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

BRIEF OF APPELLANT RODARIUS BONARD STEWART

JOHN R. WHITE
ATTORNEY AT LAW
MISSISSIPPI BAR NO [redacted]
123 SOUTH FULTON STREET
IUKA, MISSISSIPPI 38852
Tele: (662) 423-3153
Fax: (662)423-2964

Attorney for Appellant,
Rodarius Bonard Stewart

ORAL ARGUMENT IS REQUESTED

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2005-KA-00184-COA

RODARIUS BONARD STEWART
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APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
ALCORN COUNTY, MISSISSIPPI

CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellant, Rodarius Bonard Stewart, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualifications or recusal.

1. Rodarius Bonard Stewart, Appellant
2. State of Mississippi, Appellee
4. John R. White, Attorney for Appellant
5. Archibald W. Bullard, Attorney for Appellee
6. Sharion Aycock, Circuit Court Judge

This the 20th day of August, 2007.

JOHN R. WHITE, MSB[redacted]
ATTORNEY FOR APPELLANT

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ORAL ARGUMENT REQUESTED

The Appellant, Rodarius Stewart, has been sentenced to life in prison. The arguments made by Appellant's counsel in his brief call into question whether or not the Appellant received a fair and impartial jury to hear his case. Oral argument would help the Court in making a determination of whether the plain errors made at trial level are so egregious as to call into question the fundamental fairness of the verdict.

Accordingly, Appellant's counsel requests oral argument.

ISSUES

I. The Motion for Change of Venue should not have been denied.

A. Comments during voir dire

B. Other factors

II. Improper comments were made by the Prosecutors in the presence of the jury.

A. The Prosecutor interjected personal opinions.

B. The prosecutor sent an impermissible racial message to the jury in his closing rebuttal.

FACTS

On September 3, 2004, Rodarius Stewart was indicted on the charge of Murder in the Circuit Court of Alcorn County, Mississippi. Mr. Stewart petitioned the Court for an attorney and was appointed counsel on September 22, 2004. He entered a plea of not guilty that same day and a request for discovery was made on his behalf on September 24, 2004. Defense counsel filed a Motion for Special Jury Venire and to Change Venue on January 18, 2005. A Motion for the suppression of the Defendant's statement given to the police was made on June 3, 2005. Another Motion for Change of Venue was filed on July 27, 2005, and a Demand for Special Venire was made on August 29, 2005. Various additional motions were filed and ruled upon.

Significantly, the Court denied the Motion to Change Venue on September 21, 2005, reserving the right to review it's decision after voir dire. Voir dire occurred after a special venire panel was called at the Crossroads Arena on July 31, 2006, and the issue of venue change was not addressed at that point or ever again. The State made a Motion to Sequester Jury on July 26, 2006, (Page 159, Court Clerk's Official Papers) and the Court granted this motion stating in the record "the convenience of sequestering the jury versus the alternate security measures that were

going to be taken, that it is in the best interest in this case that this jury be sequestered." (Transcript Page 283:11-15)

Trial began on August 2, 2006, and lasted six days. Various versions of what occurred were testified to by witnesses of the event. It is safe to say the versions conflicted, and based upon who you believe, the Defendant could have be found guilty of depraved heart murder, manslaughter, or acquitted. The jury returned a verdict of guilty to depraved heart murder on August 6, 2006, and Rodarius Stewart was immediately sentenced to life in prison.

ARGUMENT

I. The Motion for Change of Venue should not have been denied.

> Article 3 and §14 of our constitution provides that "no person shall be deprived of life, liberty or property except by due process of law". The Supreme Court has construed this provision as guaranteeing to an accused a fair trial. *Brooks v. State*, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950). Put otherwise, under our law an accused has a due process right to a fair trial. *Collins v. State*, 408 So.2d 1376, 1380 (Miss. 1982). If an unbiased jury is not impaneled, it does not matter how fair the remainder of the proceedings may be. A complementary constitutional guarantee is found in §26 of our Bill of Rights which provides that "in all criminal prosecutions the accused shall have a right to ... trial by an impartial jury ..."

