IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00171 COA

DAVID GARDNER A/K/A "DINOSAUR" **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

DATE OF JUDGMENT:	01/30/96
TRIAL JUDGE:	HON. KENNETH LEVENE THOMAS
COURT FROM WHICH APPEALED:	COAHOMA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RICHARD B. LEWIS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
DISTRICT ATTORNEY:	LAWRENCE Y. MELLEN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	RAPE: SENTENCED TO SERVE A SENTENCE OF LIFE IMPRISONMENT IN THE MDOC; SENTENCE TO RUN CONSECUTIVE TO ANY PREVIOUSLY IMPOSED; DEFENDANT SHALL NOT BE ELIGIBLE FOR PAROLE
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

David Gardner was convicted of rape by the Coahoma County Circuit Court. Gardner challenges his conviction alleging that: (1) the trial court erred in overruling his motion to obtain a blood test in order to determine the source of the pregnancy and for possible impeachment evidence; (2) the State should not have been allowed to put on proof of prior instances of sexual contact between the victim

and Gardner not disclosed in discovery until the day of trial; (3) it was an abuse of the trial court's discretion to declare the eleven-year-old victim competent to testify at trial; and (4) the trial court erred in overruling Gardner's motion for directed verdict and subsequent motion for JNOV or alternatively for a new trial since the verdict is against the overwhelming weight of the evidence and not supported by sufficient credible evidence. Finding no error we affirm.

FACTS

Gardner frequently visited the home of the eleven-year-old victim, "L.P.," and her sister and mother. L.P. testified that she and Gardner engaged in sexual intercourse two or three times per week since she was in the fourth grade, a period of approximately one and one-half years. L.P. testified that each time the sexual intercourse took place in her bedroom while she and Gardner were supposed to be watching television. Most of the time, her mother was asleep in the living room. Both L.P. and her mother testified to substantially the same facts concerning Gardner's visit one afternoon in August 1995. The mother discovered Gardner pinning L.P. to the wall, touching her between her legs with his hands, his pants down below his knees. According to the testimony, the mother hit Gardner in the legs with a baseball bat and had L.P. call L.P.'s grandmother. Once the grandmother came over and spoke with Gardner, they ran him out of the house. At this point, the mother testified that she was under the impression that Gardner and L.P. had not yet engaged in sexual intercourse. In September, it was discovered that L.P. was pregnant. L.P. disclosed to her mother for the first time that she and Gardner had engaged in sexual intercourse. A couple of days later the mother filed charges against Gardner for the rape of L.P.

Ms. Lampkin, an administrator at L.P.'s school, testified that Gardner had come to the school in early September, posing as L.P.'s uncle. L.P. testified that Gardner asked her if he could come back to her house to see her. When L.P. told him no, he asked her not to tell anyone about the sexual contact between them so that he would not get into trouble.

Gardner testified on his own behalf. He denied ever having sexual intercourse with L.P. or ever touching her in a sexual manner. He denied that the incident in August alleged by L.P. and her mother ever occurred. Gardner stated that the mother had never raised a hand to him. He also denied posing as L.P.'s uncle at the school, but admitted he had told Ms. Lampkin that he was a friend of the family. Gardner testified that everyone was lying about the facts of the case except him.

Prior to trial, Gardner filed a motion to obtain a blood test on L.P.'s baby in order to determine paternity. Since the blood test could only be done after the baby was born, a continuance would have been necessary. The trial court denied the motion, holding that the court would not order a blood test of an infant merely for impeachment purposes, nor would the court delay the trial for several months for that purpose.

The morning of trial, Gardner was informed that L.P. would be testifying that she and Gardner had sexual intercourse two or three times per week since she was in the fourth grade. Gardner objected to the testimony because it had not been disclosed in discovery prior to the day of trial. The trial judge allowed Gardner to confer with counsel to discuss possible prejudice due to the recent disclosure. Gardner stated that he could produce as many as four witnesses to refute L.P.'s testimony that he was at her home two to three times per week over the past year and a half. The trial court ruled that such testimony would be allowed if presented, but it was not crucial to the matter because he was not

specifically charged with the prior acts. Additionally, the trial court noted that Gardner would have time to subpoena the witnesses since the case would not conclude until the following day.

