IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PAUL CLARK VALMAIN — APPELLANT

VS. — NO. 2007-KA-1062

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

PAUL CLARK VALMAIN **APPELLANT**

vs. **CAUSE No. 2007-KA-01062-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Miss Christian Allen, mother of the victim in the case at bar, testified that she and her son and daughter lived with her mother in Philadelphia. On 14 October 2006, a friend of Miss Allens asked Miss Allen to go with her that night to celebrate her birthday. Miss Allen agreed, and she asked the Appellant, who was her friend and sometimes lover, to keep her children while she was out. The children were to spend the night with the Appellant in his trailer. Miss Allen's daughter was of the age of five years at the time.

After Miss Allen got her children back, she noticed some behavioral problems with her

daughter. The child was whiny and kept urinating on herself, which was something she had not done before, and she wanted to stay close by Allen or her grandmother. She did not want males to touch her. Miss Allen asked a school counselor whether such behavior was normal behavior. Department of Human Services and law enforcement were notified. The child was also taken for a physical examination.

Miss Allen had known the Appellant for some eight years and knew that the Appellant was thirty - four years of age. The children knew the Appellant well, though they had not spent the night alone but once with him in his trailer. (R. Vol. 2, pp. 53 - 62).

Miss Allen's daughter, the victim in this case, testified. She stated that her brother and she spent the night at the Appellant's residence. While there, the Appellant bathed her. The Appellant used a bath cloth that had holes in it. He put his fingers through the holes in the bath cloth and touched the child's vagina and inserted his fingers into her vagina. At one point while the Appellant was doing this, the child's brother came into the bathroom.

The child stated that the first report she made of what the Appellant had done to her was to a "lady at the hospital." She also told Miss Dusty Brown, who was with her school. She also spoke to someone at a Wesley house and also to a police officer. (R. Vol. 2, pp. 37 - 53).

The victim's brother, seven years of age, testified. He corroborated the fact that his sister and he spent the night at the Appellant's trailer. He also told the jury what his sister, he and the Appellant had done before going to the trailer for the night. While at the trailer, he went into the bathroom and found the Appellant and his sister. His sister had no clothes on; the Appellant was bathing her, using a bath cloth that had holes in it. He saw the Appellant's fingers in his sister's private parts. (R. Vol. 2, pp. 68 - 72).

Shalotta Sharp, a registered nurse and a sexual assault nurse examiner at Rush Foundation

Hospital, testified that she examined the victim on 17 October 2006. She found that the child's labia minora exhibited reddening, as well as the vestibule. The child's hymen had two V-shaped clefts or tears. The hymen exhibited a lot of edema. These indicated irritation or trauma to the area. The condition of the hymen was not normal for a child of the age of the victim. Penetration with finders could have caused the abnormalities she observed, and those abnormalities could have been caused some seventy-two hours prior to the examination. The injuries would have caused pain for the child. The child also had a rash on her buttocks, but it did not extend to her vagina. It was not likely that the child caused the injuries observed by Sharp; Sharp testified that children of that age would stop doing whatever they were doing upon experiencing pain. (R. Vol. 2, pp. 98 - 114).

Carla Horne testified that she is a licensed professional counselor, a forensic interviewer and a counselor at Wesley House in Meridian. She interviewed the victim. The victim told her that the Appellant had touched her on her vagina and buttocks. The victim's brother told Horne that he saw the Appellant touch his sister between the legs. (R. Vol. 2, pp. 117 - 129).

Deputy Ralph Sciple, an investigator with the Neshoba County Sheriff's Department, testified that he interviewed the Appellant after the Appellant's arrest, after the Appellant waived his *Miranda* rights. The Appellant admitted that he had taken the children in. He stated that he had taken them to the casino and let them play in the arcade. The female child wet herself, so he took the children to Wal-Mart, where he bought the girl a pair of Dora pajamas and panties. He then took the children to his trailer and gave the girl a sponge bath. After that, the girl spilt a soft drink on her new pajamas, so he dressed her in one of his tee shirts.

When he gave the girl a sponge bath, the child was standing in front of the commode while he sat on the edge of the bathtub.

Sciple asked him whether any "inappropriate behavior occurred. The Appellant told him that the girl tried to kiss him on the mouth. The Appellant told Sciple that he told the child that that was an inappropriate thing to do. At that point the Appellant stated that he wished to talk to an attorney. Questioning then ceased. (R. Vol. 2, pp.77 - 80; 89 - 94).

