

MISSISSIPPI SUPREME COURT DECISIONS – JUNE 23, 2016

SUPREME COURT - CIVIL CASES

IN RE MISSISSIPPI RULES OF EVIDENCE

RESTYLING OF THE MISSISSIPPI RULES OF EVIDENCE

FACTS

In 2011 the Supreme Court of the United States approved amendments to restyle the Federal Rules of Evidence in order to make the rules clearer and easier to use without changing substantive meaning. In late 2012, the Advisory Committee on Rules began restyling the Mississippi Rules consistent with the restyling of the Federal Rules of Evidence. On May 19, 2016, the Committee moved the Court to adopt its proposed restyling.

ISSUE

Whether the Mississippi Rules of Evidence should be restyled consistent with the restyling of the Federal Rules of Evidence.

HOLDING

The Supreme Court found that the Committee’s restyling should be adopted with the following revisions: (1) the restyled rules should conform to the Court’s order of June 16, 2016 changing the “Advisory Committee Note” to read “Comment” for each of the rules, and (2) the restyled rule 103 should incorporate the Supreme Court’s amendment to that rule based on the Court’s May 26, 2016 order.

Mississippi Rules of Evidence Restyled With Revisions - 89-R-99002-SCT (June 16, 2016)

Opinion by Justice Coleman

Briefed by [Jake Bradley](#)

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IN RE RULE OF CIVIL PROCEDURE

RULES OF CIVIL PROCEDURE - AMENDMENT TO RULE 16

ISSUE

Whether Rule 16 of the Mississippi Rules of Civil Procedure should be amended.

HOLDING

The Advisory Committee on Rules’ motion to amend Rule 16 was denied.

DISSENT

Justice Waller objected to the failure to amend Rule 16 because we was concerned with the long period of time that the proposed rule was under consideration and with access to justice, particularly in civil cases filed in circuit court, which the proposed rule arguable addresses.

Motion to Amend Rule 16 Denied - 89-R-99001-SCT (June 21, 2016)

Opinion by Presiding Judge Randolph - Dissent by Chief Judge Waller
Briefed by [Jake Bradley](#)

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TARVIN V. CLC OF JACKSON, LLC

CIVIL - WRONGFUL DEATH

WRONGFUL DEATH - UNIFORM HEALTH-CARE DECISIONS ACT - SURROGATE - Under Mississippi Code Section 41-41-211, a surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available

FACTS

Debra Tarvin signed a nursing home Admission Agreement on her father's (Caldwell) behalf, which contained an arbitration provision. After her father died, she brought a wrongful-death suit against the nursing home CLC of Jackson, LLC ("Pleasant Hills"). Pleasant Hills moved to dismiss and to compel arbitration. The Uniform Health-Care Decisions Act requires determination by a primary physician that an individual lacks capacity before a "surrogate" properly can make a healthcare decision for that individual. Pleasant Hills argued that it was properly shown Dr. Thomas was Caldwell's primary physician. The trial judge granted Pleasant Hills' motion. Tarvin appealed.

ISSUE

Whether Caldwell's primary physician had determined that he lacked capacity, such that Debra was qualified statutorily to act as his "surrogate" and to bind him to the arbitration agreement.

HOLDING

Because the record merely shows that Dr. Thomas saw Caldwell twice in three years, there is insufficient evidence that Dr. Thomas was Caldwell's primary physician. Further, family members designated another physician as the "attending physician" in an Admission Agreement just three days later. The court concluded that Dr. Thomas did not qualify under the Uniform Health-Care Decisions Act to act as Caldwell's surrogate and therefore could not properly determine that he lacked capacity. Therefore, the Supreme Court reversed and remanded the judgment of the Hinds County Circuit Court.

Reversed and Remanded - 2015-CA-00145-SCT (June 23, 2016)

Opinion by Justice Lamar

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

W. Eric Stracener & W. Andrew Neely for Appellant - Margaret Sams Gratz & John G. Wheeler for Appellee

Briefed by [Paul Wallace](#)

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SUPREME COURT - CRIMINAL CASES

WILSON V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - WAIVER - PLAIN-ERROR DOCTRINE - Although an issue not raised at trial is generally barred on appeal, an obvious error, not properly raised, that affects a defendant's substantive right may be considered by an appellate court under the plain-error doctrine

APPELLATE PROCEDURE - PLAIN ERROR DOCTRINE - MANIFEST MISCARRIAGE OF JUSTICE

- For the plain-error doctrine to apply, there must have been an error that resulted in manifest miscarriage of justice or seriously affects the fairness, integrity, or public reputation of judicial proceedings

CRIMINAL PROCEDURE - JURY INSTRUCTION - SUFFICIENCY - A jury instruction that fairly announces the law of the case and creates no injustice constitutes no reversible error on appeal

CRIMINAL PROCEDURE - ATTORNEY MISCONDUCT - IMPROPER ARGUMENT - An improper opening or closing argument occurs when the natural and probable effect of such argument creates unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created

CRIMINAL PROCEDURE - IMPROPER ARGUMENT - FACTS NOT IN EVIDENCE - An attorney may make any inferences that seem proper from the evidence admitted, but may not reference facts that have not been admitted into evidence

FACTS

Paul Powers exited his home and observed two African-American gentlemen—Timothy Wilson and Randy Charles Wilson—in his neighbors’ driveway. Powers watched as the men forcefully disconnected a tandem-axle utility trailer from his neighbors’ truck and connected it to their own truck. Powers subsequently called his neighbor and inquired whether anyone had permission to use the trailer; no such permission had been granted. Powers then followed the Wilsons back to their home, speaking with a 911 operator the entire time. A police officer responded to the call and drove to the house to which the Wilsons had driven the stolen trailer. The officer questioned Timothy Wilson, who indicated that he and Randy were the ones who had driven the trailer. The officer then determined that the trailer was registered to Randy Vessel—Powers’ neighbor—and arrested Timothy and Randy Wilson. A grand jury indicted both men, charging them with felonious receipt of stolen property. At trial, the trial court denied both defendants’ *ore tenus* motions for directed verdicts. The jury found both defendants guilty as charged. Randy Wilson filed a motion for a judgment notwithstanding the verdict, which was denied. He was sentenced to ten years in prison with three years to serve. Randy appealed.

