

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

IMMANUEL MANNING

APPELLANT

VS.

NO. 2016-KA-01301-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: BARBARA BYRD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 104233**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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Statement of the Case

The Grand Jury of Oktibbeha County indicted Immanuel Manning for one count of murder, in violation of Mississippi Code Annotated section 97-3-19; one count of receiving stolen property, in violation of Mississippi Code Annotated section 97-17-70; and one count of intimidating a witness, in violation of Mississippi Code Annotated section 97-9-55. (CP 5-7). The State decided not to go forward on the charge of receiving stolen property, and that count was retired to the files. (CP 85). After a trial by jury, the Honorable James T. Kitchens Jr. presiding, Manning was convicted of intimidating a witness and murder. (CP 78-79; TR 460). He was sentenced, as a habitual offender pursuant to Mississippi Code Annotated section 99-19-81, to serve life for his murder conviction, and to serve two years for his conviction of intimidating a witness in the custody of the Mississippi Department of Corrections. (CP 81-83; TR 469-470). The trial court ordered those sentences to run consecutively. (TR 470).

Statement of the Facts

On March 7, 2014, Chris Houston was shot and killed at his home, which he shared with his girlfriend, Natalla Carter. Carter testified that she was cleaning a bathtub at the time of the shooting, and ran outside when she heard Houston call her name. When she went outside, she saw Houston lying on the ground beside the four wheeler he had been working on, and he told her "Papoose shot me." Carter explained that "Papoose" was Immanuel Manning, a man with whom she had a prior sexual relationship, and whom Houston had known well. (TR 142). After Houston was shot, Carter's neighbors came out, and someone called 911. (TR 141). Carter testified that an ambulance arrived within 15 to 20 minutes of the 911 call. (TR 141).

Reginald Ferguson, Carter's neighbor, testified that he had been outside barbecuing when he saw a gray Pontiac Bonneville pull into the area just before the shooting. (TR 165). Ferguson went inside for a moment and heard a gunshot, When he came back outside, the guy who had

driven the Pontiac was running back to his car. (TR 165-166). Ferguson testified that the man he saw running was average-sized and wore mustard-colored pants and a dark jacket. (TR 166). After the shooting, one of Ferguson's friends called 911. (TR 166). It was not until after the police arrived that Ferguson noticed that someone was lying on the ground—someone else at the scene told Ferguson that the person on the ground was Houston. (TR 166-167).

Mahyar Netadji, a patrol officer with the Oktibbeha County Sheriff's Department responded to Carter's home at 27 Gleason Drive. (TR 175). He was dispatched at 8:53 p.m., and arrived at the scene at 8:56 p.m. (TR 175-176). Netadji was the first officer to arrive on scene, and he encountered Carter, who was distraught and relayed that "Papoose" shot Houston. (TR 178). Officer Netadji testified that he knew that Papoose was Immanuel Manning's nickname. (TR 179).

Netadji tended to Houston, and testified that Houston's breathing was shallow, he had a low pulse, and he had suffered a gunshot wound. (TR 176; 180). Although Netadji attempted to speak with Houston, he was unable to, due to Houston's condition. (TR 189). Netadji stayed with Houston until the ambulance arrived; however, Netadji testified that Houston died at the scene. (TR 181-182). When EMS arrived, they attempted to revive Houston, and they also transported him to a local hospital in an attempt to revive him.¹ Those attempts were unsuccessful.²

After Houston was transported by ambulance, Netadji spoke to Carter, who told him that Manning was probably headed toward Jackson. (TR 182). In response to that information, Netadji notified dispatchers, and a "BOLO" was issued to Winston and Lowndes Counties, as well as to the highway patrol. (TR 182). Netadji also spoke to Ferguson, who gave a description

¹ Officer Netadji explained that EMS did not arrive until the scene had been secured. (TR 181).

