

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01367 COA**

MELVIN JOHNSON

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	12/21/95
TRIAL JUDGE:	HON. KENNETH LEVENE THOMAS
COURT FROM WHICH APPEALED:	BOLIVAR COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RAYMOND L. WONG
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	LAWRENCE Y. MELLEN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	VEHICULAR HOMICIDE: SENTENCED TO SERVE A TERM OF 20 YRS IN THE MDOC; SENTENCE TO RUN CONSECUTIVE TO ANY PREVIOUSLY IMPOSED
DISPOSITION:	AFFIRMED - 3/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/8/98

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

BRIDGES, C.J., FOR THE COURT:

Melvin Johnson was convicted of vehicular homicide while driving intoxicated and was sentenced to twenty years in the Mississippi Department of Corrections. Aggrieved, Johnson argues on appeal: **(1) that the court erred in allowing the state trooper to testify as an expert in the field of accident reconstruction, (2) that the court erred in allowing an impeachment instruction, (3) that the State failed to prove that the death of the victim was caused by the negligence of Johnson, and (4) that the court erred in denying Johnson's motion for directed verdict and that the verdict**

was against the overwhelming weight of the evidence. Finding no merit to these issues, we affirm.

FACTS

Shortly around 12:00 A.M. on the evening of June 10, 1995, Johnson and his girlfriend, Lisa Booth, left a local tavern in Bolivar, Mississippi to return home. Johnson was driving his car north when he decided to pass the car in front of him occupied by Tamara Lee and Eldridge Jenkins. Coming from the opposite direction was the victim, Hope Bufford. According to trial testimony, Bufford flashed her lights several times to let Johnson know that it was unsafe to pass. As Jenkins pulled off to the side of the road, Bufford attempted to also pull over onto the shoulder, but was hit by Johnson head-on and killed. Johnson testified that he hit Bufford because Booth grabbed the wheel causing the car to move into the left lane. However, Johnson's earlier statement to a detective was that he could not get back into the northbound lane because of the car in the southbound lane. Officers on the scene detected the odor of alcohol, and a blood sample was drawn indicating 0.13% ethyl alcohol.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE COURT ERRED IN ALLOWING THE STATE TROOPER TO TESTIFY AS AN EXPERT IN ACCIDENT RECONSTRUCTION.

Johnson asserts that the court erred in qualifying State Trooper Billy McClure as an accident reconstructionist under **Mississippi Rule of Evidence 702** which provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Accident reconstruction has been recognized by this State as a field in which one may be qualified as an expert witness. *Wilson v. State*, 574 So. 2d 1324, 1335 (Miss. 1990); *Moffett v. State*, 540 So. 2d 1313, 1314 (Miss. 1989); *Whittington v. State*, 523 So. 2d 966, 975 (Miss. 1988). The qualification of an expert witness is left to the sound discretion of the trial judge, and his determination will not be reversed unless it clearly appears that the witness was not qualified. *Wilson*, 574 So. 2d at 1334; *Smith v. State*, 530 So. 2d 155, 162 (Miss. 1988). Furthermore, it is clear that an officer's testimony regarding the cause of the accident would be considered accident reconstruction and would be allowed as expert testimony under Rule 702 if the officer was properly qualified based on the officer's training, experience in investigation, etc. *Roberts v. Grafe Auto Company, Inc.*, 701 So. 2d 1093, 1099 (Miss. 1997).

State Trooper McClure had been with the Mississippi Highway Patrol for thirteen years and had been assigned to regular patrol and accident reconstruction. McClure had attended and was certified as having successfully completed a four week course on accident reconstruction and a two week course on advanced accident investigation. Since completing the course, McClure has conducted four other accident reconstructions. Johnson argued that McClure had never gone to college, possessed only a high school diploma, and had never actually been qualified as an expert in court before this case. As stated above, Rule 702 of the Mississippi Rules of Evidence states the a witness may be qualified as an expert based on knowledge, skill, experience, training, *or* education. The trial court did not abuse its discretion in allowing McClure to testify as an expert in the field of accident reconstruction. This

issue is without merit.

II. WHETHER OR NOT THE COURT ERRED IN GRANTING THE STATE'S INSTRUCTION ON IMPEACHMENT.

Johnson argues the trial court erred in granting the State's impeachment instruction S-2. In support of his contention, Johnson argues that his statement compared to his testimony was neither a contradiction nor an inconsistent statement. Instruction S-2 reads as follows:

The testimony of a witness or witnesses may be discredited or impeached by showing that on a prior occasion they have made a statement which is inconsistent with or contradictory to their testimony in this case. In order to have this effect, the inconsistent or contradictory prior statement must involve a matter which is material to the issues in this case.

The prior statement of the witness or witnesses can be considered by you only for the purpose of determining the weight or believability that you give to the testimony of the witness or witnesses that made them. You may not consider the prior statement as proving the guilt or innocence of the defendant.

In *McGee v. State*, 608 So. 2d 1129 (Miss. 1992), the Mississippi Supreme Court held that the lower court erred in refusing to grant a proposed jury instruction that contained language concerning the credibility of impeached witnesses. That jury instruction is nearly identical to the language of S-2 which was granted in this case. The prior inconsistent statement was read to Johnson while he was on the witness stand, and he admitted making the statement under oath. That prior statement was contradictory to his testimony at trial, and his testimony was significant to the State's case.

Originally, Johnson's statement to police after the accident was that he was unable to get in the proper lane because of the other car. On the stand, Johnson testified that the reason he did not return to the right hand lane was because his girlfriend jerked the wheel and that was the reason his car stuck the victim's car. Additionally, Johnson contradicted himself when he stated that he remembered two individuals helping him out of the car, and then later testified that he was unconscious and had no knowledge of what happened. An evidentiary basis for the instruction clearly exists. Accordingly, we find no merit to this issue.

III. WHETHER THE STATE FAILED TO PROVE THAT JOHNSON'S NEGLIGENCE RESULTED IN BUFFORD'S DEATH.

IV. WHETHER THE COURT ERRED IN DENYING JOHNSON'S MOTION FOR DIRECTED VERDICT, AND WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Since Johnson's issues III and IV deal with the sufficiency of the evidence, we shall discuss them together. Johnson argues that the State failed to prove that he negligently cause the death of Bufford. We disagree.

According to § 63-3-611(1) of the Mississippi Code of 1972:

No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred (100) feet of any vehicle approaching from the opposite direction.

Johnson attempted to pass on the left side which was not free of oncoming traffic. Johnson violated the above statute when he was unable to overtake and completely pass without interfering with the safe operation of the vehicle that was approaching him from the opposite direction. The car he was attempting to pass knew this as it pulled over to the right side of the road. The victim knew it as she flashed her lights at Johnson several times letting him know that she was approaching. Johnson was unable to return to his side of the roadway before Bufford's car came within one hundred feet of his car. The evidence supports the finding that Johnson's negligence resulted in the death of Bufford. This issue is without merit.

Johnson was found guilty of violating **§ 63-11-30(1) of the Mississippi Code of 1972:**

(1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; or (c) has ten one-hundredths percent (.10%) or more by weight volume of alcohol in the person's blood based upon milligrams of alcohol per one hundred (100) cubic centimeters of blood as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter.

Thus, to violate Section 63-11-30 only requires that a defendant (1) operate a vehicle while intoxicated and (2) cause the death of another in a negligent manner. Johnson's blood alcohol content was registered at 0.13. Accordingly, a reasonable juror could conclude that Johnson's negligence caused the accident and unfortunate death of Bufford.

In *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993), the Mississippi Supreme Court stated that since a motion for directed verdict, a request for peremptory instruction, and a motion for JNOV each challenge the legal sufficiency of the evidence, the Court properly reviews the ruling on the last occasion the challenge was made in the trial court. The standard of review applied when the assignment or error turns on the sufficiency of evidence has been stated as:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, this Court's authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give the prosecution the benefit of all inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered points in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair minded jurors in the

exercise of impartial judgment might have reached different conclusions, the verdict of guilty is beyond our authority to disturb.

***Brooks v. State*, 695 So. 2d 593, 594 (Miss. 1997).**

When we consider whether the jury's verdict is against the overwhelming weight of the evidence, we accept as true all evidence supporting the verdict. *Ellis v. State*, 667 So.2d 599, 611 (Miss. 1995). Reversal is warranted only if there was an abuse of discretion in the circuit court's denial of a new trial. *Id.* Considering the above, we find no abuse of discretion. This issue is without merit.

THE JUDGMENT OF THE BOLIVAR COUNTY CIRCUIT COURT OF CONVICTION OF VEHICULAR HOMICIDE AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WHICH SHALL RUN CONSECUTIVE TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO BOLIVAR COUNTY.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., NOT PARTICIPATING.