

MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 10, 2023**SUPREME COURT - CIVIL CASES****BLAGODIROVA V. SCHROCK****CIVIL - CUSTODY**

FAMILY LAW - CUSTODY - MODIFICATION OF CUSTODY AGREEMENT - The party seeking a 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; before custody should be changed, the chancellor should find that the overall circumstances in which a child lives have materially changed and are likely to remain materially changed for the foreseeable future

FAMILY LAW - CUSTODY - ADVERSE EFFECT ON CHILD - The behavior of a parent must clearly posit or cause danger to the mental or emotional well-being of a child for there to be a sufficient basis to seriously consider changing custody; cavorting with a known illegal immigrant with full knowledge of his status is conduct that is detrimental to the child's best interest

FAMILY LAW - WEIGHT OF EVIDENCE - CHANCELLOR'S ROLE - By the chancellor's presence in the courtroom, the chancellor is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witness and what weight ought to be ascribed to the evidence given by those witnesses

FAMILY LAW - CUSTODY - CHILD'S RESILIENCE - A child's resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home, especially when a healthier one beckons

FACTS

Katy Blagodirova and Jose Schrock married in 2006 and subsequently had a child, J.R., in 2007. In 2013, Blagodirova and Schrock divorced, Blagodirova received custody of J.R. Schrock was allowed visitation and ordered to pay child support. In 2015, Blagodirova then married Andres Maldonado De La Rosa ("Maldonado"), an undocumented immigrant. Blagodirova and Maldonado divorced in April 2015 after claiming they were advised that a divorce would help resolve Maldonado's immigration status. Blagodirova and Maldonado continued to live together and then remarried three years later. In 2018, Schrock filed a complaint in chancery court for modification of custody in an attempt to gain physical custody of J.R. and have his child support obligations terminated. Schrock argued that a material change in circumstances had occurred that was adverse to the best interest of J.R. During discovery, allegations were raised that Blagodirova and Maldonado abused and neglected J.R. so a guardian ad litem ("GAL") was appointed to investigate. The GAL found no evidence of abuse or neglect. The chancery court found there was a material and adverse change in circumstances regarding J.R. based on Blagodirova's marriage to an undocumented immigrant who illegally entered the United States, Blagodirova allowing Maldonado to live with her and J.R. after his illegal re-entry to the United States after his deportation, Maldonado use of an illegal driver's license, Blagodirova's preference that J.R. stay with Maldonado while she was at work, the twenty or more dogs that lived in Blagodirova's home, Blagodirova placing J.R. in extracurricular activities he was not interested in, and J.R.'s preference to live with Schrock. The chancery court noted that Maldonado provided a significant amount of care to J.R., but his pattern of conduct was not supportive of a positive environment and adversely affected J.R. In its decision, the chancery court noted J.R.'s testimony that he was scared when he was with Maldonado when he was arrested and deported to Mexico, that J.R. felt like Blagodirova was teaching him to lie because she told him not to tell Schrock about the arrest and deportation. Further, the chancery court found the marriage and illegal driver's license indicated Maldonado's intentions on staying indefinitely. Testimony was also given regarding a time that Maldonado got upset and hit J.R. and another instance where Maldonado got mad and began

driving erratically with J.R. in the vehicle. Maldonado also subjected J.R. to name-calling and interfered with Schrock’s visitation privileges as well. The chancery court found that custody modification was warranted based on the totality of the circumstances. The chancery court analyzed the *Albright* factors, gave Schrock primary physical custody of J.R., and ordered Blagodirova to pay child support. Blagodirova appealed to the Court of Appeals, which ultimately reversed the chancery court’s judgment finding that a material change in circumstances had occurred but the change did not adversely affect J.R. because he was in good health, active, and bright. Schrock petitioned for a writ of certiorari.

ISSUE

Whether the chancery court erred in modifying Blagodirova and Schrock’s custody agreement by finding a material change of circumstance that was adverse to J.R.

HOLDING

Because it was undisputed that there was a material change in circumstances, because the chancery court provided a detailed opinion regarding the adverse effect J.R. experienced living with Blagodirova and Schrock, because the chancery court was in the best position to determine the credibility of the witnesses and the weight that should be assigned to the evidence, and because there was substantial evidence to support the chancery court’s finding that there was a material change of circumstances that was adverse to J.R., the chancery court properly modified Blagodirova and Schrock’s custody agreement by finding a material change of circumstance that was adverse to J.R. Therefore, the Supreme Court reversed the judgment of the Court of Appeals and reinstated and affirmed the judgment of the Monroe County Chancery Court.

The Judgment of the Court of Appeals is Reversed. The Judgment of the Monroe County Chancery Court is Reinstated & Affirmed - 2020-CT-01162-SCT (Aug. 10, 2023)

En Banc Opinion by Justice Beam

Hon. Jacqueline Estes Mask (Monroe County Chancery Court)

Jak McGee Smith for Appellant - Jason D. Herring & Michael Spencer Chapman for Appellee

Briefed by [Summie Carlay](#)

Edited by [Nivory Gordon](#) & [Ashley House](#)

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BROWNLEE V. POWELL

CIVIL - DOMESTIC RELATIONS

CUSTODY - VISITATION - IN LOCO PARENTIS - Courts recognize third party visitation for those standing in loco parentis in very limited and unique situations

EVIDENCE - ADMISSIBILITY - APPEAL - To allege error on appeal in the admission of evidence, a party must timely object at trial or in a motion for new trial and specify the ground for objection on the record

EVIDENCE - ADMISSIBILITY - PLAIN-ERROR RULE - The plain-error doctrine applies when an error results in a manifest miscarriage of justice or seriously affects the fairness, integrity, or public reputation of judicial proceedings

APPELLATE PROCEDURE - REMEDIES - ATTORNEYS’ FEES - When determining an award of legal fees, the court must find the plaintiff’s claim to be frivolous and have no hope of success

FACTS

From early 2014 to October 2019, Pamela (“Pam”) Brownlee and Jessica Powell co-habitated as romantic partners with Jessica’s two children, A.M.P. and E.R.L., from two previous relationships. In December 2019, Pam filed a Petition to Establish Custody and Visitation, seeking custody of E.R.L. and visitation with A.M.P. In October 2020, Pam revised her petition only seeking visitation with E.R.L. and A.M.P. under the doctrine of in loco parentis. In February 2021, Jessica filed a motion to dismiss, motion for temporary restraining order, and motion for award of attorney fees. In support of her brief, Jessica attached an exhibit of text messages from Pam to A.M.P. In April 2021, the chancellor

entered a judgment both dismissing the motion for temporary restraining order and denying all requests for relief by Pam. Pam subsequently filed a motion to reconsider and motion for recusal, which were both denied. Pam appealed.

