

MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 27, 2020**SUPREME COURT – POST-CONVICTION RELIEF CASES****HOWARD V. STATE****CIVIL - POST-CONVICTION RELIEF**

POST-CONVICTION RELIEF - EVIDENCE - BURDEN OF PROOF - Capital convictions and sentences are reviewed with heightened scrutiny, under which all bona fide doubts are resolved in favor of the accused

POST-CONVICTION RELIEF - EVIDENTIARY HEARING - BURDEN OF PROOF - Pursuant to Miss. Code Ann. § 99-39-23(7), the burden of proof at an evidentiary hearing on a postconviction-relief case is on the petitioner to show by a preponderance of the evidence that he is entitled to relief

POST-CONVICTION RELIEF - EVIDENCE - MATERIALITY - Pursuant to *Cranford*, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different

CRIMINAL PROCEDURE - NEWLY DISCOVERED EVIDENCE - BITE-MARK COMPARISON - Under *Cranford*, the present scientific understanding of the invalidity of identification through bite-mark comparison is a new, material fact that constitutes newly discovered evidence

FACTS

Eddie Howard was convicted in 1994 and sentenced to death for the rape and murder of an eighty-four-year-old woman. Dr. Steven Hayne performed the autopsy and the cause of death was revealed to be two stab wounds. Although the autopsy did not reveal any bite marks, Dr. Hayne requested an additional study of the victim's body, which was exhumed. In 1997, Howard's conviction and sentence were reversed and remanded for a new trial. At Howard's second trial in 2000, Dr. Michael West, a medical expert, provided bite-mark comparison testimony, which was the only evidence that strongly linked Howard to the crime. Specifically, Dr. West testified that he examined the body using an ultraviolet light, which revealed a bite mark on the victim's right breast that matched Howard's dental impressions. Dr. West also testified to a reasonable degree of medical certainty that Howard inflicted that bite mark. Howard appealed, and the Supreme Court found no reversible error and affirmed Howard's conviction. The U.S. Supreme Court denied his petition for writ of certiorari. In December 2010, the Supreme Court granted Howard's request for post-conviction DNA testing. As a result, Howard filed a motion to vacate his conviction, asserting that the American Board of Odontology ("ABFO") had proven the bite-mark evidence used against him to be completely unreliable, inadmissible, and speculative. At the evidentiary hearing, Howard also offered new evidence regarding forensic and DNA testing on the physical evidence at the scene, which did not contain Howard's DNA. Additionally, a DNA test on the murder weapon, a bloody knife found at the scene, revealed another man's DNA on the knife blade. After the evidentiary hearing, the trial court denied Howard's petition for post-conviction relief. The trial court found that Howard did not present any new evidence regarding his bite-mark identification that would constitute newly discovered evidence that would probably produce a different result or induce a different verdict, if a new trial was granted. Howard appealed.

ISSUE

Whether the newly discovered evidence presented in Howard's motion was of such a nature that it would probably produce a different result or induce a different verdict if a new trial was granted.

HOLDING

Because Dr. West's identification of Howard as "the biter" with "reasonable medical certainty" has not been permitted by the ABFO's guidelines since 2013 due to changes in the scientific understanding of bite-mark analysis and would be inadmissible today as a result, because of the absence of forensic or eyewitness evidence putting Howard at the scene

of the crime, and because of the newly discovered presence of another man's DNA on the murder weapon, Howard met his burden to show by a preponderance of the evidence that in light of his newly discovered evidence, a jury would probably not find him guilty beyond a reasonable doubt. Therefore, the Supreme Court reversed, rendered, and remanded the judgment of the Lowndes County Circuit Court.

CONCURRENCE

Presiding Justice Kitchens agreed with the majority's reasoning and called attention to additional reasons to grant Howard's petition and vacate his conviction. Specifically, he argued (1) when Howard's new evidence is construed in his favor, as Mississippi law demands, it creates reasonable doubt about whether Howard stabbed the victim; (2) on post-conviction relief, the trial court erred by holding Howard to an evidentiary standard of beyond a reasonable doubt rather than to the correct preponderance of the evidence standard; (3) the Supreme Court should not uphold a conviction and death sentence on the testimony of a proven unreliable witness; and (4) Howard's new evidence brings the State's other evidence into question. For these additional reasons, as well as the reasons that the majority stated, he would grant Howard's petition for post-conviction relief, vacate his conviction and sentence, and remand this case for a new trial.

DISSENT

Justice Griffis argued that the newly discovered evidence presented was not of such a nature that would probably produce a different result or induce a different verdict if a new trial was granted. He also argued that, besides the bite-mark evidence, other evidence was presented in support of Howard's guilt. This additional evidence included: Howard's residence being just two blocks away from the victim; Howard's former girlfriend's testimony that he smelled like burnt clothes the night after the incident and that he liked to bite her on the neck during intercourse; and that Howard advised law enforcement that the "case was solved" and then confessed to law enforcement that he "had a temper and that's why this happened." As a result, he would hold that, despite the changes in ABFO guidelines and in the scientific community's understanding of bite-mark evidence, the trial court properly denied Howard's petition for post-conviction relief and would affirm.

Reversed, Rendered, & Remanded - 2018-CA-01586-SCT (Aug. 27, 2020)

En Banc Opinion by Justice Ishee - Concurrence by Presiding Justice Kitchens - Dissent by Justice Griffis

Hon. Lee J. Howard (Lowndes County Circuit Court)

William Tucker Carrington for Appellant - Ashley Lauren Sulser, Ladonna C. Holland, Lynn Fitch, & Candice Leigh Rucker (Att'y Gen. Office) for Appellee

Briefed by [Allison Payne](#)

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SUPREME COURT - CRIMINAL CASES

WILLIS V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - AGGRAVATED ASSAULT - ELEMENTS - Miss. Code Ann. § 97-3-7(2)(a) provides that a person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life

CRIMINAL LAW - ACCOMPLICE LIABILITY - AIDING AND ABETTING - Aiding and abetting is the offense committed by those perpetrators of a crime who, although not the direct perpetrators, are yet present at its commission, doing some act to render aid to the actual perpetrator

EVIDENCE - ADMISSIBILITY - COURT'S DISCRETION - Relevancy and admissibility of evidence are largely within the trial court's discretion and reversal may be had only where that discretion has been abused

EVIDENCE - ADMISSABILITY - CHARACTER EVIDENCE - Miss. R. Evid. 404(b) states that evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion

CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER - Miss. Code Ann. § 99-19-83 provides that every person convicted in Mississippi of a felony who has been convicted twice previously of any felony upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one year or more in any state and/or federal penal institution and where any one of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation

FACTS

Travell Moore ("Travell") and Kedarious Willis ("Kedarious") got into a fight in a barbershop after a claim that Travell stole a radio from Michael Willis's ("Willis") car. Subsequently, the confrontation between Travell and Willis was renewed in front of Kedarious's grandmother's house, where Kedarious shot several bullets that struck Travell. Travell was taken to the University of Mississippi Medical Center, where he was treated for a collapsed lung, a lacerated liver, and a severed spinal cord that resulted in paralysis. Willis and Kedarious were indicted for aggravated assault and conspiracy. At trial, Willis and Kedarious moved for a directed verdict on both counts, and the conspiracy count was dismissed. Before giving jury instructions, the State received a report that one juror had been in contact with Travell's twin brother. The defense requested that she be removed from the jury, to which the State agreed and the alternate juror was seated. The jury found them both guilty of aggravated assault. Willis was sentenced to twenty years in prison as a habitual offender. Willis appealed.

ISSUES

Whether (1) the trial court abused its discretion by barring reference to Travell's earlier conviction and the frequency of his drug use; (2) the trial court improperly ruled Travell's medical records inadmissible; (3) the trial court abused its discretion by allowing the State to present Jenica Powell as a rebuttal witness; (4) the trial court improperly prevented Willis from referencing the trial court's ruling dismissing the conspiracy count in Willis's closing argument; (5) the evidence was legally sufficient to support Willis's conviction for aggravated assault; (6) the trial court erred by not granting Willis's motion for a new trial in light of the alleged contact between a juror and the victim's twin brother; and (7) Willis's twenty-year sentence as a habitual offender for aiding or abetting commission of aggravated assault was excessive, unreasonable, cruel and unusual, or grossly disproportionate.

HOLDING

(1) Because facts regarding a prior conviction were inadmissible character evidence pursuant to Miss. R. Evid. 404(b), and because the trial court's unrelated ruling did not limit the scope of the evidence Willis and Kedarious introduced concerning drug use, the trial court did not abuse its discretion by barring reference to Travell's earlier conviction and frequency of drug use. (2) Because Travell's medical records were not certified in accordance with Miss. R. Evid. 803(6) and 901(11), the trial court properly ruled the medical records inadmissible. (3) Because Powell's testimony was presented to discredit testimony that defense witnesses offered, the trial court did not abuse its discretion in allowing it on rebuttal. (4) Because Willis failed to provide legal support for his argument regarding references to the conspiracy count in closing arguments, the trial court did not abuse its discretion in preventing Willis from referencing the trial court's conspiracy count in Willis's closing argument. (5) Because Powell and Travell provided sufficient evidence to allow the jury to find that Willis aided or abetted in committing the crime, the evidence supporting the verdict was not legally insufficient. (6) Because Willis failed to make a motion for a mistrial when the juror's actions were discovered and the juror was dismissed, the trial court did not abuse its discretion by denying Willis's motion for a new trial. (7) Because the twenty-year sentence was within statutory guidelines, and because a threshold comparison revealed that the sentence was not disproportionate to the crime committed, Willis's twenty-year sentence as a habitual offender for aiding and abetting commission of aggravated assault was not unreasonable, cruel and unusual, or grossly disproportionate. Therefore, the Supreme Court affirmed the judgment of the Copiah County Circuit Court.

CONCURRENCE IN PART & IN RESULT

Presiding Justice King argued that the trial court erred by refusing to allow defense counsel to cross-examine Travell regarding the entirety of his criminal record after he provided inaccurate testimony. However, he agreed that this did not rise to the level of reversible error and therefore concurred with the majority's result.

Affirmed - 2018-KA-01509-SCT (Apr. 9, 2020)

Opinion by Chief Justice Randolph - Concurrence in Part & in Result by Presiding Justice King

Hon. Lamar Pickard (Copolia County Circuit Court)

Matt W. Kitchens for Appellant - John R. Henry Jr. (Att'y Gen. Office) for Appellee

Briefed by [Cecelia Hurt](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 25, 2020

COURT OF APPEALS - CIVIL CASES

ING V. ADAMS

CIVIL - CONTRACT

APPELLATE PROCEDURE - DISPUTES - RES JUDICATA - Miss. R. App. P. 40(a) allows a party who disputes the appellate court's ruling to challenge it by filing a motion for rehearing; if the party fails to file such motion within fourteen days of the decision, the appellate court's judgment becomes res judicata with respect to the parties

APPELLATE PROCEDURE - LAW OF THE CASE - MANDATES - A mandate that the Court of Appeals issues is binding on the trial court on remand so long as there is a similarity of facts

CONTRACTS - BREACH - ACCRUED EXPENSES - A tenant is not in default for discontinuing monthly payments for the time that the landlord is in breach of contract

FACTS

Terry Ing signed a five-year lease of a building that Song Adams owned in Holly Springs. Ing's lease was to begin on January 27, 2010. The contract required Ing to pay \$2,500 per month for the duration of the lease with an option to purchase the building at the end of the lease. If Ing did not exercise the purchase option, the lease would become a month-to-month lease. Four days prior to the lease's expiration, Ing notified Adams that he wanted to purchase the building, but Adams refused to sell. After Ing stopped paying rent, Adams filed a complaint in the Marshall County Circuit Court. In 2016, the circuit court held that Ing failed to exercise his option to purchase, granted Adams's motion to evict, and found Ing liable for back rent. Ing appealed and, in May 2018, the Court of Appeals reversed the circuit court's decision. The Court of Appeals found that Ing properly exercised his purchase option and therefore was not a "holdover tenant" subject to liability for accruing rent. Additionally, the Court of Appeals remanded the case to set a reasonable closing date that accounted for Ing's need to secure financing. Adams presented the only appraisal offered at trial for \$350,000, as a licensed residential appraiser found. The Court of Appeals noted that if Ing failed to meet his purchase obligations, the issue of holdover rent would be revisited. Ing obtained two commercial appraisals. Based on his \$280,000 appraisal, Ing was approved for a loan of \$255,000. However, the parties were again unable to agree on a purchase price. In April 2019, Ing filed a Motion to Determine Appraisal Value and argued that the Court of Appeals erred in remanding his case with instructions for the property to be sold at Adams's appraised value of \$350,000 because her appraisal was done by a residential, not commercial appraiser. The circuit court held that the value set was appropriate and found that Ing had not closed by the set deadline. The circuit court granted Adams's motion to evict and ordered a total payment of \$130,000 from Ing in back rent. Ing appealed.

