IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT R. MURRAY — APPELLANT

VS. — NO. 2008-KA-0298-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IV. RELIEF BASED ON CUMULATIVE ERROR IS NOT WARRANTED, AS NO INDIVIDUAL ERROR HAS BEEN PROVEN BY THE APPELLANT.

STATEMENT OF FACTS

Five-year-old R.S. was asleep at her grandmother's house when thirty-five-year-old Robert Murray, the grandmother's husband, awoke R.S. T. 95. Murray took R.S. to her grandmother's bedroom and removed her pants and underwear.[1] T. 88. Murray removed his clothes and began rubbing his penis on her vaginal area. T. 89. R.S. asked Murray to stop and told him that he was hurting her. T. 90. Murray responded that she better not tell anyone about the incident or he would "whoop" her. T. 90. R.S. reported the incident to her mother, Melinda, the next day. T. 91. Melinda and her uncle, Clifton, then took R.S. to the Central Mississippi Medical Center Emergency Room, where she was examined by R.N. Angie Garnand. T. 122, 174. As Garnand took R.S.'s oral history, R.S. reported that a man had "humped on her privates" and that it hurt. T. 174. A physical examination revealed abrasions at the base of the vagina, bruising on the right side of the vagina, an open vaginal canal, and redness and abrasions on the inner labia. T. 175-76.

Robert Murray was ultimately tried and convicted by Hinds County Circuit Court jury for fondling a child for lustful purposes. He was sentenced to serve fifteen years in the custody of the Mississippi Department of Corrections.

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[1]The grandmother was not at home at the time of the incident.

SUMMARY OF ARGUMENT

The trial court ruled that Angie Garnand, R.N. would be allowed to give expert testimony in the form of opinions, conclusions or specialized knowledge concerning sexual assault examination and the collection of forensic evidence. The trial court's decision to admit Garnand's opinion that R.S.'s injuries were consistent with R.S.'s report that she had been sexually abused was not arbitrary or clearly erroneous. Garnand specialized in pediatrics, emergency medicine, and sexual assault examination. She had conducted between seventy-five and one hundred sexual assault examinations. Her testimony assisted the trier of fact and was both relevant and reliable.

Melinda's testimony regarding R.S.'s disclosure of abuse was not hearsay because it was not offered for the truth of the matter asserted. Instead, the testimony was offered to show the statement's effect on Melinda and show why she took R.S. to the hospital. Further, the trial court gave a limiting instruction explaining that the statement could not be used as substantive evidence.

The State committed no discovery violation pertaining to the disclosure of the substance of Clifton's testimony. The substance of his testimony was provided via a police report that was in discovery.

Murray is not entitled to relief based on cumulative error, as he has failed to show error in any of his individual assignments of error

ARGUMENT

I. THE TRIAL COURT DID NOT ALLOW WITNESS ANGIE GARNAND, R.N. TO TESTIFY BEYOND THE SCOPE OF HER EXPERT QUALIFICATIONS.

The State offered Angie Garnand, R.N. as an expert in the field of emergency medicine and sexual assault examination. T. 161. Among other qualifications, at the time of trial Garnand had conducted between seventy-five and one hundred sexual assault examinations. T. 160. The State sought to elicit from Garnand her opinion as to whether R.S.'s injuries were "consistent with the history given by the patient as to why she's there getting treatment." T. 171. The trial court initially ruled that Garnand does possess specialized knowledge which would assist the trier of fact and that Garnand could give testimony in the form of "opinions, conclusions or specialized knowledge concerning sexual assault examination and the collection of forensic evidence associated therewith in the nursing profession." T. 169. The court, however, initially ruled that Garnand could not testify that R.S.'s injuries were consistent with sexual abuse, because the court was of the opinion that such testimony was "a roundabout way of asking about a diagnosis," which only a physician was qualified to give. T. 172-73. On cross-examination Garnand was asked whether it was possible for the type of injuries R.S. sustained to be caused by "normal play" or accidents, to which Garnand responded in the affirmative. T. 184. After cross-examination, on its own motion the court reversed its earlier ruling that Garnand could not testify that R.S.'s injury was consistent with sexual assault. T. 186. The court's reasoning was as follows.

