IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-KA-01528-COA

RODARIUS BONARD STEWART
APPELLANT

VS.

STATE OF MISSISSIPPI
APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
ALCORN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT IS REQUESTED

TABLE OF AUTHORITIES

ARGUMENT

Fair trial? The State says this was a "fair trial." No where in any of the cases cited by the State were prospective jurors allowed on the jury that said they would feel "uncomfortable" or be "influenced." This is not the "trial by jury" guaranteed by the Bill of Rights Article 3 §31 of the Mississippi Constitution and Amendment VI to the United States Constitution. The U.S. Constitution guarantees "an impartial jury." Anything but that was had by the Appellant by the admissions of the jury panel itself under sworn voir dire.

The trial court took it upon itself to question jurors at length about knowledge of the case, the victim and his family, and other factors that could influence the potential jury panel (Transcript Pages 176 - 413). The extensive qualification of the jury and voir dire was held at the Crossroads Arena over a period of two days to accommodate both the great number of prospective jurors and spectators. Within those proceedings, the trial court advised the potential jurors of the importance of a fair and impartial jury by stating the following, "I submit to you that I believe this is probably the most important stage of any trial, and it is that area where we seek earnestly to select a fair and impartial jury to try a case." (Trial Transcript Page 285:7-10).

Once the trial court questioned the jurors did it not also have the duty and responsibility to listen to the answers and ensure a fair and impartial jury? In fact, is jury selection not the most important decision and process during the entire trial? Please note the above quote from the trial court. It is the duty of all of the participants: judge, district attorney, and defense counsel to ensure that process. To do otherwise is "plain error." This Court said it best in *Fisher v. State,* 481 So.2d 203 (Miss.1985), "If an unbiased jury is not impaneled, it does not matter how fair the remainder of the proceedings may be." It is beyond belief that this jury could ever be considered fair and impartial given their statements during voir dire proceedings.

The State notes on footnote number five on page 7 of it's brief, "Juror Frank Parvin stated that his knowledge of the victim's family might influence him." This is just the point. In *Evans v. State,* 725 So. 2d 613 (Miss.1997), which the State cited in it's brief, this Court noted about a motion for change of venue:

> A presumption of prejudice may be rebutted by the State's demonstration that an impartial jury was actually impaneled. *Morgan v. State,* 681 So.2d 82, 92 (Miss.1996).....There, this Court held that "[t]he linchpin is whether the venire members state that they could be fair and impartial jurors if chosen" *Id.* (citations omitted). Here, each juror indicated that they could be fair and impartial.

Is not the antithesis of this true as well? A presumption of prejudice can be shown by a biased jury being empaneled. The "linchpin" being "uncomfortable" and "influenced" jurors.

Defense counsel, while making its argument regarding *Batson,* pointedly stated to the trial court the following:

> Thank you, Your Honor.
> With regards to the defendant making his *Batson* challenge, we submit we don't make our *Batson* challenge to the State. We make our challenge to the Court. And this informal meeting we had off the record to the side was, we submit, not on the record. And, again, we don't make our challenges to the State. We make it to the Court. And we did timely make that challenge on the record. And we submit that that's - - the jury is being picked now, not at a sidebar meeting between the State and the defendant.
> We submit the State's reason for striking several black jurors, 27, 39 and 50, was because they knew the defendant and his family. There are several jurors who the State did not strike and who, in fact, knew the victim's family.
> .....
> Juror No. 29, Angela Avent, her father is the the second cousin of the victim's family and knows family members of the victim. The State didn't strike Juror No. 29.
> Juror No. 40, Frank Parvin, P-A-R-V-I-N,

knows both sides of the victim's family, and the State chose not to strike Juror No. 40. Plus Juror No. 40 says that the victim's grandmother and his wife are cousins, and the State again chose not to strike Juror No. 40.

In addition, Juror No. 40, Frank Parvin had reservations, Your Honor. He told you there were some concerns whether he could be influenced by his knowledge of the victim's family.

(Trial Transcript Pages 582:2-18, 25-29 – 583:10)

Thus it is clear, defense counsel directly pointed out to the trial court that from his notes jurors indicated that they might be influenced prior to the proceedings.[1]

The trial court granted lesser included offense instructions and the jury was obviously considering same. During deliberations, the jury questioned the trial court about the term "willfully" (Page 219, Court Clerk's Official Papers), which was contained in Jury Instructions for the lesser included offense of Manslaughter by Culpable Negligence (Pages 164, 165, and 210, Court Clerk's Official Papers). For the Appellant, a conviction of this lesser offense would change his sentence from "life in prison" to a maximum of "20 years." A jury which was unbiased could certainly have returned a not guilty verdict or at the very least, a manslaughter verdict.

CONCLUSION

The denial of the Motion for Change of Venue, in hindsight, was indeed improper. The trial court reserved the right to revisit the issue after voir dire and never did. This is "plain error" since multiple jurors expressed, at a minimum, reservations and a lack of fairness and not only

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[1] Albeit, defense counsel made this statement to the trial court during a *Batson* challenge argument since the state attempted to excuse for cause all black jurors.

possible but direct influence as a result of pre-trial knowledge of the victim's family.

The State in its brief says "he's guilty anyway" so why reverse? Why, indeed. This jury even with the influences and prejudices attached to it was considering a lesser-included offense in this case. Even though the State would have this Court believe a guilty verdict of murder was a forgone conclusion, such was not the case. Therefore, this Court should overturn this case of "plain error" by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, John R. White, attorney of record for the Appellant, Rodarius Bondard Stewart, do hereby certify that I have this day sent via United States Mail a true and correct copy of the foregoing Reply Brief of Appellant to the following:

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This the 25th day of October 2007.

JOHN R. WHITE