IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2010-CA-00629-COA

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 11th day of October, 2010.

/s/ Victor Israel Fleitas

VICTOR I. FLEITAS

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STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

Johnnie R. Young, Jr. was indicted on three counts of sexual battery on (R. at 4-5.) Trial commenced on September 21, 2009 and on September 28, 2009, the jury found Mr. Young guilty on all counts. (Id. at 84-86.) Judgment was entered on October 30, 2010. (Id. at 99-100.)

On October 14, 2010, a sentencing hearing was held and Mr. Young was sentenced to three terms of life imprisonment to run concurrently. (Id.) After his sentencing, Mr. Young filed a Motion for Judgment of Acquittal Notwithstanding the Verdict and Motion for a New Trial. (Id. at 102-07.) The trial court denied these motions on February 18, 2010. (R. at 111.)

On February 18, 2010, the trial court granted Mr. Young's Motion for Leave to Proceed in Forma Pauperis. (Id. at 112.) Mr. Young timely filed his Notice of Appeal on March 1, 2010. (Id. at 113-14.)

(ii) Statement of Facts

(Prosecution's Witnesses)

1. Anthony Anderson

Anthony Anderson works as an investigator for Union County. (Tr. at 296.) He initiated his investigation in response to a report he received of child sexual abuse by

the Mississippi Department of Human Services ("DHS") regarding C.Y.. He and the DHS social worker set up a forensic interview for C.Y. with an organization "assigned by the State of Mississippi. The forensic interview was conducted by Angie Floyd. (Id. at 300.) Mr. Anderson acknowledged that the groups conducting the forensic interview and the physical examination worked closely with Union County law enforcement. (Id. at 312.) Mr. Anderson further acknowledged that he considered himself an "advocate" for children. (Id. at 319.)

2. Angie Floyd

Ms. Floyd was employed at the Family Resource Center and Children's Advocacy Center in Tupelo, MS. (Tr. at 222.) Ms. Floyd had previously worked at the Children's Advocacy Center in Mantachie, MS and for DHS in Itawamba County. (Id.) Ms. Floyd works as a forensic interview specialist and has conducted over 1,000 interviews of children. (Id. at 223.) Ms. Floyd holds a Bachelor's Degree and is taking course work for a Master's Degree in social work. (Id.) Ms. Floyd is a licensed social worker with over 260 hours in training to do forensic interviews. (Id.)

Ms. Floyd acknowledged that she worked as part of a team that had a prosecution orientation with members of law enforcement and DHS. (Tr. at 229.) Her methodology is a tool of the prosecutors and law enforcement with respect to offenses involving sexual abuse. (Id. at 230-31.) The cases referred to Ms. Floyd usually came

from DHS or law enforcement. (Id. at 232.) Funding for her salary comes from grants including grants from DHS and the Department of Public Safety. (Id.)

Ms. Floyd viewed her role at trial as that of an advocate for children. (Id. at 233.) Her opinion was that C.Y. disclosed abuse to her and that the disclosure was consistent with a child who had been abused. (Tr. at 233-34.)

According to Ms. Floyd, C.Y. disclosed to her that she had been abused "many times" by her father. (Id. at 353.) C.Y. recounted that the last time anything happened she was in the truck. (Id. at 358) C.Y. also testified that her father would never abuse her in front of others and that and that her father told her it was "their little secret." (Id.) C.Y. told Ms. Floyd that the abuse always happened at her mother's house anywhere "he could lay her down.". (Id. at 364-65.) C.Y. testified that the abuse happened when she was between the ages of three and six years old.[1] (Tr. at 366.)

3. C.Y.

C.Y. is Johnnie R. Young, Jr.'s daughter. Her entire direct testimony consisted solely of acknowledging that she had been interviewed and that everything she had

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[1]Accepting this testimony as true, the alleged sexual abuse would have ended over a year before the time specified in the indictment for when the abuse was alleged to have taken place. In fact, the prosecution never produced any evidence that the alleged sexual abuse actually took place during the one-year time period encompassed by the three-count indictment. Nonetheless, the prosecution never sought to amend the indictment to match it's own evidence of when the sexual assault's allegedly took place..

said on the forensic interview which was shown to the jury was the truth. (Tr. at 415-16.) C.Y. had no recollection that she had suffered a serious injury to her backside and vaginal area when she was approximately two and a half years old. (Id. at 419-421.) C.Y. never told her siblings about the alleged abuse. (Id. at 426.) C.Y. then testified the abuse happened for the last time when she was eight and a half years old the day before she reported it to her grandmother.[2] (Id.) She claimed that the abuse happened one time while her father drove the big truck home from work. (Id. at 431-32.)

4. Richard Dunsford

Richard Dunsford is the fiancee of C.Y.'s aunt, Ashley. (Tr. at 445.) Over objection, Mr. Dunsford testified that, in approximately June 2007, C.Y. and he were on the porch when she told him that her father had. Made her perform sexual acts in the big truck. (Id. at 446.) According to Mr. Dunsford, C.Y. went on to say that he observed her father beat her mother with a gun. (Id. at 447.) Mr. Dunsford directed C.Y. to go inside and tell her grandmother what she had told him. (Id. at 447-48.) Mr. Dunsford testified that C.Y. tended towards being jealous with a temper but that from his observations and interactions with her, she was a happy well-adjusted child. (Id. 450.) Mr. Dunsford testified that C.Y. told him these things because they were friends. (Tr. at

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[2]This would seem to be contradicted by Nurse Thomas' findings of no recent injury to C.Y. during her physical examination and the fact that C.Y. had not seen her father for two weeks before she reported it to her grandmother. (State's Exh. 5.)

452.)

