

MISSISSIPPI SUPREME COURT DECISIONS – MAY 25, 2023**SUPREME COURT - CIVIL CASES****SALTWATER SPORTSMAN OUTFITTERS, LLC V. MISS. DEP'T OF REV.****CIVIL - STATE BOARDS AND AGENCIES**

TAX LAW - SALES TAX - RECORD KEEPING - Miss. Code Ann. § 27-65-43 requires a sales-tax payer to keep records “as may be necessary to determine the amount of tax for which he is liable”

CONTRACTS - EQUITABLE RELIEF - CLEAN HANDS DOCTRINE - The clean hands doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue

TAX LAW - SALES TAX - JOINT LIABILITY - Miss. Code Ann. § 27-65-3(c) explicitly acknowledges that joint liability for sales tax may exist under certain circumstances and spouses who jointly benefit from a business may be jointly liable

ADMINISTRATIVE LAW - STATE AGENCIES - ASSESSMENT - A Mississippi Department of Revenue tax assessment is prima facie evidence, which has been defined by Black’s Law Dictionary as evidence “such as will suffice until contradicted and overcome by other evidence . . . [a] case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded”

ADMINISTRATIVE LAW - STATE AGENCIES - RECORDS - The phrase “from any information available” in Miss. Code Ann. § 27-65-37(1) does not mean from “the best information available”

FACTS

Saltwater Sportsman Outfitters (“SSO”) was established in Mississippi in May 2013 and sold apparel, mainly at trade shows and events. In May 2018, the Mississippi Department of Revenue (“MDOR”) began a sales tax audit of SSO. MDOR performed a markup audit since SSO had a small number of records. This consisted of comparing the wholesale price SSO paid for its merchandise with the retail prices advertised by SSO to calculate SSO’s average retail sales price markup, which was 115 percent. MDOR then applied this markup to all of SSO’s documented wholesale purchases to calculate SSO’s total gross sales proceeds. When documentation was found, MDOR subtracted the sales taxes SSO had remitted to MDOR, event promoters, and other states. SSO was then given credit for sales taxes it had paid on some of its wholesale purchases. SSO appealed.

ISSUES

Whether the trial court erred in finding that (1) SSO was liable for sales tax collected and remitted at promoted events; (2) MDOR was not estopped from arguing that SS was the “seller,” that the promoter was not the seller, that sales by vendors were not treated as wholesale transactions, and that promoters were not responsible for all sales collected at promoted events; (3) SSO failed to remit sales taxes to event promoters; (4) SSO was required to maintain documentation of every sale at promoted events; (5) MDOR’s “workpapers” were prima facie correct; and (6) MDOR’s markup analysis was appropriate.

HOLDING

(1) Because SSO was clearly a business selling tangible personal property and was required to pay sales tax and because SSO was not absolved from the responsibility to pay sales tax although event promoters may have been liable for some of the taxes as well, the trial court did not err in finding that SSO was liable for sales tax collected and remitted at promoted events. (2) Because the records that could be reconstructed from credit card transactions appeared to show that SSO repeatedly underreported its sales at promoted events and because the clean hands doctrine prevented a

complaining party from obtaining equitable relief in court when guilty of willful misconduct in the transaction at issue, the trial court did not err in finding that MDOR was not estopped from arguing that SSO was the “seller,” that the promoter was not the seller, that sales by vendors were not treated as wholesale transactions, and that promoters were not responsible for all sales collected at promoted events. (3) Because the only coherent reading of Miss. Code Ann. § 27-65-31 was that the customer was the party purchasing the items from SSO and because SSO was presumed to have collected the sales taxes, the trial court did not err in finding that SSO failed to remit sales taxes to event promoters. (4) Because Miss. Code Ann. § 27-65-43 requires a sales-tax payer to keep records to determine the amount of tax for which he is liable and because SSO failed to keep records, the trial court did not err in finding that SSO was required to maintain documentation of every sale at promoted events. (5) Because the MDOR assessment was prima facie correct and because the assessment that SSO owed MDOR back taxes was not overcome by MDOR’s admission that SSO had paid more taxes than originally believed, the trial court did not err in finding that MDOR’s “workpapers” were prima facie correct. (6) Because “from any information available” in Miss Code Ann. § 27-65-37(1) did not mean from “the best information available,” MDOR was not required to search other taxpayer account records, and the trial court did not err in finding that MDOR’s markup analysis was appropriate. Therefore, the Supreme Court affirmed the judgment of the Hancock County Chancery Court.

