REL: September 3, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0567

Sherry Welch Lewis

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-17-4044)

MINOR, Judge.

A jury convicted Sherry Welch Lewis of using her public office for personal gain, see § 36-25-5(a), Ala. Code 1975.[1] The circuit court

[1]Section 36-25-5(a) provides:

sentenced Lewis to 10 years' imprisonment and imposed a reverse-split sentence of 2 years' imprisonment and 36 months' supervised probation.[2] In this appeal we address whether the circuit court erred in failing to grant Lewis's motion for a mistrial as to count I of the indictment after the circuit court gave a supplemental jury instruction including a "hypothetical example" to explain the meaning of "personal gain" under Alabama's ethics law. For the reasons below, we affirm.

> "(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

[2]The jury acquitted Lewis of soliciting or receiving a thing for the purpose of corruptly influencing official action, see § 36–25-7, Ala. Code 1975, charged in count III of the indictment. The jury convicted Lewis, under count II of the indictment, of voting as a member of a municipal board or commission on a matter in which she had a "financial gain or interest," see § 36-25-9(c), Ala. Code 1975. The State argues, and we agree, that Lewis challenges only her conviction under count I of the indictment. Lewis does not address that argument in her reply brief. Thus, our decision does not address or affect Lewis's conviction under count II of the indictment.

In December 2008, Lewis began serving as an appointed director of the Water Works and Sewer Board of the City of Birmingham ("the Board"),[3] a public entity responsible for providing sanitary drinking water for a geographic area spanning five counties in and around Birmingham.

As a director, Lewis's responsibilities included appointing and employing agents to perform business and professional services on behalf of the Board. The position of independent engineer is among the more important of such agents retained to review contracts and to certify payments through the issuance of corporate bonds. The Board retained Arcadis U.S., Inc., as their independent engineering firm.[4] Between 2008 and 2017, Jerry Jones was the Arcadis employee responsible for the Board's account. His compensation package was based, in part, on generating "billable hours" and "booked work"[5] for Arcadis.

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[3]She was reappointed to that position in May 2011 and again in January 2017. (C. 533-35.)

[4]Arcadis was formerly known as Malcolm Pirnie, Inc.

[5]Testimony defined "booked work" as "sales commitments by clients where work will commence within a calender year, client's funding is in place and contracts are signed." (R. 750.)

Shortly after Lewis's appointment to the Board, Jerry Jones arranged employment for Lewis's son, Joseph Lewis ("Joseph"). Later, in 2010, Jerry Jones arranged for Joseph a second job with Global Solutions International, LLC, a Mobile-based company, owned by Terry Williams ("GSI"). Between July 2010 and December 2013, Joseph, who lived in Huntsville, received $750 or $880 every two weeks by check or direct deposit from GSI.[6] According to Joseph, his job was to"research websites." But GSI paid Joseph regardless of hours spent working for the company or his completion of assigned tasks. Meanwhile, GSI received multiple contracts from Arcadis involving projects for the Board, including the Upper Black Warrior River Watershed Modeling Project ("the Watershed Modeling Project").

On March 4, 2014, SARCOR, LLC, hired Joseph after GSI fired him. During that time frame, SARCOR began work on the Watershed Modeling Project. Jerry Jones was the project manager for Arcadis on the

[6]Testimony showed that several times either Terry Williams or Jerry Jones deposited money into Joseph's account and, on the same day, Joseph transferred money to Sherry Lewis's account. According to Joseph, Jerry Jones would loan him money "[w]henever I felt I needed it."

Watershed Modeling Project. Once, SARCOR was paid $5,000 more than the company had invoiced Arcadis, with the added amount representing work performed by Terry Williams and GSI. This payment occurred when Joseph was the only employee at SARCOR and when Jerry Jones was handling SARCOR's billing.[7] SARCOR continued to receive contracts for projects for the Board from Arcadis throughout Joseph's employment, even when the firm did not possess the technical capabilities required by the project specifications.

Between 2011 and 2015, Arcadis sought work from the Board aside from serving as its independent engineering firm. For example, the Board awarded Arcadis seven additional "scopes of work" worth $10,341,362. These projects helped Jerry Jones maximize his Arcadis compensation package by producing "booked work" and "billable hours."

