IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2021-KA-00483-COA

JOHNNY R. WALKER, JR. A/K/A JOHNNY RAY WALKER A/K/A JOHNNY R. WALKER — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	03/29/2021
TRIAL JUDGE:	HON. ANTHONY ALAN MOZINGO
COURT FROM WHICH APPEALED:	JEFFERSON DAVIS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	VANESSA J. JONES
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CANDICE LEIGH RUCKER ASHLEY LAUREN SULSER
DISTRICT ATTORNEY:	HALDON J. KITTRELL
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 07/26/2022
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., McDONALD AND EMFINGER, JJ.

EMFINGER, J., FOR THE COURT:

¶1. On January 31, 2020, a Jefferson Davis County grand jury indicted Johnny Ray Walker Jr. for one count of sexual battery pursuant to Mississippi Code Annotated section 97-3-95(1)(d) (Rev. 2014). A jury found Walker guilty, and the trial court sentenced him to a term of forty-two years in the custody of the Mississippi Department of Corrections (MDOC). Walker challenges his conviction on appeal. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2. On June 28, 2019, Michael Ball dropped off his children K.H., M.N., and M.B., at his

aunt's home on Hicks Lane.[1] Ball's cousin Brittany McDonald had agreed to keep his three children at their aunt's home while Ball went to work. McDonald was visiting from Texas for the summer and staying at her aunt's home along with her four children. On this particular day, their cousin Johnny Ray Walker Jr. was also at the aunt's home. Walker was twenty years old at the time. K.H., who was ten years old, later reported that Walker sexually assaulted her on multiple occasions that day (June 28, 2019) when McDonald periodically left the home with her four children. According to both McDonald and K.H., McDonald left the home at least two times that day. One time, McDonald left to go to the grocery store to get the children food for lunch, and another time, she left to go down the road to get better reception on her phone.

¶3. According to K.H., when McDonald and her kids left the home, Walker locked M.N. in a room down the hall and locked M.B. in the bathroom. K.H. claimed that Walker then took her into a different room and shut the door. Once in the room, K.H. stated that Walker took off their clothes and put her on the bed. Using an anatomical diagram at trial, K.H. testified that Walker inserted his penis into her vagina while she was lying on her back on the bed. According to K.H., he stopped when McDonald returned from the store.

¶4. K.H. further testified that McDonald and her four children left the home a second time, and while they were gone this time, Walker sexually assaulted her again. According to K.H., both M.N. and M.B. were in the living room watching TV during the second incident. K.H. testified that she was in the same room with Walker as the previous assault,

[1] We use initials to protect the identities of the minors.

with the door shut. According to K.H., Walker removed her clothes, and she was laying on the floor when Walker inserted his penis into her "behind." K.H. testified that Walker sexually assaulted her a third time on that day by again inserting his penis into her "behind" while she was laying on her stomach on the bed. According to K.H., Walker stopped when McDonald again returned to the home. K.H. testified that she was scared to tell anyone what had happened to her.

¶5. A few months later in September 2019, K.H. disclosed to a group of cousins that Walker had sexually assaulted her. Trenese Young, the mother of the cousins to whom K.H. revealed the assault, called Ball to inform him of K.H.'s disclosure. K.H. eventually confided in her father, and he testified at trial that

> she started crying at first, and she said she didn't want to live with nobody else, and I eventually forced her to tell me what had happened, and she told me that Johnny Ray tried to sexually assault her, and every time she tried to get up, he pushed her down and told her he'd kill her.

M.N. also testified that Walker had told them he would kill them if they told anyone about what happened. M.N. and M.B. also corroborated that they were locked in separate rooms during the time period that K.H. claimed she was sexually assaulted.

¶6. On September 30, 2019, Ball took K.H. to the Jefferson Davis County Sheriff's Department to make a report. Investigator Tim Culpepper took a statement from both Ball and K.H. on that date and made his initial report. K.H. also revealed to Culpepper that "Johnny Ray Walker had pulled her clothes down. . . . She said he pulled his thing and stuck it in [her] . . . ." Based on K.H.'s disclosure to him, Culpepper referred K.H. to the Kids Hub Child Advocacy Center for a forensic interview.

¶7. Robin Bixler, who would testify at trial as an expert in the field of forensic interviews, interviewed K.H. at Kids Hub on October 4, 2019. During her interview with Bixler, K.H. again disclosed that she was sexually assaulted by Walker multiple times on June 28, 2019. Bixler testified that during their interview, K.H. used age-appropriate language to describe what had happened to her. Bixler also noted that K.H.'s demeanor appropriately changed when she discussed the sexual assaults, as opposed to her demeanor when they discussed other things like going to a football game.

