IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-KA-00863-COA

JORDAN DAVIS A/K/A JORDAN D. DAVIS **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	06/18/2012
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	CLAIBORNE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES HUNTER NOLAN AIKENS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
DISTRICT ATTORNEY:	ALEXANDER C. MARTIN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF POSSESSION OF STOLEN PROPERTY, AND SENTENCED TO EIGHT YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH FOUR YEARS TO SERVE AND THE REMAINDER TO BE SUSPENDED FOR POST-RELEASE SUPERVISION
DISPOSITION:	REVERSED AND REMANDED: 02/25/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., ISHEE AND CARLTON, JJ.

GRIFFIS, P.J., FOR THE COURT:

¶1. Jordan Davis was indicted and tried for auto theft, grand larceny, and receiving stolen property. The jury acquitted him of auto theft and grand larceny but found him guilty of receiving stolen property. On appeal, he argues that his indictment and conviction violated

Mississippi Code Annotated 97-17-70 (Supp. 2013), the receiving-stolen-property statute. The State agrees and has confessed error. We reverse and remand for further proceedings.

FACTS

¶2. On November 8, 2011, John Watkins and his brother-in-law, Michael Dent, discovered that an old John Deere tractor, a cotton trailer, and two old trucks – a 1950 Chevrolet truck and a 1950 Studebaker truck – were missing from their cattle farm in Claiborne County, Mississippi. Watkins and Dent reported the theft to the sheriff's department.

¶3. Watkins and Dent would later discover tire marks that led out of their farm property to Bulldog Scrap Metal. Dent discovered his missing John Deere tractor at Bulldog Scrap Metal. Dent also discovered his missing hay forks there as well. Dent, however, did not find his cotton trailer or Watkins's trucks there. Both Dent and Watkins testified that they did not give permission for the items to be moved, nor did they have any personal knowledge of how the items were moved or who moved them.

¶4. Darrell Purvis, an employee of Bulldog Scrap Metal, testified that on October 13, 2011, Davis and Bradford Wren brought in Dent's John Deere tractor to Bulldog Scrap Metal. Purvis paid Davis and Wren $784.80 for the tractor. Purvis initially attempted to make the receipt out to Davis. But Davis instructed him to make it out to Wren. Purvis made the receipt out to Wren and paid him for the tractor. Purvis further testified that Davis returned on November 8, 2011, to Bulldog Scrap Metal to sell Dent's cotton trailer and Watkins's Chevrolet truck. Purvis paid Davis a total of $520 for the cotton trailer and the truck.

¶5. Davis was indicted for auto theft, grand larceny, receiving stolen property, and conspiracy. The conspiracy charge was dismissed prior to trial. Davis was acquitted of the charges of auto theft and grand larceny but was found guilty of receiving stolen property. Davis was sentenced to eight years in the custody of the Mississippi Department of Corrections, with four years suspended and four years to serve. Davis timely appealed.

ANALYSIS

¶6. Mississippi Code Annotated section 97-17-70, titled "Receiving stolen property," provides:

> (1) A person commits the crime of receiving stolen property if he intentionally possesses, receives, retains or disposes of stolen property knowing that it has been stolen or having reasonable grounds to believe it has been stolen, unless the property is possessed, received, retained or disposed of with intent to restore it to the owner.
>
> . . . .
>
> (3)(a) Evidence that the person charged under this section stole the property that is the subject of the charge of receiving stolen property is not a defense to a charge under this section; however, *dual charges of both stealing and receiving the same property shall not be brought against a single defendant in a single jurisdiction.*

(Emphasis added). Here, Davis was indicted and tried for the crimes of grand larceny and receiving stolen property for the same property.

¶7. The Attorney General has confessed error and concludes that "the State acknowledges that this case should be reversed and remanded for a new trial." We accept the State's confession.

¶8. However, Davis urges this Court to render his conviction for receiving stolen property. Davis argues that "[b]ecause Davis has been tried and found not guilty of grand

larceny of the tractor, a retrial of the charge of receiving stolen property would be inappropriate, as it would repeat the error – 'dual charges . . . against a single defendant in a single jurisdiction.'" Davis cites no other case law as authority for his contention that this Court should render the charge of receiving stolen property.

¶9. The State, likewise without citation to authority, argues:

> [W]here a defendant is inappropriately charged with both stealing and receiving the same property, but is only convicted on one of the counts, then a harmless error analysis should apply. Davis was not prejudiced by being charged with both stealing the John Deere tractor and receiving the stolen John Deere tractor since he was convicted only of receiving stolen property.

If we apply a harmless-error consideration to the prosecutor's violation of the statute, we will only encourage prosecutors to ignore this statute in the future. The Legislature's intent was clear. The Legislature determined that "dual charges of both stealing and receiving the same property *shall not be brought* against a single defendant in a single jurisdiction." *Id.* (Emphasis added).

