IN THE COURT APPEALS FOR THE STATE OF MISSISSIPPI

CASE NO. 2006-KA-01728-COA

LESLIE SMITH
DEFENDANT/APPELLANT

VS.

STATE OF MISSISSIPPI
APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF
PONTOTOC COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant does feel that oral argument will be helpful and beneficial in this case.

IV.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 20, 2002, a grand jury returned an indictment against appellant Leslie Smith charging him with three counts of sexual battery. (RE 2). On November 3, 2003, upon motion by Appellant Smith, an 803(25) hearing was held after which the court concluded that hearsay statements of the alleged victim would be admissible as evidence. (TR Vol. 4 p. 129).

On December 13, 2005, during pretrial motions, the State moved to amend the defective indictment against Smith. (TR Vol. 4 p. 137). The Court denied such amendment stating as his reasons that the amendment would raise the possible maximum penalty from thirty (30) years to life. (TR Vol. 4 p. 142).

After a trial by jury with Judge Thomas J. Gardner, III, presiding, the jury found Smith guilty on all three counts. (RE 4). On December 16, 2005, Smith was sentenced to thirty (30) years on each count with ten (10) years suspended. Smith filed a Notice of Appeal on September 18, 2006. (TR Vol. 8 p. 616).

B. STATEMENT OF FACTS

Some time during midsummer of 2001, Leslie Smith was first accused of sexually molesting Courtney Clayton. After Smith's indictment, attorney Robert Sneed Laher was hired to represent him. On April 16, 2004, upon motion by Laher, the Court allowed him to withdraw from the case as attorney of record and Bill Knight was appointed to take Laher's place. (TR Vol. 1 p. 000126).

On September 14, 2004, the Court granted a motion for funds to hire Dr. Marc Zimmerman to aid in the preparation of Smith's defense. (TR Vol. 1 p. 000132). On November 5, 2004, Dr. Zimmerman wrote a letter to Bill Knight pursuant to his review of the videotape of the interview by Carol Langendoen of Courtney Clayton, which took place on December 10, 2001. (TR. Vol. 2 p. 000183). This letter was favorable to Smith as Dr. Zimmerman set forth his reasons for doubting the validity of the interview and Clayton's accusations. Thereafter, Mr. Knight failed to secure Dr. Zimmerman's attendance at trial to give his expert opinion.

Smith's trial began on December 13, 2005. During jury voir dire, defense counsel, William Knight, moved to strike Peggy Hall for cause based on the fact that she knew several of the witnesses and some witnesses were her neighbors. (TR Vol. 5 p. 201). The court denied defense counsel's request stating that Peggy Hall never saw the witnesses and that "she didn't have anything to do with them." (TR Vol. 5 p. 201, 202). After moving to have Hall stricken for cause, Mr. Knight failed to use an available peremptory challenge to strike Peggy Hall and she served as a juror in the case.

During the trial, defense counsel made two motions. (TR Vol. 6 p. 404-408). First, he moved the Court to dismiss all counts in the indictment because it was fatally defective. The Court denied the motion to dismiss and stated no reasons therefore. (TR Vol. 6 p. 413).

V.

SUMMARY OF THE ARGUMENT

The trial court committed error in denying the request to dismiss the indictment against Leslie Smith. An indictment must be a plain and concise statement of the essential facts of the offense. The indictment charging Smith with sexual battery used language from two different subsections the statute and the State did not prove its case for one of the subsections. Therefore,

the indictment was fatally defective and should have been dismissed and motion for directed verdict should have been granted.

Additionally, Smith was denied effective assistance of counsel at trial. Ineffective assistance claims require the appellant to show that counsel, William Knight, was deficient and how the appellant was prejudiced by this deficiency. Smith's defense counsel was deficient in that he failed to call an expert witness whom the court had given financial assistance to engage and who had given a favorable opinion. Defense counsel also failed to interview witnesses and investigate the case, did not contact any witnesses prior to trial, and failed to use a peremptory strike on a juror that knew several of the witnesses, after he sought to have that juror stricken for cause. Defense counsel's deficiencies severely prejudiced Smith and his conviction should be reversed.

Also, the trial court committed error in allowing hearsay testimony to be admitted into evidence under the Mississippi Rules of Evidence Rule 803(25) "tender years" exception. Generally, when a child of tender years makes a statement it will be admitted provided that the content and circumstances of the statements are reliable and the child testifies at trial. The comments to Rule 803(25) provide several factors the court should consider to determine whether the statements are reliable. The child's statements in Smith's case should have been excluded because she met several of these factors indicating her statements were unreliable. Therefore, her hearsay statements should have been excluded and Smith's conviction requires reversal and a new trial.

VI.

ARGUMENT IN REPLY

A. THE TRIAL COURT COMMITTED MANIFEST ERROR IN REFUSING TO DISMISS THE INDICTMENT, WITH PREJUDICE, BASED UPON A DEFECTIVE INDICTMENT.

According to Uniform Rules of Circuit and County Court Rule 7.07, the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation." URCCC 7.07. Additionally, when considering whether an indictment is defective, the ultimate test is "whether the defendant was prejudiced in the preparation of his defense". Wilson v. State, 815 So.2d 439, 442 (Miss. App. 2002).

Here, the indictment against Leslie Smith charged him with the crime of sexual battery. The Mississippi sexual battery statute, §97-3-95, has four parts, each a separate crime with a separate punishment. Section 97-3-95 subsection (c) states that "a person is guilty of sexual battery if he or she engages in sexual penetration with ... a child at least fourteen (14) but under (16) years of age, if the person is thirty-six (36) or more months older than the child." Subsection (d) charges one with sexual battery when the child is "under the age of fourteen years of age, if the person is twenty-four (24) or more months older than the child." Miss. Code. Ann. §97-3-95(d).

According to §97-3-101(2)(a), the punishment for §97-3-95(c) for a person over twenty-one (21) years of age or older is "not more than thirty (30) years in the State Penitentiary". Section 97-3-101(3) states the punishment for §97-3-95(d) for a person over eighteen (18) years of age or older is "life in the State Penitentiary or such lesser term of imprisonment as the court may determine." The separate punishments and the essential elements for the two different subsections of the sexual battery statute are clearly, significantly different.

In the indictment against Smith, all three counts use the language "and the victim was under the age of 16 years, having a date of birth of November 11, 1992". (RE 2). The use of the language "under the age of 16 years" and the victim's date of birth track the language of both subsections (c) *and* (d). This failure to use a "plain, concise and definite statement" failed to put the defense on notice as to which charge Smith would be subjected. Given the nature of the charge – sexual battery being one of the highest in penal character, and the substantial differences in the punishments – a life sentence being one of the most severe, the Court should be particularly sensitive to the defendant's right to be *fully* notified of the accusations against him as Rule 7.07 requires.

