

MISSISSIPPI COURT OF APPEALS DECISIONS – SEPTEMBER 18, 2018**COURT OF APPEALS - CIVIL CASES****BRYANT V. DENT****CIVIL - REAL PROPERTY**

CIVIL PROCEDURE - LIMITATION OF ACTIONS - RECOVERY OF LAND - Actions to recover land are subject to the ten-year statute of limitations found in Miss. Code Ann. § 15-1-7 and § 15-1-9

CIVIL PROCEDURE - CAUSE OF ACTION - RECOVERY OF LAND - Under *Lott*, a suit to remove cloud of title is considered an action to recover land

CIVIL PROCEDURE - PLEADINGS - FRAUD - Miss. R. Civ. P. 9(b) states that the circumstances constituting fraud must be stated with particularity

FACTS

Before his death, Mellie Cooley signed and executed a warranty deed transferring his interest in real property to Katie Dent. Cooley died on January 16, 2011, and Kellie Bryant was appointed administrator of Cooley's estate. In July 2011, Albinie Bryant filed a complaint against Dent alleging the deed was void due to Cooley's lack of capacity, undue influence, and fraud. On May 21, 2012, Dent executed a warranty deed transferring the property to Christopher and Cathy Gray. Due to lack of prosecution, the first complaint was dismissed on October 19, 2016. Bryant refiled the complaint in February 2017. The trial court dismissed the complaint, because Bryant's claims were barred by the three-year statute of limitations and her allegation of fraud was not made with particularity. Bryant appealed.

ISSUES

Whether the trial court erred in dismissing the complaint because (1) the statute of limitations had tolled; and (2) the allegation of fraud was not pled with particularity.

HOLDING

(1) Because actions to recover land are subject to a ten-year statute of limitations pursuant to Miss. Code Ann. § 15-1-7 and § 15-1-9, Bryant's claim was not barred. (2) Because the circumstances constituting fraud were not pled with particularity pursuant to Miss. R. Civ. P. 9(b), the claim for fraud was properly dismissed. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Forrest County Chancery Court.

Affirmed in Part; Reversed & Remanded in Part - 2017-CA-01322-COA (Sept. 18, 2018)

Opinion by Chief Judge Lee

Hon. Susan Rhea Sheldon (Forrest County Chancery Court)

Josiah Charles Burns & Ronald C. Morton for Appellant - *Pro se* for Appellees

Briefed by [Zachary Flowers](#)

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COOPER TIRE & RUBBER CO. V. LOVELESS**CIVIL - WORKERS' COMPENSATION**

CIVIL PROCEDURE - APPEALS - FINAL ORDER - In workers' compensation cases, an appeal may not be taken unless the Commission's order is final

CIVIL PROCEDURE - JURISDICTION - MOTION - Under *Hamilton*, the Court must, on its own motion, address jurisdictional issues on appeal

FACTS

Around July 1, 2014, Rondie Loveless began to experience pain in her right foot. She did not timely report the injury as work related because the pain gradually increased over time and she could not identify an injury or cause. Cooper Tire denied compensability. Loveless was terminated from Cooper Tire on August 29, 2015. On February 17, 2017, at a hearing on the merits, the administrative judge found that Loveless made a prima facie showing that she sustained a compensable, work-related injury and was entitled to compensation benefits. The judge's order stated that the "issue of extent of permanent partial disability or industrial loss of use related to the right foot injury will be reserved until further proceedings." Cooper Tire appealed the order to the Workers' Compensation Commission. The Commission affirmed in part as to the compensability of the foot injury and remanded the case to the judge for all further proceedings as were necessary in the claim. Cooper Tire appealed.

ISSUES

Whether the Commission erred in finding Loveless sustained a compensable, work-related injury to her foot.

HOLDING

Because the Commission did not make a final adjudication as to all issues surround Loveless's alleged work-related injury, the instant appeal was deemed interlocutory and the Court thus lacked jurisdiction to hear the appeal. Therefore, the Court of Appeals dismissed the appeal.

