

MISSISSIPPI SUPREME COURT DECISIONS – JUNE 21, 2018***SUPREME COURT - CIVIL CASES*****B&B MGMT. CO., LLC v. Y.X, A MINOR****CIVIL - PERSONAL INJURY**

CIVIL PROCEDURE - JOINDER - FRAUDULENT JOINDER - Where an action is properly brought in a county in which one of the defendants resides, it may be retained notwithstanding there is a dismissal of the resident defendant, provided the following exists: (1) the action was begun in good faith in the bona fide belief that plaintiff had a cause of action against the resident defendant; (2) the joinder of the local defendant was not fraudulent or frivolous, with the intention of depriving the non-resident defendant of his right to be sued in his own county; and (3) there was a reasonable claim of liability asserted against the resident defendant

TORTS - PREMISES LIABILITY - DUTY - An owner, occupant, or person in charge of a premises owes to an invitee or business visitor a duty to exercise ordinary care to keep the premises in a reasonably safe condition or to warn the invitee of dangerous conditions, not readily apparent, which the owner or occupier knows of or should know of in the exercise of reasonable care

FACTS

Y.X. first filed a premises-liability case in Madison County against B&B Management (“B&B”) and five John Does, alleging she was injured on a treadmill in the fitness room of an apartment complex located in Madison County. Prior to B&B making an appearance, Y.X. voluntarily dismissed that case and refiled an essentially identical case in Hinds County, adding McGee, a former employee of B&B and resident of Hinds County, as a defendant. There was no dispute that the alleged incident occurred on July 18, 2015, because a special event was being held at the complex that day, where free back-to-school supplies and food were given away. Within their answer, B&B and McGee included a Motion to Dismiss and Transfer, averring that McGee was fraudulently joined in an attempt to fix venue in Hinds County. B&B and McGee submitted that under Mississippi law, there was no viable cause of action against McGee, the employee of a premises manager. B&B additionally asserted that McGee should be dismissed with prejudice and that the matter should be transferred to Madison County, Mississippi. Without addressing any facts or applicable law, the trial court denied Defendants’ Motion to Dismiss and Transfer Venue. B&B appealed.

ISSUE

Whether the trial court erred in denying Defendants’ Motion to Dismiss Terence McGee and Transfer the Case to Madison County.

HOLDING

Because no evidence was presented which established that McGee owed an individual, legal duty to Y.X., McGee was joined fraudulently and/or frivolously with the intention of depriving B&B of its right to be sued in Madison County. Further, venue was improper in Hinds County, and the trial judge erred in refusing to dismiss McGee and subsequently transfer venue to Madison County. Therefore, the Supreme Court reversed and remanded the judgment of the Hinds County Circuit Court.

CONCURRENCE

Justice King addressed concerns that the Supreme Court’s case-law at times may have conflated motions to dismiss a defendant and motions to transfer venue based on said dismissal of defendant. He added that by conflating the motions,

the Court may have sanctioned introducing matters outside the pleadings on a Rule 12(b)(6) motion without converting the motion to a motion for summary judgment, per the mandate in Rule 12.

Reversed & Remanded - 2017-IA-00131-SCT (June 21, 2018)

En Banc Opinion by Presiding Justice Randolph - Special Concurrence by Justice King

Hon. Tomie T. Green (Hinds County Circuit Court)

Michael R. Kelly & Melton James Weems for Appellants - James Ashley Ogden, James W. Smith Jr., & Tyler Arthur Royals for Appellee

Briefed by [Mary-Katherine Black](#)

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CROSBY V. THE MISS. BAR

CIVIL - BAR MATTERS

BAR COMPLAINT - RULE VIOLATION - PUBLIC REPRIMAND - When a licensed attorney fails to adhere to the rules set forth by the Mississippi Bar, he or she may be subject to public reprimand

BAR COMPLAINT- RESPONSE - REQUIRED - Upon the filing of a bar complaint, the attorney subject to the complaint must file a response with the Mississippi Bar or else be subject to a default judgment against him or her

