IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TOMMY JUNIOR MCCRORY — APPELLANT

VS. — NO. 2009-KA-0290

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TOMMY JUNIOR McCRORY **APPELLANT**

vs. **CAUSE No. 2009-KA-00290-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Rankin County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **SEXUAL BATTERY**.

STATEMENT OF FACTS

C.M.[1] testified that he was nine years of age and in fourth grade. At some point in time he and his brothers lived with the Appellant and C.M.'s mother. C.M.'s mother was married to the Appellant. C.M. did not like the Appellant because the Appellant beat him and his brother and because the Appellant "[stuck] his finger up our butt holes." C.M. saw the Appellant do this to C.M.'s brother, and the brother saw the Appellant do this to C.M. The Appellant had his hand

[1] Who was one of the Appellant's victims. Since this is a case of sexual battery, we will not use the victims' names.

beneath C.M.'s clothing when he penetrated C.M. The Appellant did this on most days.

C.M. told his mother about what the Appellant did, but C.M.'s mother did nothing about it. However, C.M.'s mother did tell him once to say nothing about what the Appellant had been doing to him. C.M. was about six or seven years of age when the Appellant battered him. (R. Vol. 2, pp. 101 - 106).

C.M.'s brother, J.M., then testified. He testified that the Appellant digitally penetrated his anus and that the Appellant told him that it was a joke. The Appellant did this on a daily basis. J.M. testified that his mother saw the Appellant do this to him on one occasion. When J.M. asked his mother to tell the Appellant to stop penetrating him, his "mother" told him it was only a joke. J.M.'s grandmother did not intervene either. He finally told his natural father. J.M. was around ten years of age when the Appellant committed these acts against him. As a consequence of the Appellant's actions, J.M. experienced bowel incontinence. J.M. identified the Appellant at trial as the man who digitally penetrated him.

The Appellant apparently referred to his actions against these children as "checking the oil." J.M. admitted that he had previously told one person that "checking the oil" was a joke, but telling another person that the Appellant did "check [his] oil." J.M. explained that he was afraid that his "mother" and the Appellant would become angry with him if he told the truth. J.M. testified that his mother did not want him to tell anyone about the Appellant's actions. (R. Vol. 2, pp. 114 - 128).

J.M.'s natural father testified. He stated that J.M. was born on 30 October 1995. J.M. had a step - brother, C.M. J.M.'s father had been married to J.M.'s mother for perhaps two years. J.M.'s father had been away for much of that time. He was a machinist with the navy, aboard the USS Saipan. J.M.'s mother began having at least one affair, which produced C.M.

C.M. bore J.M.'s father's name because his father was still married to J.M.'s mother at the time.

In October or November of 2006, when J.M. was eleven years of age, J.M.'s mother asked his father to speak to him, stating that J.M. was having problems at school and at home. J.M.'s father went to see his son. They went to a Wendy's to have something to eat. While there, J.M told his father that the Appellant had been molesting him. J.M. specifically told his father that the Appellant grabbed J.M and shoved him down as hard as he could and then put his hand in the back of his pants and shove a finger into his anus. J.M.'s father asked J.M. whether he had told anyone of this; J.M. said he told his mother but that his mother told him that she could not do without the Appellant. J.M. also said he had told someone named Brenda about it, but this Brenda did not believe him, telling him that it was a joke and some kind of family tradition.

J.M.'s father told J.M that he was going to the police. J.M. begged him not to do so, saying he wanted to go home and did not want to get in trouble. J.M.'s father contacted the Department of Human Services that night.

In due course there was a hearing in Youth Court. Present were J.M.'s father, his new wife, J.M.'s mother, Brenda anc C.M. and J.M. There was also a meeting with the Child Advocacy Center. There was a lot of screaming and such, particularly from J.M.'s mother. J.M.'s mother screamed at a police detective, J.M.'s father and his new wife, all in the presence of J.M. and C.M. J.M. and his step - brother cried profusely. Fortunately for those children, the Youth Court gave J.M custody of them both. C.M. was with J.M.'s father for some two years. When J.M. first started living with his father, he was incontinent. C.M. told J.M.'s father that the Appellant had penetrated him as well.

