IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMMERSON OSBORNE **APPELLANT**

V. **NO. 2009-KA-0658-SCT**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Emmerson Osborne, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 24th day of FEB, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Justin T Cook
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

TABLE OF CONTENT

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMMERSON OSBORNE APPELLANT

V. NO. 2009-KA-0658-SCT

STATE OF MISSISSIPPI APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S MOTION FOR A MISTRIAL WHEN IT WAS BROUGHT TO THE TRIAL COURT'S ATTENTION THAT A JUROR MADE HIGHLY INAPPROPRIATE COMMENTS PRIOR TO VOIR DIRE, IN THE PRESENCE OF OTHER PROSPECTIVE JURORS.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO IMPEACH ITS OWN WITNESS.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT HIS MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE

WEIGHT OF THE EVIDENCE WAS SUCH THAT THE APPELLANT SHOULD NOT HAVE BEEN CONVICTED.

ISSUE FOUR:

WHETHER ANY OF THE ABOVE ERRORS CONCERNING VIOLATION OF THE APPELLANT'S FAIR TRIAL RIGHTS MAY BE CONSIDERED HARMLESS.

ISSUE FIVE:

WHETHER CUMULATIVE ERROR DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

STATEMENT OF INCARCERATION

Emerson Osborne, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Bolivar County, Mississippi, and a judgment of conviction on one count of capital murder against Emerson Osborne, following a trial on November 3-7, 2008 - , the honorable Albert B. Smith III, Circuit Judge, presiding. Osborne was subsequently sentenced to life without the possibility of parole in the custody of the Mississippi Department of Corrections.

FACTS

This case involves the tragic and untimely death of Lucy Jackson. Three people were indicted for capital murder in her death - Otis Braboy, Jimmy Giles, and Emerson Osborne, the

Appellant in this case. (C.P. 8, R.E. 8). The testimony at trial occurred as follows:

Robbye Braboy, the State's first witness, testified that her son, Otis Braboy was charged in the same indictment as Osborne (T. 319). Around midnight on January 14, 2006 (or in the early morning hours of January 15), Ms. Braboy testified that she saw her son, Emerson Osborne, Jimmy Giles, and Ashante Jenkins together, down the street from her house. (T. 320). Ms. Braboy testified she was out drinking with her boyfriend that night, and that, when she saw the group, Otis told her to go home. (T. 327).

Jimmy Giles testified that, on the night in question, he was with Braboy and Osborne. (T. 339). Giles testified that Braboy hit him with his fists, and was told to go knock on the door of Lucy Jackson's house. (T. 342-43). Giles did so and, according to his testimony, Jackson opened the door, whereupon Otis Braboy hit her. (T. 343-44). Giles testified that Osborne also hit her and Jackson fell to the ground. (T. 344). According to Giles, Osborne then hit Jackson with a stick. (T. 245).

While all of this allegedly happened, Giles simply stood there. (T. 345). After the incident, Braboy threatened to kill Giles' grandmother. (T. 345). Giles then went home; the next day he ran into Emerson Osborne. (T. 347). Giles testified that Osborne told him that if he talked about what happened, Osborne was going to kill Giles' grandmother. (T. 347).

On cross-examination, Giles testified that, despite Ms. Braboy's earlier testimony, Ashanti Jenkins wasn't with him the night in question, and that he never saw Ms. Braboy that night either. (T. 351, 361). Giles further testified that Otis Braboy was a "bully" that Giles had known all of his life. (T. 352).

Giles testified that, a few days after the incident in question, he was arrested for grand larceny in a non-related case. (T. 353-55). Two weeks later, Giles was arrested for his involvement in the

instant case. (T. 355). Giles was never prosecuted on the grand larceny charge, but spent fifteen months in prison before entering a guilty plea in the instant case. (T. 356).

Prior to his testimony in Osborne's trial, Giles had not been sentenced. (T. 356). Giles testified that he didn't know if he would receive less than the maximum fifteen years based on his testimony at trial. (T. 357). Defense counsel further cross-examined Giles on many of the inconsistences in his several statements to authorities.

The first time Giles spoke to police, he told them that he was unable to identify Osborne. (T. 358). In a later statement, he claimed that he knew it was Osborne. (T. 358). The first time he spoke to police, Giles told them that Braboy attacked Jackson and Giles took off running. (T. 358). In a later statement, and at trial, Giles stated that he stood there for two or three minutes and watched Braboy beat Jackson. (T. 358). In the first statement, Giles claimed he never saw a weapon. (T. 360). In a later statement, and at trial, Giles testified that a stick was used to beat Jackson. (T. 360). Giles could not remember what either Osborne or Braboy were wearing, but testified that neither were wearing any gloves. (T. 359).

