IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01076 COA

ALEXANDER ISSAC BAILEY

a/k/a A. I. BAILEY

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. JOHN M. MONTGOMERY

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ARMSTRONG WALTERS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY JOLENE M. LOWRY

DISTRICT ATTORNEY: ROD RAY

NATURE OF THE CASE: CRIMINAL -- SEXUAL BATTERY

TRIAL COURT DISPOSITION: GUILTY -- SENTENCED TO A TERM OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., COLEMAN, AND KING, JJ.

COLEMAN, J., FOR THE COURT:

Pursuant to the jury's verdict of "Guilty as charged" on an indictment for the felony of sexual battery, the Lowndes County Circuit Court sentenced Appellant, Alexander Issac Bailey, to serve a term of ten years in the Mississippi Department of Corrections. Bailey appeals from the trial court's judgment of guilty and its order which denied his motion for new trial or a JNOV. We affirm the trial court's judgment of Bailey's guilt of the felony of sexual battery and sentence to serve ten years in the Mississippi Department of Corrections.

I. FACTS

The following recitation of the facts depicts the evidence in the light most favorable to the jury's verdict of guilty. On September 17, 1993, Gladys Tubby, a mother of a four-year-old son and a two-year-old daughter, who was separated from her husband, opened the door of her home to permit Bailey inside. Bailey and Tubby began to argue, and their disagreement soon became physical. Bailey picked Tubby up, took her to the back room in her home, where he held her down on a bed. At that point, Tubby's daughter walked into the room and told Tubby that she needed to go to the bathroom. Bailey released Tubby from the bed so that she could take her daughter to the bathroom.

After Tubby's daughter finished, Bailey hit Tubby's son. In response to Bailey's striking her son, Tubby "went off on" Bailey; and Bailey and Tubby began fighting again. Tubby instructed her son to get help. Bailey, however, prevented Tubby's son from leaving the house. When Tubby tried to flee the house, Bailey prevented her from doing so. Tubby then sat down on the sofa in her living room. While she and Bailey continued to argue, Tubby held her daughter in her arms. After Tubby's daughter got up and went into the back room, Bailey threw Tubby on the couch and, in the presence of Tubby's son, pulled Tubby's underwear to one side and forcibly entered her vagina with his penis. According to the statement that Tubby gave to the police later that day, Bailey ejaculated inside of her. Tubby testified that after Bailey finished his sexual activity with her and arose from the couch, he told her, "You know you wanted it." The jury found, however, that she didn't.

After Bailey left Tubby's house, she and her two children walked to the Columbus police station to report the incident. At the station, Tubby reported the incident to Corporal John Peavey, a detective with the Columbus Police Department. Peavey took Tubby to the emergency room of the Baptist Memorial Hospital in Columbus, where Elizabeth Jane Anderson, known as "B.J.," a registered nurse, examined Tubby with the aid of a "rape-kit." According to Anderson, Tubby was crying quietly, was shaking visibly with her eyes "about the size of saucers," and "was scared to death." Anderson noticed that Tubby's left eye "was swollen and beginning to burn blue" and that Tubby also had some scratches on her back. She also determined that Tubby was menstruating. The Columbus police arrested Bailey the same day of the incident, September 17.

The report of the emergency room physician who administered a pelvic examination to Tubby noted nothing traumatized or unusual with respect to Tubby's vagina. Lora Hurff Aria, a forensic scientist employed with the Mississippi Crime Lab, later performed fluid and hair analyses of the evidence gleaned from the rape-kit and from Bailey's shorts. She was not able to detect the presence of any semen on the vaginal swab that was taken from Tubby. Aria did identify the presence of both semen and blood on a pair of Bailey's cotton briefs. Aria, however, was not able to type the blood or conclude to whom the blood belonged.

Bailey was tried in the Circuit Court of Lowndes County on August 16, 1994. During his trial, Tubby, Peavey, Anderson, and Aria all testified for the State. Tubby's was the only eyewitness account of the what transpired between Bailey and her. Bailey declined to testify. We have already noted that the jury found Bailey guilty of sexual battery and that the trial judge sentenced him to serve a term of ten years in the Mississippi Department of Corrections.

II. ISSUES AND THE LAW

In his brief Bailey poses the following six issues for our analyses and resolution:

> (1) The jury verdict was against the great weight and sufficiency of the evidence.
>
> (2) The prosecutor improperly commented on the Defendant's failure to testify.
>
> (3) The trial court erred in not sustaining Defendant's motion in limine limiting the testimony of state's witness, B. J. Anderson.
>
> (4) Defense counsel was ineffective in that he failed to object to prosecutor's improper comments in closing argument that constituted an "appeal to the community conscience."
>
> (5) Defense counsel was ineffective in that he failed to request a jury instruction instructing the jury that the uncorroborated testimony of the prosecutrix is to be viewed with "extreme caution."
>
> (6) The question of guilt or innocence in this case is such a close one that any error cannot be regarded as "harmless error."

This Court will consider these six issues in the order that it finds appropriate to the development of its determination of whether the trial court erred so as to warrant the reversal of its judgment of guilt and concomitant sentence of ten years to serve in the Mississippi Department of Corrections.

A. Appellant's second issue:

> (2) The prosecutor improperly commented on the Defendant's failure to testify.

During the State's opening argument, the prosecutor stated:

> You will hear how . . . [Bailey] beat . . . [Tubby] up, forced her to have sex without her consent, how she went to the police and told them what happened, and they then took her to the hospital where she was subject to one of the most humiliating and embarrassing experiences one can go through, a sexual assault examination. That's the case. *You're going to hear from the one person who can tell you whether or not consent was involved, and that's Gladys Tubby.* It's her body and her decision, and you're going to hear that she said no, but "no" wasn't good enough . . . ."

At that point Bailey objected to the comment to which we have added emphasis because it constituted the prosecutor's comment "on the defendant's possible decision not to testify." Bailey now asserts that the highlighted comment by the prosecutor was improper because it entailed a comment upon Bailey's refusal to testify in his own defense. The Fifth Amendment to the United States Constitution and Section 26, Article 3 of the Mississippi Constitution protect every person from self-incrimination. However, Section 13-1-9 of the Mississippi Code of 1972, which once provided that, "[t]he failure of the accused, in any case, to testify shall not however operate to his prejudice or be commented on by counsel,"was repealed. Chapter 573, Section 141 of the Mississippi Laws, effective from and after July 1, 1991.

It is patently obvious to us that in making his "one person who can tell you whether or not consent was involved" comment, the prosecutor was in no way referring to the fact that Bailey would not be taking the stand. Any suggestion to the contrary is nothing more than an attempt to read into the prosecutor's statements something that he did not intend. We therefore reject this assignment of error.

The Mississippi Supreme Court has not decided what impact the repeal of Section 13-1-9 may have had on this genus of prosecutorial faux pas. To analyze this issue, this Court assumes that the prohibition against the state's comment on the Defendant's failure to testify is so firmly grounded in the Defendant's protection against self-incrimination afforded by the Fifth Amendment to the United States Constitution and Section 26, Article 3 of the Mississippi Constitution that the repeal of Section 13-1-9 had no effect on the prohibition against the prosecution's commenting on a criminal defendant's failure to testify at his trial.

It is true, as Bailey argues, that the prosecution's comment on the Defendant's failure to testify does not have to be direct and obvious. We fail to agree with Bailey's assertion that "[c]learly the statement made by the prosecutor falls easily within the definition adopted by the Mississippi Supreme Court." In *Bridgeforth v. State*, 498 So. 2d 796, 797 (Miss. 1986), the assistant district attorney made the following statement to the venire during his *voir dire*:

> Now I want you all to understand that this trial will not be like the ones you see on TV. So don't expect anyone to jump up in the back of the courtroom and admit to committing the crime. I don't expect that to happen any more than I expect the defendant to confess committing the crime.

In *Bridgeforth*, the assistant district attorney referred to the unlikelihood of the defendant's confessing that he committed the crime during the initial stage of jury voir dire. The supreme court held that "[t]he trial judge correctly refused to grant a mistrial on the unfortunate comment made by the assistant district attorney on voir dire." *Id.* at 798.

In the case *sub judice*, the prosecutor's comment about which Bailey complains occurred during the opening statement. After Bailey objected to it, the trial court overruled his objection, but the record fails to reflect that the prosecutor made any further references of a similar nature. We think that the assistant district attorney in the case *sub judice* was emphasizing the obvious point that Tubby was the one person who could tell for sure whether her sexual intercourse with Bailey was consensual, and the state intended to call her to tell the jury whether it was consensual. Thus, we decide this second issue against Bailey and hold that the trial court did not err when it overruled his objection to the prosecutor's comment about which he complains.

B. Appellant's third issue:

> (3) The trial court erred in not sustaining Defendant's motion in limine limiting the testimony of state's witness, B. J. Anderson.

Before the state called Anderson to testify about her making a rape-kit examination of Tubby, Bailey moved for what he describes as a motion in limine. We quote from the record:

> BAILEY'S ATTORNEY: However, we would ask the Court in limine to restrict her testimony from opinions as to what the victim's state of mind was or as to what her subjective opinion is to whether this claim was genuine or not and her testimony in anything other than what she physically did and what she physically observed that is relevant in this case, your Honor.
>
> BY THE COURT: All right. The objection and the motion in limine will be overruled and you can make a contemporaneous objection.

During the course of Anderson's testimony, the following exchange occurred between Anderson, the witness, and the assistant district attorney:

> Q. Okay. Now I think -- have you -- have you in your career as a nurse done -- uh -- a lot of these -- uh -- sexual assault kits?
>
> A. In my twenty three years in the emergency departments all over the states, I've

probably done forty to fifty exams.

Q. Did you notice anything about the demeanor of Miss Tubby when she came in?

A. In our profession, it's what you would call a textbook picture of a rape victim.

After Anderson's description of Tubby as "a textbook picture of a rape victim," Bailey objected to her answer on the ground that it comprised opinion testimony from a witness who had not been qualified as an expert. The trial court sustained the objection and then instructed the jury, "Jury, disregard that. Let's go counsel."

Bailey now asserts that the trial court erred in not granting his motion in limine. Bailey argues that had the trial court done so, Anderson would never have had the opportunity to utter her unauthorized opinion to the effect that Tubby showed all of the symptoms of a person who had been raped. Bailey's argument ignores the fact that the trial judge sustained his objection to Anderson's comment and instructed the jury to disregard

When a trial court sustains objections to improper testimony and instructs the jury to disregard it, an appellate court may presume that the jury followed the directions of the judge to disregard such comments or testimony. In *Dennis v. State*, 555 So. 2d 679 (Miss. 1989), an officer testified that when he arrested Dennis at his grandmother's home, Dennis appeared "wild-eyed" and tense, as if on alcohol or drugs. *Id*. at 682. The defense objected, and the trial judge sustained the objection and instructed the jury to disregard the answer. *Id.* Nonetheless, on appeal, Dennis argued that, "[t]he trial court allowed testimony form a police officer speculating that Ken Dennis was involved with other crimes." *Id.* The Mississippi Supreme Court responded to Dennis's argument on this issue by writing:

> This assignment of error has no merit since the jury was properly instructed and no prejudice resulted. *Williams v. State*, 512 So. 2d 666, 671 (Miss. 1987) (our law presumes that the jury does as it is told); *Shoemaker v. State*, 502 So. 2d 1193, 1195 (1987) (jurors presumed to follow trial judge's instructions and it would show insufficient confidence in the good sense and discretion of trial judges to hold otherwise); *Horne v. State*, 487 So. 2d 213 (Miss. 1986) (trial court's refusal to grant mistrial after district attorney made statement that defendant had committed prior criminal offense was not error); *Holifield v. State*, 275 So. 2d 851 (Miss. 1973), *cert. dismissed* 414 U.S. 990, 94 S. Ct. 382, 38 L. Ed. 2d 253 (when trial court sustains objections to improper remarks of legal counsel participating in a trial, it is presumed, unless otherwise shown, that jury followed the directions of the trial judge to disregard such comment or testimony).

Dennis, 555 So. 2d at 682-83.

Pursuant to Rule 28(j) of the Mississippi Rules of Appellate Procedure, Bailey's counsel has invited us to consider the recent Mississippi Supreme Court case of *Cotton v. State*, No. 92-KA-01102-SCT, 1996 WL 233895 (Miss. May 9, 1996). In that case, the supreme court reversed Cotton's conviction of aggravated assault because, among other reasons, a police officer, Jimmy Carruth, was allowed over Cotton's objection to express his opinion as an expert that a particular .45 caliber pistol could not accidentally discharge as the victim testified. *Id*. at * 2. Cotton contended, first, that the officer had never been qualified or tendered as an expert witness and, secondly, that the introduction of his testimony was a violation of what was then Uniform Criminal Rule of Circuit Court Practice 4.06. The supreme court determined that Carruth was never qualified and tendered as an expert witness and that it was reversible error to allow expert testimony from a witness never qualified or tendered as an expert. *Id*. at * 3. It also opined that, "The state's failure to list Carruth as an expert witness or provide any information regarding the substance of his testimony was also a violation of Unif. Crim. R. Cir. Ct. Pr. 406." *Id.* Bailey is correct in his assertion that the State had not listed Anderson as an expert in its discovery to him and that it had not qualified Anderson as an expert. To that extent *Cotton* would seem to be applicable precedent to support his position on this issue.

