IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00734 COA

FRANK JACOB HAYES **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

DATE OF JUDGMENT:	04/19/95
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	CLAIBORNE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT L. MORAN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
DISTRICT ATTORNEY:	MARTIN, ALEXANDER C.,
NATURE OF THE CASE:	CRIMINAL - FELONY - MURDER
TRIAL COURT DISPOSITION:	SENTENCED TO LIFE IMPRISONMENT WITH THE MDOC
DISPOSITION:	REVERSED AND REMANDED - 11/4/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/25/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

HINKEBEIN, J., FOR THE COURT:

Frank Jacob Hayes (Hayes) was convicted in the Claiborne County Circuit Court of murder. Hayes was sentenced to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections. Aggrieved by his conviction, he appeals to this Court on the following grounds:

I. THE VERDICT IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED IN ALLOWING THE HEARSAY TESTIMONY OF

EMMA CRISLER REGARDING STATEMENTS MADE BY A FOUR-YEAR-OLD WITNESS.

We hold Hayes' second assignment of error to have merit. Accordingly, the judgment of the trial court is reversed and the case remanded for new trial.

FACTS

In August 1994, Hayes lived with his girlfriend, Leslie Cheney, and her two children, Eddie (age 2) and Dana (age 4) in Claiborne County, Mississippi. The events of that day are largely undisputed. Hayes awoke the morning of the incident to the sound of Eddie crying. Cheney, who was preparing for work, immediately advised Hayes to cancel his planned fishing trip. The babysitter had backed out so Eddie and Dana were his responsibility for the day. Midmorning, after Cheney's departure, Hayes prepared an early lunch of spaghetti for himself and the children. After finishing his meal he walked outside to feed the family dogs. As he was doing this, Dana ran to the door and told him that Eddie was "choking." When the child stopped breathing, Hayes administered mouth-to-mouth resuscitation. Then, with Dana in tow, he drove Eddie to a nearby hospital. After securing medical treatment for the child, Hayes departed.

Medical personnel discovered that instead of choking, Eddie was suffering from a massive brain hemorrhage caused by a powerful blow to the head. Thereupon they transported the child to a facility in Warren County better equipped to deal with such injuries. Meanwhile, numerous bruises, scratches, and apparent cigarette burns on the child's head and body were noted. Upon Eddie's arrival at the second facility, Warren County Sheriff's Deputies and Department of Human Services (DHS) officials were notified of suspected child abuse. Since Hayes appeared to have been alone with the child (apart from Dana) prior to and upon their initial appearance at the emergency room, sheriff's deputies picked him up at the home of a friend.

When DHS social worker Emma Crisler (Crisler) spoke with Dana between two and two-thirty that afternoon, the little girl supplemented the details. Dana told Crisler that while the trio ate, Hayes had pushed Eddie's face into a bowl of spaghetti. She also recalled Hayes picking up her younger brother and throwing the child to the floor. Despite unsuccessful attempts to coax clarifying information from Dana and despite Hayes' vehement denial of the child's accusations, law enforcement personnel then formally charged him with aggravated assault. When Eddie died two days later, the charges were upgraded to murder.

ANALYSIS

I. THE VERDICT IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Following his conviction, Hayes moved for judgment notwithstanding the verdict or in the alternative, a new trial. The trial court denied this motion which contained only a cursory claim that the verdict was contrary to the law and the weight of the evidence. On appeal Hayes elaborates. He insists the suffering endured by this small child aroused the passions of the jury members, leading them to find him guilty despite the State's failure to prove such beyond a reasonable doubt. The State argues that conflicts in the evidence, however tragic, are matters to be determined by the jury. We

agree with the State.

