

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2009-KA-00290-COA

TOMMY JUNIOR McCRORY
Appellant

vs.

STATE OF MISSISSIPPI
Appellee

APPEAL
From the Circuit Court of Rankin County, Mississippi

BRIEF OF THE APPELLANT

ATTORNEY FOR THE APPELLANT:

M. Judith Barnett (MSB # [REDACTED])
M. Judith Barnett, P.A.
1764 Lelia Drive
Jackson, Mississippi 39216
Tel: (601) 981-4450
Fax: (601) 981-4717
mjbarnettpa@yahoo.com

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TOMMY JUNIOR McCrORY

APPELLANT

VS.

CAUSE NO. 2009-KA-00290-COA

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Jacque Purnell, Esq.
 Marty Miller, Esq.
 Rankin County District Attorney's Office
 P.O. Box 68
 Brandon, MS 39043
2. James M. Hood, III, Esq.
 Charles W. Maris, Jr., Esq.
 Office of the Attorney General
 P.O. Box 220
 Jackson, MS 39205-0220
3. Honorable Judge William E. Chapman, III
 Circuit Court of Rankin County, Mississippi
 P.O. Box 1626
 Canton, MS 39046
4. Tommy J. McCrory 108776
 SMCI 2 Bldg. C-2 Zone A Bed 24
 P.O. Box 1419
 Leakesville, MS 39451
5. Brandon I. Dorsey, Esq.
 P.O. Box 13427
 Jackson, MS 39236-3427

SO CERTIFIED, this the 31st day of August, 2009.



M. JUDITH BARNETT (MSB# [REDACTED])

TABLE OF CONTENTS

TABLE OF CASES	iv
STATEMENT OF THE ISSUES	v
STATEMENT OF THE CASE	1
FACTS	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. THERE IS INSUFFICIENT EVIDENCE TO PROVE THAT THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI HAD JURISDICTION OF SUBJECT MATTER IN THIS CASE AS IT PERTAINS TO C.M.	6
II. THE CHARGES AGAINST DEFENDANT REGARDING C.M. MUST BE REVERSED SINCE THE ALLEGED VICTIM, C.M., WAS UNABLE TO IDENTIFY McCRORY AS THE ALLEGED PERPETRATOR	7
III. ALLOWING EXPERT WITNESS BRIAN ERVIN TO DIRECTLY COMMENT ON THE CREDIBILITY AND VERACITY OF BOTH C.M. AND J.M. WAS REVERSIBLE ERROR	8
IV. ALLOWING THE HEARSAY TESTIMONY OF DETECTIVE JAMES THOMPSON WAS REVERSIBLE ERROR.	10
V. THE COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF RYAN MILLER SINCE IT DID NOT PROPERLY ESTABLISH THE INDICIA IF RELIABILITY AND OTHER FACTORS REQUIRED UNDER THE TENDER YEARS EXCEPTION INQUIRY	12
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF CASES

Statutes:

Section 97-3-95 of the Mississippi Code of 1972, annotated	1
Section 97-3-97 of the Mississippi Code of 1972, annotated	1,3
Section 99-11-3 of the Mississippi Code of 1972, annotated	6

Cases:

<i>Bishop v. State</i> , 982 So.2d 371 (Miss. 2008)	12,13
<i>Branch v. State</i> , 998 So.2d 411 (Miss.2008)	9
<i>Crum v. State</i> , 216 Miss. 780, 788, 63 So.2d 242, 245 (1953)	6
<i>Goodson v. State</i> , 566 So.2d 1142 (Miss.1990)	8
<i>Hobgood v. State</i> , 926 So.2d 847 (Miss. 2006)	8,9,11
<i>Smith v. State</i> , 646 So.2d 538 (Miss.1994)	6,13
<i>Swindle v. State</i> , 502 So.2d 652 (Miss.1987)	11

