IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CT-00629-SCT

JOHNNY R. YOUNG, JR. a/k/a JOHNNIE R. YOUNG, JR.

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	10/14/2009
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	UNION COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	VICTOR ISRAEL FLEITAS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	BENJAMIN F. CREEKMORE
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 10/25/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

CARLSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. Johnny R. Young, Jr., was convicted in the Circuit Court of Union County on three counts of sexual battery of his minor daughter and was sentenced to three concurrent life sentences. We assigned Young's appeal to the Court of Appeals, which unanimously affirmed. ***Young v. State***, 2010-CA-00629-COA, 2011 WL 5027251 (Miss. Ct. App. Oct. 11, 2011), *reh'g denied* (Feb. 7, 2012). We granted certiorari to consider two of Young's issues and find that: (1) the circuit court did not err by admitting evidence that Young had sexually

assaulted his stepsister when she was five and he was fifteen, because the circuit court found the prior assault probative of a noncharacter issue under Mississippi Rule of Evidence 404(b); and (2) the sexual-assault nurse examiner who examined Cindy was amply qualified by her training and experience to testify regarding the cause of the hymenal tear or rupture that she had observed while examining Cindy. Thus, we affirm the judgments of the Union County Circuit Court and of the Court of Appeals.

FACTS AND PROCEEDINGS IN THE TRIAL COURT AND THE COURT OF APPEALS

¶2. Johnny Young's eight-year-old daughter, Cindy,[1] told Richard Dunsford, a family friend, as well as her paternal stepgrandmother, that Young had sexually assaulted her many times over several years. The Union County Sheriff's Office and Child Protective Services investigated the allegations of abuse, and Angie Floyd, a forensic-interview specialist with the Children's Advocacy Center in Tupelo, interviewed Cindy. During the videotaped interview, Cindy stated that Young had abused her. As a result of this interview, Young was arrested and indicted on three counts of sexual battery of a minor that allegedly occurred between November 3, 2005, and November 3, 2006.

¶3. Before trial, Young asked the trial court to exclude any testimony of prior sexual acts alleged to have occurred twenty years earlier between him and his half-sister, Anna Smith. The trial judge ruled the testimony admissible under Mississippi Rules of Evidence 403 and 404(b), adding that he would instruct the jury of the purpose of Anna's testimony. At trial,

[1]We use this alias to protect the girl's identity.

Anna testified that, twenty years earlier , when she was five years old and Young was fifteen years old, Young had removed her panties and then his shorts and had rubbed his exposed penis on her vagina. The trial judge instructed the jury as follows:

> The testimony of the state's witness, [Anna], which is not part of charged conduct in this case, is to be used for the purpose of establishing motive, intent, plan, knowledge, identity, or absence of mistake or accident on the part of the defendant JOHNNIE R. YOUNG and should not be considered as proof of the defendant's character or to show that he acted in conformity therewith.

¶4. During direct examination, Cindy acknowledged that she had been interviewed by Floyd and stated that everything she had said during the forensic-interview video[2] was true. According to Cindy's video interview with Floyd, Young had sexually abused her on many occasions, which included penetrating her vagina, anus, and mouth. During the interview, Cindy drew pictures of her father's body parts along with her body parts, telling Floyd that her father had placed "his bottom" on "her bottom."

¶5. When the State listed Elizabeth Thomas, a sexual-assault nurse examiner, as an expert witness, Young objected to Thomas's qualifications to offer any opinion on causation. The State responded that Thomas would not offer any opinion on causation, but would testify only to what she had observed while examining Cindy. Accordingly, the trial judge ruled that Thomas could testify "within the limitations of a sexual assault nurse."

¶6. When the prosecutor asked Thomas about the significance of the removal of or injury to the hymen during sexual activity, Young again objected, and the trial judge overruled the

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[2]Cindy's forensic-interview video was played for the jury.

objection. Thomas opined that "there could be an acute injury" or "a gradual wearing away depending on the thickness of the object." Thomas also provided expert opinions about the causes of early estrogenization and of an absence of hymen at six o'clock; the hymen's ability to heal itself, estrogen's effects on the hymen, and the ability to have intercourse without injury or pain; and the cause for the tear or rupture and attenuation in Cindy's hymen. Likewise, Thomas testified that Cindy's exam was "consistent with [a] history of blunt penetrating trauma of the oral, rectal, hymen, and/or vaginal orifice."

¶7. The jury convicted Young on all three counts of sexual battery of a minor, and the circuit court sentenced him to three concurrent life sentences. After his post-trial motions were denied, Young timely appealed, raising eight issues. Young asserted that the trial court erred: (1) by allowing evidence of Cindy's out-of-court-statements; (2) by allowing evidence of Young's prior sexual misconduct; (3) by allowing Angie Floyd to testify as an expert; (4) by allowing Thomas's medical testimony; (5) by excluding Dr. Gary Mooers's expert testimony; (6) by failing to grant a limiting instruction or a mistrial for the prosecution's improper closing argument; (7) by denying Young's motion for a judgment notwithstanding the verdict, or in the alternative, motion for a new trial; and (8) by committing cumulative errors which required reversal. The Court of Appeals affirmed the trial court on all issues.

¶8. We granted certiorari to consider only the second and fourth issues: the evidence of Young's prior sexual misconduct and Nurse Thomas's testimony. We agree with the Court of Appeals' analysis and disposition of the other issues. ***Young***, 2011 WL 3804514, *9 (¶32).

See ***Harness v. State***, 58 So. 3d 1, 4 (Miss. 2011) (under Mississippi Rule of Appellate Procedure 17(h), this Court may limit the question for review upon grant of certiorari).

