IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CECIL R. BEN — APPELLANT

VS. — NO. 2009-CA-1495-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On May 11,13-14, 2009 Cecil R. Ben, "Ben" was tried for forcible rape of M.F. before a Leake County Circuit Court jury, the Honorable Vernon Cotton presiding. R. 1. Ben was found guilty and given a life sentence in the custody of the MDOC. Ben filed notice of appeal to the Mississippi Supreme Court. C.P. 60.

ISSUES ON APPEAL

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WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE VERDICT?

II.

WAS BEN DENIED A SPEEDY TRIAL?

III.

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STATEMENT OF THE FACTS

In November, 2008, Ben was indicted for forcible rape of M.F. on or about October 3, 2007 by a Leake County Grand Jury. This was under M. C. A. Sect. 97-3-65(4)(a) (1972). C.P. 2

On May 11,13-14, 2009 Cecil R. Ben was tried for forcible rape of M.F. before a Leake County Circuit Court jury, the Honorable Vernon Cotton presiding. R. 1. Ben was represented by Mr. Ottowa Carter, and Mr. James Lane, Choctaw legal counsel. R. 1.

Ms. M.F. testified that she was a student at East Central Jr. College. She lived on Highway 35 outside of Carthage. She road the bus to school each day. She identified Ben as a bus driver with the Choctaw Transit Authority on her route. R. 149.

M.F. testified that on October 3, 2007 , she was the first person that Ben picked up. R. 149. When the bus came to the intersection of highway 35 with 25, Ben pulled off the intersection. R. 150-151. Ben told her he was going to get a few minutes rest. R. 152. Instead Ben came back to where M.F. was sitting. He tried to kiss her and embrace her. R. 153.

She told him to stop and resisted his advances. Although she struggled with him, and hollered, there was no one around. Ben proceeded to forcibly rape her. It was still dark outside. R. 154. She testified he inserted his penis "into" her vagina. R. 156. After the rape, M.F. testified that Ben used some paper towels on the bus to clean himself. R. 159. He then threw them out of the bus.

M.F. testified clearly and unequivocally that he inserted his penis "into" her vagina against her will. She also identified Ben in the court room as the person who had raped her. R. 149.

Mr. Maurice Hines testified that he was M.F.'s friend. They had been friends since attending the sixth grade. Although they were not romantic friends, they stayed in contact with each other almost every day. He testified that she called him by telephone in the evening of October 7, 2007.

R. 204-205.

Mr. Hines testified that he could tell that M.F. was upset. When he asked her what was wrong, she started crying. Although she seemed afraid, she finally told him that she had been raped. R. 206.

Officer Timothy Thomas with the Choctaw Police Department testified that he went in search of the discarded paper towels. These were the paper towels that Ben allegedly used for cleaning purposes after the rape. He testified that they found them at the place indicated by M. F. R. 224. He testified that he took them into his control, and they were submitted for forensic purposes.

Nurse Sharon Hockett testified that she worked with the Choctaw health department. On October 7 , M.F. came to see her with her mother. M.F. was upset, crying, and frightened. R. 258. She said she felt like she was going "to throw up." R. 259.

Hockett testified that M.F. told her she was upset because she had been raped. The Choctaw bus driver raped her on an off ramp off at Highway 35 and 25. R. 266. Hockett testified that no rape kit was prepared because it was more than 72 hours after the rape. R. 267. However, she did draw blood for possible future forensic analysis.

On redirect, Hockett testified that she found nothing in her interview to indicate that M. F. was not telling the truth. R . 274. There was no objection.

Mr. Otis Mingo testified that he worked with the Choctaw Transit system as a dispatcher. R. 277. He knew Ben who was a driver of one of their buses. He testified that he was with Ben when they were both in the presence of M.F. R. 279. This was on October 1, 2007. He testified that Ben made a statement to him when M F had her legs "propped up in the air."

There was an objection to his testimony. The objection was on grounds of relevance, M. R. E. 801 (d) (2)(a) and 404(3). R. 281. After hearing the objection, the trial court found the statement

would be admissible as "a statement against interest." M. R. E. 804(b)(3)

Ben's counsel admitted that he knew Mingo was a state witness, but claimed he did not know the substance of his testimony. Ben's counsel did not request a continuance or request a mistrial. R. 279-292.

Mr. William H. Jones with the Mississippi Crime Laboratory testified that he tested the paper towels. This was for the presence of seminal fluid. Based upon scientific testing, they tested "positive" for male seminal fluid. R. 319; 327.

Ms. Casey Dupont with Orchid Selmark, a private forensic laboratory in Dallas, Texas was accepted as a forensic scientist expert witness. She had special experience and training as a DNA analyst. R. 332-333. He testified that based upon an analysis of the DNA found on the sample it could be determined that the DNA from both M.F. and Ben were contained therein. R. 337.

The trial court denied a motion for a directed verdict. R. 357-358.

Ms. Sandra McNeil with Choctaw Transit testified that on October 3, the day of the alleged rape, Ben clocked in an hour earlier than normal. R. 375.

Ben was found guilty and given a life sentence in the custody of the MDOC. R. 437. His post conviction motions were denied. C.P. 51-59. Ben filed notice of appeal to the Mississippi Supreme Court. C.P. 60.

SUMMARY OF THE ARGUMENT

1. The record reflects credible, substantial partially corroborated testimony in support of Ben's conviction. M.F. identified Ben as her rapist. R. 149. M.F.'s testimony was corroborated as to the circumstances surrounding the rape. The paper tissues used by Ben after intercourse were located where M.F. indicated they could be found. R. 164; 224. DNA testing from a tissue sample confirmed that Ben and M.F.'s genetic profile was present. R. 327; 337. The fact that there were no visible bruises or scratches merely confirmed her testimony about being overpowered by Ben, a strong adult male.

There was also testimony concerning Ben's lustful disposition toward M.F. R. 294. **Otis v. State** 418 So.2d 65, 67 (Miss. 1982); **Le v. State** 913 So.2d 913, 957 (¶164) (Miss. 2005). There was evidence that Ben had opportunity, preparation, access without other witnesses present, and a disposition to sexually assault M.F.

