IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2020-KA-00392-COA

JEREMY GARLINGTON **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT: 08/19/2019
TRIAL JUDGE: HON. WINSTON L. KIDD
COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT: JOHN G. HOLADAY
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: BARBARA WAKELAND BYRD
DISTRICT ATTORNEY: ROBERT SCHULER SMITH
NATURE OF THE CASE: CRIMINAL - FELONY
DISPOSITION: AFFIRMED - 07/19/2022
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

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

CARLTON, P.J., FOR THE COURT:

¶1. Jeremy Garlington was convicted by a Hinds County Circuit Court jury on one count of sexual battery against his girlfriend's young daughter, Jane.[1] The trial court sentenced Garlington to serve twenty years in the custody of the Mississippi Department of Corrections (MDOC) and ordered him to register as a sex offender. Garlington appeals, asserting ten assignments of error, restated as follows:

[1] Pseudonyms are used for the victim (Jane), her mother (Joan), and the victim's biological father (John) to protect the anonymity of the minor child.

I. Whether the trial court committed reversible error when it denied Garlington's motions for a directed verdict and motion for judgment notwithstanding the verdict (JNOV).

II. Whether the trial court committed reversible error when it admitted hearsay into evidence under the "tender years" exception (MRE 803(25)).

III. Whether the trial court committed reversible error when it granted the State's motion to amend the indictment.

IV. Whether the trial court committed reversible error when it denied the *Batson*[2] challenges raised by Garlington's counsel.

V. Whether the trial court erred in prohibiting Garlington from introducing statements made by an unavailable witness and from referencing allegations of sexual misconduct by Jane's father.

VI. Whether the trial court erred in admitting lab results conducted by third parties without testimonial or other evidentiary support.

VII. Whether the trial court erred in refusing to allow Garlington's expert witness to testify regarding learned treatises and authorities he reviewed (MRE 803(18)).

VIII. Whether the trial court erred in disallowing testimony of a defense witness regarding Garlington's relationship with her two daughters.

IX. Whether the trial court erred by allowing the State to present Dr. Scott Benton to testify as a rebuttal witness.

X. Whether the trial court erred in giving the State's Jury Instruction No. S-1 regarding the elements of sexual battery.

Finding no error, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

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[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

¶2. On July 22, 2014, a Hinds County grand jury indicted Garlington on one count of sexual battery under Miss. Code Ann. § 97-3-95(1)(d) (Rev. 2006), charging that "on and about the 29th day of May, 2014, [Garlington] did willfully, unlawfully[,] and feloniously engage in sexual penetration, as defined by Miss. Code Ann. § 97-3-97, with [Jane], an eight year old female child … by penetrating [Jane's] body with his . . . penis." In May 2017, the State moved to amend the indictment to widen the time frame in the original indictment from "on and about the 29th day of May 2014" to "on, about[,] and between the 1st day of May 2013 and the 29th day of May 2014." This motion was subsequently granted by the trial court prior to trial in August 2019. Further details pertaining to this ruling and other pretrial proceedings relating to the issues Garlington asserts on appeal will be discussed in context, below. Following his August 2019 trial, the jury found Garlington guilty of sexual battery and the trial court sentenced him as set forth above.

¶3. In its case in chief, the State presented the testimonies of Jane's mother, Joan; Jane's pediatrician, Dr. Dana Grant; Regan Doleac, a nurse practitioner at the Children's Justice Center at University of Mississippi Medical Center; Jane; and Detective Jane Henderson, who was an investigator on the case and who observed over closed-circuit television Jane's forensic interview with Gail Foster, a forensic interviewer with the Child Advocacy Center. The video of that forensic interview was also played for the jury.

¶4. Jane's mother testified that in Spring of 2014 she took Jane to her pediatrician, Dr. Grant, for treatment for vaginal discharge, chafing, and burning when she was urinating.

Jane was eight years old at the time. Jane was first treated for a urinary tract infection, but her symptoms did not go away. As a result, about a week later, Joan brought Jane to see Dr. Grant again. Dr. Grant testified that Jane also complained of a vaginal discharge with blood at this visit, and she treated Jane for a yeast infection but, again, the typical treatment did not resolve Jane's symptoms. This prompted Dr. Grant to perform a sexually transmitted disease (STD) test. The results of that test showed that Jane had been infected with gonorrhea. Because Jane tested positive for an STD, Dr. Grant contacted law enforcement officials, as is required, and also contacted the Children's Justice Center at University of Mississippi Medical Center.

¶5. Dr. Grant talked with Regan Doleac, a nurse practitioner at the Children's Justice Center, who advised Dr. Grant that she should perform a gonorrhea culture as a confirmatory measure and that she should also test Jane for HIV and syphilis, test her urine for additional STDs, and treat the active infection with Rocephin.

¶6. The day after Dr. Grant shared Jane's test results with her mother, Joan brought Jane in for the additional testing. Dr. Grant testified that she conducted a genital swab on Jane but, as she noted in Jane's medical chart, she was not confident the sample would be sufficient. She explained that, due to the uncomfortable nature of the swabbing process, Jane was not cooperative, and it was difficult to obtain a swab.

¶7. After she obtained the swab, Dr. Grant treated Jane with Rocephin. She sent the genital swab to Lab Corps for testing. However, the result that was returned was for a genital

culture—not a gonorrhea culture. Thus, the second test did not confirm or disprove the original positive gonorrhea result. The genital culture test that was actually done was not designed to test for gonorrhea.

¶8. Nurse Doleac testified that Jane was referred to the Children's Justice Center at University of Mississippi Medical Center by both Dr. Grant and by the Department of Human Services and/or law enforcement, where she was treated as a victim of sexual assault. Nurse Doleac performed a forensic exam on Jane. After listening to an audiotape of her interview with Nurse Doleac, Jane acknowledged at trial that in response to Nurse Doleac's questions whether anyone had touched her "in your middle part" or touched "her behind"[3] she told Nurse Doleac "No."

¶9. Nurse Doleac testified that in her forensic examination she found that Jane had a "narrowed hymen," which is a note of concern suggesting a history of sexual abuse. She explained that a narrowed hymen could result from non-abusive trauma, such as a bike accident, a balance beam accident, or something that would have caused trauma directly between Jane's legs, but when asked whether Jane had any history of injury to her genital area, she said she had none.

¶10. Nurse Doleac referred Jane to counseling and also recommended that she be interviewed by a forensic interviewer as soon as possible. Nurse Doleac also advised that

[3] Earlier in the interview, Jane had identified her vagina as her "middle part" and her buttocks as her "behind" when shown a diagram of a female body.

every person who lived with Jane was required to be tested. She explained that this was part of their protocol, that "when we have a child, particularly a prepuberty child with an infection like gonorrhea that they couldn't have," they "test everybody that lives in the house with them." Nurse Doleac said that "the reason that we do that is to begin the process of trying to figure out where [the infection] came from and try and figure out who the child is safe to be with, so we did do that that day [with respect to Jane]." Samples were collected from Joan, her six-year-old son, and her live-in boyfriend, Garlington—Joan tested negative for gonorrhea, but Garlington tested positive.

¶11. Nurse Doleac testified that gonorrhea is transmitted through intimate contact with an infectious secretion or an infected fluid. She clarified: "You don't get it from a toilet seat, you don't get it from a washcloth, you don't get it from holding somebody's hand, or walking around Target. It has to be a very intimate circumstance that the infected bodily fluid of someone has to touch and infect another person." She explained that when she says that "[t]he presence of gonorrhea in anyone is definitive for an intimate contact with an infectious secretion or an infected fluid," this "means that there's no other way [Jane] got it except intimate contact with an infected secretion."

¶12. Once they (Jane, Joan, and Garlington) returned home from the Children's Justice Center, and before receiving the test results from the samples given by Joan and Garlington, Joan asked Jane whether there was anything she wanted to tell her. Joan testified that Garlington was standing outside the door when she asked, and Jane did not want to talk. But

when Garlington went outside to smoke a cigarette, Jane called her mother into the bathroom and said she had something to tell her. Joan closed the door and Jane started crying. She did not go into detail, but Jane told her mother "Jeremy did this to me."

¶13. Garlington was standing by the bathroom door when Joan walked out, as if he had been listening. She asked Garlington what he did, and he said he didn't do anything and that "it didn't happen like that." Joan had her phone in her hand and was trying to call the police. She testified that Garlington tried to snatch the phone away from her and when she tried to find out "[w]hat didn't happen like that? What did you do?" Garlington ran out of the house. That was the last time Joan saw Garlington.

¶14. In accordance with Nurse Doleac's recommendation, Jane was interviewed by Gail Foster, a forensic interviewer at the Child Advocacy Center. A videotape of that interview was played for the jury.[4] Jane was eight years old at the time, and in that interview, Jane told Foster that Garlington "started to put his wrong part in her" after he had picked her up and put her on her back on the bed. Later in the interview, Jane said that "[Garlington] sticked it in [her]," and circled the penis on the boy drawing ("his thing") and circling the buttocks on the girl drawing. During the interview, Jane also said that Garlington "tried to stick it in her." As she did in her interview with Nurse Doleac, Jane identified her vagina as her "middle part" and her buttocks as her "behind." When Foster asked whether Garlington tried to put his thing in her middle part, Jane responded it was the behind. Jane told Foster that

[4] Neither party could locate Foster at the time of trial (over five years later).

it happened "one time," that Garlington had lived in their house for three years, and that it happened when Garlington first moved in.

¶15. Jane testified at the August 2019 trial. She said that on the day of the incident, she had used her mother's bathroom while her mother was at work and Garlington was babysitting her. When she came out, Garlington was in front of her. He picked her up, put her on her back on her mother's bed, pulled her pants down, and "tried to do something." Jane testified that Garlington "tried to stick his private part in [her]." She testified that she felt his private part against her, trying to go inside. Jane testified that she started kicking in response and once she got away, she ran to her room. At trial, Jane confirmed that she was eight when she was interviewed by Foster in June 2014, having turned eight that previous December. When Jane was asked to recall the incident between her and Garlington and "whether or not [it] happened before or after [her] birthday that year," Jane responded, "I think it—it happened before I turned eight."

¶16. The State rested and Garlington moved for a directed verdict, arguing that the State failed to present sufficient proof of sexual battery because, according to the defense, the State did not offer any proof of sexual penetration. The trial court denied Garlington's directed verdict. The defense then presented its case.

¶17. The trial court had previously granted Garlington's motion for funds to hire an expert witness and at trial Garlington presented the testimony of Dr. Scott Kelly, who was accepted as an expert in family medicine. Dr. Kelly opined that neither Jane nor Garlington actually

had gonorrhea. He testified that the urine test that revealed positive results for both Jane and Garlington was "cheap" and that he believed both received false positives. Regarding Jane, Dr. Kelly testified that "[his] most logical conclusion" was that she had vulvovaginitis, not gonorrhea, but he admitted that he could not diagnose her without treating her. He based his opinion that Garlington did not have gonorrhea, at least in part, on the fact that two known female sexual partners of Garlington's tested negative for the disease. Dr. Kelly found this relevant because the transmission rate from a man to a woman is anywhere from sixty to eighty percent. Based on this transmission rate, Dr. Kelly testified that "to a reasonable degree of medical certainty an infected male who is having regular sexual activity with a female unprotected is going—she will become positive for gonorrhea after one or two encounters."

¶18. Following Dr. Kelly, the defense called Sherry Naylor. She testified that, in May 2014 at the time of Jane's diagnosis, she had regularly engaged in sexual activity with Garlington and that on July 1, 2014, she was tested for gonorrhea and her results were negative.[5]

¶19. Garlington then testified in his own defense. He testified that he had relationships with both Joan and Naylor in 2014 and that he had unprotected sex with both of them. He

[5] Before Naylor testified in court, the trial court heard (outside the presence of the jury) the State's motion in limine to exclude any testimony from Naylor that Garlington had babysat her two daughters and nothing inappropriate had happened. The trial court granted the State's motion, and a proffer was conducted of Naylor's testimony on this issue. Further details on this issue are discussed below.

denied having any sexual contact with Jane. He acknowledged that he was told he had tested positive for gonorrhea, but that he "never really knew[—]I saw [the test results], [they] just showed me." He said that "to his knowledge" he had never been treated for the disease.

¶20. After the defense rested, the State called Dr. Scott Benton to rebut the opinions given by Dr. Kelly. Dr. Benton was Chief of the Division of Forensic Medicine at the University of Mississippi Medical Center and the medical director at the Children's Justice Center. As noted above, Nurse Doleac was a nurse practitioner for the Children's Justice Center.

¶21. The defense objected to Dr. Benton testifying, claiming, among other reasons, that it did not know what Dr. Benton's opinions would be, although it had admittedly received the medical records from Dr. Benton's office and his statement that he had read and reviewed Nurse Doleac's records and that he concurred. That morning, after Dr. Kelly had testified the day before, the State gave the defense Dr. Benton's Curriculum Vitae and an article relating to the opinions he would offer in rebuttal to Dr. Kelly's opinions.

¶22. The trial court allowed the defense to question Dr. Benton about the opinions he would be offering in rebuttal, and the defense conducted its examination of Dr. Benton on this basis outside the presence of the jury. After noting on the record that he allowed the defense to do so, the trial judge denied the defense's motion to exclude Dr. Benton, noting that the defense was not surprised by this witness, and the witness was offered to testify in rebuttal to Dr. Kelly's opinions.

¶23. After the jury was brought back into the courtroom, a voir dire was conducted and

Dr. Benton was accepted as an expert in pediatric sexual abuse. Dr. Benton testified that "[i]n . . .prepubertal children postneonatal age the [Center for Disease Control] says that [the presence of gonorrhea] is a definitive finding of sexual contact." He further testified that he disagreed with Dr. Kelly's assessment that Jane had vulvovaginitis or typical vaginal discharge rather than gonorrhea. As Dr. Benton explained, the follow-up genital swab test—although it was not the test prescribed—confirmed that Jane did not have vulvovaginitis.

¶24. Dr. Benton also contradicted Dr. Kelly's suggestion that the urine tests are cheap and unreliable. He testified that at the time of trial and at the time Jane and Garlington were tested, the urine test "was the gold standard in diagnosing adults with gonorrhea," and although the test was not "the gold standard for diagnosing gonorrhea in children," he explained that the test was used regularly in pediatric cases because "if gonorrhea is there [in children,] it's going to find it." Dr. Benton testified that the tests are 99% sensitive to gonorrhea and 99% positive for gonorrhea. He explained that if gonorrhea is there, there is a "99 percent plus positive" chance that the test will detect it, and if gonorrhea is detected there is a "99 percent plus positive" chance that the infection is not something else. In Dr. Benton's opinion, it was improbable that Jane would show symptoms of gonorrhea, she would test positive, the accused person would test positive, and the results of both tests be flawed. He concluded, given (1) Jane's gonorrhea positive test, (2) her abnormal hymen, which is often associated with sexual abuse, and (3) her disclosure of penile-vaginal contact

by a person who also tested positive for gonorrhea, that Jane was an abused child.

¶25. The defense renewed its motion for a directed verdict, and the trial court denied it.

¶26. After having heard the jury instructions read by the court, the jury deliberated and returned a unanimous verdict finding Garlington guilty of sexual battery. The trial court sentenced Garlington to serve twenty years in the MDOC, to register as a sex offender, and to have no contact with the victim or her family. Garlington moved for a JNOV or, in the alternative, a new trial, which the trial court denied. Garlington appeals. Additional facts, as necessary, will be addressed during the Court's analysis and discussion below.

DISCUSSION[6]

I. Sufficiency of the Evidence

¶27. Garlington asserts that the trial court committed reversible error when it denied his JNOV motion because (A) the State failed to prove that Garlington sexually penetrated Jane's body (either vaginally or anally) with his penis; and (B) the State failed to prove that the sexual battery occurred within the time frame in the indictment (May 29, 2014) or the amended indictment (May 1, 2013, through May 29, 2014). For the reasons detailed below, we find these assertions without merit.

¶28. "A JNOV motion challenges the legal sufficiency of the evidence." *Austin v. State*, 282 So. 3d 545, 554 (¶30) (Miss. Ct. App. 2019). "When addressing the legal sufficiency

[6] The applicable standards of review are discussed in context with respect to each issue raised on appeal.

of evidence, we consider all evidence in a light most favorable to the State." *Id.* (quoting *Jenkins v. State*, 101 So. 3d 161, 165 (¶12) (Miss. Ct. App. 2012)). On review, "[t]he State receives the benefit of all favorable inferences reasonably drawn from the evidence." *Bateman v. State*, 125 So. 3d 616, 624 (¶22) (Miss. 2013). "The relevant question . . . is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McBride v. State*, 61 So. 3d 138, 148 (¶39) (Miss. 2011) (internal quotation marks omitted). In this regard, "if the evidence is of such weight and quality that having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense, then it will be deemed to have been sufficient." *Id.* (internal quotation marks omitted).

¶29. Garlington was indicted for sexual battery under section 97-3-95(1)(d), which provides that "[a] person is guilty of sexual battery if he or she engages in sexual penetration with . . . [a] child under the age of fourteen . . . years of age, if the person is twenty-four . . . or more months older than the child." Garlington's original indictment provided that "on and about the 29th day of May, 2014, [Garlington] did willfully, unlawfully and feloniously engage in sexual penetration . . . with [Jane], an eight year old female child … by penetrating [Jane's] body with his . . . penis." The trial court subsequently allowed the date to be amended to "on, about[,] and between the 1st day of May 2013 and the 29th day of May

2014." We turn now to address Garlington's assertions that the State failed to prove "sexual penetration" or the timing as alleged in either the original, or the amended, indictment.

A. Sexual Penetration

¶30. Garlington asserts that "[Jane] herself never testified that Garlington had inserted, even slightly, his penis into her vagina or anus, only that he *tried* to do so" (emphasis in original), and thus there is no proof he "penetrat[ed] [Jane's] body." We disagree.

¶31. Pursuant to Mississippi Code Annotated section 97-3-97(a) (Rev. 2006), "'[s]exual penetration' includes . . . any penetration of the genital or anal openings of another person's body by any part of a person's body[.]" In the legal sense, "sexual penetration requires only penetration of the labia, the fleshy folds of skin surrounding the entrance to the vagina, and that penetration need only be slight." *Austin*, 282 So. 3d at 554 (¶32) (internal quotation mark omitted) (quoting *Walker v. State*, 262 So. 3d 560, 565 (¶12) (Miss. Ct. App. 2018)). We examine the evidence with these definitions in mind.

¶32. Jane's interview with the forensic interviewer, Gail Foster, was shown in its entirety to the jury. In that interview, Jane, eight years old at the time, started to tell Foster what happened, hiding her head in her hands as she said so. She said that Jeremy picked her up and put her on her back on the bed and "started to stick his wrong part in her." When a neighbor knocked on the door, Jane was able to run to her bedroom. But in addition to saying that Garlington "tried to stick it in her," Jane also clearly said later in the interview that "[Garlington] sticked it in [her]." She circled the penis on the boy drawing ("his thing"

or “wrong part”) and the buttocks on the girl drawing, identifying this as her “behind.” Later in the interview when Foster asked Jane whether Garlington tried to put his thing in her middle part, Jane responded it was the behind.

¶33. At trial five years later, Jane testified about the incident, as follows:

> [Jane:] One day my mom was going to work and I had to use the bathroom and it was two bathrooms in the house. My brother was in one, so my momma had told me to use the bathroom in her room, and I went to her room to use the bathroom. When I came out, Jeremy had came in front of me. He picked me up. He put me on my back on the bed and he tried to do something.
>
> [Counsel:] All right. You said he tried to do something to you. What . . . exactly did he do?
>
> [Jane:] He tried to stick his private part in me.
>
> [Counsel:] Could you actually feel his private part?
>
> [Jane:] Yes, ma’am.
>
> [Counsel:] Against you?
>
> [Jane:] Yes, ma’am.
>
> [Counsel:] Trying to go inside of you?
>
> [Jane:] Yes, ma’am.
>
> * * * * *
>
> [Counsel:] Where were your pants at the time, your underwear at the time that he was doing that?
>
> [Jane:] On my legs down at my ankles.
>
> [Counsel:] []they were down?

[Jane:] Yes, ma'am.

[Counsel:] Who pulled them down?

[Jane:] He did.

¶34. The jury also heard the evidence that Jane, at eight years old, tested positive for gonorrhea and so did Garlington. Dr. Benton testified that "[i]n . . .prepubertal children postneonatal age the [Center for Disease Control] says that [the presence of gonorrhea] is a definitive finding of sexual contact." Nurse Doleac testified that "[t]he presence of gonorrhea in anyone is definitive for an intimate contact with an infectious secretion or an infected fluid," and by this she "means that there's no other way [Jane] got it except intimate contact with an infected secretion." Dr. Benton agreed, testifying that although there need not be full penetration, there must be intimate contact. Likewise, Nurse Doleac explained that although the disease can be transmitted without penetration, there must be intimate contact, such as penile-vaginal contact or exposure, for transmission to occur.

¶35. Based upon this record, we find without merit Garlington's assertion that the State failed to prove sexual penetration. Rather, we find that the jury had sufficient evidence before it to infer that Garlington sexually "penetrat[ed] [Jane's] body with his . . . penis," as charged in the indictment. In addition to Jane's statement at eight years old that Garlington "sticked [his penis] in her" after placing her on her back on the bed, the jury also heard Jane's trial testimony, coupled with the test results that were positive for gonorrhea for both Jane and Garlington, and the testimonies of both Dr. Benton and Nurse Doleac as described

above.

¶36. We recognize that at times Jane used the phrase "tried to stick his private part in me" or other similar phrases, but the jury heard this in conjunction with Jane's testimony at trial confirming that she could "actually feel" his private part against her, trying to go inside of her. We find that this evidence, viewed as a whole, was sufficient for the jury to infer that Garlington at least slightly penetrated "the fleshy folds of skin surrounding the entrance to [Jane's] vagina," *Walker*, 262 So. 3d at 565 (¶12), constituting vaginal penetration under Mississippi law. *Austin*, 282 So. 3d at 555-56 (reviewing victim's testimony that "[i]t felt more like just, like, pressure on [her vagina]. I knew [his penis] wasn't in me but it was just pressing against me, jumbled up," together with medical evidence of trauma and a positive diagnosis of chlamydia constituted sufficient evidence of "sexual penetration"); *Walker*, 262 So. 3d at 565 (¶12) (finding victim's alternative recollection of events that the defendant "had pulled her underwear down, made her get on top of him, and 'rubbed his private between her legs,' although it was 'outside' of her body" and that the defendant had put his penis 'on top of her private'" sufficient evidence of penetration); *see also Burrows v. State*, 961 So. 2d 701, 706 (¶13) (Miss. 2007) (finding victim's testimony that Burrows "touched her butts with his 'daddy spot'"; the investigator's testimony that the victim told him that Burrows "touched the inside of her bottom with his 'daddy spot'"; and evidence that both the defendant and the victim tested positive for chlamydia constituted sufficient proof of sexual

battery).[7]

¶37. We also recognize that there were inconsistencies between eight-year-old Jane describing her encounter with Garlington and her testimony at trial (anal vs. vaginal); and that prior to her disclosures to her mother and Foster, Jane denied having been inappropriately touched by anyone. In this regard, however, the jury also heard Nurse Doleac's testimony that it is not uncommon for a child abuse victim to deny or fail to disclose the abuse at first. These inconsistencies do not change our conclusion. As this Court has previously observed, "inconsistent statements of a witness go to the weight of the evidence, not its sufficiency." *Walker*, 262 So. 3d at 564 (¶11). "The jury is the sole judge of the credibility of witnesses, and the jury's decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict." *Id.* at 565 (¶11) (internal quotation marks omitted). We find Garlington's insufficient proof of sexual

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[7] Garlington relies on *Ringer v. State*, 203 So. 3d 794 (Miss. Ct. App. 2016), to support his insufficiency of the evidence argument, but *Ringer* involves anal penetration. *Id.* at 797 (¶10). In *Ringer*, this Court found that there was "insufficient evidence to find penetration of the anal opening," specifically distinguishing vaginal penetration cases in which "penetration of the vulva [or labia] amounts to sexual penetration[.]" *Id.* at 797 (¶¶9-10). Likewise, *Williams v. State*, 216 So. 3d 409 (Miss. Ct. App. 2017), also cited by Garlington, involved an analysis of what constituted anal penetration. *Id.* at 413-14 (¶16). As we discuss above, we recognize that Jane, at age eight, told Foster that Garlington had "sticked" his penis in her behind. But the jury also heard Jane's testimony at trial and the other evidence discussed above, which we find was sufficient to allow the jury to infer that Garlington at least slightly penetrated Jane's labia, constituting sexual penetration of her vagina under Mississippi law. In the vaginal context, Garlington relies on *Jenkins* for his insufficient evidence assertions, but in *Jenkins*, 101 So. 3d at 167 (¶17), we held that "[the defendant's] putting his hand inside [the victim's] panties is not sufficient to constitute penetration," which is not the situation here.

penetration assertion without merit.

B. Timing

¶38. Garlington also asserts that his JNOV motion should have been granted because the State failed to prove that the sexual battery occurred within the time frame in the indictment (May 29, 2014) or the amended indictment (May 1, 2013, through May 29, 2014). In support for this contention, Garlington relies on eight-year-old Jane's statement to Foster in her forensic interview that the abuse occurred when Garlington first moved into their home, which was three years before May 29, 2014 (i.e., 2011). But this is not the only "timing" evidence the jury heard.

¶39. At trial, Jane was asked to recollect when the incident occurred and she responded, "I think it—it happened before I turned eight [in December 2013]," a statement from which a reasonable juror could infer that the incident occurred after May 1, 2013, but not so long ago as when Jane was five years old. The jury also heard evidence supporting a reasonable belief that Jane had contracted gonorrhea from Garlington; Jane's symptoms did not begin until April 2014; and she was diagnosed with and treated for gonorrhea in May 2014.

¶40. With respect to eight-year-old Jane's statement that Garlington relies upon, we begin by again emphasizing our deferential role on appellate review in light of the jury's role as the "sole judge" in resolving disputed facts and assessing a witness's demeanor and credibility. *Walker*, 262 So. 3d at 565 (¶11); *Davis v. State*, 863 So. 2d 1000, 1005 (¶17) (Miss. Ct. App. 2004). The jury viewed the entire forensic interview at trial and heard all the other testimony

and evidence presented. In seeing the forensic interview video in its entirety, the jury saw Jane's hesitancy to even talk about the incident at all; her statements that she was "scared" and that it was "real hard" to talk about; and her demeanor as she talked about it, covering her face with her hands, and at times hiding her entire head in the corner of the chair. Jane also described, in detail, what happened in May 2014 when she told her mother about the abuse, and how she told Garlington to "just tell the truth and you won't go to jail." Viewed in context, a juror could reasonably infer that eight-year-old Jane sought to place the incident as remotely in time as possible (i.e., when Garlington first moved into their home) and assess this statement accordingly, along with the fact that the disclosure of events that Jane described in her interview did not happen until May 2014, Jane did not exhibit any symptoms until April 2014, and Jane did not test positive for gonorrhea until May 2014. As such, considering "all evidence in a light most favorable to the State," *Austin*, 282 So. 3d at 554 (¶30), and allowing all reasonable inferences in the State's favor, *Bateman*, 125 So. 3d at 624 (¶22), we find that the State presented sufficient evidence at trial to allow the jury to reasonably infer that the abuse occurred within one year of May 29, 2014.

C. Alleged Improper Variance between the Dates Alleged in the Indictments and the Proof at Trial

¶41. Garlington also asserts that not only did the State fail to submit sufficient proof regarding the time frame of the alleged abuse, but also any variance between 2011 and the dates set forth in the original and amended indictments did not constitute a "reasonable variance" as that phrase has been addressed by the supreme court and the Fifth Circuit.

Specifically, Garlington cites *Daniels v. State*, 742 So. 2d 1140 (Miss. 1999),[8] and other decisions in which the supreme court has explained that "an allegation as to the time of the offense is not an essential element of the offense charged in the indictment and, within reasonable limits, proof of any date before the return of the indictment and within the statute of limitations is sufficient." *Id.* at 1143(¶10) (quoting *United States v. Cochran*, 697 F.2d 600, 604 (5th Cir.1983)); *see, e.g.*, *McBride*, 61 So. 3d at 149-50 (¶¶44-50). Garlington asserts that 2011 is not "within reasonable limits" of the dates alleged in either indictment.

¶42. But this is not a "variance" case. As we have addressed above, even taking into account eight-year-old Jane's statement, we find that the State presented sufficient proof to allow a reasonable juror to infer that the sexual battery took place within one year of May 2014, as alleged in the amended indictment.[9] Further, as we address in Issue III, below, we find no error in the trial court allowing the State to amend the indictment to state this one-year time frame.

¶43. In any event, in *McBride*, the supreme court explained that in applying the "within

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[8] This decision was overruled on other grounds by *Wilson v. State*, 194 So. 3d 855 (Miss. 2016).

[9] In *McBride*, 61 So. 3d at 150 (¶49), for example, the supreme court acknowledged that the State did not present sufficient evidence to prove that the alleged "sexual battery occurred precisely within the January 2002 to December 2005" time frame as alleged in the indictment and then analyzed the evidence presented under the variance test set forth in *Daniels*. In *Daniels*, the supreme court concluded that the State *did* present sufficient evidence that the crime occurred within the time frame in the indictment, but then added that "even had the date alleged in the indictment been incorrect," the variance was within "reasonable limits" within the test set forth above. *Daniels*, 742 So. 2d at 1143 (¶10).

reasonable limits" test, the court must consider "whether the defendant had adequate notice of the charge(s) against him so that he was able to prepare his defense and not be surprised at trial . . . [and] whether the defendant is protected against a second prosecution for the same offense." *Id.* at 150 (¶48) (citing *Cochran*, 697 F.2d at 604). Continuing, the supreme court recognized that "[b]asically, the variance in dates must not unfairly prejudice the defendant." *Id.* The supreme court found that the State's failure to place the alleged sexual battery within the time frame in the indictment did not prejudice McBride "in any way," where "he never asserted an alibi defense; thus, any failure to prove the alleged dates could not have affected or hampered such a defense. Moreover, he does not allege inadequate notice of the charges against him, contend that he was unfairly surprised, or raise double-jeopardy concerns." *Id.* at (¶49).

