IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN CHARLES MCGRIGGS — APPELLANT

V. — NO. 2006-KA-1927-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE 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. John Charles McGriggs, Appellant
3. Honorable G. Gilmore Martin, District Attorney
4. Honorable Isadore W. Patrick, Circuit Court Judge

This the 26th day of September, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

ISSUE NO. I : POLICE OFFICER LAY OPINION WAS A LEGAL CONCLUSION CONCERNING THE ULTIMATE OUTCOME OF THE CASE, WAS OUTSIDE THE PERSONAL KNOWLEDGE OF THE OFFICER AND DID NOT AID THE JURY IN UNDERSTANDING THE EVIDENCE. ACCORDINGLY, THE TRIAL COURT COMMITTED ERROR IN PERMITTING SAID OPINION INTO EVIDENCE.

ISSUE NO. II: EXPERT OPINION EVIDENCE OF THE EMERGENCY ROOM DOCTOR WAS SPECULATIVE AND OUTSIDE THE SCOPE OF THE DOCTOR'S AREA OF EXPERTISE. ACCORDINGLY, THE TRIAL COURT COMMITTED ERROR IN PERMITTING SAID OPINION EVIDENCE INTO EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Warren County, Mississippi, and a judgement of conviction for the crime rape against John Charles McGriggs and a resulting of eighteen years

following a jury trial commenced on January 18, 2007, the Honorable Isadore W. Patrick, Circuit Judge, presiding. John Charles McGriggs is presently incarcerated with the Mississippi Department of Corrections.

FACTS

The state commenced it's case against John Charles McGriggs ["McGriggs"] with the testimony of Dr. Brian Hudson. (T. 204) Dr. Hudson worked as an emergency room physician in the River Region Medical Center. The defense accepted him as an expert. Dr Hudson testified that a sexual assault case came in on the evening of August 19, 2004. The patient had been injured, beaten and had multiple abrasions. Her face was swollen. Dr. Hudson observed some internal vaginal bleeding. Although accepted as an expert in "emergency medicine", Dr. Hudson was allowed, over objection, to answer the question: "How difficult is it to damage a vagina?". His answer, "[the vagina is not lacerated in consensual sex." (T. 223) On cross examination Dr. Hudson admitted his statement was a generalization. (T. 224) Further cross examination concerned the patients level of intoxication.(T. 228-229). It was conceded that the level of intoxication measured could cause a person to have lessened inhibition. (T. 229)

The next witness, Luella Taylor, was on her way to Wal-Mart when she heard a call for help. (T. 237) She called 911, and over multiple hearsay objections, testified to her conversation with the 911 operator. When the police arrived, Luella was again allowed, over objection, to testify to what the police said. The trial court, sea sponge, did not allow hearsay as to what the officer told her about "what was going on." (T. 240-241)

Riley Nelson, another officer with the Vicksburg Police Department, testified that he responded to the call and found a woman naked from the wrist (sic) down. (T. 243)

The next witness was also with the Vicksburg police. Officer Kenneth Brown was present

at the hospital. He was allowed to testify, again over objection, to what the patient told him at the hospital, specifically, that "[she basically was trying to tell me that she was raped." (T. 252) The officer developed a suspect from her description, developed over two occasions, and put a "BOLO" out for the suspect and a vehicle.(T. 253-254) Mention of the suspects name was also objected to and the trial court instructed the jury that the name was not to be taken for the truth of the matter, but to understand the ensuing investigation. (T. 255)

Brown was later involved in the apprehension of McGriggs. He testified as to the condition of Mcgriggs' vehicle. He also obtained a warrant and collected "biological" specimens from McGriggs.

Cross examination concerned the interrogation of McGriggs, who freely admitted having sex with the purported victim but asserted that the sex was consensual. (T. 270,274) Brown agreed no weapon was found, that no blood was found in the van. (T. 273)

On redirect, the following question and response were admitted over objection:

> Q. Mr. Rhodes asked you a question about your investigation and whether or not **you determined** (emphasis added) or gathered knowledge that a rape took place. What did she tell you happened?
>
> A. Well at the time–
> By Mr. Rhodes: Objection.
> By the Court: Continued objection is allowed.
> Overruled.
>
> A. Well, he asked me that, as far as he and the van, the reason I asked him, no. But as far as Ms. Doe[1], I had very much evidence, **in my opinion, that a rape did take place.** (emphasis added) (T. 277)

Testimony was taken from an additional police officer and from a crime lab director.

