IN THE COURT OF APPEALS 4/9/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01022 COA

DONNIE RUSSELL

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MARCUS GORDON

COURT FROM WHICH APPEALED: NESHOBA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JEFFREY T. WEBB

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: CRIMINAL - CAPITAL RAPE - SEXUAL BATTERY

TRIAL COURT DISPOSITION: COUNT I - SENTENCED TO LIFE IN THE CUSTODY OF MISSISSIPPI DEPARTMENT OF CORRECTIONS, COUNT II - SENTENCED TO LIFE TO RUN CONCURRENTLY TO SENTENCE IMPOSED IN COUNT I; COUNT III - SENTENCED TO SERVE TEN YEARS TO RUN CONSECUTIVELY TO COUNT I AND COUNT II.

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

KING, J., FOR THE COURT:

Donnie Russell was convicted of two counts of capital rape and one count of sexual battery for which he was given two life sentences, to run concurrently, and ten years to run consecutively to the life sentences. Finding only harmless error, we affirm the convictions and sentences.

I.

During the marriage of Donnie and Mary Louise Russell, they had two children, A.R. and C.R. A.R. was born on September 22, 1977, and C.R. was born on December 27, 1978. When A.R. and C.R. were approximately eighteen and three months old respectively, Russell and Mary divorced. Mary received custody of both children.

Within a few months after the divorce, Mary began living with Randy Martin. Mary and Randy were later married. Sometime during their marriage, A.R. alleged that Randy had sexually molested and physically battered her. After an investigation, A.R. and C.R., nine and eight years old respectively, were removed from their mother's home and placed in the custody of their paternal grandparents, Olla Mae and Bobby Russell. The children lived with Olla Mae and Bobby Russell, for approximately three years.

When A.R. was approximately ten years old, and C.R. was nine years of age, and still in Olla Mae and Bobby Russell's care, A.R. and C.R. began visiting their father, Russell, in Neshoba County. A.R. alleged that during each of these visits, Russell had oral sex with her. C.R. also alleged that during some of his visits, Russell had oral sex with him.

In August of 1990, C.R. moved in with Russell. Russell married Donna in October of 1990. Around November 4, 1990, A.R., age thirteen, moved into the house with Russell, Donna, and C.R. A.R. alleged that within a few weeks after she moved in, Russell had sexual intercourse with her for the first time. In addition to having sexual intercourse with her, A.R. also alleged that it was Russell's idea that she and C.R. have sexual intercourse. A.R. explained that Russell "didn't actually make [them have sexual intercourse], but he convinced [them] that it was right." A.R. alleged that Russell told her and C.R. that they "would be able to teach each other, and it would make [them] more like women and men."

Likewise, C.R. alleged that after he moved in with Russell, Russell had oral sex with him on numerous occasions, and that sometimes Russell would ask C.R. to perform oral sex on Russell. C.R. further alleged that after A.R. moved into the house with them, Russell made him and A.R. have sex with each other. C.R. explained that after Russell told him and A.R. to have sexual intercourse with each other, Russell would watch them complete the act. Russell allegedly whipped or grounded C.R. on those occasions when C.R. refused to have sexual intercourse with A.R. However, at other times, Russell promised to give C.R. material things if C.R. had sexual intercourse with A.R.

During the time that the alleged sexual abuse was occurring, A.R. visited Rev. John Rue with one of her friends, who had also allegedly been sexually abused. While visiting Rev. Rue with the friend, A.R. confided in Rev. Rue that Russell was having sexual intercourse with her.

On November 4, 1992, Linda Palmer, a social worker with the Kemper County Department of Human Services, along with Rev. Rue and the sheriff, removed A.R. and C.R. from Russell's home. A.R. and C.R. were placed in the foster home of Barbara and Jerry McCollum.

On March 4, 1993, Russell was indicted by the Neshoba County grand jury under a multi-count indictment and charged with two counts of capital rape in violation of section 97-3-65(1) of the Mississippi Code of 1972, as amended, and one count of sexual battery in violation of section 97-3-95. The indictment charged Russell with (1) the capital rape of A.R., a female child under the age of fourteen years in violation of section 97-3-65 (1) of the Mississippi Code of 1972; (2) willfully, unlawfully, and feloniously raping, ravishing and carnally knowing A.R. by forcing C.R., a male child under the age of fourteen years, to perform sexual intercourse with A.R., contrary to and in violation of section 97-3-65; and (3) willfully, unlawfully, and feloniously engaging in sexual penetration with C.R., a male child under the age of fourteen years, by performing fellatio upon C.R., in violation of section 97-3-95.

