

MISSISSIPPI SUPREME COURT DECISIONS – NOVEMBER 2, 2017***SUPREME COURT - CIVIL CASES*****GRACELAND CARE CTR. OF NEW ALBANY, LLC v. HAMLET****CIVIL - MEDICAL MALPRACTICE**

CIVIL PROCEDURE - EX PARTE ORDERS - EFFECTIVE DATE - Ex parte orders become effective once the order has been signed by the judge and leaves the judges control

CIVIL PROCEDURE - INTERLOCUTORY ORDERS - EFFECTIVE DATE - Cases in which more than one party is involved and notice becomes essential, interlocutory orders become effective once entered officially into the record by the court clerk

CIVIL PROCEDURE - MOTION FOR EXTENSION - GOOD CAUSE - There is no requirement for good cause when a motion for an extension of time to serve process is timely filed

FACTS

In a medical malpractice suit against Graceland Care Center, Teresa Hamlet moved to extend the time to serve process. The trial judge granted the motion and signed an order; the order was not filed with the circuit clerk until the day before the granted extension period expired. Hamlet filed a second motion for time, which the trial judge also granted. Hamlet did not file the second order with the clerk until three months after the judge signed it. Graceland filed a motion to dismiss Hamlet's complaint, arguing that the statute of limitations had run before the court's order granting additional time to serve process had been entered by the clerk of the court. Graceland's motion to dismiss was denied by the trial judge. Graceland filed an interlocutory appeal.

ISSUES

Whether (1) the order to extend the time to serve process became effective when it was signed by the judge or when it was entered into the record by the clerk; and (2) Hamlet should have to show good cause to have the time to serve process extended after the 120-day deadline had expired.

HOLDING

(1) Because the order to extend the time to serve process was an ex parte order, it became effective when it was signed by the judge and left the judge's possession. (2) Because the motion was timely filed, there was no requirement for Hamlet to show good cause. Therefore, the Mississippi Supreme Court affirmed and remanded the judgment of the Union County Circuit Court.

DISSENT

Justice Coleman argued that case law has long required that every order, to be effective, must be entered into the record by the clerk. He argued that allowing ex parte orders to go unfiled with the clerk damages the ability for attorneys and defendants to make risk assessments and strategic decisions.

Affirmed & Remanded - 2015-IA-01829-SCT (Nov. 2, 2017)

En Banc Opinion by Justice King

Hon. John Kelly Luther (Union County Circuit Court)

Andy Lowry & Thomas L. Kirkland Jr. for Appellant - Richard S. McLaughlin & Nicole H. McLaughlin for Appellee

Briefed by [Jay Michael Patterson](#)

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HOWARTH V. M&H VENTURES, LLC

CIVIL - WRONGFUL DEATH

COMPARATIVE NEGLIGENCE - WRONGFUL DEATH - SOLE MEMBER ENTITIES - Under Miss. Code Ann. § 11-7-15, wrongful death beneficiaries cannot recover for the negligence of an entity that can only act through a sole member if that member is the decedent and the wrongful death occurred because of the decedent's own negligence

VICARIOUS LIABILITY - AERONAUTICAL PROPERTY - OWNER & PILOT - The owner of an aircraft is legally considered an operator as well and is vicariously liable for all the acts of the pilot

CIVIL PROCEDURE - DISCOVERY - DENYING CONTINUANCE - Under Miss. R. Civ. P. 56(f), if a party opposing a motion cannot present by affidavit facts that are essential to justify his opposition, then the court may refuse the application for judgment

FACTS

Richard Howarth, Jr. died in an airplane crash in January of 2012. Howarth was the pilot and also the sole member of M&H Ventures, LLC, the entity that owned the plane. After the crash, Cyndy Howarth, the executrix of Howarth's estate, sued M&H Ventures, LLC and other entities and alleged that Howarth's death was caused by the defendants' negligence, gross negligence, and recklessness. The wrongful death beneficiaries sought to collect from a liability insurance policy M&H Ventures held with regard to the plane. The policy was meant to protect M&H Ventures and Howarth from liability to third parties incurred during aeronautical activities. M&H Ventures filed a motion to dismiss as well as a motion for summary judgment for failure to state a claim. The trial court granted M&H Venture's motion for summary judgment. Cyndy Howarth appealed.

