

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**JEREMY DANIEL ROGERS, SR.**

**APPELLANT**

**VS.**

**NO. 2010-KA-1790**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES ..... ii**

**STATEMENT OF THE ISSUES ..... 1**

**STATEMENT OF THE FACTS ..... 1**

**SUMMARY OF THE ARGUMENT ..... 5**

**ARGUMENT ..... 6**

**ROGERS WAS NOT DENIED HIS FUNDAMENTAL RIGHT  
    TO A FAIR TRIAL ..... 6**

**CONCLUSION ..... 12**

**CERTIFICATE OF SERVICE ..... 13**

## TABLE OF AUTHORITIES

### STATE CASES

<i>Alonso v. State</i> , 838 So.2d 309, 313 (Miss. Ct. App. 2002) .....	10
<i>Colenburg v. State</i> , 735 So.2d 1099, 1102 (Miss. Ct. App.1999) .....	9
<i>Fleming v. State</i> , 604 So.2d 280, 289 (Miss. 1992) .....	8
<i>Hall v. State</i> , 735 So.2d 1124, 1127 (Miss. Ct. App. 1999) .....	11
<i>Hoops v. State</i> , 681 So.2d 521, 528 (Miss. 1996) .....	8
<i>Jones v. State</i> , 911 So.2d 556, 560 (Miss. Ct. App. 2005) .....	9, 11
<i>Lane v. State</i> , 841 So.2d 1163, 1169 (Miss. Ct. App. 2003) .....	8
<i>McGilberry v. State</i> , 843 So.2d 21, 31 (Miss. 2003) .....	10
<i>Michael v. State</i> , 918 So.2d 798, 804 (Miss. Ct. App. 2005) .....	10, 11
<i>Parham v. State</i> , 229 So.2d 582, 583 (Miss. 1969) .....	9
<i>Smiley v. State</i> , 815 So.2d 1140, 1146-47 (Miss. 2002) .....	9
<i>Walker v. State</i> , 823 So.2d 557, 563 (Miss. Ct. App. 2002) .....	10

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE ISSUES**

**ROGERS WAS NOT DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.**

**STATEMENT OF THE FACTS**

Twelve-year-old Mary<sup>1</sup> lived with her mother, Margaret and her step-dad, the Appellant, Jeremy Rogers. (Transcript p. 154). On September 8, 2009, Margaret, an ER nurse at Methodist South Hospital, left for work at around 6:30 p.m. (Transcript p. 156). Rogers walked her to the car and kissed her goodbye while Mary was watching television in the living room. (Transcript p. 127 and 156). After arriving at work, Margaret received a phone call from her daughter Megan, a student at Ole Miss, informing Mary that her other daughter, Jessica, also a student at Ole Miss, did not show up for dinner with Megan as they had planned. (Transcript p. 157). Margaret told Megan to check with Jessica's friends and call her back if she still could not find her. (Transcript p. 157). Megan called Margaret back at approximately 7:30 p.m. to let her know that she found Jessica's car

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<sup>1</sup> The State uses the name "Mary" to refer to the victim in an effort to protect her privacy and to be consistent with the Appellant's Brief in order to avoid any confusion.

parked near her last class but could not find Jessica. (Transcript p. 157). Margaret got scared and left work to get Rogers so they could go to Oxford to look for Jessica. (Transcript p. 157).

When she arrived home, Margaret left her vehicle running and ran to the front door which was usually unlocked. (Transcript p. 158). She found the door locked and began knocking and yelling for someone to come to the door. (Transcript p. 158). When no one came, she ran around to the back door which was unlocked and entered the house. (Transcript p. 158). She began yelling for Rogers and Mary but no one answered. (Transcript p. 158-59). The house was pretty much dark and no one was in the living room or in Mary's bedroom. (Transcript p. 159). She continued to yell for Rogers and Mary letting them know that Jessica was missing and they needed to go find her. (Transcript p. 159). The master bathroom door cracked open and Rogers said "what" in a shaky voice. (Transcript p. 159). Margaret said, "Jessica's missing. We need to go to Oxford. What are you doing in the bathroom in the dark?" (Transcript p. 159). Rogers responded that he was going to the bathroom. (Transcript p. 159). Margaret then asked about Mary. (Transcript p. 159). Rogers replied that he did not know where Mary was, which Margaret found odd. (Transcript p. 160). Margaret also noticed that Rogers only had on underwear and was holding his pants in his hand. (Transcript p. 160).