DISCUSSION

I. The trial court's admission under Mississippi Rule of Evidence 404(b) of the evidence of Young's prior sexual assault of his stepsister is squarely in line with this Court's recent precedent.

¶9. We apply an abuse-of-discretion standard when reviewing a trial court's ruling on the admissibility of evidence. ***Hargett v. State***, 62 So. 3d 950, 952 (Miss. 2011). And when a trial court abuses its discretion on evidentiary issues, we reverse only where "a substantial right of a party is affected." Miss. R. Evid. 103(a).

¶10. The evidentiary ruling at issue here is Anna's testimony that Young fondled her twenty years earlier, when she was five years old and Young was fifteen. Young argues that (1) the alleged incident was too remote in time, and too different from the events alleged by Cindy, to have any noncharacter purpose; and (2) any probative value the evidence had was substantially outweighed by the danger of unfair prejudice. We disagree.

¶11. With certain limited exceptions that do not apply here, our rules of evidence prohibit the use of "[e]vidence of a person's character or a trait of his character" to prove "that he acted in conformity therewith on a particular occasion. . . ." Miss. R. Evid. 404(a). The trial judge admitted Anna's testimony under Mississippi Rule of Evidence 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive,

> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Miss. R. Evid. 404(b).

¶12. We find that the evidence of Young's prior sexual assault of his half-sister satisfied Mississippi Rule of Evidence 404(b). The rule that we enunciated in ***Derouen v. State***, 994 So. 2d 748 (Miss. 2008), requires that evidence of prior sexual misconduct must satisfy Rule 404(b), be filtered through Rule 403, and be accompanied by a limiting instruction. ***Id.*** at 756. In two recent cases, we further addressed the very issue before us today – whether, where a defendant was on trial for sexual misconduct involving a prepubescent female family member, evidence that he had engaged in sexual misconduct with multiple female family members when they also were near the age of puberty was admissible for a noncharacter purpose under Rule 404(b) – and found that the evidence was properly admitted.[3] ***Gore***, 37

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[3]In ***Gore v. State***, 37 So. 3d 1178 (Miss. 2010), the defendant was on trial for "gratifying his lust or indulging his depraved licentious sexual desires" by rubbing his twenty-one-month-old granddaughter with his body, based on testimony that the defendant had been found lying in bed naked next to his naked granddaughter and that, after taking her home, her mother "pick[ed] up her bottom to put a diaper on her, and [could] see down into [her] anus." ***Gore***, 37 So. 3d at 1180-81. At trial, the defendant's daughter testified that he had molested her in his bed when she was twelve years old, and both his daughter and his son (the victim's father) testified that the defendant had required them to be naked with him at home and at a nudist camp. ***Id***. at 1183-85. We found that the defendant's "prior sexual abuse of his daughter tends to demonstrate 'pedophilic sexual activities with young and developing female juveniles . . . . [The defendant's] means of accomplishing these activities on past occasions bear substantial resemblance to each other and with the present offens[e]'" and that his demands that his children be naked involved sexual misconduct, because "his children swore that [the defendant] threatened and physically struck his daughter for failure to comply with his demand she be naked." ***Id***. at 1187. Accordingly, we found that the trial court had not abused its discretion by admitting the evidence.

In ***Green v. State***, 89 So. 3d 543 (Miss. 2012), the defendant was on trial for sexually

So. 3d 1178; ***Green***, 89 So. 3d 543. Like ***Gore*** and ***Green***, this case involves evidence that the defendant sexually abused a female family member – his half-sister – years before the sexual abuse of another female family member – his daughter – that is at issue in this case. Our recent analysis of the very issue presented in this case is directly applicable to our decision today. Consistent with ***Gore*** and ***Green***, we find that the trial court did not abuse its discretion by admitting the evidence of the defendant's prior sexual misconduct involving another female family member.

¶13. In ***Green***, we explicitly found that, while Rule 404(b) requires that evidence of prior bad acts be presented for some purpose other than character; "the trial court's failure to identify the specific applicable exception(s) under Rule 404(b) does not require reversal." ***Green***, 89 So. 3d at 551 (citing ***Gore***, 37 So. 3d at 1186). Thus, though the dissent expresses

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abusing his ten-year-old stepdaughter, based on her statement to school administrators that he had been "stick[ing] his fingers in me every morning when he gets up[,] . . . in my private parts" and her statement to a forensic interviewer that he "regularly put his finger inside her vagina 'in her bedroom when she would wake up in the morning . . . .'" ***Green***, 89 So. 3d at 545-46. The trial court admitted testimony from the defendant's niece, half-sister, and two ex-stepdaughters that the defendant had sexually molested them when they were between the ages of seven and thirteen, including by digital penetration of their vaginas. ***Id***. at 546-47. The two ex-stepdaughters testified that, late at night, after everyone else was asleep, the defendant had molested them in their bedrooms, and the niece testified that she had awakened to the defendant molesting her where she was sleeping on the couch. ***Id***. The defendant's half-sister, who was forty-nine years old at the time of trial, testified that the defendant had sexually abused her when she was between the ages of nine (when the defendant was about fifteen years old) and thirteen. ***Id***. at 547. We found that the testimony was admissible, because it "was offered to show that, over the course of five decades, [the defendant] engaged in the sexual abuse of female family members in a similar manner (the same or similar acts, in the same or similar locations), when they were near the age of puberty, i.e., vulnerable, 'young and developing . . . juveniles' (the same or similar ages)." ***Id***. at 549 (citing ***Gore***, 37 So. 3d at 1187).

frustration with what it dubs a "shotgun approach" (*i.e.* recital of all of the noncharacter purposes listed in Rule 404(b) as the purposes for admitting prior-bad-act evidence), its frustration does not warrant reversal.

