IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2005-KA-02036-COA

KEITH NORCELL YOUNG — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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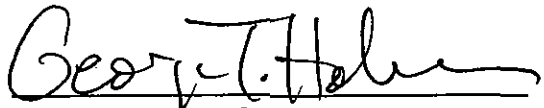
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Keith Norcell Young

THIS 28th day of March 2007.



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STATEMENT OF THE CASE

This appeal proceeds a judgment of conviction for the crimes of capital murder, first degree arson and third degree arson against Keith Norcell Young and resulting three consecutive life sentences without parole as an habitual offender out of the Circuit Court of Washington County, Mississippi following a trial held August 8-12, 2005, Honorable Richard A. Smith, Circuit Judge, presiding. Keith Young is presently incarcerated with the Mississippi Department of Corrections.

FACTS

The Greenville MS fire department received a call for a house-fire at 1304 Fairview Street about 9:00 a..m. on Wednesday October 29, 2003. [T. 525]. Firefighters responded, and after the fire was extinguished, the lifeless body of eighty-six- year-old Rosie Lee Davis was found inside the home, badly burned. [T. 528, 587]. An autopsy revealed Ms. Davis died by strangulation prior to the fire. [T. 824-25]. A nylon stocking ligature was knotted around her neck, and items were apparently missing from her house.

[T. 588]

Officer Chris Orr of the Greenville Police Department, the person who initially reported seeing smoke, arrived on the scene prior to the firefighters. [T. 502-07]. Orr noticed that there was no car in Ms. Davis' driveway, and when Orr knocked on the front door to warn any potential occupants, the door swung open, smoke boiled out so he could not go inside. Id. Orr stated he did not notice any damage to the front door or doorway. [T. 517]. The back door of the residence was bolted. [T. 526]. Ms. Davis' cousin Georgia Hymes testified that Ms. Davis always kept all of her doors locked and was extremely cautious as to whom she let in her house. [T. 743-44, 788]. Relatives and friends of Ms. Davis testified that her television and other items were missing from the house.[T. 738, 742].

The fire investigators concluded there was no forced entry into Ms. Davis' house. [T. 535, 734]. Contrarily, Greenville Police Department Crime Scene personnel noticed what they classified as a " pry mark" on the front door jam, and a blurry photograph of the mark was introduced as evidence of a breaking and entering aspect of a burglary which as the underlying offense to the capital murder charge here. [T. 586-87, 593; Ex. S2(j); R. 9-10]

Later on the day of the house fire, a report came into the Greenville Fire Department that an automobile was on fire near an abandoned mill. [T.509, 528-29, 609-10, 646-47, 661-62; Ex., S11a-c]. The automobile fire was extinguished and

investigators learned that the automobile was registered to the same Rosie Lee Davis. [T. 609-10]. Fire department officials concluded that both the house fire and automobile fire were intentionally set. [T. 731, 733]

The appellant, Keith Norcell Young, who had done yard work for Ms. Davis, was developed as a suspect and was arrested later the same day as the fires around 6:30 p. m.[T. 512-14, 610-11]. Young made no statements.

Keith Young's sisters Bridget and Lakesha Doss testified for the state. [T. 538-49, 556-65]. Bridget said that she received a telephone call from Keith on the morning of the fire at Ms. Davis'. Bridgett said Keith told her, in the call on the morning of the fire, that he killed Ms. Davis three to four days prior on "Saturday or Sunday" and that he was presently at the house and had set the house on fire, and needed Bridget to pick him up. [T.541]. Bridget did not pick up her brother, but did ride by Ms. Davis' house and saw the house on fire. [T. 543].

Bridget told the jury that Ms. Davis' name and number came up on her caller ID device and that she confirmed the number as Ms. Davis' by consulting a telephone directory. [T 544]. Telephone records were introduced at trial. [T. 579; Ex. S-1].

Later the same day as the fire, Keith came to Bridgett's house with an automobile fitting the description of Ms. Davis' green four door Mazda; Young said he was going to burn the Mazda. [T. 543, 560]. The other sister Lakesha was there at Bridgett's and corroborated Bridget's testimony. Id. Lakesha said Keith did not say anything about

stealing any items from Ms. Davis. [T. 560, 565].

