IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NICKEY WILLIAMS — APPELLANT

VS. — NO. 2008-KA-2129-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

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STATEMENT OF FACTS

Based on reports of neglect, three-year-old R.W. was removed from the home of her biological parents, Nickey and Kimberly Williams, and placed in the care and custody of the Mississippi Department of Human Services (DHS) in September of 2004. T. 330. Six months later, R.W. was placed in therapeutic foster care, with Kay Smith and her husband serving as R.W.'s foster parents. T. 333. DHS had a goal of reunifying R.W. with her biological parents. T. 333. On her first night in the Smith home, R.W. told Mrs. Smith that she did not like nighttime because her dad would come into her room at and spank her between her legs and hurt her at night. T. 262. Ms. Smith did not question the child about the statement, because she assumed that was the reason she was in DHS custody. T. 263. Mrs. Smith observed that R.W. had frequent nightmares and would cry out in her sleep, "Stop, don't, leave me alone." T. 6.

Over the next several months, the biological parents were allowed supervised visitation with R.W. twice a month. T. 256. Finally on November 11-13,2005, the biological parents were allowed an unsupervised weekend visit with R.W. in their home. Kimberly picked R.W. up from the Smith home on Friday and returned her to the Smith home Sunday at 2:00 p.m. T. 258.

That Sunday evening, Mrs. Smith was on the telephone and could see R.W. in a bedroom down the hall playing with a doll in what appeared to be a sexual manner. T. 259. When Mrs. Smith asked R.W. what she was doing, R.W. began crying and stated that her dad had poked her on her bottom with his fingernail and hurt her. T. 259. Mrs. Smith asked R.W. if she could show her with the doll what she meant, and R.W. jabbed her fingers between the baby doll's legs. T. 260. Mrs. Smith stated that she had never seen R.W. cry or hurt like she did that night. T. 260. Mrs. Smith immediately called Kimberly and informed her of the allegation. T. 260. Mrs. Smith then called her supervisor at Youth Villages, who advised her to contact R.W.'s DHS caseworker, Wanda Jones.

T. 261. The next day, the allegations were reported to the Lee County Sheriff's Department. T. 299. R.W. was subsequently taken in for a medical examination and forensic interview. T. 300-301.

Dr. Williams Marcy performed the medical exam on R.W., and found that the diameter of her hymen measured twice as large as it had one year earlier.[1] T. 421. Dr. Marcy ultimately opined that the results of R.W.'s examination were consistent with vaginal penetration. T. 429.

On December 8, 2005, R.W. went to her regularly scheduled counseling session with Tina Ballard, a counselor at Youth Villages. The main focus of the counseling sessions was to track R.W.'s developmental progress and help R.W. overcome adjustment disorder. T. 287. At the beginning of the session, R.W. played on the floor, colored, and counted with Ballard. T. 289. However, when Ballard asked R.W. about her recent visit with her biological parents, R.W. said that her father had hurt her "down there," pointing to her vaginal area. T. 290. R.W. then became agitated and started tearing paper and throwing things. T. 291. Ballard did not question R.W. further about the allegation. T. 291. Ballard would later explain at trial that she had not been informed of the allegations prior to the session, and her only intention had been to assess the home visit, as it was the first unsupervised, overnight visit with the biological parents. T. 288, 294.

When Williams was arrested for the sexual battery of R.W., R.W.'s ten-month-old sister, H.W., was taken into DHS custody. A medical examination of H.W., performed by Dr. Marcy, revealed that H.W.'s anus was stretched and swollen. T. 434-35. A Y-shaped fissure on the anus also indicated that an object had been inserted in H.W.'s anus. T. 440-41.

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[1]All children taken into DHS custody undergo a physical examination. T. 304. When R.W. was placed in the care of DHS in 2004, a physical examination was performed by a nurse practitioner who noticed that R.W.'s vaginal area was inflamed. T. 418. R.W. was then referred to Dr. Macy for further examination. T. 418. At that time, Dr. Macy noted that the diameter of R.W.'s hymen measured 3.5mm. T. 421. During the November 2005 examination, R.W.'s hymen measured 7.5mm. T. 421.

