IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00394 COA

CLAYTON WASHINGTON **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:	03/31/95
TRIAL JUDGE:	HON. KEITH STARRETT
COURT FROM WHICH APPEALED:	PIKE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CHARLES E. MILLER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	DANNY SMITH
NATURE OF THE CASE:	CRIMINAL - FOUR-COUNT INDICTMENT - COUNT I: KIDNAPPING; COUNT II: RAPE; COUNT III: RAPE; AND COUNT IV: BURGLARY OF AN OCCUPIED DWELLING IN THE NIGHT WITH A DEADLY WEAPON - A KNIFE
TRIAL COURT DISPOSITION:	COUNT I: GUILTY OF KIDNAPPING AND SENTENCED TO SERVE 45 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THE LAST 10 YEARS SUSPENDED; COUNT II: GUILTY OF RAPE AND SENTENCED TO SERVE 45 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THE LAST 10 YEARS SUSPENDED; COUNT III: GUILTY OF RAPE AND SENTENCED TO SERVE 45 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THE LAST 10 YEARS SUSPENDED, COUNT IV: GUILTY OF BURGLARY OF AN INHABITED DWELLING AND SENTENCED TO SERVE 15 YEARS IN THE CUSTODY OF

	THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH ALL SENTENCES TO RUN CONCURRENTLY.
DISPOSITION:	AFFIRMED AS TO JUDGMENTS OF GUILT OF ALL COUNTS AND SENTENCES ON COUNTS II, III, AND IV; BUT REVERSED AS TO SENTENCE IMPOSED ON COUNT I AND REMANDED FOR RESENTENCING ON COUNT I -2/24/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

In a four-count indictment which they returned against the appellant, Clayton Washington, a grand jury in Pike County charged Washington with kidnapping K. W. in Count I; with raping K. W. in Count II; with raping K. W. a second time in Count III; and with the burglary of an inhabited dwelling at night while armed with a deadly weapon in violation of Section 97-17-23 of the Mississippi Code of 1972 in Count IV.[(1)] After a trial which began on March 20, 1995, and lasted four days,[(2)] the jury found Washington guilty as charged of the first three counts of the indictment. However, with regard to Count IV, in accordance with the trial judge's instructions, the jury found Washington guilty of the lesser included offense of "burglary of [an] inhabited dwelling.[(3)] The trial judge sentenced Washington to serve 45 years in the custody of the Mississippi Department of Corrections for the felony of kidnapping with the last 10 years suspended, 45 years in the custody of the Mississippi Department of Corrections for the two felonies of rape with the last 10 years of each sentence suspended, and 15 years in the custody of the Mississippi Department of Corrections for the felony of burglary of an inhabited dwelling with all four sentences to run concurrently. Washington's three issues in this appeal are that: (1) the jury's verdict was contrary to the overwhelming weight of the evidence, (2) the trial court erred by refusing to grant a directed verdict of "Not guilty" on all four counts of the indictment on which he was tried, and (3) the trial judge erred when he allowed an emergency room physician to testify as an expert on the question of whether K. W.'s demeanor in the emergency room was consistent with her having been raped. We affirm the judgment of Washington's guilt of all four crimes for which he had been indicted and the sentences which the trial judge imposed for the crimes of rape and burglary of an inhabited dwelling. However, we reverse Washington's sentence to serve 45 years for the felony of kidnapping and remand for a new sentencing hearing for the felony of kidnapping because pursuant to Section 97-3-53, the maximum sentence for that offense cannot exceed 30 years if the jury is unable to agree upon the sentence.

I. FACTS

This Court recites the facts which are consistent with the jury's verdicts of Washington's guilt of kidnapping, rape, and burglary of a dwelling house. At about 9:00 p.m. on the evening of June 17, 1994, P. W., the mother of sixteen-year-old K. W., left her home in McComb and went to a nightclub in nearby Summit, Mississippi. P. W. left her sixteen-year-old daughter at home in bed reading a book and listening to both the radio and the television. At approximately 10:00 p.m. that Friday night, Washington, wearing a black "muscle" shirt and a pair of multi-colored striped shorts with P. W.'s peach-flowered blouse wrapped around his head, entered K. W.'s bedroom. He threw K. W. face-down on her bed and forcibly bound her hands behind her back with a portion of the telephone cord which connected the telephone in K. W.'s bedroom to the outlet in her room. Then, he took a pillowcase off of one of the pillows on her bed, placed it over her head, and then knotted one side of the pillowcase near her neck so that she could not easily remove it.