¶14. ***Gore*** and ***Green*** reveal that the evidence of Young's prior sexual assault of his half-sister was admissible for noncharacter purposes under Rule 404(b). In ***Gore***, we recognized that evidence of prior sexual misconduct is admissible under Rule 404(b) where it discloses as the defendant's *motive* "a seemingly uncontrollable desire to partake in pedophilic sexual activities with young and developing female juveniles," and where the "defendant's *means* of accomplishing these activities on past occasions bear substantial resemblance to each other and with the present offense." ***Gore***, 37 So. 3d at 1186 (quoting ***Derouen***, 994 So. 2d at 755; ***Lambert***, 724 So. 2d 392, 395-96 (Miss. 1998) (Mills, J., dissenting) (quoting ***State v. Driggers***, 554 So. 2d 720, 726 (La. Ct. App. 1989))) (emphasis added).

¶15. Similarly, in ***Green***, we found that "the 'overwhelming similarities' between these other sexual offenses . . . and the incidents at issue undeniably bring the [evidence of prior sexual assaults] within the purview of admissibility under Rule 404(b)." ***Green***, 89 So. 3d at 550. In that case, we further explained examples of purposes for which evidence of prior sexual assaults may be admitted under Rule 404(b), including "a *common plan, scheme, or system* . . . utilized . . . repeatedly to perpetrate separate but very similar crimes," such that "[o]ne could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse." ***Green***, 89 So. 3d at 550 n.19 (citations omitted) (emphasis added).

¶16. We also addressed the use of evidence of prior sexual misconduct to show *motive* – which we noted "involves '[a]n impulse, as an emotion, desire, or psychological need, acting as incitement to action'" – and found that "[t]he 'seemingly uncontrollable desire to partake in pedophilic sexual activities with young and developing female juveniles[,]' is probative regarding *motive*." ***Green***, 89 So. 3d at 550-51 n.19 (citing *Webster's II New College Dictionary* at 715; ***Gore***, 37 So. 3d at 1186 (quoting ***Driggers***, 554 So. 2d at 726)) (emphasis added). Thus, we provided in ***Gore*** and ***Green*** that evidence of prior sexual misconduct involving a female family member is admissible for noncharacter purposes where it shows motive, similar means, or a common plan, scheme, or system for the sexual abuse of the female family member for which the defendant is on trial.

¶17. Our analysis in ***Gore*** and ***Green*** is directly applicable to the case before us today. As in those cases, the trial court here did not abuse its discretion by admitting evidence of Young's previous sexual abuse of another prepubescent female family member, because the evidence was admissible for noncharacter purposes. Those purposes include establishing that Young's motive was a "seemingly uncontrollable desire to partake in pedophilic sexual activities with young and developing female juveniles" and that both assaults were part of a "common plan, scheme, or system" that involved Young taking advantage of family relationships to engage in sexual activities with prepubescent girls.

¶18. The Court of Appeals properly recognized that, "while the incident with [Young's half-sister] occurred twenty years ago, it shows similar behavior on the part of the defendant and that the victims were of a similar age" and found that there was "no abuse of discretion

in the circuit court's admission of this evidence. . . ." ***Young v. State***, 2011 WL 5027251, at **3-4 (Miss. Ct. App. Oct. 11, 2011). Because this evidence was "properly admitted under Rule 404(b), filtered through Rule 403, and accompanied by an appropriately-drafted limiting or cautionary instruction to the jury," we affirm the Court of Appeals' finding that this issue is without merit. ***Derouen***, 994 So. 2d at 756.

II. Because of her sexual-assault-nurse-examiner training and extensive experience in sexual-assault examination, Nurse Thomas clearly was qualified to testify regarding the injuries that she had observed when examining Cindy.

¶19. Young argues that Nurse Elizabeth Thomas testified repeatedly to medical causation and gave opinions not disclosed before trial. For example, according to Young, Thomas gave medical opinions about early estrogenization by implying that Cindy's sexual activity could cause and account for her level of estrogenization; about how the absence of hymen at six o'clock was generally caused by sexual assault or sexual penetration; about the ability of the hymen to heal itself and the ability to have intercourse without injury or pain; about the effects of estrogen on the hymen; about hymen size and sexual activity; and about the cause of the tear or rupture and attenuation in Cindy's hymen. The trial judge also allowed Thomas to opine that Cindy's injuries were "consistent with blunt penetrating trauma of the vaginal area and the anal area."

¶20. Before Thomas testified, Young secured an admission from Thomas that she was not qualified to determine issues of medical causation. The State informed the trial judge that Thomas would not be testifying to causation, but would testify only as to what she had

observed. The trial judge ruled that Thomas could testify within her limitations as a sexual-assault nurse examiner and could give limited opinions, but the judge did not explain those limitations.

¶21. We note that Thomas's testimony fell well within her realm of particular expertise. At the time of trial, Thomas had been employed as a sexual assault nurse examiner ("SANE") at the Memphis Sexual Assault Research Center in Memphis, Tennessee, for sixteen years, and she had been a registered nurse for thirty-two years. Thomas received an Associate Degree in Nursing from Memphis State (now the University of Memphis), a Bachelor's of Nursing from Union University, and a Master's of Nursing from the University of Tennessee. Thomas stated that, in order to be a SANE at her center, she needed a master's degree and additional didactic or theory training, and had to perform fifteen examinations on children and fifteen examinations on adults before she was allowed to practice on her own. Thomas also received post-master's-degree training in medical legal investigation from the St. Louis School of Medicine and earned an additional master's degree in that field. She also is certified in psychiatric mental health and has taught for more than fifteen years at the University of Memphis School of Nursing. In addition, Thomas's training is bolstered by an additional twelve hours of continuing education courses per year. Thomas had occasion to make physical examinations of the genitalia of nearly 3,000 persons – two-thirds to three-quarters of those being children. She had been tendered, and accepted, as an expert witness in the area of physical examination of female genitalia and as a SANE nurse numerous times over a period of years in Mississippi, Arkansas, and Tennessee.

