

COPY
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOSEPH STEVENSON

APPELLANT

FILED

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VS.

NO. 2007-KA-1229-COA

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On May 30-31, 2007, Joseph Stevenson, "Stevenson," was tried for statutory rape under M. C. A. § 97-3-65(1)(b) before a Washington County Circuit Court jury, the Honorable Ashley Hines presiding. R. 1. Stevenson was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 249. From that conviction, he appealed to the Mississippi Supreme Court. C.P. 45.

ISSUES ON APPEAL

I.

**WAS FORENSIC EVIDENCE PROPERLY ADMITTED IN
THE INSTANT CAUSE ?**

II.

**WAS THERE CREDIBLE, SUBSTANTIAL CORROBORATED
EVIDENCE IN SUPPORT OF THE CONVICTION?**

STATEMENT OF THE FACTS

On January 9, 2006, Stevenson was indicted by a Washington County grand jury for statutory rape of S.S., who was under the age of fourteen under M. C. A. § 97-3-65(1)(b). C.P. 3.

On May 30-31, 2007, Stevenson was tried for statutory rape that occurred in June, 2004 before a Washington County Circuit Court jury, the Honorable Ashley Hines presiding. R. 1. Stevenson was represented by Mr. Martin A. Kilpatrick. R. 1.

Ms. Sharlisa C. Simpson, "S.S.," testified that she was fourteen at the time of trial. R. 2. She was attending the seventh grade. R. 3. Her mother was Ms. Arlisa Simpson. Stevenson was a friend of her mother's family. R. 3. He worked on their cars and sometimes helped drive S.S. to school.

S.S. testified that Stevenson told her that he "loved me." R. 4-5. S.S. also testified that he told her, "he'll marry me when I get big." R. 4. When her mother was away, Stevenson showed S. S. a sex movie. He told her that the woman having sex in the film "was not hurting." R.7.

On a second occasion, when Stevenson knew her mother was away, Stevenson came to S.S.'s home. She let him in the door. S.S. testified that they "had sex on the couch." R. 10. She further explained that "he put his penis inside my private part." R. 10.

S.S. identified Stevenson in the court room as the person with whom she had sex. R. 25. S.S. testified that although she was scared, she let him do it because "I love him." R. 10.

S.S. admitted to having initially told a police officer, her mother and grandmother that she had never had sex with Stevenson. However, she testified that this was not true. R. 26. S.S. testified that she had lied about this because "she was scared and didn't want nobody to get in trouble." R. 40.

The trial court ruled that under M. R. E. 803(25), "the tender years exception," there were "indicia of reliability" with respect to statements made by S.S. to her mother, Ms. Arlisa Simpson,

and Ms. Veronica Velasquez, a police investigator. The trial court found that the twelve factors for consideration in admitting tender years exception statements were fulfilled in the instant cause. R. 43-45.

Ms. Arlisa Simpson testified that she was the mother of S.S. R. 47-76. She testified that Stevenson was a friend who had visited in her home. Stevenson worked on her family's cars. Ms. Simpson became worried about Stevenson's interest in her daughter, S.S. She observed "the way he was looking at her behind." R. 48. She observed this through a window when Stevenson was not aware of her presence.

Ms. Arlisa Simpson testified to putting a couch in front of her front door. She told S.S. not to move it. When she returned to her home, she noticed the heavy couch had been moved. R. 51-52. She questioned her daughter. Although S.S. denied that Stevenson had been there, her cell phone indicated that Stevenson had called. Ms. Simpson had also seen Stevenson's truck "passing through" when she returned. R. 52.

When questioned, S.S. started crying. She told Arlisa that she had been with Stevenson. She admitted that they "had sex." R. 54. Ms. Simpson testified that she "looked between her legs." R. 60. She saw "thick film on her." R. 61. The film was "on her vagina." R. 21. Arlisa took her to the police for examination.

Ms. Arlisa Simpson testified that while Stevenson had been in her home visiting, he was not her boy friend. R. 64-65. She admitted that she had whipped S.S. after learning about her having sex with Stevenson. R. 66-68.

