IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SCOTT OLIVER CALDWELL — APPELLANT

VS. — NO. 2007-KA-0970

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SCOTT OLIVER CALDWELL **APPELLANT**

vs. **CAUSE No. 2007-KA-00970-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Lee County, Mississippi, in which the Appellant was convicted and sentenced for his felony of **SEXUAL BATTERY**.

STATEMENT OF FACTS

The victim in this case, a female child nine years of age at the time of trial, testified that the Appellant placed his penis in her mouth "more than one time." She stated that he sometimes ejaculated in her mouth when he did this. The Appellant also inserted his finger into her vagina perhaps two times. These acts generally occurred at night, and the Appellant told her once that she should tell no one about what he was doing because they both could get in trouble. The acts of fellatio occurred at an Uncle Wayne's house; the acts of vaginal penetration occurred at another uncle's house.

The Appellant's actions toward his daughter came to light when she told an aunt about them. The victim further stated that the Appellant had her watch a sex videotape and allowed her to smoke cigarettes. (R. Vol. 3, pp. 213 - 233).

Christina Lynn Gray, the aunt in whom the victim confided, testified that the victim told her that the Appellant was "sexing" her. Miss Gray reported what she was told to her to her mother and to the victim's school principal. The victim's mother was contacted. The victim was taken to the Department of Human Services. (R. Vol. 3, pp. 233 - 245).

Mrs. Glenda Sue White Gray, the victim's grandmother, testified that the Appellant is the victim's stepfather. She further testified that the victim began living with her after the Department of Human Services had been contacted. While living with her, the victim told her what the Appellant had done, namely that the Appellant inserted his finger into her vagina and that he inserted his penis into her mouth. The victim told her that "white stuff come out" each time he put his penis into her mouth and that she washed her mouth afterwards. The child used a bathroom faucet to demonstrate how long the Appellant's penis was, and her fingers to demonstrate how large it was. The victim also told Miss Gray that on one occasion one of her sisters got up during the night to see whether the victim had gotten off to. The Appellant hid the victim beneath his bed. (R. Vol. 3, pp. 276 - 293).

Investigator Donna Franks Fincher testified that the house in which the acts of fellatio occurred was in Lee County, Mississippi, albeit close to the Lee-Itawamba County line. The witness testified that there had been allegations concerning two of the Appellant's younger children "humping" the victim, but the victim never stated that those children had penetrated her. It seem that the actions of the boys consisted of rubbing the victim. They admitted having done so. (R. Vol. 3, pp. 293 - 300; Vol. 4, pp. 301 - 304).

A forensic interview specialist, Angie Floyd, testified that she interviewed the victim. The victim told her, in lurid detail, the acts committed by the Appellant against her. We do not think it necessary to go into detail here as to what the victim told her, save to say only that it was

consistent with her trial testimony. The victim also described the appearance of the Appellant's genital area. The victim also told her of what her adolescent stepbrothers had done to her. (R. Vol. 4, pp. 305 - 319; 328 - 331).

Dr. Margaret Koranek testified that she had some forty - four counseling sessions with the victim. The victim told her that the Appellant had her perform fellatio on him. She was aware of sexual misbehavior committed against the victim by the victim's stepbrothers. The victim expressed anger against her stepfather for what he had done to her and anger against her mother on account of the fact that her mother did not believe her. The victim was also upset about being separated from her parents. During one of these sessions, the victim told the doctor that the Appellant had performed cunnilingus upon her. (R. Vol. 4, pp. 332 - 347).

The Appellant testified. He stated that his family and he, including the victim, moved to Uncle Wayne's house in March of 2005. He denied having placed his penis in the victim's mouth at either house. He denied having bruised the victim's face. He denied having allowed the victim to smoke cigarettes. He denied having been in possession of pornographic tapes. He stated that he knew that "the girls had been messed with," but he denied any misconduct of a sexual nature with the victim. He could give no reason why the victim would have testified as she did, but he wondered if it was because he had failed to protect her from "the boys."

The Appellant further testified that "the boys" admitted to him that they had "humped" the girls, even so far as placing their penises in their vaginas. They never admitted placing their penises in the victim's mouth. The Appellant said he did not report this because someone named Brother Merchant told him that he, the Appellant, might end up being blamed. He also testified that he thought the matter was settled because the boys had gone to live with their stepmother.

The Appellant's wife worked a factory job from three in the afternoon until half past

eleven at night. The Appellant was alone with the children during that time. He was unemployed. He denied allowing the victim to stay up later than the other children in the house. He said he had no idea why the victim testified that he had forced her to perform fellatio upon him. He did think that maybe it was because she had threatened to go live with her real daddy, or with her "nanna." (R. Vol. 4, pp. 359 - 377).

