

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

IMMANUEL MANNING

APPELLANT

v.

No. 2016-KA-1301-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

Appeal from the Circuit Court of Oktibbeha County, Mississippi

No. 2014-0297-CRK

Justin T. Cook, Miss. Bar # 102622
OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
P.O. Box 3510
Jackson MS 39207
jcook@ospd.ms.gov
T: (601) 576-4290
F: (601) 576-4205

Attorney for the Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Immanuel Manning – Appellant

Hon. James T. Kitchens, Jr.
Trial Judge

Ross Barnett, Jr.
Trial Counsel for the Appellant

Scott Rogillio, Asst. District Attorney
Trina Davidson Brooks, Asst. District Attorney
Trial Counsel for the State

Justin T. Cook
George T. Holmes
Appellate Counsel for the Appellant

Jim Hood, Esq
Attorney General of Mississippi
John Henry, Esq.
Appellate Counsel for the State

This the 30th day of May, 2017.

s/ Justin T. Cook
Justin T. Cook, MB # 102622
OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION

Attorney for the Appellant

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STATEMENT OF ASSIGNMENT

This case is properly before the Court of Appeals of the State of Mississippi.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue One: The State presented improper lay opinion evidence. The Mississippi Supreme Court has affirmatively held that testimony regarding location obtained from cell phone tower pings requires expert testimony.

Issue Two: The State presented insufficient evidence to convict Manning of witness intimidation.

Issue Three: Manning's indictment was constructively amended when the State omitted specific allegations, lessening the State's burden of proof.

Issue Four: Because there was insufficient evidence to convict Manning of witness intimidation, this Court should reverse his conviction for murder under the doctrine of retroactive misjoinder.

STATEMENT OF THE CASE

Procedural History

On July 18, 2014, the Oktibbeha County, Mississippi, Grand Jury returned a three-count indictment against the Appellant, Immanuel Manning, charging him with first-degree murder, possession of stolen property, and witness intimidation. (C.P. 5-7, R.E. 4-6). On August 4, 2016, that indictment was amended to re-number the counts. (C.P. 80, R.E. 9).

After a jury-trial beginning on August 1, 2016, Manning was convicted of first-degree murder and witness tampering and sentenced as a habitual offender pursuant to Mississippi Code section 99-19-81. (C.P. 81, 83, R.E. 10, 12). On August 5, 2016, Manning filed his post-trial motions, which were denied by the trial court that same day. (C.P. 93-96, R.E. 14-15).

Facts

On March 7, 2014, Natalla Carter was at her home on Highway 82 East in Starkville, Mississippi. (Tr. 135). Carter was in her bathroom cleaning the tub when she heard a gunshot. (Tr. 137). She then heard her boyfriend Christopher Houston calling her name. (Tr. 137). When she went outside, she found him lying on his back. (Tr. 138). Houston told Carter that “Papoose” shot him. (Tr. 138). Carter understood Papoose’s legal name to be Immanuel Manning, the Appellant. (Tr. 142). Carter and Manning had had a brief sexual relationship years earlier. (Tr. 141-42).

Reginald Ferguson lived in the same trailer park as Carter. That day he saw a gray Pontiac Bonneville. (Tr. 165). Ferguson went inside, and when he came back out after hearing a gunshot, he saw a man run into the Bonneville and drive away. (Tr. 165-66).

Quontavious Wilborn testified that he was at Ferguson’s house on the day in question. (Tr. 333). Wilborn saw someone run to a car and drive off. (Tr. 334). Wilborn testified that Carter went into Houston’s pockets, ran to a four wheeler and then back inside. (Tr. 334-35). Wilborn was adamant that he did not see Manning at the scene. (Tr. 335).

Oktober County Sheriff’s Deputy Mahyar Netadji was dispatched to the scene. (Tr. 175-76). When Deputy Netadji arrived, Houston was breathing slowly and had a low pulse, and eventually stopped breathing. (Tr. 180-1). After the scene was secure, EMS was allowed to enter. (Tr. 181). Houston was taken to a local hospital where attempts to resuscitate him were unsuccessful. Deputy Netadji notified dispatch and a “BOLO” (be on the lookout) was issued for Manning. (Tr. 182).

Oktober County Sheriff’s Department Investigator Brett Watson investigated the shooting. (Tr. 197). When Deputy Watson arrived, he was informed of the nickname

“Papoose,” and developed Manning as a potential suspect. (Tr. 198-99). Watson developed a cellular telephone number for Manning. (Tr. 199). Watson contacted T-Mobile, the phone number’s service provider and requested cell tower locations. (Tr. 200).