Mr. Robert Simpson, S.S.'s grandfather, testified that he told Stevenson to stay away from S.S. R. 100. Mr. Simpson also testified that when he spoke to S.S. she told him "she loved him." R. 102. She was referring to "Stevenson." R. 102.

Ms. Linda Buck, a registered nurse at the emergency department of the Delta Regional Hospital, testified to admitting S. S. for examination. R. 107. She was examined and a rape kit was collected. It was "signed, dated, and timed" as well as initialed by Ms. Buck. It was then submitted for forensic analysis. Buck had participated in some twenty previous rape kit collection processes. Buck testified that she also wrote down and keep as part of her medical record what S.S. told her concerning the alleged sexual assault.

The trial court found in keeping with the evidence presented by the prosecution that the probative value of the forensic evidence was "not substantially outweighed by danger of unfair prejudice to Weaver." R. 149. Although the forensic analysis results could not identify Stevenson as the donor of the seminal fluid, or semen, there was testimony that these results indicated that "male sex organ ejaculate" was inside S.S.'s vagina. This added corroboration to her testimony. This was in addition to what she told her mother, and others about her having been involved sexually with Stevenson.

Dr. William. Bracken, M.D., testified that about the results of forensic testing. He testified that the test was positive for the presence of sperm. The finding of sperm inside the vagina of S.S. indicated that "penetration" of her vagina had occurred. R. 156.

The trial court denied a motion for a direct verdict. R. 199.

Stevenson testified in his own behalf. R. 210-228. Stevenson testified that he had an on-going sexual relationship with S.S.'s mother, Ms. Simpson. Stevenson denied having any sexual contact with S.S.. Stevenson testified that he was thirty-seven at the time of trial. R. 210. Stevenson admitted to having been warned by S.S.'s grandfather about his relationship with S.S. R. 224. Stevenson believed that Arlisa Simpson, S.S.'s mother, "beat her into lying about having sexual intercourse" with him. R. 223.

Stevenson was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 249. From that conviction, he appealed to the Mississippi Supreme Court. C.P. 45.

SUMMARY OF THE ARGUMENT

PROPOSITION I

FORENSIC EVIDENCE WAS PROPERLY ADMITTED.

The record reflects that the trial court did not abuse its discretion. **Moody v. State** 841 So. 2d 1067, 1094 (Miss. 2003). The forensic evidence collected from the rape kit was relevant as well as more probative than unfairly prejudicial to Stevenson. It provided corroboration of S. S.'s testimony that she "had sex" with Stevenson. R. 10. S.S. testified that "he put his penis inside my private part." R. 10. She was eleven years old at the time. R. 76-77. After hearing that S.S. had sex with Stevenson, her mother looked "between her legs." She testified that she saw "thick film" on her daughter's "vagina." R. 61. The mother took her to a hospital for examination. S.S. identified Stevenson as the person with whom she had sex. R. 25.

Ms. Linda Buck, a registered nurse, testified to performing a rape kit collection of forensic evidence from the child's vagina. She testified that the child told of letting a man into her house. This was when her mother was temporarily out of the house. She identified the man as "Joseph." R.109-110.

Dr. Bracken testified that he examined the forensic evidence results. He found there was evidence of sperm "inside" the child's vagina . R. 155-156. This indicated that there had been "penetration" of the child's vagina. R. 156. Ms. Nasir, who performed the forensic test, testified to finding both seminal fluid and semen on the vagina swabs submitted for analysis. R. 174.

The Appellee would submit that this was sufficient credible, corroborated evidence in support of the trial court's admitting the forensic evidence. It was both relevant and probative for establishing the charge against Stevenson.

The **Winston, infra**, case fits the facts of this case more so than **Walker, infra**. In both

Winston, and the instant cause, there was positive “forensic testing” confirming intercourse without any specific DNA link to the appellants. There was also testimony and corroborated circumstantial evidence of penetration in support of the victim’s identification of the appellants as their sexual assailants. In **Walker**, there was no forensic testing.

PROPOSITION II

THERE WAS CREDIBLE SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF THE CONVICTION.

While not formally briefed as a separate issue, the appellee believes it is implied by Stevenson's argument under proposition I. When the evidence presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient, credible corroborated evidence in support of the denial of all peremptory instructions. There was no "unconscionable injustice" involved in denying a motion for a new trial. **Jones v. State**, 635 So. 2d 884, 887 (Miss. 1994).

