

**MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 24, 2023****SUPREME COURT - CIVIL CASES****BEACHY V. MISS. DIST. COUNCIL FOR ASSEMBLIES OF GOD****CIVIL - CONTRACT**

**CONSTITUTIONAL LAW - ECCLESIASTICAL ABSTENTION DOCTRINE - INTERNAL CHURCH GOVERNMENT** - Pursuant to U.S. Const. amend. I, judicial review of claims that require resolution of strictly and purely ecclesiastical questions is precluded; the alteration of a parish is, in fact, a matter of internal church government, which lies at the core of ecclesiastical affairs

**CIVIL PROCEDURE - CHURCH PROPERTY DISPUTES - COURT AUTHORITY & JURISDICTION** - Civil courts have the general authority to resolve the question of church property ownership; pursuant to the neutral principles of law approach for resolving church property disputes, religious documents must be carefully scrutinized in purely secular terms without relying on religious precepts

**CIVIL PROCEDURE - CHURCH PROPERTY DISPUTES - OWNERSHIP OF PROPERTY** - In order to gain ownership of the property, the denomination must demonstrate either an actual transfer of property from the congregation to the denomination, an express trust, or clear and convincing evidence evincing an intent on the part of the local congregation to create a trust in favor of the denomination

**CONTRACTS - TRUSTS - RESULTING TRUST** - A resulting trust is designed to give effect to the unwritten but actual intention of the parties at the time of the acquisition of title to the affected party

**FACTS**

In November 1988, the Gulf Coast Worship Center (“GCWC”) congregation voted for their local church to become a member of the Assemblies of God denomination. The congregation agreed to be governed by and accept the constitution and bylaws of both the General Council of the Assemblies of God (“General Council”) and the Mississippi District Council for Assemblies of God (“District”). GCWC also agreed to have GCWC’s property deeded to the Assemblies of God, the trustees of the local Assemblies of God church, and their successors in office. Subsequently, the General Council identified GCWC as a General Council-affiliated local assembly. In 2017, Kevin Beachy, the pastor of GCWC, did not renew his credentials as mandated by the General Council. In March 2017, the District informed Beachy that GCWC was being placed under the District’s supervision due to Beachy’s failure to renew his credentials. A few days later, the GCWC congregation, with Beachy functioning as pastor, voted to disaffiliate from the General Council and Assemblies of God Church and to amend its constitution and bylaws to remove a provision that called for GCWC’s property to revert to the District if the assembly ceased to function as a church body. The District filed a petition for declaratory judgment and injunctive relief against Beachy and the GCWC board of trustees. In its petition, the District requested that the trial court declare that GCWC’s decision to disaffiliate during its meeting was void; that GCWC had been under the District’s supervision when the GCWC’s meeting was held; and that GCWC’s real and personal property were under the control of the District. The District requested injunctive relief to assume control of GCWC and to assign an interim pastor. Beachy and the GCWC board of trustees filed a motion to dismiss arguing the trial court lacked jurisdiction because the issues were ecclesiastical. The trial court denied Beachy and the GCWC board of trustees’s motion to dismiss stating it would not consider the actions of the GCWC or of the District. The District amended its petition and added that the GCWC’s property was intended to be held in trust and was under the control of the District. The District filed a motion for summary judgment. On the same day, Beachy and the GCWC board of trustees filed a motion to dismiss and for summary judgment. The District presented GCWC’s application to the Assemblies of God Church in which it claimed that GCWC assumed the responsibilities set forth in the constitutions

