IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SHANNON TROY DEROUEN — APPELLANT/CROSS -APPELLEE

VS. — NO. 2007-KA-1005-SCT

STATE OF MISSISSIPPI — APPELLEE/CROSS - APPELLANT

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

I. THE APPELLANT'S M.R.E. 803(25) ARGUMENT IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

II. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT WHICH WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF ISSUE ON CROSS-APPEAL

I. WHETHER *MITCHELL V. STATE* SHOULD BE OVERRULED.

STATEMENT OF FACTS

Eight-year-old S.G. and her family often spent time at the home of her step-uncle, Shannon Troy Derouen, who was 38 years old. T. 205. S.G. also spent the night at Derouen's home and played with his children. T. 205. One night when S.G. spent the night, she was lying on the couch in the living room watching television after everyone else had gone to bed. T. 210. Derouen came into the living room and got under the covers next to S.G. T. 210. He then placed his hand on her vaginal area, which he rubbed in an up and down motion. T. 97, 105, 156, 174, 210, 218, 273. Months later, S.G. spent the night at Derouen's home and again slept on the couch in the living room. T. 211. Derouen again came into the living room and got on the couch, under the covers, and lay next to S.G. T. 211. This time, he placed her hand on his penis and directed her to rub it for one to two minutes. T. 97, 105, 156, 174, 211, 220, 239, 273. During this time, Bronson Derouen, the defendant's nephew, came into the living room and saw S.G. and Derouen lying on the couch under the covers. T. 126-27. Bronson then went into a back bedroom to retrieve some clothing and heard S.G. in the bathroom crying. T. 216. He asked her what was the matter and she replied that she had a stomach ache. T. 211.

S.G. did not immediately tell anyone about the molestation because she was scared. T. 245. Her first disclosure was to her fourth grade teacher, Ann Ladnier. T. 97. Ladnier then referred S.G. to the school counselor, who called the Department of Human Services. T. 97-98. A DHS social worker and a forensic interviewer with the South Mississippi Child Advocacy Center subsequently interviewed S.G., who told them about both incidents in which Derouen fondled her. T. 154, 174.

Derouen was ultimately convicted by a Jackson County Circuit Court jury on two counts of fondling. C.P. 118-19.

SUMMARY OF ARGUMENT

Derouen's M.R.E. 803(25) argument is both procedurally barred and without merit. Defense counsel failed to object to the social worker and forensic interviewer's testimony regarding S.G.'s out-of-court statements. As to Ladnier's testimony regarding S.G.'s out-of-court statements, the trial court conducted an 803(25) hearing and followed the proper legal standards prior to admitting the testimony.

The State provided legally sufficient evidence to support the jury's verdict which was not against the overwhelming weight of the evidence. Derouen asks this Court to improperly invade the province of the jury by reweighing the credibility of the witnesses.

On cross-appeal, the State urges this honorable Court to overrule *Mitchell v. State*, 539 So. 2d. 1336 (Miss. 1989), which held that admission of evidence of a sexual offense against one other than the victim is per se reversible error. In *Lambert v. State*, 724 So. 2d. 392 (Miss. 1998), this honorable Court expressed a willingness to relax the *Mitchell* holding, but fell short of overruling the case. It is the State's position that it is time to re-examine what one justice called the "flawed law" of *Mitchell*, and join suit with the other states and the federal system which allow evidence of the defendant's unlawful sexual conduct against other victims.

ARGUMENT

I. THE APPELLANT'S M.R.E. 803(25) ARGUMENT IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

Derouen claims on appeal that the trial court erred in failing to hold an 803(25) hearing before admitting Alton Hebron's and Sarah Carothers' testimony regarding S.G.'s out-of-court statements. However, defense counsel never objected to such testimony nor moved for an 803(25) hearing concerning Hebron's and Carothers' testimony. "The trial court cannot be held in error on a legal point never presented for its consideration." *Sanders v. State*, 846 So.2d 230, 237 (¶23)(Miss. Ct. App. 2002) (citing *Chase v. State*, 645 So.2d 829, 846 (Miss. 1994)). Because Derouen never objected to Hebron and Carothers' testimony and failed to ask the trial court to conduct an 803(25) hearing, this portion of his first assignment of error is procedurally barred.