ISSUES

Whether (1) the trial court committed plain error by allowing Jury Instruction S-4, which informed the jury that proof the defendant stole the property in question is prima facie evidence that the defendant knew that the property was stolen property; (2) the trial court committed plain error by allowing Jury Instruction S-3, which informed the jury that the State is not required to disprove the defendant’s alibi but rather that the State must prove the defendant’s guilt beyond a reasonable doubt; (3) the prosecution committed plain error during closing argument by arguing facts not in evidence, by misstating the Mississippi Rules of Evidence, and by expressing a personal belief in the defendant’s guilt; (4) the cumulative errors require reversal; and (5) Randy Wilson’s sentence is illegal.

HOLDING

(1) Because Jury Instruction S-4 fairly stated the law regarding receipt of stolen property, no manifest miscarriage of justice occurred, and defendant’s due process rights were not violated, the trial court did not err in allowing the instruction. (2) Because Jury Instruction S-3 correctly informed the jury of the State’s burden of proof concerning defendant’s alibi defense, Wilson’s claim of reversible error is without merit. (3) While the prosecution erred during closings arguments, such error did not rise to the level necessary to meet the plain-error doctrine’s requirements, so the defendant’s failure to object procedurally barred the issue. (4) Because no individual errors existed, no cumulative errors existed, and no reversal was required. (5) While the Court has authority to overrule its own decisions, it has no authority to overrule or abrogate legislative statutes, so the trial court’s sentencing of Wilson was proper.

CONCURRENCE & DISSENT

Justice Kitchens concurred in the affirmance of Wilson’s conviction but dissented to Wilson’s ten year sentence. Justice Kitchens argued that the trial court’s sentencing was illegal because it exceeded the five-year maximum under the amended version of Miss. Code Ann. § 97-17-70(4). Justice Kitchens would reverse Wilson’s sentence and remand for resentencing in compliance with the aforementioned statute.

Affirmed - 2015-KA-00066-SCT (June 23, 2016)

En Banc Opinion by Justice Coleman – Concurrence & Dissent by Justice Kitchens
Hon. Isadore W. Patrick, Jr. (Warren County Circuit Court)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 21, 2016

COURT OF APPEALS - CIVIL CASES

ARD, LLC v. TRULIGHT GLASS & ALUMINUM SOLUTIONS, LLC

CIVIL - CONTRACT

CIVIL PROCEDURE - SUMMARY JUDGMENT - BURDEN OF PROOF - Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, and the moving party bears the burden to show that no genuine issue of material fact exists, and the evidence must be viewed in the light most favorable to the non-movant

CIVIL PROCEDURE - SUMMARY JUDGMENT - APPELLATE REVIEW - A court shall apply de novo standard of review for grants of summary judgment

SUMMARY JUDGMENT - EVIDENCE IN SUPPORT - AFFIDAVIT - A conclusory self-serving affidavit, unsupported by material facts relevant to the proposition at issue, is insufficient as a basis to grant or deny summary judgment, and affidavits that are almost wholly conclusory, containing magical language without real facts to back them up, are less than sufficient

CONTRACTS - BREACH - STANDING - Whenever a wrong or injury results from the breach of a contract merely, an action or redress, whether in form ex contractu or ex delicto, can be maintained only by a party to the contract

CONTRACTS - BREACH - PRIVITY - In order to maintain an action to enforce a breach of contract or to recover damages growing out of a breach, a relationship of privity of contract must exist between the party damages and the party sought to be held liable for the breach

FACTS

On December 1, 2001, ARD entered into a commercial lease agreement with VVP America Inc. d/b/a Binswanger Glass (“Binswanger”) for the lease of commercial property located in Richland, Mississippi. The term of the lease agreement was ten years, from December 1, 2001, through November 30, 2011. On April 6, 2011, Binswanger filed for Chapter 11 bankruptcy protection. On June 27, 2011, Binswanger filed its Debtors’ first omnibus motion pursuant to 11 U.S.C. § 365 (2012) and Federal Rule of Bankruptcy Procedure 6006 to reject certain executory contracts and unexpired leases of nonresidential real property. The commercial lease agreement between Binswanger and ARD was listed as rejected in the motion filed. The bankruptcy court entered an order granting the rejection of the lease between Binswanger and ARD on June 27, 2011. Trulite subsequently acquired substantially all of Binswanger’s assets out of bankruptcy, but not the ARD lease. On May 29, 2012, ARD filed a proof of claim in bankruptcy for damages under the lease, including rent for November 2011, taxes, clean up and repairs, and attorneys’ fees. The total amount of the claim was \$106,470. On March 12, 2012, seventy-eight days prior to filing its proof of claim for damages, ARD filed suit based upon the lease in the county court against various entities to recover rent for November 2011, taxes, clean up and repair costs, and attorneys’ fees. ARD filed an amended complaint on March 19, 2012, naming Trulite as a defendant. ARD asserted that Trulite was a successor tenant of Binswanger, that it occupied the property subject to the lease, and, after the bankruptcy filing, that it did not vacate the property until after November 1, 2011. ARD further asserted that, upon occupying the property, Trulite, as a successor tenant, became subject to the terms of the lease agreement. Trulite filed a motion for summary judgment. The county court granted summary judgment in favor of Trulite on July 19, 2013. The county court found that there was an election of remedies by ARD when it chose to pursue its claims in bankruptcy court. It further found that ARD’s claims before the county court were barred because of the doctrine of judicial estoppel for its attempting to get exactly the same damages and make the exact same claim in a separate forum in another court. The court further found that an

affidavit submitted by ARD was not sufficient to prove that Trulite was a tenant, that the affidavit was conclusory, and that the affidavit lacked causation to prove Trulite caused the damage to the property. The court further found that Binswanger was the tenant through December 2011. ARD appealed the county court's grant of summary judgment to the circuit court. The circuit court affirmed the county court's grant of summary judgment. Specifically, the court found that the affidavit submitted by ARD was insufficient to establish that Trulite assumed the position of Binswanger under the commercial lease agreement, that it was insufficient to show Trulite ever occupied the premises, that it was conclusory, that it did not meet the minimum requirements of the law, and that it was self-contradictory. The court further found that ARD failed to provide sufficient summary-judgment proof that Trulite ever occupied the premises or that Trulite was obligated to ARD for rent. It also found that there was not summary-judgment proof to show exactly what damages were done to the premises, when the damages were done, or who caused the damages. Finally, the court found that summary-judgment was appropriate on the grounds of election of remedies and judicial estoppel. ARD appealed.