2. Benn was not denied a speedy trial under the facts of this case. The record reflects that the trial court found after a hearing, that Benn's speedy trial rights were not violated. R. 51-53. Ben never requested a trail date, and could show no prejudice. The reason for much of the delay was the time needed to complete the DNA testing. Once the results were received, Ben was indicted at the next grand jury in Leake County. R. 52. **Houser v. State**, 29 So. 3d 813, 821-822 (¶ 21) (M. C. A. 09).

3. The record reflects that the trial court properly found testimony from Mr. Hines was admissible under hearsay exceptions. M R E. 803(3). Hines testified that M.F. was upset, and seeking advice. This was under the strain of something disturbing her. He testified to merely asking her what happened. This was when she told him of being raped. She was then taken to the Choctaw nurse for medical diagnosis. The statement to Hines was admissible to explain the subsequent actions of the victim in reporting the rape after being traumatized. **Sherrell v. State** 622 So.2d 1233, 1237 (Miss.

1993).

The Choctaw nurse's testimony was admissible under M. R. E. 803(4). **Marshall v. State**, 812 So.2d 1068, 1074 -1075 (¶18) (Miss. App. 2001). The record also reflects no objection to the nurse's testimony on any evidentiary basis. Complaints about her testimony were therefore waived. **Russell v. State**, 607 So. 2d 1107, 1117 (Miss. 1993).

4. The record reflects issues related to the jury panel's composition were waived. There was no objection to the jury's composition before it was sworn in. **Wardley v. State** , 760 So.2d 774, 777 (Miss. App.1999). In addition, the record indicates that jury panel was properly selected. There is a presumption that the jury panel followed their instructions, verbal and written, and rendered an impartial verdict. **Bell v. State**, 631 So. 2d 817, 820 (Miss. 1994).

5. The record reflects that Mr. Mingo's testimony was properly received. The record reflects there was no request for a continuance or a mistrial by the defense. **McGilberry v. State** , 741 So. 2d 894, 918 (Miss. 1999). The original objection was not about a discovery violation but rather "relevance." R. 281. The trial court implicitly found that its probative value of the testimony exceeded its prejudicial effect.

In addition, the record reflects that Mingo was cross examined about the alleged prejudicial statement "that stuff looks good." R. 295-304. This waived his complaint about it being prejudicial to his defense which was consent. **Fielder v. State**, 235 Miss. 441, 108 So. 2d 590 (1959).

6. Failure to raise the unconstitutionality of a sentence with the trial court, waives the issue on appeal. **Ivory v. State** , 840 So.2d 755, 758 -759 (Miss. App. 2003).

In addition, Ben's sentence was within the statutory guidelines for one convicted of rape. M. C. A. Sect. 97-3-65(4)(a) (1972). The record reflects that it was not the trial court who determined

Ben's life sentence, but the Leake County Circuit Court jury. R.E. 40. **Barnwell v. State**, 567 So. 2d 215, 221-222 (Miss. 1990). Ben's complaint should be directed to the legislature and not this court.

ARGUMENT

PROPOSITION I

THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE GUILTY VERDICT.

Mr. Ben argues that there was insufficient credible evidence in support of his conviction. He argues that there were numerous alleged inconsistencies in M. F.'s testimony. There was also no corroboration of the fact that she had "forcible sexual intercourse." Ben complains that M. F. did not report the alleged rape for some four days. She did not have any physical examination and therefore no corroboration that she was forced into having sexual intercourse with Ben. In other words, Ben admits that he had intercourse with M.F., he merely denied that it was forced. Rather he informed investigators that it was consensual. Appellant's brief page 4-14.

The appellee would submit that the record reflects that there was sufficient credible evidence for the trial court to have denied a directed verdict and peremptory instructions. This was on grounds of allegedly no corroboration as to a forcible rape. R. 354-358; 389.

Ms. M. F. testified that she was a student at East Central Jr. College. She lived on Highway 35 outside of Carthage. M.F. road the bus to school which was miles away from her home each day. She identified Ben as a bus driver with the Choctaw Transit Authority. R. 149.

M.F. testified that on October 3, 2007, she was the first person that Ben picked up. R.149. The bus arrived earlier than she had expected. It was around 4:30 A.M. When the bus came to the intersection of highway 35 with 25, it pulled off the intersection. R.150-151. Ben told her he was going to get a few minutes rest. R. 152. Instead Ben came back to where M.F. was seating. He tried to kiss her and hold her. R. 153.

She told him to stop and resisted his advances. Although she pushed him, and screamed

there was no one present or near the bus. M.F. testified that Ben held her down and forcibly raped her.

It was still dark outside. R. 154. She testified he inserted his penis into her vagina. R. 156. After the rape, M.F. testified that Ben used some paper towels on the bus to wipe himself after intercourse. R. 159. He then discarded the tissues by throwing them out of the window of the bus. R. 157.

Ms. M.F. testified clearly and unequivocally that he inserted his penis "into" her vagina against her will. She also identified Ben in the court room as the person who had raped her.

Q. And do you see the same Cecil Ben in the courtroom today?

A. Yes.

Q. And where is he seated?

A. Right over there.

Thames: **Let the record reflect that the witness is indicated and pointed to the defendant seated at counsel table.** R. 149.

...

Q. **What did he do with his penis in relation to your vagina?**

A. **He forced his penis inside me.**

Q. **Into your vagina?**

A. **Yes.** R. 156.

...

Q. Now, what happened to your clothes that he had taken off of you?

A. It was on the seat, on the next aisle.

Q. Okay. When he got through or two minutes after he forced himself on you, what did he do?

A. **He just went to the front and wiped himself and threw the paper towels**

outside.

Q. **Where was the paper towel?**

A. **In the front. It was a box of paper towels.** R. 157.

M.F. testified that she took law enforcement investigators to the place where she saw Ben discard the paper tissues he had used.