The Mississippi Supreme Court has repeatedly held that the jury bears sole responsibility for determining the weight and credibility of evidence. *May v. State*, 460 So. 2d 778, 781 (Miss. 1985). Therefore, a new trial is appropriate only in instances where a verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand, would be to sanction an unconscionable injustice. *Wetz v. State,* 503 So. 2d 803, 812 (Miss. 1987). Such a determination "[implicates] the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). Consequently we will reverse and order a new trial on appeal only if, accepting as true all evidence favorable to the State, we determine that the trial court abused that discretion. *Id.*

At Hayes' trial, the prosecution offered the testimony of Dr. Andrew Parent, one of several treating physicians. He concluded that "based on reasonable medical certainty," child abuse caused Eddie's death. The physician described the multiple bruises observed on the child's back, buttocks, arms, and legs. He characterized these injuries as consistent with being "hit at various times" because "some were coming in while others were fading out." He also described for the jury the severe bruising and swelling of the brain and scalp that eventually led to Eddie's demise. Dr. Parent admitted that based on the level of deterioration observed, these head wounds possibly occurred as much as ninety-six hours prior to examination. However, he explained that a particularly forceful blow might have caused such trauma to appear rapidly, perhaps in as little as one hour. He expressed his professional opinion that Eddie's head injuries were of recent origin, thereby suggesting that the fatal impact occurred on the morning in question while Hayes cared for the children.

Dr. Parent also explained to the jury that significant nausea and vomiting typically accompany this type of injury. Since subsequent eating is therefore virtually impossible, so is choking. Consistent with this testimony, Eddie showed no physical signs of choking when examined by medical professionals. A later autopsy did, however, find spaghetti sauce in the child's stomach. Logic dictates that the child must have eaten this prior to receiving the fatal blow. Again, only Hayes and young Dana were present during the relevant period. Reasonable and fair-minded jurors might have found Hayes guilty of murder beyond a reasonable doubt based on this evidence. The prosecution neither created nor unnecessarily exacerbated these facts, tragic though they may be. As such, the prospect of a new trial holds no promise of eliminating emotional impact on any jury. Consequently, this assignment of error is without merit.

> II. THE TRIAL COURT ERRED IN ALLOWING THE HEARSAY TESTIMONY OF EMMA CRISLER REGARDING STATEMENTS MADE BY A FOUR-YEAR-OLD WITNESS.

Hayes further claims the trial court erred in admitting into evidence the description of events given by Dana to Crisler. The account, which was the subject of Crisler's testimony at trial, was introduced as an excited utterance under Mississippi Rule of Evidence 803(2). Hayes characterizes Dana's statement as inadmissible hearsay because the circumstances fail to show the spontaneity required for admission. In response, the State contends that because four-year-old Dana witnessed the entire episode, one might reasonably infer that she remained upset despite no visible indications of such. Because the record fails to disclose continuing emotional stress on Dana's part, we hold the excited utterance exception inapplicable.

Statements may fairly be characterized as excited utterances if made while the declarant remains under stress caused by a startling event or condition. M.R.E. 803(2). The decision to admit such evidence lies largely within the discretion of the trial judge. *Baine v. State*, 606 So. 2d 1076, 1078 (Miss. 1992) (citing *Harris v. State*, 394 So. 2d 96, 98 (Miss. 1981). However, the trial court's discretion must be exercised within the scope of the Mississippi Rules of Evidence. *Parker. v. State*, 606 So. 2d 1132, 1137-1138 (Miss. 1992). Here, this decision is based upon the totality of the circumstances present in each individual case. *Id.* No one fact is determinative because spontaneity is the ultimate objective. However, case law focuses time and again on certain considerations: (1) whether the declarant was the victim or merely a witness, (2) whether the declarant complained at the first opportunity to the first person encountered, (3) whether the statement was volunteered or was the product of questioning, (4) the intervening lapse of time between the startling event and statement, (5) outward signs of stress such as screaming, tears, or trembling and (6) the characteristics of the declarant, for example, age.

We will discuss each factor and its origin separately.

A. Victim or Witness

Statements by crime victims frequently fall within the exception since emotional upheaval may be found more easily with these individuals than with mere observers. The Mississippi Supreme Court has, however, affirmed the admission of a witness' statement on a least one occasion. *Davis v. State*, 611 So. 2d 906, 914 (Miss. 1992). In *Davis v. State*, eight-year-old Wendy witnessed the brutal beating and rape of her mother. Immediately after the attack, the victim drove several miles to the home of a relative. Wendy bounded from the car and banged on the door while *screaming* for help. Moments later, when asked who had hurt her mother, Wendy gave a statement which qualified as an excited utterance. *Id.* Apparently the declarant's identity is not so important as facts clearly suggesting that he/she was indeed still experiencing the stress of the event.

