IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-CT-01596-SCT

DANTE O. TAYLOR a/k/a DANTE O'BRYAN TAYLOR a/k/a DANTE O'BRIEN TAYLOR a/k/a DANTE TAYLOR

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	12/20/2016
TRIAL JUDGE:	HON. CHRISTOPHER LOUIS SCHMIDT
TRIAL COURT ATTORNEYS:	LISA D. COLLUMS ANGELA BROUN BLACKWELL WILLIAM CROSBY PARKER MITCHELL LANCE OWEN GLENN F. RISHEL, JR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES HUNTER NOLAN AIKENS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ABBIE EASON KOONCE
DISTRICT ATTORNEY:	JOEL SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	REVERSED AND REMANDED - 01/09/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

BEAM, JUSTICE, FOR THE COURT:

PART I:

¶1. A jury found Dante Taylor guilty of first-degree murder for the death of his uncle

Willie Lee Taylor. Dante appealed, and the Court of Appeals affirmed his conviction and sentence. ***Taylor v. State***, No. 2017-KA-01596-COA, 2018 WL 6326520 (Miss. Ct. App. Dec. 4, 2018), *reh'g denied*, (Miss. Ct. App. Apr. 2, 2019).[1] Dante timely filed a petition for writ of certiorari challenging the Court of Appeals' decision to affirm the trial court's grant of a pre-arming jury instruction. This Court granted certiorari. We hold that the trial court's decision to grant this instruction constituted reversible error. Accordingly, we reverse the decision of the Court of Appeals, and we remand the case to the Circuit Court of Harrison County for a new trial. We further hold that pre-arming instructions will no longer be permitted in criminal trials in this state, as will be discussed in Part II of this opinion.

FACTS AND PROCEDURAL HISTORY

¶2. In September 2014, Dante received a phone call from his sister Tiffany, who told him that their uncle Willie had jumped on her and choked her after an argument about her child's bicycle. Dante told her to call the police and to press charges. Dante's mother, Madeline Adams, testified at trial that she called Dante that night and told him to leave Willie alone. She also testified that Dante told her that Willie had put his hands on a female in the family for the last time and that Dante was "going to do [Willie]" or "punish" Willie.

¶3. At trial, Dante testified that he told Willie he would not let Willie do anything to him and that when he spoke with his mother, his mother told him that Willie was looking for him

[1] Judge Fair authored the opinion, joined by Chief Judge Lee, Presiding Judges Irving and Griffis, and Judges Barnes, Wilson, and Greenlee. Judge Carlton dissented, joined by Judges Westbrooks and Tindell.

and wanted to kill him. Dante said he believed Willie was a real threat, so he obtained a pistol for his protection.

¶4. On the day of the shooting, Dante explained that he went to see his sister because Willie had come to the house and had told her that since she involved the police she would have to move out or else he would come back and "beat the 'F' out of her." When Dante arrived at the house, he explained that he tried to get his sister to leave but that she wanted to wait for the person who was going to get her car for her because she believed Willie would damage her car. Dante explained that he left to get cigarettes because he did not want to wait around at a house at which he knew Willie often was.

¶5. When Dante returned, his sister was still not ready to leave. Dante sat on the trunk of his vehicle to wait. He testified that he "had a feeling" that he needed to turn around. When he did, he saw Willie charging toward him saying, "I've got you're a-s-s now." Dante's testimony was that "that's when I just pulled out my gun and I shot him. I tried to hit him in his leg, but the fact that he is charging me, running up on me, I guess it kind of went up and hit him in the stomach." Dante further explained that he felt like his life was threatened because Willie was bigger than he.

¶6. The jury received instructions on first-degree murder, second-degree murder, imperfect self-defense manslaughter, and self-defense. Additionally, a pre-arming instruction was granted to the State, instruction S-13. The Court of Appeals affirmed, concluding that Dante's self-defense claim was not preempted by the granting of a pre-arming instruction.

STANDARD OF REVIEW

¶7. "Jury instructions are generally within the discretion of the trial court and the settled standard of review is abuse of discretion." ***Moody v. State***, 202 So. 3d 1235, 1236-37 (Miss. 2016) (internal quotation marks omitted) (quoting ***Bailey v. State***, 78 So. 3d 308, 315 (Miss. 2012)). Jury instructions must fairly announce the law of the case and not create an injustice against the defendant. ***Davis v. State***, 18 So. 3d 842, 847 (Miss. 2009) (citing ***Milano v. State***, 790 So. 2d 179, 184 (Miss. 2001)).

DISCUSSION

¶8. This Court has said that "[t]he purpose of a pre-arming instruction is 'to inform the fact-finder that one cannot arm himself in advance when he is not in any physical danger, go forth and provoke a confrontation or difficulty with another, shoot the other, and then attempt to hide behind a smoke screen of self-defense.'" ***Taylor***, 2018 WL 6326520, at *4 (quoting ***Hart v. State***, 637 So. 2d 1329, 1332 (Miss. 1994)). Pre-arming instructions "have been strongly criticized in a long line of Mississippi cases, allowing the instruction only in those extremely rare incidents where the instruction was supported by the evidence." ***Dew v. State***, 748 So. 2d 751, 754 (Miss. 1999).

¶9. In ***Boston v. State***, this Court noted three cases in which such an instruction had been affirmed on appeal. ***Boston v. State***, 234 So. 3d 1231, 1235 (Miss. 2017) (citing ***Hart v. State***, 637 So. 2d 1329 (Miss. 1994); ***Hall v. State***, 420 So. 2d 1381 (Miss. 1982); ***Reid v. State***, 301 So. 2d 561 (Miss. 1974)). And ***Boston*** noted that, "[i]n each case, the record was

uncontradicted that the defendants armed themselves with the intent to initiate a confrontation." ***Id.*** (emphasis added) (citing ***Hart***, 637 So. 2d at 1334; ***Hall***, 420 So. 2d at 1385; ***Reid***, 301 So. 2d at 563).

¶10. In ***Dew***, the Court held that, "[w]hen there is a total lack of evidence, it is not proper for a court to give a pre-arming instruction." ***Dew***, 748 So. 2d at 754 (citing ***Hart***, 637 So. 2d at 1337). The State argues that Dante ignored this part of ***Dew*** and instead focused on the following statement: "When this ambiguity is present, [regarding who is the initial aggressor], a pre-arming instruction is not appropriate." ***Id.*** (citing ***Barnes v. State***, 457 So. 2d 1347, 1349-50 (Miss. 1984)). The State argues that ambiguity was not the Court's concern in ***Barnes*** but rather a lack of evidence, and the ***Dew*** Court incorrectly held that ambiguity precludes the giving of a pre-arming instruction. We find that ***Dew*** and ***Barnes*** specifically speak to the denial of a pre-arming instruction when evidence is conflicting or lacking altogether.

¶11. "The ***Dew*** Court based its conclusion on the principle that '[e]ven if the great weight of evidence against [the defendant] supports a contrary view, [the defendant] is still entitled to present his defense to the jury unimpaired by instructions . . . [that] preclude his right to self-defense.'" ***Boston***, 234 So. 3d at 1234-35 (alterations in original) (quoting ***Dew***, 748 So. 2d at 754). While evidence suggested that Dante armed himself after hearing from his mother that Willie wanted to kill him and after he had exchanged words with Willie, just as much evidence shows that Willie armed himself to protect not only himself but also his sister.

¶12. Here, though, conflicting evidence was adduced regarding whether Dante or Willie was the initial aggressor—even the trial judge deemed the evidence conflicting.

¶13. The Court of Appeals relied on ***Hall v. State***. In ***Hall***, Willie Hall was convicted of aggravated assault after he took a shotgun to the home of the victims when the victims had allegedly been rude to Hall's wife about late rent payments. ***Hall***, 420 So. 2d at 1385-86.

¶14. The Court of Appeals also relied on ***Jobe v. State***, 97 So. 3d 1267 (Miss. Ct. App. 2012), in which the defendant was convicted of aggravating assault for stabbing another person. The defendant became angry when he learned that all of the food grilled by the defendant had been eaten before he had a chance to partake. ***Id.*** at 1269. The defendant grabbed a knife from the kitchen drawer and stated to others that "he would 'handle this.'" ***Id.*** at 1270. The Court of Appeals approved the use of a pre-arming instruction because Jobe was in no physical danger when he grabbed a knife and confronted the persons he thought were responsible for eating the food. ***Id.***

¶15. Here, Dante armed himself with a pistol, went to a place where Willie frequented and lived, and, according to Dante, waited in the driveway for his sister. As the Court of Appeals dissent pointed out, "evidence [was] presented at trial [that] created a conflict as to whether Dante armed himself with the intention of initiating a confrontation with Willie and as to whether Dante was the initial aggressor." ***Taylor***, 2018 WL 6326520, at *35 (Carlton, J., dissenting). The evidence the State adduced suggesting that Dante had armed himself with the intent of confronting Willie does not make clear whether he had done so for his own

protection or whether he was trying to initiate a confrontation. Dante testified that he was at the house to pick up his sister because he believed that Willie was heading in the opposite direction at the time. Dante testified that he heard the night before that Willie wanted to kill him, so he was trying to avoid him.

¶16. When Dante heard from Tiffany the next day that Willie had threatened her, he headed over to her house, believing that Willie was not there but that he was out looking for him. When Dante arrived at Tiffany's house and she was not ready to leave, he left to get cigarettes, choosing not to hang around the house. When he returned, he testified that he was not there for very long before he got a feeling, turned around, and saw Willie charging him. At that point, Dante got off the trunk of his car and started walking toward Willie. Then, Dante pulled his gun and shot Willie.

¶17. As the State acknowledged at trial, there was a conflict in the evidence as to whether Willie was walking toward Dante or charging toward him. The State also acknowledged to the trial court that it was "convoluted" as to who was the "provoker or aggressor." According to a witness for the State, Willie had his fists up and was walking toward Dante. This was the State's claim throughout the case. Dante, however, testified that Willie was the initial aggressor and that when Dante first saw Willie, Willie was charging toward him.

¶18. We reiterate that "[i]t must be quite an overwhelming case on the facts to keep this instruction from being reversible error." ***Pulpus v. State***, 82 Miss. 548, 34 So. 2, 3 (1903); *see also* ***Tate v. State***, 95 Miss. 138, 48 So. 13, 13 (1909) ("We have over and over again

warned circuit judges against giving this sort of charge, and wherever it is given the case will always be reversed, except where this court can say, looking over the completed record, with confidence, that the defendant's guilt is so overwhelmingly manifest that no other verdict than that of guilt could probably be rendered."); ***Lofton v. State***, 79 Miss. 723, 31 So. 420, 421 (1902) (This instruction "can never be proper, save in the few, very, very rare cases where the case is such, on its facts, that a charge can be given embracing all the elements—not part of them, nor nearly all of them—essential to the estoppel.").

¶19. As we see the record, three questions were involved in this case for the jury to determine: whether Dante was guilty of murder, whether he was guilty of manslaughter, or whether the homicide was justifiable. While we find that supportive evidence was presented for each question to go to the jury, we do not find that the evidence overwhelmingly supports one over the other.

¶20. Nor do we find that this is one of those "very, very rare cases" in which the facts embrace all of the so-called elements necessary for a self-defense estoppel instruction. ***Lofton***, 31 So. at 421.

¶21. This Court repeatedly has reversed cases in which a pre-arming instruction failed to include "any consideration of the doctrine of locus penitentiae[.]"[2] ***Pulpus***, 34 So. at 3. In ***Patrick v. State***, this Court reiterated the following:

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[2] [A] chance afforded to a person, by the circumstances, of relinquishing the intention which he has formed to commit a crime, before the perpetration thereof." *Locus poenitentiae* Black's Law Dictionary (4th ed. 1968).

> "It is not every act of aggression or provocation which produces a difficulty, and in the course of which a necessity to kill another arises, that will preclude the slayer from availing himself of the right of self-defense; but it defends upon the character and quality of the act, and in some jurisdictions also upon the intent with which the difficulty was brought on." 21 Cyc. 806.
>
> The unlawful act must be one that is calculated and intended to provoke a difficulty or encounter wherein the accused is afforded the opportunity to and does slay his adversary *without the accused having, in good faith, abandoned his original intent.*

Patrick v. State, 285 So. 2d 165, 169 (Miss. 1973) (emphasis added) (quoting ***Lucas v. State***, 109 Miss. 82, 67 So. 851, 852 (1915)).

¶22. In ***Adams v. State***, this Court reversed a manslaughter conviction in a murder case because a self-defense estoppel instruction "omitted this necessary qualification." ***Adams v. State***, 136 Miss. 298, 101 So. 437, 438 (1924) (citing ***Smith v. State***, 75 Miss. 553, 23 So. 260 (1898)).

¶23. Here, the pre-arming instruction (or self-defense estoppel instruction) likewise contained no such qualification and likely confused the jury. Without this proviso, the instruction had the very real danger of compelling or constraining the jury to believe that whatever happened between Dante and Willie at the time of the shooting was irrelevant or inconsequential because Dante was armed and had voiced vague threats to others that he "was going to do [Willie]" or "punish [Willie]."

¶24. According to the dissent, though, there is no danger of this because the jury was instructed on self-defense and the presumption of innocence. Respectfully, this view disregards what this Court explained in ***Lofton***, an oft-cited opinion dealing with self-defense

estoppel:[3]

> [T]he third instruction for the state *is fatally erroneous*, *in attempting to inform the jury when the defendant would be estopped to plead self-defense, without including all the elements of fact essential to the estoppel. There is irreconcilable conflict between not only the defendant's testimony and the state's, but . . . between the other witnesses for defendant and those for the state*. If the defendant and his witnesses are to be believed, then the killing was in self-defense; and the defendant had a right to have instructions presenting his theory of the case, and ought not to have been deprived of that right by a charge, based on part, only, of the testimony, declaring him to be estopped from pleading self-defense.

Lofton, 31 So. at 420-21 (emphasis added).

¶25. The ***Lofton*** Court then cautioned,

> The old paths are the safe paths. *The juries of the country can be safely trusted to find any defendant guilty whose case is really so bad as to estop him to plead self-defense, without resort-dangerous and unwise-to the metaphysical subtleties necessarily involved in the preparation of a proper charge of that sort.* Once more we repeat (hoping that "here a little and there a little, line upon line, and precept upon precept" may at last do their work) that if the prosecution will ask few and very simple charges, and trust more to the common sense and sound judgment of the juries of the country, they will expose their circuit judges to far less risk of reversal, secure just as many convictions, and have far-very far-fewer cases reversed.

Id. at 421 (emphasis added).

¶26. Here, whether Dante pre-armed with the intent to provoke Willie into a confrontation is not overwhelmingly supported by the evidence; rather, the evidence is conflicting as to Dante's intent throughout. Accordingly, we find that the trial court erred by granting

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[3] *See* ***Lenard v. State***, 552 So. 2d 93, 98 (Miss. 1989) (calling ***Lofton*** "astoundingly prophetic commentary").

instruction S-13 and that Dante is entitled to a new trial.

MAXWELL, JUSTICE, FOR THE COURT:

PART II

¶27. In 1902, this Court sharply chastised the use of the same type of instruction we are now struggling with. This Court described the notion of instructing a jury that a defendant can be "estopped" from pursuing a self-defense theory as "exceedingly unwise" and "dangerous." ***Lofton v. State***, 79 Miss. 723, 31 So. 420, 420-21 (1902). Over the past century, this strong condemnation of pre-arming instructions has continued to manifest itself in a slew of reversals in which defendants were denied self-defense theories. In Part I, Justice Beam highlights the body of cases describing the many problems with these instructions and explains why one should not have been given here. And a majority of this Court agrees with this conclusion.

¶28. Still, past precedent and the majority's truths do not completely snuff out the dissent's view of that oddity of a case where a trial judge just might rightly find himself confronting a scenario in which this court might affirm the giving of this disfavored estoppel instruction. But these disagreements aside, what is crystal clear—and what all members of this Court can hopefully agree on—is that these instructions are still just as disfavored and difficult to divine today as they were more than a hundred years ago when this court strongly condemned them. Another truth is that an instruction aimed at estopping a defense in a criminal case certainly cuts against Mississippi's view that if there is an evidentiary foundation—albeit

"weak, insufficient, inconsistent, or of doubtful credibility"—a defendant is still entitled to instruct the jury on his or her theory. ***Welch v. State***, 566 So. 2d 680, 684 (Miss. 1990). This is true even though the sole supporting testimony is the defendant's own. ***Id.***

¶29. While this Court strongly adheres to stare decisis, we have "recognized that the doctrine is subordinate to legal reason and justice, and courts 'will depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error.'" ***Hye v. State***, 162 So. 3d 750, 755 (Miss. 2015) (quoting ***Stone v. Reichman-Crosby Co.***, 43 So. 2d 184, 190 (Miss. 1949)). In ***Hye***, this court recently abolished the practice of granting criminal defendants "lesser-non-included-offense" jury instructions. ***Id.*** at 753. But that change came about only after this Court weighed years of opinions from Mississippi appellate judges highlighting the variety of problems and criticisms of that particular instruction.

¶30. After considering a far greater body of law denouncing the "exceedingly unwise,"[4] "dangerous,"[5] and "strongly criticized"[6] practice of impinging self-defense claims, we reach a similar conclusion here. Rather than requiring trial judges to continue wringing their hands about whether to instruct a jury on estopping a defendant's self-defense plea—then sweating out possible appellate repercussions—our trials judges should simply instruct the jury on self-defense when the evidence supports it. There is no legitimate rationale to continue estopping

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[4] ***Lofton***, 31 So. at 421.

[5] ***Id.***

[6] ***Dew v. State***, 748 So. 2d 751, 754 (Miss. 1999).

self-defense claims by giving pre-arming instructions—instructions that are almost never affirmed. If a defendant's self-defense claim has an evidentiary basis but is indeed laughable, Mississippi's able prosecutors are no doubt skilled enough to point this out to juries. In fact, they do so quite often.

¶31. As Justice Beam mentions in Part I, our predecessors agreed "[t]he old paths are the safe paths" and "juries of th[is] country can be safely trusted to find any defendant guilty whose case is really so bad as to estop him to plead self-defense[.]" ***Lofton***, 31 So. at 421. We have come to this same conclusion. And we agree with the century-old view that these cases should be handled "without resort—dangerous and unwise—to the metaphysical subtleties necessarily involved in the preparation of a proper [pre-arming instruction]." ***Id.***

¶32. This advice rings particularly true today when many believe it is better to be judged by twelve than carried by six, and concealed carry for self-defense has become commonplace. Our laws allow our citizens to stand their ground and defend against attacks to themselves and others. But as this routinely condemned instruction[7] stands, if a jurist, not

[7] In 2017, in ***Boston v. State***, 234 So. 3d 1231, 1235 n.4 (Miss. 2017), we noted the collection of prior cases from ***Keys v. State***, 635 So. 2d 845, 849 (Miss. 1994), in which pre-arming instructions had been "denounced": ***Thompson v. State***, 602 So. 2d 1185 (Miss. 1992); ***Williams v. State***, 482 So. 2d 1136 (Miss. 1986); ***Barnes v. State***, 457 So. 2d 1347 (Miss. 1984); ***McMullen v. State***, 291 So. 2d 537 (Miss. 1974); ***Patrick v. State***, 285 So. 2d 165 (Miss. 1973); ***Craft v. State***, 271 So. 2d 735 (Miss. 1973); ***Ellis v. State***, 208 So. 2d 49 (Miss. 1968); ***Tate v. State***, 192 So. 2d 923 (Miss. 1966); ***Thompson v. State***, 190 Miss. 639, 200 So. 715 (1941); ***Brown v. State***, 186 Miss. 734, 191 So. 818 (1939); ***Vance v. State***, 182 Miss. 840, 183 So. 280 (1938); ***Coleman v. State***, 179 Miss. 661, 176 So. 714 (1937); ***Lee v. State***, 138 Miss. 474, 103 So. 233 (1925); ***Adams v. State***, 136 Miss. 298, 101 So. 437 (1924); ***Garner v. State***, 93 Miss. 843, 47 So. 500 (1908); ***Pulpus v. State***, 82

a jury, personally thinks an armed person provoked a "difficulty"—whatever that means—even lawfully armed persons might find themselves subjected to an instruction estopping their otherwise valid self-defense plea when placed in the unfortunate situation of defending themselves with a weapon. This truth raises the question about the ambiguity surrounding just what entering into a difficulty or provoking a difficulty entails. It is beyond dispute that this is a subjective standard, open to many interpretations and likely differing views depending on the judge. Has one provoked a difficulty if he gives a harsh eye or the finger to someone who just snaked his parking spot, then arms himself before getting out in response to that person's responsive gesture or threat? If so, what if this other person snaps and draws first? Must our armed person simply play victim and take a bullet in the face of a situation where his or her defense may indeed be estopped?

¶33. The bottom line is that one should not necessarily risk estoppel or forfeiture of his privilege of self-defense because he has previously armed himself in anticipation of an attack or a perceived dangerous situation. Therefore, we abolish this long-condemned, heavily criticized, disfavored, and exceedingly unwise instruction. On remand, a pre-arming instruction shall not be available. Instead, we instruct the trial court—as well as any trial court faced with similar circumstances—to follow the old, safe path of instructing the jury on self-defense when the evidence supports it and let the chips fall where they may.

Miss. 548, 34 So. 2 (1903); and ***Lofton v. State***, 79 Miss. 723, 31 So. 420 (1902).

CONCLUSION

¶34. We reverse the judgments of the Court of Appeals and the trial court and remand the case for a new trial.

¶35. **REVERSED AND REMANDED.**

PART I: KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL AND CHAMBERLIN, JJ., CONCUR. RANDOLPH, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY ISHEE, J. GRIFFIS, J., NOT PARTICIPATING.

PART II: KITCHENS AND KING, P.JJ., COLEMAN, BEAM AND CHAMBERLIN, JJ., CONCUR. RANDOLPH, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY ISHEE, J. GRIFFIS, J., NOT PARTICIPATING.

RANDOLPH, CHIEF JUSTICE, DISSENTING:

¶36. Let us not forget that this court was originally known as the High Court of Errors and Appeals. *See, e.g.*, ***Dismukes v. Stokes***, 41 Miss. 430 (1867) (this Court was originally known as the "High Court of Errors and Appeals of Mississippi"). Two centuries later, our role remains the same. We are to apply the relevant standard of review and evaluate the issues presented. Today's majority departs from both. The general rule is

> no error not assigned may be urged as grounds for reversal. A corollary rule is that, before an issue may be assigned and argued here, it must first be presented to the trial court. Where the issue has not been timely presented below, it is deemed waived. The point is thus said to be procedurally barred when urged here.

Read v. State, 430 So. 2d 832, 838 (1983) (citation omitted). Because the issue of a wholesale ban on the use of pre-arming instructions has not even been presented in this case it is not appropriate for us to decide it. This rule has an exception: when this Court notices

a plain error not assigned or distinctly specified, we may sua sponte address the issue. ***Johnson v. State***, 452 So. 2d 850, 853 (Miss. 1984). The purpose of this exception is to avoid manifest miscarriages of justice. ***Id.*** (citing ***Bell v. State***, 443 So. 2d 16 (Miss. 1983)). I fail to see a manifest miscarriage of justice for the execution of an unarmed man. *See infra* ¶ 58.

¶37. Dante Taylor was convicted of murder and sentenced to life in prison as a habitual offender. He challenges the issuance of a pre-arming instruction as reversible error and, in the alternative, argues that the verdict was against the overwhelming weight of the evidence. Part I of the majority rejects the decision of our Court of Appeals and that of a learned trial judge.

¶38. The grant or denial of jury instructions is reviewed for abuse of discretion. ***Quinn v. State***, 191 So. 3d 1227, 1231 (Miss. 2016) (citing ***Victory v. State***, 83 So. 3d 370, 373 (Miss. 2012)). "[I]f the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Victory v. State***, 83 So. 3d 370, 373 (Miss. 2012) (internal quotation marks omitted) (quoting ***Newell v. State***, 49 So. 3d 66, 73 (Miss. 2010)). Further,"[j]ury instructions must be read as a whole to determine if the instructions were proper." ***Sharkey v. State***, 265 So. 3d 151, 156 (Miss. 2019) (citing ***Milano v. State***, 790 So. 2d 179, 184 (Miss. 2001)).

¶39. We first ask whether the grant of the pre-arming instruction was supported by the evidence adduced and whether it correctly articulated the law. The instruction read,

> The Court instructs the Jury that *it is for the Jury to decide* and if *you* believe from *the evidence* in this case *beyond a reasonable doubt* that the Defendant, Dante O'Bryan Taylor, armed himself with a deadly weapon and sought Willie Lee Taylor, with the formed felonious intention of invoking a difficulty with Willie Lee Taylor, or brought on, or voluntarily entered into any difficulty with Willie Lee Taylor with the design and felonious intent to cause serious bodily harm to Willie Lee Taylor, then the Defendant, Dante O'Bryan Taylor, cannot invoke the law of self-defense.

(Emphasis added.) The Mississippi Supreme Court upheld a trial court's decision to give this exact jury instruction in ***Hall v. State***, 420 So. 2d 1381, 1388 (Miss. 1982).[8] I agree with the trial court, the Court of Appeals, and our precedent: this instruction was supported by the evidence and properly articulated the law.

¶40. The statement of facts is largely constrained to the testimony of the Defendant. *See* Maj. Op. Pt. I ¶¶ 2–6. The facts largely omit critical testimony from the Defendant's mother, cousins, and aunt, even some of the Defendant's own testimony. *See id.* Record review of the collective testimony clearly provides the evidentiary basis for the pre-arming instruction.

¶41. The evidence unfolded as follows. Jerry Birmingham, a Gulfport police officer, testified he responded to a radio call to a residence on 23rd Street. He saw people crowded outside the residence and a body on the ground. Birmingham was able to identify the man on the ground as Willie Taylor. He then spoke to Maya Taylor. Maya told him and would later testify that her uncle Willie had been shot by her cousin Dante Taylor. Maya testified that she had been at the residence before the shooting happened along with six others. She

[8] The instruction from ***Hall*** can be found in footnote 11 of this opinion.

saw Dante pull up and sit outside on his vehicle, not speaking to anyone. Then, she saw Willie walk up to the residence from his house behind it as he usually did each day. Maya testified that Willie saw Dante and raised his fists. Dante silently walked toward Willie and then shot him. Maya testified that they were shocked and that it all happened very fast. Dante meanwhile got into his vehicle and drove away without speaking.

¶42. The night before, Dante's sister Tiffany had argued with Willie. Willie confiscated Tiffany's son's bike because her son had been riding in the street. For most of the argument, Willie sat at the table. Then, as he got up to leave, Maya testified that Tiffany started punching Willie. Willie pushed her away several times before he started defending himself and hitting her back. Eventually Willie left and Tiffany called the police. Tiffany also called Dante telling him that Willie jumped on her and choked her. Dante came over that evening, but Maya did not see him again until he shot Willie.

¶43. Dante's mother, Madeline Adams, testified next. She called Dante the night of Willie and Tiffany's fracas to talk to him and to plead with him to leave his uncle alone. She testified that Dante responded to her negatively. He told her that "Willie put his hands on a female in the family for the last time." Dante went on to say he was "going to do [Willie]" and then that he was "going to punish [Willie]."

¶44. Next, Dante's aunt Michelle Evans testified. She also identified Dante and said that he shot Willie. Michelle had been sitting with Leon Cox, a neighbor, when the shooting happened. Michelle had seen Dante driving up and down the road earlier in the day.

Eventually he got out of his car and sat on the hood. She testified that he kept to himself the whole time he was there. Michelle saw Willie walk up from behind the house as well. She saw Dante get off the car and walk towards Willie and shoot Willie. As Michelle implored Dante why he did this, he got in his car and drove off without responding.

¶45. The State then called George Vitteck, the police officer who responded to Tiffany and Willie's altercation, to testify. Willie was not there when he arrived. Vitteck did not observe any visible injuries on Tiffany's face, arms, or neck.

¶46. When the State rested, Dante moved for a directed verdict, arguing that insufficient evidence showed a deliberate design on Dante's part to kill Willie. The court, noting the evidence, held that the State had made a prima facie case sufficient to submit to a jury that Dante's killing Willie had been deliberate.

¶47. Dante took the stand in his own defense. He testified that after he visited his sister the night before the shooting, he drove with a friend and procured a .40 caliber pistol.[9] At the time of his arrest, Dante made a statement to the police that he wiped down the pistol and threw it out the window of his car while driving away from the scene. The pistol was never recovered. Dante also testified that he removed the sim card from his phone for safekeeping. This was allegedly to protect his text messages with his uncle, but Dante later lost the sim card.

¶48. I freely acknowledge that pre-arming instructions were only proper before today when

[9] He procured a .40 caliber pistol, despite his status as a convicted felon.

evidence supported each element required for the instruction. ***Prine v. State***, 73 Miss. 838, 19 So. 711, 711 (1896). This Court has articulated the elements: (1) arming oneself in advance of (2) provoking a difficulty with another (3) with the intent to overcome one's adversary if necessary in the difficulty. ***Hall v. State***, 420 So. 2d 1381, 1385 (Miss. 1982) (quoting ***Parker v. State***, 401 So. 2d 1282 (Miss. 1981)).[10] In addition to these elements concretely expressed in the instruction, the instruction must be written so that it does not preclude the jury's determinations by peremptorily directing them to interpret evidence in a certain manner; the instruction cannot preclude the jury from considering the defendant's claim of self-defense. ***Keys v. State***, 635 So. 2d 845, 848 (Miss. 1994).[11]

¶49. In its case-in-chief, the State provided facts to support both the provocation aspect and the intent aspect of a pre-arming instruction if the jury believed the evidence presented to it.

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[10] Other cases also demonstrate this precept. *See generally* ***Woods v. State***, 183 Miss. 135, 183 So. 508 (1938); ***Durham v. State***, 158 Miss. 833, 131 So. 422 (1930), *overruled on other grounds by* ***Ray v. State***, 381 So. 2d 1032 (Miss. 1980); ***Stubblefield v. State***, 142 Miss. 787, 107 So. 663 (1926). *See also* ***Coleman v. State***, 179 Miss. 661, 176 So. 714 (1937) (reversing grant of pre-arming instruction).

[11] An example of an instruction this Court has accepted that contains all the elements and is worded properly can be found in the ***Hall*** case:

> If you believe from the evidence the Defendant armed himself with a deadly weapon and sought the victim with the formed felonious intention of invoking [sic] a difficulty with the victim, or brought on, or voluntarily entered into any difficulty with the victim with the designed and felonious intent to cause serious bodily harm to the victim then the Defendant cannot invoke the law of self-defense.

Hall, 420 So. 2d at 1382.

Madeline Adams, Dante's own mother, testified that Dante had threatened his uncle and had stated his intent to "do" him. Dante's cousin testified that Dante arrived at a place that he knew Willie to frequent and sat silently on his car, no weapon in sight, only to shoot Willie when Willie approached and then to leave without uttering a word to multiple witnesses Dante's own testimony provides the remaining element. He testified he unlawfully procured a .40 caliber pistol. He testified that rather than stay in his own home, he traveled to where he knew his uncle spent a considerable amount of time. He admits that he was armed with a gun and parked in Michelle Evans's driveway, which abuts Willie's home, and that he shot the unarmed man. If the State's evidence was believed by the jury, this was not an innocent encounter. Had Dante stayed home, then either the Castle Doctrine or a stand-your-ground theory might apply, as neither are novel in this state. *See* ***Long v. State***, 52 Miss. 23, 35 (1876); *see also* Miss. Code Ann. § 97–3–15 (Supp. 2019).

¶50. I regret having concurred in ***Boston v. State***, 234 So. 3d 1231 (Miss. 2017), as it may have served to perpetuate an incorrect statement of the law. ***Boston*** reiterated an incorrect statement of the law regarding pre-arming instructions first uttered in ***Dew v. State***, 748 So. 2d 751 (Miss. 1999): namely, that when the evidence in a case is in conflict regarding an initial aggressor, a pre-arming instruction is incorrect. ***Boston***, 234 So. 3d at 1235 (citing ***Johnson v. State***, 908 So. 2d 758, 762 (Miss. 2005)). ***Boston*** cited ***Johnson***; ***Johnson*** in turn cited ***Dew***; and ***Dew*** claimed that a fourth case, ***Barnes v. State***, 457 So. 2d 1347 (Miss. 1984), provided the grounds for this precept. ***Dew***, 748 So. 2d at 754.

¶51. ***Barnes***, though, was not decided on that principle, nor does it affirmatively state that proposition. In that opinion, this Court noted that there was considerable dispute in the record regarding who the initial aggressor was. ***Barnes***, 457 So. 2d at 1348. This Court then determined the instruction was given in error in that case because

> [t]he state never established at what point Barnes armed herself, indeed the only testimony in that regard is that of Barnes herself. She stated that she took her gun with her when she left her house early in the morning the day of the shooting. . . . There is simply no evidence to suggest that she armed herself after receiving a call reporting her boyfriend's and Stevens'[s] activities.

Barnes, 457 So. 2d at 1349–50. The holding of that case does not rest on who the initial aggressor was at all. Rather, it focuses on the reality that the prosecution failed to establish evidence to merit the instruction. There is no requirement that a pre-arming instruction can only be given when no evidence supports self-defense, as the Part I of the majority suggests. *See* Maj. Op. Pt. I ¶¶ 9–10.

¶52. If evidence is presented to support each of the elements of the instruction, our precedent holds it can be given. Contrary to ***Boston***, ***Johnson***, and ***Dew***, ***Barnes*** does not represent an inflection point in the law or the development of new legal doctrine. Rather, it is yet another case in our long line of pre-arming jurisprudence stretching back well over a century and stating that, while the instruction is disfavored, on occasion it may be properly given. *C.f.* ***Dyson v. State***, 26 Miss. 362 (1853); ***Thomas v. State***, 61 Miss. 60 (1883); ***Prine v. State***, 73 Miss. 838, 19 So. 711 (1896); ***Patrick v. State***, 285 So. 2d 165 (Miss. 1973).

¶53. Part I of the majority opines that this instruction was flawed because it fails to include

a consideration of the doctrine of "*locus penitentiae* [sic][.]"[12] Maj. Op. Pt. I ¶ 21 (quoting ***Pulpus v. State***, 82 Miss. 548, 34 So. 2, 3 (1903)). The two cases cited by Part I of the majority for this proposition, ***Pulpus***, 34 So. 2, and ***Patrick v. State***, 285 So. 2d 165 (Miss. 1973), fail to support the argument. Both acknowledge that when evidence supports that the defendant "acting in good faith, attempts to withdraw from the encounter and abandons his original purpose and intent," that *locus poenitentiae* must be accounted for in the instruction. ***Patrick***, 285 So. 2d at 168. There was no evidence that Taylor attempted to withdraw. The evidence showed that he pulled his concealed weapon and shot an unarmed man.

¶54. The statement of facts provides no evidentiary basis for this aspect of the instruction because no evidence was adduced that Taylor attempted to extricate himself from the encounter he created. *See* Maj. Op. Pt. I ¶¶ 2–6. ***Patrick*** further explicitly contradicts the notion that the propriety of this instruction hinges on the evidence being uncontradicted. While ***Patrick*** notes this Court's warning against injudicious use of the instruction found in ***Tate v. State***, 95 Miss. 138, 48 So. 13 (1909), ***Patrick*** reiterated that the basis for the instruction rests on the elements being met. *See* ***Patrick***, 285 So. 2d at 168.

¶55. Part I of the majority additionally claims that today's instruction does not embrace all the elements and inserts a block quotation from ***Lofton***, to facilitate its argument. *See* Maj.

[12] *Locus poenitentiae* translates literally as "place of repentance." It speaks to the opportunity to withdraw oneself from an ongoing process of commitment to an obligation, here pre-arming with the intent to cause a difficulty in which one kills another. *Locus poenitentiae*, Black's Law Dictionary (11th ed. 2019).

Op. Pt. I ¶ 24. But the actual text of the instruction is not revealed. A reading of the instruction demonstrates each of the necessary elements, as this Court held it must in ***Hall***, 420 So. 2d at 1382. This instruction accurately articulated the law.

¶56. The next question then is whether the instructions as a whole properly articulated the law. In addition to the pre-arming instruction, the trial court granted instructions on the presumption of innocence, C-3, and self-defense, S-10. The jury was also instructed not to single out one instruction to rely on, C-1. The jury was instructed that it was their exclusive province to consider the facts, weigh the evidence, and draw reasonable inferences from that evidence, C-1. Taken as a whole, these instructions did not preempt Taylor's right to assert his claim of self-defense, which was asserted at the trial and which the *jury* considered and rejected. Nor did the instructions misstate the law of the case so as to lead to injustice. Rather, the jury was properly instructed. The jury, not the jurist, rejected Taylor's self-defense instruction, as was their right to do. *See* Maj. Op. Pt. II ¶ 31. Nor am I persuaded by the bromide[13] found in ***Lofton*** and cited multiple times in the majority opinion, which was unavailing to this Court in 1982 and 1994 when this Court decided ***Hart*** and ***Hall***. *See* Maj. Op. Pt. I ¶ 25; Maj. Op. Pt. II ¶ 30.

¶57. Since the instructions as a whole properly articulated the law, the only remaining issue is whether the pre-arming instruction finds support in the evidence adduced at trial. The facts

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[13] Bromide is defined as "a commonplace or hackneyed statement or notion." *Bromide*, Merriam-Webster, https://www.merriam-webster.com/dictionary/bromide.

before us, if believed by the jury, are sufficient for a jury to consider a pre-arming instruction. They are akin to those in ***Hart***, in which a man armed himself, drove to another man's house, waited for the other man to emerge, and then shot him. ***Hart***, 637 So. 2d at 1333. Similarly, in ***Reid***, a man armed himself, drove to another's place of business, had words with the other man, and then shot him. ***Reid***, 301 So. 2d at 563. The defendants in ***Reid*** and ***Hart***, like Dante, claimed they acted out of fear induced by a larger man. ***Id.***; ***Hart***, 637 So. 2d at 1333–34. As there are facts to support the pre-arming instruction and our law permits the instruction, I ask, where is the error?

¶58. This Court has consistently warned practitioners and judges against infecting the jury's deliberations with any instruction not supported by the evidence.[14] This Court had never outright barred pre-arming instructions. ***Reid v. State***, 301 So. 2d 561, 564 (Miss. 1974). Any attempts to truncate or restrict the consideration of facts by concealing the law from the jury is antithetical to the jury's role as supreme finder of fact. Pre-arming instructions allow juries to "regard the events that precipitated the situation" under consideration. ***Keys***, 635 So. 2d at 850 (Banks, J., concurring). This allows a jury to discern between individuals who lawfully carry weapons as a matter of choice and right,

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[14] *See* ***McMullen v. State***, 291 So. 2d 537 (Miss. 1974); ***Patrick v. State***, 285 So. 2d 165 (Miss. 1973); ***Craft v. State***, 271 So. 2d 735 (Miss. 1973); ***Ellis v. State***, 208 So. 2d 49 (Miss. 1968); ***Tate v. State***, 192 So. 2d 923 (Miss. 1966); ***Thompson v. State***, 190 Miss. 639, 200 So. 715 (1941); ***Brown v. State***, 186 Miss. 734, 191 So. 818 (1939); ***Vance v. State***, 182 Miss. 840, 183 So. 280 (1938); ***Lee v. State***, 138 Miss. 474, 103 So. 233 (1925); ***Adams v. State***, 136 Miss. 298, 101 So. 437 (1924); ***Garner v. State***, 93 Miss. 843, 47 So. 500 (1908); ***Pulpus v. State***, 82 Miss. 548, 34 So. 2 (1903).

appropriately defending themselves, and an ex-felon who procured a handgun and unlawfully possessed it, seeking a confrontation with his uncle and elevating the confrontation to an execution. Those who obtain and wield weapons for slaying an adversary ought not to be treated any differently from those who plan or design the death of unknown victims. Pre-arming instructions allow juries may to consider all facts. When properly formulated, pre-arming instructions do not preempt the jury's deliberations, they expand them.

¶59. We can all agree that this instruction ought to be used rarely. But it is not proper for this Court, or any other, to usurp the role of a properly instructed jury in criminal cases. We should never nullify a properly instructed jury's verdict. *C.f.* ***Payton v. State***, 266 So. 3d 630, 636–37 (Miss. 2019). A court has no right to intervene and truncate a jury's deliberations by barring the jury from considering the law when supported by evidence. It is the jury's right, not a court's, to weigh evidence and determine the verdict. The instructions given, far from preempting Dante's self-defense claim, submitted the factual dispute to the jury for determination. This Court is charged with deciding if the circuit court abused its discretion. Part I of the majority has provided no basis for determining an abuse of discretion occurred. Further, ***Lofton***'s adages are unavailing in providing a basis for abandoning the precedent of this Court. *See* Maj. Op. Pt. II ¶¶ 30–32.

¶60. In Mississippi, the basis for departing from stare decisis remains "where the previous rule of law would perpetuate error and wrong would result if the decision were followed." ***Payton***, 266 So. 3d at 638 (emphasis omitted) (internal quotation mark omitted) (quoting ***Hye***

v. State, 162 So. 3d 750, 755 (Miss. 2015)). Part II of the majority, rather than following our established law and detailing the errors and wrongs meriting this change in precedent, summarily declares pre-arming instructions illicit. But the elements needed to merit a pre-arming instruction have persisted through well over a century of precedent and countless supreme court jurists. Dating to at least 1896, *see* ***Prine***, 19 So. 711, this Court has decennially pronounced opprobrium for factually insufficient grants of pre-arming instructions and approbation for the use of properly supported instructions. Part II of the majority fails to reveal the errors and wrongs of those who preceded us on this Court. Rather, it latches onto a singular instance of excoriation, the ***Lofton*** bromide. *See* Maj. Op. Pt. II ¶¶ 30–32.

¶61. I offer this dissent in defense and support of the learned trial judge, who granted the instruction, and of our Court of Appeals, which approved the instruction because it followed the established law of our state. Based on the facts of *this case* and based on this Court's precedent, there was no abuse of discretion in granting this instruction. I would affirm our Court of Appeals and the trial court.

ISHEE, J., JOINS THIS OPINION.