

MISSISSIPPI SUPREME COURT DECISIONS – MAY 26, 2022**SUPREME COURT - CIVIL CASES****WARE V. WARE****CIVIL - WILLS, TRUSTS, & ESTATES**

CIVIL PROCEDURE - JOINDER - REQUIRED JOINDER - Pursuant to Miss. R. Civ. P. 19(a), the court shall join a person as a party if (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest

CIVIL PROCEDURE - JOINDER - PERMISSIVE JOINDER - Pursuant to Miss. R. Civ. P. 20, persons may be joined as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transaction or occurrences, and if any question of law or fact common to all these persons will arise in the action

CIVIL PROCEDURE - INTERVENTION - INTERVENTION OF RIGHT - Pursuant to Miss. R. Civ. P. 24(a), a person “shall” be allowed to intervene (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest unless the applicant’s interest is adequately represented by existing parties

CIVIL PROCEDURE - INTERVENTION - PREREQUISITES - Pursuant to Miss. R. Civ. P. 24(a)(2), a would-be intervenor “shall” be allowed to intervene if he meets four prerequisites: (1) he must make timely application, (2) he must have an interest in the subject matter of the action, (3) he must be so situated that disposition of the action may as a practical matter impair or impede his ability to protect his interest, and (4) his interest must not already be adequately represented by existing parties. Today’s case is our first occasion to construe these requirements

CIVIL PROCEDURE - TIMELINESS OF INTERVENTION - FACTORS - To determine whether an application to intervene is timely, the court considers (1) the length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor’s failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and, (4) the existence of unusual circumstances militating either for or against a determination that the application is timely

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - BEGINNING OF PERIOD - Pursuant to Miss. Code Ann. § 15-1-49, the three-year statute of limitations begins to run when the cause of action accrues and the cause of action accrues when it comes into existence as an enforceable claim, that is, when the right becomes vested

CONTRACTS - BREACH OF CONTRACT - ATTEMPTED TRANSFER OF CORPORATE SHARES - When corporate bylaws prohibit shareholders from disposing of shares without first offering them for sale to the corporation, the bylaws are breached when the shareholder attempts to transfer the shares in violation of the bylaws

CIVIL PROCEDURE - CONSENT ORDERS - APPEALABILITY - Pursuant to Miss. R. Civ. P. 60(b), a party may seek relief from a consent decree by showing fraud, mistake, misconduct, misrepresentation, newly discovered evidence, that the judgment is void, that the judgment has been satisfied, released, or discharged, or a prior judgment

upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, and for any other reason justifying relief from judgment

CIVIL PROCEDURE - CONSENT ORDERS - SPECIFIC FINDINGS - When a party concedes an issue in a consent order, the chancery court is not required to issue specific findings of fact nor is it required to determine the issue

CORPORATE LAW - DISSOLUTION - APPOINTMENT OF RECEIVER - Pursuant to Miss. Code Ann. § 79-4-14.31(c), a court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held

CORPORATE LAW - RECEIVERSHIP - POWERS AND DUTIES - Pursuant to Miss. Code Ann. § 79-4-14.32(a), the court shall describe the powers and duties of the receiver or custodian in its appointing order; among other powers, the receiver may (1) dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and (2) may sue and defend in his own name as receiver of the corporation in all courts of the state

CIVIL PROCEDURE - SUBJECT MATTER JURISDICTION - DISSOLUTION AND PROBATE - While Miss. Code Ann. § 9-5-83 gives the probate court exclusive jurisdiction over all demands against an estate, the chancery court has the power to hear judicial dissolution cases that tangentially impact some estate assets

CORPORATE LAW - JUDICIAL REMOVAL OF DIRECTORS - FACTORS - Pursuant to Miss. Code Ann. § 79-4-8.09(a), a chancery court may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent of the outstanding shares of any class if the court finds that (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of discretion, with respect to the corporation, and (2) removal is in the best interests of the corporation

CIVIL PROCEDURE - SUBPOENA DUCES TECUM - NONRESIDENT NONPARTIES - A court cannot subpoena a nonresident nonparty to appear and/or produce documents that are located outside the state, even if that nonresident nonparty is subject in another context to the personal jurisdiction of the court

CORPORATE LAW - VALUATION - CHANCELLOR'S DISCRETION - Pursuant to Miss. Code Ann. § 79-4-14.34, valuation is a factual determination within the sound discretion of the chancery court

FACTS

In 2011, Frankie Ware died and was survived by his wife, Carolyn, and his children, Dana, Angela, and Richard. At the time of his death, Frankie owned twenty-five percent of four family corporations. Carolyn owned another twenty-five percent and Richard owned the remaining fifty percent of each corporation. Frankie's will placed the majority of his assets, including the shares of the corporations, into two testamentary trusts for which Carolyn, Dana, Angela, and Richard were appointed as trustees. The primary beneficiary of both trusts was Carolyn, but one trust allowed for limited distributions to Dana, Angela, and Richard as well. Carolyn petitioned the chancery court to admit Frankie's will to probate and it granted letters testamentary to Carolyn as executor. Frankie's tangible property and insurance policies were left to Carolyn and the remainder of the assets were to be distributed among the trusts, including his shares of the corporations. After publishing notice to creditors for three consecutive weeks in 2011, Carolyn petitioned to close the estate in 2014. Only Richard objected to the closing of the estate, arguing that the attempt to transfer shares of three of the corporations to the trusts violated the corporations' bylaws that required shares be offered to the corporations for purchase. The chancery court ultimately ordered Carolyn to sell the shares of the three corporations to those corporations. On appeal, the Supreme Court found that Richard's objection to the transfer was, in essence, a shareholder's derivative suit. Because he was not seeking individual recovery or individual damages, the Supreme Court held that Richard lacked standing to file his objection to closing the estate. In 2017, while the appeal on the estate case was pending, Richard filed complaints for dissolution asking the chancery court to grant corporate dissolution for the four corporations. In 2018, the chancery court authorized dissolution and appointed a receiver to oversee the liquidation and dissolution of the corporations. The order stipulated that all parties signing the order did not oppose the appointment of a receiver and Carolyn's attorney signed the order. The receiver then sought to appoint Legacy Capital to assist with the sale of the corporations' assets. Only Richard objected to the appointment of Legacy Capital and, after adjusting the fee structure, the chancery court granted the receiver's motion. In the estate case, the receiver filed an objection to closing Frankie's estate in April 2018. The chancery court held that the bylaws applied to Frankie's testamentary transfer and ordered the estate to offer the shares to the respective corporations. Thus, the closing of the

estate, as sought by Carolyn, was conditioned on the offer of the shares to the corporations. Further, the chancery court held that the receiver should use December 31, 2017, to determine the net asset values of the shares as mandated by the bylaws. Three of the four corporations elected to purchase the estate's shares. In November 2018, the chancery court ordered that the corporations be sold and approved the process for each company. Public auctions followed with Carolyn and Richard as the only bidders. Carolyn successfully bid for one corporation, while Richard successfully bid for the other three. The court approved the auctions and proposed sales of the corporations' assets. At this time, Dana and Angela filed motions to join or intervene in both the estate and dissolution actions. The chancery court denied all their motions. In 2019, the chancery court conducted a joint trial for both the estate action and the dissolution action. In the estate action, it was found that the receiver properly determined the net asset values for the estate's shares. In the dissolution action, it affirmed the auction process and the sale of the corporations' assets. Dana and Angela appealed the chancery court's denial of their motions to intervene or join both actions; Carolyn appealed and Richard cross-appealed.

