IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TIMOTHY W. JORDAN,
GLENN E. GROSE,
AND JOHNNY GROSE — APPELLANTS

VS. — NO. 2008-KA-1761

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

(IN RESPONSE TO BRIEF FILED BY TIMOTHY W. JORDAN)

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

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STATEMENT OF THE CASE

Procedural History

A grand jury impaneled in the Circuit Court of Lafayette County indicted Timothy Jordan, Glenn E. Grose and Johnny Grose on multiple counts of sexual battery, touching a child for lustful purposes, and child neglect. Jordan ultimately was convicted on four counts of sexual battery, one count of touching a child for lustful purposes, and one count of child neglect. He was sentenced to four terms of life imprisonment concurrent plus two ten-year terms for the gratification of lust and child neglect convictions, concurrent with each other, but consecutive to the life terms. Aggrieved by the judgment rendered against him, Jordan has perfected an appeal to this Court.

Substantive Facts

In October 2005, Rhiannon Shaw was employed by the Lafayette County Department of Human Services as a family protection specialist, charged with investigating reports of child abuse, neglect and exploitation. She also maintained "case loads with cases on families or foster children." On October 20, 2005, Ms. Shaw received "an anonymous phone report from someone stating possible child abuse and neglect occurring at the home of Krystal and Tim Jordan."[1] Specifically, the caller reported that Krystal and Tim Jordan had moved into the residence of Johnny Grose and Glenn Grose; that the Jordans were abusing illegal drugs and alcohol; and that Krystal was prostituting herself for drugs. (T.393-95)

Acting on this information, Ms. Shaw went to the Grose residence at County Road 250. When she pulled into the driveway, she saw a house in front of trailer. When she walked to the trailer, she observed a small child on the porch. After the child ran inside, a woman who introduced herself as Krystal Jordan came to the door. Ms. Shaw advised Krystal of the nature of the reports and asked to speak with her privately.

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[1]Krystal and Timothy Jordan, obviously, share a surname. Two of the appellants do as well. Additionally, Krystal's grandmother, Martha, is married to another member of the Grose family. Finally, Krystal's mother, Gloria Becerril, is named in the record as both "Gloria Hollis" and "Gloria Becerril," as she has recently married Sesser Beccerrill. For these reasons, unless it is quoting from the record, the state will refer to these individuals by their first names in its Statement of Substantive Facts to attempt to avoid confusion. Mrs. Jordan, who is referred to as "Cristal," "Kristi," and "Christy" in various parts of the transcript, will be designated "Krystal" unless the state is quoting from the record. The state will refer to the child victim of these sex offenses as B.J., and out of an abundance of caution, it will designate her younger sister as S.J.

As the door opened, Ms. Shaw saw a wheelchair-bound man who identified himself as Johnny Grose. She also observed that the house was untidy and that it smelled of alcohol. A large bottle of whiskey, half-empty, was on the counter. A baby, the younger sister of the victim, was asleep in a swing. Krystal "denied all the allegations in the report." (T.395-96)

Ms. Shaw then attempted to interview the older child, B.J., who was dirty and barefooted, with unwashed hair. She was also hyperactive, "picking things up and kicking things." B.J. told Ms. Shaw that her mother and father smoked "dope" which they rolled themselves. Shortly afterward, at about 3:00 p.m., Glenn and Tim arrived. Tim, too, denied the allegations in the report. When Ms. Shaw persisted, asking whether they could "pass a drug test," both men "admitted that they would probably test positive for marijuana, but that was all." (T.397-99)

Thereafter, Ms. Shaw received "an additional report" that on the night of October 25, Krystal had physically attacked Tim in the presence of the children; that Krystal had been arrested on a domestic violence charge; and that "the children were taken to the grandparent's home." A day or two later, when she went to the paternal grandparents' residence to investigate this report, she saw B.J. "squatting in the front yard with her pants down. She appeared to be defecating in the front yard." A woman who identified herself as Danielle Fortner, Tim's niece, "came running down the hill yelling at her [B.J.] to stop." She then apologized to Ms. Shaw and explained that she "was helping Tim's parents babysit [B.J.] because she was hard to handle." She also stated that B.J. had a habit of defecating in the yard. (T.400-02)

Ms. Fortner went on to inform Ms. Shaw that she had observed the incident of domestic abuse. She reported that Krystal and Tim had been "yelling back and forth, ... fighting about smoking crack and using drugs," and that Krystal told Tim that Glenn had fathered S.J. (T.402-03)

Subsequently, Krystal's mother, Gloria, told Ms. Shaw that she was having her daughter committed "to alcohol and drug treatment at Whitfield and that she (Gloria) "already had" S.J. and was "going to pick up" B.J. as well. On October 31, Gloria telephoned Ms. Shaw to report that B.J. "was having problems with potty training; that her bottom was very raw; and she was taking [making?] specific comments about people touching her and had named specific names such at [as] her father, Glenn and Johnny Grose." Ms. Shaw "told her not to question her anymore about it" and informed her that she would set up a forensic interview.[2] (T.402-03)

Thereafter, Ms. Shaw witnessed this interview which was conducted by Ejeera Selma Joiner. Ms. Shaw sat behind a one-way mirror which allowed her to watch the interview but kept her concealed from B.J. During the interview, B.J. stated that it was "okay" to touch male and female bodies "everywhere ... except for the nu-nu [vagina]." She then reported first that "Christy" had touched her nu-nu [vagina]; later she said "Christy and them," and finally "she said Tim and them." She went on to say that "Tim had touched her nu-nu; that Tim had hurt her; that she had seen Tim's boardy/dick; that Tim had touched her with her [his?] dick in her nu-nu; and that Tim had sat on her." Ms.

