

¶2. On December 21, 1996, J.W., the victim, was at the mobile home of her friend and neighbor, Walter Love. J.W. and her children were spending the night at the Love residence because the gas had been turned off to her mobile home. J.W. testified that she and her children were sleeping on the couch and that she was fully clothed.

¶3. According to J.W., Alvis Joe Hopson woke her up, hit her, and forcibly removed her clothes. She testified that he forced her into another room, got on top of her, partially inserted his penis into her vagina, and ultimately ejaculated on her. J.W. stated that she fought Hopson during the entire episode. J.W. further testified that a car drove up and Love entered the house. At this point, she said that she left the house holding her clothes and wrapped in a blanket. J.W. went directly to her sister's house. Her sister called the police. J.W. was taken to the emergency room that night. Hopson was arrested by Officer Searn Lynch while Deputy Dennis Carwyle took J.W. to the emergency room.

¶4. Dr. Timothy Lamb, the emergency room physician, testified that he examined J.W. that night. Dr. Lamb testified that from his examination he determined that the external genitalia was normal and that he did not find any trauma. He further testified that he did not find any modal or non-modal sperm in the laboratory results. However, Dr. Lamb stated that someone could be raped without bruises on the genitalia developing.

¶5. After a jury trial, Hopson was found guilty of the crime of sexual battery. He was sentenced to serve a term of fifteen years with five years suspended in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Hopson appeals that decision.

DISCUSSION

WHETHER THE STATE'S EVIDENCE WAS SUFFICIENT TO CONVICT HOPSON OF THE CRIME OF SEXUAL BATTERY

¶6. A challenge to the sufficiency of the evidence requires an analysis of the evidence by the trial judge to determine whether a hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. *May v. State*, 460 So. 2d 778, 781 (Miss. 1984). If the judge determines that no reasonable juror could find the defendant guilty, then he must grant the motion for a directed verdict and JNOV. *Id.* If he concludes that a reasonable juror could find the defendant guilty beyond a reasonable doubt, then he must deny the motion. *Id.* This Court's scope of review is limited to the same examination as that of the trial court in reviewing the motions for directed verdict and JNOV; that is, if the facts point in favor of the defendant to the extent that reasonable jurors could not have found the defendant guilty beyond a reasonable doubt, viewing all facts in the light most favorable to the State, then it must sustain the assignment of error. *Blanks v. State*, 542 So. 2d 222, 225-26 (Miss. 1989). Of course, the opposite is also true. In *Gossett v. State*, 660 So.2d 1285, 1293 (Miss. 1995), the Mississippi Supreme Court held that it may only reverse where after considering "one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty."

¶7. Mississippi Code Annotated Section 97-3-95 (Rev. 1994) states in pertinent part:

- (1) A person is guilty of sexual battery if he or she engages in sexual penetration with:
 - (a) Another person without his or her consent. . . .

¶8. Mississippi Code Annotated Section 97-3-97 (Rev. 1994) lists the definitions relating to Sections 97-3-95 through 97-3-103:

(a) "Sexual penetration" includes . . . any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

¶9. In the case *sub judice*, legally sufficient evidence existed to find Hopson guilty beyond a reasonable doubt. J.W. testified that Hopson inserted his penis into her vagina but that "he did not go all the way up in me." Thereafter, J.W. responded affirmatively when asked, "Well . . . it doesn't matter how far[,] did he insert his penis in your vagina?" With J.W.'s testimony, the State made out its prima facie case by showing that Hopson partially inserted his penis in J.W.'s vagina which meets the definition of sexual penetration as defined by Section 97-3-97. Additionally, the arresting officer testified that Hopson admitted to him that he was trying to have sexual relations with J.W. but that he did not rape her. Deputy Carwyle testified that J.W. was hysterical and had a swollen face and ripped clothes. Dr. Lamb, the treating physician in the emergency room, testified that J.W.'s examination revealed some bruises and bite marks on her breast and behind her ear. However, Dr. Lamb stated that he did not find any modal or non-modal sperm but that is not necessarily inconsistent with rape.

¶10. Hopson testified that he never assaulted J.W. and that she spiked his drink while he was in the bathroom. Nevertheless, the State put forth sufficient, credible evidence; therefore, the trial judge was required to leave the final decision of guilt or innocence to the jury. Accordingly, Hopson's claim that sufficient evidence did not exist to convict him is without merit.

¶11. THE JUDGMENT OF THE LAFAYETTE COUNTY CIRCUIT COURT OF CONVICTION OF SEXUAL BATTERY WITH A SENTENCE OF FIFTEEN YEARS IN WITH FIVE YEARS SUSPENDED AND TEN YEARS TO SERVE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LAFAYETTE COUNTY.

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, LEE, PAYNE, AND THOMAS, JJ., CONCUR.

IRVING, J., DISSENTING WITH SEPARATE WRITTEN OPINION.

MOORE, J., NOT PARTICIPATING.

IRVING, J., DISSENTING :

¶12. Because I believe the evidence insufficient on the element of penetration to convict Hopson of sexual battery, I respectfully dissent. However, I do believe the evidence sufficient to convict him of attempted sexual battery. Therefore, I would reverse and render on the charge of sexual battery but reverse and remand for sentencing on attempted sexual battery.

¶13. The facts, as told by the victim, which lead me to this conclusion are as follows:

Q. Okay. Did anything unusual happen to you on December 21, 1996?

A. Yes ma'am.

Q. And what happened?

A. I was hit and been choked by Alvis Joe Hopson.

Q. Do you remember what time this was Mrs. JW?

A. It was about 12:30.

Q. Okay. a.m or p.m.

A. A.m.

Q. Now, where were you when this happened Mrs. JW?

A. Over at Walter's house.

Q. Walter who?

A. Walter Love's house.

Q. And where were you sleeping, Mrs. JW?

A. On the couch.

Q. And where were your children?

A. On the couch with me.

Q. And you had mentioned earlier that Mr. Hopson attacked you (sic) where was (sic) you when he attacked you?

A. On the couch asleep.

Q. Can you tell me what happened?

A. I was sleeping. I just felt drug me (sic) off the couch and strip my clothes off of me.

Q. Where did he grab you, Mrs. JW?

A. Around my leg.

Q. Lets go back to the point where he grabbed you. You say he grabbed you around your neck?

A. Yes ma'am.

Q. What happened then?

A. Then he took me to the other room. Then he took my clothes off. He stripped all my clothes off.

Q. Lets hold up here. What do you mean when you say he stripped my clothes off?

A. He tore my clothes off.

Q. In what manner what was he doing?

A. I was struggling trying to keep him off of me then he stripped all my clothes off of me and he throwed (sic) me on the bed.

Q. He threw you on the bed?

A. Yes ma'am.

Q. During this time you said you and he were struggling?

A. Yes.

Q. And what happened when he threw you on the bed?

A. He threw me on the bed. He just, I mean he just was hitting me trying to keep me being still and I was trying to raise up to keep him off of me. He turned me over talking about he wanted to-.

Q. You say he hit you. Where did he hit you?

A. In my face.

Q. Okay and then what happen you were struggling and he hit you what happened from that point?

A. Then a car had drove (sic) up outside and Walter came in the house and he got up. He asked what was wrong with me and I left out of the house. I grabbed my stuff and I left.

Q. You said at one point he was trying to turn you over; what happened after that?

A. What happened.

Q. Right?

A. He tried to tried to (sic) stick his penis in me then and I was struggling trying to keep him off of me.

Q. He tried to turn you over in what position was he trying to get you in?

A. From the back.

Q. Was he able to insert his penis?

A. No, I was struggling.

Q. Then what happened?

A. Then he ejaculated I don't know it was pee or what it was. I was wet all over my body.

Q. From that point after he tried to turn you back did he try to turn you back over?

A. No ma'am.

Q. Now, from that point you and Mr. Hopson were still wrestling?

A. Yes ma'am.

Q. Now, you had stated earlier that he had initially you stated he had inserted his penis in you; what point did he do that?

A. I guess, I mean when he was on me he-- he just-- I don't know if it was pee all over my body or what he ejaculated on me.

Q. Did he insert his penis inside of you?

A. I didn't give him a chance to do it.

Q. Okay. Now, from that point forward but at that point he did have his penis out?

BY MR. BELL: Objection to the leading your Honor

BY THE COURT: Sustained. Don't lead her.

¶14. Later on in JW's testimony, she gave the following testimony:

Q. Okay. Now, one thing I wanted to ask you about Mrs. JW (sic) you had you (sic) mentioned that all you knew that you were wet?

A. Yes ma'am.

Q. In the earlier statement that you gave Deputy Prestige you testified that he had squirted semen all over you so what is your position on that now?

A. I don't know if it was pee or sperm or what, I don't know.

Q. But there was something on your body?

A. Yes ma'am.

Q. And where was it on which portion of your body?

A. It was from my navel down towards the bottom.

Q. Do you remember talking with Terry Prestige a deputy at the sheriff's department?

A. Yes ma'am.

Q. Okay. Now, do you remember telling Mr. Prestige that the defendant Alvis Joe Hopson inserted his penis in your vagina, you know what I mean when I say vagina?

A. Yes.

Q. Do you remember him (sic) telling you that?

A. Yes ma'am.

Q. Is that a true assessment of what happened; did you remember everything when you were talking to Mr. Prestige?

A. Yes ma'am, he did insert it in me but he did not go all the way up in me.

Q. Well, what I'm saying how, (sic) it doesn't matter how far did he insert his penis in your vagina?

A. Yes ma'am.

Q. And you know what I'm asking?

A. Yes ma'am.

¶15. It is clear from the colloquy set forth above that JW, the victim, did not testify --until impeached by the prosecution --that penetration had in fact occurred. I believe this impeached testimony was insufficient to convict Hobson because the impeachment occurred as to a critical element of the offense, and there was no corroborating evidence on this crucial element. I take this position fully aware of the plethora of case law in this jurisdiction holding that one may be convicted of rape on the uncorroborated testimony of the victim. However, I am aware of no case law holding that one may be convicted on the impeached, uncorroborated testimony of the victim where the impeachment occurred as to one of the crucial elements of the offense. For the reason set forth and the illuminating testimony of the victim, I respectfully dissent.