IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT MURRAY **APPELLANT**

V. **NO. 2008-KA-0298-COA**

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. Robert Murray, Appellant
3. Honorable Eleanor Faye Peterson, District Attorney
4. Honorable Bobby B. DeLaughter, Circuit Court Judge

This the 16th day of October, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Hunter N. Aikens
COUNSEL FOR APPELLANT

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

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Hinds County, Mississippi, and a conviction for the crime of gratification of lust against Robert R. Murray following a jury trial, the Honorable Bobby Burt DeLaughter, Circuit Judge, presiding. (C.P. 26-29, Tr. 218, R.E. 4-7).[1] Murray was sentenced to serve a term of fifteen (15) years. (C.P. 26, 29, Tr. 240, R.E. 7). The trial court denied Murray's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (C.P. 33, R.E. 8). Murray is presently incarcerated in the custody of the Mississippi Department of Corrections.

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[1] In the interest of explanation, it should be noted that the order of conviction entered by the trial court stated that Murray withdrew a plea of not guilty and entered a plea of guilty to the charge of gratification of lust. (C.P. 27). However, beyond this, there is nothing in the record to indicate that Murray entered a plea of guilty. The record does contain a transcript of the trial proceedings, a jury verdict, a prisoner commitment notice, and a sentencing order, all indicating that Murray was found guilty by a jury verdict for the crime of gratification of lust. (Tr. 1-240, C.P. 26, 28-29) Therefore, it appears that the order of conviction, stating that Murray entered a plea of guilty, was mistakenly entered on the wrong form.

STATEMENT OF THE FACTS

On or about May 17, 2005, five-year-old R.S.[2] stayed the night at her grandmother and step-grandfather's house; Murray is R.S.'s step-grandfather. (Tr. 87, 126, 155). On the night in question, R.S. was sleeping in a back room of the house with two other young female family members. (Tr. 95-96). According to R.S., Murray came and got her and took her to her grandmother's room; R.S.'s grandmother was not at the house. (Tr. 87-88). R.S. testified that Murray took her pants and panties off, took his clothes off, and "put his private part between mine." (Tr. 87-89). She also claimed that Murray told her he would whoop her if she told anyone. (Tr. 90).

Sometime later, R.S. told her mother, Melinda Strong ("Melinda"), about the incident. (Tr. 90). At trial, Melinda testified, over objection, that R.S. told her that "Murray had raped her." (Tr. 116-122). Melinda decided to take R.S. to the hospital and, on the way, stopped by the house of her uncle, Clifton Strong ("Clifton"), to talk to him about the incident. (Tr. 122-23). Over objection, Clifton was allowed to testify that R.S. told him, "she was asleep in the bed. Robert came into her room and woke her up. Took her to the grandmother's room. And she used the word 'thing.' Put his thing on my thing." (Tr. 152).

Melinda, R.S., and Clifton then went to the hospital. (Tr. 152). There, R.S. was treated by Angie Garnand ("Garnand"), a nurse employed by the Central Mississippi Medical Center. (Tr. 173). At trial, the State called Garnand as an expert witness in the fields of "emergency medicine" and sexual assault examination." (Tr. 160-61, 173). According to Garnand, R.S. told her that "the man had taken her pants and panties off and humped on her privates," and that "his privates were on her." (Tr. 174). Garnand stated that she noticed abrasions and some bruising on and around

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[2] In order to protect the identity of the victim, her name will not be used.

R.S.'s vagina, and her vaginal canal was open. (Tr. 175). On cross-examination, Garnand admitted that bruising to a female's vagina can happen any number of ways. (Tr. 183). On redirect, Garnand was allowed to testify, over objection, that R.S.'s injuries were consistent a penis being rubbed on her vaginal area. (Tr. 188).

Captain Henry Glaze of the Hinds County Sheriff's Office was called to the hospital, where he spoke with R.S. and her family; he also referred R.S. to the Children's Advocacy Center (CAC) for a forensic interview. (Tr. 190-92). According to Captain Glaze, R.S. went to the CAC, and an interview was conducted. (Tr. 192). However, beyond this, no evidence of the interview was presented.

At the conclusion of the State's case-in-chief, Murray unsuccessfully moved for a directed verdict. (Tr. 196-97). Murray called no witnesses and rested his case. (Tr. 198). After deliberation, the jury found Murray guilty of gratification of lust under Mississippi Code Annotated section 97-5-23(1) (Rev. 2006). (Tr. 218, C.P. 26, R.E. 5).

