

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANTE O. TAYLOR**APPELLANT****V.****NO. 2017-KA-01596-COA****STATE OF MISSISSIPPI****APPELLEE**

BRIEF OF THE APPELLANT

**Hunter N. Aikens, MS Bar No. 102195
INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290
Fax: 601-576-4205
Email: haike@ospd.ms.gov**

Counsel for Dante O. Taylor

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Dante O. Taylor, Appellant
3. Honorable Joel Smith, District Attorney
4. Honorable Christopher Schmidt, Circuit Court Judge

This the 26th day of March, 2018.

Respectfully Submitted,

INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER

BY: /s/Hunter N. Aikens
Hunter N. Aikens
COUNSEL FOR APPELLANT

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

- I. **The trial court erred in granting instruction S-13.**
- II. **The trial court erred in denying instructions D-19 and D-20.**
- III. **The verdict was against the overwhelming weight of the evidence.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, Mississippi, and a judgment of conviction for first-degree murder entered against Dante O. Taylor following a jury trial on December 13-14, 2016, the Honorable Christopher Louis Schmidt, Circuit Judge, presiding. (C.P. 181, 185-86; R.E. 8-10). Taylor was represented at trial by Lisa Collums, Esq. and Angela Blackwell, Esq. The trial court adjudged Taylor a habitual offender under Mississippi Code Annotated Section 99-19-81 and sentenced him to life without parole in the custody of the

Mississippi Department of Corrections. (C.P. 185-86; R.E. 9-10). The trial court denied Taylor's motion for judgment notwithstanding the verdict or new trial. (C.P. 187-89. 199; R.E. 14-17). Taylor is presently incarcerated in within MDOC, and he appeals to this Honorable Court for relief.

STATEMENT OF THE FACTS

On February 8, 2016, Dante Taylor ("Dante") was indicted on one count of first degree murder, stemming the shooting of Dante's uncle, Willie Taylor ("Willie"), on September 24, 2014. (C.P. 10). The night before the shooting, Willie got into a physical altercation with Dante's sister, Tiffany Taylor (Tiffany"). (Tr. 113-14,140, 193). Tiffany lived in the home of Michele Evans ("Michelle"), who was Willie's sister and Tiffany's and Dante's aunt. (Tr. 119, 135). Michelle's daughter, Maya Taylor ("Maya"), also lived in the home. (119, 136). Michelle's home was the site of both the fight between Willie and Tiffany and the shooting of Willie's shooting the following day. (Tr. 108, 113, 135-36, 152). Willie lived behind Michelle within walking distance, and he visited her home regularly. (Tr. 110, 119).

On the evening of September 23, 2014, Dante was at a friend's house when Tiffany called him crying and told him that Willie had jumped on her and choked her. (Tr. 193). Dante told Tiffany to call the police and press charges and to show police where Willie lived. (Tr. 193). Dante did not have a vehicle and could not come to Tiffany at the moment. (Tr. 193). Tiffany told Dante that she was going to call the police, and she hung up the phone. (Tr. 193). Officer George Vitteck was dispatched to Michelle's house in response to the domestic disturbance call. (Tr. 152). Officer Vitteck spoke with Tiffany, who informed him that she and her uncle Willie got into an argument over her child's bicycle, Willie hit her in the face and grabbed her around the neck. (Tr. 153, 155). Officer Vitteck testified that Tiffany's injuries were not visible at that time. (Tr. 153). Officer

Vitteck provided Tiffany with information about how to file charges; he did not know whether Tiffany followed through and actually filed charges. (Tr. 154-55).

Tiffany's cousin, Maya, was present for the altercation between Willie and Tiffany. (Tr. 113). She testified that "Tiffany and Uncle Willie were arguing and they ended up getting into an altercation." (Tr. 113). Maya testified that Willie had taken Tiffany's son's bicycle and hid it, and Tiffany's son told Tiffany that Willie broke his bicycle. (Tr. 113, 118). Maya testified that Willie and Tiffany started arguing; Willie got up; Tiffany "[w]as all up on him, so he was pushing her up off of him. And once she start punching him he started hitting her back." (Tr. 114). She testified that the fight lasted "less than five minutes," Tiffany called police, and Willie then left. (Tr. 114-15).