The Appellant's wife then testified. Uncle Wayne's house was located in Lee County. Besides the Appellant and she, there were four children living at that house, including the victim. The three girls slept in one bed; a boy slept in the room with them or with his mother and father. She said that the victim did not report any abuse by the Appellant to her. The victim did report what the Appellant's boys had done some two months after the boys went elsewhere to live. She did not report this because Brother Merchant told her not to do so.

The wife testified that she did not believe that the Appellant had done what her daughter testified he did. However, the wife admitted that she was not with the Appellant "24/7". She testified that even though she had visited her daughter after the daughter was taken from her, the daughter never denied that the Appellant had sexually abused her. (R. Vol. 4, p. 377 - 385).

One William Jason Caldwell, a nephew of the Appellants, testified that, when he left work at four in the afternoon, he went to Uncle Wayne's house and stayed there until one in the morning, or perhaps all night. He was not at the house every day or all day. He claimed that he and the Appellant drove the children around in four-wheelers, that the Appellant then cooked the children their supper, and then sent them off to bed. The witness testified that he did not see any improper behavior on the part of the Appellant.

However, on cross-examination, this witness decided that he was with the Appellant and the children each and every day of the week, and weekends too. He was not doing that at the

time of trial because he had moved to Tupelo and because his four - wheeler was not "running right." He claimed that he would have reported his uncle had he seen something remiss in his uncle's behavior with the children. (R. Vol. 4, pp. 385 - 391).

The State presented a rebuttal witness, Glenda Gray. She stated that the victim talked to her about the difference between Chad and Eric, the Appellant's two "boys." The victim told her that both attempted to penetrate her vaginally with their penises. The Appellant penetrated her orally with his penis. When describing the Appellant's penis, the victim stated that Eric had more hair than the Appellant. (R. Vol. 4, pp. 392 - 395).

The State then called one Jimmy Dale Merchant, pastor of Metts Road Church of Jesus Christ. He testified that the Appellant confided in him that his boys had been molesting the victim. The Appellant had the view that he might be blamed for their actions. He stated that he did not tell the Appellant that he might be blamed for it. He stated that he told the Appellant that it would be better to tell the victim's grandmother about what had happened. (R. Vol. 4, pp. 407 - 414).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING TO DISMISS BOTH COUNTS OF THE INDICTMENT AFTER THE TESTIMONY DISCLOSED THAT THE FACTS ALLEGED IN COUNT II OF THE INDICTMENT OCCURRED IN ITAWAMBA COUNTY, MISSISSIPPI, RATHER THAN IN LEE COUNTY, MISSISSIPPI?

2. DID THE TRIAL COURT ERR IN EXCLUDING TESTIMONY UNDER M.R.E. 412 CONCERNING PRIOR SEXUAL ABUSE AGAINST THE VICTIM; DID THE TRIAL COURT ERR IN ADMITTING CERTAIN TESTIMONY UNDER M.R.E. 803(25)?

3. WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS BOTH COUNTS OF THE INDICTMENT ON THE GROUND THAT ONE OF THE COUNTS OF THE INDICTMENT RELATED TO EVENTS THAT OCCURRED IN ITAWAMBA COUNTY

2. THAT THE TRIAL COURT DID NOT ERR IN ITS RULING UNDER M.R.E. 412; THAT THE TRIAL COURT DID NOT ERR IN ITS RULING UNDER M.R.E. 803(25)

3. THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS BOTH COUNTS OF THE INDICTMENT ON THE GROUND THAT ONE OF THE COUNTS OF THE INDICTMENT RELATED TO EVENTS THAT OCCURRED IN ITAWAMBA COUNTY

In his First Assignment of Error, the Appellant asserts that the trial court should have dismissed count II of the indictment and granted a mistrial as to count I. It is said that, contrary to the allegations of count II of the indictment, the testimony showed that the acts alleged in that count occurred in Itawamba County, rather than Lee County, Mississippi.

The indictment alleged, in count I, that the Appellant committed sexual battery against the victim by having her perform fellatio upon him. Count II alleged sexual battery against the victim in that he vaginally penetrated her with his finger or fingers. Both counts alleged that the acts were committed in Lee County. (R. Vol. 1, pp. 3 - 4). In the course of the trial, it became apparent that the acts alleged in count II occurred in Itawamba County. The trial court granted a directed verdict as to that count for that reason. (R. Vol. 4, pp. 356; 358 - 359).

The Appellant asserts that the trial court should have directed a verdict as to count II much earlier in the case, rather than at the conclusion of the State's case - in -chief. He claims that it was prejudicial error that the court did not do so because the State was able to prove that

the victim was vaginally penetrated.

