IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 86201
	)	
HELEN SEVERS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI
32ND JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE JOHN P. HEISSERER, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Helen Severs, appeals from her conviction, after a jury trial in Cape Girardeau County, of the class B felony of conspiracy to murder, Section 564.016 RSMo 2000[1]. The Honorable John P. Heisserer sentenced Mrs. Severs to five years imprisonment. This Court granted transfer pursuant to Missouri Supreme Court Rule 83.04 and therefore jurisdiction lies in this Court. Article V, Section 10, Mo. Const. (as amended 1976).

[1] All statutory references are to RSMo 2000, unless otherwise noted.

STATEMENT OF FACTS

Glenda Kay Phillips was a thirty-six year old woman in June, 2002, when she had to spend every weekend in jail after being convicted of driving while intoxicated (Tr. 130). That is where she met Linda Myers (Tr. 130). Ms. Myers began talking to Phillips about her son-in-law and told her that she was looking for a gun (Tr. 131). Myers asked Phillips, and a black woman who was present, whether either of them owned a gun because she wanted to shoot her son-in-law (Tr. 131). Myers' requests did not end when Phillips was no longer in jail (Tr. 131). During August, Myers called Phillips "over and over" again, asking if she knew where she could get a gun (Tr. 131).

On August 25th, Phillips went to the police and informed them of Myers' request (Tr. 132). Phillips met with Sgt. Terry Mills from the Missouri State Highway Patrol, and he had her arrange to have Myers call her at 1:00 p.m. the following day (Tr. 133). When Myers called, Phillips put Mills on the phone (Tr. 133). Mills, using the name "Billy" (Tr. 134), told Myers that he could get her what she wanted (Tr. 149), and that he would talk to her again in one hour (Tr. 149). Mills then had Phillips call Myers back to get her talking about her plans (Tr. 134). That conversation was recorded (Tr. 134). One thing that Myers said was that her mother, Helen Severs, had given her $75 to buy a gun (Tr. 134). After a while, Phillips said, "Billy's" back, and put Mills on the phone with Myers (Tr. 134).

Mills arranged to meet Myers that evening at 6:30 p.m. at a local Cape Girardeau mall (Tr. 155). Mills decided to recruit MSHP Sgt. Joe Crump to play "Billy," because Crump had been doing undercover work and looked the part (Tr. 155). The Sheriff of Cape Girardeau County provided the gun, a 9mm from the property room (Tr. 156). He scratched the serial number off the gun before giving it to Mills (Tr. 156).

Myers was already at the West Park Mall as planned when Crump arrived (Tr. 201). He parked his car and motioned for her to come over (Tr. 201). Myers drove over and parked beside Crump and he got out and approached her car (Tr. 202). She introduced herself as Linda (Tr. 202). Crump told her to count out the $75, told her he was selling her a 9mm, and asked if she knew how to use one (Tr. 202). Myers replied, "my mom is going to be using it" (Tr. 202). Myers then began to tell Crump about her grandchildren, showed him photographs and told him that they had been molested by Mike[2] (Tr. 203). Crump told Myers that her mother would be the first suspect if anything happened to Mike and she said she knew that (Tr. 203).

Crump then went to his car and got the gun, gave it to Myers and watched as she put it into her bag and handed him the money (Tr. 203). Myers placed the handbag on the floorboard and when Crump asked when it would happen, she

[2] Mike Ravallette was Myers' son-in-law and Mrs. Severs' grandson-in-law (Tr. 214).

replied “tonight or tomorrow,” and that if things worked out, both the gun and victim would be in the Mississippi river tomorrow (Tr. 204). Crump went back to his car ostensibly to get Myers some bullets, and as he walked, he put his hat on, the signal for the other officers to converge (Tr. 160).

When he got back to the station, Mills placed a call to Mrs. Severs, pretending to be “Billy” (Tr. 163). He told her that Linda had not shown up and he did not like being stood up (Tr. 163). Mills recorded this conversation (Tr. 163). The next day, Mills and Phil Gregory interrogated Mrs. Severs (Tr. 166). The questioning went on for two hours and Mrs. Severs spoke of her dissatisfaction with the Illinois Department of Family Services[3] and told them that she was in the process of obtaining a gun permit (Tr. 167). She admitted asking Linda’s ex-husband, Jim Dickerson, to have his sons beat Michael Ravellette to get him to leave, and that the conversation eventually led to her asking him to kill Ravellette (Tr. 168). Dickerson told Ravellette and his wife Ashley, who is Mrs. Severs’ granddaughter (Tr. 214).