ISSUES

Whether the chancery court erred by (1) denying Angela and Dana's motions to join or intervene; (2) allowing the Receiver to object to the share transfer when the statute of limitations on such objections had already expired; (3) issuing its order dissolving the Ware Corporations and appointing a receiver; (4) improperly exercising jurisdiction over probate assets that properly belonged to the probate court; (5) denying Carolyn's motion to remove and replace members of the board of directors; (6) by issuing its order authorizing payment of dividends; (7) allowing payments to be paid to the receiver and law firms hired by the receiver; (8) denying Carolyn's request as executor that one-fourth of all accumulated earnings of each corporation be declared probate assets pursuant to the laws and regulations governing Subchapter S corporations; (9) approving the receiver's request to hire Legacy Capital to assist the receiver with the sale of the company assets; (10) quashing two subpoenas duces tecum Carolyn served on Legacy Capital's in-state registered agent; (11) failing to require the receiver to comply with its orders, failing to require the receiver to comply with inventory and accounting requirements, failing to require the receiver to act as a fiduciary, and failing to remove the receiver; (12) valuing the corporations for auction as of December 31, 2017; (13) setting an arbitrary and inequitable date to value the estate's shares; (14) allowing an incorrect valuation method for the net assets of the corporations; (15) allowing payment of dividends for the year 2018 when December 31, 2017 was set as the proper share valuation date.

HOLDING

(1) Because Angela and Dana knew of Richard's objection in the estate case in 2014 and the dissolution proceedings in 2017 but did not file to intervene until 2018, because the parties who had litigated the issues for years would be severely prejudiced by their intervention, because they failed to illuminate any prejudice to them should they not be allowed to intervene, and because Carolyn adequately represented any interest of Angela and Dana, the chancery court did not err in denying their motions to intervene. (2) Because the logical point of any breach of the corporate bylaws occurred when Carolyn attempted to transfer the shares to the trusts without having first offered them to the corporations by attempting to close the estate, and because this alleged breach occurred in 2014 and the corporations did not object in 2018, the chancery court erred in not holding that the three-year statute of limitations barred the corporations' contractual claims against the estate. (3) Because the order authorizing and appointing the receiver was a consent decree signed by Carolyn's attorney on her behalf, because Carolyn alleged no valid reason to attack the validity of the consent decree, because Carolyn's attorney filed answers in the dissolution cases on behalf of Carolyn in her capacity as executrix, and because the chancery court had ample statutory authority to appoint the receiver, Carolyn's arguments that the order was void and the court lacked subject matter jurisdiction were without merit, the chancery court did not err in dissolving the Ware Corporations and appointing a receiver. (4) Because the legislature gave the chancery court the power to hear judicial dissolution cases such as this, because the dissolution case was not a demand against the estate as contemplated by the probate statute, and because the underlying corporate assets were not estate assets, the chancery court did not err exercising control over those assets. (5) Because the motion to remove Richard as director was not relevant to the dissolution case, the chancery court did not err in denying Carolyn's motion. (6) Because Carolyn agreed to the order authorizing payment of dividends without qualification, and because her attorney signed on her behalf in her capacity as executrix, the chancery court did not err in approving the payment of dividends. (7) Because Carolyn agreed to the order that created the receiver's fee, and because she did not object to the orders allowing the Receiver to obtain legal counsel or any of the fee submissions before the chancery court thus waiving any claim of error on appeal,

the chancery court did not err in allowing these payments. (8) Because it was unclear what decision Carolyn purported to find in error, and because Carolyn failed to cite any authority for her argument, the Supreme Court exercised its discretion to decline to address the issue. (9) Because Carolyn failed to object to the retention of Legacy Capital at the time the Receiver sought their appointment in chancery court, thus waiving the argument on appeal, and because Carolyn's ancillary arguments on this issue were either raised for the first time on appeal or without merit, the chancery court did not err in approving the receiver's request to hire Legacy Capital. (10) Because Legacy Capital was a nonparty and was an out-of-state entity, and because a court cannot subpoena a nonresident nonparty to appear and/or produce documents that are located outside the state, the chancery court did not err when it quashed the two subpoenas served on Legacy Capital's in-state agent. (11) Because Carolyn cited no authority for any of her propositions, the Supreme Court exercised its discretion to decline to address the issue; however, the Supreme Court noted that the receiver complied with the court's order and Carolyn's argument merely summarily alleged that his reports did not fulfill "accounting requirements," so the issue was without merit. (12) Because Carolyn did not give any reason for December 31, 2017, being error except for base assertions that the appraiser did not know what tangible assets the companies had on site on that day, the issue was waived. (13) Because the corporations' claims against the estate were made outside of the statute of limitations and the Supreme Court had reversed the determination that the estate must offer the shares to the corporations, the issue was moot. (14) Because the valuation was a factual determination within the sound discretion of the chancery court, and because Richard did not demonstrate why the chancery court abused its discretion, the chancery court did not err in employing the net asset value methodology it employed. (15) Because the corporations' claims against the estate were made outside of the statute of limitations and the Supreme Court had reversed the determination that the estate must offer the shares to the corporations, this issue was moot. Therefore, the Supreme Court affirmed in part, reversed in part, remanded, and dismissed as moot in part the judgment of the Chickasaw County Chancery Court.

