

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00482 COA

JOHNNIE PERKINS A/K/A JOHNNIE L. PERKINS A/K/A JOHNNY PERKINS

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. JOHN B. TONEY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF MADISON COUNTY

ATTORNEY FOR APPELLANT:

WALTER E. WOOD

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: JOHN T. KITCHENS

NATURE OF THE CASE: CRIMINAL: FELONY CHILD ABUSE AND RAPE OF A CHILD
UNDER THE AGE OF FOURTEEN

TRIAL COURT DISPOSITION: CONVICTED BY A JURY AND SENTENCED TO SERVE 20
YEARS FOR THE FELONY CHILD ABUSE AND 40 YEARS FOR THE RAPE, ALL IN THE
CUSTODY OF THE CUSTODY OF MDOC; SENTENCES ARE TO RUN CONSECUTIVELY

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

PAYNE, J., FOR THE COURT:

This is a criminal appeal from the Circuit Court of Madison County wherein Johnnie Perkins was convicted of felony child abuse and rape of a child under the age of fourteen. The trial court sentenced Perkins to twenty years for the felony child abuse conviction and forty years for the rape conviction, all to be served in the custody of the Mississippi Department of Corrections with the sentences to run consecutively. Feeling aggrieved, Perkins appeals to this Court attacking the admissibility of the testimony of the State's witnesses against him. Finding no error, we affirm.

STATEMENT OF THE FACTS

Jane is a nine-year-old female child. She testified that Johnnie Perkins had gotten "on top" of her, "[s]tarted rolling on" her, and "put his private part" and his index finger inside of her. She also testified that he made her "suck his private part," and that he threatened to kill her and her family if she told anyone what he had done. Jane stated that Perkins also wiped "[t]he white stuff" off of her. Jane testified that Perkins also burned her leg with a cigarette. Jane stated that all of this occurred at her grandmother's home. At trial, Jane identified Johnnie Perkins as the person who violated her and also as the person who burned her with a cigarette. Jane testified that Perkins was her stepfather. Jane said that she told her teacher "so he'll stop that doing to me [sic]."

Joann B. Taylor was Jane's teacher's assistant at Canton Elementary in February of 1993. Taylor testified that on February 5, 1993, she saw Jane crying and "leaning over and balled up in a knot." Taylor questioned Jane who reported that her stomach hurt. Taylor then attempted to take Jane to the school nurse only to discover she had not yet arrived. On the way back to the classroom, Taylor tried to determine the source of Jane's pain. Taylor testified that she did not give Jane any suggestions as to the cause. Taylor returned with Jane to the nurse's office. Helen Oliver, the school nurse, had arrived and Taylor left Jane in her care.

Helen J. Oliver testified that she is a school nurse for Canton public schools with her primary office at Canton Elementary. Oliver testified that on February 5, 1993, Jane came to her office complaining of a stomachache. Oliver treated Jane with Pepto Bismol tablets, talked with her, and then sent her back to her classroom. Oliver testified that Taylor brought Jane back to her after Jane became "hysterical, crying and weeping." Oliver testified that she then "sat the child down and tried to talk to her to figure out what was the problem because it seemed to be a little more than a stomachache." Oliver testified that Jane revealed that her dad was causing her stomach pain and indicated that he was penetrating Jane sexually. Oliver testified that Jane demonstrated with a doll what her father was doing to her. Jane also indicated to Oliver that her dad was kissing her on the mouth. Oliver testified that she "tried to ask questions that would not lead the child in any direction or imply or suggest anything to her," nor did Oliver allow Taylor to tell her what Jane had said. Oliver next called the Department of Human Services and talked with Mamie Thompson. Oliver also noted that Jane had burns on her right lower leg. Jane told Oliver that her dad had burned her with a cigarette. Oliver

stated that Jane never connected a name with her dad, nor did Oliver ask her to.

Mamie Thompson is a social worker who investigates reports of child abuse and neglect for the Madison County Department of Human Services. Thompson testified as to her training in identifying and investigating allegations of child abuse and neglect, including interviewing the children in such a manner as to not be suggestive. Thompson stated that she met and interviewed Jane at Canton Elementary School on February 5, 1993, after receiving a call from the school nurse. Thompson testified that she followed the techniques in interviewing Jane so as to avoid being suggestive. Thompson determined that further investigation was warranted and obtained an order from the youth court to have Jane taken to the hospital to be examined. Thompson then took Jane to Madison General Hospital and had her examined. Thompson stated that the examination with Dr. Bacon at Madison-Yazoo-Leake Clinic was later obtained in order to get a more in-depth examination than an emergency room visit. Thompson stated that Jane was also later seen by Dr. Catherine Dixon, a psychologist. Thompson testified as to the address in Canton where the abuse allegedly occurred.