Rules of Court

Rule 803(25) of the Mississippi Rules of Evidence	5,12,13,16
---	------------

STATEMENT OF THE ISSUES

- I. Whether there is sufficient evidence to prove that the circuit court of Rankin County, Mississippi had jurisdiction of the subject matter in this case as it pertains to C.M.
- II. Whether the charges and resulting conviction against Defendant regarding C.M. must be reversed since the alleged victim, C.M., was unable to identify McCrory as the alleged perpetrator.
- III. Whether allowing expert witness Brian Ervin to directly comment on the credibility and veracity of both C.M. and J.M. was reversible error.
- IV. Whether allowing the hearsay testimony of Detective James Thompson was reversible error.
- V. Whether the trial court's finding that C.M. and J.M.'s statements to Ryan Miller bore substantial indicia of reliability is supported by substantial evidence and whether the trial court followed the proper procedure in its determination or abused its discretion in finding that C.M. and J.M.'s statements bore indicia of reliability and in admitting their statements through Ryan Miller pursuant to the tender years exception. Miss. R. Evid. 803(25).

STATEMENT OF THE CASE

On or about May 7, 2007, Tommy Junior McCrory was indicted by the Grand Jury of Rankin County, Mississippi of two counts of Sexual Battery, in a two count indictment which alleged as follows:

COUNT I

Tommy Junior McCrory, late of the county aforesaid, on, about and between, November 18, 2005 and January 8, 2007, in the county aforesaid and within the jurisdiction of this Court, the said defendant being a male human being above the age of seventeen (17) years, whose date of birth is November 25, 1983, did willfully, unlawfully, and feloniously engage in sexual penetration, as defined by Mississippi Code Annotated §97-3-97, with C.M., a male child whose date of birth is November 18, 1998, by inserting his finger(s) into C.M.'s anal opening, at a time when Tommy Junior McCrory was more than twenty-four (24) months older than C.M., all occurring within the jurisdiction of this court and in violation of Section 97-3-95(1)(d), Mississippi Code Annotated (1972, as amended); and,

COUNT II

And, based upon a series of acts connected together and constituting parts of a common scheme and plan, Tommy Junior McCrory, late of the county aforesaid, on, about and between, November 18, 2005 and January 8, 2007, in the county aforesaid and within the jurisdiction of this Court, the said defendant being a male human being above the age of seventeen (17) years, whose date of birth is November 25, 1983, did willfully, unlawfully, and feloniously engage in sexual penetration, as defined by Mississippi Code Annotated §97-3-97, with J.M., a male child, whose date of birth is October 30, 1995, by inserting his finger(s) into J.M.'s anal opening, at a time when Tommy Junior McCrory was more than twenty-four (24) months older than J.M., all occurring within the jurisdiction of this court and in violation of Section 97-3-95(1)(d), Mississippi Code Annotated (1972, as amended).

On September 23, 2008, the cause came on for trial by jury in the Circuit Court of Rankin County, Mississippi on the charges of two counts of Sexual Battery.

After a three day trial, the case was submitted to the jury for deliberations. (R. 442). At the conclusion of their deliberations, the Jury reached a verdict on both counts of the Indictment finding the Defendant, Tommy Junior McCrory, Guilty as to both Counts. (R. 443-444).

On October 3, 2008, Defendant filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial and for Reasonable Bail Pending Appeal. (R. 82).

At a sentencing hearing on October 27, 2008, Tommy Junior McCrory was sentenced in Count I to serve a term of Thirty Five (35) years in the custody of the Mississippi Department of Corrections with Mr. McCrory being released after serving the first Thirty (30) years followed by placement on Five (5) years post-release supervision; as to Court II, Mr. McCrory was sentenced to serve a term of Thirty Five (35) years in the custody of the Mississippi Department of Corrections with Mr. McCrory being released after serving the first Thirty (30) years followed by placement on Five (5) years post-release supervision, with these sentences to run Concurrent. (R. 86-89, 466-467). Further, Mr. McCrory was ordered to pay court costs, fees and assessments in the amount of \$307.50. (R. 466-467).

On March 31, 1997, the Defendant's Renewed Motion for New Trial or in the Alternative Judgment Notwithstanding the Verdict was denied.