5. Johnnie Young, Sr.

Johnnie Young, Sr. Is the father of Johnnie R. Young, Jr. (Tr. at 470.) Over objection, Mr. Young testified that C.Y. had told him about sexual abuse two times. The first time she told him about any abuse was in 2003 or 2004.[3] (Id. at 455.) According to Mr. Young, C.Y. first told him that her daddy put his tongue on her bottom. (Id. at 456.) The second time, Mr. Young testified that he came home from work one evening and C.Y. told him and his wife that her daddy made her put her mouth on him and that he touched her bottom and put his bottom on hers. (Id. at 458.)

At the time of the trial, C.Y. had lived solely with her grandparents for a little over two years. (Id. at 474.) Prior to that time, C.Y. stayed with her grandparents whenever her mother worked from the time she was born. (Tr. at 475, 481.) When C.Y. was around three years old she hurt her female part falling on the handle of the faucet in the kitchen sink. (Id. at 493. 498.)

Mr. Young testified that after making the last disclosure, C.Y.'s behavior became very bad and she had to be sent to St. Francis Hospital for a period of time. (Id. at 488.)

6. Elizabeth Thomas

Elizabeth Thomas is a sexual assault nurse examiner ("SANE") employed with

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[3]Mr. Young later clarified that the disclosure must have taken place in early 2004. (Tr. at 477.) C.Y. would have been over five years old at that time.

the Memphis Sexual Assault Resource Center in Memphis, TN. (Tr. at 530-31.) Nurse Thomas has been a registered nurse for 32 years and has worked at the MSARC for over 16 years. (Id. at 531.) Nurse Thomas received specialized training to work as a SANE. (Id.) Nurse Thomas testified that the proper role of a nurse in her setting is to do initial intake, take a narrative from the patient and collect evidence. (Id. at 535.) Nurse Thomas acknowledged that a nurse could not render a medical diagnosis or determine issues of medical causation. (Id. at 536.) Nurse Thomas also admitted that the examination of the female genitalia in a maturing child is particularly complex requiring additional training even above a medical license. (Tr. at 541-42.)

Nurse Thomas in assessing C.Y.'s case, was never informed about her severe injury and that such an injury would be important information she would need to know. (Id. at 542-43.) According to Nurse Thomas, C.Y. disclosed to her that she had been "touched" many times by her father. (Id. at 557.) During the physical examination, Nurse Thomas observed no acute injury on C.Y. (Id. at 587.) She made findings of no hymen at six o'clock, attenuation at eight to eleven o'clock and the size of the hymenal lumens was 10-15 mm. (Id. at 591-94.)

Nurse Thomas admitted that C.Y. was developmentally normal and that he attenuation and lumens size were not indicative of sexual abuse. (Tr. at 635-41.) In addition, Nurse Thomas testified that she would have wanted to know about C.Y.'s

problems with chronic constipation and was not told of any prior injuries or problems. (Id. at 643-647.) Nurse Thomas referred to C.Y.'s earlier vaginal injury as significant. (Id. at 648.)

7. Amy Berryhill

Amy Berryhill is the daughter of Johnnie Young, Sr. and Deborah Young, C.Y.'s aunt and the half-sister of Johnnie R. Young, Jr. (Tr. at 668.) Over objection, she testified that when she was about five years old her brother, Johnnie R. Young, Jr., had her straddle him and rubbed his penis on her "vagina" before her mother walked by and saw him. (Id. at 669.) She further testified that she had always felt uncomfortable around Johnnie R. Young, Jr. but had no recollection of any other incidents. (Id. at 669.)

(Defendant's Witnesses)

1. Elizabeth Young

Elizabeth Young is the fifteen year old daughter of Johnnie R. Young, Jr. and C.Y.'s half-sister. (Tr. at 678-80.) Elizabeth would spend every other weekend with her father, step-mother, C.Y. and her step-brother Brandon. (Id. at 680.) Elizabeth loved C.Y. and was very close to her. (Id.)

Elizabeth testified that her father had never hurt her. (Id.) She witnessed C.Y. interacting with her father and observed that C.Y.. loved her father and enjoyed spending time with him. (Id. at 681.) Elizabeth never saw her father do or say anything

out of sorts or strange to C.Y. (Tr. at 681.)

After the allegations of sexual abuse were made against her father, Elizabeth was asked to come to Tupelo to be interviewed regarding her father. (Id.) Elizabeth made the trip to Tupelo with her mother, aunt and cousins. (Id. at 681-82.) She was told that her mother would be allowed to be present when she was interviewed. (Id. at 682.) Shortly thereafter, Elizabeth and her mom were escorted to a room but upon arriving at the interview room Elizabeth's mother was not allowed to enter and remained outside. (Id. at 683.) Elizabeth became upset because she had been told that her mother could be present while she was being interviewed. (Tr. at 683.) Elizabeth cried unlocked the door and ran out of the room. (Id.)

Elizabeth testified that she had been told to lie on her daddy and tell them "he touched me when he didn't," while she was in the hallway with her mother.[4] (Id. at 684, 691.) Elizabeth was told that if she refused to answer their questions she would not be allowed to see her daddy or her sister, C.Y., anymore. (Id. at 685.) Elizabeth returned to the interview room and answered all of their questions and told them that her daddy had never "touched" her. (Id. at 685-86.) The interviewer was "mad" that she would not tell them that her daddy touched her. (Tr. at 692.) C.Y. never told her

[4]Elizabeth Young's testimony regarding being pressured and threatened to lie about her father during an interview regarding sexual abuse was uncontradicted by the prosecution. The State never called the social worker or interviewer involved to rebut Elizabeth's troubling allegations of manipulation and coercion.

sister that her father had done anything to her. (Id. at 706.)