Dismissed - 2017-WC-01667-COA (Sept. 18, 2018)

Opinion by Chief Judge Lee

Mississippi Workers' Compensation Commission

M. Reed Martz for Appellant - Greg E. Beard for Appellee

Briefed by [Catherine Pettis](#)

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RODRIGUE V. RODRIGUE

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - A trial court's distribution of marital assets must be supported by substantial credible evidence

CIVIL PROCEDURE - ATTORNEY'S FEES - MCKEE FACTORS - Attorney's fees should only be granted if movant presents sufficient evidence proving inability to pay and all of the McKee factors; The McKee factors include (1) relative financial ability of the parties; (2) the skill and standing of the attorney employed; (3) the novelty and difficulty of the issues in the case; (4) the responsibility required in managing the case; (5) the time and labor required; (6) the usual and customary charge in the community; and (7) whether the attorney was precluded from undertaking other employment by accepting the case

APPELLATE PROCEDURE - ERROR - APPEAL COSTS - Miss. Rule App. P. 36(a) provides for the taxation of costs of appeal to the losing party unless otherwise agreed upon by the parties or ordered by the appellate court

FACTS

Deidi and Mitch Rodrigue separated on July 15, 2010 after twenty-one years of marriage. On August 31, 2012, the trial court entered a final judgment, after which Deidi filed an unsuccessful post-trial motion. She then appealed. On appeal, the Court of Appeals affirmed in part and reversed in part the trial court's judgment. In remanding the case for further proceedings on the issues of equitable division and alimony, the Court stated the chancellor could also revisit other

issues including attorney's fees. The Court of Appeals reversed the chancellor's alimony award after finding the award was unjust and grossly inadequate based on the trial court's findings. On remand, the chancellor entered an amended opinion and final judgment on January 4, 2017. In addressing equitable distribution of the marital property, the chancellor reaffirmed the previous division of the marital home following the original final judgment as equitable and in addition stated that the house payments did not constitute alimony, and that Mitch was entitled to tax deductions associated with the home. After distributing the marital property and debt, the chancellor determined that Deidi was entitled to \$600 a month in alimony. Regarding attorney's fees, the chancellor determined that Deidi failed to meet her burden of proving the *McKee* factors and did not plead for appeal costs and fees. Following post-trial motions, the chancellor reaffirmed his denial of Deidi's request for costs and attorney's fees on appeal because he found she failed to establish at trial either the reasonableness or necessity of those charges. Deidi appealed.

ISSUES

Whether (1) the chancellor erred in his equitable distribution of the marital estate; (2) the chancellor's alimony determination on remand was adequate; (3) the chancellor erred by not awarding Deidi's attorney's fees; and (4) the chancellor erred by not awarding Deidi the costs incurred in pursuing the first appeal.

HOLDING

(1) Because substantial credible evidence supported the chancellor's equitable division of the marital estate, there was no error. (2) Because the chancellor's decision did not constitute an abuse of discretion, the alimony determination on remand was adequate. (3) Because the chancellor concluded the evidence presented failed to sufficiently prove either Deidi's ability to pay or all of the *McKee* factors, there was no error in failing to award attorney's fees. (4) Because the Court of Appeals assessed to Mitch all costs related to the first appeal, the chancellor erred by failing to award Deidi her appellate costs. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the judgment of the Forrest County Chancery Court.

Affirmed in Part; Reversed & Rendered in Part - 2017-CA-00499-COA (Sept. 18, 2018)

Opinion by Judge Tindell

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

Maura D. McLaughlin & Lee P. Gore for Appellant - John D. Smallwood & Thomas T. Buchanan for Appellee

Briefed by [Natalie McCarty](#)

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SPEIGHTS V. SPEIGHTS

CIVIL - DOMESTIC RELATIONS

DIVORCE - GROUNDS - HABITUAL DRUNKENNESS - In order to receive a divorce on the grounds of habitual drunkenness, plaintiff should prove that the defendant was habitually, or frequently, drunk, that the drinking adversely affected the marriage, and that the habit continued at the time of the divorce trial; the chancellor, as the trier of fact, is in the best position to determine the credibility of the witnesses

DIVORCE - PROPERTY DIVISION - FINANCIAL DISCLOSURE FORMS - Each party in every domestic case involving economic issues and/or property division must provide a detailed written statement of actual income and expenses and assets and liabilities otherwise known as a Rule 8.05 Financial Disclosure Form

DIVORCE - DISTRIBUTION OF MARITAL PROPERTY - FERGUSON FACTORS - To equitably divide property, the chancellor must: (1) classify the parties' assets as marital or separate, (2) value those assets, and (3) equitably divide the marital assets based upon the *Ferguson* factors; the absence of an analysis of these factors creates error

FACTS

In January 2016, Kimberly Speights filed for divorce from Edward William "Trey" Speights III, on the grounds of habitual cruel and unusual treatment, excessive drug use, habitual drunkenness or, alternatively, irreconcilable differences. After several continuances, the trial was set for September 21, 2016. Trey failed to appear at trial before the

chancery court. At trial, Kimberly and Trey's parents testified as to Trey's alcohol abuse issues. Specifically, Kimberly and the Trey's parents testified to instances of alcohol-induced physical and verbal violence along with refusal to attend and remain in rehabilitation treatment. The trial court granted Kimberly's divorce. Additionally, Trey's parents provided the court with lists of marital property with which the court distributed the property between Kimberly and Trey. At no point, however, was the court presented with a Rule 8.05 Financial Disclosure Form. Similarly, the court did not address any of the *Ferguson* factors in dividing the marital property. Trey appealed.

ISSUES

Whether the chancery court erred in (1) failing to make findings of fact and conclusions of law on the divorce; (2) allowing Trey's parents "to act as his de facto attorneys" for the division of marital assets at trial when Trey failed to appear; (3) failing to order the parties to submit a Rule 8.05 Financial Disclosure Form; and (4) failing to make a distinction between marital and non-marital property and to support its decision with findings of fact under the *Ferguson* factors.

HOLDING

(1) Because the chancellor is in the best position to determine the credibility of witnesses, and because Kimberly and Trey's parents all testified to Trey's habitual drunkenness, the chancery court did not err in granting the divorce based on those findings of fact. (2) Because Trey's parents merely provided the court with a signed list of the marital assets, and because none of the parents' actions constitute the acts of an "attorney," this issue was without merit and, therefore, the chancery court did not err in its findings. (3) Because each party is required to provide a Rule 8.05 Financial Disclosure Form in matters involving property division, and because neither Kimberly nor Trey provided such disclosures, the chancery court erred in failing to order the parties to submit this form. (4) Because the absence of *Ferguson* analysis is prima facie error, and because the record is void from any evidence going towards consideration of the *Ferguson* factors in dividing the marital property, the chancery court erred in dividing the marital property without conducting an analysis of the *Ferguson* factors. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the decision of the Jefferson Davis County Chancery Court.

Affirmed in Part; Reversed & Remanded in Part - 2016-CA-01691-COA (Sept. 18, 2018)

En Banc Opinion by Judge Barnes

Hon. Gerald Marion Martin (Jefferson Davis County Chancery Court)

Renee M. Porter for Appellant - S. Christopher Farris for Appellee

Briefed by [Corban Snider](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

HILL V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - SUCCESSIVE WRIT - Under the Uniform Postconviction Collateral Relief Act, dismissal of a motion for post-conviction relief is a successive writ and procedurally bars subsequent motions for post-conviction relief arising from the same convictions

POST-CONVICTION RELIEF - PROCEDURAL BAR - STATUTE OF LIMITATIONS - Under the Uniform Postconviction Collateral Relief Act, failure to file a motion for post-conviction relief within three years of conviction is a procedural bar

CONSTITUTIONAL LAW - DOUBLE JEOPARDY - SEPARATE ELEMENTS - The right against double jeopardy does not preclude conviction for different crimes with separate elements arising from the same occurrence or transaction

FACTS

In May 2009, Justin Hill was indicted for the second-degree murder of William Marion and for leaving the scene of an accident. As part of a plea-deal, Hill pled guilty to culpable-negligence manslaughter and to leaving the scene of an accident. Hill was sentenced to twenty years for the first count and five years for the second count, with both sentences to be served consecutively. Hill also pled guilty the same day to DUI mutilation for injuries sustained by Susan Marion, William Marion's wife, arising from the same incident, and was sentenced to twenty-five years, to be served consecutively. Hill filed a PCR motion in October 2013, which the circuit court denied. In October 2016, Hill filed a "Petition for Correction of Sentence," asserting that his conviction for DUI mutilation violated his right against double jeopardy. Treating his filing as a second PCR motion, the circuit court held that the motion was barred as a successive writ, as well as time-barred, and had no substantive merit. Hill appealed.

ISSUES

Whether the trial court erred in holding that (1) Hill's motion was successive-writ barred; (2) Hill's motion was time-barred; and (3) Hill's double-jeopardy claim had no merit.

HOLDING

(1) Because the UPCCRA renders any order denying or dismissing a PCR motion as a bar to any second or successive PCR motion, and because the PCR petition is Hill's second motion, the trial court did not err in holding that the petition was barred as a successive writ. (2) Because the UPCCRA requires a petitioner to file a PCR petition within three years of conviction, and because Hill filed the instant petition five years after his conviction, the trial court did not err in holding that the petition was time-barred. (3) Because a conviction can only withstand a double-jeopardy analysis if each offense contains an element not contained in the other, and because Hill committed three separate crimes, each containing different elements from the others, the trial court did not err in holding that Hill's double-jeopardy claim had no merit. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Circuit Court.

Affirmed - 2017-CP-00143-COA (Sept. 18, 2018)

Opinion by Presiding Judge Tindell

Hon. James Seth Andrew Pounds (Alcorn County Circuit Court)

Pro se for Appellant - Lisa L. Blount & Joseph Scott Hemleben (Att'y Gen. Office) for Appellee

Briefed by [Jon-Paul Bushnell](#)

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COURT OF APPEALS - CRIMINAL CASES

BILLUPS V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - CONSTRUCTIVE POSSESSION - EVIDENCE - There must be evidence, in addition to physical proximity, showing the defendant consciously exercised control over the contraband; absent this evidence, a finding of constructive possession cannot be sustained

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - If, with respect to one or more elements of the offense, the evidence viewed in the light most favorable to the State would not allow reasonable and fair-minded jurors to reach any decision other than to acquit, then the trial court's decision may be reversed

CRIMINAL PROCEDURE - REVERSAL - WEIGHT OF EVIDENCE - A new trial will not be ordered due 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

Shamor Billups and another man entered a sporting goods store and asked to look at a pistol and a rifle. Both men attempted to flee with the merchandise without paying. The other man was subdued at the scene and Billups got away with the rifle in hand. The incident was videotaped and witnessed by three people. The subdued man identified the man who got away as Billups. Authorities found Billups, a convicted felon, walking out of a shed with the rifle stashed therein. At trial, Billups was convicted as a habitual offender for the unlawful possession of a firearm by a felon. Billups appealed.

ISSUES

Whether (1) there was competent evidence connecting Billups with the firearm; (2) there was insufficient evidence to support the trial verdict; (3) the trial verdict was against the overwhelming weight of the evidence; and (4) the argument raised in Billups supplemental pro se brief was procedurally barred.

HOLDING

(1) Because the jury found a sufficient connection between Billups and the rifle, this claim was without merit. (2) Because there was sufficient evidence to convict Billups, this claim was without merit. (3) Because the overwhelming weight of evidence was in favor of the jury's verdict, this claim was without merit. (4) Because Billups raised this argument for the first time on appeal, it was procedurally barred.

Affirmed - 2016-KA-01378-COA (Sept. 18, 2018)

Opinion by Judge Tindell

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

George T. Holmes (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Drey Russell](#)

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BLANDEN V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - MANSLAUGHTER - HEAT OF PASSION - Heat of passion is a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter; heat of passion is characterized as passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time, and includes an emotional state of mind of anger, rage, hatred, furious resentment or terror

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PRE-ARMING - Pre-arming is a peremptory jury instruction for the prosecution that bars the assertion of self-defense by the defendant

EVIDENCE - HEARSAY - ADMISSIBLE TESTIMONY - Testimony is not hearsay under Miss. R. Evid. 801 and is thus admissible if it is offered for some purpose other than to prove the truth of the matter asserted

FACTS

Walter Blanden and his wife Remell Blanden got into an argument. Over the course of the argument, Remell began moving some of Walter's belongings out of the home. Walter left to look for his gun, first under the pillow of their bed and later inside of his truck. After locating the gun in the truck, Walter fired a shot outside and then went back into the home. The couple's three children and Remell ran to the back of the house and into two separate rooms. Remell locked herself inside the couple's bedroom. Walter shot through the door, killing Remell. Law enforcement arrived to find Remell deceased on the floor of the bedroom. Walter was convicted of first-degree murder based, in part, upon the testimony given by his two children. Walter appealed.

ISSUES

Whether the trial court erred by (1) upholding a guilty verdict against the overwhelming weight of evidence and Walter's motion for judgment notwithstanding the verdict; (2) giving a pre-armed jury instruction; and (3) admitting hearsay testimony of the investigating officer.

