Serial: **223360**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2015-CA-01886-SCT

HYUNDAI MOTOR AMERICA AND HYUNDAI MOTOR COMPANY	***Appellants***
v.	
OLA MAE APPLEWHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AND WRONGFUL DEATH BENEFICIARIES OF DOROTHY MAE APPLEWHITE, DECEASED, CEOLA WADE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AND WRONGFUL DEATH BENEFICIARIES OF ANTHONY J. STEWART, DECEASED, AND KENNETH CORDELL CARTER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AND WRONGFUL DEATH BENEFICIARIES OF CECILIA COOPER, DECEASED	***Appellees***

EN BANC ORDER

Before the en banc Court is Hyundai's Motion to Clarify this Court's October 18, 2017 Remand Order, Appellees' Corrected Response to Hyundai's Motion to Clarify this Court's October 18, 2017 Remand Order, and Hyundai's Reply. We grant Hyundai's motion in part and further instruct the parties and trial court as follows. *See* M.R.A.P. 14(a).[1]

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[1] Mississippi Rules of Appellate Procedure 14(a) reads in pertinent part:

(a) Finding of Fact by the Supreme Court. The Supreme Court (and the Court of Appeals on those cases assigned to it by the Supreme Court) may try and

We have been informed that the discovery ordered by this Court has been concluded. The parties are now ordered to proffer to the trial court all evidence they believe to be probative to all Supplemental Motions for New Trial or for Relief from Judgment under Rule 60(b), for a Post-Trial Hearing to Investigate Possible Outside Influences on the Jury, and for Other Relief and the responses thereto, in order to fully supplement the record before this Court. The trial court is ordered to receive all evidence submitted by the parties, both testimony and documents, along with any objections to that evidence by the parties, and to certify same to this Court.

However, a juror's competency as a witness is not unlimited as pointed out in Appellees' Corrected Response to Hyundai's Motion to Clarify this Court's October 18, 2017 Remand Order. *See* M.R.E. 606. Accordingly, the trial court is ordered to complete its hearings pursuant to Rule 606(b). Once the 606(b) hearings have been completed, the trial court shall make findings of fact related thereto and shall certify to this Court and supplement the record on appeal with the transcript of the hearing and any evidence proffered. *See* M.R.A.P. 14(b).[2]

> determine all issues of fact which may arise out of any appeal before it and which are necessary to the disposition of the appeal, and, to this end, may, by order in each case, prescribe in what way evidence may be produced before it on the issue.

M.R.A.P. 14(a).

[2] Rule 14(b) of the Mississippi Rules of Appellate Procedure reads in pertinent part:

> (b) Finding of Fact by the Trial Court. In the event the Supreme Court or the Court of Appeals so directs, the trial court may determine all issues of fact which may arise out of any appeal submitted to the trial court for a

IT IS THEREFORE ORDERED that the parties are to present and the trial court is instructed to receive all evidence, along with objections, probative to the Supplemental Motion for New Trial or for Relief from Judgment under Rule 60(b), for a Post-Trial Hearing to Investigate Possible Outside Influences on the Jury, and for Other Relief and responses thereto.

IT IS FURTHER ORDERED that the trial court is to complete its Rule 606(b) hearings, ensuring jurors receive the protections specially afforded to them by Rule 606(b) and make findings of fact as provided by Rule 14(b) of the Mississippi Rules of Appellate Procedure.

IT IS FURTHER ORDERED that the trial court shall promptly certify to this Court a supplemental record to this appeal to be filed with the Clerk of this Court. The supplemental record shall include all evidence presented by the parties, objections, and transcripts of all proceedings, including transcripts of the 606(b) hearings, and all exhibits. Upon the filing of the supplemental record with the Clerk of this Court, the parties shall file supplemental briefs on the following schedule:

> Appellants' supplemental brief to be filed within forty days of the filing of the supplemental record; Appellees' supplemental brief to be filed within thirty days of service of the Appellants' supplemental brief; and Appellants' supplemental reply brief to be filed within fourteen days of service of Appellees' supplemental brief. The length of the briefs are governed by Mississippi Rule of Appellate Procedure 28(h).