Maya also testified that Tiffany called Dante and told him that Willie had jumped on her, and Dante came to Michelle's house later that night to console Tiffany. (Tr. 112-13, 115). Similarly, Dante testified that he went to Michelle's house that night to check on Tiffany and let her know that he loved her and was there for her. (Tr. 194). Before Dante left, he told Tiffany to lock the door to the house in case Willie tried to come back and hurt her. (Tr. 194).

Dante testified that, after Willie's fight with Tiffany, he talked to Willie and they had words with each other. (Tr. 198). Dante testified that Willie threatened him, and, in turn, Dante told Willie that he was not going to let Willie F with him. (Tr. 206). Dante also testified that his mother, Madeline Adams ("Madeline"), called him that night 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). Madeline told Dante "don't let him do nothing to you" and she warned "you know your uncle be sneaky, watch your back." (Tr. 193). Dante told her that he would not let Willie do anything to him, and he hung up the phone. (Tr. 193). Dante testified that he took his mother's warning seriously, and he believed that Willie was a real threat to him. (Tr. 194).

Madeline testified that she called Dante that night to talk about Willie. (Tr. 128). On direct examination, she testified that Dante said that “Willie put his hands on a female in the family for the last time” and that he was “going to do him” or “going to punish him.” (Tr. 129). She also claimed that she told Dante to leave Willie alone. (Tr. 128). Dante denied that Madeline asked him not to mess with Willie, and he denied telling her that he was going “to do him” or “punish him.” (Tr. 198-99, 206). Dante explained that he only said Willie needed to be punished, not that he was going to punish Willie. (Tr. 199, 206).¹ He also explained that he told Madeline he was not going to let Willie do anything to him, not that he was “going to do” Willie. (Tr. 199).

On cross-examination, Madeline admitted that Willie was looking for Dante that night and wanted to hurt him. (Tr. 133-34). Dante testified that he obtained a pistol that night because “my uncle is looking for me to kill me. I fell like I had to protect myself some kind of way.” (Tr. 194). Dante hardly slept that night because he was scared. (Tr. 194).

The next morning, Tiffany called Dante and told him that Willie had just come to Michelle’s house threatening her because she had called the police. (Tr. 194-95). Tiffany informed Dante that Willie told her “since she went and called the police and played police games” she had an hour to get her things and car and leave or he was “gonna to come back and beat the F out of her.” (Tr. 195). Dante told Tiffany that he was on his way to Michelle’s house, and he drove there in his wife’s car. (Tr. 195-96).

When Dante arrived at Michelle’s house, Maya, Michelle and their neighbor, Leon Cox were sitting under a tree near the road playing cards. (Tr. 108-10, 136, 142, 196, 204-07; Ex. S-2). Dante testified that he tried to get Tiffany to leave Michelle’s house with him, but she did not want to leave

¹ “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. 206).

because she was waiting on someone to come and try to move her car, and she did not want to leave her car because Willie had threatened to have it towed or to damage it. (Tr. 196). Dante told Tiffany that he was going to wait on her. (Tr. 196). Dante testified that he then drove to the store to get more cigarettes because he was anxious and “did not want to stay in that spot too long” given that Willie was looking for him. (Tr. 196). To this end, Michelle testified that Dante left Michelle’s house briefly and then came back. (Tr. 137).

Dante testified that he did not think Willie was in the area of Michelle’s house because he was told that Willie was coming to Dante’s mother’s house to find Dante; so Dante went to Michell’s house to avoid Willie and to get Tiffany while Willie was headed to Dante’s mother’s house. (Tr. 204). Dante testified that he was trying to miss Willie and not encounter him. (Tr. 204-05). He testified that he went to Michelle’s house because “my little sister needed me and I was trying to get her to come with me.” (Tr. 208).

Dante testified that he parked the car in the driveway and waited on Tiffany when he returned to Michelle’s house from getting a cigarette; he felt like he had been there too long, and he called Tiffany again to try to get her to leave with him, but she did not want to leave because she was worried about her car. (Tr. 196-97). Dante then got out of the car to smoke a cigarette, and he walked to the side of the house to use the bathroom; he saw Tawana Harper in the process. (Tr. 197). Tawana had just arrived at Michelle’s house; she and Dante exchanged hellos; she went inside the house; and, not long after, she heard a noise, went outside, and saw Willie lying on the sidewalk. (Tr. 146-48).

