

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 3, 2019**SUPREME COURT - CIVIL CASES****GARNER V. GARNER****CIVIL - CUSTODY**

FAMILY LAW - CHILD CUSTODY - NATURAL-PARENT PRESUMPTION - There is a well-settled presumption in custody disputes that favors the natural-parent, but the natural-parent presumption can be rebutted by clear and convincing evidence that (1) the parent has abandoned the child; (2) the parent has deserted the child; (3) the parent's conduct is so immoral as to be detrimental to the child; or (4) the parent is unfit, mentally or otherwise to have custody

FAMILY LAW - CHILD CUSTODY - ALBRIGHT FACTORS - Factors in determining whether an award of a child serves the child's best interest include: (1) the age, health, and sex of the child; (2) the continuity of care before the separation; (3) the parenting skills and the parent's capacity to provide primary childcare; (4) the employment of the parent and the responsibilities of that employment; (5) the physical and mental health and age of the parent; (6) the emotional ties of parent and child; (7) the moral fitness of the parent; (8) the home, school, and community record of the child; (9) the preference of the child; (10) the stability of the home environment; and (11) other factors relevant to the parent-child relationship

CIVIL - PENALTIES - CONTEMPT - To rebut a prima facie case of contempt, a defendant must show an inability to pay, that the default was not willful, that the provision violated was ambiguous, or that the performance was impossible

FACTS

April Garner is Andrew's mother. Less than two years after Andrew was born, April voluntarily relinquished him to David Smith and April's brother, Jason. During the time, Andrew started seeing a psychologist for separation-anxiety disorder. In December 2013, by agreed order, April regained legal and physical control of Andrew, but also extended extensive visitation to Smith to help with the separation-anxiety. However, in November 2014, April withheld visitation from Smith prompting him to file for emergency custody due to April's contempt of the agreed upon order and her unfitness to care for Andrew. Similarly, Judi Garner, April's mom, and Ronald Fox, April's stepfather, filed a similar petition for custody joining Smith's petition. In September 2016, the chancellor granted temporary custody of Andrew to David. Based on allegations of April's unfitness, the chancellor appointed a guardian ad litem ("GAL") to investigate. The GAL recommended weekly visitation between April and Smith, and grandparent visitation when Andrew is with Smith. In fall 2017, the Mississippi Department of Child Protection Services ("CPS") was called to investigate April's allegations of child sexual abuse against Smith. CPS investigated and concluded that there were no inappropriate actions on the part of Smith. In February 2018, a trial was held on the appellees' petition. The chancellor granted full custody, care and control of Andrew to Smith, visitation for Judi and Ronald, and visitation to April. Finally, April was found in contempt of the original order, attorney's fees and costs were assessed against April and April's request for attorney's fees were denied. April appealed.

ISSUES

Whether the chancellor erred in (1) awarding third-party custody to Smith; (2) awarding grandparent visitation to Ronald; (3) holding April in contempt; (4) assessing fees and costs against April; and (5) failing to award attorney's fees to April.

HOLDING

(1) Because the chancellor found that April's conduct—her illegal drug use, refusal to seek medical help for her depression, refusal to seek employment and placing of the child in a home fraught with domestic violence—rebutted the natural-parent presumption, and because the chancellor's full *Albright* assessment was supported by substantial evidence, the chancellor's award of custody to Smith was proper. (2) Because Ronald does not meet the definition of a grandparent under Miss. Code Ann. § 93-16-3, the chancellor erred in granting Ronald grandparent visitation. (3) Because there was evidence that April unilaterally stopped treatment with the psychologist, despite the judge's order, there is substantial evidence showing the chancellor's finding that April was in contempt of the agreed order. (4) Because the finding that April was in contempt was proper, and because April initiated unsubstantiated claims against Smith, attorney's fees were properly assessed, but, because there was no determination as to the amount Smith is entitled to incur of the GAL costs, as a result of the unsubstantiated abuse allegation, the GAL costs were reversed and remanded for determination of the amount of GAL costs incurred for the unsubstantiated sexual abuse allegations. (5) Because the chancellor found that incurring attorney's fees would not impose a financial hardship on April, the denial of April's request for attorney's fees was proper. Therefore, the Supreme Court affirmed in part, reversed and rendered in part and reversed and remanded in part the judgment of the DeSoto County Chancery Court.

CONCURRENCE IN PART & DISSENT IN PART

Chief Justice Randolph concurred that the best interest of the child was to be with Smith and that the findings were not manifestly wrong or clearly erroneous. However, Justice Randolph dissented because of the reversal of grandparent visitation to Ronald Fox. Justice Randolph wrote that considering the best interest of the child, there was sufficient evidence to show that awarding visitation to Ronald was in Andrew's best interest.

CONCURRENCE IN PART & DISSENT IN PART

Presiding Justice King agreed that Andrew should be placed with Smith and that April was properly found to be in contempt. However, Justice King dissented based on (1) the refusal of grandparent visitation to Ronald and (2) the negative/neutral consideration of April's husband's legal status and Smith's sexuality in the *Albright* analysis. Under Mississippi law, he concluded that the legislature did not mean for the law to be so narrowly interpreted to exclude Ronald from visitation rights. Finally, he questioned the negative belief that April's husband's legal status has any impact on April's parental fitness and chastised the majority for considering Smith's homosexuality as a factor of his moral character.

Affirmed in Part; Reversed & Rendered in Part; Reversed & Remanded in Part - 2018-CA-00962-SCT (Oct. 3, 2019)

En Banc Opinion by Justice Griffis - Concurrence in Part & Dissent in Part by Chief Justice Randolph - Concurrence in Part & Dissent in Part by Presiding Justice King

Hon. Percy L. Lynchard Jr. (DeSoto County Chancery Court)

Jerry Wesley Hisaw for Appellant - Gordon C. Shaw Jr. for Appellees

Briefed by [Brandon Wilson](#)

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HUTTO V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - PROSECUTORIAL MISCONDUCT - EXTRANEOUS & INFLAMMATORY MATTERS - The Court has declined to reverse based on the prosecution's comments when the comments had a de minimis effect and were harmless error in light of the overwhelming evidence

CIVIL PROCEDURE - APPEALS - INEFFECTIVE COUNSEL - To prove counsel was ineffective, a petitioner must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of his case

CRIMINAL PROCEDURE - JURY SELECTION - COGNITIVE IMPAIRMENTS - Qualified jurors are required to serve unless an illness renders them incapable of performing jury service, and a petitioner is entitled to a hearing only if he produces substantial evidence of incompetence

FACTS

James Cobb Hutto, III, was convicted of capital murder and sentenced to death in 2013, and the Mississippi Supreme Court affirmed the conviction and sentence in 2017. Based on his counsels' purported failures at trial, Hutto sought post-conviction relief from the Supreme Court or, in the alternative, leave to proceed in the trial court.