As a director, Lewis voted for each of these other projects awarded to Arcadis. According to the minutes of the December 23, 2014 meeting of the Board, Lewis cast the tie-breaking vote to award additional work to

[7]SARCOR's owner, Selena Rodgers, was on maternity leave at that time, and Jerry Jones, an Arcadis employee, handled its billing.

Arcadis. And Lewis consistently voted to pay Arcadis for the amounts it invoiced the Board, including invoices related to work GSI and SARCOR performed while Joseph was in their employ.

Testimony showed that Lewis, a member of a municipal water-works board responsible for serving ratepayers in more than one county, received or accepted monetary payments as reimbursement for meals and travel and other impermissible benefits, including football tickets from a consultant or contractor (in her case Jerry Jones) doing business with the Board.

On appeal, Lewis argues that the circuit court erred by denying her motion for a mistrial made after the court gave a supplemental instruction that included a "hypothetical example" to explain the meaning of "personal gain" under Alabama's ethics law. Lewis argues that the circuit court's hypothetical example invaded the purview of the jury by commenting on the evidence.

> " 'A trial court has broad discretion when formulating its jury instructions. See Williams v. State, 611 So. 2d 1119, 1123 (Ala. Crim. App. 1992). When reviewing a trial court's instructions, " 'the court's charge must be taken as a whole, and

> the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together.' " Self v. State, 620 So. 2d 110, 113 (Ala. Crim. App. 1992) (quoting Porter v. State, 520 So. 2d 235, 237 (Ala. Crim. App. 1987)); see also Beard v. State, 612 So. 2d 1335 (Ala. Crim. App. 1992); Alexander v. State, 601 So. 2d 1130 (Ala. Crim. App. 1992).'
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> "Williams v. State, 795 So. 2d 753, 780 (Ala. Crim. App. 1999). '[W]e must view [the jury instructions] as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them.' Johnson v. State, 820 So. 2d 842, 874 (Ala. Crim. App. 2000)."

Belcher v. State, [Ms. CR-18-0740, Dec. 16, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020).

During deliberations, the circuit court instructed the jury, in pertinent part:

> "So, you, ladies and gentlemen, are the judges and finders of the facts in the case. And in determining the guilt or innocence of this Defendant, the law says that you should not go outside of the evidence that you receive here from the witness stand. Except, the law does encourage you to use your good common sense and the life experiences that you have gathered during the course of your lives, the law encourages you to take your common sense and those life experiences with you back into the jury room and to use it during your deliberations.

> "Now, I mentioned to you before, I'll just mention it briefly again, during your deliberations, please remember that what the attorneys say is not evidence. And I've said that in other ways because I've told you that all of the evidence comes from where? The witness stand. And attorneys don't talk from the witness stand. And even the Court, what I say is not evidence in the case, because I don't talk from the witness stand. But I just want to take a moment to say to you that there is nothing that I have said nor is there any ruling that I have made that was intended to infer that the Court had an opinion one way or the other concerning the guilt or innocence of this Defendant. The law does not allow me to have an opinion regarding the guilt of this Defendant at time, and I do not. I have simply been doing my best to preside over this trial pursuant to the Rules of Law.
>
> "Now, you, ladies and gentlemen, are the judges of the weight and of the credibility of the evidence."

(R. 911-13 (emphasis added)).

Later, the circuit court, at the jury's request, gave a supplemental instruction on the meaning of "personal gain" as follows:

> "THE COURT: So, I received a communication from you as follows: Please provide further definition and clarification on, 1, personal gain under the law. Provide examples.
>
> "....
>
> "Let me say this, it is difficult for me to provide examples, because as a judge, I am prohibited from commenting on the law. For example, I cannot comment on the evidence that has been presented in this case and say that's an

example of personal gain ... because that's your job. That's not my job.

"....

"Okay. So now let's go back to first, personal gain under the law.

"So, what can I say about that?

"This is what the law says. No public official or public employee of that matter, should use or cause to be used her official position or office to obtain personal gain for herself or a family member of the public employee, or family member of the public official, or for any business with which the person is associated, unless the use and gain are otherwise specifically authorized by law.

