IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WANDA CLARK — APPELLANT

VS. — NO. 2008-KA-0549

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WANDA CLARK **APPELLANT**

VS. **NO. 2008-KA-0549**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL.

II. THE APPELLANT IS PROCEDURALLY BARRED FROM ASSERTING MANY OF THE ARGUMENTS MADE ON APPEAL REGARDING THE ADMISSIBILITY OF CHRISTINA SHUMPERT'S TESTIMONY; NONETHELESS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE TESTIMONY.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW EXHIBITS D3, D4, D5, AND D6 INTO EVIDENCE.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING PROPOSED JURY INSTRUCTION D7.

STATEMENT OF THE FACTS

On March 29, 2005, Johnnie Graves, the grandmother of then sixteen year old Latonya Johnson, arrived at Clarksdale High School after receiving a phone call from her granddaughter. (Transcript p. 198). Ms. Graves found her granddaughter in the principal's office with her head hung

down. (Transcript p. 200). As she spoke to Ms. Johnson, Ms. Graves noticed abrasions, bruises, and sores on Ms. Johnson. (Transcript p. 200). Ms. Graves removed Ms. Johnnson's shirt and found more cuts and bruises. (Transcript p. 201). The authorities were contacted immediately thereafter. (Transcript p. 201).

Subsequently, Ms. Johnson's father, Kenneth Clark, [sometimes hereinafter referred to as "the co-defendant"] was arrested and indicted as set forth below. Ms. Johnson's step-mother, Wanda Clark [hereinafter "the Appellant"], was also arrested and indicted as set forth below.

COUNT I

> That Wanda Clark and Kenneth Clark, . . . on or about February 13, 2001, . . . did unlawfully, wilfully, and feloniously while aiding and abetting and acting in concert with each other whip, strike, or otherwise abuse or mutilate a child, Latonya Johnson, eleven (11) years of age, in such a manner as to cause bodily injury by picking her up and throwing/drop the said Latonya Johnson to the floor breaking her arm . . . .

COUNT II

> That Wanda Clark and Kenneth Clark, . . . on or about January 9, 2005, . . . did unlawfully, wilfully, and feloniously while aiding and abetting and acting in concert with each other whip, strike, or otherwise abuse or mutilate a child, Latonya Johnson, fifteen (15) years of age, in such a manner as to cause bodily injury by beating the said Latonya Johnson with an extension cord about the arms, legs, back, and torso. . . .

COUNT III

> That Wanda Clark . . . on or about March 25, 2005, . . . did unlawfully, wilfully, and feloniously while aiding and abetting and acting in concert with each other whip, strike, or otherwise abuse or mutilate a child, Latonya Johnson, sixteen (16) years of age, in such a manner as to cause bodily injury by beating the said Latonya Johnson with an extension cord about the arms, legs, back, and torso. . . .

(Record p. 4-5).

The Appellant and the co-defendant were tried together. During trial, Ms. Johnson testified that the first two years after she had moved in with the co-defendant and the Appellant were good. (Transcript p. 258) She further testified that after her baby brother was born, things changed. (Transcript p. 259). When asked what she meant, she responded that "the whippings and punishment

got bad." (Transcript p. 259). She mentioned being denied food and being locked in a closet. (Transcript p. 259). With regard to the charges in Count I, Ms. Johnson testified as follows:

> . . . When I came home, I had done something, and she [the Appellant] said, since your daughter wants to act like an adult, beat her like an adult. And I remember him [the co-defendant] vividly picking me up and dropping me on the floor, pushing me against the wall. And it was between me running from him or him throwing me that my arm got broke, my shoulder got broke.

(Transcript p. 261). With regard to the charges in Count II, Ms. Johnson testified as follows:

> . . . So that's when Wanda came in with the extension cord and my dad joined her that night. And I got, my ear got cut that night. I had, I got cut real bad under my jaw, face was just swelled, real messed up, so, I couldn't go to school. I couldn't go to school the next two days.

(Transcript p. 263). The following exchange took place when Ms. Johnson was questioned about the events that led to the charges in Count III:

Q: . . . What about March 29, 2005, do you remember that day?
A: Yes.
Q: How do you remember that day?
A: I remember getting in trouble because Wanda thought I opened Kyler's Easter basket and stole some candy and I had pushed the basket under her bed in her bedroom. That's the incident where my other ear got cut, the extension cord again.
Q: Okay. And what happened with that, I mean, who was one that was doing that?
A: Wanda.
Q: Okay. And where did she hit you with hit?
A: Anywhere it landed. I did a lot of running, dodging, throwing my hands up and stuff but wherever it hit me.