Wesley Jefferson also testified against Osborne. (T. 364). At the time of trial, Jefferson was serving time for aggravated assault and drive-by shooting. (T. 364). While incarcerated in Shelby, Mississippi, Jefferson was in jail with Emerson Osborne. (T. 364-65).

Jefferson testified he heard about a murder in Shelby, Mississippi when Jefferson and Osborne were incarcerated together. (T. 367). Jefferson claimed that Osborne told him that Osborne and Otis Braboy were smoking crack, and had been surveilling Jackson's house for a few days, planning to rob the house. (T. 367-68).

Jefferson testified that the two needed a third-man, and so "they went and got Giles." (T. 368). Jefferson claimed that Osborne told him that Osborne and Otis Braboy got Giles to knock on

the door and Braboy and Osborne "burst up in there" and proceeded to beat her with their fists. (T. 368). Jefferson testified that Braboy started beating her with a 2 x 4. (T.368).

Jefferson testified that Osborne said Giles ran off. (T. 368). Osborne then allegedly told Jefferson that the intent was to rob Jackson, but Osborne only got a small amount of money because Jackson had a money belt on. (T. 369). Jefferson testified that Osborne told him that Jackson scratched him (Osborne) on the neck. (T. 370). On cross-examination, Jefferson admitted that he had called his mother, who lived in Shelby, and the two discussed the case. (T. 373).

Jefferson claimed he got this information in March of 2006, but never shared this information until he was moved into MDOC Custody. (T. 377). Jefferson sat in Bolivar County Jail, in May of 2006, and never told anyone of the information Osborne allegedly told him. (T. 377). Furthermore, it was revealed that Jefferson was attempting to set aside his guilty pleas to various crimes in Bolivar county at the time of trial. (T. 377).

Henry Parker testified that Lucy Jackson was his Great Aunt. (T. 383). Henry Parker came down once a month to tend to Ms. Jackson. (T. 383). Parker testified that Jackson lived by herself. (T. 383). On the day in question, Henry Parker visited Ms. Jackson and left in the early afternoon. (T. 386).

Janice Richardson, a receptionist at Warrington Clinic in Shelby, testified that sometime in January of 2006, she was informed that Jimmy Giles had told another friend of his that Giles new something about the death of Jackson. (T. 391). Richardson notified the police. (T. 392).

Chief Bobby Joe Williams of the Shely, Mississippi Police Department testified that on January 16, 2006, he was contacted by an individual and asked to go check on Ms. Jackson, who had not been heard from in a couple of days. (T. 403). When he arrived at Jackson's house, the security door was locked, but the wood door was cracked open a few inches. (T. 403-404).

Chief Williams obtained a bar to pry open the front door, and did so. (T. 404). When Williams pushed open the door, he saw Jackson lying down. (T. 405). He saw blood, and could tell that she was not breathing. (T. 405). Chief Williams searched for any type of weapon and was unable to find one. (T. 413-414).

Charles Griffin, an investigator for the Bolivar County Sheriff's department, also investigated the incident. Investigator Griffin testified that when he arrived on the scene, Ms. Jackson was lying on the living room floor by the couch. (T. 420). Investigator Griffin was searched the back yard and located a one dollar bill. (T. 423). This dollar bill contained no blood and was simply laying in the yard. (T. 437).

On January 27, 2006, Investigator Griffin received his first significant lead in the case, in reference to the conversation at Warrington Clinic involving Jimmy Giles (T. 431-32). Subsequent to Giles' arrest, warrants were issued for the arrest of Osborne and Otis Braboy. (T. 432). Investigator Griffin also received a letter from Wesley Jefferson and later took a statement from him on June 14, 2006. (T. 433).

John Paul Gates, the former Medical Examiner for Bolivar County, testified that he was dispatched to the scene on the day in question. When Gates arrived, *rigor mortis* had set in to Ms. Jackson's body. Gates testified that Ms. Jackson's body was taken to Jackson for an autopsy. (T. 449).

