

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES ROY GRIMES

FILED

APPELLANT

AUG 28 2008

VS.

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

NO. 2007-KP-0646

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. THE HEARSAY TESTIMONY OF THE CHILD VICTIM WAS PROPERLY ALLOWED UNDER THE TENDER YEARS EXCEPTION.
- II. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE FACTS

On January 4, 2004, ten-year-old L.O.¹ and her friend Megan rode to church on the church bus as was their normal routine. Once they arrived, L.O. tried to tell her Sunday school teacher, Ms. Paulette Cooper, that she needed to tell her something; however, Ms. Cooper was busy with the other children and “kept putting her off.” (Transcript p. 33). Finally, L.O. passed Ms. Cooper a note

¹ The minor victim in this case will be referred to as “L.O.” or “the victim” throughout the State’s brief.

which read, "Ms. Paulette I have to talk to you about James² and what he did to us when my mama went to work and I just need to talk to someone. Please can you." (Exhibit "1 "). L.O. and Ms. Cooper went to the bathroom to discuss the note. (Transcript p. 35). Ms. Cooper testified as follows about that conversation:

- A: I stopped immediately and I just kind of held my breath for a second. I said, "[L.O.], what do you have to tell me?" And she proceeded to tell me what happened to her."
- Q: Okay. What exactly did she tell you?
- A: She said, "Ms. Paulette" - - The look on her face said more than any words she could have said to me. She said, "Ms. Paulette" - - James had touched her where he shouldn't be touching her. I said, "Exactly what did he do, [L.O.]?" She said, "He had come out of the shower without any clothes on, Ms. Paulette. He threw me down on the bed, and he held my hands down tight." And said, "He went into the door next to the bed and pulled something out and put it on his private area and then he - - " she said, "My stomach hurt me this time, Ms. Paulette." She said - - she started rubbing across her stomach. She said, "It hurt me more than it ever hurt me before." And I said, "Ever hurt you before, [L.O.]? Are you trying to tell me this had happened to you before?" She said, "Yes, ma'am." She said, "It's happened before, and it happens when my mother goes to work at night." And she said that he had stuck his penis in her.

(Transcript p. 35 - 36). Ms. Cooper told L.O. that they had to tell someone and called one of the deacons in to talk with L.O. (Transcript p. 124). Deacon Glenn Cleveland came into the bathroom to talk to L.O. while Ms. Cooper stood in the doorway of the room. (Transcript p. 124). L.O. relayed the same information to Deacon Cleveland. (Transcript p. 132 - 134).

The sheriff's department and L.O.'s mother were called. (Transcript p. 134). L.O. spoke with Evan Smith of the Washington County Sheriff's Department. He testified about their conversation as follows:

[L.O.] stated to me that her and her mother were living with James Grimes at 2401

² "James" is the Appellant, James Roy Grimes. He was the live-in boyfriend of the victim's mother at the time of the incidents in question.

Old Leland Road and that after her mother would go to work, James Grimes would play with her breasts and her private area or vagina. And [L.O.] further stated to me that James would lay her down while he would lick her in her private areas, and he would also make [L.O.] touch his penis to make it hard. And the next things that [L.O.] stated to me was that she was very scared because James stated that he would beat her up if she told anybody what was going on or what had happened.

(Transcript p. 143). L.O. was then taken to the hospital to be examined. (Transcript p. 145). Dr. McLeod from Delta Regional Medical Center examined the victim and testified that the victim had a ruptured hymen and an open vaginal vault. (Transcript p. 257). Dr. McLeod explained the significance of an open vaginal vault by stating that it signified multiple occurrences of sexual activity and that it was extremely unusual in a ten-year-old. (Transcript p. 258). Dr. McLeod also diagnosed the victim as having gardnerella which is an infection normally seen in sexually active women. (Transcript p. 258). Dr. McLeod further testified that she did not need to use a virginal speculum while examining the victim. She was able to use a regular adult sized speculum and it caused the victim no pain. (Transcript p. 269).

A few days later Officer Percy Miles of the Washington County Sheriff's Department took another statement from the victim. He testified about the statement as follows:

During my interview with [L.O.], [L.O.] told me that during the Christmas holidays of 2003, when they was off for Christmas holiday, Mr. Grimes - - she said every time my mother leave for work, he touch her breasts and be touching between the legs. She said that Mr. Grimes also would kiss her breasts and he would also kiss her between the legs also. And she also told me that Mr. Grimes would sometimes put some jell on his private part and put it on her and put it in her. * * * She just said he put it in her private part.

(Transcript p. 151 - 152). The victim also spoke with Danette Cook from the Department of Human Services. The victim told her that she was abused by the Appellant and specifically stated that "he used some pink stuff sometimes on her or he would use spit, and she also said that he would put his private part into her private part." (Transcript p. 172). She further relayed to Ms. Cook that "it

hurted” and that “it would happen at least once a day when her mother was at work.” (Transcript p. 172). Ms Cook also testified to the following:

[L.O.] mentioned on the night before she and her friend were spending the night at her home and he came in and tried to, I guess sexually abuse her again, he pulled her pants - - leg out of her pants, and he also tried to attack the friend but the friend fought him off.

