IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANTE O. TAYLOR **APPELLANT**

VS. **NO. 2017-KA-01596-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. The trial court did not err in granting jury instruction S-13.

II. The trial court did not err in denying jury instructions D-19 and D-20.

III. Dante waived his right to challenge the weight of the evidence.

STATEMENT OF THE CASE

On February 8, 2016, in the first judicial district of Harrison County, Dante O'Bryan Taylor was indicted for First Degree Murder in violation of Mississippi Code Annotated section 97-3-19(1)(a). (CP 10) His indictment was later amended to allege that he was a habitual offender under Mississippi Code Annotated section 99-19-81. (CP 22) Dante proceeded to trial before the Honorable Christopher L. Schmidt where a jury found him guilty of first-degree murder. (CP 185) The trial judge found that he was a habitual offender under section 99-19-81 and sentenced him to life in prison without the possibility of parole. (CP 186) After the denial of his post-trial motion, Dante timely appealed. (CP 199-200)

STATEMENTS OF THE FACTS

Willie Taylor hid his nephew's bicycle after the boy continued to ride it in the road. (TR 113)

This angered the boy's mother, his niece Tiffany, and she and Willie argued. As the argument progressed, Tiffany punched Willie. (TR 114) In order to get Tiffany off of him, Willie hit her and left the house. (TR 114-15) Tiffany then called her brother Dante and told him that "Uncle Willy had jumped on her." (TR 115) She also called the police and Officer George Vitteck with the Gulfport Police Department responded. (TR 115, 152)

Officer Vitteck testified that when he arrived at Tiffany's house she reported that she and her uncle had fought over her son's bicycle and that "[Willie] struck her in the face and grabbed her around the neck." (TR 153) But Officer Vitteck told the jury that Tiffany had no visible injuries to her face or neck. (TR 153) He provided Tiffany with the information she would need to file charges against Willie, but he was unsure if she ever did. (TR 154)

Later that night, Dante went to see Tiffany and consoled her about she and Willie's fight. (TR 113) He also called his mother Madeline Adams to talk about Willie, who was her brother. (TR 128-29) Madeline testified that she told Dante to leave his uncle alone. Dante told her "that Willie put his hands on a female in the family for the last time." (TR 128-29) He also called Willie a "weak ass bitch" and told his mother that he was going to "do" him and punish him. (TR 129) Dante's mother assumed that this was nothing more than "trash talking." (TR 129) She did tell the jury, on cross-examination, that Willie was looking for Dante that night and wanted to hurt him. (TR 133-34)

Two witnesses to the actual shooting testified. Michelle Evans, Dante's aunt, testified that the shooting took place in front of her house as she and others were sitting under a tree in her yard. (TR 136) She saw Dante driving around before the shooting, "riding up and down the road." (TR 137) "He left and went gone for a little bit, and then he came right back." (TR 137) When he came back to her house, he parked in her driveway, and sat on his car without speaking to anyone. (TR 137) Then Willie "came from around the house" and walked towards Dante. (TR 137-38) When

Dante saw Willie, he jumped off the car and walked towards him. (TR 138) Michelle testified that it was not unusual for Willie to come to her house because he lived around the corner and came over "all the time." (TR 137-38) She thought the two men were going to fist fight, but "[n]ext thing you know, a gun went off, and my brother was down on the ground." (TR 138) She asked Dante why he shot Willie and "[h]e got in the car and took off." (TR 138-39) She did not hear either man say anything before the shooting and she said it all happened very fast. (TR 139)

Maya Taylor, Dante's cousin and Willie's niece, told the jury that prior to the shooting she was sitting with her mom, her mom's husband, and their neighbor. (TR 109) Dante was sitting on his car not talking to anyone. (TR 109) She saw Willie walk up quickly from behind her house. (TR 111) He lived behind her and came over everyday. (TR 110) Dante walked towards Willie and Willie raised his fists. (TR 111) When they got "very close together" Dante shot him. (TR 111-12) Maya did not see Willie with any weapons and everyone was "really shocked he shot him." (TR 112) As everyone was crying and screaming, Dante got in his car and left. (TR 112)

Neighbor Leon Cox was outside when the shots were fired but he did not actually witness the shooting. (TR 142-43) Tawana Harper, related[1] to both Willie and Dante, had just walked into Michelle's house when she heard the gunshot. (TR 146) Before she walked in, she saw Dante "coming up from the side of Michelle's house, coming toward the front of the apartment." (TR 147)

Officer Jerry Birmingham with the Gulfport Police Department responded to the shooting and found Willie, dead, with no weapons on his body. (TR 101) Dr. Mark LeVaughn, the chief medical examiner in Mississippi, told the jury that Willie's cause of death was a gun shot wound to the abdomen. (TR 176) Willie was 5'10" tall and weighed about 280 pounds at the time of his death.

