IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-KA-01373-SCT

ROGER D. GREEN a/k/a HUGH ROGER DALE GREEN

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	05/19/2009
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	TIPPAH COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF THE PUBLIC DEFENDER BY: GEORGE T. HOLMES LESLIE S. LEE
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE SCOTT STUART
DISTRICT ATTORNEY:	BENJAMIN F. CREEKMORE
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 05/31/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RANDOLPH, JUSTICE, FOR THE COURT:

¶1. Following a jury trial in the Circuit Court of Tippah County, Mississippi, fifty-four-year-old Roger Green was convicted of two counts of sexual battery and two counts of touching a child for lustful purposes involving D.W., Green's ten-year-old stepdaughter. Following denial of Green's "Motion for Judgment Notwithstanding the Verdict or in the Alternative For a New Trial," Green filed this appeal. We affirm Green's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2. On April 23, 2008, D.W. informed her special education teacher,[1] her regular education teacher, the school counselor, and the school nurse that Green was sexually molesting her by "stick[ing] his fingers in me every morning when he gets up[,] . . . in my private parts."[2] D.W. repeated these charges to a social worker with the Mississippi Department of Human Services ("DHS"). In a subsequent interview with forensic interviewer Angie Floyd of the Family Resource Center in Tupelo, Mississippi, D.W. stated that Green regularly put his finger inside her vagina "in her bedroom when she would wake up in the morning," on other occasions "in the living room at her house,"[3] and that he had also driven her to a "blue trailer" and touched her breasts with his mouth and made her touch his penis. All incidents occurred in Ripley, Mississippi, where her family had lived since December 2007.

Trial – State's case

¶3. At trial, Floyd testified regarding her forensic interview with D.W., and the audio-visual recording of that interview was played before the jury. D.W., then-eleven years old, testified that she understood the difference between telling the truth and lying, and that her

---

[1]Rosemary Reed, the school nurse, testified that D.W. is "a special child. She has a genetic eye disorder. She's in Special Ed. She has learning disabilities. She has a ruling of other health issues. . . . [S]he's blind in one eye; looked very malnourished; wasn't the cleanest child at school."

[2]According to D.W., she initially reported the sexual abuse to her mother, who accused D.W. of lying. D.W. testified that she then told school officials about Green's conduct "[b]ecause I thought somebody should know to get me out of that place."

[3]While a subsequent medical examination of D.W. was inconclusive, there was testimony that such a result is common "when there's just digits or fingers . . . inserted."

statements to Floyd were true; and then she made an in-court identification of Green as the perpetrator. D.W. added that Green had threatened to "slap" her if she told anyone about the incidents, which had scared her.

¶4. The State also offered the testimony of four witnesses of the same sex (female) who alleged that Green had sexually abused them in a similar manner (the same or similar acts, in their homes), in an intrafamilial context (the same or similar relationships to Green), when they were near the age of puberty (the same or similar ages).[4] Green objected to the introduction of such testimony. As shown *infra*, the circuit court followed the directives of ***Derouen v. State***, 994 So. 2d 748, 756 (Miss. 2008), for the admission of "evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense[,]" and admitted the testimony of all four witnesses. *See* paragraphs 5-11 *infra*.

¶5. In the Rule 404(b) hearing and at trial, M.S.,[5] the twenty-five-year-old ex-stepdaughter of Green, testified that when she was thirteen years old, Green would come into her bedroom "when everybody was asleep[,]" nearly "every other night[,]" and would "play with my breasts and stick his finger in my vagina." Additionally, days before M.S.'s fourteenth birthday, Green informed her that he wanted to take her to the store to buy her something, but then "parked like in a gravel road, like a dead end street, and he was taking

---

[4]The State contended during the Mississippi Rule of Evidence 404(b) hearing, "for 30 years [Green] has molested young girls – go to her bed, put his fingers in her, go to another young girl's bed and puts his fingers in her. Ten years later, he's still doing it. At the present time, he's still doing it."

[5]This Court abbreviates each victim's name in order to preserve her anonymity.

off my clothes and . . . trying to put his penis in my vagina." According to M.S., Green only stopped the attempted rape when her mother fortuitously called his cell phone and "he told her we was coming home." When M.S. told her mother about the sexual abuse, "she wouldn't listen, so I ended up telling the people in school."[6]

¶6. In the Rule 404(b) hearing and at trial, seventeen-year-old K.M.H., another former stepdaughter of Green, testified that when she was between the ages of ten and twelve years old, Green "would come in my room at night and mess with me. He would put his finger in my vagina at night when everybody was asleep." Moreover, on one occasion when K.M.H. was twelve years old, she went shopping with Green, following which he drove them "behind a church and he got out of the truck and pulled his pants and all down and then pulled mine down and he stuck his penis in my vagina." After that incident, K.M.H. testified that Green had threatened her, stating that "if I would tell anybody that he would kill my mom and my sister." While K.M.H. informed her mother about the sexual abuse, she initially recanted her account of the incident, because she was afraid of Green.[7]

¶7. In the Rule 404(b) hearing and at trial, A.R., Green's thirty-five-year-old niece testified that when she was seven or eight years old, Green and his wife had "stayed the

---

[6]Following a DHS investigation, Green was not criminally charged. According to M.S., the social worker incorrectly reported that she stated Green had "full intercourse" with her (which was not true), and that, at the time, she stated she did not know if she could go through a trial. M.S. also testified that she never recanted her allegation that Green had sexually molested her, even after Green offered her $500. According to M.S., she refused this bribe.

