

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEPHEN POWELL

APPELLANT

VS.

CASE NO. 2009-KA-01414

STATE OF MISSISSIPPI

APPELLEE

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BRIEF OF APPELLANT


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Appeal From The Circuit Court Of Panola County, Mississippi

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ORAL ARGUMENT REQUESTED

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STEPHEN POWELL

APPELLANT

VS.

CASE NO. 2009-KA-01414

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 the Court of Appeals and the Supreme Court may evaluate possible disqualification or recusal:

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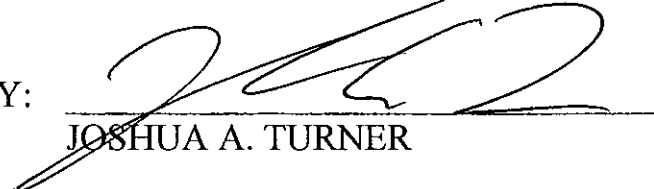
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Respectfully submitted, this the 12<sup>th</sup> day of March, 2010.

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## **STATEMENT REGARDING ORAL ARGUMENT**

Mr. Powell requests that this Court allow oral argument to help resolve the issues of his case. Oral Argument is permitted pursuant to M.R.A.P. 34 and needed to help the understanding of Mr. Powell's appeal.

## **STATEMENT OF THE ISSUES**

- I. The Trial Court Erred By Failing To Give The *Sharplin* Instruction To The Jury After It Announced It Was Deadlocked
- II. The Trial Court Erred By Denying the Defendant's Motion for a Mistrial After The Jury Returned For The Second Time With the Jurors Spilt Ten to Two.
- III. Conclusion

## SUMMARY OF THE ARGUMENT

At the onset, this case appears to be one of first impression with Mississippi Appellate Courts. The Appellant asserts two points of error for this Court and both stem from problems with the jury after the State and defense rested.

The trial court erred by failing to give the jury the *Sharplin* instruction after it announced that the jury was deadlocked. The Court polled the jury and asked if further deliberations would be helpful. Nine jurors said “yes” and three jurors said “no.” The Court required the jury to return without giving the *Sharplin* instruction and without just saying “please continue with your deliberations.” After the jury returned to deliberate a second time it announced that the jury had a verdict. When the jury was polled, two jurors told Judge Baker that they did not agree with the verdict. Judge Baker announced what occurred to be a “misread” and sent the jury to continue deliberations without giving the *Sharplin* instruction again. (Trial Tr. p. 377).

Secondly, the trial court erred by failing to grant a mistrial when the defense moved for one, after the jury was polled and two jurors announced that they did not agree with the verdict. Sending the jury back this third time was suggestive and prejudicial to Mr. Powell.



The Appellant asserts that he is entitled to a reversal of his charges and that this Court should remand the case for a new trial.

### **STATEMENT OF THE CASE AND FACTUAL BACKGROUND**

Stephen Powell and Candace McKenzie were indicted in the First Judicial District of Panola County, Mississippi on two counts each. Both were indicted for conspiracy to commit sexual battery and sexual battery. The allegations involved Candace McKenzie's biological child, who will be referred to as "B.M." throughout this brief.

On June 8, 2009 the trial of both Mr. Powell and Ms. McKenzie commenced. The prosecution called "B.M." to the stand, as well as several other witnesses. It was clear upon cross-examination that "B.M." could not remember anything at all about the incidents that were charged in the indictment. Several other witnesses were called in an attempt to corroborate B.M.'s testimony.

Additionally, both Stephen Powell and Candace McKenzie testified in their defense that none of the allegations, made by "B.M.", were true and that they were indeed innocent. The jury after hearing testimony from both the prosecution and testimony from the defense, retired to deliberate.

Notably, this case contains a very clean record until the jury retired to deliberate at the close of the case. Undoubtedly, due to the experience of the very

learned trial judge and the professionalism of both the prosecution and the defense attorney involved, the record is very thorough.

In order to better understand the transcript that is quoted herein, the rolls of the following individuals were as follows: Trial Court Judge: Hon. Andrew Baker; Assistant District Attorney: Jay Hale; Defense Attorney: Helen Kelly; Circuit Clerk: Joe Reid.