Q. Okay you did take 'em to where it happened?

A. Yes.

Q. **Okay. Now, while you were there, did you observe them find anything or-**

A. **They found the paper towels.**

Q. Okay. And where did they find the paper towels?

A. On the ground–it wasn't like the exact place where I would have been raped, but it was somewhere around there, on the floor.

Q. Had you already told em about the paper towels?

A. Yes.

Q. **So you say they found em. Did they take em up then or pick em up.**

A. **Yes, they did.** R. 164. (Emphasis by appellee).

Officer Timothy Thomas with the Choctaw Police Department testified that he went in search of the paper towels. These were the paper towels that Ben disposed of after cleaning himself. Thomas testified that they found them at the place indicated by M. F. R. 224. He testified that he took them into his control, and they were submitted for forensic testing purposes.

Q. Okay. Now, when you arrived there, were you specifically looking for anything at the scene?

A. Just what she had described that he had used and threw out the window.

Q. **What was thrown out the window that he used?**

A. **She described it as a –brown or pink looking paper towel of some sort.**

Q. **Did you take custody or possession of that stuff?**

A. **Yes, I did.** R. R. 224. (Emphasis by appellee).

Mr. William H. Jones with the Mississippi Crime Laboratory testified that he tested the paper towels. He tested for the presence of "seminal fluid." This was State's exhibit 3. Based upon scientific tests, they tested "positive" for male seminal fluid. R. 319; 327.

> Q. **And would that have contained–or contain the positive paper towel samples with seminal fluid, as well as blood from M.F. and Cecil Ben?**
>
> A. **That's correct, it would. Our item 2 was the paper towels.** There were three of them to a second test area. And then the blood stains were sub-itemized from the original packaging, 3A1 and 3A2. ...the testing I did was to determine whether seminal fluid was present or not. R. 319.
>
> Q. So that was what I-these tests that you're conducting are they accurate to determine if a substance is seminal fluid.
>
> A. Yes, they're accurate and specific, too, to males–human male seminal fluid. R. 327. (Emphasis by appellee).

Ms. Casey Dupont with Orchid Selmark, a private forensic laboratory in Dallas, Texas, was accepted as a forensic scientist expert witness. She had special experience and training as a DNA analyst. R. 332-333. She testified that that the DNA material came from both M.F. and Ben.

> Q. From your experience, or your expert opinion, was–who did the DNA belong to on those–in those–on that particular cutting from the paper towel?
>
> A. Okay. **Based on the results that were-based on the tests that were performed in our laboratory, and the results that we obtained, the mixture on the cutting from the paper towel was consistent with being a mixture of M.F. and Cecil Ben. In other words, both of their DNA profiles could be included in the mixture that we obtained from the paper towel.** R.337. (Emphasis by appellee).

The record summarized with cites to the record reflects that M.F. identified Ben as the person who raped her on October 3, 2007. R. 149. She testified he put his "penis" "into" her "vagina"

against her will. R. 156. M.F. was corroborated as to the place where the paper towels used after the rape could be found. R. 214.

The Choctaw Tribal police found them at the place she designated. R. 164; 224. M.F. was corroborated by the presence of "seminal fluid" on the discarded paper towels. This was by a forensic expert, Mr. Jones from the Mississippi Crime Laboratory. R. 319.

She was also corroborated by a second independent forensic DNA expert. He testified that both M.F.'s genetic code was present along with that of Ben on the sample he examined scientifically. R. 294. And finally, M. F. was corroborated by Otis Mingo, a Choctaw Transportation employee, who testified to Ben's lustful disposition toward M.F. two days prior to the alleged actual rape. R. 337.

Ben's denial of "forcible sexual intercourse" came only after there was more than sufficient credible evidence of rape.. He chose not to testify. He assured the court that it was his decision, after consulting with counsel, not to testify. R. 388.

Therefore, the crucial issue was for the jury to decide. The jury as trier of fact and judge of credibility found M.F.'s credibility with partial corroboration sufficient for supporting Ben's conviction. R. 437.

In **Otis v. State** 418 So.2d 65, 67 (Miss. 1982), the Supreme Court affirmed Otis' conviction. Although there was a lack of corroboration as to the rape itself, there was corroboration about facts surrounding the incident, as there was in the case sub judice.

> The testimony of the prosecutrix is positive and unequivocal. It covered all the essentials required to make out a case of forcible rape. **Although she was not corroborated as to the actual rape itself, there were other facts surrounding the incident which had corroboration. It is conceded that a person may be found guilty of rape on the uncorroborated testimony of the prosecuting witness. Killingsworth v. State**, 374 So.2d 221 (Miss.1979); **Dubose v. State**, 320 So.2d 773 (Miss.1975); **Goode v. State**, 245 Miss. 391, 146 So.2d 74 (1962); **Blade v. State**,

240 Miss. 183, 126 So.2d 278 (1961).We are of the opinion that the verdict is not contrary to the overwhelming weight of the evidence. (Emphasis by appellee).

The record reflects that the trial court denied a motion for a directed verdict. It was based upon the alleged inconsistencies or contradictions in M.F.'s testimony, which allegedly discredited her claims. R. 354-358.

In addition, the record reflects that Ben presented two witnesses on his behalf. R. 360-383. Therefore, Ben waived issues related to the sufficiency of the evidence.

In **Stever v. State** 503 So.2d 227, 230 (Miss. 1987), the Supreme court found Stever waived the sufficiency of the evidence. He did so when he presented testimony in his own behalf. This was after denial of a directed verdict.

> Stever waived his complaint about the failure of the trial court to grant him a directed verdict when the prosecution rested its case and he went forward with the presentation of evidence on his own behalf. To do otherwise requires the heart of a gambler and nerves of steel, yet to go forward with evidence waives this assignment of error. **Clements v. Young**, 481 So.2d 263 (Miss.1985); Shavers v. State, 455 So.2d 1299 (Miss.1984); Rainer v. State, 438 So.2d 290 (Miss.1983).

