IN THE COURT OF APPEALS 05/21/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01235 COA

DANIEL WILLIAMS JONES A/K/A DONALD WILLIAMS JONES

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. ANDREW CLEVELAND BAKER

COURT FROM WHICH APPEALED: TATE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID L. WALKER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN

DISTRICT ATTORNEY: ROBERT J. KELLY, ASSISTANT D.A.

NATURE OF THE CASE: CHILD FONDLING AND SEXUAL BATTERY

TRIAL COURT DISPOSITION: SENTENCED TO SERVE TEN YEARS FOR GRATIFICATION OF LUST AND TEN YEARS FOR SEXUAL BATTERY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., McMILLIN, AND PAYNE, JJ.

FRAISER, C.J., FOR THE COURT:

Daniel Williams Jones was convicted in the Tate County Circuit Court of one count of child fondling and one count of sexual battery on a child under the age of fourteen years. He was sentenced to serve ten years for child fondling, sentence suspended pending good behavior, and fifteen years for sexual battery with seven years suspended pending good behavior. Jones appeals, presenting the following issues:

I. WHETHER THE TRIAL COURT ERRED IN DENYING JONES'S GENDER- BASED PEREMPTORY CHALLENGES TO TWO VENIREMEN.

II. WHETHER THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

III. WHETHER THE TRIAL COURT ERRED IN DENYING JONES'S MOTION TO SUPPRESS HIS CONFESSION.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING JONES'S JURY INSTRUCTION D-2.

V. WHETHER THE TRIAL COURT ERRED IN GRANTING STATES INSTRUCTION S-5.

Jones's arguments lack merit. We affirm.

FACTS

On April 3, 1993, eleven-year-old L.M. spent the night at her step grandmother's home. Jones, the brother of L.M.'s step-father, came home from a night of drinking and saw L.M. asleep in a room with several other children. Jones walked L.M. to the bathroom and, because he had a "sex feeling," touched her sides and buttocks in hopes that she would get the "sex feeling" as well. Jones then attempted anal intercourse, but found L.M. was too small to completely accommodate him. Jones then sent L.M. back to her bedroom. The next day, L.M. told her mother what had occurred the previous night.

Jones was tried and convicted of child fondling and sexual battery. During voir dire, the following exchange took place between the trial judge and Jones's counsel:

MR. WALKER: Your Honor, at this time I'd like for the Court to take judicial notice that

Mr. Jones is a male, and I would assert that the Assistant District Attorney has exercised his peremptory challenges against two male prospective jurors. In effect, what I'm doing is I'm asserting a gender based *Batson* type challenge. This is a sexual battery, fondling case; the defendant is male; the Assistant District Attorney has struck two male jurors. I will concede that the current law in the State of Mississippi is that gender based *Batson* type challenges are not recognized in Mississippi. However, I would advise the Court that it's my understanding that this issue is on appeal to the United States Supreme Court and to the best of my knowledge it has not been adjudicated as of today. I could be wrong, but I don't think it has. I'm merely preserving the issue for appeal. I would ask the Court to direct the Assistant District Attorney to articulate gender neutral reasons for striking the two male prospective jurors.

THE COURT: Are you tendering six males?

MR. KELLY: Yes, sir.

THE COURT: I don't know that you're required to, Mr. Kelly, but would you like to state a basis for those peremptories?

MR. KELLY: I would not, Your Honor. I have tendered a panel of 12 to the defendant, 6 males and 6 females. I don't believe I'm required to do anything else. If Your Honor requires me to, I shall.

THE COURT: I don't think you're required to. I certainly can't say that that's showing a pattern of discrimination against males when there's six on there and you've got six challenges and you've used two of them. If this is ever adopted as the law of the state -- I kind of doubt it will be -- but I still think that I would have to come back -- the defendant would have to make some threshold showing of discrimination.

MR. WALKER: Judge, the only thing I can say in rebuttal is, of course, under the *Batson* jurisprudence there's a case and a line of cases out there that hold that one, one discriminatory strike by the State --

THE COURT: Yes, but I think the Court must first find that there is a discriminatory pattern before a showing has to be held, at least a threshold showing, and I don't find it in

this case, so I won't require it.