In its brief, the State cites Poyner v. State for the Court's conclusion that the indictment gave sufficient notice to the defendant when it included the date of birth of the victim and the date of the offense. Poyner, 2007 WL 1248510 (Miss. App. 2007). However, the Court in Poyner also reached the conclusion that the indictment was not fatally flawed because "the indictment clearly stated that Poyner was being charged with statutory rape "in direct violation of §97-3-65(1)(a).""" Id. at 4. In Smith's case, had the indictment explicitly stated another statute under which he was being accused *and* the birthdates, as in Poyner, he would have been put on notice as to the charges against him. However, Smith's indictment did not include a citation to another statute of which he was accused of violating; therefore, with the confusing inclusion of the "under the age of 16 years," rendered the indictment fatally flawed and should have been dismissed by the Court below.

The defective indictment severely prejudiced Smith in the preparation of his defense. The Court specifically stated the case would be proceeding under §97-3-95(c). (TR Vol. 6 p. 414). In order for the State to defeat a motion for directed verdict, it must establish a genuine issue of material fact for each element of the offense. The State failed to meet each element of Section

97-3-95(c) because in order to do so, there would have to be proof that the victim was at least fourteen years old, but under sixteen. Obviously, as the birthdates established, the alleged victim is under fourteen years old. Therefore, because of the defective indictment, the State did not meet its burden and directed verdict should have been granted.

Essentially, the Court allowed the State to charge Smith under §97-3-95(c) and proceed under §97-3-95(d). Accordingly, the defense was prejudiced by the indictment because the Court allowed an indictment for one subsection and proof of another. Each subsection requires different elements and distinct proof as to each. The indictment was fatally defective and should have been dismissed.

B. LESLIE SMITH WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING HIS PROSECUTION FOR SEXUAL BATTERY

According to Strickland v. Washington, ineffective assistance of counsel claims must satisfy two components. First, the defendant must show the court that counsel's assistance was deficient. Second, the defendant must show how he was prejudiced by this deficiency. Strickland, 466 U.S. 668, 687 (1984). The first prong requires the Court to ask "whether counsel's assistance was reasonable considering all the circumstances". Id. at 688. The second prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Id. at 694.

Appellant's defense counsel was unreasonably deficient in several ways. The most notable deficiency was defense counsel's failure to submit the expert opinion of Dr. Marc Zimmerman and to call him to testify at trial. Because of his indigent status, Smith had previously received financial assistance from the court to engage Dr. Zimmerman. (RE 5). Having received a favorable report from Dr. Zimmerman, defense counsel should have moved the Court for additional funds to secure Dr. Zimmerman as a trial witness. His failure to do so was highly prejudicial to the defense.

Dr. Zimmerman's opinion would have been both relevant and admissible during the trial but was not presented to the trier of fact. In a letter to defense counsel, Dr. Zimmerman states that he reviewed videotape of the alleged victim and the interviewer, Carol Langendoen. (TR Vol. 2 p. 000183). He sets forth his reasons for doubting the validity of the accusations due to the nature of the interview. For example, Dr. Zimmerman states that Langendoen used suggestive questioning techniques throughout the interview which elicited questionable replies by the child. He explains that suggestive questions "indicate to the child that regardless of what she remembers she should provide [certain] answers". (TR Vol. 2 p. 000184). He also explains that research indicates that children sometimes make false accusations when there is turmoil between the children's parents. (TR Vol. 2 p. 000183). He states that because the reliability of the child's statements is under question, it is extremely important to have corroborating physical evidence. (TR Vol. 2 p. 000184). In Smith's case, there was no such corroborating physical evidence.

Had Dr. Zimmerman testified, the defense would have cast serious doubt on the credibility of Carol Langendoen and her interview of the alleged victim, and of the victim herself. Also, Dr. Zimmerman's opinion may have aided in the exclusion of the alleged victim's hearsay testimony at the 803(25) hearing. While one might argue that the failure to procure an expert at all may be considered trial strategy; when an expert has already been engaged, *and* has given a favorable opinion, failure to call him to testify should be conclusive, indisputable evidence of the ineffective assistance of counsel.

Another deficiency of the defense counsel was his failure to properly investigate the case and interview several witnesses. Under Mississippi law, "at a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case". Payton v. State, 708 So.2d 559, 561 (Miss. 1998) (citing Ferguson v. State, 507 So.2d 94, 96 (Miss. 1987) (quoting Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir.

1985)). In Payton, the court found prejudicial ineffective assistance when the attorney failed to investigate the alleged crime, the prior convictions of the alleged victim, failed to inquire into the alleged victim's background, failed to interview and subpoena witnesses, failed to take witnesses statements, and failed to take pictures of the crime scene. Payton, 708 So.2d. 559.

The witnesses which defense counsel failed to properly investigate and their testimonial affidavits were set forth in the opening brief with specificity, therefore only two will be highlighted below.

Debbie Bolden, Smith's mother, was not interviewed by police or defense counsel prior to trial. In fact, the only time defense counsel spoke with Mrs. Bolden was for a few minutes before she was called to testify. Mrs. Bolden testified that Brent Swords informed her and her husband that the alleged victim had also previously accused him of molesting her. Defense counsel never interviewed Swords. Mrs. Bolden also knew the victim and her family and interacted with them often prior to the allegations against Smith. (RE 13).

Robert Bolden, Smith's stepfather, was not interviewed at all by defense counsel prior to trial. Defense counsel did not provide anyone connected to Smith with dates that the alleged molestation took place prior to trial, thus precluding them from providing any adequate evidence of an alibi for any of the specific dates. Had counsel informed people connected with Smith of alleged dates or range of dates, they may have been able to establish an alibi. For example, Mr. Bolden testified in his affidavit that he and Smith were hunting together on one of the dates of the alleged incident, thus for at least one of the dates, Smith would have had an alibi had defense counsel interviewed Mr. Bolden. Terry McCaine was also hunting with them that day and would have corroborated this testimony had he been interviewed. (RE 13). Both Robert and Debbie Bolden provided defense counsel with the names of several witnesses, none of which the defense counsel attempted to contact or interview. (RE 13, 14).

As the State points out in its brief, testimony to be elicited at trial is considered part of counsel's strategy; however, Mississippi law states the failure to call available witnesses on critical issues is a factor to be considered in analyzing the totality of an ineffective assistance claim. Leatherwood v. State, 473 So.2d 964 (Miss. 1985). While not calling Mr. Bolden to testify may arguably have been, though not likely, a strategic decision, not interviewing him at all certainly qualifies as ineffectiveness.

Had defense counsel properly interviewed witnesses, he may have found their testimony to be extremely useful to its case. The defense could have established, through testimony, that the victim had also made similar accusations against someone else. Also, Smith would have been able to present an alibi for at least one of the dates of an alleged incident. Therefore the failure to conduct a reasonable interview of witnesses severely prejudiced Smith.