[7]P.W., K.M.H.'s mother, testified that her other daughter also had alleged that Green "messed with her . . . ." But after Green sent P.W. several letters about DHS taking the children away from her, the other daughter recanted.

night" at her parents' home. Green and his wife slept on a mattress on the floor, while A.R. slept on the couch. According to A.R., she "woke up to [Green] touching me in my private parts." While this was a one-time occurrence, A.R. subsequently avoided being alone with Green. She did not report the incident to anyone when she was younger because "I just didn't think they would believe me."

¶8. In a Rule 404(b) proffer[8] and at trial,[9] P.B., Green's forty-nine-year-old half-sister testified that, when she was eight or nine years old, she began living in the same home as Green (then-fourteen or fifteen years old). According to P.B., between the ages of nine and thirteen, Green would touch her "private areas" with "[h]is hand and penis," and would have sexual intercourse with her. When P.B. informed her mother about the sexual abuse, her story was dismissed, with her mother stating that she "was taking things the wrong way."[10] P.B. testified that the sexual abuse ceased only after Green left home when she was thirteen years old. When P.B. was fifteen years old, Green and his then-wife moved back in, at which point P.B. got married allegedly to get away from Green.

¶9. Following the Rule 404(b) hearing testimony of M.S., K.M.H., and A.R., the circuit judge concluded that "this is *a concrete example of where 404(b) applies*. . . . I'm satisfied

---

[8]At the time of trial, P.B. was imprisoned at the Mississippi State Penitentiary for "[p]ossession of precursors." She arrived in court after the Rule 404(b) hearing on the testimony of M.S., K.M.H., and A.R. Outside of the jury's presence, a Rule 404(b) proffer was made and the circuit judge ruled that "I'm going to allow her to testify . . . ."

[9]Unlike M.S., K.M.H., and A.R., Green did *not* cross-examine P.B.

[10]P.B. testified that she told her mother that she "would get along with [Green] as long as [her mother] was living." When her mother died, P.B., then-forty-two years old, reported the incidents of sexual abuse to DHS.

that there are *overwhelming similarities* to prove motive, opportunity, intent and the other factors under Rule 404(b) . . . and this is *a textbook copy of . . . the exception created in* [***Derouen***]." (Emphasis added.) As to P.B.'s subsequently proffered testimony, the circuit judge found it "a little bit different, but I still believe that it's *under the purview of the 404(b) proof that the [c]ourt has deemed appropriate under the very specific facts of this case . . .* ." (Emphasis added.)

¶10. Regarding Mississippi Rule of Evidence 403, the circuit judge acknowledged that "the more people you have, the more prejudicial it is, ***but*** the more people you have, . . . the more likely it is that it is a reliable indicator of a pattern or plan." (Emphasis added.) As to M.S., K.M.H., and A.R., the circuit judge concluded that under Rule 403, "this testimony . . . is more probative than prejudicial, and therefore, the [c]ourt is going to allow it." Regarding P.B.'s proferred testimony, the circuit judge deemed it more probative than prejudicial, "based upon the totality of the circumstances and based also upon the specific nature of the offenses in this case."

¶11. Finally, the circuit court provided the following cautionary instruction after the testimony of each of the other victims:

> [t]he testimony of the State's witness . . . is to be used for the purpose of establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident on the part of the defendant, . . . and should not be considered as substantive evidence in this case. Remember that the defendant is on trial here only for the crimes alleged in the indictment . . . and not for any other acts. You may not return a guilty verdict unless the State

proves the crime or crimes charged in the indictment beyond a reasonable doubt.[11]

Trial – Green's case

¶12. Green's defense at trial was that he had been wrongly accused. The sole witness for the defense was Green's ten-year-old son, Dakota Green, who had resided in the home with Green, D.W., and D.W.'s mother. Dakota testified that he had never observed any inappropriate contact between Green and D.W. He added that D.W. had disclosed to him that she previously had been molested by her biological father and uncle.

Jury verdict and sentencing

¶13. The jury convicted Green on all counts. The circuit court sentenced Green to two terms of life imprisonment for the sexual-battery counts and to two fifteen-year terms of imprisonment for the counts of touching a child for lustful purposes, with all sentences to run consecutively. Following the circuit court's denial of Green's "Motion for Judgment Notwithstanding the Verdict or in the Alternative For a New Trial," Green filed this appeal.

ISSUES

¶14. This Court will consider:

---

[11]Moreover, Jury Instruction C-5 stated:

> [t]he [c]ourt instructs the jury that the testimony of the [S]tate's witnesses, [K.M.H.], [M.S.], [A.R.], and [P.B.] regarding alleged acts of [Green] were offered in an effort to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident regarding [Green]. You may give the testimony such weight and credibility as you deem proper under the circumstances. However you cannot and must not consider the testimony in any way regarding whether or not [Green] is guilty or not guilty [of the crime] for which he is presently on trial.

(1) Whether the circuit court abused its discretion in admitting evidence of other sexual offenses via the testimony of M.S., K.M.H., A.R., and P.B.
(2) Whether the "tender years" exception of Mississippi Rule of Evidence 803(25) was properly applied by the circuit court.
(3) Whether the circuit court wrongfully excluded defense evidence.
(4) Whether the jury verdict was contrary to the overwhelming weight of the evidence.

ANALYSIS

I. Whether the circuit court abused its discretion in admitting evidence of other sexual offenses via the testimony of M.S., K.M.H., A.R., and P.B.

¶15. "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge *abuses his discretion so as to be prejudicial to the accused*, the Court will not reverse this ruling." ***Gore v. State***, 37 So. 3d 1178, 1183 (Miss. 2010) (quoting ***Price v. State***, 898 So. 2d 641, 653 (Miss. 2005); ***Walker v. State***, 878 So. 2d 913, 915 (Miss. 2004)) (emphasis added). "[E]vidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which the accused is on trial[,]" may be considered by the jury "if properly admitted under Rule 404(b), filtered through Rule 403, and accompanied by an appropriately-drafted limiting or cautionary instruction . . . ." ***Derouen***, 994 So. 2d at 756.

