

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**

BRIEF ON THE MERITS BY APPELLANT

Appellant Will Seek Oral Argument

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STATEMENT OF THE ISSUES

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;

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

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.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Jermaine Robinson was indicted by the January 2005 term of a grand jury of the 1st Judicial District of Hinds County, Mississippi, Cause Number 05-0320, in connection with the November 14, 2004 death of Walter Winters Jr. in violation of MISS. CODE ANN. § 97-3-19(1) (1972). CP 4.

Mr. Robinson came on for trial before a jury of his peers and was convicted on June 7, 2006. T. 460; RE 12; CP 43. The trial court sentenced him to imprisonment for life in the custody of the Mississippi Department of Corrections. T. 461; CP 41. After proceeding with post-trial motions, all of which were denied, Mr. Robinson sought appellate review of his conviction and sentence, now before this honorable Court. CP 53; 55-59.

B. STATEMENT OF FACTS

The heart of this matter is a painful repetition of facts this Court has heard all too often before.

Jermaine Robinson, with a 9th grade education, met LaToya Johnson some two years before the fateful events of the early morning of November 14, 2004. T.377; 378. The couple had a child together but after about eighteen months, LaToya broke off the relationship. T. 378. By November 13, 2004, the relationship had been over about four months, although Mr. Robinson testified he continued to come over to see his child whenever LaToya would permit him to come. T. 378; 384. LaToya lived with her mother at 218 Millsaps Avenue, just one door away from the home of Mr. Robinson's aunt, Doris Marshall at 208 Millsaps Avenue. T. 170; 195.

Wallace Winters Jr., a friend of LaToya's, took her that night to a family get-together in Flora but Latoya got sick to her stomach. T.200. Winters brought her home about midnight,

LaToya testified, walked her into her mother's home and promised to check on her later. T. Latoya testified that she was not "dating" Winters, he was just a friend. T. 200; 201. Winters returned as he promised, about 2 A.M., while Latoya was still in bed. T. 225.

Mr. Robinson had spent the evening and early morning at Club Skinny's Bar and Lounge, around the corner from 218 Millsaps Avenue on McTyere. T. 377; 381. While he was standing outside the club, Mr. Robinson testified a friend gave him a cellular phone. T. 380. At 5: A.M., Mr. Robinson first called LaToya's cellular telephone at 5:33 A.M., a call she did not answer. T. 203. She did, however, answer the second call at 5:39 A.M., which Mr. Robinson admitted he made as he sought an invitation to her home T. 377. LaToya responded she had company; Mr. Robinson asked his identity and then to speak to Winters, who told Mr. Robinson he was not dating LaToya. T. 377. Mr. Robinson testified that Winters hung up on his call, whereupon Mr. Robinson called back, demanded to speak to Winters, who Mr. Robinson testified began to curse him. T. 378-379. A series of cellular calls, ultimately totaling seventeen, from Mr. Robinson to LaToya then ensued. Exhibit 1-A; 1-B; T. 202; 378; 382. LaToya testified that her cellular telephone would ring, Mr. Robinson would ask for Winters and she would hand the telephone over. T. 213. Mr. Robinson testified he was angry that Winters would continue to hang up on him and that Winters talked to Mr. Robinson in a threatening manner, telling him to "bring my A down there" that he (Winters) had something for Mr. Robinson. T. 378. Armed with a .380 caliber weapon he said he'd carried as protection for the past six months, Mr. Robinson went to 218 Millsaps Avenue and around to the side door steps leading into the house. T. 378; 379. Mr. Robinson admitted during his testimony he planned to fight Winters, because he was angry and upset over Winters' threats and continued hang-ups on the cellular telephone. T. 379.

