IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-00989-COA

BERNARD YOUNG — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S REPLY BRIEF

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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Issue No. 1

Preservation of the issue.

The state's position that the claimed hearsay violation was not preserved for appeal is incorrect. The record shows the hearsay issue along with the claimed discovery violation were both preserved.

The objections by defense counsel were specific enough to preserve the hearsay issue. In the context in which the evidence was offered, it was obvious on what issue or point of law the trial court was requested to, and did, rule. Nevertheless, even if trial counsel's objections were deficient, it was plain error to allow the victim's accusations into evidence.

That the evidence was objectionable was implied by the prosecutor asking the trial court to rule that the testimony fell under a hearsay exception "under Rule 803(3) or 803(3)(1). [T.123]. The prosecutor knew that it was hearsay and wanted the trial court to rule that an exception applied. The trial court made its ruling specifically referring to the testimony being an exception to the hearsay rule under 803(1) and (3) as a "present sense impression. [T. 163-68]. It is this ruling that the appellant now asks this court to review under Issue number 1.

It would have been superfluous for defense counsel to keep objecting after the

state acknowledged that evidence was indeed objectionable. Defense counsel then raised the additional objection of the discovery violation. [T. 165].

If the grounds for an objection are clearly obvious, there is no need to specifically state or repeat the intended grounds as was shown in *Jordan v. State*, 513 So.2d 574 (Miss. 1987), quoting from *Murphy v. State*, 453 So.2d 1290 (Miss.1984):

> ...it is obvious from the response of the prosecutor and the ruling of the trial judge, as well as the totality of the setting in which these objections were interposed, that everyone clearly understood that the objection was based upon the hearsay rule. There simply can be no doubt of that. In such circumstances it would be vain and foolish to demand that in the heated flow of trial, where the grounds of objection are reasonably apparent from the context, that counsel state his grounds or waive his objection.

Plain Error

In *Smith v. State* --- So.2d ----, 2007 WL 2770181 (Miss. Ct. App. 2007), the Court repeated that, with plain error review under MRAP 28(a)(3), the Court may address a plain error not identified by specific objection if a fundamental right of a criminal defendant is adversely effected; and, the appellate court may also address any "plain errors affecting substantial rights although they were not brought to the attention of the court" under Miss. R. Evid. 103(d). Citing *Berry v. State*, 728 So.2d 568, 571(6) (Miss.1999) . See also *Whigham v. State,* 611 So.2d 988, 995-96 (Miss. 1992).

To determine if plain error under MRAP 28(a)(3) exists, the Court must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial." [citation

omitted].

The fundamental or substantial rights infringed upon here in Young's case were the rights of confrontation and cross-examination under the Sixth and Fourteenth Amendments to the U. S. Constitution and Article 3 §26 of the Mississippi Constitution of 1890. The damaging testimony of Deputy Culver repeating what the victim said just before the shooting incident was hearsay evidence which Young never had the chance to confront nor test with the crucible of cross-examination.

The state relies on *Brown v. State,* 890 So. 2d 901 (Miss. 2004), for the proposition that "a relevant statement made by a murder victim prior to his death may be admissible as an exception to the hearsay rule ... under M. R. E. 803(3)." [Brief p. 10]. This is a very broad statement and correct if the "relevant statement" pertains to the victim's existing state of mind; however, the concept does not apply if the statement of the victim is testimonial and accusatory under *Crawford v. Washington*, 124 S. Ct 1354, 1356-59, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

In the latter context, the statement of the victim moves past a statement concerning a state of mind and into an area where a criminal defendant is protected from unchallenged hearsay that accuse the defendant of a crime. As held in *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74 (2006), generally under a *Crawford* analysis:

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary

> purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

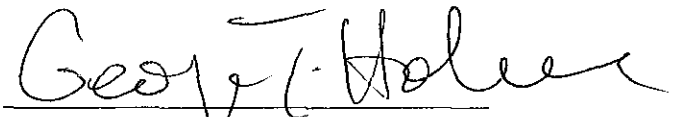
Here there was no emergency, because Deputy Culver sent Tamara Neal to Plantersville to file a complaint. Therefore, the statement was testimonial and inadmissible.

All of Young's issues were sufficiently preserved for appeal or are of such constitutional import as to allow, and arguably require, the Court to consider them.

As to all other issues and arguments, appellant relies on his initial brief.

Respectfully submitted,

BERNARD YOUNG

BY: 

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 12th day of March, 2008 mailed a true and correct copy of the above and foregoing Reply Brief to Brief Of Appellant to Hon. Sharion Aycock, Circuit Judge, P. O. Box 1100, Tupelo MS 38802, and to Hon. John R. Young, Dist. Atty. , P. O. Box 7237, Tupelo MS 38801, and to Hon. Laura H. Tedder, Spec. Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid. all by U. S. Mail, first class postage prepaid.

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