ISSUES

Whether the trial court erred in (1) finding no genuine issue of material fact and (2) denying the wrongful death beneficiaries' request for discovery under Mississippi Rule of Civil Procedure 56(f).

HOLDING

(1) Because the wrongful death beneficiaries' claims depended on their proving Howarth was negligent though they could not recover for Howarth's negligence, the court did not err in finding there was no genuine issue of material fact. (2) Because the defendant could not present facts essential to justify her opposition, the trial judge did not err in granting summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Circuit Court.

Affirmed - 2016-CA-00742-SCT (Nov. 2, 2017)

Opinion by Presiding Justice Kitchens

Hon. Vernon R. Cotten (Neshoba County Circuit Court)

Wayne E. Ferrell Jr., Bradley S. Clanton, & William Wyatt Simmons for Appellant - Glenn F. Beckham & Richard L. Kimmel for Appellee

Briefed by [Jacob Swatley](#)

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SUPREME COURT - CRIMINAL CASES

FLOWERS V. STATE

CRIMINAL - DEATH PENALTY - DIRECT APPEAL

VOIR DIRE - BATSON CHALLENGES - RACE NEUTRAL REASONS - Being acquainted with the defendant's family is a race neutral reason for striking a juror; being sued by a party in the matter is a race neutral reason for striking a juror; as concern for a juror's honesty constitutes a race neutral reason, conflicting testimony of parties can be a race neutral basis for a *Batson* challenge

CRIMINAL - EVIDENCE - PREJUDICE - In applying Miss. R. Evid. 403, the trial judge must conduct a balancing test to determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice

CRIMINAL PROCEDURE - JURY - CREDIBILITY OF EVIDENCE - The jury, as the ultimate finder of fact, is responsible for considering the evidence and weighing the credibility of witnesses, and the court will not reweigh the evidence on appeal

CONSTITUTIONAL LAW - DOUBLE JEOPARDY - The Double Jeopardy Clauses of the United States and Mississippi Constitutions provide that no person shall be twice placed in jeopardy for the same offense, but there must be an actual acquittal or conviction on the merits to bar another prosecution; double jeopardy does not attach when a conviction has been set aside on appeal or when a criminal case ends by the jury failing to reach a unanimous verdict

TRIAL - PROSECUTORIAL MISCONDUCT - CLOSING ARGUMENT - An appellate court asks whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created; where prosecutorial misconduct endangers the fairness of a trial and impartial administration of justice, reversal must follow

FACTS

Shortly after 9:00 A.M. on July 16, 1996, four bodies were discovered in Tardy Furniture Store. All four victims had been shot in the head. Shortly after arriving on the scene, officers were notified that someone had burglarized Doyle Simpson's car and stolen a .38 caliber pistol. Shell casings from .38 caliber bullets were recovered from the crime scene at Tardy Furniture. Curtis Flowers was interviewed and consented to a gunshot residue test. Flowers claimed to have been babysitting on the morning of the murders, but provided inconsistent statements about his schedule. Flowers told investigators that he had been employed at Tardy Furniture but had been fired on July 6. In March 1997 Flowers was indicted on four separate counts of capital murder. Flowers was tried, found guilty, and sentenced to death in three separate trials, but the Court reversed and remanded each case for a new trial. In the third trial, the Court found that the State had engaged in racial discrimination during jury selection. Flowers' fourth and fifth trials resulted in mistrials. In Flowers' sixth trial, the State called twenty-one witnesses. Police Chief Johnny Hargrove testified that police found a bloody shoeprint at the scene. Mississippi Highway Patrol Investigator Jack Matthews testified that he saw a bloody shoeprint and shell casings scattered near the bodies. Matthews testified that \$300 in cash should have been in the store that morning. He also testified that \$235 was found hidden in Flowers' headboard after the murders. Sheriff Bill Thornburg went to Simpson's mother's home and collected spent .38 hulls from Simpson's gun. Thornburg searched the home of Flower's girlfriend and found a size ten-and-a-half Fila Grant Hill shoebox in a dresser at Moore's house. David Balash, a firearms expert, testified that the bullet casings collected from Tardy Furniture were consistent with the casings collected from Simpson's mother's house. Joe Andrews, a forensic scientist, testified that Flower's had one particle of gunshot residue on the back of his right hand. Andrews also testified that the bloody shoeprint discovered at Tardy Furniture was consistent with size ten-and-a-half Fila Grant Hill tennis shoes. Two witnesses testified to seeing Flower's wearing Fila Grant Hill tennis shoes prior to the murders. Multiple witnesses testified that they saw Flowers near Simpson's vehicle and Tardy Furniture on the morning of the murders. Porky Collins testified that he saw two African-American men outside Tardy Furniture at around 10:00 A.M. on the day of the murders. Collins identified Flowers as one of the men he saw. Odell Hallmon, a jailhouse informant, testified that Flowers confessed to killing four people at Tardy Furniture. The jury found Flowers guilty of all four murders and sentenced Flowers to death. Flowers appealed.

