**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2010-CT-00064-SCT**

***ANTHONY LAFAYETTE***

***v.***

***STATE OF MISSISSIPPI***

**ON WRIT OF CERTIORARI**

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| DATE OF JUDGMENT: | 12/17/2009 |
| TRIAL JUDGE: | HON. KENNETH L. THOMAS |
| COURT FROM WHICH APPEALED: | BOLIVAR COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | STAN PERKINS |
| ATTORNEYS FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL<br>BY: LAURA HOGAN TEDDER<br>SCOTT STUART |
| DISTRICT ATTORNEY: | BRENDA FAY MITCHELL |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| DISPOSITION: | REVERSED AND REMANDED - 06/21/2012 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**DICKINSON, PRESIDING JUSTICE, FOR THE COURT:**

¶1. At Anthony Lafayette's murder trial, when the jury informed the trial judge that it could not reach a unanimous verdict, the judge responded to the jurors that, if they could not reach a verdict, he would call a new jury that would be "reasonable and fair" and that he hoped not to put the "County and State to the expense" if he could get around it. Lafayette moved for a mistrial, but the judge denied his motion, and Lafayette was convicted of manslaughter. The trial judge's inappropriate instruction requires that we reverse and remand for a new trial.

## BACKGROUND FACTS AND PROCEEDINGS

¶2. After deliberating for some time, the jurors returned to the courtroom and informed the judge that they were unable to reach a unanimous verdict. The judge then instructed the jury:

> Well, speaking to all of you, let me say that if there is any ray of hope, any slight chance of your reaching a unanimous decision, the law compels, it requires you to do so. If you are unable to succeed in doing that, that's not the end of the day. Certainly not the end of the case. *We will call back another jury that hopefully will be reasonable and fair, and one that can be successful in reaching a decision. I hope not to put the County and the State to the expense if I can get around it.* But if you tell me you're hopelessly deadlocked, I will accept your decision.

¶3. The jury then told the judge that the vote count was ten to two. Two jurors indicated that further deliberations might help them reach a unanimous verdict, but several others said that a unanimous decision might not be possible. After a brief discussion between the judge and the attorneys, the judge gave the jury the following instruction:

> The Court realizes that it is possible for honest men and women to have honest different opinions about the facts of a case. But if it is at all possible to reconcile your differences of opinion and decide the case, then you should do so. Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent considered judgment of each juror.
>
> It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you think, if your [sic] convinced it is erroneous. Meaning, if you think it is wrong. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the sole purpose of returning a verdict.

> You are hereby instructed to please continue with your deliberations. I don't know of anything else to say to you because I don't know how you're divided. I don't know what the problematic point is. But, in addition, if you're looking at all of the instructions as a whole, if you're uncertain about any particular thing, you can always fall back on that part of your instructions that say, use your good common sense and your sound honest judgment.

¶4. When the jury left the courtroom, Lafayette's counsel moved for a mistrial "based on what happened and . . . the fact that the jurors indicated that they are hopelessly deadlocked." The judge denied defense counsel's motion, and the jury found Lafayette guilty of manslaughter.

¶5. Lafayette appealed and raised four issues: (1) whether the trial court should have granted his peremptory jury instruction; (2) whether the trial court erred in denying his proposed jury instructions; (3) whether the trial court committed reversible error by adding language to its ***Sharplin***[1] instruction; and (3) whether the trial court erred by failing to properly instruct the jury on prior inconsistent statements made by the security guard. The Court of Appeals affirmed, and we granted Lafayette's petition for writ of certiorari. Because the ***Sharplin*** issue is dispositive, we will address that issue only.

## ANALYSIS

¶6. Lafayette argues that the trial judge committed reversible error by stating to the jury that he would "call back another jury that hopefully [would] be reasonable and fair, and one that [could] be successful in reaching a decision," and "I hope not to put the County and the State to the expense if I can get around it." We agree.

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[1] ***Sharplin v. State***, 330 So. 2d 591 (Miss. 1976) (identifying two instructions that a trial judge may give after learning that a jury cannot reach a unanimous verdict).

¶7. The State correctly points out that Lafayette's counsel failed to object contemporaneously when the judge made the inappropriate comments, but also argues that, even if Lafayette is not procedurally barred from raising the issue, the judge's statements were not coercive and were merely statements of fact.