Affirmed - 2021-SA-00881-SCT (May 25, 2023)

Opinion by Justice Ishee

Hon. Carter O. Bise (Hancock County Chancery Court)

Jason Brooks Purvis & Brian Christopher Whitman for Appellant - Morton Ward Smith & William James Dukes for Appellee

Briefed by [Albert Soussis](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MAY 23, 2023

COURT OF APPEALS - CIVIL CASES

CULVER V. CULVER

CIVIL - CUSTODY

FAMILY LAW - CUSTODY - MODIFICATION - At trial, the parent seeking custody modification must show: (1) a material change in circumstances occurred since the issuance of the decree sought to be modified; (2) that the material change adversely affected the minor child; and (3) that it would be in the child’s best interest for custody to change

FAMILY LAW - MATERIAL CHANGE IN CIRCUMSTANCES - RELOCATION - The impact of a relocation of the custodial parent upon the child constitutes a factor that the chancellor permissibly considers on the motion for modification

FAMILY LAW - CHANCELLOR’S DISCRETION - ALBRIGHT FACTORS - If the court finds an adverse material change in circumstances, then the next step is to apply the *Albright* factors to determine whether custody modification is in the child’s best interest; the *Albright* factors include: the (1) age, health, and sex of the child; (2) a determination of the parent who has had the continuity of care prior to the separation; (3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; (4) the employment of the parent and responsibilities of that employment; (5) physical and mental health and age of the parents; (6) emotional ties of parent and child; (7) moral fitness of the parents; (8) the home, school, and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; and (10) stability of the home environment and employment of each parent and other factors relevant to the parent-child relationship

FACTS

Craig and Kristen Culver married in 2008 and later had three male children (“the children”). In 2018, Craig filed a complaint for divorce. Kristen then filed her answer and counter-complaint for divorce. A temporary order was entered that gave both parties joint physical custody of the children, with alternating weeks of custody. The chancery court granted the divorce on the grounds of irreconcilable differences. The chancery court considered the *Albright* factors to reach its conclusion. In 2021, Kristen got engaged to Andrew Ehlmann. Ehlmann was in the Navy and was stationed on the Mississippi coast when he and Kristen met, but Ehlmann was transferring to Virginia. Kristen was moving with him. Kristen recognized the current visitation schedule would not work with the distance between Mississippi and Virginia, Kristen filed a complaint for modification of the visitation schedule. Craig answered the complaint and brought a counter-complaint for physical custody of the children. Craig argued that Kristen moving the children to Virginia would constitute a material change in circumstances that was adverse to the children’s welfare. The competing motions were heard, and the chancery court ruled that Kristen moving to Virginia would be a material change in circumstances that was adverse to the children’s welfare. Then, after considering the *Albright* factors, the chancery court found that the minor children’s interests would best be served in awarding physical custody to Craig. The chancery court denied Kristen’s motion to alter or amend the judgment. Kristen appealed.

ISSUES

Whether the chancery court erred by (1) finding that Kristen’s move to Virginia constituted a material change in circumstances that adversely impacted the children’s welfare and (2) awarding physical custody of the children to Craig after analyzing the *Albright* factors.