Next, the intruder forcibly removed K. W.'s shorts and underpants and threw them, twisted together, onto the floor near the stereo system in her room. With her hands bound behind her back and her head covered by the pillowcase, Washington forced K. W. to go with him through the front door of the house and get into a white, four-door Ford Tempo sedan. Washington then drove to a church located about two blocks from the P. W's home. When they arrived at the back of the church, Washington forced K. W. into the backseat of the car, where he raped her the first time. After Washington had raped K. W., he returned her to her home, but he decided not to release her from the car because there was too much traffic in the street. Instead, Washington first drove to another house, where he got out of the car and conversed with a person whom K. W. could not identify.

Shortly after Washington returned to the car and drove away from this house, a tire blew out on the passenger's side of the car. He continued to drive the Ford Tempo for a short time, but eventually stopped on the side of the road and told K. W. that he would change the tire. Washington got out of the car and went around to the trunk, but instead of preparing to change the flat tire, he returned to the back seat of the car, where he again raped K. W. Once more, Washington drove for a short period, after which he stopped the car, reached back, loosened the cord which bound K. W.'s hands behind her back, let her out of the car, and told her to walk straight ahead without looking back. Otherwise, he would return to get her.

After Washington released K. W., she finished untying her arms, removed the pillowcase from her head, and ran to a near-by house located on Highway 570 East in Pike County that belonged to James Jackson, Jr., and his wife, Velma Jackson. Startled by the frightened girl's knock on the front door of their home sometime after the ten o'clock news had ended, Mrs. Jackson asked K. W. to go around the house and remain in the back yard while she summoned the police by calling 911. After she called 911, Mrs. Jackson called Ms. Ella Mae White, K. W.'s aunt, to ask her to come get K. W. James Jackson continued to watch the automobile parked on the side of Highway 570 in front of his house while he stood in the front door because K. W. had told the Jacksons when they first opened the door that she was afraid that her assailant would pursue and harm her again. From his vantage point, James Jackson saw someone moving around in the beams of the car's headlights.

After Mrs. Jackson called her, Ms. White, her daughter, and her son-in-law drove to the Jacksons' residence to get K. W. and take her to the emergency room in the Southwest Mississippi Regional

Medical Center in McComb. While on their way to the hospital, Ms. White noticed that K. W. had a pillow case and a section of telephone cord which she continuously rolled in her hands. When Ms. White reached for the pillow case and the cord, K. W. would snatch them away from Ms. White. It was not until after K. W. was safely in the emergency room that she gave the items to her aunt. Dr. John Frederick Heaton, a physician on duty in the emergency room, examined K. W. During his examination, he administered a "rape kit" to help determine whether K. W. had been sexually active. Dr. Heaton observed semen in K. W.'s vaginal area during his examination.

In the meantime, Pike County Deputy Sheriff Gene Jones responded to a call from the dispatcher for the sheriff's department and arrived at the location of the white Tempo, which he found to have been parked perpendicularly to the right-of-way of Highway 570 near the Jacksons' home. When Deputy Sheriff Jones arrived at the scene, McComb Police Officer Eric Allen was the only other person at the location. Jones noticed that both tires on the driver's side of the car were flat and that there was some damage near the bottom of the passenger's side of the car. Shortly after Deputy Jones arrived at the location of the seemingly abandoned car and had called a wrecker to remove it from the highway right-of-way, Washington arrived in another car driven by Julius Mitchell. Mitchell, who had taken Washington to his mother's home to get a chain to tow the car, left Washington talking with Deputy Sheriff Jones. Washington told Jones that a large four-wheel-drive pick-up truck with big mud tires on it had crossed over into his lane of travel on Highway 580 and thus run him off the road. Because Deputy Sheriff Jones detected an odor of alcohol on Washington's breath, he "detained" Washington for further investigation on whether he had been driving while under the influence of alcohol.

After Washington had been formally charged with the rape and kidnap of K. W., the McComb Police Department conducted a line-up composed of eight African-American subjects, which included Washington, to determine if K. W. could identify her attacker. She readily identified Washington as the man who had raped her.

II. TRIAL

We have already related Washington's indictment and the result of his trial on the four counts of that indictment. Because Washington acknowledged that he had twice engaged in sexual intercourse with K. W. on the night of June 17, 1994, to which he maintained that K. W. had fully consented, we deal only cursorily with the State's physical and forensic evidence which it adduced for the jury's review and consideration. Dr. Heaton testified that he examined K. W. in the Southwest Regional emergency room. In addition to his testimony about his employment of a rape kit, which we have described, Dr. Heaton also described the "circumferential" marks which he observed about K. W.'s wrists and opined that these marks were consistent with her testimony that Washington had indeed bound her arms with a telephone cord. Dr. Heaton also identified five pictures taken of K. W.'s wrists which portrayed the marks about which Dr. Heaton testified.

