

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2002-KA-00183-COA**

**TIMOTHY DUPUIS**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF TRIAL COURT JUDGMENT: 1/9/2002  
TRIAL JUDGE: HON. MIKE SMITH  
COURT FROM WHICH APPEALED: LINCOLN COUNTY CIRCUIT COURT  
ATTORNEY FOR APPELLANT: JOSEPH A. FERNALD  
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL  
BY: JEAN SMITH VAUGHAN  
DISTRICT ATTORNEY: JAMES DANIEL SMITH  
NATURE OF THE CASE: CRIMINAL - FELONY  
TRIAL COURT DISPOSITION: CONVICTED OF TOUCHING, HANDLING A CHILD FOR LUSTFUL PURPOSES. SENTENCED TO FIFTEEN YEARS TO SERVE THE FIRST 168 MONTHS CONSECUTIVELY AND DAY FOR DAY BECAUSE OF THE NATURE OF THE CRIME. THE REMAINING ONE YEAR IS SUSPENDED FOR FIVE YEARS' PROBATION.  
DISPOSITION: AFFIRMED: 06/24/2003  
MOTION FOR REHEARING FILED:  
CERTIORARI FILED:  
MANDATE ISSUED:

**BEFORE KING, P.J., MYERS AND GRIFFIS, JJ.**

**GRIFFIS, J., FOR THE COURT:**

¶1. Timothy Dupuis was convicted of touching a child for lustful purposes, Miss. Code Ann. § 97-5-23

(1) (Rev. 2000). Aggrieved by the judgment of conviction, Dupuis filed a motion for a new trial; however,

no order denying the motion was included in the record on appeal. Dupuis filed a notice of appeal to this Court, which states that he appeals the verdict and seeks relief in the form of a reversal of the jury's verdict and acquittal. Finding no error, we affirm.

#### FACTS

¶2. On Easter Sunday, April 15, 2001, Bob and Susan Smith's<sup>1</sup> two daughters spent the night with his sister, Nancy Dupuis, and her husband, Timothy Dupuis. The Dupuises had two children living with them, a teenage son and a young boy. Nancy and Timothy Dupuis slept in their bedroom and the Smith girls along with the Dupuises's youngest son slept in the living room. At some point in the evening, the Dupuises's oldest son came home and he slept in his room.

¶3. The next morning around 5:30 a.m., Bob Smith received a telephone call. It was his oldest daughter, Jenny, and she asked to speak to her mother. When Susan took the phone, her daughter was crying and told her that, "Uncle Tim messed with me." Susan immediately went to the Dupuises's home and found Jenny wrapped in a blanket crying. Susan woke the other children and Nancy Dupuis, and she explained what had happened. Susan called the police and her husband and told them to meet her at the hospital.

¶4. When they arrived at the hospital, Jenny was interviewed and examined by a nurse and then a doctor. She told the nurse that "her uncle messed with her this morning." Jenny told the nurse that she woke up on the couch and her uncle was rubbing her back and legs telling her she was beautiful. She said that she pretended to be asleep and he told her to spread her legs so he could feel her. Jenny told the nurse, "he started rubbing my thing and put his fingers up in me and moved them around." The doctor

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<sup>1</sup> The names of the victim and her family have been changed in this opinion to protect their identity.

examined Jenny, and she told him what happened. He performed a pelvic examination and a urinalysis. Neither of these test revealed any abnormalities or trauma.

¶5. Jenny was also interviewed by a counselor at the Children's Advocacy Center in McComb. Again, Jenny identified Dupuis and told the counselor he had "messed with her."

¶6. Based on Jenny's testimony, Timothy Dupuis was indicted, and a hearing on the charges was held on January 4, 2002. At trial, the jury heard testimony from several witnesses for the State including the medical staff who examined Jenny, her counselor, her mother and Jenny herself. At trial, Jenny testified that Dupuis, "stuck his fingers inside my panties, inside of my private, with his finger." Dupuis testified in his own defense along with his older son. Dupuis stated that he did not touch Jenny or molest her.

¶7. The jury found Dupuis guilty of touching a child for lustful purposes, pursuant to Miss. Code Ann. § 97-5-23 (1) (Rev. 2000), and he was sentenced to a term of fifteen years in the custody of the Mississippi Department of Corrections.

¶8. Dupuis appeals to this Court asserting that (1) the verdict is against the overwhelming weight of the evidence and contrary to the instruction of law; (2) the State violated a motion in limine and the Mississippi Rules of Evidence by trying to elicit testimony of prior bad acts of Mr. Dupuis; and (3) no physical evidence or corroborating medical evidence existed to support the allegation of touching for lustful purposes. Since issues one and two challenge the weight of the evidence, they will be discussed together.

## ANALYSIS AND DISCUSSION OF LAW

### I. WHETHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND CONTRARY TO THE INSTRUCTION OF LAW AS GIVEN BY THE COURT.

