**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2010-KA-01763-COA**

**MARCO WRIGHT** **APPELLANT**

**v.**

**STATE OF MISSISSIPPI** **APPELLEE**

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| DATE OF JUDGMENT: | 07/27/2010 |
| TRIAL JUDGE: | HON. CHARLES E. WEBSTER |
| COURT FROM WHICH APPEALED: | COAHOMA COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | JOE MORGAN WILSON |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL<br>BY: LAURA HOGAN TEDDER |
| DISTRICT ATTORNEY: | BRENDA FAY MITCHELL |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| TRIAL COURT DISPOSITION: | CONVICTED OF COUNT I, STATUTORY RAPE, AND COUNT II, SEXUAL BATTERY, AND SENTENCED TO FIFTEEN YEARS ON EACH COUNT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH THE SENTENCES TO RUN CONCURRENTLY |
| DISPOSITION: | AFFIRMED - 06/19/2012 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**BEFORE LEE, C.J., ISHEE AND FAIR, JJ.**

**LEE, C.J., FOR THE COURT:**

PROCEDURAL HISTORY

¶1. Marco Wright was convicted in the Coahoma County Circuit Court of statutory rape

and sexual battery. He was sentenced to fifteen years on each count to be served in the custody of the Mississippi Department of Corrections with the sentences for each count to run concurrently.

¶2. Wright now appeals asserting the following issues: (1) the trial court erred in not allowing the defense's proposed expert witness to testify, and (2) the trial court erred in failing to grant a new trial. Finding no error, we affirm.

## FACTS

¶3. S.H.[1] testified that Wright, her mother's boyfriend, drove her in her mother's car to a dirt road and raped her. S.H. was fourteen years old at the time, and Wright was thirty-five years old. When Wright and S.H. arrived home, S.H. told her mother Wright had raped her. Wright denied it, and S.H.'s mother refused to take her to the hospital. The next day after school, S.H. told a neighbor what had happened, and the neighbor called her son, Lugene Randolph, a police officer with the City of Coahoma Police Department. Officer Randolph contacted Investigator Neal Mitchell with the Coahoma County Sheriff's Department because the incident occurred outside the city limits of Coahoma. S.H. was taken to her house where she retrieved her clothing from the night before. S.H. was taken to the hospital, and a rape kit was administered. A DNA test showed Wright's DNA was present in S.H.'s vaginal area.

## DISCUSSION

### I. EXCLUSION OF EXPERT TESTIMONY

¶4. Wright argues the trial court erred in allowing the State's medical witnesses to testify

[1] This Court declines to identify minor victims of sexual crimes.

while excluding his proposed medical witness.

¶5. On January 11, 2010, the State disclosed the following witnesses for trial: Joseph Heflin and Steven Little from the Mississippi Crime Laboratory and Jeanette Ratliff, the nurse who performed the rape kit on S.H. On July 22, 2010, supplemental discovery was faxed to Wright's counsel. This discovery identified potential witnesses Gayle Reed and Nell Brock, nurses who took DNA samples from Wright. Brock did not testify at trial.

¶6. On Sunday, July 25, 2010, the day before trial was set to begin, Wright's counsel faxed supplemental discovery to the prosecutor identifying John C. Fisher as an expert witness for trial. The document stated that Fisher was "expected to confirm or deny whatever scientific evidence may be presented by the newly discovered witnesses of the State, in addition to any other possible scientific theories which may be applicable in this cause."

¶7. During a break at the trial, a conference was held outside the presence of the jury to discuss Fisher's testimony. Wright's attorney argued that despite the late designation, Fisher should be allowed to testify regarding DNA evidence. Wright's attorney stated Fisher would testify regarding DNA transfer from one person or object to another. Specifically, Fisher would testify as to whether Wright's DNA could have been transferred to S.H.'s vaginal area by S.H. wearing her mother's underwear. The trial court asked Wright's attorney why Fisher was not designated sooner, and Wright's attorney replied:

> [WRIGHT'S COUNSEL]: . . . I did not think that the DNA evidence would be able to come in because the State had not noticed me with what I believe was a critical witness for them to be able to get the DNA evidence in. . . . Because I did not believe that

DNA would come in, [Y]our Honor, and therefore I did not go out and hire this witness out of my own pocket. . . .

BY THE COURT: I cannot be faulted for your beliefs. But I mean you can't deny that you knew the State intended to introduce DNA evidence.

[WRIGHT'S COUNSEL]: I knew that the State intended to try to introduce DNA evidence. I would still maintain my position that had [Reed] not come and testified that she took DNA from my client, all the case law that I have seen has said that when courts have been affirmed for allowing it in, it's because the police officer who was there witnessed it happen. In this case there was no witness, other than these women [(Reed and Brock)], that saw any DNA taken from my client . . . .