¶44. Garlington asserts that he did not receive adequate notice of an expanded time frame in order to explore whether Jane's biological father could have been the culprit as a defense in his case. But the record reflects that Garlington *did* attempt to pursue the "father-as-perpetrator" defense at trial in seeking to introduce into evidence alleged "statements" made by Jane's aunt to Joan (Jane's mother) about Jane's father concerning alleged sexual misconduct involving a child. Further, Garlington "never asserted an alibi defense" at trial, nor has he asserted on appeal that he would have done so, "thus, any failure to prove the alleged [original] date[] could not have affected or hampered such a defense." *Id.* at 150 (¶49). Garlington also does not "raise double-jeopardy concerns." *Id.* The State charged

Garlington with only one offense consisting of one occurrence. Garlington's defenses—that he did not do it and that neither he, nor Jane, were conclusively shown to test positive for gonorrhea—were not affected by any expanded time frame.

¶45. Regarding eight-year-old Jane's statement that the abuse happened when Garlington "first moved in" (sometime in 2011), we reiterate that this was one statement that the jury heard in the context of the entire forensics interview video and in the context of the other evidence presented at trial relating to the timing aspect of the abuse. As we have discussed above, even considering this statement, we find that the State presented sufficient evidence to allow the jury to reasonably infer that the abuse occurred within the one-year time frame in the amended indictment.

¶46. Garlington appears to assert he was unduly prejudiced or unfairly surprised by eight-year-old Jane's statement and the time frame it encompassed, but we find such assertion without merit for the same reasons addressed above.[10] Rather than being unfairly surprised, the record plainly reflects that the State gave Garlington Jane's forensic interview video

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[10] Garlington appears to assert that eight-year-old Jane's timing statement was first revealed "at trial"—but the record clearly reflects that this simply is not so. Rather, in cross examination, Jane denied that she told Foster that it "happened a long time ago" and that it "happened three years ago." Jane explained at trial that "I said three years because that's how long they [(her mother and Garlington)] had been together. She [(Foster)] never asked me how long ago it happened. She asked me how long my momma and him been together." The defense was allowed to play the video to refresh Jane's memory outside the presence of the jury. After viewing that portion of the video, Jane admitted that *in the interview*, she told Foster that Garlington had moved in with their family "three years" ago and that "it happened a long time ago" when Garlington first moved in.

about two years before trial. Indeed, the defense urged that the video be used as the "best evidence" of Jane's statements at the "tender years" evidentiary hearing that took place prior to trial, and the defense used the video to cross-examine Jane with respect to the timing statement she made in her forensics interview. Further, Garlington never defended against the sexual battery charge against him by claiming he did not babysit for Jane or live with Jane's mother during that time period, nor does he assert on appeal he would have asserted such a defense had he known of this time frame. Garlington plainly had notice that eight-year-old Jane told Foster that her encounter with Garlington happened when he first moved into their home, about three years before May 29, 2014. Garlington was not unfairly surprised by this evidence, or hampered in presenting his defenses.

¶47. For all these reasons, we find that Garlington's insufficiency of the evidence assignment of error is without merit.

II. Tender-Years Exception to the Hearsay Rule (MRE 803(25))

¶48. Garlington asserts that the trial court erred when it allowed out-of-court statements made by Jane to her mother and in her forensic interview with Foster (observed by remote closed-circuit television by Detective Henderson) under the "tender-years" exception to the hearsay rule.[11]

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[11] Garlington does not raise a Confrontation Clause issue (*see* U.S. Const. amend. VI) with respect to these statements, acknowledging that Jane testified at trial and was thus subject to cross-examination on her veracity and possible motivation to lie, as set forth in *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¶49. "The standard of review for the admission of hearsay evidence is abuse of discretion." *Austin*, 282 So. 3d at 550 (¶17). Generally, "[h]earsay is not admissible except as provided by law." MRE 802. One exception to the rule against hearsay, however, is the tender-years exception, set forth in Mississippi Rule of Evidence 803(25), as follows:

> Tender Years Exception. A statement by a child of tender years describing any 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.

¶50. The Mississippi Supreme Court recognized in *Veasley v. State*, 735 So. 2d 432, 436 (¶14) (Miss. 1999), that in determining admissibility under Rule 803(25), "the court must determine (1) that the declarant is a child of tender years and (2) that the time, content, and circumstances of the statement provide substantial indicia of reliability." Garlington concedes that Jane was of tender years but asserts that the trial court erred by failing to make a sufficient reliability determination at the tender-years hearing. We find this contention without merit.

¶51. In determining whether there is substantial indicia of reliability, a non-exhaustive list of "some factors" a trial court should consider is set forth in the advisory committee's note to Rule 803(25), as follows:

> (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.

MRE 803(25), advisory committee note. "Each factor need not be discussed separately by the trial judge, so long as the record supports a finding that the victim's statements bore indicia of reliability." *Austin*, 282 So. 3d at 552 (¶23) (quoting *Case v. State*, 187 So. 3d 177, 182-83 (¶17) (Miss. Ct. App. 2015)).

¶52. In this case, the State moved before trial to admit under the tender-years exception certain statements made by Jane to her mother and in her forensics interview with Foster. Jane's mother testified at the tender-years hearing about taking Jane to the doctor for her symptoms, Jane ultimately testing positive for gonorrhea, and Jane sobbing and telling her that "Jeremy did this to me." Joan also testified that she had learned from her friend, Felisha, that Felisha's cousin, "Ant" (deceased at the time of the hearing) had told her about an incident when he went to Joan's home when she was not there. Garlington and Jane were in the bedroom with the door closed and, when Ant knocked on the door, Garlington answered and was wearing only boxer shorts. Joan testified that Felisha told her that when Ant told her about it he said that "something didn't seem right." Joan also testified about Jeremy's actions when she confronted him: first trying to keep her from calling the police,

then fleeing from her home. She did not see him again.

¶53. Joan was thoroughly cross-examined by the defense with respect to the reliability of Jane's statement that "Jeremy did this to me," including going over the circumstances surrounding that statement and confirming that Jane did not tell her mother any other details. The defense likewise confirmed the loving relationship between Joan and her daughter and questioned Joan in detail about any visitation Jane had with her father and the dates this occurred.

¶54. Detective Henderson, the investigator assigned to Jane's case and who observed eight-year-old Jane's forensic interview with Foster, also testified at the hearing. She described the disclosure Jane made during her forensic interview and testified that no one used suggestive techniques to obtain the information that Jane provided. Like Joan, Detective Henderson testified that Jane had disclosed that Garlington was the person who had abused her. The defense also thoroughly cross-examined Detective Henderson, including questions regarding how the sexual abuse investigation was conducted, and her observations regarding Foster's forensic interview of Jane.

¶55. After hearing the testimonies presented and argument with respect to the reliability factors included in the advisory committee note to Rule 803(25), the trial court found that, based on the factors outlined in the comment to Rule 803(25), Jane's pretrial statements bore substantial indicia of reliability and should be admitted. We find that the trial court had "sufficient evidence of the time, content, and circumstances of [Jane's] out-of-court

statements to support its finding of reliability," *Austin*, 282 So. 3d at 552-53 (¶24), and thus it did not abuse its discretion in granting the State's tender-years motion. We find this particularly true here because Jane "testified at trial and was subject to cross-examination," *id.* at 553 (¶24), and Jane's forensic interview video was played at trial.

III. Amendment of the Indictment

¶56. Garlington asserts that the trial court erred by allowing the State to amend the indictment from alleging that Garlington committed the offense against Jane "on and about the 29th day of May 2014" to "on or about and between" May 1, 2013, to May 29, 2014. Garlington also asserts that even with the amendment, the proof presented at trial was inconsistent with the dates in the indictment as amended, referencing eight-year-old Jane's timing statement to Foster. As to this point, Garlington claims that "[t]his does not pass muster under *McBride*, *Daniels* or *Cochran*," as addressed in Issue I. We find these contentions without merit for the reasons stated below.

¶57. We begin with the amended one-year time frame. The State moved to amend the indictment over two years before trial. In its motion, the State detailed the basis for its request. As the State explained, on May 29, 2014, it was reported to authorities that eight-year-old Jane tested positive for having gonorrhea, a sexually transmitted disease. But discovery revealed that before May 29, 2014, Jane had been taken to see a physician because she would have a burning pain every time she urinated. This discovery was provided to the defense, and from the discovery it is clear that Jane would have had to have been infected

with gonorrhea some months prior to May 29, 2014.

¶58. The record reflects that the defense filed no response to the State's motion. The trial court conducted a hearing on the motion before the August 2019 trial. At the hearing, the State argued that there was no unfair surprise as the motion had been filed for over two years, and no notice of an alibi defense had been asserted. The defense, however, argued that to allow the amendment "would give the jury a misconception that there was abuse going on for a whole year," and that there was no evidence of such an allegation. The State clarified, however, that it was alleging that the *one* incident took place within a year from Jane's gonorrhea report on May 29, 2014. With this clarification, the trial court granted the State's motion to amend.

¶59. On appeal, Garlington asserts that the amendment was improper because he "was not given adequate notice necessary to prepare a defense due to the amendment of the indictment." The Court reviews de novo a trial court's decision to allow an amendment to an indictment. *Stone v. State*, 320 So. 3d 1246, 1253 (¶30) (Miss. Ct. App. 2021). "An indictment may be amended to conform to the evidence, so long as the amendment is one of form, not substance, and does not prejudice the defense." *Id.* at 1254 (¶32) (quoting *Odom v. State*, 73 So. 3d 550, 552 (¶11) (Miss. Ct. App. 2011)).

¶60. With respect to an amended time frame, "amendments to an indictment involving a change in date are merely changes in form and not substance, unless time is an essential element or factor in the crime." *Id.* (internal quotation marks omitted). Time is not an

essential element of the crime of sexual battery," *Jordan v. State*, 80 So. 3d 817, 827 (¶38) (Miss. Ct. App. 2010) (citing Miss. Code Ann. § 97-3-95(1)(d)), and "so long as the defendant is fully and fairly advised of the charges against him," a specifically alleged date is not required. *Stone*, 320 So. 3d at 1254 (¶34); *see also* Miss. Code. Ann. § 99-7-5 (Rev. 2007) ("An indictment for any offense shall not be insufficient for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly . . . ."). Regarding the "prejudice" element, "[t]he test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made." *Id.* at 1255 (¶37) (quoting *Eakes v. State*, 665 So. 2d 852, 859-60 (Miss. 1995)).

