

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATE OF MISSISSIPPI

Appellee

v.

2009-KA-0420-SCT

JAMES DAVID POOLE

Appellant

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

PROPOSITION I: The Circuit Court correctly denied Poole's Motion for Directed Verdict at the close of the State's evidence and Poole's Motion for Judgment Notwithstanding the Jury's Verdict as to Count II.

PROPOSITION II: The Circuit Court correctly denied Poole's Motion for New Trial.

STATEMENT OF THE CASE

On or about March 14, 2008, James David Poole was indicted on two counts of wilfully, unlawfully and feloniously having sexual intercourse with Z.B., a child under the age of fourteen (14) and who was 36 or more months younger than the Poole and was not Poole's spouse. (C.P. 10) At the time of the offenses Poole was 18 years of age or older. (C.P. 10) Count I of the indictment was an offense occurring between the 1st day of May, 2003 and the 31st day of May, 2003. (C.P. 10) Count II of the indictment was in offense occurring between the 1st day of October, 2000 and the 14th day of September, 2002. (C.P. 10) Poole was tried by a jury and was found guilty of the charge of Count II, Statutory Rape. (C.P. 1) On February 27, 2009, Poole was sentenced to serve a term of twenty (20) years with ten (10) years suspended in the custody of the Mississippi Department of Corrections. (C.P. 1) Poole was further sentenced to Post Release Supervision upon release from incarceration for a period of five (5) years. (C.P. 1)

STATEMENT OF THE FACTS

Investigator Bruce Address with the Amory Police Department testified that on January 25, 2005, he became involved in the investigation involving the statutory rape of Zaran Bridges by James Poole. (Tr. 62) He testified that Poole's date of birth was November 11, 1971. (Tr. 62) He further testified that during the years 2001 and 2002, the Bridges family lived at 30037 Dryden Lane in Wren, Mississippi. (Tr. 63) Address testified that the Bridges family lived at 100 Eighth Avenue South in Amory during May of 2003. (Tr. 63)

Janet Bridges testified that she is the mother of Zaran Bridges, who was, at the time of trial, 18. (Tr. 70) Ms. Bridges testified that she began dating Poole in 1999, and that he moved in with her and Zaran at the end August of 1999. (Tr. 72) Ms. Bridges testified that Zaran was a typical child of age eight when Bridges moved in with them. She sang, danced played with friends in the neighborhood. She was bubbly and did wonderfully in school. (Tr. 72) Ms. Bridges testified that after Poole moved in, Zaran's demeanor changed. She became more shy and withdrawn and began to have discipline problems. (Tr. 72) Zaran liked Poole and he played on the trampoline in the pool with her. (Tr. 72) Poole's son, Jamie, who was three years younger than Zaran, moved in with them during that time due to discipline problems and hyperactivity. (Tr. 73)

On October 31, 2000, Janet and Zaran, along with Poole and his son Jamie moved to Wren, Mississippi together. (Tr. 73) Ms. Bridges testified that she worked long hours at United Furniture, working til 6:00 or 7:00 on Friday evenings, and sometimes longer if she was going to have to work on Saturdays. (Tr. 73) Ms. Bridges testified that Poole worked at Lowe Ford and then at Larry Clark Chevrolet. She testified that Poole had set hours and that he would pick up

the children after work and keep them at home while she was away. (Tr. 74) Ms. Bridges testified that she noticed that there were a lot of nights when Poole said that he had to go and talk to Zaran when she went to bed. (Tr. 74-75) Zaran began having a difficult time going to sleep. This was unusual for Zaran, who had always gone to sleep when put in bed. (Tr. 75) Ms. Bridges testified that she began noticing the changes in Zaran's behavior and her sleep difficulties after they moved to Wren. (Tr. 75)

Ms. Bridges testified that when she asked Poole what Zaran needed to talk about after she went to bed, he told her it was "just school and stuff." (Tr. 75) Ms. Bridges testified that she did not think anything was going on, but that looking back, she should have seen a red sign. (Tr. 76)