2. Patti Roberts

Patti Roberts was a long-time neighbor of Johnnie Young, Sr. who knew Johnnie R. Young, Jr. From about the age of six or seven years old. (Tr. at 707-08.) Ms. Roberts described Randy Young as, "A little old skinny boy with big ole puppy dog eyes, a pair of shorts, no shoes, no shirt, kind of dirty and hungry and just sad. (Id. at 708.) During summers Randy Young would spend all day at Ms. Roberts' home and during school he would come there afterwards. (Id. at 708-09.) Ms. Roberts gave Randy Young food, clothing and shoes to wear, because his parents did not provide it for him, and took him with her sons to the movies and fairs. (Id. at 709.) Ms. Roberts observed that Randy Young did not like he took a bath every night and had him wash up before eating at her house. (Id. at 710.)

Randy Young's parents never called to ask Ms. Roberts to keep him, or to check on how he was doing, or to tell him to come home, or to see if he was hungry or alive or dead. (Tr. at 711.) Ms. Roberts described randy Young as "a sad throw-away child," who was unloved, unwanted and starved for attention. (Id.)

3. Dr. Gary Mooers

Dr. Gary Mooers, received a Bachelor's Degree from Brigham Young University; a Master's Degree in Social Work from Florida State University; and a Master's Degree

in Public Health and a Doctorate Degree in Social Work from the University of Pittsburgh. (Tr. at 724.) Dr. Mooers spent 29 years on the faculty of the Social Work Department at the university of Mississippi, twenty of those years as the Chair. (Id. at 724-25.) Dr. Mooers spent four years working in child welfare and is currently employed by the University of Southern Mississippi, housed at the Forrest County DHS, to work as a trainer and mentor for workers and as a trainer for social work supervisors in the areas of child sexual abuse, long-tern foster care cases where children are exiting the system and long-term child care cases where important decisions must be made. (Id. at 725.) Dr. Mooers, has previously testified as an expert witness in chancery court, circuit court and the federal district courts. (Id. at 725-26.)

Dr. Mooers has had hands on experience with forensic interviewing from 1969 to the present. (Id. at 726.) Dr. Mooers has educated and trained others in forensic interviewing and has evaluated forensic interviews. (Tr. at 726-27, 736.) Dr. Mooers took a Masters level course specifically in child sexual abuse interviewing and six academic quarters in general interviewing which included interviewing children. (Id. at 735-36.) Further, Dr. Mooers was requested by DHS to train its workers in forensic interviewing and conducts such training approximately 10-12 times a year. (Id. at 736, 739-40, 752.) In addition, Dr. Mooers previously was accepted as an expert witness specifically as it pertained to the "finding words" protocol. (Id. at 748-49.) In those

cases he testified, Dr. Mooers assessed how the "finding words" protocol was used and opined on the conclusions drawn by the interviewer. (Id. at 749-50.)

Dr. Mooers reviewed the videotape of the forensic interview of C.Y. four times. (Tr. at 793.) Dr. Mooers testified that there was no mechanism or way which allowed a person to know a child claiming sexual abuse was or was not telling the truth. (Id. at 794.) Dr. Mooers noted that children sometimes lied about whether or not that had or had not been abused and were persuadable. (Id. at 795-96.)

Dr. Mooers found several problem areas with C.Y.'s statements in the forensic interview. (Id. at 796.) Dr. Mooers found that C.Y.'s responses seemed scripted due to the fact that she seemed to have an agenda during the interview and had a set series of answers she wanted to give while failing to respond with specific details or relevant responses. (Id. at 796-98, 801, 807-08.) C.Y.s hostility troubled Dr. Mooers because she appeared to have a predetermined litany of complaints which led him to question the source of her hostility. (Tr. at 799.)

4. Deborah Young

Deborah Young is the mother of Amy Berryhill and Randy Young's stepmother. (Tr. at 810.) C.Y. spent the better part of the first four to five years of her life living with her because of her parents' work schedules. (Id. at 810-11.) In fact, with the exception of every other weekend and one or two days during the week every other week, C.Y.

lived exclusively with Deborah Young and her husband until she started school. (Id.)

Deborah Young was not present when C.Y. hurt herself in the sink because she had gone to a neighbor's house. (Id. at 812.) She went to the hospital with her husband, her daughter and C.Y. and called to let her parents know she had been hurt. (Id.) Deborah Young was also aware of C.Y.'s history of severe constipation which lasted until she was three or four years old before becoming more infrequent. (Tr. at 813.) On at least one occasion to Deborah Young's knowledge, C.Y. had to be hospitalized when she was over four years old because of the severity of the constipation and fecal impact. (Id. at 814-15, 833-35; Ex. D-11.)

When C.Y. was taken to Memphis to be examined by nurse Elizabeth Thomas, Deborah Young went with her. (Id. at 815.) Deborah Young claimed that she informed the social worker of C.Y.'s vaginal injury before the physical examination but did not inform the nurse herself. (Id. at 816-19.) Deborah Young also failed to notify anyone of C.Y.'s long term history of constipation.[5] (Id. at 819-20.)

Deborah Young regularly bathed and clothed C.Y. but never observed any injuries to her body. (Tr. at 825-26.) In fact, in all of her life C.Y. had never been away from Deborah Young for longer than a week but had never seen any sign of injury on

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[5]C.Y. informed her grandmother that she was aware that her mother would use her fingers to remove matter out of her anus when her mother was constipated. (Tr. at 825.)

C.Y. (Id. at 830-31.)