¶61. As we have already addressed in Issue I, we find that Garlington has not shown he was prejudiced by the one-year amendment in this case. Although Garlington contends that "on the eve of trial" he was forced to defend based upon a one-year time frame, rather than the original May 29, 2014 date, we find this assertion wholly without merit. As noted, the State filed its motion to amend the indictment to include the one-year time frame over two years before it was ruled upon. Garlington did not file a notice of alibi defense, he did not assert an alibi defense at trial, nor does he even assert on appeal that he was prevented from asserting one. As to a possible defense that Jane's biological father could have been the perpetrator, the record reflects that Garlington *did* attempt to pursue the "father-as-perpetrator" defense at trial, as we have also addressed in Issue I. Garlington plainly

investigated this potential defense regardless of the expanded one-year time frame. Garlington's defenses were that the sexual battery allegation was not true and that neither his positive test result for gonorrhea, nor Jane's, were reliable or conclusive. These defenses were not affected by the one-year expanded time frame. *See Stone*, 320 So. 3d at 1255 (¶37) (finding no prejudice in amending dates in the indictment where defenses were not affected and the defendant's assertion that he "might have" raised another defense was simply inadequate to warrant reversal). Also relevant is that the trial court made it very clear that in allowing the amended time frame, the indictment would remain unmodified with respect to the essential elements of the crime charged and would remain a single charge against Garlington for one offense consisting of one occurrence.

¶62. Garlington also asserts that the proof at trial was that "[Jane] herself accused him of sexually assaulting her three (3) years before the date in the original indictment," relying on eight-year-old Jane's forensic interview statement. As to this contention, we have already determined in Issue I that sufficient evidence was presented by the State to support a reasonable jury's determination that Jane's abuse occurred between May 1, 2013, to May 29, 2014, as set forth in the amended indictment, and we took eight-year-old Jane's statement into account in our analysis. As we also addressed in Issue I and summarized in the preceding paragraph, we find without merit Garlington's contentions that he was unfairly prejudiced or surprised by this statement or the time period it encompassed. We will not reiterate our analysis here except to particularly note that with respect to the 2011to May

2013 time period, Garlington at no time attempted to defend the sexual battery charge against him by asserting he did not live with Jane's mother during that time period, or that he did not babysit Jane during that time. Further, Garlington was given Jane's forensic interview video about two years before trial—he certainly has no basis at all for asserting "surprise" or unfair prejudice with respect to eight-year-old Jane's statement. *See McBride*, 61 So. 3d at 150 (¶¶49-50).

¶63. In sum, "[t]ime is not an essential element of the crime of sexual battery," *id.* at 1255 (¶38), and in this case the State's motion to amend the indictment to conform to the evidence was one of form, "and [was] therefore allowable." *Id.* The charge against Garlington remained the same—one offense consisting of one occurrence—and Garlington's "indictment fully and fairly advised him of the charge[] against him." *Id.* Further, as detailed above, we find that Garlington was not prejudiced by the one-year expanded time frame, *id.*, or eight-year-old Jane's statement. For these reasons, we find that Garlington's amended indictment assignment of error is without merit.

IV. *Batson* Challenges

¶64. Garlington asserts that the trial court erred by overruling Garlington's *Batson* challenges because the race-neutral reasons offered by the State for exercising its peremptory strikes against African Americans "were obviously pretextual." Garlington offers no other case-specific analysis on this issue. For the reasons addressed below, we find this assignment of error without merit.

¶65. This Court must "give[] great deference to a trial court's determinations under *Batson* because they are based largely on credibility." *Flowers v. State*, 947 So. 2d 910, 917 (¶8) (Miss. 2007). In particular, "[a] Batson ruling may not be overturned unless the record indicates that the ruling 'was clearly erroneous or against the overwhelming weight of the evidence.'" *Smith v. State*, 258 So. 3d 292, 301 (¶22) (Miss. Ct. App. 2018) (quoting *Thorson v. State*, 721 So. 2d 590, 593 (¶4) (Miss. 1998)).

¶66. A *Batson* challenge is to proceed as follows:

> First, the defendant must establish a prima facie case of discrimination in the selection of jury members. The prosecution then has the burden of stating a racially neutral reason for the challenged strike. If the State gives a racially neutral explanation, the defendant can rebut the explanation. Finally, the trial court must make a factual finding to determine if the prosecution engaged in purposeful discrimination. If the defendant fails to rebut, the trial judge must base his decision on the reasons given by the State.

Berry v. State, 802 So. 2d 1033, 1037 (¶11) (Miss. 2001) (citations omitted).

¶67. During jury selection here, the defense raised a *Batson* challenge after the State used four peremptory strikes to eliminate jurors who were African American. The State responded by noting that it had selected nine African American jurors and two Caucasian jurors. The trial court found that Garlington had not yet established a prima facie case of discrimination.

¶68. After defense counsel exercised six strikes, the State was required to tender six more jurors. The State exercised a strike against the first juror it reached and, again, defense counsel raised a *Batson* objection because the juror was African American. At this point, the trial court required the State to provide race-neutral reasons for all five of its strikes. The

reasons given for each strike were as follows:

> The first juror struck did not make eye contact, was not attentive, and was not engaged.
>
> The second juror struck listed no occupation, no home phone number, or work phone number, she had never been employed and she appeared to be disgruntled. She gave negative looks to the prosecutors and seemed to be resentful of them.
>
> The third juror struck was unresponsive throughout the State's voir dire. He made no eye contact and appeared not to answer questions. He seemed disinterested and nonresponsive.
>
> The fourth juror struck was a recent college graduate. She had never been employed and the State expressed that it did not think she would be competent to decide the issues involved in the particular case.
>
> The fifth juror was struck because, based on her body language, the State felt she favored the defense over the State. Her demeanor shifted and she became closed off when the prosecutors spoke. She did not act the same toward defense counsel.

¶69. Defense counsel's response to each reason given by the State was to disagree with the State's assessment and to primarily argue that the proffered reasons were pretextual or "bogus." Defense counsel offered no proof to substantiate its claims that the State struck jurors based on their race.

¶70. The trial court denied the defense's *Batson* challenges, specifically noting the makeup of the venire—the first panel of jurors had only one white juror and eleven black jurors; and the second panel had two white jurors and ten black jurors. Although the trial court found that the strikes had not been made in a discriminatory manner, it did require the State to provide its reasons for striking the jurors. The trial court accepted the reasons given as

race-neutral.

¶71. We find no error, and certainly no clear error, in the trial court rejecting the defense's cursory rebuttal and accepting the reasons given by the State in exercising its peremptory strikes. Each reason given by the State has been recognized by the appellate courts as race-neutral. *See Lockett v. State*, 517 So. 2d 1346, 1351-52 (Miss. 1987) (recognizing that "[a]n expression of contempt or hostility may reasonably be assumed to spell trouble for the prosecution. Such demeanor is a legitimate reason, related to any case, for a prosecutor to exercise a peremptory challenge" and including an appendix listing cases encompassing the other reasons offered by the State in this case); *see also Berry*, 802 So. 2d at 1043 (¶36) ("This Court has held [that] '[i]nattentiveness, boredom, dress, demeanor, unemployment, and sleeping during voir dire have all been determined by this Court to be racially neutral reasons.'" (quoting *Mack v. State*, 650 So. 2d 1289, 1299 (Miss. 1994))); *Smith*, 258 So. 3d at 304 (¶31) (juror disinterest and inattention); *Golden v. State*, 984 So. 2d 1026, 1030-31 (¶¶17-32) (Miss. Ct. App. 2008). Further, defense counsel failed to prove that the reasons offered were pretext for discrimination. *Golden*, 984 So. 2d at 1030 (¶15) (recognizing that "[w]here . . . the defendant fails to rebut the race/gender-neutral reasons given by the State, "the trial judge may base his decision only on the reasons given by the State"); *see also Jones v. State*, 252 So. 3d 574, 583-84 (¶38) (Miss. 2018) (recognizing that defense counsel's cursory response to the State's proffered race-neutral reasons was insufficient to prove pretext).

¶72. In light of the great deference we must afford a trial court's determination on a *Batson* challenge, the applicable law, and the defense counsel's failure to adequately rebut the State's reasons for exercising its peremptory strikes, we find no error in the trial court's denial of Garlington's *Batson* challenges in this case.

V. Statements from an Unavailable Witness Regarding Alleged Sexual Misconduct on the Part of Jane's Biological Father

¶73. Garlington asserts that the trial court erred in failing to allow evidence of alleged sexual misconduct on the part of Jane's father. We find this assignment of error without merit as discussed below.

¶74. In March 2018, Garlington filed a pretrial motion entitled "Motion to Admit Evidence of Allegation of Sexual Offense Against Complainant by Another Party," alleging in that motion that "in the discovery produced by the State, [Jane's] aunt [Dawn] informed [Jane's] mother after [Jane] and her sibling[] visited with the father that there were allegations of child sexual abuse with the father[.]" The motion was heard prior to the August 2019 trial. At the hearing, the parties explained to the trial court that the State had produced a tape-recorded interview between Joan and Nurse Doleac that took place when Jane tested positive for gonorrhea, but before Jane had made any disclosures regarding Garlington. The defense explained that in that interview Joan told Nurse Doleac that Dawn had told Joan about "allegations that [Jane's] father had abused another sister's child, a nephew." The defense claimed that it had been unable to serve Dawn with a subpoena, so it sought to elicit this information from other witnesses in order to show "that the child may have some bias and

a motive in this case to point the finger at Jeremy Garlington in an effort to protect her father."

¶75. The State argued that there was no evidence of any allegation or accusation against Jane's father relating to Jane, the "evidence" of any other sexual abuse on his part consisted only of allegations and rumors, and to introduce rumors and allegations regarding purported sexual misconduct to a third party would be "highly prejudicial to this case, . . . confusing . . . [and] it's going to mislead this jury as to why they are here."

