

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 6, 2016

SUPREME COURT - CIVIL CASES

TAYLOR V. TAYLOR

CIVIL – DOMESTIC RELATIONS

CIVIL PROCEDURE – APPEAL AND ERROR – WAIVER – It is a long-established rule in Mississippi that a question not raised in the lower court will not be considered on appeal

FACTS

Andrea Leigh Taylor and Thomas Roy Taylor, Jr. divorced and incorporated a property-settlement agreement into their divorce decree. The Union County Chancery Court determined the property settlement agreement included college tuition and related expenses for Andrea’s son - a nonparty. Andrea appealed.

ISSUE

Whether the chancery court committed error by awarding a child-support judgment to Andrea’s son.

HOLDING

Because Andrea neither challenged nor objected to the chancery court’s authority to grant an award to her son at trial or in post-trial motions, she was barred from raising the issue on appeal. Therefore, the Supreme Court affirmed the judgment of the Union County Chancery Court.

DISSENT

Justice King argued that Andrea’s son was a necessary party to the action and that the Court was not limited to the issues stated in the briefs. Rather, the Court’s appellate jurisdiction extends to the full scope of the interests of justice. Therefore, the Court should have reviewed the merits of the case on appeal.

Affirmed - 2015-CA-00105-SCT (Oct. 6, 2016)

En Banc Opinion by Justice Maxwell – Dissent by Justice King

Hon. John Andrew Hatcher (Union County Chancery Court)

Michael Lee Dulaney for Appellant - James Roger Franks Jr. & William Rufus Wheeler Jr. for Appellee

Briefed by [Kyle Hansen](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 4, 2016

COURT OF APPEALS - CIVIL CASES

FARRIS V. FARRIS

CIVIL - DOMESTIC RELATIONS

DIVORCE - FAULT - HABITUAL CRUEL AND INHUMAN TREATMENT - Habitual cruel and inhuman treatment is conduct that either: (1) endangers life, limb, or health, or creates a reasonable apprehension of such danger

and renders the relationship unsafe for the party seeking relief, or (2) is so unnatural and infamous as to render the marriage revolting to the non-offending spouse, making it impossible to carry out the duties of the marriage, therefore destroying the basis for its continuance

DOMESTIC RELATIONS - PRENUPTIAL AGREEMENTS - REPRESENTATION OF COUNSEL -

Prenuptial agreements must be fair in their execution, entered into voluntarily by both parties, and each party must disclose their financial assets; prenuptial agreements may be fair even if each side is not separately represented by counsel

DOMESTIC RELATIONS - DIVORCE – EQUITABLE DIVISION OF PROPERTY - An equitable division of property does not necessarily mean an equal division of property

DOMESTIC RELATIONS - DIVORCE - ALIMONY - Chancellors should consider the *Armstrong* factors when awarding lump-sum or periodic alimony after equitably dividing the estate; alimony is intended as an equalizer between the parties to serve equity amongst them completely once and for all

DOMESTIC RELATIONS - DIVORCE - ATTORNEY’S FEES - An award of attorney’s fees is appropriate in a divorce case only when the requesting party establishes an inability to pay

DOMESTIC RELATIONS - DIVORCE - ALIMONY AND LIFE INSURANCE POLICIES - An alimony payor may be required to maintain life insurance in an amount sufficient to satisfy payment of alimony obligations that survive the payor’s death

FACTS

Rebecca Lee Jones Robertson (“Becky”) filed for divorce from Elmer Eugene Farris (“Gene”) on the ground of habitual cruel and inhuman treatment. The chancery court granted the divorce because Gene knew he may have herpes but failed to tell Becky, ultimately transmitting the disease to her. Prior to their marriage, Gene hired an attorney (who represented only Gene) to draft a prenuptial agreement, which Becky ultimately signed without reading or seeking independent legal counsel. The chancery court found this prenuptial agreement to be invalid, as Becky did not secure legal advice prior to signing the agreement. While married, Gene and Becky purchased a rental property for \$21,000, and rented the property to tenants for \$275 per month. Becky contributed \$5,000 towards the \$21,000 purchase price, however the chancery court awarded Becky half of the gross rental income Gene collected on the property after their separation. The chancery court awarded Becky a monthly alimony of \$1,125.00 for fifty-two months, citing Becky’s age, frail health state, and contracting herpes as justification. The chancery court also awarded Becky attorney’s fees because Gene was at fault for the divorce, and because Becky had only limited assets and earning capacity, whereas Gene had significant resources and assets. Further, the chancery court ordered Gene to maintain a \$200,000 life insurance policy until the awarded alimony was paid in full. Gene appealed.

ISSUES

Whether the chancery court erred in (1) granting a divorce based on habitual cruel and inhuman treatment; (2) holding the prenuptial agreement invalid; (3) dividing the parties’ interests related to their rental property; (4) awarding alimony; (5) awarding attorney’s fees; and (6) requiring Gene to maintain a \$200,000 life insurance policy for Becky’s benefit.