ISSUE

Whether Trulite was responsible for paying rent and thus liable for the damages suffered by ARD for Binswanger's breach of contract.

HOLDING

Trulite was not a party to the contract between ARD and Binswanger. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2015-CA-00185-COA (June 21, 2016)

Opinion by Judge Greenlee

Hon. John Huey Emfinger (Rankin County Circuit Court)

Paul E. Rogers for Appellant - Robert B. Ireland III for Appellee

Briefed by [Peter H. Liddell](#)

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BENSON V. RATHER

CIVIL - PERSONAL INJURY

TORTS - PREMISES LIABILITY - CLASSIFICATION - When the facts of the case are not largely in dispute, the classification of the plaintiff becomes a question of law for the trial judge

TORTS - PREMISES LIABILITY - DANGEROUS CONDITIONS - Common architectural conditions for a building are not considered unreasonably dangerous conditions

CIVIL PROCEDURE - PLEADINGS - NEGLIGENCE - Negligence per se is a subset of negligence in general, thus a pleading of negligence would encompass negligence per se

FACTS

Helene Benson was in The Tint Shop to replace the tires on her car. Because Benson could not pay her bill with a check or card, she decided to drive her car to the bank to get cash. Benson testified that she asked the employee working on her car where her keys were. The employee asked the owner, Mack Rather, who pointed to the keys hanging on the back wall. There is conflicting testimony whether Rather moved to get the keys for Benson. Benson went to retrieve the keys, but upon doing so tripped on a concrete lip jutting from the threshold of a doorway between the two service bays. As a result of the fall, Benson broke her hip. There is conflicting testimony whether signs were posted that prohibited entry to the area the keys were located to anyone except employees. Benson filed suit against the Defendants in August 2013, asserting that their negligence proximately caused her fall. Rather then filed a motion for summary judgment, which was granted, as the circuit court concluded that Benson failed to prove that an unreasonably dangerous condition existed. Benson appealed.

ISSUES

Whether the trial court erred in finding that (1) the concrete lip was not an unreasonably dangerous condition and (2) the Defendant was not negligent per se.

HOLDING

(1) Because common architectural conditions for a building are not considered unreasonably dangerous conditions, the concrete lip—as a common architectural condition—was not an unreasonably dangerous condition. (2) Because Benson failed to plead negligence per se as a cause of action in her complaint and because the IBC statute does not apply to The Tint Shop’s building, the defendants were not negligent per se. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

Affirmed - 2014-CA-01775-COA (June 21, 2016)

Opinion by Judge Carlton

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

Frank G. Vollarfor Appellant - Arthur F. Jernigan Jr., William M. Dalehite Jr., Robert Nelson Rutherford, & James Seth McCoy for Appellees

Briefed by [Madison Coburn](#)

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CAMPBELL V. STATE

CIVIL - POST-CONVICTION RELIEF

CIVIL PROCEDURE - MOTION TO DISMISS - POST-CONVICTION RELIEF - A trial court may summarily dismiss a PCR motion without an evidentiary hearing if it plainly appears from the face of the motion, any annexed exhibits, and the prior proceedings in the case that the movant is not entitled to any relief

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - POST-CONVICTION RELIEF - A motion for relief under this article shall be made within three years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three years after entry of the judgment of conviction

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - EXEMPTIONS - Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate errors affecting fundamental constitutional rights

CIVIL PROCEDURE - POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL- In order to prevail on a claim of ineffective assistance of counsel, the petitioner must demonstrate that his counsel’s representation fell below an objective standard of reasonableness and that but for counsel’s errors, there is a reasonable probability that the outcome of the proceeding would have been different

FACTS

The trial court sentenced Clyde Campbell to a life sentence as a habitual offender. In 1974, Campbell pled guilty to assault and battery with intent to kill after he shot a police officer who subsequently died as an indirect result of the injuries he received from the shooting. On February 4, 2014 Campbell filed a post-conviction relief (“PCR”) motion. In his motion, Campbell claimed that his guilty plea for the 1974 assault and battery conviction was not voluntarily or knowingly entered, that his guilty plea was involuntary because he was coerced to plead guilty by his attorney, even though he was actually innocent, that no factual basis existed for his plea, that he was not advised of the mandatory minimum sentence he could receive if convicted, that he was not informed about the right to remain silent and the right to confront and cross-examine adverse witnesses, and that he failed to receive effective assistance from his counsel. The trial court denied relief and dismissed Campbell’s PCR motion after finding the motion clearly time-barred. Campbell appealed.

ISSUE

Whether (1) the trial court improperly applied the statute of limitations to Campbell's PCR motion; (2) Campbell demonstrated that he suffered from ineffective assistance of counsel.

HOLDING

(1) Because Campbell only had three years from the date of his guilty plea to file his PCR motion, his motion is time-barred. Further, Campbell's motion fails to include any of the instances in which his case would have been exempted from the limitation. (2) Because Campbell could not show that there was a reasonable probability but for his counsel's errors he would have not pleaded guilty and the outcome would have been different, he failed to demonstrate a claim of ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Adams County Circuit Court.

Affirmed - 2015-CP-00595-COA (June 21, 2016)

Opinion by Judge Carlton

Hon. Forrest A. Johnson Jr. (Adams County Circuit Court)

Pro se for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Daniel McDonald](#)

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CONYERS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - DISMISSAL - STANDARD OF REVIEW - A trial court may summarily dismiss a PCR motion without an evidentiary hearing if it plainly appears from the face of the motion, any exhibits, and the prior proceedings in the case that the movant is not entitled to any relief

POST-CONVICTION RELIEF - STANDARD OF REVIEW - CLEARLY ERRONEOUS - A trial court's fact finding are reviewed under the clearly erroneous standard and its determinations of law are de novo; A trial judge's denial of PCR will only be reversed if it was clearly erroneous

CIVIL PROCEDURE - POST-CONVICTION RELIEF - SUBJECT-MATTER JURISDICTION - Circuit courts shall have power to hear and determine all prosecutions in the name of the state for treason, felonies, crimes, and misdemeanors

CIVIL PROCEDURE - POST-CONVICTION RELIEF - SUBJECT-MATTER JURISDICTION - A circuit court obtains subject-matter jurisdiction over the subject of a particular offense when an indictment charging the essential elements of a crime is served on a defendant

FACTS

Conyers was convicted of armed robbery pursuant to Miss. Code Ann. §97-3-79. It is unclear from the record whether Conyers' conviction resulted from a guilty plea or jury trial. On March 12, 2015, Conyers filed a pro se motion to dismiss for lack of subject-matter jurisdiction, claiming that §97-3-79 lacked an enacting clause and thus constituted an invalid law. The trial court denied the motion. Conyers filed a motion for reconsideration on April 9, 2015, which the trial court also denied. The trial court granted in forma pauperis status to Conyers on July 7, 2015. Conyers appealed.