On January 29, 2009, the Court entered and Order Denying Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial and for Reasonable Bail Pending Appeal.

On or about February 10, 2009, Tommy Junior McCrory filed his Notice of Appeal herein.

FACTS

On or about May 7, 2007, Tommy Junior McCrory was indicted by the Grand Jury of Rankin County, Mississippi of two counts of Sexual Battery, in a two count indictment which alleged that on, about and between, November 18, 2005 and January 8, 2007, the said defendant being a male human being above the age of seventeen (17) years, whose date of birth is November 25, 1983, did willfully, unlawfully, and feloniously engage in sexual penetration, as defined by Mississippi Code Annotated §97-3-97, with C.M., a male child whose date of birth is November 18, 1998, and with J.M., a male child, whose date of birth is October 30, 1995, by inserting his finger(s) into C.M.'s anal opening and J.M.'s anal opening, at a time when Tommy Junior McCrory was more than twenty-four (24) months older than C.M. and J.M., in violation of Section 97-3-95(1)(d), Mississippi Code Annotated (1972, as amended).

The Defendant was the step-father of C.M. and J.M.

The allegations came to light when J.M. told his father, Ryan Miller, that the Defendant "would hold him down and check his oil" by running "his hands down the back of his pants on the inside and stick his finger in his butt." (R. 136). At the time of this statement, J.M. had just turned eleven (11). (R. 136). Ryan Miller contacted the Mississippi Department of Human Services on the evening of the disclosure. (R. 137).

After Ryan Miller has contacted DHS, he stated that C.M. told him that the Defendant would "check his oil" too. (R. 138). At the time of this statement, C.M. was eight (8) years old. (R. 140). C.M. is half-brother of J.M. (R. 141).

On November 7, 2006, DHS sent their report regarding C.M. and J.M. to Detective James Thompson of the Pearl Police Department. (R. 231). Upon receipt of the report, Detective Thompson contacted Judge Shirley of the Pearl Youth Court, who issued a no-contact order and

scheduled an emergency hearing regarding C.M. and J.M. (R. 231). C.M. and J.M. were placed in the custody of Ryan Miller.

As part of his investigation into the allegations of C.M. and J.M., Detective Thompson set up an interview for both C.M. and J.M. with the Children's Advocacy Center (CAC) in Jackson. (R. 233).

At the initial interview at CAC, neither C.M. or J.M. disclosed any allegations of abuse at the hands of the Defendant. (R. 235).

Approximately one month after the initial interview at CAC, Detective Thompson received a phone call from Ryan Miller who stated that "[J.M. was ready to tell the truth." (R. 236). As a result of this phone call and a meeting with J.M., Detective Thompson set up a second interview with CAC located in Rankin County. (R. 236).

At this second interview conducted by Brian Ervin, on January 4, 2007, both C.M. and J.M. disclosed to Mr. Ervin allegations of sexual abuse by the Defendant. (R. 292.)

As a result of the statements of C.M. and J.M., the Defendant was Indicted by the Grand Jury of Rankin County, Mississippi on two Counts of Sexual Battery.

On September 23, 2008, the cause came on for trial by jury in the Circuit Court of Rankin County, Mississippi on the charges of two counts of Sexual Battery.

After a three day trial, the case was submitted to the jury for deliberations. (R. 442). At the conclusion of their deliberations, the Jury reached a verdict on both counts of the Indictment finding the Defendant, Tommy Junior McCrory, Guilty as to both Counts. (R. 443-444).

Accordingly, the Defendant herein appeals his convictions to this Honorable Court.

SUMMARY OF THE ARGUMENT

I. There was insufficient proof, is any, to show that the Circuit Court of Rankin County, Mississippi had jurisdiction of the parties and subject matter in this case, as it pertains to C.M., in that there was no testimony or evidence regarding the place or places where the alleged acts occurred. There is no proof whatsoever that the alleged acts took place in Rankin County, Mississippi. If the Rankin County Circuit Court was without jurisdiction in this matter, then the sentence in this case is unlawful and must be vacated.

