IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI



KRYSTAL MARIE TESTON — APPELLANT

VS. — NO. 2007-KA-0353

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**KRYSTAL MARIE TESTON** **APPELLANT**

**vs.** **CAUSE No. 2007-KA-00353-COA**

**THE STATE OF MISSISSIPPI** **APPELLEE**

# BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

## STATEMENT OF THE CASE

This is an appeal against a judgement of the Circuit Court of Harrison County, Mississippi, Second Judicial District, in which the Appellant was convicted and sentenced for her four felonies of **DRIVING UNDER THE INFLUENCE**.

## STATEMENT OF FACTS

Mrs. Stacey Holloway Ross testified that she and her husband were driving in Interstate 10 in Harrison County, Mississippi at about twilight on 10 September 2004, traveling East. While doing so, she noticed a black Honda motorcar rapidly coming up from behind. This car was traveling at a considerably higher rate of speed than Ross and the other motorists around her. Mrs. Ross was driving at seventy - five miles per hour. Ross further noticed that the driver of the black Honda was driving in an aggressive manner.

The black Honda came up behind a brown Buick and began tailgating the Buick. The driver of the Buick did not speed up or change lanes. The driver of the Honda then backed off a

bit, and then sped up a bit behind the Buick, apparently in an effort to have the driver of the Buick give way. These actions by the driver of the black Honda alarmed Ross; she accelerated so as to put distance between herself and the Honda.

As soon as she did so, the driver of the Honda swerved sharply into Ross' lane and into the path of a sports utility vehicle. The driver of the sports utility vehicle swerved to the right as far as she could, and then swerved left. Apparently, the driver of this sports utility vehicle was unable to change lanes. In any event, after serving right, then left, the driver of the sports utility vehicle lost control; the vehicle slammed into a center cement median barrier and flipped at least once. The driver of the Honda went back into the its lane once she noticed the sports utility vehicle.

Mrs. Ross pulled over to the right - hand shoulder of the Interstate. The black Honda passed her and then stopped not far from Ross but in the center lane of the Interstate. The driver of the brown Buick, perhaps still blissfully unaware of the drama caused by the driver of the black Honda, drove on. ( R. Vol. 5, pp. 442 - 450).

Mrs. Ross, concerned that the driver of the Honda might flee the scene of the collision, asked her husband to write the Honda's license plate number down. The driver of the Honda then did a U - turn in the highway and drove back to the site of the crash, which was perhaps a quarter of a mile back. A passenger in the Honda got out. The driver then got out of the Honda. The driver was female. She wore short, dark hair and was short in stature. The driver then crossed the highway and went to the overturned sports utility vehicle. The woman was hysterical. ( R. Vol. 6, pp. 451 - 480).

Joshua David Miller was one of the occupants of the sports utility vehicle. He could not recall the crash. He was able to recall who was in the vehicle, though.

He was, at the time of the crash, a student at Mississippi College, his home then being in Pascagoula. His twin sister, Lindsay Carol Miller, was also a student at Mississippi College. Their younger brother was to have a birthday on the twelfth of September; Joshua and Lindsey wanted to go home for their brother's birthday.

They took several friends. One, Maksim Sisoev, a citizen of Uzebekistan, was Lindsay's romantic interest. Nicole Thurman was Lindsay's dormitory roommate. Beth Finch was a friend of Joshua. The group left Mississippi College for Pascagoula at about 4.00 or 4.30 on the afternoon of September 10th, Lindsay driving the Miller's sports utility vehicle.

In consequence of the crash, Joshua suffered three skull fractures, a lacerated spleen and a torn ligament in a knee. His sister, who was driving the sports utility vehicle, struck her head on the steering wheel and was killed. Beth Finch was ejected from the vehicle and was killed. Nicole Thurman suffered an injury to an eye and to a leg, but survived. The sports utility vehicle came to rest atop of Makim Sisoev, killing him. ( R. Vol. 6, pp. 485 - 497).

Nicole Thurman testified. She recounted the decision her friends and she made to drive to Pascagoula. Unlike Joshua, though, she had a clear recollection of the crash.

Lindsay was driving in the center lane of Interstate 10, heading East. She was driving at seventy or seventy-five miles per hour. All of a sudden, a car came flying out of nowhere, driving very close to the rear bumper of a car in the left lane. This car in the left lane was somewhat ahead of Lindsay. Nicole recalled that the speeding car was a black Honda Accord; she thought it was cute. The driver of the black Honda was driving in a "crazy, frantic, reckless" fashion.

The driver of the black Honda then slowed a bit. Then she suddenly surged into the center lane. Nicole said there was no time even to sound the horn. Everyone in Lindsay's car

screamed. Lindsay attempted to swerve a bit to the right to avoid the Honda, but there was another motorcar in the right lane. There was also a car behind and ahead of Lindsay, in the center lane.

The Honda sped away. Lindsay tried to swerve again to the left. At that point, Lindsay lost control of her vehicle. She slammed head - on into the concrete barrier. Nicole was knocked unconscious. When she regained consciousness, the sports utility vehicle was lying on its passenger side. She was lying on the ground. Lindsay was hanging over her and would not respond to her. Nicole called out for the others, but none answered.

Nicole was able to extricate herself. Lindsay then fell off of her. Nicole saw Maksim; he had been crushed. He was lying in a pool of blood, his head "smashed pretty good." She saw Beth "flopping rather like a dying fish, blood pouring from every opening in her head, noises from within her body. Joshua lay unconscious.

While waiting for ambulances to arrive, Nicole saw one woman praying, another person on a cell phone. At that point, the Appellant came up to her. She was screaming at Nicole. Some of what the Appellant said made sense, some did not. But the Appellant did tell her that she was sorry. The Appellant was very thin and looked sickly. The Appellant was falling over Nicole. The Appellant's behavior was highly abnormal. Some words did not make sense; those that did were repeated over and over again. A medical technician had to pull the Appellant off of Nicole. ( R. Vol. 7, pp. 605 - 630).

Officer Wesley Brantley of the Biloxi Police Department testified that he was summoned to the scene of an automobile crash at about 7.18 on the evening of 10 September 2004 at mile marker 40 on Interstate 10. His purpose at the scene was that of an accident reconstructionist.

Upon arriving at the site of the crash, Brantley noticed three vehicles on the side of I-10.

One of them was facing West in the Eastbound lane. Brantley approached the Appellant, asked her if she had witnessed the crash. She acknowledged that she had, and he asked her to write a narrative of it. He also asked the Appellant for her driver's license. He then went to the Ross' car and asked the same question. Mrs. Ross' driver's license had been taken by another officer. The Appellant admitted that she had been driving the black Honda.

After these preliminary contacts, Brantley made arrangements with other officers at the scene concerning the investigation of the crash. His part of it was to interview the witnesses. When he began speaking with the Appellant, he noticed that her speech was slurred, mumbling and confused, and that her eyes were dilated and glassy. While he did not detect the odor of alcohol, the way in which she responded to questions caused him to believe that she was impaired. The Appellant, speaking of what she had observed of the crash, stated that she, while watching the sports utility vehicle in her rear view mirror, noticed the sports utility vehicle as it flipped. She stated that she believed that the driver of the sports utility vehicle had no choice but to swerve because a car had come into her lane of traffic. When she turned to go back, an ambulance had arrived. She denied any involvement in the wreck.

Mrs. Ross, however, did tell Brantley that the Appellant's erratic, aggressive driving was the cause of the wreck.

As Brantley continued the investigation, he learned that the Appellant's driver's license was suspended. Accordingly, he arrested her for driving on a suspended license. The arrest occurred at 8.43 p.m. As Brantley was making arrangements to have the Appellant's Honda towed, the Appellant asked him whether she could get her medications from the car. Brantley found a bottle of Lorcet, the prescription indicating that it had been prescribed for the Appellant's passenger. The Appellant told Bradley that she had taken two Lorcets that day. She

also told him that she had taken a Xanax and a Goody's after the accident to calm her nerves.

Arriving at the police station, the Appellant consented to the taking of a blood sample. The sample was taken at 10.09 p.m. on the night of the crash. The Appellant took no medications between the time of her arrest and the time she gave the blood sample. The Appellant's demeanor at the time the blood sample was taken was the same as it was at the time she gave her statement about the crash. Her speech was slurred and she had a confused look about her.

An inventory was made of the contents of the Appellant's car. In it were found a bottle of Xanax containing forty three pills, a bottle of Soma containing sixty six pills, and two bottles of Lorcet, ninety pills in each. These were prescribed for the Appellant.

The Appellant was by herself for some thirty to forty-five minutes after Brantley's initial contact with her. ( R. Vol. 6, pp.507 - 573).

There was no alcohol in the Appellant's blood sample. There was a positive result for the presence of caffeine and hydrocodone. Xanax was not detected. ( R. Vol. 6 pp. 584 - 600).