Williams was indicted and tried for Count I sexual battery against R.W. and Count IV sexual battery against H.W.[2] R.W. testified that Williams placed his fingers in her "front private" when he gave her bath during the overnight visit. T. 466. R.W. testified that it hurt and she told Williams to stop but he refused. T. 469. Mrs. Smith and Ms. Ballard testified regarding R.W.'s spontaneous statements implicating her father. T. 259-60, 209. Dr. Macy also corroborated R.W.'s claim by testifying that the results of her medical examination were consistent with vaginal penetration. T. 430. Dr. Macy also testified that H.W.'s injuries were consistent with anal penetration. T. 441. Kimberly Williams also testified for the State, and confirmed that Williams had bathed R.W. and H.W. on the Friday night of R.W.'s visit while Kimberly was at work. T. 381. She also testified she had given the girls their bath that Saturday, but Williams was alone in the bathroom with R.W. when Kimberly had to step out to change H.W.'s diaper. T. 385.

Williams testified in his own defense. He denied sexually abusing his daughters. T. 485. Regarding H.W.'s injuries, he claimed that she suffered from constipation due to the iron in her baby formula, and that a doctor had advised him to "give her a enema medicine on it." T. 486. Williams also called five witnesses who testified that he was a truthful person.

Williams was found guilty on both counts. He was sentenced to serve thirty years on Count I and twenty years with ten suspended on Count IV, with both sentences running concurrently.

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[2]One count of fondling and an additional count of sexual battery were nolle prossed.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying Williams' motion to sever Counts I and IV. The offenses were sufficiently connected as parts of a common plan or scheme. An analysis of the *Corley* factors supports the State's position that the counts were properly tried together.

Williams sought to introduce testimony from certain witnesses regarding their observations of Williams and his daughters over a six-month time frame leading up to the sexual assaults. However, defense counsel admitted on the record that these witnesses had not observed Williams and his daughters during that time frame. Additionally, the testimony was properly excluded as it was not provided in discovery.

R.W.'s out-of-court statements implicating her biological father were properly admitted under M.R.E. 803(25). A lengthy 803(25) hearing was conducted outside the presence of the jury and the trial court fully considered twelve factors used in determining whether a child-victim's statement bear substantial indicia of reliability. Williams has failed to show that the trial court abused its discretion in finding that the statements were admissible.

No juror misconduct occurred which would warrant a new trial. The juror in question did not knowingly withhold information, much less critical information, during *voir dire*. Additionally, the trial court determined that the juror was fair and impartial and that she based her verdict on the evidence presented.

The State presented legally sufficient evidence to support both verdicts. Neither verdict is against the overwhelming weight of the evidence, and neither verdict represents an unconscionable injustice.

Williams' proffered instruction on child testimony was properly refused as a comment on the evidence. The instruction singled out testimony and commented on the weight of the evidence. The

instruction was also properly refused as fairly covered elsewhere.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WILLIAMS' MOTION TO SEVER COUNTS I AND IV.

Williams was indicted for the sexual battery of R.W. and H.W. on April 27, 2006. C.P.5-7. Williams waited until the first day of trial, August 4, 2008, to ask that the court sever Counts I and IV. T. 153. The trial court ruled that the motion was untimely, and further found that Williams would not be prejudiced by trying both counts together. T. 157.

A trial court's decision to deny the defendant's motion to sever counts in an indictment is reviewed for abuse of discretion. *Eakes v. State*, 665 So.2d 852, 861 (Miss. 1995). Two or more offenses may be charged in the same indictment if they are based on the same act or transaction or if the crimes involve "two or more acts or transactions connected together or constituting parts of a common scheme or plan." *Id.* (citing Miss. Code Ann. 99-7-2)). In ruling on a defendant's motion to sever counts, the trial court should consider the following factors; "the time period between the offenses, whether evidence proving each offense would be admissible to prove the other counts, and whether the offenses are interwoven." *Id.* (citing *Corley v. State*, 584 So.2d 769, 772 (Miss.1991)).