ISSUES

Whether (1) the evidence at Flowers's trial was insufficient to support a finding of guilty beyond a reasonable doubt; (2) Flowers's right to a fair trial was violated when the State argued facts not in evidence during closing argument; (3) the trial court erred in allowing Collins's in-court and out-of-court eyewitness identifications of Flowers; (4) the trial court erred in excluding expert testimony about the deficiencies in investigation and the photo lineups; (5) the trial court erred in allowing prosecution testimony about gunshot residue detected on Flowers's hand; (6) Flowers's constitutional rights were violated by the State's striking of five African American jurors, by inadequate jury deliberation due to racial bias,

and by pervasive racial bias in the venire; (7) the State's six attempts to convict Flowers of the same offense violated the Double Jeopardy Clause; (8) the trial court erred by refusing Flowers's requested circumstantial evidence instructions; (9) the trial court erred in refusing Flowers's penalty phase instructions and granting the State's aggravating-circumstances instruction; (10) Flowers's convictions and death sentences were obtained in violation of the Sixth, Eighth, and Fourteenth Amendments and the Mississippi Constitution counterparts; (11) the Supreme Court should set aside its order denying Flowers's Motion to Remand & Leave to File Supplemental Motion for New Trial; (12) Flowers's death sentence is constitutionally and statutorily disproportionate; and (13) there is cumulative error requiring reversal of the verdict and/or death sentence.

HOLDING

(1) Because the case did not require a heightened burden of proof and the jury could reasonably infer motive from the circumstances of Flowers's termination, the evidence—viewed as a whole and in the light most favorable to the State—was sufficient for a rational trier of fact to find Flowers guilty beyond a reasonable doubt. (2) Because Flowers did not object contemporaneously to the statements during closing argument and the one misstatement by prosecution did not amount to plain error, the issue was without merit. (3) Because the out-of-court identification was not the result of an unduly suggestive lineup and the credibility of the in-court identification was adequately addressed by cross-examination, the trial court did not err in allowing Collins's identifications of Flowers. (4) Because there was not enough evidence to show the experts' opinions were sufficiently reliable, the trial judge did not abuse his discretion in excluding the expert testimony. (5) Because the forensic scientist's testimony was clear that the resident did not unequivocally prove that Flowers fired a gun, the prejudicial effect of the testimony did not outweigh its probative value, and the trial judge did not abuse his discretion in admitting it. (6) Because the prior adjudications of the State's violation of *Batson* do not undermine the prosecutor's race neutral reasons, the Supreme Court could not say that the exceptional circumstances discussed in *Foster* were present in this case so as to prevent the Supreme Court from deferring to the trial court's factual determinations. Despite the historical evidence of past racial discrimination in Flowers's previous trials, the Supreme Court deferred to the trial judge, as "Flowers was given ample opportunity to question jurors, rehabilitate jurors, and make challenges." This, the Supreme Court opined, "is evidence of a fair and proper jury selection process." Further, the Supreme Court clarified that one of the white juror's "professional relationship" with a Flowers family member is distinguishable from one of the stricken black juror's "working relationship" with a Flowers family member. Finally, while the State asked more questions of potential African American jurors than white jurors, disparate questioning alone is not dispositive of purposeful discrimination. The Supreme Court found the race neutral reasons valid. (7) Because Flowers's has not been technically acquitted, his convictions have not been upheld on appeal, and he has not received multiple punishments, the Double Jeopardy Clause was not implicated for Flowers, despite his six trials. (8) Because the requested instructions were repetitive, the trial court did not err in denying Flowers's D-7 & D-8 circumstantial evidence instructions. (9) Because the trial judge had the broad discretion to rule on jury instructions, the Supreme Court found this issue without merit. Further, the "doubling"—use of an element of the underlying crime as an aggravating circumstance—does not violate the Constitution. (10) Because there was sufficient evidence to support a conviction, the issue was without merit. (11) Because this issue—regarding a motion for remand and leave to file supplemental motion for new trial—was not presented to the trial court, the Supreme Court did not address its merits. (12) Because this case involved multiple victims and the Supreme Court has upheld the imposition of the death penalty in such cases, the issue was without merit. (13) Because the Supreme Court, after thorough review, found every issue raised by Flowers without merit, there was no cumulative error. Therefore, the Supreme Court affirmed Flowers's four convictions for capital murder and sentences to death, as decided by the jury in the Montgomery County Circuit Court.