ISSUES

Whether the trial court erred in (1) refusing to invalidate the original appraisal and (2) finding that Ing was not an equitable owner and owed back rent from June 2015.

HOLDING

(1) Because the lease-purchase option did not specify what kind of appraised value was intended or include any conditions on Ing’s ability to secure financing, and because Ing sought no further considerations from the appellate courts on the pricing issue, the mandate from the Court of Appeals became res judicata to the parties and the trial court did not err in enforcing the price. (2) Because the Court of Appeals found that Ing became an equitable owner once he exercised his purchase option, and because Ing lost his equitable ownership status once he failed to close by the deadline, the trial court erred in its calculation of back rent owed and Ing should only owe a total of \$25,000 beginning at the time he failed to close. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the judgment of the Marshall County Circuit Court.

Affirmed in Part; Reversed & Rendered in Part - 2019-CA-00936-COA (Aug. 25, 2020)

Opinion by Judge McDonald

Hon. John Andrew Gregory (Marshall County Circuit Court)

Joseph Whitten Cooper for Appellant - Kent E. Smith for Appellee

Briefed by [Greyson Young](#)

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PARISH TRANSP. LLC V. JORDAN CARRIERS INC.

CIVIL - CONTRACT

CONTRACTS - ENFORCEABILITY - ELECTRONIC SIGNATURE - Under Miss. Code Ann. § 75-12-3(8), an electronic signature is “an electric sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record”

CONTRACTS - FORMATION - STATUTE OF FRAUDS - Under Miss Code Ann. § 75-2-201(1), “a contract for the sale of goods for the price of five hundred dollars (\$500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker”

FACTS

In early 2016, Parish Transport LLC and Jordan Carriers Inc. began to negotiate the sale of heavy equipment. Doug Jordan of Jordan Carriers offered via email to sell the equipment for \$1,443,000. Eric Parish of Parish Transport emailed Jordan a counteroffer of \$1,250,000. Jordan responded that he would have to discuss the counteroffer with his brother. After Parish sent another email expressing his eagerness to close the deal quickly, Jordan responded, “Ok. Let’s do it. I need to get my people in touch with your people. Do you have a preference on how the money is spread out on the equipment?” After discussing how the money would be spread out, Jordan told Parish to call “Lynda,” but Parish was unable to contact her. Two days later, Lone Star Transportation LLC agreed to purchase the equipment for more than Parish had offered. Jordan emailed Parish and told him that a contract had already been entered into for the equipment. After Parish threatened litigation, Jordan filed a motion for a declaratory judgment in the Adams County Circuit Court and asked the circuit court to find that it did not have a contract with Parish. Parish filed a complaint in the Jones County Circuit Court, alleging breach of contract and misrepresentation. After venue was transferred to the Adams County Circuit Court, Jordan filed a motion for summary judgment, arguing that the emails between the parties did not satisfy the statute of frauds. The circuit court granted summary judgment and found that the emails between Jordan and Parish did not constitute a valid, binding, written contract signed by the party against whom enforcement was sought pursuant to Mississippi law and the statute of frauds. Parish appealed, and Jordan cross appealed.

ISSUE

Whether an enforceable contract existed between Jordan Carriers and Parish Transport.

HOLDING

Because merely sending an email does not satisfy the requirements for an electronic signature under Miss. Code Ann. § 75-12-3(8), and because Jordan’s email was ambiguous, an enforceable contract did not exist between Jordan Carriers

Inc. and Parish Transportation LLC. Therefore, the Court of Appeals affirmed the judgment of the Adams County Circuit Court.

Affirmed - 2019-CA-01109-COA (Aug. 25, 2020)

En Banc Opinion by Judge J. Greenlee

Hon. Debra W. Blackwell (Adams County Circuit Court)

Mark D. Morrison & Ken R. Adcock for Appellants - Grayson Randolph Lewis for Appellee

Briefed by [Blake Tims](#)

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POND V. POND

CIVIL - DOMESTIC RELATIONS

CIVIL PROCEDURE - RELIEF FROM JUDGMENT - NEWLY DISCOVERED EVIDENCE - Miss. R.Civ. P. 60(b)(3) instructs that newly discovered evidence must be evidence which by due diligence could not have been discovered in time to move for a new trial under Miss. R.Civ. P. 59(b)

FAMILY LAW - DIVORCE - PREPARATION OF EVIDENCE - It is incumbent upon the parties, and not the chancellor or opposing party, to prepare evidence touching on matters pertinent to the issues to be tried

FAMILY LAW - DIVORCE - ABSENCE OF EVIDENCE - In the absence of any other evidence, the chancellor should proceed on the best information available

FAMILY LAW - DIVORCE - DIVISION OF MARITAL ASSETS - The division of marital assets is a matter committed to the discretion and conscience of the court, having in mind all of the equities and other relevant facts and circumstances

FAMILY LAW - DIVORCE - EQUITABLE DIVISION - The foundational step to make an equitable distribution of marital assets is to determine the value of those assets based on competent proof

FACTS

Wanda Pond filed for divorce from her then-husband, Chris Pond. Following trial, the Rankin County Chancery Court granted Wanda a divorce from Chris based on clear and convincing evidence of uncondoned adultery. The chancellor relied on the information that the parties provided to divide the marital assets between the parties, and entered the final judgment of divorce on April 12, 2019. Twelve days later, Chris filed a motion for reconsideration pursuant to Miss. R.Civ. P.59. Due to the motion's untimeliness, the chancery court converted the motion to a Miss. R.Civ. P. 60(b)(3) motion, which was ultimately denied. Chris appealed.

ISSUES

Whether the trial court erred in (1) assigning value to Chris's pension plan and (2) its division of marital assets.

