IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAWONDA SHEPHARD — APPELLANT

VS. — NO. 2009-KA-0112-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 the Circuit Court of Bolivar County and the judgment of conviction of Lawonda Shepherd for aggravated assault. Defendant Shepherd was indicted for aggravated assault in violation of *Miss. Code Ann.* ¶ 97-3-7(2)(b). (Indictment c.p. 4). After a trial by jury, the Honorable Alfred B. Smith III, the jury found defendant guilty. (Jury Verdict, c.p.38). Subsequently, defendant was sentenced to 15 years in the custody of the Mississippi Department of Corrections, 5 years suspended with 10 years to serve. (Sentencing order, c.p. 46-49).

After denial of post-trial motions this instant appeal was timely noticed. (C.p. 52).

STATEMENT OF FACTS

Defendant and her co-defendant were at a party they both left the party to gather more refreshments. Co-defendant was confronted by an acquaintance with whom he had 'issues' and had previously encountered the day before. Words were exchanged. Heated words, threats and name calling were, apparently, coming from all sides. Co-defendant turned and asked this defendant Lawonda Shepherd to give him the gun. Or, hand me the .38. Which she did. Co-defendant Kirkham shot his victim in the chest sending the man to the hospital.

Co-defendant Kirkham admitted the shooting but that it was in self-defense. Defendant Shepherd, disavowed any involvement, only physical proximity claiming vicarious self-defense.

The jury heard all the facts, testimony, conflicting stories and spin offered by the State and defense witnesses. After full and proper instruction from the court the jury retired to deliberate. After a little less then two hours consideration of the evidence the jury found both defendant's guilty beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

Issue I.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR SEVERANCE.

The motion for severance was made after the trial had commenced and the State presented its case-in-chief. Then based upon the testimony of co-defendant Kirkham from the stand defendant Shepherd moved for severance . The trial court denied the motion for severance. Kirkham's testimony did not shift the guilt to Shepherd, nor did it exonerate his own actions. No need for severance.

Issue II.

THE JURY WAS PROPERLY INSTRUCTED ON SELF-DEFENSE.

The jury was given three instructions as to self-defense, the State's burden of proof, and how to weigh the evidence of self-defense.

Issue III.

THE CLAIM OF 'CASTLE DOCTRINE IMMUNITY' IS NOT SUPPORTED BY THE RECORD.

Well, there was no evidence to support a 'Castle Doctrine Immunity' and this issue was never presented, argued or raised in the motion for new trial. Such is procedurally barred and alternatively without merit.

Issue IV.

DEFENDANT HAD EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The specific claims of ineffective assistance are all within the gambit of trial strategy and there is no prejudice claimed by his actions.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR SEVERANCE.

In this initial allegation of trial court error defendant seeks the remedy of remand for retrial. Specifically, defendant claims it was error for the trial court to deny defendant's motion for severance.

It would appear, the motion for severance was made *ore tenus* during trial and after a brief discussion, denied by the trial court. Tr. 200-201.

It is imperative to follow the development of this issue in the record. First, there does not appear to be any motion for severance filed pre-trial. It is clear and undisputed from the record that there was discovery and no claim of any discovery violation.

Looking to the record the victim testified about the assault and testified to the confrontation. The victim testified that this defendant, Lawonda Shepherd (a.k.a. 'Cabbage Patch') handed co-defendant Kirkham a gun. Tr.67-68 (direct) & tr. 83-84 (cross by co-defendant's counsel) & 92-98 (cross by defendant's counsel). Additionally, co-defendant's pre-trial statement (D-S, admitted for ID, pg. 109), was never admitted in to evidence.

Further, the claimed error in denial of severance (during trial) was ***not*** raised in defendant's motion for new trial. (Shepherd's Motion for New Trial, C.p.43-45).

Consequently it is the position of the State this claim of error is was waived and is procedurally barred from review. *Goldman v. State* 9 So.3d 394 ¶¶ 20-23(Miss.App. 2008).

Without waiving any procedural bar to review and arguing in the alternative, this issue is also without merit factually and legally.

As authority counsel for defendant not cites this court to *Walker v. State,* 430 So.2d 418, 421 (Miss. 1983). It is worth noting that as summarized in defendant's brief there is some essential language missing from the opinion of *Walker.* Specifically, the holding in *Walker* is limited to ***"...introduction of pre-trial admissions, statement, or confession given by a co-defendant which implicates the accused,...".***

> Our reflection convinces us that in a joint trial where an accused moves for a severance because the prosecution intends to introduce a pre-trial admission, statement, or confession given by a codefendant which implicates the accused, the trial judge should require the state to elect between a joint trial in which the statement is excluded, a joint trial in which the statement is admitted, but the portion implicating the accused is deleted, or agree to a severance. This election would also exclude the state from cross-examining a codefendant who takes the stand in his own defense about any pre-trial statement insofar as it implicated the accused
>
> *Walker v. State,* 430 So.2d 418, 421 (Miss. 1983)

Sub judice co-defendant Kirkham testified, and was subject to cross-examination, by defendant Shepherd's trial counsel. (Tr. 202, *et seq.*). Additionally,

there was no attempt to introduce any pre-trial statements, confession, or admission of co-defendant Kirkham that implicated this defendant.

