
IN THE SUPREME COURT OF MISSISSIPPI

No.: 2008-KA-01663

ARTIS F. POWER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF CHOCTAW COUNTY,
MISSISSIPPI**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED (Miss.R.App.Pro. 34(b))

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REPLY BRIEF OF APPELLANT

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Miss. R. App. Pro. 34(b), oral argument is requested in this case. Because of the complex interplay of record facts and the case law on the requirement of corroboration for rape prosecutions, and because of the nature of these cases, the Supreme Court or Court of Appeals would benefit from oral argument in this case.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING A DIRECTED VERDICT BECAUSE THE TESTIMONY OF THE VICTIM WAS CONTRADICTED AND NOT CORROBORATED

A. MISSISSIPPI COURTS STILL REQUIRE CORROBORATION IN A RAPE CASE WHERE THE TESTIMONY OF THE ALLEGED VICTIM IS CONTRADICTED

In the appellant's major brief, Powers described three kinds of cases—those where the testimony of the victim is not corroborated but there is insufficient contradiction to require corroboration; those where there is contradiction but also corroboration; and those where there is contradiction and no corroboration. Brief of Appellant at 8. With the exception of cases where the only contradiction is the testimony of the defendant himself, the Mississippi Supreme Court has for decades reversed those cases where there is contradiction and no corroboration. The attorney general admits this analysis in the standard cited in the appellee's brief:

This Honorable Court has held that “[t]otally uncorroborated testimony of a victim is sufficient to support a jury verdict *where the*

testimony is not discredited or contradicted by other evidence.” Farrish v. State, 920 So.2d 106, 1068 (Miss. Ct. App. 2006).

Brief of Appellee at 9 (emphasis added). The highlighted portion of the quote shows what is required: The victim’s testimony must not be discredited or contradicted by other evidence. Otherwise, it must be corroborated. The Brief of Appellee attempts to pretend away the highlighted part of the standard, stating “there is not a requirement of corroboration now.” Brief of Appellee at 11; *see* Brief of Appellee at 6, 9, 10, 12 (repeated statements that uncorroborated testimony suffices). This language is designed to do two things: Pretend away the last part of the standard, that the testimony must not be contradicted, and (with the use of the word “now”), pretend that the standard has somehow recently changed. It has not; the cases requiring corroboration have never been overruled. The court has been consistent in these cases.

The cases cited by the Attorney General all fall within the analysis in Power’s major brief: Where the testimony of the alleged victim is contradicted, there must be corroboration, and where it is not contradicted other than by the testimony of the defendant himself, there need be no corroboration. For instance, in *Parramore*, cited in Brief of Appellee at 9, 12, the only defense witness was the defendant himself, who denied that he had intercourse with the twelve year old prosecutrix. *Parramore v. State*, 5 So.3d 1074, 1076-77 (Miss.

2009). There was no other evidence contradicting the alleged victim's account. As pointed out in Power's major brief, the defendant's own testimony is insufficient to create a contradiction that requires corroboration. *See* Brief of Appellant at 12-13 (citing *Price v. State*, 898 So2d 641, 651 (Miss. 2005), and *Otis v. State*, 418 So.2d 65, 67 (Miss. 1982)). *Parramore* cites the Mississippi Supreme Court's classic formulation of the rule:

An individual may be found guilty of rape on the uncorroborated testimony of the prosecuting witness, *where the testimony is not discredited or contradicted by other credible evidence.*

Parramore, 5 So.2d at 1078 (emphasis added). This is the same formulation from the Brief of Appellant quoted above. This formulation—that the corroboration requirement only applies where “the testimony is not discredited or contradicted by other credible evidence” has been the Mississippi Court's formulation all along.

The appellant's major brief had a long survey of rape cases in order to demonstrate that the Mississippi courts have followed a consistent rule—that stated in *Parramore* and elsewhere—and to show what sorts of records call for reversal. Brief of Appellant at 8-12. The point of that discussion was to show the consistency of that rule and that it was still the law in Mississippi.

Contrary to a suggestion in the Brief of Appellant, the corroboration requirement stated in Miss. Code Ann. §97-3-69 applies to all rape prosecutions. *See* Brief of Appellee at 9-10 (arguing that corroboration requirement expressed

in Miss Code Ann. §97-3-69 does not apply to prosecutions under Miss. Code Ann. §97-3-65). Miss. Code Ann. §97-3-67 prior to repeal and being combined with Miss Code Ann. §97-3-65 defined statutory rape. The Mississippi Courts have repeatedly held that the requirement of corroboration where the victim's testimony is contradicted applies to prosecutions under Miss. Code Ann. §97-3-65. *See Magee v. State*, 966 So.2d 173 (Miss. 2007) (conviction under Miss. Code Ann. §97-3-65, stating that conviction can be upheld on uncorroborated testimony "if that testimony is not discredited or contradicted by other credible evidence"); *Christian v. State*, 456 So.2d 729, 730, 734-35 (Miss. 1984) (stating familiar standard in prosecution under §97-3-65, upholding because testimony was corroborated); *Clemons v. State*, 460 So.2d 835, 838-39 (Miss. 1984) (discussing corroboration requirement in case involving rape of an adult, not statutory rape); *Dubose v. State*, 320 So.2d 773, 774 (Miss. 1975) (same); *Goode v. State*, 245 Miss. 391, 394, 146 So.2d 74, 75 (1962) (same); *Johnson v. State*, 213 Miss. 808, 811-812, 58 So.2d 6, 8-9 (1952) (same).

It is clear that there is a requirement of corroboration if the victim's testimony is contradicted. The questions, then, are whether under this record the victim's testimony was contradicted and whether there was any corroborative proof.

