IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00047 COA

SHERMAN E. LADNER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. I. PRITCHARD III

COURT FROM WHICH APPEALED: CIRCUIT COURT OF PEARL RIVER COUNTY

ATTORNEYS FOR APPELLANT:

BOYCE HOLLEMAN

DEAN HOLLEMAN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY KLINGFUSS

DISTRICT ATTORNEY: GRAY BURDICK ASST. D. A.

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: CONVICTED OF MURDER AND SENTENCED TO LIFE IN PRISON

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

Sherman E. Ladner appeals from a conviction in the Pearl River County Circuit Court of murder and sentence of life in prison. Because the trial court erred in granting The State an "arming" instruction which cut off Ladner's right to assert self-defense, we reverse and remand for a new trial. FACTS

At the heart of this case is a shooting which occurred on October 15, 1991, near Gum Pond Road in Pearl River County where Sherman Ladner (Sherman) fatally shot Jimmy Carlos Ladner (Carlos). Carlos lived on Thomas School Road approximately one mile from Sherman's home. Bill Cottrell (Cottrell), Carlos's nephew, lived across the street from him. In the late afternoon of October 15, 1991, Carlos purchased a pickup truck from an individual at Cottrell's home. An intoxicated Carlos and Cottrell left Cottrell's home at approximately 8:00 PM. to "test drive" the pickup and to deliver sweet potatoes to Cottrell's grandmother's house on Gum Pond. In Carlos's truck were his loaded 9mm rifle in the middle of the seat pointed down at the floorboard and his loaded pistol in the glove compartment. It was not a coincidence that Carlos's test drive required him to pass the home of Sherman's parents. He had a long history of harassing Sherman's family. Carlos had previously shot Sherman and, more recently, he had been terrorizing Sherman's parents.

That night Sherman was at home, packed and ready to leave for his offshore work. Present were his mother, father, brother Joel sister, Beverly, her two young children, and Joel's brother-in-law Steve Knue (Knue).

As Cottrell and Carlos neared Sherman's home, Carlos could see Sherman and his family out close to the road. Carlos slowed down, began revving the truck's engine making loud noises, laughing, and jerking back and forth.

Sherman recognized the truck as well as Cottrell and Carlos when it came within view. Sherman could see Carlos laughing and rocking back and forth as he slowed down and revved the motor six or seven times. Carlos's conduct upset Sherman's father, who over Sherman's objection, decided to talk to Carlos about his behavior. Because of his father's bad health, Sherman chose to drive his father's pickup for him. In order to start the pickup, Sherman had to hook up the pickup's battery cables. As Sherman entered the cab with his father, he saw Joel and Steve in the bed of the pickup. While Sherman was under the hood hooking up the battery, Joel had gone to his pickup, retrieved his shotgun, loaded it, and placed it in the bed of the pickup. Joel testified that he felt it necessary to take his shotgun because he knew Carlos was usually armed and always dangerous. Sherman testified he was not armed and did not know Joel had the shotgun.

While Sherman was driving, Joel pounded on the window and asked to come up front because it was cold. Sherman pulled over and Joel and Steve got into the middle seats of the truck cab. When Joel got into the truck cab, he had the shotgun down beside him on his right side. Sherman testified he did not see the shotgun. While Sherman was stopped, Beverly passed in her Bronco with her two young children, and Sherman's mother. Sherman thought they were at home and this was his first notice they were following.

Carlos parked his truck in the small circular drive in front of Cottrell's grandmother's house where he and Cottrell watched Beverly as she passed by them. Wanting to see what "they got to say," Carlos and Cottrell proceeded towards the road. According to Sherman, when he approached the home he

saw Carlos standing next to the road holding up his rifle, and therefore Sherman did not stop. Cottrell and Carlos could see Sherman, his father, and two others in the cab of the pickup. Cottrell testified that as the Ladners drove past the house "they" called Carlos "chicken s---" and that the Ladners "told Carlos to come on down the road." When Sherman turned around and came back, Carlos was at the road without a weapon waiving his hand, flagging Sherman, and trying to stop him. Sherman stopped to talk with Carlos about his conduct towards his parents. Beverly returned and parked.

As Cottrell walked outside past Carlos's pickup he noticed Carlos's loaded 9mm rifle had been removed from the pickup. Also, the pickup's glove compartment was open, and Carlos's loaded .38 pistol had been removed.