Charles Gilmer, Chief Deputy for the Bolivar County Sheriff's Office, also investigated the scene. Gilmer testified that the bedroom in the house appeared to have been "ransacked." (T. 459). Gilmer testified that it appeared a trunk had been emptied and various personal items had been thrown about the room. (T. 459). It appeared that another bedroom in the house had not been entered into at all. (T. 460). In the kitchen area of the house, there was a purse on the floor. (T. 460). Gilmer

was unable to find any finger prints of value at the scene. (T. 463). No finger prints were recovered from the front door. (T. 464). No finger prints were recovered from the counter top in the kitchen. (T. 465).

Dr. Steven T. Hayne, a physician in the fields of anatomic, clinical and forensic pathology testified that Jackson died from blunt force trauma. (T. 481). Dr. Hayne believed that Jackson received multiple blows from a blunt object. (T. 489). According to his testimony, the injuries were consistent with a board or a heavy stick being used as a weapon. (T. 489). Dr. Hayne further testified that Ms. Jackson, at the time of the autopsy, was wearing a stocking underneath her gown which contained money. (T. 490-91). Dr. Hayne also testified to noticing a tear on Ms. Jackson's fingernail. (T. 493). Dr. Hayne performed a scraping of the fingernail, and the results were sent off to the crime lab. (T. 493).

After deliberations, the jury returned a verdict of guilty of capital murder against Osborne. (C.P. 239-40., R.E. 9-10). In a subsequent sentencing phase, the jury unanimously returned a sentence of life without eligibility of parole in the custody of the Mississippi Department of Corrections. (C.P. 239-40. R.E. 9-10).

On November 13, 2008, trial counsel filed a Motion for New Trial. (C.P. 249-52, R.E. 11-14). This motion was subsequently denied by the trial court on November 17, 2008. (C.P. 253, R.E. 15).

SUMMARY OF THE ARGUMENT

The trial court further erred in denying defense counsel's motion for a mistrial on the basis that, prior to trial, a juror had publicly expressed her opinion as to the guilt of Emerson Osborne as well as the appropriate sentence he should face – "I wish we would just hang him and get it over with and get out of here." No amount of questioning could cure the bias evident from the juror's words.

Because this juror was one who ultimately sat in the guilt-phase of the trial, the proper remedy was for the trial court to grant defense counsel's motion for a mistrial.

Secondly, the trial court erred when it allowed the State to impeach its own witness without making an on-the-record determination that the witness was hostile.

Third, the verdict was against the overwhelming weight of the evidence. There was no physical evidence admitted at trial that linked Osborne to the killing. The only evidence came from the highly suspect testimony of a co-indictee and a jail-house snitch. This Court has consistently viewed such testimony with suspect eyes. Therefore, the verdict is against the overwhelming weight of the evidence.

Fourth, because of the extreme weakness of the State's case against Osborne, the errors alleged above cannot be deemed harmless beyond a reasonable doubt.

Lastly, the above errors, if individually deemed harmless by this honorable Court, when taken in concert, create cumulative error that warrants reversal.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S MOTION FOR A MISTRIAL WHEN IT WAS BROUGHT TO THE TRIAL COURT'S ATTENTION THAT A JUROR MADE HIGHLY INAPPROPRIATE COMMENTS PRIOR TO VOIR DIRE, IN THE PRESENCE OF OTHER PROSPECTIVE JURORS.

i. Standard of review.

Under **Mississippi Rule of Evidence 606 (b)**, a trial court is obligated to investigate an allegation of misconduct when the party alleging misconduct makes a showing of extrinsic evidence

sufficient to overcome the presumption of jury impartiality. ***United States v. Infelise***, 813 F. Supp. 599, 605 (N.D. Ill. 1993). ***See also King v. United States***, 576 F.2d 432, 438 (2d Cir. 1978), ***United States v. Barshov***, 733 F.2d 842, 851 (11th Cir.1984) The standard of review for juror misconduct arising from a failure to respond to questions during voir dire is as follows:

> Where a prospective juror in a criminal case fails to respond to a question by defense counsel on voir dire, the Court should determine whether the question was (1) relevant to the voir dire examination, (2) whether it was unambiguous, and (3) whether the juror had substantial knowledge of the information sought to be elicited. If all answers to the above questions are affirmative, then the court determines if prejudice to the defendant in selecting the jury could be inferred from juror's failure to respond.

Baker v. State, 463 So. 2d 1080, 1083 (Miss. 1985).

ii. Juror #2 made improper statements prior to voir dire.