HOLDING

(1) Because Walter went outside, retrieved his gun, fired a warning shot, and then returned inside the home, he armed himself prior to the violent encounter and had ample time to contemplate his actions, and the jury verdict was not contrary to the weight of the evidence and the trial court did not abuse its discretion in denying JNOV. (2) Because Walter did not assert an independent claim of self-defense, because manslaughter is not a claim of self-defense, and because the evidence does not support a conviction of manslaughter, the trial court did not err in giving a pre-armed jury instruction. (3) Because the State's investigator provided testimony that was used to show what was learned over the investigation and not to bolster the testimony of Walter's children, or for the truth of the matter as to the identity of the shooter, the investigator's statements were not hearsay. Therefore, the Court of Appeals affirmed the judgment of the Holmes County Circuit Court.

Affirmed - 2017-KA-00741-COA (Sept. 18, 2018)

Opinion by Presiding Judge Griffis

Hon. Jannie M. Lewis (Holmes County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [David Wellen](#)

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FERGUSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - HEARSAY - Under Miss. R. Evid. 801(c), a hearsay statement is one that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement

CRIMINAL PROCEDURE - EVIDENCE - HEARSAY - Under Miss. R. Evid. 801(d)(2)(A), a statement is not hearsay if the statement is offered against an opposing party and was made by the party

CRIMINAL PROCEDURE - DIRECT APPEAL - INEFFECTIVE-ASSISTANCE-OF-COUNSEL - The court may address ineffective-assistance-of-counsel claims on direct appeal only where: (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate and the court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc., are not needed

FACTS

An individual wearing all black clothing and shoes with a "swoosh" robbed a Dollar General at gunpoint. The individual stole \$700. Shortly thereafter, Cortavius Ferguson arrived at a house across from the Dollar General wearing all black clothing and no shoes. Ferguson was arrested for the robbery. Following the arrest, police found a pile of black clothing and a pair of Nike shoes in the backyard. At the time of his arrest, Ferguson had \$837 and a cell phone in his possession. Police executed a search warrant for the cell phone and extracted text messages between Ferguson and an unidentified individual. Ferguson filed a motion *in limine* to exclude the text messages recovered from the cell phone. The trial court denied the motion. At trial, the text messages were admitted into evidence without objection. The text messages referenced robbing a place and obtaining a gun. Ferguson was convicted of two counts of armed robbery and was sentenced to thirty-five years in the custody of the Mississippi Department of Corrections on each count, with the sentences to run concurrently. Ferguson appealed.

ISSUES

Whether (1) the circuit court erroneously admitted the text messages recovered from Ferguson's phone; and (2) Ferguson received ineffective assistance of counsel.

HOLDING

(1) Because the text messages from the unidentified individual to Ferguson were not offered to prove the truth of the matters asserted but to give context to Ferguson's statements, namely that Ferguson was looking for a gun, the statements were not hearsay under Miss. R. Evid. 801(c). (2) Because the record did not affirmatively show ineffectiveness of constitutional dimensions and since there was no stipulation by the parties that the record was adequate to address the claim, the court could not adequately address Ferguson's ineffective-assistance-of-counsel claim on direct appeal and denied the issue without prejudice. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

Affirmed - 2017-KA-00540-COA (Sept. 18, 2018)

Opinion by Presiding Judge Griffis

Hon. Joseph H. Loper, Jr. (Attala County Circuit Court)

Mollie M. McMillin (Pub. Def. Office) for Appellant - Joseph S. Hemleben (Att'y Gen. Office) for Appellee

Briefed by [Davis Pigg](#)

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FOGLEMAN V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - SENTENCING - CRIME OF VIOLENCE - The jury must determine whether an offense is a "crime of violence" if the offense is unlisted within Miss. Code Ann. § 97-3-2(2)

CONSTITUTIONAL LAW - SENTENCING - FACT DETERMINATIONS - *Alleyne* and the Sixth Amendment make Miss. Code Ann. § 97-3-2(2) unconstitutional insofar as it deems an offense a "crime of violence" based on facts found only by the judge

FACTS

Jeremy Shane Fogleman was convicted of failing to stop a motor vehicle pursuant to the signal of a law enforcement officer while operating the vehicle in reckless disregard of the safety of persons or property. After the jury was dismissed, the trial judge classified Fogleman's offense as a "crime of violence," which rendered Fogleman ineligible for any type of early release. Fogleman appealed.

