IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICK WILLIAM COX — APPELLANT

VS. — NO. 2008-KA-2140

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On September 22, and 29, 2008, Patrick W. Cox, "Cox" was tried for car-jacking, kidnaping and the forcible rape of Ms. Jena Ross before a Hinds County Circuit Court jury, the Honorable W. Swan Yerger presiding. R.1.

Mr. Cox was found guilty on all counts. He was given consecutive sentences of thirty, twenty eight, and fifteen years for kidnaping, rape and car-jacking respectively. R. 1353-1354.

After denial of his post conviction motions, Cox filed appeal to the Mississippi Supreme Court. C.P. 132-134.

ISSUES ON APPEAL

I.

WAS THE JURY PROPERLY INSTRUCTED?

II.

WAS RAPE KIT EVIDENCE PROPERLY ADMITTED?

III.

WAS TESTIMONY FROM MS. PENTECOST PROPERLY ADMITTED?

IV.

WAS THE WEIGHT OF THE EVIDENCE SUFFICIENT FOR THE THREE CONVICTIONS?

V.

WAS EVIDENCE OF A CIVIL SUIT RELEVANT?

STATEMENT OF THE FACTS

Mr. Cox was indicted for car-jacking a 2005 Chevrolet Equinox S. U. V., kidnaping Ms. Jenna Ross, the car's owner, and then forcibly raping her on November 11, 2007 by a Hinds County Grand jury. C.P. 5.

On September 22, and 29, 2008, Patrick W. Cox was tried for car-jacking, kidnaping and forcible rape of Ms. Jena Ross before a Hinds County Circuit Court jury, the Honorable W. Swan Yerger presiding. R.1. Mr. Cox was represented by Ms. Allison Kelly from the Hinds County public defenders' office. R. 1.

Ms. Jenna Ross testified that while putting gas in her car, she was forced back inside by an unknown black assailant. R. He threatened to kill her if she did not do as he said. After getting into her car, a 2005 gold Equinox, the man drove off. Ross pleaded to be released, telling him she had three children to care for.

Ms. Ross remembered she had her cell phone. While in the back seat screaming to be released, she testified to calling her friend, Ms. Maria Wright, and her ex-husband, Mr. Gregory Young. Ross testified that she left the phone on while she pled with her abductor to be released. R. 1032-1107.

Ms. Ross testified that the assailant demanded she remove her clothes. This was when he stopped the car in an isolated place. Ross testified that the assailant "licked" her on the neck and breast. R. 1059. She also testified that he had on a black hat. R. 1106. After removing her clothes, Ross testified that she was raped. He threatened to kill her if she did not comply. He also told her he had AIDS. R. 1058. She testified that the male put his penis "inside" her vagina. R. 1060. When someone drove by her parked car, and distracted the assailant, Ross jumped out and ran off. R. 1063.

She ran naked across the road to a BP station. Mr. Harris, who operated the station, let the hysterical woman into the store, and gave her a plastic bag to cover herself with. He called 911 to assist her.

Ms. Ross was taken to the University of Mississippi Medical Center, "UMC" for examination. While there, Ross identified a photograph of Ross. R. 855. She also identified Ross in the court room, testifying that she would never forget his face. R. 1074.

At the hospital, Ross was interviewed by Ms. Patty Welch, a registered nurse, and Ms. Martha Pentecost, a social worker. R. 384. She told them of having been forced into her car against her will, and raped. A rape kit was prepared for testing from Ms. Ross' person.

Officer Malcolm Macon testified to finding a parked gold Equinox. This was on the corner of Red Oak Circle and Gary Drive, just off Highway 49. R. 728-729. Officer Macon testified that when he focused his flash light on the car, someone ran from the car. R. 731. Deputy Jon Cooley came to the scene with a blood hound.

After giving the dog a smell taken from the seat of the car, Stella, the dog tracker, moved north approximately a mile. She eventually stopped beside an abandoned car. Cox was found hiding inside the car. While the suspect said he had been sleeping, he "was sweating," "panting" as well as "very nervous." R. 198; 737. Officer Malcon identified Cox as the person found hiding in the car. R. 738-739.

Ms. Marie Wright, Ross's friend, testified to hearing Ross' voice on the phone. This was shortly after previously speaking to her. She testified to hearing Ms. Ross screaming. She was saying, "Take me back to the store. You can keep the truck. Don't hurt me. I have three kids." R. 249.

Mr. Gregory Young, Ross' ex-husband, testified that he received a startling phone call. R.

589. This was from Ross with whom he had recently spoken to her. They spoke about baby sitting arrangements for their mutual child. Ms. Ross told him in a whisper to call the police, she had been kidnaped. Although she was whispering, he recognized her voice and her call number. Young also heard her say "don't kill me. You can have my car, my money. I have three kids, just let me go." R. 597.

Mr. Young testified that after hearing from Ross, he called 911. Officer Taafe Hughes, and investigator Keith Dowd were notified, and listened on the open phone line shared with them by Mr. Young.

Officer Taafe Hughes testified to having contact with Mr. Greg Young. He wanted her to listen to his mobile phone. She testified to hearing the voice of a hysterical, woman screaming over the phone. Hughes also testified to details of a conversation occurring while Ross was being threatened, and then raped by her assailant rapist. R. 268-279.

Mr. Cox objected to the testimony of Ms. Martha Pentecost, a UMC social worker, who interviewed Ms. Jenna Ross, in the presence of UMC nurse, Ms. Patty Welch. This was on grounds of her testimony being hearsay. Pentecost was not, in his opinion, "diagnostic medical personnel." R. 389. This was for purposes of satisfying the requirements for admissible hearsay for medical treatment under the M. R. Evid. 803(4).

Ms. Pentecost testified that when she spoke with Ms. Ross , Ms. Patty Welch, along with a JPD detective and officer were present. This was inside an examining room at the emergency room at UMC. R. 387.

Nurse Patty Welch testified that Ross told her that she had been kidnaped against her will, as well as raped by an unknown black male. R. 419. Welch noted that she found "redness" on Ross's "labia minor." R. 432. A rape kit was prepared from Ms. Ross' body. R. 433-434.