LaToya testified that Winters walked through the house talking to Mr. Robinson on her cellular telephone. T. 227. LaToya admitted Winters "probably" hung up on Mr. Robinson a few

times and she acknowledged the two men appeared to be arguing. T. 208; 261. Winters walked outside twice; once to walk around the house and the second time, when he was shot. T. 212; 213. At some point, LaToya heard Winters say, "I am not afraid to die," but did not hear what Mr. Robinson said to elicit such a response. T. 398; *See Exhibit 10 for Identification Only*. LaToya also testified she could not hear what all of what was said by Winters. T. 401. At some point during the conversations, Winters acquired a black handled kitchen knife, presumably from her kitchen, LaToya testified. T. 228-229.

LaToya testified she never heard Mr. Robinson tell Winters to walk outside nor did she know what caused Winters walk to the side door the second time. T. 212. Mr. Robinson, however, testified that he walked over to the side door of the house and was on the first or second step when Winters opened the door. T. 379. Mr. Robinson testified that he saw Winters reaching for a dark handle with "a piece of the shiny thing" attached and he fired as he ran from the house. T.397.

LaToya testified that she heard the gunshots, then saw Winters stagger through the children's bedroom, into her bedroom telling her to call the police, then into the hallway outside her room, where he collapsed. T. 218-219. Officer Tawanda Armstrong testified she responded to 218 Millsaps Avenue about 6:12 A.M. and found Winters, identified by LaToya, dead in the hallway. T. 139-140. Although she did not touch Winters, Armstrong also testified that she saw the knife in Winters' hand inside his pocket. T. 142. Crime Scene Investigator James Chambers removed the black handled kitchen knife from Winters' hand after Hinds County Coroner Sharon Grisham Stewart had examined the body. T. 297.

Mr. Robinson continued to call LaToya after the shooting; Officer Maurice Kendrick, who arrived about 6:15 A.M. testified that LaToya held out her cellular telephone so he could hear. T. 154. Kendrick testified that he heard someone LaToya identified as Mr. Robinson say

“he was going to spend the rest of his life in jail because of her.” T. 153; 154. Kendrick also heard the caller tell LaToya that it was all her fault, that she should have told police something else and that now he would spend the rest of his life in jail. T. 154.

Mr. Robinson testified he telephoned LaToya after the shooting to find out if Winters was hurt and blamed her for the incident only because he was nervous and scared. T. 380.

Detective Sharesa Sparkman, primary detective on the case, testified police arrested Mr. Robinson on December 8, 2004, nearly a month after the shooting. T. 346. Sparkman said she issued “Miranda” warnings to Mr. Robinson who made no formal statement. Mr. Robinson did say he was no where near the murder scene that day and how did police figure he shot Winters. T. 350.

Dr. Steven Hayne conducted the autopsy of Winters that day and found he had suffered three gunshot wounds. Winters sustained one wound to the chest, which exited his back, one to his upper abdomen which also exited his back and a third wound entering the right thigh and exiting the left thigh. T. 307; 308. Hayne testified Winters died swiftly from the gunshot wound to his chest due to massive internal blood loss. T. 308; 327. Hayne speculated that Winters would have been conscious only thirty seconds to a minute after he sustained the wound. T. 319; 320.

SUMMARY OF THE ARGUMENT

Mr. Robinson respectfully asserts his conviction requires reversal and remand due to the prosecutor's deliberate and highly improper comments on his post-arrest silence. Not only did the prosecutor question Mr. Robinson before the jury as to when he made statements, she also emphasized the questions and his responses in closing arguments. The right to remain silent is virtually meaningless if prosecutors are continually permitted to comment on its exercise, a premise our case law does not condone.

Mr. Robinson also submits the trial court erred when it denied Instructions D-4 and D-5, which presented to the jury his defense he was caught in a heat of passion during the incident and committed manslaughter when he shot Winters, not murder. As part of his argument, Mr. Robinson also contends the trial court failed to use the proper legal standard to consider his requested instructions, thus depriving him of his opportunity to present a meaningful defense.

