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

APPELLANT'S BRIEF

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

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CERTIFICATE OF INTERESTED PERSONS

Artis Power vs. State of Mississippi
No.: 2008-KA-01663

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges may evaluate possible disqualification or recusal:

Artis F. Power

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I. ISSUES

1. Where a prosecutrix's testimony of statutory rape is substantially contradicted (by evidence of the defendant's incapacity due to impotence) must the prosecutrix's testimony be corroborated.

2. Where the only testimony of a statutory rape is from the prosecutrix, and there is utterly no physical, medical, or other corroborating evidence, must this court reverse the conviction because of the statutory requirement in Miss.Code.Ann. § 97-3-39 that the testimony of the prosecutrix must be corroborated.

3. Did the trial court abuse its discretion in admitting an out-of-court statement by the prosecutrix made months after the alleged rape.

II. COURSE OF PROCEEDINGS BELOW

Artis Power was indicted in a three-count indictment by a grand jury in Choctaw County, Mississippi. Count I alleged that in December, 2006, he had committed statutory rape in violation of Miss. Code Ann. § 97-3-65(1)(b) by having sexual intercourse with Brittney Stacy, who was under fourteen. R. 20.[1] Count II alleged another instance of sexual intercourse with Brittney Stacy, alleged to have occurred in February, 2007 and Count III alleged sexual battery, alleged to have occurred in March, 2007. R. 20-21.

Power's case came on for trial on August 19, 2008. Tr. 1. Four witnesses testified for the prosecution: Paula Stacy (the alleged victim's mother), Tr. 107; Billy Blalack (on whose hunting lands some of the events of Count I allegedly took place), Tr. 119; Allison

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[1]The record or clerk's papers citations are in the form "R. __" and the transcript citations in the form "Tr. __."

Brittney Stacy's name is spelled inconsistently throughout the record—sometimes "Brittney," others "Brittany" and sometimes "Stacey," others "Stacy." In this brief, it is written "Brittney Stacy."

Pittman (the alleged victim's sister-in-law, who attempted to describe hearsay statements from the alleged victim), Tr. 125-128; and Brittney Stacy (the alleged victim), Tr. 130.

The only testimony about the alleged rapes and assault was from the alleged victim. There was no physical or other proof, and no witness corroborated the events that Brittney Stacy described. Stacy also testified, over a contemporaneous defense objection that was overruled, that months after the incident, she told her sister-in-law about it. Tr. 138.

At the close of the state's evidence, Power moved for a directed verdict. Tr. 149-151. Among the grounds were that the state had failed to meet its burden of proof, and that there was no physical evidence or any other corroborating evidence of the statutory rape. Tr. 149-150. The Trial Court overruled this motion. Tr. 151.

Power called his wife to testify; her testimony primarily consisted of an explanation of why her husband was physically impotent. She also discussed his habits as a hunter. Tr. 153-183. James Power (Tr. 184-190), Michael Hauge (Tr. 190-201), and Linda Power (Tr. 202-209) were family members who testified that they were around Artis Power in the home during the times Brittney Stacy claimed to have been assaulted there in February and March. They testified that the events she described could not have occurred. Additionally, Betty Ann Pittman, who is related to the alleged victim, described Stacy's behavior when she was telling law enforcement about the alleged rapes, and made clear she did not believe the alleged victim. Tr. 210-214.

The jury returned a verdict of guilty on Count I (the alleged December incident) and not guilty on Counts II and III (the alleged February and March incidents). R. 107-108. On that same day, August 19, 2008, the Circuit Court sentenced Power to twenty years in the custody of the Mississippi Department of Corrections and entered its judgment to that effect. R. 107.

On August 29, 2008, Power filed a timely Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative Motion for a New Trial. R. 113. Among other issues, the motion reasserted that the state had failed to prove the rape charge. R. 113-114. On September 4, 2008, the Trial Court denied this motion. R. 130. On October 2, 2008, Artis Power filed a timely Notice of Appeal from which this appeal proceeds. R. 135.

III. STATEMENT OF FACTS

According to the testimony of Paula Stacy, during December of 2006, her daughter Brittney was a babysitter for Appellant Artis Power and Mary Power's children. Tr. 110. Artis Power and Paula Stacy's husband James Stacy had a 20-plus-years friendship at that time. *Id.* Sometime during the spring of 2007, Brittney Stacy became "moody" and "mean to her brothers and sisters." Tr. 111. Paula Stacy admitted this behavior seemed "kind of normal," but "more often...than, you know, a teenager would be." *Id.*

Billy Blalack is a casual acquaintance of Artis Power, and had done some trading with him. Tr. 120. Appellant Artis Power had permission to hunt on Blalack's land, and Blalack saw Power on his land to hunt several times during December of 2006. Tr. 120. On one of these occasions, he saw Artis Power on his land in a black Chevy pick-up, accompanied by a "young lady" whose identity Blalack did not know at the time, but later learned was Brittney Stacy. Tr. 120-122. Blalack, on his four-wheeler, intercepted the truck and spoke with Power for 15-20 minutes. Tr. 121. There was a gun in the truck, and Power, an "avid hunter," was wearing camouflage. Tr. 121-122. During Blalack's and Power's conversation, Brittney Stacy sat and listened, but did not say anything. Tr. 123-124.