Dante admitted that he shot Willie with a .40 caliber handgun. (Tr. 200). Dante testified that after he used the bathroom on the side of the house, he returned to his wife’s vehicle and sat on the trunk looking toward the street. (Tr. 197). He “had a feeling” telling him to turn around; and when

he turned around, he saw Willie charging at him saying “I got you’re A-S-S now.” (Tr. 197). Dante testified that: “I just pushed off the car, turned around, and that’s when he was charging at me saying I got your A-S-S now. And that’s when I just pulled out my gun and I shot him. I tried to hit him in his leg, but the fact that he is charging me, running up on me, I guess it kind of went up and hit him in the stomach.” (Tr. 197).

Dante 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). Dante weighed between 140 and 160 pounds on the day in question; according to Willie’s autopsy report, Willie was 5’ 10" tall, muscular, and weighed 290 pounds. (Tr. 199-200;180). Willie was close to Dante when Dante turned and saw Willie charging at him. (Tr. 209). Dante testified that “He was charging at me saying it [“I got your ass now”]. So I took it seriously.” (Tr. 210). At that time, Dante knew that he had already attacked his sister, and Willie had already threatened Dante. (Tr. 210). Dante was “just trying to stop him from killing me or hurting me or any kind of way.” (Tr. 210). His intention was not to kill Willie. (Tr. 210). Dante testified that he believed he was in great danger, and “the way he was coming at me and what he said to me, his intent was to come hurt me.” (Tr. 198). Dante explained that “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).

Dante acknowledged that he left the house in his wife’s vehicle after he shot Willie and that he wrapped the gun in a shirt and threw it out of the car. (Tr. 200-03). He explained that he threw the gun because he could see police coming, he was scared, and he did not want to risk being shot police if they saw him with a gun. (Tr. 203). He also testified that he took the chip out of his phone after the shooting. (Tr. 208).

Dante's mother, Madeline, testified that she talked to Dante after the shooting, and Dante told her that "Willie was approaching him" and "he pat his pocket." (Tr. 130). She testified that Dante also told her that he pulled the gun and pointed it at Willie. (Tr. 131).

Maya testified that she was sitting outside under the tree with Michelle and their neighbor Leon when the shooting occurred. (Tr. 108-10, 120-23). She testified that Dante was sitting on his wife's car for about five minutes before the shooting, and she did not see Dante holding a gun when he arrived. (Tr. 109-10, 124). Maya saw testified that she saw Willie "walking very fast" from behind Michelle's house and toward Dante. (Tr. 110-11). She testified that Willie came from behind the house, he started yelling, and he "was charging at him [Dante] with his fists." (Tr. 121-22). She testified that Dante was sitting on the vehicle at first, but he started walkng towards Willie when Willie charged him. (Tr. 111-12, 122). She testified that Dante shot Willie "when they got very close together"; and Dante then got in his wife's vehicle and left. (Tr. 111-12, 124). Maya testified that it happened very fast, she did not really see the gun, and she did not hear what, if anything, Dante or Willie said to each other. (Tr. 111-12, 122-24).

Michelle testified that she and Leon were sitting at the table under tree "way at the end of the road." (Tr. 136). Michelle saw Dante park in the driveway, get out, and sit on the vehicle. (Tr. 137). Michelle testified that Willie came "from around the house" and walked towards Dante. (Tr. 137-38). She testified that when Dante noticed Willie, he walked towards him; she thought they were about to fight; she heard a gunshot and saw Willie on the ground; and Dante then got in the vehicle and left. (Tr. 138-39). Michelle testified that she did not actually see the gun, and she did not hear what, if anything, Willie or Dante said during the incident. (Tr. 138-39). She testified that "it went so fast" that she "couldn't even tell" how much time passed between Willie walking from behind the house until the shot. (Tr. 139). Michelle was aware of what happened the night before

between Willie and Tiffany. (Tr. 140). And she testified that Willie was 5' 10" tall and "was a big boy." (Tr. 140).

Leon Cox testified that he lived two houses down from Michelle, and he was sitting outside under the tree during the incident. (Tr. 142). Cox recalled that he was sitting there talking to Michelle and he heard a shot—"That's pretty much all I know." (Tr. 143). Cox testified that he was facing the road with his back to the house, and he did not really hear or see anything. (Tr. 142, 144).