There was a lengthy hearing at the conclusion of Christina Gray's testimony. The Appellant moved *in limine* to have the State prohibited from eliciting testimony concerning what the Appellant had done to the victim at Uncle David's house. The ground alleged was that Uncle David's house was in Itawamba County. The State conceded that Uncle David's house was in Itawamba County. However, it asserted that the testimony regarding vaginal penetration at Uncle David's house was admissible under M.R.E 404(b) with respect to count I of the indictment. (R. Vol. 3, pp. 246 - 249).

The trial court acknowledged that under "*Lambert v. State*, . . . evidence of other sexual acts are admissible if they were committed on the victim of the crime charged to show a lustful disposition toward that particular victim." However, it appeared that the court thought that the fact that the Appellant had not been convicted of those other acts affected the admissibility of such evidence. The court then ruled that the State would not be permitted to prove the acts that occurred in Itawamba County and indicated that it would instruct the jury that they were to disregard all testimony concerning acts that occurred in Itawamba County. (R. Vol. 3, pg. 251).

The State sought reconsideration of that ruling, pointing out that the venue issue had nothing to do with the admissibility of the evidence under Rule 404(b). The State asked the trial court to "refrain" from a ruling at that time. The court apparently declined, but, confusingly, appeared to make an exception of some sort concerning "general opinions or findings" (R. Vol. 3, pp. 251 - 254).

Nonetheless, the court appeared to reconsider its ruling. It granted the defense a continuing objection to any testimony concerning acts that occurred in Itawamba County. It then instructed the attorneys that it intended to conduct an M.R.E. 403 analysis. The State cited

Lattimer v. State, 952 So.2d 206 (Miss Ct. App. 2006) in support of its position that the acts committed at Uncle David's house were admissible. The defense simply asserted that the evidence was much more prejudicial than probative. (R. Vol. 3, pg. 254; 258 - 259)

After a bit more argument from counsel, the trial court ruled that the acts that occurred in Itawamba County would be admissible under M.R.E. 404(b). In an extensive ruling, the court cited a number of decisions in support of its ruling. It further found that the evidence was more probative than prejudicial. It then informed the defense that a limiting instruction would be granted at the request of the defense. (R. Vol. 3, pp. 262 - 265).

We do not think it necessary to consider at what precise moment the court should have granted a directed verdict. The reason this is so is because the evidence of the vaginal penetration of the victim by the Appellant was admissible under M.R.E. 404(b) as to count I of the indictment, as recognized by the trial court. *E.g. Larson v. State*, 957 So.2d 1005, 1013 - 1014 (Miss. Ct. App. 2006); *Lattimer v. State*, 952 So.2d 206, 215 - 216 (Miss. Ct. App. 2006)(citing *Mitchell v. State*, 539 So.2d 1366 (Miss. 1989)); *McClure v. State*, 941 So.2d 896 (Miss. Ct. App. 2006). Even had there not been a count II, the evidence would have been admissible. Since this evidence would have been admissible even if only the acts at Uncle Wayne's house were the subject of the indictment, the Appellant's argument regarding venue is simply a red herring. Furthermore, since the Appellant was not convicted of count II of the indictment, we fail to see how he has any complaint to make of it.

Good point

The Appellant appears to suggest that it was unclear whether the acts of vaginal penetration occurred at Uncle David's or Uncle Wayne's house. We think the victim and other witness made it clear where they occurred, even if the one witness cited by the Appellant was unsure. In any event, it does not matter where they occurred. It is the fact that they occurred that

was the important thing. In any event, if it was unclear where they occurred, whether in Lee or Itawamba counties, then we would think that it was error for the trial court to direct a verdict as to count II. Miss. Code Ann. Section 99-11-3(1) (Rev. 2007).

The Appellant cites *Tudor v. State*, 299 So.2d 682 (Miss. 1974) for the proposition that evidence concerning other crimes should not be introduced in a trial upon an unrelated crime. However, this pre-rules decision did not involve an analysis under Rule 404(b). Under Rule 404(b), evidence of other bad conduct may be admitted in order to establish one or more of these purposes set out in the rule. *Tudor* was a case in which, according to the Court, the prosecution simply introduced bad act evidence without any evidentiary license to do so. Clearly, evidence of other sexual acts is admissible under Rule 404(b), as the cases cited above demonstrate.

The Appellant also cites *Hopkins v. State*, 639 So.2d 1247 (Miss. 1993). However, that case did not involve Rule 404(b). There, the State wished to impeach the testimony of the defendant with evidence of his prior conviction of touching a child for lustful purposes. *Hopkins* involves an entirely different rule of law and is simply not relevant here.

