IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01031 COA

JOHN G. MARSHALL A/K/A JOHN GILBERT MARSHALL — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

CONSOLIDATED WITH

NO. 95-KA-01155 COA

JOHN G. MARSHALL — **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:	08/24/95
TRIAL JUDGE:	HON. L. BRELAND HILBURN, JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	THOMAS M. FORTNER
	ROBERT M. RYAN
	BRENDA GALE JACKSON
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: PAT S. FLYNN
DISTRICT ATTORNEY:	EDWARD J. PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION	GRATIFICATION OF LUST: SENTENCED TO SERVE A TERM OF 10 YRS IN THE MDOC
DISPOSITION:	REVERSED AND REMANDED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

McMILLIN, P.J., FOR THE COURT:

John G. Marshall was convicted by a jury in the Circuit Court of Hinds County of the crime of gratification of lust. The charges arose out of an incident alleged to have occurred during a weekend visit by Marshall's ten-year-old daughter and involved allegations that Marshall improperly touched the girl in the vaginal area and forced her to touch his genitals. Marshall has appealed his conviction to this Court where he raises three issues which he claims warrant reversing his conviction. This Court finds that the trial court committed reversible error in the admission of certain hearsay evidence and expert opinion evidence, and we conclude that the conviction must be reversed and the cause remanded for new trial.

I.

Facts

We will not recite the alleged facts in significant detail, since the issues raised on appeal relate primarily to evidentiary rulings by the trial court. It is sufficient to observe that the incident which led to the indictment occurred at a time when Marshall and his daughter were alone at Marshall's home. There was no physical evidence offered at trial to substantiate the charges; therefore, the evidence against Marshall consisted solely of the accusatory statements of his daughter and such evidence as the State could produce to lend added credibility to the daughter's statements.

II.

Officer Hackney's Testimony

Officer John Hackney of the Hinds County Sheriff's Department was the primary investigating officer once the incident was reported to law enforcement. He conducted an interview of the child at the University of Mississippi Medical Center where she had been taken shortly after informing her mother of her father's alleged conduct. Officer Hackney was asked what the child related to him concerning the incident and defense counsel interposed a hearsay objection. The court overruled the objection and Officer Hackney narrated, in some detail, the facts of the incident as told to him by the victim. After Officer Hackney had been testifying for some time, the State, without prompting, announced "for the record" that it was offering Officer Hackney's testimony as an exception to the hearsay rule created by Mississippi Rule of Evidence 803(25). The trial court expressed some surprise at this announcement and stated that it was the court's opinion that the evidence was admissible under section 13-1-403 of the Mississippi Code. This code section, adopted in 1986, provides that, under certain circumstances, "[a]n out-of-court statement by a child under the age of twelve describing any act of . . . sexual abuse" could be admitted as evidence if "[s]uch statement is made for the purpose of receiving assistance or advice in order to prevent or mitigate the recurrence of the offenses . . . ." **Miss. Code Ann. § 13-1-403(1)(a) (Supp. 1997).** The trial court was in error in this ruling. This code section may not serve as the vehicle for introduction of hearsay evidence because the Mississippi Supreme Court, in a 1989 decision, determined that the enactment was an improper attempt by the legislature to encroach on the inherent powers of the judiciary to establish and enforce

rules governing court proceedings, including evidentiary rules. ***Hall v. State,* 539 So. 2d 1338 (Miss. 1989).** In *Hall,* the supreme court said of this enactment that "[a]s that act enjoys no legal validity, it may not be regarded 'law' within [rules governing the admission of evidence.]" ***Id.* at 1346.**

We, therefore, conclude that the only rational basis upon which these hearsay statements could have been admitted was under Rule 803(25), an amendment to the rules of evidence adopted shortly after the supreme court struck down the code section discussed above. As a prerequisite to admitting evidence under this rule, however, the trial court must find, "in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability . . . ." **M.R.E. 803(25)**. We note that this requirement is not merely a procedural one, but is grounded in constitutional considerations of the defendant's right of confrontation guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. ***See Idaho v. Wright,* 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).** Therefore, it may not be lightly overlooked.

