IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00039 COA

DANNY OWEN

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. THOMAS J. GARDNER III

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MELVIN C. ELLIS III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: DENVILLE CROWE, SAMUEL M. REEDY

NATURE OF THE CASE: CRIMINAL: SEXUAL BATTERY

TRIAL COURT DISPOSITION: COUNT II SEXUAL BATTERY: SENTENCED TO 20 YRS IN MDOC; SENTENCE SHALL RUN CONSECUTIVE WITH SENTENCE NOW SERVING; MAKE RESTITUTION OF $1000 TO CRIME VICTIM COMPENSATION PROGRAM

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

DIAZ, J., FOR THE COURT:

The Appellant, Danny Owen (Owen), was tried and convicted of sexual battery in the Lee County Circuit Court. He was sentenced to serve twenty years in the Mississippi Department of Corrections. Aggrieved from this judgment, Owen appeals to this Court asserting the following issues: (1) that the trial court erred in allowing witnesses to testify to hearsay statements made by the child; (2) that the trial court erred in qualifying Ms. Hunsucker as an expert witness, and that her testimony should not have been admissible; and (3) that the trial court erred in refusing Owen to question his ex-wife about her past. Finding no reversible error, we affirm the judgment.

FACTS

Owen and his ex-wife, C.O., separated in July 1992. C.O. took their three children, and moved from Tupelo to New Albany, Mississippi. On September 20, 1992, after C.O. had given R.O., her youngest daughter a bath, she noticed R.O. had laid a stuffed animal on the floor, straddled her legs around it, and began moving up and down on top of it. C.O. told R.O. to stop and that such behavior was not nice. R.O. replied that her father had done that to her.

R.O. was taken to seek professional counseling where it was revealed that R.O. was sexually molested by her father. The Appellant denies ever molesting R.O.

DISCUSSION

I. RULE 803(25)

Owen's first argument is that the trial court erred by allowing witnesses testify about hearsay statements made by R.O. to each witness. Rule 803(25) provides:

> [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) (1996).

The comment to the rule lists several factors for the trial court to consider when determining whether there is an indicium of reliability to the statements. Owen argues that the lower court did not consider all of the factors listed in the comment to the rule, and thus, did not make a thorough examination.

When determining the admissibility of a statement made under rule 803(25), a trial judge must ascertain whether the statement exhibits trustworthiness and reliability. The judge must look to such

factors such as spontaneity and consistent repetition, the mental state of the child, the use of terminology unexpected of a child of similar age, and lack of motive to fabricate. *Johnson v. State*, 666 So. 2d 784, 796 (Miss. 1995). These factors, however, are not exclusive. *Johnson*, 666 So. 2d at 796. The trial court must make an overall determination of whether "the child declarant was particularly likely to be telling the truth when the statement was made." *Id.* citing *Griffith v. State*, 584 So. 2d 383, 388 (Miss. 1991) (citations omitted).

As long as the court makes such an overall determination, time is only one of the factors to consider. *Johnson*, 666 So. 2d at 796. Rule 803(25) was drafted based on the directives stated in *Idaho v. Wright*, where the U.S. Supreme Court stated that such hearsay would be admissible provided that it bore the "particularized guarantees of trustworthiness." *Idaho*, 497 U.S. 805, 821 (1990). The court included a number of factors to help determine admissibility. *Idaho*, 497 U.S. at 821. The *Griffith* court followed the holding of *Idaho v. Wright* stating:

> These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the [Confrontation] Clause. Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.

Griffith, 584 So. 2d at 388 citing *Idaho v. Wright*, 497 U.S. at 822. In reviewing the record, it is apparent that the trial judge was familiar with, and considered the factors listed in the comment to rule 803(25). The judge was deliberate in stating his reasons on the record of his findings. We think that the trial court considered the necessary factors in determining the reliability of the statements., and accordingly, we find no error.