ISSUE

Whether the trial court lacked subject-matter jurisdiction to convict or sentence Conyers.

HOLDING

Because the Court of Appeals has recognized that a circuit court obtains subject matter jurisdiction over the subject of a particular offense when an indictment charging the essential elements of a crime is served on the defendant and Mississippi has consistently upheld the validity of the armed-robbery statute, the trial court did not lack subject-matter jurisdiction to convict or sentence Conyers. Therefore, the motion for post-conviction relief was denied.

Denied Motion for Post-Conviction Relief - 2015-CP-00841-COA (June 21, 2016)

Opinion by Judge Carlton
Hon. John Kelly Luther (Lafayette County Circuit Court)
Pro Se for Appellant - Abbie Eason Koonce & Jason L. Davis (Att’y Gen. Office) for Appellee
Briefed by [L. Morgan Eason](#)

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COOLEY V. SMITH DRUG COMPANY

CIVIL - CONTRACT

CONTRACTS - DEFAULT - AWARDS - When a contract provides protections to a seller in case the buyer defaults, the seller can be compensated by return of collateral or a monetary reward equal to the collateral’s value
PRETRIAL PROCEEDINGS - DISCOVERY - FAILURE TO RESPOND - Failure by a party to respond to a request for discovery forfeits that party’s ability to contest the admittance of related items into evidence

FACTS

In 2006, Cooley executed an agreement with Smith Drug. Smith Drug shipped Cooley inventory valued at \$141,148.57. As part of their agreement, Smith Drug retained a security interest in the inventory, and Cooley agreed to pay attorney’s fees if Smith Drug was required to initiate legal proceedings against Cooley. Cooley defaulted on his payment obligation, and Smith Drug filed a complaint in January, 2013, seeking the return of the collateral and attorney’s fees. Cooley never responded to Smith Drug’s complaint or request for admissions, but filed a motion to dismiss in March of 2013. The circuit court entered an order setting the trial for November 20, 2013, based on Smith Drug’s request for a writ of replevin. At the hearing, the court admitted Smith Drug’s evidence as to the value of the collateral because Cooley failed to answer the complaint and respond to discovery requests. During the hearing, Smith Drug’s corporate representative (Thompson) testified that he visited Cooley’s drug store the morning of the trial and could see that it was empty. Thompson also testified Cooley owed Smith Drug \$141,148.57 for the unavailable inventory. The trial court awarded Smith Drug \$141,148.57 because no proof any collateral still existed, along with \$11,396 in attorney’s fees. Cooley filed an unsuccessful motion for a new trial, and subsequently appealed.

ISSUES

Whether the circuit court erred in (1) allowing Smith Drug to present evidence of contractual damages at the replevin hearing and (2) awarding Smith Drug contractual damages.

HOLDING

The Court first found that Smith Drug’s writ of replevin was appropriate. Additionally, (1) Cooley did not respond to Smith Drug’s discovery requests and Thompson’s testimony was uncontroverted, and (2) Smith Drug was entitled to damages sustained by the wrongful taking of the inventory under Miss Code Ann. §11-37-127. For these reasons, the Court of Appeals affirmed the Wayne County Circuit Court’s decision.

Affirmed - 2015-CA-00398-COA (July 22, 2016)

Opinion by Judge Carlton
Hon. Robert Walter Bailey (Wayne County Circuit Court)
Michael W. Crosby for Appellants - Bradley Truett Golmon for Appellee
Briefed by [Cody D. Samples](#)

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FUNCHESS V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - INVOLUNTARY GUILTY PLEA - To determine whether the plea is voluntarily and intelligently given, the trial court must advise the defendant of his rights, the nature of the charge against him, as well as the consequences of his plea

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - Defendant must show by a preponderance of the evidence that counsel's performance was deficient and that, but for the deficiencies, the trial court outcome would have been different

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - GUILTY PLEA - Defendant's voluntary guilty plea waives the State's need to formally prove every element of the crime beyond a reasonable doubt

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - MULTIPLE MOTIONS - Courts are barred from reviewing a second PCR motion when the movant filed a previous motion

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - SPEEDY TRIAL - Defendant waives his or her right to a speedy trial when entering a plea of guilty

FACTS

James Funchess pled guilty to the sale of cocaine within 1,500 feet of a school. His charge was enhanced due to the proximity he was to a school in order to drop an additional charge he was facing. He was sentenced to sixty years in prison, with thirty suspended and five years of post-release supervision. Funchess timely filed his first motion for post-conviction relief ("PCR"), which was denied and dismissed. In it he argued: (1) his counsel was ineffective, (2) his plea was involuntary, and (3) his sentence was illegal. Then, Funchess filed his second PCR motion months later arguing he was denied his right to a speedy trial, which was also dismissed. Funchess appealed both rulings and the Court consolidated each claim into one appeal.

ISSUES

Whether (1) Funchess involuntarily entered a guilty plea, (2) Funchess's counsel was ineffective, (3) Funchess's enhanced charge should've been presented to a jury and proven beyond a reasonable doubt, and (4) Funchess was denied the right to a speedy trial.

HOLDING

(1) Because the record reflected that the trial court properly informed Funchess about his possible sentence, the Court concluded that Funchess's claim that he entered the plea involuntarily was meritless. (2) Because Funchess asserted in his plea petition and again in open court that he understood the ramifications of pleading guilty, the Court held that nothing in the record indicated that Funchess's counsel improperly explained the sentence. (3) Because Funchess stated on the record that he understood his plea would include the enhancement and admitted to the elements necessary, the Court argued that Funchess failed to prove the enhancement should have been a question for the jury. (4) Because Funchess previously filed a PCR motion, the Court held they were barred from reviewing the second motion filed. Therefore, the Court of Appeals affirmed the judgments of the Madison County Circuit Court.