In the present case, a multi-count indictment was proper because the crimes were connected together and involved a common scheme. Both daughters were sexually abused by Williams during the same time frame and while he was alone with them while the mother was at work. Further, all three *Corley* factors weigh in the State's favor. Count I was alleged to have occurred on or about November 12, 2005, while Count IV was alleged to have occurred between April 20, 2005 and February 14, 2006. As such, there is no time period between the offenses, as the sexual assault against R.W. occurred during the same time period as the assault against H.W. Even in cases where a specific date for each crime is alleged, a time period of five months between the commission of

the separate crimes was held by this Court to be insignificant. *Rushing v. State*, 911 So. 2d 526, 535-36 (¶17) (Miss. 2005). As to the second factor, whether the evidence proving each offense would be admissible to prove the other counts, Williams' analysis consists of the words, "definitely not." While the appellant's contention was true at one time, this Court held last year that in trial involving sexual abuse against a child, evidence of the defendant's sexual abuse of another child victim is no longer *per se* inadmissible. *Derouen v. State*, 994 So. 2d 748 (Miss. 2008) (overruling *Mitchell v. State*, 539 So.2d 1366 (Miss. 1989) and *Lambert v. State*, 724 So.2d 392 (Miss. 1998)). Accordingly, even if the counts had been severed, evidence that Williams sexually assaulted R.W. could have been admitted in his trial for sexual assault of H.W. to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Finally, the offenses are clearly interwoven as they were a part of a common scheme or plan.

The trial court also properly denied the motion as untimely. See *Broderick v. State*, 878 So.2d 103, 105 (¶8) (Miss. Ct. App. 2003). For the foregoing reasons, the trial court did not abuse its discretion in denying Williams' motion to sever the two counts of sexual assault in his indictment.

II. EVIDENCE WHICH THE TRIAL COURT RULED WAS IRRELEVANT WAS PROPERLY EXCLUDED.

Williams argues on appeal that the trial court improperly excluded defense witness testimony regarding observations of Williams and his daughters over a six-month time frame leading up to the sexual assaults. The trial court did exclude some testimony on the subject because it was not provided in discovery, it was irrelevant as to whether Williams committed the sexual assaults, and the defense failed to lay the proper predicate to show that the witnesses had observed the defendant and victims during this time frame. T. 553, 556. Defense counsel explicitly admitted on the record that the witnesses could not have observed Williams with R.W. six months before the assault because she was in DHS custody. T. 540,553-54. Clearly, the witnesses could not testify to matters beyond their personal knowledge.[3] Furthermore, even had the defense witnesses had such personal knowledge, the trial court was correct in finding that any testimony that Williams appeared to be a loving father six months prior to the assault had no relevance regarding whether or not he committed the assaults. Common sense dictates that the sexual abuse of a child is done secretly and privately.

Furthermore, Iris Culver testified that she saw Williams and R.W. on the weekend of the sexual assault and observed nothing unusual and opined that the pair seemed affectionate toward each other. T. 531. Danny Tutor testified that Williams was a loving father and seemed to have a normal relationship with his daughters. T. 504. Williams echoed this sentiment when he testified in his own defense. Accordingly, not only was the evidence in question properly excluded because the witnesses did not observe Williams with his daughters in the months prior to the assault, but also

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[3]The appellant's analysis of this issue focuses on the trial court's additional reason for excluding the evidence due to a reciprocal discovery violation. However, it goes without saying that the evidence in question could not have been provided in discovery since it was information that was not within the witnesses' personal knowledge.

such testimony would have been cumulative because three witnesses with personal knowledge testified that Williams was allegedly a good father who had what appeared to be a normal loving relationship with his daughters.

The evidence in question was properly excluded, and Williams second assignment of error must fail.

III. R.W.'S OUT-OF-COURT STATEMENTS WERE PROPERLY ADMITTED UNDER M.R.E. 803(25).

The admission or exclusion of testimony is reviewed for abused of discretion. *Bishop v. State*, 982 So. 2d 371, 375 (¶15) (Miss. 2008). Williams claims that the trial court committed reversible error in allowing Mrs. Smith and Ms. Ballard testify about R.W.'s spontaneous statements implicating her father as a sexual predator, claiming that R.W.'s testimony at the 803(25) hearing rendered her allegations unreliable. The State certainly does not dispute that throughout R.W.'s testimony at the 803(25) hearing, she repeatedly answered, "I don't know," and "I don't remember." However, these replies were followed with R.W.'s testimony that it is not true that she does not know or remember. Williams goes so far as to characterize R.W.'s testimony at the hearing as "recantations." However, it is abundantly clear that R.W.'s testimony at the hearing was due to the fact that the father who sexually assaulted her was sitting only feet away from her in the courtroom. R.W.'s testimony at the hearing, which occurred over two years after the abuse and initial allegations, has absolutely no bearing on the reliability of her earlier reports of the sexual assault.