Ms. Bridges testified that her mother had an aneurism on February 9, 2002 and then died on March 3, 2002. (Tr. 76) During the month her mother was sick, Ms. Bridges went every night after work to see her mother. The family rotated caring for their mother, and since her sister's in law stayed with her in the day because they did not work, Ms. Bridges stayed with her mother at night. (Tr. 76) During the time that Ms. Bridges was caring for her mother, Zaran was at their mobile home with Poole and Jamie. (Tr. 76) After her mother died, Ms. Bridges noticed a changed in Poole. He would not sleep in the bedroom anymore and he said that he back hurt. Ms. Bridges testified that he slept on the sofa. She did not know if he stayed on the sofa, though, because she was taking prescription drugs at bedtime to help her deal with the loss of her mother. (Tr. 77) Mr. Poole was sleeping on the sofa during this time. (Tr. 78) Poole told her that he was going to leave, and then he said that they would work it out. (Tr. 78)

Ms. Bridges testified that she found another house in Amory and Poole suggested that they should go and fix up the house and so they went and worked on the house. (Tr. 78) Ms.

Bridges testified that she thought everything was fine. However, Poole went away for a weekend and when he came back, he was a different person. He told Ms. Bridges that he was leaving.

(Tr. 78) He became colder to everyone. He did not talk. One Saturday, Ms Bridges went to get some things and Poole told her that if he was not there when she got back, he was going riding on his motorcycle. He did not come back that night. (Tr. 78) The next day she came in the house after taking her sister somewhere. Poole was there and met her at the door with an envelope with a letter in it. (Tr. 78-79) Poole told her he was leaving and that ended their relationship. (Tr. 79)

Ms. Bridges testified that after Poole left, Zaran began to get angry. One night Zaran was standing at the door and Ms. Bridges asked her what was wrong. Zaran "went beserk," and started hitting, kicking and punching. (Tr. 79) There were days when she did not want to go to school. There were days when she had headaches and days when she had rages. (Tr. 79) Ms. Bridges testified that she had Zaran assessed and sent her to Parkwood in Olive Branch. (Tr. 79-80) Zaran was there for two weeks. She continued to see one of the doctors monthly. They continued changing Zaran's medicine and the only thing that seemed to work caused her to gain weight. (Tr. 80) They changed her medicine again and it got milder. Zaran refused to go back to her school in the fall. (Tr. 80)

Through a Christian counselor, Ms. Bridges found a church run and supported children's home in Eldridge, Alabama and sent Zaran there. The school had a routine and Zaran met new friends and her natural personality began to return. Ms. Bridges testified that she was able to bring Zaran home for a visit once a month. (Tr. 80) While Zaran was at the children's home, in the fall of 2004, Zaran called her mother and mentioned that she needed to tell her mother something. (Tr. 80) Zaran mumbled and said something about Poole. Ms. Bridges asked if

Poole had contacted her and Zaran said, "No, Mama, I'll talk to you later." (Tr. 80) The next time Zaran visited, Ms. Bridges asked her what happened. Zaran told her, "Never mind. It's ok." (Tr. 81)

Zaran came back home to stay at Christmas of 2004. (Tr. 81) Then, in January of 2005, when Ms. Bridges and Zaran were going to Wal-Mart, Zaran threw herself on the floorboard of the car and began crying "It's him, it's him. Mama take me home." Zaran was hysterical and Ms. Bridges took her home. She asked Zaran what was going on, and Zaran replied, "That was his truck." Ms. Bridges asked what was wrong and Zaran told her what had occurred while Ms. Bridges had been taking care of her mother in February and March of 2002. (Tr. 81.) The next Monday morning, Ms. Bridges contacted Investigator Bruce Andress at the Amory Police Department and filed a report. (Tr. 81)

On cross examination Ms. Bridges reviewed her statement and corrected her testimony to state that the phone call from Zaran was in June of 2004 rather than in the fall, and that Zaran did tell her about that Poole masturbated against her leg and fondled her. (Tr. 85) Zaran would not explain or talk further about the phone call after she came home and Ms. Bridges took no action at that time. (Tr. 85)

Zaran Bridges testified that she was born November 18, 1990, and that she was 18 years old at the time of trial. (Tr. 105) Zaran testified that Poole's inappropriate behavior toward her began when she was a child and would go to get in bed with her mother after having a nightmare. Poole was sleeping in the same bed with her mother. While in the bed, she felt something between her legs, but did not know what it was. (Tr. 107) Zaran testified that one night after she had gone to sleep in her bunk bed, Poole came in her room. She testified that there was a lot of

wrestling around. She woke up and he was about to leave the room, and there was something on her leg. Zaran testified that Poole told her that it was a dream or a nightmare of something.

