2007-KA-01229-COA T

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1), *Mississippi Rules of Appellate Procedure*, the undersigned counsel of record for Defendant-Appellant, JOSEPH STEVENSON, does hereby certify that the following persons have an interest in the outcome of this case:

Honorable Ashley Hines
Circuit Judge
Post Office Box 1315
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Joseph Stevenson
Mississippi Department of Corrections
Greenwood, Mississippi

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THIS, the 10 day of March, 2008.

/s/ Martin A. Kilpatrick
MARTIN A. KILPATRICK

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34, *Mississippi Rules of Appellate Procedure*, the Defendant-Appellant, JOSEPH STEVENSON ("Stevenson"), requests oral argument.

Oral argument is warranted from the standpoint of the seriousness of this case, inasmuch as Stevenson was sentenced to serve a term of life imprisonment. Stevenson asserts that his conviction should be reversed because the Trial Court erred in its admission of evidence which was substantially more prejudicial than probative, in violation of *M.R.E.* 403. He relies primarily upon this Court's decision in *Walker vs. State*, 878 So. 2d 913 (Miss. 2004). *Walker* was decided by a divided Court and the Decision contained two separate dissenting opinions. The majority opinion, which reversed the conviction and remanded the case for a new trial, concluded that the admission of evidence more prejudicial than probative so poisoned the proof as to vitiate the conviction, irrespective of the quantity and quality of the other evidence in the case. The dissenting opinions concluded that the evidence was properly admitted under *M.R.E.* 404(b), or that, if erroneously admitted, the error was harmless, given the weight of the evidence in support of guilt. No subsequent decision of this Court has brought the same issue into focus.

It is respectfully submitted that oral argument in this case would be helpful to the Court in the reconciliation of the divergent views of the justices as expressed in *Walker*.

Respectfully submitted, this the 10 day of March, 2008.

Mark A Kilpatrick

MARTIN A. KILPATRICK
Attorney for Defendant-Appellant
Joseph Stevenson

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I.

STATEMENT OF ISSUE

The issue for decision on this appeal is whether the Trial Court committed reversible error in admitting, over Stevenson's objection, evidence of seminal material found upon the alleged rape victim which was not forensically connected to Stevenson. If this Court should conclude that reversible error was thus committed, then the Trial Court also erred in denying Stevenson's alternative post-trial motion for judgment notwithstanding the verdict or new trial; accordingly, this Court should reverse Stevenson's judgment of conviction and remand this case for a new trial.

II.

STATEMENT OF THE CASE

On January 9, 2006, Stevenson was indicted by the Washington County, Mississippi, Grand Jury, on a charge of statutory rape (Code § 97-3-65(1)(b)), said to have been committed against one SHARLISA SIMPSON ("Sharlisa"), between June 1, 2004 and June 25, 2004 (RE 3).

After a two-day trial, on May 30 and 31, 2007, the jury returned a verdict of guilty (RE 4). On June 6, 2007, Stevenson moved alternatively for Judgment of Acquittal or New Trial (RE 5-7), which was overruled by the Trial Court on June 14, 2007 (RE 9). On June 12, 2007, the Trial Court sentenced Stevenson to serve a term of life imprisonment in the custody of The Mississippi Department of Corrections (RE 8).

On July 11, 2007, Stevenson perfected a timely Notice of Appeal to this Court from the verdict of guilty, denial of his post-trial alternative motion and the sentence imposed against him (RE 10).

III.

STATEMENT OF FACTS

Sharlisa, born March 4, 1993 (TR 21), was the first witness called by the State (TR 2). She

testified that her mother was ARLISA SIMPSON ("Arlisa") (TR 3), and that she first met Stevenson when he was working on Arlisa's car (TR 3).

On occasion, Stevenson drove her and her brother to school (TR 4). Sharlisa testified that Stevenson told her that he loved her, and would marry her when she was grown (TR 4). Sharlisa said Stevenson visited in her home, in her words, "for my mom" and spent the night there (TR 4). Sharlisa recited an occasion when she and Stevenson were alone at her home "for three minutes" (TR 8), when he showed her "a sex movie" (TR 5-6).

On another occasion, according to Sharlisa, Stevenson came to her home when her mother was not there, they sat on the couch, he touched her inappropriately, and she got on top of him (TR 9); then, she said, they undressed and had sex on the couch (TR 10).