The Appellant testified. He said he knew the victim, her brother and mother well. When the victim's mother was recuperating from injuries sustained in an automobile accident, he visited the family often to assist in caring for the children.

On 14 October 2006, the children came to his residence at about 3.30 in the afternoon. They played outside until it was dinnertime. The Appellant took the children to the casino for supper and to let them play games in the arcade. At about 9.30 they left the casino. At that time, however, the victim told the Appellant that she had wet herself, so he took the children to Wal-Mart, where he bought her a pack of Dora panties and a pajama set. When they arrived at the Appellant's trailer, the victim took her clothes off and the Appellant washed her face, chest, arms, legs and vaginal area. There were no holes in the washrag he was using. He said he would not have washed her except that she had urinated on herself.

The Appellant then dressed the child in her pajamas and put her to bed. She spilt a drink on her pajamas, so he dressed her in one of his tee shirts. The next morning he fed the children cookies for breakfast; he took them to their mother that evening. He took the children to school on the next morning and then Tuesday morning. On that Tuesday, he learned of the charge against himself. He denied having assaulted the victim.

The Appellant did not know why the child would accuse him of assaulting her. If the child's mother encouraged the child to report his assault, he did not know why she would have done so. (R. Vol. 2, pp. 130 - 138).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S OBJECTION TO TESTIMONY BY THE WITNESS SHARP TO THE EFFECT THAT THE VICTIM TOLD HER THAT THE APPELLANT SEXUALLY ABUSED HER?

2. WAS THE VERDICT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

3. DID THE TRIAL COURT ERR IN FINDING THE VICTIM AND HER BROTHER TO BE COMPETENT WITNESSES?[1]

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S OBJECTION TO SHARP'S TESTIMONY TO THE EFFECT THAT THE VICTIM TOLD HER THAT THE APPELLANT HAD SEXUALLY ABUSE HER

2. THAT THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

3. THAT THE TRIAL COURT DID NOT ERR IN FINDING THE VICTIM AND HER BROTHER WERE COMPETENT TO TESTIFY[2]

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S OBJECTION TO SHARP'S TESTIMONY TO THE EFFECT THAT THE VICTIM TOLD HER THAT THE APPELLANT HAD SEXUALLY ABUSE HER

In the First Assignment of Error, the Appellant claims that the trial court erred in permitting Sharp, the sexual assault nurse, to testify that the mother of the victim told her that the victim told a school counselor that she, the victim, had been touched inappropriately by the Appellant. There was an objection prior to the point at which the witness gave this testimony,

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[1] We will address the Appellant's contentions in his Third and Fourth Assignments of Error in one response.

[2] We will address the Appellant's Third and Fourth Assignments of Error in this response.

but no grounds were presented in support of it. It is clear that this testimony was elicited to demonstrate that the nurse was taking a medical history in order to conduct an examination. (R. Vol. 2, pg. 101).

It seems that the Appellant presents two ground here in support of his claim of error. First, he asserts that it was error, under M.R.E. 803(4) to include the name of a perpetrator of sexual battery. Secondly, he seems to assert that 803(4) is not so broad as to permit the mother of a victim, in contrast to the victim, to relate such information. Perhaps the first ground asserted here did not need a specific objection since the ground for it was reasonably apparent. Certainly it was so for the trial court. But the second ground was not reasonably apparent, and the Appellant did not urge it upon the trial court and the trial court never ruled upon it. The second ground is not properly before the Court on account of the lack of a specific and timely objection on that ground. *Perry v. State*, 904 So.2d 1122 (Miss. Ct. App. 2004).

As to the question concerning whether it was error to permit the nurse to testify as to the identity of the perpetrator, it seems that it is well established now that this is competent testimony. *Rowlett v. State*, 791 So.2d 319 (Miss. Ct. App. 2001); *Jones v. State*, 606 So.2d 1051 (Miss. 1992). The decisions cited to the contrary by the Appellant simply do not apply. The federal decision provides a different interpretation of the federal version of M.R.E. 803(4); the domestic relation case cited by the Appellant involves a document that was generated for litigation, and thus inadmissible under Rule 803(4).

It is true that the Appellant did not live with the victim and her family and was not related to the victim. On the other hand, it is equally true that he was often with the children. The Appellant admitted this. While the rule permitting testimony concerning the identity of the perpetrator of sexual abuse of a child was originally limited to instances in which it is necessary

to protect the child against future acts of abuse by a family member, the class has been expanded to include any acquaintance of the victim. *Marshall v. State*, 812 So.2d 1068, 1075 (Miss. Ct. App. 2001)(citing *Hennington v. State*, 702 So.2d 403 (Miss. 1997). We think it is beyond any reasonable dispute that the Appellant was a person who was an acquaintance of the victim, given the testimony concerning how often he was around her.

