

IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00220 COA

WENDELL PACE a/k/a WENDALL PACE

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. FRANK ALLISON RUSSELL

COURT FROM WHICH APPEALED: MONROE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

J. DUDLEY WILLIAMS

ATTORNEY(S) FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: WAYNE SNUGGS

DISTRICT ATTORNEY: JOHN R. YOUNG

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: SEXUAL BATTERY: SENTENCED TO 30 YRS IN MDOC
WITH 10 YRS SUSPENDED; DEFENDANT IS TO SERVE 20 YRS

BEFORE THOMAS, P.J., KING, AND MCMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

Wendell Pace was convicted in the Circuit Court of Monroe County of sexual battery upon a child under the age of fourteen years and sentenced to serve thirty years in the custody of the Mississippi Department of Corrections, with ten years suspended. Feeling aggrieved, Pace appeals to this Court assigning four alleged errors.

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY OF THE VICTIM'S FOSTER MOTHER.

II. WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF DR. LINDA CHICHESTER THAT THE CHILD WAS A VICTIM OF SEXUAL ABUSE.

III. WHETHER THE TRIAL COURT ERRED IN OVERRULING PACE'S MOTION FOR A DIRECTED VERDICT.

IV. WHETHER THE TRIAL COURT ERRED IN ORDERING THE JURY TO CONTINUE TO DELIBERATE DESPITE THE DESIRE OF THE JURORS TO RECESS.

Finding no error, we affirm.

FACTS

On August 23, 1990, Melissa Hatchcock of the Monroe County Social Services received a call about three young children who were locked out of their apartment. The family had been investigated for child neglect several times. At the time, Wendell Pace was the sometimes-live-in boyfriend of the children's mother, but he had been "kicked out" earlier that month. After investigating this last incident, Miss Hathcock took the case to youth court, and the children were removed from their home and placed in foster care.

While at the children's shelter, five-year-old C.C. started exhibiting sexually aggressive behavior which was totally inappropriate for her age. This behavior included grabbing young boys in the shelter, trying to climb into bed with them at night, and having nightmares. She was taken by Miss Hathcock to Dr. Linda Chichester at the Mantachie Clinic for a physical examination.

Dr. Chichester found scarring where the hymen had been pushed up inside the vagina and found that the hymenal opening, which normally on a five-year-old would be approximately five millimeters, was fourteen millimeters. Even though Dr. Chichester did not take any medical history from the child, it was her medical conclusion that C.C.'s vagina had been penetrated by a blunt instrument. Dr. Chichester testified that the penetration of the vagina of a child without a reasonable history of how it occurred was indicative of child sexual abuse.

Shortly after being examined by Dr. Chichester, C.C. was placed in the foster home of Mrs.

Strawbridge and her husband. One night when Mrs. Strawbridge was bathing C.C., Mrs. Strawbridge noticed that the child's private parts looked "open."

After first denying that anybody had touched her there, C.C. told Mrs. Strawbridge that her mother's boyfriend, Wendell Pace, had touched her. Mrs. Strawbridge testified that she had caught C.C. acting out sex acts with her five-year-old grandson and that C.C. would climb up on men's legs and caress them. When told not to act that way, C.C. would say, "this is what Wendell showed me."

At trial, C.C., who was nine, testified that Wendell had put his "private part" and other objects inside her "a lot" and had also put his private part in her mouth. She said that this activity started when she was a baby. She further testified that her mother had caught him doing it one time and had "hit him" with a broom. She also stated that while she was living with her mother several people had done these things to her.

Pace took the stand in his own behalf and denied abusing C.C. in any way. Pace's sister-in-law testified that C.C. had fallen and cut herself in the vaginal area while she was visiting their home. She stated that C.C. was taken to the hospital and treated for this cut.

After a two-day trial, the jury began deliberations at 3:40 P.M. on the second day. The jury returned to the courtroom at 6:10 P.M., after the trial judge received a note from the jurors indicating that they needed more time and wanted to be recessed for the night and sent home. The trial judge told the jurors to continue to deliberate. At 8:30 P.M. the jury again returned to the courtroom. Once the juror's were in the courtroom one juror stated that they needed "quite a bit more time" to reach a verdict. At that point, the jury was split 7-5. The trial court told the jury that they needed to "go back and deliberate for a short period longer to see if [the jury was] making any progress." Pace was ultimately convicted by the jury.

