IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN T. GORE — APPELLANT

VS. — NO. 2009-KA-1090-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
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

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STATEMENT OF ISSUES

I. EVIDENCE OF GORE'S SEXUAL ASSAULT OF ANOTHER CHILD WAS PROPERLY ADMITTED UNDER M.R.E. 404(B).

II. LINDA STANLEY'S PROFFERED TESTIMONY WAS PROPERLY EXCLUDED UNDER M.R.E. 608(B).

III. GORE'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE WAS NOT IMPLICATED WHEN HE VOLUNTARILY LED OFFICERS TO EVIDENCE OF THE CRIME.

IV. THE JURY'S VERDICT IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

On the morning of May 11, 2007, Daniel Gore called his wife Lindsey Bohn and asked her to bring their twenty-one-month-old daughter, M.G., to Pepsi Pops, a music festival at which Daniel worked under contract. T. 91. Before heading out to the reservoir with M.G. and a friend, Lindsey stopped by the home of John T. Gore, Daniel's father, to see if he wanted to accompany them to the music festival. T. 92. Gore declined the invitation and "pretty much begged" Lindsey to leave M.G. with him while Lindsey went with her friend Matt to Pepsi Pops. T. 92, 196.

At around 10:30 p.m., Lindsey returned to Gore's house to pick up M.G. T. 92. After entering Gore's house, Lindsey testified that the following occurred.

> I seen my daughter laying on the bed next to him, and she is completely naked, no diaper, no nothing. And first words out of his mouth to me were, she found my vibrator. And I, kind of shocked me a little bit, so I said, and? Well, she knows how to turn it on. And I also said, and? Well, she put it on herself. And so I grabbed up my daughter, and I'm holding her. And she wakes up, and she wants to get down, I sat her down. And Johnny, by this time, is sitting in his bathroom. He has got a TV in his bathroom and some letters and whatnot that's kind of like his sanctuary. That's where he spent most of his time. And she grabs up a tin, a yellow tin, and it's called Burt's Bees. It's kind of a hand soft, lotion thing. And she tells me, Papa, owee's butt, pats her behind. And at that point, I got a little leery, so I grabbed up her stuff, and me and my friend, Matt, we went back to my house with my child.

T. 93. After arriving home, Lindsey was putting a diaper on M.G. when she saw that her baby's anus was stretched to the size of a nickel. T. 94. Lindsey "lost it" and grabbed a gun. T. 94. When she could not find bullets, she grabbed a combat knife and proceeded to Gore's house. T. 94. Lindsey ran in and tried to stab Gore. T. 95. When she failed, she started throwing stuff around, screaming, and "going crazy." T. 95. When Lindsey asked Gore what happened to her baby, he replied, "maybe she did it to herself or maybe she's got to poop." T. 95. Lindsey had not mentioned M.G.'s stretched anus prior to Gore's explanation. T. 95. Lindsey then called 911 and went back home to wait for law enforcement officers to arrive. T. 96. While authorities were at Lindsey's house taking

a statement, M.G., without being prompted or questioned, ran down the hall saying "butt, butt" while pointing to the area of her injury. T. 142. After giving a statement to sheriff's deputies, Lindsey took M.G. to the emergency room for a rape kit to be administered. T.96, 157.

After speaking with Lindsey, sheriff's deputies Joseph Head and Sheila Tucker spoke with Gore at his home after advising him of his *Miranda* rights. T. 116, 158. Both Head and Tucker testified that Gore was intoxicated. T. 117, 158. Gore told the officers that he laid M.G. down for a nap, and that she had woken up while he was still asleep and found a vibrator under the bed, "and she was playing with herself with the vibrator" when he awoke. T. 117, 160. He further explained that the reason the baby was naked and had on no diaper is because she had soiled her clothes and he had run out of diapers. T. 117. Gore told the officer that he kept the vibrator under the bed and went to get it, but instead Deputy Head asked Gore to just show them where it was and allow them to retrieve it just in case Gore had a gun in the house. T. 118, 136. Gore then led the officers to his bedroom and told them that the vibrator was in a box under the bed. T. 136. Deputy Tucker was then permitted to pull the heavy wooden box which housed the vibrator in question from underneath the bed. T. 140, 172. Gore was not placed under arrest that night because Deputy Tucker wanted the results of M.G.'s medical evaluation before making an arrest. T. 161. Deputy Tucker also testified at trial that she interviewed Gore three different times and that he gave a different version of events each time. T. 160, 169.

