

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00574 COA**

KEVIN PATTERSON A/K/A KEVIN L. PATTERSON

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

DATE OF JUDGMENT:	05/18/95
TRIAL JUDGE:	HON. LILLIE BLACKMON SANDERS
COURT FROM WHICH APPEALED:	ADAMS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PAMELA A. FERRINGTON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	ALONZO STURGEON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	AGGRAVATED ASSAULT: SENTENCED TO SERVE 20 YRS IN THE MDOC
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

BEFORE THOMAS, P.J., HERRING, AND SOUTHWICK, JJ.

HERRING, J., FOR THE COURT:

Kevin Patterson was convicted of aggravated assault in the Circuit Court of Adams County, Mississippi, and was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. According to Patterson, he shot Kenny Clay three times in self-defense. Patterson appeals his conviction alleging that he was denied a fair trial when the trial court sustained an objection by the prosecutor to statements made by defense counsel in opening remarks. Additionally, Patterson asserts that State failed to overcome the presumption that Patterson acted in self-defense when he shot Kenny Clay. Finding no error, we affirm the judgment of the lower court.

I. THE FACTS

Kenny Clay, age twenty eight, was a security guard and working for Lady Luck Casino and K & B Drugstore in Biloxi, Mississippi. On Christmas Day, 1993, he drove to his father's home in Natchez, Mississippi, in order to spend time with his family. He arrived at his father's home around 12:00 noon. After parking his automobile in front of the house, he briefly went inside and watched a basketball game on television and then began to unload his car. According to Clay, he took the pistol, which he used as a security guard, out of his car and placed it on the roof of his vehicle. Chriscella Clay assisted her brother in unloading his vehicle, took the gun into her father's house, and placed it in a closet. Lee Clay, Chriscella's daughter, was also helping in unloading and washing Kenny Clay's vehicle. Lee also testified that her mother took Kenny Clay's gun into the Clay home.

While Kenny Clay was washing his vehicle, a vehicle driven by Kevin Patterson passed by. Detra Fleming, Donnell Fleming, and Sean Patterson were all in the vehicle with Kevin Patterson, and they testified that Kenny Clay tried to flag them down with a pistol in his hand. They stated that Kevin Patterson had been told earlier that day that Kenny Clay was "hunting for him" and was going to kill him. Apparently, Chriscella Clay had been involved in a previous confrontation with Kevin Patterson on Thanksgiving Day, 1993, at which time Kevin Patterson jostled and spit on Chriscella, her sister, and her daughters.

On the other hand, Chriscella Clay testified that Kevin Patterson's vehicle passed by the Clay house several times and finally parked nearby. Thereafter, Donnell Fleming and Sean Patterson went onto the Clay property where Kenny Clay was washing his vehicle and began yelling at him. Attempts to convince Sean Patterson and Donnell Fleming to leave were unsuccessful, and a physical altercation broke out. All parties apparently indicated that they had no weapons on them.

At some point during the altercation, Kenny Clay struck Donnell Fleming and knocked him down. Kwami Clay, another daughter of Chriscella Clay, testified that she was watching when Kevin Patterson joined the crowd. She then noticed that Kevin Patterson was armed and yelled, "He has a gun." Kenny Clay testified that when he heard Kwami yell out, he turned and faced Kevin Patterson, who then proceeded to shoot Clay three times, in the neck, arm, and back. After the shooting, the crowd dispersed, and Chriscella Clay rushed her brother to a local hospital for treatment. Kenny Clay survived the shooting, but one of the bullets remains in his back and cannot be removed without substantial risk of permanent disability.

Kevin Patterson was apparently on his way to turn himself in to local authorities when he was stopped and arrested by law enforcement officers. He admitted that he shot Kenny Clay but maintained that he shot in self-defense, in the belief that Clay was carrying a gun and was about to shoot him. However, the evidence established that Kenny Clay was not in possession of a firearm or any other weapon at the time of the shooting.

Following closing statements, the members of the jury were given written instructions by the trial court as to how to evaluate the facts of the case in light of existing law. These instructions included an instruction on self-defense. Ultimately, the jury convicted Kevin Patterson of aggravated assault, and he was sentenced by the trial court to serve a term of twenty years in the custody of the Mississippi Department of Corrections. It is from this conviction and sentence that Kevin now appeals.

II. THE ISSUES On appeal, Patterson assigns the following errors:

I. THE TRIAL COURT ERRED IN SUSTAINING AN OBJECTION TO A STATEMENT MADE BY DEFENSE COUNSEL IN HIS OPENING REMARKS TO THE JURY.

II. THE TRIAL COURT ERRED IN DENYING PATTERSON'S MOTION FOR A DIRECTED VERDICT ON THE GROUND THAT THE STATE FAILED TO REBUT THE PRESUMPTION OF SELF-DEFENSE.

After reviewing the evidence and applicable law, we find no reversible error. Accordingly, we affirm the judgment and sentence of the trial court.