DISSENT

Chief Justice Waller dissented, reasoning that the prosecution's mischaracterizations of evidence during closing arguments affected Flowers's fundamental right to a fair trial. He cited two misstatements by the prosecution which were previously used and found to be reversible error in *Flowers II*. Further, Chief Justice Waller reiterated the heightened level of scrutiny in death penalty cases and asserted that these misstatements constitute plain error under this level of scrutiny.

DISSENT

Justice King argued that the Supreme Court has previously reversed this case for the same issues that are currently presented. He argued that the prosecution's argument of facts not in evidence and a *Batson* violation denied Flowers's right to a fair trial. Justice King would reverse and remand for a new trial.

Affirmed - 2010-DP-01348-SCT (Nov. 2, 2017)

En Banc Opinion by Justice Coleman - Dissents by Chief Justice Waller & Justice King

Hon. Joseph H. Loper Jr. (Montgomery County Circuit Court)

Alison R. Steiner, Sheri Lynn Johnson, & Keir M. Weyble (Pub. Def. Office) for Appellant - Brad A. Smith & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [Nathan Simpson](#) & [Allison A. Bruff](#)

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SUPREME COURT - ORDERS

IN RE: CODE OF JUDICIAL CONDUCT

COURT ORDER

ORDER

This en banc Order amends Canon 5F of the Code of Judicial Conduct by adding provisions for notice to the subject of the complaint and an opportunity to respond as well as requiring that these provisions comport with due process. Additionally, this Order mandates that the Clerk of the Court spread it upon the minutes of the Court and forward a true copy to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Third Edition, (Mississippi Edition)*.

OBJECTION

Chief Justice Waller objected to the use of the phrase "in a manner which comports with due process." He argued that requiring due process in an administrative proceeding is overly burdensome and vague. Since no other rule of judicial procedure uses due process in requiring notice, Waller asserted that the amendment provides no guidance to the Campaign Committee—a body of volunteers that conducts a non-judicial investigation and lacks the authority to issue sanctions or punishment—about how to satisfy due process.

OBJECTION

Justice King agreed with the amendment's clarification about giving notice to the subject of the complaint and an opportunity to respond, yet he argued that the amendment was overly broad, unnecessarily restrictive, and inconsistent with duties assigned to the Special Committee. The due process requirement prevents the Committee from responding quickly to last-minute complaints. Also, it incorrectly suggests that the Committee's authority to investigate applies only to candidates for judicial office and includes the ability to impose disciplinary actions upon judicial candidates. Justice King favored a different phrase, "in a manner determined by the Committee," rather than "in a manner which comports with due process."

Ordered - 89-R-99013-SCT (Oct. 30, 2017)

En Banc Order by Presiding Justice Randolph - Objections by Chief Justice Waller & Justice King

Briefed by [Katherine Farese](#)

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COURT OF APPEALS - CIVIL CASES

HOPKINS V. CLC OF BILOXI, LLC

CIVIL - PERSONAL INJURY

TORTS - MALPRACTICE - NOTICE - Miss. Code Ann. § 15-1-36(15) states that no action based upon the health-care provider’s professional negligence may be begun unless the defendant has been given at least sixty days prior written notice of the intention to begin the action; this shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of the filing of the complaint and who is identified therein by a fictitious name

