IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00636 COA

RUFUS TAYLOR MUIRHEAD

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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

ALBERT B. SMITH, III

JOHN S. KNOWLES, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: FRANK CARLTON AND VICTOR MCTEER

NATURE OF THE CASE: CRIMINAL: SEXUAL BATTERY

TRIAL COURT DISPOSITION: SEXUAL BATTERY: SENTENCED TO SERVE 30 YRS IN THE MDOC

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This is a criminal appeal from the Circuit Court of Washington County wherein Rufus Taylor Muirhead was convicted of the sexual battery of his stepdaughter, S.S. The trial court sentenced Muirhead to the maximum term of thirty years in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Muirhead appeals arguing the trial court erred: (1) in allowing attorney Victor McTeer to act as a special prosecutor in this case; (2) in allowing the prosecutor to make inflammatory jury arguments and to introduce improper evidence during voir dire; (3) in admitting irrelevant and highly prejudicial evidence offered by the State; (4) in excluding relevant and material evidence offered by him; (5) in refusing jury instruction D-5; and (6) in sentencing him to a maximum term without the opportunity to make a statement to the court. Finding no merit in these assignments of error, we affirm Muirhead's conviction and sentence.

STATEMENT OF THE FACTS

Victor McTeer, a private attorney in Greenville, was appointed by the district attorney to assist with the prosecution of this case. Assistant District Attorney Joyce Chiles represented the State.

Muirhead was convicted of the sexual battery of his stepdaughter, S.S. At the time of the alleged abuse, S.S. was seven years old and lived with her mother and stepfather, Muirhead. S.S. testified that after her mother returned to work from maternity leave, Muirhead would involve her in games of "dare." According to S.S., Muirhead removed his clothes and made her do the same. Muirhead would flip a coin with the winner daring the other to do something. She testified that he dared her -- and she complied with his requests -- to smoke a cigarette, urinate on a dirty towel, suck his finger. Eventually, Muirhead dared her to suck his penis. S.S. testified that Muirhead made her lie down under him, after which he placed his penis between her legs and moved up and down. S.S. testified that she told her mother about the incident, and when her mother did not believe her, she told her stepmother.

J.S., S.S.'s father, testified that she told him about the incidents during a weekend visit and identified Muirhead as her abuser. J.S. testified that he returned S.S. to her home on Sunday evening and called the Mississippi Department of Human Services (DHS) Monday morning to report the incidents. J.S. denied that he sought custody of S.S. prior to the report of the abuse.

Dr. William Leland Aron, testified as an expert witness in emergency room medicine and the sub-specialty of the examination and treatment of victims of child sexual abuse. Dr. Aron testified that upon his examination of S.S. he found redness, inflammation and considerable tenderness in the external genitalia. Dr. Aron also testified that S.S. tested positive for gonorrhea. According to Dr. Aron, this test result was conclusive diagnostic evidence of sexual abuse. Dr. Aron testified that a gonorrhea test on Muirhead was negative.

B.H., S.S.'s maternal grandmother, testified that S.S. told her about playing the "dare" game with

Muirhead. B.H. took S.S. to the Greenville Police Department.

Angela Street, director of Charter Counseling Services and a social worker, testified as an expert witness in clinical social work. Street testified that she had been treating S.S. since the abuse was reported. Street testified that S.S. identified her stepfather, Muirhead, as her abuser, and S.S. did not identify anyone else as her abuser. Street also testified as to the behavioral characteristics of abused children. Street believed that S.S. related incidents of sexual abuse with enough significant factual detail and in such a manner as to make S.S.'s allegations believable. Street assessed S.S.'s behavior concluding that she had been sexually abused.

Henry Tillman, employed by the Mississippi Department of Health in the area of disease control, testified that his position entails identifying individuals with infectious disease, testing them, providing medication for treatment, and following up any contacts which may have been exposed. Tillman testified that DHS contacted him to test B.M., Muirhead's wife, and that she tested negative for gonorrhea. Tillman did not test J.S. or his wife, or anyone else regarding this case.

