

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 16, 2023***SUPREME COURT - POST-CONVICTION RELIEF*****GARCIA V. STATE****CIVIL - DEATH PENALTY - POST CONVICTION**

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - ADDITIONAL TESTING - When defense counsel has sought and acquired a psychological evaluation of the defendant for mitigation purposes, counsel generally will not be held ineffective for failure to request additional testing

POST-CONVICTION RELIEF - DEATH PENALTY - PROHIBITIONS - The prohibitions against executing the intellectually disabled have not been extended to individuals who may be mentally ill, including those who suffer from fetal alcohol spectrum disorder

FACTS

Alberto Garcia confessed to raping and murdering a five-year-old girl. He pled guilty to capital murder and waived jury sentencing. During a three-day sentencing hearing, the State reintroduced evidence to the judge about the child's disappearance, where the child was found, and the child's injuries. Garcia's friend, Julian Casper Gray, was the initial suspect, but after Garcia volunteered several statements to the police about his involvement, the police confirmed only Garcia's DNA was found on the child. During the presentation of Garcia's mitigation evidence, trial counsel interviewed sixteen people but ultimately called only two witnesses to testify. Heather Hobby, Gray's former girlfriend, provided the initial tip to the police about Gray's history of child pornography and sexual abuse. Hobby also told the trial court that Garcia visited Gray almost daily, and the pair had an odd relationship. In a post-sentencing-hearing motion, Garcia argued he should have been allowed to introduce Hobby's hearsay statement to the police about Gray's history. The trial court denied Garcia's motion, stating the rules of evidence applied to the hearing, the trial court already heard about the history because of the role as judge and sentencer, and Garcia admitted to rape and murder, even if Gray abducted the child. Dr. Robert Storer, Garcia's psychological expert, conducted over fourteen hours of in-person interviews with Garcia, as well as interviewing other friends and family members. The report, prepared by Dr. Storer, was sealed and made part of the record. The report focused on Garcia's unstable, violent childhood, both Garcia and his mother's mental health issues, and issues with alcohol. At the age of eight, Garcia was admitted to the hospital for a psychotic disorder and drinking alcohol, and by the age of ten, Garcia was using marijuana. Dr. Storer connected Garcia's obsessive and compulsive sexual behavior to his adverse childhood experiences. Dr. Storer diagnosed Garcia with three disorders but concluded that none of those diagnoses showed deficits in Garcia's competence-related abilities. Neither Garcia's counsel nor Dr. Storer had reason to suspect Garcia had fetal alcohol spectrum disorder ("FASD") based on medical records and evaluations. Though Dr. Storer presented fourteen mitigating factors, the trial court determined the mitigating circumstances were insufficient to outweigh the aggravating circumstances. The trial court sentenced Garcia to death. Garcia appealed.

ISSUES

Whether Garcia's trial counsel were ineffective for (1) not pursuing and presenting FASD as a mitigating defense; (2) not presenting and explaining all available mitigating evidence; and (3) not developing and presenting evidence about Gray's substantial domination of Garcia during the crime as a mitigating factor.

HOLDING

(1) Because Garcia’s trial counsel located and interviewed multiple potential mitigation witnesses, including Garcia’s mother, and because FASD evidence would not have tilted the aggravating-mitigating balance drastically, Garcia’s trial counsel were not ineffective for not pursuing a possible FASD diagnosis and expert testimony. (2) Because trial counsel and their mitigation experts had interviewed approximately sixteen people, because Garcia’s family members opted not to testify on his behalf, because Garcia asked counsel not to call members of his family, and because Dr. Storer’s testimony was adequate expert testimony, Garcia’s trial counsel were not ineffective for not presenting and explaining all available mitigating evidence. (3) Because Garcia failed to identify any witnesses available to testify about his vulnerable state and because additional evidence of Gray and Garcia’s relationship would not have altered his sentencing profile, trial counsel were not ineffective for not presenting evidence of the relationship as a mitigating factor. Therefore, the Supreme Court denied the motion for post-conviction relief.

CONCURRENCE IN PART & IN RESULT

Presiding Justice Kitchens argued FASD was a mitigating circumstance and failure to investigate has been found to be a ground for a finding of ineffective assistance of counsel following a death sentence. However, mitigating evidence can be double-edged and was therefore within sound trial strategy to elect not to present this type of evidence at sentencing. He argued if lack of remorse was a result of a condition, such as FASD, then the behavior was distinguished from the double-edged evidence and had a high mitigating value. Here, he argued that Garcia’s lack of remorse was singled out as an aggravating factor, but any properly founded FASD evidence would only have mitigated that aggravated factor. He opined that the Supreme Court should avoid being overly dismissive of the potential for FASD to be a high-value mitigating factor, but because Garcia had not satisfied the two-prong standard for ineffective assistance of counsel, he concurred in part and in result.

Post-Conviction Relief Denied - 2020-DR-01224-SCT (Feb. 16, 2023)

En Banc Opinion by Justice Maxwell - Concurrence in Part & in Result by Presiding Justice Kitchens

Hon. Lisa P. Dodson (Harrison County Circuit Court)

Treasure R. Tyson (Office of Capital Post-Conviction Counsel) for Petitioner - Ashley Lauren Sulser & Brad Alan Smith (Att’y Gen. Office) for Respondent

Briefed by [Maya Langendoen](#)

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SUPREME COURT - CIVIL CASES

MISS. COMM’N ON JUD. PERFORMANCE V. MOORE

CIVIL - JUDICIAL PERFORMANCE

JUDICIAL PERFORMANCE - COMMISSION RECOMMENDATIONS - SANCTIONS - Pursuant to Miss. Const. art. VI, § 177A, on recommendation of the Commission of Judicial Performance, the Supreme Court may remove from office, suspend, fine, or publicly censure or reprimand any justice or judge for willful misconduct in office or conduct prejudicial to the administration of justice which brings the judicial office into disrepute; the Supreme Court may accept, reject or modify, in whole or in part, the findings and recommendations of the Commission

CODE OF JUDICIAL CONDUCT - CANONS - VIOLATIONS - Violations of the canons of the Code of Judicial Conduct can amount to a violation of Miss. Const. art. VI, § 177A; a judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved; a judge shall respect and comply with the law and shall act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, shall not allow their family, social, or other relationships to influence the judges’ judicial conduct or judgment, and shall not lend the prestige of their office to advance the private interests of the judges or others; a judge shall require order and decorum in proceedings before

the judge and shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacities, and shall require similar conduct of lawyers, and of their staffs, court officials, and others subject to their direction and control; a judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge and demean the judicial office or interfere with the proper performance of judicial duties