(Transcript p. 265).

At the conclusion of the State's case, the Appellant moved for a directed verdict with regard to Count I which was granted because, as noted by the trial court, Ms. Johnson testified that the co-defendant was the only one responsible for that act and the resulting injuries. (Transcript p. 397 - 399). After both the Appellant and the co-defendant presented their respective defenses, the jury

deliberated. The jury found the co-defendant not guilty with regard to Count I and was hung with regard to Count II. (Transcript p. 749). The jury found the Appellant guilty of both Counts II and III. (Transcript p. 749). The Appellant was sentenced to serve eighteen years in the custody of the Mississippi Department of Corrections for each count with six years suspended on each count. The sentences are to be served concurrently. (Record p. 40 - 42).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying the Appellant's motion for mistrial. The comment which was the subject of the motion was not irreparably prejudicial. Thus, the trial court properly admonished the jury to disregard the comment as required by law. The record does not evidence that the Appellant was found guilty as the result of any prejudice caused by this comment.

The Appellant takes issue with much of the testimony given by Christina Shumpert of the Department of Human Services; however, she is procedurally barred from making all but one of her arguments in that regard, in part, because the record did not evidence that contemporaneous objections were made. Simply arguing that the testimony in question was inadmissible in her motion for new trial, with no contemporaneous objection during trial, was not enough to preserve the issues for appeal. Moreover, the Appellant failed to cite any authority in support of those same arguments. With regard to the one argument which was properly preserved for appeal, the trial court did not abuse its discretion in allowing Ms. Shumpert's testimony regarding any statements made by the Appellant and co-defendant during her investigation. Ms. Shumpert was not a law enforcement officer and the setting was non custodial. Thus, *Miranda* warnings were not required for her investigation. Furthermore, even if it were error to allow Ms. Shumpert's testimony, it would not have been reversible error as her testimony caused no prejudice whatsoever to the Appellant's case.

The trial court did not abuse its discretion in refusing exhibits D3, D4, D5, and D6 as they were not only irrelevant to the charges but also as they were more prejudicial than probative. Additionally, the Appellant was given a fair opportunity to present her theory of defense through the testimony given at trial.

The trial judge did not abuse its discretion in refusing proposed Jury Instruction D7 as the instruction was fairly covered elsewhere in the instructions.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL.

The Appellant first argues that the trial court erred in denying her motion for mistrial based upon "a violation of the Code of Judicial Conduct Canon Three when the court wrongfully congratulated the complaining witness and alleged victim of the purported crime for her testimony thereby commenting on the witness's testimony and lending the weight of the bench to the State and greatly prejudicing [the Appellant] in front of the jury and prohibited her from getting a fair trial." (Appellant's Brief p. 10). The standard of review for a trial court's decision regarding whether to grant a mistrial is abuse of discretion. *McDonald v. State*, 881 So.2d 895, 902 (Miss. Ct. App. 2004) (citing *Caston v. State*, 823 So.2d 473, 492 (Miss. 2002)). Additionally, the Mississippi Court of Appeals has held:

> The trial judge is in the best position to determine if an alleged objectionable remark has a prejudicial effect. *Weeks v. State*, 804 So.2d 980, 992 (Miss.2001). The trial judge is provided considerable discretion in determining whether a remark is so prejudicial that a mistrial should be declared. *Id.* However, if serious and irreparable damage has not occurred, then the trial judge should direct the jury to disregard the remark. *Id.* The failure of the court to grant a motion for mistrial will not be overturned on appeal unless the trial court abused its discretion. *Bass v. State*, 597 So.2d 182, 191 (Miss.1992).

Bougon v. State, 883 So.2d 98, 105-06 (Miss. Ct. App. 2004). (*emphasis added*). In the case at

hand, the trial judge made the following statement dismissing the 18-year-old victim, Latonya Johnson, after she testified: "Like Robert Herrick said. You may be excused. Thank you. I think you held up nicely." (Transcript p. 344). After the jury was excused for the evening, counsel for the co-defendant[1] moved for a mistrial arguing that the comment to the witness "could have swayed sympathy to this child." (Transcript p. 346). After explaining to counsel that he was simply trying to be "encouraging" to the child witness, the court questioned both counsel for the State and counsel for the Appellant regarding his comment. (Transcript p. 347 - 348). Counsel for the State responded indicating that he didn't take the comment as counsel for co-defendant suggested but that the State would not object to a limiting instruction if the court felt it necessary. (Transcript p. 347). Counsel for the Appellant responded as follows:

> Your Honor, I just want to say to the Court, I join in the motion except that I accept the Court's, I'm not saying except, I do accept what the Court just said and that's the way I took it, the way, you just you did it. My only concern was that the jurors might not.