The Appellant also appears to suggest that the trial court should have granted a mistrial as to count 1 of the indictment. However, the Appellant does not appear to ever have sought a mistrial as to count 1. In any event, since the evidence of prior sexual acts was admissible in the case at bar, there would have been no good ground to grant a mistrial.

In the Appellant's lengthy, meandering argument on this issue, he utterly fails to address, or even mention, the line of decisions we have set out above. The plain and simple fact is that evidence of prior sexual misconduct by an accused against his victim, on a trial for a subsequent sexual crime committed by that accused against that same victim, is admissible under Rule 404(b). This rule has been applied in single count indictments. Thus, the venue problem with respect to

Really?

count II of the indictment is and was utterly irrelevant. The evidence of prior sexual acts by the Appellant against the victim was admissible regardless of when count II was dismissed, or even had there been no count II to begin with.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN ITS RULING UNDER M.R.E. 412; THAT THE TRIAL COURT DID NOT ERR IN ITS RULING UNDER M.R.E. 803(25)

A. M.R.E. 412

After the jury was selected to try the Appellant, the State brought on a motion to prohibit the defense from producing the testimony of the two boys who attempted to penetrate the victim vaginally. The State did not deny that the Appellant's sons did, in fact, attempt to do so, and in fact the State indicated that it intended to inform the jury about that fact. Citing [redacted], the State asserted that the testimony of the boys would be [redacted] semen, pregnancy, disease or [redacted] Since the State intended to inform the jury of what the boys had done, the testimony of the boys would be collateral. The State further noted that the boys would quite likely have to be advised of their rights and be represented by counsel. The State asserted that the boys should not be permitted to testify under authority of M.R.E. 401 and 403 (R. Vol. 3, pp. 176; 178).

The defense asserted that the purpose in calling the boys was to attempt [redacted] Appellant. When the State pointed out that that purpose was not one of those enumerated in Rule 412, the defense responded that it did not intend to call the boys for the purpose of establishing the truth of the fact that they had sexually abused the victim, only to show that "there [was] some history for which [the victim] may have knowledge of penises, vaginas, talk of that

nature, sex talk, sex in general". However, the defense acknowledged that it could likely produce such evidence through other witnesses. (R. Vol. 3, pp. 180 - 181; 183 - 184).

The trial court ruled that the victim's prior sexual conduct was not relevant under Rule 412. It further found that the purpose stated by the defense for the testimony fit none of the exceptions set up in the rule. The defense, though, claimed that the testimony would go to show the source of the injury, even though it did not identify what injury, if any injury, it was talking about. (R. Vol. 3, pp. 186 - 187). The court stood by its ruling, stating, though, that should it develop during the trial that some exception might arise it would revisit the issue. (R. Vol. 3, pp. 188 - 192).

Is there anything about construing the MRE broadly?

First of all, as admitted by the Appellant (Brief for the Appellant at 22), the defense did not file a motion under Rule 412(c)(1), (2) within the time required by that rule. Moreover, the defense utterly failed to follow the other procedural requirements of the rule. That being so, the Appellant was barred from producing the testimony of the boys. *Lofton v. State*, 818 So.2d 1229 (Miss. Ct. App. 2002); *Levy v. State*, 724 So.2d 405 (Miss. Ct. App. 1998). However, for whatever reason or reasons, neither the State nor the trial court noted this.

It has been held that, where the State fails to point out the procedural deficiencies of a defense motion under Rule 412, those deficiencies are waived. *Herrington v. State*, 690 So.2d 1132 (Miss. 1997).[1] However, we think that *Herrington* is distinguishable from the facts of the

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[1] We respectfully ask that the Court reconsider whether the failure of the State to object to a procedural defect under Rule 412 works a waiver of the defect. Under Rule 412(b)(1), past sexual behavior is not admissible unless admitted in accordance with 412(c)(1), (2). The language of the rule is mandatory. Such evidence is simply not to be admitted unless the conditions permitting admission are strictly adhered to. Rule 412 exists to protect victims of sex crimes from unnecessary and potentially embarrassing explorations into their intimate lives. This purpose ought not to be dependent on whether the State thinks to object to procedural deficiencies in a motion under Rule 412.

case at bar, and inapplicable here. In the case at bar, the defense did not file a motion under Rule 412. What occurred was that the State moved the trial court to prohibit testimony about other sexual incidents concerning the victim. The defense never filed any kind of motion under Rule 412, in [redacted] with what was done in *Herrington*.

really?
really?

