

Serial: 187234

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-M-01444

ARMSTER LACKING a/k/a ARMSTER O. LACKING

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

ORDER

This matter is before the Court en banc on the Application for Leave to Proceed in the Trial Court filed pro se by Petitioner and the Response filed by Respondent. Petitioner was convicted of kidnaping in the Pike County Circuit Court. Petitioner's conviction and sentence were affirmed by the Court of Appeals. *Lacking v. State*, 775 So.2d 731 (Miss. Ct. App. 2000).

Petitioner argues that the jury was instructed on a charge for which Petitioner was not indicted. In particular, Petitioner argues that the jury was instructed on kidnaping either by force or inveiglement, although his indictment charged kidnaping by force. After due consideration, the Court finds that Petitioner's Application is barred by the statute of limitations, and no exceptions are applicable. Miss. Code Ann. § 99-39-5(2) (Supp. 2013). The Court further finds that this issue could have been raised at trial or on direct appeal and was not, and is waived. The Application for Leave to Proceed in the Trial Court should be denied.

IT IS THEREFORE ORDERED that the Application for Leave to Proceed in the Trial

Court filed pro se by Petitioner is denied.

SO ORDERED, this the 12th day of August, 2014.

/s/ Ann H. Lamar

ANN H. LAMAR, JUSTICE
FOR THE COURT

TO DENY: WALLER, C.J., RANDOLPH, P.J., LAMAR, CHANDLER, PIERCE AND
COLEMAN, JJ.

DICKINSON, P.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN
STATEMENT JOINED BY KITCHENS AND KING, JJ.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2013-M-1444

ARMSTER LACKING a/k/a ARMSTER O. LACKING

v.

STATE OF MISSISSIPPI

DICKINSON, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. A grand jury indicted Armster Lacking for forcible kidnapping. But the trial judge instructed the jury that it may convict Lacking for kidnapping by force *or trick*. The jury returned a guilty verdict. The Court of Appeals affirmed,¹ and now he argues in his petition for post-conviction relief that the trial judge constructively amended his indictment.

¶2. In the indictment, the State specifically and particularly indicted Lacking for kidnapping by force. But at trial, the State failed to present even a shred of evidence that Lacking used force to effectuate the kidnapping. Instead, the prosecutor based his case solely on a theory of kidnapping by trick, even going so far as to tell the jury:

[T]he method he used to get the child to go with him was trickery, and when you read the instructions of the Court on the law of kidnapping you're going to see the word inveigle, and when you further read the instructions you will see that the word inveigle means to trick or to deceive. He tricked the little boy to go with him.

The prosecutor then proceeded to explain kidnapping by force, and distinguished Lacking's inveiglement case from a force case. Simply put, at no time – from opening statement to

¹ *Lacking v. State*, 775 So. 2d 731 (Miss. Ct. App. 2000).

closing argument – did the State suggest, or even attempt to prove, that Lacking used force to effectuate the kidnapping.

¶3. When the State, in the indictment, made a specific claim as to how Lacking effectuated the kidnapping, it took upon itself the burden of proving that claim.² But the trial court’s jury instructions abandoned the claim the State made in the indictment, and allowed the jury to convict on a different theory. This deprived Lacking of a defense available to him under the indictment: to oppose the sufficiency of the State’s evidence on the element of force.³ So, if procedurally proper, Lacking’s claim is meritorious. And because that claim affects Lacking’s fundamental right to a trial by grand jury indictment, it is excepted from procedural bars.⁴ So this Court should grant Lacking’s petition.

KITCHENS AND KING, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.

² See *Richmond v. State*, 751 So. 2d 1038, 1046 (Miss. 1999) (holding that when the State includes an unnecessary element of proof in the indictment, the State is required to prove that fact at trial).

³ See *Davis v. State*, 684 So. 2d 643, 660 (Miss. 1996) (holding that prejudice results when jury instructions fail to mirror an indictment in a way that precludes a defense available under the indictment and creates a possibility that the jury convicted the defendant on an extraneous element interjected by the jury charge).

⁴ *Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010).