Derouen did, however, raise the issue of the tender years exception with regard to a portion of Ladnier's proposed testimony. Defense counsel did not object to Ladnier's proposed testimony regarding S.G.'s initial disclosure, rather he objected to any testimony regarding their subsequent conversations. At trial, the following exchange occurred between defense counsel and the trial court judge.

> DEFENSE COUNSEL: Then they have a lady named Ann Ladnier, Judge, who also works at the elementary school, and it says, who may be called to testify to further discussions with the minor concerning the incidents after the initial disclosure of the events, and the minor's concerns about the same. I would object and ask for a Motion in Limine here. I think when the child initially came to this lady, if she did come to this lady, and tell her something about the touching, then I certainly think the Tender Years Exception probably applies, and she could be allowed to testify about it. But for the child to have continuing and further discussions with this lady, and to allow her to come in and testify to those things, I think is improper. I don't think it falls under the Tender Years Exception. And I think if the victim testifies -- and I think she's going to have to for the Tender Years Exception to come into play in this particular case -- if she testifies, it would be improper bolstering of her testimony, and I ask for a Motion in Limine to prevent that.

> THE COURT: Let me see if I understand the objection. You don't have a problem with the first statements the child may or may not have made to the person, is that right; but a subsequent conversation; is that right?
>
> DEFENSE COUNSEL: Yes, sir.

T. 71. The objection was peculiar in that defense counsel did not object to Ladnier's proposed testimony regarding the initial disclosure, which would be Ladnier's only testimony regarding S.G.'s out-of-court statement alleging that Derouen sexually abused her. Rather, defense counsel objected to Ladnier testifying regarding subsequent conversations in which she offered S.G. support. However, this testimony involved no hearsay, much less hearsay concerning the Derouen's sexual abuse. In any event, the trial court subsequently held an 803(25) hearing and found that S.G.'s out-of-court statements to Ladnier bore substantial indicia of reliability and that Ladnier's testimony was admissible. T. 102. Derouen claims, however, that the court erred in failing to find that S.G. was a child of tender years and failed to make on the record findings regarding all twelve factors used to determine whether a child's out-of-court statement bears substantial indicia of reliability.

Because S.G. was nine years old at the time she disclosed the sexual abuse, she is presumed to be a child of tender years. *Veasley v. State*, 735 So.2d 432, 436-37 (¶16) (Miss. 1999). Additionally, a trial court is not required to "make point-by-point findings on the twelve reliability factors." *Elkins v. State*, 918 So.2d 828, 834 (¶18) (Miss. Ct. App. 2005). Rather, the trial court must make an overall determination regarding the reliability of the statements. *Walls v. State*, 928 So.2d 922, 927 (¶14) (Miss. Ct. App. 2006) (citing *Hennington v. State*, 702 So.2d 403, 415(¶54) (Miss. 1997)). The trial court did not err as it followed the proper legal standard and found that S.G.'s out-of-court statements to Ladnier regarding the sexual abuse bore substantial indicia of reliability.

II. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT WHICH WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Derouen claims that the State failed to present legally sufficient evidence to support the verdicts simply because "there was not any physical or eyewitness evidence[,] just S.G.'s word against Mr. Derouen's." Appellant's brief at 15. Our reviewing courts have repeatedly held that "testimony of a single uncorroborated witness is sufficient to sustain a conviction ... even though there may be more than one person testifying to the contrary." *Smith v. State*, 956 So.2d 997, 1004 (¶18) (Miss. Ct. App. 2007) (quoting *Howery v. State*, 809 So.2d 761, 763 (¶7) (Miss. Ct. App. 2002)). This is especially true in sexual abuse cases which often come down to the word of the victim against the word of the perpetrator. The unsupported testimony of sexual abuse victim is sufficient to sustain a conviction when the victim's testimony has not been substantially contradicted or discredited by credible evidence. *Bradley v. State*, 921 So.2d 385, 389-90 (¶14) (Miss. Ct. App. 2005) (citing *Torrey v. State*, 891 So.2d 188, 192 (¶18) (Miss. 2004)). See also *Klauk v. State*, 940 So.2d 954, 957 (¶8) (Miss. Ct. App. 2006) (citing *Ladnier v. State*, 878 So.2d 926 (¶14) (Miss. 2004)); *Miley v. State*, 935 So.2d 998, 1001 (¶10) (Miss. 2006) (citing *Collier v. State*, 711 So.2d 458, 462 (¶10) (Miss.1998)); *Byars v. State*, 835 So.2d 965, 970 (¶14) (Miss. Ct. App. 2003); *McKnight v. State*, 738 So.2d 312, 315 (¶8) (Miss. Ct. App. 1999). In the present case, S.G.'s testimony was not uncorroborated. Her prior statements to Ladnier, Hebron, Carothers, and Douglas corroborated her trial testimony. See *Smith v. State*, 925 So.2d 825, 831-32 (¶15) (Miss. 2006) (Court found that child victim's testimony was corroborated by her prior statements to school principal, investigating officer, and experts in the field of child sexual abuse)). Further, Bronson's testimony corroborated S.G.'s account regarding the second fondling incident in that he saw Derouen under the covers with S.G. and immediately thereafter witnessed S.G. crying in the bathroom. In

viewing the evidence in the light most favorable to the verdict, a reasonable juror could have found that the State proved each element of the crime beyond a reasonable doubt.

As for Derouen's claim that the verdict was against the overwhelming weight of the evidence, he offers only the fact that S.G. did not immediately report the abuse and no physical evidence was presented. Such an argument surely does not show that the verdicts represent an unconscionable injustice. The jury heard S.G.'s accusations and Derouen's denial. In accordance with their duty, the jury resolved the conflicting accounts in favor of conviction. Matters regarding the weight and credibility of the evidence are resolved by juries, not reviewing courts. *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993). As such, Derouen's weight of the evidence claim must fail.

ARGUMENT ON CROSS-APPEAL

I. WHETHER *MITCHELL V. STATE* SHOULD BE OVERRULED.

Prior to trial, defense counsel moved to prevent the State from calling two witnesses who would testify regarding Derouen's sexual abuse of other child victims. T. 76-77. The State acknowledged that the current state of the law, as set forth in *Mitchell v. State*, 539 So. 2d. 1336 (Miss. 1989), would prohibit such testimony. T. 77-78. The State presented argument to the trial court to preserve the issue for appeal, noting that such testimony is admissible under the Federal Rules of Evidence, and that other states allow such testimony. T. 78-80. In accordance with *Mitchell*, the trial court ruled that the proposed testimony regarding sexual abuse of other child victims was inadmissible. T. 84, C.P. 76.

In *Mitchell v. State*, the defendant was tried and convicted of fondling a five-year-old girl. 539 So. 2d at 1367. During trial, the victim's baby sitter testified that Mitchell had also exposed himself to other children. *Id.* at 1372. On appeal, Mitchell argued that the testimony involved other bad acts and should have been excluded under 404(b). *Id.* The State argued that such testimony was admissible under MRE 404(b), not to show the defendant's character and conformity therewith, but rather to show "lustful disposition of Mitchell toward children." *Id.* The State cited to many cases in which the supreme court held that testimony regarding a defendant's prior sexual attacks against the victim were admissible to show a lustful and lascivious disposition toward the victim. *Id.* The *Mitchell* court rejected the State's argument and stated the following.