JUDICIAL MISCONDUCT - SANCTIONS - PROPORTIONALITY - When determining an appropriate sanction in a judicial misconduct case, the Supreme Court considers the following factors: (1) the length and character of the judge's public service, (2) whether there is any prior case law on point, (3) the magnitude of the offense and the harm suffered, (4) whether the misconduct is an isolated incident or evidences a pattern of misconduct, (5) whether the conduct was willful, intended to deprive the public of assets, or if it exploited the judge's position, and (6) the presence or absence of mitigating or aggravating factors; sanctions should be issued in proportion to the judge's offense

FACTS

In December 2020, Judge Carlos Moore represented a private client in an interview with Detective Sergeant Chris Brown of the Grenada Police Department, a Mississippi Bureau of Investigation officer, and a district attorney's investigator. At some point in the interview, a dispute arose over the legitimacy of a search warrant that had been issued for Moore's client's telephone records, and Moore directed the officers to leave his office. In response, Brown said to Moore, "I've got your number." Moore interpreted Brown's statement as a threat, so Moore called Brown's superior, Police Chief George Douglas to file a complaint. Moore ultimately chose not to file a complaint when Douglas informed him that it had to be in writing. Four days after the incident, Moore held court in Grenada Municipal Court, which was located in the same building as the police headquarters. In his official capacity as municipal court judge, Moore requested that Douglas and Brown come to the courtroom. Once Brown and Douglas entered the courtroom, Moore halted proceedings and directed the officers to approach him at the bench. Though Brown requested that they continue the conversation in the privacy of Moore's chambers, Moore proceeded to admonish the officers about the meeting with his private client in front of the entire courtroom. According to the formal complaint, Moore labeled Brown a racist and accused him of threatening Moore with bodily harm, among other things. In May 2021, the Commission of Judicial Performance ("Commission") filed a formal complaint against Moore alleging violations of Section 177A of the Mississippi Constitution and Canons 1, 2A, 2B, 3B(3), 3B(4), and 4A of the Code of Judicial Conduct. Moore responded, denying the description of certain events; however, in February 2022, Moore and a unanimous Commission approved a Stipulation of Agreed Facts and Recommendation. Moore stipulated to the fact that he kicked the officers out of his office, called Brown and Douglas into his courtroom, and publicly chastised the two officers. In May 2022, the Commission recommended that Moore be publicly reprimanded and fined \$1,500 and moved for the Supreme Court to accept its recommendation. Moore joined the Commission's motion.

ISSUES

Whether Judge Moore's conduct (1) constituted willful misconduct in office or conduct prejudicial to the administration of justice which brings the judicial office into disrepute and (2) warranted the recommended public reprimand, fine of \$1,500, and sixty-day suspension.

HOLDING

(1) Because Judge Moore failed to observe the high standard of conduct required to preserve the integrity and independence of the judiciary, because Judge Moore's behavior was antithetical to the promotion of public confidence in the integrity and impartiality of the judiciary and constituted his lending the prestige of the judicial office to further his private interests as a practicing attorney, because Judge Moore's behavior was devoid of the decorum judges are required to maintain and he forsook his duty to be patient, dignified, and courteous to persons in the courtroom, and because Judge Moore created a conflict with his judicial obligations and his extra-judicial activities by willfully engineering an encounter with the two officers in the courtroom, during a session of court over which he was presiding, for the purpose of confronting them about a conflict related to his private law practice, Judge Moore violated the canons of the Code of Judicial Conduct and the Mississippi Constitution when his behavior amounted to willful misconduct in office and conduct prejudicial to the administration of justice that brought the judicial office into disrepute. (2) Because the Supreme Court had consistently regarded temporary suspension from office as an appropriate sanction for misconduct that occurred in the courtroom and was calculated to advance private interests, because Judge Moore's misconduct also risked interference with official duties of the police, and because Judge Moore's conduct evidenced

deliberation and corrupt intent, the public reprimand and the fine, as well as the sixty-day suspension, were proportionate to Judge Moore’s offense. Therefore, the Supreme Court issued a sixty-day suspension without pay, a public reprimand, and a \$1,500 fine.

Sixty-Day Suspension Without Pay; Public Reprimand; Fine of \$1500 - 2022-JP-00504-SCT (Feb. 16, 2023)

En Banc Opinion by Presiding Justice Kitchens

Ashley May & Rachel L. Wilson for Petitioner - Terris Caton Harris for Respondent

Briefed by [Merritt Baria](#)

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SUPREME COURT - ORDERS

GILMER V. MCRAE

EN BANC ORDER

ORDER

Michelle D. Biegel, Bettie Ruth Johnson, and the Law Office of B. Ruth Johnson, PLLC (“Appellees”) filed a Motion for Fees and Costs. The Supreme Court found Barry Wade Gilmer’s conduct resulted in a frivolous suit filed against Appellees, and he failed to respond to the Motion for Fees and Costs filed by Appellees. W. Bradley Kellems requested \$12,680.00 in attorney’s fees, Robert G. Germany requested \$8,250.00 in attorney’s fees, and Michelle D. Biegel requested \$17,196.50 in attorney’s fees for a cumulative total of \$38,126.50 against Gilmer. Therefore, the Supreme Court granted the Motion for Fees and Costs and ordered that attorney’s fees were awarded against Barry Wade Gilmer.

OBJECTION

Justice Griffis found the attorney’s fees requested and awarded were excessive. He argued the Supreme Court should have stayed consistent with previous cases and that the award of attorney’s fees should have followed the guidance of previous cases.

Ordered - 2021-CA-00028-SCT Consolidated With 2021-CA-00570-SCT (Feb. 9, 2023)

Opinion by Justice Ishee - Objection by Justice Griffis

Briefed by [Kayla Tran](#)

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HAWKINS V. STATE

EN BANC ORDER

ORDER

Daryl Hawkins was convicted of attempted burglary of an automobile. In 2009, the Court of Appeals affirmed his conviction. In 2023, Hawkins filed his sixth application for leave to proceed in the trial court. The Supreme Court ordered Hawkins’s petition for an application for leave to proceed in the trial court be denied and Hawkins was warned that future filings deemed frivolous may result in monetary convictions and restrictions on filing applications for post-conviction collateral relief in forma pauperis. The Supreme Court stated Hawkins’s application for leave to proceed in the trial court was barred because it was untimely and successive, presented no arguable basis for the claims, and no exception to the statutory bar existed. Further, the Supreme Court found the filing frivolous. Therefore, the Supreme Court denied Hawkins’s Application for Leave to Proceed in the Trial Court.

