IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GEORGE FORD — APPELLANT

VS. — NO. 2009-KA-0673

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF BOLIVAR COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

REBUTTAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

I. WHETHER THE DEFENDANT WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT REFUSED INSTRUCTION D-5, DEFENDANT'S CASTLE DOCTRINE INSTRUCTION WHICH WAS NOT COVERED IN OTHER INSTRUCTIONS GIVEN BY THE COURT, THUS DENYING DEFENDANT AN INSTRUCTION ON HIS MAIN DEFENSE TO THE CHARGES.

II. WHETHER THE TRIAL COURT ERRED IN REFUSING INSTRUCTION D-6, DEFENDANT'S INSTRUCTION ON ACCIDENT, WHICH WAS ALSO NOT COVERED IN OTHER INSTRUCTIONS.

INTRODUCTION

Perusal of the two prior briefs filed in this cause would lead one to the conclusion that two different cases are being described. The State in its reply brief paints a picture of Mr. Ford being confronted by only three people in the parking lot of the Double Quick and states in footnote one on page two of its brief that although there were numerous other people in the parking lot, they were not involved in this case in any way. The State also declares on page six of its brief that Mr. Ford never asked anyone to get away from his

vehicle, and only shot at Mr. Moore after Moore was racing away from the scene.

The State is obviously describing what occurred on the day in question utilizing the facts in the light most favorable to the jury's finding of guilt as well as the reasonable inferences therefrom which are favorable to the State. This would, in fact, be the proper way to view the evidence if an issue other than the denial of Defendant's requested instructions was under consideration. But where, as here, the issue is whether a criminal defendant is entitled to a jury instruction embodying the theory of his defense, the focus of the inquiry into the evidence is on all the evidence which could provide support for the particular instruction. As stated in *Booze v. State*, 964 So. 2d 1218, 1221 (Miss. App. 2007),

> "In considering whether a proposed jury instruction is supported by the evidence presented 'we must consider all of the evidence in the light most favorable to the party requesting the instruction....That party must also be given the benefit of all favorable inferences that may be reasonably drawn from the evidence.'"
>
> "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 instructions of the court. (Cite omitted). 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, 872 (Miss. 1992).

Accordingly, contrary to the State's depiction of the record, there is sufficient evidence in the record below to support the denied instructions.

REBUTTAL ARGUMENT

The State points to two areas where it claims evidence, which is necessary for a Castle Doctrine instruction to be proper, is lacking. First, the State opines, citing Miss. Code Ann. §97-3-15(3), that Mr. Ford is precluded from such an instruction because he was not occupying the vehicle at the time he shot Mr. Moore. The State's argument misperceives the facts as well as the law on this point. First, there is testimony in the record that Mr. Moore struck George Ford while Ford was seated in his vehicle. (R.V-3, p. 161-162, 189, 192-194, 202, 216, 226-227; V-4, p. 381, 422, 442). Moreover, the State overlooks the language of Miss. Code Ann. §97-3-15(3) which provides that a presumption of reasonable fear arises not only when an attacker is actually in the process of forcibly entering an occupied vehicle, but also allows such presumption if such person "had unlawfully and forcibly entered...[an] occupied vehicle...." (Parenthetical word added.) Clearly the act of Mr. Moore hitting the Defendant while he was in his vehicle constitutes a forcible entry into an occupied vehicle.[1]

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[1] The provisions of Miss. Code Ann. §97-3-15(1)(e) should also be perused. That subsection of the statute states that a killing is justified when committed by a person in resisting any attempt unlawfully...to commit any felony on him..."in any occupied vehicle, in any place of business...or in the immediate premises thereof in which such person shall be". While the clause "immediate premises thereof" appears to be limited to places of employment in Miss. Code Ann. §97-3-15(3), no such limitation appears in Miss. Code Ann. §97-3-15(1)(e). Clearly, Mr. Ford was at the time of the shooting in the immediate premises of his vehicle which was occupied by his five year old son at the time the

Further, contrary to the State's recitation of the facts, there is testimony in the record that at the time the first shot was fired, Mario Moore was not fleeing, but instead was continuing to stand by Mr. Ford's vehicle. (R.V-4, p. 442-443, 445; V-5, p. 451). Contrary to the State's contention that the crowd in the parking lot was not involved in any altercation with Mr. Ford, there is evidence that when he fired the shot, Mr. Ford yelled "get away" to the crowd which had congregated around his vehicle. (R,V-4, p. 440-441, 443, 454-455). This group had previously been making gestures and statements to Mr. Ford which later prompted him to inquire whether they were going to jump on him and fight him. (R.V-3, p. 215, 226; V-4, p. 421, 440-441, 450, 454, 466).