Dr. Dan Williams, the emergency room physician who examined M.G., testified at trial that M.G.'s rectum was enlarged. T. 148. He further testified that the physical findings along with the patient's history led to his professional opinion that he strongly suspected that M.G. had been sexually abused. T. 149.

Daniel Gore also testified against his father. In addition to corroborating Lindsey's version

of events on the day of M.G.'s sexual assault, Daniel testified about an event that occurred some weeks prior to the assault. Daniel had been at Gore's house when Gore was heavily intoxicated and had left the room where everyone was gathered. T. 200. When Gore had been absent for a few minutes, Daniel found him in the room in which M.G. was sleeping, with his pants down around his ankle as he lay behind M.G. "spooning" her. T. 200. Daniel testified that he simply told Gore to get up and asked him what he was doing, but just wrote the situation off to Gore being "belligerently wasted." T. 200. Daniel also testified that when he was a young teenager, that Gore forced him and his sister Katie to engage in nudist activities, including taking the kids to a nudist camp and forcing them to be naked in the home whenever Gore "wanted to flip onto this mode of naturalist." T. 201-203. Daniel testified that Gore had not sexually abused him as a child, and that he had never seen Gore sexually abuse Katie. T. 210-211.

Katie, however, told a different story. In addition to being forced as a child to participate in the nudist activities described by Daniel, Gore also forced Katie to sit naked in his lap while he was naked as Gore showed Katie pictures of naked children on the internet. T. 217. Katie also testified that Gore touched her inappropriately. T. 217. Katie described a specific incident in which she was required to nap with Gore and his girlfriend while all three were naked. T. 218. When the girlfriend fell asleep, Gore pulled Katie to him and penetrated her vagina with his fingers. T. 218.

Gore testified in his own defense, denying that he had inappropriately touched M.G. T. 258. Gore's excuse for M.G.'s injury is that she was constipated. T. 260. He further testified that although he saw M.G. playing with his vibrator, he never saw her put it on her "private parts." T. 260.

A Rankin County Circuit Court jury found Gore guilty of gratification of lust. C.P. 52. He was sentenced to fifteen years with two suspended. C.P.59.

SUMMARY OF THE ARGUMENT

The trial court properly admitted evidence of Gore's sexual misconduct with Katie. The evidence was admitted to show motive, intent, preparation, plan, and lack of mistake or accident, not to show conformity therewith. The trial court performed a balancing test and determined that the evidence was not overly prejudicial. Also, the jury was given a proper limiting instruction.

Gore's girlfriend's testimony was properly excluded, as defense counsel sought to use the testimony merely to impeach Katie on a collateral matter. Case law makes clear that a witness cannot be impeached on a collateral matter.

Gore was not subjected to an unreasonable search and seizure. Rather, after being read his Miranda rights, Gore voluntarily spoke with officers and led them to evidence of the crime.

The jury's verdict is supported by substantial credible evidence and is not against the weight of the evidence. The State proved each element of the crime of fondling. The jury fulfilled its duty in weighing the credibility of several State's witnesses against Gore's denial, far-fetched assertions, and differing versions of events.

ARGUMENT

I. EVIDENCE OF GORE'S SEXUAL ASSAULT OF ANOTHER CHILD WAS PROPERLY ADMITTED UNDER M.R.E. 404(B).

Gore claims that the trial court misapplied *Derouen v. State*, 994 So. 2d 748 (Miss. 2008) in ruling that evidence of Gore's sexual abuse of his daughter Katie and evidence that Gore forced his children to participate in nudist activities was admissible under M.R.E. 404(b). Gore correctly notes that even with the expanded exception announced in *Derouen*, evidence of the defendant's sexual misconduct with child victims other than the one for which he is being tried still cannot be offered to show conformity therewith. Gore is also correct in his assessment that *Derouen* does not stand for the proposition that every allegation of the defendant's sexual abuse of other victims is *pe se* admissible. This Court made clear in *Derouen*, that such evidence is no longer *per se* inadmissible. However, Gore is incorrect in his assertion that the trial court erred in admitting the aforementioned evidence in the present case.

