

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 1998-KA-01152-COA**

**DONALD WARREN LEFFINGWELL**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT: 05/28/1998  
TRIAL JUDGE: HON. C. E. MORGAN III  
COURT FROM WHICH APPEALED: CARROLL COUNTY CIRCUIT COURT  
ATTORNEY FOR APPELLANT: LELAND H. JONES III  
ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL  
BY: PAT S. FLYNN  
DISTRICT ATTORNEY: DOUG EVANS  
NATURE OF THE CASE: CRIMINAL - FELONY  
TRIAL COURT DISPOSITION: 05/28/1998: MURDER: SENTENCED TO SERVE A TERM  
OF LIFE IMPRISONMENT WITH THE MDOC.  
DISPOSITION: AFFIRMED - 07/20/1999  
MOTION FOR REHEARING FILED: 08/03/99; denied 10/12/99  
CERTIORARI FILED: 10/22/99; denied 01/20/2000  
MANDATE ISSUED: 2/10/2000

BEFORE McMILLIN, C.J., KING, P.J., AND DIAZ, J.

KING, P.J., FOR THE COURT:

¶1. Donald Warren Leffingwell was convicted of murder and sentenced to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections. Aggrieved by his conviction and sentence, Leffingwell has appealed and assigned three errors. This Court quotes those errors verbatim:

**I. THE COURT ERRED WHEN, OVER OBJECTION BY THE DEFENDANT, IT REFUSED TO ALLOW THE DEFENDANT TO BE PRESENT DURING THE QUALIFYING OF THE**

**JURY, THEREBY REMOVING HIS ABILITY TO ASSIST IN HIS OWN DEFENSE DURING THIS VITAL STAGE IN THE PROCEEDINGS.**

**II. THE COURT ERRED IN ALLOWING THE STATE OF MISSISSIPPI TO RECALL WITNESS, SHERIFF DONALD GRAY, OVER OBJECTION AND MOTION OF THE DEFENDANT, ON THE SECOND DAY OF THE TRIAL TO REHABILITATE HIS FALSE AND/OR ERRONEOUS TESTIMONY OF THE PREVIOUS DAY.**

**III. THE COURT ERRED WHEN IT REFUSED TO GRANT JURY INSTRUCTION NUMBER D-15, REGARDING ACCOMPLICE TESTIMONY, IN THAT THE STATE RELIED UPON THE TESTIMONY OF CINDY LOU COOK, WHO WAS ARRESTED IN CONNECTION WITH THE EVENTS FOR WHICH THE DEFENDANT WAS TRIED AND CONVICTED.**

¶2. Finding no error, this court affirms the circuit court judgment.

### **FACTS**

¶3. On November 8, 1997, Donald Leffingwell offered Cindy Cook a ride to Byhalia, Mississippi. Before traveling to Byhalia, Leffingwell stated a desire to have her meet three of his friends, "Red", Red's wife, and Tommy Thompson.

¶4. Leffingwell and Cook met his friends at a tattoo shop in Vaiden, Mississippi. They arrived at the shop at approximately 10:00 p.m., and thereafter drank beer and played pool. Eventually, Leffingwell, Cook and Thompson left the tattoo shop and went across the street to a hotel.

¶5. After arriving at the hotel, Leffingwell and Thompson argued outside in the parking lot. Cook remained in a hotel room. According to Cook, while looking out a hotel room window, she saw Thompson wave a gun and then walk out of the parking lot. At this point, Leffingwell walked into the hotel room and stated that Thompson had shot at him.

¶6. Later that evening, Thompson returned to the hotel room and apologized to Leffingwell. Leffingwell refused the apology and insisted that Thompson leave. According to Cook, when Thompson left, Leffingwell stated to her that he was going to kill him.

¶7. The next morning, Leffingwell and Cook went to the tattoo shop where they ran into Thompson. After talking to Thompson momentarily, Leffingwell decided to give him a ride to Grenada, Mississippi. While riding to Grenada, Thompson mentioned that he had to urinate. Leffingwell took an exit off the highway and began to look for a dirt road. Thompson indicated three times that he had seen an appropriate place to stop, but Leffingwell continued to drive. Leffingwell finally stopped on a dirt road, and both men got out of the truck to urinate.

