IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANNY ALLEN WESTBROOK — APPELLANT

V. — NO.2008-KA-00436-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT REGARDING ORAL ARGUMENT

In accordance with M.R.A.P. Rule 34(b), the Appellant requests oral argument in this case before the Court. This case involves an issue of first impression with this Court, that is, the interpretation of the 2006 amendments to Miss. Code Ann. §97-3-15. This is case involves a complicated set of conflicting facts. Appellant believes that oral argument will greatly aid the Court in deciding the issues.

REPLY ARGUMENT OF THE APPELLANT

ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF GUILTY OF MURDER, OR IN THE ALTERNATIVE, WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In its brief, the State commented, "It is not clear, though, whether the Appellant actually intends to say that the evidence was insufficient to support the verdict, or whether his claim is that the trial court erred in failing to instruct the jury on these provisions in Section 97-3-15 *sua sponte*." Appellee Brief at 6. In case there is any confusion, Westbrook clearly asserts that the evidence was definitely insufficient to support the verdict of murder. The State failed to show that the killing was done "without the authority of law" - an essential element to the crime of murder under Miss. Code Ann. §97-3-19(1) (Rev 2004). This is especially so, given the law provided Westbrook with a presumption of that he acted in reasonable fear of death or serious bodily harm. Miss. Code Ann. §97-3-15(3) (Rev. 2006). It is significant to note that jury was never fully instructed on the law. The two points can not be separated.

Furthermore, the State suggests Westbrook has attempted to "adumbrate" the fact that Westbrook's counsel failed to ask for an instruction on justifiable homicide. Westbrook would point out that he has never tried to hide or obscure the fact no such instruction was requested by his trial counsel. That was the point of arguing ineffective assistance of counsel in Issue 5, as well as arguing that the trial judge abused his discretion in not instructing the jury, *sua sponte*, on this issue. Westbrook fails to see how that fact was not fully apparent from his brief.

Regarding the sufficiency of the evidence, the State casually dismisses the applicability of Miss. Code Ann. §97-3-15(3), commonly known as the Castle Doctrine, arguing there was no forced entry into the business's parking lot. Appellee Brief at 8. Westbrook would submit that Sharpe's return to the business after having been ejected was sufficient to show unlawful and forcible entry. The State's interpretation would render the statute unavailable to all business owners anytime the time a business was open to the public. It must be remembered that that incident took place in the business parking lot immediately outside of the appellant's place of employment. Section 97-3-15(3) specifically states the presumption that defensive force was reasonable extends to "the immediate premises of such business or place of employment." It is simply illogical that the Legislature would have allowed such a defense with a requirement that the entry into a business parking lot must be "forcible."

In fact, other states where similar statutory language is used, have extended the protection into a business parking lot. Whether or not the entrance into the parking lot was

forcible simply does not play into the discussion. In *State v. Smith*, 376 So.2d 261, 262 (Fla. 3d DCA 1979), the manager of the café was entitled to the protection, even when the disagreement spilled out into the business parking lot. The manager actually grabbed a gun and followed the man he was trying to eject outside. The Florida court held the manager had no duty to retreat in the protection of his business. *Id.* Florida's statute also states uses the language that the person against whom defensive force is used must be "in the process of unlawfully and forcefully entering." Fla. Stat. Ann. § 776.013(1)(a) (2006).

Unlike Mississippi which codified protection of a place of business, Florida courts extended their Castle Doctrine to include a place of business by case law. See *State v. James*, 867 So.2d 414, 417 (Fla. 3d DCA 2003)("We have ... extended the 'castle doctrine' privilege to employees in their place of employment, while lawfully engaged in their occupations."), and *Redondo v. State*, 380 So.2d 1107, 1110 (Fla. 3d DCA 1980), *partially vacated on other grounds*, 403 So.2d 954 (Fla. 1981) ("Indeed, the prevailing rule throughout the country among those jurisdictions which, like Florida, have adopted a general duty to retreat doctrine is that a defendant is under no duty to retreat prior to using deadly force in self-defense when violently attacked in his home or business premises, which includes inter alia his place of employment while lawfully engaged in his occupation."). Adopting the State's argument, this Court would have to conclude that Westbrook had to wait until Sharpe actually forcibly opened the bar's door before Westbrook could confront him. That was clearly not the Legislature's intent.

