IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONREGUS FLOWERS — APPELLANT

VS. — NO. 2008-KA-0609-COA

STATE OF MISSISSIPPI — APPELLEE

# BRIEF OF THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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## BRIEF FOR THE APPELLEE

## STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the First Judicial District of Hinds County, Mississippi, wherein a jury convicted Ronregus Flowers of house burglary, Mississippi Code Annotated section 97-17-23. CP 21; T 219. Flowers received ten years in the custody of the Mississippi Department of Corrections, with two years post release supervision. CP 24; T 233. Upon denial of post trial motions, Flowers appealed. CP 29, 30; T 239.

## STATEMENT OF THE ISSUES

I. Whether the trial court erred in excluding Flower's statements to Deputy Butler?

II. Whether the trial court erred in rejecting Jury Instruction D-7 on necessity?

III. Whether the trial court erred in permitting cross examination of Flowers regarding another unrelated crime?

## STATEMENT OF THE FACTS

While standing under the carport of his home on the morning of December 15, 2003, James Funches (Funches) saw Ronregus Flowers (Flowers) walk up to Alvera Jones' front door and knock. T. 114-116. Funches testified that after no one answered, Flowers broke in the front door and entered the house. T. 115-18. Funches knew Flowers from the neighborhood. T. 118 Funches told his mother to call police about a break-in at Mrs. Jones' home, retrieved his hunting rifle and stood waiting by his truck. Id. Funches testified that when Flowers came out of the house, Flowers had items in his hands. *Id.* When he realized Funches was standing there, Flowers threw everything back and then laid down on the porch. T. 119.

Mrs. Alvera Jones testified that when she left for work that morning she had Christmas gifts in the front bedroom, a room with no bed. T. 129-130; 132; 137; Ex. 3; 4; 5. Upon returning home after the break-in, Mrs. Jones said some bags of gifts from the front bedroom were pulled into the living room and some were in the hallway. T. 134; 136;137. Boxes had been torn open and crushed or busted open. *Id.* A mirror that had been hanging in the hallway when she left the house was found on the floor with the reflective side facing the wall. T. 130

Deputy William L. Butler testified he was dispatched to the scene on a report of some neighbors holding a burglary suspect at gunpoint. T. 140-141. Upon arrival, he saw a man later identified as Flowers laid out on the front porch with his upper body outside the front door and lower body inside the house. T. 141-42. Butler observed wood splinters and pieces of the door frame on the floor. T. 142; 149-50; Ex. 7. Butler handcuffed Flowers and transported him to his vehicle. T. 142.

Flowers testified in his own defense. Flowers testified he ran to Jones' house and broke in because he was hiding from someone trying to shoot him. T. 156. Flowers had seen someone he did not know, pointing a gun at him from some bushes. T. 156; 159. He ran up to the Jones house, knocked on the door and when no one answered, he broke in the front door to use the telephone but did not see one. T. 157; 159. He went through the living room, into a hallway and a small bedroom. T. 157. Flowers testified he stumbled over gifts and packages in the bedroom trying to get under a small bed. On cross examination, when confronted with the fact there was no bed in the room, Flowers said it was "a bed or table or something." T. 157; 170. Flowers testified he removed a mirror in the hallway and placed in on the floor with the reflective side against the wall because someone was standing at the window trying to shoot at him and could see him in the mirror. T. 157; 158; 161;171. Flowers testified he told Deputy Butler and the other officer about breaking in the house and someone wanting to kill him.T.144-45.

## SUMMARY OF THE ARGUMENT

Flowers' conviction and sentence should be affirmed. The exclusion of testimony offered by Flowers as to statements he made to officers immediately after his arrest was not error. See *Tigner v. State*, 478 So.2d 293 (Miss., 1985). Any testimony by Deputy Butler, that Flowers told him Flowers broke into the house because someone was trying to shoot him, was inadmissible as hearsay.

The trial court properly denied Instruction D-7 on necessity. Evidence in the case at bar does not justify a necessity instruction.

Flowers cannot complain on appeal that the trial judge erred by allowing the prosecution to cross examine him as to who would be trying to shoot him and why. The issue was initiated by

defense counsel during direct examination of Flowers.