HOLDING

(1) Because there was sufficient evidence to support the chancellor’s findings of fact and finding of habitual cruel and inhuman treatment, the chancery court correctly granted the divorce. (2) Because a prenuptial agreement may be valid even if each side is not separately represented by counsel, the chancery court incorrectly held the prenuptial agreement unenforceable. (3) Because an equitable division of property does not necessarily mean an equal division of property, the chancery court did not abuse its discretion when dividing the interests to the rental property. (4) Because the chancery court properly considered the *Armstrong* factors, it was not an abuse of discretion to award alimony based on its factual findings. (5) Because an award of attorney’s fees in divorce cases is only appropriate where the requesting party establishes an inability to pay, and Becky had the ability to pay her own fees, the chancery court improperly awarded Becky attorney’s fees. (6) Because an alimony payor is only required to maintain a life insurance policy in an amount sufficient to satisfy payment of the payor’s obligations, the chancery court improperly ordered Gene to maintain a \$200,000 life insurance policy. Therefore, the Court of Appeals affirmed in part, reversed, and rendered in part the judgment of the Tallahatchie County Chancery Court.

Affirmed in Part & Reversed & Rendered in Part - 2015-CA-00835-COA (Oct. 4, 2016)

Opinion by Judge Wilson

Hon. Catherine Farris-Carter (Tallahatchie County Chancery Court)
Sabrina D. Howell for Appellant - Luther Putnam Crull Jr. for Appellee
Briefed by [Josh Rhodes](#)

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GAFFNEY V. CITY OF RICHLAND

CIVIL - REAL PROPERTY

MUNICIPAL LAW - PROCEDURE - DEMOLITION OF PROPERTY - Under Miss. Code Ann. § 21-19-11(1), for a property located within a municipality to be declared a menace to the public health, safety, and welfare of the community, the governing authority of the municipality must first conduct a hearing; if the governing authority deems the property to be in such a state of uncleanness as to be a menace to the public health, safety, and welfare of the community, the municipality may demolish any abandoned or dilapidated buildings and otherwise clean the property

MUNICIPAL LAW - PROCEDURE - APPEAL FROM DECISION - Pursuant to Miss. Code Ann. § 11-51-75, any person aggrieved by a decision of a municipal authority may embody the facts, judgment and decision in a bill of exceptions, which will be transmitted to the circuit court acting as an appellate court

CIVIL PROCEDURE - JURISDICTION - SUBJECT MATTER JURISDICTION - The issue of subject-matter jurisdiction may be raised at any time in the proceedings, including on appeal

CIVIL PROCEDURE - REMEDIES - INJUNCTION - Although chancery courts have jurisdiction over relief sought through injunction, issuance of an injunction is an extraordinary relief requiring first a showing of imminent threat of irreparable harm for which there is no adequate remedy at law; when a statutory scheme exists concerning review of an agency or board's decision, an adequate remedy at law exists, precluding the issuance of injunctive relief

FACTS

In February 2002, the City of Richland (the "City") issued a building permit to Michael Gaffney ("Gaffney") to start building a house. The permit indicated that it would become void if work or construction did not commence within six months of the date of issuance, or if work was suspended for a period of six months at any time after work started. Over ten years after the issuance of the original permit, Gaffney had still not completed construction, and his permit was voided. Gaffney requested a hearing in front of the Board of Aldermen (the "Board"), and the Board passed a resolution allowing Gaffney to obtain new permits and requiring him to complete construction by June 16, 2013. When Gaffney failed to complete construction again, the City filed a complaint in the Rankin County Chancery Court requesting an injunction requiring Gaffney to complete construction within a set period of time and authority to demolish and remove the construction if Gaffney failed to complete it within the set time period. The chancery court ordered Gaffney to complete construction no later than September 5, 2014. When Gaffney once again failed to complete construction by the set date, the chancery court found Gaffney in contempt for failing to complete construction, authorized demolition of the house, and awarded the City \$8,232.82 in attorney's fees. Gaffney appealed.

ISSUES

Whether (1) the trial court had jurisdiction to hear the case and (2) a municipality has the authority to impose deadlines for completing construction of a dwelling and any noncompliance with such deadlines authorizes the municipality to demolish the dwelling.

HOLDING

(1) Because the "governing municipal authority" (i.e., the City's Board of Aldermen) was the appropriate entity to conduct a hearing, with any appeal being to the circuit court, the chancery court lacked subject-matter jurisdiction over any claim brought under Miss. Code Ann. § 21-19-11. (2) Because the City did not cite to any statute, local ordinance, homeowners' association's covenants, conditions, and restrictions, or case law giving it authority to impose deadlines for completing construction of a dwelling and authorizing it to demolish the dwelling for noncompliance of such

deadlines, the City failed to state a claim upon which relief can be granted. Therefore, the Court of Appeals reversed the judgment of the Rankin County Chancery Court, and remanded the case for entry of an order of dismissal.

Reversed and Remanded for Entry of an Order of Dismissal -2014-CA-01648-COA (Oct. 4, 2016)

Opinion by Chief Judge Lee

Hon. Dan H. Fairly (Rankin County Chancery Court)

Lindsey McGee Turk for Appellant - Joshua J. Weiner, Donna Brown Jacobs, & Katie B. Snell for Appellee

Briefed by [Mallory Bland](#)

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IN RE CONSERVATORSHIP OF ESTATE OF JACKSON

CIVIL - WILLS, TRUSTS, AND ESTATES

CIVIL PROCEDURE - TEMPORARY RESTRAINING ORDER - REQUIREMENTS - Rule 65 of the Mississippi Rules of Civil Procedure provides that a temporary restraining order may be granted, without notice to the adverse party or his attorney, if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required

WILLS & ESTATES - CONSERVATOR - DISCRETION - Chancellors have wide discretion in determining the appropriate person to be appointed as conservator

FACTS

Mary Elizabeth Brewer Jackson executed a power of attorney naming James E. Reed to act on her behalf and authorized Reed to make health-care decisions. Subsequently, Sherry Winston was hired to be Jackson's live-in caregiver. Winston took Jackson to an attorney who prepared a document naming Winston as Jackson's power of attorney and revoking Reed's power of attorney. Reed filed a petition seeking a temporary restraining order (TRO), a preliminary injunction, and to set aside the power of attorney. The TRO was granted and Jackson's assets were frozen. Reed filed a petition to be appointed Jackson's conservator. The trial court determined that Jackson was not competent to act on her own behalf and appointed Reed as conservator over Jackson's person and estate. Jackson appealed.

ISSUES

Whether the trial court erred in (1) granting the temporary restraining order, (2) appointing Reed as conservator, and (3) denying attorney's fees.

HOLDING

(1) Because there was testimony Winston might have taken advantage of Jackson because of her age and health, there was no abuse of discretion in granting the temporary restraining order without notice. (2) Because the other living relative, Reed's brother, voluntarily signed a waiver of notice stating he had no objection to Reed's appointment as conservator for Jackson, and since Reed had been acting on Jackson's behalf for several years, there was no abuse of discretion in appointing Reed as conservator of Jackson's person and estate. (3) Because there was no error in granting the temporary restraining order or in appointing Reed as conservator, there was no abuse of discretion in denying Jackson attorney's fees. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Chancery Court.

Affirmed - 2014-CA-00971-COA (Oct. 4, 2016)

Opinion by Chief Judge Lee

Hon. Jane R. Weathersby (Sunflower County Chancery Court)

Helen Kennedy Robinson for Appellant - John H. Daniels III for Appellee

Briefed by [Lora Wuerdeman](#)

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IN RE ESTATE OF SMITH

CIVIL - WILLS, TRUSTS, AND ESTATES

WILLS AND ESTATES - INTERPRETATION - FOUR CORNERS - A trial court begins interpretation of a will by looking within the four corners of the document, and if there is no ambiguity within the writing further analysis is proscribed

WILLS AND ESTATES - INTERPRETATION - PAROL EVIDENCE - Parol evidence is only considered if the language in the will itself can be construed to result in more than one interpretation as to the disposition of property

WILLS AND ESTATES - INTERPRETATION - EXTRINSIC EVIDENCE - If the will shows the testator's intention to be unclear, the court will examine the facts and circumstances surrounding the testator at the time the will was made, and extrinsic evidence may be admissible to ascertain the testator's intent

FACTS

James Oldrum Smith Jr. ("Big J.O.") died on August 24, 2006 and was survived by three children: James Oldrum Smith III ("Little J.O."), Patrick Raymond Smith, and Lela Smith Flowers. Big J.O. was predeceased by one child, Jinx Peterson Smith, who left three surviving children, Jinx Peterson Smith Jr., Christopher Stanton Smith, and Patricia Stafford Smith. Big J.O.'s last will and testament and three codicils were admitted to probate in chancery court. There was concern about the interpretation of codicil 3. Lyn Smith, Jinx's widow, filed a motion for construction of the codicil, but the chancellor ruled that the codicil was unambiguous and constituted a direct bequest of the assets to the named beneficiaries. Little J.O. filed a motion for reconstruction of codicil 3 and the estate's administrator filed a response to the motion. Trustmark Bank filed a memo contending the distribution of shares in codicil 3 needs extrinsic evidence to make sense. After a hearing, the chancellor found that codicil 3 was unambiguous, distributed the shares, and certified the judgment. Little J.O. and Patrick appealed.

ISSUE

Whether the chancellor improperly excluded extrinsic evidence of Big J.O.'s intent in construing the codicil.