and bylaws of the General Council and District. The District also presented a document concerning GCWC's meeting in November 1988, which asserted that a quorum of the GCWC congregation agreed to have a portion of the property deeded with the name of Assemblies of God. The District also presented evidence that, after this meeting, a District superintendent conferred with a GCWC trustee who assured him that the deed was properly worded as required by the General Council. However, Beachy and the board of trustees presented an affidavit from the secretary of GCWC at the time of the meeting in November 1988 who claimed to have no recollection that any member of GCWC informed the District that the GCWC would have the Assemblies of God's name placed on GCWC's deed or that the deed was properly worded as required by the District. The admitted certified copy of the deed from that time did not include the General Council's, the District's, or the Assemblies of God's name. The trial court denied Beachy and the GCWC board of trustees's motion for summary judgment and motion to dismiss. Further, the trial court granted the District's motion for summary judgment, determining that Beachy, the GCWC board of trustees, and the congregation had no authority to disaffiliate from the Assemblies of God church and that the real and personal property of GCWC were under the control of the District. Beachy and the GCWC board of trustees appealed.

### **ISSUES**

Whether the (1) ecclesiastical abstention doctrine applied and prevented the trial court from addressing GCWC's disaffiliation from the Assemblies of God Church and (2) trial court erred by granting the District's motion for summary judgment concerning ownership of the property.

### **HOLDING**

(1) Because making a judicial determination of whether GCWC was to remain a member of the General Council and under its control intruded into the affairs of church government and constituted an ecclesiastical question, the ecclesiastical abstention doctrine applied and prevented the trial court from addressing GCWC's disaffiliation from the Assemblies of God church. (2) Because there was conflicting evidence as to whether GCWC agreed to include the District's name on the deed, there was a genuine issue of material fact as to whether GCWC's board of trustees intended to create a trust relationship with the District, and the trial court erred by granting the District's motion for summary judgment. Therefore, the Supreme Court reversed and remanded the judgment of the Harrison County Chancery Court.

### **SPECIAL CONCURRENCE**

Justice Maxwell agreed that the ecclesiastical abstention doctrine applied and prevented the trial court from addressing GCWC's disaffiliation from the Assemblies of God Church. He also agreed that the only issue properly before the trial court was the District's claim that GCWC intended for its property to be placed in trust under the District's control. He argued that the Dissent's declaration of the Assemblies of God Church as a hierarchical church improperly weighed on church questions and resolved contested factual disputes surrounding the District's relationship with GCWC.

### **CONCURRENCE IN PART & DISSENT IN PART**

Justice Ishee agreed that the ecclesiastical abstention doctrine most likely barred the claims, not including the property dispute. However, he argued the record was not developed enough to decide whether the ecclesiastical abstention doctrine applied. Instead, he would reverse and remand to the trial court to resolve the genuine issues of material fact regarding the various complex issues presented.

### **DISSENT**

Chief Justice Randolph argued that the Assemblies of God Church was a hierarchical church and that control of GCWC was vested with the District. Therefore, the trial court did not err by finding that, when GCWC ceased to operate as an Assemblies of God affiliate, control and authority of GCWC belonged to the District.

### **Reversed & Remanded - 2021-CA-01007-SCT (Aug. 24, 2023)**

En Banc Opinion by Presiding Justice Kitchens - Special Concurrence by Justice Maxwell - Concurrence in Part & Dissent in Part by Justice Ishee - Dissent by Chief Justice Randolph

Hon. James B. Persons (Harrison County Chancery Court, First Judicial Dist.)

Malcolm F. Jones for Appellants - Lisa Anderson Reppeto for Appellee

Briefed by [Emily Phillips](#)

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

**MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 22, 2023**

**COURT OF APPEALS - CIVIL CASES**

**ALFORD V. COTTON ROW HOSPITALITY, LLC**

**CIVIL - REAL PROPERTY**

**EQUITABLE RELIEF - BARS - UNCLEAN HANDS** - No person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by willful inequity; the application of this doctrine as an equitable bar is limited

**CIVIL PROCEDURE - COMPLAINT - REQUIREMENTS** - Under Miss. R. Civ. P. 8, a complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment

**PROPERTY - ADVERSE POSSESSION - ELEMENTS** - To prove adverse possession, a party must show that the possession is (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful

**PROPERTY - PRESCRIPTIVE EASEMENT - ELEMENTS** - To establish a prescriptive easement, a claimant must show by clear and convincing evidence that his use of the property was (1) open, notorious, and visible; (2) hostile; (3) under claim of ownership; (4) exclusive; (5) peaceful; and (6) continuous and uninterrupted for ten years

**PROPERTY - ADVERSE POSSESSION/PRESCRIPTIVE EASEMENTS - DIFFERENCES** - A successful claim of adverse possession results in the claimant receiving ownership of the property while a successful claim for a prescriptive easement results in the claimant receiving an easement to use the property

**PROPERTY - PARTY WALL - ELEMENTS** - Key elements for the creation of a party wall include: (1) the wall be built on the property line, (2) the party desiring to connect to the wall of an adjoining building pay the owner of the wall half of the value, and (3) the parties formally agree to make the wall a party wall

**FACTS**

This case involved a wall between two properties in downtown Cleveland. In the mid-1950s, Arnold and Jean Alford (“the Alfords”) owned a frame shop and rented a building from H.O. Solomon, which they used as a furniture store. In 1975, the Alfords enclosed the alleyway on the north side of the frame store that ran between the frame shop and the furniture store. They built walls on the back and front of the alleyway, attaching both to the walls of both buildings, and they extended the roof over the area. In 1980, the Alfords conveyed the alleyway on the south end of the frame shop property to the City of Cleveland, and, in the deed, the Alfords agreed that the city could use the thirteen-inch masonry wall (which they referred to as a “party wall”) of the frame shop to attach a new building. In 1981, the Alfords sold the building that housed the furniture store to Solomon, from whom Billy and Mary Perry (“the Perrys”) purchased the building and opened a pawn shop. The Perrys operated their business in the entire building and maintained the building, including the interior wall to which the Alfords had extended their roof. No one objected to the Perrys’ use of the wall during the time that they owned the pawn shop from 1985 to 2017. After the Alfords passed, their son, David Alford, became the sole owner of the frame shop. David put an additional doorway into the frame shop’s interior wall of the enclosed alleyway and made the alleyway area into a gallery. In 2017, Cotton Row purchased the pawn shop property from the Perrys to construct a hotel. Cotton Row requested that David detach his roof from their wall, but David contended that the wall was a party wall. Cotton Row proceeded to build the hotel set back from the pawn shop wall, leaving the disputed wall free-standing. To support the wall, however, Cotton Row spent \$40,000 to temporarily shore up the wall. Additionally, Cotton Row later spent another \$20,000 installing structural beams encased in concrete attached to the foundation of the hotel. In 2018, David learned that Cotton Row was planning to demolish the disputed wall. That same year, he installed a new roof over the original roof covering the alleyway area, which extended over the top of the pawn shop wall rather than simply being attached to one side. David sued Cotton Row to confirm title to the wall by adverse possession and/or establish a prescriptive easement for its use. The chancery court held that David had

valid claims of adverse possession and to a prescriptive easement claim to half of the wall. But because Cotton Row owned the rest of the wall, the chancery court ordered David to pay Cotton Row for title to that half of the wall, and David would thereafter own the entire wall. The chancery court also ordered David to either construct his own support system or reimburse Cotton Row for the value of its investment in stabilizing the wall. David appealed, and Cotton Row cross-appealed.

### ISSUES

Whether (1) David was precluded from equitable relief under the unclean hands doctrine; (2) the chancery court was precluded from considering David’s prescriptive easement claim; (3) the chancery court erred in finding that David had a viable adverse possession or prescriptive easement claim to the wall; (4) the chancery court erred in finding that the pawn shop wall was not a party wall; (5) the chancery court erred in requiring Cotton Row to convey David its interest in the wall; and (6) the chancery court erred in requiring David to pay Cotton Row for securing the wall.

