

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 4, 2021***SUPREME COURT - CIVIL CASES*****THODEN V. HALLFORD****CIVIL - REAL PROPERTY**

CIVIL PROCEDURE - SERVICE OF PROCESS - REDEMPTION NOTICE - Miss. Code Ann. § 27-43-7 requires redemption notice to be given by personal service, by mail, and by publication in an appropriate newspaper

PROPERTY - TAX SALE - VOID AB INITIO - A tax sale that does not meet the requirements of Miss. Code Ann. § 27-43-3 is void ab initio; a tax sale that is void ab initio is null and void from its inception, and as a matter of law it is as if the transaction never happened

PROPERTY - ILLEGAL SALES - DAMAGES - Miss. Code Ann. § 27-45-27 sets out damages that a purchaser may obtain, including a statutory lien on the amount paid at the tax sale with a 1.5% interest per month and all expenses of the sale and registration as well as other relief

FACTS

Deborah Hallford, the record owner of a house located in Jackson County, failed to pay property taxes on the property. The Jackson County Chancery Clerk attempted to notify Hallford that the period for redemption was nearly close, but the clerk did not satisfy two of the three statutory notice requirements. When the redemption period expired and Hallford failed to redeem the property, the chancery clerk conveyed title to the land to Pierre Thoden after Thoden paid all the delinquent taxes. Thoden obtained a Judgment of Possession, began possession of the property, and began making improvements on the property. Hallford filed a complaint to set aside the tax sale, claiming she never received proper notice through personal service. Hallford claimed the tax sale of her property was void and should be set aside. Thoden received Hallford's complaint and filed his own "Defenses of Law, Affirmative Defenses, Answer and Counterclaim." Hallford then filed a motion for summary judgment, arguing that the notice requirements had not been met and that the tax sale should be declared void. After two hearings, the chancellor ordered the parties to each submit proposed findings of fact and conclusions of law and judgment. The chancellor ruled in favor of Hallford and found that there was inadequate notice and process surrounding the tax sale of Hallford's property and that the tax sale was void. The order denied Thoden any relief for failure to present proof. Thoden filed a motion to amend the chancellor's judgment, arguing that the grant of summary judgment to Hallford and the denial to Thoden of a statutory lien and reimbursement for appliances, costs, and expenses on the property was contrary to law regarding notice to the landowner. In an amended order, the chancery court found that Thoden did have a statutory lien on Hallford's property because Thoden paid \$500 at the tax sale. The chancery court ordered Hallford to pay Thoden this sum, plus interest, within ninety days. Otherwise, the chancery court found Thoden would be entitled to enforce the lien. Thoden appealed.

ISSUES

Whether the chancellor erred by (1) shifting the burden of proof to Thoden regarding the amount he was owed for his statutory lien on the property under Miss. Code Ann. § 27-45-27; (2) denying Thoden reimbursement for the taxes he paid on the property in the years after the tax sale and for the cost of the improvements Thoden made to the property; and (3) allowing Hallford a ninety-day period to pay Thoden for damages without requiring Hallford to pay the interest that would accrue during that time.

HOLDING

(1) Because there was not any discussion regarding Thoden's damages, the burden was on Thoden to present proof of damages and the claim for damages was remanded for a hearing. (2) Because the tax sale was void ab initio, the parcel of land was never sold for delinquent taxes, but Thoden is not prevented from recovering non-statutory damages under

some alternative theory of relief. (3) Because Miss. Code Ann. § 27-45-27 states that payment must be paid “within a short time to be fixed by decree[.]” and because the Mississippi Legislature has not defined “short time,” the Supreme Court declined to define the phrase as well. Therefore, the Supreme Court affirmed the judgment of the Jackson County Chancery Court.

Affirmed in Part; Reversed in Part & Remanded - 2019-CA-01159 (Feb. 4, 2021)

Opinion by Justice Chamberlin

Hon. D. Neil Harris Sr. (Jackson County Chancery Court)

Lewie G. “Skip” Negrotto IV for Appellant - E. Foley Ranson for Appellee

Briefed by [Rachel Fewell](#)

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WILBOURN V. WILBOURN

CIVIL - OTHER

TORTS - MALICIOUS PROSECUTION - ELEMENTS - To prevail on a malicious-prosecution claim, a plaintiff must prove six elements: (1) the institution or continuation of original judicial proceedings, either criminal or civil; (2) by, or at the insistence of the defendant; (3) the termination of such proceeding in plaintiff’s favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceedings; and (6) the suffering of damages as a result of the action or prosecution complained of

CRIMINAL PROCEDURE - PROCEEDINGS - STANDARD - Miss. R. Crim. P. 2.1(a) provides that all criminal proceedings shall be commenced either by charging affidavit, indictment, or bill of information

TORTS - MALICIOUS PROSECUTION - POLICY CONSIDERATION - One policy consideration behind a malicious-prosecution claim is the compelling interest to protect individuals from being wrongly accused of criminal behavior which results in unjustifiable and oppressive litigation of criminal charges

TORTS - MALICIOUS PROSECUTION - PROCEEDINGS - Unsuccessful efforts to secure the institution of proceedings, however malicious or unfounded, are not actionable as malicious prosecution

FACTS

Richard Wilbourn and Victoria Wilbourn were in a longstanding domestic matter. Victoria accused Richard of misconduct towards their children, but the chancellor determined that the accusations were unfounded. Victoria then went to the Ridgeland Police Department (“RPD”) and filed a report against Richard. RPD followed protocol, investigated, and referred the case to the district attorney’s office. Initially, the assistant district attorney, Ashley Allen, decided against pursuing charges, but after Allen wrote a letter to RPD stating her intent, Victoria contacted her. Victoria asked Allen if she would interview the children, and she did. Afterwards, Allen decided to present the case against Richard to a grand jury, charging him with gratification of lust. Richard was never charged, indicted, or arrested in connection with the investigation. In the summer of 2016, Richard discovered the investigation and grand jury presentment. Richard filed suit claiming malicious prosecution, intentional infliction of emotional distress, and negligent infliction of emotional distress. Victoria filed a motion for summary judgment. After a hearing, the trial judge granted partial summary judgment, dismissing Richard’s claim of malicious prosecution but retaining the others. The trial judge found that “no criminal proceedings were instituted and therefore [Richard] cannot satisfy the first element of his claim.” Richard petitioned for an interlocutory appeal on the dismissal of the malicious-prosecution claim.

ISSUE

Whether a criminal proceeding was initiated against Richard.

HOLDING

Because Richard was not arrested, indicted, or otherwise subjected to oppressive litigation of criminal charges for the report Victoria gave to the Ridgeland Police Department, the issue was without merit and the trial judge did not err in dismissing the malicious-prosecution claim. Therefore, the Supreme Court affirmed and remanded the judgment of the Madison County Circuit Court.