To determine whether a child-victim's out-of-court statements of sexual abuse are admissible under M.R.E. 803(25), the trial court considers the twelve factors listed in the comment to the rule to determine whether the statements bear a substantial indicia of reliability. *Id.* at 376 (¶17). In the present case, the trial court heard testimony from both sides at the 803(25) hearing and determined that R.W.'s statements of abuse were reliable. Williams discusses only one of the twelve factors in urging this Court to find that the trial court erred in determining that the statements bore substantial indicia of reliability. Nevertheless, the State will briefly show that testimony concerning all twelve factors was presented in support of showing that R.W.'s out-of-court statements were reliable. Although Lowery was not permitted to testify to the hearsay statement R.W. told her, Lowery's

testimony regarding the following factors could still be considered in determining the reliability of the out-of-court statements of abuse to which Smith and Ballard were allowed to testify.

Whether there is an apparent motive of declarant to lie

R.W. had been in Mrs. Smith's care for eight months at the time the allegations were made. T. 25, 28. During this time, she had visited with Williams numerous times.[4] After the first unsupervised, overnight visit was the first time that R.W. reported a sexual assault. No testimony at the hearing indicated that R.W. was motivated to fabricate the allegations.

The declarant's general character

Mrs. Smith testified that R.W. is generally a well-mannered child who is not prone to "making up stories." T. 6. Mrs. Smith further characterized R.W. as trustworthy. T. 58. Ms. Ballard, R.W.'s counselor, testified that R.W. was very mature for her age and communicated effectively. T. 93. Ballard also testified that R.W. shut down and refused to talk about any issue which made her uncomfortable. T. 92-93. R.W. would also become aggressive, slam objects down, and slam doors if the issue of sexual abuse came up. T. 93-94. As noted by Williams, Ms. Lowery, testified that R.W. had character issues insofar as she could be disruptive, aggressive, and defiant at school. T. 120. When asked to elaborate, Lowery stated the following.

> She's just defiant and don't want to do her work or different things. But other times we receive a report from the school where during naptime or different things she was actually sexually acting out acts and sexually aggressive with little boys and trying to act out at naptime with other kids at school.

T. 120. Lowery elaborate further, stating that R.W. actually tried to take off boys' clothes and play with their "private areas." T. 138. Obviously, R.W. not wanting to do schoolwork has no bearing

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[4]After being placed in Mrs. Smith's care, R.W. visited with Williams once a month at first, and then twice a month. T. 28.

on the reliability of her allegations. However, a four year old trying to simulate sexual acts with other children certainly gives credibility to her claim that her father performed sexual acts on her.

Whether more than one person heard the statements

R.W. made the spontaneous statements to three people, Mrs. Smith, Ms. Ballard, and Ms. Lowery. T. 30, 96, 124. Mrs. Smith also stated that her husband was present and heard R.W.'s initial revelation that Williams sexually assaulted her. T. 55.

Whether the statements were spontaneous

Smith, Ballard, and Lowery each indicated that the statements were spontaneous. R.W. was sexually acting out with a babydoll when Smith asked her what she was doing. R.W. began crying and said that her dad hurt her. When asked what she meant, R.W. rammed her fingers between the babydoll's legs. T. 30. Ballard stated that she only asked R.W. if she enjoyed her first overnight visit with her biological parents when R.W. stated that her dad hurt her "down there." T. 95-96. Ballard had no prior knowledge of the allegations before asking the general question about the visit. T. 96. Lowery had not even asked about the overnight visit when R.W. told her "she was glad that she didn't have to go back to visit with her dad because she wouldn't be hurt anymore." T. 125.

The timing of statements

Each statement was made either immediately after or in the weeks following the assault. R.W. told Smith about the assault the very night she was brought back to Smith's home after the overnight visit. R.W. told Ballard about the assault during their first counseling session after the assault. T. 95. R.W. made the statement to Lowery during a home visit one month after the assault T. 123.