South Carolina has come to the same conclusion. South Carolina also enacted the Castle Doctrine in 2006. Like Florida, the statute has similar language to the Mississippi's Statute:

> Section 16-11-440. Presumption of reasonable fear of imminent peril when using deadly force against another unlawfully entering residence, occupied vehicle or place of business.
>
> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process *of unlawfully and forcefully entering, or has unlawfully and forcibly entered* a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. §16-11-440 (2006) [emphasis added].

Even before these amended protections took place, the South Carolina Supreme Court has always maintained a duty not to retreat from a place of business.

> We agree with Appellant's argument that under the fourth element he was under no duty to retreat because the incident occurred in the parking lot of his place of business. There is no duty to retreat where an attack occurs in one's home or place of business. We have followed the general rule that the absence of a duty to retreat also extends to the curtilage of a home. See also 40 Am.Jur.2d § 168 ("curtilage" includes outbuildings, yard around dwelling, garden). We now clarify the law that, consistent with this "curtilage rule," the absence of a duty to retreat on one's place of business applies to the business parking lot. See [*State v.*]*Brooks*, 252 S.C. 504, 167 S.E.2d 307 [(S.C. 1969)] (noting if proprietor was exercising good faith attempt to eject and was

assaulted, he would have no duty to retreat; shooting occurred in parking lot outside tavern).

State v. Wiggins, 500 S.E.2d 489, 494 n.15 (S.C. 1998).

Reading the case law and the statutes[1] together, one could certainly defend the curtilage of one's home or the parking lot of one's business without waiting for a unlawful *and* forcible entry. Again, the statute is meaningless if there must be a forcible entrance into a parking lot or a home garden. Certainly the Mississippi Legislature's intent was to expand the right of self-defense, not limit it. Home and business owners should at least have the same protections as those in Florida in South Carolina with similar statues.

The State is also quick to decide that the facts of this case "hardly demonstrate" the application of the Castle Doctrine. Appellee Brief at 8. However, with all due respect, that is not a call the Attorney General's Office gets to make. Whether or not Westbrook acted in defense of his place of employment is a decision for the jury. *Williams v. State*, 803 So.2d 1159 (¶16) (Miss. 2001). Westbrook was entitled to a directed verdict of not guilty of murder under the law. At the very least, he is entitled to a new trial with a jury properly instructed on the law regarding defense of a place of employment.

The State also comments that, "While it may or may not be that the so - called 'Castle Doctrine' expands somewhat the law of defense of self, another and habitation, it is certainly no authority that mere trespassers may be killed out of hand," citing *Atterberry v. State*, 261

---

[1] It should be noted that Louisiana takes a different view, but their statute specifically limits the right of self-defense to when an accused is *inside* a place of business. Therefore, its requirement for an unlawful and forcible entry makes sense. LSA-R.S. 14:20 (2006).

So.2d 467 (Miss. 1972). Appellee Brief at 8. However, *Atterberry* is not on point given the state of the law today. *Atterberry* stands from the proposition that if one deliberately kills another to prevent a mere trespass on property, other than one's habitation, it is murder. *Id.* at 470. The Castle Doctrine grants business owners and business employees that same right to protect one's business that common law gave to protect one's home. Atterberry shot the victim on her premises, not inside her house. *Id.* at 468. Westbrook would assert that *Atterberry* has been superceded by the statute creating the Castle Doctrine. Section 97-3-15(3) certainly gives homeowners the presumption of self-defense regarding the immediate premises of their homes.