HOLDING

Because there are two reasonable interpretations of the codicil, it was ambiguous and the chancellor should have considered extrinsic evidence. Therefore, the Court of Appeals reversed and remanded the judgment of the Warren County Chancery Court.

DISSENT

Presiding Judge Irving argued that—considering the complete context of codicil 3—the codicil was not ambiguous, and it was clear that the chancellor applied the wrong numbers to allocate the shares of Yazoo River Towing. Therefore, the judgment should be affirmed and modified to correct the allocation of shares.

Reversed and Remanded - 2015-CA-00360-COA (Oct. 4, 2016)

Opinion by Presiding Judge Griffis - Dissent by Presiding Judge Irving

Hon. Hollis McGehee (Warren County Chancery Court)

William R. Striebeck & David Ryan Lynch for Appellants - David M. Sessums, Ronald C. Morton & Robert Anthony Fischer for Appellees

Briefed by [Victoria Jones](#)

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KITIRELL V. KITIRELL

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - MODIFICATION OF ALIMONY - COHABITATION – Proof of cohabitation creates a presumption that a material change in circumstances has occurred; this presumption shifts the burden to the recipient spouse to produce evidence contradicting mutual financial support; however, the paying spouse still must show that the cohabitation results in a situation of mutual support between the recipient spouse and another individual which alters the recipient spouse’s financial needs before alimony can be modified

DOMESTIC RELATIONS - MODIFICATION OF ALIMONY - DE FACTO MARRIAGE - A chancellor may find a de facto marriage if (1) the alimony recipient is deliberately avoiding remarriage merely to continue receiving alimony; or (2) absent cohabitation if the alimony recipient and another person have so fashioned their relationship, to include their physical living arrangements and financial affairs, that they could reasonably be considered as having entered into a de fact marriage

DOMESTIC RELATIONS - ALIMONY – MODIFICATION OF ALIMONY - Lump-sum alimony is a final settlement between husband and wife and may not be changed or modified by either party, absent fraud; periodic alimony may be modified or terminated if there has been a material or substantial change in circumstances since the divorce

FACTS

Stan and Stephanie Kittrell were married for fourteen years and shared a child together. As part of their divorce agreement, Stan agreed to deposit his monthly retirement check into Stephanie’s bank account, with a monthly amount of \$250 as child support, and the remainder as alimony. Stan subsequently filed and obtained primary physical custody of the child, terminating the child support obligation but not his alimony obligation. The chancery court entered a judgment against Stan, awarding Stephanie \$12,179 for outstanding alimony and child-support, with an additional \$2,000 in attorney’s fees. After further litigation regarding Stephanie’s drug abuse and live in boyfriend, the chancellor terminated the award of alimony because Stephanie had entered into a de facto marriage with her live in boyfriend. Stephanie appealed.

ISSUES

Whether the trial court erred in (1) classifying an award of alimony as periodic, and (2) subsequently terminating the award of alimony based on a finding of a de facto marriage.

HOLDING

The record was devoid of evidence that Stephanie was either avoiding remarriage in order to collect alimony or fashioned her relationship with her boyfriend as to constitute a de facto marriage. Additionally, since the provisions of the alimony agreement did not strictly adhere to the traditional characteristics of either periodic or lump-sum alimony, the provision will be enforced as written. Therefore, the Court of Appeals reversed and remanded the case.

Reversed & Remanded -2015-CA-00082-COA (Oct. 5, 2016)

Opinion by Chief Judge Lee

Hon. Billy G. Bridges (Forrest County Chancery Court)

Renee M. Porter for Appellant - Jay L. Jernigan for Appellee

Briefed by [Blake Brookshire](#)

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LONG V. VITKAUSKAS

CIVIL - TORTS - OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE

CIVIL PROCEDURE - SERVICE OF PROCESS - CERTIFIED MAIL - Pursuant to Miss. R. Civ. Pro. 4(c)(5), summons can be served on a person outside of Mississippi via certified mail with a return receipt requested, and the envelope should be marked restricted delivery when the defendant is a natural person

CIVIL PROCEDURE - SERVICE OF PROCESS - ADDITIONAL TIME - Pursuant to Miss. R. Civ. Pro. 4(h), a party seeking additional time to serve process must show good cause as to why service of process was not made within 120 days of filing the complaint

CIVIL PROCEDURE - SERVICE OF PROCESS - GOOD CAUSE - To establish good cause, the plaintiff must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice

FACTS

After Douglas Long and his wife separated, Long sued David Vitkauskas, a Pennsylvania resident, for alienation of affection. Long served Vitkauskas with process via certified mail marked restricted delivery at his place of employment, but someone other than Vitkauskas signed the return receipt. Vitkauskas filed a motion to dismiss for lack of jurisdiction, which the trial court granted. Long’s motion for reconsideration, including a request for additional time to serve, was denied. Long appealed.

ISSUE

Whether the trial court properly granted the motion to dismiss.

