IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01054 COA

RONALD HOLLEY **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:	09/20/95
TRIAL JUDGE:	HON. ROBERT H. WALKER
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	HERMAN F. COX
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I TOUCHING A CHILD FOR LUSTFUL PURPOSES:CT II SEXUAL BATTERY: CT III TOUCHING A CHILD FOR LUSTFUL PURPOSES: CT IV SEXUAL BATTERY: CT I 10 YRS, CT II 20 YRS, CT III 10 YRS & CT IV 20 YRS ALL ARE TO RUN CONCURRENTLY WITH TOTAL OF 20 YRS
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	12/4/97
CERTIORARI FILED:	2/9/98
MANDATE ISSUED:	4/16/98

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

Ronald Holley has appealed his conviction by a jury in the Circuit Court of Harrison County on a four count indictment relating to Holley's acts of a sexual nature with two young male neighbors in his apartment complex. Holley raises five issues for the Court's consideration. We find them to be without merit and affirm.

I.

Facts

Holley took two brothers, ages six and seven, on a fishing outing with the permission of their mother. The boys returned and related to their mother that Holley had engaged in improper physical contact with them, including committing acts of fellatio on both boys and rubbing his penis on both children in the area of their buttocks. Holley was indicted on two counts of touching a child for lustful purposes and two counts of sexual battery. He was convicted at trial on all four counts.

II.

The Court's Refusal to Give Defendant's Instruction

Holley asked for an instruction that informed the jury that reasonable doubt of his guilt could arise from consideration of the evidence as a whole, from a lack of evidence, from a conflict in the evidence, or from an insufficiency of the evidence. The instruction concluded with the admonition that, if the jury found reasonable doubt to exist from any of these standpoints, it was its duty to acquit him. This instruction appears to be nothing more than a variation on the apparently endless theme of attempting to define reasonable doubt, a task the Mississippi Supreme Court has said ought not to be undertaken since the phrase is self-defining. ***Barnes v. State,*** **532 So.2d 1231, 1235 (Miss. 1988).** It is nothing more than an abstract statement with multiple alternate propositions, none of which are then tied back in any meaningful way to the proof submitted for the jury's consideration.

Holley cites, as authority for his argument, the case of ***Hunter v. State,*** **489 So.2d 1086, 1089 (Miss. 1986).** However, in that case, the supreme court declined to find error in denying an almost identical instruction and criticized it as being argumentative and abstract. ***Id.***

We have reviewed the remaining jury instructions and find that, when read as a whole, they properly instructed the jury as to the law pertaining to this case. There is no merit in this issue.

III.

Admitting The Victims' Hearsay Statements

Holley claims that the trial court erred in permitting the children's mother to tell the jury what statements the boys made to her immediately after their return from the trip. Holley interposed a hearsay objection to that testimony at trial. The court overruled the objection, holding that the statements were admissible under Mississippi Rule of Evidence 803(25). This rule permits, in certain circumstances, the introduction of hearsay reports by children of sexual offenses committed against them.

This Court concedes the accuracy of Holley's assertion that the trial court's failure to make detailed findings on the factors relating to admissibility of this evidence requires us to broaden the scope of our inquiry. ***See McCarty v. State,*** **554 So. 2d 909, 912 (Miss. 1989).** We have elected, therefore, to undertake a de novo review of the admissibility of the statements.

We observe, in passing, that the trial court also suggested the "probable" admissibility of the statements under Rule 803(2) as excited utterances. However, Holley confined his argument to Rule 803(25) issues, and the State, in reply, did not suggest "excited utterance" as an alternate avenue to

admissibility. Because neither the trial judge nor either party appears to place much reliance on this theory, we will not consider it.

One of the conditions for admitting Rule 803(25) hearsay testimony is that the child must either (a) testify at trial, or (b) be unavailable as a witness. **M.R.E. 803(25).** In this case, the children had not testified at the time the hearsay statements were admitted; however, the State had previously announced its intention to call both the children and did, in fact, do so prior to resting its case-in-chief. Holley argues that case law requires that the child must have already testified before evidence of out-of-court statements may be admitted under Rule 803(25). He relies upon language in the case of ***Eakes v. State,*** **665 So. 2d 852 (Miss. 1995),** to support his position. In that case, the trial court, in passing on the admissibility of similar out-of-court statements by child victims, discussed the fact that the children had already testified. In ruling their hearsay statements admissible, the court commented on the "children's demeanor while on the witness stand" as providing an indication of the reliability of their prior statements. ***Id.*** **at 865.** However, the supreme court decision upholding the trial court's ruling on admissibility in no way establishes a rule that such observations are a necessary prerequisite to admissibility. One of the twelve factors properly to be considered according to the comments to Rule 803(25) is "the general character of the declarant." **M.R.E. 803(25) cmt.** We take the trial court's remarks in the *Eakes* case as speaking to that point. There are, however, other means to develop the general character of the declarant than personal observation on the witness stand. The child's demeanor on the stand may be *proper* fodder for the court's deliberative process, but it is not an absolute prerequisite to a ruling on admissibility, and *Eakes* does not, according to our reading, hold otherwise.

