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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL GOLDMAN — APPELLANT

VS. — NO. 2006-KA-2100

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STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

I. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF CONSTRUCTIVE AMENDMENT OF THE INDICTMENT ON APPEAL; HOWEVER, NOTWITHSTANDING THE BAR, ANY CONSTRUCTIVE AMENDMENT TO THE INDICTMENT WAS NOT SUBSTANTIVE AND THEREFORE DOES NOT CONSTITUTE REVERSIBLE ERROR.

II. DEFENDANT FAILED TO MEET THE REQUIREMENTS OF THE STRICKLAND TEST AND THEREFORE DID NOT ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE ALLEGED CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

III. CROSS-EXAMINATION OF THE VICTIM REGARDING HER PAST SEXUAL RELATIONSHIP WITH THE DEFENDANT WAS PROPERLY EXCLUDED.

IV. DEFENDANT FAILED TO MEET THE REQUIREMENTS OF THE STRICKLAND TEST AND THEREFORE DID NOT ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE CROSS-EXAMINATION OF THE VICTIM ABOUT HER PAST SEXUAL RELATIONSHIP WITH THE DEFENDANT.

V. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE VICTIM'S MEDICAL RECORDS; HOWEVER, NOTWITHSTANDING THE BAR, THE RECORDS WERE PROPERLY ADMITTED UNDER MISSISSIPPI RULE OF EVIDENCE 803(4).

VI. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING HIS SIXTH ISSUE ON APPEAL AND FURTHERMORE DEFENDANT FAILED TO SHOW HOW THIS ALLEGED ERROR PREJUDICED HIS CASE.

VII. THERE CAN BE NO CUMULATIVE ERROR AS THERE ARE NO ERRORS IN ANY OF THE ISSUES DEFENDANT RAISED.

STATEMENT OF FACTS

On the night of May 30, 2003, sixteen-year-old Ebony Beal was alone at her mother's house while her mother was at work. (Transcript p. 107 - 108). She went to sleep between 10:00 p.m. and 11:00 p.m. (Transcript p. 108). Around 1:00 a.m. she received a phone call from a male who asked if her mother, Tina Beal, was home. (Transcript p. 108). She replied that she was not and went back to sleep. (Transcript p. 108). She then received a second call from the same male asking if her brother was home and she replied that he was not. (Transcript p. 108). She checked the caller i.d. and then got back into bed. (Transcript p. 109). Later she noticed shadows and heard noises. (Transcript p. 110). She called 9-1-1 and was told to stay on the line and that help was on the way. (Transcript p. 110). She saw a person come toward her bedroom door with a knife and then the person disappeared. (Transcript p. 111). The person reappeared holding an orange blanket in front of his face. (Transcript p. 111). Ebony testified that "the person came back into the same spot, and they didn't hesitate no time to just come around the room with the cover and the knife in the right hand." (Transcript p. 111).

Ebony jumped up, screamed, and begged the person not to stab her. (Transcript p. 112). The man began struggling with her and took off her pants and underwear. (Transcript p. 113). He tried to force her to perform oral sex on him but she was able to resist. (Transcript p. 113). Ebony described it as "he was forcing, he was climbing himself on me forcing his penis towards my face." (Transcript p. 114). He threatened to kill her, choked her, and cut her leg. (Transcript p. 137). He

then began having sexual intercourse with her and the knife fell. (Transcript p. 114). She retrieved the knife, but he was able to get it back. (Transcript p. 114). While trying to get the knife back from her, he cut her and put a pillow on her face. (Transcript p. 114). Shortly afterward, the police came in the room. (Transcript p. 115). She was then able to identify the person as the Defendant, Michael Goldman [hereinafter "Goldman"]. (Transcript p. 115).

When the officers arrived they saw Goldman on top of Ebony. (Transcript p. 147 and 177). When the officers came into the bedroom, Goldman stood up and the investigators could see that his penis was erect and had a discharge on it. (Transcript p. 148 and 178). Goldman later told investigators that he was drunk, that he "fucked up," and that he made a mistake. (Transcript p. 149 and179).

Goldman was tried and convicted of Count I - burglary of a dwelling, Count II - sexual battery, and Count III - aggravated assault. (Record p. 44). He was sentenced to serve a term of twenty-five years in the Mississippi Department of Corrections for Count I. He was sentenced to serve thirty-years for Count II which will run concurrently to the sentence for Count I. He was sentenced to serve twenty-years for Count III which will run consecutive to the sentences in Count I and II. (Record p. 45). He must also register as a sex offender. (Record p. 45).