(a) Rule 404(b)

¶16. Rule 404(b) provides that:

> [e]vidence 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). The other purposes listed in Subsection (b) are not exclusive.[12] *See* Miss. R. Evid. 404 cmt.

¶17. The testimony of M.S., K.M.H., A.R., and P.B. was offered to show that, over the course of five decades, Green engaged in the sexual abuse of female family members[13] 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). ***Gore***, 37 So. 3d at 1187 (quoting ***State v. Driggers***, 554 So. 2d 720, 726 (La. Ct. App. 1989)). At the time of the sexually abusive offenses, D.W. was ten years old, M.S. was thirteen, K.M.H. was between the ages of ten and twelve, A.R. was seven or eight years

---

[12]The examples of other purposes listed in Rule 404(b) are sometimes incorrectly referred to as exceptions. They are not exceptions (like those identified in 404 (a)(1-3)), but rather evidence admitted for other purposes.

[13]Unfortunately, the intrafamilial context is fertile ground for sexual abuse and provides circumstances which are particularly problematic. As the testimony of D.W., M.S., A.R., and P.B. reflects, victims are just as likely not to be believed (creating a fear of being spurned or castigated for their allegations), as to be taken seriously. This dichotomy offers a measure of protection not available to a stranger, for many instances of abuse will either go altogether unreported by victims, or unreported by family members who fail to contact authorities, as they are torn by the potentially conflicting personal ramifications of contacting DHS and/or law enforcement and their interests in how publicizing the revelation may change their lives. The dilemmas are myriad (e.g., What social stigma may attach to our family? Is the person I love going to jail? How will I provide for myself? Do I risk physical or mental abuse if I report the incident?).

old, and P.B. was between the ages of nine and thirteen.[14] At the time of the sexually abusive offenses, D.W., M.S., and K.M.H. all were Green's stepdaughters; A.R. his niece; and P.B. his half-sister. D.W. regularly was digitally penetrated by Green in her bedroom and the living room; M.S. and K.M.H. regularly were digitally penetrated by Green in their bedrooms, A.R. was digitally penetrated by Green in her living room, and Green's regular illicit conduct with P.B. included digital penetration in their home.[15] On one occasion, Green drove D.W. to a remote location, then proceeded to touch her breasts and make her touch his penis; similarly, Green drove M.S. and K.M.H. to remote locations where he either attempted or consummated raping the young girls.[16] Finally, D.W. was threatened by Green not to report the sexual abuse; similarly, Green threatened to kill K.M.H.'s mother and sister if K.M.H. reported the sexual abuse.[17] Under the facts presented, the "overwhelming similarities"[18] between these other sexual offenses and threats and the incidents at issue undeniably bring the testimony of these other victims within the purview of admissibility

---

[14]In each of these circumstances, Green was acting as an adult to a child or, during the incidents involving P.B., as a decidedly older male to a significantly younger female.

[15]The regularity of Green's sexual abuse was directly connected to the availability of the vulnerable, young, female family members.

[16]These incidents reflect similar instances of Green grooming these victims, gradually increasing the degree of contact.

[17]Relatedly, Green bribed M.S. in an effort to induce her to recant her allegations of sexual abuse. Thus, D.W. and two victims of other sexual offenses by Green similarly were encouraged not to report or recant by Green's inducements of either a carrot (financial reward) or a stick (physical harm).

[18]"Similar" is defined as "[r]esembling though not completely identical." *Webster's II New College Dictionary* 1029 (2001). Clearly, there is an unequivocal resemblance between the incidents at issue and the other sexual offenses.

under Rule 404(b).[19] While the dissent maintains that "it is necessary that a trial judge, in applying Rule 404(b), make on-the-record findings of the several exceptions he or she deems applicable[,]" our caselaw reflects that the trial court's failure to identify the specific applicable exception(s) under Rule 404(b) does not require reversal. (Kitchens Op. at ¶ 49). *See* ***Gore***, 37 So. 3d at 1186 ("[u]nder one or more of the exceptions listed in Rule 404(b), the circuit court did not abuse its discretion in admitting evidence of Gore's prior sexual

---

[19]For example, the evidence of this "similar misconduct . . . support[s] an inference . . . of a common plan, scheme, or system[,]" utilized "repeatedly to perpetrate separate but very similar crimes." ***People v. Sabin***, 614 N.W.2d 888, 899-900 (Mich. 2000) (citing ***State v. Lough***, 889 P.2d 487 (Wash. 1995); ***People v. Ewoldt***, 867 P.2d 757 (Cal. 1994)). In ***Sabin***, the defendant was convicted of sexually assaulting his thirteen-year-old daughter. *See* ***Sabin***, 614 N.W.2d at 893. At trial, the defendant's former stepdaughter was allowed to testify that the defendant had sexually abused her from kindergarten until seventh grade, with the trial court finding that the stepdaughter's testimony was relevant to show the defendant's "plan, scheme, or system." ***Id***. at 893, 898. On appeal, the Michigan Supreme Court affirmed. *See* ***id***. at 899-901. The Michigan Supreme Court rejected the notion that the "plan" exception under Rule 404(b) requires a "single continuing conception or plot" between the prior acts and the charged offense. ***Id***. at 899-900. *See also* ***Fisher v. State***, 532 So. 2d 992, 994, 999-1000 (Miss. 1988) (affirming admissibility of similar-misconduct evidence to show the existence of a "plan" for assaulting women where the prior act and the charged offenses bore substantial resemblance but did not comprise a single continuing plot). While acknowledging that there were some dissimilarities between the defendant's alleged assault of his daughter and his alleged abuse of his former stepdaughter, that court found there were "sufficient common features to infer a plan, scheme, or system to do the acts." ***Sabin***, 614 N.W.2d at 901. According to that court, "[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." ***Id***.