(Transcript p. 348) (*emphasis added*). The court denied the motion for mistrial but agreed to give a limiting instruction. (Transcript p. 348). The court further extended to both counsel for the co-defendant and the Appellant an opportunity to draft the limiting instruction. (Transcript p. 353). Neither the Appellant or the co-defendant objected to the court giving a limiting instruction. Prior to the start of trial on the following day, the court instructed the jury and questioned them as follows:

> Court: . . . Let me say to you that on yesterday, near the close of the day, at the end of the testimony of the victim, Latonya Johnson, she testified under rigorous cross-examination, direct examination, and redirect examination. And after the court observed her, the court said to her, you did well. That was no intent on the part of the court to comment upon the believability of her testimony, or was it in no way to mean that the court disbelieved her testimony. The

[1]The Appellant's counsel on appeal was the co-defendant's counsel at trial. During trial, the Appellant was represented by Attorney Johnnie Walls of Greenville.

court and the attorneys have told you throughout this trial that you are the fact finder, that you're to base your decision on the facts and the law. You are aware of that, are you not?

Jury: Yes, sir.

Court: So, again, you're not to consider anything that the attorneys or the Judge says as evidence. You are the fact finder. Now, can you lay aside this statement that was made by the court?

Jury: Yes.

Court: Will you do that?

Jury: Yes.

Court: Can any one of you not do that? (No response).
All right. Not hearing anything in the affirmative or the negative, as far as that is concerned, we shall proceed on . . .

(Transcript p. 356-57). As this Court held in *McGilberry v. State*, "the remedial action taken by the trial judge here [a curative instruction instructing the jury to disregard the questionable comment] is usually deemed sufficient to remove the taint from the minds of the jurors." 741 So.2d 894, 913 (Miss. 1999). The *McGilberry* Court further noted that "the procedure employed by the trial judge in the case sub justice effectively cured any prejudice arising from the erroneous statement by the prosecutor." *Id.* Additionally, it is well-settled Mississippi law that it is "presumed that the jury will follow the court's instruction to disregard any inadvertent comments or evidence and to decide the case solely based on the evidence presented" and that "to presume otherwise would be to render the jury system inoperable." *Lofton v. State*, 818 So.2d 1229, 1233 (Miss. Ct. App. 2002) (quoting *King v. State*, 772 So.2d 1076, 1078 (Miss. Ct. App. 2000)). *See also Carrier v. State*, 815 So.2d 1222, 1225 - 26 (Miss. Ct. App. 2001).[2]

The Appellant, however, contends that the court's comment "violated Canon Three of the Code of Judicial Conduct in that he failed to conduct himself in an impartial and fair manner."

---

[2] Nonetheless, the Appellant asserts on appeal that the instruction "added nothing more than fuel to the fire." (Appellant's Brief p. 11). However, the Appellant nor the co-defendant objected to the trial court giving an instruction.

(Appellant's Brief p. 11). This Court has previously held that the test for determining whether an improper argument or comment requires reversal is whether the argument or comment "created prejudice against the accused, resulting in a decision influenced by prejudice." *Dennis v. State*, 555 So2.d 679, 684 (Miss. 1989). There is absolutely no evidence in this case that the comment made caused prejudice which resulted in a decision influenced by prejudice. First, counsel for the State and the Appellant's trial counsel both stated on the record that they did not believe the court's comment was in any way an attempt to sway sympathy toward the victim. (Transcript p. 347 and 348). Second, the comment was hardly the "congratulations" that the Appellant argues it was in her brief. It was almost an after thought. The court simply informed the child witness that she could step down, thanked her, and told that she held up well. Giving testimony at trial is very stressful for an adult and how much more stressful it must be for a child victim. The trial judge was, as he stated, encouraging her. As noted in *Carrier v. State*, "[w]hile the trial judge's statement would have been better left unsaid, it did not constitute reversible error." 815 So.2d at 1226. Third, there was no evidence that the comment affected the outcome of the trial. The victim testified not only that the Appellant abused her but also that the co-defendant abused her. The judge's comment clearly did not cause the jurors to believe her testimony fully as the co-defendant was acquitted of one charge and as there was a hung jury with regard to the other. Further, there was sufficient evidence to establish that the Appellant abused the victim regardless of the court's comment. Finally, as noted above, the jury was properly admonished and the presumption is that the jury followed the admonition. Moreover, in *Hansen v. State*, a case wherein the trial court commented on the qualifications of an expert witness, this Court held that the comment did not unfairly bolster the witness's testimony and that "the law does not require that during the trial the judge behave as a deaf-mute." 592 So.2d 114, 132 (Miss. 1991) (citing *Stokes v. State*, 548 So.2d 118, 125 (Miss.