DISCUSSION

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY OF THE VICTIM'S FOSTER MOTHER.

At trial, C.C.'s foster mother, Mrs. Strawbridge, testified that she asked C.C. whether or not anyone had bothered her or touched her in her private areas. At first, C.C. responded "no," but later she answered in the affirmative stating that it was her mother's boyfriend, Wendell.

Pace argues that the trial court should have excluded this testimony as hearsay. However, Rule 803(25) provides that:

A statement made by a child of tender years describing any act of sexual contact with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testified at the proceeding; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness such statement may be admitted only if there is corroborative evidence of the act.

The trial court conducted a hearing outside the presence of the jury and found the following:

Let the record reflect that the Court has heard the proffer of proof by the witness, Ms. Strawbridge with respect to statements that were allegedly made by the victim at a time when the victim was six years of age. The Court has taken into consideration the 12 factors that are listed in the comments of Rule 803 dealing with the tender years exception. The Court is of the opinion that the statements made by [C.C.] to Ms. Strawbridge do containDo contain sufficient indicia of reliability. Particularly the Court finds that the declarant has no apparent motive to lie. That the statements and, in particular the name of the one she says committed these sexual acts on her, were made spontaneously. I take into account the timing of the declarations, the fact that the declarations were made within two weeks of the time that the victim came to live in the home of Ms. Strawbridge and were made spontaneously when the issue arose when Ms. Strawbridge discovered that there appeared to be something apparently wrong with the vaginal area of [C.C.], and questioned her at that time about whether someone had done something sexually to her. And within a matter of minutes she indicated, yes, and then indicated who it was. I have also taken into account the tender age of the declarant. The Court finds that it is highly unusual for a child of six years of age, having just turned six in December to be as sexually educated as Ms. Strawbridge says she was and this is a factor in me making this determination. Also, it is very important in making this determination that Ms. Strawbridge seems to have a tremendous amount of experience dealing with children and their behavior, in that she has numerous children of her own, that she has raised. She has a good deal, or a good number of grandchildren and she has had quite a few foster children that she has had in her home, some for extended periods of time, others for short periods. And that as a result thereof she has acquired a lot of experience in dealing with children. The Court finds that the statements made by the six year old child, C.C., to Ms. Strawbridge do constitute an exception to the hearsay rule and will be allowed to be testified to by Ms. Strawbridge.

The trial court properly followed the guidelines in admitting hearsay under the tender years exception, and after following those guidelines, the trial court determined that the statements did constitute an exception to the hearsay rule. *See Griffith v. State*, 584 So. 2d 383, 388 (Miss. 1991). This Court will not disturb this finding.

II. WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF DR. LINDA CHICHESTER THAT THE CHILD WAS A VICTIM OF SEXUAL ABUSE.

Dr. Chichester, who was admitted as an expert in the field of family practice and child abuse, testified that, based upon a reasonable medical certainty, C.C. had been subjected to "vaginal penetration with a blunt object." Dr. Chichester further testified that "[b]ased upon medical evidence, I would, and at the time, I was highly suspicious of child abuse." Dr. Chichester did not express an opinion as to who the perpetrator was.

On appeal, Pace argues that Dr. Chichester's opinion that C.C.'s injury was diagnostic of sexual

abuse was inadmissible and "affected the defendant's substantial right to a fair trial." In support of this argument Pace cites this Court to the case of *Goodson v. State*, 566 So. 2d 1142 (Miss. 1990), in which our supreme court reversed Goodson's conviction of sexual battery after Dr. Chichester, the same doctor in the case *sub judice*, testified that based upon her observations of the child's behavior, it was her opinion that the child had been sexually traumatized. Our supreme court held that such comments were reversible error because Dr. Chichester was a physician not a psychiatrist or psychologist. However, *Goodson* is factually distinguishable.

In the case before us, Dr. Chichester, after observing and physically examining C.C., testified that C.C. had been sexually abused. This opinion was based upon the doctor's medical findings, i.e. her finding that a blunt object had been inserted into C.C.'s vagina.

This Court, like our supreme court has always held that there is no error in allowing a doctor to testify concerning injuries to the victim's sexual organs. See *Dennis v. State*, 555 So. 2d 679 (Miss. 1989); *McFee v. State*, 511 So. 2d 130 (Miss. 1987); *Brooks v. State*, 242 So. 2d 865 (Miss. 1971). If Dr. Chichester had only observed C.C.'s behavior, then her testimony would have been error because she is not qualified as a psychologist. However, in this case Dr. Chidester's testimony was based upon her medical findings and lack of any other reasonable explanation as to how a blunt object had been inserted into C.C.'s vagina. We find no error here.

III. WHETHER THE TRIAL COURT ERRED IN OVERRULING PACE'S MOTION FOR A DIRECTED VERDICT.

At the close of the State's case, Pace moved for a directed verdict arguing that the State had failed to make its prima facie case. Pace argued that C.C.'s testimony was incredible and inconsistent and because of such, the case should be dismissed.

Pace argues that according to the testimony elicited at trial, C.C. had at one time or another accused ten different people of molesting her. Pace argues that this, coupled with C.C.'s young age, nine at the time of trial, shows that the jury could not have rightfully concluded that Pace was guilty beyond a reasonable doubt.

As our supreme court has stated, when considering the sufficiency of the evidence, the trial court should overrule a motion for directed verdict if there is sufficient evidence to support the jury's verdict that guilt exists. *Edwards v. State*, 615 So. 2d 590, 594 (Miss. 1993). At trial, the State produced the testimony of Dr. Chidester who testified that after physically examining C.C. she had noticed that at one point a blunt object had been inserted into C.C.'s vagina. Mrs. Strawbridge testified that C.C. had told her that Pace had molested her. Finally, C.C. testified that Pace had molested her.

We find that there was credible, substantial evidence for the jury to find that Pace was guilty of sexual battery of C.C., a child under the age of fourteen.

IV. WHETHER THE TRIAL COURT ERRED IN ORDERING THE JURY TO CONTINUE TO DELIBERATE DESPITE THE DESIRE OF THE JURORS TO RECESS.

Pace argues that there was excessive deliberations ordered by the trial court and for that reason the case should be reversed and remanded for a new trial. In support of this argument, Pace cites to this Court the case of *Isom v. State*, 481 So. 2d 820 (Miss. 1985), in which our supreme court reversed a jury's verdict after finding that the trial court erred in giving a special interrogatory to the jury instead of the *Sharplin* instruction, after learning that the jury was deadlocked. The court also stated in that case that "[t]his Court suggests that [deliberating from 3:21 P.M. until 11:35 P.M. was an] excessive deliberation time." *Id.* at 824.

Pace does not argue that the jury was deadlocked and should have been given the *Sharplin* instruction; therefore we need not address that issue. Pace has confined his issue to excessive deliberations, and we will limit our opinion to that issue only.

In this case, the jury began its deliberations at 3:40 P.M. on the second day of trial. The jury returned to the courtroom at 6:10 P.M., after the trial judge received a note from the jurors indicating that they needed more time and wanted to be recessed for the night and sent home. The trial judge told the jurors to continue to deliberate. At 8:30 P.M. the jury again returned to the courtroom. Once the jurors were in the courtroom the trial court asked the jury if it was deadlocked. One juror stated that the jury was "in a pretty deep discussion" and that in a couple of hours they could make some progress. At that point, the jury was split 7-5. The trial court told the jury that it needed to "go back and deliberate for a short period longer to see if [it was] making any progress." The jury returned to deliberate and within one hour returned a guilty verdict.

In *Isom* the jury deliberated approximately eight and one-half hours, from 3:21 P.M. until 11:07 P.M., before reaching a verdict. In our case the jury deliberated approximately five and one-half hours. There is no hard and fast rule which sets out a time in which a trial court must recess a jury over night. Rather each situation is taken on a case by case basis. In some cases allowing a jury to deliberate for six hours may very well be error, while in other cases it may not be. In this case, we are not shown, nor can we find, any facts which would indicate that the jury was physically exhausted to such an extent that its verdict must be questioned. We find that, under these set of facts and circumstances, the jury was not subjected to excessive deliberations in this cause. We therefore find this issue to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF MONROE COUNTY OF CONVICTION OF SEXUAL BATTERY AND SENTENCE OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TEN YEARS SUSPENDED IS AFFIRMED. COSTS ARE ASSESSED TO MONROE COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.