CONCURRENCE

Presiding Justice Kitchens wrote a special concurrence to clarify two issues the majority's analysis implicated. First, he asserted that Miss. R. Crim. P. 2.1(a) prevails over the corresponding statute, Miss. Code Ann. § 99-1-7, in defining how a criminal proceeding begins in Mississippi courts. Second, he stated that a warrantless arrest is sufficient proof in a malicious-prosecution case to establish that criminal proceedings were instituted against the plaintiff.

Affirmed & Remanded - 2019-IA-00954-SCT (Feb. 4, 2021)

Opinion by Justice Coleman - Special Concurrence by Presiding Justice Kitchens

Hon. Dewey Key Arthur (Madison County Circuit Court)

C. Maison Heidelberg & Cynthia H. Speetjens for Appellant - Robert S. Addison & Matthew Thompson for Appellee

Briefed by [Mckenzie Williamson](#)

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SUPREME COURT - ORDERS

BRADFORD V. STATE

ORDER

ORDER

In this en banc Order, the Mississippi Supreme Court denied Sam Bradford leave to file a motion for post-conviction relief. The Order also prohibited Bradford from filing any more post-conviction relief motions related to the same conviction in forma pauperis because the court deemed his successive motions for post-conviction relief frivolous.

OBJECTION

Presiding Justice King argued that the court's prohibition on filing additional claims prioritized efficiency over justice, and denying Bradford the opportunity to file in forma pauperis violated his state constitutional right to access relief in civil court.

Ordered - 2011-M-00193 (Feb. 4, 2021)

En Banc Order by Justice Coleman - Objection by Presiding Justice King

Briefed by [Kathleen Workman](#)

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BURRELL V. STATE

EN BANC ORDER

ORDER

In this en banc order, made in consideration of a Motion for Leave that Tyrone Burrell filed pro se, the Supreme Court found Burrell's claims insufficient to merit waiving the procedural bars of his conviction. Burrell was previously warned that filing additional frivolous filings may result in monetary sanctions and restrictions on filing applications for post-conviction collateral relief in forma pauperis. This filing was deemed frivolous and, as such, the Supreme Court imposed restrictions on Burrell filing further applications for post-conviction collateral relief (or pleadings in that nature) in this case.

OBJECTION IN PART

Presiding Justice King disagreed with the Supreme Court's restrictions on filing applications for post-conviction relief in forma pauperis. He argued that justice should take priority over efficiency, and to cut off an indigent defendant's right to proceed in forma pauperis is to cut off his access to the courts and violates his constitutional rights.

Ordered - 2016-M-00576 (Feb. 4, 2021)

En Banc Order by Justice Coleman - Objection in Part by Presiding Justice King

Briefed by [Jack Hall](#)

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WALLACE V. STATE

EN BANC ORDER

ORDER

Antonio Daniel Wallace was convicted of armed robbery, kidnapping, and conspiracy to commit armed robbery. He was sentenced to concurrent thirty-four, thirty-four, and five-year terms, respectively. Wallace filed a motion to seek post-conviction relief in the trial court. Wallace also moved to amend and suspend ruling on his request for leave to seek conviction relief until he filed the motion to amend. The Supreme Court found that the motions to amend and to supplement should be granted, but found that Wallace's motion to suspend the ruling on his request for leave to seek post-conviction relief should be dismissed as moot. Turning to the merit of the pleadings, Wallace raised three issues. First, Wallace argued he was actually innocent, and the Supreme Court found Wallace's claim insufficient to merit waiving it. Second, Wallace asserted newly discovered evidence, and the Supreme Court found the newly discovered evidence did not meet the standard to cause a different result in the conviction or sentence. Finally, Wallace argued that counsel was ineffective in several aspects; however, Wallace's claim was insufficient to merit waiving them. Therefore, the Supreme Court denied Wallace's request for leave to seek post-conviction relief in the trial court. It was further ordered that his motion to amend the previously filed application for leave to proceed to the trial court for post-conviction relief and Wallace's motion to submit additional facts, arguments and evidence regarding ineffective assistance of counsel be granted. Lastly, the motion to suspend on Wallace's pending application for leave to proceed in the trial court for post-conviction relief was dismissed as moot. The Supreme Court warned Wallace that future frivolous filings may result not only in monetary sanctions, but also in restrictions on filing applications for post-conviction relief or pleadings of that nature.

OBJECTION IN PART

Presiding Justice King agreed that Wallace's application for post-conviction relief does not merit relief, but disagreed with the Supreme Court's warning that future filings deemed frivolous may result in monetary sanctions and restrictions on filing applications for post-conviction collateral relief in forma pauperis. He argued that the threat of monetary sanctions and restrictions on future filings would serve only as a way to punish or preclude a defendant from his or her lawful right to appeal. Rather, he argued that the Supreme Court should only deny or dismiss motions that lack merit.

Ordered - 2019-M-01279 (Feb. 2, 2021)

En Banc Order by Justice Coleman - Objection by Presiding Justice King

Briefed by [Morgan Hart](#)

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SUPREME COURT - CRIMINAL CASES

CLARK V. STATE

CRIMINAL - FELONY

EVIDENCE - EXPERT TESTIMONY - ADMITTANCE - Under the Miss. R. Evid. 702, expert testimony should be admitted only when (1) a witness is qualified by virtue of their knowledge, skill, experience, or education and (2) the witness's scientific, technical, or other specialized knowledge must assist the trier of fact to understand or decide a fact in issue

EVIDENCE - RELEVANCE - DEFINITION - The Mississippi Rules of Evidence define evidence as relevant if (1) it has any tendency to make a fact more or less probable than it would be without the evidence and (2) the fact is of consequence in determining the case

CRIMINAL LAW - MURDER - ELEMENTS - The elements of depraved-heart murder are the killing of a human being without authority of the law by any means or in any manner when done in the commission of an act eminently dangerous to other and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual

FACTS

In January 2008, Kyllie Clark was left in Joshua Clark's ("Clark") sole care when his wife and two teenagers staying with the Clarks left their home. When his wife and the teenagers returned, Kyllie's condition prompted alarm. Clark stated that five or ten minutes before Bethany and the teenagers returned, Kyllie made a gasping sound. Bethany brought Kyllie to the living room and attempted CPR. Kyllie was taken to a local hospital and diagnosed with rib fractures, retinal and subdural hemorrhages and brain swelling. The hospital ultimately declared her brain dead and terminated life support. Dr. Karen Lakin examined Kyllie and concluded her death had been caused by Shaken Baby Syndrome ("SBS"), now referred to as Abusive Head Trauma ("AHT"). Following the death of his daughter, Clark was convicted of depraved-heart murder. The prosecution relied heavily on Dr. Lakin's testimony. The Court of Appeals reversed and remanded Clark's conviction after finding that crucial parts of Dr. Lakin's testimony were unreliable and therefore inadmissible. The Supreme Court granted certiorari on issues raised by both Clark and the State.

