

MISSISSIPPI SUPREME COURT DECISIONS – JULY 1, 2021**SUPREME COURT - CIVIL CASES****COTTAGE GROVE NURSING HOME, L.P. V. BOWEN****CIVIL - WRONGFUL DEATH**

CIVIL PROCEDURE - MOTIONS - SUMMARY JUDGMENT - Under Miss. R. Civ. P. 56(c), summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

TORTS - MEDICAL NEGLIGENCE - EXPERT TESTIMONY - To establish a prima facie case of medical negligence, the plaintiff has the burden to establish the following elements through sworn expert testimony: (1) a duty existed requiring the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform to the required standard occurred; and (3) such breach of duty by the defendant proximately caused an injury to the plaintiff

TORTS - MEDICAL NEGLIGENCE - PROXIMATE CAUSE - To establish the element of proximate cause for medical negligence, a plaintiff must produce sworn expert testimony from a qualified medical doctor connecting the alleged injuries with the defendant's alleged negligence

FACTS

In June 2016, Guy Bowen became a resident of Cottage Grove Nursing Home, L.P. ("Cottage Grove"). One year later, he was diagnosed with prostate cancer that had metastasized into his organs and bones. A few months after his diagnosis, Guy fell in the shower at Cottage Grove and sustained multiple fractures. The attending radiologist noted that his cancer likely amplified the injuries. In March 2018, Guy presented to UMMC's emergency department with various pains. Five days later, Guy died. Prostate cancer was determined to be the cause of death. In January 2019, Carolyn Bowen filed suit against Cottage Grove for wrongful death and negligence arising out of Cottage Grove's care of Guy. Specifically, she claimed that Guy's fall at Cottage Grove was the cause of death. Cottage Grove filed a motion for summary judgment based on her failure to produce medical-expert testimony. She produced an unsworn autopsy report from Dr. Steven Hayne. In that report, Hayne concluded that the immediate causes of death were metastatic adenocarcinoma and end-stage renal disease, but he listed the fractures as a cause of death. The trial court denied Cottage Grove's motion. Cottage Grove appealed.

ISSUE

Whether the trial court erred in denying Cottage Grove's motion for summary judgment.

HOLDING

Because Bowen failed to produce sworn medical testimony containing any specific facts connecting Cottage Grove's alleged negligence to the injuries that caused her husband's death, the trial court erred in denying Cottage Grove's motion for summary judgment. Therefore, the Supreme Court reversed and rendered the judgment of the Hinds County Circuit Court.

Reversed & Rendered - 2020-IA-00749-SCT (July 1, 2021)

Opinion by Justice Beam

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

Eugene Randolph Naylor & Victoria Reppond Bradshaw for Appellant - Abby Gale Robinson for Appellee

Briefed by [Chase Baker](#)

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TAYLOR V. TOLBERT

CIVIL - WILLS, TRUSTS, & ESTATES

CIVIL PROCEDURE - APPEALS - FINAL JUDGMENT - A final, appealable, judgment is one that “adjudicates the merits of the controversy and settles all the issues to all the parties’ and requires no further action by the lower court”

APPELLATE PROCEDURE - INTERLOCUTORY APPEAL - RULE 54(b) CERTIFICATION - In order for a judgment to be heard on appeal, it must be a final judgment, or it must be certified as an appealable judgment under Miss. R. Civ. P. 54(b) meaning the trial court expresses there is no just reason for delay to decide on all the claims in an action

CIVIL PROCEDURE - DISMISSAL - INTERLOCUTORY APPEAL - Miss. R. Civ. P. 54(b) provides that when there is no determination or direction indicating an entry of a final judgment as to fewer than all of the claims or parties, the action is not terminated and may not be appealed unless certified appealable by the trial court

FACTS

Mary Markwell, deceased, was the grandmother of Michael Taylor and the mother of Cheryl Tolbert. In 2014, Markwell’s lawyer drafted a will leaving all of Markwell’s property to Taylor. The lawyer kept a copy, but Markwell kept the original though it was never seen again. After Markwell died, Taylor learned Markwell left her property to him and made him executor of her estate, but he could not find the original will in Markwell’s home. Taylor filed a petition to probate the copy of Markwell’s will. The chancery court entered an order, admitting it to probate and appointing Taylor executor. Taylor filed for and received a temporary restraining order enjoining Tolbert. Taylor also filed a petition for injunctive relief to prevent Tolbert from spending the money Markwell gave her shortly before her death. Tolbert filed a counter-petition, asking the court to set aside the probate of the will and to remove Taylor as executor of the estate. Taylor then filed a petition for recovery of deathbed gifts given to Tolbert, return of Markwell’s property Tolbert possessed, and damages for trespass and conversion. The chancellor held that Taylor failed to rebut the presumption that a will last known to be in its maker’s possession that cannot be found after her death is presumed revoked by destruction. The chancery court entered an order setting aside probate of the will, but it was not styled as a final judgment and was not certified appealable under Miss. R. Civ. P. 54(b). Tolbert filed a motion to proceed on her remaining counterclaims. Taylor appealed.

ISSUES

Whether the order (1) on appeal was a final judgment and (2) was certified as an appealable judgment under Miss. R. Civ. P. 54(b).

HOLDING

(1) Because the order on appeal did not dispose of Tolbert’s counterclaims or Taylor’s claims to set aside the inter vivos gifts, it was interlocutory. (2) Because the order on appeal was interlocutory, and because the chancery court’s order did not include a Miss. R. Civ. P. 54(b) certification, the order was not certified as an appealable judgment. Therefore, the Supreme Court dismissed the appeal of the Tate County Chancery Court’s judgment.

