

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**COPY**

AARON BISHOP

APPELLANT

VS.

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SUPREME COURT  
COURT OF APPEALS

NO. 2006-KA-1957-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF FACTS .....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	3
I.    THE TRIAL COURT PROPERLY ADMITTED M.B.'S OUT-OF-COURT STATEMENTS UNDER M.R.E. 803(25). ....	3
II.   BRENDA DONALD'S TESTIMONY SATISFIED M.R.E. 702 AND DAUBERT. ....	6
III.  BISHOP'S RIGHT TO CONFRONTATION WAS IN NO WAY VIOLATED. ....	8
CONCLUSION .....	9
CERTIFICATE OF SERVICE .....	10

## TABLE OF AUTHORITIES

### FEDERAL CASES

<b>Crawford v. Washington, 541 U.S. 36, 68 (2004)</b> .....	8
<b>Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151 (1999)</b> .....	7
<b>Ohio v. Roberts, 448 U.S. 56 (1980)</b> .....	8

### STATE CASES

<b>Bailey v. State, 956 So.2d 1016, 1027 (Miss. Ct. App. 2007)</b> .....	8
<b>Cowart v. State, 910 So.2d 726, 729 (Miss. Ct. App. 2005)</b> .....	6
<b>Elkins v. State, 918 So.2d 828, 833 (Miss. Ct. App. 2005)</b> .....	4
<b>Larson v. State, 957 So.2d 1005, 1011 (Miss. Ct. App. 2006)</b> .....	3, 4
<b>Mississippi Transportation Commision v. McLemore, 863 So.2d 31 (Miss. 2003)</b> .....	6
<b>Mooneyham v. State, 915 So.2d 1102, 1107 (Miss. Ct. App. 2005)</b> .....	7
<b>Pulphus v. State, 782 So.2d 1220, 1224 (Miss. 2001)</b> .....	8
<b>Rubenstein v. State, 941 So.2d 735, 754 (Miss. 2006)</b> .....	8
<b>Sharp v. State, 862 So.2d 576, 580 (Miss. Ct. App. 2004)</b> .....	4

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**VS.**

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE ISSUES**

- I. THE TRIAL COURT PROPERLY ADMITTED M.B.'S OUT-OF-COURT STATEMENTS UNDER M.R.E. 803(25).
- II. BRENDA DONALD'S TESTIMONY SATISFIED M.R.E. 702 AND DAUBERT.
- III. BISHOP'S RIGHT TO CONFRONTATION WAS IN NO WAY VIOLATED.

**STATEMENT OF FACTS**

On April 4, 2006, Christie Bishop was bathing her four-year-old daughter, M.B., who had small red bumps all over her body from a rash. T. 289. M.B. asked her mother if she could show her father, Aaron Bishop, the bumps on her "too too," and Christie explained to M.B. that little girls do not show their fathers their "tutu."<sup>1</sup> T. 49, 289. M.B. then revealed that she had already seen her father's "tutu." T. 49, 289. In childlike terms, M.B. told her mother that she had performed oral sex on her father and that he had "tickled her tutu with his finger." T. 49, 289.

The next morning Christie packed their bags and took M.B. to the Attala County Sheriff's

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<sup>1</sup>"Tutu" is the term M.B. used to refer to both male and female sexual reproductive organs.

Department where Christie reported the abuse. T. 290. M.B. was not interviewed at the sheriff's department. T. 312. Christie then took M.B. to Dr. Betty Turner for a physical examination. T. 49-50. Dr. Turner found no physical evidence of sexual abuse, but explained at trial that a physical examination reveals trauma from recent oral sex only occasionally. T. 319-20. During the examination, M.B. again stated "that her daddy had played with her tutu." T. 319.

Christie then took M.B. to Christie's grandparent's house. T. 50. Bishop arrived at Christie's grandparents' house later that day to ask why they had left. T. 50. Christie then told Bishop that M.B. told her what he had done to her. T. 50. Bishop initially denied that he had done anything to M.B., but then gave a ridiculous explanation that one day he was masturbating in the bathroom when M.B. walked in on him, and he accidentally ejaculated on her. T. 50. Bishop made this statement in the presence of Christie's grandfather. T. 50.