OBJECTION IN PART

Presiding Justice King agreed that Hawkins’s application for post-conviction relief should have been dismissed. However, he disagreed with the finding that the application was frivolous and with its warning that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief. Because Hawkins made reasonable arguments in his application for post-conviction relief, he argued that Hawkins should not have been warned of future sanctions and restrictions and that such restrictions were tantamount to denying Hawkins’s constitutional right of access to the courts.

Denied with Sanctions Warning - 2022-M-01131 (Feb. 7, 2023)

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

Briefed by [Oliver Samples](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 14, 2023

COURT OF APPEALS - CIVIL CASES

DENHAM V. LAFAYETTE CNTY. DEP’T OF CHILD PROT. SERVS.

CIVIL - CUSTODY

FAMILY LAW - PARENTAL RIGHTS - GROUNDS FOR TERMINATION - Under Miss. Code Ann. § 93-15-121, the following constitute grounds for termination of parental rights: 1) habitual alcoholism and drug addiction coupled with failure to successfully complete alcohol and/or drug treatment as reasonably directed by the court; or 2) unwillingness to provide reasonably necessary food, clothing, shelter, or medical care

CIVIL PROCEDURE - DUE PROCESS - ASSISTANCE OF COUNSEL - The Sixth Amendment right to effective assistance of counsel does not apply in civil proceedings

FAMILY LAW - GUARDIAN AD LITEM - DUTIES - Miss. Code Ann. § 43-21-121(3) provides that the guardian ad litem shall investigate and make recommendations to the court or enter reports as necessary to hold paramount the child’s best interest

FACTS

The Lafayette County Department of Child Protection Services (“LCDPCS”) removed Donald, a minor male, from the custody of his parents, Connie Denham and David Quick, after Denham tested positive for methamphetamines in September 2018. LCDPCS placed Donald in the home of a family member who reported continual interference by Denham and Quick. LCDPCS subsequently placed Donald in a foster home in October 2018 and the youth court adjudicated Donald as neglected the following month. LCDPCS implemented reunification plans for Denham and Quick, but in August 2020, LCDPCS filed a petition against Denham and Quick for termination of parental rights, asserting that both parents had failed to substantially comply with the terms and conditions of the service plan and that reunification was not in the best interest of Donald. The petition noted Denham’s alcoholism and drug addiction and failure to complete relevant treatment as directed by the court as well as her unwillingness to provide basic necessities for Donald. The chancery court ordered the appointed guardian ad litem (“GAL”) to investigate information regarding Donald and present a report and recommendation to the chancery court. At trial, LCDPCS called several witnesses, including LCDPCS employees, Donald’s family members and foster parent, and the GAL appointed the case. The GAL read her written recommendation into the record, stating that termination of parental rights was in Donald’s best interest. The GAL noted that Denham failed to complete her service plan, tested positive for methamphetamine twice, and failed to attend at least eight drug screens. The GAL also noted Denham’s previous arrests for various violent and drug crimes. Finally, the GAL noted that Donald acknowledged that he did not want to return to Denham’s home. LCDPCS employees testified that Denham did not cooperate with the service plan and noted safety hazards at her home. Based on the testimony, the chancery court found that Denham failed to complete the agreed-upon assessments

since entering the service plan and concluded that Denham had drug problems and should not have custody of Donald. The chancery court ultimately terminated Denham's parental rights. Denham appealed.

ISSUES

Whether (1) there was clear and convincing evidence to support the chancery court's ruling; (2) Denham's appointed counsel rendered ineffective assistance, depriving her of due process; and (3) the chancery court erred in relying on the GAL's findings.

HOLDING

(1) Because LCDCPS provided ample testimony and evidence regarding Denham's lack of cooperation and failure to comply with the service-plan requirements, and because this evidence demonstrated an unwillingness to provide necessary food, clothing, shelter, or medical care for Donald, the chancery court based his ruling on substantial credible evidence that was clear and convincing. (2) Because the Sixth Amendment did not apply to civil proceedings, Denham's claim of ineffective assistance of counsel was rendered meritless; however, because Denham did not suffer prejudice as a result of the testimony to which counsel failed to object, the chancery court did not make a reversible error by denying Denham's claim of ineffective assistance of counsel. (3) Because the GAL's report indicated that she interviewed LCDCPS caseworkers, the natural parents, the foster parents, and the minor child and reviewed documentation and court files, and because there was ample documentation admitted into evidence regarding Denham's ongoing failure to cooperate and comply with the service plan, there was no merit to Denham's assignment of error regarding the GAL's report and testimony; thus, the chancery court did not err in relying on the GAL's findings. Therefore, the Court of Appeals affirmed the judgment of the Lafayette County Chancery Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge McCarty argued that Supreme Court precedent recognized that parental rights are fundamental. Therefore, he argued that there was a duty of effective counsel in cases where a parent faces the termination of rights to their child. However, he agreed with the majority that the evidence supported the chancery court's ruling to terminate Denham's parental rights.

Affirmed - 2021-CA-00871-COA (Feb. 14, 2023)

Opinion by Chief Judge Barnes - Concurrence in Part & Dissent in Part by Judge McCarty

Hon. Robert Q. Whitwell (Lafayette County Chancery Court)

Amery Ewing Moore for Appellant - Kurt Steven Saul Jr. for Appellee

Briefed by [Anna Beavers](#)

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HAYNES V. BECKWARD

CIVIL - PERSONAL INJURY

TORTS - PREMISES LIABILITY - DANGEROUS CONDITIONS - Evidence of lack of accidents may be admissible to show (1) absence of the defect or condition alleged, (2) the lack of a causal relationship between the injury and the defect or condition charged, (3) the nonexistence of an unduly dangerous situation, or (4) want of knowledge, or of grounds to realize, the danger; many courts tend to exclude evidence of lack of accident

EVIDENCE - LIABILITY INSURANCE - ADMISSIBILITY - Miss. R. Evid. 411 provides that evidence regarding one's insurance liability is inadmissible to prove whether the person acted negligently or otherwise wrongfully

CIVIL PROCEDURE - REMITTITUR - AWARDED REMITTITURS - A remittitur may be awarded if (1) the court finds that the jury was influenced by bias, prejudice, or passion or (2) if the damages were contrary to the overwhelming weight of credible evidence