² Dr. Mark LeVaughn, Chief Medical Examiner, testified as an expert in anatomic and forensic pathology and explained that Houston suffered a single gunshot wound. (TR 269). Dr. LeVaughn opined that Houston's cause of death was a gunshot wound, and the manner of death was homicide. (TR 278).

of the car and the man who had been driving it, which Netadji also passed on to dispatch, and to Brett Watson, the Lieutenant in charge of investigations. (TR 182-183; 188).

Lieutenant Watson also responded to the scene. (TR 197). By the time he had arrived, Houston had already been transported, but Watson was told that Houston said that “Papoose” shot him. (TR 198). Watson knew that Papoose was Immanuel Manning’s nickname, and he worked to discover Manning’s cell phone number. (TR 199). Using the cell phone number that was later confirmed to belong to Manning, Watson requested the phone records associated with that cell phone number from T-Mobile, so that he might discover where the phone had been used earlier in the day. (TR 200; 215-216).

Manning’s historical cell phone records revealed that, on the day of the shooting, Manning’s phone had been used as follows:

1:53 p.m.	The phone used a tower within the city limits of Jackson. (TR 216).
2:23 p.m.	The phone used a cell phone tower near Highway 25. (TR 216).
2:29 p.m.	The phone used another tower on Highway 25, but farther northeast. (TR 216).
2:58 p.m. through 3:04 p.m.	A series of calls showed that the phone used a tower near Highway 25 and near Lena, Mississippi. (TR 216).
3:45 through 3:46 p.m.	Four calls were made using a tower located in Louisville, Mississippi. (TR 216).
5:12 p.m. through 5:29 p.m.	A series of calls was made using a tower within the city limits of Starkville. (TR 216).
6:37 p.m.	The phone used a tower within Starkville. (TR 217).
6:43 p.m.	The phone used a tower within Starkville. (TR 217).
6:51 p.m.	The phone used a tower within Starkville. (TR 217).

Watson used the phone records and Google Maps to create a map to show the locations where Manning’s cell phone was used throughout the day on March 7. (TR 216). This map was admitted into evidence during Watson’s testimony. (TR 213). And the points that Watson marked, using the historical phone records, indicated which cell phone towers had been used throughout the day, not the location of Manning’s cell phone. (TR 228).

In addition to obtaining Manning's historical phone records, Watson requested that T-Mobile assist him in tracking the real-time location of Manning's phone. (TR 200-201). Watson stated that he supplied Manning's cell phone number to T-Mobile, and T-Mobile sent him emails with real-time GPS longitude and latitude coordinates which represented the cell phone's real-time location. (TR 199-201).

Ronald Witt, a Senior Testifier with T-Mobile's Law Enforcement Relation Group, confirmed that the points that Watson plotted on the map corresponded with the real-time information that a T-Mobile representative had sent, as well as with the historical phone records. (TR 244-248). Witt also explained how the cell phone records should be interpreted. For instance, he explained how the real-time phone records and the historical phone records would be converted to Central time, each requiring a different method.³ (TR 247-249). He also explained how both sets of records were collected. Witt testified that the real-time information regarding the phone's location was sent immediately, through email; however, the historical records were based on times that the phone was actually used. (TR 250-252). Furthermore, Witt stated that, if the historical record indicated that the cell phone used a tower in Starkville, then it would not have been possible for that phone call to have been made from Jackson, instead. (TR 252-253). He explained that each cell phone tower has a specific range, so the caller would have to be within the range of the specific tower for the call to register on the record.⁴ (TR 253).

As a result of Watson's request to discover the real-time location of the phone presumed to be Manning's, Watson was notified that Manning's cell phone was located in Pearl,

³ Lieutenant Watson plotted the coordinates in Central time on the map.

⁴ Witt testified that the range for towers in Starkville, Mississippi, was approximately a mile to a mile and a half. (TR 253). But he further explained that each tower's coverage depends on the population density of the area. (TR 256).