The uncorroborated testimony of a sex crime victim is sufficient for affirming a conviction. **Otis v. State**, 418 So. 2d 65 (Miss. 1982). S.S. testified to having sex with the appellant. She testified that: "He put his penis in my private part." R. 10. S.S. was corroborated by her mother. She saw "thick film" on her vagina. R. 61. She looked "between her legs" after S.S. told of having sex with Stevenson. Dr. Bracken testified that there was forensic evidence of seminal fluid "inside" S.S.'s vagina indicating penetration. R. 163.

S.S. was eleven years old at the time of the sexual encounters. R. 61. Stevenson admitted to being thirty seven. R. 210. S.S. had never been married to anyone. R. 61.

Stevenson's testimony denying any sexual relations occurred merely created a question of credibility that the jury resolved in its deliberations. Stevenson is not entitled to give himself the benefit of favorable inferences consistent with his innocence on motions dealing with the sufficiency or weight of the evidence.

Inconsistencies in a child sex victim's testimony does not indicate insufficient evidence where a defendant is consistently identified as the sexual assailant. **Goss v. State** 413 So. 2d 1033,

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THAT FORENSIC EVIDENCE WAS PROPERLY ADMITTED.

Stevenson argues that the trial court erred in admitting forensic evidence. He believes he erred because while there was evidence of sperm being present, there was no traceable DNA that could connect him as the source of that sperm. He believes this evidence was prejudicial to his defense. Appellant's brief page 1-12.

To the contrary, the record reflects that the trial court denied a motion to exclude this forensic evidence. Stevenson argued that the admission of evidence showing sperm would be "more prejudicial than probative." R. 147. It would be more prejudicial because he could not be specifically identifiable as the donor of the sperm.

The trial court found in keeping with the evidence presented by the prosecution that the probative value of the forensic evidence was not "substantially outweighed" by danger of unfair prejudice to Stevenson. M. R. E. 403. R. 149.

The colloquy over the forensic evidence was as follows:

Kilpatrick: I am asking that the court conclude that the--that the evidence is more prejudicial than probative because while sperm may be described as found, there's nothing to connect Joseph Stevenson with it. So there is--the prejudice is the finding of sperm that is going to create some sort of assumption that it belongs to Joseph Stevenson. R. 147.

Richardson: **It's probative because it corroborates the statements of the child not only to this jury but also to the nurses and the doctors when they were performing the examination on her and that it goes to add to show them and to the jury that what this child was saying, that's for the jury to decide as to whether or not it was truthful.** Now, it's not prejudice here because-I guess he's saying it's prejudicial because there was DNA. Well, there is going to be witnesses to explain that reasoning why they could not perform DNA examinations or why there's not any results-DNA results to say that that was Stevenson's sperm. R. 149

The trial court found that the DNA evidence was relevant and probative. It was connected in that it corroborated the victim, S.S.. She testified to having “had sex” with the appellant. R. 10. This involved “penetration.” This made the DNA evidence probative on an issue relevant to the statutory rape charge. It was not “substantially outweighed by the danger of unfair prejudice” to Stevenson. M. R. E. 403. Stevenson could have presented testimony or evidence that he was not the source of the semen, if he chose to do so in his testimony before the jury.

Court: So I think that this is connected to the defendant by the testimony of the—Sharlisa Simpson, so it's not unconnected. And I think its probative value does outweigh the prejudice effect of it. As far as showing evidence that it—you know, that the source of it was somebody else, under 412(d)(2), you could admit evidence to prove that the semen belonged to another donor if such evidence existed. So there's no prohibition against the defendant admitting that kind of evidence. I haven't seen anything in this record to indicate that such evidence exists, but it is available. If it exists, you could introduce it for that purpose. **So the Court finds that the—under Rule 403 this evidence is not—its prejudicial nature does not outweigh its probative value.** R. 151. (Emphasis by Appellee).

