**IN THE COURT OF APPEALS**
**OF THE**
**STATE OF MISSISSIPPI**
**NO. 95-KA-01002 COA**

**TERRY T. JOHNSON A/K/A TERRY TYRONE JOHNSON** **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

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| DATE OF JUDGMENT: | 08/07/95 |
| TRIAL JUDGE: | HON. ROBERT L. GIBBS |
| COURT FROM WHICH APPEALED: | HINDS COUNTY CIRCUIT COURT |
| ATTORNEYS FOR APPELLANT: | THOMAS M. FORTNER |
| | VICKI GILLIAM |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL |
| | BY: JEAN SMITH VAUGHAN |
| DISTRICT ATTORNEY: | EDWARD PETERS |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| TRIAL COURT DISPOSITION: | RAPE: SENTENCED TO SERVE A TERM OF 50 YRS IN THE MDOC |
| DISPOSITION: | AFFIRMED - 1/27/98 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | |

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

Terry Johnson was convicted in the Hinds County Circuit Court of the rape of a child under the age of 14 years. The Court ordered Johnson to serve fifty years in the custody of the Mississippi Department of Corrections. Aggrieved by his conviction, Johnson appeals to this Court on the following grounds:

I. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO PRESENT PROOF OF

THE DEFENDANT'S AGE AFTER THE STATE HAD FINALLY RESTED FOLLOWING REBUTTAL.

II. THE TRIAL COURT ERRED IN ALLOWING STATE WITNESSES ERICA COUSINS, EDNA COUSINS AND GLADYS JEAN VERSELL TO TESTIFY AS TO HEARSAY STATEMENTS MADE BY THE VICTIM TO THEM IN DIRECT VIOLATION OF THE MISSISSIPPI RULES OF EVIDENCE.

III. THE TRIAL COURT ERRED IN ALLOWING DR. WILLIAM SOREY TO TESTIFY AS TO HEARSAY STATEMENTS MADE TO HIM BY THE VICTIM DURING THE COURSE OF HIS DIAGNOSIS AND TREATMENT AT WHICH TIME THE VICTIM IDENTIFIED JOHNSON AS THE PERPETRATOR OF THE ALLEGED SEXUAL ASSAULT.

IV. THE TRIAL COURT ERRED IN ORDERING THE DEFENDANT TO SERVE A SENTENCE OF FIFTY YEARS IN THE MDOC AS SUCH SENTENCE WAS IN EXCESS OF THE DEFENDANT'S LIFE EXPECTANCY AND WAS THEREFORE, TANTAMOUNT TO A SENTENCE GREATER THAN LIFE.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

## FACTS

On July 3, 1994, twelve-year-old "Connie" [a ficticious name] spent the evening with her Aunt Edna and cousins preparing for a Fourth of July holiday celebration planned for the next afternoon. The child was asleep in a room with her young cousin Erica, when Aunt Edna's live-in boyfriend, our appellant, sexually abused her. Johnson first attempted to manually stimulate the child, ceasing in response to her protests. Moments later, he returned to have vaginal intercourse with her. However, when he was unable to penetrate Connie's immature body, he temporarily exited the room a second time. Thereafter, he returned yet again, this time attempting to stimulate the child orally. Following his third attack, he warned her against telling anyone of his actions and directed her to bathe immediately upon waking. Johnson then returned to his own bedroom but not without being noticed by Erica.

The next morning, Connie, accompanied by Erica, went to her nearby home to change clothes before the family picnic. The child used the opportunity to tell her cousin that Johnson had "touched" her during the night. Thereafter, Erica reported the incident to her mother. She rephrased Connie's description, revealing that Johnson had "messed with" the child. When Edna asked Connie what had happened, the child confirmed her fears by recalling how Johnson "had licked her between the legs." When she confronted Johnson, he responded by gathering his belongings as if preparing to leave the

home. Thereafter, Edna called Connie's mother, again explaining what had taken place. When Gladys Versell arrived she went to her daughter who again, upon being asked what had happened, remembered Johnson touching her with his "thang." Upon hearing her daughter's report, the woman struck Johnson, knocking him to the floor. Johnson then abandoned his efforts at packing and awaited the arrival of police in the garage, outside the reach of Ms. Versell.