5. Johnnie R. Young, Jr.

Johnnie R. Young, Jr. ("Randy Young"), lived in Union County, Mississippi all of his life. (Tr. at 837.) At the time of the events relevant to this appeal he was married to Cindy Young and had two daughter, Elizabeth Young and C.Y. and a step-son Brandon Wright. (Id. at 837-38.)

Mr. Young denied that he had ever sexually assaulted his daughter, C.Y. (Id. at 838.) Mr. Young admitted that he had fondled his half-sister, Amy Berryhill, twenty years before. (Id. at 839.) Mr. Young was sent to Laurelwood, then to a shelter and ultimately to the Northeast Mississippi State Hospital before being released approximately a year after the incident with his half-sister. (Id. at 839-40, 847-49.) Mr. Young returned to his father's house for a few days but stayed outside in a tent before staying with his aunt one day and moving in with another family. (Tr. at 840.)

Mr. Young worked as a truck driver. (Id. at 841.) C.Y. spent most of her life living with his stepmother. (Id.) Mr. Young acknowledged that he spent time with his daughter alone but that he did not get to spend very much time alone with her because of his work. (Id. at 843-44.)

6. Brandon Wright

Brandon wright is the brother of Elizabeth Young and C.Y. and the son of

Cynthia Young. (Tr. at 878-79.) Randy Young is his stepfather. (Id. at 879.)

Brandon never observed Randy Young act in an inappropriate way towards his sisters, C.Y. or Elizabeth. (Id. at 880.) Brandon testified that Randy Young and and C.Y. interacted well together, she loved her dad and was always happy to see him when he came home. (Id.) Despite being close, C.Y. never told Brandon that her father had done anything to her. (Id. at 890.)

(Prosecution's Rebuttal Witness)

1. Tammy Pratt

Tammy Pratt testified that she had seen Johnnie R. Young, Jr. at his place of work at family picnics a few times and that she had seen C.Y. riding in the truck with him. (Tr. at 898.)

SUMMARY OF THE ARGUMENT

1. The trial court admitted into evidence numerous out of court statements by C.Y. to other individuals, including her forensic interview. These statements were all subject to being excluded from evidence on the grounds that they constituted hearsay, violated the confrontation clause and constituted impermissible witness bolstering. Based on this error, Mr. Young's conviction should be reversed.

2. The trial court admitted into evidence prior bad acts which Mr. Young had engaged in. This highly prejudicial evidence completely deprived Mr. Young of a fair

trial since its prejudicial effect substantially outweighed its probative value and led to a conclusion that Mr. Young acted in conformity with this prior bad act in this case. The court abused its discretion in admitting this evidence and the judgment of the trial court must be reversed.

3. The trial court admitted into evidence the unqualified expert opinions of the forensic examiner regarding the credibility and believability of C.Y. despite the questionable reliability in the methodology used by the forensic examiner. The admission of her opinions affected a substantial right of Mr. Young's and reversal of his conviction is called for.

4. The trial court admitted into evidence the testimony of a sexual assault nurse examiner who testified regarding diagnostic impressions and medical causation in contravention of clearly established prohibitions against such testimony. The net effect of permitting such unqualified expert testimony is to deprive Mr. Young of a fair trial and mandate the reversal of his conviction.

5. The trial court arbitrarily refused to qualify Mr. Young's abundantly qualified expert witness on forensic interviewing and child sexual abuse thus depriving mr. Young of a witness to establish a theory of the defense that the protocol used by the prosecution is flawed and the testimony of C.Y. is not consistent with sexual abuse. The refusal to allow Mr. Young's expert to testify regarding these matters prejudiced his

defense and require the reversal of his conviction.

6. The highly improper and inflammatory closing argument for the prosecution, which sought to have jurors abandon reason and adjudicate based on sympathy and prejudice mandates the reversal of Mr. Young's conviction.

7. The trial court's denial of Mr. Young's Motion for a New Trial, in light of the fact that the prosecution failed to establish every element of its case beyond a reasonable doubt compels a finding that Mr. Young's conviction is flawed and must be reversed.

8. The cumulative weight of all of the errors of record committed by the trial court deprived Mr. Young of a fair trial and require that his conviction be overturned.

ARGUMENT

1. The circuit court committed reversible error in admitting into evidence numerous out of court statements of C.Y. and the videotape recording of the forensic interview of C.Y.

During the course of the trial and over Mr. Young's repeated objections, the trial court admitted out of court statements made by C.Y. to others including: Angie Floyd, Richard Dunsford, Johnnie Young, Sr., Elizabeth Thomas and Deborah Young. These statements included the statements made by C.Y. in her forensic interview which was published and shown to the jury. Mr. Young filed a motion in limine to exclude these out of court statements as hearsay, prior consistent statements and violations of the

confrontation clause. (R. at 64-68.) Mr. Young also made contemporaneous objections to the admissibility of all of the statements.

As an initial proposition, it must be noted that 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). Since the forensic interview was exhibited to the jury prior to C.Y.'s testimony, Mr. Young had no opportunity to confront his accuser and the admission of the forensic interview was error per se. Williams, 970 So. 2d at 734. In addition, since the Court never conducted an analysis pursuant to Miss. R. Evid. 803(25) or Miss. R. Evid. 403 and 404(b), the forensic videotape retained its character as inadmissible hearsay and could not constitute substantive evidence of Mr. Young's guilt. In light of these errors, Mr. Young's conviction must be reversed.

Mr. Young also objected to the admission of C.Y.'s out of court statements as improper prior consistent statements and witness bolstering. The admission into evidence of prior consistent statements cannot be supported by an effort to bolster the witnesses credibility. Owens v. State, 666 So. 2d 814, 816 (Miss. 1995). In this case, the witnesses and the forensic interview tape were admitted into evidence solely as prior consistent statements, several of them before C.Y. had ever testified. For her part, C.Y.'s testimony consisted entirely of vouching for the forensic interview. It is indisputable that the admission of so many prior consistent statements violate the rule set forth in

Owens. In a case such as this, where the evidence of guilt is not great, such an grave evidentiary error compels reversal of the conviction.