SUMMARY OF THE ARGUMENT

The trial court erred in ruling that the defense opened the door to Garnand's impermissible expert opinion testimony that R.S.'s injuries were consistent with sexual abuse. The trial court had previously determined that Garnand was unqualified/incompetent to give such an opinion, and she was no more competent to give the opinion after defense counsel cross-examined her.

The trial court further erred in allowing Melinda to present hearsay testimony that R.S. told her that Murray had raped her. Contrary to the trial court's finding, the statement was hearsay because it was offered to prove the truth of the matter asserted. The trial court also incorrectly admitted the statement as a "first report" under *Fells v. State*, 345 So. 2d 618, 620-23 (Miss. 1977). There is no "first report" hearsay exception, and *Fells* is inapplicable to the instant case because the

Fells case dealt with statements of identification. Moreover, Melinda's hearsay testimony cannot be deemed admissible under the "tender years exception," as the trial court did not address the exception and, therefore, did make the required findings regarding reliability.

The trial court further erred in allowing Clifton to testify despite the State's failure to provide the substance of his expected testimony, as required by Uniform Circuit and County Court Rule 9.04. In contravention of proper procedure, defense counsel was not given an opportunity to interview Clifton *after* objection was made on the grounds that the State committed a discovery violation. Therefore, the trial court erred in allowing Clifton to testify.

These errors, individually or cumulatively, prejudiced Murray's defense and deprived him of his right to a fair trial. Accordingly, this Court should reverse Murray's conviction and remand this case for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING ANGIE GARNAND TO GIVE EXPERT TESTIMONY BEYOND THE SCOPE OF HER EXPERT QUALIFICATION.

"The admission of expert testimony is left to the sound discretion of the trial judge. Unless [this Court] conclude[s] that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand." *International Paper Co. v. Townsend*, 961 So. 2d 741, 756 (¶31) (Miss. Ct. App. 2007) (quoting *City of Jackson v. Estate of Stewart*, 908 So. 2d 703, 708 (¶21) (Miss. 2005)).

At trial, the State offered Garnand (the nurse that treated R.S.) as an expert witness in the fields of "emergency medicine" and "sexual assault examination" and voir dire was conducted. (Tr. 158-166). Defense counsel objected to Garnand being qualified as an expert in the areas for which she was offered. (Tr. 166). The State then made a proffer seeking to permit Garnand to testify that

R.S.'s injuries were consistent with sexual assault. (Tr. 170-73). The trial court ruled 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 within the nursing profession." (Tr. 169). However, the trial court sustained defense counsel's objection as to Garnand being allowed to testify that R.S.'s injuries were consistent with sexual abuse because Garnand, as a nurse, was unqualified. (Tr. 172-73).

On direct examination, Garnand testified that she noticed abrasions and some bruising on and around R.S.'s's vagina, and her vaginal canal was open. (Tr. 175). Also, the State asked Garnand if R.S. complained that she had fallen or hurt herself in any way. (Tr. 177). On cross-examination, defense counsel, without objection from the State, elicited testimony from Garnand that bruising can happen in any number of ways, and that she had no knowledge regarding the cause of R.S.'s injuries beyond what she had been told. (Tr. 183-86).

At the conclusion of cross-examination, the trial court, on its own accord and without a motion from the State, reversed its earlier ruling that Garnand was unqualified to testify as to whether R.S.'s injuries were consistent with sexual abuse; the trial court reasoned that the defense "opened the door" for the State to elicit this testimony.[3] (Tr. 186-87). Defense counsel again objected, unsuccessfully. (Tr. 187). As a result, the State elicited testimony from Garnand on re-direct that R.S.'s injuries were consistent with "[Murray] rubb[ing] his penis on [R.S.'s] vaginal area." (Tr. 188).

This was error. At issue is whether a defendant may open the door to

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It should be noted that in so ruling, the trial court did not re-evaluate whether Garnand was competent or qualified to give such an opinion. Therefore, the trial court's previous ruling that Garnand was incompetent to give such expert testimony remained in tact.

incompetent/unqualified expert opinion evidence. While it does not appear that the appellate courts of our State have directly addressed this precise issue, the Mississippi Supreme Court has addressed an analogous issue and determined that one cannot open the door to hearsay evidence, because "[h]earsay evidence is incompetent evidence." *See Murphy v. State*, 453 So.2d 1290, 1294 (Miss. 1984).