ISSUES

Whether (1) Fogleman's offense was a "crime of violence" pursuant to Miss. Code Ann. § 97-3-2; and (2) Miss. Code Ann. § 97-3-2(2) violates the United States Constitution by increasing the penalty for the crime based on facts not submitted to the jury.

HOLDING

(1) Because Fogleman was convicted of a felony unlisted within Miss Code Ann. § 97-3-2, the trial judge must submit to the jury the question of whether Fogleman's offense was a "crime of violence." (2) Because the trial judge's determination at least doubled the minimum term Fogleman would serve in prison, Miss. Code Ann. § 97-3-2 97-3-2(2) violates Fogleman's rights under the Sixth and Fourteenth Amendments pursuant to the *Alleyne* holding. Therefore, the Court of Appeals affirmed in part, and reversed and rendered in part the judgment of the Harrison County Circuit Court.

Affirmed in Part; Reversed & Rendered in Part - 2016-KA-01244-COA (Sept. 18, 2018)

En Banc Opinion by Judge Wilson

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

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Katy Gerber (Att'y Gen. Office) for Appellee

Briefed by [Nathaniel Snyder](#)

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KIMBLE V. STATE

CRIMINAL - FELONY

PROCEDURE - JURIES - JURY ROLES - Juries determine a witnesses' credibility, are allowed to make logical inferences, and can come to different conclusions of elements of a crime while not making the evidence insufficient

ETHICS - INEFFECTIVE ASSISTANCE OF COUNSEL - POST-TRIAL MOTIONS - A direct appeal of ineffective assistance of counsel is proper 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 without consideration of the findings of the fact of the trial judge

ETHICS - INEFFECTIVE ASSISTANCE OF COUNSEL - PREJUDICE EXCEPTION - Even if the attorney's failure to file a post-trial motion is a deficiency of performance, ineffective assistance of counsel is only proper if the error prejudiced the client

FACTS

Rickarius Kimble was indicted by a Bolivar County Grand Jury for burglary and for the rape of Lakeisha Adams. Despite an ulterior theory of the night's events, Kimble was convicted for rape and sentenced to fifteen years in the custody of the Mississippi Department of Corrections (MDOC). Kimble appealed.

ISSUES

Whether (1) the evidence was sufficient to support a conviction of rape; (2) the jury's verdict was against the weight of the evidence; and (3) Kimble's counsel provided ineffective assistance by failing to file a motion for a new trial.

HOLDING

(1) Because viewing the evidence in the light most favorable to the State could have returned a guilty verdict of rape beyond a reasonable doubt, the evidence was sufficient to support the verdict. (2) Because the jury had opportunity to consider the evidence's inconsistencies, this issue was without merit. (3) Because there was no prejudice from the lack of a post-trial motion, this issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

Affirmed - 2017-KA-00071-COA (Sept. 18, 2018)

Opinion by Judge Greenlee

Hon. Linda F. Coleman (Bolivar County Circuit Court (First Judicial Dist.))

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Brandon H. Wilson](#)

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PEOPLES V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - DIRECTED VERDICT - REASONABLE DOUBT - In reviewing the denial of a motion for a JNOV, the relevant question is 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 - NEW TRIAL - SUFFICIENCY OF EVIDENCE - The power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict; the reviewing court must weigh the evidence in the light most favorable to the verdict

DUE PROCESS - LOST OR DESTROYED EVIDENCE - TILLIS TEST - To succeed on a claim of violation of due-process rights because the State lost or destroyed evidence, (1) the evidence in question must possess an

exculpatory value that was apparent before the evidence was destroyed, (2) the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means, and (3) the prosecution's destruction of the evidence must have been in bad faith

FACTS

Tamira Yvonne Peoples shot both Rotanda Gholar and Rotanda's daughter, Samina. Samina died of a fatal gunshot wound to the head. During trial, the State presented evidence that Peoples had an ongoing conflict with Gholar and Samina. At trial, Gholar had an emotional outburst, which prompted Peoples to move for a mistrial. The trial court denied Peoples's motion for a mistrial after removing the jury from the courtroom, taking a recess, and allowing Gholar to compose herself. Deputy Smith also testified that he believed that he seized three bags of evidence. The State found that Smith misspoke, as he stated only one bag was seized at the time the police report was written. Peoples was convicted of murder and aggravated assault. Peoples filed a motion for a JNOV, or, alternatively, for a new trial. The trial court denied Peoples's motion. Peoples appealed.