Relatedly, "motive" involves "[a]n impulse, as an emotion, desire, or psychological need, acting as incitement to action." *Webster's II New College Dictionary* at 715. The "seemingly uncontrollable desire to partake in pedophilic sexual activities with young and developing female juveniles[,]" is probative regarding motive. ***Gore***, 37 So. 3d at 1186 (quoting ***Driggers***, 554 So. 2d at 726).

Finally, even the dissent concedes that "it may be true that the defenses raised by Green conceivably created some issue of material fact other than character, that arguably would have fit one or more of the enumerated exceptions under Rule 404(b) . . . ." (Kitchens Op. at ¶ 52).

abuse of his daughter . . . ."). Accordingly, the circuit court did not abuse its discretion in admitting the subject testimony under Rule 404(b).

¶18. While not addressed by the circuit court or briefed by the parties, Presiding Justice Dickinson opines that the "doctrine of chances" would have provided another basis for admissibility. (Dickinson Op. at ¶ 38). However, we part with our learned colleague in his assertion that the "doctrine of chances" does not implicate Rule 404(b). (Dickinson Op. at ¶ 42). In ***People v. Mardlin***, 790 N.W.2d 607 (Mich. 2010), the Michigan Supreme Court stated that:

> [e]vidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test . . . .

Id. at 612 (emphasis in original). As stated in footnote 19 *supra*, the testimony of the other victims was offered and admitted for noncharacter purposes, and certainly satisfies Mississippi Rules of Evidence 401 and 402.[20] The fact that such evidence "unavoidably

---

[20]Under Rule 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401. Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible." Miss. R. Evid. 402. Contrary to the dissent's contention that this evidence "was not, by definition, probative[,]" these other crimes, wrong, or acts were relevant to (and, thus, admissible under) the nonexclusive, noncharacter purposes listed in Rule 404(b). (Kitchens Op. at ¶ 51). *See* footnote 19 *supra*.

reflects the defendant's character" is for the trial judge to consider, within his or her discretion, under Rule 403. ***Id***. But the mere fact that evidence offered for noncharacter purpose(s) bears some reflection on the defendant's character does not bar its admissibility under Rule 404(b). Moreover, the absence of a "single continuing conception or plot" between the prior acts and the charged offense does not nullify the applicability of the other purposes listed in Rule 404(b). ***Sabin***, 614 N.W.2d at 899-900. *See also* ***Fischer***, 532 So. 2d at 994, 999-1000.

(b) Rule 403

¶19. Rule 403 states, in pertinent part, that "[a]lthough relevant, evidence may be excluded if the probative value is *substantially outweighed* by the danger of unfair prejudice . . . ." Miss. R. Evid. 403 (emphasis added).

¶20. As paragraph 17 *supra* clearly reflects, the circuit court was presented with the same genre of conduct visited upon the same class of persons (i.e., "pedophilic sexual activities with young and developing [intrafamilial] female juveniles"), with Green's "means of accomplishing those activities on past occasions bear[ing] substantial resemblance to each other and with the present offens[e]." ***Gore***, 37 So. 3d at 1187 (quoting ***Driggers***, 554 So. 2d at 726). Indeed, there is an eerily "*striking similarity* between the prior bad acts and the acts for which the defendant is charged."[21] ***Gore***, 37 So. 3d at 1192 (Kitchens, J., dissenting)

---

[21]Contrary to the dissent's contentions otherwise, it is similarity (defined in footnote 18 *supra*), and not the "*same* specific conduct[,]" which is the relevant inquiry regarding other sexual offenses. (Kitchens Op. at ¶ 55) (emphasis added). Furthermore, the dissent erroneously argues remoteness and "that Green was neither charged nor convicted concerning any of these accusations." (Kitchens Op. at ¶ 56). As to remoteness, ***Gore*** provided that the central inquiry is whether "the incidents are all within the same time period

(emphasis added). In today's case, the circuit court was presented with compelling evidence of a sordid history of similar sexual predatory conduct through the sexual abuse of female family members (the same or similar relationships to Green), 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). ***Gore***, 37 So. 3d at 1187 (quoting ***Driggers***, 554 So. 2d at 726). Under such circumstances, the circuit court did not abuse its discretion in finding that the probative value of the subject testimony was not "substantially outweighed" by its prejudicial effect. Miss. R. Evid. 403.

(c) Limiting or cautionary instruction

¶21. The cautionary instructions following the testimony of each of the other victims, as well as Jury Instruction C-5, are nearly identical to the limiting instruction provided to the jury in ***Gore*** and satisfy the requirement of "an appropriately-drafted limiting or cautionary instruction . . . ." ***Gore***, 37 So. 3d at 1187. *See also* ***Derouen***, 994 So. 2d at 756.

Conclusion

¶22. The circuit court carefully and meticulously considered, then admitted, the testimony of M.S., K.M.H., A.R., and P.B. under Rule 404(b); filtered it through Rule 403; and then provided appropriate cautionary instructions to the jury following the testimony of each witness, as well as a final limiting instruction, as mandated by recent decisions of this Court.

---

in terms of the victims' lives[,]" and that "[w]here the competency of evidence is doubtful because of remoteness, the better practice is to admit the evidence, leaving it to the jury to determine its credibility and weight." ***Gore***, 37 So. 3d at 1186 (quoting ***Ex parte Register***, 680 So. 2d 225, 228 (Ala. 1994); ***Driggers***, 554 So. 2d at 727) (emphasis added). Additionally, in ***Gore***, the defendant had never been charged or convicted.

See ***Gore***, 37 So. 3d at 1187; ***Derouen***, 994 So. 2d at 756. Accordingly, the admission of these similar, other sexual offenses was not an abuse of discretion.

II. Whether the "tender years" exception of Mississippi Rule of Evidence 803(25) was properly applied by the circuit court.

¶23. Green now contends that the circuit court abused its discretion in not conducting a Rule 803(25)[22] hearing to determine the reliability of D.W.'s statements to the school nurse, Reed, and the forensic interviewer, Floyd. Green further maintains that the circuit court erred in admitting testimony of K.M.H.'s mother regarding the accusations made against Green by K.M.H., because her testimony was inadmissible hearsay, violative of Rule 404(b), and was not accompanied by a limiting instruction. Finally, Green argues that the circuit court erred in allegedly allowing hearsay testimony by Investigator Scott Watson of the Ripley Police Department. Specifically, Watson testified regarding the course of the investigation and

---

[22]Rule 803(25) provides that:

> [t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (25) **Tender years exception**. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Miss. R. Evid. 803(25).

stated very generally that allegations of sexual misconduct were made by D.W. against Green during Floyd's forensic interview of D.W.

¶24. Regarding the subject testimony of Reed, Floyd, and K.M.H's mother, Green acknowledges that he failed to object to their admission. Furthermore, Green declined a limiting instruction following the testimony of K.M.H.'s mother. "This Court has consistently held that the failure to make a contemporaneous objection constitutes waiver of an issue on appeal." ***Derouen***, 994 So. 2d at 751 (citing ***Walker v. State***, 671 So. 2d 581, 587 (Miss. 1995)). Accordingly, Green is procedurally barred from arguing that such testimony was erroneously admitted.

¶25. As to Investigator Watson's testimony, Green's objections at trial were not that Rule 803(25) was misapplied by the circuit court. At trial, Green only objected that Watson's testimony was based on knowledge he had gleaned from the videotaped interview. Specifically, "[o]bjection. It's asking him to testify to something that he heard from a video. It's certainly not best evidence of anything. It's hearsay." When asked D.W.'s age at the time of the alleged incidents, Watson responded that she was ten years old. Again, Green objected on the basis that this information was gleaned from Watson's having watched the recording of the forensic interview, not that Rule 803(25) had been misapplied in allowing Watson's testimony. Accordingly, Green has failed to preserve this assignment of error for appeal, as there was no specific objection at trial to Watson's testimony on the basis that a Rule 803(25) hearing had not been held to determine the reliability of the testimony. *See* ***Scott v. State***, 796 So. 2d 959, 964 (Miss. 2001) (citing ***Oates v. State***, 421 So. 2d 1025, 1030 (Miss. 1982); ***Heard v. State***, 59 Miss. 545 (1882)) ("It is well established that objections

must be made with specificity to preserve for appeal."); ***Brown v. State***, 682 So. 2d 340, 350 (Miss. 1996) ("[A]n objection on one or more specific grounds constitutes a waiver of all other grounds.").

¶26. Alternatively, Green argues that his trial counsel was ineffective for failure to properly object to the aforementioned testimony. "In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove that his attorney's performance was deficient, and that the deficiency was so substantial as to deprive the defendant of a fair trial." ***Holly v. State***, 716 So. 2d 979, 989 (Miss. 1998) (citing ***Strickland v. Washington***, 466 U.S. 668, 687-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Even assuming *arguendo* that trial counsel's performance was deficient, we cannot conclude that Green was deprived of a "fair trial." ***Id***. As discussed in Issue IV *infra*, the jury was presented with such overwhelming evidence of Green's guilt that he cannot satisfy the prejudice prong.

III. Whether the circuit court wrongfully excluded defense evidence.

¶27. Green argues that the circuit judge erred when he sustained the State's objection to some of the testimony of Dakota, the defendant's son. Green argues that Dakota would have testified that D.W. fabricated the allegations because a friend told her that making such a false allegation would result in D.W. being removed from Green's home.

¶28. "When testimony is not allowed at trial, a record of the proffered testimony must be made in order to preserve the point for appeal." ***Metcalf v. State***, 629 So. 2d 558, 567 (Miss. 1993) (citations omitted). *See also* Miss. R. Evid. 103(a)(2). Since the record does not include a proffer of the basis of Dakota's alleged knowledge on this subject, this issue has not been properly preserved for appeal. Accordingly, this issue is procedurally barred.

IV. Whether the jury verdict was contrary to the overwhelming weight of the evidence.

¶29. "This Court reviews a trial court's denial of a motion for a new trial under an abuse-of-discretion standard." ***King v. State***, 83 So. 3d 376, 379 (Miss. 2012) (citing ***Massey v. State***, 992 So. 2d 1161, 1164 (Miss. 2008)). "When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005). "[T]he power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." ***Id***.

¶30. Through the trial testimony of D.W.; her in-court identification of Green as the perpetrator; the audio-visual recording of the forensic interview with D.W.; the testimony of Floyd, the forensic interviewer; and the Rule 404(b) testimony of M.S., K.M.H., A.R., and P.B., the jury was presented with overwhelming evidence of Green's guilt. As the learned circuit judge observed at sentencing, "this is a very sound verdict, very well supported by the evidence in this case, . . . and *there is no realistic question about [Green's] guilt in this case*." (Emphasis added.) Because the jury verdict was not against the overwhelming weight of the evidence, the circuit court did not abuse its discretion in denying Green's motion for a new trial. Accordingly, this issue is without merit.