Zaran testified that she remembered feeling something and Poole told her it was imaginary. She got up and there was something white on her leg. When she was 9 or 10 she did not know what it was, but she testified that now she knew that it was semen. (Tr. 108) Zaran testified that during the time Poole did things to her, her mother was sound asleep and not there because she worked long hours. (Tr. 108)

Poole told her that this stuff was normal and that every father did this. (Tr. 108) Zaran testified that since she had never had a father figure she didn't know any better. (Tr. 109)

Poole's inappropriate behavior with Zaran worsened after they moved to Wren. Zaran testified that Poole called it playing. (Tr. 109) Zaran testified that she thought it was normal and that she had learned to trust Poole. (Tr. 109) At the house on Meadow Wood, Poole began to feel around her breasts and her vagina. (Tr. 110) After the family moved to Wren, Poole began to penetrate her vagina with his fingers. (Tr. 110) Zaran testified that Poole began to touch her with his penis and to insert the tip of his penis into her vagina. (Tr. 111) Zaran testified that eventually he put his penis all the way in to her vagina and that there was a lot of bleeding. She testified that it hurt and she asked him to stop and he wouldn't. (Tr. 111) Zaran testified that she tried to get away and he held her down. (Tr. 112) Zaran testified that she began to figure out that this was not something a father would do, that a father wouldn't hurt someone. (Tr. 112) She testified that she then began to start saying no and asking him to stop. (Tr. 112) Poole then told her that he had killed someone and told Zaran how he had done it. He told her that if she ever said anything he would kill her and her mom. (Tr. 112)

Zaran testified that if her mother was asleep in her mother's room, then these things would happen in Zaran's room. If her mother was not home, it would be anywhere in the house. (Tr. 112) Zaran testified that Poole turned the lock on Jamie's door so that it could be locked from the outside and he would lock Jamie in his room and tell him if he got off his bed, a monster would come and get him. (Tr. 113) If her mother was at home then Poole would come in her room around 9:30 or 10:00 after her mother and Jamie had gone to bed. (Tr. 113)

Zaran testified that after they moved back to Amory, she and Jamie had rooms upstairs and Poole and her mother had a room downstairs. (Tr. 114) Zaran testified that she began to tell him "no" and that he would just go back downstairs because she and Jamie were upstairs. (Tr. 114)

Zaran testified that some time after Poole moved out something happened. She could not remember the date, but thought that it was around May because she was wearing shorts. She testified that she was at the house on the porch with her Mom's friend, David Van. (Tr. 114) Poole drove up and Van left because he did not like to be around people. (Tr. 114) Poole told Zaran that he just wanted to see what they had done to the house and he wanted to talk to Zaran and her Mom. (Tr. 114) Zaran testified that she didn't know why she let him in the house. She showed him the house and when they got upstairs, he raped her, holding her face down in the carpet by her hair. Zaran testified that his penis was in her vagina. Zaran testified that she was 13 years old at the time. (Tr. 115)

Zaran testified that she had a lot of anger problems and rage resulting from being raped by Poole. She testified that she put her hand through a plate glass window and required a five hour surgery. She also began cutting herself. (Tr. 116) Zaran testified that she was angry

because she felt guilty. She thought that what had happened was her fault and she did not fully understand it. (Tr. 116)

Zaran testified that her housemother at school had noticed that she was different and called her in to talk. Zaran told her about being raped by Poole and her housemother made her tell her mother. Zaran testified that she did not want to tell her mother everything over the phone and that she just told her that some stuff had happened. (Tr. 117) Zaran stated that she saw Poole once after that, in the parking lot at Wal-Mart. Zaran testified that she remembered going to the floorboard and crying because she did not want him to see her. (Tr. 116) After seeing Poole in his truck at Wal-Mart, Zaran told her mother everything that had happened. (Tr. 117) She testified that her mother kept talking to her after the incident at Wal-Mart and that was when she told her everything. (Tr. 118)