> determination, and which may be necessary for the disposition of cases on appeal.

M.R.A.P. 14(b).

SO ORDERED, this the 18th day of January, 2019.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR.,
CHIEF JUSTICE
FOR THE COURT

AGREE: WALLER, C.J., RANDOLPH, P.J., COLEMAN, BEAM AND ISHEE, JJ.

KITCHENS, P.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KING, J.

KING, J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KITCHENS, P.J.

NOT PARTICIPATING: MAXWELL AND CHAMBERLIN, JJ.

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KITCHENS, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. I find the procedure that this Court has contrived in response to Hyundai's motion to clarify our October 18, 2017, remand order to be highly irregular. Hyundai asks this Court to interpret its October 18, 2017, order in a manner that requires the trial court to complete the hearing pursuant to Rule 606(b) of the Mississippi Rules of Evidence and certify a supplemental appeal record without conducting any fact-finding or issuing any ruling on the ultimate issue of whether a reasonable possibility exists that the jury's verdict was altered by extraneous influences. In other words, Hyundai wants the trial court to hold a Rule 606(b)

hearing, but for this Court, rather than the trial court, to rule on the evidence adduced at that hearing. Hyundai makes this request for clarification despite this Court's clear language in its October 18, 2017, order staying the appeal and remanding the case to the trial court "for discovery and investigation, and a full and complete hearing *to determine* if 'extraneous prejudicial information was improperly brought to the jury's attention' or if 'an outside influence was improperly brought to bear on any juror.' M.R.E. 606(b)(2)." (Emphasis added.) Because this Court ordered a hearing *to determine* the ultimate issues under Rule 606(b), it is abundantly clear that we ordered the trial court to make a judicial determination concerning those issues and no clarification of the October 18, 2017, order is needed.

¶2. Contrary to our perfectly clear remand order, the Court grants Hyundai's motion for clarification in part and orders the trial court to receive evidence and objections, complete its Rule 606(b) hearing, and make findings of fact related thereto. We require the trial court to refrain from making a ruling on the merits, but to certify a supplemental appeal record to this Court so that we can make the ultimate determination of whether a new trial is required because of extraneous influences on the jury, if any. In crafting this scheme, this Court sidesteps the procedure it adopted for addressing allegations of extraneous influences on juries in ***Gladney v. Clarksdale Beverage Co., Inc.***, 625 So. 2d 407 (Miss. 1993), that has been applied in numerous cases. According to that procedure, when an allegation of juror misconduct arises, an investigation must occur if the party alleging misconduct makes a threshold showing that is adequate to overcome the presumption of jury impartiality. ***Id.*** at 418. That party must show "that there is sufficient evidence to conclude that good cause

exists to believe that there was in fact an improper outside influence or extraneous prejudicial information." ***Id.*** at 419. If the trial court finds that a threshold showing has been made, then a post-trial hearing must occur. ***Id.*** "The trial court has the inherent power and duty to supervise these post-trial investigations to ensure that jurors are protected from harassment and to guard against inquiry into subjects beyond which a juror is competent to testify under M.R.E. 606(b)." ***Id.*** At the hearing, the trial court shall limit the questioning of jurors "to determine whether the communication was made and what it contained." ***Id.*** If the trial court finds that a communication was made and discerns its contents, then the trial court must decide whether it is reasonably possible that the communication altered the verdict, necessitating a new trial. ***Id.*** (citing ***United States v. Infelise***, 813 F. Supp. 599, 611-12 (N.D. Ill. 1993)). This Court reviews the trial court's determination for abuse of discretion. ***Payton v. State***, 897 So. 2d 921, 954 (Miss. 2003).