B.M. testified that she went back to work on October 26, after being at home for maternity leave with her newborn son. B.M. stated that Muirhead was at home because he was sick and that S.S. stayed at home to help take care of the baby. Muirhead's mother was also in the home all afternoon. B.M. testified that she and Muirhead were having sexual intercourse regularly during this period, and that she did not have gonorrhea. She stated that S.S.'s father had wanted custody of S.S. prior to the report of the abuse. B.M. also testified that Muirhead had touched S.S. in the vaginal area while instructing her where not to allow people to touch her.

Tommie Muirhead, Muirhead's mother, testified that she was at the Muirhead home on the afternoon of the day that B.M. returned to work. She observed no abuse during this time.

Muirhead testified in his own defense. Muirhead denied that any abuse had taken place. He testified that the reason S.S. was at home on October 26 was because he was sick.

Janice Ferguson, principal of S.S.'s school, testified as a rebuttal witness. She stated that S.S. attended school every day in October and did not miss a day until November 6.

The jury convicted Muirhead of sexual battery.

ARGUMENT AND DISCUSSION OF THE LAW

I. WAS IT ERROR FOR THE TRIAL COURT TO ALLOW ATTORNEY VICTOR MCTEER TO ACT AS A SPECIAL PROSECUTOR IN THIS CASE?

Muirhead challenges the appointment of a special prosecutor in this case. Muirhead points out that section 25-31-39 abolished part-time district attorneys. *See* Miss. Code Ann. § 25-31-39 (1972). Muirhead asserts that this case does not fall within the statutory exception for special prosecutors found in section 25-31-21. *See* Miss. Code Ann. § 25-31-21 (1972). Muirhead concludes that the trial court was in error in allowing the trial court to proceed with the special prosecutor.

The State contends McTeer's role was that of an assistant district attorney, and that section 25-31-21 does not apply. The State asserts that Muirhead should not be allowed to raise an objection to

McTeer's assisting the prosecution particularly in light of the fact that no constitutional right of his was impaired by McTeer's serving as prosecutor. The State asserts that the law in Mississippi has long allowed for a private attorney to be employed by the family of a victim to assist the State in prosecuting. The State argues that in this case, McTeer served the same function with the only difference being who paid the private attorney. The State contends that Muirhead does not raise the issue of payment of the private attorney and concludes that section 25-31-39 does not apply.

We find Muirhead's argument unpersuasive. As the State points out, the Mississippi Supreme Court has held:

> This Court takes judicial notice of the fact that it has been the custom in this State from time immemorial for individuals interested in the punishment of an accused, such as the husband of the deceased, to employ a special prosecutor in whom they have particular confidence to assist the State's attorney in the prosecution. This practice has been uniformly permissible in this State. *Edwards v. State*, 1873, 47 Miss. 581, 587; *Carlisle v. State*, 1895, 73 Miss. 387, 394-395, 19 So. 207. It represents a common law practice, and that of a large majority of the states of the Union.

Goldsby v. State, 240 Miss. 647, 669, 123 So. 2d 429, 437 (1960). The court went on to quote the following language with approval:

> At common law, criminal prosecutions were generally carried on by individuals interested in the punishment of the accused, and not by the public. The private prosecutor employed his own counsel, had the indictment found and the case laid before the grand jury, and took charge of the trial before the petit jury. While under the present practice officers are appointed or elected for the express purpose of managing criminal business, the old practice survives in most jurisdictions to the extent that counsel employed by the complaining witness or by other persons desirous of a conviction are permitted to assist the prosecuting attorney in the conduct of the prosecution, and *as a general rule no valid objection can be raised by the accused to allowing the prosecuting attorney to have the assistance of private members of the bar.*

Goldsby, 240 Miss. at 669-70, 123 So. 2d at 437 (emphasis added) (quoting 42 Am. Jur. *Prosecuting Attorneys* § 10).

In the present case, the district attorney sought to employ the services of a private attorney to assist in the prosecution of this case. Both Muirhead and the State recognize that Assistant District Attorney Joyce Chiles represented the State throughout the process. We find that Muirhead has no basis upon which to object to the employment of a private attorney to prosecute this case. Accordingly, we find this assignment of error without merit.

