

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-00420-SCT

JAMES DAVID POOLE

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or refusal.

1. James David Poole, Appellant
2. State of Mississippi, Appellee
3. Gary Street Goodwin, Esq., Attorney for Appellant
4. Honorable Thomas J. Gardner, III, District 1 Circuit Court Judge
5. John R. Young, District Attorney
6. Larry Baker, Assistant District Attorney
7. Paul Gault, Assistant District Attorney
8. Jim Hood, Mississippi Attorney General

So certified, this the 9th day of October, 2009.



GARY STREET GOODWIN,
ATTORNEY FOR APPELLANT
MSB # 

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STATEMENT OF THE ISSUES

APPELLANT'S PROPOSITION NO. 1

THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE, AND FAILED TO GRANT A JUDGMENT OF "NOT GUILTY" NOTWITHSTANDING THE JURY'S VERDICT AS TO COUNT II.

APPELLANT'S PROPOSITION NO. 2

THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR A NEW TRIAL.

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-00420-SCT

JAMES DAVID POOLE

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

STATEMENT OF THE CASE

James David Poole ("Jim") was indicted at the February 2007 Term of the Circuit Court of Monroe County, Mississippi on two (2) counts of statutory rape. Jim was born in 1971. The alleged victim, Zaran Elizabeth Bridges ("Zaran") was born in November 1990. Accordingly, the indictment alleged that Zaran was 36 or more months younger than Jim, and not his spouse, being under the age of fourteen (14) years at the time of the incident alleged in Count I and Count II, and in both instances, Jim was above the age of eighteen (18) years. Count I alleged a statutory rape to have occurred during the month of May 2003, the indictment specifically stating it occurred between May 1 and May 31. Count II alleged a similar statutory rape occurred between October 1, 2000 and September 14, 2002 [Record ("R"), p. 10-11]. Accordingly, Count I was alleged to have been the most recent crime, and Count II was alleged to be the more remote crime. Jim was convicted of the more remote crime alleged in Count II and found not guilty as to the most recent crime [R, p. 57-58; Transcript ("T"), p. 207-213].

Prior to the case being submitted to the jury, Jim moved for a directed verdict on both counts, on the basis that there was an insufficiency of evidence to support a conviction [T, p. 177]. The Court denied the motion. The case was submitted to the jury, and the jury, as stated above, returned a conviction on Count II and an acquittal on Count I. Thereafter, Jim preserved his insufficiency

of evidence question in his Motion for Judgment Notwithstanding the Verdict [T, p. 213-214]. Jim also coupled this motion with a Motion for a New Trial, which the Court overruled [R, p. 70-73]. The Court then sentenced Jim to a term of 10 years in the Mississippi Department of Corrections, to be followed by 5 years post-release supervision for his conviction on Count II of the indictment. It is from his denial of the post-judgment motions that Jim appeals to this Court. A brief summary of the evidence would be appropriate to an understanding of Jim's complaint that the Court erred as a matter of law in determining the sufficiency of the evidence to support the verdict and that the Court abused its discretion in denying him a new trial.

The first witness called by the State of Mississippi was Bruce Address. Address testified that he was a policeman with the Amory Police Department, serving 24 years, and for the last 8 years, serving as an investigator. He first became involved in the investigation regarding Zaran and Jim on January 25, 2005. He became familiar with Jim through his investigation, and learned that his date of birth was November 11, 1971. He identified Jim in the courtroom. Detective Address learned that Zaran and her mother lived at 100 Eighth Avenue South in Amory, Mississippi in May of 2003. Prior to that time, in 2001 and 2002, they had lived in Wren, Mississippi at 30037 Dryden Lane. Both of these residences were in Monroe County, Mississippi. Jim's relationship with Zaran's mother, Janet, began in 1999 and continued until 2003. Most of that time, they lived in the Wren area, and eventually moved back to Amory. The first incident of alleged statutory rape occurred somewhere during the period of time between 2000 and 2002, and the last incident was in May of 2003. The first incident allegedly occurred when the parties were living on Dryden Lane in Wren. Address recommended that Zaran and her mother go to a clinic in Mantachie for a forensic interview and counseling. He also reported the matter to the Department of Human Services. However, it was

determined that since Jim was no longer living in the household, DHS never got involved. Andress also stated that he had interviewed Jim, and Jim denied that the acts had occurred [T, p. 61-68].

Janet Bridges was the next witness for the State of Mississippi. She testified that she lived at 100 Eighth Avenue South in Amory, Mississippi. She had one child, Zaran, who was now 18 years old. In 1999, she met Jim while she was living at 103 Meadow Wood Drive North in Amory. She was introduced to him through mutual friends, and personally met him in May of 1999. He moved in with her and Zaran at the end of August, 1999. Zaran was 8 years old at the time. She testified that prior to Jim moving in, Zaran danced, sang, played with friends in the neighborhood and was generally a typical child. Her demeanor or attitude changed after a few months as she seemed to become more shy and withdrawn. She also indicated that there were discipline problems. Janet testified that Zaran was withdrawn toward her, but she appeared to like Jim, and he would play with her on the trampoline and in the swimming pool. Shortly after Jim moved in, his son, Jamie, who is 3 years younger than Zaran, moved in with them. In October of 2000, Jim, Janet, Zaran and Jamie all moved to Wren. Janet worked in Amory, sometimes working until as late as 6:00 or 7:00 p.m. on Friday nights to do payroll, and sometimes having to work on Saturdays. Jim worked at the Ford dealership in Aberdeen, and had set hours. He worked at the Ford dealership until he moved to the Chevrolet dealership in January of 2001. When Janet was away from home working, Zaran would be at school, and after school, someone watched her and Jamie. If Janet could not pick the children up, Jim would. He would also keep them at home while she was away. Janet testified that "a lot of nights" Jim would say he had to go talk to Zaran. This would usually occur around bedtime when Zaran was in her bedroom. At this time, Zaran began to have trouble going to sleep. Janet didn't understand why, since she had not had any troubles previously. The sleep disorder first started when

the parties moved to Wren. Janet testified that she asked Jim what Zaran needed to talk about on those occasions. She stated that he would just say that it was "school and stuff". Janet testified that she honestly did not think anything unnatural was going on, but looking back, she remembered a couple of incidents that should have "thrown up a red sign, but we were a family. We loved each other; we trusted each other. I didn't have any cause at the time to question it. I thought we were a family". Janet testified that her mother had an aneurysm on February 9, 2002, and died on March 3, 2002. During this time, her she and her sister went every night after work, assisting other family members on a rotating basis, to take care of her mother. After her mother died, Jim did not act the same. When Janet would go stay with her mother, Zaran would remain in Wren with Jim and Jamie. Janet testified that after her mother died, Jim began sleeping on the sofa, saying his back hurt. Janet would take prescription medicine and go to sleep. Eventually, Jim told Janet that he was going to leave, and then stated that he would attempt to work it out. Janet found another house in Amory, which is where she lives today. Jim helped her clean it up and fix it. She thought everything was still fine until the Labor Day weekend. Jim went to some kind of race, and when he came back he was a different person. She testified that he stated he was leaving. He was colder toward everyone and did not seem to have the same personality. The Saturday after the first week they spent in the house in Amory, Jim told Janet that he was going for a ride on his motorcycle and didn't come home that night. The next day, he met her at her door with a letter, and told her he was leaving. The relationship ended in September of 2002. After Jim moved out, Zaran's attitude started to change. She became violent towards herself and there was an episode after Jim had moved out where Zaran "went berserk", hitting, kicking and punching. Zaran would have days when she didn't want to go to school, having headaches and rages. Zaran was assessed at Parkwood Hospital in Olive Branch

for a period of 2 weeks. She followed up that hospitalization with meeting a doctor once a month, with her medications continually changing. When school started, Zaran told Janet she wasn't going back to "that school". She was then sent to a children's home in Eldridge, Alabama, which was religiously based and supported. Janet would get Zaran once a month. Janet stated that Zaran slowly met new friends, and her personality began to change again. In the Fall of 2004, she finally mentioned on the phone that she needed to tell Janet something. In the phone call, she said something about Jim, and Janet questioned whether he had contacted her there. Zaran told her no, but that she would talk to her mother later. On her next visit, Janet questioned Zaran, and Zaran stated it was okay, and would not tell her anything else. Zaran came home at Christmas of 2004, and has been with Janet ever since. In January of 2005, Janet and Zaran went to WalMart, and as they were pulling in, Zaran threw herself on the floorboard and started crying. She was hysterical and requested her mother take her home, saying "It's him. It's him". When they got home, Zaran told Janet that she had seen Jim's truck, and she then proceeded to tell Janet that "things happened" while Janet was at the hospital with her mother. Janet testified that her next contact was with Bruce Andress at the Amory Police Department when she filed a report and started the investigation [T, p. 69-82].

On cross-examination, Janet admitted that the first time Zaran mentioned this matter was in the Spring of 2004, but that Zaran did not elaborate. Janet stated that the statements made by Zaran left Janet with the impression that Jim was sexually abusing Zaran, but Zaran would not elaborate on it. Janet identified a document as a statement she'd previously given, dated January 25, 2005. She identified a portion of the statement referring to June 2004, when Zaran had allegedly told her on the phone that over a period of time, Jim had begun masturbating on her leg, to fondling,

and then "on to the other". Janet testified that she did not know what "the other" meant, because at the time, Zaran would not tell her. She also admitted that she may have known about the incident earlier, as reflected by her statement. However, she did not take Zaran to a doctor in June of 2004, but rather the Spring of 2005. She stated that this was because Zaran would not talk about it and would not express anything, and was depressed. Janet admitted that she was hurt by Jim leaving the relationship with her. She admitted that she believed they were all a family. After Jim left, Janet continued to have a relationship with Jamie, continuing to see Jamie sometimes twice a month and at Christmas. She also attended Jamie's birthday party the next February after Jim left. Jamie and Zaran were also close, like siblings. Two weeks after Jim moved out, a female friend and her two children moved in with him. Janet admitted that Jamie had called from his dad's house and asked if Zaran could come over and eat pizza. Janet discussed it with Candy, Jim's friend and roommate, who approved. Accordingly, Janet dropped Zaran off at Jim's house. After that, Zaran would go over to Jim's house at other times. Although she was not exactly sure, Janet believed Zaran went over to Jim's house to play approximately 3 times. One morning, Zaran was in a rage, and Janet called Jim and asked him to come by and speak to Zaran. Zaran began to go into a rage at Jim. Janet told Jim that she could not discipline Zaran and whipped her. Jim then left. Janet also admitted that from time to time, she would telephone Jim requesting that he talk to Zaran over the phone to help her because Janet could not control her. Janet admitted that Zaran's rages continued after she was discharged from Parkwood and the religious home in Winfield, Alabama. She would not go to school and did not want to be around anyone. She wanted to stay in the house and be left alone, and not go anywhere. She also started cutting herself. Her rages became more violent, and in one of her rages, Zaran jerked a knife up at her mother. Ultimately, Janet took her to Jackson to a facility and

had her assessed for approximately 40 days. Janet also testified that there was another incident of violence after Jim left in September of 2002. On October 6, 2002, Zaran was outside and got mad about something and put her hand through a plate glass window, necessitating surgery and therapy. Zaran requested that her mother call Jim, but Jim did not come to the hospital. At Christmas of 2002, Zaran was also in a rage, telling her mother she was mad at Jim. Janet testified that she told Zaran, "Don't beat on me, go beat on him". Despite this, Zaran hit Janet that night. Zaran had stated she was "just so mad at him", referring to Jim. Accordingly, Janet put Zaran in the car and took her over to Jim's house. Jim and Candy came out the door. They stood outside and Janet reiterated the episode to Jim and told Zaran to hit him. Zaran hit Jim two or three times. It was cold outside, and Candy invited everyone inside. Jim took Zaran in another room and talked to her. After a few minutes, Janet went into the room and said, "Come on out". Janet continued to be friends with Jim and Candy, even taking care of Candy's two children while Candy had surgery. Janet and Candy became friends, talking on the phone, and Janet would go over to Candy's house. She specifically remembered an incident when she went to Candy's house to help take care of Candy's little girl, who had a high temperature. Janet admitted that she had known that Jim and Candy had a relationship prior to Janet meeting Jim [T, p. 82-105].

The next witness to testify on behalf of the State was Zaran Elizabeth Bridges. Zaran testified that she was 18 years old, and her birth date was November 18, 1990. She presently lived at 100 Eighth Avenue South in Amory. She was familiar with Jim, and when he lived with her and her mother, she called him either Jim or Daddy. When she first met Jim, she lived at 103 Meadow Wood in Amory, and this occurred around 1998 or 1999, when she was 9 years old. Her mother had begun to date him and Jim would come to the house. At that time, just Zaran and her mother were living

together. She remembered that Jim would come over on the weekends and would often bring Jamie, his son, with him. Jamie was approximately three or four years younger than Zaran. A couple of months after he had been dating her mother, Jim moved in. She testified it was "kind of weird" having another man in her mom's life, but that Jim was okay. She liked Jamie, being an only child and always wanting a brother or sister. She stated that it was nice to have someone to play with. Her first recollection of any inappropriate behavior on Jim's part was when she had a bad dream or nightmare. Jim had been living with them for a few months and Zaran woke up and got in bed with her mom. She stated she felt something in between her legs, and this happened a few more times, too. Her next recollection was in her room in a bunk bed. She remembered being woken up and "a bunch of wrestling around". She remembers there was something on her leg, and Jim told her to go back to bed. She stated this was like a dream or nightmare and that Jim told her it was just imaginary or something, but she remembered wiping something white off her leg. She stated she knows now that it was semen on her leg. During the time period that he would do activities like this, Zaran testified her mother would be sound asleep. She stated Jim told her that the type of things he was doing to her were just normal and that "every father did this". Zaran stated she didn't know the difference because she had never had a father figure. Zaran testified further that approximately six or seven months after Jim met Janet, he got custody of his son, Jamie, and they all moved to Wren. This occurred in 2000. The inappropriate activities continued in Wren. Zaran claimed that they got worse and Jim explained it as "playing". She stated she thought it was normal and had learned to trust him because she thought he was a good guy. When living at 103 Meadow Wood, Zaran said Jim would feel around her breast area and her vagina. When they moved to Wren, he actually started touching her on her vagina with his fingers. Then it proceeded to actual penetration with

his fingers. He also began touching her vagina with his penis, just putting the tip of the penis in the vagina. Eventually, he put it all the way in. She stated that it hurt and she remembered a lot of bleeding. When she realized she was bleeding and hurting, she asked him to stop and he would not. She stated that she tried to get away and he would hold her down. She testified that she started to figure out that this was not supposed to be hurting her, and that a father would not hurt her in this manner, and she started saying no and asking him to stop. However, she stated that Jim told her that he had killed somebody before and he told her how he had done so. She stated that he explained to her that if she ever said anything, he would kill her and her mom. She remembered him explaining that he would put something over his hair to keep it from falling out and wear something over his feet and would dispose of the bodies, and take his clothes and anything he had and dump it at a site that burns regularly. Zaran stated that she believed him because he said it so coldly. Zaran testified that he generally did these things after her mother was asleep after taking pills. Her mother worked long hours and if she wasn't at home, then it could happen anywhere in the house. If Jamie was in the house, Jim would turn a lock in Jamie's room, where it locked from the outside. This usually occurred when her mother was home, about 9:30 or 10:00 at night. Zaran testified that they all later moved back to Amory. Jim did not live there for very long because he and her mother split up. She stated that when they first moved back to Amory, Jim would come upstairs to her bedroom and "ask", but she would say no and he would go back downstairs. However, after Jim moved out, she did remember one incident, but did not remember the date. She did remember that it was around May and she was wearing shorts because the weather was warmer. David Vann, a friend of her mom, was visiting with Janet and Zaran on the front porch. Jim came to the house, and David left when Jim pulled up. Jim stated he wanted to see what had been done to the house and

to talk to Zaran and Janet. Zaran testified that she did not know why she let Jim in the house, but she remembered showing him the work done on the house. When Jim and Zaran got to her bedroom, she said she didn't remember how she got down, but she was face down and he had her by the hair and was raping her from behind. She stated he was holding her by the hair, face down in the carpet with his penis in her vagina that day. That event being in May of 2003, she would have been 13 years old. This was the last time she remembered Jim doing anything inappropriate, and this was the time that she started having problems, as far as anger issues. In October of that year, she threw her hand through a plate glass window, and required a five hour surgery. She stated she was angry because of the guilt, thinking it was all her fault. She saw him one more time, in a parking lot. She remembered just going to the floorboard and crying because she didn't want him to see her. This occurred after she had been to the children's home in Alabama, and was approximately 2005. She remembered being in the children's home, which had a good Christian environment. She wasn't sure of the dates, but she remembered confessing these matters to her house parent, and her house parent making her tell her mother. She stated she didn't tell her mother everything over the telephone, but just told her things had happened. She came home in July, and said she remembered telling her mom everything that happened after seeing Jim's truck at WalMart and crying on the floorboard. She stated she did not tell her mother any of the things that had happened before because Jim said that he would hurt them. She felt guilty, as though it was her fault, and felt that her mother would not believe her. She testified that she did wish she had told her mother [T, p. 105-118].

On cross-examination, Zaran clarified that she was in the children's home in Alabama from June of 2003 until July of 2004. She had finished her school year at that time, and her mother allowed her to come home. She also clarified that the phone conversation with her mother, in which

she first recollected to her mother Jim's inappropriate behavior, was in June of 2004. The conversation she had with her house mother occurred approximately a week before the telephone call. She testified that she did not know whether her mother notified law enforcement in Mississippi after the telephone call, and didn't know if there had been any communication between her house mother and her mother. Her house mother in Alabama did not take her to the doctor after that conversation. She did remember eventually going to a clinic in Mantachie, Mississippi, where she talked with a social worker. She remembered telling her about the sexual intercourse. She recollected telling the social worker that the first time Jim inserted his penis, it was painful and she bled, and since it was hurting, she asked him to stop. She stated he held her down where she couldn't move. She then testified that this occurred in her mother's bed, and admitted she told the social worker "That's when he popped my cherry". She stated she did not know what that phrase meant at the time it happened, but she did once she went to Parkwood and watched a video. She admitted she told the interviewer that at this incident, there was a lot of pain and a lot of blood. She admitted she recollected to the interviewer that she was told to take a shower and that she was bleeding because "it" was too big for her. She stated that the statement that it was too big for her was a statement made by Jim. She admitted she told the interviewer that Jim told her she could not tell, but really couldn't remember everything she had told the interviewer because she was trying to block all of her memories. Zaran admitted that after Jim moved out of the house he shared with her and her mother, she went over to his house where Jamie and Candy's two children were having a pizza party. However, she stated she did not know Jim was present. She did not remember the date. She did not remember making any phone calls to the residence to Jim for him to call her back. She did not remember requesting Jim see her at the time she had her surgery. She did remember her

mother taking her to see Jim near Christmas of 2002. She stated that this was about the time she had been diagnosed with post-traumatic stress disorder, and would have raging fits and the medication would not work. She was getting mad and taking it out on her mother and screaming. Her mother had asked her "Why do you hate me?" She replied that she didn't hate her mother, but she hated Jim. She didn't think she told her mother why, so her mother took her over to Jim's to find out. She did not remember what happened when she got to Jim's house. She stated she didn't remember any of her rages because she blacks out. She did remember being in a room with Jim, hitting him, but he never said anything about it. Her mother then came and got her and they left. Zaran admitted that she did not get along well with mother at that time, but stated she didn't get along with anybody. Her mother was the only one who she was ever around. She denied ever taking a knife after her mother, and admitted that she probably told others that she hated her mother. She also denied any contact with Jim after he moved out via telephone. Zaran testified that she did not remember if Jim was present when she went to eat pizza at his house. At the time, she was on medication, being Adderall XR® Amytriptylene®, and had been on Effexor XR® and about to start Cymbalta®. She did not recollect whether or not she had ever told Bruce Andress that Jim had popped her cherry, but did understand that term to mean "breaking a hymen". She admitted that her mother was upset about Jim moving out of the house and cheating on her. She remembered their being engaged and planning to get married. Jim provided a father figure to her "at first". Her birth father had been an alcoholic [T, p. 118-137].

On redirect examination, Zaran testified that no one had told her to lie on the stand, and remembers Jim raping her in the house that she lives in now, and at the house in Wren. She was questioned about her forensic interview, and admitted that she had given a forensic interview to Ms.

Floyd in January of 2005. She did not remember exactly word for word what she told her when she was testifying today in 2009. She stated that she has had so much counseling to try and block her memories and try to have a normal teenage life, but sometimes couldn't remember things. When she talked to Ms. Floyd in 2005, she would have been 14 years old, and was 18 years old now. The occurrences with Jim dated from the beginning when she was 8 or 9 years old and continued until she was 12 years old. She said she had not been able to block out all of her memories, although she would have liked to [T, p. 137-140].

After Janet and Zaran had testified, the State rested [T, p. 140]. The Defendant then moved for a directed verdict, which was denied by the Court [T, p. 142]. The defense proceeded to put on its case in chief, calling to the stand Dr. Patrick Chaney. Chaney testified that he was a medical doctor and a specialist in obstetrics and gynecology, having practiced in Amory, Mississippi for approximately 20 years. He testified that on January 7, 2005, he performed a physical examination on Zaran Bridges. The physical examination was not only a general exam, but also a pelvic examination. He found the hymen to be intact. He used a pediatric speculum which was easily admitted into the vaginal opening. He stated that he did a digital exam, and her hymen admitted one finger for the pelvic exam. He stated that it was unlikely there had ever been complete vaginal penetration with the intact hymen.

Dr. Chaney testified that if a patient were to have told him that "someone popped their cherry", they would be referring to a slang term which he understood and assumed has always had the meaning that the hymen had been ruptured and that there was bleeding from the tearing of the tissues. He stated that it would be less likely for this to have happened or to have taken place where the patient had an intact hymen. Dr. Chaney's report was then entered into evidence [T, p. 147-

On cross-examination, Dr. Chaney indicated that at the time he examined Zaran, she had a pap smear which showed findings of Human Papilloma Virus (HPV) which is a sexually transmitted disease. The virus was located on her cervix, the sample being taken from that area. The most common method of transmission of the disease is intercourse. Dr. Chaney reiterated that evidence of an intact hymen would suggest that penetration had never taken place, but since there was a spectrum of the size [a penis that could be inserted in] of the vaginal opening, he couldn't completely say that the intact hymen would preclude the possibility of penetration, at least partially. He again stated that the term "popped my cherry" is not a medical term. He indicated that it was possible, if there were trauma to other structures in the vaginal area, for the penis to cause bleeding of the female genitalia without rupturing the hymen. The urethra is one of those areas. With regard to partial insertion of the penis, without rupturing the hymen, he thought that there could certainly have been partial insertion, but a physical size has to be considered, i.e., the diameter of the hymen, the size of the penis, and the variations from individual to individual [T, p. 150-153].

On redirect examination, Dr. Chaney indicated that in his examination, he did not document any evidence of trauma, and the only thing that would be consistent with some type of sexual activity would have been the pap smear with the HPV findings. He indicated that there could be trauma to other tissues of the genitalia which would not necessarily affect the hymen but would cause the other tissues to bleed. The hymen is a fairly delicate tissue and can rupture or break or stretch with other types of activities. He stated that it is not necessary to have sexual intercourse to rupture the hymen. He indicated that there were over a hundred types of HPV [recognized by the medical profession], forty of which had been identified [as typically found] in the genital region. There were

three different ways to test for HPV, one of which is cytology, or a pap smear. This test is based on a review of the cells that were taken from the sample. It is considered a definite finding of HPV, even though the specific virus of HPV is not identified. He stated that if a female has had HPV, she is likely to pass it on to a sexual partner, but there is not comprehensive scientific knowledge regarding HPV. He indicated that the type of HPV found in the genital area of a female has to be sexually transmitted, but that does not necessarily mean vaginal intercourse occurred. It could have been genital to genital contact, manual[digital]/genital contact, or oral/genital contact, but it is impossible to tell how or when it was transmitted. HPV is common in young women, and many strains of HPV clear up on their own or are transient. Dr. Chaney also advised that the speculum he used on Zaran was a pediatric speculum, which was described to the jury as to size, and was the same type of speculum that he would use on a patient that was much younger [T, p. 153-158].

The next witness to testify on behalf of the defendant was Annetta Haynes. Annetta testified that she was a Monroe County resident and had met Jim sometime between 1997 and 1998. She first became acquainted with Zaran when Zaran would call her house and ask for Jim. This started in approximately 2002. She would call Jim, crying, and state that she wanted to talk to Jim. Jim and Annetta's youngest daughter, Candy, lived in a trailer behind Annetta's residence in 2003. They had been engaged to be married, but subsequently broke up. She surmised that calling her was the only way Zaran knew how to get in touch with Jim. When Zaran would call, she would tell Zaran that she would tell Jim she had called, but Zaran never told her why she was wanting to talk to him. She remembered that the last phone call for Jim was in 2003, because Zaran was "crying really bad". She recollected this call occurred in 2003 because it was about the time she had purchased a home and was working on the improvements to it. Jim was at her house doing some plumbing work for her.

They needed to obtain some supplies from Walmart, and she and Jim were going to town. Jim drove Annetta's truck and asked Annetta's permission to see if they could go by and see Zaran on the way to Walmart. They pulled up at Zaran's house and she came outside. This was only the second time that Annetta had ever seen Zaran. When she came to the truck, she went around to the passenger side mirror, noticed Annetta sitting there, and then went to the driver's side and had a conversation with Jim. Annetta does not remember the entirety of the conversation with Jim. Neither Annetta or Jim got out of the truck, and were present at Zaran's house approximately five minutes. She did not appear to be afraid of Jim, but appeared to be upset due to some problems with her mother, as she communicated this to Annetta in the initial telephone call. The first time she saw Annetta was at a "Premiere" jewelry party that Candy had given at the home she and Jim leased on Green Street in Amory in 2002. Zaran was present at that party, and Annetta was also. Zaran's mother, Janet, was also present, as was Jim. This occurred approximately eight or ten months prior to May of 2003. At the party, Zaran sat down at the table where Jim was sitting, and they talked. There were children at the party, and at least 15 or 20 people were present. Zaran's demeanor did not indicate that she was afraid of him. Candy's children were also present at the party, as was Jim's son, Jaime [T, p. 160-164].

On cross-examination, Annetta indicated that at the party where Zaran was present, it didn't appear she had any reason to be afraid. Annetta was an adult, and was present, as was Zaran's mother. Zaran was not alone with Jim. Annetta reiterated that she had no knowledge of Zaran other than the two occasions that she described that she observed her [T, p. 164-166].

SUMMARY OF THE ARGUMENT

APPELLANT'S PROPOSITION NO. 1

THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE, AND FAILED TO GRANT A JUDGMENT OF "NOT GUILTY" NOTWITHSTANDING THE JURY'S VERDICT AS TO COUNT II.