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[1]To protect the identity of the victim the victim will be referred to by a fictitious name.

Ms. Doe testified as to her version of the events. (T. 314) On the night in question, she had gone out to buy crack. She was admittedly intoxicated. She was out walking when she heard a man she knew as "Charles" call her name. He asked her if she wanted a ride. After accepting the ride, she was informed that she must give him something for the ride. She told him she had no money. She then heard a clicking sound she believed to be a knife (T. 316)

She told him he didn't have " to go through all this... **it isn't going to take all this.**" (Emphasis added) (T. 318) She repeated her willingness to engage in sexual activity. (T. 318) At that point she was struck, knocking her glasses off. She testified that his hands were over her mouth and nose. Her head ended up on the passenger floorboard. Ms. Doe told the man "Charles" that she would quit "hollering."(T. 318)

Again she advised this man of her willingness to assent to sex:

I said , man, we ain't got to go through all this." (T. 319)

The man indicated his desire for oral sex. She began to do as he had requested, thinking she would pick up a tool and strike him. She somehow ended up on her back in the back of the van.

He told her to take her clothes off and she began to do so; but not fast enough for "Charles." (T. 319-320) He began to beat her. He jerked her legs open and entered her. She told the jury it hurt her. Ms. Doe then testified that as the act was being consummated, the man elbowed her and hit her in the head. She ended up laying in her stomach, noticing " a lot of tools" in his van. The cuts she had received and began to sting. Shortly, the man commenced to have sex with Ms. Doe a second time. (T. 321)

She was asked at this point if she consented to the sexual intercourse and she replied "No." (T 321) Meanwhile he kept hitting her. (T. 322) She believed he intended to kill her. Believing her life was imperiled, she convinced him to let her out to go to the bathroom. She assured him she

would not try to get away, and he replied that he would kill her if she did. (T. 322-323) None-the-less, she ran down the hill, where she sought help. She was taken in an ambulance to the hospital.

Ms. Doe identified the pictures of her back and told the jury about torn ligaments in her knee.

Without having identified the defendant as the man she knew as "Charles" she closed her direct examination with a second denial that the sex was consensual. (T. 329)

Upon cross examination, she admitted drinking whiskey and beer that night, following that with crack cocaine. She was out seeking additional drugs when she got the ride from "Charles." (T. 329-332) She had not checked the window on her door, nor the other doors to see if she could get out. (T. 333-334) She testified that she saw the knife she had heard click, and that he put it in his pocket when they got to "where he wanted to take me." (T. 336) Again, Ms. Doe testified that he didn't have to this to me; in other words she was willing to participate. (T. 336) She agreed that the acts could be described as "very rough" sex. (T. 337)

She denied that McGriggs had offered her money or drugs for her consent to the sexual acts. (T. 338) She then denied she had ever had sex with McGriggs in the past in exchange for drugs or money. (T. 344)

On redirect, she once again denied that she consented to have sex. (T. 344) She repeated her denial of consent, then the State rested. A motion for directed verdict was denied by the trial court

Upon being advised of his right to testify, McGriggs elected to testify on his own behalf. He denied having met Ms. Doe in Jackson, nor of having picked her up on a prior occasion. (T. 356-358)

On the day in question McGriggs testified that Ms. Doe had asked him to meet her at which occasion they entered an agreement to exchange sex for money and drugs. McGriggs had agreed to pay Ms. Doe $200, according to his testimony, but he only gave her $15. (T. 360) a dispute arose

over his failure to pay as agreed and, McGriggs claimed Ms. Doe picked up an object and hit him. He readily agreed he also hit her.