In viewing the hearsay statements of these children under the twelve factors suggested in *Idaho v. Wright* and carried forward into the comments to Rule 803(25), this Court cannot conclude that the trial court was manifestly in error in admitting the evidence. ***Idaho v. Wright,*** **497 U.S. 805, 821-22 (1990); M.R.E. 803(25) cmt.** The only factor that would tend to weigh against admissibility is item number 3, which suggests that a statement is more likely to have the necessary indicia of reliability if it were heard by more than one person. This is apparently based on the notion that the witness would less likely be untruthful about what she claimed to have heard if the statement was made in the presence of others. However, we find nothing in the record to suggest that the mother of these children had any motive to manufacture the statements she attributed to her children. She was subjected to cross-examination and it was within the province of the jury to decide what credence to put into her report of her children's statements.

We do not feel it necessary to individually itemize and analyze the remaining eleven considerations. We simply observe that our review of the record tends to convince us that all of the remaining considerations weigh in favor of the admissibility of the statements under Rule 803(25), and we decline to reverse this conviction on this basis.

IV.

Motion for Severance

Holley filed a motion seeking to sever his trial so that the two counts involving one child could be tried separately from the two counts relating to the other child. The trial court held a hearing on the motion as mandated by ***Corley v. State,*** **584 So. 2d 769, 772 (Miss. 1991).** The court declined to sever,

finding that the underlying allegations of the indictment, if proven, would show (a) that the events occurred essentially contemporaneously, (b) that the facts were interwoven, and (c) that a substantial amount of the evidence on behalf of the State would be admissible on each of the four counts. We find that the trial court observed the proper procedure. Therefore, our review of its decision is limited to an abuse of discretion standard. ***McCarty v. State,* 554 So. 2d 909, 914 (Miss. 1989).** In that light, we cannot conclude that there has been such an abuse of discretion since the trial court's conclusions do not appear subject to contradiction. Therefore, it was not reversible error to try Holley on all four counts in one trial.

V.

Sufficiency of the Evidence

Holley seeks reversal on a claim that the jury's verdict was not supported by sufficient evidence to sustain a finding of guilt. In reviewing such a claim, we must look at the evidence in the light most favorable to support the jury's verdict. ***Clayton v. State,* 652 So. 2d 720, 724 (Miss. 1995).** If there was credible evidence presented by the State as to each of the necessary elements of the crime, then we must affirm on this issue. Holley's primary argument is that there was no physical evidence to support the otherwise-unsubstantiated claims of these children. The testimony of these two children was heard by the jury, and the boys were subjected to cross-examination. They related events that, if believed by the jury, would undoubtedly constitute the necessary elements of the crimes. The children told of activities by this defendant that would not be expected to leave lasting physical marks; therefore, the absence of corroborating physical evidence is unremarkable to this Court and does not constitute a basis for reversal.

VI.

Refusal to Grant Peremptory Instructions

Holley seeks to rehash his claim that the evidence was insufficient to support his conviction by claiming error in the trial court's refusal to give four requested instructions directing the jury to return verdicts of not guilty on each of the counts. We have answered that contention in Part V above. Holley advances no new argument in this section of his brief, and we decline to consider the matter further.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF COUNT ONE TOUCHING A CHILD FOR LUSTFUL PURPOSES AND SENTENCE OF TEN YEARS; COUNT TWO SEXUAL BATTERY AND SENTENCE OF TWENTY YEARS; COUNT THREE TOUCHING A CHILD FOR LUSTFUL PURPOSES AND SENTENCE OF TEN YEARS; COUNT FOUR SEXUAL BATTERY AND SENTENCE OF TWENTY YEARS

ALL SENTENCES TO RUN CONCURRENTLY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.