In *Derouen*, the defendant was convicted of two counts of fondling his eight-year-old niece. 994 So. 2d at 750. Prior to trial, defense counsel moved to prevent the State from calling two witnesses who would testify regarding Derouen's sexual abuse of other child victims. *Id.* at 752. The trial court ruled that it had no choice but to exclude the testimony based on the authority of *Mitchell v. State*, 539 So. 2d 1366 (Miss. 1989) and *Lambert v. State*, 724 So. 2d 392 (Miss. 1998). *Id.* This honorable Court ultimately overruled *Mitchell* and *Lambert*, holding that evidence of a defendant's sexual abuse of other child victims "if properly admitted under Rule 404(b), filtered through Rule 403, and accompanied by an appropriately drafted limiting or cautionary instruction to the jury, should not be considered *per se* error." *Id.* at 756 (¶20). In the present case, the State argued and the trial court accepted that evidence of Gore forcing his children to participate in nudist

activities and evidence of his sexual abuse of Katie was admissible to show motive, intent, preparation, plan, and lack of mistake or accident. T. 190. The trial court also found that the evidence was more probative than prejudicial. T. 190. Finally, the trial court gave the following limiting instruction.

> The Court instructs the jury that acts testified to by Daniel Gore and Mary Katlin Jenkins are acts relating to charges for which the defendant is not presently on trial and are to be considered only for the limited purpose of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

C.P. 37. Because the evidence in question was properly admitted under 404(b) and filtered through 403, and the trial court gave a proper limiting instruction, in accordance with *Derouen*, the trial court did not err in admitting the evidence in question.

Gore claims, however, that the evidence of Katie's sexual abuse was too remote in time, and that the evidence of nudist activities did not involve a claim of sexual misconduct.[1] As to the first contention, the State would note that the *Derouen* opinion cited approvingly to at least one case from another jurisdictions in which the defendant's sexual abuse of another child victim was admitted even though the abuse occurred more than twenty years prior to the crime for which the defendant was being tried. *Id.* at 755 (¶17) (citing *State v. Driggers*, 554 So. 2d 720, 726 (La. Ct. App. 1989). As to the second contention, the *Derouen* opinion also cited to a case in which a prurient statement the defendant made to an eight-year-old girl who was not the victim of the offense for which he was tried was admitted to prove motive. *Id.* (citing *State v. Miller*, 718 So. 2d 960 (La. 1998). Accordingly, so long as the requirements stated in *Dereouen* are met, evidence of a defendant's prior

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[1]Gore's contention that the evidence of the nudist activities did not involve sexual abuse is not entirely accurate. Katie and Daniel's testimony suggests that Gore was conditioning Katie for sexual contact.

sexual misconduct with other child victims may be admissible even where the prior incidents were remote or involved sexual misconduct other than physical sexual misconduct.

For the foregoing reasons, the trial court properly admitted evidence of Gore's abuse of Katie and evidence Daniel and Katie's forced participation in nudist activities under M.R.E. 404(b).

II. LINDA STANLEY'S PROFFERED TESTIMONY WAS PROPERLY EXCLUDED UNDER M.R.E. 608(B).

As previously stated, Katie testified that once when she was twelve years old, she, Gore and his girlfriend napped nude in Gore's bed, and Gore molested her after the girlfriend fell asleep. T. 218, 222. Subsequently, defense counsel indicated that the defense would call Linda Stanley who was prepared to testify that she was Gore's girlfriend when Katie was twelve years old and that Katie never got in the bed with them naked. T. 234-36. The State objected, citing M.R.E. 608(b) and the general rule that a witness may not be impeached on a collateral matter. T. 235. During a hearing outside the presence of the jury, Stanley testified that she dated Gore for fifteen years. T. 239. She testified that she was usually present when Katie came for visitation. T. 239. Stanley further testified that Katie often slept in the bed with Gore and Stanley, but that they were never naked when they slept together. T. 240, 247. Stanley also testified that she had never seen Gore improperly touch Katie. T. 241. After the proffer, the trial court ruled that Stanley's testimony that Katie never slept with she and Gore naked was inadmissible under M.R.E. 608(b).