### HOLDING

(1) Because neither party gained a legal advantage by their pre-trial maneuvers since the proof of the key legal issues—adverse possession and prescriptive easement—reached back prior to David’s and Cotton Row’s recent actions, David was not precluded from relief under the unclean hands doctrine. (2) Because David began his complaint by stating that he was filing his action “to confirm title to certain real property and to a prescriptive easement,” because David specifically pleaded the elements that create a prescriptive easement in paragraphs 16-17 of his complaint, and because David specifically requested an order confirming his “title in a prescriptive easement” in his “prayer for relief,” the chancery court was not precluded from considering David’s prescriptive easement claim. (3) Because David did not prove by clear and convincing evidence the exclusive use needed to establish adverse possession of the wall, because David established a prescriptive easement to the use of the wall, and because Cotton Row as the servient landowner could not destroy the wall, the chancery court erred in finding that David had a viable adverse possession claim but did not err in finding that David had a viable prescriptive easement claim. (4) Because David established a prescriptive easement to use the wall but he did not establish ownership of (i.e., title to) the wall, the chancery court did not err in finding the pawn shop wall was not a party wall. (5) Because the chancery court determined that David did not establish ownership of the wall by adverse possession, the ownership of the wall continued to be held by the Perrys and then Cotton Row, and the chancery court erred in requiring Cotton row to convey David its interest in the wall. (6) Because David held a prescriptive easement for the wall’s use and because Cotton Row could not demolish the wall or otherwise interfere with David’s easement, Cotton Row was obligated to support the remaining wall if it determined the wall needed reinforcement, and the chancery court erred in requiring David to pay Cotton Row for securing the wall. Therefore, the Court of Appeals affirmed in part and reversed, vacated, and rendered in part the judgment of the Bolivar Chancery Court.

**On Direct Appeal: Affirmed in Part; Reversed, Vacated, & Rendered in Part. On Cross-Appeal: Affirmed in Part; Reversed, Vacated, & Rendered in Part - 2022-CA-00125-COA (Aug. 22, 2023)**

Opinion by Judge McDonald

Hon. Catherine Farris-Carter (Bolivar County Chancery Court, Second Judicial Dist.)

Sheldon G. Alston, Warren Kendrick Rogers Jr., & Jacob Arthur Bradley for Appellant - William Jacob Long IV & Christopher Daniel Meyer for Appellee

Briefed by [Minnie Blackman](#)

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

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**CIVIL - CUSTODY**

**FAMILY LAW - THIRD PARTY CUSTODY BATTLES - BEST INTEREST OF CHILD** - In custody battles between a natural parent and a third party, it is presumed that it is in the child's best interest to remain with his or her natural parent; a finding of unfitness is required before a court can consider the best interest of the child

**FAMILY LAW - NATURAL PARENT PRESUMPTION - REBUTTABLE PRESUMPTION** - The natural parent presumption can be rebutted by clear evidence showing that (1) the parent has abandoned the child; (2) the parent has deserted the child; (3) the parent's conduct is so immoral as to be detrimental to the child; or (4) the parent is unfit, mentally, or otherwise, to have custody

**FACTS**

Michael and K.P. married and had three children, G.P., R.P. and B.P. (born in 2018). Even before the birth of B.P., Child Protective Services ("CPS") investigated the home of Michael and K.P. after it was reported that G.P. was found out of the house unsupervised without the knowledge of the parents. In 2018, during a CPS meeting, Michael and K.P. agreed guardianships would be created for their children because of their absences from the home. One guardianship would be established for G.P. and R.P., and another for B.P. Michael alleged the guardianships were only temporary since he would be at the police academy and K.P. would be getting treatment for mental health. Those familiar with Michael and K.P.'s home were very concerned for the children. Dawn Williams, a relative of Michael, testified the home was unsanitary, had no running water, and only had one room with heat during the winter months. Williams also testified a local church tried to restore water and repair broken windows and holes in the porch. Williams further testified she believed Michael did not take care of the children. She said Michael would stay out all night and leave K.P. with the kids. On one occasion, when an active tornado had come through the area, Michael left the kids and K.P. at home without a vehicle. Williams testified she told Michael and K.P. something had to be done or the kids would be hurt or taken away. After the 2018 meeting, Patrick and Jennifer Thomas were awarded guardianship of B.P. Michael was given visitation through the remainder of the year. In a letter to Michael in December 2018, Patrick shared his concerns about B.P. going back with her father. Patrick wrote that Michael had not visited, called, or communicated with the Thomases to check on B.P. Patrick expressed that he did think it was in the best interest of the child to be back with Michael.