Darlene Evans, a registered nurse, was on duty in the emergency room of Madison General Hospital on February 5, 1993, when Jane was brought in by Thompson for an examination. Evans testified that she initially met with Jane to evaluate the seriousness of her condition and determine her priority among the emergency room patients--a process known as triage. Evans testified that she prepared the nursing portion of an emergency room record for Jane which included taking the patient's history. According to Evans, every patient presented to the emergency room gets a triage evaluation and an emergency room record is prepared for each patient. Evans stated that Jane was presented as a victim of rape and she was complaining of stomach pains. Evans obtained the information contained in the patient's history from both Jane and Thompson, the social worker who accompanied her. Evans testified that she did not examine Jane nor was she present when the emergency room physician examined Jane. Evans also testified that at the time she completed the record the information was fresh in her mind.

Dr. Janice Bacon, a staff pediatrician at the Madison-Yazoo-Leake Health Center, testified as an expert in pediatric medicine and in identifying cases of child sexual abuse. Dr. Bacon testified that she examined Jane on February 19, 1993. Dr. Bacon used a medical record prepared for Jane to write "progress" notes. She explained that notes are made while examining a patient and are then typed and made part of a final report in the patient's official record. Dr. Bacon testified that Jane told her that her stepfather, Johnnie Perkins, had "put his private in me and got on me." Dr. Bacon also summarized what Jane had told her that Perkins had done. Dr. Bacon testified that she did a full physical examination on Jane which is a routine practice on every patient. Dr. Bacon noted that Jane's vaginal opening was "two centimeters in size, with increased amount of erythem [sic] or amount of redness." Dr. Bacon testified that this was well above the average of .4 centimeters for a girl Jane's age. Dr. Bacon also observed approximately eleven circular lesions on Jane's legs and arms which were consistent with cigarette burns. Dr. Bacon diagnosed Jane as a victim of sexual and physical abuse.

Dr. Catherine Meeks Dixon is a licensed psychologist in the State of Mississippi who has practiced mostly with children, adolescents, and families. The trial court accepted Dr. Dixon as an expert in the field of child psychology and in the identification and treatment of sexual abuse in children. Dr. Dixon testified that Thompson first brought Jane to see her on February 15, 1993. Jane told Dr. Dixon that

Johnnie Perkins had hurt her in the vaginal area, and that this took place at her grandmother's house. Dr. Dixon asked Jane to demonstrate what happened using fully clothed anatomically correct dolls. Dr. Dixon testified that Jane then identified an adult male doll as Perkins and a child female doll as herself. Jane next "took the adult male doll and placed it on top of the child female doll in a prone position and moved the adult male doll up and down, up and down, several times." Jane told Dr. Dixon that Perkins lay on top of her while she was in bed, and that he also touched her on the mouth with his "thing." When Dr. Dixon asked Jane if anyone else had ever touched her in the same way, Jane stated that "[a] white man did," identifying him as a friend of Perkins. Dr. Dixon next testified about what she considers in evaluating a child's statements. Dr. Dixon concluded that she had no evidence to suggest that Jane's story was contaminated prior to being seen by Dr. Dixon. Dr. Dixon discussed the pattern of trauma that children who have been sexually molested typically display. She then related the characteristics to Jane who had suffered sleep difficulties, nightmares, and bed wetting. Dr. Dixon stated that when she first saw Jane that Jane was frequently tearful, had little eye contact, and was very withdrawn. Dr. Dixon found that Jane could describe the sexual victimization with incredible detail. Dr. Dixon concluded that Jane had been sexually abused. A year later in February 1994, Dr. Dixon administered an intelligence test to Jane and found her to be bright, happy, and appropriately interactive.

Bertha Perkins, Jane's mother and wife of Johnnie Perkins, testified that in February 1993, Jane lived at 407 East X, Canton, Madison County, Mississippi.

Clinton Davis was the only witness for the defense. Davis owns a farm in Madison County, Mississippi. On the week of February 1-5, 1993, which includes the date of the alleged rape, Davis hired Perkins and some other men to pull corn from his field. Davis testified that the work included Monday through Friday of that week and the hours worked were from approximately 9:00 a.m. until 5:00 p.m. each day. Davis identified Perkins as one of the men who worked for him that week. Davis kept a written record of Perkins work for payroll purposes and testified that he paid Perkins for his work that week.

