LATOYA DOMINIQUE ROBINSON — APPELLANT

VS. — NO. 2008-KA-1689-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from a judgement of conviction in the Circuit Court of Amite County, Mississippi, wherein Latoya Dominique Robinson was convicted of the aggravated assault of Christina Bonds. CP. 28. The court sentenced Robinson to fifteen (15) years in the custody of the Mississippi Department of Corrections, five years to serve, and ten years on post release supervision with the first five years on reporting supervision. CP. 29. After the denial of post trial motions, Robinson appealed.

STATEMENT OF THE ISSUES

I. **WHETHER DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE FOR NOT REQUESTING A SELF DEFENSE JURY INSTRUCTION?**

STATEMENT OF THE FACTS

Christina Bonds (Christy) testified she and Kellie Carter (Kellie) picked up Nia Barnes (Nia) and two other girls in Kellie's car. T. 48; 49. Christy testified that upon arriving at a friend's house, Latoya Dominique Robinson (Appellant) and a group of girls started "...saying what all they was going to do to us. We were standing outside." T. 50. Christy testified Appellant said into the crowd of girls that "she was going to put – she wasn't fighting; she was going to put us in a body bag, and

After stopping the car, Druscilla Robinson (Druscilla), a girl in Appellant's group, walked toward the car, Nia got and the two started fighting a few feet away from the car. T. 57. Neither Nia or Druscilla had a weapon. T. 58. When Christy saw Appellant walking toward the fight involving her niece Nia, Christy stepped in between the Appellant and Nia. T. 52-54; 67-68. Christy grabbed Appellant's arm to stop her from hitting Nia. *Id.* Appellant then swung across Christy's face and cut her. *Id.* Christy started fighting with Appellant and then Kellie joined in to assist Christy. T. 68-69. Kellie testified Appellant hit her in the head with a bottle. T. 69 Nia testified that Christy was cut and bleeding and Kellie was hit in the eye and bleeding. T. 79-80.

After the fight broke up Christy and Kelly sought medical care at the hospital. T. 69. Christy received fifty-three stitches in her face. T. 55; 56. No one in Christy's group knew what Appellant used to cut Christy but the hospital staff told her she was cut with either a razor blade or box cutter. *Id.*

Sasha Robinson, called by the defense, testified she, Druscilla and Appellant were walking on the sidewalk when the other group of girls "came through, and they jumped out. They had – one of them had something wrapped up in a paper towel. And [Appellant] and two other girls got to fighting, and Druscilla and one other girl got to fighting." T. 89. Sasha first testified that she did not know which girl had the white paper towel with an unknown object wrapped in it but on cross examination she remembered that it was Nia. T. 91-92; 95. Sasha also testified Appellant did not have a knife or razor on her. T. 91.

Appellant testified in her own defense. She claimed Christy started fighting her and then Kellie hit her in the head with a gin bottle. T. 102. According to Appellant, while tussling over a bottle of gin, she grabbed a paper towel on the back of the car to defend herself. T. 102. Appellant testified the paper towel contained a razor that she used to cut Christy. T. 102-04; 106. Appellant testified she was not bleeding as a result of the blow with the bottle but she did cut her feet. T. 107. Appellant admitted on cross examination that when she gave a statement to the sheriff the day following the fight, she did not mention the white paper towel. T. 106.

SUMMARY OF THE ARGUMENT

Appellant received effective assistance of counsel; the judgment of the Amite County Circuit Court should be affirmed. To establish that her trial counsel was ineffective in failing to request a jury instruction, Appellant must demonstrate both error in failing to receive the instruction and prejudice to her defense. She proved neither. A jury instruction on self-defense was not supported by the record. However, even if the record did warrant a self defense instruction, there was overwhelming evidence of guilt. There was no showing of either inadequate representation, nor of any prejudice to Appellant's defense as a result of the actions of her trial counsel.

ARGUMENT

PROPOSITION

ROBINSON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

In *Burns v. State*, 813 So.2d 668, 673 (Miss.2001), the Mississippi Supreme Court looked

> The standard for determining if a defendant received effective assistance of counsel is well settled. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. *Id.* at 687, 104 S.Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984) (citing *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052). The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Id.*

In her sole assignment of error Appellant alleges that her trial counsel offered ineffective assistance of counsel by failing to request a self-defense jury instruction. The State submits that there is a lack of evidence in support of a self-defense instruction. Failure to request such an instruction is therefore not a basis for a claim of ineffective assistance of counsel. While an accused has a fundamental right to have a jury instruction that presents her theory of defense, the instruction must find support in the evidence. *Heidel v. State,* 587 So. 2d 835, 842 (Miss. 1991). *Murphy v. State,* 566 So. 2d 1201, 1206 (Miss. 1990). The record at hand does not support self defense on Appellant's part.

