

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CAMERON TRAVELSTEAD

APPELLANT

VS.

NO. 2016-KA-00013-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court correctly allowed Investigator Jay Houston and Agent Wayne Mitchell to testify that the images found on Travelstead's computer were known images of child pornography.**
- II. The trial court correctly overruled the defense' objection to the prosecution's statement in argument that Travelstead shared illegal images of child pornography.**
- III. The record is not complete for purposes of determining the issue of ineffective assistance of counsel; or, alternatively, Travelstead did not receive constitutionally ineffective assistance of counsel.**
- IV. The trial court did not err in allowing the indictment to be amended.**
- V. The trial court did not err in refusing Instruction D-7.**
- VI. The trial court correctly excluded defense evidence.**

STATEMENT OF THE CASE

On December 8, 2011, a Hinds County Grand Jury indicted Cameron Travelstead for the possession of a photograph, drawing, sketch, film, video tape or other visual depiction of an actual child, under the age of 18, engaging in sexually explicit conduct as defined by Mississippi Code Annotated § 97-5-31(b) (1972, as amended). C.P. 9. Travelstead was tried before a jury of his peers in Hinds County Circuit Court, First Judicial District, on October 12, 2015, the Honorable Jeff Weill, presiding. Travelstead was convicted of possession of child pornography and the trial court sentencing Travelstead to 20 years in the custody of the Mississippi Department of Corrections with 12 years to serve and 8 years suspended. (Tr. 1005) The trial judge further ordered 5 years of post-release supervision after Travelstead's release from prison. As a result of his conviction Travelstead is also required to register as a sex offender. (Tr. 1005) The trial judge offered the opportunity for Travelstead to be incarcerated in the central Mississippi area so that he could continue to participate in his religious support group during his incarceration. (Tr. 1006) Aggrieved of his conviction, Travelstead filed the instant appeal. (C.P. 187)

STATEMENT OF THE FACTS

During the period of time between and including February 1, 2010 and, the date of Travelstead's arrest, February 23, 2010, Travelstead downloaded a peer-to-peer network software called FrostWire that allows a user to view files from other people's computers that contained child pornography and those people then could view all of his files. Travelstead used search words to reach other people who have files with that information. Travelstead searched for child pornography using his peer-to-peer network software. As he was viewing the child pornography, Travelstead downloaded it and made it part of his files.

Investigator Jay Houston, Deputy Commander of the Mississippi Attorney General's Office Cyber Crime Division for the Internet Crimes Against Children Task Force, testified that he is responsible for investigating crimes against children dealing directly with the internet. Tr. 305. Houston testified as an expert in cyber crime, peer-to-peer network sharing and undercover child exploitations cases.

Houston testified that an IP address is a series of numbers divided by periods or dots that allows a computer to access the internet. The IP address of a computer is an identifier of that computer in the same way a phone number is an identifier of that phone. Peer-to-peer software is a freeware program that wherein users agree to share files and open up a small portion of their computer for sharing files. Frostwire allows computer users to trade pictures or other information online. Once the user installs the program the user may search for and download information. Once that information is downloaded to the user's computer, it is then available to other users to download from the initial users computer. Examples of peer-to-peer software are products called LimeWire or FrostWire. Travelstead downloaded "FrostWire for Mac" to his

personal Macintosh laptop computer. FrostWire uses a “BitTorrent” network. This allows content creators to put their work into “bytes” and their work for free. Each user who downloads FrostWire must agree to an End User License Agreement which provides that the user that when using FrostWire they will be sharing files using a peer-to-peer program which means that not only will they be downloading the files, but that they will also be sharing them. Users who share a lot of files are given priority and are able to download a lot of files. Tr. 326. In order to install FrostWire on his computer Travelstead was required to acknowledge that he would also be sharing any files that he downloaded with FrostWire. A user who runs a search on FrostWire receives a list of file titles. The user then selects the files he wants to download directly onto his computer. Tr. 328. The user can then view the files. Tr. 329.

Houston testified that in his experience child pornography is shared via FrostWire. Tr. 330. Search engines such as Google or Yahoo will not return child pornography because it is illegal, so users searching for child pornography install peer-to-peer networks. Tr. 330. In October of 2008, Houston received training on a system called the Wyoming Toolkit which was used to investigate internet crimes against children. Tr. 331. The Wyoming Toolkit is an investigative tool to allow investigators to find people using peer-to-peer software to trade child pornography. Tr. 332.

Houston testified that the Wyoming Toolkit suspected child pornography report was received in his office on January 31, 2010, for the IP address that was later found to correspond to Travelstead’s computer. The report listed the hash values of 40 “known images” of child pornography. The National Center for Missing and Exploited Children maintains a database of “known images” of child pornography. The Mississippi Attorney General’s Office also

maintains a library of “known images” of child pornography. Thirty nine of the images were photographs and one image was a movie. Houston reviewed the images to determine if they met the definition for child pornography. He obtained a grand jury subpoena for the ISP, Comcast Cable, for the IP address. The IP address was used by Comcast account holder Joel Travelstead, Cameron Travelstead’s uncle. Agents obtained a search warrant for the Travelstead’s residence and executed the warrant on February 23, 2010.

Cameron Travelstead was at home when the agents executed the warrant and questioned him about his online activity. Travelstead was mirandized. He admitted to downloading pornography on his MacBook Pro laptop. Travelstead initially told the investigators that he downloaded child pornography inadvertently while he was looking for adult pornography. He later stated that he downloaded it because he was curious. He then stated that he used child pornography search terms and admitted his growing interest in child pornography. He told the agents that he had a “weakness”. Travelstead admitted masturbating to child pornography. He denied that he had touched actual children in a sexual way.

The investigators found a receipt showing that Travelstead purchased the MacBook Pro new on September 14, 2009. FBI Agent Mitchell testified that the laptop appeared to have been purchased new. The laptop contained four photos of child pornography still accessible and not deleted. Additional files containing child pornography had been downloaded and later deleted. The investigators could not tell how long the deleted files were accessible or whether they were actually viewed.

The Attorney General’s Office sent Travelstead’s MacBook Pro to the FBI for a forensic computer examination. FBI Agent Wayne Mitchell, a forensic computer examiner was asked to

look for child pornography on the computer, including deleted files. Mitchell was qualified as an expert in computer forensics. Mitchell located a total of 352 images of suspected child pornography. Of the 352 suspect files, Mitchell found 16 files that were images of child pornography which he recovered from the computer as deleted files. Some of the photos were located inside the Frostwire incomplete folder, but appeared to be whole pictures. Photos that are in the incomplete file may actually be complete and accessible to the user.

In his examination of the laptop, Mitchell examined other search engines. The Google search report showed that Travelstead had specifically used the search term “kiddie porn”. There were child pornography searches on the Safari search engine as well. After being unable to retrieve images via Google, Frostwire was downloaded a few days later, and resulted in multiple child pornography images being downloaded to Travelstead’s computer. Agent Mitchell could not detect any evidence of modification of any of the images. Agent Mitchell and FBI Agent Jeremy Turner testified that the images found on Travelstead’s computer were images of actual children confirmed by NCMEC or in other investigations they had conducted.

SUMMARY OF THE ARGUMENT

The trial court correctly allowed Investigator Jay Houston and FBI Agents Wayne Mitchell and Jeremy Turner to testify that the images found on Travelstead's computer were known images of child pornography. Expert witnesses are allowed to rely on information from other experts. Further, the evidence against Travelstead was so overwhelming that even if the use of the term “known images” was error, the outcome of the trial would have been the same and any error was harmless.

Travelstead argues that the change in the indictment to charge him for a period of time in which multiple images were on his computer deprives him of the defense of “mistake”, and that it changes his offense from a one day occurrence to an episodic occurrence. However, even the indictment charged only images which were on the computer on February 22nd, the prior images would have been admissible to show lack of mistake. The images, whether charged as individual crimes of possession, would have still be admissible for the prosecution to use to defeat Travelstead’s dubious claim of mistake. The fact that Travelstead performed multiple searches for child pornography and that he persisted in the behavior over time and accessed many images prior to February 22nd, would have been competent, admissible evidence to show lack of mistake. Therefore, the defense Travelstead had prior to the amendment was not diminished by the amendment to the indictment. The weakness of the defense was present under the original indictment and the amended indictment.

The date that the Appellant, Cameron Travelstead , allegedly possessed child pornography is not an essential element of the crime of exploitation of a child. *See* Mississippi Code Annotated (1972, as amended). All of the defenses available to Travelstead under the

original indictment were equally available to him under the amended indictment. The evidence in the case and its admissibility was not affected by the amendment to the indictment. The amendment to the indictment to enlarge the date range from “on or about February 22, 2010” to “on, about and between the 1st day of February, 2010 and the 28th day of February, 2010,” did not prejudice Travelstead’s defense in any way. The trial court correct granted the prosecution’s motion to so amend the indictment. This issue is without merit and the jury’s verdict and the rulings of the trial court should be affirmed.

The language of Instruction C-4, given to the jury by the trial court, clearly provides that a juror may disagree with the other members of the jury and that a guilty verdict cannot be rendered unless all jurors agree. The instruction specifies that considered judgement of "each" juror is required and short of the agreement of all, no conviction will result. Instruction C-4 gives the jurors "each" the responsibility to reach their own judgment in the case. Therefore, Instruction D-7 is merely repetitive and was correctly refused by the trial court.

The trial court’s instruction correctly stated the law. The trial judge correctly noted that the instruction offered by the defense was similar to a *Sharplin* instruction. The trial judge correctly stated that he would give such an instruction if the jury indicated a split that they could not resolve. The prosecution, in objecting to the instruction, noted that the language of the instruction was not neutral, but “loaded” and favored the defense. The trial court correctly declined to give the instruction unless a the jury sent a note for guidance on differing opinions.

While a defendant certainly has a right to offer the testimony of witnesses in his favor, there is always the requirement that the evidence must be relevant. See *Hentz v. State*, 542 So.2d 914 (Miss. 1989). Even if the testimony of Travelstead’s counselor was wrongly excluded due

to a discovery violation, it simply cannot have been relevant to case. If it had been relevant to the case, relevant to the possession of child pornography by the Appellant, the testimony would have been offered much sooner, and certainly would have been proffered on being excluded.

