IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00185 COA

LINDA BRYANT **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:	01/25/96
TRIAL JUDGE:	HON. C. E. MORGAN III
COURT FROM WHICH APPEALED:	WEBSTER COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	LEE S. COLEMAN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	AGGRAVATED ASSAULT: SENTENCED TO SERVE A TERM OF 12 YRS IN THE MDOC
DISPOSITION:	REVERSED AND REMANDED - 12/16/97
MOTION FOR REHEARING FILED:	1/7/98
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

This case is an appeal by Linda Bryant from her conviction for aggravated assault returned by a jury in the Circuit Court of Webster County. The sole issue on appeal is whether the trial court erred when it refused to grant Bryant's requested jury instruction on self-defense. Finding that the trial court erred in denying the instruction, we reverse and remand.

I.

Facts

Bryant, along with her boyfriend and Bryant's young daughter, were at home in Bryant's apartment in Maben when Natalie Williams presented herself at the front door and demanded entrance. Williams had previously been romantically involved with Bryant's boyfriend and there was evidence that Williams had appeared for the purpose of attempting to retrieve a ring from him. Williams's tactics appear to have been somewhat confrontational, and a disturbance quickly ensued. Bryant seemed intent on admitting Williams to the apartment; however, her boyfriend was equally intent on denying Williams admittance by simultaneously holding the door closed and physically restraining Bryant. Williams's efforts to enter the apartment were undertaken with sufficient zeal to break the chain latch on the door and damage the doorframe. Bryant, thwarted in her efforts to permit Williams access to the apartment, took advantage of her boyfriend's preoccupation with Williams to obtain a pistol, exit the back door of her apartment, and pass through her neighbor's adjoining apartment to come out and confront Williams at the entrance to her home.

The evidence is essentially undisputed that Bryant then pointed the pistol at Williams's face. From there the evidence diverges into two versions of events. In one version, Bryant is cautioned not to shoot Williams in the face, whereupon she lowers the pistol and purposely shoots Williams in the leg. In the other version, Williams reaches for the gun pointed at her face and the gun accidentally discharges in the struggle that follows, the bullet striking Bryant in the leg.

Bryant's testimony indicated that she obtained the pistol for a two-fold purpose: (1) she hoped to use it to frighten Williams away, and (2) she claimed that she was afraid of Williams and wanted the pistol to protect herself, her boyfriend, and her daughter. She testified that her fear was based on knowledge that Williams had stabbed three people in the past and had threatened to kill both her and her boyfriend "if she saw us in town."

II.

Self-Defense Instruction

Bryant's request for an instruction setting out the elements the jury must consider in evaluating a claim of self-defense was rejected by the trial court. The court said that Bryant "admits that she armed herself and went and confronted [Williams]. I think there is specific case law that if you arm yourself and go and confront a person, that you are not entitled to a self-defense instruction any more."

While there is case law that generally deals with the proposition stated by the trial court, we are of the opinion that the actual rule is somewhat more complex and is applicable in only the narrowest of circumstances. In ***Parker v. State,* 401 So. 2d 1282 (Miss. 1981)**, the supreme court considered a case where the defendant, Parker, had obtained a rifle, followed his victim to the courthouse, then fired shots through a window of the building. Though the victim had been previously armed and had fired shots at Parker's brother, there was no indication that Parker's pursuit was undertaken as a protective measure for either Parker or his brother. ***Id.* at 1285-86**. Rather, Parker's own testimony indicated that the pursuit and shooting were done for purposes of retribution. ***Id.* at 1286**. The supreme court, in holding that Parker was not entitled to a self-defense instruction on these facts, quoted with approval a rule announced in a previous case:

> If a person provokes a difficulty, arming himself in advance, and intending, if necessary, to use

his weapon and overcome his adversary, he becomes the aggressor, and deprives himself of the right of self-defense.

***Id.* at 1286** (quoting *Woods v State*, 183 Miss. 135, 147, 184 So. 311, 311 (1938).)

The proper application of this concept in fashioning jury instructions has been a source of some continuing difficulty in this State. The prosecution at times, as in this case, attempts to use the theory to deprive the defendant of a self-defense instruction altogether. ***Tate v. State,* 192 So. 2d 923, 924 (Miss. 1966).** In other instances, the prosecution requests, instead, an affirmative statement of the theory in the nature of an "estoppel" instruction, informing the jury that aggressive behavior fitting within the rule of *Woods v. State* may estop the defendant from asserting self-defense. ***See, e.g., Keys v. State,* 635 So. 2d 845, 848 (Miss. 1994); *Barnes v. State,* 457 So. 2d 1347, 1349 (Miss. 1984).** The practice of giving this estoppel instruction has been soundly criticized by the Mississippi Supreme Court. In ***Lofton v. State,* 79 Miss. 723, 734, 31 So. 420, 421 (1902)**, the supreme court said the instruction "is an exceedingly unwise one to be given." In *Thompson v. State*, the supreme court said that it had "consistently, painstakingly, and repeatedly cautioned and admonished bench and bar that [such] instructions . . . should be given only in the exceedingly rare circumstances where the facts meet all the required elements necessary to preempt a defendant's right to claim self-defense." ***Thompson v. State,* 602 So. 2d 1185, 1189 (Miss. 1992).**

This Court is of the opinion that the same considerations are at work when the trial court, rather than granting the disfavored estoppel instruction, uses the same rationale to refuse to grant a self-defense instruction. The effect of having the trial court, as a matter of law, remove considerations of self-defense from the jury's deliberations is profound. Any doubt as to this notion was erased in this case when the State, in its summation, told the jury that "[y]ou have not been instructed on self-defense. In this stack of instructions there is no self-defense instruction. That is not to be considered by this jury."