"That simply means unless the law somewhere else says it's okay. Okay.

"So, the law says this specifically on the topic of personal gain.

"Personal gain is achieved when the public official or public employee or a family member of them receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain.

"That's a lot of legal words. Okay.

"Y'all going to make me give y'all a legal example. Okay.

"Let's say—let's say–okay. Let's take that city councilman, that fictitious city councilman I was talking to

y'all about earlier, and let's say that there was a contractor who was trying to get the job with that fictitious city that I'm speaking about, and let's say that that contractor gave that public official, that city councilman, some personal gain as I've defined it to you. A personal gain, it doesn't have to be money. It can be anything of value. Okay. It can be anything of value. So, when the councilman votes the way that contractor wants them to because they know they're going to get that personal gain, that thing of value, that's what we're talking about here. Okay. We're not talking about, you know, that city councilman just trying to do right for the citizens of this fictitious city because the councilman thinks that's just what's right. That's okay. That's why we put them there; right? To take care of the people. But when people go outside of that and they obtain personal gain for them or their family member, and because of that, they–they–they vote a particular way on matters that come before them, then that's when that's a problem.

"Does that make sense, ladies and gentlemen?

"JURY: Yes.

"THE COURT: Okay. And that's why it says that public official, public employee, or family member. You know, some people, you know, they may not get it directly, but their family member may get it. And because that family member got that gain, then you know, that's a benefit to them. You know. If you help my daughter, you're helping me. You know, the way I look at it.

"And then if they do something, not just because they think it's the right thing to do, if they do it because they just think it's the right thing to do, that's okay. But if they do it, if they vote that particular way because of what that contractor

did for their daughter, okay, that's where the problem is. And that's what the ethics law doesn't want to happen.

"Does that make sense, ladies and gentlemen?

"JURY: Yes."

(R. 944-51 (emphasis added).)

Lewis immediately objected, arguing as follows:

"[Defense counsel]: Judge, for the record, before the jury came back in, the Court instructed them with answers to their questions, we specifically asked the Court to refrain from providing any examples to the jury.

"THE COURT: You did.

"[Defense counsel]: And the Defense believes that the instructions that were given to the jury on the issue of personal gain were too close to the facts of this case, in that the Court made a comment to the jury that if a family member, i.e., the Court's daughter were to get a benefit from a contract that a fictitious–

"THE COURT: The fictitious councilman.

"[Defense counsel]: Yes, Your Honor, we believe that the fictitious councilman's example that the Court gave to the jury was too close to—

"THE COURT: Y'all can be seated. [Defense counsel's] the only one that needs to be standing.

"[Defense counsel]: Your Honor, we believe that the fictitious councilman hypothetical that was given to the jury as an example that we objected to, was too close to the facts of this case, and we would at this time, move the Court for a mistrial.

"THE COURT: Well, let me say this, [defense counsel]. When I just read to them what I intended on reading them, and I'm saying this for the record in response to your statement, they didn't get it. It's a bunch of legal jargon in the code. And I could tell by their faces that they just didn't get it, and that that wasn't helpful, and that they needed for me to try to provide them some example of what might, for example, constitute personal gain.

"And I intentionally attempted to stay clear of anything that I thought would be too close to the situation at hand. And so the only thing that I could think of was the situation with the city council person voting on the matter that he or she or their family member may have had a personal interests in. And I did my best. That's all I can say.

"[Defense counsel]: Judge, we certainly understand the Court's position–

"THE COURT: I wish the law would've provided me with some concrete examples, but I didn't see any concrete answers.

"[Defense counsel]: And, Your Honor, the ethics law that's written is very complicated, very convoluted, and that's why matters are still on appeal from convictions of public officials on these very matters.

"But again, we believe that the Court's example, of the Court's daughter or the contractor's daughter, we're dealing

with a child, we're dealing with contractors. We believe the example—this is the reason why we asked the Court to refrain from giving specific examples—

"THE COURT: Well, what example do you suggest that I would have given?

"[Defense counsel]: We requested no example. Just to read the law. Definitions only.

"THE COURT: But if I need to give the jury an example, and they clearly needed an example because they aren't lawyers like you and the State and the Court, they haven't [ever] practiced law. You could probably ask some lawyers what's personal gain under the statute, and they may not give you the right answer.

