

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00225-COA

JERMAINE ROBINSON

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

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

REBUTTAL BY APPELLANT

Appellant Seeks Oral Argument

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STATEMENT REGARDING ORAL ARGUMENT

The undersigned counsel of record respectfully seeks oral argument for this case because of the continuing problems regarding the appropriate standard by which jury instructions are to be granted in a criminal case. Long-standing Mississippi case law has used the same or similar standards for nearly a century or more, yet criminal defendants in the 7th Circuit District are routinely denied jury instructions to the extent that these individuals are denied their fundamental constitutional right to present a defense through appropriate jury instructions.

In addition, comments by this prosecutor, well known to this honorable Court, continue to prejudice the accused in the exercise of fundamental constitutional rights. There is a substantive distinction between vigorous cross-examination and conduct which demonstrates a complete lack of respect for the distinguished jurists of this state as well as opposing counsel.

Elucidation of these issues during oral argument may assist the Court in consideration of the claimed errors and in the rendering of an opinion that would aid trial court jurists and counsel throughout the state.


Virginia L. Watkins, MSB No. [REDACTED]

Jermaine Robinson v. State of Mississippi

2008-KA-00225-COA

Table of Contents

Statement Regarding Oral Argument	i
Table of Contents	ii
Table of Authorities	iii
Rebuttal by Appellant	1
Conclusion	6
Certificate of Service	7

Jermaine Robinson v. State of Mississippi

2008-KA-00225-COA

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bailey v. State</i> , 952 So.2d 225 (Miss.Ct.App. 2006)	1
<i>Davis v. State</i> , 970 So.2d 164 (Miss.Ct.App. 2006)	1
<i>Emery v. State</i> , 949 So.2d 405 (Miss. 2004)	1
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006)	4
<i>Jones v. State</i> , 768 So.2d 1241 (Miss. 2001)	3
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	1
<i>Phillips v. State</i> , 493 So.2d 350 (Miss. 1986)	3
<i>Quick v. State</i> , 560 So.2d 1197 (Miss. 1990)	2
<i>Shell v. State</i> , 554 So.2d 887 (Miss. 1989), overruled other grounds, 498 U.S. 1 (1990)	1
<i>Smith v. State</i> , 733 So.2d 739 (Miss. 1999)	4
<u>Constitutions, Statutes and other Authorities</u>	<u>Page</u>
AMEND. V, U.S. CONST.	1
AMEND. XIV, U.S. CONST.	1
ART. 3, § 14 MISS. CONST.	1
ART. 3, § 26 MISS. CONST.	1
MISSISSIPPI RULE OF EVIDENCE 611	4
COMMENT, MISS.R.EVID. 611	4

REBUTTAL BY APPELLANT

I. The trial court erred in its denial of a mistrial when the prosecutor improperly commented on the right of Mr. Robinson to remain silent, a violation of his fundamental fair trial rights;

The Mississippi Supreme Court has already announced its answer to this error in *Emery v. State*, 869 So.2d 405 (Miss. 2004). “...[T]he question before us is whether the trial court committed reversible error by *allowing the prosecutor to imply to the jury that Emery's post-arrest silence was an indication that he was untruthful* and, by implication, an indication that he committed the crime.” *Emery*, at 408. The Mississippi Supreme Court, in following decades-long precedent, found the trial judge committed reversible error when it permitted the prosecutor to continue exactly the line of questioning in which this prosecutor engaged, reproduced in *Brief on the Merits by Appellant*, pgs. 7-10.

The practice the Supreme Court decried in *Emery* is exactly the practice in which this prosecutor engaged in the trial of Jermain Robinson and exactly what both U.S. Constitution the Mississippi Constitution of 1890 prohibit. AMEND. V, XIV, U.S. CONST.; ART. 3, §§ 14; 26, MISS. CONST. Unfortunately, however, this Court is more than familiar with the performance of this prosecutor in the cases of *Davis v. State*, 970 So.2d 164 (Miss.Ct.App. 2006), *reh'g denied, cert. den'd.*; *McGee v. State*, 953 So.2d 211 (Miss. 2007) and *Bailey v. State*, 952 So.2d 225 (Miss.Ct.App. 2006), *reh'g den'd; cert den'd.* Mr. Robinson submits the continuing disrespect this prosecutor shows for the exercise of fundamental constitutional rights truly contributes to an erosion of public trust in our criminal justice system.

Contrary to assertions by learned counsel for the state *Shell v. State* is both factually and legally distinguishable from the case at hand, distinctions that Mr. Robinson argues make it wholly inapplicable to these facts. *Shell v. State*, 554 So.2d 887 (Miss. 1989) *overruled on other grounds by* 498 U.S. 1 (1990).

Shell gave no less than *five* statements to the Winston County Sheriff over a period of several weeks, some even written in his own hand. All of the statements, according to the reported decision, were each preceded by the sheriff's repetition of warnings required by *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Esteemed counsel for the state fails to acknowledge that Mr. Robinson made no formal statement after being informed of his rights under *Miranda*, which makes *Emery* directly applicable. T. Mr. Robinson did *not* waive his right against self-incrimination, unlike *Shell*, who took numerous opportunities to waive his rights. T. 347.