HOLDING

(1) Because the chancery court’s record reflected that it considered the totality of the circumstances in determining whether the move would be a material change in circumstances adverse to the welfare of the children, and because it found the move would have taken the children away from their school, family, friends, and the community that the children had lived in their entire lives to move to a new place that was vastly unknown to the children and to Kristen, the chancery court did not err by finding that Kristen’s move to Virginia constituted a material change in circumstance that adversely impacted the children’s welfare. (2) Because the chancery court identified each of the *Albright* factors and made findings of each in its order, because the chancery court found the best interest of the children would be served by granting Craig sole physical custody after it considered all of the *Albright* factors, and because the chancery court acknowledged the thin margins from which it drew its decision and assigned no fault to either party, the chancery court did not err by awarding physical custody of the children to Craig after analyzing the *Albright* factors. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2021-CA-01108-COA (May 23, 2023)

Opinion by Judge Emfinger

Hon. Mark Anthony Maples (Jackson County Chancery Court)

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RHODES V. RL STRATTON PROPERTIES LLC

CIVIL - PERSONAL INJURY

PREMISES LIABILITY - DUTY TO WARN - CONSTRUCTIVE KNOWLEDGE - Unless a dangerous condition was created by the landowner’s own negligence, the plaintiff must prove the landowner had actual or constructive knowledge of the condition

PREMISES LIABILITY - DUTY TO WARN - INTIMATELY CONNECTED DOCTRINE - A premises owner is relieved of a duty to provide an independent contractor with a reasonably safe place to work or give a warning

of danger when the premises owner contracts with another to repair defects of the premises, and the contractor or their employee suffers injuries that arise out of or are intimately connected with the work

FACTS

Lee Stratton inherited a commercial real estate building in 2018. Lee conveyed the property to RL Stratton. Lee is the sole member of RL Stratton. In 2019, Lee visited the property. He observed leaks in the ceiling. RL Stratton hired Rhodes, a licensed contractor, to repair the water leaks. An invoice from June 2019 stated Rhodes performed roof repair on the building. RL Stratton paid the invoice, but the roof continued to leak. Lee contacted Rhodes, who returned to the property a second time but did not fix the leak. Rhodes returned for a third time in 2020 to fix the leaks. Rhodes was in the attic of the building searching for the source of the leaks when he fell through a framed opening in the attic floor, sustaining serious injuries. Although the attic was dark, Rhodes was wearing a headlamp. The framed opening appeared to have been left after an object had been removed, leaving just the opening that was missing joists and a deck. The opening could not be seen from above. Rhodes and his wife filed a complaint in Tate County Circuit Court against RL Stratton alleging that it failed to warn Rhodes of the dangerous condition existing in the attic. RL Stratton filed a motion for summary judgment following discovery. RL Stratton asserted that (1) Rhodes had no evidence of a specific act or omission by RL Stratton that caused his fall; (2) Rhodes had no evidence prior to the fall that RL Stratton had any knowledge of the existence of the framed opening; and (3) RL Stratton was not responsible for Rhodes’s injuries because his injuries resulted from actions that were “intimately connected” to the work he was doing as a professional roofer. Rhodes responded that (1) there was a genuine issue of material fact whether RL Stratton had constructive knowledge of the dangerous condition; and (2) the “intimately connected” doctrine did not apply because the act of him looking inside the dormer for water leaks was not a risk “arising from or intimately connected with defects of the premises” that he had “undertaken to repair.” After a hearing, the circuit court granted summary judgment in RL Stratton’s favor and dismissed the Rhodeses’ claims, with prejudice. The circuit court found that the failure-to-warn claim was barred by the intimately connected doctrine. Rhodes appealed.

ISSUES

Whether (1) RL Stratton had a duty to warn Rhodes of a dangerous condition on its property and (2) the dangerous condition was intimately connected with the work Rhodes was hired to do.

HOLDING

(1) Because RL Stratton had no constructive knowledge of the dangerous condition and because Rhodes was injured while trying to locate the leak he was hired to repair, RL Stratton did not have a duty to warn of a dangerous condition on its property. (2) Because Rhodes was hired to fix the leak in the roof, and because his fall through the framed opening was intimately connected to locating the leak, the dangerous condition was intimately connected with the work Rhodes was hired to do. Therefore, the Court of Appeals affirmed the judgment of the Tate County Circuit Court.