ISSUES

Whether (1) defense counsel failed to present and explain all available mitigating evidence; (2) prosecutorial misconduct resulted in a verdict that was tainted by extraneous, inflammatory matters outside of the evidence; (3) counsel failed to investigate the circumstances underlying Hutto's prior violent-felony aggravator; and (4) defense counsel was ineffective for failing to challenge a juror with alleged cognitive impairments.

HOLDING

(1) Because the alternate psychologist's affidavit aligns with testimony presented at trial, and Hutto himself directly curtailed the amount of mitigating evidence presented at trial, his defense was not prejudiced, and the testimony would not have affected the outcome. (2) Because Hutto did not raise the prosecutor's comments about his failure to testify on direct appeal, he waived appeal of that issue. Because the prosecutor commented on Hutto's mitigating evidence and his remarks during trial, they did not deprive Hutto of a fair trial. (3) Because none of the facts underlying Hutto's past conviction support his claim, and his own account of facts would have prejudiced him and opened the door to the victim's and an eyewitness's accounts, defense counsel's actions were reasonable, and Hutto's claims are without merit. (4) Because the decision to accept the juror on the jury was a strategic one, Hutto provided no proof that the juror was incompetent at or near the trial, and any alleged mental impairment of the juror is not an extraneous influence for impeachment purposes, Hutto did not demonstrate deficient performance of his counsel or prejudice in allowing the juror to serve. Therefore, the Supreme Court denied Hutto's petition for post-conviction relief.

Relief Denied - 2017-DR-01207-SCT (Oct. 3, 2019)

En Banc Opinion by Justice Chamberlin

Hon. William A. Gowan, Jr. (Hinds County Circuit Court)

Benjamin H. McGee III & Alexander D. M. Kassoff (Office of Post-Conviction Council) for Petitioner - Ladonna C. Holland (Att'y Gen. Office) for Respondent

Briefed by [Reid Hudson](#)

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MISS. BAR V. GIBBONS

CIVIL - BAR MATTERS

BAR MATTERS - SUSPENSION - RETAKING THE MPRE - An attorney disbarred or suspended for six months or longer is also subject to the Multi State Professional Responsibility Exam (MPRE), if the Complaint Tribunal determines, on a case-by-case basis, that good cause exists to require it

BAR MATTERS - SUSPENSION - RECIPROCAL DISCIPLINE - The sanction imposed in Miss. generally mirrors the sanction imposed in a sister state, absent extraordinary circumstances which compel, justify or support variance from the foreign jurisdiction's sanction

FACTS

The Louisiana Supreme Court handed down David Cartan Loker Gibbons, Jr.'s suspension from the practice of law in Louisiana for a period of one year and one day, with all but six months deferred. The Louisiana Supreme Court accepted the findings set forth in a joint petition for consent discipline submitted by Gibbons and the Office of Disciplinary Counsel ("ODC"). According to the complaint, Greater New Orleans Federal Credit Union ("GNOFCU") retained Gibbons to handle car seizures and deficiency lawsuits. Gibbons, suffering from depression and anxiety, neglected his work and fell behind in his cases. GNOFCU eventually found out Gibbons had been neglecting his cases and retained other counsel to take on Gibbons cases. GNOFCU sued Gibbons for professional malpractice, which eventually settled.

Gibbons admitted violating Rules 1.3 (diligence), 1.4 (failure to communicate), 1.16 (obligations upon termination), and 8.4(c) (conduct involving misrepresentation) of the Louisiana Rules of Professional Conduct. Gibbons was permitted to seek reinstatement on or after July 9, 2019 upon filing an affidavit with the Louisiana Supreme Court. Mississippi rules, however, require an attorney petition the Supreme Court for reinstatement after a suspension of six months. Mississippi also requires a suspended attorney to retake the MPRE upon a tribunal finding such requirement is necessary. On April 5, 2019, the Miss. Bar filed a complaint for reciprocal discipline against Gibbons. Gibbons filed a response, admitting each allegation in the complaint, and requesting the Miss. Supreme Court decrease the discipline from that imposed by the Louisiana Supreme Court in light of mitigating factors, and due to the states' respective differences in rules regarding reinstatement.

ISSUES

Whether (1) Gibbons shall be required to retake the MPRE as mandated by the newly amended Rule 12 of the Rules of Discipline for the Miss. State Bar ("Rule 12") and (2) whether Gibbons's cited mitigating factors, including the states' respective differences in rules regarding reinstatement, constitute extraordinary circumstances that compel, justify or support variance from Louisiana's six month suspension order.

HOLDING

(1) Because Rule 12's amendment takes effect after the complaint of the Miss. Bar, the former Rule 12.5 applies here. Given no Complaint Tribunal was convened, and that the Miss. Bar made no request in its complaint that Gibbons be required to take the MPRE, Gibbons is not required to take the MPRE prior to petitioning the Mississippi Supreme Court for reinstatement. (2) Because personal or emotional problems, full and free disclosure and consent to disciplinary proceedings, remorse, absence of a prior disciplinary record, the absence of harm to Mississippians, and the states' differences in petition requirements for reinstatement do not constitute extraordinary circumstances, they do not compel, justify or support variance from Louisiana's six-month suspension order. Thus, the Supreme Court mirrored the sanction imposed by the Louisiana Supreme Court.