Officer Jerry Birmingham of the Gulfport Police Department responded to Michelle's house at about 1:30p.m.; he testified that Michelle's house was located in Gulfport, Mississippi, within the First Judicial District of Harrison County. (Tr. 94-95). He testified that about six people were outside the house, and he saw Willie with a gunshot wound to the abdomen lying on halfway on the grass and halfway on the sidewalk in front of the house. (Tr. 97-100; Ex. S-4). Willie was alive but unresponsive, and Birmingham heard heavy labored breathing, gurgling and raspy breath. (Tr. 100). Officer Birmingham found no weapons, and he removed Willie's wallet to identify him. (Tr. 100-01; Ex. S-5). Officer Birmingham testified that he spoke with Maya and Dante's ex-wife Belinda Taylor. (Tr. 102-03, 105-06).

Crime scene technician Jessica Kendziorek went to the scene at about 2:00p.m. (Tr. 161). She found a .40 caliber shell casing on the ground near the driveway. (Tr. 163-64; Ex. S-4, Ex. S-6). He also attended Willie's autopsy, and she collected a projectile that was recovered from Willie's body. (Tr. 164-65; Ex. S-7).

Investigator Bruce Archebelle also responded to Michelle's house. (Tr. 168). He attempted to locate the gun used, but he never found it. (Tr. 169). He later arrested Dante. (Tr. 169). Archebelle testified that Dante had a cell phone when he was arrested, police searched Dante's phone, but and they found no text messages between Dante and Willie. (Tr. 168-70). However,

Archebelle explained, “that doesn’t mean that there weren’t [any]” because “[i]f a message is deleted, it’s not always going to show up on the report.” (Tr. 170). Archebelle testified that police also recovered Willie’s cellphone at the hospital. (Tr. 171-72). Archebelle testified that he attempted to search Willie’s phone, but the search yielded nothing because the phone was password-protected. (Tr. 171).

Dr. Mark LeVaughn testified about Willie’s autopsy as an expert witness in the field of forensic pathology. (Tr. 176). He testified that Willie suffered a single gunshot wound to the abdomen, “right in the vicinity of the belly button.” (Tr. 177). There was no exit wound. (Tr. 177). Dr. LeVaughn opined that the cause of Willie’s death was a gunshot wound to the abdomen, and the manner of death was homicide. (Tr. 176). He acknowledged that “homicide just means that someone died as a result of the actions of another person” and does not mean that the killing was not justifiable or was first-degree murder. (Tr. 181). Dr. LeVaughn testified that no stippling or “muzzle flash” was visible on Willie’s body, which indicated that the barrel of the gun was more than two or three away. (Tr. 178). He also explained that the absence of stippling could have been due to Willie wearing a shirt. (Tr. 181-82). He testified that Willie was 5' 10" tall, weighed 290 pounds, and the autopsy report described Willie as “muscular.” (Tr. 180).

The jury received instructions on first degree murder, second degree murder, imperfect self-defense manslaughter, and self-defense. After deliberations, the jury returned a verdict finding Dante guilty of first degree murder. (Tr. 279; C.P. 181; R.E. 8).

SUMMARY OF THE ARGUMENT

The trial court erred in granting the State a “pre-arming” instruction, which impermissibly and prejudicially impaired or cut off the jury’s consideration of and Dante’s ability to assert his claim of self-defense. “This type of pre-arming instruction has repeatedly been denounced by this Court.”

Boston v. State, 234 So. 3d 1231, 1234 (Miss. 2017) (quoting *Johnson v. State*, 908 So. 2d 758, 762 (Miss. 2005)). In this case, the evidence was contradictory as to whether Dante was in danger when he armed himself and whether he armed himself with the intent to initiate a confrontation with Willie. Furthermore, the evidence showed that Willie, not Dante, was the initial aggressor of the incident. The evidence failed to establish the “exceedingly rare circumstances” in which the grant of a pre-arming instruction is appropriate and not reversal error. The pre-arming instruction unfairly impaired Dante’s right and ability to fully present his defense, and the instruction prejudiced Dante’s right to a fundamentally fair trial. Accordingly, Dante requests this Honorable Court to reverse his conviction and sentence and remand this case for a new trial.