B. First Opportunity Exercised

Similarly, the exception often applies where a declarant exercises the first available opportunity to tell his/her story. For example, in *Evans v. State*, 547 So.2d 38 (Miss. 1989), a nun described her sexual assault with relative calm. Her remarks nevertheless qualified as excited utterances under Rule 803(2) because she made them shortly after the event to the first person she saw. *Id.* at 40. In contrast, silence throughout such an encounter may suggest opportunity for reflection. However, such a failure to complain does not necessarily preclude application of the exception where other circumstances indicate continuing stress. *Heflin v. State*, 643 So.2d 512, 519 (Miss. 1994)(reversed on other grounds by *Owens v. State*, 666 So. 2d 814, 817)(finding the temporary silence of rape *victim* reasonable in light of the shame associated with the crime and fear caused by the presence of the perpetrator).

C. Volunteered or Product of Questioning

Likewise, asking questions of the declarant weighs against but does not necessarily preclude application of the exception. *Sanders v. State*, 586 So. 2d 792 , 795 (Miss. 1991). In *Sanders*, a fourteen-year-old sexual battery victim responded to a police officer's simple question "[w]hat happened?" *Id.* While acknowledging defense concerns regarding possible manufacture, the court

affirmed the decision to admit the child's response because only a *short time* had elapsed and the victim remained *visibly upset. Id.*

D. Intervening Lapse of Time

Neither are excited utterances limited to any particular period of time. *Heflin*, 643 So.2d at 519. In fact, the Mississippi Supreme Court has allowed a time lapse of as much as twenty four hours. *Id.* The court reasoned in *Heflin* that, despite the passage of time and encounters with others, a sixteen-year-old might reasonably be expected to remain under the stress of being beaten and repeatedly raped by her father. Notably, though, the court justified its determination by describing the young *victim's uncontrollable crying* at the time of the statement. *Id.*

E. Outward Signs of Stress

Outward indications of emotional stress almost always accompany the appropriate application of the exception. *See Davis*, 611 So.2d at 908 (involving a witness screaming minutes after incident). Case law suggests that the apparent emotional stress required bears a direct relationship to the amount of time that has elapsed. The more immediate the remarks, the more calmly they may have been made. *See Evans v. State*, 547 So.2d at 40; *Baine v. State*, 606 So. 2d 1076, 1078 (Miss. 1992) (finding a seven-year-old's unemotional description of sexual abuse admissible because the child*volunteered* the information *within minutes* of seeing her mother). In any case, the totality of the circumstances must at least suggest continuing stress that might reasonably lead to spontaneity.

F. Age of the Declarant

While the Mississippi Supreme Court has not yet directly addressed the importance of a declarant's age in this context, case law from other jurisdictions provides modest guidance. Other courts have expressed confidence in the trustworthiness of young declarants such as Dana, concluding that "tender years" tend to reduce the likelihood of reflection and fabrication. *See Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988) (finding a four-year-old *victim's hysterical* statements to her mother admissible in action against father for damages arising out of alleged sexual abuse). However, cases such as *Foretich* mirror Mississippi's approach to the excited utterances exception in that age remains but one factor in the equation. *Id.* Spontaneity, as suggested by the totality of the circumstances, clearly remains the issue.

Particularly in sexual abuse cases, the Mississippi Supreme Court has excused delayed utterances based on the reasonable expectation of stress. *Heflin*, 643 So.2d at 519. Here, however, the record clearly shows only a calm demeanor and opportunity for reflection, and thus no basis for a reasonable inference of spontaneity. Dana witnessed Warren County Sheriff's Deputies arrest Hayes. She thus had reason to believe he had done something terribly wrong. Dana was then placed in the custody of adults with whom she was comfortable but who harbored pre-existing animosities toward Hayes. What was said to and in the presence of the little girl is unknown. The record also reflects no attempt on Dana's part to explain what had happened until hours later, when questioned by Crisler. As Dana sat in the lap of a close family friend, Crisler asked the child "what happened?" She responded immediately by recounting what she had eaten for breakfast. She then mentioned not having watched cartoons that morning. Only later did she discuss Hayes' behavior toward Eddie. Perhaps most

important, an extensive search through the trial testimony has uncovered no indication that Dana was upset at the time of questioning.

