

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**STEPHEN POWELL**

**APPELLANT**

**VS.**

**NO. 2009-KA-1414-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE CASE**

The grand jury of Panola County indicted defendant for the crimes of Conspiracy to Commit Sexual Battery and Sexual Battery in violation of *Miss. Code Ann.* §§ 97-7-1 & 97-3-95(c). (Indictment c.p.5-6). After a trial by jury, the Honorable Andrew C. Baker presiding, the jury found defendant guilty of both charges. (Jury Verdict, c.p.31-32). Subsequently, defendant was sentenced to 5 years on the Conspiracy conviction, concurrent to 20 years sentence (12 suspended with 8 to serve) in the custody of the Mississippi Department of Corrections. Additionally defendant is to pay all costs of court and assessments. (Sentencing order, c.p. 35-37).

After denial of post-trial motions this instant appeal was timely noticed. (C.p.46).

### **STATEMENT OF FACTS**

Defendant with knowledge, permission and the help of the mother molested a little girl who was nine at the time of trial and about seven years of age at the time of the molestation. Defendant digitally penetrated the child's vagina, and ejaculated on her leg.

## **SUMMARY OF THE ARGUMENT**

### **ISSUE I.**

#### **THE GIVING OF A *SHARPLIN* INSTRUCTION IS DISCRETIONARY WITH THE TRIAL COURT.**

The giving of a *Sharplin* instruction when a jury cannot reach a verdict is discretionary with the trial court, not mandatory.

### **ISSUE II.**

#### **THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL AFTER LESS THAN FOUR HOURS OF JURY DELIBERATION.**

The jury had deliberated, in total over two days, about 3 hours and 15 minutes. Considering the nature of the case with two defendant with two counts each, denying the motion for mistrial was not an abuse of discretion.

## **ARGUMENT**

### **ISSUE I.**

#### **THE GIVING OF A *SHARPLIN* INSTRUCTION IS DISCRETIONARY WITH THE TRIAL COURT.**

In this initial allegation of trial court error defendant seeks to have his conviction reversed and remanded for a new trial.

The claimed error is that after reading the verdict and upon the polling jurors as to whether this was their unanimous decision two jurors said the decision was not theirs. The trial court opined there was some confusion as to whether the verdict was unanimous. The trial judge sent them back to the jury room to make further consideration as to whether the verdict was, in fact, unanimous. Tr. 370-374.

Upon being sent back to clarify their verdicts the trial court to the opportunity to explain on the record his reasons and rationale for his actions. Tr. 379-380. The judge also noted that total time of jury deliberation, over two days, was 3 hours 15 minutes. Tr. 380.

In a factually similar situation the reviewing courts of Mississippi have held:

¶ 39. McDonald argues the trial court erred when it required the jury to keep deliberating without giving a *Sharplin* instruction to the jury. When the jury returned from deliberating, the verdict had been reached but was not in proper form. The judge told the jury to return to the jury room and amend the verdict so it would comply with the jury instructions.

¶ 40. Approximately six minutes later, the jury returned and presented the judge with a verdict. While the judge was polling the jury, one juror indicated it was not his verdict and the judge instructed the jury to return to the jury room to continue the deliberations. After deliberating thirty minutes, the jury returned a unanimous verdict of guilty.

¶ 41. "It is within the sound discretion of the trial judge as to how long he will keep the jury in deliberation, and this discretion will not be reviewed on appeal unless there has been a clear abuse of discretion." *Dixon v. State*, 306 So.2d 302, 304 (Miss.1975) (quoting *Gordon v. State*, 149 So.2d 475, 477 (Miss.1963)). If a trial judge believes there is a possibility that a jury might reach a verdict, he may return the jury for further deliberations by simply instructing the jury to continue its deliberations or he may give the *Sharplin* instruction. *Brantley v. State*, 610 So.2d 1139, 1142 (Miss.1992).

*McDonald v. State*, 881 So.2d 895 (Miss.App. 2004).

It is the position of the State the trial judge had the discretion to return the jury to continue deliberations *or* to give a *Sharplin* instruction.

¶ 24. Since there is no "bright line rule" as to when a trial judge should grant a continuance or recess, our analysis necessarily then focuses upon the unique facts of each case. *Hooker v. State*, 716 So.2d 1104, 1113(¶ 36) (Miss.1998).

*Jones v. State*, 993 So.2d 386 (Miss.App. 2008).

Looking to the facts of the case at trial, the fact was noted the jury was deliberating with facts and law as to multiple charges for two defendants. The trial court further noted the rather limited of time the jury had deliberated over two days. Under those facts the actions of the trial court were reasonable.