HOLDING

(1) Because Chris failed to provide any evidence related to the value of his pension plan at trial and failed to show that the evidence was undiscoverable at trial or within ten days following the trial, the trial court did not err in assigning value to Chris's pension plan. (2) Because there was substantial evidence to support the chancellor's findings that Chris's addictions and medical conditions contributed to the dissipation of assets, that the workshop he built after draining his 401K added no value to the marital home, and that Chris contributed to the destruction of the marriage through his addictions, poor financial dealings, and admitted adultery, the trial court did not err in its division of marital assets. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Affirmed - 2019-CA-00809-COA (Aug. 25, 2020)

Opinion by Judge Westbrook

Hon. Troy Farrell Odom (Rankin County Chancery Court)

Robert Russell Williard for Appellant - Emily Robertson Sumrall for Appellee

Briefed by [Cody Austin](#)

RILEY V. HEISINGER

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - MODIFICATION - At trial, the parent seeking custody modification must show (1) a material change in circumstances occurred since the issuance of the decree sought to be modified; (2) that the material change adversely affected the minor child; and (3) that it would be in the child's best interest for custody to change
FAMILY LAW - CUSTODY - BEST INTEREST OF CHILD - The polestar consideration in a child custody case is the best interest of the child

FAMILY LAW - BEST INTEREST OF CHILD - ALBRIGHT ANALYSIS - When evaluating a child's best interest, the following factors must be considered: (1) the age, health, and sex of the child; (2) which parent has had continuity of care; (3) the parties' parenting skills; (4) the parties' willingness and capacity to provide primary child care; (5) the parties' employment responsibilities; (6) the parties' physical and mental health and age; (7) the emotional ties of parent and child; (8) the parties' moral fitness; (9) the home, school and community records of the child; (10) the child's preference, if the child is at least twelve years old; (11) the stability of the home environment and employment of each party; and (12) and other factors relevant to the parent-child relationship

FAMILY LAW - DIVORCE - ATTORNEY'S FEES - Determining whether to award attorney's fees in a divorce action is a matter largely entrusted to the chancellor's discretion

FACTS

In 2011, Priscilla Riley became pregnant and believed that Adam Heisinger might be the father. Priscilla moved to Iowa, and their daughter, B.H., was born in 2012. Adam was deployed overseas at the time, but demanded DNA testing once her returned and was determined to be B.H.'s father. In September 2013, an Iowa court awarded Adam and Priscilla joint legal custody, awarded Priscilla physical custody, and awarded Adam visitation. At the time, Adam was in a residency program in Ohio. In November 2014, the Iowa court found Priscilla in contempt for denying Adam visitation with B.H. Around that time, Priscilla, her husband, and B.H. moved to Meridian. In August 2015, Adam discovered burn marks on B.H.'s finger and forearm. However, each party blamed the other. As a result, Priscilla denied Adam visitation and filed a petition in the Lauderdale County Chancery Court to enroll the Iowa judgment and to suspend and/or modify Adam's visitation. The chancellor then appointed a guardian ad litem ("GAL"). B.H. was uncomfortable around Adam because Priscilla denied him visitation for several months. Thus, the GAL recommended B.H. receive counseling from Dr. Jennifer Whitcomb, a child psychologist. In September 2016, the first trial occurred and Priscilla refused to allow Adam any pre and post-trial visitation with B.H. without a court order. The chancellor found that Priscilla tried to coach B.H. to accuse her father of burning her. Thus, the chancellor denied Priscilla's request to modify visitation as well as Priscilla's petition to suspend visitation or to require supervised visitation. The chancellor also found Priscilla in contempt for willfully violating a court order by denying Adam's multiple visitation requests and that there was a material change in circumstances due to Priscilla's interference with visitation. However, the chancellor found that it was in B.H.'s best interest to remain with Priscilla after considering the *Albright* factors. Adam appealed and filed a petition for contempt. After a hearing, the chancery court entered an agreed order that Adam's contempt petitions would be heard later. Priscilla was ordered to obtain a birth certificate reflecting B.H.'s surname and to continue working with Dr. Whitcomb. Subsequently, the case was reversed, and Adam's petition to modify custody was remanded for a new *Albright* analysis. The chancellor originally erred by weighing continuity of care and emotional ties between the parents and child in favor of Priscilla. Thus, the chancellor set the case for a new trial on December 3-4, 2018. Both parties stipulated that the chancellor could consider all evidence and testimony from the first trial on remand. On remand, the GAL recommended a change of custody due to Priscilla's consistent misconduct. Dr. Whitcomb testified that Priscilla's parenting decisions amounted to emotional abuse. Adam testified that Priscilla repeatedly denied his requests for visitation between September 2016 and October 2017. Adam testified that his work schedule would allow him to take B.H. to school and pick her up from daycare, and Priscilla testified that she was a stay-at-home mom to four kids and that B.H. was close with her half siblings. Adam never received an official copy of B.H.'s birth certificate

and Priscilla did not use Adam's last name on B.H.'s school and medical records. Priscilla also did not re-engage Dr. Whitcomb's counseling. Accordingly, the chancellor found Priscilla in contempt of prior orders and awarded Adam \$8,000 in attorney fees. The chancellor conducted a new *Albright* analysis and found that it would be in B.H.'s best interest for Adam to have custody. The petition to modify custody was granted, Adam was awarded physical and legal custody of B.H., and Priscilla was granted visitation. Priscilla appealed.

ISSUE

Whether (1) the chancellor followed the Court of Appeals' instructions on remand; (2) based on the Court of Appeals' prior decision, the chancellor's finding of a material, adverse change in circumstances was the law of the case; (3) the chancellor committed any clear or manifest error in applying the *Albright* factors or by finding that a modification of custody was in B.H.'s best interest; (4) the chancellor was required to appoint a new GAL; and (5) the chancellor's findings of contempt and award of attorney's fees were supported by substantial evidence.

HOLDING

(1) Because both parties stipulated that the chancellor could consider all evidence from the first trial, and because the first trial evidence and Priscilla's history of denying visitation was relevant in determining B.H.'s present best interest, the chancellor did follow the Court of Appeals' instructions on remand. (2) Because the material change was already established and supported by credible evidence in the first appeal, and because the chancellor was correct to proceed directly to the new *Albright* analysis, the chancellor's finding of a material, adverse change in circumstances was the law of the case on remand. (3) Because the chancellor followed the Court of Appeals' prior decision by not finding the emotional ties factor in Priscilla's favor due to her misconduct, because the chancellor found the parenting skills factor favored Adam based on Priscilla's continued influence in his relationship with B.H., because there was no compelling evidence that either parent's schedule would be in B.H.'s best interest such that finding the employment responsibilities as a neutral factor would not constitute an abuse of discretion, because there was substantial evidence to support finding the moral fitness factor favored Adam, because the chancellor found it was in B.H.'s best interest to award custody to Adam despite separation from step and half siblings, and because the chancellor had ultimate discretion in weighing the evidence to determine B.H.'s best interest as he saw fit, the chancellor did not commit any clear or manifest error in applying the *Albright* factors or finding that modifying custody was in B.H.'s best interest. (4) Because neither party made a formal allegation of abuse, and because the chancellor had discretion to determine whether assertions of abuse/neglect were legitimate to warrant a GAL, the chancellor was not required to appoint a new GAL (5) Because Priscilla was in contempt on all three of Adam's petitions by failing to change B.H.'s surname on her birth certificate, failing to obtain a new birth certificate, and denying Adam visitation, the chancellor's findings of contempt and award of attorney's fees were proper and supported by substantial evidence. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Chancery Court.