ISSUES

Whether the chancery court (1) incorrectly determined that there was no common law right to in loco parentis visitation by a third party; (2) erred by considering text messages attached as an exhibit to a pleading as evidence and by not allowing testimony or evidence; and (3) incorrectly determined that Pam's petition was filed in bad faith and incorrectly awarded attorneys' fees to Jessica.

HOLDING

(1) Because common law granted in loco parentis visitation rights to third parties in very limited, unique situations, Pam should have been given the chance to provide proof that this was that kind of situation, and the chancery court erred in granting dismissal. (2) Because Pam did not object to the introduction of the text messages and did not raise the issue in her motion for new trial, and because the plain-error doctrine did not apply, the chancery court did not err in allowing the texts into evidence. (3) Because Pam's petition had hope of success, the petition was not filed in bad faith, and the chancery court erred in awarding attorneys' fees to Jessica. Therefore, the Supreme Court reversed and remanded the judgment of the Jones County Chancery Court.

CONCURRENCE IN RESULT ONLY

Presiding Justice Kitchens argued a third party is not required to rebut the natural parent presumption when pursuing in loco parentis visitation rights. Instead, a third party seeking visitation rights on the basis of in loco parentis must present sufficient evidence of a bond between him or her and the child that arose from a custodial or parent-like relationship. If a viable and wholesome relationship exists with the child, the trial court must ascertain whether visitation is in the child's best interest. If so, visitation rights should be granted.

Reversed & Remanded - 2022-CA-00196-SCT (Aug. 10, 2023)

En Banc Opinion by Justice Beam - Concurrence in Result Only by Presiding Justice Kitchens

Hon. Billie J. Graham (Jones County Chancery Court)

Dianne Herman Ellis for Appellant - Sherry L. Lowe & *Pro se* for Appellees

Briefed by [John Walker Webb](#)

Edited by [Kara Edwards & Mason Scioneaux](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 8, 2023

COURT OF APPEALS - CIVIL CASES

COVIN V. COVIN

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - PROPERTY SETTLEMENT AGREEMENTS - AMBIGUITY - To determine whether a property settlement agreement is ambiguous, the court begins the process by reviewing the “four corners” of the settlement agreement; the court must read the contract as a whole so as to give effect to, or harmonize, the various provisions of the agreement, if possible

FAMILY LAW - RELIEF SOUGHT - COURT'S DISCRETION - A party's prayer for general relief is sufficient to allow a chancellor to impose any relief to which the party was entitled by the proof and which was within the jurisdiction to grant; a chancellor may grant relief not specifically requested by a party and shall grant the relief to which the party in whose favor it is rendered is entitled by the proof

APPELLATE PROCEDURE - MOOTNESS - STAY OF ENFORCEMENT - Under Miss. R. App. P. 8(b), application for a stay of the judgment or the order of a trial court pending appeal or for approval or disapproval of a

contested supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance to the trial court

CIVIL PROCEDURE - CONTEMPT OF COURT - COURT'S DISCRETION - Courts have substantial discretion in deciding whether a party is in contempt; failure to comply with a divorce decree is prima facie evidence of contempt; once a chancellor finds that a prima facie case has been made, the burden shifts to the opposing party to rebut that case with proof that is clear and convincing and rising above a state of doubtfulness

FAMILY LAW - CONTEMPT OF COURT - ATTORNEY'S FEES - The fact that a successful petitioner is eligible for an award of attorney's fees in a contempt action does not automatically entitle them to an award; the chancellor weighs all facts and assesses the circumstances to award attorney's fees

FACTS

Matthew Covin and Stacey Covin were married in April 2012. Matthew and Stacey separated in September 2016. Stacey filed a complaint for divorce and a motion for temporary relief. The chancery court issued a temporary order governing custody, spousal support, property division, finances, and a guardian ad litem. In April 2020, the chancery court entered an order allowing the withdrawal of fault grounds, and a final judgment of divorce was entered on the same day. Matthew filed a complaint for contempt alleging Stacey failed to allow visitation. After a video hearing, the chancery court entered an order finding Stacey in contempt and ordered her to pay Matthew \$750 for attorney's fees and \$158 for court costs. In July 2020, Matthew filed an amended motion for contempt against Stacey asking the chancery court to order that the marital home and property be listed for sale immediately, require Stacey to either immediately or upon sale of the marital home and property remit to Matthew his \$49,082 interest in the marital property, issue an order for Matthew to be allowed to enter the marital home and property to retrieve his personal belongings, and require Stacey to account for Matthew's missing personal belongings in accordance with the Property Settlement Agreement ("the agreement"). Stacey filed a response to Matthew's motion with her own counterclaim for contempt, alleging that Matthew had failed to remit \$10,000 awarded to her in the final judgment of divorce. After a trial, the chancery court found Stacey and Matthew in contempt and entered an order to clarify the agreement. The chancery court found the agreement was vague because it failed to specify the items entitled to Matthew. The chancery court ordered Stacey to tender Matthew's personal property from the marital home within thirty days, or she would be incarcerated. The chancery court also ordered Matthew to tender \$10,380 to Stacey via cashier's check within thirty days, or he would be incarcerated. The chancery court denied Stacey and Matthew's requests for attorney's fees. Stacey appealed.

ISSUES

Whether the chancery court erred by (1) making a sua sponte clarification and modification of Stacey and Matthew's final judgment of divorce; (2) ordering Stacey's incarceration if she failed to comply with the chancery court's order; (3) finding Stacey in contempt; and (4) failing to award Stacey attorney's fees and court costs after making a prima facie case of contempt against Matthew.

HOLDING

(1) Because the agreement was vague or ambiguous as it related to the items of personal property Matthew was entitled to retrieve, and because the chancery court was not manifestly wrong or clearly erroneous in its interpretation of the vague or ambiguous portions of the agreement, the chancery court did not err by making a sua sponte clarification and modification of Stacey and Matthew's final judgment of divorce. (2) Because the time for performance of the contract had long passed, and because there was no evidence in the record to show that Stacey sought a stay of the enforcement of the final judgment pursuant to Miss. R. App. P. 8(b), the Court of Appeals did not exercise appellate review on whether the chancery court erred by ordering Stacey's incarceration if she failed to comply with the chancery court's order. (3) Because it was undisputed that Stacey failed to tender the funds representing Matthew's equitable interest during the sixty-day period as required and refused to allow Matthew access to the marital property, because Matthew made a prima facie case of contempt, and because Stacey failed to rebut the prima facie case of contempt by failing to offer a reasonable defense as to why she failed to refinance the marital home or to allow Matthew to retrieve his personal property from the marital home, the chancery court did not err by finding Stacey in contempt. (4) Because the chancery court's finding that Matthew was in contempt of court did not automatically entitle Stacey to an award, the chancery court did not err by failing to award Stacey attorney's fees and court costs after making a prima facie case of contempt against Matthew. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Chancery Court.