Still addresses the propriety of the evidence under 412, though

Since the Appellant never filed a motion, there was, in fact, nothing about a motion under Rule 412 for the State to object to – the motion before the court was the State's motion, not one by the defense. The defense in the case at bar simply argued against the State's motion. Since the defense never affirmatively sought admission under Rule 412, but simply argued against the State's motion, it never actually invoked Rule 412's procedure for admission of this kind of evidence. Since that did not occur, the defense is in no position to complain of the trial court's ruling here. The first half of the Second Assignment of Error is barred here because the Appellant did not move for admission of this evidence under Rule 412 and did not comply with the procedural requirements of Rule 412. The State has not waived its objections in view of the fact that there was no motion by the defense to object to. Rather, the defense simply did not move for admission of this testimony.

Assuming that the first half of the Second Assignment of Error is before the Court, notwithstanding the fact that it is not, there is no merit in it.

As we have said, the defense stated that it wanted the testimony of the two boys in order to demonstrate that the victim's knowledge of sexual matters came from their acts against her. However, under Rule 412(b)(2)(A), this purpose is not one of those listed. In any event, there was no evidence of pregnancy, source of semen or disease; there was nothing to show an injury save a bruise, which the victim got while playing on playground equipment. The Court of Appeals has held that evidence of prior sexual behavior, if admissible, is admissible only as to

the particular items set out in Rule 412(b)(2)(A). *Levy v. State, supra*, at 408. Since the purpose asserted by the defense was not one of the items listed in the rule, the trial court was correct to refuse to permit the boys from testifying.

The Appellant suggests that the evidence somehow might have gone to demonstrate fabrication on the part of the victim. (Brief for the Appellant at 23). This claim was not raised in the trial court and may not be raised here. *Crenshaw v. State*, 520 So.2d 131 (Miss. 1988). In any event, there is nothing in this record to support any theory of fabrication beyond the Appellant's denial of having battered his stepdaughter.

The Appellant then says that the victim was traumatized, and thus physically injured. From that, he somehow reasons that maybe Rule 412 does not apply after all and that he should have been permitted to show that the boys caused the "injury". (Brief for the Appellant, at 23). This argument barely requires a response, so obviously strained as it is. If emotional or psychological trauma on the part of sexual battery victims would be sufficient to constitute "injury" sufficient to permit enquiry into a victim's past sexual behavior, then there would be no limits at all: it may be fairly assumed that all such victims suffer emotionally. The purpose in limiting enquiries into a victim's sexual history would be completely frustrated were non-physical trauma sufficient to permit such enquiries. In any event, [redacted], 676 So.2d 909 (Miss. 1996) is no authority for the Appellant. In that case, the Court held that [redacted] Here, the Appellant wanted to introduce evidence of entirely separate and unrelated instances of sexual misconduct with the victim, instances which did not involve him. The acts in question were different in kind as well. The evidence proposed to be admitted was not that of an alternate explanation but was of an entirely separate incident.

That's not true, State is saying trauma would open floodgates. In truth, prior trauma only would open door to inquiry on that prior trauma cause (if relevant under 403, of course)

The Appellant then surmises that the boys' testimony might have been admissible under Rule 412(b)(1). First of all, this was not urged as a ground of admission in the trial court. The Appellant may not be heard to raise it here. *Crenshaw, supra.* Secondly, since he urges admission of this testimony for the first time under 412(b)(1), we will point out that he did not comply with the requirements of the rule. He did not file a motion in the time required under Rule 412(c)(1), and he did not provide a written offer of proof as required by Rule 412(c)(2). Rule 412(b)(1) requires compliance with these rules. Since he failed to comply with the rule, there would have been no error had the trial court, under 412(b)(1), prohibited the testimony. *Aguilar v. State*, 955 So.2d 386 (Miss. Ct. App. 2006).

Beyond this, we fail to see how the Appellant's right of confrontation was implicated. The acts by the boys were entirely separate and distinct from those of the Appellants. The Appellant was completely free to exercise the right to confront the victim about the acts he committed against her. This was sufficient since nothing the boys did against the victim was evidence against the Appellant.

The Appellant then says that the "policy reasons" behind Rule 412 do not apply in the case at bar, asserting that the only purpose for the rule is to protect sexual assault victims from being humiliated by evidence of their sexual history. This argument was not raised in the trial court, and it may not be raised here. *Brown v. State*, 682 So.2d 340, 350 (Miss. 1996).

Regardless of what the Appellant claims to be the "policy reasons" behind Rule 412, the text of the rule itself clearly shows that the question of admission of this evidence was controlled by the rule. It is utterly irrelevant what the Appellant considers to be the "policy reasons" in view of the fact that the rule itself is clearly applicable. Just as this Court would not apply principles of statutory construction when considering a plain and unambiguous statute, *Gilmer v.*

State, 955 So.2d 829 (Miss. 2007), neither should it find it needful to consider "policy reasons" underpinning Rule 412. Rule 412 is a plain and unambiguous rule, and it clearly applied to the Appellant's attempt to delve into the victim's troubles with the Appellant's sons.