"So, it's my duty as the judge to make sure to give them examples of what they need.

"So, I'm just asking you, if you had to give them an example, what kind of example would you have given, [defense counsel]?

"[Defense counsel]: Frankly, Your Honor, I would not have given them an example. I know they asked for one, but the jury does not get to ask, and the Court does not have to instruct on specific examples. The Court can only instruct on the law as it is written. And we reiterate that we believe that the example was frightfully close and too close, and again, we'll renew our motion, oral motion for a mistrial.

"THE COURT: Well, we give examples all the times. I mean, the dog in the snow, is an example of circumstantial evidence. You know, the jet planes leaving–

> "[Defense counsel]: But not a contractor and a daughter, and a daughter getting benefit for something that was voted on by a city official. It's frightfully close, and that's why we're asking for a mistrial.
>
> "THE COURT: I understand, [defense counsel]. You got to do your job. And you've done a very good job, and I'm going to respectfully deny your motion.
>
> "Yes, sir, [prosecutor]?
>
> "[Prosecutor]: For the record, a mistrial is an extreme measure, and typically the court of appeals would require consideration of a lesser alternative. And I was just curious if the Court was willing to inquire my colleague of whether he has suggestive curative instruction that he feels–you know, if he wants the jury back for curative instruction, would the Court entertain a curative–you know, the idea of a curative instruction, if the Defense can propound one.
>
> "THE COURT: Can you?
>
> "[Defense counsel]: No, sir. I'm asking for a mistrial.
>
> "THE COURT: All right. Well, it's denied for the third time.
>
> "All right. Thank you."

(R. 953-58.)

Alabama follows the rule that a judge may not comment on the evidence. § 12–16–11, Ala. Code 1975 ("The court may state to the jury

the law of the case and may also state the evidence when the same is undisputed, but shall not charge upon the effect of the testimony, unless required to do so by one of the parties."); Rule 21.1, Ala. R. Crim. P. ("In charging the jury, the judge shall not express his opinion of the evidence."); C. Gamble, McElroy's Alabama Evidence, § 469.01 at 1030 (4th ed. 1991) ("In charging the jury, it is the duty of the trial judge not to indicate, by the matter or manner of his charge, what his own views are as to the effect of the testimony.").

> "Even the federal courts, which acknowledge the trial judge's power to comment on the evidence, recognize that the power 'is restricted and ... subject to review.' 3 W. LaFave & J. Israel, Criminal Procedure § 23.6(c) at 41 (1984).
>
> > " 'As the Supreme Court noted in Quercia v. United States [289 U.S. 466, 470, 53 S.Ct. 698, 699, 77 L.Ed. 1321 (1933)],
> >
> > > " ' "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add

> to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses." '

"W. LaFave & J. Israel, id.

> " ' "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.' ... In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition. ... He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the government's witnesses. This was error and we cannot doubt that it was highly prejudicial." '

"Cal–Bay Corp. v. United States, 169 F.2d 15, 22–23 (9th Cir.), cert. denied, 335 U.S. 859, 69 S.Ct. 134, 93 L.Ed. 406 (1948) (quoting Quercia v. United States, 289 U.S. at 470–72, 53 S.Ct. at 699–700)."

Cameron v. State, 615 So. 2d 121, 125 (Ala. Crim. App. 1992).

In Chance v. Dallas County, 456 So. 2d 295 (Ala. 1984), the Alabama Supreme Court considered whether the trial court's dramatization of the "John Wayne" hypothetical unfairly influenced the jury. In holding that it did not, the Alabama Supreme Court held:

> "We understand and appreciate Appellant's concern with respect to this 'dramatization' in which the independent contractor (the oil well fire fighter) clearly assumed the risk of injury to himself and his employees, particularly where the hypothetical contained no hint of 'hidden dangers' known to the landowner, but unknown to the invitee contractor. If the trial court had concluded its charge with the telling of this story, we would not hesitate to accept this allegation of error; but it is clear from the record that the follow-up instructions were specifically designed to dispel any undue restrictions on the jury's factfinding prerogatives regarding the respective 'hidden danger' contentions of the parties. We hold that, when the charge is considered as a whole, this challenged portion of the charge does not constitute reversible error. Alabama Power Co. v. Tatum, 293 Ala. 500, 306 So. 2d 251 (1975).
>
> "Moreover, we are reluctant to be hypercritical of the trial court's use of commonplace examples in explaining abstract legal principles. Well chosen hypotheticals can become the meat and blood that enflesh the bare bones of legal abstractions, giving life, and thus practical application, to the whole body of the trial court's instructions to the jury. To be sure, when the trial court uses such examples, care must be taken not to cross the forbidden line that separates legal instructions from comments on the evidence. In the instant case, the trial judge trod near that line of separation by giving a classical assumption-of-the-risk-of-injury example, but

> avoided its encroachment by carefully preserving the jury's factfinding prerogatives. After all, reversible error does not find its source in mere imperfection, for litigants are not entitled to a perfect trial, only a fair one."

Chance, 456 So. 2d at 299.

According to Lewis, the defense's theory of the case was not that she or her family did not receive objects constituting personal gain from persons with contracts before the Board but that she did not use her position as director of the Board to obtain those objects constituting such personal gain. The circuit judge's hypothetical example referred to a city councilman having voted "that particular way because of what that contractor did for their daughter, okay, that's where the problem is. And that's what the ethics law doesn't want to happen." When considering the jury instructions as a whole, we do not think that the trial judge "expressed his opinion of the evidence." Rule 21.1, Ala. R. Crim. P. See Tucker v. State, 650 So. 2d 534, 537 (Ala. Crim. App. 1994) (holding that trial court's example did not parallel the facts of that case because the court made no comment on the evidence); compare Cameron, 615 So. 2d 121, 126 (Ala. Crim. App. 1992) (holding that trial court's hypothetical

example that tended to bolster the state witness's testimony and disregard the defense's theory of the case was error).[8]

As further evidence the jury was not confused about its role as factfinder, even after the trial court's hypothetical example, the jury returned, for the second time, communication to the trial judge stating, "Judge, we have a unanimous decision on Count 3 but do not have consensus on Counts 1 and 2, and discussions have stalled."[9] (R. 958.)

And we do not agree that a mistrial was the only available remedy. The record does not show the trial court's alleged error rose to a high level requiring a mistrial. "A mistrial is a drastic remedy that should be used sparingly and only to prevent manifest injustice." Hammonds v. State, 777 So. 2d 750, 767 (Ala. Crim. App. 1999). " 'A trial judge is allowed broad discretion in determining whether a mistrial should be declared, because he is in the best position to observe the scenario, to determine its

[8]Any argument Lewis makes that, like Cameron, the hypothetical example here "obviously paralleled [a witness's] version of the facts" is unpersuasive. (Lewis's brief, p. 23.)

[9]As noted above, the jury acquitted Lewis of soliciting or receiving a thing for the purpose of corruptly influencing official action, see § 36–25-7, Ala. Code 1975.

effect upon the jury, and to determine whether the mistrial should be granted.' " Berryhill v. State, 726 So. 2d 297, 302 (Ala. Crim. App. 1998) (quoting Dixon v. State, 476 So. 2d 1236, 1240 (Ala. Crim. App. 1985)).

Based on that, we hold that, when considered as a whole, the supplemental instruction including the hypothetical example did not constitute reversible error; thus, Lewis is due no relief on this claim.

AFFIRMED.

Kellum and McCool, JJ., concur. Windom, P.J., concurs specially, with opinion. Cole, J., recuses himself.

WINDOM, Presiding Judge, concurring specially.

In her brief on appeal, Sherry Welch Lewis relies primarily on Ex parte Brown, 581 So. 2d 436 (Ala. 1991), and Cameron v. State, 615 So. 2d 121 (Ala. Crim. App. 1992), in support of her claim that a hypothetical posed to the jury during the circuit court's supplemental jury instructions constituted an improper comment on the evidence. Lewis asserts that the circuit court's hypothetical instruction in this case "combines the errors in Brown and Cameron." (Lewis's brief, at 23.) I write specially to explain why I believe neither Brown nor Cameron requires a reversal of Lewis's conviction.