In the case *sub judice*, there was a fight going on between two girls, Nia and Druscilla. Christy intervened when Appellant was about to attack Nia. T. 52-55; 68. Even though Nia, Druscilla and Christy were not armed, Appellant used a deadly weapon to cut and disfigure Christy. T. 58; 74; 80; 82. The defense testimony that there was a weapon rolled up in the white paper towel sitting on top of the car was not plausible. Sasha, Druscilla and Appellant all testified they could not see what was in the paper towel. Christy, Kellie and Nia had been eating pizza in the car, so it

armed thereby necessitating Appellant pulling out a deadly weapon for self-defense . T.60. 75; 81; 83.

> While a person has the right to repel force with force, even to the extent of shooting an assailant in self defense, a person may only justify such act as self-defense if he has good reason to believe that he was then and there in danger, real or apparent, of being done great bodily harm or losing his life at the hands of the assailant; such danger must reasonably appear to be imminent and impending, and mere fear, apprehension or belief alone does not justify a plea of self defense. *Johnson v. State*, 723 So.2d 1205 (Miss.App.,1998).

Self-defense could only be used if it was reasonably necessary under the circumstances. Such was not the case here.

Christy testified "[Druscilla] was walking up to the car, and her and my niece, they start to fight. And I saw [Appellant] coming toward my niece." T. 52. She went on to testify:

Q. Okay. Did you say anything to [Appellant] as she approached your niece?
A. I just stepped, like – and they was – I stepped in the way –
Q. All right.
A. –you may as well say.
Q. Did you get between the [Appellant] and your niece?
A. Yes, ma'am.
Q. All right. And did you say anything to the [Appellant] at that point?
A. No, ma'am. [Appellant] just still – she just cut me.
Q. What did you do?
A. I hit her.
Q. I'm sorry?
A. I hit her.
Q. Was that before or after she cut you?
A. After.
Q. Okay. What did you do before she cut you?
A. I just stepped in the way--
Q. Okay.
A. – you know, trying to block my niece, cause I knew she was coming to hit her. But I didn't know she had nothing in her hand.

....

In *Burnside v. State*, 882 So.2d 212 (Miss.,2004), a simple assault prosecution, the Mississippi Supreme Court held the defense counsel's performance was not deficient because he failed to request a self-defense jury instruction, as the facts did not warrant the instruction. While a defendant is entitled to have a jury instruction that presents her theory of the case, the instruction must be supported by the evidence. *Heidel v. State*, 587 So. 2d 835, 842 (Miss. 1991).

There was no credible testimony that Christy, Kellie, Nia or Druscilla were armed with any type weapon which would justify Appellant using a deadly weapon in self-defense. Based on the testimony of the witnesses, Appellant fails to demonstrate that she was entitled to a self defense jury instruction or that she was prejudiced in her defense of the case, as required under *Strickland.* An appellant has the duty to demonstrate both error in failing to receive the instruction and the prejudice to the defense. See *King v. State*, 857 So.2d 702, 719 (Miss.2003); *McGowan v. State*, 706 So.2d 231, 243 (Miss.1997).

Citing *Davis v. State*, 743 So.2d 326, 334 (Miss.1999), the Mississippi Supreme Court held:

> To determine the second prong of prejudice to the defense, the standard is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991).... There is no constitutional right then to errorless counsel. *Cabello v. State,* 524 So.2d 313, 315 (Miss.1988).... If the post-conviction application fails on either of the Strickland prongs, the proceedings end. *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1987).

Appellee submits the record simply does not support by a reasonable probability that, but for defense counsel's failure to request a self defense instruction, the jury would not have convicted Robinson. There was overwhelming evidence of guilt and presenting a self defense instruction would not have mattered. Therefore, Appellee failed in establishing prejudice to her defense, the

Appellant's defense as a result of the actions of her trial counsel. The verdict of the Amite County Circuit Court should be affirmed.

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 Circuit Court of Amite County.

Respectfully submitted,

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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 14TH day of May, 2009.

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