IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00262 COA

RODERICK WILLIAMS A/K/A ROGER WILLIAMS

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. JOHN LESLIE HATCHER

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

AZKI SHAH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL: RAPE

TRIAL COURT DISPOSITION: GUILTY: SENTENCED TO TWELVE YEARS IN MDOC, WITH SIX YEARS SUSPENDED. SENTENCE CONSECUTIVE TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED.

BEFORE THOMAS, P.J., COLEMAN, DIAZ, SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Roderick Williams (Williams) was tried and convicted of rape in the Coahoma County Circuit Court. Aggrieved from the judgment, Williams appeals to this Court asserting the following issues: (1) that the trial court erred in allowing Lisa Lilly, a child therapist employed by the Mississippi Department of Mental Health, to testify regarding the victim's allegations; (2) that the court erred in finding the victim competent to testify at trial; (3) that the court erred in allowing witnesses to testify about statements made to them by the victim under Mississippi Rules of Evidence 803(25); and (4) that the court erred in allowing Sister Durand to testify as an expert witness. Finding no reversible error, we affirm the judgment.

FACTS

The Appellant, Roderick Williams (Roderick) was about thirteen years old during the time alleged in the indictment. The victim, W.W., was three years old at the time. W.W was living with a woman named Dorotha, (known as "Fee") during the period of abuse. W.W.'s mother, Francis, was in and out of an alcohol rehabilitation program. Francis had a live-in boyfriend, Lewis Williams, Jr., ("Slam"). Roderick, the Appellant, is Slam's brother . Slam also had a son, Lewis Williams, III, whom they called "Comfort." Fee is Slam and Roderick's mother.

From 1991 through 1992, W.W. and her two brothers lived with various friends and relatives. After living with a string of relatives, W.W. went to live with V.W., her aunt; her brothers were sent to live with two other aunts. After W.W. moved in with V.W., V.W. noticed some health problems, and also peculiar behavioral problems with W.W. At that point, V.W. took W.W. to seek professional help. Several professionals examined W.W..

W.W. testified that Roderick, along with others, had sexually molested her. She testified that while she was living at Fee's house, Roderick touched her. She testified that he was on top of her and that he hurt her private parts with his private parts by twisting and turning. When she cried, he put his hand over her mouth so that nobody could hear her crying. Both of W.W.'s brother's, who slept in the same room with her when they lived with Fee, testified that they saw Roderick having sex with W.W. and on top of W.W. When one of her brothers told Fee about what he saw, she refused to believe him. The findings from W.W.'s medical exam were consistent with a child who had been sexually molested. Roderick denies that he ever molested W.W.

DISCUSSION

I. EXPERT: LISA LILLY

Williams' first argument is that the trial court erred in allowing Lisa Lilly to testify about whether it appeared that W.W. fabricated the events that happened. Lisa Lilly is a child therapist that

interviewed and examined W.W. Williams cites to the cases *House v. State* and *Goodson v. State* in support of this argument. *Goodson v. State*, 566 So. 2d 1142 (Miss. 1990); *House v. State*, 445 So. 2d 815 (Miss. 1984). The *House* case held that a hypnotist could not give an opinion on the veracity of the accused or the prosecutrix. *House*, 445 So. 2d at 822. The holding in the *House* case is rather narrow because it deals with the context of one under hypnosis, and thus, is not particularly persuasive in this instance.

In the *Goodson* case, the court stated in dicta that expert witnesses such as psychologists and psychiatrists are not experts at discerning the truth. Therefore, they may not give an opinion on the truthfulness of a particular witness. *Goodson*, 566 So. 2d at 1153.

The testimony to which Williams objects is as follows:

> Q: Could you tell whether or not this appeared to be spontaneous or any signs of coaching or prompting in that area?
>
> A: It was very spontaneous. We were talking about something else and she just provided the information freely and without prompting. It was not coached at all. I interviewed the child on many times after this and she would talk about incidences of where she alleges child sexual abuse and she never appeared to be coached in any way or fabricating, due to the fact of the way she could pick up in the middle--[defense objection and motion to strike both of which were overruled.]
>
> A: (resumed) I was saying that she did not appear to be fabricating because she was able to pick up in the middle of describing the incident and at times she would show different emotions. Sometimes she would feel uncomfortable while she was talking about it and other times she did not. She did not in my opinion appear to be coached at all.

To the extent that Ms. Lilly's testimony expressed an opinion of W.W.'s truthfulness, allowing it was error. *Jones v. State*, 606 So. 2d 1051, 1058 (Miss. 1992). However, it is apparent from the above testimony, that the witness was merely responding to the question of whether the victim appeared to be spontaneous or coached in her responses. Taking her testimony as a whole, and in context, it reflects that she was merely explaining the spontaneity of W.W.'s responses. This line of testimony concerning W.W.'s spontaneity is certainly admissible even if Ms. Lilly was not an expert witness because it is based on the witness' perception of W.W. during her interviews. M.R.E. 701(a). Taking Ms. Lilly's complete response, whatever error made in admitting her opinion on truthfulness was harmless because her full answer was in response to the issue of W.W.'s spontaneity. There is no reversible error here.

II. COMPETENCY OF W.W.

Williams argues that the lower court did not hold a hearing to determine whether the victim was

competent to testify. He claims instead that the lower court held a hearing to determine whether the statements made by the victim to others would fall under the tender years exception to the hearsay rule stated in the Mississippi Rules of Evidence 803(25). After reviewing the present record, we find that this issue is really based on form over substance.

Rule 601 states that every person, subject to certain exceptions not applicable in the instant case, is competent to be a witness. M.R.E. 601; *see Eakes v. State*, 665 So. 2d 852, 869 (Miss. 1995). The question of whether a child is a competent witness is generally committed to the sound discretion of the trial court. *Eakes*, 665 So. 2d at 869. Before allowing a child of tender years to testify, the trial court should affirmatively determine that the child has the ability to perceive and remember events, to understand and answer questions intelligently, and to comprehend and accept the importance of truthfulness. *Bowen v. State*, 607 So. 2d 1159, 1160 (Miss. 1992).

In the present case, both the prosecutor and the defense attorney had an opportunity to question W.W. in the "803(25)" hearing conducted in the judge's chambers before trial. The defense then specifically asked the judge to determine whether W.W. was competent to testify. Accordingly, the court decided that W.W. was competent. The record reflects that W.W. was attentive and cooperative. She knew the difference between numbers and letters, and knew the reverend of the church she attended. She remembered living with different friends and relatives, and was able to state the basic relationship between the people she had lived with, and the people around her. She knew the difference between telling the truth and telling a story, and that telling a story would be wrong. The trial court was acting within its discretion when it found W.W. to be a competent witness. There is no merit to this issue.

III. RULE 803(25)

Williams makes a blanket argument that the trial court erred by allowing "everyone" who interviewed W.W. to testify about her statements to them under Rule 803(25) of the rules of evidence. Rule 803(25) provides:

> [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.

M.R.E. 803(25).

The comment to the rule lists several factors for the trial court to consider when determining whether there is an indicia of reliability to the statements. Williams argues that some people who testified about W.W.'s statements did not actually talk to W.W. until a year after the time that the rape occurred. Williams argues that this casts doubt on the reliability of her statements, and thus the trial court erred in allowing such testimony.

When determining the admissibility of a statement made under Rule 803(25), the trial judge must determine whether the statement exhibits trustworthiness and reliability. The court must look to such factors as spontaneity and consistent repetition, the mental state of the child, the use of terminology unexpected of a child of similar age, and lack of motive to fabricate. *Johnson v. State*, 666 So. 2d 784, 796 (Miss. 1995). These factors, however, are not exclusive. *Johnson*, 666 So. 2d at 796. The trial court must make an overall determination of whether "the child declarant was particularly likely to be telling the truth when the statement was made." *Id.* (citing *Griffith v. State*, 584 So. 2d 383, 388 (Miss. 1991)).

As long as the court makes an overall determination that the child declarant was particularly likely to be telling the truth when the statement was made, time is only one of the factors to consider. *Johnson*, 666 So. 2d at 796. In the present case, the court ruled that the testimony of Sheriff Thompson, Evelyn Jossell, and Lisa Lilly were admissible regarding the statements that W.W. had made to them. The trial judge made this finding after considering the factors set forth in the comment to the rule, stating particularly that one factor to be considered is whether more than one person heard the statements, which factor existed in the present case. It is apparent from the record that the trial court considered the necessary factors in determining the reliability of the statements. Accordingly, we find no error.

IV. EXPERT: SISTER MANETTE DURAND

Williams' final argument contends that the trial court erred in allowing Sister Durand to testify as an expert witness. Sister Durand testified as an expert witness in her capacity as a nurse practitioner. Drawing from the Appellant's brief, the Appellant seems to be arguing under the mistaken premise that a nurse practitioner does not exist in Mississippi. Section 73-25-35 of the Mississippi Code specifically recognizes the designation of a nurse practitioner. Miss. Code Ann. § 73-25-35 (Rev. 1995). The code section states:

> Registered nurses who are licensed and certified by the Mississippi Board of Nursing as nurse practitioners are not prohibited from such nursing practice, but are entitled to engage therein without a physician's license.

Miss. Code Ann. § 73-25-35 (Rev. 1995).

This Court has set out the test under Rule 702 of the rules of evidence that governs expert testimony. The inquiry is two-fold: (1) Is the field of expertise one in which it has been scientifically established that due investigation and study in conformity with techniques and practices generally accepted within the field will produce a valid opinion; and (2) will the proposed testimony assist the trier of fact? *Hall v. State*, 611 So. 2d 915, 919 (Miss. 1992) (citations omitted). Once it is determined that expert testimony will assist the trier of fact, the expert must be adjudged qualified in his field. *Couch v. City of D'Iberville*, 656 So. 2d 146, 152 (Miss. 1995). "The adjudication of whether a witness is legitimately qualified as an expert is left to the sound discretion of the trial judge." *Couch*, 656 So. 2d at 152.

Under this test for expert witnesses set forth in Rule 702 of the rules of evidence, Sister Durand is certainly qualified. Sister Durand earned her Bachelors of Arts in Nursing from the College of Saint Catherine in St. Paul, Minnesota. After studying at the University of Alabama to become a nurse

practitioner, she became nationally certified. She is licensed to practice in Mississippi, and was accepted by the lower court as qualified to testify as an expert in her capacity as a nurse practitioner. Sister Durand testified that as a certified nurse practitioner, she is qualified to diagnose and treat patients, as well as give prescriptions. We find that the lower court was acting within its discretion when it accepted Sister Durand as an expert within her designation as a nurse practitioner.

This Court does not find any errors alleged in the briefs that warrant reversal. Although not raised as an issue on appeal, we feel compelled to point out the fact that the Appellant was only fourteen years old at the time he was sentenced. The trial court sentenced him to serve twelve years at the Mississippi Department of Corrections with six years of the sentence suspended. Naturally, we were concerned about this sentence because of the age of the Appellant. During the sentencing hearing, the trial judge was careful to stress on the record that he had spoken to officials at the Department of Corrections, and they had reassured him that the Appellant would be placed in a protective custody type of situation. Therefore, we are satisfied that certain precautions will be taken to separate the Appellant from certain situations because of his young age. Accordingly, we affirm the judgment of the lower court.

THE JUDGMENT OF CONVICTION IN THE COAHOMA COUNTY CIRCUIT COURT OF RAPE AND SENTENCE OF TWELVE (12) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SIX (6) YEARS SUSPENDED AND TO MAKE FULL RESTITUTION TO VICTIM IS AFFIRMED. THE SENTENCE IMPOSED IN THIS CAUSE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

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