Finally, the trial court erred when it denied him the right to cross examine LaToya Johnson during the state's case-in-chief and impeach her with inconsistencies between her contemporaneous written statement to police and her testimony at trial. As the jury assesses and assigns weight and credibility accorded to evidence, it was essential to presentation of his defense that Mr. Robinson be able to impeach the witness on cross-examination, rather than recalling LaToya during presentation of his case, when the impeachment loses much of its force.

BY MS. MANSELL: Thank you.

BY MS. MANSELL: (Continuing)

Q. When is the **first time** that you have ever told any human being that Walter Winters, who is now dead so that I can't ask him if he said this, conveniently, **when have you ever told anybody** that Walter Winters said bring your ass down here because I'm going to do something to you? When is the first time you've ever told any human being that?

BY MS. WALL: Your Honor, I'm sorry. I'm going to have to object because this man has a right to remain silent, and she's asking what he told his lawyer.

BY MS. MANSELL: I did not ask that. I asked him who's he's told. He's on the stand. He's waived any right.

BY THE COURT: She said any human being. I mean, it wasn't specifically referring to a lawyer.

BY MS. WALL: He was given Miranda. He didn't have to say anything. And what he told his lawyer is confidential.

BY MS. MANSELL: Your Honor, I didn't ask what he told his lawyer.

BY THE COURT: That was not asked.

BY MS. MANSELL: And he's on cross-examination. **He's waived any rights at this point.**

BY THE COURT: Well, except for what he told his lawyer.

BY MS. MANSELL: Obviously.

Q. Okay. So you didn't tell back in – because this happened in November of 2004. *Conveniently Ms. Wall has reminded you maybe you can tell your attorney. But before you said you hadn't told anybody. Didn't you just say that?*

A. I told my attorney on November – in November when he came to see me he asked me what exactly happened.

Q. Okay. Then why didn't you tell Detective Sparkman that?

A. Because I was scared I was going to jail.

Q. Well, why would you go to jail if someone had threatened your life?

A. What?

Q. I'm asking you a question. Why would you go to jail if somebody threatened your life?

A. Because I shot this man.

Q. But you're saying now two years after the fact that he threatened you. *Why didn't you tell* – where is Detective Sparkman? She's right there. *Why didn't you tell* her that the man told you to bring your ass down there and he was going to do something to you?

A. I was afraid at the time. I told you the first time I told you.

Q. You were afraid?

A. Yeah.

Q. Okay. Then why did you tell LaToya that it was all her fault and that she was going to – you were going to spend the rest of your life in jail because of her?

A. Because I was upset.

Q. Why didn't you tell LaToya that time – any time during these conversations – because we know you called her after the police got there. Let's see. You called her one, two, three, four, five, six, seven, eight more times after that. Why didn't you tell her, look, I was afraid this man was going to do something to me? Why didn't you tell her that?

A. I just told her that I hung the phone up because I was nervous and scared.

Q. But doesn't the truth set you free?

A. Yeah. I'm telling the truth today.

Q. Today. But we know you lied to –

BY MS. WALL: Objection, your Honor. We move for a mistrial. This man has had an absolute right to remain silent. And today is when he can testify –

BY MS. MANSELL: Your Honor –

BY MS. WALL: This is improper.

BY MS. MANSELL: I'm asking him – that's right. *He waives any objection whenever he gets on the stand.*

BY MS. WALL: But Judge, she's asking him why didn't he tell back then to Detective Sparkman –

BY THE COURT: He has a right to remain silent for a period of time, of course, until he took the stand.

BY MS. MANSELL: That's right. When he takes the stand that's over.

BY THE COURT: Well, but not about previous things –

BY MS. MANSELL: I didn't ask him anything about that.

T. 385-387; RE 16-18.

And shortly thereafter, as cross-examination continues, the following exchange permits the prosecutor to emphasize once again Mr. Robinson's exercise of his constitutionally guaranteed rights.

Q. Oh, you wouldn't have. You wouldn't have come up with something better? If you knew your aunt had put you on scene you obviously couldn't say you were there. Because when is the first time we've ever heard you were on the scene? It was yesterday, right, when Mr. McWilliams got up and said he was there and it was self- that's the *first time* we've ever heard that; right?