In *Murphy*, the State failed to object to hearsay testimony that the defense elicited on cross-examination. *Id.* at 1293-94. On re-direct, the State, over defense objection, elicited further hearsay testimony from the witness regarding the topic breached on cross-examination. *Id.* On appeal, the Mississippi Supreme Court reversed, holding as follows:

> You may allow [hearsay testimony's] admission by failing to object to it, but you simply cannot "open the door" to hearsay. *Hearsay is incompetent evidence.* You may open the door for collateral, irrelevant, or otherwise damaging evidence to come in on cross-examination, [citations omitted], but Mississippi recognizes no rule of law that allows double hearsay to be brought in through this open door.

Id. at 1294 (emphasis added). Expounding on the reasoning behind the rule, the court in *Murphy* further explained:

> The state cannot sit silent while the defense elicits hearsay and then seek to solicit hearsay in response over the objection of the defense, based upon the state's initial failure to object. "Sauce for the goose, sauce for the gander" does not apply in this situation. To allow this is tantamount to allowing two wrongs in the hope of arriving at a right.

Id.

The crux of the *Murphy* decision is found in the court's statement that "[h]earsay is incompetent evidence." *Id.* Essentially, the holding in *Murphy* is that the introduction of incompetent evidence does not open the door for more of the same incompetent evidence. Just as hearsay is incompetent evidence, so too is unqualified expert opinion testimony. Inherent in a trial court's determination that one is unqualified to give an expert opinion on a certain subject is that the

witness is incompetent to give the opinion.

Mississippi Rule of Evidence 702 provides the following regarding the admission of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

M.R.E. 702.

The trial court initially (and correctly) determined that Garnand was unqualified to give an expert opinion that R.S.'s injuries were consistent with sexual abuse, as this testimony required scientific, technical, or other specialized knowledge that Garnand did not possess. (Tr. 172-73). Therefore, Garnand was unqualified/incompetent to give the opinion; defense counsel's cross-examination of Garnand did not "open the door" for the State to elicit impermissible expert testimony from the unqualified Garnand, nor did it instantly render Garnand qualified to give the opinion.

As in *Murphy*, the State sat idly by as defense counsel elicited testimony from Garnand on cross-examination regarding bruising and her lack of knowledge as to the actual cause of R.S.'s injuries. If the prosecution believed this questioning went beyond the scope of Garnand's qualifications (the trial judge apparently did), an objection should have been interposed on that basis. Under *Murphy*, the State's failure to object to Garnand's incompetent testimony did not open the door for the State to expound during re-direct into matters that Garnand (as determined by the trial court) was unqualified to testify to.

Consequently, the trial court erred in allowing Garnand to testify on re-direct that R.S.'s

injuries were consistent with sexual abuse. This case essentially turned on whether the jury believed R.S.'s testimony. Because Garnand's impermissible expert opinion was the only medical evidence, and significantly bolstered R.S.'s testimony, Murray's defense was prejudiced. Therefore, this Court should reverse Murray's conviction and remand this case for a new trial.

In the event this Court determines that this error is not reversible in-and-of itself, Murray contends that this error, combined with the errors asserted below, had the cumulative effect of depriving Murray of his right to a fair trial.

II. THE TRIAL COURT ERRED IN ALLOWING MELINDA STRONG TO PRESENT HEARSAY TESTIMONY REGARDING WHAT R.S. TOLD HER AFTER THE ALLEGED INCIDENT.

"The standard of review for either the admission or exclusion of evidence is abuse of discretion." *McGriggs v. State*, 987 So. 2d 455, 457 (¶3) (Miss. Ct. App. 2008) (quoting *Harrison v. McMillan*, 828 So. 2d 756, 765 (¶27) (Miss. 2002)). This Court will not reverse "unless the error adversely affects a substantial right of a party." *Id.* (citing *Gibson v. Wright*, 870 So. 2d 1250, 1258 (¶28) (Miss. Ct. App. 2004)); M.R.E. 103(a).

At trial, Melinda was allowed to testify that R.S. told her that Murray had raped her. (Tr. 122). Defense counsel objected on the grounds of hearsay; however, the trial court overruled the objection and admitted the statement on two separate grounds. (Tr. 116-121).