State witness Roger McBride testified that he was with Keith Young smoking "crack" cocaine in the early morning of October 29, 2003 prior to the fires. [T.665-73] McBride shared with the jury that Young was seen with the following items: a floor model television, a green four door "Honda" and a bed, all which Young was trying to sell earlier the same morning as, but before, the fire. Id.

State witness David Borgogni, a trained fire-fighter and investigator, was offered as an expert witness by the state; but, the trial court found that Mr. Borgogni did not qualify as an expert witness, in part, because he was not certified in "fire investigations" and had never testified in court before as an expert. [T.720]. The court did allow Mr. Borgogni to give "lay" opinion evidence and explained to the jury that Mr. Borgogni was not an expert. [715-26]. Borgogni gave opinions over objection that both the car fire and house fire were arson. [T. 728-31]

The jury convicted Young of capital murder, plus first and third degree arson. The state sought the death penalty; but, the jury returned a verdict of a life sentence after the sentencing phase of the trial. [Ex. C-8; R. 228]

SUMMARY OF THE ARGUMENT

Not all of the necessary elements of capital murder were proven and the jury heard improper opinion evidence.

ARGUMENT

ISSUE NO. 1: WHETHER THE STATE SUFFICIENTLY PROVED ALL OF THE NECESSARY ELEMENTS OF CAPITAL MURDER?

This case lacks sufficient evidence that a burglary occurred and if a burglary did occur, there was no proof of the requisite temporal nexus between the victim's death and the occurrence of a burglary, if any. Under Count I of the indictment in this case issued pursuant to MCA §97-3-19(2)(e)(1972), the state was required to prove that Ms. Davis was killed while Keith Young "was engaged in the commission of the crime of burglary".

The first prong of the appellant's argument under this issue is that the proof of a burglary was insufficient, and thus the trial court should have granted a directed verdict. The second prong is that even if a burglary was proven, the state failed to present sufficient evidence as to the time of the alleged killing and whether there was an unbroken chain of events between the alleged killing and the burglary to provide a factual basis for a temporal nexus between Ms. Davis death and any burglary.

There was conflicting evidence as to whether a burglary occurred. The state argued that State's Exhibit S2(j)j, which is the blurry photograph of the so called "pry mark" on Ms. Davis' front door, was proof of a burglary. However, the assistant fire chief said he did not notice any signs of forced entry, "[the door] hadn't been damaged in any way if that's what you're asking me." [T. 535]. Even though there was evidence that Young admitted killing Ms. Davis and setting the fires, there is no admission of burglary by Young.

The only evidence in support of a breaking and entering was the so called "mark"on Ms. Davis' front door jam; but, there was no evidence that the mark did not predate Ms. Davis' death. [T. 586-87; Ex. S2(j)]. Georgia Hynes, Ms. Davis' cousin, testified that Ms. Davis always kept her doors securely locked. [T. 535, 734 743-44, 788] Arguably, from the photograph, the mark on the door was not violent enough to have opened a dead bolt lock on the door. [Ex. S2(j)].

Recently in Magee v. State, 2003-KA-02768-COA (decided 3-6-07 not reported yet) the defendant was convicted of burglary and rape. Magee's position was that he entered the house of the victim with a key and that the sex was consensual. However, there were fresh tool marks on the door jam and other indicia of breaking and entering such as the locking mechanism was still in the locked position when police were investigating. Morever, in Magee, the second element of burglary, that is an intent to commit a crime while inside, was shown by the defendant saying, "I didn't come after your money, I came after you ."

The present case is distinguishable from Magee. Here, the mark on the door jam was not shown to be "fresh", there was no other evidence of a breaking and entering, and there was no proof that, if Young broke and entered the house, he did so with the intent to steal or kill. He just as likely could have been there to resolve their money dispute.