The statement taken by the nurse was clearly for the purpose of obtaining a medical history. The witness was a sexual assault examiner; the information given to her was essential in order to perform a proper examination of the victim. It goes without saying that the information given to the witness was something that would have been reasonably relied upon by a nurse.

In the event, however, that this Court should determine that it was error to admit testimony of the nurse concerning the identity of the Appellant as the perpetrator, any such error should be considered harmless error. As in *Jones, supra*, the victim testified as to what the Appellant had done to her. This being so, the nurse's testimony was cumulative. Thus, as in *Jones*, any such error should be considered harmless here.

As for the claim that the trial court should refuse admission of this statement because it was the mother, rather than the child, who told the nurse, we again point out that no objection on this ground was made in the trial court. But even had there been a proper objection, we think the child's statement to her mother would have been admissible under M.R.E. 803(25), or perhaps as an excited utterance. While it may be that there is a predicate to lay under Rule 803(25), the Appellant's failure to specifically object to the lack of such a predicate is waiver of same. *Perry, supra*. Since the statement of the child to her mother fit a hearsay objection as much as the mother's statement to the nurse, the admissibility requirement of "double hearsay," M.R.E. 805, was met.

In the event, however, that this Court finds that the Appellant's second claim in the First Assignment of Error is before the Court, yet that the trial court somehow erred in admitting the statement the mother made to the nurse, we submit that any error would be harmless error. In the case at bar, the victim and her brother testified as to the Appellant's actions with respect to the victim. Consequently, the nurse's testimony concerning the identity of the Appellant was cumulative, and harmless for that reason. *Moss v. State*, 977 So.2d 1201 (Miss. Ct. App. 2007).

The First Assignment of Error is without merit.

2. THAT THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

In the Second Assignment of Error, the Appellant contends that the verdict was contrary to the great weight of the evidence. Since he does not, in his argument in support of it, contend that he should be discharged, but only that the verdict should be "overturned," we do not construe his claim to be a contention that the verdict was unsupported by the evidence. Though often confused by appellants, there is a substantive difference in the claims. *May v. State*, 460 So.2d 778 (Miss. 1984).

The State, though the victim's testimony, proved that the Appellant penetrated the victim with his finger or fingers. This testimony was corroborated by her brother, who saw the Appellant with the victim. Her testimony was further corroborated by the sexual assault nurse, who described the injuries to the victim's hymen.

In fact, the Appellant did not deny having had the child disrobe and having touched her pubic area. He did, it is true, deny having penetrated her, but this testimony simply created an issue of fact for the jury to resolve.

The Appellant alleges that the children denied penetration to the forensic interviewer.

While the witness' testimony was not very clear as to what the child told her, the witness did state that over seventy per cent of children vary between full and tentative disclosure. It would not have been unusual for the child to fail to tell her about the penetration. (R. Vol. 2, pg. 127). We think the point attempted by the Appellant is of no consequence in view of the injuries to the child's hymen. Those injuries, as we have said, clearly show that penetration occurred. In any event, to the extent that the child did fail to tell the interview about the penetration, this was a matter going to the weight and credibility of her testimony, and, as such, a jury issue. The trial court did not abuse its discretion in denying relief on the Appellant's motion for a new trial. *Pryor v. State*, 958 So.2d 818 (Miss. Ct. App. 2007); *Moore v. State*, 773 So.2d 984 (Miss. Ct. App. 2000).

The Second Assignment of Error is without merit.

3. THAT THE TRIAL COURT DID NOT ERR IN FINDING THE VICTIM AND HER BROTHER WERE COMPETENT TO TESTIFY[3]

In the Third and Fourth Assignments of Error, the Appellant alleges that the trial court erred in finding the victim and her brother competent to give testimony. The crux of the argument in support of this claim appears to be that the trial court erred by assessing the competency of the children under M.R.E. 803(25), the "tender years exception to the rule against hearsay.

As to the victim, the trial court, in a hearing outside the presence of the jury and before the victim gave testimony, held a competency hearing. (R. Vol. 2, pp. 22 - 31). It does indeed appear that the court assessed the child's competency in light of Rule 803(25). Later, the court

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[3] We will address the Appellant's Third and Fourth Assignments of Error in this response.

held a competency hearing with respect to the victim's brother. (R. Vol. 2, pp. 63 - 68). In its ruling, however, while the court did advert to "the same finding with this young fellow as I did to the previous young witness," the court went on to specifically find that the brother was competent to testify. (R. Vol. 2, pp. 67 - 68).