FACTS

Michael Crosby was retained to represent a client in a criminal trial. The client was convicted, and Crosby subsequently filed a notice of appeal. On five separate occasions, Crosby requested additional time to file the appellate brief. The court entered a show cause order after the fifth request and gave Crosby two weeks to file his brief. Crosby contended that after putting the brief in the mail, he was informed that his client was getting another attorney to represent him. Crosby retrieved the brief from the mail but did not inform the court that the client now had a different attorney. The client's appeal was dismissed for failure to file an appellate brief. The client filed a complaint with the Mississippi Bar, to which Crosby was required to respond. Crosby was twice ordered to respond but failed to do so both times. Crosby emailed the Bar over three months after the response was due and cited his caseload as his reason for not responding. The Bar filed a formal complaint against Crosby, to which he did not respond. The Bar moved for a default judgment, which was granted. Crosby moved to set aside the default judgment, which was also granted. Trial was held on October 14, 2016, and Crosby was the only witness who testified. The Complaint Tribunal found that Crosby had violated multiple rules based on his failure to file an appellate brief on the client's behalf, and his failure to respond to the Bar complaint. The tribunal found that the appropriate disciplinary sanction was a public reprimand. Crosby appealed.

ISSUES

Whether (1) the Mississippi Bar proved by clear and convincing evidence that Crosby had violated each of the rules; and (2) the Complaint Tribunal's opinion and final judgment omitted material facts or contained misleading statements.

HOLDING

(1) Because the Complaint Tribunal clearly articulated its reasoning and directly cited the rules that Crosby violated, there was clear and convincing evidence of Crosby's violations. (2) Because the Complaint Tribunal did not need to consider the extraneous facts that Crosby sought to introduce, this issue was also without merit. Therefore, the Mississippi Supreme Court affirmed the judgment of the Mississippi Bar.

Affirmed - 2017-BA-00250-SCT (June 21, 2018)

En Banc Opinion by Presiding Justice Randolph

Pro se for Appellant - Adam Bradley Kilgore & James Russell Clark for Appellee

Briefed by [Addison K. Watson](#)

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SUPREME COURT - ORDERS

MISS. BAR V. CLARK

COURT ORDER

STATE BAR - RULES OF DISCIPLINE - IRREVOCABLE RESIGNATION - Upon the tender of an irrevocable resignation from an attorney, the Court shall enter an order accepting the resignation, revoking the attorney's license, and barring the attorney's right to seek reinstatement in the future

FACTS

Tacey June Clark executed a proper Notice of Irrevocable Resignation pursuant to Rule 10.5 of the Rules of Discipline for the Mississippi Bar. Clark indicated that she had no desire to defend her outstanding disciplinary matter, and therefore requested permission to resign irrevocably and with prejudice from the Mississippi Bar.

ORDER

The Supreme Court granted the Mississippi Bar's Motion to Accept Clark's Irrevocable Resignation. The Court ordered the: (1) acceptance of Clark's resignation with prejudice; (2) revocation of Clark's license; (3) prohibition on Clark's reinstatement; (4) forwarding of a copy of the Order to Clark and the Executive Director of the Bar; (5) notification of resignation to all of Johnson's clients and the disbursement of funds Clark held in trust; (6) filing of an affidavit attesting to the clients' notification; (7) punishment for failure to comply with the Order; (8) forwarding of a copy of the Order to the Clerks of the United States District Courts for the Northern and Southern Districts of Mississippi, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States; and (9) assessment of costs of the formal complaint to Clark.