Ms. Sharlisa C. Simpson, “S.S.”, testified that she was fourteen at the time of trial. R. 2. Her birthday was on March 4, 1993. R. 21. She was only eleven years old at the time of the alleged rape. R. 84. At the time of trial, she was attending the seventh grade. R. 3. Her mother was Ms. Arlisa Simpson. Stevenson was a friend of her mother and her extended family. R. 3. She testified that Stevenson told her that he “loved me” and that “he'll marry me when I get big.” R. 4. When her mother was away, Stevenson showed her a sex movie. He told her that having sex would not hurt her. R. 7.

On a second occasion, when Stevenson knew S.S.'s mother was away, Stevenson came to her house. She let him in the door. S.S. testified that although she was scared, she let him have sex because she loved him. R. 10. S.S. testified that they “had sex on the couch.” R. 10. She further explained that “he put his penis inside my private part.” R. 10. S.S. identified Stevenson in the court

room as the person with whom she had sex. R. 25.

Q. Okay. And what happened next?

A. We had sex on the couch.

Q. Okay. Now, when you say that you had sex, can you explain what exactly you mean by that?

A. He put his penis inside my private part.

Q. And how did you feel about that?

A. Scared and—but I still did it.

Q. Why did you let him do it?

A. Because I love him. R. 10. (Emphasis by Appellee).

The trial court ruled that under M. R. E. 803(25) “the tender years exception,” there were “indicia of reliability” with respect to statements made by S.S. to her mother, Ms. Arlisa Simpson, and Ms. Veronica Velasquez, a Greenville police department investigator. The trial court found that the twelve factors for consideration in admitting tender years exception statements were fulfilled in the instant cause. R. 43-45.

Ms. Arlisa Simpson testified that she was the mother of S.S. She testified that Stevenson was a friend who had visited in her home. Stevenson worked on her family’s cars. Ms. Simpson became worried about Stevenson’s interest in her daughter, S.S. She observed “the way he was looking at her behind”and “shaking his head.” R. 48. This was when Stevenson was not aware that he was being observed by Arlisa.

Ms. Simpson testified to putting a couch in front of her front door. She told S.S. not to move it. When she returned to her home, she noticed the heavy couch had been moved. R. 51. She questioned her daughter. Although S.S. denied that he had been there, her cell phone indicated that

Stevenson had called. R. 52. Arlisa Simpson had seen Stevenson's truck "passing through" when she returned. R. 52. When confronted, S.S. started crying. She admitted that Stevenson had been there. She also admitted they "had sex." R. 54. Arlisa testified that she looked "between her legs." R. 60. She saw "thick film on her." R. 61. The film was on her vagina. This confirmed for her that she had engaged in sex with Stevenson. Ms. Arlisa Simpson then took S.S. to the police for examination.

Q. And how did you discover that there had been some sort of physical contact with her and Joseph Stevenson that night?

A. I looked between her legs.

Q. What made you look between her legs?

A. Because she told me that they had sex, and I looked between her legs. She was eleven years old, and when I saw film, I knew to take her to the doctor.

Q. Now, you say "film." Can you explain to us what exactly that means.

A. Thick film on her, And other times that I confront her she would take a bath, you know, she would get in the tub, but she didn't—that night she didn't. I didn't let her get in the tub.

Q. Okay. And you say you saw thick film. **Where was the film?**

A. On her vagina. R. 60-61. (Emphasis by Appellee).

Ms. Linda Buck, a registered nurse at the emergency department of the Delta Regional Hospital, testified to admitting S. S. for examination. R. 107. She was examined and a rape kit was collected. It was "signed, dated, and timed" as well as initialed by herself, and then submitted for forensic analysis. Buck had participated in some twenty previous rape kit collection processes. Buck also testified that she also wrote down as part of her medical record what S.S. told her concerning the alleged sexual assault.

S.S. told Ms. Buck that when her mother went to the store, she went and opened the door

for a man named "Joseph." R. 109-110. Ms. Buck testified that the rape kit collected data from both outside S.S.'s vagina as well as inside.