> II. DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO INTRODUCE IMPROPER EVIDENCE DURING VOIR DIRE AND MAKE INFLAMMATORY JURY ARGUMENTS DURING CLOSING STATEMENT?

Muirhead contends that the trial court erred in allowing the State to bring in expert testimony through one of the potential jurors about false-positive and false-negative test results on gonorrhea.

The trial court overruled Muirhead's objection to the juror's explanation. Muirhead alleges this constitutes reversible error because the juror's response was inflammatory, prejudicial, and irrelevant. Muirhead contends that the trial court prevented him from explaining.

Muirhead further contends that the prosecutor improperly injected his personal life in referencing his own daughter during his closing argument. Muirhead recognizes that the trial court sustained his objection, but argues that the trial court failed to admonish the jury to disregard the improper argument.

Muirhead also asserts that the trial court erred in overruling his objection to the prosecutor's statement during closing argument in which he stated "you never heard from her mother, you never heard from her grandmother, you never heard from Rufus Taylor Muirhead that she [S.S.] lies." Muirhead argues this placed the burden on him to prove that S.S. did not lie.

The State argues that the jurors were being questioned about their knowledge and attitudes on the particular issues of this case. The State asserts that the questions were within the limits of acceptable voir dire. The State further contends that the prosecutor's statements during closing argument fall within the wide latitude permitted during closing arguments, and that no unjust prejudice resulted.

Voir dire examination is left to the sound discretion of the trial court. *See Ballenger v. State*, 667 So. 2d 1242, 1250 (Miss. 1995). We recognize that the trial court is in the best position to evaluate the propriety of questions posed during voir dire. In fact, "[t]he line between a proper and improper question is not always easily drawn; it is manifestly a process in which the trial judge must be given considerable discretion." *Taylor v. State*, 672 So. 2d 1246, 1263 (Miss. 1996) (citing *Harris v. State*, 532 So. 2d 602, 606 (Miss. 1988); *Murphy v. State*, 246 So. 2d 920, 922 (Miss. 1971)). In the present case, we do not find that the trial court abused its discretion.

Muirhead's assertion that he was prohibited from explaining the information stated by the potential juror is not compelling. We are unable to discern what Muirhead is referring to after reviewing the record which indicates that he was permitted to answer questions regarding his being tested for gonorrhea. The State timely objected to Muirhead's reference to an argument with someone over his allegedly wanting a drug test. This was a nonresponsive addition to one of his answers. Furthermore, Muirhead made no proffer of the excluded testimony. Accordingly, this issue is not preserved for appeal. *See Thompson v. State*, 602 So. 2d 1185, 1188 (Miss. 1992) ("a record proffer of excluded testimony must be made to preserve the point for appeal").

As to Muirhead's contention on the prosecutor's statements during his closing argument:

> Generally, attorneys on both sides in a criminal prosecution are given broad latitude during closing arguments. This Court has explained that not only should the State and defense counsel be given wide latitude in their arguments to the jury, but the court should also be very careful in limiting free play of ideas, imagery, and personalities of counsel in their argument to jury. Given the latitude afforded an attorney during closing argument, any allegedly improper prosecutorial comment must be considered in context, considering the circumstances of the case, when deciding on their propriety.

Ballenger v. State, 667 So. 2d 1242, 1270 (Miss. 1995) (quoting *Ahmad v. State*, 603 So. 2d 843,

846 (Miss. 1992)); *see also Davis v. State*, 660 So. 2d 1228, 1248 (Miss. 1995). "Our well-worn test for determining if improper argument by the prosecutor to the jury requires reversal is: 'whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created.'" *Davis*, 660 So. 2d at 1248 (quoting *Davis v. State*, 530 So. 2d 694, 701 (Miss. 1988)). In *Davis*, the trial court overruled Davis' objection, and Davis did not request that the trial court admonish the jury that closing arguments are not evidence. *Davis*, 660 So. 2d at 1248-49. The trial court did, however, instruct the jury during jury instructions that the closing arguments were not evidence, and that the jury should disregard any part which has no basis in the evidence. *Id.* at 1249. On appeal, the court held that "[b]ecause the jury was instructed that closing argument was not evidence and was therefore instructed to disregard comments not supported by the evidence, this Court presumes that the jury followed the lower court's instructions and disregarded the prosecutor's argument that was not supported by the evidence." *Id.* (citing *Ormond v. State*, 599 So. 2d 951, 961 (Miss. 1992)). In the present case, the trial court included in its instructions to the jury the following:

> After I have completed reading this instruction, the attorneys will make closing arguments. These arguments are intended to help you understand the evidence and apply the law. But, the arguments are not evidence. Therefore, if a statement is made during the argument which is not based upon evidence, you should disregard the statement entirely.

