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Weekly Newsletter

Mississippi Cases Editor: Emily A. Warwick

MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 30, 2018

SUPREME COURT - CIVIL CASES

BROWN V. PROF'L BLDG. SERVS., INC.

CIVIL - PERSONAL INJURY

EVIDENCE - ADMISSABILITY - PHOTOGRAPHIC RECREATIONS - The mere fact that a photograph was taken at a different time from that in question does not render it inadmissible if the witness is able to verify it as a substantial representation of the conditions as they existed at the time in question

EVIDENCE - ADMISSABILITY - PHOTOGRAPHIC RECREATIONS - The fact that the conditions are somewhat changed before a photograph is taken does not render the photograph inadmissible if the changes are not material, and if the changes are carefully pointed out and brought to the jury's attention

EVIDENCE - ADMISSABILITY - EXPERT TESTIMONY - Miss. R. Evid. 702 states if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principals and methods reliably to the facts of the case

FACTS

Curtis Brown filed an action against Professional Building Services, Inc. ("PBS") under the theory that PBS employees negligently caused him to trip and fall over a chair at work. Brown was the former clubhouse manager at Colonial Country Club. At 5 p.m. on the day of the incident, Brown arrived at the clubhouse to do inventory in a restaurant inside the clubhouse. PBS employees were also at the clubhouse cleaning. At 8 p.m., the PBS staff left, leaving Brown alone in the clubhouse. Brown noted that the overhead lights were off, but the machines produced some secondary lighting. Brown testified that as soon as he turned into the doorway of the grill, he stumbled and fell over a chair left in the doorway. He felt immediate pain in his knees and face and was later taken to the hospital, diagnosed with a bilateral patellar tendon rupture in both knees, and underwent surgery. At trial, the court admitted into evidence a brightly-lit photograph of a chair in the doorway of the grill taken years after the accident, as well as the testimony of an expert in the field of biomechanics. Both parties agreed the photograph of the chair should have been rotated. The jury returned a verdict in favor of PBS. The circuit court denied Brown's post-trial motions and entered judgment in favor of PBS. Brown appealed, and the Court of Appeals affirmed. Brown petitioned for writ of certiorari.

ISSUES

Whether the trial court erred in (1) admitting the brightly-lit photograph taken by defense counsel several years after the incident into evidence; and (2) admitting expert testimony from a witness about the biomechanics of Brown's alleged chair collision.

HOLDING

(1) Because Brown did not preserve the lighting issue of the photograph for review, because Brown was the only witness to his accident, and because the position of the chair in the doorway was not a material issue, the photograph presented was a substantial representation of the alleged accident, and the trial court did not abuse its discretion by finding that Brown's testimony was a fair basis for admission of the photograph. (2) Because nothing in the record provided contradictory evidence to suggest the expert's testimony lacked a scientific basis, the trial court did not err in finding

the expert's testimony was based on sufficient facts and was the product of reliable principles and methods under Miss. R. Evid. 702. Therefore, the Supreme Court affirmed the judgment of the Hinds County Circuit Court.

DISSENT

Justice King argued that the trial court abused its discretion in admitting the photograph because Brown properly objected to the lighting in the recreation photograph when defense counsel filed a motion in limine, argued at hearing that the recreation photograph should be excluded, and argued against the photograph during his opening statement. He would therefore reverse the decision of trial court and the Court of Appeals and remand the case for a new trial.

Affirmed - 2016-CT-00818-SCT (Aug. 30, 2018)
En Banc Opinion by Justice Beam - Dissent by Justice King
Hon. Jeff Weill Sr. (Hinds County Circuit Court)
Steven Hiser Funderburg & Craig Robert Sessums for Appellant - Jason Hood Strong, Robert L. Gibbs & Richard Benjamin McMurtray for Appellee
Briefed by Katelin Davis

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CITY OF CLINTON V. TORNES

CIVIL - OTHER

TORTS - EMPLOYEE'S LIABILITY - PERSONAL EXCEPTION - Miss. Code Ann § 11-46-7(2) states that no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties
TORTS - EMPLOYEE'S LIABILITY - RECKLESS DISREGARD - Miss. Code Ann. § 11-46-9(1)(c) states that a government entity or employee acting within the course or scope of their employment duties are not liable unless they acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury
TORTS - IMMUNITIES - DISCRETIONARY FUNCTION - The test for discretionary-function immunity requires the court to: (1) ascertain whether the activity involved an element of choice or judgment, and (2) decide whether that choice or judgment involved social, economic or political considerations