Q. And when you spoke with Sharlisa, what did she tell you?

A. Shalisa basically said that her mother had gone to the store and it was night, and she said that she heard a knock on the window of her bedroom. She said she and her baby brother were in their beds, and she thought it was her mother. **And she said she went and opened the front door and let the man in. The man came in when she opened the front door.**

Q. Did she tell you who the man was?

A. Yes, sir. She named the person.

Q. What name did she give?

A. She gave the name of Joseph.

Q. Now, did you document this?

A. Yes, sir.

Q. In addition to speaking to her, you say you collected evidence. Do you have that with you?

A. Yes, sir. R. 109-110.

...

Q. And so S-2 that I've just handed you before, was that from the outer labia?

A. Yes, sir.

Q. And this package that you have, that's from the inner area of the vagina?

A. Yes.

Q. Is that the same package, or do you know that that package encompasses the evidence that you collected?

A. Yes.

Q. How do you recognize that package?

A. Because I signed it and I dated it and timed it. R. 111-112. (Emphasis by Appellee).

Dr. William. Bracken, an emergency room physician, testified about the results of forensic testing. He testified that the test was positive for the presence of sperm. The finding of sperm "inside" the vagina of S.S. indicated that "penetration" of her vagina had occurred. R. 156.

Q. Okay. And do you know what the results of the wet mount for Sharlisa Simpson revealed?

A. **There was non-motile sperm that was located within the vaginal vault, so it was inside the vagina they found sperm that was non-motile.**

Q. Okay. And is there any significance with the fact that the sperm was non-motile?

A. No, about—in an average ejaculate there's probably 30 to 40 percent sometimes of sperm that is not motile. And what motile means is the sperm is designed with a cap, and you have a central—like a spiraling center, and then you have a tail on it. And when you say "non-motile," that means that there's a sperm there but the tail is not moving. It's still. And in normal ejaculate you'll have non-motile sperm.

Q. And does the presence of sperm in the vaginal—I'm sorry—did you call it a "vault" or canal?

A. Vaginal vault or inside the vagina.

Q. Okay, does the presence of non-motile sperm in the vaginal vault indicate anything in particular to you in this case?

A. **Yes, that there had been penetration, or there's been penetration for the sperm to get that deep into the vaginal vault, that somehow the sperm got there.** R. 156. (Emphasis by Appellee).

On cross examination, while Dr. Bracken testified that it was "possible" to have sperm inside a vaginal vault without penile penetration, this was based upon a hypothetical about what "could have happened." R. 163. This hypothetical would involve ejaculation by a male on or near a female's vagina, and then use of a finger to penetrate the vagina and introduce the sperm. R. 163.

Whereas, in the instant cause, we had testimony from S.S. that she "had sex" with Stevenson.

She explained this as "he put his penis inside my private part." R. 10.

On re-direct, Dr. Bracken explained that the distinction between whether a male's penis is all the way inside or just partly inside a female would be something learned through experience. This could explain how attempted sexual intercourse could be confused with actual intercourse by a child victim. It could also explain the degree of trauma to a child's vagina.

Q. Doctor, would the trauma in the vaginal area—would the significance of that be changed if you knew that the child did not struggle or resist in any way?

A. Yeah, it—you're right. Someone who is going to hold someone down against her will and someone who's flexing their muscles in their lower pelvis—if penetration in that manner would pervert in more trauma the vaginal area as opposed to someone who is scared or who fears that if they do move that, you know, this occurring as this—their life could be taken, they would be still and scared. It could be to where he could insert a portion of his penis in without, you know, causing much tearing or irritation. That's where the attempt comes in. Here is a girl whose not—I mean, she's not—she's eleven years old. She doesn't know much about sex. She don't know whether something is all the way in or something is out. You know, it's a learning process with all human beings with sexual activity, and for her knowledge in this state, you know, who knows. R. 164.

Ms. Dorothy Courtney, a social worker supervisor at the Delta Medical Center, testified that she interviewed S. S. at the Delta Regional Medical Center. S.S. told her of being involved in sexual acts with Stevenson.

Q. All right. And I want you to share with the jury what you learned from Sharlisa regarding the sexual abuse when you spoke to her on June 25th, 2004.

A. **She informed me that she had been sexually abused by a family friend, Joseph Stevenson. She advised me that she had an opportunity to engage in sexual activity with him.** (Emphasis by Appellee).

