

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00072-COA**

**HOWARD BROWER A/K/A HOWARD BROWER,
JR.**

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:	12/12/95
TRIAL JUDGE:	HON. GRAY EVANS
COURT FROM WHICH APPEALED:	LEFLORE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KATHERINE P. STUCKEY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN
DISTRICT ATTORNEY:	FRANK CARLTON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	RAPE: SENTENCED TO A TERM OF 2 ½ YRS IN THE MDOC
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

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

McMILLIN, P.J., FOR THE COURT:

Howard Brower has appealed to this Court seeking reversal of his conviction of rape returned by a jury in the Circuit Court of Leflore County. He assigns as error a claim that the jury's verdict was against the weight of the evidence. We conclude that this issue is without merit and affirm Brower's conviction.

I.

Facts

Brower was indicted for two separate sexual offenses arising out of his encounter with a young female acquaintance. One count was for rape and involved a claim of forced sexual intercourse. The other count was for sexual battery involving a claim of anal penetration. Both crimes were said to have occurred in the same incident and were alleged to have happened after Brower and his victim had dropped off a mutual friend and gone for a ride in Brower's truck. The State's proof consisted principally of the testimony of the victim, testimony from several witnesses who had been with Brower and the victim shortly before and after the incident, and scientific evidence of the existence of seminal fluid recovered from the victim's vagina. In the course of presenting this scientific evidence it developed that the examining physician had also obtained an anal swab from the victim which failed to reveal the presence of any such fluid. Brower was convicted of rape but the jury acquitted him on the sexual battery count.

Brower did not testify in his own defense; however, through cross-examination of the State's witnesses and the testimony of several witnesses called in his own behalf, it is clear that Brower's defense was not that the incident did not take place but rather that the sexual activity complained of was consensual and that a difficulty between the two had arisen over the matter of anal intercourse, which Brower told one of the witnesses had occurred accidentally.

II.

Discussion

Brower appears to be arguing that the verdict of guilt on one count and acquittal on the other are logically inconsistent, and thus the guilty verdict cannot stand. The directly-incriminating evidence of the events of the sexual encounter itself was provided solely by the testimony of the victim. Brower claims that the acquittal on the charge of anal penetration is an indication that the jury disbelieved the victim's story, and that being the case, there was no logical basis for the jury to believe the remaining part of her story concerning the alleged rape.

The logical failure of that argument is that a judgment of acquittal is not necessarily a determination by the jury that the prosecuting witness was being untruthful. There is, quite properly, an extremely high burden of proof placed on the State to convict a defendant of criminal activity. In this case, there was corroborating physical evidence of recent sexual intercourse presented to the jury; whereas, the victim's allegation of anal penetration was not corroborated by any extraneous evidence. It is within the realm of possibility that the jury did not totally disbelieve the victim's claims regarding the various aspects of the incident, but instead, collectively concluded that as to the one particular charge, the proof did not reach the necessary standard of satisfying them of guilt beyond a reasonable doubt. This Court is not prepared to hold, as a matter of law, that a careful weighing of the evidence could not support a reasonable conclusion that rape was proven beyond a reasonable doubt but that the proof on the remaining count of sexual battery failed to rise to that level.

Even were we prepared to find that the acquittal on the second count was logically inconsistent with the verdict of guilt on the first count, that would not be a basis to grant a new trial. The United States Supreme Court, in considering the matter of inconsistent verdicts on different counts in a multiple count indictment, said that "[i]nconsistent verdicts . . . present a situation where 'error,' in the sense

that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." *U.S. v. Powell*, 469 U.S. 57, 65 (1984). Counterbalancing the possibility that the jury has improperly convicted without evidence, the Court said, "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on [one] offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [other] offense." *Id.* at 65. None of these factors would, even if proven to exist, warrant disturbing the conviction on the first count if the evidence was sufficient to sustain the verdict of guilt -- a different issue altogether, but one which the defendant may test by post-trial motion and appeal. *Id.* at 67.

Insofar as a more straightforward assessment of where the weight of the evidence came down in this case is concerned, we note that in this State, it has long been accepted that the testimony of a rape victim, standing alone, may be enough to sustain a conviction. *Barker v. State*, 463 So. 2d 1080, 1082 (Miss. 1985). The victim's testimony in this case, if believed by the jury, was beyond a doubt consistent with a finding of guilt of rape. There was, in opposition to this proof, evidence presented to the jury from which it could have concluded that the sexual encounter between these two individuals was consensual. However, a review of that evidence shows that it consisted primarily of statements to that effect made by the defendant at the time that he and the victim rejoined their other friends and acquaintances on the night of the incident. We do not find this evidence to be of such probative quality that the jury's evident decision to reject it resulted in a substantial miscarriage of justice in this case. That being so, there is no basis for us to disturb the verdict of guilt. *Roberts v. State*, 582 So. 2d 423, 424 (Miss. 1991).

THE JUDGMENT OF THE CIRCUIT COURT OF LEFLORE COUNTY OF CONVICTION OF RAPE AND SENTENCE OF TWO AND A HALF YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO LEFLORE COUNTY.

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