After the guilt phase of the proceedings, and prior to the sentencing phase, juror misconduct was brought to the attention of the trial court. Defense counsel informed the judge of the following:

> "I hate to be the bearer of news of any kind. But I left here; went to the Chinese buffet to eat. Was approached by [a potential juror], who was originally in the panel and he said – comes up and he said, "Y'all made a critical mistake." I said, "What are you referring to?" And he says that the juror that was seated two down from him, blah, blah, blah made the comment to him <u>let's go ahead and fry his ass so we can go home</u>."

(T. 560)(emphasis added).

The trial court, however, denied defense counsel's motion for a mistrial. (T. 560-63). The juror who reported the misconduct was eventually called to testify about the incident;

> [BY THE WITNESS] Uh, I was in the jury quarters, was it Tuesday, when we was reporting at 1 o'clock. And this was just before 1. P.m. and a lady said, "I wish we would just hang him and get it over with and get out of here."
>
> And I responded to her that this was a man's life that we're talk talking about here and she shouldn't have that kind of attitude.
>
> [BY DEFENSE COUNSEL] Did she have any response to that?

[BY THE WITNESS] No.

[BY DEFENSE COUNSEL] Were there any other jurors in your presence when that was said?

[BY THE WITNESS] There was a couple there but I could not identify him.

(T. 570).

After being questioned, Juror #2 claimed, "I don't remember any. I was just trying to get out of here." (T. 582).

iii. What did the statement mean?

An inquiry into the meaning of the statement "I wish we would just hang him and get it over with and get out of here." is necessary in analyzing whether the trial court erred in denying Osborne's motion for a mistrial. The statement, on its face, undoubtedly leans towards the fact that the trial court erred in denying the motion for a mistrial.

The statement itself indicates not merely a predisposition in favor of guilt or in favor of the death penalty, it expresses a conclusion of guilt and conclusion that the appropriate outcome would be the death penalty. Even if the statement was made because of frustration over the civic duty of jury service, the words themselves still have meaning. Respectfully, it does not matter what Juror #2 meant when she said what she said. What matters is that she said it.

Juror #2, through her own words, advocated that Osborne was guilty and should be put to death. That those words may have been uttered for purpose of expressing frustration is insignificant. Juror #2 never explicitly denied saying those words.

Had that statement been in response to a question in voir dire, there is absolutely no doubt Juror #2 would have been removed for cause.

Even if Juror #2 believed she could be fair, the words alone indicate that her immediate

response to not wanting to serve on a jury and wanting to go home is that the defendant in criminal cases is guilty and should be hung. Perhaps the statement wasn't made with bad intentions, but the words of the statement alone are what should be judged.

Juror #2 had previously made up her mind that guilt and death penalty were the appropriate outcome. Even if she wanted to "get out of [jury service]," her words expressing such frustration advocated guilt and the death penalty before any evidence whatsoever had been presented to the jury.

iv. The law clearly supports that a mistrial should have been granted.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XI.

There can be no less partial jury than one consisting of a juror who has already made up her mind as to the guilt and the appropriate sentence of the defendant.

This honorable Court has even extended this concept to civil cases in which jurors do not appropriately reveal their predispositions. In ***T.K. Stanley, Inc. v. Cason***, 614 So. 2d 942 (Miss. 1992), the defendant corporation moved for a new trial after submitting an affidavit alleging one of the jurors said during recesses that she knew the plaintiff, that the plaintiff should be awarded money, and that the vice president of the company could not be trusted. ***Stanley,*** 614 So. 2d at 948. The corporation's motion further alleged that the juror failed to disclose that her brother had been killed while working for the defendant corporation. ***Id.*** The trial court allowed the parties to question the juror, who admitted that she knew the plaintiff, but denied speaking about the parties to any other

jurors before deliberation. ***Id.*** The trial court concluded that the defendant's voir dire questions were not specific enough to make the juror's failure to disclose her knowledge reversible error. ***Id.*** at 949.

On appeal, this Court reversed the trial court finding that "[t]he evidence is overwhelming that [the juror] withheld material information during voir dire which would have resulted in her being challenged by [the defendant], then relayed the exact disqualifying information to other members of the jury during deliberations." ***Id.*** at 950.

This Court emphasized:

> "where, as a matter of common experience, a full and correct response would have provided the basis for a peremptory challenge, not rising to the dignity of a challenge for cause, our courts have greater discretion, although a discretion that should always be exercised against the back-drop of our duty to secure each party trial before a fair and impartial jury."

Id. at 949 (citing ***Myers v. State*** , 565 So. 2d 554, 558 (Miss. 1990)).

