IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-KA-00997-SCT

DEWAYNE CARLOS SMALL

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	03/22/2019
TRIAL JUDGE:	HON. JOHN HUEY EMFINGER
TRIAL COURT ATTORNEYS:	HEATHER MARIE ABY L. ABRAHAM ROWE, JR. THOMAS RICHARD MAYFIELD ASHLEY RIDDLE ALLEN JOHN K. BRAMLETT, JR.
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: W. DANIEL HINCHCLIFF GEORGE T. HOLMES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	JOHN K. BRAMLETT, JR.
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 10/08/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., MAXWELL AND GRIFFIS, JJ.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. A jury found Dewayne Carlos Small guilty of felony exploitation of a vulnerable adult. The charge stemmed from Small and his girlfriend cashing twenty checks totaling more than $12,000 written by 79-year-old Charlotte Davis. Small claimed he was performing yard work for Charlotte, a widow who lived alone. But after viewing photographs of a half-

cut tree, piles of debris, unraked leaves, overgrown shrubs, and other evidence of a scam, the jury rejected his argument. Based on the guilty verdict, the trial judge sentenced Small as a habitual offender to ten years in prison without the possibility of parole.

¶2. Small appeals his conviction and sentence as a habitual offender. Though he attacks the weight and sufficiency of the evidence, the State presented substantial evidence that Charlotte was a vulnerable person, as defined by statute, and that Small exploited her.

¶3. Small has also filed a pro se supplemental brief. He first challenges his habitual-offender status, lodging a Sixth Amendment challenge to his conviction records. But he made no objection at trial. And the self-authenticated, out-of-state judgment and sentencing orders were nontestimonial. Thus, they did not require a sponsoring witness with personal knowledge to pass constitutional muster.[1]

¶4. Small next claims his jury was tainted because the trial court did not strike for cause a juror who had previously worked with the police officer who testified against Small. Despite being aware of this juror's relationship and suggestion he would"probably [be] unduly influenced" by the officer's testimony, Small never challenged this juror for cause. And this Court does not permit a defendant "to plant an error and grow a risk-free trial" by foregoing a challenge against a supposedly biased juror at trial, then arguing that juror's service requires reversal on appeal.[2] Instead, Small's failure to challenge this juror during

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[1] ***Burrell v. State***, 183 So. 3d 19, 25 (Miss. 2015).

[2] ***Ambrose v. State***, 254 So. 3d 77, 113 (Miss. 2018) (quoting ***United States v. Johnson***, 688 F.3d 494, 501-02 (8th Cir. 2012))

jury selection "operates as a conclusive waiver."[3]

¶5. We thus affirm Small's conviction of exploitation of a vulnerable person and sentence as a habitual offender.

Background Facts and Procedural History

¶6. Tim Davis, Charlotte's only child, first met Small in July 2017. Small was in Charlotte's yard. Small told Tim Charlotte had hired him to cut her yard every two weeks for $100. During Tim's visit, Charlotte asked Tim if she should have Small cut down a tree for $1,400 to $1,500. Tim told her the price seemed fair. But Small only cut part of the tree and never removed the remaining pieces from the yard.

¶7. Five months later, on December 6, 2017, Tim learned Charlotte's bank account had been overdrawn. Tim had asked his mother to help with his daughter's private-school tuition, and Charlotte told him her bank had advised her she had no money in her account. When Tim inquired with the bank, he learned someone had cashed a large number of checks written from Charlotte's account, leaving Charlotte overdrawn by $3,000. Tim immediately called the police.

¶8. That same day, Officer Patricia Mack responded to Charlotte's house. Small was there when she arrived. Small approached Officer Mack and told her, "I charged Ms. Davis $8,000 off the top." Following an investigation, Officer Mack learned Charlotte had written Small a series of checks totaling $12,425. After Small was arrested in April 2018, he gave a voluntary statement in which he claimed he and Charlotte had agreed Charlotte would pay

[3] ***Id.*** at 112 (quoting ***Johnson***, 688 F.3d at 501).