¶3. Today's decision, which orders the trial court to engage in fact-finding but make no conclusions of law, constitutes appellate intrusion into the well-established role of the trial court delineated in ***Gladney***. Hyundai argues that, because its appeal is pending, the trial court lacks jurisdiction on remand to make findings of fact or conclusions of law on the issue of alleged jury tampering. The Court cites Mississippi Rule of Appellate Procedure 14(b) for the proposition that this Court may order the trial court to make findings of fact. M.R.A.P. 14(b). While Rule 14(b) permits this Court to require fact-findings from the trial court, there is precedent for an appellate court in Mississippi to order a trial court to make findings of fact and conclusions of law concerning an issue in a case pending on appeal. This Court did just

that in ***Keller v. State***, in which we retained jurisdiction over Keller's appeal, but remanded for an evidentiary hearing on whether his confession had been coerced, with instructions for the trial court to make findings of fact and conclusions of law and to submit them to this Court. ***Keller v. State***, No. 2010-DP-00425-SCT (Order entered February 15, 2013). No reason exists why this Court cannot remedy Hyundai's purported confusion about the October 18, 2017, order by instructing the trial court to make findings of fact and conclusions of law in this case subject to review for abuse of discretion.

¶4. ***Gladney*** provides an ample, time-tested procedure that is more than adequate to deal with every kind of jury tampering allegation made in this case. It is elementary that the trial judge, who heard the testimony, observed the witnesses, the jury, and the trial proceedings, and generally "smelled the smoke of battle" is best positioned to rule on a claim of extraneous influences on the jury. There is no allegation by anyone that the trial judge is anything less than well qualified and able to do so. Regarding the allegation of attorney misconduct, the investigative and disciplinary processes of the Mississippi Bar have been set in motion at the behest of the trial court. Because that issue will be resolved through the appropriate channels, no need exists for this Court to delve into it. We need not go outside the box to create an extra-remedial procedure in this matter in which the trial court is relegated to a role akin to that of a special master. The Court's decision to do so usurps the trial court's authority to make the ultimate decision on the merits of a Rule 606(b) claim and demeans, if not insults, the trial bench. With respect, I disagree with the Court's order.

KING, J., JOINS THIS SEPARATE WRITTEN STATEMENT.

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KING, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶5. This Court's Order allowing the trial court to make findings of fact, but prohibiting it from making findings of fact (except as to the narrow Rule 606(b) issues) and prohibiting it from issuing a ruling or conclusions of law on the ultimate issues regarding the merits of Hyundai's jury influence arguments and motion for a new trial, violates this Court's precedent and past practice, and, in the least, treads dangerously close to unconstitutionally

expanding this Court's appellate jurisdiction. Accordingly, I object to the prohibition against the trial court issuing a ruling on the merits.[3]

¶6. "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law." Miss. Const. Art. 6, § 146. Accordingly, "proper jurisdiction of this [C]ourt is only to review and revise the judicial action of an inferior tribunal, and such incidental jurisdiction of a quasi-original character as is necessary to preserve its dignity and decorum and to give full and complete operation to its appellate powers." ***Brown v. Sutton***, 121 So. 835, 837 (Miss. 1929) (internal quotations omitted). "Where, therefore, there is no ruling by the trial court by which it can be put into error, there is nothing on the particular point which we may review." ***Calif. Co. v. State Oil & Gas Bd.***, 28 So. 2d 120, 120-21 (Miss. 1946). Indeed, in its October 18, 2017, Order in this case, the Court remanded for "a full and complete hearing to *determine*" if the jury was improperly influenced. (Emphasis added.) The Court also vacated the trial court's original denial of Hyundai's Supplemental Motions for New Trial or for Relief from Judgment under Rule 60(b), for Post-Trial Hearing to Investigate Outside Influences on the Jury, and for Other Relief. Thus, the trial court's prior order on the issue is, from a legal standpoint, no longer in existence. Without a new ruling by the trial court, complete with its findings of fact, on

[3]Hyundai's Motion to Clarify asks that this Court prohibit the trial court from engaging in any fact-finding or rulings. I have to question what Hyundai is so afraid of that it would ask this Court to prohibit the trial court from performing its judicial functions and duties. *See* ***White v. State***, 131 So. 96, 97 (Miss. 1930). I also note that the trial court is obligated to follow the judicial oath of office, which obligates judges to administer justice fairly and impartially. Miss. Const. Art. 6, § 155.

this issue, this Court has nothing from the trial court to review, and nothing by which the trial court can be put into error.[4] This Court instead appears to seek original jurisdiction on the fact-finding and ultimate issue of whether Hyundai is entitled to a new trial due to improper jury influence. It is highly questionable whether the constitution, this Court's precedent, or this Court's rules grant it original or quasi-original jurisdiction over the determination of whether a motion for new trial should be granted or denied due to allegations that external influences altered the jury verdict. Thus, if the Court's order does not violate the constitutional restrictions on appellate jurisdiction, it comes dangerously close to doing so.

¶7. Furthermore, "[t]his Court's authority to reverse a trial court's ruling on a motion for new trial is limited to those instances when the trial court abuses that discretion." ***Gladney v. Clarksdale Beverage Co., Inc.***, 625 So. 2d 407, 415 (Miss. 1993). How will we determine whether the trial court abused its discretion in a ruling on a motion for new trial when no such ruling exists? Moreover, this Court has held that in such a hearing as it has ordered in this case, the trial court is "to *decide* whether it is reasonably possible" any external influences altered the verdict. ***Id.*** at 419 (emphasis added).

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[4]*See* ***Darnell v. Darnell***, 199 So. 3d 695 (Miss. 2016). ***Darnell*** holds that where a post-trial motion remains pending in the trial court, no final, appealable judgment exists, and this Court lacks appellate jurisdiction. *See also* Miss. R. App. P. 4(d). This Court vacation of the trial court's order on Hyundai's Rule 60 motion for new trial and order that a hearing be held on said motion has effectively left that motion pending before the trial court, a notion the Court acknowledges with its order to the parties "to proffer to the trial court all evidence they belief to be probative to all Supplemental Motions for New Trial or for Relief from Judgment under Rule 60(b) . . . ." The trial court should dispose of that motion for this Court to have appellate jurisdiction.

¶8. A determination regarding whether any external influences existed and whether it is reasonably possible they influenced the verdict is a determination that rests largely on credibility, which is within the province of the trial court that observes the demeanor of the witnesses, and that observed the trial and the demeanor of the jurors. *See* ***Chamberlin v. State***, 989 So. 2d 320, 336-37 (Miss. 2008) ("This Court gives great deference to a trial court's determination under ***Batson*** because it is based largely on credibility."). Comparable to this analysis is this Court's treatment of ***Batson***[5] hearings, when, finding no other reversible error, the Court remands for a hearing on only the ***Batson*** issue. When this Court remands for a ***Batson*** hearing, the trial judge rules on the ultimate issue of whether discrimination occurred. ***Manning v. State***, 735 So. 2d 323 (Miss. 1999); ***Manning v. State***, 765 So. 2d 516 (Miss. 2000) (opinion after remand, examined the trial court's order and ruling on the ultimate issue); ***H.A.S. Elec. Contractors, Inc. v. Hemphill Cost. Co., Inc.***, 232 So. 3d 117, 125 (Miss. 2016) (*retaining jurisdiction* of the case, remanding for a ***Batson*** hearing and noting that after the results are certified, this Court "will then review the trial court's ***Batson*** *ruling*") (emphasis added); ***H.A.S. Elec. Contractors***, 232 So. 3d at 126 (Randolph, P.J., concurring) (noting that "the trial court should make a factual finding *and conclude* whether the strike should stand or whether the stated reason was pretextual") (emphasis added). Yet, this Court has confusingly prohibited the trial court from making a ruling in this case.

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[5]***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

¶9. This Court should tread carefully around its constitutional mandate as an appellate court, and follow its past precedent and practice. It should therefore direct and allow the trial court to make a ruling on Hyundai's motion for a new trial as it relates to jury influence.

KITCHENS, P.J., JOINS THIS SEPARATE WRITTEN STATEMENT.