II. As a basic principle of law, the alleged victim in this matter, C.M., failed to identify the Defendant, Tommy Junior McCrory, in the courtroom during the trial in this matter as the alleged perpetrator and as such, the Defendant was not only entitled to a directed verdict as to the charges involving C.M., but there was insufficient evidence for any competent jury to find Mr. McCrory guilty of the charges lodged against him by C.M.

III. Allowing expert witness Brian Ervin to directly comment on the credibility and veracity of both C.M. and J.M. was reversible error.

IV. Allowing the hearsay testimony of Detective James Thompson was reversible error.

V. The trial court's finding that C.M. and J.M.'s statements to Ryan Miller bore substantial indicia of reliability is not supported by substantial evidence. Furthermore, the trial court did not follow the proper procedure in its determination, and abuses its discretion in finding that C.M. and J.M.'s statements bore indicia of reliability and in admitting their statements through Ryan Miller pursuant to the tender years exception. Miss. R. Evid. 803(25).

ARGUMENT:

I. THERE IS INSUFFICIENT EVIDENCE TO PROVE THAT THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI DID HAD JURISDICTION OF SUBJECT MATTER IN THIS CASE AS IT PERTAINS TO C.M..

In a criminal case, venue is jurisdictional, must be proved, and may be raised for the first time on appeal. *Crum v. State*, 216 Miss. 780, 788, 63 So.2d 242, 245 (1953). The venue of a criminal offense is in the county where the crime was committed, unless otherwise provided by law. *Miss.Code Ann. § 99-11-3(1) (Rev.2000)*. Proof of jurisdiction may be shown either by direct or circumstantial evidence. *Smith v. State*, 646 So.2d 538, 541 (Miss.1994). In the case at bar, there was no showing that the alleged acts pertaining to C.M. herein occurred in Rankin County, Mississippi.

No testimony was elicited from C.M., as to the exact date(s) and place(s) of occurrence of the alleged acts of the Defendant. The testimony that was elicited from C.M. asked him where he lived when this allegedly happened, not where did it happen.

At trial, the testimony of C.M. was as follows:

Q. Where did you live when it happened?

A. I was living with my grandmother. Then me and Jeremy moved to Pearl with my mom and Tommy.

Q. The times that you were living with your grandmother, would you go visit your mom and Tommy too?

A. Mainly my mom, but Tommy was mainly there.

(R. 104).

C.M. did not state where the alleged acts took place, if they took place in his grandmother's home, or if they took place at his mother's home. There simply was no testimony whatsoever from C.M. to establish that the alleged acts occurred in Rankin County, Mississippi.

To further illustrate this point, on Cross Examination, at trial, the testimony of C.M. was as follows:

Q. ... Now you said that Tommy did some bad things to you, right?

A. Yes, sir.

Q. Do you remember where that occurred?

A. No, sir.

Q. You don't remember where it occurred?

A. No, sir.

(R. 110).

As such, the Circuit Court of Rankin County, Mississippi was without jurisdiction of the subject matter of this criminal case against Mr. McCrory as it pertains to the charges by C.M., and the sentence in this case should be vacated and the charges against him dismissed in toto.

II. THE CHARGES AGAINST DEFENDANT REGARDING C.M. MUST BE REVERSED SINCE THE ALLEGED VICTIM, C.M., WAS UNABLE TO IDENTIFY McCRORY AS THE ALLEGED PERPETRATOR.

It is irrefutable that C.M. failed to identify the Defendant, Tommy Junior McCrory, in the Courtroom at the trial in this matter.

At trial, the testimony of C.M. was as follows:

Q. Since all this happened and y'all told about it, have you seen Tommy?

A. No, ma'am.

Q. Do you see him in the courtroom today, Christopher?

A. No, ma'am.

Q. I need you to stand up and look around for me.

A. No, ma'am.

(R. 105).

No previous lineups, out-of-court identifications, or photo-lineups were used in this matter and the legal precedent regarding such is irrelevant here. As a basic principle of law, the alleged victim in this matter, C.M., failed to identify the Defendant, Tommy Junior McCrory, in the courtroom during the trial in this matter as the alleged perpetrator and as such, the Defendant was not only entitled to a directed verdict as to the charges involving C.M., but there was insufficient evidence for any competent jury to find Mr. McCrory guilty of the charges lodged against him by C.M.