Rogers suggested that they go in the back yard to see if Mary's bike was there. (Transcript p. 160). Margaret started to follow him outside, but then stopped and turned around. (Transcript p. 160). When she did, she noticed that the bathroom door was now shut and the light was on in the room. (Transcript p. 160). She began beating on the door, yelling "Mary, are you in there?" (Transcript p. 160). Mary stated that she was going to the bathroom. (Transcript p. 160). Mary finally opened the door and was standing there wrapped in a green towel. (Transcript p. 161).

Margaret asked if she was in the bathroom with Rogers and Mary responded that she was not, but was just taking a shower. (Transcript p. 161). Margaret noticed that Mary was not wet and asked the two, "what is going on?" (Transcript p. 161). Rogers told Mary to go get dressed and Margaret followed her to her bedroom. (Transcript p. 161-62). Margaret told Mary to tell her what was going on and Mary responded repeatedly that "nothing happened, mama." (Transcript p. 162).

Rogers came into the room and asked what they were talking about and Margaret said, "I was just asking Mary what's going on, Jeremy. Why are y'all both in my bedroom with no clothes on?" (Transcript p. 162). Rogers replied, "Just what are you accusing me of?" (Transcript p. 162). Rogers then reminded her about Jessica being missing. (Transcript p. 162).

Rogers and Margaret dropped Mary off at Margaret's parents' house and headed toward Oxford. (Transcript p. 162). When they go to Oxford, they learned that Jessica had been arrested for DUI and was very sick. (Transcript p. 163). They returned home at 2:00 or 3:00 a.m. and did not pick Mary up from her grandparents' house. (Transcript p. 163). After arriving at home, Margaret began looking around her bedroom to see if she could figure out what had been going on before she got home from work. (Transcript p. 163). She found a pair of panties under her bed. (Transcript p. 163).

The next morning, Margaret went to her parents' house to pick up Mary. (Transcript p. 164). She pretended to be there to take Mary to school but instead pulled over in the Walgreens parking lot and confronted her again about what happened the night before. (Transcript p. 164). Mary initially denied that anything happened but eventually said "we had sex." (Transcript p. 164).

Margaret contacted the police and both she and Mary gave statements. (Transcript p. 165). Mary was taken to the Rape Crisis Center for evaluation. (Transcript p. 165). The nurse practitioner

who performed the sexual assault exam on Mary testified that she had the following injuries: (1) excoriation to the labia minor, (2) acute laceration at her posterior fourchette, and an area of cervical ectropion. (Transcript p. 220-22 and 226). The nurse practitioner's opinion was that "her injuries were caused by blunt, penetrating trauma from a sexual assault." (Transcript p. 228).

Rogers was charged with statutory rape, sexual battery, and fondling. During his trial, Mary testified that after her mom left for work on September 8, Rogers began touching her on her butt and legs with his hands while she was watching television. (Transcript p. 127-28). He then took her to his and her mother's bedroom and they had sex. (Transcript p. 128). She further testified that this was not the first time he had touched her. (Transcript p. 129). Her testimony revealed:

Q: - - and just talk about different occasions and what happened on each occasion, okay?

\* \* \*

A: It lead up to oral sex.

Q: What do you mean by oral sex?

A: Finger or tongue with - -

Q: Whose finger or tongue?

A: Jeremy's

Q: What part of your body was touched?

A: My vagina.

\* \* \*

Q: So you're saying that he touched you with his - -

A: finger.

Q: - - finger in your vagina?

A: um-hum.

Q: His tongue in your vagina?

A: Yes.

\* \* \*

Q: And did he ever touch you on any other part of your body of a sexual nature?

A: Yes.

Q: Where did he touch you?

A: He touched me on my breasts.