According to the testimony of Prosecutrix Brittney Stacy, in November of 2006, appellant Artis Power asked her parents if she could go deer hunting with him, which she did. Tr. 131. On that occasion, while on the deer stand, Power began rubbing her stomach,

The remaining defense testimony was largely concerned with events at Artis Power's house in February and March of 2007, and therefore related to counts II and III, on which he was acquitted. Tr. 172 & 209; see *Supra* at 2 (outlining testimony of other witnesses at trial). Betty Ann Pittman, a sister-in-law of the alleged victim, Tr. 210, described Brittney Stacy's behavior when she was first interviewed by law enforcement in mid-April. Tr. 211-12; see Tr. 146 (police came to Stacy's house in mid-April). She said Brittney "seemed happy. She didn't seem like she was upset or anything." Tr. 212. Pittman was surprised by Brittney's demeanor. *Id.* Brittney "was almost bragging". *Id.* An objection was then sustained to Pittman's statement that Brittney's behavior made her doubt Brittney was telling the truth. Tr. 213-214.

Power was acquitted of the charges relating to events in February and March. R. 107-108. He was convicted only on the charge relating to the events in December, R. 107-108, where Brittney testified he had sexual intercourse with her on a hunting trip. Tr. 132-134. Other than her testimony, there was no physical, medical, or other evidence about this incident.

IV. SUMMARY OF THE ARGUMENT

This statutory rape prosecution was based solely on the slenderest of reeds: The uncorroborated testimony of a fourteen-year-old that she had sex with the defendant. Miss. Code Ann. § 97-3-69 "requires that the testimony of the prosecutrix must be corroborated by other evidence." ***Howard v. State,*** 417 So.2d 932, 933 (Miss. 1982). The Mississippi Supreme Court has held that corroboration is particularly required where the account of the rape is contradicted by other evidence. Here, the account of the rape was contradicted by the testimony of the defendant's wife that he was impotent due to pain medication he was

taking. The Mississippi Supreme Court has expressly recognized that testimony of incapacity serves to contradict the prosecutrix's account, requiring that her testimony be corroborated.

The corroboration must be of the "secret part of the crime," that the prosecutrix and the defendant had sexual relations. For instance, admissions by a defendant—in one case, that he was in "a hell of a fix" with the prosecutrix who was pregnant—are corroborative. The prosecutrix's condition at the time—that she was upset, or disheveled, or (in one case) was wearing the defendant's clothing in a locked house with the defendant when another witness arrived—can be corroborative. Her report can be corroborated by the fact that she made an immediate report to someone else.

Nothing remotely like the corroborative evidence recognized by the Mississippi courts is present in this case. The alleged statutory rape in the count of conviction, Count I, occurred in December of 2006. The sole evidence of the prosecutrix's condition was from March or April of 2007. From December of 2006, there is only evidence that the defendant and the prosecutrix were together, going hunting. The Mississippi Supreme Court has squarely held that the fact of the defendant and prosecutrix being alone together is not corroborative, because it does not corroborate "the secret part of the crime." It does not corroborate that the prosecutrix had sexual intercourse with anyone.

Further, the evidence of the prosecutrix's condition, even months later, corroborates nothing. Her sister-in-law testified that, at the time of the report to the police in April of 2007, the prosecutrix "seemed happy. She didn't seem like she was upset or anything" and she was "almost bragging." Tr. 212. The prosecutrix's mother testified that, in the Spring of 2007, the prosecutrix was "moody... mean to her brothers and sisters... seems kind of normal... just more often than usual, you know, a teenager would be." Tr. 111. None of this

is suggestive of a victim, and none of this bears the remotest resemblance to the sort of behavior the Mississippi Courts have recognized as corroborative of rape testimony.

Where, as here, there is *no* evidence in corroboration, there is a failure of an essential element of the state's proof, and (as in ***Howard*** and other cases), this Court reverses the conviction and discharges the defendant.

The trial court compounded error by admitting an out-of-court statement by the prosecutrix from months after the alleged statutory rape, in an apparent attempt to bolster her testimony. The inadmissible hearsay statement was the prosecutrix's own testimony about what she told her sister-in-law, months after the fact. The Mississippi Supreme Court has held admission of such statements under these circumstances to be reversible error.

V. ARGUMENT

A. WHERE THERE IS EVIDENCE CONTRADICTING A STATUTORY RAPE CHARGE, THE CHARGE MUST BE INDEPENDENTLY CORROBORATED.

Artis Power was convicted on Count I of the indictment for violation of Miss. Code Ann. § 97-3-65(1)(b), statutory rape of a child under the age of fourteen. R. 20, 107-108. A victim's uncorroborated testimony is not sufficient for a conviction where the testimony is contradicted by other evidence. ***Christian v. State***, 456 So.2d 729, 734 (Miss. 1984). This requirement of corroboration is statutory. "In order to affirm the conviction for statutory rape, Miss. Code Ann. § 97-3-69 (1972), requires that the testimony of the prosecutrix must be corroborated by other evidence." ***Howard v. State,*** 417 So.2d 932, 933 (Miss. 1982); ***see*** Miss. Code Ann. § 97-3-69 (1972) ("[N]o person shall be convicted upon the uncorroborated testimony of the injured female.").

In Artis Power's case, there was testimony (from Power's wife) that Power was impotent and therefore incapable of having sexual relations due to medication he was using.