Dr. Edward John Barbieri, a forensic toxicologist, testified that the Appellant's blood sample disclosed a level of hydrocodone of 110 nanograms per mililitre. To reach that level, the Appellant would have had to have taken about four of the largest Lorcet tablets. It was his opinion that a person having such a level of hydrocodone in his blood would be significantly impaired. It was his opinion that since the Appellant's blood sample showed that concentration of hydrocodone three hours after the wreck, the Appellant would have been impaired at the time of the wreck. The symptoms of slurred speech, difficulty in putting words together, confusion and disorientation would be expected from a person impaired by hydrocodone. ( R. Vol. 7, pp. 635 - 651).

The defense called Dr. Robert Ryan, who was qualified as an expert in the field forensic toxicology and pharmacology. It was his opinion that, given the level of hydrocodone in the Appellant's blood some three hours after the wreck, the level at the time of the wreck would have been very high, so high that he doubted that the Appellant could have functioned at all. He thought it would be very difficult for a person with such level to operate a motor vehicle.

He was of the view that the taking of two Lorcets could cause a person to reach the level detected in the Appellant's blood sample.

It was his view that hydrocodone is a sedative. Consequently, a person having a high concentration of the drug in his system would not be expected to be able to drive as aggressively as the Appellant, or act hysterically as she did after the wreck. He did not believe that the Appellant was impaired on account of hydrocodone at the time of the wreck. ( R. Vol. 7, pp. 690 - 726).

## STATEMENT OF ISSUES

**1. ARE THE VERDICTS SUPPORTED BY THE EVIDENCE; ARE THEY OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE SUCH THAT THE TRIAL COURT SHOULD HAVE GRANTED A NEW TRIAL?**

**2. DID THE TRIAL COURT ERR IN PERMITTING THE STATE'S TOXICOLOGIST TO GIVE HIS OPINION AS TO THE LEVEL OF HYDROCODONE IN THE APPELLANT'S BLOOD AT THE TIME OF THE WRECK AND THAT THE APPELLANT WAS IMPAIRED AT THE TIME OF THE WRECK?**

**3. DID THE TRIAL COURT ERR IN REFUSING ADMISSION TO EVIDENCE ONE OF THE APPELLANT'S STATEMENTS?**

**4. DID THE TRIAL COURT ERR IN PERMITTING THE STATE TO PROVE THAT THE APPELLANT WAS ARRESTED FOR DRIVING UNDER A SUSPENDED LICENSE AT THE SCENE OF THE WRECK?**

**5. DID THE TRIAL COURT ERR IN PERMITTING THE STATE TO PROCEED TO TRIAL ON COUNTS V - VIII OF THE INDICTMENT?**

**6. DID THE TRIAL COURT ERR IN FAILING TO GIVE A CIRCUMSTANTIAL EVIDENCE INSTRUCTION?**

**7. DID THE PROSECUTOR IMPROPERLY COMMENT ON THE FACT THAT THE APPELLANT DID NOT TESTIFY IN HIS OPENING STATEMENT AND SUMMATION?**

**8. WERE THE SENTENCES IMPOSED GROSSLY DISPROPORTIONATE WHEN COMPARED TO THE APPELLANT'S FELONIES?**

**9. DID THE TRIAL COURT ERR IN ADMITTING THE RESULTS OF THE BLOOD SAMPLE, ALLEGEDLY DRAWN IN VIOLATION OF MISS. CODE ANN. SECTION 63-11-8?**

## SUMMARY OF ARGUMENT

**1. THAT THE VERDICTS ARE SUPPORTED BY THE EVIDENCE; THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL ON THE GROUND THAT THE VERDICTS WERE OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE**

**2. THAT THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE'S EXPERT WITNESS TO TESTIFY TO HIS OPINION THAT THE APPELLANT WAS IMPAIRED AT THE TIME OF THE WRECK**

**3. THAT THE TRIAL COURT DID NOT ERR IN EXCLUDING THE APPELLANT'S STATEMENT TO THE BILOXI POLICE MADE AT THE BILOXI POLICE DEPARTMENT**

**4. THAT THE TRIAL COURT DID NOT ERR IN RULING THAT THE STATE WOULD BE PERMITTED TO PROVE THAT THE APPELLANT WAS ARRESTED FOR DRIVING UNDER A SUSPENDED LICENSE**

**5. THAT THE TRIAL COURT'S DISMISSAL OF COUNTS V THROUGH VIII OF THE INDICTMENT CURED SUCH ERROR, IF ANY, IN THE ALLEGATIONS OF THE INDICTMENT**

**6. THAT NO CIRCUMSTANTIAL EVIDENCE INSTRUCTION WAS WARRANTED**

**7. THAT THE PROSECUTOR DID NOT COMMENT ON THE APPELLANT'S FAILURE TO TESTIFY**

**8. THAT THE SENTENCES IMPOSED BY THE TRIAL COURT ARE NOT DISPROPORTIONATE**

**9. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING TEST RESULTS OF THE BLOOD SAMPLE**

## ARGUMENT

**1. THAT THE VERDICTS ARE SUPPORTED BY THE EVIDENCE; THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL ON THE GROUND THAT THE VERDICTS WERE OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE**

In considering the Appellant's First Assignment of Error, we bear in mind the standards of review applicable to them. *May v. State*, 460 So.2d 778 (Miss. 1984).

Briefly restated, the facts in support of the verdict, taken as true, together with all reasonable inferences therefrom, are these. The Appellant, driving a black Honda Accord, drove up behind a Buick very quickly. The Appellant's driving was described as being aggressive, erratic, crazy. Apparently frustrated with the driver of the Buick, the Appellant tried to pass him. Her attempt to change lanes to do so caused Lindsay Miller, the driver of the sports utility vehicle, to make a sudden veer toward the right. When she tried to correct it, she lost control of the vehicle, crashing into a concrete barrier. She and two others were killed; the other two passengers in the sports utility vehicle were injured.

The Appellant stopped her vehicle and returned to the scene of the crash. She approached Nicole Thurman, one of the survivors of the crash, and began screaming at her. Much of what the Appellant said did not make sense, but the Appellant did apologize. The Appellant at one point tried to grab Nicole. An emergency medical technician pulled the Appellant away.

When Officer Brantley arrived at the scene and spoke to the Appellant, she told him that she was a witness to the crash but denied involvement in it. While Brantley did not notice at first an indication of impairment, when he spoke to her later he did. The Appellant displayed confusion and slurred speech. When he found the Lorcet bottles in her car, he asked her whether

she had taken any that day, and she told him that she had taken two. She also said that, between the time of the accident and the time of her arrest, she had taken Xanax and a Goody's. She did not say that she had taken Lorcet in that time period at that time. It was also in evidence that the Appellant initially lied about her involvement in the crash. She indicated that she was simply a witness to the crash. She indicated that the driver of the sports utility vehicle might have been avoiding another motorcar, omitting the fact that it was she the driver was attempting to avoid.

The blood sample given by the Appellant showed a level of hydrocodone that would result in impairment. It was said that that level was a high level.

The crux of the Appellant's contention is that the State wholly failed to show that she was impaired or under the influence of hydrocodone at the time of the accident. While she does not go so far as to say that she took this drug after the accident, she would lead this Court into believing that perhaps she did.

Brantley testified that the Appellant told him that she had taken two Lorcet that day, and a Xanax and Goody's after the accident. The Appellant did not say that she had taken Lorcet after the accident while she was at the scene of the collision. Given the context of the statement and the distinction made by the Appellant – that she had taken two Lorcets that day but, after the accident, Xanax and a Goody – we think it is a fair and reasonable construction of her words to mean that she had taken the Lorcets before the accident.

Brantley's initial contact with the Appellant was very brief, taking no more time than it took to ask her if she had witnessed the wreck and to give her a form to fill out. ( R. Vol. 6, pp. 510 - 511). He spent more time with her at the second contact, and thus had more time to observe her demeanor. Her demeanor at the second contact was similar to what it had been when she was attempting to say something to Nicole Thurman immediately after the wreck.

In *Holloman v. State*, 820 So.2d 52 (Miss. Ct. App. 2002), the facts were that the defendant there caused a fatal accident, that measurable amounts of methamphetamine and cocaine were found in his blood, that he had been seen hours before the accident acting in an unusual manner, and that he had been driving on the wrong side of the road at the time of the accident. One argument raised on appeal by that defendant was that there was no proof that he was impaired or under the influence, for purposes of Miss. Code Ann. Section 63-11-30(1) (Rev. 2004). This court, however, held, that the fact that he had been seen acting in an erratic way prior to the accident, the fact that measurable amounts of drugs were found in his blood, and his reckless operation of his motor vehicle were facts sufficient to permit a reasonable jury to find that he was under the influence of a substance that impaired his ability to operate a motor vehicle. *Holloman*, at 58 - 59.

In the case at bar, the Appellant's operation of her motor vehicle was nothing if not very reckless. She drove up behind the Buick at a high rate of speed, stayed on the Buick's bumper, backing off and then driving up. She then tried to pass in the center lane, apparently without even looking to see if the lane change could be safely made. What the Appellant was doing driving in this way indicated violations of Miss. Code Ann. Section 63-3-619(1); 63-3-613(2); 63-3-509(2) (Rev. 2004). In any event, the Appellant admitted in summation that she was driving negligently. ( R. Vol. 8, pp. 758; 769).