The trial court first determined that the statement was not hearsay, reasoning as follows:

> One is that the statement is not hearsay and the probative value would not lie in the truth of the matter asserted.
>
> R.S. has testified in this case, so this testimony the probative value in the Court's opinion is not whether or not she was molested by the defendant, but its probative value in [sic] explaining to the jury as to why this witness, her mother, took her to the hospital, took her to be examined by medical personnel, and the Court would give the jury a limiting instruction as to that purpose.

(Tr. 119).

The trial court next determined that the statement was admissible as a "first report" under *Fells v. State*, 345 So. 2d 618, 620-23 (Miss. 1977) and its progeny. (Tr. 119-20). To this end, the trial court stated as follows:

> But also, under a line of cases beginning with I believe the name of the case was Fells versus State, F-E-L-L-S, the Supreme Court has stated it has become ingrained in Mississippi law that it's admissible over hearsay objection for any witness, any female witness, to her testimony in a sexual assault type of case to give testimony concerning the first report, and following cross-examination of the defendant of that, then it's permissible for the State to present corroborating testimony of that first report; that is, the person to whom that report was made.

(Tr. 119-120). The trial court concluded: "the Court's ruling is it's not even hearsay; therefore, I don't even get to the step of seeing whether or not an exception applies." (Tr. 120). For the reasons explained below, Murray contends that both grounds on which the trial judge admitting Melinda's hearsay testimony were erroneous.

A. The statement was hearsay, as it was offered to prove the truth of the matter asserted.

Under Mississippi Rule of Evidence 801(c), "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(c). It is beyond dispute that the statement at issue was not made by [R.S.] while testifying at the trial or hearing. Thus, the relevant inquiry is whether the statement was offered to prove the truth of the matter asserted.

The trial court's ruling that the statement was not offered for the truth of the matter asserted but, instead, to explain why R.S. was taken to the hospital was arbitrary and clearly erroneous. While the statement may have, to some extent, reinforced the reason that R.S. was taken to the hospital, such a result/purpose is merely incidental or collateral to the purpose for which the

statement was clearly offered–to prove that Murray "raped" R.S. The prosecution directly asked Melinda "did [R.S.] tell you that Robert Murray had done something bad to her at your mother's house? (Tr. 116). Although the trial court's decision to admit or exclude evidence is afforded great deference, this Court may reverse that decision, where as here, it "was *arbitrary* and clearly erroneous, amounting to an abuse of discretion" *Tunica County v. Matthews*, 926 So. 2d 209, 212-13 (¶5) (Miss. 2006) (citation omitted) (emphasis added).

Accordingly, the trial court erred in finding that the statement was not hearsay because it was not offered to prove the truth of the matter asserted.

B. The trial court erred in admitting statement as a "first report."

As a second ground for admitting Melinda's testimony, the trial judge relied on *Fells v. State*, 345 So. 2d 618, 620-23 (Miss. 1977), and determined that Melinda could testify as to what R.S. told her because the statement was a "first report." It should be noted that the Mississippi Rules of Evidence do not contain a "first report" hearsay exception.[4] Mississippi Rule of Evidence 802 provides that "[h]earsay is not admissible except as provided by law." M.R.E. 802.

The *Fells* case is neither applicable to nor controlling of this issue, as *Fells* pertains to extra-judicial identifications. The court in *Fells* expressed its holding as follows:

> [T]he principal witness to a crime may testify concerning an out-of-court identification whether it occurs in a police lineup, a personal confrontation or otherwise because the initial identification being nearest in time to the event has, in our opinion, the greater likelihood of accuracy and truthfulness being undimmed by fading memory and intervening events occasioned by the passage of time. It is not intended that the foregoing be construed to eliminate a corroborating in-court identification.

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Although not yet authoritative, this Court recognized as much in the recent unreported case of *Pierce v. State*, WL 307457 (Miss. Ct. App. February 05, 2008) ("Indeed, there is no first report exception to the hearsay rule under the Mississippi Rules of Evidence.).

> We further hold that if the principal witness' identification is impeached, then independent evidence of the identification may be introduced through third persons present at the out-of-court identification. We are persuaded to this view because such evidence not only has greater probative force and thus preserves the better evidence, but also because the witness testifying is in court and subject to cross-examination.

Fells, 345 So. 2d at 622.