Additionally, Leslie Smith, and Mr. and Mrs. Bolden all tried numerous times to contact defense counsel prior to trial, to no avail. (RE 13, 14). Approximately twenty to twenty-five phone calls were made unreturned. In fact, the defense counsel met with its witnesses for the first time the day of the trial. Defense counsel only called three witnesses besides the defendant: Christy Swords Page (the alleged victim's mother), Debbie Bolden, and Brenda Harris. Defense counsel failed to develop or prepare them for their testimony. According to Mrs. Bolden, defense counsel never interviewed her prior to trial. He only spoke to her briefly during the trial before she was to testify. (RE 13).

Also, defense counsel failed to investigate and/or present potentially mitigating testimony. Specifically, the Bolden's testify in their affidavits that Brent Swords informed them that the alleged victim had also previously accused him of similar accusations. (RE 13, 14). This evidence was never even pursued, which demonstrates an unreasonable failure to investigate.

Had this testimony come to light, at minimum the credibility of the alleged victim may have come into question.

Failure to conduct a reasonable investigation of the case is also evidenced by the fact that defense counsel never visited the alleged crime scenes. To that end, no pictures were taken of the alleged crime scenes to possibly show to jury. Both the swimming pool and the laundry room are located in plain view of the public and, at the very least, photographs would have given a visual picture of the alleged location. (RE 13, 14).

Defense counsel's performance was also deficient for failing to strike juror Peggy Hall peremptorily. During voir dire, Peggy Hall stated that she knew several of the witnesses in the case. First, she stated that she knew Margaret, Andy, and Charlie Swords, and that Margaret is her neighbor. (TR Vol. 5 p. 174; 176; 184). These are all family members of the alleged victim. Later in voir dire, Hall admitted that she knew all of the Swords family, including Christy Swords Page, the alleged victim's mother. (TR Vol. 5 p. 185).

After voir dire, defense counsel moved to strike Peggy Hall for cause, which the Court denied based on the fact that she said she did not have anything to do with the witnesses she knew. (TR Vol. 5 p. 201). However, incredulously, defense counsel did not use an available peremptory strike on Hall although he should have because of her connection with the witnesses, namely the Swords which are her neighbors. This failure to strike Hall prejudiced Smith because the notion that Hall could sit on the jury and remain unbiased when her neighbors and community members are testifying is clearly unreasonable.

Looking at all of the circumstances, the deficiencies of Smith's defense counsel combined satisfy the first prong of Strickland. There were glaring deficiencies in defense counsel's performance, including his failure to:

- call Dr. Zimmerman's as an expert witness to give his expert opinion,
- interview several key witnesses,
- investigate the facts and circumstances of the case,
- contact Smith or any of the witnesses prior to trial,
- prepare the witnesses for their testimony, and
- strike juror Peggy Hall peremptorily.

As for the second prong of Strickland, there is certainly a reasonable probability that the outcome of the case would have been different but for defense counsel's deficiencies. The defense may have had several witnesses who would have challenged key aspects of the State's case had defense counsel conducted a reasonable investigation and interviewed all of the witnesses. Also, had Dr. Zimmerman's testimony been offered, the trier of fact may have doubted the witnesses' credibility. Undoubtedly, there is more than a reasonable probability that had counsel performed any combination of the above-named deficiencies, Smith would not have been completely deprived of his right to a fair trial.

Essentially, Leslie Smith was on trial for his life. The crime which Smith was accused is one of the most serious and sensitive in nature. The penalties for sexual battery are enormous and the stigma associated with a conviction are irreversible. The lack of effective assistance here was significant and prejudicial to Smith, and warrants reversal.

C. TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING HEARSAY TESTIMONY TO BE ADMITTED INTO EVIDENCE UNDER RULE 803(25) "TENDER YEARS" EXCEPTION.

Rule 803(25) of the Mississippi Rules of Evidence provides, in pertinent part, that "A statement made by a child of tender years, describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the Court finds, in a hearing conducted

outside the presence of the jury, that the time, content and circumstances of the statement provide substantial indicia of reliability, and (b) the child ... testifies at the proceedings."

The comments to the Rule provide that in order to determine whether there is substantial indicia of reliability, the court will look to several factors including whether there is an apparent motive on the child's part to lie, the child's general character, whether more than one person heard the statement, whether the statements were made spontaneously, and whether suggestive techniques were used in eliciting the statement. M.R.E. 803(25) cmt. Corroborating evidence may not be used as indicia of reliability. Penny v. State, 960 So.2d 533, 539 (Miss. 2006) (quoting Idaho v. Wright, 497 U.S. 805, 823 (1990)).

The Court committed error by admitting the hearsay testimony of the alleged victim. First, the alleged victim's parents were involved in a child custody dispute when the allegations were made. Debbie and Robert Bolden have testified in their affidavits that Kurt Clayton, the natural father, could have influenced her to make false allegation in order to obtain custody of the child. (RE 13, 14). Also, as Dr. Zimmerman explained in his opinion letter, children often make false accusations of molestation "when there is turmoil between the significant adults in the child's life, usually parents". (TR Vol. 2 p. 000183). This suggests that the alleged victim's accusations could be the result of the turmoil created by her parents' custody dispute, and thus falsely made.

In addition, Nikki Swords, a child the alleged victim was often around had made similar accusations that her stepfather had molested her. This may have planted the seed in the alleged victim's mind to make similar accusations against Smith, thus creating an additional motive for false accusations.

Second, the statements were not spontaneous, but were the result of suggestive techniques used to elicit the statements. Dr. Zimmerman suggested that later in the interview of

the child, the interviewer "ask[ed] direct questions which are suggestive to the child," and used these suggestive techniques throughout the interview. (TR Vol. 2 p. 000183). Dr. Zimmerman also stated that when children are repeatedly asked the same question, to which they do not recall an answer, they often feel as if they should remember something and often claim to remember something that may or may not have occurred. (TR Vol. 2. p. 000184). Given the number of times the alleged victim in this case was questioned regarding any incidents with Smith, she may have felt she should claim something that may not have happened. The number of times she was questioned would also increase her chances of faulty recollection. Had Dr. Zimmerman been called as a witness, a foundation could have been laid through his testimony alone to exclude these objectionable hearsay statements.

With all of these factors taken into account, the Court should not have admitted the alleged victim's hearsay testimony. She did possess a motive to lie and her allegations may have been the product of suggestive techniques used to elicit that particular response. Therefore, it was error for the Court to not exclude such statements and requires reversal and a new trial.

VII.

CONCLUSION

Leslie W. Smith is entitled to a reversal of his sexual battery conviction and a new trial. The indictment charging him with three counts of sexual battery was fatally defective and should have been dismissed. Also, because the indictment was defective, the State did not establish a genuine issue of material fact and Smith's motion for directed verdict should have been granted.

