IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-KA-01711-COA

ALVIN BARNES A/K/A ALVIN M. BARNES **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	10/04/2019
TRIAL JUDGE:	HON. ELEANOR JOHNSON PETERSON
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT:	LOUWLYNN VANZETTA WILLIAMS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BRITTNEY SHARAE EAKINS
DISTRICT ATTORNEY:	JODY EDWARD OWENS II
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 06/29/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., WESTBROOKS AND EMFINGER, JJ.

CARLTON, P.J., FOR THE COURT:

¶1. A Hinds County Circuit Court jury found Alvin Barnes guilty of gratification of lust in violation of Mississippi Code Annotated section 97-5-23(1) (Supp. 2015). The circuit court sentenced Barnes to serve ten years in the custody of the Mississippi Department of Corrections (MDOC), with six years suspended and four years to serve followed by three years of supervised probation. Barnes was also required to register as a sex offender.

¶2. Barnes appeals his conviction and sentence, asserting on direct appeal that (1) the language in the gratification-of-lust statute providing that it applies to "[a]ny person above the age of eighteen (18) years" is impermissibly vague in violation of Barnes's due process

rights under the Fourteenth Amendment of the United States Constitution; and (2) certain statements made in the prosecutor's closing arguments violated Barnes's right to a fair trial. For the reasons addressed below, we find these assertions are without merit. We therefore affirm Barnes's conviction and sentence.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶3. This case arises from an incident that occurred between Barnes and a fifteen-year-old girl (Jessica)[1] on May 20, 2017. Barnes was born in early April 1999. He was eighteen years old at the time of the incident. Following the incident, Barnes was indicted for one count of sexual battery in violation of Mississippi Code Annotated section 97-3-95(1)(a) (Rev. 2014) and one count of gratification of lust in violation of section 97-5-23(1).

¶4. A jury trial was conducted in the First Judicial District of the Hinds County Circuit Court, beginning on September 16, 2019. Priscilla Dawson, Jessica's mother, testified at trial that she asked her friend Dana Barnes take Jessica to a youth "lock-in" hosted by their local church.[2] Dana was a coordinator for the lock-in event. Because she had other errands to do, Dana asked Dawson if her son, the defendant Alvin Barnes, could pick up Jessica and take her to the lock-in. Dawson said that this would be ok.

¶5. Jessica testified at trial. She said that Barnes picked her up, but instead of taking her

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[1] A pseudonym is used for the victim due to her age and the sensitive nature of this case.

[2] At trial, the victim's mother explained that a "lock-in" is when the church youth spend the night at the church and are picked up the next morning.

to the church, he took her to his home. She said Dana was home when they got there, but then she left. Then Barnes forced Jessica to have sexual intercourse with him, and Barnes then took her to the church.

¶6. Jessica said that she did not tell anyone at the lock-in what had happened, but when her mother picked her up the next day, Jessica told her mother that Barnes had raped her. When Dawson confronted Dana and Barnes about what Jessica said, Barnes admitted to having sex with Jessica, but according to Dawson, he said that it was consensual. Dawson then reported the incident to the police and brought her daughter to the hospital for a medical evaluation. The Mississippi Children's Advocacy Center conducted a forensic interview of Jessica. In this interview, Jessica gave details of the incident.

¶7. After the State rested, Barnes called two witnesses. Both witnesses were facilitators at the lock-in and testified that Jessica appeared normal during the event. Barnes did not testify.

¶8. The jury found Barnes guilty of one count of gratification of lust and not guilty of sexual battery. The circuit court sentenced Barnes to ten years in the custody of the MDOC, with six years suspended and four years to serve followed by three years of supervised probation. Barnes was also required to register as a sex offender.

¶9. Barnes filed a "Motion for Judgment Notwithstanding the Verdict and Rule 59 Motion for New Trial." The motion was left pending without being set for a hearing for over thirty days. In accordance with Rule 25.3 of the Mississippi Rules of Criminal Procedure, it was

deemed denied by operation of law. Barnes appeals.

STANDARD OF REVIEW

¶10. Barnes challenges the constitutionality of the gratification-of-lust statute, section 97-5-23(1), in his first assignment of error on appeal. In making such a challenge, "[a] party . . . must prove his case by showing the unconstitutionality of the statute beyond a reasonable doubt." *Jones v. State*, 710 So. 2d 870, 877 (¶29) (Miss. 1998). The reviewing Court "will strike down a statute on constitutional grounds only where it appears beyond all reasonable doubt that such statute violates the constitution." *Id.* (quoting *Wells v. Panola Cnty. Bd. of Educ*., 645 So. 2d 883, 888 (Miss. 1994)).

