No. ___

IN THE

Supreme Court of the United States

COURTNEY L. RAINEY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR WRIT OF CERTIORARI

E. CARLOS TANNER, III, ESQ.
263 E. Pearl Street
Jackson, MI 39201
(601) 460-1745
carlos.tanner@thetannerlawfirm.com

LISA MISHUNE ROSS, ESQ.
Counsel of Record
LAW OFFICES OF LISA M. ROSS
514 E Woodrow Wilson Avenue
Building E
Jackson, MI 39216
(601) 981-7900
lross@lmrossatlaw.com

Counsel for Petitioner

June 7, 2022

QUESTIONS PRESENTED

The State of Mississippi convicted Petitioner of one count of witness intimidation pursuant to Section 97-9-113(d) of the Mississippi Code, which makes it a crime to ask a witness to provide false information in connection with an ongoing investigation. The sole witness the State of Mississippi presented at trial to support that conviction told the jury that she, the witness, had falsely told law enforcement that Petitioner had engaged in criminal activity. As to the witness intimidation charge, the witness informed the jury that Petitioner never intimidated, or attempted to intimidate, her and that Petitioner only asked the witness to go back to the police and tell them the truth to correct the false accusations the witness had made against Petitioner. The Mississippi Court of Appeals reversed Petitioner's conviction for witness

intimidation, but the Mississippi Supreme Court reinstated the conviction on the State of Mississippi's writ of certiorari to that Court.

The questions presented are:

1. Whether it violates a citizens' rights under the First Amendment's Freedom of Speech clause for a State to prosecute that citizen for asking someone to correct false incriminating information they have provided law enforcement in connection with a criminal investigation.

2. Whether a conviction pursuant to Miss. Code Ann. § 97-9-113(d) offends the Due Process Clauses of the Fifth and Fourteenth Amendment in the absence of evidence that the defendant sought to have the witness provide false information to police in an ongoing investigation.

PARTIES TO PROCEEDING AND RELATED CASES

PARTIES TO PROCEEDING:
Courtney Rainey, Petitioner

State of Mississippi, Respondent

CASES:

States of Mississippi v. Courtney Rainey, Mississippi Cause No. 2018-0512 (Closed)

State of Mississippi v. Courtney Rainey, Mississippi Cause No:, 2018-0513 (Closed)

States of Mississippi v. Courtney Rainey, Mississippi Cause No. 2018-0514 (Closed)

States of Mississippi v. Courtney Rainey, Mississippi Cause No. 2018-0515 (Closed)

States of Mississippi v. Courtney Rainey, Mississippi Cause No. 2018-0516 (Closed)

States of Mississippi v. Courtney Rainey, Mississippi Cause No. 2018-0517, (Closed)

States of Mississippi v. Courtney Rainey, Mississippi Cause No. 2018-0518,

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A. OPINIONS BELOW

The unpublished opinion of the Mississippi Supreme Court overturning the opinion of the Mississippi Court of Appeals and affirming Petitioner's conviction is reproduced in the Appendix as Appendix A. The unpublished opinion of the Mississippi Court of Appeals reversing Petitioner's conviction is reproduced in the Appendix as Appendix B. The Judgment of Conviction and Sentencing Order of the Circuit Court of Madison County, Mississippi, dated September 24, 2019, is reproduced in the Appendix as Appendix C. The Order of the Mississippi Court of Appeals Denying the State of Mississippi's Motion for Rehearing, dated June 29, 2021, is reproduced in the Appendix as Appendix D.

JURISDICTION

The Mississippi Supreme Court rendered its decision affirming Petitioner's conviction on March 10, 2022. (App. 1a) On this date, Petitioner timely filed her petition for certiorari to this Court. This Court, therefore, has jurisdiction over this petition for writ of certiorari pursuant to Title 28 § 1257.

STATEMENT OF THE CASE

In November 2018, a former prosecutor with the Madison County, Mississippi District Attorney's Office indicted nine different people on allegations of vote fraud and related offenses. (App. 40a). Petitioner, Ms. Courtney Rainey, was one of the people the State of Mississippi charged in that exercise. (APP. 40a). Respondent charged Ms. Rainey in eight separately-filed, multicount indictments. (APP. 31a). The result of two jury trials and a series of dismissals of the majority of the

indictments against Petitioner was that Petitioner was convicted of none of the vote fraud charges and received a guilty verdict for witness intimidation in violation of MISS. CODE ANN. § 97-9-113(d). (App. 2a; App. 31a). That version of the statute requires the State to prove that Petitioner encouraged a witness to provide false information to law enforcement in an ongoing investigation. (App. 5a)

At the trial which resulted in Petitioner's sole count of conviction, the State called one witness to support its claims that Petitioner had violated Miss. Code. Ann. § 97-9-113(d). (App. 34a) The State of Mississippi's sole trial witness who testified on the issue of witness intimidation stated expressly (1) that Petitioner only told her to go back to Respondent's investigators and tell them the truth about the witness' voting related encounters with Petitioner, (2) that up to the point of the one

encounter that formed Mississippi's basis for the conviction, the witness had in fact told those investigators numerous falsehoods implicating Petitioner in vote fraud, (3) that the witness was not intimidated by Petitioner during that encounter, and (4) that the witness did not perceive Petitioner to be trying to intimidate her. (APP. 34a).

After Petitioner's second trial which resulted in no convictions, the Mississippi trial court sentenced Petitioner for her conviction in the first trial to the statutory maximum, fifteen-year sentence of imprisonment for witness intimidation in violation of MISS. CODE ANN. § 97-9-113(d), but it suspended three of those fifteen years in prison. (App. 39a)

Ms. Rainey timely appealed her conviction and sentence to the Mississippi Court of Appeals. (App. 30a) Petitioner attacked her conviction on free

speech grounds based on the First Amendment and on insufficiency of the evidence grounds, which is rooted in the due process clauses of the Fifth and Fourteenth Amendments (APP.44a).

The Mississippi Court of Appeals reversed and rendered Petitioner's conviction on the grounds that the State of Mississippi had failed to put forth legally sufficient evidence to sustain the jury's verdict. (App. 56a) The State of Mississippi moved the Mississippi Court of Appeals for a rehearing, and that Court denied the State's motion. (App. 74a) The State then petitioned the Mississippi Supreme Court for a writ of certiorari. The Mississippi Supreme Court reversed the opinion of the Mississippi Court of Appeals and affirmed Petitioner's conviction and sentence.

The State of Mississippi's prosecution of Petitioner, and the jury's finding Petitioner guilty,

for witness intimidation violates Petitioner's rights to free speech under the FIRST AMENDMENT to the United States Constitution. U.S. CONST., amend. I, XIV. The subject conviction also offends the FIFTH and FOURTEENTH AMENDMENTS because the State of Mississippi failed to present legally sufficient evidence to meet the elements of witness intimidation under Section 97-9-113(d). That statute requires proof that, among other facts, the person being prosecuted told a victim-witness to provide law enforcement (1) ***false information*** in connection with (2) an ***ongoing*** investigation. The state offered through its only witness at trial on this point evidence that directly contradicted the first of those above-mentioned elements and no evidence whatsoever in support of the latter of those two elements. The jury, nevertheless, convicted Petitioner of that count. (APP.30a).

REASONS FOR GRANTING CERTIORARI

This Court should grant Petitioner certiorari because this Court's and other jurisdictions' precedent demonstrate that Petitioner's conviction and sentence for the version of witness intimidation at issue contravenes the FIRST, FIFTH, and FOURTEENTH AMENDMENTS to the United States Constitution. U.S. CONST., amend. I, XIV. The jurisprudence in which Court's have sustained convictions on witness intimidation statutes generally fall in two categories, neither of which are present in Petitioner's case. Constitutionally acceptable prosecutions for witness intimidation either involve (1) actual, attempted, or victim-perceived intimidation or "true threats" of harm, or (2) conduct that does or intends to thwart justice or inject falsities into legal proceedings or

investigations. *United States v. Judd*, 315 Fed. App'x 35, 39 (10th Cir. 2008); *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). Mississippi's appellate courts contravened this Court's and other courts' prior holdings and erroneously restricted Petitioner's First Amendment rights.

It would be a perversion of the FIRST and FOURTEENTH AMENDMENTS for a person to become aware that he or she had been falsely implicated in a crime and then be prosecuted and convicted for requesting that the person who provided the Government that false incriminating information to go back to law enforcement to correct those falsities. Mississippi's only witness on the witness intimidation count against Petitioner stated at trial that her interaction with Petitioner was just

that—Petitioner's request for her to correct falsities. The witness stated without equivocation that Petitioner asked her about her false comments to law enforcement and then requested she change them in an effort to clear Petitioner's name of wrongdoing. Importantly, the witness testified that as of the time Petitioner made the aforementioned request to her, the witness had in fact provided law enforcement with false information implicating Petitioner in criminal voting activity.

The State of Mississippi obtained the conviction at issue with insufficient evidence, thereby violating Petitioner's rights under the Fifth and Fourteenth Amendments. U.S. CONST., amend. V and XIV. (APP.185-190). Section 97-9-113(d) For those reasons, Petitioner asks this Court to grant her certiorari.

The aforementioned witness stated without equivocation that Petitioner questioned her about her false comments to law enforcement and then requested she change them in an effort to clear Petitioner's name of wrongdoing. Importantly, the State of Mississippi's witness testified that as of the time Petitioner made the aforementioned request to her, the subject witness had in fact provided law enforcement with false information implicating Petitioner in criminal voting activity. The witness swore to the jury that Petitioner only told her "to go back and tell the truth" to the State's investigators. That statement was within Ms. Rainey's free speech rights.

If these facts withstand constitutional scrutiny, then an overzealous prosecutor could prosecute anyone—a lawyer, a parent, or a concerned citizen, for example—who might endeavor

to get a falsifying witness to come forward with truthful information in support of someone they had lied on and subjected to criminal prosecution. And what of a court? Under the law that *this* set of facts would yield if unchecked, a judge could be prosecuted for admonishing a falsely testifying witness to tell the truth, however, far-fetched that might seem.

The elements of Section 97-9-113(d) are as follows:

> (1) That the defendant did (or attempted to) solicit, encourage, or requested a witness;
> (2) To provide ***false*** information intended to hinder or interfere an ***ongoing*** investigation of a criminal act; and
> (3) That the defendant did so intentionally or knowingly.

MISS. CODE ANN. § 97-9-113(d); (APP.9-10).

On the "ongoing investigation" element, the State of Mississippi called none of its investigative personnel or persons with knowledge of whether the investigation into this vote fraud issue was still

ongoing at the time Petitioner spoke with the witness. The prosecution was required to present trial testimony proving that the investigation was still ongoing because to find otherwise would be to read that language out of the statute. For that reason alone, Mississippi's Courts should have found pursuant to the Fifth and Fourteenth Amendments that the evidence underlying Petitioner's Section 97-9-113(d) witness intimidation conviction is insufficient.

CONCLUSION

For the reasons outlined above, Petitioner, Ms. Courtney Rainey, prays that this Court will grant her certiorari with respect to her conviction and sentence as it violates the FIRST, FIFTH and FOURTEENTH EIGHTH AMENDMENTS to the United States Constitution .

RESPECTFULLY SUBMITTED, this the 7th day of June, 2022.

Lisa Mishune Ross, Esq.
Counsel of Record
Law Offices of Lisa M. Ross
514 E Woodrow Wilson Avenue
Building E
Jackson, Mississippi 39216
(601) 981-7900 (Office)
(601) 981-7197 (Facsimile)
lross@lmrossatlaw.com

E. Carlos Tanner, III, Esq.
263 E. Pearl Street
Jackson, Mississippi 39201
Telephone: (601) 460-1745
Facsimile: (662) 796-3509
carlos.tanner@thetannerlawfirm.com

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

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No. 2019-CT-01651-SCT

———

COURTNEY L. RAINEY

v.

STATE OF MISSISSIPPI

———

ON WRIT OF CERTIORARI

———

DATE OF JUDGMENT:
09/24/2019

TRIAL JUDGE:
HON. DEWEY KEY ARTHUR

TRIAL COURT ATTORNEYS:
BRYAN P. BUCKLEY
DARLA Y. MANNERY-PALMER
E. CARLOS TANNER, III
KATIE NICOLE MOULDS
MICHAEL T. STERLING
JOHN CURTIS HALL, II
RANDALL HARRIS
ASHLEY RIDDLE ALLEN
JAD JAMAL KHALAF

COURT FROM WHICH APPEALED:
MADISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:
E. CARLOS TANNER, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL
BY: BARBARA BYRD

DISTRICT ATTORNEY:

JOHN K. BRAMLETT, JR.

NATURE OF THE CASE:

CRIMINAL - FELONY

DISPOSITION:

THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED, AND THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT IS REINSTATED AND AFFIRMED - 03/10/2022

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

EN BANC.

GRIFFIS, JUSTICE, FOR THE COURT:

¶1. This certiorari case considers whether there was sufficient evidence for a jury to convict Courtney Rainey of the crime of witness intimidation and whether the fifteen-year sentence violates Rainey's Eighth Amendment right to be free of cruel and unusual punishment. We reverse the judgment of the Court of Appeals and reinstate and affirm the judgment of the Madison County Circuit Court.

PROCEDURAL HISTORY

¶2. Courtney Rainey was indicted on two counts. Count I charged Rainey with the crime of voter fraud under Mississippi Code Section 23-15-753 (Rev. 2018). Count II charged Rainey with the crime of witness intimidation under Mississippi Code Section 97-9-113(1)(d) (Rev. 2020). The jury found Rainey guilty of

Count II but could not decide on Count I, and the circuit court declared a mistrial as to Count I. On the conviction for Count II, Rainey was sentenced to serve fifteen years with three years suspended and five years' probation, together with court costs and fees. The circuit court denied Rainey's post-trial motions.

¶3. Rainey filed a timely appeal, and the appeal was deflected to the Court of Appeals. A divided Court of Appeals reversed and rendered Rainey' s conviction and sentence. *Rainey v. State*, No. 2019-KA-01651-COA, 2021 WL 973050, at *1 (Miss. Ct. App. Mar. 16, 2021). Judge Deborah McDonald's well-written opinion addressed Rainey's issues. First, Rainey claimed that her conviction for witness intimidation violated her First Amendment right to free speech. The Court of Appeals held that Rainey's conviction did not violate her First Amendment right to free speech. *Id.* at *8. Second, Rainey claimed that insufficient evidence supported her conviction for witness intimidation. The Court of Appeals agreed and reversed and rendered Rainey's conviction. *Id.* at *10. Third, Rainey claimed that the circuit court abused its discretion when it sentenced her to the statutory maximum without considering the proportionality of the sentence under the Eighth Amendment. The Court of Appeals did not address this issue. *Id.*

¶4. The State filed a petition for writ of certiorari arguing that the Court of Appeals erred, that sufficient evidence sustained Rainey's conviction for witness intimidation, and that Rainey's sentence did not amount to cruel and unusual punishment under the Eighth Amendment. This Court granted certiorari.

DISCUSSION

I. Did Rainey's conviction under the witness-intimidation statute violate her First Amendment right to free speech?

¶5. The Court of Appeals ruled that "[b]ecause Rainey's speech in this instance could constitute prosecutable speech under Mississippi's statute, we cannot hold the statute unconstitutional as applied to her facts. Accordingly, we do not find that Mississippi Code Annotated [S]ection 97-9-113 as applied to her facts violated Rainey's First Amendment free-speech right." *Id.* at *18. Rainey did not challenge this ruling. Therefore, it is not before this Court and will not be addressed.

II. Was sufficient evidence presented to convict Rainey of the crime of witness intimidation under Mississippi Code Section 97-9-113?

A. Standard of Review

¶6. This Court reviews a sufficiency-of-the-evidence challenge de novo. *Body v. State*, 318 So. 3d 1104, 1108 (Miss. 2021). "[T]he critical inquiry 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.* (internal quotation marks omitted) (quoting *Parish v. State*, 176 So. 3d 781, 785 (Miss. 2015)). "This Court accept[s] as true all evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and . . . disregard[s] evidence favorable to' [the defendant]." *Barfield v. State*, 22 So. 3d 1175, 1186 (Miss. 2009) (alterations in original) (quoting *Moore v. State*, 996 So. 2d 756, 760-1 (Miss. 2008)).

B. The Crime Charged

¶7. Under Count II, the indictment charged that Rainey

> intentionally and knowingly attempted] to solicit, encourage or request a witness to provide false information intended to defeat or defend against an existing criminal charge or to hinder or interfere an ongoing investigation of criminal act, to-wit: Emma Ousley (a witness to a crime purportedly committed by Defendant) at her home at the Canton Place Apartments, by requesting Ms. Ousley to change her story that she provided to investigators so the defendant would not get in trouble[.]

Section 97-9-113(1)(d) provides that "[a] person commits the crime of intimidating a witness if he intentionally or knowingly: . . . [s]olicits, encourages, or requests a witness to provide false information intended to defeat or defend against an existing criminal charge or to hinder or interfere an ongoing investigation of a criminal act." Miss. Code Ann. § 97-9-113(1)(d) (Rev. 2020).

C. The Evidence Admitted

¶8. The evidence established that Rainey was a City of Canton resident and employee. In March 2017, Rainey actively supported a local candidate in the upcoming Canton municipal election. Rainey sought to register voters and encountered Emma Ousley at Ousley's apartment. Rainey approached Ousley's apartment and met Ousley, Marvin Cain, and a man named Red, who were drinking beers on the porch when Rainey met them.

¶9. Rainey asked if they were registered to vote. Cain said that he was not. Rainey then helped Cain and Ousley, who had recently moved and not updated her information, fill out the voter registration forms. Rainey filled out the forms, allowed Cain and Ousley to read over the answers, and then they signed the forms. Rainey then said that she would buy them a round of beer and gave $10 to Red, who went to purchase the beer.

¶10. As the election neared, Rainey again encountered Ousley. Rainey offered Ousley a ride to allow Ousley to vote by absentee ballot. After Ousley voted, Rainey gave her $10 for lunch.

¶11. In early 2018, the Madison County District Attorney's office investigated potential voter fraud associated with the May 2017 Canton municipal election. Carroll Phelps, Samuel Goodman, and Max Mayes conducted the investigation.

¶12. Mayes and Phelps contacted Ousley and questioned her about Rainey. They asked Ousley about Rainey's voter-registration visit. Based on Ousley's answers, Mayes wrote a statement, which Ousley signed, that revealed that Rainey had come to the apartments, called out for anyone who wanted to vote, and asked if anyone wanted to make some money. The statement also revealed that Rainey had given both Marvin and Ousley $10 each for a beer after she registered them.

¶13. Shortly after Ousley spoke with investigators, Rainey confronted Ousley at her apartment complex about her statements to the investigators. The record did not mention how Rainey learned of the investigation or how Rainey knew that investigators questioned Ousley.

¶14. At trial, Ousley testified about each of Rainey's visits to her apartment and all events related to her registration and voting. Ousley also testified about her encounter with Rainey after the investigation had begun.

¶15. Ousley acknowledged at trial that she lied to investigators Mayes and Phelps because they made her nervous. Ousley told the investigators that Rainey gave Ousley, Cain, and Red each $10 to purchase beer after they registered to vote. Ousley corrected her statement and testified that Rainey had given them $10 to split amongst them for beer. Ousley testified that she did not tell the investigators that Rainey had given her $10 for lunch after she had voted. Ousley also said that the investigators did not coerce, intimidate, or frighten her to make a statement.

¶16. Ousley then testified about her encounter with Rainey. Ousley said that Rainey did not intimidate her but that Rainey asked her what she said to investigators. Ousley recalled that she told Rainey that she "was going to tell the truth." However, Ousley later contradicted this statement and testified that Rainey told Ousley "to tell the truth." When Ousley was done with the conversation, she told Rainey to leave, and Rainey "just left, it wasn't no bad thing about that."

D. Whether the evidence admitted was sufficient.

¶17. Rainey was charged with a violation of Section 97-9-113(1)(d). The State had the burden to prove beyond a reasonable doubt that Rainey intentionally or knowingly "solicit[ed], encourag[ed], or request[ed]" that Ousley, a witness, "provide false information intended to defeat or defend against an existing

criminal charge or to hinder or interfere an ongoing investigation of a criminal act." Miss. Code Ann. § 97-9-113(1)(d).

¶18. In the majority opinion, the Court of Appeals ruled:

> With no proof of intimidation, threats, harassment, or proof that Rainey instructed Ousley to give false statements, the verdict of the jury must be overturned. . . .
>
> But here the one witness against Rainey was Ousley who in her sworn testimony to the jury said that Rainey did not threaten or intimidate her. Nor did Rainey pressure her to give false testimony. To reiterate, Ousley repeatedly testified that Rainey told her to tell the truth. In his dissent, Judge Wilson asserts that we have overstepped our bounds in our review. He quotes *Poole v State*, 46 So. 3d 290, 293-94 (¶ 20) (Miss. 2010), "We are not required to decide—and in fact we must refrain from deciding whether we think the State proved the elements. Rather, we must decide whether a reasonable juror could rationally say that the State did." But immediately thereafter, the supreme court in *Poole* says, "If, *on any element of the crime*, it is impossible to say that a reasonable person could have found that the State proved that element, then we must reverse and render." *Id.* (emphasis added). In this case, there is simply no credible evidence that Rainey told Ousley to give false statements in the investigation, which was a key element of the crime charged. This is one of those "exceptional cases" referred to in *Weatherspoon*

> *v. State*, 56 So. 3d 559, 564 (¶ 20) (Miss. 2011), where "the evidence preponderates heavily against the verdict." Given the proof in this record, reasonable men could not have found her guilty of witness intimidation beyond a reasonable doubt. Accordingly, we reverse and render in favor of Rainey.

Rainey, 2021 WL 973050, at *10 (footnotes omitted). Judge Wilson's dissenting opinion asserted:

> When Rainey later learned that Ousley had talked to the investigators, she showed up at Ousley's house. Ousley testified that Rainey had never visited her house on any other occasion. According to Ousley, Rainey asked her "a lot of questions" about what she had told the investigators and wanted to know whether she had told the investigators that Rainey had given her ten dollars. On cross-examination, defense counsel asked Ousley, "[H]ow many times did [Rainey] try to tell you to change your story . . . ?" Ousley answered, "One time"—when Rainey confronted her "at [her] house."
>
> The majority finds that Rainey is innocent by reasoning that "[i]f Rainey was trying to get Ousley to `change her story,' it was only to change it from the lies contained in her written statement to the truth." *Ante* at ¶ 38 (footnote omitted). This improperly views the evidence in the light most favorable to Rainey. The jury was not required to accept this innocent explanation, and in a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the State, not Rainey. *Poole v*

State, 46 So. 3d 290, 293 (¶ 20) (Miss. 2010). "We are not required to decide—and in fact we must refrain from deciding—whether we think the State proved the elements. Rather, we must decide whether a reasonable juror could rationally say that the State did." *Id.* at 293-94 (¶ 20).

The majority seems to assume and accept as fact that Rainey (a) had learned all the details of Ousley's statement to the investigators and (b) confronted Ousley only to urge her to correct specific misstatements—e.g., that Rainey gave Ousley and Cain ten dollars total, not ten dollars each, when she helped them complete voter registration applications. *See ante* at ¶¶ 37-38. The jury was not required to accept this innocent explanation of Rainey' s visit. Rather, there was sufficient evidence for the jury to infer that Rainey (a) knew Ousley had told investigators that Rainey had given her money in connection with her registration application and/or absentee vote and (b) confronted Ousley to get her to recant her statement in its entirety. Thus, the jury reasonably could have found Rainey guilty of asking or encouraging Ousley "to provide false information" in order to hinder the ongoing criminal investigation. Miss. Code Ann. § 97-9-113(1)(d). Accordingly, Rainey's conviction should be affirmed.

Id. at *15 (Wilson, P.J., dissenting).

¶19. There was simply no basis for the Court of Appeals' ruling that "[w]ith no proof of intimidation, threats, harassment, or proof that Rainey instructed Ousley to give false statements, the verdict of the jury

must be overturned." *Id.* at * 10. The Court of Appeals was in error to conclude that "intimidation, threats, [or] harassment" was required to support a conviction under Section 97-9-113(1)(d). *Id.* The statute requires that the State prove that Rainey intentionally or knowingly solicited, encouraged, or requested that Ousley provide false information intended to defeat or defend against an existing criminal charge or to hinder or interfere with an ongoing investigation of a criminal act.

¶20. Also, there is no requirement under Mississippi Code Section 97-9-113(1)(d) that Rainey successfully intimidate, threaten, or harass Ousley or any other witness. Section 97- 9-113(3) provides that "[i]t is not a defense to a prosecution under this section if the actual completion . . . was prevented from occuring." Miss. Code Ann. § 97-9-113(3) (Rev. 2020).

¶21. The Court of Appeals found that "[t]his is one of those 'exceptional cases' referred to in *Weatherspoon v. State*, 56 So. 3d 559, 564 (¶ 20) (Miss. 2011), where 'the evidence preponderates heavily against the verdict." *Rainey*, 2021 WL 973050, at * 10. The Court of Appeals held that "there is simply no credible evidence that Rainey told Ousley to give false statements in the investigation, which was a key element of the crime charged." *Id.* The Court of Appeals claimed that "reasonable men could not have found her guilty of witness intimidation beyond a reasonable doubt." *Id.*

¶22. In *Weatherspoon*, the Court considered the grant of a new trial and the overwhelming weight of the evidence, not the legal sufficiency of the evidence. *Weatherspoon*, 56 So. 3d at 563 ("Weatherspoon does not contest the legal sufficiency of the evidence."). The "exceptional cases" mentioned specifically concerned new trials and not the overwhelming weight of

evidence. *Id.* at 564 ("[t]he power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." (Internal quotation marks omitted) (quoting *Bush v State*, 895 So. 2d 836, 844 (Miss. 2005), *abrogated on other grounds by Little v. State*, 233 So. 3d 288 (Miss. 2017))). Therefore, *Weatherspoon's* "exceptional cases" do not apply here. The Court of Appeals improperly interpreted the "exceptional cases" referred to in *Weatherspoon.*

¶23. The standard of review requires that this Court view the evidence in the light most favorable to the State and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Body*, 318 So. 3d at 1108 (internal quotation marks omitted) (quoting *Parish*, 176 So. 3d at 785).

¶24. The evidence clearly established that Rainey went to Ousley's apartment to discuss Ousley's statements to the investigators. Ousley testified that she told Rainey that "she was going to tell the truth." Later, Ousley stated that Rainey was the one to tell her to "tell the truth." The evidence indicated that Ousley made contradicting statements. Yet the defense did not attempt to impeach her. There was no evidence as to how Rainey learned of the content of Ousley's statements to investigators. Ousley consistently claimed that Rainey asked her numerous questions about the investigation and what she told the investigators. When Rainey confronted Ousley, she had no other reason to approach her except to discuss the investigation.

¶25. Ousley also testified that Rainey came to see her at work on "two or three" occasions but that Ousley was not there on those days. Ousley did not know why

Rainey would visit her place of work but "figured" that Rainey came to her place of work to convince her to change her story, just as she tried to do at Ousley's apartment.

¶26. From these facts, the Court of Appeals found that "the jury's conviction of witness tampering by inducing a witness to give a false statement [was] unsupported" because "Ousley repeatedly testified that Rainey told her to tell the truth." *Rainey*, 2021 WL 973050, at *9, * 10. The Court of Appeals inferred that "[i]f Rainey was trying to get Ousley to 'change her story,' it was only to change it from the lies contained in her written statement to the truth." *Id.* at *9.

¶27. The State contends that the Court of Appeals incorrectly characterized "tell the truth" and that the jurors had a duty to resolve the conflict in Ousley's testimony. Rainey counters and claims that she wanted Ousley to be honest with investigators.

¶28. This Court must refrain from "actively [] evaluat[ing] the sufficiency, weight and credibility of the evidence anew—even going so far as to discredit any reliance by the jury on" Ousley's testimony. *Lenoir v. State*, 222 So. 3d 273, 279 (Miss. 2017). This Court is not in the position to decide which statements the jury was required to believe; whether Ousley told Rainey to "tell the truth" or vice versa. *Parker v. State*, 825 So. 2d 59, 66 (Miss. Ct. App. 2002) (internal quotation mark omitted) ("The jury not only has the right and duty to determine the truth or falsity of the witnesses, but also has the right to evaluate and determine what portions of the testimony of any witness it will accept or reject[.]" (quoting *Henson v. Roberts*, 679 So. 2d 1041, 1045 (Miss. 1996))). Nor does this Court know which statement, by Ousley, was given greater weight by the jury. *Id.*

¶29. Although Rainey argues that she told Ousley to tell the truth to rectify the falsehoods she had made about Rainey's investigation, "[t]he jury was not *required* to accept this innocent explanation[.]" *Rainey*, 2021 WL 973050, at *15 (Wilson, P.J., dissenting). "The jury has a much better vantage point to interpret witness tones, mannerisms, or dispositions." *King v. State*, 798 So. 2d 1258, 1262 (Miss. 2001). "Unlike an appellate court, which must rely on a 'cold, printed record,' the [fact-finder] hears and observes the witnesses firsthand and 'smells the smoke of the battle.' *Knight v. Clark*, 283 So. 3d 1111, 1119 (Miss. Ct. App. 2019) (quoting *Amiker v. Drugs For Less Inc.*, 796 So. 2d 942, 948 (Miss. 2000)).

¶30. While the record reflects inconsistencies in Ousley' s testimony, the jury found Ousley credible and chose the portions of her testimony to give greater weight, thereby supporting its conclusion of guilt as to Count II. The jury determined that sufficient evidence reasonably supported each element of the indictment and the jury instructions. "[T]he jury [is] the sole fact-finder in [this] case[,] and we do not sit as a new jury and reevaluate the evidence." *Parker*, 825 So. 2d at 66. "The jury determines the weight and credibility to give witness testimony and other evidence." *Manning v State*, 269 So. 3d 216, 221 (Miss. Ct. App. 2018) (internal quotation marks omitted) (quoting *Gillett v State*, 56 So. 3d 469, 505 (Miss. 2010)).

¶31. Before the start of the investigation, Rainey visited Ousley on two other occasions related to voter registration and voting. Yet, after the investigation, Rainey confronted Ousley at her home and tried to speak with her at work on at least two occasions. Ousley even said that it was unusual for Rainey to visit her home or her place of business, both of which

she had not done until recently. Given Ousley and Rainey's prior history, their limited contact, and recent encounters, there was sufficient evidence for a reasonable jury to find that Rainey encouraged or asked Ousley to provide false information to hinder or interfere with an ongoing criminal investigation. Miss. Code Ann. § 97-9-113(1)(d).

¶32. As the dissent points out, Ousley did not explicitly testify that Rainey told Ousley to provide false information to investigators. However, to find Rainey guilty of witness intimidation, Ousley was not required to say that Rainey told her to lie to investigators. A "jury [is] free to consider [a defendant's] acts coupled with the surrounding facts and circumstances." *Thomas v. State*, 277 So. 3d 532, 535 (Miss. 2019) (citing *Shanklin v. State*, 290 So. 2d 625, 627 (Miss. 1974)). Furthermore, "the law makes no distinction between direct and circumstantial evidence but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case." *Nevels v. State*, 325 So. 3d 627, 634 (Miss. 2021) (internal quotation mark omitted) (quoting *Mack v. State*, 481 So. 2d 793, 797 (Miss. 1985) (Robertson, J., concurring)). "[I] f the jury is convinced beyond a reasonable doubt, we can require no more." *Id.* (internal quotation marks omitted) (quoting *Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954)).

¶33. Therefore, we cannot "view the evidence in the light most favorable to the prosecution" and say that the conviction of witness intimidation was "impossible" for a "reasonable juror" to reach. *Poole*, 46 So. 3d at 293-99. As to this issue, we reverse the

judgment of the Court of Appeals' and we reinstate and affirm the judgment of the circuit court.

III. Whether Rainey's sentence violated the Eighth Amendment right to be free of cruel and unusual punishment.

¶34. Because this Court reverses judgment of the Court of Appeals, we must address the final issue presented by Rainey—whether her sentence amounted to cruel and unusual punishment under the Eighth Amendment. Rainey cites only *Davis v. State*, 724 So. 2d 342 (Miss. 1998), and fails to provide any analysis to support her challenge based on the Eighth Amendment.

¶35. "Eighth Amendment challenges assert an important constitutional right, and this Court 'will indulge in every reasonable presumption against the waiver of a constitutional right.'" *Nash v. State*, 293 So. 3d 265, 267 (Miss. 2020) (quoting *Portis v. State*, 245 So. 3d 457, 474 n.15 (Miss. 2018)). "The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179, 1185, 155 L. Ed. 2d 108 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97, 111 S. Ct. 2680, 115 L. Ed. 2d 869 (1991 (Kennedy, J., concurring in part and concurring in judgment)).

¶36. The proportionality principle under the Eighth Amendment is evaluated under a three-part test from *Solem v. Helm*, 463 U.S. 277, 292, 103 S. Ct. 3001, 3010, 77 L. Ed. 2d 637 (1983). *Nash* recently summarized the *Solem* factors, otherwise known as the *Solem* proportionality test:

> [T]o determine if a particular sentence is grossly disproportionate, a court must first compare the gravity of the offense to the severity of the sentence. Only in the exceedingly "'rare case in which this threshold comparison leads to an inference of gross disproportionality"' should the court "then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions."

Nash, 293 So. 3d at 269 (citing *Graham v. Florida*, 560 U.S. 48, 59-60, 130S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

¶37. It is the defendant's burden to present evidence as to "each *Solem* factor in order for the court to determine whether the sentence is disproportionate." *Johnson v. State*, 29 So. 3d 738, 744 (Miss. 2009) (citing *Willis v State*, 911, So. 2d 947, 951 (Miss. 2005)). Therefore, failure to address one of the *Solem* factors procedurally bars the claim. *Long v State*, 33 So. 3d 1122, 1132 (Miss. 2010) (claim procedurally barred because the defendant failed to address any of the *Solem* factors); *Johnson v. State*, 29 So. 3d 738, 744 (Miss. 2009) (defendant "failed to present the trial court or this Court with evidence as to each *Solem* factor, and as such, this claim is barred from further review" (citing *Willis v. State*, 911 So. 2d 947, 951 (Miss. 2005))); *Willis*, 911 So. 2d at 951 (Miss. 2005) (claim dismissed for failure to address the third *Solem* factor).

¶38. Rainey's gross-disproportionality claim is barred. First, Rainey offered improper evidence as to the second factor—inquiry into sentences received by other offenders in the same jurisdiction. Rainey's brief

discusses sentencing for defendants charged with voter fraud crimes rather than sentencing for the crime of witness intimidation. Rainey's brief states that the "sentences . . . imposed on Ms. Rainey far exceed the sentences and resolutions . . . imposed on the other defendants in separate but related cases." However, the cited individuals were not charged with witness intimidation but rather voter fraud.[1] Voter fraud and witness intimidation are different crimes charged under distinct statutes. While Rainey correctly contends that her conviction was more severe, the statutory maximum sentence for voting crimes and witness intimidation are not similar. Moreover, several of the other individuals that were sentenced pled guilty.

¶39. Next, Rainey's brief does not provide any information or statistics regarding the third factor—inquiry with similar sentences in other jurisdictions. Rainey does not cite any statutes, convictions, or any case law from other jurisdictions. As a result, Rainey is precluded from raising her Eighth Amendment challenge under *Solem*.

¶40. Despite this bar, even if Rainey addressed the second and third *Solem* factors, her gross-dispropor-

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[1] Each individual that Rainey mentions was indicted for various voting crimes in relation to the May 2017 Canton municipal primaries and the June 2017 general election. Andrew Grant pled guilty to one count of conspiracy to commit voter fraud and was sentenced to five years imprisonment and five years suspended along with a fine. Donnell Robinson pled guilty to a misdemeanor on voter fraud and was required to pay a small fine. Valerie Smith pled guilty to a misdemeanor in violation of voter registration statutes; she was only required to pay a fine. The other individuals listed in her brief had charges dismissed for various reasons.

tionality argument would still be without merit. Though not required, this Court details why Rainey's sentence was not grossly disproportionate.

¶41. This Court has repeatedly held that "[s]entencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Nichols v. State*, 826 So. 2d 1288, 1290 (Miss. 2002) (quoting *Wall v. State*, 718 So. 2d 1107, 1114 (Miss. 1998)); *see also Ellis v. State*, 326 So. 2d 466, 468 (Miss. 1976); *Ainsworth v. State*, 304 So. 2d 656 (Miss. 1974). Generally, "a sentence cannot be disturbed on appeal so long as it does not exceed the maximum term allowed by statute." *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992).

¶42. Rainey was sentenced to the maximum duration permitted under Mississippi Code Section 97-9-129 (Rev. 2020), which is fifteen years. Although fifteen years is a severe sentence, it does not lead to an inference of gross disproportionality because it clearly falls within the statutory limits. *Corley v. State*, 536 So. 2d 1314, 1319 (Miss. 1988).

¶43. On rare occasions, this Court has "vacated and remanded sentences even though an initial comparison of the crime and the sentence did not suggest 'gross disproportionality.'" *Ford v State*, 975 So. 2d 859, 870 (Miss. 2008) (citing *White v. State*, 742 So. 2d 1126 (Miss. 1999); *Davis*, 724 So. 2d 342).

¶44. In both *White* and *Davis*, the Court vacated the defendants' sentences because the "judge did not use discretion in and simply opted for the maximum penalt[ies]." *Ford*, 975 So. 2d at 870 (citing *White*, 742 So. 2d at 1137-38; *Davis*, 724 So. 2d at 344). The defendants "were first-time offenders who were convicted of selling a small amount of cocaine and

sentenced to the maximum term of sixty years." *Id.* (citing *White*, 742 So. 2d at 1137; *Davis*, 724 So. 2d at 343). The Court noted that "there was nothing in the record to demonstrat[e] the imposition of the maximum sentence" in either of those cases. *Id.* (citing *White*, 742 So. 2d at 1137; *Davis*, 724 So. 2d at 344).

¶45. In *Nash*, however, the defendant's sentence was upheld because the defendant's maximum sentence of twelve years for possession of a cell phone in a correctional facility was not grossly disproportionate to the crime. *Nash*, 293 So. 3d at 270. The Court noted that the trial court reviewed the presentence-investigation report and emphasized the seriousness of the charge and considered Nash's previous felony charges. *Id.*

¶46. In *Ford*, the Court upheld the first-time offender's conviction. The Court found that the judge used his discretion when he "denied the request for a pre-sentence investigation [and] . . . repeatedly expressed concerns about the severity of the crime. *Ford*, 975 So. 2d at 870. This Court noted that the defendant committed a violent crime and was not sentenced to the maximum penalty. *Id.* Moreover, the trial court "repeatedly expressed concerns about the severity of the crime." *Id.*

¶47. Rainey, just like defendants in *White*, *Davis*, and *Ford*, was a first-time offender. However, in *White* and *Davis*, without justification, the court gave each defendant the maximum sentence. By contrast, Rainey's sentence was similar to that in *Ford* and *Nash* because "the trial judge did not simply opt for the maximum penalty without justification." *Nash*, 293 So. 3d at 270. Here, the circuit judge did not let Rainey waive her presentence investigation report and insisted that one be done before sentencing, unlike in

Ford, in which the judge refused to issue a presentence investigation and report. *Ford*, 975 So. 2d at 869.

¶48. At sentencing, the circuit judge discussed the presentence investigation and report, allowed the attorneys to offer evidence, and discussed the severity of the crime. The circuit judge considered the "good Rainey has done" in the community; however, the circuit judge was concerned with the political power she had amassed and the abuse of that power. Unlike in *Davis* and *White*, the circuit judge articulated the seriousness of the offense on the record and expressed concerns as to her abuse of power with respect to witness intimidation. The circuit judge, just like in *Nash* and *Ford*, used his discretion to sentence Rainey. As stated by the circuit judge, "[w]hen you have a lot of influence and responsibility, it's your responsibility to use it [wisely]." The circuit judge emphasized the importance of criminal matters being settled within the system rather than "by going outside the system . . . and talking to people, whether that be violence, threats, influence, persuasion, and that's got to come to a stop."

¶49. Therefore, we find that Rainey's sentence was not grossly disproportionate to the crime charged. The circuit judge clearly articulated the severity of the crime and repeatedly expressed concerns for crimes that obstruct justice. This is not one of those exceedingly rare cases in which the Court should proceed with the remainder of the *Solem* factors.

CONCLUSION

¶50. Taking into account the role of the jury as the fact-finder, as well as the evidence and testimony elicited by both parties, Rainey's verdict was legally sufficient. Additionally, Rainey is procedurally barred

from raising an Eighth Amendment challenge because she failed to address two of the three *Solem* factors. Therefore, the judgment of the Court of Appeals is reversed. As to the judgment of the Circuit Court of Madison County, we reinstate and affirm Rainey's conviction and sentence for witness intimidation.

¶51. THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED, AND THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT IS REINSTATED AND AFFIRMED.

RANDOLPH, C.J., MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J., AND COLEMAN, J.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶52. Respectfully, I dissent. I find that the State's evidence was insufficient because a rational juror could have found that Rainey did not solicit, encourage, or request Ousley to provide false information to the investigators, which is an essential element of the crime charged.

¶53. Rainey contends that the State's evidence was insufficient to support the jury's verdict. "This Court has held that [w]hen reviewing challenges to the sufficiency of the evidence, we view all evidence in the light most favorable to the State.'" *Walker v. State*, 299 So. 3d 759, 764 (Miss. 2020) (alteration in original) (quoting *Thomas v. State*, 277 So. 3d 532, 535 (Miss. 2019)). "If any facts or inferences 'point 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, the proper remedy is for the appellate court to reverse and

render.'"[2] *Johnson v. State*, 81 So. 3d 1020, 1023 (Miss. 2011) (quoting *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005), *abrogated on other grounds by Little v. State*, 233 So. 3d 288 (Miss. 2017)).

¶54. Rainey was indicted under Mississippi Code Section 97-9-113(1)(d), which provides in relevant part:

> (1) A person commits the crime of intimidating a witness if he intentionally or knowingly:
>
> . . . .
>
> (d) Solicits, encourages or requests a witness to provide false information intended to defeat or defend an existing criminal charge or to hinder or interfere [sic] an ongoing investigation of a criminal act.

Miss. Code Ann. § 97-9-113(1)(d) (Rev. 2020). In order to convict under Section 97-9- 113(1)(d), the State must prove that: (1) the defendant acted intentionally or knowingly, (2) the defendant solicited, encouraged, or requested a witness to provide false information in an ongoing criminal investigation, and (3) the information was intended to defeat or defend an existing criminal charge or to hinder or interfere with an

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[2] This Court has recognized that "[a] challenge to the weight of the evidence is separate and distinct from a challenge to the legal sufficiency of the evidence." *Thomas v. State*, 48 So. 3d 460, 469 (Miss. 2010) (citing *Fleming v. State*, 732 So. 2d 172, 183 (Miss. 1999)). Thus, I agree with the majority that the "Court of Appeals improperly interpreted the 'exceptional cases' referred to in *Weatherspoon* [*v. State*, 56 So. 3d 559 (Miss. 2011)]." Maj. Op. 1122. But this Court should reverse and render on sufficiency of the evidence grounds in this case because one of the essential elements was not met.

ongoing criminal investigation. *Id.* In the present case, the State must have proven, beyond a reasonable doubt, that Rainey solicited, encouraged, or requested a witness—Ousley—to provide false information with the intent to defeat or hinder a criminal investigation.

¶55. The State's case relied solely on Ousley' s testimony. Ousley did not testify that Rainey had solicited, encouraged, or requested her to provide false information to the investigators. Ousley's testimony regarding whether Rainey encouraged her to provide false information in order to hinder an ongoing criminal investigation is as follows:

> Q: And what did she say when she approached you that time?
>
> A: She came up to my house, she was asking me a lot of questions. I told her I was going to tell the truth.
>
> Q: Didn't you say that Courtney asked you to change your story?
>
> A: That was before, that was before that.
>
> Q: I'm not talking about the timing, ma'am, I'm asking you a separate question. What did she tell you to say?
>
> A: She didn't tell me to say anything.
>
> Q: She told you to tell them folks the truth?
>
> A: Yes.
>
> Q: Okay. So she was just telling you to tell the folks the truth?
>
> A: Yeah, just tell the truth.

As the Court of Appeals noted correctly, "[n]owhere in her testimony did Ousley say that Rainey had told her

to lie about the money Rainey had given her as the State argues." Rainey *v. State*, No. 2019-KA-01651-COA, 2021 WL 973050, at *9 (Miss. Ct. App. Mar. 16, 2021). Did Rainey talk to Ousley? Yes. Did Rainey ask Ousley to speak to the investigators? Yes. Was that request false or intended to hinder an investigation? No. Therefore, "reasonable men could not have found beyond a reasonable doubt that [Rainey was guilty[]" of violating Code Section 97-9-113(1)(d). *Walker*, 299 So. 3d at 764 (internal quotation mark omitted) (quoting *Hughes v. State*, 983 So. 2d 270, 275-76 (Miss. 2008)).

¶56. I agree with the majority that Section 97-9-113(1)(d) does not require the State to prove that Rainey intimidated, threatened, or harassed Ousley. *See* Maj. Op. ¶ 20. The prosecutor's comments in his closing argument about intimidation were misleading, confusing, and prejudicial. In the State's closing argument, the prosecutor said the following:

> The evidence shows that the defendant came to Emma Ousley's home months after she voted. See, there was some kind of investigation going on about some irregularities in an election, and the defendant came to see Emma Ousley once again. She came to her asking her about statements that she might have made to the investigators. No other reason whatsoever for the defendant to come back and visit with Emma Ousley, but she came there to inquire about what's going on and what she told the investigators. And you can infer from the circumstances that she was there to intimidate her. The law says if you attempt to get a witness to provide false information to defeat a criminal charge, or

> intended to interfere or hinder an ongoing investigation. You see, Ms. Rainey here, is worried that Emma Ousley told these people that she was paid money. Now, Emma told you, upon being questioned, were you intimidated by her. And she said, no, I wasn't intimidated. But the law doesn't require that the defendant succeed in the crime. Just because she didn't succeed in getting Ms. Ousley to admit she was intimidated doesn't mean she's not guilty. It is the attempt to intimidate that makes her guilty in this particular case. Because if you attempt and still fail, you're still guilty.

The prosecutor's references to intimidation when Section 97-9-113(1)(d) does not require intimidation were misplaced, and they were misleading. If it was the State's intention to pursue this theory, it should have sought to indict Rainey under Mississippi Code Section 97-9-113(1)(b), which does not require the essential element of providing false information to hinder an ongoing criminal investigation. *See* Miss. Code Ann. § 97-9-113(1)(b) (Rev. 2020) ("A person commits the crime of intimidating a witness if he intentionally or knowingly: . . . [h]arasses or intimidates or attempts to threaten, harass or intimidate a witness or a person reasonably expected to be a witness[.]"). Instead, "[t]he State chose to prosecute Rainey for instructing Ousley to give false statements to investigators, not for threatening or intimidating Ousley." Rainey, 2021 WL 973050, at *10. An essential element of Section 97-9-113(1)(d) is that the defendant solicit or encourage the witness to provide false information in order to hinder the investigators and, looking at the record in the light most favorable to the State, the prosecution adduced no evidence

that satisfied, beyond a reasonable doubt, all of the elements of Section 97-9-113(1)(d).

¶57. The majority finds sufficient evidence by assuming a reasonable jury would find that Rainey encouraged Ousley to provide false information to hinder a criminal investigation "[g]iven Ousley and Rainey's prior history, their limited contact, and recent encounters[.]" Maj. Op. IT 31. But the majority is "actively reevaluat[ing] the sufficiency, weight, and credibility of the evidence anew[.]" *Lenoir v. State*, 222 So. 3d 273, 279 (Miss. 2017). This is at odds with our holding in *Poole v State*, that

> [w]e are not required to decide—and in fact we must refrain from deciding—whether we think the State proved the elements. Rather, we must decide whether a reasonable juror could rationally say that the State did. If, on any element of the crime, it is impossible to say that a reasonable person could have found that the State proved that element, then we must reverse and render.

Poole v State, 46 So. 3d 290, 293-94 (Miss. 2010). The majority speculates about past interactions of Rainey and Ousley and the importance those interactions could have to a reasonable jury. But past interactions of these two people cannot overcome the complete absence of proof that Rainey encouraged or requested Ousley to provide false information to the investigators, an essential element of the crime charged. Actually, Ousley's trial testimony contradicts the majority's assumptions because Ousley testified that, at their recent encounters, all Rainey asked of her was to "tell the truth."

¶58. The majority maintains that, "[a]lthough Rainey argues that she told Ousley to tell the truth to rectify the falsehoods she had made about Rainey's investigation, 'the jury was not *required* to accept this innocent explanation[.]'" Maj. Op. If 29 (second alteration in original) (quoting *Rainey*, 2021 WL 973050, at *15 (Wilson, P.J., dissenting)). It is true that "[t]he jury determines the weight and credibility to give witness testimony and other evidence[,]" *Gillett v. State*, 56 So. 3d 469, 505 (Miss. 2010) (citing *Massey v. State*, 992 So. 2d 1161, 1163 (Miss. 2008)), but no reasonable jury could have found that the State had proved an essential element of the crime, *i.e.*, that the defendant had solicited, encouraged, or requested a witness to provide false information intended to defeat or hinder a criminal investigation. *See Johnson*, 81 So. 3d at 1023 (quoting *Bush*, 895 So. 2d at 843). Ousley did not testify that Rainey had told her to provide false information. Ousley testified consistently that Rainey told her to "tell the truth." Rainey never asked Ousley to lie for her. To the contrary, Rainey repeatedly admonished Ousley to be truthful. The State provided no evidence to the contrary.

¶59. An indispensable element of Section 97-9-113(1)(d) is that the witness be encouraged or asked to give false information intended to defeat or hinder a criminal investigation. The record is altogether devoid of evidence that Rainey asked or encouraged Ousley to speak falsely, either in or out of court. Even viewing the evidence in the light most favorable to the prosecution, the State failed to adduce a shred of evidence that Rainey had solicited, encouraged, or requested Ousley to give investigators information that was false or a hindrance to their voter fraud investigation. Because the facts do "point in favor of [Rainey] on [an] element of the offense with sufficient force that reasonable men

could not have found beyond a reasonable doubt that the defendant was guilty," *Johnson*, 81 So. 3d at 1023 (internal quotation mark omitted) (quoting *Bush*, 895 So. 2d at 843), I would reverse and render Rainey's conviction.

KING, P.J., AND COLEMAN, J., JOIN THIS OPINION.

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF MISSISSIPPI

———

No. 2019-KA-01651-COA

———

COURTNEY L. RAINEY
Appellant,
v.
STATE OF MISSISSIPPI
Appellee.

———

DATE OF JUDGMENT:
09/24/2019

TRIAL JUDGE:
HON. DEWEY KEY ARTHUR

COURT FROM WHICH APPEALED:
MADISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:
EUGENE CARLOS TANNER III

ATTORNEY FOR APPELLEE:
OFFICE OF THE ATTORNEY GENERAL
BY: BARBARA WAKELAND BYRD

DISTRICT ATTORNEY:
JOHN K. BRAMLETT

NATURE OF THE CASE:
CRIMINAL – FELONY

DISPOSITION:
REVERSED AND RENDERED - 03/16/2021

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

BEFORE BARNES, C.J., MCDONALD AND LAWRENCE, JJ.

MCDONALD, J., FOR THE COURT:

¶1. Courtney Rainey appeals from her July 2019 jury conviction of felony witness intimidation and subsequent sentence of fifteen years in the custody of the Mississippi Department of Corrections with three years suspended and five years of supervised probation or post-release supervision. Rainey was originally indicted on two counts—Count I (voter fraud) for influencing the vote of Emma Ousley when Rainey allegedly registered Ousley to vote and bought her beer in exchange; and Count II (witness intimidation) for allegedly encouraging Ousley to provide false information when the District Attorney's office began investigating voter fraud in Canton municipal elections. The jury could not reach a verdict on Count I but found Rainey guilty of Count II. On appeal, Rainey argues that there was insufficient evidence to support the jury's verdict on Count II, that the witness intimidation statute, as applied in this case, deprived her of her constitutional right to free speech, and that the circuit court's sentence was grossly disproportional and violated Rainey's Eighth Amendment right to be free of cruel and unusual punishment. After reviewing the record, the arguments of counsel, and relevant precedent, we reverse and render, finding the evidence insufficient to support the jury's verdict.

Facts

¶2. In March 2017, Courtney Rainey, a Canton, Mississippi, resident and city employee, was actively

supporting a candidate in the upcoming Canton municipal election. She also sought to register voters, and in this effort, Rainey encountered Emma Ousley at Ousley's apartment. Ousley, her boyfriend, Marvin Cain, and a neighbor named Red were on the porch drinking beer when Rainey met them. Rainey asked if everyone was registered to vote, and Cain said he was not. So Rainey helped both him and Ousley fill out the voter registration forms.[1] She asked each of them the questions on the forms, allowed them to read over their answers, and they signed them. Thereafter, Rainey said that she would buy them a round of beer and gave $10 to Red who went to purchase it.

¶3. As the election neared, Rainey called Ousley and offered to take her to City Hall to vote by absentee ballot. Ousley agreed, went with Rainey, and voted. After she voted, Ousley testified that Rainey gave her $10 to get something to eat.

¶4. In early 2018, the Madison County District Attorney's office began an investigation into potential voter fraud in the May 2 and May 16, 2017 Canton municipal primaries and the June 2017 general election. To assist its in-house investigators, Carroll Phelps and Samuel Goodman, the District Attorney contracted with an independent investigator, Max Mayes.

¶5. Mayes and Phelps contacted Ousley in June 2018 and questioned her about Rainey. Ousley told them about Rainey's voter registration visit. A statement that Mayes wrote and Ousley signed that day revealed that Rainey had come to the apartments, called out for anyone who wanted to vote, and asked

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[1] Even though Ousley had previously registered and voted in other elections, she had moved.

if anyone wanted to make some money. The statement also revealed that Rainey had given both Marvin and Ousley ten dollars each for beer after she registered them.

¶6. It is unknown how Rainey found out about the investigation, but sometime after it had begun, Rainey visited Ousley again at her apartment. Rainey asked Ousley about what Ousley had told the investigators. Rainey told Ousley to tell the investigators the truth of what happened between them.

¶7. On October 17, 2018, a Madison County, Mississippi grand jury returned an indictment against Rainey concerning her interactions with Ousley. Rainey was charged with violating Mississippi Code Annotated section 23-15-753 (Rev. 2018) by attempting to "procure or influence the vote of Emma Ousley by the payment of money in exchange for [sic] his vote" (Count I-Voter Fraud). Rainey was also charged with attempting "to solicit, encourage or request a witness to provide false information intended to defeat or defend against an existing criminal charge . . . to wit: Emma Ousley (a witness to a crime purportedly committed by the Defendant) at her home . . . by requesting Ms. Ousley to change her story that she provided to investigators so the defendant would not get in trouble," in violation of Mississippi Code Annotated section 97-9-113(d) (Rev. 2020) (Count II-Witness Intimidation).

¶8. A week before the start of the jury trial, Ousley admitted to the prosecutor that parts of the statement that Mayes wrote for her were untrue and that she had said these things because she was scared and nervous because the "police" had come to her house. Apparently either Mayes or Phelps had a gun and a badge when they met with her.

¶9. Trial began on July 30, 2019.[2] Ousley testified about Rainey's visit to her apartment and the events surrounding her registration and voting which are related above. Ousley then testified that Rainey came back several months later after the investigation into the election had begun. Ousley said that Rainey specifically asked if Ousley had told the investigators about the money Rainey had given her. At trial, Ousley described this meeting as follows:

> Q. And what did she say when she approached you that time?
>
> A. She came up to my house, she was asking me a lot of questions. I told her I was going to tell the truth.
>
> Q. What were those questions about?
>
> A. Did she give me ten dollars, or what did I say, Twin, is it true. I told her, I said I was just going to tell the truth. I walked her down to the car, and I told her, I said, I'm just going to tell the truth. And she got in her car and went home, or wherever she went. I don't know where she went.

Ousley said that Rainey was not attempting to intimidate her:

> Q. . . . What did she tell you [?]
>
> A. She didn't tell me to say anything.
>
> Q. She told you to tell them folks the truth?

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[2] A few days before trial started, a shooting occurred at Ousley's apartment building. The State informed the court that it had no information that the shooting was connected to Rainey, and no mention of it was made to the jury.

A. Yes.

Q. So her intimidating you was to tell you to tell the police the truth?

A. Yes. And it wasn't no intimidation. She didn't intimidate me. She didn't intimidate me at all.

Q. And you don't get the feeling that she was trying –

A . – no, she didn't intimidate me. I'm not going to – see, you say like intimidate me. It was no kind of intimidation at all.

Q. Okay. So she was just telling you to tell folks the truth?

A. Yeah, just tell the truth.

¶10. If Ousley felt uneasy with anyone, it appears to have been Mayes because Ousley testified that Mayes and Phelps scared her:

A. I didn't know, I really don't even know why I'm up here, to tell you the truth. But when I told that man on that paper what I said, I told him because I was scared of the police. I was scared because they was intimidating me, they was trying to tell me say something happened, which I couldn't say that they was telling me, they was telling me, you know, they was talking to me. As they talked to me, I was telling them and I was nervous. I did lie. I told you that one time before.

Q. But now you said they were trying to intimidate you. Who? Are you saying Phelps –

A. [T]hey didn't really try to intimidate me. They was just asking me a lot of questions all at one time.

Q. Okay, and that was Phelps and Mayes?

A. Yes.

Q. Both of them were doing that?

A. No, just Mr. Mayes was.

Q. So the way Mr. Mayes was questioning you and dealing with you, he made you nervous?

A. Yes, he did.

¶11. At trial, Ousley also said Rainey did not buy her vote:

Q. She didn't give you anything on the day –

A. No, she didn't give me anything.

Q. So she didn't pay you for your vote?

A. No.

Q. She didn't pay you to register?

A. No, she didn't pay me to register.

Q. She didn't try to pay you to register?

A. No, she didn't pay, no, she didn't pay me, she didn't give me nothing.

¶12. Ousley testified that on two other occasions, Rainey went to Ousley's workplace, the Holiday Inn, but Ousley was not working on those days. Ousley guessed that Rainey was there to talk to her.

¶13. Ousley said that she knew Rainey was active in the community and had an annual turkey give-away. Ousley attended and saw Rainey, but Rainey

did not try to talk to her about the investigation or get her to change her story at that time either.

¶14. Marvin Cain also testified at trial. He said that in March 2017, Rainey came around asking people if they were registered to vote. He told her that he had just moved from Jackson and needed to transfer his registration to Canton. Cain explained that Rainey filled out the form with the answers he gave to the questions. When Rainey offered to buy them a round of beer, Red jumped up and volunteered to go. So Rainey gave Red the money. Cain was emphatic that Rainey did not suggest that they vote for Eric Gilkey as Phelps or Mayes put in the statement that they prepared for Cain to sign during their investigation. Nor did he tell them that Rainey gave each of them (Cain and Ousley) $10 for registering as is also stated in his written statement. Cain testified that when he signed the statement, he told Mayes and Phelps that the information was incorrect and they said they would re-write it.

¶15. After presenting Ousley and Cain's testimony, the State rested. The circuit court denied Rainey's motion for a directed verdict and instructed Rainey on her right to testify. Rainey decided not to testify and proceeded to present testimony from Briseida Rios Castillo.

¶16. Castillo is the daughter of a friend of Rainey, and Castillo would help Rainey register legal Hispanics to vote. Castillo accompanied Rainey to the apartments in March 2017. The exact date, March 27, was confirmed when Castillo identified the registration form of an Hispanic lady she assisted. Castillo said their sole purpose was to register voters, not to campaign for any candidate. Castillo testified that Rainey was with her the whole time that day and that

they were registering people by her car. After Castillo testified, Rainey rested her case.

¶17. The circuit court instructed the jury, and after counsel presented closing arguments, the jury retired to deliberate. During that time, they sent out two questions:

> Is there a difference between "procure or influence the vote," and "procure or influence the right to vote?"
>
> Count 1 states "on or about March 27th," would this include the alleged $10 payment made mention for vote?

Without objection by the parties, the circuit court responded:

> The jury has received all of the evidence and all of the instructions. Please continue in your deliberations.

Thereafter, the jury sent another note:

> The jury cannot reach a decision on Count 1. We have reached a decision on Count 2.

The circuit court polled the jury and asked each if further deliberations on Count I would be helpful. All responded in the negative. The circuit court decided against giving a "*Sharplin*" instruction[3] and asked the jury to return the verdict it was able to reach. The jury did so and found Rainey guilty of Count II. The court declared a mistrial on Count I.

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[3] In this instruction, the court says, "I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but, if it is possible to reconcile your differences of opinion and decide this case, then you should do so." *Sharplin v. State*, 330 So. 2d 591, 596 (Miss. 1976).

¶18. On September 23, 2019, the circuit court convened Rainey's sentencing hearing. The State asked for the maximum penalty for her conviction of witness intimidation, which is a Class I felony (no more than fifteen years and a maximum fine of $5,000).[4] Rainey submitted numerous letters from community leaders vouching for her background[5] and character.[6] Rainey's attorney pointed out that the State offered misdemeanor pleas to other individuals similarly charged. Others received pre-trial diversion and even those who pleaded guilty to felony charges did not spend any time in jail.[7] Yet the State's only pre-trial offer was

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[4] Mississippi Code Annotated section 97-9-129 (Rev. 2020) provides:

> (1) A person who has been convicted of any Class 1 felony under this article shall be sentenced to imprisonment for a term of not more than fifteen (15) years or fined not more than Five Thousand Dollars ($5,000.00), or both.

[5] Rainey grew up in public housing in Canton. She graduated from Canton public schools and from Delta State University. She obtained a master's degree from Jackson State University.

[6] According to Ollie Linson, Rainey is the single mother of a nine-year-old daughter, and she is an asset to her sisters, her mother, and to the community as a whole. According to Cherry Deddens, Rainey's work on the Canton School Board has made it more responsive to the needs of the district. Constable Johnny Sims has never known Rainey to break any laws and said that she has worked tirelessly in the community. Alderwoman Daphne Sims vouched for Rainey's fine work as Canton's Human Cultural Needs director.

[7] Specifically, Rainey pointed out in her later-filed "Motion for Bond Pending Appeal" the following:

> A. Andrew Grant pleaded guilty to one count of conspiracy to commit vote fraud, and the court sentenced Mr. Grant to five years imprisonment with all five years suspended and a fine. The Court dismissed all of

sixteen years in jail. Her attorney also raised a concern that the statute as applied in the facts of this case violated Rainey's First Amendment free-speech rights if she could not contact someone who had lied about her and, without threats or intimidation, tell them to tell the truth.

¶19. The circuit court commented that others charged had accepted responsibility and none were charged with witness intimidation. The court further said that Rainey's case was not so much about "intimidation" but more about "influence." The court said:

> Additionally, this Court had Andrew Grant stand in front of it and say, I acted with Courtney Rainey in a manner to attempt to commit voter fraud. As far as the nature of the crime, there's nothing that strikes at the heart of the system more than people with

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Mr. Grant's remaining indictments and charges, including certain uncharged conduct;

B. Vickie McNeil's case is still pending but is not likely to proceed to trial due to her extreme infirmity;

C. Donnell Robinson, indicted on multiple vote fraud counts as a habitual offender, was permitted to plead to a misdemeanor, was not sentenced to jail time, and was ordered to pay a fine;

D. Valerie Smith plead guilty to a vote fraud felony and was given five years imprisonment with all five years suspended;

E. Jennifer Robinson's charges were dismissed;

F. Sherman Mattock's charges were dismissed;

G. Cary Johnson's charges were dismissed; and

H. Desmand King's charges were dismissed.

> influence using that influence to help themselves.
>
> Now, I understand that the claim by the defense is all Ms. Rainey did was go back and tell a witness she better go tell the truth. The problem the Court has with that is the grand jury process is supposed to be secret. Indictments weren't even handed down at this point.
>
> The defense made an argument in opening statements that really struck the Court. The defense talked about there are only so many seats of power and money in this community, and what the Court is struck by is Ms. Rainey sits in every one of those seats, at the intersection of each and every seat of power in this community. And that's what this case comes down to. . . .
>
> For too long in this community, people believed they can take care of criminal matters by going outside the system, by going and talking to people, whether that be violence, threats, influence, persuasion, and that's got to come to a stop. So the Court has to send a message today. You can't attempt to influence the witness of others, the testimony of others.

¶20. After further comments, the circuit court sentenced Rainey to fifteen years with the last three years suspended, and five years' probation along with $698.50 in court costs and fees. The "Judgment of Conviction and Sentence Instanter" was signed on September 23, 2019, and filed on September 24, 2019.

¶21. Thereafter, Rainey filed a "Motion for Bail Pending Appeal," which the circuit court denied, saying:

> The Court is of the opinion that witness intimidation or influencing a witness strikes at the heart of the criminal justice system. The undisputed fact that Defendant approached a witness she believed gave a statement contrary to her and attempted to get that witness to change her statement weighs heavily against the grant of bail.
>
> And this Court cannot ignore that every witness against the Defendant in the witness intimidation case were victims of a shooting into their residence on the eve of trial. Another witness, Chip Matthews, who testified during jury selection regarding a potential juror, also became the victim of a shooting into his residence after his testimony.[8] While there is not a current institution of criminal proceedings for these shootings against the Defendant or anyone connected with Defendant, the Court cannot eradicate this information from its decision in whether Defendant may constitute a special danger to any other person or the community.

¶22. On October 4, 2019, Rainey filed a "Motion to Set Aside Verdict, or in the Alternative, For a New

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[8] After the voir dire, during challenges for cause, the State called Charles Matthews to testify. Matthews had observed a potential juror take off his "juror" sticker and approach Rainey's attorneys. There is nothing in the record concerning Matthews being the victim of a shooting thereafter or that the shooting was related to Matthews's testimony or to Rainey.

Trial." She argued (1) that as applied to her, the statute under which she was convicted unconstitutionally deprived her of her right to free speech; (2) that the evidence presented was insufficient to support a conviction; and (3) that the sentence imposed upon her was grossly disproportionate to her crime compared to the sentences of others. In her motion, Rainey pointed out:

> Furthermore, this Court spoke of things that were simply not true when sentencing Courtney Rainey. For example, this Court based its sentence, in-part, on the fact that Alderman Grant said he conspired with Courtney Rainey, a charge Ms. Rainey was acquitted of all together. But Alderman Grant never said any such thing. The conduct Alderman Grant described was not factually sufficient to support a conspiracy conviction. He expressly stated that there was never an agreement to do anything.

On October 11, 2019, without opinion, the circuit court denied Rainey's motion.

¶23. On October 25, 2019, Rainey filed her notice of appeal. She raises three issues: (1) whether the conviction for witness intimidation in violation of Mississippi Code Annotated section 97-9-113 violated her First Amendment right to free speech; (2) whether the State presented sufficient evidence to support Rainey's violation of section 97-9-113(d); and (3) whether the circuit court's sentence of the maximum imprisonment violated Rainey's Eighth Amendment right.

Discussion

¶24. As noted above, the jury could not reach a verdict on Count I, the voter fraud charge. Rainey's appeal, and our review, is limited to the facts relevant to Rainey's conviction and sentence for telling a witness to give false statements in violation of the witness-intimidation statute. Accordingly, any alleged exchange of money, i.e., the $10 paid for beer on the day of voter registration and the $10 paid for lunch on the day of voting, is irrelevant to the appeal before us. Our focus is on the facts relating to Rainey's interactions with Ousley after the district attorney's investigation had begun one year later and that involved no alleged exchange of money.

I. Did Rainey's conviction under the witness intimidation statute violate her First Amendment right to free speech?

¶25. The statute under which Rainey was convicted reads in relevant part:

> (1) A person commits the crime of intimidating a witness if he intentionally or knowingly:
>
> (a) Attempts, by use of a threat directed to a witness . . . to:
>
> (i) Influence the testimony of that person;
>
> . . . .
>
> (b) Harasses or intimidates or attempts to threaten, harass or intimidate a witness or a person reasonably expected to be a witness;[or]
>
> . . . .
>
> (d) Solicits, encourages or requests a witness to provide false information intended

> to defeat or defend against an existing criminal charge or to hinder or interfere an ongoing investigation of a criminal act.

Miss. Code Ann. § 97-9-113.

¶26. "This Court applies de novo review to the issue of the constitutionality of a statute or ordinance. We bear in mind (1) the strong presumption of constitutionality; (2) the challenging party's burden to prove the statute is unconstitutional beyond a reasonable doubt; and (3) all doubts are resolved in favor of a statute's validity." *Crook v. City of Madison*, 168 So. 3d 930, 935 (¶14) (Miss. 2015) (citing *Johnson v. Sysco Food Servs.*, 86 So. 3d 242, 243 (¶3) (Miss. 2012)).

¶27. "A plaintiff can only succeed in a facial challenge [to the constitutionality of a statute] by establishing that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). "Facial challenges to a statute based on First Amendment grounds generally implicate the 'overbreadth doctrine,'" namely that a statute is overbroad if it "sweeps within its ambit other activities protected by the First Amendment." *Wilcher v. State*, 227 So. 3d 890, 895 (¶26) (Miss. 2017). Mississippi Code Annotated section 97-9-127 (Rev. 2014) makes it a crime to intentionally or knowingly harm an individual in retaliation for something lawfully done by that individual who was acting in his capacity as a public servant. *Wilcher*, 227 So. 3d at 894 (¶19). Wilcher was charged with violation of this statute when she falsely accused Sheriff's Deputy Townsend of raping her during an arrest. *Id.* at 893 (¶13). On appeal of her conviction, she

challenged the statute, alleging, among other things, that it was vague, *id.* at 894 (¶21), and that her accusation was protected speech. *Id.* at 895 (¶23). However, Wilcher cited no legal authority to support how the statute infringed upon her First Amendment rights. *Id.* at (¶24). Considering her vagueness argument in light of the First Amendment, the court recognized that a statute could be "unconstitutionally overbroad if it does not aim specifically at evils within the allowable area of State control, but, on the contrary sweeps within its ambit other activities protected by the First Amendment." *Id.* at 895 (¶26). But

> [t]his Court will not strike down a statute on constitutional grounds unless it appears beyond all reasonable doubt the statute violates the Constitution. The party challenging the statute's constitutionality bears the burden of proving its unconstitutionality.

Id. at 895-96 (¶28) (citations omitted). Examining the wording in the statute, the *Wilcher* court said that "each word and phrase that comprises it is readily understandable to any reasonable person of ordinary intelligence." *Id.* at 896 (¶12).

¶28. Similarly, in the case at hand, Rainey fails to present authority to show that section 97- 9-113 infringes upon her right to free speech. The statute clearly and specifically prohibits threats, harassment, intimidation, and influence of a witness—terms readily understandable by ordinary persons. Rainey agrees that "threats" are not protected by the First Amendment, *Virginia v. Black*, 538 U.S. 343, 359 (2003), and makes no challenge the use of the words "intimidation" or "harassment" as being unconstitutionally vague.

¶29. Rainey herself agrees that she has no facial constitutional challenge to the statute in question. Instead she says hers is an "as applied challenge" to the statute, saying that "applying [section] 97-9-113(d) to the facts the State put forth at trial, this Court should overturn her conviction as unconstitutional under both the United States and Mississippi Constitutions." A plaintiff generally cannot prevail on an "as-applied" challenge without showing that the law has in fact been, or is sufficiently likely to be, unconstitutionally applied to him. *McCullen v. Coakley*, 573 U.S. 464, 509 n.5 (2014). For example, in *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971), the Supreme Court found a Connecticut statute that required payment of court fees and costs to obtain a divorce was unconstitutional as applied to a class of welfare recipients who were unable to pay the required fees. The Court held:

> [W]e conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process.

Id. at 380-81.

¶30. Rainey claims the witness intimidation statute, as applied to her, infringes on her right to free speech. But not all speech is protected. "Many acts which involve only speech can be criminalized: extortion, bribery, witness intimidation, perjury. The fact that Defendant's acts were speech acts does not bring them within the protection of the First

Amendment." *United States v. Edwards*, No. 2:17-CR-170, 2020 WL 2465006, at *3 (S.D. Ohio May 13, 2020). In this case, Rainey cites no precedent or authority with facts similar to hers that holds that talking to a witness about a criminal investigation constitutes deprivation of free speech.

¶31. Rainey argues repeatedly that her conversations with Ousley did not constitute a "true threat" that would be prosecutable speech, citing *United States v. Colhoff*, 833 F.3d 980, 982-83 (8th Cir. 2016). Admittedly *Colhoff* is not applicable to Rainey's facts. There, the appellate court was examining a federal statute, 18 U.S.C. § 1512(b)(1), which required the government to show that Colhoff knowingly attempted to "use intimidation, threaten, or corruptly persuade another person" with the intent to "influence, delay, or prevent" testimony in an official proceeding. *Id*. at 984. The statute specifically prohibited threats to a witness.[9]

¶32 *Colhoff* is inapplicable to the case at hand because Mississippi's witness intimidation statute is broader than the federal statute considered in *Colhoff*. Our intimidation statute covers more than threatening conduct, and in essence, Rainey's constitutional argument is merely an argument that her post-investigation contact with Ousley did not violate the statute. But whether Rainey's conversation was innocent speech or whether it constituted harassment, intimidation, or an attempt to influence Ousley to

[9] Colhoff claimed that his telling a witness that "snitches get stitches" was merely a "political rant" protected by the First Amendment and not a "true threat," but the court found that Colhoff's statement could cause a reasonable person to fear bodily harm and rejected Colhoff's First Amendment challenge. *Colhoff*, 833 F.3d at 984.

make false statements, which is also covered by the statute, was a factual question for the jury to decide. Because Rainey's speech in this instance could constitute prosecutable speech under Mississippi's statute, we cannot hold the statute unconstitutional as applied to her facts. Accordingly, we do not find that Mississippi Code Annotated section 97-9-113 as applied to her facts violated Rainey's First Amendment free-speech right.

II. Was evidence sufficient to convict Rainey of violation of section 97-9-113?

¶33. When considering a sufficiency of evidence argument, "[t]he critical inquiry is whether the evidence shows beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed." *O'Donnell v. State*, 173 So. 3d 907, 916 (¶20) (Miss. Ct. App. 2015) (internal quotation marks omitted). "[T]his Court will reverse and render only if the facts and inferences point 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." *Manning v. State*, 269 So. 3d 216, 220 (¶17) (Miss. Ct. App. 2018) (citing *Hughes v. State*, 983 So. 2d 270, 275-76 (¶10) (Miss. 2008)). The evidence and all inferences that could be drawn from it are considered in the light most favorable to the State. *Id.* We proceed, then, to examine if the evidence presented proved each element of the charges against Rainey and was sufficient to sustain a guilty verdict.

¶34. As previously noted, section 97-9-113 prohibits three types of behavior: (1) threatening a witness to influence his testimony; (2) harassing or intimidating

a potential witness; and (3) soliciting, encouraging, or requesting a witness to give false testimony.

¶35. In this case, the Jury Instruction on Count II of Rainey's charges read:

JURY INSTRUCTION 8

> The Court instructs the jury that Courtney L. Rainey has been charged with the crime of Intimidating a Witness in Count II of the Indictment. If you find from the evidence in this case beyond a reasonable doubt that:
>
> COUNT II
>
> 1. Based upon a series of acts connected together and constituting parts of a common scheme and plan that the Defendant, Courtney L. Rainey, on or about and between August 1, 2017 through August 17, 2018 in Madison County, Mississippi;
>
> 2. Did intentionally and knowingly attempt to solicit, encourage or request a witness to provide false information;
>
> 3. Intended to defeat or defend against an existing criminal charge; or
>
> 4. Intended to hinder or interfere in an ongoing investigation of a criminal act, particularly the Voter Fraud allegation contained in Count I of the Indictment;
>
> 5. By going to the home of witness, Emma Ousley, and requesting her to change her story that she had given to investigators so that the Defendant, Courtney L. Rainey, would not get in trouble;

> then you shall find the Defendant, Courtney L. Rainey, guilty of Intimidating a Witness, as charged in Count II of the Indictment.
>
> If the State has failed to prove any one or more of the above-listed elements beyond a reasonable doubt, then you shall find the Defendant, Courtney L. Rainey, not guilty of Intimidating a Witness, as charged in Count II of the Indictment.[10]

Although the instruction itself does not faithfully track the language of the statute, it appears to instruct the jury that Rainey is charged with the third type of prohibited behavior, i.e., encouraging a witness to give false testimony.[11]

¶36. The only proof on this count presented by the State was testimony from Ousley. The State argues that Ousley testified that Rainey suggested that she should not mention the money Rainey had given her or actually tell investigators that she had not received any money. But in her actual testimony, Ousley did not say this. Only twice did Ousley give the specifics of her conversation with Rainey about the investigation and what Rainey said. On direct examination, Ousley said Rainey came to her apartment and asked her questions about it.

> Q. What were those questions about?
>
> A. Did she give me ten dollars, or what did I say, Twin, is it true. I told her, I said I was

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[10] This elements instruction was proposed by the State. Rainey did not object to it and withdrew her proposed elements instruction.

[11] Even the dissents agree that Rainey was not charged with, and the State did not have to prove, that Rainey intimidated Ousley.

> just going to tell the truth. I walked her down to the car, and I told her, I said, I'm just going to tell the truth. And she got in her car and went home, or wherever she went. I don't know where she went.

On cross-examination, the following exchange occurred:

> Q. . . . What did she tell you to say?
>
> A. She didn't tell me to say anything.
>
> Q. She told you to tell them folks the truth?
>
> A. Yes.
>
> Q. So her intimidating you was to tell you to tell the police the truth?
>
> A. Yes. And it wasn't no intimidation. She didn't intimidate me. She didn't intimidate me at all.
>
> Q. And you don't get the feeling that she was trying –
>
> A . – no, she didn't intimidate me. I'm not going to – see, you say like intimidate me. It was no kind of intimidation at all.
>
> Q. Okay. So she was just telling you to tell folks the truth?
>
> A. Yeah, just tell the truth.

¶37. Nowhere in her testimony did Ousley say that Rainey had told her to lie about the money Rainey had given her as the State argues. Ousley testified about the investigators coming (Mayes and Goodman) and the written statement that they had her to sign. In that written statement, Ousley said that Rainey had come to the apartments asking people if they wanted to make some money. On the witness stand Ousley

said that this was not true. In that written statement, Ousley also said that Rainey gave both her and Cain $10 each, which was also not true. Ousley then went on to say that after she had given this written statement, Rainey came to her apartment and asked Ousley what she had told the investigators about the money and was it true. Thereafter, Ousley told Rainey that she would tell the truth.

¶38. On cross examination, the inaccuracy of Ousley's written statement again was raised. Ousley turned to the jury and admitted that the statement she gave contained material lies. Apparently Rainey learned about the investigation, and approached Ousley. Ousley said Rainey specifically told her to tell the truth—Rainey did not tell her what to say; she only told her to tell the truth.[12] If Rainey was trying to get Ousley to "change her story,"[13] it was only to change it from the lies contained in her written

---

[12] Judge Wilson's dissent charges the majority with "assuming that Rainey had learned all of the details of Ousley's statement and confronted Ousley only to urge her to correct specific misstatements. . . . " But we make no assumptions; we merely state the facts proven in the record; namely that after the investigators had spoken to Ousley, Rainey approached Ousley and told her to the truth. In fact, it is Judge Wilson who makes ungrounded assumptions when he says that a jury could infer "that Rainey (a) knew that Ousley had told investigators that Rainey had given her money in connection with her registration application and/or absentee vote and (b) confronted Ousley to get her to recant her statement in its entirety," despite the lack of evidence on what Rainey knew and despite Ousley's repeated testimony that Rainey only told her to tell the truth.

[13] When attempting to impeach Ousley as to where she and Rainey were when they spoke—whether at Ousley's apartment or at her job—defense counsel inartfully used the term "change your story." Ousley never used that term but repeatedly said Rainey told her to tell the truth.

statement to the truth. Without direct testimony that Rainey told Ousley to give false statements or evidence of the false statements Rainey allegedly instructed Ousley to give, there is no proof in the record of a key element of the crime charged and the jury's conviction of witness tampering by inducing a witness to give a false statement is unsupported. Ousley's testimony that she "figured" Rainey wanted her to change her story was itself speculation. To conclude from Ousley's speculation that the reason for Rainey's visit was to instruct Ousley to give false statements is not an "inference" as the dissents advance, but rather further speculation on our part.

¶39. Although the State also argues that the statute itself says that failure to intimidate or threaten a witness is no defense, citing section 97-9-113(3), Rainey was not charged with intimidating or threatening Ousley, making the State's argument meaningless. The State chose to prosecute Rainey for instructing Ousley to give false statements to investigators, not for threatening or intimidating Ousley. Moreover, there is no proof in the record of threats or intimidation by Rainey.

¶40. With no proof of intimidation, threats, harassment, or proof that Rainey instructed Ousley to give false statements, the verdict of the jury must be overturned. The proof in this case is not like that presented by the State in another witness intimidation case, *Manning v. State*. There, Natalla Carter was in Christopher Houston's home when he was shot and killed. *Manning*, 269 So. 3d at 218 (¶3). Hearing the shot, Carter ran outside and found Houston. *Id*. In his dying breath, Houston identified Manning as the shooter. *Id.* Carter reported this to law enforcement and became a key witness in the State's case against

Manning. *Id.* at (¶4). Later, Carter encountered Manning on two occasions: once at her mother's apartment complex where Manning made kissing gestures to her and another time when he came near and she heard him say something about "doing something." *Id.* at 221 (¶19). Carter was frightened enough by these encounters to press charges against Manning. *Id*. at 219 (¶8). We held that the testimony of the single witness, Carter, to the threats and fear she experienced, was sufficient to support a conviction, citing *Cousar v. State*, 855 So. 2d 993, 998-99 (¶16) (Miss. 2003).

¶41. But here the one witness against Rainey was Ousley who in her sworn testimony to the jury said that Rainey did not threaten or intimidate her. Nor did Rainey pressure her to give false testimony. To reiterate, Ousley repeatedly testified that Rainey told her to tell the truth. In his dissent, Judge Wilson asserts that we have overstepped our bounds in our review. He quotes *Poole v. State*, 46 So. 3d 290, 293-94 (¶20) (Miss. 2010), "We are not required to decide—and in fact we must refrain from deciding whether we think the State proved the elements. Rather, we must decide whether a reasonable juror could rationally say that the State did." But immediately thereafter, the supreme court in *Poole* says, "If, *on any element of the crime*, it is impossible to say that a reasonable person could have found that the State proved *that element*, then we must reverse and render." *Id.* (emphasis added). In this case, there is simply no credible evidence that Rainey told Ousley to give false statements in the investigation, which was a key element of the crime charged. This is one of those "exceptional cases" referred to in *Weatherspoon v. State*, 56 So. 3d 559, 564 (¶20) (Miss. 2011), where "the evidence preponderates heavily against the verdict."

Given the proof in this record, reasonable men could not have found her guilty of witness intimidation beyond a reasonable doubt.[14] Accordingly, we reverse and render in favor of Rainey.[15]

¶42. Because we reverse and render in favor of Rainey, we need not deal with the issue of the legality of her sentence.

Conclusion

¶43. Although there was no merit to Rainey's free-speech claim, because there was insufficient evidence to support her conviction of witness intimidation, we reverse and render a judgment of acquittal.

¶44. REVERSED AND RENDERED.

BARNES, C.J., WESTBROOKS AND McCARTY, JJ., CONCUR. LAWRENCE, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, C.J., WESTBROOKS, McDONALD AND McCARTY, JJ. CARLTON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY WILSON, P.J., GREENLEE AND SMITH, JJ. WILSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY CARLTON,

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[14] Judge Wilson also asserts that we have improperly viewed the evidence in the light most favorable to Rainey, instead of the State. He misconstrues our threshold examination of the record for proof of the elements of the crime, which we must undertake before examining any reasonable inferences that can be drawn from it. Here the record lacks proof on the element that Rainey instructed Ousley to give false statements, so no inferences, one way or another, can be drawn.

[15] We are not determining that Rainey was innocent as Judge Wilson says; rather we are determining that the State did not meet its burden of proving her guilty.

P.J., GREENLEE AND SMITH, JJ. EMFINGER, J., NOT PARTICIPATING.

LAWRENCE, J., SPECIALLY CONCURRING:

¶45. I concur with the majority's decision to reverse and render the circuit court's judgment based on insufficient evidence to convict Rainey under Count II pursuant to Mississippi Code Annotated section 97-9-113(d) (Rev. 2020). I write separately to elaborate on how the State failed to meet its burden of proof on each of the elements of the crime alleged in Count II of the indictment.

¶46. On November 20, 2018, a Madison County grand jury returned a two-count indictment against Rainey for voter fraud (Count I) and intimidating a witness (Count II). At trial, the jury was unable to reach a verdict on Count I but found Rainey guilty of Count II.[16] Count II of Rainey's indictment specifically charged that Rainey

> did intentionally and knowingly attempt to solicit, encourage or request a witness to provide false information intended to defeat or defend against an existing criminal charge or to hinder or interfere an ongoing investigation of criminal act, to-wit: Emma Ousley (a witness to a crime purportedly committed by Defendant) at her home at the Canton Place Apartments, by requesting Ms. Ousley to change her story that she provided to investigators so the defendant would not get in trouble[.]

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[16] Because the jury could not reach a verdict on Count I of the indictment, I limit my comments regarding the sufficiency of the evidence to Count II.

(Emphasis added). At trial, the State had the burden of proving each and every essential element of the offense charged beyond a reasonable doubt. *Mangum v. State*, 762 So. 2d 337, 341 (¶11) (Miss. 2000). While there are several potential ways to violate Mississippi Code Annotated section 97-9-113, in this case, the State chose to allege that Rainey solicited or encouraged Ousley to provide false information. The State is bound by the crime indicted and the language utilized within the indictment.[17] *Hall v. State*, 127 So. 3d 202, 207 (¶17) (Miss. 2013); *Martin v. State*, 501 So. 2d 1124, 1128 (Miss. 1987); *Talley v. State*, 174 Miss. 349, 167 So. 771, 771-72 (1935). Yet a review of Ousley's actual testimony at trial provides little support for the allegations in the indictment, much less proof beyond a reasonable doubt.

¶47. The State called Emma Ousley as its sole witness to testify regarding the essential elements described in Count II of Rainey's indictment. Notably, during direct examination the State never asked Ousley to describe what "false information" that Rainey allegedly asked her to provide or how Rainey asked her to "change her story" from what she initially provided to investigators so that "Rainey would not get in trouble." In fact, those words were never uttered by the witness. Further, the State never proffered any question concerning whether Rainey's alleged request to Ousley was done during an investigation or to hinder an investigation. On cross-examination, Ousley testified that Rainey came to her house to

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[17] The State moved to amend Rainey's indictment as to Count I prior to trial. However, the State never filed a motion to strike surplusage or a motion to amend the indictment as to Count II either prior to trial or during trial to conform to the evidence presented.

ask questions about the investigation and told Ousley to "tell the truth." Ousley was asked multiple times throughout her cross-examination, "[W]hat did [Rainey] tell you to say?" Ousley stated, "She didn't tell me to say anything" but "just tell the truth." When asked, "[D]idn't you say [Rainey] came to your job and tried to get you to change your story?" Ousley stated, "I wasn't there but I figured that's what she wanted me to do."[18] (Emphasis added). Ousley's testimony regarding Rainey's reason for visiting her workplace is completely speculative because the one encounter between Ousley and Rainey never happened at her workplace. Their only encounter took place at Ousley's house. Further, the indictment alleged that the State would prove that Rainey requested Ousley "to change her story that she provided to investigators so the defendant would not get in trouble." There was absolutely zero testimony as to that allegation in the indictment.

¶48. Ousley's statement that Rainey told her to "tell the truth" in and of itself is not sufficient evidence that reasonable men could have found, beyond a reasonable doubt, that Rainey was guilty of soliciting, encouraging, or requesting Ousley to provide false information. Ousley's testimony was clear that she initially lied to the investigators on several points because she was nervous, and she told the State a week before trial about the incorrect information in the police report. In addition, Ousley, clarified her testimony that when she said she changed her story,

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[18] It is obvious that there was only one meeting between Ousley and Rainey and that on that occasion Rainey told Ousley to tell the truth. The victim's "I figured" testimony is not only speculative but also wholly insufficient as proof beyond a reasonable doubt.

she did so to tell the truth because her initial statement in the police report was incorrect on several points.

¶49. An indictment is a critical step in the criminal justice process and serves as notice of what the State is alleging the defendant did wrong. It outlines what the State must prove according to the facts of the case and the law under which the defendant was indicted. The State never proved beyond a reasonable doubt the following essential elements listed within the indictment:

- that Rainey solicited, encouraged, or requested a witness
- to provide false information,
- intended to defeat or defend against an existing criminal investigation or to hinder or interfere an ongoing investigation of a criminal act, and
- that Ousley "changed her story that she provided to investigators so the defendant would not get in trouble."

Ousley testified the only reason she changed her story was to "tell the truth" and to correct what was incorrectly stated in the police report. That is hardly a sufficient basis to convict Rainey of soliciting a witness to provide false testimony. It is axiomatic that a trial is a search for the truth.[19] Ousley testified under oath that she was correcting information she had

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[19] *Tyson v. State*, 237 Miss. 149, 112 So. 2d 563, 564 (1959); *Sims v. ANR Freight System Inc.*, 77 F.3d 846, 849 (5th Cir.1996); *Jones v. Jones*, 995 So. 2d 706, 711(¶16) (Miss. 2008); *Miss. Comm'n on Judicial Performance v. Osborne*, 11 So. 3d 107, 115 (¶26) (Miss. 2009).

previously given to the police. She admitted under oath that Rainey told her to "tell the truth" at trial. How can Rainey be convicted of procuring false testimony when Ousley herself said the testimony was truthful?

BARNES, C.J., WESTBROOKS, McDONALD AND McCARTY, JJ., JOIN THIS OPINION.

CARLTON, P.J., DISSENTING:

¶50. I respectfully dissent from the majority's finding that insufficient evidence existed to support the jury's verdict finding Rainey guilty of witness intimidation. In support of its decision, the majority states that the only proof offered by the State in support of Count II was Ousley's testimony. The majority asserts that Ousley's testimony failed to prove that Rainey told Ousley to give false statements to investigators, and as a result, "the jury's conviction of witness tampering by inducing a witness to give a false statement is unsupported." (Maj. Op. at (¶38)). The majority accordingly reverses and renders Rainey's conviction. However, after viewing all of the evidence in the light most favorable to the State, as required when reviewing a challenge to the sufficiency of the evidence, I find that the evidence is sufficient to support the jury's verdict. *See Walker v. State*, 299 So. 3d 759, 764 (¶16) (Miss. 2020).

¶51. The Mississippi Supreme Court has instructed that "when reviewing challenges to the sufficiency of the evidence" on appeal, the appellate court must "view all evidence in the light most favorable to the State." *Id*. (quoting *Thomas v. State*, 277 So. 3d 532, 535 (¶11) (Miss. 2019)). "Under this standard, 'the State receives the benefit of all favorable inferences that may be reasonably drawn from the evidence.'"

Thomas, 277 So. 3d at 535 (¶11) (quoting *Hughes v. State*, 983 So. 2d 270, 276 (¶10) (Miss. 2008)). This Court "must affirm if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id*. (quoting *Cotton v. State*, 144 So. 3d 137, 142 (¶8) (Miss. 2014)). Furthermore, "this Court will reverse and render only if the facts and inferences 'point 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[.]'" *Walker*, 299 So. 3d at 764 (¶16) (quoting *Hughes*, 983 So. 2d at 275-76 (¶10)).

¶52. The record reflects that Count II of Rainey's indictment charged her with intimidating a witness in violation of Mississippi Code Annotated section 97-9-113(1)(d) (Rev. 2020). Section 97-9-113(1)(d) provides that "[a] person commits the crime of intimidating a witness if he intentionally or knowingly . . . [s]olicits, encourages or requests a witness to provide false information intended to defeat or defend against an existing criminal charge or to hinder or interfere an ongoing investigation of a criminal act."[20] Rainey's indictment specifically charged that Rainey

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[20] In footnote 11, the majority states, "Even the dissents agree that Rainey was not charged with, and the State did not have to prove, that Rainey intimidated Ousley." (Maj. Op. at n.11). To be clear, this dissent does not agree that Rainey was not charged with intimidating Ousley. The record reflects that intimidating Ousley is exactly what Rainey was charged with: Count II of Rainey's indictment charges her with intimidating a witness in violation of section 97-9-113(1)(d). In fact, the title of section 97-9-113 is "Intimidating a witness." As discussed later in this separate opinion, section 97-9-113(3) clearly states that "[i]t is not a defense to a prosecution under this section if the actual completion of the threat, harassment or intimidation was pre-

> intentionally and knowingly attempt[ed] to solicit, encourage or request a witness to provide false information intended to defeat or defend against an existing criminal charge or to hinder or interfere an ongoing investigation of criminal act, to-wit: Emma Ousley (a witness to a crime purportedly committed by Defendant) at her home at the Canton Place Apartments, by requesting Ms. Ousley to change her story that she provided to investigators so the defendant would not get in trouble[.]

¶53. As part of their investigation into potential voter fraud, investigators with the District Attorney's office interviewed Ousley and questioned her about Rainey. Ousley provided a statement to the investigators about Rainey's voter registration visit. Ousley's statement, which was admitted into evidence as exhibit D-1, reflects that she told investigators she filled out the voter registration application after Rainey approached her and asked "if we wanted to make a couple of dollars." However, at trial, Ousley admitted that she was not entirely truthful in her statement to investigators. Ousley testified her statement that Rainey asked her if she wanted to make some money was not true. Ousley explained she only told investigators that Rainey said that because Ousley was nervous. Ousley also admitted that although she told the investigators that Rainey gave

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vented from occurring." Stated differently, the State did not have to prove that Ousley was actually intimidated by Rainey in order to find Rainey guilty of the charged offense. Further, as discussed below, the jury instruction in this case that set forth the elements of the crime of intimidating a witness tracked the language of the statute and Rainey's indictment.

both her and Cain ten dollars, Rainey actually only gave Cain ten dollars.

¶54. Ousley testified that after she gave her statement to the investigators, Rainey visited her at her home. According to Ousley, "[Rainey] was asking me a lot of questions" about what she told the investigators. In its brief, the State asserts Ousley testified that during this time, Rainey "suggested that [Ousley] should not mention that Rainey had given her any money." However, as the majority acknowledges, "in her actual testimony, Ousley did not say this." (Maj. Op. at (¶36)). Instead, a review of Ousley's trial testimony regarding Rainey's visit to her home reflects that when the State asked Ousley what Rainey asked her, Ousley answered, "Did she give me ten dollars, or what did I say, . . . is it true." Ousley testified that in response to Rainey's questions, she told Rainey that "I was just going to tell the truth. I walked her down to the car, and I told her, I said, I'm just going to tell the truth." As to any specific statements Rainey made to Ousley while questioning her about what Ousley told investigators, Ousley testified at trial that Rainey specifically told Ousley to tell the investigators the truth.[21]

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[21] During cross-examination, the following exchange occurred:

Q: What did she tell you to say?

A: She didn't tell me to say anything.

Q: She told you to tell [the investigators] the truth?

A: Yes.

Q: So her intimidating you was to tell you to tell the police the truth?

A: Yes. And it wasn't no intimidation. She didn't intimidate me. She didn't intimidate me at all.

. . . .

¶55. Ousley testified that after Rainey came to her home, Rainey also came to see Ousley at the hotel where Ousley worked. Ousley stated that Rainey came by the hotel on two or three different occasions, but Ousley was not there during any of these visits. Ousley stated that Rainey had never come to her workplace before. Ousley testified that she "figured" Rainey came to see her at work to try and get her to change her story given to the investigators. During cross-examination, defense counsel asked, "And how many times did [Rainey] try to tell you to change your story towards you?" Ousley clarified "[o]ne time," referring to the time Rainey approached Ousley at her house.

¶56. Ousley also testified that she was not intimated by Rainey. However, section 97-9-113(3) provides that "[i]t is not a defense to a prosecution under this section if the actual completion of the threat, harassment or intimidation was prevented from occurring." After viewing the evidence in the light most favorable to the State, I find that the jury could infer from the evidence and circumstances that Rainey intimidated Ousley by "intentionally or knowingly . . . solicit[ing], encourag[ing,] or request[ing] . . . [Ousley] to provide false information intended to defeat or defend against an existing criminal charge or to hinder of interfere with an ongoing investigation of a criminal act" when Rainey visited Ousley and questioned her about her statement to investigators.[22] Miss. Code

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Q. Okay. So she was just telling you to tell folks the truth?

A: Yeah, just tell the truth.

[22] The jury instruction that set forth the elements of intimidating a witness tracked the language of section 97-9-113(1)(d) and Rainey's indictment:

Ann. § 97-9-113(1)(d). Additionally, a review of the transcript also shows that the defense did not present any evidence or testimony to contradict Ousley's statements that Rainey visited her at work and that Ousley figured Rainey only visited her because she wanted Ousley to change her story to the investi-

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> The [c]ourt instructs the jury that [Rainey] has been charged with the crime of Intimidating a Witness in Count II of the Indictment. If you find from the evidence in this case beyond a reasonable doubt that:
>
> COUNT II
>
> 1. Based upon a series of acts connected together and constituting parts of a common scheme and plan that [Rainey] on or about and between August 1, 2017 through August 17, 2018 in Madison County, Mississippi;
> 2. Did intentionally and knowingly attempt to solicit, encourage or request a witness to provide false information;
> 3. Intended to defeat or defend against an existing criminal charge; or
> 4. Intended to hinder or interfere in an ongoing investigation of a criminal act, particularly the Voter Fraud allegation contained in Count I of the Indictment;
> 5. By going to the home of witness, Emma Ousley, and requesting her to change her story that she had given to investigators so that the Defendant, Courtney L. Rainey, would not get in trouble;
>
> then you shall find the Defendant, Courtney L. Rainey, guilty of Intimidating a Witness, as charged in Count II of the Indictment.
>
> If the State has failed to prove any one or more of the above-listed elements beyond a reasonable doubt, then you shall find the Defendant, Courtney L. Rainey, not guilty of Intimidating a Witness, as charged in Count II of the Indictment.

gators. Furthermore, I disagree with the majority's finding that the facts and inferences so point in favor of Rainey that "reasonable men could not have found her guilty of witness intimidation beyond a reasonable doubt." (Maj. Op. at (¶41)). I therefore respectfully dissent from the majority's decision to reverse and render.

WILSON, P.J., GREENLEE AND SMITH, JJ., JOIN THIS OPINION.

WILSON, P.J., DISSENTING:

¶57. Viewing the evidence in the light most favorable to the jury's verdict, there is sufficient evidence for a rational juror to find Rainey guilty. Therefore, Rainey's conviction and sentence must be affirmed. The majority reverses the conviction only by improperly viewing the evidence in the light most favorable to Rainey. I respectfully dissent.

¶58. To find Rainey guilty of "the crime of intimidating a witness," the jury had to find that Rainey "intentionally or knowingly . . . [s]olicit[ed], encourage[d] or request[ed] [Ousley] to provide false information intended to defeat or defend against an existing criminal charge or to hinder or interfere an ongoing investigation of a criminal act." Miss. Code Ann. § 97-9-113(1)(d) (Rev. 2020). The State was not required to prove that Rainey intended to intimidate Ousley or actually intimidated Ousley but only that Rainey asked or encouraged Ousley "to provide false information." *Id.*

¶59. Ousley testified at trial that Rainey gave her and Cain ten dollars for beer after she helped them complete a voter registration application. Ousley originally told investigators that Rainey gave her and Cain ten dollars each, but at trial she testified that

Rainey gave them a total of ten dollars. Ousley also testified at trial that Rainey later drove her to City Hall to vote by absentee ballot and afterward gave her an additional ten dollars. Ousley had not mentioned this second payment to the investigators.

¶60. When Rainey later learned that Ousley had talked to the investigators, she showed up at Ousley's house. Ousley testified that Rainey had never visited her house on any other occasion. According to Ousley, Rainey asked her "a lot of questions" about what she had told the investigators and wanted to know whether she had told the investigators that Rainey had given her ten dollars. On cross-examination, defense counsel asked Ousley, "[H]ow many times did [Rainey] try to tell you to change your story . . . ?" Ousley answered, "One time"—when Rainey confronted her "at [her] house."[23]

¶61. The majority finds that Rainey is innocent by reasoning that "[i]f Rainey was trying to get Ousley to 'change her story,' it was only to change it from the lies contained in her written statement to the truth." *Ante* at ¶38 (footnote omitted). This improperly views the evidence in the light most favorable to Rainey. The jury was not required to accept this innocent explanation, and in a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to *the State*, not Rainey. *Poole v. State*, 46 So. 3d 290, 293 (¶20) (Miss. 2010). "We are not required to decide—and in fact we must refrain from deciding—whether we think the

[23] On two other occasions, Rainey showed up at Ousley's place of work looking for her, but Ousley was not at work on those days. Ousley testified that Rainey had never come to her place of work before.

State proved the elements. Rather, we must decide whether a reasonable juror could rationally say that the State did." *Id.* at 293-94 (¶20).

¶62. The majority seems to assume and accept as fact that Rainey (a) had learned all the details of Ousley's statement to the investigators and (b) confronted Ousley only to urge her to correct specific misstatements—e.g., that Rainey gave Ousley and Cain ten dollars *total*, not ten dollars *each*, when she helped them complete voter registration applications. *See ante* at ¶¶37-38. The jury was not *required* to accept this innocent explanation of Rainey's visit. Rather, there was sufficient evidence for the jury to infer that Rainey (a) knew Ousley had told investigators that Rainey had given her money in connection with her registration application and/or absentee vote and (b) confronted Ousley to get her to recant her statement in its entirety. Thus, the jury reasonably could have found Rainey guilty of asking or encouraging Ousley "to provide false information" in order to hinder the ongoing criminal investigation. Miss. Code Ann. § 97-9-113(1)(d). Accordingly, Rainey's conviction should be affirmed.

CARLTON, P.J., GREENLEE AND SMITH, JJ., JOIN THIS OPINION.

APPENDIX C

IN THE CIRCUIT COURT OF
MADISON COUNTY, MISSISSIPPI

Cause No. 2018-0518
Count II

STATE OF MISSISSIPPI

vs.

COURTNEY L. RAINEY

Defendant.

JUDGMENT OF CONVICTION AND
SENTENCE INSTANTER

THIS CAUSE having come on for trial on the 31ST DAY OF DAY OF JULY, 2019, during the July Term of this Court, and the Defendant, whose legal name is COURTNEY L. RAINEY, whose date of birth is [redacted], whose Social Security Number is [redacted] and whose Attorney of Record is CARLOS TANNER, MICHAEL STERLING and JOHN HALL and the State of Mississippi, by and through the Assistant District Attorneys, KATIE MOULDS and A. RANDALL HARRIS; and, a jury of twelve (12) good and lawful citizens and qualified electors of Madison County, Mississippi, having been duly impaneled and accepted by the parties and sworn according to law to try the issues. The jury, having heard the testimony of witnesses and all the evidence introduced during the trial of this Cause, both oral and documentary, and having heard the instructions of the Court and arguments of Counsel in open Court,

retired to consider their verdict and presently returned into Court the following verdict, through its foreman:

> "As to COUNT II, we the jury, find the Defendant, COURTNEY L. RAINEY, Guilty as Charged"

WHEREUPON, motion of the Defendant, the Court polled the jury, and having found and determined that the verdict was unanimous, the Court ordered that the verdicts be filed and entered of record.

THE COURT HAVING conducted a sentencing hearing on 23rd day of September, 2019, at which time the Defendant appeared before the Court in her own proper person and with her counsel of record, Carlos Tanner and John Hall. The State of Mississippi appeared by and through Assistant District Attorney Katie Moulds. After hearing the matters presented, the Court finds as follows:

IT IS THEREFORE ORDERED, that upon the verdict of the jury and the findings of the Court, the Defendant, COURTNEY L. RAINEY, is hereby adjudicated guilty of INTIMIDATING A WITNESS IN COUNT II, as charged in the indictment in this cause, and the Court imposed the sentence as follows:

(1) To serve a term of FIFTEEN (15) year(s) in the custody of the Mississippi Department of Corrections, in COUNT II. PROVIDED, HOWEVER, that the execution of the last THREE (3) year(s) of the sentence imposed herein is/are hereby stayed and that portion of the sentence is/are suspended AND the Defendant shall be released and placed on SUPERVISED PROBATION under the direct supervision of the Mississippi Department of Corrections on the terms, provisions and conditions prescribed elsewhere in this

Order. The sentence imposed shall run consecutively to any and all other sentences.

(2) To serve a term of FIVE (5) year(s) on SUPERVISED PROBATION under the direct supervision of the Department of Corrections which shall commence upon the Defendant's release from custody of the Mississippi Department of Corrections.

During the term of SUPERVISED PROBATION or POST-RELEASE SUPERVISION the Defendant shall obey all orders of this Court and all the terms and conditions of probation or post-release supervision as may be imposed by this Court or the Mississippi Department of Corrections ("MDOC"), including but not limited to conditions set forth by Miss. Code Ann. §47-7-35 (1972, as amended), as well as any modification or alterations thereto made by either this Court or the MDOC. It is further provided that, if the Defendant is adjudicated to be guilty of a material breach, violation or nonobservance of any of the terms, provisions or conditions of probation or post-release supervision, the probationary term may be revoked the stay of execution and suspension of sentence terminated, and the Defendant's custody may be remanded to the MDOC for incarceration until the unserved portion of bis sentence is fully satisfied.

(3) To pay court costs, fees and assessments in the amount of $698.50, to be paid at the rate of $75.00 per month beginning within thirty (30) days after release from custody until paid in full.

IT IS HEREBY ORDERED that payments for any applicable court costs, fees and assessments, fine(s) or restitution paid by the Defendant shall be applied as follows: FIRST to court costs, fees and assessments; SECOND to fine(s); THIRD to restitution.

IT IS FURTHER ORDERED that all time served in pretrial detainment in this cause is credited against this sentence.

SO ORDERED AND ADJUDGED THIS THE 23RD DAY OF SEPTEMBER, 2019.

/s/ [Illegible]
CIRCUIT JUDGE

APPENDIX D

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

D. Jeremy Whitmire
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(*Street Address*)
450 High Street
Jackson, Mississippi 39201-1082

e-mail: sctclerk@courts.ms.gov

June 29, 2021

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 29th day of June, 2021.

Court of Appeals Case # 2019-KA-01651-COA
Trial Court Case # 2018-0518

Courtney L. Rainey v. State of Mississippi

The motion for rehearing is denied. Carlton and Wilson, P.JJ., and Smith, J., would grant. Emfinger, J., not participating.

NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions."