

**IN THE COURT OF APPEALS 12/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00480 COA**

**MANNY RICO BROWN**

**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: MADISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WALTER E. WOOD

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

NATURE OF THE CASE: CRIMINAL - RAPE

TRIAL COURT DISPOSITION: FOUND GUILTY OF CAPITAL RAPE AND SENTENCED TO  
29.3 YEARS IMPRISONMENT

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Manny Rico Brown was found guilty of raping a child. He appeals, arguing that the trial court erred in allowing a nurse to testify from a sexual assault report in lieu of the testimony of the attending physician who wrote the report. Brown contends that this was a violation of his right to confront the doctor writing the report. We find his argument without merit and affirm.

## FACTS

The victim in this case is an eleven-year-old girl. She testified that she had gone to a store for her mother and was on her way back when she was forcibly taken into some nearby bushes and raped. She immediately went to her grandmother's house and told her mother and grandmother what had happened. They took the victim to the police station and then to the emergency room. The victim told the officers at the police station who had raped her. After investigating, the officers went looking for Brown but he was not found until later.

At the hospital, the victim was examined by a physician in the presence of Nurse Deloris Harris. A medical report was signed by both the doctor and the nurse. At the trial, Nurse Harris testified that the victim was nervous and crying as she told them that she had been sexually assaulted. The nurse also testified that the examination revealed that the victim had "redness to both wrist areas, and her hymen was ruptured" and that there was exquisite tenderness in the vaginal area. When asked what the conclusion of the examination was, the nurse read from the medical report stating: "The physician stated 'From evidence obtained, it appears patient was indeed sexually assaulted.'" Brown testified in his own defense claiming that he did not rape the victim, but had seen her that day getting out of a black car, crying, with money in her hand. He testified that he grabbed the money from her and ran.

## DISCUSSION

The Mississippi supreme court has stated that "[t]he admissibility of evidence is largely within the trial court's discretion. *Doe v. Doe*, 644 So. 2d 1199, 1205 (Miss. 1994) (citing *Baine v. State*, 606 So. 2d 1076, 1078 (Miss. 1992). However, where the trial court employed an incorrect legal standard in its fact findings regarding the admissibility of evidence, a broader standard of review is invoked on appeal." *Doe*, 644 So. 2d at 1206.

Brown contends that his Sixth Amendment right to confrontation was violated in that he was not allowed an opportunity to cross-examine the doctor whose report was used against him. He argues that the state should have either produced the doctor for testifying or showed that he was unavailable. In any case, he argues that the nurse should not have been allowed to testify to the contents of the sexual assault report. It is well settled that the "the Sixth Amendment right of the accused to be confronted with the witness against him must be observed" when hearsay testimony is introduced into evidence, and "the best tool we have for exposing the truth" is cross-examination. *Eakes v. State*, 665 So. 2d 852, 922 (Miss. 1995).

The trial court allowed evidence of the contents of the medical report as an exception to the hearsay rule pursuant to Mississippi Rule of Evidence 803(4) and (5). Rule 803(4) states:

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, 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.

Rule 803(4) requires that a two-part test be met: (1) the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and, (2) the content of the statement must be such as is reasonably relied on by a physician in treatment. *Eakes v. State*, 665 So. 2d 852, 866 (Miss. 1995). The rule is not concerned with the availability of the declarant. See Comment to M.R.E. 803(4).

We have reviewed the record and have divided the nurse's testimony into two parts. We will discuss each part of that testimony separately.

### *1. Nurse's Testimony of Child's Statements and Appearance*

The nurse testified that "[t]he patient stated that she had been sexually assaulted." The nurse also testified that the victim was "nervous and crying, just afraid, just scared." This testimony is admissible under M.R.E. 803(4). First, Rule 803(4) does not explicitly require that the motives of the victim be explained on-the-record prior to admission. *Doe v. Doe*, 644 So. 2d 1199, 1206 (Miss. 1994). Although the judge did not make on-the-record findings about the victim's motives, we note that at the time of the rape, the victim was only eleven years old. There was no evidence of a motive to lie by the accused. Furthermore, the victim was visibly shaking and crying. We find that her "motive" in making the statements was for the purposes of medical diagnosis or treatment in compliance with M.R.E. 803(4). The second part of the test is satisfied if the statements of the victim are such that are reasonably relied on by the physician in treatment. The victim told the nurse and doctor that she had been sexually assaulted. This statement from the eleven year old victim was one that a physician would reasonably rely on in treating the victim. Therefore, the two part test was met as to the part of the testimony of the nurse conveying what the child told her in order to receive the necessary medical attention.

### *2. Nurse's Testimony on Contents of Sexual Assault Report*

Brown claims that the second part of the sexual assault report contains the observations and conclusions of the physician and that this part of the report should not have been admitted by the court without the physician's being called to testify. Although we agree that the contents of the sexual assault report does not fall under the 803(4) exception to hearsay, we find that even in the absence of the report, the state has met its burden of proof in this case.

Brown did not contest that the victim was raped; he only contended that he was not the perpetrator. In fact, Brown alluded to the possibility that the victim had been sexually involved when he testified:

Well, what occurred at that point, I met a little girl coming down the path and that got out a black limousine car. And she had some money in her hand going through the pass by McNeal School. And so -- she was crying, and I snatched the money out of her hand and kept a running.

The sexual assault report does not assert that the victim accused Brown of raping her; it only notes that it appeared the victim had been sexually assaulted. That evidence was no more than had already been testified to by other witnesses. Officer Bernice Caldwell, who investigated the incident, testified that the victim was shaking and crying as she told the officer what happened. Caldwell stated:

She said that this grown man had did something to her. And I asked her what. She said, "He have -- he pulled me behind the house." and she said, "He stuck something in me." . . . So I went back and asked her, "Where were you at the time?" She said, "I went to the store for my mom." She said, "He followed me," and she said, "When I was coming back" -- this was the corner of Bowman and Canal. And it's a path that goes between her house out into the field behind some more houses where it was some greens planted. . . . And she says, "He pulled my panties off and stuck his thing into me." And so I asked her, I said, "Who was it?" She said, "PeeWee Brown," she said, "his twin." She said, "It's not the rough-skin one. It's the smooth-skin one."

Lieutenant Vicky McNeill testified that she, too, talked with the victim. The Lieutenant testified that:

[the victim] was crying, upset, nervous. She didn't really want her relatives out of her sight. And she was telling me that it was the Brown twin. . . . that she knew the man when she saw him, that she would be able to identify him. She knew that he was one of the twins and that he was the one that had smooth skin.

Finally, the victim testified that after she had gone to the store for her mother, the Brown twin with the smooth skin grabbed her around the waist and pulled me in the bushes. She further testified:

He started pulling down his clothes. And he had my pants like this, and I was trying to run. And he started pulling down his clothes, and he pulled down my clothes. . . . And then he got me down on the ground. . . . On my back. . . . Then he put his private part in my private part. . . . He hurt me down below.

When asked if she remembered the person who grabbed her and pulled her in the bushes, the victim stated that she remembered it plainly. She identified Brown as that person.

Brown never contested that the victim had a sexual encounter with someone. That fact was amply proven by testimony from various witnesses and was not challenged by anyone. Thus the doctor's

opinion that the victim had been sexually assaulted was cumulative and without effect on the outcome.

Allowing the nurse to testify to the doctor's conclusions on the sexual assault report was harmless error in light of the other evidence presented to the jury. Therefore, we affirm the conviction.

**THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL RAPE OF A CHILD AND SENTENCE OF 29.3 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO MADISON COUNTY.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.J.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, J.J., CONCUR.**