Affirmed - 2022-CA-00338-COA (May 23, 2023)

Opinion by Presiding Judge Carlton

Hon. James McClure III (Tate County Circuit Court)

John Thomas Lamar III & Taylor Allison Heck for Appellants - Marc Allan Sorin for Appellee

Briefed by [Ross Dockins](#)

Edited by [Kayla Tran](#) & [Mason Scioneaux](#)

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ROOSA V. ROOSA

CIVIL - WILLS, TRUSTS, AND ESTATES

CIVIL PROCEDURE - APPELLATE PRACTICE - WAIVER - Failure to cite any relevant authority in support of an assignment of error may preclude the court from considering the claim on appeal because failure to request a specific finding constitutes a waiver of the issue on appeal

WILLS & ESTATES - EXECUTOR'S AUTHORITY - DISTRIBUTION OF ASSETS - The chancellor shall grant the executor of a will the authority to distribute assets as set forth within the language of the will

APPEAL AND ERROR - REVIEW - SILENT RECORD - When there is no discretionary ruling on a specific finding of fact for the appellate court to review, the trial court will proceed under the assumption that all fact issues are resolved

FACTS

Sibling beneficiaries Rosemary and Christopher Roosa were the children of deceased parents Joan B. Roosa and astronaut Colonel Stuart Roosa. This matter centered around the distribution of Joan's will and the space artifacts her husband bequeathed to her when he passed away. Joan left Christopher as the executor of her will, which stated that the executor could donate the space artifacts to the Stuart Roosa Foundation ("Foundation") and then equally divide the remaining artifacts between the children. The artifacts were located in two separate locations: a storage facility and a safe room, the latter of which was a closet at Joan's home. After an appeal, the chancellor ordered the distribution of assets, and Christopher signed a letter designating all space items and artifacts to the Foundation. Rosemary moved to reopen the estate and to appoint a new administrator, which the chancellor granted. Christopher moved to set the judge's order aside, and the chancellor ordered the appointment of a neutral party to oversee a complete review of the boxes at the storage facility and set aside his order reopening the estate and appointing an administrator because of insufficient service of process. The chancellor also ordered that artifacts not at the storage facility were deemed donated to the Foundation. Rosemary then moved for an inspection and inventory of the safe room items, and Christopher filed a response and separately moved to close the estate. Christopher argued that according to the chancellor's order, the items not located at the storage facility had already been deemed donated to the Foundation. Christopher also argued that according to Rosemary's own motion and the chancellor's order, the estate was reopened for the limited purpose of inspecting the storage unit items. Rosemary replied to Christopher's response and denied that the donation had ever occurred. Rosemary argued that even if the donation had occurred, the requirements of a valid inter vivos gift had not been satisfied because Christopher's actions were more properly considered an "offer" to donate to the Foundation, which the Foundation did not accept. The chancellor entered an order closing the estate, denied Rosemary's motion for inspection, and found that the artifacts had been donated to the Foundation. Rosemary appealed.

ISSUES

Whether (1) the executor of the will was authorized to donate the items in the safe room and (2) the executor's donation to the Foundation constituted a valid inter vivos gift.

HOLDING

(1) Because Rosemary failed to cite on appeal any legal authority in support of her assertion that the executor could not donate items not properly inventoried and identified and because the explicit language of the will allowed the executor to donate any items to the Foundation, Rosemary's claim was procedurally barred but still failed on the merits since Christopher had the authority to distribute the items in the safe room. (2) Because the chancellor deemed the items as having been donated to the Foundation, and Rosemary did not request specific findings in the trial court as to whether the donation met the requirements of a valid inter vivos gift, the Court presumed that the acceptance and delivery requirements of an inter vivos gift were met. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2022-CA-00128-COA (May 23, 2023)