Tr. 169-171. Testimony that the defendant was incapable of having sex was held to contradict the alleged victim's testimony of rape in ***Upton v. State,*** 192 Miss. 339, 339, 6 So.2d 129, 129-130 (1942), in which the court held the corroboration requirement was not met, and a conviction was therefore reversed.

The Mississippi Supreme Court's cases on the corroboration requirement for rape are confusing because the cases are very fact and record dependent, and the Court has tended not to explain how the facts in each case generated the particular result. At first glance, it seems difficult to reconcile some of these cases with the explicit statutory requirement of corroboration. As will be shown below, the cases divide into three groups: (1) Those where the testimony of the alleged victim is uncorroborated, but is not sufficiently contradicted by other evidence and a conviction therefore was upheld; (2) Those where the testimony of the alleged victim was corroborated and therefore a conviction was upheld even though the testimony was contradicted; and (3) Those where the testimony of the alleged victim was both contradicted and uncorroborated, and a conviction was therefore reversed.

The language the Mississippi appellate courts use—that corroboration "must be, not merely of incidental details, but of the commission of the prohibited act,"[3] for instance, on the one hand, or that "[i]t's the jury's duty to weigh conflicting testimony and witness credibility,"[4] on the other hand—is not particularly helpful to resolve whether a jury verdict is to be upheld or overturned. The limited usefulness of these generalities in understanding the results in these cases was recognized by Justice Griffith as long ago as ***Jones v. State,*** 155 Miss. 335, 335, 124 So. 368, 369 (1929), a statutory rape prosecution in which the Court

[3]***Howard v. State,*** 417 So.2d 932, 933 (Miss. 1982).

[4]***Watson v. State,*** 848 So.2d 203, 213 (Miss. App. 2003). ***Watson*** is discussed more fully, ***infra*** at 13.

explicitly noted the "hundreds" of cases in which the result seemed determined by whether "the particular court was controlled on the one hand by the rule that verdicts of juries are not to be reversed... and on the other hand by the cautionary duty that was emphasized more than 200 years ago... that in such cases as this 'the accusation is easily made, hard to prove, and harder to be defended and disproved by the party accused, although ever so innocent.'" In ***Jones,*** admissions by the defendant and the victim's condition at the time served to corroborate the charge and the conviction was affirmed. While these very general principles are starting points, they do not help an appellate court resolve the specific question of whether the statutory corroboration requirement in this particular case was met.

Resolving rape cases with corroboration questions presents several distinct issues: What will suffice to "contradict" an alleged victim's testimony? If the testimony is contradicted, what will suffice to corroborate it? Physical evidence (suggesting that there was no rape, or that the defendant was incapable of committing rape) and alibi evidence have been held sufficient to contradict the victim's testimony and require corroboration, while testimony from the defendant denying commission of the offense (standing alone) has not. Although the court's classic formulations of the corroboration requirement have required substantiation of the commission of the prohibited act *by the defendant*, this requirement has been loosened somewhat; proof that a rape or (with statutory rape charges) sexual intercourse occurred has sufficed to meet the corroboration requirement.

It is where there *is* corroboration that the resolution of the inconsistencies becomes a jury question. ***Blade v. State,*** 240 Miss. 183, 188-89, 126 So.2d 278, 280 (1961)(holding that corroboration made the question one for the jury, although the opinion explains neither the contradictions nor what corroborated the victim's account). The Court's language that

inconsistencies are properly to be resolved by a jury only apply when the victim's testimony is either not contradicted, or where it is corroborated.

Some cases are simple to categorize. Obviously, where the defendant has confessed to the crime, his own admission serves to corroborate the victim's testimony. ***See Knight v. State,*** 751 So.2d 1144, 1148 (Miss. App. 1999) (holding that admission by defendant corroborated victim's testimony); ***Smith v. State,*** 188 Miss. 339, 194 So. 922, 923 (1940) (admissions by defendant that he got the victim "in trouble," combined with her pregnancy and that they were alone together in his truck all served to corroborate the victim's testimony); ***compare Gillis v. State,*** 152 Miss. 551, 120 So. 455, 456 (1929) (on similar evidence, but lacking the admissions by the defendant, corroboration not established).[5] Where there was physical evidence of the rape (an 8-year-old had injuries consistent with rape and contracted a venereal disease), and nothing contradicted the victim's account, the lack of contradiction and the corroboration both resulted in an affirmance of a conviction for capital rape. ***Taylor v. State***, 744 So.2d 306, 312-13 (Miss. 1999); ***Gordon v. State,*** 977 So.2d 420 (Miss. App. 2008) (medical evidence of sexual assault corroborated victim's account); ***Withers v. State,*** 907 So.2d 342, 351-52 (Miss. 2005) (medical testimony that the twelve-year-old victim's condition was consistent with sexual activity, combined with testimony of others in the house that defendant locked himself in the bathroom with her, and victim's report to them of the rape all corroborated her testimony). Where the victim immediately reports the rape, and that report is consistent with her later account of the rape, that serves to corroborate her testimony. ***Green v. State***, 887 So.2d 840, 845-46 (Miss.