In **Le v. State** 913 So.2d 913, 957 (¶164) (Miss. 2005), the Supreme Court quoted from **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 2005), in stating the standard of review on a challenge to "the weight of the evidence."

> ¶ 164. The standard of review regarding the weight of the evidence is: A motion for a new trial is addressed to the sound discretion of the trial judge who may grant a new trial if he deems such is required in the interest of justice or is the verdict is contrary to law or the weight of the evidence. The trial judge should not order a new trial unless he is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice.
> **In reviewing this claim, this Court must accept as true the evidence favorable to the State. This Court will reverse only when it is convinced that the trial judge has abused his discretion. Further, where there is conflicting testimony, the jury is the judge of the credibility of the witnesses. Wetz**, 503 So.2d at 812 (citations omitted). (Emphasis by appellee).

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any "conflicting evidence" created by defense witnesses was to be resolved by the jury. What the jury believes and who the jury believes as to what piece of evidence presented is solely for their determination. As stated:

> Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

The appellee would submit that there was sufficient credible evidence in support of Ben's conviction. M.F.'s testimony was not discredited as to the fact of her being forcibly raped. As shown with cites to the record, there was corroboration for the intercourse, as well as the rape. There was also corroboration of access, opportunity, preparation and a disposition to sexually assault on the part of Ben. Ben checked in an hour early the day of the rape, corroborating M.F.'s testimony. R. 375.

Ben did not testify and dispute the rape. R.388. Ben's statements to investigators about sexual relations being consensual was for the jury to resolve along with all the testimony and evidence. Ben argued consent vigorously to the jury. R. 408-426. They did not find his claim of consensual sex convincing given the evidence before them.

This issue is lacking in merit.

PROPOSITION II

BEN RECEIVED A SPEEDY TRIAL UNDER THE FACTS OF THIS CASE.

Ben argues he was denied his right to a speedy trial. He was denied his right to a speedy trial because there was more than eight months between his arrest and his trial. While there was a delay because of the need for DNA testing, he argues this was not his fault. And he believes that this alleged delay prejudiced him. It caused him anxiety, as well as by limited his ability to defend himself against the charge. Appellant's brief page 14-19.

To the contrary, the record reflects that the trial court denied a motion to dismiss for failure to provide Ben with a speedy trial. R. 32-52. After hearing argument, the trial court found that Ben had not asserted his right prior to his trial date, had not shown any prejudice to his defense, and that the reason for the delay was the need to complete DNA testing at a forensic laboratory in Dallas, Texas. After the testing results were received, Ben was indicted at the next meeting of the grand jury. The Leake County grand jury only meets three times a year.

After hearing testimony, the trial court found there was a lack of evidence in support of finding that Ben's speedy trial rights had been violated. As stated:

> So construing rule, factors one and two, I'm going to construe those together. Ordinarily a fifteen month delay would be presumptively construed and weighed against the state. But when you factor in the Texas laboratory being involved, and also the grand jury's meeting three times a year here and the first opportunity after July that I was presented, I find no-that would be entitled to no relief as far as how long. And then number two, the reason for the delay, the reason being the gathering of evidence. And number three, I think you almost confessed that, as far as the–his duty to assert his right. Number four, again, this is part of life. Witness, the emotional aspect, loss of income, the anxiety. I can understand that. But I believe it falls woefully short compared to hat some of the general case law would show. So, all in all, you've made your record and the court is going to overrule the motions. R. 52.

In **Barker v. Wingo**, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed 2d 101, 116-118 (1972), the

Court stated the now well known four factors to be considered by a court when assessing the validity of a Constitutional speedy trial claim. In **Barker**, the court found no such violation of Barker's right even though he was tried after some twelve continuances some five years after his arrest. Barker never contested eleven continuances requested by the State or requested a trial date. He was also out on bond as was Thames.

Barker was, in fact, gambling on his co-defendant's acquittal as a benefit to him in his own trial. The four factors the Court identified as crucial were assessing claims of possible speedy trial violations are length of delay, reasons for delay, assertion of the right to a speedy trial, and prejudice to the defendant.

The Court pointed out that all four factors must be considered in each case prior to making any determination of the validity of any such claim under the constitution. **McGhee v. State**, 657 So. 2d 799, 801-802 (Miss. 1994). As stated in **Barker, supra**:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Through some might express them in different ways, we identify four such factors: Length of delay, the reasons for the delay, the defendant's assertion of his right, and prejudice to the defendant. Id. 116.

The record reflects that the DNA results were confirmed in July 16, 2008. R. 46. The next Leake County grand jury was in November, 2008, which was when Ben was indicted. R. 46-47.

In **Houser v. State**, 29 So. 3d 813, 821-822 (¶ 21) (M. C. A. 09), the court found that crowded dockets, shortage of staff, and judicial engagements were "neutral reasons" for delay. In addition, there was no evidence of any "deliberate attempt to sabotage the defense" by delaying the trial.

The record does not include any showing of prejudice to Ben's consensual sex defense.

While Ben complains that the memory of the witnesses who were on the bus after the alleged rape would not have been as accurate, given the delay, the fact remains that Ben was the regular appointed driver of the bus, and would know who his passengers were.

In addition, the record reflects that there were no other passengers on the bus at the time of the rape. R.149. Additionally, Ben could have contacted other passengers or had his attorneys contact any riders on the bus after the rape prior to his trial date. R. 48-49.

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

PROPOSITION III

TESTIMONY FROM WITNESSES HINES AND HOCKETT WAS PROPERLY RECEIVED BY THE TRIAL COURT.

Ben argues that the trial court erred in admitting hearsay testimony from Mr. Maurice Hines and Choctaw Tribal Nurse Sharon Hockett. He does not believe that M.F.'s statements to Hines were properly admitted under M. R. E. 803 (3) for "then existing mental, emotional or physical condition." He believes that four days was an excessive amount of time between the alleged rape and the statement M.F. subsequently made to Mr. Hines.

He also argues that testimony from Nurse Hockett that her interview did not reveal anything to suggest that M. F. was being less than truthful was improper. It was simply an alleged impermissible way of bolstering M. F.'s testimony. Appellant's brief page 19-21.

