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**MISSISSIPPI SUPREME COURT DECISIONS – NOVEMBER 1, 2018**

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***SUPREME COURT - ORDERS*****SHEPARD V. STATE****COURT ORDER****ORDER**

This en banc order by the Mississippi Supreme Court dismissed a writ of certiorari previously granted to Donte Shepard on August 9, 2018.

**DISAGREEMENT**

Justice King argued that the State presented insufficient evidence to support Shepard's conviction and that the trial court erred in denying Shepard's proposed circumstantial-evidence jury instruction.

**Dismissed - 2016-CT-01567-SCT (Nov. 1, 2018)**

En Banc Opinion by Justice Maxwell - Disagreement by Justice King

Briefed by [Baxter Geddie](#)

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**MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 30, 2018**

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***COURT OF APPEALS - CIVIL CASES*****BOND V. BOND****CIVIL - REAL PROPERTY**

**CIVIL - EQUITABLE LIEN - CONTRACT ENFORCEMENT** - An equitable lien is not appropriate to enforce a contract that otherwise fails to meet the requirements of the statute of frauds

**CIVIL - STATUTE OF FRAUDS - CONTRACTS** - Under the Mississippi Statute of Frauds, contracts involving the transfer of real property must be in writing

**CIVIL - APPELLATE REVIEW - CHANCELLOR EXCEPTION** - Where a chancellor does not make explicit findings, appellate courts will assume that all disputed issues were resolved in favor of the appellees

**FACTS**

Lamar Bond lived in an apartment he built on the homestead of Lee Bond, his son, and Jennifer Bond, his daughter-in-law. Lee removed Lamar from the property for using marijuana and Lamar filed suit alleging the couple violated an agreement allowing him to remain on the property indefinitely. The Jackson County Chancery Court ruled in favor of Lee and Jennifer. Lamar appealed.

**ISSUES**

Whether Lamar is entitled to (1) an equitable lien; and (2) restitution.

## **HOLDING**

(1) Because Lamar knew that the title to the property was held by Lee and Jennifer, and an equitable lien is not appropriate to enforce a contract that fails to meet the requirements under the Mississippi Statute of Frauds, Lamar was not entitled to an equitable lien. (2) Because Lee and Jennifer's testimony that Lamar's money to them was a gift was more credible than Lamar's testimony, and there is no entitlement to restitution under unjust enrichment, Lamar was not entitled to restitution. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

**Affirmed - 2017-CA-00599-COA (Oct. 30, 2018)**

Opinion by Judge Fair

Hon. Michael L. Fondren (Jackson County Chancery Court)

E. Foley Ranson for Appellant - G. Charles Bordis IV & Joshua Wesley Danos for Appellees

Briefed by [Brandon H. Wilson](#)

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## **BOOKER V. GLENNIS**

### **CIVIL - REAL PROPERTY**

**CIVIL PROCEDURE - APPEAL - FAILURE TO FILE RESPONSE BRIEF** - When appellees fail to file a response brief, it is taken as a confession of error only when: (1) the record is complicated or voluminous, and (2) the appellant has presented an apparent case of error; otherwise the appellee's failure to file a brief is disregarded

**CIVIL PROCEDURE - PLEADINGS - TRIABLE ISSUES** - When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings

**CIVIL PROCEDURE - NEW TRIAL - WEIGHT OF EVIDENCE** - A new trial will not be ordered unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice

### **FACTS**

C.V. and Livia Sue Glennis filed a petition for contempt against Donald and Nerissa Booker for violating a judicial order stemming from an ongoing property dispute. Evidence was presented at trial that the Bookers took issue with the shrubs blocking their lake view. The evidence also showed that the shrubs were damaged only to the point that they no longer interfered with the Bookers' lake view. Counsel for both parties agreed to amend the pleadings to conform to the evidence presented at the conclusion of trial because multiple issues were tried that were not pleaded. The Glennises were granted an award of \$1,320 against the Bookers for the destruction of shrubs on their property. The Bookers appealed.