> It should be emphasized that [the cases relied on by the State] specifically limited evidence of other sexual relations to those between the defendant and the particular victim. In this case, evidence was admitted of Mitchell exposing himself to children other than Shannon. The state would have this Court expand the holding in these cases to include testimony that shows a defendant's character of lustful behavior toward children in general, not just toward Shannon. Such an expansion would not be consistent with the purposes of M.R.E. 404(b), nor consistent with the notion that

a defendant is on trial for a specific crime and not for generally being a bad person. *Id.* The court's analysis fell short of explaining why testimony regarding the defendant's sexual acts against other child victims could not be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, while testimony regarding sexual acts, for which the defendant was not currently standing trial, against the same victim was admissible to show such. Justice Hawkins noted in his dissent that, "The overwhelming weight of authority is that in the unusual context of cases of this nature such evidence is admissible." *Id.* at 1374.

Nearly a decade later this Court decided the case of *Lambert v. State*, 724 So. 2d. 392 (Miss. 1998). The Court of Appeals reversed Lambert's fondling conviction "due to admission of evidence of improper conduct with young girls besides that for which he was on trial." *Id.* at 393. This Court granted the State's petition for certiorari but ultimately affirmed the Court of Appeals' decision to reverse. However, the Court rejected the Court of Appeals' stringent interpretation of *Mitchell* and stated the following.

> The Court of Appeals found that *Mitchell* holds that any time evidence of a sexual offense other than the one charged, which involves a victim other than the victim of the charged offense, is admitted, then that admission of evidence of the offense is per se reversible, even if the evidence at issue comes under one of the exceptions under M.R.E. 404(b). This interpretation is what the State questions in its petition. The State argues that *Mitchell* should not be applied so mechanically, and that the evidence here did fit one (or all) of the exceptions under 404(b). While **we agree that there could be a case where similar evidence could be admissible**, the Court of Appeals was correct in reversing Lambert's conviction.
>
> While the argument could be made that the evidence in question fits one of the 404(b) exceptions (proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident), the evidence which was admitted is extremely prejudicial under M.R.E. 403. Admission of such evidence would amount to the exception that negates the rule.

Id. at 394 (¶¶6-7) (emphasis added). Again, the Court failed to explain why the admission of such

evidence would amount to the exception that negates M.R.E. 403, while the admission of evidence of a defendant's previous unlawful sexual conduct against the same victim does not negate the rule. A three-justice dissent argued that *Mitchell* was "flawed law" and offered the following.

> I would overrule *Mitchell* since it arbitrarily instructs that admission of evidence of a sexual offense against one other than the victim is per se reversible. Astonishingly, *Mitchell* calls for reversal even when the evidence comes under one of the exceptions of M.R.E. 404(b). Since the majority's holding does little to correct the reasoning of *Mitchell*, I must respectfully dissent.
>
> It is the general rule that prior bad acts are inadmissible to prove character. However, such acts may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. In contrast to this Court's holding in *Mitchell*, the majority recognizes there could be a case where similar evidence would be admissible. However, the majority finds that the evidence offered here, the testimony of girls other than the victim, is so prejudicial that its introduction was reversible error. *Mitchell* has produced, in the words of Alexander Pope, " ... a work where nothing's just or fit, one glaring chaos and wild heap of wit." According to *Mitchell* logic, as applied in this case, if evidence is effective, it must be prejudicial since it tends to establish the truth, it must be stricken. How ridiculous.
>
> The trial judge balanced the probative value of the testimony with its prejudice on the record and found the evidence should be allowed under M.R.E. 403. A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses his discretion so as to be prejudicial to the accused, the Court will not reverse this ruling. I do not find the trial judge abused his discretion.
>
> Sex crimes against children are furtive, secret events usually lacking evidence other than the conflicting testimony of the defendant and the victim. The only viable proof of motive, intent, plan, knowledge, identity or absence of mistake or accident may be the pattern of abuse suffered by others at the hands of the defendant. The need for this type of evidence has influenced the law in several states.