Around Christmas, presumably of 2006, these children found out that their "mother" was

going to have visitation with them. This upset them mightily; J.M. began again having trouble with incontinence. The children told J.M.'s father that they had not told the truth. They wanted to speak with a Detective Thompson and the Children's Advocacy Center and tell them what had happened. J.M.'s father told them that they had to tell them the truth. The children apparently originally told interviewers at the Children's Advocacy Center that the Appellant had done nothing to them. They told J.M.'s father that they had lied when they found out that their mother was going to have visitation with them. J.M. may have had problems with incontinence prior to the time the Appellant began living with his "mother," but that problem became much worse after the Appellant arrived. (R. Vol. 3, pp. 166 - 200).

Katherine Kolar, a pediatric nurse practitioner with the Children's Justice Center at the University of Mississippi Medical Center was accepted as an expert witness in child sexual abuse. She examined J.M and C.M. She found no tears, lesions or scars in their anal areas. This was no surprise to her, the muscles in the area being capable of expanding to accommodate a finger. She stated that it is common to find child abuse victims initially denying abuse but later reveal what they have endured. (R. Vol. 3, pp. 205 - 228).

Detective Sergeant James Thompson investigated the report against the Appellant. There was an emergency hearing in Youth Court and an appointment at the Children's Advocacy Center on the same day. In the course of the Youth Court hearing, Thompson heard J.M.'s mother state that what had happened with her sons was just a game, something that had been passed on from one generation to another. He then learned that the children were told not to tell anyone of this "game" because their mother did not want the Appellant to be in prison for it. These revelations bothered Thompson; when the mother, the victims and the others arrived at the Children's Advocacy Center, Thompson confronted the mother about what he had heard. The

children were present and became upset over the confrontation. It was because of the confrontation that the children did not disclose the abuse they had suffered at that meeting with the Children's Advocacy Center and in fact denied such abuse.

About a month later, Thompson received a call from J.M.'s father. J.M.'s father rang to say that J.M. was ready to tell the truth. J.M.'s father brought J.M. in to see Thompson; Thompson set up an interview with the Children's Center in Rankin County. The location at which the acts of penetration occurred was a residence in a particular street in Pearl and in Rankin County. There were other addresses in Pearl, Rankin County, Mississippi where the Appellant the children and the children's mother lived.

The Appellant changed his appearance between January of 2007 and the time of trial. The Appellant, in a non - custodial interview with Thompson, denied having penetrated the children. (R. Vol. 3, pp. 229 - 261).

Mr. Brian Ervin, a forensic interviewers with the Children's Advocacy Center in Rankin County, was brought in to testify. C.M told Ervin that his mother's boyfriend, the Appellant, "checked the oil . . . by putting his finger right up my butt hole." C.M. stated that this began when he was seven years of age. The Appellant put his hand inside C.M.'s clothing to "check the oil." C.M. stated that it was quite painful.

C.M. further told Ervin that C.M.'s mother was aware of what the Appellant was doing and that his mother told him to tell no one about it. She was afraid the Appellant might go to prison.

C.M. also saw the Appellant do the same thing to J.M.

J.M. told Ervin that the Appellant "stuck his finger up my butt." The Appellant began doing this when J.M. was ten years of age. The Appellant told J.M. that what he was doing was a

joke. J.M. could not say how many times the Appellant enjoyed his joke. Not long after this began, J.M. began having problems with incontinence.

Both children had some difficulty in stating the time periods involved in this abuse, but both indicated that it occurred on numerous occasions. (R. Vol. 3, pp. 284 - 300; Vol. 4, pp. 301 - 319).

The defense presented a case - in - chief, beginning with one Althea Susie Sheppard, who was the Appellant's aunt. She stated that she knew the victims in consequence of the Appellant's involvement with their mother. The Appellant lived with her from July, 2005 through February, 2006. The victims occasionally visited in her home. The Appellant got down on the floor and played with them. The phrase "checking the oil" was a joke, its meaning being that someone was not quite right in the head. She was unaware that the phrase ever referred to digitally penetrating an anus. J.M. was said to have had a condition which tended to make him incontinent.