CONCURRENCE IN PART/DISSENT IN PART

Judge Lawrence agreed that there was sufficient evidence to justify the chancery court's order of contempt against Priscilla and the payment of attorney's fees, and agreed with *Story*'s holding that a parent should not benefit from his or her wrongdoing and that the parent's actions should be considered when weighing the *Albright* factors. However, he argued that although *Riley I* followed the Court of Appeals' instruction in *Story*, it went too far by instructing the chancellor how to find a certain *Albright* factor on remand. As a result, he would reverse the chancellor's decision and remand for a new *Albright* analysis free from the Court's command that certain factors be neutral or in Adam's favor.

Affirmed - 2019-CA-00211-COA (Aug. 25, 2020)

En Banc Opinion by Presiding Judge Wilson - Concurrence in Part & Dissent in Part by Judge Lawrence

Hon. Jerry G. Wilson (Lauderdale County Chancery Court)

William Stacy Kellum III for Appellant - J. Douglas Ford for Appellee

Briefed by [Madison Reightler](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

MCDADE V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - SUBSEQUENT MOTIONS - BAR - Under Miss. Code Ann. 99-39-23(6), any order dismissing the petitioner’s motion or otherwise denying relief under the Uniform Post-Conviction Collateral Relief Act (“UPCCRA”) is a final judgment and shall be a bar to a second or successive motion

POST-CONVICTION RELIEF - SUBSEQUENT MOTIONS - EXCEPTION - When a subsequent PCR motion is filed, the burden falls on the movant to show he has met a statutory exception

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - FAILURE TO FILE - A motion for post-conviction relief must be filed within three years following the entry of judgment of conviction, and failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - Errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA

FACTS

In 2008, Michael Anthony McDade was indicted for armed robbery and charged as a habitual offender. At the time of his arrest, McDade was on parole from a life sentence for a prior murder conviction. The new robbery charge resulted in the revocation of his parole. In November 2009, McDade pled guilty to robbery and filed a sworn “Petition to Enter Plea of Guilty.” McDade was sentenced to serve three years to run consecutively with his life sentence. In December 2012, McDade filed his first post-conviction collateral relief (“PCR”) motion in the Lauderdale County Circuit Court. The circuit court denied his motion as frivolous, and McDade filed a notice of appeal in January 2014. In April 2014, McDade filed a pro se motion requesting dismissal of his appeal, and the Court of Appeals granted McDade’s motion to dismiss. In October 2018, nearly a decade after his conviction, McDade filed his second PCR motion, challenging the legality of his sentences and alleged numerous constitutional violations. The circuit court dismissed McDade’s second PCR motion as successive and time-barred. McDade appealed.

ISSUES

Whether the trial court erred in (1) dismissing McDade’s PCR motion for being untimely and (2) dismissing McDade’s PCR motion as successive.

HOLDING

(1) Because McDade’s second PCR motion, which was filed nearly a decade after his conviction, was outside of the applicable three-year UPCCRA statutory limitations period, the trial court properly dismissed McDade’s motion as time-barred. (2) Because McDade’s first PCR motion was denied, which procedurally barred any successive claims absent a statutory exception, and because McDade failed to provide proof of the alleged constitutional violations, he clearly failed to establish an excepted error to overcome the UPCCRA procedural bars and the trial court properly dismissed McDade’s PCR motion as successive. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2019-CP-00785-COA (Aug. 25, 2020)

Opinion by Judge Westbrook

Hon. Robert Thomas Bailey (Lauderdale County Circuit Court)

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

Briefed by [Betsy Lee Montague](#)

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SANDLIN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - *STRICKLAND* TEST - ELEMENTS - To prove a claim of ineffective assistance of counsel, both prongs of the *Strickland* test must be satisfied: (1) the defendant must show that counsel's errors were so severe that counsel was not functioning as guaranteed by the Sixth Amendment and (2) the defendant must show that the counsel's errors were so severe that the defendant was deprived of a fair trial

POST-CONVICTION RELIEF - *BRAWNER* RULE - MERIT - In *Brammer*, the Mississippi Supreme Court held that "counsel will not be deemed ineffective for following his client's wishes, so long as the client has made an informed decision"

POST-CONVICTION RELIEF - CUMULATIVE ERROR - MERIT - Individual errors that are not reversible in and of themselves may combine to make up a reversible error if the cumulative effect deprives the defendant of a fair trial

FACTS

Lisa Sandlin lived in Saltillo, Mississippi with her husband, Sammy Sandlin, and mother-in-law, Mary Sandlin. Sammy's son from a previous marriage, Kirk Sandlin, lived down the hill on the same parcel of family land. In September 2010, Kirk walked to Sammy and Lisa's home to talk to his grandmother. During the conversation, an argument broke out between Lisa and Kirk. After engaging in a heated verbal argument, Lisa eventually separated herself from the altercation, retreating back indoors. Kirk, however, remained outside the house. Sammy returned home and confronted Kirk about the altercation. Lisa came back outside and the argument resumed, escalating when Kirk pushed Lisa and spit at her. Enraged, Lisa went back into the house and retrieved Sammy's shotgun from the bedroom closet. She then returned outside with the gun and shot Kirk in the abdomen. Kirk died soon afterwards from the gunshot wound. Police arrived at the scene and Lisa was arrested. At trial, Christopher Bauer represented Lisa, and used the trial strategy to allow Lisa's husband to testify at trial and base Lisa's case on the shooting being accidental rather than on self-defense. In December 2011, a jury convicted Lisa on the charge of first-degree murder. Lisa directly appealed and, in 2013, the Mississippi Supreme Court affirmed her conviction. Two years after her appeal, Lisa filed an application for leave to proceed with a post-conviction relief ("PCR") motion with the Mississippi Supreme Court, which was granted on three of the seven issues alleged. Lisa then filed her PCR motion in the Lee County Circuit Court. After considering the totality of the circumstances and the testimony given at the hearing, the circuit court denied Lisa's PCR motion. Lisa appealed.