Officer Charles Taylor testified that he found a black hat on the victim's abandoned car. R. 570.

Ms. Gina Pineda, a DNA analyst, testified that she did a DNA analysis on evidence submitted in the instant cause. She testified that there was sufficient genetic material to determine that Cox's DNA profile was present on the hat. This was the hat found in the car he allegedly abandoned. His DNA profile was also on the breast and neck of Ms. Ross. R. 824-825.

Officer Kimberly Brown testified that she interviewed Ms. Ross. Officers brought photographs of the suspects found in abandoned cars. Brown testified that when Ross saw photograph 1 she became hysterical. She told them while screaming, "That's him." R. 855.

Ms. Kathryn Moyse, another DNA analyst, testified that she found sufficient genetic material for determining that Cox's DNA profile was present "inside" Ms. Ross's vagina. R. 1029.

The trial court found that testimony from Ms. Pentecost would be admissible. The proffer indicated that Pentecost was present in the emergency room with a nurse, Ms. Patty Welch. R. 396. This provided circumstances for assuring "the trustworthiness" of the information provided by Ms. Ross.

Ms. Patty Welch, a registered nurse assigned to the UMC emergency room, testified that she was present with Ms. Pentecost, a social worker. This was when Ross was interviewed for medical diagnosis and treatment. R. 416. Welch testified that Ross told her of being kidnaped, and raped in her own car after she was forced into it by threats that she would be killed.

The trial court admitted the rape kits from Ms. Ross and Mr. Cox into evidence. Cox objected on the basis of discrepancies in the testimony of investigators as to who took the rape kits to Scales laboratory for analysis. The trial court found there no evidence of tampering or by implication or any break in the chain of custody. R. 922; 950.

The trial court granted jury instruction S-4 which included the language that proof of "the slightest penetration of sexual organ of female" was sufficient for proving that sexual intercourse had occurred. C.P. 96. The court rejected Cox's instructions D-6 and D-7 which included the language that the finding of "penetration of the vagina" was needed for establishing rape. R. 1295-1296. This was on grounds of these instructions being "repetitive," given instruction S-4 as well as many others. C.P. 73; 76; R. 1297.

The record reflects that the trial court, after hearing argument and reviewing the statute changes in the supplement volume and case law, found that jury instruction S-4 did not alter or substitute new elements for rape. R. 1295-1296.

Mr. Cox was found guilty on all counts. He was given consecutive sentences of thirty, twenty eight, and fifteen years for kidnaping, rape and car-jacking respectively. R. 1353-1354.

After denial of his post conviction motions, Cox filed appeal to the Mississippi Supreme Court. C. P. 132-134.

SUMMARY OF THE ARGUMENT

1. The record reflects that Cox was not submitted to an ex-post facto law as a result of jury instruction S-4 and others provided the jury. R. 1294-1295; 1297. The language added to M. C. A. Sect. 97-3-65(6) in 2007 was an attempt as making the rape statute gender neutral along with "a minor stylistic change." See 97-3-65(6) (2009 Supp.).

The record reflects that the jury was properly instructed. R. 1297. Jury instruction S-4 stated that forcible rape could be established where there was evidence of "the slightest penetration of the sexual organ of the female." C.P. 96. This was based upon previous case law which found "the slightest penetration" of the female sex organ was sufficient for establishing an evidentiary basis for rape. **Jackson v. State**, 452 So.2d 438, 440 -441 (Miss. 1984).

The record indicates that the victim testified that Cox put his penis "inside" her vagina against her will. R. 1060. Ms. Kathryn Moyse, a trained genetic analyst, testified that Cox's DNA profile was present "inside" Ms. Ross's vagina. R. 1029. Ross's labia minor was "red." R. 432.

In short, the appellee believes the record supports the trial court in finding that S-4 neither altered the definition for rape, nor substituted new elements for proving rape. R. 1295-1296; 1297; C.P. 73, 79, 96. **Taylor v. State**, 597 So. 2d 192, 195 (Miss. 1992).

2. The record reflects that the trial court admitted the rape kits and rape kit admission forms into evidence. R. 923; 928; 950-951. The record does not reflect any basis for finding that any "tampering" with or altering of the evidence occurred. **Wilburn v. State** 856 So.2d 686, 689 (Miss. App. 2003). While there were discrepancies as to who took which of the rape kits to and from Scales Laboratory, Officer Monroe resolved this issue. He testified that he took the victim's rape kit to Scales. R. 931. His signature was on the admission form admitted into evidence. R. 928.

Officer Monroe testified that both he and Lewis worked together for the District Attorney's

Office on this case. He believed that Lewis may have returned the tested genetic evidence to their offices prior to it being brought to court. R. 930. Monroe testified that the evidence was kept at his office. His door was locked up when he was not present. Both DNA analysts testified their was no evidence of contamination or degradation of the biological evidence they tested. R. 780 ; 978.

The record reflects that the evidence submission forms for the suspect's and the victim's rape kits were admitted into evidence without objection from Mr. Cox. R. 928; 950-951. They had Mr. Monroe's and Mr. Lewis's signature on them. The appellee would submit that the record reflects a lack of evidence that any "tainting" of evidence occurred based upon alleged breaks in the chain of custody or for any other reason.

3. The record reflects that the testimony of Ms. Pentecost was properly admitted. R. 396. The record reflects that she was present as part of an admission team. R. 387. This team included Ms. Patty Welch, a registered nurse. See M. R. E. 803(4) and **Anthony v. State** 23 So.3d 611, 617 (Miss. App. 2009) for criteria for admission under Rule 803(4).

In addition to Pentecost, and Welch, two police officers were present when Ms. Jenna Ross was admitted into the UMC hospital for medical diagnosis and treatment. R. 378-412; 413-484.

4. The record reflects that there was credible, substantial corroborated evidence in support of Cox's convictions for car jacking, kidnaping and forcible rape. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993). Ms. Ross's testimony of being forced into her car, driven to an isolated location against her will, and then raped was corroborated by numerous witnesses. R. 180; 248; 260; 579. These witnesses included Ross's best friend, Ms. Maria Wright, her ex-husband, Mr. Gregory Young, and Officers Taafe Hughes and Keith Dowd. They testified to listening to Ross's obviously distressed, if not hysterical voice. R. 180 248; 260; 579. This was under circumstances from which it could be inferred that she was being held against her will, and being forcibly raped. She was being

threatened by an unidentified male.