On December 26, 2018, Michael and his girlfriend Hannah went to the Thomases to exercise visitation. The pre-arranged visitation was to take place at the Thomases' home. When Michael arrived at the Thomases, he was handed B.P. Michael then handed B.P. to Hannah and she took the child to the car to be strapped in. Michael was heard saying "I tried to do this the right way" on a video submitted as evidence. Realizing Michael had planned to remove the child from the home, Patrick and Michael tussled near the car where the child was strapped in. Jennifer ran out screaming for help, called 911 and jumped into the driver's seat to prevent Michael from leaving with the child. Jennifer also directed her daughter E.T. to call nearby family members for help. Patrick's father arrived shortly after a call with E.T. and came with a raised board to try to end the fight. Many on scene testified Michael reached behind his back for his concealed firearm, at least twice during the altercation. Hannah testified Patrick's father lowered the board once Michael reached for his firearm. Other family members later arrived and blocked Michael's vehicle in the driveway. Once police were on scene, they secured Michael's firearm, convinced Michael to seek an attorney, and returned B.P. safely with the Thomases. Michael testified he did conceal his firearm that day, but he did not plan to use it. Michael also admitted through testimony that he did not anticipate the Thomases' reaction and that he regretted his decision to remove B.P. In January 2019, Michael petitioned to terminate B.P.'s guardianship with the Thomases. That same day, the Thomases filed for termination of Michael's parental rights and adoption of B.P. in a separate cause number, and a motion to stay the guardianship proceedings until the adoption was complete. In March, the Thomases also filed a third-party custody claim in the guardianship case. In June, the guardianship and adoption cases were consolidated. The chancellor ruled Michael lost his parental presumption because of his involvement in the December 26, 2018, incident. The chancellor also noted parental rights, although fundamental, were not absolute, and the rebuttable presumption that a child's best interest for custody was to be placed in the custody of the surviving natural parent was overcome by clear and convincing evidence. The chancellor found Michael admittedly used poor judgment and acted without regard for the impact of his actions on B.P., and determined it was in the best interest of the child that B.P. remain with the Thomases. The

Thomases were awarded custody of B.P. with some visitation for Michael. K.P.'s parental rights were terminated. Michael appealed.

### ISSUE

Whether the chancery court erred by finding that the natural parent presumption was successfully rebutted by the Thomases, regarding custody of B.P., as a result of Michael's actions on December 26, 2018.

### HOLDING

Because Michael's deliberate plot to remove B.P. from the Thomases' home showed disregard for the impact of his actions on the child, because Michael admittedly took matters into his own hands to the detriment of his child, and because Michael exhibited poor judgment in bringing the concealed firearm to the visitation, the chancellor did not abuse his discretion by finding Michael's parental presumption was rebutted. Therefore, the Court of Appeals affirmed the judgment of the Choctaw County Chancery Court.

#### **Affirmed - 2021-CA-01288-COA (Aug. 22, 2023)**

Opinion by Judge Emfinger

Hon. Kiley Catledge Kirk (Choctaw County Chancery Court)

Mark G. Williamson for Appellant - Marty Craig Robertson & John S. Grant IV for Appellees

Briefed by [Taylor Davis](#)

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

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## **NDICU V. GACHERI**

### **CIVIL - CUSTODY**

**FAMILY LAW - CHILD SUPPORT - CHANCELLOR DISCRETION** - The trial court maintains discretion on whether to award the child support for the future and past support of the minor children