ISSUES

Whether (1) Lisa's counsel was ineffective by failing to object to the district attorney calling Sammy as a witness; (2) Lisa's counsel was ineffective for objecting to the state's attempt to include self-defense in the elements instruction; and (3) there were cumulative errors that denied Lisa her constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

HOLDING

(1) Because Lisa was part of the decision-making process throughout the trial and it was ultimately her decision to have Sammy testify, this issue was without merit. (2) Because Lisa's attorney had numerous conversations with her about alternative trial strategy leading up to the trial, this issue was without merit. (3) Because Lisa's two claims of ineffective counsel were without merit, there were no errors by the trial court that would require reversal and this issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

DISSENT

Presiding Judge Carlton argued that, because a criminal defendant has a right to assert alternative theories of defense and there was a sufficient amount of evidence in the record for Lisa to argue self-defense, Lisa met her burden of proving ineffective counsel on her claim that counsel's objection to include self-defense in the element instruction prejudiced her defense.

Affirmed - 2019-CA-00282-COA (Aug. 25, 2020)

En Banc Opinion by Judge Lawrence - Dissent by Presiding Judge Carlton
Hon. Paul S. Funderburk (Lee County Circuit Court)
Merrill K. Nordstrom & Lawrence John Tucker Jr. for Appellant - Lisa L. Blount (Att’y Gen. Office) for Appellee

Consolidated with:

Affirmed - 2012-KA-00258-SCT (Oct. 10, 2013)

Hon. Paul S. Funderburk (Lee County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Lisa L. Blount (Att’y Gen. Office) for Appellee

Briefed by [John Michael Sweatt](#)

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COURT OF APPEALS - CRIMINAL CASES

BOLER V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - ILLEGAL SEARCH & SEIZURE - CHALLENGE - A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed, and only defendants whose Fourth Amendment rights have been violated may benefit from the amendment’s protections

EVIDENCE - ADMISSIBILITY - COURT’S DISCRETION - Relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused

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

FACTS

Officer Winstead was dispatched to a call near Pearl Avenue and Loper Street and was the first to respond to the scene. Officers Jeremy May and Joe Willis arrived later, and Winstead recognized a familiar black vehicle. Winstead gave the tag number to dispatch and learned that one of the registered owners, Travis Boler, had outstanding warrants with the city. As the three officers approached the vehicle, Boler pulled into the driveway of an unknown residence, exited the vehicle, and threw the keys to a woman standing nearby. Winstead parked his car behind Boler’s and advised Boler to go near the patrol car. Winstead took Boler into custody, handcuffed him, and left him at the front of the vehicle. The officers planned to tow and impound Boler’s vehicle, but could not locate the keys due to Boler discarding them. May stood by the passenger side front door, shined a flashlight through the window, and noticed a “crystal-like substance.” May notified Winstead the car was unlocked, and then opened the door to find methamphetamine and marijuana in the center console. A Neshoba County grand jury indicted Boler as a habitual offender for one count of possession of methamphetamine and one count of possession of marijuana. During Winstead’s testimony, the circuit court excused the jury and held a hearing on the defense’s motion to suppress the drugs recovered from Boler’s vehicle. May testified that when he shined the light on the center console, he saw the methamphetamine and marijuana “in plain sight.” May’s body-camera video footage was played during the hearing, which corroborated his testimony. Ultimately, the circuit court denied the motion to suppress. The jury found Boler guilty of possession of methamphetamine and marijuana. Boler filed a motion for a new trial, which was denied. Boler appealed.

ISSUE

Whether the circuit court erred in allowing the jury to hear evidence seized under the plain view doctrine.

HOLDING

Because the drugs were within the plain view of the officer, the illegal substance was subject to seizure and was able to be introduced into evidence. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Circuit Court.

Affirmed - 2019-KA-00602-COA (Aug. 25, 2020)

Opinion by Judge Lawrence

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

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

Briefed by [Morgan Hart](#)

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BURFORD V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - BURGLARY - ELEMENTS - Pursuant to Miss. Code Ann. § 97-17-23, the prosecution must prove that the defendant committed the unlawful breaking and entering of the dwelling house or inner door of such dwelling house of another with the intent to commit a crime once entry has been gained

CRIMINAL PROCEDURE - DIRECTED VERDICT - REASONABLE DOUBT - The relevant question in determining whether a directed verdict should be granted is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS - A guilty plea will only be binding upon a criminal defendant if it is voluntary and intelligently entered, which means a defendant must be advised about the nature of the crime charged against him and the consequences of the guilty plea

FACTS

The Clarke County Sheriff’s Department dispatched an officer to investigate a burglary at Kaytelyn Smith’s residence. Smith provided the officer with a list of items missing from her home. Two days later, the sheriff’s department took part in a car chase, in which the car was ultimately wrecked and the occupants escaped on foot. The officers searched the car and found several items, including identification cards belonging to Cynthia Burford’s boyfriend, Casey Dunnigan. The sheriff’s department called Smith and she identified items from the car as the missing property from her residence. Officers searched Burford’s home and retrieved additional stolen items relating to the initial burglary. A grand jury indicted Burford and Dunnigan for one count of burglary of a dwelling and, in the alternative, one count of grand larceny. Burford was tried separately, with the State presenting two witnesses and Burford’s written and recorded statements. Following her testimony, Burford rested and renewed her motion for a directed verdict. The court denied the motion. The jury found Burford guilty of burglary of a dwelling. After sentencing, Burford filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, arguing that her confession was not knowingly, intelligently, and voluntarily made. The circuit court denied the motion. Burford appealed.

ISSUES

Whether the circuit court erred by (1) denying Burford’s motion for judgment notwithstanding the verdict; (2) admitting Burford’s written and recorded confessions; (3) excluding evidence concerning Burford’s intent; and (4) ordering restitution.

HOLDING

(1) Because the jury was instructed on both burglary of a dwelling and grand larceny, and because there was sufficient evidence that Burford had the requisite intent, the trial court did not err in denying Burford’s motion for judgment notwithstanding the verdict. (2) Because Burford’s did not timely file a motion to suppress, and because testimony or other evidence corroborated the State’s case, the issue was procedurally barred and trial court did not err by admitting Burford’s written and recorded confessions. (3) Because the statement Burford attempted to offer was hearsay, the trial

court did not err by excluding evidence concerning Burford's intent. (4) Because the issue was waived after Burford failed to object to the restitution at the time of sentencing or in a post-trial motion, the trial court did not err by ordering restitution. Therefore, the Court of Appeals affirmed the judgment of the Clark County Circuit Court.