Due to C.M.'s failure to identify the Defendant herein, the sentence against him as they relate to C.M., must be vacated and the charges dismissed.

III. ALLOWING EXPERT WITNESS BRIAN ERVIN TO DIRECTLY COMMENT ON THE CREDIBILITY AND VERACITY OF BOTH C.M. AND J.M. WAS REVERSIBLE ERROR.

It is well settled that under Rule 702 "experts called to testify about behavioral characteristics that may affect an alleged victim's credibility may not give an opinion of the credibility of a particular witness." *Hobgood v. State*, 926 So.2d 847 (Miss. 2006) (*quoting Goodson v. State*, 566 So.2d 1142, 1153 (Miss.1990)).

In this case, not only did the tendered expert witness, Brian Ervin, opine about the credibility of both C.M. and J.M., but he did so in response to the State's direct question as to the credibility of the witnesses.

At trial, the testimony of Brian Ervin was as follows:

- Q. (By Ms. Purnell) At the conclusion of interviews, let's take Christopher first, did you find his disclosure of sexual abuse at the hands of Mr. McCrory credible?
- A. He gave details and descriptions that added credibility to his report.
- Q. For example?
- A. For example, exactly what happened, describing how the touch occurred inside of the clothing. He uses his own terminology saying the - - I don't want to misquote him. He said, "Putting his finger right up my butt hole." He stated in his words, "It was painful." And then another comment, "It felt like a needle going up my butt hole."
- Q. What about Jeremy, did you find his disclosure credible?
- A. Jeremy told me, on the same lines, details of multiple incidents when this occurred, descriptive on exactly what occurred with saying how and where he was touched, that it was inside of his clothing. Also adding credibility to Jeremy's report was the fact that he appeared to have more reason not to disclose abuse than to disclose abuse. You saw the video. He was so distraught about being there that he would hardly look at me. This is very common with young boys who have been sexually abused. They are very ashamed by it. They are very concerned about what the other person in the room is thinking about them. I've had -- not in this one -- but I've had numerous interviews where I've had children ask me, "Does this mean I'm gay?" Little boys ask me that. It causes them just a bunch of feelings and emotions that at their young age they're really not capable of dealing with. In this situation I think all that expressed in the way he was leaned down, the way he talked, the way his voice carried, the fact that he even said he was afraid his mother was going to be mad at him for telling. He had more reason not to disclose this abuse than to disclose this abuse, and to me that adds great credibility to his report.

(R. 294-295.

In this case the court abused its discretion and improperly allowed Ervin to comment on C.M. and J.M.'s credibility and veracity regarding the allegations of abuse.

This case is distinguishable from *Hobgood v. State*, 926 So.2d 847 (Miss.2006) wherein a trial court's decision to allow testimony as to the credibility of a child-abuse victim was upheld. In the *Hobgood* case, a psychotherapist, tendered as an expert, was asked if he found the child victim credible. *Hobgood*, 926 So.2d at 854. "The expert replied "yes" and explained that the

victim's account of the abuse was always consistent and physical evidence supported the child's statements." *Branch v. State*, 998 So.2d 411, 415-416 (Miss.2008) (citing *Hobgood*, 926 So.2d at 854).

In contrast, in the case at bar, Mr. Ervin goes beyond the realm accepted by this Court in *Hobgood* in that Ervin comments on the veracity of J.M. by stating "that he appeared to have more reason not to disclose that to disclose abuse, and to me that adds great credibility to his report." (R. 294-295). Ervin further comments on the veracity of J.M. by pointing out that "I think all that expressed in the way he was leaned down, the way he talked, the way his voice carried, the fact that he even said he was afraid his mother was going to be mad at him for telling." (*Id.*)

Ervin does not testify as to the consistency of the statement of C.M., as was done by the expert in *Hobgood*, but rather testifies that he believed C.M. to be credible from the child's descriptions, terminology, and comments. (R. 294).