### **ISSUES**

Whether (1) the failure of the Glennises to respond to the appeal has any effect on review; (2) the claim for damages for the death of the shrubs was properly before the court and tried by consent; and (3) there was sufficient evidence to support the findings of the chancellor's damage award.

## **HOLDING**

(1) Because there was a sound basis upon which the judgment may be safely affirmed, the Glennis' failure to file a response brief was disregarded and not taken as a confession of error. (2) Because counsel for both parties put on evidence regarding the shrub destruction, and counsel for both parties requested and consented to amending the pleadings, the trial court did not err in adjudicating the issue of damages. (3) Because there was clear and convincing evidence that the Bookers destroyed the shrubs, the trial court did not err in its fact-finding, and thus the damage award was proper.

**Affirmed - 2017-CA-01309-COA (Oct. 30, 2018)**

Opinion by Judge Tindell  
Hon. Debra K. Halford (Pike County Chancery Court)  
D. Scott Gibson for Appellants - Ronald L. Whittington for Appellees  
Briefed by [Drey Russell](#)

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## BRUTON V. BRUTON

### CIVIL - DOMESTIC RELATIONS

**FAMILY LAW - CHILD SUPPORT - MODIFICATION** - When a chancellor conducts a satisfactory finding of facts to justify a modification of child support, the decision will not be overturned unless a clear abuse of discretion exists

**DOMESTIC RELATION - MORALITY PROVISIONS - OVERNIGHT GUESTS** - When two people are in cohabitation, one cannot be simultaneously considered an overnight guest

### FACTS

Chuck and Allison Bruton separated and divorced in 2012. Subsequently, Chuck filed a motion to amend the chancellor's judgment based on Chuck's decrease in income and change in status because he was now supporting his new girlfriend's child, and a change in Allison's income and address. Chuck moved the court to sanction Allison for failure to inform Chuck of the address change and failure to communicate to Chuck the children's health, education, and extracurricular activities. Allison filed a counterclaim alleging that Chuck had violated the chancellor's order by having an overnight guest in their children's presence, and claimed that Chuck's income had increased, and that a material change had occurred relating to the costs of raising their children, warranting an increase in Chuck's child-support obligation. The chancellor entered an order increasing Chuck's monthly child-support payment, dismissed Chuck's claim of contempt against Allison, and awarded Allison attorney's fees. Chuck appealed.

### ISSUES

Whether (1) the chancellor's order violated the statutory guidelines for child support; (2) the chancellor improperly denied Chuck's request to modify his obligation to pay his children's health-insurance premiums; (3) Chuck should have been allowed to claim one of his minor children on his tax return; (4) the chancellor erred in dismissing Chuck's claim for civil contempt against Allison; (5) the chancellor erred in finding Chuck in contempt; and (6) Allison should be awarded attorney's fees.

### HOLDING

(1) Because the chancellor made sufficient findings to warrant an increase in child-support, and because the chancellor only made a slight modification to Chuck's child support obligation, the chancellor did not err. (2) Because the chancellor did not abuse his discretion, and the chancellor allowed for a health-insurance tax deduction in calculating Chuck's income for child support, the chancellor did not err in denying Chuck's request for modification. (3) Because Chuck alleged no material change in circumstance to warrant modification of the tax exemption, the chancellor did not err in denying Chuck's request to claim one of his minor children on his tax return. (4) Because Allison regularly informed Chuck of their children's health status, the chancellor did not err in dismissing Chuck's contempt claim. (5) Because Chuck did not have an overnight guest, but a cohabitant, the chancellor erred by holding Chuck in contempt. (6) Because the chancellor erred in holding Chuck in contempt, and because Allison failed to prove an inability to pay, the chancellor erred in awarding Allison attorney's fees. Therefore, the Court of Appeals affirmed in part, reversed and rendered in part, and vacated in part the judgment of the Lamar County Chancery Court.

