IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00609-COA

RONREGUS FLOWERS — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

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

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# REPLY BY APPELLANT

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## ARGUMENT

### I. The trial judge erred in ruling that statements of Mr. Flowers to Deputy Butler were inadmissible hearsay, as the court thus impermissibly violated his fundamental right to present a defense as guaranteed by both federal and state constitutions;

While Mr. Flowers acknowledges the traditional rule against offering the statement of the accused unless first offered by the state, that rule does not here apply.

A comparison of the testimony of Deputy Butler with the narrative report (*Exhibit 8 for Identification*, attached as Appendix "A") shows that Deputy Butler was orally examined as to virtually the entire report, with the sole exception of the statement made by Mr. Flowers. In essence, the state had already put into evidence everything that transpired *but* the words uttered by Mr. Flowers, "I don't care just get me away from here someone is trying to kill me. That is why I went into the house." *Exhibit 8 for Identification* (Appendix "A"). Mr. Flowers, according to Butler, had a subjective fear he would be killed if he stayed out in the open. The trial court could have easily confined Butler's testimony to the fact that Mr. Flowers expressed fear he was in danger of being shot, particularly since the prosecution used his testimony to bring before the jury evidence of another charge for which he was not on trial. [*See* Issue. III].

The net effect of the trial court's action was to essentially strip from Mr. Flowers his "meaningful opportunity to mount a complete defense," as cited in *Crane v. Kentucky,* 476 U.S. 683 (1986). With all due respect for learned counsel for the state, Mr. Flowers vehemently disagrees with the characterization of *Crane v.*

*Kentucky* as "not authoritative" on the critical, constitutional issue regarding the individual's capability to defend against the majesty of the state, with all its attendant resources. Humbly, Mr. Flowers asks this Court to also review the more recent case of *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) in which the U.S. Supreme Court, in a unanimous opinion, reversed a capital murder conviction because of the very principle argued here. At issue in *Holmes* was application of an evidentiary rule that once the state presented strong forensic evidence of culpability of the accused, the defendant is then barred from presenting proof of a third party's responsibility for the crime. The Court, in reversing Holmes' conviction, recited as authority the constitutional mandate from *Crane* and other cases that state evidentiary rules and procedures may not be so applied as to cripple a defendant's capability to defend.

Further, Mr. Flowers disagrees with the esteemed state's counsel reasoning that because a statement is self-serving, it automatically comes within the ambit of the rule excluding it from evidence.

Merely because a statement is exculpatory or self-serving is not the basis for excluding it from evidence.

In the case of *Slaydon v. State*, 58 So. 977 (Miss. 1912), the Court reversed the conviction of Slaydon for larceny of a steer in part because the trial court refused to permit Slaydon to put on evidence that before the alleged larceny, Slaydon had talked to several people about the animal, describing it as an ox he had purchased from a Louisiana cattle dealer. Slaydon felt testimony of his acts prior to

the alleged theft would negate the notion that he stole the steer; the trial court excluded the evidence as self-serving.

"In the instant case, to exclude the evidence offered was to assume, first the guilt of the accused; and, second, that he did and said these things in order to furnish an exoneration of himself of the crime then contemplated," the Court wrote, quoting Wigmore. *Id.* 102 Miss. 101; 58 So. at 978. "The enforcement of such a rule is to deny the defendant the benefit of the presumption of innocence." *Id.* Granted, the *Slaydon* ruling applied to evidence of acts before the alleged crime occurred, but here, the trial court could easily have restricted the cross-examination of Butler to relating Mr. Flowers' of his fear of being killed so long as he was in the open. These were not necessarily statements in his own interest in the sense of the term, but pleas by Mr. Flowers to the deputy to get him inside due to his fear of being killed.

Nevertheless, even if the statement failed to qualify under the arguments made above, Mr. Flowers' statements qualify as exceptions to the rule against the use of hearsay as a present sense impression under MISS.R.EVID. 803(1) or under MISS.R.EVID. 803(2) as an excited utterance.

Mr. Flowers would argue that the present sense impression under MISS.R.EVID. 803(1) applies. To be admissible as a present sense impression the statement must meet the three requirements set out in MISS.R.EVID. 803(1):

(1) A statement must be made while the event or condition is being perceived by the declarant or "immediately thereafter;"

(2) The declarant must "perceive" the event or condition;

(3) The statement must describe or explain the event or condition. *Peterson v. State*, 518 So.2d 632, 640 (Miss. 1987). [internal citations omitted].

In *Peterson*, the Mississippi Supreme Court affirmed the admission of hearsay testimony by a Mississippi Bureau of Narcotics agent as to what she heard a second agent say as the second agent completed an undercover drug purchase (an audio recording was made). The Court found that the second agent was participating in the undercover drug buy and relating the statements transmitted on the audio wire - statements which came in through testimony of the first agent who was listening. *Id.* Here, Mr. Flowers was clearly still in the grip of events as they were happening and obviously witnessed them as they happened.

The rationale for the exception embodied in MISS.R.EVID. 803(2) "is that one caught in a sudden, startling event lacks the capacity for calm reflection, tending to make such statements reliable," this Court wrote in *Bankston v. State*, 907 So.2d 966, 969 (¶ 6) (Miss.Ct.App.2005). "When evaluating whether a statement will qualify as an excited utterance, "it is important that there has been no intervening matter to eliminate the state of excitement and call into question the reliability of the utterance." *Id.* [internal citations omitted]. In this instance, Deputy Butler had just arrived on the scene and Mr. Flowers, clearly under the stress of still-unfolding events, sought protection from the deputy.

Under at least three different theories, these statements are admissible and were vital to establishing the defense of necessity for Mr. Flowers in the break of Jones' home. To exclude them was an abuse of discretion prejudicial to the right of Mr. Flowers' opportunity to mount a complete defense, a right secured to him under both state and federal constitutions. Therefore, Mr. Flowers respectfully asks this honorable Court to reverse his conviction and remand this matter for a new trial.

## II. The trial court abused its discretion in rejecting Jury Instruction D-7 on necessity, depriving Mr. Flowers of his fundamental right to present his theory of defense to the jury;

Most respectfully, Mr. Flowers submits that learned counsel for the state fails to perceive the correct legal standard by which trial judges are to consider requests for jury instructions.

> Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court. Where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error. *Hester v. State,* 602 So.2d 869 (Miss. 1992)

"The general rule is that where there is serious doubt as to whether a requested instruction should be given, doubt should ordinarily be resolved in favor of the accused." *Lenard v. State,* 552 So.2d 93, 96 (Miss. 1989), citing *Wadford v. State,* 385 So.2d 951, 955 (Miss. 1980). The trial court is required to view the evidence in the light most favorable to the accused. *Anderson v. State,* 571 So.2d 961, 964 (Miss. 1990). In evaluating the requested jury instruction, the court is to consider all reasonable favorable inferences which may be drawn in favor of the accused and consider also that the jury may not be required to believe *any* evidence offered by the state. *Fairchild v. State,* 459 So.2d 793, 801 (Miss. 1984).

Clearly, in this case, the trial court failed to apply the proper legal standard in evaluating the jury instruction Mr. Flowers sought on the defense of necessity.

The disputed instruction is D-7, reproduced here again for the convenience of the Court:

> The Court instructs the jury that the defense of necessity allows conduct which is ordinarily criminal to be excused where a person reasonably believes that he is in danger of physical harm. The defense has three elements: *(1) the act charged must have been done to prevent a significant evil; (2) there must have been no adequate alternative; and (3) the harm caused must not have been disproportionate to the harm avoided.*
>
> If you believe from the evidence in this case that:
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> (1) Ronregus Flowers entered the home of Alvera Jones in order to avoid physical harm to his person;
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> (2) Ronregus Flowers had no alternative to enter the home; and
>
> (3) Any harm caused by his entry into the home did not outweigh the physical harm he avoided to his person;
>
> Then you should find Ronregus Flowers Not guilty. [emphasis added]

When considered by the proper legal standard required for evaluation of jury instructions, Mr. Flowers' testimony clearly met the test. The "significant evil" he sought to avoid was death by unknown assailant. There was no adequate alternative, as the state suggests. If one is attempting to avoid detection and to find a place which might offer a telephone to alert authorities, one does *not* cross into an open street or to a mobile home that appears grown up with bushes. Further, there was no showing that Mr. Flowers saw Funchess across the street from the home of Alvera Jones. Finally, according to the testimony of Mr. Flowers, the harm he avoided was death, surely not disproportionate to breaking into the home of Ms. Jones under what to Mr. Flowers were desperate circumstances.

The state's reliance on *Stodghill v. State*, 892 So.2d 236 (Miss. 2005) is misplaced, for in that case, the Supreme Court found that Stodghill had reasonable alternatives to driving while intoxicated. Stodghill could have had his daughter and son-in-law drive his sick girlfriend to the hospital. Further, *Stodghill* deals specifically with application of the defense of necessity when driving while intoxicated. "In light of the grave danger posed to the public by drunken drivers, we are reluctant to extend the defense of necessity in all but the most exceptional circumstances of driving under the influence of alcohol." *Id.* 892 So. 2d at 239 (¶11).

Mr. Flowers would reiterate that the prosecutor in this case was also clearly ignorant of the correct legal standard by which the trial court must consider jury instructions. (By the Prosecutor: "Of course the jury would have to find that there was no reasonable alternative to the defendant breaking into Ms. Jones' house in order for a necessity instruction to be given. I don't believe 12 reasonable people would come anywhere close to agreeing to that, Your Honor." T. 182. The trial court subsequently denied the requested instruction. T. 184, RE 13).

Again, the standard for granting a jury instruction is *not* belief beyond a reasonable doubt. *Hester* recites the proper standard and it was prejudicial error fatal to the cause of Mr. Flowers to deny him the one instruction which presented his defense of necessity.

Therefore, this cause should be reversed and remanded for a new trial for failure to grant Mr. Flowers the sole jury instruction which embodied his defense, for which an evidentiary basis existed and which was not covered by any other instructions.

### III. The trial court erred in permitting the prosecution to cross-examine Mr. Flowers regarding another unrelated crime to the irredeemable prejudice of Mr. Flowers.

It is disingenuous in the extreme to claim that the accused "opened the door" to questions about another charge when the trial court plainly restricted any testimony to validate the assertion by Mr. Flowers that he was fleeing from an assailant he did not know. Consideration of this issue is closely intertwined with evaluation of the error claimed in Issue I.

State's counsel also engages in a game of semantics. The following exchange occurred shortly before trial when Mr. Flowers sought an *ore tenus Motion in Limine* to prevent any mention of a strong-armed robbery indictment then pending.

THE COURT: You don't intend to do that, do you?

MR. DOLEAC: No, sir, I don't.

T. 102.

The prosecutor made no conditions upon his agreement with Mr. Flowers' motion.

Nevertheless, upon cross-examination the prosecutor asked Mr. Flowers if the reason someone with a gun was after him was because Mr. Flowers had stolen a car from his assailant. T. 161-162. There was no mention of such a robbery in this record.

"The general rule in Mississippi is that in criminal trials, with certain exceptions, proof of other criminal conduct by the accused is inadmissible." *Darby v. State*, 538 So.2d 1168 (Miss. 1987). Darby was accused of assaulting one Richardson, who was engaged in food stamp fraud. Darby's counsel sought to

introduce evidence that Darby was a police informant, whereupon the prosecutor sought to question Darby about previous crimes for which he had not been convicted. The Court found that this ruling denied Darby due process of law by preventing him from presenting a complete defense. *Id.*, 538 So.2d 1173.

Darby also assigned as error a ruling by the trial court sustaining the prosecutor's objection to a question by defense counsel as to whether Darby had used a gun in an auto burglary, another crime not involved in his aggravated assault trial. "Rule 608(b) Mississippi Rules of Evidence provides that specific instances of conduct of a witness are admissible on cross-examination of a witness if probative of truthfulness or untruthfulness *but only where the character trait of truthfulness or untruthfulness* is being explored. This was not the case here. The defense counsel was simply attempting to impeach the witness' testimony." *Id.*, at 1174. Since Darby's character trait for truthfulness was not in issue, the Court held there was no error to sustaining the prosecutor's objection.

In *Spraggins v. State*, 606 So.2d 592 (Miss. 1992), the Mississippi Supreme Court reversed the sale of controlled substance conviction of Spraggins due to the prosecution's questions about a prior conviction, prior arrests and other bad acts, all in violation of MISS.R.EVID. 404(b). The Court contrasted the situation of *Quinn v. State*, 479 So.2d 706 (Miss. 1985), in which the accused not only denied involvement in the charged sale of marijuana, but having *ever* sold marijuana, which the Court found constituted "opening the door" to the questioning by the State. *Id.*, at 596-597. The Court held Spraggins "went no where near the door" as had Quinn and cited

the case of *Stewart v. State*, 596 So.2d 851, at 853 (Miss. 1992): "[t]he prosecution's impeachment privilege may not exceed the invitation extended."

Mr. Flowers would also respectfully point out that under MISS.R.EVID. 609, "[t]his Court has held many times that this examination must be limited to convictions and even then the details of the crime cannot be inquired into." *Alison v. State*, 274 So.2d 678, 682 (Miss. 1973). It is clear from this record that this prosecutor substantially deviated from the Court's standard in cross-examination of Mr. Flowers, who opened no doors during direct through which the prosecution should have been permitted to walk.

The prosecutor sought to question Mr. Flowers about another charge for which he had not been convicted, ostensibly to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." MISS.R. EVID. 404(b). The prosecutor also told the court the questions were invited because Mr. Flowers offered a defense of necessity which he contended made relevant questions regarding other separately charged acts. T. 164.

The problem, however, was the complete lack of evidence in this case regarding efforts by Mr. Flowers to forcibly take away another individual's car. T. 156.

| ☐ CHECK HERE IF SUPPLEMENTARY | NARRATIVE | EVENT# 03-1215-17 | CASE NO |
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59. DESCRIBE IN DETAIL HOW OFFENSE WAS COMMITTED (If Other is used in Check Off, Explain Here.)

ON MONDAY 12-15-03 AT 1511HRS THIS DEPUTY WAS DISPATCHED TO 1084 EUGENE ST. FOR A BURGLARY SUSPECT THAT WAS BEING HELD WITH A GUN. UPON ARRIVAL AT SCENE THIS DEPUTY SAW A BLACK MALE LYING ON THE FRONT PORCH HALF IN AND HALF OUT OF THE HOUSE. THE COMPLAINANT'S SON-IN-LAW WAS IN THE FRONT YARD ALONG WITH SEVERAL OTHER MEN. UPON EXITING THE PATROL VEHICLE THIS DEPUTY PLACED THE SUSPECT IN CUSTODY. THIS DEPUTY WAS ESCORTING THE SUSPECT TO THE PATROL CAR WHEN THE SUSPECT STARTED TO TALK. HE STARTED TO SAY SOMETHING THAT WOULD INCRIMINATE HIM. THIS DEPUTY STOPPED HIM AND READ HIM HIS MIRANDA WARNING. THIS WAS DONE AT 1514HRS. THE SUSPECT CONTINUED TO SAY" I DID IT JUST GET ME AWAY FROM HERE." THE SUSPECT CONTINUED TO MAKE THOSE STATEMENTS. THIS DEPUTY ADVISED HIM THAT HE NEEDED TO REMAIN SILENT. HE STATED " I DON'T CARE JUST GET ME AWAY FROM HERE SOMEONE IS TRYING TO KILL ME. THAT IS WHY I WENT INTO THE HOUSE". THIS DEPUTY SPOKE TO THE SON-IN-LAW, KEITH WILLIAMS, WHO STATED WHEN HE WALKED UP THE SUSPECT WAS ON THE GROUND AT THE FRONT DOOR. THIS DEPUTY ALSO TALKED TO JAMES EARL FUNCHESS WHO SAW THE SUSPECT PUT A SHOULDER TO THE FRONT DOOR AND GO IN THE HOUSE. HE ALSO HELD THE SUSPECT UNTIL LAW ENFORCEMENT ARRIVED. THE FRONT DOOR AROUND THE DOOR KNOB WAS BUSTED WITH WOOD PIECES ON THE FLOOR. THE SUSPECT WAS ORDERED TO COME OUT OF THE HOUSE BY JAMES FUNCHESS AND THE SUSPECT COMPLIED. THE SUSPECT WAS THEN TRANSPORTED TO RAYMOND DETENTION CENTER AND BOOKED IN FOR HOUSE BURGLARY.

E. O. R.

| SUSPECT VEHICLE INFORMATION. | MAKE | MODEL | YEAR | TAG # | STATE | EXP |
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CODES TO BE USED: B=Both Stolen & Recovered D=Damaged E=Evidence F=Found L=Lost R=Recovered S=Stolen

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DISPOSITION OF PROPERTY ☐ Evidence Office ☐ R Y D C Evidence Box ☐ Other

| 60 SUPERVISOR'S SIGNATURE | 61 PID | 62 OFFICER'S SIGNATURE | 63 PID |
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| | | D. L. Foster | 142 |

Appendix "A."