James Coward, a McComb Police Department crime scene specialist, developed three latent fingerprints on the opposite sides of the telephone found in K. W.'s bedroom, and Ms. Clydell Morgan, a forensic scientist employed by the Mississippi Crime Laboratory who specialized in latent print comparisons, opined that two of the prints were from Washington's left middle finger and left thumb based on her comparison of Washington's known finger prints which James E. Moore, then the McComb Police Department's processor, had taken on June 22, 1994. Joe Edward Andrews, a

forensic scientist also employed by the Mississippi Crime Laboratory who specialized in microanalysis, opined that the end of the cord which K. W. had given her aunt in the emergency room on Friday night, June 17, 1994, matched the end of the cord which Officer Coward had recovered from K. W.'s bedroom that same night. He further opined that the outer insulation of the cord bore serration marks which indicated that the cord had been at least partially cut with a knife before it had been yanked apart.

The State also introduced into evidence K. W.'s mother's peach blouse with which K. W. testified her assailant had covered his head, K. W.'s pants intertwined with her underpants, both of which Officer Coward also found in K. W.'s bedroom, the pillowcase with which K. W. testified Washington had covered her head, the telephone cords, and the telephone from which the cords had been removed.

K. W.'s mother testified that she had gone on one date with Washington several months prior to K. W.'s attack when she rode with Washington to Percy Quinn State Park and returned home with him at about 5:00 p.m., all within approximately one hour's time. Her mother then explained that when Washington came to her home prior to their date, she introduced him to her daughter K. W. P. W. claimed that she had no further contact with Washington after her one ride with him to and from Percy Quinn State Park. Relevant to Count IV of the indictment was P. W.'s testimony that a rip in the screen door on the back entrance to her home was much larger after she had returned to her home from the hospital after her daughter's attack than it had been previously. P. W. explained that after she left her home to go to the club in Summit that night, she realized that she had not locked the back door; however, she was certain that the back door was closed -- if not locked -- when she left her house that night. She was positive that the screen door in which the screen had been ripped was locked from within.

K. W. was the State's last witness. Our recitation of the facts in this case reflect the essence of her testimony. However, K. W. also testified that when Washington raped her, she was three months pregnant. Her baby was born December 18, 1994. K. W. identified her child's father by name and testified that he was on active duty at Camp Pendleton in the United States Marine Corps. K. W. testified that during Washington's first rape, she tried to close her legs, but that he forced them open. She asserted that she did not consent to either sexual attack by Washington, but she told the jury that during Washington's second attack, she thought that "[i]f I cooperated, maybe I could live." On cross-examination K. W. stated that she had met Washington in January 1994, when her mother introduced her to Washington in their home. During cross-examination, she repeated that when Washington first attacked her in her bed at home, she thought that he had a knife because he put something "cold and flat" against her neck.

Washington's version of his acts of sexual intercourse with K. W. differed significantly from K. W.'s testimony. He testified that after he took his wife to her work in Brookhaven, he went to his mother's home in Summit with his stepson. There he helped his brother Otis repair Otis's car. After they had repaired the car, they drove in his brother's car to the barroom, where they drank some beer and shot a few games of pool. Washington left his stepson playing with his nieces and his nephews at his mother's home. After Washington and his brother finished playing pool at the barroom, they returned to their mother's house. Washington left his mother's home to visit Regina McNulty, and then he went to a store where he bought a beer and a pack of cigarettes.

According to Washington's version of events, when he returned to his mother's home after he had bought the beer and cigarettes, K. W. called him at his mother's home and suggested that he come pick her up. When Washington drove into K. W.'s yard, he honked, and K. W. left the house and got into his car. Washington then testified that K. W. suggested that they drive to the church, which Washington did. There, according to Washington, K. W. and he twice engaged in sexual intercourse inside the car. Washington stated that when he was putting on his clothes after his sexual encounter with K. W., he felt Regina McNulty's house key in his pocket. He explained that McNulty had given him the key when he visited her earlier that evening so that he could go inside and rest while she ran some errands. According to Washington, K. W. voluntarily accompanied him to McNulty's home. McNulty returned to her home after Washington and K. W. had driven there, but according to Washington, McNulty became angry when she saw another woman in his car. Washington jumped back into his car, handed McNulty her house key through the car's open window, and drove away with K. W. in his car.

Washington returned K. W. to her mother's home, where he let her out of the car. K. W.'s mother came out of the house talking loudly, and Washington drove away. He then drove to Highway 570, where he met a truck driving from one side of the road to the other. Washington drove his car into the ditch to avoid being hit by the truck. He got out of his car and discovered that two of the tires had blown out. While he waited for help, K. W. and her mother drove by and then briefly stopped farther down the highway. About ten minutes later, Julius Mitchell approached Washington in Mitchell's car, Washington flagged him, Mitchell stopped, and Washington asked Mitchell to take him to Washington's mother's house so that he could get a chain to pull his car with the two flat tires from the ditch. Because his mother did not have a chain, Washington borrowed his brother-in-law's chain and returned with Mitchell to his car parked on the side of Highway 570. When they returned to Washington's car, a police officer was waiting. The officer would not allow Washington and Mitchell to move the car because the officer had just received a report that Washington's car was parked at the scene of a rape. Another officer then arrived on the scene, arrested Washington for DUI, and drove him to the jail in Magnolia.