[5]Obviously, where there is no contradiction between the other evidence and the victim's story, and the victim's story is corroborated, then the conviction will be affirmed. ***Collier v. State,*** 711 So.2d 458, 462 (Miss. 1998); ***Lee v. State,*** 242 Miss. 97, 105-06, 134 So.2d 145, 148-49 (1961)

App. 2004); *see* ***Riley v. State,*** 797 So.2d 285, 288 (Miss. 2001) (additionally, other evidence corroborated the victim's account). This is particularly so where medical reports establish that her condition is consistent with rape. ***Magee v. State,*** 966 So.2d 173, 179-80 (Miss. App. 2007); *see* ***Watson v. State,*** 848 So.2d 203, 212-13 (Miss. 2003) (physical and mental condition of victim combined with her immediate report corroborated charge); ***Inman v. State,*** 515 So.2d 1150 (Miss. 1987) (medical testimony about victim having been beaten, requiring stitches, her immediate report of the incident, and the presence of sperm all corroborated her account of the rape); ***Goode v. State,*** 245 Miss. 391, 146 So.2d 74 (1962) (medical testimony combined with immediate outcry to corroborate victim's testimony); ***Dubose v. State,*** 320 So.2d 773, 774 (Miss. 1975) (medical testimony that there had been a rape combined with a suspicious statement by the defendant—denying that he had "bothered no woman" before he knew he was being charged—corroborated rape in spite of alibi). While an immediate report at least partially establishes corroboration, inconsistencies in the behavior of the victim do not require reversal in a case where there is proof of the defendant's fingerprints on the window to the victim's home, and where the defendant has the same blood type as that of semen taken from the victim (a blood type shared by only 7% of the population). ***Clemons v. State,*** 460 So.2d 835, 837-38 (Miss. 1984). When another witness to the rape corroborates the victim's account, the corroboration requirement is met. ***Brown v. State,*** 751 So.2d 1155, 1156 (Miss. App. 1999).

Where the defendant cannot point to any contradiction between the victim's testimony and other facts or testimony, there is no contradiction and the corroboration requirement does not compel reversal. ***Davis v. State,*** 920 So.2d 1228, 1230 (Miss. App. 2005). The contradiction shown must relate to the incident itself. ***Goss v. State,*** 465

So.2d 1079 (Miss. 1985) (testimony was corroborated, and alleged contradiction—that victim later accepted rides from defendant—did not relate to incident itself); ***see McKnight v. State,*** 738 So.2d 312, 315-16 (Miss. App. 1999) (admission by victim that she lied about being a virgin did not contradict her account of the sexual battery itself).

The Mississippi Supreme Court has not found that the testimony of the victim is contradicted where the only contradiction is between the testimony of the alleged victim and the defendant himself; in those instances, the Court has ruled that the question is one of credibility and for the jury to decide. ***Price v. State,*** 898 So.2d 641, 651 (Miss. 2005); ***Otis v. State,*** 418 So.2d 65, 67 (Miss. 1982). In ***Otis,*** the Court rejected the corroboration issue but reversed the conviction on other grounds. In dealing with corroboration, the court noted that there was no corroboration of the rape itself but "there were other facts surrounding the incident which had corroboration." ***Otis,*** 418 So.2d at 67. ***Otis*** makes an instructive comparison to ***Howard,*** decided the same year, in which the court cited the requirement of corroboration for statutory rape and reversed and discharged the defendant, citing the classic formulation of the corroboration requirement.[6] ***Allman v. State,*** 571 So.2d 244, 252 (Miss. 1990), like ***Price,*** involved contradiction between the account of a victim (who was ten) and the defendant's account. There was medical testimony corroborating that a rape had occurred, and the question was whether the jury believed the victim's testimony (that the defendant was the rapist) or the defendant's (that he was not). There is nothing remotely like the medical evidence in ***Allman*** in this case—there is nothing

[6]It is difficult to reconcile ***Price*** with the explicit statutory requirement of corroboration in Miss. Code Ann. § 97-3-69 (1972) and the holding in ***Howard,*** 417 So.2d at 933, that follows the statute's mandate. However, because Artis Power's case does not depend upon a conflict between his testimony and the victim's to establish a contradiction, this Court need not attempt to harmonize the statutory requirement and ***Price*** to decide this case. Because there was corroboration present in ***Otis*** ("other facts surrounding the incident... had corroboration."), that case does not control this one.

establishing that a child of such tender years had been sexually active at all, that would suggest that the victim's account of a rape was truthful. Put another way, there is nothing other than Brittney Stacy's testimony that she has had sexual relations at all.

Here, the clearest contradiction to Stacy's testimony is that Artis Power was impotent. The alleged rape occurred in December of 2006. Mrs. Power testified that in July of 2006, Power had fallen at work and seriously injured his back. Tr. 155-156. He took medication for seven months that caused him to be impotent. Tr. 169-171. In ***Upton***, testimony of physical incapacity, and the fact that the victim's conduct after the rape was not consistent with the charge that she had no injuries, and that the defendant had an alibi all resulted in a reversal of a conviction for forcible rape. ***Upton,*** 192 Miss. at 339, 6 So.2d at 130. A comparison of the facts here are illustrative. There was uncontradicted testimony of Power's impotence. Stacy did not say a word about the charge until the Spring of 2007, months later. There was no medical proof that she had been sexually active, or any other proof to that effect. Her sister-in-law testified that when Brittney reported the alleged crime, she "seemed happy. She didn't seem like she was upset or anything." Tr. 212. The sister-in-law was surprised by Brittney's demeanor, and said Brittney "was almost bragging". *Id.* All of this testimony, particularly the evidence of impotence, which was recognized by the Mississippi Supreme Court in ***Upton*** as requiring corroboration, serves to contradict Stacy's account and require that in some way it be corroborated.