¶22. Thomas asserted during her voir dire that a SANE nurse was not qualified to determine issues of medical causation. She made assessments and observations and rendered opinions, but did not make a medical diagnosis or assign treatment. Instead, the supervising physician, in this case Dr. Claudette Shepard, made a final determination as to ultimate causation, medical diagnosis, and treatment. Thomas agreed with Young's attorney during voir dire that she was able to provide or give an opinion only concerning the degree of certainty as to "consistent with," and not as to causation.

¶23. Young objected to Thomas's qualifications to offer any causation opinion, and the State responded that Thomas would not offer any causation testimony, but would testify only as to what she had observed while examining Cindy. The trial judge ruled that Thomas was "imminently [*sic*] qualified [to testify] within the limitations of a sexual assault nurse." In so doing, the trial judge clearly instructed Nurse Thomas not to testify as to medical diagnosis and treatment, consistent with Mississippi caselaw. He specifically instructed Thomas not to testify that the condition was caused by sexual abuse, and a perusal of the record indicates that Thomas did indeed testify within these proper limitations. Thomas's expert testimony at trial was that Cindy's injuries were *consistent with* blunt force trauma. At no point did she assert that Cindy's injuries were *caused by* sexual assault or penetration of the genitalia.

¶24. In fact, none of Thomas's testimony constituted a conclusion or opinion as to medical causation under Mississippi law. In ***Richardson v. Methodist Hospital of Hattiesburg, Inc.***, 807 So. 2d 1244, 1248 (Miss. 2002), Linda Richardson filed a personal-injury and wrongful-death action against Methodist Hospital of Hattiesburg, Inc. (Methodist), claiming that her

mother, Vivian Wheeless, died as a result of Methodist's negligent failure to provide adequate care, including adequate nursing care. ***Richardson***, 807 So. 2d at 1245. The plaintiff's expert was Crystal D. Keller, a registered nurse (RN) and Certified Legal Nurse Consultant, who testified to the appropriate nursing standards of care and that deviations from them led to the decedent's suffering and subsequent death. ***Id.*** The trial court granted summary judgment to Methodist.

¶25. On appeal, we held that "the trial court's ruling was overly restrictive in not allowing Keller to testify concerning the appropriate standard of nursing care and the deviations from that standard." ***Id.*** at 1246. We noted that "[t]he fact that Keller is not a physician does not bar her right to testify concerning the standard of care for the nursing staff, but more appropriately may affect the weight of her testimony, which is an issue for the trier of fact." ***Id.*** at 1247. However, we stated that Keller was "not qualified to testify concerning the causal nexus between these deviations and Wheeless's death." ***Id.*** at 1247-48. Although we did not "require expert testimony by a medical doctor in order to establish the cause of death," we held that "[t]he cause of a stroke . . . is a complex medical issue" and that Keller "lacks the requisite education and experience as an expert to testify concerning the causal link between Wheeless's death and the alleged deviations in nursing care. . . ." ***Id.*** at 1248. Thus, our limited holding in ***Richardson*** was that Keller was not qualified to testify to such a causal link, given Keller's particular education and expertise under the facts presented.

¶26. Our decision in ***Vaughn v. Mississippi Baptist Medical Center***, 20 So. 3d 645 (Miss. 2009), likewise does not suggest that Nurse Thomas's testimony was improper. In ***Vaughn***,

the trial court found that the plaintiff had failed to establish the necessary element of proximate cause, based on its finding that Vaughn's designated expert – Crystal Keller, R.N., the same nurse at issue in ***Richardson*** – was not qualified to testify as to whether the negligent acts of Mississippi Baptist Medical Center (Baptist) had proximately caused Vaughn's staph infection. ***Vaughn***, 20 So. 3d at 652 (Miss. 2009). In ***Vaughn***, it was undisputed *that* a staph infection had developed in Vaughn's surgical wounds, but the parties disputed *when* the infection developed. Baptist cited ***Richardson*** for the proposition that "a nurse is not qualified to testify as to whether the deviation in the standard of care caused Vaughn's staph infection[,]" and we noted that Keller was not qualified to diagnose a staph infection. ***Id.*** at 651.

¶27. We found that ***Richardson*** "explicitly held that a nurse cannot testify as to cause of death," and that "***Richardson*** should be interpreted as having made impermissible any testimony from a nursing expert on diagnostic impressions, because nurses are not qualified to make medical diagnoses or attest to the causes of illnesses." ***Id.*** at 652. In that context, we held that "nurses cannot testify as to medical causation." ***Id.*** We explained this holding as logically following from the fact that "medical diagnosis is outside a nurse's scope of practice," and we stated that the holding was "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." ***Id.*** (citations omitted). In light of our qualification in ***Vaughn***, it should be readily apparent that, in today's case, Thomas's carefully limited, noncausation

testimony dealing with matters that pertained to her area of profound expertise *did not* fall within the realm of testimony that nurses cannot give under ***Vaughn***.[4]

¶28. Since ***Vaughn*** was handed down, this Court has continued to consider SANE testimony like that offered by Nurse Thomas in the instant case. In ***Harden v. State***, 59 So. 3d 594 (Miss. 2011), we noted that "[SANE Elizabeth] Thomas testified that her physical examination of [the victim] revealed recent blunt penetrating trauma in the genital and rectal areas. Thomas admitted on cross-examination that she could not identify the object of penetration from her physical examination." ***Harden***, 59 So. 3d at 600. The resemblance of this testimony to Thomas's testimony in today's case is apparent. In weighing the evidence in ***Harden***, we considered the effect of this testimony, noting that "the jury was confronted with . . . the results of the physical examination of [the victim], which revealed recent blunt penetrating trauma." ***Harden***, 59 So. 3d 594 at 610. It is clear that this Court has never