The record reflects that after hearing testimony, and arguments from Ben's counsel, the trial court determined with record support that the statements to Mr. Hines were admissible under M. R. E. 803 (3) . R. 212. In addition, the record reflects there was "no contemporaneous objection" to the testimony of registered nurse Ms. Sharon Hockett. R. 274. Nor was this issue raised in Ben's post conviction motion. C.P. 44-45. The issue was therefore waived. **Russell v. State** , 607 So. 2d 1107, 1117 (Miss. 1993).

Mr. Maurice Hines testified that he was M.F.'s friend. They had been friends since attending the sixth grade. Although they were not romantic friends, they stayed in contact with each other almost every day. He testified that she called him by telephone in the evening of October 7, 2007. R. 204-205.

Mr. Hines testified that M.F. called him late one evening. He could tell that she was upset about something. When he asked her what was wrong, she started crying. Although she seemed

afraid of something, she finally told him that she had been raped. R. 206. He merely asked her what was wrong?

Q. You said you could sense something was wrong? Was she crying?

A. Yes, sir.

Q. **Emotionally, how did she sound?**

A. **Number one she sounded like she was scared to death, because she didn't know what to do.**

Q. Okay. Did you inquire as to what was wrong with her?

A. Yes, sir.

Q. **What did you ask her?**

A. **I asked her, I said, Megan, is something wrong?**

Q. **And how did she respond?**

A. **At first she didn't say anything, and then I asked her again, I said, Megan what's wrong? And she said, Maurice, she said, I don't know how to say it. I said, Megan, what's wrong. She said, Maurice, I was raped.** R. 213-214. (Emphasis by appellee).

The prosecution argued that Mr. Hines' testimony indicated that this was the first person to whom M.F. spoke; the first person after the alleged rape. She confided in Hines while still emotionally disturbed. She revealed what happened to her only after he determined that she was emotionally upset.

To Hines she appeared to be under some kind of stress. He merely asked her what's wrong? This was when she revealed that she was upset because she had been raped.

M. F. had already testified that she told no one prior to telling Mr. Maurice Hines. She was too "ashamed" and "embarrassed." She was not even speaking to her own mother, but just staying in her room. She took showers all the time.

It was Mr. Hines who persuaded her to tell her mother. This was on Sunday, four days after the rape which occurred on Wednesday October 3.

> Thames: The witness has testified that he knew Ms. Frazier very well. He could tell there was something wrong with her emotionally. He asked her what was wrong with her after she started crying, and was obviously emotionally not right. Based on that, this is a on-line exception to the hearsay rule under rule 803 subsection (3). It's–she is telling him, when he asked her what is wrong, she's telling –this is the first person she has told, so she is telling her then existing emotional condition. And he's simply asking her why is her emotional condition at that particular moment, as it is. And she tells him, because I was raped some three or four days ago. This is on the 7th, and she was raped on the 3rd. R. 210.

After hearing from defense counsel, the trial court overruled objections to Mr. Hines testimony. This was on the basis of M. C. A. Sect. 803(1), (2) and (3).

> Court: All right. We're out of the presence of the jury. Mr. Carter, you might inform me, if maybe if I've missed something in this–within the spectrum of Rule 803. **And of course, we have the first three exceptions: Present sense impression, excited utterance, and then the existing mental, emotional or physical condition, which that last one seems to fit more.** But let me hear you on what maybe I've missed....**So the Court is of the opinion that it meets the test of the exception of the hearsay rule, 803(3), and the testimony is allowed.** R. 207; 212. (Emphasis by appellee).

Ms. M.F. testified that she was too "embarrassed" and "ashamed" to tell what happened. R. 160. She did not speak to anyone. She was taking baths all day, and just staying in her room. Finally, she "couldn't hold it any longer." R. 160. She called her best friend, Maurice. When he asked what was wrong with her, she told him.

Mr. Maurice Hines then persuaded her that she had to tell her mother. Her mother was upset, and crying also. When she called the Choctaw Police Department, they came to her house. They then followed her to the place where the used paper towels had been thrown from the bus. R. 163-164.

> Q. Why was it that you didn't say something to somebody?
>
> A. **I was ashamed, embarrassed, I mean, shocked I didn't, I couldn't–it was just**

embarrassing.

Q. Al right. Now, did you go on to school that day?

A. Yeah.

Q. **This would have been Wednesday. When was it that you finally told somebody?**

A. **That Sunday I told my best friend, Maurice.**

Q. **Now, how did that come about?**

A. **I just couldn't hold it in any longer. I had to tell somebody.**

Q. Well, now, between Wednesday morning and the Sunday night when you told Maurice, what-how were you emotionally?

A. **I was taking eight showers a day. I was usually really talkative, but I just kept to myself. I didn't talk to anybody. I just went to my room, slept, and that was about it. Just kept to myself and didn't speak a lot.**

Q. And who –who did you live with?

A. My mom.

Q. And what's her name?

A. Abby Lewis.

Q. Okay. Now, you talked to Maurice about what time on Sunday?

A. Probably like 11:00.

Q. At night.

A. I told him that I had something to tell him. He said what? And then, I said, I was raped. And then it was like, by who. And I told him, a guy that drives the transit bus, that I ride to school. He's like–he was like, you've gotta tell your mom. And I said, I can't. **And he kept telling me and telling me to have to tell my mom, but I just couldn't then. Somehow he just persuaded me to and I did.** R. 160. (Emphasis by appellee).

The record reflects that Ben did not testify. R. 388 . However, his statement to investigators

was that while he had sexual relations with M. F. but that the sexual encounter was allegedly consensual.

Therefore, the admission of M.F.'s emotional statement to her friend was evidence of her "state of mind" at that time. Even if it was four days after the rape, it was, nevertheless, the first person to whom she revealed the rape. It was also the motivating factor for her to reveal that she had been raped to the Choctaw tribal nurse within a few hours of telling Mr. Hines.