BY MS. WALL: Objection, your Honor. We moved for a mistrial and we'd like a ruling, please.

BY THE COURT: Deny the motion for mistrial.

BY MS. MANSELL: Thank you.

BY MS. MANSELL: (Continuing)

Q. First time we heard it; right?

A. Yes, ma'm.

Q. And this was on 6-0-06?

A. Yes, ma'm.

T. 388-389; RE 19.

“Courts in this nation have also consistently held that the Fifth Amendment right not be compelled to be a witness against oneself, incorporated as well as in Art. 3, § 26 of the Mississippi Constitution, includes the right not to have the prosecution make any comment upon a defendant's exercise of that right. *The right would be eviscerated if the government were free to make invidious reference when an accused chose not to testify. Whigham v. State*, 611 So.2d 988, 995 (Miss. 1992). [emphasis added]

To add insult to injury, this prosecutor emphasized in closing arguments over vehement objection by defense counsel the fact that Mr. Robinson – aside from telling his lawyer – had waited until trial to tell his side of the tragic events of November 14, 2004. T. 440; 454; RE 21; 22.

In *Emery v. State*, 949 So.2d 405 (Miss.2004), the state Supreme Court reversed Odis Emery's house burglary conviction due to comments almost precisely as occurred here. In this case, Mr. Robinson admitted shooting Winters; nevertheless, he claimed that he saw the handle of what appeared to be a weapon protruding from Winters' sleeve and a motion by Winters as

though he planned to use it. For the prosecutor to cast such aspersions upon his testimony and his exercise of the fundamental right to silence removes this error from the realm of harmless error. As in *Emery*, the prosecutor argued no exception whatsoever, nor did the trial court rule any exception applied. *Id.*, at 409 (¶ 19). It was as though this hallowed rule, horn book law now for more than forty years, does not even exist.

Mr. Robinson respectfully contends that the prosecutor's egregious failure to honor this most basic of American freedoms is reversible error as in *Emery*, requiring reversal and remand.

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

The denial of the trial court to permit Instructions D-4 and D-5 (CP 31-33) essentially deprived Mr. Robinson of his fundamental right to present his defense of manslaughter committed in heat of passion to the jury. In addition, Mr. Robinson argues the trial court failed to use the appropriate standard by which to evaluate the requested instruction.

The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper, only if the trial court-and this Court on appeal-can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inferences which may be drawn from the evidence in favor of the requesting party, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction.

Hill v. Dunaway, 487 so.2d 807, 809 (Miss. 1986)

Jones v. State, 768 So.2d 1241, 1254, ¶ 40 (Miss. 2001) also points out that "the granting of instructions should err on the side of inclusion rather than exclusion." [internal citations omitted]. So long as the proposed instruction correctly states the law, is supported by the evidence *and is not repetitious*, the requested instruction should be granted.

Upon review all jury instructions are to be read together, taken as a whole. *Chinn v. State*, 958 So.2d 1223, 1225 (¶ 12) (Miss. 2007). [additional citations omitted] "A defendant is entitled

to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, or is without foundation in the evidence.” . . . “We will not find reversible error ‘where the instructions actually given, when read together as a whole, fairly announce the law of the case and create no injustice.’ ” *Chinn v. State*, 958 So.2d 1223, 1225 (¶12) (Miss. 2007) [internal citations omitted].

In this case, no other instruction addressed the issue of heat of passion or permitted the jury to consider the theory of manslaughter. There was no argument that the instructions failed to accurately state the law, merely the prosecutor’s argument that no evidence of heat of passion existed. Nevertheless, using the correct standard as enunciated above, and considering all evidence in favor of the requesting party, the prosecutor’s argument fails to sustain its own burden. Mr. Robinson testified as to his anger and fear of Winters, whom he testified cursed at him during the telephone calls, admittedly calls Mr. Robinson made. Mr. Robinson also testified that he found Winters statements to him threatening and that he felt compelled to respond to Winters’ threats. Winters was found with a knife secreted up his sleeve; Mr. Robinson testified he fired when he saw Winters move as though to use the handle with “a shiny piece” attached protruding from Winters’ sleeve. No other instruction addressed the issue of heat of passion or manslaughter, effectively removing from jury consideration the possibility of manslaughter and the lesser sentence it carried – a maximum of twenty (20) years versus life imprisonment.