CONCLUSION

¶31. The circuit court precisely applied the directives of ***Derouen*** and did not abuse its discretion in admitting the evidence of other similar sexual offenses. The issue of whether Rule 803(25) was improperly applied is procedurally barred. Likewise, Green's complaint that Dakota's testimony was improperly excluded is procedurally barred, due to a failure to sufficiently proffer the testimony and preserve it in the appellate record. Finally, the jury verdict was not against the overwhelming weight of the evidence, such that the circuit court did not abuse its discretion in denying Green's motion for a new trial. Thus, we affirm Green's convictions and sentences.

¶32. **COUNT I: CONVICTION OF SEXUAL BATTERY AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT II: CONVICTION OF SEXUAL BATTERY AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT III: CONVICTION OF TOUCHING A CHILD FOR LUSTFUL PURPOSES AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. COUNT IV: CONVICTION OF TOUCHING A CHILD FOR LUSTFUL PURPOSES AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. SENTENCES SHALL RUN CONSECUTIVELY TO EACH OTHER.**

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

DICKINSON, PRESIDING JUSTICE, CONCURRING IN PART AND IN RESULT:

¶33. Today – without saying so, and without implementing our usual rule-making procedures – this Court adopts Federal Rule of Evidence 414. That said, I do agree with the

majority that, under the facts of this case, Green's prior sexual misconduct was admissible. But I do not agree with the majority's reasoning as to why it was admissible. And because the distinction is an important one (make no mistake, all prior sexual misconduct will now be admissible) I respectfully concur in the majority's result, but not its reasoning.

¶34. Rule 404(b) prohibits the use of "other crimes, wrongs, or acts (often referred to as "prior bad acts") for the purpose of showing that the defendant acted "in conformity" with those prior bad acts. There are ***no exceptions*** to this rule.[23] While Rule 404(b) does allow the use of "prior bad acts" ***for other purposes***, simple logic requires us to conclude that, if the evidence is being used for other purposes, it is not being used for the prohibited purpose and is therefore not an exception.[24]

¶35. Prior opinions of this Court have erroneously referred to Rule 404(b)'s "other purposes" as exceptions.[25] The confusion may be traced to an error in Rule 404(b)'s comment which erroneously labels as "exceptions" the other purposes for which evidence of prior bad acts may be admitted.[26] Only one other state has made the same mistake,[27] while all other states have been more careful. For instance, the comment to Alabama's Rule 404(b) correctly avoids the "exceptions" label by stating:

---

[23] Miss. R. Evid. 404(b).

[24] *See id.*

[25] *E.g.*, ***Hargett v. State***, 62 So. 2d 950, 953 (Miss. 2011); ***Palmer v. State***, 939 So. 2d 792, 795 (Miss. 2006).

[26] *See* Miss. R. Evid. 404(b) cmt.

[27] La. Code Evid. Ann. art. 404(b) cmt. (1988).

> The general rule excluding character evidence does not bar evidence of specific acts when that evidence is offered for some purpose other than the impermissible one of proving action in conformity with a particular character. While section (b) does not purport to provide an exhaustive listing of proper purposes, it states that proper purposes may include proving such things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[28]

¶36. Mississippi's Rule 404(b) does not prohibit evidence of a prior bad act for purposes other than proving a person acted in conformity with the prior bad act. The rule states:

> **Other Crimes, Wrongs, or 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. 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.

¶37. While the rule lists several specific, acceptable purposes for which prior bad acts may be used as evidence, the phrase "such as" clearly allows for other purposes not listed. And this case, in my view, presents this Court an opportunity to adopt what is commonly referred to as the "doctrine of chances."[29]

The doctrine of chances

¶38. The doctrine of chances – as adopted by and applied in several states[30] – has its origin in the English case ***Rex v. Smith***, in which the defendant was charged with murdering his

---

[28] Ala. R. Evid. 303(b) cmt.

[29] 2 John H. Wigmore, *Wigmore on Evidence* § 302, 245 (Chadbourne rev. ed., 1979)).

[30] *E.g.*, ***People v. Spector***, 128 Cal. Rptr. 3d 31, 65-68 (Cal. Ct. App. 2011); ***Robbins v. State***, 88 S.W.2d 256, 267-68 (Tex. Crim. App. 2002); ***People v. Mardlin***, 790 N.W.2d 607, 614-15 (Mich. 2010).

wife by drowning her in a bathtub.[31] At trial, the judge allowed the prosecution to introduce evidence that two of the defendant's previous wives also had "accidentally" drowned in bathtubs.[32] The Court of Criminal Appeal held that, because of its striking similarity, the evidence was admissible.[33]

¶39. Following the language and reasoning set forth in ***Rex***, Michigan has applied the doctrine of chances – otherwise known as the "doctrine of objective improbability" – on several occasions.[34] For instance, in ***People v. Mardlin***, the Michigan Supreme Court applied the doctrine where a defendant was charged with arson and burning insured property.[35] The court held that the evidence of past fires was logically relevant to the objective probability that the defendant intentionally set fire to his home.[36] The court, when discussing the doctrine of chances, noted that

> the doctrine describes a logical link, based on objective probabilities, between evidence of past acts or incidents that may be connected with a defendant and proper, noncharacter inferences that may be drawn from these events on the basis of their frequency.[37]

---

[31] ***Robbins***, 88 S.W.3d at 267 (citing ***Rex v. Smith***, 11 Crim. App. R. 229, 84 L.J.K.B. 2153, 2154 (1915)).

[32] ***Id.*** (citing ***Rex***, 84 L.J.K.B. at 2154).

[33] ***Id.***

[34] *E.g.*, ***Mardlin***, 790 N.W.2d at 612-14; ***People v. Crawford***, 582 N.W.2d 785 (Mich. 1998).

[35] ***Mardlin***, 790 N.W.2d at 612-14.

[36] ***Id.*** at 617.

[37] ***Id.*** at 613.

¶40. Michigan's application of the doctrine of chances is equally appropriate in sexual-abuse cases. The predicate for using the doctrine in sexual-abuse cases, wrote one commentator, "relies on the improbability that one individual would be the object of repeated false accusations."[38]

¶41. The key is that the evidence of prior sexual misconduct, in these instances, is not admitted to attack the defendant's character, or to show that the defendant has a propensity for committing the alleged act; instead, it is admitted to show the improbability that the defendant would be accused falsely multiple times.

True purpose of the evidence

¶42. Although the majority recognizes the similarities among the charged offense in this case and Green's prior bad acts, it incorrectly concludes that those similarities fit Rule 404(b)'s listed noncharacter purposes. But the four prior incidences occurred long before Green knew the victim in this case – and at least one before she was even born. For example, when M.S. alleges she was abused by Green, the victim in this case was not yet born; so the purpose of the evidence of Green's abuse of M.S. was certainly not to show his "motive, opportunity, intent, preparation, [or] plan" to abuse the victim who, at that time, was not even born.

¶43. But the evidence was clearly probative for a purpose unrelated to Green's character. At trial, four witnesses testified that when Green sexually abused them they were young, they

---

[38]Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered*, 29 U.C. Davis L. Rev. 355, 393 (1996) ("The perception that repeated false rape accusations are highly improbable is in part the result of our belief that repeated rapes by the same person are highly probable.").

were related to Greene, and he digitally penetrated them. Under the doctrine of chances, the evidence is relevant because it is unlikely that the same defendant would be subjected to multiple false accusations so similar to one another, especially in sexual-abuse cases where victims already are unwilling – or unable – to come forward. The exclusion of this evidence, therefore, is based on probability, not propensity.

¶44. This view also has found support outside of court:

> Given the infrequent occurrence of false rape and child abuse allegations relative to the entire eligible population, the probability that the same innocent person will be the object of multiple false accusations is extremely low. That conclusion is based on the so-called product rule, which posits that the probability that two independent events will occur together is calculated by multiplying the probability that each will occur alone.[39]

¶45. As Wigmore wrote, "it is the mere repetition of instances, and not their system or scheme, that satisfies our logical demand. Yet, in order to satisfy this demand, it is at least necessary that prior acts should be *similar*."[40] And because of the similarities among the accusations in this case – namely, the ages of the victims and the manner of the crime – and the frequency of prior misconduct, I agree with the majority that the trial court did not abuse its discretion in admitting the evidence. But to admit it by calling it what it is not – plan, motive, etc. – is a slippery slope that invites complete abrogation of Rule 404, and mandates adoption of Federal Rule of Evidence 414. I therefore concur in part and in result.

WALLER, C.J., RANDOLPH, LAMAR AND PIERCE, JJ., JOIN THIS OPINION IN PART.

KITCHENS, JUSTICE, DISSENTING:

---

[39] *Id.* at 397.

[40] Wigmore at 245.

¶46. I dissent in the instant case for two reasons: (1) the trial judge erred in failing to make an on-the-record finding regarding which of the exceptions[41] under Mississippi Rule of 404(b) he deemed applicable, and (2) the testimony of the four women (the alleged former victims of Green) was more prejudicial than probative, thus violating Mississippi Rule of Evidence 403. Accordingly, the only proper disposition is to reverse and remand for a new trial.

¶47. The State proffered the testimony of three women and a teenager, who all alleged that Green had sexually abused them when they were children. The purpose of this testimony, the State argued, was that it served as evidence of one of the exceptions under Mississippi Rule of Evidence 404(b), i.e., proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, the State did not specify which of the exceptions it contended the evidence tended to prove. The trial court allowed the testimony after finding that the witnesses' allegations were overwhelmingly similar to the charged crimes in the instant case; thus, according to the trial court, the extrinsic evidence tended to prove "motive, opportunity, intent, and the other factors under 404(b)." The trial court never made an on-the-record finding as to which of the exceptions he believed the testimony tended to prove. At the conclusion of the case, the jury was instructed that the

[41]Throughout the dissent, I refer to the enumerated "other purposes" as exceptions because the comments to Rule 404(b) read as follows: "Against the general prohibition of producing evidence of prior offenses or actions to show that the party acted in conformity with past behavior, is posited a list of *exceptions* . . . All of the *exceptions* in Rule 404(b) have been recognized and applied on numerous occasions by the Mississippi Supreme Court." (Emphasis added.)

testimony of those four witnesses was before them as proof of all the enumerated exceptions under Rule 404(b).

¶48. Rule 404(b) of the Mississippi Rules of Evidence 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.

¶49. Obviously, the rule lists its enumerated exceptions disjunctively, not conjunctively. Implicit in the listing is that a trial judge, in deciding which, if any, of the exceptions may apply to particular proffered testimony, has a duty to select one or more of them from the list. It is hard, if not impossible, to imagine an evidentiary scenario in which *all* of them could apply. Although in some instances more than one of the exceptions might fit, it also is arguable that some are mutually exclusive of others. For instance, a defendant's prior act which tended to prove his identity would be unlikely also to provide proof of an absence of accident. Similarly, proof of motive would not ordinarily be probative of a person's having had an opportunity to commit a crime. Thus it is necessary that a trial judge, in applying Rule 404(b), make on-the-record findings of the several exceptions he or she deems applicable. A failure to do so impedes appropriate appellate analysis and, worse, does not provide proper guidance to jurors when, as here, all of the possible exceptions are thrown at them in an instruction. In giving jurors this sort of multiple-choice instruction, a judge with the purest and best of intentions could easily mislead them.

¶50. Specifically, in this case, the trial court gave Instruction No. C-5:

> The Court instructs the jury that the testimony of the state's witnesses, [K.M.H.], [M.S.], [A.R.], and [P.B.] regarding alleged acts of the Defendant, HUGH ROGER DALE GREEN were offered in an effort to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident regarding the Defendant. You may give the testimony such weight and credibility as you deem proper under the circumstances. However you cannot and must not consider the testimony in any way regarding whether or not this Defendant is guilty or not guilty for which he is presently on trial.

¶51. While defense counsel was granted a continuing objection concerning the testimony of the four women, he did not object to Instruction No. C-5, which is confusing and self-contradictory. Although it may have been intended as a cautionary or limiting instruction, it is anything but that, and is likely to have generated more wonderment than enlightenment in the minds of the jurors. The judge who recently had determined that the testimony of the four women was more probative than prejudicial then undertook to inform the jurors that they should not consider the women's testimony concerning Green's alleged prior bad acts "in any way regarding whether or not this Defendant is guilty or not guilty for which he is presently on trial." The only decision these jurors were called upon to make was whether Green was guilty or not guilty. If the jurors were not to consider the women's testimony for that purpose, of what, then, was it probative? The jurors were the only people in the courtroom to whom anyone was trying to prove anything, and the testimony of these women was adduced by the only party with anything to prove: the prosecution, whose burden it was to try to prove Green *guilty*. While the inflammatory and prejudicial nature of the testimony is almost sure to have been of enormous assistance to the prosecution in pushing the jury toward a guilty verdict, it did nothing to help *prove* his guilt, and therefore was not, by definition, *probative*. Accordingly, it should not have been presented to the trier of fact, as

its value to the prosecution is incapable of discernment anywhere other than in its overtly prejudicial nature and effect.

¶52. At trial, Green's defense was that he was innocent of the charges against him. Green adduced the testimony of his son, Dakota, who had lived in the family home with D.W. and Green. In essence, Dakota's testimony was that Green would not have had the opportunity to commit the crime charged because he never was alone with D.W. in the early mornings when most of the instances of digital penetration were said to have occurred. He testified that D.W. had told him that she had been molested by her uncle and her biological father. Nothing in the record, however, informed the jurors or this Court which of the 404(b) exceptions the trial judge thought applicable in this case, and the jury was left to speculate about the purpose for which the extrinsic evidence was adduced.[42] 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. While it may be true that the defenses raised by Green conceivably created some issue of material fact other than character, that arguably would have fit one or more of the enumerated exceptions under Rule 404(b), even this would not end our inquiry, as

[42] The trial court found that the extrinsic evidence served to "prove motive, opportunity, intent, and the other factors under 404(b)." The jury was instructed that the women's testimony was "offered in an effort to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Thus, the court verbally found that all of the evidentiary objectives authorized under Rule 404(b), plus some unnamed "other factors," justified the testimony in question. Then, *in writing,* the court instructed the jury in the disjunctive ("or"), thereby leaving it to each juror to choose which options he or she thought applicable.

admissibility would require that the probative value be judicially determined to outweigh the prejudicial effect under Rule 403.

¶53. Rule 403 provides, in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." This Court in ***Derouen v. State***, 994 So. 2d 748, 756 (Miss. 2008), held that "evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which the accused is on trial," is admissible "if properly admitted under Rule 404(b), filtered through Rule 403, and accompanied by an appropriately-drafted limiting or cautionary instruction to the jury."

¶54. In the instant case, the trial court, in addition to finding the testimony admissible under Rule 404(b), determined the testimony to be more probative than prejudicial under Rule 403. Green argues that this constituted reversible error on the part of the trial court, given the testimony's highly prejudicial nature, and was a misapplication by the trial court of the standard set out in ***Deruoen*.** I find this argument compelling.

¶55. The trial court erred in finding "overwhelming similarities" between the witnesses' allegations and the crimes charged in this case, as most of the witnesses' testimony was about alleged conduct dissimilar in nature. Given its dissimilar and inflammatory nature, the testimony was not more probative than prejudicial under Rule 403. Twenty-five-year-old M.S. testified that, when Green was her stepfather, he had molested her on multiple occasions when she was fourteen, and on one occasion had attempted to have sexual intercourse with her. Seventeen-year-old K.M.H. testified that, when she was ten years old, Green had begun fondling her on a regular basis and, on one occasion, when she was twelve

years old, had raped her. According to K.M.H.'s testimony, Green had threatened to kill her mother and sister if she told anyone. Green's half-sister, forty-nine-year-old P.B., testified that Green had sexual intercourse with her from age nine until age fifteen. P.B. testified that Green is five years older than she and that, at the time he was engaging in sexual intercourse with her, he was about fourteen or fifteen years old (a minor). The only allegations somewhat similar to D.W.'s allegations were made by Green's niece, thirty-five-year-old A.R., who testified that, at age seven or eight, she was fondled by Green during an overnight visit to his home. Even she, however, did not relate the same specific conduct that Green was alleged to have visited upon D.W.

¶56. With the exception of K.M.H.'s allegations, the testimony alleged incidents that were extremely remote in time. M.S. testified that she was molested eleven years earlier. P.B. testified that Green had sex with her thirty-four years ago. A.R. testified that she was fondled by Green twenty-seven years ago. Furthermore, the record reflects that Green was neither charged nor convicted concerning any of these accusations.

¶57. Once this highly prejudicial evidence was before the jury, it served to poison the well, such that it would have been virtually impossible for the jury not to consider the testimony as evidence that Green had acted, in the present circumstances, in conformity with his bad character. *See* Miss. R. Evid. 404(b) ("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."). Thus, the limiting instruction given by the trial court was insufficient to overcome the prejudicial nature of the testimony. Because Green was improperly prejudiced

by the women's testimony, the only proper disposition is that this Court reverse the verdict and remand for a new trial.

CHANDLER AND KING, JJ., JOIN THIS OPINION.