

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLARENCE BENNETT, JR

APPELLANT

V.

NO. 2006-KA-0054-COA

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Clarence Bennett, Jr., Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Kenneth L. Thomas, Circuit Court Judge

This the 8th day of FEB, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 
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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

**WHETHER THE GUILTY VERDICT WAS AGAINST THE OVERWHELMING
WEIGHT OF THE EVIDENCE.**

STATEMENT OF INCARCERATION

Clarence Bennett, the Appellant in this case is currently incarcerated in the Mississippi
Department of Corrections

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the
Mississippi Constitution and Miss. Code Annotated § 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Bolivar County, Mississippi and a judgment

of conviction on one count of aggravated assault and one count of possession of a firearm by a convicted felon against Clarence Bennett, following a trial on November 14-17, 2005, the Honorable Kenneth Thomas, Circuit Judge, presiding. Bennett was subsequently sentenced to serve a seventeen year sentence for the aggravated assault charge and three years for the possession of a firearm by a convicted felon charge, with the sentences to run concurrently, pursuant to **Mississippi Code Annotated § 97-37-2** and **Mississippi Code Annotated § 97-37-5**.

FACTS

On April 6, 2005, Clarence Bennett (Bennett) and his neighbors, Myron Hall (Hall) and Tonya Lewis (Lewis), disputed over the parking of Bennett's truck. Lewis testified that Bennett regularly harassed her when she complained about how he had his truck parked. (T. 63). On the day in question, Bennett was complaining about how Lewis was responsible for having his truck towed and that he began to "steadily approach" her until Hall stopped him and chased him back into his apartment. (T. 63, 80-81). At that point, Lewis called the police.(T. 64).

When police arrived, they were let into Bennett's apartment where they began to question him. Officers believed him to be under the influence of alcohol. (T. 107). Bennett was agitated and claimed that the people who lived a couple apartments down from him called the landlord on him because he had a broken down truck in the parking lot. Bennett claimed that, if not for those individuals, his truck would not have been towed. (T. 107). During his conversation with the police, Bennett repeatedly shouted at people who were standing around outside of his apartment. The officers asked him to stop but he would not. (T. 107-8). At that point, Bennett was placed under arrest for disorderly conduct and then taken to the police station for booking. (T. 108). According to officer's testimony, while on the way to the station, Bennett made several threatening statements

about how he needed to "just go get a gun and shoot their ass" and also acted like he was cocking a pistol. (T. 114).

When Hall and Davis returned to their apartment, Bennett was standing in the doorway of his apartment. (T. 64). Davis went into their apartment with one of her children, and Hall remained outside. Hall and Bennett began to talk loudly, and Bennett pulled out a gun. (T. 82-3, 97). Hall began to run into his apartment when Bennett shot at him three or four times. (T. 83). Hall then opened the door to his apartment and went inside (T. 83, 97). Hall was not carrying a weapon at this point or during the earlier incident. (T. 84).

Bennett's story of the situation, however, differed significantly. According to Bennett, that afternoon, he left his apartment to put some trash in the dumpster. When he exited the apartment, he walked past Hall, and Hall told Bennett that he needed to "junk that old piece of junk," in reference to Bennett's truck. Bennett told Hall to leave him alone and said that Hall's time would be better spent teaching his girlfriend, Lewis, how to drive. (T. 129). At that point, Hall began to approach Bennett with a pocket knife, using threatening language. (T. 130). Bennett returned to his apartment and closed the door while Hall remained outside, where he kicked the door and Bennett's truck. (T. 130).

Five or ten minutes later, Officers Steven Haywood and Rhett Nelson of the Cleveland Police Department arrived at Bennett's apartment. (T. 132). The police officers entered the apartment and informed Bennett that they had received a call regarding a disturbance at the apartment complex. Bennett told them his side of the story and was arrested by Officer Nelson for disorderly conduct. (T. 132-33). Bennett was taken in handcuffs to the Cleveland Police Department where he was booked for disorderly conduct. (T. 133-34). Bennett made bond the same day and the bondsman took him back to his apartment. (T. 134). Bennett ran several errands and then returned to his apartment.

(T. 134-35).

When Bennett returned to his apartment, he saw Hall and a little girl playing outside. (T. 135). Bennett got his gun out of the glove compartment of his vehicle and put it behind his back. (T. 135) Bennett then backed up behind his car so that he could keep an eye on Hall because Hall was approaching him again. (T. 136) Bennett walked towards the door of his apartment and Hall began to run towards him while brandishing a knife in a menacing manner (T. 136-37). At this point, Bennett asked Hall to leave him alone because he did not want to return to jail. Hall continued to approach Bennett menacingly, using profanity and brandishing a knife. (T. 137-38). Bennett tried to open the door to his apartment with his hands behind his back while watching Hall, who continued to approach him. (T. 138).

