IN THE COURT OF APPEALS 8/20/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00167 COA

JIMMY LEE JOHNSON

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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

LELAND H. HONES, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF ATTEMPTED SEXUAL BATTERY AND SENTENCED TO SERVE TWENTY YEARS IN THE CUSTODY OF MDOC, AND ORDERED TO PAY ALL COURT COSTS.

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

Jimmy Lee Johnson was convicted of attempted sexual battery and sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. From this conviction he appeals to this Court assigning two alleged errors. Finding no error, we affirm.

FACTS

Because Johnson raised neither the weight or sufficiency of the evidence on appeal, a detailed statement of the facts is not needed. The evidence presented at trial showed that in late November or early December of 1991, Johnson took his eleven-year-old second cousin, S.W. to the house in which he was living, threw her down on the bed, pulled down her pants and panties, and attempted to penetrate her sexually. S.W. reported the incident to the police, a few weeks later, on December 7, 1991.

Even though S.W. reported the incident on December 7, 1991, stating that the events occurred some time prior to that date, the grand jury returned an indictment alleging that "on the 9th day of December 1991," Johnson committed the act which constitutes sexual battery. The proof at trial showed that the crime occurred prior to December 7, 1991, and not on the date in the indictment.

At the close of the State's case in chief, the prosecutor moved the trial court to amend the indictment to allege that the offense had been committed "prior to the 9th of December." Johnson objected to the amendment of the indictment arguing that one of the defenses in his case was that of alibi, in that Johnson could not have committed the crime on December 9, 1991, because he was incarcerated in the Greenwood City Jail. The trial court overruled Johnson's objection and allowed the indictment to be amended, finding that the date on which the incident occurred was not an essential element of the offense. Johnson then moved for a continuance which was denied by the trial court.

I. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INDICTMENT TO BE AMENDED?

Johnson submits to this Court that the trial court erred in allowing the indictment to be amended because the amendment destroyed his alibi defense. In support of this argument, Johnson cites to this Court *Shelby v. State*, 246 So. 2d 543, 545 (Miss. 1971), where our supreme court stated that "[i]t is well settled in this state, as was noted by the learned circuit judge, that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or *materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case*."

However, in this case, the amendment of the indictment did not prejudice the Defendant's case. Section 99-7-5 of the Mississippi Code provides the following:

> An indictment for any offense shall not be insufficient for omitting to state the time at which the offense was committed in any case where the time is not of the essence of the offense, *nor for stating the time imperfectly, nor for stating the offense to have been*

> *committed on a day subsequent to the finding of the indictment, or an impossible day, or on a day that never happened, nor for the want of a proper or perfect venue.*

Miss. Code Ann. § 99-7-5 (1972) (emphasis added).

S.W. reported the crime to the police on December 7, 1991; therefore, it stands to reason that the crime could not have occurred on December 9, 1991, as the indictment states. Johnson was not mislead by this incorrect date on the indictment. Through the pre-trial statements of the witnesses, and through the police report, Johnson knew that the crime could not have occurred on December 9, 1991, but rather, prior to December 7, 1991. In fact, no where in Johnson's brief before this Court, or in arguments in front of the lower court, does Johnson state that he believed he was being tried for an offense that occurred on December 9, 1991.

In *McCullum v. State*, 487 So. 2d 1335, 1338-39 (Miss. 1986), our supreme court stated:

> Without doubt there is a minor discrepancy between the date set forth in the form of the indictment and that proof offered. It should be noted, however, that the exhibit attached to the indictment which is the heart of the offense - the affidavit signed by McCullum - is dated "3-14-83." Again, we think it clear that McCullum knew what she was charged with.
>
> Rule 2.05(5) speaks to the point. It requires that an indictment include:
>
> > the date and, if applicable, the time, on which the offense was alleged to be committed. Failure to state the correct date shall not render the indictment insufficient;

Again the rule directs our employment of common sense. There appears little doubt that McCullum was fairly and fully advised of the charge against her. At no point in her brief does McCullum indicate that she was misled, confused or subject to injustice because of this minor discrepancy in the date contained in the indictment. The assignment of error is denied.

Furthermore, in *Hudson v. State*, 311 So. 2d 648 (Miss. 1975), our supreme court was faced with a case exactly like the case before us. In that case, our supreme court stated that the trial court was correct in allowing the State to amend the indictment to show that the offense had actually occurred on an earlier date. *Id.* at 649. After finding that the trial court was correct in amending the indictment, our supreme court turned its attention to whether the defendant was prejudiced by the trial court's failure to grant a continuance. In that case, just like the case before us, the defendant argued that the indictment should not have been amended because he had an ironclad alibi for the date listed in the indictment. *Id.* Our supreme court found that the defendant was unable to show that he was prejudiced by the failure to grant a continuance.

Just like the case in *Hudson*, Johnson has been unable to show that he was prejudiced by the failure to grant a continuance. The decision to grant or deny a motion for a continuance is left to the

discretion of the trial court and will not be reversed absent an abuse of discretion amounting to prejudice against the defendant. *Lambert v. State*, 518 So. 2d 621, 623 (Miss. 1987). Johnson's main defense at trial was that S.W.'s mother talked her into making these allegations because Johnson would not co-sign a loan with the mother. While the amendment did take away one of the defenses that Johnson planned on using at trial, Johnson knew that the proof, i.e. that the crime occurred prior to December 7, 1991, would make his alibi defense inapplicable.

We find that the holdings in *Hudson* and *McCullum* to be directly on point. The trial court was correct in finding that time was not of the essence in the indictment and was also correct in allowing the amendment. It is clear from the record that Johnson knew or should have known that he was being tried for his actions that occurred prior to the date in the indictment; therefore, we find that Johnson suffered no prejudice which would justify a continuance.

II. WHETHER THE CIRCUIT COURT ERRED IN SENTENCING JOHNSON TO A TERM OF TWENTY YEARS.

We note at the outset that the record is devoid of any objection by Johnson at the sentencing hearing that his sentence of twenty years was in error. As our supreme court has stated the failure to object at the sentencing hearing will act as a procedural bar on appeal. *Smith v. State*, 569 So. 2d 1203, 1206 (Miss. 1990); *Reed v. State*, 536 So. 2d 1336, 1339 (Miss. 1988).

Even were we to find that Johnson's argument was properly before this Court, Johnson would still not prevail. Under Mississippi Code, section 97-1-7, the punishment for an attempt to commit an offense "if the offense attempted be punishable by imprisonment in the penitentiary . . . then the attempt to commit such offense shall be punished for a period or for an amount not greater than is prescribed for the actual commission of the offense so attempted." Miss. Code Ann. § 97-1-7 (1972). In this case the attempt was an attempt to commit sexual battery which is punishable by a term of thirty (30) years. *Id.* § 97-3-101. Therefore, Johnson could have been sentenced to a term not to exceed thirty years. He was only sentenced to twenty years which is well within the guidelines of the statute.

THE JUDGMENT OF THE CIRCUIT COURT OF LEFLORE COUNTY OF CONVICTION OF ATTEMPTED SEXUAL BATTERY AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. COSTS OF APPEAL ARE TAXED TO LEFLORE COUNTY.

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

FRAISER, C.J., NOT PARTICIPATING.