Appeal Dismissed - 2020-CA-00904-SCT (July 1, 2021)

Opinion by Justice Ishee

Hon. Percy L. Lynchard Jr. (Tate County Chancery Court)

John Thomas Lamar Jr. & Taylor Allison Heck for Appellant - Joseph M. Sparkman Jr. & Jerry Wesley Hisaw for Appellee

Briefed by [Meagan Guyse](#)

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SUPREME COURT - CRIMINAL CASES

STEVENSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - PLAIN ERROR DOCTRINE - MISTRIAL - Under the plain-error doctrine, there must be an error that results in a manifest miscarriage of justice or seriously affects the fairness, integrity, or public reputation of judicial proceedings

EVIDENCE - PRIOR BAD ACTS - ADMISSIBILITY - Miss. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character, but that evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident

EVIDENCE - PROBATIVE VALUE - PREJUDICE - Under Miss. R. Evid. 403, the court may exclude relevant evidence if its probative value substantially outweighs a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

FACTS

In April 2016, Yancy Stevenson asked his friend, Cord Tyler, to drive him from Lambert to Marks. Stevenson and Tyler were accompanied on the trip by Barry Walker and Shakeri McNutt. Walker observed that Stevenson was mad and had a gun with him. Stevenson told the group he wanted to retrieve a package he left in Dennis Wesley's car – a package he believed Dennis Wesley and Latoya Market stole from him. Stevenson used McNutt's phone to send threatening text messages to Wesley and to call Market's roommate to say that if he saw Wesley or Market, he was going to kill them. After making a few stops throughout the night, the group arrived at Wesley's home, where Stevenson confronted Wesley and Market. Stevenson and Wesley searched Wesley's car for the package but were ultimately unsuccessful. Stevenson and Wesley were walking back into Wesley's home when Stevenson struck or shot the screen-door window, breaking it. As the group of passengers who rode with Stevenson were waiting to leave in Tyler's car, Stevenson remained talking with Wesley and Market. Suddenly, Wesley began to run away, and Stevenson shot him. Later, an autopsy confirmed Wesley died from a gunshot wound to the chest. Stevenson also shot Market while she was sitting in Wesley's car begging for her life and begging for him not to do this in front of her kids. Later, an autopsy confirmed that Market died from a gunshot wound to the head. Stevenson then got into Tyler's car and the group returned to Lambert. Tyler testified that Stevenson was sad when he got back into the car. During the State's direct examination, Tyler also testified Stevenson said, "I got a feeling one of y'all ... gonna snitch on me and I don't wanna kill nobody else; I ain't killed nobody in a long time." Stevenson's counsel did not object. Also at Stevenson's trial, the State called thirteen witnesses, including the passengers in Tyler's car on the night of the shootings and Market's eleven-year-old son, who witnessed Stevenson shoot Market from Wesley's house. The State further presented evidence of Stevenson's threats to kill Wesley and Market, and Stevenson's DNA was found on the broken door and at the crime scene. Market's son also identified Stevenson in a photographic lineup as the man who shot his mother and Wesley. Stevenson called no witnesses. Rather, Stevenson's counsel attempted to discredit the State's witnesses by suggesting their recollections of the night in question were unreliable. The jury found Stevenson guilty of two counts of first-degree murder. Stevenson appealed.

ISSUES

Whether (1) the trial court erred by failing to declare a mistrial sua sponte after a witness testified about Stevenson's prior bad acts, namely, his having killed before and (2) Stevenson did not receive effective assistance of counsel.

HOLDING

(1) Because Cord's statements about Stevenson's prior bad acts were not offered to speak to his character but were offered to show Stevenson's consciousness of guilt following the killings, the admissible testimony did not create a manifest necessity to declare a mistrial. (2) Because Stevenson failed to meet his burden under the second *Strickland* prong regarding his attorney's failure to object to Cord's statements that Stevenson had killed before, the ineffective assistance of counsel claim was without merit. Therefore, the Supreme Court affirmed the judgment of the Quitman County Circuit Court.

CONCURRENCE

Presiding Justice King argued the better course would have been to dismiss all of the ineffective assistance of counsel claims without prejudice and allow Stevenson to raise them in postconviction relief proceedings. Severing the claims in the manner which the majority did was simply unnecessary.

Affirmed - 2020-KA-00364-SCT (July 1, 2021)

En Banc Opinion by Justice Ishee - Concurrence by Presiding Justice King

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

W. Daniel Hinchcliff & George T. Holmes (Pub. Def. Office) for Appellant - Meta S. Copeland (Att'y Gen. Office) for Appellee

Briefed by [Chatham M. DeProspo](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 29, 2021

COURT OF APPEALS - CIVIL CASES

BRITT V. ORRISON

CIVIL - CONTRACT

CONTRACT - AGREED ORDER - MISREPRESENTATION - To set aside an agreed order due to misrepresentation, the facts must not have been known to the injured party at the time of the original decree, nor can the ignorance of the fact result from lack of reasonable care of diligence

CONTRACT - AGREED ORDER - AMBIGUITY - In determining whether a contract is ambiguous, the court should consider the contracts as a whole and only consider extrinsic evidence should there be a finding that the contract is ambiguous

CONTRACT - AGREED ORDER - STATUTE OF FRAUDS - Agreed orders establishing an obligation to convey land in the future are not themselves conveyance of land, and thus not subject to the statute of frauds

CIVIL PROCEDURE - MOTION FOR CONTEMPT - RULE 81 SUMMONS - A party must obtain and serve a Miss. R. Civ. P. 81 summons to commence a proceeding for contempt; this requirement can be waived if the defending party appears on the issue of contempt and defends the charge without raising any objections to the service of process

CONTRACT - CIVIL PROCEDURE - COUNTERCLAIM - When a counterclaim is based on the granting of a motion to set aside an agreed order and the appellate court overturns the granting of that motion, there remains no basis for the counterclaim

FACTS

Brian Britt negotiated a deal with Craig Orrison and The Shed Inc., of which Orrison was the sole owner, where Orrison would purchase and move Britt's log house. The two signed a contract, finalizing the deal where Orrison would pay Britt and, at some later date, convey two and half acres of property in exchange for the house. Later that year, the log house flooded, however Britt told Orrison there was no structural damages. Later, Orrison told Britt that because of the flooding he was backing out of the deal. Orrison had not inspected or entered the log house to determine its condition before backing out. Due to already selling the property the house sat on, Britt paid out-of-pocket to move the house himself. Thereafter, Britt filed a complaint against Orrison, asking for specific performance, a temporary