FACTS

Officer Michael Kelly was responding to a call when, on route, he was involved in a motor vehicle accident with Patrice Tornes. Tornes sued Kelly and his employer, the City of Clinton, for negligence. Kelly and the City of Clinton filed for summary judgment under the Mississippi Tort Claims Act, which the Hinds County Court denied. Kelly and the City of Clinton subsequently filed an interlocutory appeal.

ISSUES

Whether the trial court erred in denying summary judgment based on (1) a lack of individual liability; (2) the police-protection immunity; and (3) the discretionary-function immunity.

HOLDING

(1) Because Kelly's actions were within the scope and course of his duties, he cannot be held individually liable. (2) Because Kelly's actions rose only to the level of simple negligence, the City of Clinton is shielded by the police-protection immunity. (3) Because the training and entrusting of Kelly with a police vehicle falls under the discretion of the city, the City of Clinton enjoys the discretionary-function immunity. Therefore, the Supreme Court reversed the judgment of the Hinds County Court and rendered a judgment in favor of Kelly and the City of Clinton.

Reversed & Rendered - 2017-IA-00219-SCT (Aug. 30, 2018)
Opinion by Justice Maxwell
Hon. Larita M. Cooper-Stokes (Hinds County Court)

Robert O. Allen, John Chadwick Williams, & William Robert Allen for Appellants - Kelly Marie Williams & Aafram Yaphet Sellers for Appellee
Briefed by Brandon Wilson

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MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 28, 2018

COURT OF APPEALS - CIVIL CASES

DUNNAM V. DUNNAM

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - BEST INTEREST OF CHILD - The polestar consideration in a child custody case is the best interest of the child
FAMILY LAW - BEST INTEREST OF CHILD - *ALBRIGHT* FACTORS - The chancellor should consider the following factors to determine the best interest of the child: 1) age, health and sex of the child; 2) determination of the parent that had the continuity of care prior to the separation; 3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; 4) the employment of the parent and responsibilities of that employment; 5) physical and mental health and age of the parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school and community record of the child; 9) the preference of the child at the age sufficient to express a preference by law; 10) stability of home environment and employment of each parent; and 11) other factors relevant to the parent-child relationship

FACTS

Heather Dunnam filed a complaint for divorce from her husband, Shaun Dunnam, and for sole custody of her children. Shaun filed his answer to Heather's complaint. Both parties consented to an irreconcilable differences divorce but left matters of custody and asset division to the discretion of the chancellor. Following a one-day trial, the chancellor granted joint legal custody to both parties and physical custody to Shaun. Heather appealed.

ISSUE

Whether the chancellor improperly applied certain *Albright* factors.

HOLDING

Because the chancellor has the ultimate discretion to weigh the evidence and his conclusions of law were supported by substantial evidence on record, the court found no error in the chancellor's application of the *Albright* factors. Further, the chancellor may consider the custody of other children as a factor in the best interests of the children in the present custody hearing. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2017-CA-00599-COA (Aug. 28, 2018)
Opinion by Judge Westbrooks
Hon. Michael L. Fondren (Jackson County Chancery Court)
Rita Marion Silin for Appellant - *Pro se* for Appellee
Briefed by Jack Schultz

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HARMON V. SFD HOLDINGS INC.

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - COMMISSION'S FINDINGS - DEFERENCE - The Commission sits as the ultimate finder of facts in compensation cases, and if the findings of the Commission are supported by substantial evidence, then they are binding on the Court of Appeals; the Court is bound even if the evidence would convince the Court otherwise if it were instead the ultimate fact finder

WORKERS' COMPENSATION - LOSS OF WAGE-EARNING CAPACITY - FACTORS - To determine loss of wage-earning capacity, the Commission considers the employee's actual wages earned prior to the injury as compared to the employee's capacity to earn those same wages after the injury, as well as the employee's age, education, training and work experience, and his or her ability to return to the same or other employment

FACTS

Mary Harmon suffered an on-the-job injury while working at SFD Holdings Inc. ("SFD"). Harmon filed a petition to controvert. The administrative judge found that Harmon suffered a fifty percent loss of wage-earning capacity and awarded her disability benefits. SFD appealed to the Mississippi Workers' Compensation Commission. The conclusions of medical and vocational evaluations were that Harmon was capable of light-duty work with certain restrictions. Over twenty-six jobs were available within these restrictions, but Harmon applied for only three of the available jobs. The Commission reduced the loss of wage-earning capacity from fifty percent to twenty percent, thereby diminishing the amount of disability benefits. Harmon appealed.