None of these facts alone necessarily rules out the correct application of the excited utterance exception. But when viewed as a whole, the testimony does not paint a picture of an emotionally distraught child. Despite the State's argument to the contrary, Dana's age alone cannot transform her remarks into excited utterances. Every other relevant factor weighs against admissibility: (1) she was only a witness to the incident, not the victim; (2) she did not complain at the first opportunity; (3) the remarks were made in response to a question; (4) approximately four hours lapsed between the event and statement; and (5) she did not appear to be experiencing emotional stress. As such, no reasonable interpretation of the facts could lead to a determination of spontaneity. Because the record established by the prosecution is insufficient to support a finding that the statements were made by Dana while she was under stress of excitement caused by the event, we must reverse and remand for a new trial. In doing so we note that this dilemma might easily have been avoided had the prosecution gently asked Dana herself to repeat the statements she made to Crisler. At her young age, we suspect that she would have been neither as eager to testify nor as polished. However, her personal recollection of these events would not have fallen prey to Rule 802 of the Mississippi Rules of Evidence.

The dissent is justified in stating that there are reasons that a fact-finder might conclude that this statement was indeed reliable. Even though there may be inadequate evidence to support application of the excited utterance exception, there may be sufficient "guarantees of reliability and trustworthiness" to allow the statement's introduction under M.R.E. 803(24) or 804(5) as the case may be. However, this is not the proper forum for such an inquiry. Despite the dissent's assertions otherwise, the procedural safeguards of those rules must be followed. Whether the remarks conform to any hearsay exception is for the trial court to determine on remand.

THE JUDGMENT OF THE CIRCUIT COURT OF CLAIBORNE COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED AGAINST CLAIBORNE COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ, J.

PAYNE, J., DISSENTING:

I respectfully dissent to the opinion of my colleagues to the extent that they would reverse the present case due to what they deem as an erroneous admission of hearsay statements under the excited utterance exception of the Mississippi Rules of Evidence. The majority's rationale hinges on six considerations: (1) whether the declarant was the victim or merely a witness, (2) whether the declarant complained at the first opportunity to the first person encountered, (3) whether the statement was volunteered or was the product of questioning, (4) the intervening lapse of time between the startling event and statement, (5) outward signs of stress such as screaming, tears, or trembling and (6) the characteristics of the declarant, for example, age. I have no problem with the

majority's reliance on these six considerations, nor do I find fault with the discussion and case law cited in support of each factor. I do, however, take issue with the majority's conclusion based on the application of each of the above considerations to the facts of the case before us. As such, I will discuss each factor in light of the particular facts of the case at bar.

A. Victim or Witness

Granted, Dana was not the victim of this crime of child abuse and murder. Nevertheless, Dana is a four-year-old child who witnessed a brutal attack on her two-year-old brother, Eddie. At the time of the attack, three people were present, Dana, Eddie, and the appellant, Hayes. The events described by Dana included a description of Hayes pushing Eddie's face into a bowl of spaghetti and subsequently picking Eddie up and throwing him to the floor. Dana further witnessed Eddie's reaction to the attack, described as choking. She also witnessed Hayes's attempts at resuscitation on the young boy, and then had no choice but to accompany Hayes as he frantically raced to the Claiborne County Hospital. Still, Dana remained with Hayes when her brother was transferred by ambulance to the Vicksburg Medical Center. The record indicates that Hayes also went to Vicksburg but did not go to the medical center. Instead, Hayes, with Dana in tow, went to a friend's house where he was subsequently arrested. Only then was Dana removed from Hayes's presence. I dare say that these events alone make the fact that Dana was a witness and not the victim inconsequential. If anything, the trauma for this particular witness was worse than if she had been the victim. After all, Dana was conscious throughout the entire episode and for several hours had to remain with the man that had attacked her brother.

B. First Opportunity Exercised

C. Volunteered or Product of Questioning

D. Intervening Lapse of Time

The majority apparently finds it significant that Dana did not recount the events to the first person she saw after the alleged attack. I find no significance in this. As I have already stated, Dana remained in the company of the alleged attacker from the time of Eddie's injury, between 10:00 a.m. and 11:00 a.m., until Hayes was arrested in her presence at approximately 1:30 p.m.. I can see no reasonable opportunity for this child to tell anyone what had happened especially during the period of time that she was with Hayes. The facts indicate that upon Hayes's arrest, Dana was placed in the custody of adults with whom she was acquainted and that they brought her to the Vicksburg Medical Center where she was interviewed by a social worker. The time of this interview, according to the record, was sometime between 2: 30 p.m. and 4:00 p.m. Thus, if Dana was going to tell someone what had happened without having to do it in the presence of Hayes, she had, at the most, two hours to do so from the time she was placed in the custody of a close family friend until her interview with the social worker. Keep in mind that during this two hour period she was being transported from the house where Hayes was arrested to the custody of another adult and then landed at the hospital shortly before her interview with the social worker. Certainly, it is reasonable to conclude that a four-year-old that has been through the events described above might not tell anyone that she witnessed Hayes's attack on her brother until she was specifically asked.

E. Outward Signs of Stress

The majority weighs this factor against Dana because she did not show outward signs of emotional stress. I disagree. Again, Dana remained with Hayes for the majority of the time it took for all of the events of the day to unfold. It seems to me that her behavior is exactly as might be expected of a four-year-old. Granted, no one describes Dana's behavior at anytime, other than the point when Hayes was arrested and taken away, to consist of screaming, crying, or hysteria. Instead, Dana acted just the opposite. She was quiet, shy, and somewhat withdrawn. During her interview with the social worker, Dana responded to the question of "what happened?" by beginning with what she had for breakfast and informing her interviewer that she did not watch cartoons, eventually leading up to Hayes's behavior toward Eddie. The majority sees a lack of emotional distress while I see a child who was afraid, a child who had witnessed an attack on her brother by a man with whom she has spent a great deal of time. The doctors' reports all indicated that Eddie's body exhibited signs of a pattern of abuse in that he had fading bruises, new bruises, and what appeared to be a cigarette burn. A four-year-old would reasonably be afraid to show any emotion or tell someone what had happened for fear that Hayes might get her too. Or, alternatively, a child who has been raised in a household where abuse is the norm would not think that Hayes had done something that he was not supposed to do. This is evident by Hayes's description that Dana was crying and screaming when the police handcuffed him and took him away. From Dana's perspective, one of her caretakers was getting into trouble. Thus, Dana's reluctance to immediately blurt out what Hayes had done to Eddie is just not that unreasonable. Dana's actions indicate to me that she was afraid to tell anyone what had happened either out of fear that Hayes might hurt her too or out of fear that she might get Hayes in even bigger trouble or both.

F. Age of the Declarant

The majority treats age merely as one factor in their determination of whether Dana's statements come under the excited utterance exception. They conclude, and rightly so, that Dana's age alone cannot transform her remarks into excited utterances. I agree that age is but one factor, and at the same time, I see Dana's young age as being the glue that supports all of the other factors. Dana's age should be indicative of what one might expect from any four-year-old under the same circumstances. I believe that when considering each of the above factors, age is the one constant we have in evaluating Dana's actions and emotions. Furthermore, I find persuasive case law from other jurisdictions that supports the proposition that the younger the child the less likely he or she is to consciously reflect or fabricate the events in question. *See State v. Plant*, 461 N.W.2d 253, 263 (Neb. 1990) (stating "a child of 4 years is hardly adept at the type of conscious reflection necessary to fabricate a story of infanticide."); *People v. Gross*, 393 N.E.2d 1308,1309 (Ill. 1979) (stating that "whether the reply of the four-year-old is deemed a spontaneous declaration or an excited utterance, it serves the ends of justice to follow the liberal approach in favor of admission of what is clearly not a contrived response.").

CONCLUSION

It is well established that the determination of whether a declarant's statement falls within the excited utterance exception of the hearsay rules is left to the sound discretion of the judge. *Heflin v. State*, 643 So. 2d 512, 520 (Miss. 1994). In the present case, the judge found Dana's remarks to the social worker to be admissible as excited utterances. The social worker's testimony coupled with testimony from medical personnel as to what kind of act would have caused Eddie's injuries is not inconsistent

with Dana's account of what happened on the morning of August 13, 1994. Based on my analysis above, I cannot find that the trial judge abused his discretion in admitting the testimony. This case should not be reversed. I therefore respectfully dissent.

DIAZ, J., JOINS THIS SEPARATE WRITTEN OPINION.