A defendant is entitled to have the jury instructed as to her theory of the case, even though the evidence in support of that theory may be slight. ***Triplett v. State,* 672 So. 2d 1184, 1186 (Miss. 1996).** This includes the right to have the jury consider a defense of self-defense. ***Anderson v. State,* 571 So. 2d 961, 963 (Miss. 1990).** The trial court ought to deny a self-defense instruction only when, considering all the evidence in a light favorable to the defendant and drawing all reasonable inferences from that evidence that favors the defense, the court concludes that no reasonable jury could find the facts to be in accord with the defendant's theory. ***Catchings v. State,* 684 So. 2d 591, 596 (Miss. 1996).**

We are of the opinion that this case is not one fitting within the narrow rule announced in *Parker v. State*, and that the trial court therefore erred in denying the defendant's requested self- defense instruction. In order to deny a self-defense instruction on the basis of *Parker*, the evidence must be unequivocal that Bryant armed herself for the express purpose of originating a difficulty. "The law is that she must have armed herself for the purpose of provoking the difficulty and overcoming opposition if necessary." ***Coleman v. State,* 179 Miss. 661, 176 So. 714, 714 (1937).** It would appear that on the facts of this case, taken in the light most favorable to Bryant, the jury could reasonably conclude that a "difficulty" already existed at the time Bryant armed herself and that Williams was the instigator of that difficulty. In that light, Bryant's act of arming herself could be seen

as a reasonable countermeasure taken in self-defense. A person is entitled to be secure in her own home, and we do not find that Bryant's actions in moving, in the most direct route available to her, from inside her apartment to the front door necessarily constituted an act of searching out Williams for the purpose of provoking a difficulty.

There was certainly substantial evidence presented by the State that made Bryant's self- defense claims appear less than credible. Had the jury believed that evidence, it could quite reasonably have concluded that Williams's presence amounted to nothing more than an aggravation to Bryant and that Williams did not pose a legitimate threat of imminent serious bodily harm to Bryant or anyone else. In that view, Bryant's actions could be seen to be undertaken, not out of motives of self-preservation, but out of a desire simply to rid herself of Williams's presence at her home. Nevertheless, the granting of a self-defense instruction would have done nothing to prevent the jury from accepting this version of the facts. It is only when evidence consistent with self-defense is non-existent that the instruction ought to be denied.

There is somewhat of a difficulty in this case regarding the issue of self-defense. The actual shooting, according to Bryant's theory of the case, was the unintended consequence of a struggle over possession of the firearm. Generally, a defense of self-defense suggests that the injury was intentionally -- not accidentally -- inflicted in a conscious effort to prevent an imminent serious bodily injury. Bryant, in this case, did not seek an "accident" instruction. The State, for its part, sought to cut off an "accident" defense at the conclusion of the proof by amending its instruction defining the elements of the crime to include the alternative ground that the injury was inflicted "recklessly under circumstances manifesting extreme indifference to the value of human life" even though the indictment charged that the injury was purposely inflicted. ***See*** **Miss. Code Ann. § 97-3-7 (Rev. 1994).** The State's effort to change the instruction appears to have been based on essentially the same notion that supports the estoppel theory, *i.e.,* that the defendant may not purposely confront another with a gun, provoke an altercation, and then defend on the ground of *accident*, even if the weapon was, beyond question, accidentally discharged in the struggle.

We conclude, even though Bryant claims the gun discharge was accidental, that a self-defense instruction would have been appropriate in order to permit Bryant to fairly meet the State's assertion that a finding of accidental discharge would not require acquittal since the mere possession of the pistol in these circumstances was a reckless act manifesting extreme indifference to the value of human life. If the jury found that Bryant armed herself in reasonable anticipation of having to defend herself from Williams, then it would logically follow that the act of possessing the firearm was not, in itself, reckless. By its failure to give a self-defense instruction, the trial court precluded Bryant from attempting to persuade the jury to accept this theory of her defense.

III.

Modification of Indictment

Because we are reversing for a new trial on the basis that Bryant should have been given a self-defense instruction, we cannot fail to notice, under principles of plain error, that the effort by the State to expand the definition of the crime from one of wilful infliction of bodily injury to encompass alternatively the reckless infliction of injury under circumstances manifesting extreme indifference to the value of human life appears improper. This change in the elements of the crime runs directly afoul

of the holding in ***Quick v. State,* 569 So. 2d 1197 (Miss. 1990)**. In that case, the defendant was indicted under section 97-9-7(2)(b) for intentionally causing bodily injury with a deadly weapon. The State, on the morning of trial, moved to amend the indictment to include an alternative allegation that the injury was inflicted "recklessly under circumstances manifesting extreme indifference to the value of human life . . . ." ***Id.* at 1198.** No formal amendment to the indictment was ever made; however, this alternate language was inserted by interlineation in the instructions to the jury. ***Id.* at 1198-99.** The supreme court reversed the conviction, finding that this change in the elements of the crime was an impermissible substantive change in the indictment and not one merely of form. ***Id.* at 1199-1200.** The facts of this case are indistinguishable from those in the *Quick* decision except that the defense did not, in this case, interpose a timely objection to the proposed amendment to the jury instruction and did not raise the issue on appeal.

In order to avoid potential reversible error on retrial, we suggest that the State be held to proving the charge set out in the indictment and that the jury instructions defining the elements of the crime be restricted to the form of the indictment in order to conform to the holding in *Quick.*

THE JUDGMENT OF THE CIRCUIT COURT OF WEBSTER COUNTY IS REVERSED AND THE CASE IS REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE TAXED TO WEBSTER COUNTY.

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