ISSUE

Whether the Commission erred in deciding to reduce the loss of wage-earning capacity from fifty percent to twenty percent.

HOLDING

Because Harmon had several certificates, was characterized as having proficient computer skills for an office environment, and lacked an effort in applying for available jobs, the Commission's decision to reduce the loss of wage-earning capacity was supported. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

Affirmed - 2017-WC-01449-COA (Aug. 28, 2018)
Opinion by Chief Judge Lee
Miss. Workers' Compensation Comm'n
Roberta Lynn Haughton for Appellant **-** George E. Read & Shea Stewart Scott for Appellees
Briefed by Luke Phillips

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LEE V. CITY OF BYRAM

CIVIL - OTHER

MUNICIPAL AUTHORITY - EXCLUSIVE REMEDY - APPEAL - Pursuant to Miss. Code Ann. § 11-51-75, an appeal to a circuit court is an exclusive remedy for a party aggrieved by the decision of a municipal authority

MUNICIPAL DECISIONS - NOTICE - APPEAL - If notice of a hearing is deficient, an appeal cannot be the exclusive remedy because plaintiff would not have been afforded adequate relief

FACTS

Sharon and Herbert Lee filed a complaint for declaratory and injunctive relief against the City of Byram over a zoning dispute concerning properties near their home. The Lees claimed certain properties were mistakenly labeled and incorrectly zoned. The Hinds County Circuit Court, First Judicial District dismissed the complaint because it was not filed as an appeal within ten days after the initial zoning as required by statute. The Lees appealed.

ISSUES

Whether (1) an appeal to the circuit court was the exclusive remedy if the aggrieved party had no proper notice of the zoning hearing; (2) the controversy was moot due to a rezoning effort in 2014; and (3) the suit should have been dismissed for failure to prosecute.

HOLDING

(1) Because the required notice was not given, an appeal would not have afforded the plaintiff adequate relief and was therefore not the exclusive remedy. (2) Because the 2012 ordinance referred to the property in question and there were remaining zoning questions, the issue was not moot. (3) Because the failure to prosecute claims was raised for the first time on appeal, it was barred. Therefore, the Court of Appeals reversed and remanded the judgment of the Hinds County Circuit Court, First Judicial District.

Reversed & Remanded - 2016-CA-01649-COA (Aug. 28, 2018)
Opinion by Judge Fair
Hon. Henry L. Lackey (Hinds County Circuit Court, First Judicial Dist.)
Jane E. Tucker, Edward Blackmon, & Herbert Lee, Jr. for Appellants - John Preston Scanlon & Jerry L. Mills for Appellees
Briefed by Karen Lott
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PEVEY V. PEVEY

CIVIL - DOMESTIC RELATIONS

EVIDENCE - ADMISSIBILITY - PRIOR STATEMENTS - Pursuant to Miss. R. Evid. 801 (d), a statement is not hearsay when the declarant testifies and is subject to cross-examination about a prior statement and the statement is either inconsistent with the declarant's testimony given under oath or is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant's recently fabricated it or acted from a recent improper influence or motive in so testifying

FAMILY LAW - CASES OF ABUSE OR NEGLECT - GUARDIAN AD LITEM REPORT - The Mississippi Supreme Court has held that the chancellor is required to include a summary of the guardian ad litem's recommendations when the appointment is mandatory, as it is in cases where abuse or neglect has been alleged

FAMILY LAW - CUSTODY - MODIFICATION - The general standard regarding modification of custody is a material change of circumstances and an adverse effect on the child; a specific exception to the general standard allowing modification is when a child is living in a custodial environment clearly adverse to the child's best interest, and somehow appears to remain unscarred by his or her surroundings