Ms. Huma Nasir from Reliagene Technologies in New Orleans, testified that she was a DNA analyst. She conducted the analysis on the specimens collected from S.S. She testified that although the amount of seminal fluid found was small, there was enough to indicate that seminal fluid was present along with some sperm. Seminal fluid is produced by the male sex organ ejaculate, just as

is actual sperm.

Q. Okay. So as a result of your testing, what were your findings?

A. The findings were that there were three swabs, the vulvar swab, the vaginal swabs, and the other vulvar swabs were positive for the presence of seminal fluid. **There were sperm present on the vulvar swabs, S-4...** R. 174. (Emphasis by Appellee).

On redirect, Ms. Nasir testified that three swabs had seminal fluid. One of the three had sperm cells. She had previously testified that seminal fluid, semen and sperm were all part of male sexual "ejaculate." R. 170.

Q. So all three swabs had seminal fluid?

A. **They were positive for seminal fluid.**

Q. **Seminal fluid comes from the male organ.**

A. Yes.

Q. **One of those three had sperm.**

A. **Correct.** R. 181. (Emphasis by Appellee).

In **Walker v. State** 878 So.2d 913, 922 (¶46) (Miss. 2004), the majority found reversible error in admitting a forensically "untested" towel. That case is distinguished from the instant cause. In the instant cause, not only was there forensic testing of the victim, there was a "positive result." There was medical testimony indicating that given the positive result for the presence of sperm, that "penetration" had occurred. R. 156.

In addition, the testimony of S. S. about having had sexual intercourse with Weaver was partially corroborated by her mother. The mother checked her vagina. This was before S.S. had a chance to take a bath. She found "thick film" on her vagina. R. 61. A nurse further corroborated S.S. and her mother by testifying that S.S. told her about letting a man named "Joseph" into her home when her mother was absent. R. 109.

Finally, Dr. Bracken testified that the positive forensic test for the presence of sperm inside S.S.'s vagina indicated that "penetration" had occurred. R. 156. Forensic analyst H. Nasir, who conducted the DNA analysis, testified that sperm were present along with seminal fluid in the samples submitted. R.174; 180-181. This indicated male sex organ ejaculate was present.

And finally, Ms. Dorothy Courtney, an experience social worker supervisor, testified that S.S. told her of having "engaged in sexual activity with Stevenson," the appellant. R. 187. Ms. Courtney also testified that, based upon her experience with sex abuse victims, she did not believe she was "getting the complete story" of what happened from S.S. At the time of Courtney's interview, S. S. was crying and under a lot of stress. R. 188.

In Baldwin v. State 784 So.2d 148, 156 (¶ 27-¶28) (Miss.2001), the Supreme Court stated that the trial court did not abuse its discretion in admitting forensic evidence. This was evidence showing seminal fluid was present in the murder victim's vagina. It was not from the appellant. It was from his brother. This corroborated the state's theory of the case and was consistent with other evidence. That evidence indicated that Baldwin's involvement with his brother in a series of crimes that lead to the death of the victim.

¶27. ..We then stated that our task as an appellate court reviewing a Rule 403 determination is not to engage anew in the Rule 403 balancing process. Id. Rather, this Court must simply determine whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence. Id.

✱ ¶ 28. The evidence that Darnell's seminal fluid was found in the victim's vagina is relevant as it makes the State's theory of the case more probable than it would be without the evidence. The evidence is consistent with the testimony of others regarding Clint's admissions that Darnell raped Liz Dill while Clint watched. The rape was part of the sequence of events leading to Liz Dill's murder; thus, evidence linking Clint's brother to the rape is clearly relevant. We find that the trial court did not abuse its discretion and that this issue is without merit.

In Moody v. State 841 So. 2d 1067, 1094 (¶ 82) (Miss. 2003), found that the admission of

evidence was “within the discretion of the trial court.” Unless there was evidence of an abuse of discretion, the trial court’s ruling will be upheld on appeal. In that case, testimony was received about the taking of vaginal swabs by Dr. Ward at an autopsy, even though the person testifying did not personally take the swabs.

