COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LONNIE YOUNG — APPELANT

VS. — CASE NO. 2010-KA-00240-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record verifies 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 disqualifications or recusal:

1. Lonnie Young----------Appellant
2. Honorable Robert W. Bailey----------Circuit Court Judge, Tenth Judicial District
3. Phillip Weinberg----------Assistant District Attorney
4. Dan Angero----------Assistant District Attorney
5. Aafram Y. Sellers----------Attorney for Appellant, Lonnie Young
6. Brice R. White----------Attorney for Appellant, Lonnie Young

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   i. The presence of surprise or unexpected hostility by the witness was sufficient to allow for impeachment regarding the witness's prior inconsistent statements.

B. **WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S PROFFERRED IMPERFECT SELF-DEFENSE JURY INSTRUCTION (D-4).**

   i. The Appellant's theory of the case, as well as, the evidence produced was sufficient for the proffered jury instruction to be granted.

   ii. The imperfect self-defense instruction should have been granted as a lesser-included offense of murder.

C. **WHETHER THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT.**

D. **WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.**

STATEMENT OF THE CASE

On or about the 13th day of January, 2009, Appellant Lonnie Young (hereafter referred to as Appellant), was indicted by a Wayne County Grand Jury. The indictment charged Appellant with Murder/Manslaughter. (R.6-7). The case was tried on or about January 11, 2009, and the jury found the Appellant guilty of murder. (Tr. 328). The lower court denied the Appellant's Motion for Directed Verdict on the charge Murder/Manslaughter. (R.97-99). On or about January 14, 2010, the lower court sentenced Appellant for the charge of Murder to serve life imprisonment, pursuant to §97-3-19(1) (a) of the Mississippi Code Annotated. (R. 94-95, Tr. 329). The Appellant was also ordered to pay court costs in the amount of $306.00, and upon release of confine Appellant, if he is ever released, the Appellant is required to report within thirty (30) days to the clerk of this court to arrange for the payment or any sum ordered. (R.95).

On or about January 25, 2010, Appellant filed a Motion for a New Trial, or in the Alternative, Judgment Not Withstanding the Verdict. (R.97-98). On or about January 26, 2010, the Court entered its order denying the Appellant's Motion for a New Trial, or in the Alternative, Judgment Not Withstanding the Verdict.(R.100). Appellant filed his Notice of Appeal to the Mississippi Supreme Court on or about February 4, 2010. (R.101).

STATEMENT OF FACTS

On or about January 13, 2009, Appellant was indicted by a Wayne County Grand Jury. The indictment charged Appellant with the Murder/Manslaughter of Otis Lee Morgan which occurred on or about July 4, 2008. (R.6-7). The relevant testimony shows that on the day of July 4, 2008, Appellant walked from his house next door to his mother-in-law's house, where a family reunion was taking place to talk to his wife about being present at the house with the victim, Otis Morgan, whom Appellant suspected was having an affair with his wife. (Tr. 254-255). After requesting that his wife leave the reunion on three separate occasions, Appellant left his mother-in-law's house and returned home. (Id.). Appellant returned to his mother-in-law's house later that evening and approached Otis Morgan in reference to Appellant's wife. (Tr. 255-256). At this time, words were exchanged between the two men and Otis Morgan pulled a gun and Appellant shot Mr. Morgan and left the scene. (Id.). Appellant was later found at his mother's house where he surrendered and was taking into custody. (Tr. 205). When the police arrived there was not a gun at the scene where Mr. Morgan's body was found. However, a few days later, after overhearing a discussion by Otis Morgan's family members and Rosetta Russell at the hospital, officers eventually recovered a nine-millimeter gun, that was later identified as the gun belonging to the victim. (Tr.208-209). Through testimony it was learned that the gun had been in Otis Morgan's possession at the time of the shooting, but that it had been removed by the victim's brother, Styron Morgan, before the officers made it to the scene. (Tr.199 & 208-209).

SUMMARY OF THE ARGUMENT

Appellant was denied the right to a fair trial. Appellant submits that he was prejudiced by the Courts ruling denying his attorney the right to properly impeach a hostile witness, known as, Shakita Harris. Further, Appellant was prejudiced by the Courts denial of Appellant's imperfect self-defense instruction. Additionally, based on the evidence presented at the trial, the trial judge should have granted the motion for a directed verdict and motion for judgment not withstanding the verdict. Furthermore, viewing the evidence in the light most favorable to the State, the trial judge should have granted Appellant's motion for new trial.