¶8. The trial court then allowed Fisher to give a summary of his testimony outside the presence of the jury. Fisher stated that his specialty was cancer-cell mutation, but he understood the transfer of DNA from one object to another. The trial court found Fisher to be a possibly critical witness. However, the trial court excluded Fisher as a witness because of the late designation. It found Wright's counsel knew DNA evidence was relevant as early as December 2009. The trial court also noted the statement in discovery regarding the substance of Fisher's expected testimony fell "woefully short" of the requirements of Uniform Rule of Circuit and County Court 9.04.

¶9. Rule 9.04(C)(1) states:

> C. If the defendant requests discovery under this rule, the defendant shall, subject to constitutional limitations, promptly disclose to the prosecutor and permit the prosecutor to inspect, copy, test, and photograph the following information and material which corresponds to that which the defendant sought and which is in the possession, custody, or control of the defendant or the defendant's attorney, or the existence of which is known, or by the exercise

> of due diligence may become known, to the defendant or defendant's counsel:
>
> 1. Names and addresses of all witnesses in chief which the defendant may offer at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statements made by any such witness.

¶10. A defendant has the constitutional right to call witnesses in his favor. *See* U.S. Const. amend. VI; Miss. Const. art. 3, § 26. A defendant must also meet certain discovery requirements regarding the testimony of witnesses. If the trial court determines that a defendant's discovery violation is "willful and motivated by a desire to obtain a tactical advantage," the witness may be excluded from testifying. *Darby v. State*, 538 So. 2d 1168, 1176 (Miss. 1989); *see also Morris v. State*, 927 So. 2d 744, 747 (¶9) (Miss. 2006).

¶11. In deciding to exclude Fisher's testimony, the trial court stated the following:

> What I'm concerned about is that [Wright] knew from December of '09 that DNA would be an issue. You apparently gambled your entire defense on a fact that [the State] [did not] divulge the name of a person - - well, [did not] specifically divulge the name of a person who took a swab from your client. That's it. That name was apparently in materials that were disclosed back in December; it just [was not] listed as a witness. And now, you know, I mean you've put the whole [defense] on that, it doesn't go your way, and I'm faced with a disclosure from the [d]efense that is of absolutely no value. All [the disclosure] does is give a name of an individual. It does have a [curriculum vitae]. [The disclosure] gives nothing as far as opinions, reports, what [the expert] is going to say or anything else. And you [(Wright)] take umbrage to the fact, although that [sic] this woman's name was in these discovery materials back in December, you knew DNA was going to be an issue, yet you wait until Sunday before the Monday of the trial to even talk to somebody about DNA? Even in the unlikely event that it might not go your way, it would have seemed to me that the more prudent thing would have been to cover both bases. You chose not to do so. Which is certainly your choice. That's what's . . . disturbing.

As stated above, the trial court found Wright knew the DNA evidence was relevant as early as December 2009. Furthermore, Wright failed to follow the dictates of Rule 9.04(C)(1).

The trial court excluded Fisher due to the late designation, finding that allowing Fisher to testify would be unfair to the State. We agree with the trial court's decision. This issue is without merit.

¶12. We further note that expert testimony must be based upon credible evidence in the case. *Williams v. State*, 35 So. 3d 480, 486 (¶19) (Miss. 2010) (quoting *Catchings v. State*, 684 So. 2d 591, 596 (Miss. 1996)). According to the record there was no credible testimony to support Wright's theory that S.H. was wearing her mother's underwear. The only testimony came from S.H.'s mother, a witness for Wright who stated on redirect she told Investigator Mitchell that S.H. had been wearing her underwear. Investigator Mitchell also testified that one of Wright's statements to the authorities said S.H.'s mother "later told me [S.H.] had been wearing her panties." Another statement Wright made to the authorities failed to disclose this fact. Wright failed to develop this theory during trial.

II. MOTION FOR A NEW TRIAL

¶13. In this issue, Wright reiterates his argument from issue one. Wright argues the trial court erred in denying his motion for a new trial because Fisher's testimony was excluded. Wright asserts Fisher would have testified that Wright's semen could have been transferred to S.H. through contact with her mother's underwear. As discussed in issue one, we cannot find the trial court was incorrect in excluding Fisher's testimony. This issue is without merit.

