IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY R. YOUNG — APPELLANT

VS. — NO. 2010-CA-0629-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On September 21-18, 2009, Johnnie R. Young, Jr., "Young" was tried for three counts of sexual battery of C. Y., his daughter, before a Union County Circuit Court jury. R.1. Young was found guilty on all counts. R. 969. Young was sentenced to three concurrent life sentences. C.P. 99-100.

From denial of his post conviction motions, Young appealed to this Court. C.P.111; 113.

ISSUES ON APPEAL

I.

WAS THE TESTIMONY OF C.Y. PROPERLY ADMITTED?

II.

WAS TESTIMONY ABOUT YOUNG'S PRIOR BAD ACTS PROPERLY ADMITTED?

III.

WAS TESTIMONY FROM MS. FLOYD PROPERLY ADMITTED?

IV.

WAS TESTIMONY FROM NURSE THOMAS PROPERLY ADMITTED?

V.

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VI.

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WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF YOUNG'S CONVICTIONS?

VIII.

WAS YOUNG GIVEN A FAIR TRIAL BY HIS PEERS?

STATEMENT OF THE FACTS

In November, 2007, Young was indicted for three counts of sexual battery of Ms. Chelsey Young, "C. Y."by a Union County Grand jury. This occurred between November 3, 2005 and November 3, 2006. C.P. 4-5. This was under M. C. A. Sect. 97-3-95(1)(d). C. Y. was "under the age of fourteen years of age," her birthday was "November 3, 1998" and Young, an adult male, was "more than twenty four months older than the child." C.P. 4; R. 300.

On September 21-18, 2009, Young was tried for three counts of sexual battery of C. Y., his daughter, before a Union County Circuit Court jury. R.1; 6. Young was represented by Mr. Victor Fleitas. R. 6.

Officer Anthony Anderson, an investigator with the Union County Sheriff's department, testified that he investigated allegations of alleged sexual abuse. This was abuse by Young. He testified that he arranged for C. Y. to have a forensic interview at the Child Advocacy Center in Tupelo. As a result of that monitored interview, and an investigation, charges were brought against Young through the Union County Sheriff's Office. R. 303.

The trial court accepted Ms. Angie Floyd as an expert in the field of child forensic interview techniques. R. 267-268. Ms. Floyd had a Master's degree in Social Work. She also had education and continuing specialized training in conducting these monitored and recorded interviews. R. 328-329.

Ms. Floyd testified that she interviewed C. Y. on June 26, 2007 . C. Y. was eight years old at the time. R. 344. Floyd testified that the forensic interview was recorded on a DVD. R. 333, and see state's exhibit 1 in manila envelop marked "Exhibits." She testified that she had reviewed the recording. It was a true and correct account of what occurred during the interview with C.Y. R. 347. The trial court admitted the DVD into evidence, along with statements of abuse made by C.Y. to

others under M. R. E. 803(25). R. 347.

Ms. Floyd testified that the forensic interviews followed "a RATAC protocol." R. 336. This procedure allowed for open ended communication with a child. This was after establishing a rapport with these vulnerable children. The interviews are conducted without suggestions or leading questions. It included looking for consistency and details in accounts of what allegedly happened to the child. It also involved looking for any evidence that a child might have been coached to make up allegations.

During the interview, C.Y. told of a long pattern of sexual abuse. This was when her father was alone with her; her mother being elsewhere. C.Y. identified her father as the person who had sexually abused her on these many occasions. R. 352. These sexual assaults included penetration of her vagina, her anus, and her mouth. Ms. Floyd testified that during the interview C.Y. used a marker to make a drawing. This was her way of illustrating the position of her body parts at the time of the alleged sexual penetrations by her father's body parts.

Ms. Floyd testified that she did not request the drawings. C.Y. made them to assist her in showing what had happened to her. R. 350. See State's exhibit 1, 2 and 3 for video of child making the drawings and the actual drawings themselves included in court papers in the record. .

One drawing shows a child stick figure sitting in a chair with a stick figure male close to her. Something from the middle of the male's body is shown in the child's mouth. R. 371; 413. The second figure shows a table where C.Y. said her father placed her "face up." He would pick her up and "lay her down on the table." R. 360. This was when he would penetrate her anus. R. 362. She told Floyd her father placed "his bottom" on "her bottom." R. 370. C.P. 3-4.

During the interview C.Y. pointed to the vagina and anus areas on the adult male and child female drawings as a way of showing what she meant by "bottom." The appellant's father also

testified that C. Y. pointed to her "front bottom" when she told him that her father "put his tongue on my bottom." R. 477.

Ms. Floyd testified that although she looked for inconsistencies, that she found no basis for concluding that C. Y. had been coached to make the allegations against her father. R. 373.

C. Y. testified and was cross examined. R. 415-437. C.Y. was ten at the time of trial. 415. She testified to knowing the difference between a lie and the truth. C.Y. testified that her statements to Ms. Floyd during the interview were true. R. 416. She identified her father as the person who had sexually assaulted her over a long time. R. 437. She testified that it started when she was as young as three and continued until she was around eight and a half. This was when she was removed from his home for her protection. R. 426-427.

Mr. Dunsford, a family friend, corroborated C. Y. Dunsford testified that C.Y. spontaneously and unexpectedly told him of being forced into performing "oral sex." This was when she was with her father in his truck. R. 444-446.

The trial court accepted sexual assault nurse examiner, "SANE ," Ms. Elizabeth Thomas as an expert in her specialty. R. 582. Nurse Thomas testified to examining C.Y. She testified to finding that C.Y. lacked a hymen at 6:00 or at the lowest portion of her vagina. Thomas testified that this was consistent with "trauma" from a penis, finger or other object. She also found that there was a deep scar on her anus. This would be consistent with "trauma" from penetration by penis, finger or other object, and then healing of the anal tissue. R. 576; 629.

Young's father testified that C. Y. told him that her father "put his tongue on my bottom." She pointed to her "front bottom" to illustrate where this occurred. R. 477 . The trial court found that statements made by C. Y. to Young's father was admissible under MRE 803(25), 403 and 404(B). The trial court found the probative value of this testimony exceeded that of any unfair

prejudice. R. 277.

Ms. Amy Berryhill, Mr. Young's half sister, testified to having been sexually assaulted by Young when she was young. She was twenty five at the time of trial. She also testified that this embarrassing incident was witnessed by her mother.

Ms. Berryhill testified that Young removed her panties and his shorts. He then rubbed his exposed penis on her vagina. R. 668-669. Her mother unexpectedly saw this. It disturbed and frightened Ms. Berryhill. She was upset and crying when she spoke of it during her testimony.