Opinion by Judge Westbrook

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

Paul M. Newton Jr. for Appellant - John G. McDonnell & Courtney McDonnell Snodgrass for Appellees

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COURT OF APPEALS - POST-CONVICTION RELIEF

BROWN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - FAILURE TO FILE - A motion for post-conviction relief must be filed within three years following the entry of judgment of conviction, and failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

POST-CONVICTION RELIEF - PROCEDURAL BAR - RES JUDICATA - Res judicata extends to those claims that could have been raised in prior proceedings but were not

POST-CONVICTION RELIEF - PROCEDURAL BAR - FUNDAMENTAL-RIGHTS EXCEPTION - Under Miss. Code Ann. § 99-39-5, the fundamental-rights exception does not apply to the substantive, constitutional bars codified by the legislature in the Mississippi Uniform Post-Conviction Collateral Relief Act (“UPCCRA”)

POST-CONVICTION RELIEF - PROCEDURAL BAR - EVIDENTIARY HEARING - A circuit court may dismiss a PCR motion without an evidentiary hearing if the movant fails to show that his claim is “procedurally alive”

FACTS

In 1999, Eric Brown pled guilty to the murder of his pregnant girlfriend and the manslaughter of his unborn child. Brown’s attorney did not ensure he received an independent competency hearing before Brown entered his guilty pleas. Brown’s attorney also did not forward Brown’s sister’s contact information to the expert who conducted a mental-competency examination at the Mississippi State Hospital. Brown filed several post-conviction relief (“PCR”) motions arguing the circuit court should not have accepted his guilty pleas without conducting a competency hearing. The Court of Appeals upheld the dismissal of his fifth PCR motion because it was time-barred and barred as successive. Brown filed his sixth PCR motion in 2021 that claimed he received ineffective assistance of counsel because his defense attorney did not obtain an expert psychiatrist, thoroughly investigate his mental history, or obtain a competency hearing. Brown did not argue that he received ineffective assistance of counsel in any of his previous five PCR motions but argued that his claims were not time-barred under the fundamental-rights exception. The circuit court ordered the State to respond to Brown’s PCR motion, but the State failed to respond within the provided deadline. However, at a show-cause hearing, the circuit court ordered the State to show cause why it should not be held in contempt for failing to respond to Brown’s PCR motion. The State told the circuit court that it thought it had more time. After the hearing, the State provided a response to Brown’s motion. The circuit court ultimately denied Brown’s PCR motion because it was time-barred and barred as successive and alternatively lacked merit. Brown appealed.

ISSUES

Whether the circuit court erred by declining to (1) find that Brown received ineffective assistance of counsel before he entered his guilty pleas; (2) grant Brown’s motion for summary judgment or to find the State in contempt; and (3) conduct an evidentiary hearing on Brown’s sixth PCR motion.

HOLDING

(1) Because Brown collaterally challenged a judgment of convictions that were entered in 1999, because Brown failed to seek relief within three years from the entry of the judgment of conviction under Miss. Code Ann. § 99-39-5, because Brown had previously filed five unsuccessful PCR motions, because Brown attempted to reframe an issue he had already raised twice before under the guise of ineffective-assistance-of counsel, and because Brown’s claim of fundamental-rights exception failed to apply to overcome Miss. Code Ann. § 99-39-5, Brown’s claims were untimely, barred as successive, and precluded by res judicata, and the circuit court did not err when it declined to find that Brown received ineffective assistance of counsel. (2) Because Brown cited no authority that he was entitled to summary judgment in his favor, and because Brown cited no relevant authority that the circuit court should have found the State in contempt for not responding to Brown’s PCR motion by the deadline ordered by the circuit court, Brown’s claims that the circuit court should have granted Brown’s motion for summary judgment and found the State in contempt were barred. (3) Because Brown’s PCR motion was untimely, barred as successive, and precluded by res judicata, Brown was not entitled

to an evidentiary hearing, and the circuit court was not obligated to conduct an evidentiary hearing on Brown's sixth PCR motion. Therefore, the Court of Appeals affirmed the judgment of the Pontotoc County Circuit Court.