Sherman, unarmed, exited the pickup as did Sherman's father, Knue, and Joel. Joel stayed next to the pickup door, holding the shotgun in his right hand. Joel was about seven or eight feet behind his father. Words were being exchanged between Beverly and Carlos. Beverly asked Carlos why he kept bothering her parents and asked why he told her parents that he was going to send them to the grave. Sherman asked Carlos why he kept "messing" with his father and mother. Carlos suddenly pulled from behind him a piece of pull chain about two feet long. He attempted to hit Sherman in the head. Sherman blocked the chain with his left arm and hand. Sherman backed up and turned around grasping his left hand. As Sherman was backing up, Joel stepped forward to a position between Carlos and his family. As he did so, Joel handed his shotgun to Sherman and said, "Here, hold this." Sherman testified that this was the first time he knew the shotgun was present. Sherman took the shotgun and laid it against the pickup because his hand hurt.

Joel stepped up unarmed to face Carlos. Carlos told Joel he was going to "jump on him." Abruptly, a member of Sherman's family hollered, "Look out, he's got a gun," and Carlos threatened to blow Joel's "damn brains out" with his pistol.

Carlos fired three times: first at Joel, then at Sherman's father, then at Sherman's mother. When this occurred, no one had a gun pointed at Carlos, and no one was threatening him. Joel testified the pistol shots were close enough that he could feel the "compression" from the pistol as he turned away from Carlos. By the time the third shot was fired, Sherman had picked up the shotgun and warned Carlos that if he shot his pistol again Sherman would shoot him. Carlos pointed his pistol at Sherman. Sherman testified that when this happened, he fired the shotgun in defense of himself and his family. When Carlos pointed his pistol at Sherman a second time, Sherman fired the shotgun again.

After Sherman fired the shotgun the second time, Carlos turned and ran back to his pickup with his pistol in his hand. He reached into the pickup bed retrieved his 9mm rifle, and fired it one time in the direction of Sherman and his family as they were leaving. Soon thereafter Carlos died.

Sherman was indicted, tried, and convicted of the murder of Carlos in violation of section 97-3-19(1) (1972) in the Pearl River County Circuit Court. At trial, the trial court granted the following instructions requested by the State over Sherman’s objection:

Arming Instruction

> One who is the aggressor in a confrontation may not claim the right of self-defense so long as he remains the aggressor and does not withdraw from the confrontation. If you

> find from the evidence that the Defendant was the aggressor in this matter and brought on the difficulty with James C. Ladner, and that he entered the encounter with a gun intending to use it when he provoked or brought on the encounter, if necessary to overcome James C. Ladner in the course of the encounter, then the Defendant may not claim the right of self-defense.

Dueling Instruction

> The Court instructs the jury that where two persons engage in mutual combat, not in reasonable necessary self-defense but each with the intent to kill or do serious bodily injury to the other, and one of said persons does, in fact, kill the other, then the person who commits the killing shall be guilty of murder, If you find from the evidence in this case beyond a reasonable doubt that the Defendant, Sherman Ladner, and the deceased, James C. Ladner, engaged in mutual combat; that this was not in necessary self-defense but, rather, that each intended to kill or do serious bodily injury to the other; and that the Defendant, Sherman Ladner, did in fact, kill James C. Ladner then the defense of self-defense is not available to the Defendant.

Sherman contends that these instructions constitute reversible error. We agree.

DISCUSSION

I. THE ARMING INSTRUCTION

Self-defense is an integral part of our history and heritage. *Thompson v. State*, 602 So. 2d 1185, 1190 (Miss. 1992) An individual's right to claim self-defense is so deeply rooted in our case law as to hardly ever admit encroachment. *Id.* "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 instruction of the court." *Hester v. State*, 602 So. 2d 869, 872-73 (Miss. 1992). "It is fundamentally unfair to deny the jury an opportunity to consider the defendant's defense where, as here, there is testimony to support his theory of self-defense." *Keys v. State*, 635 So. 2d 845, 849 (Miss. 1994). For these reasons, the necessary elements which must be established prerequisite to estop or deny one from asserting this valuable right are set out in the early case of *Prine v. State*, 73 Miss. 838, 19 So. 711 (1896). In *Prine*, the Supreme Court of Mississippi, in discussing and reversing the case because of erroneously granted State jury instructions, stated:

> The second and third instructions for the state are fatally erroneous. Both omit any reference to what was the state of Prine's mind ,--whether he had the murderous purpose formed at the time he provoked the difficulty ,-- if, indeed, the jury should believe from the evidence that Prine first approached Chain and brought on the difficulty. *The jury might believe Prine the aggressor, and brought on the difficulty, and that he entered it armed with a pistol, yet Prine was not cut off from the right of self-defense, unless the jury should further believe from the evidence that Prine so brought on the difficulty, armed with a deadly weapon, and intending to use it when he provoked or brought on the encounter. He must have been the originator of the difficulty; he must have entered it*

> *armed, and he must have so brought it on and entered into it intending to use his pistol and overcome his adversary, if necessary in the course of the encounter.*

Prine, 19 So. at 712 (emphasis added). The Mississippi Supreme Court has consistently followed *Prine* in condemning outright arming instructions because they preclude a defendant from asserting his claim of self-defense. *Keys v. State*, 635 So. 2d 845 (Miss. 1994); *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 Miss. 548, 34 So. 2 (1903); *Lofton v. State*, 79 Miss. 723, 31 So. 420 (1901); *Prine v. State*, 73 Miss. 838, 19 So. 711 (1896).

Absent any one of the *Prine* factors, a court may not estop a defendant from asserting self-defense. Two of the *Prine* factors are conspicuously absent from this case. First, there is no evidence that Sherman entered the altercation armed; consequently, he could not have brought on the altercation armed intending to use the shotgun to overcome his adversary. Second, there is not sufficient evidence that Sherman was the aggressor to estop him from asserting self-defense.

The record is uncontradicted that Sherman did not arm himself prior to confronting Carlos. In fact, the testimony reflects that Sherman did not arm himself until after the fight had begun. Further, the proof adduced by Sherman was that he did not arm himself until Carlos attacked him with two different deadly weapons, a chain and a pistol. He then retreated and finally armed himself. Under this evidence, we cannot conclude that Sherman armed himself with the intent to instigate the fatal conflict. The conflict had been initiated and was raging when Sherman armed himself. This evidence precluded the trial court from issuing an arming instruction estopping Sherman from asserting his right of self-defense.

The prosecution below and the State on appeal argue that the *Prine* requirement that Sherman entered the altercation intending to overcome Carlos with the shotgun was met by Sherman's brother Joel arming himself prior to leaving his their father's home. We disagree. *Prine* and its progeny explicitly require the defendant and no other to arm himself and initiate the fatal melee with the intent of using the weapon to overcome his opponent. *See Thompson*, 602 So. 2d at 1189. Additionally, the evidence is not sufficiently clear that Sherman was the aggressor in this conflict. In *Ellis v. State*, 208 So. 2d 49, 50 (Miss. 1968), the Mississippi Supreme Court held the trial court's decision to give an arming instruction similar to the arming instruction in this case constituted reversible error because there was conflicting evidence concerning who was the aggressor. The court held that where there is conflicting evidence as to who was the aggressor the granting of an arming instruction is improper. *Id.* In the case sub judice, there is at least conflicting evidence as to who initiated the conflict. The record is uncontradicted that Carlos initiated physical contact by striking Sherman with the chain. There was conflicting evidence that Carlos shot three times at Sherman and his family. The

eyewitnesses testified that Carlos shot at Sherman and several members of his family. Several State's "earwitnesses" claimed not to hear Carlos's three pistol shots, but did claim to hear Sherman's two shotgun blasts. Admittedly, Sherman did follow Carlos to the place the conflict erupted; however, as discussed above, he went unarmed. Under these facts, Sherman could not be estopped from asserting his right to self-defense because there is at least conflicting evidence as to who was the aggressor in this deadly conflict.

The State claims that any error in granting the arming instruction is harmless because the jury instructions as a whole correctly state the law. This is not the first time the State has attempted to make this argument, but we hope it will be the last. The Mississippi Supreme Court has rejected this argument in arming instruction cases. In considering this argument, the court held as follows:

> We do not forget the rule that if instructions correctly state the law when read together as a whole, there is no reversible error. Also, if an error in one instruction is cured by another when the instructions are considered as a whole, the error will not be reversible.
>
> Here Thompson requested and was granted two self-defense instructions in the form attached as Appendix "A" to this opinion. The granting of these instructions, however, was insufficient to cure the court's error in granting S-6 and S-7 because we also recognize the rule that "*when the court gives inconsistent instructions on a material issue, this violates the principle that the instructions must not mislead the jury and therefore must be consistent and harmonious. The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it." Furthermore, "the jury should not be required to determine which part of a contradictory charge is correct."*
>
> Here, the defense instructions told the jury that if certain facts existed the accused had the right to be acquitted because of self-defense. The State's instructions then told the jury that it makes no difference if the facts set forth in the defense instructions exist; that the defendant had no right to claim self-defense if facts (not supported by the record) were found. *The jury should not be placed in this type of predicament while deciding a citizen's fate*. When read together the State and defense instructions do not correctly state the law under the adduced evidence and resolved facts. The evidence does not support State Instructions S-6 and S-7. The defendant's instructions on self-defense cannot cure the State's deficiency. *The instructions under these circumstances are conflicting and the error occasioned by the granting of them is reversible.*

Thompson, 602 So. 2d at 1190-91 (emphasis added) (citations omitted). Because the issue decided by the *Thompson* Court is identical to the issue raised in this case the ruling in *Thompson* is dispositive, and the States's argument is without merit.

One last comment with regard to arming instructions. For almost a century the Mississippi Supreme Court has warned of the dangers of granting arming instructions, stating:

> The words of wisdom set out in *Lofton v. State*, 79 Miss. 723, 734,

31 So. 420, 421 (1901) are worth repeating: This form of charge,

> counsel for appellant. It can never be proper, save in the few 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. 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 prosecuting attorneys 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.

> Ninety years after this Court spoke to this issue in *Lofton v. State* we find ourselves again reminding the bench and bar of this State that those who are ignorant of their history are condemned to repeat it. The bench and bar have an obligation to provide juries with proper, uncomplicated and understandable instructions. This is what Lofton and its progeny were all about, although the articulation apparently remains unheeded. The admonitions of Lofton are a line drawn in the sand and they are clear and visible. We again say to the bench and bar that an instruction estopping one from asserting self-defense is never proper except in the few rare cases where all the elements of estoppel are clearly present. The reason for permitting a self- defense theory to be decided by a jury far out-weighs the reasons for estopping one from asserting this most basic right. The right of self-defense is firmly ingrained in the common law and our heritage. This alone should persuade prosecutorial authorities to stop, think, ponder, and assess the facts carefully, before running the risk of reversal by requesting this often condemned charge.

Thompson, 602 So. 2d at 1190. We hope the bench and bar of this State will finally heed this warning.

II. THE DUELING INSTRUCTION

While the granting of the arming instruction requires us to reverse and remand this case, we think it wise to address briefly the dueling instruction’s applicability at the new trial. Sherman argues that there is no legal support for the issuing of this instruction. Again, Sherman is correct. There is no Mississippi authority to support the trial court issuing this instruction. As Sherman’s counsel ably argues, the trial court could not rely on an unpublished opinion as authority for this instruction. *See* M.R.C.P. 35-B. The State responds that while it cannot rely on an unpublished opinion, the unpublished opinion simply restates the law found in *Price v. State*, 36 Miss. 531, 542 (1858). However, a careful reading of *Price* reveals that the State’s contention is not supported by the case

cited. The dueling instruction states:

> The Court instructs the jury that where two persons engage in mutual combat, not in reasonable necessary self-defense but each with the intent to kill or do serious bodily injury to the other, and one of said persons does, in fact, kill the other, then the person who commits the killing shall be guilty of murder. If you find from the evidence in this case beyond a reasonable doubt that the Defendant, Sherman Ladner, and the deceased, James C. Ladner, engaged in mutual combat; that this was not in necessary self-defense but, rather, that each intended to kill or do serious bodily injury to the other; and that the Defendant, Sherman Ladner, did in fact, kill James C. Ladner then the defense of self defense is not available to the Defendant.

The rule enunciated in *Price* is that "if a party enters into a contest dangerously armed, and fights under an undue advantage, though mutual blows pass, and kills his adversary, it is not manslaughter but murder." *Price*, 36 Miss. at 542. The *Price* rule is not the rule of law applied in the dueling instruction. The dueling instruction lacks the central element of entering the contest dangerously armed with an undue advantage. Therefore the dueling instruction is not supported by the law and should not be granted on retrial. We also note that if the instruction properly reflected the law it would still be inappropriate as there is no evidence that Sherman entered the fight armed.

For the foregoing reasons, the lower court's decision is reversed and remanded for a new trial under proper jury instructions, which neither infringe on the Defendant's right to self-defense nor inaccurately reflect the law.

THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY ON CHANGE OF VENUE TO LAUDERDALE COUNTY FINDING SHERMAN LADNER GUILTY OF MURDER IS REVERSED AND REMANDED FOR A NEW TRIAL. COSTS ARE ASSESSED AGAINST PEARL RIVER COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.