¶8. On October 7, 2019, Investigator Culpepper interviewed Walker. According to Culpepper's testimony, "[Walker] told [him] that they sat on the couch and watched TV, while [McDonald] was gone, which would be the time when the events would have taken place." Walker did not testify at trial nor was the video of his interview played for the jury. Culpepper testified that he "signed charges on [Walker] for sexual battery" after the interview.

¶9. Walker's trial began on March 24, 2021, and ended on March 25, 2021. At the conclusion of the trial, the jury found Walker guilty of sexual battery, as charged in the indictment, for inserting his penis into K.H.'s genitals. Walker filed a motion for a new trial and a motion for judgment notwithstanding the verdict on that same day. The court denied his motions in separate orders, entered on April 13, 2021. The court sentenced Walker on March 26, 2021, to serve a term of forty-two years in the custody of the MDOC. Walker appealed.

ANALYSIS

¶10. Walker raises five issues on appeal, which we address separately below.

I. Walker challenges the sufficiency of the evidence.

¶11. Walker contends that he should be acquitted because the State failed to produce any physical, scientific, or corroborative evidence. While Walker is correct that the State did not provide any physical or scientific evidence at trial, that is not the appropriate test to determine whether a jury's verdict should be overturned due to insufficient evidence.

¶12. The test for the sufficiency of the evidence on appeal is set forth in *Washington v. State*, 298 So. 3d 430, 438 (¶27) (Miss. Ct. App. 2020):

> It is well settled that "[a] challenge to the sufficiency of the evidence is reviewed in the light most favorable to the State, giving the State the benefit of all favorable inferences reasonably drawn from the evidence." *Ward v. State*, 285 So. 3d 136, 140 (¶14) (Miss. 2019) (internal quotation mark omitted) (quoting *Henley v. State*, 136 So. 3d 413, 415 (¶8) (Miss. 2014)). "This Court must reverse and render if the facts and inferences so considered point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty." *Id*. (internal quotation mark omitted) (quoting *Henley*, 136 So. 3d at 415-16 (¶8)).

The appellate courts have also addressed the absence of physical or scientific evidence. In *Morgan v. State*, 995 So. 2d 812, 817-18 (¶17) (Miss. Ct. App. 2008), this Court held:

> "[T]he unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where the testimony is not discredited or contradicted by other credible evidence. . . ." *Davis* [*v. State*], 878 So. 2d [1020], 1027 (¶29) [(Miss. Ct. App. 2004)] (quoting *Cross v. State*, 759 So. 2d 354, 356 (¶11) (Miss. 1999)). Further, Morgan fails to realize that physical evidence of sexual penetration specifically linking him to C.E.'s abuse is not necessary to secure a conviction. *See, e.g.*, *Williams v. State*, 757 So. 2d 953, 957 (¶17) (Miss. 1999). In *Williams*, the defendant argued that there was no physical evidence of sexual penetration of any of the victims. *Id*. at 957 (¶16). The court held that, although the State did not present any physical evidence of sexual penetration, the unsupported word of the victim is sufficient, and "it is in the

> province of the jury to determine the credibility of witnesses." *Id*. at 957 (¶17) (citations omitted).

See also Smith v. State, 163 So. 3d 971, 974 (¶16) (Miss. Ct. App. 2014).

¶13. Here, K.H.'s trial testimony alone was sufficient to prove each of the elements of sexual battery as charged by the indictment.[2] The jury was properly instructed that each of the elements of sexual battery, as set forth in the trial court's instruction, must be proved beyond a reasonable doubt. Further, the jury was instructed that K.H.'s testimony alone was sufficient to support a verdict of guilty if the jury found that her testimony was not discredited or contradicted by other credible evidence. We find that the jury's verdict was properly supported by sufficient evidence. This issue is without merit.

II. Walker contends his due process rights were violated.

¶14. Walker argues on appeal that his due process rights were violated at trial because his trial was conducted "during the height of the pandemic scare around Covid 19." He contends, "Jurors naturally desired not to be exposed to the deadly virus, wished not to be in proximity to each other and distrusted all the people in the courtroom; as a result, they rushed through their sworn duties and rendered an unreasonable verdict to escape confinement." However, Walker points to absolutely no record evidence to substantiate this argument. *See* M.R.A.P. 28(a)(7) (requiring "citations to the . . . parts of the record relied on").

¶15. The State asked the potential jurors during voir dire:

> Q. Is everybody okay wearing a mask, if you're serving on this jury?