In other words, this MRE 803(3) evidence sheds light on the question of whether it was consensual or forced sexual relations. Was sexual relations with an adult bus driver inside a highly uncomfortable school bus at 5:00 in the morning consensual or not was the crucial issue?

Would a female college student consent to sex with the driver of her bus under these conditions or not? And if she had done so, would she have subsequently taken baths four times a day for four days, stayed in her room, and not spoken to anyone including her mother? And finally under great stress would she tell someone she trusted that she had been raped? This was when she could not contain her bottled up emotions any longer? She testified that "she couldn't hold it any longer." R. 160.

In **Sherrell v. State** 622 So.2d 1233, 1237 (Miss. 1993), the Court found a murder victim's statement to the owner of a store was admissible under 803(3) to show her state of mind with regard to her fear of Sherrell. He was someone with whom she was living. She expressed the dilemma she faced at the time of the statement.

She was scared that Sherrell might kill her but she was also afraid of asking him to leave her trailer. Sherrell's contention was that the victim had been giving him things to pawn at the time of her death. Deputy Vick testified that Sherrell told him the victim gave him things, such as a diamond ring, to pawn so he would have money to return to the Gulf Coast.

ring, to pawn so he would have money to return to the Gulf Coast.

> Boone's statement to Brock that she intended to ask Sherrell to leave is admissible under Miss. R. Evid. 803(3) because it responds to Sherrell's contention that Boone gave him things to pawn. Boone was frightened for her life by the person whom she was sharing a trailer. Although she was scared to return with Sherrell there, she was just as scared to ask him to leave. Therefore, Brock's testimony as to Boone's state of mind was both relevant and admissible under Miss. R. Evid. 803(3).

The record reflects that M.F.'s statement to the Choctaw nurse was clearly admissible under M. R. E. 803(4). The record reflects it was made within hours of the statement to Mr. Hines. The nurse corroborated Mr. Hines as to M.F.'s emotional condition. She was crying and upset to the point of feeling like she was going "to throw up." R. 259.

Ms. Sharon Hockett, R.N., testified that she was a registered nurse. She worked at the Choctaw Health Department. She had received training for sexual assault cases. On October 8, 2007, M. F. was brought to see her about an alleged sexual assault. She was with her mother. She testified that M.F. was "upset, crying and frightened. "R. 258.

> Q. Okay. I believe you said that it was obvious she was crying and was--was she also kind of sick or anything?
>
> A. **She stated that she felt like she was going to throw up**. R. 259. (Emphasis by appellee).

She told Hockett she had been sexually assaulted and raped by Ben on a school bus. Hockett collected a sample of her blood for later forensic analysis results. R. 267.

There was no objection to Hocket's testifying that she found no basis for her to conclude that M. F. was not telling the truth. This was based upon her questioning of the still emotionally disturbed M F.

> Q. Can you tell us how she told you what was wrong with her?
>
> A. She stated that she was in the transportation bus and that the driver, and she named the name.

Q. And who was that?

A. Cecil Ben. Had pulled over into a side road in Carthage and told her that it would not matter if she screamed or cried, that he was going to do this, and then she told me that he stated to her, and you're probably gonna like what I do to you, anyway.

Q. Did she indicate to you that he forcibly had sex with her?

A. That is what she indicated , yes. R. 266.

...

Q. **At the time you talked to Megan Frazier, Nurse Hackett, was it your concern to take care of the immediate problem she was having emotionally?**

A. **Yes, sir.**

...

Q. Now, was there anything indicating to you that she wasn't telling the truth?

A. There was nothing to indicate that she was not telling the truth. R. 274. (Emphasis by appellee).

In **Marshall v. State**, 812 So.2d 1068, 1074 -1075 (¶18) (Miss. App. 2001), the Court found statements made for the purposes of medical treatment were admissible under M. R.E. 803(4).

> ¶18. We find that the testimony of Beavers, Blount and Chidester falls safely under the medical diagnosis exception to the hearsay rule. That exception provides that a "declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and ... the content of the statement must be such as is reasonably relied on by a physician in treatment." M.R.E. 803(4). See **Doe**, 644 So.2d at 1206; **Jones v. State**, 606 So.2d 1051, 1056 (Miss.1992). "**[A] statement that one has been sexually abused, as well as any identification of the perpetrator, is reasonably pertinent to treatment and, therefore, reasonably relied upon by a treating physician.**" **Hennington**, 702 So.2d at 413. See **Mitchell v. State**, 539 So.2d 1366 (Miss.1989). This rule was expanded to include identification of any acquaintance of the victim or any person to come into contact with the victim, not just a household member or relative. **Hennington**, 702 So.2d at 413-14; Eakes, 665 So.2d at 866-67. "Prevention of further abuse will always be an immediate concern, whether the perpetrator has daily, weekly, or only sporadic opportunity to abuse a child." **Hennington**, 702 So.2d at 414 (quoting **Eakes**, 665 So.2d at 867).

The record reflects that M.F.'s statements to Nurse Hockett was clearly admissible under M. R. E. 803(4) Statements for Purposes of Medical Diagnosis or Treatment.

While the court did find admission of statements under 803(3) inadmissible in **Edwards v. State**, 856 So. 2d 587, 593-593 (¶16) (Miss App. 2003), relied upon by Ben, it also found it was "harmless error."

In that case, there was overwhelming evidence of guilt including Edwards admissions in a confession. In the case sub judice there was positive identification of Ben as the person who forced himself upon M. F. R. 149. She was corroborated by the finding of forensically testable evidence at the place she indicated the rape had occurred. And she was corroborated by the testimony of both Mr. Hines, and Nurse Hockett as to her being emotionally disturbed , to the point of wanting "to throw up." R. 259. This is not what one would expect if M.F. had agreed to have sex with on older man on a dark bus along an intersection to two highways.

There was no objection to the nurse's testimony about "nothing to indicate that she was not telling the truth." R.274. The issue was therefore waived. **Russell v. State** , 607 So. 2d 1107, 1117 (Miss. 1993).

These evidentiary issues are also lacking in merit.