On April 7, 2006, M.B. was interviewed by Dr. Trudi Porter, who conducted a forensic interview at the request of either the sheriff's department or D.H.S. T. 13-14. During the twenty minute interview, M.B. relayed to Porter that she had been forced to perform oral sex on her father. T. 15.

Christie subsequently obtained for her daughter the services of child therapist Brenda Donald. Donald's first meeting with M.B. was on June 6, 2006. T. 168. By the time of the September 15 pretrial hearing, M.B. had attended nine or ten sessions with Donald. T. 168. During the course of her therapy, M.B. gave very explicit details regarding the sexual abuse she had endured by her father. T. 169-74, T. 325-41.

Bishop was arrested on April 18, 2006. T. 313. On September 27, 2006, an Attala County Circuit Court jury convicted Bishop of one count of sexual battery and one count of fondling. C.P. 322. He was sentenced to thirty years on Count I and fifteen years on Count II, with the sentences

running consecutively. C.P. 326-27.

### **SUMMARY OF THE ARGUMENT**

The trial court properly admitted M.B.'s out-of-court statements through the testimony of Christie and Donald. The trial court conducted a pretrial hearing and conducted an M.R.E. 803(25) analysis. The court found that M.B. was unavailable to testify as a witness, her statements bore substantial indicia of reliability, and there was evidence to corroborate the acts in question. Bishop had failed to show that the trial court abused its discretion in admitting the testimony in question.

Brenda Donald was properly tendered as an expert in child therapy related to sexual abuse. The trial court performed its gate-keeping duties in determining that Donald's testimony was both relevant and reliable in accordance with M.R.E. 702. Bishop has failed to show that the trial court's findings were clearly erroneous.

Bishop's last argument is that he was denied his right to confrontation. His argument is wholly meritless, as the hearsay statements of which he complains are nontestimonial hearsay statements and outside the realm of confrontation clause violations.

### **ARGUMENT**

#### **I. THE TRIAL COURT PROPERLY ADMITTED M.B.'S OUT-OF-COURT STATEMENTS UNDER M.R.E. 803(25).**

At a pretrial hearing, the trial court ruled that Christie and Donald could testify as to M.B.'s out-of-court statements. The trial court ruled that Dr. Trudi Porter, a forensic interviewer, could not testify as to M.B.'s out-of-court statements, because they were testimonial in nature.

"The admission of testimonial evidence is within the sound discretion of the trial court, which will be found in error only if the ruling was an abuse of discretion." **Larson v. State**, 957 So.2d 1005, 1011 (¶25) (Miss. Ct. App. 2006). In accordance with Rule 803(25) of the Mississippi

Rules of Evidence, the trial court found that M.B.'s statements bore substantial indicia of reliability, M.B. was unavailable as a witness, and there was corroborative evidence of the act.<sup>2</sup> Accordingly, the trial court cannot be said to have abused its discretion in allowing Christie and Donald to testify as to M.B.'s out-of-court statements.

**Substantial indicia of reliability**

The following factors must be considered in determining whether the statements in question bear substantial indicia of reliability:

(1) whether there is an apparent motive of declarant to lie; (2) the declarant's general character; (3) whether more than one person heard the statements; (4) whether the statements were spontaneous; (5) the timing of statements; (6) the relationship between the declarant and the witness; (7) the possibility of faulty recollection by the declarant is remote; (8) certainty that the statements were made; (9) the credibility of the witness testifying about the statements; (10) the declarant's age or maturity; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge and experience made it unlikely that the declarant fabricated.

**Elkins v. State**, 918 So.2d 828, 833 (¶14) (Miss. Ct. App. 2005). A trial court's failure to specifically address these factors does not constitute error so long as the record supports a finding that the victim's statements bore indicia of reliability. *Id.* at 834 (¶18) (citing **Sharp v. State**, 862 So.2d 576, 580 (¶15) (Miss. Ct. App. 2004)). "The circuit court must ultimately determine 'whether the child declarant was particularly likely to be telling the truth when the statement was made.'" **Larson**, 957 So.2d at 1012 (quoting **Marshall v. State**, 812 So.2d 1068, 1075 (¶21)).

