

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01336 COA**

**LINWOOD LEE FULLOVE A/K/A LINDWOOD
FULLOVE**

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:	02/08/95
TRIAL JUDGE:	HON. JOSEPH H. LOPER, JR.
COURT FROM WHICH APPEALED:	GRENADA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT T. LASTER, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: WAYNE SNUGGS, DEWITT T. ALLRED III
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	RAPE: SENTENCED AS HABITUAL TO A TERM OF 35 YRS IN THE CUSTODY OF THE MDOC, WHICH SENTENCE SHALL BE SERVED CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY IMPOSED; SENTENCE SHALL NOT BE REDUCED OR SUSPENDED NOR ELIGIBLE FOR PAROLE OR PROBATION
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HERRING, J., FOR THE COURT:

This case involves an appeal from the Circuit Court of Grenada County, Mississippi. Linwood Lee Fullove was convicted of rape by the Circuit Court of Grenada County, Mississippi, and sentenced to thirty-five years in the custody of the Mississippi Department of Corrections. Fullove claims that the trial court erred in refusing to require the Mississippi Crime Laboratory to perform certain tests, that the court erred in allowing a State's witness to give his opinion that the victim was telling the truth when she said she was raped, and finally that the trial court erred in refusing to grant Fullove a new trial. We hold that none of these arguments have merit. Thus, we affirm.

A. THE FACTS

On April 25, 1994, D.W., a thirty-four-year-old female, was walking to her place of employment at approximately 5:00 A.M. when an assailant approached her with a knife. D.W. attempted to scream but the assailant held the knife to her throat and told her that he would kill her if she did not keep quiet. As Fullove pulled D.W. into a used car lot, she managed to wrestle the knife away from Fullove, and after doing so she used the knife to cut him on the arm. As a result, Fullove's blood was deposited on D.W.'s shirt. After a struggle, Fullove regained control of the knife and began beating D.W. Subsequently, he led her to a nearby wooded area where he forcibly raped her and then allowed her to leave.

After the assault, D.W. ran to a nearby police station where she was assisted by law enforcement officers. The officers took a statement from D.W. as to how the assault occurred, at which time she gave the officers a physical description of her assailant. She was then taken to a nearby hospital where she submitted to a medical examination to determine whether or not she had been raped. Samples of hair and body fluids were taken and a sample of the blood found on D.W.'s shirt was also taken. On that same day, law enforcement officers prepared a "line up" of photographs of possible assailants for D.W.'s inspection, based upon the description which she gave to the officers. This photographic line up did not include a photograph of Fullove, and D.W. was unable to identify her attacker from any of the photographs presented to her. However, D.W. was later shown a second photographic line up which did include Fullove's picture, and she immediately identified the Appellant as her attacker at that time. At trial, D.W. testified that she had no doubt that it was Fullove who raped her, because she had plenty of time to see and observe him during the period when he struggled with her and raped her.

Fullove was arrested on April 28, 1995, and charged with raping D.W. At the time of the arrest, Fullove did have a fresh cut on his left forearm. A sample of his blood was taken in order to determine whether his blood type matched that of the blood found on D.W.'s shirt. The test results showed a positive match and that both blood types were type B, a blood type shared by only ten percent of the world's population. D.W. had bruises on her face and arms. Her clothes had leaves and dried grass on them in addition to the blood found on her shirt. The medical examination of D.W. produced evidence which was ultimately proven to be acid phosphatase, one of the components of seminal fluid. This substance was found on D.W.'s underwear. However, no semen as such was discovered on either the clothing or the body of D.W.

Fullove testified in his own defense and claimed that he did not commit the crime charged. He first testified that he injured his arm when he was attacked by an unknown assailant. However, Fullove was unable to describe his attacker and was not sure of the day when the attack occurred. In

addition, he was unable to account for his whereabouts on the morning of April 25, 1994, the day when the rape was alleged to have occurred. Ultimately, the jury convicted Fullove of rape, and he was sentenced to serve thirty-five years in the custody of the Mississippi Department of Corrections. He was also adjudged to be an habitual offender and therefore was ordered to serve the time of his confinement without parole. He now appeals his conviction to this Court.

I. THE ISSUES

Fullove alleges that the trial court committed reversible error and raises three issues which are taken verbatim from his brief:

I. THE TRIAL COURT ERRED WHEN IT REFUSED DEFENDANT'S MOTION TO REQUIRE THE MISSISSIPPI CRIME LAB TO DO FURTHER TESTING OF THE EVIDENCE IT HAD IN ITS POSSESSION.

II. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE'S WITNESS, DR. SUMMERS TO TESTIFY OVER OBJECTIONS OF DEFENDANT AS TO THE FACT THAT HE BELIEVED THE VICTIM WAS TELLING THE TRUTH.

III. THE TRIAL COURT ERRED IN REFUSING THE APPELLANT A NEW TRIAL PURSUANT TO RULE 5.16 OF THE UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE.

C. ANALYSIS

I. DID THE TRIAL COURT ERR IN REFUSING FULLOVE'S MOTION FOR FURTHER TESTING?

During the investigation of the alleged rape, the Mississippi Crime Laboratory performed a series of tests to determine blood types and whether or not Fullove's semen could be located as a result of the rape. As stated, no semen was recovered, although acid phosphatase was found on D.W.'s undergarment. Pubic hair was recovered from D.W.'s body during the course of her medical examination. However, no test was performed to determine if any foreign pubic hair found on D.W.'s body was similar to the pubic hair of the Appellant.

On the morning that this case was set for trial, Fullove moved the court *ore tenus* to require further scientific tests to be performed on the evidence gathered during D.W.'s physical examination. Specifically, Fullove wanted to compare the pubic hair found on D.W.'s body with Fullove's pubic hair, prior to proceeding with a trial on the merits. This motion was denied by the trial court. Although we have found no Mississippi cases directly on point, other jurisdictions have treated motions for further scientific testing as motions for a continuance. *See Mark v. State, 568 N.W.2d 820, 827 (Iowa Ct. App. 1997)*. Under the circumstances of this case, Fullove's motion was tantamount to a motion for a continuance since it was orally requested in an untimely manner on the morning that trial of this action was scheduled to begin. In regard to motions for a continuance, the Mississippi Supreme Court has held that "[t]he decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be grounds for reversal unless shown to have resulted in manifest injustice." *Coleman v. State, 697 So. 2d 777, 780 (Miss. 1997)* (also a rape

case involving a motion for a continuance for DNA testing of evidence). In *Coleman*, the Mississippi Supreme Court cited *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) and held that the defendant was not entitled to further DNA testing because there was "no showing that it would significantly aid the defense." Likewise, in the case *sub judice* Fullove has made no positive showing that the further testing would significantly aid the defense. We rule that the trial court's denial of Fullove's motion for further testing did not result in any manifest injustice and was not an abuse of the court's discretion. Thus, we rule that this issue has no merit.

II. DID THE TRIAL COURT ERR IN ALLOWING DR. SUMMERS TO TESTIFY THAT HE BELIEVED THE VICTIM WAS TELLING THE TRUTH?

Fullove contends that the trial court committed reversible error by allowing Dr. Richard Summers, the emergency room physician who examined D.W., to testify that he was of the opinion that she was telling the truth when she stated that she had been raped. During the trial of this action, the following verbal exchange took place between the prosecutor and Dr. Summers:

Q: And, tell us with regard to this particular patient, Ms. D.W., was her demeanor and appearance consistent with someone that had been raped?

BY MR. LASTER: I object, Your Honor. It calls for a conclusion.

BY THE COURT: He's been allowed to testify as an expert, and he's qualified as an expert, and he's testified that he sees dozens of such patients.

BY MR. LASTER: He's qualified as an expert in emergency room doctor, not as a rape doctor, Your Honor.

BY THE COURT: I'll overrule the objection and allow him to answer.

A: First of all, emergency room physicians are the people that see rape victims, not gynecologists, not anybody else. They're the ones that primarily see rape victims. And, when I was called to testify about this case, even though I do see dozens in a year, this in one that I remember because it was on [sic] of the few that I felt like I believed her story.

No further objection was raised by the defense to the testimony of Dr. Summers. Thus, it is arguable that Fullove is procedurally barred from raising, for the first time on appeal, the issue of whether Dr. Summers's testimony was prejudicial to Fullove, when no objection was made to the testimony during the trial. Absent a contemporaneous objection allowing the trial court to correct an error made at trial, we will ordinarily not entertain an issue raised for the first time on appeal. *Chase v. State*, 699 So. 2d 521, 531 (Miss. 1997). Moreover, although Fullove objected to the form of the State's question to Dr. Summers concerning D.W.'s demeanor and appearance as improperly calling for a conclusion, the trial court correctly overruled this objection in accord with *Ivy v. State*, 522 So. 2d 740, 743-44 (Miss. 1988). *Ivy* held that a pediatrician could state his opinion as to whether a child's appearance and demeanor were consistent with the claim that the child had been abused, although the physician had no training in psychiatry or child psychology. Fullove now objects to the fact that Dr. Summers stated his opinion as to the truthfulness of the statements of D.W. that she had been raped.

In the case *sub judice*, no objection to this testimony was made at trial. As the Mississippi Supreme Court has held, "[i]t is elementary that different grounds than the objections presented to the trial court cannot be presented for the first time on appeal." *Thornhill v. State*, 561 So. 2d 1025, 1029 (Miss. 1989). Notwithstanding the possible procedural bar, we hold that any error resulting from Dr. Summers' testimony was harmless. *Roundtree v. State*, 568 So. 2d 1173, 1179 (Miss. 1990) (Unresponsive answer by expert witness held harmless error because the prosecution gained no unfair advantage and the answer had no effect on the outcome of the trial.).