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 Willie’s size advantage and capability to cause serious bodily injury to Dante with his hands and fists caused Dante to reasonably fear an imminent danger of such harm from Willie. Willie was unarmed, and it is undisputed that Willie was much larger than Dante—Willie weighing 290 pounds and Dante weighing at most 160 pounds. Self-defense was Dante’s theory of the defense, and Mississippi law provides that, under the circumstances of the case, Dante was not deprived of the right to act in his own defense even though Willie was unarmed. The trial court’s refusal of instructions D-19 and D-20 left Dante’s jury unfairly and inadequately informed of Dante’s theory of defense. Dante’s trial was prejudiced. And Dante requests this Honorable Court to reverse his conviction and sentence and remand this case for a new trial.

The verdict was against the overwhelming weight of the evidence. Dante was much smaller than Willie. And after Tiffany called police on Willie at Dante’s suggestion, Willie had been looking for Dante. Dante testified that Willie had threatened to kill him, and Dante’s mother acknowledged

that she knew that Willie was looking for Dante and wanted to hurt him. Dante was scared and he obtained a pistol to protect himself in case Willie found him. Dante testified that he went to Michelle's house to help his little sister, and he testified that he went to Michelle's house to avoid Willie, not encounter him, because he was told that Willie was headed to his mother's house looking for him. It is undisputed that Willie emerged from behind Michelle's house and charged at Dante with his fists, whereupon Dante shot Willie one time in the lower abdomen. Dante testified that he was not trying to kill Willie, but only trying to stop him and the reasonably apparent and imminent threat of seriously bodily harm that Willie posed. The overwhelming weight of the evidence showed that Dante acted in reasonable self-defense. And, especially considering the grant of State's pre-arming instruction and the denial of Dante's proposed instructions D-19 and D-20, affirming this verdict would sanction an unconscionable injustice. Thus, Dante requests this Honorable Court to reverse his conviction and sentence and remand this case for a new trial.

ARGUMENT

I. The trial court erred in granting instruction S-13.

The trial court committed prejudicial reversible error in granting the State a "pre-arming" instruction. The instruction—offered as instruction S-13 and granted as instruction #12—read as follows:

The Court instructs the Jury that it 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 with the design and felonious intent to cause serious bodily harm to Willie Lee Taylor, *then the Defendant, Dante O'Bryan Taylor, cannot invoke the law of self-defense.*

(C.P. 151; R.E. 11) (emphasis added).

“Jury instructions are generally within the discretion of the trial court[,] and the settled standard of review is abuse of discretion.”” *Boston v. State*, 234 So. 3d 1231, 1233 (Miss. 2017) (quoting *Moody v. State*, 202 So. 3d 1235, 1236–37 (Miss. 2016)). “Jury instructions must fairly announce the law of the case and not create an injustice against the defendant.”” *Id.* (quoting *Davis v. State*, 18 So. 3d 842, 847 (Miss. 2009)). “A criminal defendant is entitled to present his defense to the finder of fact. This Court has condemned outright the granting of any instruction that precludes a defendant from asserting a claim of self-defense.”” *Johnson v. State*, 908 So. 2d 758, 762 (Miss. 2005) (quoting *Keys v. State*, 635 So. 2d 845, 848 (Miss. 1984)).

Instructions like instruction S-13, “have appeared in different forms throughout this Court’s history,” and “they first received the name ‘pre-arming instruction’ in 1999.” *Boston*, 234 So. 3d at 1234 (citing *Dew v. State*, 748 So. 2d 751, 754 (Miss. 1999)). Our supreme court “[h]as used strong language condemning the use of pre-arming instructions, as that type of instruction prohibits the defendant from being able to assert his theory of the case.”” *Id.* (citing *Johnson*, 908 So. 2d at 762; *Dew*, 748 So. 2d at 754; *Keys*, 635 So. 2d at 849).

A pre-arming instruction is appropriate only where “[t]he record [is] uncontradicted that the defendants armed themselves with the intent to initiate a confrontation.”” *Boston*, at 1235 (citing *Hart v. State*, 637 So. 2d 1329, 1334 (Miss. 1994); *Hall v. State*, 420 So. 2d 1381, 1385 (Miss. 1982); *Reid v. State*, 301 So. 2d 561, 563 (Miss. 1974)). Also, “[w]hen there is ambiguity regarding who is the first aggressor, a pre-arming instruction is not appropriate.”” *Johnson*, 908 So. 2d at 762 (citing *Dew*, 748 So. 2d at 754); *see also*, *Barnes v. State*, 457 So. 2d 1347, 1349–50 (Miss. 1984).