When corroboration of the prosecutrix's testimony is required, it "must be, not merely of incidental details, but of the commission of the prohibited act," and, furthermore, "[m]ere opportunity creating a possibility is not enough of itself." ***Yancey v. State***, 202 Miss. 662, 668, 32 So.2d 151, 152 (Miss. 1947) (citing ***Hollins v. State***, 128 Miss. 119, 90 So. 630 (Miss. 1922)); ***Gillis v. State***, 152 Miss. 551, 120 So. 455, 456 (Miss. 1929); ***Grogan***

v. State, 118 So. 627, 627 (Miss. 1928). The standard set forth in *Yancey* was followed by the Mississippi Supreme Court in *Howard v. State,* 417 So.2d 932, 933 (Miss. 1982), in which the Court reversed a statutory rape prosecution where there was evidence to support that the victim had had sex—she became pregnant—but no evidence she had sex with the defendant. In other words, the fact that the defendant and the victim were together—mere opportunity—is insufficient. What must be corroborated is that the defendant himself had sexual relations with the victim.

In *Woods v. State,* 973 So.2d 1022 (Miss. App. 2008), the Court of Appeals was faced with a conviction for statutory rape. Two girls had written notes at school shortly after the incident that the defendant, a fifty-year-old, had sex with both of them. They told the police this, and testified before the grand jury. At trial, one testified to the statutory rape, and the other denied it had occurred. *Woods v. State,* 973 So.2d at 1025-26. The prosecution questioned the girl who denied rape about her grand jury testimony, in which she had said that the rape had occurred. As the Court of Appeals stated, this use of the grand jury testimony served to bolster the other girl's account of the rapes. *Id.* Thus, although the rape was sharply contradicted by other testimony, it was corroborated. The Court of Appeals cited as corroborating that the girls were without a doubt present in the home at the time of the alleged incident, and the note written between the girls describing the statutory rape, written five days after the incident. *Woods v. State,* 973 So.2d at 1031-1032.[7]

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[7]The presence of some evidence in corroboration, noted in the text preceding this footnote, makes Woods clearly distinguishable from the case at bar. In *Woods*, the Court of Appeals closely divided, with Judge Roberts (joined by four judges) writing an eloquent dissenting opinion that the victim's testimony was "totally uncorroborated....discredited, impeached, and contradicted by other credible evidence" to the point that the verdict was contrary to the great weight of the evidence. *Woods*, 973 So.2d at 1032-34. While it is questionable whether

Here, there is nothing like the corroboration offered in ***Woods***, where the girls had both written about the incident in a note very shortly after it, and the girl who at trial denied the rape at trial was proved to have testified in the grand jury that it had occurred. In Artis Power's case, there is only the testimony of Brittney Stacy.

Evidence that would corroborate a rape includes "the victim's physical and mental condition after the incident, as well as the fact that she *immediately* reported the rape." ***Christian***, 456 So.2d at 734 (emphasis supplied). In this case, there was no proof whatsoever of the victim's condition in December (or even January) around the time of the incident. There was only two bits of testimony about her condition, both from the spring of 2007, months thereafter. First, her mother testified under direct examination by the prosecutor:

> Q. Okay. Taking you back into the spring of 2007, did you begin to hear or notice anything different about your daughter?
>
> A. She was moody, you know, just kind of like she would be—be mean to her brothers and sisters, you know, that seems kind of normal, but it was like—I don't know. Just more often than usual, than, you know, a teenager would be.

Tr. 111 (lines 7-14). Testimony that months later she was "mean to her brothers and sisters" in a way that was "kind of normal... [j]ust more often than usual..." hardly suggests any kind of trauma and is not at all connected in time to the purported rape. The victim's sister-in-law also testified to Brittney's behavior in the Spring of 2007, testifying that when she was first interviewed by law enforcement she "seemed happy. She didn't seem like she was upset or anything." Tr. 211-12.

Woods follows this Court's case law going back generations on these issues, the problem of squaring ***Woods*** with controlling precedents does not arise here because of the corroboration in ***Woods***.

Compare this to the evidence in ***Christian***, where the victim "was shaking and crying uncontrollably" when her boyfriend was with her immediately after the rape, and then was taken immediately to a medical clinic, where a deputy described her as "hysterical" and her mother said she was sobbing. ***Christian***, 456 So.2d at 732; ***see Watson v. State***, 848 So.2d at 212-23 (physical condition of victim corroborated rape charge).

In another case involving a statutory rape conviction, the defendant's wife (Mae Ella) became suspicious because the victim—an eleven-year-old—was acting strangely, and further, when the wife came home she found the victim wearing the wife's clothing and the defendant wearing only boxer shorts inside a locked house. These facts led Mae Ella to ask the victim what had happened, and the victim told her about the rapes. This combined with medical testimony that the victim was sexually injured corroborated the rape. ***Lee v. State***, 910 So.2d 1123, 1125, 1129 (Miss. App. 2005).