The testimony of Ervin, although using the word credibility, was actually commentary on the truthfulness of C.M. and J.M. he perceived from his interview, and as such, these comments go beyond that which acceptable and their admission amounts to an abuse of discretion and reversible error herein.

IV. ALLOWING THE HEARSAY TESTIMONY OF DETECTIVE JAMES THOMPSON WAS REVERSIBLE ERROR.

On Direct Examination, Detective James Thompson, was allowed, over the objection of the Defendant, to state hearsay testimony regarding what was said, allegedly, by C.M., J.M., and/or their mother, the record is unclear as to who exactly made the statement to the Detective.

At trial, the testimony of Detective James Thompson was as follows:

Q. Tell the jury what happened at that CAC interview?

- A. You want me to tell what led up to that and then what happened there?
- Q. Let's advise the jury of what led up to that meeting from Youth Court that y'all were required to go to CAC for an interview, who all went, and just talk us through that day's events?
- A. As an adult and as a police officer, my job is to protect kids. Well, during that hearing at Youth Court, the mother had made a comment in open court that it was just a game.

MR. DORSEY: Your Honor, I object to hearsay.

MR. MILLER: It's not being offered for the truth of the matter.

THE COURT: Overruled. It's not offered for the truth of the matter. You may answer.

- A. That this was just a game and it was something that had been passed on from generation to generation, and that bothered me. Then I also learned that the kids were told not to tell because mom didn't want Tommy to go to jail because he was the provider in the household. So we leave Youth Court. Naturally as a human being and as a father, I was fuming. So I drove to Jackson and got to CAC. When I got there, I got the mother to come outside on the sidewalk there and I let her have it. Whether that be right or wrong, the kids overheard me and seen me, and I guess they were upset that not only was the provider in the household in trouble, but now mom is in trouble because of things she's said. So they didn't disclose as CAC that day because of me.

"A statement is inadmissible hearsay if it is made for the truth of the matter asserted, and typically a witness' statement to the police is hearsay." *Hobgood v. State*, 926 So.2d 847, 853 (Miss.2006) (citing *Swindle v. State*, 502 So.2d 652, 657 (Miss.1987)). "However, to be deemed hearsay, the purpose of the testimony must be for the truth of the matter asserted." *Hobgood v. State*, 926 So.2d 847, 853 (Miss.2006) (citing *Swindle v. State*, 502 So.2d 652, 658 (Miss.1987)). In this case the trial court abused its discretion in finding the alleged statements by the mother and/or C.M. and J.M. to Detective Thompson were not admitted for their substantive truth, for that is exactly what they were admitted for. This testimony cannot be deemed to be harmless error when analyzing the content therein and the implication thereof which substantially

prejudice and harm the Defendant in violation of his constitutional rights. The admission of these hearsay statements was reversible error.

V. THE COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF RYAN MILLER SINCE IT DID NOT PROPERLY ESTABLISH THE INDICIA OF RELIABILITY AND OTHER FACTORS REQUIRED UNDER THE TENDER YEARS EXCEPTION INQUIRY

Ryan Miller, the father of J.M., and no-blood relation to C.M., was permitted to testify as to the out of court statements of both C.M. and J.M. in this matter after the Court attempted to conduct a Tender Years Hearing in this matter.

In order for a Court to allow the admissibility of the statements of a child of tender years through another witness, the trial court must determine if a statement meets the reliability test under Rule 803(25), in order for it to be deemed admissible under Rule 803(4). See *Bishop v. State*, 982 So.2d 371 (Miss. 2008).

Rule 803(25) states as follows:

Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Miss. R. Evid. 803(25).

“The comment to Rule 803(25) provides the following non-exhaustive list of factors that a trial court should consider in determining if the statement has sufficient indicia of reliability:

(1) whether there is an apparent motive of declarant to lie; (2) the declarant's general character; (3) whether more than one person heard the statements; (4) whether the statements were spontaneous; (5) the timing of statements; (6) the relationship between the declarant and the witness; (7) the possibility of faulty recollection by the declarant is

remote; (8) certainty that the statements were made; (9) the credibility of the witness testifying about the statements; (10) the declarant's age or maturity; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge and experience made it unlikely that the declarant fabricated."

