IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RANDY SHON HOWARD — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

DOCKET NO. : 2007-KA-00799-COA

APPEAL FROM THE
CIRCUIT COURT OF NESHOBA COUNTY

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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After the jury had been selected and seated, the State moved to be permitted to exercise its last peremptory challenge to remove Juror Evelyn Burkes. (T[1]. p. 43). Only jurors who become unable to serve or are disqualified may be removed and replaced by alternates. *Mississippi Code Annotated* § 13-5-67 (1972). Ms. Burkes was not shown to be either unable or disqualified from serving.

The State failed to demonstrate that Juror Evelyn Burkes was in any way evasive or less than honest in her responses to voir dire. The trial court noted, "So we don't know of any wrongdoing or her lack of response...." (T. p. 51). Nevertheless, the trial court removed Ms. Burkes and replaced her with an alternate juror, effectively granting the State's motion to belatedly use its last peremptory challenge.

Although it is always impossible to ever prove actual prejudice from the removal of a qualified juror, courts have been willing to presume prejudice in a variety of circumstances. This circumstance results in a structural unfairness such that prejudice should be presumed.

ARGUMENT

The trial court erred when it improperly removed Juror Evelyn Burkes.

After the jury had been empanelled, the State sought to remove Evelyn Burkes from the jury by using a peremptory challenge. (T pp. 40, 43). The apparent concern was that Ms. Burkes once had the same employer as Defendant's father. (T. p. 40). She had, according to the State, failed to disclose this connection during voir dire. Ultimately, the trial court excused her for "the

[1] The following abbreviation is used "T" for Transcript.

appearance of impropriety and a lack of response."(T. p. 51). However, the trial court was careful to state that it knew of no wrongdoing in her lack of response. (T. p.51).

To understand the exact basis for the removal of Ms. Burkes it is important to remember the following facts: (1) The employment of Defendant's father at the same utility as Ms. Burkes ended twelve or thirteen years before trial, in 1994 or 1995. (T. p. 45); (2) contact between Ms. Burkes and Defendant's father had been slight – he worked at an outside job and she at a clerical one. (T. p. 41); and Defendant's father only came into the office where Ms. Burkes worked to get the mail when his supervisor was on vacation, and at those times she was often not present (T. p. 46). More importantly, there was absolutely no showing that Ms. Burkes either knew Defendant's father, or for that matter, knew that he was Defendant's father.

Finally, the purported lack of candor of Ms. Burkes is based on the question by the trial court to the jury pool, "I'll ask you do you know the Defendant. And living in Neshoba County, you probably do know him." (T. p. 14). Ms. Burkes did not respond.

Of course, the State does not argue that Ms. Burkes knew the Defendant. Nothing suggests that conclusion. Rather, because Ms. Burkes had the same employer as Defendant's father over twelve years ago, the State urges that she should have responded. (T. p. 40).

Assuming *arguendo* the unproven assertions that she knew Randolph Howard and that she also knew that he was, in fact, the father of the Defendant, there was no question posed regarding these collateral relationships. Implicitly, the State argues that relationships with members of the Defendant's family must be disclosed. There is no such rule.

The difficulty in requiring a prospective juror to anticipate what facts regarding knowledge of family or friends must be disclosed is obvious. Must employment with any family member be disclosed? Does that extend to employment at the same place as siblings of the

Defendant? What if a prospective juror attended the same school, but in a different grade, as a sibling of the Defendant? Need friendship with an uncle of the Defendant be disclosed?

As the trial court noted, "In a rural county, like Leake County and Neshoba County, we know each other." (T. p. 14). To expect a prospective juror to answer regarding employment relationships in the distant past that produced only the most incidental of contact with a family member when asked, "Do you know the Defendant," is surely not reasonable. Thus, the implication that Ms. Burkes was evasive or even dishonest, is completely false. Without reasonably precise questions, a prospective juror cannot be expected to know how she should respond.

Thus, there was no reason to remove Ms. Burke from the jury. The State essentially admitted as much. The prosecutor stated,

> "Your Honor, if we didn't have any preemptory challenges left then I suppose we would be out of luck. But we do have one left, and for that reason, we would move to excuse her, and use that one preemptory challenge now that this has been brought to our attention." (T. p. 43).

Defense counsel then indicated if the State were permitted to exercise its last peremptory challenge belatedly, the Defendant, too, had a challenge left that he might wish to use.(T. p.43).