ARGUMENT AND DISCUSSION OF THE LAW

I. THE TRIAL COURT ERRED IN ALLOWING JANE TO TESTIFY AND IN FAILING TO ALLOW THE DEFENSE TO VOIR DIRE HER QUALIFICATION TO TAKE THE OATH.

Perkins contends that the trial court violated his Sixth Amendment right of confrontation of witnesses in failing to allow him to voir dire Jane. Perkins contends that he should have been allowed to cross-examine Jane as to her understanding of the requirements of the oath to tell the truth.

The question of competency of a witness is one left to the sound discretion of the trial judge. *Bowen v. State*, 607 So. 2d 1159, 1160 (Miss. 1992). "The determination whether a child is a competent witness is generally committed to the sound discretion of the trial judge." *Bowen*, 607 So. 2d at 1160 (citation omitted). Additionally, the Mississippi Supreme Court has stated:

Rule 601 of the Mississippi Rules of Evidence governs the general rules of witness competency. This rule provides that every person is competent to be a witness except as restricted by the specific exceptions within the rule itself. "Before allowing a child witness

to testify, the trial judge should determine ‘that the child has ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness.’”

Brent v. State, 632 So. 2d 936, 942 (Miss. 1994) (citations omitted).

In the present case, the trial court questioned Jane and made a finding that she understood the difference between right and wrong and allowed her to testify. We find no abuse of discretion. Accordingly, this issue is without merit.

II. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF HELEN OLIVER, R.N., ON THE BASIS OF THE MEDICAL EXCEPTION, M.R.E. 803(4).

Helen Oliver was the school nurse who treated Jane. The trial court allowed Oliver to testify about statements made by Jane under M.R.E. 803(4) over Perkins’ objection. Perkins argues that Oliver was not performing any medical service, but was investigating potential child abuse. We disagree.

Mississippi Rule of Evidence 803(4) provides:

Statements Made 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). In order for such statements to be admissible under Rule 803(4), a two-part test must be met: "[T]he declarant’s motive in making the statement must be consistent with the purposes of promoting treatment; and . . . the content of the statement must be such as is reasonably relied on by a physician in treatment." *Doe v. Doe*, 644 So. 2d 1199, 1205-06 (Miss. 1994) (citations omitted).

Additionally, the Mississippi Supreme Court has recognized that a finding of the identity of the child’s perpetrator was pertinent to treatment so as to prevent further abuse. *Eakes v. State*, 665 So. 2d 852, 867 (Miss. 1995); *see also Johnson v. State*, 666 So. 2d 784, 795 (Miss. 1995). "It follows that prevention of further abuse will always be an immediate concern, whether the perpetrator has daily, weekly, or only sporadic opportunity to abuse a child." *Eakes v. State*, 665 So. 2d at 867. The court in *Eakes* expanded this reasoning to include identification by the child even when the perpetrator is not a member of the child’s household or someone who had regular contact with the child. *Id.* at 867.

In the present case, Jane was taken to see Oliver (the school nurse) by Taylor (the teacher’s assistant) after complaining of stomach pains. Jane returned to Oliver within a short period of time still requiring assistance. We find that as school nurse, Oliver clearly saw Jane for the purpose of medical

diagnosis and treatment. We further note that Rule 803(4) does not require that the information be revealed to a physician, rather the comment to the rule states "the statement need not be made to a physician" and include "non-medical personnel" to be among those able to testify under M.R.E. 803(4). *See* M.R.E. 803(4) cmt. It was during Oliver's time with the child that she learned the true source of Jane's complaint and the identity of her perpetrator. Jane revealed that she was being sexually abused by Perkins. This identification came during a conversation in which Oliver was attempting to identify and treat Jane's complaints of stomach pains. It is clear that Oliver's testimony regarding Jane's identification of Perkins as her perpetrator falls within Rule 803(4). Accordingly, we find this assignment of error to be without merit.

III. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE HEARSAY STATEMENTS FROM MAMIE THOMPSON AS TO THE LOCATION OF THE COMPLAINED OF INCIDENT OVER THE OBJECTION OF THE DEFENDANT.