On Direct Appeal: Affirmed in Part, Reversed in Part, & Remanded. On Cross Appeal: Affirmed in Part; Dismissed as Moot in Part - 2020-CA-00702-SCT (May 26, 2022)

Opinion by Presiding Justice King

Hon. Joseph N. Studdard (Chickasaw County Chancery Court)

Rhett R. Russell, Keith Curtis Kantack & Rex F. Sanderson for Appellants - J. Cal Mayo Jr., Casey Langston Lott, Derek Andrew Henderson & Dustin Colt Childers for Appellees

Consolidated with:

On Direct Appeal: Affirmed in Part, Reversed in Part, & Remanded. On Cross Appeal: Affirmed in Part; Dismissed as Moot in Part - 2020-CA-00706-SCT (May 26, 2022)

Hon. Joseph N. Studdard (Chickasaw County Chancery Court)

Rhett R. Russell, Keith Curtis Kantack & Rex F. Sanderson for Appellants - J. Cal Mayo Jr., Casey Langston Lott, Derek Andrew Henderson & Dustin Colt Childers for Appellees

Consolidated with:

2016-CA-00288-SCT

Consolidated with:

2016-CA-01589-SCT

Briefed by [Morgan Arrington Jones](#)

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SUPREME COURT - ORDERS

FLECHAS V. MISS. BAR

ORDER OF DISBARMENT

BAR MATTERS - DISCIPLINE - IRREVOCABLE RESIGNATION - Miss. R. of Discipline 10.5 provides that an attorney may tender an irrevocable resignation, and upon receipt of such a resignation, either the Court or Tribunal

shall enter its order accepting the resignation, revoking the attorney’s license, and barring forever thereafter the attorney’s right to seek reinstatement to the privilege of practicing law in this state

BAR MATTERS - DISCIPLINE - JURISDICTION - The Supreme Court has exclusive and inherent jurisdiction regarding the discipline of attorneys promulgated in the Miss. R. of Discipline for the Bar

FACTS

In March 2021, the Mississippi Bar (“Bar”) filed a formal complaint to disbar Eduardo Flechas. The Complaint Tribunal entered a default judgment to disbar Flechas and subsequently denied Flechas’s motion to set aside default judgment. Flechas filed a Notice of Appeal in September 2021. In April 2022, Flechas executed a Notice of Irrevocable Resignation. In his notice, Flechas noted that the matter was the only disciplinary matter against him and he no longer wished to defend against the matter. The Bar then moved the Court to accept Flechas’s resignation.

ORDER

The Supreme Court granted the Bar’s motion to accept the Irrevocable Resignation of Eduardo A. Flechas. The Supreme Court ordered: (1) the acceptance of Flechas’s resignation with prejudice from the Bar, and the resignation was tantamount to proof of guilt on the matter charged; (2) that Flechas’s license to practice law in the state was permanently revoked; (3) Flechas to be barred from seeking reinstatement to the privilege of practicing law in the state in the future; (4) that an attested copy of the order be forwarded to Flechas and to the Executive Director of the Bar; (5) that Flechas should notify clients and affected courts of his resignation from the Bar, properly disburse all funds he held in trust, and comply with all other requirements that applied under Miss. R. of Discipline 11; (6) that Flechas should file an affidavit with the Court that stated that all of his clients had been notified of his resignation from the Bar and his inability to practice law in Mississippi, and that he fully complied with all applicable requirements of Miss. R. of Discipline 11, as well as other requirements of the order; (7) that if Flechas failed to comply with the order he may be punished as contempt and may constitute separate grounds for disciplinary action; (8) the Clerk of the Court to immediately forward an attested copy of the order to the Clerks of the United States District Courts for the Northern and Southern Districts of Mississippi, the Clerk of the United States Court of Appeals for the Fifth Circuit, and the Clerk of the Supreme Court of the United States; (9) the disciplinary appeal dismissed; and (10) the costs of the proceeding assessed to Flechas.

Granted - 2021-BA-01051-SCT (May 24, 2022)

En Banc Order by Justice Chamberlin

Briefed by [J. Evan Thomas](#)

SUPREME COURT - CRIMINAL CASES

WEBB V. STATE

CRIMINAL - FELONY

EVIDENCE - CHARACTER EVIDENCE - ADMISSIBILITY - Miss. R. Evid. 404(b)(2) provides that otherwise inadmissible character evidence may be admitted for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident

EVIDENCE - AUTHENTICATION - PRIMA FACIE SHOWING - Miss. R. Evid. 901(a) provides that evidence is authenticated by providing “evidence sufficient to support a finding that the item is what the proponent claims it is”

EVIDENCE - ADMISSIBILITY - RELEVANCE - Miss. R. Evid. 401 provides that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and that any admission is favored if the evidence has any probative value

EVIDENCE - ELECTRONIC EVIDENCE - AUTHENTICATION - Something more than a photo and account name is required to make a prima facie showing of authenticity required for the admission of electronic evidence, and this may include responses that circumstantially indicate the author of a communication

FACTS

A jury found John Henry Zachariah Webb guilty of one count of fondling and three counts of sexual battery of two minor girls. Evidence admitted against him at trial included occurrences of past, out-of-state sexual assault on one of the victims, a photo of one of the victim's diary entry, screenshots of Snapchat messages with one of the victims, and text messages between Webb and his live-in girlfriend, the mother of one of the victims. The trial court sentenced Webb to serve a total of sixty years' imprisonment. Webb appealed.

ISSUES

Whether (1) the trial court abused its discretion in holding that a victim's testimony concerning Webb's prior acts of sexual assault outside of Mississippi was admissible as more probative than prejudicial; (2) the photo of the victim's diary entry was properly admitted as relevant; (3) the Snapchat conversation screenshots were properly authenticated; (4) the admitted text messages between Webb and his girlfriend, one victim's mother, were proportional and relevant to the case; and (5) the jury's verdict contradicted the overwhelming weight of the evidence.

HOLDING

(1) Because evidence of the prior sexual abuse was overwhelmingly similar to Webb's continued acts in Mississippi so as to show motive and a common plan and the trial court gave a limiting instruction to the jury directing them not to consider the out-of-state conduct as evidence of Webb's guilt with regard to the Mississippi charges, the trial court did not abuse its discretion in admitting the evidence. (2) Because the diary entry showed the victim's belief that her sexual relationship with Webb was a result of her special relationship with him, the trial court did not abuse its discretion by admitting the evidence as relevant. (3) Because a photograph of electronic evidence need not be sponsored by the photographer, because the messages were sent from Webb's Snapchat account, and because the author's messages and responses were similar to the way Webb spoke to the victim, there was sufficient evidence for the jury to make a determination of authenticity. (4) Because the text messages discussed Webb's inappropriate relationship with his girlfriend's daughter, because Webb admitted therein to having sexual feelings toward the victim, and because Webb did not show that he was in any way prejudiced by the admission of other text messages not discussing these matters, the trial court did not abuse its discretion by admitting the text messages into evidence. (5) Because the jury determined the credibility of witnesses' testimony concerning Webb's illegal sexual conduct with the minor girls and there existed in evidence corroborating letters, texts, and screenshots of Snapchat conversations, a written request to hide the relationship, and inappropriate photos of the victims on Webb's phone, the overwhelming weight of the evidence was in support of the jury's verdict. Therefore, the Supreme Court affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2021-KA-00082-SCT (May 26, 2022)

Opinion by Justice Maxwell

Hon. Celeste Embrey Wilson (Desoto County Circuit Court)