ISSUES

Whether (1) the Court of Appeals applied an incorrect *Daubert* standard in analyzing the trial court's admission of portions of Dr. Lakin's expert testimony; (2) the evidence at trial was insufficient to establish guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence; (3) under *Johnson v. United States*, both Miss. Code Ann. § 97-3-19(2)(f) and § 97-5-39(2)(c) are unconstitutionally vague; (4) the trial court erroneously instructed the jury on the lesser nonincluded offense of depraved-heart murder when Clark did not request such an instruction and, as a result, the circuit court violated Clark's rights per the Sixth and Fourteenth Amendment and Miss. Const. art. III, § 26; (5) the trial court violated Clark's Sixth and Fourteenth Amendment rights to a fair cross section of the community on the jury by refusing to separate the trial into a guilt phase and a penalty phase so that jurors opposed to the death penalty could sit at the guilt phase; (6) the trial court erred by excluding relevant defense evidence and permitting irrelevant prosecution evidence and, as a result, such errors denied Clark a fair trial in violation of the Fourteenth Amendment; and (7) the admission of nurse practitioner Ashley Weiderhold's medical report violated Clark's confrontation rights under the Sixth Amendment.

HOLDING

(1) Because the trial judge considered not only Dr. Lakin's qualifications but also the relevance and reliability of her expert testimony concerning SBS/AHT, because the fact that the Court of Appeals may itself deem the defense's expert testimony as better than that of Dr. Lakin's testimony was irrelevant to the admissibility of Dr. Lakin's testimony, and because despite controversy in the scientific community regarding the legitimacy of SBS/AHT, the validation of a proposed submission need not be universally accepted to render it admissible, the Court of Appeals applied an incorrect *Daubert* standard in analyzing the trial court's admission of portions of Dr. Lakin's expert testimony. (2) Because Dr. Lakin's expert testimony substantially contradicted Clark's alternative causes for Kyllie's death, and because when the evidence is viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of depraved-heart murder beyond a reasonable doubt, the evidence at trial was sufficient to establish guilt beyond a reasonable doubt and Clark's argument that insufficient evidence was presented was without merit. (3) Because the element of serious bodily harm in Miss. Code Ann. § 97-5-39(2)(c)(iii), along with the clarification in Miss. Code Ann. § 97-5-39(2)(g) that discipline of a child is not precluded under paragraph (c), negated any concern that ordinary people

would differ with regard to what actions constitute abuse of a child, the Supreme Court was un-persuaded that a person of ordinary intelligence would lack “a reasonable opportunity to know what conduct is prohibited” and Miss. Code Ann. § 97-3-19(2)(f) and Miss. Code Ann. § 97-5-39(2)(c) are not unconstitutionally vague. (4) Because every murder done with deliberate design is by definition done in the commission of an act imminently dangerous to others and evinces a depraved heart, which involves an act so reckless that malice or deliberate design is implied, and because Clark’s indictment alleging that he “did willfully, unlawfully and feloniously with or without malice aforethought or deliberate design kill and murder Kiley [sic] Clark” while engaged in the crime of felony child abuse clearly served as notice under Miss. Code Ann. §97-3-19(3), Clark’s argument that depraved heart murder is a lesser, rather than a lesser-included, offense of capital murder was without merit, and the trial court did not erroneously instruct the jury on the lesser non-included offense of depraved-heart murder; (5) Because the Mississippi felony-murder aggravator genuinely narrows the class of defendants eligible for the death penalty, because felonious child abuse is an underlying felony, as well as an aggravator, in Mississippi’s capital-sentencing scheme and such use of an underlying felony as an aggravator is not a constitutional error, and because Clark was unable to show that jurors opposed to the death penalty constitute a “distinctive group” for fair-cross-section purposes such that the exclusion of such jurors violated his rights, the trial court did not violate Clark’s Sixth and Fourteenth Amendment rights; (6) Because the prosecution’s evidence regarding Dr. Shuman’s compensation for testifying was relevant to show potential economically motivated bias, because the circuit court ruled on the admissibility of the compensation testimony after hearing arguments from both parties after both Clark’s motion in limine and Clark’s objection during the State’s closing argument, because Clark’s counsel’s questioning on cross-examination regarding Dr. Lakin’s personal divorce and matters related to her children was irrelevant per Miss. R. Evid. 401 and, therefore, inadmissible under Miss. R. Evid. 402, and because evidence of Bethany Clark’s subsequent drug conviction held little, if any, probative value such that its exclusion, even if abuse of discretion, was harmless, the circuit court did not err by excluding relevant defense evidence and permitting irrelevant prosecution evidence; (7) Because Dr. Lakin dictated, reviewed and signed Weiderhold’s report, and because Dr. Lakin testified at trial and was subject to Clark’s cross-examination, Clark’s fundamental right to confront the witness against him was not violated by an inability to confront a party that dictated a medical report. Therefore, the Supreme Court reversed the judgment of the Court of Appeals and reinstated and affirmed the judgment of the Itawamba County Circuit Court.

DISSENT

Justice Ishee argued that the State failed to establish that its expert was anything more than a qualified pediatrician. He stated that *Daubert v. Merrell Dow Pharmaceuticals, Inc.* requires the prosecution to show reliance methodology, that Dr. Lakin could reliably establish that Kyllie was injured in Clark’s custody and that her injuries were caused by abusive head trauma, and that the State failed to do so. Further, he argued that an extensive voir dire of Dr. Lakin revealed that the methodology behind her opinion failed to meet the reliability prong. Finally, he argued that when questioned about whether the CPR could have caused Kyllie’s subdural hemorrhages, Dr. Lakin could not rule the possibility out and instead of determining whether Dr. Lakin’s testimony was reliable, the circuit court erroneously found only that Dr. Lakin was in fact an expert.