There was a third occasion, Sharlisa said, when Stevenson came to her home when Arlisa was not there (TR 11). She testified there was intimate activity, but no sexual penetration on this occasion (TR 12). On a fourth occasion, Sharlisa said, Stevenson came to her home, and they had sex on the couch (TR 14). Sharlisa testified that Stevenson occasionally called her on Arlisa's cell phone (TR 18). Sharlisa testified that she eventually told her mother what had been going on, Arlisa whipped her and took her to the hospital (TR 20).

On cross-examination, Sharlisa said she had not talked with a policeman about the case (TR 26). She was then shown a report from a police investigation which said "the victim stated they never had sex" (TR 26), to which she merely said "that's not true" (TR 26). She admitted telling her mother and grandmother that there had been no sex (TR 27). Sharlisa testified that Stevenson came to visit her mother over a four-week period during June of 2004 (TR 31).

Arlisa was the next witness for the State (TR 47). She denied having a sexual relationship with Stevenson, and said he was just a family friend (TR 48). She said that, on an unspecified occasion, she became suspicious of what she perceived as Stevenson's interest in Sharlisa (TR 52). Once, she

noticed Sharlisa had been talking to Stevenson on the cell phone (TR 54). She said she called the police, but no report was made (TR 54). About a week later, she heard Sharlisa having another telephone conversation with Stevenson (TR 57). She said that, on that occasion, she saw "thick film" on Sharlisa's "vaginal" (TR 60-61).

According to Arlisa, Stevenson never spent the night at her home (TR 64), but visited there over a space of two years (TR 64). This was in stark contrast to the testimony given by Sharlisa.

The third witness for the State was Greenville Police Investigator VERONICA VELASQUEZ ("Velasquez") (TR 77-78). On June 25, 2004, Velasquez responded to a local hospital, Delta Regional Medical Center ("DRMC"), pursuant to information received by fellow officer JAMES EVANS (TR 78). She spoke with Sharlisa there, and Sharlisa told her she and "a friend of her mother" had engaged in oral sex "a couple of weeks before" (TR 80). Velasquez instructed DRMC to perform a rape kit (TR 81). She also contacted The Department of Human Services ("DHS"), but did not follow up on the investigation, as she left the police department shortly thereafter (TR 84). On cross -examination,Velasquez affirmed that Sharlisa told her during the interview that she and Joseph had never had sex, just oral sex, which had taken place several weeks earlier (TR 91).

LINDA BUCK, a nursing director at DRMC (TR 106), was at the emergency room on June 25, 2004, when Sharlisa was given a rape kit (TR 107). She said that Sharlisa told her that Stevenson did not "get inside her" (TR 119), and that the event had taken place a couple of days before that (TR 120). No sexual act was described by Sharlisa except "attempted" (TR 135). Detective RICKY SPRATLIN ("Spratlin") retrieved the rape kit, and sent it to RELIAGENE, a testing laboratory (TR 140).

The next witness for the State was DR. WILLIAM BRACKEN ("Bracken"). Before he was called, however, counsel for Stevenson moved *in limine*, and outside the presence of the jury, for exclusion of certain of the testimony the State was expected to offer through Bracken (TR 146); RE 11-13. More specifically, Stevenson objected to testimony that sperm was identified upon examination

of Sharlisa, when the Reliagene report indicated that minimal sperm was found, but the sperm was immobile and could not be linked to Stevenson (TR 146). For this reason, Stevenson argued, the evidence of the finding of sperm was inadmissible under *M.R.E.* 403, being more prejudicial than probative (TR 147). The Trial Court overruled the objection (TR 151; RE 14).

Bracken, an emergency room physician at DRMC, was then called by the State (TR 153), and said he was on duty when Sharlisa was brought to the hospital (TR 153). He said that a "wet mount" swab test showed non-mobile sperm (TR 155). He admitted that there was no vaginal trauma and that the sperm could have been within the vaginal vault without actual penetration (TR 163).

Forensic scientist for Reliagene, HUMA NASIR, next testified (TR 165). She said, over Stevenson's objection, that some of the DRMC samples showed sperm cells (TR 172); she was unable, however, to obtain a male DNA profile (TR 173). She did not receive the pubic or head hair which Spratlin testified he had sent (TR 177-178). This prevented DNA evaluation, and the blood taken from Stevenson could not be matched against anything (TR 177).

DOROTHY COURTNEY, DHS supervisor (TR 185), interviewed Sharlisa at the emergency room (TR 186). Sharlisa described two sexually-related events, but denied there had been any sexual intercourse (TR 188).

Stevenson moved for directed verdict or judgment of acquittal (TR 198), which was denied (TR 199).

