

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS

PLAINTIFF

V.

NO. 04CR-15-551

MAURICIO ALEJANDRO TORRES

DEFENDANT

ORDER DENYING STATE'S MOTION FOR RECONSIDERATION

Now on this 19th day of March, 2020, this matter comes on before the Court on the State's Motion for Reconsideration on the pleadings. The Court, being well and sufficiently advised, finds as follows:

FINDINGS OF FACT

1. That on March 4, 2020, a Benton County jury unanimously found the State had met their burden beyond a reasonable doubt. They found the above defendant guilty of Capital Murder, Class Y felony (A.C.A. §5-10-101(a)(9)(A); and Battery in the First Degree, Class B felony (A.C.A. §5-13-201(a)(7).
2. That on March 5, 2020, pursuant to A.C.A. §5-4-602(3)(A)(i), "Capital Murder – Trial Procedure" which states in part: "If the defendant is found guilty of capital murder, the same jury shall sit again in order to: (i) Hear additional evidence . . ."
3. However, on March 5, 2020, during the sentencing phase of this trial, a State's witness (who was in the custody of the Arkansas Department of Corrections) and in response to a direct examination question by the State: "Did the defendant sexually molest you?" leapt from the witness box and physically lunged towards the defendant and his counsel. While the jury was present, the witness knocked down a deputy

prosecuting attorney, he overturned a defense counsel table, and he required three (3) court personnel to subdue him. The Court immediately ordered the jury to return to the jury room.

4. Subsequently, on March 5, 2020, due to the above melee, the defense made a motion for mistrial as to “sentencing” only. This Court inquired of defense counsel whether the defendant was willing to accept the capital murder conviction. Defense counsel responded that he was not willing to waive any issues on appeal during the guilt phase. This Court granted the defendant’s motion for mistrial as to “sentencing” and sua sponte granted a mistrial as to the above capital murder “conviction” pursuant to A.C.A. §5-4-602(3)(A)(i) which requires that the same jury sit in the sentencing phase of a “capital murder” trial. This Court then released the jury in this matter during the sentencing phase. The jury had not provided the Court with a sentencing recommendation. The State requested this Court to reconsider its ruling as to granting a mistrial for the capital murder “conviction”.
5. That on March 5, 2020, this Court set this matter for a hearing on March 19, 2020, at 9:00 a.m. to reconsider its granting of a mistrial in this matter.
6. That on March 13, 2020, the State filed its motion and brief in support of its motion to reconsider.
7. That on March 13, 2020, the Defense filed its response and brief to State’s Motion to Reconsider.
8. That on March 16, 2020, this Court vacated the March 19, 2020, hearing due to Benton County’s closing of the courthouse in response to the coronavirus. This Court notified the parties that this Court would make its ruling on the pleadings.

9. That no sentencing order or notice of appeal have been filed in this matter and this case has not been remanded to this trial court by the Arkansas Supreme Court.

CONCLUSIONS OF LAW

The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Potter v. City of Tontitown*, 371 Ark. 200, 264 S.W.3d 473 (2007). Further, penal statutes are to be strictly construed, and all doubts are to be resolved in favor of the defendant. *Williams v. State*, 364 Ark. 203, 217 S.W.3d 817 (2005). However, even a penal statute must not be construed so strictly as to defeat the obvious intent of the legislature. *Id.* Additionally, in construing any statute, it must be placed beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *Singleton v. State*, 2009 Ark. 594, 357 S.W.3d 891; *Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999).

That Ark. Code Ann. §5-4-602(3), entitled “Capital Murder Charge – Trial Procedure” is clear, plain, and concise when it states that “if a defendant is found guilty of capital murder, the same jury **shall** sit again in order (i) hear additional evidence; and (ii) determine the sentence in the manner provided by §85-4-603.” (emphasis added) In other words, §5-4-602 requires the same jury to sit on both the “guilt” and “sentencing” phase of a capital murder trial when the defendant has been “convicted” of capital murder.

Here, it is undisputed that on March 4, 2020, this jury convicted the defendant of “capital murder”, Class Y felony (A.C.A. §5-10-101(a)(9)(A)). However, on March 5, 2020, this Court released the jury in this matter at the sentencing phase of this trial before the jury provided a sentencing recommendation to this Court. This Court found that the above melee, which was

caused by the State's witness during the State's direct examination, was so inherently and irretrievably prejudicial to the defendant that no court admonition to the jury could possibly have cured it.

In its motion to reconsider this Court's granting of a mistrial as to the defendant's capital murder "conviction", the State argues that this "Court went too far when it ordered a mistrial as to guilt. To order a mistrial as to guilt when no error occurred during the guilt phase would amount to a miscarriage of justice and an abuse of the Court's discretion." This Court finds the State's argument to be erroneous. Here, this Court strictly construed penal statute A.C.A. §5-4-602(3), which reads that when "a defendant is found guilty of capital murder the same jury shall sit again" at the sentencing phase, must be interpreted to be resolved in favor of the defendant. Namely, the term "shall" requires this Court to grant a mistrial as to the capital murder conviction because this Court had found the same jury was unable to sit at the sentencing phase. This Court gives the word "shall" its ordinary and usually accepted meaning in common language to literally mean an "imperative command" or "required duty".

Therefore, this Court finds that because the defendant had been convicted of capital murder; that A.C.A. §5-4-602(3) is a penal statute which requires the same jury to decide sentencing; that penal statutes require all doubts to be resolved in favor of the defendant; and that this Court was required by statute to grant a mistrial as to the defendant's capital murder "conviction". Therefore, the State's motion for reconsideration of the capital murder "conviction" is hereby denied.

The State further argues that the "Arkansas legislature has clearly contemplated the possibility of unique circumstances where the statute does not prohibit the impaneling of a new jury to sit for sentencing only." In support of this argument, the State cites A.C.A. §5-4-616(a)

entitled “Procedures following **remand** of capital case after vacation of death sentence – retroactive application”, which states in part:

(a) Notwithstanding §5-4-602(3) that requires that the same jury sit in the sentencing phase of a capital murder trial, the following shall apply:

(1)(a) Upon any appeal by the defendant when the sentence is of death, if the appellate court finds prejudicial error in the sentencing proceedings only, the appellate court may set aside the sentence of death and remand the case to the trial court.”

This Court finds the State’s argument to be disingenuous. It is important to note that the title of the above statute includes the word “remand”. Here, it is undisputed that although the defendant was found guilty of capital murder, he was not sentenced to death; a sentencing order has not been filed in this matter; no notice of appeal has been filed with the Arkansas Supreme Court; and the case has not been remanded to this Court.

It is obvious to this Court the intent of the legislature in this matter when reviewing A.C.A. §5-4-616(a) beside A.C.A. §5-4-602(3). Here, 616(a) reminds this Court that §5-4-602(3) is included in its language. It clearly reminds this Court that “§5-4-602(3) requires that the same jury sit in the sentencing phase of a capital murder trial” unless the defendant was sentenced to death, there was an appeal by the defendant; the appellate court finds prejudicial error in the sentencing, then the appellate court may set aside the death sentence and remand it to the trial court.

Therefore, this Court finds that because the plainly ascribed meaning and effect of the above statutes clearly set out the obvious intent of the legislature, when reviewing the above statutes side by side is that A.C.A. §5-4-602(3) requires that the same jury to sit in the sentencing phase when the defendant is found guilty of capital murder. Also, that A.C.A. §5-4-616(a) carries one exception, and one exception only, which is that when there is an appeal of a death

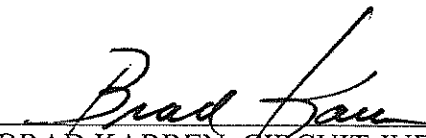
sentence and prejudicial error is found only in the penalty phase then the appellate court may set aside the death sentence and remand the case to the trial court. Moreover, this Court finds that the cases cited by the State, *State v. McMillan*, an Indiana case, and *State v. Zeimer*, a Utah case, are unpersuasive in that both cases are state-specific and neither case is a capital case. For those reasons, the State's motion to reconsider this Court's granting of a mistrial as to the defendant's capital murder "conviction" is hereby denied. To rule otherwise would equate to this Court legislating from the bench.

Finally, the State argues that because the defendant moved for a mistrial as to "sentencing" only, he waived his right to be sentenced by the jury that was impaneled. In other words, the State claims that the defendant waived his right to object to the capital murder "conviction" when the defendant moved for a mistrial as to "sentencing only." This Court finds the State's argument to be unpersuasive. "Waiver" is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. *Foreman Sch. Dist. No. 25 v. Steele*, 347 Ark. 193 (2001). In other words, the defendant's waiver must be "intentional". When defense counsel moved for a mistrial as to "sentencing" only, this Court inquired of defense counsel whether the defendant accepted the jury's finding of guilt as to capital murder. Defense counsel responded that the defendant did not accept the capital murder conviction and did not waive his right to appeal the conviction. This Court finds that the defendant's motion for mistrial as to "sentencing" only was not an intentional waiver of Defendant's right to a mistrial as to the defendant's capital murder "conviction". Defense counsel clearly did not stipulate or accept the capital murder "conviction". Therefore, he did not intentionally waive his right to a mistrial as to the capital murder "conviction" by solely moving for a mistrial as to "sentencing" only. Moreover, even if

this Court were to find that the defendant waived his right to claim a mistrial as to the capital murder “conviction”, A.C.A. §5-4-616(a) does not provide this Court with any authority to empanel a jury for “sentencing” purpose only. Here, A.C.A. §5-4-616(a) requires that the same jury sit in the sentencing phase of a capital murder trial unless the defendant was sentenced to death; there was an appeal by the defendant; the appellate court found prejudicial error in the sentencing only; and the case is remanded to the trial court. None of these exceptions enumerated in A.C.A. §5-4-616(a) are present. This Court has no statutory or case precedent authority to empanel a jury for “sentencing” only purposes.

THEREFORE, this Court finds that because A.C.A. §5-4-602(3) is a penal statute; that it requires the same jury to decide sentencing; that this jury was not able to sit at the sentencing phase; that penal statutes require all doubts to be resolved in favor of the defendant; that when reviewing the above statutes side by side the intent of the legislature is obvious; that none of the exceptions enumerated in A.C.A. §5-4-616(a) which requires the same jury to sit in sentencing phase are present; that defense counsel did not intentionally waive his right to request a mistrial as to the capital murder “conviction”. The State’s motion for reconsideration as to the capital murder “conviction” is hereby denied.

IT IS SO ORDERED.



BRAD KARREN, CIRCUIT JUDGE
ENTERED 3-19-2020