HOLDING

Because Vitkauskas clearly did not sign the return receipt and Long did not attempt to serve process again or file a motion for additional time, the trial court did not abuse its discretion in granting the motion to dismiss. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2015-CA-00527-COA (Oct. 4, 2016)

Opinion by Chief Judge Lee

Hon. Robert P. Chamberlin (Desoto County Circuit Court)

Michael J. Malouf, Robert Eugene Jones II, & James Matthew Lenderman for Appellant - A.E. (Rusty) Harlow Jr. & Kathi Crestman Wilson for Appellee

Briefed by [Alison Guider](#)

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SINGLETON V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - GUILTY PLEA - WAIVER - A valid guilty plea waives the defendant’s right to certain constitutional challenges, including those under the Fourth Amendment

CRIMINAL - GUILTY PLEA - EVIDENTIARY PROOF - A voluntary guilty plea waives the requirement that the prosecution prove each element on the offense

INEFFECTIVE ASSISTANCE OF COUNSEL - PLEA BARGAINS - AFFIDAVITS - If the movant in a post-conviction relief hearing offers only his affidavit, then his ineffective assistance of counsel claim is without merit

FACTS

Daniel Keith Singleton pled guilty to possession of a “dirk knife.” The court accepted his plea as “knowing and voluntary.” Singleton filed a motion for post-conviction relief. The Rankin County Circuit court dismissed the Singleton’s motion for post-conviction relief. Singleton appealed.

ISSUES

Whether the (1) search and investigatory stop that led to the defendant's arrest was lawful under the Fourth Amendment; (2) the "dirk" knife was actually a "survival" knife; and (3) his attorney misinformed him about "dirk" knives, constituting ineffective assistance of counsel.

HOLDING

(1) Because a valid guilty plea waives a defendant's right to a search-and-seizure challenge under the Fourth Amendment, defendant's Fourth Amendment claims were without merit. (2) Because the defendant expressly and voluntarily admitted under oath that he was in possession of a "dirk" knife, the defendant's claim that the knife was actually a "survival" knife was without merit. (3) Because the defendant offered no more than his own affidavit in support of his ineffective assistance claim, his ineffective assistance claim was without merit. Therefore, the Court of Appeals affirmed the decision of the Rankin County Circuit Court.

Affirmed - 2015-CP-01419-COA (Oct. 4, 2016)

Opinion by Judge Wilson

Hon. William E. Chapman III (Rankin County Circuit Court)

Pro se for Appellant - Lara Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Meredith Pohl](#)

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UNIV. OF MISS. MED. CTR. V. LITTLETON

CIVIL - WRONGFUL DEATH

EVIDENCE - EXPERT TESTIMONY - RELEVANT AND RELIABLE - The trial court has a responsibility to ensure that any and all scientific testimony is not only relevant, but reliable

MISS. RULES OF EVIDENCE - ADMISSIBILITY - EXPERT TESTIMONY - Miss. R. Evid. 702 states that a witness may testify as an expert if the witness is qualified as an expert by knowledge, skill, experience, training, or education and if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

NEGLIGENCE - WRONGFUL DEATH - CAUSATION - In cases alleging death caused by the negligence of a health care provider, expert testimony need not conclusively establish the cause of death, but it must, at a minimum, show that deviations from the standard of care caused or contributed to the decedent's death

FACTS

Cleopatra Littleton was admitted to the University of Mississippi Medical Center ("UMMC") and diagnosed with meningitis. After a few days of treatment, Cleopatra died. Cleopatra's mother filed a complaint against UMMC for negligence and designated Dr. Wiggins as her expert witness. Dr. Wiggins had no regular experience in treating patients on a hospital floor as opposed to an emergency room. UMMC moved for a directed verdict, but the trial court denied the motion. The trial court held that UMMC breached its duty of care and awarded damages. UMMC appealed.

ISSUES

Whether the trial court erred in (1) allowing Dr. Wiggins to testify about the standard of care; (2) allowing Dr. Wiggins to testify about the cause of death; (3) denying a directed verdict when the evidence on causation was speculative; and (4) entering a judgment that was not based on substantial credible evidence.

HOLDING

(1) Because Dr. Wiggins was not experienced in intensive care and had no residency or subspecialty in critical or intensive care, Dr. Wiggins was unqualified to testify about the standard of care. (2) Because Dr. Wiggins failed to establish causation between the hospital's alleged negligence and the injury, Dr. Wiggins was unqualified to testify about the cause of death. (3) Because Dr. Wiggins's testimony was speculative, the trial court erred in denying a directed verdict. (4) Because the expert testimony was impermissibly based on speculation, the trial court erred in entering a judgment not

based on substantial credible evidence. Therefore, the Court of Appeals reversed the judgment of the Hinds County Circuit Court.