On appeal, Gore claims that M.R.E. 608(b) was misapplied because Stanley's excluded testimony did not pertain to Katie's character for truthfulness. Appellant's Brief at 11. Instead, Gore claims, the testimony pertained to whether the events to which Katie testified occurred or did not occur. Although it does appear that M.R.E. 608(b) may not have been the correct basis for excluding Stanley's testimony, a trial court's decision should be affirmed "when it reaches the right result but

for the wrong reason." *McClurg v. State*, 870 So.2d 681, 682 (¶6) (Miss. Ct. App. 2004). The trial court's exclusion of Stanley's testimony must be upheld because it is well-settled that a witness may not be impeached on a collateral issue. *Lee v. State*, 944 So.2d 35, 42 -43 (¶¶24-29) (Miss. 2006); *Peyton v. State*, 858 So.2d 156, 160 (¶21) (Miss. Ct. App. 2003); *Howard v. State*, 755 So. 2d 1188, 1190-91 (¶¶11-15) (Miss. Ct. App. 1999); *Ruffin v. State*, 736 So.2d 407, 409 (¶8) (Miss. Ct. App. 1999); *Bingham v. State*, 723 So. 2d 1189, 1191 (¶9) (Miss. Ct. App. 1998); *Johnson v. State*, 655 So.2d 37, 41 (Miss. 1995). A matter is collateral when it is not directly relevant to the central issue of the case. *Lee*, 944 So. 2d at 43 (¶28). The central issue of any criminal case is whether the defendant is guilty of the crime charged. In the present case, Katie's testimony was offered under 404(b), and the jury was instructed that the testimony was not to be considered as proof of the crime charged. As such, Katie's testimony involved a collateral matter, and Gore was not entitled to impeach the State's witness on the collateral matter. It must also be noted that Stanley's excluded testimony would not have impeached Katie's testimony that she was molested by Gore. Instead, Stanley's excluded testimony could only serve to impeach Katie's statement that the trio was nude when she was molested by Gore. Whether Katie slept nude with Gore has absolutely no bearing on whether or not Gore fondled M.G. Accordingly, the trial court properly excluded Stanley's testimony.

III. GORE'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE WAS NOT IMPLICATED WHEN HE VOLUNTARILY LED OFFICERS TO EVIDENCE OF THE CRIME.

Deputy Head testified that after responding to the call from Lindsey's residence, he and Investigator Tucker proceeded to Gore's residence. Before speaking with Gore, Officer Head advised Gore of his *Miranda* rights. T. 116. Gore and the officers were on the front porch where Gore told his side of the story, which was that he and M.G. were laying down for a nap, and when

he awoke, M.G. was playing with a vibrator. T. 117. Gore also explained that M.G. was naked because she has soiled her clothes. T. 117. The following exchange then occurred at trial.

> Q. Did you gather any information from the defendant as to any physical evidence that may be present at this location?
>
> A. Yes, sir, the vibrator.
>
> Q. Were you able to obtain or secure this piece of evidence in question?
>
> A. Yes, sir.
>
> MR. GORE: I object unless he had a search warrant, if the court please.
>
> THE COURT: Overruled.
>
> Q. (Mr. Miller, Continuing) How was it that you knew where to find this vibrator?
>
> A. Mr. Gore told us he kept it under the bed in his box and he tried to get it. And I think I asked him to let me get it if he didn't mind.
>
> Q. So he showed you what it was?
>
> A. Yes, sir.

T. 119. When the State offered the vibrator into evidence, defense counsel raised another objection, arguing that the item should be excluded because there was no consent to search nor was Gore committing a felony in their presence. T. 132. The jury was excused, and the State countered that Gore had been read his rights, voluntarily spoke with the officers, and voluntarily showed the officers where the vibrator was located. T. 133. The trial court then questioned the officer regarding how he came to be in possession of the item in question. T. 135. Deputy Head again stated that after Gore was *Mirandized*, Gore brought up the matter of the vibrator and offered to retrieve it. T. 136. At that point, Deputy Head asked Gore to just show them where it was because he was concerned that there may be a gun in the house. T. 136. Gore then lead the officers to the location of the

vibrator, and Investigator Tucker retrieved it. T. 136, 140.