injunction requiring Orrison to move the house, and relief related to Britt's expense to move the house. When Britt served Orrison, Orrison said he thought the contract was voided due to flood damage; however, Orrison had yet to inspect to see if there was any flood damage. Relying on Britt's claim, Orrison instructed his attorney to settle, and the two reached a settlement quickly. Before entry of the agreed order, Orrison's attorney emailed Britt noting extensive damage and mold issues in the house. A month after the entry of the agreed order, Orrison arrived at the house and saw extensive water and mold damage. Britt filed a motion for contempt as Orrison had failed to move the house by the twenty-eight-day deadline required by the agreed order. Conversely, Orrison filed a motion to set aside the agreed order, arguing Britt misrepresented the condition of the house. The chancery court refused to hear Britt's motion for contempt because Britt did not issue a Miss. R. Civ. P. 81 summons. The following month, the chancery court also granted Orrison's motion to set aside the agreed order because the parties failed to use the sufficient specificity needed to convey the two and half acres. Shortly thereafter, Orrison filed a counterclaim, Britt filed a motion to strike Orrison's counterclaim but did not file an answer. The court set aside Britt's motion to strike, and the clerk entered a default judgment against Britt. A few months later, the chancery court held a hearing on Britt's original complaint for specific performance. Orrison won a directed verdict with the court finding the parties failed to accurately describe the property being conveyed and there was not sufficient description of the land required by the statute of frauds. Orrison filed a motion for a default judgment as he had obtained the entry of default earlier. The chancery court granted Orrison a default judgment. Britt filed a motion for a new trial which was denied Britt's motion. Britt appealed.

ISSUES

Whether (1) there was misrepresentation sufficient to set aside the agreed order; (2) the chancery court erred in granting Orrison's motion to set aside the agreed order due to ambiguity; (3) the contract provision regarding the two and half acres violated the statute of frauds; (4) the chancery court erred in refusing to hear Britt's motion for contempt; and (5) the chancery court erred in entering a default judgment on Orrison's counterclaim.

HOLDING

(1) Because the email showed Orrison knew of the water damage before the agreed order was entered, and because Orrison showed a lack of diligence by failing to inspect the property, Orrison failed to establish both elements needed to set aside an agreed order due to misrepresentation. (2) Because the intent of the parties was clear that Orrison agreed to convey property to Britt, the chancery court erred in granting the motion to set aside the agreed order due to ambiguity. (3) Because the agreed order was not a conveyance itself and only established an obligation for Orrison to convey in the future, the agreed order did not violate the statute of frauds. (4) Because Orrison's counsel waived the requirements of Miss. R. Civ. P. 81 by failing to object to the lack of service of process, the chancery court erred in refusing to hear Britt's motion for contempt. (5) Because the chancery court erred in setting aside the agreed order, there was no basis for Orrison's counterclaim and, thus, the chancery court erred in entering a default judgment. Therefore, the Court of Appeals reversed and rendered in part and reversed and remanded in part the judgment of the Jackson County Chancery Court.

Reversed & Rendered In Part; Reversed & Remanded In Part - 2017-CP-00700-COA (June 29, 2021)

Opinion by Judge McDonald

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

Pro se for Appellant - Nathan Lamar Prescott & Zachary Glenn Barlow for Appellees

Briefed by [Samuel Taylor Rayburn](#)

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CITY OF JACKSON V. HILTON

CIVIL - PERSONAL INJURY

MISS. TORT CLAIMS ACT - GOVERNMENTAL ENTITY - IMMUNITY - Miss. Code Ann. § 11-46-9(1)(d) provides that a government entity and its employees will be exempt from tort liability for any claim based upon the

exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused

EVIDENCE - TRIAL - SPOILIATION - When evidence is lost or destroyed by one party, thus hindering the other party's ability to prove his case, a presumption is raised that the missing evidence would have been unfavorable to the party responsible for its loss

TORTS - GOVERNMENTAL ENTITY - NEGLIGENCE LIABILITY - A governmental entity shall not be held liable for a claim arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; however, a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care

FACTS

In July 2000, during an evening walk, Grace Hilton fell into an uncovered water meter opening located on a sidewalk in Jackson. The water meter was overgrown with approximately a foot of grass. Subsequently, Hilton experienced arm, shoulder, and neck pain, which resulted in numerous emergency room visits. In April 2001, Hilton sent a notice of claim to the City of Jackson's Mayor pursuant to the Mississippi Tort Claims Act ("MTCA"), Miss. Code Ann. § 11-46-11 (1). In June 2001, Hilton filed a complaint in the Hinds County Circuit Court, alleging negligence as a result of the City of Jackson ("the City") leaving meter holes uncovered and requested damages for her alleged injuries, lost wages, medical, hospital and drug bills, psychological injuries, and mental anguish. In February 2002, Hilton saw Dr. Carroll McLeod to seek pain management for her alleged injuries. The City filed a motion for summary judgment which was later denied. In October 2018, a second bench trial was scheduled. The City filed a motion to dismiss the day before the trial and argued that it was immune from liability pursuant to Miss. Code Ann. § 11-46-9(1)(d). Additionally, the City filed a motion in limine to exclude testimony of Hilton's experts. The circuit court dismissed the motion as untimely and denied the City's motion in limine. The circuit court admitted Cathy Smith as an expert in vocational counseling and life care planning who in turn calculated Hilton's life expectancy as approximately twenty-four years, which required \$247,815.88 for future medical expenses and treatment. Smith did not account for Hilton's prior medical history. During trial, Albert Conley, a meter reader for the City testified that if tops were missing from meters, a meter reader should have noticed and subsequently entered a trouble code. As a result of this testimony, Hilton moved for the court to find an inference of spoliation. Another meter reader testified that trouble codes were only kept for five to ten years. The circuit court entered its opinion and order and found that Hinton's injuries occurred due to a concealed danger that the City created and had notice of, which allowed Hinton to prevail on her negligence claim. Due to her previous medical history, the court only awarded \$100,000 in damages. The court also concluded that a spoliation inference was proper because the City failed to preserve the trouble codes. The City appealed and Hilton cross appealed.

ISSUES

Whether the (1) City was immune from liability as a matter of law; (2) circuit court erred in holding the City liable and in awarding Hilton damages of \$100,000; and (3) circuit court erred in ruling that an inference of spoliation was proper.

HOLDING

(1) Because the City did not assert its affirmative defense of immunity under the MTCA until seventeen years after filing its answer to Hilton's complaint, the City was not immune to liability due to untimely filing. (2) Because the circuit court's determination that the sidewalk posed a "dangerous condition" and that the City had notice of the condition was supported by the evidence, and because the expert testimony to support the award of damages was based upon reliable medical findings and figures, the circuit court did not err in holding the City liable and in awarding Hilton damages of \$100,000. (3) Because the circuit court's determination that the loss of data regarding trouble codes entitled Hilton to an inference of spoliation was supported by the record, the circuit court did not err in ruling that an inference of spoliation was proper. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed - 2019-CA-01397-COA (June 29, 2021)

Opinion by Chief Judge Barnes

Hon. Winston L. Kidd (Hinds County Circuit Court, First Judicial Dist.)