When the jury did return the court meticulously polled each juror as to each



charge for each defendant to make sure there was no confusion. Such is the preferred manner of handling such cases. Failure to follow the procedure used by the trial court would have been reversible error. *Beyersdoffer v. State*, 520 So.2d 1364, 1366 (Miss. 1988).

Accordingly, there being no abuse of discretion no relief should be granted on this allegation of trial court error.

## **ISSUE II.**

### **THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL AFTER LESS THAN FOUR HOURS OF JURY DELIBERATION.**

To reiterate, with a slightly different focus, the jury deliberated then was sent home, with instructions, for the night. Tr. 370. Upon returning the next day and deliberating briefly, a note was sent out indicating they could not agree. Inquiry was made of each juror whether with additional time they might reach a unanimous decision. The trial court noted that nine indicated more time would be helpful, three did not think more time would be helpful. Tr.374.

Shortly thereafter, the jury sent out a note indicating they had reached a verdict. Tr. 374. The verdict was read in court. Tr. 375. The jury was polled and when asked "does that represent your decision as to each count and each of the parties?" – two jurors indicted – no. Tr. 375-376. The trial judge, Andrew C. Baker, sent the jury

back with these instructions:

All right. Ladies and gentlemen, what I have here, I want to ask the jury to go back into the jury room. I'm getting a misread here. When you tell me we are ready to report, that indicates to me that is a unanimous decision; but as I poll the jury individually, it seems to be a ten-to-two decision. I'm not suggesting anyone change their mind or anything, but I just want you to go back and reconvene and I have got to know whether it's a split decision or whether it's a unanimous decision. I just want you all to go back there and huddle up and send me another note when you are ready to come back out, and I'll do the same thing again and see if the results are the same.

Tr. 377.

Out of the presence of the jury defense counsel requested a mistrial. Tr. 378

The trial court explained his rationale for his actions, essentially denying the motion for mistrial. Tr. 379.

¶ 24. This Court has long recognized that "whether to grant a motion for mistrial is within the sound discretion of the trial court." *Carpenter v. State*, 910 So.2d 528, 533 (¶ 14) (Miss.2005) (quoting *Pulphus v. State*, 782 So.2d 1220, 1223 (¶ 10) (Miss.2001)). Additionally, this Court will review a trial court's denial of a mistrial under an abuse of discretion standard. *Id.* "The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case; however, the trial judge is permitted considerable discretion in determining whether a mistrial is warranted since the judge is best positioned for measuring the prejudicial effect." \*863 *Sipp v. State*, 936 So.2d 326, 331 (¶ 7) (Miss.2006) (citing *Tate v. State*, 912 So.2d 919, 932 (¶ 41) (Miss.2005)). Further, "[i]t is within the sound discretion of the trial judge as to how long he will keep the jury in deliberation, and this discretion will not be reviewed [sic] on appeal unless there has been a clear abuse of discretion." *Hardiman v. State*, 776 So.2d 723, 728 (¶ 24) (Miss.Ct.App.2000) (quoting *Dixon v. State*, 306 So.2d 302, 304 (Miss.1975)).

*Brown v. State*, 999 So.2d 853 (Miss.App. 2008).

In *Brown*, the jury had deliberated over nine hours when the trial court denied a motion of mistrial. Sub judice the jury deliberated about 3 hours and fifteen minutes over two days. Tr.380. It is the position of the State the trial court carefully considered the facts of the situation, the total time the jury had deliberated and the complexity of the case. (Two defendants with two charges each). Such actions as noted in the record show a reasonable decision by the trial court.

Therefore, no relief should be granted based upon this claim of trial court error.

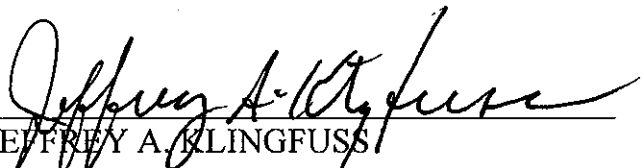
**CONCLUSION**

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdicts and sentences of the trial court.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL**

BY: \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

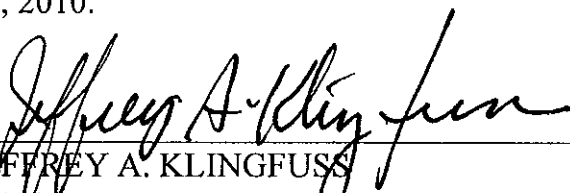
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Andrew C. Baker  
Circuit Court Judge  
Post Office Drawer 368  
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Honorable John Champion  
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This the 1<sup>st</sup> day of July, 2010.

  
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