IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01781-COA

ANTHONY THOMAS — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT
OF
HINDS COUNTY, MISSISSIPPI

REPLY BY APPELLANT

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REPLY BY APPELLANT

I. The trial court erred in permitting the prosecutor to inquire into details of a 1999 aggravated assault conviction, as it was irrelevant and far more prejudicial than probative, and thus deprived Mr. Thomas of his fundamental right to a fair and impartial trial;

With all due respect to honored counsel for the state, Mr. Thomas respectfully submits the arguments advanced in *Brief of the Appellee* fail to take into account the facts of this case. In particular, the "open door/invited error" doctrine is inapplicable to this case because Mr. Thomas did not open the door; rather, the prosecutor kicked it in.

A review of the disputed testimony and application of basic, elementary school grammar demonstrates the error of the prosecutor. In defining the word "do," *Webster's Ninth Collegiate Dictionary* first lists the various tenses of the verb, including "do" (present tense), did (past tense), done (past perfect) and doing, the active tense of the verb "do." The dictionary then goes on to define the contraction "don't" as "1. *do* not; 2. *does* not." [emphasis added]

BY MR. THOMAS

> So I go to the apartment then. I couldn't go back to the house. I couldn't go back to the house. Her son probably would have killed me, and don't even know what really went on. So I couldn't go back. That's the very reason I couldn't go back to the house, because her son probably would have probably shot me.

Her nieces carry pistols, he carry pistols. **I don't carry pistols.** He probably would have killed me, you understand. Don't even know what's happened. So that the reason I didn't go back to the house. I know she was in an ambulance, the very reason I don't go back to the house." T. 384. [emphasis added].

Clearly, the word "don't" refers to *present* practice, not *past* practice, thus knocking out any legal support for the trial court ruling that Mr. Thomas opened the door and "invited" the prosecutor to ask a multitude of questions regarding a prior conviction for assault, all in violation of the Mississippi Rules of Evidence and the right of Mr. Thomas to a fair trial. Despite vehement objections from defense, the trial court permitted the following by the prosecutor, all to the prejudice of Mr. Thomas.

BY MS. [WOOTEN] MANSELL:

Q. Did you say that you don't carry a pistol? Is that what you said?

A. I don't carry a pistol no more because I'm a convicted felon.

Q. You said I don't carry a pistol. Do you remember saying that?

A. I don't carry a pistol.

Q. Okay. Do you remember back in 1999 when you shot Ms. Alice Proctor, the aggravated assault that you were convicted of?

BY MR. MCWILLIAMS: Your Honor, I'm going to object to that.

BY THE COURT: Pardon me?

BY MR. MCWILLIAMS: I'm going to object to that. There's no testimony about him shooting anybody –

BY MS [WOOTEN] MANSELL: Your Honor, he opened the door. Well, we've got the indictment right here.

BY THE COURT: All right. Overruled.

BY MS. [WOOTEN] MANSELL:[Continuing]

Q. Do you remember shooting Ms. Alice Proctor, a woman that was going to leave you? Do you remember shooting her?

A. Yes, ma'm. I remember shooting her.

Q Okay. So you do carry pistols?

A. But –

Q. I didn't ask you –

A. -- it was about no leaving.

Q. I didn't ask you for an explanation.

A. Okay.

BY MR. MCWILLIAMS: May he answer the question, Your Honor?

BY THE COURT: Pardon me?

BY MR. MCWILLIAMS: May he answer the question?

BY MS. [WOOTEN] MANSELL:I didn't – I asked him did he shoot Alice Proctor.

A. Yes, ma'm.

Q. Okay. So you did carry pistols?

A. No, ma'am.

Q. You did back in 1999?

A Yes, ma'am.

Q. So you've been convicted of aggravated assault of a woman back in 1999 because she was going to leave you right?

A. No, ma'am.

T. 387-389; RE 25.

Mr. Thomas acknowledges the state is correct in noting that *if* the accused opens the door to otherwise inadmissible evidence, the prosecution *may* inquire further and the accused may not be heard to complain of evidence he so invited. Honored counsel for the state, however, fails to note the substantive limitation to the doctrine; that the prosecutor may *not* exceed the *scope* of the invitation given.

Even if Mr. Thomas invited the question (which he does not concede), the prosecutor far exceeded the scope.

The prosecution at trial demonstrated woeful ignorance of the distinction between two legal concepts, that of the "open door/invited response" doctrine and that of admission of "other crime" evidence controlled by Mississippi Rules of Evidence 404 and 609. The prosecutor at this trial, sadly well known to this Court, appeared to rely upon a version of the "invited response" doctrine the Mississippi Supreme Court seriously questioned in *Randall v. State,* 806 So.2d 185 (Miss. 2001).[1] Then-Justice Mills based his criticism in part on the majority opinion of Justice Thurgood Marshall in *Caldwell v. Mississippi,* 472 US 320, 335-337, (1985) *overturning Caldwell v. State,* 443 So.2d 806 (Miss. 1983). Both *Randall* and *Caldwell* stand for the proposition that any invitation of error by "opening the door" to otherwise inadmissible evidence is bounded by traditional evidentiary and constitutional limitations, a substantive distinction lost on both the prosecution and the trial court in this case. "The Mississippi Supreme Court has cautioned that, in taking advantage of a defendant's invitation to introduce otherwise-inadmissible evidence through a door opened by the defendant, the State may not exceed the scope of the invitation. *Sanders v. State,* 751 so.2d 1256, ¶ 9, (Miss.App.Ct. 2000), citing *Stewart v. State,* 596 So.2d 851, 853-54 (Miss.1992)."

