

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAWONDA SHEPHERD

APPELLANT

v.

No. 2009-KA-00112-COA

STATE OF MISSISSIPPI

APPELLEE

**REPLY BRIEF OF APPELLANT
LAWONDA SHEPHERD**

On Appeal from the
Circuit Court of Bolivar County
No. 2008-022-CR2

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Lawonda Shepherd, *Appellant*
2. Alfred Kirkham, *Appellant*
3. The Honorable Albert B. Smith, III, *Bolivar County Circuit Judge*
4. Ms. Leslie Flint, *Assistant District Attorney, Eleventh Judicial District*
5. Ms. Brenda F. Mitchell, *Assistant District Attorney, Eleventh Judicial District*
6. Mr. Wilbert L. Johnson, *Trial Counsel for Appellant Shepherd*
7. Mr. Stan S. Perkins, *Trial Counsel for Appellant Kirkham*
8. Fabian Curry, *Victim*
9. Andrew B. "Drew" Schimmel, *Lead Appellate Counsel for Appellant Shepherd*
10. David Neil McCarty, *Appellate Counsel for Appellant Shepherd*
11. Mississippi Office of Indigent Appeals
12. Jeffrey A. Klingfuss, *Special Assistant Attorney General*

So CERTIFIED, this the 1st day of July, 2010.

Respectfully submitted,



David Neil McCarty
Miss. Bar No. [REDACTED]
Attorney for Appellant

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Argument.....	1
I. The Trial Should Have Been Severed.....	1
II. Reversal Is Mandated Because the Jury Was Improperly Instructed on the Law of Self-Defense	4
III. Trial Counsel Was Ineffective.....	5
Conclusion	6
Certificate of Service.....	7

TABLE OF AUTHORITIES

Cases

<i>Anderson v. State</i> , 5 So. 3d 1088 (Miss. Ct. App. 2007).....	1
<i>Bailey v. State</i> , 837 So. 2d 228 (Miss. Ct. App. 2003)	4
<i>Brooks v. State</i> , 18 So. 3d 833 (Miss. 2009).....	4
<i>Christmas v. State</i> , 10 So. 3d 413 (Miss. 2009).....	3
<i>Duckworth v. State</i> , 477 So. 2d 935 (Miss. 1985)	2, 3
<i>Jones v. State</i> , 820 So. 2d 687 (Miss. Ct. App. 2000)	4
<i>King v. State</i> , 857 So. 2d 702 (Miss. 2003)	1
<i>Munford, Inc. v. Fleming</i> , 597 So. 2d 1282 (Miss. 1992).....	4
<i>Powers v. State</i> , 883 So. 2d 20 (Miss. 2003)	4
<i>Walker v. State</i> , 430 So. 2d 418 (Miss. 1983).....	1, 3
<i>Woods v. State</i> , 965 So. 2d 725 (Miss. Ct. App. 2007).....	4

Statute

Miss. Code Ann. § 97-3-15.....	4
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REPLY BRIEF OF APPELLANT LAWONDA SHEPHERD

Ms. Shepherd's conviction must be reversed for the reasons set forth in the Appellant's Brief—namely, because her trial should have been severed from her co-defendant, because the jury instructions in her case did not properly reflect the law, and because her counsel was ineffective.

I. The Trial Should Have Been Severed.

Mississippi law is clear that Ms. Shepherd's case should have been severed from her co-defendant at trial. The ultimate question is whether the trial court abused its discretion in refusing to sever the trial. See *King v. State*, 857 So. 2d 702, 716 (Miss. 2003).

The State objects to the severance, focusing on two grounds. First, the State argues that the trial judge was not required to sever the trial because Mr. Kirkham's perjurious statements at trial do not fall within the *Walker* rule. That case requires that in a joint trial where the accused moves for severance because the prosecution intends to introduce a confession given by a co-defendant that implicates the accused, the trial judge should require the State to elect among three options: 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 *redacted*; or to agree to a *severance*. See *Walker v. State*, 430 So. 2d 418, 421 (Miss. 1983). The State reads the case narrowly, arguing that it only applies to pre-trial admissions or confessions.

