IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SHANNON TROY DEROUEN — APPELLANT

V. — NO. 2007-KA-1005-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Brenda Jackson Patterson, [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Shannon Troy Derouen

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SHANNON TROY DEROUEN	**APPELLANT**
V.	**NO. 2007-KA-1005-SCT**
STATE OF MISSISSIPPI	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Shannon Troy Derouen, Appellant
3. Honorable Anthony (Tony) Lawrence, III, District Attorney
4. Honorable Robert B. Krebs, Circuit Court Judge

This the 26th day of November, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

BRENDA JACKSON PATTERSON
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

On April 6, 2005, Shannon Troy Derouen was indicted on a multi-count indictment by a Jackson County Grand Jury. In Count I of the indictment Mr. Derouen was charged under Miss. Code Ann. Sec. 97-5-23 (2) 1972 as amended, with touching of a child under the age of eighteen (18) years for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, by unlawfully, wilfully and feloniously handling, touching or rubbing with his hand, or any part of his body, or any member thereof, the body of S.G., when Mr. Derouen was at the time in question over the age of eighteen (18) years and occupied a position of authority or trust over S.G., to wit: her uncle. Count II of the indictment was the identical charge as Count I with the dates of occurrence the only difference. After a jury trial, Mr. Derouen was found guilty in both Counts I and II and sentenced to serve identical sentences of fifteen (15) years in the custody of the Mississippi Department of Corrections, with eight (8) years to serve and the balance of the sentence to be on Post Release Supervision. Both Counts I and II were to run concurrent to each other.

STATEMENT OF THE FACTS

S.G. was in the fourth grade and nine (9) years old. One day in class her teacher, Ms. Ann Ladnier was having a general discussion with her entire class about trust and finding an adult that they felt they could trust if they needed to tell somebody something or needed help. This discussion lasted approximately forty-five minutes (45) and later that day there was a note from S.G. to Ms. Ladnier placed on her desk. T. 96 and 104. After receiving the note, Ms. Ladnier called S.G. into the hall and asked her to explain the note. S.G. started weeping and told Ms. Ladnier that she was at her stepfather's brother house and he got on the couch while she was on the couch and touched her in her private area and on another occasion, while she was on the couch at her step-uncle's house

he took her hand and placed it on his private part. Ms. Ladnier immediately called for the school counselor. T. 105.

Bronson Derouen is the nephew of the defendant Troy Derouen. He is S.G.'s stepbrother. He testified that they would gather at his uncle Troy's house for cookouts and just spending time together over there. He came in one night to get some clothing and his uncle was laying on the couch and S.G. was laying like on the edge. He went on in to get his clothing and then he heard S.G. in the bathroom crying and she wouldn't talk. His Uncle Troy and his grandma came in asking what was wrong. Grandma told her to come on to bed with her and said she was having a bad dream. T. 126-127.

Alton Hebron, a social worker came to the school to conduct a forensic interview with S.G. She told him that she was spending the night at her uncle's house with her brother Blake. While she was sleeping on the couch, her uncle came and laid down beside her and put his hand down under her clothes, toward her vagina area. T. 155. S.G. also told him of another incident where her uncle placed her hand on top of his penis. T. 156.

Sarah Bishop Carothers, forensic interviewer with the South Mississippi Child Advocacy Center, interviewed S.G. in October 2004. S.G. was referred to her by Kim Versiga with the Jackson County Sheriff's Office. T. 172. During this interview, S.G. disclosed that Troy Derouen, her step-uncle, put his hand on her genital area over her clothes, and that he also placed her hand on his genital area over his clothes. T. 174.

S.G. was twelve (12) years old on the day she testified. She testified that she and her step-uncle's sons Kieran and Keaton were in the living room at her step-uncle's house. They were on the pull-out bed and she was on the couch. They were sleeping. The tv was on and Uncle Troy came out of his room, climbed up beside her on the couch, got under the covers, and about five (5) minutes

later, he took his hand and placed it on her private area. T. 210. The second incident occurred when she, Kieran and Keaton were on the couch. They were on the pull-out bed, and she was under the covers and the tv was on and she was about to go to sleep and Uncle Troy came out and crawled up under the covers with her, and he took her hand and placed it on his private area. Her brother Bronson came in and she ran to the bathroom. She told Bronson that she had a stomachache and he told her to sleep with her grandma. T. 211.