The relationship between the declarant and the witness

By all accounts, Mrs. Smith and R.W. have a loving relationship. Mrs. Smith testified that

she loved R.W. like her own child and was in the process of adopting her at the time of trial. T. 261. Ballard testified that she had established a rapport with R.W., they had a good relationship, and R.W. felt comfortable talking to her except about sexual abuse or other uncomfortable topics. T. 92-93. R.W. trusted Smith and Ballard and had relationships with them from the time she was first placed in foster care.

The possibility of faulty recollection by the declarant is remote

As previously stated, R.W. made the allegations immediately after the assault and then again just weeks later. Further, R.W. consistently maintained that her father was her abuser, and she has never accused anyone else of the sexual assault.

Certainty that the statements were made

Smith, Ballard, and Lowery expressed no uncertainty that the statements were made.

The credibility of the witness testifying about the statements

Smith's and Ballard's credibility was never brought into question by the defense.

The declarant's age or maturity

Although R.W. was only four-years-old when the abuse occurred and when she made the statements, Ballard testified that she was mature for her age and that she communicated with adults in a mature manner. T. 93.

Whether suggestive techniques were used in eliciting the statement

Neither Smith, Ballard, or Lowery elicited the statements from R.W., much less in a suggestive manner. The statement to Smith was totally spontaneous. The statement to Ballard was made after a general question about her weekend. The statement to Lowery was made after Lowery asked R.W. if she felt safe in the Smith home.

Whether the declarant's age, knowledge and experience made it unlikely that the declarant

fabricated

R.W possessed sexual knowledge beyond her age of four years. R.W. was "humping" the babydoll before she told Smith that Williams placed his fingers in her "front private." R.W. also sexually acted out at school by trying to take off boys' clothes at naptime and play with their "private areas" and kiss on them. T. 121, 138.

In summary, Williams asks this Court to focus on the child-victim's demeanor at the hearing and determine that her initial spontaneous reports of abuse were not reliable. Williams' focus on R.W.'s testimony at the hearing is misplaced. The trial court fully considered the above factors and did not abuse its discretion in determining that the statements were admissible. Accordingly, the trial court's decision that the statements were admissible must be upheld.

Williams also claims that the trial court erred in allowing unreliable double hearsay to be introduced through Dr. Marcy's testimony. However, Williams fails to provide a transcript citation or even articulate the out-of-court statement made during the forensic interview to which Dr. Marcy supposedly testified. First, Williams never objected to this alleged double-hearsay, wherever it is he thinks it occurred. As such, Williams' claim is procedurally barred. *Baker v. State*, 930 So.2d 399, 412-13 (¶30) (Miss. Ct. App. 2005). Second, although Dr. Marcy did indicate that he used information from R.W.'s medical history in forming his conclusion, he never relayed an out-of-court statement that was given during the forensic interview. The only reference Dr. Marcy made regarding the interview on direct examination was that based on the physical examination alone, his finding would be that R.W. possibly suffered sexual abuse, but the physical findings along with the patient's medical history led him to conclude that R.W. probably suffered sexual abuse. T. 430. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. M.R.E. 801©. Again, no out-of-court statement made during the forensic interview was ever testified to by Dr.

Marcy. As such, he clearly did not relay hearsay within hearsay. Because no hearsay statement was admitted, an 803(4) analysis is not required. Suffice it to say that all of the "medical exception" cases Williams relies on actually involved medical personnel testifying about a hearsay statement. Such is not the case at hand, and Williams' third assignment of error necessarily fails.

IV. NO JUROR MISCONDUCT OCCURRED WHICH WOULD WARRANT A NEW TRIAL.

Williams claims that he is entitled to a new trial because juror Melvyn Blackmon failed to indicate during *voir dire* that she knew witness Wanda Jones. During *voir dire*, the court read the witness list and asked if any of the potential jurors were related to or close personal friends with any of the anticipated witnesses. T. 165. Later, defense asked during *voir dire* if any potential juror had "any close family members with the Department of Human Services that works with these kinds of situations." T. 211. Juror Blackmon did not respond to either question. Defense counsel became suspicious when he saw Blackmon sitting near Jones at the sentencing hearing. T. 621.