Fisher v. State, 481 So.2d 203, 216. (Miss. 1985)

There are several arguments as to why the Court should have granted the Defendant's Motion for Change of Venue which was filed on July 27, 2005. (Page 46, Court Clerk's Official Papers). However, the Court denied the Motion to Change Venue in a written opinion dated September 21, 2005. In that opinion, the Court reserved it's final opinion until completion of voir dire. (Page 119, Court Clerk's Official Papers). When Defense counsel stated it's opposition to the State's motion to sequester the jury, counsel renewed their motion for a change of venue. "If there is a need to sequester the jury, there is more so a need to change venue." (Transcript Page 281:26-28). The Court stated, ".....and the convenience of sequestering the jury

versus the alternate security measures that were going to be taken, that it is in the best interest in this case that this jury be sequestered." (Transcript Page 283:11-15). The Court went on to deny Defense counsel's renewed change of venue, but did reserve the right to re-look after the voir dire proceedings. (Transcript Page 283:26-29). This was never done. Even after statements given by two of the actual jurors stating that they didn't think it was appropriate for them to be on the jury, the Court wrongfully never addresses the venue issue again after voir dire. This was plain error.

A. Comments during voir dire

The Appellant, fundamentally, did not receive a fair trial. Of the fourteen people who were in the jury panel (twelve jurors and two alternates) and sequestered by the Court due to publicity and community interest in the alleged crime, (State's Motion to Sequester the Jury, Page 159, Court Clerk's Official Papers) the following can be gleaned from the voir dire:

1. Mary Hall, Juror No. 7, stated that she had met the victim's mother and father and her husband grew up with the victim's father. She also stated she attended church with some of the victim's relatives. Ms. Hall also stated that she had a niece who was "shot and killed". (Transcript Pages 353:26 - 354:16; 408:7-26).

2. Angela Avent, Juror No. 29, stated that she knew Mr. Bullard through her children's sports activities. (Transcript Pages 296:7 - 297:7). Ms. Avent also stating the following while being questioned by the Court:

> **Q.** This is Juror Ms. Avent. And how do you know the family?
> **A.** My father and Mrs. Gant[1] were second cousins. And my father was a game warden here for years and worked with Mr. Gant and were friends for years.

[1] Mrs. Gant was the victim's grandmother.

Q. Your father and Bill Gant[2] worked together?
A. Yes.
Q. Is there anything out of that relationship that would affect you in making a decision in this case?
A. No.
Q. And you told me first something else?
A. My father and Mrs. Gant were second cousins.
Q. And for the record, you're speaking of Tammy - - of Bill Gant's wife?
A. Yes, ma'am.
Q. Would that affect your decision in this case?
A. It would not affect my decision. I just - - I do not think it would be appropriate for me to be on there.
Q. Tell me why.
A. I just think the question you asked me a bout seeing the family later and would I feel compelled to talk or whatever, I think that I might.
Q. Feel the need to explain your decision if it were for the defendant in this case?
A. Yes, ma'am.
Q. Okay. So having taken all of what's been said in consideration just the totality of it, do you represent to me under oath that you would not be about to hear the case and make a fair and impartial decision?
A. I think I would be able to do that. I just think it would be uncomfortable for me possibly afterward with the family.

(Transcript Pages 359:11 - 360:13)

3. Patsy Cornelius, Juror No. 35, stated that the victim and her daughter went to school together (Transcript Page 340:16-25).

4. Frank Parvin, Juror No. 40, stated the following while being questioned by the Court:

A. Frank Parvin, No. 40.
Q. Mr. Parvin, how do you know the family?
A. I know both sides of the family and - -
Q. Tell me first how you know the victim's side.
A. The victim's side, the victim's grandmother and my wife was cousins.
Q. So do you attend some family reunions and such together?
A. No, ma'am.