Additionally, Smith was denied effective assistance of counsel at his criminal trial. Smith's defense counsel's performance was deficient in several ways. Those deficiencies had a prejudicial effect on the outcome of the case.

Last, the Court committed error by admitting the hearsay testimony of the alleged victim pursuant to the 803(25) "tender years" hearsay exception. The Court should take into account several factors set forth in comments to 803(25) to determine whether the child's statements are considered reliable. A review of the factors reveal that, at Smith's trial, the child's hearsay statements should have been excluded.

DATED this 10th day of October, 2007.

RESPECTFULLY SUBMITTED,

LESLIE SMITH, Appellant/Defendant

By: _____

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VIII.

CERTIFICATE OF SERVICE

I, David G. Hill, of Hill & Minyard, P.A., do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellant's Reply Brief by United States mail with postage prepaid on the following persons at these addresses

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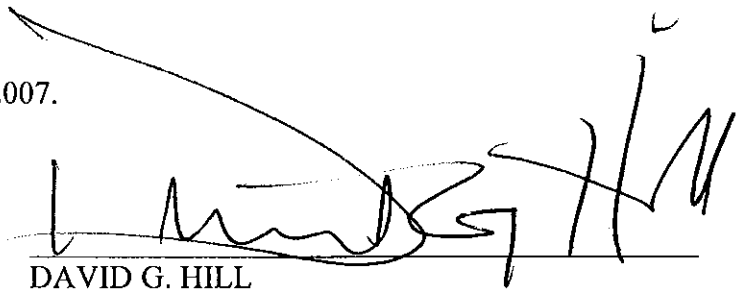
DATED this 10th day of October, 2007.



DAVID G. HILL

IX.

APPENDIX

2007 WL 1248510 (Miss. App. 2007)

962 So.2d 68
(Cite as: 962 So.2d 68)

H

Poynor v. State
Miss.App.,2007.

Court of Appeals of Mississippi.
John POYNOR, Sr., Appellant
v.
STATE of Mississippi, Appellee.
No. 2005-KA-01919-COA.

May 1, 2007.

Background: Defendant was convicted in the Circuit Court, Panola County, Andrew C. Baker, J., of statutory rape and child fondling. He appealed.

Holdings: On denial of rehearing, the Court of Appeals, en banc, Ishee, J., held that:

(1) count of indictment charging defendant under first provision of statutory-rape statute was not so fatally flawed as to warrant reversal;

(2) medical expert's testimony that victim was different than 98% of other child abuse victims because there were physical findings did not constitute improper generalization about child abuse victims;

(3) trial court acted within its discretion in refusing to allow defendant to cross examine victim's mother about whether money was her motive for allegedly accusing him of sexual abuse; and

(4) defendant was not entitled to requested jury instruction related to absence of or injury to a hymenal ring.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐1032(5)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1032 Indictment or Information
110k1032(5) k. Requisites and Sufficiency of Accusation. Most Cited Cases

Criminal Law 110 ⇐1044.1(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1044 Motion Presenting Objection
110k1044.1 In General; Necessity of Motion
110k1044.1(2) k. Preliminary Proceedings; Indictment, Information, or Complaint. Most Cited Cases

Defendant waived appellate review of his claim that indictment charging him under first provision of statutory-rape statute was fatally flawed because it cited first provision of statute but used language of second provision of statute, where defendant did not object to indictment during voir dire discussion on peremptory challenges for cause and also did not raise issue in his motion for judgment notwithstanding the verdict (JNOV). West's A.M.C. § 97-3-65(1)(a, b).

[2] Criminal Law 110 ⇐1134(3)

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) k. Questions Considered in General. Most Cited Cases

Issue of whether an indictment is so flawed as to warrant reversal is a question of law and allows an appellate court a broad standard of review.

[3] Indictment and Information 210 ⚖71.2(3)

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k71 Certainty and Particularity
210k71.2 Purpose of Requirement and Test of Compliance
210k71.2(3) k. Enabling Accused to Prepare for Trial. Most Cited Cases
Primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense.

[4] Indictment and Information 210 ⚖60

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k58 Subject-Matter of Allegations
210k60 k. Elements and Incidents of Offense in General. Most Cited Cases
All that is required of an indictment is that it provide a concise and clear statement of the elements of the crimes charged.

[5] Criminal Law 110 ⚖1167(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1167 Rulings as to Indictment or Pleas
110k1167(1) k. Indictment or Information in General. Most Cited Cases

Rape 321 ⚖20

321 Rape
321II Prosecution
321II(A) Indictment and Information
321k20 k. Requisites and Sufficiency in General. Most Cited Cases
Indictment charging defendant under first provision of statutory-rape statute was not so fatally flawed as to warrant reversal, even though indictment alleged in part that defendant was 24 or more months older than victim, which was language from second provision of statutory-rape statute; indictment clearly stated that defendant was being charged with statutory rape "in direct violation of [first provision], " which concerned children at least 14 years of age but under 16 years of age, and clearly stated that defendant had sexual intercourse with victim through a date that was after victim's 14th birthday. West's A.M.C. § 97-3-65(1)(a, b).

[6] Criminal Law 110 ⚖469.2

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k469.2 k. Discretion. Most Cited Cases
Whether to admit expert testimony is a decision left to the sound discretion of the trial court. Rules of Evid., Rule 702.

[7] Criminal Law 110 ⚖1153(1)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence; Witnesses
110k1153(1) k. In General. Most Cited Cases
A trial court's admission of expert testimony will not be a basis for reversal unless the appellate court concludes that the admission was arbitrary and clearly erroneous, i.e., that the trial court abused its discretion. Rules of Evid., Rule 702.

[8] Criminal Law 110 ⚖1043(3)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(3) k. Adding to or Changing Grounds of Objection. Most Cited Cases
Defendant was procedurally barred on appeal from statutory-rape conviction from raising a claim that doctor was not properly qualified as an expert witness and, thus, that her testimony was inadmissible at trial, even though defendant

objected at trial to portions of doctor's testimony, where defendant did not object to doctor being qualified as a medical expert. Rules of Evid., Rule 702.

[9] Criminal Law 110 ⇐1043(3)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(3) k. Adding to or Changing Grounds of Objection. Most Cited Cases
For purposes of error preservation, an objection to the testimony of a purported expert witness does not constitute an objection to the witness's credentials. Rules of Evid., Rule 702.

[10] Criminal Law 110 ⇐474.4(4)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474.4 Character Traits or Profiles; Syndromes
110k474.4(4) k. Battered or Abused Children. Most Cited Cases
Medical expert's testimony that minor victim was different than 98% of other child abuse victims because there were physical findings did not constitute improper generalization about child abuse victims, in prosecution for statutory rape; expert's testimony focused on results of her physical examination of victim rather than profiles of child sexual abuse and did not address similarities that victim shared with other child abuse victims. Rules of Evid., Rule 702.