PROPOSITION IV

THIS ISSUE WAS WAIVED AS WELL AS LACKING IN MERIT.

Mr. Ben argues that it was plain error to have not presented him with a complete panel of jurors before requiring him to make peremptory strikes on the proposed jurors. Ben acknowledges there was no objection made during jury selection or at trial. He also complains that he was prejudiced because the state selected jurors that had allegedly already served on previous juries. Therefore, he argues that this was allegedly "plain error." Appellant's brief page 21-22.

The record reflects this issue was waived for failure to make "a contemporaneous objection".

In **Wardley v. State** , 760 So.2d 774, 777 (Miss. App.1999), the Court relied upon **Smith v. State, infra**. If a party does not object to the composition of the jury prior to it being sworn in then the issue is waived on appeal.

> Wardley made no objection at trial to any of the State's peremptory strikes, and never asked that the State articulate race-neutral reasons for those strikes, nor did he object to the final composition of the jury. A party waives any and all claims regarding the composition of his jury if he fails to raise an objection before the jury is sworn. **Smith v. State**, 724 So.2d 280, 330 (Miss.1998).

In addition, it would appear to the appellee that there was nothing inappropriate about the selection of the jury that resulted in prejudice to Ben.

The record reflects that the prosecution had accepted twelve jurors prior to tendering them to the defense.

Kilgore: Twelve strikes, is that right?

Court: That's right. This is a capital case.

Kilgore: **Your Honor, we'll accept those twelve.**

The court: **All right. What does the defendant say to the twelve that have been**

accepted? R. 124. (Emphasis by appellee).

In addition, the record indicates that a juror who had served previously was a Mr. Jason Johnston. Johnston was excused from serving on the jury . It was discovered that he was a prior felony. R. 343; 353; 442. The record reflects that the first alternate juror, Ms. Tonya Stribling, took his place on the jury, and participated in jury deliberations. The record also reflects that the jury were informed of this change, and that they should continue following the instructions of the court. R. 351. This was prior to the beginning of their deliberations. R. 430-431.

In **Bell v. State**, 631 So. 2d 817, 820 (Miss. 1994), this Court stated that there is a presumption that jurors follow the trial court's admonition.

> This Court has held that it must be presumed that the jurors followed the court's admonition to disregard the unanticipated, unprovoked incident and decide the case solely upon the evidence presented; to presume otherwise would be to render the jury system inoperable. See **Wright v. State**, 540 So. 2d 1, 4 (Miss. 1982); **Hunt v. State**, 538 So. 2d 422, 426 (Miss. 1989).

In **Morgan v. State**, 793 So.2d 615, 617 (Miss. 2001), the Supreme court found that unless there were errors so egregious as to result in a fundamental miscarriage of justice they would not be considered "plain error."

> ¶ 9. The plain error rule is codified in Miss. R. Evid. 103(d). It provides that nothing precludes the Court from taking notice of plain errors affecting the substantial rights of a defendant, even though they were not brought to the attention of the trial court. If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See **Edwards v. Sears, Roebuck & Co.**, 512 F.2d 276 (5th Cir.1975). "Only an error so fundamental that it generates a miscarriage of justice rises to the level of plain error," however. **Gray v. State**, 549 So.2d 1316, 1321 (Miss.1989); **Kuehne & Nagel (AG & Co.) v. Geosource, Inc.**, 874 F.2d 283, 292 (5th Cir.1989).
> In **Wiley v State**, 842 So. 2d 1280, 1285 (¶17) (Miss. 2003), the Supreme Court found that Wiley had previously raised ineffective assistance. He had no new evidence that he could not have been raised in his previous filing. Therefore, he failed to met his burden for showing any ineffective assistance of counsel.

The record reflects that this issue was waived. It is also lacking in merit. There is no evidence indicating that Ben's right to a fair and impartial jury was violated during jury selection or at any other time during his trial.

This issue is also lacking in merit.

PROPOSITION V

TESTIMONY FROM MR. OTIS MINGO WAS RECEIVED AS AN ADMISSION AGAINST INTEREST. ISSUES RELATED TO DISCOVERY WERE WAIVED WHERE THERE WAS NO REQUEST FOR A CONTINUANCE.

Mr. Ben argues that the trial court erred in admitting testimony from Otis Mingo. He believes that even if Ben's statement to Mingo was admissible under M. R. Evidence 404(b), it was still not admissible at trial. It was not admissible because Ben allegedly had not had a prior opportunity to review his actual statement and no continuance was granted him to do so. Appellant's brief page 22-24.

The record reflects that the objection to the testimony of Otis Mingo came only after Mingo had already testified that Ben said something to him about M. F. in his presence He testified that when the statement was made M.F. had her "legs propped in the air." The record also clearly indicates there was neither a request for a "continuance" or a "mistrial." See UCCCR, Rule 9.04. R. 281-287.

Q. Can you tell us what Megan was doing and what Cecil was doing?

A. **No, I didn't know what–I don't know that Megan was doing. Cecil come up to me and made a statement that she had her legs propped in the air—**

Lane: **Your Honor, at this time, we would object.** R. 279. (Emphasis by appellee).

The record reflects that Ben's counsel objected originally to Mingo's testimony on grounds of "really relevancy" and M. R. E. 404(B). R. 281. After hearing this objection and argument, the trial court found that Ben's statement to Mr. Mingo would be admissible as an "admission against interest." M. R. E. 804(b)(3). R. 287.

In addition, counsel for Ben admitted that he knew that Mingo was going to be a witness for the prosecution for "at least a week and a half ago." R. 287. While he claimed that discovery as to

the substance of his testimony was lost or misplaced, he admitted that he had not attempted to interview Mr. Mingo prior to trial.

He also argued before the trial court that any statement by Ben about M.F. to another short of a declared intention to actually commit an anticipated rape would fall short of showing motive or intent to commit the alleged future rape under M. R.E. 404(b). R. 285.

The record also reflects that Ben's counsel never claimed "undue prejudice or unfair prejudice," or asked for "a continuance or a mistrial." He had ample opportunity to do so. R. 279-292. See UCCCR rule 9. 04.

