

**IN THE COURT OF APPEALS 2/25/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00304 COA**

**KIMMIE PHILLIP ADAMS**

**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. TOM J. GARDNER, III

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LEE COUNTY

ATTORNEY FOR APPELLANT:

WILLIAM C. STENNETT

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: ASSIT. D.A. ROWLAND GETTIE

NATURE OF THE CASE: CRIMINAL: TWO COUNTS OF SEXUAL BATTERY

TRIAL COURT DISPOSITION: CONVICTED ON TWO COUNTS OF SEXUAL BATTERY  
AND SENTENCED TO SERVE 20 YEARS CONSECUTIVE FOR EACH

BEFORE McMILLIN, P.J., KING AND PAYNE, JJ.

KING, J., FOR THE COURT:

Kimmie Phillip Adams was convicted of two counts of sexual battery of minors, R.R. and her sister S.R., in the Circuit Court of Lee County. The State presented both children as witnesses as well as their mother, the interviewing social worker, the attending physician, and the investigating police officer. Upon conviction, Adams received two twenty-year sentences, to be served consecutively in the custody of the Mississippi Department of Corrections. Aggrieved, Adams appeals his convictions contending that: (1) the trial court erred in allowing the hearsay testimony of third party witnesses to be heard by the jury; (2) the trial court erred in allowing opinion testimony that the children alleged to have been victims of sexual abuse were telling the truth; and (3) that he was denied effective assistance of counsel, guaranteed to him by the Sixth Amendment of the United States Constitution. Finding no error in the trial court's decision, we affirm.

#### FACTS

Kimmie Adams was convicted of two counts of sexual battery of minors, R.R. and S.R., who were ages nine and twelve years old when the abuse occurred. Adams was the sometime live-in boyfriend of the children's mother. During the trial, both children testified that Adams forced them to engage in sexual acts with him and that he threaten to kill them, their mother, and their grandmother if either girl told of the abuse. The State also presented testimony from the children's mother, the investigating police officer, and social worker as well as the doctor who examined the children. Adams testified in his own defense that he had not engaged in sexual acts with either of the children, and that the accusations were a result of their mother's intention to get even with him. In an effort to establish this defense, Adams also presented testimony from two witnesses who testified that the victims' mother harbored bad feelings toward him. The case went to the jury, and the jury convicted Adams of sexual battery of the two minors. He was sentenced to serve two consecutive twenty-year sentences in the custody of the Mississippi Department of Corrections.

Adams appeals assigning the following issues:

- I. The trial court erred in allowing the hearsay testimony of third party witnesses to be heard by the jury.
- II. The trial court erred in allowing opinion testimony that the children alleged to have been victims of sexual abuse were telling the truth.
- III. The Defendant was denied the effective assistance of counsel guaranteed him by the Sixth Amendment of the United States Constitution.

I.

THE TRIAL COURT ERRED IN ALLOWING THE HEARSAY TESTIMONY OF

### THIRD PARTY WITNESSES TO BE HEARD BY THE JURY.

In a motion in limine, Adams moved to suppress the hearsay testimony of State's witnesses the victims' mother; Bart Aguire, investigating police officer; Amy Cates, interviewing social worker; and Dr. William L. Marcy, the examining physician in the case. Adams claims that these witnesses could testify only to what the two alleged victims had told them of the alleged sexual acts committed against them and the identity of the alleged perpetrator. He claimed that this testimony was garden variety hearsay, therefore, unreliable.

Rule 803(25) of the Mississippi Rules of Evidence provides:

A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness . . .

M.R.E. 803(25).

Rule 803(25) allows the trial judge to determine, in his discretion, the reliability of the statement based on corroborating evidence. *Doe v. State*, 644 So. 2d 1199, 1206 (Miss. 1994). "While no mechanical test is available, factors which should be considered in judging reliability are: spontaneity and consistent repetition; mental state of declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate." *Id.* This is not an exclusive list of factors. When the trial court correctly employs the precept of Rule 803(25), this Court will not reverse a finding of admissibility unless there has been an abuse of discretion. *Doe*, 644 So. 2d at 1207.

In the present case, the trial judge conducted a hearing outside the presence of the jury, as required by Rule 803(25). After considering the twelve factors, which the court should examine and on the assurance that the two child victims would testify, the trial judge determined that the State had met the precepts of Rule 803(25), and that the statements made to the witnesses were admissible. We find that the trial court employed the correct legal standard, without an abuse of discretion, in allowing the testimony that Adams now complains of.

## II.

THE TRIAL COURT ERRED IN ALLOWING OPINION TESTIMONY THAT THE CHILDREN ALLEGED TO HAVE BEEN VICTIMS OF SEXUAL ABUSE WERE TELLING THE TRUTH.

Adams contends that the trial court allowed impermissible testimony by the criminal investigator,

Aguire, and by the social worker, Cates that the children's testimony was truthful. However, Adams failed to raise a contemporaneous objection to this testimony during the trial. This Court has consistently held that an objection raised for the first time on appeal is barred. *Cole v. State*, 666 So. 2d 767, 774 (Miss. 1995). Accordingly, this claim is barred.

### III.

THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED HIM BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

When a defendant raises an ineffectiveness of counsel issue, this Court considers whether the overall performance was deficient and whether the defendant was prejudiced by any such deficiencies. *Moore v. State*, 676 So. 2d 244, 246 (Miss. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1994)). The defendant carries the burden of establishing the elements of the *Strickland* test. "To be entitled to an evidentiary hearing on a claim of ineffective assistance of counsel, a petitioner further must allege 'with specificity and detail' that counsel's performance was deficient and that the deficient performance so prejudiced his defense so as to deprive him of a fair trial." *Moore*, 676 So. 2d at 246 (citing *Perkins v. State* 487 So. 2d 791, 793 (Miss. 1986)). After careful examination of the record in the present case, we find that Adams has failed to meet this burden. Therefore, we are unable to say that counsel was ineffective.

**THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY OF CONVICTION OF TWO COUNTS OF SEXUAL BATTERY AND SENTENCE OF 20 YEARS FOR EACH COUNT, TO BE SERVED CONSECUTIVELY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF APPEAL ARE TAXED TO LEE COUNTY.**

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