

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 94-KP-01045 COA**

**LARRY MARTIN A/K/A LARRY LEON MARTIN**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	08/12/94
TRIAL JUDGE:	HON. JOHN B. TONEY
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PRO SE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	JIM KELLY
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	DEFENDANT ADJUDGED GUILTY OF TWO COUNTS OF SEXUAL BATTERY AND ONE COUNT OF TOUCHING A CHILD FOR LUSTFUL PURPOSES; SENTENCED TO THIRTY YEARS FOR EACH COUNT OF SEXUAL BATTERY, SENTENCES TO BE SERVED CONCURRENTLY, AND TWO YEARS FOR TOUCHING A CHILD FOR LUSTFUL PURPOSES, SENTENCE TO BE SERVED CONSECUTIVELY, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.
DISPOSITION:	AFFIRMED - 10/21/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	2/9/98
MANDATE ISSUED:	4/16/98

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

COLEMAN, J., FOR THE COURT:

Larry Martin (Martin) was indicted on two counts of sexual battery on his daughters, KM and AM, and with two counts of touching a child for lustful purposes (fondling) on his nieces, BR and JM. At

the conclusion of the State's case, the trial judge sustained Martin's motion for a directed verdict of not guilty on the count of fondling JM. After a two day trial, the jury found Martin guilty of the two counts of sexual battery on his two daughters and the one count of fondling BR. The trial judge sentenced Martin to serve thirty years for each conviction of sexual battery, which sentences were to be served concurrently, and to two years for the one count of touching, handling, etc., a child for lustful purposes on BR. The two-year sentence was to be served consecutively to the preceding two sentences of thirty years each on the two convictions of sexual battery. The trial court ordered Martin to serve all three sentences in the custody of the Mississippi Department of Corrections.

Martin's trial attorneys filed an appellate brief on his behalf in which they asserted that the trial judge erred in admitting prior statements of witnesses into evidence and in failing to grant a motion for a directed verdict. After their brief was filed, Martin discharged his trial lawyers and then proceeded in this appeal pro se. Martin has filed a revised supplement to opening brief, in which he alleges, *inter alia*, ineffective assistance of counsel. This Court affirms all three of Martin's convictions.

## I. FACTS

Larry Martin and his wife, Angie Roby Martin, have two daughters, KM and AM, and one son, Matthew. The genesis of this case was KM's and AM's accusation that Martin had forced each of them to fellate him. Two of Martin's nieces, BR and JM, also accused Martin of touching their breasts for lustful purposes. More specifically, on March 23, 1994, Martin had twice touched BR on her breast while she was spending the night at the Martins' home with KM and AM., and on March 29, 1994, Martin had forced his older daughter, KM, to fellate him.

After KM had told her mother, Angie Martin, what Martin had forced her to do, her mother and Sherry Roby, BR's mother, filed criminal charges against Larry Martin. The Rankin County Sheriff's Deputies, Greg Eklund and M.T. "Squeaky" Ingram, interviewed both girls separately about what Martin had done to each of them. The deputy sheriffs recorded their interviews with both KM and BR. Martin was subsequently arrested at his place of employment in Hinds County, and the same two Rankin County deputy sheriffs took him to the Rankin County Sheriff's office in Brandon. At the Rankin County Sheriff's office, Deputies Eklund and Ingram informed Martin that he had been charged with "sexual allegations against his daughter and niece." After the deputies advised Martin of his right against self-incrimination, but just before Martin asked to see a lawyer, Martin asked the deputies, "If I did have a problem like that, could I get help?"

The next day, March 31, Angie Martin brought her younger daughter, AM, to the sheriff's office to report that Martin had also compelled AM to fellate him. As they had done when they interviewed KM and BR the day before, the deputies taped their interview with AM about what Martin had forced her to do.

After KM and AM reported the sexual misconduct of their father, they were referred to Dr. Catherine Dixon, whom the trial judge accepted as an expert in psychology and the detection and treatment of child sexual abuse. Both girls met with Dr. Dixon approximately six times and during the first three sessions they related to her what their father had made them do. However, on their fifth interview, which occurred after Martin had been released on bail in the amount of \$200,000, both of Martin's daughters entirely recanted their accusations to Dr. Dixon.

## II. TRIAL

Martin's trial began on July 28, 1994, and lasted for two days. The State's first witness was Dr. Dixon, who testified about her interviews and counseling of KM and AM. Next, the State called KM and AM, both of whom again entirely recanted their earlier accusations of their father's forcing each of them to perform fellatio on him. Each daughter testified that they had fabricated the charges against their father because they were angry with him. His daughters were angry because Martin did not attend their school functions or the team sporting events in which they participated and because they had overheard arguments between their mother and their father, during which their father indicated that he intended to divorce their mother. Moreover, the mobile home in which the family lived had burned down in February, 1994. The record contains testimony that BR had taken KM and AM to a near-by establishment which had pool tables and sold beer. Martin acknowledged that when he discovered that his daughters had gone to the pool hall, he suspended their privileges for two weeks.

The testimony of Martin, his wife, and his two daughters also established that Martin had kept approximately eighteen pornographic video tapes and some explicit magazines, including "Playboy," in his gun cabinet under lock and key. Almost all of the video tapes contained graphic depictions of the performance of fellatio. Martin testified that he had hidden the key to the gun cabinet by placing it on a magnet behind a speaker to a stereo system in his house. KM testified that while she could not remember where she got the key, she had used it to unlock the gun cabinet and retrieve one of the video tapes. KM stated that she and her sister then watched the tape for about five minutes but that "[w]hen we seen [sic] what was on it, we just cut it off." KM explained that her watching the video tape inspired her false story that her father had compelled her to fellate him. AM's testimony corroborated that she and KM had watched the video, and that when they saw a nude woman fellating a man, they "cut it off right quick and put it back up."

After both of Martin's daughters had recanted from the witness stand their accusations that their father had compelled them to fellate him, the State moved to introduce into evidence the authenticated transcripts of their testimony at Martin's preliminary hearing. At that time, both KM and AM testified that Martin had compelled them to engage in oral sex with him. The trial judge admitted these transcripts into evidence over the objection of Martin's counsel.

BR testified that one night when she was spending the night with her cousins, KM and AM, at the Martins' home, Martin came into his daughters' room where KM, AM, and BR were getting ready for bed to ask if any of them wanted some ice cream. BR was the only one who accepted Martin's offer. BR testified that while Martin and she were in the kitchen, Martin hugged her from behind and "started feeling of me [sic]." BR further testified that later that same evening when she was in the bathroom, Martin came to the door, reached his hand inside and around the bathroom door, and fondled her breast while she attempted to hide behind the opened bathroom door.

When the State rested, Martin moved for a directed verdict. The trial judge denied the motion as to Counts I, II, and III, but he sustained the motion as to Count IV, which was for touching JM for lustful purposes because JM testified that she "did not attach any sexual purpose to [Martin's] contact." Martin called four witnesses in his defense. Martin was among the four, and he testified that he committed none of the acts with which he had been charged. We have noted the result of the trial

and the trial judge's sentences imposed upon Martin.

After Martin's convictions, the trial court rendered an order by which it granted leave to Martin "to proceed in forma pauperis in his appeal from the Circuit Court of Rankin County to the Mississippi Supreme Court."

### **III. REVIEW AND RESOLUTION OF THE ISSUES**

Martin's trial lawyers filed a brief on Martin's behalf prior to being discharged by order of the Mississippi Supreme Court as Martin's counsel at Martin's specific request. Martin then filed a thirty-nine page brief which he entitled "Revised Supplement to Opening Brief" and in which he included other reasons for reversing the trial court's judgment of his guilt. However, Martin did not delineate specific issues for this Court to consider as Rule 28(a)(3) of the Mississippi Rules of Appellate Procedure requires.<sup>(1)</sup> We begin our review and resolution of the issues by quoting the two issues which Martin's trial counsel propounded in the brief which they initially filed on their client's behalf.

1. SHOULD THE TRIAL JUDGE HAVE EXCLUDED THE EVIDENCE OF PRIOR TESTIMONY BY THE STATE'S CHIEF WITNESSES, THE ALLEGED VICTIMS, AS HEARSAY UNDER MISSISSIPPI RULE OF EVIDENCE 804(b)(1)?

2. BASED ON THE PROPER EXCLUSION OF THE HEARSAY EVIDENCE, SHOULD THE TRIAL JUDGE HAVE GRANTED A DIRECTED VERDICT?

#### **A. Martin's trial counsels' first issue:**

After the prosecutor had completed his direct examination of KM, during all of which KM firmly recanted her accusation that her father had forced her to fellate him, he moved to introduce into evidence the authentic transcript of KM's testimony at Martin's preliminary hearing. The prosecutor's basis for his motion was "prior inconsistent statements taken under oath at a preliminary hearing as substantive evidence." When the trial judge sustained the prosecutor's motion to introduce the transcript, one of Martin's two attorneys inquired of the trial judge, "Your Honor, is the Court's ruling that it's admissible as impeachment as a prior inconsistent statement?" The trial judge replied, "Substantive evidence under Rule 801; it comes in by itself." Because AM was equally intransigent in her recanting her similar accusations against Martin when the State called her as its witness, the prosecutor moved to introduce an authentic transcript of her testimony given at Martin's preliminary hearing. Again one of Martin's attorneys objected to its admission for the same reason that he had objected to the introduction of the transcript of KM's testimony, and as with KM's transcript, the trial judge ruled that the transcript of AM's testimony was to "be admitted as substantive evidence."

Martin relies on Mississippi Rules of Evidence 804(b)(1) to contend that because both KM and AM were available to testify, the trial court erred in granting the State's motion to admit the transcripts of their testimony at Martin's preliminary hearing.<sup>(2)</sup> At the preliminary hearing, the girls testified that Martin had forced them to perform sex acts on him, but at the trial they said that they lied at the preliminary hearing and their stories were not true. The girls' contradictory testimony from the preliminary hearing was admitted as substantive evidence against Martin at trial. Martin argues that this evidence was admitted in error, and without it he could not have been found guilty.

Martin claims the former testimony was admitted only for impeachment purposes, and because both of Martin's daughters were available to testify at trial, their former testimony was inadmissible based on Rule 804(b)(1) of the Mississippi Rules of Evidence. However, the trial judge held that Rule 801(d)(1)(A) of the Mississippi Rules of Evidence rendered KM and AM's prior testimony at Martin's preliminary hearing to be non-hearsay statements.<sup>(3)</sup> Thus, because KM and AM's testimony was not hearsay, it was as admissible as was their testimony directly from the witness stand during Martin's trial.

KM and AM testified at the preliminary hearing that Martin had perpetrated the acts for which he was indicted. The comment to Rule 801 reads, "Under Rule 801(d)(1)(A) the prior inconsistent statements may be admissible as substantive evidence if they were made under oath, *e. g.*, at a deposition or at a judicial proceeding." In *Dedeaux v. State*, 630 So. 2d 30, 38 n2 (Miss. 1993), the supreme court explained that "[Mississippi Rule of Evidence] 801 make[s] significant changes in the evidentiary effect of an inconsistent pretrial statement 'given under oath subject to the penalty of perjury at a trial.' Such inconsistent statement by definition under this rule is not hearsay and is admissible as substantive evidence." The supreme court has clarified when Rule 801(d)(1)(A) becomes applicable at trial by explaining:

MRE 801(d)(1)(A) makes a prior statement given under oath at "a " trial etc., which is inconsistent with the witness' testimony in the present trial admissible "nonhearsay". In other words, MRE 801(d)(1)(A) is not applicable until the declarant testifies at the present trial on a matter which is inconsistent with a previous sworn statement.

*Craft v. State*, 656 So. 2d 1156, 1164 (Miss. 1995).

All the prerequisites of Rule 801(d)(1)(A) for the admission of the transcripts of KM and AM's testimony at Martin's preliminary hearing were satisfied. KM and AM testified at Martin's trial and recanted their accusations against their father, and they were subject to cross-examination by the prosecutor. Their previous testimony at the preliminary hearing was "given under oath subject to the penalty of perjury." Their previous testimony was inconsistent with their recantation testimony at Martin's trial. Therefore, the application of Rule 801(d)(1)(A) to KM and AM's statements at Martin's preliminary hearing rendered that testimony nonhearsay. Thus, the transcripts of their testimony were admissible, and the trial judge did not err when he admitted the transcripts as substantial evidence pursuant to 801(d)(1)(A) because the transcripts contained statements of both daughters which were inconsistent with their recanting their accusations as witnesses which the State called. The trial judge's admitting these transcripts into evidence "protect[ed the State] from turncoat witnesses." *Wilkins v. State*, 603 So. 2d 309, 320 (Miss. 1992). We affirm the trial court's granting the State's motion to admit the transcripts and resolve Martin's trial counsels' first issue against Martin.

**B. Martin's trial counsels' second issue:**

The second issue is that the trial judge erred when he denied Martin's motion for directed verdict. Martin predicates his success on this second issue on our reversal of the trial judge's granting of the

State's motion to admit the authenticated transcripts of KM and AM's testimony at Martin's preliminary hearing. Martin argues, "It follows that had the prior inconsistent statements made by the Martin girls been excluded, a directed verdict should have been granted, at least as to the Martin girls." From our affirming the trial judge's admission of the transcripts into evidence it would seem to follow that the evidence was sufficient to support Martin's conviction of sexual battery on both of his daughters. The testimony of both KM and AM at Martin's preliminary hearing forthrightly recited that Martin had forced both of them to fellate him.

Motions for directed verdict challenge the legal sufficiency of the evidence. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* This Court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). We review and analyze this second issue cognizant of this standard of review.

Section 97-3-95 of the Mississippi Code of 1972, which defines the crime of sexual battery, reads in relevant part as follows:

(1) A person is guilty of sexual battery if he or she engages in sexual penetration with:

....

(c) A child under the age of fourteen (14) years.

(2) A person is guilty of sexual battery if he or she engages in sexual penetration with a child of fourteen (14) but less than eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

Miss. Code Ann. § 97-3-95 (Rev. 1994). Section 97-3-97(a) of the Mississippi Code of 1972 provides:

For purposes of Sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body."

Miss. Code Ann. § 97-3-97 (Rev. 1994). Martin was adjudged guilty of the sexual battery of his two daughters, KM and AM. KM and AM's testimony at the preliminary hearing unequivocally established that Martin had inserted his penis into each of his daughters' mouths, and thus was sufficient evidence to support the jury's verdicts of Martin's guilt of sexual battery on both KM and AM. We note that Martin was indicted for sexual battery of AM, who was thirteen years of age when

the battery occurred, pursuant to Section 97-3-95(1)(c) and that Martin was indicted for sexual battery of KM, who was fourteen years of age when the battery occurred, pursuant to Section 97-3-95(2).

Section 97-5-23 of the Mississippi Code of 1972 defines the crime of touching, handling, etc., a child for lustful purposes. The portion of Section 97-5-23 which applies to Martin's indictment reads as follows:

Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child younger than himself or herself and under the age of eighteen (18) years who is not such person's spouse, with or without the child's consent, when the person occupies a position of trust or authority over the child shall be guilty of a high crime . . . . A person in a position of trust or authority over a child includes without limitation a child's . . . uncle . . . .

Miss. Code Ann. § 97-5-23(2) (Rev. 1994). BR's testimony about Martin's fondling her breast as she put her empty bowl in the kitchen sink and, later, Martin's reaching through and around the bathroom door again to fondle her breasts was sufficient to support the jury's verdict of Martin's guilt of fondling BR. Our standard of review requires that this Court view the evidence in the light most favorable to the verdict including any inferences which may be drawn from that evidence. *See McClain*, 625 So. 2d at 778.

While KM and AM recanted their accusations against their father when the State called them as its witnesses, it is the jury who weighs the evidence to determine the defendant's guilt. In *Arteigapiloto v. State*, 496 So.2d 681, 686 (Miss. 1986), the Mississippi Supreme Court explained the province and function of the jury as follows:

This Court has stated many times that the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of each witness's testimony. Furthermore, where a jury's decision is based on conflicting evidence, it will not be set aside where there is substantial and believable evidence supporting the verdict.

In *Gandy v. State*, 373 So.2d 1042, 1045 (Miss.1979) the Mississippi Supreme Court elaborated:

No formula dictates the manner in which jurors resolve conflicting testimony into findings of fact sufficient to support their verdict. That resolution results from the jurors' hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict.

In *Nash v. State*, 278 So. 2d 779, 780 (Miss. 1978), the Mississippi Supreme Court opined that "the testimony of a single witness is sufficient to sustain a conviction though there may be more than one witness testifying to the contrary." The standard of review and the foregoing authorities persuade this Court that the evidence was sufficient to support the jury's three verdicts of Martin's guilt of sexual battery and fondling. Thus, we resolve this second issue adversely to Martin and affirm the trial

court's denial of Martin's motion for judgment notwithstanding the verdict.

### **Martin's three pro se issues**

Although Martin's revised supplement to opening brief contains no statement of issues, the State reduces, we think fairly, his miscellany of complaints into four issues, one of which is Martin's reasons for arguing that the evidence was insufficient to support the jury's verdicts of his guilt. This Court finds nothing in Martin's contentions on the insufficiency of the evidence to affect its adverse resolution of the second issue by affirming the trial judge's denial of Martin's motion for judgment notwithstanding the verdict. However, we will review and resolve the remaining three issues which the State suggests are contained in the revised supplement to opening brief. The three issues are the following:

Proposition III. Whether or not the circuit court judge committed reversible error when he admitted the testimony of the State's witness, Dr. Catherine Dixon.

Proposition IV. Whether or not the state failed to comply with the court's discovery order.

Proposition V. Whether Martin was denied effective assistance of counsel.

The Mississippi Supreme Court has opined that "[a] pro se complaint is held to less stringent standards than formal pleadings drafted by lawyers." *McFadden v. State*, 580 So.2d 1210, 1214 (Miss. 1991). While perhaps a pro se brief ought also to be held to less stringent standards, Martin's arguments presented in his pro se supplement are less than clear, and the issues which he attempts to raise are not concise. The supreme court has written:

The purpose of briefs and arguments is to present to the Court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case, to assist the Court in arriving at a just and proper conclusion, and to notify opposing counsel of the questions to be presented and the authorities relied on in reference thereto. In other words, the purpose is to aid the appellate court in determining what the law is.

*Dozier v. State*, 157 So. 2d 798, 799 (Miss. 1963).

**C.** Whether or not the circuit court judge committed reversible error when he admitted the testimony of Dr. Catherine Dixon.

Martin maintains that Dr. Dixon's testimony "should never have been allowed in [because] her testimony was only for the purpose of discrediting the testimony of [his] daughters, KM and AM." He also complains that his trial counsel failed to cross-examine Dr. Dixon adequately. Martin cites no specific testimony of Dr. Dixon that was erroneously allowed by the trial judge, except to say "there is absolutely no scientific basis for which she gave an expert opinion; that I had sexually molested my daughters." Martin contends that because all of Dr. Dixon's testimony was allowed in error, his convictions must be reversed.

Only once did either of Martin's trial counsel object to any of Dr. Dixon's testimony. After Dr. Dixon had testified for some time without objection by Martin's trial counsel, the trial court recessed for the lunch hour and the jury left the court room. Following the jury's departure, one of Martin's lawyers

made the following objection to Dr. Dixon's testimony:

Now, based upon what she has testified to, we would like to make an objection to her testimony and move that it be stricken and that the jury be instructed that they're not to entertain her testimony on the grounds that it is hearsay, that she is not a medical doctor within the meaning of the statute, that this was not medical treatment within the meaning of the statute.

The trial judge opined that her testimony was "allowable under [Mississippi Rules of Evidence 803], subparagraph (4)" and overruled this objection.<sup>(4)</sup> The objection was to all of Dr. Dixon's testimony, much of which had dealt with what KM and AM had told her in the course of her treating them as her patients. Martin cites no authority that the trial judge erred when he overruled this objection; but Rule 803(4) renders admissible the statements of patients of health professionals who treat "emotional and mental health."

Martin's attorney made a voir dire examination of Dr. Dixon prior to the judge's declaring her to be an expert witness in the field of psychology and the treatment of child abuse. Martin's counsel did not object to the trial judge's acceptance of her as an expert in those fields. In *Russell v. State*, 670 So. 2d 816, 826 (Miss. 1995), the supreme court held that it will not address errors on appeal where the defendant failed to raise contemporaneous objection at trial. Accordingly, Martin's complaint about Dr. Dixon's testifying as she did presents no issue for this Court to review.

Nevertheless, the record details Dr. Dixon's qualifications as an expert. She had obtained a Master's degree from California Family Study Center at Azusa Pacific University, a Master's degree from the University of Southern Mississippi, and a doctorate from the University of Mississippi in psychology. Over the course of ten years in the field of sexual child abuse, Dr. Dixon had treated several hundred children and had been qualified as an expert in Federal Court, the Youth Court, Chancery Court, and Circuit Court of various counties in the state. Based upon Dr. Dixon's qualifications and Martin's failure to object to her expertise, we find that the trial court correctly allowed Dr. Dixon to testify as an expert. Martin's only objection, general in nature and made well after Dr. Dixon had begun to testify, was correctly overruled by the trial judge based on Mississippi Rule of Evidence 803(4). Therefore, we find against Martin on this issue.

**D. Whether or not the state failed to comply with the court's discovery order.**

Martin argues that the state failed to comply with the court's discovery order by failing "to provide [his attorneys] with the audio tapes made of the interviews between Rankin County, Mississippi Sheriff's Department Investigators and Brandy Roby." However, Martin continues in his argument:

I am relying on the statement made by my former attorney, J. Hal Ross; that all he received from the State regarding his discovery motion was my initial arrest report and the fact that my family members have visually inspected my entire file in Mr. Ross' office and nothing the State produced in court was present, tapes or letters. Either one of two things factually happened. The State did not comply which is certainly outrageous government conduct, or the State did comply and Mr. Ross did not use any of that information in my defense, but regardless of which took place, I suffered.

In other words, he does not know if the State really was in error, but somebody has to be at fault because he, "an innocent man," is in prison.

Martin cites *United States v. Bagley*, 105 S.Ct. 3375, 3381 (1985), where the prosecution failed to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. Such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. *Id.* However, the Supreme Court opined, " Consistent with our overriding concern with the justice of the finding of guilt, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* The record in the case *sub judice* does not indicate that a discovery violation actually exists, much less that the result of Martin's trial would have been different with the tapes.

The Mississippi Supreme Court has held that "[i]t is elementary that a party seeking reversal of the judgment of a trial court must present this court with a record adequate to show that an error of reversible proportions has been committed and that the point has been procedurally preserved." *Chase v. State*, 645 So. 2d 829, 845 (Miss. 1994). "This Court must decide each case by the facts shown in the record, not assertions in the brief . . . . The burden falls upon an appellant to ensure the record contains sufficient evidence to support his assignments of error on appeal. In the present state of the record, we may not credit this charge of error." *Hansen v. State*, 592 So. 2d 114, 127 (Miss. 1991). The evidence that the State failed to comply with the trial court's discovery order comes not from the record of the proceedings in the trial of the case *sub judice* but in allegations of events that happened after the trial had ended. To succeed on an issue, the appellant must show not only that there was error in the proceedings of the lower court, but also that he was prejudiced by such error. *Mitcham v. Illinois Central Gulf Railroad*, 515 So. 2d 852, 859 (Miss. 1987). Martin fails to demonstrate that the State failed to comply with the court's discovery order. Thus, we resolve this issue against him.

#### **E. Whether or not Martin was denied effective assistance of counsel.**

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." In *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), the United States Supreme Court held that the Sixth Amendment to the federal Constitution providing that in all criminal prosecutions the accused shall enjoy right to assistance of counsel for his defense is made obligatory on the states by the Fourteenth Amendment, and that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him. In *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970), the United States Supreme Court recognized that "the right to counsel is the right to the effective assistance of counsel."

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established the standard by which appointed counsel's representation of an indigent defendant amounted to effective assistance. The Supreme Court then established in *Strickland* that an indigent defendant must demonstrate that his counsel's performance fell below that standard before any court would be warranted in reversing his conviction because his counsel's representation had indeed been ineffective. The Supreme Court opined: "The benchmark for judging any claim of effectiveness must be whether

counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 286.

In *Strickland*, the Supreme Court explained that if an indigent defendant is to prevail in reversing his conviction on the ground that his court-appointed counsel rendered him or her ineffective assistance, that defendant must satisfy both components of his claim that his counsel's assistance was that ineffective. *Id.* The Supreme Court has defined each component as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* at 687.

With respect to claims of ineffective assistance of counsel, the Mississippi Supreme Court has stated:

When faced with a claim of ineffective assistance of counsel at trial or sentencing, this Court follows the test set down in *Strickland, supra.* . . . This Court set out the test and standards in *Cabello v. State*, 524 So.2d 313 (Miss.1988):

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674, 693 (1984), the United States Supreme Court established a two-prong test, required to prove the ineffective assistance of counsel: the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense . . . . The burden of proof then rests with the movant . . . .

Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." . . . In short, defense counsel is presumed competent.

Under the second prong, even if counsel's conduct is "professionally unreasonable," the judgment stands "if the error had no effect on the judgment." ... Consequently, the movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." . . . There is no constitutional right then to errorless counsel . . . .

*Handley v. State*, 574 So. 2d 671, 683 (Miss. 1990) (quoting *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988)).

Martin's sole complaint about his counsels' ineffective representation at trial concerns the procurement of Dr. Dan Cox, a psychologist, as an expert witness in his defense on the day before his trial was scheduled to begin. Martin writes, "[One of my attorneys] told my father four (4) months prior to trial that a psychologist or psychiatrist would not be beneficial, yet retains the services of a

psychologist sixteen (16) hours prior to the beginning of my trial." The record contains nothing to support that either of Martin's attorneys made such a statement to Martin's father. If Martin is to prevail on this issue, "[h]e must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Fisher v. State*, 532 So. 2d 992, 997 (Miss. 1988).

This Court finds *Merritt v. State*, 517 So. 2d 517 (Miss.1987), to contain an issue analogous to this issue. *Merritt* involved the appellant's petition for post conviction relief from his conviction of the murder of his two-year-old daughter. *Id.* at 518. Merritt's counsel did not hire a forensic pathologist to testify about the cause of his daughter's death, an issue which Merritt considered to be important at trial. *Id.* Thus, in his petition for post conviction relief, Merritt alleged that his counsel's representation had been ineffective because of his failure to hire a forensic pathologist to testify about the cause of his daughter's death *Id.* However, Merritt's counsel had consulted his cousin, a pathologist, about the State's pathologist's report. The cousin advised Merritt's counsel that "he . . . saw nothing which would be of any benefit." *Id.* In its opinion, the supreme court opined: "[T]here is no law requiring employment of a forensic pathologist as a prerequisite to defense counsel being considered constitutionally effective." *Id.*

In the case *sub judice*, defense counsel retained the services of Dr. Dan Cox, a clinical psychologist. Dr. Cox testified that he had observed all of the records and documents in this case and said that he was unable to reach the conclusion that Martin molested the children. Dr. Cox testified that Martin's counsel asked him about evaluation procedures for the handling of child abuse cases. Dr. Cox observed most of Dr. Catherine Dixon's testimony during the trial. Martin does not suggest why the outcome of his trial might have been favorable to him had his counsel employed an expert earlier than he did. Martin fails to satisfy the first prong of the two-pronged test of *Strickland*, which is that the performance of his two trial counsel was "professionally unreasonable;" hence, "the strong presumption that counsel's conduct falls within the wide range of reasonable assistance" remains. We resolve this issue adversely to Martin.

## V. SUMMARY

Mississippi Rule of Evidence 801(d)(1)(A) establishes that the authenticated transcripts of KM and AM's testimony at their father's preliminary hearing was not hearsay testimony; thus, the transcripts became admissible when Martin's daughters recanted their accusations of Martin's conduct from the witness stand as the State's witnesses. Their testimony at the preliminary hearing was so explicit that it was sufficient to establish the elements of Martin's sexual battery committed on each of his two daughters. "The testimony of a single witness is sufficient to sustain a conviction though there may be more than one witness testifying to the contrary." *See Nash*, 278 So. 2d at 780.

This Court also rejects the matters which Martin presented pro se in his revised supplement to opening brief. The trial judge did not err when he admitted the testimony of Dr. Catherine Dixon into evidence both because the record reflects that she was qualified as an expert in psychology and because Martin's attorneys' only objection to her testimony, which came well after she had begun to testify, was based on "hearsay." The objection was non-specific as to what part of her testimony was hearsay, and the trial judge's reliance on Mississippi Rule of Evidence 803(4) to overrule the objection was no abuse of his discretion. The record does not support Martin's allegation that the

State failed to comply with the trial court's discovery order by failing to produce the tape of the officers' interview of BR. This Court can not consider any statements which Martin's counsel may have made about what the State produced or may have failed to produce with nothing in the record to support that he in fact made those statements. As for Martin's argument that his trial attorneys were constitutionally deficient in their performance at trial because one of them did not hire a psychologist until the day before his trial began, the record reflects that the psychologist, Dr. Dan Cox, testified in contradiction to Dr. Catherine Dixon's opinion that KM and AM had been sexually molested. The conflict of expert opinions was an issue of fact for the jury to resolve. Therefore, this Court affirms the trial court's judgment of Martin's guilt of sexual battery committed on his two daughters, KM and AM, and fondling of his niece, BR, and the sentences which the trial judge imposed on Martin for those crimes.

**THE RANKIN COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANT'S GUILT OF COUNT I, SEXUAL BATTERY OF A FEMALE LESS THAN FOURTEEN YEARS OF AGE; COUNT II, SEXUAL BATTERY OF A FEMALE MORE THAN FOURTEEN YEARS OF AGE, BUT LESS THAN EIGHTEEN YEARS OF AGE; AND COUNT IV, TOUCHING FOR LUSTFUL PURPOSES A FEMALE OVER FOURTEEN YEARS OF AGE BUT LESS THAN EIGHTEEN YEARS OF AGE; AND ITS SENTENCES OF THIRTY YEARS TO SERVE ON BOTH COUNT I AND II, WHICH ARE TO BE SERVED CONCURRENTLY, AND TWO YEARS TO SERVE ON COUNT IV, WHICH LAST SENTENCE IS TO BE SERVED CONSECUTIVELY TO THE TWO SENTENCES OF THIRTY YEARS FOR COUNTS I AND II, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, ARE AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO RANKIN COUNTY.**

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

1. Rule 28(a)(3) requires:

(a) **Brief of the Appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(3) *Statement of Issues.* A statement shall identify the issues presented for review. No separate assignment of errors shall be filed. Each issue presented for review shall be separately numbered in the statement.

M.R.A.P. 28(a)(3).

2. Mississippi Rule of Evidence 804(b)(1) reads:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same

or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

M.R.E. 804(b)(1)

3. Rule 801(d)(1)(A) states:

**Statements Which Are Not Hearsay.** A statement is not hearsay if:

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition . . . .

M.R.E. 801(d)(1)(A).

4. Rule 803(4) reads:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness. For purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health.

M.R.E. 803(4).