Affirmed - 2015-CP-00370-COA; 2015-CP-00680 (June 21, 2016)

Opinion by Judge Ishee

Hon. John Huey Emfinger (Madison County Circuit Court)

Pro se for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Rachel Smith](#)

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HICKS V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - POST CONVICTION RELIEF - TIME BAR - A defendant's post-conviction challenge to an indictment after a guilty plea must be filed within three years of entry of the judgment of conviction

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - EXCEPTIONS TO TIME BAR - Although errors affecting fundamental constitutional rights are excepted from the procedural bars of the Uniform Post-

Conviction Collateral Relief Act, the three-year statute of limitations still applies to claims that an indictment was defective

CRIMINAL PROCEDURE - DEFICIENT INDICTMENT - CAPITAL MURDER - Deficiencies in a capital-murder indictment do not require reversal of a conviction or sentence obtained under the non-capital portion of the indictment where the accused pleaded guilty to simple murder

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - In order to prevail on an ineffective assistance of counsel claim, the movant must show that counsel's performance was deficient and the deficiency prejudiced his defense

FACTS

Amos Hicks pled guilty to murdering his wife. He was sentenced to life in 2006. In 2015 Hicks filed a petition for post-conviction relief which was dismissed as time-barred. Hicks appealed, claiming that his guilty plea was involuntary as a result of a defective indictment and that he received ineffective assistance of counsel.

ISSUES

Whether (1) Hick's PCR motion was procedurally barred, (2) Hick's indictment was defective, (3) Hick's entered his guilty plea voluntarily, knowingly, and intelligently, and (4) Hicks received ineffective assistance of counsel.

HOLDING

(1) Because merely asserting that a claim involves a fundamental right is insufficient to overcome a time bar and claims for PCR are barred after three years, Hick's PCR motion was procedurally barred. (2) Hick's indictment was not defective because he pled guilty to murder and not capital murder. (3) Because Hicks stated during his guilty plea that his attorney discussed the indictment and that he understood the charge against him, his claim that his plea was not voluntarily made was without merit. (4) It did not appear that Hick's counsel was deficient as Hicks pled guilty to a lesser offense than he was charged with. Therefore, the judgment of the Jackson County Circuit Court was affirmed.

Affirmed - 2015-CP-00765-COA (June 21, 2016)

Opinion by Judge Griffis

Hon. Robert P. Krebs (Jackson County Circuit Court)

Pro se for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Jake Bradley](#)

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ISAAC V. STATE

CIVIL - POST-CONVICTION RELIEF

CIVIL PROCEDURE - APPEALS - DUTIES OF APPELLANT - The appellant shall file a brief containing a statement of the issues to be reviewed with some particularity, including a citation to the portion of the record where those facts may be discovered

FACTS

Tracey Isaac was convicted of a drug offense and sentenced to thirty years in the custody of the Mississippi Department of Corrections, with fifteen years to serve and fifteen years suspended, followed by five years of post-release supervision. Isaac filed for post-conviction relief and the circuit court filed two orders denying relief. Isaac appealed.

ISSUE

Whether there is an issue.

HOLDING

Isaac's request for relief is unclear. The brief submitted to the Court of Appeals contained no request for relief, and the statements contained therein did not place any appealable issues before the court. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

Affirmed - 2015-CP-00700-COA (June 21, 2016)

Opinion by Judge Griffis

Hon. David G. Strong Jr. (Pike County Circuit Court)

Pro se for Appellant - Jeffrey A. Klingfuss for Appellee

Briefed by [Reginald R. Lewis](#)

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KING v. McCARTY

CIVIL - OTHER

CONSTITUTIONAL LAW - PRISONER'S RIGHTS - DUE PROCESS - Pursuant to Miss. Code Ann. § 47-5-807, any offender who is aggrieved by an adverse decision rendered pursuant to any administrative review procedure may, within thirty days after receipt of the agency's final decision, seek judicial review of the decision

CONSTITUTIONAL LAW - PRISONER'S RIGHTS - DUE PROCESS - The MDOC has the burden of proving its affirmative defense that the prisoner received notice and that the prisoner's appeal was untimely

CONSTITUTIONAL LAW - PRISONER'S RIGHTS - EARNED-TIME CREDITS - Pursuant to Miss. Code Ann. § 47-5-139(1)(d), an inmate shall not be eligible for the earned-time allowance if he was convicted of a sex crime

FACTS

In 2001, Nathan Paul King was convicted of sexual battery, conspiracy to commit sexual battery, and contributing to the delinquency of a minor. King was improperly placed into trusty status during the intake process. As a result, he began accruing trusty time credit. Due to the nature of his convictions, the Mississippi Department of Corrections (MDOC) found that King should not have been classified as a trusty. Consequently, MDOC revoked nearly all of King's accrued trusty-time credit. More than ten years after MDOC reclassified him, King filed a complaint through MDOC's Administrative Remedy Program (ARP). MDOC found that his complaint was untimely. MDOC dismissed King's ARP complaint on September 30, 2014. However, King claims that he did not receive notice of MDOC's decision at that time. King filed a motion for judicial review in the Greene County Circuit Court. The circuit court dismissed it because King did not seek judicial review within thirty days of MDOC's decision. King appealed.

ISSUE

Whether the trial court erred by granting the MDOC's motion to dismiss.

HOLDING

Because MDOC demonstrated that King had notice because he received numerous copies of his time sheet and because King was not eligible to receive earned-time or trusty-time credit because he had been convicted of three sex offenses, MDOC did not err when it found that King's underlying complaint was untimely. Therefore the Court of Appeals affirmed the judgment of the Green County Circuit Court.