Mrs. Severs repeated much of the same things she had told Mills when she believed he was “Billy” (Tr. 169). She said that Linda and she had gone to Ravallette’s home the previous Saturday to deliver birthday presents to her great-grandchildren (Tr. 169). Ravallette would not let them in and called them names (Tr. 169). The children, ages three and one (Tr. 215), said they hated Mrs. Sever

[3] Mrs. Severs lives in Ullin, Illinois.

and asked her not to kill their Daddy (Tr. 169). Ravallette had told Mrs. Severs and Linda to stay away, and they had not seen the children for a year (Tr. 215).

As they were going home, they began talking about getting a gun, and Linda said that she knew someone in Cape Girardeau who could get one (Tr. 170). Mrs. Severs asked "Billy" if he had ever heard of using a plastic soda bottle as a silencer. She was interested because Ravellette lived close to a police station (Tr. 172). She talked about a drive-by shooting and about getting Ravellette alone in the yard (Tr. 171). Mrs. Severs also told "Billy" that she needed extra bullets in order to practice (Tr. 195), and that she wanted a gun that could not be traced (Tr. 196). She commented that if they could not find the weapon, they could not prove anything and added, "O.J. got by with it" (Tr. 196).

During the interrogation, she stated that she had just been "supposing," not planning, but when Mills pushed her, she became angry and said, "OK, I was getting the gun to kill Mike" (Tr. 172). According to Phillip Gregory, the other officer present during the interrogation (Tr. 166), this statement was made at the end of the two hours and after Mrs. Severs became aggravated (Tr. 243-244). Gregory testified that Mrs. Severs told them that she and Linda had discussed several different ways they could kill Ravallette (Tr. 245). This interview was not recorded, nor was Mrs. Severs asked to write a statement (Tr. 247).

Mills testified that the main topic when he spoke to Mrs. Severs on the telephone as "Billy," and when he interrogated her the next day, was Mrs. Severs' belief that Mike Ravallette was sexually abusing the three-year-old, Shay (Tr. 182,

190). Toward the end of the conversation between "Billy" and Mrs. Severs, he said "surely you guys have a plan" (Tr. 183). That was the first time a plan had been mentioned, and Mrs. Severs' replied, "[w]e thought a drive-by might be the answer" (Tr. 185). Later in the conversation, Mrs. Severs said that she was buying the gun, but whether she used it or not, she was buying the gun (Tr. 186). She stated that she would get the gun and if something happened and she did not use it, she would throw it away (Tr. 187). Mills testified that Mrs. Severs told him four times during the interview that there was no plan other than hypothetical (Tr. 190). Mrs. Severs also "rambled on" about suicide, but that topic was not explored (Tr. 192).

Michael Ravellette lived in Jonesboro, Illinois, near the police station (Tr. 214). He lived with his wife Ashley, and their children Shay Lynn and Dustin (Tr. 214). Shay was two months old when Michael met Ashley (Tr. 220). He moved in with them three or four days later (Tr. 219). Mrs. Severs had accused Ravellette of sexually molesting Shay, but an investigation found that the charge was unfounded and Shay remained in his home (Tr. 216). When Mrs. Sever and Linda came by three days after Shay's third birthday, Ravallette would not let them in, and they would not leave (Tr. 217). Ashley called the police who removed the two women (Tr. 217).

Early on in the relationship, Ashley left Shay with Mrs. Sever for a week or two at a time (Tr. 225). Ravallette told Ashley he did not like that, that in his family, you did not pass your child off to a grandmother to baby sit, so the practice

stopped (Tr. 225). Ravallette testified that Mrs. Sever was jealous of his relationship with Shay Lynn (Tr. 225).