After agreeing to consensual sex, she and McGriggs went to the back of his van where she addressed. (T. 363) McGriggs sent Ms. Doe a letter, offering her the additional $5. (T. 362) he ended his direct testimony asserting the sexual encounter was consensual and denied owning a knife. (T. 364)

On cross examination McGriggs explained that although he picked Ms. Doe up near his house he did not take her home, not engaging in such activity in his own home. (T. 366) instead they went to a "dead end street." (T. 368) He asserted Ms. Doe could have left, she could have gotten out the door. (T. 369) He admitted being considerably larger and said the "altercation" was after agreed upon sex. (T. 369-371) He disputed the ER Doctor's finding of internal vaginal bleeding as defying common sense. (T. 371-374) After the sex, after the altercation, Ms. Doe asked him if she could go to the bathroom. When he allowed that, she took off running, leaving her clothes in the van. He indicated that the back of the van would not have been a comfortable place to have intercourse.

Redirect revealed that McGriggs deceived Ms. Doe about his ability to meet his obligations under the agreement. (T. 385)

McGriggs called Ms. Doe, who agreed she saw no blood in the hospital and further indicated she was unable to see if there was any blood at the scene. (T. 386-388) The motion for a directed verdict was renewed

SUMMARY OF THE ARGUMENT

Improper opinion evidence was admitted into evidence which, as it both disputed the defendant's theory of the case and proofs, was extremely prejudicial and denied McGriggs a fair trial. McGriggs sentence of eighteen years, his life expectancy, was an improper sentence.

ARGUMENT

ISSUE NO. I : POLICE OFFICER LAY OPINION WAS A LEGAL CONCLUSION CONCERNING THE ULTIMATE OUTCOME OF THE CASE, WAS OUTSIDE THE PERSONAL KNOWLEDGE OF THE OFFICER AND DID NOT AID THE JURY IN UNDERSTANDING THE EVIDENCE. ACCORDINGLY, THE TRIAL COURT COMMITTED ERROR IN PERMITTING SAID OPINION INTO EVIDENCE.

As is evident from the recitation of facts, this case is the classic he said-she said rape allegation case. The corroborating evidence put on by the State, while supportive of the testimony of Ms. Doe, was not contradictory to the McGriggs' version of the incident. Thus, any *opinion* testimony made by a police officer as to the ultimate issue for the jury would be extremely prejudicial.

Police officer testimony can have great influence on a jury. This principle was discussed by Justice Dan M. Lee in his dissent in the case of *Whittington v. State,* 523 So. 2d 966, 982 (Miss. 1988). Justice Lee, in discussing an instance of a police officer giving opinion evidence contradicting the defense theory of the case without firsthand knowledge, nor special qualification, stated that the opinion did not help the jury understand the evidence. Instead "[i]t merely told the jury how the case should be decided, thereby shifting responsibility for the decision from the jury to the witness." *Whittington, Id.* at 982. This "shifting of the juries responsibility cannot be deemed as harmless error." *Id.* Justice Lee asserted that a police officer has great "influence" and leaves a defendant without an equally influential witness to rebut the police officers usurpation of the juries function.

When police officer gave his essentially unsolicited opinion that McGriggs had raped Ms. Doe, he transferred the burden of proof from the State to the defendant, to prove he did not rape Ms. Doe. Officer Kenneth Brown, an investigator with fourteen years experience, offered the following opinion:

Q. Mr. Rhodes asked you a question about your investigation and whether or not you determined a rape took place. What did she tell you what happened?

A. Well, at the time- -

By Mr. Rhodes: Objection.

By the Court: Continued objection [2] is allowed. Overruled.

A. Well, he asked me that, as far as he and the van, the reason that I asked him, no. But as far as [Ms. Doe] **I had very much evidence, in my opinion, that a rape did take place**. (Emphasis added)

The impact on a jury of an opinion offered by a police officer that vouches for the State's case while undermining the defense theory cannot be underestimated . As then Justice Lee believed, the role of the jury is supplanted and the burden of proof is reversed, forcing the defendant to have to prove beyond a reasonable doubt, that he is not guilty. As such, police opinion as to the ultimate disputed issue of the case, subverts a defendants constitutional right to a fair trial and to due process under the Constitution. *(U.S.C.A. Const. Amends. 5, 14)* "[D]ue process requires that the State prove each element of the offense beyond a reasonable doubt".*Neal v. State*, 451 So.2d 743, 757 (Miss. 1984)

Officer brown was not tendered as an expert. As a police officer, not qualified as an expert, any opinion offered by him must be permissible under M.R. E. 701, as lay opinion. This first and foremost requires personal knowledge of the matter.