Jury deliberations began at 2:10 P.M. on June 10, 2009. (Trial Tr. p. 370). The trial judge took a recess at 4:45 on June 10, 2009. (Trial Tr. p. 320). The jury reconvened on the next morning June 11, 2009. After some deliberation, the jury sent a note to the trial judge that stated that they were unable to reach a unanimous verdict. (Trial Tr. p. 371). After receiving the note, the trial court brought the jury into the jury box and questioned them individually about whether additional deliberation would be helpful. (Trial Tr. p. 371-374). Nine jurors said that additional deliberation would be helpful and three said that additional deliberation would not be helpful. (Trial Tr. pp. 374).

The jury then retired to the jury room for further deliberation. After further deliberation, the jury sent a note to the trial judge indicating that it had reached a verdict. The exchange went as follows:

Judge Baker:            Okay. I received your note here. And let me just ask you a question and you respond directly to the question that I ask you. Has the jury reached a verdict in the case?

Juror Johnson: Yes, sir, we have.

Judge Baker: Would you hand it to the court clerk and he'll it to me for review.

**(THE COURT REVIEWS VERDICT)**

Judge Baker: Mr. Clerk, would you read the verdict of the jury in open court?

Mr. Reid: In Count 1, we the Jury find Defendant Candace McKenzie guilty. In Count 2, we the Jury find the Defendant Candace McKenzie guilty. In Count 1, we the Jury find the Defendant Steve Powell guilty. In Count 2, we the Jury find the Defendant Steve Powell guilty.

Judge Baker: Do I hear any request of counsel?

Ms. Kelly: Yes, Your Honor. We ask that the jury be polled.

Judge Baker: Okay. I will ask each of you individually if this represents your individual decision. Ms. Rosa Johnson, does that represent your decision as to each count and each of the parties?

Juror Johnson: Yes, sir.

Judge Baker: Mr. Wesley, is that your decision as to each count in each party?

Juror Wesley: Yes.

Judge Baker: And Ms. Harris, does that represent your decision as to each count and each party?

Juror Shalanda Harris: **No, it does not, no.**

Judge Baker: Ms. Bobo, does that represent your decision to each count and each party?

Juror Bobo: **(Shakes head).**

Judge Baker: **Does not.** James Harris, does that represent your decision as to each count and each party?

Juror Harris: Yes, Judge.

Judge Baker: Marchello Stokes, does that your represent your decision as to each count and each party?

Juror Stokes: Yes, sir.

Judge Baker: Okay. Stephanie Jones, does that represent your decision as to each count and each party?

Juror Jones: Yes, Your Honor.

Judge Baker: Jessie Logan, your decision as to each count and each party?

Juror Logan: Yes, sir.

Judge Baker: Lois J. Ross, does that your represent you're decision to each count and each party?

Juror Ross: Yes, sir.

Judge Baker: Ms. Bain, Mary B. Bain, does that represent your decision as to each count and each party?

Juror Bain: Yes, Your Honor.

Judge Baker: Carl Hubbard, does that represent your decision as to each count and each party?

Juror Hubbard: Yes, Judge.

Judge Baker: All right. Mr. Mack A. Willey, does that represent your decision to each count and each party?

Juror Willey: Yes, sir.

Judge Baker: **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.**

Mr. Hale: Your Honor, may we approach for a second?

Judge Baker: Yes.

**(A BENCH CONFERENCE WAS HELD)**

Judge Baker: Well, take them back in and let them talk this over among themselves because I'm getting a misread here. **I don't know if they intended to have a unanimous verdict or whether it's still split.**

**(THE JURY IS DISMISSED)**

Judge Baker: Several years ago this happened to me in a trial in Batesville where I received a note from a jury that indicated a verdict had been reached. I brought the jury into the courtroom here and I polled the jury and it was not what the note indicated. At that time I mistried the case. Within two weeks after that decision, a decision of me, a decision came down from the State Supreme Court that ordered trial judges that when you

get a misreading like this, to give the jury a chance to clarify their findings. I can't call the name of the case right now, but as far as I know, its still good case law in the State of Mississippi that you give the jury a chance.

Ms. Kelly, you indicated you'd like to make a motion for the record at this time?