Although the trial court did not state that it was permitting this request to belatedly use a peremptory challenge, in practice that is what occurred. The trial court had no basis to remove Ms. Burkes from the jury. Thus, permitting removal was effectively doing nothing more than permitting the State to use its last peremptory challenge. However, by removing the juror for "the appearance of impropriety and a lack of response," the trial court simply denied the Defendant the right to also use his last peremptory challenge belatedly.

It is important to remember that this is not a case in which a <u>prospective</u> juror was removed for cause. Ms. Burkes had already been seated on the jury. (T. p. 39). Except in rare

cases, a juror once seated and sworn is on the case for the duration. *Folk v. State*, 576 So. 2d 1243, 1249 (Miss. 1991).

By statute, a court has authority to remove a seated juror who becomes "unable" or "disqualified" to perform his or her duties. *Id.* The court may also excuse a juror where, after the trial has begun, it is discovered the juror did not truthfully answer questions on voir dire that went to possible challenges for cause. *Id.* Trial courts have no license to remove jurors and replace them with alternates, willy nilly. *Myers v. State*, 565 So. 2d 554, 557 (Miss. 1990).

Mississippi law provides that a juror is "disqualified" within the meaning of *Mississippi Code Annotated* § 13-5-67 (1972) where on voir dire examination he or she has withheld information or misrepresented material facts. *Myles v. Entergy Miss., Inc.*, 2000-CA-01609-COA (¶11)(2002). The test of whether a juror gave accurate and honest responses during voir dire is the following: (1) whether the question was relevant to the voir dire examination; (2) whether the question was unambiguous and (3) whether the juror had substantial knowledge of the information sought to be elicited. *Russell v. State,* 97-DR-00046-SCT (¶35) (2003). As previously shown, Ms. Burkes neither withheld information nor misrepresented material facts. She was neither unable nor disqualified to serve as a juror.

The State urges that the Defendant has failed to show that he was prejudiced by the removal of Ms. Burke from the seated jury. The implication is that the Defendant must show that the outcome would have been different had the error not occurred. Of course, it is impossible for a party to ever argue that the outcome of a trial certainly, or even probably, have been different had a particular juror not been excluded. Without having heard all of the testimony and participating in deliberations, no unbiased excused juror could ever state what verdict she would have reached. Had, for example, the trial court permitted the State to exercise six peremptory challenges, but the Defendant fewer, he could never demonstrate that the

outcome of the trial would have been different had no error occurred. As a practical consequence, this is what occurred in the trial court. In such instances where actual prejudice can never be shown, it is appropriate to consider whether prejudice should be presumed.

Mississippi courts have presumed prejudice in a variety of circumstances. For example, an affirmative showing of prejudice is not necessary to prove denial of a speedy trial. *Trotter v. State*, 554 So. 2d 313, 318 (Miss. 1989). An actual showing of a conflict of interest on the part of an accused's attorney requires no showing of actual prejudice. *Sykes v. State*, 624 So. 2d 500, 503 (Miss. 1993). Similarly, federal courts have held that certain structural errors create a presumption of prejudice. See *Williams v. Woodford*, 396 F.3d 1059, 1069 (9th Cir. 2005)(*Batson* violation is structural error for which prejudice is generally presumed).

Respect for the sanctity of an impartial trial requires that courts guard against even the appearance of unfairness for "public confidence in the fairness of jury trials is essential to the existence of our legal system. Whatever tends to threaten public confidence in the fairness of jury trials, tends to threaten one of our sacred legal institutions." *Page v. Siemens Energy & Automation, Inc.*, 97-CA-00063-SCT (¶24) (Miss. 1998). In the case *sub judice,* by removing a seated juror without cause the trial court effectively permitted the State to exercise one more peremptory challenge than it permitted the Defendant. This raises at least the appearance of unfairness. For this reason prejudice to the Defendant should be presumed and the judgment of the trial court reversed.

CONCLUSION

The Order Overruling Motion for a New Trial should be reversed.

CERTIFICATE OF SERVICE

I, Christopher A. Collins, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLANT to the following:

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SO CERTIFIED, this the 29th day of February, 2008.

CHRISTOPHER A. COLLINS

CERTIFICATE OF FILING

I, Christopher A. Collins, attorney for the Appellant, Randy Shon Howard, do hereby certify that I have this date filed Reply Brief of Appellant by depositing an original and three copies of Brief of Appellee with the United States Postal Service, first class postage prepaid, addressed to Betty W. Sephton, Clerk, Supreme Court and Court of Appeals, Post Office 249, Jackson, Mississippi 39205-0249.

This, the 29th day of February, 2008.

CHRISTOPHER A. COLLINS