FACTS

Dallas Pevey ("Dallas") and Vanessa Marie Black Pevey ("Marie") divorced in 2014. Physical custody of their children was granted to Marie. Dallas sued Marie to modify the custody of their two children. Dallas alleged that Marie was using illegal drugs, acting erratically, and not properly caring for their children. Although these claims caused great concern, the court ruled that Dallas failed to show a material change of circumstances adversely affecting the children. Dallas filed a motion to reconsider under Miss. R. Civ. P. 59. The chancery court granted his motion allowing him a hearing and additional testimony. The court found that Marie had testified falsely at the initial hearing, and custody of the children was awarded to Dallas. Marie appealed.

ISSUES

Whether the court erred in (1) granting a motion to reconsider; (2) failing to consider the guardian ad litem's report; (3) refusing to admit a copy of an e-mail into evidence; (4) modifying custody; (5) denying Marie's Rule 52 and 59 motions; and (6) altering visitation provisions.

HOLDING

(1) Because the chancellor has the discretion to open a judgment based on circumstances of the case pursuant to Miss. R. Civ. P. 59, there was no abuse of discretion. (2) Because the guardian ad litem did not make a recommendation as to custody, there was no error in the chancellor's failure to discuss the report at length. (3) Because the printout and annotations of the e-mail failed to meet the exclusions within Miss. R. Civ. P. 801(d)(1)(A) and (B), there was no error in the chancellor's refusal to admit the e-mail into evidence. (4) Because the chancellor did not misunderstand case law, did not abuse his discretion in determining witness creditability, and did not place undue emphasis on moral fitness or seek to punish Marie's immoral behavior, there was no error in modifying parental custody. (5) Because a chancery court is only required to make general findings of fact and conclusion of law under Miss. R. Civ. P. 52 and there was no issue being presented in Marie's Rule 59 motion, the chancery court did not err in denying both motions. (6) Because there is no authority stating that chancellors may not alter visitations provisions unless evidence is presented, no error was committed. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Affirmed - 2017-CA-01144-COA (Aug. 28, 2018)
Opinion by Judge Fair
Hon. John S. Grant III (Rankin County Chancery Court)
Stephen L. Beach III for Appellant - Paul E. Rogers for Appellee
Briefed by Whitney Jackson

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POSEY V. POPE

CIVIL - WILLS, TRUSTS, & ESTATES

EVIDENCE - ADMISSIBILITY - ABUSE OF DISCRETION - Relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused
CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR - If jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found
WILLS & ESTATES - CONFIDENTIAL RELATIONSHIP - FACTORS - In order to determine whether a confidential relationship is present, a court should look to the following factors, determining whether: (1) one person has to be taken care of by others, (2) one person maintains a close relationship with another, (3) one person is provided transportation and has her medical care provided for by another, (4) one person maintains joint accounts with another, (5) one is physically or mentally weak, (6) one is of advanced age or poor health, and (7) there exists a power of attorney between the one and another

FACTS

A dispute arose among siblings Paul Posey and Robert Posey (the "Proponents") and Dorothy Pope and Willard Posey (the "Contestants") as to the validity of a 2008 will executed by their mother, Gladys Posey. The Contestants filed a complaint alleging that the Proponents procured both the 2008 will and several deeds through undue influence. The trial court returned a jury verdict in favor of the Contestants. The Proponents appealed.

ISSUES

Whether (1) the chancellor's evidentiary rulings on the parties' motions *in limine* resulted in the admission of evidence that was unfairly prejudicial, confused the issues, and misled the jury; (2) the chancellor erroneously gave jury instructions that were too numerous and that misled and confused the jury; and (3) insufficient evidence supported the jury's verdict that the Proponents procured the 2008 will through undue influence.

HOLDING

(1) Because the evidence's probative value substantially outweighed any unfair prejudice or tendency to confuse the issues or mislead the jury, the admission of the evidence was not unfairly prejudicial, did not confuse the issues, and did not confuse the jury. (2) Because the jury instructions as a whole fairly announced the applicable case law and created no injustice, the chancellor did not err in allowing the jury instructions. (3) Because a reasonable juror could have found

that the Contestants met their evidentiary burden to establish the second prong for undue influence and that the Proponents failed to rebut the presumption of undue influence by clear and convincing evidence, the chancellor did not err in denying the Proponent's motion for a JNOV. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Chancery Court.