Ms. Kelly: Yes, Your Honor. It comes now the Defendant Stephen Powell and Candace McKenzie and ask the Court to declare a mistrial. It is obvious that this jury has had ample time to deliberate this matter and that have sent two notes out saying that they were split nine to three, and when the last note came out, it was indicated that they had reached a verdict when they in fact had not. There are ten yeses and two nos, and , Your Honor, I feel that it would be prejudicial to my clients to force the jury to further deliberate since they have had ample time and obviously these two people have stood their ground so far, and at this time we would respectfully request a mistrial be declared.

Mr. Hale: Your Honor, I don't think we are forcing them to deliberate. It appears that they came out with a verdict read in open court. The did not - -two jurors said that that was not their full decision. We are dealing with multiple counts here, multiple defendants here. I think the jurors need to be given time to clarify their decision, and if they are still locked up, the Court will have to take that under advisement at the proper time.

Judge Baker: I think I am following the proper procedure. As I said, it has happened with me before, its happened in other courts before and its gone to the appellate courts, and without having the benefit of the citation of the case, our Supreme Court did direct that when a situation like this occurs at the trial level, to give the jury a chance to clarify their verdict so the Court can determine whether or not they have a verdict or if they do not have a verdict.

**(PAUSE IN PROCEEDINGS)**

Judge Baker: Let the record reflect at this point in time the jury has, including today being the 11<sup>th</sup>, and yesterday on June the 10<sup>th</sup>, the jury has been in total deliberation time about three hours and 15 minutes.  
Kathy, let the record reflect I have received another note from the baliff that reads, "We have reached a final verdict."  
Would you bring the jury in and put them in the jury box?

(Trial Tr. pp. 374-380) (emphasis supplied)

The jury returned at this time and found both defendants guilty on both counts charged in the indictment. (Trial Tr. pp. 384).

## ARGUMENT

### I. The Trial Court Erred By Failing To Give The *Sharplin* Instruction

Not once after the polling for verdicts by individual jurors, did the judge ask if more time was needed; at no time did the trial judge read the *Sharplin* jury instruction and at no time did he use words "please continue with your deliberations."

This Court has acknowledged that "[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 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)). "The object of the jury system is to secure a verdict by a comparison of views and by agreements among the jurors themselves. Although the verdict of the jury should represent the opinion of each individual juror, it does not follow that opinions of jurors may not be changed by conference with each other in the jury room."

*Sharplin v. State*, 330 So.2d 591, 596 (Miss.1976).  
Consequently, if the trial judge feels that there is a possibility that the jury might reach a verdict, he may return the jury for further deliberations by simply stating to the jury to please continue its deliberations or he may give the instruction that was given in the case sub judice.  
*Sharplin*, 330 So.2d at 596.

*Greenlee v. State*, 725 So.2d 816, 824 (Miss. 1998).

Judge Baker abused his discretion and caused the jury to be confused by failing to give the *Sharplin* instruction. Presumably when one continues to send a jury to deliberate three times, jurors are influenced to change their vote; something they were instructed to never do. ( See R. p. 19, Court's Jury Instruction 6).

All the authorities hold that, if they (the jurors) *were exposed to improper influences, which might have produced the verdict, the presumption of law is against its purity*; and testimony will not be heard to rebut this presumption. It is a conclusive presumption.

*Edlin v. State*, 523 So.2d 42, 45 (Miss. 1988) quoting *Collins v. State*, 54 So. 665 (Miss. 1911) (emphasis supplied).

In the present case, the jurors were exposed to the suggestive nature of a trial judge, who made them continue deliberating not once, not twice but three times. The jury first indicated that they were deadlocked, then the second time they were brought to the courtroom it was clear that the vote was ten to two. Two jurors did not agree that the verdict was their decision.



Respectfully, the trial court did not announce the proper instruction as outlined in *Edlin v. State*, 523 So.2d 42 (Miss. 1988) and *Sharplin v. State*, 330 So.2d 591 (Miss. 1976).

Failing to instruct the jury properly not once but twice was error that prejudiced Mr. Powell and requires this Court to reverse and remand this case for a new trial.

**II. The Trial Court Erred By Denying the Defendant's Motion for a Mistrial After The Jury Returned For The Second Time With the Jurors Spilt Ten to Two.**

The transcript quoted above shows that the trial court erred by denying the Appellant's Motion For A Mistrial. At no time after the jury came back the second time, did the trial court ask if "further deliberations would be helpful." Instead, the trial court unilaterally sent the jury back. There was no ambiguity involved once the jurors were polled. Indeed, the court, the prosecution and the defense all knew that the vote was ten to two.