Ms. Ross was also corroborated by DNA evidence. Cox's DNA profile was found on Ross's neck, breast, and and "inside" her vagina. R. 824; 1029. This corroborated her testimony about being "licked" on "my neck," and "my breast" prior to being raped by her assailant. R. 1059. She identified her assailant before the jury as being Cox. R. 1074. The black hat left in Ross's car also contained biological evidence which fit Cox's DNA profile. R. 793; 824; 1106.

5. This issue was waived for failure to make an adequate record. The record does not contain any "proffer" of how the civil suit was relevant to the testimony of Ms. Ross to the best of the appellee's knowledge. **Metcalf v. State** 629 So.2d 558, 567 (Miss. 1993) and M R E. 103(a)(2) and 403.

The trial court found there was a lack of evidence that testimony about a civil suit filed by the victim against Sunrise Convenience Store was relevant. R.E. 15.

Additionally, The record reflects that Ms. Ross was subjected to thorough cross examination. R. 1074-1106. This included proposed testimony about her employment history on unsubstantiated grounds of the victim allegedly needing money. R. 1101.

Therefore, the appellee would submit that this issue was not only waived, it was also lacking in merit.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THE JURY WAS PROPERLY INSTRUCTED.

Mr. Cox argues that the trial court erred in granting jury instruction S-4, and denying his instructions D-6 and D-7. C.P. 73; 76; 96. Cox believed the legislature altered a definition of "sexual intercourse" under an amended rape statute in March, 2007. He believes S-4 incorporated this alleged new definition. This action allegedly subjected him to "an ex-post facto law." Cox argues that this allowed the jury to convict him even though he believes there was no convincing scientific evidence that his penis penetrated the victim's vagina. Appellant's brief page 14-18.

The record reflects that this is a case where penetration of the vagina was fully corroborated. Ms. Jenna Ross testified clearly and unequivocally that Cox penetrated her vagina with his penis. She testified that Cox put his penis "in my vagina." R. 1060.

Q. Where did he stick his penis?

A. **In my vagina. I was screaming and hollering and he told me to shut up. He wasn't hurting me. I got three kits. It wasn't hurting.** R. 1060. (Emphasis by appellee).

Cox was indicted under M. C. A. Sect. 97-3-65 (4)(a) for having "forcible sexual intercourse with another person." Under 97-3-65(6), which defines intercourse, the statute stated "Penis...inserted into the vagina..."

The record also reflects that Ms. Kathryn Moyse, a DNA analyst, testified that Mr. Cox's DNA profile was found "inside" the vagina. This was based upon genetic analysis of the vagina swab from Ms. Ross.

Q. You can tell me he penetrated–someone with that profile penetrated her, though?

A. **I can tell you that his DNA was inside her on the vaginal swab, yes.** R. 1029.

(Emphasis by appellee).

The record reflects, as noted by the trial court, 97-3-65 (6) was altered in 2007 to make the statute "gender neutral." After the phrase, "the penis of the male is inserted into the vagina of the female" was added the following clause: "or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female." M. C. A. Sect. 97-3-65(6),(2007 Supp.).

The record reflects that the trial court, after hearing argument and reviewing the statutory changes in the 2007 supplement volume and case law, found that jury instruction S-4 was adequate for instructing the jury. It was adequate for instructing them on the evidence needed for establishing a rape conviction beyond a reasonable doubt. The record also reflects that many other instruction were provided by the court, by the prosecution and by the defense. R. 1297.

> Trial Court: All right. And then in the **Jackson versus State** case, which has been referred to several times, the court has already mentioned there the language in that case as to why it is the general law that in a rape case, some penetration is required. Only slight penetration of private parts is required to constitute the offense. And then refers to other courts upholding rape convictions where slight penetration of vulva or labia is shown and cites a whole list of cases from other states. So in view of the –the case law, the court's of the opinion that S-4 should be given. R. 1294-1295.

In **Morris v. State** , 913 So.2d 432, 435 (Miss. App. 2005), the court pointed out that a victim's testimony of digital penetration was sufficient for providing an evidentiary basis for a jury instruction for rape. This was in a case lacking any medical corroboration, which we have in the instant cause.

> ¶ 13. At trial, S. R. gave testimony that Morris digitally penetrated her private parts. S. R.'s testimony is sufficient to establish an evidentiary basis for the act of penetration. The lack of medical testimony does not vitiate the claim of slight penetration of the vulva or labia. These are terms of biology, which are accorded their ordinary usage in describing the victim's account. The Mississippi Supreme Court has held that the "totally uncorroborated testimony of a victim is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other

> evidence." **Christian v. State**, 456 So.2d 729, 734 (Miss.1984). The victim's statements regarding Morris' intrusion into her private body parts were sufficient to warrant an instruction regarding digital penetration. Although her testimony is contradicted by the accused, credibility is to be determine by the jury.

In **Jackson v. State**, 452 So.2d 438, 440 -441 (Miss. 1984), the Supreme Court found that "slight penetration" of the private parts of the victim was sufficient for a rape conviction. Evidence of penetration of "the labias" was found sufficient for establishing penetration for purpose of the rape statute.

In the instant cause, Nurse Welch testified that her examination revealed "erythema," or "redness" and "painfulness" on Ms Ross's labia minor. R. 432.

> While it is the general law that in a rape case some penetration is required, only slight penetration of the private parts of the victim is required to constitute the offense. Jackson was seen on top of the child in the very act of committing the rape. **The doctor's testimony showed penetration to the extent of causing traumatic injury to the child's major and minor labias. This was sufficient penetration within the meaning of the statute.** Horton v. State, 374 So.2d 764 (Miss.1979); Lang v. State, 87 So.2d 265, 230 Miss. 147 (1956), cert. den. 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed.2d 167, citing 75 C. J. S. Rape § 10b. (Emphasis by appellee.)