Granted - 2018-BD-00400 (June 21, 2018)

En Banc Order by Justice King

Briefed by [Sean Grady](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 19, 2018

COURT OF APPEALS - CIVIL CASES

BAKER V. BAKER

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - PERIODIC-ALIMONY - A chancellor should only consider a periodic-alimony award when they determine that a party has suffered a disparity of income and standard of living following the equitable distribution of the marital assets

FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - When dividing marital property, courts are to (1) classify the parties' assets as marital or separate; (2) determine the value of those assets; (3) divide the marital estate equitably based upon the factors set forth in Ferguson; and (4) consider the appropriateness of alimony if either party is left with a deficiency

FACTS

Nakia and Ramon Baker married in December 1998. In August 2012, Ramona filed a divorce complaint on the grounds of adultery and cruel and inhuman treatment or, alternatively, irreconcilable differences. At the start of their divorce hearing in September 2014, the parties withdrew their fault-based grounds and consented to an irreconcilable-differences divorce. They also agreed on all issues, except the distribution of their marital estate and Ramona's periodic-alimony request. The chancellor entered a judgment granting the parties an irreconcilable-differences divorce in March 2016. After considering the *Ferguson* factors, the chancellor awarded Ramona marital assets valued at \$110,600, and being the equity in the Princeton Street home the couple had, the home's furnishings and appliances, and Ramona's Toyota 4Runner. The chancellor awarded Nakia marital assets valued at \$110,660 being the equity in the Billings Street home the couple had, the home's furnishings and appliances, Nakia's 1999 Chevrolet truck and 2006 Chevrolet Corvette, and his retirement account. The parties were also ordered to be responsible for any debt with their assigned marital assets. The chancellor found that the equitable distribution of the marital estate eliminated the need from an alimony award. Ramona appealed.

ISSUES

Whether the chancellor erred in (1) the distribution of the marital estate; and (2) the refusal to award periodic alimony.

HOLDING

(1) Because the chancellor considered all of the *Ferguson* factors and determined that Nakia's contributions to the accumulation of marital property were greater, the record contains enough substantial credible evidence to support the chancellor's division and distribution of the marital estate. Further, the chancellor also noted that Ramona received monthly disability benefits for herself and their daughter and benefits associated with her PERS account. (2) Because the chancellor determined that sufficient assets existed to adequately provide for both parties and that Ramona suffered no deficit after division of the marital assets, and substantial credible evidence supported the chancellor's findings, the trial court did not abuse its discretion in denying Ramona's periodic-alimony request. Therefore, the Court of Appeals affirmed the judgment of the Washington County Chancery Court.

Affirmed - 2016-CA-00522-COA (June 19, 2018)

Opinion by Judge Tindell

Hon. Jane R. Weathersby (Washington County Chancery Court)

Brandon Isaac Dorsey for Appellant - William R. Striebeck for Appellee

Briefed by [Michael Farese](#)

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CAMPBELL V. CAMPBELL

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD SUPPORT - MODIFICATION - The change must occur as a result of after-arising circumstances of the parties not reasonably anticipated at the time of the agreement

FAMILY LAW - CUSTODY - ATTORNEY'S FEES - The decision to award attorney's fees is largely entrusted to a chancellor's sound discretion; further, unless the party requesting attorney's fees can establish an inability to pay, such fees should not be awarded

FACTS

Mark Campbell and Misty Campbell married in 1992 and separated in 2008. The parties had four children and agreed to shared joint legal custody, with Misty retaining physical custody and Mark receiving reasonable visitation rights. The agreement stated Mark would pay \$1,250 per month per child until the children were 21, married, joined the armed forces, or otherwise fully emancipated. Mark filed for modification based upon both his second oldest son joining the army and a dramatic decrease in Mark's income. Misty filed a counterpetition alleging contempt and incompliance with the child support order. The chancellor found that the son's joining of the military was not foreseeable and modified

the child support order to statutory guidelines which increased the monthly support. The chancellor further ordered Mark to pay Misty's attorney's fees and GAL fees. Mark appealed.

ISSUES

Whether the chancellor erred in (1) an upward modification of child support; and (2) award of attorney's fees to Misty.

HOLDING

(1) Because the parties discussed and provided for this exact situation when considering child support, the chancellor's modification of child support was manifestly erroneous. (2) Because the chancellor failed to separate the attorney's fees, this portion was remanded for a determination of attorney's fees incurred defending the unsubstantiated allegations of abuse and neglect. Therefore, the Court of Appeals reversed, rendered in part and remanded in part the judgment of the Grenada County Chancery Court.