Affirmed - 2015-CP-00815-COA (June 21, 2016)

Opinion by Presiding Judge Irving

Hon. Kathy King Jackson (Greene County Circuit Court)

Pro se for Appellant - Anthony Louis Schmidt (Att'y Gen. Office) for Appellee

Briefed by [Breanna Goff](#)

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LITTLE V. OCEAN SPRINGS

CIVIL - ZONING

ZONING – REZONING APPLICATION – SUFFICIENT PROOF– An applicant seeking rezoning must prove by clear and convincing evidence that there was a mistake in the original zoning, or the character of the neighborhood has changed to such an extent as to justify rezoning

BOARD OF ALDERMAN – ZONING– PUBLIC NEED – The Board of Aldermen is the fact-finder, charged with determining the public needs and therefore maintains discretion in zoning decisions

REZONING – BOARD OF ALDERMAN – DISCRETION – The Board of Alderman’s decision will be upheld when “fairly debatable” given the evidence, unless it is clearly shown to be arbitrary, capricious, discriminatory, illegal, or not supported by substantial evidence

FACTS

James Little and five other land owners sought rezoning of a part of the Davis Bayou subdivision from R-1 (single family residential) to C-2 (personal and retail business of the community). Little and other owners owned eleven of the thirty-six lots in a subdivision located along Highway 90. The lots were all subject to covenants restricting their use to residential purposes. The Ocean Springs Planning Commission voted unanimously to recommend denying Little’s application for rezoning. Little appealed to the Board of Alderman, which, after a hearing, unanimously denied rezoning. Little appealed.

ISSUE

Whether the Board of Alderman erred in denying rezoning, classifying the subdivision as a neighborhood.

HOLDING

Because it is within the Board of Alderman’s discretion to determine the needs of the public, and the conclusions advocated by both sides were fairly debated, the Board’s decision cannot be disturbed. Therefore the Court of Appeals affirmed the judgment of the Jackson County Circuit Court

Affirmed - 2015-CA-00579-COA (June 21, 2016)

Opinion by Judge Fair

Hon. Kathy King Jackson (Jackson County Circuit Court)

Michael F. Cavanaugh Appellant - John B. Edwards for Appellee

Briefed by [Alexandra Bruce](#)

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RANDALLSON V. GREEN

CIVIL - CUSTODY

FAMILY LAW - CUSTODY - RULE 36 ADMISSION - Basing a determination of child custody solely on a Rule 36 admission is improper

FAMILY LAW - CUSTODY - NATURAL-PARENT PRESUMPTION - The natural parent presumption can be rebutted by a clear showing that (1) the parent has abandoned the child; (2) the parent has deserted the child; (3) the parent’s conduct is so immoral as to be detrimental to the child; or (4) the parent is unfit, mentally or otherwise, to have custody

FAMILY LAW - CUSTODY - MISS. CODE ANN. § 93-5-24(9) - There is a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of a parent with a history of perpetrating family violence

FAMILY LAW - CUSTODY - VISITATION - There must be evidence presented that a particular restriction on visitation is necessary to avoid harm to the child before a chancellor may properly impose the restriction

FACTS

April and Arthur were married in June 2004. April gave birth to Aeva in July 2004. April was physically and verbally abusive, their house was ridden animals and animal feces, and April was addicted to painkillers and administered NyQuill to Aeva to induce sleep. Aeva had never been to an eye doctor or dentist. In March of 2013, Randall and Laura, Arthur's parents and Aeva's grandparents, filed a complaint for custody of Aeva. Fifty-one days later, Arthur and April filed their answer to the complaint, as well as their responses to the discovery requests. The Chancellor found Arthur and April were unfit parents, April was a perpetrator of domestic violence, and, after an *Albright* analysis, it was in Aeva's best interest to give full legal and physical custody to Randall and Laura, with supervised discretionary visitation. Arthur and April appealed.

ISSUES

Whether the trial court erred in (1) relying on requests for admissions to determine custody, (2) awarding custody to Randall and Laura, and (3) awarding supervised discretionary visitation.

HOLDING

(1) Because the chancellor did not solely rely on requests for admission that were deemed admitted for the basis of the custody decision, it was not an abuse of discretion. (2) Because there was substantial evidence to support the chancellor's finding by clear and convincing evidence that Arthur and April were unfit parents, the chancellor did not abuse her discretion in finding April was a perpetrator of domestic violence, and the chancellor's decision was not manifestly wrong or clearly erroneous the trial court did not err in awarding custody to Randall and Laura. (3) Because evidence was presented regarding April's prescription-drug use, her threats of suicide, her domestic violence, and the deplorable condition of Arthur and April's house, the chancellor did not abuse her discretion in restricting visitation. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Chancery Court.

Affirmed - No. 2014-CA-01781-COA (June 21, 2016)

Opinion by Judge Lee

Hon. Vicki B. Daniels (DeSoto County Chancery Court)

Jerry Wesley Hisaw for Appellants - Jason D. Herring & Michael Spencer Chapman for Appellees

Briefed by [Addie Clark](#)

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COURT OF APPEALS - CRIMINAL CASES

BERGERON V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - ASSISTANCE OF COUNSEL - LINDSEY BRIEF - When a defendant's appellate attorney does not find any arguable issues to support an appeal, appellate counsel must (1) file a brief showing that counsel has thoroughly reviewed the record and has found nothing to support an appeal; (2) send the appellant a copy of the brief, informing the client that counsel found no arguable issue for an appeal; and (3) advise the client of his right to file a pro se brief

CONSTITUTIONAL LAW - ASSISTANCE OF COUNSEL - LINDSEY BRIEF - Before filing a *Linsy* brief, trial counsel must review the following: (a) the reason for the arrest and the circumstances surrounding arrest; (b) any possible violations of the client's right to counsel; (c) the entire trial transcript; (d) all rulings of the trial court; (e) possible prosecutorial misconduct; (f) all jury instructions; (g) all exhibits, whether admitted into evidence or not; and (h) possible misapplication of the law in sentencing

CONSTITUTIONAL LAW - ASSISTANCE OF COUNSEL - SUPPLEMENTAL BRIEFING - If the defendant raises any arguable issue in his pro se brief, or if the appellate court finds an arguable issue upon its independent review of the record, the appellate court must, if the circumstances warrant, require counsel to file supplemental briefing on the issue

FACTS

“Rachel” informed her mother that Billy Bergeron inappropriately touched her. Rachel told the police about the inappropriate touching and Bergeron was arrested. At trial, Rachel testified. Although Bergeron claimed that he did not fondle Rachel, he called no witnesses in his defense. Bergeron was convicted in Jasper County for molestation. His counsel filed a *Lindsey* brief, stating that he diligently searched the record but could find no arguable issues for appellate review. Bergeron did not file a pro se brief.