At the close of evidence, Gardner made a motion for directed verdict, the judge denied the motion, and the jury returned a verdict of guilty. Gardner renewed his motion for directed verdict or alternatively a new trial. The judge denied this motion as well and sentenced Gardner to serve life in prison pursuant to Miss. Code Ann. § 97-3-65(1) (Rev. 1993).

DISCUSSION

1. Motion for Blood Test & Continuance

The trial judge's decision to grant or deny a motion for a continuance is within the sound discretion of the court and will not be reversed unless it is shown that manifest injustice has resulted. ***Coleman v. State*, 697 So. 2d 777, 780 (Miss.1997).** In order to reverse as to the blood test, the trial court's denial of expert assistance must be an abuse of discretion so egregious as to deny the defendant due process and where the defendant's trial was thereby rendered fundamentally unfair." ***Fisher v. City of Eupora*, 587 So. 2d 878, 883 (Miss.1991).** "Undeveloped assertions" that expert assistance will be helpful are insufficient. ***Griffin v. State*, 557 So. 2d 542, 550 (Miss.1990).**

Gardner made a motion the day before trial to compel the court to order a blood test in order to determine the paternity of the baby that L.P. was carrying. The trial judge denied the motion because the paternity of the baby was of no consequence to the determination of whether Gardner raped L.P. The only purpose that the test would have served Gardner at trial would have been impeachment of L.P. Further the trial court denied the motion because a continuance would have been required. The test could not have been performed until the baby was born, four months later. Based on the limited use that Gardner could have made of the results of the blood test, we find that the trial court did not abuse its discretion in refusing to order the blood test and grant the continuance.

2. Prior Instances of Sexual Behavior

Gardner asserts as error the admission of proof of prior instances of sexual behavior between L.P. and Gardner not disclosed by the State until the day of trial. The State insisted that this information did not come to light until the Friday before it was disclosed on Monday. The trial court based its ruling on an analogous case, ***State v. White*, 520 So. 2d 497, 500 (Miss. 1988).** In *White* the supreme court held that evidence of prior sexual encounters between the victim and the accused is admissible to show the accused's "lustful, lascivious disposition toward his particular victim, especially where, as here, the victim was under the age of consent." ***Id.*** There is nothing in the case under consideration to distinguish it from the previous cases and require a different ruling in this regard.

Gardner's central point is that this was a discovery violation. He needed a continuance properly to gather witnesses to rebut allegations that he was at the victim's house three days a week. Based on Rule 9.04 Uniform Circuit and County Court Rules, we do not find a discovery violation. This rule provides that names and addresses of all witnesses must be disclosed, along with any statements, written or oral, that were preserved. There is no evidence of any prior statements by L.P. on this point. Once the statements were made, the State disclosed them to Gardner. The State perhaps could

have informed Gardner's attorney on the Friday when they gained this information instead of waiting until the Monday of trial, but that was the only delay. After a hearing, the court found that the State had with reasonable promptness informed Gardner of the testimony. There was no discovery violation.

What Gardner specifically wanted was a continuance. The court allowed Gardner an opportunity to confer with his attorney on what witnesses might be available to rebut the new information on the frequency of Gardner's visits to the girl's home. Counsel informed the court that there might be four witnesses that his client would like to subpoena on this question. The court allowed him to do so with the assumption that Gardner would not need them until the next day. The court also stated that whether the witnesses could be obtained by the next day or not was not terribly significant, "because he is not specifically charged with the prior acts."

The evidence was relevant under the case law already cited. To call it not "crucial" overlooks the State's strong belief to the contrary as revealed by its interest in the admission of this evidence. A jury may react differently if the case only addresses one disputed event, but there was testimony of over 100 similar acts with the same child and she was distressingly young to have encountered such abuse. The testimony is relevant and admissible, but it is not insignificant.

Gardner did not have a right to have strong evidence against him excluded simply because it was strong evidence. Though the evidence was disclosed late, the court struck a reasonable balance on allowing its admission since Gardner would have time to respond to it. Gardner does not show how more time would have enabled him to discredit this evidence. After the court stated that Gardner would have until the next day to bring the four witnesses in that apparently had been identified, there was no objection that this was insufficient time. No such witnesses were called, nor did Gardner the next day after the State rested renew his motion for a continuance based on an inability to locate these alibi witnesses. We find no error, much less harmful error.