[11] Criminal Law 110 ⇐342

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k342 k. Motive or Absence of Motive. Most Cited Cases

Witnesses 410 ⇐372(2)

410 Witnesses
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k372 Cross-Examination to Show Interest or Bias
410k372(2) k. Inquiry as to Particular Acts or Facts Tending to Show Interest or Bias. Most Cited Cases
Trial court acted within its discretion in refusing to allow defendant to cross examine minor victim's mother about whether money was her motive for allegedly accusing him of sexual abuse, in prosecution for statutory rape and child fondling, where court determined that mother's motive was a collateral matter that would not help jury decide whether offenses occurred. West's A.M.C. §§ 97-3-65(1)(a), 97-5-23(1).

[12] Criminal Law 110 ⇐822(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k822 Construction and Effect of Charge as a Whole
110k822(1) k. In General. Most Cited Cases
In determining whether error lies in the manner in which a jury was instructed, the various requested instructions are not considered in isolation; rather, the instructions actually given must be read as a whole.

[13] Criminal Law 110 ⇐1172.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.1 In General
110k1172.1(1) k. Instructions in General. Most Cited Cases
No reversible error will be found in jury instructions if the instructions fairly announce the law of the case and create no injustice.

[14] Criminal Law 110 ⇐770(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k770 Issues and Theories of Case in General
110k770(2) k. Necessity of Instructions. Most Cited Cases
Although a defendant is entitled to jury instructions that present his theory of the case, this entitlement is limited to instructions that correctly state the law, are not covered fairly elsewhere in the instructions, and have a foundation in the evidence.

[15] Criminal Law 110 ⇐811(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k811 Undue Prominence of Particular Matters
110k811(1) k. In General. Most Cited Cases
Jury instructions should not single out or contain comments on specific evidence.

[16] Rape 321 ⇐59(15)

321 Rape
321II Prosecution
321II(C) Trial and Review
321k59 Instructions
321k59(15) k. Carnal Knowledge. Most Cited Cases
Defendant was not entitled to requested jury instruction that "absence of, or injury to, a hymenal ring of a purported victim shall not, in and of itself, lead to a finding that the hymenal ring was injured or absent due to sexual contact," in prosecution for statutory rape; instruction was not necessary for defendant to present his theory that there was alternate source of injury to victim's hymenal ring, as he made his theory clear to jury through testimonies of two witnesses that they had sexual intercourse with victim and through testimony of medical expert that injury to a hymenal ring could hypothetically be caused by objects other than a penis. West's A.M.C. § 97-3-65(1)(a).

***70** Alison Oliver Kelly, Robert L. Williams, Elizabeth Paige Williams, attorneys for appellant.
Office of the Attorney General by W. Glenn Watts, attorney for appellee.

EN BANC.

ISHEE, J., for the Court.
¶ 1. The motion for rehearing is denied, and the original opinion in this appeal is withdrawn, and this opinion is substituted in lieu thereof. Poynor was sentenced to serve ten years, with five years suspended, for statutory rape, and five years for child fondling, with both sentences to be served consecutively, all in the custody of the Mississippi Department of Corrections (MDOC). John Poynor, Sr. was convicted in the Circuit Court of Panola County of statutory rape and child fondling. Poynor was sentenced to serve ten years, with five years suspended, for statutory rape, and five years for child fondling, with that five year sentence suspended and to be served consecutively to the five year suspended sentence for the statutory rape conviction, all in the custody of the Mississippi Department of Corrections (MDOC). Aggrieved by the judgment against him, Poynor appeals. He asserts the following issues for this Court's review:
I. Whether the indictment was fatally flawed as a matter of law.
II. Whether the court erred in allowing the testimony of the State's expert witness because she was not qualified and her opinions as to the general characteristics of other child sexual abuse victims were improper.
III. Whether the court erred in limiting and restricting Poynor from showing that the mother of the alleged victims, as well as the alleged victims, were prejudiced or biased toward Poynor and further erred in refusing to allow Poynor to call other witnesses to demonstrate such bias or prejudice.
IV. Whether the jury was inadequately instructed as to the law of the case.
V. Whether Poynor's trial counsel was

constitutionally ineffective.
VI. Whether the cumulative effect of all the errors requires reversal.

Finding no error, we affirm.

¶ 2. On April 18, 2005, Poynor was indicted by a Panola County grand jury for count one, statutory rape of A. M., count two statutory rape of C. S., and count *71 three, child fondling of T.S.[FN1] At the time of the trial, Poynor was sixty years old. The mother of the three female child victims (Mother) was Poynor's tenant. She also dated Poynor during the time that the alleged offenses were committed.

FN1. Initials are used to protect the identity of the minor children.

¶ 3. Count one of the indictment stated that, from July of 2001 through December of 2004, Poynor:
did wilfully, unlawfully and feloniously, have sexual intercourse with A. M., a child with a birth date of March 11, 1990, who was under the age of fourteen (14) years until March 11, 2004. [Poynor] was over the age of seventeen (17) years. [Poynor] was twenty-four (24) or more months older than A.M.A.M. was not [Poynor's] spouse, in direct violation of Section 97-3-65(1)(a), Mississippi Code 1972 Annotated.

Count three of the indictment stated that, during the fall of 2004, Poynor:did wilfully, unlawfully and feloniously, touch or rub T. S., a child whose birth date of December 22, 1992, with his hands. [Poynor] was above the age of eighteen (18) years. T.S. was under the age of sixteen (16) years. [Poynor] did touch or rub T.S. for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, in direct violation of Section 97-5-23(1), Mississippi Code 1972 Annotated.

¶ 4. On July 11, 2005, Poynor filed a notice of intent to introduce evidence of prior sexual activity of the purported victims, and on July 26, 2005, Poynor filed an amended motion to offer evidence of past sexual behavior with persons other than the accused. In the amended motion, Poynor requested that he be allowed to introduce evidence that two teenage boys, J.E. and C. D., had sexual intercourse with one of the victims. Poynor asserted that this evidence was admissible pursuant to Rule 412 of the Mississippi Rules of Evidence and Mississippi Code Annotated section 97-3-68 (Rev.2006). During a hearing on Poynor's motion, the trial court ruled that Poynor's attorney had done "about all a defense lawyer can do to come up and tell the State, well you have an injury and we are going to show you that we have witnesses that can show there is another source of the injury and then it becomes a jury question." Thus, the trial court determined that Poynor complied with Rule 412 of the Mississippi Rules of Evidence and ruled that he could introduce evidence of past sexual behavior with persons other than the accused.[FN2]

FN2. Rule 412(b)(2)(A) provides in part that evidence of a victim's past sexual behavior is admissible if it is evidence of:
[p]ast sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen, pregnancy, disease, or injury.