2. The circuit court committed reversible error in admitting into evidence prior bad acts of Johnnie R. Young, Jr.

Prior to trial, Mr. Young filed a motion in limine to exclude all evidence of prior bad acts which the prosecution intended to seek to introduce into evidence. (R. at 64-68.) The evidence consisted of the testimony of Amy Berryhill and other documentary evidence regarding an incident where Mr. Young, at the age of 15-16 years old, over twenty years earlier, fondled Ms. Berryhill and was caught by his stepmother. After hearing a proffer of the proposed evidence the trial court ruled that the prior bad act evidence was admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (Tr. at 277-78.) The prosecution never asserted and the trial court never identified which of the bases for limited admissibility supported the introduction of such prejudicial testimony. In allowing the prejudicial testimony regarding Mr. Young's prior bad act with Ms. Berryhill the trial court committed reversible error.

The evidentiary standard established in Mitchell v. State, 539 So. 2d 1366 (Miss. 1989) and Lambert v. State, 724 So. 2d 392 (Miss. 1998) placed an understandable limitation on the admission of evidence of prior bad acts in sexual abuse cases because of the caustic and highly prejudicial nature of such evidence. Despite the limitation, the

court in Lambert recognized that such evidence could be admitted in proper circumstances. Lambert, 724 So. 2d at 394. In response to the perception that a per se rule of inadmissibility regarding alleged prior bad acts in sexual offense cases had been created by Mitchell and Lambert, the Court in Derouen v. State, 994 So. 2d 748, 756 (Miss. 2008), overruled Mitchell and held that it would not constitute error per se to admit evidence of prior bad acts involving a sexual offense, other than the one charged, which involves a different person where such evidence had been analyzed pursuant to Miss. R. Evid. 403 and 404(b).

The prior bad acts evidence admitted against Mr. Young here was premised on an event which took place 20 years in the past when Mr. Young was a juvenile. Though the trial court recognized the highly prejudicial nature of the evidence which the prosecution sought to have admitted against Mr. Young, it applied Derouen mechanically as almost a per se rule of admissibility. (Tr. at 278.) The court ultimately decided that such evidence was admissible on a limited basis pursuant to Rule 404(b) with a limiting instruction. Neither the trial court nor the prosecution ever identified the alternative basis for admissibility under Rule 404(b). However, the prosecution, in light of the overruling of Mr. Young's motion in limine and objections, asserted the prior bad act evidence as substantive character evidence which Mr. Young acted in conformity therewith in its cross examination of Mr. Young and in its closing argument.

See (Tr. at 869-871, 957.)

The assertions that alternative admissibility under Rule 404(b) was proper simply fail muster. The prior bad act evidence regarding Amy Berryhill was too remote in time and different from the events alleged by C.Y. to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. For the prosecution to argue that motive is established in this case by asserting that Mr. Young's prior bad act with Ms. Berryhill constitutes evidence of "a seemingly uncontrollable desire to partake in pedophilic sexual activities with young and developing female juveniles,"[6] turns the rules of evidence on their head and force a result contrary to the purpose for the rule.

First, the prosecution never asserted or argued that the incident involving Ms. Berryhill established motive in this case. Second, the assertion that Mr. Young might have been motivated to commit this offense because of the incident with Ms. Berryhill simply allows the state to establish under the guise of "motive" that Mr. Young acted in conformity with the prior bad act in this case. Thus, motive consists of nothing more than an indirect way of admitting evidence of a prior bad act for the purpose of proving that a person acted in conformity therewith. Such a result cannot survive sound appellate scrutiny.

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[6]Lambert, 724 So. 2d at 396 (Mills, J., dissenting).

The probative value of the evidence regarding the incident involving Amy Berryhill was substantially outweighed by the prejudicial effect such evidence had on the defense of Mr. Young's case. In addition, the prosecution failed to establish the alternate basis for the admissibility of this evidence. Consequently, in admitting the highly prejudicial evidence regarding Amy Berryhill, the trial court abused its discretion and deprived Mr. Young of a fair trial mandating the reversal of his conviction.

3. The circuit court committed reversible error in admitting into evidence the "expert" testimony and opinions of Angie Floyd.

Prior to her testifying, Mr. Young moved in limine to exclude the expert testimony of Angie Floyd and the forensic interview she conducted. Mr. Young asserted that the methodology used by Ms. Floyd could not pass scrutiny under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).[7]

Ms. Floyd was employed at the Family Resource Center and Children's Advocacy Center in Tupelo, MS. (Tr. at 222.) Ms. Floyd had previously worked at the Children's Advocacy Center in Mantachie, MS and for DHS in Itawamba County. (Id.) Ms. Floyd works as a forensic interview specialist and has conducted over 1,000

[7]In 2000 and 2003, Miss. R. Evid. 702 was amended to incorporate the federal standard for expert witnesses. Hill v. Mills, 26 So. 3d 322, 324 n.1 (Miss. 2010).

interviews of children. (Id. at 223.) Ms. Floyd holds a Bachelor's Degree and is taking course work for a Master's Degree in social work. (Id.) Ms. Floyd is a licensed social worker with over 260 hours in training to do forensic interviews. (Id.)

Ms. Floyd acknowledged that she worked as part of a team that had a prosecution orientation with members of law enforcement and DHS. (Tr. at 229.) Her methodology is a tool of the prosecutors and law enforcement with respect to offenses involving sexual abuse. (Id. at 230-31.) The cases referred to Ms. Floyd usually came from DHS or law enforcement. (Id. at 232.) Funding for her salary comes from grants including grants from DHS and the Department of Public Safety. (Id.)