At the conclusion of the prosecution's case, the trial court denied a motion for a directed verdict. This was on grounds of a lack of evidence as to the time of the alleged sexual assaults. The prosecution pointed out that C. Y. stated in her interview that the assaults began when she was as young as six and continued until she was around eight and a half. These dates would be included within the "November 3, 2005" to "November 3, 2006" period included in the indictment. R. 677-678; C.P. 4-5.

Young testified in his own behalf. R. 837-877. Young denied having sexually assaulted C.Y. in the manner indicated. R. 838. While Young admitted that he was alone with C. Y. on occasion, he denied that he was alone with her in his truck. R. 844.

Young's own witness Ms. Tammy Pratt testified to seeing C. Y. in Young's truck. R. 897-898.

Young was found guilty on all counts. R. 969. Young was sentenced to three concurrent life sentences. C.P. 99-100. Young filed a motion for a new trial. Young was given a hearing. The trial court denied relief, reaffirming his ruling during the trial. R. 968-969..

From denial of his post conviction motions, Young appealed to the Supreme Court. C.P.111; 113.

SUMMARY OF THE ARGUMENT

1. The record reflects that the trial court did not abuse its discretion in admitting evidence in the instant cause. The trial court properly admitted into evidence the DVD recording of C. Y.'s forensic interview, C. Y.'s out of court statements to a S. A. N. E. nurse, and others. R.267-268; 445-446; 671-676. **Gilley v. State**, 748 So. 2d 123, 126 (Miss. 1999).

The trial court found that there were admissible under M. R. E. 803(25) and there was no violation of Young's Sixth Amendment rights. C.Y. testified and was cross examined. R. 415-437. C.Y. was only ten at the time of trial. R. 415. The abuse occurred when she was some six to eight and a half years old. R. 426.

Therefore, there was no violation of Young's confrontation rights. Ms. Floyd was accepted as an expert witness. She identified the DVD recording and the accompanying drawings by C. Y. as a true and accurate account of what occurred during her forensic interview. R. 347. She referred to visual and audio data from the interview during her testimony, as corroboration of the statements made by C. Y. Ms. Floyd found no basis for concluding from the interview that C. Y. had been coached. R. 365.

C. Y. testified about the interview, and was cross examined , as was Ms. Angie Floyd, the forensic interviewer, who testified to the circumstances under which C.Y. revealed to her sexual abuse by her father. R.373-403. Dr. Mooers, Young's expert, testified about some of the limitations of the DVD interview. He also testified about limitations of C.Y.'s statements of abuse as he viewed it as a defense witness. R. 791-808.

2. The record reflects that the trial court did not abuse its discretion in admitting prior bad acts by the appellant. **Gilley, supra**. The trial court admitted them under MRE 803(25), and 403 and 404(b). The testimony was relevant with evidence of reliability. It was found to be

evidence of intent, plan as well as being more probable than unfairly prejudicial. R. 277-278; 465-466. Young was also given "limiting instructions." They instructed the jury that this evidence was for consideration of plan, intent, knowledge, and not to be used as conforming character evidence. C.P. 74-75.

3. The record reflects that the trial court did not abuse its discretion in accepting Ms. Angie Floyd as an expert. This was in the field of forensic interviewing of children. This was under M R E 702. R. 267-268. The record also reflects that Ms. Floyd was qualified by virtue of her education and training to be admitted as an expert in this specialized field. Floyd testified to the spontaneous manner in which C. Y. told her of the sexual abuse both verbally, and in her drawings which included anatomical details. The record reflects that Floyd testified that she found no basis for finding that C. Y. had been coached into making accusations against her father. R. 373. **Mooneyham v. State** 915 So.2d 1102, 1104 (¶6) (Miss. App. 2005).

4. The record reflects that the trial court did not abuse its discretion in admitting testimony from nurse Elizabeth Thomas. R. 529-530. **Foley v. State** , 914 So.2d 677, 685 (Miss. 2005). Thomas was accepted as an expert based upon her education and training as a "SANE" nurse. She was qualified to give testimony regarding physical evidence "consistent with" trauma from a sexual assault. The record reflects that her testimony did not exceed the boundaries for someone with these qualifications. She testified that what she observed based upon her examination of C. Y.'s genitalia would be consistent with trauma from penetration. It would also be consistent with the rubbing or wearing away of the hymen by friction from penis, fingers or other foreign objects. R. 591. Thomas also found two deep scars on C. Y.'s anus. This was also consistent with trauma from penetration by penis, finger or other objects. R. 600.

The record reflects that Ms. Thomas was cross examined thoroughly. Thomas testified

clearly more than once she could not give a conclusive medical opinion on causation. She could only testify based upon her careful observations, documentation and measurements. Her conclusion was that what she observed was consistent with man made penetration/ and or friction on the child's genitalia. R. 664.

5. The trial court did not abuse its discretion in admitting Dr. Mooers' testimony. R. 791-808. **Gilley v. State**, 748 So. 2d 123, 126 (Miss. 1999). He was not allowed to testify about the forensic interview because he did not conduct it. In addition, he testified that he did not find any problems with the interview or the methodology used by the interviewer. R. 800. However, he did testify both about the limitations of the forensic protocol and the weakness of C.Y.'s responses and statements as viewed from his perspective as a defense witness. He testified that it was for the jury to decide if C.Y. was truthful or not. R. 800.

6. The record reflects there was "no specific contemporaneous objection" during closing argument. R. 957-959. In addition, the prosecutor's closing argument was based upon evidence before the jury. **Jimpson v. State**, 532 So. 2d 985, 991 (Miss. 1989). There was record evidence indicating that C. Y. wanted the long term sexual abuse to stop, and to having told family members, including her mother, grand mother, and brother; all to no avail. She was told to keep it "a secret." R. 435, 669. The prosecutor was arguing that finding Young guilty, based upon the evidence before them, would be a way of stopping any additional abuse by her father. The defense was arguing, in keeping with Young's testimony, that C. Y. was lying because she wanted a change of custody. In other words, there was no abuse to stop. R. 939-956; 965.

In addition, the record reflects overwhelming evidence of guilt, as there was in **Chisolm**, **infra**, relied upon by Young in his "golden rule" argument on appeal.

7. There was no "injustice" involved in the trial court's denial of a motion for a new trial. **Jones v.**

State , 635 So. 2d 884, 887 (Miss. 1994). There was overwhelming evidence of guilt. C. Y. was corroborated by forensic evidence, and testimony from numerous prosecution witnesses. This included testimony from Young's father and his half sister. R. 477; 668-669.