The *Idaho v. Wright* decision, which undergirds the validity of Rule 803(25) in a criminal case, permitted the admission of hearsay evidence against a defendant in those limited circumstances where other earmarks of reliability of the evidence could be fairly said to substitute for the right of cross-examination. The case set out a number of factors to consider in determining whether other indicia of reliability were sufficient to overcome a hearsay objection and the related confrontation considerations embodied in the Sixth Amendment. Those factors have been carried forward into the official comments to Rule 803(25) and consist of twelve areas of inquiry. **M. R.E. 803(25) cmt. (25).** In the case now before us, no such Rule 803(25) hearing was conducted due to the trial court's erroneous reliance on the invalid statutory enactment. This was, without question, error.

On the other hand, this Court notes that the child's mother was permitted, without a hearsay objection, to relate the child's out-of-court statements about the incident made to the mother shortly after the child returned home from the visit. It was this initial report that prompted the mother to notify law enforcement authorities, and the statements now complained of were made to Officer Hackney not long after the child had made a similar report to her mother. We also note that the child testified at trial, so that her story was subject to cross-examination. In fact, defense counsel relied, in part, on perceived inconsistencies in her prior statements to law enforcement authorities as a means to try to impeach her in-court testimony.

The Mississippi Supreme Court has held that, especially in circumstances where essentially the same evidence is presented by in-court testimony, it may be harmless error to permit the jury to hear out-of-court statements of this nature that ought to have been excluded had the rules of evidence been more rigorously followed. ***See Balfour v. State,* 580 So. 2d 1203, 1209-10 (Miss. 1991); *Higgins v. State,* 502 So. 2d 332, 334-35 (Miss. 1987); *Barker v. State,* 463 So. 2d 1080, 1084 (Miss. 1985); *Austin v. State,* 384 So. 2d 600, 601 (Miss. 1980); *Boyd v. State,* 239 Miss. 589, 123 So. 2d 857 (1960).** Were we confronted solely with this issue on appeal, it would appear that a strong argument could be made that the error of failing to conduct the hearing required by Rule 803(25) prior to admitting Officer Hackney's testimony was harmless. However, that is not the sole error that relates to the central issue of the credibility of this child's testimony. We will, therefore, proceed to consider other assignments of error and then consider the cumulative impact of any evidentiary errors that may be discovered.

III.

The Testimony of Liz Walker

The child was taken to the University of Mississippi Medical Center for examination on recommendation of law enforcement authorities. There, Liz Walker, a pediatric social worker employed at the Medical Center, was called in to assist. At trial, Walker was qualified as an expert in the field of social work and was permitted to testify that because the child had related essentially similar accounts of the episode to three different people--the investigating officer, the examining physician, and her mother--"it leans more to be a truthful story." Walker had not spoken to the child about the alleged incident and based her opinion solely on her understanding of what the child had related to others. Before Walker's answer was admitted, defense counsel objected saying, "Your Honor, if she's gonna give an opinion as to facts that are based on -- I just don't know what qualifies her to give an opinion."

This Court is in agreement with defense counsel. There is nothing in the jurisprudence of this State that suggests a social worker is qualified by training or experience to render a meaningful opinion as to the truthfulness of a statement made to her by another person, much less statements reported to the social worker second-hand. Mississippi Rule of Evidence 702 permits the introduction of "specialized knowledge" in the form of an opinion only if it will "assist the trier of fact to . . . determine a fact in issue" and if it is offered by "a witness qualified as an expert by knowledge, skill, experience, training, or education" in the field. **M.R.E. 702.** In the case of ***House v. State,*** **445 So. 2d 815 (Miss. 1984),** the supreme court reversed a criminal conviction because a hypnotist was permitted to offer an opinion as to the truthfulness of events related by the prosecuting witness while under hypnosis. ***Id.*** **at 822.** The court framed the question as follows:

> 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? Where the answer to this question is in the affirmative, we generally allow expert testimony.

Id.

The court concluded that hypnosis did "not have the status as a science whose practitioners are capable of giving opinions regarding the truthfulness of their subject with that high degree of validity that we demand of expert witnesses generally." ***Id.*** This Court finds that this language has equal application in the case now before us. There is nothing in the record that indicates that a social worker, no matter the degree of her skill and experience, is capable of determining the truthfulness of accusations made by an alleged sexual abuse victim with any degree of validity, much less statements that she did not even hear but were only related to her by others. We find this testimony an improper attempt to bolster the testimony of the alleged victim in this trial. ***See also Goodson v. State,*** **566 So. 2d 1142, 1153 (Miss. 1990).**

It is unfortunately true that, based upon our review of the record, we are of the opinion that there may have been legitimate concerns affecting the jury's decision on the veracity of the victim's out-of-court statements and in-court testimony. There was testimony that raised the possibility of resentment on the child's part against her father because he had failed to visit her for an extended period of time.