The law of this state allows a conviction for rape to be supported only by the prosecutrix' testimony. There is no requirement of corroboration or physical evidence. However, in such cases, the testimony must be scrutinized in a heightened manner and cannot be discredited or contradicted by other credible evidence. In the case *sub judice*, the prosecutrix described two incidences of forcible rape. The first incident described was non-specific as to date, but she claimed it occurred in her mother's bed, that she suffered pain and bled from it, and the appellant held her down to complete the act. She described full insertion of the penis and admitted that she described the incident to a law enforcement officer and a counselor a few years later as the time the appellant "popped her cherry". An examining physician testified that he examined her on a date several years after the incident occurred and found her hymen to be intact, and that she had contracted HPV, but could not identify the source of the sexually transmitted disease. He opined that the HPV could have been transmitted by oral, digital or penile contact. The jury acquitted the defendant of the charge of statutory rape in this count (Count II). As to the rape that was alleged to have occurred, and which was indicted as Count I, the prosecutrix testified was much more time and detail specific, and essentially was a forcible rape that she alleged to have occurred in May of 2003. She alleged the appellant arrived at her mother's home, with her mother present on the front porch. The prosecutrix invited the appellant into the home, and she described a forcible rape that occurred while her mother was apparently still on the front porch. The jury obviously found her testimony as to this incident

and returned a "not guilty" verdict in this count (Count I). Given the fact that the jury found her testimony incredible as to Count I, coupled with the severe discrediting evidence elicited from the medical doctor as to Count II, the Circuit Judge should have granted a directed verdict as to Count II, and when the motion was renewed in the form of a motion for a judgment notwithstanding the verdict, the judge erred in denying same.

APPELLANT'S PROPOSITION NO. 2

THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S
MOTION FOR A NEW TRIAL.

Hand in hand with the considerations set forth above, the trial court, sitting as the thirteenth juror should have granted the appellant's motion for a new trial.

ARGUMENT

APPELLANT'S PROPOSITION NO. 1

THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE, AND FAILED TO GRANT A JUDGMENT OF "NOT GUILTY" NOTWITHSTANDING THE JURY'S VERDICT AS TO COUNT II.

In *Parramore v. State*; 5 So.3d 1074 (Miss. 2009), this Court stated as follows:

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. See *Withers v. State*, 907 So.2d 342, 353 (Miss. 2005) (persons accused of statutory rape "may be found guilty on the uncorroborated testimony of a single witness.") (citation omitted); *Killingsworth v. State*, 374 So.2d 221, 223 (Miss. 1979) ("[w]hile it is true that a conviction for rape may rest on the uncorroborated testimony of the person raped, that testimony should always be scrutinized with caution."); *Dubose v. State*, 320 So.2d 773, 774 (Miss. 1975) ("the testimony of the victim of a rape may be sufficient to support a guilty verdict where the victim's testimony is neither contradicted nor discredited by other evidence or by surrounding circumstances."); *Blade v. State*, 240 Miss. 183, 188, 126 So.2d 278, 280 (1961) (the testimony of the prosecutrix in a rape case "does not need corroboration...").

It will be remembered that Zaran's testimony as to Count II was non-specific as to the date of the occurrence, but she remembered the location where she lived and significant circumstances that she claimed happened as a result, i.e., Jim "popped her cherry" [T, p. 123]. She stated that Jim would at first put the tip of his penis in her vagina, but eventually would put it in all the way. She remembered a lot of bleeding and hurting, essentially describing a forcible rape, because, she stated, she tried to get away and he would hold her down [T, p. 111]. She stated these episodes happened in her room or anywhere in the house [T, p. 111-114]. She recollected that the first time he completely inserted his penis was the time it was painful and she bled. She claimed this incident happened in her mother's bed [T, p. 122-127]. Zaran's recollection as to the crime charged in Count I was much more time and detail specific, essentially describing a rape occurring after she and

her mother had moved to the new house in Amory, and after Jim moved out. Jim had supposedly come over to their house and with her mother present on the front porch, went back to Zaran's bedroom and forcibly raped her by getting her face-down on the floor, holding her hair behind her head, and putting his penis in her vagina from behind [T, p. 114-115]. Accordingly, Zaran's testimony about the account of the incident for which Jim was acquitted, was much more detailed than the account of the incident for which Jim was convicted.