The Appellant moved out of Sheppard's residence in February, 2006. He lived in Colonial Trace Apartments for three or four months. The apartments were located in Pearl and not in Brandon. The Appellant then moved into a house in Malbury in Pearl. The victims' mother did not live with the Appellant at these places.

Sheppard admitted that the phrase "checking the oil" could have a meaning of which she was unaware. She further stated that she could not say what the Appellant did with the children when he was not living with her. (R. Vol. 4, pp. 336 - 344).

Glenn Sheppard, Althea Susie Sheppard's husband, testified that "checking the oil" meant "tak[ing] your thumb and go on their butt, check the oil." It was a joke, and it did not particularly mean penetrating the anus. He saw the victims at his house on occasion and saw the Appellant interact with them.

The Appellant moved out in February of 2006 and moved into an apartment in Pearl. He thought that the victims and their mother moved in with the Appellant in November, 2006. (R. Vol. 4, pp. 344 - 349).

Brenda Mason testified. She stated that she was the victims' grandmother, the victims' mother being her daughter. The victims' mother and the Appellant moved into a house in Malbury Street in Pearl in late 2006. The victims, though, were living with Mason and had lived with her for most of their lives. J.M.'s father had little contact with him.

In late October, 2006, J.M.'s father rang Mason, asking to come to visit his son. J.M.'s father came to visit. He had a gift for his son but had forgotten to obtain batteries for it. J.M. and his father went to get the batteries and to get something to eat. They were gone for some two or three hours. They returned in due course; J.M.'s father left at about eleven o'clock that evening.

Mason learned the following Monday that the Appellant might have been doing something with the boys. After a telephone call from J.M.'s father that Monday night, J.M. became upset about something. At some point he told Mason that the Appellant had been abusing his half brother and him. When asked what he meant by that, J.M. told Mason that the Appellant had been abusing them by trying to check their oil. J.M. apparently gave a demonstration of what he meant. Mason then asked J.M. and C.M. if the Appellant had "stuck his finger in [their] butt[s]." Both children denied that Appellant had done such a thing. Mason told the children that the Appellant would be told not to do what he was doing again. J.M. began crying, but he again denied that the Appellant had penetrated him.

After this conversation, around the first of November, the children moved in with their mother and the Appellant for awhile. However, they moved back in with Mason on account of

the fact that they had friends in the area in which Mason lived. (R. Vol. 4, pp. 349 - 364).

The victims' mother was then called to testify. She began her testimony with an explanation of her rather complicated history with marriage and romance. J.M's father seldom exercised visitation with J.M. and did not maintain telephonic contact with him.

The Appellant began his relationship with the victims' mother in 2004. They married in October of 2006. The Appellant was said to have been like a "big kid" with the victims. He was said to be as though he were one of their best friends. The children moved in with the Appellant and their mother in November of 2006; they lived at 508 Malbury Street in Pearl.

The victims' mother learned of the allegations against the Appellant on 7 November 2006. Upon learning of the allegations of abuse, the mother gathered her children and when to her mother's house. The victims' mother asked the victims whether anyone had done anything to them. They denied having been hurt by anyone.

She testified that she had spoken with her sons about "good touches and bad touches" in 2004. She had that conversation with them, she said, because the boys had told her that her second husband had hurt them. Prior to the time that J.M. and his father had their visit, the first one in almost two years, there had been no allegations of wrongdoing against the Appellant. J.M. was subsequently placed with his natural father

The victims' mother had a verbal confrontation with Detective Thompson after the Youth Court hearing. The victims were upset and were not able to be interviewed at that time. A "no contact" order was issued against the mother. She did manage to have one instance of supervised visitation later, but the "no contact order" was then re-issued. She then described other instances of supervised visitation, but there is little purpose to be served in recounting those here. In other testimony, she could only identify one instance in which the Appellant was alone with C.M. She

admitted that she had a conviction for embezzlement.

The victims' mother had no explanation as to why the victims would testify that she knew what the Appellant was doing, yet took no action to stop the Appellant. She gave a non-responsive answer when asked whether the only reason she divorced the Appellant was to be able to re-gain custody of her children. She stated that she was testifying on behalf of the Appellant only on account of what the victims told her. She denied that was testifying on behalf of the Appellant in order to help him avoid convictions for having battered her children.