CIVIL PROCEDURE - RELATION BACK - FICTITIOUS PARTIES - The relation-back privilege provided for fictitious parties under Miss. R. Civ. P. 15(c)(2) requires the plaintiff to actually exercise diligent inquiry into the identity of the fictitious party

FACTS

Sanders Hopkins Sr., a resident of the Community Living Center (“CLC”) in Biloxi, was a dialysis patient who was routinely transported to his dialysis treatment at Fresenius Medical Care’s South Mississippi Kidney Center (“Fresenius”) by Mobile One Non-Emergency Transport Service LLC (“Mobile One”). On December 10, 2013 while a passenger in Mobile One, Hopkins’ wheel chair, which was provided by CLC, fell over and he hit his head. Later that day, Hopkins again hit his head and subsequently complained of having a headache associated with the falls. After his return to CLC, he continued to complain about a headache, so he was transported to Biloxi Regional Hospital where he was diagnosed with a subdural hematoma. Two days later, Hopkins died. On March 31, 2015, Sanders Hopkins Jr., on behalf of his father filed suit against Mobile One and Fresenius. Eleven months later, Hopkins Jr. filed a second amended complaint to add CLC to the lawsuit. A pre-suit notice was sent to CLC on December 17, 2015—two years and five days after Hopkins’s death, and he filed his second amended complaint on February 22, 2016. CLC filed a motion to dismiss, asserting that the pre-suit notice did not toll the statute of limitations and that Hopkins Jr.’s claims against CLC were time-barred. The court granted CLC’s motion. Hopkins Jr. appealed.

ISSUE

Whether the trial court erred in granting CLC’s motion to dismiss.

HOLDING

Because CLC’s potential liability was known at the time Hopkins Jr. filed his original complaint and because Hopkins Jr. was derelict in not adding CLC until after the statute of limitations had run, the trial court did not err in granting CLC’s motion to dismiss. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2016-CA-01090-COA (Oct. 31, 2017)

En Banc Opinion by Presiding Judge Irving

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)

Matthew Stephen Lott for Appellant - John G. Wheeler & Margaret Sams Gratz for Appellee

Briefed by [Maggie Vinzant](#)

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LOWE’S HOME CTRS., LLC V. SCOTT

CIVIL - WORKERS’ COMPENSATION

CIVIL - WORKERS’ COMPENSATION - EXPERT EVIDENCE - The reviewing court will affirm the Commission’s decision, whether the award is for or against the claimant, when there is conflicting expert evidence

CIVIL - WORKERS' COMPENSATION - BURDEN OF PROOF - The claimant bears the burden of proving by a fair preponderance of the evidence a causal connection between the injury and the claimed disability

FACTS

Edwin Scott received epidural injections for treatment as a result of a workplace injury from unloading a heavy appliance in the course of his employment for Lowe's Home Centers, LLC. Scott later developed a staph infection in his spine. After the second injection, Scott was found to have an epidural abscess in the lower back. Scott had to have several serious surgeries as a result. The Mississippi Workers' Compensation Commission was presented with two expert opinions. Lowe's expert testified that Scott's infection was not the result of the injections. He testified that infections rarely resulted from epidural injections. Furthermore, Scott, as a diabetic, was vulnerable to infections, as he had had two staph infections in the past two years. Scott's expert, an infectious disease specialist who treated Scott, testified that he believed the infection was caused by the injections based on the timing of the injections, and the location of the injections being only a few centimeters away from the infection. Scott's expert noted that it would be unusual for an infection to result from an epidural infection or progress in the manner Scott's did, but he found it was more likely than not that the infection was caused by the injections. The Commission also heard from a specialist in anesthesiology and pain management who treated Scott. He testified that while he could not say they injections caused the infection, he disagreed with Lowe's expert that one could say with confidence that they had not caused the infection. After hearing this evidence, the Mississippi Workers' Compensation Commission found that the infection had resulted from the injections and that this was a compensable injury. Lowe's appealed.

ISSUE

Whether Scott's expert should not have been credited.