¶ 82. The State correctly cites **Parker v. State**, 606 So.2d 1132, 1136 (Miss.1992), where we held: “The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused.” **Johnston v. State**, 567 So.2d 237, 238 (Miss.1990), citing **Hentz v. State**, 542 So. 2d 914, 917 (Miss.1989), **Monk v. State**, 532 So.2d 592, 599 (Miss.1988). Unless the trial judge’s discretion is so abused as to be prejudicial to the accused, this Court will not reverse his ruling. **Shearer v. State**, 423 So.2d 824, 826 (Miss.1982), citing **Page v. State**, 295 So.2d 279 (Miss.1974). The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. **Johnston**, 567 So. 2d at 238.

The trial judge did not abuse his discretion in allowing the testimony of Newell, as she had the requisite personal knowledge of that about which she was testifying. Once the evidence was received, it was for the jury to determine what weight and credit to give the evidence based on Newell’s admission that she did not recall this particular autopsy.

The record cited above clearly indicates that the trial court did not abuse its discretion. The forensic results indicated that seminal fluid and semen were present “within” S.S.’s vagina. R. 156. This corroborated S.S.’s testimony about Stevenson having placed his “penis” inside her vagina. R. 10. It corroborated S.S.’s mother’s testimony of seeing “thick film” on her vagina. R.60-61 . It also corroborated S.S.’s statements to a forensic nurse, and a social worker about having participated in “sexual activities” with someone named “Joseph.” R. 109; 187. This distinguishes this case from

Walker, supra, where there was no forensic testing .

In **Walker v. State** 878 So.2d 913, 917 (Miss. 2004), the Court pointed out no rape kit was conducted on the alleged victim in that case. However, the court pointed out that in **Winston, infra.**, the court affirmed a conviction under similar circumstances. In that case, a rape kit was “tested.”

It did not link Winston to the victim. However, the victim's and corroborating evidence was sufficient to affirm the conviction.

¶19. In **Winston**, the results from the crime lab tests on the rape kit did not link Winston to the victim. **Winston**, 754 So.2d at 1155 (Miss 2000). Unlike **Winston**, no rape kit was conducted on M.M. because of the time lapse between the alleged molestation and the time it was reported. Other than the testing for semen, no lab tests were conducted on the towel.

The Appellee would therefore submit that given the facts, as cited above, this issue is lacking in merit.

PROPOSITION II

THERE WAS CREDIBLE, CORROBORATED EVIDENCE IN SUPPORT OF STEVENSON'S CONVICTION.

The second "implied" assignment of error is that the verdict of the jury was against the overwhelming weight of the evidence and unsupported by the evidence. Stevenson mentions inconsistencies in S.S.'s statements to investigators before trial about when she had sexual activities, and exactly what kind of sexual activity it was. This assignment of error, in effect, complains that the trial judge erred in overruling the motion for a judgment notwithstanding the verdict or in the alternative for a new trial.

The record cited above indicates that while there were differences between S.S.'s pre-trial statements, particularly about the kind of sexual activity she had engaged in with Stevenson, she consistently identified Stevenson as the person with whom she "had sex." R. 10. She further testified that "he put his penis inside her private part." R. 10. The record reflects that S.S. was eleven and Stevenson was thirty seven at the time of trial. Stevenson was not S.S.'s spouse. R. 61 ; 210.

In addition, S.S. admitted that she initially lied to her mother, her grandmother, and a police officer about not having had sex with Stevenson. She did so because "she was scared and didn't want nobody to get in trouble." R. 40.

In Goss v. State 413 So.2d 1033, 1035 -1036 (Miss.1982), the Supreme Court found that the identification of the appellant as her sexual assailant was sufficient for supporting his conviction.

Although there were "inconsistencies" between the victim's statements before and during the trial, she was consistent in identifying Goss as her assailant.

↳ The prosecutrix in this case positively and unequivocally identified the defendant as the person who had committed the assault upon her. She was subjected to a very rigorous and extensive cross-examination by defense counsel and although there were some inconsistencies between statements attributed to her prior to the trial and the

testimony at the trial she consistently throughout the whole proceedings maintained *1036 that it was the defendant who had committed the assault upon her. Her actions were consistent with the actions and reactions of a female who has been raped.

