IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-01204 COA

JAMES ROWE

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. E. J. SMITH, JR.

COURT FROM WHICH APPEALED: TUNICA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RICHARD B. LEWIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL: CAPITAL RAPE

TRIAL COURT DISPOSITION: GUILTY; SENTENCED TO LIFE IN PRISON

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

SOUTHWICK, J., FOR THE COURT:

James Rowe was convicted of raping his eight-year-old daughter and sentenced to life imprisonment.

He appeals his conviction, contending that his child victim should have been subjected to psychological examination by his physicians alleging juror misconduct and challenging the trial court's refusal to admit several defense exhibits in evidence. We affirm.

FACTS

Based on the statements of his daughter and son, Rowe was arrested in 1992 and charged with the rape of his eight-year-old daughter. Viewed in the light most favorable to the verdict, the evidence supports that the victim and her thirteen-year old brother were asleep in the living room of their home when their father called her into his bedroom. Her father took off her clothes and raped her. The victim's brother heard his sister crying "stop, it hurts" from their father's bedroom, to which their father replied "shh, keep it down." When the brother went to the door, he discovered their naked father laying on top of his sister. A clinical psychologist who had examined the child at a Memphis hospital testified that the child displayed typical characteristics of sexual abuse. In addition, an emergency room physician testified that, while he found no signs of physical trauma to the child, he detected acid phosphatase that may have come from seminal fluid. A nurse testified concerning the history of the rape given to her by the child upon admission to the emergency room. In addition, the nurse testified concerning her observations of swollen, raw, and red genitals in the child.

The defense presented an alternative view. A school teacher and a school principal testified concerning a lack of a propensity for truthfulness on the part of Rowe's son who testified against him at trial. A babysitter confirmed this testimony and gave her opinion that the son had a strong influence over the victim's ability to tell the truth. Rowe's stepfather also testified that the victim and her brother were untrustworthy. Rowe called his sister to testify concerning the cause of the victim's vaginal irritation, which she attributed to a period of bed wetting. Rowe's sister also testified that the victim did not appear to be distressed on the way to the emergency room and that she had heard the victim's brother tell her that they were going to the hospital because their father had raped her. Rowe himself testified, denying that he had raped his daughter.

The defense also called a forensic scientist employed by the State Crime Lab who testified that there was no exchange of pubic hairs—militating against the conclusion that the child had been raped. A forensic serologist, also employed by the State Crime Lab, testified that she found no seminal fluid in any of the samples taken from the victim. The serologist rebutted the testimony of the emergency room physician by testifying that acid phosphatase is not derived strictly from seminal fluid, but that it can also be found in vaginal fluids. A board certified obstetrician and gynecologist testified as an expert for the defense that, based on his review of the records in this case, there was insufficient evidence to conclude that the child had been raped. He attributed the irritation of the vaginal area to the history of bed wetting and testified that the absence of a hymen was not significant.

After hearing this evidence, the jury deliberated and returned a guilty verdict. The trial court sentenced Rowe to life imprisonment.

DISCUSSION

1. Psychological Examination of Children

Prior to trial, Rowe moved to have the victim psychologically examined to evaluate her ability to tell

the truth. The trial court denied the motion. On appeal, Rowe urges this Court to allow such psychological examinations in circumstances where the sole evidence of guilt is the testimony of the victim and the physical evidence is unsupportive of the State's case. Rowe relies on authorities from other states in which the issue has been decided. Rowe and the State acknowledge that this question is not one which the supreme court has explicitly addressed.

Nonetheless, there are useful precedents from the supreme court. In one case, the court was faced with a conviction of touching a child for lustful purposes. *See Baine v. State*, 604 So. 2d 249, 251 (Miss. 1992). Among other challenges, the defendant argued that a psychologist could not testify as an expert since his opinion was based on a child victim's statements that lacked credibility. *Id.* at 254. In rejecting the challenge, the court held that the child's "credibility was a question for the jury." *Id.* The decision in *Baine* came the same year as the court's decision in *Jones v. State*, 606 So. 2d 1051 (Miss. 1992). In *Jones*, the supreme court held that allowing testimony concerning a child's propensity for truth telling is error. *Jones*, 606 So. 2d at 1057-58 (citations omitted). A majority of the court in *Jones* reaffirmed a plurality holding in the earlier case of *Goodson v. State*, 566 So. 2d 1142 (Miss. 1990). There, in holding that a trial court may not admit expert opinion testimony concerning the veracity of a child's allegations of sexual abuse, the plurality stated:

> Put generally, the question is whether . . . the trial court may admit expert opinion testimony that a child alleged to have been the victim of sexual abuse is telling the truth. In *Williams v. State*, 539 So. 2d 1049, 1051 (Miss. 1989), we said such testimony would be 'of dubious competency.' We repeated the doubt in *Hosford* [*v. State*, 560 So. 2d 163, 166-67 (Miss. 1990)]. *Hall v. State*, 539 So. 2d 1338, 1341 n.1 (Miss. 1989), recognizes this as a 'hotly disputed legal issue,' but did not address the question. Before Rule 702 became law, the Court had held that a psychologist who hypnotized an eight-year-old girl could not testify that in his opinion the girl was telling the truth when under hypnosis she said the defendant had sexually abused her. *House v. State*, 445 So. 2d 815, 821-23 (Miss. 1984).
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> The law forbids use as evidence the results of a lie detector test. On what basis can the court find that a physician's opinion of the truthfulness of a child is more reliable than a lie detector's 'opinion' of the truthfulness of the person tested? One authority reports 'that behavioral scientists themselves recognize that they have no particular expertise in evaluating the credibility of a child abuse complainant.' [Authorities] have carefully considered the point and conclude that '[i]t is appropriate to prohibit expert testimony that a child told the truth on a particular occasion.' And the overwhelming majority of courts preclude such testimony.

Goodson, 566 So. 2d at 1153 [citations omitted]. In light of these authorities, we conclude that the trial court correctly refused Rowe's request to have his daughter examined by a psychiatrist to evaluate her credibility.

We note authorities exist in other states that have permitted independent evaluations in somewhat

similar circumstances. *See, e.g., State v. Rhone,* 566 So. 2d 1367, 1368 (Fla. Ct. App. 1990). In the present case the essential evidence comes almost exclusively from the victim and her brother, while the physical evidence is minimal. We cannot consistently with the binding supreme court precedents establish a rule requiring such evaluations. The supreme court is the proper place to readdress the overall issue.

2. Juror Misconduct

Following the trial, Rowe urged the court to grant him a new trial based on information he learned concerning statements made by the jury foreman. Rowe argued that the statements demonstrated that the foreman had prejudged Rowe's case and had not answered questions truthfully during *voir dire* when asked whether he could fairly and impartially consider the case. A witness called by Rowe to support his position testified that she had a conversation with the foreman prior to the calling of a jury venire in which the foreman told her that a man who rapes his daughter ought to be hung and castrated. The witness conceded, however, that the foreman did not state that he believed Rowe to be guilty and did not state that he had come to a conclusion about the case which had not yet come to trial.

The foreman responded during *voir dire* that he could fairly and impartially try Rowe's guilt, presuming his innocence. That *voir dire* pledge is not negated by the later ambiguous testimony. *See Chase v. State*, 645 So. 2d 829, 846-47 (Miss. 1994) (citation omitted).

3. Admission of Evidence

At trial, in an effort to impeach the testimony of the victim's brother, Rowe sought to introduce medical records concerning treatment for depression and other psychological problems received by the brother following Rowe's arrest. The trial court refused to admit the evidence. On appeal, Rowe contends that excluding the records was error and that he should have been permitted to use them to impeach the boy's credibility. We do not agree.

Setting aside whether Rowe laid the proper foundation for admitting the records at trial, it is clear that the records are improper impeachment evidence. The records do not address the boy's credibility, nor do they demonstrate any evidence of bias, prejudice, or interest of the boy against his father. *See* M.R.E. 616. Consequently, they were irrelevant and properly excluded.

However, Rowe also argues that, because the records indicated that the boy engaged in incidents of sexual aggression at school, the evidence was relevant to present the jury with another possible suspect for the victim's rape. In short, Rowe wanted to implicate his son in the rape of his daughter. The records do not indicate that the boy demonstrated any sexual aggression toward his sister. Accordingly, the trial court did not abuse its discretion in refusing to admit the records.

THE JUDGMENT OF THE TUNICA COUNTY CIRCUIT COURT OF CONVICTION OF RAPE: CARNAL KNOWLEDGE OF CHILD UNDER 14 YEARS OLD AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

IS AFFIRMED. SENTENCE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO TUNICA COUNTY.

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