In ***Golding v. State***, 144 Miss. 298, 298, 109 So. 731, 731 (1926), the corroboration was statements by the defendant that he and the victim were "keeping company," and, then, in connection with her pregnancy thereafter, that he was "in a 'hell of a fix.'" This all served to corroborate the testimony of statutory rape. ***Golding*** has been described as involving "a [defendant's] statement virtually admitting his guilt." ***Gillis v. State***, 152 Miss. 551, 551, 120 So. 455, 455 (1929).[8] In ***Gillis***, the Court held that a victim's own statement alone could not corroborate her testimony. The fact that the victim and the defendant were alone together was insufficient to corroborate that they had had sex. Finally, the fact of her having a child that, when produced in court at 4 ½ months of age purportedly resembled the defendant, was insufficient to prove that the defendant had sex with the victim. In its

[8]***Davis v. State***, 406 So.2d 795, 798, 801 (Miss 1981), in which two confessions by the defendant to forcible rape were put in evidence.

holding, the Court quoted ***Hollins***, 128 Miss. at ___, 90 So. 630 at 632, which has the clearest formulation of what must be corroborated:

> The secret part of the crime—that element which, in the nature of the things, in a great majority of cases, no one else than the guilty parties would know anything about—is the element as to which she must be corroborated...Those elements of the crime which are susceptible ordinarily of proof by other witnesses than the guilty parties require no corroboration; and this principle applies to all the elements of the crime... except that of carnal knowledge; as to that, and that alone, the evidence of the injured female must be corroborated...

This "secret part of the crime" language was also quoted and followed by the court in reversing a statutory rape prosecution in ***Howard,*** 417 So.2d at 933. What this means is that corroboration must show that the defendant had sex with the victim. In ***Hollins***, the only issue on which there was no corroboration was the victim's testimony about her age; the court held corroboration was not required on that issue. ***Hollins,*** 417 So.2d at 632.

The principles stated in ***Hollins*** were reaffirmed in ***Yancey v. State,*** 202 Miss. at ____, 32 So.2d at 151-152, which was also a statutory rape prosecution:

> Under the statute covered by the indictment, corroboration must be, not merely of incidental details, but of the commission of the prohibited act. Even though circumstances and admissions may be sufficient to this end (as in ***Jones v. State***, 155 Miss. 335, 124 So. 368; ***Smith v. State***, 188 Miss. 339, 194 So. 922; ***Ferguson v. State***, 71 Miss. 805, 15 So. 66, 42 Am.St.Rep. 492; ***Golding v. State***, 144 Miss. 298, 109 So. 731) it remains true that corroboration must be of the secret part or gist of the crime. ***Hollins v. State***, 128 Miss. 119, 90 So. 630; ***Gillis v. State***, 152 Miss. 551, 120 So. 455. Mere opportunity creating a possibility is not enough of itself. ***Gillis v. State, supra; Grogan v. State***, 151 Miss. 652, 118 So. 627.

Because it is the act itself that must be corroborated, it is insufficient to show that the defendant and the victim were together at about the time the victim testified they had sex. ***Grogan v. State,*** 151 Miss. 652, 118 So. 627 (1928). Existence of corroboration surrounding the event has been held insufficient where the only testimony about the act itself was only testimony by the victim. ***Howard***, 417 So.2d at 933; ***Johnson v. State,*** 213 Miss. 808, 809, 58 So.2d 6, 7 (1952) (reversing as against the great weight of the evidence a

conviction where there was no corroboration of the act, and the victim's behavior was not consistent with her claim of forcible rape).

Here, the testimony was:

1) That the alleged victim and the defendant were together at or about the time the victim says she had intercourse. This testimony came through Mr. Blalack, who testified 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;

2) That the alleged victim did not seek medical attention or mention anything about having sex with the defendant at the time (December of 2006) or to anyone at all until well into the Spring of 2007. Tr. 146-148. This meant there was no proof that at the time of her alleged rape, she had had sex with anyone at all.

3) That she was moody and picked on her siblings a little more than usual during the Spring of 2007, months after the alleged rape. Tr. 111. This bears no resemblance to the corroborative proof in cases where the victim's agitation at the time of the alleged rape was proof of what supported that a rape had occurred.

Beyond this evidence, 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. Other than her own uncorroborated testimony that she had sex with Artis Power, for all the record shows, the alleged victim was a virgin. She was not shown by physical evidence to have had sex either in December of 2007 or at any time thereafter. This means that the corroboration was even

weaker than that 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,*** 417 So.2d at 933. Chief Justice Patterson wrote that proof of the pregnancy "fails, however, to establish that the defendant was the person with whom she engaged in sex." Because of this failure of proof, the ***Howard*** court reversed and ordered the defendant discharged. ***Id.***

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. at 668, 32 So.2d at 152. 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,*** 128 Miss. at 119, 90 So. at 632. "[C]orroboration must be, not merely of incidental details, but of the commission of the prohibited act." ***Yancey,*** 202 Miss. at 668, 32 So.2d at 152. 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.

The testimony of her condition months later is not corroborative, both because it is so separated in time, and because it does not support a conclusion that she was a victim—her sister-in-law described her when she first reported to law enforcement that she "seemed happy. She didn't seem like she was upset or anything" and "almost bragging". Tr. 211-12.