Affirmed - 2022-CA-00019-COA (Aug. 8, 2023)

Opinion by Judge Emfinger

Hon. Michael Chadwick Smith (Forrest County Chancery Court)

Chase Ford Morgan for Appellant - Renee M. Porter for Appellee

Briefed by [Reynolds Ward](#)

Edited by [Doug Reynolds](#) & [Ashley House](#)

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DAVIDSON V. DAVIDSON

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - FAMILY-USE DOCTRINE - Property that was once separate may convert to marital property under the family-use doctrine; the doctrine will almost always convert a separately owned marital home to marital property

FAMILY LAW - DIVORCE - MARITAL DEBT - Debts incurred for the benefit of both parties or the family are considered marital debt

FAMILY LAW - DIVORCE - MARITAL DEBT DIVISION - Orders for the division of marital debt must be sufficiently clear regarding the amount to be split

FACTS

Tiffany and Timothy (“Bo”) Davidson were married in Hinds County in January 2017. The marriage produced no children, but both maintained custody of minor children from previous relationships. The couple separated in May 2018 and filed for an irreconcilable differences divorce in August 2018. In July 2019, Tiffany requested that the chancery court decide the division of the marital assets because the parties were unable to reach an agreement. The disagreement over the division of assets centered around the marital home. Prior to the marriage Tiffany had built, and paid in full, a home in Byram. After the separation, Bo defaulted on a \$53,000 home equity line of credit through Trustmark National Bank, securitized against the Byram residence. Tiffany filed an emergency motion asking Bo to authorize Trustmark to release information regarding the loan to her so she could sell the home to avoid foreclosure. Bo’s response asserted that Tiffany already had access to the Trustmark loan and that \$30,000 of the equity in the home should be held in escrow until the chancellor ruled on the property division. The chancellor ordered Bo to execute all documents necessary to complete the sale and ordered Tiffany to place \$30,000 of the proceeds from the sale into a trust held by her attorney. At the hearing on the division of marital assets, Bo was the first to testify. He claimed that he left the home in May 2018, but prior to leaving, he made significant improvements to the property including landscaping and repairs to the sprinkler system, air conditioner, and drywall. He further converted the garage to a bedroom and closed off a wall to create an additional bedroom in the home. He also testified that he spent \$28,000 of his own money to build a workshop behind the house. Regarding the home equity loan, Bo testified that he and Tiffany both took out the loan but omitted Tiffany for the purpose of securing a lower interest rate. Bo stated that the loan was used for the three children’s private school tuition, home repairs, and \$17,000 in unpaid property taxes that Tiffany had not paid in the three years preceding the marriage. Bo testified that the house would have been lost but for his intervention in the matter. Bo also testified regarding an outstanding credit card balance of \$13,000. The card had no balance at the beginning of the marriage and \$13,000 at the time of separation. Bo had paid the card down to \$9,970 at the time of the hearing. Bo testified that the card was used for family expenses, but on cross examination, he admitted that he had charged the card \$1,131.20 for his son’s graduation trip after the separation. Tiffany’s testimony confirmed the stipulated uses for the home equity line of credit and that she was omitted from the Trustmark loan due to her credit. She asserted, however, that Bo’s improvements to the home, such as enclosing the garage, hurt the sale price of the home. She admitted that the home was used for family purposes. She also claimed to have given Bo \$2,000 a month to be applied to the credit card. The chancellor determined that the home in Byram had been transformed into marital property. The chancellor weighed each of the eight *Ferguson* factors, ruling the \$30,000 held in escrow should be distributed to Bo as his portion of the home’s equity. The chancellor also found that the credit card debt was a marital debt because it had accrued during the union and benefitted both parties. The chancellor noted that the charges incurred regarding the senior trip were not

part of the marital debt and ordered Tiffany to pay Bo one half of the expenses incurred prior to May 20, 2018. Tiffany appealed.

ISSUES

Whether (1) the Byram residence was properly classified as marital property and (2) the chancellor's order regarding the division of the credit card debt was improper.

HOLDING

(1) Because Bo contributed to the payment of bills and upkeep of the house, used his own money to complete renovations, and used his good credit as a marital asset by securing a line of credit to save the house from tax forfeiture, the chancery court did not abuse its discretion or manifestly err in classifying the house as marital property. (2) Because both parties stipulated that the credit card was used for family expenses, because the charges benefited both parties and were properly classified as marital debt, and because the chancellor's order did not make a clear finding on the amount of the credit card debt to be split, the credit card debt was properly classified as marital debt but not specific enough on the amount to be classified as such. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Hinds County Chancery Court.

Affirmed in Part; Reversed & Remanded in Part - 2022-CA-00372-COA (Aug. 8, 2023)

Opinion by Judge Westbrook

Hon. Crystal Wise Martin (Hinds County Chancery Court, First Judicial Dist.)

H. Byron Carter III for Appellant - William Charles Bell for Appellee

Briefed by [Andrew Blake Huffman](#)

Edited by [Kara Edwards](#) & [Mason Scioneaux](#)

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GILLEN V. GILLEN

CIVIL - DOMESTIC RELATIONS

JURISDICTION - APPEAL - FUGITIVE DISMISSAL RULE - An appellate court may dismiss a defendant's appeal if the defendant is a fugitive, regardless of the merits of the appeal

FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - In a dissolution of marriage, the property of the estate shall be divided in a manner that is equitable and fair in light of the circumstances

CIVIL PROCEDURE - COURT ORDERS - CONTEMPT - Contempt is an issue of fact to be decided on a case-by-case basis; the chancery court has substantial discretion in deciding whether a party is in contempt