[4]In fact, shortly before ***Vaughn*** was decided, the Court of Appeals determined explicitly that a nurse may testify that "injuries were consistent with [the victim's] account that she had been sexually abused" so long as the testimony is not that the injuries "were, in fact, caused by sexual abuse." ***Murray v. State***, 20 So. 3d 739, 742 (Miss. Ct. App. 2009). Indeed, the Court of Appeals noted that "nursing professionals routinely testify as to whether a victim's injuries are consistent with a sexual assault." ***Murray***, 20 So. 3d at 742 (citing ***Havard v. State***, 988 So. 2d 322, 332(¶ 29) (Miss. 2008) (nurse testified that injuries received by minor victim were the result of sexual trauma); ***Adams v. State***, 772 So. 2d 1010, 1017(¶ 29) (Miss. 2000) (nurse testified that the victim's hymen was torn and that this injury was consistent with penetration by a penis, finger, or other object)).

interpreted ***Vaughn*** as barring testimony like that offered by Nurse Thomas in the instant case.[5]

¶29. We further note that in sexual-assault cases, many of our sister states allow SANEs to register testimony similar to that of Nurse Thomas in this case. In fact, we are unable to find a single state whose caselaw prohibits SANEs from testifying to *causation* at sex-crime trials. For example, the Supreme Court of Virginia has "recognized an exception to the general rule that only a medical doctor may render an opinion regarding the cause of a physical human injury." ***John v. Im***, 263 Va. 315, 321, 559 S.E.2d 694, 697 (2002) (citation omitted). The Virginia court recognized that "although the SANE was not a medical doctor, she was qualified under the facts presented to render an expert opinion concerning the 'causation of injuries in the context of an alleged sexual assault'"; however, the court took pains to note that the holding "is limited to the unique context of a SANE's expert opinion concerning the causation of injuries in a sexual assault case; that holding does not change the general rule . . . that only a medical doctor may give an expert opinion about the cause of a physical human injury." ***Id.*** (citations omitted).[6] In today's case, Thomas, a sexual-assault

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[5]To be clear, then, in no way does this opinion overrule our holdings in ***Vaughn*** or ***Richardson***, or in any other case.

[6]Several other states have recognized similar exceptions for the testimony of SANE nurses in sexual-assault cases. *See* ***Com. v. Jennings***, 2008 PA Super 230, 958 A.2d 536, 541 (Pa. Super. Ct. 2008) (finding persuasive the holding that SANEs are qualified to testify as expert witnesses to the causation of injuries to victims of sexual crimes); ***Newbill v. State***, 884 N.E.2d 383, 396-97 (Ind. App. 2008) (allowing a SANE to apply her expertise to testify as to whether redness and irritation in the victim's vaginal area was likely the result of forced sex); ***Rodriguez v. State***, 281 Ga. App. 129, 635 S.E.2d 402 (2006) (holding a SANE was

nurse examiner, did not testify as to what *caused* Cindy's injuries; her testimony was only that those injuries were *consistent with* blunt, penetrating trauma. To follow the dissent's path and exclude this evidence would make Mississippi easily the most restrictive state in the Union regarding the admission of SANE testimony.[7]

¶30. Such a position is unjustifiable, given the degree of exposure that SANEs receive – not only to sexual assaults, but to the legal process – by their training and experience. The International Association of Forensic Nurses ("the IAFN"), which administers the board certification exam to become a SANE, defines SANEs as "registered nurses who have completed specialized education and clinical preparation in the medical forensic care of the patient who has experienced sexual assault or abuse."[8] Becoming a SANE requires specialized training: the "eligibility requirements include the completion of a 40 hour classroom training that meets the IAFN education guidelines. The nurse must then also complete a clinical component to that training to assure that she is competent to care for sexual assault patients."[9] A SANE's role as a witness is literally part of the job description:

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qualified to testify the child victim's injuries were consistent with digital penetration); ***State v. Fuller***, 166 N.C. App. 548, 603 S.E.2d 569 (2004) (finding that a SANE could testify regarding whether the child victim's injuries were consistent with someone who had been sexually assaulted).

[7]On the other hand, we choose not to go as far as our sister states in that we refuse to find in today's case that SANEs may testify as to *causation* in sexual-assault or abuse cases.

[8]IAFN: About Forensic Nursing - Sexual Assault Nurse Examiners (SANE), http://www.iafn.org/displaycommon.cfm?an=1&subarticlenbr=546 (last visited October 22, 2012).

[9]*Id.*

the IAFN, in its online explanation of the SANE role, provides that a "SANE also can testify in any legal proceedings related to the [sexual assault] examination."[10] The Mississippi Coalition Against Sexual Assault ("MSCASA") states succinctly that:

> A S.A.N.E. is a registered nurse with at least forty hours of specialized training. The training enables the RN to:
>
> *Provide comprehensive care to sexual assault victims,
> *Conduct a forensic exam, &
> *Testify effectively in court
>
> The Sane program benefits a sexual assault victim by streamlining the process of providing comprehensive medical treatment while facilitating the collection of evidence.[11]

SANE course objectives include the requirements to "[r]eview the process of evidence evaluation by the criminalist . . . " and to "[r]eview the roles and responsibilities of the criminal justice system including the laws of Mississippi, the criminal justice process, prosecution strategies, defense strategies and SANE testimony techniques."[12] Indeed, according to a brochure produced by MSCASA and made available on its website, the SANE course includes a mock trial.[13]

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[10] *Id.*

[11] Mississippi Coalition Against Sexual Assault - S.A.N.E. (Sexual Assault Nurse Examiner), http://www.mscasa.org/what-we-do/sexual-assault-nurse-examiner/ (last visited October 22, 2012).