TORTS - DAMAGES - FUTURE MEDICAL EXPENSES - A plaintiff is incompetent to testify regarding his or her own medical prognosis and treatment; damages must be shown with reasonable certainty and not left to speculation and conjecture

TORTS - LOST WAGES - WORK-LIFE EXPECTANCY - Work-life expectancy must be based on an objective standard

FACTS

In 2015, Dorothy Beckward filed a complaint against Barry Haynes for the alleged negligent operation of a vehicle when he backed into her car with his truck and trailer in 2014. A year later, Beckward amended her complaint to allege additional negligence complaints, loss of consortium, negligent hiring and entrustment, and vicarious liability. At trial, Beckward testified she did not see Haynes's trailer before the collision and that Haynes backed into her vehicle. Following the accident, Beckward complained of a headache and neck, shoulder, and back pain. Beckward was taken to the hospital and discharged two hours later. Roughly a week later, Beckward hired a lawyer and visited Dr. Michael Patterson who had previously treated her following an earlier car accident in 2008. At trial, when Beckward was asked why she went to a lawyer first and then the doctor, Beckward stated that Haynes had said his insurance company would contact her so she thought she needed a legal representative. As the trial continued, Beckward stated she had considered retirement but decided she would work as long as she could. Around the same time as the accident, Beckward was hired as a nurse where she worked with accommodations. Beckward stopped working in 2017 due to her physical limitations. Beckman alleged those limitations were a result of the accident with Haynes, and that she had a continuous pain management treatment. At trial, Dr. Howard Katz calculated Beckward's estimated costs of anticipated future medical needs, which totaled \$18,431, exclusive of any surgeries. Dr. Katz also testified that Beckward had reached maximum improvement at the time of the trial. Additionally, Dr. George Carter testified on economics. He calculated that Beckward's future lost wages totaled \$38,734. Following Dr. Carter, Haynes took the stand, where he testified that there was not a dangerous condition when he decided to back out of the construction road and that other vehicles could proceed around the trailer without incident. Haynes stated that he waited for traffic to clear and was stationary when Beckward hit his trailer. The jury found Haynes negligent in the operation of the vehicle and awarded Beckward damages for medical expenses, lost wages, pain and suffering, disability, and loss of enjoyment of life. The jury assessed thirty percent fault to Beckward and seventy percent fault to Haynes. The trial court reduced the total amount of damages by thirty percent and held Roy Collins Construction Co., Inc. and Haynes jointly and severally liable in the sum of \$346,500 together with court costs and interest in the amount of eight percent per annum. Haynes filed a motion for remittitur or a new trial or, alternatively, judgment notwithstanding the verdict or to alter or amend the judgment. The trial court denied the motion after a hearing. Haynes appealed.

ISSUES

Whether the trial court erred (1) by excluding Haynes's testimony that other vehicles drove around the trailer without incident; (2) by denying Haynes's request for a mistrial after Beckward mentioned insurance in front of the jury; and (3) by denying Haynes's motion for a remittitur or a new trial because the jury's awards of damages for future medical expenses and lost wages were not supported by the evidence.

HOLDING

(1) Because Haynes abandoned his argument that his testimony should have been admissible to prove there was no dangerous condition when he effectively stipulated as to how the testimony would be used at trial, Haynes failed to preserve this issue for appeal, and there would have been no reversible error even if Haynes had properly preserved the issue for appeal because the jury could have easily inferred that other vehicles safely passed the trailer before the accident occurred; thus, the trial court did not err in excluding Haynes' testimony that other vehicles drove around the trailer without incident. (2) Because evidence that Haynes had insurance was not presented to prove whether Haynes acted negligently or otherwise wrongfully, but was offered to clarify why Beckward hired legal counsel before seeing a chiropractor, Haynes was not prejudiced by Beckward mentioning insurance in front of the jury and the trial court did not err in denying Haynes's request for a mistrial. (3) Because Beckward testified as to her own medical treatment and failed to provide a medical diagnosis or treatment plan, the only basis for the jury's award of damages was Beckward's own testimony based on conjecture, and because Beckward failed to present evidence that she would have been capable to work beyond her work-life expectancy had the accident not occurred, the trial court abused its discretion by denying Haynes's motion for a remittitur or new trial. Therefore, the Court of Appeals affirmed in part, reversed in part, and remanded in part the judgment of the Bolivar County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge Lawrence argued that Beckward's testimony should have been admissible because it was based on her own perception and knowledge as opposed to technical or scientific knowledge. He argued the jury award for future medical expenses and lost wages was sufficiently supported by the evidence and should not have been disturbed. Therefore, the trial court did not abuse its discretion in not granting a remittitur as to the jury verdict on future medical expenses and lost wages.

Affirmed in Part, Reversed in Part & Remanded in Part - 2019-CA-01508-COA (Feb. 14, 2023)

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

Hon. Linda F. Coleman (Bolivar County Circuit Court, Second Judicial District)

Michael Wayne Baxter & Michael Madison Taylor Jr. for Appellants - Baskin Lowber Jones & John H. Daniels III for Appellees

Briefed by [Sierra Albano](#)

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McFARLAND V. STATE

CIVIL - STATE BOARDS & AGENCIES

CRIMINAL PROCEDURE - FELONY SENTENCES - MODIFICATIONS - Once a felony sentence has been entered of record, and the term of the court expires, the circuit judge is without jurisdiction to change or modify that sentence at a later time; a circuit judge may address discrepancies between sentencing orders and wording of statutes

CRIMINAL PROCEDURE - PAROLE ELIGIBILITY - LEGISLATIVE GRACE - Parole eligibility is not a fundamental constitutional right but a matter of legislative grace

CRIMINAL PROCEDURE - PAROLE ELIGIBILITY - JURISDICTION - An inmate may bring an original action in circuit court to determine parole eligibility date under Miss. Code. Ann. § 41-29-139(f)(1)

CRIMINAL PROCEDURE - ELIGIBILITY FOR PAROLE - CONTROLLED SUBSTANCES - Under Miss. Code. Ann. § 41-29-139(f)(1), any person trafficking in controlled substances shall be guilty of a felony and, upon conviction, shall be imprisoned for a term of not less than ten years nor more than forty years and shall be fined not less than Five Thousand Dollars nor more than One Million Dollars; the ten-year mandatory sentence shall not be reduced or suspended and the person shall not be eligible for probation or parole

