IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRYANT CARTER — APPELLANT

VS. — NO. 2007-KA-0691-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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BRYANT CARTER **APPELLANT**

VS. **NO. 2007-KA-0691-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

ISSUES

I. KEITH STOVALL AND DR. CATHERINE DIXON'S EXPERT TESTIMONY WAS PROPERLY ADMITTED AT TRIAL.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE CHILD-VICTIM'S OUT-OF-COURT STATEMENTS WERE ADMISSIBLE UNDER THE TENDER-YEARS EXCEPTION.

III. THE APPELLANT WAS NOT PREJUDICED BY THE CHILD-VICTIM'S IN-COURT IDENTIFICATION OF THE APPELLANT.

IV. THE TRIAL COURT DID NOT ERR IN ITS EVIDENTIARY RULINGS.

V. CARTER'S DISPROPORTIONALITY ARGUMENT IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

STATEMENT OF THE FACTS

Melissa Kelly began dating Bryant Carter in January of 2004, at which time she was separated from her husband. T. 333. After dating for one month, the couple moved into an apartment together with Melissa's then seven-year-old daughter, V.K., and V.K.'s younger brother. T. 334. The couple lived in the apartment for a short time before moving into a pink trailer in March or April of 2004. T. 334, 336. They then moved to a larger trailer later that summer, and continued to date until January of the next year, at which time Melissa ended the relationship and Carter moved out. T. 337-38.

Shortly after the break-up, Melissa noticed that V.K. was "not herself." T. 338. When Melissa asked what was wrong, V.K. replied, "Mama, Bryant touched me." T. 338. The incident was subsequently reported to the Department of Human Services, and Kimberly Weathers, a DHS worker, interviewed V.K. on April 15, 2005. T. 279. V.K. told Weathers that Carter had touched her vagina on more than one occasion, and that he had penetrated her vagina with his fingers at least once. T. 280. Weathers reported the incident to the Pike County Sheriff's Department, and Melissa was advised to take her daughter in for a medical evaluation and to the Children's Advocacy Center (CAC) for a forensic interview. T. 281-82, 311. The doctor who examined V.K. testified that her hymen had been stretched, which was consistent with digital penetration. T. 527, 529.

Keith Stovall, a counselor and forensic interviewer at the CAC, interviewed V.K. in April 2005. V.K. told Stovall that Carter had touched and inserted his fingers in her vagina. T. 391. Stovall ultimately opined that V.K. had no motivation to lie, she did not appear to be "coached," and her statement was consistent with that of a child who had been sexually abused. T. 402, 405. Dr. Catherine Dixon, an expert for the State, reviewed V.K.'s taped interview, Stovall's report, V.K.'s therapist's notes, and the defense expert's analysis of the Stovall interview, before testifying that

V.K.'s statements were consistent with those of a child that has been sexually abused. T. 467, 481. Defense expert Dr. Gary Mooers also reviewed the taped interview and opined that V.K.'s statements were not consistent with those of a child who has been sexually abused. T. 599. He testified that if he had interviewed V.K., he would have employed a protocol similar to that employed by Stovall. T. 606. He admitted that Stovall did follow the proper protocol during the interview, but that the interview "could have been done much better." T. 615.

Carter was convicted of sexual battery and sentenced to life imprisonment. C.P. 52.

SUMMARY OF THE ARGUMENT

Carter has wholly failed to show that the trial court was clearly erroneous in allowing Dixon and Stovall to testify as expert witnesses. Carter cites to no authority to support his proposition that the trial court erred in allowing "excessive" use of the tender-years exception. V.K.'s in-court identification of Carter was properly allowed and in no way prejudiced Carter. No substantial right belonging to Carter was violated by any of the trial court's evidentiary rulings. Finally, Carter's contention that his sentence is disproportionate to the crime committed is both procedurally barred and without merit.

ARGUMENT

I. KEITH STOVALL AND DR. CATHERINE DIXON'S EXPERT TESTIMONY WAS PROPERLY ADMITTED AT TRIAL.

Dixon testified at the pretrial hearing on Carter's motion to disqualify Stovall and Dixon as expert witnesses. At the conclusion of her testimony, the trial court ruled that she was qualified as an expert in child sexual abuse, forensic interviewing of children, and child development, and that her testimony was both relevant and reliable. T. 51-54, 471. The court also ruled that defense witness Mooers was qualified as an expert in the field of social work, child welfare, and child maltreatment. T. 92-93. After these rulings, defense counsel noted that Dixon and Stovall had similar training and relied on the same principles in their work. T. 97. Defense counsel stated, "[W]hile not conceding that [Stovall] is an expert, I would at this time stipulate to his CV, stipulate to that would be the effect of his testimony and ask the Court to make a ruling based on that without a formal hearing." T. 97. The court then found that Stovall's testimony would be admissible. T. 97. At trial Stovall was tendered as an expert in the field of forensic interviewing of children. T. 388.