> The admissibility of lay witness opinion testimony is determined by a two part test under M.R.E. 701 and M.R.E. 602. Pursuant to M.R.E. 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." As for the admissibility of Sergeant Henderson's opinion and inference testimony, it is admissible if it was "(a) rationally based on the perception of the

[2] The continued objection is to hearsay.

> witness, (b) helpful to the clear understanding of testimony or the determination of a fact in issue, and © not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." M.R.E. 701; Christian v. State, 859 So.2d 1068(¶ 7) (Miss.Ct.App.2003).

Travis v. State, ___So.2d___, 2007 WL 1413208, 7(Miss.App. May 15,2007)

Kenneth Brown was not present in the van, and thus it cannot be said he had any personal knowledge of what took place. His perceptions were all based on what others told him. His opinion thus fails the first prong of the requirement.

An opinion offered by this lay police officer also fails the second necessity. It does not help the jury understand any testimony or fact. In *Roberson v. State*, 569 So. 2d 691 (Miss. 1990) an officer, testifying about a latent hand print he had taken at the scene of a crime, gave his opinion that the print he lifted had been placed on the counter within one hour of his lifting the print. Roberson testified the contrary, that he had been in the store earlier. Thus any postulation as to time of the print would be an opinion as to a jury factual determination by a lay person without specific knowledge and education to support such an opinion. The Court found the officer lacked personal knowledge and was telling the jury something that it had already heard via permissible evidence. In that case the jury heard that newer prints lift quicker. In this case, Ms. Doe had testified to rape. The second prong of the test for lay witness opinion thus fails.

It is next critical to consider that Browns opinion directly contradicted the defense, that the sexual encounter was entirely voluntary. The record reveals numerous statements by Ms. Doe that could have been understood by the defendant that she consented; that it did not require the violence for her to engage in sex. McGriggs said the liaison was for money. As the Supreme Court concluded in *Roberson, Id.* at 696, the admission of such opinion which directly conflicts with the appellant's testimony cannot be considered harmless. Allowing a police officer offer a lay opinion that is in

effect a legal conclusion that invades the juries province is "impermissible." This is the conclusion reached in a case, analogous to the present matter, where the police officer opined that based on his investigation, he concluded that "legally" an armed-robbery occurred.

> It is clear that Jowers derived his opinion based upon his investigation; however, to allow Jowers to give a legal conclusion that a "strong armed robbery" occurred was impermissible. The issue of whether a robbery occurred was an issue for the jury to the decide. Any rational juror could determine whether a robbery occurred without the comment from Jowers.

Holliday v. State, 758 So.2d 1078, 1081 (Miss.App. 2000) In this case in was the juries duty to decide if a rape took place without the interjection of the opinion of the investigating officer.

The defense did not object to this officers opinion and conclusion and consequently, for this Court to reverse the error must be deemed "plain error." The components of plain error were delineated by the United States Supreme Court in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed. 2d 508 (1993) as follows. First there must be error. It must be plain and affect substantial rights of the appellant. Ultimately the error must have prejudiced the outcome of the case or have "seriously affect[ed] the fairness integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392 80 L. Ed. 555 (1936) As the right to a jury trial is essential to a fundamentally fair trial, this case must be reversed.

ISSUE NO. II: EXPERT OPINION EVIDENCE OF THE EMERGENCY ROOM DOCTOR WAS SPECULATIVE AND OUTSIDE THE SCOPE OF THE DOCTOR'S AREA OF EXPERTISE. ACCORDINGLY, THE TRIAL COURT COMMITTED ERROR IN PERMITTING SAID OPINION EVIDENCE INTO EVIDENCE.