Reversed and Rendered - 2014-CA-00732-COA (Oct. 4, 2016)

Opinion by Judge Barnes

Hon. Winston L. Kidd (Hinds County Circuit Court)

John M. Coleman & Jacob O. Malatesta for Appellant - Suzanne G. Keys & Crystal R. Martin for Appellee

Briefed by [Catherine Norton](#)

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VENEZIA V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARILY & INTELLIGENTLY - Before the trial court may accept a plea of guilty, it must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea

CRIMINAL PROCEDURE - GUILTY PLEA - SUFFICIENT FACTUAL BASIS - A factual basis for a plea may be established by a statement of the prosecutor, the testimony of live witnesses, and prior proceedings

FACTS

In January 2012, Venezia pleaded “not guilty” to possession of precursors with the intent to manufacture methamphetamine. Before the presentation of evidence at trial, Venezia changed his plea to “guilty.” Deputy Garner testified that in February 2011 a confidential informant had purchased methamphetamine from Venezia at his residence. Later that month while several Louisiana and Mississippi narcotics units were monitoring several pharmacies near the Louisiana state line, it was discovered Venezia had purchased Sudafed and lithium batteries, two main ingredients in methamphetamine. At the request of the Lamar County narcotics unit, the highway patrol conducted a routine traffic stop on Venezia’s vehicle. Precursor chemicals were found and Venezia was subsequently arrested. Officers then secured Venezia’s residence in Purvis, Mississippi, and applied for a search warrant, which was granted and executed. Other precursors were also found at Venezia’s residence, but the trial judge stated those precursors were not at issue until trial. At a hearing on Venezia’s pretrial motion to suppress a search warrant, the State presented testimony of Deputy Garner. After his plea hearing, Venezia was sentenced to thirty years, with twenty years to serve, and ten years of post-release supervision, and fined \$5,000. In May 2015, Venezia filed a post-conviction relief motion claiming his guilty plea was involuntary, his indictment was defective, and there was a violation of an ex post facto law. The trial court dismissed the motion, and Venezia appealed.

ISSUE

Whether the trial court erred in dismissing Venezia’s PCR motion when the trial court accepted his guilty plea without a sufficient factual basis for the charges against him.

HOLDING

The testimony by Deputy Garner on the motion to suppress provided a sufficient factual basis for Venezia’s guilty plea for the charge of possession of precursors with the intent to manufacture. Therefore, the trial court’s judgment dismissing Venezia’s motion for post-conviction relief was affirmed.

Affirmed - 2015-CP-01290-COA (Oct. 04, 2016)

Opinion by Justice Barnes

Hon. Anthony Alan Mazingo (Lamar County Circuit Court)

Pro se for Appellant – Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Amber Kipfmiller](#)

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COURT OF APPEALS - CRIMINAL CASES

ADAMS V. STATE

CRIMINAL -FELONY

CRIMINAL PROCEDURE - GROUNDS OF REVIEW - PROCEDURAL BAR - Where a defendant fails to make an argument during the hearing on his motion to suppress or at any other point during his criminal proceedings, such argument on appeal is procedurally barred

CRIMINAL PROCEDURE - PROBABLE CAUSE - WARRANTS - There must be a substantial basis for concluding that probable cause exists in order for a search warrant to properly be issued; an appellate court will overturn the trial court if there was not substantial credible evidence to support the issuance of the search warrant

CRIMINAL PROCEDURE - PROBABLE CAUSE - AUTOMOBILE EXCEPTION - The warrantless search of an automobile is valid as long as probable cause exists

FACTS

Andrew Adams had double parked his Kia vehicle in the road next to his Chevrolet Impala which was parked on the side of the road. He was shining a light into the Impala and returned to the driver's seat of the Kia when officers arrived. The officers activated their blue lights, Adams exited the Kia and resisted instructions to stay where he was. Adams was arrested for blocking the roadway and for what were later determined to be synthetic cannabinoids in plain view in the Kia. After a drug-detecting police dog alerted to the presence of illegal drugs in the Impala, officers obtained a search warrant for the vehicle. Officers then found marijuana in a plastic bag on the rear floorboard on the driver's side. He was charged with possession of marijuana. Adams presented several motions to suppress the evidence, but none of them challenged the search warrant for the Impala. When offered the opportunity to present evidence and arguments relating to that search warrant, his attorney "stood on the motion." The Harrison County Circuit Court convicted Adams of possession of 250 or more grams of marijuana and sentenced him as a habitual offender to sixteen years in the custody of MDOC, without eligibility for parole or early release. He appealed.

ISSUE

Whether the trial court erred in denying Adams's motions to suppress.

HOLDING

Because Adams's failure to present evidence and arguments relating to the search warrant denied opportunity to both the State to present evidence on details of how the dog alerted the presence of drugs and to the trial court to make specific findings of fact, the argument was procedurally barred. Notwithstanding the procedural bar, because Adams failed to show that the officer's description of where the dog alerted was false or that the allegedly false statement was material to whether probable cause was established, the argument had no merit. Therefore, the Supreme Court affirmed the Harrison Country Circuit Court's conviction and sentence of Adams.

