

**IN THE COURT OF APPEALS 12/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-KA-01252 COA**

**JIMMY MITCHELL A/K/A JAMIIL ABDUL ALI A/K/A JAMIL ABDUL ALI**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**PER CURIAM AFFIRMANCE MEMORANDUM OPINION**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS C. LEVIDIOTIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT S. FLYNN

DISTRICT ATTORNEY: LAWRENCE L. LITTLE

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CT I: AGGRAVATED ASSAULT, CT II: AGGRAVATED  
ASSAULT, CT III: SEXUAL BATTERY, CT I: 20 YRS; CT II: 20 YRS; CT III: 30 YRS; EACH  
COUNT IS TO RUN CONSECUTIVE TO EACH COUNT AND CAUSE #LK93-218

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

PER CURIAM:

Jimmy Mitchell was convicted of two counts of aggravated assault and one count of sexual battery for which he was sentenced to seventy years imprisonment in the custody of the Mississippi Department of Corrections. On appeal, Mitchell challenges the trial court's denial of his motion for severance of the two counts in the indictment and argues that the jury's verdict is without sufficient evidence to support it and is against the overwhelming weight of the evidence.

#### FACTS

The evidence presented by the State showed that on May 3, 1994 Jimmy Mitchell was visiting his aunt and niece, who were his next door neighbors. According to the aunt's testimony Mitchell unexpectedly attacked her with a knife. The ensuing disturbance awakened the niece, who ran toward the room where her mother was being attacked. The niece testified that Mitchell stabbed her in the side. Both the niece and her mother escaped from the home and attempted to flee to Mitchell's parents' home located next door. The niece testified that when they were outside, Mitchell pushed her down onto the ground and sodomized her.

#### ANALYSIS

We find that the trial court was correct in denying Mitchell's motion for directed verdict. Directed verdict and JNOV motions challenge the legal sufficiency of the evidence. *McClain v. State*, 625 So. 2d 774, 781. With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *McClain*, 625 So. 2d at 781. This Court is authorized to 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*, 503 So. 2d at 808. In reviewing the evidence in this case, we find it sufficient to support a verdict of guilty beyond a reasonable doubt. Therefore, we find no error in the trial court's denial of Mitchell's motion for directed verdict.

Motions for a new trial challenge the weight of the evidence and "[implicate] the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). New trial decisions rest within the discretion of the trial court. *McClain*, 625 So. 2d at 781. A new trial motion should only be granted when the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). This Court, on appeal, will reverse and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. *McClain*, 625 So. 2d at 781. Considering this standard, and after reviewing the record, we find that the jury had ample evidence to support a verdict of guilty. Therefore, based upon the weight of the evidence supporting the verdict, we find that the trial court did not abuse its discretion in denying Mitchell's motion for a

new trial.

Regarding the trial court's denial of Mitchell's motion for severance, no transcript was made of the omnibus hearing on which this motion was ruled. In the absence of a transcript, it is impossible for this Court to review the trial court's determination not to sever. *See Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990) (holding appellant has duty to see that record of trial proceedings wherein error is claimed is brought before appellate court). Furthermore, the authority cited by Mitchell indicates that hearings on motions to sever are discretionary. *See* URCCC 9.03 (stating that granting or refusing of severance "shall be in the discretion of the trial judge"); *see also Corley v. State*, 584 So. 2d 769, 772 (Miss. 1991) (holding that when defendant raises issue of severance, it is recommended that trial court hold hearing on issue and trial court's decision is to be given due deference, subject to review for abuse of discretion). Mitchell has cited no authority supporting his contention that there should have been a "formal hearing had with respect to this issue alone." Additionally, even a cursory inspection of the facts makes it clear that the charges against Mitchell

were interwoven and arose out of the same transaction making the offenses properly chargeable in the same indictment. This assertion of error is without merit, and we affirm Mitchell's conviction.

**THE JUDGMENT OF THE CIRCUIT COURT OF LAFAYETTE COUNTY OF CONVICTION OF COUNT I: AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS; COUNT II: AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS, AND COUNT III: SEXUAL BATTERY AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH EACH COUNT TO RUN CONSECUTIVE TO EACH COUNT AND CAUSE #LK93-218 IS AFFIRMED. COSTS ARE ASSESSED AGAINST LAFAYETTE COUNTY.**

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