

IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2010-CA-00629-COA

RT

JOHNNIE R. YOUNG, JR.,

Appellant,

VERSUS

STATE OF MISSISSIPPI

Appellee.

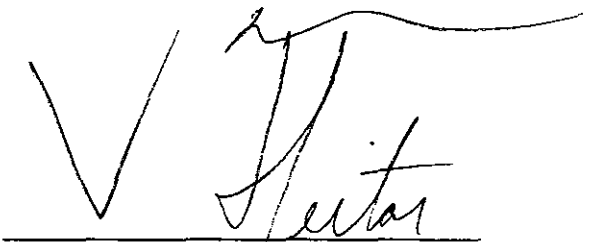
CERTIFICATE OF INTERESTED PERSONS

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Johnnie R. Young, Jr., Defendant/Appellant,
2. Victor I. Fleitas, Attorney for Johnnie R. Young, Jr.,
3. State of Mississippi, Plaintiff/Appellee
4. Kelly Luther, Esq., Assistant District Attorney,
5. Honey Ussery, Esq., Assistant District Attorney,

6. Chelsea Young, putative victim

This the 18th day of January, 2011.



VICTOR I. FLEITAS

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REPLY ARGUMENT

1. Mr. Young properly and repeatedly objected to the admission of the out of court statements of C.Y., including the forensic interview, and the circuit court erred in admitting the statements and forensic interview into evidence.

Contrary to the State's assertion in its brief, Mr. Young properly and repeatedly objected to the admission of any out of court statements made by C.Y. and the admission of her forensic interview conducted by Angie Floyd. In light of the fact that the admission of this highly prejudicial hearsay testimony constituted an abuse of discretion, Mr. Young's conviction must be reversed.

Prior to the commencement of trial, Mr. Young filed a motion *in limine* seeking to exclude from evidence all out of court statements made by C.Y. as well as her forensic interview. (R. at 64-68.) In that motion, Mr. Young asserted that the out of court statements and the forensic interview would constitute inadmissible hearsay, improper witness testimony bolstering through prior consistent statements and violate the Sixth Amendment Confrontation Clause. In addition, Mr. Young also objected contemporaneously to each attempt by the State to have such evidence admitted. For example, prior to the testimony of Ms. Floyd, (Tr. at 326), and the admission of the forensic interview, Mr. Young renewed his objections:

BY MR. LUTHER: Your Honor, at this time, we would move to introduce that video into evidence, your Honor, to be played before the jury.

BY THE COURT: All right.

BY MR. FLEITAS: Your Honor, renew the objection.

BY THE COURT: The objection will be noted. It will be marked and received into evidence.

(Id. at 347.)

Having properly objected all issues regarding the admissibility of the out of court statements of C.Y. and the forensic interview are preserved on appeal. As already noted, the forensic interview tape of C.Y. was hearsay and testimonial in accordance with Williams v. State, 970 So. 2d 727, 734 (Miss. App. 2007). In addition, since the forensic interview was exhibited to the jury prior to C.Y.'s testimony, Mr. Young had no opportunity to confront his accuser prior to its playing and the admission of the forensic interview was error per se. Williams, 970 So. 2d at 734. It was only after showing the improperly admitted forensic interview to the jury through the testimony of Ms. Floyd that the State allowed C.Y. to testify. Given that the entire "substance" of C.Y.'s testimony consisted of nothing more than attesting that what she had stated in he forensic interview was the truth, (Tr. at 415-16), the error in permitting the admission of the forensic interview and out of court statements is magnified and compels the reversal of Mr. Young's conviction.

The quality of the out of court statements made by C.Y. as improper witness bolstering and prior consistent statements also mandates reversal of Mr. Young's

conviction. In response to the obvious error in admitting these out of court statements the State simply baldly asserts that there was “overwhelming evidence of guilt” in this case and that any error in admitting the out of court statements was harmless. In fact, in this case the only evidence against Mr. Young are the “statements” of C.Y. since there is no corroborating witnesses, a confession or forensic corroboration. See Sea v. State, No. 2009-KA-01052 ¶ 19 (Miss. Dec. 9, 2010) (stating sexual abuse case based entirely on testimony of accusers not overwhelming). Consequently, the rule of Owens v. State, 666 So. 2d 814, 816 (Miss. 1995) prevails and the court erred in admitting the forensic interview and out of court statements of C.Y. as improper bolstering and prior consistent statements.

2. The rule of *Derouen v. State* does not create a per se rule for the admissibility of prior bad acts in sexual abuse cases.

In response to Mr. Young’s argument that the admission of prior bad acts evidence by the circuit court constituted reversible error, the State basically asserts that the trial court was fully authorized, in fact almost compelled, to admit such acts pursuant to Derouen v. State, 994 So. 2d 748, 756 (Miss. 2008). Because the circuit court abdicated its evidentiary gatekeeper role pursuant to Miss. R. Evid. 403 and 404(b) and adopted a per se rule of admissibility for such bad acts, Mr. Young’s conviction must be reversed.