It is well known that the burden of proof in civil proceedings is that the claim must be proven by a preponderance of the evidence. Criminal convictions must be proven by a higher standard – beyond a reasonable doubt. If similar juror misconduct warrants reversal in civil proceedings, such conduct necessarily warrants reversal, where the State has a higher burden.

Furthermore, this honorable Court has set forth a standard for which a new trial should be granted on the grounds of failure to respond to a direct, relevant and unambiguous question posed by defense counsel during voir dire of a criminal trial. In ***Odom v. State,*** 355 So. 2d 1381, 1383 (Miss. 1978), this honorable Court stated that a motion for a new trial should be granted when the question propounded to the juror was relevant to the voir dire examination, was not ambiguous and when the juror had substantial knowledge regarding the information sought to be solicited. If these questions are answered in the affirmative, the court then asks whether prejudice to the defendant could reasonably be inferred from the juror's failure to respond. ***Id.***

In the case *sub judice*, the elements laid forth in ***Odom*** are clearly met. During the voir dire, the trial court, the State, and trial counsel asked questions of the jury regarding their ability to impartially hear a capital murder case. The trial court asked the venire if there was anything about a capital murder case that would prevent them from performing their duties and carrying out their oath as jurors. (T. 100) The State also asked the venire if they could be reasonable jurors and return a death penalty verdict if the evidence so warranted and a not guilty verdict if the evidence so warranted. The venire responded affirmatively. (T. 217) Defense counsel also asked the venire if they could be fair and impartial when deciding sentencing in a capital murder case. (T. 218-220). In each instance, the trial court and each attorney clearly asked the venire if they would be able to fairly hear and determine the sentencing on a capital murder case. Clearly in a capital murder case, it is relevant to determine whether or not a potential juror can return a verdict for the death penalty so the first prong of ***Odom*** was met.

The second ***Odom*** prong was also met because the trial court and each attorney clearly asked the venire if they would be able to fairly hear and determine the sentencing on a capital murder case.

The third ***Odom*** prong is also met because a desire to hang a death penalty defendant before hearing any evidence would clearly be something that a judge or attorney would like to have solicited during voir dire. Therefore all of the prongs of ***Odom*** exist in this case.

The next issue that must be resolved under ***Odom*** is prejudice caused by Juror #2's lack of candor with the trial court and the attorneys during voir dire. In ***Odom***, the venire was asked whether or not any of them had any relatives who were in law enforcement. A member of the venire did not respond even though his brother was one of the police officers who investigated the alleged crime. The ***Odom*** court said that this was not fair to the criminal defendant because any reasonable defense

attorney would have questioned that venire member if he responded affirmatively to the question and probably would have challenged him either peremptorily or cause upon determining that his brother was a police officer in the area where the alleged crime occurred. ***Id. at 1383.*** Similarly in the case *sub judice*, had Juror #2 been candid regarding her feelings that Osborne should just be hung so that they could go home, trial counsel undoubtedly would have sought to strike her whether for cause or peremptorily. However her lack of candor prevented him from doing so, and, therefore Osborne was prejudiced.

v. Conclusion.

Juror #2 was biased. Either she had made up her mind as to Osborne's guilt prior to hearing any evidence presented, or she was predisposed to being biased. Her words indicate she could not and would not be fair and impartial. The trial court erred in not declaring a mistrial. The denial of said motion was contrary to both the United States Constitution and the laws of the State of Mississippi.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO IMPEACH ITS OWN WITNESS.

This honorable Court's standard of review of a trial court's admission or exclusion of evidence is abuse of discretion. ***Herring v. Poirrier***, 797 So. 2d 797, 804 (Miss. 2000).

Historically, under Mississippi law, parties were prohibited from impeaching their own witnesses. ***Moffett .v. State***, 456 So. 2d 714, 718 (Miss. 1984). This precedent rests on the belief that "[t]he party calling the witness is said to vouch for his credibility." ***Id.*** "The underlying premise is that, a trial being a search for the truth, a litigant has no business presenting a witness whose credibility is open to serious doubt." ***Id.***

The Supreme Court, however, has noted that this rule is not in favor and has exceptions. ***Id.***. One such exception is that "[w]itnesses may be cross-examined or impeached by the party calling them when they prove to be hostile" ***Hall v. State***, 165 So. 2d 345, 350 (1964)(citations omitted). Before a party may proceed under this exception, however, the proper foundation must be laid. ***Id.*** The Supreme court described this processes authoritatively:

> The party must first show that the evidence as given, has taken him by surprise and that the witness is hostile. The witness may then be asked if he has made contradictory statements out of court, the times, places and circumstances of the statements being described to him in detail.