DISCUSSION

I. WHETHER THE TRIAL COURT ERRED IN DENYING JONES'S GENDER- BASED PEREMPTORY CHALLENGES TO TWO VENIREMEN

Jones argues that the prosecution should not have been permitted to exercise its peremptory challenges based on gender. At the time the case was tried, the law of Mississippi was that *Batson* type challenges could not be exercised to prevent a party from exercising its peremptory challenges based on gender. *See Simon v. State*, 633 So. 2d 407, 411 (Miss. 1994). Seven months later, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbade the exercise of peremptory challenges based on gender. *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1421 (1994). Because the case sub judice was pending on direct review at the time *J.E.B. v. Alabama* was decided, the *J.E.B. v Alabama* decision applies retroactively to our case. *See Griffith v. Kentucky*, 479 U.S. 314, 321 (1987) (holding that *Batson v. Kentucky* applied retroactively to those cases on direct review when it was decided). Thus, we must determine whether the actions of the trial court comply with the dictates of *J.E.B. v. Alabama*.

The United States Supreme Court noted that "[a]s with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike." *J.E.B.*, 114 S. Ct. at 1429 (citing *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)).

Under *J.E.B* and *Batson*, in order for the defendant to raise a prima facie case that the State has improperly struck a potential juror on the basis of gender, it must be shown (1) that he is a member of a cognizable gender group, and that the State has exercised peremptory challenges to remove from the venire members of that gender group; (2) that the defendant is entitled to rely on the fact that peremptory challenges allow those to discriminate who are of a mind to discriminate; and (3) that these facts and *any other relevant circumstances* raise an inference that the State used that practice to exclude the veniremen from the petit jury on account of their gender. J.E.B., 114 S. Ct. at 429; Batson, 476 U.S. at 96. First, Jones is a member of a cognizable gender group; he is male. The State used its peremptory challenges to remove two male veniremen from the panel. Second, peremptory challenges potentially allow those who wish to discriminate based on gender to do so. However, the trial court found that the relevant facts and circumstances in this case did not raise an inference of gender based discrimination. The record reflects that the trial court found that the State's use of only two of its six challenges and the fact that the panel tendered was composed of six males and six females indicated that the State did not use its challenges in a gender-biased manner. Therefore, Jones did not establish a prima facie case of gender discrimination, and the State was not required to give gender-neutral reasons for its peremptory challenges.

II. WHETHER THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

Jones claims the jury's verdict was against the overwhelming weight of the evidence. A challenge to the weight of the evidence via a motion for a new trial implicates the trial court's sound discretion. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State. *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987).

The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses. *Lewis v. State,* 580 So. 2d 1279, 1288 (Miss. 1991); *Benson v. State,* 551 So. 2d 188, 191 (Miss. 1989); *Dixon v. State,* 519 So. 2d 1226, 1228 (Miss. 1988); *Temple v. State,* 498 So. 2d 379, 382 (Miss. 1986).

Both L.M.'s testimony and Jones confession indicate that Jones improperly touched and anally penetrated L.M.. Jones admitted, "I pulled down her pants and put my penis in her but it would not go all the way in because she was too little to take it." L.M. corroborated Jones's testimony saying Jones "put his thing in my bootie." Further, medical testimony indicated a wedge shaped abrasion on L.M.'s anal tissue indicative of forced penetration.

Viewing the evidence in a light most favorable to the verdict, we cannot say that the jury reached the wrong verdict. The trial court did not abuse its discretion in denying Jones's motion for a new trial. We are not persuaded "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." *Wetz*, 503 So. 2d at 812; *Temple*, 498 So. 2d at 382; *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983).

III. WHETHER THE TRIAL COURT ERRED IN DENYING JONES'S MOTION TO SUPPRESS HIS CONFESSION

Jones alleges that he did not receive *Miranda* warnings prior to giving his statement and that he was questioned after requesting time to think about whether he wanted legal counsel present.

On April 8, 1993, Jones was arrested. Jones testified that the arresting officer did not give him *Miranda* warnings prior to questioning him. The arresting officer testified that he did read Jones his *Miranda* warnings. Whether Jones or the arresting officer is correct is not dispositive of whether Jones's confession was valid. Jones testified that after being arrested he was not questioned until the following day because he was under the influence of drugs and alcohol at the time he was arrested. Prior to being questioned he was read his rights by the interrogating officer, which fact was witnessed by an investigator for the district attorney's office. Additionally, Jones signed a waiver of rights. Jones does not argue that he was not advised of his rights before he was interrogated and further testified that he was not asked any questions before the interrogation. Therefore, Jones's confession was properly admitted over his objection that he was not properly given his *Miranda* rights.

Next, Jones claims that his statement should have been suppressed because he asked for time to

consider whether he wanted counsel present. After a few minutes, Jones decided to continue answering questions without counsel. The two interrogating officers testified that Jones never asked for time to think about having an attorney present or directly to have an attorney present. After reviewing the testimony of Jones, the officers, and the signed waiver of rights, the trial court found that "[n]one of that leads me to believe that he interrupted the interview and requested the assistance of counsel. There's no proof here to support that other than the defendant's weak assertion that that happened."