On cross examination Zaran testified that she told the forensic interviewer who interviewed her in January of 2005 that Poole had "popped her cherry." She testified that it hurt and it bled a lot. Zaran testified that Poole told her he was "too big her her" and that afterwards he told her to "take a shower." (Tr. 122) Zaran testified that the statement she gave to the forensic interviewer was wrong where it said that Poole raped her in December of 2004 when he came by to see what they had done to the house. Zaran testified that it happened in April or May of 2004 after Poole had moved out in September of 2002. (Tr. 131)

Zaran testified that she did not remember calling Poole to come and see her when she had her hand surgery or at any other time. (Tr. 133) She did remember going to his house for a children's party, but said that she did not know that Poole was there that day. (Tr. 132)

Zaran testified that the inappropriate sexual contact by Poole began when she was 8 or 9

and continued until she was almost 12. She testified that she was interviewed by the forensic interviewer, Mrs. Floyd, when she had just turned 14. Zaran testified that she was 18 at the time of trial. (Tr. 139)

Dr. James Patrick Chaney testified for the defense. He testified that he examined Zaran Bridges on January 7, 2005. (Tr. 148) Dr. Chaney testified that he conducted a general physical exam and a pelvic exam. He found that the hymen was intact, but that Zaran's vagina easily admitted the pediatric speculum he used. Dr. Chaney testified that he performed a PAP smear on Zaran that it showed findings of human papilloma virus which is a sexually transmitted disease. Dr. Chaney testified that an intact hymen would suggest that penetration had not taken place but that it did not preclude the possibility of penetration having taken place, at least partially. (Tr. 151) Dr. Chaney further testified that it is possible for the penis to cause bleeding of the female genitalia without rupturing the hymen. (Tr. 152) Dr. Chaney testified that there is a lot of variation from individual to individual as to the size of the penis and the vagina and that there could be partial insertion without rupturing the hymen. (Tr. 153) Dr. Chaney testified that the urethra could be injured and bleed during sexual intercourse. (Tr. 153) He further testified that the human papilloma virus present in Zaran's PAP smear is consistent with some type of sexual activity. (Tr. 153)

Anita Haynes testified for the defense that she has known Poole since 1997 or 1998. (Tr. 158-9) She testified that she had met Zaran Bridges twice and that Zaran began calling her house asking for Poole sometime in 2000 or 2002. Haynes testified that Poole was living with her daughter at the time and that they had a trailer behind her house. She testified that Zaran was crying when she called. She testified that she would give the messages to Poole. (Tr. 160) Ms.

Haynes testified that she and Poole pulled up to the Bridges' house and that Zaran came out to talk to Poole and seemed upset because she had a fight with her mother. (Tr. 162) She also testified that Zaran came with her mother to a Premier Jewelry party given by her daughter Candy in 2002. Haynes testified that Zaran and Poole talked at the party. (Tr. 163)

SUMMARY OF THE ARGUMENT

The Circuit Court correctly denied Poole's Motion for Directed Verdict at the close of the State's evidence and Poole's Motion for Judgment Notwithstanding the Jury's Verdict as to Count II. The evidence clearly established that Poole was more than 36 months older than Zaran that she was younger than 14 when she was raped by Poole. Further, the evidence showed that while Poole lived in the house with Zaran and her mother, he cultivated an inappropriate relationship with Zaran. Janet Bridges testimony also establishes that Zaran and Poole were often alone together during this time period. Bridges testified that Zaran told her about the fondling and then under great stress told her mother about the rapes by Poole. Zaran's testimony establishes that between 1st day of October, 2000 and the 14th day of September, 2002, Poole began fondling her and committing acts of sexual battery by penetrating her vaginal area with his fingers. Zaran's testimony clearly establishes that Poole penetrated her vagina with his penis during that time period. Taking the testimony in the light most favorable to the prosecution, there is sufficient evidence to support the jury's verdict of guilty for Count II.