It is unclear exactly when Ms. Davis died. The phone records of the decedent, [Ex. S-1] indicate there were no telephone calls answered at Ms. Davis' house after

Monday October 27, 2003 at 4:06 p. m. Young reportedly told his sister he killed Ms. Davis "Friday or Saturday" before the fire. The fire was on Wednesday October 29, 2003. [T. 541]. Ms. Davis was seen by her cousin Bettie Pruitt Friday at lunch, at which time Ms. Davis was moderately upset about having paid her yard man in advance and he had not returned to do the work [T. 749-51]. Yet, Ms. Davis was last seen and by a neighbor, James Mathews, the same Friday afternoon, prior to her death, raking her yard with Keith Young helping her. [T. 795]. Another neighbor from across the street did not notice Ms. Davis' car missing until the morning of the fire. [T. 780].

In Murphy v. State, 566 So. 1201, 1205-06 (MS 1990), the defendant was found guilty of business burglary based on his possession of stolen property. The court found that the evidence created no more than a suspicion of guilt which was insufficient for conviction, and reversed explaining that even taking the state's case in the best possible light, if the only evidence of burglary is circumstantial possession of the stolen property, so long as there other reasonable hypotheses consistent with innocence, a burglary conviction cannot stand.

For the sake of argument, assuming, in the best light to the state, that a burglary did occur, when did it occur?[1] Since there is no concrete time associated with any burglary here, it is just as likely, under the state's evidence, in its best light, that Young

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Without a reasonable hypothesis of innocence, mere possession of stolen property can be sufficient evidence to support a burglary conviction. Shields v. State, 702 So. 2d 380, 382 (MS 1997)

was allowed into Ms. Davis house (i. e. there was no breaking and entering), there was an argument about money, and Ms. Davis was killed, perhaps on Monday the 27th, and that Young returned later either on or prior to Wednesday the 29th and committed the separate and subsequent offense of house burglary, stealing the personal property. Or, Young could have committed the breaking and entering to start the fire on the Wednesday morning.

For the state to meet the burden of proving a temporal nexus between the victim's death and the commission of the underlying felony, there "must be a continuous chain of events." See Shaw v. State, 915 So. 2d 442, 449 (MS 2005), Walker v. State, 671 So. 2d 581, 594-95 (MS 1995) and West v. State, 553 So.2d 8, 13 (Miss.1989). In both West and Walker, the defendants asserted that underlying sexual assaults occurred after the victims' deaths, and in both the court said:

> Mississippi law accepts a "one continuous transaction" rationale in capital cases. In Pickle v. State, 345 So.2d 623 (Miss.1977), we construed our capital murder statute and held that "the underlying crime begins where an indictable attempt is reached...." 345 So.2d at 626; (further cites omitted). 671 So. 2nd at 594-95, 553 So. 2d 13[2]

The record here in Young's case does not provide this Court with the answer to the question: "Was there a one continuous transaction in this case?". In both West and Walker , the court found evidence existed by which the juries could conclude either that

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The same rational as "one continuous transaction" is used by other courts. See Florida v. Williams, 776 So. 2d 1066,1069-72 (FL 2001)

the victims were alive or that the defendant had *a priori* intent to commit the sexual assault after the victims death as part of a continuing transaction.

> An indictment charging a killing occurring "while engaged in the commission of" one of the enumerated felonies includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony." [cites omitted]. The fact that the actual moment of the victim's death preceded consummation of the underlying felony does not vitiate the capital charge.

Quoting from 40 Am. Jur. 2nd Homicide §73, at 366-67 (1968), the court in Pickle v. State, 345 So. 623, 626 (MS 1977) said:

> Application of the felony-murder doctrine does not require that the underlying crime shall have been technically completed at the time of the homicide, nor does it matter at what point during the commission of the underlying felony the homicide occurs. When, however, there is a break in the chain of events leading from the initial felony, as by the felon's abandonment of the original criminal activity, a subsequent homicide committed by him is not within the felony-murder statute, and it is a question of fact for the jury whether the original criminal activity did in fact terminate prior to the homicide.

This same language was used again recently by the court in Moody v. State, 841 So. 2d 1067, 1091-92 (MS 2003) Where is this Court to look to determine whether there was a break in the chain of events? According to the Moody court:

> The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent.
>
> 841 So. 2nd at 1093.