HOLDING

Because Scott's expert considered all of the various factors in reaching his ultimate conclusion as an exercise of his professional judgment as an infectious disease specialist and the Commission was entitled to decide to credit Scott's expert over Lowe's expert, there was no error in crediting Scott's expert. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

Affirmed - 2016-WC-01652-COA (Oct. 31, 2017)

Opinion by Judge Fair

Mississippi Workers' Compensation Commission

Jill Renee Miller & Michael Madison Taylor Jr. for Appellant - Brett Andrew Ferguson for Appellee

Briefed by [Michael Farese](#)

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PARRISH V. PARRISH

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DISTRIBUTION OF MARITAL PROPERTY - FAMILY-USE DOCTRINE - A home brought into marriage will almost always convert to marital property

FAMILY LAW - DIVORCE - DISTRIBUTION OF MARITAL PROPERTY - A chancellor's distribution of property in divorce proceedings will only be reversed if the overall distribution is inequitable

FAMILY LAW - DIVORCE - ALIMONY - Alimony is considered only after all marital property has been equitably distributed and will be awarded only if one spouse is determined to suffer a deficit

FACTS

Paul and Jaime Parrish married in 2007, but consented to divorce for irreconcilable differences in 2016. They lived together in a home that Paul owned for around twenty-eight years, which Paul conveyed to himself and Jaime in a joint

tenancy. Paul and Jaime shared both labor and costs to improving the home. Both parties claimed that the home was worth \$100,000. In distributing property through the divorce, the chancellor gave Paul a \$25,000 credit off the value and classified that value contributed as non-marital property. Further, the chancellor classified each party's retirement account as non-marital and declined to award Jaime alimony. Jaime appealed.

ISSUES

Whether the chancellor erred when he (1) classified the marital home as Paul's partially separate property, (2) classified Paul's retirement account as separate property, and (3) declined to award Jaime alimony.

HOLDING

(1) Because an error in the classification of property does not warrant reversal if overall distribution was fair, and because the chancellor accounted for Paul's longstanding ownership by distributing him more equity in the home, the chancellor did not err in the distribution of property. (2) Because a chancellor's division of property is reviewed for overall fairness, and because neither Paul nor Jaime submitted evidence of the pre-marital value of their retirement plans, the chancellor did not err in the classification of both retirement plans as non-marital. (3) Because alimony should only be considered where equitable distribution of property leaves one party with a deficit, and because the chancellor determined that there were sufficient assets to adequately provide for both parties, the chancellor did not err in rejecting Jaime's request for alimony. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Chancery Court.

Affirmed - 2016-CA-00871-COA (Oct. 31, 2017)

Opinion by Chief Judge Lee

Hon. John Andrew Hatcher (Alcorn County Chancery Court)

Richard Shane McLaughlin for Appellant - John A. Ferrell for Appellee

Briefed by [D. Kirkwood Palmer](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

STATE V. MONTGOMERY

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - DENIAL OF PAROLE - JURISDICTION - The grant or denial of parole is entirely within the Parole Board's discretion; here is no statutory mandate granting circuit courts jurisdiction to consider an issue directly under the purview of the Parole Board

FACTS

Charles Montgomery, Jr. was convicted of capital murder and sentenced to life in prison. He was also convicted of two counts of forgery and sentenced to two consecutive twelve-year, six-month sentences. The forgery sentences were to run consecutively to his life sentence. In March 2016, the Parole Board denied Montgomery parole and set his next parole-eligible hearing for four years. Montgomery filed a motion to vacate, set aside, and correct the decision, and alleged he was entitled to a parole hearing once a year. The circuit court treated Montgomery's pleading as a post-conviction relief motion and granted his request. The State appealed.

ISSUE

Whether the circuit court lacked jurisdiction to hear Montgomery's post-conviction relief claim.

HOLDING

Because there is no statutory mandate granting circuit courts jurisdiction over appeals concerning denials of parole, the decision was entirely within the discretion of the Parole Board. Therefore, the Court of Appeals reversed and rendered a judgment of dismissal without prejudice to the Lauderdale County Circuit Court.