Affirmed -2015-KA-00520-COA (Oct. 4, 2016)

Opinion by Judge Fair

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court)

Phillip Broadhead (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Brittany Barbee](#)

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CURRY V. STATE

CRIMINAL - FELONY

MISSISSIPPI RULES OF EVIDENCE - NON-CHARACTER PURPOSE - ADMISSIBILITY - Evidence related to a non-character purpose is admissible under Rule 404(b) even if it also reflects on a defendant's character, and is inadmissible only if it is relevant solely to the defendant's character or criminal propensity

EVIDENCE - UNDUE PREJUDICE - NON-CHARACTER PURPOSE - Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under Mississippi Rules of Evidence Rule 403

MISSISSIPPI RULES OF EVIDENCE - RULE 403 - EXCLUSION - Relevant evidence should not be excluded under Rule 403 unless its probative value is substantially outweighed by the danger of unfair prejudice or some other consideration

PROSECUTORIAL MISCONDUCT - CLOSING ARGUMENTS - STANDARD - Though attorneys are generally allowed a wide latitude during closing remarks, prosecutors cannot use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury

INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - STRICKLAND - In order to establish a constitutional claim of ineffective assistance of counsel, a defendant must show both (1) that counsel's performance was deficient, and (2) that he suffered prejudice as a result

INEFFECTIVE ASSISTANCE OF COUNSEL - FAILURE TO OBJECT - PRESUMPTION - It is generally assumed that counsel's failure to object during closing argument reflects trial strategy, not ineffective assistance

FACTS

Inmate Jamarcus Curry was found guilty of two counts of simple assault on a law enforcement officer stemming from an incident where Curry punched and kicked correctional officer Georgia Shelby and punched correctional officer Leon Shields. The altercation between Curry and the correctional officers resulted from Curry not complying with Shields' orders to turn around and face a wall. During trial, Curry indicated he was in fear of the guards due to past incidents. The Court then allowed Curry to be questioned on his prior disciplinary violations. Further, the prosecutor's closing argument referenced Curry's prior incidents and attacked his credibility. Curry was sentenced to two consecutive five-year sentences. Curry appealed.

ISSUES

Whether (1) the trial court erred by allowing the State to question him about his prior disciplinary actions and by not instructing the jury as to the limited purpose for which it could consider the violations, and (2) his trial was rendered unfair by parts of the prosecutor's closing argument and alleged ineffective assistance of counsel.

HOLDING

(1) Because Curry had "raised the issue" of prior incidents regarding prior alleged incidents of assaults by correctional officers, the jury already knew Curry was an inmate who had prior disciplinary violations, and there was no objection to his testimony, the trial court did not err in permitting the testimony of the prior disciplinary violations. Further, because the prosecutor's closing arguments were within the bounds of legitimate argument and because the Court generally presumes a defense counsel's decision to not request a limiting instruction reflects trial strategy, Curry's ineffective assistance claim was without merit. Therefore, the Court of Appeals affirmed the decision of the Rankin County Circuit Court.

Affirmed - 2015-KA-01288-COA (October 4, 2016)

Opinion by Judge Wilson

Hon. Judge John Huey Emfinger (Rankin County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Patrick Huston](#)

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PUSTAY V. STATE

CRIMINAL - FELONY

EVIDENCE - LIMITED CROSS-EXAMINATION - NO PROFFER - A trial court will not be reversed for limiting cross-examination where no proffer was made of the testimony nor was a statement dictated into the record to indicate what was proposed to be shown by the examination

CRIMINAL PROCEDURE - INDICTMENT - CHILD SEXUAL ABUSE - An indictment in a child sexual abuse case is not required to list a specific date so long as the defendant is “fully and fairly advised of the charge against him”

CRIMINAL PROCEDURE - JURY SELECTION - *BATSON* CHALLENGE - Determination of discriminatory intent will likely turn on a trial judge’s evaluation of a presenter’s credibility and whether an explanation should be believed; to be deemed gender neutral the reasons need not be persuasive, or even plausible; so long as the reasons are not inherently discriminatory

EVIDENCE - ADMISSIBILITY - PAST SEXUAL BEHAVIOR - When a defendant offers proof of a victim’s past sexual behavior that purports to meet one of the exceptions in Mississippi Rules of Evidence 412(2), the trial court may admit the evidence only if the court: conducts a hearing in chambers to determine admissibility of the evidence and finds that the probative value of relevant evidence outweighs the danger of unfair prejudice

CRIMINAL PROCEDURE - MERGER - SEX OFFENSES - Under Mississippi law, sexual battery of a child and unlawful touching are separate and distinct criminal offenses; it is possible to commit an unlawful touching without committing sexual battery