Id.

The State called Robbye Braboy to the stand. (T. 318). Ms. Braboy's son was also charged in the same indictment as Osborne with capital murder. During her testimony, Braboy was allowed to be impeached by the State, despite being the State's own witness:

> [BY THE PROSECUTOR] Your Honor, this is – if she has given a contrary statement, this is the only way that is allowed to get that in, the fact that on a certain time that she gave a statement, and what was a statement if it was contrary to that. And that's what I'm attempting to do. It's the only way I can do that –
>
> [BY DEFENSE COUNSEL] He can't –
>
> [BY THE PROSECUTOR] He can't impeach his own witness.
>
> [BY THE PROSECUTOR] Any witness can be impeached]
>
> [THE COURT] Huh?
>
> [BY THE PROSECUTOR] In fact, that's the rules, someone's own witness. And I can claim surprise and do claim surprise.
>
> [BY THE COURT] Okay. I'm – I obviously didn't follow this witness. You're saying that she – in present questioning she's not doing – saying the same thing she said to you at another time?

(T. 323-24).

Then, after conversing with its law clerk, the trial court made the following ruling, "I

don't think he's – I don't think he's just really crossed the line as far as leading. He can ask her if she gave a different statement and move on." (T. 324).

The State subsequently proceeded to impeach its own witness with her previous statements. (T. 324-325).

The record is abundantly clear that the State impeached its own witness. Significantly, the trial court made no on-the-record determination that the witness was hostile. Instead, the trial court made an arbitrary ruling concerning the State asking leading questions. Because there was no on-the-record determination that Ms. Braboy was hostile, it was improper for the State to impeach its own witness. Therefore, the trial court committed error, and such error warrants reversal.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT HIS MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE WEIGHT OF THE EVIDENCE WAS SUCH THAT THE APPELLANT SHOULD NOT HAVE BEEN CONVICTED.

i. Standard of Review

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. ***Dilworth***, 909 So.2d at 737. A reversal is warranted if the lower court abuses its discretion in denying a motion for new trial. ***Id.*** When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a verdict when "it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new

trial, the trial court sits as a thirteenth juror, but the motion is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Id.*** The evidence should also be weighed in the light most favorable to the verdict. The ***Bush*** Court stated:

> A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226 (1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at 737.

In determining the issue of the weight of the evidence, this honorable Court must consider the credibility of the witnesses presented at trial: (1)Jimmy Giles, a co-indictee, testified against Osborne. Giles' testimony resulted in Giles' original indictment for capital

murder being reduced to the charge of being accessory before the fact to manslaughter. (2) Wesley Jefferson, a jail house snitch, who offered highly suspect testimony. Furthermore, when assessing the weight of the evidence, this honorable court should note that there is no physical evidence whatsoever linking Emerson Osborne to the crime he was ultimately convicted of.

This Court should not overlook these essential facts when determining the weight and credibility of the evidence and the testimony given during the trial by these witnesses.

ii. There was no physical evidence, forensic or otherwise linking the Appellant to the crime.

Through the course of trial, the State failed to provide any physical evidence that linked Osborne to the crime. It is acknowledged physical evidence is not necessary to support a conviction; however, the lack of it is certainly relevant to the weight of the evidence analysis before this Court.

No finger prints of any value were found at the scene. (T. 463). No finger prints were recovered from the front door. (T. 464). No finger prints were recovered from the counter top in the kitchen. (T. 460). While it was testified that there were some fingernail scrapings done of Ms. Jackson, no testimony was provided to show that those scrapings matched any of the alleged perpetrators of the crime in question. Furthermore, no weapon was ever recovered. (T. 413-14).

The lack of physical evidence, together with the unreliable, incredible, and inconsistent testimony of the State's witnesses, do not support the jury's conclusion of the guilt of the Osborne.

iii. Osborne was convicted based on the testimony of an alleged accomplice.