¶11. With respect to the prosecutorial misconduct assertions Barnes makes in his second assignment of error, the applicable standard of review the "appellate courts must apply . . . is 'whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created.'" *White v. State*, 228 So. 3d 893, 904 (¶28) (Miss. Ct. App. 2017) (quoting *Wilson v. State*, 194 So. 3d 855, 864 (¶30) (Miss. 2016)).

DISCUSSION

I. Whether section 97-5-23(1) is unconstitutionally vague.

¶12. Barnes asserts that his conviction and sentence should be reversed because the language in Mississippi's gratification-of-lust statute providing that it applies to "[a]ny person above the age of eighteen (18) years" is unconstitutionally vague. He contends that

this is so because the statute does not define "above the age of eighteen."

¶13. Section 97-5-23(1) provides, in relevant part:

> Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, or with any object, any child under the age of sixteen (16) years, with or without the child's consent, . . . shall be guilty of a felony. . . .

¶14. In reviewing the language of section 97-5-23(1), we are mindful that we must first look to the plain language of the statute; if the words "are plain and unambiguous there is no room for interpretation or construction, and we apply the statute according to the meaning of those words." *Coleman v. State*, 947 So. 2d 878, 881 (¶10) (Miss. 2006). We further recognize that "[s]tatutes enjoy a strong presumption of validity and all doubts must be resolved in favor of the validity of a statute." *Parker v. State*, 917 So. 2d 120, 123 (¶10) (Miss. Ct. App. 2005) (citing *Jones*, 710 So. 2d at 877 (¶29)).

¶15. As support for his vagueness argument, Barnes cites *Wilcher v. State*, 227 So. 3d 890, 896 (¶29) (Miss. 2017), a case in which the Mississippi Supreme Court recognized that "[d]ue process requires a reasonable degree of certainty in legislation." We agree but also observe that the supreme court elaborated on this principle in *Wilcher*, recognizing that in the vagueness context, "all due process requires is that 'the law give sufficient warning that [people] may conform their conduct so as to avoid that which is forbidden.'" *Id.* (quoting *State v. Mays*, 329 So. 2d 65, 66 (Miss. 1976)). In determining whether a statute is vague under this standard, "'we view the law from the standpoint of a person of ordinary

intelligence.'" *Trainer v. State*, 930 So. 2d 373, 379 (¶11) (Miss. 2006) (quoting *J & B Ent. Inc. v. City of Jackson*, 152 F.3d 362, 367 (5th Cir. 1998)).

¶16. Barnes asserts that the language "above the age of eighteen years" is unconstitutionally vague because it "could mean literally anything from eighteen years and one day old or older or it could possibly be nineteen years." We disagree. "In the absence of a statutory definition of a phrase, it must be given its common and ordinary meaning." *Taylor Constr. Co. Inc. v. Superior Mat Co. Inc*., 298 So. 3d 956, 958 (¶9) (Miss. 2020) (quoting *Buffington v. Miss. State Tax Comm'n*, 43 So. 3d 450, 455 (¶16) (Miss. 2010)). Age is the length of time a person has lived. *See Age*, Webster's Unabridged Dictionary (2d ed. 2001). After a person reaches the age of eighteen, that person is "above the age of eighteen."

¶17. Section 97-5-23(1) unambiguously prohibits "[a]ny person above the age of eighteen" from "handl[ing], touch[ing] or rub[bing]" a child for any "sexual" purpose. A plain reading of the statute informs a "person of ordinary intelligence," *Trainer*, 930 So. 2d at 379 (¶11), that, at the age of eighteen, it becomes illegal to inappropriately touch and fondle a child under the age of sixteen for sexual purposes. We find that section 97-5-23(1) does not forbid this conduct in terms so vague "that persons of 'common intelligence must necessarily guess at its meaning and differ as to its application,"' *Wilcher*, 227 So. 3d at 896 (¶29) (quoting *State v. Roderick*, 704 So. 2d 49, 53 (¶13) (Miss. 1997)); nor do we find that section 97-5-23(1) is "so indefinite that it 'encourages arbitrary and erratic arrests and convictions[.]'" *Id.* (quoting *Roberson v. State*, 501 So. 2d 398, 400 (Miss. 1987)).

¶18. As we have delineated above, we will "strike down a statute on constitutional grounds only where it appears *beyond all reasonable doubt* that [the] statute violates the constitution." *Jones*, 710 So. 2d at 877 (¶29) (emphasis added) (citation and internal quotation marks omitted). The record reflects that Barnes was eighteen years, one month, and fourteen days old on May 20, 2017, the day the incident occurred. We find that a person of ordinary intelligence would have no reasonable doubt that a person "above the age of eighteen" is a person, like the defendant, who is eighteen years old.[3] We therefore find that section 97-5-23(1) is not unconstitutionally vague. This assignment of error issue is without merit.