Gore claims on appeal that he merely told the officers that the vibrator was under the bed, and an officer then reached under the bed and retrieved the box containing the vibrator in question. Relying on *Bumper v. North Carolina*, 391 U.S. 218 (1973), Gore claims that a warrantless search and seizure occurred because he did no more than acquiesce to a claim of lawful authority. Gore's reliance on *Bumper* is misplaced, because in that case, the Court found that consent to search was involuntary because the defendant's grandmother "consented" only after authorities stated that they had a search warrant. *Bumper* at 546-49. No such claim was made in the present case, and Gore was not merely acquiescing to show of authority. Rather, after waiving his rights, Gore voluntarily spoke with the officers, and offered to retrieve the vibrator that he claimed M.G. found and used on herself. There was no full-blown search conducted by the officers, and to the extent the situation could be characterized as a search, it was consensual. Accordingly, the trial court correctly denied Gore's motion to suppress.

IV. THE JURY'S VERDICT IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Reviewing courts will not reverse based on a claim that the verdict is against the weight of the evidence unless allowing the verdict to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005). When considering such a claim, the evidence is viewed in the light most favorable to the verdict. *Id.* Additionally, matters regarding the weight and credibility of the evidence are resolved by juries, not reviewing courts. *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993).

In the present case, the jury was confronted with the fact that when Lindsey retrieved her twenty-one month old daughter from Gore's house, the toddler's rectum had been stretched to the size of a nickel. T. 94. Lindsey testified that at no time prior to leaving M.G. with Gore had M.G.

suffered from such a condition. T. 97. The jury also heard that the first thing Gore said to Lindsey when she came to pick M.G. up was that the toddler found his vibrator and that she had used it on herself. T. 93. Before leaving Gore's house, the baby picked up a container of lubricant and said to her mother, "Papa, owee's butt," as she patted her behind. T. 93. When Lindsey returned to Gore's home and demanded to know what happened to M.G., Gore told Lindsey that maybe M.G. "did it to herself or maybe she's got to poop," although Lindsey had not even referenced the visible condition of M.G.'s anus. T. 95. Also, weeks before the incident in question, Gore was found drunk with his pants pulled down to his ankles as he lay in bed behind M.G. spooning her. 200. Finally, the emergency room doctor who examined M.G. after she was taken from Gore's home opined that her injuries were consistent with sexual abuse. T. 149. Gore, on the other hand, told Lindsey and authorities that M.G. used the vibrator on her "private parts," but testified at trial that he never said that M.G. rubbed the vibrator on her "private parts." T. 93, 139, 160, 260, 265. Gore also gave conflicting accounts during his three interviews with Investigator Tucker. T. 160. Incredibly, Gore also told Tucker that as a former law enforcement officer he had been involved in several cases where a twenty-one-month-old child used a vibrator on herself. T. 171. At trial, Gore simply denied the allegations and explained to the jury that M.G. had been constipated and he simply tried to assist her in having a bowel movement. T. 260. He also made it a point to note that when Lindsey picked M.G. up that night, Lindsey's friend Matt "grabbed the baby by the bottom" and "was actually holding the baby by the bottom." T. 262.

When viewing the evidence in the light most favorable to the verdict, it is clear that the verdict is not against the weight of the evidence, nor does the verdict represent an unconscionable injustice.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Gore's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: La Donna C. Holland

LA DONNA C. HOLLAND
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

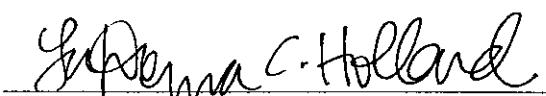
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable William E. Chapman, III
Circuit Court Judge
Post Office Box 1885
Brandon, MS 39043

Honorable Michael Guest
District Attorney
Post Office Box 68
Brandon, MS 39043

George T. Holmes, Esquire
Attorney at Law
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 9th day of October, 2009.



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

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