¶ 5. On August 18, 2005, Poynor's trial began. During voir dire, the trial court ruled that each side would be allowed six, rather than twelve, peremptory challenges for cause because the statute under which Poynor was indicted did not carry a possible life sentence. In making this ruling, the trial court made clear that Poynor was charged under Mississippi Code Annotated section 97-3-65(1)(a), rather than (1)(b), as a conviction under (1)(a) carried a maximum sentence of thirty years, while a conviction under (1)(b) carried a maximum sentence of life imprisonment.

¶ 6. A. M., who was fifteen years old at the time of the trial, testified that when she helped Poynor in his radiator shop, he used to "feel on" her. She

further testified*72 that Poynor "put his penis in [her] vagina" on numerous occasions, beginning when she was eleven years old and ending in December of 2004. According to A. M., Poynor gave her money and told her not to tell anyone about the incidents. A.M. testified that the sexual assaults ceased when she went to visit her dad in Illinois in December of 2004. The first person A.M. told about the sexual assault was her mother, who then took her to see a social worker with the Department of Human Services, as well as Dr. Tanya King.

¶ 7. T.S. was in the sixth grade at the time of the trial. She testified that Poynor touched her on her " private spot" between her legs when they were riding a four-wheeler together. T.S. further testified that Poynor put his hands between her shorts and her underwear on more than one occasion. T.S. explained that she did not tell her mother what had happened because she was scared that she would "get in trouble."

¶ 8. Dr. Tanya King testified as a medical expert for the State. Dr. King graduated from the University of Mississippi Medical Center with a specialty in pediatrics. She testified that she was board certified in pediatrics, that she was a member of the Lafayette County Child Abuse Task Force, and that she had been trained in the field of child sex abuse. Dr. King was qualified by the trial court as an expert witness without an objection from defense counsel.

¶ 9. Dr. King examined A. M.'s vagina with a culposcope, which enabled her to magnify A. M.'s genitalia and film the examination. Dr. King testified that her examination revealed that A.M. had a "thin hymenal ring with deep notches." She further testified that the notches were consistent with the history that A.M. had been vaginally penetrated more than forty times.

¶ 10. At the conclusion of the State's case-in-chief, Poynor moved for a directed verdict. The trial court found that a jury question had been made as to counts one and three, but found insufficient evidence to submit count two of the indictment to the jury. Consequently, the trial court dismissed count two regarding the statutory rape of C. S.

¶ 11. The first witness to testify for the defense was C. D., a teenager who was three years older than A.M.C.D. testified that he had sexual intercourse with A.M. on two occasions. J. E., who was seventeen at the time of the trial, also testified that he had sexual intercourse with A.M.J.E. further testified that he had sexual intercourse with A.M. only once, but that he could not remember the year or the month when it happened.

¶ 12. Poynor testified that he met the Mother in 1999, and that he had lived with her and engaged in a sexual relationship with her "off and on" for the past four or five years. He further testified that he never had sexual intercourse with A.M. Regarding the charge of child fondling, Poynor testified that, one day when he and T.S. were riding a four-wheeler, he grabbed her pants' leg because the four-wheeler was about to turn over. He further testified that he did not grab T.S. to fulfill any sexual desires.

¶ 13. The State called A.M. and T.S. as rebuttal witnesses. A.M. testified that she never had sexual intercourse with C.D. or J.E.A.M. further testified that she had sexual intercourse with Poynor on more than twenty occasions. T.S. testified that the four-wheeler did not almost turn over when Poynor touched her.

¶ 14. On August 18, 2005, the jury found Poynor guilty of count one, statutory rape, and count three, child fondling. Poynor's amended motion for JNOV or, in the alternative, a new trial, was denied.

I. Whether the indictment was fatally flawed as a matter of law.

¶ 15. Poynor asserts that the indictment was fatally flawed because it cited Mississippi Code Annotated section 97-3-65(1)(a), but used the language of Mississippi Code Annotated section

97-3-65(1)(b).[FN3] Consequently, Poynor asserts that count one charged Poynor with the statutory rape of A.M. while A.M. was both under the age of fourteen and over the age of fourteen. The State asserts that Poynor has waived this issue because he failed to raise this issue in the court below. We agree.

> FN3. Mississippi Code Annotated section 97-3-65(1)(b) (Rev.2006) provides that the crime of statutory rape is committed when:
> (b) A person of any age has sexual intercourse with a child who:
> (I) Is under the age of fourteen (14) years;
> (ii) Is twenty-four (24) or more months younger than the person; and
> (iii) Is not the person's spouse.

[1] ¶ 16. Poynor failed to object to the indictment during the voir dire discussion regarding peremptory challenges for cause. Poynor also did not raise this issue in his motion for JNOV. "It is well stated that failure to make a contemporaneous objection waives that issue for the purposes of an appeal." *Robertson v. State,* 921 So.2d 348, 351(¶ 7) (Miss.Ct.App.2005) (citing *Smith v. State,* 729 So.2d 1191, 1210(¶ 87) (Miss.1998)). Therefore, we find that this issue has been waived.

[2][3][4] ¶ 17. We must also note that the issue of whether an indictment is so flawed as to warrant reversal is a question of law and allows this Court a broad standard of review. *Steen v. State,* 873 So.2d 155, 161(¶ 21) (Miss.Ct.App.2004) (citing *Peterson v. State,* 671 So.2d 647, 652 (Miss.1996)). The primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense. *See Lewis v. State,* 897 So.2d 994, 996(¶ 9) (Miss.Ct.App.2004) . All that is required is that the indictment provide " a concise and clear statement of the elements of the crimes charged." *Williams v. State,* 445 So.2d 798, 804 (Miss.1984).

[5] ¶ 18. Pursuant to Mississippi Code Annotated section 97-3-65(1)(a) (Supp.2005), the crime of statutory rape is also committed when:
(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:
(I) Is at least fourteen (14) but under (16) years of age;
(ii) Is thirty-six (36) or more months younger than the person; and
(iii) Is not the person's spouse.

Regarding count one, the indictment stated that from July of 2001 through December of 2004, Poynor:did wilfully, unlawfully and feloniously, have sexual intercourse with A. M., a child with a birth date of March 11, 1990, who was under the age of fourteen (14) years until March 11, 2004. [Poynor] was over the age of seventeen (17) years. [Poynor] was twenty-four (24) or more months older than A.M.A.M. was not [Poynor's] spouse, in direct violation of Section 97-3-65(1)(a), Mississippi Code 1972 Annotated.