Small $15,300 to complete her yard. As he put it, "I charged Ms. Davis: three trees to be removed at $3,000 per tree; $2,500 for the cutting back of shrubs; [and] $1,800 for the removal of bamboo[.]"

¶9. But at trial, Officer Mack testified that when she arrived on December 6, 2017, Charlotte's yard "looked like it needed work." According to Officer Mack,

> It didn't look like anyone had been working in it. Just a lot of overgrown trees, overgrown flowerbeds. The grass wasn't cut, leaves everywhere, bamboo cut and laying down, a half tree cut down and half of the tree still laying down. I mean, it just—it looked hideous. It didn't look like it had been worked on.

Officer Mack returned to the house the next day and took pictures of the overgrown yard and half-cut tree. These pictures were admitted into evidence.

¶10. Officer Mack also testified about Charlotte. To Officer Mack, Charlotte appeared unable to care for herself. Her sink and toilet did not work. And Charlotte smelled like urine. Charlotte asked Officer Mack if "the nice man" was going to jail. Charlotte could not remember Small's name. Officer Mack recalled that Charlotte "really didn't have a clue what was happening." Officer Mack suggested to Tim that Charlotte should not be left by herself. So Tim moved Charlotte in his wife and him.

¶11. Tim testified that, before his mother moved in with him, he had visited her regularly. In 2017, he began noticing Charlotte no longer ate in the dining room, nor would she put up her dishes. She had also stopped flushing the toilet. Tim testified that Charlotte used to be an avid baker and would sell her cakes. But she had stopped that too. Tim surmised she had forgotten how to bake. Tim's wife Christie also testified. Christie had noticed, before Charlotte moved in, that she had not been taking care of herself. Charlotte had poor hygiene.

She did not bathe or wash her clothes. She had also stopped returning her friends' phone calls, prompting them to contact Tim to check if Charlotte was okay.

¶12. Christie remembered meeting Small the Sunday before Thanksgiving 2017. Small told Christie he "was going to make [Charlotte's] yard the most beautiful yard in Flora." Christie watched Charlotte write Small a $400 check. Small promised to return the next day to perform the paid-for work. But Small did not return that Monday.

¶13. Soon after learning about Charlotte's payments to Small, on December 22, 2017, Tim took Charlotte to see family physician Dr. William Eugene Loper about her memory loss. Dr. Loper, who was accepted at trial as an expert in general medicine, testified that Charlotte's long-term memory seemed fine. But he noted Charlotte struggled with her short-term memory. He testified that Charlotte, "as a 79-year-old, was further along than you would like to see with her memory loss." Because Charlotte's Vitamin B12 levels were low, Dr. Loper started her on B12 injections, hoping to boost her memory.

¶14. To counter Dr. Loper's expert testimony, Small admitted the report of his own medical expert, Dr. Robert Allen Sheely. Dr. Sheely opined there was insufficient evidence Charlotte suffered from dementia in December 2017. She was never prescribed dementia medication and never evaluated by a neurologist. Further, in 2018, she refused to undergo recommended bypass surgery, indicating she was able to make her own medical decisions.

¶15. The jury also heard from Charlotte herself. At the March 2019 trial, Charlotte had just turned eighty years old. But she told the jury she was sixty-seven. When asked about her home, she could not "think right now" where she was living. Though Tim testified he was

an only child, Charlotte believed she had two children. And she could not "think of who it was" that she had hired to work on her yard. She did not recognize Small in the courtroom. She also had no idea who the jury members were or why they were there. But on cross-examination, she answered affirmatively that she "remember[ed] a man by the name of Dewayne Small." Charlotte testified she had paid him for a "a good bit" of yard work.