¶9. Dupuis alleges the evidence presented by the prosecution could not have supported a guilty verdict. He asserts no physical evidence was presented to support the assault, and the verdict was based entirely

on the testimony of the victim and her report to the social worker. The Mississippi Supreme Court has often held that issues regarding the weight and credibility of evidence lie with the jury. *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995). We will reverse only where the evidence, as to at least one of the elements of the crime charged, is such that a reasonable and fair minded juror could not find the accused guilty. *Id.* This Court will order a new trial only when it is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it would sanction an unconscionable injustice. *Id.* In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court accepts as true all evidence which supports the verdict and will reverse only when convinced that the trial court has abused its discretion in failing to grant a new trial. *Id.*

¶10. The record indicates Dupuis filed a motion for a new trial which challenged the sufficiency of the evidence. Dupuis states in his brief the trial court denied the motion on February 4, 2002. However, the record does not show that the trial court ever ruled upon Dupuis's motion for a new trial. Additionally, it appears from the trial transcript that Dupuis made a motion for a directed verdict at the end of the prosecution's case, but failed to renew his motion at the conclusion of the presentation of evidence.

¶11. In *Harris v. State*, 413 So. 2d 1016, 1018 (Miss. 1982), the supreme court held:

It is elemental that after a motion for directed verdict is overruled at the conclusion of the State's evidence, and the appellant proceeds to introduce evidence in his own behalf, the point is waived. In order to preserve it, the appellant must renew his motion for a directed verdict at the conclusion of all the evidence.

¶12. If any error existed in the court's refusal to grant Dupuis a directed verdict at the close of the State's case in chief, Dupuis waived it when he proceeded to present evidence on his behalf. Because Dupuis did not renew this motion by way of a motion for a directed verdict at the conclusion of the evidence or by a motion for a peremptory instruction, any objection he had to the sufficiency of the evidence is waived. *Id.*

Furthermore, it does not appear in the record that the motion for a new trial was ever ruled upon by the trial court. It is the responsibility of the movant to obtain a ruling on all motions filed by them, and the failure to obtain a ruling constitutes a waiver. *Martin v. State*, 354 So. 2d 1114, 1119 (Miss. 1978). Consequently, this assignment of error is not properly before this Court.

## II. WHETHER THE STATE VIOLATED A MOTION IN LIMINE AND THE MISSISSIPPI RULES OF EVIDENCE BY TRYING TO ELICIT TESTIMONY OF PRIOR BAD ACTS.

¶13. Dupuis asserts that a motion in limine was filed to exclude any mention of a prior conviction; however, no ruling on the motion is included in the record on appeal. As stated earlier, it is the Appellant's duty to obtain a ruling on his motion and to present a record which adequately reflects the alleged error. Presumably, the judge ruled on the motion, we simply do not have the benefit of his findings. "In absence of anything in the record appearing to the contrary, this Court presumes that the trial court acted properly." *Moawad v. State*, 531 So. 2d 632, 635 (Miss. 1977).

¶14. From Dupuis's brief, he contends the State tried to introduce testimony about his prior bad acts through questioning him about why his daughter no longer lives with him. He also claims the State tried to elicit this evidence from his oldest son when they cross-examined him. With regard to Dupuis's testimony, the record shows that while his attorney objected to "the form of the question," he did not specifically state his objection on the record, nor did he base his objection on any rule violation or motion in limine. With regard to the testimony of his son, Dupuis objected to "the line of questioning." He never stated any rule violation or mentioned the motion in limine.

¶15. A timely objection stating the specific ground of objection is required under M.R.E. 103(a) if error is to be predicated upon a ruling which admits evidence. *Oates v. State*, 421 So. 2d 1025, 1030 (Miss.

1982); *Edwards v. State*, 723 So. 2d 1221, 1231 (¶38) (Miss. Ct. App. 1998). We find that Dupuis failed to properly preserve the alleged error for appellate review.

¶16. Furthermore, even if Dupuis made a proper objection, questions about where Dupuis and his son lived, who lived with them, how many family members each had were asked on direct examination. Also, questions were asked as to who was present in the home the morning of the incident. Therefore, the State was allowed to explore the reasons for the answers on cross-examination. Moreover, Dupuis's prior conviction was for indecent exposure. Questions by the State concerning Dupuis's daughter are unrelated to this conviction. We fail to see how this line of questioning would have violated the motion in limine or any rule of evidence. The trial judge's decision overruling Dupuis's objections was proper. We find no error and affirm.

**¶17. THE JUDGMENT OF THE LINCOLN COUNTY CIRCUIT COURT OF CONVICTION OF TOUCHING A CHILD FOR LUSTFUL PURPOSES AND SENTENCE OF FIFTEEN YEARS TO SERVE THE FIRST 168 MONTHS CONSECUTIVELY AND DAY-FOR-DAY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND THE REMAINING ONE YEAR SUSPENDED FOR FIVE YEARS' PROBATION AND A \$5,000 FINE IS AFFIRMED. COST OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**McMILLIN, C.J., KING, P.J., BRIDGES, THOMAS, LEE, IRVING, MYERS AND CHANDLER, JJ., CONCUR. SOUTHWICK, P.J., CONCURS IN RESULT ONLY.**