The evidence which supports the trial court's finding that M.B.'s statements bore substantial indicia of reliability is as follows. M.B.'s initial revelation was a spontaneous statement made to her mother. T. 49. Dr. Porter testified that M.B.'s statements to her were spontaneous and that M.B.

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<sup>2</sup>It was undisputed that M.B. was a child of tender years, as she was four years old at the time the statements were made.

did not appear to be coached. T. 16. Dr. Porter opined that although M.B. could not verbally demonstrate that she knew the difference between the truth and a lie, she was reliable in that her statements to her mother, Porter, and Donald have been consistent. T. 44. Donald also testified that although M.B. revealed more details to her over the course of ten sessions because she had established a good rapport with M.B. and earned her trust, M.B.'s allegations have been consistent. T. 177, 189. Donald explored non-abuse explanations for M.B.'s statements, but M.B. remained steadfast in her allegations that her father had sexually abused her. T. 191. Donald further stated that M.B.'s statements met the criteria for a credible statement of abuse, according to criteria established by American Professional Society for the Abuse of Children.

T. 179. Donald, who has worked with hundreds of sexually abused children for the past thirty years, ultimately opined that M.B.'s statements were consistent with a child who has been sexually abused. T. 182.

The record contains ample evidence to support the trial court's finding that M.B. statements bore substantial indicia of reliability.

#### **M.B.'s unavailability**

After hearing testimony from Dr. Porter and Christie, the trial court ruled that M.B. was unavailable to testify, considering the likelihood that forcing the four-year-old to speak out against her father in his presence in open court would traumatize her. T. 70-70. A child is unavailable as a witness where there is a "substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused." M.R.E. 804(a)(6). Dr. Porter's testimony regarding the likelihood of trauma if M.B. were forced to testify in open court was uncontradicted. As such, the trial court cannot be found to have abused its discretion in finding that M.B. was unavailable to testify in accordance with M.R.E.

804(a)(6).

**Corroborating evidence**

The trial court found that corroborative evidence of the acts existed in Bishop's admission that he had masturbated in M.B.'s presence and ejaculated on her. T. 225. The comment to M.R.E. 803(25) states, "Corroboration required for admissibility under M.R.E. 803(25)(b)(2) need not be eyewitness testimony or physical evidence, but may include confessions, doctor's reports, inappropriate conduct by the child, and other appropriate expert testimony." In addition to Bishop's admission, other corroborating evidence includes the fact that M.B. possessed sexual knowledge well beyond that of a typical four year old. M.B. was able to describe the size and shape of Bishop's penis. T. 169. She described a sexual device that Bishop used, saying, "He put a toy that makes noise in his booty." T. 170. She demonstrated in child-like terms that she understood the concept of ejaculation. T. 173. She also described the sensation that she felt when Bishop performed oral sex on her by saying that "it tickled." T. 173. Much more graphic testimony goes on for many pages, but suffice it to say that M.B.'s understanding of sexuality was both extensive and unusual for a four year old. Donald's testimony regarding M.B.'s sexual knowledge along with Bishop's admission corroborate that acts which M.B. described.

**II. BRENDA DONALD'S TESTIMONY SATISFIED M.R.E. 702 AND DAUBERT.**

This honorable Court will not disturb a trial court's decision to admit expert testimony unless the trial court's determination was clearly erroneous. **Cowart v. State**, 910 So.2d 726, 729 (¶11) (Miss. Ct. App. 2005). On appeal, Bishop challenges the trial court's decision to admit Brenda Donald's expert testimony.