Bishop v. State, 982 So.2d 371 (Miss. 2008) (citing Miss. R. Evid. 803(25) cmt.; *see also Smith v. State*, 925 So.2d 825, 834 (Miss.2006)).

At the end of the Tender Years Exception hearing pertaining to Ryan Miller, the Court made its findings as follows:

Now, I'm looking at the tender years exception under 803(25), and I have considered all of the factors that the rule says the court should consider. I don't believe it's necessary for me to make an on the record finding relative to my thoughts on those twelve, but having considered all of those and having looked at these two victims on the witness stand, and, you know, quite frankly, for my purpose having examined Mr. Miller, I do find that under the rule of time, content, and circumstances of the statements made by both of the victims provide substantial indicia of reliability.

I think those are the magical findings that I have to find under the rule. But it seems like to me the circumstances set forth by Mr. Miller's testimony -- I mean, there's no doubt in my mind about the reliability of the statements made by the victims in this case to him outside of the courtroom. So he will be allowed to testify as to those statements.

(R. 165.)

In that the trial Judge did not make a finding, as was done in the case of *Bishop v. State*, 982 So.2d 371 (Miss. 2008), as to his finding regarding the twelve factors delineated in the comment and adopted by this Court, there is not basis on the record for the Court's findings.

Specifically, Defendant points out the following items of inquiry: (1) whether there is an apparent motive of declarant to lie; (3) whether more than one person heard the statements; (4) whether the statements were spontaneous; (5) the timing of statements; and (6) the relationship between the declarant and the witness.

(A) Whether there is an apparent motive of declarant to lie and the timing of statements.

The Court did not specifically address these issues. The allegations came to light when J.M. told his father, Ryan Miller, that the Defendant “would hold him down and check his oil” by running “his hands down the back of his pants on the inside and stick his finger in his butt.” (R. 136). At the time of this statement, sometime prior to November 7, 2006, J.M. had just turned eleven (11). (R. 136). Ryan Miller contacted the Mississippi Department of Human Services on the evening of the disclosure. (R. 137).

After Ryan Miller has contacted DHS, he stated that C.M. told him that the Defendant would “check his oil” too. (R. 138). At the time of this statement, C.M. was eight (8) years old. (R. 140). C.M. is half-brother of J.M. (R. 141).

On November 7, 2006, DHS sent their report regarding C.M. and J.M. to Detective James Thompson of the Pearl Police Department. (R. 231).

At the initial interview at CAC, neither C.M. or J.M. disclosed any allegations of abuse at the hands of the Defendant. (R. 235).

Approximately one month after the initial interview at CAC, Detective Thompson received a phone call from Ryan Miller who stated that “[J.M. was ready to tell the truth.” (R. 236). As a result of this phone call and a meeting with J.M., Detective Thompson set up a second interview with CAC located in Rankin County. (R. 236).

At this second interview conducted by Brian Ervin, on January 4, 2007, both C.M. and J.M. disclosed to Mr. Ervin allegations of sexual abuse by the Defendant. (R. 292.)

No inquiry was made, and the court had no basis to determine, what transpired between the first disclosure by J.M. to Ryan Miller, his denial to CAC of any abuse, and his ultimate disclosure to CAC more than two (2) months later.

No inquiry was made, and the court had no basis to determine what precipitated C.M. to make a statement to Ryan Miller that he had been abused by Defendant. There was no evidence as to time and place at all.

Specifically, the Court did not address the fact that J.M. told Ryan Miller that he was lying.

Ryan Miller testified as follows:

- Q. You went with Jeremy when he went to CAC, and he did not disclose anything; is that correct?
- A. Yes, we all went together. We has left the Youth Court. Actually, he rode over there with my wife, because I had to ride with Stephanie because we had all the kids in the car.
- Q. Again, sometime after that he changed his story.
- A. When we left there that day, he had told Christopher when we were getting in this car that everything was fine now, that he had taken care of everything. When we asked about it later, **he said he was lying.**

(R. 143) (emphasis added).