The Judgment of the Court of Appeals is Reversed; The Judgment of the Itawamba County Circuit Court is Reinstated & Affirmed - 2017-CT-00411-SCT (Feb. 4, 2021)

En Banc Opinion by Justice Chamberlin - Dissent by Justice Ishee

Hon. Thomas J. Gardner, III (Itawamba County Circuit Court)

Jim Waide, Dan W. Webb, & Daniel M. Waide for Appellant - Stuart Scott (Att’y Gen. Office) for Appellee

Briefed by [Gabrielle Beech](#) & [Cameron Johnson](#)

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THAMES V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - REVERSIBLE ERROR - The appellate court reviews a trial court's decision to allow or exclude evidence under an abuse-of-discretion standard, and if error is found, the decision will only be reversed if the error adversely affects a substantial right of a party

EVIDENCE - OBJECTIONS - WAIVER - When a party does not object to evidence at trial and does not request limiting instructions or a balancing test, he waives his right and the issue is barred from review absent plain error

CRIMINAL LAW - APPEALS - PLAIN ERROR DOCTRINE - Under *Johnson*, for the plain-error doctrine to apply, there must have been an error that resulted in a manifest miscarriage of justice or seriously affects the fairness, integrity, or public reputation of judicial proceedings

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - A new trial will not be ordered unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice; this high standard is necessary because any factual disputes are properly resolved by the jury, not by an appellate court

FACTS

In March 2017, Jamarcus Townsend was shot and killed. Officers identified Lydale Jones, Richard Lofton, Jordan Myers, and Robbie Chapman as suspects in the case. The suspects and the deceased were determined to be members of rival gangs. Through the officers' investigation, Darron Lashun Thames was identified as a member of the gang that the four suspects were members of and was discovered to have been with the four suspects prior to Townsend's death. Thames was subsequently arrested in April 2017. Although Thames denied any involvement in the shooting, Lofton pleaded guilty to conspiracy to commit murder and agreed to testify against others involved in the case. Throughout his various statements, Lofton provided inconsistent stories as to his and other suspects' gang involvement and each of the suspects' involvement in the shooting. After repeatedly discussing Thames's involvement, Lofton stated in a letter at Thames's trial that Thames was not involved in the shooting. Lofton's previous statements and his letter were admitted as evidence. The jury found Thames not guilty of conspiracy to commit murder and guilty of accessory after the fact to murder. Thames appealed.

ISSUE

Whether (1) Thames was unfairly prejudiced by the use of impeachment evidence and Lofton's previous statements and (2) the trial court erred by denying Thames's request for a preemptory instruction directing the jury to find him not guilty of accessory after the fact to murder or by denying his motion for a new trial based on the weight of the evidence.

HOLDING

(1) Because Thames did not object at trial to the use of Lofton's prior inconsistent statement or request a Miss. R. Evid. 105 limiting instruction or a Miss. R. Evid. 403 balancing test, and because the State demonstrated the threshold requirements for Miss. R. Evid. 611 in cross examining a hostile witness, the issue was barred from review absent plain error and there was no plain error in the trial court's ruling. (2) Because the jury was presented evidence that Thames gave the four shooters the "green light" to go to Townsend's house and that he assisted in concealing weapons, a rational juror could conclude that a murder occurred and that Thames, knowing that a murder occurred, assisted the principals responsible for the murder to escape or avoid arrest. Therefore, the Supreme Court affirmed judgment of the Newton County Circuit Court.

Affirmed - 2019-KA-00814-SCT (Feb. 4, 2021)

Opinion by Justice Beam

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

George T. Holmes & Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Jeffrey A. Klingfuss & Allison K. Hartman (Att'y Gen. Office) for Appellee

Briefed by [Schyler Burney](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 2, 2021

COURT OF APPEALS - CIVIL CASES

CARTER V. CARTER

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - VISITATION - Visitation is a matter within the chancellor's sound discretion, and the chancellor is charged with fashioning a visitation schedule that is in the best interests of the children

FAMILY LAW - FEES - GUARDIAN AD LITEM - Guardian ad litem fees are treated as court costs to be awarded against the non-prevailing party

EVIDENCE - ADMISSABILITY - RELEVANCY - Miss. R. Evid. 401 states that relevant evidence is evidence that has any tendency to make a fact more or less probable than it would be without the evidence and is of consequence in determining the action

FACTS

David and Mary Carter divorced and a chancery court arranged a custody agreement awarding each party joint legal and physical custody of their children. In the agreement, David was allowed to visit his children every weekend. Three years later, Mary filed a motion to modify the then-existing custody agreement, claiming that David threatened her and allowed their children to stay out late at night. David filed a series of motions in response and issued Mary a set of interrogatories. The chancery court dismissed David's Rule 12(b) motions, ruling that Mary stated a claim upon which relief could be granted because she documented David's questionable parenting skills and expressed concerns for their children's safety. A guardian ad litem ("GAL") was appointed to investigate the matter. The chancery court made it clear that it would only allow the relevant interrogatories to be addressed during the hearing. After hearing David's argument, the chancery court denied his motion to dismiss. Mary testified about the allegations she included in her contempt motion. The GAL recommended the father continue weekly visitation on the condition that he attend counseling with the children. Mary's attorney suggested they split the GAL bill and David argued that the chancery court should require Mary to pay in full because she initiated the proceedings with her contempt motion. The chancery court ordered the GAL bill to be split equally. In the chancery court's later written ruling on the merits, the chancery court conducted an *Albright* analysis, found in Mary's favor, and reduced David's visitation to two weekends per month. David appealed.

ISSUES

Whether the chancery court erred in (1) "disallowing" consideration of Mary's answers to most of David's interrogatories during the hearing; (2) excluding David's motion to dismiss and accompanying brief; (3) finding that David's stepson voluntarily left his mother's home; (4) stating David was not allowed to represent himself in court; and (5) ordering David to split the GAL fees with Mary.

HOLDING

(1) Because the questions David asked in the interrogatories lacked probative value, most of the interrogatories were irrelevant to the matter presently before the chancery court. (2) Because the divorce was not an issue before the chancery court, David's attached divorce decree to his motion to dismiss and accompanying brief was an issue without merit. (3) Because the chancery court's misstatement that the stepson voluntarily left his mother's home did not amount to reversible error or would have swayed the results of the *Albright* analysis, this issue was without merit. (4) Because David's allegation regarding not being allowed to represent himself was referring to a judge that recused herself from this case, this issue was without merit as the present judge clearly allowed David to represent himself. (5) Because David was the non-prevailing party, and because he admitted that he was the party who requested the hearing, the chancery court was empowered to assess him a portion of the GAL fees. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Chancery Court.