**B. THE TESTIMONY OF THE VICTIM WAS
CONTRADICTED BUT NOT CORROBORATED IN THIS CASE**

The first question is whether the victim's testimony was contradicted. It clearly was. Artis Power's wife testified that he was impotent and therefore incapable of having sexual relations due to medications he was using. Tr. 169-171. Testimony of impotence has been held by the Mississippi Supreme Court to contradict the alleged victim's testimony of rape, and, where there was not corroboration, require reversal. *Upton v. State*, 192 Miss. 339, 339, 6 So.2d 129, 129-30 (1942). Beyond this, the alleged victim did not seek medical attention or mention anything about having sex with the defendant at that time (December of 2006) or to anyone at all until the Spring of 2007. Tr. 146-48. When she did say something, she did so in a way that caused her sister-in-law, Betty Ann Pittman, to describe her as happy, "almost bragging," and not "upset or anything," Tr. 211-214, all of which aroused suspicion as to whether the victim was telling the truth. This testimony, particularly the testimony of impotency recognized as contradictory in *Upton*, imposes on the prosecution the burden of corroborating the victim's testimony.

The Attorney General argues that the victim's testimony "was corroborated to some extent by Blalack and the Appellant's wife." Brief of Appellant at 13. It is startling that the appellant's wife's testimony is viewed as corroborative—she is the witness who testified that Artis Power was impotent. Apparently, the

“corroboration” from Mrs. Powers was that Artis Powers and the victim went hunting together. Tr. 153-183. In any event, the testimony of Blalack and the Appellant’s wife does nothing more than show that Artis Power and the victim were together. Blalack testified that he saw them in Power’s truck in December of 2006. Tr. 121-122. This testimony of “opportunity” does not prove that the victim had sex with anyone at all, much less that she had had sex with the defendant.

Evidence that shows the defendant and the alleged victim were together does not corroborate the victim’s testimony. “Mere opportunity creating a possibility is not enough of itself.” *Yancey*, 202 Miss. 662, 668, 32 So.2d 151, 152 (1947). Thus, the testimony from Blalack and others that they were seen hunting together provides no corroboration. Further, what must be corroborated is “that of carnal knowledge,” “[t]he secret part of the crime...” *Hollins v. State*, 128 Miss. 119, 90 So. 630, 632 (1922) . “[C]orroboration must be, not merely of incidental details, but of the commission of the prohibited act.” *Yancey v. State*, 202 Miss. 662, 668, 32 So.2d 151, 152 (1947). There is no evidence in this case that there was sexual intercourse between Brittney Stacy and Artis Power other than the testimony of Brittney Stacy herself. There was no corroboration of “carnal knowledge,” or “the secret part of the crime.” The kinds of corroboration the Mississippi Courts have recognized in the past are entirely absent. There is no testimony whatsoever of her condition in

December of 2007, about the time of the alleged offense. She did not make a report for months, and therefore did not act as a victim might act.

There is an absence of proof—there was no medical or other testimony that the alleged victim had had sex with anyone, at any time, which, as noted previously (Brief of Appellant at 18-19), is substantially weaker than the evidence that lead to reversal in *Howard*, where the Mississippi Supreme Court reversed because the only corroboration the victim had sex with the defendant was that she became pregnant. .” *Howard v. State*, 417 So.2d 932, 933 (Miss. 1982). Because of this failure of proof, the *Howard* court reversed and ordered the defendant discharged. *Id.*

II. THE VICTIM’S OUT-OF-COURT STATEMENT WAS HEARSAY AND THERE WAS A TIMELY OBJECTION

The remaining issue involves hearsay testimony in which the defense counsel objected when the victim was asked whether she had told anyone about the alleged crime. Tr. 138. Defense counsel did timely object and was overruled. Tr. 138. The state’s first argument is that this object was not enough; apparently on the theory that defense counsel was obligated to object again after obtaining a clear and unequivocal ruling from the trial judge. Once a ruling was made, defense counsel had preserved the record. The victim testified to what she told her sister-in-law—about the alleged rape—and not merely that she had talked to her sister-in-law.

This Court reversed in *Leatherwood v. State*, 548 So.2d 389 (Miss. 1989) and *Veasley v. State*, 735 So.2d 432 (Miss. 1999) for admission of a statement such as this one. See Brief of Appellant at 22-24 (discussing these cases). The Attorney General's brief attempts to distinguish them by stating there was not a contemporaneous objection. Brief of Appellant at 14-15. Failing that, the Attorney General argues that such a statement is admissible to rebut a charge of recent fabrication, citing *Barnett v. State*, 757 So.2d 323 (Miss. 2000). Brief of Appellant at 15-16. In *Barnett*, an identifying statement from the victim to a physician during medical treatment immediately after the rape was admitted because the defense argued that the victim's identification of the defendant only dated from later, when it was suggested by family and social workers. This case presents nothing remotely like those facts; the alleged victim here told her sister-in-law and law enforcement at the same time, and there is no suggestion that the statement to the sister-in-law somehow shows the victim wasn't fabricating when she told law enforcement. The argument the Attorney General makes to support admission simply does not apply to these facts.

CONCLUSION

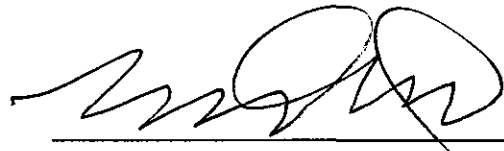
The testimony of the alleged victim in this rape prosecution was contradicted but not corroborated. The complete lack of corroborative proof means that this Court should reverse and render the conviction. Even if

reversal were not warranted on that grounds, reversal would be warranted for the inadmissible hearsay statement by the alleged victim.

Respectfully submitted, this 24th the day of November, 2009.

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