### CONCURRENCE

Judge Westbrook argued that Chuck technically violated the morality clause of the chancellor's original order, but agreed with the majority that Chuck should not have been held in contempt.

### PARTIAL CONCURRENCE/DISSENT

Judge Barnes argued that Chuck's girlfriend, Katie, could be classified as an overnight guest. Because the majority's classification rested on the fact that Chuck and Katie owned their home together, Judge Barnes argued that the majority had not explained how that affected the propriety of the situation.

**Affirmed in Part, Reversed & Rendered in Part, and Vacated in Part - 2017-CA-00124-COA (Oct. 30, 2018)**

En Banc Opinion by Judge Tindell - Concurrence by Judge Westbrook - Partial Concurrence/Dissent by Judge Barnes

Hon. M. Ronald Doleac (Lamar County Chancery Court)

David Neil McCarty for Appellant - Albert Ralph Jordan IV for Appellee

Briefed by [Yance Falkner](#)

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## **COURT OF APPEALS - POST-CONVICTION RELIEF**

### **BROWN V. STATE**

#### **CIVIL - POST-CONVICTION RELIEF**

**POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - STANDARD** - To show that counsel was ineffective during the trial, a defendant must show that his or her counsel's errors were so significant, they were effectively deprived of a fair trial under the U.S. Supreme Court's standard articulated in *Strickland*

**POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - EVIDENTIARY BURDEN** - To show a defendant was deprived of a fair trial under the U.S. Supreme Court's standard in *Strickland*, a party must submit more than his or her own affidavit of ineffective assistance of counsel as evidence under the standard articulated by the Supreme Court in *Walden*

#### **FACTS**

Nicholas Brown was charged with two counts of drug possession. In Count I, he was charged with possession of twelve point one milliliters of codeine and in Count II he was charged with possession of one point two grams of cocaine. Brown pled guilty to Count II and requested to be placed in a drug-court program. The trial court accepted the plan and suspended Brown's guilty plea for Count II. After violating the terms of the drug-court program, the trial court accepted his guilty plea and sentenced Brown to sixteen years on Count I and eight years on Count II. Brown filed motions for post-conviction relief alleging that his plea was involuntary, his counsel was ineffective, the search warrant was invalid, and that his guilty-plea hearing was inadequate. Brown did not raise his improper conviction and sentence on Count I. In May 2018, the trial court entered a corrective order to reflect the error in Brown's sentence by removing the incorrect guilty plea and improper sentence under Count I. The order was submitted to the Court of Appeals. Apart from issuing the corrective order, the trial court denied Brown's four motions for post-conviction relief. Brown appealed.

#### **ISSUES**

Whether the trial court erred in denying Brown's claim that (1) his plea was voluntary; (2) his counsel was ineffective; (3) the search warrant was invalid; and (4) his guilty-plea hearing was inadequate.

#### **HOLDING**

(1) Because Brown was advised at trial of the nature of the charges and the consequences of his plea, Brown's plea was not involuntary. (2) Because Brown did not offer any evidence aside from his own personal affidavit to support his ineffective assistance of counsel claim, and a defendant must submit more than his or her own affidavit of ineffective assistance of counsel as evidence under *Walden*, Brown's counsel was not ineffective. (3) Because Brown pled guilty, and a defendant waives their right to challenge the sufficiency of the State's evidence if the defendant pleads guilty, the warrant was not invalid. (4) Because Brown was informed of his rights, stated he was satisfied with his assistance of

counsel, and was not under the influence of drugs or alcohol during the hearings, his hearing was not inadequate. Therefore, the Court of Appeals affirmed the judgment of the Simpson County Circuit Court.