FACTS

Tammy Gillen had been the owner of J&J Tire & Muffler (J&J) for approximately thirty years. Tammy married Gregory ("Greg") Gillen in 2003. In August 2018, Greg transferred \$500,000 from J&J's savings account to its checking account. He then wrote two checks to himself, totaling \$350,000, and deposited those checks in his and Tammy's joint personal savings account. Later in August 2018, Greg wired \$1,075,000 from the couple's joint personal savings account to his father, Keith Gillen, in Missouri. Greg also abandoned the couple's marital residence and fled to Missouri on the same day. In December, Tammy filed for divorce from Greg and named Keith as a party to the suit. As part of the divorce suit, Tammy requested a temporary restraining order and an injunction against Greg and Keith to prevent them from spending the disputed funds. Greg and Keith appeared at the hearing, where the Court ordered Greg to deposit \$1,000,000 to the court's registry by the following Monday. Greg never deposited the disputed funds to the registry, and Tammy moved to hold Greg in contempt. At the same time, Greg filed for an interlocutory appeal, asserting that he was not a party to the marriage and that the court had no personal jurisdiction over him. At the contempt hearing in October 2019, neither Greg, Keith, nor either of their counsel appeared. As such, Greg and Keith were held in civil and criminal contempt. Their attorney moved for a new trial or to set aside the judgment, and Greg's subsequent attorney moved to set aside the contempt order, arguing that Greg had not deposited funds to the registry because he did not

have the funds to deposit and argued that he did not appear at the hearing because he feared incarceration. The court denied the defendant's motions, finding them to be "frivolous and without merit." Further, the court held that "[d]ue to their unclean hands and failure to demonstrate good faith compliance, the court finds that neither defendant is entitled to any relief whatsoever." In July 2021, Greg filed a petition for interlocutory appeal, asserting that the court erred in refusing to set aside the temporary restraining order and the contempt order.

ISSUES

Whether (1) the court had jurisdiction over Greg's claims; (2) the trial court's finding of contempt violated Greg's constitutional rights; and (3) the trial court erred in not granting the June 2021 motion to set aside the contempt order.

HOLDING

(1) Because Greg absented himself from Mississippi and refused to show good faith or attempt to comply with the court order—by refusing to attend hearings and submit to the court's jurisdiction—Greg was subject to the "fugitive dismissal rule," and the court lacked jurisdiction over Greg's claims. In the alternative, because Greg effectively waived his jurisdictional claims on appeal when his attorney signed the order in August 2019, the court did not have jurisdiction over Greg's claims. (2) Because Greg was presented with opportunities to appear and present evidence of his inability to pay, but did not offer any evidence, Greg's claim that the court's finding of contempt violated his constitutional rights was without merit, and the trial court's finding of contempt did not violate Greg's constitutional rights. (3) Because Greg cited no authority to support his claim nor was the emergency motion contained in the record, Greg's claim was procedurally barred, and the trial court did not err in not granting the June 2021 motion to set aside the order. Therefore, the Court of Appeals dismissed the defendant's appeal of the Lauderdale County Chancery Court's temporary order and contempt order.

Appeal Dismissed - 2021-CA-00837-COA (Aug. 8, 2023)

Opinion by Chief Judge Barnes

Hon. Lawrence Primeaux (Lauderdale County Chancery Court)

Matthew Allen Baldridge for Appellant - John S. Grant IV, John S. Grant III, & Brooke Trusty Grant for Appellee

Briefed by [Forrest Carman](#)

Edited by [Emilee Crocker](#) & [Mason Scioneaux](#)

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TUBWELL V. FV-1, INC.

CIVIL - REAL PROPERTY

JURISDICTION - FORECLOSURE SETTLEMENT - ENFORCEABILITY - Once a foreclosure settlement has been reached in federal court and there is a final judgment, questions of enforceability can be addressed by state courts

FORECLOSURE - STATUTE OF LIMITATIONS - DEFICIENCY JUDGMENT - The statute of limitations prescribed in Miss. Code Ann. § 15-1-13 does not apply to all claims relating to foreclosure; rather, it only applies to deficiency judgments

SUMMARY JUDGMENT - AFFIDAVITS - PROBATIVE EVIDENCE - Miss. R. Civ. Pro. 56(a) allows, but does not require, affidavits when moving for summary judgment, and other forms of supporting documents can be submitted to provide probative evidence

CIVIL PROCEDURE - COUNTERCLAIMS - EJECTMENT ACTION - A party may bring counterclaims in an ejectment action, but the claims must properly arise out of the possessory action stemming from the ejectment proceeding

FACTS

Joe Clyde Tubwell had been living in a house in Desoto County since 2005. In 2016, the loan on the house went into default and foreclosure proceedings commenced. Tubwell filed a complaint against the mortgage companies to prevent

impending foreclosure. The mortgage companies removed the case to federal court, where summary judgment was granted in their favor. Tubwell filed post-judgment claims, but they were not addressed because the parties reached a settlement. The parties signed a Confidential Settlement Agreement and a Release Document (collectively referred to as the “CSA”), in which Tubwell was paid an undisclosed sum. In return, he promised to vacate the property by April 2020 and to waive all foreclosure objections. Following this agreement, a foreclosure sale was held in which FV-1, Inc. (“FV-1”) purchased the property and subsequently recorded the deed. Tubwell was then paid his settlement sum, but due to Covid-19, the parties repeatedly delayed Tubwell’s move-out date until a final date was set in March 2021. However, in February 2021, Tubwell filed a notice of non-confirmation of the settlement agreement, claiming the mortgage companies breached the CSA. In response, FV-1 filed a notice of intent to enforce the settlement against Tubwell. The federal court held it had no jurisdiction to rule on the enforcement of the settlement agreement, so FV-1 filed suit in Desoto County Circuit Court, seeking enforcement of the settlement and an order ejecting Tubwell from the property. FV-1 moved for summary judgment, arguing it was the record holder of the property and that the parties entered into an enforceable CSA. Tubwell responded with a plethora of motions, the primary one being a motion to dismiss on the grounds of adverse possession and the running of the statute of limitations. Tubwell also opposed summary judgment on the grounds that FV-1 failed to provide supporting affidavits required by Miss. R. Civ. Pro. 56(c), and his own affidavits demonstrated genuine issues of material fact. The circuit court denied all of Tubwell’s motions and granted summary judgment for FV-1. In denying Tubwell’s motion to dismiss, the circuit court held that the complaint was timely under Miss. Code Ann. § 11-25-101 and that adverse possession did not begin until his permission to possess expired in March of 2021. When granting summary judgment for FV-1, the circuit court held that it had the right to immediate possession as a matter of law. In the same order, the circuit court also dismissed Tubwell’s counterclaims by finding that no triable issue remained as to FV-1’s claim for possession. Tubwell was set to be evicted in June 2022, but he vacated the premises shortly beforehand. Tubwell appealed.

ISSUES

Whether the circuit court erred in (1) exercising jurisdiction over FV-1’s action; (2) denying Tubwell’s motion to dismiss; (3) granting summary judgment in favor of FV-1 on the right to immediate possession; and (4) summarily dismissing Tubwell’s counterclaims without prejudice.

HOLDING

(1) Because the federal court specifically stated that it had entered a final judgment when the settlement was reached and because Tubwell was not questioning the mere existence of the CSA, but rather, its enforceability, the circuit court did not err in exercising jurisdiction. (2) Because the statute of limitations under Miss. Code Ann. § 15-1-23 was only applicable to foreclosure actions regarding deficiency judgments, not ejectment actions, and because Tubwell offered no evidence to satisfy any of the elements of adverse possession under Miss. Code Ann. § 15-1-13, the circuit court did not err in denying Tubwell’s motion to dismiss. (3) Because Miss. R. Civ. Pro. 56(a) simply allows, and does not require, supporting affidavits to accompany a summary judgment motion, because FV-1 provided sufficient supporting documentation in the form of the notarized CSA and a copy of its deed to the property, and because Tubwell’s own affidavits were merely general allegations with no material facts, the circuit court correctly granted summary judgment for FV-1. (4) Because the sole issue the circuit court faced centered on possession and ejectment and because Tubwell’s counterclaims sought damages for actions unrelated to the enforceability of the CSA, the circuit court did not err by dismissing Tubwell’s counterclaims without prejudice. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Presiding Judge Wilson argued that the circuit court erred by dismissing Tubwell’s counterclaims. The circuit court improperly equated FV-1’s claim to an unlawful entry and detainer proceeding rather than a complaint for ejectment. Miss. Code Ann. § 11-25-101 precludes counterclaims in unlawful detainer proceedings, but not for ejectment actions. Therefore, Tubwell’s counterclaims should not have been dismissed.

Affirmed - 2021-CP-01345-COA (Aug. 8, 2023)

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

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

Pro se for Appellant - John Thomas Rouse for Appellees

Briefed by [Benjamin Duddy](#)

WEST V. NICHOLS CTR.

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - APPEALS - GROUNDS FOR REVERSAL - Sufficient cause for reversal only occurs when a Mississippi Workers' Compensation Commission order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law

WORKERS' COMPENSATION - EVIDENCE - BURDEN OF PROOF - In a workers' compensation case, the claimant bears the burden of proving by a fair preponderance of the evidence: (1) an accidental injury, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the death or claimed disability; once the claimant makes out a prima facie case of disability, the burden of proof shifts to the employer; the claimant has the burden to establish every essential element of the claim, and it is not sufficient to leave the matter to surmise, conjecture or speculation

FACTS

In June 2020, Donna West was employed as a nurse at the Nichols Center. West informed her supervisor that she had woken up with a fever. West tested positive for COVID-19. West's supervisor told her to quarantine for two weeks. After West's two-week quarantine ended, she informed the Nichols Center she was still sick and could not return to work. On July 8, West went to MEA medical clinic ("MEA") for symptoms related to COVID-19, which included a cough. West was prescribed a Z-Pak and cough medicine. On July 24, West visited MEA again, still reporting COVID-19-related symptoms as well as pain in her left thigh. MEA diagnosed West with an upper respiratory tract infection and referred her to St. Dominic's Hospital for an ultrasound of her left leg, which revealed no blood clotting nor any causes for concern. On August 12, West returned to MEA for continued pain in her left leg as well as extreme fatigue from COVID-19. On August 20, West filed a petition to controvert where she alleged that she developed a blood clot in her leg and other pulmonary injuries as a result of contracting COVID-19 while taking care of COVID-19-positive patients at the Nichols Center. In July 2021, a hearing was held before an Administrative Judge ("AJ") where the parties agreed the only issues to be addressed were whether West's COVID-19 diagnosis was causally related to her work at the Nichols Center, and whether West was diagnosed with a blood clot, and, if so, whether the blood clot was causally related to her employment. West testified that in March or April 2020, she covered a short-term patient COVID-19 wing in the Nichols Center where West believed she was the ninth person who had tested positive since the beginning of the pandemic. However, West failed to identify any COVID-19-positive people she had come in contact with during her last two weeks at the Nichols Center. Additionally, West testified that she and the other employees took significant precautions to prevent the spread of the virus which included wearing N95 masks, face shields, gowns, goggles, and gloves and sanitizing equipment and surfaces. Furthermore, West stated that she primarily remained at home or at work, although she did go to Walmart to get gas, and that she only lived with one person, Thomas Nines, who never got sick. Following the hearing, the AJ found that West failed to prove, by a preponderance of the evidence, that she sustained a work-related injury, that West produced no evidence that she contracted COVID-19 at work, that West was never diagnosed with a blood clot in her leg as well, and that there was no medical evidence to support West's claim that her left leg pain was causally related to her COVID-19 diagnosis and her employment. West filed a petition for review by the full Mississippi Workers' Compensation Commission ("the Commission"). The Commission affirmed the AJ's findings that West failed to meet her burden of proof. West appealed.

ISSUE

Whether the Commission erred in finding that West failed to meet her burden of proof.

HOLDING

Because the Commission's order was not clearly erroneous nor contrary to the weight of the evidence, because West offered no proof, lay or medical, that she contracted COVID-19 at the Nichols Center, because West's medical records

did not support her claim, because the AJ and Commission found that West’s medical records clearly refuted her allegations of having developed blood clots as a result of COVID-19, because West offered no evidence to show where she contracted COVID-19, and because it is also possible that West contracted COVID-19 from somewhere or someone else, the Commission did not err in finding that West failed to meet her burden of proof. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers’ Compensation Commission.

Affirmed - 2021-WC-01403-COA (Aug. 8, 2023)

Opinion by Presiding Judge Wilson

Mississippi Workers’ Compensation Commission

Marshall Jackson Goff for Appellant - Betty B. Arinder & Lana E. Gillon for Appellees

Briefed by [Zachary Perez](#)

Edited by [Doug Reynolds](#) & [Ashley House](#)

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COURT OF APPEALS - CRIMINAL CASES

CARPENTER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR - A Jury must be properly instructed on the elements of a crime, it is reversible error for courts to deny an accused the right to have a jury decide guilt as to every element; if jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - ATTEMPT ELEMENTS - A proper jury instruction for an “attempt” charge requires the three elements stated in the statute of (1) a design or endeavor to commit an offense, (2) an overt act toward commission thereof, and (3) a failure to consummate the act

CRIMINAL PROCEDURE - PREJUDICE - OVERWHELMING EVIDENCE OF GUILT - Prejudice often is lacking when the weight of the evidence against the defendant is overwhelming

FACTS

In 2019, Jessie Carpenter got into a physical altercation with Antonio Hart. Later that year, Carpenter was in a parked car with two others in Starkville. Hart arrived, and then he and Carpenter exchanged words. Carpenter shot Hart twice. Carpenter attempted to shoot Hart a third time, but his gun jammed. Hart escaped and drove himself to the hospital, where he received treatment for the gunshot wounds. Hart informed the police that Carpenter shot him, and Carpenter admitted to the shooting in a recorded interview. Carpenter was indicted for attempted murder and for being a felon in possession of a firearm. At trial, Carpenter’s recorded interview was admitted into evidence. Carpenter objected to one of the State’s jury instructions so they could enter a substitute elements instruction. Without objection from Carpenter, the State also offered a jury instruction defining attempt, design, and deliberate design. Carpenter was convicted of attempted murder and possession of a firearm by a felon. Carpenter’s post-trial motions were denied. Carpenter appealed.

ISSUE

Whether the circuit court committed plain error by not instructing the jury on the elements of murder.

HOLDING

Because Carpenter was charged with attempted murder rather than murder, because the jury was provided with instructions that adequately defined attempted murder, because a jury instruction for an attempt of a crime did not require a companion definition for the attempted felony, and because Carpenter failed to show he suffered prejudice from the jury instructions because the weight of the evidence against him was overwhelming, the circuit court did not

commit plain error by not instructing the jury on the elements of murder. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Circuit Court.

Affirmed - 2022-KA-00398-COA (Aug. 8, 2023)

Opinion by Judge McCarty

Hon. Lee Sorrels Coleman (Oktibbeha County Circuit Court)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee

Briefed by [Stephanie Iken](#)

Edited by [Doug Reynolds](#) & [Ashley House](#)

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DAVIS 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 PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - A new trial will not be ordered unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice; this high standard is necessary because any factual disputes are properly resolved by the jury, not by an appellate court

CRIMINAL LAW - ROBBERY - ELEMENTS - To obtain a conviction for the crime of robbery under Miss. Code Ann. § 97-3-79, the State must prove beyond a reasonable doubt that the defendant (1) feloniously took (2) the personal property of another (3) in his presence or from his person and (4) against his will, (5) by violence to his person or by putting such person in fear of some immediate injury to his person

FACTS

In June 2021, Issac Shorter, a seventy-four-year-old man, noticed a man following him during his morning jog. This man was later identified as Rickel Davis. Davis then followed Shorter home and pulled a gun on him. Shorter testified that Davis told him to get the money out of his pockets, but when Shorter checked his pockets, he realized that he had no money. Shorter told Davis that he was “going to have to shoot me.” Shorter then ran into his home, grabbed a gun, and returned outside. Davis turned and ran away once he saw the gun. While one officer patrolled the area, he noticed someone near the crime scene enter a residence. Shorter told officers about nearby cameras that surveil the area. They reviewed the footage, and Shorter identified the man who pulled the firearm on him. The officers then gave a description of the suspect to the patrolling officer, which matched the person that the patrolling officer saw enter a residence near the crime scene. Officers then went to the residence where the owner, Davis’s grandmother, consented to a search of the home. Davis was present during the search. During the search the officers found an open closet with clothes that matched the description from the footage as well as a .22-caliber pistol that matched the description given by Shorter. Davis was then taken into custody and indicted for armed robbery with an elder enhancement. Davis pled not guilty. During the trial, Shorter testified that he was scared when Davis pointed the gun at him. The defense did not object to this questioning. After the close of evidence, Davis requested that the jury be provided instructions for a lesser-included offense of simple assault, but the court denied this request on the grounds that no reasonable or rational juror could find the defendant to be guilty of simple assault as opposed to armed robbery. The jury returned with a guilty verdict on the charge of armed robbery with an elderly victim enhancement. Davis moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The court denied Davis’s motion and entered its judgement and sentence. Davis appealed.

ISSUES

Whether the trial court erred in (1) finding that the fear element of armed robbery was satisfied under the weight of the evidence and (2) denying Davis’s proposed instruction on the lesser-included offense of simple assault.

HOLDING

(1) Because Davis did not challenge Shorter’s testimony that he was afraid and because there was no evidence that Shorter was not afraid, the trial court properly found that the fear element of armed robbery was satisfied under the weight of the evidence. (2) Because Davis did not provide any evidence to show that a reasonable juror could find him guilty of simple assault and not guilty of armed robbery, the trial court properly denied his proposed jury instruction on the lesser-included offense. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

Affirmed - 2022-KA-00573-COA (Aug. 8, 2023)

Opinion by Judge McDonald

Hon. Charles E. Webster (Bolivar County Circuit Court, Second Judicial Dist.)

Daniel Hinchcliff (Pub. Def. Office) for Appellant - Alexandra Lebron (Att’y Gen. Office) for Appellee

Briefed by [Zylan Coleman](#)

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

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GARDNER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY SELECTION - EXCUSED FOR CAUSE - A juror may be excused for cause if they are (1) unable to perform their duties or (2) disqualified; the mere fact that a prospective juror knew of the defendant is not enough to find error; a juror can remain upon stating that, notwithstanding the acquaintance with the defendant, they would be unbiased and decide the case solely on the law and evidence

EVIDENCE - TENDER YEARS TESTIMONY - COMPETENCY - Children of tender years may testify if they are determined to be competent at the time the court makes its decision, which may be accomplished if the court determines that the child has the ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness, and to appreciate the seriousness of the criminal charge and of the legal proceedings; to exclude the testimony of a child witness, a party must show that at the time the court made its initial decision that it was apparent that the witness did not meet the criteria for testifying, not that the subsequent testimony was flawed

EVIDENCE - TENDER YEARS TESTIMONY - CREDIBILITY - Whether the child can remember the exact event or whether the child was coached to give the desired testimony goes more to the weight of the child’s credibility, and are for the jury to evaluate

EVIDENCE - OBJECTIONS - PROCEDURAL BARS - A defendant is procedurally barred from asserting an issue on appeal if he fails to object to the statements during trial, absent plain error; the defendant must make a specific objection to allow the trial court to consider the issue

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PLAIN ERROR DOCTRINE - When applying the plain-error rule, the appellate court must determine (1) whether the trial court deviated from a legal rule; (2) whether the error is plain, clear, or obvious; and (3) whether the error prejudiced the outcome of the trial; when there is no binding authority or clear legal rule disapproving of such instruction, the instruction cannot be plain error

FACTS

In August 2017, Marcus Gardner went to his next-door neighbor Andrew Perry’s home. Gardner was let in by Perry’s daughter. Gardener told Perry that someone had attempted to rob his home where his wife, Chelsea Pace, and four-year-old son, Jay, were sleeping. Gardner and Perry went back to Gardner’s home to investigate. Perry observed no signs of a break-in. Upon entering the home, Perry observed a trail of blood leading to a bedroom containing Pace’s body. Perry observed a motionless Jay in another bedroom. Perry became concerned about Gardner’s involvement in Pace’s death when Gardener asked Perry for reassurance that he would not reveal the bloody discovery. Upon returning

to his home, Perry had his wife and daughter contact authorities to report the crime and request assistance. Gardner then left the Perry home. Later, the Perrys observed smoke coming from the back of the Gardner home and realized that Pace's body had been moved to the backyard. Jay survived despite receiving multiple gunshot wounds. Law enforcement subsequently arrested and charged Gardner for the murder of Pace and the attempted murder of Jay. In June 2021, Gardner's case proceeded to trial. After selecting twelve jurors and two alternates, Gardner alerted the trial court that a prospective juror, Birchfield, who was a minister had preached to Gardner in jail while he was awaiting trial. The trial court commenced a separate voir dire that revealed that Birchfield had conducted sermons to Gardner and other inmates in a group setting. Gardner requested to strike Birchfield because of his failure to disclose material information and because he was employed with law enforcement. After review, the trial court denied the for-cause challenge and allowed Birchfield to sit on the jury. Gardner did not move for a mistrial, nor did he file a motion for a new trial. At the competency hearing, the trial court assessed Jay's competency to testify. Jay testified that he remembered the night his mother died and how Gardner looked at the time of the incident. On cross-examination, Gardner revealed facts that Jay did not remember, such as inconsistent statements Jay made to a forensic interviewer. The trial court found that though some of his statements were inconsistent, Jay could testify as he could understand questions and remember events. The trial continued with the presentation of evidence, including Perry's testimony. At the beginning of Perry's cross-examination, Gardner asked him about previous felonies. The State argued that the question violated Miss. R. Evid. 609(b) by admitting prior convictions within the past ten years. Gardner argued that the prior convictions were probative because they were crimes of dishonesty. The trial court ruled that Gardner failed to show that admitting the prior convictions would be more probative than prejudicial. Gardner then argued that Perry's pending charge of a felon in possession of a weapon was relevant to the question of Perry's credibility, especially if the State had offered any leniency in exchange for his testimony. The trial court ruled that Gardner could cross-examine Perry about the pending felony charge, but Gardner failed to do so. The State proposed three jury instructions, the first being an instruction on the first-degree murder of Pace, the second defining "deliberate design," and the third for the attempted murder of Jay. The State's instructions were admitted without objection. The jury found Gardner guilty of the first-degree murder of Pace and the attempted murder of Jay. Gardner appealed.

ISSUES

Whether the trial court erred by (1) failing to strike a juror for cause; (2) finding Jay competent to testify; (3) limiting the cross-examination of Perry; and (4) admitting the State's third jury instruction for the attempted murder of Jay.

HOLDING

(1) Because the State did not provide any proof that Gardner intentionally delayed alerting the trial court of the juror's alleged impartiality, because Gardner failed to show that the trial court's ruling was erroneous, because there was no evidence that the juror had a personal relationship or had discussed the criminal charges or case with Gardner, and because the prospective juror indicated that he would remain impartial, Gardner's right to an impartial jury was not violated, and the trial court did not err by failing to strike the juror for cause. (2) Because Jay demonstrated an ability to perceive and remember events from the night of the shooting, to understand and answer questions, and to understand the importance of truthfulness, because Gardner was given the opportunity to thoroughly cross-examine Jay which brought the alleged coercion by Jay's grandmother to the jury's attention, and because the question of whether a child was influenced in giving the desired testimony was a question for the jury, the trial court did not err by finding Jay competent to testify. (3) Because Gardner did not mention to the trial court that he desired to cross-examine Perry on the fact that he was facing a potential ten-year sentence for a pending felony, Gardner waived the argument that the trial court erred by limiting the cross-examination of Perry on appeal. (4) Because Gardner did not object to the jury instruction at trial nor did he file a post-trial motion, because it was not plainly or clearly obvious that the State should have included the word "deliberate" because the statute for attempted murder did not contain the word "deliberate," because there was no rule prohibiting the use of the phrase "unlawfully designed" in place of "deliberate design" under the statute for attempted murder, and because the jury could have understood from the instructions that having the "design" to commit an act indicated that the action was "deliberate," Gardner failed to show that he met the first prong of the plain error doctrine, and was procedurally barred from arguing the trial court erred by admitting the State's third jury instruction. Therefore, the Court of Appeals affirmed the judgment of the Noxubee County Circuit Court.

Affirmed - 2021-KA-00886-COA (Aug. 8, 2023)

Opinion by Judge Westbrook

Hon. Lee Sorrels Coleman (Noxubee County Circuit Court)
Cynthia Ann Stewart for Appellant - Casey B. Farmer (Att’y Gen. Office) for Appellee
Briefed by [Maggie Crain](#)
Edited by [Nivory Gordon](#) & [Ashley House](#)

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JONES V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - A new trial will not be ordered unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice; this high standard is necessary because any factual disputes are properly resolved by the jury, not by an appellate court

CRIMINAL PROCEDURE - JURY INSTRUCTION - EXCUSE OF ACCIDENT - Under Miss. Code Ann. § 97-3-17(b), the killing of any human being by the act, procurement, or omission of another shall be excusable when committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation

CRIMINAL PROCEDURE - JURY INSTRUCTION - THEORY OF CASE - A Defendant is entitled to have jury instructions given which present his theory of the case, no matter how meager; however, the Defendant must offer some evidence to support the theory for the court to be obligated to instruct the jury on it

FACTS

In April 2020, during a game of craps at the Ivy Apartments in Louisville, Michael Jones refused to pay “the house” five dollars after winning a roll and being instructed by Malik Hudson to do so. Jones and Hudson argued, and the game broke up. Later that evening, Jones returned with a gun and shot Hudson in the head as Hudson was leaving in his car, killing him. During a jury trial, three eyewitnesses testified that they saw Jones shoot Hudson as Hudson was driving away. The same three witnesses and one additional witness testified that they had never seen Hudson with a gun that night. In Jones’s statement to police, he stated that he only heard shots fired and that after the shots were fired, he fought his nephew over a gun before letting go. At trial, Jones testified that he did shoot at Hudson with a gun he “snatched” from someone nearby, but only after another shot was fired from someone else. Jones also testified that he fought with his cousin over a gun after the shots were fired. Jones proposed instructions to the jury for “excuse of accident,” but the trial judge refused the instruction. Jones was convicted of second-degree murder. Jones appealed.

ISSUES

Whether the circuit court erred (1) by finding that the jury’s verdict was not against the overwhelming weight of the evidence and (2) by refusing Jones’s proposed jury instruction on the “excuse of accident.”

HOLDING

(1) Because there were three eyewitnesses that testified to Jones shooting Hudson in the head, the circuit court did not err by finding that the jury’s verdict was not against the overwhelming weight of the evidence. (2) Because Jones testified that the fight over the gun with his nephew happened after the shooting, because Jones never testified that he accidentally fired a gun or that a gun went off during the fight with his nephew, and because Jones presented no evidence in support of his “excuse of accident” theory, the circuit court did not err by refusing Jones’s proposed instruction on the “excuse of accident.” Therefore, the Court of Appeals affirmed the judgment of the Winston County Circuit Court.

Affirmed - 2021-KA-01375-COA (Aug. 8, 2023)

Opinion by Presiding Judge Wilson
Hon. George M. Mitchell Jr. (Winston County Circuit Court)
George T. Holmes (Pub. Def. Office) for Appellant - Alexandra Lebron (Att’y Gen. Office) for Appellee
Briefed by [Caroline Byrd](#)
Edited by [Doug Reynolds](#) & [Mason Scioneaux](#)

WHITE V. STATE

CRIMINAL - FELONY

EVIDENCE - SUFFICIENCY OF EVIDENCE - STANDARD - The legal sufficiency of the evidence is viewed in a light most favorable to the State

EVIDENCE - WEIGHT OF THE EVIDENCE - STANDARD - A challenge to the weight of the evidence must be reviewed in the light most favorable to the verdict and disturb the verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

EVIDENCE - WEIGHT OF THE EVIDENCE - ROLE OF THE JURY - When evidence or testimony conflicts, the jury is the sole judge of the weight and worth of evidence and witness credibility

EVIDENCE - WEIGHT OF THE EVIDENCE - DIRECT & CIRCUMSTANTIAL EVIDENCE - Direct evidence includes confessions, the testimony of an eyewitness, or surveillance video of the gravamen of the offense; circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist; circumstantial evidence and direct evidence carry the same weight

FACTS

In August 2019, twelve-year-old Eric and his brother TyShawn were riding TyShawn's motorcycle when a white SUV began following them. When Eric and TyShawn reached their aunt's house, individuals in the SUV shot at the home, hitting Eric and another twelve-year-old boy. Eric named Joe and Justin as the shooters. The Winston County Sheriff's Department arrested Joe White, Justin White, and LaKelvin Hughes. Joe, Justin, and LaKelvin were indicted for a drive-by shooting under Miss. Code Ann. § 97-3-109(1) ("Count I") and shooting in a dwelling house under Miss. Code Ann. § 97-37-29 ("Count II"). At trial, Eric testified that he knew Joe and Justin because they rode the bus with him. On cross-examination, Eric admitted that he did not see who was driving the white SUV or who shot them. During redirect examination, Eric testified that TyShawn and Joe had some problems between them. Chief Deputy for the Sheriff's Department, Keith Alexander, testified that he responded to the shooting and that one of the victims indicated that Joe White was the shooter. Alexander's body camera footage was entered into evidence and played for the jury. Alexander testified that after receiving an anonymous tip, he located a white SUV that had been impounded. Law enforcement testified that Joe's cell phone data was analyzed, but admitted Joe's location during the shooting could not be ascertained due to lack of tower service. LaKelvin and Joe had gunshot residue on them. Investigators found bullet casings in the white SUV and in the driveway of the home, both of which an employee from the Mississippi Crime Laboratory testified were shot from Justin's pistol. The pistol was located in Justin's car. In addition, surveillance footage from a gas station showed Joe, Justin, and LaKelvin in a white SUV just eleven minutes after the police received a call about the shooting. The owner of the white SUV testified that LaKelvin borrowed the vehicle on the night of the shooting. The SUV's owner testified that the person who sold her the vehicle informed her the back windows did not work, but she never tried to roll them down herself. Joe and Justin's counsel then called Brad Ivy who testified that LaKelvin had admitted to shooting the two victims because he and TyShawn would fight over a girl. Joe and Justin's counsel argued that LaKelvin picked them up after the shooting and that LaKelvin did not give Justin the gun until after the shooting. LaKelvin testified that Joe received a phone call informing him that TyShawn and his brother were on a motorcycle. Joe told LaKelvin to turn around. Once they found them, they followed them and Justin started shooting at the home. The trial court found Joe, Justin, and LaKelvin guilty of both counts, and the trial court denied Joe and Justin's motion for a judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial. Joe and Justin appealed.

ISSUES

Whether the evidence presented at trial (1) was sufficient to support the convictions and (2) went against the weight of the evidence.

HOLDING

(1) Because viewing all the evidence in the light most favorable to the State, there was ample evidence from which a rational jury could determine guilt beyond a reasonable doubt, and because the evidence was sufficient to prove each statutory element for drive-by shooting and shooting into a dwelling house, the evidence presented at trial was sufficient evidence to support the convictions. (2) Because the jury heard the conflicting testimony and resolved the conflicts in the evidence as instructed by the trial court, and because there was a conflict of evidence as to whether Joe and Justin were involved in the crimes, because both circumstantial and direct evidence was offered to prove Joe and Justin's involvement in the commission of the crimes, and because affirming the jury's verdicts did not sanction an unconscionable injustice, the evidence presented at trial did not against the weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Winston County Circuit Court.

Affirmed - 2021-KA-00818-COA (Aug. 8, 2023)

Opinion by Judge Lawrence

Hon. Joseph H. Loper Jr. (Winston County Circuit Court)

Christopher A. Collins for Appellants - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Taylor Coe](#)

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

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