Affirmed - 2017-CA-00104-COA (Aug. 28, 2018)
Opinion by Judge Tindell
Hon. Edward C. Fenwick (Neshoba County Chancery Court)
Steven Detroy Settlemires for Appellants - G. Todd Burwell for Appellees
Briefed by Katie Humphries

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COURT OF APPEALS - CRIMINAL CASES

BADGER V. STATE

CRIMINAL - FELONY

EVIDENCE - REDIRECT EXAMINATION - COURT DISCRETION - It is within the sound discretion of the trial court to permit a witness to be recalled to the stand once the witness has completed his testimony
EVIDENCE - REDIRECT EXAMINATION - COUNSEL'S DUTY - Counsel seeking redirect examination must show that the witness is either under process or a reasonable effort has been made to serve the witness with a subpoena
EVIDENCE - TRAIL BY AMBUSH - FAILURE TO REQUEST CONTINUANCE - If new evidence is presented at trial, counsel must make reasonable effort to investigate the evidence

FACTS

Craytonia Badger was arrested for burglary. During cross-examination of the arresting officer, Badger's counsel was made aware of a potential recording of the arrest. Badger's counsel informed the court that he might want to recall the officer as a witness later at trial. The court denied his request, and Badger was ultimately convicted. Badger appealed.

ISSUES

Whether the trial court (1) erred in not allowing Badger to recall a witness to the stand; and (2) subjected Badger to trial by ambush.

HOLDING

(1) Because the arresting officer was an out-of-state witness on disability and Badger's counsel did not seek all avenues to ensure the witness would reappear to testify at trial, the assignment of error was without merit. (2) Because Badger's counsel failed to subpoena the witness before trial, failed to request a subpoena instanter for him after his trial testimony, and failed to request a continuance to investigate the new evidence, Badger was not subjected to trial by ambush.

CONCURRENCE

Judge Westbrooks argued that the trial court erred in denying Badger the opportunity to recall the witness. However, the error was harmless, and the overwhelming weight of evidence supported the jury's verdict.

Affirmed - 2017-KA-01141-COA (Aug. 28, 2018)
Opinion by Judge Carlton - Concurrence by Judge Westbrooks
Hon. Forrest A. Johnson Jr. (Amite County Circuit Court)
W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee
Briefed by Drey Russell

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CAFFIE V. STATE

CRIMINAL - FELONY

CRIMINAL - FELONY - SHOOTING INTO A DWELLING - Under Miss. Code Ann. § 97-37-29, it is a felony to willfully and unlawfully shoot or discharge a pistol, shotgun, rifle or firearm of any nature or description into a dwelling house or any other building usually occupied by persons, whether actually occupied or not
CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR - If jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found

FACTS

Travis Caffie was charged with shooting into a dwelling, shooting into a motor vehicle, and two counts of aggravated assault. A witness familiar with the defendant testified that Caffie fired a handgun from a moving vehicle toward the home of an individual that Caffie had a problem with. Three bullets entered the home, a bullet entered a parked car, and two bullets struck third-parties. Caffie was convicted on each count, with sentences to run consecutively. Caffie filed a motion for JNOV or, in the alternative, a new trial. He alleged that the trial court had failed to properly instruct the injury on the elements of shooting into a dwelling by failing to state that the dwelling must be "usually occupied by persons." The trial court denied his motion. Caffie appealed.

ISSUES

Whether the trial court erred in (1) failing to instruct the jury that "dwelling house" must be "usually occupied by persons" to satisfy the elements of Miss. Code Ann. § 97-37-29; and (2) failing to instruct the jury on the venue of the crimes of shooting into a motor vehicle and aggravated assault.

HOLDING

(1) Because the trial court will not be reversed for jury instructions that fairly announce the law of the case and create no injustice, and because, under Miss. Code Ann. § 97-37-29, the phrase "usually occupied by persons" describes "or any other building" rather than "dwelling house", the trial court did not err in failing to instruct the jury that the dwelling shot into must be "usually occupied by persons". (2) Because the instructions for shooting into a motor vehicle and aggravated assault both required the jury to make findings on venue, and because the record shows that the crimes occurred in Simpson County, the trial court did not err in failing to instruct the jury on the venue of the crimes of shooting into a motor vehicle and aggravated assault. Therefore, the Court of Appeals affirmed the judgment of the Simpson County Circuit Court.