The Mississippi Supreme Court adopted the modified **Daubert** standard for determining the admissibility of expert testimony in **Mississippi Transportation Commission v. McLemore**, 863

So.2d 31 (Miss. 2003). The **McLemore** court stated that the **Daubert** factors, which were formulated to assess the reliability of scientific testimony, may not be applicable in every case because “[t]oo much depends upon the particular circumstances of the particular case at issue.” **McLemore** at 37 (¶13) (quoting **Kumho Tire Co. v. Carmichael**, 526 U.S. 137, 151 (1999)). Because the **Daubert** factors were meant to be helpful rather than definitive, they should be considered only when “they are reasonable measures of the reliability of expert testimony.” **Mooneyham v. State**, 915 So.2d 1102, 1107 (Miss. Ct. App. 2005). Accordingly, “the trial court has considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” **McLemore** at 37 (¶13).

The **McLemore** court explained that the modified **Daubert** standard consists of a two-part test for determining whether expert testimony is reliable under M.R.E. 702. **Id.** at 38 (¶16).

First, the court must determine that the expert testimony is relevant—that is, the requirement that the testimony must assist the trier of fact means the evidence must be relevant. Next, the trial court must determine whether the proffered testimony is reliable. Depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the **Daubert** analysis is a flexible one. **Daubert** provides an illustrative, but not an exhaustive, list of factors that trial courts may use in assessing the reliability of expert testimony.

**Id.** (internal citations omitted).

The trial court correctly found that Donald’s testimony was relevant in that it provided the jury with the context in which M.B.’s statements regarding the sexual abuse were made, that is, during the course of therapy. The court was also correct in finding that Donald’s testimony was reliable in that Donald has been a child therapist for nearly thirty years, has treated hundreds of children who have been sexually abused, and has been qualified as an expert numerous times. T. 147-67. Additionally, the trial court correctly noted that the only expert opinion Donald rendered

was that M.B.'s statements were consistent with a child who has been sexually abused. T. 182, 218.

On appeal, Bishop does nothing more than attempt to characterize child therapy as a pseudoscience by improperly referencing and attaching a random article which is not part of the record.<sup>3</sup> The remainder of his argument is a weak attempt to show that his expert, Dr. Huffman, was superior to Donald. However, none of these opinions are relevant in determining whether Donald's testimony was relevant and reliable. The trial court found Donald's testimony to be both relevant and reliable, and Bishop has failed to show that the trial court's determination was clearly erroneous.

### **III. BISHOP'S RIGHT TO CONFRONTATION WAS IN NO WAY VIOLATED.**

Bishop claims that his right to confrontation was violated when the trial court admitted M.B.'s out-of-court statements through Christie and Donald's testimony. However, hearsay statements offend a defendant's constitutional right to confrontation only when the statements in question constitute testimonial hearsay. **Bailey v. State**, 956 So.2d 1016, 1027 (¶33) (Miss. Ct. App. 2007). "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does [**Ohio v. Roberts**, 448 U.S. 56 (1980),] and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." **Rubenstein v. State**, 941 So.2d 735, 754 -55 (¶47) (Miss. 2006) (quoting **Crawford v. Washington**, 541 U.S. 36, 68 (2004)).

"Testimonial statements are those reasonably expected to be used 'prosecutorally,' such as confessions, affidavits, custodial police examinations, and depositions." **Id.** at 754 (¶46). This definition is the precise reason that the trial court refused to allow Dr. Porter to testify, but did allow

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<sup>3</sup>"This Court will not consider matters that do not appear in the record, and it must confine its review to what appears in the record." **Pulphus v. State**, 782 So.2d 1220, 1224 (¶15)(Miss. 2001).

Donald to testify. The court found that "the child was sent to Dr. Porter by law enforcement for the purpose of gathering evidence against Mr. Bishop." T. 71. The court found that Donald became involved strictly for the purpose of treating M.B. through therapy and not for any prosecutorial purpose. T. 209. Accordingly, the trial court properly allowed Donald to testify as to M.B.'s nontestimonial hearsay statements. Further, M.B.'s spontaneous statement to her mother cannot be characterized as testimonial hearsay.



### CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Bishop's convictions and sentences.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 1 day of August, 2007.

  
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