Kristen N. Blanchard Love & Timothy Craig Howard for Appellant - Yancy B. Burns & Roderick D. Ward III for Appellee

ESTATE OF STEPHENS V. ESTATE OF PALMER

CIVIL - WILLS, TRUSTS, & ESTATES

WILLS & ESTATES - TRUSTEE - NECESSARY PARTY - Where a trustee carries out the duties and responsibilities associated with their role as trustee, and it is their actions that are being challenged, they are a necessary party

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - NECESSARY PARTY - If the statute of limitations has run, a necessary party cannot be added as a party to an action

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - REMEDY - Pursuant to Miss. Code Ann. § 15-1-3(1), once the statute of limitations has expired, the remedy is barred

FACTS

In 2007, Mark Stephens Sr. executed and delivered a renewed deed of trust for rental property he had purchased from H.C. Palmer (“Sonny”) in 2001. Robert M. Dreyfus Jr. was named as trustee, with Sonny and his wife, Shirley, as beneficiaries. The deed of trust required Stephens Sr. to pay the debt owed to Sonny and Shirley, as well as all taxes and assessments, which he did until his death in 2011. After Sonny’s death, Shirley was left as sole beneficiary. Shirley assigned the note and deed of trust, along with all her rights and interest, to Marc and Candice Dunlap in November 2014. The Dunlaps claimed the Stephens Estate was in default and requested Dreyfus foreclose on the property, which was a power that had been granted to him under the deed of trust. Dreyfus noticed the sale pursuant to the terms of the deed, and the foreclosure was conducted on December 12, 2014. As the Dunlaps were the highest bidders, Dreyfus executed a trustee’s deed and conveyed his interest to the Dunlaps. On May 18, 2016, Mark Stephens Jr. filed a complaint against the Dunlaps and Shirley, on behalf of the Stephens Estate, to set aside the foreclosure sale. Dreyfus was not included as a party. The Stephens Estate claimed it had paid its debt in full in August 2014 and that, therefore, the Dunlaps wrongfully foreclosed on the property. Further, the Stephens Estate claimed it was not given proper notice of the foreclosure. The Stephens Estate requested additional remedies, including the return of the property and the payment of any rents collected from the property following the foreclosure. On November 21, 2019, the chancery court rendered its judgment, finding that the Stephens Estate, by not including Dreyfus as a party, failed to include all necessary parties. Furthermore, the chancery court dismissed the action as the three-year statute of limitations had run as to an action against the trustee. The Stephens Estate appealed.

ISSUES

Whether the chancery court erred by (1) finding the trustee to the deed of trust a necessary party to the action; (2) finding the three-year statute of limitations to be expired; (3) not addressing the Stephens Estate’s paid-in-full argument; and (4) mischaracterized and limited the grounds for relief.

HOLDING

(1) Because Dreyfus carried out the duties and responsibilities of the role of trustee, and because the Stephens Estate challenged his actions, the chancery court did not err in finding that the trustee was a necessary party. (2) Because the Stephens Estate did not argue the issue before the chancery court, the issue of the three-year statute of limitation was waived and correctly applied as run by the chancery court. (3) Because failure to cite legal authority in support of an issue is a procedural bar on appeal, and because the Stephens Estate failed to present cited authority or a showing of payment in full, the chancery court did not err by failing to address the paid-in-full argument. (4) Because Mississippi is a non-judicial foreclosure state, and because the prerequisites to the foreclosure sale were not proved to be violated, the foreclosure could not be set aside, therefore, chancery court properly found the other requested relief improper. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Chancery Court.

DISSENT

Presiding Judge Wilson argued that, because Dreyfus conveyed his interest to the Dunlaps by a trustee's deed, Dreyfus was not a necessary or indispensable party as he claimed no interest in the subject property following the conveyance. He further argued there were no allegations in the complaint against Dreyfus, which would make Dreyfus a necessary party. Lastly, he claimed that appropriate relief could be granted in Dreyfus's absence and the Stephens Estate would not be prejudiced if Dreyfus was not joined as a party. Therefore, he would have reversed and remanded for further proceedings.

Affirmed - 2020-CA-00044-COA (June 29, 2021)

Opinion by Judge Greenlee - Dissent by Presiding Judge Wilson
Hon. Lawrence Primeaux (Lauderdale County Chancery Court)
Caleb Elias May for Appellant – Mark A. Scarborough for Appellees
Briefed by [Mariel Soehner](#)

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HATTON V. HATTON

CIVIL - DOMESTIC RELATIONS

APPELLATE PROCEDURE - RESPONSE - FAILURE TO FILE RESPONSE - If an appellee fails to file a response brief, the court may consider it a confession of error and reverse if the case contains complicated subject matter that was thoroughly briefed and adequately supported by the appellant, or the court may disregard the error and affirm the decision if the record is easily examined and there is a sound and unmistakable basis for affirmation

FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - A valid and enforceable antenuptial contract that grants the parties an indivisible joint tenancy in marital assets will preclude the application of the *Ferguson* factors for determining equitable distribution of marital assets

FAMILY LAW - DIVORCE - DISSIPATION OF ASSETS - Only marital assets are considered for equitable distribution; any assets acquired prior to the marriage that are dissipated during the marriage will not be considered for equitable distribution unless they have been placed into a joint account or otherwise have become marital assets

FACTS

In 2007, Jerry and Linda Hatton married. Prior to the marriage, they executed an antenuptial contract that ensured each party's individual assets at the time of marriage would remain separate should they divorce. Additionally, the contract provided that "any property subsequently acquired or titled between the parties hereto as joint tenants with the full rights of survivorship, shall pass to the surviving tenant" and that such property "shall remain titled as such, and neither party shall attempt at any time to sever such joint tenancy, unless mutually agreed upon by the parties." The couple purchased a home after they were married. In 2016, Jerry and Linda filed separate complaints for divorce, both citing cause and, in the alternative, irreconcilable differences. In his complaint, Jerry sought sole ownership of the marital home and other real property he owned prior to the marriage. In her amended complaint, Linda sought alimony, equitable distribution of the marital property, \$150,000, and partition of the marital home. Eventually, the parties filed a joint motion, asking the court to grant a divorce based on irreconcilable differences. In the joint motion, both parties stipulated that the antenuptial contract was fully binding on the parties and neither party contested the provisions therein. Specifically, the parties requested that the court identify which assets were marital and division of those assets after a trial by affidavits. In Linda's affidavit, she proved that she had spent \$150,000 in acquiring the marital home and requested partition of the home to realize her contribution. Jerry's affidavit challenged the partition of the home based upon the joint tenancy language in the antenuptial contract and requested that the chancellor consider the dissipation of his assets by Linda. The chancellor found only three marital assets at issue: the marital home, insurance proceeds for the repair of a damaged roof, and outdoor furniture of unknown value. Moreover, the chancellor found the antenuptial contract to be enforceable. As such, the chancellor refused to grant either party exclusive use of the marital home and ordered the insurance proceeds to be used to repair the roof. Due to the joint tenancy stipulated in the contract and the indivisibility of all such property absent a mutual agreement, the chancellor found it unnecessary to address the *Ferguson*

factors regarding equitable distribution of marital assets. The chancellor did not consider Jerry's claim for dissipation of assets. Jerry appealed.

ISSUES

Whether (1) Linda's failure to file a response brief amounted to a confession of error; (2) the chancellor erred by failing to consider the *Ferguson* factors regarding equitable distribution of marital assets; and (3) the chancellor erred by failing to consider Jerry's claim for dissipation of assets he held prior to the marriage.

HOLDING

(1) Because the record could be easily examined and the court could find a sound and unmistakable basis for affirming the chancellor's decision, Linda's failure to file a response brief did not constitute a confession of error. (2) Because the marital property disposition was controlled by a contract that rendered all marital assets acquired after the marriage indivisible without mutual agreement of the parties, and because there was no marital property or debt subject to equitable distribution, the chancellor did not err by failing to address the *Ferguson* factors. (3) Because the alleged dissipated assets were not marital assets, and because only marital assets are subject to equitable distribution, the chancellor did not err by failing to consider the claim for dissipation of assets. Therefore, the Court of Appeals affirmed the judgment of the Marion County Chancery Court.

Affirmed - 2020-CA-00168-COA (June 29, 2021)

Opinion by Judge Emfinger

Hon. Sheila Havard Smallwood (Marion County Chancery Court)

Allen Flowers for Appellant - *Pro se* for Appellee

Briefed by [Morgan A. Jones](#)

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MANN V. PREMIER GASTROENTEROLOGY, PC

CIVIL - MEDICAL MALPRACTICE

TORTS - MEDICAL MALPRACTICE - BURDEN OF PROOF - Negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care

TORTS - MEDICAL MALPRACTICE - BURDEN OF PROOF - A physician's negligence cannot be established through layman's testimony unless the negligence is purely factual

CIVIL PROCEDURE - DISCOVERY - EXPERT TESTIMONY - Layman's testimony is sufficient to establish only those medical questions that are purely factual in nature or thought to be the common knowledge of laymen, whereas any question not purely factual requires medical expert testimony

FACTS

In November 2017, Ernestine Mann underwent an outpatient procedure at Premier Gastroenterology ("Premier") where an employee inserted an IV into Mann's right hand. Throughout the procedure, Mann complained to Dr. Tariq A. Khan of pain in her hand from the IV. Despite Mann voicing her concern, Kahn and his nurse performed the procedure. Once Mann returned home, her pain worsened, causing her to seek medical treatment from another doctor for the pain and swelling of her hand. Mann sued Premier and Khan, alleging negligence in failing to use reasonable care in treating and evaluating her. Premier and Khan filed a motion for summary judgment, alleging that Mann had not provided an expert witness as required to establish a medical negligence claim. The trial court granted the motion for summary judgment. Mann appealed.

ISSUE

Whether the trial court erred in granting summary judgment.

HOLDING

Because Mann’s allegations of negligence against Premier and Khan were not purely factual, medical expert testimony was required and the motion for summary judgment was properly awarded. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

Affirmed - 2020-CP-00842-COA (June 29, 2021)

Opinion by Judge Westbrook

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

Pro se for Appellant - Kevin O’Neal Baskette for Appellees

Briefed by [Macy Walters](#)

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SMITH V. MISS. COAST OB/GYN

CIVIL - MEDICAL MALPRACTICE

CIVIL PROCEDURE - REMEDIES - SANCTIONS - Every reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion

CIVIL PROCEDURE - QUESTIONING - PREJUDICE - The mere asking of a potentially prejudicial question is not grounds for a mistrial when the court sustained an objection and instructed the jury to disregard the question

CIVIL PROCEDURE - JURY INSTRUCTION - OBJECTIONS - Defects in specific instructions do not require reversal where all instructions taken as a whole fairly announce the applicable primary rules of law

FACTS

Hannah Smith gave birth to her daughter, Abigail, via cesarean delivery in July 2009 after being admitted to the hospital for symptoms of preeclampsia around week thirty-seven of her pregnancy. Although unnoticed at birth and for a short time afterward, Abigail was paralyzed from the chest down. Hannah and her husband, Derrick, (“the Smiths”) filed a lawsuit against Dr. Joseph Vice and Mississippi Coast OB/GYN, a clinic of which Vice was a shareholder. The Smiths alleged that Vice had injured Abigail’s neck and spinal cord during delivery causing her paralysis and other related physical issues. In December 2016, the Smiths filed a motion for sanctions under Miss. R. Civ. P. 37, arguing that Vice had failed to provide deposition dates for his experts and had ignored the dates offered by their experts. The Smiths sought a default judgment or, in the alternative, exclusion of Vice’s expert witnesses. Vice’s counsel admitted to their oversight and offered proof that they sent the Smiths a letter offering deposition dates two weeks prior to the filing of the motion for sanctions. The trial court denied a grant of default judgment of exclusion of witnesses but did award the Smiths attorney’s fees for having to bring the motion. Prior to trial, the Smiths filed a motion in limine to exclude evidence related to Abigail’s chromosomal abnormality, arguing that the abnormality was unrelated to the issues in the case and would be highly prejudicial and/or distracting to the jury. Vice opposed the motion in limine, not because he intended to link the abnormality to Abigail’s paralysis but because elements of her life-care plan and the Smiths’ claim for damages were related to the effects of the abnormality rather than her paralysis. The motion in limine was denied. Following trial, a jury returned a unanimous verdict in favor of Vice. The Smiths appealed.