**FAMILY LAW - CHILD SUPPORT - FUTURE AND PAST SUPPORT** - Under Miss. Code Ann. § 93-11-65(1)(d), the noncustodial parent's liabilities for past education and necessary support and maintenance and other expenses are limited to a period of one year next preceding the commencement of an action; the chancellor has discretion in making an award for the future and past support of the minor children; financial statements and/or proof concerning past expenditures in support of the children aid to provide evidence to support an award for past child support

### FACTS

Martin Ndicu and Susan Gacheri married in February 2003 and shared two children, E.B. and M.B. Ndicu filed for divorce in 2006. In September 2008, the divorce was finalized but did not address the custody or support of the minor children. In 2016, Gacheri filed a petition for child custody, temporary relief, and a restraining order in the trial court. The trial court entered an ex parte temporary child custody order, granting temporary joint legal custody of the children to Ndicu and Gacheri, with Ndicu having temporary physical custody subject to Gacheri's reasonable visitation. The order did not require either party to pay child support. In February 2017, Ndicu filed an answer to Gacheri's petition and filed a counter-petition for child custody and other relief, including "retroactive support" and educational expenses. After a hearing in September 2021, the trial court (1) noted that the court had jurisdiction to enter the order but strongly suggested that any future modification and/or contempt proceeding be conducted where the mother or father live; (2) granted Ndicu sole physical and legal custody of the children subject to reasonable visitation by Gacheri; (3) ordered Gacheri to pay Ndicu \$1,000.00 per month of child support; and (4) denied all other relief, including Ndicu's request for child support during the pendency of the action. In October 2021, Ndicu filed a motion to amend the judgment because it should have included "retroactive support" and education expenses from one year prior to the date of the petition in accordance with Miss. Code Ann. §§ 93-11-65(1)(b) and (d). The chancellor denied the motion because Ndicu

failed to (1) provide the trial court with the proof required to grant relief from the judgment and (2) direct the trial court's attention to any evidence presented at trial. Ndicu appealed.

### ISSUE

Whether the chancery court erred by failing to award Ndicu child support and educational expenses for the period of time prior to the entry of the judgment.

### HOLDING

Because the chancery court had discretion in making an award for the future and past support of the minor children, because there was no prior order of support, because Ndicu did not provide any evidence to support an award for past child support, because Ndicu took custody of the minor children without the benefit of a court order granting his custody or support, because Ndicu never sought temporary child support during the pendency of the matter, and because the delay in getting the case to trial could be partially attributed to Gacheri and Ndicu, the trial court did not err by failing to award Ndicu child support and education expenses for the period of time prior to the entry of the judgment. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Chancery Court.

**Affirmed - 2022-CA-00415-COA (Aug. 22, 2023)**

Opinion by Judge Emfinger

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

Matthew Daniel Wilson for Appellant - *Pro se* for Appellee

Briefed by [Margaret Gardner](#)

Edited by [Doug Reynolds](#) & [Mason Scioneaux](#)

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## ***COURT OF APPEALS - CRIMINAL CASES***

### **KELLY V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - VOIR DIRE - DETERMINING JUROR MISCONDUCT** - If a prospective juror fails to respond to a relevant, direct, and unambiguous question presented by defense counsel of voir dire, although having knowledge of the information sought to be elicited, the trial court should, upon motion for a new trial, determine whether the question propounded to the juror was (1) relevant to the voir dire examination, (2) unambiguous, and (3) whether the juror had substantial knowledge of the information sought to be elicited

**CRIMINAL PROCEDURE - VOIR DIRE - PREJUDICE** - If the trial court determines the question propounded to the juror was relevant to the voir dire examination, unambiguous, and that the juror had substantial knowledge of the information sought to be elicited, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond

**CRIMINAL PROCEDURE - JUROR MISCONDUCT - NEW TRIAL** - When a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for a challenge for cause, the trial court must grant a new trial