¶14. **THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I, STATUTORY RAPE, AND COUNT II, SEXUAL BATTERY, AND SENTENCES OF FIFTEEN YEARS ON EACH COUNT, WITH THE SENTENCES TO RUN CONCURRENTLY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BARNES, ISHEE, ROBERTS, MAXWELL, RUSSELL AND FAIR, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY IRVING AND GRIFFIS, P.JJ.**

**CARLTON, J., DISSENTING:**

¶15. I respectfully dissent from the majority's decision. I submit that the trial court erred in this criminal case by excluding the defense expert witness testimony on DNA transfer. The record reflects no finding by the trial court that the defense's discovery violation was wilful or motivated to gain tactical advantage, and the record shows the trial court failed to consider the sufficiency of lesser sanctions such as a continuance. I further respectfully submit that upon review, the record fails to support a showing or finding that the defense's discovery violation was wilful or motivated to gain tactical advantage. I would, therefore, reverse and remand this case to the trial court for a new trial. *See Williams v. State*, 54 So. 3d 212 (Miss. 2011). In my view, a review of the application of precedent to the facts and context of this case shows that the trial court's severe sanction violated Wright's fundamental right to present witnesses on his behalf in this criminal prosecution.

¶16. As recognized in *Williams,* the trial court certainly possessed the discretion to determine that Wright committed a discovery violation by the late disclosure of an intended witness. *Id.* at 213 (¶5). The admission or exclusion of evidence by the trial court is reviewed for abuse of discretion and will stand unless arbitrary and clearly erroneous. *Id*. "If a trial court is made aware of a party's failure to comply with discovery requirements, it may admit the evidence, grant a continuance, or 'enter such an order as it deems just under the circumstances.'" *Id*. at 215 (¶10). "If a trial court determines that the defendant's discovery violation is 'willful and motivated by a desire to obtain a tactical advantage,' the

newly discovered evidence or witnesses may be excluded." *Id.* *See* URCCC 9.04. Furthermore, "[t]he admission or exclusion of evidence constitutes reversible error only where a party can show prejudice or harm." *Williams,* 54 So. 3d at 216 (¶14).

¶17. In turning to review the facts and context of this case, the record shows that at 3:37 p.m. in the afternoon on Thursday, July 22, 2010, less than five calendar days before trial, the State provided the defense with a supplemental disclosure of two potential witnesses and their qualifications. The defense noted that the late supplemental disclosure by the State left the defense with a little more than one full work day to respond to the State's new witness disclosure. The supplemental disclosure by the State identified potential witnesses, Gayle Reed and Nell Brock, and the record shows these witnesses as the nurses who collected the DNA samples from Wright. In response to the State's supplemental disclosure, on Sunday, July 25, 2010, Wright's counsel sent a supplemental discovery list to the State identifying John C. Fisher as a defense expert witness expected to testify to matters including confirming or denying scientific evidence that may be presented by the newly discovered State witnesses, Reed and Brock. At trial, defense counsel argued that the defense contacted the State so close to trial because the State provided its supplemental witness disclosure late on Thursday afternoon July 22, 2010 at 3:37 p.m., leaving little time to respond earlier. Defense counsel further argued that the defense had provided the supplemental disclosure of Fisher as an expert witness the day before trial because the defense engaged no DNA expert until the defense received the State's supplemental disclosure late in the afternoon of July 22, 2010. The defense argued that the State's supplemental witnesses constituted the only witnesses who allegedly saw DNA collected from Wright and, without these witnesses, the

State could not have admitted the DNA into evidence at trial. The defense further asserted that since the State had not previously identified or disclosed these witnesses as potential witnesses in the State's case in chief, then Wright bore no duty or need to engage a DNA expert witness to attack the integrity of the collection process. The defense also asserted that, upon receipt of the State's supplemental discovery, the defense was surprised by the forensic qualifications of the State's new witnesses that extended beyond only nursing degrees.

¶18. The defense argued inequity in the exclusion of its DNA expert witness, offered to rebut the integrity of the collection process, since the trial court allowed the testimony of Reed, a supplemental witness on behalf of the State, who participated in collecting Wright's DNA. The defense explained that the testimony of its expert witness related to the potential transfer of Wright's DNA when collected and related to the potential transfer occurring if the victim rubbed against or came into contact with an object or garment containing Wright's DNA, like her mother's underwear.

¶19. In response, the trial judge stated that he did not find the State's witnesses to be critical and provided that Wright's counsel should have obtained a DNA expert earlier in the case, noting the names of the witnesses on previously disclosed discovery documents. The trial court determined that the defense should have anticipated who the State would identify as witnesses. The record shows that the trial court further reflected on the inadequate and vague disclosure of the substance of the defense expert witness's testimony provided by the defense in its supplemental discovery to the State. To more clearly ascertain the substance and relevance of the testimony of the defense expert witness, the trial court then held an in-camera discussion as to the relevance and helpfulness of the defense expert witness's

testimony pertaining to DNA transfer.