II. EXPERT: KAREN HUNSUCKER

Owen argues that the trial court erred by allowing Ms. Hunsucker to testify as an expert in the area of child abuse because she received her degrees in social work, and not child therapy. This Court has established the test under the rule 702 of the rules of evidence that governs expert testimony. The two-part inquiry is as follows: (1) 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; and (2) will the proposed testimony assist the trier of fact? *Hall v. State*, 611 So. 2d 915, 919 (Miss. 1992) (citations omitted). Once it is determined that expert testimony will assist the trier of fact, the expert must be adjudged qualified in his field. *Couch v. City of D'Iberville*, 656 So. 2d 146, 152 (Miss. 1995). "The adjudication of whether a witness is legitimately qualified as an expert is left to the sound discretion of the trial judge." *Couch*, 656 So. 2d at 152.

Subjecting Ms. Hunsucker to this test for expert witnesses set forth in rule 702, she is certainly qualified to be an expert witness. Ms. Hunsucker received both her bachelor and master degrees in social work from East Carolina University in North Carolina. She was licensed in Texas, and is

currently licensed in Mississippi. Ms. Hunsucker has worked in several psychiatric centers in North Carolina, Texas, and Mississippi. She has specialized in working with sexually abused children, and has received training in the area. At the time of trial, Ms. Hunsucker was working at the Mantachie Clinic in Mantachie, Mississippi. The court accepted Ms. Hunsucker as an expert child therapist specializing in child sexual abuse. The lower court was acting well within its discretion in accepting Ms. Hunsucker as an expert.

Owen also argues that the lower court erred in allowing expert testimony on the subject of child abuse. He claims that such testimony was improper bolstering. Owen cites to *Griffith v. State*, where the court held that a witness in a child abuse case cannot give a direct opinion as to the veracity of the child's statement. *Griffith*, 584 So. 2d at 386 (Miss. 1991). Such testimony would be inadmissible. Looking at the present record, Ms. Hunsucker did not give an opinion on the veracity of R.O.'s statements to her on direct examination. On direct, Ms. Hunsucker merely relates to the court what R.O. told her, and her observations during her sessions with R.O. Such testimony is not only admissible under 803(25), but rule 803(4). We find no merit to this contention.

III. CROSS-EXAMINATION OF THE MOTHER

Owen's third contention of error is that the trial court improperly limited his right to cross-examine R.O.'s mother about her past. Apparently, C.O. was herself a victim of child abuse. Owen claims that her past may have tainted her credibility in a child abuse case. The court found that such evidence would be irrelevant and that it would have no probative value.

Rule 103(a) provides that an error may not be predicated on a ruling that either admits or excludes evidence unless a substantial right of the party is affected, and (1) an objection is made, or (2) an offer of proof is made. M.R.E. 103(a) (1996). When a party objects to the exclusion of evidence, an offer of proof must be made for the benefit of the appellate court. In the present case, Owen did not properly preserve this issue for review. "The rule is well established that the action of the trial court is not subject to review when the objection to evidence is sustained, unless counsel either states into the record what is expected to be proved, or in the absence of the jury, to have the witness answer the questions." *Brown v. State*, 338 So. 2d 1008, 1009-10 (Miss. 1976). The purpose of this rule is so that the trial court can determine the competency of the proffered evidence and that this Court can review it on appeal. *Brown*, 338 So. 2d at 1011. Except for the conclusory statement that C.O.'s credibility may be questioned due to her own past, Owen makes no proffer of evidence as to the issue. Without such a proffer, we cannot say that the trial court abused its discretion in excluding such evidence.

THE JUDGMENT OF CONVICTION IN THE LEE COUNTY CIRCUIT COURT OF SEXUAL BATTERY WITH SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND RESTITUTION OF $1000 TO THE CRIME VICTIM COMPENSATION PROGRAM NIS AFFIRMED. THIS SENTENCE SHALL RUN CONSECUTIVELY TO ANY SENTENCE CURRENTLY SERVING. COSTS OF THIS APPEAL ARE TAXED TO LEE COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING,

McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.