II. Whether the prosecutor improperly commented on Barnes's decision not to testify during her closing argument.

¶19. Barnes asserts that during the prosecutor's closing argument, she improperly commented on Barnes's decision not to testify, thereby prejudicing his right to a fair trial and warranting a new trial. Barnes acknowledges that no objection was made at trial to the prosecutor's comments. Barnes therefore relies on "plain error" in raising this issue on appeal. *Foster v. State*, 639 So. 2d 1263, 1289 (Miss. 1994) ("The defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on

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[3] *Cf. State v. Miles*, 557 So. 2d 1375, 1376 (La. 1990) (discussing an indecent behavior statute applying to persons "over the age of seventeen" and finding that because "the ordinary person would have no reasonable doubt that a person over the age of seventeen is a person who is seventeen or older, the statute is not unconstitutionally vague"); *see also People v. Lam*, 925 N.Y.S.2d 805, 807 (N.Y. App. Term 2011) (finding that "the most natural understanding of the phrase 'over the age of eighteen' includes individuals, like defendant, who have passed their eighteenth birthday").

appeal."); *see Stokes v. State*, 141 So. 3d 421, 427-28 (¶26) (Miss. Ct. App. 2013). In this regard, we observe that although the plain-error exception exists, "'it is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Id*. at 428 (¶26) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)). Applying this standard to the prosecutorial comments Barnes places in issue, we find Barnes's assertions are without merit for the reasons addressed below.

¶20. For completeness, we review the select prosecutorial comments that Barnes places in issue in the full context of that portion of the prosecutor's closing argument. The comments that Barnes asserts are prejudicial are italicized for ease of reference, as follows:

> PROSECUTOR:
>
> Look, [Jessica] didn't let what we adults can sometimes allow, allow our shame of being abused get in the way of seeking justice. She deserves justice. Alvin Barnes needs to be held accountable for what he did to her. This baby was able to continue to go to church and be stared down by Alvin's mom. And, look, . . . if you attend anywhere, a church or a place where there's a gathering, you know how folks gossip about you (indicating).
>
> She endured that. She made it. *She got here. She told you the truth*. No reason for her to not tell you the truth. *She summoned up the courage to come here*, during her senior year of high school, *and tell you what Alvin Barnes did* to her at his mama's house on May 20th of 2017. *She told you that*. She told you, *and so did her mama*.
>
> Yeah, he was confronted at church. That ain't hard to believe. The mamas are[—]they were friends at that time. That's how you're going to do it. That is not hard to believe. [Jessica] told everybody that she had to come in contact with because of Alvin and his behavior, his actions, she told all of them the same thing. She told all of them what he did to her.
>
> *Don't be fooled by these smoke and mirrors.* King Solomon had it right.

> *When folks are*[—]*when they are found out, they're going to run and hide. He's trying to hide behind his defense attorneys and behind that smoke and mirror*. Sleep well tonight when you return those guilty verdicts. Sleep well because he *deserves it.* He *earned it.* He *did it.*

(Emphasis added to indicate alleged prejudicial statements).

¶21. We recognize that "a direct comment on a defendant's failure to testify is not allowed," *Jimpson v. State*, 532 So. 2d 985, 991 (Miss. 1988), nor may a prosecutor "refer[] to a defendant's failure to testify 'by innuendo and insinuation.'" *Id.* (quoting *Wilson v. State*, 433 So. 2d 1142, 1146 (Miss. 1983)). As the supreme court recognized in *Jimpson*, however, "[t]here is a difference . . . between a comment on the defendant's failure to testify and a comment on the failure to put on a *successful defense*." *Id.* (emphasis added); *see also Holland v. State*, 705 So. 2d 307, 344-45 (¶¶148-49) (Miss. 1997) (recognizing that "a comment on the defense" does not constitute an impermissible comment on the defendant's failure to testify).

¶22. We find this distinction is applicable here. Reviewing the prosecutor's comments in the context of the entire trial and the closing arguments from both sides, we find that the prosecutor commented only on the victim's courage in facing her abuser in court and the unconvincing defenses offered by Barnes's attorneys as "smoke and mirrors" meant to distract the jury. The prosecutor never commented on the fact that Barnes did not testify, nor did she insinuate to the jury that Barnes was guilty because of his decision not to testify. In short, we find that the record simply does not support Barnes's assertions that he was denied a fair trial as a result of the prosecutor's closing argument. Accordingly, we find this

assignment of error is without merit.

¶23. **AFFIRMED.**

BARNES, C.J., WILSON, P.J., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE, McCARTY, SMITH AND EMFINGER, JJ., CONCUR.