SUMMARY OF ARGUMENT

Goldman is procedurally barred from raising the issue of constructive amendment of the indictment on appeal as there was no contemporaneous objection made at trial and as the issue was not raised in his motion for new trial. Notwithstanding the bar, any constructive amendment to the indictment was not substantive and therefore does not constitute reversible error. Also, Defendant did not establish that he received ineffective assistance of counsel with regard to the alleged constructive amendment of the indictment in that he failed to meet the requirements of the *Strickland*

test.

Cross-examination of the victim regarding her past sexual relationship with the Defendant was properly excluded. Again, Defendant failed to meet the requirements of the *Strickland* test and therefore did not establish that he received ineffective assistance of counsel with regard to the cross-examination of the victim about her past sexual relationship with the Defendant.

Defendant is procedurally barred from raising the issue of whether the trial court erred in allowing into evidence the victim's medical records as the objection made at trial waived the objection on the grounds set forth in Defendant's brief and as the issue was not set forth in Defendant's motion for new trial. However, notwithstanding the bar, the records were properly admitted under Mississippi Rule of Evidence 803(4).

Defendant is procedurally barred from raising his sixth issue on appeal as there was no contemporaneous objection made at trial and as the issue was not raised in his motion for new trial. Furthermore, Defendant failed to show how this alleged error prejudiced his case.

There can be no cumulative error as there are no errors in any of the issues Defendant raised.

ARGUMENTS

I. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF CONSTRUCTIVE AMENDMENT OF THE INDICTMENT ON APPEAL; HOWEVER, NOTWITHSTANDING THE BAR, ANY CONSTRUCTIVE AMENDMENT TO THE INDICTMENT WAS NOT SUBSTANTIVE AND THEREFORE DOES NOT CONSTITUTE REVERSIBLE ERROR.

Goldman argues that "the trial court erred in allowing the jury instruction on count three to constructively amend the indictment to not only change the method of the assault but also the necessity of proving any injury." (Appellant's Brief p. 8). However, Goldman is procedurally barred from raising the issue on appeal as no contemporaneous objection was made and as the issue was

not raised in his motion for new trial.[1] With regard to failure to make a contemporaneous objection, this Court has previously held:

> "It is axiomatic that a litigant is required to make a timely objection." *Smith v. State*, 797 So.2d 854, 856(¶ 7) (Miss.2001) (citing *Barnett v. State*, 725 So.2d 797, 801(¶ 23) (Miss.1998)). The failure to make a contemporaneous objection, serves as a waiver of any error. *Id.* Thus, the failure to make a timely objection serves as a procedural bar in this case.

Washington v. State, 957 So.2d 426, 429 (Miss. Ct. App. 2007). *See also Davis v. State,* 684 So.2d 643, 659 (Miss. 1996) (holding that the defendant "did not object to Instruction S-3 on the grounds that a variance existed between the indictment and the instruction; therefore, he is procedurally barred."). Additionally, Goldman did not raise the issue in his motion for new trial. "Questions will not be decided on appeal which were not presented to the trial court and that court given an opportunity to rule on them." *Stringer v. State*, 279 So.2d 156, 158 (Miss. 1973). "In other words, the trial court cannot be put in error, unless it has had an opportunity of committing error." *Id.*

Notwithstanding the bar, Goldman is not entitled to a reversal of his conviction and sentence as he contends. Goldman argues that Jury Instruction No. 8 had the "effect of amending the indictment." (Appellant's Brief p. 8). This Court noted in *Harris v. State*, that "it is not error for jury instructions to reflect a constructive amendment to an indictment." 830 So.2d 681, 684 (Miss. Ct. App. 2002). Furthermore, the Mississippi Supreme Court has held:

> Not all variances between the indictment and instructions constitute a constructive amendment, nor do they rise to plain error. The central question is whether the variance is such as to substantially alter the elements of proof necessary for a conviction.

---

[1] Goldman's motion for new trial is not in the record. However, the transcript of the hearing on the motion indicates that the only two issues raised in the motion were that the verdict was against the weight of the evidence and that the trial court erred in refusing to allow cross-examination of the victim regarding previous sexual relations with the defendant. (Transcript p. 321 - 327).