¶8. Leffingwell returned to the truck, but yelled at Thompson to remain off the road. He removed a nine millimeter handgun from underneath his coat, aimed it partially out of the truck window and shot Thompson five times. Leffingwell then got out of the truck and walked over to Thompson. He picked up Thompson's left hand, and stated to Cook that Thompson was dead.

¶9. Leffingwell returned to the truck and ordered Cook to get down on the floorboard. They left the area

and headed back to Vaiden to retrieve Leffingwell's tattoo guns. Upon retrieving the tattoo guns, Leffingwell went to talk to Red. He and Cook then drove to Nevada.

¶10. Later that evening, Derek Kendall drove down the dirt road where Thompson had been shot. He noticed Thompson's body lying on the ground. Mr. Kendall called the sheriff's department to report that he had seen an injured man.

¶11. Sheriff Donald Gray, several deputies and an ambulance went to the reported scene. The ambulance personnel were unable to revive Thompson. He died at the scene.

¶12. Dr. Steven Haynes, a pathologist, performed an autopsy on Thompson. He determined that Thompson sustained five gunshot wounds: two in the back, one in the back of the left arm, one in the back of the head, and one on the left side of the left jaw. It was Dr. Haynes's opinion that Thompson died of a distant and penetrating gunshot wound to the back. The manner of death was homicide.

¶13. After several weeks, Cook returned to her home in Memphis, Tennessee. She reported the incident to the Carroll County Sheriff's Department and gave a statement. Cook was charged as an accessory to Thompson's murder.

¶14. Leffingwell was arrested in Reno, Nevada on December 24, 1997, and subsequently indicted for murder. A trial was held, and the jury convicted Leffingwell. His motion for judgment notwithstanding the verdict and new trial was denied. Leffingwell now appeals his conviction and sentence.

## ISSUES

**I. THE COURT ERRED WHEN, OVER OBJECTION BY THE DEFENDANT, IT REFUSED TO ALLOW THE DEFENDANT TO BE PRESENT DURING THE QUALIFYING OF THE JURY, THEREBY REMOVING HIS ABILITY TO ASSIST IN HIS OWN DEFENSE DURING THIS VITAL STAGE IN THE PROCEEDINGS.**

¶15. Leffingwell contends that the trial court erred by not allowing him to be present during the qualification of the jury.

## Law

¶16. The supreme court has determined that "a defendant has the right to be present only at 'critical stages' of the trial." *Ludgood v. State*, 710 So.2d 1222, 1224 (Miss.1998). These stages have been defined as "proceedings in which the defendant's presence has a reasonably substantial relation to his opportunity to defend himself against the charges." *Id.*

## Analysis

¶17. Prior to the calling of the instant case, the trial judge proceeded to qualify the pool of prospective jurors. Leffingwell's attorney objected, stating that his client was entitled to be present during this stage of the trial proceedings. The trial judge overruled the objection and held that the defendant was not entitled to be present at jury qualification because the case had not officially been called.

¶18. A defendant has the right under the Sixth Amendment to be present in the courtroom only at critical stages of the trial. *Id.* These stages dictate that the defendant's presence in the courtroom has a reasonably substantial relation to his opportunity to defend himself against the charges. *Id.*

¶19. In the instant case, Leffingwell argues that he should have been present during the qualification of the jurors. Yet, he alleges nothing to demonstrate that his presence would have assisted his attorney in his defense. *Id.* at 1225. During the qualification process, the trial judge merely asked questions regarding the availability of the prospective jurors to serve on a jury. His questions centered around their ages, ability to read and write, existence of felony convictions, registered voter status, past jury service, present status of any personal case pending in court, employment with the Mississippi Department of Corrections, personal or family illness, and business and financial hardships. At this stage prior to trial, Leffingwell's presence in the courtroom did not have a reasonably substantial relation to his opportunity to defend himself against the charge of murder. His case had not been called nor had juror selection begun. This Court finds no merit to Leffingwell's first assignment of error.

**II. THE COURT ERRED IN ALLOWING THE STATE OF MISSISSIPPI TO RECALL WITNESS, SHERIFF DONALD GRAY, OVER OBJECTION AND MOTION OF THE DEFENDANT, ON THE SECOND DAY OF THE TRIAL TO REHABILITATE HIS FALSE AND/OR ERRONEOUS TESTIMONY OF THE PREVIOUS DAY.**

¶20. Leffingwell contends that Sheriff Gray should not have been allowed to testify on redirect examination regarding his previous testimony about the number of shells found in Thompson's gun. In pertinent part, Sheriff Gray's testimony reads as follows:

Q: What was your testimony with regard to the bullets that were in the gun, Sheriff?