Fells is not applicable to the present situation. Indeed, out-of-court identification evidence (of the type at issue in *Fells*) is admissible under Rule 801(d)(1)(c), which essentially engulfs and/or supersedes the *Fells* case. *See, e.g., Livingston v. State*, 519 So. 2d 1218, 1221 (Miss. 1988); M.R.E. 802 cmt. However, the "*Fells* rule" and/or Rule 802(d)(1)(c) is inapplicable to the hearsay statement at issue (i.e., that Murray raped R.S.) because **the statement is not one of identification**. The statement was not offered to identify Murray; instead, the statement was offered to prove what Murray allegedly did.

Accordingly, the trial court applied an incorrect legal standard in ruling that Melinda's hearsay testimony was admissible as a "first report," and the trial court's ruling was clearly erroneous.

C. The statement cannot be deemed admissible under the "tender years exception."

An appropriate vehicle for admitting Melinda's hearsay testimony would have been under the "tender years exception" to the hearsay rule under Mississippi Rule of Evidence 803(25). However, the trial judge failed to address the exception and, thus, failed to conduct the required hearing and make the required findings of reliability. Consequently, Melinda's hearsay testimony cannot be deemed properly admitted by this Court under the tender years exception.

Rule 803(25) provides:

(25) *Tender Years Exception.* A statement made by a child of tender years describing

> any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

M.R.E. 803(25). R.S. was five years of age at the time the statement was made; therefore, the tender years exception was applicable at trial. *Klauk v. State*, 940 So. 2d 954, 956 (¶6) (Miss. App. 2006).

However, in order for a statement to be admitted under the tender years exception, the trial court must first determine, "in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability." M.R.E. 803(25). It is error for a trial court to admit evidence under the tender years exception in the absence of these required findings. *See Klauk*, 940 So.2d at 956 (¶6).

In sum, the trial court erred in admitting the statement on the two grounds on which it relied. While the statement could *possibly* have been admitted under Rule 803(25), the trial court declined to address the exception. Consequently, the trial court did not conduct the required hearing, or make the required findings of reliability. Therefore, this Court should find that the trial court erred in admitting Melinda's hearsay testimony, which was prejudicially cumulative to Murray's case.

III. THE TRIAL COURT ERRED IN ALLOWING CLIFTON STRONG TO TESTIFY, AS THE STATE COMMITTED A DISCOVERY VIOLATION BY FAILING TO DISCLOSE THE SUBSTANCE OF HIS TESTIMONY BEFORE TRIAL.

At trial, the State called Clifton Strong (Clifton) as a witness, and a hearing was held out of the presence of the jury to preliminarily determine the admissibility of certain anticipated hearsay statements. (Tr. 135-150). Clifton was examined directly by the State and on cross-examination by the defense; thereafter, as the court was ruling as to hearsay, defense counsel objected to Clifton's testimony on the ground that the State committed a discovery violation under Rule 9.04 of the

Uniform Rules of Circuit and County Court. (Tr. 142-43). Specifically, defense counsel argued that the State failed to provide the substance of Clifton's expected testimony. (Tr. 142-42). The State argued (apparently) that the substance of Clifton's testimony was disclosed through a statement of Melinda that was provided in discovery. (Tr. 144-45). The State also claimed that defense counsel asked the day before trial if Clifton would be called as a witness, and the State responded in the affirmative. (Tr. 147).

Ultimately, the trial court overruled defense counsel's objection:

> All right. What the rules of discovery provide is that the defense is to be given the names of witnesses that the State intends to call to testify at trial, a copy of any statement given by that witness, and if there is not one, then the substance of their testimony.
>
> Now I'm looking at page two of the Hinds County Sheriff's department offense/supplementary report, and in the paragraph labeled "disclosure" it very clearly identifies Clifton Strong as being the uncle of this child, the fact that the child's mother took her to Clifton Strong's house, the reason why she took the child to Clifton Strong's house, the fact that Clifton Strong spoke with [R.S.'s aunt]. . .
>
> And at the same time after [R.S.'s aunt] made this revelation concerning her that R.S. then informed Mr. Strong that Robert Murray had done the same thing to her, and, therefore, Clifton took both girls to the hospital.
>
> The Court is of the opinion that contains the substance of the testimony. While it may not go into the specific detail of the testimony that's coming out during trial, I don't know of any requirement that requires either side in discovery or reciprocal discovery to give the details.
>
> It gives the substance, and that's all that discovery requires. This is sufficient to have put the defense on notice that if you needed more details, then go talk to Clifton Strong.