Bell v. State, 725 So.2d 836, 855 (Miss. 1998). In this regard, the Court set forth the following guidelines:

> It is well settled in this state that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. (*Citations omitted*). The test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made. (*Citations omitted*).

Spann v. State, 771 So.2d 883, 898 (Miss. 2000).

Goldman first argues that the indictment charged him with causing or attempting to cause serious bodily injury by "striking and choking Ebony." (Appellant's Brief p. 9). He then argues that there was no evidence that he did so and that "this absence of evidence provided [Goldman] a defense to the charges contained in count three." (Appellant's Brief p. 9 - 10). However, there was evidence that he struck and choked Ebony. (Transcript p. 137). Further, Goldman notes that the jury instruction allowed the jury to convict him if he "caused or attempted to cause bodily injury with a knife." (Appellant's Brief p. 10). Again there was evidence that he did so. (Transcript p. 114). Therefore, in either circumstance, his defense was that he did not cause or attempt to cause any injury serious or otherwise to Ebony. However, the evidence presented at trial illustrated that he struck (transcript p. 137), choked (transcript p. 137), threatened Ebony with a knife (transcript p. 114 and 137), and in fact, injured Ebony with a knife (transcript p. 117). Thus his defense did not change and failed regardless.

Goldman also argues that "the jury under this instruction need not find that Goldman caused any injury." (Appellant's Brief p. 10). While Goldman is correct in stating that the jury instruction required only that the jury find that he "attempt[ed] to cause" injury, the indictment also gave notice that the State intended to prove that he "attempt[ed] to cause" bodily injury as well. Thus, under

either circumstance, attempt to cause injury was all that was required and Goldman's defense that he did not cause or attempt to cause any injury, serious or otherwise, remained intact. At no point, was the State required to show that Ebony suffered serious injury. The State only had to show that Goldman attempted to cause injury. As trial courts are allowed to amend indictments "if the amendment is immaterial to the merits of the case and the defense will not prejudiced by the amendment," this issue is without merit. *Smith v. State*, 725 So.2d 922, 928 (Miss. Ct. App. 1998) (quoting *Eakes v. State*, 665 So.2d 852, 859 (Miss. 1995)).

II. DEFENDANT FAILED TO MEET THE REQUIREMENTS OF THE STRICKLAND TEST AND THEREFORE DID NOT ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE ALLEGED CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

Goldman claims that his "trial counsel was ineffective for failing to object to the constructive amendment of the indictment." (Appellant's Brief p. 12). While a defendant may raise the issue of ineffective assistance of counsel on direct appeal, "this Court may determine the merits of the claim only when '(a) ... the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by the trial judge able to consider the demeanor of witnesses, etc. are not needed.'" *Clayton v. State,* 946 So.2d 796, 803 (Miss. Ct. App. 2006). **"A conclusion that the record affirmatively shows ineffectiveness of constitutional dimensions is equivalent to a finding that the trial court should have declared a mistrial or ordered a new trial *sua sponte*."** *Id.* (citing *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. Ct. App.1999) (*Emphasis added*). The record in this case does not demonstrate that the trial court should have declared a mistrial or ordered a new trial *sua sponte* because of the quality of defense counsel's representation of Goldman and, therefore, does not support a claim of ineffective assistance of counsel. With regard to ineffective assistance of counsel

claims, the Mississippi Supreme Court has held the following:

> In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney's overall performance was deficient and (2) that the deficient performance, if any, was so substantial as to prejudice the defendant and deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Furthermore, there is a "strong but rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Walters v. State*, 720 So.2d 856, 868 (Miss.1998). To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Schmitt v. State*, 560 So.2d 148, 154 (Miss.1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Only where it is reasonably probable that, but for the attorney's errors, the outcome of the trial would have been different will this Court find the counsel's performance was deficient." *Id.*

Smiley v. State, 815 So.2d 1140, 1146-47 (Miss.2002) (quoting *Gary v. State*, 760 So.2d 743, 753 (Miss.2000)) (*Emphasis added*). Moreover, this Court held that "[i]n addition to the presumption that counsel's conduct is reasonably professional, there is a presumption that counsel's decision are strategic in nature, rather than negligent." *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002).