Perkins argues that Mamie Thomson should not have been allowed to testify, over his objection, as to the location of where the abuse allegedly occurred so as to establish jurisdiction of the cause. The record reveals that when asked about the location where Jane's alleged abuse had taken place Thompson replied, "The address is 407 West [X] Street. It's the home of Nora Brown, the child's maternal grandmother" and indicated in a follow-up question that the address she had stated was in Canton. Jane's mother, Bertha Perkins, testified that in February of 1993, Jane resided at 407 East X, Canton, Madison County, Mississippi.

We find that the testimony of Bertha Perkins clearly established venue. Additionally, to the extent that Thompson had personal knowledge of Jane's maternal grandmother's address, her testimony as to the address was properly admitted. Combining Thompson's identification of the address of Jane's grandmother along with the testimony of Jane who stated that the abuse occurred at her grandmother's house, we find that venue was established. However, the testimony of Thomson was merely cumulative in establishing venue. Accordingly, we find this issue to be without merit.

IV. THE TRIAL COURT ERRED IN ALLOWING NURSE DARLENE EVANS TO TESTIFY VERBATIM FROM THE EMERGENCY ROOM RECORD AFTER SHE HAD TESTIFIED BOTH ON CROSS-EXAMINATION THAT SHE HAD NO PRESENT RECOLLECTION WHICH COULD BE REFRESHED BY THE DOCUMENT.

Darlene Evans was the registered nurse on duty who attended to Jane when she was brought to the emergency room for diagnosis and treatment. Evans testified at trial regarding the visit and was allowed to testify from that portion of the emergency room report which she prepared. Evans admitted being unable to recollect exactly what Jane told her as opposed to what Thompson told her. When asked by the trial court whether she had an independent recollection of what the child told her Evans replied:

A. You know I would be lying if I said I could remember exactly because I don't. I mean, it's too long ago to remember exactly what a child said or exactly what the other person said. If you'll look at the record the way that I stated it, look at-- can I see the record

again?

Evans then referred to the emergency room record and testified as follows:

A. "Child stated that step dad got on top of her and had sex with her." So if I wrote that, that means that the child actually told me that.

A. If the social worker had told me that, I would have written "social worker." So by reading this, I can only go by what I can-- see, because, I mean, from memory I don't know who told me what; but by reading this record and the way that this was written, I would, you know, the way I write records, the child would've had to have told me this.

Perkins argues that Evans was allowed to read the emergency room report while she had no present recollection at trial of the visit. Perkins asserts that this was not proper refreshing of a present recollection and was error. Perkins asserts that Evans' testimony does not meet M.R.E. 602 which requires a witness to testify from personal knowledge. Perkins concludes that Evans' testimony merely bolstered the allegations against him.

Mississippi Rule of Evidence 803(5) reads as follows:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect the knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

M.R.E. 803(5). It is clear from the record that Evans was unable to testify fully and accurately without the emergency room record because she lacked the independent recollection to limit her testimony to statements made by the child. "There is great judicial discretion in Rule 803(5)." M.R.E. 803(5) cmt. We find no abuse of discretion.

We find Perkins' emphasis on the personal knowledge requirement of Rule 602 to be irrelevant because Evans plainly established that she in fact saw Jane, spoke with her and prepared that portion of the report from which Evans testified. Accordingly, we find no merit in Perkins' fourth assignment of error.

V. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENSE'S MOTION FOR A MISTRIAL BASED UPON THE ADMISSION OF THE HEARSAY TESTIMONY OF MAMIE THOMSON AND NURSE DARLENE EVANS.

Perkins argues that a mistrial should have been granted and makes reference to his other arguments. The State points out that this assignment of error is a restatement of his previous propositions and does not require separate discussion. We agree. We have previously addressed the trial court's admission of the testimony of both Thomson and Evans and need not revisit those questions here.

Furthermore, we note that the trial court is given great discretion in evaluating the necessity of a mistrial. *See Gossett v. State*, 660 So. 2d 1285, 1290-91 (Miss. 1995). In viewing this standard after consideration of our previous discussions under issues III and IV, we find no abuse of discretion.

VI. THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENSE'S MOTION FOR A MISTRIAL BASED ON THE TESTIMONY OF DR. JANICE BACON.

Perkins argues the Dr. Bacon's testimony included a reference about "the last episode." Perkins concludes this reference clearly gave the jury the information that there were other alleged episodes of abuse and so tainted the jury that he did not receive a fair trial.

The State contends that the reference was to other episodes of stomach pains, not other episodes of abuse. Additionally, the State argues that Perkins acquiesced to the trial court's conclusion that any admonishment would have the harmful effect of emphasizing the matter to the jury.

