

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROSCOE JOHNSON

APPELLANT

v.

No. 2018-KA-00101-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

Appeal from the Circuit Court of Leflore County, Miss.
No. 2017-0020

Mollie M. McMillin, MB # 102708
OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
P.O. Box 3510
Jackson MS 39207
mmcmi@ospd.ms.gov
T: (601) 576-4290
F: (601) 576-4205

Attorney for the Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. State of Mississippi
2. Roscoe Johnson, Appellant
3. Honorable W. Dewayne Richardson, District Attorney
4. Honorable Carol White-Richard, Circuit Court Judge

This the 10th day of September 2018.

s/ Mollie M. McMillin

Mollie M. McMillin, MB # 102708

OFFICE OF STATE PUBLIC DEFENDER

INDIGENT APPEALS DIVISION

Attorney for the Appellant

TABLE OF CONTENTS

Certificate of Interested Persons.....	i
Table of Contents.....	ii
Index of Authorities	ii
Statement of Assignment.....	1
Statement of the Issues	1
Statement of the Case.....	1
STATEMENT OF FACTS	1
Summary of the Argument	3
Argument	4
Conclusion	9
Certificate of Service.....	10

INDEX OF AUTHORITIES

Cases

<i>Carr v. State</i> , 873 So.2d 991(27)	8
<i>Shinn v. State</i> , 174 So. 3d 961 (Miss. Ct App. 2015)	8
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984)	4, 5

Statutes

Mississippi Code Annotated section 41-29-139.....	1
Mississippi Code Annotated section 97-3-95(2)	6, 7

Rules

Mississippi Rule of Appellate Procedure 25	10
Mississippi Rules of Appellate Procedure 28(a)(1)	i

Other Authorities

Miss. Prac. Model Jury Instr. Criminal § 9:6	7
--	---

STATEMENT OF ASSIGNMENT

This case is properly assigned to the Mississippi Court of Appeals.

STATEMENT OF THE ISSUES

Issue I: Johnson's trial counsel provided constitutionally ineffective assistance of counsel when he failed to file a motion in limine to prevent the State from offering evidence of other abuse allegations against Johnson and failed to offer a jury instruction defining "position of trust or authority," an essential element of the offense.

STATEMENT OF THE CASE

This appeal proceeds from the circuit court of Leflore County, Mississippi, and a judgment of conviction entered against Roscoe Johnson for one count of sexual battery, in violation of Mississippi Code Annotated section 41-29-139. After a jury trial, the Honorable Carol White-Richard, circuit judge, presiding, Johnson was convicted and sentenced to fifteen years in the custody of the Mississippi Department of Corrections, with five years suspended and five years of post-release supervision. (C.P. 65, R.E. 7). Johnson filed a post-trial motion for new trial or for judgment notwithstanding the verdict, which the trial court denied. (R.E. 6).

Johnson is presently incarcerated and appeals to this Honorable Court for relief.

STATEMENT OF FACTS

Johnson was charged and convicted of sexual battery of his wife's sixteen-year - old granddaughter, "Carrie."¹ Carrie was living with Johnson and his wife, Calanthe, who had custody of Carrie and her brother following their mother's death. (Tr. 114). Calanthe worked at the local hospital, and the children were in Johnson's care after school. (Tr. 114-15). Carrie testified in August of 2015, when she was sixteen, Johnson

¹ The victim was a minor at the time of the abuse, and we are not using her real name.

began touching her inappropriately. He began by touching her buttocks on the outside of her clothes. (Tr. 143). According to Carrie, Johnson would tell Carrie not to tell her grandmother. (Tr. 144). On another occasion, Johnson touched Carrie's vagina, inside her clothes. Carrie moved Johnson's hand away and told him not to touch her. (Tr. 145). According to Carrie, Johnson inserted his finger into her vagina during that incident. (Tr. 146).

Another time, Carrie stated that Johnson dragged her into his bedroom. (Tr. 147). She resisted, holding onto door jambs, but Johnson was able to take her into his room and close the door. (Tr. 147). Johnson pushed Carrie onto the bed. He took off Carrie's pants and underwear. He then licked Carrie's vagina. (Tr. 148). According to Carrie, Johnson tried to put his penis into her vagina; but he was unable to penetrate her because she was still a virgin. (Tr. 149). Johnson also tried to put his penis into Carrie's anus. Carrie kicked Johnson and ran out of the room. (Tr. 149). According to Carrie, Johnson also took photographs of her with his phone. (Tr. 150).

Carrie did not tell her grandmother, Calanthe, about Johnson's behavior until December 6, 2015, when Johnson was no longer living in the home. (Tr. 152). Calanthe reported the abuse to the Greenwood Police Department. She also took Carrie to a gynecologist. (Tr. 116). According to Edgar Gibson, the investigator with the Greenwood Police Department, Carrie tested negative for sexually transmitted diseases. (Tr. 107). However, Calanthe testified that the doctor told them that Carrie had an infection that could have resulted from the abuse. (Tr. 120-22). There was no testimony regarding whether Johnson had any sexually transmitted infections or diseases.