Affirmed - 2020-CP-00439-COA (Feb. 2, 2021)

Opinion by Judge McCarty

Hon. Willie James Perkins Sr. (Coahoma County Chancery Court)

Pro se for Appellant - Azki Shah for Appellee

Briefed by [MaryScott Polk](#)

LEASY V. SW GAMING, LLC

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - RECORD OF DELAY - EXTRINSIC FACTORS - It must be clear from the record that the delay was the result of the plaintiff's failure to prosecute the claim, rather than extrinsic factors beyond the control of the plaintiff

CIVIL PROCEDURE - DISMISSAL - FAILURE TO PROSECUTE - An appellate court may uphold a Miss. R. Civ. P. 41(b) dismissal when there is a record of dilatory or contumacious conduct by the plaintiff and a finding by the court that lesser sanctions would not serve the interest of justice

CIVIL PROCEDURE - DISMISSAL - AGGRAVATING FACTORS - While aggravating factors are not required, the presence of such factors strengthens the case for dismissal under Miss. R. Civ. P. 41(b)

FACTS

Victoria Leasy allegedly slipped and fell in her hotel room's bathroom at Harlow's Casino due to a slippery substance on the floor. As a result, Leasy asserted she suffered serious bodily injury, for which she continued to receive medical treatment. Leasy filed a complaint, asserting negligence and premises liability claims. The parties filed an agreed order to substitute SW Gaming, LLC ("SW Gaming") as the proper defendant. Neither party filed anything from May 1, 2017 until May 31, 2019, when SW Gaming filed a motion to dismiss for Leasy's failure to prosecute pursuant to Miss. R. Civ. P. 41(b). In response, Leasy claimed that between 2017 and 2019, she was receiving ongoing medical treatment and there was confusion regarding her medical insurance and who was to pay the substantial medical bills. Leasy's attorney claimed he and defense counsel had an informal agreement to stay the discovery process until they established the extent of Leasy's damages. SW Gaming denied the existence of any agreement and argued it suffered prejudice as a result of stale evidence because witnesses were no longer employed at the casino. Leasy filed several responsive pleadings, notices of discovery responses, and an expert witness designation to fast-track the litigation. Leasy also provided SW Gaming with voluminous medical records documenting her ongoing medical treatment. At the motion hearing, Leasy's attorney offered to bear the expense for the preparation of a medical-records summary and offered to pay the cost of a private investigator to locate any witnesses who were no longer employed at the casino as lesser sanctions. The circuit court refused Leasy's request for lesser sanctions and entered an order granting SW Gaming's motion to dismiss pursuant to Miss. R. Civ. P. 41(b). Leasy appealed.

ISSUES

Whether the trial court abused its discretion by (1) dismissing Leasy's complaint for failure to prosecute; (2) imposing the extreme sanction of dismissal; and (3) finding additional aggravating factors to warrant a dismissal.

HOLDING

(1) Because the two-year delay was not Leasy's fault, and because the longevity of Leasy's medical treatment was an extrinsic factor beyond Leasy's control and could not be considered contumacious on Leasy's part, the two-year delay was excusable and insufficient on its own to support a dismissal for failure to prosecute. (2) Because the suggested alternative sanctions would have given SW Gaming the opportunity to find and interview prospective witnesses without cost to SW Gaming and would have afforded an efficient and timely review of the voluminous medical records, the proposed lesser sanctions would have more than cured any potential prejudice at no expense to SW Gaming and would have better served the interest of justice. (3) Because the record was completely devoid of any proof that Leasy was directly or personally responsible for the delay, or that the delay was contumacious on Leasy's part, and because SW Gaming failed to prove actual prejudice and could only speculate as to the possibility, there were no aggravating factors to substantiate or bolster an argument in favor of dismissal. Therefore, the Court of Appeals reversed and remanded the judgment of the Washington County Circuit Court.

DISSENT

Presiding Judge Carlton argued that Leasy's inaction and delay of over two years showed dilatory and contumacious conduct and that lesser sanctions would not sufficiently cure the prejudice SW Gaming suffered as a result of the delay. Therefore, she would affirm the circuit court's judgment.

Reversed & Remanded - 2019-CA-01505-COA (Feb. 2, 2021)

Opinion by Judge Lawrence - Dissent by Presiding Judge Carlton

Hon. W. Ashley Hines (Washington County Circuit Court)

Yancy B. Burns for Appellant - Blake Damon Smith, Dale Gibson Russell, & Ian Russell Underwood for Appellee

Briefed by [Lynette Potter](#)

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MILLER V. CITY OF GULFPORT

CIVIL - PERSONAL INJURY

TORTS - PREMISES LIABILITY - DUTY TO INVITEES - A landowner owes an invitee the duty to keep the premises reasonably safe, and when not reasonably safe, to warn only where there is hidden danger or peril that is not in plain and open view

MISS. TORT CLAIMS ACT - GOVERNMENTAL ENTITY - IMMUNITY - Under the Miss. Tort Claims Act, a governmental entity is immune from claims arising from a non-obvious dangerous condition on government property, or failure to warn of such condition, absent actual or constructive notice

TORTS - PREMISES LIABILITY - DUTY TO INSPECT THE PREMISES - Within a premises owner's duty to keep the premises reasonably safe is included a duty to conduct reasonable inspections

FACTS

In May 2016, Rose Miller went to watch a youth baseball tournament at the SportsPlex. While walking along the sidewalk within the SportsPlex, Miller stepped in a hole and fell, requiring medical attention. Miller conceded that the hole was not hidden and that she would have seen it if she had been paying attention. It was unclear as to the exact nature of the hole, but it was probably a sprinkler or drain. Miller testified that the cover was partly dislodged at the time of the accident. The City of Gulfport ("the City") owned the SportsPlex. Dennis Shoemaker rented the SportsPlex for the baseball tournament with an indemnity agreement in place and requisite insurance procured. Shoemaker testified that inspections of the SportsPlex mainly focused on the ballfields. In August 2017, Miller sued the City. In June 2018, Miller amended her complaint to add Shoemaker as a defendant. Miller asserted a premises liability action, alleging that the City and Shoemaker were negligent. Shoemaker filed an answer, and the City filed a motion to stay the amended complaint and to assert an affirmative defense based on the Miss. Tort Claims Act pursuant to Miss. Code Ann. § 11-46-9(1). A hearing was not held on the City's immunity-based motion; rather, the City participated in discovery and filed a joinder to Shoemaker's motion for summary judgment. Shoemaker and the City argued that summary judgment was appropriate because Miller could not establish the essential elements of a premises-liability claim. In July 2019, the circuit court heard the summary judgment motion and determined that no dispute existed among the parties as to Miller's status as a business invitee and as to Shoemaker's control of the premises on the date of the accident. The circuit court found that Miller failed to provide proof needed to succeed on any of the three methods available to establish negligence on the part of Shoemaker or the City. Miller appealed.

ISSUE

Whether the circuit court erred in granting summary judgment and concluding that no genuine issues of material fact exist regarding the City's and Shoemaker duty to inspect and warn Miller of a dangerous condition.

HOLDING

Because Miller failed to provide any evidence that reasonable inspections by the City or Shoemaker would have revealed the dislodged cover, because there was no evidence as to how or when the cover to the hole became dislodged, and because Miller did not provide proof of other improperly covered holes, Miller did not produce sufficient evidence of

the essential elements of the claim, which would have been required at trial, so there was no genuine issue of material fact. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - No. 2019-CA-01615-COA (Feb. 2, 2021)

Opinion by Judge Westbrook

Hon. Lisa P. Dodson (Harrison County Circuit Court, First Judicial Dist.)