Even the testimony of the defense witness, Dr. Chaney, testified that it was possible that Poole penetrated Zaran with his penis, thus committing rape. Only the slightest penetration is required to sustain a conviction of rape. As to Poole's argument that the two verdicts are inconsistent, since the jury convicted on Count II and acquitted on Count I, inconsistent verdicts do not require reversal. Further, it is not clear that these two verdicts are inconsistent, since a jury is entitled to believe a witnesses testimony in whole or in part, and may have given more credibility to some parts of Zaran's testimony and less to other parts.

The Circuit Court correctly denied Poole's Motion for New Trial. The testimony of Inspector Andress, Janet Bridges and Zaran Bridges overwhelmingly supports the jury's verdict of guilty in Count II, statutory rape of Zaran Bridges between the occurring between the 1st day of October, 2000 and the 14th day of September, 2002. Testimony of Mrs. Bridges and Zaran established the inappropriate contact by Poole towards Zaran during this time period. Zaran meticulously detailed the progression of the sexual contact from fondling and masturbating to penetration. This testimony was corroborated by her mother's testimony of the changes in Zaran's behavior during this time and her subsequent difficulties with anger and feelings of guilt. Determining the credibility of witness testimony is squarely within the province of the fact-finder and the jury clearly found these witnesses to be credible. Even the defense witness Dr. Chaney could not eliminate the possibility of penetration and bleeding. Even the slightest penetration of Poole's penis into Zaran's labia is enough to support the verdict of rape. Further, Dr. Chaney's testimony clearly established that sexual contact had occurred, since Zaran's PAP smear was positive for human papilloma virus, which is sexually transmitted. Considering the evidence in the light most favorable to the State, the trial court correctly denied Poole's Motion for a New Trial.

ARGUMENT

PROPOSITION I: The Circuit Court correctly denied Poole's Motion for Directed Verdict at the close of the State's evidence and Poole's Motion for Judgment Notwithstanding the Jury's Verdict as to Count II.

The standard of review for the denial of a judgment notwithstanding the verdict and a directed verdict are the same. Gleaton v. State, 716 So.2d 1083, 1087 (Miss.1998). The standard of review is as follows:

Requests for a directed verdict and motions JNOV implicate the sufficiency of the evidence. The standard of review for the legal sufficiency of the evidence is well-settled:

[W]e must, with respect to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. The credible evidence which is consistent with the guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Id. (quoting Franklin v. State, 676 So.2d 287, 288 (Miss.1996))(quoting Wetz v. State, 503 So.2d 803, 808 (Miss.1987) (citations omitted)).

The appellate review of a motion for a directed verdict tests the legal sufficiency of the evidence. Bush v. State, 895 So.2d 836, 843 (Miss.2005) (citing Carr v. State, 208 So.2d 886, 889 (Miss.1968)). The appellate court must ask whether the evidence shows "beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." Id. (quoting Carr, 208 So.2d at 889). Taking the

evidence in the light most favorable to the prosecution, the question is whether a rational trier of fact could have found all the essential elements beyond a reasonable doubt. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

The Circuit Court correctly denied Poole's Motion for Directed Verdict at the close of the State's evidence and Poole's Motion for Judgment Notwithstanding the Jury's Verdict as to Count II. The evidence clearly established that Poole was more than 36 months older than Zaran that she was younger than 14 when she was raped by Poole. Further, the evidence showed that while Poole lived in the house with Zaran and her mother, he cultivated an inappropriate relationship with Zaran. Janet Bridges testimony also establishes that Zaran and Poole were often alone together during this time period. Bridges testified that Zaran told her about the fondling and then under great stress told her mother about the rapes by Poole. Zaran's testimony establishes that between 1st day of October, 2000 and the 14th day of September, 2002, Poole began fondling her and committing acts of sexual battery by penetrating her vaginal area with his fingers. Zaran's testimony clearly establishes that Poole penetrated her vagina with his penis during that time period. Taking the testimony in the light most favorable to the prosecution, there is sufficient evidence to support the jury's verdict of guilty for Count II.