Johnson testified, denying the charges and suggesting that Carrie made up the allegation to retaliate for punishments she received when Johnson and Calanthe found

out she had a boyfriend. According to Johnson, the family were Jehovah's Witnesses, and as part of their faith, Carrie knew she could not date or have boyfriends. (Tr. 167). He testified that Carrie had gotten interested in boys and had gotten into trouble. Johnson also testified that he had started drinking heavily in that time and smoked crack. (Tr. 167). Carrie had sent pictures of herself to a boy using a social network site. (Tr. 169). Carrie admitted in her testimony that Johnson was very strict, and she had been disciplined when Johnson found out she had sent nude photographs of herself to a boy. (Tr. 154). She testified that her grandmother whipped her. (Tr. 155).

Johnson was convicted of sexual battery and sentenced to fifteen years in the custody of the Mississippi Department of Corrections, with five years suspended.

SUMMARY OF THE ARGUMENT

Johnson's trial counsel provided ineffective assistance. Trial counsel failed to file a motion in limine to prevent the State's witnesses from testifying about an allegation of abuse made by Carrie's younger brother, which resulted in the State's witness testifying that she had substantiated two allegations of abuse against Johnson, despite Johnson being acquitted in a separate trial of abusing Carrie's brother. Further, trial counsel failed to request and procure an instruction defining position of trust and authority, an essential element of the crime of sexual battery in this case. The statute does not expressly state that a step-grandparent is in a position of trust and authority, thus, it required a special finding of fact by the jury which they were not instructed on.

ARGUMENT

Issue I: Johnson’s trial counsel provided constitutionally ineffective assistance of counsel when he failed to file a motion in limine to prevent the State from offering evidence of other abuse allegations against Johnson and failed to offer a jury instruction defining “position of trust or authority,” an essential element of the offense.

“[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.” *Strickland v. Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 2063 (1984). Accordingly, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* To establish a claim of ineffective assistance of counsel, the defendant must show that: (1) trial counsel’s performance was deficient, and (2) trial counsel’s deficient performance prejudiced his or her defense. *Id.*, 466 U.S. at 687, 104 S. Ct. at 2064. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Id.* 466 U.S. at 687-88, 104 S.Ct. at 2064-65. An attorney’s performance is deficient if his or her “representation fell below an objective standard of reasonableness.” *Id.* To establish deficient performance, a defendant must show that “the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.*, 466 U.S. at 690, 104 S. Ct. at 2066.

Regarding prejudice, the Strickland Court explained: “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.*, 466 U.S. at 694, 104 S. Ct. at 2068. Thus, to establish prejudice, “a

defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, 466 U.S. at 693, 104 S. Ct. at 2068 (emphasis added). Instead, a defendant need only show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694, 104 S. Ct. at 2068 (emphasis added).

i. Motion in limine

Johnson's trial counsel failed to file a motion in limine prior to trial to prevent the State from introducing evidence that Johnson had been accused of abusing Carrie as well as her younger brother. The State called Shavonne Taylor, a family protection specialist with Child Protective Services (CPS), to testify regarding the abuse allegation against Johnson. Taylor testified that CPS received a report in December 2015 regarding Johnson, but they did not open a case because Johnson was no longer living in the home with his step-grandchildren. (Tr. 124). Taylor testified that although they did not open up a case, they did investigate the allegation. (Tr. 124). Taylor stated that the abuse allegation was substantiated. When asked whether the allegation she substantiated involved Carrie, Taylor responded, "[Y]es, and [her brother]." (Tr. 124).

Johnson objected and made a motion for a mistrial, arguing that the State and injected the allegation of abuse made by Carrie's brother. Johnson had already been acquitted of abusing Carrie's brother. (Tr. 125). The trial court inquired whether Johnson had filed a motion in limine to prevent evidence of other allegations against Johnson from being presented at trial, and Johnson's counsel admitted that he did not file any motion because he could not have anticipated whether a witness would offer information about other allegations. The trial attorney stated:

Your Honor, we would submit that regardless of a motion in limine – I mean, we have no idea if a witness may testify unknowingly as to any sort of investigation. I mean, even if the State doesn't try to bring that elicit that testimony, we can't control what a witness says. And if a witness even unintentionally injects that issue into the case, Mr. Johnson would be unfairly prejudiced and the jury could be inflamed or influenced.

(Tr. 126-27).

The trial court was not persuaded. The court responded to Johnson's argument, stating:

But if you believe that they would be unduly prejudiced by the fact that there were allegations that sexual abuse was substantiated against [Carrie's brother] as well, then there should have been a motion in limine to limit any witnesses from referring to that.