Without proof as to the time frame of the burglary, if any, Young's conduct and

admissions are the best evidence of his intent regarding burglary and theft. The record reveals the best proof of the time of the theft is from state's witness Roger McBride who said Young had a television, and bed on the morning of October 29, 2003 . [T. 665-73] Young did not reportedly have the victims' automobile until the same day as the fires. [T. 543, 560] These factors support a conclusion that any stealing, and or any killing, were separate events.

There was no admission of burglary by Young. All of the evidence about the time frame of theft points to Young returning at least two days after Ms. Davis' death. Hence, there was a clear break in the chain of events between the death of Ms. Davis and the theft of her personal property.

It is just as likely, under the state's evidence, in its best light, that Young was allowed into Ms. Davis house (i. e. there was no breaking and entering), there was an argument about money, and Ms. Davis was killed and that Young returned later and committed the separate and subsequent offense of house burglary, stealing the personal property. Or, Young could have committed the breaking and entering to start the fire on the Wednesday morning.

Without sufficient proof of a burglary or a temporal connection between any burglary and the death of the victim, the state failed to prove capital murder under Count I. Accordingly, the Court could reverse and remand for new trial; or, since the jury made no finding of deliberate design, the Court could render a verdict of manslaughter and

remand for resentencing.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED BY ALLOWING IMPROPER OPINION TESTIMONY?

David Borgogni was offered as an expert witness by the state in the area of fire investigation; but, the trial court found that he did not qualify as an expert witness, in part because Mr. Borgogni was not certified in "fire investigations" and had never testified in court before as an expert. [T. 720] The court did allow him to give "lay" opinion evidence and explained to the jury that Mr. Borgogni was not testifying as an expert. [715-26] The court did not explain to the jury the evidentiary significance of this pronouncement.

It is the appellant's position that Mr. Borgogni, crossed the boundaries established by Miss. R. Evid. Rules 701 and 702; and, what transpired during the testimony of Mr. Borgogni was exactly what Miss. R. Evid. Rules 701 and 702 were designed to prevent, namely, a witness not qualified as an expert positing "expert" opinions disguised as "lay" opinions.[3] In other words, even though Mr. Borgogni was to limit his testimony to non-

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RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness,(b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment

The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or

scientific, non-technical and opinions not otherwise based on "special knowledge", he nevertheless offered opinions based on his technical and scientific training as to the cause and origin of the fires in this case, and went as far as to opine that the fires were not only intentional, but "mischievously set". [T. 728-31] This testimony prejudiced Keith Young under Counts II and III of the indictment.

During Mr. Borgogni's testimony, the following transpired:

> A. (Mr. Borgogni)
> ...What I found was two separate unconnected fires in this location. At the fire scene, there was a front bedroom, and there was a back bedroom. In the front bedroom, there was a fire; and in the back bedroom, there was a fire. These fires were unconnected. There were two points of origin in this location.
> Q. (Prosecutor Mr. Gore) Okay. And could you tell us the damage that was done in the front bedroom?
> A. In the front bedroom, the fire – the bed was used as a fire load.
> Q. I'm sorry?
> A. The bed was used as a fire load. The ignition was from a flammable device such as a match, or a lighter was used.
> BY MR. LABARRE (defense counsel) Your Honor, I'm going to object at this point.
> BY THE COURT: sustained.

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observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702.

RULE 702. TESTIMONY BY EXPERTS

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A. Also, in the rear bedroom, that bed was used as a fire load.

BY MR. LABARRE: Your Honor, I'm going to object to his testimony about this–

BY THE COURT: sustained.

A That bed was used as a fire load.

BY MR. LABARRE: Your Honor –

BY THE COURT: Counsel, next question. Objection is sustained.

BY MR. GORE: Okay. Go ahead and tell us about the damage that you found in the back bedroom.

A. This room received fire damage.

Q. And what was located in the back bedroom besides the fire damage?

A. We had a victim that was located on the bed.

Q. Okay. All right. Now, did you smell any type of accelerants like gasoline or anything of that nature.

A. No, sir, I did not.

Q. Okay. And did there appear to have been, based on your experience –

BY MR. LABARRE: Your Honor, I'm going to object to this point based on his experience. He's testifying as a lay witness.