Jimmy Giles was originally indicted for the capital murder of the victim in the instant case. If convicted for capital murder, Giles could have faced the death penalty; however, because of his testimony, Giles plead guilty to being an accessory to robbery. (C.P. 260-284). He received a total of 5 years to serve.[1]

"The uncorroborated testimony of an accomplice may be sufficient to sustain a guilty verdict." ***Catchings v. State***, 394 So.2d 869, 870 (Miss. 1981), ***Moore v. State***, 291 So.2d 187 (Miss. 1974.). "However, such testimony should be viewed with great caution and suspicion and must be reasonable, not improbable, self-contradictory or substantially impeached." ***Catchings***, 394 So.2d at 870, ***Moody v. State***, 371 So.2d 408 (Miss. 1979), ***Jones v. State***, 368 So.2d 1265 (Miss. 1979), ***Thomas v. State***, 340 So.2d 1, 2 (Miss. 1976), ***Black v. State***, 336 So.2d 1302, 1303 (Miss. 1976) .

In ***Feranda v. State***, 267 So.2d 305 (Miss. 1972), the Mississippi Supreme Court reversed the conviction of burglary and larceny as an accessory before the fact was reversed, the court found that the accomplice's testimony, upon which it was based, was inconsistent overly vague and almost completely uncorroborated.

Similarly in ***Lyle v. State***, 8 So.2d 459, 461 (Miss. 1942), the Mississippi Supreme Court reversed an arson conviction where the accomplice's testimony, upon which it was based was unreasonable on its face and impeached by unimpeached witnesses.

In the instant case, Giles' testimony was almost completely uncorroborated and inherently suspect. Giles offered numerous accounts of the alleged events in separate

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1. Interestingly, the State, during Giles' sentencing proceeding, argued for a even more significant departure based upon his testimony at trial. (C.P. 260-284).

interviews and statements. The first time Giles spoke to police, he revealed he was unable to identify Osborne. (T. 358). In a later statement, he claimed that he knew it was Emerson Osborne. (T. 358). The first time he spoke to police, Giles stated that Braboy attacked Ms. Jackson and Giles took off running. (T. 358). In a later statement, and at trial, Giles stated he stood there for two or three minutes and watched Jackson being beaten. (T. 358). In his initial statement, Giles told police that he never saw a weapon. (T. 360). Later, he testified that a stick was used to beat Jackson. (T. 360).

Giles' testimony was extremely suspect and uncorroborated. Giles stood to benefit greatly from his testimony at trial. Giles went from facing the death penalty to serving five years in prison! It is apparent from the record that degree of leniency conferred to him by the State because of his testimony against Osborne.

iii. Osborne was convicted based on the testimony of a jail house snitch.

The Mississippi Supreme Court has held that " 'jail-house snitch' testimony [is] "becoming an increasing problem in this state, as well as throughout the American criminal justice system." ***Moore v. State***, 787 So. 2d 1282, 1287 (Miss. 2001) (citing ***McNeal v. State***, 551 So. 2d 151, 158 (Miss. 1989).

In ***Sherrell v. State***, the Mississippi Supreme Court held that the trial court did not err in allowing the testimony of a jail-house informant. ***Sherrell v. State***, 622 So. 2d 1233, 1236 (Miss. 1993). The ***Sherrell*** Court, however, qualified it's holding concluding:

> Although the trial judge allowed the testimony of [the informant] into evidence, he made certain that a cautionary instruction was given to the jury.... The jury was instructed to view his testimony with caution and suspicion in light of [his] criminal conviction. The judge also reminded the jurors that they should consider the rest of the physical evidence presented during the trial and not judge the case based on the

> alleged confession... No evidence was presented which showed that [the informant] would benefit in any way for testifying against Sherrell.

Id. at 1236.

The principles outlined in ***Sherrell*** are just as applicable to case *sub judice* in the context of an argument concerning the weight of the evidence.

Osborne was convicted, in large part, based on the highly-suspect testimony of Wesley Jefferson, a jail-house snitch. Jefferson's testimony, as noted above, was that Osborne told him specific details about the murder of Ms. Jackson during the course of the two being incarcerated together. Jefferson, however, neglected to tell anyone about the alleged information told to him, until months after Osborne allegedly told him. (T. 377). Furthermore, Osborne allegedly told Jefferson that he (Osborne) could not have known – that Ms. Jackson had been wearing a money belt. (T. 369). If Osborne had known about the presence of a money belt, and he were the person who committed this crime, the reasonable inference to be drawn is that he would have taken the belt. Furthermore, Jefferson openly testified that his mother lived in Shelby, and that he talk to her about the case against Osborne. (T. 373).

Respectfully, Jefferson's testimony seems concocted for the sole purpose of benefitting him in some way. Jefferson even admitted trying to set aside his guilty pleas to various felonies. (T. 377). Based on the nature of the testimony, it's reasonable to conclude that Jefferson was attempting to gain something from testifying against Osborne.

v. Conclusion.