Like the court in *Davis*, we presume that the jury followed the trial court's instructions and disregarded any argument, statement, or remark not supported by the evidence.

Furthermore, the Mississippi Supreme Court has stated that the same rationale in the principle that "where an objection to a question is sustained and no request is made that the jury be instructed to disregard the question, there is no error" also applies to objections during closing arguments unless a fundamental right is clearly involved. *Brock v. State*, 530 So. 2d 146, 155 (Miss. 1988) (citation omitted). In the present case, there was timely objection to the statement. There was then timely sustaining of the objection. Then, although defense counsel did not request an instruction to disregard, the Judge said, "I have instructed the jury to disregard." The record does not reveal any such instruction, but the defense did not bring this oversight to the Court's attention. The trial court obviously thought that he had so instructed the jury. The supreme court has held in a similar circumstance that a trial judge will not be held in error for an omission which defense counsel did not call to his attention. *Sanders v. State*, 260 So.2d 466 (Miss. 1972). While we do not condone the prosecutor's comment (about his relationship to his daughter) to which an objection was sustained, we cannot hold that it was reversible error which prompted a verdict due to unjust prejudice. There was ample evidence on which the jury could base a conviction.

We find this assignment of error to be without merit.

> III. DID THE TRIAL COURT ERR IN ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OFFERED BY THE STATE?

Muirhead contends that the trial court erroneously allowed hearsay testimony to be admitted from J.S., B.H., and Angela Street in violation of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990). Muirhead contends that the in-camera hearings on hearsay statements made by S.S. to J.S. and B.H. were legally insufficient to satisfy Mississippi Rule of Evidence 803(25). Muirhead points out that the

trial court failed to make an on-the-record finding on each of the factors to be considered under Rule 803(25). Muirhead argues that no 803(25) hearing was held for the hearsay expert testimony of Angela Street. Muirhead argues that Street was erroneously allowed to testify regarding her opinion of whether S.S. was telling the truth. Finally, Muirhead contends that the State was erroneously allowed to question him about his five prior marriages. He asserts that this was irrelevant and prejudicial.

The State contends that the record reflects that the trial court considered the Rule 803(25) factors when it assessed the evidence produced at the hearing on the reliability of the out-of-court statements made by S.S. The State asserts that the trial court considered the factors as a guideline and that there is no requirement that each factor be discussed separately and apart on the record. The State also contends that Muirhead first made S.S.'s truthfulness an issue during his examination of her on the witness stand. The State argues that the trial court was well within his discretion in allowing Street, a mental health expert, to testify as to the characteristics she looks for in determining whether a child has been abused and her observations of how they apply to S.S. Finally, the State asserts that the questions regarding Muirhead's numerous marriages were not so prejudicial as to require reversal.

Rule 803(25) states:

> Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence 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 either (1) 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.

M.R.E. 803(25). The comment to Rule 803(25) states:

> Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). A finding that there is a substantial indicia of reliability should be made on the record.

M.R.E. 803(25) cmt.

We agree with the State in its contention that there has never been a requirement that an on-the-record finding be made for each of the factors enumerated in *Wright* and the comment to M.R.E. 803(25). The case law is clear that the factors are not exclusive. *See Johnson v. State*, 666 So. 2d

784, 796 (Miss. 1995); *Doe v. Doe*, 644 So. 2d 1199, 1206 (Miss. 1994); *Griffith v. State*, 584 So. 2d 383, 388 (Miss. 1991); *see also Idaho v. Wright*, 497 U.S. 805, 822, 110 S. Ct. 3139, 3150, 111 L.Ed.2d 638 (1990). In fact, the Mississippi Supreme Court has stated that the factors do not provide a basis for a mechanical test. *See Johnson*, 666 So. 2d at 796; *Doe*, 644 So. 2d at 1206; *Griffith*, 584 So. 2d at 388.

The record reflects that the trial court, outside the presence of the jury, held separate hearings pursuant to the requirements contained in the tender years exception to the hearsay rule on the admissibility of testimony by J.S. and B.H. regarding statements made by S.S. to each of them. It is clear from the record that the trial court determined that statements made by S.S. to both J.S. and B.H. and testified to by them fell under the tender years exception. The trial court specifically found that there was "sufficient indicia of reliability" regarding each of the statements made to J.S. and B.H. after it considered the factors outlined in the comment to Rule 803(25). The record clearly demonstrates that the trial court considered the appropriate standard under Rule 803(25) and that S.S. did testify at trial. Thus, the requirements of M.R.E. 803(25) were met. We find this issue to be without merit.

As to the testimony of Angela Street, a licensed clinical social worker and the director of Charter Counseling Center, Muirhead never objected to Street's testimony of what S.S. told her. Accordingly, he has waived this assignment of error on appeal. *See King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) ("[i]t is elementary that, for preservation of error for review, there must be contemporaneous objections.") (citing *Smith v. State*, 530 So. 2d 155, 161-62 (Miss. 1988)); *see also Lambert v. State*, 518 So. 2d 621, 625 (Miss. 1987) (objections to admissibility of evidence must be timely made when the evidence is offered, or the issue is waived).

As to Muirhead's contention that Street was erroneously allowed to testify as to S.S.'s truthfulness, the record reveals that Street testified as an expert witness in clinical social work. Over Muirhead's objection, Street was allowed to testify to the characteristics she used in evaluating the information a child tells her. We do not find that the admission of this testimony was error.

Finally, we can see little, if any, probative value of the questions proposed to Muirhead regarding the number of times he has been married. However, Muirhead had failed to establish what prejudice, if any, he suffered, and we do not find that these questions rise to the level of reversible error. *See* M.R.E. 103(a). We find this assignment of error to be without merit.

IV. DID THE TRIAL COURT ERR IN EXCLUDING RELEVANT AND MATERIAL EVIDENCE OFFERED BY THE DEFENSE?

Muirhead asserts that the trial court erred in preventing him asking and fully developing evidence of prior alleged incidents, discord, and strife between J.S. and the Muirheads concerning the custody of S.S. Muirhead specifically points to the testimony of J.S. asserting the trial court did not allow J.S. to testify concerning fights between the two families over the custody of S.S. Muirhead argues such testimony was admissible under Mississippi Rule of Evidence 616 to show bias, prejudice, and the hostile interest of J.S. and his family. Muirhead also points to the testimony of B.M. and Taylor Muirhead alleging the same error occurred.

Next Muirhead asserts that B.M. was extensively and rudely cross-examined regarding her feelings

for S.S. and the reason for her perceived distance from S.S. On redirect, Muirhead asserts that B.M. was asked to explain her perceived distance from S.S. with the State objecting, and the trial court sustaining the objection. Muirhead argues that her response was admissible under Rule 801(d)(2). Muirhead contends that he was prejudiced by not being allowed to make this crucial explanation.

The State argues that the record does not support Muirhead's contention that he was not allowed to develop evidence regarding the prior fights between the two families concerning the custody of S.S. The State also points out that the trial court allowed questions regarding the time period *prior* to the alleged abuse, but sustained the State's objection as to relevance when Muirhead attempted to question J.S. about the time period *after* the alleged abuse. The State asserts that Rule 616 does not require the admission of irrelevant evidence. The State further contends that the cross-examination of B.M. was relevant and within the boundaries of cross-examination.

We find that the record does not support Muirhead's contention that he was prohibited from exposing any bias, prejudice, or hostile interest of J.S.'s. Muirhead was allowed to question J.S. about any discord between the families over the custody of S.S. *prior to the allegation of abuse*. We find the trial court properly excluded irrelevant testimony regarding incidents after the allegation of abuse.