FACTS

In September 2018, Marcus McFarland was convicted of cocaine trafficking in August 2017 in violation of Miss. Code Ann. § 41-29-139(f) and sentenced to a term of twenty years in the custody of the Mississippi Department of Corrections ("MDOC"), with McFarland being ineligible for parole or probation during the first ten years of the sentence. McFarland appealed his conviction and the Court of Appeals upheld the circuit court's decision. In June 2021, McFarland filed a motion for post-conviction relief ("PCR") claiming ineffective assistance of counsel and that the MDOC wrongly calculated his sentence as a twenty-year sentence without eligibility for parole. The Supreme Court denied McFarland's ineffective assistance claim and dismissed the sentencing-calculation claim without prejudice reasoning that it was appropriate to be considered through the MDOC's administrative remedies program ("ARP"). In September 2021, McFarland filed a complaint with the MDOC's ARP, arguing that he would be eligible for parole after serving the first ten years of his twenty-year sentence. Before the ARP responded to McFarland, McFarland filed a petition to correct his parole eligibility in the circuit court. McFarland pled that PCR procedures did not apply. He sought judicial review of the MDOC's classifications of his sentence and any unfavorable response the MDOC might make against his ARP complaint. McFarland obtained summonses issued to Warden David Wingo of the Marion County Correctional Facility, to Commissioner Nathan Cain of the MDOC, to Chairman Steven Pickett of the Mississippi Parole Board, and to Lynn Fitch on behalf of the State. Before any defendant answered the summons, the circuit court denied McFarland's petition. After considering McFarland's petition as a motion to modify his sentence, the circuit court found that it had no jurisdiction to act because the term in which McFarland was sentenced had expired, and McFarland was not eligible for parole under Miss. Code Ann. § 47-7-3(1)(f). In November 2021, the MDOC responded to McFarland's APR complaint and denied McFarland's request. MDOC responded that McFarland's cocaine trafficking did not afford him eligibility for parole or early release. However, McFarland had the right to proceed to the next step

in the appeal process, but the record did not indicate whether McFarland received the MDOC decision or pursued any further appeal within the MDOC itself. McFarland appealed.

ISSUES

Whether (1) the circuit court had jurisdiction to consider McFarland’s petition and (2) McFarland was eligible for parole.

HOLDING

(1) Because McFarland was seeking resolution of his parole eligibility status and not asking to modify his sentence, and because the circuit court had jurisdiction to hear McFarland’s petition and address the discrepancy between McFarland’s sentencing order and the wording of the statute, the circuit court erred in finding that McFarland’s petition was a motion to modify his sentence. (2) Because the circuit court found that McFarland was not eligible for parole under both the parole eligibility statute, Miss. Code Ann. § 41-29-139(f)(1), and Miss. Code Ann. § 41-29-139(f) which was in effect at the time of his sentencing, the circuit court correctly held that McFarland was not eligible for parole at any time during his twenty-year sentence. Therefore, the Court of Appeals affirmed in part, and reversed and rendered in part the judgment of the Clarke County Circuit Court.

Affirmed in Part; Reversed and Rendered in Part - 2021-CA-01311-COA (Feb. 14, 2023)

Opinion by Judge McDonald

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

John S. Grant IV for Appellant - Douglas T. Miracle, Kimberly Pine Turner, Jessica Leann Rice Robinson, William Robert Allen, & Lance Wesley Martin (Att’y Gen. Office) for Appellees

Briefed by [Oliver Samples](#)

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MIMG C WOODRIDGE SUB LLC V. COURSE

CIVIL - OTHER

CIVIL PROCEDURE - AWARDS - REMITTITUR - The question of whether a jury award is excessive must be addressed on a case-by-case basis; in reviewing a jury’s award of damages, after the trial court has refused to grant a new trial on the question of damages, the question then becomes whether the verdict was either so excessive or inadequate as to shock the conscience and to respond to reason

CIVIL PROCEDURE - AWARDS - NONECONOMIC DAMAGES - The jury has broad leeway in determining pain and suffering and other noneconomic damages

FACTS

Kimberly Course and her two daughters lived in Woodridge Apartments (“Woodbridge”). Course chose Woodridge because she valued safety and Woodridge was the only apartment in the area that mentioned video surveillance; Course had experienced a burglary before her daughters were born. She opted to stay on the second floor as another protective measure. Late one evening, Course arrived home with her daughters and found an office key left in her door. She did not recall requesting maintenance. Course examined the home by herself and found that her house had been burglarized. The burglars took many items including electronics and her .38-caliber handgun. Course tried confronting management about the burglary and the office key left in her door, but several managers either did not take her seriously, made rude comments, or failed to return her phone calls. Course also requested to see camera footage, but management told her the cameras only covered the office and a building across the street. After receiving no help from management, Kimberly refused to pay rent until the issue was resolved. Woodridge management responded by giving Course a three-day notice to move out. After the burglary, Course experienced severe mental and physical pain. She filed suit against Woodridge. At trial, she testified to numerous symptoms of her crippling anxiety such as constantly urinating on herself, being unable to sleep, and enduring headaches and stomachaches. Course’s unease also began to affect her work, as she struggled to concentrate. The jury awarded Course a total of \$492,080, \$450,000 of which was noneconomic. The trial court denied Woodridge’s motion for remittitur pertaining to Course’s noneconomic damages. Woodridge appealed.

ISSUE

Whether the jury's award for noneconomic damages was excessive.

HOLDING

Because the weight of the evidence was overwhelming, and because the jury had broad leeway in determining pain and suffering for noneconomic losses, the jury did not abuse its discretion in awarding noneconomic damages. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

DISSENT

Presiding Judge Wilson argued that the noneconomic damages were excessive and contrary to the weight of the evidence. Therefore, he opined the award was an abuse of discretion.

Affirmed - 2021-CA-00535-COA (Feb. 14, 2023)

Opinion by Judge McCarty - Dissent by Presiding Judge Wilson

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

Richard Edward King, Matthew Taylor Biggers, & Olivia Yen Truong for Appellant - James Ashley Ogden for Appellee

Briefed by [Jacoby Gilmore](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

HULL V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - SENTENCING - PAROLE ELIGIBILITY - Under Miss. Code Ann. § 47-7-3, an individual convicted of nonviolent crimes may be eligible for parole

CRIMINAL PROCEDURE - SENTENCING - PAROLE ELIGIBILITY - Under Miss. Code Ann. § 47-7-3, an individual sentence for either first-degree or second-degree murder is not eligible for parole

FACTS

Lorenzo Hull was convicted of depraved heart murder. In 2015, the Court of Appeals affirmed his conviction but vacated and remanded Hull's habitual-offender sentence because the State did not introduce evidence of two prior drug-related convictions or make them part of the record. On remand, Hull was re-sentenced as a non-habitual offender and was sentenced to serve thirty-five years. During his re-sentencing, the State argued that Hull was not eligible for parole, and neither Hull nor his attorney objected. In 2021, Hull petitioned the trial court for post-conviction relief ("PCR"). He claimed that the applicable statute at the time of his offense would have subjected him to early release or parole eligibility in his re-sentencing and that he received ineffective assistance of counsel. He also claimed that he was wrongfully denied a copy of his re-sentencing transcript. The trial court did not rule on Hull's PCR petition, and Hull filed a petition for writ of mandamus with the Supreme Court. The Supreme Court directed the trial court to respond. In response, the trial court dismissed Hull's petition, holding that Hull was not eligible for parole because he was convicted of murder and the trial court was unaware of relief available to him. Hull appealed.