> Now on cross-examination the defense has gone through a litany of several things eliciting the witness's conclusions or opinions concerning other matters in which these injuries would be consistent and thereby has opened the door for the State to, likewise, attempt to elicit testimony as to whether or not in the witness's opinion the injuries were consistent with sexual assault.

T. 186. On redirect, the State elicited from Garnand her opinion that R.S.'s injury to her inner labia

was consistent with "an object rubbing around her vagina or sliding or hitting on her vagina and right on the inner labia." T. 188. The State further asked, "The injuries that you observed, are they consistent with the history that was given to you and that the defendant rubbed his penis on her vaginal area?" T. 188. Garnand responded in the affirmative. T. 188.

On appeal, Murray alleges that the trial court erred in allowing the State to elicit Garnand's opinion that R.S.'s injury was consistent with a sexual assault. Specifically, Murray alleges that the trial court improperly found that the defendant opened the door to incompetent or unqualified expert opinion evidence. The admissibility of expert testimony is within the sound discretion of the trial court judge. *Bishop v. State*, 982 So.2d 371, 380 (¶33) (Miss. 2008). A trial court's decision to admit expert testimony will not be reversed unless the decision is arbitrary, clearly erroneous, or an abuse of discretion. *Id.*

To support his position, Murray relies on *Murphy v. State*, 453 So. 2d 1290 (Miss. 1984). In *Murphy*, the State elicited double hearsay from a witness whose testimony purported to be a statement by the defendant to a third party that the third party had relayed to the witness. *Id.* at 1294. The supreme court found that admission of the double hearsay statement violated the defendant's right to a fair trial because "This particular hearsay purported to reveal eyewitness testimony of the crime, which testimony in itself would have been enough to convict the accused." *Id. Murphy* is distinguishable for a number of reasons. First and most obviously, the erroneously admitted evidence in *Murphy* was hearsay, not expert opinion testimony. Further, the facts of *Murphy* do not indicate that the State had any other proof to link Murphy to the murder other than the double hearsay statement in which Muphy allegedly recounted details of the crime. In the present case, R.S. had already testified that Murray had sexually assaulted her. At best, Garnand's opinion simply corroborates R.S.'s version of events, whereas in *Murphy* the double hearsay statement was

essentially an admission by Murphy of his involvement in the murder. For these reasons, *Murphy* is not applicable to the case *sub judice*.

Additionally, this Court must affirm a trial court's correct result even if the trial court's reasoning is flawed. "On appeal, we will affirm a decision of the circuit court where the right result is reached even though we may disagree with the reason for that result." *Puckett v. Stuckey*, 633 So.2d 978, 980 (Miss. 1993) (citing *Stewart v. Walls*, 534 So.2d 1033, 1035 (Miss. 1988)). The supreme court has also stated the following regarding an appellate court's duty to affirm a trial court's correct decision.

> Appellate courts are not in the business of reversing a trial court when it has made a correct ruling or decision. We are first interested in the result of the decision, and if it is correct we are not concerned with the route-straight path or detour-which the trial court took to get there.

Hickox By and Through Hickox v. Holleman, 502 So.2d 626, 634-35 (Miss. 1987). To the extent that the trial court's decision and reasoning can be construed as an initial finding that Garnand was unqualified to give the type of opinion in question, and that defense counsel opened the door to unqualified expert opinion evidence, the State would ask the Court to employ the "right result, wrong reason" analysis. The State contends that Garnand's opinion fits within the parameters of the court's initial ruling that Garnand could give an opinion or conclusion based on her expertise in sexual assault examinations. Garnand had conducted between seventy-five and one hundred sexual assault examinations and was certainly qualified to give an opinion about whether an injury was consistent with a sexual assault. By virtue of the very definition of *diagnosis*, it is clear that the trial court's initial finding that Garnand's testimony was tantamount to giving a diagnosis was simply incorrect. The term *diagnosis* is defined as "a medical term meaning the discovery of the source of a patient's illness or the determination of the nature of his disease from a study of its symptoms." Black's Law