ISSUES

Whether (1) the trial court erred by denying the Smith’s motion for sanctions under Miss. R. Civ. P. 37; (2) a new trial was required because of an unanswered question regarding Abigail’s chromosomal abnormality; and (3) the Smiths’ objections to the jury instructions should have been waived and without merit.

HOLDING

(1) Because Vice did offer dates for deposition and attempt to schedule the depositions before the Smiths filed their motion for sanctions, because there remained time for the Smiths to schedule depositions of Vice’s experts even after the missed deadline, and because the Smiths only sought drastic sanctions, the trial court did not err by denying the motion. (2) Because the Smiths did not move for a mistrial or request special jury instructions after the court reporter

confirmed that Chalhoub had not answered the question, the issue of a mistrial was waived on appeal. (3) Because the Smiths did not make an objection at trial or offer any proposed instruction that referenced the specific allegation, and because the instructions, as a whole, fairly announced the applicable rules of law, the issue was without merit and procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2019-CA-01058-COA (June 29, 2021)

Opinion by Presiding Judge Wilson

Hon. Dale Harkey (Jackson County Circuit Court)

Kristopher W. Carter, Douglas Lamont Tynes Jr., & Courtney Parker Wilson for Appellants - John A. Banahan, Jessica B. McNeel, & Michael Riley Moore for Appellees

Briefed by [Anna Tucker](#)

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WILLIAMS V. CARRIERE

CIVIL - CONTRACT

CONTRACTS - BREACH - ELEMENTS - For a breach of contract claim, a party must show: (1) a valid and binding contract exists and (2) the defendant has broken or breached the agreement

CONTRACTS - BREACH - DAMAGES - When evaluating damages for a breach of contract, the court's intention is to restore the injured party to the position she would have been in but for the breach

CIVIL PROCEDURE - PLEADING - RELIEF - Final judgments shall grant relief to which the party is entitled and which the court has jurisdiction to grant, even if the specific relief is not demanded in the pleadings

CIVIL PROCEDURE - PLEADING - IMPLIED CONSENT - If a party does not object to the introduction of issues not raised in the original pleading, such issues are deemed to be tried by implied consent

FACTS

Andrea Williams and Melissa Carriere purchased a run-down home in Gulfport following Hurricane Katrina, with plans to renovate and resell it. The pair agreed to split the profits and expenses equally, but there was never a formal written agreement. As joint tenants with rights of survivorship, Williams and Carriere both signed the deed in exchange for a \$216,000 loan in September 2006. When no offers were made to buy the home after renovations, they decided to rent the property instead. Rental income covered the mortgage, but Williams and Carriere were still obligated to pay the insurance and taxes. In July 2008, Williams informed Carriere that she did not want to keep the house any longer, offered to sign the property over to Carriere, and stated that she would not make any more payments on the house. Carriere looked into refinancing or selling the home, but both options would have hurt Carriere at the time. Thus, Carriere continued to pay the expenses on the home except for times when it was being rented. In March 2010, Carriere filed suit in the Harrison County County Court against Williams for breach of contract and breach of the duty of good faith and fair dealing. The county court found that the women entered into a legally enforceable oral contract, which Williams breached. The court totaled the mortgage payments, taxes, insurance policies, utilities, and various repairs, and then ordered Williams to pay half of the total expenses in damages. The court also ordered Williams to deed her interest in the property to Carriere and pay any costs of refinancing. Williams appealed the decision to the Harrison County Circuit Court in July 2013 and, in May 2020, Harrison County Circuit Court affirmed the decision of the county court. Williams appealed.

ISSUES

Whether the circuit court erred in affirming the (1) county court's breach-of-contract finding; (2) damage assessment of \$40,432.83; and (3) order requiring Williams to quitclaim the property to Carriere.

HOLDING

(1) Because Williams was procedurally barred from arguing violations of the Uniform Partnership Act, because Williams was procedurally barred from raising statutory defenses on appeal, because the oral agreement between Williams and

Carriere did not violate the statute of frauds, and because Williams acknowledged the existence of the contract and her failure to meet her obligations under it, the circuit court did not err in affirming the county court's finding that the contract was breached and that Carriere was entitled to damages for the breach. (2) Because the damages were correctly calculated by the county court to restore Carriere to the position she would have been in prior to the breach, the circuit court did not err in affirming the amount of damages assessed in the county court's judgment. (3) Because the court's order was no surprise to Williams, because there was no objection to evidence surrounding the transfer, and because the county court had jurisdiction to grant such relief, the circuit court did not err in affirming the county court's order for Williams to transfer her interest in the property. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge Lawrence agreed that the award of damages by the county court should be affirmed, but he argued that the court abused its discretion when it ordered Williams to transfer her property. He argued that the transfer caused Williams an unjust deprivation of her property interest without the court having knowledge of the true effect of the order.

Affirmed - 2020-CA-00582-COA (June 29, 2021)

Opinion by Judge McDonald - Concurrence in Part & Dissent in Part by Judge Lawrence
Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, First Judicial Dist.)
William Michael Kulick for Appellant - William Alex Brady II for Appellee
Briefed by [Emily Duck](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

HUGHES V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - DUI - OUT-OF-STATE PRIOR CONVICTIONS - Miss. Code Ann. § 63-11-30(7) provides that convictions in another state of violations for driving or operating a vehicle while under the influence of an intoxicating liquor or while under the influence of any other substance that has impaired the person's ability to operate a motor vehicle occurring within five years before an offense shall be counted for the purposes of determining if a violation of subsection one of this section is a second, third, fourth, or subsequent offense and the penalty that shall be imposed upon conviction for a violation of subsection one of this section

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - To successfully claim ineffective assistance of counsel, a defendant must prove that: (1) counsel's performance was deficient, and (2) the deficiency prejudiced the defense

CRIMINAL PROCEDURE - GUILTY PLEA - WAIVER - A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial, notably the right to a speedy trial can be waived or forfeited, whether the origin be statutory or constitutional

FACTS

In 2017, Raymond Hughes was indicted for felony driving under the influence ("2017 DUI"), and in 2018, Hughes was indicted for another felony DUI ("2018 DUI"). Prior to the 2017 and 2018 DUIs, Hughes was convicted on three additional DUI charges, one of which occurred in Utah and the two others in Lafayette County, Mississippi. In 2018, Hughes pled guilty to both the 2017 and 2018 DUIs. Hughes was sentenced to serve a total of four years in the custody of the Mississippi Department of Corrections ("MDOC") with a \$2,000 fine suspended for the 2017 DUI and to ten years, with six years suspended and four years to serve running concurrent, for the 2018 DUI sentence. Further, Hughes was placed on five years of supervised post-release supervision and ordered to pay a \$3,000 fine. In 2019, Hughes filed a motion for post-conviction relief, which the circuit court denied. Hughes appealed.