III. DID THE TRIAL COURT ERR IN REFUSING TO GRANT THE APPELLANT A NEW TRIAL PURSUANT TO RULE 5.16 OF THE UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE?

Rule 5.16 of the Uniform Criminal Rules of Circuit Court Practice, which was superceded on May 1, 1995, by Rule 10.05 of the Uniform Rules of Circuit and Chancery Court Practice, states:

The court on written motion of the defendant may grant a new trial on any of the following grounds:

1. If required in the interests of justice;
2. If the verdict is contrary to law or the weight of the evidence;
3. Where new and material evidence is recently discovered which would probably produce a different result at a new trial, and such evidence could not have been discovered sooner, by reasonable diligence of the attorney;
4. If the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony;
5. If the jurors, after retiring to deliberate upon the verdict, separated without leave of court; and
6. If the court has misdirected the jury in a material matter of law, or has failed to instruct the jury upon all questions of law necessary for their guidance.

In the case *sub judice*, Fullove claims that the testimony of D.W. was discredited to the extent that he is entitled to a new trial. This argument attacks the weight and sufficiency of the evidence presented against Fullove. Specifically, he points out that D.W. (1) failed to notice that Fullove had a tattoo on his forehead and one on his forearm, (2) incorrectly estimated Fullove's height as 5'7" to 5'9", when in actuality he is approximately 6'3", (3) and that he wore a mustache and had a bald spot when in fact Fullove has no bald spot, but merely a receding hairline. Fullove asserts that under the rule set forth in *Carr v. State*, 208 So. 2d 886 (Miss. 1968), he should be granted a new trial. In *Carr*, the Mississippi Supreme Court held that while a defendant can be convicted of rape solely upon the testimony of the victim, "where there is much in the facts in evidence to discredit her testimony, another jury should be permitted to pass upon these facts." *Id.* at 889. On the other hand, the State contends that any contradiction found when comparing D.W.'s testimony to the facts as established at trial can easily be explained by the degree of trauma under which D.W. was making her observations.

We hold that the discrepancies found in D.W.'s testimony do not rise to the level contemplated by *Carr*.

The decision to deny or grant a new trial is committed to the sound discretion of the trial court. ***Washington v. State*, 645 So. 2d 915, 919 (Miss. 1994)**. On the question of whether or not the evidence presented at trial was sufficient to support a conviction on appeal, our Mississippi Supreme Court has recently held:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the 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 inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered points 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 fair minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is beyond our authority to disturb.

***Brooks v. State*, 695 So. 2d 593, 594 (Miss. 1997)**. We find that there was substantial evidence in the record in this case from which a jury could have found the Appellant guilty as charged. Thus, we find that Fullove's challenge to the sufficiency of the evidence against him is without merit.

In regard to Fullove's claim that the jury's verdict was against the overwhelming weight of the evidence, the Mississippi Supreme Court has ruled that in determining "whether or not a jury verdict is against the overwhelming weight of the evidence, 'this Court must accept as true the evidence which supports the verdict and will reverse only when it is convinced that the circuit court has abused its discretion in failing to grant a new trial.'" ***Nicolaou v. State*, 612 So. 2d 1080, 1083 (Miss. 1992)** (quoting *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss.1989)). In the case *sub judice*, the evidence presented against Fullove was substantial. His blood type matched that found on the victim's shirt and she unhesitatingly identified Fullove as the assailant when she was presented with a photographic line up that included Fullove's photograph. D.W. was bruised about the face and shoulder and blood was found on the ground in the woods where the rape was committed. Dr. Summers said it was not unusual that no semen was found on the body or clothes of D.W., although some acid phosphatase was found. Furthermore, Fullove's attempts to exonerate himself through his testimony were less than convincing and he changed his story as to how his arm was injured on several occasions and could not account for his actions or location on the morning of the rape. Based on these facts, and the record as a whole, we cannot say that the trial judge abused his discretion in refusing to grant a new trial in this case or in failing to rule that the jury's verdict was against the overwhelming weight of the evidence. The conviction is supported by substantial evidence. Thus, we affirm.

**THE JUDGMENT OF THE CIRCUIT COURT OF GRENADA COUNTY OF
CONVICTION OF RAPE AND SENTENCE OF THIRTY-FIVE YEARS IN THE CUSTODY
OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE
SHALL RUN CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY IMPOSED AND**

SHALL NOT BE REDUCED OR SUSPENDED NOR ELIGIBLE FOR PAROLE OR PROBATION. ALL COSTS OF THIS APPEAL ARE TAXED TO GRENADA COUNTY.

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