

IN THE COURT OF APPEALS 2/27/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00232 COA

CHARLIE JOHNSON, a/k/a CHARLIE JOHNSON, JR., a/k/a "BALL"

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. JOHN M. MONTGOMERY

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS L. KESLER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: FORREST ALLGOOD

NATURE OF THE CASE: CRIMINAL - RAPE

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF FIFTEEN YEARS IN
THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

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

KING, J., FOR THE COURT:

Charlie Johnson was indicted in the Circuit Court of Lowndes County for rape and kidnaping. The jury acquitted Johnson of the charge of kidnaping and found him guilty of the rape charge. The trial court sentenced Johnson to a term of fifteen years in the custody of the Mississippi Department of Corrections. Finding no error, we affirm.

I.

It is undisputed that on December 9, 1992, D.M.T. went to Charlie Johnson's house to ask for a ride. After asking for the ride, Johnson overheard D.M.T. tell Mellow Lowery, Johnson's wife, or long-term live-in companion that he was having an affair. Thereafter a fight ensued between D.M.T. and Johnson in Lowery's presence. At this point, the evidence becomes conflicting.

According to D.M.T., after Johnson overheard her tell Lowery that he was having or had previously had an affair with her sister, Johnson beat D.M.T. and raped her on the den sofa in view of his wife. Johnson then forced her to stand at a window while he beat her with a whip or rope. After that, Johnson bound her hands and feet in a chair, released her, and took her into a bedroom where he again sexually assaulted her. Thereafter, Johnson forced D.M.T. into his truck, at gunpoint, and threatened to take her to Mexico and kill her. D.M.T. was taken to another location and raped again. After this assault, D.M.T. told Johnson that she was hungry and asked him to take her to get something to eat. Instead, Johnson drove her to K-Mart in Columbus to buy cocoa butter to cover the marks on her face. Upon entering K-Mart, Johnson and D.M.T. parted company: Johnson went to use the telephone, and D.M.T. went to the beauty-aid section, where she approached an employee of K-Mart and alleged that she had been raped. D.M.T. was taken to the local hospital and examined. Charlie Johnson was arrested and indicted on charges of rape and kidnaping.

At the trial, which commenced on November 29, 1994, Mary Bridges, an employee of K-Mart, testified that on December 9, 1992, D.M.T. approached her in the beauty-aid section and told her that she had been raped and asked her to call the police. Madeline Ellen Malcolm, assistant manager of K-Mart, testified that while on duty on December 9, 1992, Bridges called her and told her that a lady was with her who had been raped.

Greg Wright, investigator with the Lowndes County Sheriff's Department, testified that on December 9, 1992, he carried D.M.T. to the emergency room of Golden Triangle Regional Medical Hospital to have a sexual assault examination. Officer Wright stated that D.M.T. was very upset, crying, shaking, and had marks on her face.

Dr. Stewart testified that during the examination, he saw multiple bruising over a considerable area of D.M.T.'s body. There were bruises and swelling under her left eye, bruises on her back, her buttocks, her left arm, and upper posterior thighs. Dr. Stewart found no sperm or tearing or lacerations in her vaginal area. Staff nurse, B.J. Anderson, gave essentially the same testimony as Dr. Stewart relative to D.M.T.'s physical condition when examined. Additionally, Anderson testified that she took pictures of the wounds.

The defense's version of the events is as follows: Johnson asserts that he was having an affair with D.M.T., not her sister, and that after the fight, his wife left the house, and he and D.M.T. reconciled. When Johnson's wife returned, D.M.T. and Johnson left Johnson's house and went to his office building in Columbus, where they had sexual intercourse. After the sexual intercourse was over, D.M.T. told Johnson that she wanted something to eat. They decided, however, that before they ate, they would go to K-Mart to get something to put on D.M.T.'s face to mask the bruises left from their fight. Upon arriving in K-Mart, D.M.T. told an employee that she had been raped, authorities were called, and the investigation began. Johnson did not testify in his own defense.

After deliberations, Johnson was acquitted of the kidnaping charge and convicted on the rape charge and sentenced to fifteen years in the custody of the Mississippi Department of Corrections.

II.

1. WHETHER THE TRIAL COURT ERRED IN ADMITTING ANDERSON'S TESTIMONY UNDER RULE 701 OF THE MISSISSIPPI RULES OF EVIDENCE?

Johnson contends that the trial court erred when it admitted, under Rule 701 of the Mississippi Rules of Evidence, testimony from B.J. Anderson, a registered nurse, that she considered D.M.T.'s injuries to be "very severe." Rule 701 provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to the clear understanding of his testimony or the determination of a fact in issue.

M.R.E. 701.

The record in the instant case indicates that Anderson was on duty when D.M.T. arrived at the hospital; Anderson assisted D.M.T. in getting ready to be examined; Anderson observed that D.M.T.'s left eye was swollen and that there were large amounts of bruising on the front and back of her upper legs and buttocks. Additionally, Anderson photographed the evidence. Based on these facts, we find that Anderson gave testimony, which was based on her personal observations of D.M.T., and that the testimony was helpful to the understanding of the case. This assignment of error is without merit.

2. WHETHER THE TRIAL COURT ERRED IN REFUSING TO CONDUCT AN INQUIRY INTO ALLEGED EXTRANEIOUS INFLUENCES ON THE DELIBERATION PROCESS?