However, this is too strict a reading. The Court's actual concern is based on the prejudice of the confession, not at what point they arise. The Court of Appeals has clarified that:

In a joint trial where the accused moves for severance because the prosecution intends to introduce a confession given by a co-defendant, implicating the accused, the trial judge should require the State to elect among 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.

Anderson v. State, 5 So. 3d 1088, 1093 (Miss. Ct. App. 2007). In that case, “the trial court redacted the confessions by all three defendants to eliminate any reference to their co-defendants by name.” *Id.* at 1093. Further, the Court then considered at length whether the limiting instructions passed constitutional muster. *Id.* at 1094-97. The fact that the confessions were made prior to trial had nothing to do with the analysis—rather, the focus was on whether the co-defendants were harmed by the confessions. That is the rule that must be applied in this case.

As the *Anderson* case makes clear, a trial court must weigh the possibility of prejudice against a co-defendant when another implicates her with a confession. That is exactly the case at hand, and because the trial court did not instruct the State to elect between one of the three paths in *Walker*, it abused its discretion.

Second, the State primarily relies on one severance case that is not applicable to the facts at hand. See *Duckworth v. State*, 477 So. 2d 935, 937 (Miss. 1985). In that case, “the testimony of [one co-defendant] did not tend to exculpate himself at the expense of [the other two] co-defendants, i.e., there does not appear to be a conflict of interest among the co-defendants.” *Id.* at 937. “Absent a showing of prejudice, there are no grounds to hold that the trial court abused its discretion.” *Id.*

In the case at hand, Ms. Shepherd suffered tremendous prejudice from Mr. Kirkham’s sudden (and perjurious) change in testimony. The jury might have rejected the self-serving testimony of Mr. Curry—but once the undisputed shooter agreed with the victim that Ms. Shepherd played a role in the shooting, her chances of exoneration disappeared. This situation reflects the height of prejudice.

Moreover, Mr. Kirkham attempted to exculpate himself by lassoing his girlfriend in as an accomplice. The entirety of his defense rested on a theory that Mr. Curry had been badgering him for money; that he had previously been attacked by Mr. Curry; and that Mr. Curry

threatened him along with several accomplices. *See Appellant's Brief* at 2-3. Before his sentencing for the shooting, Kirkham had also been convicted of a felony for possession of cocaine with the intent to sell. Tr. at 271. As a convicted felon, he could not possess a gun. His perjury acted to defray the possibility that he committed a felony simply by possessing the gun itself, let alone discharging it at another person.

In the colloquial vernacular, Mr. Kirkham tried to throw Ms. Shepherd under the bus to help himself. Unlike the co-defendant in *Duckworth*, who had nothing to gain from his attack on co-defendants, Mr. Kirkham had a narrow possibility of acquittal if the jury believed that he was an innocent attacked by an enraged Mr. Curry, helped by a fearful girlfriend. Therefore the trial court abused its discretion by refusing to sever the trials.

Whether the *Duckworth* or *Walker* cases are employed, the result is the same—it was an abuse of discretion for the trial court to refuse to sever Ms. Shepherd's trial.

Additionally, the State appears to argue that the issue of severance is somehow procedurally barred because it was not raised in post-trial motions. It is well settled that “to preserve an issue for appeal, a contemporaneous objection must be made.” *Christmas v. State*, 10 So. 3d 413, 421 (Miss. 2009) (internal quotes, alterations, and citation omitted). This is all. The State concedes there was an *ore tenus* motion for severance made during the trial. Brief at 4. Under *Christmas*, this is all that is required. The State simply attempts to create a new procedural bar, and this effort should be disregarded.

Further, the State protests that the motion to sever was not raised prior to trial. However, the perjurious statements of Mr. Kirkham were not introduced until he was on the stand. His change in sworn testimony was the trigger for requesting severance, and as noted above, an *ore tenus* motion was submitted to the trial court. The need to sever the trial became critical only when Mr. Kirkham changed his testimony on the stand.

For these reasons, the trial court abused its discretion in refusing to sever the trial, and Ms. Shepherd's case should be reversed and remanded for a full and independent trial.