Suspended from the practice of law for a period of one year and one day, with all but six months deferred - 2019-BD-00629-SCT (Oct. 3, 2019)

En Banc Opinion by Justice Beam

Melissa Scott for Appellant - Andrew Kilpatrick Jr., Ashley Lane, & Kristine J. Swearingen for Appellee

Briefed by [Charles Ellzey](#)

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SHORT V. VERSIGA

CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

CIVIL PROCEDURE - PRELIMINARY CONSIDERATIONS - VENUE - Miss. Code Ann. § 11-11-3(1)(a)(i) provides four permissible venue options for civil actions of which the circuit court has original jurisdiction: (1) in the county where the defendant resides; (2) if a corporation, in the county of its principal place of business; (3) in the county where a substantial alleged act or omission occurred; or (4) where a substantial event that caused the injury occurred

CIVIL PROCEDURE - PRELIMINARY CONSIDERATIONS - VENUE - Mississippi's venue statute does not authorize venue in every county where an event occurred, but instead the statute requires a case to be filed where a substantial event that caused the injury occurred

FACTS

Katherine Grace Short's husband, Tye Breland, died from a gunshot wound to the chest at their home in Pascagoula, Mississippi. Investigators ruled Breland's death an accident. Forty years later, *Cold Justice: Beyond the Grave*, an Oxygen Network true-crime documentary television program that aired nationally, featured Breland's story and considered whether Short murdered her late husband. Short filed a complaint for defamation and tortious invasion of privacy against various media entities, a crime expert, a crime investigator, and Darren Versiga, a law enforcement officer, in

the Circuit Court of the First Judicial District of Harrison County, which is where she resided. Versiga filed a motion to transfer venue to Jackson County. The Circuit Court of the First Judicial District of Harrison County granted Versiga’s motion to transfer because Breland’s case was investigated there, the majority of the acts complained of occurred there, and Versiga resided there. Short appealed.

ISSUE

Whether the trial court abused its discretion by transferring venue from the First Judicial District of Harrison County to Jackson County.

HOLDING

Because the substantial event that caused Short’s injury was reputational harm in her community caused by the publication of a true-crime documentary considering whether Short murdered her late husband, because that substantial event occurred in the First Judicial District of Harrison County, and because although the television episode aired across Mississippi, Mississippi’s venue statute does not authorize venue in every county where the event occurred but only where a substantial event that caused the injury occurred, the trial court abused its discretion by transferring venue to Jackson County. Therefore, the Supreme Court reversed and remanded the order of the Circuit Court of the First Judicial District of Harrison County.

Reversed & Remanded - 2018-IA-01302-SCT (Oct. 3, 2019)

Opinion by Justice Griffis

Hon. Roger T. Clark (Harrison County Circuit Court, First Judicial Dist.)

Christopher Edward Smith & Grady Morgan Holder for Appellant - Edward C. Taylor & Katie Ryan Van Camp for Appellee

Briefed by [Elena Mosby Peters](#)

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TIPPAH CTY. V. LEROSE

CIVIL - OTHER

DUE PROCESS - NOTICE - BOARD OF SUPERVISORS MEETINGS - Miss. Code Ann. § 19-3-11 furnishes constructive notice to the public for regular meetings of the Board of Supervisors, but further notice is required when prescribed by statute or in unusual circumstances

EMINENT DOMAIN - JURISDICTION - INVERSE CONDEMNATION - The special court of eminent domain does not have exclusive jurisdiction over inverse-condemnation claims, and circuit courts have validly heard inverse-condemnation claims

FACTS

The Tippah County Board of Supervisors (“the Board”), following a hearing, entered an order to abandon a county road running through land owned by the LeRoses. Prior to this hearing, the Board published notice in the local newspaper. The Board reconsidered its decision 18 months later at a standard Board of Supervisors hearing. It rescinded the abandonment order without publishing notice in the newspaper or otherwise notifying the LeRoses of the hearing. The LeRoses filed suit against Tippah County for inverse condemnation and the Tippah County Circuit Court granted partial summary judgment for the LeRoses. Tippah County appealed.

ISSUES

Whether the trial court erred by (1) finding the rescindment order void for want of notice and (2) exercising subject matter jurisdiction over the claim for inverse condemnation.

HOLDING

- (1) Because rescinding an abandonment order is an unusual circumstance and the LeRoses did not receive actual notice of the board hearing, the trial court properly found the Tippah County Board of Supervisors’ rescindment order void.
- (2) Because the Mississippi Constitution does not vest the special court of eminent domain with exclusive subject matter

jurisdiction over inverse-condemnation claims, the trial court properly exercised subject matter jurisdiction. Therefore, the Supreme Court affirmed and remanded the judgment of the Tippah County Circuit Court.

Affirmed & Remanded - 2018-IA-01079-SCT (Oct. 3, 2019)

Opinion by Justice Ishee

Hon. John Andrew Gregory (Tippah County Circuit Court)

Daniel Judson Griffith & B. Sean Akins for Appellant - Wendell H. Trapp, Jr. for Appellees

Briefed by [Eli Scott](#)

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WATKINS DEV., LLC V. JACKSON REDEVELOPMENT AUTH.

CIVIL - OTHER

CONTRACTS - BREACH - SUBSTANTIAL PERFORMANCE - Substantial performance is not obtained simply by spending a substantial amount of money, but rather, is judged by how close the tenant came to meeting its obligations under the lease

CONTRACTS - BREACH - WAIVER - Where the cause of forfeiture is a continuing breach, the waiver of one breach does not destroy the breached condition or covenant, or waive subsequent breaches thereof, such waiver discharging only the particular breach

CONTRACTS - FORFEITURE - EQUITABLE REMEDIES - Where there is a contract, parties may not abandon same and resort to quantum meruit

FACTS

Between 1997 and 2001, the Jackson Redevelopment Authority (“JRA”) acquired properties along Farish Street in Jackson, Mississippi. In March 2002, JRA entered into a lease with Performa Mississippi, LLC to develop the properties into the Farish Street Entertainment District, modeled after Beale Street in Memphis, Tennessee. However, after six years, Performa had failed to make any significant development towards the project. Watkins Development, LLC formed Farish Street Group (“FSG”) to take over the project in 2008. Performa then assigned the lease to FSG in 2009. FSG and JRA executed an amended lease agreement on January 27, 2010. That same day, Watkins Development entered into an agreement with FSG to perform nearly all of the construction required by the amended lease. The amended lease provided deadlines FSG was required to meet to refurbish and sublet the properties. None of the deadlines were met, and after three years none of the properties had been sublet. The construction project was funded in part by a \$5.4 million loan from the State. On July 26, 2013, JRA gave written notice of termination of lease to certain properties. On September 25, 2013, JRA gave written notice of termination of lease as to the remaining properties. On October 7, 2013, JRA sent another letter reiterating that the lease was fully and finally terminated. All of JRA’s letters cited FSG’s failure to commence or complete construction. By then, Watkins Development had filed a mechanic’s lien on the properties in the amount of \$4,757,484.33. JRA sued to expunge the lien. In 2014, JRA filed a motion for partial summary judgment, asking the court to declare the lien invalid. In 2015, the chancellor granted the motion, holding the lien invalid as a matter of law. After trial, the chancellor found that the lease was properly terminated. Watkins Development and FSG appealed.