Reversed & Rendered - 2016-CA-00849-COA (Oct. 31, 2017)

Opinion by Judge Carlton

Hon. Lester F. Williamson Jr. (Lauderdale County Circuit Court)

Darrell Clayton Baughn (Att’y Gen. Office) for Appellant - *Pro se* for Appellee

Briefed by [Sarah Raben](#)

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COURT OF APPEALS - CRIMINAL CASES

BEASLEY V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - JNOV - When determining the sufficiency of evidence, the court decides 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 - WEIGHT OF EVIDENCE - A challenge of the weight of the evidence will only succeed in granting a new trial when the verdict is so contrary to the weight of the evidence presented that the verdict is an unconscionable injustice

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE - DIRECT APPEAL - A claim of ineffective assistance of counsel on direct appeal should be addressed only when (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge

FACTS

Lori Ehlers and her parents, Vernon and Elaine, were at dinner when Elaine received a text message and voice mail from Lori’s ex-boyfriend Timothy Beasley. Beasley stated that he was headed to Lori’s home to put down a cat the two had owned. Lori had an order of protection against Beasley that included her home, her person, and both of her parents. Upon arriving home, Lori and her parents noticed nothing out of the ordinary and proceeded inside. According to Lori and her parents, Beasley then jumped out at them and said, “now I can get all three of you” while wielding a knife and a pipe wrench. Lori pushed Elaine and Vernon and struck at Beasley with a cat’s scratching post knocking the knife out of his hands, but Vernon was struck several times by Beasley with the pipe wrench. Elaine was able to run outside to look for help. Initially Beasley followed, but then returned and tried to break back in before ultimately leaving the scene. During police interviews, Beasley admitted to knowing of the protection order against him, entering the dwelling via an unlocked window, that he was armed with a pipe wrench, and that he did not have permission to enter the dwelling. Beasley was convicted of burglary of a dwelling, aggravated stalking, and aggravated assault. Beasley filed a motion for a new trial, or in the alternative, a judgment notwithstanding the verdict (JNOV), which was denied. Beasley appealed.

ISSUES

Whether (1) the verdict was against the overwhelming weight of the evidence; (2) the evidence was sufficient to maintain the convictions; and (3) Beasley received ineffective assistance of counsel.

HOLDING

(1) Because the State proved that Beasley entered into a dwelling while prohibited by a protection order, the verdict was not against the overwhelming weight of the evidence and did not create an unconscionable injustice. (2) Because Beasley had already been convicted of stalking previously, evidence showed his conduct would cause a reasonable person to

fear for their safety or property, and the evidence showed that serious bodily injury occurred in an attempt that was likely to cause such bodily injury, the evidence was sufficient to support the conviction. (3) Because the record did not support an ineffective-assistance-of-counsel claim on direct appeal, the court denied relief without prejudice to Beasley's right to petition the Mississippi Supreme Court for permission to proceed for post-conviction relief on this issue. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2016-KS-00685-COA (Oct. 31, 2017)

En Banc Opinion by Presiding Judge Irving

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, First Judicial Dist.)

Benjamin A. Suber (Pub. Def. Office) for Appellant - Joseph S. Hemleben (Att'y Gen. Office) for Appellee

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

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CHILTON V. STATE

CRIMINAL - FELONY

ROBBERY - STATUTORY ELEMENTS - JURY INSTRUCTIONS - Jury instructions may be appropriately given when the instructions track the required elements of a crime but do not mirror the exact statutory language

CRIMINAL PROCEDURE - INDICTMENT - DEFECTS - An indictment must contain the essential elements of the crime charged, sufficient facts to fairly inform the defendant of the charge that he must defend, and sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense

EVIDENCE - RELEVANCY - Relevant evidence means evidence having any tendency to make the existence of any fact consequential to the determination of the action more or less probable than it would be without the evidence

FACTS

Artea Chilton was driving a red Mustang and picked up Darisha Johnson to go out to eat. Chilton instead drove to McMullan Motors and spoke with Dewayne Morris, asking to see the fastest and most expensive car in the dealership. Morris directed Chilton to a Dodge Charger that was on display and discussed the listing price with Chilton, indicating that he would be willing to sell the car for \$50,000 if Chilton paid cash. Chilton stated that he was going to the bank to retrieve the cash and would return for the car. Chilton then drove to BancorpSouth, entered and announced that he was robbing the bank. Tina Gibbs, the bank's branch manager, pressed the silent alarm on the side of her desk. She testified that Chilton told her that he had a gun in his pocket, but she never actually saw the gun. Gibbs then directed the tellers to hand Chilton the "bait money," or money typically given during a robbery, and Chilton left the bank with the money. Johnson testified that Chilton was calm upon returning to the car, but he began throwing money out of the window once a police car started following them. When she had the chance, Johnson jumped out of the car and ran into an auto parts store, before Chilton was apprehended. Chilton was indicted on one count of armed robbery using a deadly weapon. After a two-day trial, he was convicted for armed robbery and sentenced to twenty-five years in a custody of the MDOC, with twenty years to serve, followed by five years of PRS and a fine of \$5,000. Chilton appealed.