ISSUE

Whether there were no arguable issues on appeal consistent with the Supreme Court’s decision in *Lindsey*.

HOLDING

Because Bergeron’s trial counsel followed the appropriate procedure under *Lindsey* and found no issues and because the Court of Appeals’ independent review found no arguable issues that would require supplemental briefing, there were no arguable issues for appeal. Therefore, the judgment of the trial court was affirmed.

Affirmed - 2015-KA-00467-COA (June 21, 2016)

Opinion by Judge Irving

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

W. Daniel Hinchcliff (Office of Pub. Def.) for Appellant - Ladonna C. Holland (Att’y Gen. Office) for Appellee

Briefed by [Jake Bradley](#)

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BOZEMAN V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - ASSISTANCE OF COUNSEL - *LINDSEY* BRIEF - When a defendant’s appellate attorney does not find any arguable issues to support an appeal, appellate counsel must (1) file a brief showing that counsel has thoroughly reviewed the record and has found nothing to support an appeal; (2) send the appellant a copy of the brief, informing the client that counsel found no arguable issue for an appeal; and (3) advise the client of his right to file a pro se brief

CONSTITUTIONAL LAW - ASSISTANCE OF COUNSEL - SUPPLEMENTAL BRIEFING - If the defendant raises any arguable issue in his pro se brief, or if the appellate court finds an arguable issue upon its independent review of the record, the appellate court must, if the circumstances warrant, require counsel to file supplemental briefing on the issue

FACTS

A jury found Jason Bozemen guilty of two counts of fondling a child under the age of fourteen and one count of attempted fondling of a child under fourteen. The trial court denied Bozeman’s post-trial motion for a judgment notwithstanding the verdict. Bozeman appealed his conviction. Bozeman’s appellate attorney filed a brief stating that she diligently searched the procedural and factual history of the case, but that she could find no issues that could be presented in good faith. Specifically, she asserted that she examined: (1) the reason for Bozeman’s arrest and the circumstances surrounding the arrest; (2) any possible violations of Bozeman’s right to counsel; (3) the entire trial transcript; (4) all rulings of the trial court; (5) possible procedural misconduct; (6) all jury instructions; (7) all exhibits, including those not in evidence; (8) possible misapplication of the law in sentencing; (9) the indictment and all pleadings; (10) any possible ineffective-assistance-of-counsel issues; and (11) other possible reviewable issues. She sent the brief to Bozeman, informing him that she did not find any meritorious issues for appeal. Bozeman failed to file a pro se supplemental brief within forty days.

ISSUES

Whether there were arguable issues for appellate review that Bozeman’s appellate counsel failed to argue.

HOLDING

Because Bozeman’s attorney examined the record and found no arguable issues, sent her *Lindsey* brief to Bozeman, informed him that she did not find any arguable issues, and Bozeman did not file a supplementary brief within forty days, Bozeman’s attorney complied with the *Lindsey* requirements. Further, the Court of Appeals found no arguable issues that required supplemental briefing. Therefore, the Court of Appeals affirmed the judgment of the Tunica County Circuit Court.

Affirmed - No. 2015-KA-00734-COA (Jun. 21, 2016)

Opinion by Judge Fair

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

Mollie Marie McMillin (Office of Pub. Defender) for Appellant - Jason L. Davis (Att’y Gen. Office) for Appellee

Briefed by [Abby Abide](#)

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GILLESPIE V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SUFFICIENCY OF EVIDENCE - STANDARD - After a guilty verdict, all credible evidence consistent with the defendant’s guilt will be accepted as true, as well as all favorable inferences that may be reasonably drawn from the evidence

CRIMINAL PROCEDURE - SUFFICIENCY OF EVIDENCE - BURDEN OF PROOF - In reviewing the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the prosecution any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt

CRIMINAL PROCEDURE - SUFFICIENCY OF EVIDENCE - ONE WITNESS - The testimony of a single uncorroborated witness is sufficient to sustain a conviction

FACTS

In October 2013, Kristopher Pritchard and Nicholas Zander went to a convenience store around 11 p.m. As they parked, they noticed a tall African American male with tattoos on his neck standing against the store. The man was later identified as defendant Joe Gillespie. When Zander went inside the store, Gillespie approached the vehicle and asked Pritchard for a couple of dollars. As Pritchard took out his wallet, Gillespie grabbed it and ran away. After Pritchard and Zander unsuccessfully attempted to chase Gillespie down, they called 911 and gave a description of Gillespie. After positively identifying Gillespie out of a photo lineup, Gillespie was arrested for robbery a few days later. At trial, Pritchard and Zander identified Gillespie as the assailant in open court, although cross-examination revealed that Zander had only seen Gillespie’s back. While Gillespie did not testify, the defense’s theory of the case was that Pritchard called Gillespie over to the vehicle to inquire about purchasing drugs and that Pritchard fabricated the robbery after Gillespie took Pritchard’s money and did not return with drugs. The jury found Gillespie guilty of robbery. Gillespie was sentenced as a habitual offender to serve fifteen years in prison. Gillespie appealed.

ISSUE

Whether the evidence was sufficient to support a guilty verdict for robbery.

HOLDING

Because Pritchard identified Gillespie as the individual who took his wallet from a photo lineup due to Gillespie’s facial features and a distinctive tattoo on his neck and because Zander corroborated Pritchard’s testimony, there was sufficient evidence to support the verdict. Therefore the Court of Appeals affirmed the judgment of the Oktibbeha County Circuit Court.

Affirmed - 2015-KA-00218-COA (June 21, 2016)

Opinion by Judge Barnes

Hon. Lee J. Howard (Oktober County Circuit Court)
Benjamin Allen Suber for Appellant - Ladonna C. Holland (Att'y Gen. Office) for Appellee
Briefed by [Wes Bulgarella](#)

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JONES V. STATE

CRIMINAL - FELONY

JURY INSTRUCTION - ACCOMPLICE-LIABILITY - DISCRETION - If the instruction fairly announce the law of the case and create no injustice, no reversible error will be found

JURY INSTRUCTION - CAUTIONARY INSTRUCTION - REQUIREMENT - A cautionary instruction is required when the accomplice's testimony is the sole basis for the conviction, and the defendant's guilt is not clearly proven

FACTS

Joel Jones was seen looking for an accomplice named Alvin Johnson near Ash Street in Columbus because Alvin owed Jones money. Jones and Alvin got into a fight, aided by two comrades on either side of the scruff. Conner and Tillman helped Jones fight the others. Jones and two others were riding in a car after the fight. Witness testimony revealed that either Jones or Conner shot two victims with a shotgun, both of whom were involved in the earlier fight. Although the state's theory was that Jones was the shooter, they instructed the jury as to accomplice liability as well. Jones failed to object. Jones was convicted in the Circuit Court of Lowndes County of two counts of aggravated assault. Jones appealed.

