

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MATTHEW JONATHAN MOBERG

APPELLANT

V.

#2018-KA-01726-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

Appeal from the Circuit Court of Greene County, Mississippi
No. 21-17-10,061(3)

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Matthew Jonathan Moberg, Appellant
3. Angel Myers McIlrath, District Attorney
4. Honorable Dale Harkey, Circuit Court Judge
5. Honorable Anthony Lawrence, III, Court of Appeals Judge

This, the 5th day of August, 2019

/s/ Mollie M. McMillin

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BRIEF OF THE APPELLANT

STATEMENT OF ASSIGNMENT

This case is properly assigned to the Mississippi Court of Appeals.

STATEMENT OF THE ISSUES

- I. The trial court erred in denying Moberg's motion for directed verdict on capital murder, as the evidence is insufficient to sustain a conviction for killing during the course of a kidnapping.
- II. The trial court erred in allowing the State to enter State's Exhibit 25 into evidence. The photo of the victim's badly decomposed body was gruesome, served no evidentiary purpose, and was far more prejudicial than probative. As such, the trial court should have excluded the photograph.

STATEMENT OF THE CASE

This appeal proceeds from the circuit court of Greene County, Mississippi, and a judgment of conviction entered against Matthew Moberg for the capital murder of Jessie Parker during the course of a kidnapping. After a jury trial on September 24-28, 2018, the Honorable Dale Harkey, circuit judge, presiding, Moberg was convicted and sentenced to life in the custody of the Mississippi Department of Corrections without possibility of parole. (C.P. 474, 507, R.E. 19, 20). Moberg's trial counsel filed a post-trial motion for new trial or judgment notwithstanding the verdict, which the trial court denied. (C.P. 511, 545, R.E. 22, 29).

Moberg is presently incarcerated and appeals to this Honorable Court for relief.

STATEMENT OF FACTS

Jessie Parker (Jessie) and Moberg were part of a close-knit group of friends living in Mobile County, Alabama. The group of friends was made up of teenagers and Moberg, who was 22 years old. (Tr. 461, 488, 717-18). The teens spent time together, usually at Jessie's house, drinking and partying. (Tr. 489). On May 23, 2017, Jessie left his house with Moberg and never returned. (Tr. 467). His partially decomposed body was found a week later, hidden in a wooded area in Greene County, Mississippi. (Tr. 519-24).

Jessie's mom, Tina Parker (Tina), called the Mobile County Sheriff's Office to report Jessie missing the same night he left with Moberg. (Tr. 501). According to Tina, Jessie had spent the night before, a Monday night, with his friend Joshua Lee. (Tr. 462). Jessie came home early Tuesday morning and went to sleep. (Tr. 464). Moberg came over that morning to see Jessie, but Tina made him leave because Jessie was sleeping. (Tr. 465). Moberg came back a second time, around 11:45, and woke Jessie. (Tr. 467). Jessie told his mother he was going to help Moberg move into his new trailer and then left with Moberg. (Tr. 467-68).

Moberg came back to Tina's that day to return Jessie's phone, which Moberg said Jessie had left in Moberg's truck. (Tr. 472). According to Tina, Moberg's clothes were wet. (Tr. 475). Moberg told Tina that he had dropped Jessie off about thirty minutes earlier and watched Jessie get into a black car with some people, possibly "dope heads." (Tr. 472, 484). Tina did not see Jessie when Moberg dropped him off, and she did not hear Moberg's truck outside her home. (Tr. 473). Tina

testified that Jessie would not have left without his phone and would have let her know where he was going. (Tr. 474). When Tina began looking for Jessie, nobody had seen him. (Tr. 475).

Tina texted Moberg later that evening while looking for Jessie, and was alarmed by a text Moberg sent her stating, “Hopefully somebody can identify him and we can locate where he’s at.” (Tr. 483). Tina contacted law enforcement at around 11:30 that night.

Investigator Matthew Peak of the Mobile County Sheriff’s Department’s major crimes unit, testified that they immediately wanted to talk to Moberg when they learned Jessie was last seen with him. (Tr. 956). He went to the trailer park where Moberg had recently rented a place, but nobody was staying there yet. (Tr. 957, 961). He called Moberg’s cell phone, and Moberg answered. (Tr. 961). Moberg was staying with friends, but he agreed to meet investigators at a gas station. (Tr. 962). Moberg told investigators that he had picked Jessie up so Jessie could help him move into his new trailer. (Tr. 963). Moberg said he dropped Jessie off at his house earlier, and Jessie got into a black car with people Moberg could not identify. (Tr. 965). Moberg told investigators that he had gone to work at Hard Rock Stone and Tile, where he worked, after hanging out with Jessie.

When Peak and other officers went to Hard Rock Stone and Tile to verify Moberg’s timeline, Moberg fled on foot. (Tr. 973-74). He was captured later that day. (Tr. 975). Officers saw a receipt in Moberg’s truck from a Dollar General in Lucedale, Mississippi, indicating that Moberg had been there the day Jessie went

missing. (Tr. 978). Further, after executing a search warrant on Moberg's truck, officers found a GPS tracking device that had been installed on Moberg's truck by the car dealership. (Tr. 996). Using the Dollar General receipt, bank records found in the truck, and data from the GPS tracker, officers tracked Moberg's movements the day Jessie disappeared. That information also led to a focused search for Jessie, which ended when Jessie's body was discovered. Jessie's body was so decomposed that the medical examiner was unable to determine a cause of death, only that the manner of death was homicide. (Tr. 692).

Prior to Jessie's murder, Moberg had been in a relationship with Savannah Harvison. The Friday before Jessie's murder, Savannah broke up with Moberg and went to stay with her dad and other family members in Silas, Alabama. (Tr. 876, 917-18). Savannah and Moberg argued about him returning her personal items. Moberg insisted that Savannah meet with him, but she wanted her dad to be with her when she got her items. (Tr. 901-03). The Sunday after their breakup, Savannah went to a party at Jessie's house, where all "the Squad" were present except Moberg. (Tr. 896). At that party, Savannah had sex with Moberg's brother Dillon and later with Jessie. (Tr. 899-900). She then went back to her dad's house over an hour away. (Tr. 900).

Over the next two days, Moberg went back and forth between Silas and Mobile County. In the early morning hours of Tuesday, the day Jessie was last seen, Savannah told Moberg that she had sex with Dillon and Jessie at the party. (Tr. 906). Moberg told Savannah, "I got something for Jessie." (Tr. 907). A short

time later, Moberg texted Jessie, saying, “I know what you did.” (Tr. 1008). A few hours later, Moberg texted Dillon: “[Dillon] remember this no matter how drunk I am I would never f*** someone that you in love with just remember that because I’m sparing you.” (Tr. 1010-1011, Exhibit 52 for ID). Afterwards, he texted Jessie again: “Oh yeah I forgot to tell you I’m just going to let it go because honesty [S]avannah is not worth my time and my effort and I am tired of all her b***** and all the heart drama so it is over with between me and her for [] good.” (Tr. 1012, Exhibit 52 for ID).

Moberg picked up Jessie at his house at around noon on Tuesday. (Tr. 1011). At 1:40 p.m., he texted Jessie, “Hey bro where are you at you left her [sic] phone in my car” and “By the way how do you like my place on old Pascagoula Road nice huh.” (Tr. 1013, Exhibit 52 for ID). According to investigators, Moberg was headed back to Mobile County from Mississippi after killing Jessie when the texts were sent.

In addition to evidence of Moberg’s movements after picking up Jessie, the State presented evidence from a jailhouse informant, Kenneth Johnson, an inmate housed with Moberg at the George County Correctional Facility for several months in 2017 and 2018. According to Johnson, Moberg said to other people in the jail that he had hit Jessie in the back of the head with a pipe, used a stun gun to immobilize Jessie, then held Jessie’s head under the water in the creek bed. (Tr. 761-63). The State put on evidence that Moberg bought a stun gun from a pawn shop before he even knew about Jessie and Savannah. (Tr. 586-93).

Moberg's friend, Logan Frazier, also testified that Moberg confessed to killing Jessie. Frazier testified that Moberg came to his apartment Tuesday evening after Frazier got home from work. (Tr. 807). Moberg said his friend (Jessie) was missing, that they had gotten into a fight, and that Moberg had strangled Jessie. (Tr. 808). According to Frazier, Moberg told Jessie they were going to get drugs when he picked him up. (Tr. 809).

SUMMARY OF THE ARGUMENT

The State charged Moberg with capital murder for killing Jessie during the commission of the underlying felony of kidnapping, arguing to the jury that Moberg used trickery to get Jessie to go with him to Mississippi. However, the State failed to present evidence on all the elements of kidnapping, specifically that Moberg tricked Jessie with the intent to cause Jessie to be confined or imprisoned against his will. There is no evidence that Jessie did not go to Mississippi willingly with Moberg, or that Moberg and Jessie did not in fact go buy drugs when they left Jessie's house that day. Because the State failed to present evidence on each element of kidnapping, the trial court erred in denying Moberg's motion for directed verdict on capital murder.

Second, the trial court erred in allowing the State to enter into evidence State's Exhibit 25, a photo of Jessie's decomposing body taken during the autopsy. According to the expert witness who conducted the autopsy, the autopsy did not yield any useful evidence for determining what happened to Jessie. Allowing the photograph showing maggots, decomposing flesh, and protruding bones, did not

serve any evidentiary purpose. It was more prejudicial than probative, and the trial court erred in allowing the State to present it the jury.

ARGUMENT

I. The trial court erred in denying Moberg’s motion for directed verdict on capital murder, as the evidence is insufficient to sustain a conviction for killing during the course of a kidnapping.

This Court has held that challenges to the sufficiency of the evidence should be addressed not by asking whether this Court “believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, 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.” *McCarty v. State*, 247 So. 3d 260, 268 (Miss. Ct. App. 2017), reh'g denied (Mar. 6, 2018), cert. denied, 246 So. 3d 885 (Miss. 2018) (citing *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005), *abrogated on other grounds by Little v. State*, 233 So.3d 288, 289–90, 291–93 (Miss. 2017)). The appellate court considers the evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *Bush*, 895 So. 2d at 843 (¶16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). “Should the facts and inferences considered in a challenge to the sufficiency of the evidence ‘point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,’ the

proper remedy is for the appellate court to reverse and render.” *Id.* (quoting *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985)).

Moberg was charged and convicted of capital murder during the course of a kidnapping. Capital murder is defined as the killing of a human being without authority of law by any means or in any manner “when done with or without any design to effect death, by any person engaged in the commission of the crime of . . . kidnapping . . . or in an attempt to commit such felonies.” Miss. Code Ann. § 97-3-27(2)(e). Mississippi Code Annotated section 97-3-53 defines kidnapping and states that a person who “without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or her will” is guilty of kidnapping. Miss. Code Ann. §97-3-53.

The State did not present any evidence that Moberg forcibly seized Jessie on the day he was killed. And, the evidence is clear that Jessie went willingly with Moberg, telling his mother that they were going to move items into Moberg’s new trailer. Rather, the State proceeded under the portion of the statute regarding “inveigling” a person “with intent to cause such person to be confined or imprisoned against his or her will. . . .” Miss. Code Ann. § 97-3-53. While there is evidence that Moberg *possibly* inveigled or tricked Jessie into getting into his truck with him, there is no evidence that Moberg intended to cause Jessie to be confined or imprisoned against his will.

When investigators found the Dollar General receipt on the front seat of Moberg's truck, an investigator went to the Lucedale store and examined the surveillance video for a period of time covered in the receipt. The video showed Moberg and Jessie entering the store at around 12:33 p.m. (Tr. 993). They walked around the store together before purchasing energy drinks and then leaving together. (Tr. 752-57). The witnesses who reviewed the video described that the pair seemed normal when they came in – nobody seemed to be in distress or behaving strangely. Further, there is no evidence that Moberg's suggestion to Jessie that they go buy drugs was a trick. Witnesses testified that all the young people in the group drank underage and smoked marijuana. (Tr. 489-91, 738, 747).

Further, Frazier, who testified that Moberg said he told Jessie they were going to get drugs, testified that Moberg said he and Jessie got into a fight over Savannah and Moberg strangled him. (Tr. 808-09). Frazier's testimony undermines the State's assertion that Moberg inveigled Jessie in order to confine him against his will.

The Mississippi Supreme Court has held that "the [kidnapping] statute does not require that a victim must attempt to flee or that she be told that she cannot leave for a kidnapping to arise." *Graham v. State*, 185 So. 3d 992, 1003 (Miss. 2016). But there still must be evidence that the victim was not free to leave. In *Graham*, the Court noted evidence in the record that the victim was punched, her path was blocked by one of her assailants, and that she asked to be taken

somewhere else but was told by her assailants that “they would not because they thought that she would run.” *Id.* at ¶34.

The record in this case does not show that Jessie was not free to leave or that he was confined against his will. Therefore, Moberg respectfully requests this Court reverse his conviction for capital murder and remand to the circuit court for a new trial.

II. The trial court erred in allowing the State to enter State’s Exhibit 25 into evidence. The photo of the victim’s badly decomposed body was gruesome, served no evidentiary purpose, and was far more prejudicial than probative. As such, the trial court should have excluded the photograph.

Appellate courts review a trial court’s decision to admit or exclude evidence under an abuse of discretion standard. *Bonds v. State*, 138 So. 3d 914, 917 (¶5) (Miss. 2014) (citing *Grim v. State*, 102 So. 3d 1073, 1078 (¶11) (Miss. 2012)). Even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” M.R.E. 403. “[A] trial court must conduct a two-part test to determine whether a crime victim’s photograph is admissible.” *Gray v. State*, 202 So. 3d 243, 255 (Miss. Ct. App. 2015) (quoting *Bonds v. State*, 138 So. 3d 914, 918 (¶8) (Miss. 2014)). The court must determine whether the proof is absolute or in doubt as to the identity of the guilty party, then whether the photographs are necessary or simply a ploy by the State “to arouse the passion and prejudice of the jury.” *Id.*

The admission of photos of a deceased victim is within the discretion of the trial court and is proper “so long as the photos serve some useful, evidentiary purpose.” *Ambrose v. State*, 254 So. 3d 77, (¶186) (Miss. 2018), *reh’g denied* (Oct. 18, 2018), *cert. denied*, 18-7503 (2019) (citing *Bennett v. State*, 933 So. 2d 930, 946 (¶53) (Miss. 2006)). The supreme court has noted that photos of a victim have evidentiary value in certain cases:

In *Westbrook v. State*, 658 So. 2d 847, 849 (Miss. 1995), this Court found that photographs of a victim have evidentiary value when they aid in describing the circumstance of the killing, *Williams v. State*, 354 So. 2d 266 (Miss. 1978); describe the location of the body and cause of death, *Ashley v. State*, 423 So. 2d 1311 (Miss. 1982); or supplement of clarify witness testimony, *Hughes v. State*, 401 So. 2d 1100 (Miss. 1981).

Hutto v. State, 227 So. 3d 963, 981-82 (¶55) (Miss. 2017) (quoting *Keller v. State*, 138 So. 3d 817, 857 (Miss. 2014)).

In *Bonds*, the supreme court held that the trial court’s discretion to admit photographs of victims is not without limits, and the probative value of the photograph must be weighed against the “prejudicial effect and potential to inflame the passions of the jury.” *Ambrose*, 254 So. 3d at 135 (¶188) (citing *Bonds*, 138 So. 3d at 920-21 (¶16)). The Court held that it “will give great deference to trial judges in the sound exercise of their discretion in the admission of photographs, but we are bound as an appellate court to determine whether such discretion has been abused by the admission of a photograph whose prejudicial effect far outweighs its probative value.” *Id.* at (¶13).

Moberg objected to the State's introduction of a photograph of Jessie's decomposing body, showing maggots and a bone protruding through a hole in Jessie's chest. The photo in this case had no evidentiary value and was probative of nothing. First, the photo did not "aid in describing the circumstances of the killing and the corpus delicti." *See Westbrook*, 658 So. 2d at 849. The medical examiner could not determine a cause of death in this case, and could not point to any specific injury on the body. The body was so badly decomposed and had been subject to animal scavenger activity, and the expert witness was unable to explain the significance of "defects" he found on Jessie's body. The color photograph of Jessie's body, showing maggots and a bone protruding through a hole in his chest, offered nothing to help the jury understand the circumstances of the killing. Even the medical examiner was unable to determine that information. (Tr. 692).

Second, the photo did not "describe the location of the body and the cause of death." *Id.* The photo was taken during the autopsy and therefore does not describe the location of the body when it was found. And the medical examiner could not determine a cause of death because of the level of decomposition. (Tr. 692).

Third, the photo did not "supplement or clarify witness testimony." *Id.* The medical examiner was permitted to testify about the "defects" in Jessie's body that were found during the autopsy. But the trial court prevented him from speculating about what might have caused the defects – whether the defect could be an injury or whether it was a product of decomposition and animal activity on the body. (Tr. 663). Seeing the color photograph of the body did not aid the jury in determining

the origin of a hole in Jessie's chest that the medical examiner himself could not have determined. Any description of the "defect" could have been adequately explained using a diagram, rather than showing the photograph.¹

In *Bonds*, the supreme court reversed LeDarius Bonds's murder conviction because the probative value of a photograph entered into evidence was outweighed by the danger of unfair prejudice. The trial court in *Bonds* allowed the State to admit a "full-color, close-up, frontal photograph of [the victim]'s maggot-infested skull and facial area." *Id.* at (¶10). The Court noted that there was an alternate photograph that could have shown the injury at issue, "which did not depict decaying flesh and maggot-infested eye sockets." *Id.*

The Court in *Bonds* held that the exhibit was "gruesome in the extreme" and that the prejudicial effect of the admission of the photograph far outweighed any evidentiary value it had, and that the trial court abused its discretion when it allowed the photograph to be admitted. *Id.* at (¶15).

The photograph in this case is also "gruesome in the extreme" and should have been excluded by the trial court. The photo depicts Jessie's torso and shows his decaying flesh, a gaping hole where his armpit should have been, and a hole in

¹ Notably, the trial court refused to allow the State to display the photograph on the overhead projector while the jury was out of the courtroom and the trial court was hearing arguments on the admission of the photograph. The prosecutor asked, "Is it possible, Judge, if we display the State's Exhibit 25 on the overhead?" And the judge responded, "No, it's not possible." (Tr. 657).

his chest with one of his ribs protruding. Maggots are visible on Jessie's chest and stomach area. (State's Exhibit 25, R.E. 32).

The photograph at issue in this case served no evidentiary purpose. It was not probative of any fact at issue. And the probative value of the photograph is far outweighed by the potential it had to arouse the passions of the jury. The trial court erred in allowing the photograph into evidence, and Moberg respectfully requests this Court reverse his conviction and sentence and remand his case for a new trial.

CONCLUSION

Moberg submits that based on the propositions cited and briefed above, together with any plain error noticed by this Court which has not been specifically raised but may appear to the Court on a full review of the record, the judgment of the trial court and his conviction and sentence should be reversed and vacated, respectively, and this matter remanded to the lower court for further proceedings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Mollie M. McMillin, counsel for the appellant, hereby certify that I have this day filed by means of the electronic case filing system the foregoing Brief of the Appellant, pursuant to Mississippi Rule of Appellate Procedure 25 by which immediate notification to the following ECF participants in this cause is made:

Honorable Jason Davis

In addition, the following non-ECF participants are served by United States Mail, first class postage prepaid:

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This the 5th day of August, 2019

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