8. The record reflects that Young was given a fair trial by a jury of his peers. There were no trial errors that interfered with his ability to defend himself, given the evidence presented against him. He denied the charge, and was aggressively defended by his counsel. R. 838. The jury did not find his testimony convincing in light of all the evidence. C.Y. testified that her birthday was November 3, 1998. R. 300. Her father was an adult male, more than twenty four months older than she. She testified that the abuse occurred many times, but specifically testified to it occurring between the time she was six and eight and half. R. 436; 436. **Gibson v. State**, 731 So. 2d 1087, 1098 (Miss. 1998).

ARGUMENT

PROPOSITION I

THE TRIAL COURT PROPERLY ADMITTED THE DVD INTERVIEW AND STATEMENTS BY C.Y. UNDER M. R. E. 803(4) AND 803(25).

Young argues that the trial court erred in admitting into evidence statements that C.Y. made to others about alleged abuse, as well as the DVD audio/ video made during her forensic interview with Ms. Angie Floyd. Young argues that these out of court statements made to others were hearsay as was the DVD interview recording. Therefore, he opines the trial court improperly admitted C. Y.'s statements. He argues that this was an improper way of bolstering the alleged victim's statements. Appellant's brief page 17-19.

To the contrary, the appellee would submit that the record reflects that the trial court did not abuse its discretion.

In **Gilley v. State**, 748 So. 2d 123, 126 (Miss. 1999), the Court stated that it would not reverse a trial court on admission of evidence unless the court abused its discretion.

> This Court has held that 'a trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.' **Turner v. State**, 732 So. 2d 937, 946 (Miss. 1999) (quoting **Fisher v. State**, 690 So. 2d 268, 274(Miss. 1996).

The record reflects that C. Y. testified and was cross examined. R. 415-437. C. Y. testified clearly and unequivocally that her father repeatedly sexually assaulted her, as stated and shown in her drawings during the interview. R. 416; 437. She also testified that she was telling the truth throughout her forensic interview. The DVD recorded interview was also admitted into evidence. R. 416. It was shown to the jury.

Ms. Angie Floyd, the forensic interviewer , as seen on the DVD in evidence, also testified

and was cross examined. R. 327-413. In addition, Young had his own expert, Dr. Mooers, who testified about the overall significance of the forensic interview technique used and some problems he found with C. Y.'s responses and statements based upon his viewing of the DVD. R. 791-808.

The record reflects that while Young objected to the admission of "the drawings" by C.Y. allegedly made during the interview, he did not object to the admission of the DVD. He merely objected to whether it would be "part of the case State's case in chief." R. 326.

> Fleitas: **But there's no issue with this tape. The issue will be is if it's sought to be admitted or used as part of the case State's case in chief.** R. 326. (Emphasis by appellee).

The record also reflects that after the jury had seen the DVD recorded forensic interview and heard the testimony of Angie Floyd, C. Y. and Mr. Dunsford, the defense argued that the DVD and statements by C.Y. to others should not be admitted as substantive evidence. The trial court found that the DVD recording and the statements by C. Y. during the interview to Ms. Floyd and to Mr. Dunsford were admissible as substantive evidence under M. R.E. 803 (25). R. 675; 678.

> Court:..You know, sometimes with these very young witnesses, the 803 (25) proof is the only substantive proof in these cases, so I'm confused by your assertion that it's not substantive. R. 675. ...There's a jury question on these issues and construing all matters in light most favorable to the non-moving party, I believe there are questions for the jury and that the motion for judgment of acquittal is denied. R. 678.

The trial court made this ruling at the same time that it denied a motion for a directed verdict. R. 677-678. This was also on grounds of an alleged lack of evidence as to "the time" of the alleged sexual penetrations of the female child witness.

The Court also found that the illustrative anatomical drawings by C. Y., State's exhibit 2 and 3 , were admissible as having been drawn without prompting or direction on the part of Ms. Floyd. R. 350-351.

Ms. Floyd testified that C.Y. spontaneously drew the pictures (including body parts of her father and herself) to help show how she was penetrated in her vagina, anus and her mouth. See DVD in manila envelop, the 36 minute forensic interview with C.Y. by Ms. Floyd. In that video, Ms. Floyd gave C.Y. some paper when she left the room. C.Y. then drew the picture of a child in a chair with something going into her mouth from a standing stick figure which represented her father. This was C.Y.'s way of showing how what she called his "bottom" went into her mouth. In addition, on the anatomical drawing she pointed to the area of the man's genitals as what she was referring to as her father's "bottom."

Q. **Did you ask–were you present when that picture was drawn?**

A. **No, sir.**

Q. **Did you ask her to draw that picture?**

A. **No, sir.**

Q. **Was it a spontaneous picture?**

A. **Yes, sir.**

Q. **Does that picture truly and accurately depict or is it the same picture that was drawn by C.Y. in the course of this interview on the date of the interview?**

A. **Yes, sir.** R. 350. (Emphasis by appellee).

In addition, the record reflects, as more fully will be covered under proposition III, that the trial court accepted Ms. Angie Floyd as an experienced expert forensic interviewer of children. Ms. Floyd was employed by the Child Advocacy Center in Tupelo. R. 267-268. She testified that the DVD recording made of her interview with C.Y. under controlled conditions was a true and correct account of what occurred in her presence. R. 347.

Q. **Does it truly and accurately depict what transpired and what was said on that date?**

A. **Yes, sir.** R. 347. (Emphasis by appellee).

She also testified that as a result of her interview she did not find a basis for concluding that C. Y. had been coached into making accusations against her father. R. 373.

Q. **Based on the details and the tools you used, did you see any evidence that this child was coached to say anything?**

A. **No, sir.** R. 373. (Emphasis by appellee).

In **Smith v. State** 925 So.2d 825, 839 (¶ 33)(Miss. 2006), the Court affirmed the admission of the videotapes of the child victims' forensic interviews. The admission of testimony from experts in this field was also found not to be an abuse of discretion. This was where there was evidence of their education, and training in this specialized field.

> ¶ 33. The jury had the benefit of examining the videotapes with Joan and Karen's interviews to compare to their in-court testimony, thereby placing the jury in a position to draw upon their own life experiences as to the veracity of the young girls. They could draw their own conclusions from the verbal statements and non-verbal reactions of the girls in the taped interviews and on the witness stand. As always, the jury has the prerogative to accept or reject, in whole or part, the testimony of any witness, expert or lay. Based upon the aforementioned analysis, and because the standard for reversal on appeal as to this issue is "clear abuse of discretion," **Logan**, 773 So.2d at 346-47 (quoting **Sheffield**, 740 So.2d at 856), this Court concludes that the trial judge's decision ought to be upheld. Nonetheless, this Court cautions trial judges to prudently evaluate witnesses proffered as experts, as not all who claim special expertise are so qualified. Moreover, any opinions as to a witness's veracity should generally be excluded, unless otherwise admissible. See Comment to Miss. R. Ev. 404(a) ("With regard to character evidence relating to the veracity of witnesses, Rule 404 refers one to Rules 607, 608, and 609.").

The trial court also found that C. Y.'s statements to Mr. Dunsford, a family friend, about alleged sexual abuse by her father were also admissible under M R E 803(25). R. 444-445. His testimony corroborated C. Y.'s accounts of being forced into performing oral sex. R. 446. After considering the factors for admissibility under this rule, the trial court found that they were

admissible as spontaneous, and without any evidence of motive or reason for being less than truthful at the time of the statement.

> Court: This is a statement under 803(25), and that the child being the declarant, there's been no proof of any motive to lie on her part or anything disparagement of character. It's a statement that was only heard by the witness so that actually favors not allowing–clearly the statements were made spontaneously. The timing and the relationships are not particularly notable issues. It does not appear that there's any faulty recollection by the witness-the declarant. This is by the declarant. That's an admission of her being a child. Certainly, the statement was made. There's no doubt that favors admission. Credibility about the person testifying has not been called into question. Age and maturity of the declarant is an issue for the jury. Where suggestive techniques were used, obviously, it was made spontaneous. There was no inquiry made. **The Court's opinion is that based on the factors in 803(25) which favors admission of the statement by the witness as to the hearsay–the testimony of the witness as to the hearsay statements made by the child.** R. 444-445. (Emphasis by appellee).

In **Owens v. State** 666 So.2d 814, 817 (Miss. 1995), relied upon by Young, while the Court found improper hearsay was introduced, it, nevertheless, found in was "harmless error." There was in that case, as well as in the case sub judice, overwhelming evidence of guilt.

> We conclude, however, that the trial court's error was harmless. The jury had before it the testimony of the victim as well as that of Frances Vaughn who stated that immediately after the incident, the defendant expressed to her that "he touched Loretta in the wrong place and that he was sorry." The jury also had the testimony of John Vaughn, Charles Kendall, and Dewayne Shields, who all stated that the defendant expressed his regret about the incident and requested that the authorities not be informed of the incident. The evidence presented by the State through the testimony of the several witnesses is quite overwhelming. Thus, we hold that the error in admitting the cumulative prior statement was harmless.

The appellee would submit that based upon the record in this case, the trial court did not abuse its discretion in admitting into evidence the DVD recorded interview, the testimony of Ms. Floyd as an expert witness , or the accompanying drawings which Floyd testified were made by C. Y. They were made without any prompting during the interview. The trial court found that C. Y.'s statements to Mr. Dunsford were also admissible under M R E 803(25). R. 444

The appellee would submit that this series of evidentiary issues are lacking in merit.

PROPOSITION II

THE TRIAL COURT PROPERLY ADMITTED PRIOR BAD ACT TESTIMONY UNDER MRE 403 AND 404(B).

Young argues that the admission of testimony about Young's alleged prior bad acts was reversible error. Young argues that testimony about his alleged improper sexual acts with others, including his half sister, were too remote in time and different in character from the charges to have been admissible. This testimony by family members of other bad acts was unfairly prejudicial to his defense against the charges by the alleged child victim. He argues that this was improper character evidence, implying that his actions in the instant cause were in keeping with his alleged previous sexual compulsions. Appellant's brief 19-22.

To the contrary, the record reflects that the trial court found that C.Y.'s statement to her grandparents about her father's abuse was admissible under MRE 803(25). The testimony of Ms. Berryhill was admissible under M. R. E. 403 and 404(b). This testimony was probative and not substantially outweighed by the danger of unfair prejudice. It was also admissible under the **Derouen v. State** 994 So.2d 748, 756 (Miss. 2008) precedent. The Court found testimony of sexual abuse of others was admissible where both relevant and probative.

As stated by the trial court:

> Court: ...I wouldn't see how to resolve it; but the **Derouen** case applies it to a fact specific situation and says here's where under these facts, you know, it's admissible. It sort of glosses over the problems with 404(b). I'm talking too much, but I'm saying that I believe that I'm directed to apply it in the way that they've asked me to apply or that they've applied it in that case, and **I think that that means that this particular evidence is prejudicial, but it's probative, and that the prejudice is not outweighed by the probative value and it should be admitted under 404(b) provided there's a limiting instruction, which I intend to give, if requested, at the time of the testimony as well as at the end of the case. I will give it twice. I think it's probably what I'm supposed to do.** R. 277-278. (Emphasis by appellee).

In **Derouen v. State** 994 So.2d 748, 756 (Miss. 2008), the Supreme Court found that

testimony about improper sexual acts with other victims by a defendant was admissible. It was admissible where relevant to show motive, intent, plan, knowledge, or lack of accident.

> ¶ 20. For these reasons, while we agree with Justice Graves's affirmance of Derouen's conviction and sentence on direct appeal, we likewise rule in favor of the State on its cross-appeal and unequivocally overrule and bury **Mitchell** and its progeny, including **Lambert**, as these cases relate to the per se exclusion of evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which the accused is on trial. Stated differently, such evidence, 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.

Mr. Johnnie Edward Young testified that C.Y. told him that "her daddy put his tongue on her bottom." R. 477. She pointed to her "front bottom" as a way of showing where her father put "his tongue."

> Q. What are the circumstances about her making any statements to you? How did it come about?
>
> A. I believe I was watching TV. My wife was giving her a bath one night, and my wife called me in the bathroom where she was at. She was drying her off. She told Chelsey to tell me what she just told her. **She pointed to her bottom and said that her daddy put his tongue on her bottom.**
>
> Q. Anything else?
>
> A. No.
>
> Q.. The word bottom, does your family use that word bottom or where does that word come from; do you know?
>
> A. I don't know. She pointed to the location too also.
>
> Q. **Where did she point?**
>
> A. **To her front bottom.** R. 477. (Emphasis by appellee).

Ms. Amy Berryhill testified that Young, her half brother, rubbed his exposed penis on her exposed vagina. This shocked and frightened her. She was upset and crying on the stand while

testifying about this incident which happened in the past.

> Q...What, if anything happened when you were younger concerning your half brother, the defendant, Johnnie Randy Young? Do you call him Johnnie or Randy?
>
> A. Randy. (Witness crying) the incident that I remember clearly we were at my grandfather's house in Pontotoc and we were outside in a playhouse and -(witness crying). **He was sitting down and he had me straddle him facing towards him. He undid his pants and exposed himself to me and he pulled down my elastic shorts and was rubbing his penis on my vagina. Shortly after that, my mom walked by and saw him**. (witness crying).
>
> Q. What happened next?
>
> A. I stood up and my shorts came back up, but he was still exposed and my mom told me to go in the house. I got scared and I ran to my neighbor's house and hid under their bed and my mom later came and found me there. I went back home and she talked to me and told me that if anybody ever touched me or made me feel uncomfortable that I always needed to tell her. R. 668-669. (Emphasis by appellee).

The record also reflects that jury instructions S-2 and S-3 were given. They instructed the jury that Ms. Berryhill's and Johnnie Edward Young's testimony about improper sexual acts was to be considered as evidence of motive, intent , plan, knowledge , identity or absence of mistake or accident. It was not to be used to show that Young acted in conformity with that conduct in the instant cause. C.P. 74-75.

Jury instruction S-3 based upon Johnnie Edward Young stated as follows:

> The testimony of the state's witness, Johnnie Edward Young regarding alleged acts of oral penetration involving the tongue of Johnnie R. Young, which is not part of the charged conduct in this case, is to be used for the purpose of establishing motive, intent,, plan, knowledge, identity or absence of mistake or accident on the part of the defendant Johnnie R. Young and should not be considered as proof of the defendant's character or to show that he acted in conformity therewith. C.P. 75.

The record reflects that the trial court found that the prior bad acts were admissible and that their probative value on the issue of motive, intent, opportunity made them more probative than unfairly prejudicial. R. 277-278. The trial court also provided limiting instructions for the jury's

guidance for both Ms. Berryhill and the appellant's father's testimony. C.P. 74-75.

Therefore, the appellee would submit that this issue is also lacking in merit.

PROPOSITION III

THE RECORD REFLECTS THAT TESTIMONY OF MS. ANGIE FLOYD WAS PROPERLY RECEIVED.

Young argues that the trial court committed reversible error in accepting Ms. Floyd's testimony as an expert witness under MRE 702. Young argues that the field of child forensic interviewing has not been established as an accepted field of scientific study. He argues that it has not yet provided a reliable basis to support any of the conclusions reached by forensic interviewers. Young argues that Ms. Floyd's testimony was merely a form of bolstering the child victim's testimony. It amounted to her testifying that C.Y. was telling the truth without any objective basis for arriving at that conclusion. Appellant's brief page 22-25.

The record reflects that the trial court accepted Ms. Angie Floyd as an expert witness in the field of forensic interviewing. R. 267-268. The trial court also found that based upon the precedents of the Mississippi Court of Appeals and Supreme Court that the field of forensic interviewing had been accepted as a valid field of scientific endeavor. This would be the case where it was conducted within proper protocols established for the conducting of such interview with children suffering from alleged sexual abuse.

> Court: **In any event, I think that Ms. Floyd does have the requisite training by experience to offer opinions and to have her interviews admitted assuming we will see the interview first, but assuming-well, she can do so.** Her opinions are more or should be more, these forensic interviewers, it's more about what is different about children and what do you look for in children to determine whether or not they're lying or being manipulative versus consistent with telling the truth which does go to the core question and should be reserved for the jury. I think that the defendant's ability to cross examine on those points is adequate to make sure the jury understands that it's not intended for the expert to make the decision in their place, but instead to assist them on why, assuming that's her opinion, why she believes the testimony of the child–the statement of the child to be truthful, consistent with the truth. **I'm going to allow her to testify as I have before as an interviewer, and presuming that she conducted the interview, which I have not seen, and that there is sufficient information derived from the interview in which to arrive as**

such conclusions. R. 267-268. (Emphasis by appellee).

In **Mooneyham v. State** 915 So.2d 1102, 1104 (¶6) (Miss. App. 2005), the Appeals Court found that forensic interview testimony based upon using "the CAC" interview protocol was admissible as evidence. The trial court's admission of expert testimony where there is evidence of proper education and training was also affirmed.

This was where there was evidence that a witness was properly qualified by education and training to use the protocol under controlled conditions. It also rejected the claim, made by defendants, that the field of forensic interviewing using the "finding words" indirect interview was not a legitimate area of expertise.

> ¶ 6. The State counters that this Court has recognized the area of investigations of sexual abuse cases, especially through interviews, as a competent area of expertise. See **T.K. ex rel. D.K. v. Simpson County Sch. Dist.**, 846 So.2d 312, 318 (¶ 22) (Miss. Ct. App.2003) (affirming admission of licensed counselor as expert witness who had interviewed over 2,800 sexually abused children). The State further argues that Langendoen illustrated all of the factors necessary under M.R.E. 702. According to the State, Langendoen's testimony was based upon sufficient facts and data as she testified in detail as to how she conducted her interview with the victim and she testified in detail as to what the victim told her. The State also argues that Langendoen's testimony was the product of reliable principles and methods, despite the general consensus within her field that there is no single "right way" to conduct an interview. Furthermore, according to the State, Langendoen applied the principles and methods of her interviewing skills reliably to the facts of the case. **We agree, and find that there was a credible basis for accepting Langendoen as an expert in the area of forensic interviewing. The admission of Langendoen's testimony was within the sound discretion of the trial court, and no abuse of that discretion is evident. This argument is without merit.** (Emphasis by appellee).

Ms. Angie Floyd with the Child Advocacy Center in Tupelo testified to being employed as an interviewer of alleged abused children. She had a Bachelor's and Master's degree in social work, as well as some 260 hours of additional educational training in forensic interviewing of such vulnerable children. R. 328. After hearing her qualification testimony, the trial court accepted her as an expert in the field of forensic interviewer of children. R. 267-268.

Ms. Floyd testified that during the interview, C. Y. identified her father as the person sexually abusing her. The DVD recordings, as reviewed by the appellee, shows that Ms Floyd did not make suggestions as to identity of the perpetrator during the recorded interview.

Q. **Did she name a perpetrator in the course of your interview?**

A. **Yes, sir.**

Q. **Who was that person?**

A. **Her father.**

Q. The defendant in this case?

A. Yes, sir.

Q. Did she name anyone else?

A. No, sir. R. 352. (Emphasis by appellee).

Ms. C. Y. told Ms. Floyd of being penetrated vaginally, anally, and in her mouth on numerous occasions. During the interview, she said more than once that he made her "suck it." She also spontaneously, without any suggestions having been made, drew two pictures. One such drawing illustrated how she was placed sitting upright in a chair where her father would insert his bottom, penis, into her mouth. She also drew a picture to show how her father would lay her face up on a table when he penetrated her anus. See State's exhibit 2 and 3 in manila envelop for copy of C.Y.'s drawings and DVD audio for statements by C.Y. of having to "suck it."

C. Y. did not identify anyone else as having abused her. Floyd testified that she found no basis for finding, as she did in some interviews , that C. Y. had been coached into making accusations against her father.