In **Taylor v. State**, 597 So. 2d 192, 195 (Miss. 1992), this Court stated that the trial court's instructions must be taken together. They need not cover every point of importance as long as the point is fairly presented elsewhere. In the instant cause, instruction S-4 included "the slightest penetration of the sexual organ." In Cox's proposed instructions, he stated "penis inserted into vagina" C.P. 73;76; 96.

> Our well settled rule is that on appeal we consider complaints of error in jury instructions by reading the instructions as a whole. All instructions "are to be read together and if the jury is fully and fairly instructed by other instructions the refusal of any similar instruction does not constitute reversal error." **Laney v. State**, 486 So. 2d 1242, 1246 (Miss. 1986). **Not every instructions need cover every point of importance, so long as the point is fairly presented elsewhere.**
> (Emphasis by appellee).

In **Butler v. State** 608 So.2d 314, 320 -321 (Miss. 1992), relied upon by Cox, the felony

child abuse statute was altered in instructions from statutory language that include "any bone..fractured,"or body part "mutilated, disfigured or destroyed" to the more general, "intentionally injure" the child so as "to cause serious bodily injury." This was in 1989.

> On April 11-12, 1989, the date of the commission of the crime, Miss. Code Ann. § 97-5-39(2) required in order to convict of child abuse that the injury inflicted must have been "in such a manner so that any bone is fractured or any part of the body of such child is mutilated, disfigured or destroyed." Miss. Code Ann. § 97-5-39(2) was amended, effective April 21, 1989, to require merely that the defendant intentionally injured the child "in such a manner as to cause serious bodily harm."

In **Rushing v. State** , 753 So.2d 1136, 1146 (Miss. App. 2000), also relied upon by Cox, the Court found the trial court altered the indictment in instructions. It did so by including an element for the offense that was not originally stated in the indictment. Under the disjunctive aggravated assault statute "serious bodily injury" was included in section (a) while using "a deadly weapon" was included in (b).

> By giving jury instruction C-7, the trial court indirectly amended the indictment, by dropping the serious bodily injury element of § 97-3-7(2)(a), and substituting the deadly weapon element of § 97-3-7(2)(b).

The record reflects that the trial court found that jury instructions D-6 and D-7 were rejected because they would be "duplicative." R. 1295-1296.

The record reflects that the jury was properly instructed. R. 1254-1299. There were many other instructions provided by the trial court, including C-2, C-3,S-1, S-2. S-3, S-4, S-6, S-7 and S-8 in addition to defense instructions D-3, D-9 and D-10. R. 1297.

The appellee would submit that there was no evidence that Cox was submitted to an ex post facto law. based upon use of the gender neutral language added to M. C. A. Sect. 97-3-65(6) (Supp. 2007).

In short, the appellee believes the definition of "forcible rape" as stated in S-4 was not

substantially altered. It merely included the more general language "slightest penetration of the sexual organ" rather than the more specific "penis inserted in vagina" language offered in Cox's proposed instructions. C.P. 73, 76, 96.

Therefore, the appellee would submit that Mr. Cox was not subjected to any ex post facto law. Nor was his rape indictment altered by the instructions given which included S-4 among many others. R. 1297.

This issue is lacking in merit.

PROPOSITION II

THE RAPE KIT WAS PROPERLY ADMITTED INTO EVIDENCE.

Cox argues that the trial court erred in allowing rape kits to be admitted into evidence. He argues this was error because there were inconsistencies in the testimony of law enforcement about how the rape kits were collected, labeled, taken to the genetic labs, tested, with the positive results documented and then returned to law enforcement for submission during the trial. Cox argues there was a break in custody based upon this conflicting testimony of Officers Lewis and Monroe. Appellant page 18-22.

The appellee believes the record supports the trial court in finding that the suspect and the victim's rape kit was properly admitted into evidence. R. 923; 928; 950. The record reflects that the trial court, after hearing objections, found there was no evidence that any "tampering" with or altering of the evidence ever occurred. While there were discrepancies as to who took the rape kits to Scales Biological Laboratory for testing, and then after testing returned them, the trial court found this could be dealt with on cross examination. R. 923.

It was dealt with during the testimony of Officer Wayne Monroe. Monroe testified that, as shown by his signature on the admission form admitted into evidence, he took Ms. Ross' rape kit to Scales Laboratory for testing. He testified that Lewis who had previously testified was mistaken in testifying that he had done so. While Lewis had handled some rape kit evidence prior to trial in this case, as well as in others, he was not the person who submitted it to Scales for testing. In short, Officer Monroe's testimony indicated there was no break in custody, based upon the conflict between his testimony and that previously heard from Officer Lewis.

Officer Wayne Monroe testified that he took the victim's rape kit to Scales. R. 931. This was after he received it from investigators with the JPD. Monroe testified that both he and Officer Lewis

worked for the District Attorney's Office. They worked together on this case. Monroe testified that Lewis may have received the evidence after it was tested by Scales laboratory, and placed it in their office R. 930. Monroe testified that the evidence was kept at his office. His door was locked up when he was not present. He also testified that it was an old building and it was cold at times.

> Q. What does it say you brought down there?
>
> A. Sexual assault kit from victim, Jenna Ross. Vaginal swabs from victim. Sexual assault–I guess that's SAE kit from Jenna Ross. Y filer. Is that vulvar?
>
> Q. Vulvar?
>
> A. Vulvar swabs from victim. SAE kit from Jenna Ross. Y filer.
>
> Q. **And that was filled out in your presence; was it not?**
>
> A. **Yes, sir.**
>
> Q. **And that–your signature, what does that mean on that document?**
>
> A. **It's–means that I delivered this to Scales Laboratory.**
>
> McBride: Your Honor, at this time, we'd ask for this evidence submission form to be entered into evidence?
>
> Court: Any objection.
>
> Ms. Kelly: No, your honor.
>
> Court: It may be admitted. R. 928. (Emphasis by appellee).

...

Officer Monroe testified that Mr. Lewis had been mistaken when he stated that he took Ms. Ross' rape kit to Scales Lab for testing. This was in part the result to Lewis working with Monroe on this case, as well as many others involving trips to and from various crime labs and genetic labs.

> Q. And upon learning that Mr. Lewis said he had taken the suspect's kit when you know that you took it, would you–in your opinion, would that be a lie on Mr. Lewis' part or a mistake?