**Affirmed - 2016-CP-00600-COA (Oct. 30, 2018)**

En Banc Opinion by Judge Westbrook

Hon. Eddie H. Bowen (Simpson County Circuit Court)

*Pro se* for Appellant - Laura Hogan Tedder (Att’y Gen. Office) for Appellee

Briefed by [David Wellen](#)

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## HALEY V. STATE

### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - GUILTY PLEA - VOLUNTARINESS** - A plea is considered voluntary and intelligent if the defendant is advised of the nature of the charge against him and the consequences of pleading guilty  
**POST-CONVICTION RELIEF - GUILTY PLEA - INEFFECTIVE ASSISTANCE OF COUNSEL** - When a defendant pleads guilty, and later asserts ineffective assistance of counsel, he must demonstrate that his counsel’s conduct proximately resulted in the guilty plea, and that but for counsel’s errors, he would not have entered the plea  
**POST-CONVICTION RELIEF - GUILTY PLEA - AFFIRMATIVE DEFENSE** - The entrance of a voluntary guilty plea waives any defense a movant may have had to a charge, including the defense of entrapment

#### FACTS

Antwone Marquis Haley pled guilty to aggravated assault and was sentenced to six years in the custody of the Mississippi Department of Corrections. In his guilty plea, Haley affirmed that his guilty plea was voluntary and, in his plea colloquy, Haley affirmed that his lawyer fully explained the charges and crime to him. Haley filed a motion for post-conviction relief alleging that his plea was involuntary and that he received ineffective assistance of counsel. The circuit court denied Haley’s motion as lacking merit. Haley appealed.

#### ISSUES

Whether the trial court erred in dismissing Haley’s motion for post-conviction relief on the grounds that (1) his plea was involuntary; (2) he received ineffective assistance of counsel; and (3) he was entrapped.

#### HOLDING

(1) Because Haley affirmed in his guilty plea petition that he understood the nature of the charge to which he was pleading guilty, his plea was freely and voluntarily entered, he possessed a full understanding of the indictment against him, and he understood the constitutional right he would waive by pleading guilty, Haley’s guilty plea was knowingly, intelligently, and voluntarily made. (2) Because Haley affirmed that he fully understood the nature of the offense to which he was pleading guilty, his lawyer had explained the minimum and maximum sentences possible under the crime, the elements the State must prove, and any possible defenses, and he was satisfied with the advice, help, and assistance from his lawyer, Haley failed to demonstrate any information or advice he failed to receive from his counsel. (3) Because Haley waived the affirmative defense of entrapment by pleading guilty, Haley’s entrapment defense was without merit. Therefore, the Court of Appeals affirmed the judgment of the Copiah County Circuit Court.

**Affirmed - 2018-CP-0072-COA (Oct. 30, 2018)**

Opinion by Chief Judge Lee

Hon. Lamar Pickard (Copiah County Circuit Court)

*Pro se* for Appellant - Jeffrey A. Klingfuss (Att’y Gen. Office) for Appellee

Briefed by [Davis Pigg](#)

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## MAGEE V. STATE

### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - APPELLATE PROCEDURE - PROCEDURAL BAR** - Issues not raised in a motion for post-conviction relief may not be raised for the first time on appeal

**POST-CONVICTION RELIEF - AMENDMENTS - LIMITS** - To amend a petition for post-conviction relief, the petitioner must do so within thirty days or request and obtain permission of the circuit court

**POST-CONVICTION RELIEF - REVOCATION HEARING - CONTROLLING DECISION** - The circuit court's remarks during a revocation hearing are not controlling; the court's subsequent written decision is controlling

### FACTS

Chad Hamilton Magee pled guilty to two counts of conspiracy to commit kidnapping. Magee was sentenced to five years in the custody of the Mississippi Department of Corrections ("MDOC") with nearly five years suspended on each count and running consecutively to each other and consecutively to Magee's previous sentences. Magee was later released but failed to report to his probation officer, and was subsequently arrested. At Magee's revocation hearing, his post-release supervision was revoked and he was remanded to MDOC custody to serve the remainder of his kidnapping sentences. The judge remarked that Magee's sentences should run concurrently, yet the written revocation order stated that Magee's sentences were to run consecutively. Magee filed a PCR petition in the Rankin County Circuit Court but did not raise the issue of the remark at the revocation hearing until thirty-six days after filing his petition. Magee never requested leave to amend his original petition. Magee's PCR petition was denied. Magee appealed.

### ISSUES

Whether the trial court erred by (1) ordering Magee's sentences to run consecutively; (2) holding Magee's revocation hearing twenty-seven days after his arrest in Alabama; and (3) failing to afford Magee a preliminary hearing.

### HOLDING

(1) Because Magee failed to raise the issue of the judge's remark in his PCR petition and failed to request or obtain leave to amend his petition, and because the remark was not controlling, his claim was both procedurally barred and without merit. (2) Because Magee did not raise the issue of holding the hearing twenty-seven days after his arrest in his revocation hearing, his claim was procedurally barred. (3) Because Magee did not raise the issue of the lack of a preliminary hearing in his revocation hearing, his claim was procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2018-CA-00117-COA (Oct. 30, 2018)**

Opinion by Judge Wilson

Hon. Steve S. Ratcliff III (Rankin County Circuit Court)

Daniel Christopher Jones for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Luke Phillips](#)

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## *COURT OF APPEALS - CRIMINAL*

## ANDERSON V. STATE

### CRIMINAL - FELONY



**APPELLATE PROCEDURE - IMPROPER SENTENCING - PRESERVATION OF ERROR** - To preserve an error related to improper sentencing, there must be an objection to the sentence at trial

**CRIMINAL PROCEDURE - SENTENCING - PROPORTIONALITY** - A sentence which does not exceed the statutory limit will not be disturbed on appeal

**CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE** - A new trial will not be ordered unless the court is convinced that the jury verdict is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice

## **FACTS**

After an automobile accident, witnesses observed Steven Anderson emerge from his car, throw unknown objects into the nearby woods, and rummage through his vehicle. After attacking one witness, Anderson was detained, taken to a hospital, and given a blood test in which he tested positive for methamphetamine. Police secured the scene of the accident and recovered from the nearby woods a digital scale with Anderson's thumbprint on it, several empty bags, a substance later confirmed to be methamphetamine, and a can with a hidden compartment. At trial, a jury found Anderson not guilty of aggravated DUI and possession of methamphetamine with intent to distribute, but found him guilty of DUI and possession of methamphetamine. The trial court sentenced Anderson as a habitual offender to eight years in prison, to run consecutively to a prior sentence, as well as a \$25,000 fine and forty-eight hours in the custody of the Jones County Adult Detention Center. Anderson moved for a JNOV or, in the alternative, a new trial, which the trial court denied. Anderson appealed.

## **ISSUES**

Whether (1) Anderson was procedurally barred from appealing his sentence; (2) the trial court erred by rendering a disproportionate sentence; and (3) the trial court erred in refusing to grant a new trial.

## **HOLDING**

(1) Because there must be an objection made at trial to preserve for appeal an error relating to improper sentencing, and because Anderson did not object to his sentence at trial, Anderson was procedurally barred from appealing his sentence. (2) Because a sentence that does not exceed the maximum statutory limit will not be disturbed on appeal, and because Anderson's sentence fell within the statutory limit, the trial court did not err in rendering his sentence. (3) Because a new trial will not be ordered unless the court is convinced that the jury verdict is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice, and because the jury had ample opportunity to hear and judge a variety of witnesses and forensic evidence at trial, the trial court did not err in refusing to grant a new trial. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

**Affirmed - 2017-KA-00368-COA (Oct. 30, 2018)**

Opinion by Presiding Judge Greenlee

Hon. Dal Williamson (Jones County Circuit Court, First Judicial Dist.)