Q. Did Chelsey Young name anyone else as the perpetrator in this matter?

A. No, sir.

Q. **Based on the details and the tools you used, did you have any evidence that this child was coached to say anything?**

A. **No, sir.** R. 373. (Emphasis by appellee).

The record reflects that there was credible record evidence in support of the trial court's finding that Ms. Floyd qualified under M R E 702 as an expert witness in the field of forensic interviewing of vulnerable children. The record reflects that she had the requisite educational background, and training.

This issue is also lacking in merit.

PROPOSITION IV

THE RECORD REFLECTS THAT TESTIMONY FROM 'SANE' NURSE THOMAS WAS PROPERLY RECEIVED.

Mr. Young argues that the trial court erred in allowing Ms. Elizabeth Thomas, a certified SANE nurse, to testify as an expert in giving medical testimony. He argues this alleged medical testimony about causation with regard to the conditions observed on C.Y. was not proper lay testimony. Rather he opines that it was expert medical testimony which she was not qualified to give before the jury. Appellant's brief page 25-30.

The record reflects that the trial court properly admitted Ms. Thomas to testify as a certified "SANE", sexual assault nurse examiner. R. 554-555.

> **She has made it very clear what she believes her limitations are in her ability to render opinions in this case, and the Court is satisfied she is going to testify within the limitations, and because of that, she's qualified to render those limited opinions, and I'm going to allow her to testify.** R. 555. (Emphasis by appellee).

The record reflects that Nurse Elizabeth Thomas did not exceed the limits for testifying within her specialty. She testified to finding physical evidence which included absence of hymen on the child's vagina in the lower bottom, as well as scars on the child's anus. R. 624; 629. She testified that his was "consistent with blunt penetrating trauma of the vaginal area and the anal area." R. 629.

Thomas testimony including clarification in light of defense claims of previous vaginal injury when C.Y. was quite young.

> Q. Thinning or wearing away. What causes attenuation of a hymen?
>
> A. There are several things that can cause attenuation of the hymen. The most prevalent reason is a repetitive motion against it wearing it away. There could also be medical infection that has worn away parts of the hymen. There could be a

different diagnosis because there has been an insertion in that area for dilation that has worn it away.

Q. Have you been made aware of any medical condition or medical treatment, dilation, or anything that would cause a wearing or thinning of the hymen?

A. No.

Q. That fall on the faucet, is there anything about that injury or the nature of the injury that would cause a thinning or wearing away of the hymen at nine to eleven o'clock?

A. No. You would expect a tear or a laceration from an acute injury like that.

Q. Not a wearing?

A. That's correct.

Q. You were asked about is it accepted science and this and that about the hymen size. Do you make a notation of the hymenal size of every little girl you observe?

A. I do.

Q. Is that based on your training?

A. It is.

Q. Is that based on the research that you're aware of?

A. Yes. R. 666-667.

Contrary to Young's argument, Thomas' testimony was not about causation as a medical expert. The record reflects that Thomas was thoroughly cross examined about her examination of C. Y. and her tentative findings. R. 630-657. The record indicates that Thomas testified that her physical examination of C. Y.'s vagina and anal areas, indicated physical findings "consistent with" "blunt penetrating trauma", and penetration and/or friction to these areas of the female child's body. R. 629; 664.

Ms. Thomas also testified that she could only give testimony as to what was consistent with

her findings. This conclusion was not conclusive but tentative based upon the physical evidence and what she learned from the alleged victim and medical records in this case.

> Q. **Is there any way that you could given any opinion more than consistent with? Do you know an of the facts of this case or see anything? Are you a witness to anything or eye witness to any of this?**
>
> A. **Not other than the review of the medical records that I was provided.**
>
> Q. **There's no way you could ever given anything more than consistent with, is there?**
>
> A. **That's correct.** R. 664. (Emphasis by appellee).

In **Foley v. State** , 914 So.2d 677, 685 (Miss. 2005), the Supreme Court found that statements made by an alleged child victim as part of "a neutral medical evaluation" were admissible under both M. R. E. 803(4) and 803(25). They were also not a violation of a defendant's sixth amendment rights under **Crawford v. Washington**.

> The Court declined to further elaborate on its definition. Id. Statements made by K. F. do not fall into any of those categories, and Foley failed to argue or show that the therapists or medical professionals who testified concerning statements made by K. F. had contacted the police or were being used by the police as a means to interrogate K.F. or investigate her claims. See, e.g. **State v. Snowden**, 385 Md. 64, 867 A.2d 314, 326 (Md.2005). K. F.'s statements were made as a part of neutral medical evaluations and thus do not meet Crawford's "testimonial" criterion. Thus, Foley's **Crawford** argument is without merit.

The appellee would submit that the record cited indicates that the trial court did not exceed its discretion in admitting Nurse Thomas's testimony as a qualified SANE nurse. **Gilley, supra**.

The record also reflects that Thomas made and documented her physical findings based upon her examination of C.Y.'s body. She testified that these physical findings were consistent with trauma from penetration. It was consistent with friction from a penis, finger, or other objects. Thomas did not testified that this was a conclusive medical finding. It was limited to what she

observed and the information available to her from the alleged victim and her medical records.

This issue is also lacking in merit.

PROPOSITION V

THE RECORD REFLECTS TESTIMONY FROM DR. MOOERS WAS PROPERLY RECEIVED.

Young argues that the trial court erred in not allowing Dr. Mooers to testify as an expert witness about how he viewed the forensic interview conducted by Ms. Floyd. Young argues that this interfered with his defense to the charges against him. He argues that Dr. Mooers was better qualified by education and training than the prosecution's witness and should have been given free rein to testify about the forensic interview and C.Y.'s accusations. Appellant's brief page 30-31.

To the contrary, the record reflects that Dr. Mooers was allowed to testify. R. 791-808. The trial court found that he would not be allowed to critique Ms. Floyd's forensic interview which was presented to the jury through the DVD recording. This was because Dr. Mooers was not qualified by training, education and continuing monitored experience in conducting forensic interviews with children nor was he present when the forensic interview on the DVD occurred. R. 767.

However, he was allowed to testify about both the limitations of "the RATAC " forensic interview technique in general as well as some actions or statements by C. Y. he observed, along with the jury, during the interview.

The record reflects Dr. Mooers did testify about the limitations of the interview technique used as well as some statements and actions by C.Y. during the interview. This was inadequate from his point of view as a defense witness. However, on cross examination he admitted that it was the jury's responsibility to determine if C. Y. was credible in her claims of sexual abuse by her father. R. 800.

The trial court's ruling on Dr. Mooer's testimony was as follows:

> Court: The other way of stating that, rather than the way you did, is to say, and this is the Court's opinion of it, Ms. Floyd works in a highly specialized area. That highly

specialized area is now in favor with the Mississippi Supreme Court and I, therefore, allow under it under the appropriate circumstances that they have determined what the appropriate circumstances are. I'm still the gate keeper. **She works in a highly specialized area. Dr. Mooers does not. He's not qualified to second guess those things that are highly specialized.** R. 767.