[12] *Id.*

[13] "What is a Sexual Assault Nurse Examiner (SANE)?" Available online at http://www.mscasa.org/images/user_files/files/SANE-brochure.pdf (last visited October 22, 2012).

¶31. To restrict the testimonial privileges of these professionals almost out of existence *in their own field of specialization* might well have dire consequences for trial practice in Mississippi. Although, in this instance, Nurse Thomas was supervised by a physician, nothing in the record indicates that this will be the case for every SANE or every reasonably well-equipped sexual-assault center. To restrict SANEs from testifying as to sexual assault would set a dangerous precedent, forcing supervising physicians to devote more of their valuable time to trial work, and making it more difficult for rape victims to achieve justice, while failing to provide any useful protections to sexual-assault defendants. We affirm the Court of Appeals' finding that this issue is without merit. [14]

CONCLUSION

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[14]We briefly note the dissent's assertion that " the trial court erred by allowing Nurse Thomas to testify concerning undisclosed opinions." The dissent states that we neglect to address this issue "perhaps because Young inartfully raised the issue." In fact, this purported issue was not raised by Young on appeal.

At trial, Young made an objection to Thomas's testimony about the abnormality of Cindy's hymenal orifice size, as a discovery violation under Uniform Circuit and County Court Rule 9.04. However, in reviewing Young's briefs, we do not find any reference to the Rule 9.04 objection, to discovery violations, or even to Nurse Thomas testifying beyond her disclosed opinions.

The only language we find that might be stretched to constitute Young's raising the Rule 9.04 issue is the following line: "[i]t is from the trial court's complete abandonment of [the ruling that Nurse Thomas must testify within her limitations] and the prosecution's use of unqualified and *surprise* expert testimony that Mr. Young raises this assignment of error." (Emphasis added.) The brief then goes on to discuss exclusively the argument addressed above, that Nurse Thomas improperly testified to causation. We would not strain the English language to find that this sentence constituted an appeal of Young's Rule 9.04 objection at trial. Instead, we find the discovery objection to have been waived, and we do not address it *sua sponte*.

¶32. Based on today's discussion, we affirm the judgments of the Circuit Court of Union County and the Court of Appeals.

¶33. **THE JUDGMENTS OF THE COURT OF APPEALS AND THE CIRCUIT COURT OF UNION COUNTY ARE AFFIRMED. COUNT I: CONVICTION OF SEXUAL BATTERY AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT II: CONVICTION OF SEXUAL BATTERY AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT III: CONVICTION OF SEXUAL BATTERY AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. SENTENCES SHALL RUN CONCURRENTLY WITH EACH OTHER WITH CONDITIONS.**

RANDOLPH, LAMAR AND PIERCE, JJ., CONCUR. DICKINSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER, J.; KITCHENS AND KING, JJ., JOIN IN PART. WALLER, C.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED IN PART BY DICKINSON, P.J. KITCHENS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER AND KING, JJ.; DICKINSON, P.J., JOINS IN PART.

DICKINSON, PRESIDING JUSTICE, DISSENTING:

¶34. In order to gain a conviction of Johnny Young for sexual battery of his minor daughter, the prosecutor produced Young's half-sister, who testified, over Young's objection, that – twenty years earlier, when she was five and Young was fifteen – he had removed her panties and his shorts and rubbed his exposed penis on her vagina.

¶35. What was the prosecutor's purpose for introducing this "prior bad-act" evidence? No one denies that the law forbids prosecutors from putting into evidence a defendant's prior acts of misconduct for the purpose of implying that the defendant acted in conformity with

the prior misconduct "on a particular occasion."[15] This evidentiary tactic – sometimes called "propensity" or "he did it before, he probably did it this time" evidence – has been forbidden since at least 1692,[16] just forty-two years after the Mayflower sailed.

¶36. And no one claims the purpose was covered by one of Rule 404(a)'s three exceptions. Instead, the majority concludes that the introduction of this twenty-year-old, alleged, uncharged misconduct did not offend Rule 404(a) because it was offered for a different purpose. What purpose? If the prosecutor who offered the evidence at trial knew the purpose, he kept it to himself. He provided no argument or explanation whatsoever as to the purpose of the evidence.

¶37. The trial judge provided no help, stating only that he was allowing the State to introduce testimony about the twenty-year-old incident with Anna for the "purpose of establishing motive, intent, plan, knowledge, identity, or absence of mistake or accident on the part of the defendant . . . ." Interestingly, the trial judge used the conjunction "or," implying the jurors should take their pick because he was not sure which one applied. Here are the juror's choices:

¶38. ***Motive***. Is it possible that what Anna claims Young did twenty years before provided his motive to commit sexual misconduct twenty years later? This suggests that if Young were asked why he committed this sexual battery, he would answer that he did it because,

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[15] Miss. R. Evid. 404(a).

[16] ***Harrison's Trial***, 12 How. St. Tr. 834 (Old Bailey 1692).

twenty years before, he had fondled his half-sister. This argument is void of logic. The prosecutor told the jurors:

> The judge has instructed you to use [Anna's] testimony for motive because none of us can wrap our minds around why a father would do this to their own child. What's the motive there? Why? ***He had done it before and he was doing it again because he couldn't help himself***.

¶39. This bold statement – laced with honesty, but incorrectly placing a "motive" label on propensity – shows that the prosecutor's true purpose was to say: "Young did it before, so he probably did it this time," which fits squarely within Rule 404(a)'s prohibition. If Young's prior bad act qualifies as "motive," then Rule 404(a) has no purpose.