When Hall got close to Bennett, he leapt at him and Bennett pulled out his pistol and shot at Hall one time. (T. 138-40). When Bennett fired, Hall made a twisting motion that was "like a ballerina bow." (T. 140-41). Bennett fired again and Hall began to shake as if he was in pain. (T. 141). Bennett continued to point his gun as Hall returned to his apartment. When Hall had made it most of the way back to his apartment, Bennett returned to his apartment. Approximately ten to fifteen minutes later, the police arrived at Bennett's apartment and arrested him. (T. 142-43)..

After deliberation, the Jury returned verdicts of guilty of aggravated assault and being a felon in possession of a firearm against the Appellant. (C.P. 31-33, R.E. 7-9). During sentencing, Bennett's story changed regarding the incident, and he insisted that he did not shoot Hall, but, rather, another man. (T. 226). Regardless, the Appellant was subsequently sentenced to 12 years in the custody of the Mississippi Department of Corrections for the aggravated assault conviction, and three years for the felon in possession of a firearm charge, those sentences to run concurrently. (C.P. 49-50, R.E. 16-17).

On December 9, 2005, Bennett filed a Motion for J.N.O.V. or in the Alternative for New Trial (C.P. 35, R.E. 10). On December 9, 2005, the motion was denied. (C.P. 37, R.E. 12). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, Bennett filed a notice of appeal. (C.P. 38, R.E. 12).¹

SUMMARY OF THE ARGUMENT

The jury's verdict of guilt for aggravated assault was against the overwhelming weight of the evidence. Bennett's actions clearly fall under the long-recognized self-defense defense to aggravated assault. The proper relief is reversal and remand for a new trial.

ARGUMENT

ISSUE :

WHETHER THE GUILTY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE. SELF-DEFENSE.

i. Standard of Review

1. It is important to note, trial counsel was subject of a bar complaint, and ultimately, a six-month suspension by the Mississippi Bar for, at least in part, his inaction in the instant case. See, *Wong v. The Mississippi Bar*, 5 So.3d 369, 371 (Miss. 2008). In the instant case, trial counsel insisted that he was unable to find a viable issue on appeal. *Id.* Trial counsel, however, was unable to remember whether he informed Bennett that he was not going to file a brief on his behalf. *Id.* Thus, Bennett's appeal was ultimately dismissed. Bennett's appeal was ultimately reinstated, however. Mississippi appellate courts will only address an issue of ineffective assistance of counsel on direct appeal if the parties stipulate counsel was ineffective, or the record is clear that counsel's performance was so deficient as to raise constitutional concerns. *Ramsey v. State*, 959 So.2d 15 (¶¶ 30-31) (Miss. Ct. App.2006) (citing *Read v. State*, 430 So.2d 832, 841 (Miss.1983)). However, it should be noted that the failure of the record to clearly indicate deficient performance could, at least in part, be a result of trial counsel's inefficient performance. Accordingly, Bennett requests that any issues regarding trial counsel's ineffective assistance of counsel be preserved for post-conviction relief or otherwise appropriate proceedings. It should also be noted that, because of the length of delay between trial and appeal, certain exhibits were not made available.

The standard of review for denial of a motion for a new trial is abuse of discretion. *Tentoni v. Slayton*, 968 So.2d 431, 441 (Miss. 2007). A motion for a new trial challenges the weight of the evidence presented at trial. *Edwards v. State*, 800 So.2d 454, 464 (Miss. 2001). The appellate court will disturb a verdict when it is so contrary to the weight of the evidence that allowing the verdict to stand would be an unconscionable injustice. *McClain v. State*, 625 So.2d 774, 781 (Miss. 1993). When the court hears a motion for new trial, it sits as the hypothetical thirteenth juror. The motion is addressed to the court's discretion which should be exercised with caution. The power to grant a new trial should only be granted when the evidence weighs heavily against the verdict. *Amiker v. Drugs for Less*, 796 So.2d 942, 947 (Miss. 2000). The appellate court should weigh the evidence in the light most favorable to the trial verdict. *King v. State*, 798 So.2d 1258, 1261 (Miss. 2001).

Though it is rare that an appellate court would overturn the verdict of a circuit court jury, such circumstances do exist. The *Thomas* court stated:

in exceedingly rare cases where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. In such a case we think it proper to award a new trial on the facts, and let another jury have an opportunity to weigh and judge the testimony at another time, and under different circumstances, when the mistake of the first jury may be corrected, if a mistake has been made, and justice in the case, which the state desires as well as the accused, can be duly awarded.