Therefore, in order for a defendant to prevail on a claim of ineffective assistance of counsel raised on direct appeal, the defendant must show "from the record that his counsel's performance was deficient, and that the deficient performance prejudiced him." *Walker v. State,* 823 So.2d 557, 563 (Miss. Ct. App. 2002) (citing *Strickland*, 466 U.S. at 686) (*emphasis added*). This determination is made based on the "totality of the circumstances." *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995) (citing *Frierson v. State*, 606 So.2d 604, 608 (Miss. 1992)). "The target of appellate scrutiny in evaluating the deficiency and prejudice prongs of *Strickland* is counsel's 'over-all' performance." *Id.*

Accordingly, Goldman must, not only show that his counsel was deficient in the areas he

alleged, but he also must show how these alleged deficiencies prejudiced his case. In order to prove prejudice, Goldman must show from the record that his counsel's "errors were of such a serious magnitude as to deprive the defendant of a fair trial because of a reasonable probability that, but for counselor's unprofessional errors, the results would have been different." *Cole*, 666 So.2d at 775 (quoting *Martin v. State*, 609 So.2d 435, 438 (Miss. 1992)). Goldman has failed to meet this burden.

Goldman fails to show, from the record, how his counsel's failure to object to the jury instruction would have changed the outcome of his case. First, as set forth above, the instruction did not substantively change the indictment and therefore was properly allowed. Second, there is nothing in the record to show that even if the instruction were objected to and refused, that Goldman would not have been convicted of aggravated assault. As set forth in detail above, the evidence clearly shows that Goldman, at the very least, attempted to cause bodily injury to Ebony by striking her, choking her, and threatening her with a knife. Thus, Goldman has failed to show that he was prejudiced by his attorney's alleged deficient performance. Thus, his second issue is without merit.

III. CROSS-EXAMINATION OF THE VICTIM REGARDING HER PAST SEXUAL RELATIONSHIP WITH THE DEFENDANT WAS PROPERLY EXCLUDED.

Goldman also argues that "the trial court erred in refusing to allow the defendant to cross-examine Ebony Neal about her past sexual relations with the defendant." (Appellant's Brief p. 13). "The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal." *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)). "When the trial court stays within the parameters of the Rules of Evidence, the decision to exclude or admit evidence will be afforded a high degree of deference." *Id.*

When the issue was before the trial judge, he responded that:

> It looks like to me that, first of all, Ms. Palmer, there has not been a compliance with the requirements under 412(c). But I will tell you, quite frankly, even if I were to have found there was compliance, I don't believe this element, I mean this type of testimony would be relevant. And I say that - - well, first of all, and even if I were to have found that that type of testimony would have been relevant, I believe I would have excluded it under 403, because I believe any probative value would have been substantially outweighed by the unfair prejudice. And the reason I say that is, even if there had been a prior sexual relationship between the defendant and the victim, Ebony Beal, it's very clear on that tape that she was not consenting; and I believe that it would be confusing to the jury to say that because - - to allow a defendant to make an argument that, because she had sex with him before or consented, that that is a defense to him coming in and committing sexual battery at knife point. I just believe that would be unfairly prejudiced. And any probative value would have been outweighed by that. First of all, the requirements of 412 have not been complied with. But even if they had been complied with, I don't believe that evidence is relevant. And even if it was relevant, I believe the probative value would be substantially outweighed by the unfair prejudice, presenting that evidence to the jury to allow them to possibly make a decision that prior consent meant that this situation would have been consensual, and it's clear from the tape that it wasn't to me.

(Transcript p. 216-217). The testimony was properly excluded on all three grounds articulated by the trial judge. Mississippi Rule of Evidence 412 states in pertinent part as follows:

> * * *
> (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:
> * * *
> (2) Admitted in accordance with subdivision (c) hereof and is evidence of
> * * *
> (B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which a sexual offense is alleged;
> * * *
> (c) (1) If the person accused of committing a sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior or evidence of past false allegations made by the alleged victim, the accused shall make a written motion to the offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made a later date, including during trial, if the court determines either that the evidence is newly

> discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.
>
> * * *
>
> (3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.
>
> * * *

First, Goldman failed to comply with Mississippi Rule of Evidence 412(c) which requires that the defendant make a written motion to the court no later than fifteen days of trial requesting leave to offer evidence specific instances of the victim's past sexual behavior. On that basis alone, the evidence was properly excluded. *See Levy v. State*, 724 So.2d 405 (Miss. Ct. App. 1998) and *Aguilar v. State*, 955 So.2d 386 (Miss. Ct. App. 2006).