Her conduct before the wreck was erratic – crazy, according to one witness. Her conduct immediately after the wreck was bizarre, as the testimony of Nicole Thurman establishes. The amount of hydrocodone in her blood was measurable indeed. Hydrocodone is a schedule II controlled substance. Miss. Code Ann. Section 41-29-115(a)(1)(x) (Rev. 2005).

As in *Holloman*, the State's evidence was entirely sufficient to create a jury question as to

whether the Appellant was under the influence of a substance that impaired her ability to operate a motor vehicle.

The Appellant, though, would have this Court believe that Officer Brantley "irrefutably established that [the Appellant] was not impaired when he arrived on the scene. . . ." This is not an accurate assessment of Brantley's testimony in this regard. Brantley, when he first encountered the Appellant, did no more than ask whether she witnessed the crash, giving her a narrative form to fill out when she claimed she was a witness. Beyond that, the Appellant's actions, her confusion and incomprehensible speech just after the crash, as testified to by Nicole Thurman, provided evidence of impairment. The Appellant claims that this was simply the consequence of her hysteria. Whether it was hysteria or a drug - induced state of affairs simply created a jury issue.

The Appellant then claims that since there was testimony to the effect that she brought her automobile to a stop and returned to the scene of the crash, this was evidence that she was not impaired. Again, this was at most evidence for the jury to consider on the issue of impairment.

The Appellant cites several decisions in support of her position. The Court will see, however, upon examination of them, that they provide no assistance to the Appellant. In *Hedrick v. State*, 637 So.2d 834 (Miss. 1994), the defendant in that case struck and killed a person with his automobile. There was evidence that the defendant had purchased a quantity of alcohol prior to the accident, but none that he had consumed any of it prior to or at the time of the accident. The only evidence concerning consumption of the alcohol was that there was some consumed after the accident. There was evidence that the bottle of alcohol purchased by that defendant was unopened after the accident but that it subsequently disappeared. There was no evidence of consumption of alcohol prior to the accident. The Court thus found that the State had failed in

Her proof to show that the appellant in that case was intoxicated at the time of the accident.

Interesting, though, is Justice McRae's concurring opinion. There, he pointed out that had the State established through the testimony of just one witness that the defendant appeared drunk prior to or shortly after the accident a different result would have obtained. He also noted that had there been any evidence that related the blood alcohol test result to the time of the accident, the conviction would have stood. *Hedrick*, at 840. That is the situation in the case at bar.

Here the State produced evidence of the Appellant's erratic, crazy driving just prior to the crash, her bizarre conduct just after the crash, her admission that she had taken two Lorcets that day, that there was no evidence that she took Lorcets after the crash, together with the level of Hydrocodone in her blood after the crash. There was testimony that related the level of hydrocodone in the Appellant's blood to the time of the crash. ( R. Vol. 7, pp. 648 - 651).[1] There was indeed evidence of impairment at the time of the crash.

In *Wilkerson v. State*, 731 So.2d 1173 (Miss. 1999), the evidence was that the defendant in that case was involved in a head - on collision with another driver, which resulted in the death of that other driver, that the defendant had been driving recklessly just prior to the accident, and that the defendant's blood alcohol level at some point after the accident was .15 percent. While there was no evidence to relate that blood alcohol level to the time of the accident, there was

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[1] The Appellant attempts to say that the State's expert actually testified that the level of hydrocodone in her blood was below the threshold for impairment. (Brief for the Appellant, at 17). Actually, the expert testified that there was no "threshold limit" for impairment. The expert used a "ballpark figure" of a hundred nanograms to determine impairment. ( R. Vol. 4, pp. 174 - 175). The expert, in any event, testified that he was of the opinion that the Appellant was impaired at the time of the crash. While it is true that the Appellant's expert differed somewhat with the State's expert, this was all a matter going to weight and credibility.

evidence that there was a strong odor of alcohol about the defendant after the accident. The Court found that the evidence was sufficient to permit the jury to decide the case. 731 So.2d at 1182 - 1183.

Here, as in *Wilkerson*, there was evidence that the Appellant was impaired. She had taken Lorcet prior to the crash. There was no evidence that she took it after the crash, only Xanax and a Goody's. There was evidence of highly reckless, dangerous driving by the Appellant just prior to the crash. There was also her bizarre behavior just after the crash.

In *Accu Fab & Const., Inc. v. Ladner,* 778 So.2d 766 (Miss. 2001), the Court held that there was no error in excluding from evidence the fact that the decedent was in possession of a marijuana cigarette at the time of his death and in excluding a blood test result that indicated the presence of cannabis in the decedent's bloodstream where there was no evidence that the decedent was impaired, and where there was evidence that the decedent was under no impairment just before his death. Here, though, there was evidence of impairment at the time of the crash: again, the Appellant's reckless driving and her behavior after the crash and her admission that she had taken Lorcet demonstrated this.

The Appellant does not appear to expend much effort in supporting his claim that the trial court erred in refusing to grant relief on her motion for a new trial. In any event, we find nothing in the record to support a claim that the verdict was contrary to the great weight of the evidence. There were conflicts in the evidence at times, but it was for the jury to resolve them. The trial court did not abuse its discretion in refusing to grant a new trial.

The First Assignment of Error is without merit.

**2. THAT THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE'S EXPERT WITNESS TO TESTIFY TO HIS OPINION THAT THE APPELLANT WAS IMPAIRED AT THE TIME OF THE WRECK**

In the Second Assignment of Error, the Appellant contends that the trial court erred in permitting the State's expert to give his opinion as to whether the Appellant was impaired at the time of the wreck. Several claims are advanced in support of this notion.

The Appellant first claims that there was no evidence that she was impaired at the time of the accident. (Brief for the Appellant, at 19). This is untrue, as we have pointed out above.

The Appellant then alleges that a hypothetical question asked by the prosecutor was based upon inaccurate and incomplete facts.

The Mississippi Supreme Court has held the following concerning hypothetical questions:

> This Court has held that "the interrogator may frame his question on any theory which can reasonably be deduced from the evidence and select as a predicate therefor such facts as the evidence proves or reasonably tends to establish or justify. [citations omitted] Whether or not sufficient evidence is present to support the hypothetical question presented to the expert is a question of law for this Court to determine. [citations omitted] When facts are in dispute the hypothetical question may be stated in terms consistent with the theory of the interrogator. [citations omitted] The interrogator may not, however, assume facts unsupported by any evidence [citations omitted], nor omit material undisputed facts. [citations omitted] Slight exaggerations of the evidence presented in the hypothetical generally will not require its exclusion [citation omitted] If the question posed fairly summarizes the relevant facts, it is not necessary that every minute undisputed detail be included, so long as opposing counsel has an opportunity on cross - examination to bring out the additional details. [citation omitted]

*Williams v. State*, 544 So.2d 782, 787 (Miss. 1987).

The hypothetical question put to the expert by the prosecutor included these facts: That the wreck occurred at about 7.00 p.m.; that blood was drawn from the Appellant about three hours later and that the sample was found to contain 110 nanograms of hydrocodone; that the

Appellant at the time of the wreck or immediately prior to the wreck was driving very erratically; that immediately after the wreck she walked across traffic; that she had difficulty at the scene acting properly and putting words together; and that some fifty or so minutes later at the scene, when talking to an officer, she had slurred speech, was disoriented and confused. ( R. Vol. 7, pp. 648 - 649).

The Appellant complains that there were a number of material facts left out of the hypothetical, and she lists nine said - to - be facts in support of that contention. (Brief for the Appellant, at 22). With the exception of item 8, however, we do not find that the Appellant urged these upon the trial court when she objected to the hypothetical. She may not be heard to complain of their lack now. The objections made by the Appellant did not specify those other points. The specific objection the Appellant did make acts as a waiver as to any others she might have made. *Spicer v. State*, 921 So.2d 292 (Miss. 2006).

Assuming for argument that the Appellant did preserve the issue as to these points, there is no merit to her complaint.

Points 1 - 4 appear to us to be a more specific description of the erratic driving the Appellant was engaged in. We do not think it was necessary to be that specific. The prosecutor's characterization of the Appellant's driving was completely supported by the evidence. It simply was not necessary to go into detail how she was driving erratically.

Items 5 and 6 were supported by the evidence, but we do not see that they were material. It was also true that there was evidence that the Appellant was confused and babbling just after the accident; to the extent that it was true that she stopped her car and turned around, it was also true that she was dazed and confused. Whether the Appellant was acting normally at the point in time just after the wreck was a disputed point. Thus, the prosecutor had the right to state the

facts consistent with his theory. The Appellant, in turn, could and did bring out the facts concerning the stopping of the car and the return to the scene of the crash. ( R. Vol. 7, pg. 658). In view of these considerations, the trial court cannot be said to have abused its discretion in allowing the prosecutor to state the hypothetical in the way he did.

Item 7 was a part of the prosecutor's hypothetical. The witness Thurman did testify that much of what the Appellant was saying to her was unintelligible. In any event, as acknowledged by the Appellant, the witness was cross - examined on her theory of what made her act as she did.