Thomas v. State, 92 So. 225, 226 (Miss. 1922).

While the standard for granting a motion for new trial is high, an appellate court will use its authority to order a new trial when it considers the first jury's determination of guilt to be based on weak evidence, even if that evidence is enough to withstand a motion for a directed verdict. *Dilworth v. State*, 909 So. 2d 731, 737 (Miss. 2005).

ii. The overwhelming weight of the evidence shows that the Appellant did not commit aggravated assault.

The verdict is against the overwhelming weight of the evidence. While this honorable Court may find that the testimony was enough to allow the jury to infer that an aggravated assault was committed, it is not the case that simply because the jury could make such an inference. The Appellant respectfully contends that any inference made by the jury in the case *sub judice* was not reasonable and was the product of mere speculation, conjecture, or guesswork. Looking at the circumstances surrounding the shooting, it is clear that the jury's determination or inference of the nature of the shooting was tenuous at best.

First, there were no witnesses without a stake in the outcome of the trial who could definitively say what happened. The only other witness who testified about her knowledge of the shooting was Bobby Riley. It is clear from the testimony given by Bobby Riley that she simply heard an argument. Riley was unable to see anything from her position inside of her apartment, she even testified that she "didn't see the guy who shot Myron." (T. 96) Riley also testified that she was unable to have a clear view of Hall. Her testimony was also significantly different from the statement that she gave to the police at the scene. Riley is the only "witness" that the state presented who could possibly have an unbiased version of the facts of the case but she was not a witness to the actual shooting.

Second, there is ample evidence from the record to show that there were earlier confrontations between Bennett and Hall that support Bennett's testimony that he was seeking to defend himself against Hall, rather than acting aggressively when he shot him. Tonya Lewis, Hall's girlfriend, testified that Hall had chased Bennett back into his apartment earlier in the day. (T.

80-81). Though it is in dispute, Bennett actually testified that Hall pursued Bennett back to his apartment while brandishing a knife. (T. 130). Bennett also testified that after following him, Hall kicked the door and Bennett's truck after chasing him inside the apartment. (T. 130). There was also further testimony from Bennett to indicate that Hall once again brandished a pocket knife in the moments before the shooting. (T. 136-37).

Under Mississippi law, self-defense is a recognized defense to a charge of aggravated assault. In order to succeed on a claim of self-defense, the defendant must show that the danger to them was either actual, present and urgent or the defendant must have reasonable grounds to apprehend design on the part of the victim to kill or do him some great bodily harm and in addition there must be some imminent danger of the design being accomplished. *Anderson v. State*, 571 So.2d 961, 963 (Miss. 1990). In the case at hand, Bennett testified that there was an actual, present and urgent danger about to befall him. Bennett testified that Hall was approaching him with a knife; clearly he felt that there was clear and present danger. These are also reasonable grounds to apprehend design on the part of the victim to kill or do him some great bodily harm. There was also imminent danger of the "design being accomplished" as they were in close quarters. Bennett testified that he was backed up against the door of his apartment as Hall approached him. (T. 138). Bennett was so afraid of Hall's design being accomplished that he didn't dare turn away from Hall as he approached. Based on this testimony, the jury should have found that Bennett acted in self-defense.

Furthermore, Bennett's actions do not meet the standard of what is not self-defense under Mississippi law. Mississippi courts have found that it is not self-defense if a person provokes a difficulty, arms himself in advance and intends to use his weapon if necessary and overcome his adversary, he is the aggressor and has not acted in self-defense. *Parker v. State*, 401 So.2d 1282,

1286 (Miss. 1981). In this case, Bennett did indeed arm himself when he left his vehicle but he did not attempt to "provoke a difficulty". (T. 135). Indeed, according to Bennett's testimony, he was just trying to walk into his own apartment when Hall approached him with a knife. (T. 136-37). Bennett also testified that he asked Hall to leave him alone because he did not want to return to jail. (T. 137-38). Based on this testimony, it is clear that the jury had no option other than to believe that Bennett was acting in self-defense.

iii. Conclusion

Based on the evidence presented at trial, no reasonable jury could have inferred that Bennett was guilty of aggravated assault. There were no unbiased eyewitnesses to the shooting. Bennett was not the aggressor. Hall approached Bennett in a threatening manner earlier in the day. Furthermore, while Bennett was armed, he simply attempted to enter his home when he was cornered by Hall who was approaching him menacingly with a knife. Based on this evidence, the jury was only justified in returning a verdict of not guilty.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on one charge of aggravated assault, with instructions to the lower court.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


Justin T Cook
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Clarence Bennett, Jr., do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 8th day of FEB, 2010.


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