A: At the time I testified, I testified that the gun contained five live rounds of ammunition.

Q: Was that correct?

A: That was not correct, but that is what I thought to be correct at the time I testified.

Q: And what was, what was, in fact, in the gun and when did you notice that?

A: When I unloaded the gun here on the stand yesterday for safety reasons, that is the first time that these shells had actually been removed from this gun. And at the time I was placing them in the bag, I thought I noticed that one of the rounds was an empty round.

Q: And what did you do?

A: I immediately notified the attorneys after my testimony yesterday.

Q: All right sir. And so how many live rounds were in the weapon yesterday?

A: There were four live rounds, one empty round.

Q: And why was it that you thought that there were five live rounds when you first testified?

A: On the date that this happened and when we, we secured the gun and I brought it back to the

office, we upon examining the gun at the office, we were trying to be very careful about the handling of the gun as far as trying not to touch it. We didn't know if it might later be needed for latent fingerprints or test firings, and as I recall, we did not actually remove the shells from the chambers, but we just examined the end of the shells, and it was our opinion that we did not see any firing marks, or it was our opinion at that time that none of these shells had been fired. But yesterday was the first time that the shells had actually been removed from the gun.

### **Law and Analysis**

¶21. Leffingwell incorrectly asserts that Sheriff Gray was improperly allowed to testify on *redirect examination*. Sheriff Gray was actually *recalled* as a witness after having completed his testimony the previous day.

¶22. It is within the trial court's discretion to decide whether to allow a witness to be recalled to the stand. *Ellis v. State*, 661 So.2d 177, 179 (Miss.1995). Miss. Rule of Evidence 611(a) provides that "the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth".

¶23. The record reveals that Sheriff Gray testified incorrectly regarding the number of spent shells found in Thompson's gun. The State requested that he be recalled as a witness merely to correct his previous testimony. In the interest of the effective and accurate presentation of facts, it was well within the trial judge's discretion to allow Sheriff Gray to retake the stand to state the correct number of live and empty shells that had been found.

¶24. This Court notes that Leffingwell claimed during trial that because Thompson had fired a gun at him while on the dirt road, he discharged his weapon in self-defense. Sheriff Gray's testimony on recall would appear to have aided Leffingwell's defense rather than hindered it.

### **III. THE COURT ERRED WHEN IT REFUSED TO GRANT JURY INSTRUCTION NUMBER D-15, REGARDING ACCOMPLICE TESTIMONY, IN THAT THE STATE RELIED UPON THE TESTIMONY OF CINDY LOU COOK, WHO WAS ARRESTED IN CONNECTION WITH THE EVENTS FOR WHICH THE DEFENDANT WAS TRIED AND CONVICTED.**

¶25. Leffingwell contends that because Cook had been charged as an accessory and believed herself to still be charged when testifying at trial, Instruction D-15, an accomplice instruction, should have been granted.

### **Law**

¶26. In determining whether a defendant is entitled to a cautionary instruction on accomplice testimony, this Court has stated that an accomplice is a person who is implicated in the commission of a crime. *Williams v. State*, 95-CT-01199-SCT (¶9) (Miss.1998).

### **Analysis**

¶27. This Court focuses on whether Cook was charged as an accomplice at the time she testified at trial. Cook's testimony suggests that she still believed herself to be subject to the accomplice indictment. However, Sheriff Gray testified that after an investigation of Cook's participation in Thompson's death, he found "no evidence that she was an accomplice as far as in this murder." In light of the sheriff's testimony, the granting of a cautionary accomplice instruction would have been improper. At the time of trial, Cook was not pursued by the State as an accomplice. Accordingly, the trial judge did not err in failing to grant this instruction.

¶28. Finding no error in the instant case, this Court affirms the circuit court judgment.

**¶29. THE JUDGMENT OF THE CARROLL COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO CARROLL COUNTY.**

**McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, DIAZ, LEE, PAYNE, AND THOMAS, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION. MOORE, J., NOT PARTICIPATING.**

IRVING, J., DISSENTING:

¶30. I respectfully dissent from the majority's conclusion that Leffingwell was not entitled to a cautionary instruction regarding the testimony of Cindy Cook, and because of the importance of her testimony to the prosecution's case, I would reverse and remand.

¶31. Leffingwell sought the following instruction:

A person criminally involved with others in a crime is an accomplice. The testimony of an accomplice is to be considered and weighed with great care, caution and suspicion. You may give it such weight and credit as you deem it is entitled.

¶32. The trial court refused to grant the instruction on the basis that Cindy was not an accomplice inasmuch as she was not under indictment. The majority agrees with that characterization of Cindy's status. The record, however, in my opinion neither supports nor compels that conclusion.

¶33. The record reflects that Cindy's sister called the Carroll County Sheriff Department from Memphis, Tennessee and advised that "she had some information" regarding a homicide that had occurred in Carroll County, Mississippi. It is not clear from the record whether the sister meant the sister had some information or Cindy had some information. In any event, Cindy was located and interviewed.

¶34. During the direct examination of Sheriff Don Gray, he was asked whether, following the interview with Cindy, he had any leads as to a suspect in the shooting, and he answered, "Yes, sir. We did." When asked if he made any "arrest for and charge for murder in this case," he answered "Yes, sir." Upon being asked who was arrested, he answered, "Donald Warren Leffingwell." He failed to mention that Cindy had also been arrested. However, during cross-examination, the following colloquy occurred:

Q. The District Attorney asked you about an arrest. You told us about Mr. Leffingwell?

A. Yes, sir.

Q. I show you a document and ask you if that refreshes your memory about any other arrests made in this matter?

A. Yes, sir.

Q. Sheriff, there was an arrest of Cindy Lou Cook, was there not?

A. Yes, sir.

Q. And she was charged with accessory to murder?

A. Yes, sir.

Q. She was incarcerated, brought to this jurisdiction released on bond?

A. Yes, sir.

Q. The case was presented to the Grand Jury. Ms. Cook was not indicted; is that correct?

A. This case was presented. I don't recall that Ms.--

BY [THE DISTRICT ATTORNEY]: --*Your Honor, I think I'm the only one that can answer what happened in the grand jury, and I'm not on the stand. I don't think the Sheriff is a qualified witness to answer what was done at the grand jury.*(Emphasis added).

**BY THE COURT:** That's true. That is sustained.

BY MR. JONES:

Q. Sheriff, as the chief law enforcement officer of Carroll County, when the recalled Grand Jury of November '97 met April the 20th of '98, did you serve a capias on Cindy Lou Cook for accessory to murder?

A. No, sir. I did not.

Q. You have seen her as recently as today?

A. Yes, sir.

Q. If you had such a warrant or a capias, she was within your presence that you could serve that on her?

A. Yes, sir; that's correct.

Q. You don't have such a document, do you, sir?

A. No, sir.

¶35. Cindy testified as follows:

Q. After you gave this statement [on December 10, 1997] to the Highway Patrol investigators in Holly Springs, you were arrested?

A. That's correct.

Q. You were charged with accessory to murder?

A. That's correct.

Q. You were transported from the Holly Springs Jail to the Carroll County Jail?

A. No, sir.

Q. Where did you go?

A. To Oxford. Oxford Jail.

Q. You stayed there?

A. For, for one night, for approximately 24 hours and then to Carroll County.

Q. When were you released from the Carroll County Jail?

A. February, the second week in February on a Sunday.

Q. So from December 10 to the second Sunday in February you remained locked up?

A. Yes, sir.

Q. You made bond and were released?

A. I made bond and was released. Yes, sir.

Q. Have you been served with a copy of an indictment?

A. No, sir.

Q. Charging you with accessory to murder or charging you with anything?

A. I was given just the warrant from-

Q. --since that time?

A. No, sir.

Q. So after the Grand Jury met April the 20th, the only thing you got about being here, I guess, was a subpoena to be here?

A. That's correct.

Q. Is it your belief that you're unarrested with respect to this matter?

A. No, sir.

¶36. During redirect examination, Cindy testified that no one offered her anything, that she came forward because she couldn't live with it, and that "as far as I know, I am still [an] accessory to murder."

¶37. The majority relies on the testimony of Sheriff Gray-- that he found no evidence that Cindy was an accomplice as far as the murder was concerned-- to conclude that Cindy was not an accomplice. The record reflects that during the time that Thompson was killed Cindy was the only passenger in the vehicle. During her interview with law enforcement officers on December 10, 1997, which was approximately a month following Thompson's death, she gave a version of what transpired the evening of Thompson's death that was radically different from the version testified to at trial. During the month immediately following Thompson's death, she and Leffingwell were together almost that entire period. In preparation for trial, the district attorney's office interviewed her extensively. It was apparently at this time that she gave a different version from what she related to investigators on December 10, 1997. For example, in the December 10th statement she said that she did not see Leffingwell shoot, that he got out of the truck and went out of her sight, and that she did not see the pistol used by Leffingwell until sometime later when he placed it on the seat of the truck. At trial, she testified that she saw Leffingwell angle his pistol out of the window and fire.

¶38. The comment of the district attorney that only he knew whether an indictment had been returned against Cindy, coupled with Cindy's thinking that she was still charged as an accomplice and her turnabout in relating what happened during the murder of Thompson, compels me to the conclusion that the cautionary instruction should have been given. The district attorney further advised that he was not on the witness stand, apparently meaning he was not going to advise either the court or defense counsel of Cindy's status. His statement concerning exclusive scienter of Cindy's status and his unwillingness to share it with others raised the specter of whether Cindy's fate would be determined by the type of testimony she gave during trial. Either Cindy was or was not an accomplice. After all, she had been incarcerated, and remained in jail for approximately two months as an accessory to murder. She had bonded out of jail on the accessory charge, and apparently was still under bond for that charge. If there was no indecorous arrangement or understanding between the State and Cindy regarding her testimony, it bedevils me why the district attorney would not simply just advise everyone of Cindy's status. I believe more forthrightness should be required of the State.

¶39. The fact that the Sheriff testified that his investigation revealed that Cindy was not actually involved in the murder does nothing to resolve the issue. First, there is nothing in the record indicating any sort of investigation of Cindy's role vel non in the murder of Thompson other than the Sheriff's summary statement mentioned above. In fact, the record indicates that Cindy came to the authorities, not the other way around. This fact, of course, could be the proverbial two-edged sword. Cindy may have been involved and was trying to help herself by coming forward and placing all the blame on Leffingwell, or she in fact may not have been involved at all.

¶40. In *Williams v. State*, 1998 WL 852598 (Miss. 1998), cited by the majority, our Supreme Court reversed Williams' conviction partly because of the failure of the trial court to give a cautionary instruction regarding accomplices' testimony. In arriving at its decision, the *Williams* court taught:

Arnotia was much more than a passive observer. *It is not necessary for an accomplice to be prosecuted, and Arnotia may be considered to be an accomplice even though she was not prosecuted for her participation or later attempts to obstruct the investigation. Furthermore, since there was no corroboration of the testimony of these three witnesses, other than each other, the instruction would be mandatory.* See *Holmes v. State*, 481 So. 2d 319, 322-23 (Miss. 1985); *Hussey v. State*, 473 So. 2d 478, 480 (Miss. 1985); *Edwards v. State*, 630 So. 2d 343, 343-44 (Miss. 1994).

*More importantly, especially as to Arnotia's testimony, in Ferrill v. State*, 643 So. 2d 501 (Miss. 1994), *this Court reversed and remanded the conviction for the trial court's failure to grant a cautionary instruction based on prior inconsistent statements of the State's witness.*

In this case, all of the witness testifying had lied at some point to police officers about their own involvement in the matter. As there was error in denying the cautionary instruction in this case, the cumulative effect of this error combined with the failure to properly instruct the jury on the question of deliberation or premeditation in a case with questionable proof thereon merits reversal.

*Id at 10.* (emphasis added).

¶41. In my opinion, *Williams*, stands at least for the proposition that prosecution is not indispensable to one being an accomplice. Therefore, Cindy may be considered to be an accomplice even though she was not prosecuted. Further, inasmuch as Cindy gave a prior inconsistent statement, it would appear that *Ferrill v. State*, 643 So. 2d 501 (Miss. 1994), cited by the Supreme Court in *Williams* would provide persuasive authority for the propriety of granting a cautionary instruction in this case. For the reasons stated, I respectfully dissent.