We also note that Gardner did not assert this as grounds for a new trial. The trial judge has broad discretion in granting and denying continuances. ***Cole v. State, 405 So. 2d 910, 912 (Miss. 1981). In Jackson v. State, 423 So. 2d 129, 131-32 (Miss. 1982)***, the court provided a list of errors that must be brought to the attention of the trial court in a motion for new trial. In that list, the court specifically stated that "the denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground, making the necessary proof to substantiate the motion." ***Id.*** Consequently, when Gardner failed to cite failure to grant a continuance in the motion for new trial, he waived that issue.

3. Competence of L.P. to Testify

Gardner cites the pre-rule case of *House v. State* in support of his contention that the trial court's examination of L.P. was not sufficient to determine her competence to testify at trial. ***House v. State,* 445 So. 2d 815, 827 (Miss. 1984)**. Mississippi Rule of Evidence 601 provides that every person is competent as a witness and adopts an exclusive list of grounds for disqualifying a witness. To prevent a witness from testifying, the trial judge must shift his attention from the proposed witness to the proffered testimony, and from competency to relevancy, all as defined by Mississippi Rules of Evidence 401 and 403***. Ivy v. State*, 522 So. 2d 740, 742 (Miss. 1988).** The trial judge questioned L.P. in chambers and was satisfied that she would be a competent witness. Additionally, L.P. testified

based on personal knowledge and declared by oath that she would testify truthfully. This meets the requirements of both Rule 602 and Rule 603, as well as our pre-rule standards. We hold that L.P. was competent under Rule 601, and thus the trial judge did not err.

4a. Sufficiency of the Evidence

Gardner requested a directed verdict at the close of the State's evidence and again when the trial evidence was concluded. These two motions for a directed verdict by Gardner challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the trial court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. ***Wetz v. State,* 503 So. 2d 803, 807-08 (Miss.1987).** In appeals from an overruled motion for a directed verdict the sufficiency of the evidence as a matter of law is viewed and tested in the light most favorable to the State. ***Esparaza v. State,* 595 So. 2d 418, 426 (Miss.1992).** The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. ***Wetz,* 503 So. 2d at 808.** 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. ***McLain v. State,* 625 So. 2d 774, 778-79 (Miss. 1993).**

The crime of statutory rape occurs when an individual over eighteen years of age rapes, by carnally and unlawfully knowing, a child under the age of fourteen. **Miss. Code Ann. §97-3-65(1) (Rev. 1993).** All of the elements of the crime were proven by the State.

Gardner argues that the State's case rested upon the unsupported word of a child victim. The supreme court has repeatedly held that the unsupported word of the victim of a sex crime is sufficient, unless substantially contradicted by other credible evidence. ***See Allman v. State*, 571 So. 2d 244, 253 (Miss. 1990); *Goss v. State,* 465 So. 2d 1079, 1082 (Miss. 1985); *Barker v. State,* 463 So. 2d 1080, 1082; *Christian v. State*, 456 So. 2d 729, 734 (Miss. 1984); *Otis v. State*, 418 So. 2d 65, 67 (Miss. 1982).**

There was credible evidence on each element of the offense. The only contrary evidence was the testimony of Gardner himself. It is not our function to determine whose testimony to believe as that is the function of the jury. ***Allman v. State*, 571 So. 2d 244, 253 (Miss. 1990).** We will not disturb the findings of a jury based on conflicting testimony where there is substantial credible evidence to support the verdict rendered.

4b. Weight of the Evidence

A motion for new trial should be granted only if the trial judge is convinced that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant a new trial would result in an unconscionable injustice. ***May v. State*, 460 So. 2d 778, 781 (Miss. 1984).** In determining whether a verdict is against the overwhelming weight of the evidence, this Court is required to view all of the evidence adduced at trial in the light consistent with the jury verdict. The proper function of the jury is to decide the outcome of the case. The reviewing court should not substitute its own view of the evidence for that of the jury's. ***Blanks v. State*, 542 So. 2d 222, 226 (Miss. 1989).**

Upon reviewing the evidence presented at trial in the light consistent with the verdict, we find that the trial judge did not abuse his discretion in denying Gardner's motion for a new trial.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF CONVICTION OF RAPE AND SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE TO RUN CONSECUTIVE TO ANY PREVIOUS SENTENCE. ALL COSTS OF THIS APPEAL ARE ASSESSED AGAINST COAHOMA COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.