## ARGUMENT

### I. The trial court did not err in excluding Flowers' statements to Deputy Butler.

In his first assignment of error, Flowers contends the trial court erred in excluding statements Flowers made to Deputy Butler as being hearsay. Flowers argues the court failed to properly apply M.R.E. 801 to find that his statements were not hearsay and therefore admissible. According to the defense, extrajudicial statements by an accused are always admissible.

The record of Deputy Butler's examination contains no testimony that

> Mr. Flowers immediately admitted to Deputy Butler breaking in, but entreated Butler to get him away from the scene because "[s]omeone is trying to to kill me. That is why I went in the house."T.l 144-145; *Exhibit 8 for Identification.* At that point, Butler advised Mr. Flowers to quit talking and the deputy Mirandized Mr. Flowers. T. 142; 145.

as asserted in Appellant's Brief at page 3; 4. Flowers' trial counsel made an informal proffer of what Butler's testimony would be, but it was not testified to as indicated in Appellant's Statement of Facts.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. M.R.E. Rule 801(c). Under M.R.E. Rule 802, hearsay is not admissible unless provided by law. M.R.E. 801(d)(2)(A) provides a statement is not hearsay if it is offered *against a party* and is his own statement. Flowers contends the statements at issue are admissible under Rule 801 (d)(2)(A).

M.R.E. Rule 801 (d)(2)(A) is not applicable in the case *sub judice*. Flowers' statements were self serving statements he offered into evidence and were not being offered against him. The

defendant is barred from introducing a statement made by the defendant immediately after the crime, if it is self-serving, and if the State refuses to use any of it. *Ward v. State*, 935 So.2d 1047 ¶ 18 (Miss.App.,2005); *Nicholson ex rel. Gollott v. State*, 672 So.2d 744, 754 (Miss.1996).

Any statements made by Flowers to Butler regarding someone trying to shoot him that were not offered in evidence by the State would serve Flower's argument at trial that his actions of breaking into the house were justified by necessity. Therefore, the statements were self-serving and properly excluded by the trial judge.

Flowers incorrectly relies on *Cobb v. State*, 734 So.2d 182, 185 (Miss.Ct.App. 1999) in support of his argument. *Cobb* is not authoritative in the case *sub judice* because Cobb's confession to police was offered by the prosecution against Cobb. Cobb's statements were offered against a party opponent and therefore not considered hearsay under Rule 801(d)(2)(A) and not admissible.

Flowers also cites *Crane v. Kentucky*, 476 U.S. 683 (1986) in support of his argument that the trial court's exclusion of the statements deprived him of a "meaningful opportunity to present a complete defense." *Crane* is not authoritative; it deals with admission of an accused's confession by the prosecution and subsequent denial of the defendant's right to cross examine witnesses on the manner in which the confession was obtained. Again, the accused's statements were offered in evidence by the prosecution not the defendant.

In *Tigner v. State*, 478 So.2d 293, 296 (Miss.,1985) the Mississippi Supreme Court stated "It is the general rule, almost unanimously followed, that where the State introduces evidence of statements made by the defendant immediately after a crime, defendant is entitled to bring out the whole of his statement. In the absence of the State using the evidence in the record, the defendant cannot introduce any part on his behalf." *Collins v. State*, 148 Miss. 250, 114 So. 480 (1927); *Davis*

*v. State*, 230 Miss. 183, 92 So.2d 359 (1957).

Flowers also argues the statements to Butler were excited utterances under M.R.E. 803(2) and therefore admissible as an exception to hearsay. The State contends the statements do not qualify as excited utterances and therefore are not excepted from the hearsay rules. However, even if this Court held the statements were an exception to the hearsay rule, they would still be inadmissible because they are self serving statements offered by a party, not against a party.

The trial court did not deny Flowers the opportunity to present a defense of necessity, of hiding to avoid being killed, by full cross-examination of Deputy Butler. There is no merit to this argument.