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[2] Mr. Gant was the victim's grandfather and the former Sheriff of Alcorn County.

Q. In my family, we count cousins down to the tenth degree. We claim everybody. I don't know how y'all claim them up here, so is it close enough - -

A. They are probably second or third cousins.

Q. Okay. But does that bring you into their home or them into your home?

A. No, ma'am.

Q. Okay. Now, you also represent to me that you know the defendant's family?

A. No, ma'am. The daddy's side of the family.

Q. I see.

A. The Hamlin side.

Q. Thank you.

A. Mr. Hamlin and his brother was raised a quarter of a mile from me where I've been for the last 36 years. My wife also worked with the victim's aunt for years.

Q. Having these relationships and working relationships and knowing them and being kin to them a bit distantly, would any of that affect you in such a way that you could not be a fair and impartial juror in this case?

A. Well, I'm suppose to say not, probably not, but it might make an influence.

Q. Well, you've just said something that I want to clarify in case it's not been stated adequately. There's no right or wrong answer. This is not a test. This is just tell me what's in your heart and soul so we can pick a fair and impartial juror. So there's no right answer. An honest answer is the right answer.

A. Yes, ma'am.

Q. You're honestly telling me it might influence you?

A. Yes, ma'am. And I did not know the victim, but it would probably make an influence.

Q. Thank you, sir. Thank you very much. Yes, sir.

(Transcript Pages 360:25 - 362:8)

5. April Haddock, Juror No. 46, stated that she knew someone seated with the defendant's family. She had attended school with the woman. Ms. Haddock also stated she knew the Hamlin[3] family from the bank she had previously worked. She would see the family on a regular basis at her work (Transcript Pages 328:20 - 329:7; 364:22 - 366:6).

[3] The victim in this cause is Tyler Hamlin.

6. David Payne, Juror No. 63, had worked with the victim's father in years past (Transcript Pages 369:27 - 370:6).

7. Phyllis Murphy, Juror No. 65, worked with Mr. Bullard's[4] sister for ten years and also stated that she recalled a newspaper article regarding the incident (Transcript Pages 298:8-29; 399:5-25)

In other words, after denying the Defendant's Motion for Change of Venue, the Court wound up with a "fair and impartial jury" of people, who among other things, were related to the victim's family, worked with the victim's family, and more than one occasion stated that it would make them uncomfortable to sit on the jury. This is the jury obtained in the county where this crime occurred after summonsing hundreds of prospective jurors to the Crossroads Arena (not the Alcorn County Courthouse) in order to accommodate the massive number of jurors and interested parties.

How is this a fair and impartial jury? From that moment on (the denial of the Motion to Change Venue and the voir dire process), the Appellant's fate was decided, not by unbiased jurors, but by people with a vested interest in the outcome, or at the very least, people who would be uncomfortable giving a verdict of not guilty, no matter what the facts. This cannot be allowed if we hold "fair and impartial" as our standard, to do otherwise would be plain error.

This Court in *Lutes v. State*, 517 So.2d 541, 546 (Miss. 1987), in a five-four decision, affirmed the denial of a Motion to Change Venue despite a vehementent dissent by Justice Roberts. The majority opinion states:

> In both *Johnson* and *Fisher* this Court kept in mind that this Court sits as a court of review. In reviewing whether the trial court abused his discretion in denying a

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[4] Assistant District Attorney Arch Bullard

> change of venue "we look to the completed trial, particularly including the voir dire examination of prospective jurors, to determine whether the accused received a fair trial." *Winters v. State*, 473 So.2d452, 457 (Miss.1985); *Billiot v. State*, 454 So.2d 445, 455 (Miss.1984). See *Fisher*, 481 So.2d at 223; *Johnson*, 476 So.2d at 1215.