The trial court's findings of fact on the voluntariness of a confession will not be overturned if supported by substantial evidence. *Holland v. State*, 587 So. 2d 848, 855 (Miss. 1991). Here the trial court's finding is supported by the knowing and intelligent waiver of rights freely signed by Jones and the testimony of the two officers present for the investigation. Such evidence is sufficient to support the trial court's finding that Jones's confession was admissible at trial.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING JONES'S JURY INSTRUCTION D-2

Jones contends that the trial court erred in refusing to grant the following instruction:

> The court instructs the Jury that if you find from the evidence presented in this case beyond a reasonable doubt that Daniel Williams Jones a/k/a Donald Williams Jones on or about April 2, 1993, in Tate County, Mississippi attempted to cause or purposely, knowingly or recklessly caused bodily injury to L.M., then you shall find Daniel Williams Jones a/k/a Donald Williams Jones guilty of simple assault.

Jones erroneously contends that because simple assault is a lesser included offense of child fondling and sexual battery of a child under the age of fourteen, jury instruction D-2 should have been given to the jury by the trial court. The trial court correctly denied this instruction because a simple assault is not a lesser included offense to a charge of child fondling and sexual battery of a child under fourteen.

A lesser included offense instruction is simply inappropriate in this case. It has been stated:

> A lesser included offense by definition is one in which all its essential ingredients are contained in the offense for which the accused is indicted, but not all of the essential ingredients of the indicted offense. An accused could not be guilty of the offense for which he is indicted without at the same time being guilty of the lesser included offense. The lesser included crime is encompassed within the crime for which the accused is indicted.
>
> There may very well be a separate, distinct and less serious crime which the proof at trial shows the defendant committed, but this does not necessarily mean it is a lesser included offense. *To constitute a lesser included offense, every one of the essential ingredients*

> *must also constitute essential ingredients of the more serious crime of which the accused is indicted.*

Payton v. State, 642 So. 2d 1328, 1334 (Miss. 1994) (emphasis added) (citations omitted).

While there was sufficient proof adduced at trial that Jones committed simple assault this does not mean that simple assault is a lesser included offense of child fondling and sexual battery of a child under the age of fourteen years. *Id.* To constitute a lesser included offense, every one of the essential ingredients of simple assault must also constitute essential ingredients of the more serious crime, either child fondling or sexual battery of a child under fourteen, of which the accused is indicted.

The essential elements of a simple assault are purposely, knowingly, or recklessly causing bodily injury to another. Miss. Code Ann. § 97-3-7(1) (1972). Neither of these elements or ingredients are essential elements of sexual battery of a child under the age of fourteen. A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of fourteen years. *Id.* § 97-3-95(1)(c). Intending to cause bodily injury is not an essential ingredient of the sexual battery offense charged. Therefore, simple assault is not a lesser included offense of sexual battery of a child under the age fourteen. Accordingly, the trial court correctly denied the lesser included offense instruction as to the sexual battery charge.

Further, purposely, knowingly, or recklessly causing bodily injury to another is not an essential element of child fondling. A person is guilty of child fondling if he or she is above the age of eighteen years, and for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch with hands or any part of his or her body or member thereof, any child under the age of fourteen years, with or without the child's consent. *Id.* § 95-5-23. Because causing bodily injury is not a necessary element of this offense, the trial court did not err in denying Jones's lesser included offense instruction, D-2.

> V. WHETHER THE TRIAL COURT ERRED IN GRANTING STATES INSTRUCTION S-5

Because Jones cites no authority in support of his contention that instruction S-5 should not have been granted as a matter of law, we do not address this claim. *See Bland v. Bland*, 629 So. 2d 582, 591 (Miss. 1993).

For the foregoing reasons the judgment of the trial court is affirmed.

THE JUDGMENT OF THE TATE COUNTY CIRCUIT COURT OF CONVICTION OF COUNT 1: CHILD FONDLING, AND SENTENCE OF TEN YEARS, SENTENCE SUSPENDED PENDING GOOD BEHAVIOR; AND COUNT 2: SEXUAL BATTERY OF A CHILD UNDER THE AGE OF FOURTEEN AND SENTENCE OF FIFTEEN YEARS, SEVEN YEARS SUSPENDED PENDING GOOD BEHAVIOR, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. THE SENTENCE IN COUNT 1 IS TO RUN CONSECUTIVELY TO THE SENTENCE IN COUNT 2. COSTS

ARE TAXED TO THE APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.