Ms. Floyd viewed her role at trial as that of an advocate for children. (Id. at 233.) Her opinion was that C.Y. disclosed abuse to her and that the disclosure was consistent with a child who had been abused. (Tr. at 233-34.) According to Ms. Floyd, her training allowed her to determine better than others whether what someone tells her is consistent with some event she never observed. (Id. at 234.) Ms. Floyd acknowledged that what she was actually doing by testifying was establishing that C.Y. was telling the truth and that she could determine whether or not C.Y. was telling the truth by using the methodology. (Id. at 235-37.)

Ms. Floyd stated that there was no way to test her claim that she could ascertain whether or not a child or C.Y. was telling the truth and that one had to take her word

for it. (Id. at 238.) Ms. Floyd stated that there existed peer reviewed literature on the methodology she used but no data on error rates. (Id. at 238-39.) Ms. Floyd testified that to her knowledge she had never been wrong. (Tr. at 239-40.) Ms. Floyd alluded to research which supported her methodology but all of the research was from advocacy groups and with one exception she could not cite any from a scholarly journal. (Id. at 241-44.) Ms. Floyd testified in circuit court numerous times previously. (Id. at 248-49.) She is unaware which states have rejected the finding words methodology but is aware of scholarly literature which questions the legitimacy of the protocol. (Id. at 250-51.)

Though cognizant of this Court's prior holdings in Mooneyham v. State, 915 So. 2d 1102 (Miss. App. 2005) and Carter v. State, 996 So. 2d 112 (Miss. App. 2008), upholding the use of the "finding words" protocol and the admissibility of expert testimony under the Daubert standard, Mr. Young submits that this protocol and the "advocates" who zealously advance it are foisting a methodology lacking scientific legitimacy or any mechanism for determining the efficacy and reliability of the method.

In this case, cross examination of Ms. Floyd demonstrated that the factors this Court must consider in passing upon the admissibility of Ms. Floyd's expert opinion were not met. Based on her own testimony, Ms. Floyd's "finding words" protocol cannot be tested to determine its utility or effectiveness; the protocol lacks scholarly, independent and objective peer review; the protocol's known or potential error rate is

undetermined; the standards and control in applying the protocol appear subjective from interviewer to interviewer; and the protocol, outside its circle of law enforcement, prosecutorial and child advocacy proponents lacks acceptance in the broader scientific community. Daubert, 509 U.S. at 593-94. In light of this protocol's questionable scientific and professional merit, this Court cannot avoid the obligation to scrutinize whether it passes muster under Rule 702 in this instance.

Based on the absence of a legitimate basis to declare that Ms. Floyd's testimony passed muster under Rule 702, the trial court abused its discretion in admitting her expert opinions and denied Mr. Young a fair trial. Reversal of Mr. Young's conviction is the appropriate remedy for this assignment of error.

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

Prior to her testimony, SANE Elizabeth Thomas, testified outside the presence of the jury regarding her qualifications and opinions to be offered by the prosecution against Mr. Young. (Tr. at 529-30.) Over the objection of Mr. Young, the trial court accepted Nurse Thomas as an expert witness to render opinions regarding her findings during the physical examination of C.Y.:[8]

[8]During her voir dire examination, Nurse Thomas admitted that she was not qualified to opine regarding diagnosis of an injury, or render an opinion regarding the medical causation for an injury and that the causation for the injury to C.Y., in this case, was a medical determination . (Tr. at 536-37, 539.) Nurse Thomas further stated that the extent of her opinion in this case was that the injuries to C.Y. were consistent with

> All right. I will have to say Mr. Fleitas has caused me to think about some of these things that I don't think about in every case. He has made some very very eloquent and good arguments about some of these things that, you know, contrast in the experts in these different types of cases, state versus defendant, plaintiff versus defendant, civil cases, and I always think about that and the cause for concern and evaluation.
> Now, as far as this particular witness' expertise, which has not been within her field not been impeached as to the accuracy of what she has testified to as her credentials. Personally, you know, I would be of the view that she probably could render a more valid opinion in this area than a gynecologist could to the vagina or a proctologist could to the anus, but it's not my place to confer upon her degrees that she hasn't been awarded, and the law is in love with the degrees; but quite frankly, she's imminently qualified, in the Court's opinion, within the limitations of a sexual assault nurse. She has made it 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 those limitations, and because of that, she's qualified to render those limited opinions, and I'm going to allow her to do so.

(Id. at 554-55.) It is from the trial court's complete abandonment of this ruling and the prosecution's use of unqualified and surprise expert testimony that Mr. Young raises this assignment of error.

Despite the limitations placed on Nurse Thomas' under proposed expert testimony inherent in the trial court's ruling and the statement by the prosecution that, "We're not asking her to render a medical opinion as to what caused this injury," (Id. at 551, 555-56), Nurse Thomas testified repeatedly regarding causation and beyond her disclosed opinions. For example, Nurse Thomas rendered a medical opinion, over

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blunt force trauma. (Id. at 542; Ex. 5.) Nurse Thomas finally stated that she was not rendering an opinion that the injuries to C.Y. were caused by sexual abuse. (Id. at 545.)

objection, regarding early estrogenization by implying that sexual activity by C.Y. could cause and account for her level of estrogenization.[9] (Id. 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. (Tr. at 624-25.) Nurse Thomas rendered medical opinions and conclusions regarding hymen size and sexual activity.[10] (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.[11] (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, admittedly a medical conclusion. (Id. at 631.) In arriving at these opinions, Nurse Thomas had no information regarding two important facts: that

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[9]Nurse Thomas admitted on cross examination that C.Y. was developmentally normal with respect to her estrogenization. (Tr. at 640-41.)