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

A witness "qualified as an expert by knowledge, skill, experience, training, or education" is allowed to testify and offer opinions if her "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." M.R.E. 702. The Mississippi Supreme Court adopted the modified *Daubert* standard for determining the admissibility

of expert testimony in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003). The framework employed to determine whether expert testimony meets the requirements of M.R.E. 702 requires the trial determine whether the expert testimony is both relevant and reliable. *Id.* at 38 (¶16). The relevance requirement is simply a restatement of the M.R.E. 702 requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." The factors employed to determine whether expert testimony is reliable include "whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community." *Id.* at 37 (¶13). However, the *McLemore* court made clear that "[t]he applicability of these factors depends on the nature of the issue, the expert's particular expertise, and the subject of the testimony." *Id.* (citing *Kumho Tire Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999)). Accordingly, the *Daubert* analysis is a flexible one, and the reliability factors are illustrative rather than definitive. *Id.* at 38 (¶16).

There is no question that both Dixon and Stovall were qualified to testify as experts and that their testimony was relevant. Dixon has a doctorate in educational psychology and counseling psychology, has twenty years professional experience as a child psychologist, has conducted approximately 300 forensic interviews, and has supervised more than 2,000 forensic interviews. T. 8, Exhibit S1. Stovall has a master's degree in counseling psychology, has four years experience as a child therapist and forensic interviewer at the Southwest Mississippi Children's Advocacy Center, has conducted between 500-600 forensic interviews, and has observed another 150 forensic interviews. T. 387, Exhibit S3. Further, both Dixon and Stovall have been accepted as experts multiple times in Mississippi courts. T. 18, 388.

This honorable Court has previously ruled, "While an expert may not opine that an alleged child sex abuse victim has been truthful, the scope of permissible expert testimony under Rule 702 includes an expert's opinion that the alleged victim's characteristics are consistent with those of children who have been sexually abused." *Elkins v. State*, 918 So.2d 828, 832 (¶ 9) (Miss. Ct. App. 2005). As such, Dixon and Stovall's testimony was relevant, as they both opined that V.K.'s statements were consistent with those of a sexually abused child.

Dixon and Stovall both testified as to the Corner House method utilized by CAC forensic interviewers, which were the methods utilized by Stovall during his interview of V.K. T. 9. The Corner House method is, "a semi-structured protocol which is research based and has been structured based on peer reviewed research in the child development and memory, suggestibility, linguistics, offender dynamics, victim dynamics, you know, a myriad of types of psychological research designed to inform our practice in forensic interviewing." T. 9. Dixon testified that the model is constantly under review and has been revised and updated. T. 14. Even Mooers testified that the methods utilized by CAC forensic interviewers are valid. T. 613. Mooers further testified that Stovall followed the protocol properly. T. 615. Accordingly, four of the five *Daubert* factors for testing the reliability of expert testimony were met. Carter essentially argues that a single *Daubert* factor, whether there is a high known or potential rate of error, was not met. However, as the *McLemore* court stated, the *Daubert* factors, which were formulated to assess the reliability of scientific testimony, may not be applicable in every case because "[t]oo much depends upon the particular circumstances of the particular case at issue." *McLemore* at 37 (¶13) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999)). Because the *Daubert* factors were meant to be helpful rather than definitive, they should be considered only when "they are reasonable measures of the reliability of expert testimony." *Mooneyham v. State*, 915 So.2d 1102, 1107 (Miss. Ct. App.

2005). Accordingly, "the trial court has considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *McLemore* at 37 (¶13). The trial court noted the flexibility in applying the factors during its ruling. T. 51-54.

The factor in question is simply inapplicable to the discipline in question. After defense counsel asked Stovall whether his conclusions as to whether a child's statement is consistent with abuse could be tested, the following exchange occurred.

