IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES PATRICK GRAHAM — APPELLANT

VS. NO. 2006-KA-00518

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

A Forrest County grand jury indicted Charles Patrick Graham (Appellant) on two (2) counts of Simple Assault on Peace Officer, in violation of Miss. Code Ann. Section 97-37-7(1)©). (C.P. 8). Counts One and Two of said indictment contained identical scribbler's errors. (Tr. 3). Specifically, both counts of the indictment read, "...in Forrest County, Mississippi, on or about October 03, 2005, did unlawfully, feloniously and willfully attempt by physical menace to put..., in fear of imminent serious bodily harm by *arming himself with a pen and bottle of bleach while* kicking, hitting, and threatening..." (*Emphasis added*) (C.P. 8). A March14, 2006 hearing was held on the State's Motion to Amend Indictment. (C.P. 12) (Tr. 2-7). The State explained that the language was intended for inclusion in an indictment of an entirely separate incident that did involve a pen and a bottle of bleach. (Tr. 3). The trial court ruled that amending the indictment by deleting "arming himself with a pen and a bottle of bleach" had no affect on the charging language. (Tr. 6).

Thereafter, Appellant was tried under the amended indictment before a Forrest County Circuit Court Jury, the Honorable Robert B. Helfrich presiding. Appellant was found guilty on both counts and was sentenced to two (2) consecutive 5-year sentences in the custody of the Mississippi Department of Corrections. (C.P. 41-44).

STATEMENT OF FACTS

On or about October 3, 2005 at approximately 2 pm, Appellant was released from the Forrest County jail, which is located just across the street from the Forrest County Sheriff's Office. Apparently, Appellant's personal items, including his shoes, were stored at the Sheriff's Office while he served time in the Forrest County jail. Rather than directly crossing the street upon his release from the jail at 2 pm to retrieve his shoes, a shoeless Appellant waited until after 5 pm to visit the Sheriff's Office for his personal items. Finding the front door locked, as it is everyday during the 5 pm to 6 pm shift change, Appellant became irrate and forced his way into the building by kicking in the front door. As Appellant continued through the building toward the jail area of the building, Officers Orlando Dantzler and John Simmons attempted to stop him to determine why he forced his way into the building. At such time, Appellant began kicking and hitting the officers. Appellant also threatened the officers and their families with death. Appellant was subsequently arrested.

STATEMENT OF THE ISSUES

ISSUE ONE

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE COURT ALLOWED THE STATE TO MAKE A SUBSTANTIVE AMENDMENT TO THE INDICTMENT?

ISSUE TWO

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE COURT GRANTED STATE'S INSTRUCTION S-1A WHICH WAS AN INCORRECT STATEMENT OF LAW?

ISSUE THREE

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE COURT REFUSED DEFENSE INSTRUCTIONS D-4, D-5, D-6, D-7, AND D-8?

ISSUE FOUR

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT'S MOTION FOR DIRECTED VERDICT, PEREMPTORY INSTRUCTION AND FURTHER ERRED IN DENYING APPELLANT'S MOTION FOR J.N.O.V. AND IN THE ALTERNATIVE A MOTION FOR NEW TRIAL?

ISSUE FIVE

WHETHER THE CUMULATIVE AND PREJUDICIAL EFFECT OF THE ERRORS COMMITTED BY THE TRIAL COURT PREVENTED THE APPELLANT FROM RECEIVING A FAIR TRIAL?

SUMMARY OF THE ARGUMENT

The indictment against Appellant was properly amended and said amendment was not a substantive change to the amendment. State's instruction S-1A was properly granted as a correct statement of the law. The court properly denied defense instructions D-4, D-5, D-6, D-7 and D-8. The court properly denied Appellant's Motion for Directed Verdict, Peremptory Instruction, Motion for J.N.O.V. and Motion for New Trial.

ARGUMENT

ISSUE ONE

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE COURT ALLOWED THE STATE TO MAKE A SUBSTANTIVE AMENDMENT TO

THE INDICTMENT?

In his first assignment of error, Appellant claims that the trial court allowed the State to make a substantive amendment to the indictment. Counts One and Two of said indictment contained identical scribbler's errors. (Tr. 3). Specifically, both counts of the indictment read, "...in Forrest County, Mississippi, on or about October 03, 2005, did unlawfully, feloniously and willfully attempt by physical menace to put..., in fear of imminent serious bodily harm by *arming himself with a pen and bottle of bleach while* kicking, hitting, and threatening..." (*Emphasis added*) (C.P. 8).

"It is fundamental law that courts may amend indictments only to correct defects of form and that defects of substance must be corrected by the grand jury." *Jones v. State,* 912 So.2d 973 (Miss.2005) (siting *Rhymes v. State,* 638 So.2d 1270, 1275 (Miss.1994)). "An amendment is one of form if the amendment is immaterial to the merits of the case and the defense will not be prejudiced by the amendment. *Id.* (Siting *Pool v. State,* 764 So.2d 440, 443 Miss.2000)). "The test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made." *Pool v. State,* 764 So.2d 440, 443 (Miss.2000).

A March14, 2006 hearing was held on the State's Motion to Amend Indictment. (C.P. 12) (Tr. 2-7). The State explained that the language was intended for inclusion in an indictment of an entirely separate incident that did involve a pen and a bottle of bleach. (Tr. 3). The trial court ruled that amending the indictment by deleting "arming himself with a pen and a bottle of bleach" had no affect on the charging language. (Tr. 6).

With or without the scribbler's error, the indictment clearly tracks the language of the

statute and contains the essential elements of the crime charged. "An indictment that tracks the language of the statute is generally sufficient to inform the accused of the charge against him. *Hennington v. State,* 702 So.2d 403 (Miss.1997) (Siting *Cantrell v. State,* 507 So.2d 325, 329 (Miss.1987)). "However, in order to be sufficient, the indictment must contain the essential elements of the crime with which the accused is charged. *Id.* (Siting *Peterson v. State,* 671 So.2d 647, 653 (Miss.1996)).

Furthermore, Appellant fails to demonstrate the prejudice created by the court's allowing the scribbler's error to be deleted and therefore, does not trigger a reversal. *Nicholson ex rel. Gallott v. State,* 672 So.2d 744, 751 (Miss.1996).

ISSUES TWO AND THREE

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE COURT GRANTED STATE'S INSTRUCTION S-1A WHICH WAS AN INCORRECT STATEMENT OF LAW? WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE COURT REFUSED DEFENSE INSTRUCTIONS D-4, D-5, D-6, D-7, AND D-8?

Appellants second and third assignments of error address instructions to the jury. We will address these assignments of error as one. In *Connors v. State,* 822 So.2d 290 (Miss.Ct.App. 2001), the Court of Appeals spells out the standard of review for jury instructions. We quote:

> In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole...When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found.

Miss. Code Ann. Section 97-3-7(1)©) states that "a person is guilty of simple assault if he ©) attempts by physical menace to put another in fear of imminent serious bodily harm." Jury

instruction S-1A reads, "You are instructed on the phrase "physical menace" as used in other instructions means: a threat; or declaration of a disposition to inflict immediate injury on another." Jury instruction S-1A is an accurate explaination of the meaning of "physical menace" in the context of 97-3-7(1)©). Furthermore, Jury instruction S-1A, when read with the other jury instructions as a whole, fairly announces the law of the case and creates no injustice to Appellant. The trial court properly admitted jury instruction S-1A.

Appellant's jury instructions D-4, D-5, D-6, D-7 and D-8 all suggest that Appellant was entitled to a lesser included offense instruction of resisting arrest. The facts of this case do not support an instruction of resisting arrest. Officers Clark, Dantzler, Simmons and Hudson all testified that at the time that Appellant committed the simple assaults on Officers Dantzler and Simmons that he was not under arrest. At the time the assaults were occurring, the officers involved were trying to determine why Appellant was in the area that was supposed to be on lock down. As the State and trial court pointed out at trial, Appellant could not resist arrest when was not under arrest. Therefore, the trial court properly refused said jury instructions.

ISSUE FOUR

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT'S MOTION FOR DIRECTED VERDICT, PEREMPTORY INSTRUCTION AND FURTHER ERRED IN DENYING APPELLANT'S MOTION FOR J.N.O.V. AND IN THE ALTERNATIVE A MOTION FOR NEW TRIAL?