ISSUES

Whether the trial court erred in (1) finding that the indictment was valid; (2) giving jury instructions S-4; (3) giving jury instructions S-1A; (4) finding that there was sufficient evidence to convict Chilton; and (5) prohibiting Chilton from introducing a video into evidence.

HOLDING

(1) Because the evidence presented supports a charge of armed robbery, Chilton was adequately put on notice that the state would attempt to prove that he committed armed robbery. Accordingly, his indictment was proper. (2) Because Chilton patted his pant leg to signal that he had a gun and told another person that he had a gun, jury instructions S-4 were appropriate in allow the jury to consider Chilton's possession of a deadly weapon. (3) Because jury instructions S-

1A followed the statutory language defining robbery under Miss. Code Ann. § 97-3-79, the jury was properly instructed about the state's burden of proof. (4) Because there exists no overwhelming weight of evidence contrary to the jury's verdict, the trial court did not err in upholding the verdict. (5) Because the evidence that Chilton sought to enter was found to be irrelevant, the trial court's decision to exclude the tape was appropriate.

Affirmed - 2014-KA-00330 - COA (Oct. 31, 2017)

Opinion by Judge Westbrook

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

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

Briefed by [Kelsey Dismukes](#)

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McCARTY V. STATE

CRIMINAL - FELONY

EVIDENCE - SUFFICIENCY - LESSER OFFENSE - Where the State presents sufficient evidence of a greater offense, the defendant may not complain that the jury instead convicted her of the lesser offense

EVIDENCE - SUFFICIENCY - ALTERNATIVE FACTUAL THEORIES - Reversal is not warranted when the jury is presented with alternative factual theories, even if one of those theories is factually inadequate to sustain the conviction

JURY INSTRUCTIONS - MISTAKE - PLAIN-ERROR - For jury instructions to constitute plain error, the error must result in a manifest miscarriage of justice

FACTS

Grace McCarty was indicted for depraved-heart (second-degree) murder after she killed her husband by backing his car over him in the driveway of their home. McCarty's testimony varied substantially from that of the victim's son. The jury returned a verdict finding McCarty guilty of manslaughter but did not specify the theory of manslaughter as either culpable-negligence manslaughter or heat-of-passion manslaughter. Subsequently, the circuit court sentenced her to serve twenty years in the custody of the Mississippi Department of Corrections. McCarty appealed.

ISSUES

Whether (1) the evidence was insufficient to support the conviction of manslaughter; (2) the jury's verdict of manslaughter was against the overwhelming weight of the evidence; (3) the trial judge erred by denying the motion for a mistrial; and (4) mistake in the jury instructions on culpable-negligence manslaughter required a new trial.

HOLDING

(1) Because the State presented sufficient evidence of the greater offense of depraved-heart murder, the evidence was sufficient to support McCarty's conviction of the lesser offense of manslaughter. (2) Because there was sufficient evidence for the jury to find McCarty committed either culpable-negligence manslaughter or heat-of-passion manslaughter, the trial court did not abuse its discretion. (3) Because there was no evidence that testimony was coached, the trial judge did not abuse his discretion by denying the motion for mistrial. (4) Because a one-word mistake, referring to McCarthy as "him" instead of "her," in the jury instructions does not rise to the level of plain error, the mistake in instructions does not require a new trial. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

DISSENT

Judge Greenlee argued that the trial court's jury instruction regarding "his culpable negligence," rather than her culpable negligence, was plain error. He also contended that the evidence submitted on heat-of-passion manslaughter was insufficient to uphold a conviction of that crime. Judge Greenlee argued that allowing the verdict to stand would sanction an unconscionable injustice, and he would reverse and remand the case.

Affirmed - 2016-KA-00602-COA (Oct. 31, 2017)

En Banc Opinion by Judge Wilson Dissent by Judge Greenlee

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

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Caroline Loveless](#) & [Allison A. Bruff](#)

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