Appellant's counsel is aware that any court of appellate jurisdiction is loathe to revisit the issue of venue, leaving many of these matters "to the sound discretion of the trial judge." Rarely, do appeal courts overturn cases on this issue. However, this case is unique and affirming it would be to stand the phrase "fair and impartial" on it's head. The Supreme Court, as recently as August of 2007, has affirmed, yet another, appeal on this basis, *King v. State*, ----So.2d-----, 2007 WL 1558733 (Miss.). The court in *King* stated, ".....King did not present any evidence that he could not receive a fair trial from the twelve jurors who heard his case. In *Swann*, this Court held that the State can rebut the presumption that the defendant could not received a fair trial by proving that the trial court impaneled an impartial jury. *Swann*, 806 So.2d at 1116."

Here two jurors, under questioning by the Court (not individualized questioning, but in open court and in a large group of prospective jurors), stated not only their reluctance, but that they were "uncomfortable" and "influenced" by their relationship with the victim's family. Impartial? I think not.

As the Mississippi Supreme Court stated in *Fisher*:

> Elementary principles of group psychology, as well as empirical findings, make clear that, where questions are put to the panel as a whole, the average potential juror will be extremely reluctant to disclose his biases. He knows that he is supposed to be fair and impartial. Knowing that, and being subject to the peer pressure of the courtroom setting (not to mention the intimidating nature of the whole experience to the first-time juror), he will be unlikely to admit that he cannot give the accused a fair hearing, even though he suspects that to be the fact. For these and other reasons, voir dire, even when most skillfully performed, is often ineffective to discover the extent to which a juror's vote may be affected by what he has heard about a case. (at 220)

However, in this case, the Court probed the prospective jurors well in it's voir dire questions. On two separate occasions, two potential jurors expressed their inability to not be influenced by their relationship with the victim's family and not feel uncomfortable about being around the victim's family later. Even after these honest expressions of reluctance and trepidation, these two were placed on the jury. This created reversible error.

No one knows what goes on behind closed doors (at least in a jury room). However, it is clear that from the note from the jury (Page 219, Court Clerk's Official Papers) that the jury was deliberating "willfully". What role these "influenced jurors" played in that deliberation, we cannot know, but clearly whatever influence they had, was improper.

B. Other factors

Other factors that support the Appellant's position that the motion for change of venue should have been granted:

1. Assistant District Arch Bullard's testimony that he was concerned for the Defendant's safety if he was released on bond. (Transcript Pages 106-125).

2. The packed courtroom divided along racial lines and extra security need.

3. The venire panel required by the Court in an effort to obtain hundreds of prospective jurors.

4. The use of Crossroads Arena to accommodate the hundreds of prospective jurors and interested parties.

5. The State moved that the Court sequester the jury due to "publicity and community interest in the crime." (Page 159, Court Clerk's Official Papers). The Court granted this motion stating in the record "the convenience of sequestering the jury versus the alternate security measures that were going to be taken, that it is in the best interest in this case that this jury be

sequestered." (Transcript Page 283:11-15)

II. Improper comments were made by the Prosecutors in the presence of the jury.

A. The Prosecutor interjected personal opinions.

During cross-examination of Defense witness, Alisha Grimes, Prosecutor improperly interjection his opinion of "what a reasonable person would do".

Q. You didn't go to the police department, you didn't go to the sheriff's department because these people were trying to kill you?
A. No.
Q. That's what I would have done. Why didn't you?
Mr. Alkebu-Lan: Objection, Your Honor.
The Court: Be sustained.
Mr. Alkebu-Lan: We ask the jury be instructed to disregard that last comment and not to consider it for any purpose whatsoever.
The Court: The jury is so instructed.
Mr. Pounds: Thank you, Your Honor.
Q. Why didn't you go - -
Mr. Alkebu-Lan: We move for a mistrial, Your Honor.
The Court: Counsel approach.
(The following conference was held at the bench outside the hearing of the jury)
Mr. Alkebu-Lan: Your Honor, that last comment, the prosecutor knew he should not have made, interjecting his sole opinion as to what he would have done to impeach or discredit the testimony of this witness as to going to the police after being threatened, scared to death, in fear of her life, to try to insinuate in from of this jury in the presence of this jury that it didn't happen. It's so prejudicial that we would request a mistrial.
The Court: Your response, Mr. Pounds?
Mr. Pounds: Yes, ma'am. Thank you. It's just no different from saying that's what an average citizen would have done, that's what other people would have done, that's what a person without a guilty conscience would have done. And I - - that's what I would have asked, and that's what I planned on asking her. Y'all had a guilty conscience, and that's where I was going with this line of questioning.
The Court: A mistrial is denied. Do refrain from making comments where you subject yourself to the jury, what you yourself would have done.

Mr. Pounds: Thank you. Yes ma'am. I'll try to - - is it okay to frame it that's what a person with a non-guilty conscience would have done?

The Court: Average person.

Mr. Pounds: Average person. Thank you. Fair enough.

(Transcript Pages 1185:4 -1186:27)

B. The prosecutor sent an impermissible racial message to the jury in his closing rebuttal.

In his closing arguments, Assistant District Attorney Arch Bullard stated the following:

> "I am going to talk about the white elephant in the room. This case has everything to do with race. This case has nothing to do with race. It has everything to do with race in that a black man is accused of killing a white man. It has nothing to do with race because justice is blind. The killer is the defendant. The deceased is the victim. It has everything to do with race because obviously from the groups that were involved, prejudices and stereotypes and fears that they have of each other. But it has nothing to do with race because you are white and black. You're male and female. You're young and older. And you looking at what happened out there, the facts that occurred, is where justice is made." (Transcript Page 1380:3-15).

This commentary by two assistant district attorneys improperly interjected themselves and race into the verdict. The Court should have immediately declared a mistrial when faced with this type of case where the atmosphere is contagious with the issue of race. Racial commentary is *persona non grata*. *Tate v. State*, 784 So.2d 208 (Miss.2001).

CONCLUSION

Even before opening statements were made, the impartiality of the jury who sat in judgment of Rodarius Stewart can and should be called into question. During extensive voir dire questioning by the Court, potential jurors questioned their ability to be fair and described relationships to the victim's family. Those potential jurors became actual jurors sitting in the jury box for the six day trial that ended in a unanimous guilty verdict and a twenty year old man going to prison for the rest of his natural life. Of the fourteen jurors, one expressed that she did

not think it would be fair she sit on the jury due to her relationship with the family. Another juror expressed that his relationship with the victim's family would have an influence over him. Five other jurors gave accounts of personal relationships with either the victim or the victim's family. This was the "fair and impartial" jury that sat in judgment of Rodarius Stewart.

Clearly, the Motion to Change Venue should have been granted and the totality of the circumstances support this conclusion. The very foundation of our justice system is built upon a fair and impartial jury. This foundation quickly crumbles if jurors are "influenced" and "uncomfortable".

Respectfully submitted,

JOHN R. WHITE, MS BAR [redacted]
ATTORNEY FOR APPELLANT
123 SOUTH FULTON STREET
IUKA, MISSISSIPPI 38852
662-423-3153 TELEPHONE
662-423-2964 FACSIMILE

CERTIFICATE OF SERVICE

I, the undersigned, John R. White, attorney of record for the Appellant, Rodarius Bonard Stewart, do hereby certify that I have this day mailed a true and correct copy of the foregoing Brief of the Appellant to:

Honorable Sharion Aycock
P.O. Drawer 1100
Tupelo, MS 38802

Arch Bullard
Assistant District Attorney
P.O. Box 212
Corinth, MS 38835

This the 20th day of August, 2007.

JOHN R. WHITE