Watson took the longitude and latitude information from cell towers and put the data into Google to “give [him Manning’s] a direction of travel.” (Tr. 205). Through leading questions from the State, Deputy Watson answered affirmatively when the State argued that the phone traveled from Scott County to the Brandon or Pearl area. (Tr. 206).

Watson also “tracked” the phone earlier on the day of the shooting. Watson testified that he was able to plot calls and cell tower location tracking the phone from Jackson up Highway 25 to Starkville. (Tr. 207-08). Ronald Witt, an employee of T-Mobile testified, without being qualified as an expert, matching his records with Investigator Watson’s map. (Tr. 245-51).

On March 7, 2014, Tyler Burnell, then with the Pearl, Mississippi, Police Department, made a stop of a Pontiac Bonneville being driven by Immanuel Manning after received the BOLO. (Tr. 289-91). Manning was placed into custody. Officers found no firearm in his vehicle. (Tr. 292).

Officer Greg Jones, then with the Starkville, Mississippi Police Department arrived where the Bonneville was stopped. (Tr. 299). He administered a gunshot residue test. (Tr. 304-5). Particles indicative of gunshot residue were identified on Manning’s right and left palm. (Tr. 318-19).

After Manning was arrested, he bonded out. (Tr. 143). On one occasion, Carter was entering Brooksville Garden and Manning was leaving. (Tr. 144). Carter testified

that manning was “making kissing gestures.” (Tr. 143). Carter testified that on another occasion, Manning “said something like motherfuckers to (sic) before something – before something – before something happen” (Tr. 143-44). Carter’s testimony on this alleged incident is somewhat difficult to decipher with respect to what was said, what she heard, and what was allegedly threatened.

Manning testified that on the day in question, he went to Brandon and later into Scott County to see his brother. (Tr. 352). He left Scott County and went through Carthage and towards Starkville. (Tr. 352-53.). Manning called a friend, who did not answer, so he stopped to eat in Louisville. After being unable to connect with anyone, he went back into Scott County. (Tr. 354). He then headed back to Jackson, where he was stopped in Rankin County. (Tr. 355). Throughout Manning’s testimony, he adamantly denied being involved in Houston’s death. (Tr. 357-64).

SUMMARY OF THE ARGUMENT

Deputy Watson was not offered as an expert in cellular telephone tower tracking. The Mississippi Supreme Court has explicitly held that such testimony may only come in through expert testimony. Accordingly, the trial court permitted the State to offer improper lay opinion testimony specifically prohibited by our rules of court and Mississippi Supreme Court caselaw.

The State presented insufficient evidence to convict Manning of witness intimidation. The State’s sole witness regarding the alleged intimidation was unable to clearly say what, precisely, Manning was alleged to have said. Her nebulous testimony combined with a purported blowing of a kiss does not amount to a criminal act.

Furthermore, the trial court erred in allowing the State to constructively amend the indictment when it altered the specific allegations of the grand jury with respect to

the witness intimidation count. Because only a grand jury may substantively amend the indictment, this was error.

Lastly, under the doctrine of retroactive misjoinder, Manning's murder conviction must be reversed.

ARGUMENT

Issue One: The State presented improper lay opinion evidence. The Mississippi Supreme Court has affirmatively held that testimony regarding location obtained from cell phone tower pings requires expert testimony.

“The standard of review regarding the admission or exclusion of evidence is abuse of discretion.” *Palmer v. State*, 939 So. 2d 792, 794 (Miss. 2006).

Mississippi Rule of Evidence 701 allows lay witnesses to give opinion testimony so long as that testimony is “not based on scientific, technical, or other specialized knowledge within the scope of [Mississippi] Rule [of Evidence] 702.” Miss. R. Evid. 701. Mississippi rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Miss. R. Evid. 702

The Mississippi Supreme Court has held that “where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a [Rule] 702 opinion and not a [Rule] 701 opinion.” *Langston v. Kidder*, 670 So.2d 1, 3–4 (Miss.1995).

The distinction is important because “[l]ay and expert witnesses are treated differently in discovery” and the opposite party is entitled to “notice and opportunity to prepare rebuttal” regarding expert testimony. *Id.* “A lay witness's unique qualifications have no bearing on the witness's ability give [sic] a lay opinion.” *Heflin v. Merrill*, 154 So.3d 857, 863 (Miss.2014).

In *Heflin*, the plaintiff's husband, an insurance agent, attempted to testify as to the exact speed at which the car that hit their car was traveling. *Id.* The plaintiff attempted to bolster his qualification to give a lay opinion about speed by citing his experience as an insurance agent. *Id.* The Supreme Court found that Rule 701 “prohibits lay opinions that are based on special training and knowledge.” *Id.*

Furthermore, the Supreme Court has held that because “the public hold police officers in great trust, the potential harm to the objecting party requires reversal where a police officer gives expert testimony without first being qualified as such.” *Kirk v. State*, 160 So.3d 685, 693 (Miss.2015). The *Kirk* Court determined that “[w]hile [the police officer] may have been able to testify regarding his observations, e.g., that [the victim's] neck had red marks on it, his testimony that it appeared [the victim] had been strangled constituted the sort of testimony properly reserved to an expert.” *Id.*

When assessing the expert/lay opinion status of testimony regarding location of defendants from cell phone tower data, the Mississippi Supreme Court has clearly and unequivocally held:

[T]estimony that simply describes the information in a cell phone record is properly lay testimony. Likewise, testimony that merely informs the jury as to the location of cell phone towers may properly be lay testimony when it is based upon the personal observations of the witness. But testimony that goes beyond the simple descriptions of cell phone basics, specifically testimony that purports to pinpoint the general area in which the cell phone user was located based on historical cellular data, requires

scientific, technical, or other specialized knowledge that requires expert testimony

Collins v. State, 172 So. 3d 724, 743 (Miss. 2015).

It is clear that the testimony in this case was clearly inadmissible lay opinion testimony. Deputy Watson took the longitude and latitude information from cell towers and entered the data into Google to “give [him] a direction of travel.” (Tr. 205). Through leading questions from the State, Deputy Watson answered affirmatively when the State argued that the phone traveled from Scott County to the Brandon or Pearl area. (Tr. 206). Watson also “tracked” the phone earlier on the day of the shooting. Watson testified that he was able to plot calls and cell tower location tracking the phone from Jackson up Highway 25 to Starkville. (Tr. 207-08).

The State was well-aware of the nature of Deputy Watson’s testimony. The prosecutor described the cell-phone tower ping as “trying to locate where this phone was.” (Tr. 199) and “where this phone is located.” (Tr. 201). Through leading questions from the State, Deputy Watson answered affirmatively when the State argued that the phone traveled from Scott County to the Brandon or Pearl area. (Tr. 206).

Watson’s testimony purporting to establish Manning’s location as it related to cell-tower pings was improper expert testimony. Watson’s own testimony is telling: “[A]nd again, I’m no expert.” (Tr. 231). Because Watson was not qualified as an expert and because Deputy Watson’s testimony was central to the State’s case, this error requires reversal.

Issue Two: The State presented insufficient evidence to convict Manning of witness intimidation.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether,

“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.” *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will stand if “reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense.” *Id.* (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985)). However, this Court may reverse and render where the evidence “point[s] 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[.]” *Id.*

Mississippi Code section 97-9-55 defines witness intimidation as follows:

If any person or persons by threats, force or abuse, attempt to intimidate or otherwise influence a judge, justice of the peace, juror, or one whose name has been drawn for jury service, witness, prosecuting or defense attorney or any other officer in the discharge of his duties, or by such force, abuse or reprisals or threats thereof after the performance of such duties, or to obstruct or impede the administration of justice in any court, he shall, upon conviction, be punished by imprisonment not less than one (1) month in the county jail nor more than two (2) years in the state penitentiary or by a fine not exceeding five hundred dollars (\$500.00), or both such fine and imprisonment.

Miss. Code Ann. § 97-9-55.

Carter’s testimony regarding Manning’s alleged actions after he bonded out was very lacking in detail. First, she alleged that Manning was “making kissing gestures.” (Tr. 143). Then, Carter offered a string of testimony that failed to allege any real threat or intimidating act. In fact, Carter’s testimony is so patchy, non-descript, and nebulous that it is impossible to conclude what Manning was alleged to have said to her in the first place. (Tr. 143-44).

The State was required to prove witness intimidation beyond a reasonable doubt.

It cannot be said, making all reasonable inferences in favor of the State, that the State did so in this case. Manning's conviction for witness intimidation should be reversed and rendered.

Issue Three: Manning's indictment was constructively amended when the State omitted specific allegations, lessening the State's burden of proof.

The United States Supreme Court has held:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.

United States v. Scheffer, 523 U.S. 303, 329 n. 16 (1998). *See also Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Manning's indictment for witness intimidation alleged that Manning:

did unlawfully, willfully, and feloniously attempt to intimidate or otherwise influence Natalla Carter, a witness to a crime, by threats, force or abuse, by engaging in conversation and blowing kisses at Natalla Carter, to obstruct or impede the administration of Justice in any Court[.]

(C.P. 7) (emphasis added).

The State's elements instruction however departs from the indictment in materially significant ways. Jury Instruction S-3(A) provided, in pertinent part, the following elements:

1. On, about or between April 1, 2014 and June 2014, in Oktibbeha County, Mississippi,
2. The Defendant, Immanuel Manning,
3. Did unlawfully, willfully and feloniously;
4. Attempt to intimidate or otherwise influence Natalia Carter, a witness to a crime;
5. By threats, communicating with her with threats, force or abuse,

6. 6. To obstruct or impede the administration of Justice in any Court
(C.P. 63).

“An indictment may not be amended to change the nature of the charge, except by action of the grand jury which returned the indictment.” *Griffin v. State*, 584 So. 2d 1274, 1275 (Miss. 1991).

It is well settled in this state . . . that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant’s case.

Id. at 1275-76 (internal citations omitted). The Uniform Rules of Circuit and County Court Practice further prevent the State from amending the substance of an indictment. URCCCP 7.09 (“All indictments may be amended as to form but not as to the substance of the offense charged.”).

Because there was no order amending the indictment, the variance between the State’s *Milano* Instruction, as it relates to the aggravated assault charges, and Jones’s indictment was a constructive amendment of the indictment. A constructive amendment of the indictment occurs when the proof and instructions broaden the grounds upon which the defendant may be found guilty of the offense charged so that the defendant may be convicted without proof of the elements alleged by the grand jury in its indictment. *See United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985).

The grand jury chose to charge that Manning allegedly engaged in conversation and blowing kisses. The State’s jury instruction, however, neglects to allege on overt act. This was a constructive amendment of the indictment and was improper.

A constructive amendment of the indictment violates both Article 3, §26 and

Article 3, §27 of the Mississippi Constitution. *See, generally, McCain v. State*, 1 So. 3d 1055, 1062 (Miss. 2012) (Dickinson, P.J., concurring). The Mississippi Constitution demands that defendants are placed on notice of their charges and provides grand juries the authority to determine what the charges are.

This Court should reverse Manning’s witness intimidation conviction and remand this matter for further proceedings, wherein the exclusive province of the Jury is not invaded.

Issue Four: Because there was insufficient evidence to convict Manning of witness intimidation, this Court should reverse his conviction for murder under the doctrine of retroactive misjoinder.

Retroactive misjoinder “occurs when joinder of multiple counts was initially proper¹ but, through later developments such as an appellate court’s reversal of less than all convictions, joinder has been rendered improper.” *Williams v. State*, 37 So. 3d 717, 720 (Miss. Ct. App. 2010) (citations omitted)

This has Court adopted the doctrine of retroactive misjoinder concluding that: “if the defendant can show that he suffered clear and compelling prejudice as a result of the evidence introduced to support the vacated count, he is entitled to a new trial on the remaining count(s).” *Williams v. State*, 37 So. 3d 717, 720-21 (Miss. Ct. App. 2010)

Manning’s alleged misconduct of witness intimidation was inadmissible for any other purpose. *See generally* Miss. R. Evid. 404(b), Miss. R. Evid. 609. For the reasons stated in Issues Two and Three above, the State both wholly failed to prove witness

¹ Manning questions whether *due process* allows for a concurrent charges for witness intimidation and the principle charge for which the witness is to testify. However, this Court need not address this larger concern and can simply apply the doctrine of retroactive misjoinder in this case.

intimidation and improperly instructed the jury on the elements.

Manning was prejudiced by the introduction of this evidence. The improper admission of such evidence has significant consequences for criminal defendants. In *Robinson v. State*, 35 So. 3d 501 (Miss. 2010), a unanimous Mississippi Supreme Court concluded that the improper admission of prior bad acts evidence presented a defendant with “with the options of either taking the witness stand in an attempt to mitigate the prejudice caused, or foregoing that right and permitting the jury's consideration of such evidence without response. *Robinson*, 35 So. 3d at 507. Evidence, no matter how doubtful and insufficient, that Manning allegedly attempted to intimidate a witness was, by its very nature, damaging to his credibility.

Accordingly, the doctrine of retroactive misjoinder applies, and Manning’s conviction for murder should be reversed.

CONCLUSION

Manning submits that based on the propositions cited and briefed hereinabove, 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 convictions and sentences should be reversed and vacated, respectively, and this matter remanded to the lower court for further proceedings.

Respectfully submitted,

Immanuel Manning, Appellant

s/ Justin T. Cook
Justin T. Cook
Miss. Bar No. 102622
OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
Post Office Box 3510
Jackson, MS 39207

CERTIFICATE OF SERVICE

I, Justin T. Cook , 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:

Jason W. Davis, Esq.
Assistant Attorney General

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

Honorable James T. Kitchens, Jr.
Circuit Judge
Post Office Box 1387
Columbus, MS 39703

Scott Colom
District Attorney
Post Office Box 1044
Columbus, MS 39703

THIS the 30th day of May, 2017

s/ Justin T. Cook
Justin T. Cook, Miss Bar #102622