\* \* \*

Q: Do you remember when, roughly when, it happened at W.E. Ross Parkway?

A: All the time.

\* \* \*

Q: Did y'all talk about sex as far as in a conversation?

A: Yes.

Q: Tell us about those conversations.

A: Instead of breasts, he would prefer boobs or tits; or instead of vagina, he would prefer pussy; or instead of butt, he would prefer ass.

Q: As far as parts of your body, these are the words that he told you to use?

A: Yes.

Q: Now, did he talk to you about just how sex works? I mean, you're at an age where that would need to be explained, wouldn't you?

A: Yes.

\* \* \*

A: He told me that whenever you have sex, it happens with a penis and a vagina, and he told me that - - he told me that it's only for adults, but he said it's going to be practice for me and him.

Q: So you and him would practice?

A: Yes. He said it would be better for me later on in life.

\* \* \*

Q: Did he ever use a condom when you had sex?

A: Yes.

Q: And did he ever take any pictures of you unclothed?

A: Yes.

Q: What did he use to take those pictures?

A: His phone.

\* \* \*

Q: And what were you doing in those pictures?

A: I was naked, laying on the bed.

(Transcript p. 130-34). The jury convicted Rogers of all three counts. Rogers was sentenced to serve thirty years for the statutory rape conviction and thirty years for the sexual battery conviction with the sentences to run concurrently. He was sentenced to fifteen years for the fondling conviction with two years to serve and thirteen years suspended with that sentence to run consecutive to the other two sentences. He now appeals.

### **SUMMARY OF THE ARGUMENT**

Jeremy Rogers's convictions and sentences should be affirmed as he was not denied his fundamental right to a fair trial. Allowing Rogers's wife's testimony on cross-examination about



an incident which occurred prior to Rogers's having sex with his stepdaughter was not error. The testimony was a direct result of defense counsel's cross-examination of Rogers's wife. Mississippi law is clear that when the testimony is the result of defense counsel's questions, there can be no error.

Additionally, Rogers failed to establish that his trial counsel provided ineffective assistance of counsel. He did not establish either prong of the *Strickland* test. First, trial counsel's decision to elicit testimony about the incident in question was strategic in nature. Counsel was attempting to show the jury that Rogers's wife had a motive to fabricate a story about Rogers sexually abusing her daughter. Rogers's defense was that Mary was coached by her mom and that the story was a complete fabrication. Testimony about this incident was necessary to show motive for fabricating such a story. Second, Rogers failed to show that but for this testimony, the outcome would have been different. The record clearly establishes that even without this testimony, there was a strong likelihood that Rogers would have been convicted. The evidence of his guilt was overwhelming.

## **ARGUMENT**

### **ROGERS WAS NOT DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.**

Rogers argues that he "was denied his fundamental right to a fair trial by the introduction of extensive prior bad acts evidence." (Appellant's Brief p. 5). The State, however, contends that he received a fundamentally fair trial.

#### **A. Allowing the Testimony of Roger's Wife on Cross-Examination about an Incident Which Occurred Prior to the Criminal Acts at Issue Here Was Not Plain Error.**

Both Mary and Margaret testified that Margaret and Rogers had a good marriage. During Margaret's cross-examination, in an effort to show the jury that the marriage was not good, thereby

showing a motive for instigating the investigation which led to Rogers' conviction, defense counsel asked the following:

- Q: What was your and Jeremy's relationship back on 9-8-09?  
A: We were husband and wife.  
Q: What was your relationship like?  
A: I was completely in love with him, and I thought he was completely in love with me. He was the first person I wanted to go to when I thought that my daughter was in danger because Jeremy protected us always. Jeremy never let anything happen to any of us.  
Q: Had you and him had any marital problems prior to 9-8-09?  
A: We had normal marital problems that everyone has.  
Q: Was there three incidents in particular where you had left and didn't come home that irritated Jeremy in the past?  
A: There was one incident, yes, sir.  
Q: What happened on that incident?

ADA WILLIAMSON: Your, Honor, I'm going to object to relevance. I don't know what's -

THE COURT: Y'all approach.