Following Johnson's arrest for rape, and upon the advice of responding police officers, Ms. Versell transported Connie to the nearest emergency room. There, the child again gave a similar account to the on-duty physician. After the examination performed by the doctor uncovered physical injuries consistent with attempted vaginal intercourse, Johnson was indicted, tried, and ultimately convicted of raping the girl.

## ANALYSIS

### I. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO PRESENT PROOF OF THE DEFENDANT'S AGE AFTER THE STATE HAD FINALLY RESTED FOLLOWING REBUTTAL.

Johnson first alleges that the trial court incorrectly allowed the State to re-open and present an essential, but previously overlooked, element of its case following his final motion for directed verdict. He contends that because the applicable criminal statute requires those convicted of its violation to be at least eighteen years of age, the State bore an affirmative duty of proving such at trial. He then claims that since the prosecution apparently just forgot to ask his age while cross-examining him, the trial judge should have directed the jury to find in his favor rather than allowing the State to correct its mistake. In response, the State urges respect for the trial court's discretionary decision to avoid the time and expense of Johnson's inevitable re-trial by allowing presentation of the evidence. We agree with the State.

Generally speaking, due process requires that the State prove each element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). *See also Carlson v. State*, 597 So. 2d 657, 659 (Miss. 1992); *Fisher v. State*, 481 So. 2d 203, 211 (Miss. 1985); *Neal v. State*, 451 So. 2d 743, 757 (Miss. 1984).

More specifically, in *Love v. State*, 211 Miss. 606, 52 So. 2d 470 (Miss. 1951), the Mississippi Supreme Court held that an indictment charging indecent assault on or violation of a female child under age of 13 years pursuant to § 2052 of the Mississippi Code of 1942 was defective for failure to charge that defendant was a male person above age of 18 years. *Love*, 211 Miss. at 610, 52 So. 2d at 471. Because the statute expressly required that the accused be a male above the age of eighteen years, the court required that the element "be charged and proved by the state." *Id.* As the court wrote, "[i]t is not a mere formality." *Id.*

The court later relied on its decision in *Love*, while requiring that a prosecution for "peeping," include proof of the substantive statutory element of the accused's masculine gender. *Burchfield v. State*, 277

So. 2d 623, 625 (Miss. 1973). Thereafter, the court again cited the quoted text while holding that the age of a child sexual battery *victim* is likewise an essential element of the offense that must be alleged and proved. *Washington v. State,* 645 So. 2d 915, 917 (Miss. 1994). While the court noted therein that surely a defendant's physical appearance may be considered by a jury in determining his or her age, it had before it nothing in the record to allow a review of the "ocular and auditory" aspect of the proof as to age and was therefore forced to remand. *Id.* at 919.

Based on these authorities, we are precluded from holding that the age element is trivial. The State bears the burden of proving that the accused is above the age of eighteen. *See Crenshaw v. State,* 520 So. 2d 131, 133 (Miss. 1988) (interpreting Miss. Code Ann. § 97-5-23 which at the time defined criminal gratification of lust). However, an aside within *Washington v. State* makes clear that the State's failure to present the essential element of proof during case-in-chief did not constitute a fatal flaw. While chiding the prosecution, the court wrote, "[i]n spite of this failure at trial, the State had several alternatives that could have been pursued once noticed by the defense that it had failed to prove F.M.'s age. The State could have moved the court to re-open its case-in-chief, but it did not make such a request." *Washington,* 645 So. 2d at 920. Clearly, with this remark, our supreme court expressed its, albeit implicit, approval of the tactics employed by the prosecution below. Our inquiry does not end here, though, as Johnson attacks not only the trial court's resolution of the problem but the route by which it arrived at that decision.

Johnson relies on *U.S. v. Rodriquez,* 43 F.3d 117 (5th Cir. 1995), wherein the Fifth Circuit suggested that trial courts faced with such requests consider certain factors, including "(1) timeliness of the motion, (2) whether a proffer is made, (3) the character of the proffered testimony, (4) the effect of granting the motion, (5) existence of an explanation for failing to present the evidence during the movant's case-in-chief, (6) whether the explanation is reasonable, and (7) whether the proffer is relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused." *Rodriguez,* 43 F.3d at 125. He claims that "the record is silent as to the state's compliance with the factors as set froth [sic] in *Rodriguez* and [therefore] allowing the state to reopen without any proffer was a clear abuse of the trial court's discretion." However, he fails to notice that, while affirming a U.S. District Court's denial of a defendant's motion to reopen, the Fifth Circuit bowed to the lower body's discretion. Nor does he provide any support for his suggestion that *Rodriguez* requires an express, on the record determination citing each of the enumerated factors. As he candidly admits in his appellate brief, there is none.

While the trial judge never mentioned *Rodriguez* by name, he clearly employed the appropriate analysis. He weighed the State's failure to offer an explanation for the omission against the essential nature of the information and was finally swayed by the effect of not granting the motion. And as the court noted, handing the incomplete case to a jury in expectation of remand and eminent re-trial defies logic. *See Washington v. State,* 645 So. 2d at 920 (remanding rather than rendering where the prosecution failed at trial to put forth any evidence concerning an essential element of the crime). This understandably drove the inquiry in the direction of allowing re-opening.

After Edna Cousins confirmed that he was in fact thirty-three years of age, Johnson was offered the opportunity to present any further testimony he might desire and this offer was declined. He was not prejudiced by this procedure and there is no error therein. *See Lewis v. State,* 56 So. 2d 397, 397-8 (Miss. 1952) *(citing Williams v. State,* 26 So. 2d 64 (Miss. 1946), for the proposition that allowing

the State to reopen its case in a criminal prosecution does not constitute reversible error where the defendant is provided a full and fair opportunity to rebut the additional evidence); *State v. Martin,* 102 Miss. 165, 59 So. 7 (1912). *See also George v. State,* 813 S.W.2d 792 (Ark. 1991) (holding that trial court did not abuse its discretion in permitting State to reopen its case to prove that defendant was over age 18, as required to prove first-degree sexual abuse, after defendant had moved for directed verdict but before defendant had put on his case); *Commonwealth v. Tharp,* 575 A.2d 557 (Pa. 1990) (holding that trial court did not abuse its discretion in permitting the prosecution to reopen its case to present direct evidence as to defendant's age in order to further establish the age element of the charge for corruption of a minor after demurrer was interposed and before a ruling was made upon that motion). This assignment of error is without merit.

II. THE TRIAL COURT ERRED IN ALLOWING STATE WITNESSES ERICA COUSINS, EDNA COUSINS AND GLADYS JEAN VERSELL TO TESTIFY AS TO HEARSAY STATEMENTS MADE BY THE VICTIM TO THEM IN DIRECT VIOLATION OF THE MISSISSIPPI RULES OF EVIDENCE.

Each of the persons present at Edna Cousins home on the morning of July 4 testified at trial. Erica recalled Connie's initial description of the abuse. Then Edna remembered being first notified of the incident by her daughter and thereafter hearing Connie repeat her description of the event. Next, Gladys recounted the call that she received from Edna as well as Connie's own account of the abuse. Finally Connie herself testified, telling her story yet again. During the course of the prosecution's case-in-chief, the jury heard these witnesses repeatedly mention Connie's statements that Johnson "messed with" or "touched" her. On appeal, as he did at trial, Johnson objects to the trial court's decision to admit the testimony of each individual, characterizing the relevant portions as hearsay under Mississippi Rule of Evidence 802. Moreover, he contends that presentation of the evidence through the words of four separate witnesses served only to bolster the child's credibility, an impermissible purpose. We will address both of Johnson's allegations in turn, beginning with the trial court's basis for allowing into evidence the testimony of each witness and the State's accompanying response to his claims of error. In doing so we are ever mindful that the admissibility of evidence rests within the sound discretion of the trial court. *Hall v. State,* 611 So. 2d 915, 918 (Miss. 1992). Only where its judicial discretion has been abused may we reverse. *Hall,* 611 So. 2d 918.

*Erica Cousins' testimony*

Johnson first attacks the admissibility of Connie's initial remarks to her cousin, Erica. In response, the State claims that the statement fits squarely within M.R.E. 803(25), the tender years exception to the hearsay rule. We agree with the State.

M.R.E. 803(25) provides an exception to the hearsay rule for:

[a] statement made by a child of tender years describing any act of sexual contact performed with or on the child by another . . . 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 . . .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.

"The 'substantial indicia of reliability' required by the rule are necessary to prevent confrontation clause problems." *Eakes v. State,* 665 So. 2d 852, 864 (Miss. 1995) (*quoting Doe v. Doe,* 644 So. 2d 1199, 1206 (Miss. 1994)). In that regard the ultimate inquiry is "whether the child declarant was particularly likely to be telling the truth when the statement was made." *Griffith v. State,* 584 So. 2d 383, 388 (Miss. 1991) (*quoting Idaho v. Wright,* 497 U.S. 805, 822 (1990)). The U.S. Supreme Court expressly declined in *Idaho v. Wright* to adopt a "mechanical test." *Wright,* 497 U.S. at 822. However, the determination should be made on the record. M.R.E. 803(25) Cmt. And the trial court cannot consider other corroborating evidence of guilt. *Griffith* 584 So. 2d at 388 *(citing Idaho v. Wright,* 497 U.S. at 822). "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.*

Pursuant to the rule, the trial judge conducted a hearing outside the presence of the jury and determined, based on the circumstances surrounding Connie's revelation, that the requisite reliability existed. In arriving at this conclusion he considered the relatively short lapse of time, Johnson's constant presence in the household during the interim and Connie's planned testimony and accompanying availability for cross-examination. Based on these, he found it particularly likely that the child had been telling the truth. When the correct legal standard is employed by the trial court, as was done, we will reverse a finding of admissibility only when there has been an abuse of discretion. *Doe,* 644 So. 2d at 1207. After reviewing the record, we find none.

Connie, within a relatively short period of time, overcame the embarrassment associated with rape as well as the fear brought on by his warning to remain quiet. Then she turned, without prompting, to her young cousin and close friend who had been lying beside her as the attack occurred. In tears, and with apparently no motive for falsely accusing Johnson, the child described her ordeal. Since we find no fault in the trial court's determination that this statement had "particularized guarantees of trustworthiness," this facet of Johnson's contention is without merit.

*Edna Cousins' testimony*

Johnson further claims the trial court erred in admitting into evidence the description of events given by Connie to her aunt. The account, which was the subject of Edna's testimony at trial, was introduced as an excited utterance under Mississippi Rule of Evidence 803(2). Johnson characterizes Connie's statement as inadmissible hearsay because the circumstances fail to show the spontaneity required for admission. The State fails to respond directly to Johnson's allegations, intermingling its discussion of Edna's testimony with that of Erica and the child's mother, both of which were admitted by the trial court on wholly different grounds. Nevertheless, Johnson fails to direct this court to any error which carries with it the potential for requiring reversal.

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). Within the confines of the Mississippi Rules of Evidence, 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)); *Parker. v. State*, 606 So. 2d 1132, 1137-1138 (Miss. 1992). This determination is based upon the totality of the circumstances present in each individual case. *Parker*, 606 So. 2d at 1137-1138. No one fact is determinative because spontaneity is the ultimate objective. *Evans v. State*, 547 So. 2d 38 (Miss. 1989). However, case law focuses time and again on the context in which the statement was made. *See, e.g., Davis v. State*, 611 So. 2d 906, 914 (Miss. 1992) (whether the declarant was the victim or merely a witness); *Evans*, 547 So. 2d 38 (whether the declarant complained at the first opportunity to the first person encountered); *Sanders v. State*, 586 So. 2d 792 (Miss. 1991) (whether the statement was volunteered or was the product of questioning); *Heflin v. State*, 643 So.2d 512 (Miss. 1994) (the intervening lapse of time between the startling event and statement); *Baine*, 606 So. 2d 1076 (outward signs of stress); *See Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988) (age of the declarant).

The excited utterance exception often applies where a declarant exercises the first available opportunity to tell his/her story. *Evans*, 547 So.2d at 40 (remarks of a rape victim made with relative calm nevertheless held to be excited utterances because she made them shortly after the event to the first person she saw). However, failure to complain immediately does not necessarily preclude application of the exception where other circumstances indicate continuing stress. For example, in *Heflin*, 643 So. 2d at 519, our supreme court found the temporary silence of a young rape victim reasonable in light of the shame associated with the crime and fear caused by the presence of the perpetrator. In fact, *Heflin* also illustrates that excited utterances are not limited to any particular period of time. *Heflin*, 643 So. 2d at 519. In that case, the Mississippi Supreme Court allowed a time lapse of twenty four hours. *Id.*

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?" *Sanders*, 586 So. 2d at 795. 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.*

Finally, as indicated by the rationale of *Sanders*, the appropriate application of the exception is generally signaled by outward signs of stress. *See also, Davis*, 611 So. 2d at 908 (involving a witness

screaming minutes after incident); *Heflin,* 643 So. 2d at 519 (identifying the young rape victim's uncontrollable crying at the time of the statement as the determinative factor while affirming the application of the exception). Case law suggests that the apparent emotional stress required bears a direct relationship to the amount of time that has elapsed. Clearly, the more immediate the remarks, the more calmly they may have been made. *See Evans*, 547 So. 2d at 40; *Baine*, 606 So. 2d at 1078 (finding a seven-year-old's unemotional description of sexual abuse admissible because the child volunteered the information within minutes of seeing her mother). We would expect the converse to be true as well.

Here, fear of reprisal from Johnson initially prevented Connie's reporting the event. As she explained at trial, she lay in bed for hours awake and unable to move following Johnson's third visit to her room and warning to keep quiet. Only in the daylight of the next morning, without the immediate threat of Johnson's return, did Connie gain the courage to speak of the attack. Then, as she told Erica, she began to cry uncontrollably. She slipped into the bathroom in an attempt to regain her composure. However, she could hear doors slamming throughout the house, as well as voices raised in an accusatory tone toward her attacker. And within minutes, a steady stream of concerned and inquisitive relatives appeared in the bathroom's door. Because Connie's exchange with Edna occurred only moments after her initial report of the abuse, her remarks were largely repetitious, and her weeping persisted throughout the exchange, each of the statements may reasonably be viewed as a component of a single, traumatic episode. As such, these statements were correctly admitted as excited utterances.

*Gladys Versell's testimony*

Johnson also claims that the trial court erroneously admitted Connie's remarks to her mother. In essence, he argues that the applicability of the excited utterance exception becomes more tenuous with the passage of time and with the repetition of Connie's accusations. However, because the description of Johnson's attack which Connie gave her mother might be fairly characterized as yet another fragment of the larger, stressful episode, we question the validity of Johnson's assertion. But in any event, since Connie subsequently testified at trial, enduring Johnson's cross-examination, any error in admitting Gladys Versell's testimony would be insufficient to require reversal. *See Lambert v. State*, 574 So. 2d 573, 578-9 (Miss. 1990) (stating that erroneous admission of hearsay testimony that defendant's stepdaughter accused him of forcing sex upon her was insufficient to require reversal because the child testified, was cross-examined by defense counsel, and the additional testimony only bolstered other witnesses' accounts of what the child said). *See also, Jones v. State*, 606 So. 2d 1051, 1057 (Miss. 1992) (stating that where corroborative evidence exists and the hearsay evidence is merely cumulative, the admission may be held to be harmless). Therefore, this facet of Johnson's contention is also without merit.

*Cumulative Effect*

Finally, Johnson claims that aside from the admissibility of these individual remarks, the presentation of the whole served only to impermissibly bolster the child's testimony as it occurred prior to Connie's taking the stand and therefore, prior to any attack on the child's credibility. In response, the State argues that each of the three witnesses gave testimony which was in some fashion distinct from either that provided by the others or that given by Connie. The State then continues, alleging that the combined testimony of the witnesses provided the jury with a complete picture of the crime as well as its resulting effect on the family and in particular, Connie. We agree with the State.

Evidence generally may not be introduced merely to bolster the testimony of a witness. *Canton v. State*, 539 So. 2d 1024, 1028 (Miss. 1989). But by rejecting the otherwise applicable hearsay label in instances where . . . "[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . ." Mississippi Rule of Evidence 801(d)(1)(B) represents a departure from this historically prevailing, yet ill-defined prohibition. *See Tome v. U.S.*, 513 U.S. 150, 156 (1995)(interpreting the federal equivalent). Such statements are excluded from hearsay consideration at the outset and therefore are admissible as substantive evidence without an applicable exception to the rule. *Tome,* 513 U.S. at 157. However, the failure to accord this weighty, non-hearsay status to all prior consistent statements does not require that those falling outside the confines of 801(d)(1)(B) be discarded without further inquiry. Where evidence serves some alternative purpose and falls within an independent hearsay exception, the general dictate loses much of its force. *See Baine*, 606 So. 2d at 1080 (affirming the admission of a young victim's statements to a psychologist prior to any claim of fabrication, in part, because the testimony fell within the Rule 803(4) hearsay exception, for which the availability of the declarant is immaterial). And even the isolated erroneous admission of a statement to which no hearsay exception applies may not necessarily be fatal. *See Lambert,* 574 So. 2d at 578 (holding the erroneous admission of hearsay testimony insufficient to require reversal because it "at worst bolster[ed] what [the victim] testified to"); *See also, Jones*, 606 So. 2d at 1057 (holding the admission of "merely cumulative"hearsay evidence to have been harmless).

Since Connie had not yet taken the stand when the evidence was offered, Johnson correctly labels the relevant testimony of Erica, Edna, and Ms. Versell as hearsay. *See Lambert*, 574 So. 2d at 576 (holding the similarly offered testimony of a school nurse inadmissible hearsay). However, aside from Gladys Versell's otherwise excusable testimony, each portion of the contested evidence fits firmly within an established exception to the hearsay rule. Moreover, the testimony of each witness establishes why she proceeded further with the matter and how the authorities ultimately became involved. Because we consider it unlikely that the jury may have returned a different verdict had it not heard the hearsay testimony at issue, we find no error sufficient to require reversal. *See Owens v. State*, 666 So. 2d 814, 817 (Miss. 1995) (upholding conviction for child fondling despite trial court's erroneous admission of victim's prior consistent statement due to overwhelming evidence of guilt). This facet of Johnson's contention is without merit as well.

III. THE TRIAL COURT ERRED IN ALLOWING DR. WILLIAM SOREY TO TESTIFY AS TO HEARSAY STATEMENTS MADE TO HIM BY THE VICTIM DURING THE COURSE OF HIS DIAGNOSIS AND TREATMENT AT WHICH TIME THE VICTIM IDENTIFIED JOHNSON AS THE PERPETRATOR OF THE ALLEGED SEXUAL ASSAULT.

Next, Johnson questions the admissibility of remarks made by Connie to Dr. William Sorey, a physician at University Medical Center who examined the child following the attack. Following Johnson's arrest, Gladys Versell, at the direction of police, transported her daughter to the hospital. During the course of the ensuing medical examination, the child again identified Johnson as her attacker. Johnson now characterizes this statement as inadmissible hearsay. While Johnson focuses

primarily on the inapplicability of Rule 803(4), the State defends the trial court's decision to allow the identification into evidence via M.R.E. 803(25), the tender years exception. We agree with the State. As above, the trial judge employed the described correct procedure. Once again, he conducted the required hearing outside the presence of the jury. Again, he determined based on the factual context surrounding the statement, that the requisite reliability existed. And his determination was again heavily influenced by Connie's availability for cross-examination. Because the court employed the correct legal standard with no apparent abuse of discretion, we have no authority to reverse his conclusion. This assignment of error is therefore without merit.