On March 8, 1993, Russell filed a Rule 412 motion in which he requested that he be allowed to introduce evidence of prior sexual behavior of the alleged victims and evidence of past false allegations made by the alleged victims.

In support of his theory of the case, as delineated in the Rule 412 motion, at trial, Russell presented evidence to show A.R.'s and C.R.'s propensities for lying and being untruthful. Through his witnesses, Russell purported to show that because the children had previously made false allegations against their stepfather and grandparents, they were lying about the acts that they alleged he committed on them, or the acts that they alleged that he caused them to commit with each other. Russell also denied having had sex with either of the children.

The jury rejected Russell's theory of the case and found him guilty of two counts of capital rape, and one count of sexual battery. Russell received two life sentences on the capital rape charges, to run concurrently, and ten years on the sexual battery, to run consecutively to the life sentences.

II.

> WHETHER THE TRIAL COURT ERRED IN ALLOWING LINDA PALMER AND JACKIE SPEARSON TO TESTIFY REGARDING "COMMON CHARACTERISTICS" EXHIBITED BY SEXUAL ABUSED VICTIMS AND TO TESTIFY THAT A.R. AND C.R. EXHIBITED THESE CHARACTERISTICS?

Russell complains that the trial court erred in allowing social workers, Linda Palmer and Jackie Spearson, to give testimony relevant to the common characteristics of sexual abused victims since they were not qualified as expert witnesses pursuant to Rule 702 of the Mississippi Rules of Evidence. Russell explains that a witness offering an opinion which indicates that a child has been

sexually abused based upon observations of certain generalized behaviors and characteristics must be accepted by the trial court as an expert, before such testimony may be presented.

Relying on *Hall v State*, Russell first argues that the trial court erred in admitting Palmer's testimony. Russell's reliance on *Hall*, to argue that a social worker could not testify about a sexual abused victim's characteristics and behavioral patterns problems is misplaced. After the defendant in *Hall* was convicted for the sexual battery of his son, he complained that Debbie Graham, a social worker with the Hinds County Human Services Officer (Formerly the Department of Public Welfare), had testified about "child abuse syndrome" over his timely objection, and had given testimony on the common patterns that occur in families where abuse is present. *Hall v. State*, 611 So. 2d 915, 918 (Miss. 1992). In upholding the trial court's decision to admit Graham's testimony, the Mississippi Supreme Court first noted that Graham did not testify that the child had been sexually abused. However, the court stated "[e]ven so, Graham has worked for the Department of Public Welfare for over 10 years; and the trial court properly admitted her testimony as a lay witness under Miss. R. Evid. 701." *Id.*

In the instant case, after Russell objected that Palmer had not been properly qualified as an expert, the trial court, relying on the court's holding in *Hall*, overruled the objection. The trial court made the following findings:

> BY THE COURT: Well, *Hall versus State* recognizes that a social worker may give this type of testimony. A doctor or a social worker can give testimony, so your objection is overruled. She has testified to her working experience, her education, and her background. Your objection is overruled. Bring in the jury.

However, prior to the jury's returning to the courtroom, the trial court apparently recognized that its ruling was not clearly stated on-the-record and continued with its findings as indicated below:

> BY THE COURT: Mrs. Palmer has been called as a witness for the State of Mississippi. She has testified that she has a B.S. Degree in Social Work. I believe that was your testimony; was it not?

A: Yes, sir.

> BY THE COURT: And that she has worked in her field for all these many years with the Department of Human Resources in Kemper County, Mississippi. She has been called upon to give substitive [sic] testimony regarding the common behavior of those children who have been abused by adults.
>
> *Hall versus State*, 611 So. 2d 918, recognizes and accepts this testimony. With this Court being of the opinion that the testimony of Mrs. Palmer would be

> helpful to the Jury to decide the issues of this case overrules the objection of the Defendant and permits this lady to give her opinion and give her testimony regarding common behavior of a child abuse victim. Your objection is overruled. Bring in the Jury, please.