What has been said above directly answers the State's second argument that in order for the Castle Doctrine and its presumption to apply, the person against whom the defensive force was used must be the process of entering an occupied vehicle or already have accomplished that invasion. Proof that Mr. Moore struck Mr. Ford with his fist while Mr. Ford was seated in his vehicle clearly reflects that an unlawful entry was made to a vehicle occupied not only by Mr. Ford but also his five year old son.

Continuing to argue that Mr. Ford's Castle Doctrine instruction was not proper, the State maintains there was "no testimony that anyone was attempting to rob the Appellant or commit any other felony." Though the record is full of testimony that Mr. Gallion, Mr.

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first shot was fired. Clearly, Mr. Ford was also in the immediate premises of a place of business at the time the shot was fired.

Moore and others in the crowd gathering around Mr. Ford's automobile were making statements to Mr. Ford, the record reflects little of what was said. Nevertheless, the record does reflect that not only did Mr. Ford feel threatened, but also that Wytisha Jackson, an employee of the Double Quick, thought the situation was volatile enough to escort Mr. Ford's five year old son to the automobile. (R.V-3, p. 161-163, 202, 227, 262, 282; V-4, p. 381, 382, 426, 431, 437, 440-441, 443; V-5, p. 454-456, 466). Based on what was transpiring with Mr. Gallion, Moore and the group, Mr. Ford feared "these people were trying to rob" him. (R.V-4, p. 443, 476). Also as noted in Mr. Ford's original brief at page 15, the facts were at least sufficient to raise the presumption found in §97-3-15(3) of the Miss. Code of 1972, and thus an instruction as requested by Mr. Ford should have been granted.

Attempting to demolish Mr. Ford's contentions about the failure of the trial court to instruct the jury to consider in determining whether he acted in reasonable self defense, his fear not only of Mario Moore, but also his apprehensions concerning the crowd, the State cites *Gordon v. State*, 9 So. 2d 877 (Miss. 1942), and attempts to distinguish *Wood v. State*, 81 Miss. 408, 33 So. 285 (Miss. 1903). The State points out that the group described in the *Wood* case had weapons whereas the Defendant's sole remaining assailant in *Gordon* was unarmed. The presence or absence of a gun or knife in the hands of any of the members of the group confronting Mr. Ford is a matter of no significance, however, for under the right circumstances an individual's hands alone may constitute a

deadly weapon. See, *Jackson v. State*, 594 So. 2d 20, 24 (Miss. 1992). Further, a jury using its common sense could reasonably conclude that while a single assailant might not injure a lone defendant with his hands, a group of assailants if so inclined could much more easily inflict serious bodily injury even in the absence of pistols, knives or other such implements.

The facts of this case are much more analogous to the *Wood* case. George Ford while being confronted by a group of at least six individuals crowding around his vehicle was struck by Mario Moore. Mr. Ford's comments as revealed in his testimony disclose he was in fear of this crowd. He not only asked them if they were going to jump on him, but also when he fired the shot he told them to get away from his vehicle. By failing to advise the jury that it could assess the danger Mr. Ford perceived by considering not only Mario Moore's actions, but also the actions of the crowd, the court denied Mr. Ford an essential ingredient of his theory of the case which was not otherwise covered in any other instructions. Consequently, the failure to instruct the jury that it could consider Mr. Ford's fear of the group was reversible error. *Hester, supra*, 602 So. 2d at page 873.

CONCLUSION

In failing to address other points argued in the State's brief, Mr. Ford does not concede their correctness. He merely continues to rely on the arguments contained in his original brief.

As demonstrated above, the Castle Doctrine instruction should have been given.

CERTIFICATE OF SERVICE

I, Rabun Jones, attorney for Appellant, George Ford, certify that I have this day mailed, via regular U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Rebuttal Brief of Appellant to Honorable Brenda F. Mitchell, Assistant District Attorney, Post Office Box 848, Cleveland, Mississippi 38732, and Honorable Kenneth L. Thomas, Circuit Court Judge, Post Office Box 548, Cleveland, Mississippi 38732.

This, the 13th day of May, 2010.

RABUN JONES, MSB [redacted]