

MISSISSIPPI SUPREME COURT DECISIONS – NOVEMBER 17, 2022***SUPREME COURT - CIVIL CASES*****JONES CNTY. V. EST. OF BRIGHT****CIVIL - WRONGFUL DEATH**

CIVIL PROCEDURE - VENUE - FORUM NON CONVENIENS - Pursuant to Miss. R. Civ. P. 82(d), when an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein

CIVIL PROCEDURE - VENUE - POLITICAL SUBDIVISIONS - In all suits against political subdivisions, venue must lie in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located

FACTS

In 2018, Shelley Rose was arrested twice within two days, once in Lauderdale County and once in Jones County, for driving under the influence and public intoxication. After being released from the second arrest, Rose drove a rental vehicle the wrong way down Interstate 59 and collided head-on with a vehicle driven by Jada Bright, who was killed. The collision occurred in Pearl River County. The Estate of Jada Bright filed a wrongful death suit in Pearl River County Circuit Court against multiple defendants, asserting that venue was proper pursuant to Miss. Code Ann. § 11-11-3 because the claim arose out of an accident that occurred in Pearl River County. Defendants Jones County, Lauderdale County, and the City of Ellisville filed motions for a change of venue based on Miss. Code Ann. § 11-46-13(2) of the Mississippi Tort Claims Act (“MTCA”). The circuit court denied the change of venue. Jones County, Lauderdale County, and the City of Ellisville petitioned for interlocutory appeal.

ISSUES

Whether (1) the circuit court properly denied a transfer of venue and (2) whether venue was proper in either Jones County or Lauderdale County.

HOLDING

(1) Because the language concerning venue in the MTCA provided mandatory language that required venue to be in a place where the administrative offices of a political subdivision were located, Pearl River County was an impermissible venue and warranted reversal of the denial of the motion to transfer venue. (2) Because the claims against Jones County and the City of Ellisville may have been filed in the Jones County Circuit Court, and because the claims against Lauderdale County may have been brought in the Lauderdale County Circuit Court, either Jones County or Lauderdale County would have been the appropriate venue in order to satisfy the wrongful death statute’s one-suit requirement. Therefore, the Supreme Court reversed and remanded the judgment of the Pearl River County Circuit Court.

Reversed & Remanded - 2021-IA-00631-SCT (Nov. 17, 2022)

Opinion by Justice Coleman

Hon. Prentiss Greene Harrell (Pearl River County Circuit Court)

William Robert Allen, Lee Thaggard, L. Clark Hicks Jr., & Katelyn Adele Riley for Appellants - Mary Lee Holmes & Marcus Alan McLelland for Appellees

Briefed by [Doug Reynolds](#)

[Click here to view the full opinion](#)

SUPREME COURT – ORDERS

IN RE: COMM'N ON MANDATORY CONTINUING LEGAL EDUC.

EN BANC ORDER

ORDER

This en banc Order by the Supreme Court was made in consideration of the Mississippi Commission on Continuing Legal Education's petition to temporarily waive the in-person continuing legal education obligation for the 2022-23 reporting year. The petition was approved and made to allow continuing legal education credits to be obtained via online, webinar, or live, in-person programs chosen by the attorney, so long as they comply with the remaining provisions of Rules 3 and 4. In addition, the Supreme Court found that additional actions were warranted to temporarily amend Rule 3b so that newly licensed lawyers are allowed to complete the new lawyer program through the method of their choosing, whether online, webinar, or live, in-person. Both attorneys and new lawyers may seek a hardship exemption or extension from the commission if they are unable to comply with the rules that have been temporarily amended.

Ordered - 89-R-99011-SCT (Nov. 10, 2022)

En Banc Order by Presiding Justice King

Briefed by [Kennedy Gerard](#)

[Click here to view the full opinion](#)

IN RE: RULES & REGULS. GOVERNING CERTIFIED CT. REPS.

ORDER

ORDER

This Order addresses the Rules and Regulations Governing Certified Court Reporters, made in consideration of the Court's own motion, and amends Sections III(B), V(B), VI(B), VII(B), and VIII(B). The only amendment to each Section decreases the applicant age requirement from twenty-one to eighteen.

Exhibit A, referenced and attached to the Order, shows the amendments to the Rules and Regulations Governing Certified Court Reporters.

Ordered - 89-R-99021-SCT (Nov. 14, 2022)

Order by Presiding Justice King

Briefed by [Anna Palmer](#)

[Click here to view the full opinion](#)

IN RE: RULES GOVERNING ADMISSION TO THE MISS. BAR

EN BANC ORDER

ORDER

This en banc Order by the Supreme Court is made in consideration of the motions by the Mississippi Board of Bar Admissions, Jefferson Carl Harvey, and Applicant 11596. This Order grants the motion by the Mississippi Board of Bar Admissions amending the Rules Governing Admission to the Mississippi Bar, denies the motions of Jefferson Carl Harvey and Applicant 11596, and dismisses Jefferson Carl Harvey's Petition for Ruling regarding the Petition to Amend the Rules Governing Admission to the Mississippi Bar. The amendment granted by the Supreme Court states that applicants who have unsuccessfully taken the Mississippi Bar Exam at least four times shall no longer be eligible for re-examination. The amendment will become effective for applications for and subsequent to the February 2023, Mississippi Bar Examination.

Exhibit A, referenced and attached to the Order, shows the amendment to the Rules Governing Admission to the Mississippi Bar.

Ordered - 89-R-99012-SCT (Nov. 10, 2022)

En Banc Order by Presiding Justice King

Briefed by [Hannah Elliott](#)

[Click here to view the full opinion](#)

SUPREME COURT - CRIMINAL CASES

FISHER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - DEFENDANT TESTIMONY - Inasmuch as the defendant was represented by counsel throughout the proceeding and the record does not reflect any desire by the defendant to testify, the failure of the trial court to advise the defendant of his right to testify does not constitute reversible error; there is no violation of the defendant's right to testify when the record is silent on the defendant's desire to testify

CRIMINAL PROCEDURE - SEARCHES - TWO-PART TEST - A search occurs when the government either trespasses on a constitutionally protected area or violates a subjective expectation of privacy that society recognizes as reasonable in an attempt to find something or to obtain information

FACTS

Robert Fisher leased a storage unit at Davis Mini Storage, owned by Tim Davis. Fisher rented a unit in Building Three, which consisted of twenty to thirty climate-controlled units. In 2019, Fisher placed approximately thirty-one kilograms of marijuana in the storage unit. Due to a strong smell of marijuana coming, a customer complained. The sheriff's office dispatched Deputy Ferrell to the scene, who stated that he smelled the distinctive odor of marijuana once he entered Building Three. Davis gave Ferrell and other officers permission to search the common areas in Building 3. Due to the blowing of the air conditioner in the climate-controlled building, Ferrell could not pinpoint the source of the marijuana odor. Therefore, Davis provided Ferrell with a ladder to rise above the blowing air stream and identify the unit. Ferrell determined the odor was coming from Unit 404, and from his vantage point, Ferrell could see large bundles in trash bags. Davis informed Ferrell that the unit was leased by Fisher. Investigator Gann then obtained a search warrant for Unit 404, and the officers executed the warrant and found bags of marijuana inside. Then, Gann obtained an arrest warrant for Fisher and a search warrant for Fisher's house. Officers found marijuana, hydromorphone tablets, amphetamine tablets, methamphetamine, cocaine, and several firearms. At trial, Fisher offered no objections to the admission of the marijuana seized from the storage unit. The jury convicted Fisher of two counts of possessing marijuana, one count of aggravated trafficking of cocaine, one count of aggravated trafficking of schedule II methamphetamine, one count of trafficking amphetamine, and one count of trafficking hydromorphone. During the sentencing, the trial court found Fisher to be a habitual offender under Miss. Code Ann. § 99-19-81. The trial court deviated from the maximum sentence and instead sentenced Fisher to the mandatory minimum sentence required for

each of his two aggravated trafficking convictions. The trial court denied Fisher’s motion for a new trial and judgment notwithstanding the verdict. Fisher appealed.

ISSUES

Whether (1) Fisher was denied the right to testify on his own behalf; (2) climbing a ladder and looking into a ceilingless storage unit constituted an unlawful search; and (3) Fisher was improperly sentenced as a habitual offender.

HOLDING

(1) Because Fisher was represented by counsel throughout the proceeding, and because the record was silent as to whether Fisher desired to testify or knew of his right to testify, there was no basis to support Fisher’s argument that he was denied the right to testify on his own behalf. (2) Because the officers, at the time of seeing, were positioned in an area where they had permission to be, because Fisher leased a storage unit without a ceiling in a commercial facility that was accessible to management and many others, because Building Three was controlled by management, which was entitled to allow anyone it desired to have access to the building, to search the building’s common area, and to use the facility’s ladder, and because Fisher did not have a subjective or reasonable expectation of privacy in the contents of the ceilingless unit as seen from a ladder, the officers did not conduct a search under the trespassory test or the reasonable expectation of privacy test. (3) Because Fisher was sentenced to the lightest sentences he could receive for his convictions, because Fisher was unable to show he was prejudiced by the trial court’s error or that there was an error that resulted in a manifest miscarriage of justice, and because the habitual offender status did not impact Fisher’s sentence, it was unnecessary to resentence Fisher. Therefore, the Supreme Court affirmed the judgment of the Yazoo County Circuit Court.

Affirmed - 2021-KA-00828-SCT (Nov. 17, 2022)

Opinion by Chief Justice Randolph

Hon. Barry W. Ford (Yazoo County Circuit Court)

Louwlynn Vanzetta Williams for Appellant - Allison Kay Hartman for Appellee

Briefed by [Mariah Rhodes](#)

[Click here to view the full opinion](#)

MISSISSIPPI COURT OF APPEALS DECISIONS – NOVEMBER 15, 2022

COURT OF APPEALS - CIVIL CASES

BROWN V. BROWN

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - DISTRIBUTION OF PROPERTY - To divide and distribute property between the parties, the chancellor must (1) classify the parties’ assets as marital or separate, (2) value those assets, and (3) divide the marital assets equitably

FAMILY LAW - DIVORCE - DISTRIBUTION OF PROPERTY - If marital property is not properly identified and valued, the distribution ordered is not equitable and should be reversed

FACTS

Rhonda and Greg Brown were and started a small auto sales business, R & G. In 2019, Rhonda filed for divorce on both fault and no-fault grounds. Rhonda and Greg both filed financial statements, listing the following items of property owned by the parties: the marital home, household furniture and fixtures, personal clothing, R & G, a fishing boat, a four-wheeler, a camper, a commercial lawnmower, a tractor, a coin collection, a 2015 Outback, a 2007 Mazda, tools and equipment, and two joint bank accounts. Before trial, the parties filed a joint motion to withdraw the contested grounds of divorce and proceed on the sole ground of irreconcilable differences. However, they could not agree upon the division of the property and asked the trial court to resolve the matter. At trial, Rhonda valued the equity in the home

at \$12,000; Greg valued the equity at \$26,000. Testimony determined that both Rhonda and Greg each had half-ownership in R & G, but Greg ran the day-to-day operations. R & G's net profit in 2016 was \$18,029 but Greg valued R & G at \$6,241. Rhonda testified that the camper was in both their names, but Greg had possession; no title was entered into evidence. Rhonda stated she did not want the camper, just her mother's wedding ring she left inside the camper. Rhonda testified that a black truck was purchased during the marriage to pull the camper, which she valued between \$28,000-\$35,000; Greg claimed it was purchased after they separated. Rhonda placed a value of \$1,000 on a lawnmower on her financial statement but she valued it at \$8,000 at trial; Greg valued it at \$6,000 on his financial statement but valued it between \$3,500-\$4,500 at trial. Rhonda testified that her Mazda was worth \$5,000. Greg valued a tractor at \$5,000. Rhonda had title in a boat she valued at \$1,800; Greg valued it between \$2,500-\$3,000. Rhonda requested the money back she invested in R & G and the interest in the lot, a vehicle, and the house. Greg requested R & G. At the conclusion of trial, the trial court determined that the house was marital property and valued it at \$20,000 and its equity at \$30,000. The trial court further found that R & G, the vehicles, boat, camper, lawnmower, and tools were also marital property. The trial court placed no value on R & G or the vehicles but valued the camper at \$30,000 and the boat, lawnmower, and tools collectively at \$3,000. Using the *Ferguson* factors, the trial court then determined equitable distribution of the marital property. Rhonda was awarded the marital home and furnishings, the black truck, the camper, the lawnmower, her mother's wedding ring, and her own vehicle. Greg was awarded R & G, which was not valued, along with the boat, four-wheelers, tools, the trailer, and all vehicles except the black truck, and the final judgment of divorce was entered. Rhonda filed a motion to reconsider, asking for clarification of terms and a deadline for enforcement. Greg responded to the motion the same day asking the trial court to set aside its opinion. The trial court denied both motions. Greg appealed.

ISSUES

Whether the trial court erred in (1) its valuation of the marital home and furnishings; (2) failing to value other items of property; (3) failing to value R & G Auto Sales; and (4) awarding the black truck and Rhonda's mother's wedding ring to Rhonda.

HOLDING

(1) Because neither party offered a formal appraisal and because there was adequate evidence to support using the average of both parties' valuation of the property, the trial court did not err in its valuation of the marital home and furnishings. (2) Because the trial court did not classify the Mazda as marital or non-marital, and because the trial court did not address or value the other property of the parties, the trial court erred in failing to value the other items of property. (3) Because R & G was marital property, and because the trial court failed to value R & G, the trial court erred in its distribution of R & G and all the marital property. (4) Because the classification of the black truck was unclear, because the trial court did not place a value on the black truck, and because the trial court did not classify the ring as either marital or separate property, the trial court erred in awarding the black truck and the ring to Rhonda. Therefore, the Court of Appeals affirmed in part, reversed in part, and remanded the judgment of the DeSoto County Chancery Court.

DISSENT

Presiding Judge Wilson argued that there was no dispute regarding the award of some of the items and that Greg did not show how the trial court failing to value the Mazda, tractor, clothes, four-wheelers, and the tools and equipment prejudiced him. He further argued that Greg failed to show how the trial court's failure to assign a value to the black truck and the ring prejudiced him or that the distribution of property was unfair. He noted that the overall division of property was fair and should have been affirmed.

Affirmed in Part; Reversed in Part; & Remanded - 2021-CA-00728-COA (Nov. 15, 2022)

En Banc Opinion by Judge McDonald - Dissent by Presiding Judge Wilson
Hon. Mitchell M. Lundy Jr. (DeSoto County Chancery Court)
Derek D. Hopson for Appellant - Jerry Wesley Hisaw for Appellee
Briefed by [Spencer Cash](#)

[Click here to view the full opinion](#)

PARTRIDGE V. CITY OF MERIDIAN

CIVIL - OTHER

CIVIL RIGHTS - EMPLOYMENT PRACTICES - TITLE VII - To establish a prima facie case for retaliation under Title VII, a plaintiff must show (1) that he engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action

CIVIL RIGHTS - EMPLOYMENT PRACTICES - TITLE VII - Title VII only prohibits discrimination on those grounds set out in the statute; therefore, Title VII's anti-retaliation provision protects an employee only from retaliation for complaining about the types of discrimination it prohibits

FACTS

Henry Partridge, a former longtime employee of the City of Meridian (“City”) sued the City under Title VII of the Civil Rights Act of 1964. Partridge alleged that the City forced him to resign and unlawfully retaliated against him after he complained to the Mayor of Meridian, Percy Bland, about his supervisor, the City’s Chief Administrative Officer (“CAO”), Richie McAlister. McAlister confronted Partridge after learning that Partridge allegedly orchestrated a plot to have city council members vote against McAlister’s reappointment as CAO. Mayor Bland arranged a meeting between Partridge and McAlister during which Partridge expressed his displeasure with McAlister’s harassment and desired Mayor Bland to file an Equal Employment Opportunity Commission (“EEOC”) complaint regarding workplace harassment and intimidation. Mayor Bland agreed to look into the complaint, but after about three months, Mayor Bland asked Partridge to take leave. During the time of absence, Mayor Bland interviewed City employees and discovered that Partridge failed to implement initiatives important to Mayor Bland. Mayor Bland informed Partridge that he had lost confidence in him due to job performance, and Partridge agreed to resign to avoid being fired. After resigning, Partridge filed a charge of discrimination with the EEOC alleging that McAlister threatened his employment and he was constructively discharged and retaliated against for complaining, in violation of Title VII. The EEOC issued a dismissal after finding no violation of any statute. Next, Partridge filed a complaint in circuit court against the City alleging that the City, Mayor Bland, and McAlister violated Title VII’s anti-retaliation provision. The circuit court found that because Partridge had not engaged in any protected activity or opposed any discrimination prohibited by Title VII, he failed to establish a prima facie case under Title VII. The circuit court granted the City’s motion for summary judgment. Partridge appealed.

ISSUE

Whether the circuit court erred by granting the City’s motion for summary judgment and denying Partridge’s claim of retaliation under Title VII.

HOLDING

Because Partridge failed to present any evidence that he had engaged in any protected activity or opposed any practice made unlawful by Title VII, the circuit court correctly held that the City was entitled to summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2021-CA-00827-COA (Nov. 15, 2022)

Opinion by Presiding Judge Wilson

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

Daniel Myers Waide for Appellant - William C. Hammack & William Wyatt Simmons for Appellee

Briefed by [Oliver Samples](#)

[Click here to view the full opinion](#)

READING V. READING

CIVIL - DOMESTIC RELATIONS

APPELLATE PROCEDURE - BRIEFS - PROCEDURAL REQUIREMENTS - Miss. R. App. P. 28(a)(7) requires the argument section of appellate briefs to contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on; arguments that do not comply with the rule are procedurally barred

APPELLATE PROCEDURE - BRIEFS - PROCEDURAL BAR - On appeal, an appellant must support his argument with sufficient reasons and legal authorities, and in the absence of meaningful argument and citation of authority, appellate courts generally will not consider an assignment of error

FACTS

Amanda and Anthony Reading married in 1999. The couple had five children together and moved to Mississippi twenty days before separating in 2017. In January 2018, Amanda and Anthony's daughter received a letter from the Assistant State Attorney for the State of Florida. Their daughter was sexually assaulted by Anthony, and the letter informed her that Anthony pled guilty to two counts of sexual activity with a child. Anthony was sentenced to thirty years of incarceration in Florida. In August 2018, Amanda filed for divorce on the grounds of incarceration and irreconcilable differences, and Anthony was served with process. Anthony filed a motion to dismiss the divorce complaint alleging that Amanda and her attorneys violated his Fifth Amendment and Fourteenth Amendment rights because the criminal conviction letter containing his charges was attached to the divorce complaint prohibiting his response. In 2019, the case was called for trial in the chancery court, and Anthony's motion to dismiss was denied. The chancery court entered judgment on the divorce awarding Amanda sole physical and legal custody of the minor children but reserved the distribution of marital property and other assets for a later date. In 2021, Amanda filed for distribution of the marital assets, and a summons was issued and served upon Anthony by mail. Anthony responded with a written Statement of Facts, a Formal Complaint of Illegal Activity, and a Request for Investigation. The chancery court held a hearing on the distribution of property. The chancery court awarded full title, possession, and ownership of the marital property to Amanda because she used her own money for the down payment on the home and paid every monthly payment since the home was purchased. The chancery court further found process was sufficient and entered final judgment on the distribution. Anthony appealed.

ISSUE

Whether Anthony's claim was procedurally barred.

HOLDING

Because Anthony did not abide by Miss. R. App. P. 28(a)(7) by including relevant legal authority, meaningful arguments, and references to the record, his claim was procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2021-CP-01002-COA (Nov. 15, 2022)

Opinion by Judge Lawrence

Hon. Carter O. Bise (Harrison County Chancery Court, First Judicial Dist.)

Pro se for Appellant - John R. Reeves for Appellee

Briefed by [Maya Langendoen](#)

[Click here to view the full opinion](#)

SMITH V. BANKS

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - JURISDICTION - Pursuant to UCCJEA § 93-27-201, a court has jurisdiction to make an initial custody determination only if the state is the home state of the child on the date of the commencement

of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state

FAMILY LAW - CUSTODY - HOME STATE - “Home state” for the purposes of the UCCJEA is defined as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding

FACTS

Zellen Smith filed a petition against Jessie Banks, Jr. for child custody and support of their son, J.B. In response to the petition, Banks filed an answer in which he claimed that jurisdiction and venue were improper because Mississippi was not J.B.’s home state pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”). Contrary to Smith’s petition stating that J.B. lived with her in Adams County, Banks claimed that J.B. had lived with him in Louisiana for his entire life. The chancery court held a custody hearing, and testimony was presented regarding J.B.’s daily care, school records, and sources of state government assistance. The chancery court determined that Louisiana was J.B.’s residence as Banks asserted and entered an order dismissing Smith’s petition for lack of jurisdiction. Smith appealed.

ISSUE

Whether the chancery court erred in finding that it lacked jurisdiction over Smith’s petition for child custody and support.

HOLDING

Because J.B. had been in the custody of Banks in Louisiana since his birth, because J.B. had been enrolled in school in Louisiana since the 2017-2018 school year and in receipt of Medicaid benefits from Louisiana, and because Smith took J.B. from his home in Louisiana less than a month before the custody hearing, the chancery court did not err in dismissing Smith’s petition for lack of jurisdiction. Therefore, the Court of Appeals affirmed the judgment of the Adams County Chancery Court.

Affirmed - 2021-CA-01063-COA (Nov. 15, 2022)

Opinion by Judge Emfinger

Hon. George Ward (Adams County Chancery Court)

Charles E. Miller for Appellant - *Pro se* for Appellee

Briefed by [Mason Borneman](#)

[Click here to view the full opinion](#)

WATTS V. WATTS

CIVIL - WRONGFUL DEATH

CONSTITUTIONAL LAW - PRIVILEGE AGAINST SELF-INCRIMINATION - CIVIL CASES - There is no blanket right to remain silent in civil cases and a witness in a civil case must answer all questions except those that would require him to give incriminating evidence; the claim of privilege in a civil case is to be determined by the court and not by the witness as in a criminal case

CONSTITUTIONAL LAW - PRIVILEGE AGAINST SELF-INCRIMINATION - ADVERSE INFERENCE - An adverse inference may be drawn by a trier of fact from a defendant’s assertion of the privilege against self-incrimination; the trier of fact has the authority to decide whether to apply an adverse interest

FACTS

Thomas Watts and Kimberly Watts were married for several years, with Trevor Watts as their only son. In 2009, the parties divorced, and Thomas was ordered to pay Kimberly \$332 in child support each month, \$1,000 a month in periodic alimony for the remainder of Kimberly’s life, and \$15,000 to Kimberly in attorney’s fees. Thomas appealed, and the Court of Appeals affirmed the chancery court’s decision, noting Thomas’s prior history of drug abuse. In 2014,

Kimberly's brother-in-law, George Bass, found her body stabbed and strangled in her home. After an investigation, no one was ever arrested, charged, or indicted for Kimberly's murder. As part of the investigation, Thomas was questioned but invoked his Fifth Amendment right against self-incrimination. In 2017, Trevor filed a wrongful death suit against Thomas, alleging that Thomas proximately caused the death of Kimberly. Thomas denied Trevor's allegations of killing Kimberly, and the parties proceeded to written discovery. In response to interrogatories, Thomas asserted his Fifth Amendment right and refused to answer most questions or objected to the scope of the question. In 2019, each party deposed the other through their respective attorneys. During his deposition, Thomas admitted to prior drug and also admitted he knew where Kimberly lived after their divorce and had been to her home on several occasions. After being asked if he had driven by Kimberly's home during the time of her death, Thomas's attorney objected. Thomas also asserted his Fifth Amendment right not to answer and refused to answer most of the questions asked after that point. Subsequently, Thomas filed a motion for summary judgment but did not attach any exhibits in support. Trevor filed a response and attached the following as evidence to a genuine issue of material fact: his deposition, Thomas's deposition, an affidavit of George Bass, the Court of Appeals opinion in the divorce case, and Thomas's appellate brief filed in that case. Bass's affidavit asserted that Kimberly expressed fear that Thomas would kill her one day. In Trevor's deposition, he stated, among other things that his parent's relationship was strained after the divorce, that Thomas had scratches on his hands after Kimberly died, that Thomas did not deny killing Kimberly when Trevor confronted him, and that Thomas's phone was turned off during the time of the murder which prevented him from being tracked. Trevor additionally argued that Thomas's invocation of his Fifth Amendment right created a genuine issue of material fact. In opposition to the motion for summary judgment, Trevor asked the trial court to consider Thomas's pause when asked if he killed Kimberly to be an admission by silence and for the trial court to give an adverse inference to each question on which Thomas invoked his Fifth Amendment right. Trevor also filed a motion to compel Thomas to testify to determine whether he was entitled to assert his Fifth Amendment right against self-incrimination to each question. Thomas's motion for summary judgment was granted on the grounds Trevor failed to establish any genuine issue of material fact. Trevor filed a motion requesting the trial court to make specific findings and alternatively to amend or alter the judgment, and a motion for reconsideration. The trial court amended the summary judgment order with specific findings and upheld the grant of summary judgment. The trial court also denied Trevor's motion for reconsideration. Trevor appealed.

ISSUE

Whether Trevor presented sufficient probative evidence to establish a genuine issue of material fact as to an essential element of his wrongful death claim.

HOLDING

Because the combination of circumstantial evidence presented plus the potential for any adverse inference, which could be considered by a trier of fact, created a genuine issue of material fact as to whether Thomas was responsible for the wrongful death of Kimberly, the trial court erred in granting summary judgment. Therefore, the Court of Appeals reversed and remanded the judgment of the Harrison County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge Westbrook agreed that the trier of fact could draw an adverse inference from the invocation of the Fifth Amendment right but disagreed that Trevor produced any evidence to support a genuine issue of material fact regarding the essential wrongful-death element of causation. She argued that adverse inferences alone were insufficient to allow a claim to survive summary judgment and that there was a lack of any other independent evidence outside the negative inferences to support causation in this case.

Reversed & Remanded - 2021-CA-00321-COA (Nov. 15, 2022)

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

Hon. Robert B. Helfrich (Harrison County Circuit Court, First Judicial Dist.)

Tim C. Holleman for Appellant - Ross Douglas Vaughn & Richard Anthony Filce for Appellee

Briefed by [Emilee Crocker](#)

[Click here to view the full opinion](#)

COURT OF APPEALS - CRIMINAL CASES

GREEN V. STATE

CRIMINAL - FELONY

EVIDENCE - WITNESS CREDIBILITY - INCONSISTENCY - Issues of witness credibility and the weight to be accorded a witness's testimony, even when there are inconsistencies and contradictions within the testimony, are matters to be resolved by the trier of fact

EVIDENCE - CHARACTER EVIDENCE - PRIOR SEXUAL MISCONDUCT - Evidence of other sexual misconduct, if properly admitted under Miss. R. Evid. 404(b), filtered through Miss R. Evid. 403, and accompanied by an appropriately drafted limiting or cautionary instruction to the jury, should not be considered per se error

EVIDENCE - CHARACTER EVIDENCE - PRIOR SEXUAL MISCONDUCT - Evidence of prior instances of sexual misconduct is admissible as proof of motive if it tends to show a seemingly uncontrollable desire to partake in pedophilic sexual activities with young and developing juveniles; the jury may hear evidence of a defendant's means of accomplishing these activities if they bear a substantial resemblance to each other and with the present offense

EVIDENCE - CHARACTER EVIDENCE - PRIOR SEXUAL MISCONDUCT - Evidence of prior instances of sexual misconduct are not inadmissible due to their remoteness in time from the present offense so long as the incidents are all within the same time period in terms of the victims' lives

EVIDENCE - WITNESS IMPEACHMENT - PRIOR INCONSISTENT STATEMENT - Under Miss. R. Evid. 613(b), if counsel for a party desires to impeach the testimony of a witness with a pretrial, out-of-court statement that is inconsistent with his trial testimony, counsel must lay a foundation by asking the witness about the contents of the prior inconsistent statement and giving the witness a chance to explain or deny it; however, the trial court has the discretion to admit a pretrial inconsistent statement of a witness into evidence for which no predicate was laid only after the trial court has seen to it that the witness is available for recall and is given the opportunity to deny

FACTS

Kelvin Green was indicted on a sexual battery charge concerning a victim under fourteen years of age. The indictment alleged Green engaged in sexual intercourse with the victim in 2018. During the trial, it was established that Green was fifty-eight years old, and the victim was eight years old at the time of the alleged offense. The victim testified that she lived with her father, who was legally blind, requiring the need for Green to enter and exit the house when aiding her father. The victim testified that on a specific occasion, Green removed the victim's clothing and had sexual intercourse with her while the victim's father was asleep. The victim reported the sexual assault to a social worker, and a forensic interview was arranged with the Child Advocacy Center ("CAC"). During the CAC's interview, the victim disclosed that Green had sexual intercourse with the victim at the victim's house. A recording of this interview was admitted into evidence, and the video recording was played for the jury at trial. Additionally, seven witnesses were called by the State and two witnesses were called by the defense. At the conclusion of trial, the jury returned a verdict finding Green guilty of sexual battery. Green appealed.

ISSUES

Whether the trial court erred in (1) determining the evidence was legally sufficient to support Green's conviction; (2) allowing prior-bad-acts evidence; (3) finding that Green could not attempt to impeach the victim's testimony by using allegedly inconsistent statements by the victim in a recorded interview; and (4) determining that the jury's verdict was not against the overwhelming weight of the evidence and denying the motion for a new trial.

HOLDING

(1) Because it was the jury's responsibility to resolve any conflicts in the evidence and to determine the worth and weight to give the testimony of each witness, and because any rational trier of fact could have found each and every one of the elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State, the trial court appropriately determined there was legally sufficient evidence to support Green's conviction. (2) Because the acts described by all three victims involved forcible sexual assaults of young girls in somewhat isolated circumstances,

because all victims feared Green, and because all victims were between the ages of eight and seventeen, the trial court properly admitted the testimony of the previous victims and properly instructed the jury regarding their testimony. (3) Because Green failed to lay the proper foundation for the admission of a prior inconsistent statement from the recorded interview, and because Green failed to preserve the issue for appellate review by proffering expected testimony, the trial court did not abuse its discretion. (4) Because the jury determined the weight of the evidence and credibility of witnesses, and because the jury heard all the testimony and observed all the witnesses, the jury's verdict was not against the overwhelming weight of the evidence and the trial court did not err in allowing the jury's verdict to stand. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2021-KA-01019-COA (Nov. 15, 2022)

Opinion by Judge Emfinger

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

Justin T. Cook (Pub. Def. Office) for Appellant - Casey B. Farmer (Att'y Gen. Office) for Appellee

Briefed by [Joe M. Curry II](#)

[Click here to view the full opinion](#)

WILLIAMS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER - To sentence a defendant as a habitual offender, all that is required is that the accused be properly indicted as a habitual offender, that the State prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the State's proof; the State is not entitled to a second chance to prove a defendant's habitual-offender status on remand

CRIMINAL LAW - AGGRAVATED DOMESTIC VIOLENCE - DEADLY WEAPON - Under Miss. Code Ann. § 97-3-7(4)(a)(ii), when a deadly weapon is used, the State is only required to prove that the defendant caused or attempted to cause bodily injury, not serious bodily injury

CRIMINAL PROCEDURE - EVIDENCE - SUFFICIENCY OF EVIDENCE - The court views the evidence in the light most favorable to the prosecution to determine whether rational, reasonable fair-minded jurors could have found that the State proved each essential element of the crime

EVIDENCE - SUFFICIENCY OF EVIDENCE - TESTING - The State is not required to test every item of evidence collected but only to disclose it to the defendant, who may then seek to have it tested

FACTS

In 2019, while away from home, Alicia Brown received a call from her daughter, Tatyanna, informing Brown that Kenyon Williams, her ex-boyfriend, was outside their home. Brown returned home to find that Williams was no longer there. Later that evening, Brown and Tatyanna heard a knock on Brown's bedroom window. Suspecting that Williams had returned, Brown instructed Tatyanna to call the police. Upon looking out of her bedroom window, Brown witnessed Williams standing outside. Brown was able to see Williams notwithstanding the darkness outside because her porch light and the security light on the light pole outside were both on. Williams demanded that Brown come outside, but Brown refused. Following Brown's refusal to come outside, Williams began firing a shotgun through the walls of Brown's mobile home. Brown heard a total of five shots and was ultimately struck three times. The responding deputy observed bullet holes in the side of the home and testified that the porch and security lights were on when he arrived. The deputy entered the home to find Brown bleeding from bullet wounds. Brown and Tatyanna immediately identified Williams as the shooter. Williams was indicted by a Copiah County grand jury for shooting a gun into a dwelling, felony possession of a firearm, and aggravated domestic violence. At trial, both Brown and Tatyanna identified Williams as the shooter. Brown testified that she actually saw Williams that night, and Tatyanna testified that although she did not see Williams, she heard his voice. Additionally, Tatyanna testified that she did not see Williams earlier in the day when she placed the call to her mother; however, she did see his unique Buick with modified exhaust pipes. Testifying in his own defense, Williams denied ever being at Brown's home on the day of the shooting. The jury found Williams guilty of

shooting a gun into a dwelling, possession of a firearm by a felon, and aggravated domestic violence. Additionally, Williams was sentenced as a nonviolent habitual offender, and as a result, he was to serve consecutive terms of ten years, ten years, and twenty years in the custody of the Mississippi Department of Corrections. Williams appealed.

ISSUES

Whether (1) the trial court committed plain error by sentencing Williams as a habitual offender; (2) Williams's indictment failed to allege that he caused serious bodily injury to Brown and in turn failed to charge him with aggravated assault; (3) the State convicted Williams against the sufficiency or weight of the evidence; and (4) Williams's trial counsel provided constitutionally ineffective assistance of counsel.

HOLDING

(1) Because the State failed to prove Williams's prior offenses by providing competent evidence that he had at least two prior convictions and sentences, and because the Attorney General confessed error on this point, the trial court committed plain error by sentencing Williams as a habitual offender. (2) Because the amended indictment alleged that Williams caused bodily injury with a deadly weapon by shooting Brown, because the amended indictment properly charged Williams with aggravated domestic violence, and because the statute only required that the State prove that the defendant caused or attempted to cause bodily injury when a deadly weapon was used, this issue was without merit. (3) Because the evidence was more than sufficient for rational jurors to find Williams guilty of shooting into a dwelling, possession of a firearm by a felon, and aggravated domestic violence, because the trial court did not its discretion in denying Williams's motion for a new trial, and because the jury's verdict was not against the overwhelming weight of the evidence, this issue was without merit. (4) Because Williams's indictment was not void, because Williams identified no valid objection to Tatyanna's testimony, and because the lack of testing of the shotgun shells was not a basis for an objection or dismissal of charges, Williams failed to meet his burden of proving that he received ineffective assistance of counsel at trial. Therefore, the Court of Appeals affirmed in part and vacated and remanded in part the judgment of the Copiah County Circuit Court.

Affirmed in Part; Vacated & Remanded in Part - 2020-KA-01373-COA (Nov. 15, 2022)

Opinion by Presiding Judge Wilson

Hon. Tomika Harris Irving (Copiah County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Lauren Gabrielle Cantrell (Atty Gen. Office) for Appellee

Briefed by [Merritt Baria](#)

[Click here to view the full opinion](#)

MISSISSIPPI CASES EDITOR

EMILY DUCK

ASSOCIATE CASES EDITORS

CHASE BAKER

KELSEY DAVIS

MORGAN ARRINGTON JONES

DALLAS MARTIN

REGAN MONK

J. EVAN THOMAS

Thank you for supporting the Mississippi Law Journal.

Questions or comments: Emily Duck, newsletter@mississippilawjournal.org

All BriefServ subscribers traditionally receive access to our website with archived case briefs since January 2007.

Our BriefServ Archive is available to subscribers at <https://mississippilawjournal.org/briefserv/>. Currently, our digital database is still being updated with previous editions of the Newsletter. Requests for previous editions of the Newsletter not yet available in the BriefServ Archive can be made to Emily Duck, newsletter@mississippilawjournal.org. If you have questions about accessing or using the BriefServ website, please contact us at support@mississippilawjournal.org