Her mother described her about the same time—the Spring of 2007—as "moody, you know, just kind of like she would be—be mean to her brothers and sisters, you know, that seems kind of normal, but it was like—I don't know. Just more often than usual, than, you know, a teenager would be." Tr. 111. This testimony of her behavior months thereafter corroborates nothing. It is not the sort of behavior immediately after an incident that corroborates the alleged victim's version of the incident. The only testimony from the time of the alleged crime—that the victim and the defendant were together—this Court has repeatedly found insufficient. There was no testimony about how she was at the time of the alleged crime, and the testimony from months later does not suggest her story is true. There is nothing else in the record. There is, therefore, a complete failure of evidence of corroboration.

There are two standards on which the government's proof is evaluated. One asks whether the prosecution made its proof at all—was there a failure of some element of the prosecution's case, requiring that a directed verdict be granted. The other asks whether the proof made was so weak, or there were questions of truthfulness that the Court must conclude that the jury's verdict was against the great weight of the evidence. In this case, both kinds of issues were preserved below; at the close of the state's case, the defense moved for a directed verdict, Tr. 149, and raised that issue again in its post-trial motion, R. 113-114. Also, in the post-trial motion, the defense raised that the verdict was against the great weight of the evidence. R. 113-114.

One difference between these two standards is that, where the Court decides there was a failure of proof on an essential element, Double Jeopardy prohibits a retrial and mandates that the proceedings against the defendant be at an end. ***Burks v. U.S.***, 437 U.S. 1, 11 (1978)("The Double Jeopardy Clause forbids a second trial for the purpose of

affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. The Clause does not allow 'the State... to make repeated efforts to convict an individual for an alleged offense...."); ***Roebuck v. State,*** 915 So.2d 1132 (Miss. App. 2005) (following ***Burks*** and holding that exclusion of an essential element of the state's case on appeal required the court reverse and render because Double Jeopardy barred a retrial). This logic has caused the Mississippi appellate courts to consistently reverse and order the defendant discharged when there is a failure of proof of corroboration in a rape prosecution. In ***Yancey,*** there was no proof to corroborate the testimony of the alleged victim to a statutory rape charge. There being no corroboration, the Court reversed and ordered the defendant discharged. ***Yancey***, 202 Miss. at 668, 32 So.2d at 152. In ***Howard,*** where the alleged victim reported the alleged statutory rape over a month after it supposedly occurred, and the victim's testimony was the only evidence against the defendant, there was a failure of evidence of corroboration (even though the victim became pregnant) because no evidence pointed toward the defendant himself. The Court therefore reversed and ordered the defendant discharged. ***Howard,*** 417 So.2d at 933. In ***Gillis,*** the Court held that the defendant "was entitled to a peremptory instruction" on a statutory rape charge and therefore reversed and discharged him. ***Gillis,*** 152 Miss. at 551, 120 So. at 456 (the pregnancy of the victim and the fact that they were alone together in itself did not suffice to corroborate her testimony).

Given the utter failure of proof on the issue of corroboration and the mandates of the Mississippi Supreme Court that, where such proof fails, the Court must reverse and discharge the defendant, the Mississippi appellate courts must reverse the conviction of Artis Power and discharge him.

III. WHETHER THE ADMISSION OF HEARSAY TESTIMONY BY PROSECUTRIX BRITTNEY STACY WAS REVERSIBLE ERROR

At the conclusion of Brittney Stacy's direct testimony, she described the sexual encounters she claims to have had with Artis Power. Tr., 136-138. The prosecution asked, "Did you tell anybody about all this?" Tr. 138. Defense counsel objected to this testimony as hearsay, but was overruled. ***Id.*** Stacy testified she told her sister-in-law. She said she wanted to tell her sister-in-law Allison Pittman what happened, changed her mind, and then, Pittman "made me tell her. And I just told her that Frankie had had sex with me." Tr. 138. According to Stacy, Pittman then passed this information along to her husband, and eventually law enforcement was informed of Stacy's accusation as well. Tr. 138-139.

A prior statement by a witness is definitely hearsay. "[A]n out of court statement made and repeated by a witness testifying at trial is hearsay." Miss. R. Evid 801, comment; ***see*** Miss. R. Evid 801(c) (defining hearsay as any statement other than testimony at trial); Miss. R. Evid 801 (d)(1) (defining limited non-hearsay status for consistent statements – only to rebut allegation of recent fabrication, or for identification purposes).[9] The Mississippi Supreme Court has held that a prosecutrix's out-of-court statements in a statutory rape trial are inadmissible hearsay, and that the admission of such testimony is prejudicial reversible error. ***Leatherwood v. State***, 548 So.2d 389, 401 (Miss. 1989); ***see Veasley v. State***, 735 So.2d 432, 436 (Miss. 1999) (ruling admission, if error, would be harmful, and reversing for findings as to whether statement could be admitted under tender years hearsay exception). The Supreme Court's opinion in ***Leatherwood*** works through every possible exception for

[9] Miss. R. Evid. 801(d)(1)(B) defines a prior *consistent* statement as non-hearsay under very limited circumstances—where the statement is offered to show motive, or to rebut an infererence of recent fabrication, for instance. Such statements may not be introduced "merely to bolster a witness's credibility, but only to refute an alleged motive" to lie or recent fabrication. ***Woods v. State***, 973 So.2d at 1028 (Miss., 2008), citing ***Tome v. U.S.***, 513 U.S. 150, 157 (1995).

