

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00761 COA**

PAMELA MITCHELL

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:	04/21/95
TRIAL JUDGE:	HON. JAMES W. BACKSTROM
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GEORGE S. SHADDOCK
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH VAUGHAN
DISTRICT ATTORNEY:	DALE HARKEY
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MANSLAUGHTER: SENTENCED TO SERVE A TERM OF 7 YRS IN THE CUSTODY OF THE MDOC
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	10/14/97
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

BRIDGES, C.J., FOR THE COURT:

Pamela Mitchell was convicted in the Circuit Court of Jackson County on April 14, 1995, of manslaughter and was sentenced to term of seven years in the custody of the Mississippi Department of Corrections. Aggrieved, Mitchell appeals raising the following issues: (1) that the court erred in granting jury instruction S-2 and refusing to grant jury instruction D-3 and D-5A, (2) that the verdict is against the overwhelming weight of the evidence, and (3) that the alleged cumulative errors at trial constituted a violation of the defendant's right to a fair trial. Finding no merit in the issues raised by Mitchell, we affirm the jury's verdict.

FACTS

On the morning of December 23, 1993, Mitchell and her boyfriend, Lewis Sewell, had a heated argument. Mitchell testified that this was the first of several beatings to occur. During one such beating, Sewell knocked out one of Mitchell's teeth. The next morning, Mitchell telephoned Sewell and the two eventually decided to take a ride together to work out their problems. Mitchell took her grandfather's gun and put it in her purse before leaving with Sewell. Mitchell testified that an argument erupted and she was forced to jump from the car at her house. She testified that Sewell ran after her and beat her. Mitchell went inside her house, pulled out her gun, and confronted Sewell in her yard. Mitchell testified that she asked Sewell to leave, and as he approached her, she fired a shot. A second shot struck and killed Sewell. A third shot was fired into the ground. Mitchell returned to her home, laid the gun down in a bedroom, and walked down the street to her aunt's house. Mitchell later turned herself in to the authorities.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE TRIAL COURT ERRED IN GRANTING THE STATE'S INSTRUCTION ON SELF-DEFENSE OR IN DENYING MITCHELL'S INSTRUCTIONS ON SELF-DEFENSE.

Mitchell argues that the trial court erred in granting the State's instruction S-2 and in denying her proposed instructions D-3 and D-5A. In support of her contention, Mitchell argues that instruction S-2 did not correctly state the law of self-defense in that it left out the element of imminent danger being accomplished in Sewell's acts. In addition, Mitchell argues that instruction S-2 was in conflict with D-5 which would tend to mislead the jury. We find Mitchell's argument with regards to S-2 to be procedurally barred. The following exchange between the trial judge and the defense counsel occurred during the approval of jury instructions:

BY THE COURT: S-2.

BY MR. SHADDOCK: No objection.

BY THE COURT: It will be given.

The law is well settled in this state that the failure to object to jury instructions at trial precludes the consideration of the issue on appeal. *Lester v. State*, 692 So. 2d 755, 799 (Miss. 1997); *Jackson v. State*, 684 So. 2d 1213, 1229 (Miss. 1996); *Walker v. State*, 671 So. 2d 581, 618 (Miss. 1995); *Carr v. State*, 655 So. 2d 824, 856 (Miss. 1995); *Chase v. State*, 645 So. 2d 829, 852 (Miss. 1994). We find Mitchell's objection to S-2 after it was initially given without objection to be tantamount to a failure to object.

Mitchell did not raise an objection to S-2 until D-5 was objected to by the State.

BY THE COURT: Well, have I given this instruction?

BY MR. MILLER: Yes, sir. You gave--the instruction that you see in *Robinson*, you gave in S-2.

BY MR. SHADDOCK: We're going to go back and object to S-2 anyway.

BY THE COURT: Well, I'm going to give D-5. It will be read together, and I don't see that it changes anything, and I'll give it. D-6.

BY MR. MILLER: No objection, Judge.

BY THE COURT: All right, it will be given.

BY MR. SHADDOCK: How about 5 (A)? Have you got it?

No ruling was ever made on the objection. Mitchell failed to seek a definitive ruling. When no definitive ruling is made and no corrective action is requested, the objection is waived. *Gayten v. State*, 595 So. 2d 409, 413 (Miss. 1992).

With regard to the two defense instructions which were refused by the trial court, it is the opinion of this Court that they were properly refused. Defense Instruction D-3 reads as follows:

The Court instructs the jury that the law presumes a defendant in a criminal trial to be innocent and the fact the Pam Mitchell is accused of a crime is not evidence of guilt. You the jury must not allow yourselves to be biased against the Defendant merely because she has been charged with a crime or the fact that she is standing trial today. None of these facts are evidence and should not be considered by you during your deliberations. The Defendant in this case begins this trial with a "clean slate" and is presumed innocent. The law allows nothing but sworn testimony presented at trial to be considered by you, the jury, in determining the guilt or innocence of Pam Mitchell.

The Court instructs the jury that the burden of proof in this case rests solely on the State and that burden of proof never shifts to the Defendant. The

State must prove each and every element of the crime charged beyond a reasonable doubt and if you find that the State failed to prove each element of the crime charged beyond a reasonable doubt, then you must acquit the Defendant of the crime charged.

Defense Instruction D-5A reads as follows:

The Court instructs the Jury that a homicide may, under the law of the State Mississippi, be justifiable when committed in the lawful defense of one's own person where there shall be reasonable grounds to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such being accomplished.

"Where one jury instruction adequately covers the defendant's theory of self-defense, the trial court may properly refuse to grant a second instruction on the grounds that it is redundant or cumulative." *Gossett v. State*, 660 So. 2d 1285, 1295 (Miss. 1995). The Mississippi Supreme Court's standard in reviewing jury instructions is "to read all instructions together, and if the jury is fully and fairly charged by other instructions, the refusal of any similar instructions does not constitute reversible error." *Hull v. State*, 687 So. 2d 708, 722 (Miss. 1996). Failure to give a jury instruction is reversible only if the instruction was substantially correct, was not substantially covered by other instructions actually delivered, and concerned a point at trial so that failure to give it seriously impaired defendant's ability to present a given defense. *U.S. v. Andrews*, 22 F. 3d 1328,1345 (5th Cir. 1994).

Mitchell argues that Instruction D-3 and 5-A should have been granted because they were critical in informing the jury of her total defense. We disagree. The same law of D-3 was covered by Instruction C-1, which was given to the jury. Additionally, the same law of D-5A was covered by Instruction S-2 and S-5, which also were given to the jury. The trial court need not instruct the jury on otherwise valid instructions "if the subject matter contained in the proposed instruction is adequately covered by an instruction already granted." *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992). We feel that C-1, S-2, and S-5 adequately covered D-3 and D-5A; and therefore, were not necessary. We find no merit to this issue.

II. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Where the defendant contends that a new trial should have been granted because the jury verdict was against the weight of the evidence, the standard of review is as follows:

The challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes [Mississippi Uniform Criminal Rule of Circuit Court Practice] 5.16. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

McClain v. State, 625 So. 2d 774, 781 (Miss. 1993). All matters concerning the weight and credibility of the evidence are resolved by the jury. *Id.* The Supreme Court of Mississippi condensed this standard stating:

[O]nce the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part from that [sic] the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.

Williams v. State, 463 So. 2d 1064, 1068 (Miss. 1985).

The evidence in this case is clear. Mitchell shot and killed Lewis Sewell. Mitchell's own testimony attested to this. The State's witness, Keith Fortenberry, heard shots and people hollering. He went to his window and saw Mitchell standing in her driveway with a gun in her hand. Mr. Fortenberry testified that Mitchell told him, "Don't nobody mess with me." We find that a reasonable juror could have easily found Mitchell guilty and thus, we will not overturn the jury's verdict in this case. This issue is without merit.

III. WHETHER THE ALLEGED CUMULATIVE ERRORS AT TRIAL CONSTITUTED A VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

Mitchell asserts that the cumulative effect of errors operated to deprive her of a fundamentally fair trial. The Mississippi Supreme Court has held that "individual errors, not reversible in themselves, may combine with other errors to make up reversible error." *Wilburn v. State*, 608 So. 2d 702, 705

(Miss. 1992). Mitchell cites *Stringer v. State*, 500 So. 2d 928, 946 (Miss. 1986), in support of her proposition. However, that case dealt with errors not comparable to the case *sub judice*: comments on the defendant's failure to testify, admission of prejudicial photos of the body, an attempt to prevent a witness from testifying, improper voir dire, and use of photos of the body during closing argument, to name a few. The rationale of *Stringer* is not applicable to this case. Where there is "no reversible error in any part, . . . there is no reversible error to the whole." *McFee v. State*, 511 So. 2d 130, 136 (Miss. 1987).

This Court has examined the record and determined that Mitchell received a fair trial--albeit not a perfect one. *See Nixon v. State*, 641 So. 2d 751, 755 (Miss. 1994); *Sand v. State*, 467 So. 2d 907, 911 (Miss. 1985). Each one of Mitchell's complaints combined was not such as to deny Mitchell a fundamentally fair trial. This is not one of those rare cases requiring reversal on the ground that cumulative effect of all errors deprived the defendant of a fair trial. Accordingly, we find no merit to this issue.

THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT .

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.