Mississippi.⁵ (TR 214). The Oktibbeha County Sheriff's Department contacted one of its former employees, Greg Jones, who worked for the Pearl Police Department at the time of the investigation, and told him to be on the lookout for a gray Pontiac Bonneville with a wing on the back. (TR 215; 288).

Tyler Burnell was on patrol in Pearl that evening and was informed that, based on cell phone tracking, officers believed that the suspect had recently passed the Brandon exit. (TR 289). Burnell testified that, in response to that information, he pulled off of the interstate at Airport Road and watched traffic to see whether the vehicle would pass. (TR 289). As Burnell watched the traffic, he saw a silver Pontiac Bonneville traveling in the middle lane driven by a black male driver. (TR 289). Burnell pulled behind the vehicle and notified Officer Eric Jones that he had located the suspect's vehicle. (TR 289). Burnell continued to follow the vehicle, and Officer Jones pulled behind him. (TR 289-290). As Burnell and Jones followed the suspect's vehicle, Burnell received more information about the vehicle that indicated that Burnell was following the right car. (TR 290). Eventually, Burnell activated his blue lights and attempted to stop the driver; however, the driver did not immediately pull over. (TR 290). Instead, he continued to drive, took the Pearson Road exit, and eventually pulled into the Ruby Tuesday's parking lot. (TR 290; 295). When the driver finally stopped, the officers exited their vehicles, with weapons drawn, and removed the driver from the car and detained him. (TR 291).

When the officers searched the driver's person, they recovered his driver's license, which confirmed that he was Immanuel Manning. (TR 291). The officers also recovered the cell phone that Watson had been tracking. (TR 218-220; 292-293). Before he placed him in the patrol car,

⁵ In addition to plotting the historical phone records using Google Maps, Watson plotted the information that he received from T-Mobile regarding the real-time location of Manning's phone. (TR 205; 245).

Burnell verbally Mirandized Manning, and Manning told Burnell that he understood his rights. (TR 292). Then, Eric Jones placed Manning in the car. (TR 292).

After the officers had detained Manning, Greg Jones responded to the scene. (TR 293). Burnell informed him about what had transpired. (TR 293; 301). And Burnell testified that Officer Jones, who knew Manning due to his past employment with the Oktibbeha Sheriff's Department, then walked over to the patrol car where Manning was being held and said, "What's up, Papoose." (TR 293; 302). Burnell testified that, when Officer Jones did this, Manning turned his head and looked shocked. (TR 293).

After Manning was apprehended, Oktibbeha County faxed over an arrest warrant. (TR 303). The officers transported Manning to the Pearl Police Department, booked him, and held him until someone from the Oktibbeha County Sheriff's Department came to pick him up. (TR 303). While at the Pearl Police Department, Greg Jones conducted a gunshot residue kit to collect any evidence of gunshot residue from Manning's hands. (TR 303-306).

Jacob Burchfield, a forensic scientist with the Mississippi Crime Lab, was accepted as an expert in forensic science and gunshot residue analysis. (TR 315). Burchfield explained that a gunshot residue analysis tests for the presence of primer residue, which comes from the primer of a projectile. (TR 315). Burchfield stated that, when a firing pin strikes the primer cap, it ignites gun primer residue, which propels the bullet out of the weapon and creates a little cloud around the weapon (usually 2-3 feet), which is considered gunshot residue. (TR 316). Burchfield testified that after four hours, a normal person's activities would remove most, if not all, gunshot residue. (TR 320). And he testified that, after approximately eight hours, there is a high probability that no residue would be found. (TR 320).

Burchfield tested the samples that were taken from four areas of Manning's hands: the right back of his hand, his right palm, the left back of his hand, and his left palm. (TR 316-317).

Burchfield testified that his analysis revealed that particles indicative of gunshot residue were present on Manning's right and left palms. (TR 318-319). In other words, although not all components indicating that gunshot residue was present, a combination of those components was present. (TR 319).

After the State presented its case-in-chief, the defense called Quontavious Wilborn to testify. At the time of trial, Wilborn was housed at the Oktibbeha County Jail, where Manning was also incarcerated. (TR 331; 344). He testified that he asked someone why Manning was there, and was informed that he had been arrested for murdering Houston. (TR 344). However, Wilborn explained that he did not think that Manning could have done it, because the man that he said he saw leaving the scene of the shooting looked different—he “had a neck,” while, according to Wilborn, Manning had broad, “no-neck shoulders.” (TR 340).

Wilborn testified that he had been at Reginald Ferguson's home on the night of the shooting, and heard the gunshot. (TR 333). Wilborn stated that, after the shooting, he ran over to where the shooting had occurred, and before police or the ambulance arrived, Natalla Carter went through Houston's pockets to retrieve some item, and ran over to the four wheeler before going inside and then coming back out. (TR 334). Wilborn testified that he talked to Houston and tried to keep him alert, but claimed that Houston did not say anything. (TR 335). According to Wilborn, “Houston's girl”⁶ and “Reggie” had mentioned something about Houston having three children, so he told Houston that he needed to “stay up” for his kids. (TR 334; 338-339).

Natalla Carter was re-called by the State to testify in rebuttal. She testified that she only had one child—a daughter. (TR 399). And she testified that, as far as she knew, Houston did not have any children, and she never told anyone otherwise. (TR 399). Furthermore, Carter denied Wilborn's claim that he had attempted to comfort Houston after the shooting. In fact, she said

⁶ Wilborn did not know whether “Houston's girl” was named Natalla. (TR 240).

that she never saw a man named Quontavious Wilborn at the scene. (TR 400). She also said that she did not go through Houston's pockets after he was shot. (TR 400).

Manning also testified in order to explain where he was on the day of the shooting. He testified that he left his Jackson home at around 2 p.m. and went to his brother's house in Forrest, where he stayed and drank until around 3 or 4 p.m.⁷ (TR 351-352). Thereafter, he went to meet someone named Terry Grayer in Starkville, and headed back toward Jackson, by way of Philadelphia, at around 5:30 or 6 p.m. (TR 352-353). However, before he headed home, he went back to Forrest and ate at McDonald's with his brother. (TR 354). At some point, he decided to go to a strip club and tried to find a woman to take with him. (TR 354-355). According to his testimony, sometime after 10 p.m., Manning left Forrest and headed toward Jackson. (TR 354-355). Manning testified that, while he was driving, he noticed a number of police officers at the Brandon exit and the Airport exit, so he continued driving until he was eventually pulled over at the Pearl exit, and he pulled into the Ruby Tuesday's parking lot, where he was arrested. (TR 356-357).

Manning's testimony contradicted the statement that he voluntarily gave to the police while he was being held in Pearl. (TR 391-392). Brett Watson specifically asked whether Manning had been in Starkville that day, and Manning told him that he had not, he had been in Jackson. (TR 372). Manning even told Watson to call his wife, and said that she would tell the officers that he was with her all day in Jackson.⁸ (TR 373; 377).

In addition to testifying about the events surrounding Houston's murder, Natalla Carter also testified that, after Manning posted bond and was released from jail, Carter saw Manning when she was visiting her mother's home, and on another occasion when she was picking up her

⁷ Manning testified that he probably fired a gun at some point while he was at his brother's house. (TR 361).

⁸ Manning testified that, at the time of trial, he was married but separated. (TR 367).

daughter from her mother's home. (TR 143). Carter explained that Manning and her mother lived in the same apartment complex, on adjacent sides of the building. (TR 144). Carter testified that, when she saw Manning, he made kissing gestures toward her, and, on a different occasion, he told her "Mother F***ers need to. . .before something happen." (TR 143-144). Although Carter did not hear what Manning suggested that she do (or stop doing), she believed that the comment was a threat. (TR 145). And Manning's actions toward her led her to contact the authorities. (TR 145).

After hearing all of the evidence regarding both the murder charge and the charge for intimidating a witness, the jury convicted Manning of both counts.(TR 460).

Summary of the Argument

The lay testimony of Deputy Brett Watson was offered without objection, and with approval by defense counsel. Accordingly, any allegation of error in his testimony was waived and is barred from review by this Court. However, the issue surrounding his testimony is also without merit. Deputy Watson's testimony, that was based on cell phone records that he received from Manning's cell phone service provider, was admissible and did not require him to be an expert witness.

The State presented sufficient evidence to convict Manning of witness intimidation. Pursuant to the relevant statute, in order to convict Manning for intimidating a witness, the State was required to prove that Manning attempted to intimidate or otherwise influence a witness. Natalla Carter, the murder victim's girlfriend, testified that after Manning was released on bond, comments that he made to her and conduct that he directed toward her caused her to be intimidated and led her to contact authorities and press charges against him. This was clearly an attempt by Manning to influence one of the key witnesses against him. Accordingly, the State met its burden of proving that Manning was guilty of witness intimidation.

Manning claims that the State constructively amended his indictment for witness intimidation through its elements instruction. This argument was not presented at trial; therefore, the issue is barred. However, any variance between Manning's indictment and the instructions that were given did not materially alter the charge against him and, therefore, was not erroneous.

The doctrine of retroactive misjoinder does not apply in this case. Even if the State had not formally charged Manning with witness intimidation, and even if this Court were to find that the State presented insufficient evidence to sustain the conviction for that charge, evidence surrounding his attempt to intimidate Carter would have been relevant and admissible. Accordingly, the argument that the doctrine of retroactive misjoinder requires a new trial for Manning's murder charge is without merit.

Argument

I. Whether the trial court improperly permitted Lieutenant Brett Watson to offer expert testimony.

Relying on our Supreme Court's holding in *Collins v. State*, 172 So. 3d 724 (Miss. 2015), Manning argues that Lieutenant Brent Watson provided improper expert testimony when he testified about the records that he received from T-Mobile and explained how he charted the information from those records using Google Maps. However, this issue was not preserved for appeal because no objection was made by the defense. *Smith v. State*, 724 So. 2d 280, 319 (Miss. 1998). And this issue was repeatedly waived when defense counsel stated, on numerous occasions, that he had no objection to Watson's testimony and agreed with the way that the State proposed to present the evidence surrounding Manning's cell phone records. (TR 194; 195; 202; 208; 213). See *Caston v. State*, 823 So. 2d 473, 502 (Miss. 2002)(quoting *Singleton v. State*, 518 So. 2d 653, 655 (Miss. 1988)(finding that "a defendant cannot complain on appeal of alleged errors invited or induced by himself.")).

Waiver notwithstanding, the issue is without merit. The testimony offered by Watson in the present case is markedly different from the testimony that the Court warned about in *Collins*. In *Collins*, a law enforcement officer testified that, based on his training on cellular technology, he could pinpoint where the defendant was at particular points of time, by using cell phone records to calculate the approximate distance and direction that the defendant would have been from each cell phone tower. *Collins*, 172 So. 3d at 732-34. Collins' defense counsel objected to that testimony based on the fact that the officer was not established as an expert witness, but the trial court overruled the objection. *Id.* The Supreme Court explained that the type of technology that was used to establish the location of the defendant and the victim in *Collins* required specialized knowledge "regarding the various antennas on cell sites and the cell site coverage range and how those interact to determine the entire area in which a cell phone user might have been located while making a cell phone call." *Id.* at 741. Because the officer's testimony in *Collins* went further than "simply describ[ing] the information in a cell phone record," and "purport[ed] to pinpoint the general area in which the cell phone user was located," the testimony "required scientific, technical, or other specialized knowledge that require[d] expert testimony." *Id.* at 743. Accordingly, the Court found that the trial court erred in allowing the officer to testify as a lay witness regarding the location of the defendant and the victim's cell phones. *Id.* at 744.

Lieutenant Watson merely placed the coordinates from the records supplied by T-Mobile into Google Maps. His testimony was not complex or technical, and did not require specialized knowledge or training; therefore, it was not expert testimony. *See Collins*, 172 So. 3d at 743; *Malone v. State*, 73 So. 3d 1197 (Miss. Ct. App. 2011) (overruled, in part, by *Collins*, 172 So. 3d at n.7, but adopted, in part, by *Collins*, 172 So. 3d at n.6).

For the foregoing reasons, this issue was waived, is barred, and is also without merit.

II. The State presented sufficient evidence to convict Manning of witness intimidation.

Pursuant to Mississippi Code Annotated section 97-9-55, in order to convict Manning for intimidating a witness, the State was required to prove that Manning, by threat, force or abuse, attempted to intimidate or otherwise influence a witness. Miss. Code Ann. §97-9-55.

When this Court reviews a case to determine whether sufficient evidence was presented to support a conviction, it should “consider all evidence in the light most favorable to the State.” *Duke v. State*, 146 So. 3d 401, 405 (Miss. Ct. App. 2014). Furthermore, this Court must accept all credible evidence consistent with guilt as true, and should “give the State the benefit of all favorable inferences reasonably drawn from the evidence.” *Id.* The question that this Court must answer 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.” *Id.*

Carter testified that, on more than one occasion, Manning made comments and gestures toward her that she interpreted as threatening. On appeal, Manning contends that Carter “failed to allege any *real* threat or intimidating act.” (Appellant’s Brief p. 8)(emphasis added). However, whether Manning’s statement or actions toward Carter amounted to an attempt to intimidate her was an issue for the jury to resolve. The State presented evidence to show that Manning threatened Carter, and the jury was justified in finding that Manning’s actions and statements did, in fact, cause Carter to be intimidated.

III. Instruction S-3(A) was not materially different than the allegation of witness intimidation in his indictment.

Manning’s indictment informed him that he was charged with intimidating a witness by “unlawfully, willfully, and feloniously attempt[ing] 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. . .” (CP 7). Instruction S-3(A) informed the jury that it should find Manning guilty of intimidating a witness if it found from the evidence beyond a reasonable doubt that 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. to obstruct or impede the administration of Justice in any Court.” (CP 63).

For the first time on appeal, Manning claims that the State constructively amended his indictment and lessened its burden of proof for the intimidating a witness charge through its elements instruction. Essentially, Manning argues that because the indictment contained the facts surrounding the charge, the instruction was required to contain the same factual description. (Appellant’s Brief p. 9-11). However, this issue is barred because Manning did not object to the variance between the instruction and the indictment, and, instead, objected on other grounds. *Faulkner v. State*, 109 So. 3d 142, 146 (Miss. Ct. App. 2013); *Walker v. State*, 671 So. 2d 581, 606 (Miss. 1995)(finding that an argument was procedurally barred because one objection was raised at trial, and a different assertion of error was raised on appeal).

Although Manning has not asked this Court to invoke the plain error doctrine,⁹ if this Court were to conduct a plain error review, it should find that there was no error, plain or otherwise.

The Supreme Court has held that:

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.

⁹ See *Davis v. State*, 891 So. 2d 256, 259 (Miss. Ct. App. 2004)(citation omitted)(finding that the Court may invoke the plain error rule “if a party persuades the court of the substantial injustice that would occur if the rule were not invoked, but noting that “the plain error rule arises only if an error is so fundamental that it generates a miscarriage of justice.”).

Bell v. State, 725 So. 2d 836, 855 (Miss. 1998). However, in the same case, the Court noted that “[n]ot all variances between the indictment and instructions constitute a constructive amendment.” *Id.* And, it held that “[t]he central question is whether the variance is such as to substantially alter the elements of proof necessary for a conviction.” *Id.*

In the present case, the elements instruction did not specify the offensive conduct to the same extent that Manning’s indictment did; however, the evidence presented at trial was consistent with those facts alleged in the indictment.¹⁰ Manning has failed to show how the variance in the elements instruction and his indictment broadened the grounds upon which he could be found guilty. Therefore, this Court should find that any alteration between the indictment and the instruction was not material, and did not amount to plain error.

IV. The evidence was sufficient to convict Manning of witness intimidation, and the doctrine of retroactive misjoinder is not applicable.

Manning argues that, if this Court finds that insufficient evidence was presented to support his conviction for witness intimidation, then it should also grant him a new trial for his murder charge because the evidence surrounding the intimidation of Natalla Carter was “damaging to his credibility.” (Appellant’s Brief p. 11-12).

As discussed in Issue II, the State presented sufficient evidence to convict Manning of intimidating a witness. However, even if this Court did find that the evidence presented was not sufficient to convict Manning for violating Mississippi Code Annotated section 97-9-55, the evidence surrounding Manning’s conduct toward Carter, after he was alleged to have murdered her boyfriend, would still have been relevant and admissible. *See Henderson v. State*, 211 So. 3d

¹⁰ Manning alleges that, because the factual basis surrounding the charge in his indictment was set forth in the conjunctive, the State was required to prove both that he engaged in conversation with Carter and blew kisses at her. (Appellant’s Brief p. 10). While the State did prove that Manning committed both of these acts, the jury could have convicted Manning of the charge if it had found that Manning committed either act, and that his conduct was an attempt to intimidate Carter. *See Lenoir v. State*, 115 So. 2d 731, 732 (Miss. 1959)(finding that if a defendant is charged of two or more distinct acts conjunctively, he may be found guilty if the jury finds that he committed either of the acts).

761, 765 (Miss. Ct. App. 2016)(citing *Mattox v. State*, 137 So. 2d 920, 923 (Miss. 1962)(finding that “[evidence of a defendant’s attempt] to keep a witness from testifying has probative value as an incriminating circumstance inconsistent with the defendant’s innocence, and as tending to show a consciousness of guilt and that his cause lacked honesty and truth.”); *Johnson v. State*, 2016 WL 7328041 (Miss. Dec. 15, 2016)(finding that evidence that the defendant allegedly intimidated one of the witnesses was evidence that supported his murder conviction).

This Court should find that the doctrine of retroactive misjoinder¹¹ does not apply in this case. Any prejudice caused by the admission of evidence surrounding Manning’s attempt to intimidate a witness is not grounds for reversal of his murder conviction. One should not be permitted to attempt to intimidate the witnesses against him, and then claim that “the incident [is] so prejudicial that evidence of its occurrence should be kept from the jury.” See *Sims v. Collins*, 762 So. 2d 785, 788 (Miss. Ct. App. 2000). This issue is without merit.

¹¹ See *Williams v. State*, 37 So. 3d 717, 721 (Miss. Ct. App. 2010)(adopting the doctrine of retroactive misjoinder, and holding that if the joinder two or more counts was initially proper, but one of those counts is later vacated and the defendant can show that he suffered clear and compelling prejudice as a result of the evidence to support the vacated count, he is entitled to a new trial on the remaining count.).

Conclusion

The issues presented by Manning are either barred or are without merit. Accordingly, the State of Mississippi respectfully requests that this Honorable Court affirm his convictions.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: s/ Barbara Byrd
BARBARA BYRD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 104233

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed (and mailed by United States Postal Service) the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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

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

Justin T. Cook, Esq.
Office of State Public Defender
Post Office Box 3510
Jackson, MS 39207

This the 25th day of July, 2017.

s/Barbara Byrd
BARBARA BYRD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205-0220
Telephone: (601) 359-3680