ISSUES

Whether the chancellor (1) erred in finding that FSG materially breached its lease with JRA; (2) abused his discretion in holding that JRA’s initial forbearance did not preclude it from terminating the lease; (3) erred in holding that if JRA properly terminated the lease, FSG was not entitled to an equitable remedy for valuable improvements done to the properties and forfeited as a result of their failure to finish construction; (4) erred in holding that FSG was not excused from the construction deadlines because of impossibility or impracticality of performance; (5) erred in not finding JRA breached its implied duty of good faith and fair dealing by terminating the lease; (6) erred in expunging Watkins Development’s lien on the subject properties; and (7) allowed JRA’s actions to amount to an inverse condemnation under the Mississippi and United States Constitutions.

HOLDING

(1) Because FSG failed to meet all the provisions and deadlines contained in the lease, the chancellor was not manifestly wrong or clearly erroneous in finding FSG's breaches material. (2) Because the amended lease's anti-waiver clause expressly stated that JRA's failure to insist upon strict performance did not constitute a waiver of subsequent breaches, the chancellor did not abuse his discretion in holding JRA should not be estopped from terminating the lease. (3) Because the contract provided that the improvements would become JRA's property and that no compensation would be provided in the event the lease was terminated early, the chancellor did not err in holding FSG was not entitled to equitable compensation for valuable improvements made to the properties. (4) Because the mere fact that a contract becomes burdensome or even impossible to perform does not for that reason alone excuse performance, the chancellor did not err in holding FSG was not excused from the construction deadlines. (5) Because termination of the lease was authorized by the contract, JRA did not act in bad faith. (6) Because a mechanic's lien cannot attach to public property or property used for the benefit of the public, the chancellor did not err in expunging Watkins Development's lien. (7) Because Watkins Development's briefing was inadequate to meet its burden to show error on appeal with regard to its claims of constitutional violations, the Court did not consider the issue. Therefore, the Supreme Court affirmed the judgment of the Hinds County Chancery Court.

Affirmed - 2018-CA-00302-SCT (Oct. 3, 2019)

Opinion by Justice Ishee

Hon. J. Dewayne Thomas (Hinds County Chancery Court)

W. David Watkins & Robert L. Gibbs for Appellants - Mark D. Herbert, Ginny Y. Deliman, James W. Shelson, & Pernila Stimley Brown for Appellees

Briefed by [Michael Stirgus](#)

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SUPREME COURT – ORDERS

RAY V. STATE

COURT ORDER

ORDER

Garrett Eugene Ray's conviction was affirmed on direct appeal on April 5, 2018. Ray filed an application for leave on June 5, 2018, and filed another on August 6, 2018. Those applications were denied on October 10, 2018, and Ray then filed a motion for reconsideration. The motion was denied on June 3, 2019. Ray filed a new application for leave to proceed in the trial court on June 20, 2019. The Supreme Court denied Ray's application for leave. It found that the application was successive and does not qualify under any of the successive-writ bar exceptions. The court determined that Ray's arguments were barred by time, the successive-writ bar, and the doctrine of res judicata. Because Ray's successive application for leave was deemed frivolous, the court warned Ray that future frivolous filings could result in monetary sanctions and restrictions on filing future applications.

OBJECTION

Presiding Justice King disagreed with the court's finding that Ray's application was frivolous and with the warning the court issued for future frivolous filings. He argued that monetary sanctions and restrictions on future filings would violate a defendant's constitutional rights by restricting his access to the courts.

Denied - 2018-M-00798 (Oct. 2, 2018)

En Banc Order by Justice Ishee - Objection by Presiding Justice King

Briefed by [Luke Seymour](#)

SUPREME COURT - CRIMINAL CASES

BOWMAN V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - FELONY - BURGLARY - To convict a defendant of burglary under Miss. Code Ann. § 97-17-23, the prosecution must prove that the defendant committed (1) the unlawful breaking and entering of the dwelling house or inner door of such dwelling house of another (2) with the intent to commit a crime once entry has been gained

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - NONREQUESTED INSTUCTIONS - A trial court is not required to give the jury sua sponte instructions or instructions supplementing those by the parties

EVIDENCE - ADMISSIBILITY - OTHER CRIMES - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith; it may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

FACTS

Chad Bowman and Emily Anne Chenoweth were married. Chenoweth often visited a hunting camp, with advance notice to her father or the caretaker Wayne Stewart, Jr., as an escape from a rapidly deteriorating and abusive relationship with Bowman. The conflicts resulted in numerous injuries inflicted on Chenoweth that she never reported to the police. The night before the incident, Chenoweth gave Bowman an ultimatum of either getting marriage counseling and medication for his anger or getting a divorce. Bowman reacted by screaming at her and, after further abuse by Bowman, she decided to leave for the hunting camp. Once Chenoweth arrived at the hunting camp, Stewart unlocked the camp house for her, and they talked before falling asleep on the couch next to each other. Bowman decided to drive to the hunting camp, arriving to the camp at around 5:00 a.m. The parties disputed the events at the hunting camp, but generally speaking, the following events occurred. Bowman walked around the camp house to find an unlocked sliding screen door. Upon entering, he discovered Chenoweth and Stewart together. Bowman then attacked Stewart by punching him and choking him until he was unconscious. Bowman then left the camp, followed by Stewart and Chenoweth. Bowman was charged with burglary, aggravated assault and attempted murder, but the Noxubee County Circuit Court only convicted Bowman of the burglary. The Court sentenced Bowman to twenty years in prison, with ten years suspended and five years of post-release supervision. Bowman appealed.

ISSUES

Whether (1) the burglary conviction was supported by the sufficiency of the evidence; (2) the burglary conviction was supported by the weight of the evidence; (3) the trial court erred by not giving two jury instructions for the burglary charge; (4) the trial court admitted improper Rule 404(b) evidence regarding Bowman's prior assault of Chenoweth and his drug and alcohol abuse; and (5) whether Bowman's sentence was based on misapplied or misunderstood law.

HOLDING

(1) Because Chenoweth did not have to prove that the hunting camp was her permanent, continuous residence, and because Bowman's own testimony supports the claim that he lacked permission to enter the dwelling, there was sufficient evidence to support the burglary conviction. (2) Because Bowman testified that he entered the camp through an unlocked back door, there is evidence to support the weight of the burglary conviction. (3) Because Bowman withdrew his instruction regarding knowledge, permission or consent, and because Bowman never requested the dwelling house instruction, the trial court did not err in not giving the instructions. (4) Because evidence of Bowman's drug abuse and prior assaults towards Chenoweth were deemed probative to show intent and escalation to the burglary committed in this case, the trial court did not abuse its discretion by admitting such evidence to complete the story. (5) Because the trial court mistakenly believed that Miss. Code Ann. § 97-3-2(2)'s fifty percent parole eligibility applied to

all Miss. Code Ann. § 97-3-2 violations, Bowman’s sentencing was based on misapplied law. Therefore, the Supreme Court affirmed the conviction of the Noxubee County Circuit Court but remanded the case for resentencing.