The State also puts much stock into Westbrook's state of mind, apparently arguing that if a person has premeditation to kill, (a fact the appellant does not concede he did), he can not invoke the Castle Doctrine. The statute has no such requirement. The State invites this Court to compare the case of *Lester v. State*, 862 So.2d 582 (Miss.App. 2004). However, there is a significant difference in *Lester* and the case at bar. Although Lester was convicted of murder after shooting a trespasser who refused to leave his house, the jury was fully instructed on the applicable law regarding self-defense and the right of an individual to protect his home from unauthorized trespassers. Westbrook's jury had no such instructions. Furthermore, in a case like this, manslaughter should be the only crime the jury considers even though "the accused is mad and is bearing ill will toward his adversary at the time of killing...." *Bangren v. State*, 17 So.2d 599, 600 (Miss. 1944), *overruled on other grounds*, *Ferrell v. State*, 733 So.2d 788, 791 (Miss. 1999).

It is interesting to note that the *Ferrell* case went a step further and noted that the jury not only should be limited to a possible manslaughter conviction, but must be specifically instructed that the crime is either manslaughter or the accused is not guilty, a step beyond the mandate of *Bangren*. *Ferrell*, 733 So.2d at ¶13. Westbrook submits that the court still had the obligation under *Bangren* and *Ferrell* to limit the possible verdict to manslaughter. Westbrook should receive a new trial with the jury being instructed that the only issue is manslaughter or acquittal.

Finally, the State asserts that there was "no evidence at all that the Appellant killed the victim in the course of resisting an attempt by the victim to kill him or commit some felony upon him" to support a manslaughter instruction under Miss. Code Ann. §97-3-31 (1972). However, the State fails to read the entire statute. As discussed in depth in Issue 2 of Westbrook's original brief, §97-3-31 states that a killing is manslaughter, not only when the decedent attempts to kill or commit a felony upon him, but includes resisting "any unlawful act." When Sharpe drove back into the bar's parking lot, he was clearly a trespasser. The State failed to prove otherwise, never attempting to show Sharpe had a right to be where he was at the time of the incident. At the most, this killing was manslaughter.

ISSUE NO. 3: WHETHER THE JURY INSTRUCTIONS REGARDING CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER WERE CONFUSING TO THE JURY OR IMPROPERLY STATED THE LAW.

In the brief of the Appellee, the State comments that "the Appellant does not appear to get round to explaining, exactly, what the trial court should have instructed the jury about beyond those instructions it did grant." Appellee Brief at 17. However, Westbrook clearly

stated in his original brief that the trial court should have instructed the jury that depraved heart murder "requires a higher degree of recklessness from which malice or deliberate design might be implied." Appellant Brief at 25, citing *Staten v. State*, 989 So.2d 938 (¶14) (Miss. App. 2008), and *Windham v. State*, 602 So.2d 798, 801 (Miss. 1992). Otherwise, there is no meaningful difference between depraved heart murder and culpable negligence manslaughter.

ISSUE NO. 5: IN THE ALTERNATIVE, WHETHER THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Finally, and briefly, the Appellee asserts that it is difficult to see how Westbrook was prejudiced by his counsel's failure to request instructions on the different theories of manslaughter and, on defense of his business under the Castle Doctrine. Appellee Brief at 30. The standard for determining prejudice in *Strickland* is straightforward.

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694 (1984).

Certainly there can be no confidence that the jury would have come back with a murder verdict had they been instructed on the legal presumption that Westbrook reasonably feared death or serious bodily harm in defense of his business under Miss. Code Ann. §97-3-15(3), or manslaughter under at least Miss. Code Ann. §97-3-31 or §97-3-33. Given the facts of this case, Westbrook is surely entitled to a new trial.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, Danny Allen Westbrook, contends that he is entitled to a new trial. The appellant would stand on his original brief in support of issues not responded to in this reply brief.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Danny Allen Westbrook, Appellant

By: _____
Leslie S. Lee

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 1st day of April, 2008, mailed a true and correct copy of the above and foregoing Reply Brief Of Appellant, by United States mail, postage paid, to the following:

Honorable Lawrence P. Bourgeois, Jr.
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney
P.O. Drawer 1180
Gulfport, MS 39502

Honorable John R. Henry
Special Assistant Attorney General
P. O. Box 220
Jackson MS 39205

Mr. Danny Allen Westbrook, MDOC# 132067
Wilkinson County Correctional Facility
P.O. Box 1079
Woodville, MS 39669

So certified, this the 1st day of April, 2009.

Leslie S. Lee