In *Penny v. State*, 960 So.2d 533 (Miss. Ct. App. 2006), this Court set out a trial court's duty when the competency of a child witness is questioned. This Court stated:

> The question of whether a witness is competent to testify is left to the sound discretion of the trial court. *Barnes v. State,* 906 So.2d 16, 20 (Miss. Ct. App. 2004). A child is competent to testify if the court ascertains that the child possesses "the ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness." *Mohr v. State,* 584 So.2d 426, 431 (Miss.1991). "The trial court is afforded great deference in its determination that a child witness is competent to testify." *Williams v. State,* 859 So.2d 1046, 1049 (Miss. Ct. App. 2003). In order to prevail, [an appellant] "must show that at the time the court made its initial decision that it was apparent that the witness did not meet the criteria for testifying, not that the subsequent testimony was flawed or that the initial determination was possibly erroneous." *Id.* *Penny*, at 540.

It is not clear to us why the trial court would have considered Rule 803(25) when confronted with a challenge to the competency of a child witness. Nonetheless, we think that the trial court did so, at least as to the victim, is a matter of no consequence.

The trial court heard the responses of the child to the questions put to her. Among those responses, the child indicated that she knew what it meant to tell the truth and knew what it meant to tell a story that was untrue. She knew that she was to tell the truth, and she said that she was going to tell the truth. She knew her family relationships. She then went on to give a coherent account of what the Appellant did to her.

The trial court found that the child was intelligent for her age, understood the questions put to her, and that her responses were prompt. She did not require assistance to answer those

questions. The trial found that the child had "considerable reliability." (R. Vol. 2, pp. 23 - 31). Later, as the trial court was about to administer the oath to the child, he again asked her about the difference between telling the truth and not telling the truth. She indicated that she knew the difference and knew that "[y]ou get to go to jail" if she did not tell the truth. She was also of the view that the devil would get her to boot. (R. Vol. 2, pp. 32 - 33).

We think that the trial court's finding that the child had "considerable reliability" was, in effect, a finding that she had "the ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness". The trial court's finding in this regard is supported by the testimony that the child gave; the trial court was in the position to hear and see the child as she answered questions and was so able to assess her competency.

In an effort to have the trial court's decision to permit the child to testify, the Appellant tells this Court that the she did not establish that she understood the meaning of truthfulness. We do not believe that it was necessary to engage the child in a philosophical enquiry as to the meaning of the truth. *Lacking v. State*, 775 So.2d 731 (Miss. Ct. App. 2000). What was necessary, simply, was that she demonstrate that she understood that she had to tell the truth and not a story, and that she would do so. She did so, in the face of repeated questions on the point. She knew that either the jailer or the devil or both would get her if she did not tell the truth. In any event, if the Appellant was of the view that the questions put to the child were insufficient to establish her competency, he might have put his own to her. He did not.

The Appellant has shown nothing to demonstrate that the trial court abused its discretion. Again, viewing the answers given by the child to the questions put to her just prior to trial, it is clear that she was competent to testify. The trial court did not abuse its discretion in permitting

the victim to testify.

As for the victim's brother, he too was examined in chambers prior to his testimony. He stated that he knew the difference between telling the truth and telling a lie and that it was wrong not to tell the truth. He stated that he was going to tell the truth. He then went through his proposed testimony. The trial court found that the child "ha[d] the indicia of credibility, [understood] the penalty for falsehood, and [was] willing to tell the truth" (R. Vol. 2, pp. 63 - 68). The responses by the boy to the questions asked of him in this in-chamber hearing fully support the trial court's findings.

Both children clearly demonstrated, by their answers to the questions put to them, that they had the ability to perceive and remember events, to understand and answer questions, and to comprehend and accept the importance of truthfulness. The trial court did not abuse its discretion in finding that they were competent to testify.

The Third and Fourth Assignments of Error are without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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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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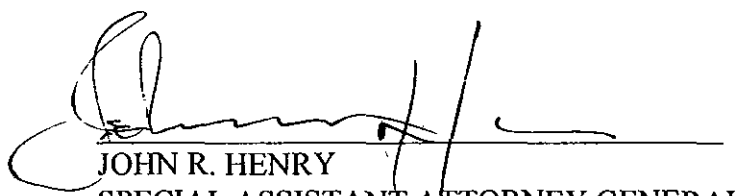
This the 16th day of May, 2008.



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