The record reflects that Dr. Mooers testified about the forensic interview before the jury and was cross examined about his criticisms of the same. R. 791-808. Ms. Angie Young ,a forensic interviewer with the Child Advocacy Center, had previously testified about her forensic interview of C. Y.. R. 327-373. She was thoroughly cross examined about the circumstances under which C. Y. was interviewed, as well as the conclusions that she derived from that interview. R. 374- 403.

In addition, the record reflects that Dr. Mooers admitted on cross examination that he did not have any criticism of how Ms. Floyd conducted her interview of C.Y. R. 800.

He also admitted that while he saw some limitations in C. Y.'s statements during the interview, it would be up to the jury to decide who was being truthful as to the charges. R. 800.

Q. Is what you're trying to tell us is that ultimately these people right here will have to be the people to decide if that little girl was telling the truth that day or not?

A. Yeah, definitely.

Q. What your opinion is, what Angie Floyd's opinion is, what mine is, what the Judge's opinion is doesn't matter?

A. That's the way the system is set up, yes.

Q. That's the way the system works anyway. But you said you didn't–as far as how Angie Floyd conducted the interview, you said you didn't have any problem with that, did you?

A. As I said, it probably wasn't a flawless interview, but that was because of the child, and I don't think anybody would have conducted a flawless interview with that child; but, no, I didn't have a criticism of how she did things. R. 800.

In **Hall v. State** 611 So.2d 915, 918 (Miss. 1992), the Supreme Court found that unless the trial court abused its discretion in determining the admission of alleged expert witnesses in scientific

areas it would not reverse his ruling.

> Under this Court's standard of review, the admissibility of evidence rests within the trial court's discretion. **Wade v. State**, 583 So.2d 965, 967 (Miss.1991). Unless his judicial discretion is abused, this Court will not reverse his ruling. **Lewis v. State**, 573 So.2d 719, 722 (Miss.1990). The qualifications of an expert in fields of scientific knowledge is left to the sound discretion of the trial judge. His determination on this issue will not be reversed unless it clearly appears that the witness is not qualified. **Wilson v. State**, 574 So.2d 1324, 1334 (Miss.1990); **Smith v. State**, 530 So.2d 155, 162 (Miss.1988).

The appellee would submit that the trial court did not abuse its discretion in allowing Dr. Moore's testimony in the instant cause. The record does not reflect that this interfered with Young's defense to the charges.

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

PROPOSITION VI

THE RECORD REFLECTS THIS ISSUE WAS WAIVED FOR FAILURE TO MAKE A SPECIFIC OBJECTION. THE CLOSING WAS BASED UPON TESTIMONY AND EVIDENCE BEFORE THE JURY.

Mr. Young argues that during closing argument the prosecution improperly used a so called "golden rule argument." He argues this argument improperly requested the jury to put themselves in place of the victim rather than remain impartial in their deliberation on the credibility of witnesses and the determination of the facts before them based upon all the testimony and evidence presented. This type of argument allegedly prejudiced and interfered with his defense to the charges. Appellant's brief page 31-35.

The record reflects that while Young made objections during closing argument, he made "general , non- specific objections." R. 957-959.

In **Burns v. State**, 729 So. 2d 203, 219 (Miss 1998), this court stated that one could not expand upon an objection made at trail on appeal.

> In **Conner**, this Court held that an objection on one or more specific grounds constitutes a waiver of all other grounds. **Id** at 1255 (citing **Stringer v. State**, 279 So. 2d 156, 158 (Miss. 1973). See also **Brown v. State**, 682 So. 2d 340, 350 (Miss 1996), It has long been the finding of this Court that "an objection at trial cannot be enlarged in a reviewing court to embrace an omission not complained of at trial. **Brown**, 682 at 350 (citing **McGarrh v. State**, 249 Miss. 247, 148 So. 2d 494, 506 (1963). This claim is procedurally barred.
> Objection on one or more specific grounds at trial constitutes a waiver of all other grounds for objection on appeal. **Burns v. State**, 728 So.2d 203 (Miss. 1998).

While Young asked for a curative instruction and a mistrial, he did so after the fact. R. 968. The appellee would submit that the record reflects that the trial court did not abuse its discretion in denying both. **Alexander v. State**, 602 So. 2d 1180, 1182 (Miss. 1992).

Additionally, the record indicates that C. Y.'s family members had been informed of Young's improper sexual actions toward her but had chosen not to report them to anyone outside

their home. R. 435, 669, 689, 932. C. Y. stated that her father told her not to tell about his sexual assaults. It was their "secret." Her brother also told her not to report the abuse.

Q. **And you never mentioned it to Brandon?**

A. **Unh-unh, because he always told me to keep it a secret. Don't tell anyone.**

Q. And you never told it to Elizabeth?

A. No.

Q. Or your grandma or your granpa?

A. **My grandma because I knew that I shouldn't be keeping it a secret anymore and the last time I told my grandma.** R. 435.

In the forensic interview, C.Y. stated that she did not want to be subjected to sexual assaults by her father any more. This was why she told others about this abuse. This included her mother, her grandmother, brother and Mr. Richard Dunsford, a family friend. R. 435. None of her family prevented the abuse or reported it to law enforcement. It was a family friend, Mr. Dunsford, who reported the abuse to the authorities. R. 448.

Ms. Elizabeth Young, C.Y.'s sister, testified to being told not to talk to anyone from DHS.

Q. **Had your grandmother or mother told you you better stay away from DHS and don't talk to them?**

A. **Yes, sir.** R. 689. (Emphasis by appellee).

The forensic interview and testimony in the record indicates that C. Y. wanted the sexual abuse to stop. She was subject to being intimidated by her father while living in the same home with him. Her family members, who should have protected her, did not want anything reported to DHS.

Therefore, the prosecution's closing argument about how the alleged victim wanted someone to put a stop to the sexual abuse was solidly based upon testimony and evidence before them. It was

also a response to the defense arguing that this vulnerable child was lying and the defendant should be released since he was allegedly innocent of any sexual abuse. R. 965-966. **Booker v State**, 511 So. 2d 1327, 1332 (Miss 1987).

In **Jimpson v. State**, 532 So. 2d 985, 991 (Miss. 1989), the Court found that the prosecutions' comments about how they, the defense, could not explain eye witnesses putting Jimpson near the scene of a bank shooting was not a comment on his failure to testify. District Attorney Peters said that "they' haven't bothered to tell you how Jimpson could be arrested, out of breath within a mile of the bank where a bank teller was shot. This was when Jimpson had presented an alibi witness that supposedly suggested that Jimpson was at a trailer park at the time of the crime. As this Court stated:

> There is a difference, however, between a comment on the defendant's failure to testify and a comment on the failure to put on a successful defense. Terry Road (the location of the bank) is not located in North Jackson; therefore it is proper for the District Attorney to question the defense's inability to successfully explain Jimpson's presence in the area.

In **Chisolm v. State** 529 So.2d 635, 640 (Miss. 1988), relied upon by Young, the Court found that while a prosecutor referred to putting themselves in the place of the victim, nevertheless, this was "harmless error." Contrary, to the instant cause, a specific contemporaneous objection to adopting the victim's perspective was made in **Chisolm**. In addition, there was in that case, as there is in the instant cause, overwhelming evidence of guilt.

> Attorneys should not tell a jury, in effect, that the law authorizes it to depart from neutrality and to make its determination from the point of view of bias or personal interest. See also **Copiah Dairies v. Addkison**, 247 Miss. 327, 338, 153 So.2d 689 (1963); 70 A.L.R.2d 927; 53 Am. Jur. Trial § 496, p. 401; 88 C. J. S. Trial, § 191, p. 376.
> [10] There is no reason on principle why this prohibition on "golden rule" arguments should not extend as well to criminal cases. See **Tuff v. State**, 509 So.2d 953 (Fla. App.1987); **Bullard v. State**, 436 So.2d 962 (Fla. App.1983); **Bertolotti v. State**,

476 So.2d 130, 133 (Fla.1985); **Estes v. Commonwealth**, 744 S.W.2d 421, 426 (Ky.1987); and Lycans v. Commonwealth, 562 S.W.2d 303, 306 (Ky.1978). **On the other hand, the argument was sufficiently insignificant in the overall context of the case before us that we find the error harmless.** See **Bertolotti v. State**, 476 So.2d 130, 133 (Fla.1985); **James v. State**, 263 So.2d 284, 286 (Fla. App.1972). (emphasis by appellee).

The appellee would submit that based upon the record cited above, this issue was waived. It was waived for failure to make a contemporaneous objection, and when viewed in the context of closing argument, it was also lacking in merit.

PROPOSITION VII

THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED TESTIMONY AND EVIDENCE IN SUPPORT OF THE DENIAL OF POST CONVICTION MOTIONS.

Mr. Young argues that there was insufficient credible evidence in the record in support of his conviction and the trial court's denial of his motion for a new trial. Young argues there was a lack of evidence as to "when" the alleged sexual assaults occurred as was charged in the indictment. Appellant's brief page 35.

This "when" issue was not raised in Young's motion for a new trial on any new grounds. C.P. 102-106. This issue raised and rejected by the trial court was that there was insufficient evidence as to when the many sexual assaults of C.Y. occurred.

The record indicates that this issue of a lack of evidence as to the time the abuse occurred was raised in Young's motion for a directed verdict. This was at the close of the state's case in chief. R. 673. The record indicates that the trial court found that the dates of the sexual penetrations were included in statements made by the child witness. This was in the forensic interview and in C.Y.'s testimony. C.Y. testified when she was five or six when it was occurring with the last report of abuse when she was eight and a half years old. R. 673-674

> Luther: That tape is in evidence. It's before the jury to hears and the child has said that those matters are correct. She adopted them. **She also said that this matter started at a very young age, and we've got testimony that three years old is the testimony and it happened until the time that this was reported on the last chance when she was eight and half years old, you Honor. Those dates encompass that and she said it happened all the time, you Honor, and I think there's sufficient factual basis for this jury could find that she was penetrated in her anal, vaginal, and oral openings by this man with his penis; and that he is more than 18 years old and she was under 14 years of age and he was more than 24 months older than her, and it happened in this county, Your Honor.** R. 674.

In addition, the record reflects that C. Y. testified on cross examination that the abuse

occurred until she was about eight and a half years old. She also testified that she was only five or six when this began to happen.

Q. And how old were you when this happened?

A. **About–I don't know how old I was when I was little, but I know it went on until I was eight and a half.**

Q. **It went on until you were eight and a half years old?**

A. **Yes.**

Q. And how old are you now, Young Lady?

A. Ten and a half.

Q. When did you stop living with your mom and dad and Brandon?

A. When I was about nine.

Q. Well, that would have just been last year, Young Lady?

A. Oh, when I was-when I went to my grandma's the next day I told her.

Q. What grade were you in?

A. First. R. 426.

Q. And how young were you when you say this started?

A. **Not when I was little. It was about five or six when it started happening**. R. 436. (Emphasis by appellee).

The record reflects that the trial court also denied Young's motion for a new trial. This was after a hearing in Circuit Court. R. 984-998.

> Trial Court: ...Yet in this case, I believe the court did not commit error and that the JNOV or judgment of acquittal is not appropriate in this case, so the motion will be denied that this matter may promptly be appealed and another court can review what I have done. R. 994.

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated

that a motion for a new trial should be denied unless doing so would result in an "unconscionable injustice."

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

The appellee would submit that this issue is also lacking in merit. As found by the trial court in his ruling after a hearing on Young's motion for a new trial, there was no injustice involved in denying Young's post conviction motion for a new trial.

PROPOSITION VIII

THERE WERE NO ERRORS THAT DENIED YOUNG A FAIR TRIAL.

Mr. Young argues that the trial court erred in denying him a new trial because of the alleged numerous errors made on evidentiary matters during the trial. Appellant's brief page 35-36.

As shown under previous propositions I through VII, the appellee has submitted that the trial court did not err in its evidentiary rulings. This would include the admission of the forensic interview DVD recording, the acceptance of expert witness testimony, or the statements made by C. Y. to others about sexual abuse. The trial court properly found that the testimony about sexual misconduct with others was probative and not unfairly prejudicial to the defendant. The prosecution's closing argument was about testimony about the frustration of the child victim in not finding relief from the repeated abuse. This was after telling family members about it more than once. It was also a response to the defense argument that the jury needed to release this alleged innocent defendant; since the child witness was allegedly lying.

In **Gibson v. State**, 731 So. 2d 1087, 1098 (Miss. 1998), this Court found no errors individual or cumulative that had deprived Gibson of a fair trial.

> Where there is ' no reversible error in any part,...there is no reversible error to the whole.' **McFee v. State** , 511 So. 2d 130, 136 (Miss. 1987). We have examined each one of Gibson's complaints and hold the cumulative effect of all alleged errors was not such as to deny the defendant a fundamental fair trial. In fact, we have determined that all five of Gibson's assignments of error lack merit. Therefore, this Court further concludes that the cumulative effect of these alleged errors do not merit reversal of Gibson's guilt.

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

CONCLUSION

Young's convictions should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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