¶76. The trial court denied Garlington's motion, observing that there was no "statement" by Dawn to admit, and although "[s]omeone else could possibly give testimony as to the statement she made to them that would be hearsay. Hearsay that would not be admissible." Accordingly, the trial court found "that the motion to admit evidence of other allegations of sex with the victim by others is not well taken and will be denied."

¶77. Citing *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *Terry v. State*, 718 So. 2d 1115 (Miss. 1998), for the proposition that a defendant is entitled to present evidence of third-party guilt, Garlington asserts on appeal that the trial court's decision to exclude this evidence was reversible error. He argues that the proposed evidence was relevant and would show that Jane was biased and had motive to fabricate her identification of Garlington.

¶78. In addressing the trial court's exclusion of the purported evidence, we apply an abuse of discretion standard. *Moffett v. State*, 49 So. 3d 1073, 1096 (¶71) (Miss. 2010). We find that neither *Holmes*, nor *Terry*, is on point and that the supreme court's analysis in *Moffett*

more aptly fits the circumstances in this case. As addressed below, we find that the trial court did not abuse its discretion in excluding the purported evidence of alleged sexual misconduct on the part of Jane's father in this case.

¶79. The issue in *Holmes*, 547 U.S. at 321, was "whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of *third-party guilt* if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." (Emphasis added). Unlike the proposed evidence in *Holmes*, Dawn's "statement," in this case did not show, in any way, that Jane's father was implicated in *Jane's* sexual abuse. Also, the third party in *Holmes* "was (according to several witnesses) in the neighborhood at the time of the crime; and . . . had (according to four witnesses) confessed his own guilt and/or acknowledged that the defendant was innocent." *Moffett*, 49 So. 3d at 1096 (¶69) (citing *Holmes*, 547 U.S. at 323). In this case, there is no direct proof of Jane's father abusing her or any sexual misconduct on his part with respect to anyone else.

¶80. The *Holmes* Court ultimately held:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence *if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.*

Holmes, 547 U.S. at 326 (emphasis added).

¶81. In *Terry*, 718 So. 2d at 1121 (¶29), the trial court excluded testimony and evidence

offered by the defendant "that another person took the money which she was accused of embezzling." On appeal, the supreme court held that "Terry should have been allowed to present evidence that would prove her theories of innocence. Because she was denied this opportunity, we reverse and remand for a new trial." *Id.* at 1123 (¶37). Although recognizing that "[o]n remand, the trial judge should afford Terry the opportunity to prove her theories of innocence[,]" the supreme court then specifically cautioned, "However, no evidence should be admitted without first traveling through the filter of Miss. R. Evid. 403." *Id.* We find that the proposed evidence in this case would not survive the relevancy test under Rule 403, as we address below.

¶82. As noted, we find that the supreme court's analysis in *Moffett* is applicable here. Moffett was convicted of capital murder after he killed a five-year-old child while he was engaged in committing felonious abuse of the child. *Moffett*, 49 So. 3d at 1077 (¶1). At his trial, Moffett sought to present evidence that a third party might have committed the crime. *Id.* at 1095 (¶68). Specifically, he sought to elicit testimony that his stepfather—a convicted sex offender—had been at the scene before the crime. *Id.* Defense counsel asked the homicide detective, "During your investigation, based on a report from an officer who was on the scene, you determined that there was a convicted sex offender associated with this family?" *Id.* The State objected on the grounds of relevance and hearsay. *Id.* The trial court sustained the State's objection but allowed the defense to make a proffer. *Id.*

¶83. During the proffer, the detective testified that there was no evidence that Moffett's

stepfather had been at the scene at the time of the murder or before it, *id.*, and the detective did not know how the other officer would have known about the stepfather's status as a sex offender. *Id.* "After the proffer, the [trial] court ruled that the evidence was inadmissible, as it was (1) hearsay without an exception; (2) irrelevant; and (3) if relevant, its 'probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.'" *Id.* at 1095-96 (¶68). Finding the circumstances distinguishable from those in *Holmes* and *Terry*, the supreme court held that in Moffett's case that "the trial court correctly applied the rules of evidence to the facts of the case. Accordingly, we find no abuse of discretion in excluding this evidence." *Id.* at 1096 (¶71).

¶84. In Garlington's case, the defense presented no evidence at all that Jane's father was implicated in any way with respect to *her* sexual abuse. *Terry* and *Holmes* simply do not apply. *See Nelson v. State*, 995 So. 2d 799, 806 (¶3) (Miss. Ct. App. 2008) (finding that where the appellant had no "witnesses who had direct, first-hand knowledge of issues directly relevant to its particular case," the holding in *Terry* did not apply).

¶85. Even with respect to the allegations about Jane's father and the nephew, Garlington had no evidence that any report had been filed against Jane's father, much less that Jane's father had been charged for, or convicted of, any sexual misconduct. And, as the trial court pointed out, Garlington did not even have any "statement" from Dawn to possibly admit under Rule 804 (unavailability of witness), but only intended to solicit inadmissible hearsay evidence from other witnesses. On appeal, Garlington cites no exception to the hearsay rule

allowing such evidence to be admitted.

¶86. Although Garlington asserts that "[a]t a minimum, the evidence went to [Jane's] motive and bias," we find that the unsubstantiated allegations at issue here would not pass muster under Rule 403, even if such evidence were admissible under a hearsay exception. Any probative value would be far outweighed by concerns of "unfair prejudice, confusing the issues, [and] misleading the [jury]," MRE 403, with respect to the actual case before the jury concerning *Jane's* sexual abuse. *See Holmes*, 547 U.S. at 326; *Moffett*, 49 So. 3d at 1096 (¶71); *Terry*, 718 So. 2d at 1123 (¶37).[12]

¶87. For the reasons stated, we find no abuse of discretion in the trial court excluding evidence pertaining to alleged sexual misconduct on the part of Jane's biological father.

VI. Admission of Lab Results

¶88. Garlington asserts that the trial court erred in admitting the lab results for Jane, her mother, and himself[13] over his Confrontation Clause objections[14] because there was no

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[12] We recognize that the trial court did not address the State's Rule 403 arguments, but "[r]egardless of the trial court's reason for [denying Garlington's motion,] . . . an appellate court may affirm a trial court if the correct result is reached, even if the trial court reached the result for the wrong reasons." *Harper v. State*, 102 So. 3d 1154, 1161 (¶21) (Miss. Ct. App. 2012).

[13] The lab results for Jane (S-5 (positive for gonorrhea) and S-6 (genital culture test results), Jane's mother (S-8 (negative for gonorrhea)), and Garlington (S-9 (positive for gonorrhea)) were admitted over the defense's Confrontation Clause objections.

[14] Both the United States Constitution and the Mississippi Constitution guarantee a defendant in a criminal prosecution the right to confront the witnesses against him. U.S. Const. amend. VI; Miss. Const. art. 3, § 26.

witness from the labs that conducted the tests to testify at trial. We find this assignment of error without merit for the reasons stated below.

¶89. We "review[] de novo a Confrontation Clause objection." *Williams v. State*, 281 So. 3d 263, 266 (¶8) (Miss. Ct. App. 2019). In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), the United States Supreme Court held that "[*t*]*estimonial statements* of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]." (Emphasis added). This Court has observed that "'[l]aboratory reports *created to serve as evidence against the accused at trial* are testimonial statements covered by the Confrontation Clause.'" *Williams v. State*, 240 So. 3d 436, 448 (¶36) (Miss. Ct. App. 2017) (emphasis added) (quoting *Crawford*, 541 U.S. at 68). Similarly, in *Vanwey v. State*, 147 So. 3d 367, 370 (¶10) (Miss. Ct. App. 2014), this Court found that "[a] document is testimonial when it is created for the *sole purpose* of the State's use as evidence against the defendant." (Emphasis added). *See Daniels v. State*, 242 So. 3d 878, 883 (¶14) (Miss. Ct. App. 2017).

¶90. In contrast, statements obtained in circumstances that do not have "the primary purpose of creating evidence for [the defendant's] prosecution[]" do not implicate the Confrontation Clause. *Ohio v. Clark*, 576 U.S. 237, 246 (2015); *United States v. Barker*, 820 F.3d 167, 172 (5th Cir. 2016); *see also Madden v. State*, 97 So. 3d 1217, 1228 (¶52) (Miss. Ct. App. 2011); *Jordan*, 80 So. 3d at 828 (¶45). Because the lab results in this case were not solely created to serve as evidence against Garlington, we find that they are non-testimonial

and Garlington's Confrontation Clause rights were not violated when the lab results were admitted at trial. We turn now to discuss the relevant authorities and apply them to the facts of this case.

¶91. In *Ohio v. Clark*, Clark was taking care of his girlfriend's three-year-old son. *Clark*, 576 U.S. at 240. The next day at school, teachers discovered red marks on the child and he identified Clark as his abuser. *Id.* The question before the Supreme Court was "whether the Sixth Amendment's Confrontation Clause prohibited prosecutors from introducing those statements when the child was not available to be cross-examined." *Id.* The Supreme Court held that "[b]ecause neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial." *Id.* In particular, the Supreme Court recognized that "under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Id.* at 245. In this regard, the Supreme Court found that the child's statements were not testimonial, as they "were not made with the primary purpose of creating evidence for Clark's prosecution. [They] . . . occurred in the context of an ongoing emergency involving suspected child abuse. [The victim's] teachers asked questions aimed at identifying and ending a threat." *Id.* at 237-38; *see id.* at 246-47. The Supreme Court further held that "[i]t is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution." *Id.* at 250.

¶92. Similarly, the Fifth Circuit Court of Appeals concluded in *Barker*, 820 F.3d at 172,

that a child's statements to a certified Sexual Assault Nurse Examiner ("SANE") were non-testimonial and admissible. The Fifth Circuit found that the nurse's "SANE certification did not convert the essential purpose of her conversation with [the child] from medical evaluation and treatment to evidence-collection, *though it may have tended to lead to Barker's prosecution*." *Id.* (emphasis added). As the Fifth Circuit observed, "[l]ike all good nurses, [the nurse] would have acted with the principal purpose to provide [the child] with medical care—whether or not she possessed the SANE certification." *Id.*; *see also Madden*, 97 So. 3d at 1228 (¶52) (finding that the child's referral to the therapist by DHS was not to "look for evidence for future prosecution," but was for the primary purpose of addressing "the harmful behavior Jane reportedly had been exhibiting toward herself and to others," and that the therapist "thereafter contacted DHS and the district attorney's office and reported what she had observed," did not render the child's statements non-testimonial); *Jordan*, 80 So. 3d at 828 (¶45) (finding that statements made during therapy were not testimonial, and statements made during a DHS forensic interview—and not based on a police investigation—were not testimonial).

¶93. Based upon the authorities discussed above, we find that the lab results at issue here are non-testimonial in nature and thus the Confrontation Clause is not implicated in this case. Dr. Grant, Jane's pediatrician, testified that the STD test was performed because the typical treatment was not resolving Jane's symptoms. In short, it was done for medical purposes. Similarly, after eight-year-old Jane tested positive for gonorrhea, the tests were performed

on everyone in the household to protect Jane and determine where she could be safe, as Nurse Doleac explained:

> There is per our policy and the protocol when we have a child, particularly a prepuberty child with an infection like gonorrhea that they couldn't have[—]we test everybody that lives in the house with them, and the reason that we do that is to begin the process of trying to figure out where it came from and try and figure out who the child is safe to be with.

Garlington was not targeted in the testing process. All household members (including Jane's six-year-old brother) were tested. On review, we find that the primary purpose of these tests was not to "create evidence for Garlington's prosecution." *Clark*, 576 U.S. at 246-470.

¶94. Garlington relies on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011), to support his argument that the lab results in this case constitute "testimonial" evidence implicating his Confrontation Clause rights. But in both cases, the United States Supreme Court makes clear that the reports at issue were "testimonial" in that they were created for the "sole purpose" of providing "principal evidence" against the accused. *See Bullcoming*, 564 U.S. at 664 (forensic laboratory report prepared by the state crime lab from blood drawn pursuant to a warrant authorizing a blood-alcohol analysis for use as the "[*p*]*rincipal evidence*" against the defendant in his driving-while-intoxicated trial was "testimonial" in nature (emphasis added)); *Melendez-Diaz*, 557 U.S. at 311 (state crime-lab certifications analyzing cocaine in defendant's drug trial created for the "*sole purpose* of . . . provid[ing] 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance" were

"testimonial" in nature (emphasis added)).

¶95. The reports at issue in *Melendez-Diaz* and *Bullcoming* are wholly distinguishable from the lab results in this case. The testimonies of Dr. Grant and Nurse Doleac show that these lab results were not created for the primary purpose of serving as evidence against Garlington, and thus they do not constitute "testimonial" evidence pursuant to the federal and state authorities we have discussed in detail above.

¶96. Garlington also asserts that the test results were "testimonial" in nature because they were "given" to the police in the course of their investigation. We disagree. With respect to Jane's test results, that Dr. Grant was required by law to report the results does not change our analysis because the "primary purpose" of performing the test was to providing Jane with medical care. Similarly, as Nurse Doleac's testimony illustrates, the subsequent testing of *all* household members after Jane tested positive for gonorrhea was done to try and pinpoint the source of the sexually transmitted disease in the prepubescent child and "figure out who the child is safe to be with." In short, the test results were not "created to serve as evidence against the accused at trial," *Williams*, 240 So. 3d at 448 (¶36), and were not "testimonial" as that term is applied under federal and state law. *See Clark*, 576 U.S. at 237-40; *Barker*, 820 F.3d at 172; *see also Madden*, 97 So. 3d at 1228 (¶52).

¶97. Accordingly, we find that the non-testimonial lab results did not implicate Garlington's Sixth Amendment right of confrontation. We find no error in the trial court admitting the lab results into evidence at trial. This assignment of error is without merit.

VII. Mississippi Rule of Evidence 803(18)

¶98. Garlington asserts that the trial court violated Mississippi Rule of Evidence 803(18) when it prohibited his expert from referring to certain learned treatises, periodicals, and other materials he had relied on in forming his opinions. A trial court's evidentiary rulings are generally reviewed for abuse of discretion. *Hartfield v. State*, 161 So. 3d 125, 130 (¶10) (Miss. 2015). We find no abuse of discretion in the trial court's ruling on this issue, as addressed below.

¶99. Rule 803(18) provides, in full:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> . . . .
>
> (18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:
>
> > (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
> >
> > (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
>
> If admitted, the statement may be read into evidence but not received as an exhibit. *A treatise used in direct examination must be disclosed to an opposing party without charge in discovery*.

MRE 803(18) (emphasis added).

¶100. During the direct examination of Garlington's expert, Dr. Kelly, defense counsel sought to refer to, or allow Dr. Kelly to refer to, learned treatises or periodicals that Dr. Kelly

had used to form his opinions. The State objected because the particular articles at issue had not been produced to the State during discovery. Citing Rule 803(18), the trial court ruled that the articles could not be referred to during direct examination because they had not been disclosed to the State.

¶101. The plain language of Rule 803(18) supports the trial court's ruling. Rule 803(18) specifically provides that any "treatise used in direct examination must be disclosed to an opposing party without charge in discovery," and the record reflects that the materials at issue had not been produced. Mississippi Rule of Criminal Procedure 17.8 requires that "[b]oth the State and the defendant have a duty timely to supplement discovery," and the defense failed to do so with respect to the articles at issue. Accordingly, we find no abuse of discretion in the trial court's ruling on this issue. *See Hartel v. Pruett*, 998 So. 2d 979, 986 (¶16) (Miss. 2008) (concluding in an analogous civil context that "the circuit court did not abuse its discretion in foreclosing the Hartels' expert witnesses from relying upon or referring to the subject medical articles on direct examination," where the articles were not disclosed until six days before trial). This assignment of error is without merit.

VIII. Admissibility of Naylor's Testimony as Character Evidence

¶102. Garlington asserts that the trial court erred when it precluded him from introducing the testimony of Sherry Naylor to show that he had a "healthy relationship" with her young daughters and "that no one had ever accused him of improper sexual behavior around them." In particular, Naylor's proffered testimony was that Garlington often babysat her two young

daughters alone and they never reported that he inappropriately touched them.

¶103. The State asked the court to exclude this testimony, arguing that it was irrelevant to whether Garlington sexually abused Jane. The trial court sustained the objection, finding that Naylor's testimony about Garlington's conduct with her children was not relevant to whether Garlington committed the act of misconduct for which he was on trial.

¶104. We review the trial court's evidentiary ruling in this instance for an abuse of discretion. *Williams v. State*, 35 So. 3d 480, 488 (¶25) (Miss. 2010). We find no abuse of discretion in the trial court's ruling on this issue.

¶105. Garlington asserts that the proffered testimony was relevant "to rebut the State's allegations that Garlington was a pedophile," and that it therefore should have been allowed under Mississippi Rule of Evidence 404(a). Rule 404(a)(2)(A) allows a defendant in a criminal case to "offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it."

¶106. According to Garlington, Naylor's proffered testimony is evidence of "[his] 'pertinent trait' of gentleness and kindness toward children" and was therefore "certainly admissible in this case." We do not find that "gentleness and kindness toward children" is a "pertinent trait" in a child sexual battery case. *McCammon v. State*, 299 So. 3d 873 (Miss. Ct. App. 2020), supports our conclusion, albeit in the expert opinion context.

¶107. McCammon was convicted of sexual battery of a seven-year-old girl. *Id.* at 880 (¶1). He asserted on appeal that the trial court erred in excluding the opinion of his expert, Dr.

Stanley Smith, who had conducted a range of tests on McCammon, ultimately concluded that "McCammon does not have the characteristics of a pedophile." *Id.* at 885 (¶36). The trial court excluded Smith's proposed testimony after concluding not only "that his methods were not widely accepted or reliable," but also because "McCammon's general characteristics were not relevant to whether he did or did not commit the specific abuse alleged in this case." *Id.* at 885 (¶37). As this Court noted, "aside from [a] brain scan, Smith's various tests consisted primarily of asking McCammon questions. *McCammon assured Smith that he had good moral values and no sexual interest in children*." *Id.* at 885 (¶36) (emphasis added).

¶108. Finding no abuse of discretion in the trial court's relevancy ruling, this Court observed, "[t]he trial judge excluded Smith's testimony after concluding that Smith's opinion relied on McCammon's general characteristics and that those characteristics were not relevant to whether he actually committed the crime for which he was charged." *Id.* at 886 (¶39). Likewise, in this case, we cannot say it was an abuse of discretion for the trial court to exclude as irrelevant Naylor's testimony about Garlington's "kindness" or "gentleness" with her children, as it simply was not relevant to "the crime for which he was charged." *Id.*; *see also, e.g.*, *State v. Walston*, 766 S.E.2d 312, 314 (N.C. 2014) (finding that "evidence of being respectful towards children" was not a "pertinent trait" with respect to the State's child sexual abuse charges against the defendant and was therefore inadmissible under North Carolina Rule of Evidence 404(a)(1)).

¶109. With respect to Naylor's proffered testimony that her daughters had not ever reported

that Garlington abused them, we note that in *Winters v. State*, 449 So. 2d 766, 768 (Miss.1984), the supreme court held that although a defendant in a criminal proceeding may introduce evidence of good character, "[p]roof of a character trait . . . may not be made by proof of specific past actions. The defendant is limited to offering testimony as to general reputation."[15] In *Winters*, the supreme court found that the trial court properly excluded character evidence relating to defendant's "general reputation" for committing the specific crimes charged. *Id.* at 768-70. We find that in this case Naylor's proffered testimony essentially relates to "specific acts" that Garlington did not attempt with her young children—i.e., Garlington was "alone" with her children and did not "inappropriately touch[] them." We find that *Winters* supports excluding Naylor's "specific acts" testimony on this point.