STATEMENT OF ISSUES

1. WAS THE EVIDENCE SUFFICIENT TO SHOW THAT THE CIRCUIT COURT OF RANKIN COUNTY HAD JURISDICTION OF THE CASE AT BAR?

2. MUST THE CONVICTION CONCERNING THE VICTIM C.M BE REVERSED ON ACCOUNT OF THAT VICTIM'S INABILITY TO IDENTIFY THE APPELLANT AT TRIAL?

3. DID THE TRIAL COURT ERR IN PERMITTING THE WITNESS ERVIN TO DIRECTLY COMMENT ON THE CREDIBILITY OF THE VICTIMS?

4. DID THE TRIAL COURT ERR IN ADMITTING HEARSAY TESTIMONY FROM THE WITNESS THOMPSON?

5. DID THE TRIAL COURT ERR IN ADMITTING THE TESTIMONY OF RYAN MILLER UNDER THE "TENDER YEARS" EXCEPTION

SUMMARY OF ARGUMENT

1. THAT THE CIRCUIT COURT OF RANKIN COUNTY HAD JURISDICTION OF THE CASE AT BAR

2. THAT THE FACT THAT C.M. COULD NOT IDENTIFY THE APPELLANT AT TRIAL AS THE PERPETRATOR DID NOT REQUIRE THE TRIAL COURT TO DIRECT A VERDICT OF ACQUITTAL WITH RESPECT TO COUNT 1 OF THE INDICTMENT

3. THAT THE THIRD ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT ERROR, IF ERROR, IN THE ADMISSION OF A CERTAIN PART OF THE WITNESS ERVIN'S TESTIMONY WAS HARMLESS

4. THAT THE TRIAL COURT DID NOT ERR IN THE ADMISSION OF CERTAIN TESTIMONY BY THE WITNESS THOMPSON

5. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE WITNESS MILLER'S TESTIMONY UNDER M.R.E. 803(25)

ARGUMENT

1. THAT THE CIRCUIT COURT OF RANKIN COUNTY HAD JURISDICTION OF THE CASE AT BAR

In the First Assignment of Error, the Appellant claims that the State failed to establish venue. In an effort to give color to this surprising claim, the Appellant points to the testimony of one of the victims, C.M.. It is said that C.M. could not state whether the acts committed against him were committed in his mother's home or his grandmother's home. It is said that C.M. testified that he did not know where they occurred. There was no objection at trial to the effect that the State failed to establish venue.

This Court has held:

> In criminal cases, venue is jurisdictional, must be proved, and may be raised for the first time on appeal." *Hensley v. State,* 912 So.2d 1083, 1086 (Miss.Ct.App.2005). The State bears the burden of proving venue beyond a reasonable doubt. *Hill v. State,* 797 So.2d 914, 916 (Miss.2001). Venue may be proven by direct and circumstantial evidence. *Hensley,* 912 So.2d at 1086. Where there is sufficient evidence to lead a reasonable trier of fact to conclude that part or all of the crime occurred in the county where the case is being tried, then evidence of venue is sufficient. *Hill,* 797 So.2d at 916.

McBride v. State, 934 So.2d 1033, 1035 (Miss. Ct. App. 2006). It has also been held that this Court may take judicial notice of the county in which a city of this State is located. *Thomas v. State*, 784 So.2d 247, 251 (Miss. Ct. App. 2000).

It may be that C.M. did not testify where the acts committed against his person by the Appellant occurred. However, the record clearly establishes those acts occurred in Rankin

County. The witness Thompson established venue, as did the witness Sheppard and the victims' mother. There were was much testimony about the fact that the acts committed by the Appellant occurred in Pearl. Even if there had not been a specific reference to Rankin County, the jurors would surely have known that Pearl is located in Rankin County. This Court may, in any event, notice that fact.

