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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement contained on page 4 of Appellant's Opening Substitute Brief is incorporated here by reference.

STATEMENT OF FACTS

The Statement of Facts contained on pages 5 through 13 of Appellant's Opening Substitute Brief is incorporated here by reference.

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).

State v. Peters, 855 S.W.2d 345 (Mo. banc 1993);

State v. Burke, 809 S.W.2d 391 (Mo.App., E.D. 1990);

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

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

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.

Respondent begins its argument with the conclusion that the jury's assessment of punishment at "5 years with suspended imposition of sentence" was "simply a request for leniency, which the trial court properly treated as surplusage." Resp. br. at 9. Respondent repeats this conclusion throughout its argument. Resp. br. at 14, 16, 18, 26. The jury in Mrs. Severs' case was not recommending or requesting leniency. It was assessing her punishment.

Respondent points out a fact Appellant overlooked in her opening substitute brief which strengthens her argument. Along with its third note to the trial court asking whether it could offer a 5 year suspended sentence, the jury foreman had attached the verdict form assessing punishment at "5 years with suspended imposition sentence" (sic). The verdict had been signed by the foreman and a note at the bottom of the verdict read, "see above requested sentence." (L.F. 25; Tr. 330). After hearing from both parties, the trial court accepted the verdict without

responding to the jury's question (Tr. 338). From this, it can be assumed that the jury believed its verdict, and assessment of punishment, was proper. This is especially true when, at the suggestion of the prosecuting attorney, the court read the verdict with the assessment of 5 years suspended imposition of sentence included when polling the jury (Tr. 340). It was only after accepting the verdict that the trial court met with jurors to find out what they intended (Tr. 339, 342).

From these facts, Respondent argues that "the verdict form is not facially or inherently inconsistent." The jury found Appellant guilty of the crime charged (conspiracy to commit murder) and assessed a five-year term of imprisonment, which was within the range (5 to 15 years) provided for by the verdict-directing instruction." Resp. br. at 14. But that is not what the jury did. The jury assessed punishment at "5 years suspended imposition of sentence." (L.F. 24, 25). The jury did not want Mrs. Severs convicted of a felony. The trial court erred in accepting a verdict with an assessment of punishment it had no intention of respecting without informing the jury that its assessment of punishment was improper and sending it back for further deliberations.

The cases cited by Respondent for the proposition that the jury's assessment of punishment in this case was simply a request for leniency are easily distinguished. In *State v. Churchill*, 299 S.W.2d 475, 479 (Mo. 1957), the jury's verdict actually requested leniency. In *State v. Lynch*, 659 S.W.2d 618, 619 (Mo.App., E.D. 1983) the jury "recommended" probation, and the trial court accepted the verdict only after announcing to the jury that it considered that

recommendation surplusage and was not bound by it. *Id*. at 619. The same is true in *State v. Merriett*, 564 S.W.2d 559 (Mo.App., D.C.D. 1978), where the jury "recommended leniency." *Id*. at 560. In *State v. Keck*, 389 S.W.2d 816 (Mo. 1965), the issue was not raised. However, this Court held that the verdict was in proper form, and the inclusion of "subject to parole or probation at 6 months for good behavior" was a recommendation for leniency properly disregarded. *Id*. at 819. Trial court's have no jurisdiction to order the Department of Corrections to release someone after 6 months for good behavior. Trial courts' do have authority to suspend imposition of sentence on someone convicted of the class B felony of conspiracy to commit murder.

Respondent argues that "nothing in the verdict itself supports" Appellant's "speculation" that the jury did not want Mrs. Severs to suffer a conviction. Resp. br. at 17. This can only be argued by ignoring the plain language of the verdict, "5 years with suspended imposition sentence" (sic) (L.F. 25). Respondent faults Appellant for relying on the testimony of Ms. Phillips as the basis for the jury's knowledge that a suspended imposition of sentence results in no conviction. Resp. br. at 17. But the trial court too "speculated" that the jury learned the legal impact of a suspended imposition of sentence during the testimony of Ms. Phillips (Tr. 338). Respondent also points out that the jury could have known the meaning of suspended imposition of sentence because four jurors had relatives who committed crimes, one had a DUI, and one was a chaplain at the jail. Resp. br. at 18-19. The source of the jury's knowledge is irrelevant to the issue in this case. It is the fact

that the jury believed it had the right to assess punishment at "5 years suspended imposition sentence" (sic),and that the court would impose that sentence that is important. If the trial court had doubts about what the jury meant, which it clearly did, (Tr. 329-339), it was the court's duty to instruct the jury that its verdict was improper and to send it back for further deliberations.

Respondent's reliance on *State v. Ball*, 654 S.W.2d 336 (Mo.App., W.D. 1983) is misplaced. Resp. br. at 19. "It 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." *Ball, supra* at 340. That is Appellant's point - the trial court did not know what the jury's intent was. After deciding to accept the verdict, the trial court told the parties that it would speak with the jurors, "to inquire as to what they meant by this. At least after the fact in terms of assisting me in sentencing." During the same discussion the court stated, "I am curious as to what they want me to do." (Tr. 339) Contrary to Respondent's assertion, the verdict in this case was **not** good since neither the parties, nor the trial court, could ascertain the jury's intent from a reading of that verdict.

Respondent argues that sending the jury back might have actually prejudiced Mrs. Severs since it might send "the jury a message that the trial court was looking for a particular result or that the jury's plea for clemency was contrary to what the trial court believed was a just result." Resp. br. at 20, citing *State v. Peters*, 855 S.W.2d 345 (Mo. banc 1993). While Appellant appreciates Respondent's concern that she avoid prejudicing herself, in making its argument,

Respondent is relying on the *Peters* dissent. The majority in *Peters* supports Appellant's argument that the trial court had a duty to send the jury back for further deliberations. In *Peters*, the jury initially returned verdicts finding the defendant not guilty of assault, but guilty of armed criminal action. *Id.* at 347. The trial court refused the verdicts and sent the jury back for further deliberations with instructions that its verdict was improper and it should reread all of the instructions. *Id*. The jury returned with guilty verdicts on both counts. *Id*. Defendant argued that by finding him not guilty of assault, the jury's guilty verdict on armed criminal action could not stand and he should have been discharged. *Id.* This Court disagreed and found that the trial court handled the situation properly. Citing *State v. Lashley*, 667 S.W.2d 712 (Mo.banc), *cert. denied*, 469 U.S. 873 (1985), this Court held that the trial court had a **duty** to send the jury back in order to give it an opportunity to correct the verdicts. *Peters, supra* at 347.

> We believe the trial judge did the proper thing in returning the verdict and asking the jury to reconsider the instructions. Only the jurors know what their intended verdicts were, and because they are in the courtroom and available, we should afford them the opportunity to correct the inconsistency.

Id. at 349. The same is true of the case at bar. The trial court, the prosecutor and defense counsel had no idea what the jury intended by assessing punishment at 5 years suspended imposition of sentence. It was the trial court's **duty** to inform the

jury that it could not assess a suspended imposition of sentence and then send it back for further deliberations.

Respondent argues what Appellant "actually wanted in this case was not clarification, but an acquittal." Resp. br. at 21. Appellant agrees that had the jury been given an instruction that it could not assess punishment at a suspended imposition of sentence, it may have returned a verdict of not guilty. While courts may assume that jurors follow the court's instructions, they also recognize that jury nullification sometimes occurs even if it should not be instructed on or encouraged. *State v. Hunter*, 586 S.W.2d 345, 347 (Mo. banc 1979). Another example of a court recognizing that juries do not always follow the court's instructions, is *State v. Burke*, 809 S.W.2d 391 (Mo.App., E.D. 1990), (cited by Respondent for the proposition that juries are presumed to follow the instructions, Resp. br. at 22). In *Burke*, the Eastern District held that the trial court erred in asking the jury for an advisory recommendation on punishment after the defendant waived jury sentencing but found the error harmless. *Id*. at 392.

In discussing why a defendant might want to waive jury sentencing, the Court stated:

> A defendant may wish to do this in order to avoid a compromise verdict: the jurors compromising their views on the guilt of the defendant and, then, finding guilt but assessing what they believe to be a short sentence as punishment.

Id. at 394. Obviously, a juror who would compromise on guilt in exchange for a light sentence is not following the court's instructions. But as the *Burke* Court recognized, it happens often enough that it may be a factor in some defendants decision to waive jury sentencing.

This could well have been the scenario in Mrs. Severs' case. Some of the jurors may have compromised their belief in her innocence in exchange for a punishment that would not result in imprisonment or the stigma of a felony conviction. Appellant recognizes that this is pure speculation. But that is what this Court is left with since the trial court accepted the jury's verdict rather than sending the jury back for further deliberations.

The jury's verdict in this case was not a request or recommendation for leniency or mercy, it was the jury's assessment of punishment. The record reflects that the trial court could not determine the jury's intent by reading the verdict. The trial court did nothing to clarify the jury's intention as expressed in its verdict prior to accepting it. Mrs. Severs' was prejudiced by the trial court's failure to tell the jury that it could not assess punishment at a 5 year suspended sentence and then send the jury back for further deliberations. Had it done so, the jury may have acquitted Mrs. Severs. If any of the jurors had compromised their verdict on guilt in return for the sentence given, the jury may have been unable to reach a verdict. Mrs. Severs' is entitled to a new trial.

CONCLUSION

Because the verdict in this case was improper, and the jury's intent could not 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). 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 2,287 words, which does not exceed the 7,750 words allowed for an appellant's reply 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 program, which was updated in November, 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 18th day of November, 2004, to Evan J. Buchheim, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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