Appellant has been seriously prejudiced by the fact that his attorney was not allowed to impeach a hostile witness, and even more so prejudiced by the Courts decision not to allow the Appellant's imperfect self-defense instruction. Appellant submits that this Court should reverse the case for a new trial, or in the alternative, reverse and render the decision in favor of Appellant.

ARGUMENTS OF ISSUES ON APPEAL BY APPELLANT

A. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S ATTORNEY TO IMPEACH A HOSTILE WITNESS

The standard of review of a trial court's admission or exclusion of evidence is abuse of discretion. *Herring v. Poirrier*, 1998-CA-01596-SCT, ¶18 (Miss. 2000). Historically in regards to impeachment, the law in Mississippi prohibits a party from impeaching his own witness. *Moffit v. State*, 456 So.2d 714, 718 (Miss. 1984). However, one such exception is that witnesses may be cross-examined or impeached by the party calling them when they prove to be hostile. *Hall v. State*, 250 Miss (1964) citing *Bove v. State*, 185 Miss. (1939). Before a party may introduce for impeachment purposes an unsworn pretrial inconsistent statement of his own witness, he must show surprise or unexpected hostility. *F.R.E. 607* and *Wilkins v. State*, 603 So. 2d 309 (Miss. 1992).

Once a party has shown that they are surprised and that the witness is hostile, they may then ask the witness if he/she has made contradictory statements out of court, the times, places and circumstances of the statements being described to him/her in detail. *Hall*, 250 Miss. (1964) citing *Bove*, 185 Miss. (1939). In the present case the record reveals that Appellant's attorney laid the proper foundation to impeach the Appellant's witness, Shakita Harris, as a hostile witness.

Appellant's witness, Shakita Harris, was questioned about whether she had told the police that Otis Morgan had a gun in his hand at the time of the shooting. (Tr. 237-238). Shakita Harris testified at trial that she saw the gun in Otis Morgan's hand after he fell to the ground. (Tr. 238). However, in prior statements to the police and the Appellant's attorney, Ms. Harris testified she saw Otis Morgan with a gun in his hand when the shots were fired. (Tr. 238, Tr. Ex. 8). After questioning, the Court granted Appellant an opportunity to play Shakita Harris' tape recorded statement to the police. (Tr. 242-243). However, the Court subsequently, and erroneously, ruled that the prior testimony of Shakita Harris to the police was not impeachable and denied Appellant

an opportunity to further question the witness regarding her prior contradictory statements. Accordingly, Appellant was denied a fair trial by the courts refusal to allow Appellant's attorney an opportunity to impeach Shakita Harris on her prior testimony regarding the victim having a gun in his hand at the time of the shooting.

B. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S PROFFERRED IMPERFECT SELF-DEFENSE JURY INSTRUCTION (D-4A)

1. The Appellant's theory of the case, as well as, the evidence produced was sufficient for the proffered jury instruction to be granted.

Trial Courts are given considerable discretion regarding the instructions' form and substance when jury instructions are challenged on appeal. *Brown v. State*, 99-KA-00058-COA. ¶9 (Miss. Ct. App. 1999). However, both parties are entitled to have jury instructions which lay out their theory of the case; though, the court may refuse instructions that incorrectly state the law, are fairly covered elsewhere in the instructions, or are not supported by the evidence. *Williams v. State*, 05-KA-01674-COA, ¶6 (Miss. Ct. App. 2006). The appellate courts evaluate the evidence from the view of the party requesting the instruction. *Brown*, 768 So. 2d at 315 ¶9. The various requested instructions are not considered in isolation; rather, the instructions actually given must be read as a whole. *Sheffield v. State*, 01-KA-00283-COA, ¶12 (Miss. Ct. App. 2003) *citing Turner v. States*, 97-KA-00605-SCT, ¶21 (Miss. 1998). Furthermore, it is an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. *O'Bryant v. State*, 530 So.2d, 129, 133 (Miss. 1988) *citing Ward v. State*, 479 So.2d 713 (Miss.1985); *Lancaster v. State*, 472 So.2d 363 (Miss. 1985); *Pierce v. State*, 289 So.2d 901 (Miss. 1974); *Chandler v. State*, 05-KA-01321-SCT (Miss. 2006). The Supreme Court has made it very clear that a defendant has the right to present his theory of the case and where the 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. *Chinn v. State*, 05-KA-02231-SCT (Miss. 2007) citing *Phillipson v. State*, 05-KA-02345-SCT (Miss. 2006). Appellant Young submits that his imperfect self-defense instruction, which was submitted as D-4A, was not only supported by the evidence but was also a part of his theory of the case. Accordingly, the courts denial of said instruction was reversible error.