Item eight, as stated here by the Appellant, is an incorrect statement. Brantley did not state that he observed the Appellant closely at first contact, or that he had the opportunity to do so. Brantley's testimony was that his first contact with the Appellant was very brief. In any event, the Appellant did cross- examine the expert on her interpretation of the first contact, putting her own hypothetical question to the expert. ( R. Vol. 7, pg. 672). In view of this, we simply cannot see how the Appellant could consider herself improperly prejudiced by the State's question.

As for item 9, the Appellant brought all of that out in the course of his cross - examination. ( R. Vol. 7, pp. 672 - 673).

The prosecutor did not assume facts not in evidence. As to the claim that material facts were omitted, we do not think the record supports that claim. But even if it did, since the Appellant herself, through hypothetical and other questions put by her to the expert, supplied any such missing material facts, there can be no basis for finding an abuse of discretion by the trial court in allowing the hypothetical question asked by the prosecutor.

The Appellant then says that the State misrepresented facts. Specifically, she claims that

there was no fact in evidence to the effect that she was driving very erratically and no fact in evidence that she had difficulty putting words together immediately after the wreck. (Brief for the Appellant at 24). This simply is not true. There were at least two witnesses who described how very erratically the Appellant was driving. Nicole Thurman also described the Appellant's dazed and confused demeanor after the wreck. That the Appellant would wish a different construction put on her appearance is not the point. That there may or may not have been evidence that might have been in some conflict with Thurman's account in no way means that Thurman did not say what she said in her testimony.

The Appellant then alleges that the trial court, under M.R.E. 702, should have excluded retrograde extrapolation testimony. (Brief for the Appellant, at 25 - 29).

First of all, we note that this Court has recognized the reliability of retrograde extrapolation. *Smith v. State*, 942 So.2d 308, 315 - 318 (Miss. Ct. App. 2006). The Appellant, though, says that she has not found a decision in which retrograde extrapolation has been utilized to determine concentrations of substances other than alcohol in blood. We have found no decision either. On the other hand, we have found no decision in which the technique was said to be invalid when involving substances other than alcohol. In any event, the State's expert provided a sufficient scientific basis so as to permit the trial judge to allow admission of the evidence.

In a hearing prior to trial, the prosecutor presented his expert witness, Dr. Edward John Barbieri. Dr. Barbieri testified that he had taken a doctorate in pharmacology from Philadelphia College of Pharmacy and Science in Philadelphia and that he was then currently employed as a forensic toxicologist and as an assistant laboratory director with National Medical Services. He stated that he had testified in court some forty to forty - five times as an expert in forensic

pharmacology.

Of these cases in which he testified, one involved hydrocodone. He stated that there were not any studies that he could find concerning retrograde extrapolation of hydrocodone. He stated that the kinetics are different for a drug such as hydrocodone than for alcohol. However, he stated that, on the basis of knowledge about half - lives of drugs such as hydrocodone, it would be possible to relate back. There were studies on the effect of hydrocodone on automobile drivers.

This process involves "peak averages." He then went on to explain that process. It involved taking a number that represents either a therapeutic or toxic level of a drug, apply the elimination half - life, which is a mathematical formulation, so as to go back in time and reach an estimate of concentration in the blood at a particular time. He had testified in cases using this technique.

The witness further stated that there were studies that supported this technique. He discussed one of them, the Bernhart study. He acknowledged that the levels found in a person varied from person to person. He, however, had not done any clinical studies. He stated that he was not aware of any studies involving females. He stated that he did not take into account the Appellant's weight.

His company was asked by the Mississippi Crime Laboratory to quantify the level of hydrocodone in the Appellant's blood sample. This was done. While the witness was not the analyst who determined the concentration of hydrocodone, the work done by the analyst was reviewed by two individuals, including the assistant supervisor of the department. Barbieri testified that he was competent to testify that the policy, procedures and protocols of his laboratory concerning the quantification of the hydrocodone in the Appellant's blood were

followed. He stated that he verified that the blood test was performed pursuant to such procedures and protocols.

Subsequently, at the request of Biloxi police department, the witness prepared a supplemental report concerning whether the level of concentration found in the Appellant's blood would have cause her to be impaired.

The witness then went on to explain the mathematics of this technique and explained how he arrived at his opinion. While he could not definitely say that impairment on account of hydrocodone caused the Appellant to drive erratically, it certainly would be something persons under the influence of the drug would do.

Without knowing the history of the Appellant, the Barbeiri stated that his opinion was based upon the assumption that the Appellant took hydrocodone prior to the three-hour period between the time of the accident and the time she gave the blood sample. On that assumption, he applied average half life of the drug in the body, based upon a fast metabolizing person. Most people, he said, are fast metabolizers. He further stated that it would be possible for the Appellant to have had the level of concentration found in her blood if she had taken hydrocodone at about 8.30 p.m. on the date of the wreck. Other scenarios concerning the time the Appellant took the drug might have varied his opinion as to the level at the time of the crash.

The expert's opinion was based on the hypotheticals put to him. He did not have to hand the personal history of the Appellant. It was not known at what time or times she took hydrocodone, or what strength the Lorcets were. While there was not a "threshold limit" as to when a person would become impaired to drive a car, the expert used a value of around 100 nanograms for impairment. On the other hand, he stated that a person could be at such a level and not, in his opinion, be impaired to drive. It would depend on the person's tolerance for the

drug and other circumstances. He arrived at that figure on the basis of two driving cases which involved blood concentration levels of hydrocodone at 130 and 190 nanograms.

If the Appellant had taken no pills after the wreck, then, relating back to the time of the wreck, the blood concentration level of hydrocodone at the time of the wreck would have been at about 220 nanograms, a near lethal level. ( R. Vol. 3, pp. 115- 150; Vol. 4, pp. 151 - 186).

The Appellant asserted that the expert testimony should not be admitted under M.R.E. 702 because: (1) beyond the Berhart study there were no studies concerning hydrocodone, and none involving females; (2) that he had not considered any of the Appellant's personal characteristics; and (3) that the expert could not state whether the Appellant was or was not impaired at the time of the accident, only that she may well have been, based upon the description of her conduct immediately after the wreck.

The prosecutor, noting that it is impossible to prove precisely the amount of an intoxicant a person has in his blood stream at the time of an accident, asserted that the expert's testimony was admissible. Hypothetical questions were to be asked of him. The expert had been shown to be qualified to answer such hypotheticals. ( R. Vol. 4, pp. 187 - 203).

The Circuit Court found that Barbieri would be qualified as an expert in the field of forensic toxicology; that there was an accepted methodology for testing blood for the presence of hydrocodone; that there was an accepted protocol for testing and forming an opinion as to impairment; that those protocols appeared to have been followed in the case at bar; and that the assumptions and hypotheticals and opinions of the expert would be matters left to the jury to consider, in terms of weight and credibility. ( R. Vol. 4, pp. 252 - 254). At trial, the expert was given various hypotheticals and testified as to his opinions.

The defense, at trial, presented its expert, and he too, while disagreeing with the scientific

validity of the study used by Barbieri, testified to his opinion as to whether the Appellant was impaired at the time of the wreck. Since the defense presented expert testimony in the same field presented by the State, we think it is in no position to complain that the State did so.

The decision by a trial court to admit expert testimony under M.R.E. 702 is a matter left to the discretion of the trial court. Absent abuse of that discretion, this Court will not disturb the ruling by the trial court. *Lawrence v. State*, 931 So.2d 600, 606 (Miss. Ct. App. 2005).

In the case at bar, the trial court did consider and make findings on the three considerations set out in Rule 702. There was evidence in support of its findings, which we have set out above. The State's expert was clearly qualified to testify as an forensic toxicologist. The testimony was, of course, highly relevant and of assistance to the jury.

The Appellant, though, claims that there are no scientific studies in support of the technique. Dr. Barbieri testified otherwise. It may be that most of the testimony in this regard focused on the Berhart study, but the most that can be said of this is that it was a matter going to weight and credibility of the technique. Under Rule 702, a trial court is to act as a gatekeeper. It is to determine whether there is some basis in science for proposed expert scientific testimony. That there may be controversy among scientists as to the reliability of a particular area of expertise is no ground of itself to refuse admission of such testimony: there is such controversy about retrograde extrapolation in alcohol cases, yet such testimony is admissible. That experts reach different conclusions in the course of using the same methodology is also no ground to refuse admission. *Lawrence v. State*, 931 So.2d 600, 607 (Miss. Ct. App. 2005). All of the complaints raised by the Appellant were simply matters for the jury to consider. They could have, should have, and were explored on cross - examination, and through the direct examination of the defense expert.

Dr. Barbieri's testimony was based upon the half - lives of drugs, not on retrograde extrapolation as used in alcohol cases. In fact, it does not appear to us that his testimony was actually based upon retrograde extrapolation, as that phrase is understood in alcohol cases. What he did, in view of the scientific knowledge of how hydrocodone is eliminated from the body, was to come to a scientifically informed opinion of whether the Appellant would have been impaired at the time of the accident. The amount or concentration of hydrocodone in the Appellant's blood at the time of the wreck was not such an important fact; whether she was impaired was. He indicated that there were studies involving half - lives for hydrocodone. It was on the basis of these studies that he reached his opinion. He was not using studies concerning retrograde extrapolation in alcohol cases. ( R. Vol. 3, pp. 126 - 127). Barbeiri's testimony was based upon the known half life of hydrocodone.

The Appellant then claims that Barbieri falsely applied date to his conclusions. This is nothing more than the Appellant's opinion. Barbieri did not testify that he had falsified anything in his analysis. That the experts might have disagreed on various points is not surprising; in any event, it is certainly not the task of a court to become an expert in these often recondite fields of science and to make such determinations. These various complaints simply were for the jury to consider. There is, in any event, no basis for the Appellant to claim that Barbieri lied about his findings. Barbieri was quite careful with his "caveats" to explain how his opinions might vary in different hypotheticals.

The Appellant then complains that the expert cited no studies to demonstrate that hydrocodone at a concentration of 100 ng/ml will produce impairment. The expert did testify as to what level of concentration would be potentially lethal. Given his expertise as a forensic toxicologist, we think he was entirely qualified to give such an opinion.

We do not see why it was necessary for the expert to know how many pills the Appellant took, or the dosage strength of the pills. The expert's testimony was based on the concentration found in the Appellant's blood sample. From that, knowing the half - life of the drug, he could reach an opinion as to the level of hydrocodone in her system at the time of the accident. The hypothetical questions concerning what level of concentration would have been expected had the Appellant taken two pills after the accident were designed to demonstrate that she could not have reached the level of concentration of hydrocodone found in the blood sample with just two pills. In other words, the Appellant, assuming she had taken hydrocodone after the wreck, must have already had hydrocodone in her system at the time of the wreck.

The balance of the Appellant's complaints, just as the ones we have briefly addressed, go simply to weight and credibility of the expert's testimony. In cases of this kind, the State is required to prove that an accused was "impaired." The State will almost never be able to prove the time that an accused consumed a drug, the dosage level and the other facts that the Appellant thinks the State must prove. In the end, these facts, even if they were known to the State, would not be so important. They key evidence is evidence to show that the accused was impaired at the time of the accident. Where the results of a blood test show a level of concentration of a drug that would cause impairment, then a scientific opinion as to impairment at the time of an accident is proper.

In the event, however, that this Court should find that the trial court abused its discretion in allowing this expert testimony, any such error should be considered harmless error. She was driving in a dangerous, negligent way. She apologized to one of the victims for causing the wreck. There was testimony by a police officer and by one of the survivors of the wreck as to the Appellant's impaired condition and bizarre conduct at the scene of the wreck. The Appellant lied

about her involvement in the crash. She admitted that she had taken hydrocodone. There was no evidence that she took any after the wreck, and she had a high level of hydrocodone in her blood. This testimony was sufficient, independently of the expert testimony, to permit the jury to find that the Appellant was impaired. What was necessary for the State to prove in the case at bar was that the Appellant was impaired at the time of the crash. It was not necessary to prove a certain concentration of hydrocodone in her blood, only that she was impaired by hydrocodone. This was proved by the State, aside from the expert's testimony. The jury would have certainly reached the same verdict had the expert not testified as to his opinion as to whether the Appellant was impaired.

As for the claim that the espert's testimony was irrelevant, it was clearly relevant testimony. There was no undue prejudice from. In any event, the Appellant's argument on this point is unsupported by authority. *Jordan v. State*, 918 So.2d 636 (Miss. 2005).

The Second Assignment of Error is without merit.

**3. THAT THE TRIAL COURT DID NOT ERR IN EXCLUDING THE APPELLANT'S STATEMENT TO THE BILOXI POLICE MADE AT THE BILOXI POLICE DEPARTMENT**

The Appellant made statements to a Biloxi policeman at the scene of the wreck and at the time she was arrested for driving under a suspended driver's license. Later, after she had given a blood sample, she made a third statement. In that statement, the only one that was recorded, she attempted to say that she had taken hydrocodone after the wreck. This State did not introduce this statement into evidence. The Appellant asserts here that the State should have been compelled to introduce the statement. Her argument appears to be based upon M.R.E 106 and 611(a). This argument, under Rule 106, was urged upon the trial court. The trial court refused to require the State to enter the third statement into evidence, and it refused to permit the defense to

do so unless the Appellant testified. ( R. Vol. V, pp. 406 - 412).

First of all, we note that the Appellant could have testified, if she wished. She could have given testimony to the effect that she had taken hydrocodone after the wreck. In view of this, we think the Third Assignment of Error is much to do abut nothing. While we think the trial court was clearly correct in its ruling, in the event that this Court should conclude otherwise any such error would be harmless in view of the fact that the Appellant might have testified.

As the Appellant admits (Brief for the Appellant, at 36), the only recorded statement concerning when she took hydrocodone was the statement in which the Appellant claimed that she had ingested hydrocodone after the wreck.[2] Rule 106 states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The State, with respect to the statements the Appellant made at the scene and when she was arrested concerning when and what she ingested, did not introduce written or recorded statements. Those statements were established by the live testimony of a police officer. Since there were no written or recorded statements introduced by the State concerning when the Appellant took hydrocodone, by the terms of the rule itself, the one written or recorded statement could not be required to be introduced. The rule does not apply in this circumstance.

In addition to this, what is clear is that there was a clear beginning and ending to each of the Appellant' statements to the police. The Appellant, though, would have this Court consider

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[2] It appears that the Appellant did provide a written narrative of what she allegedly saw as the wreck occurred, which was introduced into evidence as State's Exhibit 5. ( R. Vol. 6, pg. 511). This document, however, contained nothing concerning when and what kind of substances were ingested by the Appellant. It is not relevant to the issue at hand.

all of her statements to constitute one statement, for purposes of M.R.E 106. There is no authority cited by the Appellant to construe this rule in such a way, and it was never the intention of the drafters of the rule for it to be applied in such a way. The statements were separated by time and place.

Since the Appellant did not testify, any attempted admission by her of this particular statement from her recorded statement would have been hearsay. It would have been inadmissible hearsay; thus the trial court would have correctly refused to permit her to introduce it. *Adams v. State*, 851 So.2d 366, 374 (Miss. Ct. App. 2002). It may be that Rule 106 states that an adverse party may require the proponent of a written or recorded statement to introduce the rest or another written or recorded statement which ought in fairness be considered, but this rule cannot make incompetent evidence competent.

Inadmissible hearsay is incompetent evidence. So much so that one cannot open the door to it. *Murphy v. State*, 453 So.2d 1290 (Miss. 1984). The admission of so much of the Appellant's written statement that indicated that she used hydrocodone after the accident would have been self - serving in nature for her. Thus, the State would not be offering it against the Appellant, as authorized by M.R.E. 801(d)(2), but offering it on her behalf. As *Adams* demonstrates, the statement was not admissible for this purpose. It would have been no less inadmissible hearsay if the State put it into evidence for this purpose. Rule 106 assumes that any writing involved is admissible into evidence to begin with.

The Appellant then tells this Court that the federal courts have somehow or another discovered that their version of M.R.E. 611(a) is authority to apply Rule 106 to oral statements. We do not find that the Appellant urged an argument under Rule 611(a) in the trial court. He may not raise it here. The specific rule involved in the hearing on this matter was rule 106; the

Appellant may not add some other theory here. *Spicer v. State*, 931 So.2d 292 (Miss. 2006).

Perhaps one or two federal circuit courts have held that Rule 611(a) has something to do with the rule of completeness. *United States v. Haddad*, 10 F.3rd 1252 (7th Cir. 1993). But this is neither here nor there. There is no authority that holds or suggests that M.R.E. 611(a) possesses such hidden, inscrutable and unsuspected power. Nothing in the text of the rule would remotely suggest that it has such an application. The experiment by one or two federal circuit courts should not be followed. It is an obvious attempt to create authority for a ruling where none in fact exists. Beyond this, the cases cited by the Appellant involve proving the whole of an oral statement after some parts of it were proven. In the case at bar, once again, the Appellant's written or recorded statement was never put into evidence by the State. The federal decisions cited by the Appellant simply are not relevant to the facts of this issue in the case at bar. The written statement simply was not a part of the two unrecorded statements.

The Appellant cites *Davis v. State*, 320 Miss. 183, 92 So.2d 359 (1957). That decision is a "pre-rules" case. As noted in the comment to Rule 106, *Davis* represented a somewhat broader rule of completeness than is present now. *Davis* was supplanted by Rule 106.

The Appellant then attempts to say that he was denied his right to confront witnesses against him when she was not allowed to cross-examine the police officer about the written statement. Since the written statement was never entered into evidence or testified about, there was nothing for the Appellant to confront. As a functional matter, the statement was as though it did not exist. On the other hand, it is clear that the Appellant was permitted a full and vigorous cross-examination of the witness. In any event, the Appellant presents no authority for the proposition that exclusion of the written statement somehow violated her right to confront witnesses against her. The claim is thus abandoned. *Britt v. State*, 844 So.2d 1180 (Miss. Ct.

App. 2003).

The Third Assignment of Error is without merit.

**4. THAT THE TRIAL COURT DID NOT ERR IN RULING THAT THE STATE WOULD BE PERMITTED TO PROVE THAT THE APPELLANT WAS ARRESTED FOR DRIVING UNDER A SUSPENDED LICENSE**

Prior to trial, the Appellant moved the trial court to prohibit the State from proving that she was arrested at the scene of the wreck for driving under a suspended license. The State, at that time, confessed the motion. Prior to the beginning of trial, however, the State clarified Her position. The prosecution told the trial court that, while it agreed that the Appellant's other driving offenses would not be admissible against the Appellant, the fact of the arrest for driving under a suspended license would be admissible. The court and counsel for the Appellant were notified of this prior to the beginning of trial. Nonetheless, at that time, the trial court ruled that it would stand by the previous ruling. ( R. Vol. 4, pp. 215 - 222). Subsequently, the trial court reversed itself on its ruling. The requested a change in the ruling on account of the fact that the defense had raised a question as why no field sobriety test was performed. The State wished to bring out the fact that the Appellant had been arrested. The State wished to prove the fact of arrest in order to explain why no field test was performed.

After the court reversed its original ruling, the defense asked for a limiting instruction. The court indicated that it would grant one if one was submitted by the defense. ( R. Vol. 6, pp. 498 - 506).

Evidence of the fact of the Appellant's arrest was necessary in order to explain why no field sobriety tests were performed. The issue of a field sobriety test was raised by the defense during *voir dire*. Here, the Appellant complains that the prosecutor did not ask the police officer if that was why no such test was performed. But, if true, the point is meaningless: The evidence

was before the jury to counter any later argument by the defense on the lack of a field sobriety test.

Evidence of the arrest was introduced simply to explain the entire story of these felonies. Evidence of this kind is admissible for this purpose. *Hall v. State*, 760 So.2d 817 (Miss. Ct. App. 2000). It was not introduced to demonstrate that the Appellant was a bad woman, or for any other such forbidden purpose. The trial court did not abuse its discretion in admitting the evidence. This is particularly true in view of the fact that the trial court agreed to grant a limiting instruction concerning the arrest, in the event the defense submitted one.

In the event, however, that this Court should for some reason find an abuse of discretion on the part of the trial court in admitting evidence of the Appellant's arrest, any such error should surely be regarded as harmless error. The jury was not informed of the reason for the Appellant's suspended license, and, given the evidence of her guilt for these felonies, the evidence concerning her arrest simply cannot be reasonable thought to have made a difference in the jury's resolution of the case.

The Appellant further claims that this reversal by the trial court compromised her ability to put questions to the venire to determine whether the evidence of the arrest would cause the members to believe that she might be guilty of the felonies at bar. The Appellant might have put such questions to the venire had she wished. We do not think this complaint has any significance: The Appellant brought about the change in the trial judge's ruling by her questions in *voir dire*; a limiting instruction was available to the defense. *West v. State*, 553 So.2d 8 (Miss. 1989) and *Harris v. State*, 532 So.2d 602 (Miss. 1988), while standing for the general proposition that an accused may probe potential prejudices of potential jurors, do not stand for the proposition that the failure or inability to put questions on a thing such as this amounts to

reversible error. There is nothing to demonstrate that the jury actually selected used the evidence of the Appellant's arrest as evidence of her guilt. There was no harm to the Appellant's case.

The Fourth Assignment of Error should be denied.

**5. THAT THE TRIAL COURT'S DISMISSAL OF COUNTS V THROUGH VIII OF THE INDICTMENT CURED SUCH ERROR, IF ANY, IN THE ALLEGATIONS OF THE INDICTMENT**

There were eight counts in the indictment returned against the Appellant. In four of them, the Appellant was alleged to have been impaired by hydrocodone; in the other four, the Appellant was alleged to have been impaired by a drug or a controlled substance. Otherwise, the counts appear to have been the same. ( R. Vol. 1, pp. 12 - 16). At the conclusion of evidentiary phase of the trial, the trial court granted directed verdicts as to counts V - VIII, those being the counts alleging simply that the Appellant was impaired by a drug or controlled substance. ( R. Vol. 7, pp. 729 - 730). The jury was not presented with instructions on counts V - VIII and did not convict the Appellant under those counts. The case went to the jury on the theory that the Appellant was impaired by hydrocodone, which is what the proof indicated.

The Appellant moved to quash or dismiss the indictment, alleging that the indictment was duplicitous. ( R. Vol. 1, pp. 18 - 19). The motion was brought up, and the trial court denied relief on it. ( R. Vol. 4, pp. 226 - 237).

The Mississippi Supreme Court has held that it is potentially violative of the proscription against double jeopardy to convict an accused on two counts of an indictment alleging violations of two subsections of Miss. Code Ann. 63-11-30(1) where the two counts arise from one offense. *Kramm v. State*, 949 So.2d 18 (Miss. 2007). In *Kramm*, the defendant there was charged in two counts with violations of Section 63-11-30(1)(a) and ( c).

On the other hand, the Court noted in *Kramm* that it is permissible for the State to

proceed, in a prosecution for one offense, under both subsections, citing *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997). The trouble in *Kramm* was not that the State alleged both subsections with respect to one offense. It was that the trial court convicted and sentenced the defendant in that case on both counts of the indictment, even though there was but one offense.

In the case at bar, however, the indictment did not charge alternate subsections of Section 63-11-30(1). All counts of the indictment charged offenses under Section 63-11-30(1)(b). The only difference between the two sets was one set of counts charged hydrocodone. The others were not specific as to what substance was involved.

Whether the Appellant might have been properly convicted under all eight is not a question before the Court in view of the trial court's action in granting a directed verdict as to counts V through VIII. Put simply, the Appellant was convicted only under the set that charged the specific substance of hydrocodone. Thus, she was not convicted and sentenced twice for the same offenses. Whether the indictment should have been quashed is not before the Court for the same reason. The action by the Circuit Court in granting the directed verdicts mooted the issue.

The Appellant was not prejudiced by the indictment. While she claims prejudice, she demonstrates none. The indictment was entirely sufficient to apprise her charges against her and that she was alleged to have been impaired by hydrocodone or any other drug or controlled substance. Whatever substance impaired the Appellant, other than alcohol, she violated Section 63-11-30(1)(b). The indictment noticed her that the State intended to establish that she violated that subsection.

The Mississippi Supreme Court, in *Young, supra*, held that the State may proceed under Section 63-11-30(1)(a) and ( c) in a prosecution, stating that those subsections simply establish

different ways of committing the same offense. We submit that *Young*, by analogy, would permit what was done here with respect to the counts of the indictment. The counts charged the same offense, just different ways of committing the same offense. After the proof was in, the trial court dismissed those counts for which the State's evidence was insufficient. In *Kramm* the Court affirmed the conviction on one count of the indictment, reversed the conviction on the second, and remanded the case for re-sentencing. This action by the Court seems to us to approve the approach taken by the State in the case at bar in the way She constructed Her indictment.

The Fifth Assignment of Error is without merit.

**6. THAT NO CIRCUMSTANTIAL EVIDENCE INSTRUCTION WAS WARRANTED**

In the Sixth Assignment of Error, the Appellant claims that the trial court erred in refusing to grant a circumstantial evidence instruction. She claims that the case against her was circumstantial in nature because no one could testify that she was driving her car at the time of the wreck. However, the Appellant admitted that she had been driving the Honda.

A circumstantial evidence instruction is required only where the State's case is wholly circumstantial. *Brown v. State*, 961 So.2d 720 (Miss. Ct. App. 2007). Where the State's case includes eyewitness testimony, or a confession or incriminating statement by the accused as to any element of the offense charged, the case is not "wholly circumstantial." *Kniep v. State*, 525 So.2d 385 (Miss. 1985).

There was eyewitness evidence in this case as to the negligence of the driver of the Honda, negligence being one element of Miss. Code Ann. Section 63-11-30(5) (Rev. 2004). This testimony came from Thurman and Ross. There was direct evidence in this case concerning the Appellant's impaired condition just after the accident, this coming from Thurman. There was

direct evidence in the case concerning the deaths the Appellant caused. There was direct evidence of the Appellant impaired condition from the testimony of the State's expert.

And then there was the Appellant's admission that she had been driving the Honda, the very same Honda that had been driven so dangerously. This was direct evidence. The Appellant says that this was not direct evidence because the officer to whom she made this admission did not ask her whether she was driving at the time of the accident.

The testimony was that the police officer asked the Appellant whether she had seen anything. The Appellant told him that she had been driving the Honda. ( R. Vol. 6, pg. 510; 519; 536). The claim that this was not direct evidence, because she did not explicitly say that she had been driving at the time of the accident simply ignores the plain meaning and intention of the Appellant's words. In the context in which they were made, she could only have meant that she was driving when the wreck occurred. To place another construction on her words, say, that she might have meant that she was driving on the morning of the wreck, would be to adopt an absurd understanding of her meaning. In any event, Mrs. Ross testified that she saw the Appellant get out of the driver's side of the Accord after the accident. This was direct evidence, corroborating the Appellant's admission.