"The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992) (citations omitted). Our supreme court has determined that a social worker may give testimony on the common characteristics and behavior of children who have been sexually abused.

In the instant case, Palmer gave testimony concerning the common characteristics and behavior of sexually abused children. Under *Hall*, the court contemplated that such evidence may be presented through a social worker qualified to testify on the matter. *Hall*, 611 So. 2d at 918. We find that the trial court did not abuse its discretion in admitting Palmer's testimony.

Russell also complains that testimony given by Palmer that A.R. and C.R. exhibited signs and characteristics of sexual abused victims was tantamount to Palmer giving a lay opinion that A.R. and C.R. were sexually abused. We disagree. The testimony of which Russell complains is as follows:

> Q: (Turner) In your talking and dealing with A.R. during the course of things, could you tell us whether, or not, A.R.'s behavior pattern has been consistent with that of a sexually abused child?
>
> BY MR. LEWIS: Judge, I'm going to object to that.
>
> BY THE COURT: Overruled. You can answer.
>
> A: Yes, sir.
>
> Q: (Turner) Have you also been dealing with C.R.?
>
> A. Yes.
>
> Q: And could you tell us, likewise, as to C.R. whether, or not, the behavior pattern that he has exhibited is consistent with that of a sexually abused child?
>
> A: Yes, it has.
>
> Q: Mrs. Palmer, in your dealing with A.R. and C.R., have both of them confided in you, with reference to what they say has happened to them?
>
> A: Yes, they have.

As in *Hall*, and as indicated above, the social worker in the instant case did not testify that A.R. and C.R. had been abused. Instead, Palmer testified that A.R.'s and C.R.'s behavior patterns were

consistent with that of sexually abused children. This assignment of error is without merit.

Russell next complains that Spearson's testimony was impermissible because although she was not an expert, she testified that A.R. and C.R. were abused because they exhibited the common characteristics and behavior of sexually abused children. The State concedes that Spearson was never formally accepted by the trial court as an expert. However, it asserts that because Russell failed to raise a contemporaneous objection, he is barred from raising this in his appeal.

The decision to hold admissible Spearson's testimony describing A.R.'s and C.R.'s behavior patterns as common with that of sexually abused children is within the trial judge's discretion absent an abuse of that discretion. *Hall*, 611 So. 2d at 918; *Wade v. State*, 583 So. 2d 965, 967 (Miss. 1991); *Lewis v. State*, 573 So. 2d 719, 722 (Miss. 1990).

Under Rule 702, Spearson was more than qualified to give expert testimony on the common symptoms and behavior consistent with sexual abuse although she was not formally presented as an expert. Spearson graduated from the Mississippi University for Women in 1974, with an undergraduate degree in Social Work. She received a Master's degree from the University of Southern Mississippi, in 1981, in Counseling Psychology. She is a licensed professional counselor in the State of Mississippi, and has been counseling sexually abused children for more than twenty (20) years. Spearson's employment includes working with sexually abused children at the Mississippi State Hospital for two (2) years, and working with families of sexually abused children for eighteen (18) years at Weems Mental Health. At the time of the trial, Spearson was employed as a sexual crisis counselor at Wesley House in Meridian, Mississippi. We find that the trial court did not abuse its discretion in admitting her testimony.

Russell also complains that the trial court erred in allowing Spearson to testify that A.R. was sexually abused because she exhibited some of the common characteristics and behavior of sexually abused children. We disagree.

Having found that Spearson was more than qualified to give expert testimony, although not formally presented as an expert, we find that this complaint is without merit. As our supreme court explained in *Hall*, "[e]xpert testimony explaining such behaviors can assist the jury in understanding the evidence and determining facts in issue," and "should be admitted unless its probative value is substantially outweighed by the potential for unfair prejudice or confusion of the jury." *Hall*, 611 So. 2d at 919.

In addition to being without merit, this portion of the assignment of error is also procedurally waived. Russell asserts that Spearson gave testimony, over his objection, that A.R.'s demeanor and behavior patterns were similar to those of other sexually abused children. However, the record clearly indicates that Russell did not object to the question or response to Spearson in regard to A.R., although he objected and an objection was sustained when the same question was asked with regard to C.R.. This assignment of error is without merit.

III.

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF BARBARA MCCOLLUM AND REV. JOHN RUE?