¶8. The ***Sharplin*** instruction is this Court's approved alternative to the "***Allen*** charge."[2] An ***Allen*** charge is an instruction that reminds the jury of its duty and the time and expense of trial.[3] While the ***Allen*** charge is used at the federal level,[4] this Court has found it inappropriate and coercive. In ***Sharplin v. State***, we held that a trial judge – on learning that a jury could not reach a unanimous verdict – may give one of two instructions.[5] The judge may instruct the jury to "[p]lease continue [their] deliberations"; or the judge may state:

> I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but, if it is possible to reconcile your differences of opinion and decide this case, then you should do so. Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Please continue your deliberations.[6]

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[2] ***Bolton v. State***, 643 So. 2d 942, 944 (Miss. 1994).

[3] ***United States v. Anderton***, 679 F. 2d 1199, 1203 (5th Cir. 1982).

[4] *E.g.*, ***United States v. Hitt***, 473 F. 3d 146, 154 (5th Cir. 2006).

[5] ***Sharplin***, 330 So. 2d at 596.

[6] ***Id.***

¶9. As the Court of Appeals noted, Lafayette did not immediately object when the judge inappropriately instructed the jury on the costs of litigation and his willingness to get another jury that would be fair and reasonable. Instead, Lafayette's attorney moved for a mistrial after the judge had given the approved ***Sharplin*** instruction. Although we agree that Lafayette failed to object contemporaneously, this Court may still reverse a defendant's conviction for plain error where a judge deviates from this Court's approved ***Sharplin*** instruction.[7]

¶10. The State's argument – that the trial judge's comments were not coercive – is contrary to the judge's plain words and to precedent. In ***Murphy v. State***, the jury informed the trial judge that it could not reach a unanimous verdict, and the judge commented on the expense of trials and the necessity of trying the case in front of another jury if it could not reach a verdict.[8] We found that the judge's statements were "highly prejudicial" and were a "clear departure" from ***Sharplin***.[9] We reversed the defendant's conviction.[10]

¶11. And in ***Edlin v. State***, we reversed a defendant's conviction where the judge told the jury – through the bailiff – that "too much time and work" had been put into the case.[11] We said that "[t]hese errors need not occur at all – ever," and that *"**Sharplin*** very clearly

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[7]***Isom v. State***, 481 So. 2d 820, 822 (Miss. 1985).

[8]***Murphy v. State***, 426 So. 2d 786, 790 (Miss. 1983).

[9]***Id.*** at 791.

[10]***Id.***

[11]***Edlin v. State***, 523 So. 2d 42, 46 (Miss. 1988).

delineated the two proper charges a judge could give to a deadlocked jury."[12] Likewise, in ***Bolton v. State***, we reversed a defendant's conviction where the trial judge added an ***Allen*** charge to the ***Sharplin*** instruction by referring to the "time, effort and money" that both sides had expended on the trial.[13] As we have said before, "the possibility of coercion, if any, lies in the trial judge's conduct and comments after he receives the division, that is, whether the judge merely affords the jury additional time to deliberate or whether he attempts to force a verdict by suggestive or coercive measures."[14]

¶12. A trial judge has great credibility with the jury, and the potential of coercion and influence is too great. We reinforce our decision in ***Sharplin*** that, upon learning the jury is deadlocked, the trial judge may give one of two instructions stated in that case, and addressing the costs of trial and the possibility of calling another jury that is fair and reasonable is not an option. And in today's case, the improper communication was – as it was in ***Edlin*** – "incurable reversible error."[15]

## CONCLUSION

¶13. Because the trial judge improperly instructed the jury on the costs of trial and the possibility of calling another jury that would be fair and reasonable, we reverse the judgments of the Court of Appeals and the circuit court and remand this case to the Bolivar County Circuit Court for a new trial.

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[12] ***Id.*** at 45.

[13] ***Bolton***, 643 So. 2d at 943-45.

[14] ***Isom***, 481 So. 2d at 822.

[15] ***Edlin***, 523 So. 2d at 45.

¶14. **REVERSED AND REMANDED.**

**WALLER, C.J., CARLSON, P.J., RANDOLPH, LAMAR, KITCHENS, CHANDLER, PIERCE AND KING, JJ., CONCUR. CARLSON, P.J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY WALLER, C.J., DICKINSON, P.J., RANDOLPH, LAMAR, KITCHENS, CHANDLER AND PIERCE, JJ.**

**CARLSON, PRESIDING JUSTICE, SPECIALLY CONCURRING**:

¶15. The Court of Appeals held that, because Lafayette failed to object contemporaneously to the trial judge's comments and did not raise the issue in his motion for judgment notwithstanding the verdict, the issue was waived on appeal. ***Lafayette v. State***, 2010-KA-00064-COA, 2011 WL 2811432 (¶16) (Miss. Ct. App. July 19, 2011). The Court of Appeals also held that, regardless of the waiver issue, the trial judge's comments, combined with the proper ***Sharplin*** instruction, did not constitute reversible error. ***Id.*** (citing ***Sharplin v. State***, 330 So. 2d 591, 596 (Miss. 1976)). The majority disagrees on both points, holding that Lafayette's conviction and sentence must be reversed and this case remanded for a new trial. I agree, but I write separately to expand the discussion of the plain-error doctrine.