Counsel for the state cites, among others, *Bogard v. State,* 624 So.2d 1313, 1316 (Miss. 1993). Mr. Thomas respectfully contends a reading of *Bogard* shows the state's reliance is misplaced due to three crucial distinctions from the present case.

in MISS.R.EVID. 609. The crime here was aggravated assault, which is not a crime of deceit, and which the trial court in *Bogard* refused to admit due to its inherent prejudice.

Counsel for the state also cites *Williams v. State*, 819 So.2d 532, 541 (Miss.Ct.App. 2001) for the proposition that it is harmless error to fail to conduct the balancing test of *Peterson v. State*, 518 So.2d 632 (Miss. 1987). As the state notes, it is harmless error *only if* the case is one of overwhelming guilt. That is not the case here, for as explained in Issue II, Mr. Thomas was prohibited by the trial court from full cross-examination of Burks to establish his defense of self-defense. There were only two witnesses to this incident: Mr. Thomas and Karen Burks. This is a classic case of "he said, she said," a battle of credibility decided by a jury fatally tainted by the detailed questions regarding his prior conviction for aggravated assault. In addition, the refusal of the trial court to permit full cross-examination of Burks regarding her intake of alcohol and other drugs to establish the defense of self-defense of Mr. Thomas, further demonstrates this was not a case of "harmless error."

II. The trial court abused its discretion when it barred inquiry by Mr. Thomas into the drug and alcohol use of Karen Burks, as it bore on her credibility and state of mind, and

The state's argument here utterly fails to address the fact that the trial court's refusal to permit cross-examination into Burks' intake of alcohol and other drugs that evening did nothing less than deny to him the opportunity to present a meaningful defense, a right guaranteed under the Sixth and Fourteenth

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den'd, cert. den'd and *DericBailey v. State*, 2004-KA-01560-COA; reh'g den'd, cert. den'd to name just two.

amendments to the U.S. Constitution and art. 3, § 26 of the Mississippi Constitution. *Crane v. Kentucky*, 476 U.S. 683 (1986).

Mr. Thomas acknowledges that Burks' memory may have suffered due to the trauma and hospitalization, but that is a question for the jury. Mr. Thomas claimed self-defense as his defense. Inability to fully cross-examine Burks deprived the jury of essential information by which they could evaluate her credibility.

This denial of a fundamental right cannot amount to harmless error, as it impacts the very structure of the trial mechanism itself, the ability to mount a defense and to provide the jury with all relevant facts. For this reason, Mr. Thomas is entitled to reversal and vacation of his sentence and remand for retrial.

III. The trial court erred in denial of the *Motion to Sever* by Mr. Thomas, denying him his fundamental fair trial rights.

Mr. Thomas respectfully suggests that this honorable Court has already spoken to this issue in its opinion in *Charlie Sawyer Jr. v. State of Mississippi*, 2007-KA-00136-COA (July 1, 2008).

As this honorable Court noted, the case of *Carter v. State*, 953 So.3d 224 (Miss. 2007) does not involve application of MISS.R.EVID. 404(b). Here the State sought to prove an element of the crime of possession by a convicted felon of a deadly weapon. MISS.CODE ANN. § 99-37-5 (1972). As in *Old Chief v. United States*, 519 U.S. 172 (1997), the use of a stipulation that Mr. Thomas was a convicted felon was sufficient to meet the state's burden of proof with absolutely no risk of prejudice to either the accused or the integrity of the proceedings.

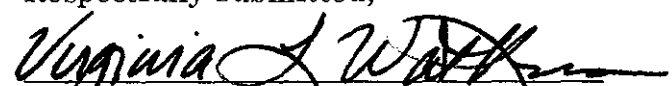
CONCLUSION

Mr. Thomas reiterates all argument and authority as recited in *Brief on the Merits by Appellant* regarding fundamental errors he respectfully submits occurred.

The trial court abused its discretion and failed to follow the Mississippi Rules of Evidence when it permitted the prosecutor to go into the details of a prior conviction for aggravated assault. Mr. Thomas humbly contends he did not open the door to invite such legally inappropriate cross-examination as here. The trial court compounded the error when it refused to permit full cross-examination of Karen Burks to establish her alcohol and other drug intake the night of the incident to provide the jury necessary information to assess her credibility. Finally, as *Old Chief v. United States* shows, the trial court committed prejudicial error by refusing a stipulation that met the state's burden of proof yet prevented any prejudice.

For these reasons, Mr. Thomas humbly asks this honorable Court to reverse his conviction, vacate his sentence and remand for a new trial.

Respectfully submitted,



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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the following:

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