It was the job of the jury to judge the credibility of Mr. Winters’ testimony and his version of events, something the jury instructions in this case failed to permit. Therefore, Mr. Robinson respectfully argues this necessitates reversal and remand of his conviction and sentence for a new trial in which he is permitted to present his defense of manslaughter committed in the heat of passion.

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.

During cross-examination of LaToya Johnson, a key witness for the state, counsel for Mr. Robinson sought to impeach her testimony regarding Winters' statement to Mr. Robinson, "I am not afraid to die." T. 252; RE 14. The prosecutor objected, advancing arguments such as Mr. Robinson's failure to give notice before trial to the State that the defense planned to ask for application of an exception to the hearsay rule, MISSISSIPPI RULE OF EVIDENCE 803(3), which the prosecutor steadfastly maintained was required of all hearsay exceptions by MISS.R.EVID. 803(24). T. 234.

Although the trial court ultimately permitted testimony by LaToya as to Winters' statement, virtually all of the vitality of the impeachment was lost due the trial court's abuse of discretion in denying impeachment during cross-examination. T. 252; RE 14. Later defense counsel sought a mistrial on the same issue. T. 366; RE 15.

The trial court accepted without comment the prosecution's argument that impeachment was improper until *after* Mr. Robinson began presentation of his case, a truly puzzling ruling that turns our criminal justice system on its head.

In *Davis v. State*, 970 So.2d 164 (Miss.Ct.App. 2006), this Court reversed the Douvell Davis's murder conviction for similar action by this very same prosecutor. In that case, the trial court failed to permit full cross-examination of a key state witness. The Court found it was an impermissible constraint of Mr. Davis's confrontation rights under the Sixth and Fourteenth Amendments.

While it is true that Mr. Robinson was permitted to recall LaToya during his case in chief, he argues that the force of his argument, building his case of self-defense through the

crucible of impeachment, was immeasurably blunted by the prejudice of being unable to question LaToya during cross-examination. What is mind-boggling is that after defense counsel sought to accommodate the ruling of the trial court and recall LaToya, the prosecutor objected, stating that it was only proper to question LaToya during cross-examination. T. 367 – 368.

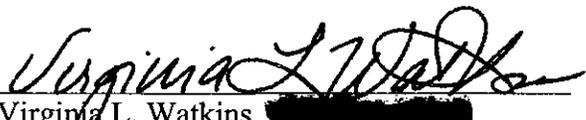
Mr. Robinson humbly contends that this action by the prosecutor impermissibly hindered his right and ability to fully impeach the state's key witness against him. Therefore, reversal is required and remand is necessary.

CONCLUSION

Mr. Robinson respectfully argues that the trial court erred to his fatal prejudice by permitting completely improper questions and remarks in cross-examination of Mr. Robinson and during closing regarding his exercise of his constitutionally protected right to remain silent. *Emery v. State*, discussed above, is dispositive of this assignment of error. The trial court also deprived Mr. Robinson of his fundamental right to present his theory of defense to the jury through appropriate jury instructions, when it failed to use the correct standard to evaluate his request. Finally, Mr. Robinson was also fatally prejudiced by the trial court's refusal to permit him to conduct impeachment of a key state witness until he commenced his own case.

For these reasons and the authority cited herein, Mr. Robinson asks this honorable Court to reverse and remand this cause for a new trial held in accord with basic constitutional guarantees.

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 BRIEF OF APPELLANT ON THE MERITS to the following:

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So certified, this the 24th day of November, 2008.


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