Benjamin Suber, George Holmes, & Mollie McMillan (Pub. Def. Office) for Appellant - Katy Taylor Gerber (Att'y Gen. Office) for Appellee

Briefed by [Jon-Paul Bushnell](#)

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## **JOHNSON V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - EVIDENCE - SUFFICIENCY OF THE EVIDENCE** - To sustain a conviction, a court must ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

**CRIMINAL PROCEDURE - EVIDENCE - EYEWITNESS TESTIMONY** - Eyewitness testimony, even in the absence of physical evidence, is legally sufficient

**CRIMINAL PROCEDURE - JNOV - WEIGHT OF THE EVIDENCE** - When reviewing a challenge to the weight of the evidence, the court will disturb a jury verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

### **FACTS**

Jarvette Brown went to a neighbor's home in Alligator, Mississippi. Someone had entered the home during her brief absence. A man emerged from the back room, wearing black clothes and a black bandana. The man aimed a gun at her and ordered her to stop. Brown heard the gun click, disregarded the man's orders and dashed for the door. She stopped a passing car to call the police, and officers arrived a half-hour later. They located an unarmed man who matched the description Brown gave and approached him on the street. He evaded the officers and ran into a nearby home. Brown stood nearby and recognized him as the culprit. After police set up a perimeter around the house and ordered its occupants to evacuate, Brown identified one of the men who emerged, Christopher Johnson, as the culprit. Johnson was wearing different clothing when he emerged, but Brown knew his mother well and was familiar with him. The police never found the black clothes or black bandana and never dusted for fingerprints at the scene of the crime. A jury found Johnson guilty of burglary of a dwelling, aggravated assault, and possession of a firearm by a convicted felon. Johnson moved for a JNOV or, alternatively, a new trial, which the circuit court denied. Johnson appealed.

### **ISSUES**

Whether (1) the evidence was sufficient to support Johnson's identity as the culprit; (2) the evidence was sufficient to support Johnson's conviction for aggravated assault; (3) the evidence was sufficient to support Johnson's conviction for firearm possession by a felon; and (4) the verdicts were against the overwhelming weight of the evidence.

### **HOLDING**

(1) Because after viewing all the evidence in the light most favorable to the prosecution any rational trier of fact could have found beyond a reasonable doubt that Johnson was the burglar, this issue was without merit. (2) Because a rational trier of fact could have found beyond a reasonable doubt that Johnson was guilty of aggravated assault, the trial court did not err in denying Johnson's motion for a JNOV, and this issue was without merit. (3) Because it was not required that the deadly weapon be introduced at trial, and because Brown testified about the gun, its size, and Johnson's aiming it directly at her, her testimony was sufficient to support the conviction for firearm possession by a felon and the denial of Johnson's JNOV motion. (4) Because the verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice, the jury's verdict was not against the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

### **CONCURRENCE**

Judge Tindell argued that there was not sufficient evidence to support Johnson's aggravated assault conviction, and that this conviction should have been reversed and rendered. In discussing cases involving a conviction for aggravated assault with a deadly weapon where the defendant never actually used the weapon or, in the case of a firearm, never actually discharged the firearm, appellate courts have closely scrutinized the factual circumstances involved. Judge Tindell argued that no rational trier of fact could have found the sound of an unidentified "click" sufficient to prove Johnson actually attempted to discharge the weapon in an attempt to assault Brown.

**Affirmed - 2017-KA-00657 (Oct. 30, 2018)**

Opinion by Judge Greenlee

Hon. Albert B. Smith III (Bolivar County Circuit Court, Second Judicial Dist.)

Hunter N. Aikens (Pub. Def. Office) for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Natalie McCarty](#)

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**NELSON V. STATE**

**CRIMINAL - FELONY**



**CRIMINAL LAW - MANSLAUGHTER - IMPERFECT SELF-DEFENSE** - Imperfect self-defense is an intentional killing done without malice under a bona fide, but unfounded, belief that it is necessary to prevent death or great bodily harm

**CRIMINAL LAW - FIRST-DEGREE MURDER - AGGRESSOR** - If a person is an aggressor, he or she can lose that status by clearly withdrawing from a fight and clearly evidences the desire to withdraw from a fight by either word or act so long as the person's intentions are clear

**CRIMINAL LAW - FIRST-DEGREE MURDER - DELIBERATE DESIGN** - Deliberate design to kill a person may be formed very quickly, perhaps only moments before the act of consummating the intent

