d 426, 430 (Miss. 1991).

Specifically, Haynes contends that the first appointed attorney was constitutionally ineffective in failing 1) to insist on a preliminary hearing; 2) to take steps to preserve evanescent evidence; and 3) to contest the search warrant. Without reaching the issue of whether Haynes' first attorney violated the first prong of the test, we find that Haynes has failed to make a showing of prejudice resulting from any one of the three incidents cited. Haynes completely failed to demonstrate that he had been prejudiced by not receiving a preliminary hearing.

Haynes next claims that his attorney was ineffective in failing to secure independent bite mark identification evidence, and that this failure resulted in the loss of transitory proof. The effective lapse occurred between November 22, 1992, when the initial evidence was gathered and March 1, 1993, when the subsequent attorney was appointed. The bite mark referred to was preserved through photographs taken one day after the attack. The State's expert, Dr. West, was able to make a positive identification after personally examining the victim on January 6, 1993, forty-nine days after the crime. At the time of trial, in June of 1993, there was sufficient evidence of the bite mark remaining on the victim's body to enable the defense expert to compare the size of the defendant's dental model with the bite mark. Therefore, we cannot conclude that crucial evidence was lost in the interim.

Haynes further complains that his original counsel's performance was somehow deficient because he failed to contest a search warrant for the Defendant's person. This argument is cursory in that it does not indicate on what grounds the warrant should have been challenged or whether the challenge would have had any probability of success.

Finally, Haynes points out that he was effectively without counsel from February 11 to March 1, 1993. Again, because he fails to show how he was prejudiced by this, his claim of ineffective assistance of counsel must be rejected. As such, Haynes' second assignment of error must also fail.

III. THE COURT ERRED IN DIRECTING DR. HARRY MINCER TO PERFORM A SPONTANEOUS IN-COURT EXAMINATION OF THE VICTIM IN FRONT OF THE JURY.

Haynes contends that the spontaneous in-court demonstration by Sandra Butler and Dr. Mincer, expert for the defense, was highly prejudicial and inflammatory when performed in the presence of the jury and constitutes an abuse of discretion and reversible error. During direct examination, Dr. Mincer testified that based on his examination of Dr. West's data, he could not state with certainty that the dental model matched the bite mark. Dr. Mincer stated that the photographs of the bite mark may have distorted its actual size and that a more accurate determination could have been made had he been allowed to examine the victim.

During cross-examination, the State requested that Dr. Mincer examine the victim and the bite mark in front of the jury. Upon objection by the defense, the court directed the demonstration to be

conducted in the presence of the jury. Haynes also asserts that the probative value of the examination was substantially outweighed by its prejudicial effect because the in-court examination did not meet the test of "similar conditions" as set forth in Mississippi Rule of Evidence 703.

We find that the "similar conditions" requirement is not applicable to the facts before us because this was not the purpose of the in court examination. Rather, the purpose was to better ascertain the basis of Dr. Mincer's opinion and to aid him in making a determination of whether Haynes' dental mold matched the victim's bite mark. Dr. Mincer himself indicated that such a comparison would be useful and would help him to clarify his opinion. In the light of this indication, the trial court did not abuse its discretion in allowing Dr. Mincer to perform the comparison and to testify as to the conclusions drawn from it. Hence, this assignment of error is without merit.

IV. THE VERDICT OF THE JURY WAS MANIFESTLY ERRONEOUS BECAUSE IT WAS THE RESULT OF PREJUDICE, AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND WITHOUT SUFFICIENT EVIDENCE TO SUPPORT IT.

Haynes claims that because he was denied a preliminary hearing and received ineffective assistance of counsel, the judgment against him was the result of prejudice. Because Haynes failed to demonstrate any resulting prejudice in addressing those issues, we cannot find that the judgment against him was the result of prejudice.

Next, Haynes contends that the verdict is contrary to the evidence and without adequate evidence to support it. He submits that because the testimony of the victim contained some contradictory statements and because there was a lack of certain forensic evidence, there is insufficient evidence upon which to base a conviction. Using this argument as justification, Haynes asks that we reverse the decision of the trial court and render a decision in his favor.

Because Haynes' argument implicates both the weight and sufficiency of the evidence, we will address this issue by determining whether the trial court erred in failing to grant a directed verdict and in failing to grant a motion for a new trial. The standard of review in such instances is as follows:

If no reasonable hypothetical juror could have reached a guilty verdict, the defendant's motion for a directed verdict must result in discharge. When [we review] a trial court's denial of a motion for directed verdict, the Court will give the state the benefit of all favorable inferences and then examine the evidence to be sure it supports the verdict beyond a reasonable doubt.

[We] will reverse the trial court's denial of a motion for new trial only if, by denying, the trial court abused its discretion. A new trial should be granted only when the jury's verdict so contradicts the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice.

In asserting this issue, Haynes does not state that a motion for directed verdict was made, and after reviewing the record, we cannot find where one was made. In giving the Defendant the benefit of the doubt as to this matter, we find that there was sufficient evidence in this case to pose a jury question.

Regarding Haynes' motion for a new trial, the weight of the evidence supports the jury's verdict. When determining whether a defendant is entitled to a new trial on this ground, the reviewing court "must accept as true the evidence favorable to the state." *Van Buren v. State*, 498 So. 2d 1224, 1229 (Miss. 1986). "Factual disputes are properly resolved by the jury and do not mandate a new trial." *Benson v. State*, 551 So. 2d 188, 193 (Miss. 1989).

The verdict in this case was supported by the State's evidence which included the following facts. The victim gave positive eyewitness testimony that Haynes was the person who assaulted her. The victim's testimony as to the specifics of the sexual battery were corroborated by medical proof of penetration. The State's expert, Dr. West, conclusively identified Haynes as the person who left the bite mark on the victim. Finally, a physical examination of Haynes showed that he had several injuries which resemble puncture wounds which were consistent with the victim's testimony that she had stabbed Haynes with a meat fork in an attempt to defend herself.

Taking this evidence in the light most favorable to the State, the verdict was not against the overwhelming weight of the evidence. We find, therefore, this assignment of error without merit. Given the foregoing reasons, the judgment of the trial court is affirmed.

THE JUDGMENT OF THE LINCOLN COUNTY CIRCUIT COURT OF CONVICTION OF FOUR COUNTS OF SEXUAL BATTERY AND SENTENCED AS A HABITUAL OFFENDER TO A TERM OF THIRTY YEARS ON EACH COUNT TO RUN CONCURRENTLY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST LINCOLN COUNTY.

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