II. Reversal Is Mandated Because the Jury Was Improperly Instructed on the Law of Self-Defense.

Because the jury was instructed on superseded law, the Court must reverse Ms. Shepherd's conviction and remand for a new trial.

Simply put, "[j]ury instructions must correctly state the law," and "[t]he granting of an instruction that misstates the law is error." *Jones v. State*, 820 So. 2d 687, 690 (Miss. Ct. App. 2000) (emphasis added, internal citation omitted). As the Mississippi Supreme Court has held, "[i]t is, of course, error to grant a jury instruction that misstates the law applicable to a case." *Munford, Inc. v. Fleming*, 597 So. 2d 1282, 1286 (Miss. 1992).

Jury instructions are only valid if they detail the law accurately. "Proposed jury instructions generally should be granted *if they are correct statements of law*, are supported by the evidence, and are not repetitious." *Brooks v. State*, 18 So. 3d 833, 839 (Miss. 2009) (emphasis added). "A jury instruction must be supported by the evidence and *be a correct statement of the law*." *Bailey v. State*, 837 So. 2d 228, 233 (Miss. Ct. App. 2003) (emphasis added).

The trial court bears the burden of accurately instructing the jury, as "[a] circuit judge has a responsibility to see that the jury is properly instructed." *Woods v. State*, 965 So. 2d 725, 729 (Miss. Ct. App. 2007) (internal quotations and citation omitted). Once given, a jury instruction is a creature of the trial court: "It is of no moment as to whether the prosecution or the defense offers an instruction, for once the jury instruction is granted by the trial judge, *it becomes the court's instruction*." *Powers v. State*, 883 So. 2d 20, 33-34 (Miss. 2003) (emphasis added).

In the case at hand, it cannot be contested that the jury was given instructions based on pre-Castle Doctrine law. *See* Appellant's Brief at 9-12. Those instructions were based on law that was wholly superseded by Miss. Code Ann. § 97-3-15, which had taken effect almost a year before the shooting of Mr. Curry, and long before the trial. The State argues that "the jury was adequately and fully instructed on self-defense," but this is incorrect *as a matter of law*, as the law itself had substantively changed.

Further, to the extent that the Castle Doctrine was not raised as a defense at trial, as the State argues in its brief at 11-12, this is a matter of law encompassed by the trial court's failure to correctly instruct the jury. Because it is the trial court's inherent duty to correctly instruct the jury regarding the law of self-defense, which was substantively changed by the adoption of the Castle Doctrine, any error of law in the jury instructions warrants reversal.

The trial court committed an inherent error by instructing the jury on outdated and superseded law. Ms. Shepherd's conviction must be reversed because the jury was instructed with an incorrect statement of law.

III. Trial Counsel Was Ineffective.

Ms. Shepherd's counsel's performance at trial was deficient, and this ineffectiveness materially prejudiced her.

The State argues vehemently in its brief that all errors claimed on appeal are waived. *See* Appellee's Brief at pages 4, 8, 11. No "clairvoyance" is required to reason that a severance would have materially benefitted Ms. Shepherd's trial; that jury instructions which properly reflected the law would have been a boon to her case; and that the assertion of a statutorily-created defense would have protected her from conviction. *See* Appellant's Brief at 13-15.

The failure of Ms. Shepherd's counsel to further her interests at trial resulted in her conviction, and for this reason the sentence must be vacated, and this matter remanded for a new trial.

CONCLUSION

Once her co-defendant turned on her, Ms. Shepherd's trial should have been severed, or the evidence presented against her greatly redacted. The trial court's refusal to sever the trial was an abuse of discretion which warrants reversal and a new trial.


Additionally, the trial court's erroneous instruction regarding self-defense law is incorrect as a matter of law. Because incorrect instructions warrant reversal, this case should be remanded for a new trial.

Last, because Ms. Shepherd's counsel at trial was deficient, and this deficiency materially prejudiced her, her conviction must be vacated and this case remanded for a new trial.

Filed this the 8th day of February, 2010.

Respectfully Submitted,

Attorney for Appellant



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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery, a true and correct copy of the above and foregoing *Reply Brief of the Appellant*, to the following persons at these addresses:

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THIS, the 1st day of July, 2010.



DAVID NEIL McCARTY, ESQ.