Dr. Brian Hudson, the emergency room treating physician, was called as a witness for the State and qualified as an expert in the field of emergency medicine. (T. 205) He was on duty the evening of August 19, 2004 when ms. Doe was brought in. The doctor testified that she had multiple abrasions and a swollen face. He offers his belief that she was "obviously...beaten" (T. 207), though

he did not offer this belief as a medical opinion based on a reasonable degree of medical certainty. The patient complained of vaginal pain. Dr. Hudson noted "some abrasions to her back." (T. 213) Dr. Hudson's chart indicated that the "patient states beat and sexually assaulted." (T. 217) Pursuant thereto, the patient received a pelvic examination. Dr. Hudson also noted she was intoxicated and smelled of alcohol. (T. 218)

During the pelvic exam, "mild bleeding' within the vaginal vault. Dr. Hudson found some "perennial abrasion." The injuries were "just abrasions, scraps(sic) and tears." (T. 219) Dr. Hudson's opinion that the injuries were not consistent with consensual sex. (T. 223)

To this point Dr Hudson was giving proper expert opinion. But the next question and answer went beyond the scope of Dr. Hudson's expertise and clearly called for conjecture. A proper objection was made that the question asked would lead to speculation. None-the-less, Dr. Hudson was allowed to testify "[t]hat the vagina is not lacerated in consensual sex." (T. 223) This type of opinion, one outside the area of expertise, is just the type of opinion condemned in the recent landmark case of *Edmonds v. State*. There is no way an emergency room physician can make such a flat assertion.

> Tyler's substantial rights were affected by Dr. Hayne's conclusory and improper testimony. Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. See M.R.E. 702. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness. See generally Simmons v. State, 722 So.2d 666, 673 (Miss.1998); see also United States v. Benson, 941 F.2d 598, 604 (7th Cir.1991) (an expert's "stamp of approval" on a particular witness's testimony [or theory of the case] may unduly influence the jury). Here, Dr. Hayne's two-shooter testimony impermissibly (because it was not empirically proven) bolstered the State's theory of the case that Kristi helped Tyler to fire the gun. The error was magnified when Dr. Hayne's testimony was the only evidence-other than Tyler's

Edmonds v. State, 955 So.2d 787, 792 (Miss. 2007) In fact, Dr. Hudson later admitted he that his opinion was only a generalization. (T. 224) But the damage was done. Expert opinions are powerful evidence. Experts, like laymen, are forbidden from making conclusive and speculative testimony, thereby "substitut[ing] himself of herself for the jury and advise them with the ultimate disposition of the case." *Smith v. State*, 925 So. 2d 825, 838 (Miss. 2006), citing *State v. Lindsey*, 720 P. 2d 75 (Ariz. 1986)

Dr. Hudson also offered opinion in the field of toxicology when he testified that a blood alcohol reading of 0.123 is mild intoxication that would not affect recall. (T. 229) This amount is obviously well above the lawful limit for driving under the influence. (Miss. Code Ann. § 63-11-30) In would seem elementary that only a toxicologist could testify whether or not that level of impairment could affect recollection. Although raised on cross examination, as in Edmonds, Id. this is not a bar to raising the issue on appeal.

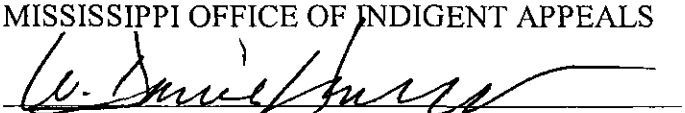
Dr. Hudson's statements exceed his professional scope as examining physician[3] and his areas of expertise. As in Issue I above, this opinion evidence, invading the province of the jury, denied McGriggs a fundamentally fair trial.

For these reasons this case should be reversed.

CONCLUSION

All defendants are entitled to the constitutional protection of a fair trial by a jury. Hence McGriggs' conviction for the crime of rape should be reversed and remanded for a new trail.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. [redacted]

[3]*Simmons v. State*, 722 So. 2d 666,671-672 (Miss. 1998) also a rape case involving the treating physician testifying as to his opinions in a rape case.

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for John Charles McGriggs, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 26th day of September, 2007.

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