IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANTE O. TAYLOR **APPELLANT**

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

STATE OF MISSISSIPPI **APPELLEE**

MOTION FOR REHEARING

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COMES NOW the Appellant, Dante O. Taylor, in the above-styled matter, by and through counsel, pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, and files this Motion for Rehearing of the decision handed down by this Honorable Court on December 4, 2018, and in support thereof would show:

I. The trial court erred in granting an often condemned "pre-arming" instruction, which precluded or impaired Dante's theory of self defense.

In concluding that the trial court properly granted the pre-arming instruction, the majority opinion held:

> Here, the testimony from the witnesses showed that Dante armed himself when he was not in any physical danger, went to a house that Willie visited every day (which was also right next to Willie's house), sat in front of that house with a gun in his back pocket, and then shot Willie from at least two feet away. Dante's mother testified that, the night before the shooting, Dante had threatened to "punish" or "do" Willie. And Dante testified that he got a pistol that same night after talking to his mother. Based on Mississippi precedent, we find the evidence here supported the court's decision to give a pre-arming instruction.

Opinion at (¶26).

The majority opinion's analysis overlooks numerous material facts pertinent to the issue. As Judge Carlton notes in her dissenting opinion, "the record reflects that the evidence presented at trial

created a conflict as to whether Dante armed himself with the intention of initiating a confrontation with Willie and as to whether Dante was the initial aggressor." Opinion at (¶35) (Carlton, J., Dissenting).

The evidence conflicted as to whether Dante armed himself with the intent to initiate a confrontation with Willie. The majority opinion overlooks that Dante testified that his mother called him the night before the shooting and told him that Willie had "just left [her] house, threatened to kill me, and [said] when he catch me he was going to kill me." (Tr. 193). The majority points to Dante's mother testimony that Dante threatened to "punish" or "do" Willie; the majority overlooks, however, that Dante denied telling his mother that he was going "to do him" or "punish him." (Tr. 198-99, 206).[1] Dante also testified that he took Willie's threat seriously and that he got the gun to protect himself in case Willie was able to find him to follow through on the threat. (Tr. 193-94, 206, 210). Dante's mother acknowledged that she knew Willie was looking for Dante and wanted to hurt him. (Tr. 133-34). Dante also specifically testified that he went to Evans' house with the intent to help his sister[2] and to actually avoid Willie (not encounter or provoke a confrontation with Willie), as Dante was told that Willie was headed to Dante's mother's house looking for him at the time. (Tr. 204-05, 208).

As Judge Carlton's dissent accurately observes, "a pre-arming instruction is appropriate only

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[1] Dante explained that he only said Willie needed to be punished, not that he was going to punish Willie: "I didn't tell my momma I was going to punish him. I said he needed to be punished, but I didn't say I was going to do it." (Tr. 199, 206). Dante also testified that he told his mother he was not going to let Willie do anything to him, not that he was "going to do" Willie. (Tr. 199).

[2] Dante testified that, on the morning of the shooting, his sister called and said Willie had threatened to come and "beat the F out of her" because she called police on him the night before. (Tr. 194-95). Dante testified that he went to Evans' house to try to get his sister to leave with him while Willie was headed to Dante's mother's house looking for Dante. (Tr. 196, 208).

where '[t]he record [is] uncontradicted that the defendants armed themselves with the intent to initiate a confrontation.'" Opinion at (¶35) (quoting *Boston v. State*, 234 So. 3d 1231, 1235 (¶12) (Miss. 2017)). In this case, there was evidence that Dante armed himself only to protect himself and that Dante went to Evan's house to help his sister and to actually avoid Willie–not encounter or initiate a confrontation with Willie. As Judge Carlton's dissent further notes, the trial court itself deemed the evidence conflicting on this point. Opinion at (¶34). "This is a case containing disputed facts regarding [Dante's] self-defense, and this issue [] should be presented to the jury by conventional self-defense instructions." *Johnson v. State*, 908 So. 2d 758, 763 (Miss. 2005) (citing *Keys v. State*, 635 So. 2d 845, 849 (Miss. 1994). It is not important whether the trial judge thinks appellant's story is plausible. This is the jury's job." *Lenard v. State*, 552 So. 2d 93, 97–98 (Miss. 1989).

The evidence also established that Willie, not Dante, was the initial aggressor. At worst, the evidence was ambiguous as to who was the initial aggressor. The majority's analysis states that Dante sat at the house with a gun "and then shot Willie from at least two feet away." Opinion at (¶26). The majority overlooks that the evidence established that Willie emerged from behind the house and charged at Dante. Maya testified that she saw Willie "walking very fast" from behind the house, yelling and "charging at him [Dante] with his fists." (Tr. 110-11,121-22). Dante testified that he turned around to find Willie charging at him and threatening "I got you're A-S-S now." (Tr. 197, 210). Additionally, Dante's mother testified that, after the shooting, Dante told her that Willie "patted his pocket" as he was approaching Dante. (Tr. 130).

"[W]hen there is ambiguity regarding who is the first aggressor, a pre-arming instruction is not appropriate." *Johnson v. State*, 908 So. 2d 758, 762 (¶15) (Miss. 2005) (citing *Dew v. State*, 748 So. 2d 751, 754 (Miss. 1999)); *see also*, *Barnes v. State*, 457 So. 2d 1347, 1349–50 (Miss. 1984).

In this case, there was evidence that Willie, not Dante was the initial aggressor. At worst, the evidence on this point was ambiguous. Thus, a pre-arming instruction was not appropriate, and the trial court erred in granting the pre-arming instruction for this reason also.

Finally, the majority opinion reasons that the pre-arming instruction "did not preempt Dante's self-defense claim but submitted the issue to the jury for its determination." Opinion at (¶27) (citing *Hall v. State*, 420 So. 2d 1381, 1385 (Miss. 1982)). The majority's reasoning on this point misapprehends the law. "The rationale for caution regarding a pre-arming instruction is that in effect it is a peremptory instruction for the prosecution, impairing or precluding the defendant's right to self-defense." *Dew*, 748 So. 2d at 754 (citing *Keys*, 635 So. 2d at 849); *see also Boston*, 234 So. 3d at 1234 (¶9). Additionally, pre-arming "'instructions such as [these] place a higher burden on a defendant to assert a claim of self-defense than is required by our law. It allows certain parts of the evidence to be considered while omitting other parts advantageous to the defendant's case.'" *Johnson*, 908 So. 2d at 762 (¶15) (quoting *Keys*, at 849). Furthermore, the improper grant of a pre-arming instruction in conjunction with other [proper] instructions, is not cured by the other instructions; instead, the pre-arming instruction makes the instructions, as a whole, inconsistent, misleading and confusing. *See, e.g.*, *Keys*, at 849; *Thompson v. State*, 602 So. 2d 1185, 1190 (Miss. 1992).

Dante submits that the majority opinion overlooked material facts and misapprehended the law in finding that the trial court did not err in granting the pre-arming instruction. The evidence was not uncontradicted as to whether Dante intended to initiate a confrontation with Willie and as to whether Dante was the initial aggressor. As Judge Carlton's dissent observes, "'[e]ven if the great weight of evidence against the defendant supports a contrary view, the defendant is still entitled to present his defense to the jury unimpaired by instructions that preclude his right to self-defense.'"

Opinion at (¶35) (quoting *Boston*, 234 So. 3d at 1234 (¶11)). This case does not present the rare circumstances in which the grant of a pre-arming instruction is appropriate and not reversal error. "'This type of pre-arming instruction has repeatedly been denounced by [our supreme court].'" *Boston*, at 1234 (¶10) (quoting *Johnson*, 908 So. 2d at 762 (¶15)). And our supreme court "'[h]as stated numerous times that when the State seeks this instruction, it does so at its own peril.'" *Id*., (quoting *Johnson*, at 763 (¶19)). The majority opinion in this case conflicts with the decisions of our supreme court in *Boston*, *Johnson*, *Dew* and *Keys*. Accordingly, Dante requests this Court to grant rehearing and to hand down a new opinion reversing and remanding this case for a new trial due to the trial court's error in giving a pre-arming instruction.

II. The trial court erred in refusing instructions D-19 and D-20.

The trial court erred in refusing instructions D-19 and D-20, which would have properly and fairly informed the jury that Dante was permitted to claim self-defense even though Willie was unarmed if Dante reasonable feared serious bodily injury at the hands of Willie, a much larger man.

The opinion in this case finds that the trial court properly refused instructions D-19 and D-20 for two reasons. First, the opinion reasons that "[t]here was no physical struggle between Dante and Willie; the evidence showed that Dante shot Willie from at least two feet away." Opinion at (¶30). The opinion overlooks that the evidence showed that immediately before the shot, Willie emerged from behind a house and was charging Dante with his fists while threatening "I got you're ASS now." (Tr. 110-11, 121-22, 197, 210). The opinion also overlooks that Dante's mother testified that Dante told her that Willie "patted his pocket" as he was approaching Dante. (Tr. 130).

Under the opinion's reasoning, a person must wait until they have been assaulted before they are entitled to use force to defend themself. That is a misapprehension of the law. Under Mississippi law, Dante had the right to anticipate an attack and to act upon reasonable appearances.

See, e.g., *Lee v. State*, 232 Miss. 717, 724, 100 So. 2d 358, 361 (1958) ("The appellant had the right to anticipate the acts of the intruder and to act upon what then reasonably appeared to be necessary for the protection of his life.") (citing *Lomax v. State*, 205 Miss. 635, 642, 39 So. 2d 267, 269 (1949); *Bell v. State*, 207 Miss. 518, 529, 42 So. 2d 728, 732 (Miss. 1949) ("'[T]he danger need not be actual, but only reasonably apparent and imminent. . . . The law authorizes action on reasonable appearances[.]'") (citing *Scott v. State*, 203 Miss. 349, 353-54, 34 So. 2d 718, 719 (1948)).

It is undisputed that Willie was much larger than Dante. Willie weighed 290 pounds and Dante weighed between 140 and 160 pounds. (Tr. 180, 199-200). And in furtherance of his defense, Dante testified that Willie's size was a significant factor in his fear and decision to use the gun: "I was just trying to stop him. . . I didn't want him to do nothing to me because for one, you know, *he already twice my size at that time*. And he threatened to kill me, so I was just defending myself." (Tr. 198) (emphasis added). Dante also testified that "I didn't know if he had anything or not. It's just my life was threatened. *And as big as he is*, he could have did anything to me." (Tr. 205) (emphasis added).

The opinion also finds no error in the refusal of instructions D-19 and D-20 on the reasoning that "[D]ante's theory of self-defense was properly presented in Instruction S-10 [a general instruction on the definition of self-defense.]" Opinion at (¶30). The opinion overlooks that a general self-defense instruction does not obviate the error in refusing instructions such as D-19 and D-20 where, as here, the defendant claims (and presents evidence) that he was justified in using a deadly weapon against a larger unarmed person. *Robinson v. State*, 858 So. 2d 887, 898-99 (¶¶46-50) (Miss. Ct. App. 2003). Here, as in *Robinson*, "[t]he most important part of the defense was not explained, namely, that the defendant was justified in using a deadly weapon against the larger and intimidating [Willie] if [Dante] reasonably perceived that he was in danger of death or serious bodily

injury from [Willie's] fists." *Robinson*, at 899 (¶51).

The opinion also overlooks how the denial of instructions D-19 and D-20 prejudiced Dante's defense. During closing argument, the State opportunistically capitalized on the refusal of the instructions by unfairly arguing:

> Willie Taylor put his hands [fists] up. This defendant pulled out a gun and shot him. Ladies and gentlemen, that can't be an excuse to take someone's life. Do you know how many fights happen every day down here on the Mississippi Gulf Coast? Some end in fist fights. That doesn't give somebody the right to take somebody's life. . ..
>
> [He] never saw a knife, never saw a gun, that's because Willie didn't have any of those. He thought at most this was going to be a fist fight with a guy who was trash talking him.

(Tr. 257; 262-63). Dante's defense was further prejudiced because the trial court granted the State an instruction (S-11), which permitted the jury to find that the use of deadly weapon was unjustified as excessive force: "The Court instructs the jury that a person may not use more force than necessary to save life or protect himself from great bodily harm. The question of whether he was justified in the weapon is for determination by the jury. . . ." (C.P. 150).

"'[I]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. This Court will never permit an accused to be denied this fundamental right."' *Chinn v. State*, 958 So. 2d 1223, 1225 (¶13) (Miss. 2007) (quoting *O'Bryant v. State*, 530 So. 2d 129, 133 (Miss. 1988)). At Dante's trial, a critical aspect of his defense was that Willie was a much larger man who was capable of inflicting serious bodily injury upon Dante with his hands and fists. Under Mississippi law, Dante was justified in defending himself with a gun if he reasonably believed that Willie posed a reasonably apparent and imminent danger of causing serious bodily injury with his hands or fists.

Dante maintains that the trial court erred in refusing instructions D-19 and D-20, and he requests this Court to grant rehearing and issue a new opinion reversing and remanding this case for a new trial.

CONCLUSION

The Appellant, Dante Taylor, submits that the foregoing propositions warrant the grant of this Motion for Rehearing. He requests this Court to withdraw its original opinion and substitute a new opinion reversing his conviction and sentence and remanding this case for a new trial.

WHEREFORE, PREMISES CONSIDERED, Appellant requests this Honorable Court to grant this Motion for Rehearing.

Respectfully submitted,

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BY: /s/ Hunter N. Aikens
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CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Dante O. Taylor, do hereby certify that I have this day electronically filed the foregoing **Motion for Rehearing** with the Clerk of the Court using the MEC system which issued electronic notification of such filing to:

Honorable Jason L. Davis
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So certified, this the 14th day of December, 2018.

/s/ Hunter N. Aikens
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