Stevenson testified in his own behalf (TR 210). He and Arlisa had been sleeping together, involving sexual relations, for about two years , usually twice a week (TR 213-214). He never came into the home when Arlisa was not there, and had no interest in Sharlisa (TR 214). He denied all the sexually-oriented testimony given by Sharlisa (TR 215). Arlisa wanted him to move in with her, but he would not do it (TR 217). He felt that Sharlisa testified as she did because of the way Arlisa would beat her (TR 223).

Stevenson then rested, and the State had no rebuttal (TR 228). Stevenson renewed his motion for directed verdict, which was again denied (TR 229). After instructions and final argument, the jury returned a verdict of guilty (TR 245). On June 12, 2007, the Trial Court sentenced Stevenson to life imprisonment (TR 249). This appeal timely ensued from the judgment of conviction and denial of Stevenson's post-trial motions for judgment of acquittal or new trial.

IV.

SUMMARY OF THE ARGUMENT

The testimony that there was sperm within Sharlisa's vaginal cavity was technically relevant under *M.R.E.* Rule 401. Stevenson cannot argue that it did not have any tendency to make the ultimate issue-sexual penetration by Stevenson-more probably than without it. Although this testimony was "relevant", it should have nevertheless been excluded because, as prescribed by *M.R.E.* Rule 403, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury. In *Walker vs. State*, 878 So. 2d 913 (Miss. 2004), this Court reversed a conviction of rape because the admission of a towel containing sperm unconnected to the defendant was more prejudicial than probative, and the same principle applies in this case.

No testimony that lab could not link to particular person.

V.

ARGUMENT

M.R.E. 401 defines "Relevant Evidence" as:

> "...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

If evidence is "relevant", it is admissible unless otherwise provided by the Rules. *M.R.E.* 403 provides that, although "relevant", evidence is excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury".

The interplay between *M.R.E.* 401 and the "unfair prejudice" exception of *M.R.E.* and 403 is well explained in *Walker vs. State*, 878 So. 2d 913 (Miss. 2004), a decision which is dispositive in favor of Stevenson on this appeal. In *Walker*, the defendant, Freddie Walker, was indicted for capital rape, consisting of several alleged assaults against a young female, from May of 1999 until August 15, 2000. Although it was not part of the indictment, there was said to have been such a sexual attack at the victim's home in August of 1999, following which Walker cleaned himself with a towel. The child retrieved the towel and secreted it inside another towel, both of which she later gave to her mother. Walker filed a pre-trial motion for suppression of the towel as evidence, inasmuch as there was no confirmation that the semen on the towel was his. The Trial Court denied the motion, and the towel containing residue of semen was admitted into evidence. Because the incident alleged was not included in the indictment, the evidence was permitted by the Trial Court under *M.R.E.* 404(b), upon the premise that, in the prosecution of sexual offenses, evidence of prior sexual acts between the accused and the victim shows the defendant's lustful disposition toward the victim. The Trial Court's decision to admit the towel into evidence was based upon its interpretations of *Crawford vs. State*, 754 So. 2d 1211 (Miss. 2000); *Hicks vs. State*, 441 So. 2d 1359 (Miss. 1983); and *Barbetta vs. State*, 738 So. 2d (Miss. Ct. App. 1999).

This Court, however, reversed Walker's conviction and remanded the case for a new trial, holding that the towel's probative value was substantially outweighed by the danger of unfair prejudice, given that the prosecution failed to connect the semen on the towel to Walker.

In its decision, this Court clearly explained its reasoning:

> "Though the alleged victim testified how she retrieved the towel, the prosecution's failure to positively connect the semen on the towel to Walker renders the towel inadmissible. To simply admit such a towel, without employing the available scientific means for authentication, fails the unfair prejudice standard set forth in

M.R.E. 403, infringed upon Walker's right to a fair trial, and served only to bolster the testimony of the prosecution's witnesses."
(878 So. 2d at 915-916)

Citing *Crawford*, this Court noted that "Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass"; and, moreover, that, "with no direct link to the accused, a soiled towel would tend to mislead, confuse and incite prejudice in the jury, especially in a capital rape trial involving a 13-year-old victim". (898 So. 2d at 916).

The factual and legal issues on Stevenson's appeal are remarkably similar to those in *Walker*, except that the factual basis for conviction in *Walker* was stronger-that is, bolstered by a tape-recorded licentious telephone conversation between Walker and the alleged victim-than the case presented against Stevenson. NO. Here, semen found ON Victim's body.