> 410 Q. Maybe I wasn't clear. I wasn't talking about the specific interview itself. I'm talking about you and about the specific conclusions you reach when you make a decision that a child's story is consistent with what they're telling you or inconsistent. Is there a way for you to test yourself to know whether those rulings or findings are right or not?
>
> A. Well I tell you what I can do. I can go back and view the tape, I can judge myself critically, I can take a look at the tactics that I employed and come up with --
>
> Q. Other than you reviewing and satisfying yourself, is there a way that someone else can objectively look at your work and determine whether you have made a mistake?
>
> A. If they judged my work according to the best practice or the best standard of literature that's out there now, then I'd have to say yes."
>
> . . . .
>
> Q. There is no way, to a reasonable degree of certainty, that you can tell whether you are correct in determining whether someone's lying; is that right?
>
> . . . .
>
> A. The forensic interview is one portion of the investigation, and ultimately it is the jury that determines whether a crime's taken place or not.[1]

T. 410-11. Apparently, Carter's position is that unless a forensic interviewer can claim to be an infallible human lie detector, he cannot give expert testimony in the field of forensic interviewing.

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[1]A further reading of this portion of the transcript also reveals a blatant mischaracterization in the appellant's brief that Stovall said he had never been wrong and that juries that disagree with him are wrong.

However, as the trial court noted, "I don't think there's such a thing as an expert who can tell if people are telling the truth all the time or not. Obviously I think things of that nature would be outside the realm of permissible testimony." T. 52-53.

Carter wholly failed to show that the trial court's decision to admit Dixon and Stovall's testimony was clearly erroneous. As such, his first assignment of error necessarily fails.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE CHILD-VICTIM'S OUT-OF-COURT STATEMENTS WERE ADMISSIBLE UNDER THE TENDER-YEARS EXCEPTION.

Carter cites to no controlling law which states that testimony admissible under MRE 803(25) is limited to a certain number of witnesses who may testify as to the child-victim's out-of-court statement. Although he postures the argument as a an MRE 403 issue, such an objection was not raised at trial and is procedurally barred from being raised for the first time on appeal. Carter does not argue that the statements were inadmissible or that MRE 803(25) was incorrectly applied. Rather, he argues only that it was unfair for the State to have so much admissible testimony while Carter only had one chance to tell his version of events. "The appellant bears the burden on appeal, and we will entertain no claims for which no supporting authority has been cited." *Jones v. State*, 740 So.2d 904, 911 (¶22) (Miss. 1999) (quoting *Cavett v. State*, 717 So.2d 722, 724 (¶9) (Miss.1998)).

III. THE APPELLANT WAS NOT PREJUDICED BY THE CHILD-VICTIM'S IN-COURT IDENTIFICATION OF THE APPELLANT.

Although V.K. did not initially recognize Carter in court, she explained that he looked different than the last time she saw him two years prior because he had shaved his head. T. 450. Carter also testified that he had changed his appearance since the last time he saw V.K. by shaving his moustache and goatee. T. 571. "The character and adequacy of evidence of identification of an accused in a criminal case is primarily a question for the jury, provided the evidence could reasonably be held sufficient to comply with the requirement of proof beyond a reasonable doubt." *Hardin v. State*, 932 So.2d 70, 72 (¶7) (Miss. Ct. App. 2006) (quoting *Passons v. State*, 239 Miss. 629, 634, 124 So.2d 847, 848 (Miss. 1960)). Accordingly, the trial court properly ruled that V.K.'s identification of Carter "goes to the credibility of the witness, it goes to the witness's memory and recollection, and that's the stuff of argument, not the stuff for mistrials." T. 460.

Furthermore, for the sake of argument only, even if V.K.'s identification of Carter was insufficient, "[A] positive identification of a suspect is not required if other evidence is sufficient to support the jury's verdict." *Edwards v. State*, 736 So.2d 475, 483 (¶29) (Miss. Ct. App. 1999) (citing *Bogard v. State*, 233 So.2d 102, 105 (Miss. 1970)). The proof was clearly sufficient to support the jury's verdict. V.K.'s testimony alone was sufficient to prove all of the required elements of the charge of sexual battery. She clearly named Carter as her abuser both at trial and numerous times prior to trial. There was no real question as to Carter's identity as Detective Haygood positively identified him in court, and Carter testified in his own behalf and identified himself as Bryant Carter. T. 310, 561. As such, Carter's third assignment of error is without merit.

IV. THE TRIAL COURT DID NOT ERR IN ITS EVIDENTIARY RULINGS.

Carter claims that the trial court erred in limiting his cross-examination of Stovall regarding whether he had ever been wrong in his determination that a child's story was consistent with abuse and what it meant if a jury had disagreed with him. A plain reading of the record shows that defense counsel received an answer to both questions. When asked if Stovall had ever been wrong in his determination that a child's story was consistent with abuse, he clearly replied, "I'm sure I have." T. 413. Regarding Stovall's subjective belief as to what it meant if a jury had disagreed with him, the following exchange occurred between defense counsel and Stovall.