The trial court also noted, however, that regardless of whether the requirements of Rule 412(c) were met, the testimony should be excluded as it was irrelevant and more prejudicial than probative. This Court has previously upheld a trial court's decision that evidence of prior sexual relations between a victim and defendant was not relevant and more prejudicial than probative noting that "[a]ll that was relevant regarding sexual relations at this trial was whether the victim consented to the shocking abuses visited upon him on [the day in question]." *Fuqua v. State,* 938 So.2d 277, 282 -283 (Miss. Ct. App. 2006). As noted by the trial judge during the hearing on the motion for new trial, "just because this defendant had sex with the victim before, it wasn't probative on any consent she would have given . . . and the testimony was that . . . he went through the window with a knife and got in bed with her." (Transcript p. 326). Thus, the trial judge did not abuse his discretion in refusing to allow the testimony. As such, Goldman's third issue is without merit.

IV. DEFENDANT FAILED TO MEET THE REQUIREMENTS OF THE STRICKLAND TEST AND THEREFORE DID NOT ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE CROSS-EXAMINATION OF THE VICTIM ABOUT HER PAST SEXUAL RELATIONSHIP WITH THE DEFENDANT.

Goldman alleges that his "trial counsel was ineffective in failing to give proper notice so as to allows the Defendant to put on evidence of a previous sexual encounter with Ebony Neal." (Appellant's Brief p. 16). As set forth in detail above, Goldman must, not only show that his counsel was deficient in the failing to give proper notice, but he also must show how this alleged deficiency prejudiced his case. In order to prove prejudice, Goldman must show from the record that his counsel's "errors were of such a serious magnitude as to deprive the defendant of a fair trial because of a reasonable probability that, but for counselor's unprofessional errors, the results would have been different." *Cole*, 666 So.2d at 775 (quoting *Martin v. State*, 609 So.2d 435, 438 (Miss. 1992)). Again, Goldman has failed to meet this burden in that he wholly failed to show that his counsel's failure to timely file the 412(c) motion prejudiced his case. *See Wiltcher v. State,* 724 So.2d 933, 936-37 (Miss. Ct. App. 1998) (holding that there was nothing to suggest that the admission of excluded evidence would have changed the outcome of the verdict and therefore no prejudice shown). The record clearly indicates that the trial judge would have excluded the testimony regardless of the late notice as the testimony was not relevant and more prejudicial than probative. (Transcript p. 216). Thus, the outcome of the trial would not have been altered even if trial counsel had given timely notice. As such, Goldman's fourth issue is without merit.

V. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE VICTIM'S MEDICAL RECORDS; HOWEVER, NOTWITHSTANDING THE BAR, THE RECORDS WERE PROPERLY ADMITTED UNDER MISSISSIPPI RULE OF EVIDENCE 803(4).

Goldman argues that the "trial court erred in allowing the prosecution to admit Ebony's medical records" as they contained "Ebony's out-of-court statement of what happened to her starting from the phone calls asking Ebony whether her mother and brother were home to the police kicking in the door." (Appellant's Brief p. 17). However, Goldman is procedurally barred from raising this issue on appeal as he did not object to the admittance of the records on the grounds articulated in his brief and as the issue was not raised in his motion for new trial.

"An objection must be made with specificity, and failure to articulate the grounds for objection constitutes a waiver of the alleged error." *Ross v. State*, 954 So.2d 968, 987 (Miss. 2007). Further, "an objection on one or more specific grounds constitutes a waiver of all other grounds." *Morgan v. State*, 741 So.2d 246, 253 (Miss. 1999) (quoting *Stringer v. State*, 279 So.2d 156, 158 (Miss. 1973)). In the case at hand, when the State moved to admit the records into evidence, the following exchange took place:

Mr. McBride (Attorney for State):	Your Honor, at this time, we would ask for that narrative to be entered into evidence.
The Court:	Any objections?
Ms. Palmer (Attorney for Goldman):	Your Honor, I would just object because she has not been qualified as SANE expert or nurse in this matter.