In Brown, the trial court gave the following instruction:

> " 'In order to bring in a verdict, each one of you – a verdict of guilty, each one of you must be convinced beyond a reasonable doubt and to a moral certainty that out there – I'm not really sure exactly where that place is. But here in Mobile, in Mobile County, Alabama on the 23rd of December 1987 at some time between 11:00 and midnight, this Defendant went up to that woman and that man, that he snatched at her purse and told her to hand it over; that when she didn't do it, he reached in and pulled out this switchblade knife, snapped it open, and threatened her and her companion with her. If anyone of you has a reasonable doubt that

> that is what happened out there that night, then you could not bring in a verdict of guilty. That does not mean that you bring in a verdict of not guilty.
>
> " 'In order to bring in a verdict of not guilty, all 12 of you must have a reasonable doubt as to the truth of one of those material allegations of this indictment. And if all 12 of you are convinced beyond a reasonable doubt and to a moral certainty that he and the others—but he in particular—went up to this woman and this man as they were going across that parking lot, asked them to hand over that purse or snatched that purse and pulled that knife on her, and that that happened in December of 1987 in Mobile County, Alabama, then you should bring in a verdict, "We, the jury, find the Defendant guilty of robbery first degree as charged in the indictment."
>
> " 'If all 12 of you have a reasonable doubt of any of those material allegations and thus of the guilt of the Defendant, then you should bring in a verdict "We, the jury, find the Defendant not guilty." ' "

Ex parte Brown, 581 So. 2d at 436-37. The Alabama Supreme Court held that the "trial court's summary of only the State's evidence amounted to a factual determination," and that the "trial court's delivery of its summation of only the State's evidence could reasonably have been taken to advocate the State's version of the evidence." Id. (emphasis added).

The most obvious distinction is that the instruction in Lewis's case was not a summation of the State's evidence. Rather, as Lewis concedes, the circuit court posed a hypothetical to the jury to explain the legal issue before it. That said, the similarity of the hypothetical to the State's evidence is apparent. Even so, I believe Brown can be further distinguished from this case because the circuit court's hypothetical in this case did not address only the State's evidence:

> "Let's take that city councilman, that fictitious city councilman I was talking to y'all about earlier, and let's say that there was a contractor who was trying to get the job with that fictitious city that I'm speaking about, and let's say that that contractor gave that public official, that city councilman, some personal gain as I've defined it to you. A personal gain, it doesn't have to be money. It can be anything of value. Okay. It can be anything of value. So, when the councilman votes the way that contractor wants them to because they know they're going to get that personal gain, that thing of value, that's what we're talking about here. Okay. We're not talking about, you know, that city councilman just trying to do right for the citizens of this fictitious city because the councilman thinks that's just what's right. That's okay. That's why we put them there; right? To take care of the people."

(R. 949-50) (emphasis added). As the emphasized portion of the circuit court's hypothetical shows, the circuit court addressed both the State's

and Lewis's theories of the case. Therefore, I believe Brown is distinguishable and does not require reversal.

The circuit court's hypothetical is more akin to the instruction at issue in Cameron, yet I believe this Court's holding in Cameron is readily distinguishable as well. In Cameron, the appellant had been involved in a string of fights one evening, both inside and outside a mobile home. The appellant was convicted of second-degree assault after circumstantial evidence was presented, primarily by Kenneth Hazelrig, indicating that the appellant had struck four-year-old Jeremy Dean in the head with a blunt instrument. The State's theory of the case was that, after an earlier altercation, the appellant had returned to the mobile home to continue the fight with Bubba Brown and, thinking that Brown was asleep in the master bedroom, mistakenly hit Dean with a tire iron instead. The appellant's theory of the case was that Dean had been injured by someone else at some other time that evening, either during the melee in the living room or during the brawl outside.

In an attempt to explain circumstantial and reasonable doubt to the jury, the trial court offered the following supplemental instruction:

" 'I will give you an example of something where there would be no reasonable doubt but where a fanciful theory might supply a doubt.