Both Blackmon and Jones testified at the hearing on Williams' motion for a new trial. Both women testified that they did not know each other personally, but knew of each other because Blackmon sold Avon products at Jones' place of employment three of four times. T. 624, 634. Both women testified that it had been two or three years since they had seen each other through the sporadic Avon sales. T. 624, 634, 635, 637. Jones testified that at the time of trial, she did not know Blackmon's name, but did recognize her face. T. 625. Jones testified that she recognized Blackmon after Blackmon motioned to her after she testified. T. 626 Jones also testified that they were not sitting together at the hearing. Rather Jones was sitting with a group of individuals, and Blackmon came and sat with the group. T. 624, 630. Blackmon testified that she did not remember being asked during voir dire if she knew any of the potential witnesses. T. 633. Blackmon further testified that she only knew Jones' face, not her name. T. 639. Blackmon acknowledged that when Jones left the stand after testifying, she asked Jones "Aren't you Brenda's friend," to which Jones nodded and walked past. T. 635, 639. Blackmon stated that she had not recognized Jones during her testimony and only thought she looked familiar when she walked past to exit the courtroom. T. 636,

639. Blackmon repeatedly testified that she did not personally know Jones. T. 636. Blackmon insisted that the extent of her knowledge of Jones consisted of briefly seeing her during the three Avon deliveries she made to Jones' place of employment some two years prior to trial. T. 638. Finally, Blackmon testified that her tenuous acquaintance with Jones had absolutely no bearing on her decision that Williams was guilty. T. 639. Blackmon testified that her decision was based strictly on the evidence presented. T. 640.

After the testimony, the trial court made the following findings.

> The Court finds that Ms. Blackmon did not know or recognize the name of Ms. Jones at the time of voir dire, based on the testimony here today. It was only after that she saw her that she realized that she knew her from two or three occasions, approximately two years prior to the trial. Ms. Blackmon further stated that it had absolutely no effect whatsoever on her decision in this case. Therefore, the Court is going to deny the appellant's motion for JNOV on those grounds.
>
> It's not uncommon, and I know, I've been doing this a long time, I would say probably a hundred times have I been in a similar situation where I had somebody's name on a case that I was handling and after I saw them, I realized who it was. And even then it didn't make any difference. And that's not uncommon in smaller communities where we all come in close contact with each other through one relationship or another. Therefore, the JNOV will be denied on those grounds.

T. 645-55.

When a defendant claims in a motion for new trial that a juror failed to respond to a question asked during voir dire, the trial court should determine "whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited." *Odom v. State*, 355 So.2d 1381, 1383 (Miss. 1978). If all three questions are answered in the affirmative, the court then decides whether prejudice to the defendant can be inferred from the juror's failure to respond. *Id.* "It is, of course, a judicial question as to whether a jury is fair and impartial, and the court's judgment will not be disturbed unless it appears that it is clearly wrong." *Doss v. State*, 882 So.2d

176, 183 (¶10) (Miss. 2004) (quoting *Odom* at 1383).

In the present case, the trial court did not explicitly address each of the *Odom* factors, but did find that Williams suffered no prejudice from juror Blackmon's knowledge of Jones. The State must point out that the jury was not asked whether they knew of any of the witnesses. They were instead asked if they were relatives or close personal friends with any of the witnesses. Knowledge of someone is not the same as being close personal friends. In any event, the trial court's determination that juror Blackmon was fair and impartial and did not knowingly withhold critical information during *voir dire* is not clearly erroneous. As such, Williams' allegation of juror misconduct must fail.

V. THE VERDICT IN COUNT I IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

Williams claims that the verdict in Count I is against the overwhelming weight of the evidence because R.W. recanted, was aggressive, and "did not follow the rules." Appellant's brief at 21. The duty of assessing witness credibility lies within the sole province of the jury. *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993). The jury heard that R.W. was aggressive and disruptive at times, but the jury also heard a very good reason as to why this would be. R.W. never recanted her allegation that Williams sexually assaulted her. She did say "I don't know," and "I don't remember" at the hearing, but as previously stated, these statements were followed by indications that it was not true that she did not know or remember who assaulted her. At trial, she was able to tell the jury, as she told three others immediately after the assault, that Williams sexually assaulted her. It is not a reviewing court's duty to second guess a jury's finding of fact or assessment of witness credibility. The appellant has failed to prove his claim or show that the verdict represents an unconscionable injustice.