Russell objects to the testimony of Barbara McCollum and Rev. John Rue as inadmissible hearsay. First, Russell contends that C.R. and A.R.'s foster parent, Barbara McCollum, was permitted to testify, over an objection, regarding out-of-court statements that C.R. made to her. Here, Russell objects to all of the hearsay statements admitted through McCollum.

However, at trial, as indicated below, Russell did not object to the following hearsay statements:

> Q: With reference to any sexual activity between C.R. and A.R., did either or both of the children say anything about what their father did about that?
>
> A: Would you like to know the one that came to me first?
>
> Q: Yes, ma'am.
>
> A: C.R. came to me crying. I was cooking in the kitchen, and he told me. He said that he had to tell somebody that it was overburdening him. This is what's wrong. He said, "My daddy forced us to have sex together." He said his father told him, "A.R. had been broken in and what better place to learn sex than from my other sister, who had been already used."

Russell argues that the trial court should have excluded the following statements: "My daddy forced us to have sex together," and "A.R. had been broken in and what better place to learn sex than from my other sister, who had been already used."

Because Russell did not make a contemporaneous objection to the question posed by the State or to McCollum's response, this issue is not properly before this Court. Under Mississippi law, "objections must be made at the time offered in order to object to evidence via appeal." *Department of Human Servs. v. Moore,* 632 So. 2d 929, 933 (Miss. 1994).

The record does indicate that Russell objected to some of McCollum's hearsay statements. The following colloquy transpired:

> Q: Did he say who had broken her in?
>
> > BY MR. LEWIS: Now, Judge, we are going to object to this. It certainly is remote from the time charged in this indictment of being sometime in 1993. It is not spontaneous of any outcry of rage, and the proof is certainly not probative in this cause of action.
> >
> > BY MR. TURNER: We would sight [sic] *Hosper vs. State.*
> >
> > BY THE COURT: Overruled.
>
> Q: (Turner) Mrs. McCollum, did he say who had broken Amy in?
>
> A: Yes, he did.

Q: Who was that?

A: Her father.

Q: Now, with regard to any sexual activity strictly between Donnie Russell and C.R., did he give you that information?

A: Yes, he did.

Q: And what did he say?

A: He--

BY MR. LEWIS: Judge, for reasons we have previously stated, we will object to this too.

BY THE COURT: Overruled.

Q: (Turner) The Judge says you may answer.

A: He told me that his father had performed oral sex on him on a regular basis.

BY MR. TURNER: I believe that's all, Your Honor.

The trial court erred in not excluding, as hearsay, McCollum's statements. However, at the time the question was asked, both C.R. and A.R. had testified to the sexual abuse that they had encountered at the hands of their father. The jury had heard C.R.'s account of how Russell performed oral sex with him on numerous occasions, and how Russell both encouraged and forced C.R. and A.R. to have sex with each other. Likewise, the jury had heard A.R.'s testimony that within a few weeks after she moved in with Russell and his wife, Russell took her virginity, and thereafter had sexual intercourse with her on numerous occasions. A.R. had also testified that Russell told her and C.R. that it was okay for them to have sex with each other because they "would be able to teach each other, and it would make [them] more like women and men." Read in context, McCollum's statement that C.R. told her that Russell told him that he (Russell) had broken A.R. in was essentially the evidence presented by A.R. when she testified that Russell took her virginity when she was thirteen.

Because the jury had C.R.'s and A.R.'s testimonies on the sexual abuse, the hearsay evidence offered through McCollum was "cumulative, thus harmless." *Earl v. State*, No. 92-KA-00970-SCT, 1995 Miss. LEXIS 624, at *1 (Miss. Dec. 21, 1995). This assignment of error is without merit.

Russell next complains that Rev. John Rue was permitted to testify, over an objection, regarding the hearsay statements that A.R. made to him.

However, because a review of the proceedings indicates that Russell did not object to the testimony of Rev. Rue on the basis of hearsay, this issue is not properly before this Court. "A defendant is procedurally barred from raising an objection on appeal that is different than that raised at trial." *Jones v. State*, 606 So. 2d 1051, 1058 (Miss. 1992); *Willie v. State*, 585 So. 2d 660, 671 (Miss.

1991); *Thornhill v. State*, 561 So. 2d 1025, 1029 (Miss. 1989). "A trial judge will not be found in error on a matter not presented to him for decision." *Jones*, 606 So. 2d at 1058 (citations omitted).