" 'If you, Mr. [jury foreman], saw me walk into the jury room with a gun in [the bailiff's] back and, after we went in the room, the door closed, a moment later a shot rang out and a moment later I walked out with a smoking pistol and you stepped in and there lay [the bailiff] shot, I cannot imagine that there could be a reasonable doubt as to who shot [the bailiff].

" 'But you could suppose that perhaps there was someone hiding in the ceiling who shot through a piece of the tile or that [the bailiff] seized the gun from me and shot himself and I picked the gun back up and walked out.

" 'Those would be fanciful theories. Those would be guess or surmise. Those would not be reasonable doubt.

" 'Now a reasonable doubt may arise not only from the evidence in the case, but also from a lack of evidence.

" '....

" 'The example that I have given you of me going into the jury room with [the bailiff] is also a good example of circumstantial evidence because the evidence in that case would be circumstantial.

> " 'No one would have seen me shoot [the bailiff], but all of the circumstances would point to my guilt because there wouldn't be any other reasonable hypothesis or reasonable theory as to how it could have happened.
>
> " 'There could be theories as I say that, you know, that he took the gun away from me, shot himself and I picked the gun back up and walked out. That's I suppose a[n] infinitesimally small possibility, but it's not a reasonable possibility.
>
> " 'The idea of someone hiding in the ceiling, lifting a tile and shooting might be a theory, but it wouldn't be a reasonable theory.
>
> " 'For circumstantial evidence to convict the circumstances as proven must be such as to exclude any reasonable theory except the theory of the Defendant's guilt.' "

Cameron, 615 So. 2d at 123.

This Court held that the instructions constituted a hypothetical that "corresponded, partially in fact and fully in legal effect, with the testimony of State's witness Kenneth Hazelrig." Cameron, 615 So. 2d at 124. The trial court's instructions effectively bolstered Hazelrig's testimony, which was particularly problematic because Hazelrig's testimony "was not only disputed by defense witnesses, but was also called into question by the

attempted impeachment of Hazelrig with a prior inconsistent statement." Cameron, 615 So. 2d at 125.

In Lewis's case, though, there was no real dispute that Lewis and her son had received money and various other gifts from entities and individuals who sought contractual work from the Water Works and Sewer Board of the City of Birmingham. With respect to count I of Lewis's indictment, the issue for the jury was whether Lewis had used her official position to obtain the money and various other gifts. The circuit court's supplemental instructions left this issue for the jury. Further, as noted earlier, the circuit court's hypothetical captured Lewis's defense – that she acted only in the best interest of the citizens and that she did not use her official position for personal gain. Thus, to the extent the circuit court's supplemental instructions could be construed as bolstering the State's evidence, then the instructions likewise bolstered Lewis's evidence.

Additionally, this Court noted in Cameron that "[t]he speed with which the jury returned its verdict after the supplemental charge is an indication that it was strongly influenced by the court's additional instruction." Cameron, 615 So. 2d at 125. In this case, the jury retired to

deliberate for approximately an hour following the contested hypothetical. After which, the jury notified the circuit court that it had reached a unanimous decision on count III – which turned out to be a unanimous decision to acquit Lewis – but could not reach a consensus on count I or count II. It was not until the following morning that it reached a unanimous verdict with respect to the other two counts. Thus, unlike Cameron, the timing of the deliberations do not suggest that the jury was strongly influenced by the circuit court's supplemental instructions.

In sum, because the circuit court's supplemental instructions presented the respective positions of both sides, did not bolster a highly contested factual issue, and did not appear to strongly influence the jury, I believe Cameron is distinguishable and does not require reversal.

Lewis sought a mistrial – and only a mistrial – as a remedy for the circuit court's hypothetical during its supplemental jury instructions. But a mistrial is a drastic remedy, appropriate only "when a fundamental error in a trial vitiates its result." Garzarek v. State, 153 So. 3d 840, 852 (Ala. Crim. App. 2013) (citing Levett v. State, 593 So. 2d 130, 135 (Ala. Crim. App. 1991)). I do not believe a mistrial was warranted here because

the circuit court's supplemental instructions were not fraught with the same problems as the instructions in Brown or Cameron. I believe a lesser remedy could have cured any prejudice from the circuit court's hypothetical, but Lewis explicitly rejected any such remedy. Consequently, I do not believe she is entitled to relief on appeal.