III. ANALYSIS

A. DID THE TRIAL COURT ERR IN SUSTAINING THE PROSECUTOR'S OBJECTION TO THE ANALYSIS OF SELF-DEFENSE MADE BY DEFENSE COUNSEL IN HIS OPENING STATEMENTS.

In his opening statement to the jury, defense counsel stated:

Under the laws of this State, if a person is attacked, he's under no duty to run away. He's under no duty to run away. If you are attacked, you have a right to stand your ground and use whatever force is necessary --

MR. HARPER: Your Honor, I'm going to object to Mr. Rosenthal first of all arguing law in the opening statement. But more importantly he's misrepresenting to the jury what the law is, Your Honor. and I'm going to object to that.

THE COURT: Sustained.

MR. ROSENTHALL: But you're going to hear that the defendant was acting in self defense when he shot Kenny Clay. Thank you, ladies and gentlemen.

On appeal, Patterson argues that defense counsel did not misrepresent the law to the jury and "by sustaining the objection on the stated basis, the Court gave weight to that erroneous and misleading statement and improperly allowed the jury to assess the facts later presented according to an incorrect standard of law." For this reason, Patterson contends that his conviction of aggravated assault should be set aside.

In *Long v. State*, 52 Miss. 23, 34 (1876), the Mississippi Supreme Court stated:

Flight is a mode of escaping danger to which a party is not bound to resort, so long as he is in a place where he has a right to be, and is neither engaged in an unlawful enterprise, nor the provoker of, nor the aggressor in, the combat. In such case, he may stand his ground and resist force by force, taking care that his resistance be not disproportioned to the attack.

See also Haynes v. State, 451 So. 2d 227, 229 (Miss. 1984), which states as follows:

[I]t has always been the law in this State that a defendant is not deprived of the right to claim self-defense in a slaying even if he could have avoided the threat to his safety by fleeing.

Thus, Patterson is correct that, under certain circumstances, he could have stood his ground in his confrontation with Kenny Clay. However, at the close of the trial the trial court correctly instructed the jury as follows:

[I]f you further believe from the evidence, that the said Kenny Clay committed some overt act in such a manner so as to cause the defendant to believe that he then and there was in danger of sudden death or great personal harm at the hands of the said Kenny Clay, then under the law of this land the defendant was not required to retreat or run or leave his position, but the defendant had a perfect and absolute right to stand his ground and do whatever then and there reasonably appeared to the defendant . . . to be reasonably necessary for the protection of the defendant

We conclude that even if it could be said that the trial court committed error in sustaining the prosecution's objection to that portion of Patterson's opening statement to the jury that is complained of, no reversible error occurred because the jury was correctly instructed on the issue of self-defense at the end of the trial. *See Lester v. State*, 692 So. 2d 755, 770 (Miss. 1997) (holding that the trial court corrected any potentially misleading comments made by the prosecutor by giving an adequate instruction). Moreover, the record discloses nothing to indicate that Kevin Patterson's right to a fair trial was in any way prejudiced by the trial court's actions or that the jury did anything other than follow the trial court's instructions in arriving at its verdict. Thus, there is no merit in this assignment of error.

B. DID THE TRIAL COURT ERR IN DENYING PATTERSON'S MOTION FOR A DIRECTED VERDICT ON THE GROUND THAT THE STATE FAILED TO SUFFICIENTLY SHOW THAT PATTERSON DID NOT ACT IN SELF-DEFENSE?

At the close of the State's case in chief, Patterson moved for a directed verdict on the ground that the State failed to prove the elements of the crime for which Patterson was charged in the indictment. The trial court denied Patterson's request. Following the close of the testimony, Patterson did not renew his motion for a directed verdict, nor did he request a peremptory instruction. Furthermore, Patterson failed to move for a judgment notwithstanding the verdict challenging the sufficiency of the evidence in his post trial motions.

It is well settled in Mississippi that when the "defendant proceeds with his case after the State rests and the court overrules the defendant's motion for a directed verdict, the defendant has waived the appeal [of the denial] of that [motion for] directed verdict." *Holland v. State*, 656 So. 2d 1192, 1197 (Miss. 1995) (citing *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992)); *see also*, *Bounds v. State*, 688 So. 2d 1362, 1372 (Miss. 1997). Furthermore, when the defendant fails to request a peremptory instruction or fails to move for a judgment notwithstanding the verdict in his post trial motions, he waives the matter of testing the sufficiency of the evidence on appeal. *Holland*, 656 So. 2d at 1197. Because Patterson failed to request a peremptory instruction or move for a judgment notwithstanding the verdict in his post trial motions, he failed to preserve for his appeal a challenge against the sufficiency of the evidence adduced at trial in the case *sub judice*. Thus, we will not consider this issue on appeal.

THE JUDGMENT OF THE CIRCUIT COURT OF ADAMS COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO ADAMS COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, J.J., CONCUR.