[10]On cross examination, Nurse Thomas admitted that it was not generally accepted in the scientific or medical community that the size of the hymenal orifice is indicative of sexual abuse. (Tr. at 638.)

[11]Though Nurse Thomas testified on direct that the cause of attenuation in the hymen could be caused by rubbing or wearing away by a penis, fingers or other foreign object. (Tr. at 593.) On cross examination, Nurse Thomas admitted that attenuation of the hymen was not indicative of any injury to the hymen. (Id. at 636-37.)

C.Y. had a severe injury to her bottom and vagina years before; and that C.Y had severe constipation and impaction. (Tr. at 656-57.)

In Richardson v. Methodist Hospital of Hattiesburg, Inc., 807 So. 2d 1244, 1247-48 (Miss. 2002), the Court held that a nurse could not testify regarding cause of death because nurses are not qualified to make medical diagnoses or attest to the cause of illness. Subsequently, in Vaughn v. Mississippi Baptist Med. Ctr., 20 So. 3d 645, 652 (Miss. 2009), the Court expressly held that a nurse cannot testify as to medical causation.

> Since medical diagnosis is outside a nurse's scope of practice, logically it would follow that a nurse should not be permitted to testify as to his/her diagnostic impressions or as to the cause of a particular infectious disease or illness. This is in keeping with the majority rule that nursing experts cannot opine as to medical causation and are unable to establish the necessary element of proximate cause.

Vaughn, 20 So. 3d at 652. The court noted that Miss. Code Ann. § 73-15-5(2) provides that the "practice of nursing . . . shall not be deemed to include acts of medical diagnosis. Id. at 652 n.2.

The primary basis for Mr. Young's objection to the testimony of Nurse Thomas centered on the readily apparent double-standard applied by the courts to the admission of expert testimony in civil cases as opposed to criminal cases. This apparent double-standard was recognized and commented on by the trial court when it ruled on Mr. Young's post-trial motion for a judgment of acquittal or a new trial:

> All right. Well, you know, I don't want to sound like I'm blowing smoke. I said this at trial , and I'm going to say it again. Mr. Fleitas makes some very compelling arguments on behalf of his client about these evidentiary matters. I'm not just saying that gratuitously. I mean it and it has been a pretty good example shown here this morning with back to back motions in a civil case pertaining to medical negligence and this criminal case where the defendant received a long prison sentence . . . .
>
> I agree with some of the points he's made, but I, nonetheless, fall back on the sort of lame position that all of these arguments were made at trial. The Court ruled on them and I'm still of the opinion that the Court did not commit error in its ruling. I would be absolutely willing to admit that this displays some disparities in how the rules of evidence seem to be applied when you look at the protections afforded the defendants in criminal cases who are supposed to be given the greatest constitutional protections the law provides . . . .

(Tr. at 993-94.)

At no point did the prosecution suggest that the opinions offered by Nurse Thomas were not medical opinions. In fact, any unbiased observer must conclude that Nurse Thomas' opinion included medical diagnosis, diagnostic impressions and medical causation for the injuries she observed. Her testimony consisted of the same types of opinions expressly rejected by the Court in Richardson and Vaughn. The devastating effect of allowing an unqualified expert to render testimony beyond their competency severely prejudiced Mr. Young's defense and denied him a fair trial. The only appropriate remedy for such a denial of fundamental due process is the reversal of his conviction.

5. The circuit court committed reversible error in excluding the expert opinion of Dr. Gary Mooers.

Mr. Young designated Dr. Gary Mooers as an expert in social work and forensic interviewing. Well in advance of trial, Mr. Young provided the prosecution with his CV and his opinions regarding the forensic interview of C.Y. and the "finding words" methodology used in the forensic interview process. (Def.'s Exh. 9, 10.) Despite, Dr. Mooers, superior academic, research and experiential credentials to Ms. Floyd, whom he taught at the University of Mississippi, the trial court inexplicably ruled that Dr. Mooers was not qualified to remark on the forensic interview conducted by Ms. Floyd. (Tr. at 759-63.) In so doing, the trial court hamstrung Mr. Young from responding directly to the allegations and innuendos made by the state through its expert witness and did not allow him to develop a theory of his defense. In refusing to permit Mr. Young's witness Dr. Mooers to testify, the trial court affected substantial constitutional rights of Mr. Young and committed reversible error.

As already noted, Dr. Mooers' CV and voir dire regarding his experience establish that he may, without question, be the most qualified individual in this state to remark and offer expert testimony on issues related to social work, forensic interviewing and child sexual abuse. The fact that the State of Mississippi hires him specifically to train its social workers and social work supervisors on handling cases of

child sexual abuse should foreclose any challenge to his credentials or expertise. In fact, this Court has recognized Dr. Mooers' qualification as an expert witness previously. See Carter, 996 So. 2d at 116-17.

Dr. Mooers testimony was specifically needed to rebut the testimony of Ms. Floyd that C.Y. was believable and that her out of court statements in the forensic interview were consistent with a child who had been abused. In addition, Dr. Moers was to provide other evidence as an expert in social work, forensic interviewing and sexual abuse regarding what the jury should look for in the forensic interview which called into question the prosecutions theory of sexual abuse. As such, his testimony was critical to Mr. Young's theory of defense that he did not sexually abuse C.Y.