The fact that C.M. did not or could not testify as to venue is a matter of no consequence in view of the fact that the other witnesses clearly put the house or houses where the acts occurred in Rankin County. J.M. was present at the time C.M. was battered. J.M. and C.M lived together during the time the Appellant committed his acts against them. There is nothing in the record to demonstrate or suggest that the Appellant committed his acts against C.M. in some other county of the State. While there may have been some small and ultimately inconsequential question as to whether the acts occurred at a house or at an apartment or at both, these places were in Rankin County. Venue was sufficiently established. *Hensley v. State*, 912 So.2d 1083 (Miss. Ct. App. 2005).

While not stated explicitly, it appears that it is the Appellant's notion that proof of venue must be made by a victim of a crime. We say this because the Appellant ignores the testimony concerning venue, presented through other witnesses, and points only to C.M.'s testimony in his argument here. He asserts that his conviction for the sexual battery of C.M. must fail because C.M. did not or could not establish venue. There is no authority of which we are aware for such a notion, and none presented by the Appellant. Nor, if there were such a rule, could we imagine the existence of a good reason for it. We might observe that such a rule, if it existed, would have devastating consequences in homicide cases or in other cases in which the victim was for some

reason other than death unable to testify.

The First Assignment of Error is without merit.

2. THAT THE FACT THAT C.M. COULD NOT IDENTIFY THE APPELLANT AT TRIAL AS THE PERPETRATOR DID NOT REQUIRE THE TRIAL COURT TO DIRECT A VERDICT OF ACQUITTAL WITH RESPECT TO COUNT 1 OF THE INDICTMENT

As set out in our "Statement of Facts," C.M. was unable to identify the Appellant at trial as the person who sexually battered him. Detective Thompson, though, testified that the Appellant's appearance had changed since the time the Appellant's actions came to light. J.M. did identify the Appellant as the perpetrator.

C.M. testify that "Tommy" sexually battered J.M. and him. He also knew that this "Tommy" was the father of his mother's latest child. He knew that "Tommy" was or had been married to his mother. He did not like "Tommy" because of what "Tommy" had done to him. (R. Vol. 2, pp. 103 - 104). Nonetheless, the Appellant says that because C.M., six years of age at the time these things were done to him and nine years of age at the time of trial (R. Vol. 2, pg. 106), was unable to identify the Appellant at trial, a directed verdict should have been granted as to the count of the indictment concerning C.M.

The Appellant presents no authority to support his claim that the trial court erred in failing to direct a verdict as to count 1 of the indictment on account of C.M.'s inability to identify the Appellant. He claims that there is a "basic principle of law" involved (Brief for the Appellant, at 8), but he has not troubled himself to state what that principle might be or where it might be found. The Second Assignment of Error is for that reason abandoned. *Wall v. State*, 883 So.2d 617, 619 (Miss. Ct. App. 2004). Besides this, we note that the C.M.'s failure to identify the Appellant at trial was not a point raised by the Appellant in his motion for a directed

verdict. (R. Vol. 4, pp. 320 - 321). Nor was this point raised in the post - trial motion for judgment notwithstanding the verdict. (R. Vol. 1, pp. 82 - 83). Since the specific point embraced by the Second Assignment of Error was not raised in the court below, it may not be raised here. *Moore v. State*, 958 So.2d 824, 830 - 831 (Miss. Ct. App. 2007).

We have found no decision in which the fact that a victim was unable to identify the perpetrator of the crime committed against himself was for that reason alone sufficient to require the granting of a directed verdict. On the other hand, the Court has rejected such an argument in cases in which there was testimony as to the identity of the perpetrator from other witnesses. *Anderson v. State*, 5 So.2d 3rd 1088, 1096 fn. 4 (Miss. Ct. App. 2007).

C.M. testified as to the Appellant's name. J.M. identified the Appellant at trial and described what the Appellant had done. J.M. further testified that C.M. saw what the Appellant did to him. Other witnesses, including C.M.'s mother, established the Appellant's connection with C.M. The detective explained that the Appellant's appearance at trial was different from the time C.M. would have last saw him. Taking these considerations together, this is not a case in which the State simply failed to present sufficient evidence of identity. The fact that the child could not himself recognize the Appellant in his altered appearance was no reason for a directed verdict.

The Second Assignment of Error is without merit.