David Neil Harris Jr. for Appellant - Jeffrey S. Bruni & James D. Holland for Appellees

Briefed by [Caroline Heavey](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

BOOKER V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROBATION REVOCATION - DUE PROCESS - For probation revocation hearings, only minimum due process standards are required, which include: written notice of the claimed violations; disclosure to the probationer of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses (unless a hearing officer finds good cause for not allowing such confrontation); a neutral and detached hearing body or officer; and a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation

CRIMINAL LAW - CONSTRUCTIVE POSSESSION - INTENT - Constructive possession is established by showing that contraband was under the defendant's dominion and control; sufficient facts must warrant a finding that the defendant was aware of the presence and character of the contraband and was intentionally and consciously in possession of it

POST-CONVICTION RELIEF - PROBATION REVOCATION - BURDEN OF PROOF - According to Miss. Code Ann. § 47-7-37.1, if the State establishes "by a preponderance of the evidence[] that a probationer or a person under post-release supervision has committed a felony or absconded, the court may revoke his probation and impose any or all of the sentence"

FACTS

After Dalvin Booker pled guilty to attempted robbery, the DeSoto County Circuit Court sentenced him to ten years of post-release supervision. Seven years later, the State filed a petition to revoke Booker's post-release supervision, asserting he had committed one count of possession of a controlled substance with intent to distribute and two counts of possession of a firearm by a felon. At Booker's revocation hearing, Sergeant Jonathan Ellis of the Southaven Police Department testified that he had obtained and executed a warrant to search Booker's residence after days of surveillance and trash inspection. Officers found marijuana, drug paraphernalia, and three weapons. Booker and his wife, Kimberly Blount, gave separate statements that attributed the items to either Booker or Blount. Blount's sister testified that the weapons were under Blount's name and were usually kept at Blount's sister's home away from Booker. Regardless, the circuit court found, by a preponderance of the evidence, that Booker had committed the offenses, revoked his probation, and ordered him to serve his ten-year sentence in the Mississippi Department of Corrections. Booker filed a petition for post-conviction collateral relief ("PCR"), which the circuit court denied. Booker appealed.

ISSUES

Whether the circuit court (1) unlawfully revoked Booker's post-release supervision and (2) erroneously denied him credit for his seven years of good standing while on post-release supervision.

HOLDING

(1) Because the State presented sufficient proof that Booker had constructively possessed drugs and firearms, there was no error in the circuit court's revocation of Booker's post-release supervision. (2) Because a defendant is not entitled to

credit toward a suspended sentence for time spent on post-release supervision, the circuit court possessed the authority to fully reinstate Booker’s suspended ten-year sentence. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

Affirmed - 2020-CP-00023-COA (Feb. 2, 2021)

Opinion by Judge McCarty

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

Pro se for Appellant - Zakia Helen Annyce Butler (Att’y Gen. Office) for Appellee

Briefed by [Rod Bridges](#)

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HAWKINS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PETITION - STATUTE OF LIMITATIONS - Pursuant to Miss. Code Ann. § 99-39-5(2), a post-conviction relief motion must be filed within three years after a conviction based on a guilty plea

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - EXCEPTIONS - Miss. Code Ann § 99-39-5(a)(a)(i) includes an exception to the three-year statute of limitations for cases in which the petitioner can demonstrate that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence

CRIMINAL PROCEDURE - GUILTY PLEA - WAIVER - A guilty plea waives the defendant’s right to require the State to prove each element of the offense beyond a reasonable doubt

FACTS

In 1999, a Hinds County grand jury indicted Daryl Hawkins for armed robbery. In 2001, he pled guilty to the lesser-included offense of “simple” or “strong arm” robbery. He was sentenced to two years in the custody of the Department of Corrections with one year suspended, one year to serve, and one year of supervised probation. In 2018, Hawkins filed a motion for post-conviction relief (“PCR”) attacking his 2001 robbery conviction. He alleged that the conviction should be set aside on “newly discovered evidence;” however, he did not provide any information regarding the evidence. He further alleged that the circuit court “breached his plea agreement” by sentencing him for “strong arm robbery” after he pled guilty to robbery. Lastly, he alleged there was insufficient evidence to convict him and the evidence against him was “incorrect.” The circuit court denied his motion as untimely and without merit. Hawkins appealed.

ISSUES

Whether (1) the statute of limitations barred Hawkins’s PCR motion; (2) there was sufficient evidence to support Hawkins’ conviction; and (3) the circuit court breached Hawkins plea agreement by sentencing him for strong arm robbery.

HOLDING

(1) Because a PCR motion must be filed within three years after a conviction based on a guilty plea, because Hawkins’s motion was filed nearly seventeen years after his conviction, and because Hawkins failed to provide information regarding his “newly discovered evidence” and thus failed to meet the exception to the statute of limitations, the statute of limitations barred Hawkins’s PCR motion. (2) Because a guilty plea waives the defendant’s right to hold the State to its proof, and because Hawkins pled guilty and admitted that he had committed a robbery, there was sufficient evidence to support his conviction. (3) Because simple robbery and strong-arm robbery are one and the same, Hawkins’s claim that he was improperly convicted of strong-arm robbery rather than robbery was without merit and the circuit court did not breach his plea agreement. Therefore, the Supreme Court affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2019-CP-01359-COA (Feb. 2, 2021)
Opinion by Presiding Judge Wilson
Hon. Tomie T. Green (Hinds County Circuit Court, First Judicial Dist.)
Pro se for Appellant - Allison Kay Hartman (Att’y Gen. Office) for Appellee
Briefed by [Mackinlee Rogers](#)

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COURT OF APPEALS - CRIMINAL CASES

COPES V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - PRO HAC VICE - FOREIGN ATTORNEY - Miss. R. App. P. 46(b)(2) provides that a foreign attorney must be of good moral character and familiar with the ethics, principles, practices, customs, and usages of the legal profession in this state

APPELLATE PROCEDURE - ERROR PRESERVATION - WAIVER - Generally, the Court of Appeals will not address issues raised for the first time on appeal

EVIDENCE - RELEVANCE - RAPE SHIELD RULE - Miss. R. Evid. 412, commonly referred to as the rape shield rule, prevents the introduction of irrelevant evidence of the victim’s past sexual behavior to confuse and inflame the jury into trying the victim rather than the defendant

EVIDENCE - ADMISSABILITY - VERACITY - Under *Griffith v. State*, a direct opinion offered by a witness in a child sexual abuse case as to the child’s veracity has been held to be inadmissible

FACTS

In 2006, Anna and Betty were placed in a residential cottage with house parents Seth and Kara Copes at the Palmer Home for Children in Columbus, Mississippi. During a visit with her aunt in 2013, Anna and Betty disclosed that Seth sexually abused them years earlier. The girls’ grandmother reported the sexual abuse allegations to a counselor at the Palmer Home, and the Palmer Home reported the allegations to law enforcement and the Department of Human Services. Mokesha Thompson, with the Division of Family and Children Services (“DFCS”), interviewed the girls and scheduled subsequent forensic interviews following their disclosure of having been touched inappropriately. Following an investigation and resulting indictment, Seth filed a motion through his local attorney for admission of Thomas Pavlinic, a Maryland attorney admitted pro hac vice. During opening statements, Pavlinic told the jury that Anna and Betty had used another’s electronic device to send ‘sexts,’ or inappropriate text messages. The trial court held that Pavlinic could use the information that an internet rule of the home had been violated, but not the sexual nature of the violation in order to abide by the rape shield rule, Miss. R. Evid. 412. Pavlinic, outside the presence of the jury, proffered information about times Anna violated rules of the home, including some of a sexual nature. The trial court limited Pavlinic to information that was relevant, part of discovery, and not sexual in nature. After a discussion about reciprocal discovery, Pavlinic reasserted his desire to question Anna about the irrelevant and sexually-related rule violations. On cross-examination, Anna admitted the rule violations and Pavlinic followed with a question about a possible suicide attempt by Anna. The trial court, based on a belief that he was intentionally attempting to prejudice the jury against Anna, limited Pavlinic to remaining at counsel’s table to advise while Seth’s local attorney questioned witnesses. The trial court allowed testimony of counseling notes made in reference to Cathy, a fellow resident and alleged victim of sexual abuse by Seth, in an effort to abide by medical privileges. Thompson, the DFCS employee, testified to the consistency between Anna and Betty’s disclosures during her initial interview and from her observation of the forensic interviews. Ultimately, Seth was convicted of two counts of sexual battery of minors, Anna and Betty, and sentenced to twenty years on each count, to be served consecutively. Seth appealed.

ISSUES

Whether (1) Seth was denied his right to his counsel of choice, (2) the trial court erred in limiting and excluding evidence of Cathy’s counseling sessions; (3) the trial court erred in excluding evidence of Anna’s alleged misconduct; and (4) the trial court erred in admitting incompetent opinion evidence from Thompson.

HOLDING

(1) Because Pavlinic was admitted with the understanding that he would follow the rules of Mississippi courts, because he did not act in good faith, and because he was allowed to remain a part of Seth’s counsel, although no longer allowed to question witnesses, Seth was not denied his right to his counsel of choice. (2) Because the record did not show that Seth asked the trial court to admit additional records in reference to Cathy’s counseling notes, and because issues raised for the first time on appeal will not be addressed, this issue was waived. (3) Because Anna admitted to the alleged misconduct, and because the other information was irrelevant and sexual in nature, the evidence was excludable. (4) Because Thompson’s testimony acknowledged the consistency of the girls’ statements and not the veracity of their statements, Thompson’s testimony was admissible. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

DISSENT

Judge McCarty argued the trial court violated the Sixth Amendment by disqualifying Seth’s out-of-state attorney, especially during a criminal trial, and violated his right to confront a witness on a legitimate avenue of inquiry. Therefore, on this issue, he argued that the trial court erred.

Affirmed - 2019-KA-00302-COA (Feb. 2, 2021)

Opinion by Judge Greenlee - Dissent by Judge McCarty

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

George T. Holmes (Pub. Def. Office) for Appellant - Abbie Eason Koonce (Att’y Gen. Office) for Appellee

Briefed by [Ashley Pruitt](#)

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DORSEY V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - COMPETENCY HEARINGS - SUA SPONTE HEARINGS - In order for a court’s decision not to sua sponte order a competency hearing to be error, there must have been reasonable grounds to doubt competency

EVIDENCE - PROSECUTORIAL MISCODUCT - CLOSING ARGUMENTS - Improper remarks made during closing arguments can be harmless error where the evidence of guilt is overwhelming

SENTENCING - STATUTORY LIMITATIONS - SUPERVISED PROBATION - Time spent on probation is not included in the calculation of the maximum allowable sentence

FACTS

In July 2018, Tanya Michelle Dorsey was convicted of shooting into a dwelling house pursuant to Miss. Code Ann. § 97-37-29 in the Rankin County Circuit Court. The house belonged to Christopher and Leslie Smith, Dorsey’s former next-door neighbors. During the investigation, the Flowood Police Department provided information from the city’s license plate reader (“LPR”) system regarding the whereabouts of Dorsey’s vehicle. The system showed Dorsey travelling towards the Smiths’ residence at 6:18 a.m. and in the opposite direction at 6:48 a.m. The arresting officer searched Dorsey and her property without a search warrant, finding a .22-caliber Beretta pistol in the glove box of her car. Gunshot residue was found on her hands. A firearms expert found that the pistol had the similarities and class characteristics consistent with at least one of the bullets found in the Smiths’ home. The county court ordered a psychological evaluation for Dorsey due to her inability to effectively communicate with the court and her counsel. Dr. Criss Lott found that Dorsey was unable to “confer with her attorney with a reasonable degree of rational understanding,” and she did not “have a factual and rational understanding of the nature and object of the legal

proceedings against her.” Dorsey was treated through Region 8 Mental Health Services prior to her indictment. She then filed a motion for a mental examination and for a continuance. She also filed a notice of insanity defense pursuant to Miss. R. Crim. P. 17.4. During a competency hearing, relying on Dr. Lott’s testimony regarding additional evaluations, Dorsey was found to be in better condition and competent to stand trial. She later withdrew her insanity defense. Prior to trial, she moved to exclude the evidence obtained from the LPR system, arguing that it was hearsay, but the court held the motion in abeyance until proof was offered at trial. During trial, Dorsey’s counsel objected when Officer McAlpin of the Rankin County Sherriff’s Department began discussing the LPR system. The objection was sustained because McAlpin could not testify that the supporting documents provided were true and accurate copies. However, even though the supporting documents were not admitted, McAlpin was allowed to testify regarding his request for the LPR information, the result of his investigation, and how the information led to the arrest warrant. The State also referred to the LPR system during closing arguments, Dorsey’s counsel objected, and the objection was sustained. Dorsey moved for a mistrial based this mention of the LPR information after the jury retired for deliberation, and this was denied. Dorsey was found guilty and sentenced to ten years in the Mississippi Department of Corrections, with four suspended and six to serve, followed by five years of supervised probation. She then filed a motion for a judgment notwithstanding the verdict, a motion to vacate the judgment, and a motion for new trial. The circuit court denied these motions. Dorsey appealed.

ISSUES

Whether the circuit court erred in (1) failing to conduct a competency hearing immediately prior to trial; (2) failing to grant a mistrial where the prosecutor argued facts specifically excluded from evidence by the court; and (3) sentencing Dorsey to a term that exceeds the statutory limitation.

HOLDING

(1) Because Dorsey’s counsel did not request another mental examination prior to or on the first day of trial, and because there was no evidence or reasonable grounds that the circuit court should have sua sponte ordered a competency hearing based on Dorsey’s demeanor at trial, the circuit court did not err in failing to conduct a competency hearing immediately prior to trial. (2) Because there was clear evidence to support the jury’s finding that Dorsey was guilty of shooting into a dwelling house, the circuit court properly denied Dorsey’s motion for a mistrial. (3) Because years of supervised probation are not included in the calculation of a sentence, the circuit court did not sentence Dorsey to a term that exceeded the statutory limitation. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2020-KA-00032-COA (Feb. 2, 2021)

Opinion by Judge McDonald

Hon. John Huey Emfinger (Rankin County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att’y Gen. Office) for Appellee.

Briefed by [Brie Mansoor](#)

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RUSSELL V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - CONVICTION - SUFFICIENCY OF EVIDENCE - The appellate court views the sufficiency of evidence in the light most favorable to the State and decides if a rational juror could have found the State proved each element of the crime

CRIMINAL PROCEDURE - MOTION FOR RETRIAL - WEIGHT OF THE EVIDENCE - The appellate court will only disturb a verdict 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 - EVIDENCE - ADMISSION - For a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party

CRIMINAL PROCEDURE - SENTENCING - LEGALITY - Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute

FACTS

Steven Brooks Russell worked for the road service department at KLLM/FFE Transport Services (“KLLM/FFE”) for approximately five years. His responsibilities included compiling lists of long-term trucks “down” for extended periods of time, calling vendors to repair trucks, and making sure that trucks were repaired in a timely manner. The KLLM/FFE service department used Comdata Corporation to electronically make payments to vendors and repair shops nationwide. When a repair was complete, the service department arranged for Comdata to make a payment to the vendor for repairs by issuing a unique Comdata payee authorization code for payment to be made either electronically by Comdata or via check (called a “Comchek”). KLLM/FFE instructed James Jones, Russell’s supervisor, to perform an audit and identify any issues when the company decided to swap from Comdata to a new electronic payment service called Electric Funds Source LLC. While performing the audit, Jones discovered a pattern in truck repairs for coolant leaks or air leaks, with each repair costing less than the \$500 (the company did not scrutinize repairs totaling \$500 and under). Jones stated that he noticed Russell had opened and closed all of these repairs, and he testified that it was unusual for an employee to close a job that they opened. He also discovered that the Comcheks for the jobs were all being cashed at later dates at the Pilot Truck Stop on Gallatin Street in Jackson, Mississippi. After discovering the pattern, Jones tracked Russell’s job openings. When Jones caught Russell open a job on February 6, 2017, and close it two days later, he reported Russell to his supervisor. The supervisor and Jones then reported Russell to Lieutenant Lee Drake, who caught Russell cashing Comcheks at the Pilot Station on Gallatin Street and pocketing the payout that he reported to KLLM/FFE as repair funds for trucks. Drake confronted Russell outside of the truck stop and instructed him to come in for questioning. Russell admitted on video tape that he had been stealing the Comchek money for quite some time. Russell was arrested and later indicted of embezzlement in excess of \$25,000. Marcie McDonald, the warranty manager for KLLM/FFE, created a spreadsheet that was marked for identification but not admitted into evidence showed that Russell had 405 instances of similar transactions and that KLLM/FFE suffered a total loss of approximately \$190,000. Multiple FEE drivers testified and all denied repairs for their trucks for jobs opened and closed by Russell. At trial, Russell moved for a directed verdict, arguing that the state failed to prove that he had converted KLLM/FFE funds to his own use. The trial court denied his motion, and the jury convicted Russell of embezzlement in excess of \$25,000. The Rankin County Circuit Court sentenced him to twenty years in the custody of MDOC, along with a restitution fine of \$191,007.63. Russell filed a motion for judgment notwithstanding the verdict, a motion to vacate judgment, and a motion for new trial. The trial court denied all three motions. Russell appealed.

ISSUES

Whether (1) the State failed to meet its burden of presenting sufficient evidence to support a conviction of embezzlement in excess of \$25,000; (2) the trial court erred in failing to grant Russell’s motion for a new trial on the ground that the verdict was against the overwhelming weight of the evidence; (3) the trial court erred in allowing the introduction of business records of Comdata and Pilot Truck Stop through McDonald’s testimony without proper authentication of the records; and (4) the trial court’s sentence was illegal.

HOLDING

(1) Because the record contained sufficient evidence for a jury to find that Russell wrongfully converted KLLM/FFE funds to his own use, because the funds were entrusted to Russell by nature of his employment, because the State presented sufficient evidence to prove the express checks were issued as a result of Russell’s false repair orders, and because there was more than \$25,000 worth of Comcheks for repairs issued under Russell’s name, sufficient evidence existed for rational jurors to find Russell guilty of embezzlement and the State presented sufficient evidence for the jury to find Russell guilty of embezzling an amount in excess of \$25,000. (2) Because the evidence supporting the jury’s verdict, taken as true and in a light most favorable to the verdict, did not sanction an “unconscionable injustice,” there was no abuse of discretion in the trial court’s denial of Russell’s motion for a new trial. (3) Because no Comdata records were introduced into evidence, because the record showed that the information and data McDonald obtained belonged to KLLM/FFE, and because the Comcheks and Pilot Truck Stop receipts were properly authenticated by the general manager for the Pilot Truck Stop and therefore excepted from the rule against hearsay, there was no prejudice against Russell by the admission of these documents or McDonald’s testimony regarding those documents. (4) Because McDonald’s testimony regarding the spreadsheet concluded that the losses that KLLM/FFE suffered due to Russell’s

embezzlement totaled \$191,007.63, and because Russell's sentence was within the statutory limits, the trial court did not abuse its discretion in sentencing Russell to twenty years and pay restitution of \$191,007.63. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

CONCURRENCE IN PART/DISSENT IN PART

Judge McCarty argued that just because the jury could find Russell embezzled over \$25,000 does not automatically mean that there was actual proof that he embezzled \$191,007.63. He agreed that the State presented enough evidence to establish the \$25,000 threshold for felony conviction, but he concluded that the trial court had insufficient proof to find that all 405 repair orders were subject to Russell's embezzlement scheme and totaled the full \$191,000.63 in restitution. Therefore, he argued that the only restitution ordered should be the amount proven by the record at trial.

Affirmed - 2019-KA-00763-COA (Feb. 2, 2021)

En Banc Opinion by Presiding Judge Carlton - Concurrence In Part/Dissent In Part by Judge McCarty
Hon. William E. Chapman III (Rankin County Circuit Court)
George T. Holmes (Pub. Def. Office) for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee
Briefed by [Jacob D. Hamm](#)

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