1989)). *See also Wells v. State*, 698 So.2d 497, 510 (Miss. 1997) (holding that the law "does not place the judge in a straight jacket nor prevent him from having anything to say during the course of a trial").

Accordingly, the trial court did not abuse its discretion in denying the Appellant's motion for mistrial. The Appellant's first issue is without merit.

II. THE APPELLANT IS PROCEDURALLY BARRED FROM ASSERTING MANY OF THE ARGUMENTS MADE ON APPEAL REGARDING THE ADMISSIBILITY OF CHRISTINA SHUMPERT'S TESTIMONY; NONETHELESS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE TESTIMONY.

During trial, Christina Shumpert of the Department of Human Services testified regarding the Department of Human Service's investigation of Ms. Johnson's injuries. The Appellant takes issue with much of Ms. Shumpert's testimony specifically arguing the following: 1) Ms. Shumpert "was allowed to testify and bolster the testimony of a competent witness, 18 year old Johnson;" 2) "Shumpert gave opinion evidence concerning confidential matters;" 3) "the State was allowed to cross examine the [Appellant] with regards to [her] statements [given] during an unlawful search of her home;" and 4) "Shumpert was allowed to testify that she concluded the child had to be placed in DHS custody due to the severity of the injuries as a criminal act committed by [the Appellant] which usurped the providence of the jury." (Appellant's Brief p. 15 - 15).

The Appellant is procedurally barred from arguing subsections 1, 2, and 4 of this issue.[3] First, the record does not indicate that the arguments set forth above as subsections 1, 2, and 4 were

[3] The Appellant did not divide the issue into four numbered subsections in her brief. The State did this in order to respond to each argument in an organized manner especially in light of the procedural bars.

brought to the trial court's attention prior to or during trial.[4] As there is no evidence on the record of a specific objection on these grounds, the Appellant is procedurally barred from making these arguments on appeal. *See Ross v. State,* 954 So.2d 968, 987 (Miss. 2007)(holding that "an objection must be made with specificity") and *Swington v. State*, 742 So.2d 1106, 1112 (Miss.,1999) (holding that "failure to make a contemporaneous objection waives the issue on appeal"). The State does recognize that all of the arguments raised on appeal with regard to Ms. Shumpert's testimony were presented to the trial judge in the Appellant's Amended Motion for New Trial; however, this Court has previously held that "while certain issues are required to be raised in a motion for new trial, raising objections in a motion for new trial which should have been made at trial has never been thought to cure the failure to object at the proper time." *Ross v. State,* 954 So.2d 968, 987 (Miss. 2007) *(emphasis added)*. Moreover, the Appellant is also procedurally barred from making these particular arguments because she failed to cite any legal authority in support of these specific arguments in her brief. *See Walker v. State*, 913 So.2d 198, 222 (Miss. 2005).[5]

Additionally, the Appellant is barred from making part of subsection 3 argument. The record illustrates that after the jury was selected, the State requested a session in chambers during which the State questioned the trial court as to whether the statements made by the Appellant and co-defendant in the course of Ms. Shumpert's investigation would be admissible. (Transcript p. 169).

---

[4] According to the Appellant, a motion to suppress Ms. Shumpert's testimony was lost and is not a part of the record. (Appellant's Brief p. 15). There was a vague reference by counsel for the State to a prior ruling by the trial court on the overall admissibility of Ms. Shumpert's testimony. The record does not show what the substance of that ruling was or what objections were made with regard to the admissibility of Ms. Shumpert's testimony. It is the duty of the Appellant to preserve the record of his or her objections. *See Bowman v. State,* 106 So. 264, 264-65 (Miss. 1925).

[5] The only authority cited by the Appellant's brief under this issue was Fourth Amendment of the United States Constitution and the Mississippi Constitution, both of which she relied on to support her argument that the Appellant's Fourth Amendment rights were violated.