Affirmed & Remanded - 2017-KA-01381-SCT (Oct. 3, 2019)

Opinion by Justice Maxwell

Hon. James T. Kitchens, Jr. (Noxubee County Circuit Court)

Julie Ann Epps, Robert Thomas Rich, & Tommy Ray Savant for Appellant - Kaylyn Havrilla McClinton & Stanley Alexander (Att’y Gen. Office) for Appellee

Briefed by [Daniel Bond](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 1, 2019

COURT OF APPEALS - CIVIL CASES

BAPTIST MEM’L HOSP.-N. MISS. INC. V. DEPENDENTS OF SLATE

CIVIL - WORKERS’ COMPENSATION

LABOR & EMPLOYMENT - WORKERS’ COMPENSATION - REBUTTABLE PRESUMPTION - To rebut the presumption that an untoward event or events arose out of and in the course of employment, an employer or carrier must show two things: (1) the cause of death of the employee and (2) that the work activities of the decedent were fully developed to show that such activities did not cause or contribute to the death

LABOR & EMPLOYMENT - WORKERS’ COMPENSATION - REBUTTABLE PRESUMPTION – A carrier may well escape liability upon proof that the worker’s death was wholly unrelated to his work activities

LABOR & EMPLOYMENT - WORKERS’ COMPENSATION - REBUTTABLE PRESUMPTION - Under Miss. Code Ann. § 71-3-3(3)(b), an untoward event or events shall not be presumed to have arisen out of and in the course of employment, except in the case of an employee found dead in the course of employment

STATUTORY INTERPRETATION - AMBIGUITY - PLAIN MEANING RULE - The most fundamental rule of statutory construction is the plain meaning rule, which provides that if a statute is not ambiguous, then this Court must apply the statute according to its terms

FACTS

Angela Slate was a material-management technician at Baptist Memorial Hospital (“Baptist”), where her various job duties consisted of filling requisitions, delivering supplies to the various hospital departments, processing patient charges, and handling paperwork. In 2016, Slate died unexpectedly in her office. The death certificate listed Slate’s cause of death as acute myocardial infarction, and no autopsy was conducted. Slate’s manager and co-workers had no knowledge of what Slate was doing in the hours leading up to her death, and there was no direct evidence as to what had actually happened on the day in question. Baptist retained a cardiac electrophysiologist to testify about Slate’s death who conceded outright that he could not state with a reasonable degree of medical certainty the exact cause of Slate’s death because no autopsy was conducted. However, he believed that Slate’s sudden death could only be attributed to a limited number of causes. Slate’s dependents sought workers’ compensation benefits and an administrative judge found that Baptist failed to carry its burden of rebutting the found-dead presumption. Therefore, the judge awarded Slate’s family death benefits. The Mississippi Workers’ Compensation Commission (“the Commission”) affirmed that decision. Baptist appealed.

ISSUES

Whether the Commission erred in (1) determining that Baptist failed to rebut the found-dead presumption and (2) failing to abandon the found-dead presumption.

HOLDING

(1) Because Baptist’s evidence was based on mere assumptions and they failed to produce direct evidence of Slate’s work activities prior to her death, the Commission did not err in determining that Baptist failed to overcome the found-dead presumption. (2) Because alterations of statutory directives are presumed to be within the sole power of the Legislature, the Commission did not err in maintaining the found-dead presumption as statutory authority. Therefore, the Court of Appeals affirmed the decision of the Mississippi Workers’ Compensation Commission.

Affirmed - 2018-WC-01167-COA (Oct. 1, 2019)

Opinion by Judge McCarty

Mississippi Workers’ Compensation Commission

Marjorie T. Matlock for Appellants - J. Keith Pearson & Sarah Lynn Dickey for Appellee

Briefed by [Sarah Schofield](#)

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HICKS V. PUB. EMPS.’ RET. SYS. OF MISS.

CIVIL - STATE BOARDS & AGENCIES

CIVIL PROCEDURE - PUBLIC EMPLOYMENT - DISTRIBUTION OF FUNDS - Miss. Code Ann. § 25-11-103(1)(g) and § 25-11-114(2)(a) state that a surviving spouse of a deceased member of [PERS] shall receive a lifetime monthly benefit, regardless of the named beneficiary on file so long as the marriage was at least one year and the surviving spouse has not signed a written waiver of benefits

TORT LIABILITY - SLAYER STATUTE - PRECLUSION OF DISTRIBUTION OF FUNDS - Miss. Code Ann. § 91-1-25 and § 91-5-33 prohibit inheritance by an individual who “willfully” causes the death of another individual

FACTS

Megan Hicks, a member of Public Employees’ Retirement System (“PERS”) died as a result of a car accident caused by her husband, Jeremy Earnest, driving while being intoxicated. Megan listed her husband as a 40 percent beneficiary and her sister, Mortischa Hicks, as a 60 percent beneficiary in the event a refund of accumulated contributions and interest were payable upon Megan’s death. PERS followed Miss. Code Ann. § 25-11-103(1)(g) and § 25-11-114(2)(a) and determined Jeremy was entitled to all of the statutory survivor benefits regardless of Megan’s beneficiary designations. However, Jeremy was criminally indicted for unlawfully and feloniously operating a vehicle in a negligent manner, causing the death of Megan. PERS concluded that Jeremy’s conviction did not preclude him from receiving benefits. Mortischa later requested an inquiry into the benefit payments to Jeremy after his conviction stating plans to seek recovery of all funds held by Megan arguing Jeremy “willfully” caused the death of Megan because he “willfully” drove a vehicle that he knew or should have known, he was incapable of operating due to his voluntary intoxication and therefore slayer statutes preclude him from receiving spousal survival benefits. PERS concluded that there was no actual evidence Jeremy “willfully” intended to cause Megan’s death because aggravated-DUI is a crime of negligence and not a willful intent to cause death. Mortischa appealed.

ISSUE

Whether the husband of a deceased PERS member is entitled to receive lifetime spousal benefits notwithstanding the fact that he was convicted of aggravated-DUI in connection with her death.

HOLDING

Because Jeremy was convicted for the offense of vehicular homicide, a crime of operating a motor vehicle in a “negligent” manner, there was no evidence that he “willfully” caused Megan’s death. Accordingly, under the current laws of Mississippi, PERS cannot deny Jeremy statutory survivor benefits unless sufficient evidence is presented that he willfully caused Megan’s death. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

CONCURRENCE

Judge Lawrence argued that Mortischa’s argument was sound in that Jeremy voluntarily and intentionally consumed alcohol and it would not be a stretch to hold that our law implicitly demands that whenever a person willfully or voluntarily ingests alcohol and then negligently causes the death of another, that under slayer statutes, the person’s acts be construed as willful. However, that is not the present state of Mississippi Law and as a result Jeremy is entitled to lifetime spousal survivor benefits.

Affirmed - 2018-SA-00977-COA (Oct. 1, 2019)

Opinion by Chief Judge Barnes - Concurrence by Judge Lawrence
Hon. Joseph Anthony Sclafani (Hinds County Circuit Court, First Judicial Dist.)
Orvis A. Shiyou Jr. for Appellant - S. Martin Millette (Att’y Gen. Office) for Appellee
Briefed by [Robert Rhea](#)

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STRINGFELLOW V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - POST-CONVICTION RELIEF - MODIFICATION OF SENTENCING - A reduction or reconsideration of a sentence by a judge must occur prior to the expiration of the sentencing term; a circuit court judge may not alter or vacate a sentence once the term of court in which the defendant was sentenced has ended

CRIMINAL LAW - POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - A movant has three years to file a post-conviction relief motion, and failure to file a motion within the three years is a procedural bar under Miss. Code Ann. § 99-39-5(2)

FACTS

Tyrone Stringfellow was indicted for armed robbery as a violent habitual offender in 2002. He subsequently pled guilty in exchange for a recommended twenty-three year sentence. In 2018, Stringfellow filed a “Motion for Sentence Reduction by Credit Earned Time for Good Behavior.” However, the circuit court denied the motion ruling that it lacked jurisdiction to reconsider Stringfellow’s sentence. Stringfellow appealed.

ISSUE

Whether the circuit court erred in denying Stringfellow’s motion for post-conviction relief.

HOLDING

Because a circuit court may not alter or vacate a sentence once the term of the court in which the defendant was sentenced has ended, the circuit court correctly held that it lacked authority to reconsider Stringfellow’s motion for post-conviction relief. Further, Stringfellow’s motion was time-barred by the three-year statute of limitations applicable to such motions under Miss. Code Ann. § 99-39-5(2). Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2018-CP-01196-COA (Oct. 1, 2019)

Opinion by Presiding Judge J. Wilson
Hon. Lester F. Williamson Jr. (Lauderdale County Circuit Court)
Pro se for Appellant - Lisa L. Blount (Att’y Gen. Office) for Appellee
Briefed by [Charity Karanja](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

GREEN V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - RES JUDICATA - Res judicata bars re-litigation of the same issues and claims that were raised in a prior PCR motion

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS EXCEPTION - The exception to the statute of limitations applies if the petitioner can show that additional DNA testing would provide a reasonable likelihood of more probative results

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - SUCCESSIVE MOTIONS - A successive PCR motion is permitted if the petitioner has requested DNA testing and asserts new or different grounds for relief related to DNA testing not previously presented or the availability of more advanced DNA technology

FACTS

A Jackson County grand jury charged Jess Green in two different multi-count indictments arising out of similar but separate incidents. First, he was charged with two counts of kidnapping, two counts of sexual battery, and one count of armed robbery. Second, he was charged with one count of kidnapping, one count of armed robbery, and one count of attempted sexual battery. Green pled guilty to all charges in both indictments and was sentenced to serve thirty years in the custody of the Department of Corrections on each count, with the sentences to run concurrently. Green filed his first post-conviction relief (“PCR”) motion in 2015, challenging all his convictions under both indictments, and alleging, among other things, that DNA evidence from his case should be subjected to additional testing. The trial court denied the motion, and the Court of Appeals affirmed, holding that Green’s claim was not excepted from the three-year statute of limitations under the Uniform Post-Conviction and Collateral Relief Act (“UPCCRA”) because Green did not show that a “different testing method would produce more probative results.” Green’s second PCR motion raised some of the same claims as the first motion but only addressed his conviction in the second indictment. The Court of Appeals upheld the trial court’s denial of his motion because Green’s claims were barred by the statute of limitations, the UPCCRA’s bar on successive PCR motions, and the doctrine of res judicata. In his third PCR motion, Green asserted that DNA evidence from his case could be subjected to additional testing and “such additional testing would provide a reasonable likelihood of more probative results.” As part of his PCR motion, Green attached a letter addressed to him from an expert in DNA analysis advising that the original DNA testing in his case was still considered “reliable” and capable of identifying a DNA match to a reasonable degree of scientific certainty. The trial court denied Green’s motion, holding that it was barred by the statute of limitations, the bar of successive PCR motions, and the doctrine of res judicata. Green appealed.

ISSUE

Whether the trial court erred in denying Green’s PCR motion.

HOLDING

Because Green’s claim was barred by the doctrine of res judicata, and because the exception to the statute of limitations did not apply because Green failed to show that additional DNA testing would provide a reasonable likelihood of more probative results, and because Green presented the same claim that the court rejected two years prior, the trial court did not err in denying Green’s PCR motion. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2017-CP-01668-COA (Oct. 1, 2019)

Opinion by Presiding Judge J. Wilson

Hon. Dale Harkey (Jackson County Circuit Court)

Pro se for Appellant - Abbie Eason Koonce (Att’y Gen. Office) for Appellee

Briefed by [Jordan Thomas](#)

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PIPKIN V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - PLEA AGREEMENT - FACTUAL BASIS - In order for the court to accept a guilty plea, the trial court must determine there is a factual basis supporting the plea

CRIMINAL LAW - HOMICIDE - DELIBERATE-DESIGN - Under Miss. Code Ann. § 97-3-19(1)(a), deliberate-design murder is the killing of a human being without the authority of law with deliberate design to cause the death of the person killed, or of any human being

POST-CONVICTION RELIEF - INNEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - To succeed in a claim for ineffective assistance of counsel, one must prove his counsel was deficient and this deficiency prejudiced him

FACTS

Devonta Pipkin and four others killed Emanuel Gomez while robbing him. During the plea conversation with the State, Pipkin agreed under oath as to the facts and circumstances of the crime asserted by the State. The State also relied on the four co-defendants' statements asserting that Pipkin was carrying a gun and involved in the decision to rob Gomez. Pipkin ultimately pled guilty to the deliberate-design murder of Gomez. However, prior to Pipkin's plea, two of the co-defendants recanted their statement regarding Pipkin's involvement in the crime. Pipkin was sentenced to life in prison. The trial court denied Pipkin's petition for post-conviction relief. Pipkin appealed.

ISSUES

Whether the trial court erred when it (1) found a factual basis to support Pipkin's guilty plea and (2) denied Pipkin's claim for ineffective assistance of counsel.

HOLDING

(1) Because the State was prepared to prove beyond a reasonable doubt that Pipkin and the four other co-defendants killed Gomez while robbing him, and because Pipkin agreed under oath as to the facts recited by the State, the trial court did not err when it found a factual basis to support Pipkin's guilty plea. (2) Because all four co-defendants' statements indicated Pipkin was carrying a gun and was involved in the decision to rob Gomez, and because Pipkin swore under oath that he was guilty of murdering Gomez, Pipkin did not demonstrate how the outcome of his case would have been different, and the trial court did not err when it denied Pipkin's claim for ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Tate County Circuit Court.

Affirmed - 2018-CA-00436-COA (Oct. 1, 2019)

Opinion by Judge McCarty

Hon. Smith Murphey (Tate County Circuit Court)

Imhotep Alkebu-Lan for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Charles Matranga](#)

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COURT OF APPEALS - CRIMINAL CASES

BRISCO V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - DIRECTED VERDICT - REVERSAL - A trial court's ruling can only be reversed if, after viewing all of the evidence in the light most favorable to the verdict, one or more of the elements of the charged offense is such that reasonable fair-minded jurors could only find the accused not guilty

CRIMINAL PROCEDURE - APPEAL - SUFFICIENCY OF EVIDENCE - A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice

CRIMINAL LAW & PROCEDURE - TRIALS - JURY INSTRUCTIONS - Instructions must be read as a whole, and if they fairly state the law of the case and create no injustice, no reversible error will be found

FACTS

Latoya Brisco, Carl Whitaker, and Casheka Northern were all socializing one evening at Northern's house. Northern and Whitaker were both drinking tequila, Northern so much that she passed out asleep. Northern's two minor children, K.N. and Z.N., were also there. After Northern passed out, an argument over a debt Whitaker owed Brisco broke out. This was not the first argument between Brisco and Whitaker. In voice messages seven months earlier, Whitaker threatened to kill Brisco, but since then the two had resumed their friendship. Northern's children testified at trial that the argument intensified to the point that Brisco blocked the door to prevent Whitaker from leaving. Whitaker, highly intoxicated, proceeded to call 911 and informed the operator that he was at a house where he was not allowed to leave. According to K.N., after the 911 call dropped Whitaker charged Brisco and the two fell to the floor. K.N. then approached and stabbed Whitaker in the back. This allowed Brisco to free herself from Whitaker, and what happened next, Brisco claimed at trial, was self-defense. Brisco testified that she reached out with her knife and stabbed Whitaker in the neck. After Whitaker fell to the ground Brisco called 911, but because of Whitaker's previous 911 call Deputy Sheriff Chris Satcher was already on the scene. Less than a minute after Satcher arrived, Whitaker died. While no arrest was made that night Brisco, K.N., and Z.N. all gave statements about what occurred that evening. Brisco was eventually indicted for Whitaker's murder following an investigation performed by Satcher. Prior to trial Brisco entered a motion in limine to limit Satcher's testimony concerning the content of 911 calls because the calls were mostly unintelligible. The Warren County Circuit Court agreed to limit Satcher's testimony only to the fact that he launched his investigation based on the 911 calls. Brisco filed an additional motion in limine to admit threatening voice messages made by Whitaker to Brisco seven months earlier. The Warren County Circuit Court denied this motion, because it deemed the messages too remote in time to prove Brisco's state of mind seven months later. At trial the State argued that the blood evidence in the house suggested that Brisco was blocking the front door, and that Brisco stabbed Whitaker near the front door. After the State rested, Brisco moved for a directed verdict, which the court denied. The defense only presented Brisco as a witness. The State, in its closing argument, argued its interpretation of the unintelligible portions of the 911 calls to the jury. At the close of trial, the court properly instructed the jury, including two instructions that set forth the law on self-defense. During deliberation, the jury sent out a question to the trial judge on three separate occasions. Each time the trial judge conferred with counsel from both sides and then responded to the jury. Brisco did not object on any of these three occasions. The jury found Brisco guilty of culpable negligence manslaughter. Brisco appealed.

ISSUES

Whether (1) the trial court erred in failing to admit Whitaker's voice messages; (2) the trial court erred in its responses to the jury's questions; (3) the trial court erred in failing to grant Brisco's motion for a directed verdict; (4) the trial court erroneously overruled Brisco's objections to certain testimony and evidence at trial; (5) the verdict was against the overwhelming weight of the evidence; (6) the trial court erred in allowing the State to argue to the jury what was said on Whitaker's 911 calls; (7) the trial court erred in granting instruction S-5A; and (8) Brisco was provided ineffective counsel.

HOLDING

(1) Because the voice messages were too remote in time, and because Brisco and Whitaker had frequent amicable contacts with each other after the voice messages, the trial court did not err in ruling that the voice messages were not probative of Brisco's state of mind when she stabbed Whitaker and thus not admissible. (2) Because Brisco failed to object to the court's responses to the jury's questions, and because the court sought input from both the State and Brisco before responding to the jury's questions, the trial court did not abuse its discretion in answering the jury's questions. (3) Because there was evidence that Brisco impeded Whitaker's exit from the house, and because evidence is to be viewed in a light most favorable to the verdict, the trial court did not err in failing to grant Brisco's motion for a