Appellant next alleges that the trial court committed reversible error in overruling his motion for a directed verdict, peremptory instruction, motion for judgement notwithstanding the verdict and in the alternative motion for a new trial. Appellant was convicted of two counts of simple assault on peace officer in violation of Miss. Code Ann. Section 97-3-7(1)©). Miss. Code

Ann. Section 97-3-7(1)©) reads, "a person is guilty of simple assault if he ©) attempts by physical menace to put another in fear of imminent serious bodily harm." To prevail on this claim, Appellant must satisfy the stringent standard of review that applies to a peremptory instruction, motion for directed verdict and a motion for JNOV.

In *McClain v. State,* 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not this court. We quote:

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. *Wetz v. State,* 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. *Esparaza v. State,* 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; *Harveston v. State,* 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. *Spikes v. State,* 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz,* at 808 , *Hammond v. State,* 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. *Neal v. State,* 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; *Fisher v. State,* 481 So. 2d 203, 212 (Miss. 1985).

Officers Clark, Dantzler, Simmons and Hudson all testified that Appellant entered the

Sheriff's Office during a lock down period by kicking in the front door and bypassing the standard procedure of ensuring that he was unarmed. As Officers Dantzler and Simmons attempted to find out why Appellant was in the building during lock down, he kicked and hit the officers several times. Appellant also attempted to bite the officers. Appellant made threats of killing the officers and their families. The officers testified that they were fear of imminent serious bodily harm. Appellants crimes were witnessed and testified to by many officers. Neither Appellant nor any witness testified on his behalf to deny the accounts described by the officers. The weight and credibility of the evidence was such that a reasonable and fair-minded jury could only find the defendant guilty as charged.

Appellant contends the trial court committed reversible error in overruling his motion for new trial on the ground that the verdict is against the overwhelming weight of the evidence. To prevail on this claim, he must satisfy the stringent standard of review summarized as follows:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. *Dudley v. State*, 719 So.2d 180, 182 (Miss.1998) (collecting authorities). Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. *Id.*
>
> *Montana v. State*, 822 So.2d 954, 967-68 (Miss.2002).

"Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system." *Hughes v. State*, 724 So.2d 893, 896 (Miss.1998). "Factual disputes are properly resolved by the jury and do not mandate a new trial." *Benson v. State*, 551 So.2d 188, 193 (Miss.1989). Accord, *Clay v. State*, 736 So.2d 436 439-40 (Miss.App.1999).

"As to matters upon which the evidence was in conflict, the court should assume that the jury resolved the conflict in a manner consistent with the verdict." *Craig v. State*, 777 So.2d 677, 680 (Miss.App.2000). The Court in *Craig* went on to observe that

> [t]he jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) "It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief." *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).

The state presented unequivocal testimony from five officers who witnessed the simple assaults committed by Appellant. The jury weighed the evidence and concluded that Appellant was guilty. Their verdict should not be disturbed.

ISSUE FIVE

WHETHER THE CUMULATIVE AND PREJUDICIAL EFFECT OF THE ERRORS COMMITTED BY THE TRIAL COURT PREVENTED THE APPELLANT FROM RECEIVING A FAIR TRIAL?

Lastly, Appellant asserts that there was cumulative error in his trial that warrants a reversal of his conviction. Citing to the Mississippi Supreme Court, the Court of Appeals in *Lee v. State,* 918 So.2d 87, 89 -90 (Miss.App.2006), addressed cumulative error. We quote:

> The Mississippi Supreme Court has held "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). An analysis of cumulative error must be based on the fact that each error found on appeal, standing alone, did not produce an unfair trial, but when evaluated cumulatively did produce an unfair trial. *Id.* However, for there to be a cumulative *90 effect it must be found that there were multiple errors at trial. *Sheffield v. State,* 844 So.2d 519, 525.

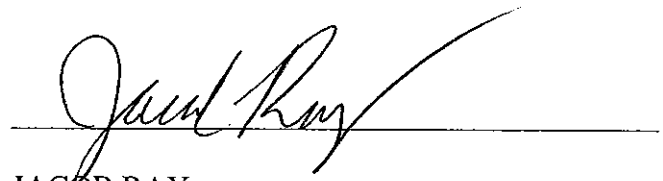
The State submits that Appellant has not proven an error, much less the multiple errors required of him to assert that his convictions should be reversed because of cumulative error. This issue is without merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal and exhibits, the State would ask this court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jacob Ray, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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