IN THE COURT OF APPEALS 02/11/97

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01338 COA

JOSEPH GASPER PISARICH A/K/A JOEY PISARICH

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. JERRY OWEN TERRY, SR.

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT:

KELLY MCKOIN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: MARK WARD

NATURE OF THE CASE: CRIMINAL: SEXUAL BATTERY

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO 10 YEARS IN THE CUSTODY OF THE MDOC

MANDATE ISSUED: 6/10/97

EN BANC:

PAYNE, J., FOR THE COURT:

Joseph Pisarich was indicted under a multi-count indictment for capital rape and sexual battery. The court convicted Pisarich of sexual battery and sentenced him to serve ten (10) years in the custody of the Mississippi Department of Corrections. The trial court denied Pisarich's motion for JNOV or, in the alternative, a new trial. We find that Pisarich's issues on appeal have no merit and therefore affirm.

FACTS

Joseph Pisarich, a thirty-one year old male, was charged with capital rape and sexual battery. Pisarich was alleged to have committed these crimes upon thirteen-year-old K.W., the sister-in-law of Pisarich's friend, C.W. On May 10, 1992, C.W. invited Pisarich to stay overnight at her home. Both Pisarich and C.W. stated that this was not uncommon as C.W. often had friends sleep over. Pisarich stated that C.W.'s sleep-overs had always been strictly innocent and never involved sex. On this date, K.W. was also staying with C.W. while her parents were out of town. C.W.'s husband was out of town attending a military camp.

The parties indicated that on this occasion the three of them (Pisarich, K.W., and C.W.) piled onto the sofa bed to go to sleep. Later in the evening, C.W. left the sofa bed to go to her bedroom to sleep. C.W. left K.W. on the sofa bed with Pisarich. K.W. was wearing a pair of shorts about one inch above her knee, a purple shirt with a bra and panties underneath. Pisarich was wearing a pair of pants, underwear, and no shirt. K.W. stated that Pisarich was lying on the right, and she was lying on the left side of the bed. K.W. stated that Pisarich kept getting closer and closer to her until he was right next to her with his front facing her back. K.W. testified that Pisarich put his hands on her shirt, on her breast, and began massaging her body. Pisarich next put his hand into her panties and placed his finger into her vagina. K.W. stated that she was scared so she just acted like she was sleeping. K.W. stated that Pisarich then pulled down her pants, placed his erect penis against her back, and then placed his penis into her vagina. K.W. testified that only "a little bit" of penetration resulted because she held her legs tightly clamped together. K.W. stated that she did not tell him to stop because she was scared. K.W. testified that Pisarich asked her "Do you want me?" to which she did not reply, and he subsequently rolled over and said "Oh, s___" when he realized he could go no further.

The next morning, Pisarich went to work and K.W. went to school. K.W. only told C.W. what happened after C.W. mentioned that she wanted to invite Pisarich to a party she was going to have for her husband. This conversation took place fourteen to fifteen hours after the alleged incident occurred. C.W. testified that K.W. was very upset when she told her about the incident. C.W. stated that she called Pisarich and questioned him about the incident. C.W. stated that Pisarich admitted that

he had "messed" with K.W. and had put his fingers inside of her. C.W. stated that Pisarich told her that he would seek help at the V.A. and begged her not to tell anyone. C.W. stated that Pisarich indicated that he was contemplating suicide.

Dr. Ronald Bruni, a pediatrician, testified that he examined K.W. some nine days after the incident. Dr. Bruni stated that K.W. seemed "quite depressed" and that she "very reluctantly" told the doctor her story. The doctor's vaginal examination revealed no tears, the hymen was intact and he saw no signs of acute trauma. The doctor stated, however, that his examination would neither prove nor disprove what she said had happened.

After Pisarich's motion for a directed verdict was denied, he took the stand and testified on his own behalf. Pisarich completely denied that anything had happened between him and K.W. and denied having admitted anything to C.W. Pisarich then proceeded to offer testimony of relatives and friends to testify as to his character for truth and veracity.