(Tr. 148-49).

This Court reviews the trial court's ruling on a discovery violation under the abuse of discretion standard of review. *Montgomery v. State*, 891 So.2d 179, 181 (¶6) (Miss. 2004).

Under Rule 9.04 of the Uniform Rules of Circuit and County Court, the prosecution must disclose to the defense:

> Names and addresses of all witnesses in chief proposed to be offered by the

> prosecution at trial, *together with* a copy of the contents of any statement, written or recorded or otherwise preserved of each such witness and *the substance of any oral statement made by any such witness.*

URCCC 9.04(A)(1) (emphasis added). The plain language of the rule specifically requires that the substance of a witness's oral statement be provided "*together with*" the name and address of that witness. In the instant case, the trial court incorrectly relied on the Hinds County Sheriff's department offense/supplementary report to support a finding that the State complied with Rule 9.04(A)(1), and provided the substance of Clifton's proposed testimony to the defense. Although the Hinds County Sheriff's department offense/supplementary report may have shed some indirect light on the essence of Clifton's proposed testimony (through the statements of others), the State failed to provide the substance of Clifton's expected testimony along with his name and address. The rule should not require the defense to speculatively "patch together" the possible substance of a State's witness's testimony from the statements of others found in documents throughout the discovery. Accordingly, the State committed a technical discovery violation.

Rule 9.04(I) provides the procedure to be followed by the trial court concerning a discovery violation; that rule states in pertinent part:

> If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:
>
> 1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs, or other evidence; and
>
> 2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or a mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

URCCC 9.04(I).

It is acknowledged that defense counsel in the instant case did not ask for a continuance or declare a mistrial, and such a failure is held to result in waiver of the issue. *Roberson v. State*, 595 So.2d 1310, 1316 (Miss. 1992) (quoting *Cole v. State*, 525 So.2d 365, 367 (Miss.1987). However, under the above-outlined procedure, the trial judge erred by failing to give the defense a reasonable opportunity to interview Clifton regarding the substance of his testimony *after the objection was raised.* Therefore, the need to request a continuance had not yet arisen.

Admittedly, defense counsel was allowed to cross-examine Clifton during the hearing to preliminarily determine the admissibility of possible hearsay testimony. (Tr. 138-141). However, this examination was brief and occurred *before* objection was raised on the grounds that the State committed a discovery violation. Accordingly, Murray requests that this Court address this issue and find the trial court in error for failing to follow the procedures outlined in Rule 9.04(I) and allowing Clifton to testify.

IV. CUMULATIVE ERROR DEPRIVED MURRAY OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. *Ross v. State,* 954 So. 2d 968, 1018 (¶138) (Miss. 2007) (citing *Byrom v. State*, 863 So. 2d 836, 847 (¶12) (Miss. 2003)). The critical inquiry under a cumulative error analysis "is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial." *Byrom*, 836 So. 2d at 847 (¶12). "Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charge." *Ross*, 954 So. 2d at 1018 (¶138) (citation omitted).

In the instant case, the issue of Murray's guilt essentially turned on whether the jury believed R.S.'s testimony. As explained in the issues above, the trial court erred in (1) allowing Garnand to provide impermissible expert testimony that R.S.'s injuries were consistent with sexual abuse, (2) allowing Melinda to present hearsay testimony that R.S. told her that Murray raped her, and (3) allowing Clifton to testify as to the same despite the State's discovery violation. These errors, if not reversible individually, combined to cumulatively prejudice Murray's defense, in that, all three errors allowed evidence that bolstered R.S.'s testimony. Therefore, Murray was deprived of his right to a fair trial, and this Court should reverse Murray's conviction and sentence and remand this case for a new trial.

CONCLUSION

Based on the arguments and authorities cited and briefed above, Murray submits that the individual and/or cumulative errors, together with any plain error noticed by this Court which has not been specifically raised, require that the judgment of conviction and sentence of the trial court be reversed and this case be remanded for a new trial on the merits.

CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Robert Murray, 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 Bobby B. DeLaughter
Circuit Court Judge
429 Tombigbee Street
Raymond, MS 39154

Honorable Eleanor Faye Peterson
District Attorney,
Post Office Box 22747
Jackson, MS 39225-2747

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

This the 16th day of October, 2008.

Hunter N. Aikens
COUNSEL FOR APPELLANT

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