FACTS

On May 7, 2007, Thomas Pustay was convicted and sentenced to forty years for sexually abusing his biological niece, whom was also his adopted daughter. Pustay, who was a chief investigator with the Pass Christian Police Department, began inappropriately touching his daughter when she was around the fifth grade, and the touching escalated into sexual intercourse that lasted from sixth grade to the eleventh grade. After Pustay was convicted, he timely filed a motion for a new trial or, in the alternative, a judgment notwithstanding the verdict (JNOV). A year later, on May 16, 2008, Pustay filed a pro se motion to dismiss. Then, five years later, on February 25, 2013, Pustay filed a pro se motion for a new trial. After waiting six years to receive a ruling on his post-trial motions, Pustay filed a pro se petition for mandamus with the Mississippi Supreme Court on June 10, 2013, to require the trial court to render a decision. On July 25, 2013, the trial court judge entered an order denying Pustay’s post-trial motions. Pustay appealed.

ISSUES

Whether the trial court erred in (1) allowing the State to treat its own witness as hostile and establish its case through impeached testimony; (2) limiting Pustay’s cross-examination of a State’s witness; (3) improperly limiting Pustay’s testimony; (4) denying Pustay’s motion to review the records of relevant youth-court proceedings; (5) whether Pustay’s indictment was insufficient and vague, rendering it defective; (6) whether the trial court erred in its *Batson* analysis and in placing jurors stricken by Pustay back onto the jury; (7) admitting irrelevant and prejudicial evidence of Pustay’s character in violation of Mississippi Rule of Evidence 404(b); (8) excluding relevant and probative evidence under Mississippi Rule of Evidence 412; and (9) admitting improper lay-opinion testimony. Whether (10) Pustay received constitutionally ineffective assistance of counsel, which resulted in prejudice; (11) the lesser-included Count II, lustful touching, merged with Count VI, sexual battery; (12) the evidence was sufficient or the verdicts were supported by the weight of the evidence; and (13) cumulative error requires reversal.

HOLDING

(1) Because the record reflects sufficient evidence supporting the trial court’s decision to admit the State’s witness’s pretrial inconsistent statements as impeachment evidence, the record therefore reflects no abuse of discretion in the trial court’s decision to admit such statements into evidence at trial. (2) Because the defense failed to make a proffer or dictate into the record to indicate what was to be shown by the examination, the trial court did not abuse its discretion in limiting cross-examination. (3) Because Pustay failed to prove that his testimony about the child’s behavior was relevant or was in the furtherance of his defense, the trial court did not abuse its discretion in precluding Pustay’s

testimony of the child's character. (4) Because Pustay failed to articulate any reason that entitled him to a copy of the youth-court proceedings and the trial court reviewed the youth-court proceedings and failed to find any necessary disclosure, Pustay did not suffer any prejudice by not receiving the youth-court proceedings. (5) Because the record failed to indicate the State possessed any knowledge to narrow down the time period for the charges against Pustay, the language of the indictment was sufficient to put Pustay on notice of the charges against him. (6) Because the record reflects that the trial court observed a pattern by the defense of using peremptory strikes based on gender and the defense's explanations were insufficient, the trial court did not err in denying two of Pustay's peremptory strikes against females. (7) Because Pustay failed to assert that the blog-post entry constituted improper character evidence under M.R.E. Rule 404(b), the trial court did not err in admitting evidence of Pustay's aggressive character. (8) Because the trial court determined the victim's testimony about the semen on the towel went to her credibility rather than to prove the source of the semen under M.R.E. Rule 412, the trial court properly excluded the evidence. (9) Because the record shows that the witness testified to clarify to the jury about the signals and behaviors she observed from the victim and about aspects of the victim's behavior that she perceived, the trial court did not err in allowing the witness's testimony. (10) Because the record does not provide sufficient information for the court to consider the merits of Pustay's claim for ineffective assistance of counsel, the appropriate resolution of Pustay's claim was to deny relief without prejudice so that Pustay can raise his ineffective-assistance of counsel issue through appropriate post-conviction proceedings if he so chooses. (11) Because the jury could have reasonably inferred these two separate crimes happened during the same time period, the court found that Count II did not merge with Count VI. (12) Because the evidence presented against Pustay was sufficient to establish the elements of gratification of lust and sexual battery beyond a reasonable doubt, the verdict of the jury was not contrary to the overwhelming weight of the evidence. (13) Because no error occurred during Pustay's trial, there can be no cumulative error. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

CONCURRENCE

Presiding Judge Griffis argued that the taped statement was clearly and unequivocally hearsay, and no hearsay exception would allow the statement to be admitted. He argued further that the impeachment rules do not trump the hearsay rules. Therefore, he wrote separately to address his different opinion as to the legal analysis on the admission of the taped statements in issue one.

Affirmed - 2013-KA-00977-COA (Oct. 4, 2016)

Opinion by Judge Carlton - Concurrence by Presiding Judge Griffis

Hon. Stephen B. Simpson (Harrison County Circuit Court)

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

Briefed by [TreMarcus Rosemon](#)

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