¶16. To show exactly how many times Charlotte paid Small, the State called Floyd Plummer, an investigator with Charlotte's bank, Regions Bank. Plummer had culled through Charlotte's bank records from the latter months of 2017. He had also viewed bank security footage. Plummer testified that in the month of October alone, Small cashed ten checks from Charlotte and his girlfriend cashed one. The checks—ranging from $400 to $1,400—were cashed at multiple Regions branches, often within days. On one day, October 10, 2017, Small cashed a $1,000 check in Madison County, Mississippi, and his girlfriend cashed another $1,000 check from Charlotte in Slidell, Louisiana. By Plummer's count, Small and his girlfriend had cashed twenty checks, withdrawing more than $12,000 from Charlotte's account.[4]

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[4] As written by Charlotte, the date and amount of these twenty checks were:

(1)	9/1/2014	$200	(11)	10/23/2017	$400
(2)	9/4/2017	$1,500	(12)	10/26/2017	$1,000
(3)	9/30/2017	$200	(13)	10/30/2017	$1,000
(4)	10/2/2017	$1,400	(14)	11/1/2017	$400
(5)	10/6/2018	$1,000	(15)	11/5/2017	$400
(6)	10/7/2017	$1,000	(16)	11/6/2017	$400
(7)	10/9/2017	$1,000	(17)	11/7/2017	$400
(8)	10/11/2017	$500	(18)	11/13/2017	$275
(9)	10/15/2017	$1,000	(19)	11/20/2017	$300
(10)	10/18/2014	$800	(20)	11/21/2017	$450

¶17. Defense counsel pointed out—when cross-examining Tim—that during this same time period Charlotte had also written multiple checks to her son totaling $6,388.85 to help him pay bills and debts. Tim testified his parents, and then his mother after his father died, had always helped with his mortgage and his daughters' education.

¶18. After deliberating, the jury found Small guilty of felony exploitation of a vulnerable person. Miss. Code Ann. § 43-47-19(1), (2)(b) (Rev. 2015). The trial court sentenced him as a habitual offender to the maximum ten years' imprisonment without parole.[5] Miss. Code Ann. § 43-47-19(2)(b); Miss. Code Ann. § 99-19-81 (Rev. 2015).

Discussion

¶19. Small appeals both his conviction and habitual-offender sentence.

I. Exploitation of a Vulnerable Person

¶20. Under the Mississippi Vulnerable Person Acts, it is "unlawful for any person to abuse, neglect or exploit any vulnerable person." Mississippi Code Section 43-47-19(1). "Any person who willfully exploits a vulnerable person, . . .where the value of the exploitation is Two Hundred Fifty Dollars ($250.00) or more, . . . shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment . . . for not more than ten (10) years." Miss. Code Ann. § 43-47-19(2)(b). Small's first challenge, advanced through his appellate counsel, is to the sufficiency of the evidence. Specifically, he argues the State failed to prove Charlotte met the statutory definition of "vulnerable person" or that Small exploited her.

¶21. When testing the sufficiency of evidence, this Court views the evidence in the light

[5] The court also ordered Small to pay $8,000 in restitution.

most favorable to the State to determine if any rational juror could have found the essential elements of the crime beyond a reasonable doubt. ***Martin v. State***, 214 So. 3d 217, 222 (Miss. 2017). The State receives the benefit of all favorable inferences reasonably drawn from the evidence. ***Hughes v. State***, 983 So. 2d 270, 276 (Miss. 2008). Applying this standard, we find sufficient evidence supported the jury's finding both that Charlotte was a vulnerable person and that Davis exploited her.

A. Vulnerable Person

¶22. The Mississippi Vulnerable Persons Act defines "vulnerable person" as

> a person, whether a minor or adult, whose ability to perform the normal activities of daily living or to provide for his or her own care or protection from abuse, neglect, exploitation or improper sexual contact is impaired due to a mental, emotional, physical or developmental disability or dysfunction, or brain damage or the infirmities of aging.