Thus, even though the issue was not raised in the court below, we also find that the indictment was not so flawed as to warrant reversal. The indictment clearly stated that Poynor was being charged with statutory rape "in direct violation of Section 97-3-65(1)(a), Mississippi Code 1972 Annotated." The indictment also clearly stated ***74** that Poynor had sexual intercourse with A.M. through December of 2004, which was after her fourteenth birthday. Therefore, this issue is without merit.

II. Whether the court erred in allowing the testimony of the State's expert witness because she was not qualified and her opinions as to the general characteristics of other child sexual abuse victims were improper.

[6][7] ¶ 19. Whether to admit expert testimony is a decision left to the sound discretion of the trial court. *Marbra v. State,* 904 So.2d 1169, 1176(¶ 27) (Miss.Ct.App.2004) (citing *Puckett v. State,* 737 So.2d 322, 342(¶ 57) (Miss.1999)). We will not reverse based on the trial court's admission of expert testimony, unless we conclude that the admission was arbitrary and clearly erroneous, i.e., that the trial court abused its discretion. *Id.* Regarding expert testimony, Rule 702 of the Mississippi Rules of Evidence provides that:

[I]f 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.

[8][9] ¶ 20. Poynor asserts that Dr. King's testimony was inadmissible because she was not properly qualified as an expert witness and because her testimony regarding the general characteristics of other child sexual abuse victims was improper. In addressing this issue, we first note that, during trial, Poynor objected to portions of Dr. King's testimony, but did not object to Dr. King being qualified as a medical expert. An objection to a witness's testimony does not constitute an objection to the witness's credentials. *McBeath v. State,* 739 So.2d 451, 454(¶ 10) (Miss.Ct.App.1999). The Mississippi Supreme Court has refused to hold that an expert was not properly qualified when the opposing party did not object to the witness's credentials but only to the testimony. *Id.* (citing *Baine v. State,* 604 So.2d 249, 255 (Miss.1992)). Because Poynor failed to object to Dr. King's qualification as an expert, we find that Poynor is procedurally barred from raising this issue on appeal.

[10] ¶ 21. Regarding the content of Dr. King's testimony, Poynor asserts that Dr. King made improper generalizations about child abuse victims, contrary to the Mississippi Supreme Court's ruling in *Hosford v. State,* 560 So.2d 163, 168 (Miss.1990) . The generalization to which Poynor refers is Dr. King's testimony that A.M. was different than ninety-eight percent of other child abuse victims because there were physical findings. Poynor also challenges the admissibility of Dr. King's opinion that the "notch" shown by the examination with the culposcope could be a sign of penal vaginal penetration.

¶ 22. In *Hosford,* the court found that expert testimony about commonly shared characteristics and traits of sexually abused children, or child sexual abuse profiles, was improper under Rule 702 of the Mississippi Rules of Evidence. *Id.* at 166. The *Hosford* court reasoned that, until a child sexual abuse profile had been scientifically established, "courts should be reluctant to allow expert testimony that a child displays the so-called typical characteristics of other victims." *Id.* at 168.

¶ 23. We find that the expert testimony in *Hosford* is readily distinguishable from that in the case at bar. The testimony of *75 the expert witness in *Hosford* primarily involved a description of child abuse profiles. *Id.* Furthermore, the expert in *Hosford* concluded that the victim in that case had been sexually abused, as she exhibited the characteristics and traits of sexually abused children. *Id.* In the case at bar, Dr. King's only testimony regarding traits of sexually abused children did not address similarities A.M. shared with those victims, but noted that A.M. differed from ninety-eight percent of those victims. Furthermore, Dr. King's testimony focused on the results of her physical examination of A. M., rather than child sexual abuse profiles. Dr. King testified that A.M. had "multiple notches" on her hymenal ring and that this was "consistent with her being vaginally penetrated" more than forty times. Moreover, on cross-examination, Dr. King gave the following testimony:
[Defense counsel]: Now, can anything other than a penis cause these hymenal ring abnormalities?
[Dr. King]: Yes.
[Defense counsel]: And what would those things be?
[Dr. King]: Could be anything, sir.
[Defense counsel]: All right. Could be sex toys, couldn't it?
[Dr. King]: Could be.

¶ 24. We are not persuaded by Poynor's argument that Dr. King made improper generalizations about child abuse victims. In *Hobgood v. State,* 926 So.2d 847, 855(¶ 27) (Miss.2006), the court held that "experts may not testify as to a syndrome commonly associated with children who have been

sexually abused, but can testify as to common characteristics of sexually abused children." Consequently, we find that the trial court did not abuse its discretion in allowing Dr. King's testimony. This issue is without merit.

III. Whether the court erred in limiting and restricting Poynor from showing that the mother of the alleged victims, as well as the alleged victims, were prejudiced or biased toward Poynor and further erred in refusing to allow Poynor to call other witnesses to demonstrate such bias or prejudice.

¶ 25. A trial judge has great discretion in determining the relevancy and admissibility of evidence. *Fisher v. State,* 690 So.2d 268, 274 (Miss.1996) (citing *Shearer v. State,* 423 So.2d 824, 826 (Miss.1982)). The trial judge's ruling on such matters will not be reversed, unless the judge abused this discretion so as to be prejudicial to the accused. *Id.*Rule 103(a) of the Mississippi Rules of Evidence states in part that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

[11] ¶ 26. Poynor asserts that the court erred in not allowing him to demonstrate the bias or prejudice of witnesses in this case. We disagree. The record shows that Poynor testified that the reason he was being accused of sexually abusing A.M. and T.S. was "all about money." He further testified that the Mother admitted that the motive was money. During cross-examination of the Mother by Poynor's attorney, the following exchange took place:
[Defense counsel]: Have you told anybody around town that you are going to take [Poynor] for all he's worth?
[The Mother]: No.
[Defense Counsel]: You haven't? Have you made any plans to file a civil lawsuit against him?
[The Mother]: Yes.
*76 [Defense Counsel]: And you have talked to an attorney about that, haven't you?
[The Mother]: I've talked to two.
[The State]: Object to relevancy, Your Honor.
[Defense Counsel]: Motive.
[The State]: But she doesn't have any motive.
BY THE COURT: I sustain the objection. It would not be relevant as to the children in the criminal charge.

¶ 27. We are not persuaded that the trial court abused its discretion in determining that the Mother's motive was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred. Therefore, this issue is without merit.