IV.

> WHETHER THE TRIAL COURT ERRED IN ALLOWING A.R. RUSSELL TO TESTIFY REGARDING OTHER POTENTIAL VICTIMS NOT NAMED IN THE INDICTMENT?

Russell contends that the trial court erred in admitting A.R.'s testimony regarding other potential victims not named in the indictment. Russell argues that even though the trial court sustained his objection, the damage had been done when the jury received the information.

In the instant case, after the trial court sustained defense counsel's objection, counsel did not ask the trial court to instruct the jury to disregard the testimony. "It is the rule in this State that where an objection is sustained, and no request is made that the jury be told to disregard the objectionable matter, there is no error." *Perry v. State*, 637 So. 2d 871, 874 (Miss. 1994) (citations omitted). This assignment of error is without merit.

V.

> WHETHER THE TRIAL COURT ERRED WHEN IT REFUSED DEFENDANT'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL?

A "motion for j.n.o.v. tests the legal sufficiency of the evidence supporting the verdict." *Goodwin v. Derryberry Co.*, 553 So. 2d 40, 42 (Miss. 1989) (quoting *Stubblefield v. Jesco*, 464 So. 2d 47, 54 (Miss. 1984)). In reviewing the evidence, this Court:

> [c]onsider[s] the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [we are] required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Munford, Inc. v. Fleming, 597 So. 2d 1282, 1284 (Miss. 1992). When addressing whether the trial court erred in refusing a motion for a new trial, this Court employs an abuse of discretion standard of review. *Harvey v. Wall*, 649 So. 2d 184, 186 (Miss. 1995).

When viewed in the light most favorable to the State, and giving the State the benefit of all favorable inferences that may be reasonably drawn from the evidence, the following evidence supports the

verdicts: C.R. testified that Russell forced him and his sister to have sex with each other while he watched. Russell allegedly whipped or grounded C.R. on those occasions when C.R. refused to have sexual intercourse with A.R. However, at other times, Russell promised to give him material things if he had sexual intercourse with A.R. C.R. also testified that Russell performed oral sex on him.

A.R. testified that Russell convinced her and C.R. that it was all right for them to have sex with each other. Russell told them that by having sex together, they would "be able to teach each other, and it would make [them] more like women and men." There was testimony that Russell had oral sex with A.R. prior to her thirteenth birthday. When A.R. was thirteen, Russell had sexual intercourse with her.

Donna Russell, Russell's wife during the time period that the sexual abuse allegedly occurred, testified that Russell called her by A.R.'s name while he was kissing her, and that on a particular night, she awakened at approximately midnight and discovered Russell was not in the bed, but was in A.R.'s room. Donna also gave testimony that Russell and A.R. had a sexually transmitted disease. We find that this evidence is substantial and supports the jury's verdict of guilty on all charges. This assignment of error is without merit.

As an alternative, Russell argues that the trial court should have granted a new trial. A motion for a new trial challenges the weight of the evidence and "implicates the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). The test for reviewing an overruled motion for a new trial is as follows: "New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice." *Id.* (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). On review, we accept as true all evidence favorable to the State and will only reverse for abuse of discretion.

The evidence at trial was of the necessary weight and sufficiency to sustain a guilty verdict. Considering the evidence in the light most favorable to the verdict, the evidence is not such that reasonable and fair-minded jurors could only have found the accused not guilty. Furthermore, if all the evidence that is favorable to the State is considered true, the lower court did not abuse its discretion in overruling the motion for a new trial. Therefore, the trial court properly denied Russell's motion for JNOV and motion for a new trial.

For the foregoing reasons, we affirm the convictions and sentences of the trial court.

THE NESHOBA COUNTY CIRCUIT COURT CONVICTION OF CAPITAL RAPE AND LIFE SENTENCE IN COUNT I, AND CAPITAL RAPE AND LIFE SENTENCE IN COUNT II TO RUN CONCURRENTLY TO COUNT I, AND CONVICTION OF SEXUAL BATTERY AND SENTENCE OF TEN YEARS TO RUN CONSECUTIVELY TO COUNT I AND COUNT II, ARE AFFIRMED. NESHOBA COUNTY IS TAXED WITH ALL COSTS OF THIS APPEAL.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.