ISSUES

Whether (1) the state's jury instruction on accomplice liability was an impermissible constructive amendment of the indictment, (2) the state presented no evidence to support the accomplice-liability instruction, and (3) the trial court erred in giving the state's cautionary instruction concerning accomplice testimony.

HOLDING

(1) Because Jones failed to raise the issue of jury instructions at trial, he was procedurally barred from raising this issue. Further, the issue was without merit. (2) Because there was no dispute that Jones was at the scene, there was sufficient evidence to support an accomplice-liability jury instruction. (3) Because the accomplice's testimony was corroborated, whether to give a cautionary instruction was within the trial judge's discretion. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Affirmed - No. 2014-KA-01356-COA (June 21, 2016)

Opinion by Judge Irving

George T. Holmes & Justin Taylor Cook (Office of Pub. Defender) for Appellant - Alicia Marie Ainsworth (Att'y General Office) for Appellee

Briefed by [Sean Doran](#)

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RUCKER V. STATE

CRIMINAL - FELONY

CRIMINAL - JURY INSTRUCTIONS - SUA SPONTE COURT INSTRUCTIONS - Where extensive conversations between the state, defendant, and trial court occur, a trial court does not commit reversible error by submitting a jury instruction concurrent with a defendant's instructions

FACTS

In 2012, Mario Rucker stabbed a man five times with a pair of scissors at a Waffle House in Jackson. The victim, William Nuby, died two days later at the hospital. The State's forensic pathologist attributed the death to sharp-force injuries. Rucker's own medical expert attributed Nuby's death to an accident at the hospital. At trial, Rucker submitted a jury instruction for aggravated assault and manslaughter. The trial court submitted its own jury instruction for aggravated assault. Rucker was subsequently convicted for aggravated assault and sentenced as a habitual offender. Rucker appealed.

ISSUE

Whether the trial court committed reversible error by sua sponte submitting a jury instruction for aggravated assault.

HOLDING

Because the record indicated extensive discussions between the State, Rucker, and the trial court over the aggravated assault instruction and because Rucker submitted his own instruction for aggravated assault, it cannot be said that the trial court submitted its instruction sua sponte. Additionally, Rucker's own request for an aggravated assault instruction waived his objection to such an instruction by the trial court. Therefore, the Court of Appeals affirmed the judgement of the Hinds County Circuit Court.

Affirmed - 2015-KA-00147-COA (June 21, 2016)

Opinion by Judge Lee

Hon. Jeff Weill Sr. (Hinds County Circuit Court)

Justin Taylor Cook (Office of Pub. Def.) for Appellant - Lisa L. Blunt (Att'y Gen. Office) for Appellee

Briefed by [John G. Archer](#)

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SCOTT V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - INSTRUCTIONS READ AS A WHOLE - In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole

CONSTITUTIONAL LAW - SPEEDY TRIAL - DELAY ATTRIBUTABLE TO DEFENDANT - A delay attributable to the defendant tolls the constitutional speedy trial clock

CONSTITUTIONAL LAW - SPEEDY TRIAL - DEMAND FOR DISMISSAL - A demand for dismissal for violation of the right to speedy trial is not the equivalent of a demand for speedy trial

FACTS

On July 3, 2009, James Scott broke into the home of Danielle Landry in Hattiesburg, Mississippi. Scott entered the home, dragged Landry toward the bedroom, stopped when she offered him money, took five dollars from her purse, and placed Landry in the her car to make her get him more money from an ATM. Landry was able to escape the vehicle and run to a neighbor's house as Scott drove off. Police issued an arrest warrant on July 3, 2009, and Scott turned himself in to police in October or November 2009. Scott remained in prison until February 6, 2011 on an unserved sentence from a prior conviction. On September 26, 2011, a Forrest County grand jury indicted Scott for attempted rape, kidnapping, and burglary of a dwelling stemming from the July 3, 2009 incident. On March 14, 2012, Scott was arraigned. Scott then filed a motion for recusal of the trial judge, but no ruling occurred on that motion until September 6, 2012, when the trial judge recused on his own motion. On September 20, 2012, the Mississippi Supreme Court appointed a special judge. No further action in this case appears in the record until March 24, 2014, when Scott filed a pro se motion to dismiss the case based on speedy-trial violations. Scott filed a similar motion on May 2, 2014, and his appointed counsel filed a third motion to dismiss on August 14, 2014. The trial court denied the third motion and conducted the trial on August 18 and 19, 2014. The jury returned a guilty verdict on all three counts. Scott filed several post-trial motions, which the trial court also denied. Scott appealed.

ISSUES

Whether the trial court erred in (1) prohibiting testimony of a defense witness, (2) giving instruction S-11A, and (3) denying Scott's motions to dismiss for his right to a speedy trial, and whether (4) the State knowingly proffered perjured testimony and suppressed evidence.

HOLDING

(1) Because the evidence did not support Scott's theory of the case and was thus irrelevant, the trial court did not err in prohibiting the testimony of the defense witness. (2) Because the jury instructions taken as a whole stated the necessary elements of kidnapping, the trial court did not err in giving instruction S-11A. (3) Because the reasons for the delay either slightly weighed against the State, weighed against Scott, or were neutral reasons, and because Scott failed to assert his right to a speedy trial, the trial court did not err in denying Scott's motions to dismiss for his right to a speedy trial. (4) Because Scott attempted to suppress the evidence himself and because the contradicting statement was never entered into evidence nor made under oath, the State did not suppress or proffer perjured testimony. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2014-KA-00572-COA (June 21, 2016)

Opinion by Judge Griffis

Hon. Samac S. Richardson (Forrest County Circuit Court)

George T. Holmes & Hunter Nolan Aikens (Office of Pub. Def.) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Andrew B. Lintner](#)

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