In *Phillips v. State*, 99-KA-01276-SCT, (Miss. 2001), the defendant argued that he should have been allowed to present the jury with an instruction explaining his defense of imperfect self-defense. Id. The Court denied defendants imperfect self-defense instruction based on the fact that there was insufficient evidence presented to warrant an imperfect self-defense instruction. Id. at 1038. The Court's reasoning for denying the instruction was that there was no evidence presented that the victim neither had a weapon nor was there any evidence presented that the victim was using deadly force. Id. However, in the present case, it is clear from the evidence that the victim had a gun in his possession at the time of the shooting, which was removed from the scene but later recovered by the police. (Tr. 208). Additionally, Appellant testified that the only reason he pulled a weapon and shot the victim was because he saw the victim pull a gun. (Tr. 257). It is clear from the evidence that Appellant saw a weapon in the victim's hand when he fired his weapon. The state's witness, Rosetta Russell testified on cross-examination that Otis Morgan's gun was tucked in his jean pocket and not visible prior to the shooting. (Tr. 110). According to this testimony, the only logical way Appellant could have known that Otis Morgan had a gun at the time of the shooting was because Otis Morgan pulled the gun from his pants pocket during the confrontation. Thus, the present case is clearly distinguishable from *Phillips* based on the fact that the victim in this case had a weapon. Accordingly, there was more than sufficient evidence to warrant the granting of the proffered imperfect self-defense instruction.

In *Smith v. State*, 08-KA-00375-COA (Miss.App. 2009), a case which is factually analogous to the present case, the defendant argued that by denying his right to a heat-of-passion jury instruction he was not being allowed to argue his theory of the case. Id. In *Smith*, the defendant, after having an altercation with the victim on the previous day, approached the victim a few days later at a local restaurant and shot the victim after believing that the victim was reaching for a gun. Id at p.13. Additionally, in *Smith*, a witness testified that he never saw the victim make any sudden movements. Id. However, a gun was discovered in the glove compartment of the victim's vehicle during a subsequent search. Id. In *Smith*, the Court of Appeals, ruling that a heat of passion instruction was not warranted considering that the altercation had occurred the previous day, nevertheless, stated that the defendant had not been denied his right to a manslaughter instruction considering that the defendant had been granted an imperfect self defense instruction. Id. Again, the facts in the present case are similar to those in *Smith*. The appellant approached the victim, words were exchanged, and Appellant saw the victim pull a gun and as a result pulled his gun and shot the victim. (Tr. 256-257). Unlike, in *Smith*, the Appellant in this case was erroneously denied his proposed imperfect self-defense instruction. Accordingly, as the court in *Smith*, based on similar facts, properly granted an imperfect self-defense instruction the same should have been granted in this case. Consequently, the Appellant was denied the right to argue his theory of the case, as well as denied a lesser included offense manslaughter instruction.

Again, it is well-settled under Mississippi law, that it is an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. The fact that the Appellant testified that he acted in self-defense, along with evidence showing that the victim had a gun in his possession at the time of the shooting is without a doubt substantial

enough to warrant the granting of the jury instruction in question. However, in the present case the jury was not given the opportunity, due to the Court's improper denial of Appellant's proffered imperfect self-defense instruction.

2. The imperfect self-defense instruction should have been allowed considering that it was a lesser-included offense of murder.