The jury found Pisarich not guilty of capital rape and guilty of sexual battery. The trial court sentenced Pisarich to serve ten years in the custody of the Mississippi Department of Corrections. The court subsequently denied his motion for JNOV/new trial, and he now appeals.

ANALYSIS

I. DID THE TRIAL COURT ERR IN FAILING TO GRANT PISARICH'S MOTION TO SUPPRESS THE TESTIMONY OF C.W. CONCERNING A CONVERSATION BETWEEN C.W. AND THE VICTIM, K.W.?

Pisarich contends that the testimony of C.W. concerning a conversation she had with the victim, K.W., fourteen to fifteen hours after the sexual battery occurred is hearsay and does not fall within a recognized hearsay exception. Pisarich argues that C.W.'s testimony should have been declared inadmissible as hearsay under Mississippi Rules of Evidence 802 and 803(1) and (2).

The State, however, argues that C.W.'s testimony was clearly admissible as nonhearsay pursuant to Rule 801(d)(1)(B) of the Mississippi Rules of Evidence. The State contends that Pisarich's attorney opened the door during his cross-examination of K.W. by focusing on the alleged inconsistencies between her prior statements to C.W. and her testimony on direct examination. The State argues that this line of questioning was a clear implication by the defense that K.W. had fabricated the sexual attack by Pisarich.

In previous decisions, the Mississippi Supreme Court has agreed with the State on the application of Mississippi Rule of Evidence 801(d)(1)(B) as it pertains to corroborative testimony offered to rebut a charge of recent fabrication against the declarant. In *Heflin v. State*, 643 So. 2d 512, 520 (Miss. 1994), the sister of a rape victim was permitted to testify to what the victim had told her about the rape. The court admitted the sister's testimony as an excited utterance under Mississippi Rule of Evidence 803(2). *Id.*; *see* M.R.E. 803(2). The *Heflin* court, in dicta, went on to state that the testimony of the victim's sister was also admissible under Rule 801(d)(1)(B) as a prior consistent

statement offered to rebut a charge by the defense that the victim had fabricated the rape in an effort to escape the strict discipline imposed by her father, the defendant. *Id.*; *see also Jones v. State*, 606 So. 2d 1051, 1059 (Miss. 1992) (testimony of a family friend was admissible as nonhearsay on grounds that the testimony was corroborative of the victim's testimony and rebutted defense counsel's attempt to impeach the victim by implying the incident was a bad dream or that it never happened at all); *Hosford v. State*, 560 So. 2d 163, 166 (Miss. 1990) (holding that the Mississippi Rules of Evidence allow for the limited rehabilitation of a witness's testimony once that testimony has been subjected to impeachment by cross-examination). However, in light of the United States Supreme Court decision of *Tome v. United States*, 115 S. Ct. 696, 700 (1995), the Mississippi Supreme Court changed its position regarding the application of Rule 801(d)(1)(B), as discussed in *Owens v. State*, 666 So. 2d 814, 816-17 (Miss. 1995). In *Owens*, the court, disavowing the conclusion reached in *Heflin* regarding the applicability of Rule 801(d)(1)(B), stated:

> The United States Supreme Court in *Tome v. United States*, -- U.S. --, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995), stated that "a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards." *Id.* at --, 115 S. Ct. at 700. The Court further explained that a prior consistent statement may not be admitted to refute all forms of impeachment or merely to bolster the witness's credibility, but only to rebut an alleged motive. *Id.* The Court emphasized that the limitation of the rule is instructive to reinforce the significance of the requirement that the consistent statements must have been made before an alleged influence, or motive to fabricate arose. *Id.* After making a detailed analysis of the rule, the Court concluded that "the language of the Rule, in its concentration on rebutting charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in its use of wording which follows the language of the common-law cases, suggests that it was intended" to include the requirement that the consistent statements must have been made prior to the arising of the alleged motive to fabricate. *Id.* at --, 115 S.Ct. at 702.