VI. THE VERDICT IN COUNT IV IS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Williams claims that the State failed to provide legally sufficient evidence to support the jury's verdict of guilty on Count IV sexual assault against H.W. In considering whether the State presented legally sufficient evidence to support the jury's verdict, this Court does not "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Johnson v. State*, 950 So.2d 178, 182(¶ 13) (Miss.2007). Instead, this Court must determine whether any rational juror, after viewing the evidence in the light most favorable to the verdict, could have found that the elements of the crime were proven beyond a reasonable doubt. *Id.*

Dr. Marcy testified as to the severity of H.W.'s anal injuries. Dr. Marcy testified that a baby should have linear folds around the anus, but H.W.'s anus was so swollen and inflamed that the folds were not present. T. 434-35. Dr. Marcy also testified that a baby's anus should be round, but due to swelling or stretching, H.W.'s anus was an irregular shape. T. 935. Additionally, H.W. had a Y-shaped fissure or tear which revealed the tissue underneath. T. 936. Dr. Marcy stated that a very large, hard bowel movement could cause a fissure, but such a tear would occur inside the anal opening. T. 940. Dr. Marcy stated that a tear on the outside of the anus occurs from something pushing into the anus. T. 440. Dr. Marcy ultimately opined that H.W.'s injuries were consistent with anal penetration. T. 441.

H.W. was removed from the Williams home when she was only ten months old. T. 303. The only individuals who ever kept H.W. in the ten months prior to her removal from the Williams' home were the appellant, Kimberly, and Kimberly's seventy-seven year old grandmother.[5] T. 388-

[5]Williams incorrectly states in his brief that H.W. had been exposed to an individual who molested Kimberly when she was younger. Appellant's brief at 22. The record actually shows that

89. Both Kimberly and the grandmother testified that they had never inserted any object in H.W.'s anus. T. 392, 528. Williams also denied sexually abusing H.W. His explanation for the anal tear was that H.W. consumed a baby formula which contained iron and made her constipated. T. 485. Williams elaborated as follows. "It was everything she had straining to do this. And we took her to the doctor a couple times on it and they just said give her a enema medicine on it. Or, you know, to lay off of it. You know, or to cut back on her formula." T. 486.

The jury heard medical evidence that H.W. had been sexually assaulted. The testimony showed that only three people kept H.W. prior to her removal from the Williams home. All three people denied sexually assaulting H.W. The jury heard the testimony and saw the demeanor of the only three individuals who could have committed the assault, and determined that neither Kimberly or her 77-year-old grandmother penetrated H.W.'s anus. Williams received a circumstantial evidence instruction and two theory instruction regarding Count IV. C.P. 102-103. The jury clearly found that Williams' testimony was not credible, nor was his explanation for the severe anal tear. Viewing the evidence in the light most favorable to the verdict, a reasonable juror could find that Williams sexually assaulted H.W. by penetrating her anus.

Kimberly testified that R.W., not H.W., may have been exposed to this individual when R.W. was briefly in Jenny Culver's care prior to R.W. being placed in the Smith home. T. 395-96.

VII. WILLIAMS' INSTRUCTION ON CHILD TESTIMONY WAS PROPERLY REFUSED AS AN IMPROPER COMMENT ON THE EVIDENCE.

Williams offered the following instruction which was refused by the trial court.

> The Court instructs the jury that [R.W], a 7 year old child, has testified in this case about alleged events that occurred when she was 4 years old. The Court instructs you as a jury that you are to view the testimony of this child in light of the child's age and understanding and you are to give it such weight and credit as you deem it is entitled.

C.P. 93. In refusing the instruction, the trial court cited *Goodnite v. State*, 799 So. 2d 64 (Miss. 2001). T. 561. The court also reasoned that the instruction calls too much attention to a particular witness's testimony, and further found that the instruction was not necessary or helpful to the jury. T. 561. On appeal, Williams claims that the refused instruction in *Goodnite* is not comparable to the refused instruction in the present case, and further claims that this Court has approved the granting of the instruction at issue.