The Appellant says that she gave a statement in which she observed the wreck as it occurred in her rear view mirror. So she did, but so too does that clearly prove that she was driving the Honda, unless the Court is prepared to believe that she somehow changed seats in the car without even stopping. The driver of a car is the one who uses the rear view mirror.

There was eyewitness testimony as to the negligence of the driver of the Honda; there was eyewitness testimony concerning the Appellant's condition immediately after the wreck; there was direct evidence concerning the level of hydrocodone in the Appellant's blood; there was

direct evidence of the carnage resulting from the wreck; and there was the Appellant's statement that she had been driving the black Honda. There is, no doubt, more direct evidence that could be pointed out. But we think it is sufficient to note these more obvious examples; obviously, this was not a "wholly circumstantial" case. The trial court committed no error in refusing a circumstantial evidence instruction.

The Sixth Assignment of Error is without merit.

**7. THAT THE PROSECUTOR DID NOT COMMENT ON THE APPELLANT'S FAILURE TO TESTIFY**

The Appellant points to two comments made by the prosecutor in the case at bar, one in the course of opening statement and the other during summation, in which the prosecutor is said to have commented on the Appellant's failure to testify. The comments complained of were not comments about the Appellant's failure to testify.

In the first instance cited by the Appellant, the record demonstrates, first of all, that the Appellant did not lodge a contemporary objection at the time the supposedly improper statement was made. The prosecutor made his comment, then completed his opening statement, and it was only then that the Appellant moved for a mistrial. ( R. Vol. 5, pp. 422 - 424). Because the defense did not make a timely objection, the issue is not before this Court. *Rogers v. State*, 928 So.2d 831 (Miss. 2006).

Assuming for argument that the first comment made by the prosecutor is before the Court, there is no merit in the Appellant's complaint concerning it.

At the time the comment was made, no one had testified. The comment thus could not possibly have been one which would have drawn the jury's attention to the fact that the Appellant did not testify. Beyond this, the comment, taken in context, was simply a statement that

anticipated the defense in this case, that defense being that the deaths the Appellant caused were an accident. Just before the comment was made, the prosecutor explained what he expected to prove to show that the wreck was not a tragic accident but instead the consequence of a criminal act. What the prosecutor meant, obviously, by stating that "[s]he can't come in here now and say, oops, and we're all sorry about the dead kids" was that it was the State's position that accident would be no defense. That is what the prosecutor clearly meant, not that the Appellant herself had somehow failed to testify and that for that reason the defense of accident was not available.

As for the second comment complained about, again, context is critical. In the course of the defense summation, it was asserted that the Biloxi police department failed to get a blood sample from the Appellant once it had information that the Appellant was the driver of the Honda and that the Honda was the cause of the wreck. It was said that the police should have then and there taken the Appellant to give a blood sample. ( R. Vol. 8, pp. 762; 763; 767; 772). The defense then told the jury that she did not mention her involvement in the wreck in her statement to the police because it would have been difficult for her to do so and because it was not clear to her that she had been involved. ( R. Vol. 8, pg. 769). All through the trial and the summation, the defense attorney expressed sorrow for the deaths of the victims.

The prosecutor's statements were a response to this argument. He pointed to the Appellant's statement, which was in evidence, in which she did not mention that her actions while trying to overtake the Buick were the cause of the wreck. He told the jury that had she admitted her involvement there would have been a blood sample taken much sooner. The prosecutor blamed the delay in the taking of the blood sample on the Appellant, stating that her lie about her involvement in the wreck was the cause of that delay. He then stated that "[s]he

can't come in here with a straight face and tell you I lied for whatever kind, sweet reason counsel opposite might have you believe."

The comment cannot be reasonably construed to have been a comment upon the Appellant's failure to testify. The comment was clearly directed to the Appellant's attorney's statement during his summation. The prosecutor stated that it was the "kind, sweet reason counsel opposite would have you believe" that could not be believed. It is true that the prosecutor said that the Appellant could not say that she lied for the reasons the defense counsel gave, but, clearly, since this comment was in the context of the Appellant's statement and her counsel's argument, the comment was addressed to the statement and the argument, not to the fact that the Appellant did not testify.

Prosecutors are prohibited from making direct comments on an accused's failure to testify; they are also prohibited from making such comments by innuendo or insinuation. However, balanced against this prohibition is the rule that permits prosecutors wide latitude in their summations to juries. *Jones v. State*, 669 So.2d 1383 (Miss. 1995). Here, the prosecutor was very clearly responding to the comments made by the defense attorney, comments which referenced the Appellant's statement. This was fair argument.

The Appellant then claims that the prosecutor was "improperly referring to [the Appellant] at the defense table until the [c]ourt admonished him to direct his comments to the jury" (Brief for the Appellant, at 44, fn35). It is true that the trial court told the prosecutor to direct his comments to the jury. ( R. Vol. 8, pg. 774). However, there is nothing in the record to support the Appellant's allegation of fact that the prosecutor was "improperly referring directly" to the Appellant. In the record, we have no idea what or to whom the prosecutor was directing his comments. The allegation of fact having no support in the record, it is to be ignored. *Mason*

*v. State*, 440 So.2d 318 (Miss. 1983). In any event, since the Appellant did not object to this alleged improper reference, she may not complain of it here.

The Seventh Assignment of Error is without merit.

**8. THAT THE SENTENCES IMPOSED BY THE TRIAL COURT ARE NOT DISPROPORTIONATE**

The trial court sentenced the Appellant to three fifteen-year sentences for the three deaths she caused and to one fifteen-year sentence for the assault she caused. These sentences were ordered to be served consecutively, for a total of sixty years. The trial court then suspended execution of thirty of these years, five years on post - release supervision. ( R. Vol. 8, pg. 797). Under Miss Code Ann. Section 63-11-30(5) (Rev. 2004, the maximum sentence imposable for each death and injury was twenty five years. Thus, in the case at bar the aggregate maximum sentence was100 years.

In her motion for a new trial, the Appellant asserted, *inter alia*, that the sentences imposed were disproportionate. In an effort to establish that claim, she mentioned several DUI death cases in which lesser sentences had been imposed.

The first one mentioned was a case in Stone County in which six "kids" were killed. However, counsel for the Appellant admitted that the accused in that case entered a guilty plea and that the families "urged it." ( R. Vol. 8, pg. 844). Presumably, counsel meant that the families were satisfied with the sentence. In any event, the trial court indicated that the families pleaded with the court not to impose incarceration. ( R. Vol. 8, pg. 846)

In other cases, cases not involving multiple deaths or injuries, the sentences ranged from twenty years with eight to serve to twenty-five years. There was one case in which a one year sentence was imposed, but there again the victim's family asked the court for lenity. ( R. Vol. 8,

pg. 846).

The Appellant then claimed that she could locate only one reported decision involving multiple deaths, that being *Ramage v. State*, 914 So.2d 274. In that case, he claimed that the defendant killed two people and received twenty - two years sentences, with seventeen to serve. The sentences were to be served concurrently. ( R. Vol. 8, pg. 847). She then mentioned two other decisions.

The trial court, noting the maximum that might have been imposed, stated that it did not impose the maximum sentences imposable because it thought to do so would be disproportionate. It then stated that in view of other sentences it had imposed for these felonies it did not feel that the sentences imposed against the Appellant were disproportionate. ( R. Vol. 8, pp. 851 - 853).

The general rule in this State is that this Court may not disturb a sentence imposed by a Circuit Court unless that sentence exceeds the maximum sentence that may be imposed. *Wilkerson v. State*, 731 So.2d 1173, 1183 (Miss. 1999). *Wilkerson* further holds that there is no requirement to engage in a proportionality review unless a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality. *Id.* In *Wilkerson*, that appellant had been sentenced to a term of twenty years imprisonment with two suspended upon good behavior. He had been convicted on one count of DUI manslaughter. Surely this case alone would stand for the proposition that a fifteen-year sentence for DUI manslaughter is not disproportionate.

There can be no inference of gross disproportionality in the case at bar. The Appellant's actions resulted in the death of three people and severe injury to another. In *Lawrence v. State*, 931 So.2d 600 (Miss. Ct. App. 2005). The appellant in that case killed five children and injured

another person. The sentences imposed were more severe than those imposed here. This Court has upheld the imposition of the maximum term of imprisonment in case involving one victim. *Law v. State*, 822 So.2d 1006 (Miss. Ct. App. 2002).

The cases cited to the trial court are easily distinguishable. As for the two instances in which a very light sentence was imposed, including the Rutland case, cited by the Appellant here, according to the trial court these were imposed on account of the express wishes of the families of the victims. In the case at bar, members of the victim's families were heard prior to sentencing. There was no plea for leniency. ( R. Vol. 8, pp. 787 - 795). On the other hand, there were other instances cited by the Appellant in which more severe sentences were imposed, even though those cases did not involve multiple victims.