In *Quick v. State*, 569 So.2d 1197, 1199 (Miss. 1990), a unanimous state Supreme Court reversed the aggravated assault conviction of James Quick due in part to the prosecutor's inquiry as to "whether he made certain complaints or explanations" after receiving *Miranda* warnings. "...[A]n accused person who has been given *Miranda* warnings is not obliged to answer any questions or make any explanation," the Court wrote. "Certainly *it is improper to inquire of the defendant as to whether he made any protest or explanation* to the arresting officers." [emphasis added] [internal citations omitted].

Mr. Robinson also asserts that this is not a case in which there is overwhelming evidence of guilt of deliberate design murder, as the trial court failed to use the proper standard in evaluating the request of Mr. Robinson for a jury instruction on manslaughter, discussed in greater detail below.

II. The trial court abused its discretion in denial of Instructions D-4 and D-5 dealing with manslaughter and so denied Mr. Robinson his fundamental right to present to the jury his defense of heat of passion manslaughter, and

Respectfully, Mr. Robinson argues that counsel for the state fails to point to the record in making the conclusion that he did not provide at trial evidence of heat of passion.

Yes, Mr. Robinson acknowledges telephoning LaToya Johnson, but it is clear from the testimony that the verbal war between the two men escalated to the point that Winters “told me to bring my ass down there and he was going to do something to me.” T. 379. Mr. Robinson testified he was angry and afraid and out of fear armed himself before meeting Winters. T. 379. Mr. Robinson testified as to his fear when he saw Winters reach for a handle he thought was a gun. T. 379. Winters was armed with a knife when his body was found. T. 142; 157; 189; 242, 397. Mr. Robinson had a long-term relationship with LaToya Johnson, who was the mother of his child, a relationship Mr. Robinson testified he thought was still viable.

As Mr. Robinson argued in *Brief on the Merits by Appellant*, pg. 12, “the granting of instructions should err on the side of inclusion rather than exclusion.” *Jones v. State*, 768 So.2d 1241, 1254, (¶40) (Miss. 2001) [internal citations omitted].

Since the jury was never instructed as to heat of passion manslaughter, Mr. Robinson humbly submits the state’s counsel errs in concluding no reasonable, hypothetical juror could have found him guilty of manslaughter rather than deliberate design murder. This was the theory of Mr. Robinson’s case and the heart of his defense. Regardless of the meager state of such evidence, the fact is that Mr. Robinson’s testimony provided the necessary basis for the giving of such an instruction. In considering the request for instructions, the trial court is bound to take the testimony of the defendant as true, particularly when the instruction is the only one embodying the defense theory espoused by the accused. *Phillips v. State*, 493 So.2d 350, 353-354 (Miss. 1986).

III. The trial court abused its discretion when it improperly denied Mr. Robinson the right to impeach state witness LaToya Johnson during the prosecution's case-in-chief.

When Mr. Robinson attempted to question the state's chief witness, LaToya Johnson, during cross-examination on the statement by Winters "I am not afraid to die," the trial court sustained the objection of the prosecution. T. 252; RE 14. Later, defense counsel sought a mistrial on the trial court's failure to permit full cross-examination of Johnson during the state's case-in-chief. T. 366; RE 15.

Therefore, Mr. Robinson is mystified by the state's assertion that the claim of error is procedurally barred.

In *Smith v. State*, 733 So.2d 739 (Miss. 1999), the state Supreme Court reversed the capital murder conviction of Terry Ray Smith for failure to permit cross-examination of the state's chief witness, Joey Cornish, to show past mental illness and substance abuse, in order that the jury could fully judge the credibility of Cornish. *Id.*, at 801-802 (¶¶40; 42). In this case, LaToya Johnson was present with Winters in the hours before his death and privy to Winters' side of his conversation with Mr. Robinson on her telephone. Under MISSISSIPPI RULE OF EVIDENCE 611, "any matter may be probed that is relevant." *Comment*, MISS.R.EVID. 611. In *Holmes v. South Carolina*, 547 U.S. 319 (2006), a unanimous U.S. Supreme Court ruled that application of state evidentiary rules is limited by the due process clause of the Fourteenth Amendment when such application impermissibly interferes with a fundamental right of the accused, in this case the right to "a meaningful opportunity to present a complete defense." [internal citations omitted].


Mr. Robinson submits that his efforts to question LaToya Johnson fully about the events leading up to the death of Winters and statements she heard Winters make to Mr. Robinson, were critical to establishing his defense of heat of passion manslaughter. Later, counsel for Mr.

CONCLUSION

The trial court abused its discretion in its failure to order a mistrial upon the misconduct of the prosecutor, commenting through her questions on Mr. Robinson's exercise of his right against self-incrimination. T. 388-389; RE 19. Although the testimony of Mr. Robinson as to his fear and anger provided a sufficient basis for the giving of a jury instruction on his theory of heat-of-passion manslaughter, the trial court failed to use the appropriate legal standard in considering the supporting evidence as well as the instruction itself. Finally, Mr. Robinson was effectively denied the right of confronting LaToya Johnson by the refusal of the trial court to permit the wide open cross examination permitted by the Mississippi Rules of Evidence and the state and federal constitutions.

For these reasons and the authority cited herein and in the *Brief on the Merits by Appellant*, Mr. Robinson asks this honorable Court to reverse the jury verdict against him, vacate his conviction and remand this case 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 REBUTTAL BY APPELLANT to the following:

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So certified, this the 9th day of March, 2009.


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