However, Bailey ignores the difference between *Cotton* and the case *sub judice*. Unlike the trial judge who admitted the officer's opinion testimony in *Cotton*, the trial judge in the case *sub judice* sustained Bailey's objection to Anderson's comment that Tubby presented a "textbook picture of a rape victim" and he then instructed, to disregard that part of her answer. Thus, we are compelled to apply the principle for which *Williams v. State* stands, *I. e.*, "[o]ur law presumes that the jury does as it is told." *Williams v. State*, 512 So. 2d 666, 671 (Miss. 1987). We decide Bailey's third issue against him and affirm the trial court's action in sustaining the objection to Anderson's comment and instructing the jury to disregard it.

C. Appellant's fourth and fifth issues:

> (4) Defense counsel was ineffective in that he failed to object to prosecutor's improper comments in closing argument that constituted an "appeal to the community conscience."
>
> (5) Defense counsel was ineffective in that he failed to request a jury instruction instructing the jury that the uncorroborated testimony of the prosecutrix is to be viewed with "extreme caution."

Bailey asserts that the performance of his trial counsel was ineffective. In *Handley v. State*, 574 So. 2d 671, 683 (Miss. 1990), which included the issue of ineffective counsel, the Mississippi Supreme Court explained the basis for evaluating an appellant's claim that his counsel was ineffective:

> In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), the United States Supreme Court established a two-prong-test, required to

> prove the ineffective assistance of counsel: the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense . . . . The burden of proof then rests with the movant . . . .
>
> Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." . . . In short, defense counsel is presumed competent.
>
> Under the second prong, even if counsel's conduct is "professionally unreasonable," the judgment stands "if the error had no effect on the judgment." . . . Consequently, the movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

(quoting *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988)). Because these two issues are essentially identical, we have joined them for our review and analysis.

Bailey first asserts that his attorney erred when he failed to object to an improper comment made by the prosecutor during his closing argument to the jury. The improper argument of which he complains is the prosecutor's appeal to the jury to "set the standard for the community." Bailey correctly asserts that in *Williams v. State*, 522 So. 2d 201, 209 (Miss. 1988), the Mississippi Supreme Court held that it was improper to appeal to the jury to decide a case as representatives of the community or its standards because such argument interfered with the jury's duty to decide each case on its merits. In his brief, Bailey did not designate which of the prosecutor's comments comprised an argument that the jury should set the standard for the community. However, this Court accepted Bailey's fourth issue as his invitation for us to review the prosecutor's closing argument to determine whether any of his comments were of that nature. From our review of his closing argument, we could find no such prosecutor's appeal to "set the standard for the community." Therefore, with regard to his fourth issue, we find no factual basis to support that issue. This Court decides it against him. We cannot affirm the trial court on this issue because Bailey did nothing to invoke that court's decision for us to affirm or reverse.

Bailey's fifth issue rests on the contention that his counsel's failure to request a jury instruction that Tubby's uncorroborated testimony was to be viewed with extreme caution constituted ineffectual representation. Bailey's four-line, one-paragraph argument on this issue cites only *Killingsworth v. State*, 374 So. 2d 221 (Miss. 1982) in which the supreme court reversed Killingsworth's conviction of rape. However, the supreme court did not reverse Killingsworth's conviction because the trial court failed to grant an instruction that the victim's uncorroborated testimony was to be viewed with extreme caution. Instead, the reason for the reversal was that the prosecutor introduced into evidence Killingsworth's coat, which had nothing to do with the act for which he had been indicted, so that he could then introduce the presence of a green leafy substance which had been found in the coat's pocket. *Id.* at 224. The court reversed because it could not "say with confidence that [the coat and contents of the pocket] had no effect on the jury's verdict."*Id.* at 225.

