IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2017-KA-1044-COA

TIMOTHY OWENS APPELLANT

V.

STATE OF MISSISSIPPI APPELLEE

MOTION FOR REHEARING

COMES NOW Timothy Owens, by and through counsel, pursuant to MRAP Rule 40, and files this Motion for Rehearing, and in support thereof, would most respectfully show unto the Court the following, to-wit:

1. On December 4, 2018, the Court of Appeals (COA) rendered its opinion in this case affirming Owens' first-degree murder conviction.

2. Owens respectfully requests rehearing based on misapprehension of law and facts under issues 2 and 3.

Issue 2 – Ineffective Assistance of Counsel

3. Owens respectfully requests rehearing based on misapprehension of law and facts under Issue No. 2 wherein the COA declined to address the merits of Owens' arguments on the issue of ineffective assistance of counsel choosing rather to preserve the issue for any post-conviction collateral relief petition Owens may file.

4. The COA observed that and the state did not stipulate to the adequacy of the record as Owens had and found that the record did not affirmatively show "ineffectiveness of constitutional dimensions." (Op. ¶ 30).

5. For purposes of rehearing, Owens asserts that the record is more than adequate

and affirmatively shows that Owens' his trial counsel was constitutionally ineffective under the Sixth Amendment and Art. 3 §26 of the Mississippi Constitution by:

a. failing to request a culpable negligence manslaughter instruction
b. failing to request an imperfect self-defense manslaughter instruction
c. offering an incomplete self-defense instruction
d. failing to file a post-trial motion for JNOV
e. failing to file a post-trial motion for new trial

6. These deficiencies interfered with Owens' rights to due process and proximately contributed to an unfair trial.

Failure to ask for culpable negligence manslaughter instruction

7. The jury in this case received lesser offense instructions on second-degree murder instruction and a heat of passion manslaughter but was not instructed on culpable negligence manslaughter under Miss. Code Ann. § 97-3-47 (1972). Owens would have been entitled to an instruction on culpable negligence manslaughter since the trial court instructed the jury on second degree (depraved heart) murder. *Shumpert v. State*, 935 So. 2d 962, 967 (Miss. 2006). A culpable negligence manslaughter instruction would have been consistent with Owens' accident defense.

8. Since the only difference in culpable negligence manslaughter and depraved heart second degree murder is the degree of culpability, the trial court would have been required to instruct the jury that it could find Owens guilty of manslaughter under the theory that he was less culpable than required for second degree murder. *Id.* But Owens' trial counsel failed to request this instruction and Owens was thereby deprived of the opportunity to have the jury consider a lesser offense for which there was evidence in the

record.

9. Owens, like all criminal defendants, was entitled to have his theory of the case presented to the jury in jury instructions. *Sayles v. State*, 552 So. 2d 1383, 1390 (Miss. 1989). "A defendant is entitled to have instructions on his theory of the case presented, even though the evidence that supports it is weak, inconsistent, or of doubtful credibility." *Ellis v. State*, 778 So. 2d 114, 118 (Miss. 2000). Failure of an attorney to request applicable jury instructions "has been condemned ..., and in some cases would amount to a breach of duty to the client." *J. C. Penney Co. v. Evans*, 172 Miss. 900, 160 So. 779 (1935).

10. Specifically, where a defendant asserts a defense and presents testimony or evidence in support of such a defense as did Owens, the defendant is entitled to a jury instruction relating to that theory of defense. *Cochran v. State*, 913 So. 2d 371, 375 (Miss. Ct. App. 2005); *Young v. State*, 451 So. 2d 208, 210 (Miss. 1984). However, because no instruction allowing the culpable negligence manslaughter instruction was requested by his trial counsel, the jury here deliberated Owens' fate without such theory of defense instruction.

11. In *Blunt v. State*, 55 So. 3d 207, 208-12 (Miss. Ct. App. 2011), the Court of Appeals found that Blunt's trial counsel was ineffective, under a plain error analysis, for not requesting a proper instruction which accurately stated the applicable rules of law on self-defense. The record plainly shows that Owens' counsel was likewise ineffective.

12. In *McTiller v. State,* 113 So. 3d 1284, 1291-92 (Miss. Ct. App. 2013),

the defendant's trial counsel did not request an instruction on several defenses available to McTiller upon which his whole defense rested. *Id*. The Court of Appeals reversed finding that McTiller's counsel was prejudicially ineffective. *Id.* Owens' case is not unlike Blunt's and McTiller's and both authorities would require reversal here with the granting of a new trial.

Failure to request an imperfect self-defense manslaughter instruction

13. In addition to accident, Owens asserted self-defense as a defense based on the victim reaching for Owens' pistol during an argument. The fact that the victim was unarmed after Owens seized the pistol supported an inference that Owens' fear was initially bona fide, but unfounded in the end. *Wade v. State*, 748 So. 2d 771, 775 (Miss. 1999) (citing *Lanier v. State*, 684 So. 2d 93, 97 (Miss. 1996). Trial counsel initially submitted an imperfect self-defense manslaughter instruction but withdrew it.

14. For the same reasons and under the same authorities cited above regarding the lack of a culpable negligence manslaughter instruction, Owens asserts the record shows that his trial counsel was ineffective for failing to request an imperfect self-defense manslaughter instruction.

Offering incomplete instruction on self-defense

15. The instruction on self-defense given in this case, D-13, did not contain language that Owens did not have to prove that he acted in self-defense, and there was no other instruction to that effect. When a defendant claims self-defense to a murder charge, the lack of self-defense becomes an element that the state must prove *Johnson v. State*, 749

So. 2d 369, 374 (Miss. Ct. App. 1999). A "defendant is not required to prove he acted in self-defense, and, if a reasonable doubt of his guilt arises from the evidence, he must be acquitted." *Ambrose v. State*, 133 So. 3d 786, 791 (Miss. 2013).

16. Failure to give a proper self-defense instruction can result in reversible error. *Maye v. State*, 49 So. 3d 1124 (Miss. 2010). The law is clear that when such instruction is given as in this case, it must be accompanied by an instruction which identifies for the jury "which party has the burden of proof in such a showing of self-defense." *Id*. In *McGee v. State*, 820 So. 2d 700, 707 (Miss. Ct. App. 2000), the Court found that even though an instruction similar to D-13 was given, no instruction made it clear that the state had the burden to prove lack of self-defense nor was it apparent from reading all the instructions combined, so, reversal was required. The record is clear that *Magee* applies to the facts of this case.

17. Because the self-defense instruction here was incomplete, Owen' jury did not know that Owens was not required to prove that he acted in self-defense. The lack of a complete self-defense instruction affected the outcome of the trial adversely as to Owens' constitutional guarantee of due process and a fair trial. No conceivable trial strategy existed to justify counsel's failure to request a complete self-defense instruction since self-defense was a key part of his defenses to the murder charge and Owens presented testimony in support thereof. Under the same arguments offered above regarding the lack of a culpable negligence manslaughter instruction, Owens asserts that his trial counsel was ineffective by not seeking complete instructions on self-defense. The deficiency was

not harmless because, it cannot be said that the jury was aware that Owens did not have to prove that he acted in self-defense.

Failure to file post-trial motions.

18. The record is abundantly clear that Owens' trial counsel failed to file any post-trial motions on his behalf. Such inaction has been found to be deficient. *Giles v. State,* 187 So. 3d 116, 125 (Miss. 2016).

19. In *Holland v. State*, 656 So. 2d 1192, 1198 (Miss. 1995), the Court found that trial counsel rendered ineffective assistance of counsel by failing to file post-trial motions because the evidence was insufficient to support the verdict, and the trial court would likely have granted the JNOV motion. *Holland*, 656 So. 2d at 1198. The present case is akin to *Holland* in that the trial court would likely have granted the motion for new trial or found that the weight of evidence supported a second degree murder or manslaughter conviction rather than first degree murder. Further, a motion for new trial would have preserved the issue of the weight of evidence for appellate review. The *Holland* court found the lawyer's performance was deficient enough to amount to "ineffective assistance of counsel because the omissions (1) deprived the trial judge of the of the opportunity to reexamine possible errors at trial' which (2) deprived Holland of a fair trial." *Id*.

20. In *Woods v. State*, 242 So. 3d 47, 51 (Miss. 2018), as in Owens' case, Woods' trial counsel did not file any post-trial motions. The Supreme Court reversed Wood's conviction and remanded for a new trial based on ineffective assistance of counsel

regarding Woods' trial counsel's failure to file a post-trial motion for a new trial challenging the weight of the evidence." *Id*. at 52-53.

21. The Supreme Court in *Woods* found that the "failure to file any post-trial motion, namely, a motion for a new trial, constituted deficient performance." *Id*. at 58-59. Having found the deficiency, the *Woods* Court considered "whether a reasonable probability exist[ed] that the trial court would have granted the motion." *Id*.

22. In *Woods*, the evidence weighed heavily in favor of Woods and supported his theories of justifiable self-defense, imperfect self-defense, and heat of passion manslaughter. The record here more than adequately shows that Owens' case is strikingly similar to *Woods* on this point. The evidence in Owens' case weighed more heavily in favor of second degree murder, manslaughter, justifiable homicide or accident as opposed to first degree murder.

23. Ultimately, the *Woods* Court found that, if the trial court had been presented with a motion for a new trial, based on the evidence, "a reasonable probability exists that the trial court would have found that the overwhelming weight of the evidence showed that Woods" actions were in justifiable self-defense and "the trial court would have found that the verdict was contrary to the overwhelming weight of the evidence … and would have granted a new trial." *Id*. at 61.

24. The *Woods* Court reiterated that, "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* (citing

Strickland, 466 U.S. at 693, 104 S.Ct. 2052). The probability of the trial court granting a new trial was "sufficient to undermine confidence in the outcome" of Woods' trial. *Id.* The same probability exists in Owens' case to a sufficient degree to likewise undermine the confidence in the outcome of his case.

25. Under the facts of Owens' case, if there was a post-trial motion for JNOV, the trial court could have, and should have, granted the JNOV and rendered an acquittal on the grounds of accidental homicide, or rendered a manslaughter conviction on the grounds of imperfect self-defense, heat of passion or culpable negligence, or rendered a second degree murder conviction. If counsel had requested a JNOV and presented the trial court with the above options post trial, it is likely that the trial court would have granted one of them. See *Tait v. State*, 669 So. 2d 85, 86-88 (Miss. 1996); *Dedeaux v. State*, 630 So. 2d 30, 31-33 (Miss. 1993); *Clemons v. State*, 473 So. 2d 943, 944-45 (Miss. 1985).

26. So, the record is more than clear to establish that, as a result of trial counsel's deficient performance, (1) Owens' jury was not instructed that Owens did not have to prove that he acted in self-defense; (2) Owens' jury was not given the option of culpable negligence manslaughter; (3) Owens' jury was not given the option for a manslaughter conviction based on imperfect self-defense; (4) the trial court was not given the opportunity to grant Owens a new trial when the weight of evidence weighed in Owens' favor regarding first degree murder; (5) the trial court was not given a second opportunity after trial to grant a JNOV for acquittal, manslaughter or second degree murder; (6) the

Court on appeal is prohibited from reviewing the weight of evidence; (7) Owens was denied a fair trial.

27. The record in this case is more than sufficient for the Court, on rehearing, to evaluate and rule on the ineffective assistance of counsel issue. Once that occurs, Owens respectfully requests a new trial.

Issue 3 – Prosecutorial Misconduct in Closing Arguments

28. Owens respectfully requests rehearing based on misapprehension of law and facts under Issue No. 3 wherein the COA ruled that Owens was not prejudiced by improper closing remarks by the prosecutor that Owens "forced his family" to go through a trial.

29. The COA did not directly address whether the state's closing argument was an impermissible direct negative comment on Owens' constitutional right to stand trial. See *Spicer v. State*, 921 So. 2d 292, 318 (¶ 55) (Miss. 2006) promulgating a two-part test).

30. Nevertheless, similar statements by prosecutors have been ruled improper. See *Bolton v. State*, 113 So. 3d 573, 578 (Miss. Ct. App. 2012) rev'd on other grounds by 113 So. 3d 542 (Miss. 2013); *Moore v. State*, 932 So. 2d 833, 839 (Miss. Ct. App. 2005).

31. The COA relied on *Bolton* and *Moore* in reaching its ruling, but both cases are materially distinguishable. In *Bolton*, the prosecutor's improper remarks concerned the defendant not pleading guilty when faced with overwhelming evidence of guilt. 113 So. 3d at 578. Such remarks were not intended to inflame the jury or evoke an emotional or sympathetic response. In *Moore,* the improper remarks were that the defendant forced the

jury to have to sit through a trial. 932 So. 2d 839. Again, the remarks were not intended to inflame the jury or evoke an emotional response. In Owens' case, the prosecutor's remarks were intended to inflame the jury and to have it make its decision based on sympathy and emotion, not on the evidence. The jury was asked to punish Owens and find him guilty because he made his family go through a trial.

32. So, Owens was prejudiced by the jury being influenced to decide the case, not on the evidence, but out of sympathy for Owens' family. It cannot be said that the jury would have found Owens guilty of first degree murder without the prosecutor's inflammatory comment. It is likely that the jury would have found Owens only guilty of manslaughter, or second degree murder, or not guilty, if the jury had not been emotionally prodded to punish Owens for forcing the families in this case to endure a trial.

33. The prosecutor's comments were improper. Owens was prejudiced, and the comments affected the outcome of the trial. A new trial is respectfully requested.

34. The COA placed emphasis on the fact that the jury was instructed that it could not convict unless the state proved all of the elements of first-degree murder beyond a reasonable doubt. (Op. ¶ 37). In actuality, due to the ineffective assistance of counsel, as argued above, the instructions to the jury were incomplete in regard to Owens' defenses which further distinguishes Owens' case from *Bolton* and *Moore*.

35. On rehearing, Owens respectfully requests a new trial based on the prosecutor's improper remarks.

CONCLUSION

For the forgoing reasons, Owens respectfully requests rehearing and that his conviction be reversed and with remand for a new trial.

TIMOTHY OWENS

By: /s/ George T. Holmes
George T. Holmes, His Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 6th day of December 2018, electronically filed the foregoing motion with the Clerk of the Court using the MEC system which issued electronic notification of such filing to Hon. Scott Stuart, Assistant Mississippi Attorney General.

/s/ George T. Holmes
George T. Holmes

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