The only evidence that convicted Osborne was unreliable and untrustworthy. There

was no physical or forensic evidence that was able to link the Appellant to the Scene of the crime. Osborne's conviction was solely based on jail house snitch and co-defendant testimony. Therefore, the verdict was contrary to the overwhelming weight of the evidence. Osborne is entitled to a new trial.

ISSUE FOUR:

WHETHER ANY OF THE ABOVE ERRORS CONCERNING VIOLATION OF THE APPELLANT'S FAIR TRIAL RIGHTS MAY BE CONSIDERED HARMLESS.

The repeated holdings of the United States Supreme Court show that the proper harmless error analysis for a constitutional violation is not a review of whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the appropriate analysis is whether the constitutional error "might have contributed to the conviction" or "possibly influenced the jury."

In ***Payne v. Arkansas***, the state of Arkansas asked the United States Supreme Court to affirm a conviction despite the admission of a coerced confession into evidence. ***Payne v. Arkasnas***, 356 U.S. 560, 568 (1958). The State asserted that the conviction should be affirmed because "there was adequate evidence before the jury to sustain the verdict." ***Id.*** at 567-68. However, the Supreme Court rejected the State's assertion recognizing that "no one can say what credit and weight the jury gave to the confession." ***Id.*** at 568.

In ***Fahy v. Connecticut***, the Court revisited this issue ultimately holding, "[W]e are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable probability that the evidence complained of might have contributed to the

conviction." ***Fahy v. Connecticut***, 375 U.S. 85, 86-87 (1963)(emphasis added).

Four years later, the Court recognized that the state of California applied a "miscarriage of justice" rule with "emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.'" ***Chapman v. California***, 386 U.S. 18, 23 (1967). There, the Supreme Court rejected the California rule, preferring instead the ***Fahy*** approach: "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." ***Id.*** The court reasoned that this analysis "emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party." ***Id.*** Thus, an "error in admitting plainly relevant evidence which *possibly influenced* the jury adversely to a litigant cannot, under ***Fahy***, be conceived of as harmless." ***Id.*** at 23-24 (emphasis added).

These cases show that for at least fifty years, the United States Supreme Court has rejected a harmless error analysis which simply questions whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the reviewing court should look at the facts and evidence of the case to determine whether the constitutional error "might have contributed to the conviction" or "possibly influence the jury."

Under the proper analysis, it is clear that the multiple violations of Osborne's fundamental right to a fair trial, considered separately or in conjunction, "might have contributed to [his] conviction" and "possibly influene[d] the jury." Therefore, the above errors should not and cannot be deemed "harmless."

ISSUE FIVE:

WHETHER CUMULATIVE ERROR DEPRIVED THE APPELLANT OF HIS

FUNDAMENTAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine stems from the doctrine of harmless error. ***Ross v. State,*** 954 So. 2d 968, 1018 (Miss. 2007). It holds that individual errors, not reversible in themselves, may combine with other errors to constitute reversible error. ***Hansen v. State***, 582 So.2d 114, 142 (Miss. 1991); ***Griffin v. State***, 557 So. 2d 542, 553 (Miss. 1990). The question under a cumulative error analysis is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. ***McFee v. State***, 511 So. 2d 130, 136 (Miss.1987).

Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. ***Ross***, 954 So. 2d at 1018.

The quantity of the error in the instant case is significant. The State was allowed to improperly impeach its own witness without a determination of the witness being hostile by the trial court. Statements by Juror #2 indicate inflamatory jury misconduct that deprived Osborne of his constitutionally-mandated right to a fair trial.

Therefore, Osborne contends that the above errors, taken alone, constitute reversible error, and further that the cumulative effect of these errors deprived Osborne of his fundamental right to a fair trial and warrant reversal.

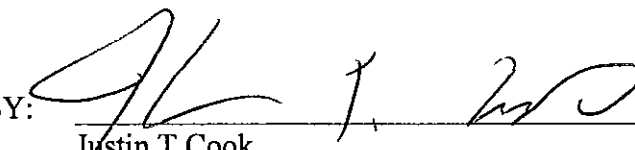
CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically

raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on capital murder, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Justin T Cook
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Emmerson Osborne, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Albert B. Smith, III
Circuit Court Judge
510 George Street, Suite 300
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney, District 11
Post Office Box 848
Cleveland, MS 38732

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 24th day of FEB, 2010.

Justin T Cook
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200