In *Killingsworth* the supreme court cited *Richardson v. State*, 196 Miss. 560, 17 So. 2d 799 (1944) for the general proposition that:

> While it is true that a conviction for rape may rest on the uncorroborated testimony of the person raped, that testimony should always be scrutinized with caution.

Killingsworth, 374 So. 2d at 223. However, in neither of these two cases did the Mississippi Supreme Court reverse the defendant's conviction of rape because he sought, but was refused, an instruction that the victim's uncorroborated testimony was to be viewed with "extreme caution."

Thus we find that Bailey's counsel's failure to request such an instruction did not comprise ineffective assistance of counsel. Even had Bailey's counsel requested such an instruction and even had the trial court granted such an instruction, we remain unpersuaded that the jury's verdict might have been different. Thus, we conclude that under the second prong of *Strickland*, Bailey's contention must fail.

D. Appellant's first issue:

> (1) The jury verdict was against the great weight and sufficiency of the evidence.

There is a "distinction with a difference" between the "sufficiency of the evidence" and the "weight of the evidence." We first consider whether the evidence was sufficient to sustain Bailey's conviction of sexual battery. With respect to a challenge to the sufficiency of the evidence, the Mississippi Supreme Court has stated:

> 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 favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point 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 fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.

Garrett v. State, 549 So. 2d 1325, 1331 (Miss. 1989).

Section 97-3-95 of the Mississippi Code defines the crime of sexual battery as follows:

> (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; . . . .

Miss. Code Ann. § 97-3-95 (1972). Section 97-3-97 defines "sexual penetration as follows:

> For purposes of sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:
>
> (a) "Sexual penetration" includes 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.

Miss. Code Ann. § 97-3-97 (1972).

In her testimony, Tubby described Bailey's attack as follows:

> [My daughter] went to the back room and we [Bailey and I] started fightin' again and he throwed me down on the couch and then he was holdin' my hand so I couldn't get it loose and my son was sittin' there watching us and I was telling my son to go to the back room, but he never did. When he had me on the couch, he pulled my panties to the side and then he did it to me and when he got up, he said, "You know you wanted it." So I got up, I went to the bathroom, I got my kids and we left and went to the police station.

Later, the assistant district attorney asked her:

> Q. At any time, did you give the defendant permission to have sex with you?

A. No.

> Q. At any time, did you decide to stay there and just what happened . . . or did you resist?

A. Yes, I resist.

Q. Were you scared while this was going on?

A. Yes.

Still later the assistant district attorney asked Tubby:

> Q. And how -- was he holding you down? You testified he held you down, were your arms behind you or beside you or how?

A. Behind my head. Back like this.

As to the issue of the sufficiency of the evidence, we find that Tubby's testimony was sufficient to establish that Bailey penetrated her genital opening with his penis and that he did so without her permission. Thus, her testimony was sufficient to establish the elements of the felony of sexual battery as Sections 97-3-95 and 97-3-97 of the Mississippi Code of 1972 define that crime. In *Ragland v. State*, 403 So. 2d 146 (Miss. 1981), Ragland was convicted of the crime of armed robbery. *Id.* at 146. On appeal, Ragland argued that the supreme court ought to reverse his conviction because the victim of the armed robbery was the only witness against him.

The supreme court answered Ragland's argument in the following language:

> In contending that the state failed to make out a prima facie case of armed robbery, that the motion for a directed verdict of not guilty should have been granted, and that the verdict of the jury was against the overwhelming weight of the evidence, the appellant argues that the only witness who testified about the facts of the crime was the victim Smith, and that the state had the duty to produce the knife with which appellant threatened Smith. Appellant overlooks the well established rule that a person may be found guilty on the uncorroborated testimony of a single witness. In *Freeland v. State*, 285 So. 2d 895 (Miss. 1973), the Court said:
>
> > Regardless of all the procedural rules argued, the testimony of a single witness may be sufficient to sustain a conviction even though there may be more than one witness testifying to the contrary.

Ragland, 403 So. 2d at 147. The quoted portion from the *Ragland* opinion denies Bailey's argument that the evidence was insufficient to convict him because "[t]here existed no evidence whatsoever of the Defendant's guilt except the uncorroborated and substantially impeached testimony of [Tubby]." This Court holds that the testimony of Tubby was sufficient by itself to establish all of the elements of the crime of sexual battery and decides this part of Bailey's first issue adversely to his innocence.

In *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983), the Mississippi Supreme Court articulated the standard of review by which it would determine whether the jury's verdict was against the great weight of the evidence. The supreme court opined:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an

unconscionable injustice.

Bailey specifically argues that Tubby's testimony is weakened by the fact that the vaginal swab taken from her at the Baptist Memorial Hospital showed no evidence of semen and by the fact that the doctor's medical examination revealed no tears or lacerations in her vagina. Bailey also argues that the prior statement that Tubby gave to Pevey on the day of the alleged crime to the effect that she had not seen Bailey since the beginning of August, contradicted her in-court admission that the two of them were living together at the time of the crime and therefore impeached her credibility.

On the other hand, Tubby's testimony that Bailey sexually assaulted her was corroborated by Anderson's description of Tubby's emotionally distraught state which she observed when Tubby came into the hospital emergency room. Further, even though the forensic scientist from the state's crime laboratory was unable to type the blood that she identified on Bailey's cotton briefs, the fact that she was able to identify both blood and semen on those briefs supports the inference that Bailey had sexual intercourse with Tubby on the day in question. Finally, detective Peavey's photographs portray bruises and scratches on Tubby's person. These bruises and scratches corroborate Tubby's testimony that Bailey's sexual attack occurred after they had fought for some time. Finally, Tubby testified that she did not consent to Bailey's intercourse with her.

We think that the following quote from *Gandy v. State*, 373 So. 2d 1042, 1045 (Miss. 1979) explains the jury's prerogative in resolving the evidentiary issues which Bailey argues:

> Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject, the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into findings of fact sufficient to support their verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. (citation omitted).

We conclude that the State presented sufficient evidence and the defense created such questions about the nature of the State's evidence that the resulting conflict in the evidence created a factual dispute for a jury resolution. The jurors unanimously settled the conflicts about which Bailey now argues in favor of his guilt of sexual battery on Tubby; and we choose not set their verdict aside.

D. Appellant's sixth issue:

> (6) The question of guilt or innocence in this case is such a close one that any error cannot be regarded as "harmless error."

In his final assignment of error, Bailey seeks to prevent this Court's minimizing his issues by categorizing them as "harmless error." He then cites *Forrest v. State*, 335 So. 2d 900 (Miss. 1976) to argue that were this court to opine that all the errors of which he complains were "harmless errors," nevertheless, the cumulative effect of all the "harmless errors" was the State's denial of a fair trial. From our analysis and consideration of all of Bailey's first five issues, we concluded that the trial court committed no error at all. We found it unnecessary to resort to the concept of harmless error to avoid resolving any of these five issues against Bailey. Therefore, his sixth and last issue has been rendered moot, and we need consider it no further now that we have noted it.

III. Summary

Contrary to Bailey's protestation, the evidence was sufficient to sustain the jury's verdict of guilty of sexual battery. The testimony of Tubby alone was sufficient to sustain Bailey's conviction, but there was additional corroboration from the testimony of the emergency room nurse and the State's forensic scientist. To the extent that Bailey maintains that his counsel impeached the testimony of the State's witnesses, the jury resolved the issue of their credibility in favor of the state. That is the jury's function and prerogative, and it exercised it to Bailey's detriment. Neither do we interpret the assistant district attorney's comment to the jury that only Tubby knew whether she had consented to Bailey's sexual intercourse with her as a comment on Bailey's failure to testify. His complaint about Anderson's description of Tubby as a "textbook picture of a rape victim" is groundless because the trial judge sustained his objection to that comment and instructed the jury to disregard it.

Bailey's counsel's *mea culpa* assertions of ineffective counsel were not supported by either the contents of the record for the prosecutor's "community standards" argument or by specifically cited precedent for his failure to request the precautionary instruction. We are unpersuaded by Bailey's argument that the outcome of the trial would likely have been other than the jury's verdict of "guilty as charged" but for his counsel's self-professed ineffectiveness. We affirm the trial court's judgment of Bailey's guilt of the felony of sexual battery without resorting to the concept of harmless error and without evaluating whether an accumulation of harmless errors rendered Bailey's trial unfair.

THE LOWNDES COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANT'S GUILT OF THE CRIME OF SEXUAL BATTERY AND ITS SENTENCE TO A TERM OF TEN YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS ARE ASSESSED TO LOWNDES COUNTY.

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