Counsel for the co-defendant objected to allowing those statements into evidence "because of the fact that they were ultimately charged with this incident that she was investigating." (Transcript p. 169). She further argued that Ms. Shumpert "was acting on behalf of the State of Mississippi" in her capacity as a Department of Human Services investigator and that "she had a responsibility to advise them of their rights, of their *Miranda* warnings before they would make any statements to her." (Transcript p. 170). The trial judge refused to suppress the statements noting that he did not have caselaw before him that says that such statements should be suppressed. (Transcript p. 177). After further discussion, the trial court asked the Appellant's counsel if the Appellant had been placed under arrest at the time the statements were given and he responded that she had not. (Transcript p. 178). The trial court ultimately ruled that the State would have the opportunity to show that the statements in question were made and that defense would have the opportunity to show that they were made under duress. (Transcript p. 180). On appeal, the Appellant not only argues that Ms. Shumpert should have given the Appellant a *Miranda* warning but also that Ms. Shumpert could not enter into the Appellant and co-defendant's home without a search warrant since she was accompanied by law enforcement officers. (Appellant's Brief p. 15). She further asserts that "anything gathered in furtherance of this investigation is illegal, including any statements of the defendants" under the Fourth Amendment of the United States Constitution and under the Mississippi Constitution. (Appellant's Brief p. 15 - 16). However, the Appellant cannot now argue that her Fourth Amendment rights were violated as she did not make this argument before the trial court. This argument is in effect waived. *See Swington v. State,* 742 So.2d 1106, 1110 (Miss.1999) (holding that "an objection on one specific ground waives all other grounds").

The only argument made by the Appellant during trial on the record is that Ms. Shumpert's testimony regarding the statements made to her during her investigation were not admissible as the

Appellant was not given her *Miranda* warning. However, the Appellant cited no legal authority in support of this assertion.[6] In fact, Mississippi case law does not support this assertion. In *Hennington v. State*, the defendant argued that his statements to a social worker employed by the State of Mississippi should not have been admitted into evidence because he was not advised of his *Miranda* rights. 702 So.2d 403 (Miss. 1993). In response this Court held that:

> . . . a social worker is not a law enforcement official. He had no authority to arrest [the defendant]. [The social worker] was under a duty to report any suspected sexual abuse that he uncovered as a result of his investigation to law enforcement authorities. Miss. Code Ann. §43-21-353(1993). "The mere fact that an investigation has focused on a suspect does not trigger the need for Miranda warnings in non custodial settings." *Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S.Ct. 1136, 1144, 79 L.Ed.2d 409 (1984).

Id. at 409 (*emphasis added*). Just as in *Hennington*, Ms. Shumpert was not a law enforcement official and had no authority to arrest the Appellant or co-defendant. Further, the setting was non custodial. As noted by the Court of Appeals, a person is in custody for *Miranda* purposes in a situation where a "reasonable person would feel that he was in custody." *Brown v. State*, 875 So.2d 214, 218 (Miss. Ct. App. 2003) (quoting *Hunt v. State*, 687 So.2d 1154, 1160 (Miss. 1996)). "In other words, 'whether a reasonable person would feel that he was going to jail - - and not just being temporarily detained.'" *Id.* Nothing in the record evidences that the Appellant believed that she was in custody or that she was going to jail. Ms. Shumpert came to the Appellant's home and questioned the members of the family as she was required to do since there were allegations of abuse and additional children in the home. (Transcript p. 392 - 393). In fact, the Appellant testified as follows:

> . . . so I didn't mind showing her anything. I showed her anything that she asked me. I showed her and I volunteered some information on my own. . . .

---

[6] As previously noted, the only authority cited by the Appellant's brief under this issue was Fourth Amendment of the United States Constitution and the Mississippi Constitution, both of which she relied on to support her argument that the Appellant's Fourth Amendment rights were violated. Thus, she is technically barred from making this portion of the argument as well for failure to cite to legal authority in support of her position.

(Transcript p. 657). While the Appellant made clear during her testimony that she did not care for the way Ms. Shumpert conducted her investigation, the Appellant testified that she had "always told [her] kids that the Department of Human Services was her best friend." (Transcript p. 657). Neither the Appellant's testimony or that of Ms. Shumpert reflected that the Appellant believed that she was going to jail or that she was in police custody. As such, the law is clear that she should be considered to be in a non custodial environment.

The Appellant also asserts that Ms. Shumpert's action in following procedure and being escorted to the house by police officers somehow changes the circumstances. This assertion has no merit as Miss. Code Ann. §47-27-113 allows for the procedure. This is especially true in light of the fact that there was no testimony that the officers questioned anyone or conducted any searches. The testimony at trial reflects only that each member of the family was questioned by Ms. Shumpert and that the Appellant gave Ms. Shumpert a tour of the home. (Transcript p. 393). Thus, any testimony regarding statements made by the Appellant during Ms. Shumpert's investigation were admissible. *See Hester v. State*, 753 So.2d 463, 469 (Miss. Ct. App. 1999) (holding that a person making statements to a DHS official with no arrest authority in a non-custodial setting did not require a *Miranda* warning before the interview).

"The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal." *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)). "When the trial court stays within the parameters of the Rules of Evidence, the decision to exclude or admit evidence will be afforded a high degree of deference." *Id.* Moreover, Mississippi law is clear that in order "to warrant reversal on an issue, a party must show both error and a resulting injury." *Vardaman v. State,* 966 So.2d 885, 891 (Miss. Ct. App.

2007). "An error is only grounds for reversal if it affects the final result of the case." *Id.* Contrary to the Appellant's contentions, Ms. Shumpert's testimony was not very damaging. She simply testified about the specific actions taken by the Department of Human Services in response to Ms. Johnson's injuries. The only testimony she gave regarding statements made by the Appellant are set forth below:

> . . . And that's where Ms. Clark stated that she and Mr. Clark, that was their bedroom. And when asked, where do Latonya sleep, she produced a small cot from under her bed, and that's where Latonya slept. . . .

(Transcript p. 394).

Q: Did you have a chance to, well, first of all, did you have a chance to speak with Ms. Clark about the injuries on Latonya?
A: I did.
Q: While you were in the home that day?
A: I did.
Q: Okay. And what was her response?
A: Ms. Clark responded that Latonya came home with those, those marks on her.
Q: Okay?
A: She said that some boy did it.

(Transcript p. 394).

Q: Did you ask them what type of or how they disciplined their children?
A: I did.
Q: And how did they respond to that?
A: They take things away as punishment and occasionally they spank or whip with a belt or ruler.

(Transcript p. 394 - 395). This testimony regarding those few statements given by the Appellant hardly rise to the level of prejudicing her case. Even if it were error to allow Ms. Shumpert's testimony in this regard, which the State is certainly not conceding that it was, that error would not be reversible as no prejudice whatsoever was caused. This is especially true considering that Ms. Shumpert did not testify with regard to any statements made by Ms. Johnson during the investigation. (Transcript p. 392). As the record does not evidence that the trial court abused its

discretion in allowing Ms. Shumpert's testimony and as the testimony allowed in no way prejudiced the Appellant's case, reversal on this issue is not required.

Most of the Appellant's arguments made on appeal are procedurally barred and should not be addressed by this Court. The argument which was not barred is without merit as the trial court did not abuse its discretion and as there was no evidence of prejudice resulting from the testimony.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW EXHIBITS D3, D4, D5, AND D6 INTO EVIDENCE.

The Appellant also argues that the trial court abused its discretion in refusing to allow exhibits D3, D4, D5, and D6 into evidence asserting that they "should have been [admitted] since they would have been weighed by the jury concerning the credibility of the witness, Latonya Johnson." (Appellant's Brief p. 19). The Appellant further argues that she "should have been able to cross examine Johnson on these exhibits and the court should have allowed all into evidence to support the Defendant's theory of the case." (Appellant's Brief p. 20). The Appellant stated in her brief that her theory of the defense is "that the bruises and injuries to Johnson were done by someone else because 1) Johnson had come home with bruises on her face before (t.562) 2) Johnson had fought with a previous boyfriend (t. 576) 3) Johnson was known to get into fights at school (t.577) and 4) Clark didn't do it (t.662) and did not know how they came to be on her, but that she had come home from school with bruises from time to time according to one of the daughters. (Appellant's Brief p. 19).

The exhibits in question were initially brought to the trial court's attention during a recess and were explained as being relevant to "to show she [Ms. Johnson] is not as timid and mild as she says she is." (Transcript p. 328 - 329). To which the trial court responded "but the charges are not against her [Ms. Johnson], they're against her parents." (Transcript p. 329). Exhibit D3 which is a