ISSUES

Whether (1) the trial court should have granted Hull's PCR petition and denied his claims; (2) Hull was denied effective assistance of counsel; and (3) Hull's rights were violated because the trial court failed to provide him with a copy of the sentencing transcript.

HOLDING

(1) Because Hull was convicted of depraved heart murder, he was not eligible for parole under Miss. Code Ann. § 47-7-3 when he was convicted or under Miss. Code Ann. § 47-3-2 when he was resentenced, and because at the time of the offense, Miss. Code Ann. § 47-7-3 stated that homicide did not fall within the definition of nonviolent crime, the trial court correctly denied relief. (2) Because Hull was not eligible for parole, Hull's defense was not prejudiced by his trial counsel's decision not to object to the State's statement regarding his parole eligibility. (3) Because a copy of the transcript and supplemental record was sent to Hull, the issue was moot. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

Affirmed - 2022-CP-00088-COA (Feb. 14, 2023)

Opinion by Judge McCarty

Hon. Toni Demetresse Terrett (Warren County Circuit Court)

Pro se for Appellant - Casey Bonner Farmer (Att'y Gen. Office) for Appellee

Briefed by [Meaghan Pickles](#)

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RYE V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - GUILTY PLEA - AVAILABILITY OF NEW EVIDENCE - A defendant who pleads guilty may seek post-conviction relief based on newly discovered evidence

CRIMINAL PROCEDURE - GUILTY PLEA - SUFFICIENCY OF NEW EVIDENCE - A defendant who has entered a plea of guilty can only successfully challenge the conviction through post-conviction relief if the newly discovered evidence is sufficient to result in a different result or induce a different verdict

FACTS

James Kameron Rye was indicted on two charges of sexual battery and one charge of fondling. In 2020, Rye pled guilty to both sexual battery charges, and the remaining charge of fondling was retired to the files. The trial court sentenced Rye to two concurrent twenty-five-year terms, with twenty-two years of the sentence suspended, and three years to serve. Upon Rye's release, the trial court's sentencing subjected Rye to five years of post-release supervision. In 2021, Rye filed a motion for post-conviction relief asserting that there was new evidence available which supported Rye's innocence. Rye's motion was denied by the trial court on the grounds that a plea of guilty negated any notion that there would be any undiscovered evidence which could prove his innocence. Rye appealed.

ISSUE

Whether the trial court erred in denying Rye's post-conviction relief motion asserting newly discovered evidence based solely on Rye's guilty plea.

HOLDING

Because the Supreme Court disagreed with the notion that newly discovered evidence was relevant only in situations where a defendant went to trial and was convicted, and because the Court of Appeals had traditionally recognized and followed the Supreme Court's disagreement on other matters, the trial court erred in denying Rye's post-conviction relief motion based solely on his guilty plea. Therefore, the Court of Appeals reversed and remanded the judgment of the Monroe County Circuit Court.

Reversed & Remanded - 2021-CA-00477-COA (Feb. 14, 2023)

Opinion by Chief Judge Barnes

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

Jeffrey D. Waldo for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

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

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COURT OF APPEALS - CRIMINAL CASES

CLAYTON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER-INCLUDED OFFENSE - To be entitled to a lesser-included offense instruction, the defendant must point to evidence in the record from which a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of the lesser-included offense

CRIMINAL LAW - MURDER - DELIBERATE DESIGN - For purposes of murder, the terms deliberate design and malice aforethought connote an intent to kill; intent may be proven by the acts of the person involved at the time and the circumstances surrounding the incident and intent may be inferred from the use of a deadly weapon

FACTS

Jason Clayton and a few others were riding in one of the friend's cars to go buy marijuana. Another one of the friends brought a gun for protection, but after Clayton asked if he could see the gun, he began shooting it out the window. Upon arriving at the house where Clayton planned to buy marijuana, Clayton exited the vehicle with the gun while the other three remained behind. From the vehicle, the three friends heard gunshots from inside the home where only Clayton and one other man were located. The friends then noticed another man approaching the house, but as Clayton exited the home and saw the man, Clayton shot him and then returned to the vehicle. After Clayton and his three friends left the residence, their vehicle was spotted speeding down the street by a woman who reported the information to authorities. The tag number that she identified traced the vehicle back to Clayton and the three friends who were there when the murder took place. In Clayton's indictment, he was charged with "murder/manslaughter," but the jury was only given instructions on the murder charges. Clayton was convicted of two counts of first-degree murder. Clayton appealed.

ISSUES

Whether (1) the trial court erred in refusing Clayton's lesser-included-offense jury instructions for second-degree murder and culpable-negligence manslaughter and (2) the evidence was insufficient on the deliberate design element for both counts of first-degree murder.

HOLDING

(1) Because the inclusion of the language charging manslaughter as a lesser offense was unnecessary and was surplusage, because it was Clayton's responsibility at trial to point the trial court to an evidentiary basis for the giving of a lesser-included-offense instruction, because Clayton's trial counsel offered no argument in support of giving the second-degree murder instruction, and because there was no evidence of negligence in the shootings, the trial court did not err in refusing a lesser-included-offense jury instruction. (2) Because Clayton entered the home with a gun, used the deadly weapon, and then stated to his friends that he wanted to kill more people, it could have been sufficiently inferred that Clayton acted with deliberate design. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2021-KA-00505-COA (Feb. 14, 2023)

Opinion by Judge Emfinger

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

John S. Grant IV for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Olivia Schwab](#)

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JORDAN V. STATE

CRIMINAL - FELONY

EVIDENCE - EXPERT QUALIFICATION - FAILURE TO OBJECT - If no objection is made to a witness's credentials or qualifications, the issue of qualification as an expert is waived