¶110. Garlington also asserts that Naylor's proffered testimony "was admissible to prove Garlington's motive—specifically, his lack of motive to molest or sexually abuse children." We reject this contention. Garlington did not have to disprove "motive" in this case because the State did not have to prove it as an element of the sexual battery charge against him pursuant to section 97-3-95(1)(d). *See, e.g.*, *Bennett v. State*, 933 So. 2d 930, 945 (¶¶49-50) (Miss. 2006) (rejecting the defendant's assertion that evidence of specific instances of good

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[15] The supreme court explained the reason for this rule using a hypothetical case involving a first-offense armed robber, noting that a character witness could be asked whether he knew the defendant to have ever committed a similar crime. 449 So. 2d at 768. Although the answer in this scenario would be "no," such testimony would have no bearing on whether the defendant actually did commit this first-time offense. *Id.*

character were necessary to "negate his intent to kill [the victim]," *id.* at 945 (¶50), observing that the defendant "did not have to disprove intent[] because the State was not required to prove it" for the crime charged). For all the reasons set forth above, we find this assignment of error without merit.

IX. Dr. Benton's Testimony and *Brady v. Maryland*

¶111. Garlington asserts that the trial court erred in allowing Dr. Benton to testify as a rebuttal witness in violation of Garlington's due process rights under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), because the defense had not received certain information from the State concerning Dr. Benton's opinions. We find this assertion without merit for the reasons addressed below.

¶112. Dr. Benton did not testify in the State's case-in-chief and was called to rebut opinions presented by the defense's expert, Dr. Kelly, at trial. The defense objected because it had not received a Curriculum Vitae (CV) or a report from Dr. Benton, although it admitted it had received the Nurse Doleac medical records from the State that contained Dr. Benton's statement "that he read and reviewed the records of Nurse Doleac and he concurred." Earlier in the trial, the defense had questioned Nurse Doleac about these records and had them marked for identification during her cross-examination. Regarding Dr. Benton's CV and report, the State explained that Dr. Benton did not have a report because he was going to be used in rebuttal. His testimony would be based upon the already-produced medical records and his rebuttal to the opinions expressed by Dr. Kelly when Dr. Benton listened to his

testimony during trial the day before. The State also noted that earlier that morning it had given the defense Dr. Benton's CV and the article he may rely on in his rebuttal testimony.

¶113. The trial court allowed the defense to conduct a voir dire of Dr. Benton outside the presence of the jury in order to explore the opinions that Dr. Benton would be giving. In response to the defense's questioning, Dr. Benton summarized the opinions he would be providing, and specifically enumerated the opinions given by Dr. Kelly that he would be addressing in rebuttal. The defense then examined Dr. Benton with respect to those opinions. When the defense had finished questioning Dr. Benton, the trial judge overruled the defense's objections, allowing Dr. Benton to testify as a rebuttal witness, and specifically noting on the record he had "allowed the defendant to question the witness outside the presence of the jury."

¶114. "We review alleged *Brady* violations de novo," *Thomas v. State*, 45 So. 3d 1217, 1219 (¶7) (Miss. Ct. App. 2010), but "we defer to factual findings underlying the [trial court's] decision." *Blakely v. State*, 311 So. 3d 593, 603 (¶33) (Miss. Ct. App. 2020), *cert. denied*, 310 So. 3d 830 (Miss. 2021) (quoting *United States v. Swenson*, 894 F.3d 677, 683 (5th Cir. 2018)). In this case, upon review, we find that Garlington has not established a *Brady* claim.

¶115. The supreme court has delineated a four-prong test to be utilized in determining whether a defendant has established a *Brady* violation, as follows:

> The defendant must prove: (a) that the State possessed evidence favorable to the defendant (including impeachment evidence); (b) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (c) that the prosecution suppressed the favorable evidence; and (d)

> that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Manning v. State, 929 So. 2d 885, 891 (¶15) (Miss. 2006). In *United States v. Bagley*, 473 U.S. 667, 676 (1985), the Supreme Court made clear that "impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule . . . . Such evidence is 'evidence favorable to an accused,' *Brady*, 373 U.S. at 87, . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." (Other citation omitted).

¶116. Based upon our review of the record, we find that even if the materials could arguably be considered impeachment evidence, Garlington has failed to meet any of the remaining factors of the *Brady* test. Regarding the second and third factors, Garlington "possessed" the information; the State did not "suppress" it, nor was this information "favorable" to the defendant as that term is defined in *Bagley*, 473 U.S. at 676.

¶117. In particular, Garlington already had the Nurse Doleac medical records that contained Dr. Benton's statement that he read and reviewed the records of Nurse Doleac and that he concurred. In fact, as noted above, the defense had questioned Nurse Doleac about them during her cross-examination earlier in the week of trial. Further, Dr. Benton did not have a report. He was a rebuttal witness and the testimony he would present would either be in rebuttal to Dr. Kelly's opinions, or be based on Nurse Doleac's medical records that the defense already had. The State produced Dr. Benton's CV and the one article he might rely upon the morning before Dr. Benton was called as a rebuttal witness, and the defense was allowed to question Dr. Benton out of the presence of the jury about the opinions he would

be providing and the basis for them. Moreover, when Dr. Benton testified before the jury, the defense thoroughly and effectively cross-examined him at length on his opinions and what support he had for them.

¶118. We find there was no "suppression" of evidence constituting a *Brady* violation under these circumstances. *See, e.g.*, *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir.1994) ("Because we find that the existence and contents of the [evidence] were disclosed at trial, we hold that the prosecution did not suppress any evidence."); *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985) (finding the defendant failed to show a *Brady* violation where he was able to use documents disclosed during trial in an effective cross-examination).

¶119. Even if Garlington had satisfied the first three requisites of the *Brady* test, he cannot meet the fourth factor: that "a reasonable probability exists that the outcome of the proceedings would have been different." *Manning*, 929 So. 2d at 891 (¶15). Indeed, Garlington does not even address this factor in his brief. Garlington was furnished the information relating to Dr. Benton, his counsel was allowed to examine Dr. Benton outside the presence of the jury on this material, and his counsel ably and effectively cross-examined Dr. Benton before the jury. In sum, we find no error in the trial court allowing Dr. Benton to testify as a rebuttal witness. We therefore find that Garlington's *Brady* violation assignment of error is without merit.[16]

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[16] We note that although Garlington asserts that the trial court "committed reversible error based, *inter alia*, on *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and Rule 17.2 of the Mississippi Rules of Criminal Procedure," he offers no argument at all with respect to Rule

X. "Elements" Jury Instruction

¶120. Garlington asserts that the trial court erred in rejecting his counsel's argument at the charge conference that the "elements" jury instruction (S-1) should include the time frame as charged in the amended indictment. We find this assignment of error without merit for the reasons stated below.

¶121. The jury instruction regarding the elements of sexual battery in this case provided:

> Jeremy Garlington has been charged in the Indictment with the offense of sexual battery. If you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. In the First Judicial District of Hinds County, Mississippi;
>
> 2. that Jeremy Garlington, a male human being;
>
> 3. did willfully and unlawfully engage in sexual penetration;
>
> 4. with [Jane], a child under the age of fourteen (14) years;
>
> 5. At a time when Jeremy Garlington was more than twenty-four (24) months older than [Jane] then you shall find the defendant, Jeremy Garlington, guilty of sexual battery as charged in the Indictment.
>
> If the prosecution has failed to prove any one or more of the above listed

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17.2. That particular issue is therefore waived. M.R.A.P. 28(a)(7); *Freelon v. State*, 285 So. 3d 701, 702 (¶6) (Miss. Ct. App. 2019). In any event, any purported discovery violation on the State's part is harmless for the same reasons set forth in our *Brady* analysis above—Garlington's counsel was allowed to examine Dr. Benton outside the presence of the jury and Garlington failed to show he was prejudiced by the trial court allowing Dr. Benton to testify as a rebuttal witness. *See Johnson v. State*, 94 So. 3d 1209, 1212 (¶13) (Miss. Ct. App. 2011) ("A violation of Rule 9.04 [(the predecessor rule to the discovery rules set forth in MRCrP 17)] is considered harmless error unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice.").

> elements beyond a reasonable doubt, then you shall find the Defendant, Jeremy Garlington, not guilty of sexual battery as charged in the Indictment.

¶122. Pursuant to section 97-3-95(1)(d), the State was required to prove that Garlington engaged in sexual penetration with a child under the age of fourteen and that he was twenty-four or more months older than that child. *See Allred v. State*, 130 So. 3d 504, 507 (¶8) (Miss. 2014). "[T]ime is not an essential element of the crime of sexual battery." *Stone*, 320 So. 3d at 1254 (¶32).

¶123. Garlington acknowledges that time is not an element of sexual battery, but quotes the argument asserted by his trial counsel that it was error to omit the amended time frame in the elements instruction because "[t]he State [went] through great pains to amend the indictment to reflect certain dates," and to omit it "would confuse the jury."

¶124. We find that the record does not support Garlington's assessment of the situation. In particular, the hearing on the State's motion to amend the indictment was held outside the presence of the jury. The jury did not know of any purported "great pains" the State went through to obtain the amended indictment. We find nothing unduly prejudicial in the fact that the elements instruction did not include the one-year time frame. This is not a multi-count, or even a multi-occurrence, case. The trial court made clear in allowing the amended indictment that the charge remained limited to the *one* incident. As to that *one* incident, we have found in Issue I that the State presented sufficient evidence at trial to allow the jury to reasonably infer that the abuse occurred within one year of May 29, 2014. The jury heard the proof presented at trial and was properly charged with finding the essential elements of

sexual battery as required pursuant to section 97-3-95(1)(d).

¶125. Indeed, even if omitting the date from the elements jury instruction was in error, it was harmless. We have applied a harmless-error analysis to a wide variety of trial errors, including errors in jury instructions, *see, e.g.*, *Williams v. State*, 222 So. 3d 1066, 1072 (¶18) (Miss. Ct. App. 2017), and we find that such a situation is present here. Although Garlington asserts that the lack of a date in the jury instruction unfairly prejudiced him "in the preparation and the presentation of his defense at trial," even Garlington recognizes that "time is not an essential element of the crime of sexual battery." *Stone*, 320 So. 3d at 1254 (¶32). Further, in this case the dates were included in the indictment; Garlington had notice of the time frame from discovery and the indictment; the victim testified about the time period of when the sexual battery occurred; and the defense had the opportunity to cross-examine the victim regarding the timing of the sexual battery. Accordingly, for the reasons stated, we find that Garlington's elements-instruction assignment of error is without merit.

¶126. **AFFIRMED.**

BARNES, C.J., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE AND SMITH, JJ., CONCUR. WILSON, P.J., McCARTY AND EMFINGER, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION.