

IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00978 COA

MICHAEL SIMMONS

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. ELZY JONATHAN SMITH, JR.

COURT FROM WHICH APPEALED: TUNICA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ALLAN D. SHACKELFORD

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEYS: PATRICIA BECKETT AND LAURENCE MELLEN

NATURE OF THE CASE: CRIMINAL - RAPE

TRIAL COURT DISPOSITION: DEFENDANT CONVICTED OF RAPE AND SENTENCED TO
SERVE TERM OF TWENTY-FIVE YEARS IN CUSTODY OF MISSISSIPPI DEPARTMENT
OF CORRECTIONS

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

BARBER, J., FOR THE COURT:

Michael Simmons was tried and convicted of rape in the Tunica County Circuit Court. He was sentenced to serve a term of twenty-five years imprisonment in the custody of the Mississippi Department of Corrections. Simmons appeals his conviction on the following grounds:

I. WHETHER THE COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY AS TO THE ELEMENTS OF FORCE AND RESISTANCE.

II. WHETHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

FACTS

On the night of November 5, 1993 at approximately 10:00 P.M., Michael Simmons was in the home of his girlfriend, Pat Johnson, waiting for her to return from work. Also present were Johnson's three nieces. Testimony at trial indicated that after Simmons arrived at the Johnson residence, the three children went to sleep in various locations throughout the home. Johnson's fifteen-year-old niece was asleep by herself in her bedroom when Simmons entered the room. According to her testimony, Simmons awakened her by climbing on top of her and fondling her breasts. Simmons then proceeded to rape the fifteen-year-old niece despite her protests and demands that he get off her. Simmons denied having sexual intercourse with the victim.

At trial, the State presented medical testimony indicating that the victim had engaged in sexual intercourse on the night in question. Prior to November 5, 1993, the fifteen-year-old niece was a virgin. The victim testified that she tried to resist Simmons's advances, but was unsuccessful and that her sisters were not awakened by her attempts. The victim also testified that she did not scream or call for help because she was ashamed and embarrassed, and that she did not recall if she scratched or bit Simmons. After the rape was over, the victim took a bath and returned to her bedroom where she cried all night. Simmons left the Johnson residence after he elicited a promise from the victim that she would not tell anyone about the alleged rape. When the victim's mother came home from work she stuck her head into her daughter's room but did not hear her crying. Out of fear, the victim waited until the next morning to inform her mother of the rape, at which time Ms. Johnson summoned the police, who came to the Johnson home to collect evidence. The officers also took the victim to a hospital emergency room where a rape kit analysis was performed on her, and she was examined by Dr. James E. Warrington.

ANALYSIS

I. WHETHER THE COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY AS TO THE ELEMENTS OF FORCE AND RESISTANCE.

Simmons argues that the trial court committed reversible error in the instructions it submitted to the jury. At trial, the State proposed one instruction for the jury, while Simmons offered five of his own. The trial court refused to charge the jury with any of the instructions offered by Simmons, and instead used the State's instruction. Simmons asserts that the instruction given was erroneous because it failed to charge the jury that the sexual act in question must have been accomplished by force, in order for a rape to have occurred. The State counters this argument by directing this Court to the text of the instruction given to the jury.

Section 97-3-65(2) of the Mississippi Code requires that to be guilty of rape the accused must have "forcibly ravish[ed]" the victim. Miss. Code Ann. § 97-3-65(2) (1972). An inspection of the instruction given at trial reveals that it made clear to the jury that in order for sexual intercourse to be rape, the act must have been done without the alleged victim's consent, by "actual penetration of her private parts by *force*." (emphasis added). The language of the instruction satisfies all the requirements of the statute, including "force" and therefore, constitutes an adequate instruction to the jury.

In order for a jury instruction to be proper, it must be supported by the evidence and provide correct statements of the law. *See Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995) (holding trial court in error for refusing to grant defendant's proposed jury instruction where instruction was correct statement of law and was supported by evidence). Even a cursory analysis of the instructions proposed by Simmons reveals serious flaws in their legal accuracy. This Court, however, need not address the legal accuracy (or lack thereof) of instructions that were not granted by the trial court, because the instruction actually given was adequate. *See Turner*, 602 So. 2d at 823 (holding that when instructions granted adequately instruct jury, party may not complain of refused instruction on appeal). Additionally, even if the instructions offered by Simmons had been accurate statements of the law, "[t]he trial judge is not required to give repetitious instructions." *Triplett v. State*, 672 So. 2d 1184, 1186 (Miss. 1996). This assignment of error is wholly without merit.

II. WHETHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Simmons's final assignment of error is that the jury's verdict was against the overwhelming weight of the evidence and, therefore, challenges the trial court's denial of his motion for new trial. However, in the body of his argument on this point it appears that he is, in fact, claiming that the evidence was insufficient as a matter of law to sustain his conviction. This would entitle him to a JNOV, rather than a new trial. Because of the ambiguity surrounding Simmons's position, we have elected to address both issues.

Our standards for reviewing challenges to convictions based on both the weight of the evidence and the sufficiency of the evidence are well established. As to each element of the offense, we consider all of the evidence in the light most favorable to the verdict. We reverse and render when, with respect to an element of the offense charged, the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). As to the related but separate issue of whether the verdict is contrary to the overwhelming weight of the evidence, the trial court is given discretion to order a new trial in the face of overwhelming evidence contrary to the jury's verdict in order to prevent an

unconscionable injustice. *McClain*, 625 So. 2d at 781. This Court, on appeal, will reverse and order a new trial only upon a determination that the trial court abused its discretion by denying the motion for new trial.

In the case at bar, Simmons argues that the "conflicts in the State's proof should be addressed." Simmons bases his objection on discrepancies in the victim's testimony that she gave in court from her prior statements to a psychotherapist, hospital employees, and her friends at school. Simmons also asserts that the following are sufficient to warrant a reversal of the jury's verdict: 1) the absence of certain medical evidence; 2) the fact that the victim's mother was not aware of the incident until the next day; and 3) that the victim's sisters knew nothing of the incident while it was in progress. This Court has examined the record and is well aware of the discrepancies that Simmons argues. However, such discrepancies in testimony are a natural part of the fact finding process of a trial court. After all, the purpose of a jury is to resolve conflicts and discrepancies in the testimony. *Jones v. State*, 564 So. 2d 848, 850 (Miss. 1990). It is not apparent from the record that the discrepancies targeted as error by Simmons are of such magnitude as to necessitate a reversal of the jury's verdict. We find Simmons's challenge to his conviction, whether from the standpoint of the weight or the sufficiency of the evidence, is without merit.

THE JUDGMENT OF THE TUNICA COUNTY CIRCUIT COURT OF CONVICTION OF RAPE AND SENTENCE OF TWENTY FIVE (25) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO MAKE FULL RESTITUTION TO VICTIM IS AFFIRMED. SENTENCE IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. COSTS ARE ASSESSED AGAINST TUNICA COUNTY.

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