In the case, trial counsel argued that a pre-arming instruction impermissibly commented on the evidence and was unsupported by the evidence, in that, the evidence failed to establish that Dante was the first aggressor in the fatal altercation. (Tr. 221). The State argued that “[i]t’s not a model

instruction. It's pulled from multiple cases", citing *Hart v. State*, 637 So. 2d 1329 (Miss. 1994). (Tr. 221, 236). The trial court granted the State a pre-arming instruction, reasoning that there was conflicting evidence, a portion of which the jury could infer that Dante got the gun with the intent to shoot Willie. (Tr. 237). Specifically, the trial court reasoned:

Well, I think there's conflicting testimony or it can be inferentially argued based upon the mother's testimony about what the defendant told her about his, being the defendant, intent or plans to go punish him or set it right, whatever the testimony was, which my appreciation was that there was some malice aforethought going on, perhaps. Which a jury could make a legal inference that that's why he had that weapon.

(Tr. 237). The trial court applied an incorrect standard in deciding to grant a pre-arming instruction. ““[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.”” *Boston*, 234 So. 3d at 1234-35 (quoting *Dew*, 748 So. 2d at 754). Dante's testimony provided evidence that Willie had threatened to kill him, he took the threat seriously, and he got the gun to protect himself in case Willie was able to find him and tried to follow through on his threat. (Tr. 193-94, 206, 210). Dante's testimony was also supported by the testimony of his mother, who ultimately admitted that she knew Willie was looking for Dante and wanted to hurt² him. (Tr. 133-34). Dante also specifically testified that he went to Michelle's house with the intent to help his sister and to actually avoid Willie (not encounter him), as Dante believed Willie was headed to Dante's mother's house looking for him at the time. (Tr. 204-05, 208).

Simply put, a properly instructed jury could have believed Dante, even though the trial judge himself did not. And the trial court incorrectly substituted its judgment for that of the jury,

² It should also be noted that the word “hurt” (as opposed to “kill”) was used by the attorney in the question posed to Dante's mother. (Tr. 134).

erroneously taking the issue out of the jury's hands. *See Reynolds v. State*, 776 So. 2d 698, 700 (Miss. Ct. App. 2000) ("The issue of justifiable self-defense presents a question of the weight and credibility of the evidence rather than sufficiency and is to be decided by the jury.") (quoting *Meshell v. State*, 506 So. 2d 989, 991-92 (Miss. 1987)).

Again, *Boston* explained that a pre-arming instruction is appropriate only where "[t]he record [is] uncontradicted that the defendants armed themselves with the intent to initiate a confrontation." *Boston*, at 1235 (citations omitted). Here—as acknowledged by the trial court itself in ruling to grant the instruction—the evidence conflicted (i.e., was not uncontradicted) as to whether Dante armed himself with the intention of initiating a confrontation with Willie. Furthermore, as trial counsel argued, the evidence also did not establish that Dante was the initial aggressor. Instead, the evidence established that Willie was the initial aggressor in the fatal altercation. Dante, Maya, and Michelle all testified that Dante was sitting on his car, and Willie came from behind the house and charged at Dante with his fists. (Tr. 111, 121-22, 137-38, 197). "[W]hen there is ambiguity regarding who is the first aggressor, a pre-arming instruction is not appropriate." *Johnson*, 908 So. 2d at 762 (citing *Dew*, 748 So. 2d at 754; *see also*, *Barnes*, 457 So. 2d at 1349–50).

Dante submits that a pre-arming instruction clearly should not have been given. However, if for argument's sake there was any doubt, our law provides that such doubt should have been resolved in his favor. *Davis v. State*, 18 So. 3d 842, 847 (Miss. 2009) ("[W]hen serious doubt exists as to whether an instruction should be included, the doubt should be resolved in favor of the accused.") (citation omitted).

Pre-arming instruction such as instruction S-13 have "[r]epeatedly been denounced" by our supreme court, which has "[s]tated numerous times that when the State seeks this instruction, it does so at its own peril." *Boston*, 234 So. 3d at 1234 (quoting *Johnson*, 908 So. 2d at 763). The

instructive warning from *Thompson v. State*, 602 So. 2d 1185 (Miss. 1992), warrants repeating in this case:

This form of charge, declaring a defendant estopped to plead self-defense, is an exceedingly unwise one to be given. We have repeatedly condemned it . . . It can never be proper, save in the few very rare cases where the case is such, on its facts, that a charge can be given embracing all the elements—not part of them, nor nearly all of them—essential to the estoppel. The old paths are the safe paths. The juries of the country can be safely trusted to find any defendant guilty whose case is really so bad as to estop him to plead self-defense, without resort—dangerous and unwise—to the metaphysical subtleties necessarily involved in the preparation of a proper charge of that sort. Once more we repeat [] that if prosecuting attorneys will ask few and very simple charges, and trust more to the common sense and sound judgment of the juries of the country, they will expose their circuit judges to far less risk of reversal, secure just as many convictions, and have far—very far—fewer cases reversed.

Thompson v. State, 602 So. 2d 1185, 1190 (Miss. 1992) (quoting *Lofton v. State*, 79 Miss. 723, 734, 31 So. 420, 421 (1902)).

The trial court erred in granting instruction S-13. Dante's trial was prejudiced because his only theory of defense was improperly and substantially curtailed. And Dante requests this Court to reverse his conviction and sentence and remand this case for a new trial.

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

A critical aspect of Dante's theory of self-defense was that Willie was a much larger man capable of causing serious bodily injury with his hands and fists, and Dante was justified in using deadly force because he reasonably feared an imminent and apparent danger of serious bodily harm posed by Willie when Willie emerged from behind the house and charged him. Through instructions D-19 and D-20, Dante sought to have his jury informed that he was not deprived of the ability to claim self-defense because Willie was unarmed.

Instruction D-19 read as follows:

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.

(C.P. 170; R.E. 12).

Instruction D-20 similarly 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 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.

(C.P. 171; R.E. 13).

The trial court denied D-19 and D-20, finding that Dante's theories of self-defense were adequately covered elsewhere. (Tr. 234).

““On appellate review of the trial court’s grant or denial of a proposed jury instruction, our primary concern is that ‘the jury was fairly instructed and that each party’s proof-grounded theory of the case was placed before it.’” *Banyard v. State*, 47 So. 3d 676, 681 (¶11) (Miss. 2010) (quoting *Young v. Guild*, 7 So. 3d 251, 259 (Miss. 2009)). In this case, one of Dante’s proof-grounded theories was that he acted out of reasonable fear of an apparent and imminent threat of seriously bodily harm posed by Willie, who was a much larger man than Dante and capable of causing serious

bodily harm with only his hands and fists. Due to the trial court's refusal to grant either D-19 or D-20, the jury was not fairly and adequately informed of this important aspect of Dante's defense.³

"In cases of homicide, failure by the trial court to grant an instruction which presents the defendant's theories of justification, defense or excuse is reversible error so long as there is some evidence to support the theory." *Robinson v. State*, 858 So. 2d 887, 897 (Miss. Ct. App. 2003) (citing *Hester v. State*, 602 So. 2d 869, 872 (Miss. 1992)). "'If the defendant presents sufficient evidence in the record to support his theory of the case, he should then be given an instruction on his theory of the case. There needs not be even a plausible explanation.'" *Maye v. State*, 49 So. 3d 1124, 1129 (Miss. 2010) (quoting *Walker v. State*, 913 So. 2d 198, 235 (Miss. 2005)).

In *Robinson v. State*, this Court reversed a manslaughter conviction due to the trial court's refusal of a substantial similar instruction. *Robinson v. State*, 858 So. 2d 887, 896-97 (Miss. Ct. App. 2003). The trial court in *Robinson*—like the trial court in Dante's case—refused the instruction as being repetitious of other instructions already given. *Robinson*, at 897. As in *Robinson*, the other jury instructions given in Dante's trial did "[n]ot explicitly raise the issue of the right in some situations to use a deadly weapon to ward off an attack with fists" nor was "[a] specific instruction [given] in which the facts of the disparate size and the right in some circumstances to use a deadly weapon in response to mere fists explained to the jury." *Id.* at 898-99

Instructions D-19 or D20 correctly stated the law. See *Robinson*, at 896-97, 899 (¶¶41, 43, 53). And instructions D-19 or D-20 were amply supported by the evidence. Dante testified that at the time of the incident he weighed 140-160 pounds. (Tr. 199-200). Willie, on the other hand,

³ In fact the trial court granted the State an instruction implying that Dante was not justified in using a deadly weapon: "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).

weighed 290 pounds. (Tr. 180). In furtherance of his defense, Dante's testimony explained that Willie's size was a significant factor in his fear and decision to use the gun: He testified that he believed he was in great danger and that: "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).

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.

"'[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, and If Dante reasonably believed that Willie posed an apparent and imminent danger of causing him such injury, Dante was justified in defending himself with a gun even though Willie was unarmed.

The trial court erred in refusing to grant instruction D-19 or instruction D-20. The refusal of the instruction(s) alone caused prejudice to Dante's defense, as Dante's jury was not fairly and adequately instructed that his use of a gun could be justified even though Willie was unarmed. But

the State further prejudiced Dante's defense by opportunistically capitalizing on the refusal of the instructions during closing arguments, when it unfairly argued:

Willie Taylor put his hands 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 maintains that the trial court reversibly erred in refusing to grant instruction D-19 or instruction D-20. Accordingly, Dante requests this Court to reverse his conviction and sentence and remand this case for a new trial.

III. The verdict was against the overwhelming weight of the evidence.

Dante maintains that the verdict was against the overwhelming weight of the evidence. On appellate review of a challenge to the weight of the evidence, the Court "view[s] the evidence in a light most favorable to the verdict, and the verdict will be disturbed only 'when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.'" *Bowser v. State*, 182 So. 3d 425, 431 (Miss. 2015) (quoting *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005)).

It is undisputed that Willie, at 290 pounds, was a much larger man than Dante, who weighed at most 160 pounds. Also, the evidence established that Willie was the initial aggressor in the encounter, as all eyewitnesses testified that Dante was sitting on his car and Willie then appeared from behind the house and charged Dante with his fists. Willie, not Dante, was the initial aggressor. Dante testified that Willie had threatened to kill him, and Dante's mom acknowledged that Willie

was looking for Dante and wanted to hurt him. Dante testified that he went to Michelle's house to help his sister, who Willie had also recently threatened to beat the F out of. He also testified that he went to Michelle's house to actually avoid Willie, as Dante was told that Willie was headed to Dante's mother's house at the time looking for Dante. Dante explained that Willie was already to close when Dante turned and noticed Willie charging at him with his fists, saying "I got your ass now." Based on Willie's size and his threats to Dante, Dante shot Willie one time to prevent the imminent danger of serious bodily injury that Willie posed. Dante explained that he tried to shoot Willie in the leg because he was only trying to stop Willie, not trying to kill him; and this was corroborated by the fact that the shot Willie low in the abdomen.

Willie maintains that the overwhelming weight of the evidence established that he shot Willie in reasonable self-defense or, at worst, in imperfect self-defense based on a bona fide subjective belief of imminent serious bodily that was objectively unreasonable under the circumstances. Especially in light of the trial court's errors in grating a pre-arming instruction and refusing to instruct the jury that Dante's use of the gun could be justified even though Willie was unarmed, Dante submits that affirming his conviction would sanction an unconscionable injustice. Accordingly, Dante requests this Honorable Court to reverse his conviction and sentence and remand this case for a new trial.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Dante Taylor respectfully requests this Honorable Court to reverse his conviction and sentence and remand this case for a new trial.

Respectfully Submitted,

OFFICE OF STATE PUBLIC DEFENDER

INDIGENT APPEALS DIVISION
For Dante O'Bryan Taylor, Appellant

BY: /s/ Hunter N. Aikens
Hunter N Aikens, MSB# 102195
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290
Fax: 601-576-4205
email: haike@ospd.ms.gov

CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Dante O. Taylor, do hereby certify that on this day I electronically filed the forgoing **BRIEF OF THE APPELLANT** with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable Jason L. Davis
Attorney General Office
Post Office Box 220
Jackson, MS 39205-0220

Further, I have this day caused to be mailed electronically or via United States Postal Service, First Class postage prepaid, a true and correct copy of the above to the following non- MEC participants:

Honorable Christopher Schmidt
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

Honorable Joel Smith
District Attorney, District 2
Post Office Box 1180
Gulfport, MS 39502

This the 26th day of March 2018.

/s/Hunter N. Aikens

Hunter N. Aikens
COUNSEL FOR APPELLANT

Hunter N. Aikens, MS Bar No. 102195
INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290
Fax: 601-576-4205
Email: haike@ospd.ms.gov