Ravallette admitted to "tons" of criminal convictions, including assaults on Ashley, other family members, and a police officer. He also had drug related convictions (Tr. 229-231). He collected knives, and owned a pellet gun (Tr. 230). Ashley told him that Mrs. Severs had offered to buy her a trailer if she would leave him (Tr. 233). Ravallette cut off contact between Shay and Mrs. Severs after the allegation of sexual abuse was made (Tr. 236). Mrs. Severs would still sometimes drop off clothes for the children (Tr. 236).

Mrs. Severs' Motion for Judgment of Acquittal at the close of the State's Case was denied (Tr. 248). Mrs. Severs then testified in her own defense.

Mrs. Severs lived in Ullin, Illinois (Tr. 248), and made her living providing licensed day care (Tr. 249). She allowed Ashley to live with her for a week before going home when Shay was born. She allowed Ashley to live with her a various other times, but she would not permit Ashley's boyfriends to move in with her (Tr. 250). Mrs. Severs was afraid for Shay because Ashley used drugs and alcohol (Tr. 250).

She was not concerned about Ravallette at first, but it did not take her long to "find out about him" (Tr. 252). She knew he was beating Ashley, and during one visit, Shay told her that he was doing sexual things to her, "playing with her butt" and biting her (Tr. 253). Mrs. Sever admitted to Ravallette that she had turned him in and she became afraid because she knew he was violent (Tr. 258).

This was when she first started thinking about getting a gun (Tr. 259). She knew he could beat Ashley, and she was living alone, was 5'3" tall and weighed 129 pounds (Tr. 259). She considered him a serious threat (Tr. 259).

Mrs. Severs said that when "Billy" called, she believed him to be a thug and a murderer (Tr. 262). She knew that Linda was going to meet him and he sounded mean when he said he did not like being stood up (Tr. 263). She did not know where Linda was so she decided to go along with "Billy" and try and find out what happened to Linda (Tr. 265).

Mrs. Sever admitted that she and Linda had talked many times about what they would like to do to Ravallette (Tr. 266). They talked about hanging him from a high tree by certain parts of his anatomy, or pouring honey all over him, tying him to a tree and hoping bees would come (Tr. 266). A "drive-by" would be difficult because Mrs. Severs doesn't see well, and cannot drive at night because she had cataracts (Tr. 267).

Mrs. Severs testified that every time she said something during the interrogation, she was called a liar (Tr. 269). She had never been interrogated before and had no criminal record (Tr. 269). She said that Mills told her he had interrogated serial killers who were more honest than she was (Tr. 270). She told them that she had a right to own a gun and that she did not know until they told her that the gun Linda purchased had no serial number (Tr. 271). She believed it was legal for Linda to buy a gun (Tr. 271).

She said during the interview that Ashley needed to be killed too but she and Linda would never do such a thing (Tr. 272). According to Mrs. Severs, there was no plan to kill Ravallette, but she got agitated because they kept calling her a liar so she finally said "okay, I got the gun to kill Mike," because that is what they wanted to hear (Tr. 274). She said that in addition to being agitated, after two hours she told them she was tired. She had had a heart attack earlier that year and another one in December (Tr. 274-275). Mrs. Severs stated that there was no agreement between she and Linda to kill Ravallette (Tr. 275). She wanted the gun for protection from him, and to kill herself (Tr. 275).

Mrs. Severs' Motion for Judgment of Acquittal at the Close of All of the Evidence was denied (Tr. 292). The case was submitted to the jury and during deliberations, notes were sent out asking: 1) for a copy of the transcript of Helen talking to "Billy," which was provided (L.F. 22); 2) if Mrs. Severs would have to serve the entire five year minimum sentence, or would she be eligible for parole or reduced sentence", which the trial judge could not answer (L.F. 23); and 3) if the jury could offer a five year suspended sentence," which the trial judge did not answer (L.F. 24, Tr. 329). The jury returned a verdict of guilty and assessed punishment at five years, followed by the words, "with suspended imposition sentence" (sic) (L.F. 25).

Mrs. Severs objected to the verdict and asked that the trial court send the jury back for further deliberations (Tr. 329). She argued that the jury knew that a suspended imposition of sentence was not a conviction, and so they were not

recommending leniency or probation, but were asking that she not receive a conviction (Tr. 329). The State argued that the trial court should treat the SIS language as surplusage and accept the verdict (Tr. 329). The trial court accepted the verdict over Mrs. Severs' objection (Tr. 338).