BY THE COURT: Lay your predicate.

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Q. Now, in you training, tell us how you can identify the difference between, say, fire that was used [sic] with an accelerant and one that was not.

BY MR. LABARRE: Your Honor, I would object to this question. Under 701(c), he cannot testify based on scientific, technical, or other specialized knowledge. That would be under the area of an expert witness. He is not an expert witness.

BY MR. GORE: Your Honor, he's testifying simply as to his experience as a lay witness. It's to help clarify his testimony.

BY MR. LABARRE: Your Honor, he's already answered the question as far whether or not there was an accelerant. I don't see any reason for him to explain that.

BY THE COURT: All right, I'm going to let him explain his answer, but – well, we'll see how it goes. Go ahead. I'll let him explain it.

A. Could you ask be the question, again, sir?

Q. Okay. Based on you training, can you tell just by looking at the scene whether an accelerant was used or not – accelerant meaning gas, something of that nature.

A. Well, sir, I didn't detect anything with my nose. I couldn't smell any

gas.

***

Q. Okay. If an accelerant is used in a fire–

BY MR. LABARRE: Your Honor, I'm going to object if he's testifying about anything but this fire.

BY THE COURT: All right. Counsel, that be sustained, and go ahead.

Q. All right. Did you see anything at the scene or smell anything that would lead you to believe that an accelerant was used to start this fire?

A. No, sir.

BY MR. LABARRE: Your Honor, I'm going to object. It's asked and answered. He's already stated – testified no accelerant.

BY THE COURT: All right. He's testifying under 701. He can testify as to what he saw. I'll let him go ahead and answer that question.

BY MR. GORE: Well, I believe he had–

Q. What was your answer to the questions?

A. No, sir.

Q. No. Okay. From what you saw at the first scene that you went to – the house, in your lay opinion what was this? Accident, arson?

BY MR. LABARRE: Your Honor, I object to the leading question.

BY THE COURT: All right. Rephrase your question so it's not leading, counsel.

Q. From what you saw at the scene, did you come to a lay opinion as to what this was?

***

A. **This fire had two points of origin. Two separate, unconnected fires. These fires were intentionally and mischievously set. I classified it as an incendiary fire, which is an arson fire.**[T. 728-31] [emphasis added]

Mr. Borgogni went on to testify that the automobile fire was arson also, to which defense counsel objected, and the trial court ruled:

"I'm going to accept it under 701. It's helpful to the jury, that will be overruled."

[T 733].

In Palmer v. Volkswagen of America, Inc., 905 So.2d 564, 588 (MS App.,2003), there was objection to a lay opinion about an air bag equipped automobile, the Court of Appeals said in reversing:

> In Sample v. State,[643 So. 2d 524, 530 (MS 1994)] our supreme court stated that, while there is a very thin line between lay testimony and expert opinion, there is a bright line rule: "[t]hat is, where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Rule 702 opinion and not a Rule 701 opinion" Id. at 529-30. [The witness'] explanation of how tank testing works, and his calculation of the Jetta's peak pressure and rise rate from the tank test curves certainly required experience or expertise beyond that of the average, randomly selected adult. His testimony regarding the tank test curves was extremely technical. It was expert testimony. The trial court abused its discretion by allowing [this] testimony to stray into the realm of scientific, technical and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Rule 702.

On *certiorari*, in Palmer v. Volkswagen of America, Inc. 904 So.2d 1077, 1092 (MS 2005), the supreme court concurred withe the court of appeals, finding the plaintiff was prejudiced by improper opinion testimony and stating:

> The testimony provided by [the witness], a highly-skilled, specially educated engineer, very definitely required scientific, technical knowledge beyond that of the randomly selected adult. Such testimony therefore constituted expert testimony. [cites omitted]
>
> * * *
>
> To be clear, the test for expert testimony is not whether it is fact or opinion. The test is whether it requires "scientific, technical, or other specialized knowledge" beyond that of the "randomly selected adult." If so, the testimony is expert in nature, and must be treated in discovery, and at trial, as such.
>
> This Court has held that it "will not reverse the admission or exclusion of evidence unless the error adversely affects a substantial right of a party." [cites omitted] "[F]or a case to be reversed on the admission or

exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." [cites omitted]

* * *

The trial court abused it discretion by allowing [Volkswagen's expert] testimony to stray into the realm of scientific, technical and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Rule 702.

Young's position here is that arson detection, at least in this case, is an area requiring expert testimony under Miss. R. Evid. Rule 702; because, fire investigation is scientific and technical so that a jury of lay persons would need assistance. Here, Mr. Borgogni used his training to reach conclusions that an untrained jury could not be expected to make within any reasonable degree of reliability.

An average lay person would not know the characteristics of such things as burn patterns, v-patterns, cone patterns, depth of charring, effects of weather, the aromas of accelerants, nor the general characteristics of arson fires. A lay jury would not be familiar with basic industry standards of arson detection.

In Cotton v. State, 675 So. 2d 308, 312 (MS 1996), the court said

[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to the clear understanding of his testimony or the determination of a fact in issue.

* * *

Lay opinion testimony must meet a two prong test; the witness must have observed the fact or had first hand knowledge, and the opinion must be helpful to the determination of the issues. Comment, M.R.E. 701.

* * *

[W]here, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected

adult, it is a M.R.E. 702 opinion and not a Rule 701 opinion." Citing Sample v. State, 643 So.2d 524, 530 (Miss.1994);

In Cotton the case turned on whether a weapon fired accidently or not and the witness at issue testified that certain safety characteristics of a semi-automatic pistol used in that case would only allow the gun to fire in certain circumstances. The Cotton court ruled that such evidence required the witness to testify from particularly specialized knowledge of the weapon which would "constituted expert opinion"; and, since the witness was never qualified as an expert, it was reversible error. Id. See also, Sample v. State, 643 So.2d 524, 530 (Miss.1994).

Here, Mr. Borgogni was not testifying merely as to what he observed; he told the jury what he *concluded* based on his observations. These *conclusions* were founded on his scientific and technical training and experience. These opinions concerned a topic in which the jury needed expert help, not a communication of lay opinions based on observation in an area where the jury needed no technical assistance.

The case of Goodson v. State, 566 So. 2d 1142, 1153 (MS 1990) is authority for the proposition here that Young was prejudiced by the admission of Borgogni's opinions. The defendant in Goodson was charged with rape of a female under the age of fourteen and the trial court allowed testimony about "child sexual abuse profiles" an area which had been determined to be not an area of expertise. Id. at 1142-46

There were two reasons the Goodson court reversed, first the physician who testified for the state did not have expertise to give an opinion with the reliability required

by Rule 702; and, secondly, the state did not establish proof that behavioral science has developed to the point where even the most knowledgeable experts in the field may give opinion that sexual abuse has occurred or not with the required level of reliability. Id. at 1147.

The Goodson court stated that "[t]here was a substantial probability that the jury would be mislead by [the doctor's] opinion", and letting [the doctor] testify about profiles denied Goodson the right to a fair trial Rule 103(a) MRE Id. at 1148.

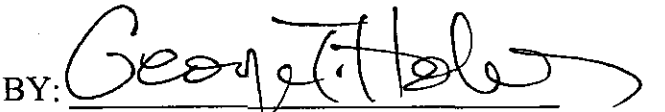
Here in Young's case, as in Goodson, even though the court instructed the jury that Mr. Borgagni was not an expert, the jury would have been influenced by his improper lay opinions. It would follow that Young, as Goodson, did not, therefore, receive a fair trial, and at a minimum the convictions under Counts II and III should be reversed.

CONCLUSION

Young is entitled to have his convictions under Counts I, II and III reversed with remand for retrial or resentencing.

Respectfully submitted,

KEITH NORCELL YOUNG

BY: 

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 28th day of March, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Richard A Smith, Circuit Judge, P. O. Box 1953, Greenwood MS 38935, and to Hon. Tucker Gore, Dist. Attorney, P. O. Box 426, Greenville MS 38702, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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