Affirmed - 2019-KA-00180-COA (Aug. 25, 2020)

En Banc Opinion by Presiding Judge Greenlee

Hon. Charles W. Wright Jr. (Clarke County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Ashley L. Sulser & Matthew W. Walton (Att'y Gen. Office) for Appellee

Briefed by [Joshua L. Holmes](#)

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HARRIS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SEARCHES & SEIZURES - INVESTIGATORY STOP - Under *Wren*, an investigatory traffic stop is permissible where an officer has reasonable suspicion to believe that the occupants of a vehicle have been, are currently, or are about to be involved in criminal activity

EVIDENCE - SUFFICIENCY - GUILTY KNOWLEDGE - Under *Whatley*, guilty knowledge may be shown by evidence that the defendant received the property under circumstances that would lead a reasonable man to believe it to be stolen

CRIMINAL PROCEDURE - MOTOR VEHICLES - REGULATIONS - Miss. Code Ann. § 63-25-5(3)(a) states that “[a]ny person who buys, disposes, sells, transfers[,] or possesses a motor vehicle or motor vehicle part with the knowledge that the [VIN] of the motor vehicle or motor vehicle part has been altered, counterfeited, defaced, destroyed, disguised, falsified, forged, obliterated[,] or removed shall be guilty of a felony”

CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDERS - Miss. Code Ann. § 99-19-81 states that “every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times... shall be sentenced to the maximum term of imprisonment prescribed for such felony”

CONSTITUTIONAL LAW - RIGHT TO SPEEDY TRIAL - BALANCING TEST - *Barke* establishes a “balancing test” which considers (1) length of delay; (2) reason for delay; (3) defendant’s assertion of his or her right to a speedy trial; and (4) prejudice to the defendant as factors for determining the violation of a defendant’s constitutional speedy-trial right

FACTS

A police officer received a be-on-the-lookout notification for a stolen truck. Roosevelt Harris was driving a truck with the same license plate number as the notification, and the officer pulled him over. The officer asked for Harris’s consent to search the truck for documentation to determine whether the vehicle was stolen. Harris consented to the search, and the officer retrieved a certificate of title, a bill of sale, insurance cards, and the vehicle’s registration from the truck. All documents indicated that Harris owned the truck. It was also discovered that a VIN sticker had been covering the truck’s original VIN, which matched the VIN of the stolen truck. Harris was arrested and charged with possession of stolen goods (“Count I”); possession of a vehicle with an altered VIN (“Count II”); and making a false representation to defraud the government (“Count III”). Harris filed a pretrial motion to suppress the evidence obtained during the search, which the circuit court denied. At trial, the officer testified regarding how he found the original VIN number and explained why there was no video recording of the arrest from the arresting officer’s squad car. The police department’s chief investigator testified that the truck’s Bill of Sale was fraudulent, and the dealership that originally sold the truck testified that the truck’s title applications were fraudulent. The jury found Harris guilty of all three counts and sentenced him as a habitual offender. Harris filed a motion for a new trial, which was denied. Harris appealed.

ISSUES

Whether (1) the circuit court erred in denying Harris’s motion to suppress; (2) the State presented insufficient evidence to support the jury’s verdict as to each count; (3) the circuit court erred by sentencing Harris as a habitual offender; (4) the State failed to preserve evidence; (5) the trial court erred by imposing an illegal sentence; (6) the State improperly instructed the jury on the law of the case; (7) Harris was subjected to double jeopardy in regard to Counts I and II of his indictment; (8) the circuit court violated Harris’s constitutional right to a speedy trial; (9) the State committed prosecutorial misconduct during its closing argument; and (10) Harris had an ineffective assistance of counsel.

HOLDING

(1) Because the officer had reasonable suspicion and probable cause to conduct an investigatory stop of Harris’s truck, and because Harris consented to the officer’s search of his vehicle, the circuit court’s denial of Harris’s motion to suppress evidence was appropriate. (2) Because the State showed at trial that Harris purchased the truck at a discounted rate, possessed a bill of sale and title application that were riddled with errors, bought new license plates, and established the original value of the stolen truck; because, despite Harris’s familiarity with purchasing, owning, and operating various vehicles, Harris maintained that he noticed nothing questionable about the truck’s VIN; and because the evidence at trial failed to prove that Harris produced the title application to the officer; the State presented sufficient evidence to prove beyond a reasonable doubt each element of receiving stolen property and that Harris knew or should have known that his truck’s VIN had been altered, but failed to provide beyond a reasonable doubt that Harris “knowingly” or “willfully” made, used, or produced the title application with the “intent to defraud” the police officer. (3) Because Harris’s two felony convictions sufficiently established his habitual offender status under Miss. Code Ann. § 99-19-81, the circuit court did not err by sentencing Harris as a habitual offender. (4) Because Harris failed to prove that the State acted in bad faith, his argument lacked merit. (5) Because the sentences that the circuit court imposed fell within the applicable statutory sentencing limits and there was no inference of gross disproportionality, the circuit court did not impose an illegal sentence. (6) Because instructing the jury on the caselaw aided the jury in its understanding of the evidence, there was no abuse of discretion in the circuit court’s decision. (7) Because Counts I and II of Harris’s indictment charged two separate and distinct offenses, Harris’s claim that Counts I and II of his indictment subjected him to double jeopardy lacked merit. (8) Because Harris failed to assert any demand for a speedy trial until after the proceedings, and because of the absence of any prejudice in the case as a result of the delay, the circuit court did not err in its decision to overrule Harris’s *ore tenus* motion. (9) Because Harris failed to object to the State’s comments during closing argument, he was procedurally barred from raising this issue on appeal. (10) Because the parties did not stipulate to the adequacy of the record, and because the facts surrounding Harris’s claims of ineffective assistance of counsel were not fully apparent from the record, Harris’s right to seek permission from the Supreme Court to file a motion for post-conviction relief was denied. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the judgment of the Rankin County Circuit Court.

CONCURRENCE IN PART / DISSENT IN PART

Presiding Judge Carlton agreed with the Court’s decision to affirm Harris’s convictions and sentences for Counts I and II. However, she dissented with the majority’s decision to reverse and render Harris’s conviction and sentence for Count III, arguing Harris knew of his fraudulent paperwork in the truck and that by consenting to a search, he “knowingly produced” these documents as a result.