IV. Whether the jury was inadequately instructed as to the law of the case.

[12][13][14][15] ¶ 28. "In determining whether error lies in the manner in which the jury was instructed, the various requested instructions are not considered in isolation. Rather, the instructions actually given must be read as a whole." *Sheffield v. State,* 844 So.2d 519, 524(¶ 12) (Miss.Ct.App.2003) (citing *Turner v. State,* 721 So.2d 642, 648(¶ 21) (Miss.1998)). No reversible error will be found if the instructions fairly announce the law of the case and create no injustice. *Id.*(citing *Coleman v. State,* 697 So.2d 777, 782 (Miss.1997)). Although a defendant is entitled to jury instructions which present his theory of the case, "this entitlement is limited to instructions that correctly state the law, are not covered fairly elsewhere in the instructions, and have a foundation in the evidence." *Sproles v. State,* 815 So.2d 451, 454(¶ 9) (Miss.Ct.App.2002) (citing *Heidel v. State,* 587 So.2d 835, 842 (Miss.1991)). Furthermore, "[I]t is also well established that instructions to the jury should not single out or contain comments on specific evidence. " *Crimm v. State,* 888 So.2d 1178, 1186(¶ 35) (Miss.Ct.App.2004) (quoting *Lester v. State,* 744 So.2d 757, 759(¶ 6) (Miss.1999)).

¶ 29. Poynor asserts that the trial court erred in giving jury instructions S-1 and C-13, and in refusing to grant jury instruction D-6. In jury instruction S-1, the court instructed the jury to find Poynor guilty of statutory rape under count one if

the State has proven each of the following elements beyond a reasonable doubt: (1) beginning in July 2001 and continuing until December 2004, Poynor did engage in sexual intercourse with A. M.; (2) A.M. was a child under the age of fourteen years; (3) A.M. is twenty-four months younger than Poynor; and (4) A.M. is not the spouse of Poynor. Jury instruction C-13 read as follows: "[t]he issue of chastity or lack of on the part of [A.M.] shall not be considered by the jury in reaching your verdict in count [one] of this trial." Requested jury instruction D-6 read as follows: "[t]he jury is instructed that the absence of, or injury to, a hymenal ring of a purported victim shall not, in and of itself, lead to a finding that the hymenal ring was injured or absent due to sexual contact."

¶ 30. Regarding jury instruction C-13, Poynor concedes that it is a correct statement of the law. Nonetheless, he asserts that it is an incomplete statement of the law, as "Rule 412 of the Rules of Evidence permits evidence of sexual intercourse with others, other than the defendant as to the source of the injury." Poynor further asserts that the exclusion of jury instruction D-6 left the jury "to wonder why the testimony of [C.D. and J.E.] was offered in the first place." Thus, Poynor maintains that the court failed to "restrict the evidence to its proper scope and instruct the jury accordingly," as required by Rule 105 of the Mississippi Rules of Evidence.

*77 [16] ¶ 31. The record reflects that the court refused to grant jury instruction D-6 because it was not supported by the evidence and was not necessary for Poynor to present his theory of defense that there was an alternate source of injury to the hymenal ring. We agree. Poynor made his theory of defense clear to the jury through the testimony of C.D. and J. E., who both testified that they had sexual intercourse with A.M. Poynor further suggested an alternate source of injury through Dr. King's testimony that injury to a hymenal ring can, hypothetically, be caused by objects other than a penis. During closing arguments, Poynor also argued that Dr. King's testimony regarding other sources of injury to the hymenal ring created reasonable doubt. Dr. King's hypothetical statement did not, however, constitute proof that A. M.'s hymenal ring was injured as a result of sexual contact.

Consequently, we find that the trial court did not err in refusing to grant jury instruction D-6.

¶ 32. Regarding jury instruction S-1, Poynor asserts that the court ruled that the jury could not even consider acts occurring before A. M.'s fourteenth birthday. The record reveals no such ruling by the trial court. Furthermore, as previously stated, the indictment, as well as jury instruction S-1, clearly address whether Poynor had sexual intercourse with A.M. through December of 2004, which was after her fourteenth birthday. This issue is without merit.

V. Whether Poynor's trial counsel was constitutionally ineffective.

¶ 33. Poynor asserts that his trial counsel was ineffective because he should have considered requesting the following: (1) severance of the charges, (2) a M.R.E. 803(25) hearing outside the presence of the jury to determined the admissibility of hearsay testimony given by the social worker from the Department of Human Services who interviewed A.M. and T. S., and (3) a jury instruction that the proof in count two was insufficient to prove the crime charged in count two. Poynor also asserts that his trial counsel should have objected to improper comments made by the State in closing, and to jury instruction S-1.

¶ 34. The standard of review for a claim of ineffective assistance of counsel was set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To bring a successful claim for ineffective assistance of counsel, pursuant to the court's ruling in *Strickland,* the defendant must prove that his attorney's overall performance was deficient and that this deficiency deprived him of a fair trial. *Id.* at 689, 104 S.Ct. 2052; *Moore v. State,* 676 So.2d 244, 246 (Miss.1996) (citing *Perkins v. State,* 487 So.2d 791, 793 (Miss.1986)). We must be mindful of the "strong rebuttable presumption that an attorney's performance falls

within a wide range of reasonable professional assistance and that the decisions made by trial counsel are strategic." *Covington v. State,* 909 So.2d 160, 162(¶ 4) (Miss.Ct.App.2005) (quoting *Stevenson v. State,* 798 So.2d 599, 602(¶ 6) (Miss.Ct.App.2001)). To overcome this presumption, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052; *Woodson v. State,* 845 So.2d 740, 742(¶ 9) (Miss.Ct.App.2003). This Court considers the totality of the circumstances when addressing a claim of ineffective assistance of counsel. *Colenburg v. State,* 735 So.2d 1099, 1103(¶ 9) (Miss.Ct.App.1999) (citing *Carney v. State,* 525 So.2d 776, 780 (Miss.1988)).

***78** ¶ 35. The record reflects that Poynor's trial counsel filed numerous pre-trial motions, including his successful motion to offer evidence of past sexual behavior, and that trial counsel presented numerous witnesses in Poynor's defense. The record further reflects that Poynor's trial counsel succeeded in having count two of the indictment dismissed. In his brief to this court, Poynor merely asserts that trial counsel should have considered making certain requests or objections; he does not demonstrate how he was prejudiced by his counsel's alleged errors. Consequently, we find that Poynor has not overcome the presumption that his attorney's performance fell within a wide range of reasonably professional assistance and that the decisions made by his attorney were strategic. This issue is without merit.

VI. Whether the cumulative effect of all the errors requires reversal.

¶ 36. Because we determine that Poynor has failed to demonstrate any error whatsoever, we find that this issue is without merit.

¶ 37. THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY OF CONVICTION OF COUNT ONE, STATUTORY RAPE, AND SENTENCE OF TEN YEARS, WITH FIVE YEARS SUSPENDED, AND COUNT THREE, CHILD FONDLING, AND SENTENCE OF FIVE YEARS SUSPENDED, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH COUNTS ONE AND THREE TO RUN CONSECUTIVELY TO EACH OTHER, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, BARNES AND ROBERTS, JJ., CONCUR. CARLTON, J., NOT PARTICIPATING.
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