ARGUMENT

I. The trial court correctly allowed Investigator Jay Houston and Agent Wayne Mitchell to testify that the images found on Travelstead's computer were known images of child pornography.

Travelstead complains that testimony of investigators testifying at trial that they recognized some of the images on Travelstead's computer as belonging to known series of child pornography as classified by NCMEC was inadmissible hearsay and violated his right to confrontation.

Investigator Jay Houston, deputy commander of the Mississippi Attorney General's Cyber Crimes Unit, was offered as an expert in peer-to-peer network sharing, expert undercover child exploitation cases, specifically, and cyber crimes, generally. Houston was received and identified as an expert witness for these purposes. (Tr. 308) Investigator Houston testified that he had been trained to use an investigative software tool known as the Wyoming Toolkit.¹ Tr. 331. The Wyoming Toolkit contains and identifies known hash values of child pornography. When files with those hash values are shared, the Wyoming Toolkit provides a report that an IP address was seen with files of child pornography. Tr. 332-333.

The files found on Travelstead's computer were found by their known hash values, each picture having a separate hash value, and being a separate photograph of child pornography. The images themselves were identified by Houston as belonging to various series of known child pornography, such as Tori and LS Models. According to Houston's testimony, the Attorney General's Office maintains a library of known child pornography. Houston testified that the

¹The Wyoming Toolkit has since been replaced with newer software.

photographs entered into evidence were printed from the Attorney General's Library of known child pornography. Two images of known child pornography, Exhibits 33 and 41, were not printed, since the images was not in the agency's library. Tr. 374, 378.

Travelstead's argument is without merit because his confrontation rights were not violated. NCMEC reports were not entered into evidence. England had the opportunity to confront the witness against him. Dr. LeVaughn generated the autopsy report, based on his own findings. He was available to testify at trial, and he was subjected to cross-examination by defense counsel. England has not shown that his rights were violated.

Standard of Review

Appellate Courts apply a de novo standard of review to Confrontation Clause objections. *Birkhead v. State*, 57 So. 3d 1223, 1233 (Miss. 2011)(citing *Smith v. State*, 986 So. 2d 290, 296 (Miss. 2008)).

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 (applicable to the states through U.S. Const. amend. XIV); Miss. Const. art. 3, § 26 (1890). The United States Supreme Court has held that testimonial statements of witnesses absent from trial should be admitted only where the declarant is unavailable to testify, and the defendant has had a prior opportunity to cross-examine him. *Crawford v. Wash.*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)(emphasis added).

Travelstead argues that, because Investigator Houston and Investigator Turner did not personally make the determinations of authenticity of known series of child pornography, they could not testify that the images found on Travelstead's computer were known images of child

pornography identified by the National Center for Missing and Exploited Children without violating the Confrontation Clause. (Appellant's Brief p.). However, as experts, Investigator Houston and Agent Turner were entitled to rely on information from other sources to form their opinions, even though they did not personally create that information. Investigator Houston and Agent Turner testified at trial, and were subjected to cross-examination; therefore, Travelstead had a meaningful opportunity to confront the witness against him, and his rights were not violated.

The trial court did not abuse its discretion when it allowed Agent Turner and Investigator Houston to testify about their own expert opinions as to whether the images on Travelstead's computer were images of actual children. (Tr. 399-401). Their testimony was admissible pursuant to Rule 703 of the Mississippi Rules of Evidence.

Pursuant to Rule 703, an expert may use facts or data from another source in forming his opinion if the source is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Miss. R. Evid. 703. The requirements of Rule 703 were met in the present case. Investigator and Agent Turner examined the information obtained from Travelstead's computer and came to their own conclusions as to whether the pictures were child pornography.. (Tr. 412). The witnesses both testified that they were familiar with the images had encountered the images before in other child pornography cases. The agents both testified that hash marks do not change and that the images found on Travelstead's computer with known hash marks

The Supreme Court has rejected the proposition that "in every case, the only person permitted to testify is the primary analyst who performed the test. . . ." *Jenkins v. State*, 102 So.

3d 1063, 1067 (Miss. 2012). In this case, while Houston and Turner did not make the original determinations that the “known images” were child pornography, they were correctly allowed to rely on those designations which are commonly relied on by experts in the field of child pornography as well as their own experience and knowledge. In *Connors v. State*, the Supreme Court held that a witness may testify regarding a testimonial document if (1) he had intimate knowledge of the report, and (2) he was actively involved in the production of the report at issue. *Connors v. State*, 92 so. 3d 676, 690 (Miss. 2012). And in *McGowen v. State*, the Supreme Court held that an expert witness, "who participated in the analysis in some capacity, such as by performing procedural checks," may testify without violating the defendant's rights to confrontation. *McGowen v. State*, , 859 So. 2d 320, 339 (Miss. 2003).