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[2]That interview was conducted on November 3, 2005. (T.453)

Shaw recounted additionally that B.J. stated Glenn "had touched her nu-nu; that she had seen Glenn while her pants were down; that she had seen his boardy/dick; and later on that his dick touched her." Ms. Shaw then related that B.J. said that "Johnny had touched her nu-nu with her pants down; that she had seen his boardy/dick, that it had touched her; and that it had touched her nu-nu." (T.405-10)

Finally, Ms. Shaw testified that on the two occasions she had observed B.J. before she was picked up by Gloria, B. J. been dirty. She was also obese. She had "several of her bottom teeth capped" because "they were rotting," apparently from excess consumption of sugar. (T.410-15)

The DVD of the forensic interview was introduced into evidence and played for the jury. (T.406)

Tomiko Mackey, a clinical social worker, was accepted by the court as an expert in the field of forensic examination. (T.446) Mrs. Mackey testified that she had observed the DVD of the forensic interview and had made a "provisional transcript" of it. (T.449) Having pointed out that "there is no perfect interview," Mrs. Mackey did testify that she had some concerns with the one at issue here. She summarized her conclusion as follows: "In this case the issues that I saw in the interview were primarily with the interviewer. I saw few issues with the child." She elaborated that after B.J. said three times that "Christy and them" had touched her, the interviewer had failed to ask the follow-up question, "What did Christy and them do?" Mrs. Mackey also observed that while the interviewer had "followed the protocol, there were some techniques that were problematic." Specifically, Ms. Joiner had asked a series of questions without allowing B.J. a chance to respond to them individually. Nonetheless,

Mrs. Mackey had observed that B.J. had been "pretty consistent in what she disclosed in terms of her vaginal area being touched by a penis or someone looking at her vaginal area." B.J. had been "fairly consistent in providing that disclosure in spite of the issues with the interviewer." (T.454-57) Finally, when she was asked to give her conclusion about B.J.'s disclosure, Mrs. Mackey testified as follows:

> Based on what [B.J.] disclosed, in spite of the issues that I had with the interviewer, [B.J.] did say that– and she said multiple times– Glenn, Tim, and Johnny touched her nu-nu. [B.J.] said that, she was able to give the information about when her nu-nu was touched. She gave information about seeing their penis. She gave information about their seeing her nu-nu. She specifically said that Glenn touched her vaginal area with his penis, and she specifically said that Tim touched her vaginal area with his penis. Based on her disclosure, and in spite of the issues I had with the interviewer, I believe [B.J.'s] disclosure is consistent with a child who has been sexually abused.
>
> (T.473)

On redirect examination, Mrs. Mackey maintained that while "[t]here are issues with her [Ms. Joiner's] technique, Ms. Joiner had "followed the protocol, and B.J.'s disclosure was that "Glenn touched her nu-nu, Tim touched her nu-nu, Johnny touched her nu-nu." (T.;492-93)

Martha Hester Grose, Krystal's maternal grandmother, testified that she had allowed Krystal and Tim to use her car, which was not running at the time. They had represented that they would have it repaired, but had failed to do so. On October 30, after "Christy wound up in jail," Martha and her husband, Larry Grose, "went to get the car." When they "got down there," B.J. "got in the car" with Mr. and Mrs. Grose, "grabbed a hold of [the] steering wheel, and she wouldn't let go." She "said she was going home" with them. Tim said, "Go ahead and take her if you want to, and I'll get

her some clothes." (T.498-99)

Martha and Larry then took B.J. to the motel room in Bruce in which they were residing. At one point, B.J. "had to use the bathroom; and when she did, she cried. She said, Mammaw, it hurts me so bad when I pee pee." Shortly afterward, after Martha drew a bath for the child, B.J. got into the tub "and sat down, and she cried again. She said it hurt her so bad. That water hurt her so bad when she sat down in it." Martha asked whether someone had "hurt" her "down there," and B.J. answered, "Yes, Mammaw, Tim and Crhisty and Johnny and Glen." Martha "just turned and went out the bathroom and sat down on the side of the bed and ... cried." The next day, Mr. Grose drove his wife and B.J. to the residence of Martha's daughter, Gloria, and told her what B.J. had said. "[A]s soon as the DHS opened up that morning," Gloria "called them; and that got everything started right there." (T.499-500)

On redirect examination, Martha testified that on the day she was taken to the motel room, B.J. named "Christy, Tim, Johnny, and Glenn," and no one else, as the perpetrators. (T.513)

Dr. Thomas Fowlkes, a physician accepted by the court as an expert in the field of medicine, testified that he first treated Krystal in October 2005 when she was incarcerated in the Lafayette County Detention Center. Krystal told Dr. Fowlkes that she had been "abusing cocaine, marijuana, and Lortabs," a narcotic prescribed for pain relief. A few days after Dr. Fowlkes performed his initial evaluation of her, Krystal was transported to the State Hospital for alcohol and drug treatment. When she returned in January 2006, she began expressing a desire to kill herself and was placed on suicide watch. Dr. Fowlkes "put her on an antidepressant similar to what she had been on in

Whitfield." After she remained in the isolation cell "for a good period of time," she "stopped complaining about wanting to commit suicide," but she "was just more agitated and was acting out in a variety of ways." After "another week or two" Dr. Fowlkes prescribed Haldol, an anti-psychotic medication which ultimately had the desired calming effect on Krystal. At the time of trial, she was still taking "only a small dose" of Haldol "at nighttime." (T.516-23) He believed that it would have no effect on her mental capacity during the day, and would not prevent her from being alert enough to testify. (T.526)

Dr. Fowlkes went on to testify that he had concluded that Krystal was mildly mentally retarded and that she had "some organic brain syndrome, or ... some additional brain damage that makes her even less able to function now than she was three years ago." He believed some of this deterioration had been caused by Krystal's abuse of inhalants, or "huffing." (T.524)

Krystal testified that after she was married to Tim and while she was living in the Lafayette Springs community, she routinely drank alcohol, used crystal methamphetamine and crack cocaine, and took Lortab. She also had sexual relations from time to time with Glenn and Johnny, both at the Grose trailer and at the house she shared with Tim. On these occasions she would obtain drugs from them. Tim knew about this arrangement and was "mad" about it. He bought drugs from Johnny and Glenn. There was talk that S.J. might be Glenn's child. (T.539-44)

Shortly before S.J. was born, Krystal was, of course, "big," and her physical condition prompted Tim to suggest that he have sex with B.J. Krystal acquiesced, and the three of them got into the shower together. According to Krystal, "He started

fucking her. I had to hold her up." She elaborated that he "fucked" her with his "dick" in her "pussy"[3] while the baby was "[s]creaming and crying." Krystal later wiped Tim's ejaculate off B.J.'s "belly." (T.546-47)

A similar incident took place later in Tim and Krystal's bedroom, but this time they gave the child Lortab and "[w]aited about an hour "[f]or her to calm down." Then, again, Tim "stuck his dick in her pussy" and ejaculated on "her belly." These violations caused irritation which Krystal treated with antibiotic ointment. Tim penetrated B.J. a "couple" of times again before S.J. was born and the family moved to the Grose trailer. All four of them– Krystal, Tim, B.J. and S.J.-- slept in the back bedroom. (T.548-51)

Johnny and Glenn continued to provide Krystal with drugs, and Tim continued to purchase and use the contraband. When Krystal and Tim told Glenn what Tim had been doing to B.J., Glenn said that he "wanted to do the same thing." On one occasion, Krystal took B.J.'s clothes off and put her in the bed with Tim and Glenn, both of whom were naked. Krystal removed her own clothes and joined them in the bed. At that point Glenn "started fucking" B.J., i.e., putting his "dick" in her "pussy." Tim also "penetrated her with his dick." Afterward, Krystal "had to wipe the come off her belly." (T.551-56)

Not to be left out of the sordid activities of this menage, Johnny told Krystal that

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[3]Undersigned counsel is impelled to apologize to the Court for the repeated use of such language, but it is part of the testimony transcribed in the record. Trial counsel for the prosecution expressed several times that they were tired of having to utter these words. Undersigned counsel has grown weary of typing them, but they are part of the record and they cannot be avoided.

he wanted to have sex with B.J. as well. Krystal agreed and gave the child a Lortab. After the drug took effect, she took B.J.'s clothes off, took Johnny's clothes off, and put her on top of him while he was on his back on a bed.[4] Johnny "started fucking" her, i.e., with his "dick" in "her pussy." While he was performing this act, Krystal went outside and "smoked" with Glenn and Tim. When she went back inside, she wiped the "come" off the child's "belly." (T.556-59)

Krystal went on to testify that Glenn "fucked" B.J. three or four times in "the back bedroom." On two occasions, she was present and followed the same procedure as before. On other occasions, Glenn would be alone with B.J. while Krystal was outside smoking, and upon her return she would find "come" on B.J.'s belly. (T.560-62)

Krystal also testified that she performed a "blow job" on Johnny to show B.J. how to do it. Afterward, imitating her mother, B.J. performed the same act on Johnny. (T.562-68)

Pammie Davidson, a licensed social worker, was employed as the victim's assistance coordinator for the district attorney's office. She met with Krystal "[t]en to 15 times" between October 2007 and September 2008. (T.650) When she was asked what statements Krystal had made about Tim, Ms. Davidson testified as follows:

> Krystal stated to me that the first time that Tim had sex with [B.J.] that she was still pregnant with [S.J.]; that it happened in her and Tim's home in the bathroom; that she removed [B.J.'s] clothes; and Tim removed his clothes. They went in there, and she sat [B.J.] down on top of Tim, and he had sex with her.

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[4]At this time, Glenn and Tim were "outside smoking." (T.557)

* * * * *

She said after he ejaculated, she would clean it up off of [B.J.'s] stomach. She also said that there were numerous other occasions when Tim would have sex with her in the bedroom of their home. He would ejaculate on her stomach, and Krystal would clean the come up off [B.J.'s] stomach. She said [B.J.] would scream and holler the first time Tim had sex with her, cried, Mommy, help me, several times.

(T.654)

Ms. Davidson testified additionally that Krystal told her "they obtained Lortab to give [B.J.] to calm her down so should wouldn't scream when Tim was having sex with her. (T.654)

When she was asked what Krystal had told her about Glenn and B.J., Ms. Davidson gave this testimony:

According to Mrs. Jordan, Glenn had sex with [B.J.] in the home of Johnny Grose in the back bedroom where she was keeping [S.J.'s] baby bed. This was by the time she had given birth to [S.J.] and moved over to the home of Johnny; and that he had sex with [B.J.] in the back bedroom on the bed where she was sleeping at night. She said she removed [B.J.'s] clothes, and that Mr. Glenn Grose would have sex with her in her vaginal area.

* * * * *

She stated on one occasion that they were in the home of Johnny Grose when Glenn was there; and that Tim and Glenn both was in the back bedroom with [B.J.] having sex with her and giving her Lortabs to keep her from screaming at that time too.

* * * * *

She said each time these men would have sex with [B.J.] that she would clean the come off of [B.J.], and at times would put ointment on [B.J.]. She would be raw and irritated.

(T.655)

Finally, Ms. Davidson gave this testimony about Krystal's statements about Johnny:

> She stated Johnny Grose was the last one to have sex after Glenn and Tim; that he was the last male to have sex with her. She stated that Johnny was in a wheelchair; so she had to remove Johnny's clothes and well as [B.J.'s] clothes; that she would set [B.J.] on top of Johnny to have sex; and she explained to me the way she knew Johnny could have sex was she had been having sex with Johnny prior to letting [B.J.].
>
> (T.655-56)

When the prosecutor inquired how many times these events occurred, Ms. Davidson answered, "Several times she could remember at least five times. Five times it happened in front of her and Tim. She said Johnny had sex with [B.J.] the least amount of times of all of them." Krystal also told Ms. Davidson "that she showed [B.J.] how to give a blow job; and she took [B.J.] and they were in the same room together; and after she showed [B.J.] how to do it, she closed [B.J.'s] mouth on Mr. Johnny's penis." (T.656)

Dr. Tanya King, a pediatrician practicing in Oxford, was accepted by the court as an expert in the field of pediatric medicine. Dr. King testified that she first examined B.J. on November 3, 2005. She obtained a medical history from Ms. Shaw and Gloria, but B.J. was too "[u]ncooperative" to give a statement. (T.711-14)

Dr. King then performed a "head to toe" examination on B.J., during which the child was "very anxious." Dr. King found inflammation in the child's genital area and well as bruising on both sides of the opening of her vagina. She elaborated that she had discovered "deep bruising, ... deeper than the labia majora ... " While B.J.'s hymen was not torn, Dr. King that "if she had any hymenal tears or tearing that ... would have

been healed." She also explained that a young girl's hymen is "somewhat protected just by the anatomy of the female because it is more recessed once they hit puberty." (T.718-22) Dr. King went on to testify that "more than 85 percent of the time, there are no physical findings on children who have been [sexually] abused." It was her "understanding" that perpetrators "often get only the corona or the very tip of the penis in and then ejaculate on the abdomen or another spot." Judging from B.J.'s demeanor and the bruising, Dr. King surmised that the last instance of abuse had occurred between three days and a week before the examination. (T.718-27)

Dr. King testified additionally that B.J.'s "anus was dilated which comes after many, many times of being penetrated by some object." This condition was "not normal, not even normal for a child who would have chronic constipation." Dr. King was certain that the injury had been caused by "repeated penetration by an object" which had occurred over a period of "[m]onths." Having performed between 200 and 300 examinations on victims of child sexual abuse, Dr. King had never seen another child with an anus so damaged. (T.723, 728)

In response to questions asked during cross-examination, the prosecutor asked Dr. King on redirect examination whether the inflammation could have been caused by diaper rash. She responded, "Considering with all the other findings, I think it definitely was healing from her sexual abuse." She also testified that to a reasonable medical certainty, her opinion was that the bruising inside the labia majora was caused by "penetration by an object, whether it be, you know, a penis or whatever." (T.743-44)

Gloria testified that during 2005, she "didn't visit" Tim and Krystal "a whole lot" because she did not approve of their excessive drinking and drug abuse. She had

seen Tim smoking marijuana, and "on one occasion they had a party" at Tim and Krystal's trailer "and they were passing something around on foil." Later that year, she visited Tim and Krystal "at Johnny Grose's trailer." Krystal's pre-adolescent son Justin, from a previous marriage, was present, along with Gloria's mother, B.J. and S.J., who was born in May 2005. Gloria was "not sure," but she thought Glenn "was in the house" too.[5] According to her, "the baby was in the back bedroom of the trailer on the bed, and [B.J.] and Justin was just running loose everywhere. They was all in the yard." Gloria described the children as "nasty and dirty." B.J. "would have on just a shirt. Her hair never looked like it had ever been combed. Her panties were wet and nasty and a lot of times there would be poop running down her legs." She did not see Tim or Krystal prepare meals for the children; rather, Martha did so. (T.746-50)

On October 31, Gloria learned from Martha "that Tim and Kristi had been fighting and Kristi ended up in jail." Gloria and Martha then went to the residence of Tim's parents to "check on the kids." According to an agreement, Gloria took S.J. while the paternal grandparents kept B.J. A few days later, Martha brought B.J. to Gloria's house and told her that B.J. had complained of pain during urination.[6] Upon examining B.J.'s

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[5]Gloria had had a sexual relationship with Glenn, but she ended it after about a month because she "didn't like all the drugs and the alcohol." (T.749)

[6]Gloria testified that B.J. had been with Martha for approximately two days. (T.753)

vaginal area, Gloria saw that it was "red and raw." B.J. then told her "that Kristi and Tim and Glen and Johnny had hurt her." She told her grandmother "that they had hurt her with their fingers and Tim had hurt her with his dick."[7] On several subsequent occasions, Gloria asked B.J. who had hurt her. The child always named "Kristi and Tim and Glen and Johnny."[8] B.J. also told Gloria that she, Tim and Kristi had taken showers together, that she (B.J.) "had sucked Tim's dick,"[9] and that Johnny and Glenn had "hurt her down there" with their fingers. (T.751-54)

In the beginning of B.J.'s stay with Gloria, B.J. tried to nurture her little sister, but eventually she began displaying hostility toward her. She hit the baby in the stomach, bent her fingers backward, and said that she wanted to put S.J. "in a garbage bag and smother her." (T.755) B.J. also began acting inappropriately in other ways. She once took a frankfurter out of a bun and simulated fellatio on it. She ate and smeared her own feces. She masturbated in the presence of the meter reader. (T.761-62)

Robin Smith, a clinical social worker with an emphasis on physically and sexually abused children, was accepted by the court as an expert in this field. (T.802) Ms. Smith

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[7]At that point, Gloria notified DHS, as Martha testified.

[8]"A little later," B.J. named Larry Grose as a perpetrator. (T.754)

[9]Gloria testified that she never had used such language in B.J.'s presence. (T.754)

began seeing B.J. shortly after she turned four, when she was in Gloria's custody. Gloria had reported that B.J. was angry, destructive, violent, defiant, hyperactive, disobedient, totally lacking in social skills and unable to focus. She was cruel and threatening to her little sister; she was cruel to the family dog. Desperate for attention, B.J. routinely behaved provocatively with men, even strangers. She would try to sit on their laps and rub their crotches. In Ms. Smith's words, B.J."had no boundaries." (T.804-08) She illustrated this point with the following testimony:

> [B.J.] was very likely to walk up to somebody and say, Do you want to touch my pussy or I want you to touch my pussy, or walk up to somebody and say, I want to touch your dick. I mean, that was just as likely as her to walk up to you and say, Hi. Those were the things she did.
>
> She walked in my office the first day and I asked her where her mother was because she had been removed from her mother and she proceeded to tell me who all was in jail and I asked her why they were in jail. She spread her legs wide apart and she said, They touched me here in my pussy, and then she turned around and showed me they had touched her in her rectum too. ...
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> * * * * *
>
> The masturbating, and we still have a problem with that. She would masturbate at school, at home, in front of people. It didn't matter. She would grab women's breasts. In fact, she's tried to grab mine. She would be very promiscuous and provocative for a four-year-old ...
>
> (T.808-09)

Ms. Smith testified further that B.J. had touched other children inappropriately when she was at Head Start and when she was in treatment at Alliance. She had a habit of staring at people. She routinely stared at her step-grandfather while he was eating dinner. When he asked her why, she said that she wanted him to touch her.

(T.809-12)

Regarding B.J.'s eating and smearing of her feces, Ms. Smith testified that she had "never seen a child do it that wasn't sexually abused." Asked about her behavior toward S.J., Ms. Smith answered, "She hated her little sister. ... [S]he would tell you she hated her little sister. She was mean to her." B.J. also told Ms. Smith that she "wanted to cut them [S.J. and Gloria] up in little pieces and put them in a plastic bag." (T.812-14)

All of these behaviors led Ms. Smith to diagnose B.J. "with post-traumatic stress syndrome, and that's because of the abuse." She also had both the inattentive and hyperactive types Attention Deficit Hyperactive Disorder (ADHD) and reactive attchment disorder. She "had no attachment to anybody." She also suffered trichotillomania, manifested by the obsessive pulling of "hunks of hair out of her head." (T.814-16) During play therapy, Ms. Smith discovered that B.J. "didn't know how to play. She had no concept of playing." (T.829)

After Gloria reported that B.J. had been eating and smearing her own excrement, Ms. Smith "started exploring this" with the child. B.J. blurted, "Kristi has a pussy." When Ms. Smith asked, "Do you want to tell me more about that?" B.J. answered the "Glen likes to play with her pussy. Glen lists to play with Kristi's pussy. It's always Kristi and Tim. It's never mother and daddy." Ms. Smith went on to testify, "She has repeatedly told me that the people that touched her in her pussy were Kristi, Tim, Glen, Johnny, and Larry. She told me that in the beginning. She told me that just a few weeks ago." (T.830-31) On one occasion during therapy, B.J. tried to grab Mrs. Smith's breasts and screamed, "I hate Tim and Kristi." When she was asked why, she

"pointed to her vaginal area again and said that Tim, Kristi, Glen, and Johnny had touched her there, and Larry also." She repeatedly denied that her half-brother Justin had molested her. (T.835-36)

Over the next two years, B.J. was admitted to two different residential facilities for psychiatric treatment. Such commitment was virtually unheard-of for a child so young. B.J. continued to display bizarre behaviors, some of them indicating that she was experiencing flashbacks. She tried to touch her little sister's genitals. (T.836-46)

Asked about B.J.'s prognosis, Ms. Smith testified that she had a "grave concern" that the child would turn to substance abuse, that she would be promiscuous, that she would be an easy target for abuse, that she would become psychotic, and/or that she would mutilate or kill herself. (T.847-49)

Tim testified that the only time he "touched" B.J. "down there" was when he "was giving her a bath or having to wipe her tail or something like that when she had to go to the bathroom." He also said he "would never think" that Glenn or Johnny "would do something like that," i.e., sexually abuse B.J. (T.1002-03)

Glenn took the stand and admitted a history of drug and alcohol abuse. (T.1096-98) He denied having given Krystal drugs in exchange for sex; rather, he stated, "she was always wanting to have sex with me." (T.1108) He also denied having "messed with BJ in a sexual way." (T.1119)

Johnny testified that he routinely gave Krystal money, purportedly to be used to buy milk and diapers for the children. He denied having had sexual contact with B.J. (T.1244-45)

Additional facts will be set out as necessary in the following argument.

SUMMARY OF THE ARGUMENT

PROPOSITION ONE: **NO ERROR HAS BEEN SHOWN IN THE COURT'S RULINGS WITH RESPECT TO THE TESTIMONY OF CARNELIA FONDREN**

PROPOSITION TWO: **TRIAL COURT DID NOT ERR IN ALLOWING THE INDICTMENT TO BE AMENDED TO CONFORM TO THE PROOF**

PROPOSITION THREE: **THE TRIAL COURT DID NOT ERR IN DENYING JORDAN A SEPARATE TRIAL**

PROPOSITION FOUR: **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING THE TENDER YEARS EXCEPTION TO THE HEARSAY RULE**

PROPOSITION FIVE: ***THEVERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE***

The trial court did not err in allowing the indictment to be amended to conform to the proof.

The trial court did not err in denying Jordan a separate trial.

The verdict was not contrary to the overwhelming weight of the evidence.

PROPOSITION ONE:

NO ERROR HAS BEEN SHOWN IN THE COURT'S RULINGS WITH RESPECT TO THE TESTIMONY OF CARNELIA FONDREN

Krystal was subjected to extensive cross-examination, apparently in part to attempt to show that her testimony was unreliable because it had been obtained as a result of a "sweetheart deal" with the prosecution.[10] To attempt to rebut that it was

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[10]Upon her plea of guilty, Krystal was sentenced to 20 years' imprisonment with ten years to serve and ten suspended. (T.668)

"responsible for giving this case away against Krystal Jordan in some kind of vendetta against these defendants," the state called contended that it was "entitled to present ... the true circumstances of this plea agreement" and how it was reached." To that end, the state called Krystal's counsel, Camelia Fondren, as a witness. (T.659-61)

Counsel for Jordan objected initially on three grounds: that Ms. Fondren had not been disclosed during discovery as a witness; that her testimony would violate the attorney-client privilege;[11] and that her testimony would constitute hearsay. (T.659) The prosecutor responded that he had no objection to allowing the defense to interview Ms. Fondren prior to her testifying, and that to the effect that it would embody any arguable "statement" by Krystal, it would not be hearsay, pursuant to M.R.E. 801(d)(1).[12] The trial court allowed the defense to interview Ms. Fondren and offered to "hear any further objections" after the interview. After the defense spoke with Ms. Fondren, she was called to the stand without further objection at this point. (T.659-62)

The next objection appears at T.667, after the prosecutor asked Ms. Fondren to

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[11]Ms. Fondren testified later that Krystal had waived her attorney-client privilege with respect to Ms. Fondren's testimony at trial. (T.663)

[12]That subsection provides that a prior statement of a witness is not hearsay if it is "consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive..."

testify about the plea negotiation. The defense objected on the ground of hearsay; the prosecutor responded that the plea negotiation did not embody a statement of fact offered to prove the truth of the matter asserted,[13] and therefore was not hearsay.[14] The objection was overruled. (T.667)

When Ms. Fondren was asked to define her duty to determine whether her client was guilty of the charges or at least some of the charges against her, counsel for Jordan objected, but failed to state a specific ground and failed to obtain a ruling on the record. (T.668)

Additionally, when she was asked whether she had been satisfied that "there were grounds for the entry of the guilty plea," counsel for Jordan objected, but failed to put the ground(s) on the record. (T.672-73)

It is well-settled that a specific, contemporaneous objection on the record is required to preserve an issue for review. *Young v. State*, 987 So.2d 1074 (Miss. App. 2008); *Lee v. State*, 944 So.2d 56, 64 (Miss. App. 2005). Moreover, the objecting party

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[13]M.R.E. 801(c).

[14] The prosecutor argued specifically,

> Your Honor, I don't think it's hearsay. We're talking about a negotiation toward reaching an agreement which was, in fact, reached and which the defense has already raised... This is a negotiation. It's not even a factual statement.
>
> (T.667)

must obtain a ruling on the record. *Hobson v. State*, 730 So.2d 20 (Miss.1998). Jordan did not raise an objection on the record to improper opinion testimony. Accordingly, that issue is barred. Regarding the hearsay-based objection, we maintain the position of the prosecution at trial: the negotiations were not statements and therefore were not hearsay. To the extent any of this testimony embodied statements of a witness, they were offered to rebut an express or implied charge of recent fabrication or improper influence or motive and therefore were not barred by the hearsay rule. *Hendrix v. State*, 957 So.2d 1023 (Miss. App. 2007), citing *Caston v. State*, 823 So.2d 473, 489 (Miss. 2002).

The state submits that Jordan has failed to show error with respect to the court's rulings on the objections to Ms. Fondren's testimony. Moreover, the motion for mistrial made after Ms. Fondren had left the stand was untimely and therefore properly overruled. *Williams v. State*, 919 So.2d 250, 254 (Miss. App. 2005). For these reasons, Jordan's first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN ALLOWING THE INDICTMENT TO BE AMENDED TO CONFORM TO THE PROOF

Jordan ultimately was convicted on Counts 1, 3, 5, 7, 10, and 33 of the second superseding indictment. (C.P.202) The superseding indictment originally charged that Jordan committed sexual battery as charged in Counts 1, 3, 5, and 7, respectively, "during the month of March, 2005; ... during the month of April, 2005; during the month of May, 2005, ... and during the month of June, 2005." (C.P.33-35) The superseding indictment went on to charge that the offense of touching a child for lustful purposes as alleged in Count 10 occurred "during the month of July, 2005," and that the offense of

child neglect charged under Count 33 occurred "between the dates of on or about March 1, 2005 and October 31, 2005..." (C.P.36, 44)

With respect to these counts, the court allowed the state to amend the indictment to change the pertinent dates as follows: Counts 1, 3, 5, and 7, "between on or about the months of March through May, 2005." Count 10 was amended to allege that the fondling occurred "between on or about the months of May through October, 2005." (C.P.59-62) When the state sought this amendment, Jordan objected on the ground that it was improper and untimely, that it added "new substantive counts," and that it would violate his due process rights. (T.923) The prosecutor countered,

> All the proof before the Court is in conformance with the amendments that we have requested. **All of that proof came in without objection, so that is the state of the record at this time as far as the proof is concerned and it is the state of the record in the presence of the defendants and it was entered without objection.** I don't think they can have an objection from a due process ground or otherwise since the proof came in in open court without objection. The indictment should be amended to reflect the state of the proof wince that's the state of the proof.
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> (emphasis added) (T.925-26)

With these findings and conclusions, the court allowed the amendment:

> The counts do, from what I can see, refer to during the month of. Now, certainly it would be a rationale for objecting to that early and often. That hadn't [sic] happened. **There's been no demonstrated compromise in the defendant's ability to defend the case based upon the fact that the indictment originally alleged a general time frame for these offenses, and further, the Court believes that it's not a matter of substance and that it is a matter of form and it does conform with the proof in this case** and that to change the language from during the month of to on or about is clearly not– that's verbage [sic] and that's not substantive. The time frame is what it is. It's a broader time frame. That is unusual. It does conform with the proof,

> however, no demonstrated prejudice other than those that are obvious and have not been raised at this point. The Court is going to allow the amendment as to those counts.
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> (emphasis added) (T.926)

At the outset, the state points out that "[t]he indictment is not required to state the correct date as long as it does not invalidate the indictment, and the time element does not have to be specific as long as it is within reasonable limits." *Burbank v.* State, 800 So.2d 540, 544-45 (Miss. App.2001), citing Morris *v. State,* 595 So.2d 840, 842 (Miss.1991). See also URCCC 7.06(5). It follows that "[a]mendments may be made to the date of an alleged crime by the trial court provided that they do not prejudice the defense." *Burbank*, 800 So.2d at 544-45, citing *Crawford v. State*, 754 So.2d 1211, 1219 (Miss. 2000). In other words, "[t]he relevant question is whether amending the indictment to correct the date of the offense amounts to a defect of form or substance. Resolution of that question depends on the facts of the case and the context of a defendant's theory of the case." *Leonard v. State*, 972 So.2d 24, 28 (Miss. 2008). Amendment "is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." *Id.*

In this case, Jordan's defense was that he had never touched B.J. inappropriately, at all, at any time. See *Leonard,* 972 So.2d at 28 (amendment was permissible where defense was that defendant never touched the victim inappropriately). Accord, *Burbank v. State*, 800 So.2d at 544-45. Thus, the amendment did not materially affect the viability of his defense. Indeed, when the state

sought to amend the indictment, Jordan did not assert that the change in dates would have any effect on his defense. Nor did he "show that he had other witnesses to present" or "request a continuance or a recess upon the motion to amend the date." *Burbank*, 800 So.2d at 545. In light of *Leonard* and *Burbank*, his challenge to the court's granting the state's motion to amend should be denied.[15] Accorrd, *Davis v. State*, 866 So.2d 1107, 110-11 (Miss. App. 2003). Jordan's second proposition should be rejected.

PROPOSITION THREE:

THE TRIAL COURT DID NOT ERR IN DENYING JORDAN A SEPARATE TRIAL

Jordan contends additionally that the trial court committed reversible error in overruling his motion for severance. During the hearing on this motion, counsel for Johnny and Glenn stated that they had no objection a joint trial. Jordan, however, maintained his position that he was entitled to a separate trial because the defenses of each defendant were inconsistent. (T.182-84) When asked to respond, the prosecutor made an argument set out in pertinent part as follows:

> I think there is a lot of speculation in what Mr. McLauphlin [sic] just said because I'm not aware and **I don't think there is going to be any evidence given to me in the way of counter discovery that says defendant A says defendant B abused the child. There is no evidence like that.**

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[15] *Moses v. State*, 795 So.2d 569 (Miss.2001), implicated the trial court's denial of a motion to quash an indictment charging conduct which allegedly occurred over a period of three years. This case, to the contrary, involves a motion to amend the indictment to conform to proof which had been admitted without objection. *Moses* is distinguishable on that basis.

> There may be evidence that says defendant A says I didn't do it and I don't know who could have done it. I mean I don't have any personal knowledge of who did this and it may have happened but I didn't do it. That is not the same thing as saying I didn't do it and B did ut. There is no proof like that. So if there is I would like to know about it. I don't know about it. **And I don't think there is any such proof. So it's not as if the defendant, co defendants point the finger at each other. They don't.** I don't know what their theory is exactly but if it is to concede that abuse took place but to deny that each o them did it, that is not the same thing as pointing your finger at the other one. It points the finger at some unknown person.
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> (emphasis added) (T.184)

Having reviewed the case law cited by counsel for Jordan, the trial court made this finding and ruling: "There is no evidence before this Court that the defenses of the defendants conflict with one another at all or certainly not substantially if at all. So the court is going to deny the motion to sever and require that the cases be tried together." (T.184-85).

"Defendants jointly indicted for a felony are not entitled to separate trials as a matter of right." *Sanders v. State,* 942 So.2d 156, 158 (Miss.20076), citing *Price v. State*, 336 So.2d 1311, 1312 (Miss.1976). To the contrary, both the Mississippi Supreme Court and the United States Supreme Court "have recognized the importance of joint trials." *Sanders,* 942 So.2d at 158, citing *Richardson v. Marsh*, 481 U.S. 200, 210 (1987) ("Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which sometimes operate to the defendant's benefit."). When ruling on a motion for severance, the trial court must consider whether the testimony of another defendant(s) that defendant(s) at the expense of the movant, and whether the balance of the

evidence "preponderates more heavily against one defendant than another." *Sneed v. State*, ___ So.3d ___ (Miss.App.2007-KA-0381, decided August 25, 2009) (2009 WL 2595696). Accord, *Duckworth v. State*, 477 So.2d So.2d 935, 937 (Miss.1985). The court's ruling on this issue is not subject to reversal absent a finding of abuse of judicial discretion. URCCC 9.03 (the "granting or refusing of severance of defendants in cases not involving the death penalty shall be in the discretion of the trial judge"). See also *King v. State*, 857 So.2d 702, 716 (Miss.2003). "Unless prejudice can be shown, the trial court cannot be found to have abused its discretion." *Sneed*, citing *Sanders*, 942 So.2d at 159.

The state submits the trial court did not abuse its discretion in denying Jordan's motion for severance. During the hearing on this motion, the prosecutor asserted that he had no knowledge that Johnny and/or Glenn would exculpate themselves at Jordan's expense.[16] In fact, Johnny and Glenn took the stand denied culpability, but neither pointed a finger at Jordan. Moreover, the overwhelming evidence was that all three defendants were guilty of abusing this child; thus, the proof balance of the proof did not tend to go more toward the guilt of one rather than another or others. It follows that Jordan was not prejudiced by the denial of his motion for severance.

Jordan relies primarily on *Usry v. State*, 378 So.2d 635, 637 (Miss.1979), wherein the Mississippi Supreme Court stated, "We would observe, however, that in cases involving multiple defendants, where one or more is charged as a habitual

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[16]Counsel for Jordan did not rebut this assertion.

offender, a severance would ordinarily be preferred." The state counters first that "preferred" does not mean "required." Moreover, the self-styled observation is merely dictum, not necessary to the decision of the case, and therefore not controlling here. Finally, the state reiterates that Jordan must show that he was prejudiced in order to establish an abuse of discretion in the court's ruling. Because Glenn's status as an habitual offender was not presented to the jury, the state submits Jordan cannot show that it had an effect on the outcome of his trial. Thus, Jordan has failed to establish prejudice with respect to this issue.

For these reasons, the state contends Jordan's third proposition should be denied.

PROPOSITION FOUR:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING THE TENDER YEARS EXCEPTION TO THE HEARSAY RULE

Prior to trial, the court conducted a hearing on the applicability of the tender years exception to the hearsay rule.[17] During that hearing, Ms. Smith testified that she

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[17]M.R.E. 803(25) provides as follows:

> 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

had had regular appointments with B.J. for the purpose of therapy since February 6, 2006. She began seeing B.J. a"because the grandmother was having a very difficult time with [B.J.'s] behavior and that is why they enlisted" Ms. Smith's "help." (T.36-37)

Ms. Smith went on to testify that B.J. had been defiant, acting in sexually inappropriate ways, masturbating in public, eating her own feces, treating the family pets cruelly, and using foul language. After she told Gloria that she wanted her step-grandfather to touch her private areas, Ms. Smith referred the child to a psychiatric

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> witness, such statement may be admitted only if there is corroborative evidence of the act.

The rule's comments list several factors, sometimes referred to as the "*Wright* factors," that a trial court should consider to determine whether there is a "substantial indicia of reliability." See *Idaho v. Wright*, 497 U.S. 805, 821-22, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Those suggested factors are

> (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated.
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> M.R.E. 803(25) cmt.

hospital, where she received anti-psychotic medication and remained for three weeks. (T.38-44)

When she returned in April 2006 for another session with Ms. Smith, B.J. tired to "grab" her "breast" and "got in a panic" when "[t]alking about Christy." When Ms. Smith would mention "Tim and Christy" during subsequent sessions, B.J. would become "real agitated again." (T.50-54)

In his initial argument in support of a finding that B.J. was unavailable, the assistant district attorney correctly noticed that "based on the testimony of Robin Smith that she is unavailable from the stand point of her own health. ... So we do submit that she is unavailable because of her years and ... the trauma that she has under-gone." (T.156-57)

Countering the defendants' reliance on *Crawford v. Washington*, 541 So.2d 36 (2004), the assistant district attorney argued that the statements in issue were given during the process of therapy, not during the course of any investigatory procedure "or testimonial effort but simply to try to be of assistance to especially Robin Smith in her therapy with the child." (T.157)

When the hearing continued on some two months later, the state argued in part that the evidence in question had sufficient indicia of reliability to be admissible.[18] Specifically, the assistant district attorney argued that the child was "of very tender years," approximately three years old, when these statements were made; that there

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[18]Those indicia are set out under the *Comment* to Rule 803(25).

was no proof that the child had any motive to lie; that B.J. had implicated these three defendants on more than one occasion in the presence of a number of different people; that the statements to Robin Smith were "clearly spontaneous"; that B.J. told her grandmother the names of the people who had been abusing her as soon as she (B.J.) was in a safe environment, i.e., out of the custody of her abusers; that B.J. had consistently named Tim, Johnny and Glenn as men who had "hurt" her; that her statements were corroborated by physical and behavioral evidence which established "for sure" that the child had "been grossly abused"; and that the statements certainly had been made, i.e., that B.J. had made them to several people, none of whom had "axes to grind" with these defendants. The assistant district attorney conceded that the tenth factor, the age or maturity of the declarant, weighed against admissibility. (T.185-89) The state concluded its argument as follows:

> Eleven, whether suggestive techniques were used in eliciting the statements. Of course, we are talking about many statements and as early on in the process as early as possible the child was given a forensic interview without any leading having taken place. So again that weighs for the State. And whether the declarants [sic] age and all that experience make it unlikely that the declarant fabricated. And that weighs in the States [sic] favor because of the simple age of the child. She is not old enough yet to scheme and have motives to name these people to the exclusion of others who might have abused her in a way of hiding others. And all these, these three defendants and her mother who has already pleaded guilty, all were the people with the most opportunity to do this. So when you weigh all of these considerations, Your Honor, set forth in the note to rule sub part of 25 the weight of these indicia weigh overwhelmingly in the States [sic] favor.
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> (T.189-90)

Thereafter, the trial court painstakingly analyzed the evidence in light of the

factors listed under the *Comment* to M.R.E. 803(25) and found, in pertinent part, that it had been established "beyond any reasonable argument that this child has unquestionably been abused, been sexually abused ... " (T.190-201) Having thoroughly considered these factors, the court ultimately concluded,

> it's abundantly clear the implication of these defendants is reliable and so for those reasons the Court and for all the matters disclosed in the record of the earlier hearing, the Court is of the opinion that the tender years exemption should apply in this case and that these hearsay statements should be admitted into evidence."
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> (T.201)

The state contends no abuse discretion can be shown in this ruling. See *Hobgood v. State*, 926 So.2d 847, 852 (Miss.2006) (appellate court "reviews the admission or exclusion of evidence for abuse of discretion"). From the foregoing excerpts from the record, it appears that the prosecution presented overwhelming evidence that the child was unavailable within the meaning of M.R.E. 804(a)(6);[19] that the statements had substantial indicia of reliability; and that there was sufficient corroboration of the fact of the abuse. Having employed the correct legal standards, the trial court found on the record that the tender years exception was applicable. See *Bishop v. State*, 982 So.2d 371, 375-76 (Miss.2208). It follows that "appellate review is

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[19]The child was so traumatized that the mere mention of her parents' names required her to be placed in a psychiatric hospital. We submit there is no real question about her ability to testify without further damage to her mental, physical and emotional health. See *Hobgood*, 926 So.2d at 851, and *Bishop v. State*, 982 So.2d 371 (Miss.2008).

limited to the abuse of discretion standard." *Shirley v. State*, 843 So.2d 47, 48 (Miss. App.2002), citing *Baine v. State*, 606 So.2d 1076, 1078 (Miss.1992). The trial court applied the appropriate legal criteria to the overwhelming evidence and found that the tender years exception should apply. No abuse of judicial discretion can be shown in this case.

The state submits additionally that the court did not err in accepting the prosecutor's argument that the statements in question were not testimonial within the meaning of *Crawford v. Washington*. We reiterate the assistant district attorney's argument that B.J.'s statements to Robin Smith were not taken in the course of a police investigation, but were given in a therapeutic setting. *Hobgood*, 956 So.2d at 851. See also *Bishop*, 982 So.2d 371, 374-75 (Miss.2008). To the extent the statements in issue could be deemed testimonial– and we maintain our position that they cannot– they were harmless. In this case, the state had a weapon that it rarely possesses in trials involving sexual abuse of a child: it had eyewitness testimony of someone other than the child victim. We recognize that Krystal's credibility has been attacked, but that issue was properly resolved by the jury. Accordingly, the admission of these statements was harmless at worst. *Hobgood*, 956 So.2d at 852. For these reasons, the state submits Jordan's fourth proposition should be denied.

PROPOSITION FIVE:

THE VERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Finally, Jordan challenges the weight of the evidence undergirding his conviction. To prevail, he must satisfy the following formidable standard of review:

> The standard of review in determining whether a jury

> verdict is against the overwhelming weight of the evidence is also well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Collins v. State*, 757 So.2d 335, 337(¶ 5) (Miss.Ct.App.2000) (quoting *Dudley v. State*, 719 So.2d 180, 182(¶ 9) (Miss.1998)). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Collins*, 757 So.2d at 337(¶ 5) (citing *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992)). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Collins*, 757 So.2d at 337(¶ 5) (quoting *Dudley*, 719 So.2d at 182).
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> *Carle v. State*, 864 So.2d 993, 998 (Miss.App.2004).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court stated in *Ford v. State*, 737 So.2d 424, 425 (Miss. App.1999),

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
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> (emphasis added)

Finally, as the Mississippi Supreme Court reiterated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the

very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

Jordan's argument is primarily an attack on Krystal's credibility. The state counters that the believability of Krystal's testimony, tested by extensive cross-examination, was a matter for the jury's determination. It also was corroborated by B.J.'s statements to her grandmother, mother and therapist. The proof created a straight issue of fact which was properly resolved by the jury. Jordan's final proposition should be denied.

CONCLUSION

The state respectfully submits the arguments advanced by Jordan have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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This the 30th day of October, 2009.

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