Even the testimony of the defense witness, Dr. Chaney, testified that it was possible that Poole penetrated Zaran with his penis, thus committing rape. Only the slightest penetration is required to sustain a conviction of rape. As to Poole's argument that the two verdicts are inconsistent, since the jury convicted on Count II and acquitted on Count I, inconsistent verdicts do not require reversal. Further, it is not clear that these two verdicts are inconsistent, since a jury is entitled to believe a witnesses testimony in whole or in part, and may

have given more credibility to some parts of Zaran's testimony and less to other parts.

In Culp v. State, 933 So.2d 264 (Miss. 2005), the Mississippi Supreme Court held that inconsistent verdicts are permissible under the rationale of United States v. Powell, 469 U.S. 57, 65, 69, 105 S.Ct. 471, 476-77, 479, 83 L.Ed.2d 461 (1984). In Powell, the United States Supreme Court held:

[I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal ...

Inconsistent verdicts therefore present a situation where “error,” in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.

... there is no reason to vacate the respondent's conviction merely because the verdicts cannot rationally be reconciled. Respondent is given the benefit of her acquittal on the counts on which she was acquitted, and it is neither irrational nor illogical to require her to accept the burden of her conviction on the counts on which the jury convicted.

United States v. Powell, 469 U.S. 57, 65, 69, 105 S.Ct. 471, 476-77, 479, 83 L.Ed.2d 461 (1984) (citations omitted).

In Hubbard v. State, 938 So.2d 287, 291 (Miss.Ct.App.2006), this Court held that “an inconsistent verdict, in and of itself, is insufficient to reverse a criminal conviction.” Chambers v. State, 973 So.2d 266 (Miss.Ct.App.2007) (citing, Hubbard v. State, 938 So.2d 287, 291 (Miss.Ct.App.2006)) (citing George v. State, 752 So.2d 440, 443 (Miss.Ct.App.1999)).

Poole argues speculatively that the jury must have found Z.B.'s testimony as to the as to Count I, since it returned a verdict of not guilty as to Count I. Poole argues that "given the fact that the jury found her testimony incredible as to Count I. Determining the credibility of witness testimony is squarely within the province of the fact-finder. Curry v. State, 939 So.2d 785 (Miss.2006) (citing, Groseclose v. State, 440 So.2d 297, 300-01 (Miss.1983)). On questions of witness testimony, the Mississippi Supreme Court has held that "[t]he jury determines the weight and credibility to give witness testimony and other evidence." Moore v. State, 933 So.2d 910, 922 (Miss.2006) (citing Johnson v. State, 904 So.2d 162, 167 (Miss.2005)). This Court "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.' " Id. (quoting Davis v. State, 568 So.2d 277, 281 (Miss.1990)). As to the credibility of witnesses, this Court in Gathright v. State, 380 So.2d 1276 (Miss.1980), has held that "in a criminal prosecution the jury may accept the testimony of some witnesses and reject that of others, and that they may accept in part and reject in part the evidence on behalf of the state or on behalf of the accused. In other words, the credibility of witnesses is not for the reviewing court." Gathright, 380 So.2d at 1277 (citing Davis v. State, 320 So.2d 789 (Miss.1975)).

It is well established that the jury has the prerogative to accept or reject, in whole or part, the testimony of any witness, expert or lay. Smith v. State, 925 So.2d 825 (Miss.2006). Stated similarly, the jury may in whole or in part, believe or disbelieve, accept or reject the testimony of any witness. Baliker v. State, 799 So.2d 151 (Miss.Cl.App.2001) (citing, Groseclose v. State, 440 So.2d 297, 300 (Miss.1983)). In this case, the jury clearly believed Z.B.'s testimony that James Poole raped her during the time period of between the 1st day of October, 2000 and the 14th

day of September, 2002, while Poole was living in the home with Z.B. and her mother, Janet Bridges. It is unclear whether the jury disbelieved Z.B.'s testimony regarding the first count of the indictment, that Poole raped Z.B. during the time period occurring between the 1st day of May, 2003 and the 31st day of May, 2003. Because it is the jury's prerogative to accept or reject, in whole or part, the testimony of any witness, expert or lay, if the jury chose to believe one part of her testimony and not the other, it is not error.