Houston and Turner were qualified to testify about their conclusions that the images were child pornography because they conducted their own investigations and came to their own conclusions. The fact that information that supported their conclusions was provided by other people or entities is not material. Both the Mississippi Supreme Court and the United States Supreme Court have recognized that some tests involve multiple analysts. *Jenkins*, 102 So. 3d at 1068 (citing *Melendez-Diaz*, 129 S.Ct. At 2532 n. 1). And, in *Jenkins*, the Supreme Court held that it is not required that the particular analyst who conducted the test testify at trial. Because Investigator Houston and Agent Turner were sufficiently involved in the investigation of the case and the analysis of Travelstead’s computer and made their own conclusion about the images present on the computer, they could testify about their conclusions. Because Travelstead had the opportunity to confront the witness against him, the testimony of Investigator Houston and Agent Turner about their conclusions and the information they used to support those conclusions

was admissible.

Travelstead also argues that the testimony regarding “known images” of child pornography found on Travelstead’s computer was hearsay. The records are admissible. The foundational requirements for admitting evidence under the business records exception to the hearsay rule are: (1) the statement is in written or recorded form; (2) the record concerns acts, events, conditions, opinions or diagnoses; (3) the record was made at or near the time of the matter recorded; (4) the source of the information had personal knowledge of the matter; (5) the record was kept in the course of regular business activity; and (6) it was the regular practice of the business activity to make the record. Rules of Evid., Rule 803(6). The Attorney General’s Office maintains a library of known pornographic images. The images retrieved by Investigator Houston were retrieved from this database which is kept in the regular practice of business activity.

The jury was clearly instructed that it was the jury’s duty to determine if the images found on Travelstead’s computer were child pornography.

The jury was instructed as follows:

Instruction S-5A:

The Court instructs the jury . . . that in order to sustain a conviction for the offense of exploitation of a child it must be proved beyond a reasonable doubt that the photograph, drawing, sketch, film, video tape or other visual depiction of the sexually explicit conduct possessed by the defendant are of an actual child. However, the identity of the actual child need not be proved.

Instruction S-2:

The Court instructs the jury that a “Child” means any individual who has not attained the age of eighteen, 18, years.

Instruction S-3A:

The Court instructs the jury that “sexually explicit conduct” means actual or simulated:

- (i) oral genital contact, oral anal contact, or sexual intercourse whether between persons of the same or opposite sex;
- (ii) bestiality;
- (iii) masturbation;
- (iv) sadistic or masochistic abuse;
- (v) lascivious exhibition of the genitals or public area of any person;
or
- (vi) fondling or other erotic touching of the genitals, pubic area, buttocks, anus or breast.

These instructions required the jury itself to determine whether the images on Travelstead’s computer were child pornography. Juror’s are presumed to follow the instructions of the trial court. There was ample evidence before the jury to allow the jury to make findings of fact that the images were child pornography. The names of the computer files containing child pornography, included obvious references to the fact that the images depicted children. The jury viewed the photographs and video of images that could not be adults mistaken for children. The jury was able to observe the photographs and based on their own observations determine if the photographs were of an actual child. Investigator Houston and Agent Turner testified that based on their experience investigating and testifying child pornography cases, these images were child pornography. Cameron Travelstead admitted to the investigators who executed the search warrant that he had intentionally searched for, looked at and masturbated to child pornography. The images of the child identified as “Tori” depicted the same child in multiple pictures found

on Cameron Travelstead's computer. Each of these testimonial or evidentiary facts before the jury is admissible and competent to prove that Cameron Travelstead possessed images which were pornographic depictions of actual children under the age of 18 and engaged in sexually explicit conduct. Even if the trial court had excluded testimony that these images were verified by NCMEC as images of known pornography, the evidence presented to the jury was more than sufficient to prove that Cameron Travelstead possessed child pornography. Even if the trial court erred in allowing testimony that the images were part of known series of child pornography verified by NCMEC, the error was harmless.

In sum, the trial court did not abuse its discretion by admitting Investigator Houston's and Agent Turner's testimony over Travelstead's counsel's objections. If there was any error, it was harmless, since the jury was instructed to determine if the images were actual child pornography and there was ample evidence even without testimony that the images were known images of child pornography from the NCMEC database. Based on the overwhelming evidence against him, Travelstead would have been convicted on the evidence without the reference to "known images." Therefore, Travelstead suffered no prejudice from this testimony. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

II. The trial court correctly overruled the defense' objection to the prosecution's statement in argument that Travelstead shared illegal images of child pornography.

Travelstead asserts that the prosecution argued facts not in evidence when he stated, "when [Travelstead] downloaded these files, they're on his computer, he's advertising to everybody else, if you're looking for kiddie porn, I got it. Here it is." Tr. 936. This proposition, that by having files on his computer via Frostwire, Travelstead was advertising to other Frostwire users that he had child pornography available to share, was prominently in evidence.

The State's first witness, Investigator Jay Houston, Deputy Commander of the Internet Crimes Against Children Task Force, testified to the operation of Frostwire, a free internet download program, which Travelstead had downloaded to his computer and used to acquire child pornography. Tr. 306. Houston testified that Frostwire is a peer-to-peer network sharing program that allows a user to download files shared by other users. Users who opt out of sharing with others on the network penalized for their failure to share and receive fewer files in their searches. The decision to opt-out or out-in to file sharing, or "seeding", is a decision the user must consciously make when he downloads Frostwire to his computer. Houston testified that the Frostwire website states, "Seeding is a process where you keep your BitTorrent client open even after you finished your download to help distribute the file to other users. If other users want to download the file you just did, they will request chunks, or small pieces of this file from you and many other users or peers. They will download tiny chunks from as many users as they can connect to . . . and their Torrent Client will put the files together as they were originally intended to be. When you downloaded your file, it came in chunks from different users of the BitTorrent network, as well." Tr. 324-5. Houston testified that if the user does not select an option setting for seeding, Frostwire will not continue loading and will prompt the user to finish the download seeding setting. Tr. 324.

Houston testified that files are shared in small chunks of information from each user who has the requested file. When the files are downloaded onto the requestor's computer, the chunks of information are reassembled to recreate the original requested file. The goal is that each user shares and much as he receives as he uses Frostwire. As a user is downloading, he may also be sharing, or "seeding". Users who seed are given priority to receive requested documents.

Because Travelstead used Frostwire, the Attorney General's Office received a report from its Wyoming Toolkit investigative program that Travelstead had downloaded certain images of child pornography. During download a user is "seeding", or sharing. He may turn off sharing afterwards, but during download, he is sharing the files. He is distributing that child pornography. Tr. 389. By downloading these files using Frostwire, Travelstead was also advertising that he has the files, so that when another user searches for the file, it will be able to identify Travelstead's computer as having the file, and chunks of the file may be shared from Travelstead as well as from other users. Tr. 389.

Testimony was clearly in evidence that Travelstead was advertising to other Frostwire users that he had child pornography. While there was an objection to prior statements by the prosecutor, there was no objection to this statement, thus it is waived on appeal. However, more importantly, this was a statement backed up by the evidence in the thorough and comprehensive testimony of Agent Jay Houston explaining the peer-to-peer file sharing activity of Frostwire users. Further, even if the statement had been unsupported by the evidence, the jury was instructed by the trial court that arguments of counsel are not evidence and that if the arguments of counsel are unsupported by the evidence, they should be disregarded. Tr. 136. Juries are presumed to follow the instructions of the trial court. The Mississippi Supreme Court has opined:

This Court has held on numerous occasions that when a trial court instructs the jury, it is presumed the jurors follow the instructions of the court. See *Crenshaw v. State*, 520 So.2d 131 (Miss.1988); *McFee v. State*, 511 So.2d 130 (Miss.1987); *Johnson v. State*, 475 So.2d 1136 (Miss.1985). Stated differently, courts assume that juries follow the instructions. *Johnson v. State*, 475 So.2d 1136, 1141 (Miss.1985). "Our law presumes the jury does as it is told." *Williams v. State*, 512 So.2d 666, 671 (Miss.1987) (citations omitted). "To presume otherwise would be to render the jury system inoperable." *Johnson*, 475 So.2d at 1142.

Williams v. State, 684 So. 2d 1179, 1209 (Miss. 1996).

Accordingly, this issue is waived and it is further without merit. The jury's verdict and the rulings of the trial court should be affirmed.

III. The record is not complete for purposes of determining the issue of ineffective assistance of counsel; or, alternatively, Travelstead did not receive constitutionally ineffective assistance of counsel.

Travelstead alleges that he received ineffective assistance of counsel because his trial counsel for several reasons. Travelstead asserted that his trial counsel was deficient in failing to seek exclusion of "known images" of child pornography; failing to seek a limiting instruction regarding known images; abandoning the opportunity to present evidence of Travelstead's only defense; and, failure to offer a non-abstract mens rea instruction.

To prove ineffective assistance of counsel, Travelstead must show that: (1) his counsel's performance was deficient, and (2) this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that a counsel's performance falls within the range of reasonable professional assistance. *Id.* at 689, 104 S.Ct. 2052. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

When a claim of ineffective assistance of counsel is raised on direct appeal, it should be addressed only when "(1) the record affirmatively show[s] ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge." *Colenburg v. State*, 735 So.2d 1099, 1101 (¶ 5) (Miss.Ct.App.1999). The State does not so stipulate and

asserts that the record is inadequate to determine whether Travelstead's counsel was inadequate for the reasons Travelstead alleges. If the reviewing court does not reverse on other grounds and is unable to conclude that the defendant received ineffective assistance of counsel, it should affirm "without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction proceedings." *Id.* Review on direct appeal of an ineffective-assistance-of-counsel claim is confined strictly to the record. *Id.* at 1102.

The standard for determining if a criminal defendant received constitutionally effective counsel is well established. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must demonstrate that his attorney's actions were deficient and that the deficiency prejudiced the defense of the case. *Id.* at 687, 104 S.Ct. 2052. The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Id.*

Judicial scrutiny of counsel's performance must be highly deferential. (citation omitted) ... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Stringer v. State, 454 So.2d 468, 477 (Miss. 1984) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.) When evaluating overall performance of counsel in connection with claim of ineffective assistance of counsel, a reviewing court considers the fact that counsel must make strategic

discretionary decisions including whether to file certain motions, call certain witnesses, ask certain questions, or make certain objections. *Branch v. State*, 882 So. 2d 36 (Miss. 2004) Defense counsel is presumed competent. *Johnson v. State*, 476 So.2d 1195, 1204 (Miss.1985). There is no constitutional right then to errorless counsel. *Cabello v. State*, 524 So.2d 313, 315 (Miss.1988); *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991) (right to effective counsel does not entitle defendant to have an attorney who makes no mistakes at trial; defendant just has right to have competent counsel). Where there is little support for the notion that trial counsel will prevail on a motion or objection, counsel is not deficient for failing to make the motion or objection. See *David v. State*, 743 So.2d 326 (Miss. 1999).

Testimony from Investigator Jay Houston and FBI Agent Wayne Turner that many of the images on Travelstead's computer were "known images" of child pornography and that they had communicated with the National Center for Missing and Exploited Children regarding those images was admissible. The Attorney General's Office maintains its own library of known images and Investigator Houston testified that he viewed the images using the AGO library. Further, these images have been adjudicated to be child pornography in dozens of cases around the country. Both witnesses testified that they knew the images from previous investigations and prosecutions and knew the images from their training. The witnesses were entitled to rely on other expert determinations in coming to their own conclusions that these images were child pornography. The jury was instructed that it had the duty to find all the elements of the crime beyond a reasonable doubt, including whether the images were child pornography, including whether the images were of real children under the age of 18 and whether the images were pornographic in nature. The evidence that the images were "known images" that were a part of

various series of child pornography involving particular victims was admissible expert testimony and the images were a part of the records kept by the Attorney General's Office. Even if a limiting instruction had been granted instructing the jury that the images were not to be considered for the truth of the matter asserted, there was ample evidence for the jury to rely on to support its finding that the images were child pornography. Therefore, even if the failure to ask for a limiting instruction was an error of counsel, there was no prejudice to Travelstead.

During the execution of the search warrant in this case, investigators from the Attorney General's Office questioned Travelstead regarding whether he had acted on his sexual impulses toward images of children with actual children. The tape of Travelstead's interview with investigators from the Attorney General's was played for the jury because it contained Travelstead's admissions that he had downloaded child pornography and had masturbated while looking at the images. The investigators were vigorously cross examined by Travelstead's counsel and testified that the questions were asked because individuals who possess child pornography may sometimes act on their attraction to images of children with a real child. Travelstead had access to children in many areas of his life. However, upon questioning, the investigators testified that they determined that there was no need for further investigation related to Travelstead's involvement with children and youth programs at his church. Travelstead's aunt and uncle, with whom Travelstead lived, had three young boys. Investigator's testified that Travelstead's aunt and uncle chose not to have the Child Advocacy Center conduct interviews with their children. The testimony established that this was simply a part of the investigation and that no charges were brought beyond possession of child pornography and the issue of sexual contact with actual children was not pursued any further.

This was simply a description and explanation of the investigatory process. Further, the conversation was part of the interview in which Travelstead made relevant admissions and it would have been difficult to redact. There is nothing in the record to establish that the taped interview prejudiced Travelstead in any way.

The testimony of state witness Richard Johnson was simply an explanation of why the questions were asked in the interview. This was relevant and admissible to show the process the investigators used to investigate what they recovered when they executed the search warrant and found Travelstead and seized his computer. The State is entitled to tell the whole story of its investigation. *Wheeler v. State*, 536 So.2d 1347 (Miss. 1988). The evidence of the internet search which led to a story about the rape of a young boy was relevant and admissible to show that Travelstead was intentionally searching for child pornography. When he determined that he could not retrieve those images on Google, he then turned to Frostwire to retrieve images of the desired subject matter. Many of the images depicted rape or forcible intercourse with children. The fact that Travelstead performed a Google search that turned up the article was admissible, competent evidence to show Travelstead's interest in obtaining such images. Any objection by Travelstead's trial counsel would have been overruled.

There was ample evidence to convict Travelstead for one count of possession of a pornographic image of an actual child and any evidence which came about as the result of the investigation and was introduced to explain the investigation conducted by the Attorney General's Office and any evidence which was admissible to prove Travelstead's intent to retrieve child pornography did result in any actual prejudice to Travelstead. The verdict would have been the same regardless of the admission of these items of testimony.

Travelstead had no defense that he had downloaded these images by mistake. He admitted to the investigators that he downloaded them because he was curious. He told investigators that he intentionally searched for the terms “kiddie porn”, “pedo”, and “pthc”. The term “incest” is often included in his searches. Travelstead told investigators that his interest in pornography grew and evolved to child pornography. He told investigators that he had a “weakness”, and it evolved over time. Any testimony Travelstead’s counsel could have elicited from him on direct to the effect that he downloaded the child pornography images by mistake would have been quickly impeached on cross examination. Any “ambiguities” would have been resolved against Travelstead, since he could not deny what he had done without being proven to be lying and he could not admit what he had done without being convicted. An unambiguous denial would have been quickly undone. Travelstead’s counsel did the only thing she could. She got out as much testimony as she could about Travelstead’s childhood and then she got out before he perjured himself on the stand and was subsequently impeached before the jury. Travelstead’s counsel was indeed passionate and emotional about her client. Given the evidence against him, her dedication to his case and her concern and advocacy for her client were the strongest things Travelstead had going for him. Travelstead had no realistic, believable story to tell as his version of the presence of child pornography on his personal computer. There was no available testimony that could withstand cross examination.

The evidence did not support an instruction on a theory of mistake or accident. Further, such an instruction would not have changed the outcome of this case, and any error was harmless.

Travelstead cannot show that the outcome would have been different if his attorney had

sought exclusion of the “known images” of child pornography, or, in the alternative sought a limiting instruction, sought in exclusion of “inflammatory extraneous evidence, or in the alternative, sought a limiting instruction, continued the examination of Travelstead, offered a non-abstract mens rea instruction. There is nothing in the record to show “ineffectiveness of constitutional dimensions” on behalf of Travelstead's trial counsel. Travelstead's ineffective-assistance-of-counsel claim should be dismissed without prejudice to his right to later raise the issue in post-conviction proceedings if he so chooses; or, denied outright on the merits.

IV. The trial court did not err in allowing the indictment to be amended.

The original indictment of Cameron Travelstead in this cause was returned on December 9, 2012, alleging that Travelstead committed the crime of exploitation of a child in violation of Mississippi Code Annotated § 97-5-33(5) (1972, as amended). In particular, the indictment charged Travelstead with possession of child pornography. On September 28, 2015, the prosecution moved to amend the indictment against Travelstead to enlarge the time frame that he was charged from “on and about the 22nd day of February, 2010” to “on, about and between the 31st day of January, 2010 and the 28th day of February, 2010.” C.P. 102. Discovery in the case, which was provided to Travelstead, showed that Travelstead had been accessing and possessing child pornography from the beginning of February 2010 until his arrest on February 23, 2010.

Rule 7.06 of the Uniform Rules of Circuit and County Court provides that “[f]ailure to state the correct date shall not render the indictment insufficient.” URCCC 7.06. Although UCCCR 7.09 does not allow substantive amendments of indictments, the Mississippi Supreme Court has held that amending the date of the alleged offense is a change of form rather than substance where time is not an essential element or factor in the indictment. *Givens v. State*, 730

So.2d 81, 90 (Miss. Ct.App.1998); *Baine v. State*, 604 So.2d 258, 260–261 (Miss.1992).

Further, the Court has upheld amendments to indictments which effected a change in the date of the offense charged. See *Kincaid v. State*, 711 So.2d 873, 877 (Miss.1998) (allowing the trial court to change the date of the indictment by one month by entering an order so amending the indictment and holding that issue was waived by defense counsel during guilty plea hearing); *Eakes v. State*, 665 So.2d 852, 860 (Miss.1995) (finding that the lack of specific dates in the indictment was not fatal where the defendant was fully and fairly advised of the charges against him); *Norman v. State*, 385 So.2d 1298, 1301 (Miss.1980) (involving the trial judge's specifically finding absence of surprise or prejudice); *Deaton v. State*, 242 So.2d 452, 453 (Miss.1970) (finding discrepancy did not show surprise or prejudice and conviction was sustained although the offense occurred on August 16 and the indictment alleged it occurred on November 14).

“[A] change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case.” *Shelby v. State*, 246 So.2d 543, 545 (Miss.1971). Rule 7.09 permits an amendment “if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.” URCCC 7.09. The well-established test in this jurisdiction for determining whether the defendant is prejudiced by the amendment depends on whether a defense under the original indictment would be equally available under the amended indictment. *Byrd v. State*, 228 So.2d 874, 875–76 (Miss.1969) (cited with approval in *Lester v. State*, 692 So.2d 755, 775 (Miss.1997)). Furthermore, the court must determine whether the evidence the defendant plans to present would be equally applicable

to the amended indictment. *Byrd*, 228 So.2d at 875–76. If both the defense and the evidence remain unhindered after amending the indictment, then the amendment is considered to be an amendment of form rather than substance. *Griffin v. State*, 540 So.2d 17, 21 (Miss.1989); *Doby v. State*, 532 So.2d 584, 586 (Miss.1988); *Reed v. State*, 506 So.2d 277, 279 (Miss.1987); *Byrd*, 228 So.2d at 876.

Travelstead argues that the change in the indictment to charge him for a period of time in which multiple images were on his computer deprives him of the defense of “mistake”, and that it changes his offense from a one day occurrence to an episodic occurrence. However, even the indictment charged only images which were on the computer on February 22nd, the prior images would have been admissible to show lack of mistake. The images, whether charged as individual crimes of possession, would have still be admissible for the prosecution to use to defeat Travelstead’s dubious claim of mistake. The fact that Travelstead performed multiple searches for child pornography and that he persisted in the behavior over time and accessed many images prior to February 22nd, would have been competent, admissible evidence to show lack of mistake. Therefore, the defense Travelstead had prior to the amendment was not diminished by the amendment to the indictment. The weakness of the defense was present under the original indictment and the amended indictment.

The date that the Appellant, Cameron Travelstead , allegedly possessed child pornography is not an essential element of the crime of exploitation of a child. *See* Mississippi Code Annotated (1972, as amended). All of the defenses available to Travelstead under the original indictment were equally available to him under the amended indictment. The evidence in the case and its admissibility was not affected by the amendment to the indictment. The

amendment to the indictment to enlarge the date range from “on or about February 22, 2010” to “on, about and between the 31st day of January, 2010 and the 28th day of February, 2010,” did not prejudice Travelstead’s defense in any way. The trial court correct granted the prosecution’s motion to so amend the indictment. This issue is without merit and the jury’s verdict and the rulings of the trial court should be affirmed.

V. The trial court did not err in refusing Instruction D-7.

When considering challenges to jury instructions, our standard of review requires the appellate court avoid considering instructions in isolation, but rather consider them as a whole for determining whether the jury was properly instructed. *Comby v. State*, 901 So.2d 1282, 1288(¶ 15) (Miss.Ct.App.2004). “Defects in specific instructions do not require reversal ‘where all instructions taken as a whole fairly—although not perfectly—announce the applicable primary rules of law.’ ” *Burton ex rel. Bradford v. Barnett*, 615 So.2d 580, 583 (Miss.1993) (citations omitted). In reviewing a challenge to jury instructions, the instructions actually given must be read as a whole. *Williams v. State*, 803 So.2d 1159(¶ 7) (Miss.2001). When read as a whole, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. *Id.*

In the case *sub judice*, the defense requested instruction D-7, an instruction on jury deliberations and the requirement of a unanimous verdict. The language of D-7 is less than neutral and has the intended effect of encouraging a deadlock. Instruction D-7, which was correctly refused by the trial court, stated:

This Court instructs the jury that it is the duty of each and every member of the jury in this case to decide the issues presented for yourself, and if, after a careful consideration of all the evidence in the case and the instructions of the Court on

the law and free consultation with your fellow jurors, there is any single juror who has reasonable doubt of Cameron Travelstead's guilty, it is your solemn duty as a juror under oath to stand by your belief, you must never yield your belief simply because every other single member of the jury may disagree with you.

C.P. 159.

The prosecution objected to D-7 and noted that it was similar to the trial court's instruction C-4, an instruction on deliberations and the necessity of a unanimous verdict.

Instruction C-4 states, as follows:

The verdict of the jury must represent the considered judgment of **each** juror. In order to return a verdict it will be necessary that **each** juror agree thereto. In other words, all twelve jurors must agree before a verdict can be rendered by the jury.

[emphasis added].

The language of Instruction C-4, given to the jury by the trial court, clearly provides that a juror may disagree with the other members of the jury and that a guilty verdict cannot be rendered unless all jurors agree. The instruction specifies that considered judgement of "each" juror is required and short of the agreement of all, no conviction will result. Instruction C-4 gives the jurors "each" the responsibility to reach their own judgment in the case. Therefore, Instruction D-7 is merely repetitive and refusal was proper. The prosecution further noted that the language of the instruction, that a juror must "never yield", exaggerated the language generally used to instruct a juror regarding the re-examination of his or her views in light of a disagreement among the jurors. The model jury instruction for a deadlocked jury states, in pertinent part:

While deciding this case, do not hesitate to re-examine your own views and change your mind, but only if you become convinced that you were wrong. Do not change your opinion just because other jurors disagree with you or simply to return a verdict. Please continue your deliberations.

Mississippi Model Jury Instruction - Criminal 1:20.

The trial court refused Instruction D-7 noting that the instruction was similar to a *Sharplin* Instruction and was therefore premature. The trial court stated the in the event of a hung jury, he would consider Instruction D-7 or a similar instruction. In *Sharplin*, the trial judge gave the following instruction when the jury communicated to the court that it was deadlocked:

I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but, if it is possible to reconcile your differences of opinion and decide this case, then you should do so.

Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Please continue your deliberations

Sharplin v. State, 330 So.2d 591 (Miss.1976).

The trial court's instruction correctly stated the law. The trial judge correctly noted that the instruction offered by the defense was similar to a *Sharplin* instruction. The trial judge correctly stated that he would give such an instruction if the jury indicated a split that they could not resolve. The prosecution, in objecting to the instruction, noted that the language of the instruction was not neutral, but "loaded" and favored the defense. The trial court correctly declined to give the instruction unless a the jury sent a note for guidance on differing opinions.

This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

VI. The trial court correctly excluded defense evidence.

Travelstead argues that the trial court erred in excluding testimony from Travelstead to explain all of the circumstances of his life that led to him accessing alleged child pornography and in excluding testimony from Dr. Don Waller who counseled Travelstead. Appellant's Brief, p. 48. The State's evidence explaining its investigation and questions regarding Travelstead's interest in children does not open the door for the admissibility of Travelstead's argument that he had a hard childhood and that his criminal behavior should be excused for that reason.

Travelstead's troubled childhood was wholly irrelevant to whether he possessed images of child pornography. His counselor's testimony could have been proffered, but it is difficult to imagine what his counselor could have said which would have offered an actual defense to the charges against Travelstead. This evidence was relevant towards mitigation in a sentencing hearing, but was completely irrelevant to show whether Travelstead possessed images of child pornography on his laptop computer.

While a defendant certainly has a right to offer the testimony of witnesses in his favor, there is always the requirement that the evidence must be relevant. See *Hentz v. State*, 542 So.2d 914 (Miss. 1989). Even if the testimony of Travelstead's counselor was wrongly excluded due to a discovery violation, it simply cannot have been relevant to case. If it had been relevant to the case, relevant to the possession of child pornography by the Appellant, the testimony would have been offered much sooner, and certainly would have been proffered on being excluded.

This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

The assignments of error presented by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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Indigent Appeals Division
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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

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This the 6th day of September, 2016.

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