Reversed, Rendered in Part, Remanded in Part - 2017-CA-00331-COA (June 19, 2018)

Opinion by Judge Tindell

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

Charles E. Winfield & Ashlyn Brown Matthews for Appellant - A. E. "Rusty" Harlow Jr. for Appellee

Briefed by [Sarah Raben](#)

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McCoy v. Direct Express

CIVIL - TORTS OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

CIVIL PROCEDURE - SERVICE OF PROCESS - PERFECTING SERVICE - When a plaintiff fails to perfect service within the 120-day period and fails to show good cause for the untimely service, Miss. R. Civ. P. 4(h) directs the court to dismiss the plaintiff's complaint without prejudice

CIVIL PROCEDURE - SERVICE OF PROCESS BY MAIL - ACKNOWLEDGMENT - Receiving the acknowledgment back from the defendants is the final step required for perfection of service by mail

FACTS

Timothy McCoy filed a *pro se* complaint against the defendants, alleging Anthony McCoy and Kim Harvard fraudulently used his debit card and Direct Express allowed the unauthorized withdrawals. The Rankin County Circuit Court entered an order finding McCoy failed to serve a summons and a copy of the complaint on any of the defendants within 120 days of filing his complaint. The Circuit Court allowed him thirty days to show good cause for failing to effect service. McCoy claimed he mailed the notice, complaint, and summons to the defendants on October 20, 2016. Pursuant to McCoy's knowledge, Harvard resided in Mississippi, while Anthony and Direct were located out of state. The Court found McCoy failed to show good cause. The Court dismissed his complaint under Miss. R. Civ. P. 4(h). McCoy filed an unsuccessful motion for reconsideration. McCoy appealed.

ISSUES

Whether (1) McCoy failed to serve process on the defendants; and (2) McCoy showed good cause for failing to serve process on the defendants.

HOLDING

(1) Because the record contained no proof that McCoy mailed the defendants an acknowledgement within twenty days of the date of mailing, he never perfected service of process on the defendants by mail under Miss R. Civ. P. 4(c)(3). Further, McCoy failed to serve process on the defendants within the 120-day period in any manner permitted by Miss. R. Civ. P. 4. (2) Because McCoy's unsuccessful mailing of process constituted his one and only attempt to serve the defendants, he failed to show good cause for not doing so. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2017-CP-00655-COA (June 19, 2018)
Opinion by Judge Tindell
Hon. William E. Chapman III (Rankin County Circuit Court)
Pro se for Appellant - No Appearance for Appellee
Briefed by [Caroline Loveless](#)

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NIXON V. HOWARD INDUS., INC.

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - JUDGMENTS - STANDARD OF REVIEW - Though an administrative law judge finds an award in a workers compensation matter, the appellate court reviews the decision of the Mississippi Workers' Compensation Commission

WORKERS' COMPENSATION - AVERAGE WEEKLY WAGES - CALCULATION - The average weekly wages are to be determined from the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury

WORKERS' COMPENSATION - PERMANENT PARTIAL DISABILITY - CALCULATION OF PAYMENTS - Compensation for permanent partial disability must be sixty-six and two-thirds percent of the difference between average weekly wages and wage-earning capacity after the injury

FACTS

Kenneth Nixon suffered a work-related injury within the course and scope of his employment with Howard Industries. After a hearing, the administrative judge found Nixon had incurred a loss of wage-earning capacity and awarded him permanent partial disability benefits. The Mississippi Workers' Compensation Commission (the "Commission") adopted the findings and award of the administrative judge. Howard Industries appealed.

ISSUE

Whether the Commission erred in its computation of Nixon's disability benefits.

HOLDING

Because the Commission failed to use Nixon's stipulated pre-injury weekly wage in its calculation, the amount of the award was incorrect. Therefore, the Court of Appeals reversed and rendered the judgment of the Mississippi Workers' Compensation Commission.

PARTIAL CONCURRENCE/DISSENT

Judge Carlton argued that Nixon failed to show that he suffered a loss of wage-earning capacity and permanent disability. She would have reversed the judgment of the Mississippi Workers' Compensation Commission on different grounds.

Reversed & Rendered - 2017-WC-01478-COA (June 19, 2018)
Opinion by Judge Fair
Mississippi Workers' Compensation Commission
Floyd E. Doolittle for Appellant - Richard Lewis Yoder Jr. for Appellee
Briefed by [Jacob Swatley](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

PHINIZEE V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF

- In order to succeed on a claim of ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - TRIAL STRATEGY -

Trial counsel is afforded broad discretion in such matters of trial strategy, and the court will not second guess counsel's decisions that fairly may be characterized as strategic

FACTS

John Phinizee was convicted of one count of the sale of cocaine and two counts of possession with intent to distribute in 2006. In 2011, the Supreme Court granted Phinizee's application for leave to file his PCR motion in the trial court. Phinizee alleged ineffective assistance of counsel claiming that his trial counsel failed to raise facts and circumstances that would allow him to show he was incompetent to stand trial. The circuit court conducted a bifurcated evidentiary hearing to determine whether Phinizee received effective assistance of counsel. Phinizee's motion was denied in 2016. Phinizee appealed.

ISSUE

Whether the trial court erred in denying Phinizee's motion for post-conviction relief on the grounds of ineffective assistance of counsel.

HOLDING

Because the trial court considered all of the evidence, including the two experts' testimony, the trial counsel's testimony, and the fact that Phinizee was competent enough to file a pro se motion for post-conviction relief, and great deference is given to the trial court as the authority for determining credibility, Phinizee failed to carry his burden of proof. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Affirmed - 2016-CA-01230-COA (June 19, 2018)

Opinion by Judge Westbrook

Hon. James T. Kitchens Jr. (Lowndes County Circuit Court)

Blewett W. Thomas for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [D. Hunter V. Robertson](#)

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COURT OF APPEALS - CRIMINAL CASES

DONALDSON V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - CHILD PORNOGROPHY - POSSESSION - To find someone guilty of possession of child pornography, a jury must find that individual actually or constructively possessed any visual depiction of an actual child engaging in sexually explicit conduct

CRIMINAL PROCEDURE - JURY INSTRUCTION - CIRCUMSTANTIAL EVIDENCE - In order to receive the two-theory, special, circumstantial-evidence instruction, two reasonable hypotheses or theories must be presented to the jury: one theory showing how the evidence illustrates the defendant's innocence, and the other theory showing how the same evidence illustrates the defendant's guilt

JUDICIAL REVIEW - RECUSAL - SEARCH WARRANT - On review of a challenge to the issuance of a search warrant, this Court will affirm if there was a substantial basis for the conclusion that probable cause existed

FACTS

During an investigation for child pornography, the Mississippi Attorney General's Office Cyber Crime Unit obtained a warrant to search Michael Donaldson's residence. The Cyber Crime Unit seized over thirty items of digital evidence, including two Dell laptops. The laptops contained over one hundred child pornography videos and images. One video showed Donaldson turning on the webcam in his bathroom, placing the laptop on the floor, then Donaldson instructing a minor female not to touch the laptop because he was downloading something from the Internet. The webcam recorded the minor using the restroom and Donaldson immediately entering the restroom after to turn off the webcam. Donaldson was indicted for possession of child pornography and filming a person in violation of expectation of privacy. The jury found Donaldson guilty on both counts. Donaldson appealed.

ISSUES

Whether (1) the trial court erred in ruling Donaldson could not testify as an expert witness; (2) the evidence was insufficient to support the verdict on possession of child pornography; (3) the state failed to prove MB was recorded within the two-year statute of limitations, (4) the jury instructions on Count II failed to require jurors to find the essential element of intent; (5) the denial of Donaldson's request for a circumstantial evidence instruction on Count I warranted a new trial; (6) the court committed reversible error by not excluding evidence about images on the cell phone; (7) the court erred in not allowing the defense access to the original hard drive; (8) the judge who issued the search warrant was not fair and impartial; (9) the judge assigned to the case should have been recused, and the judge who reassigned the case to himself should have also been recused; (10) the court committed reversible error by improperly precluding Donaldson from presenting a defense; (11) the court erred in not severing the counts; and (12) prosecutorial misconduct occurred during closing arguments.

HOLDING

(1) Because Donaldson's counsel did not provide the proper designation of an expert witness to identify Donaldson or disclose the opinions that he might offer at trial, there was no error. (2) Because a majority of the pornography files were found in folders that contained cell-phone images depicting Donaldson, and Donaldson was the only person inside the home on the morning the search warrant was executed, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (3) Because the investigator testified as to the date that Donaldson recorded and possessed the video, the jury could have found beyond a reasonable doubt that the video was recorded within the statute of limitations. (4) Because the instruction properly described the type of intent required, any error was cured. (5) Because the State presented video that showed Donaldson in possession of the laptop just before recording MB, the State's case was not based on purely circumstantial evidence. (6) Because the court ordered the State to allow the defense to examine the cell phone and cross-examine the investigator, Donaldson was not prejudiced. (7) Because no order that denied Donaldson's motion to examine the laptop and its contents was entered, this issue was waived. (8) Because no evidence was presented to establish that the issuing judge knew that John was Michael Donaldson's brother or that John's girlfriend had ever talked to the issuing judge about the pictures, and John's girlfriend testified that the conversation with the judge occurred months prior to the issuance of the search warrant, this issue was without merit. (9) Because Donaldson did present evidence to indicate that the judge was biased or unqualified to rule on his motions, this issue was without merit. (10) Because Donaldson was able to cross-examine the investigator regarding issues specific to his defense, and Donaldson was able cross-examine the State's expert witness regarding the defense documents that were excluded, the court committed no reversible error. (11) Because the court properly considered the *Corley* factors in determining the recording of the video and the possession of child pornography were so interwoven as to warrant a multi-count indictment, refusal to sever the counts was not an abuse of discretion. (12) Because the prosecutor's statement was not prejudicial, no prosecutorial misconduct occurred. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2016-KA-01207-COA (June 19, 2018)

Opinion by Presiding Judge Griffis

Hon. William E. Chapman III (Rankin County Circuit Court)

Julie Ann Epps & Cynthia Ann Stewart for Appellant - Katy Taylor Gerber (Att'y Gen. Office) for Appellee

Briefed by [Jay Patterson](#) & [Marilyn Higdon](#)

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HOLLINGSWORTH V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - SCOPE OF REVIEW - PLAIN-ERROR DOCTRINE - Where the trial court commits error resulting in a manifest miscarriage of justice or seriously affects the fairness, integrity, or public reputation of the judicial proceedings, the appellate court may correct such error notwithstanding the appellant's failure to raise any issue regarding the error at the trial level

APPELLATE PROCEDURE - PLAIN-ERROR DOCTRINE - STANDARD OF REVIEW - Under the plain-error doctrine, the appellate court must look to whether the trial court deviated from a known legal rule in disposing of the case

CRIMINAL PROCEDURE - CONFRONTATION CLAUSE - EXPERT TESTIMONY - The Sixth Amendment of the U.S. Const. does not prohibit admission of a forensic-science expert actively involved in the production of a drug analysis report and having intimate knowledge of the analysis even though not perform the test first hand; furthermore, admission of such testimony does not violate the Confrontation Clause for failure to cross-examine the primary analyst

FACTS

Eddie Hollingsworth was indicted on two counts of selling methamphetamine, one count of possession with intent to sell, and one count of selling a substance falsely represented to be a controlled substance. At trial, the State presented testimony of Teresia Hickmon, as expert forensic-drug analyst, whose testimony included her process and findings in reviewing the drug analyst reports on Hollingsworth's case. The State also presented testimony from Gary Fernandez, lab manager of Batesville Forensic Laboratory. Fernandez corroborated Hickmon's testimony that the substances in Hollingsworth's possession were methamphetamine. Neither of these experts were the originator of the expert drug analysis report. Hollingsworth did not exercise his voir dire objections during either of these experts' testimonies. The jury found Hollingsworth guilty on all four counts. The Desoto County Circuit Court sentenced Hollingsworth to three 20 years sentences to run concurrently. Hollingsworth filed a motion for new trial on the grounds that Hollingsworth's Sixth Amendment right to confront his accuser was violated. The trial court denied his motion. Hollingsworth appealed.

ISSUE

Whether the trial court was in plain error for failing to grant Hollingsworth the ability to cross-examine the primary analyst that formed the conclusion that the substances in Hollingsworth possession was methamphetamine.

HOLDING

Because admission of expert testimony actively involved in, but not the originator of, a drug analysis report does not violate the Sixth Amendment's right to confront your accuser, and because Hollingsworth failed to raise any issue relating to expert testimony at the trial level, the trial court was not in plain error for admitting the testimony of Hickmon and Fernandez. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2017-KA-00389-COA (June 19, 2018)

Opinion by Judge Tindell

Hon. James McClure III (Desoto County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Jeffrey A Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [D. Kirkwood Palmer](#)

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CRIMINAL - FELONY

CRIMINAL - EVIDENCE - PRIOR-CONVICTION - When pursuing a felon-in-possession charge, if the defendant does not offer to stipulate to his status as a prior-convicted felon, the prosecution is entitled to prove its case by evidence of its own choice; when a prior conviction is an element of a crime, the State is authorized to introduce evidence of the conviction and is not limited in its method of proof

CRIMINAL - INEFFECTIVE ASSISTANCE OF COUNSEL - CONSTITUTIONAL DIMENSIONS - The Court will reach the merits on an ineffective assistance claim only where: (1) the record affirmatively shows ineffectiveness of constitutional dimensions; or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding

CRIMINAL - EVIDENCE - TESTIFYING - Miss. R. Evid. 612 states that a witness may use a writing, recording, or object to refresh his or her memory while testifying

TESTIMONY - PROFFER - APPELLATE REVIEW - When a trial court rules so as to prevent certain testimony from being introduced, it is incumbent on the party to make a proffer of what the witness would have testified to or the point is waived for appellate review

FACTS

On September 1, 2014 a white Ford Ranger was found burning in Marion County with Ryan Cooper deceased inside. Investigator Jamie Singley followed a trail of blood from the scene to the driveway of the residence of Jerry Page. Later that day, Singley approached Page at a gas station. Page fled and Singley heard him rack his gun, and Singley waited for backup before pursuing further. Later that evening, the arresting officer saw Page throw a Lorcin .380 semiautomatic pistol into a ditch. At trial, Alex Abram testified that on the day of Ryan Cooper's murder, Abram saw two white trucks, and Page, Cooper, and others outside arguing. He then realized that Page had a gun and before turning to run home, he heard the gun cock. While running back to his house, Abram saw the two white trucks drive by, but he could not identify the drivers. Alex Garner also testified, and corroborated Abram's testimony. Garner further testified that Page shot Cooper in the face, Anthony Abram put Cooper's body in the back of the white Ford Ranger and drove off, and Page followed in his own truck. Further, Page returned about forty-five minutes later, and Garner gave him a gas can to help burn the blood in the driveway and then covered blood with dirt. The jury found Page guilty on all charges. Page appealed.

ISSUES

Whether (1) the trial judge erred by admitting an unredacted copy of Page's New Jersey criminal file; (2) Page's trial counsel provided ineffective assistance by refusing to stipulate that Page was a convicted felon; (3) the trial judge erred by allowing the jury to hear the audio of a witness's prior statement and use transcripts while listening; (4) the trial judge erred by limiting Page's cross-examination of a prosecution witness regarding the witness's criminal history; (5) the trial court erred in excluding defense witnesses; (6) the trial judge erred in telling the jury Page was a convicted felon; and (7) the trial judge erred by denying Page's motion to exclude evidence.