3. THAT THE THIRD ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT ERROR, IF ERROR, IN THE ADMISSION OF A CERTAIN PART OF THE WITNESS ERVIN'S TESTIMONY WAS HARMLESS

Brian Ervin was qualified as an expert witness in the field of forensic interviewing. He interviewed C.M. and J.M., and in the course of that interview the victims related what the Appellant had done to them. (R. Vol. 3, pp. 284 - 297).

At one point, in the direct examination of the witness, the prosecutor asked the witness whether the witness found C.M.'s disclosure of the sexual battery committed by the Appellant to be credible. Without objection by the defense, the witness detailed the behaviors exhibited by the victims that tended to demonstrate their accounts as being credible. (R. Vol. 3, pp. 294 - 295).

Since there was no objection to this testimony by the defense, the Appellant may not now complain of the admission of that testimony. *Golden v. State*, 984 So.2d 1026, 1033 (Miss. Ct. App. 2008).

Assuming that it would have been error to permit this testimony into evidence, had the defense entered a proper and contemporaneous objection, and such error would have been harmless. The victims testified in the case at bar, thereby permitting the jury to come to its own determination as to how credible their account was. That being so, any error in this regard was harmless. *Lattimer v. State*, 952 So.2d 206, 222 (Miss. Ct. App. 2006).

Finally, while it is true that the prosecutor asked the witness whether he found the victims' disclosures to be credible, we do not find that the witness stated his opinion concerning their credibility. He did indeed discuss the victims' behaviors and the way they responded to questions, stating that those tended to make their disclosures more credible, but he did not directly express an opinion as to whether the children were credible.

The Third Assignment of Error is without merit.

4. THAT THE TRIAL COURT DID NOT ERR IN THE ADMISSION OF CERTAIN TESTIMONY BY THE WITNESS THOMPSON

In the Fourth Assignment of Error, the Appellant cites a portion of Detective Thompson's testimony, in which the detective was asked to testify to certain statements heard by him during a

Youth Court hearing, and asserts that his testimony on the point was inadmissible hearsay. There was an objection; the trial court overruled the objection, stating that the response sought to the question put by the prosecutor was not for the truth of the matter. The detective described what occurred and then attempted to testify that it was because of the confrontation between the victims' mother and himself, witnessed by the victims, that the interview was aborted. An objection to that attempted testimony was sustained on the ground that it was the witness' speculation. (R. Vol. 3, pp. 234 - 235).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. M.R.E. 801(c). When the complete line of questioning is considered, we think it is fairly obvious that the prosecutor was not attempting to have the detective testify as to the truth of the statements he heard – that the Appellant's actions were just a game and that the mother did not want the Appellant imprisoned because he was the provider in the household. The purpose of the question was to explain why the detective did what he did. He "lost his cool," as they say, and confronted the mother. It is clear that the prosecutor's purpose was to put this into evidence to explain why the victims did were not interviewed as scheduled. In the end, the trial court ruled that the detective's speculation that it was the confrontation between the mother and himself that disrupted the planned interview was inadmissible. But it is clear that the purpose of the testimony by the detective as to what he heard was not offered for the truth of the matter, but only to explain why the interview did not occur.

Testimony of this kind is admissible, as against a hearsay objection. *E.g. Neal v. State*, 15 So.3rd 388, 404 (Miss. 2009). The truth of the statements heard by the detective was immaterial. What was material was that what he heard caused him to do certain things,

regardless of the truth of the statements. Statements offered for this purpose are not hearsay.

In the event this Court should find that the trial court erred in admitting this testimony, any such error is harmless error. The substance of those statements – that the Appellant's acts were a game and that the mother did not want the Appellant to go to prison – was established by other witnesses. (R. Vol. 2, pp. 116 -118; Vol. 3, 171). Since what the detective testified about was otherwise properly admitted, any error in permitting his testimony was harmless. *Brown v. State*, 868 So.2d 1027 (Miss. Ct. App. 2003).

The Fourth Assignment of Error is without merit.

5. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE WITNESS MILLER'S TESTIMONY UNDER M.R.E. 803(25)

In his final assignment of error, the Appellant asserts that the trial court erred in permitting J.M.'s father to testify to certain statements made by J.M. to him.