Miss. Code. Ann. § 43-47-5(q) (Rev. 2015).

¶23. Small zeros in on the word "impaired." He argues that to be impaired Charlotte must have been unable to perform "the normal activities of daily living." And, he asserts, the evidence showed Charlotte, while perhaps "less than tidy," was living on her own at the time. But viewed in the light most favorable to the State, the evidence showed Charlotte, while living on her own, was not carrying out her normal activities of daily living. The jury heard evidence of her declining personal hygiene and withdrawal. She had stopped eating in the dining room and cleaning up after herself. She did not flush her toilet, and she no longer answered or returned her phone calls.

¶24. Moreover, the definition of vulnerable person is not as restrictive as Small suggests.

It is not limited only to those persons whose "ability to perform the normal activities of daily living . . . is impaired . . . ." *Id.* A person may also be vulnerable if her "ability . . . to provide for . . . her own care or protection from abuse, neglect, exploitation or improper sexual contact is impaired . . . ." *Id.* Small contends Charlotte was not impaired in this way because Dr. Loper never diagnosed her with or treated her for dementia. But the statute does not require any formal diagnosis. A vulnerable person may be "impaired due to a mental, emotional, physical or developmental disability or dysfunction, or brain damage or the infirmities of aging." *Id.* Again, giving the State the reasonable inferences our standard requires, the evidence showed Charlotte suffered short-term memory loss due to aging that impaired her ability to protect herself from Davis's exploitation. The jury heard evidence that Charlotte could not remember Davis's name when Officer Mack came to investigate. And she had often written him multiple checks, sometimes in the span of a day or two, in the same amount for apparently the same work.

¶25. Small counters this by pointing out Charlotte had also written checks to her son during this same time period. But Tim's mother's continued assistance to him and his daughters does not negate her meeting the definition of a vulnerable person. As this Court has acknowledged, "the Legislature has defined the term 'vulnerable person' *broadly* . . . ." ***Colburn v. State***, 201 So. 3d 462, 468 (Miss. 2016) (emphasis added). And the evidence presented by the State, when viewed in its favor, sufficiently proved Charlotte fell within this broad definition.

B. Exploitation

¶26. While the Act defines vulnerable person broadly, it defines the criminal offense of exploitation "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." ***Colburn***, 201 So. 3d at 468 (quoting ***Fulgham v. State***, 47 So. 3d 698, 701 (Miss. 2010)). In other words, the Act makes clear when the receipt of a check from a vulnerable person is criminal and when it is not.

¶27. According to the Act, "'Exploitation' means the illegal or improper use of a vulnerable person or his resources for another's profit, advantage or unjust enrichment, with or without the consent of the vulnerable person, and may include actions taken pursuant to a power of attorney."[6] Miss. Code Ann. § 43-47-5(i) (Rev. 2015). Small asserts the State's evidence he intended to unjustly enrich himself was not only lacking but "bluntly contradicted by the evidence adduced at trial." According to Small, the evidence showed he "was performing his contracted duties," that "grass had been cut," that "bamboo had been cut," that "one tree was cut down," and that on the day Tim called the police "Small was

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[6] The Act further defines "illegal use" and "improper use":

> (j) "Illegal use" means any action defined under Mississippi law as a criminal act.
>
> (k) "Improper use" means any use without the consent of the vulnerable person, any use with the consent of the vulnerable person if the consent is obtained by undue means, or any use that deprives the vulnerable person of his ability to obtain essential services or a lifestyle to which the vulnerable person has become accustomed and could have otherwise afforded.

Miss. Code Ann. § 43-47-5(j), (k) (Rev. 2015).

cutting his mothers [sic] grass."