The Appellant's Second Assignment of Error is, in any event, a purely hypothetical issue. What the Appellant does not bother to tell this Court is that evidence that the victim was molested by the Appellant's sons was produced, and elicited by counsel for the Appellant. (R. Vol.3, pp. 298 - 299). Once this was put into evidence, there was further testimony on the point. (R. Vol. 3, pp. 300; Vol. 4, pp. 304; 317; 330 - 331; 365 - 368; 380 - 382; 393 - 395). Once this evidence was presented to the jury, the defense could have argued that it was the victim's troubles with the boys that gave her knowledge things sexual in nature. In any event, since there was testimony about what the Appellant's sons did to the victim, if there was any error in the court's ruling concerning under rule 412, any such error was surely cured. *Jackson v. State*, 594 So.2d 20, 25 (Miss. 1992).

The Appellant's complaints about the Rule 412 ruling are without merit.

B. M.R.E 803(25)

The Appellant complains that the trial court committed error in permitting the State to present a rebuttal witness for the purpose of testifying, under M.R.E. 803(25), as to the acts committed against the victim by the Appellant's sons. The Appellant contends that he was denied the right to confront the victim about the sexual abuse she suffered at the hands of the Appellant's boys. Apparently, the Appellant means to be understood to say that, because the State did not present the child victim as a rebuttal witness, but instead another witness, the Appellant was denied the right to confront the child victim witness about the acts the Appellant's sons committed against here.

First of all, while the Appellant here cites *Crawford v. Washington*, 541 U.S. 36 (2004), we find no objection in this record based upon *Crawford* specifically or on the Sixth Amendment right to counsel generally. The Appellant's entire objection was that the testimony was inadmissible hearsay and unduly prejudicial. (R. Vol. 4, pp. 396 - 400). This being so, he may not be heard to complain of an alleged denial of his right to confront the victim about what his darling boys did to her. *Robinson v. State*, 585 So.2d 735, 737 fn 2 (Miss. 1991).

We are aware that this Court held, in *Hobgood v. State*, 926 So.2d 847 (Miss. 2006), that the failure to present a timely objection in the trial court to an alleged denial of the right of confrontation does not work a waiver of the complaint. *Hobgood*, at 852. However, this was stated by the Court in one sentence and without any citation to authority. Ironically, while the Court in *Hobgood* did cite *Robinson* for another proposition, it failed to note that *Robinson* held that the right of confrontation can be waived by the failure object. The Court did not take into account what was held in *Robinson* in this regard and did not overrule *Robinson* on this point.

The statement by the Court in *Hobgood* is contrary to decisions on the point by other courts. *See Magruder v. Commonwealth*, 275 Va. 283, 657 S.E.2d 113 (2008); *Ludlow v. State*, 761 P.2d 1293 (Okla. Cr. 1988); *Eustis v. State*, 191 S.W.3rd 879, 885 - 886 *and cases cited therein* (Tex. App. 2006); *Commonwealth v. Amirault*, 424 Mass. 618, 677 N.E.2d 652 (1997); *Denson v. State*, 240 Ind. 324, 163 N.E.2d 749 (1960); *State v. Rawls*, 198 Conn. 111, 502 A.2d 374 (1985).

Courts have also pointed out that the right of confrontation is not one of those that only an accused may waive. *Commonwealth v. Amirault, supra.* The right of confrontation is clearly a waivable right; defense attorneys not uncommonly forego cross-examinations of witnesses.

In view of these considerations, the one sentence statement in *Hobgood,* to the effect that

the right of confrontation is not a waivable right, should be regarded as an erroneous statement. The right to confront witnesses is clearly a waivable right. Since the Appellant did not assert a denial of the right to confront witnesses in his argument to the trial court, he may not do so here.

Assuming that the Appellant's contention is before the Court, though without intending to waive the foregoing reason why it is not, there is, nonetheless, no merit in it. Some factual background may be helpful to the Court in understanding this issue.

As we discussed above, the trial court originally barred testimony about the sexual acts committed by the Appellant's boys against the victim. Somehow, though, during the cross-examination of the witness Fincher by the defense, the trial court permitted the defense to explore the issue of whether the victim had been sexually abused by others. (R. Vol. 3, pp. 298 - 300; Vol. 4, pp. 304). The trial court, it will be noted, gave no reason for this apparent about - face on the issue of the victim's sexual history. However, later in the trial, the prosecutors stated that they "realize[d] that the door was opened as far as the testimony of the young men. . . ." In any event, after the door was "opened," there was considerable testimony about what the Appellant's boys had done to the victim.