ISSUES

Whether (1) the circuit court erred in considering Hughes's prior out-of-state DUI in his 2018 DUI indictment pursuant to Miss. Code Ann. § 63-11-30(7); (2) Hughes's guilty plea to the 2017 DUI was involuntary as a result of ineffective assistance of counsel; and (3) Hughes's guilty plea regarding his 2017 DUI conviction should have been vacated because his constitutional and statutory rights to a speedy trial and due-process rights were violated.

HOLDING

(1) Because the indictment for the 2018 DUI incorrectly included Hughes's 2008 out-of-state DUI conviction as an underlying conviction for purposes of classifying a felony DUI fourth, and because Hughes's guilty plea also expressly relied on the 2008 out-of-state conviction, the circuit court erred in considering his prior out-of-state DUI in his 2018 DUI and the conviction was vacated and remanded to the circuit court. (2) Because there was no evidence in the record showing how defense counsel's performance was deficient or how Hughes suffered any prejudice to his defense as to the 2017 felony charge, and because the PCR motion lacked sufficient detail to show any deficient performance, Hughes's ineffective-assistance-of-counsel claim was without merit. (3) Because there was no evidence that his guilty plea was involuntary, Hughes entered a valid guilty plea, and the issue was procedurally barred on appeal. Therefore, the Court of Appeals affirmed in part, reversed in part, and vacated and remanded in part the judgment of the Lafayette County Circuit Court.

Affirmed In Part; Reversed In Part; Vacated & Remanded In Part - 2019-CP-01309-COA (June 29, 2021)

Opinion by Judge Lawrence

Hon. John Andrew Gregory (Lafayette County Circuit Court)

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

Briefed by [J. Evan Thomas](#)

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COURT OF APPEALS - CRIMINAL CASES

BARNES V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - STATUTORY INTERPRETATION - VAGUENESS - A reviewing court will strike down a statute only where it appears beyond all reasonable doubt that the statute violates the constitution; in making that determination, the court looks to the plain language of the statute and if the statute is unambiguous from the standpoint of a person of ordinary intelligence, the statute will not be struck down

CRIMINAL PROCEDURE - CLOSING ARGUMENTS - FAILURE TO TESTIFY - Attorneys are given wide latitude in making their closing arguments, but direct references to the defendant's failure to testify are strictly prohibited; however, the state is entitled to comment on the lack of any defense, and such comment will not be construed as a reference to the defendant's failure to testify by innuendo and insinuation

FACTS

Alvin Barnes was found guilty of gratification of lust in violation of Miss. Code Ann. § 97-5-23(1). The charges against Barnes arose from a sexual encounter he had when he was eighteen years old with a fifteen-year-old girl. Barnes picked up the girl to take her to a church event, but instead, he took her to his house and had sex with her. The girl said that Barnes had raped her, but Barnes maintained that it was consensual. Barnes did not testify at trial, and the prosecutor never commented on that decision. Barnes was sentenced to ten years in the custody of the Mississippi Department of Corrections ("MDOC") and was required to register as a sex offender. Barnes filed a motion for judgment notwithstanding the verdict ("JNOV"). Because it was left pending for over thirty days, the motion was deemed denied by operation of law. Barnes appealed.

ISSUES

Whether (1) Miss. Code Ann. § 97-5-23(1) is unconstitutionally vague and (2) the prosecutor improperly commented on Barnes's decision not to testify during her closing argument.

HOLDING

(1) Because a person of ordinary intelligence would have no reasonable doubt that a person "above the age of eighteen" is a person who is eighteen years old, the statute was not unconstitutionally vague. (2) Because the prosecutor neither commented on Barnes's decision not to testify nor insinuated Barnes was guilty because of his decision not to testify, the prosecutor's closing argument was not improper, and there was no merit to Barnes's assertion that he was denied a fair trial as a result. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2019-KA-01711-COA (June 29, 2021)

Opinion by Presiding Judge Carlton

Hon. Eleanor Johnson Peterson (Hinds County Circuit Court, First Judicial District)

Louwlynn Vanzetta Williams for Appellant - Brittney Sharae Eakins (Att'y Gen. Office) for Appellee

Briefed by [Garner Vance](#)

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MILES V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - MISTRIAL - DOUBLE JEOPARDY - Determining whether double jeopardy bars a defendant from being retried after a mistrial depends on which party moved for mistrial; where a mistrial is granted upon the court's motion, a second trial is barred because of double jeopardy, unless taking into consideration all the circumstances, there was a manifest necessity for the mistrial

CRIMINAL PROCEDURE - MISTRIAL - MANIFEST NECESSITY - A trial judge may order a mistrial sua sponte if he/she determines there to be a manifest necessity, and that order is reviewed for abuse of discretion

CRIMINAL PROCEDURE - JURY SELECTION - BATSON ANALYSIS - The trial court must completely and clearly address all three prongs of the *Batson* analysis

EVIDENCE - CONFRONTATION CLAUSE - HARMLESS ERROR - A reviewing court may only affirm a violation of the Confrontation Clause if the error is harmless beyond a reasonable doubt

EVIDENCE - DIRECT EXAMINATION - LEADING QUESTIONS - Whether a party may ask leading questions is within the discretion of the trial court and such decision will not be reversed unless a party suffers injury

FACTS

Jelani Miles was convicted of shooting into a vehicle, aggravated assault, and second-degree murder. Miles argued on appeal that the trial court erroneously ordered a mistrial after Miles twice moved the court for mistrial because his home was shot into and one of the State's witnesses was murdered before testifying. It was not clear whether this order took the form of a granted motion or if it was made sua sponte. Miles then attempted to assert his double jeopardy protection because of the alleged erroneous mistrial. Further, at the second trial, the State made seven reverse-*Batson* challenges, and Miles was required to proffer race-neutral reasons for each strike. The trial court ruled against Miles on three of the strikes without allowing the State an opportunity for rebuttal as required by *Batson*. The trial court also sustained objections to leading questions Miles posed to a pre-determined hostile witness, and the State was allowed to play their now-deceased witness's recorded statement at the subsequent trial over the pre-trial objection of Miles. Miles appealed.