Id. at 395 (¶¶11-14) (internal citations omitted). The dissent went on to discuss Louisiana, Alabama, and Florida cases which held that such evidence was admissible in those jurisdictions. *Id.* The dissent concluded that "the reasoning of this Court in *Mitchell* undermines the balancing process contemplated by M.R.E. 403 and conflicts with M.R.E. 404(b) by imposing a virtual ban on evidence other than that of the relationship between the victim and the accused." *Id.* at 396 (¶18).

The State now asks this honorable Court re-examine and overrule *Mitchell*. In addition to the persuasive analysis provided by the *Lambert* dissent, the State also asks this honorable Court to consider the fact that a defendant's previous unlawful sexual acts against the same victim is admissible "for the limited purpose of showing the lustful and lascivious disposition of the accused towards the victim." *Fisackerly v. State*, 880 So.2d 368, 372 (¶18) (Miss. Ct. App. 2004). See also *Walker v. State*, 878 So.2d 913, 915 (¶14) (Miss. 2004); *Barrett v. State*, 886 So.2d 22, 26 (¶23) (Miss. Ct. App. 2004); *Crawford v. State*, 754 So.2d 1211, 1220-21 (¶23) (Miss. 2000) ("[S]uch evidence is admissible in this limited situation to show appellant's lustful, lascivious disposition toward his particular victim, especially where, as here, the victim was under the age of consent.); *Allen v. State*, 749 So.2d 1152, 1156 (¶8) (Miss. Ct. App. 1999); *Boggan v. State*, 726 So.2d 1236, 1237 (¶5) (Miss. Ct. App. 1998); *Wiltcher v. State*, 724 So.2d 933, 937 (¶9) (Miss. Ct. App. 1998); *Givens v. State*, 730 So.2d 81, 89 (¶27) (Miss. Ct. App. 1998). In such cases, reviewing courts have found that evidence of the defendant's unlawful sexual conduct against the same victim does not offend M.R.E. 404(b) or M.R.E. 403. One reason for such a finding is that the defendant is entitled to a limiting instructions which explains to the jury that the evidence is being admitted for a limited purpose, and not to prove the defendant's character to show that he acted in conformity therewith. *Fiskarly* at 371 (¶15). The same reasoning is equally applicable to cases in which the State seeks to introduce evidence of the defendant's unlawful sexual conduct with other victims.

In addition to the probative value of such evidence in sex crime prosecutions, one author has stated a compelling and common sense policy reason for the admission of evidence of a defendant's unlawful sexual acts against other victims.

> [D]ue to the secretive nature of sexual offenses and the reluctance of victims to report such crimes, a neutral witness to the offense is unavailable in most instances. Therefore, without the introduction of supporting collateral evidence, sexual offense

> prosecutions will often be reduced to "unresolvable swearing matches" between the accused and the victim. As stated by one commentator, "[i]n many [sexual offense] cases, the only available supporting evidence comes from the pattern of the defendant's attacks."

John David Collins, *Character Evidence and Sex Crimes in Alabama: Moving Toward the Adoption of New Federal Rules 413, 414, & 415*, Ala. L. Rev. 1651, 1679 (2000).

The State also asks this Court to consider the fact that federal courts have admitted evidence of unlawful sexual acts against other victims for well over a decade, with the 1994 adoption of F.R.E. 413 and F.R.E. 414.[1] Under the federal rules, the other sexual offenses need not have been the subject of a previous criminal conviction. *U.S. v. Guidry*, 456 F.3d 493, 503 (5th Cir. 2006). Federal courts have noted that such rules are consistent with the federal counterpart to M.R.E. 404(b). *Id.* The State asks this Court to follow suit with the federal courts and many states which allow evidence of a defendant's unlawful sexual conduct with other victims.

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[1]F.R.E. 413(a) provides, "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

F.R.E. 414(a) provides, "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Derouen's convictions and sentences. The State also asks that this honorable Court accept the State's argument in cross-appeal and overrule *Mitchell v. State*.

Respectfully submitted,

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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:

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