(COUNSEL APPROACHED THE BENCH FOR A CONFERENCE; SAME NOT REPORTED.)

THE COURT: The objection will be overruled. You may proceed, Mr. Horan.

- Q: So what occasion was that that you had left?  
A: I can't recall the date. I can recall the incident. We had been out - -  
Q: Let me ask you this before you get into it. Could you give us a time frame? How close was it to 9-8-09?  
A: It wasn't close, but it was during the time that we lived at W.E. Ross Parkway, but it was not close.  
Q: Tell me what happened.

(Transcript p. 168-69). Margaret then described a night when she and Rogers went out and Rogers became very drunk. (Transcript p. 169-70). They stopped at Waffle House to eat and Rogers had words, which included racial slurs, with some teenaged boys. (Transcript p. 170-71). She described him yelling at her and using racial slurs with her as well. (Transcript p. 171). After going on for a while with her story, defense counsel stopped her and the following exchange occurred:

- Q: My question was: When you were gone for a period of time. Are you getting to that part of it?
- A: Yes, sir, but I have to tell you the circumstances around that.
- Q: Okay. As long as we're still on the same page.

(Transcript p. 172). Margaret then testified that Rogers became violent and hit her with a lawn chair.

(Transcript p. 173). She stated that after he stopped, she crawled through a window and left.

(Transcript p. 173). Defense counsel then asked her on what night did Rogers kick the front door in and she replied that it was the same night as the incident at Waffle House. (Transcript p. 175).

On appeal, Rogers claims that it was error to allow this testimony into evidence. However, “a defendant cannot complain of evidence that he himself introduces by virtue of his own questions.” *Smith v. State*, 28 So.3d 678, 683 (Miss. Ct. App. 2010) (quoting *Lane v. State*, 841 So.2d 1163, 1169 (Miss. Ct. App. 2003)). Furthermore, “[o]bjectionable statements are not error if they are the product of direct and cross-examinations by the defense counsel.” *Id.* (*emphasis added*). The testimony at issue here was the direct result of defense counsel’s cross-examination and, therefore, CANNOT be error. *See also Fleming v. State*, 604 So.2d 280, 289 (Miss. 1992) (holding that “it is axiomatic that a defendant cannot complain on appeal concerning evidence that he himself brought out at trial”) and *Hoops v. State*, 681 So.2d 521, 528 (Miss. 1996) (holding that “[g]enerally, a defendant cannot complain of damaging and inappropriate testimony if the testimony is in response to his questions”).

**B. Questioning Roger’s Wife about the Incident on Cross Examination Does Not Constitute Ineffective Assistance of Counsel.**

Rogers also argues that “trial counsel’s elicitation of the evidence at issue, failure to interject and/or limit the prejudicial flow of evidence from Margaret, and failure to request a limiting instruction regarding the evidence deprived [him] of his Sixth Amendment right to effective

assistance of counsel.” (Appellant’s Brief p. 6). “When a defendant alleges ineffective assistance of counsel, the burden of proof is on the defendant.” *Jones v. State*, 911 So.2d 556, 560 (Miss. Ct. App. 2005) (quoting *Walker v. State*, 863 So.2d 1, 12 (Miss. 2003)). Rogers has failed to meet this burden.

“For a successful claim of ineffective assistance on direct appeal, the appellant must show that the record affirmatively shows ineffectiveness of constitutional dimensions, or that the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge.” *Jones*, 911 So.2d at 558 (citing *Read v. State*, 430 So.2d 832, 841 (Miss.1983)). “The question presented is not whether trial counsel was ineffective ‘but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.’” *Id.* at 558-59. (quoting *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. Ct. App.1999)). Such performance must be “so lacking in confidence that it becomes apparent or should be apparent that it is the duty of the trial judge to correct it so as to prevent a mockery of justice.” *Id.* (quoting *Parham v. State*, 229 So.2d 582, 583 (Miss.1969)). The record in this case does not demonstrate that the trial court should have declared a mistrial or ordered a new trial *sua sponte* because of the quality of defense counsel’s representation and, therefore, does not support a claim of ineffective assistance of counsel.