¶40. ***Intent***. The use of prior bad acts to show intent is usually reserved for cases where the defendant admits doing the act, but claims it was an accident. I can think of no rational explanation as to how Young's twenty-year-old fondling of his half-sister demonstrates that he intended to commit sexual battery on someone who, at that time, had not been born.

¶41. ***Plan***. Same argument. How could Young have been planning to commit sexual battery on someone who had not even been born?

¶42. ***Knowledge***. Young's knowledge of the victim is not an issue, so knowledge of what? We are not told.

¶43. ***Identity***. Not an issue in this case. No one claims confusion about the identity of any person associated with this case.

¶44. ***Absence of mistake or accident***. Again, not an issue in this case. This purpose is reserved for cases where the defendant's defense is that what happened was an accident or mistake.

¶45. Again, the State never suggested to the trial judge, or to the jury, how the incident with Anna could provide proof of motive, intent, or opportunity for an incident that was not to occur for another twenty years.

¶46. Prior bad acts may serve to show opportunity, for instance, where a defendant presents an alibi defense to a robbery charge, claiming he was on vacation in Europe, while the prosecution has evidence that the defendant was arrested for a DUI in the same city, on the same night as the robbery.[17] Rule 404(b) would permit the prosecution to admit this evidence to show that the defendant had the opportunity to commit the robbery.[18] And in a prosecution for assault with a gun, evidence that the defendant stole the gun from a pawn shop certainly would be admissible to show preparation and opportunity. But neither opportunity nor preparation is at issue here.

¶47. The prosecutor clearly used Rule 404(b) as a pretext to gain admission of propensity evidence. As stated by one author:

> If Rule 404(b) is used as a pretext for the introduction and misuse of character evidence at trial, the potential prejudice to the accused is substantial. The jury could decide the case based on propensity evidence, short-circuiting the

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[17]Christopher W. Behan, *Evidence and the Advocate: A Conceptual Approach to Learning Evidence* 174 (2012).

[18]*Id.*

> burden of proof and effectively holding the accused liable for all his past misdeeds. The constraints posed by Rule 404(a) and Rule 405 could, moreover, prevent the accused from mounting an effective defense by first requiring him to identify a pertinent character trait to defend and then limiting him to proof by reputation or opinion testimony.[19]

¶48. Here, the State introduced the evidence to prove that Young had the propensity to commit the same act again. Rule 404(b)'s alternative purposes were chanted as a pretext. The past sexual act (with Anna) and the crime charged (with Cindy) were too remote in time, and too dissimilar, to satisfy any of Rule 404(b)'s noncharacter purposes. We stated clearly in ***Gore v. State*** that past sexual acts bearing "***substantial resemblance*** to each other and the present offense" may make the evidence of prior sexual misconduct admissible.[20] But our statement in ***Gore*** assumes the State has a legitimate Rule 404(b) purpose for the evidence.

¶49. In ***Green v. State***, for instance, the majority found that the defendant's prior sexual conduct bore "striking" similarities to the charged crime: sexual abuse of female family members of the same or similar family relationships to the defendant; same or similar acts; same or similar locations; and same or similar ages of the victims.[21]

¶50. Here, the State produced no evidence that Young's single, prior sexual act, which occurred twenty years earlier, bore a "substantial resemblance" to the crime alleged in this case. And the State likewise articulated no legitimate purpose under Rule 404(b). The

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[19] *Id*. at 173 (2012).

[20] ***Gore v. State***, 37 So. 3d 1178, 1187 (Miss. 2010) (emphasis added).

[21] ***Green v. State***, 89 So. 3d 543, 552 (Miss. 2012).

majority places great evidentiary value on the fact that the victims were of similar age. But given the twenty-year lapse of time between the incidents, demonstrating nothing more than similar age of the victims does not rise to the "substantial resemblance" and "striking resemblance" standards set out in ***Derouen***, ***Green***, and ***Gore***.

¶51. It is hornbook law that Rule 404(b) forbids the use of prior bad acts to imply or prove a defendant's propensity to commit similar acts. The majority – borrowing language from a Louisiana appellate court[22] – unashamedly argues that the State was free to do exactly what Rule 404(b) forbids.

¶52. According to the majority, Young had a "seemingly uncontrollable desire to partake in pedophilic sexual activities with young and developing female juveniles," and both assaults were part of a "common plan, scheme, or system" that involved Young taking advantage of familial relationships to engage in sexual activities with prepubescent girls. The majority's hypothesis – the majority came up with this idea because the prosecution never argued it at trial, and it is nowhere in the record – that a single sexual act that allegedly occurred twenty years ago was part of a "common plan, scheme, or system" to commit a second act twenty years later; or that it demonstrates a "seemingly uncontrollable desire to partake in pedophilic sexual activities" is indefensible.

¶53. The simple truth is, the trial court abused its discretion by admitting the evidence without a legitimate, noncharacter purpose for admissibility and by allowing the State to

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[22] ***Gore***, 37 So. 3d at 1186 (quoting ***State v. Driggers***, 554 So. 2d 720, 726 (La. Ct. App. 1989)).

imply in closing argument that such evidence could be used to imply that, because Young had abused Anna, he probably had abused Cindy. And because the trial court's error prejudiced Young's ability to defend his case, the error requires reversal.

Nurse Thomas

¶54. Nurse Thomas testified repeatedly regarding causation and beyond her disclosed opinions. But the majority does not address the trial court's ruling regarding Nurse Thomas's undisclosed opinions – perhaps because Young inartfully raised the issue. I believe this Court should address the issue, and I would find that the trial court erred by allowing Nurse Thomas to testify concerning undisclosed opinions.