Affirmed in Part; Reversed & Rendered in Part - 2018-KA-01266-COA (Aug. 25, 2020)

En Banc Opinion by Chief Judge Barnes - Concurrence in Part & Dissent in Part by Presiding Judge Carlton

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

Hunter Nolan Aikens, George T. Holmes (Pub. Def. Office), & *Pro se* for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee
Briefed by [Muriel Collins](#)

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JASPER V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - AGGRAVATED ASSAULT - ELEMENTS - Miss. Code Ann. § 97-3-7(2)(a) provides that a person is guilty of aggravated assault if he attempts to cause serious bodily injury to another or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life

CRIMINAL PROCEDURE - JURY SELECTION - VOIR DIRE - Voir dire is presumed sufficient to ensure a fair and impartial jury; to overcome this presumption, a party must present evidence indicating that the jury was not fair and impartial and show that prejudice resulted from the trial court's handling of the voir dire

EVIDENCE - OBJECTIONS - PROCEDURAL BAR - A defendant is procedurally barred from asserting an issue on appeal if he fails to object to the statements during trial

FACTS

A Tunica County grand jury indicted Antonio "Mac-T" Jasper for the murder of Jeremy Jones, aggravated assault of Ladarius Hibbler, and felonious possession of a firearm. The Tunica County Circuit Court jury found Jasper guilty of the murder and felonious possession charges, but the jury was unable to reach a verdict on the aggravated assault charge. Jasper was sentenced to life imprisonment for his murder conviction and five years of imprisonment for the felonious possession. Jasper filed a motion for judgment notwithstanding the verdict ("JNOV"), or, in the alternative, a new trial for multiple reasons, including juror misconduct, insufficient evidence, and reversible error. The circuit court held that Jasper's motion was without merit and denied the motion. Jasper appealed.

ISSUES

Whether the trial court erred in (1) failing to grant a new trial in response to Jasper's claim that a juror failed to respond to questions during voir dire and (2) admitting surveillance footage and any narration or commentary of the video from the lay witness.

HOLDING

(1) Because a juror failed to disclose substantial and prejudicial information, and because the circuit court failed to hold a hearing or even inquire into the issue of juror misconduct, the circuit court erred in not granting a new trial. (2) Because Jasper failed to raise the issue of the testimony admission in his JNOV motion, the issue was procedurally barred. Therefore, the Court of Appeals reversed and remanded the judgment of the Tunica County Circuit Court.

Reversed & Remanded - 2019-KA-00684-COA (Aug. 25, 2020)

Opinion by Judge McDonald

Hon. Linda F. Coleman (Tunica County Circuit Court)

John Keith Perry Jr. for Appellant - Barbara Byrd (Att'y Gen. Office) for Appellee

Briefed by [Bess Fisher](#)

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LACEY V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER-INCLUDED OFFENSE - A lesser-included offense instruction should be given where the evidence is such that a reasonable jury could find the defendant not guilty of the principal offense charged in the indictment, yet guilty of the lesser-included offense

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - THEORY OF THE CASE - A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court

may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in another instruction, or is without foundation in the evidence

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - SUA SPONTE INSTRUCTION - A trial court is not required to sua sponte instruct the jury or suggest jury instructions in addition to what the parties tender

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - It is the sole responsibility of the jury to weigh the credibility of the witnesses and resolve conflicts in testimony; the appellate court is to view the evidence in the light most favorable to the verdict and disturb the verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

CRIMINAL PROCEDURE - JURY SELECTION - REFUSAL TO EXCUSE - Before an appellant may challenge a trial court's refusal to excuse a juror for cause, he must show that he utilized all of his peremptory challenges

FACTS

Late one evening, Gary Martin entered the parking lot of an apartment complex known as the "High Rise" and attempted to purchase drugs. Earlier that day, Martin approached High Rise resident Robert Warren trying to purchase drugs, but Warren stated he did not have any drugs. Warren saw Martin return to the High Rise around 2 a.m. the next day and heard two gunshots, which came from the driver's side of Martin's truck. Multiple witnesses saw Martin's truck then go into reverse, jump a curb, and come to rest after hitting a garbage bin and a parked car. Sidney Henderson, another resident of the High Rise who was initially charged alongside David Lacey, also testified to seeing Martin that night. Henderson offered to sell Martin crack cocaine, so Martin drove Henderson to a different part of the complex to retrieve the drugs. Upon Henderson's return with the drugs, Lacey was standing by Martin's driver's side window with Demarco Felps. Henderson pushed Lacey away in order to complete his drug sale. Martin told Henderson that Lacey and Felps had been "jacking him all day and night." Henderson then heard shots ring out near Martin's truck, and saw Lacey pointing a gun at the ground. Henderson, Felps, and Lacey all fled the scene, and Henderson reported his statements to police the following day. Officers arrived at the scene that night and found Martin's body inside his truck with the engine still running, a \$100 bill in his hand, and his wallet still in his pocket, evidencing that he was not robbed. Experts concluded Martin was shot from outside his driver's side door and Lacey's fingerprints were found on Martin's truck. Lacey and Felps were charged with armed robbery and capital murder, while Henderson was charged with accessory after the fact to armed robbery and capital murder as a habitual offender. All charges were severed except the capital murder charges against Lacey and Felps, who were tried as co-defendants. The state requested and received a lesser-included offense instruction of first-degree murder for Lacey. A jury found Felps not guilty and Lacey guilty of first-degree murder. Lacey appealed.

ISSUES

Whether the trial court erred by (1) abusing its discretion regarding jury instructions; (2) denying Lacey's motion for a directed verdict and JNOV; (3) denying Lacey's motion for a new trial; and (4) limiting the two co-defendants to twelve peremptory challenges during jury selection.

HOLDING

(1) Because a reasonable jury could find Lacey guilty of the lesser-included first degree murder charge for which jury instruction was given, because there was no evidence presented at trial which could substantiate a manslaughter instruction as Lacey requested, and because the trial court had no obligation to sua sponte instruct the jury on the definition of "deliberate design" when neither party requested such an instruction, the trial court did not abuse its discretion regarding jury instructions. (2) Because the jury was aware of Henderson's criminal history, his ties to the case, and the alleged inconsistencies in his testimony, and because the physical evidence presented at trial corroborated Henderson's testimony such that a reasonable juror could find Lacey guilty of the crime charged, the trial court did not err in denying Lacey's motion for a directed verdict and JNOV. (3) Because the jury's verdict was not against the overwhelming weight of the evidence in viewing all of the evidence in the light most favorable to the verdict, the trial court did not abuse its discretion in refusing a new trial. (4) Because Lacey had three peremptory challenges remaining and could potentially have cured any error he alleged, the trial court did not commit reversible error in limiting the two co-defendants to twelve peremptory challenges. Therefore, the Court of Appeals affirmed the judgment of the Wayne County Circuit Court.

Affirmed - 2019-KA-00529-COA (Aug. 25, 2020)

Opinion by Judge Lawrence
Hon. Charles W. Wright Jr. (Wayne County Circuit Court)
George Holmes & Leslie Roussell (Pub. Def. Office) for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee
Briefed by [Cameron Johnson](#)

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