The record reveals that when asked to summarize what Jane had told her Perkins had done, Dr. Bacon stated:

A. Okay. She also related that he tried to "push my head onto his private" and that, in terms of the incident, she said that she saw "white stuff" at that time in her vaginal area. According to [Jane] she, in turn told her grandmother about it; and her grandmother cleaned her up.

She states that she had been having problems with stomach pains, so she told her teacher at school about the last episode; and it was from there that Social Services contacted--

Perkins objected and the trial court dismissed the jury from the room. Perkins argued that a mistrial was proper because of Dr. Bacon's reference to the "last episode." Upon further inquiry from the court outside the jury's presence, Dr. Bacon stated that she was referring to the last episode of stomach pain. In denying Perkins' motion for a mistrial, the trial court stated:

I don't think it's cause for a mistrial. I think that it was an inadvertent statement on the part of the witness, and I don't think that the words that were uttered by the witness, previous incident, or words to that effect, are going to keep this Defendant from getting a fair trial.

Continuing, the trial court noted:

Rather than going back and revisiting this issue with the jury, it was such a slight part of the narrative answer, I think that I would focus undue attention on the words previous incident if I go back and tell the jury not to consider it and do it in the form of a motion to strike. It is sort of like unringing the bell. It cannot be done. And I think if I go back and

rattle that thing one more time, it's just going to cause more problems than it prevents.

The court went on, at Perkins' request, to instruct Dr. Bacon not to refer to any alleged prior bad acts except as to what allegedly occurred on or about February 3, 1993.

In consideration of the discretion afforded the trial court, we find that the trial court did not abuse his discretion in denying Perkins' motion for mistrial. *See Gossett v. State*, 660 So. 2d at 1290-91. We believe that the judge properly exercised his discretion, and this issue therefore has no merit.

VII. THE TRIAL COURT ERRED IN ALLOWING DR. CATHERINE DIXON TO TESTIFY TO THE HEARSAY STATEMENTS OF JANE, OVER THE OBJECTION OF THE DEFENSE.

Dr. Dixon was accepted by the trial court as an expert in the field of child psychology and the identification of child sexual abuse. Perkins argues that Dr. Dixon should not have been allowed to testify as to statements made by Jane. Perkins maintains that these statements do not fall within any exception to the hearsay rule. Perkins further contends that Dr. Dixon was allowed to bolster the testimony of Jane by testifying that she believed Jane was telling the truth.

Perkins fails to recognize that Dr. Dixon's testimony regarding statements made by Jane falls within Mississippi Rule of Evidence 803(4). Again, this exception to the hearsay rule allows statements made for the purpose of medical diagnosis or treatment to be admissible. *See* M.R.E. 803(4). "For purposes of [M.R.E. 803(4)], the term "medical" refers to emotional and mental health as well as physical health." *Id.* Furthermore, the identity of the perpetrator is among the information considered pertinent to treatment so as to prevent further abuse. *See Eakes v. State*, 665 So. 2d at 867; *see also Johnson v. State*, 666 So. 2d at 795. We find that the trial court properly admitted the testimony of Dr. Dixon.

As to Perkins' claims of Dr. Dixon's testimony about the truthfulness of Jane's claims, to the extent that Dr. Dixon's testimony may have been an opinion of Jane's truthfulness, allowing it was error. *See Jones v. State*, 606 So. 2d 1051, 1058 (Miss. 1992). Additionally, like in *Jones*, there may be some relevancy problems with portions of Dr. Dixon's testimony which do not relate to Jane. *Id.* at 1058. However, neither at trial nor on appeal does Perkins attack Dr. Dixon's testimony on relevancy, and we need not to discuss it here. We note that Dr. Dixon's opinion as to whether Jane was abused is a proper question. *Id.* The prosecutor, however, asked Dr. Dixon regarding her "opinion as to whether or not [Jane] was contaminated prior to her coming to [Dr. Dixon]" to which she answered "I saw no evidence that she was." The prosecutor's question in this case is much closer to commenting as to Jane's truthfulness. Regardless, we find that any error in the admission of this testimony was harmless. *See Jones v. State*, 606 So. 2d at 1058.

THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY OF CONVICTIONS OF FELONY CHILD ABUSE AND RAPE OF A CHILD UNDER THE AGE OF FOURTEEN AND SENTENCES OF TWENTY YEARS AND FORTY YEARS RESPECTIVELY, WITH SENTENCES TO BE SERVED CONSECUTIVELY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO MADISON COUNTY.

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