There was evidence that the child had, prior to this incident, experienced emotional problems significant enough to require professional intervention and that, among the problems reported, was a tendency to be untruthful.

In such a situation, where the only evidence upon which the conviction rests consists of the in-court testimony and other out-of-court accusatory statements by the victim, it is essential that the jury be permitted to judge the credibility of the victim based solely upon relevant evidence. Because of the distinct possibility that the jury would, in wrestling with this difficult issue, give undue weight to the opinion of this "expert," we cannot pass this improper opinion evidence off as harmless error.

IV.

The Testimony of the Victim's Mother

Marshall complains that the trial court improperly permitted the child's mother to testify to statements made by the child after she returned from visiting her father. He claims that no pre-admission Rule 803(25) hearing was held to determine the admissibility of this hearsay evidence. The short answer to this contention is that Marshall failed to interpose a hearsay objection at any point during the mother's testimony, and this Court may not put a trial court in error based on alleged errors in receipt of evidence if there was not a timely objection at the time the evidence was offered. **M.R.E. 103(a); *Thornton v. State*, 313 So. 2d 16, 18 (Miss. 1975)** (citing *Brooks v. State*, 242 So. 2d 865 (Miss. 1971) ;*Pepper v. State*, 200 Miss. 891, 27 So. 2d 842 (1946)). Whether the testimony may be admitted on retrial is a matter to be resolved at the time, assuming it is offered and assuming the defense makes a timely and valid objection to its receipt.

V.

The Weight of the Evidence

Because we have determined that this conviction must be reversed on other grounds, there is no reason to consider the final issue raised by Marshall that the verdict was against the weight of the evidence. The matter is moot in light of our concerns regarding errors in the admission of prejudicial evidence.

VI.

Other Expert Evidence

The State called two other social workers, both of whom had some contacts with the victim in the aftermath of this incident. They were permitted to testify, both about statements related to them by the victim and as to their opinions concerning whether the child had been subjected to sexual abuse. We have some difficulty in analyzing these issues in the current state of this record. Often hearsay statements were admitted without objection and it is unclear whether the statements were being received under Rule 803(4) or Rule 803(25). We only observe that, on retrial, if such statements are offered and meet with a timely hearsay objection, Rule 803(4) requires the court to affirmatively find, as a prerequisite to admissibility, that "the proffered statements were made under circumstances substantially indicating their trustworthiness." **M.R.E. 803(4).** And, of course, admissibility under Rule 803(25) requires, as to those particular statements, the full inquiry as to indicia of reliability set

out in the rule and the comment thereto.

As to any expert opinions offered by such witnesses at retrial, it would appear that the witnesses are limited to an opinion that the child does, or does not, display characteristics or behavior that fits scientifically-established profiles of a sexually abused child. These witnesses are not qualified, for reasons already discussed, to offer their opinion as to the truthfulness of the child's statements relating the actual events, nor to offer opinions that the defendant was, in fact, the perpetrator of any abuse. The limits of the admissibility of their opinions in regard to the relevant issues of this case would appear to be defined in the case of ***Hall v. State,* 611 So. 2d 915 (Miss. 1992)**. In that case, the supreme court held that expert testimony describing a child's "behavior as common with that of a sexually abused child is within the trial judge's discretion absent an abuse of that discretion." ***Id.* at 919.**

VII.

Conclusion

This Court has already observed that, in this case, the conviction rests solely on the alleged victim's out-of-court statements and her testimony at trial. In that context, the trial court's failure to permit the defendant to properly test the admissibility of the victim's out-of-court statements under Mississippi Rule of Evidence 803(25), when considered together with the error of permitting the State to improperly bolster those statements by the "expert opinion" of a social worker that the statements were true, cannot be dismissed as harmless error. This defendant has, in the opinion of this Court, been denied a fundamentally fair trial on these facts. For that reason, we are compelled to reverse this conviction and remand it for new trial.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND THE CASE IS REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED TO HINDS COUNTY.

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