¶10. Mississippi Code Annotated section 97-17-70(3)(a) unequivocally tells prosecutors not to indict a person for "both stealing and receiving the same property . . . against a single defendant in a single jurisdiction." Here, because the prosecutor violated this section, Davis's conviction is reversed. The parties briefs do not sufficiently address the legal authorities and arguments necessary to consider the issue of double jeopardy, under the Fifth Amendment to the United States Constitution or Article 3, Section 22 of the Mississippi Constitution. As a result, we do not address this issue here. Instead, we remand this action for further proceedings consistent with this opinion.

¶11. **THE JUDGMENT OF THE CIRCUIT COURT OF CLAIBORNE COUNTY IS**

REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO CLAIBORNE COUNTY.

LEE, C.J., ISHEE, CARLTON AND JAMES, JJ., CONCUR. ROBERTS AND FAIR, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. MAXWELL, J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION, JOINED BY ROBERTS AND FAIR, JJ. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, J.

MAXWELL, J., CONCURRING IN RESULT ONLY:

¶12. I agree with the majority that this case must be reversed and remanded, but not for the reason it cites. The majority would reverse Davis's receiving-stolen-property conviction because a separate grand-larceny count—a count upon which Davis was actually acquitted at trial—was also charged in the indictment. But any initial problem with the dual charges in the indictment was obviated when the jury acquitted Davis of grand larceny. Because jeopardy has attached to the count he was acquitted of, there is no longer danger of dual convictions or sentences for stealing and receiving the same property.

¶13. Still, I do find reversal is necessary since the jury was wrongly instructed on the only count of conviction—the receiving-stolen-property count. Even the State concedes as much. An essential element of receiving stolen property is that "the defendant knew or had reasonable grounds to believe the property had been stolen."[1] But here this element was wholly omitted from the jury instructions. Because of this obvious, plain error in the jury instructions, I find the proper course is to reverse and remand the receiving-stolen-property conviction for retrial.

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[1] *Ladd v. State*, 87 So. 3d 1108, 1117 (¶30) (Miss. Ct. App. 2012).

I. No Possibility of Dual Convictions or Punishments

¶14. Our Legislature saw fit to preclude charging a single defendant with both stealing and unlawfully receiving the same property.[2] This prohibition was no doubt premised on hornbook law that a thief cannot be convicted of both stealing and receiving the goods he has stolen. *See Thomas v. State*, 205 Miss. 653, 657, 39 So. 2d 272, 273 (1949) (citing 53 C.J. § 28). Drawing from a legal treatise on this common-sense notion, the Mississippi Supreme Court acknowledged that the statutory crime of receiving stolen property is "not intended to punish the thief by way of a double penalty but [is] directed against those who would make theft easy or profitable." *Id.* So it is obvious that protection from double conviction and punishment is at the heart of both the statutory and common-law prohibition against prosecuting a single defendant for both receiving and stealing the same goods.

¶15. However, here, there are not dual convictions or punishments to complain of. Since Davis was acquitted by the jury on the larceny charge, jeopardy has attached on that count. So he can never be subjected to dual larceny and receipt-of-stolen-property charges stemming from these same acts. *See* Miss. Const. art. 3, § 22 ("No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution."); *see also North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (overruled on other grounds) (holding Double Jeopardy Clause in Fifth Amendment of United States Constitution protects against second prosecution for same offense after acquittal). In other words, the evil of double convictions and punishments is no longer present. Thus, I disagree with the majority's reason for reversal and remand.

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[2] *See* Miss. Code Ann. § 97-17-70(3)(a) (Supp. 2013).

II. Missing Element in Jury Instructions

¶16. However, I do agree with the majority that reversal is proper. The required elements of receiving stolen property are: "(1) the intentional possession, receipt, retention or disposition of personal property (2) stolen from someone else (3) with knowledge or a reasonable belief that the property is stolen." *Ezell v. State*, 956 So. 2d 315, 319 (¶12) (Miss. 2006) (quoting *Washington v. State*, 726 So. 2d 209, 212-13 (¶10) (Miss. Ct. App. 1998)); *see also* Miss. Code Ann. § 97-17-70(1) (Supp. 2013). And here, the State concedes that the jury was not instructed that the defendant knew or should have reasonably believed the tractor was stolen—a necessary element of this crime.[3] *See Ladd,* 87 So. 3d at 1117 (¶30).

¶17. Until recently, this omission would have been subject to harmless-error review. For a little over a decade, Mississippi had adhered to the United States Supreme Court's view that "the omission of an element is an error that is subject to harmless-error analysis." *Neder*

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[3] The receiving-stolen-property instruction read:

> [I]f you believe from the evidence in this case, beyond a reasonable doubt, that:
>
> (1) On or about the 13th day of October, 2011, in Claiborne County, Mississippi;
>
> (2) the said Jordan Davis did wilfully, unlawfully, intentionally and feloniously possess, retain and dispose of a John Deere tractor;
>
> (3) of value of more than five hundred dollars;
>
> (4) the personal property of Mike Dent,
>
> then you shall find the said Jordan Davis guilty of Possession of Stolen Property as to count three.

v. United States, 527 U.S. 1, 15 (1999); *Kolberg v. State*, 829 So. 2d 29, 49-50 (¶39) (Miss. 2002) (applying *Neder*'s harmless-error analysis where trial court failed to instruct jury on underlying felony in capital-murder prosecution). But our state's high court just recently reversed course and jettisoned this approach.

¶18. In *Harrell v. State*, a majority of our supreme court overruled *Kolberg*'s holding that "each case must stand on its own facts in determining whether a particular error constitutes reversible error"[4] when reviewing the omission of an element from a jury instruction. *Harrell v. State*, 2010-CT-01571-SCT, 2014 WL 172125, at *5 (¶18) (Miss. Jan. 16, 2014). In overruling *Kolberg*, the *Harrell* majority created a new automatic-reversal rule. Under this rule, our supreme court instructs that it is now "always and in every case reversible error" if an element of a charged criminal offense is omitted from a jury instruction. *Id.* at *9 (¶30). This approach apparently mandates reversal in all cases even if the instructional error was not raised at trial and even if under *Neder*-based harmless-error review it did not affect the jury's verdict.[5]

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[4] *Kolberg*, 829 So. 2d at 48 (¶34) (quoting *Carleton v. State*, 425 So. 2d 1036, 1040 (Miss. 1983), *overruled on other grounds by Payton v. State*, 785 So. 2d 267, 270 (¶11) (Miss. 1999)).

[5] There is the potential that *Harrell*'s mandatory reversal rule will likely, in some instances, entice defendants to remain silent at instruction conferences when they know the State's or court's instruction is flawed—hedging their bets that, if not acquitted by the jury, they can always claim plain error on appeal and *automatically* get a new trial. And this new absolute rule mandates reversal in cases where our appellate courts would confidently conclude the instructional error did not affect the verdict. For example, there could be a case where a required element is stipulated by the defendant and State—removing the necessity the element be proven by the State beyond a reasonable doubt—but the element is inadvertently left out of an instruction. In such instances, reversal would be mandated, even though the error was obviously harmless.

¶19. While after *Harrell*, it looks like courts need no longer engage in deciding if an injustice occurred in the omission of an element from an instruction, I still find the omission here was harmful because the jury was wrongly instructed it could convict Davis without the State proving he knew or should have known the tractor was stolen.

¶20. And it is not unreasonable to believe that, here, the jury perhaps convicted Davis of the property-receipt crime—rather than the larceny charge—because larceny required stealing, while the erroneous receiving-stolen-property instruction directed that mere possession, retention, or disposal of the tractor by Davis was enough to impose criminal liability.

¶21. Because Davis's substantial rights were affected by the omission of the essential element that the State prove he had knowledge the tractor was stolen, I would reverse and remand this count.

ROBERTS AND FAIR, JJ., JOIN THIS OPINION.

IRVING, P.J., DISSENTING:

¶22. I agree with the majority that Davis's conviction must be reversed because his indictment violated Mississippi Code Annotated section 97-17-70(3)(a) (Supp. 2013). I also agree with Judge Maxwell that the jury was not properly instructed with respect to the charge of receiving stolen property. Further, I agree with Judge Maxwell that since Davis was tried and acquitted of the larceny charge, jeopardy has attached to the acquitted count. However, with all due respect to the majority and to Judge Maxwell, I cannot agree that Davis can be legally retried for receiving stolen property. Therefore, I dissent. I would reverse and render Davis's conviction for receiving stolen property.

¶23. Section 97-17-70(3)(a) provides in pertinent part that "dual charges of both stealing and receiving the same property shall not be brought against a single defendant in a single jurisdiction." In my judgment, it is noteworthy and dispositive of the issue in today's case that the statute prohibits the bringing of dual charges in a ***single jurisdiction***. Notice, the prohibition is not against bringing dual charges in a single indictment, but against bringing dual charges against ***a single defendant in a single jurisdiction***. Therefore, prosecuting a single defendant in a single jurisdiction in separate trials—once for both larceny and receiving stolen property, and once for receiving stolen property only—is prohibited by the statute, as there is no way that Davis can be retried for receiving stolen property in Claiborne County, Mississippi, without becoming the victim of dual charges brought in a single jurisdiction. He has already been acquitted of one charge—larceny—brought against him in Claiborne County. Retrying him in Claiborne County on the charge of receiving stolen property would result in dual charges being brought against him in a single jurisdiction, which is prohibited by section 97-17-70(3)(a).

¶24. In my judgment, Judge Maxwell's focus on dual convictions and dual punishments misdirects the argument. It ignores a critical fact to suggest, as he does, that "protection from double conviction and punishment is at the heart of both the statutory and common-law prohibition against prosecuting a single defendant for both receiving and stealing the same goods." Con. Op. at (¶14). Be that as it may, by the plain wording of the statute, it is the ***bringing of dual charges*** that is prohibited, not the obtaining of dual convictions or punishments. I would see no need for the statutory enactment if it were simply the prohibition of dual convictions or punishments that the Legislature was taking aim at, as the

double-jeopardy provisions of both our state and federal Constitutions take care of that.

¶25. For the reasons presented, I dissent. I would reverse and render Davis's conviction for receiving stolen property, rather than send the case back for retrial.

BARNES, J., JOINS THIS OPINION.