(Transcript p. 173).

At trial Megan, the victim’s friend from church testified that she spent the night at the victim’s house on the night before they attended church together. (Transcript p. 193). She stated that after the victim’s mother went to work that night, Grimes tried to kiss her, pull down her pants, and pull up her shirt while the victim was in the bathroom. (Transcript p. 194). As L.O. walked in, Megan began to push Grimes away and told him to leave her alone. (Transcript p. 194 - 196). L.O. helped her fight him off and then sat on the couch beside Megan. (Transcript p. 196). Grimes then tried to pull down L.O.’s pants and pull up her shirt and tried to kiss her as well. (Transcript p. 196). The two girls were finally able to get him to leave them alone. (Transcript p. 196). Megan told L.O. that she had to tell someone about what was going on at her house. (Transcript p. 200).

Grimes was tried and convicted of statutory rape. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The hearsay testimony of the child victim was properly allowed under the tender years exception as a hearing was conducted outside the presence of the jury during which the trial judge addressed the *Wright* Factors and made an on-the-record finding regarding whether the statements provided sufficient indicia of reliability. The trial judge did not abuse his discretion in holding that the hearsay testimony in question regarding the victim’s statements to various people fell squarely

within the tender years exception to the hearsay rule. Furthermore, the verdict was not against the overwhelming weight of the evidence.

ARGUMENT

I. THE HEARSAY TESTIMONY OF THE CHILD VICTIM WAS PROPERLY ALLOWED UNDER THE TENDER YEARS EXCEPTION.

Grimes first argues that “the trial court should not have allowed the hearsay testimony regarding L.O.’s statements as the tender years exception was not satisfied in this case.” (Appellant’s Brief p. 6). “The trial judge has the discretion to either accept or reject evidence offered by the parties.” *Voyles v. State*, 822 So.2d 353, 359(Miss. Ct. App. 2002) (citing *Austin v. State*, 784 So.2d 186, 193 (Miss. 2001)). “That discretion must be exercised within the scope of the Mississippi Rules of Evidence, and reversal will only by had when an abuse of discretion results in prejudice to the accused.” *Id.* The pertinent rule in this case is Mississippi Rule of Evidence 803(25) which reads as follows:

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

* * *

(25) Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

This Court has previously acknowledged that “when analyzing such testimony, the court must assess first whether the child falls into the category of one who is of ‘tender years.’” *Marshall v. State*, 812 So.2d 1068, 1075 (Miss. Ct. App. 2001) (citing *Veasley v. State*, 735 So.2d 432, 434 (Miss. 1999)). This Court further noted that “there is a rebuttable presumption that a child under the age of twelve is of tender years.” *Id.* “The relevant time to determine whether the tender years

exception to the hearsay rule applies is the age of the child at the time the relevant statement was made rather than the age of the child at the time that testimony is given at trial. *Id.* (quoting *McGowan v. State*, 742 So.2d 1183 (Miss. Ct. App. 1999)). In this case, the victim was ten years old at the time she made the statements in question, thus the presumption applies.

The Rule further requires that the trial court conduct a hearing outside the presence of the jury and the comment to the Rule requires that “a finding that there is a substantial indicia of reliability should be made on the record.” See *Eakes v. State*, 665 So.2d 852, 865 (Miss. 1995) and *Sanderson v. State*, 872 So.2d 735, 740 (Miss. Ct. App. 2004). These requirements were met in the case at hand. A hearing was held outside the presence of the jury during which Ms. Paulette Cooper, Deacon Glenn Cleveland, Officer Evan Smith, Officer Percy Miles, Ms. Danette Clark, and the victim testified. (Transcript p. 48 - 120). At the conclusion of testimony, the trial judge considered the *Wright* Factors which are listed in the Comment to Rule 803(25) and are set forth below:

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

The trial judge, like the judge in *Sanderson*, 872 So.2d at 740, “made extensive findings as to the factors necessary to ascertain the veracity of the declarant’s testimony” and held as follows in that regard:

So, I went through each one of the factors. The one being whether or not there is an

apparent motive, and the court has before allowed that to go to the credibility of the witness on this, when the other factors seem to weigh in favor of admitting it. The general character of the declarant. Again, the court's inquiry being at the time the statement was made when she was ten. The court relies on the statements that were made about her being appropriate for her age, the people knowing her, the people at the church, the statements that they made, their testimony to the Court about her. Whether more than one - - and the court does note the earlier statement where she lied, but again, that would go to impeachment of her whole testimony. Whether more than one person heard the statement, both at the church and - - well, at each instance - - the church, the sheriff's department, and DHS - - there multiple people who heard the statements. The statements were made spontaneously to the people at the church. She sought them out. Both the sheriff's department and DHS commented about how freely she gave information, and Lt. Miles gave his testimony about how he elicited the information, he used open-ended questions, did not seem to make suggestions to her. The timing of the declarations, the morning after what is alleged to be a major recent incident, including the friend, the court finds timing not to be an issue. The relationship between the declarant. The church people and the declarant having had a formal relationship and a long-standing relationship, they seem like natural people that she would have talked to, and DHS and the sheriff's department are just a part of the natural process of following up with that. The possibility of her recollection being faulty is remote. Looking back at the age of ten, the testimony of everyone else seems to suggest that she recalled what she was saying and the detail with which her statement was made. The court finds that the statements were made to people who reported, partially because of the consistency, and the court sees no reason for them to lie about the statements being made. Nine, the credibility of the persons testifying about the statements, the Court finds them to be credible. She was ten years old. Everyone testified that she was of the normal maturity and appropriateness for her age. The court doesn't find any suggestive techniques were used in eliciting the statements. And the details of the statements seem to satisfy, in this court's opinion, the final requirement about knowledge of this type of thing, given her age. So the court, looking at the totality of the factors that the Court has outlined, is going to find that the statements will be allowed as having substantial indicia of reliability.

(Transcript p. 116 - 118).

Nonetheless, in support of his argument, Grimes argues that "the trial court abused its discretion in finding, when considering the evidence as a whole, that L.O.'s statements contained a substantial indicia of reliability." (Appellant's Brief p. 8). Specifically, Grimes argues that "several times throughout the trial, [L.O.]'s statements were filled with inconsistencies" and that she "had already established herself as an unworthy declarant." (Appellant's Brief p. 8). With regard

to the alleged inconsistencies in the victim's statements and testimony, this Court has previously held that they do "not in the least prove that [the victim] was not of tender years at the time the incident occurred." *Davis v. State*, 878 So.2d 1020, 1026 (Miss. Ct. App. 2004). Moreover, this Court also noted in *Davis*, with regard to "reliability," that "instead of pertaining to the statement's contradiction to other evidence, which will ultimately be considered by the fact finder, the reliability of the statement is determined by the surrounding circumstances in which the statement was given." *Id.* at 1025. Thus, the trial judge did not abuse his discretion in allowing the testimony.

II. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Grimes also argues that his "conviction was based on weak and tenuous evidence and the court should have granted [his] motion for a new trial." (Appellant's Brief p. 9). "A motion for new trial asks the Court to hold that the verdict was contrary to the overwhelming weight of the evidence." *Wilson v. State*, 891 So.2d 237, 240 (Miss. Ct. App. 2004) (citing *Crowley v. State*, 791 So.2d 249, 253 (Miss. Ct. App. 2000)). "When a motion for a new trial is made, the court must accept as true all evidence that favors the verdict." *Id.* (citing *Youngblood v. State*, 759 So.2d 479, 483 (Miss. Ct. App. 2000)). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id.* (quoting *Dudley v. State*, 719 So.2d 180, 182 (Miss. 1998) (*overruled on other grounds*)).

Grimes first asserts that "the State relied heavily on the contradicted and unreliable accusations of the declarant, L.O." (Appellant's Brief p. 9). However, the victim's testimony and statements to Ms. Cooper and others regarding the fact that Grimes repeatedly had sexual intercourse with her and that he repeatedly touched her inappropriately never wavered. Furthermore, the

testimony of Dr. McLeod confirmed that the victim had repeated sexual intercourse. The victim's story was also corroborated by the fact that her friend Megan testified that Grimes tried to touch her inappropriately and that she saw him try to touch the victim inappropriately. Moreover, "any issues of credibility or motive was for the jury to decide." *Barrett v. State*, 886 So.2d 22, 27 (Miss. Ct. App. 2004) (citing *McClain v. State*, 625 So.2d 774, 778 (Miss.1993)). The appellate courts "cannot step into the jury box and usurp the role of the jurors." *Id.*

Grimes also questions the medical testimony of Dr. McLeod and the crime lab report. However, "[t]his Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Bradley v. State*, 921 So.2d 385, 390 (Miss. Ct. App. 2005) (quoting *Langston v. State*, 791 So.2d 273, 280 (Miss. Ct. App. 2001)) (*emphasis added*). As such, the trial court did not err in refusing to grant Grimes' Motion for New Trial.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of the Appellant as the hearsay testimony of the child victim was properly admitted under the tender years exception and as the verdict was not against the overwhelming weight of the evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

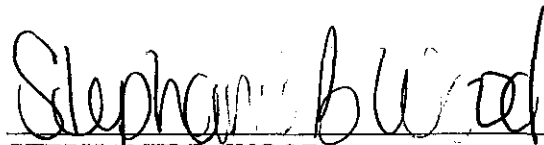
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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