Before Washington testified, he had called Regina McNulty, who testified that she had previously dated Washington, to corroborate that she had given him the key to her house earlier that night and that when he returned to give her the key, Washington had an unidentified woman in his car. On cross-examination and without objection, McNulty testified that she thought that Washington appeared as though he had had sex earlier that night. Other witnesses testified that they had seen Washington and K. W. together on previous occasions. Washington's mother, Anna Pearl Jackson Lee, testified that she had received calls from K. W. at her house for two or three months before the night in question and to corroborate Washington's testimony that K. W. had called her house that night to speak to her son. Julius Mitchell testified to corroborate Washington's testimony about Mitchell's taking Washington to his mother's house to get a chain to use to pull his car from the side of Highway 570.

We have previously explained the results of the trial and the trial judge's sentences which he imposed on Washington. Washington appeals to present three issues for this Court to resolve, which issues we recite verbatim from Washington's brief.

III. ISSUES

I. The verdict of the jury was contrary to the overwhelming weight of the evidence.

II. The court erred in refusing to direct a verdict for the appellant on the charges of rape, kidnap and burglary of an inhabited dwelling.

III. The court erred in allowing the emergency room physician to testify as an expert regarding the victim's alleged rape.

IV. REVIEW, ANALYSIS, AND RESOLUTION OF THE ISSUES.

A. Issue III:The court erred in allowing the emergency room physician to testify as an expert regarding the victim's alleged rape.

1. Washington's argument

We elect to deal with Washington's third issue first. We begin our review of this issue by noting the following statement which we quote from Washington's brief: "No objection was raised on the issue of the doctor's qualifications as an emergency room physician." Instead, Washington objects to the trial judge's allowing the emergency room physician, Dr. Heaton, "to testify that the alleged victim's demeanor was consistent with her medical history of rape." Washington rests his objection on the proposition that "for the physician to give this opinion he had to be qualified as an expert on the behavior of rape victims." Instead, Washington argues that "Dr. Heaton is not qualified as an expert in any field which would allow him to render an opinion as to whether an alleged rape victim is in fact a victim of rape."

2. Standard of review

In ***Seal v. Miller,* 605 So. 2d 240, 243 (Miss. 1992),** the Mississippi Supreme Court explained: "The admission of expert testimony is addressed to the sound discretion of the trial judge. Unless we conclude that the decision was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand."

3. Resolution of Issue 3.

Washington asserts that Dr. Heaton's testimony is not covered by Mississippi Rule of Evidence 702, but we believe that Rule 702 is relevant to this issue.[(4)] Dr. Heaton testified that he had worked in the emergency room of the Southwest Mississippi Medical Center from 1986 through 1994 as an emergency physician. Dr. Heaton estimated that during his eight years of service as an emergency room physician, he had treated between twenty-five and thirty rape victims, from whom he had collected forensic evidence of their accusation of rape and had treated all of their associated injuries. At the time of trial, Dr. Heaton had chosen a specialty in the field of anesthesiology and was working on the staff of the Louisiana State University Medical School.

The record reflects that Dr. Heaton did not express an opinion of K. W.'s condition that was beyond his realm of expertise. The portion of his testimony to which Washington objects is the following:

> Q. Dr. Heaton, regarding [K. W.], would you describe her demeanor, if you recall?
>
> A. Seemed somewhat stunned, very quiet, very much compatible with somebody that had just been --

Washington's counsel objected at this point. After the trial judge heard Washington's argument in support of his objection outside the presence of the jury, the trial judge ruled as follows:

> I'm going to sustain the objection as the questioning goes any further than asking the witness was this lady's demeanor consistent, based on his experience and expertise as an emergency physician. Was her demeanor consistent with having been, consistent with a sexual assault complainant, I think would be a better way to ask the question.

The prosecutor replied, "Very well, Your Honor, I'll restrict my questions.

After the jury returned to the courtroom, the following direct examination of Dr. Heaton occurred:

> Q. Very well. Dr. Heaton, did [K. W.] give you a medical history, and if she did, would you relate that to the jury, please, the history that she gave you?
>
> A. The medical history she gave was one of being abducted, raped, and she had been, had her hands bound behind her. Her medical history in terms of past medical history, was otherwise negative. Other than some complaints relative to her being bound, she had no complaints of any associated injuries.
>
> Q. Now, having received this medical history from [K. W.], would you tell us, Dr. Heaton, what if anything you observed during your physical examination of [K. W.]?
>
> A. [K. W.] had ligature marks or circumferential red whelps on both wrists. The remainder of her nonreproductive system exam was negative.
>
> Q. Would you describe again her demeanor?
>
> . . . .
>
> A. Very quiet and very stunned, would be the best word, I guess.
>
> Q. Doctor, in your experience in emergency room medicine, I would ask if you would tell the jury if her demeanor, that is, the way that she acted in the emergency room, was consistent with the medical history that she gave you?
>
> A. In my experience, yes.

It is readily apparent to this Court that Dr. Heaton based his opinion that K. W.'s demeanor was consistent with her history of having been raped on the experience he had had treating the twenty-five to thirty rape victims as an emergency room physician. Dr. Heaton's testimony was based on his experience as an emergency room physician, and Washington did not object to Dr. Heaton's qualifications as an emergency room physician.

The Mississippi Supreme Court has opined:

> An expert witness must possess that skill, knowledge or experience in the field in which he purports to render expert testimony to make it appear that his opinion or inference will probably aid the trier in his search for truth. However, [i]t is not necessary that one offering to testify as an expert be infallible or possess the highest degree of skill; it is sufficient if that person possess peculiar knowledge or information regarding the relevant subject matter which is not likely to be possessed by laymen.

***Seal,* 605 So. 2d at 247**. Contrary to Washington's contentions, we affirm the trial judge's allowing Dr. Heaton to offer his opinion that K. W.'s demeanor was consistent with her history of having been "abducted and raped." Thus, we resolve Issue 3 against Washington.

B. Issue 2. The court erred in refusing to direct a verdict for the appellant on the charges of rape, kidnap and burglary of an inhabited dwelling.

1. Standard of Review

Washington moved for a directed verdict of not guilty on all four counts of the indictment when the State rested, and he again moved for a directed verdict after the State rested on rebuttal. After the trial judge entered an order incorporating a jury verdict, the final judgment in this case, Washington filed a motion for a new trial and "alternatively judgment," to which he asserted that he was entitled because the "guilty verdict is not supported by the evidence." In ***McClain v. State,* 625 So. 2d 774, 779 (Miss. 1993),** the Mississippi Supreme Court enunciated this succinct standard of review for an appellant's challenge of the legal sufficiency of the evidence:

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. *This occurred when the Circuit Court overruled McClain's motion for JNOV.* In appeals from an overruled motion for JNOV the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with McClain's guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. 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.

(citations omitted) (emphasis added). *McClain* requires that we review the state of the evidence in the case *sub judice* after the State had rested on rebuttal because only then did Washington move for a JNOV. However, we have further concluded that the State had shouldered its burden of proof when it rested initially.

2. Rape

Section 97-3-65(2) of the Mississippi Code of 1972 succinctly defines the crime of rape relevant to the facts in the case *sub judice* by providing that "[e]very person who shall forcibly ravish any person of the age of fourteen (14) years or upward" is guilty of rape. The elements necessary to prove rape

include: a) carnal knowledge, b) without consent and by force, and c) of a female age fourteen or upward. ***See Hailey v. State,* 537 So. 2d 411, 414 (Miss. 1988)**. To support his argument that the evidence was insufficient to support the jury's verdicts that he was guilty of the rape of K.

W., Washington cites ***McQueen v. State,* 423 So. 2d 800 (Miss. 1982)**, in which the Mississippi Supreme Court reversed the appellant's conviction of raping a fourteen year old girl. In that case, no evidence of the crime was present except a reddening of the vulva of the girl. ***Id.* at 803.** There was no weapon, no threats, and no force used in removing her from the truck, in removing her clothes, or making her lie down in the truck. ***Id.*** The Court wrote, "The evidence for the state not only fails to satisfy the mind of the guilt of the accused but suggests grave doubt of it." It is true that the supreme court reversed McQueen's conviction of rape because "the evidence . . . was legally insufficient to support a conviction . . . ." However, in ***Barker v. State,* 463 So. 2d 1080, 1082 (Miss. 1985)**, the Mississippi Supreme Court opined that "[a]lthough the uncorroborated testimony of the prosecutrix in a rape case should be examined closely, it is well-established law that such uncorroborated testimony is sufficient to sustain a rape conviction."

Washington testified that his two acts of sexual intercourse with K. W. were with her consent; K. W. testified that she did not consent to Washington's having sexual intercourse with her. We have noted Dr. Heaton's description of the "circumferential" marks which he observed when he examined K. W. in the emergency room and the photographs of those marks. The State also introduced into evidence a portion of a telephone cord which K. W.'s aunt testified K. W. gave her in the emergency room. A forensic scientist who specialized in microanalysis opined that an end of this cord matched the end of a portion of the telephone cord which an officer recovered from K. W.'s bedroom. All of this evidence, which the State competently accumulated and skillfully introduced, corroborated K. W.'s testimony that after Washington entered her bedroom, he bound her wrists with a portion of the cord to the telephone in her bedroom and forced her to accompany him to his car, in which she was twice raped at two different locations.

Our standard of review requires that the State must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Thus, we conclude that the evidence which the State adduced was sufficient to establish and to support the three elements necessary to prove rape, *i. e.*, a) carnal knowledge, b) without consent and by force, and c) of a female age fourteen or upward. ***See Hailey,* 537 So. 2d at 414.**

3. Kidnapping

Mississippi Code Section 97-3-53 defines the crime of kidnapping.[(5)]

Although it was construing what was then Section 97-3-51 of the Mississippi Code of 1972 in ***Hughes v. State,* 401 So. 2d 1100, 1105 (Miss. 1981)**, the Mississippi Supreme Court opined that "[u]nder the statute the state must prove that a person, without lawful authority, either (1) forcibly seized and confined another person, or (2) inveigled or kidnaped another person . . . ."[(6)] Our reasons for finding that there was substantial evidence to support the jury's verdicts that Washington was guilty of rape are equally persuasive that the evidence introduced by the State's case-in-chief was sufficient to support the jury's verdict that Washington was guilty of kidnapping because much of the State's evidence which corroborated K. W.'s rape by Washington also corroborated K. W.'s testimony that Washington forced her from her home and into his car before he took her behind the near-by

church where he raped her the first time. K. W.'s testimony and the State's corroborating evidence readily established that Washington "forcibly seize[d] and confine[d]" K. W. . . . against her will. We thus reject Washington's argument that the evidence was insufficient to support the jury's verdict of guilty of kidnapping.

3. Error in sentencing

However, the trial judge's sentence of Washington to serve 45 years on his conviction of kidnapping in the absence of the jury's fixing his sentence at life imprisonment exceeded the maximum sentence of 30 years which Section 97-3-53 permits.[(7)] ***Smith v. State*, 477 So. 2d 259 (Miss. 1985),** is directly on point. As in the case *sub judice*, the trial judge sentenced the appellant to serve45 years, but the appellant did not assign the matter of his sentence as error. ***Id.* at 260.** The supreme court dealt with Smith's excessive sentence as follows:

> Although appellant does not raise the issue on appeal, the court notes that the sentence imposed in Cause 7774 for the crime of kidnapping exceeds that allowed by statute. Miss. Code Ann. § 97-3-53, as it read at the time of appellant's sentencing and as presently enacted, provides that the maximum sentence that may be imposed by the court for the crime of kidnapping is thirty years, even though a jury might impose a sentence of life imprisonment.
>
> The denial of the writ of habeas corpus is affirmed; however, we remand this cause to the Circuit Court of Forrest County for resentencing in accordance with the statute.

Id. Although this Court affirms Washington's conviction of kidnapping, we must remand this case to the trial court for Washington's resentencing in accordance with the statute as the Mississippi Supreme Court did in *Smith.*

4. Burglary of a dwelling house

In the introduction to this opinion, we recited that the trial judge granted a "lesser offense" instruction with regard to Count IV of the indictment and that, in fact, the jury found Washington guilty only of "burglary of inhabited dwelling house." The record contains the following colloquy between Washington's counsel and the trial judge about the jury's verdict of guilty of "burglary of inhabited dwelling house":

> Washington's counsel: Your honor, so that my client will understand, that was burglary of a dwelling?
>
> By the Court: Not of an inhabited dwelling at night while armed with a deadly weapon.
>
> Washington's counsel: Yes, Sir.

Section 97-17-21 of the Mississippi Code of 1972 defines the crime of burglary of an inhabited dwelling, the "lesser included offense" of which the jury convicted Washington, and it provides that a person convicted of that crime be "imprisoned in the penitentiary not less than seven years nor more than fifteen years." **Miss. Code Ann. § 97-17-21 (Rev. 1994)** (repealed April 11, 1996). The Mississippi Supreme Court has established that the crime of burglary has two essential elements, the unlawful breaking and entering and the intent to commit some crime once entry has been gained.

***Deloach v. State,* 658 So. 2d 875, 876 (Miss. 1995)**. Washington emphasizes that fingerprints which were not his were lifted from the doorknob on the inside of the wooden door at the back of the house through which the State argued he had entered the house. He also stresses that the policeman who secured the house before it was examined for evidence found the back screen door latched from the inside.

In contrast to this aspect of the evidence, we earlier recited P. W.'s testimony that the rip in the screen on the back door was larger when she returned from the hospital the night that K. W. was raped. P. W. also testified that once she had left for the club, she remembered that she had not locked the inside door at the back of her home, but she was certain that she had left it closed. K. W. testified that Washington told her that he had entered her home through its back door. As the Mississippi Supreme Court noted in ***Alford v. State*, 656 So. 2d 1186, 1190 (Miss. 1995),** "[a]ny effort, however slight, such as the turning of a door knob to enter, constitutes a breaking . . . ." In ***Newburn v. State*, 205 So.2d 260, 263 (Miss.1967)**, the Mississippi Supreme Court explained that "[w]e have repeatedly held that evidence of the slightest force necessary to open an entrance into a dwelling house is sufficient to satisfy the essential element of breaking under the charge of burglary of an inhabitant's dwelling." In ***Smith v. State*, 499 So.2d 750, 752 (Miss.1986),** the Mississippi Supreme Court stated that "breaking" is "any act or force, however, slight, 'employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.'"

The jury rejected the original charge of burglary of an inhabited dwelling house at night while armed with a deadly weapon and, instead, convicted Washington of burglary of an inhabited dwelling house as defined by Section 97-17-21. We find the evidence which we have reviewed in this opinion sufficient to support the two elements of this crime, which are (1) breaking and entering by opening both the screen and wooden back doors and (2)with the intent to rape K. W.

5. Summary of Issue 2

The application of the established standard of review to the state of the evidence when the State rested on rebuttal more than satisfies this Court that there was more than sufficient evidence adduced by the State to establish the elements of all four crimes of which the jury convicted Washington, and this Court resolves Washington's second issue against him.

C. Issue I.The verdict of the jury was contrary to the overwhelming weight of the evidence.

1. Standard of review

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." ***Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997).** "Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." ***Id.*** "Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict." ***Id.***

Although we have reviewed in some detail the evidence adduced by both the State and Washington, the essence of the four issues of Washington's guilt or innocence was whether the jury found K. W.

or Washington the more credible witness. If the jury believed Washington's testimony, which he sought to corroborate primarily by the testimony of his mother, brother, and former girlfriend, then, of course, they would have believed that K. W. had consented to go with Washington and to have sexual intercourse with him. Ergo, he was guilty of nothing. If the jury believed K. W.'s testimony which we have recited, and the evidence which the State adduced to corroborate her testimony, then Washington was guilty of having kidnaped and raped her after he had gained access to K. W.'s bedroom by forcing open the closed wooden door in the back of her mother's house. The photographs of the circumferential marks on K. W.'s wrists, which corroborated her testimony that Washington bound her wrists with a portion of the telephone cord cut or snatched from the telephone in her bedroom, the testimony of the Jacksons, who described a hysterical K. W. at their front door after the news had ended that night, Washington's fingerprints discovered on the telephone in K. W.'s room, pictures of K. W.'s pants and underpants intertwined and lying on the floor in her bedroom, all tended to corroborate K. W's testimony that Washington broke into her mother's house, kidnaped, and raped her twice.

This Court is thus compelled to the conclusion that the State's evidence, when viewed in the light most favorable to the State, supports the jury's four verdicts of Washington's guilt. Therefore, to rely on our standard of review, we find that to allow the jury's four verdicts of Washington's guilt to stand does not "sanction an unconscionable injustice."

In short, this case presented a classic jury issue. About the jury's function to resolve conflicts in the testimony and evidence which are presented to juries, the Mississippi Supreme Court explained in ***Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983):**

> Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support their verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution.

(citation omitted) (quoting *Gandy v. State*, 373 So. 2d 1042, 1045 (Miss. 1979)). The jury resolved the issues of Washington's guilt or innocence from all of the foregoing evidence and testimony, which clearly presented a "factual dispute" for their resolution. The trial judge did not err when he denied Washington's motion for a new trial, and we resolve Washington's first issue against him.

V. SUMMARY

We reviewed Washington's three issues in opposite order to the manner in which he listed them in his brief. The trial judge did not err when he allowed Dr. Heaton, whom Washington's attorney acknowledges was an expert in emergency medicine, to testify that K. W.'s subdued demeanor was consistent with her medical history of having been abducted and raped. Dr. Heaton explained that his opinion was based on his observation and treatment of twenty-five to thirty victims of rape to whom he had administered rape kits during his eight years of emergency room practice. This Court finds that the evidence which we have reviewed and analyzed was more than sufficient to support the jury's

four verdicts of Washington's guilt of kidnapping K. W., raping her twice, and burglarizing her mother's home by breaking into it through its back screen and wooden doors with the intent to commit the crime of rape inside the home.

As for Washington's argument that the jury's verdict was against the overwhelming weight of the evidence, we find that Washington's contention that K. W. consented to having engaged twice in sexual intercourse with him and that K. W.'s testimony that she did not consent to either act but was compelled to accompany Washington to his car in which he twice raped her presented classic questions for the jury to resolve. To this Court it is not an "unconscionable injustice" to affirm the trial court's judgment of Washington's guilt of the four crimes for which he stood trial.

Nevertheless, pursuant to *Smith v. State*, we must reverse the trial court's sentence of Washington to serve 45 years for the crime of kidnapping K. W. because the maximum sentence which Section 97-3-53 allows for this crime, if the jury fails to agree on fixing the penalty at imprisonment for life, is 30 years. Therefore, this Court affirms the trial court's judgment of Washington's guilt of kidnapping, two counts of rape, and burglary of an inhabited dwelling house, and it affirms the sentences of 45 years with the last 10 years suspended for each conviction of rape and the sentence of 15 years for burglary of an inhabited dwelling house with all three of these sentences to run concurrently. This Court further reverses the court's sentencing Washington to serve 45 years with the last 10 years suspended and remands this case for the sole purpose of resentencing Washington on the conviction of kidnapping consistent with the sentencing provisions of Section 97-3-53 of the Mississippi Code of 1972.

THE PIKE COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANT'S GUILT OF COUNT I, KIDNAPPING; COUNTS II AND III, RAPE; AND COUNT IV, BURGLARY OF AN INHABITED DWELLING; AND ITS SENTENCES TO SERVE 45 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ON COUNTS II AND III FOR RAPE WITH THE LAST 10 YEARS OF EACH COUNT SUSPENDED, AND TO SERVE 15 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ON COUNT IV FOR BURGLARY OF AN INHABITED DWELLING, WITH ALL SENTENCES TO RUN CONCURRENTLY, ARE AFFIRMED. THE APPELLANT'S SENTENCE TO SERVE FORTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH THE LAST 10 YEARS SUSPENDED, ON COUNT I FOR KIDNAPPING IS REVERSED AND REMANDED FOR RESENTENCING CONSISTENT WITH SECTION 97-3-53 OF THE MISSISSIPPI CODE. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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

1. When this case was tried, Section 97-17-23 read as follows:

> Every person who shall be convicted of breaking and entering, in the night, the dwelling house of another, armed with a deadly weapon, in which there shall be at the time some human being, with intent to commit some crime therein, shall be punished by imprisonment in the penitentiary not more than twenty-five years.

Miss. Code Ann. 71-3-5 (1972).

2. The record reflects that during his discharge of the jury after they had returned their verdicts into open court, the trial judge commented, "You have been a part of history this week, whether you know it or not. This is the longest criminal trial, as far as anybody can remember, in Pike County."

3. When this case was tried, Section 97-17-21 defined this crime as follows:

Every person who shall be convicted of breaking and entering, in the day or night, the dwelling house of another, in which there shall be, at the time, some human being, with intent to commit some crime therein . . . shall be guilty of burglary, and imprisoned in the penitentiary not less than seven years nor more than fifteen years.

Miss. Code Ann. 97-17-21 (1972). Effective April 11, 1996, Section 97-17-21 was repealed and Section 97-17-23 was amended to read as follows:

Every person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein, shall be punished by imprisonment in the Penitentiary not less than three (3) years nor more than twenty-five (25) years.

Miss. Code Ann. 97-17-23 (Supp. 1997). Therefore, from and after April 11, 1996, the maximum sentence which can be imposed for the burglary of a dwelling house is twenty-five years, regardless of whether: (1) the burglary occurs during the day or night, (2) the burglar is armed with a deadly weapon, or (3) whether the dwelling house was occupied by a human being.

4. **Rule 702 of the Mississippi Rules of Evidence** provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

M.R.E. 702.

5. Section 97-3-53 reads in pertinent part:

Any person who shall without lawful authority forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be secretly confined or imprisoned against his or her will . . . shall, upon conviction, be imprisoned for life in the state penitentiary if the punishment is so fixed by the jury in its verdict. If the jury fails to agree on fixing the penalty at imprisonment for life the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the state penitentiary.

Miss. Code Ann. § 97-3-53 (Rev. 1994).

6. Section 97-3-51 as the supreme court construed it in *Hughes* was repealed in 1980, and the current version of Section 97-3-51 was added in 1984. ***See*** **SOURCES, Miss. Code Ann. § 97-3-51 (Rev. 1994).** Nevertheless, the supreme court again quoted from *Hughes* its interpretation of the repealed version of Section 97-3-51 to construe Section 97-3-53 as it has read since it was last amended effective April 23, 1974. ***See*** **SOURCES, Miss. Code Ann. § 97-3-53 (Rev. 1994).** The present Section 97-3-51 makes it "unlawful for any non custodial parent or relative with intent to violate a court order awarding custody of a child to another to remove the child form this state." **Miss. Code Ann. § 97-3-51 (Rev. 1994).**

7. Section 97-3-53 provides: "If the jury fails to agree on fixing the penalty at imprisonment for life the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the state penitentiary." **Miss. Code Ann. § 97-3-53 (Rev. 1994).**