¶16. The trial judge improperly instructed the jury when he deviated from the approved ***Sharplin*** instruction by telling the members of the jury that if they could not reach a unanimous verdict, he would have to call in another jury that "hopefully [would] be reasonable and fair," but that he hoped to avoid doing that due to the added expense that the county would incur for another trial. The judge then gave the approved ***Sharplin*** instruction. Based on this Court's precedent that such a deviation from ***Sharplin*** amounts to reversible error, the majority reverses and remands for a new trial. Even though Lafayette failed to

object contemporaneously to the trial judge's comments, this Court can reverse the conviction under the "plain-error" doctrine. (Maj. Op. ¶ 9).

¶17. I believe the majority's application of the "plain-error" doctrine is correct. Although the defendant should have objected at trial, he can rely on the plain-error rule to raise the unpreserved argument on appeal. ***Flora v. State***, 925 So. 2d 797, 811 (Miss. 2006) (citing ***Foster v. State***, 639 So. 2d 1263, 1289 (Miss. 1994)). Further, the plain-error doctrine allows this Court to address an issue that was not raised at trial or in post-trial motions, or even brought to this Court's attention on appeal. ***Grubb v. State***, 584 So. 2d 786, 789 (Miss. 1991); ***Gray v. State***, 549 So. 2d 1316, 1321 (Miss. 1989); Miss. R. Evid. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the [C]ourt."). "It has been established that where fundamental rights are violated, procedural rules give way to prevent a miscarriage of justice." ***Gray***, 549 So. 2d at 1321. This Court employs the plain-error rule only "when a defendant's substantive or fundamental rights are affected." ***Flora***, 925 So. 2d at 811 (citing ***Grubb***, 584 So. 2d at 789).

¶18. "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." ***Flora***, 925 So. 2d at 811. To determine if plain error has occurred, this Court must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear[,] or obvious, and whether the error has prejudiced the outcome of the trial." ***McGee v. State***, 953 So. 2d 211, 215 (Miss. 2007) (quoting ***Cox v. State***, 793 So. 2d 591, 597 (Miss. 2001) (relying on ***Grubb***, 584 So. 2d at 789)). In this case, the trial judge clearly deviated from the legal rule regarding additional instructions given to

deadlocked juries. The only approved instruction in that situation is the instruction set forth in ***Sharplin v. State***. In ***Sharplin***, this Court held that a "possibility of coercion . . . lies in the trial judge's conduct and comments after he receives the [jury's numerical] division." ***Sharplin***, 330 So. 2d at 596. This Court has "repeatedly reversed where our circuit courts have practiced verdict coercion in excess of that allowed in ***Sharplin***." ***Folk v. State***, 576 So. 2d 1243, 1251 (Miss. 1991). *See also* ***Herrington v. State***, 690 So. 2d 1132, 1137-38 (Miss. 1997) ("This Court has for twenty years held that any deviation from the approved ***Sharplin*** charge is reversible error. . . . This unbroken line of cases represents a longstanding bright line rule for this Court."); ***Brantley v. State***, 610 So. 2d 1139, 1142 (Miss. 1992) (". . . trial judge's failure to follow the clear and unambiguous procedure for instructing a deadlocked jury as set forth in ***Edlin*** and ***Sharplin*** is clear error and commands reversal.").

¶19. When the trial judge, prior to giving the approved ***Sharplin*** instruction, referred to the expense of another trial and to calling in another jury that "hopefully [would] be reasonable and fair," he deviated from the rule set forth in ***Sharplin*** for instructing deadlocked juries. As a result of this deviation from the legal rule, Lafayette's "substantive and fundamental rights" were affected. Therefore, this situation is ripe for application of the plain-error doctrine, and I agree with the majority that this case must be reversed and remanded for a new trial. Having offered my views on the plain-error doctrine, I fully concur with the majority opinion reversing Lafayette's conviction and sentence and remanding to the trial court for a new trial.

**WALLER, C.J., DICKINSON, P.J., RANDOLPH, LAMAR, KITCHENS, CHANDLER AND PIERCE, JJ., JOIN THIS OPINION.**