Affirmed - 2022-CP-00069-COA (May 23, 2023)

Opinion by Judge Lawrence

Hon. Kelly Lee Mims (Pontotoc County Circuit Court)

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

Briefed by [Meaghan Pickles](#)

Edited by [Emilee Crocker](#) & [Ashley House](#)

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COURT OF APPEALS - CRIMINAL CASES

TREST V. STATE

CRIMINAL - FELONY

EVIDENCE - CHARACTER EVIDENCE - ADMISSIBILITY - Under Miss. R. Evid. 404, evidence of a crime, wrong, or other act, to prove a person's character in order to show that on a particular occasion the person acted in accordance with their character may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident

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

EVIDENCE - SEXUAL OFFENSE - LIMITING INSTRUCTIONS - Evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which the accused is on trial, may be considered by the jury 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

CRIMINAL PROCEDURE - MISTRIAL - IMPROPER COMMENT - A trial judge need declare a mistrial only when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case; the grant of a mistrial is left to the sound discretion of the trial judge

EVIDENCE - HEARSAY - TENDER YEARS EXCEPTION - Under Miss. R. Evid. 803(25), a statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indication of reliability, and (b) the child either (1) testifies at the proceedings, or (2) is unavailable as a witness; tender age witnesses may testify inconsistently in sexual abuse cases

CRIMINAL PROCEDURE - EVIDENCE PRESENTED - SUFFICIENCY OF EVIDENCE - Courts must reverse and render verdicts only if the facts and inferences so considered point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty

FACTS

From 2016 to 2018, minor children K.B. and C.B. spent at least one week in the winter and a majority of their summers in Mississippi with their maternal grandmother and her husband, Harry Trest. The minor children primarily lived with their mother, R.J., in South Carolina. In January 2019, K.B. and C.B. disclosed to R.J. that they had been molested by Trest. R.J. brought the children to a hospital in South Carolina and contacted the police. The physical exam conducted at the hospital showed no signs of physical abuse. Following the physical exam, K.B. and C.B. returned to Mississippi and underwent a forensic interview with Kaitlyn Jewell. During the interview, K.B. and C.B. each explained how the

sexual abuse occurred. During the interview, the girls did not use accurate language when describing “private parts” but accurately described the specific anatomy and pointed to the correct body part on a diagram. Further, both girls indicated that Trest had touched them. The State indicted Trest in Hancock County for four counts of sexual battery and four counts of touching a child for lustful purposes. During the trial, the State put on ten witnesses. Trest challenged the admission of the testimonies of M.K.B., Jewell, R.J., K.B. and C.B. M.K.B. was the natural granddaughter of Trest. During the trial, M.K.B. testified that Trest had abused her in the past. M.K.B. was roughly the same age as K.B. and C.B. when the alleged abuse occurred. Each individual shared a familial relationship with Trest. The alleged abuse always happened in the family home. Each individual testified to similar alleged acts by Trest. M.K.B. also testified the alleged abuse occurred in the presence of other people. Trest filed a motion in limine to not allow M.K.B.’s testimony. After a hearing on the issue, the trial court ruled that her testimony was admissible under Miss. R. Evid. 404(b) and Miss. R. Evid. 403, but limited the testimony to her personal experience. During M.K.B.’s proffer, she mentioned that Trest’s abuse happened to her and her brothers. Out of the jury’s presence, the trial court admonished M.K.B. to limit the testimony to just herself. However, M.K.B. subsequently used the phrase “us” during the trial by mistake. The State corrected it. Trest moved for a mistrial, but the trial court ruled that the reference to “us” was not so prejudicial as to render a mistrial. Further, Trest provided a limiting instruction to the jury explaining that M.K.B.’s testimony concerned alleged acts, and not the acts he was on trial for. The trial court admitted Jewell and R.J. testimonies under the tender years exception to hearsay. K.B. and C.B. both testified at trial. Their testimonies were consistent with their out of court statements, although both girls testified that Trest’s hands remained on the outside of their bodies. This was refuted by Jewell and R.J.’s testimonies and the forensic interview that Trest had penetrated the girls. The jury convicted Trest of four counts of sexual battery and four counts of touching a child for lustful purposes. The trial court sentenced Trest to serve forty-five years without eligibility for parole. Trest filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial, which the trial court denied. Trest appealed.

ISSUES

Whether the (1) trial court abused its discretion by allowing M.K.B.’s testimony at trial and failing to strike her testimony or failing to strike her testimony when M.K.B. testified about her siblings against the court’s order; (2) trial court abused its discretion by denying Trest’s motion for a mistrial; (3) trial court erred by admitting R.J.’s and Jewell’s testimony concerning the minor children’s out of court statements under Miss. R. Evid. 803(25); and (4) evidence was insufficient to convict Trest of sexual battery because C.B. and K.B. did not claim to have been penetrated during the trial.

HOLDING

(1) Because M.K.B.’s testimony was offered under the Miss. R. Evid. 404(b) prior bad acts exception to show a common motive and plan, because there were similarities between M.K.B., C.B., and K.B.’s testimonies, because the similarities in testimony were enough to justify Miss. R. Evid. 404(b) exceptions, because the evidence was not so remote in time or dissimilar to the facts to make M.K.B.’s testimony more prejudicial than probative under Miss. R. Evid. 403, because the trial court provided the jury with a proper limiting instruction to prevent undue prejudice, and because Trest did not object to the particular limiting instruction that he provided the trial court to give to the jury, the trial court did not abuse its discretion by admitting M.K.B.’s testimony under Miss. R. Evid. 404(b)(2) and Miss. R. Evid. 403. (2) Because the trial court stopped the proceedings and admonished M.K.B. for the improper comment, because the trial court found M.K.B. did not intentionally disregard the trial court’s order, because there was a limiting instruction following M.K.B.’s testimony, because the trial court found the infraction did not rise to the level of declaring a mistrial, because the trial court was in the best position to determine if an improper comment had a prejudicial effect, and because Trest failed to show that the trial court committed an error of judgment that caused him substantial and irreparable justice, the trial court did not abuse its discretion by declining to grant a mistrial. (3) Because the trial court properly analyzed the factors for admitting tender years testimony under Miss. R. Evid. 803(25) and determined there was a substantial indicia of reliability from the children and that the children would testify, because Trest was allowed to call the minor children’s motives into question, because Trest cited no cases supporting that his due process rights were violated nor that R.J. and Jewell’s testimony should have been excluded because they contradicted C.B.’s and K.B.’s testimonies, because tender age witnesses were allowed to testify inconsistently because it was a sexual abuse case, and because the trial court found R.J. to be credible, the trial court did not abuse its discretion by allowing R.J. and Jewell to testify under Miss. R. Evid. 803(25). (4) Because the jury heard evidence from R.J. and Jewell that the minor children told them about the sexual penetration by Trest, because the jury watched the video of the forensic interview where C.B. and K.B. both

independently testified they were penetrated, because the minor children's testimonies at trial were not a denial of penetration, because tender age witnesses testifying in the context of sexual cases are allowed to be inconsistent in their testimonies, and because the jury had to resolve the conflict of other evidence presented, there was sufficient evidence that a reasonable jury could have found Trest guilty beyond a reasonable doubt. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Circuit Court.

Affirmed - 2021-KA-00968 (May 23, 2023)

Opinion by Judge Greenlee

Hon. Christopher Louis Schmidt (Hancock County Circuit Court)

Samuel Christopher Johnson for Appellant - Alexandra Rosenblatt (Att'y Gen. Office) for Appellee

Briefed by [AnnaGrace Meeks](#)

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