APPELLATE PROCEDURE - BRIEFS - REQUIREMENTS - Miss. R. App. P. 28(a)(7) requires that an appellate brief contain the contentions of appellant with respect to the issues presented, and the reasons for those contentions, with citation to the authorities, statutes, and parts of the record relied on

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

CRIMINAL LAW - SEXUAL BATTERY - TESTIMONY - Actual medical evidence of oral sex is not necessary and proof of oral sex may be offered by witness testimony or circumstantial evidence

FACTS

Michael Jordan began a relationship with Jane's mother, Joan, when Jane was in elementary school. During Jane's ninth-grade year of high school, Jordan began driving Jane home from school and after-school activities, and their relationship outwardly improved. As Jane and Jordan's relationship became more agreeable, Jordan began giving Jane lessons on how to speak to and act around boys. In addition, while riding in the car together, Jordan would graze Jane's thigh and take hold of Jane's face to act as if he was kissing her on a date. Jordan would justify these actions by telling Jane that she must be prepared for how a boy might behave in a similar situation. Later on, Jordan told Jane that he had romantic feelings for her and questioned whether Jane wanted to take their relationship to the next level. When Joan was out-of-town for work, Jordan told Jane that her mother wanted Jane to learn more about boys and Jordan began giving Jane more lessons about boys at night. Jordan demonstrated how boys like to be touched and kissed. Jordan would show Jane how this was done and then ask her to complete those acts with him. In time, Jordan performed oral sex on Jane. Almost every night while Joan was gone, Jordan and Jane had vaginal, oral, or anal sex. Jordan continued to sexually abuse Jane after Joan came back, despite Jane asking him not to do it. In 2015, Jordan performed oral sex on Jane, while at the same time, Joan returned home early from work. Joan noticed that Jane looked surprised to see her home early, a light was on in the laundry room, and Jordan had an erection. Upon seeing Joan at home, Jordan asked Joan why she did not inform him she was returning home before she arrived. Joan became skeptical of Jordan's comment and purchased a camera to monitor the activities in the house. One day, the camera showed Jordan and Jane having a conversation on the couch, Jordan placing his foot on Jane's leg, and Jane sucking Jordan's toes. After viewing the footage, Joan filed a report with the Gulfport Police Department and took Jane to the Department of Human Services ("DHS") where Jane's relationship with Jordan was investigated. After being questioned, Jane eventually revealed the sexual abuse she had endured from Jordan. Later, Jane wrote Joan a letter about the events that had taken place. At trial, the camera footage and the letter were shown to the jury. During the trial, a registered sexual assault nurse examiner ("SANE") testified that Jane and Joan were referred to the emergency room by DHS. Jane disclosed that she had been sexually assaulted by Jordan and that Jordan had choked her. The SANE nurse conducted a sexual assault kit on Jane but did not find any evidence of past sexual assaults. At trial, the SANE nurse testified that she did not find any irregularities associated with the sexual assault kit and Jane testified that she did not think the nurse would discover any abnormalities because she had not been sexually abused recently. The defense counsel objected to the SANE nurse testifying to the absence of abnormalities in the kit. Additionally, an expert in forensic serology testified at the trial that she tested swabs taken from Jane's mouth, vagina, and rectum and determined that they tested negative for seminal fluid because of the lapse of time between Jane's last sexual assaults and when the swabs were taken. The jury convicted Jordan on four counts of sexual battery. Jordan filed a motion for judgment notwithstanding the verdict, or in the alternative, a new trial. After a hearing, the trial court denied the motion and later granted Jordan's motion to file an out-of-time appeal. Jordan appealed.

ISSUES

Whether (1) the trial court erred by allowing the SANE nurse to testify that the results of Jane’s sexual assault kit were not abnormal; (2) the trial court erred by admitting into evidence the camera video; (3) Jordan was denied effective assistance of counsel when his trial counsel did not object on the basis of hearsay to the admission of Jane’s letter; and (4) the State presented sufficient evidence to convict Jordan of sexual battery.

HOLDING

(1) Because Jordan did not object to the SANE nurse’s credentials or qualifications, the issue of qualification as an expert was waived; however, because a jury could have reasonably inferred, given the amount of time that had elapsed, that nothing of evidentiary value would have been present at the time of the sexual assault kit, because Jordan made no objection to, and effectively permitted, two other witnesses to testify in the same manner, and because Jane testified that she did not think the nurse would find anything from the kit, the trial court did not err by allowing the SANE nurse to testify that results of Jane’s sexual assault kit were not abnormal. (2) Because Miss. R. App. P. 28(a)(7) required that the appellate brief contain the contentions of Jordan 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, because Jordan did not explain how the trial court allegedly erred by admitting the video into evidence, and because Jordan’s argument regarding the admission of the video did not comply with Miss. R. App. P. 28(a)(7), the trial court did not err by admitting into evidence the video (3) Because Jordan had to show both that counsel’s performance was deficient and that he was prejudiced as a result to prevail on a claim of ineffective assistance of counsel, because trial counsel’s decision to object to the letter as cumulative rather than hearsay was not a strategic decision, because the admission was harmless, and because Jordan failed to establish prejudice, Jordan was not denied effective assistance of counsel when trial counsel did not object on the basis of hearsay to the admission of Jane’s letter. (4) Because Jane testified at trial that she and Jordan engaged in oral sex, and because a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the State presented sufficient evidence to convict Jordan of sexual battery. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2021-KA-01421-COA (Feb. 14, 2023)

Opinion by Justice Greenlee

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

Justin Taylor Cook (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [AnnaGrace Meeks](#)

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KIRK V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - ATTEMPTED AGGRAVATED ASSAULT - INTENT - To prove an attempt to commit aggravated assault, the State must establish that the defendant acted with an unequivocal intent to cause serious bodily injury to the victim; however, if serious bodily injury occurs as a result of the conduct, the State need not prove unequivocal intent

CRIMINAL LAW - AGGRAVATED ASSAULT BY A VEHICLE - CULPABILITY - When a motorist exceeds the speed fixed by law, and the excess is so much above the legal rate of speed as to leave no doubt that the excess was distinctly intentional and willful, it is culpable in its want of due care

CRIMINAL PROCEDURE - NEW TRIAL - WEIGHT OF EVIDENCE - A new trial will not be ordered unless the court is convinced the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would sanction an unconscionable injustice