This was not an instance in which the State made the strategic decision to complete the examination of the child victim, without going into the other acts that were committed against her, only to go into them with later witnesses. At the time of the examination of the victim, the ruling by the trial court was that there would be no testimony concerning the acts of the boys. Here it was the defense that "opened the door" to that line of testimony well after the victim completed her testimony.

The victim never testified as to the acts committed against her by the Appellant's sons. Since she did not, there was nothing to confront. Nonetheless, if the Appellant believed that it

would have been beneficial to the defense for her to so testify, then the defense might have called her to the stand in the defense case - in - chief for that purpose. The Appellant attempts to excuse his failure to do so by the statement to the effect that it is "well known" that by doing so it might appear that the defense was "bullying" the child. (Brief for the Appellant at 30). However, this is no excuse at all. The child could have been recalled by the defense, and it would not have been necessary to "bully" the child about the Appellant's boys' conduct. It is not "well known" that recalling a victim to the witness stand in a defense case - in - chief will be invariably prejudicial to the defense. Indeed, if a victim is recalled by the defense, to give testimony that was not gone into in the State's case, it could appear to a jury that the State held back evidence. That would tend to prejudice the State.

Strategy not appealable

Contrary to what is claimed here, the trial court did not refuse the defense request to have the child recalled to testify. The trial court simply ruled on the Appellant's objections to the rebuttal witness. It did not indicate that the State could not recall the child. (R. Vol. 4, pp. 396 - 400). In any event, we are aware of no authority that would permit a trial court to instruct the State on what witnesses to present. On the other hand, we are aware that neither an appellant nor a trial court has any authority to instruct the State as to what witnesses it will call to the witness stand. *Brown v. State*, 969 So.2d 855, 863 (Miss. 2007).

The Appellant discusses at some length the Court of Appeals' decision in *Golden v. State*, No. 2005-KA-00111-COA (Decided 5 February 2008, Not Yet Officially Reported). For what purpose, though, is unclear. At the end of his discussion, he points out that the Court of Appeals found that that appellant's confrontation right had not been violated, yet claims somehow that the Appellant's right has been

It is likewise unclear why *Williams v. State*, 970 So.2d 727 (Miss. Ct. App. 2007) is

useful here. In that decision, the Court found no harmful error in the admission of a video taped statement of the victim where the accused later had the opportunity to examine the victim in court about the statement. In fact, there the accused did call the victim in his case - in - chief.

The rebuttal witness the Appellant complains of, Glenda Gray, the victim's grandmother, testified as to the acts the Appellant's sons committed against her on rebuttal. (R. Vol. 4, pp. 392 - 395). Prior to trial, when the trial court was considering whether she might testify under M.R.E 803(25), the witness testified that she was the victim's grandmother. She testified that the way she learned of what the Appellant had done to the victim was that she received a telephone call from another of her daughters, Christina, who said that the victim had a bruise. Gray further testified that Christina told her that the victim told Christina that the Appellant tried to have sex with her. It was on the same day that she learned that the Appellant's sons were committing acts against the victim. Gray took the victim and her siblings to live with her; later, the victim went into more detail as to what the boys had done. (R. Vol. 2, pp. 43 - 66). The trial court considered the factors under 803(25) with respect to Gray, and found that she had no motive to lie, that the events related to her by the victim were consistent, that the child was intelligent and able to distinguish the acts committed against her by the Appellant and his sons, and that the child was able to distinguish and describe the various acts committed against her by the Appellant and his sons. The court further found that the statements made by the child to Glenda Gray were spontaneous, were not in chronological order, and that the child had made a tentative attempt to tell her of what the Appellant had been doing prior to the time the child actually reported it. Considering these and other factors, the court held that the child's hearsay statements to Gray and others would be admitted. (R. Vol. 2, pp. 113 - 119). The Appellant does not appear to challenge the propriety of this finding.

The statements made by the victim to her grandmother were not "testimonial", under *Crawford*. The grandmother was not working in conjunction with law enforcement. The statements were spontaneous. There was no violation of *Crawford*. *Bishop v. State*, 982 So.2d 371 (Miss. 2008); *Hobgood v. State*, 926 So.2d 847 (Miss. Ct. App. 2006).

There is nothing to show that the child was not "available" to the defense. There is only the Appellant's unsupported allegation that she was not. This is to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983).