ISSUES

Whether (1) the evidence was insufficient to support Peoples's murder conviction; (2) the verdict was against the overwhelming weight of the evidence; (3) the trial court erred in not granting a mistrial; and (4) Peoples was entitled to a new trial because the State failed to preserve evidence.

HOLDING

(1) Because the evidence was sufficient to enable a reasonable jury to find the elements of murder beyond a reasonable doubt, the evidence was sufficient to support Peoples's murder conviction. (2) Because sufficient evidence showed Peoples deliberately shot to cause death and bodily injury, the verdict was not against the overwhelming weight of the evidence. (3) Because any harm from Gholar's outburst was removed by the trial court's proficient handling of the matter, the trial court did not err in not granting a mistrial. (4) Because Peoples failed to show that the State violated her due-process rights by losing or destroying evidence with exculpatory value, Peoples was not entitled to a new trial. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2017-KA-00431-COA (Sept. 18, 2018)

Opinion by Judge Westbrook

Hon. Robert B. Helfrich (Forrest County Circuit Court)

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

Briefed by [Luke Phillips](#)

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PUGH V. STATE

CRIMINAL - FELONY

EVIDENCE - ADMISSIBILITY - STANDARD OF REVIEW - The admission or suppression of evidence is within the sound discretion of the circuit court and will only be reversed if the admission of the evidence results in prejudice or harm to the opposing party

CRIMINAL LAW - CONSPIRACY - CIRCUMSTANTIAL EVIDENCE - Under Miss. Code Ann. §97-1-1(1)(a), a conspiracy occurs if two or more persons conspire to commit a crime; an alleged conspirator's participation may be proved entirely by circumstantial evidence

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

FACTS

Martin Blake Pugh was charged with one count of conspiracy to commit sexual battery and one count of sexual battery of an unconscious seventeen-year-old girl, Gina Warren, with two other men. A portion of the sexual conduct was recorded on Snapchat, a video-sharing social media platform. Drew Kazemba received a copy of the Snapchat video from Matthew Anderson Craddock that showed two boys having sex with a girl who looked unconscious. Kazemba saved the video and turned it in to Marshall County law enforcement. Craddock, Pugh, and Jayland Christopher Brittmon were indicted on charges of conspiracy to commit sexual battery and sexual battery of an incapacitated person. Brittmon pled guilty to the conspiracy charge and to the reduced charge of simple assault. Craddock pled guilty to aggravated assault. Pugh proceeded to trial. At trial, the video and various text-message conversations between the boys and Gina about the night the alleged sexual battery occurred were admitted into evidence with no objection by Pugh. Brittmon also testified that the boys had to help Gina into the house where the alleged assault occurred, and that Gina was not competent enough to give consent. Pugh was found guilty of both conspiracy to commit sexual battery and sexual battery of an incapacitated person. Pugh appealed.

ISSUES

Whether (1) the circuit court erroneously admitted a Snapchat video and various text-message conversations into evidence; (2) there was insufficient evidence to support Pugh's conviction of conspiracy to commit sexual battery; and (3) the numerous evidentiary errors amounted to cumulative error.

HOLDING

(1) Because the Snapchat video and text-messages were properly authenticated and were relevant to Gina's condition during the incident and because no prejudice or harm resulted from the admission of the Snapchat video or text-messages, the trial court did not err in admitting the evidence. (2) Because Brittmon testified that he, Pugh, and Craddock had to help Gina inside Brittmon's home when she arrived because of her condition and that he, Pugh, and Craddock had sex with Gina at some point in the night, there was sufficient evidence presented to allow a jury to infer that a conspiracy existed. (3) Because Pugh was not deprived of a fundamentally fair trial by the cumulative effect of any individual errors, the cumulative error doctrine did not mandate reversal. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2017-KA-00538-COA (Sept. 18, 2018)

Opinion by Presiding Judge Griffis

Hon. Gerald W. Chatham Sr. (Desoto County Circuit Court)

John T. Lamar Jr & Taylor A. Heck for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Katelin Davis](#)