Q. Has a jury ever disagreed with you?

A. Yes.

Q. Do you believe the jury was wrong?

A. That was their findings and --

Q. Well, it's a simple question. You just stated that you didn't believe you had ever been wrong, and a jury disagreed with you, so --

State: Your Honor, I object.
Court: I'll sustain. It's a simple question, and it's also a question that calls for a legal opinion, so I will sustain.

Q. So if a jury disagrees with you, that doesn't necessarily mean you're wrong. Is that what you're telling me?

A. **I think it could mean that there was not enough evidence to prove abuse, or perhaps, for whatever reason, the case that presented wasn't as strong as it needed to be.**

T. 414. Carter's assertion that the trial court improperly limited cross-examination is contrary to the record, and his assertion that any such limitation violated the Confrontation Clause is too absurd to warrant a response.

Carter's remaining two allegations of error under this issue are simple questions of admission

and exclusion of evidence. Appellate courts will not reverse based on an error resulting from the admission or exclusion of evidence unless a substantial right of the defendant has been violated. *Ladnier v. State*, 878 So.2d 926, 933 (¶27) (Miss. 2004). No substantial right belonging to Carter was violated by the trial court's decision to admit or exclude evidence.

V. CARTER'S DISPROPORTIONALITY ARGUMENT IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

Carter was found guilty of sexual battery, in violation of Mississippi Code Annotated §97-3-95(d). "Every person who shall be convicted of sexual battery under Section 97- 3-95(1)(d) who is eighteen (18) years of age or older shall be imprisoned for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years." Miss. Code Ann. 97-3-101(3). Carter's sentence of life imprisonment is clearly warranted by statute. His argument that this his sentence is disproportionate to the crime charged is procedurally barred because he failed to raise the issue at trial and failed to present the trial court with the statistical information required for a proper analysis. See *Edwards v. State*, 800 So.2d 454, 468 (¶44) (Miss. 2001).

Even if Carter's final issue were not procedurally barred, it also fails on the merits. As a general rule, sentences which do not exceed the statutory maximum will not be disturbed on appeal. *Johnson v. State*, 950 So.2d 178, 183 (¶22) (Miss. 2007). "[P]roviding punishment for crime is a function of the legislature, and, unless the punishment specified by statute constitutes cruel and unusual treatment, it will not be disturbed by the judiciary." *Id.* (citing *Presley v. State*, 474 So.2d 612, 620 (Miss. 1985)). In arguing that his sentence is disproportionate to the repulsive crime he committed, Carter relies on *Solem v. Helm*, 463 U.S. 277 (1983). However, the United States Supreme Court overruled *Solem* to the extent that it found a guarantee of proportionality in the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) ("It should be apparent from the above discussion that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law. . . . We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."). Nevertheless,

reviewing courts may still consider the *Solem* factors, but only when "a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." *Johnson* at 183 (¶22).

The case repeatedly used by our courts as a guide for conducting the threshold comparison is *Rummel v. Estelle*, 445 U.S. 263 (1980). See *Coleman v. State*, 788 So.2d 788, 793-94 (¶¶12-13) (Miss. Ct. App. 2000); *Gibson v. State*, 731 So.2d 1087, 1097 (¶¶28-29) (Miss. 1998); *Wall v. State*, 718 So.2d 1107, 1114 (¶¶29-30) (Miss. 1998); *Hoops v. State*, 681 So.2d 521, 538 (Miss. 1996). Although Rummel was sentenced under a recidivist statute to life imprisonment for his third non-violent felony conviction, where the total loss from the three crimes was less than $250, the United States Supreme Court found that Rummel's sentence was not disproportionate nor violative of the Eighth Amendment. *Rummel* at 285. In light of *Rummel*, it cannot be said that Carter's sentence was grossly disproportionate to the vile crime which he committed.

CONCLUSION

For the foregoing reason, the Stat asks this honorable Court to affirm Carter's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: La Donna C. Holland

LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

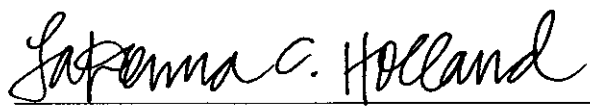
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Michael M. Taylor
Circuit Court Judge
Post Office Drawer 1350
Brookhaven, MS 39602

Honorable Dewitt (Dee) Bates
District Attorney
284 East Bay St.
Magnolia, MS 39652

George T. Holmes, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 10th day of December, 2007.



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680