After review of the record, the trial court's finding that C.M. and J.M.'s statements bore substantial indicia of reliability, in light of J.M.'a admission that he lied is NOT supported by substantial evidence. The Court abuses its discretion in finding that C.M. and J.M.'s statements bore indicia of reliability and in admitting their statements pursuant to the tender years exception. Miss. R. Evid. 803(25).

B. Whether more than one person heard the statements.

At the time of the purported disclosure of J.M. to Ryan Miller, no one else was party to this conversation. (R. 136).

There is no evidence in the record as to who was present when C.M. allegedly made his purported disclosure to Ryan Miller, except for a statement by Mr. Miller that states his Wife was

present at some point in time without elaboration as to time and place or what she allegedly heard. (R. 146).

As such, the trial Court could not have deemed this point of inquiry as one which would tend to favor an indicia of reliability.

C. Whether the statements were spontaneous.

There is no evidence in the record as to who was present when C.M. allegedly made his purported disclosure to Ryan Miller, where this purported disclosure was made, when this purported disclosure was made, what was actually said to Ryan Miller by C.M., or if C.M. was being questioned by Ryan Miller or someone else at the time of the purported statement. As such, the Court could not have determined whether C.M.'s statement was spontaneous, and could not have deemed this point of inquiry as one which would tend to favor an indicia of reliability..

D. The relationship between the declarant and the witness.

Ryan Miller, the father of J.M., admittedly had little visitation or contact with his son prior to the alleged disclosure at the Wendy's in November of 2006, and, in fact, had only supervised visitation. (R. 141-142). J.M.'s mother has custody of the child. (Id.)

Ryan Miller is not a blood relation to C.M., who was born during Ryan Miller's marriage to Stephanie Jamison, but who had an affair during the marriage which resulted in the birth of C.M. (R. 154).

The Court could not have deemed this point of inquiry as one which would tend to favor an indicia of reliability.

The trial court's finding that C.M. and J.M.'s statements to Ryan Miller bore substantial indicia of reliability is not supported by substantial evidence. Furthermore, the trial court did not follow the proper procedure in its determination, and abuses its discretion in finding that C.M.

and J.M.'s statements bore indicia of reliability and in admitting their statements through Ryan Miller pursuant to the tender years exception. Miss. R. Evid. 803(25).


CONCLUSION

For all of the above and foregoing reasons, Appellant requests that this Honorable Court reverse the judgment of the Circuit Court of Rankin County, Mississippi.

Respectfully submitted, this the 31st day of August, 2009.

TOMMY JUNIOR McCRORY

BY: 
M. JUDITH BARNETT (MSB )

M. Judith Barnett (MSB # )
M. Judith Barnett, P.A.
1764 Lelia Drive
Jackson, Mississippi 39216
Tel: (601) 981-4450
Fax: (601) 981-4717
mjbarnettpa@yahoo.com

CERTIFICATE OF SERVICE

I, M. Judith Barnett, do hereby certify that I have this day caused one (1) true and correct copy of the Brief for the Appellant to be forwarded, via United States Mail, postage prepaid, and addressed as indicated below to the following:


1. Jacque Purnell, Esq.
 Marty Miller, Esq.
 Rankin County District Attorney's Office
 P.O. Box 68
 Brandon, MS 39043

2. James M. Hood, III, Esq.
 Charles W. Maris, Jr., Esq.
 Office of the Attorney General
 P.O. Box 220
 Jackson, MS 39205-0220

3. Honorable Judge William E. Chapman, III
 Circuit Court of Rankin County, Mississippi
 P.O. Box 1626
 Canton, MS 39046

4. Tommy J. McCrory 108776
 SMCI 2 Bldg. C-2 Zone A Bed 24
 P.O. Box 1419
 Leakesville, MS 39451

This service effective this, the 31st day of August, 2009.



M. Judith Barnett (MSB # [REDACTED])