**II. The trial court properly rejected Jury Instruction D-7 on necessity.**

In his next assignment of error, Flowers claims that he was entitled to a jury instruction presenting his entire theory of the case, i.e., that Flowers had no alternative but to enter Mrs. Jones' home in order to avoid being shot by an unknown assailant.

"In determining whether error lies in the manner in which the jury was instructed, the various requested instructions are not considered in isolation. Rather, the instructions actually given must be read as a whole." *Sheffield v. State*, 844 So.2d 519, 524(¶ 12) (Miss.Ct.App.2003) (citing *Turner v. State*, 721 So.2d 642, 648(¶ 21) (Miss.1998)). No reversible error will be found if the instructions fairly announce the law of the case and create no injustice. *Johnson v. State*, 908 So.2d 758, 764(¶ 20) (Miss.2005) (citing *Williams v. State*, 863 So.2d 63, 65(¶ 5) (Miss.Ct.App.2003)). "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, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Byrom v.*

*State*, 863 So.2d 836, 874 (¶ 129) (Miss.2003) (quoting *Heidel v. State*, 587 So.2d 835, 842 (Miss.1991)). Jury instructions are within the sound discretion of the trial court. *Goodin v. State*, 787 So.2d 639, 657(¶ 60) (Miss.2001).

In *Stodghill v. State*, 892 So.2d 236, 238 (Miss.2005), the Mississippi Supreme Court held for a defendant to prove that he had an objective need to commit a crime excusable by the defense of necessity, the defendant must prove the following: (1) the act charged was done to prevent a significant evil, (2) there was no adequate alternative, and (3) the harm caused was not disproportionate to the harm avoided. When a defendant attempts to prove an affirmative defense, such as necessity, it is his burden to prove that such circumstances exist so as to substantiate such a defense. *Id.*

In the case *sub judice*, Flowers fails in his burden of proof. Other than Flowers' testimony that an unknown assailant, for unknown reasons, was trying to shoot him, there is nothing in the record which supports his claim. Flowers testified that while running from the unknown assailant he passed an abandoned trailer next door to the Jones' home. When asked on cross examination why he didn't hide in the abandoned trailer, he responded that he didn't "think the abandoned trailer would have been appropriate I don't think so." T. 158. Flowers could have also sought help at Funches' house across the street instead of breaking in the Jones' home where he knew no one was home. T. 169

Evidence in the case at bar does not justify a necessity instruction, as Flowers' failed to prove that someone was trying to shoot him and that there was no adequate alternative to breaking in the home.

## III. The trial court did not err in permitting cross examination of Flowers regarding another crime.

Flowers next contends that the trial judge committed reversible error by allowing the prosecution to cross examine Flowers regarding criminal conduct in a separate indictment robbery The State contends the issue was initiated by defense counsel during Flowers' direct examination and the State was entitled to question Flowers as to who would be trying to shoot him and why. T.157-159.

It is well-settled that a defendant who "opens the door" to a particular issue runs the risk that collateral, irrelevant, or otherwise damaging evidence may come in on cross-examination. *Martin v. State*, 970 So.2d 723, 26 (Miss.,2007) (citing *Murphy v. State*, 453 So.2d 1290, 1294) (Miss.1980)). A defendant cannot complain on appeal concerning evidence that he himself brought out at trial. *Fleming v. State*, 604 So.2d 280, 289 (Miss.1992).

Prior to commencement of testimony, defense counsel made a *motion in limine* to exclude any mention of the strong armed robbery indictment pending against Flowers. T.101 When the trial court addressed Appellant's motion, the State did not confess the matter as claimed, the State acknowledged that it did not intend to get into any of the matters unless and until it became relevant. T.101; 102 . The trial court ruled "Any prior convictions or any prior arrests, the state does not need to get into those matters unless the door is opened by the defendant." *Id.*

When Flowers claimed it was necessary for him to break into a home because someone was trying to shoot him it became relevant as to who and why. The questions were invited by the defense so Flowers cannot complain now on appeal that the trial judge erred in allowing the State to continue this line of questioning. T. 160-173. This issue is without merit.

## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict and sentence of the trial court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Lisa L. Blount, Speical Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 7th day of May, 2009.

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