Michael Haden Lawyer for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee

Briefed by [Katharine Van Pelt](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MAY 24, 2022

COURT OF APPEALS - CIVIL CASES

BREWER V. BUSH

CIVIL - PERSONAL INJURY

APPELLATE PROCEDURE - APPELLATE REVIEW - STANDARDS OF DEFERENCE - When reviewing a denial of a motion for a new trial, the appellate court affords great deference to both the trial court in determining the

weight of the evidence issue and whether to grant a new trial, and the jury verdict, since the jury alone considers the weight and credibility of the evidence when making its decision

CIVIL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR - If jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found

CIVIL PROCEDURE - JURY INSTRUCTIONS - ABUSE OF DISCRETION - A trial judge does not commit an abuse of discretion when giving jury instructions that are accurate statements of law and relevant to the case's facts

CIVIL PROCEDURE - OBJECTIONS - WAIVERS - The appellant is procedurally barred from asserting an issue on appeal if he fails to object at the appropriate time during the trial

FACTS

In May 2016, Kemp Bush asked Kathy Darlene Brewer and Mack Busby to help him install a barbed wire fence around his garden to keep out cows. Bush and Brewer were friends and the two had helped each other with tasks in the past, including working in Bush's garden and Bush helping with Brewer's beekeeping. With Bush having already purchased the barbed wire, metal T-posts, and other fence materials, Brewer and Busby arrived at Bush's property to work in May 2016. Brewer and Bush moved the barbed wire to Bush's utility vehicle, which the two had permission to use when working on a project for Bush, and headed out to the garden. Busby and Brewer both later testified that they had spoken to Bush the previous morning about working on the fence, and Busby testified that Bush gave no directions as to how to put up the fence. Bush testified that he could not remember whether he had talked to Brewer or Busby the previous morning. Brewer and Busby started their work by attaching the first spool of wire to a metal T-post already installed by Bush or Bush's daughter. Brewer, in order to have the wire unrolled as she and Busby drove the utility vehicle, then took a wooden pole from the utility vehicle, ran it through the barb wire spool, and wedged one end of the pole into the back of the utility vehicle. Busby began to drive, but the pole began to bend, and the spool fell off. Busby then used a bungee cord to keep the spool in place. Busby testified that he thought the bungee cord would hold despite it not being in good condition. However, once he started driving again, the bungee cord snapped, and the broken end hit Brewer in her right eye, which caused serious injury and loss of vision for Brewer. At the time of the incident, Bush was not at the garden and had not been there that day. Brewer sued Bush, alleging that Bush failed to exercise reasonable care for her safety as an invitee and failed to provide reasonably safe tools for the work that Bush requested Brewer to complete. After discovery, Brewer filed for summary judgment, arguing he did not breach any duty owed to Brewer. In addition, Bush argued that the sole proximate cause of the accident was Busby's and/or Brewer's decision to use the bungee cord. Brewer responded, arguing that the arrangement between Bush and Brewer helping each other was an implied contract for hire. The circuit court granted summary judgment for the claims based on premises liability but denied summary judgment for the safe tools claim because there was a dispute of material fact as to whether there was an employer-employee relationship between Bush and Brewer. After a jury trial, the jury returned a unanimous verdict in favor of Bush. Brewer filed a motion for a new trial, but it was denied. Brewer appealed.

ISSUES

Whether (1) the jury's verdict was against the overwhelming weight of the evidence and the trial judge abused his discretion by denying Brewer's motion for a new trial; (2) the jury was fairly instructed on the issue of proximate causation; (3) the circuit court abused its discretion by giving Bush's proposed instruction regarding simple tools; (4) the circuit court abused its discretion by giving Bush's proposed instruction on foreseeability and proximate causation; (5) the submission of four verdict forms was reversible error; and (6) the number of jury instructions Bush proposed resulted in prejudice to Brewer.

HOLDING

(1) Because there was a genuine dispute of material fact over whether an employer-employee relationship existed, and because it would have been reasonable for the jury, based on the evidence presented, to find that either no employer-employee relationship existed or that the tools provided were reasonably safe and that Bush did not breach any duty owed to Brewer, the jury's verdict was not against the overwhelming weight of the evidence, and the circuit court did not abuse its discretion by denying Brewer's motion for a new trial. (2) Because the jury instructions as a whole fairly stated the applicable rules of law in regard to proximate causation, the jury was fairly instructed on the issue of proximate causation. (3) Because the instruction accurately stated the law, because the wooden pole and bungee cord were simple tools, and because the jury instruction did not direct the jury to return a verdict for Bush or to reach any conclusion, the circuit court did not abuse its discretion. (4) Because the jury instruction was a model instruction that correctly stated

the law and was relevant to the facts of the case, the circuit court did not abuse its discretion. (5) Because Brewer did not object to the verdict form including Busby's name during the charge conference, because the evidence at trial would have permitted the jury to assign fault to Busby, and because the verdict forms, read as a whole, fairly stated the law and guided the jury, the submission of four verdict forms was not reversible error. (6) Because Brewer failed to raise the issue of the number of offered jury instructions during the trial, and because the circuit court's record did not support Brewer's claim about the charge conference's length or that she was prejudiced by its length, the issue was both waived and without merit. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2020-CA-00214-COA (May 24, 2022)

Opinion by Presiding Judge Wilson

Hon. Dal Williamson (Jones County Circuit Court, Second Judicial Dist.)

James L. Quinn for Appellant - Sam Starnes Thomas & Owen Patrick Terry for Appellee

Briefed by [William Doherty](#)

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MONTGOMERY V. MONTGOMERY

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - PROPERTY SETTLEMENT AGREEMENTS - A property settlement agreement has the character of other contracts and also has the nature of a court order when it is incorporated into the final decree

FAMILY LAW - DIVORCE - DISCRETION - A chancellor's granting of divorce will only be reversed if the findings were manifestly wrong and against the overwhelming weight of the evidence

CIVIL PROCEDURE - STANDARD OF LITIGATION - PRO SE LITIGANTS - Pro se litigants are afforded some leniency, but they must be held to substantially the same standards of litigation conduct as members of the bar

FACTS

Glen and Mary Montgomery married in 1986, had two adult children and separated in 2011. The couple owned and rented one commercial and two residential properties. Mary retained the marital home after their separation, but the house was later foreclosed after damage from Hurricane Isaac went unrepaired. Eight months after the separation, Mary filed for divorce against Glen on the grounds of habitual cruel and inhuman treatment. During the 2014 trial, the judge dismissed her complaint and Glen voluntarily dismissed his counterclaim. The couple remained married but separated. In July 2016, Glen filed for divorce against Mary on the grounds of habitual cruel and inhuman treatment and sought equitable distribution of the marital property. The divorce proceedings occurred in April 2017. During trial, Glen testified about the marriage, Mary's use of drugs, Mary no longer allowing Glen's family in their home, Mary's threatening of physical violence, that Glen feared for his safety and left the home, and that she tried to file rape charges against him. After the separation, Mary continued living in the marital home. The home sustained damage from Hurricane Isaac. Glen said the insurance company provided funds to fix the damages, Mary received the funds, but she never used the money to repair the home. During her cross-examination of Glen, Mary, among other things, admitted to taking Ambien with the intent to sleep for days and denied that she declined marital counseling or that she threatened to kill him. Further, Glen called the couple's neighbor, Tonya Lynd, as his witness, who testified, among other things, that Mary told her that she told Glen to leave and that she wished she could shoot Glen. After hearing testimony, the chancery court granted Glen a divorce on the ground of habitual cruel and inhuman treatment. There was a second hearing on property division. Glen testified to the value and money owed for a commercial building, two residential buildings the couple jointly owned, and other assets. Glen entered into evidence deeds of the properties, a list of upkeep expenses, documentation of back taxes as well as insurance, and a 2013 appraisal of the home. Mary asked the court to rule on her motion to put Glen's name on a hospital bill and asked for spousal support. A final judgment of divorce was signed by the court and given to the parties. The judgment stated that alimony and equitable distribution would be addressed in August 2017. In May 2017, Mary filed a motion to appeal, which was subsequently dismissed by the court in March 2019 due to the order being interlocutory. The chancery court resumed testimony on the issue of equitable distribution in September 2020. Since the last trial, the rental properties had sold and the profit of \$36,202 was deposited

into the court's registry. Glen offered to give Mary the profits and would not ask Mary for reimbursement of taxes paid if he could keep his retirement account. Glen also offered Mary the commercial building if he could be relieved of any obligation on it. Mary entered into evidence one of Glen's paychecks, proving garnishment. Before the lunch break, the court asked Mary to review the offer Glen gave her. Mary rejected the offer but stated that she would take a total settlement amount of \$48,000 and leave Glen the retirement account. The amount in the registry was given, as well as an additional \$11,797.88 to be paid by Glen in sixty days. Glen kept the commercial building and a timeshare the couple owned, as well as their obligations. In September 2020, the parties signed the final judgment with the appropriate terms. A court date was set sixty days out to check on Glen's payments. In October 2020, Mary filed a motion to appeal and the court allowed Glen to interplead the \$11,797.88 to the registry of the court. Mary's appeals were consolidated.

ISSUES

Whether the chancery court erred in (1) granting Glen a divorce on the grounds of habitual cruel and inhuman treatment and (2) approving the division of assets of the parties.

HOLDING

(1) Because pro se litigants are held to the same procedural and evidentiary requirements as individuals represented by counsel, because Mary failed to present proper factual and legal authority to support her claim, and because the chancery court's findings were not manifestly wrong or against the overwhelming weight of the evidence, the chancery court did not err in granting Glen a divorce on the grounds of habitual cruel and inhuman treatment. (2) Because Mary failed to cite facts or authority to support her claim of error, because the parties created their own property division settlement, because Mary agreed to the terms of the settlement, and because nothing in record barred the chancery court from accepting the settlement, the chancery court did not err in approving the division of assets of the parties. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2020-CP-01135-COA (May 24, 2022)

Opinion by Judge McDonald

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

Pro se for Appellant - Mark V. Knighten & Steven Jay Miller for Appellee

Consolidated with:

Affirmed - 2017-CP-00632-COA (May 24, 2022)

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

Pro se for Appellant - Mark V. Knighten & Steven Jay Miller for Appellee

Briefed by [Marlee Russell](#)

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PROWELL V. NATIONSTAR MORTG. LLC

CIVIL - REAL PROPERTY

CIVIL PROCEDURE - FINAL JUDGMENT - MULTIPLE CLAIMS - Pursuant to Miss. R. Civ. P. 54(b), when more than one claim for relief is presented in an action, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of judgment

CIVIL PROCEDURE - FINAL JUDGMENT - MULTIPLE CLAIMS - If the court chooses to enter a final order, it must do so in a definite, unmistakable manner; absent a certification under Miss. R. Civ. P. 54(b), any order in a multiple party or multiple claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory

FACTS

In 1995, Antonio Prowell acquired title to real property in Jackson, Mississippi. Prowell and his wife pledged the property as collateral for the debt incurred when he borrowed \$65,031 from Union Planters Bank National Association ("Union Planters"). Prowell and his wife also executed a deed of trust for the benefit of Union Planters connected to

the loan. In 2015, Nationstar Mortgage LLC (“Nationstar”) acquired the assignment of the loan and deed of trust. From 2003 to 2009, Countrywide Home Loans Inc. (“Countrywide”) serviced Prowell’s loan, and during that time Prowell became delinquent. Countrywide and Prowell agreed to let Prowell make additional monthly payments to bring the loan current through a special forbearance agreement. In 2008, Prowell again fell behind in making payments by six months, which resulted in another forbearance agreement. From 2007 to 2010, the Prowell occasionally made payments on the loan that Nationstar’s predecessors accepted in interest. Prowell also claimed to have blocked previous foreclosure attempts on the property by filing for bankruptcy protection. Prowell filed the action at issue after Nationstar tried to foreclose the property and filed an “Emergency Complaint for a Temporary Restraining Order and/or Permanent Injunction, and for Adverse Possession.” The court then granted Prowell a temporary restraining order without notice to Nationstar. As a result, Nationstar was unable to continue with the foreclosure until the hearing. Nationstar answered with a counterclaim for judicial foreclosure and other relief and the debtors answered the counterclaim. Once the court received the parties’ briefs, it dismissed Prowell’s complaint with prejudice and granted Nationstar’s counterclaim, allowing them to proceed with the foreclosure. The counterclaim for the judicial foreclosure was still pending for a final hearing at the time the court rendered its judgment. Prowell appealed.

ISSUE

Whether the chancellor’s order was a final, appealable judgment pursuant to Miss. R. Civ. P. 54(b).

HOLDING

Because not all issues between the parties were adjudicated in the order at issue and the order was not certified as required by Miss. R. Civ. Pro. 54(b), the order was not a final, appealable judgment and the Court of Appeals lacked jurisdiction. Therefore, the Court of Appeals dismissed the appeal from the Hinds County Chancery Court.

Appeal Dismissed - 2021-CA-00055-COA (May 24, 2022)

Opinion by Judge Emfinger

Hon. J. Dewayne Thomas (Hinds County Chancery Court, First Judicial Dist.)

Roger Lane McGehee Jr. for Appellants - Beth Windsor Burton for Appellees

Briefed by [Katie Lee Crockett](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

CAMPBOR V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF

- To prevail on an ineffective assistance of counsel claim, the movant must show (1) the counsel’s representation fell below an objective standard of reasonableness and (2) but for the counsel’s errors, there is a reasonable probability that the outcome of the proceeding would have been different; claims of ineffective assistance of counsel must be pled with specificity and be supported by affidavits other than the movant’s

APPELLATE PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - PRESUMPTION OF SOUND TRIAL STRATEGY - Where a defendant alleges ineffective assistance of counsel, there is a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy

APPELLATE PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - SOUND TRIAL STRATEGY - Challenged actions that might be considered sound trial strategy include decisions regarding filing motions, calling witnesses, asking questions, making objections, and choosing to not pursue all plausible lines of defense after an adequate investigation of the rejected alternative

FACTS

In January 2015, Tyree Camphor was convicted of murdering Angelique Smith and was later sentenced to serve thirty-five years with five years suspended. Approximately six days before the murder, Officer Michael Cameron responded to a disturbance between Camphor and Smith. A subpoena was issued for the officer, but he could not be located and served. While the circuit court allowed the officer's report to be brought in through a different witness, Detective Camel, the court imposed limitations on the evidence. Neither the state nor the defense questioned the witness about Officer Cameron's report. The defense's theory at trial was that an unknown male standing with Smith was the initial aggressor, and Camphor's claim of self-defense was based upon the unknown male's actions as opposed to Smith's actions. His motion for a new trial or, in the alternative, a judgment notwithstanding the verdict was denied. After almost three years, he retained new counsel and filed a petition for post-conviction collateral relief ("PCR") alleging ineffective assistance of counsel at trial. The circuit court denied the petition. Camphor appealed.

ISSUES

Whether the trial court erred in denying Camphor's PCR petition claiming ineffective assistance of counsel because Camphor's trial counsel failed to (1) subpoena Officer Cameron to testify to the fact that he had responded to a disturbance between Camphor and Smith six days prior to the shooting where Smith was deemed to be the aggressor and (2) object to improper comments made by the prosecution during the closing arguments.

HOLDING

(1) Because Camphor's trial counsel made a genuine effort to locate Officer Cameron and because Camphor did not show how Officer Cameron's testimony would have produced a reasonable probability the outcome of the trial would have been different, failure to cause Officer Cameron to testify to the fact that he had responded to a disturbance between Camphor and Smith six days prior to the shooting where Smith was deemed to be the aggressor was not ineffective assistance of counsel. (2) Because Camphor does not suggest how an objection to the prosecutor's comment at trial could have produced a reasonable probability that the outcome at trial could have been different and because he provides nothing to overcome the presumption that counsel made a sound strategic decision not to object to the comment, failing to object to improper comments made by the prosecution during the closing arguments was not ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2021-CP-00048-COA (May 24, 2022)

Opinion by Judge Emfinger

Hon. Betty W. Sanders (Hinds County Circuit Court, First Judicial District)

Pro se for Appellant - Allison Horne (Att'y Gen. Office) for Appellee

Briefed by [Christian Eaves](#)

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FROST V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - SENTENCING - AUTHORITY TO RECONSIDER - Trial court judges do not have inherent authority to modify sentences after the end of the term of court during which sentence is given, but, rather, judges' authority is limited to that set forth in the Constitution or statute

POST-CONVICTION RELIEF - SENTENCING - AUTHORITY TO RECONSIDER - Once a criminal case has been terminated and the term of court ends, a circuit court is powerless to alter or vacate its judgment

APPELLATE PROCEDURE - BRIEFS - FORM - Pursuant to Miss. R. App. P. Rule 28(a)(1)(7), failure to cite any authority is a procedural bar, and an appellate court is under no obligation to consider the assignment

FACTS

Michele Frost was indicted in August 1995 by a grand jury on charges of embezzlement and pled guilty to one count of embezzlement in May 1996. Frost was sentenced to serve five years in the custody of the Mississippi Department of

Corrections. However, the court suspended all five years and placed Frost on five years of probation. He was also required to pay court costs and \$11,291 in restitution. At sentencing and in the probation order, the circuit court retained jurisdiction of the case. However, the circuit court did not withhold acceptance of Frost's guilty plea. The disposition specifically noted that Frost's conviction was the result of a guilty plea. After paying the restitution, Frost was released from probation early. On November 5, 2020, before a new judge and with the assistance of a new attorney, Frost filed a petition requesting that the circuit court reconsider his adjudication of guilty, grant him non- adjudication, dismiss the embezzlement charges, and expunge his record. The petition was denied. Frost appealed.

ISSUES

Whether (1) the trial court retained jurisdiction; (2) an appellate court may grant the circuit court jurisdiction to non-adjudicate Frost's conviction; and (3) special circumstances exist that would allow an appellate court to grant the circuit court jurisdiction to non-adjudicate Frost's conviction.

HOLDING

(1) Because the sentence had already ended, the circuit court did not have authority to modify the judgment and therefore did not err. (2) Because Frost never appealed his sentence based on illegality and he served the sentence to completion, because Frost's case was never remanded for resentencing, and because no other grounds existed allowing the appellate court to remand and resentence Frost, the issue was without merit. (3) Because Frost's brief did not cite any authorities supporting the special circumstances that he argued as required by Miss. R. App. P 28(a)(7), the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit.

Affirmed - 2021-CA-00152-COA (May 24, 2022)

Opinion by Judge Westbrook

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

Jim L. Davis III for Appellant - Alexandra Lebron (Att'y Gen. Office) for Appellee

Briefed by [Chandler Coleman](#)

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KLIS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - TIMING - Pursuant to Miss. Code Ann. § 99-39-5(2), a motion for post-conviction relief must be filed within three years following the entry of judgment of conviction; failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - INEFFECTIVE ASSISTANCE OF COUNSEL - To be excepted from the procedural bar in an ineffective assistance of counsel claim, a movant must show extraordinary circumstances that would explain his or her failure to assert post-conviction relief claims within the statutory three-year time

POST-CONVICTION RELIEF - PETITION - INEFFECTIVE ASSISTANCE OF COUNSEL - A claim of ineffective assistance of counsel must be pled with specificity and the claim must be supported by affidavits other than the defendant's own

FACTS

Patrick Klis pled guilty to two counts of statutory rape in December 2015. At the guilty plea hearing, the circuit court found that Klis's guilty pleas were made freely, voluntarily, and intelligently. The circuit court accepted his guilty pleas and adjudicated Klis to be guilty of two counts of statutory rape. The judgment of conviction was entered in December 2015 and a sentencing hearing was later held in January 2016. Klis was sentenced to fifteen years in the custody of the Mississippi Department of Corrections for one count and fifteen years, with nine years to serve, followed by six years of post-release supervision for the second count. The sentences were ordered to run consecutively. The circuit court entered the sentencing order on February 4, 2016. The circuit clerk's docket showed that Klis filed his post-conviction

relief (“PCR”) petition on February 7, 2019. Klis claimed he was denied effective assistance of counsel at his sentencing hearing, but he did not challenge his convictions but instead requested a new sentencing hearing. Klis attached his own sworn affidavit and two psychological evaluations in support of his petition. The reports were not presented at the sentencing hearing and showed that Klis suffered from post-traumatic stress disorder. The first evaluation was from March 2010 and the second evaluation was from October 2015. The second examination was conducted to determine if Klis was competent to stand trial and whether Klis was *M’Naghten* insane at the time of the crimes. The circuit court denied Klis’s PCR petition stating that it was not filed within the three-year statute of limitations imposed by Miss. Code Ann. § 99-39-5(2) and was procedurally barred. The circuit court also recognized that under extraordinary circumstances, an ineffective-assistance claim may be exempt from the time bar. After considering the matters presented, the circuit court found that Klis’s claim of ineffective assistance of counsel had no merit and that his petition was procedurally barred. Klis appealed.

ISSUES

Whether (1) Klis’s PCR petition was procedurally barred and (2) Klis’s claim of ineffective assistance of counsel provided an exception to the procedural bar.

HOLDING

(1) Because Klis filed his PCR petition more than three years after the entry of his judgment of conviction, the petition was procedurally time-barred. (2) Because Klis did not show any extraordinary circumstances to provide an explanation for why his petition was not filed within three years after the judgment of conviction was entered and because Klis did not provide an affidavit other than his own, Klis’s claim of ineffective assistance of counsel did not provide an exception to the procedural bar. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2021-CA-00349-COA (May 24, 2022)

Opinion by Judge Emfinger

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

Christopher G. Holt for Appellant - Alexandra Rosenblatt (Att’y Gen. Office) for Appellee

Briefed by [Abbey Bufkin](#)

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PIPKIN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - FAILURE TO FILE - A motion for post-conviction relief is only timely if it is filed within three years of the conviction

POST-CONVICTION RELIEF - FINAL JUDGMENT - SUCCESSIVE MOTIONS - A court’s dismissal or denial of a post-conviction relief motion is a final judgment and shall be conclusive until reversed; it shall be a bar to a second or successive motion

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - EXCEPTIONS - Motions for post-conviction relief may be filed after their three-year limit if (1) there was an applicable, intervening decision of the United States Supreme Court or the Mississippi Supreme Court; (2) new evidence not reasonably discoverable at trial is discovered; or (3) there is an expired sentence, an unlawful revocation of parole, probation, or conditional release

POST-CONVICTION RELIEF - NEWLY DISCOVERED EVIDENCE - REQUIREMENTS - Evidence constitutes “new evidence” for post-conviction relief purposes if it was discovered after trial, could not have been discovered before trial through due diligence, would have produced a different result at trial, and is material to the facts at hand

POST-CONVICTION RELIEF - ACTUAL INNOCENCE - REQUIREMENTS - To prevail on a claim of actual innocence, a petitioner must show that (1) they have newly discovered evidence that proves their innocence and (2) they have a constitutional claim for review on the merits

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - GUILTY PLEA - To prevail on a claim of ineffective assistance of counsel, a petitioner who originally pled guilty must show that but for the ineffective assistance they would not have pled guilty and insisted on a trial

FACTS

Devonta Pipkin pled guilty to one count of first-degree murder in June of 2014. At the time of this plea, the trial court determined that Pipkin was well advised by his attorney and that the plea was freely and voluntarily made. Pipkin was sentenced to life imprisonment without parole. In June of 2017, Pipkin filed his first motion for post-conviction relief. This motion was denied. Pipkin filed a second motion for post-conviction relief in December of 2020. In this second motion, Pipkin alleged that he was actually and factually innocent. In support of this motion, Pipkin presented four affidavits from his co-defendants. These affidavits had previously been referenced by Pipkin's attorney in a motion to sever. Notably, these affidavits conflicted with some of the co-defendants' prior testimony. The trial court ultimately denied Pipkin's second motion on the grounds that it was without merit, time-barred, and successive. Pipkin appealed.

ISSUES

Whether (1) Pipkin's second motion for post-conviction relief was time-barred; (2) the affidavits by Pipkin's co-defendants constituted newly discovered evidence; (3) Pipkin could establish a claim of actual and factual innocence; and (4) Pipkin had received ineffective assistance of counsel.

HOLDING

(1) Because Pipkin's 2020 motion was filed more than three years after his 2014 sentencing, his motion was time-barred. (2) Because the affidavits could have been discovered prior to Pipkin's trial through due diligence, and because their suspicious conflict with the co-defendants' prior statements would have likely prevented a different outcome from occurring at trial, the affidavits did not constitute newly discovered evidence. (3) Because Pipkin's motion did not include a constitutional claim in addition to his assertion of actual innocence, he could not establish an actual innocence claim. (4) Because Pipkin could not establish that he would have insisted on a trial if not for his counsel's allegedly ineffective assistance, he could not prevail on his claim of ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Tate County Circuit Court.

Affirmed - 2021-CA-00517-COA (May 24, 2022)

Opinion by Judge Westbrook

Hon. Smith Murphey (Tate County Circuit Court)

Imhotep Alkebu-Lan for Appellant - Allison Kay Hartman (Att'y Gen. Office) for Appellee

Briefed by [Marianna Nichols](#)

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COURT OF APPEALS - CRIMINAL CASES

BORSI V. STATE

CRIMINAL - MISDEMEANOR

CRIMINAL PROCEDURE - ROADBLOCK - PUBLIC WELFARE - The State's interest in conducting a roadblock to ensure the welfare of the public substantially outweighs the intrusion of an individual's liberty and does not violate the Fourth Amendment

CRIMINAL PROCEDURE - QUESTIONING - MIRANDA RIGHTS - An individual's *Miranda* rights are not triggered by general questioning or voluntary statements

CRIMINAL PROCEDURE - WITNESS - POLICE OFFICER - In accordance with Miss. R. Evid. 701, a police officer does not have to be tendered as an expert witness to testify about their observations of an individual at trial

CRIMINAL PROCEDURE - BENCH TRIAL - EXPERT TESTIMONY - A judge may weigh expert testimony provided before a bench trial however he or she so chooses

CRIMINAL PROCEDURE - FINES & FEES - CIRCUIT CLERK - A circuit clerk is not permitted to charge a fee unless it is clearly authorized by Miss. Code Ann. § 25-7-13

APPELLATE PROCEDURE - NEW ARGUMENTS - PERMISSION - An appellate court is not permitted to hear new arguments on appeal that were not originally raised at trial

FACTS

In April 2019, Stephen Borsi and his friend, Christopher Hathaway, were traveling on Highway 80 in Rankin County when they encountered a Mississippi Highway Patrol (“MHP”) safety checkpoint. MHP Trooper Willard Holifield approached Borsi’s vehicle as it slowed, and when Borsi rolled down his window, Trooper Holifield immediately recognized the odor of marijuana emanating from the automobile, prompting him to ask Borsi to pull over for questioning. Borsi admitted that he and Hathaway had been smoking marijuana two hours prior at the campsite where he resided, so Trooper Holifield asked fellow MHP Trooper Ivana Williams to conduct a field sobriety test, which Borsi failed. After a burnt marijuana cigarette was found under the vehicle’s passenger seat and Borsi further admitted to Trooper Holifield that he had purchased fifty dollars worth of marijuana earlier in the day, Trooper Holifield placed Borsi under arrest. Approximately thirty minutes later, Borsi voluntarily consented to a urine sample. Approximately four months later, in August 2019, Borsi pled no contest in Rankin County Justice Court and was convicted of driving under the influence (“DUI”) pursuant to Miss. Code Ann. § 63-1-30(1)(b) and (c). Borsi appealed the DUI conviction to the Rankin County Circuit Court and filed a motion to dismiss the DUI charge for discovery violations and a motion to suppress for *Miranda* violations, but both motions were denied. At trial, the State produced two toxicology expert witnesses from the Mississippi Crime Laboratory who collectively testified that marijuana was found in the burnt cigarette recovered from Borsi’s vehicle and that marijuana metabolites were found in Borsi’s urine sample. Further, Trooper Holifield testified that, at the time of his arrest, Borsi appeared to be high based on his physical appearance and demeanor. Borsi changed his story in court by claiming to have only smoked CBD and insisted he was not impaired at the time of his arrest. Additionally, Shawana Winstead, Borsi’s only witness, testified that Borsi was not inebriated when the two had interacted on the day he was arrested. However, the trial court was not swayed, and Borsi was ultimately found guilty of violating Miss. Code Ann. § 63-11-30(1)(c). Borsi appealed to the Rankin County Circuit Court, where, in addition to costs pertaining to his appeal and bond, Borsi was charged eighty-five dollars for a circuit court transfer fee. The Rankin County Circuit Court affirmed the conviction and remanded the case for execution of the sentence. Borsi appealed.

ISSUES

Whether the (1) trial court erred when it failed to rule that the roadblock was unregulated or violated Borsi’s Fourth Amendment rights; (2) trial court erred when it held that Borsi’s *Miranda* rights were not violated; (3) trial court erred when it allowed lay opinions about Borsi’s alleged marijuana use to be presented at trial; (4) trial court erred when it held that evidence of marijuana metabolites present in Borsi’s urine sample was sufficient to find Borsi guilty beyond a reasonable doubt; (5) trial court erred when it did not find that Borsi was improperly assessed an eighty-five dollar transfer fee; (6) Borsi’s new arguments raised on appeal were properly before the court.

HOLDING

(1) Because the State’s interest in conducting a roadblock to ensure safety on roadways substantially outweighed the intrusion of Borsi’s individual liberties, the trial court did not err when it failed to rule that the roadblock was unregulated or violated Borsi’s Fourth Amendment rights. (2) Because Borsi’s initial statement about smoking marijuana occurred in the first moments of Trooper Holifield’s questioning when no *Miranda* warnings were required, the trial court did not err when it held that Borsi’s *Miranda* rights were not violated. (3) Because Miss. R. Evid. 701 allowed a police officer to testify about his personal observations without being tendered as an expert, the trial court did not err when it allowed lay opinions about Borsi’s alleged marijuana use to be presented at trial. (4) Because the judge was permitted to place whatever weight she chooses on expert testimony in a bench trial, and because DUI convictions can be obtained without the presence of a blood or urine test, the trial court did not err when it held that evidence of marijuana metabolites present in Borsi’s urine sample was sufficient to find Borsi guilty beyond a reasonable doubt. (5) Because the fee Borsi was charged by the circuit clerk was unauthorized pursuant to Miss. Code Ann. § 25-7-13, the trial court erred when it did not find that Borsi was improperly assessed an eight-five-dollar transfer fee. (6) Because Borsi did not introduce his

additional arguments at trial, he was procedurally barred from raising the arguments on appeal. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the judgment of the Rankin County Circuit Court.

Affirmed in Part; Reversed & Rendered in Part - 2021-KM-00643-COA (May 24, 2022)

Opinion by Judge Westbrook
Hon. Dewey Key Arthur (Rankin County Circuit Court)
Pro se for Appellant - John Shirley for Appellee
Briefed by [John McDonald](#)

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SHORT V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR - When a defendant fails to object to a jury instruction as constructively amending the indictment at trial, this issue is waived on appeal and may only be reviewed for plain error to determine whether the instruction at issue affected the defendant's substantive or fundamental rights

CRIMINAL PROCEDURE - INDICTMENT - AMENDMENT - A constructive amendment of the indictment occurs when the proof and instructions broaden the grounds upon which the jury may render a guilty verdict so that the defendant may be convicted without proof of the elements alleged in the indictment

CRIMINAL PROCEDURE - INDICTMENT - AMENDMENT - As long as a variance between the indictment and jury instructions does not materially alter the facts which were the essence of the offense on the face of the original indictment or materially alter a defense to the indictment in a way that would prejudice the defendant's case, the amendment is permissible

CRIMINAL PROCEDURE - INDICTMENT - AMENDMENT - A defendant is prejudiced by an amendment if a defense under the original indictment is not equally available once amended

FACTS

A man was caught on home-surveillance footage shattering the windows of two vehicles with a crowbar. The footage was provided to law enforcement and Anthony Short was identified as the culprit in the video. Short subsequently turned himself in and was charged with the crime. At trial, the home-surveillance footage was admitted into evidence, and Short was identified as the man in the video by two witnesses. Short was found guilty of malicious mischief and sentenced to serve ten years as a nonviolent habitual offender. Short appealed, arguing that the jury instruction setting forth the elements of the crime constructively amended his indictment.

ISSUE

Whether the trial court's giving of a jury instruction prejudiced Short's defense or resulted in a manifest miscarriage of justice and, thus, resulted in plain error.

HOLDING

Because the alleged variance between Short's indictment and the jury instruction at issue did not materially alter any facts essential to the offense in the original indictment, and because the instruction did not prejudice Short's defense or otherwise affect his substantial right to a fair trial, giving the instruction did not constitute plain error. Therefore, the Court of Appeals affirmed the judgment of the Covich County Circuit Court.

Affirmed - 2021-KA-00499-COA (May 24, 2022)

Opinion by Judge Smith
Hon. Tomika Harris Irving (Covich County Circuit Court)
George T. Holmes & Zakia Helen Annyce Butler (Pub. Def. Office) for Appellant - Alexandra LeBron (Att'y Gen. Office) for Appellee
Briefed by [Rachel Gholson](#)

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