Finally, even if by some chance there was error is not permitting the child to be cross-examined about what the Appellant's sons did to her, any such error is surely harmless. *Bynum v. State*, 929 So.2d 312 (Miss. 2006). In the course of the trial, counsel for the defense indicated that he wished to enquire into this area in order to show that the child's knowledge about matters sexual in nature arose from what the Appellant's boys did to her. The testimony that was admitted concerning those acts was completely sufficient to allow the defense to take this position. It may be that counsel now wishes to expand on the trial attorney's reasons, but this he may not do – he is limited to the grounds alleged in the trial court. In any event, given the testimony that was admitted and the ostensible purpose for it, it simply cannot be said that the fact that the Appellant did not cross-examine the victim about these facts amounted to prejudicial error. It is difficult to see how such cross - examination would have produced anything more of value to the defense beyond what was admitted.

The Second Assignment of Error is without merit.

3. THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In considering the Appellant's Third Assignment of Error, we bear in mind the standard of review applicable to claims that a trial court erred in denying a motion for a new trial on the ground that the verdict was contrary to the great weight of the evidence. *May v. State*, 460 So.2d 778 (Miss. 1984).

The victim in the case at bar testified clearly as to the acts the Appellant committed against her. She was the only witness to these acts, a situation hardly surprising in cases of this kind. Especially in cases such as this, perpetrators look for opportunities to be alone with the victim. As the Appellant recognizes, a conviction for the felony of sexual battery may rest upon the uncorroborated testimony of the victim. *Collier v. State*, 711 So.2d 458, 462 (Miss. 1998).

The victim's account of what the Appellant did to her was consistent, not implausible and not improbable. Her account never varied in any significant detail. Beyond this, there was the fact that she described in some detail the characteristics of the Appellant's privy member, even going so far as to contrast at least one difference with one of his son's member. These facts serve as to corroborate her testimony.

There were no significant inconsistencies in the child's testimony. Whether she did or did not have a particular name for the Appellant's member can hardly be thought a significant inconsistency. Nor were there significant inconsistencies in the testimony of the other witnesses for the State. But even if it may be said that there were some inconsistencies in the testimony of those other witnesses, the victim's testimony was quite clear and consistent.

It is quite true that the defense offered the testimony of the Appellant and a relative of his, which created a factual issue for the jury to resolve. Yet, that was the very function of the jury.

The fact that the Appellant denied the allegations brought against him is, of itself, no ground to find that the trial court abused its discretion in denying a new trial. The verdict does not constitute an unconscionable injustice. Where a verdict rests upon conflicting evidence, the jury is the judge of the credibility and weight of the evidence. *Williams v. State*, 970 So.2d 727 (Miss. Ct. App. 2007).

The testimony regarding the acts committed in Itawamba County was not inadmissible, for the reasons we have discussed above. Nor was the testimony of those permitted to testify under M.R.E 803(25). There was no improper bolstering.

The Appellant then tediously rehashes an occasion of inadmissible testimony, the statement by the law enforcement officer that the Appellant was lying. An objection was sustained to this response by the officer, and the jury was admonished to disregard the statement. (R. Vol. 3, pp. 302 - 303). Jurors are presumed to follow the instructions of a trial court. *Yarbrough v. State*, 911 So.2d 951 (Miss. 2005). In any event, since the Appellant did not demand a mistrial, it is incongruous for him now to claim that such missteps were greatly prejudicial to him. As for the said - to - be improper argument by the State (R. Vol. 3, pg. 439), there was not even an objection to the argument.

The child's testimony clearly proved the allegations of sexual battery against the Appellant. While there were no witnesses other than the child at the time the acts were committed, the child's testimony was corroborated by the consistency of her account and by the detailed description of her stepfather's genital area, which she compared to that of one of his son's. While it is true that the Appellant denied having sexually battered the child, thus creating an issue of fact, this was a matter for the jury to resolve. In short, there is no basis here for a finding that the verdict is an unconscionable one. The trial court did not abuse its discretion in

refusing to grant a new trial.

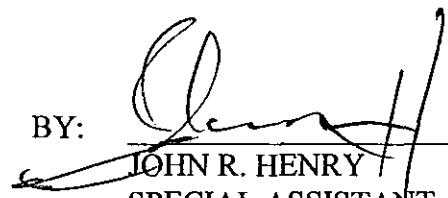
The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence 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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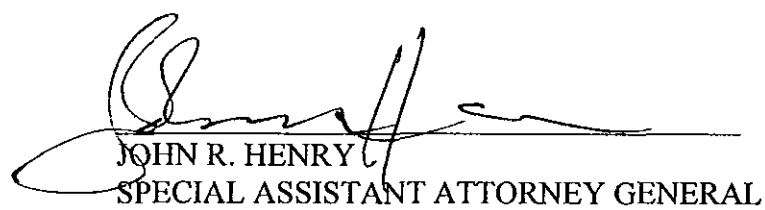

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