In **McGilberry v. State** , 741 So. 2d 894, 918 (Miss. 1999), the court found that it would not hold a trial court in error where it was not given an opportunity to make a ruling.

> Absent a request for a continuance, we are unwilling to hold the trial court in error where it was not given an opportunity to make a ruling. **Fleming v. State**, 604 So.2d 280, 293 (Miss.1992). When told that the State would direct Dr. Maggio to be forthright with him, defense counsel responded, "Thank you. That's all I request." McGilberry's argument that the State committed a discovery violation, while technically correct, is unfounded due to the discussions of the defense and the propounding of Dr. Deal's report on the eve of trial.

The record also reflects that Mingo was cross examined thoroughly about the remark more than once. In other words, the remark, "that stuff looks good" which allegedly prejudiced him was repeated by Ben's counsel in his questioning of Mingo. R. 297.

Mr. Mingo was questioned about why he took offense at such a statement. He was questioned about when the statement was made, and to whom it was reported. The question implied that Mingo's taking offense was more of a personal peculiarity rather than a professional matter.

> Q. **But you took personal offense to his comment, allegedly that he said that stuff looks good?**
>
> A. **I did, 'cause it wasn't right.**

Q. It wasn't right because you don't ever do anything like that?

A. Nope. But I'm not the one on trial. R. 299. (Emphasis by appellee).

On redirect, the prosecution clarified Otis's testimony. Otis explained that he took the remark seriously enough to report it to his supervisor. In other words, Otis' reaction was not just his personal reaction. He viewed it as serious enough to take professional action in his capacity as dispatcher for Choctaw Transit Authority. He also explained that after the alleged rape occurred on Wednesday, Ben "didn't drive ..Megan's route, or Monday." R. 304.

Q. **Mr. Mingo, when Ben said what he said to you, you took it serious enough and were offended enough, you reported it to his supervisor?**

A. **Yes, I did.** (Emphasis by appellee).

In **Fielder v. State**, 235 Miss. 441, 108 So. 2d 590 (1959), the Supreme Court held that cross examining a witness on the matter complained of as prejudicial waived the issue on appeal.

> Appellant made only one objection to the first of a number of questions about this. However, appellant's counsel cross examined Hosey about what the boys said and this waived the objections.

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

PROPOSITION VI

BEN'S SENTENCE WAS WITHIN THE STATUTORY GUIDELINES FOR HIS CONVICTION.

Ben argues that his sentence was cruel and unusual as well as disproportionate when compared to the sentences given for others convicted of the same offense. He believes this was particularly true since the jury determined his sentence without any consideration of mitigating factors, such as the fact that Ben had no prior felonies, and M.F. was not a child victim. Appellant's brief page 24-25.

In **Ivory v. State** , 840 So.2d 755, 758 -759 (Miss. App. 2003), the Court pointed out that failure to raise "the unconstitutionality" of a sentence prior to its imposition waived the issue on appeal.

> The State points out, however, that Ivory failed to object to his sentence either at the time the sentence was imposed or in his post-trial motion. If the appellant did not present to the trial court the proposition that his sentence was unconstitutional, he may not assert that allegation on appeal, and it is procedurally barred. **Reed v. State**, 536 So.2d 1336, 1339 (Miss.1988)

The record reflects that the issue raised with the trial court was that the sentence was excessive for the offense committed. R. 471. The prosecution pointed out that in this case it was not the judge who determined the sentence but rather the jury. The jury not only found Ben guilty of rape, they also chose to give him a life sentence. R. 437-438 . Therefore, the trial court did not have discretion as to the sentence. The court merely imposed the sentence as found by the jury in their deliberations.

The record reflects that jury instruction S-2 instructed the jury that they could find Ben guilty without fixing his sentence at life imprisonment. C.P. 31. Under M. C. A. Sect. 97-3-65(4)(a) (1972) the sentence for forcible rape can be life "where" this is determined by the jury as occurred in the

instant cause. R. 438.

In **Barnwell v. State**, 567 So. 2d 215, 221-222 (Miss. 1990), this Court stated that when sentences are within the guidelines provided for punishment by the legislature, they would not be considered cruel and unusual punishment. As stated:

> There are general principles which can be drawn from the Supreme court's rulings in **Rummel** and **Solem** which have been adopted by a number of jurisdictions and which we now adopt. In cases factually similar to **Rummel, Rummel (Rummel v. Estelle**, 445 U. S. 263, 100 S. Ct. 1133, 63 L. Ed. 382 (1980) provides the rule. Apart from the factual context of **Solem** (***Solem v. Helm***, 463 U. S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637(1983) - a sentence of life in prison without the possibility of parole - or a sentence which is manifestly disproportionate to the crime committed (e.g. life sentence for overtime parking, see, **Rummel**, 445 U. S. at 274 n.11, 100 S. Ct. at 1139 n.11) extended proportionality analysis is not required by the Eighth Amendment. **Moreno v. Estelle**, 717 F. 2d 171, 180 (5th Cir 1983), cert. denied, 466 U.S. 975, 104 S. Ct. 2353, 80 L. Ed. 2d 826 (1984); ...
>
> These principles are consistent with the Supreme Court's overriding theme expressed in both **Solem** and **Rummel**, of giving substantial deference to the legislature in determining the limits of punishment for crimes, as well as recognizing the discretion of trial courts in sentencing criminals. Further, they are consistent with our own prior case law on this subject.

Mr. Ben needs to direct his complaint to the legislature and not to this Court.

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

CONCLUSION

Mr. Ben's conviction and sentence 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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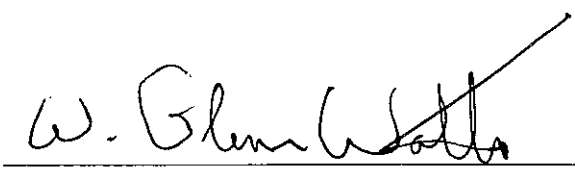
This the 7th day of October, 2010.



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