A. I think that would be a mistake. R. 932.

The rape kit evidence taken from Mr. Cox was admitted into evidence without any objection from the defense. R. 950-951. The rape kit admission form was signed by Officer Kenny Lewis. R. 951. Therefore, issues related to Cox's rape kit were waived for failure to make any objection.

In **Russell v. State** , 607 So. 2d 1107, 1117 (Miss. 1993), the Court stated issues not raised during trial on a specific objection were waived on appeal.

> This is the first time the question of voluntariness of the July 27, 1989, statement has been raised in connection with its impeachment use; at trial, Russell challenged impeachment use of his prior statement only on the grounds of authenticity. "It is elementary that different grounds than the objections presented to the trial court cannot be presented for the first time on appeal." **Thornhill v. State** , 561 So. 2d 1025, 1029 (Miss. 1989.)

Both Ms. Gina Pineda, and Ms. Kathry Moyse, the DNA analysts expert witnesses , testified that there was no evidence of contamination or degradation of the evidence submitted to their genetic labs for testing. R. 780; 978.

They also testified about the professionally established procedures and monitored controls used by Reliagene Technologies, and Orchid Cellmark who acquired ReliaGene after Hurricane Katrina, necessary for certifying the accuracy of their genetic testing results.

The trial court found, based upon all the evidence presented, that there was a lack of evidence of any tainting of the evidence. Any factual discrepancies about the specifics of who did what in establishing the chain of custody would be a credibility issue for the jury to consider. When Officer Monroe's testimony clarified the issue of who took the rape kit to Scales Laboratory, there was no objection to the admission of the rape kit submission form. This would indicate to the appellee that there was no break in the chain of custody.

As stated by the trial court:

> And so from the standpoint of chain of custody, the question is whether -and when Scales received it, what condition was it in. Was it in any way tainted, they–did it in any way affect their examination and testing and so on. So thus far, there has been no evidence of tainting.
>
> So as to the chain of custody issue, at this point, it remains that if there are two versions of two different–at least from the standpoint of the jury, then the defendant, of course, can cross examine the witnesses, including any Scales witness, concerning the same of those matters relating to being tainted or what they received it or who they received it from or whatever. All right. So the–the motion at this time is going to be denied. R. 923.

In **Wilburn v. State** 856 So.2d 686, 689 (Miss. App. 2003), the Court found no evidence of "tampering." The burden was upon the defendant to establish some evidence of tampering.

> ¶ 9. A defect in a chain of custody arises if there is any suggestion of tampering or substitution of evidence. **Wells v. State**, 604 So.2d 271, 277 (Miss.1992). The test for improper chain of possession of evidence is whether there is any reasonable inference of likely tampering with or substitution of evidence. **Williams v. State**, 794 So.2d 181, 185 (¶ 10) (Miss. 2001). The burden of proof in establishing tampering with evidence is on the defendant. Id. In this case, Wilburn did not present any evidence that the tape was tampered with. While the envelope the tape was placed in did not have the metal tab, the envelope was not placed in evidence. Furthermore, the testimony of the officers provided the jury with information of who had the tape and where the tape was located at all times. Therefore, we find that there was no abuse of discretion by the trial court.

The record cited above indicates that both the rape kit analysis results and the submission forms were admitted into evidence. R. 923; 928; 950. The submission forms contained Investigator Monroe's and Lewis's signatures. Both Monroe and Investigator Lewis were subjected to cross examination. R. 692-698; 932-940. The trial court found there was no evidence of tampering. R. 923. In other words, the objecting party, Mr. Cox, did not meet his burden of proof for showing break in the chain of custody or that any tampering with the evidence submitted for testing occurred.

The appellee would submit that the record fully supports the trial court's ruling. This issue is also lacking in merit.

PROPOSITION III

THE RECORD REFLECTS MS. PENTECOST'S TESTIMONY AND DOCUMENTATION WAS PROPERLY ADMITTED.

Mr. Cox argues that the trial court erred in admitting testimony by a social worker, who allegedly was not a medical diagnostician. He argues this was a violation of the M. R. Evid. 803(4) for admissible hearsay under the medical exception. He believes statements made by a declarant must be given only if received by him or her in connection with medical diagnosis and treatment. He does not think Ms. Pentecost's testimony met the criteria for admission under this exception. Appellant's brief page 22-24.

The record reflects that Ms. Pentecost, a UMC social worker assigned to the emergency room, testified that she was working as part of a team. This was in the emergency room at UMC. In other words, she was not alone when she spoke with Ms. Ross about her medical condition. The record reflects that when she spoke with Ms. Ross a registered nurse was present, Ms. Welch, along with a police officer and a detective. R. 387.

> Q. Who was present in the room when you–when you met with her?
>
> A. **I believe I noted that JPD Officer Taafee N. Hughes, Detective Kimberly Brown, Patty Welch, which was the SANE nurse, the RN that was there, and myself.** (Emphasis by appellee). R. 387.

The trial court found that Ms. Pentecost's testimony was admissible. The circumstances under which the victim's statements were made at the hospital provided evidence of "trustworthiness."

> All right. Well, we're going to admit it for this reason, Rule–under Rule 803-4, as been referred to, said it refers to regardless to whom the statements are made. **And the court in this case finds that under the circumstances, she's just been brought into the hospital and she's speaking before a nurse and this woman, a social worker. And the circumstances certainly would substantially indicate the trustworthiness.** So far these reasons as well as the fact that the nurse is going to be

called and going to give testimony about the same thing, so there wouldn't be any unfair prejudice to the defendant. R. 396. (Emphasis by appellee).

The record also indicates that Ms. Welch, a registered nurse present for the interview, corroborated Ms. Pentecost's testimony. R. 413-484.

Q. Okay. And when you–you went into the room with–with the social worker, Ms. Pentecost?

A. Yes, sir.

Q. **And when you were in the room with Ms. Pentecost, did she get a history of what had occurred from the patient?**

A. **Yes, sir.**

Q. **And that's her job.**

A. **Yes, sir. We try to do that at the same time the nurse, the social worker and usually the–like a police officer, if they have not already gotten a report. We go in at the same time.** R. 416. (Emphasis by appellee).

The record reflects that the testimony of Ms. Pentecost, the social worker, was consistent with that of the registered nurse, Ms. Patty Welch, who also testified. This would be with regard to the medical diagnosis for their patient, Ms. Ross. R. 398-401; 417.

Q. **What you understand to be the history that the patient presented?**

A. **That she had been raped by a black male. She had been abducted from a gas station. Said she was on her way to work and was abducted and thrown in the back of her truck, taken off to a side road and was raped.** R. 417. (Emphasis by appellee).

In **Anthony v. State** 23 So.3d 611, 617 (Miss. App. 2009), the Court found that if the declarant's statement was consistent with the purpose of promoting treatment, and the content of the statement was relied upon by a physician in treatment it met the criteria for admission.

¶26. Mississippi courts recognize a two-part test for the admission of evidence under Rule 803(4). "First, 'the declarant's motive in making the statement must be consistent with the purposes of promoting treatment,' and second, 'the content of the

> statement must be such as is reasonably relied on by a physician in treatment.' " **Osborne v. State**, 942 So.2d 193, 197-98(¶ 15) (Miss. Ct. App.2006) (quoting **Davis v. State**, 878 So.2d 1020, 1024(¶ 12) (Miss. Ct. App.2004)).
>
> ¶ 27. Rule 803(4) applies to statements made to non-medical personnel, including psychologists. In re S.C. v. State, 795 So.2d 526, 530(¶ 15) (Miss.2001); Davis v. State, 878 So.2d 1020, 1023-24 (¶¶ 7, 13) (Miss. Ct. App.2004); see also M. R.E. 803(4) cmt. This exception also allows for the admission of "statements which relate to the source or cause of the medical problem." **Foley v. State**, 914 So.2d 677, 683 n. 1 (Miss.2005) (citing M. R. E. 803(4) cmt.).

In **Newsome v. State**, 629 So. 2d 611, 615 (Miss. 1990), the Court found that the admission or exclusion of evidence was left within "the trial court's sound discretion."

> The exclusion of inconsequential evidence does not affect Newsome's substantial right to a fair trial and does not require reversal of his conviction. The admission of evidence rests within the trial court's sound discretion and here there was no abuse. **Hall v. State**, 611 So. 2d 915, 918 (Miss. 1992)

The record cited indicates that under the facts of this case there was no evidence of abuse of discretion. Ms. Martha Pentecost's testimony was fully corroborated. She worked not in isolation, but as part of a team which included a registered nurse. In addition, the record reflects that Ms. Ross's statement of being raped by a man claiming to have AIDs was used as a basis for treatment. R. 400. Ms. Ross was examined physically, as well as tested for confirmation of her medical condition. A rape kit was also prepared for submission to Scales Laboratory in Brandon. It was found to contain Cox's genetic profile on her neck, breast, and vagina. R. 570; 824-825; 1029.

The appellee would submit that this issue is also lacking in merit.

PROPOSITION IV

THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF THE CONVICTIONS.

Mr. Cox argues there was insufficient evidence in support of his convictions for car-jacking, kidnaping and rape. He argues there was allegedly a lack of evidence of any vaginal penetration, and that there was conflicting information about the timing of the crucial events in the instant cause. He argues that these discrepancies were sufficient for undermining confidence in the reliability of his three convictions. Appellant's brief page 25-28.

To the contrary, the appellee would submit that the record reflects an abundance of corroborated testimony and evidence sufficient for establishing all the elements of car-jacking, kidnaping, and rape. Ms. Ross' identified Cox in the court room. She testified this was the person who took her gold Equinox, forced her to remain inside, and then forcibly raped her in the back seat of her car. R. 1074.

Fortunately for the prosecution, Ms. Ross remembered she had her "cell phone." It was in her back pocket. When her assailant was distracted driving, Ross dialed "911" and then left it on during her ordeal. R. 1047.

> A. I picked the phone up, I dialed the number and I laid it down and left it on. R. 1047.

This allowed four witnesses to hear Ms. Ross desperately speaking to her assailant while confined inside her own car. These witnesses were Mr. Young, Ms. Ross's ex-husband, Ms. Wright, Ross's best friend, as well as two police officers. R. 180-181; 249 ; 262; 589.

Ms. Marie Wright, Ms. Ross' best friend, testified that she recognized her friend's voice. She had recently spoken to her about their day's activities. After recognizing Ross's voice, she realized Ross was in great distress. She was trying to be released from confinement. She was being held

somewhere against her will. She was screaming and hysterical.

Q. Did–was Jenna responsive to you during this minute?

A. No. She –when–she didn't hear–I guess she didn't hear anything I was saying because I was steady calling. I just heard her screaming and hollering just please take me back to the –take me back to the store. "Don't hurt me. Take me back to the store on 18." Like she was trying to let me know where she was or something. R. 252

Officer Keith Dowd testified to hearing a disturbing call on what sounded like an open phone line. He was with Officer Hughes. R. 180-181. He heard a male voice threatening to kill a female voice. The female voice was "begging" to be released. He also heard the male voice threatening to rape the female. R. 180-181.

Jackson Police Officer Taafe Hughes testified to having been contacted by Mr. Greg Young. R. 260. Young was Ross's ex-husband and father of one of her three children. Mr. Young wanted Officer Hughes to listen to his mobile phone. Officer Hughes testified to hearing the voice of a hysterical, woman screaming over the phone.

Hughes also testified to details of a conversation occurring when Ross was being threatened, and forcibly raped by her assailant and rapist. This included hearing Ross being told "to pull her pants and underwear down", and "spread her legs" out. This was in addition to hearing her assailant telling her she was too "tight."

Q. You can tell the jury what that was?

A. **I heard him tell her to get in the back seat and pull her pants down, pull her underwear down. I heard him tell her to bend over and spread her legs.** Well, I guess she was on her back first. I heard him tell her to spread her legs. And she was screaming, "Stop it hurts." You know, that she hadn't had sex before. It was too tight or something. That's what he said. He was like, "Bitch, why are you so tight?" And then I heard him tell her to bend over backwards. He wanted to do it from behind. It was awful, but...R. 268-269.

...

Q. Did you hear him make any threats to her?

A. **He told her he would kill her if she didn't turn around behind and bend over the back seat. And that's, I guess when she–I know she bent over behind-bent over the back seat because she was like, "I'm doing exactly what you tell me to do. Would you just–you know, please just stop. Please stop." And he was like, "Bitch, do what I tell you to do.**" R. 269. (Emphasis by appellee).

Mr. Gregory Young, Ross's ex-husband, testified to getting a phone call from Ms. Ross. He had recently spoken to her on the phone. However, on this call Ross wasn't talking to him. She was hysterically screaming , "Please don't kill me." R. 597. She was desperately pleading for her life and to be released!

Q. All right. And when she was screaming, I think–did you testify that she said, "Don't kill me"?

A. **Yeah. She was like, "Please don't kill me You can have the car. You can have the money. I got three kids. Just let me go."** She –and she was constantly saying, "Sir." So I'm like why are you saying–you're being polite in a situation like this? Come on you know.

Q. Now, when she was saying this stuff, she wasn't talking to you, right?

A. No, she wasn't talking to me. R. 597. (Emphasis by appellee).

Officer Kimberly Brown testified that she interviewed Ms. Ross. R. 838. This was when she was at the hospital being examined. When Officers from the JPD brought photographs of the three suspects found in abandoned cars in a junk yard, Brown testified that she became "hysterical." She screamed, "That's him." R. 855. She identified Ross's photograph 1 of 3 as being her assailant and rapist.

Q. What did she do when you showed her Exhibit 1?

A. **She went hysterical. She started hollering.**

Q. **What did she holler?**

A. **She shriveled up. She said, "That's him. That's him.**"R. 855. (Emphasis by appellee).

Ms. Jenna Ross testified that she was forced into her car, a 2005 gold Equinox. This was by a man who threatened to kill her at a gas station. He forced her into the back seat of her car. He then drove off, letting the gas pump fall to the ground.

> Q. Now, you–you said that you told him he could have it and you also said you were screaming?
>
> A. Uh-huh.
>
> Q. Tell the jury what your demeanor was like. If they–what would they have–how was your demeanor while all of this was going on?
>
> A. I mean, I was stunned that it had happened to me. I was shocked. I was crying. I just wanted to get out. I didn't care–like I said, I didn't care about the truck. I didn't care about anything. I just wanted to live and just get out the truck. I didn't want him to take me anywhere.
>
> Q. But he did pull off, didn't he?
>
> A. He pulled off. The gas pump was still in my truck when he pulled off.
>
> Q. How did you know?
>
> A. Because I heard it hit the ground. I looked back when it hit the ground. R. 1046-1047.

...

Ms. Ross testified that the assailant threatened to kill her if she did not remove her clothes. He threatened to kill her when she fought and resisted. He then raped her against her will. She testified that he "stuck his penis" in her "vagina." R. 1060.

> Q. Was your face facing toward the back of the truck?
>
> A. My face was facing the back window. He got out–he pulled his pants down. And I was begging him not–I'm begging him, begging him, begging him not to do this to me. "Please don't do it." He did it anyway.

Q. He didn't care?

A. **He didn't care. He stuck his penis in me.**

Q. **Where did he stick his penis?**

A. **In my vagina.** I was screaming and hollering and he told me to shut up. He wasn't hurting me. I got three kids. I wasn't hurting. R. 1060. (Emphasis by appellee)

Ms. Jena Ross, the victim of this tragedy, identified Cox in the court room. R. 1074. She identified him as the person who had taken her SUV, confined her inside with threats of shooting her with a hand gun, and then raped her forcibly against her will inside the car.

Q. **I'm going to ask you if you can recognize in this courtroom the man that kidnaped you and raped you. Can you do that for us?**

A. **Yes.**

Q. Stand up and point him out to this jury.

A. **That's him. That's him. I want him to look at me like he looked at me that night. That's him. Just because they done cleaned him up and shaved his mustache, that's still him (indicating).**

McBride: **Your Honor, I'd ask the record to reflect that the victim has identified the defendant.**

Court: **It may so reflect.** R. 1074. (Emphasis by appellee).

The record reflects that Cox's DNA profile was found on the victim's neck, breast, and vagina as well as on the hat he left in the victim's car. R. 570; 824-825; 1029.

Q. So it's–we feel pretty confident it's him, don't we. 99.9 percent it was him?

A. 99.9 percent of the population it couldn't have been. 99 percent of the population is excluded or couldn't have contributed to that DNA.

Q. .01 per cent –well, it's–it's real–it's a high number. That's what we say for him, right?

A. That's correct.

Q. **It's even higher when we get to her breast?**

A. **That's correct.**

Q. **And it's 100 per cent when we get to the hat?**

A. **Correct.** R. 825. (Emphasis by appellee).

This genetic profile evidence corroborated Ms. Ross' testimony about being "licked" on "my neck" and "my breast." This was done by her assailant in preparation for rape. R. 1058-1059. It also corroborated her testimony about being forcible raped in her own car. She testified he put his penis "inside" my vagina. R. 1060.

Ms. Kathryn Moyse with Scales Biological Laboratory in Brandon was accepted as an expert witness. She testified that the DNA profile found inside Ms. Ross' vagina was consistent with Ross's genetic profile.

Q. You can tell me he penetrated –someone with that profile penetrated her, though?

A. I can tell you that his DNA was inside here on the vaginal swab, yes.

Q. **Okay. His DNA was inside her vagina?**

A. **That's correct.** R. 1029. (Emphasis by appellee).

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence was challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appeal's court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an

> overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

The appellee would submit that when the identification testimony of Ms. Ross was taken as true along with all the other corroborating evidence there was more than sufficient, credible substantial evidence in support of Cox's convictions. Seldom does a criminal case involve this much corroboration. This was based upon Ms. Ross's use of her live "cell phone" during her ordeal. Ms. Ross was also corroborated by testimony of the DNA analysts expert witnesses who testified. R. 570; 824-825; 1029. She was also corroborated by Nurse Welch. Welch found "erythema" or "redness" on Ms. Ross's labia minor. R. 432.

Although Cox chose not to testify, his statement to investigators was that he was innocent of all the charges. R. 1249. This made his credibility an issue for the jury to determine in their deliberations. While the victim was corroborated many times over, Mr. Cox had only his general denials of criminal involvement in support of his claim. R. 180-181 268-269; 570; 597; 824-825; 855.

Mr. Cox's argues in his appellant brief that alleged factual discrepancies about the proper time sequence within which these tragic events occurred on the evening of November 11, 2006 undermine the credibility of the victim, Ms. Ross. Appellant's brief page 24-25. However, this argument is based upon granting Cox favorable inferences based upon these alleged factual

sequential event discrepancies. This would be based upon the testimony of numerous witnesses, and references to documents by various persons about their recollections about when what happened during the investigation on November 11, 2006.

Whereas, on post conviction motions challenging the weight of the evidence, it is the appellee who is entitled to have the evidence consistent with the verdict accepted as true with reasonable inferences. These factual issues about exactly what happened when and in what sequence during a complicated criminal investigation were for the jury to resolve from all the evidence presented. **Mamon v. State**, 724 So. 2d 878, 881 (Miss. 1998).

In **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988) , the Mississippi Supreme Court stated that a conviction could be sustained based upon "the uncorroborated testimony of a single witness."

> With this reasoning in mind, the Court holds that the testimony of Conner was legally sufficient to support Doby's conviction for the sale of cocaine. This Court recognizes the rule that persons may be found guilty on the uncorroborated testimony of a single witness. See **Ragland v. State**, 403 So. 2d 146 (Miss. 1981);...

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion for a new trial should be denied unless doing so would result in an "unconscionable injustice." All the evidence must be considered in the light most consistent with the verdict. In this case, all the evidence consistent with the three verdicts for car jacking, kidnaping and rape.

> Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987).We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State** , 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

The appellee would submit that from the evidence and testimony cited above, it can be

readily inferred, that there was credible, thoroughly corroborated testimony and scientific evidence in support of Cox's convictions for car-jacking, kidnaping, and rape. Seldom does a criminal case have as much corroboration as was presented in the instant cause; nor as little corroboration from an accused.

The appellee would submit that this issue is lacking in merit.

PROPOSITION V

EVIDENCE OF A CIVIL SUIT FOR DAMAGES WAS PROPERLY EXCLUDED UNDER M. R E.103 and 403.

Cox argued that he was prejudiced by the trial court's decision to exclude evidence of a civil action filed against Sunrise Convenience store, which was the service station on highway 18 South from which Ms. Ross was abducted. He believes this prevented him from being able to show bias or prejudice against him by Ms. Ross on cross examination. Appellant's brief page 26-29.

To the best of the appellee's knowledge, the record does not contain "a proffer" as to how testimony about a civil suit against Sunrise Convenience store would have been relevant to the testimony of Ms. Ross. C.P. 1-141; R.E. 1-23.

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated that it did not accept assertions about facts not proven in the certified record of the cause on appeal.

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v. State**, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

In **Metcalf v. State** 629 So.2d 558, 567 (Miss. 1993), the Supreme Court stated that if "a proffer" is not made as to the relevance of excluded testimony, the point was not properly preserved for appeal. See also M. R. Evidence 103(a)(2).

> When testimony is not allowed at trial, a record of the proffered testimony must be made in order to preserve the point for appeal. **Johnson v. State**, 416 So.2d 679, 681 (Miss.1982); **Gates v. State**, 484 So.2d 1002, 1008 (Miss.1986). Metcalf made no formal proffer of testimony.

In addition, the record reflects that Ms. Ross was subjected to thorough cross examination. R. 1074-1106. She was cross examined about what happened to her, and what she did, and said about this assault. She was also questioned about under what circumstances she communicated with

investigators and medical personnel. There was also an attempt to question her about other matters, such as whether she had other employment at Radio Shack in addition to her job at Whitfield State Hospital.

Outside the presence of the jury, the defense argued that the victim might have a motive to lie since she had three children and allegedly needed money. The trial court found that this was not shown to be relevant to her testimony about the charges in this case. R. 1100-1101.

The record reflects that Cox did not testify in his own behalf. R. 1249. His pre-trial statement to investigators was that he was "innocent." He stated that he did not rape the woman, or commit any other crimes against Ms. Ross. R. 219.

If the one page statement included in the record excerpts can be relied upon without any certification, or context provided, it would appear to the appellee that the trial court correctly found that proposed testimony about a civil suit against the convenience store/ gas station was not relevant to the determination of whether Cox was guilty of these charges or not. R.E. 15.

This would be for having car-jacked the victim's car, kidnaped her, and then forcible raped her on November 11, 2006. In addition, to not having been shown relevant, the trial court also found that this could lead to a danger of confusion of the issues, misleading of the jury, and undue delay and waste of time under M. R.E. 403.

As stated by the trial court:

> And of course, Rule 401 has a definition of relevant evidence which means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probative or less probative than it would be without the evidence. The Court doesn't believe–the court is of the opinion that this situation involving a civil suit does not meet the test. Even if it did meet that test, which this court does not believe, under Rule 403, exclusion of relevant evidence on the grounds of prejudice, confusion or waste of time, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay,

> waste of time or needless presentation of cumulative evidence. Except for the latter part there about needless presentation of cumulative evidence, the court is of opinion that all of the above under rule 403 apply, that this civil suit should not be mentioned, should not be brought up for those reasons stated in Rule 403 the court just named, recited. R.E. 15.

The appellee would submit that this issue was waived. It was waived for failure to make an adequate record. The record reflects that a civil suit for damages was never shown to be relevant to the testimony of Ms. Ross. It was no more relevant that an attempt at questioning the victim about her employment history. R. 1100-1101.

The trial court found such testimony was not relevant to the guilt or innocence of Mr. Cox to the charges submitted to the jury in the instant cause. There was also danger of confusion of issues, misleading the jury and waste of time. See M. R. E. 403.

Therefore, the appellee would submit that, based upon the record, the trial court did not abuse its discretion in denying testimony about this civil suit.

This issue is also lacking in merit.

CONCLUSION

Cox's convictions for car jacking, kidnaping and rape should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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