Muirhead did not ask to make a proffer of B.M.'s testimony about any statement made by officials to her, nor did he seek admission under Rule 801(d)(2). The law is clear--when testimony is not allowed by the trial court, a proffer of the excluded testimony must be made in order to preserve the issue for appeal. *See Thompson v. State*, 602 So. 2d 1185, 1188 (Miss. 1992) ("a record proffer of excluded testimony must be made to preserve the point for appeal") In the present case, Muirhead made no such proffer. Thus, this issue is without merit. Additionally, the record does not reflect that Muirhead ever argued the admissibility of B.M.'s testimony under Rule 802(d)(2). Any alleged error is waived because Muirhead failed to timely present the matter to the trial court for ruling. *Ballenger v. State*, 667 So. 2d 1242, 1252 (Miss. 1995). The rule is well established in this State that an appellate court will not put the trial court in error "on a matter not presented to [it] for decision." *Id.* at 1256 (citations omitted).

We find this issue to be without merit.

V. DID THE TRIAL COURT ERR IN REFUSING JURY INSTRUCTION D-5?

Muirhead argues that the trial court erred in refusing the following jury instruction:

> The testimony of a law enforcement officer, Department of Human Services Investigator, Social Worker, or any other state investigator should be considered by you just as any other evidence in the case. In evaluating his or her credibility you should use the same guidelines which you may apply the testimony of any witness. In no way should you give either greater or lesser credence to the testimony of any witness merely because he or she is a law enforcement officer, Department of Human Services Investigator, Social Worker, or any other state investigator.

Muirhead asserts that *Flight Line Inc. v. Tanksley*, 608 So. 2d 1149 (Miss. 1992) is controlling. Muirhead argues that because Angela Street is a law enforcement officer who testified as an expert

that the instruction was necessary.

The State responds by claiming that Muirhead's proposed instruction was an impermissible comment on the evidence. We agree. The Mississippi Supreme Court has held that such an instruction is a comment on the evidence, and a trial court will not be held in error for refusing such an instruction. *See Hansen v. State*, 592 So. 2d 114, 140-41 (Miss. 1991); *Stewart v. State*, 355 So. 2d 94, 96 (Miss. 1978); *Washington v. State*, 341 So. 2d 663, 664 (Miss. 1977). We find that the trial court was not in error in refusing Muirhead's proposed instruction D-5. Thus, this issue is without merit.

> VI. DID THE TRIAL COURT ERR IN SENTENCING MUIRHEAD TO A MAXIMUM TERM WITH NO CHANCE TO PRESENT EVIDENCE IN MITIGATION OR MAKE A STATEMENT TO THE COURT?

Muirhead fails to cite any authority in support of this assignment of error. The Mississippi Supreme Court has held that failure to cite authority in support of a claim waives any error presented by the issue. *Holloman v. State*, 656 So. 2d 1134, 1141 (Miss. 1995) (citing *Magee v. State*, 542 So. 2d 228, 234 (Miss. 1989)). However, even if there had been error, as Muirhead claims, no sentence will be disturbed that is within the statutory maximum. *See Reynolds v. State*, 585 So. 2d 753, 756 (Miss. 1991) ("[t]he imposition of a sentence is within the discretion of the trial court, and this Court will not review the sentence, if it is within the limits prescribed by statute") (citing *Reed v. State*, 536 So. 2d 1336, 1339 (Miss. 1988); *Boyington v. State*, 389 So. 2d 485, 491 (Miss. 1980)); *see also Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992) ("the general rule in this state is that a sentence cannot be disturbed on appeal so long as it does not exceed the maximum term allowed by statute") (citing *Corley v. State*, 536 So. 2d 1314, 1319 (Miss. 1988); *Reed v. State*, 536 So. 2d 1336, 1339 (Miss. 1988)). The maximum sentence in section 97-3-101 for first conviction sexual battery is thirty years. Muirhead was sentenced by the trial court to thirty years; thus his sentence does not exceed the maximum sentence prescribed by the statute. Accordingly, this issue is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY OF CONVICTION OF SEXUAL BATTERY AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO WASHINGTON COUNTY.

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