The trial court clearly recognized this distinction and denied the mid-trial motion for severance.

> ¶ 11. "Defendants [who are] jointly indicted for a felony are not entitled to separate trials as a matter of right." Id. (11) (citing Price v. State, 336 So.2d 1311, 1312 (Miss.1976)). The trial judge may grant a motion to sever if he determines that it is necessary to promote a fair determination of a co-defendant's guilt or innocence. Id. (12) (citing Carter v. State, 799 So.2d 40, 44(13) (Miss.2001)). In determining whether to grant a motion to sever, the trial court should consider: (1) whether one co-defendant's testimony tends to exonerate himself by placing blame on the other co-defendant, and (2) whether the weight of the evidence goes more to the guilt of one co-defendant than the other. Id. at 159(15) (citing Duckworth v. State, 477 So.2d 935, 937 (Miss.1985)).
>
> *Miller v. State*, 17 So.3d 1109 (Miss.App. 2009).

Looking to co-defendant Kirkham's testimony – at trial – the testimony did not exonerate Kirkham. That is the difference from pre-trial admissions, confession that 'implicate' co-defendant. Severance regarding testimony elicited at trial is slightly different looking to whether it exonerates or goes more to the guilt of the other.

The testimony does not exonerate Kirkham nor does it assert 'more guilt' on Shepherd.

There being no abuse of discretion the trial court was not in error by denying the motion for severance.

No relief should be granted on this allegation of trial court error.

Issue II.

THE JURY WAS PROPERLY INSTRUCTED ON SELF-DEFENSE.

As counsel for defendant Shepherd has noted the jury was instructed on self-defense as to both defendants. More specifically, C.p 33 is the elements instruction wherein it instructs the jury that in order to find either defendant guilty of aggravated assault the State must prove – beyond a reasonable doubt – that the actions of defendant(s) was "...not in necessary self-defense. Next there was the instruction on page 35 of the Clerk's papers that it was for the jury to determine the reasonableness of the circumstances for either defendant as to a self-defense claim. And, finally instruction memorialized in the Clerk's papers at page 36, regarding the amount of force necessary in a self-defense claim.

Looking to the record there was no objection to or denial of any instruction regarding self-defense and this defendant. Additionally, there is no objection to the granting, denial or inaccuracy of any self-defense instruction in the motion for new trial. (Shepherd's Motion for New Trial, C.p.43-45).

> ¶ 22. We first note that Williams failed to contemporaneously object and failed to raise this issue in his motion for a new trial; thus, he has waived this issue for purposes of appellate review. Ahmad v. State, 603 So.2d 843, 846-47 (Miss.1992).
>
> Williams v. State, 2010 WL 522686 (Miss.App. 2010)(decided. 2-16-2010).

Without waiving any procedural bar to review and arguing in the alternative, --this issue is also without merit in fact and law.

First, the facts: The jury was adequately instructed on self-defense as to this defendant. (Instructions addressing self-defense applicable to Defendant Shepherd, C.p. pp. 33, 35, 36). The jury was instructed as the State's duty to prove any actions were not in necessary self-defense – before finding defendant guilty of the crime charged. And, the jury was instructed as to how to weigh the evidence when self-defense is claimed.

> ¶ 10. The law is clear that " '[w]hen considering a challenge to a jury instruction on appeal, we do not review the jury instructions in isolation; rather, we *576 read them as a whole to determine if the jury was properly instructed.' " Milano v. State, 790 So.2d 179, 184(¶ 14) (Miss.2001) (quoting Burton ex rel. Bradford v. Barnett, 615 So.2d 580, 583 (Miss.1993)). "[I]f all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." Milano, 790 So.2d at 184(¶ 14). Here, a review of the jury instructions given by the trial court reveals that when read together, the instructions set forth an adequate statement of the law on self-defense. Further, the jury was properly instructed as to the theory of Roberts's case, that is, if it found that he was acting in self-defense or in the defense of others, it was to find him not guilty.
>
> *Roberts v. State,* 911 So.2d 573 (Miss.App. 2005).

Reading all of the given instruction and defendant's defense as argued at trial the jury was adequately and fully instructed on self-defense as to this defendant.

Now as to defendant's belated claim that a Castle Doctrine should have been

given, such is just not factually supported by the testimony. (See co-defendant Kirkham's own testimony at tr. 197 – he was not on his motorcycle..., granted he was on it earlier, 194) – certainly not enough to raise the Castle Doctrine.

Accordingly, this issue is procedurally barred and alternatively without merit. No relief should be granted on this claim of trial court error.

Issue III.
THE CLAIM OF 'CASTLE DOCTRINE IMMUNITY' IS NOT SUPPORTED BY THE RECORD.

Now, again for the first time on appeal, counsel for defendant Shepherd raises a new claim – which, is totally unsupported by the record or citation to same in the brief. Particularly, defendant asserts she is immune from prosecution by the Castle Doctrine.

However, there is no citation to the record where it occurred, there is no substantive citation to authority to support the claim of vicarious immunity.

It is the position of the State this is more similar to the facts and holding of *Westbrook v. State*, 29 So.3d 828, 833 (Miss.App. 2009). The co-defendant Kirkham and the victim were apparently, just engaged in conversation or at the very least an mutually entered argument.

Moreover, since this claim or defense was never raised at trial there is no record to now try and review the validity of such a claim.

> ¶ 70. . . . We conclude, therefore, that [the] failure to affirmatively raise the issue at the trial level works as a bar to our consideration of the issue on appeal under the well-known principle that the primary purpose of an appellate court is to correct erroneous rulings by the trial court and not to rule on alleged errors that were not presented to the trial court for decision in the first instance. Sanders v. State, 678 So.2d 663, 670-71 (Miss.1996). . . .
>
> *Williams v. State,* 2009 WL 4808181 (Miss.App. 2009).

Therefore, this issue is not properly before this court, barred from review and alternatively without merit.

No relief should be granted on this claim of error.

Issue IV.
DEFENDANT HAD EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

In this last claim defendant asserts she had ineffective assistance of trial counsel under the rationale and standard of *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Defendant specifically the three instances raised as substantive claims of error, and with clairvoyance predicts that if claim of procedurally bar due to waiver is claimed the ineffective nature is heightened.

The first claim is that trial counsel failed to introduce co-defendant Kirkham's prior sworn statement. Well, first of all, trial counsel did try to have it introduced (tr. 112), but it was inadmissible. Further, while it was admitted for ID purposes as defense exhibit 2, the copy submitted by the clerk would appear to be *unsworn.* There is no recitation of truth, it is just an unsworn statement.

> ¶ 43. As for the remaining seven assertions made by Neal in support of his claim of ineffective assistance of counsel, none constitutes ineffective assistance. Neal's assertions that defense counsel failed to object to hearsay and jury instructions and failed to make timely objections are all protected as within the realm of trial strategy. "The decision to 'make certain objections fall[s] within the ambit of trial strategy and cannot give rise to an ineffective assistance of counsel claim.' " Spicer v. State, 973 So.2d 184, 203 (Miss.2007) (quoting Powell v. State, 806 So.2d 1069, 1077 (Miss.2001)). Likewise, Neal's claim that defense counsel failed to cross-examine witnesses to develop a post-mortem-decapitation theory falls within the ambit of trial strategy. See Wilcher, 863 So.2d at 762. Neal's allegation that defense counsel was deficient for failing to move for a change of venue does not require reversal. "This Court has held that defense counsel is under no duty to

> attempt to transfer venue; therefore, the decision not to seek a change of venue would fall within the realm of trial strategy." Brawner v. State, 947 So.2d 254, 262 (Miss.2006). Neal's claim that it was error for counsel not to request the lesser-offense manslaughter and mutilation jury instructions fails, as this Court has stated that "trial counsel's decision to not request a jury instruction falls under the category of trial tactics, which are not subject to review." Smiley v. State, 815 So.2d 1140, 1148 (Miss.2002)
>
> *Neal v. State*, 15 So.3d 388 (Miss. 2009).

It is the position of the State the introduction or non-introduction of an unsworn, hearsay statement was trial strategy. Further there is no claim of showing of proof of how this did prejudice her case.

As to the claims of the jury instructions and alternative defenses, again, it is the clear position that such actions are all within the gambit of trial strategy.

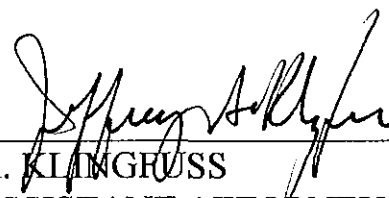
Under rationale of *Neal* there is no merit to this allegation of error and no relief should be granted on this claim of error.

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 verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special 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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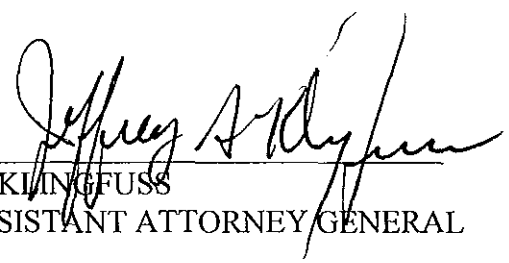
This the 14th day of May, 2010.



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