"When a verdict is rendered into open court in due form, responsive to the issues, and signed by the jury, the defendant's right to acquittal becomes complete. Of course, the court may poll the jury by asking [if] it is agreed in its verdict, *but the court has no power to require a jury to acquiesce in an agreement that deprives a citizen of his life or liberty.*" *Scott v. Taylor*, 544 So.2d 1387, 1388 (Miss. 1989) quoting *State v. Chambliss*, 107 So. 200 (1926) (emphasis supplied).

“The general rule is that the court *may require the jury to clear up an indefinite or ambiguous verdict* and, “[i]ndeed it is the duty of the court to direct the jury to reconsider their verdict when satisfied that there is a palpable mistake.” *Anderson v. State*, 95 So.2d 465, 467 (Miss. 1957) (emphasis supplied).

The problem is, there is nothing ambiguous about a juror responding “No judge, that’s not my verdict.” This jury was sent back to continue discussing this case three times. How many times does the trial court get to continue to send the jury back? Especially after being notified that it was deadlocked and then after getting a verdict where upon polling two jurors announce that their respective votes were not consistent with the verdict on the piece of paper handed to the trial court and read into the record by the Circuit Clerk. The following chronology of what occurred must be treated with great attention:

- 1) The jury sent a note to the trial court indicating that it could not reach a verdict.
- 2) The trial court brought the jury in and asked each of them individually if additional time to deliberate would be helpful.
- 3) Nine jurors indicated additional time would help. Three jurors said additional time would not help.
- 4) The trial court did not give the *Sharplin* instruction.
- 5) The jury sent out another note saying that it had reached a verdict.

- 6) The trial judge asked the foreman if the jury reached a verdict.
- 7) Juror Johnson reported “yes sir.”
- 8) Judge Baker asked Juror Johnson to hand the verdict to the Circuit Clerk, Joe Reid.
- 9) Judge Baker asked Mr. Reid to read the verdict in open court.
- 10) Mr. Reid read the verdict, which indicated that the jury found both defendants guilty of Counts I and II of the indictment.
- 11) Judge Baker then asked if counsel had any requests.
- 12) Ms. Kelly asked that the jury be polled.
- 13) Upon polling, Juror Shalanda Harris and Juror Bobo indicated that they did not agree with the verdict.
- 14) Judge Baker sent the jury back a third time to continue deliberation without giving the *Sharplin* instruction or any other instructions.

***“If a juror dissents in a criminal case or in a civil case if less than the required number cannot agree the court may: 1) return the jury for further deliberations or 2) declare a mistrial.*** No motion to poll the jury shall be entertained after the verdict is ordered to be filed and entered of record or the jury is discharged.” ***U.R.C.C.C. 3.10*** (emphasis supplied). In this case the trial court abused its discretion by not granting a mistrial.

**U.R.C.C.C. 3.12** reads:

Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the party, the party's attorneys, or someone acting at the behest of the party or the party's attorney, resulting in substantial and irreparable prejudice to the movant's case.

Upon motion of a party or its own motion, the court may declare a mistrial if:

1. The trial cannot proceed in conformity with law; or
2. *It appears there is no reasonable probability of the jury's agreement upon a verdict.*

(emphasis supplied).

Upon the jury announcing that it was deadlocked the first time when it returned to the courtroom and then again after announcing that it was still split ten to two, the proper ruling would be to grant the Defendant's motion for mistrial. The primary reason being that there was no reasonable probability of the jury agreeing upon a verdict without suggestive behavior by the trial court.

The trial court erred by not granting the motion for a mistrial and the Appellant was irreparably prejudiced by the failure to grant the mistrial. As such, this case should be reversed and remanded for a new trial.

### III. Conclusion


The Appellant respectfully requests that this Court reverse and remand this case for a new trial in light of the individual and/or cumulative errors herein.

Respectfully submitted, this the 12<sup>th</sup> day of March, 2010.

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CERTIFICATE OF SERVICE

This is to certify that I, Joshua A. Turner, have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellant Stephen Powell* to the following:


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