Affirmed - 2017-KA-00692-COA (Aug. 28, 2018)
Opinion by Presiding Judge Griffis
Hon. Eddie H. Bowen (Simpson County Circuit Court)
W. Terrell Stubbs for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee
Briefed by Jon-Paul Bushnell

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PRYOR V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JNOV - SUFFICIENCY OF THE EVIDENCE - To determine whether evidence is sufficient to sustain a conviction, the court asks 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 - JURY INSTRUCTIONS - PLAIN ERROR DOCTRINE - For the plain error doctrine to apply, the court must find: (1) the circuit court deviated from a legal rule, (2) the error is plain, clear, or obvious, and (3) the error prejudiced the outcome of the trial

CRIMINAL PROCEDURE - MOTION TO SUPPRESS - ABUSE OF DISCRETION - The trial court's decision on a motion to suppress evidence will be affirmed unless there is a definite and firm conviction that it committed a clear error of judgment in the conclusion it reached upon weighing relevant factors

FACTS

James Edward Pryor was convicted for driving a vehicle under the influence of an impairing substance at an aggravated level. Pryor rear-ended a truck, causing it to roll several times and pin one of its passengers beneath it. The first patrolman that arrived on scene witnessed Pryor's staggered walk, heard his slurred speech, and smelled alcohol on his breath. Pryor stated he had drunk alcohol that day and did not remember the accident. Pryor's blood sample tested positive for alcohol and methamphetamine. The second patrolman that arrived wrote a report on the accident and later served as an accident reconstructionist. At trial, Pryor did not object to the reconstructionist's testimony, nor did he object to the jury instructions. The Jones County Circuit Court denied Pryor's motion at trial to suppress evidence pertaining to his impairment. After trial, the Jones County Circuit Court also denied Pryor's motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial. Pryor appealed.

ISSUES

Whether (1) the evidence was sufficient to support the guilty verdict; (2) the jury was properly instructed on the elements of aggravated DUI; (3) the circuit court erred when it allowed the accident reconstructionist to testify; (4) Pryor's ineffective-assistance-of-counsel claim should be preserved; and (5) the circuit court erred when it denied Pryor's motion to suppress evidence.

HOLDING

(1) Because a rational trier of fact could have found Pryor guilty of aggravated DUI, there was sufficient evidence to support the verdict. (2) Because the trial court's failure to further define the terms "mutilation" and "disfigurement" did not prejudice the outcome, the jury was properly instructed. (3) Because Pryor did not object to the accident reconstructionist's testimony at trial, the issue was barred on appeal. (4) Because the record on appeal was insufficient to review Pryor's claim of ineffective-assistance-of-counsel, he was granted permission to seek the Supreme Court's leave to raise the claim in a post-conviction relief motion. (5) Because the trial court did not abuse its discretion or commit a clear error of judgment, it did not err in denying Pryor's motion to suppress evidence. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

PARTIAL CONCURRENCE

Judge Barnes agreed with the majority's determination of the merits but disagreed with the majority's decision to preserve the issue of ineffective-assistance-of-counsel with respect to counsel's failure to object to the accident reconstructionist's testimony. She argued that based on the majority's own finding that the admission of the testimony was "at best . . . harmless error," Pryor could not demonstrate actual prejudice. She would affirm the judgment but deny Pryor's request to preserve his right to an ineffective-assistance-of-counsel claim.