A defendant's constitutional right to a fair trial "necessarily embraces his right to have his theory of defense presented to the jury and to have the jury properly instructed on the law regarding that defense. Williams v. State, 797 So. 2d 372, 378 (Miss. App. 2001). In not allowing Dr. Mooers to testify, the trial court eliminated an entire aspect of Mr. Young's defense to the charge and denied him a constitutionally error free trial. Consequently, the judgment of conviction must be reversed.

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

During the prosecution's closing argument two contemporaneous objections

were lodged by Mr. Young. (Tr. at 957, 959.) At the end of the prosecutions argument, Mr. Young requested a curative instruction from the trial court which was denied. (Id. at 965.) Mr. Young's further request for a mistrial based on the improper closing argument was also overruled. (Id. at 968.)

The prosecution made use of the prior bad acts, and out of court statements admitted into evidence by the trial court for a limited purpose, over Mr. Young's objections, as substantive evidence to show that Mr. Young acted in conformity with the prior bad acts and out of court statements. The prosecution also argued to the jury matters not admitted into evidence as follows:

> Mama, mama. It's me, [C.Y.]. Daddy is doing things to me. You need to know about it. Make him stop. Help me. Mama, it's me, [C.Y.]. Help me. Daddy is doing things to me. That's your daddy now. Don't be talking like that about your daddy. He's your daddy. Never mind the fact that he's done the same thing to your [sic] little sister when she was this age. Your daddy wouldn't do anything like that. Go on and play.
>
> BY MR. FLEITAS: Objection, your honor.
>
> BY THE COURT Overruled.
>
> BY MR. LUTHER (Continuing) . . . .
> Mammaw, mammaw, it's me [C.Y.]. Can you hear me? Can you hear me? My daddy has been doing things to me. My daddy he's putting his tongue down there. Make him stop . . . .

(Tr. at 957-58.)

The remarks alluding to Mr. Young's prior bad act with his half-sister, Amy

Berryhill, and the remarks testified to by her grandfather, Johhnie Young, Sr., were admitted into evidence, over strenuous objection, only for the limited purpose to show motive, etc. This evidence was not to be considered as proof of his character or to show he acted in conformity therewith. Nonetheless, the prosecution's argument totally ignored those limitations and argued it the jury as evidence of character and as a substantive prior bad act. In addition, the argument that [C.Y.] had reported prior acts of sexual assault or abuse to her mother which were not acted on was completely unsupported by the record evidence.

The prosecution then compounded this egregious error by directly appealing to the sympathies and the natural prejudices of the jurors with the following:

> Now [C.Y.] has told y'all, each and every one of y'all. Are you going to help her?
>
> BY MR. FLEITAS: Objection, your honor.
>
> BY THE COURT Overruled.
>
> BY MR. LUTHER (Continuing)
> Are you going to make the pain go away or are you going to call her a liar? What are you going to do? Are you going to call [C.Y.] a liar . . . .

(Id. at 959.)

This modified "golden rule" argument asked the jurors to abandon their roles as neutral and unbiased judges of the facts and assume the roles of advocates on C.Y.'s

behalf by making "her pain go away."

In Harvey v. State, 666 So. 2d 798, 801 (Miss. 1995), the Court noted that the standard for determining whether the conduct of an attorney is so prejudicial that an objection should be sustained or a new trial granted "is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by prejudice." Though attorneys have a right and a duty to deduce and argue reasonable conclusions based upon the evidence those conclusions must be legitimate. Harvey, 666 So. 2d at 801. Where, as here, a prosecutor argues as substantive evidence matters which are outside the record or are admitted for only a limited purpose, it cannot be argued in the absence of a curative instruction that the decision of the jury was not influenced by prejudice. Id. (citing Johnson v. State, 596 So. 2d 865 (Miss. 1992))

It has long been the law in Mississippi that "golden rule" arguments which ask the jurors to put themselves in the place of one of the parties will not be permitted in civil or criminal cases. Chisolm v. State, 529 So. 2d 635, 639-40 (Miss. 1998). 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." Chisolm, 529 So. 2d at 640.

The prosecution's argument crossed the line from the permissible to the

impermissible and prejudicial when it went beyond the record in its argument and sought to appeal to the sympathy of the jury and not the facts and the reasonable inferences to be drawn therefrom. Despite these errors the trial court overruled Mr. Young's contemporaneous objections and denied his request for a mistrial. These errors prejudiced Mr. Young's right to a fair trial and mandate reversal and remand.

7. The trial court erred in denying Mr. Young's Motion for a New Trial based on the sufficiency of the evidence.

After the jury's verdict, Mr. Young challenged the sufficiency of the prosecution's proof in his Motion for a New Trial. (R. at 102-107.) The trial court denied his motion. (Id. at 111.) In denying Mr. Young's Motion for a New Trial the court committed reversible error.

The denial of a motion for a new trial is subject to review for an abuse of discretion. Faircluld v. State, 459 So. 2d 793, 798 (Miss. 1984). In this case the prosecution's proof with respect to when the alleged incidents of sexual assault occurred, or even if they occurred during the time alleged in the indictment is entirely nonexistent. In the absence of any proof, much less proof beyond a reasonable doubt, that any of the charged criminal conduct occurred during the time set forth in the indictment, mr. Young's conviction must be reversed.

8. The cumulative errors committed by the trial court mandate reversal.

Mr. Young has identified for the Court numerous errors committed by the trial

court in the conduct of his trial. Mr. Young asserts that the cumulative effect of these errors mandates the reversal of his conviction and sentence since it denied him his due process right to a fair trial. See Manning v. State, 735 So. 2d 323, 352 (Miss. 1999).

CONCLUSION

For the reasons stated above, 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 11th day of October, 2010.

/s/ Victor Israel Fleitas

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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 11th day of October, 2010.

/s/ Victor Israel Fleitas

VICTOR I. FLEITAS