“In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney's overall performance was deficient and (2) that the deficient performance, if any, was so substantial as to prejudice the defendant and deprive him of a fair trial.” *Smiley v. State*, 815 So.2d 1140, 1146-47 (Miss.2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). As such, in order for a defendant to prevail on a claim of

ineffective assistance of counsel raised on direct appeal, the defendant must show “from the record that his counsel's performance was deficient, and that the deficient performance prejudiced him.” *Walker v. State*, 823 So.2d 557, 563 (Miss. Ct. App. 2002) (citing *Strickland*, 466 U.S. at 686) (*emphasis added*). There is a presumption that “counsel’s conduct is reasonably professional, there is a presumption that counsel’s decision are strategic in nature, rather than negligent.” *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Michael v. State*, 918 So.2d 798, 804 (Miss. Ct. App. 2005) (quoting *Burns v. State*, 813 So.2d 668, 673 (Miss. 2001)).

Rogers has failed to establish both prongs of the *Strickland* test and to overcome the presumptions of both professionalism and trial strategy. First, trial counsel’s decision to elicit testimony about the incident in question was strategic in nature. This Court has made it clear that trial counsel’s “choice of whether to ask certain questions or make certain objections falls within the realm of trial strategy and does not amount to ineffective assistance of counsel.” *McGilberry v. State*, 843 So.2d 21, 31 (Miss. 2003) (citing *Cole v. State*, 666 So.2d 767, 777 (Miss. 1995)) (*emphasis added*). Rogers’s counsel was attempting to show the jury that Rogers’s wife Margaret had a motive to fabricate a story about Rogers sexually abusing her daughter. Rogers’s defense was that Mary was coached by Margaret and that the story was a complete fabrication. Testimony about this incident was necessary to show motive for fabricating such a story. Prior to this testimony, the only evidence before the jury about Margaret and Roger’s relationship was that it was a fantastic relationship. Why on earth would a jury believe Margaret made up a story about a husband with

whom she had a fantastic relationship? This testimony was necessary to complete the defense. Certainly, defense counsel would have preferred that Margaret left out the racial slurs in telling the story but the jury needed to know that there had been a fight so violent and heated that Margaret left the house in order to establish a motive for fabrication. Of course, there may have been a better way to get this information before the jury but, as the Court of Appeals has previously held, “having a trial strategy negates an ineffective assistance of counsel claim, regardless of counsel’s insufficiencies.” *Michael*, 918 So.2d at 805 (quoting *Hall v. State*, 735 So.2d 1124, 1127 (Miss. Ct. App. 1999) (*emphasis added*)). “Decisions of trial strategy are presumed to be reasonable.” *Id.* (quoting *Burns*, 813 So.2d at 677). Moreover, “[t]he fact that the strategy was unsuccessful does not render counsel’s performance ineffective.” *Id.*

Second, Rogers failed to show that but for this testimony, the outcome would have been different. The record clearly establishes that even without this testimony, there was a strong likelihood that Rogers would have been convicted. The evidence of his guilt was overwhelming. As set forth earlier in this brief, Mary testified in detail regarding the sexual abuse. Margaret’s testimony corroborated Mary’s testimony about the events of September 8, 2009. Further, the testimony regarding the nurse practitioner’s examination of Mary corroborated Mary’s testimony. “A defendant has clearly failed to satisfy the prejudice test of *Strickland* when it is clear from the record that the defendant is ‘hopelessly guilty.’” *Jones*, 911 So.2d at 560 (quoting *Ward v. State*, 461 So.2d 724, 727 (Miss. 1984)). As was the case in *Jones*, “[t]his overwhelming evidence of guilt makes the determination by the jury in this case thoroughly reliable.” *Id.*

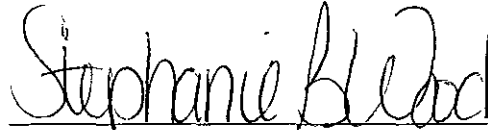
## CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm Jeremy Rogers's convictions and sentences.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script, appearing to read "Stephanie B. Wood", written over a horizontal line.

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## CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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This the 10th day of November, 2011.

  
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