ISSUES

Whether the trial court erred by (1) declaring a mistrial without a manifest necessity; (2) failing to conduct a proper reverse-*Batson* analysis; (3) admitting an unavailable witness's statement; and (4) denying the request to examine an adverse witness with leading questions.

HOLDING

(1) Because Miles seemingly moved for a mistrial and the trial judge did not abuse his discretion in finding a manifest necessity, Miles's second trial was not barred by double jeopardy. (2) Because the trial court seemed to drift between the prongs of the *Batson* analysis and did not give the State an opportunity for rebuttal, it did not properly and fully conduct the *Batson* analysis. (3) Because the recorded statement was a Confrontation Clause violation but corroborated by a number of other witnesses, it was harmless beyond a reasonable doubt. (4) Because Miles did not suffer substantial injury from not being able to ask unlimited leading questions, there was no reversible error. Therefore, the Court of Appeals affirmed in part and remanded in part the judgment of the Yazoo County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge Westbrook argued that instead of remanding for a new *Batson* hearing, the court should have reversed Miles's conviction and remanded for a new trial. She agreed with the majority opinion on all other issues.

Affirmed in Part; Remanded in Part - 2019-KA-00895-COA (June 29, 2021)

En Banc Opinion by Judge Smith - Concurrence in Part & Dissent in Part by Judge Westbrook

Hon. Jannie M. Lewis-Blackmon (Yazoo County Circuit Court)

Chuck McRae & Drew McLemore Martin for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Channing Curtis](#)

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POPE V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - PREEMPTORY CHALLENGE - BATSON ANALYSIS - To establish a prima facie case of discrimination under *Batson*, the opponent of the peremptory challenges must make a showing that the proponent has engaged in a pattern of discriminatory strikes

CRIMINAL PROCEDURE - SIXTH AMENDMENT - RIGHT TO CONFRONTATION - Nontestimonial statements do not require confrontation to be admissible

CRIMINAL PROCEDURE - INDICTMENT - HABITUAL OFFENDER - Miss. Code Ann. § 99-19-83 provides that person is a violent-habitual offender if they have previously been convicted of two separate felonies for which they served one year or more, and one of the convictions was for a crime of violence

CRIMINAL PROCEDURE - DOUBLE JEOPARDY - BLOCKBURGER TEST - The *Blockburger* test asks whether each conviction contains an element missing from the other

FACTS

Jerry Lee Lewis, Eugen Weathersby, and Mitchell Weathersby were standing around Mitchell's car when two men approached them with a shotgun. After handing over some money and after the robbers went through Jerry's pockets, all three men were shot. As a result, Eugene and Jerry were both hospitalized, and Mitchell was killed. A police investigation identified one unfired shotgun shell and three fired shotgun shells at the scene. The police received a tip that led them to J'Var Pope, whose grandmother's home was near the crime scene. Shell casings were found at the home that matched those identified at the crime scene. Another tip led the police to Robert Hart whose GPS ankle monitor fitted by the Mississippi Department of Corrections showed him near the scene at the time of the crime. Pope and Hart were arrested and charged with one count of capital murder, two counts of aggravated assault, and two counts of armed robbery. The trial court granted a motion from the State to consolidate their two trials. Pope and Hart each filed a motion to sever which were denied. Later, the State moved to amend the indictment to charge both Pope and Hart as habitual offenders. At a separate hearing on the motion, the State submitted certified copies of their previous convictions. The trial court granted the motion to amend the indictment. The initial jury venire consisted of thirteen black potential jurors and fifty-five white potential jurors. During the peremptory-challenge phase, the defense raised two *Batson* allegations against the State. The trial court overruled each objection, finding that the defense failed to make

a prima facie showing of discrimination. The jury unanimously found both Pope and Hart guilty of all counts. Pope and Hart appealed.

ISSUES

Whether (1) the trial court failed to make a prima facie showing of discrimination; (2) the State committed a discovery violation by withholding exculpatory evidence; (3) the trial court erred by refusing to include circumstantial-evidence language in the element instructions; (4) the trial court erred in granting a one-continuous-transaction jury instruction; (5) the trial court erred by denying Pope’s and Hart’s motions for severance; (6) the admission of Pope’s out-of-court statements through witness testimony violated his Sixth Amendment right to confrontation; (7) the indictment against Pope was void because the State omitted essential elements of the crimes charged; (8) the indictment failed to prove Pope was a habitual offender under the statute; and (9) Pope’s convictions for armed robbery violated his right to be protected against double jeopardy.

HOLDING

(1) Because there was no statistical pattern of discrimination in the State’s strikes against jurors, Pope and Hart failed to make a prima facie showing of discrimination. (2) Because the evidence had been provided to the defense before trial, and because the defense failed to raise the discovery issue before trial, there was no discovery violation. (3) Because Pope and Hart could not point to a case that provided that jury instructions must contain circumstantial-evidence burden of proof, the trial court did not err in denying altered instruction, and the jury was properly instructed. (4) Because the one-continuous-transaction doctrine applied to the facts of the case and the jury instruction properly followed the law, the trial court did not err in granting that instruction. (5) Because neither Pope nor Hart were prejudiced by the consolidation of the trials, neither of them were entitled to severance. (6) Because the testimony related only to Pope, and because the relevant statements did not fall under the *Crawford* classification of testimonial hearsay, Hart’s right to confrontation was not violated when the trial court admitted Pope’s out-of-court statements through third-party testimony. (7) Because the indictment followed the language from the relevant statutes and included each offense element, there was no error in the language of the indictment. (8) Because the State provided Pope’s conviction records that showed he had been convicted of two prior felonies, the State properly established that Pope was a habitual offender under Miss. Code Ann. § 97-17-23. (9) Because each count of armed robbery was for a different victim, Pope’s right of protection against double jeopardy was not violated. Therefore, the Court of Appeals affirmed the judgment of the Harris County Circuit Court.

Affirmed - 2020-KA-00025-COA (June 29, 2021)

Opinion by Judge McCarty

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, First Judicial Dist.)

Frank Phillip Wittmann IV & Jim L. Davis III (Pub. Def. Office) for Appellants - Allison Elizabeth Horne (Att’y Gen. Office) for Appellee

Briefed by [Carter Babaz](#)

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