

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00514 COA

JAMES RICHARD RICE

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. LEE J. HOWARD

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS L. KESSLER

ATTORNEY FOR APPELLEE:

DeWITT ALLRED III

ATTORNEY GENERAL'S OFFICE

DISTRICT ATTORNEY: FORREST ALLGOOD

NATURE OF THE CASE: CRIMINAL-AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: DEFENDANT CONVICTED AND SENTENCED TO
EIGHTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS

BEFORE FRAISER, C.J., KING, McMILLIN, AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

James Richard Rice was tried and convicted of aggravated assault in the Lowndes County Circuit Court in May of 1994. Rice defended on the theory of self-defense. He now appeals to this Court, arguing only that it was reversible error for the trial court to refuse Rice's requested self-defense instruction. Finding this argument to have no merit, we affirm.

I.

FACTS

James Rice and Willie Lee Perkins encountered one another on three separate occasions culminating with Rice shooting Perkins with a .25 caliber pistol. On the first occasion, a fight ensued because Perkins did not like the way Rice was looking at him. No weapons were involved. Only about two weeks afterward, Rice and Perkins had another altercation that was broken up by friends. Again, no weapons were used; however, Perkins testified that Rice left with the intention of getting a gun and returning, but Rice did not come back that night. Rice testified that, during that second fight, Perkins stole some money from him and threatened to kill him if he told the police. Just a few days later, Rice saw Perkins near a park where Perkins had been shooting basketball. Rice walked up to Perkins and asked him about the money, to which Perkins replied, "What money?" Perkins testified that at this point Rice started to pull a gun from the back of his pants. Perkins claimed he was trying to "get up on" Rice to grab the gun, but was unsuccessful. Rice said that Perkins rushed toward him and that out of fear he pulled the gun and fired it, shooting Perkins in the back of the head. Rice was subsequently arrested, tried, and convicted for the aggravated assault of Perkins.

At trial, Rice admitted to shooting Perkins, but claimed that the shooting was justified under a theory of self-defense. The basis for his self-defense theory was that Perkins had previously assaulted Rice and had threatened Rice's life. Therefore, according to Rice, he had reasonable grounds to apprehend that Perkins would cause imminent and serious bodily harm to him. Rice grounded his argument on the concept that he did not have to wait until Perkins actually inflicted harm upon him before defending himself. To present this theory of self-defense to the jury, Rice requested that instruction D-4 be given to the jury. That instruction states:

Instruction D-4

The Court instructs the Jury that the Defendant was not under an obligation to wait and see if Willie Lee Perkins, Jr., was going to inflict serious bodily harm upon the Defendant before the Defendant took action to defend himself from an attack by Willie Lee Perkins, Jr.; and if you find from the evidence that the Defendant, James Richard Rice, shot without knowing for certain that Willie Lee

Perkins, Jr., was about to cause him serious bodily harm, and further that it was reasonably apparent to a reasonable person of average prudence that the Defendant was in danger of serious bodily harm, then you must find the Defendant not guilty.

The trial court refused this instruction on the basis that it was confusing. Rice now appeals, claiming that it was reversible error for the trial court to refuse his instruction because without it, he was not given the opportunity to adequately present his theory of self-defense to the jury.

II.

THE LAW

When dealing with an issue of a refused jury instruction, as we are here, the trial court is afforded considerable discretion and our primary concern on appeal is that "the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." *Splain v. Hines*, 609 So. 2d 1234, 1239 (Miss. 1992) (citing *Rester v. Lott*, 566 So. 2d 1266, 1269 (Miss. 1990)).

Rice's only theory of defense was self-defense. He claims that by refusing to grant proposed instruction D-4, the trial court effectively barred him from placing his self-defense theory before the jury. However, the trial court granted two other instructions, S-2 and S-3, which presented the theory of self-defense. Instruction S-2, an elements-of-the-crime instruction, stated that in order to convict, the jury must find that Rice did not act in self-defense. The Mississippi Supreme Court has articulated exactly what language should be used in a self-defense instruction. *Robinson v. State*, 434 So. 2d 206, 207 (Miss. 1983), *overruled in part on other grounds by Flowers v. State*, 473 So. 2d 164 (Miss. 1985). Instruction S-3, known as the "*Robinson* instruction" very clearly and comprehensively sets out the theory of self-defense.

The Court in *Robinson* dealt with the issue of an instruction offered by the State and granted by the trial court. The instruction in that case was one that had been used by prosecuting attorneys since 1859. Although the Court held that it was not reversible error for the trial court to have granted the instruction in question, it found that instruction to be "too long, redundant and confusing." *Robinson*, 434 So. 2d at 207. Therefore, it proposed that the following instruction be used to present the self-defense theory to the jury:

The court instructs the jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant acts.

Id. Instruction S-3 is essentially identical to the *Robinson* instruction. The only difference being the nature of the crime.

Moreover, there are numerous cases in Mississippi that have been reversed on the basis that misleading or confusing jury instructions were granted. *See, e.g., McCary v. Caperton*, 601 So. 2d 866, 869 (Miss. 1992); *Moak v. Black*, 230 Miss. 337, 92 So. 2d 845, 853 (1957); *Bridges v. Crapps*, 214 Miss. 126, 58 So. 2d 364, 367 (1952). In this case, the trial court ruled that the first part of instruction D-4 could confuse the jury. The first part of D-4 broadly states that Rice was under no obligation to wait and see if Perkins was going to hurt him before Rice could legally defend himself. As the State argues, this could easily lead the jury to believe, mistakenly so, that at the mere thought by Rice that Perkins may hurt him, Rice can justifiably react with physical violence. This statement divorces the reasonable apprehension of imminent danger aspect from the theory of self-defense; and while the second part of the instruction approaches toward being a correct statement of the law, it does nothing to cure the aforementioned confusing language.

The theory of self-defense was sufficiently and fairly presented to the jury through instructions S-2 and S-3. In addition, the trial court properly ruled that instruction D-4 was confusing and did not commit reversible error in refusing to grant it. We, therefore, affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF LOWNDES COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE TO EIGHTEEN (18) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED TO LOWNDES COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE AND SOUTHWICK, JJ., CONCUR.