¶20. During the in-chambers review, the defense expert witness, Fisher, explained to the trial judge that he possessed expertise to testify as to the ease of transfer of DNA from one object to another. The record shows that the trial judge held this discussion in chambers after the court provided the assistant-district attorney with an opportunity to talk to Fisher, and after doing so, the State informed the trial court that it was not currently in a position to rebut the defense expert witness's testimony. The assistant-district attorney explained that the defense expert witness was not a forensic DNA expert. The State explained that the defense expert witness possessed an expertise in molecular DNA and DNA transfer, and the State's medical witnesses at trial lacked expertise in the area of DNA transfer. After listening to the defense expert witness's proposed testimony, the trial judge stated, in part, as follows:

> [A]t least one of the issues that would be a central reason I think for him to call you as a witness, and you can tell me whether or not it would fall in your area of expertise because I don't know, it would have to do with the ability of . . . a substance that contained DNA, such as seminal fluid or something like that, the ability of that substance and the DNA contained in it to be transferred from one, for example, to be transferred from one article of clothing onto either another article of clothing or onto the body of a person. The ease with which that can happen and matters such as that.

Fisher explained to the trial judge that he possessed knowledge in the area of DNA transfer and that it was extremely sticky in the sense that it will cling onto pretty much anything. Fisher further provided that if one wanted to take DNA from one object and place it onto another, then it would not be difficult to transfer the DNA from one place to another. After Fisher's confirmation as to the substance of his testimony and expertise, the trial judge stated that it appeared through the questioning that the testimony could very well be relevant to the

issue. However, the trial judge then stated that he fell back to the issue of discovery and ruled that he would not allow Fisher to testify. The record reflects that the trial court issued this ruling excluding the proposed defense testimony without a finding that the defense's discovery violation was willful or motivated by tactical advantage and without considering the sufficiency of less harsh sanctions or remedies. I respectfully submit that based upon a review of the record, the record would not support such a finding in this case.

¶21. As previously acknowledged, the trial court excluded the defense expert witness without a finding that a continuance or other remedy failed to provide the State with sufficient opportunity to meet the evidence. In reviewing whether the trial court considered the sufficiency of lesser sanctions, the record shows that the trial court provided the assistant-district attorney with time to consult with the proposed defense expert witness during trial, before holding the in-camera hearing as to the substance of the defense expert witness's testimony. The assistant-district attorney informed the trial judge after that consultation that the State's expert witness at trial was not prepared to address the testimony of the defense expert witness, but the record shows no consideration or discussion of any ability or inability of the State to obtain an expert qualified to testify regarding DNA transfer in the event the trial court granted a continuance or other remedy. *See Williams*, 54 So. 3d 215-16 (¶13) (explaining that the suspicious timing of a supplemental discovery disclosure failed to constitute a finding or showing of willfulness or motivation to gain tactical advantage).

¶22. I respectfully submit that we must not lose sight of the context of the defense's supplemental witness disclosure. As previously noted, the record shows the defense provided the supplemental expert witness disclosure in response to the State's late

supplemental witness disclosure of witnesses necessary for the State to establish chain of custody to admit the DNA samples collected from Wright into evidence. The defense argued that the expert witness's testimony relevantly explained the ease of the transfer when in contact with other items or objects potentially occurring in the collection process or potentially occurring if the victim wore her mother's undergarments. In the context of this case and consistent with supreme court precedent as set forth in *Williams,* I respectfully submit that the trial court erred in the severe sanction of exclusion of the defense expert testimony, and the trial court should have considered sufficiency of less severe sanctions since the record reflects no findings and the record fails to support findings of willfulness or motivation for tactical advantage.[2] The accused in a criminal prosecution possesses a fundamental right to present witnesses in his own defense. We must not overlook that the record shows that the trial court found the defense expert testimony relevant, but the trial court then excluded its admission due to the defense's discovery violation without a record finding of willfulness or of motivation for tactical advantage and without consideration of whether other less severe sanctions could have provided the State a sufficient opportunity to meet the evidence. *See id*. I would, therefore, reverse and remand this case for a new trial.

**IRVING AND GRIFFIS, P.JJ., JOIN THIS OPINION.**

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[2] We must always acknowledge that the defense possesses a fundamental right to present witnesses while also respecting the trial court's authority to subject the attorney to appropriate sanctions for willful discovery violations. Here, however, the criminal defendant, not his counsel, received the severest sanction in the exclusion of his expert witness's testimony to defend against the State's DNA evidence. The record alternatively reflects the State provided supplemental discovery with new witnesses to testify as to the DNA collection only days before trial, but the State received no sanction. At trial, the defense counsel raised the issue of disparate treatment.