### **FACTS**

Derrick Nelson and Willie Hood were disputing at a graduation party for Nelson's brother when Hood, who was intoxicated, began swinging wildly and punching his own vehicle before throwing a beer bottle that hit Nelson. Nelson retrieved a gun from a friend's vehicle and fired into the air before telling Hood to "chill out." Hood responded by attempting to take the gun. During the struggle, however, the gun discharged and killed Hood. Nelson fled the scene but turned himself in to police ten hours later, claiming that the shooting was an accident. At trial, Nelson based his defense on his statements to police and the testimony of his sisters who were present at the party. The trial court instructed the jury on theories of first-degree murder, second-degree murder, misdemeanor manslaughter, heat-of-passion manslaughter, culpable-negligence manslaughter, accident, and self-defense. Nelson's instruction on imperfect self-defense was initially accepted, but the trial court later refused that instruction and did not provide it to the jury. Nelson was convicted of first-degree murder. Nelson appealed.

### **ISSUES**

Whether (1) the trial court erred in failing to provide an instruction to the jury on imperfect self-defense; and (2) whether the sufficiency of the evidence supported Nelson's conviction for first-degree murder.

### **HOLDING**

(1) Because a reasonable juror could conclude that Nelson lied about his initial claim that the shooting was an accident and believe Nelson's later claim that he fired in self-defense, the instruction of imperfect self-defense should have been given. (2) Because there was sufficient evidence of deliberate design on Nelson's part to kill Hood, a reasonable juror could conclude that Nelson committed first-degree murder. Therefore, the Court of Appeals reversed and remanded the judgment of the Lowndes County Circuit Court.

### **DISSENT**

Judge Wilson argued that the trial court did not err in denying Nelson's request for a jury instruction on imperfect self-defense because a jury would have to speculate as to whether Nelson shot Hood in imperfect self-defense and that there was no evidence that the killing involved a subjective belief by Nelson that his life was in danger or that he might have suffered great bodily harm.

#### **Reversed & Remanded - 2016-KA-00835-COA (Oct. 30, 2018)**

En Banc Opinion by Judge Fair - Dissent by Judge Wilson

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

David Neil McCarty for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Ryan Overturf](#)

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**TOLIVER V. STATE**

**CRIMINAL - FELONY**

**CRIMINAL LAW - FELONY - POSSESSION OF A WEAPON BY A CONVICTED FELON** - Miss. Code Ann. § 97-37-5 provides that it shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm”

**EVIDENCE - WITNESSES - CREDIBILITY** - It is well established that it is within the province of the jury to determine the credibility of witnesses; the jury may believe or disbelieve, accept or reject the utterances of any witness

**EVIDENCE - WITNESSES - TESTIMONY** - Witness testimony is more than sufficient evidence to convict a defendant of possession of a weapon by a felon

### **FACTS**

Christopher Toliver was convicted of possession of a weapon by a convicted felon. He was sentenced to serve eight years in the custody of the Mississippi Department of Corrections. Toliver’s post-trial motions were denied. Toliver appealed.

### **ISSUE**

Whether there was sufficient evidence to support the jury’s guilty verdict.

### **HOLDING**

Because the jury heard witness testimony, saw the exhibits relating to the elements, and was allowed to take the exhibits back with them to the jury room for review, there was sufficient evidence to support the jury’s guilty verdict. Therefore, the Court of Appeals affirmed the judgment of the Copiah County Circuit Court.

**Affirmed - 2017-KA-01268-COA (Oct. 30, 2018)**

Opinion by Judge Carlton

Hon. Lamar Pickard (Copiah County Circuit Court)

Benjamin A. Suber, George T. Holmes, & Mollie M. McMillan (Pub. Def. Office) for Appellant - Abbie Eason Koonce (Att’y Gen. Office) for Appellee

Briefed by [Katie Humphries](#)

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### **MISSISSIPPI CASES EDITOR**

**EMILY A. WARWICK**

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