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SHEPHERD V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - HOME-INVASION BURGLARY - ELEMENTS - Miss. Code Ann. § 97-17-23 characterizes the elements of burglary as the unlawful breaking and entering of a dwelling and the intent to commit some crime therein and enhances the penalty when burglary is committed under circumstances likely to terrorize any person who is occupying the house at the time of the criminal invasion of the premises

CRIMINAL PROCEDURE - JNOV - SUFFICIENCY OF THE EVIDENCE - A JNOV 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

CRIMINAL PROCEDURE - NEW TRIAL - WEIGHT OF THE EVIDENCE - A new trial based on the weight of the evidence should be granted only in exceptional cases in which the evidence preponderates heavily against the verdict

FACTS

Devin Shepherd was arrested after a homeowner, Eva Steverson, called police and claimed Shepherd had broken into her home and threatened her grandson, Franklin Steverson. Franklin stated that Shepherd broke into the home in order to retaliate against him from a previous encounter where the two of them fought. Shepherd claimed that he was friends with Franklin and the two frequently socialized. Shepherd further claimed that he got into an argument with Franklin and entered the residence without knocking, but blamed the incident on his own intoxication. Shepherd stated that he may have trespassed and possibly vandalized the Steverson residence, but he did not commit burglary. A jury found Shepherd guilty of home-invasion burglary. Shepherd appealed.

ISSUES

Whether (1) there was insufficient evidence to support Shepherd's conviction; and (2) the conviction was against the overwhelming weight of the evidence.

HOLDING

(1) Because the evidence was sufficient for the jury to conclude that the State had proven both elements of burglary beyond a reasonable doubt, the trial court did not err in denying Shepherd's motion for a JNOV. (2) Because the verdict was not contrary to the overwhelming weight of the evidence and allowing the verdict to stand would not sanction an unconscionable injustice, the trial court did not err in denying Shepherd's motion for a new trial. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

Affirmed - 2017-KA-00837-COA (Sept. 18, 2018)

Opinion by Chief Judge Lee

Hon. Gerald W. Chatham Sr. (DeSoto County Circuit Court)

Benjamin A. Suber & George T. Holmes (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Ryan Overturf](#)

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WARE V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - JURY FINDINGS - If, when viewing the evidence in a light most favorable to the State, a reasonable trier of fact could have found that the essential elements of a crime existed, the conviction will be affirmed

CRIMINAL PROCEDURE - EVIDENCE - JURY FINDINGS - The jury determines the credibility of witnesses and resolves conflicts in the evidence

CONSTITUTIONAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Bare allegations are insufficient to prove ineffective assistance of counsel

FACTS

Pursuant to a 911 call for a domestic disturbance, an officer found a large knife in John Ware's vehicle. The officer confiscated the knife, and turned it over to an investigator who said he believed it to be a butcher knife. Aware of Ware's prior felony convictions, Ware was brought in for questioning. After waiving his *Miranda* rights, Ware told the investigator that he kept the knife in his car for protection. A jury found Ware guilty of possession of a deadly weapon by a convicted felon. The trial court sentenced Ware as a habitual defender. Ware filed a post-trial motion, which was denied. Ware appealed.

ISSUES

Whether (1) the evidence was sufficient to show that the knife Ware possessed was a butcher knife; (2) Ware had effective assistance of counsel; and (3) Ware's sentence was legal, based on the fact that he was a habitual offender.

HOLDING

(1) Because a conviction will be affirmed if a reasonable trier of fact could have found that the essential elements of the crime existed, and because the jury viewed the knife and testimony existed to support it was a butcher knife, the evidence was sufficient to support the finding that Ware possessed a butcher knife. (2) Because an ineffective-assistance-of-counsel claim should only be addressed on direct appeal where the record affirmatively shows a deficiency, or where the parties stipulate that the record is sufficient for appellate review, and because Ware failed to show how counsel prejudiced his pre-trial or post-trial claims, the court found that Ware had effective counsel. (3) Because the state admitted into evidence a report with certified copies of Ware's three prior felony convictions, the sentence was legal. Therefore, the Court of Appeals affirmed the judgment of the Scott County Circuit Court.

Affirmed - 2017-KA-00853-COA (Sept. 18, 2018)

Opinion by Chief Judge Lee

Hon. Christopher A. Collins (Scott County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Katy Taylor Gerber (Att'y Gen. Office) for Appellee

Briefed by [Yance Falkner](#)

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