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[1] Tawana testified that Dante was her cousin's nephew and Willie was her cousin's brother.

(TR 180)

Dante was the only defense witness. He told the jury that the night before the shooting his sister called him crying because Willie had choked her. (TR 193) He told her to call the police because he could not come to her since he was without a car. (TR 193) Dante claimed that his mother then called him and said that Willie had threatened to kill him and that he better watch his back. (TR 193) Dante "went and got a pistol" to protect himself from Willie. (TR 194) He said the next day he got a call from his sister saying that Willie had come over threatening her because she had called the police on him. (TR 195)

So he took his wife's car and headed to his aunt Michelle's house where Tiffany was staying. (TR 195) He said that when he pulled up some of his family members were sitting under a tree playing dominos. He said he spoke to "everybody" and tried to get his sister to leave with him. She refused because she did not want to leave her car there because Willie had apparently threatened to damage it or have it towed. Dante told the jury that he left to go get cigarettes and was "annoyed" because Willie was looking for him. When he came back to the house, he said that he sat in his car for a while and tried again, over the phone, to get his sister to leave. (TR 196)

Dante testified that he got out of the car smoking a cigarette and walked to the side of the house to use the bathroom. (TR 196) He turned around "because he just had a feeling" and he saw Willie "coming outside the house charging" him. (TR 196) Willie allegedly yelled, "I got your A-S-S now." (TR 196, 209) Dante claimed that the witnesses to the shooting didn't hear Willie say anything because they were too far away. (TR 209-10)

Dante then described himself as leaning on the trunk of his car, as opposed to being on the side of the house where he had just stood using the bathroom: "I just pushed off the car, turned around, and that's when he was charging me saying I got your A-S-S now. And that's when I just

pulled out my gun and I shot him." (TR 197) He told the jury that he was "just trying to stop [Willie]." (TR 198)

On cross-examination, Dante admitted that he told Willie that Willie wasn't "going to F with [him]" the night before the shooting. (TR 198, 206) He claimed that his mother's testimony was essentially all wrong– she didn't plead with him to leave Willie alone, he didn't call his uncle a "weak ass bitch" and he didn't tell his mom he was going to "do" Willie. (TR 199)

Dante admitted to going over to his aunt's house the day of the shooting knowing that Willie went there every day. (TR 203-04) But he claimed that he didn't think Willie would be there at that time because he "was told [Willie] was coming to my house at that very moment." (TR 204) He said he never called the police for help because of the "lifestyle" he was living. (TR 207)

Dante also admitted fleeing the scene after the shooting but said that he did not wipe the gun down, despite telling police after he was arrested that he did. (TR 201) He testified that he fled because he saw the police and got spooked. (TR 203) He wrapped the gun in a shirt "because it wasn't [his] gun and [he] didn't know what else the gun could have been used for." (TR 203) He told the jury that he threw the gun out the window but he didn't know where. (TR 203)

He told the jury that he removed the SIM card from his cell phone because he and Willie had exchanged text messages the night before. (TR 208) He tried to explain that he removed it because he did not want "the officers to have my phone and to withhold the evidence" and because he might want to bring the card to court to "prove my innocence." (TR 209) But he told the jury that he could actually no longer find the SIM card. (TR 209)

SUMMARY OF THE ARGUMENT

The pre-arming instruction given in this case was not error based on the evidence presented to the jury. While these instructions are not always proper, its use here was consistent with prior case

law of this court and the Mississippi Supreme Court. The trial judge did not abuse his discretion in refusing to give Dante's proposed instruction D-19 and D-20. Since Dante and Willie were not in any physical altercation when Dante shot Willie, these instructions were not warranted.

Dante's challenge to the weight of the evidence should be barred since he did not raise this issue in his motion for a new trial. But even so, the jury's guilty verdict was not against the overwhelming weight of the evidence. The jury heard from Dante's mother who testified that Dante had threatened Willie and insinuated that his demise was coming. The next day, Dante went to the house where he knew Willie visited every day, armed with a pistol, and shot Willie as soon as he approached. Dante's conviction and sentence should be affirmed.

ARGUMENT

I. The trial court did not err in granting jury instruction S-13.

Dante argues that the granting of jury instruction S-13 was error because it prevented him from claiming self-defense. But "[Dante's] argument on appeal is diluted by the fact that he did receive a self-defense jury instruction." ***Hart v. State***, 637 So. 2d 1329, 1336 (Miss. 1994). Instruction S-13 is known as a "pre-arming" instruction, which admittedly should only be used in "extremely rare incidents where the instruction was supported by the evidence." ***Dew v. State***, 749 So. 2d 751, 754 (Miss. 1999).

The purpose of a pre-arming instruction is "to inform the fact-finder that one cannot arm himself in advance when he is not in any physical danger, go forth and provoke a confrontation or difficulty with another, shoot the other, and then attempt to hide behind a smoke screen of self-defense." ***Hart v. State***, 637 So. 2d 1329, 1337 (Miss. 1994). Dante did just that– he armed himself when he was not in any immediate danger, went to a house that Willie visited every day, sat in front of that house with a gun in his back pocket, and then shot an unarmed Willie as the two men

approached each other. The instruction read:

> The Court instructs the Jury that it is for the Jury to decide and if you believe from the evidence in this case beyond a reasonable doubt that the Defendant, Dante O'Bryan Taylor, armed himself with a deadly weapon and sought Willie Lee Taylor, with the formed felonious intention of invoking a difficulty with Willie Lee Taylor, or brought on, or voluntarily entered into any difficulty with Willie Lee Taylor, then the Defendant, Dante O'Bryan Taylor, cannot invoke the law of self-defense.

(CP 151) This instruction has been approved in nearly identical form in several cases.

In ***Barnett v. State***, 563 So. 2d 1377 (Miss. 1990), Barnett and Harmon got into an argument about "who could whip the other." ***Id***. at 1378. Harmon pulled out a knife and Barnett grabbed a shovel. Barnett then went into a nearby trailer, grabbed a gun and "came back outside and shot Harmon." ***Id.*** "It is *disputed* as to whether Harmon was making any advance at all upon Barnett when he shot him." ***Id***. at 1379-80 (emphasis added). Four witnesses testified that Harmon was "advancing on" Barnett with a knife when he was shot. ***Id***. Despite this, the Court concluded that the pre-arming instruction was properly given.

The pre-arming instruction in Barnett's case was nearly identical to Dante's. The Supreme Court concluded that "[t]here was ample evidence for the jury to conclude that Barnett, when not in any danger, went into one trailer, got a rifle, then went into another trailer and got a bullet, and returned to the scene and shot Harmon." ***Id***. at 1381. The factual scenario in Dante's case was similar in several respects. First, Dante armed himself with a pistol when not in any physical danger. Although he said he believed Willie was looking for him and wanted to hurt him, he was in no actual danger when he got the pistol and drove to his aunt's house. He then sat on the hood of his car with his pistol in his back pocket. The jury could have easily concluded that he was waiting on Willie to arrive so that he could shoot him. He admitted knowing that Willie came to that house every day and he gave contradicting testimony about where he thought Willie would be. (TR 204-05) Although

there was evidence that Willie walked towards Dante with raised fists, it was unclear whether those fists were up to protect himself or were in anticipation of a physical fight with Dante. It was undisputed that Willie had no weapon on him at the time of the shooting.

Before finding that the jury was properly instructed, the ***Barnett*** Court noted:

> We do not retreat from what we have repeatedly stated, that only in cases where the proof substantiates the accused was not in any danger when he armed himself, and from which the proof will show that he armed himself for the very purpose of shooting the victim, that such an instruction may be properly considered by the court.

Id. Based on the testimony of Dante's own mother, it appeared that Dante got the gun in order to shoot Willie. Dante told her that he was going to punish Willie and "do" him and that Willie had put his hands on a female in their family for the *last* time. This evidence supported the use of a pre-arming instruction just as it did in the ***Barnett*** case.

This Court affirmed the use of the instruction in ***Jobe v. State***, 97 So. 3d 1267 (Miss. Ct. App. 2012). Jobe was angry over missing meat at a cookout. He grabbed a knife from a kitchen drawer and went outside to "handle" it. Jobe fought with Perry before another man, Hill, jumped in the fight to help Perry. Hill was able to escape but not until he had been cut by Jobe's knife. Jobe alleged that Perry actually had the knife first and that he and Hill attacked him when he went outside. ***Id***. at 1269.

On appeal, Jobe argued that the pre-arming instruction deprived him of his theory of self-defense. This Court noted that the "only evidence of self-defense is Jobe's own testimony that two 'kids' attacked him with a kitchen knife after being questioned about the missing meat." ***Id***. at 1270. The Court approved the use of the instruction because Jobe grabbed the knife when he was in no physical danger, went outside, and said he would "handle this." Similarly, Dante, in assumed defense of his sister, got a pistol and shot Willie after telling his mother that he was going to punish him. The

Jobe Court noted that the pre-arming instruction did not preempt Jobe's self-defense claim "but submitted the issue to the jury for its determination." ***Id***. The same should be said in Dante's case. The jury was instructed on self-defense and this pre-arming instruction did not invalidate that.

A nearly identical instruction was also approved in ***Reid v. State***, 301 So. 2d 561 (Miss. 1974). Reid shot and killed Wolf, a man that Reid claimed had threatened to kill him. ***Id***. at 562. Reid, like Dante, "deliberately armed himself with his pistol for what he says was self-protection." ***Id***. at 564. Reid said he thought Wolf had a knife and was trying to get up out of his chair to come towards him when he shot. ***Id***. at 563. While the Court found that Reid had essentially invited Wolf to a "duel," the similar facts between the two cases show that the pre-arming instruction was also appropriate in Dante's case.

The Supreme Court also affirmed the use of an identical instruction in ***Hall v. State***, 420 So. 2d 1381 (Miss. 1982). Hall shot at two men who rented a trailer from him. ***Id***. at 1384. Hall claimed that he fired the two shots "in an effort to scare them and give himself a chance to leave." No one was hit. ***Id***. The Court noted:

> The record is uncontradicted that Hall left his employment, armed himself with a shotgun, went to the Bradleys home after having been warned by his wife that they had threatened to "mess him up" if he came to the house, and after his wife reported to him that Willie Bradley had cursed her and threatened her earlier during the evening.

Id. at 1385. An important similarity to Dante's case is the fact that both he and Hall went to the place they knew their victims would be, or likely would be, while armed.

The ***Hall*** Court found that it was not error for the trial court to give the instruction because it did not "peremptorily estop Hall from claiming self-defense, but submitted the issue to the jury for its determination." ***Id***. The Court also noted that Hall's jury was instructed on self-defense

"which permitted the jury to consider whether he acted in self-defense under all the circumstances then existing viewed from the standpoint of Hall." ***Id***.

The same analysis should be used in Dante's case. Hall's defense was similar to Dante's in that they both armed themselves with pistols supposedly in self-defense. But both men then appeared to go looking for their victims despite hearing from others that their victims might want to hurt them. Dante's jury, like Hall's, was still able to consider whether the shooting was self-defense even though they also received a pre-arming instruction.

II. The trial court did not err in denying jury instructions D-19 and D-20.

Dante argues that the trial judge's refusal to grant his proposed instructions D-19 and 20 was reversible error because they embodied a critical theory of his defense which was that Willie was much larger than Dante and "capable of causing serious bodily injury with his hands and fists." (Appellant's Br. at 15). Testimony revealed that Willie was 5'10" tall and weighed 280 pounds when he was killed. During his interview with police, Dante reported that he weighed 160 pounds. Nothing in the record revealed Dante's height.

D-19 read:

> The Court instructs the jury that if you believe from the evidence that the deceased Willie Lee Taylor was a larger man than the defendant DANTE O'BRYAN TAYLOR and was capable of inflicting great and serious bodily harm upon DANTE O'BRYAN TAYLOR with his hands or fists, and the Defendant had a reason to believe as a man of ordinary reason that he was then and there in danger of such serious bodily harm at the hands of the deceased Willie Lee Taylor and the Defendant used a handgun, with which he fatally shot Willie Lee Taylor, to protect himself from such harm, then the Defendant was justified even though the deceased was not armed.

(CP 170)

D-20 read:

> The Court instructs the jury that if you believe from the evidence that the deceased

> Willie Lee Taylor was capable of inflicting great and serious bodily harm upon DANTE O'BRYAN TAYLOR with his hands or fists, and the Defendant had reason to believe as a man of ordinary reason that he was then and there in danger of such serious bodily harm at the hands of the deceased Willie Lee Taylor and the Defendant used a handgun, with which he fatally shot Willie Lee Taylor, to protect himself from such harm, then the Defendant was justified even though the deceased was not armed.

(CP 171)

As this Court has stated many times:

> It is well-settled that jury instructions generally are within the discretion of the trial court, so the standard of review for the denial of jury instructions is abuse of discretion. The instructions actually must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. Further, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court.

Thomas v. State, 75 So. 3d 1112,1114-15 (Miss. App. Ct. 2011) (citations and quotations omitted). While it is true that Dante's proposed instructions have been approved in other cases, it is only when they are supported by the evidence. ***Robinson v. State***, 858 So. 2d 887, 897 (Miss. Ct. App. 2003).

Dante and Willie were not involved in any physical altercation when Dante shot Willie. Testimony revealed that they were walking towards each other but were at least two to three feet apart when Willie was shot. (TR 178) In ***Robinson***, Robinson and his victim were actually engaged in a physical struggle when the victim realized he was cut. ***Id***. at 891. His victim was much larger than he was and the Court found that the instruction was proper. ***Id***. at 897.

A better factual comparison to Dante's case is ***Marshall v. State***, 72 So. 2d 169 (Miss. 1954). There Marshall stabbed his victim after a morning of drinking and fighting between the two. ***Id***. at 851. On appeal, Marshall offered an essentially identical instruction to Dante's D-19 and 20. ***Id***. at 855. This Court, in affirming Marshall's conviction, found:

> There is no proof in the record to show that the deceased at the time of the fatal

> encounter was attempting to inflict 'great and serious bodily harm upon the defendant with his hands and feet.' The defendant testified that at the time he stabbed the deceased the deceased was advancing on him with a shovel. The defendant testified more than once that he was afraid of the deceased. But the mere fact that the deceased may have been 'physically capable of inflicting great and serious bodily harm upon the defendant with his feet and hands,' and that the defendant was afraid of the deceased, was not sufficient in itself to justify the stabbing.

Id. The same conclusion should be found here. While Dante did testify that he was afraid of Willie and Willie did weigh more than Dante, that was not enough to justify Willie's shooting and an instruction of this kind. The critical difference between Dante's case and ***Robinson*** is that Willie had not laid a hand on Dante at the time he was shot.

The trial court found that "the self-defense theories of the case are properly or adequately covered elsewhere, and given the instruction as a whole, your theory of the defense is covered." (TR 233) This was not an abuse of discretion and Dante's jury was properly instructed.

III. Dante waived his right to challenge the weight of the evidence.

Dante did not raise the weight of the evidence in his Motion for New Trial. (CP 187) Instead, he challenged the sufficiency of the evidence and the trial judge's denial of three of his proposed jury instructions. As a result, he has waived his right to challenge the weight of the evidence that was presented against him. "[B]ased upon [Dante's] failure to present to the circuit court a motion for new trial regarding the weight of the evidence, this Court concludes that his present challenge to the weight of the evidence is procedurally barred." ***Davis v. State***, 43 So. 3d 1116, 1122 (Miss. 2010).

But even so, the jury's verdict of first degree murder was not against the overwhelming weight of the evidence. After Willie had fought with his sister, Dante told his mother that Willie was a "weak ass bitch" and that he was going to punish and "do" him. He went and got a pistol and sat on his car in front of his aunt's house where Willie was known to frequent every day. When Willie approached the house, Dante jumped off the car and walked towards him, shooting him when they

got close. Dante fled the scene, wiped down the gun that he used, wrapped it in a shirt and threw it out the window. He also took the SIM card out of his phone so law enforcement couldn't access the text messages between the two men.

Willie was a larger man that Dante but there was no evidence that he presented any real danger to Dante when they encountered each other that day. He had no weapons and while one witness did testify that he raised his fists, this could have been to protect himself from Dante. It appeared that Dante, armed with a pistol, was waiting on Willie to show up and when he saw him, he immediately engaged him.

All of this evidence supports the deliberate design required to convict Dante and contradicts his claims of self-defense. Although the jury was presented with Dante's version of events, they obviously chose to not believe it. This was reasonable, given that "[w]eight and credibility are matters for the jury to resolve." ***Moore. v. State***, 160 So.3d 728, 735 (Miss. Ct. App. 2015). "When reviewing a denial of a motion for a new trial *based on an objection to the weight of the evidence*, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Davis***, 43 So. 3d at 1122 (quoting ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005) (emphasis added)). There is no unconscionable injustice here and Dante never objected to the weight of the evidence in his motion for new trial, which bars the issue.

CONCLUSION

As discussed herein, the issues raised by Dante O. Taylor are without merit. Accordingly, the State of Mississippi respectfully requests that this Honorable Court affirm his conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ABBIE EASON KOONCE, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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This, the 29th day of May, 2018.

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