Dictionary 453 (6th ed. 1990). Garnand was clearly not testifying that the child-victim's injuries were in fact caused by sexual abuse. Rather, Garnand simply testified that the injuries were consistent with the victim's oral history in which she stated that she had been sexually abused. Garnand had also testified on cross that bruising on a female's genitalia could also occur from normal play or accidents. After Garnand's testimony on cross, it is reasonable to believe that the trial court realized that its initial ruling, that the testimony was tantamount to a diagnosis, was simply incorrect. In any event, the admission of Garnand's expert testimony was not arbitrary or clearly erroneous. Accordingly, the trial court's decision to admit Garnand's testimony should be affirmed.

Even if the Court were to disagree with the State's analysis, any perceived error was harmless. At trial, Murray obviously believed that Garnand was qualified to testify that the injuries could be consistent with normal play or an accident. As such, the jury was simply faced with Garnand's opinion that vaginal bruising could occur from normal play or an accident, but that the victim's injuries were also consistent with her report that she had been sexually assaulted. The alleged error would also be harmless since a defendant may be convicted even upon the uncorroborated testimony of a victim of a sex crime. *Christian v. State*, 456 So.2d 729, 734 (Miss. 1984).

II. THE CHILD VICTIM'S OUT-OF-COURT STATEMENTS TO WHICH WITNESS MELINDA S. TESTIFIED WERE NOT HEARSAY.

At trial, R.S.'s mother, Melinda, was allowed to testify that R.S. told her that Murray had sexually assaulted her. T. 122. The trial court found that the probative value of the statement was not for proving the truth of the matter asserted, but rather to show why Melinda took R.S. to the hospital. T. 119. Before allowing Melinda to testify to R.S.'s out-of-court statement, the trial court gave a limiting instruction, explaining to the jury that Melinda's testimony could be considered by the jury "solely to explain to you why this witness, the child's mother, took certain actions or a course of conduct and not for whether or not the child was actually molested . . . ." T. 122. On appeal, Murray claims that the statement in question was offered to prove the truth of the matter asserted.

A trial court's decision to admit or exclude testimony is reviewed for abuse of discretion. *Hobgood v. State*, 926 So.2d 847, 853 (Miss. 2006). Error will not be predicated upon the admission or exclusion of evidence unless a substantial right belonging to the defendant was affected by the admission or exclusion of evidence. *Ladnier v. State*, 878 So.2d 926, 933 (¶27) (Miss. 2004). Out-of-court statements are not hearsay when they are offered to show their effects on a person rather than for the truth of the matter asserted. *Knight v. State*, 601 So.2d 403, 406 (Miss. 1992). Police officers are routinely allowed to testify about out-of-court statements to explain an officer's course of investigation. *Smith v. State*, 984 So.2d 295, 300 (Miss. Ct. App. 2007) (citing *Rubenstein v. State*, 941 So.2d 735, 764 (¶ 111) (Miss.2006);*Gray v. State*, 931 So.2d 627, 631(¶ 14) (Miss. Ct. App. 2006); *Swindle v. State*, 502 So.2d 652, 658 (Miss. 1987)). This is because such testimony is not being offered to prove the truth of the matter asserted. The trial court did not abuse its discretion in finding that Melinda's statement was being offered to show the effect it had on her and the actions

she took after receiving the information. After testifying to R.S.'s out-of-court statement, Melinda testified that she took R.S. to the hospital. Clearly, the statement was not offered to prove the truth of the matter asserted. Further, the court gave a limiting instruction which explicitly told the jury that the statement was not being offered to prove the truth of the matter asserted. There is a presumption that the jury will follow a court's limiting instruction. *King v. State*, 857 So.2d 702, 729 (¶97) (Miss. 2003); Carr v. State, 828 So.2d 224, 227 (¶15) (Miss. Ct. App. 2002). Murray has failed to overcome this presumption.