There was a hearing outside the presence of the jury concerning this issue. In that hearing, Miller testified that he was J.M.'s natural father and that he had been appointed guardian for C.M. for a time.

J. M.'s mother told J.M.'s father that J.M. was having problems and that she wanted J.M.'s father to speak to J.M. J.M.'s father took J.M. to a Wendy's restaurant to speak with him. J.M. told his father what the Appellant had been doing to him while his father and he were at a Wendy's restaurant. J.M. was eleven years of age at the time. J.M.'s father had no idea that J.M. was going to make such a disclosure before J.M. did so. J.M. and his father were both upset. When J.M. made this disclosure to his father, his father asked him whether he had told anyone about the matter. J.M. replied that he had told his mother but that his mother did not believe him and that no one would do anything to help him. When J.M.'s father stated that he was going to

contact law enforcement, J.M. asked him not to do so, J.M. being afraid of what would happen after he went home. J.M.'s father contacted the Department of Human Services that evening.

C.M. told J.M.'s father about what the Appellant was doing some time after he began living with J.M.'s father, and after the aborted interview. J.M.'s father did not initiate or elicit information from C.M.

J.M. did not make a disclosure at the first interview. J.M. later told his father that he was lying at the first interview. They boys became upset when they found out that they were going to visit with their mother and the Appellant. (R. Vol. 2, pp. 135 - 149).

The trial court, through its questions to the witness, got a focused and clarified account of what the boys told the witness and the circumstances under which they made the disclosures.

J.M. made his disclosure at Wendy's restaurant. J.M.'s mother wanted J.M's father to speak to J.M. because J.M. was having trouble in school and at home. J.M. told his father what the Appellant had been doing to him. When his father asked whether J.M. had told his mother, J.M. replied that he had but that his mother told J.M. that the Appellant made five hundred dollars a week and that she could not do without the Appellant. J.M. also told his grandmother, but she thought it was a joke, something of a "family tradition." J.M. did not want his father to contact law enforcement for fear of what would happen to him. The only persons part of the conversation at Wendy's were J.M. and his father.

Sometime later J.M.'s father had a conversation with C.M. not long after the aborted interview and when the boys found out about visitation with their mother and the Appellant. C.M. was about eight years of age at the time. C.M. also revealed the Appellant's acts of "checking the oil." C.M. brought these things out on his own. (R. Vol. 3, pp. 151 - 160).

The trial court found that the statements by the children made to J.M.'s father would be

admissible under M.R.E. 803(25). While the trial court did not make specific findings on each and every factor, it did state that it had taken those factors into consideration in reaching its decision. Given the time, content and circumstances of the statements, the court was satisfied that the State had sufficiently demonstrated their reliability. (R. Vol. 3, pg. 165).

A claim of error based upon the admission of testimony under Rule 803(25) is analyzed under an abuse - of - discretion standard. *Bishop v. State*, 982 So.2d 371 (Miss. 2008).

The Appellant focuses on several of the factors to be considered by a trial court when admission of testimony is sought under Rule 803(25) and claims that the testimony in support of admission did not establish those factors. We will point out that these particular points raised by the Appellant here were not raised in the trial court. (R. Vol. 3, pp. 163 - 165). That being so, the Appellant should not be heard here to claim error on a claim of lack of evidence on those points. There is, in any event, no merit in these claims.

Apparent motive of declarant to lie and timing of the statements

The first complaint here, apparently, is that there was no testimony as to what transpired between the time of first disclosure by J.M. to Miller and the disclosure to "CAC" a short time later. (Brief for the Appellant, at 14). We fail to see any particular significance to this point. Certainly the Appellant does not attempt to show that there was any such requirement to show this. On the other hand, the Appellant's attorney might have cross - examined the witness on the point. There is, on the other hand, nothing whatever to show that Miller in any way coaxed or attempted to coax disclosures from either victim. His testimony was clear that the children became upset at the prospect of being around the Appellant again. It was apparently that prospect that caused them to disclose.

As for C.M., Miller could not recall exactly when that child made disclosures, but it is

clear that C.M. did so on his own accord. The disclosures occurred at Miller's house.