Johnson contends that the trial court erred in refusing to conduct an inquiry into allegations that juror(s) may have known the victim.

In adopting a method "to uniformly execute juror inquiry, under M.R.E. 606(b), within this state," the Mississippi Supreme Court stated:

As a beginning to this inquiry, the trial court and opposing counsel must be made aware of any potential juror misconduct when this evidence is manifested. Thus, if a juror approaches an attorney for one of the parties or the court itself, or if either subsequently learns such through alternative means, all parties involved should be made aware of the allegation as expeditiously as possible. However, to prevent either party from "fishing" for a way to change the undesirable conclusions rendered in their jury's verdict, a balance must be struck between the right to inquire into the jury verdict and the right of each juror to be free from harassment and secure in their verdict.

Once an allegation of juror misconduct arises, then the next step is to consider whether an investigation is warranted. In order for the duty to investigate to arise, the party contending there is misconduct must make an adequate showing to overcome the presumption in this state of jury impartiality. Juror polling shall only be permitted by an attorney, outside the supervision of the court, upon written request.

At the very minimum, it must be shown that there is sufficient evidence to conclude that good cause exists to believe that there was in fact an improper outside influence or extraneous prejudicial information.

Gladney v. Clarksdale Beverage Co., 625 So. 2d 407, 418-19 (Miss. 1993).

In the instant case, the trial court held a hearing on Johnson's post-trial motions. During that hearing, the following colloquy relative to juror misconduct transpired:

By Mr. Kesler: Your Honor, I had a motion asking the Court for permission to interview jurors. There had been some information that it seems now dubious quality filtering back to me that perhaps some of the jurors had not been truthful with the Court during voir dire and in fact, knew the defendant or [D.M.T.] Your Honor, I have been unable to develop any evidence that I can present to the Court, other than those rumors. I have no way to present those rumors, so I am not in a position to offer any evidence on that particular motion.

By The Court: All right. Mr. Allgood, do you care to respond in the record on the motion?

By Mr. Allgood: If your Honor please, I don't think we can be impeaching juries' verdicts on mere rumors. If there had been something solid that had come to defense counsel, I think we would be in a different position, but as it is, what I am hearing is that what we have got is some rumors [sic] that have "filtered back" and I don't think it is proper to try

to pierce the jury room veil at this point and impeach the jury's verdict on mere rumor. I don't think you can do that.

....

By The Court: All right. The defendant's motion to allow juror interviews, the Court finds that there is no basis to support the motion to challenge the jurors, not even identify who the jurors are. It is no more than speculation and conjecture and rumor and there is no factual basis for the Court to allow interviews. The Court is very sensitive to the issue of - - the Court granted a new trial on this very issue during the first trial of Mr. Johnson and it appears that he wants to allege this a second time. The Court basically finds that there is no basis for it and there is no outside influence that affected the jury's verdict and under existing laws it is not proper and will be overruled.

Following *Gladney*, defense counsel must have, at a minimum, "shown that there is sufficient evidence to conclude that good cause exists to believe that there was in fact an improper outside influence or extraneous prejudicial information." *Gladney*, 625 So. 2d at 419. However, based on the above colloquy, it is clear that defense counsel offered no evidence beyond rumor and speculation. We find that the trial court did not err in ruling that an investigation was not warranted. This assignment of error is without merit.

3. WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILTY OF RAPE OR IN THE ALTERNATIVE WAS AGAINST THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE?

By this issue, Hayes first contends that the evidence was insufficient to support a conviction of rape.

The scope of review by an appellate court is limited when presented with the question of the sufficiency of evidence. *Benson v. State*, 551 So. 2d 188, 192 (Miss. 1989). In *Swinford v. State*, the Mississippi Supreme Court explained that:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with jury's verdict is quite limited. We proceed by considering all of the evidence-not just that supporting the case for the prosecution-in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.

Swinford v. State, 653 So. 2d 912, 914 (Miss. 1995) (citations omitted).

In the instant case, D.M.T. testified that Johnson sexually assaulted her and beat her. Nurse Anderson testified that D.M.T.'s injuries were very severe. Dr. Stewart testified that although there was no tearing of the vagina, there were multiple bruises over D.M.T.'s body. On the other hand, Johnson's theory of defense was that he and D.M.T. had a prior sexual relationship, and that upon finding D.M.T. with his wife, he beat her in anger, but did not inflict serious bodily harm. Thereafter, he and D.M.T. made up and had consensual sexual intercourse.

Given the conflict, the question of whether D.M.T. consented to sexual intercourse with Johnson was a proper issue for the jury to resolve. "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." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). After hearing the evidence in the instant case, the jury chose to accept the State's version and to reject Johnson's version. Given the facts of this case and all reasonable inferences which might be drawn from them, we find that the record contains sufficient evidence upon which a reasonable person might find Johnson guilty of rape.

In an alternative theory, Johnson argues that the jury verdict was against the overwhelming weight of the evidence and that the trial court erred in denying his motion for a new trial. "New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice." *McClain*, 625 So. 2d at 781 (citations omitted). "We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State." *Id.* Reviewing the evidence in the light most favorable to the verdict and accepting it as true, we cannot say that "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).

For the foregoing reasons, we affirm the conviction and sentence of the trial court.

THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT OF CONVICTION OF RAPE AND SENTENCE TO SERVE FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST LOWNDES COUNTY.