It is possible, as the United States Supreme Court stated in *Powell*, that the jury, convinced of guilt, properly reached its conclusion on the first offense (Count II of the Indictment), and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the second offense (Count I of the Indictment). As the Court in *Powell* held, and as Mississippi Courts have held,

... there is no reason to vacate the respondent's conviction merely because the verdicts cannot rationally be reconciled. Respondent is given the benefit of her acquittal on the counts on which she was acquitted, and it is neither irrational nor illogical to require her to accept the burden of her conviction on the counts on which the jury convicted.

United States v. Powell, 469 U.S. 57, 65, 69, 105 S.Ct. 471, 476-77, 479, 83 L.Ed.2d 461

(1984) (citations omitted).

Mississippi courts have held that "any penetration of the labia, no matter how slight, is sufficient to establish the element of 'sexual penetration' in a rape case." Pryer v. State, 958 So.2d 818, 823 (Miss.Ct.App.2007) (quoting McGee v. Cuna Mutual Ins. Society, 452 So.2d 438, 440-41 (Miss.1984))(see also, Jackson v. State, 452 So.2d 438 (Miss. 1984). Furthermore, Penetration does not need to be established by actual medical evidence. Wilson v. State, 606 So.2d 598, 600 (Miss.1992). Additionally, penetration, "need not be proved in any particular

form of words, and circumstantial evidence may suffice.” Lang v. State, 230 Miss. 147, 158-59, 87 So.2d 265, 268 (1956).

PROPOSITION II: The Circuit Court correctly denied Poole’s Motion for New Trial.

A new-trial motion challenges the weight of the evidence. Wilkins v. State, 1 So.3d 850, 854 (Miss.2008). Mississippi Appellate Courts will reverse only if the trial court abused its discretion in denying a motion for new trial. Massey v. State, 992 So.2d 1161, 1164 (Miss.2008).

The Mississippi Supreme Court has stated:

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Herring v. State, 691 So.2d 948, 957 (Miss.1997). The evidence should be weighed in the light most favorable to the verdict. Id.

Jones v. State, 904 So.2d 149, 154 (Miss.2005).

The Circuit Court correctly denied Poole’s Motion for New Trial. The testimony of Inspector Andress, Janet Bridges and Zaran Bridges overwhelming supports the jury’s verdict of guilty in Count II, statutory rape of Zaran Bridges between the occurring between the 1st day of October, 2000 and the 14th day of September, 2002. Testimony of Mrs. Bridges and Zaran established the inappropriate contact by Poole towards Zaran during this time period. Zaran meticulously detailed the progression of the sexual contact from fondling and masturbating to penetration. This testimony was corroborated by her mother’s testimony of the changes in Zaran’s behavior during this time and her subsequent difficulties with anger and feelings of guilt. Determining the credibility of witness testimony is squarely within the province of the fact-finder and the jury clearly found these witnesses to be credible. Even the defense witness Dr. Chaney could not eliminate the possibility of penetration and bleeding. Even the slightest penetration of

Poole's penis into Zaran's labia is enough to support the verdict of rape. Further, Dr. Chaney's testimony clearly established that sexual contact had occurred, since Zaran's PAP smear was positive for human papilloma virus, which is sexually transmitted. Considering the evidence in the light most favorable to the State, the trial court correctly denied Poole's Motion for a New Trial.

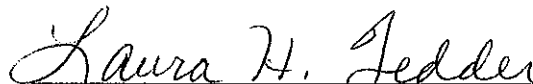
CONCLUSION

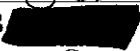
WHEREFORE, PREMISES CONSIDERED, the Appellant's assignments of error are without merit and the jury's verdict and the rulings of the trial court should be upheld.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
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By:



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CERTIFICATE OF SERVICE

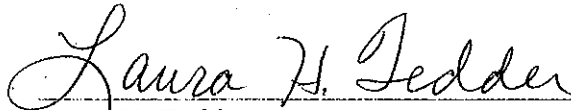
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee to the following:

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This the 13th day of January, 2010.

A handwritten signature in cursive script that reads "Laura H. Tedder". The signature is written in dark ink and is positioned above a horizontal line.

Laura H. Tedder
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