FACTS

In April 2019, Antonie Kirk, his then-girlfriend Ayterria Wright, and friend Malex Jasper were driving home from Soso. During the drive, Kirk and Wright began to argue over Wright’s desire to end the relationship. Wright told Kirk she was breaking up with him. Kirk stopped the vehicle and told Jasper to get out of the vehicle. Jasper refused to exit the

vehicle. Wright then got out of the vehicle and informed Kirk she was going to walk home. Wright threw the promise ring that Kirk had given her and stated that she was breaking up with Kirk. Wright ran up a nearby hill, in which Kirk followed her. Kirk physically brought Wright down the hill and sat her on the trunk of the car. Wright was returned to the vehicle by force, and Kirk then began to drive again. As Kirk was driving, his vehicle began to swerve and fishtail as he reached a speed of 102 miles per hour. The vehicle became airborne, flipped several times, struck a power pole, and landed upside down. Wright and Kirk suffered injuries as a result of the wreck. Wright was diagnosed with a spinal fracture, paralysis in both legs, bilateral pneumothorax, and broken ribs. Kirk sustained a punctured lung and a pneumothorax. In December 2019, Kirk was indicted for a charge of aggravated assault against Wright pursuant to Miss. Code Ann. § 97-3-7(2). At trial, the State produced testimony from Wright, two witnesses to the altercation between Wright and Kirk, and a witness who observed the wreck. In May 2021, a jury found Kirk guilty of aggravated assault. The circuit court entered an amended sentencing order in June 2021. Kirk filed a motion for a new trial, which the circuit court denied. Kirk appealed.

ISSUES

Whether (1) the State provided sufficient evidence to convict Kirk of aggravated assault and (2) Kirk's conviction was against the weight of the evidence presented.

HOLDING

(1) Because the State was not required to establish that Kirk acted with unequivocal intent, because Kirk was not being prosecuted for a mere attempted aggravated assault, and because the record in its entirety revealed Kirk was driving with culpable negligence when the wreck occurred and caused serious bodily injuries to Wright, the State provided sufficient evidence to convict Kirk of aggravated assault. (2) Because matters regarding the weight of the evidence were to be resolved by the jury, and because the jury weighed all the evidence presented and found that the State proved beyond a reasonable doubt that Kirk was guilty of aggravated assault, Kirk's conviction was not against the weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2021-KA-00733-COA (Feb. 14, 2023)

Opinion by Judge Smith

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

Eric Nicholas Cerra & Thomas Quitman Brame Jr. for Appellant - Alexandra Lebron (Att'y Gen. Office) for Appellee

Briefed by [Ross Dockins](#)

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STEVENSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - CONFRONTATION CLAUSE - REMOTE TESTIMONY - Under the *Craig* test, (1) the trial court must make a case-specific finding that denial of physical face-to-face confrontation is necessary to further an important public policy, and (2) the trial court must determine that reliability of the testimony is otherwise assured

CRIMINAL LAW - APPELLATE REVIEW - PLAIN ERROR - Under the plain-error doctrine, an obvious error which was not properly raised by the defendant and which affects a defendant's fundamental, substantive right can be reviewed despite a procedural bar

CRIMINAL LAW - HARMLESS ERROR - FACTORS - Relevant factors in determining whether an error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged

FACTS

In 2017, musicians Billy Smiley and Leonard Stevenson traveled to Greenville to play a concert. At some point during their ride home, Stevenson and Smiley had a dispute over payment for Stevenson's services. While in Smiley's truck,

Stevenson stabbed Smiley multiple times. Despite his injuries, Smiley managed to drive home and inform his brother and friend that Stevenson tried to rob him. Shortly thereafter, Smiley was transported to the University of Mississippi Medical Center where he died three days later. A grand jury indicted Stevenson for capital murder, charging him with Smiley's murder during the commission of a robbery. In 2019, the State filed a motion requesting that Dr. Lisa Funte, the forensic pathologist, be allowed to remotely testify live during the trial. The State asserted in its motion that Dr. Funte conducted Smiley's autopsy but that she was then working in Maine. Additionally, the State contended that the costs related to Dr. Funte's travel back to Mississippi were considerable and allowing Dr. Funte to testify was akin to taking deposition testimony when exceptional circumstances exist, and the interest of justice was served. The State also argued that allowing Dr. Funte to testify live offered the parties the opportunity for contemporaneous objections, responses, and rulings. Stevenson did not file a response to the State's motion, and the circuit court entered an order permitting the remote testimony. At trial, Smiley's brother, James, testified that on the day of the incident, he saw Smiley drive up to the house and fall out of his truck. Smiley told James that Stevenson stabbed him and tried to rob him. Smiley's friend, Michael Carter, testified that Smiley was lying on the ground, barely moving, and covered in blood. Smiley told Carter that Leonard Stevenson did it. When Dr. Funte testified at trial remotely, she stated that despite not having Smiley's full case history, she was still able to determine that the stab wounds caused his death and did not find any evidence indicating that Smiley's surgical wounds contributed, impacted, or played a part in his death. Dr. Funte testified that the manner of death was homicide. At the end of the trial, the jury found Stevenson guilty of capital murder, and the circuit court sentenced him to serve life in prison without parole. After Stevenson filed a motion for judgment notwithstanding the verdict, or, alternatively, a new trial, the circuit court entered an order denying Stevenson's post-trial motion. Stevenson appealed.

ISSUES

Whether (1) Stevenson's alleged Confrontation Clause violation resulted in a manifest miscarriage of justice despite Stevenson's failure to preserve the issue for appellate review; (2) the circuit court violated Stevenson's Sixth Amendment confrontation right by allowing Dr. Funte to testify remotely; and (3) Stevenson was harmed by a Confrontation Clause violation.

HOLDING

(1) Because a Confrontation Clause violation was a fundamental and substantive right, because the plain-error doctrine allowed review upon obvious error that affects a defendant's fundamental, substantive right not properly raised by the defendant, and because the error may have been harmless, no manifest miscarriage of justice resulted. (2) Because Dr. Funte's testimony could have been allowed if the circuit court made the requisite finding of necessity and reliability, because the reliability prong was satisfied since Stevenson had the opportunity to extensively cross-examine Dr. Funte, but because the circuit court failed to make a case-specific determination of necessity, Stevenson's rights were violated; however, the error was harmless. (3) Because the jury was justified in finding beyond a reasonable doubt that the stab wounds caused Smiley's death even without Dr. Funte's testimony, Stevenson was not harmed by a Confrontation Clause violation. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

Affirmed - 2021-KA-00411-COA (Feb. 14, 2023)

Opinion by Judge McDonald

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

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Kara Edwards](#)

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