Mr. Derouen was later arrested, and charged with two counts of touching of a child for lustful purposes.

STATEMENT OF THE ISSUES

I. TRIAL COURT SHOULD NOT HAVE ADMITTED HEARSAY TESTIMONY OF THE ALLEGED 9 YEAR OLD VICTIM BY SOCIAL WORKER AND FORENSIC INTERVIEWER UNDER TENDER YEARS EXCEPTION.

II. WHETHER THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF THE ALLEGED VICTIM INTO EVIDENCE UNDER THE "TENDER YEARS EXCEPTION".

Mr. Derouen contends on appeal that the trial court erred in admitting the hearsay testimony of the alleged victim. He argues that the testimony of Alton Hebron, social worker and Sarah Bishop Carothers, forensic interviewer should not have been admitted prior to a factual determination that the alleged victim was a child of tender years and the hearsay statements of the alleged victim provided substantial indicia of reliability.

Rule 803 (25) of the Mississippi Rules of Evidence, "Tender Years Exception," is an exception to some hearsay statements and provides that:

A statement by a child of tender years, describing any act of sexual conduct performed with or on the child by another, is admissible in evidence if the court finds in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provides substantial indicia of reliability, and (a), the child either testifies at the proceeding; or (b) is unavailable as a witness, provided that when the child is unavailable as a witness, such statement

may be admitted only if there's corroborative evidence of the act.

The trial court held one hearing outside the presence of the jury and on the record, as prescribed by case law. During the hearing, the trial court heard from Ms. Ann Ladnier, fourth grade teacher of S.G., who testified that one day she had a general conversation with her entire class about trust. She said that different students talked about disappointments with friends and others. Her advice to them was that they needed to find an adult that they felt they could trust if they needed someone to talk to. After this discussion with her class, she told them if there was something they were concerned about and they didn't want to tell her right then they could place a note on her desk. Later that day, she found a note on her desk from S.G. to her. T. 96 and 104. Once she read the note, she called S.G. to her to inquire about the note and S.G. began sobbing. She then told her that once while at her step-uncle's house she was on the couch and he got on the couch with her and touched her on her private part. On another occasion, while she was on the couch, her step-uncle got on the couch with her and took her hand and placed it on his private parts. She was terrified, but pretended to be sleep. Both times his clothing were on. T. 97. Ms. Ladnier immediately called the school counselor and the school counselor called someone in to talk to S.G. T. 97-99.

Ms. Ladnier further testified that S.G was worried about her allegations separating her family. She wanted reassurance that what she told Ms. Ladnier about her uncle was okay because there was already a lot of turmoil in the family because her step-dad was physically abusing her mother and she did not want to get her uncle in trouble. Ms. Ladnier also testified that S.G. continued contacting her and coming to see her after she left her class up until the date of the trial. T. 99 and 102.

The only witness called during the hearing was Ms. Ladnier and after the hearing, the trial court ruled : "The case law is pretty clear that when dealing with these kind of cases we have to find

a substantial indicia of reliability, and I so find with respect to this witness. The exception or indicia are pretty clear, where there's an apparent motive on the declarant's part to lie, the general character of the declarant, the timing - - and the other thing that I note in this particular case, Mr. Miller, as well, with respect to this witness, whether suggestive techniques were used in eliciting the statement, this young lady had a relationship with this teacher, as students do for a long time, so I believe the State's met the substantial indicia of reliability, and we'll let it go before the jury." T. 102.

Here, the trial court failed to question S.G. and the social worker and forensic interviewer and afterwards make an on the record finding that the child was of tender years and a finding of substantial indicia of reliability of the testimony of the social worker and forensic interviewer.

The facts in the present case are substantially similar to the facts in Veasley v. State, 735 So.2d 432 (Miss. 1999). In Veasley, the Sheriff of Coahoma County, Andrew Thompson, Jr., received a phone call from the father of a thirteen (13) year-old female alleging that his daughter was being sexually abused by her step-father. A social worker with the Department of Human Services and an Officer with the Jonestown Police Department removed the child from her home. After removal, the child was interviewed by the social worker and Sheriff Thompson. During the interview, the child informed the social worker that her step-father had been having sexual intercourse with her since she was seven or eight years old. Later she also told the physician that her stepfather had been sexually abusing her since she was seven. Because of the comment to Rule 803 (25), the trial court stated that according to case law anyone under fourteen is considered to be of tender years. Thus, the social worker and Sheriff Thompson were permitted to testify to out-of-court statements made to them by the child about the sexual contact, without the trial court first conducting a hearing to determine whether the child was in fact a child of tender years. The social worker also

testified to acts of physical abuse told to her by the child. The child testified to her sexual intercourse with her step-father also.

After Mr. Veasley was convicted, the Court of Appeals reversed and remanded for a new trial finding the trial court erred as a matter of law in ruling on the admissibility of the out-of-court statements made by the child to the social worker and the Sheriff and that the trial court erred in refusing to hold a hearing relative to the status of the child as a child of tender years.

The State filed a petition for writ of certiorari and the Mississippi Supreme Court held that there is a rebuttal presumption that a child under the age of twelve is of tender years. The Court provided that where an alleged sexuality abuse victim is twelve or older, there is no such presumption and the trial court must make a case-by-case determination as to whether the victim is of tender years. They stated that this determination should be made on the record and based on a factual finding as to the victim's mental and emotional age. If the court finds that the declarant is of tender years, then it must still rule on the Rule 803(25)(a) and (b) factors before admitting the testimony. They affirmed the Court of Appeals ruling that the trial court erred in admitting the testimony of the social worker and the Sheriff without first making the required factual determinations.

Mr. Derouen contends that the trial court failed to follow the guidelines in Veasley, which requires that it make an independent inquiry on the record into the alleged victim's mental and emotional age in its determination as to whether she was of tender years. Also, he argues that the trial court failed to make findings of facts with regard to all twelve suggested factors listed in the

comments to Rule 803(25).[1] Specifically, the trial court questioned Ms. Ladnier, however, failed to question the social worker and forensic interviewer. The trial courts finding of a substantial indicia of reliability was with respect to Ms. Ladnier's testimony only.

In Palmer v. State , No. 2005-KA-01503-COA (Oct. 30, 2007), where the Court of Appeal found that the trial court properly conducted an 803(25) hearing outside the presence of the jury. The court heard testimony from both alleged victims, as well as other witnesses who would be offering statements based on hearsay. In its ruling on the applicability of Rule 803(25), the trial court reviewed its findings of fact with regard to all twelve suggested factors listed in the comments to Rule 803(25), finding that both girls' statements possessed substantial indicia of reliability. Then the court found, for the purposes of Rule 803(25), one girl was of tender years but the other was not. Relying in part on the Veasley case and in part on its own findings with respect to their mental and emotional maturity.

In Withers v. State, 907 So.2d 342, 349 (Miss. 2005), where the trial court held two hearings outside the presence of the jury and on the record as prescribed by case law. At the first hearing, the trial court found that the victim was competent and capable of testifying as a witness. During the competency hearing, when asked if she knew the difference between the truth and a lie, the victim

---

1

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

stated that "[t] ruth is when you do something wrong, you admit to it, and yeah, you're scared to tell the truth, but you know its right, and you do it because you're hurting everybody else, and yourself inside. A lie is when you don't care." The trial court found she distinctly knew the difference in truth and imagination. The victim was fourteen at the time of trial, and twelve when the sexual intercourse began. The trial court found evidence to the victim's reliability, as enumerated in comments to 803(25). Idaho v. Wright, 497 U.S. 805, (1990). The trial court also based his decision on the testimony of the numerous prosecution witnesses about "the time, content, and circumstance" under which the victim told of the sexual abuse by Mr. Withers. The victim's mother testified that the victim told her about being raped by Mr. Withers and J.B. testified that she asked the victim what was wrong after hearing her cry and she told her she had been raped by her stepfather. All the other witnesses, Sasha Reed, R.Q., and Dr. Byram also testified that the victim told them she had been raped by her stepfather. After all the above testimony, the trial court found "substantial indicia of reliability" in the victim's statements made to five different witnesses, who were all cross-examined by counsel for Mr. Withers.

The trial court in the Withers case then made a thorough reasoning on the record for his finding that the victim was of tender years and his findings of a substantial indicia of reliability in all the witnesses testimony based upon the Wright factors. Withers, 907 So.2d at 349.[2]

2

[O] ne of the core issues here as far as what triggered the stopping of his, was that the defendant's daughter, [name omitted], lived there in the home with the mother and step-father, and apparently there was a good relationship between [the victim] and [name omitted].
[the victim] also knew that her mother loved the defendant, and those things working together seemed impliedly by the totality of the evidence. It is implied to the Court that she allowed this to go on because she didn't want to hurt her mother. She knew her mother loved the defendant. Also, she was afraid of the defendant.

In the present case Mr. Derouen contends that based on the above case law, the trial court erred in failing to hold a hearing to determine whether the alleged victim was of tender years and another hearing to determine if hearsay statements of the social worker and the forensic interviewer contained substantial indicia of reliability and fall under the 803(25) exception to the hearsay rule.

¶ 21. The circuit judge stated that "[i] t is hard to jump into the skin of a little girl who is 6 years old and who would have at the time no judgment whatsoever, no wariness about sexuality, and to be thrust in an adult situation where a grown person was performing sexual acts upon her." He concluded that the victim was "at the mercy of the defendant as she grew older, and of course, it can be inferred that as she got older and was at school and around her classmates, taht she became more aware of sexuality and things that were going on." "[b] ut it comes back to this one thing that is what triggered all of this, ... the breaking up of the marriage of the victim's mother with her husband ... And that husband was going to leave and was going to take his daughter [name omitted], with him. And one of the high points, I believe, in the testimony, which is supportive of the state's position is that [the victim] did not want to see the same thing happen to her, to [name omitted], as had happened to her."

¶ 22. Regarding the specific issue of reliability, the circuit judge stated that after the dissolution of the marriage that "Pandora's Box was opened, so to speak."
Conversations at school with J.B., when she saw her classmate crying, and that she asked her about it. And she said, my stepfather raped me. And that lead to telling Clark Reynolds, the deputy sheriff, in the school resource officer. And of course, from that point on, everything began to unravel quickly. And the testimony of each of these witnesses would be supportive as far as the consistency of what happened.

As far as the lack of motive to fabricate, I think it is just at the other end of the pole of someone fabricates something. I think she was wanting to protect [name omitted], the little girl, and to not offend her mother, knowing that she loved her husband at that time ...

Because the child was thirteen at the time, I find that the child, [the victim], is mentally and emotionally of tender years, and I allude to the case of Marshall v. State, 812 So.2d 1068, which states basically that the court must make a finding of tender years or not, because if the child is under twelve years of age, there is a rebuttal presumption as such, but the child was over 12 at that time but I make the finding now.

And the second finding I make, based on the totality of the circumstances and the evidence, the credible evidence, I affirmatively find that at the time of the content in circumstances of the statements provided substantial indicia of reliability. And therefore I find that the statements that have been made here to the mother, J.B., Clark Reynolds, Sasha Brown Reed, and R.Q., also are all found to be exceptions to the hearsay rule, and are therefor inadmissible.

"The 'substantial indicia of reliability' required by M.R.E. 803(25) are necessary to prevent confrontation clause problems.' Eakes v. State ,665 So.2d 852, 865 (Miss. 1995). Doe v. Doe, 644 So.2d 1199, 1206 (Miss.1994). The reliability of the statement must be judged independently of any corroborating evidence; otherwise, the confrontation clause may be violated. Eakes citing Doe at 1206 (citing Griffith v. State, 584 So.2d 383, 388 (Miss. 1991)). While no mechanical test is available, factors which should be considered in judging reliability are: spontaneity and consistent repetition; mental state of declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate. Eakes citing Doe at 1206. (citing Idaho v. Wright, 497 U.S. 805 (1990)). When the correct legal standard is employed by the trial court, this Court will reverse a finding of admissibility only when there has been an abuse of discretion. Eakes (citing Doe at 1207).

In the present case, the trial court erred in failing to conduct a competency hearing outside the presence of the jury and erred in failing to make a factual finding on the record as to the mental and emotional age of S.G. to determine whether she fell within the category of a child of "tender years." The trial court must make this assessment first. Veasley, 735 So.2d at 434. S.G. was eight or nine when the alleged abuse occurred and nine when the relevant statement was made which is the time to determine whether the tender years exception applies. McGowan v. State, 742 So.2d 1183 (¶ 18) (Miss. Ct. App. 1999). There is a rebuttable presumption that a child under the age of twelve is of tender years and the trial court must first make required factual determinations that victim is child of tender years. Veasley at 437. If the court finds that the declarant is of tender years, then it must still rule on the Rule 803 (25)(a) and (b) facts before admitting the testimony. Id. The trial court in the present case further erred in failing to make an on the record finding on the

Rule 803(25)(a) and (b) factors before admitting the testimony of the social worker and the forensic interviewer.

Mr. Derouen contends that the admission of the hearsay testimony was not harmless beyond a reasonable doubt. "To apply the harmless error analysis ... this Court must determine whether the weight of the evidence against Mr. Derouen is sufficient to outweigh the harm done by allowing admission of [the] evidence." Id. citing Fuslelier v. State, 702 So.2d 388, 391 (Miss. 1997). The only evidence besides the testimony of the social worker and the forensic interviewer regarding the touching by her uncle, was S.G.'s testimony and her teacher, Ms. Ladnier. In deciding that the teacher, Ms. Ladnier's statements contained substantial indicia of reliability, the trial court failed to acknowledge that the statement made by S.G. to Ms. Ladnier was not spontaneous but the product of suggestion or coercion. Without the testimony of the social worker and the forensic interviewer to bolster S.G.'s statements, this case is dependant on what S.G. told her teacher. There is no physical evidence or eyewitness testimony to substantiate her allegations and there is not any other exceptions that would allow this testimony.

II. INSUFFICIENCY OF THE EVIDENCE AND OVERWHELMING WEIGHT OF THE EVIDENCE.

The standard of review for a post-trial motion, like a motion for judgement non obstante veredicto, is abuse of discretion. Smith v. State , 925 So.2d 825, 830 (Miss. 2006) citing Brown v. State, 907 So.2d 336, 339 (Miss. 2005) (citing Howell v.State, 860 So. 2d 704, 764 (Miss. 2003)). The key inquiry is whether the evidence shows " 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the

offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.' " Smith, 925 So.2d at 830 citing Brown, 907 So.2d at 339 (quoting Carr v. State, 208 So.2d 886, 889 (Miss. 1968)). In other words, the question to be answered, viewed in the light most favorable to the prosecution, is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Smith, 925 So.2d at 830 (citing Brown, 907 So.2d at 339 (citing Jackson v. Virginia, 443 U.S. 307, (1979) (citations omitted) (emphasis in original)). Assuming arguendo that this Court may believe the evidence at trial failed to establish guilt beyond a reasonable doubt, this is, nevertheless an insufficient basis for reversal. Smith, 925 So. 2d at 830) citing (Brown, 907 So.2d at 339). As long as " ' reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense,' [then] the evidence will be deemed to have been sufficient." Id. (Quoting Edwards v. State, 469 So.2d 68, 70 (Miss. 1985)).

Mr. Derouen was charged with two counts of unlawfully, willfully and feloniously handling, touching or rubbing with his hand, or any part of his body, or any member thereof, for lustful purposes, the body of S.G., a child who was, at the time in question, under the age of eighteen (18) years, when the Defendant, Shannon Troy Derouen, occupied a position of authority or trust over said victim, to-wit: her uncle, who was over the age of eighteen (18) years. Mr. Derouen contends that there was insufficient evidence to convict him of two counts of touching of a child for lustful purposes and therefore the trial court should have dismissed both counts I and count II. He asserts that the only evidence offered was S.G.'s testimony. He asserts that her teacher, Ms. Ladnier's testimony was the product of suggestion and coercion. He offers the following testimony in support of his position.