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[2] Portions of K.H.'s testimony were, in fact, corroborated by other witnesses for the State.

A. (Venire Indicated)

Q. And are you okay if we're able to stand far enough back that the attorneys pull our masks down, so that you can hear us okay?

A. (Venire Indicated)

None of the jurors indicated that they had a problem with wearing a mask or any of the other requirements related to Covid-19. Walker's attorney also addressed the proposed jurors during voir dire and asked:

> So again, I would ask on you oath that if you just don't want to be here, you don't want to listen, if [you] raise your hand so that we know that right now, because this is very important. We don't get to rewind this, after it's over with, and it has lifelong consequences for everyone in this room. . . . So if there is anyone that's sitting in those bleachers this morning, who in your heart know[s] that you cannot be fair and impartial, if you will raise your hand, so we know that.

As a result of the State's and Walker's counsel's questions during voir dire, the record reflects that one juror was excused. The remaining jurors had ample opportunity during voir dire to express any concerns they might have related to serving on the jury during the pandemic, and nothing in the record shows that potential jurors raised any such concern. "It is the duty of counsel to make more than an assertion; they should state reasons for their propositions, and cite authorities in their support." *Johnson v. State*, 154 Miss. 512, 122 So. 529 (1929). Given that Walker offered no proof to substantiate his claim that the jurors' fear for their safety negatively impacted their participation in the trial and deliberation, this argument is without merit.

III. Walker contends that prosecutorial misconduct contributed to unethical emotional manipulation.

¶16. Walker argues on appeal that the State "heavily coached" K.H. and therefore he alleges prosecutorial misconduct. Walker bases his argument on the difference in K.H.'s demeanor during her interviews with Culpepper and Bixler and her demeanor on the stand at trial. Walker offers absolutely no evidence of any prosecutorial misconduct by the State to substantiate his claim. In *Britt v. State*, 844 So. 2d 1180, 1183 (¶9) (Miss. Ct. App. 2003), this Court addressed a similar issue:

> The State cites the well-established principle that, "[i]t is the duty of counsel to make more than an assertion; they should state reasons for their propositions, and cite authorities in their support." *Johnson v. State*, 154 Miss. 512, 513, 122 So. 529, 529 (1929). There is little more that this Court can add to the State's response except to say that the issue is barred for failure to support the argument with "citations to the authorities, statutes and parts of the record relied upon." M.R.A.P. 28(a)(6).[3]

We find that this issue is procedurally barred due to Walker's failure to point to any evidence of any action by the State which he contends amounts to prosecutorial misconduct.

IV. Walker contends that the trial court abused its discretion by improperly admitting evidence.

¶17. Walker argues that both Bixler's and Culpepper's testimony was improperly admitted into evidence because their testimony did not meet the tender-years exception set forth in Mississippi Rule of Evidence 803(25). Walker claims that "the hearsay testimony should not have been admitted because it lacks substantial indicia of reliability and is not supported by circumstantial guarantees of trustworthiness." Walker further claims that such testimony was improperly admitted because it was used solely to bolster K.H.'s testimony.

¶18. Rule 803(25) states:

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[3] This provision is now found at Rule 28(a)(7).

(25) Tender Years Exception. A statement by a child of tender years describing an act of sexual contact with or by another is admissible if:

(A) the court – after a hearing outside the jury's presence – determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and

(B) the child either:

(i) testifies; or

(ii) is unavailable as a witness, and other evidence corroborates the act.

In *Crawford v. State*, 282 So. 3d 1230, 1236 (¶¶17-18) (Miss. Ct. App. 2019), this Court discussed a trial court's finding of "substantial indicia of reliability":

> Drawing from the Supreme Court case of *Idaho v. Wright*, 497 U.S. 805, 822 . . . (1990), the comment to Rule 803 provides a non-exhaustive list of twelve factors that the trial court can consider when determining if there was sufficient indicia of reliability, including:
>
> > (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.
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> M.R.E. 803(25) advisory committee's note.
>
> This Court has previously held that "a sufficient on-the-record finding of reliability does not require 'each factor be listed and discussed separately by the trial judge.'" *Webb v. State*, 113 So. 3d 592, 600 (¶24) (Miss. Ct. App. 2012) (quoting *Bosarge v. State*, 786 So. 2d 426, 437 (¶32) (Miss. Ct. App.

> 2001)). Moreover, the list of factors is not exclusive, and "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." *Wright*, 497 U.S. at 822.

¶19. It is undisputed that K.H. was a child of tender years when the incident took place and when she made the statements at issue. K.H. did testify at trial and was subjected to cross-examination. The trial court had a hearing outside the jury's presence and made a determination that K.H.'s statements were reliable. The court properly analyzed and discussed on the record "some" of the factors the judge considered in making his determination of admissibility. While the trial court may not have specifically addressed every factor in making his ruling, such action is not required. "An appellate court's standard of review of a trial court's admission or exclusion of evidence is abuse of discretion." *Carothers v. State*, 152 So. 3d 277, 281 (¶14) (Miss. 2014). We find that the trial court made a sufficient finding of reliability on the record and did not abuse his discretion by admitting Bixler's and Culpepper's testimony.

¶20. Walker also contends that the admission of the testimony of Bixler and Culpepper was offered solely to (improperly) bolster K.H.'s testimony at trial. Hearsay testimony typically is admitted pursuant to Rule 803(25) when the child also testifies at trial. This case is not unusual in that regard. The hearsay testimony offered through a law enforcement officer often is offered to show the information upon which the officer took some action. In the present case that was to obtain a forensic interview of K.H. and lead him to question Walker. This provides context and tells a coherent story of the investigative process. Bixler's forensic interview was another step in the investigative process. In *Marquis v. State*, 242 So. 3d 86,

90 (¶18) (Miss. 2018), the supreme court wrote:

> [T]he forensic interview, though not conducted by law-enforcement officers themselves, was an investigatory step, done for the purpose of gathering a statement that was testimonial in nature. Indeed, the word "forensic" is defined as "[u]sed in or suitable to courts of law[.]" Forensic, Black's Law Dictionary (10th ed. 2014).

Again, we find that the trial court did not abuse its discretion in allowing both Bixler's and Culpepper's testimony.

V. Walker contends that the trial court abused its discretion by giving an improper jury instruction.

¶21. Walker contends that during the State's closing argument, the prosecutor read only a portion of one jury instruction and, as a result, misled the jury as to the law it was to apply in reaching its verdict. However, Walker admits that this instruction (No. 9), as given by the court, was a proper instruction of the law. The issue Walker raises here is really one of prosecutorial misconduct.

¶22. Before closing arguments, the trial court read all the jury instructions to the jury. Therefore, the jury was advised of the full content of, not only Jury Instruction No. 9, but all the instructions before closing arguments began. The jury was also advised that they would have the written jury instructions available to refresh their memory of the law and for their use during deliberations.

¶23. During the State's final argument, in obvious response to the defense's argument that there was no medical proof that these events ever happened, the prosecutor said:

> What Jury Instruction 9 says is that the unsupported word, the testimony of a victim of sexual abuse, the testimony of a victim like [K.H.] who sits here under oath and tells you what happened to her, that testimony is evidence. It

> is proof enough for the State to prove that Johnny Ray Walker sexually penetrated [K.H.] on June 28th, 2019. That's the law, and the defense said it. I'll say it again. We have to follow the law. We talked a lot about medical evidence in this case. Members of the jury, this trial is not a trial of Michael Ball's parenting.

Although Walker complains on appeal about this comment, his trial counsel did not make a contemporaneous objection. This failure would in most cases, and does in this case, bar consideration of this issue on appeal. *See Ross v. State*, 275 So. 3d 1090, 1093 (¶9) (Miss. 2019). However, in *Barnes v. State*, 328 So.3d 743, 747 (¶19) (Miss. Ct. App. 2021), this Court said:

> Barnes asserts that during the prosecutor's closing argument, she improperly commented on Barnes's decision not to testify, thereby prejudicing his right to a fair trial and warranting a new trial. Barnes acknowledges that no objection was made at trial to the prosecutor's comments. Barnes therefore relies on "plain error" in raising this issue on appeal. *Foster v. State*, 639 So. 2d 1263, 1289 (Miss. 1994) ("The defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal."); *see Stokes v. State*, 141 So. 3d 421, 427-28 (¶26) (Miss. Ct. App. 2013). In this regard, we observe that although the plain-error exception exists, "'it is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Id*. at 428 (¶26) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 . . . (1982)[.]

¶24. Even if we were to consider a plain-error analysis, this is not one of those rare instances in which a "miscarriage of justice" would result if Walker were not given a new trial. The trial court had already read the full instruction to the jury, and the jury had the full instruction to use during jury deliberations.

CONCLUSION

¶25. After reviewing the record, we find no error. Walker's conviction and sentence are affirmed.

¶26. **AFFIRMED.**

BARNES, C.J., CARLTON AND WILSON, P.JJ., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE, McCARTY AND SMITH, JJ., CONCUR.