HOLDING

(1) Because Page refused to stipulate that he was a prior convicted felon, the prosecution was entitled to prove its case by evidence of its own choice. (2) Because the record does not show that Page's constitutional rights were violated, and the State did not stipulate that the record is adequate, this issue was without merit. (3) Because Page waived any objection to the playing of the interview, this issue was without merit. (4) Because Page failed to make a proffer regarding Garner's prior felony convictions, and because Garner's prior conviction for residential burglary would have marginal impeachment value, the ruling was not reversible error. (5) Because Page's counsel was unable to state what the witnesses would provide, and there was no support in the record to show prejudice, this issue was without merit. (6) Because prior felonies are an element of felon in possession, the trial court did not err by informing the jury that Page was previously convicted of felonies. (7) Because Page failed to articulate how the admission of a page of evidence that had been unintentionally omitted previously was prejudicial to the defense, there was no abuse of discretion. Therefore, the Court of Appeals affirmed the judgment of the Marion County Circuit Court.

Affirmed - 2016-KA-01464-COA (June 19, 2018)

Opinion by Judge Wilson

Hon. Prentiss Greene Harrell (Marion County Circuit Court)

W. Daniel Hinchcliff for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Maggie Vinzant](#)

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WALKER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INDICTMENTS - NOTICE - An indictment that tracks the statutory language is sufficient to put the defendant on notice of the charge against him, such that the defendant is not prejudiced in preparing a defense

CRIMINAL PROCEDURE - REVERSAL - SUFFICIENCY OF EVIDENCE - In reviewing a conviction for legal sufficiency of the evidence, the relevant inquiry is whether, viewing the evidence in the light most favorable to the prosecution, a reasonable finder of fact could have found the essential elements of the crime beyond a reasonable doubt

CRIMINAL PROCEDURE - DOUBLE JEOPARDY - LESSER-INCLUDED OFFENSES - Where the counts in an indictment are substantiated by separate acts of the defendant, the fact that one count could be a lesser-included offense of the other is irrelevant and does not implicate double jeopardy issues

FACTS

In September 2012, eight-year-old “Amy” spent the day with her step-sister Leslie Horton. When dropping Amy back off at home, Amy indicated to Horton that her mother’s live-in boyfriend, Douglas Walker, had assaulted her. Horton then met with Amy’s aunt, Debbie Williams, and Amy repeated this. Amy was later examined by a nurse practitioner who specialized in pediatric forensic medicine. The nurse practitioner found redness on Amy’s labia majora. Amy also disclosed her abuse to Katrina Kennedy, a forensic examiner, and a video recording of this interview was entered into evidence at trial. Walker was convicted of one count of sexual battery and one count of fondling. Walker appealed.

ISSUES

Whether (1) Walker’s indictment was inadequate; (2) there was sufficient evidence to uphold the convictions; and (3) Walker’s convictions violated the Double Jeopardy clause because fondling can be a lesser-included offense of sexual battery.

HOLDING

(1) Because Walker failed to object to the form of the indictment, and because the language in the indictment adequately put Walker on notice, the issue was waived for appeal. Further, Walker was not prejudiced in preparation of his defense. (2) Because the jury was free to assess the credibility of the victim’s accounts at trial and in her forensic interview about whether there was statutory penetration, any inconsistencies in the victim’s testimony were not fatal to the sufficiency of the evidence as a reasonable jury could have found the defendant guilty beyond a reasonable doubt. (3) Because the two counts were substantiated by separate acts of the defendant, it was irrelevant that fondling can be a lesser included offense of sexual battery. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

PARTIAL CONCURRENCE/DISSENT

Judge Greenlee argued that Amy’s testimony at trial and during the forensic interview were insufficient to establish statutory penetration, which is an essential element of sexual battery. Therefore, Judge Greenlee concurred with the majority’s conviction for fondling, but dissented as to the sexual battery conviction.

Affirmed - 2016-KA-01442-COA (June 19, 2018)

En Banc Opinion by Judge Fair - Partial Concurrence/Dissent by Judge Greenlee

Hon. Johnnie E. Walls Jr. (Bolivar County Circuit Court, Second Judicial Dist.)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee
Briefed by [Daniel Tankersley](#)

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