

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01366-COA**

KOURTNEY BYNUM A/K/A COURTNEY BYNUM

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

DATE OF JUDGMENT:	12/21/95
TRIAL JUDGE:	HON. KENNETH LEVENE THOMAS
COURT FROM WHICH APPEALED:	BOLIVAR COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RAYMOND L. WONG
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	LAWRENCE Y. MELLEN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	RAPE: SENTENCED TO SERVE A TERM OF 25 YEARS IN THE MDOC; SENTENCE SHALL RUN CONSECUTIVE TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED
DISPOSITION:	AFFIRMED - 12/02/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE McMILLIN, P.J., KING, PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Kourtney Bynum was convicted of rape by the Bolivar County Circuit Court. He appeals his conviction alleging that: (1) the trial court erred in failing to give the jury a legal definition for the term consent and (2) the verdict was against the overwhelming weight of the evidence. Finding no merit to Bynum's assertions of error, we affirm.

FACTS

The evidence taken in the light consistent with the verdict is this. On January 31, 1995, a student at Delta State University was raped by two men, Ben Sturdivant and Kourtney Bynum. Bynum was the only one tried since Sturdivant had fled the area and was still at large at the time of trial. The victim

and another DSU student were seeking a ride to Rosedale so that one of the women could have her hair braided by the other's aunt. They opted to go with Bynum and Sturdivant. Over the objections of the two women, the group detoured to a levee near Beulah, Mississippi and parked. The victim testified that Bynum held her leg while Sturdivant raped her. After Sturdivant finished, Bynum also raped her himself. She testified that she resisted both Bynum's and Sturdivant's advances by spraying pepper spray, screaming "no", "don't do this", and asking "why?" She also locked her legs tightly together, moved her head so that they could not kiss her, and scratched Bynum so hard that her fingernail came off. The other student, who was not raped, corroborated this story and testified that she had either seen or heard everything that happened in the backseat.

Bynum testified at trial that the sexual intercourse was consensual. He claimed that when he asked for sex the victim said nothing, but opened her legs. He stated that this physical action constituted consent. After the event, Bynum cleaned out his dormitory room and left DSU. He was apprehended six months later in Jackson and brought to trial.

At the close of the trial Bynum requested a jury instruction defining consent. The trial court asked him to provide a legal definition, but he could not. He did present a standard dictionary definition that consent was "agree to do something." The trial judge stated that he did not see that such an instruction was necessary, but if a legal definition was provided in instruction form he would consider it. Bynum never did that and no consent instruction was given.

The jury returned a verdict of guilty of rape. Because the jury was unable to fix the penalty, sentencing was deferred pending a pre-sentencing investigation. Bynum's motion for JNOV or for new trial was denied on December 19, 1995. Two days later the trial judge sentenced Bynum to serve twenty-five years in the custody of the Mississippi Department of Corrections.

DISCUSSION

I. JURY INSTRUCTION

Bynum argues that the trial court erred in denying his proposed jury instruction defining consent. The judge rejected the dictionary phrase "agree to do something," but invited Bynum's attorney to present something more appropriate. That did not happen. A trial judge will not be found in error for failing to give an instruction unless it was requested in writing. *Ivory v. State*, 336 So. 2d 732, 734 (Miss. 1976). Bynum requested a consent instruction, yet had not drawn up an instruction for the trial judge's consideration. Under the circumstances, it was not error for the trial judge to exclude the dictionary definition of the term consent.

Additionally, the trial court granted a favorable instruction on the victim's obligation to resist. This instruction required the jury to find that the victim had used all physical resources reasonably available to her to resist Bynum. This instruction surely went further than "agree to do something" would have done in explaining the notion of agreement. All jury instructions are to be considered as a whole. Error may not be predicated upon the inadequacy of one instruction when another instruction compensates for it. *McLelland v. State*, 204 So. 2d 158, 164 (Miss. 1967). Accordingly, this

assignment of error is overruled.

II. WEIGHT OF THE EVIDENCE

Bynum claims that the verdict was against the overwhelming weight of the evidence. Before a new trial motion is granted for that reason, the trial judge must be convinced that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant a new trial would result in an unconscionable injustice. *May v. State*, 460 So. 2d 778, 781 (Miss. 1984). In reviewing a denial of a new trial, this Court is required to consider the evidence in the light consistent with the jury verdict. The reviewing court should not substitute its own view of the evidence for that of the jury's. *Blanks v. State*, 542 So. 2d 222, 226 (Miss. 1989).

Here there was conflicting witness testimony. Bynum claims that the victim consented to having sexual intercourse with him. Both of the female students claimed that there was no consent. It is not within the proper scope of our inquiry to weigh the testimony of the witnesses. "It is the function of the jury to weigh the evidence and to determine the credibility of the witnesses." *Miller v. State*, 634 So.2d 127, 130 (Miss. 1994).

Upon reviewing the evidence presented at trial in the light consistent with the verdict, we find that the trial judge did not abuse his discretion in denying Wright's motion for a new trial.

THE JUDGMENT OF THE BOLIVAR COUNTY CIRCUIT COURT OF CONVICTION OF RAPE AND SENTENCE OF TWENTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, SENTENCE TO RUN CONSECUTIVE TO ALL PREVIOUS SENTENCES, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED AGAINST BOLIVAR COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.