(Transcript p. 202). Goldman then argues in his Brief that the records inadmissible as a "prior consistent statement." (Appellant's Brief p. 18). At no point during trial did Goldman mention "prior consistent statement" as an objection. This Court has previously held that a party cannot

make a specific objection at trial and then present "an entirely different and wholly unrelated objection" on appeal. *Stringer*, 279 So.2d at 158. This rule is necessary in that permitting "litigants to hold back objections until on appeal would mean that costly new trials would be had where valid objections could have been sustained during the trial." *Id.* Moreover this Court in *Swington v. State*, after noting that an objection on one specific ground waives all other grounds, held that:

> there are threes basic considerations which underlie the rule regarding specific objections. It avoids costly new trials. *Boring v. State*, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. *Heard v. State*, 59 Miss. 545 (Miss.1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. *Boutwell v. State*, 143 So. 479 (Miss. 1932).

742 So.2d 1106, 1110 (Miss. 1999) (quoting *Oates v. State*, 421 So.2d 1025, 1030 (Miss. 1982)).

Additionally, Goldman did not raise the issue in his motion for new trial. As noted above, "[q]uestions will not be decided on appeal which were not presented to the trial court and that court given an opportunity to rule on them." *Stringer*, 279 So.2d at 158. "In other words, the trial court cannot be put in error, unless it has had an opportunity of committing error." *Id.*

Notwithstanding the bar, the records were properly admitted into evidence. "The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal." *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)). "When the trial court stays within the parameters of the Rules of Evidence, the decision to exclude or admit evidence will be afforded a high degree of deference." *Id.* The trial judge allowed the records into evidence under Mississippi Rule of Evidence 803(4). (Transcript p. 202). Mississippi Rule of Evidence 803(4) states as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> * * *

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness. For the purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health.

(*Emphasis added*). As noted in the comment to the rule, statements about cause of the medical problem are admissible. Accordingly, the statements Ebony made to the nurse at the hospital after being attacked are admissible. *See Madere v. State,* 794 So.2d 200, 213-14 (Miss. 2001). Thus, Goldman's fifth issue is without merit.

VI. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING HIS SIXTH ISSUE ON APPEAL AND FURTHERMORE DEFENDANT FAILED TO SHOW HOW THIS ALLEGED ERROR PREJUDICED HIS CASE.

Goldman argues that "the trial court erred in meeting with the jury prior to sentencing." (Appellant's Brief p. 19). However, this issue is procedurally barred in that no contemporaneous objection was raised at trial and as the matter was not addressed in Goldman's motion for new trial. *See Washington v. State,* 957 So.2d 426, 429 (Miss. Ct. App. 2007) and *Stringer v. State*, 279 So.2d 156, 158 (Miss. 1973).

Furthermore, Goldman fails to establish how this alleged error prejudiced him. First, there is no indication on the record that the trial judge discussed the merits of the case with the jury or received any feedback whatsoever from the jurors regarding the details of the case. In fact, the judge made the following statement during his comments before sentencing: "And again, I don't know what the jury's thoughts were in that process or whether or not they picked up on that." (Transcript p. 315). This statement indicates that the judge did not discuss the details of the case with the jury. As there is no indication from the record that the judge discussed the details of the case with the jury

or that any discussions that he did have with the jury affected his decision with regard to sentencing, this issue is without merit.

VII. THERE CAN BE NO CUMULATIVE ERROR AS THERE ARE NO ERRORS IN ANY OF THE ISSUES DEFENDANT RAISED.

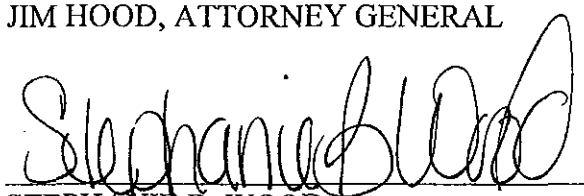
Goldman also claims that "the errors taken together are cause for a new trial." (Appellant's Brief p. 21). While this Court has recognized that several errors not individually sufficient to warrant a new trial can require reversal when taken together, that rule is not applicable where there is no error in any of the issues raised. *Rankin v. State,* 963 So.2d 1255, 1262 (Miss. Ct. App. 2007). Thus, there is no cumulative error and Goldman's seventh issue is without merit.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of the lower court as the lower court did not commit reversible error.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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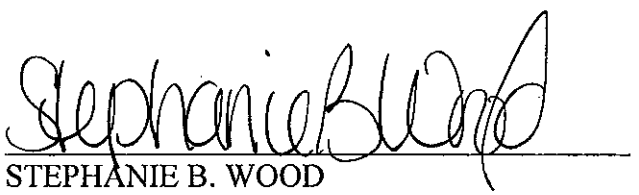
This the 22nd day of October, 2007.



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