In **Winston v. State**, 754 So.2d 1154, 1156 (¶7) (Miss. 1999), while there was no positive forensic results from a rape kit, there was testimony from an examining physician that the missing girl found in Winston's home had engaged in sexual intercourse within the last twenty four hours. The victim, like S.S., initially denied having sex with her assailant.

¶7. Winston also points to the victim's initial denial that Winston had sex with her, the victim's admission that Winston "messed with" her occurring only after her mother hit her. The victim and her mother both testified regarding the victim's initial denial of the assault, and both were subject to cross-examination. As the Court of Appeals held, the credibility of the witnesses' testimony and resolution of conflicting testimony was for the jury to determine. **Collier v. State**, 711 So.2d 458, 462 (Miss.1998). Taking the testimony of the victim, her relatives, police, and the examining doctor in the light most favorable to the State, the jury's finding that it was Winston with whom the victim had intercourse was not "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." **White v. State**, 732 So.2d 961, 965 (Miss.1999) (quoting **Herring v. State**, 691 So. 2d 948, 957 (Miss.1997)). We find that the Court of Appeals properly affirmed Winston's conviction.

In **Moore v. State** 933 So.2d 910, 922 (¶ 43-¶44) (Miss. 2006), the Supreme Court found that there was sufficient evidence in support of his conviction. Moore, like Stevenson, argued that the fact that "seminal fluid" taken from the victim could not be matched to him created doubt as to his guilt. The Supreme Court found otherwise.

¶ 43. Moore's argument is without merit. The jury was not bound to believe Moore's alibi testimony. The jury determines the weight and credibility to give witness testimony and other evidence. **Johnson v. State**, 904 So.2d 162, 167 (Miss.2005). We may not "pass upon the credibility of witnesses and, where the evidence justifies a verdict, it must be accepted as having been found worthy of belief." **Davis v. State**, 568 So.2d 277, 281 (Miss.1990).

¶ 44. The victim identified Moore at trial by his voice. Her blood was found on his belt, and he confessed to raping L.D.T. Accepting as true this evidence supporting

the verdict, we hold the verdict was not against the overwhelming weight of the evidence. The trial court did not abuse its discretion by failing to grant Moore's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any "conflicts in the evidence" created by testimony from witnesses was to be resolved by the jury. What the jury believes and who the jury believes as to what conflicting testimony presented is solely for their determination. As stated:

Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

The Appellee would submit that when the evidence presented by the prosecution was taken as true along with reasonable inferences, there was more than sufficient credible substantial evidence in support of the trial court's denial of all peremptory instructions. S.S. identified Stevenson as the person with whom she had sex. R. 25. She testified the sex involved penile penetration. R. 10. Her mother saw "thick film" on her vagina. R. 61. This was after S.S. told her of having sex with Stevenson. What her mother testified to seeing was corroboration of vaginal sexual activity by S.S. and someone else.

Dr. Bracken and Ms. Nasir testified that forensic analysis of the rape kit performed on S.S. showed that seminal fluid and semen were present "inside" her vagina. R. 156; 174. This was consistent with the fact that "penetration" had occurred.

Stevenson testified in his own behalf. R. 210-228. His denial that he had sex with S.S.

merely created a conflict in the evidence the jury was responsible for resolving. This would have to do with inconsistencies in S.S.'s testimony before and during the trial. Inconsistencies in the facts and testimony were for the jury to resolve. C.P. 26-28.

The evidence indicated that S.S. was eleven at the time of the alleged intercourse and Stevenson was over thirty years old. Stevenson was not S.S.'s spouse. R. 61; 210. S.S. identified Stevenson as the person with whom she had sex. R. 25. There was forensic corroboration, visual corroboration and testimony from others that sexual intercourse had occurred; that penetration had occurred. There was no "injustice" involved in denying a motion for a new trial. *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994).

Stevenson is not entitled to have inconsistencies or conflicts about time, place, and factual specifics in the record taken as true with inferences favorable with his innocence. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

The Appellee would submit that this issue is also lacking in merit.

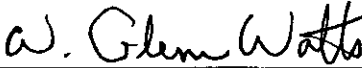
CONCLUSION

Stevenson's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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