In *Goodnite*, the trial court refused two instructions offered by the defendant which advised the jury to "examine closely" and "scrutinize with great caution" the uncorroborated testimony of the child victim. *Id.* at 67 (¶15). This Court held that instructions which tell the jury to view a child victim's testimony with great caution are improper. The *Goodnite* court reasoned as follows.

> [T]he language of the instruction, in telling the jury to view L.H.'s testimony "with great caution," sets out the same standard given to the jury for evaluating the testimony of accomplices and co-defendants. The instruction is given in those cases because of the inherent mistrust of those witnesses' veracity. That is not necessarily the case with a child witness. In that case, it is not presumed that the child may be dishonest, but simply that he or she may not have the capacity to understand sufficiently *68 or remember correctly the events to which he or she is testifying. A child's testimony should not be viewed with a jaundiced eye as to whether or not the child is truthful-a child may be presumed to be as truthful as any other witness. If the jury is to be instructed at all with respect to the testimony of a child, it should be told to view the testimony in the light of the child's age and understanding, not his veracity.

Id. at 67-68 (¶19) (quoting *Bandy v. State*, 495 So.2d 486, 492 (Miss. 1986) (overruled on other

grounds)). Williams claims that the instruction in the present case "is not even close to being comparable" to the refused instructions in *Goodnite*. While it is true that the refused instruction in the present case does not explicitly tell the jury to use great caution in scrutinizing the child-victim's testimony, the instruction impermissibly singles out testimony and implicitly calls the child's credibility into question by emphasizing that she was only four years old at the time of the incident and at trial was required to recall events from three years prior. The *Goodnite* court explicitly stated that "instructions that tend to comment on the truthfulness of the child's testimony should be rejected." *Id.* While the language of the rejected instruction in the present case is not as severe as the language from the refused instructions in *Goodnite*, the instruction in the case *sub judice* is tantamount to a comment on R.W.'s truthfulness because it implies that R.W. may not be able to accurately recall or understand what happened years earlier. As such, the instruction was properly refused under the authority of *Goodnite*.

Williams also relies on *Burbank v. State*, 800 So. 2d 540 (Miss. Ct. App. 2001) and *Jones v. State*, 606 So.2d 1051, 1059-60 (Miss. 1992) to support his position that the trial court erred in refusing the instruction in question. Both cases, like *Goodnite*, cite to *Bandy v. State*, which states, "**If the jury is to be instructed at all with respect to the testimony of a child**, it should be told to view the testimony in the light of the child's age and understanding, not his veracity." 495 So.2d 486, 492 (Miss. 1986) (emphasis added). The language employed by the *Bandy* court indicates that court's doubt that such an instruction would be proper at all. Such doubt is warranted because "[i]t is []well established that instructions to the jury should not single out or contain comments on specific evidence." *Lester v. State*, 744 So.2d 757, 759 (Miss. 1999). This Court has also stated, "A jury instruction that emphasizes any particular part of the testimony given at trial in a manner as to amount to a comment on the weight of the evidence, is improper." *Montgomery v. State*, 891

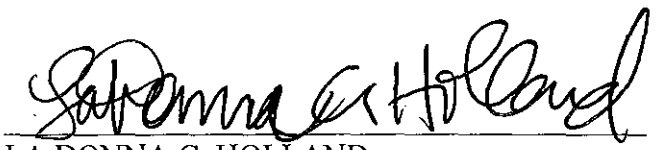
So.2d 179, 184 (¶16) (Miss. 2004) (citing *Manuel v. State*, 667 So.2d 590, 592 (Miss. 1995)). See also Miss. Code Ann. Miss. Code Ann. § 99-17-35. The instruction at issue amounts to a comment on the weight of R.W.'s testimony, and as such it was properly refused. In the event that this honorable Court finds that the instruction was not an improper comment on the evidence, the instruction was also properly refused as being fairly covered elsewhere, as the jury was already instructed on its exclusive duty of weighing the evidence and assessing witness credibility. C.P. 95.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Williams' convictions and sentences.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

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

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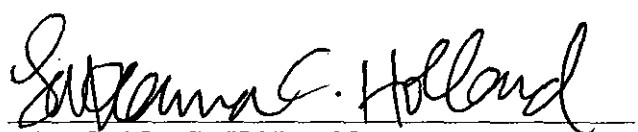
This the 24th day of June, 2009.



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