So in light of the fact that there was no motion in limine, I'm not going to grant the mistrial. The Court is willing to give a limiting instruction, and from this point forward, we can instruct this witness not to make any other references.

And any other witnesses that the State intends to call, we can instruct them not to make any references to any other case other than the one that we are here about, which is [Carrie].

(Tr. 127).

The trial court's ruling indicates that had Johnson's counsel filed a motion in limine, then the trial court would have ordered the State to instruct its witnesses not to testify as to allegations made by Carrie's brother. Further, the ruling suggests that a mistrial would have been in order had there been a motion in limine and a ruling before trial. By giving the jury a limiting instruction and directing the State to instruct its witnesses not to make any references to other cases, the trial court indicated that a motion in limine would have been appropriate and would have been granted. Failure to file the motion in limine resulted in the jury hearing about a substantiated allegation against Johnson that would have been excluded but for the attorney's oversight.

ii. *Jury instruction*

Johnson was charged with sexual battery under Mississippi Code Annotated

section 97-3-95(2), which states that:

[a] person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

§ 97-3-95(2). Whether Johnson was in a position of trust or authority is an essential element of the offense. The elements instruction granted by the trial court did not initially include the element that Johnson was in a position of trust or authority. However, the trial court noticed the omission and ordered the State to modify the instruction to include the additional element. However, the jury was never instructed on who is considered to be in a position of trust or authority over a child under age eighteen. The model jury instructions provide the following instruction regarding the position of trust or authority for purposes of sexual battery:

You are instructed that a person who occupies a position of trust or authority over the child shall include but is not limited to: a child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

Miss. Prac. Model Jury Instr. Criminal § 9:6 (2d ed.).

Johnson was Carrie's step-grandparent and there is no evidence that he was also Carrie's legal guardian. Thus, his relationship to Carrie is not covered explicitly in the statute. While the statute includes the above relationships "without limitation", the jury should have been instructed on what types of relationships could be considered positions of trust or authority. The jury was not fully instructed on the law necessary to make a determination of whether Johnson was in a position of trust or authority.

"With respect to the overall performance of the attorney, counsel's choice of

whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall[s] within the ambit of trial strategy and cannot give rise to an ineffective assistance of counsel claim.” *Shinn v. State*, 174 So. 3d 961, 965 (Miss. C.t App. 2015) (quoting *Carr v. State*, 873 So.2d 991, 1003(27) (Miss.2004)). Johnson submits that his trial counsel’s decisions were not based on trial strategy, but were the result of oversight by counsel. Johnson’s attorney admitted that he did not file the motion because he did not anticipate the State’s witness testifying about the other allegation. However, that is the purpose of a motion in limine – to prevent the admission of evidence that the trial court may find inadmissible before it can be put before the jury. The trial attorney in this case failed, and it resulted in the jury hearing evidence that another child in the home made an abuse allegation against Johnson. The jury heard that the allegation was substantiated, despite the fact that Johnson had already been tried and acquitted of the abuse of Carrie’s brother.

Johnson submits that due to trial counsel’s errors, there is a reasonable probability sufficient to undermine confidence in the outcome of the trial that the result at trial would have been different had counsel not failed to offer instructions or to file the motion in limine to prevent the admission of evidence regarding other sex abuse allegations. Therefore, Johnson respectfully requests this Court reverse the conviction against him and remand his case for a new trial.

CONCLUSION

Johnson submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by this Court which has not been specifically raised but may appear to the Court on a full review of the record, the judgment of the trial court and Johnson's conviction and sentence should be reversed and vacated, respectively, and this matter remanded to the lower court for further proceedings.

Respectfully submitted,

ROSCOE JOHNSON, Appellant

/s Mollie M. McMillin

Mollie M. McMillin

Miss. Bar. 102708

Office of State Public Defender

Indigent Appeals Division

Post Office Box 3510

Jackson, MS 39207

CERTIFICATE OF SERVICE

I, Mollie M. McMillin, counsel for the appellant, hereby certify that I have this day filed by means of the electronic case filing system the foregoing Brief of the Appellant, pursuant to Mississippi Rule of Appellate Procedure 25 by which immediate notification to the following ECF participants in this cause is made:

Honorable Jason Davis

In addition, the following non-ECF participants are served by United States Mail, first class postage prepaid:

Trial Judge

Hon David H. Strong, Jr.
Circuit Judge
P.O. Box 1387
McComb MS 39649

District Attorney

Hon. Dee T. Bates, Jr.
District Attorney
284 East Bay Street
Magnolia, MS 39652

THIS the 10th day of September 2018

s/ Mollie M. McMillin
Mollie M. McMillin, Miss Bar #102708