Over strenuous and repeated objections the trial court reflexively admitted prior

bad acts. In so doing, the circuit court appeared to apply a per se rule of admissibility for such prior bad acts and glossed over the prejudicial effect of such testimony in Mr. Young's trial. (Tr. at 277-78.) In Sea, the Court noted, in reversing a conviction based on ineffective assistance of counsel for failing to object to the admission of prior bad acts in a sexual abuse case, that evidence of "prior convictions for sexual battery - one involving a child under thirteen years of age - was incendiary." Sea, No. 2009-KA-01052 at ¶ 20. There is no dispute that despite the limiting instruction given by the circuit court the prosecution made use of the prior bad acts to argue to the jury that Mr. Young acted in conformity with those prior bad acts in this case. (Tr. at 869-871, 957.) Thus, the reversal of Mr. Young's conviction is compelled by the admission of such incompetent and inflammatory prior bad acts evidence which carried a presumption of prejudice. Sea, No. 2009-KA-01052 at ¶ 20.

3. The circuit court committed reversible error in admitting into evidence the "expert" medical testimony of nurse Elizabeth Thomas.

In responding to this assignment of error, the State takes the ostrich approach and ignores the essence of Mr. Young's argument in the hope it will just go away. Mr. Young established that the trial court committed error by allowing Sexual Assault Nurse Examiner Elizabeth Thomas to give testimony regarding medical causation. Permitting a nurse to testify regarding medical causation contravened the Court's directives and prejudiced Mr. Young's trial mandating the reversal of his conviction.

As previously noted, Nurse Thomas rendered a medical opinion, over objection, regarding C.Y.'s early estrogenization by implying that sexual activity by C.Y. could cause and account for her level of estrogenization. (R. at 601-03, 626-27.) Nurse Thomas rendered an opinion that the absence of hymen at six o'clock was generally caused by sexual assault or sexual penetration. (Id. at 604-06.) Nurse Thomas also provided medical testimony and opinions regarding the ability of a hymen to heal itself and the effects of estrogen on the hymen and the ability to have intercourse without injury or pain. (Id. at 624-25.) Nurse Thomas rendered medical opinions and conclusions regarding hymen size and sexual activity. (Id. at 628-29.) Nurse Thomas also offered medical opinions regarding the causation for the tear or rupture and attenuation in C.Y.'s hymen related to sexual activity. (Id. at 591-93, 666-67.) Nurse Thomas concluded by opining that the injuries she observed on C.Y. were consistent with blunt force trauma, a clear medical conclusion. (Id. at 631.)

The preceding examples of testimony regarding medical causation by Nurse Thomas were admitted into evidence by the circuit court over objection despite the clear mandate from the Court prohibiting such testimony by a nurse. See Richardson v. Methodist Hospital of Hattiesburg, Inc., 807 So. 2d 1244, 1247-48 (Miss. 2002) (holding nurse could not testify regarding cause of death because nurses are not qualified to make medical diagnoses or attest to the cause of illness); Vaughn v. Mississippi Baptist

Med. Ctr., 20 So. 3d 645, 652 (Miss. 2009) (holding nurse cannot testify as to medical causation). The State has not rebutted Mr. Young's assertion that Nurse Thomas provided testimony regarding medical causation and has offered no authority suggesting that such medical causation testimony by a nurse is appropriate or admissible. The effect of allowing Nurse Thomas to render expert opinions beyond their competency severely prejudiced Mr. Young's defense and denied him a fair trial thus mandating the reversal of his conviction.

4. The circuit court committed reversible error in not granting a curative instruction or declaring a mistrial for the prosecution's improper closing argument.

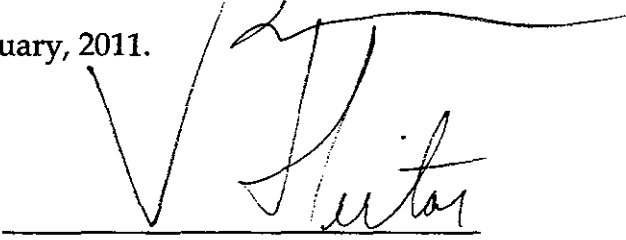
As already noted, during closing arguments the State committed errors which the circuit court refused to remedy despite a request for a curative instruction or a mistrial. In response to Mr. Young's appellate argument highlighting the impropriety of the State's conduct at trial, the State feebly asserts that any assertion of error was waived for a failure to provide a specific objection. Due to the grievous error committed by the State during closing argument which was properly objected to and was unremedied by the circuit court, Mr. Young's conviction must be reversed.

There is no doubt that the State's assertion to the jury that they should "help" C.Y. by convicting Mr. Young constituted an impermissible "Golden Rule" argument. Chisolm v. State, 529 So. 2d 635, 639-40 (Miss. 1998). Despite the State's assertion to the

CONCLUSION

For the reasons stated above, and in his Brief for the Appellant, Mr. Young requests that the Court reverse his convictions for sexual battery and provide such further or additional relief as the Court deems proper under the circumstances.

Respectfully submitted, this the 18th day of January, 2011.



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CERTIFICATE OF SERVICE


I, Victor I. Fleitas, attorney for Johnnie R. Young, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

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This the 18th day of January, 2011.


VICTOR I. FLEITAS