### FACTS

In October 2019, James Kelly was charged with the kidnapping and murder of Demarquis Houston. After investigators received information on a tip line that implicated Kelly in Houston's disappearance after the two had a dispute, they subpoenaed Kelly's ankle monitor data to track his whereabouts around the time of Houston's disappearance. Houston's body was later recovered from a pond. During voir dire for Kelly's trial, the circuit court asked whether any potential juror was related to Houston by blood or marriage. None of the jurors, including Corsha Hickman, indicated a relationship to Houston by blood or marriage. Hickman was later selected as a juror for Kelly's trial. Before the second

day of trial, Hickman reported that one of Kelly's family members had sent her a message via Facebook. In the message, the sender expressed their hope that Hickman would make a good decision regarding the outcome of Kelly's trial despite being related to Houston. Outside the jury's presence, the circuit court informed the State and Kelly that it had questioned Hickman regarding the accusation and that Hickman had denied any familial relation. The circuit court stated it had no question that Hickman remained fair and impartial. In the State's and Kelly's presence, the circuit court questioned Hickman for a second time on the record. Neither the State nor Kelly objected and both indicated they were satisfied with the proceeding. Kelly's trial continued, and the jurors found Kelly guilty of capital murder. The circuit court sentenced Kelly to life imprisonment without eligibility for parole in Mississippi Department of Correction's custody. Kelly filed a post-trial motion for a new trial. In the motion, Kelly asserted that Hickman was Houston's first cousin by marriage but failed to disclose the familial connection. Kelly also attached several exhibits to his motion, including screenshots of Facebook posts, a diagram purporting to show a familial connection between Hickman and Houston, and results from an online background and genealogy search. The circuit court denied Kelly's motion. Kelly appealed.

### **ISSUE**

Whether the circuit court erred by denying Kelly's motion for a new trial.

### **HOLDING**

Because Kelly failed to provide any credible or admissible evidence to contradict Hickman's testimony that she and Houston were not related, because Kelly's supporting exhibits contained no affidavits or other admissible evidence to establish a familial connection between Hickman and Houston, and because, even if Kelly had sufficiently supported his claim that Hickman and Houston were related, Kelly still failed to establish that Hickman had substantial knowledge that she and Houston were related but withheld that information, the circuit court properly denied Kelly's motion for a new trial finding no evidence of juror misconduct. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Circuit Court.

#### **Affirmed - 2022-KA-00577-COA (Aug. 22, 2023)**

Opinion by Judge Smith

Hon. Mark Sheldon Duncan (Neshoba County Circuit Court)

Zakia Butler Chamberlain (Pub. Def. Office) for Appellant - Alexandra Lebron (Att'y Gen. Office) for Appellee

Briefed by [Jarius Colley](#)

Edited by [Kennedy Gerard](#) & [Ashley House](#)

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## **SMITH V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PRE-ARMING JURY INSTRUCTION** - Pre-arming jury instructions were previously lawful to inform the fact-finder that one cannot arm himself in advance when he is not in any physical danger, go forth and provoke a confrontation or difficulty with another, shoot the other, and then attempt to hide behind a smoke screen of self-defense; before its abolition, pre-arming jury instructions were allowed only in the extremely rare incidents where it was supported by the evidence

**EVIDENCE - SUFFICIENCY OF EVIDENCE - STANDARD OF REVIEW** - When reviewing the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - JURY FLIGHT INSTRUCTION** - A defendant's flight may be admissible evidence of consciousness of guilt; a flight instruction is appropriate when (1) the flight was unexplained and (2) the circumstance has considerable probative value; any explanation given in an effort to show an independent reason for flight must not be contradicted by other evidence presented at trial



**CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF** - To prevail on a claim for ineffective assistance of counsel it must be proven that counsel's performance was deficient and the deficient performance prejudiced the defendant; counsel's choice of whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy

### **FACTS**

Walter Smith and Humphrey Ryland were at the home of Roosevelt Brown when Smith approached Ryland, claiming that Ryland owed him money for drugs. After Ryland responded that he would pay Smith the following month, Smith hit Ryland in the head with a pistol. Ryland retaliated by hitting Smith, who in turn shot Ryland and ran out of the home. Smith was later arrested and charged with aggravated assault and possession of a firearm by a felon. Chief Demtrius Allen, an officer who arrived on the scene and knew Smith personally, Investigator Ward Steed, the first responder who tended to Ryland, Deputy Cole McGinnis, the person Ryland informed that Smith instigated the confrontation, and Brown, each gave testimony that pointed toward Smith being the aggressor of the incident. Further, Chief Allen testified that Ryland did not have any weapons on his person. Investigator Steed testified that Smith did not have any injuries, but Ryland did. At the end of the trial, the State offered a flight jury instruction which Smith's counsel objected to on grounds of it not being an element of the actual charges. The State further offered a pre-armed jury instruction which Smith's counsel also objected to, arguing it was duplicative. The trial court gave the instruction over the objection. Smith then offered a self-defense instruction to which the State objected. Despite the pre-armed instruction, the trial court gave Smith's self-defense jury instruction but found an insufficient factual basis to support Smith's necessity instruction. The jury found Smith guilty and sentenced him to serve twenty years for aggravated assault and ten years for the possession of a firearm to be served consecutively. After the trial, Smith's counsel filed a notice of appeal but was one day late. After confusion over whether Smith was entitled to in forma pauperis status, the appeal costs were not paid. Subsequently, the Clerk of Appellate Courts administratively dismissed the appeal for the failure. Smith, acting pro se, sought and was granted a withdrawal of the mandate and for his appeal to be reinstated. After a review of whether an out-of-time appeal was warranted, the Supreme Court suspended the deadline to appeal. Smith appealed.

### **ISSUES**

Whether (1) the trial court committed harmless error by giving the pre-armed jury instruction; (2) there was sufficient evidence establishing Smith's identity; (3) the trial court erred by giving the jury a flight instruction; and (4) Smith's trial counsel was ineffective.

### **HOLDING**

(1) Because the only proof presented at trial was that Smith was the initial aggressor in the conflict, because there was no evidence upon which a rational jury could have found a self-defense claim applicable, and because the trial court giving the now-abolished pre-armed instruction did not prejudice Smith's right and ability to fully present his defenses, the trial court did not err by giving the pre-armed jury instruction. (2) Because each witness that testified at trial identified Smith as the shooter, and because Brown, who had known Smith his whole life, testified that he heard a gunshot inside the home as Ryland and Smith were inside and then saw Smith run out of it, there was ample evidence that a rational trier of fact could have found beyond a reasonable doubt that Smith committed aggravated assault and possessed a firearm. (3) Because the evidence presented at trial contradicted Smith's contention that he fled to get away from Ryland claiming that Ryland had the upper hand in the altercation and was beating him, and because Smith failed to provide an independent and uncontradicted reason for his flight, the trial court did not err by giving the jury a flight instruction. (4) Because each law enforcement officer properly testified as to their investigation and perception of Smith and Ryland as provided under Miss. R. Evid. 701, because trial counsel's decision to not object to the testimony fell within the ambit of trial strategy, and because Smith could not show that his trial counsel was deficient, Smith's claim of ineffective assistance of counsel was without merit. Therefore, the Court of Appeals affirmed the judgment of the Humphreys County Circuit Court.

### **DISSENT**

Judge Emfinger argued that the Court of Appeals should not have decided the merits of Smith's direct appeal because the direct appeal of Smith's convictions and sentences was not properly before it. He argued that the Court of Appeals should have addressed Smith's first perfected appeal of the denial of his motion for an out-of-time appeal before considering an untimely appeal of his convictions and sentences.

**Affirmed - 2020-KA-00774-COA (Aug. 22, 2023)**

En Banc Opinion by Judge McCarty - Dissent by Judge Emfinger

Hon. Jannie M. Lewis-Blackmon (Humphreys County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Alexandra Rodu Rosenblatt & Ashley L. Sulser (Att'y Gen. Office) for Appellee

Briefed by [Dane D. Norvell II](#)

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