In determining the defendant's motion for a directed verdict, the Court stated that he felt the verdict was merely inconsistent. It is obvious that the jury found Zaran's testimony suspect and incredible as to the count on which Jim was acquitted. The credibility of her testimony was lacking, no doubt due to the fact that the rape allegedly occurred while her mother was on the front porch while she "showed Jim the improvements made to the dwelling". Secondly, in describing a forcible rape from the standpoint of his insertion of his penis, there also is no doubt the jury considered Dr. Chaney's testimony that his findings as to the condition of Zaran's hymen would be inconsistent with full penile penetration. Dr. Chaney's testimony left no doubt that no full penetration had ever occurred, unless the penetration had been with a penis the size of Dr. Chaney's finger. Unfortunately, there was no elaboration as to the size of Dr. Chaney's finger. No doubt, however, the jury was able to view Dr. Chaney on the stand.

Zaran's testimony was, therefore, suspect and incredible, substantially contradicted by medical testimony. There was no other physical or circumstantial evidence that corroborated any part of Zaran's testimony as to any of the two incidences of sexual intercourse claimed to be remembered by her. Although such was not needed by the State as a matter of law, since there was no corroborating evidence, the substantially contradicting testimony was sufficient to make her

testimony not credible and within the rule that the verdict could not be supported by sufficient evidence. Accordingly, the motion for directed verdict before the matter was submitted to the jury and the renewed motion for judgment notwithstanding the verdict should have been granted by the Circuit Judge.

ARGUMENT

APPELLANT'S PROPOSITION NO. 2

THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR A NEW TRIAL.

In *Parramore*, *supra*, this Court also described the function of a motion for a new trial. There, the Court, quoting from *Wilkins v. State*, 103 So.3d 850 (Miss.2008) stated as follows:

"[a] motion for new trial challenges the weight of the evidence. *Sheffield v. State*, 749 So.2d 123, 127 (Miss. 1999). A reversal is warranted only if the trial court *abused its discretion* in denying a motion for new trial." [*Ivy v. State*, 949 So.2d 748, 753 (Miss. 2007)] (emphasis added). In *Bush v. State*, 895 So.2d 836 (Miss. 2005)], this Court set out the standard of review for weight of the evidence, stating:

[w]hen reviewing a denial of a motion for a new trial base 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). We have stated that on a motion for new trial:

The court sits a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.

Amiker v. Drugs For Less, Inc., 796 So.2d 942, 947 (Miss. 2000)... [T]he evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957.

Bush, 895 So.2d at 844.

Wilkins v. State. 1 So.3d 850 at 854 (Miss. 2008).

5 So.3d 1074 at 1077, 1078. In *Armstead v. State*, 716 So.2d 576, the Court also said:

It has long been held in Mississippi "that a conviction for rape may rest on the uncorroborated testimony of the person alleged to have been raped, but it should

always be scrutinized with caution; and where there is much in the facts and circumstances in evidence to discredit her testimony, another jury should be permitted to pass thereon." *Richardson v. State*, 196 Miss. 560, 564, 17 So.2d 799, 800 (1944). See also *Goode v. State*, 245 Miss. 391, 394, 146 So.2d 74, 75 (1962); *Killingworth v. State*, 374 So.2d 221, 223 (Miss. 1979); *Goss v. State*, 413 So.2d 1033, 1034 (Miss. 1982).

716 So.2d 576 at 578.

As the thirteenth juror in this case, this Court must scrutinize with caution, Zaran's testimony. There is sufficient evidence and circumstances to discredit her testimony, and it is undoubtedly enough evidence to say there is "much in the facts and circumstances to discredit her testimony". *Richardson, supra*. Since the jury split on the two verdicts, it no doubt discredited her testimony in part, if not in whole, and the testimony of Dr. Chaney was certainly sufficient for no reasonable juror to have not discredited her testimony in full. Accordingly, the Circuit Judge should have granted Jim a new trial.

CONCLUSION

For the foregoing reasons, this cause should be reversed and rendered, or in the alternative reversed and remanded for a new trial.

Respectfully submitted, this the 9th day of October, 2009.

JAMES DAVID POOLE,
APPELLANT

BY:



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CERTIFICATE OF SERVICE

This will certify that I, Gary Street Goodwin, have this day mailed via United States mail, postage prepaid, a true and correct copy of the foregoing BRIEF FOR APPELLANT to: Honorable Thomas J. Gardner, III, District 1 Circuit Court Judge, Post Office Box 1100, Tupelo, Mississippi 38802-1100, John R. Young, District Attorney, Post Office Box 212, Corinth, Mississippi 38834-0212, and Jim Hood, Mississippi Attorney General, Post Office Box 220, Jackson, Mississippi 39205-220.

So certified, this the 9th day of October, 2009.



GARY STREET GOODWIN