Affirmed - 2017-KA-00516-COA (Aug. 28, 2018)
Opinion by Judge Greenlee - Partial Concurrence by Judge Barnes
Hon. Dal Williamson (Jones County Circuit Court, First Judicial Dist.)
W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee
Briefed by Baxter Geddie

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WARREN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - DIRECT APPEAL - An ineffective-assistance-of-counsel claim can be addressed on direct appeal when: (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 without consideration of the findings of fact of the trial judge

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - JURY INSTRUCTIONS - A cautionary instruction is required when an accomplice's testimony is the basis for the conviction, and the defendant's guilt is not clearly proven

FACTS

On August 20, 2016, Irene Eakes's granddaughter, Kassie Woods, and Joshua Warren were driven to Eakes's house by Debra Fox, who remained in the car. Several hours after Warren and Woods left her house, Eakes realized that several rings were missing from her bedroom. She reported the missing rings to the Sheriff's department and stated she suspected that Woods and Warren had taken them. Woods testified that she and Warren planned to steal Eakes's rings. At trial, Warren's attorney did not request a cautionary instruction about the reliability of accomplice testimony. Warren testified in his own defense and was convicted by a jury of grand larceny. Warren appealed.

ISSUE

Whether Warren's trial counsel was ineffective for failing to request a cautionary instruction about the reliability of accomplice testimony.

HOLDING

Because there was other testimony tying Warren to the crime, Warren's trial counsel was not constitutionally deficient. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Circuit Court.

Affirmed - 2017-KA-01086 (Aug. 28, 2018)
Opinion by Chief Judge Lee
Hon. Christopher A. Collins (Neshoba County Circuit Court)
Justin T. Cook (Pub. Def. Office) for Appellant - Lisa Blount (Att'y Gen. Office) for Appellee
Briefed by Natalie McCarty

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WHITTAKER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - CUMULATIVE ERROR - APPEAL - The cumulative-error doctrine stems from the harmless-error doctrine and holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial

CRIMINAL PROCEDURE - HEARSAY - WARRANT - Hearsay can provide a proper basis for a search warrant under certain circumstances, and, under the totality-of-the-circumstances test, the task of the issuing judge is simply to make a practical, common-sense decision based on all the circumstances set forth in the affidavit before him, including the veracity and the basis of the knowledge of persons supplying hearsay information

FACTS

In early 2011, a fourteen-year old girl ("A.T"), was forced inside of Tremaine Whittaker's car while waiting at her school-bus stop. Whittaker took A.T. to his apartment before dropping her off at school. A warrant was secured for Whittaker based upon facts and circumstances as reported by Detective Janice Hartzog regarding the day of the incident. At trial, the prosecution used the word "rape" before the jury, and although an objection to the use of the word was sustained, Whittaker did not seek an instruction to disregard the question that drew the objection. Additionally, testimony was provided at trial from both Katherine Bullie and Jessica Jones, each employed with Children's Advocacy Centers of

Mississippi. A.T. was taken to Children's Advocacy Center for examination following the encounter with Whittaker. Bullie was the forensic interviewer assigned to A.T., and Jones was a registered nurse. Bullie testified to her experiences at Children's and to the process she used in conducting her interview of A.T., while Jones testified regarding the medical history of A.T.'s medical records. In September of 2012, a jury found Whittaker guilty of statutory rape, sexual battery of a minor child, and gratification of lust. Whittaker moved for post-conviction relief in September of 2013. The circuit court then conducted an evidentiary hearing on whether Whittaker should be granted an out-of-time appeal, and relief to allow the appeal was granted. Whittaker appealed.

ISSUES

Whether (1) cumulative error deprived Whittaker of his right to a fundamentally fair and impartial trial; (2) the search warrant issued deprived Whittaker of his Fourth and Sixth Amendment rights provided by the United States Constitution; and (3) the circuit court erred in allowing testimony from Bullie and Jones.

HOLDING

(1) Because the prosecution's use of the word "rape" in front of the jury did not damage Whittaker's case, and because any error regarding the use of the word "rape" was harmless, there was no violation of Whittaker's due-process rights. (2) Because hearsay can provide a proper basis for a search warrant under certain circumstances, and because there was substantial evidence to support the judge's finding of probable cause to issue the warrant, the warrant was justified under the totality-of-the-circumstances test. (3) Because Bullie's testimony was not reciting an out-of-court statement but was testifying about what she did, and because the reading of medical records by Jones accords with the recognized hearsay exception that allows statements made for the purposes of medical diagnosis and treatment, the circuit court did not err in allowing testimony from Bullie and Jones. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2017-KA-00566-COA (Aug. 28, 2018)
Opinion by Judge Greenlee
Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)
Benjamin A. Suber, George T. Holmes, & Daniel Hinchcliff (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee
Briefed by Carson Phillips

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