The Appellant then states that J.M. stated that he lied when he failed to disclose the abuse he suffered at the Appellant's hands. It is true that J.M. stated that he lied, but it is also clear that J.M. was afraid of being returned to his mother and the Appellant. The reason why J.M. failed to disclose at the interview was established. The trial court committed no error in considering that reason in the process of considering whether the disclosures made bore sufficient indicia of reliability.

Presence of another person

No one was present at the conversation between Miller and J.M. at the restaurant when J.M. told Miller of what the Appellant had done. This is hardly surprising given the sensitive nature of the subject. That no one else was present at that time cannot weigh heavily against admission. One would expect that an initial disclosure of sexual abuse would be made confidentially.

As for C.M., Miller's wife may have been present. The disclosure or disclosures occurred at Miller's house. We perceive no reason why what was testified to in this respect would not have been sufficient to permit the trial court to find reliability, when considered with the other factors.

Spontaneous statement

The Appellant then complains that there was no evidence at to who was present when C.M. made his disclosure to Miller, where the disclosure was made, when it was made, or what was actually said, or if the statements were in response to questions.

Miller testified that C.M. made his disclosure not long after J.M. made his. Miller believed the disclosure was at his house, and the disclosure occurred after C.M. found that he

was going to have to visit with his mother and the Appellant. Miller believed that it was around Christmas. On at least one occasion, C.M. made disclosures in the presence of Miller, his wife, and J.M. It does not appear that the disclosures were made in response to questions by Miller. They appear to have been volunteered by C.M. (R. Vol. 3, pp. 154 - 157; Vol. 2, pg. 140). This information was sufficient for the trial court. Certainly the Appellant wholly fails to attempt to demonstrate that it was not.

Relationship between declarant and witness

The Appellant points out that Miller had little contact with J.M. and was not the father of C.M. Somehow or another, the Appellant concludes that these facts show that there was an insufficient showing of reliability. But of course the Appellant does not explain how that might be.

Miller testified that his limited contact with J.M. had much to do with the fact that his former wife did not cooperate. (R. Vol. 2, pg. 142). As for C.M., Miller testified that he looked upon him as one of his sons, cared for him and was close to him. (R. Vol. 2, pg. 141). Miller undertook the care of these children when they were taken from their mother. We think the record demonstrates a caring relationship.

The trial court stated that it had considered the factors to be considered. This was sufficient. The trial court did what it was required to do in this regard. Its decision therefore should not be disturbed. *Walls v. State*, 928 So.2d 922 (Miss. Ct. App. 2006). This particularly in view of the fact that the Appellant has not shown any specific factual error made by the court.

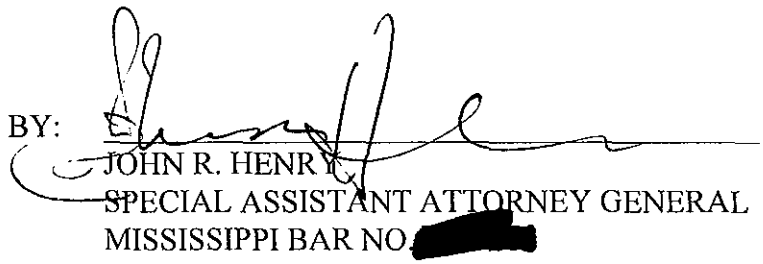
The Fifth Assignment of Error is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

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

CERTIFICATE OF SERVICE

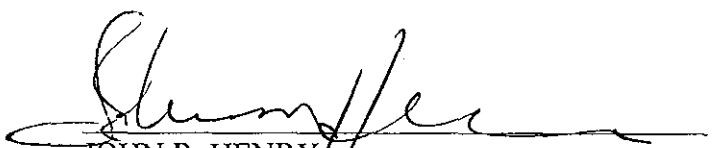
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable William E. Chapman, III
Circuit Court Judge
P. O. Box 1885
Brandon, MS 39043

Honorable Michael Guest
District Attorney
P. O. Box 68
Brandon, MS 39043

M. Judith Barnett, Esquire
Attorney At Law
1764 Lelia Drive
Jackson, MS 39216

This the 4th day of December, 2009.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

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