directed verdict. (4) Because the court will only reverse the trial court's decisions on motions or objections during the trial for an abuse of discretion, and because the director of the 911 call office testified on cross-examination that the time of Whitaker's call was the time recorded in the police report, the trial court did not abuse its discretion in allowing the director to testify on re-direct about the time of Whitaker's 911 call. Because the State was laying a foundation by asking a leading question to Satcher, and because Satcher did not provide any expert testimony and only lay opinions, the trial court did not abuse its discretion in allowing Satcher's testimony. Because Brisco questioned Satcher about the purpose of the 911 call on cross-examination, the court did not abuse its discretion in allowing the State to question Satcher about it further on re-direct examination. Because Brisco asked Satcher about the photos he took of the wounds suffered by the parties involved, the trial court did not abuse its discretion by allowing the State to ask questions relating to these pictures on re-direct examination. Because Miss. R. Evid. Rule 801(d)(2) provides that an admission by a party opponent is not hearsay, and because Z.N.'s testimony was relevant to show why she told investigators what she did, the trial court did not abuse its discretion in admitting Z.N.'s testimony concerning her conversation with Brisco while they were waiting to be questioned by police. Because the State was merely repeating what the witness had already testified to, the trial court did not abuse its discretion in denying Brisco's leading question objections. (5) Because the evidence was such that, giving the State the benefit of all reasonable inferences, reasonable jurors could find that each element of culpable manslaughter was proven, the verdict was not against the overwhelming evidence. (6) Because the jury was properly instructed that the statements made by counsel were not evidence, the trial court did not err in allowing the State to argue what was on the 911 calls in its closing statement. (7) Because the jury was properly instructed that the State had to prove that Brisco's actions were not necessary for self-defense, the trial court did not err in granting instruction S-5A. (8) Because appellate courts are limited to the trial record on direct appeal and ineffective assistance of counsel claims are more appropriately brought during post-conviction proceedings, the Courts of Appeals dismissed this claim without prejudice in order to allow Briscoe to raise this issue in a post-conviction relief petition. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

Affirmed - 2018-KA-01237-COA (Oct. 1, 2019)

Opinion by Judge McDonald

Hon. M. James Chaney Jr. (Warren County Circuit Court)

John R. Reeves for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Bryant Carlton](#)

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CARTER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - PRIOR BAD ACTS - A trial judge may conduct a Rule 403 on-the-record balancing test at his own discretion

CRIMINAL PROCEDURE - EVIDENCE - PRIOR BAD ACTS - Evidence of a crime or other wrong is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character

CRIMINAL PROCEDURE - EVIDENCE - PRIOR BAD ACTS - Although evidence may not be admitted to prove the person acted in accordance with the character, it may be admitted for other purposes such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident

FACTS

Kevin Ladexter Carter had an on-again-off-again relationship with Angela Collier since they were teenagers. Collier lived in a trailer with her roommate Delisa Joyce Aills, next door to Collier's grandmother. On February 12, 2017, Aills was woken by a scream. Hearing Collier and Carter arguing, Aills grabbed a pocket knife from her room and ran to the bathroom where she found Collier on the floor and Carter holding a rifle. Aills attempted to stab Carter in an attempt to get Collier out of the room, but Carter knocked her to the floor and stomped on her face. When Collier tried to intervene, Carter began beating her which gave Aills a chance to run for help. Johnny Shumaker, Collier's uncle who

lived on the same property, came to Aills's aid. Shumaker heard what he thought to be a gunshot and called the police. When Shumaker and Aills returned to Collier's trailer, she was bleeding heavily from a gunshot wound to the leg. Carter had left the scene. Collier later died from the wound. At trial, Aills and Shumaker testified about prior domestic-violence incidents between Carter and Collier where he became violent and made numerous threats to kill her. Carter moved to exclude the testimony, but after hearing arguments from both parties, the court admitted it. Carter was convicted of second degree murder, aggravated assault, and felon in possession of a firearm. Carter appealed.

ISSUE

Whether the trial judge erred in failing to conduct an on-the-record balancing test pursuant to Miss. R. Evid. 403 in admitting testimony about Carter's prior incidents of domestic violence.

HOLDING

Because the trial judge heard arguments from both parties about whether to exclude the testimony of prior domestic violence, and because the evidence was not patently prejudicial to Carter, the trial judge did not err in not performing an on-the-record balancing test for Rule 403. Therefore, the Court of Appeals affirmed the judgment of the Winston County Circuit Court.

Affirmed - 2018-KA-00811-COA (Oct. 1, 2019)

Opinion by Judge McDonald

Hon. Joseph H. Loper Jr. (Winston County Circuit Court)

Mollie Marie McMillin & George T. Holmes (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [John Forrest Kelly](#)

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WEAVER V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - WEAPONS - POSSESSION - To establish a felon in possession of a firearm, the State must prove that the defendant was a convicted felon and willfully possessed a firearm

CRIMINAL LAW - WEAPONS - INSTRUCTIONS ON POSSESSION - Although possession can be actual or constructive, instructions on constructive possession are only appropriate if there is no evidence establishing actual possession

CRIMINAL LAW - WEAPONS - ACTUAL POSSESSION - To prove actual possession, there must be sufficient facts to warrant a finding that the defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it

CRIMINAL LAW - WEAPONS - ACTUAL POSSESSION - Witness testimony is sufficient evidence for a finding of actual possession, and possession of recently stolen property is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt

FACTS

While detectives with the Quitman County Sheriff's Office were responding to a call reporting suspicious activity of a white Chrysler Sebring in the area, they received information about a possible burglary that had occurred nearby where the Sebring was sighted. At the scene, the detectives located the Sebring, another car, and three individuals: Jackie Weaver, Cameron Roberson, and Casey Hamilton. The detectives also found firearms and other personal property in the grass near the Sebring. After the burglary victim identified the property as those items missing from her home, the police arrested all three individuals. At trial, Roberson testified that Weaver orchestrated the whole operation. Specifically, Roberson testified that Weaver came up with the plan to rob the victim's house, drove the Sebring to the house, entered the house and took the items in question, and set up the meeting with Hamilton to purchase the stolen items, which was the event taking place when the detectives arrived at the scene. Following the jury trial in the Quitman

County Circuit Court, Weaver was convicted of burglary of a dwelling and being a felon in possession of a firearm. The trial court denied Weaver's motions for JNOV and a new trial. Weaver appealed.

ISSUE

Whether the trial court erred in allowing the State to present a theory of constructive possession of the gun without the jury receiving instructions on constructive possession.

HOLDING

Because Roberson's testimony established that Weaver was aware of the presence of the guns and asserted control over them, there was sufficient evidence to warrant a finding that Weaver had actual possession of them. Because there was evidence of actual possession, there was no need to provide evidence of constructive possession. Therefore, the Court of Appeals affirmed the judgment of the Quitman County Circuit Court.

Affirmed - 2018-KA-00442-COA (Oct. 1, 2019)

Opinion by Judge Westbrook

Hon. Charles E. Webster (Quitman County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Breland Parker](#)

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