such testimony and rules that, where the statements are made after the alleged rape, they do not qualify for admission. The Court analyzed and rejected admission of such statements under Miss.R.Evid. 803(2) (Excited Utterance), 803(3) (Then Existing Mental, Emotional or Physical Condition), and 803(24) (the residual exception). ***Leatherwood***, 548 So.2d at 399-400. As in ***Leatherwood,*** the statements here cannot be said to be an excited utterance, or a statement of "then existing mental... condition"—both of which require the statement be made while the events described are ongoing. The statement Stacy made occurred months after the December incident. According to ***Leatherwood***, the passage of several weeks between the alleged sexual contact and the prosecutrix's accusations results in inadmissibility under the 803(2) excited utterance exception and also the 803(3) then-existing mental state exception to the hearsay rule.

The only other available exception is the tender years exception. A child of over twelve is not presumed to be "of tender years." ***Veasley,*** 735 So.2d at 436-37. At the time of her hearsay statement, Stacy was fourteen years old. Tr. 130. Where an attempt is made for admission under the tender years exception, the court must hold a hearing outside the presence of the jury to make a series of findings. The first is whether Stacy is in fact of tender years. Then, the court must find that "The time, content, and circumstances of the statement provide substantial indicia of reliability...." Miss. R. Evid. 803(25); ***see Veasley,*** 735 So2d at 436 (quoting rule and requiring these findings). Where a child is chronologically older than twelve, the presumption is that the child is no longer of tender years. ***Veasley,*** 735 So.2d at 436. The burden then shifts to the party advocating admission – because the witness is no longer of tender years. That is, the state must show that the child, although older, is mentally less than fourteen. Miss. R. Evid. 803(25). Here, there is not a hint of anything in the record to suggest that Brittney Stacy's maturity was less than her

chronological age. While ***Veasley*** establishes that the trial court must make a finding, there must be facts in the record on which a finding can be made. Here, because no facts whatsoever support a finding that her maturity was less than her chronological age, admission of the statement was error.

While the standard of review for error for admission of evidence is abuse of discretion,[10] in ***Leatherwood,*** the Court made clear it would reverse as an abuse of discretion where a statement by the alleged victim in a rape case was admitted where the statement fit within no hearsay exception. ***Leatherwood***, 548 So.2d at 400. In ***Veasley,*** the Court made clear that admission was abuse of discretion if the trial court did not make the appropriate findings for admission under the tender years exception. ***Veasley***, 735 So.2d at 435.

To apply the harmless error analysis, the Court must determine whether the weight of the evidence against the defendant is sufficient to outweigh the harm done by the admission of the improper evidence. ***Fuselier v. State,*** 702 So.2d 388, 391 (Miss. 1997). Here, the only evidence against Power was Stacy's testimony combined with her out-of-court statement. This case is squarely identical to ***Veasley***, where the only evidence against the defendant consisted of her testimony and her out-of-court statements, and the Mississippi Supreme Court held that the erroneous admission of some out-of-court statements served only to bolster the prosecutrix's testimony, and therefore could not have been harmless. ***Veasley***, 735 So.2d at 437.

Brittney Stacy's testimony is the only direct evidence of sexual contact between herself and Artis Power. Power's conviction on Count I of the indictment for violation of Miss. Code Ann. § 97-3-65(1), is based solely on Brittney Stacy's testimony, entirely uncorroborated by any physical evidence or medical opinion. The admission of the hearsay

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[10]***Chandler v. State,*** 946 So.2d 355, 364 (Miss. 2006).

testimony, the essence of which is "I told my sister-in-law, and she believed me, and so did her husband, and so did the police," served only to bolster Brittney Stacy's testimony, and it does not fall under any available hearsay exception. The slender reed on which this conviction rests is shown by the acquittals on counts II and III. The jury obviously had doubts about Brittney Stacy's testimony. The hearsay testimony bolstered her version of the story and its admission undoubtedly prejudiced Power.

The analysis in *Veasley* compels an identical result here: The admission of this evidence could not be said to be harmless error, and this case must be reversed because of its admission.

CONCLUSION

The utter lack of corroboration combined with the evidence contradicting the testimony of Brittney Stacy mandates that this Court reverse and discharge Artis Power.

With that holding, this Court need not reach the other error of the trial court, the admission of inadmissible hearsay. However, but for the lack of corroboration requiring discharge of Artis Power, the admission of that hearsay would require a reversal for a new trial.

Respectfully submitted, this 23rd the day of June, 2009.

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CERTIFICATE OF SERVICE

I, T.H. Freeland, IV, attorney for appellant, Artis F. Power, certify that I have this day filed the foregoing with the Clerk of Court of the Supreme Court of Mississippi, and have served a copy of the above and foregoing by United States Mail with postage prepaid on the following persons at these addresses:

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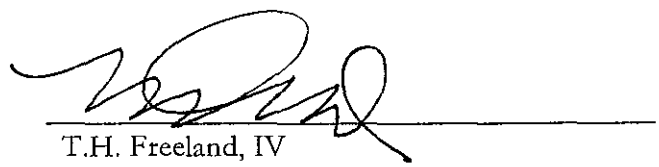
This the 23rd day of June, 2009.



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