Mrs. Severs' Motion for New Trial was denied (Tr. 344), and after hearing thirteen witnesses testify on Mrs. Severs' behalf, the trial court found that placing her on probation would "send a horrible message to the public," and imposed a five year sentence of imprisonment (Tr. 377, L.F. 29). Mrs. Severs was granted leave to appeal *in forma pauperis* (L.F. 32), Notice of Appeal was timely filed (L.F. 33), and this appeal follows.

POINT RELIED ON

The trial court erred in accepting the jury's verdict and in sentencing Mrs. Severs to five years imprisonment because those actions denied Mrs. Severs her constitutional rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution in that the jury's verdict was inconsistent on its face since it found Mrs. Severs guilty, but also stated that she should not be given a conviction, but rather a suspended imposition of sentence.

State v. Lashley, 667 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873 (1985);

Williams v. State, 92 Okla.Crim. 70, 220 P.2d 836 (1950);

State v. Wood, 355 Mo. 1008, 199 S.W.2d 396 (Mo. 1947);

Cook v. United States, 379 F.2d 966 (5th Cir. 1967);

U.S. Const., Amendments V, VI and XIV;

Mo. Const., Article I, Sections 10 and 18(a); and

Rule 29.11.

ARGUMENT

The trial court erred in accepting the jury's verdict and in sentencing Mrs. Severs to five years imprisonment because those actions denied Mrs. Severs her constitutional rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution in that the jury's verdict was inconsistent on its face since it found Mrs. Severs guilty, and then stated that she should not be given a conviction, but rather a suspended imposition of sentence.

When the jury returned a verdict finding Mrs. Severs guilty of conspiracy, but also finding that she should receive a suspended imposition of sentence, the trial court had an obligation to send it back for further deliberations. If it was the jury's intent that Mrs. Severs not receive a conviction, further deliberation may have resulted in a not guilty verdict.

Preservation:

When the jury came back with its verdict finding Mrs. Severs guilty, it also found that she should receive a suspended imposition of sentence (L.F. 25). Mrs. Severs objected and asked the trial court to send the jury back for further deliberations (Tr. 329). The trial court overruled that objection and accepted the verdict, treating the language concerning the SIS as surplusage (Tr. 329). Mrs.

Severs included this claim of error in her motion for new trial (L.F. 27) and therefore it is properly preserved for review by this Court. Rule 29.11(d).

Facts:

After hearing all of the evidence and argument, the jury began its deliberations (Tr. 327). During those deliberations, the jury sent out three notes (Tr. 329). The first one asked for the transcript of Mrs. Severs' conversation with "Billy," (L.F. 22). The second asked if Mrs. Severs would have to serve the entire five year minimum sentence, or if she would be eligible for parole or a reduced sentence (L.F. 23). The trial court informed the jury that he could not answer that question (L.F. 23). The final question was whether the jury could offer a five year suspended sentence (L.F. 24). The trial court did not answer the question (L.F. 24).

The jury returned its verdict, which read: "5 years with suspended imposition sentence" (L.F. 25). The trial court accepted the verdict over Mrs. Severs' objection, treating the SIS language as surplusage (Tr. 329).

After deciding to accept the verdict, the trial court informed counsel that he intended to discuss the verdict with the jurors after trial "to inquire as to what they meant by this. At least after the fact in terms of assisting me in sentencing." (Tr. 339). Later in the discussion the court said, "I'm curious as to what they want me to do." (Tr. 339). The prosecutor then asked that if the court polled the jury, it read the entire verdict, including the suspended imposition of sentence language, because, "if you only read them part of it, then it would be opening a can of

worms. I would say read them the entire thing including the surplusage and ask them, '[I]s this your verdict?" (Tr. 340). That is what the court did, it read the entire verdict, including the language "five years with suspended imposition [of] sentence," and asked each juror if that was his/her verdict (Tr. 341). Each juror responded, "Yes, sir." (Tr. 341-342). The trial court then discharged the jury, but asked them to wait in the jury room because he wanted to speak with them and "ask you a couple of questions and explain some of the things that I couldn't answer for you earlier, okay." (Tr. 342).[4]

At trial, the State called Glenda Kay Phillips as its first witness (Tr. 129). During the cross examination of Phillips, Mrs. Severs asked her if she had been convicted of child endangerment on September 7, 1989 and Phillips replied that it was a suspended imposition of sentence (SIS) (Tr. 141). When Mrs. Severs followed up with, "[s]o in other words, the DWI is not the only time you've ever been convicted of a crime –," the prosecutor broke in and objected, stating in front of the jury, "Counsel should know an SIS is not technically a conviction, so – " (Tr. 141). That objection was sustained (Tr. 141). The parties then approached the bench and after an off the record discussion, Mrs. Severs' cross examination resumed with:

> Q. So you do not have a conviction for the (sic) endangering the welfare of a child?
>
> A. Not on an SIS. I understood it wasn't supposed to be a conviction.

[4] The discussion in the jury room was not made part of the record.

Q. But you did plead guilty to endangering the welfare of a child.

(Tr. 142).

Standard of Review:

Whether a verdict is in proper form is a purely legal question and therefore, this Court should review the issue presented here *de novo*. *State v. Berry*, 54 S.W.3d 668, 672 (Mo.App., E.D. 2001).

Argument:

A trial court's failure to properly examine a verdict for defects, inconsistencies or ambiguities may result in reversible error. *State v. Dorsey*, 706 S.W.2d 478, 480 (Mo.App., E.D. 1986). "The law is clear that when a jury returns a verdict in improper form, it is the **duty** of the trial court to refuse to accept the same and require further deliberations until a verdict in proper form is returned. *State v. Lashley*, 667 S.W.2d 712, 715 (Mo. banc 1984), *cert. denied*, 469 U.S. 873 (1985) (emphasis in the original). The verdict returned in *Lashley* was in the sentencing phase of a death penalty case. *Id*. at 713. The jury had been instructed on one aggravating factor, whether the State had proved, beyond a reasonable doubt, that the defendant had committed the murder for the purpose of receiving money or any other thing of monetary value. *Id*. at 715. The jury's verdict form stated, "there was no evidence to disprove he entered the house for the reason of obtaining money." *Id.* The Supreme Court found that the trial court had acted properly in sending the jurors back for further deliberations, telling them that their verdict was in improper form and advising them to reread the instructions. *Id*.

In *State v. Wood*, 355 Mo. 1008, 199 S.W.2d 396 (Mo. 1947), the jury returned a verdict which read "[w]e, the jury find the defendant, T.L. Wood, guilty of rape, as charged in the information, and we do assess his punishment at 2 years with clemency." 199 S.W.2d at 398. The trial judge refused to accept the verdict, informed the jury that their verdict meant two years in the state penitentiary and that no instruction had been given that would permit the words "with clemency." *Id*. He then sent the jurors back for further deliberations, and they returned a verdict finding defendant guilty and assessing punishment at 2 years. The words "with clemency" had been removed. *Id*. The *Wood* court held that the trial court's actions were entirely proper, stating that a court not only may, but should see that verdicts are in proper form. *Id*., see also, *State v. Hurley*, 602 S.W.2d 838, 840 (Mo App., W.D. 1980).

The mandatory language in *Lashley*, *Wood* and *Hurley*, has not been uniformly followed by Missouri appellate courts. For example, in *State v. Marks*, 376 S.W.2d 116 (Mo. 1964), the jury returned a verdict which, after finding the defendant guilty and assessing punishment at two years, added, "[w]e request this man be given mental examination." *Id*. at 117. The trial court accepted the verdict, but held the jury and spoke with the foreman to determine what the jury's intent had been in adding that language. *Id*. The appellate court affirmed Marks' conviction, finding that it was clear that the jury had rejected the defendant's defense of mental disease and defect with its finding of guilt. *Id*. The court went on to say that "it would have been the better practice to have instructed the jury to

return to the jury room for further deliberations and to return a verdict in the proper form, in accordance with the instructions, as was done in *State v. Wood*, 355 Mo. 1008, 199 S.W.2d 396 (Mo. 1947)." *Id*. at 118.

To the extent that *Marks, supra,* can be read to hold that jury verdicts assessing punishment unauthorized by statute may also be disregarded as surplusage, 376 S.W.2d at 118, it can be distinguished from Mrs. Severs' case.

In *Marks*, there was no statute authorizing the trial court to order a mental examination for someone who had been found competent to stand trial and whose defense of not guilty by reason of mental disease and/or defect had been rejected. *Id.* at 117. Therefore, the jury's recommendation was not authorized by law. But Section 557.011 permits the trial court to sentence someone in Mrs. Severs' position to a suspended imposition of sentence. The jury in Mrs. Severs' case did not request a disposition unauthorized by law and it did not attempt to usurp the trial court's authority. In all cases, it is the trial court's responsibility to sentence the offender. Section 557.036. The issue here is whether the trial court could ascertain the jury's intent from its verdict. Looking at the facts, the answer to that question is clearly "no."

In *State v. Ball*, 654 S.W.2d 336, 340 (Mo.App., W.D. 1983), a case reviewed for plain error, the court held that "[i]t is well established in Missouri that although its form may be irregular, a verdict is good if the intent of the jury may be ascertained." citing *State v. Lewis*, 491 S.W.2d 326, 328 (Mo. 1973). In *Ball*, the verdict added the words "without parole" after the recommended

sentence of one year. 654 S.W.2d at 340 n.2. The *Ball* court held that a verdict that contained sufficient information to support a judgment would not be found "to be bad because it is informal or because it contains surplusage." *Id.* In *Lewis, supra,* the minimum punishment provided for in the statute was "imprisonment in the county jail [for] not less than fifty days." 491 S.W.2d at 328. In its verdict, the jury assessed punishment at imprisonment "for not more than 50 days." *Id*. The court affirmed Lewis' conviction, holding "that a verdict must be certain, positive and free from ambiguity. However, a verdict is not to be tested by technical rules of construction. The controlling object is to ascertain the intent of the jury, and if this is disclosed, the verdict is good though irregular in form." *Id*., citing *State v. McCarthy*, 336 S.W.2d 411, 417 (Mo. 1960). See also *State v. Lovitt*, 243 Mo. 510, 147 S.W.484 (1912).

It is difficult to ascertain any universal rule concerning the effects of improper verdicts from the case law. While *Ball* and *Lewis* hold that a verdict is good as long as the jury's intent is clear, certainly the jury's intent was clear in *Wood* and the court could have concluded that the jury's request for clemency was surplusage.

One type of improper verdict does seem to garner the same results in most cases. In *State v. Gordon*, 657 S.W.2d 47 (Mo.App., W.D. 1983), the jury had recommended a punishment of 30 days in the county jail "subject to probation providing he will agree to seek professional help." *Id*. at 48. The appellate court affirmed the verdict, holding that the language concerning probation was a

recommendation for leniency, and could be disregarded as surplusage. *Id.* at 49, citing *State v. Churchill*, 299 S.W.2d 475 (Mo. 1957); *State v. Keck*, 389 S.W.2d 816 (Mo. 1965) and *State v. Merriett*, 564 S.W.2d 559 (Mo.App. 1978). *See also State v. Lynch*, 659 S.W.2d 618, 619 (Mo.App., E.D. 1983) (Jury found defendant guilty, assessed punishment, and then recommended probation.) While the holding in *Gordon* is contrary to *Wood*, *supra*, the *Gordon* court distinguished *Wood* by saying that even if the court had rejected the verdicts and sent the jury back for further deliberations, the preferable procedure, it did not follow that acceptance of an imperfect verdict necessarily results in prejudice to the defendant. *Id*. The court concluded that a recommendation for leniency, is "the species of imperfection," that may be disregarded as surplusage. *Id.*

The assessment of punishment in this case was not put in the form of a recommendation. The jury wrote, "5 years with suspended imposition [of] sentence" (L.F. 25). The jury was not requesting leniency. Its verdict indicated the jury's intent that Mrs. Severs not be given a conviction. The jury had asked the trial court if this was a permissible verdict, and received no response (L.F. 24, Tr. 329). Since the trial court had responded to the jury's first question, informing it that he could not provide the answer they sought, it is reasonable to assume that the jury believed that a five year sentence with suspended imposition of sentence was a permissible assessment of punishment.

Three cases from other jurisdictions support Mrs. Severs' claim of error. In *Garrett v. State*, 159 Tex.Crim. 203, 262 S.W.2d 414 (1953), the court was faced

with situation almost identical to the one here. In that case the jury returned a verdict which read: "We, the jury find Louis (Greer) or Garrett guilty as charged, and fine her $500.00 plus cost of court, and one year in jail. Due to her condition a one-year suspension is recommended, unless convicted again of charges involving the sale of whiskey, beer or wine in such case, she shall serve the year in jail. Joe Bickley, Foreman." *Id*. at 415. The trial court ignored the suspension of the jail sentence and sentenced Garrett to one year in jail, stating that the jury's recommendation was not authorized by law and was mere surplusage. *Id*.

The appellate court reversed, holding that the trial court erred in ignoring the "surplusage." It found that the judge should have refused to accept the verdict and sent the jury back for further deliberation. *Id*. Citing *McCoy v. State*, 136 Tex.Cr.R. 473, 126 S.W.2d 487 (1939), the court concluded:

> . . .unless such an unresponsive verdict as the present one is corrected in the jurors' presence and by their permission, that the trial judge can no more reform the same by ignoring any part thereof than he could by adding anything thereto.

Id.

In *Cook v. United States*, 379 F.2d 966 (5th Cir. 1967), the jury found the defendant guilty as charged, but added a note at the bottom of the verdict form which read, "This Jury, however, respectfully request (sic) that this court give to J. Sydney Cook, Jr. every degree of leniency possible." *Id*. at 968. The trial court accepted the verdict and informed the jury that he would not sentence Cook until a

presentence investigation had been completed, and not without affording Mr. Cook, his counsel, family and friends, the opportunity to speak to the issue of punishment. *Id.* at 968-969. Cook then asked that the jury be polled. The first juror stated, "I was reluctant to at the beginning; I voted guilty." The second juror simply said, "Guilty, sir." The third juror replied, "Guilty, based on the note at the bottom." and the remainder of the jurors replied, "Guilty, as noted at the bottom of the verdict." *Id.* at 969. Defense counsel asked that each juror be asked whether their guilty verdict was qualified by the note on the bottom, and/or whether their votes would be for conviction if they were advised they could not make the recommendation or the recommendation need not be followed by the court. The trial court denied both requests. *Id*.

The 5th Circuit reversed, citing *Garrett*, *supra*. The court first noted that recommendations for leniency are normally ignored as surplusage. *Id*. at 970. "But where the circumstances strongly suggest that there would have been no agreement as to the verdict unless the recommendation of leniency was also accepted, the effect of the recommendation, steadfastly adhered to on the poll, was to nullify the verdict." *Id.* The court noted that the trial court could have cured any error by asking the questions defendant proposed, but by refusing to do so, there was left an obscurity that rendered the verdict doubtful, and failure to clarify that obscurity when the trial court could have done so, proved fatal to the verdict.

Finally, in *Williams v. State*, 92 Okla.Crim 70, 220 P.2d 836 (1950), the jury returned a verdict finding the defendant guilty of manslaughter. The verdict

was proper except for the clause "with the recommendation that said sentence be suspended." *Id*. at 843. Oklahoma law did not permit suspended sentences in manslaughter cases. *Id*. Defendant's counsel did not object and the trial court accepted the verdict. *Id.* The appellate court reversed, finding that it could not sustain a jury's verdict that might have been favorable to the defendant had the jury known that the trial court could not carry out their intended sentence. *Id*. The appellate court noted that the jury's confusion in *Williams* was not due to an improper instruction, or any improper comments by the trial court, but "the effect was just as prejudicial to the defendant's right as though they had been misled by the court. A verdict resulting from confusion as to the law of the case, where it is clear a different result favorable to the accused might have resulted, in the absence of confusion, should not be permitted to stand where the defendant's rights have been materially affected . . . It is altogether possible that a different result might have been reached if the jury had not been confused by its consideration of the proposition of a suspended sentence. *Id*. at 843.

The trial court in this case should not have accepted the jury's verdict. The jury's intent was not clear and unambiguous, nor was the jury merely recommending leniency. Mrs. Severs' jury first requested a conviction by finding her guilty and assessing punishment at the statutory minimum of five years, but then it asked that she not be given a conviction by including the language "suspended imposition sentence" (L.F. 25).

When one successfully completes an SIS probation, it is normally not considered a conviction. *State v. Prell*, 35 S.W.3d 447, 450 (Mo.App., W.D. 2000). The Missouri Supreme Court first addressed the issue of whether a suspended imposition of sentence is a "conviction" in *Yale v. City of Independence*, 846 S.W.2d 193 (Mo banc 1993). The Court first noted that there are two meanings to the term "conviction." *Id*. at 194. The common law sense of conviction "may merely include 'the confession of the accused in open court, or the verdict returned against him by the jury.'" *Id*., citing *Meyer v. Missouri Real Estate Comm'n*., 238 Mo.App. 476, 183 S.W.2d 342 (1944). But when the term refers to a determination of guilt from a prior proceeding, and bears directly on an individual's status or rights, it takes on a different meaning. *Id.* In those circumstances, a "conviction" requires a final judgment, and a suspended imposition of sentence is not a final judgment. *Id.*

It is reasonable to assume that Mrs. Severs' jury would not have understood the difference between the common law meaning of "conviction" as merely a stage in a criminal proceeding, and the more technical meaning which requires a final judgment before collateral consequences can attach to a "conviction." However, the jurors believed that a suspended imposition of sentence was not a conviction because the prosecuting attorney and witness Glenda Kay Phillips had explained that to them (Tr. 141). Thus, it is impossible to determine what they intended when they included "suspended imposition sentence" on their verdict

form. From what they heard during the cross examination of Phillips, they may have intended that Mrs. Severs not be convicted.

The trial court added to the jury's confusion when it failed to answer its question, "Could we offer a five year suspended sentence?" (L.F. 24). The trial court had responded to the jury's earlier question about how much time Mrs. Severs would serve by writing back "I am sorry but the law does not permit me to answer this question." (L.F. 23). By not replying to the question about suspended sentences, the jury could well have thought the court was telling them that this was a legitimate sentence.

And finally, the court's polling of the jury did nothing to clarify the verdict. The prosecutor's statement to the judge that if the verdict was read without the "suspended imposition sentence" language, it would be "opening a can of worms" (Tr. 340), indicates that the prosecutor understood that at least some of the jurors would respond that a sentence of five years in prison was **not** their verdict and they would acquit Mrs. Severs if a guilty verdict meant she would spend five years in prison.

That is not an intention that can be foreclosed by looking solely at the verdict form itself. In fact, the trial judge admitted that he did not understand the jury's intent (Tr. 339). But instead of seeking clarification *before* accepting the verdict, the court spoke to the jurors about what their verdict meant *after* they had been discharged (Tr. 339, 342).

The trial court had a duty to reject the verdict, instruct the jury, and send it back for further deliberations. Those instructions should have included telling the jury that their verdict was improper, that no instruction permitted them to request a suspended imposition of sentence, and that their verdict meant a five year term of imprisonment. This is what the appellate court approved of in *Wood*, *supra*, and it would have given the jury a clear understanding of why their verdict was rejected.

Because the verdict form in Mrs. Severs' case contained an obvious ambiguity which the trial court failed to cure by returning the jury for further deliberations, Mrs. Severs was prejudiced and denied her right to a fair trial. *State v. Dorsey*, 706 S.W.2d at 480-481. If the jurors had understood that by finding Mrs. Severs guilty and assessing punishment at five years, she would be sentenced to five years imprisonment, and that the trial court would ignore the "suspended imposition [of] sentence" language, some of them may have acquitted her. Accepting the verdict when this was a real possibility constitutes error that prejudiced Mrs. Severs. *Williams v. State*, 220 P.2d at 843.

The trial court's action in accepting the improper verdict and refusing to clarify the jury's intent foreclosed any chance of a more favorable outcome for Mrs. Severs and denied her a fair trial. Therefore, this Court should reverse her conviction and remand her cause for a new trial.

CONCLUSION

Because the verdict in this case is improper, and the jury's intent cannot be determined by examining the face of that verdict, this Court should reverse Mrs. Severs' conviction for conspiracy and remand her cause for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b), and Special Rule 360. The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,781 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program, which was updated in, September 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of September, 2004, to Charnette Douglas, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Nancy A. McKerrow

APPENDIX

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