In the present case, the victim, K.W., testified on direct examination that she told C.W. what Pisarich had done to her. Pisarich, on cross-examination of K.W., focused on why K.W. had waited fourteen to fifteen hours before telling anyone of the incident and on alleged inconsistencies between her prior statements to C.W. and her direct examination. On re-direct, the State attempted to clarify what K.W. had told C.W. following the incident. The State then called C.W. as a witness to verify what K.W. had told her regarding the sexual battery and to rebut Pisarich's contention that K.W. was lying about what Pisarich had done. Following the reasoning of the Mississippi Supreme Court in *Owens* as well as the United States Supreme Court decision in *Tome*, we must ask whether K. W. had a motive to lie about what Pisarich had done to her prior to telling C.W. what had happened. If K.W. had a motive to lie prior to her conversation with C.W. then C.W's testimony concerning what K.W. had told her is not admissible as nonhearsay under Mississippi Rule of Evidence 801(d)(1)(B). However, if K.W. had no motive to lie or if a motive to lie arose after her conversation with C.W. then Rule 801(d)(1)(B) is applicable, and C.W.'s testimony is admissible. This presents a dilemma as neither the United States Supreme Court nor the Mississippi Supreme Court gives us any guidance as to how we are to determine when a motive to fabricate arises.

In the present case, Pisarich implies during his cross-examination of K.W. that she was angry with Pisarich because he told her that a certain man she was interested in was too old for her. If we believe that K.W. was angry with Pisarich then the natural conclusion would be that K.W. maintained a motive to fabricate the allegations against Pisarich prior to the occurrence of the sexual battery and prior to her conversation with C.W. Thus, C.W.'s testimony would be inadmissible per *Owens* and *Tome*. K.W., however, denies that she had any reason to be angry with Pisarich prior to the sexual battery. If we believe K.W., then we must conclude that she had no reason to fabricate her allegations against Pisarich. Thus, C.W.'s testimony would be admissible under Rule 801(d)(1)(B). This issue places this Court in the position of having to judge a witness' credibility which is certainly not our function. Therefore, we shall defer to the judgment of the trial judge and find that C.W.'s testimony was properly admitted as nonhearsay under Rule 801(d)(1)(B). However, if we had determined that the trial court erred in admitting C.W.'s testimony, we would have found the admitted testimony to be harmless error. *See Owens v. State*, 666 So. 2d 814, 817 (Miss. 1995).

Here, the jury had before it the testimony of the victim as well as that of C.W. who stated that she had confronted Pisarich about the incident and that he had admitted that K.W.'s allegations were true. Pisarich had the opportunity to cross-examine both K.W. and C.W. as well as offer witnesses in his own behalf. We do not believe that C.W.'s testimony corroborating what K.W. had already stated in open court was prejudicial to Pisarich's case because C.W.'s testimony did not reveal to the jury anything that it had not already heard in previous testimony. Thus, if an error had been committed, the error in admitting the cumulative prior statement would have been harmless.

Pisarich further contends that C.W.'s testimony does not fall within the scope of Rule 801(d)(1) because C.W. "made no prior statement under oath according to the record" and "[t]here are no charges against her of fabrication, improper influence or motive which would be involved in the hearsay conversation between her and K.W." We believe that C.W.'s testimony is the type of testimony that Rule 801(d)(1) intended to cover. If we interpret Rule 801(d)(1) in conjunction with the facts of this case, it would read as follows:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if:
>
> (1) Prior Statement by Witness. The declarant [K.W.] testifies at the trial or hearing and is subject to cross-examination concerning the statement [that the testifying witness, C. W., is now offering], and the statement [that the testifying witness, C.W. is now offering] is
>
> (A) inconsistent with [the declarant, K.W.'s] testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or
>
> (B) consistent with [the declarant, K.W.'s] testimony and is offered to rebut an express or implied charge against him [the declarant, K.W.] of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving him . . .

M.R.E. 801(d)(1).

If the rule is read in the above context, it should be clear that the "made under oath" requirement applies to subsection (A) and *not* (B). Further, the "charge of fabrication" requirement does not apply to a charge against the testifying witness, C.W., as Pisarich contends, but toward the declarant in this case, K.W. Therefore, C.W.'s testimony falls within the province of Rule 801(d)(1)(B). Our standard of review regarding the admissibility of evidence is abuse of discretion. *Doe v. Doe*, 644 So. 2d 1199, 1205 (Miss. 1994) (citing *Baine v. State*, 606 So. 2d 1076, 1078 (Miss. 1992)). We believe that the trial court acted within its discretion in admitting the testimony of C. W., and we affirm on this issue.

II. DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT OF NOT GUILTY ON THE CHARGE OF CAPITAL RAPE AND DID THIS DENIAL RESULT IN A COMPROMISE VERDICT OF GUILTY ON THE SEXUAL BATTERY CHARGE?

Pisarich contends that the trial court erred in failing to grant a directed verdict of not guilty on the charge of capital rape. He argues that there was no evidence prior to the indictments nor was there any credible evidence produced at trial that would sustain a charge of capital rape. Pisarich contends that the State offered neither evidence of force nor medical testimony to corroborate penetration of the victim by the Defendant. Pisarich argues that the State's case was based wholly on the unsupported testimony of the victim, and the charge should have never been allowed to go to the jury.

Pisarich argues further that allowing the capital rape charge to go to the jury "was an effort to muddy the water, confuse the issues and affect a compromise verdict." Pisarich contends that a new trial without the capital rape charge would result in a not guilty verdict on the sexual battery charge.

Pisarich's contentions are hopelessly flawed. Whether the trial court erred in failing to grant a directed verdict on the capital rape charge is a moot issue because the jury subsequently ruled in his favor and found him not guilty of capital rape. *See Dunn v. Jack Walker's Audio Visual Ctr.*, 544 So. 2d 829, 830 (Miss. 1989) (holding that an error in failing to grant a directed verdict is harmless when the jury finds for the complaining party anyway). Although it is not necessary for this Court to address the sufficiency of the evidence of the capital rape charge, we will do so in an effort to clarify any misinterpretations of the capital rape statute. As the State correctly argues, section 97-3-65(1) of the Mississippi Code requires no showing of force where the victim is a child under the age of fourteen. As to the issue of penetration, proof of penetration is not required where it is shown that the child's private parts have been torn or lacerated. Miss. Code Ann. § 97-3-65(1) (1972). In the absence of tearing or laceration, however, penetration must be proved. The Mississippi Supreme Court has held that "[t]o establish the offense of rape, the State must prove that there was 'some

penetration' of the victim's vagina by the defendant's penis." *Wilson v. State*, 606 So. 2d 598, 599 (Miss. 1992) (citing *Davis v. State*, 406 So. 2d 795, 801 (Miss. 1981)). In *Wilson*, the court held that only "slight penetration" need be shown. *Id.* (citing *Jackson v. State*, 452 So. 2d 438, 440 (Miss. 1984)). The court also held that medical evidence of penetration was not necessary and that testimony by the victim that penetration had occurred was sufficient to overcome a motion for a directed verdict. *Id*. at 599-600.

In the present case, the victim testified that Pisarich penetrated her vagina with his penis "a little bit." Under *Wilson*, this testimony is sufficient to permit jury deliberation on the capital rape charge. The jury subsequently decided, for its own reasons, that Pisarich was not guilty of capital rape beyond a reasonable doubt but that the evidence was sufficient to prove him guilty of sexual battery. Pisarich attacks the sufficiency of the evidence by alleging that the jury reached a compromise verdict when it found him guilty of sexual battery. The Mississippi Supreme Court has stated that the standard of review regarding a challenge of the sufficiency of the evidence is well established:

> [T]he [sufficiency of the] evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Pisarich's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to 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.

Jones v. State, 669 So. 2d 1383, 1388 (Miss. 1995) (quoting *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993)); *see also Tait v. State*, 669 So. 2d 85, 88 (Miss. 1996); *Williams v. State*, 667 So. 2d 15, 23 (Miss. 1996). In the present case, considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Pisarich not guilty. The pertinent part of the sexual battery statute requires that it be shown that the defendant engaged in sexual penetration with a victim under the age of fourteen. Miss. Code Ann. § 97-3-95 (1972). Sexual penetration is defined as "cunnilingus, fellatio, buggery or pederasty, 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." *Id.* § 97-3-97(a). In the present case, the State established that the victim was thirteen years old at the time of the incident, and the victim testified that Pisarich put his finger into her vagina and that testimony was corroborated by what the doctor, and C.W. stated that the victim had told them. C. W. also testified that Pisarich admitted to her that he had put his finger inside of the victim's vagina.

Considering all of the evidence adduced at trial in the light most consistent with the verdict, and giving the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence, 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 found Pisarich guilty of sexual battery. We affirm on this

issue.

III. DID THE TRIAL COURT ERR IN RESTRICTING PISARICH'S DIRECT AND CROSS-EXAMINATION OF WITNESSES?

Pisarich argues that his attempts to examine witnesses on direct and cross-examination were restricted to the point that he could not get information vital to his defense to the jury. While Pisarich makes a blanket appeal that he was unduly restricted during his examination of *every* witness, we will only address the two witnesses that he discusses in his brief.

Pisarich complains that he was denied the right to fully cross-examine the prosecuting witness, K. W., concerning statements she had made regarding two episodes of prior sexual activity, neither of which involved the Defendant. The State was successful in obtaining a motion in limine to prevent inquiry concerning these matters on the basis that such evidence was procedurally barred under Mississippi Rule of Evidence 412. The State contended, and the trial court agreed, that Pisarich's failure to timely file a written motion of intention to introduce such evidence under Rule 412(c) prevented its introduction.

Pisarich argues on appeal that Rule 412 exists for the purpose of preventing, or at least controlling, attacks on the alleged victim intended to show her to be a person of unchaste character. He claims that his purpose in seeking to examine K. W. was not to attack her character in this manner, but, instead, to demonstrate the falsity of her prior statements and thereby attack her credibility. Pisarich argues that this is, therefore, a Rule 404 matter rather than one cognizable under Rule 412.

We disagree. While specific instances of a witness's past propensity to tell untruths may be admissible in certain circumstances, nevertheless, when these incidents involve past sexual behavior, Rule 412 specifically applies to such evidence "[n]otwithstanding any other provision of law . . . ." M.R.E. 412(b). The term "sexual behavior" is more extensive than simply physical activity of a sexual nature. One of the leading treatises on the comparable federal rule of procedure has specifically said that the term "sexual behavior" may include such matters as the mode of dress of the victim, living arrangements different from the norm, sexual fantasies, and "verbal conduct, such as invitations to engage in sexual conduct *or narratives purporting to describe past sexual behavior*." 23 Charles A. Wright & Kenneth A. Graham, Jr., *Federal Practice and Procedure* § 5384 (1980) (emphasis added) .

It is not the underlying purpose for which the evidence is being introduced, as Pisarich suggests, that determines whether Rule 412 applies. It is, rather, the subject matter of the proof itself that implicates the rule. "Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires." 2 Jack B. Weinstein, et al., *Weinstein's Evidence*, 412-1 (1996).

We do not disagree with Pisarich's argument that such evidence may, indeed, have been probative on the issue of K. W.'s credibility. As such, it may have been admissible despite the limitations of Rule

412 if the trial court had concluded that the issue was so central to the defense that to exclude the evidence improperly violated Pisarich's Sixth Amendment right of confrontation, since Rule 412(b)(1) conditionally compels the admission of such evidence if it is "constitutionally required." M.R.E. 412(b)(1).

Where Pisarich fails in his argument, however, is that evidence involving past sexual behavior otherwise admissible, even on constitutional grounds, is admissible only upon compliance with the procedure set out in Rule 412(c). Arguments that may have been persuasive at a Rule 412(c) hearing touching the merits of the question are unavailing at this time--not because they lack merit--but because they are procedurally barred.

Pisarich also contends that the trial court unduly restricted his direct examination of Cassie Shaw Johnson. Pisarich points to two specific instances in which the trial court sustained the State's objections: (1) Pisarich asked Ms. Johnson if she believed what C.W. and K.W. had told her about the incident. Ms. Johnson answered negatively, and the State objected without stating specific grounds. The trial court sustained and admonished the jury to disregard the question. (2) Pisarich asked Ms. Johnson whether she had discussed this case with the State's attorney. He then asked her to recall what the State had asked her during this discussion. The State objected without stating specific grounds, and the trial court sustained. Pisarich contends that the Uniform Criminal Rules of Circuit Court Practice provides that any objection by counsel-opposite must be specific and not general. He argues that the trial court's rulings on these general objections restricted his examination of Ms. Shaw.

A reading of Rule 5.12, Conduct of Counsel, does in fact state that objections are to be specific and not general. Unif. Crim. R. Cir. Ct. Prac. 5.12. However, the Mississippi Supreme Court has held that an attorney must state the specific ground of an objection unless the specific ground is apparent from the context. *Murphy v. State*, 453 So. 2d 1290, 1293-94 (Miss. 1984). This holding has been codified in Rule 103(a)(1) of the Mississippi Rules of Evidence. In the present case, it seems clear that the trial court sustained the objection on grounds that the line of questioning was irrelevant. We find Pisarich's contentions on this issue to be without merit and, therefore, affirm.

IV. DID THE TRIAL COURT FAIL TO INSTRUCT THE JURY ON ALL QUESTIONS OF LAW?

Pisarich contends that the trial court erred in refusing to grant any of the eleven instructions which he requested. Following the trial judge's denial of the Defendant's instructions, Pisarich's attorney moved that the court should assist the Defendant in drafting acceptable instructions to be submitted to the jury on the Defendant's behalf. The trial court denied the motion stating that the jury had been adequately instructed on the issues involved and the elements of the crimes. Pisarich contends that the trial judge's failure to assist the Defendant in drafting instructions "removed from the jury Pisarich's right to a considered verdict."

The State argues that the court properly refused Pisarich's instructions because they were either

misstatements of the law, peremptory, repetitious, or were improper. We agree. Mississippi law allows the trial judge to instruct the jury upon the principles of law applicable to the case. Miss. Code Ann. § 99-17-35 (1972); Unif. Crim. R. Cir. Ct. Prac. 5.03; *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975). A careful review of the instructions and the record reveals that the trial judge acted in accordance with the responsibilities required by law.

The Mississippi Supreme Court has held that the failure of a court to give a requested instruction is not grounds for reversal if the jury was "fairly, fully and accurately instructed on the law governing the facts of the case." *Smith v. State*, 572 So. 2d 847, 848 (Miss. 1990) (citation omitted); *see also Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990) (holding that the trial court may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions); *Calhoun v. State*, 526 So. 2d 531, 533 (Miss. 1988) (holding that a trial court is not required to instruct a jury over and over on the same point of law even though some variations are used in different instructions).

In the present case, the instructions given properly instructed the jury on the elements of the crimes and the burden of proof. We believe that the trial court did not abuse its discretion in refusing the Defendant's instructions, and we find that this issue is without merit.

V. WAS THE VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Pisarich argues that the evidence against him did not justify the verdict. Pisarich contends that the testimony given by him, his friends, and his family effectively reduced the weight of the testimony given by the victim and C.W. to the point at which no reasonable juror could have found him guilty. He believes that the verdict was clearly against the overwhelming weight of the evidence and requests a new trial. The State argues that more than enough evidence was presented to the jury to find Pisarich guilty of sexual battery. The State contends that the jury is permitted to resolve conflicts in evidence which present factual disputes such as the testimony between the State's witnesses and the testimony given by the defense's witnesses.

The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses and the evidence presented by both the State and the defense. The State provided testimony of the victim and witnesses that the sexual battery did, in fact, occur. Pisarich took the stand in his own behalf and disputed the victim's account of what happened. Pisarich also presented character testimony by friends and family. This testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Pisarich.. The trial court did not abuse its discretion by refusing to grant Pisarich a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. The trial court properly denied Pisarich's motion for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF SEXUAL BATTERY AND SENTENCE OF TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

BARBER, COLEMAN, AND KING, JJ., CONCUR. MCMILLIN, P.J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., AND SOUTHWICK, J. THOMAS, P.J., DIAZ AND HERRING, JJ., NOT PARTICIPATING.

IN THE COURT OF APPEALS 02/11/97

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STATE OF MISSISSIPPI

NO. 93-KA-01338 COA

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APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

McMILLIN, P.J., CONCURRING:

I concur in the result reached by the majority in this case. However, I must respectfully disagree with the reasoning advanced by the majority on the issue of the admissibility of the victim's out-of-court statements made to her sister-in-law. The majority concludes that the statements were admissible under Mississippi Rule of Evidence 801(d)(1)(B) to rebut a charge of recent fabrication. The only allegation of a motive for fabrication advanced by the defense was that the victim was angry at the defendant over an incident involving remarks he had made about the victim's improper interest in an older man. That alleged incident occurred prior to the victim's statements to her sister-in-law, and under applicable case law and plain logic, cannot support a claim of recent fabrication since the only suggested motive to fabricate already existed when the out-of-court statements were made. *See Owens v. State*, 666 So. 2d 814, 816 (Miss. 1995).

During cross-examination of the victim, defense counsel clearly was accusing the victim of making a prior inconsistent statement by suggesting that, in her prior discussion of the incident with her sister-in-law, she had never mentioned actual penile penetration by the defendant. (Such a statement would have been *inconsistent* on the rape charge, though arguably *consistent* on the sexual battery count.) Having laid the proper predicate, the defense could unquestionably have called the sister-in-law to prove the prior inconsistency. *See* M.R.E. 613. In this case, however, it was the prosecution, not the defense, that introduced the prior statement through the sister-in-law's testimony. The fact that the defendant laid the proper predicate for the admission of the prior statement did not necessarily require him to put the statement into evidence. It merely established his right to do so if he chose.

Thus, the question before this Court is whether the prosecution may make that election for the defense by introducing the statement. In this case, the State was apparently trying to rehabilitate the victim's credibility by attempting to show that the statement was not, in fact, inconsistent with her trial testimony. By specifically naming a limited number of instances where such a prior consistent statement is admissible (to rebut a charge of (a) recent fabrication, (b) improper influence or (c) improper motive), the evidence rules would seem to imply the inadmissibility of such a statement in other situations. *See* M.R.E. 801(d)(1)(B). Since none of the enumerated instances apply in this case, I would conclude that the evidence, when offered by the State rather than the defense, was inadmissible. This conclusion would appear to be consistent with discussion on a similar issue in *White v. State*, 616 So. 2d 304, 308-09 (Miss. 1993).

However, since the statement would have been admissible if offered by the defense, and since the statement was harmful only because it tended to improperly bolster the direct testimony of the victim, a harmless error analysis seems appropriate. *Id.* at 309. Mississippi Rule of Evidence 103(a) tells us that "[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected . . . ." M.R.E. 103(a). This technical violation of the evidentiary rules actually turned out to be helpful to the defendant on the more serious rape charge since the sister-in-law equivocated on the question of the victim's prior statements about penile penetration. The jury apparently agreed and acquitted the defendant of rape. I cannot see where any substantial right to a fair trial has been adversely affected on these facts, and I would affirm on the basis of harmless error rather than the rationale advanced by the majority.

BRIDGES, C.J., AND SOUTHWICK, J., JOIN THIS SEPARATE WRITTEN OPINION.