Three young people were killed in consequence of the Appellant's impaired, erratic and highly dangerous driving. A fourth was badly injured. The sentences imposed were considerably less than those that might have been imposed. It simply cannot be reasonably said that there is an inference of gross disproportionality. The sentences imposed are not "inconsistent." More severe sentences have been upheld by this Court.

The aggregate sentence is not disproportionate. There were four victims in this case and four felonies committed by the Appellant. This being so, one would naturally expect to an aggregate sentence like this. Each individual sentence is well below the maximum that might have been imposed, and well below sentences that have been upheld as against a claim of disproportionality.

The Appellant cites *Ramage v. State*, 914 So.2d 274 (Miss. Ct. App. 2005) for the proposition that her consecutive sentences are grossly disproportionate and violative of equal protection. Yet, we find nothing in that decision that says any such thing; in fact, we find no

issue in that decision concerning whether the sentences imposed were disproportionate. We will note, though, that the appellant in that case received a twenty-year term, with five years suspended. As for *Kramm v. State*, 949 So.2d 18 (Miss. 2007), that decision did not address the propriety of the sentence meted out to that appellant; nor did the opinion in *Smith v. State*, 956 So.2d 997 (Miss Ct. App. 2007). In *Smith v. State*, 942 So.2d 308 (Miss. Ct. App. 2006), a twenty-year sentence with five years suspended was upheld.

The Eighth Assignment of Error is without merit.

**9. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING TEST RESULTS OF THE BLOOD SAMPLE**

In the final Assignment of Error, the Appellant asserts that the trial court erred in admitting the test result of her blood sample. Pointing out that the blood sample was taken about three hours after the accident and that Miss. Code Ann. Section 63-11-8(1) (Rev. 2004) requires that such a sample is to be taken within two hours of an accident, she claims that the trial court should have suppressed the sample and the results thereon.

The wreck occurred at about 7.09 on the evening of 10 September 2004. When Officer Brantley arrived, he very briefly spoke to the Appellant and gave her a form to fill out. The Appellant did not tell Brantley that she had caused the wreck. Brantley then went on to speak with others at the scene. The Appellant was arrested at about 8.40 that evening; after it was discovered that she was driving under a suspended license; she gave her blood sample about an hour and a half later.

There were several reasons for the delay. First of all, law enforcement's immediate task was to assist the victims of the crash. Secondly, the Appellant was not the only person at the scene. Others at the scene, such as Mrs. Ross, had to be interviewed as well. Driver's licenses

had to be checked. Because the officers did not know of the Appellant's involvement until well on into the on - the -scene investigation, they had no reason to seek a blood sample from her. ( R. Vol.3, pp. 116 - 118). Given the complexity of the wreck, the numbers of people to be interviewed, and the fact that the Appellant was not immediately a suspect, it was not reasonably possible to take the Appellant to have a blood sample drawn. There was certainly not any evidence that the police deliberately delayed the taking of the blood sample.

In *McDuff v. State*, 763 So.2d 850 (Miss. 2000), the Mississippi Supreme Court held Section 63-11-8 to be unconstitutional in that it purports to require a search and seizure without regard to whether probable cause exists. In *Wash v. State*, 790 So.2d 856 (Miss. Ct. App. 2001), this Court recognized the Mississippi Supreme Court's holding concerning Section 63-11-8, and because of that holding, found that that appellant's argument concerning the two-hour period was unnecessary to be resolved. Instead, the question before the Court was whether a basis at law existed for the taking of the blood sample – whether consent was given or whether probable cause existed for the taking of the sample. *Wash*, at 859.

We think the same result as in *Wash* should obtain here. Since Section 63-11-8 has been found to be unconstitutional, the only question before the Court is whether there was probable cause to seize the Appellant's blood or whether she consented to the taking of her blood. The record is quite clear that she gave consent. No issue has been made that she did not so consent. As for whether the level of concentration of hydrocodone was affected by any post - collision ingestion of the drug, this would not affect admissibility of the test result. It was a matter going to the weight and credibility of the test result.

In the event, however, that the Court might disagree with our analysis of the ninth issue, we will address the time issue under the assumption that the two - hour period in Section 63-11-8

has somehow survived *McDuff.*

The Court has not strictly applied the two - hour period set out in Section 63-11-8(1). In *Wash v. State*, 790 So.2d 856 (Miss. Ct. App. 2001), the period between the time of the collision and the time the blood sample was drawn was a period of two and a half to three hours. In *Smith v. State*, 942 So.2d 308 (Miss. Ct. App. 2006) the period involved was four hours. In neither of these cases did the Court find error in the admission of the blood sample test result, even though the State failed to strictly comply with the two - hour period set out in the statute.

As in *Smith*, the Appellant was the cause of some of the delay. She failed to tell anyone about her involvement in the crash. While it appears to be true that no one stood by to be sure the Appellant did not ingest anything, this was not done at the time because she was not a suspect. Once she did become a suspect, law enforcement ensured that she did not take anything.

It is true that in the statement suppressed by the trial court that the Appellant, after the blood sample was drawn, indicated that she took some hydrocodone between the time of the wreck and the time of the taking of the blood sample. We submit, though, that this claim, never in fact established,[3] would at most have gone to the weight and credibility of the blood sample test result. The statement was not introduced into evidence at trial, and the Appellant did not testify. There is no "overwhelming" evidence that the Appellant took hydrocodone after the wreck.

There is no rule of which we are aware to the effect that, in a case where it is definitely established that an accused drank or ingested some intoxicating substance after a collision, a

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[3] The Appellant claims that the testimony of Brantley and Barbeiri establish as a fact that the Appellant took hydrocodone after the wreck. This is a mischaracterization of what they said. Brantley only said that the Appellant said that; Barbeiri testified in response to hypotheticals in which the Appellant was assumed to have done so.

blood sample test result may not be put into evidence for that reason alone. Certainly the Appellant cites none. While she does cite *Acklin v. State*, 722 So.2d 1264 (Miss. Ct. App. 1998), that decision does not say that the possibility that an accused drank or took an intoxicant after a collision causes blood sample evidence to be inadmissible. On the other hand, *Acklin* does hold that admissibility turns on relevance, not on timing of a blood sample. Even in a case in which it is definitely established that an accused consumed an intoxicant after an accident, this would be a fact that at most would affect the weight and credibility of blood evidence.

Here, the blood sample test result was clearly relevant. It is true that some cases mention the fact that suspects more monitored between the time of a collision and the time of a blood test, but none of them have held that such is a prerequisite to admission of the results of tests on their blood.

There are any number of reasons why law enforcement will be unable to comply with the two - hour period set out in Section 63-11-8. *Smith* and *Wash, supra*, are illustrative but not definitive as to what reasons will suffice. Here, the delay was caused by the complexity of the collision scene, the fact that the Appellant did not tell law enforcement of her involvement in the wreck, and the need to assist the victims and interview witnesses. The delay was not occasioned by some malignant purpose on the part of law enforcement. The test result from the blood sample, while disputed, both in whether it accurately showed the level of concentration of hydrocodone at the time of the wreck and in terms of whether it indicated "impairment," for purposes of Section 63-11-30(1)(b) (Rev. 2004), was clearly relevant. *Smith* and *Wash* demonstrate that the time frame involved here – three hours – is not so much in excess of the statute's time period as to require exclusion of the blood sample test result.

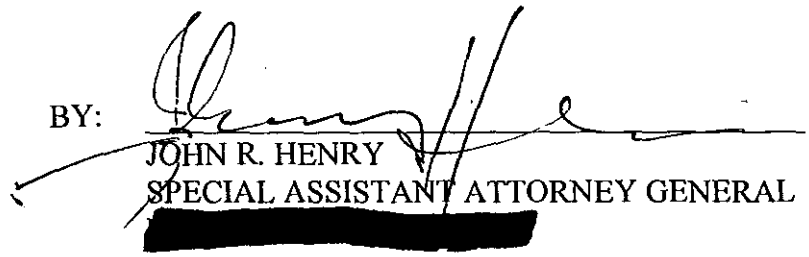
The Ninth Assignment of Error is without merit.

## CONCLUSION

The Appellant convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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## CERTIFICATE OF SERVICE

I, John R. Henry, 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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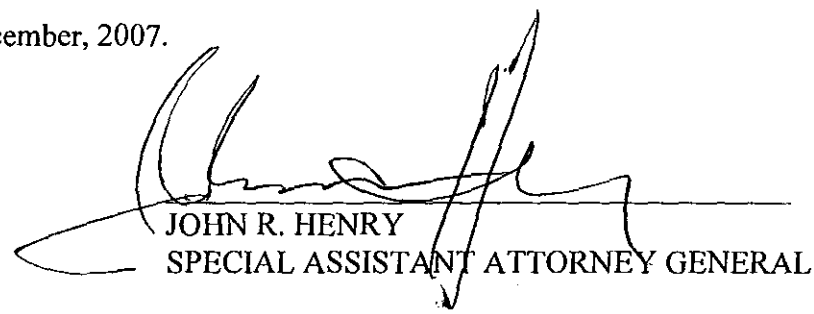
This the 20th day of December, 2007.



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