¶28. But viewing the evidence in the light most favorable to the State, a reasonable juror could conclude the opposite—that Small was scamming the elderly woman. The jury heard evidence of more than $12,000 worth of checks written to Small, with minimal work performed. Her yard was covered in leaves, only *some* bamboo had been cut and not hauled off, and only *one* tree had been *half* cut and left on the ground. There were multiple cashed checks charging thousands of dollars for the same tree and other unfinished or unperformed work. Small had spread the checks out, cashing them at various Regions branches. He even had Charlotte write checks to his girlfriend, which she cashed in Louisiana. Though Small claimed the checks were written to her to pay Small's yard crew at the end of the work day, no crew members testified. Nor were any identified. The only person ever seen at Charlotte's house was Small.

¶29. From this, the evidence was sufficient to prove Small had exploited Charlotte, a vulnerable adult, and had sought to avoid suspicion from bank tellers, while unjustly enriching himself, obtaining thousands of dollars for work he had either already been paid for performing or did not intend to perform.

¶30. Alternatively, Small argues the jury's verdict is against the weight of the evidence because, at best, his "only crime [wa]s being slow, maybe even dilatory" in carrying out his promise to give Charlotte the best yard in Flora. When reviewing challenges to the weight of the evidence, this Court views the evidence "in the light most favorable to the verdict[.]" ***Little v. State***, 233 So. 3d 288, 292 (Miss. 2017) (citing ***Lindsey v. State***, 212 So. 3d 44, 45

(Miss. 2017)). This Court will only disturb a verdict "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Id.*** (quoting ***Lindsey***, 212 So. 3d at 45). Our affirming Small's conviction would not sanction an unconscionable injustice. Small characterizes the evidence as him performing agreed-upon yard work, albeit slowly. But the jury obviously disagreed and instead believed he was exploiting Charlotte by repeatedly obtaining her money through a yard-work scam.

¶31. Small's conviction for exploitation of a vulnerable person is supported by both the sufficiency and weight of the evidence.

II. Habitual Offender Status

¶32. In a pro se supplemental brief, Small challenges his statutory-maximum ten years' imprisonment. After review, we find the trial court properly deemed Small a habitual offender and sentenced him accordingly.

¶33. Mississippi Code Section 99-19-81 mandates,

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony unless the court provides an explanation in its sentencing order setting forth the cause for deviating from the maximum sentence, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

The grand jury indicted Small as a habitual offender under Section 99-19-81. An exhibit listing three separate prior qualifying felony convictions in South Carolina was attached to

his indictment. Following Small's exploitation conviction, the trial court held a separate sentencing hearing. The State presented certified copies of two of Small's out-of-state felony convictions and sentencing records. Small's counsel did not object to the introduction of these records. Rather, counsel merely pointed out that Small's second predicate conviction, breach of trust with fraudulent intent, resulted in a five-year suspended sentence, which he served on probation. *But see* ***Thomas v. State***, 247 So. 3d 1252, 1258 (Miss. 2018) (holding that whether defendant "actually served time in prison for the[] prior offenses" is "irrelevant" for purposes of habitual-offender status).

¶34. On appeal, Small objects for the first time to the introduction of these records. He now insists a sponsoring witness was required. In short, he claims his Sixth Amendment right to confront his accuser was violated. Again, Small did not object to the records' introduction, so this issue is procedurally barred. ***Conners v. State***, 92 So. 3d 676, 682 (Miss. 2012). Still, despite the bar, there was no Confrontation Clause violation. This Court, adopting the rationale of the Mississippi Court of Appeals, has held that "self-authenticating records of a defendant's prior convictions are not testimonial," so the Sixth Amendment requirements set forth in the United States Supreme Court's decision in ***Bullcoming v. New Mexico***, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), do not apply. ***Burrell v. State***, 183 So. 3d 19, 25 (Miss. 2015) (citing ***Sykes v. State***, 148 So. 3d 677, 679 (Miss. Ct. App. 2014); ***Small v. State***, 141 So. 3d 61, 68-69 (Miss. Ct. App. 2014); ***Vanwey v. State***, 147 So. 3d 367, 370 (Miss. Ct. App. 2014)). So even though his argument is barred, the State's introduction of Small's records did not violate his Sixth Amendment right to confront

his accuser.

¶35. Because these records support Small's being sentenced as a habitual offender under Section 99-19-81, we affirm his ten-year sentence to be served without possibility of parole or early release.

III. Jury Selection

¶36. Small's second pro se argument is that the jury was "tainted." Small argues the trial court reversibly erred by not striking for cause Juror 14, Philip Tolstad. This juror claimed he had worked with Officer Mack as a firefighter and would "probably [be] unduly influenced" by her testimony. Small notes the trial court *did* strike for cause Juror 36, Marshall Loeb, because Loeb said he would be "unduly influenced" by Dr. Loper's testimony because Dr. Loper was a friend.

¶37. But Small raised no objection at trial. He did not object during voir dire to striking Juror 36 but not Juror 14. Nor did he assert Juror 14 should also be struck for cause. Instead, when invited to challenge additional jurors for cause, his counsel asked that two other jurors be struck for cause, Juror 7 and Juror 10. He specifically argued against Juror 7's selection because Juror 7 knew Dr. Loper as well. The trial court refused to strike Juror 7. But the judge did strike Juror 10 for being familiar with the appearance of Charlotte's home. The judge then asked if there were "[a]ny other challenges for cause the Defense would like the Court to consider." And Small's counsel said no. So this issue is waived.

¶38. Moreover, in this particular scenario, Small's failure to object "operates as a conclusive waiver" for which this Court declines to apply plain-error review. ***Ambrose v.***

State, 254 So. 3d 77, 112 (Miss. 2018). In ***Ambrose***, this Court adopted the reasoning for no plain-error review advanced by of the Eighth Circuit Court of Appeals in ***United States v. Johnson***, 688 F.3d 494, 500-01 (8th Cir. 2012), a case strikingly similar to both ***Ambrose*** and this case. ***Ambrose***, 254 So. 3d at 112.

¶39. In ***Johnson***, the Eighth Circuit "was faced with the issue of 'whether the empaneling of Juror S.R., who admitted there "might be a possibility" she would find law enforcement officers more credible than other witnesses, violated Johnson's Sixth Amendment right to be tried by an impartial jury.'" ***Ambrose***, 254 So. 3d at 112 (quoting ***Johnson***, 688 F.3d at 500). The Eighth Circuit "declined to employ plain error review on appeal when reviewing a scenario in which the defendant failed to object to the seating of a juror during voir dire when the basis for the objection was then known." ***Id.*** (citing ***Johnson***, 688 F.3d at 500). Instead, that Court determined "that the 'failure to object at the time the jury is empaneled *operates as a conclusive waiver* if the basis of the objection is known or might have been known or discovered through the exercise of reasonable diligence.'" ***Id.*** at 112-13 (emphasis added) (quoting ***Johnson***, 688 F.3d at 501). In declining plain-error review in ***Ambrose***, this Court explained, "The reasoning for the rule is simple: 'if a defendant is allowed to forego challenges for-cause to a biased juror and then allowed to have the conviction reversed on appeal because of that juror's service, that would be equivalent to allowing the defendant to plant an error and grow a risk-free trial.'" ***Id.*** at 113 (quoting ***Johnson***, 688 F.3d at 501-02).

¶40. Here, the basis of Small's objection to Juror 14—the juror's response that he would "probably [be] unduly influenced" by Officer Mack's testimony based on his prior working

relationship with her—was known when the trial court asked Small's counsel if any additional jurors should be challenged for cause. And Small's lawyer said no. Thus, Small's failure to object to Juror 14 before he was empaneled operates as a conclusive waiver. Our precedent requires no further analysis.

Conclusion

¶41. We affirm Small's conviction and sentence as a habitual offender.

¶42. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.