There was no forensic or other physical evidence offered against Stevenson which linked him to the crime charged, and the testimony offered against Stevenson was rife with contradiction. According to the testimony, Sharlisa told the investigating officer, Velasquez, that she and Stevenson's never had actual sex, just oral sex (TR 91); she told the DHS investigator, Courtney, that there had never been any sexual intercourse with Stevenson (TR 188); she told the DRMC nursing director, Buck, there was only "attempted" intercourse (TR 135); and she also denied to her mother and grandmother that there had been any sex between her and Stevenson (TR 20).

Close scrutiny of the testimony given by Sharlisa, in juxtaposition with that given by her mother, Arlisa, discloses disturbing inconsistency and elemental interstices in the value of the proof. The matter of attribution of the semen to Stevenson (albeit without forensic support) is, however, of Not attributed to him critical importance, and considered first in this Argument. The State asked Sharlisa:

"Q....During any time when (Stevenson) would be there with you, did any type of liquid ever come from his penis? Do you recall ever seeing

liquid come from his penis?"
(TR 12)

The prosecution no doubt expected an affirmative answer; however, Sharlisa responded, quite simply, "No." (TR 12). Later, this colloquy ensued between the State and Sharlisa:

"Q. Can you explain to me what you mean
when you say 'sex'?
A. He put his penis inside my private part.
Q. Okay. Did anything else happen?
A. Witness shook head negatively."
(TR 15)

There was no evidence offered by the State that there was any seminal fluid found on any surface of any material in Arlisa's home; not on any clothing, towels or the couch where Sharlisa said she and Stevenson had sex. The testimonial inconsistency regarding the matter of semen is remarkably well seen by this divergence in the proof: Sharlisa said she had not seen Stevenson for a week before she went to DRMC; Arlisa said that the night before she took Sharlisa to DRMC, she saw "thick film... on her vaginal." (TR 61). This time-line discrepancy cannot be rationally reconciled. Moreover, if Arlisa was telling the truth, there can be no rational explanation how it was that no live semen was found by performance of the rape kit.

It is also obvious that there can be no empirical reconciliation of the relationship between Arlisa and Stevenson, as Arlisa described it, and as Sharlisa explained it. Sharlisa testified that Stevenson had spent the night at her home, together with her mother (TR 5, 30); Arlisa said that he had never spent the night there (TR 64). Sharlisa said that, when Stevenson would come to visit her mother, they would rent and watch movies and that Stevenson was her mother's "boyfriend" (TR 30-31). Arlisa testified that they had never watched movies when Stevenson visited (TR 64). While Arlisa said Stevenson visited her two or three times a week over a span of two years (TR 64). Sharlisa testified that he visited her home over a span of only four weeks, during the month of June of 2004 (TR 31).

Sharlisa's various versions of the number and content of her alleged intimate contacts with

Stevenson are not reconcilable with what she told others, or among themselves. According to her direct testimony, she was at home alone with Stevenson, on a first occasion, the date of which was neither given nor estimated, when he showed her a "sex movie" (TR 5). The content of the movie, however, was not described; nothing else happened; and he was there "for three minutes" (TR 8, 9). The second time, she said, they had sexual intercourse on the couch (TR 10). The third time, they were intimate, she said, but there was no sexual intercourse (TR 12). On the fourth, and last occasion, according to Sharlisa, they had sexual intercourse on the couch (TR 16). On cross-examination, Sharlisa testified that she and Stevenson had been at her home alone *on only three occasions* and that they had sexual intercourse *on only one occasion* (TR 33). Sharlisa told her mother Stevenson had been there three times, and the last two times, they had sex (TR 72). Sharlisa denied to all others that she had sexual relations with Stevenson.

The testimony about the DRMC visit and the rape kit is elliptical at best. The rape-kit forms were admitted as Exhibits S-6A and 6B, and consisted of a two-sheet form (TR 115). The form, offered through Nurse Buck, indicated there was only "attempted" penetration; that is, according to Sharlisa, "...he did not get inside of her vagina, but she was wet." (TR 119). Sharlisa told Buck the event had taken place the evening before (TR 119-120), whereas Sharlisa testified that she had not seen Stevenson for a week prior to going to DRMC (TR 61). The form reported no sexual relations within the last 72 hours (TR 134).

Prior to the beginning of Dr. Bracken's testimony, counsel for Stevenson moved the Court, outside the presence of the jury, as follows:

> "Under...Rule 401...The evidence of sperm found on examination is in some sense relevant because it tends to prove or disprove one side or the other version of this case.
>
> I am asking that the Court conclude that the... evidence is more prejudicial than probative

> because while sperm may be described as found, there's nothing to connect Joseph Stevenson with it. So...the prejudice is the finding of sperm that is going to create some sort of assumption that it belongs to Joseph Stevenson."
> (TR 147; RE 11-13)

The Trial Court denied the motion (TR 151; RE 14), and granted Stevenson a continuing objection to the testimony of Bracken and to that of the testing company, Reliagene. (TR 152).

Dr. Bracken was on duty at the DRMC emergency room while Sharlisa was there but did not speak with her, leaving the matter to nursing personnel (TR 154). He testified on direct examination that there was non-mobile sperm in the vaginal vault, indicating that there had been penetration (TR 156). On cross-examination, Bracken initially testified that there was "trauma...to the vaginal area itself from the penetration" (TR 157), but when confronted with the rape kit forms, he admitted that there was no vaginal trauma indicated (TR 159-160). He had no knowledge whether Sharlisa's vaginal anatomy was of normal size or not (TR 161). Bracken was asked whether a man of Stevenson's size could penetrate Sharlisa without causing vaginal trauma, and he responded:

> "I don't...know if...she had been sexually molested for months until this point...and if...anybody takes a child and slowly brings them...to have sexual intercourse like this, then the vaginal walls will stretch out...if this is an ongoing molestation that's been precipitated."
> (TR 161)

He also opined that:

> "I'm sure if it was a first time, first sexual assault,...there would be tearing and such as that in the vaginal vault and bruising..."
> (TR 162)

Ultimately, Bracken admitted that, all factors considered, the sperm material could have gotten into the vaginal vault without penetration (TR 163).

There is certainly nothing in the Record to even suggest that Stevenson had engaged in any long-term manipulation of Sharlisa, and thus no rationale for the State's position that Stevenson could have penetrated Sharlisa without causing vaginal trauma.

The Reliagene representative, Nasir, testified that, of the three swabs from the rape kit, two (Exhibits S-2 and S-3) revealed no sperm cells, and in the other, Exhibit S-4), she detected "a very, very small amount of sperm cells...." (TR 172). She did DNA analysis but was unable to obtain a male DNA profile (TR 173). Nasir testified that she only saw two sperm in the sample, and that an ordinary ejaculation contains millions of sperm cells (TR 193). Ultimately, Nasir admitted that, as to the material furnished to Reliagene:

> "It couldn't be connected to anybody because we didn't receive a result. If we had gotten a DNA profile, then we could compare it to someone, but as of right now, we don't have a result, so we cannot compare it to anybody."
> (TR 180)

Stevenson has demonstrated in this section of his Brief the unfair prejudice-versus-probative value imbalance which was created when the existence of uncorrelated semen was injected into the case. The State presented a jumbled mixture of contradictory testimony which was so at odds with itself that, albeit unknown to the State, the entire sum of the case could have easily been a malicious hoax. There was simply no common thread of proof which could have reconciled its constantly clashing portions. This being the case, the element of sperm, although unconnected to Stevenson, most likely and, in any event, easily could have tipped the balance against him. As in *Walker*, "in the instant case, the need for scientific testing is clear." (*Walker* at 917).

Stevenson understands and accepts that physical evidence is not required to uphold a conviction of capital rape, e.g., *Winston vs. State*, 754 So. 2d 1154 (Miss. 2000) and *Walker*. But this case presents an altogether different question. This case is one wherein the prosecution, not content to present a case

dependent upon mere testimony, insisted upon injecting ephemeral, unconnected "pseudo-science" into the case. While it is true that no person outside the jury will ever know the impact the unlinked semen evidence had upon the verdict, Stevenson need not show actual unfair prejudice, but only "the *danger* of unfair prejudice, confusion of the issues or misleading the jury." *M.R.E.* 403. The injection of unconnected sperm evidence was pure toxicity, designed to create a *presumption* of scientific connectedness which Stevenson was powerless to combat, except to object to it, as he did. Had the State been willing to stand on its testimony, albeit tangled, disorganized and contradictory, Stevenson may have had little to complain of on appeal. But the State chose to "gild the lilly" with venomous, scientific half-truth and, as a consequence, should have to try this case again, within the confirms of the *Rules of Evidence*, so that Stevenson will have a fair trial.

VI.

CONCLUSION

Stevenson respectfully submits that this Honorable Court should enter its Decision reversing his conviction herein, and remanding the case for a new trial, without any evidence presented as to unconnected evidence of semen.

VII.

CERTIFICATE OF SERVICE

I, Martin A. Kilpatrick, do hereby certify that I have this day, served via-U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing documents upon:

Honorable Ashley Hines
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Kimberly Merchant, Esquire
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THIS, the 10 day of March, 2008

MARTIN A. KILPATRICK