"Discipline Incident Form" from Clarksdale Municipal School District indicating that on June 23, 2005 (a date subsequent to the incidents in question here) Ms. Johnson was caught having sex in the restroom at Wendy's and that she had been "very disrespectful since she and Phillip have been together" and further indicating that Ms. Johnson was sent home and was not to return to summer school, was presented to the trial judge. (Transcript p. 334). The trial judge then ruled that it would deny the defendants "leave to question this child about an intimate act." (Transcript p. 334). The matter was later revisited wherein the trial judge questioned defense counsel regarding any legal authority supporting their contention that subsequent sexual activity of the victim in a child abuse case is admissible. (Transcript p. 350). No authority was presented and the trial judge once again ruled that the document was inadmissible.. (Transcript p. 353). Exhibits D4, D5, and D6 were then presented to the trial judge. (Transcript p. 353 - 354). Exhibit D4 is also a "Discipline Incident Form" from Clarksdale Municipal School District indicating that on February 23, 2005 Ms. Johnson "shoved her desk really hard towards Patrice Myles" and that when Ms. Myles got up Ms Johnson "was ready to fight, using profanity terms." (Exhibit D4). Exhibit D5 is a "Student Referral Form" dated April 19, 2004 indicating that a fellow student reported that Ms. Johnson's parents:

> don't treat her right. They make her wash the car in the cold, clean up the house, mow the grass, keep her sisters and brothers, and walk to school. She sits outside until they come home after school.

(Exhibit D4). The form also indicated that when confronted, Ms, Johnson denied being mistreated and that her step-mother was contacted. (Exhibit D5). Exhibit D6 is a handwritten letter dated February 23, 2005 stating that Ms. Johnson was disrespectful and also discussing her having sexual relations with Phillip Taylor. Each of the exhibits was denied.

The standard of review governing the admission or exclusion of evidence is abuse of discretion. *Williams v. State,* 991 So.2d 593, 597 (Miss. 2008) (citing *Brown v. State*, 969 So.2d

855, 860 (Miss.2007)). "Thus, 'a trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.'" *Id.* (quoting *Shaw v. State*, 915 So.2d 442, 445 (Miss.2005)). While a defendant does have a right to present his or her theory of defense, that right "is limited by considerations of relevance and prejudice." *Hughey v. State*, 729 So.2d 828, 831 (Miss. Ct. App. 1998). "The trial judge is predominately vested with the discretion to decide whether evidence is relevant and admissible." *Womack v. State*, 774 So.2d 476, 484 (Miss. Ct. App. 2000). The trial judge in the case at hand properly ruled that evidence of the minor victim's sexual encounters and behavior at school are not relevant to whether her parents abused her. Additionally, the evidence would certainly be more prejudicial than probative as it was essentially putting the victim on trial. Thus, the trial judge properly refused the evidence.

Moreover, the Appellant was able to fairly present her theory of defense without the admission of these exhibits just as the defendants in *Williams v. State*, 991 So.2d 593, 599 (Miss. 2008) and *Fuqua v. State*, 938 So.2d 277, 283 (Miss. Ct. App. 2006). The Appellant herself sets forth in her brief certain testimony given at trial wherein her theory of defense was presented to the jury. For example, she states in her brief that part of her theory is that "Johnson had come home with bruises on her face before (t.562)." (Appellant's Brief p. 19). She also acknowledged that on page 576 of the transcript there was testimony that Ms. Johnson had fought with a previous boyfriend and that on page 577 of the transcript there was testimony that Ms. Johnson was got into fights at school. (Appellant's Brief p. 19). She also correctly asserts that there was testimony that she "didn't do it" on page 662 of the transcript. (Appellant's Brief p. 19). As such, she cannot now complain that she was not given an opportunity to present her theory of defense.

The trial court did not abuse its discretion in refusing the exhibits in question as they were

not only irrelevant to the charges but also as they were more prejudicial than probative. Additionally, the Appellant was given a fair opportunity to present her theory of defense. Thus, this issue is also without merit.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING PROPOSED JURY INSTRUCTION D7.

Lastly, the Appellant argues that the trial court abused its discretion in refusing proposed jury instruction D7 which presented the jury with the Appellant's theory of defense. (Appellant's Brief p. 21). Proposed Instruction D7 reads as follows:

> The Court instructs the jury that you must be convinced by the evidence presented beyond a reasonable doubt that the alleged abuse of Latonya Johnson was inflicted and caused by Wanda Clark on the dates as charged in the indictment, an if you can determine from the evidence that the alleged abuse of Latonya Johnson could have been or was caused by something else other than the intentional acts of Wanda Clark then you shall find Wanda Clark not guilty of the charges against her.

(Record p. 75).

Jury instructions are within the sound discretion of the trial court. *Shumpert v. State,* 935 So.2d 962, 968 (Miss.2006). Additionally, "jury instructions are to be read together and taken as a whole with no one instruction taken out of context." *Id.* (citing *Rushing v. State,* 911 So.2d 526, 537 (Miss.2005)). While the Appellant "is entitled to have jury instructions given which represent his theory of the case" that entitlement "is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Id.* (citing *Byrom v. State,* 863 So.2d 836, 874 (Miss.2003)). In this case, the theory of the case was adequately covered elsewhere in the instructions. The elements instruction given regarding the charges against the Appellant coupled with the Instruction C-15, both of which are set forth below, fully instructed the jury as to the requirements for finding the Appellant guilty. The elements instruction reads as follows:

The Defendant, WANDA CLARK, has been charged by a multi-count indictment with two counts of Felonious Abuse/Battery of a Child.

In Count II, if you find from the evidence in this case beyond a reasonable doubt that:

(1) on or about January 9, 2005, in Coahoma County, Mississippi the Defendant, WANDA CLARK, did individually or while aiding and abetting another,

(2) unlawfully, willfully, and feloniously whip, strike, or otherwise abuse or mutilate a child, Latonya Johnson,

(3) who was fifteen (15) years of age,

(4) causing bodily injury by beating Latonya Johnson with an extension cord about the arms, legs, back and torso, and

(5) said abuse was not in self-defense or to prevent bodily harm to a third party,

then you shall find the Defendant, WANDA CLARK, guilty in Count II of Felonious Abuse/Battery of a Child.

If the State has failed to prove any one or more of the above elements beyond a reasonable doubt, then you shall find the defendant not guilty in Count II.

In Count III, if you find from the evidence in this case beyond a reasonable doubt that:

(1) on or about March 25, 2005, in Coahoma County, Mississippi the Defendant, WANDA CLARK, did individually or while aiding and abetting another,

(2) unlawfully, willfully, and feloniously whip, strike, or otherwise abuse or mutilate a child, Latonya Johnson,

(3) who was sixteen (16) years of age,

(4) causing bodily injury by beating Latonya Johnson with an extension cord about the arms, legs, back and torso, and

(5) said abuse was not in self-defense or to prevent bodily harm to a third party,

then you shall find the Defendant, WANDA CLARK, guilty in Count III of Felonious Abuse/Battery of a Child.

If the State has failed to prove any one or more of the above elements beyond a reasonable doubt, then you shall find the defendant not guilty in Count III.

(Record p. 70 - 71). Instruction C-15 reads in part that the presumption of innocence "places on the State the burden of proving the Defendant guilty of every material element of the crime with which he is charged." (Record p. 63) (*emphasis added*). The Appellant's theory of defense is that she did not cause the injuries and that someone or something else did. These instructions fully inform the jury that in order to find the Appellant guilty they must find beyond a reasonable doubt that the

Appellant caused the injuries. This Court has previously held that "[w]e do not forget the rule that if instructions correctly state the law when read together as a whole, there is no reversible error." *Thompson v. State,* 602 So.2d 1185, 1190 (Miss.1992). Moreover, the instruction was not necessary for the Appellant to present her theory of defense that she did not cause the injuries and that someone else must have. *See Poynor v. State*, 962 So.2d 68, 77 (Miss. Ct. App. 2007). As set forth above, the testimony presented at trial adequately presented her theory to the jury.

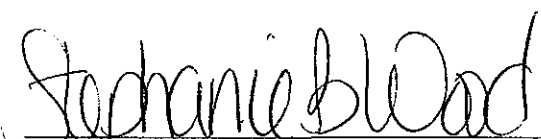
The jury instructions given fairly announced the law and created no injustice. The trial judge did not abuse his discretion in refusing proposed jury instruction D-7. As such, the Appellant's fourth issue is also without merit.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Wanda Clark as there were no reversible errors and as she received a fundamentally fair trial.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

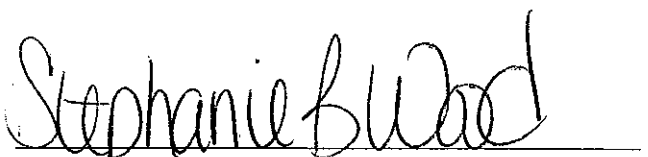
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Kenneth L. Thomas
Circuit Court Judge
P. O. Box 548
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney
115 First Street, Suite 130
Clarksdale, MS 38614

Cheryl Ann Webster, Esquire
Attorney At Law
Post Office Box 1342
Clarksdale, MS 38614

This the 25th day of January, 2010.



STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680