Because Melinda's testimony was not offered to prove the truth of the matter asserted, it was not hearsay. Further, Murray has failed to even articulate which of his substantial rights was effected even if the trial court erred in allowing the non-hearsay testimony. For the foregoing reasons, the trial court did not err in allowing the testimony in question.[2]

[2]The Appellant also argues that the trial court's alternative reasoning in ruling that the testimony in question was admissible was erroneous. However, because the trial court's primary finding that the testimony was not hearsay is correct, it would be superfluous to address any additional basis for which the trial court found the testimony to be admissible.

III. THE STATE COMMITTED NO DISCOVERY VIOLATION WITH REGARD TO THE SUBSTANCE OF WITNESS CLIFTON S.'S TESTIMONY.

Prior to Clifton S., R.S.'s uncle, taking the stand, a hearing was held outside the presence of the jury to determine the admissibility of Clifton's testimony concerning R.S.'s disclosure of abuse to him. At the conclusion of the hearing, trial court ruled that Clifton could testify to R.S.'s out-of-court statement because the statement was not hearsay. During the hearing, defense counsel alleged a discovery violation, claiming that the State failed to disclose the substance of Clifton's testimony. The trial court examined the discovery provided by the State, and found that a police report in discovery clearly indicated that R.S. told her uncle about the sexual abuse before he accompanied her and her mother to the hospital. T. 148-49. After giving a limiting instruction, the court allowed Clifton to testify that R.S. told him that Murray had "put his thing on my thing," and that Clifton accompanied R.S. and her mother to the hospital. T. 152.

This Court reviews a trial court's ruling pertaining to alleged discovery violations for abuse of discretion. *O'Neal v. State*, 977 So.2d 1252, 1254 (¶10) (Miss. Ct. App. 2008). On appeal, Murray acknowledges that the substance of Clifton's testimony was provided in discovery through the police report which clearly indicated that R.S. told Clifton about the abuse. However, Murray contends that the State committed a "technical discovery violation" because the State did not prepare a written summary of the testimony and present it "together with" Clifton's name and address. Appellant's Brief at 14. The purpose of URCCC 9.04 is not for appellants to ferret out "technical violations" to argue on appeal, but rather to prevent trial by ambush. *Livingston v. State*, 943 So.2d 66, 70 (¶8) (Miss. Ct. App. 2006). Murray cannot genuinely argue that he was not provided with the substance of Clifton's testimony simply because it was not typed on the same sheet of paper as Clifton's name and address and labeled "Substance of Clifton S.'s Oral Statement." Because the trial

court did not abuse its discretion in finding that the substance of Clifton's testimony was provided through the police report, Murray's third assignment of error must fail.

Additionally, even if this Court were to find that the State committed a discovery violation, "[w]here the discovery violation results in the admission of evidence that is merely cumulative, the error is harmless." *O'Neal* at 1255 (¶13). Clifton's testimony was cumulative, as R.S. and her mother had already testified that R.S. told Clifton that Murray had sexually abused her. Accordingly, even if the State had committed a discovery violation, which it clearly did not, any such error would be harmless.

IV. RELIEF BASED ON CUMULATIVE ERROR IS NOT WARRANTED, AS NO INDIVIDUAL ERROR HAS BEEN PROVEN BY THE APPELLANT.

"Where there is no error in any one of the alleged assignment of errors, there can be no error cumulatively." *Hughes v. State*, 892 So.2d 203, 213 (¶29) (Miss. 2004). Because Murray failed to show error in any of his individual assignments of error, his final issue necessarily fails.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Murray's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE
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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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