Ann Ladnier - (Direct Hearing Jury Out) T. 96

Q. Was there an occasion when S.G. brought to your attention concerns she had involving her step-uncle:

A. Yes.

Q. Can you tell me how that came about.

A. I don't recall the exact circumstance, but I had a general discussion with my entire class about trust, and different students talked about different disappointments with friends or whatever, and my advice to them was that you need to find an adult that you feel that you can trust, and if there's anything that you need help with, and you're not comfortable talking with other people. And we had probably a 30 or 45 minute discussion that day. And there was a note that was placed on my desk from S.G. to me.

Ann Ladnier - Direct (Jury Present) T. 104.

Q. And did you have an occasion to, or was there an opportunity where S.G. came forward with some information concerning her step-uncle?

A. There was.

Q. Can you please tell me what gave rise to that.

A. I was having a general classroom discussion about trust, and I

> talked to all of my class about if there's an issue of concern, or if you feel that you can't trust certain people, or if there's something that you need to tell that you know, or that you need advice for, then you need to find an adult that you can trust, that you're comfortable with. And different kids had different things to say. And after the discussion, there was a note that was placed on my desk. I believe I said, if there is something that you're concerned about and you don't want to tell me right now, you may put a note on my desk, because that's always my rules, so I'm sure it was the same at that time. And I opened the note. It was folded and it said to Mrs. Ladnier from S.G.

The question to be answered, viewed in the light most favorable to the prosecution, is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Brown, 907 So.2d at 339 (citing Jackson, 443 U.S. at 315).

Here, the information about S.G.'s step-uncle was not spontaneously given but coercion by her teacher and therefore unreliable. Further, there was not any physical or eyewitness evidence just S.G.'s word against Mr. Derouen's.

Even the testimony of Bronson Derouen, that he came into his uncle's house one evening and his uncle was laying on the couch and S.G. was laying on the edge and later, when he heard S.G. in the bathroom crying and asked her what was wrong and all that was said was that she had a bad dream. He further testified that S.G. never told him his uncle did anything to her. He said S.G. was

real playful, outgoing and the type of child to run and jump upon you. T. 134-135. He also said that once S.G. accused him of sexual misconduct when he was younger and it was not true. T. 135-136. When S.G. testified she stated that she continued to go over her step-uncle's house and never told anyone that he had touched her. She never acted different with her step-uncle. She said the night that Bronson asked her what was wrong in the bathroom, she told him her stomach ached.. T. 233-235.

S.G.'s stepfather also testified that S.G. never acted different and never objected to going over his brother's house. She never told him anything about his brother touching her. T. 265.

Based upon the above stated information no rational trier of fact could find the essential elements beyond a reasonable doubt.

As for as the weight of the evidence, this Court will disturb a verdict only "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." Bush v. State, 895 So.2d 836, 844 (Miss. 2005).

In the present case, based on the testimony of the above cited witnesses at trial the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Because of S.G.'s behavior in waiting over a year to say anything about her uncle's conduct and the witnesses testimony that she never told them and never objected to going to his house and even more important acted the same towards him. There is no physical evidence or eyewitness evidence and Ms. Ladnier obtained her information from S.G. by coercion and not spontaneously which makes it unreliable.

CONCLUSION

The trial court erred in failing to hold a hearing to determine whether S.G. was a child of tender years. This hearing should have been made on the record and based on a factual finding as to the alleged victim's mental and emotional age. The trial court further erred in failing to hold a second hearing outside the presence of the jury and on the record making the required factual finding under 803(25) to determine whether the social worker and the forensic interviewer's hearsay statements contained substantial indicia of reliability. This error was not harmless beyond a reasonable doubt and therefore the conviction for Count I and Count II Touching of a Child For Lustful Purposes by a Person in a Position of Trust should be reversed and this case remanded to the trial court for a new trial.

In addition to the above argument, because the jury verdict was "so contrary to the overwhelming weight of the evidence and because no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt both count I and count II should be dismissed.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Judson Patterson

BRENDA JACKSON PATTERSON, STAFF ATTORNEY
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Shannon Troy Derouen, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Robert B. Krebs
Circuit Court Judge
1253 Jackson Ave., Suite B
Pascagoula, MS 39568

Honorable Anthony (Tony) Lawrence, III
District Attorney, District 19
Post Office Box 1756
Pascagoula, MS 39568

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 26th day of November, 2007.

BRENDA JACKSON PATTERSON
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200