Lesser-included offense instructions should be given if there is an evidentiary basis in the record that would permit a jury to rationally find the defendant guilty of the lesser offense and to acquit him of the greater offense. *Welch v. state*, 566 So.2d 680, 684 (Miss.1990). In reviewing the propriety of such an instruction, a lesser-included offense instruction should be granted unless the trial judge and ultimately this Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser-included offense. *McGowan v. State*, 541 So.2d 1027, 1028 (Miss.1989). Imperfect self-defense is considered a defense theory which based on the heat of passion statute, where "an intentional killing may be considered manslaughter if done without malice but under a bona find (but unfounded) belief that it was necessary to prevent death or great bodily harm." *Smiley v. State*, 00-KA-00606-SCT (Miss. 2002) quoting *Wade v. State*, 97-CT-00504-SCT, ¶12 (Miss.1999), *Cook v. State*, 467 So. 2d 637, 642 (Miss. 1991). Thus, in the present case, an imperfect self-defense instruction should have been allowed as a lesser-included offense manslaughter instruction.

In *Chandler*, the defendant armed himself prior to meeting the victim, followed the victim to the woods, fired the gun three times and eventually shot the victim without any evidence of the victim having a gun or testimony by the defendant that he acted in self-defense. *Chandler*, 05-KA-013210-SCT, ¶ 26-28 (2006). Yet, the defendant in *Chandler* argued that he should have been allowed a lesser-included culpable negligence instruction. Id at 360. The trial court in *Chandler* denied

the culpable negligence instruction, stating that the evidence did not warrant such an instruction. Id at 361. However, the trial court granted an imperfect self-defense instruction, and in its ruling on appeal the Supreme Court stated that "the trial court in *Chandler* was fair, and that this (imperfect self-defense) instruction adequately informed the jury of the lesser included offense of manslaughter". Id at 362. Unlike in *Chandler*, in the present case it is clear from the testimony that words were exchanged between the Appellant and the victim prior to the shooting. (Tr. 256-257). Furthermore, it is without question, that the victim had a gun in his possession at the time of the shooting and this gun was visible to the Appellant. As previously stated, the state's witness, Rosetta Russell testified on cross-examination that Otis Morgan's gun was tucked in his jean pocket and not visible prior to the shooting. (Tr. 110). Again, based on this testimony, the only logical way the Appellant could have known that Otis Morgan had a gun at the time of the shooting was because Otis Morgan pulled the gun from his pants pocket during the confrontation. Furthermore, the Appellant testified that the only reason he fired his weapon was in self-defense. (Tr. 281-282). If courts have granted an imperfect self-defense instruction and the granting of said instruction has been found by the Mississippi Supreme Court to be "fair", in a case where there was no evidence of the victim having a gun or being involved in any altercation, clearly and without a doubt, the same instruction should have been granted in the present case based on the facts presented at trial.

Based on the evidence, taken in the light most favorable to the accused, at the time of the shooting, the Appellant was not acting with malice but was under a bona fide belief that shooting the victim was necessary to prevent death or great bodily harm. It was a question for the jury to decide whether this belief was reasonable. Accordingly, the trail court erred in denying the Appellant's proposed imperfect self-defense instruction, as a lesser included offense of manslaughter.

C. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT.

The standard for reviewing the denial of a judgment notwithstanding the verdict is whether or not the evidence was sufficient to warrant such and whether fair-minded jurors could have arrived at the same verdict. White v. State, 98-KP-00844-COA (Miss. App. 2000). [Appellant courts] may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find that the accused was not guilty. Gleeton v. State, 96-KA-01392-SCT (Miss. 1998).

Motions for directed verdict and motions for judgment notwithstanding the verdict are both for the purpose of challenging the legal sufficiency of the evidence. Noe v. State, 616 So.2d 298, 302 (Miss. 1993); McClain v. State, 625 So. 2d 774, 781 (Miss. 1993). See also Strong v. State, 600 So.2d 199, 201 (Miss. 1992).

> The sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [the Appellant's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. McClain, 625 So.2d at 778; Deloach v. State, 811 So.2d 454, 456 (Miss.App. 2001).

In viewing the evidence presented by the State in a light most favorable to the State, the State undoubtedly failed to establish a prima facie case for the crimes murder/manslaughter murder.

Accepting the state's entire case-in-chief as true, there is insufficient evidence to warrant a conviction for Murder/Manslaughter murder. Accordingly the trial judge should have granted Appellant's motion for directed verdict.

D. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

In criminal appeals, a presumption of correctness attaches to any ruling by the trial court. *Carr v. State*, 98-KA-01115-COA (Miss.App. 2000), citing *Hansen v. State*, 592 So.2d 114, 127 (Miss. 1991). A motion for a new trial focuses on the weight of the evidence presented at trial and a judgment notwithstanding the verdict concentrates on the legal sufficiency of the evidence. *Bessent v. State*, 99-KA-00947-SCT (Miss. App. 2001). The standard for reviewing a denial of a new trial goes to the weight of the evidence. *White v. State*, 761 So.2d at 224. Appellant courts reverse only when there has been an abuse of discretion. *McClain v. State*, 625 So.2d 774, 781 (Miss. 1993).

> In determining whether the verdict was against the overwhelming weight of the evidence, [This Court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice will this Court disturb it on appeal. As such, if the verdict is against the overwhelming weight of the evidence, then a new trial is proper.

Dudley v. State, 97-KA-00601-SCT (Miss. 1998), *Todd v. State*, 00-KA-00888-SCT (Miss. 2001), *Crawford v. State*, 98-KA-01578-SCT (Miss. 2000), *Collier v. State*, 96-KA-00775-SCT (Miss. 1998).

The challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. *McClain v. State*, 625 So.2d at 781. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. *Bessent v. State*, 808 So.2d at 986, 987, citing McClain v. State, 625 So.2d 774, 781 (Miss.1993). [Appellant courts] will reverse only for abuse of discretion, and on review accept as true all evidence favorable to the state. *Id.*

The State presented no evidence to support a finding of guilt beyond a reasonable doubt for the crime of Murder. As mentioned earlier in this brief, the State did not present evidence to make

out a prima facie case for the charge of Murder. In balancing the weight of the evidence presented by the State and the defense, the trial judge should have granted a new trial.

Furthermore, in support of this argument, Appellant would direct the Court's attention to the argument and analysis presented in the previously discussed sections of this brief.

In viewing the entire trial in a light most favorable to the State, there is insufficient evidence to warrant conviction for Murder. The overwhelming weight of the credible evidence favors Appellant. The trial judge should have granted Appellant's motion for a new trial. This case should be reversed and remanded back to circuit court for a new trial.

CONCLUSION

Appellant submits that the lower Court erred in denying his attorney the right to properly impeach a hostile witness, known as, Shakita Harris. Additionally, the trial court erred in denying the Appellant's imperfect self-defense instruction. Finally, the circuit court's ruling on the Appellant's motion for directed verdict and motion for judgment notwithstanding the verdict not supported by substantial evidence. Based on the forgoing, Appellant urges this court to reverse the trial court's ruling and render a decision in favor of Appellant.

Respectfully submitted,

LONNIE YOUNG

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CERTIFICATE OF SERVICE

I, Aafram Y. Sellers, attorney for Appellant, Lonnie Young, do hereby certify that we have this day mailed a true and correct copy of the above and foregoing Brief For Appellant to Honorable Robert Walter Bailey, Circuit Court Judge, Tenth Judicial District, P.O. Box 1167, Meridian, MS 39302; Attorney General's Office-Criminal Division, P.O. Box 220, Jackson, Mississippi 39205-0220; Phillip Wienberg and Dan Angero, Assistant District Attorney's of Wayne County, P.O. Box 5163, Meridian, MS 39302; and Lonnie Young, CMCF, G-Building, Bed 36, P.O. Box 88550, Pearl, MS 39288.

Dated this the 3rd day of September, 2010.

AAFRAM Y. SELLERS, MSB#[redacted]

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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CERTIFICATE OF MAILING

I, Aafram Y. Sellers, attorney for Appellant, LONNIE YOUNG, do hereby certify that I this day hand-delivered, the following documents:

1. Original of the Brief of Appellant, Lonnie Young
2. Original of the Record Excerpts for Appellant, Lonnie Young
3. Three (3) Copies of the Brief of Appellant, Lonnie Young
4. Three (3) Copies of the Record Excerpts for Appellant, Lonnie Young

To: Kathy Gillis
Supreme Court Clerk
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Jackson, MS 39205

Respectfully Submitted on this the 3rd day of September, 2010

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