¶55. I would also find that the trial court erred by allowing Nurse Thomas to testify concerning the cause of Cindy's injuries. This Court has held unequivocally that nurses cannot testify as to medical causation.[23] In ***Richardson v. Methodist Hospital of Hattiesburg, Inc.***, we held that a nurse lacks the qualifications necessary to establish a causal connection between a nurse's standard of care and the cause of death.[24] And in ***Vaughn v. Mississippi Baptist Medical Center***, we further explained a nurse's limitations, holding that medical diagnosis and causation are outside a nurse's qualifications.[25] More specifically, we

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[23] ***Vaughn v. Miss. Baptist Med. Ctr.***, 20 So. 3d 645, 652 (Miss. 2009).

[24] ***Richardson v. Methodist Hosp. of Hattiesburg, Inc.***, 807 So. 2d 1244, 1248 (Miss. 2002).

[25] ***Vaughn***, 20 So. 3d at 652.

held that a nurse could not testify to "diagnostic impressions or as to the cause of a particular infectious disease or illness."[26]

¶56. The majority, however, finds that Nurse Thomas did not provide causation testimony. I disagree. Her testimony clearly asserted her opinion of the ***cause*** of Cindy's injuries: "blunt penetrating trauma of the vaginal area and the anal area." The majority's suggestion that an opinion of "consistent with" does not equal an opinion of causation is simply unsupported in logic or the law. If Nurse Thomas's purpose in testifying that the injuries were consistent with blunt-force trauma was not to say that blunt-force trauma caused the injuries, then what was the purpose?

¶57. The majority, citing ***Harden v. State***,[27] also suggests that this Court already has allowed SANE nurse testimony of this nature**.** But because we did not address this issue in ***Harden***, that case is irrelevant to today's analysis. And Young – as opposed to the defendant in ***Harden*** – actually raised the issue.

¶58. Because I agree with our holdings in ***Richardson*** and ***Vaughn***, which both prohibit a nurse from testifying to medical causation, I would find that the trial court improperly allowed Nurse Thomas to testify concerning medical causation.

¶59. Unfortunately, the majority's opinion provides greater protection to civil defendants (where plaintiffs need only prove their case by a preponderance of the evidence) than it does

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[26] ***Id.***

[27] ***Harden v. State***, 59 So. 3d 594 (Miss. 2011).

to the accused (where the prosecution must prove its case beyond a reasonable doubt). Thus, the majority's holding creates an unbalanced rule of law, and I cannot accept it.

CHANDLER, J., JOINS THIS OPINION. KITCHENS AND KING, JJ., JOIN THIS OPINION IN PART.

WALLER, CHIEF JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶60. I agree with the majority that the trial court did not err in admitting evidence of Johnny Young's prior sexual assault of his stepsister. I disagree, however, that Nurse Elizabeth Thomas should have been allowed to testify as to medical causation. I join Presiding Justice Dickinson's dissent on that particular issue.

¶61. For these reasons, I respectfully concur in part and dissent in part.

DICKINSON, P.J., JOINS THIS OPINION IN PART.

KITCHENS, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶62. I agree with the result reached and the analysis employed by the dissent regarding Issue I, whether the trial court committed reversible error by allowing testimony about Young's prior bad acts. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Miss. R. Evid. 404(b). I agree with the dissent that the trial court erred in instructing the jury that the evidence of the twenty-year-old prior sexual abuse was being introduced "for the purpose of establishing motive, intent, plan, knowledge identity, or absence of mistake or accident" on

the part of Young, as jurors were left to "take their pick" as to which exception applied in the instant case. Diss. Op. at 37.

¶63. Much like the jury in ***Green v. State***, 89 So. 3d 543, 559-60 (Miss. 2012) (Kitchens, J., dissenting), the jury in the instant case "was left to speculate about the purpose for which the extrinsic evidence was adduced. Some jurors could have picked one set of options from the 404(b) list, while others on the jury made quite different selections. This Court certainly ought not guess about which of the 404(b) options might apply, if any." Moreover, I agree with the dissent that the State's contention that the testimony from the prior victim fit one or all of the enumerated exceptions under Rule 404(b) was merely a pretext "to gain admission of propensity evidence." Diss. Op. at 47. Accordingly, the proper disposition of this case is to reverse the conviction, given that the trial court's error in this regard "prejudiced Young's ability to defend his case." Diss. Op. at 53.

¶64. However, the dissent and I diverge in opinion as to Young's second assignment of error, whether the sexual assault nurse examiner in this case was qualified to testify that injuries to the victim were consistent with penetration. This Court heretofore has employed an overly broad application of the holdings in ***Richardson v. Methodist Hospital of Hattiesburg, Inc.***, 807 So. 2d 1244 (Miss. 2002), and ***Vaughn v. Mississippi Baptist Medical Center***, 20 So. 3d 645 (Miss. 2009).

> [T]he issue of whether a particular nurse, by virtue of his or her knowledge, skill, experience, training or education, possesses such ability is better determined by a case-by-case inquiry than by a broad, "one-size-fits-all" judicial pontification to the effect that no nurse in the world will ever be allowed to testify as to medical causation in any Mississippi court case. As is

> true of any other profession, the education, experience and understanding of nurses span a broad spectrum. We should not enunciate a hard and fast rule that permanently forecloses the possibility of any nurse's being qualified to give expert testimony on medical causation in any and all cases that may arise in the future.

Id. at 657 (Kitchens, J., dissenting). I agree with the majority that the trial court did not err in allowing Nurse Thomas's expert testimony.

CHANDLER AND KING, JJ., JOIN THIS OPINION. DICKINSON, P.J., JOINS IN PART.