IV. THE TRIAL COURT ERRED IN ORDERING THE DEFENDANT TO SERVE A SENTENCE OF FIFTY YEARS IN THE MDOC AS SUCH SENTENCE WAS IN EXCESS OF THE DEFENDANT'S LIFE EXPECTANCY AND WAS THEREFORE, TANTAMOUNT TO A SENTENCE GREATER THAN LIFE.

In his final assignment of error, Johnson requests that this Court remand his case for re-sentencing, characterizing the lengthy punishment imposed by the trial court as violative of the penalty provision within section 97-3-65 of the Mississippi Code (Rev. 1994). The statute places the imposition of a life sentence within the sole province of the jury, and unless the court has the authority from the jury, no such sentence can be imposed by the trial judge. It presupposes, absent a jury recommendation of life imprisonment, that the judge will sentence the defendant to a definite term reasonably expected to be less than life. *Hickobottom v. State*, 409 So. 2d 1337, 1339 (Miss. 1982)(*citing Lee v. State*, 322 So. 2d 751 (Miss.1975)). Johnson contends that despite the absence of such a jury recommendation, his sentence of fifty years is the equivalent of a life sentence since it exceeds his actuarial life expectancy - around 36 years. In response, the State argues Johnson is procedurally barred from arguing the issue on appeal since he failed to raise the issue either at his sentencing hearing or in his post-trial motions. We agree with the State.

A trial judge may not be put in error on a matter which was not presented to him for decision. *Read v. State*, 430 So. 2d 832, 838 (Miss. 1983). Therefore, failure to make a contemporaneous objection at trial waives the issue on appeal. *Ratliff v. State*, 313 So. 2d 386, 388 (Miss.1975). Furthermore, appellants are procedurally barred from raising before this court issues not listed in their motion for JNOV or a new trial. *Pool v. State*, 483 So. 2d 331, 336 (Miss. 1986). Therefore, since Johnson's allegation first appears in his brief to this Court, we are under no obligation to consider it. However, because his claim may be overcome with ease, we proceed to the merits of the contention. Johnson relies exclusively on *Erwin v. State*, 557 So. 2d 799 (Miss. 1990). In *Erwin*, our supreme court vacated a forty year penalty for a § 97-3-53 kidnapping conviction and remanded the case for a new sentencing hearing. Here, the statute placed a limit of thirty years on the sentence which might be

imposed where the jury failed to find a sentence of life appropriate. *Erwin ,* 557 So. 2d at 801. However, when analyzing the similarly lengthy sentence given for a rape committed in connection with that crime, the court wrote, "Miss. Code Ann. § 97-3-65 does not impose a limitation for the penalty for rape although it, also, allows the jury to fix a penalty at life imprisonment. If the jury does not so fix the penalty, then it may be fixed for any term, less than life, as the court, in its discretion, may determine. It appears, therefore, that the sentence imposed by the court upon the rape conviction does not exceed any statutory limit." *Id. (citing Warren v. State*, 456 So. 2d 735, 738-9 (Miss. 1984) , for the proposition that, within the enumerated bounds, the court may fix the penalty at imprisonment in the state penitentiary for such term as the court in its discretion may determine). Moreover, the court, while commenting on acceptable sentencing possibilities on remand, cleared the path for the imposition of two sentences, to be served consecutively, which might exceed Erwin's actuarial life expectancy. *Id.* at 803. The court's language makes clear that concern for arming the State with meaningful penalties with which to punish serious offenders far outweighs statistical speculation as to their potential life-span. In that vein, we find no fault with the trial court's sentence of fifty years in the case sub judice. This assignment of error is without merit.

**THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF RAPE OF A CHILD UNDER FOURTEEN YEARS OF AGE AND SENTENCE OF FIFTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST HINDS COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**