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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARISE FORD — APPELLANT

VS. — NO. 2006-KA-1706

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF MISSISSIPPI

CHARISE FORD **APPELLANT**

VERSUS **NO. 2006-KA-1706-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Charise Ford was convicted in the Circuit Court of the First Judicial District of Hinds County on a charge of aggravated assault and was sentenced to a term of 17 years in the custody of the Mississippi Department of Corrections. (C.P.42) Aggrieved by the judgment rendered against her, Ford has perfected an appeal to this Court.

Substantive Facts

Misty Gaddy, testified that in July 2003, she was 17 years old and employed at the Comfort Inn on Greenway Drive in Jackson. On July 6, 2003, Gaddy reported for work, and, at first, "everything was going fine." At some point, however, her colleague Charise Ford stared at her and said "fucking bitch" under her breath.

Gaddy and the defendant were the only people in the room at this time. Ms. Gaddy replied, "You're pathetic." Ford answered, "Are you talking to me?" Gaddy asked Ford if she had been referring to her as a "fucking bitch." Ford "just walked off in the kitchen." Ms. Gaddy "walked past the kitchen ... to look" for her boss "Sonny to tell him what she said, and he wasn't back there. A maid was back there." Gaddy told this housekeeper, Willie O'Quinn, "If somebody don't leave me alone, I'm going to kick their ass." Gaddy "turned around and walked back through there," and Ford met her at the door. (T.158-60)

Ford had been in the kitchen while Gaddy "passed by and went in the laundry room." At this point, Ford was "standing in, like, the door frame of the kitchen" with her hand behind her back. She confronted Gaddy, saying, "Do you want to kick somebody's ass?" as she held a knife by her side. Gaddy replied, "Are you going to pull a knife on me now?" Ford answered, "You're damn right, you stupid bitch." (T.160-61)

Gaddy recounted what happened next as follows:

> And she raised it up, and I pushed her back in her chest, and she fell back against the wall, and she started swinging both of her arms at me. And she had the knife in her hand. And I kicked her and pushed her and was trying to keep her off of me, and I fell up against the wall that last time I kicked her, and she stabbed me in my eye.
>
> (T.161)

Gaddy "grabbed" her eye, which was bleeding, and "started crying and screaming, 'Jesus, Jesus,'" while Ford "was just standing there." Apparently having heard Gaddy's screams, O'Quinn ran into the hallway. Ford "ran out the front door

and got in the car that was waiting there." (T.161-62)

Gaddy went on to testify that she was not armed at the time of this attack. Asked, "Why did you push her in the first place?" Gaddy answered, "Because she raised the knife up, and I thought she was fixing to stab me." Gaddy testified further that nothing prevented Ford from returning to the kitchen, her work area. (T.163-64) Although she did push and kick Ford in an attempt to defend herself, Gaddy never grabbed her neck; she never attempted to choke her. (T.174)

Gaddy testified additionally that the knife had detached her retina, leaving her blind in her right eye. While the doctors had managed to save the injured eye, it was noticeably different from her left one. (T.164-65)

On redirect examination, Gaddy testified that she had gone to the laundry room to look for her supervisor, not to try to confront Ford. (T.193-94) She also testified that after Ford displayed the knife, she (Gaddy) was afraid to walk past her, back to her desk. (T.201)

Willie O'Quinn testified that while she was working in the laundry, she "heard some noise." She "entered the lobby to see what was wrong, see what was going on." She saw Gaddy "standing right at the bathroom door" and "heard her holler," saying that she "had been cut." Ford "was still standing close up on her." Shortly thereafter, Ford "went back in the kitchen and opened up the cabinet door and throwed [sic] the steak knife in the cabine. And she came out the kitchen," and bumped into O'Quinn as she (Ford) ran "out the front door." (T.206-07)

O'Quinn testified that she had not observed any bruises around Ford's neck; nor was Ford's hair disheveled. Gaddy did not appear to be armed. (T.209-10)

Dr. Hussein Wafapoor was accepted by the court, without objection by the defense, as an expert in the field of "ophthalmology concerning surgery and retinas." (T.236-37) Dr. Wafapoor testified that he had examined Gaddy in July 2003 and observed that she had sustained "a penetrating injury" to her right eye. The CT scan "showed bleeding inside the eye, and the eye was collapsed." (T.237-41)

The prosecutor asked Dr. Wafapoor whether the steak knife previously admitted into evidence was "consistent with the wounds" that he had observed on Gaddy's eye. Dr. Wafapoor answered, "It is consistent with a penetrating injury. It could be a knife, anything sharp that can go inside. ... This was a penetrating injury. It's consistent with a penetrating injury with a sharp object." (T.248)

Dr. Wafapoor went on to testify that Gaddy also had sustained a fracture to her nasal bone, and that a certain "amount of force" was required to push an object through the eye." (T.256-27) He elaborated,

> this is a bad injury, and I think it's self-explanatory. I mean any injury to the eye is bad. ... And then in her case we know there was a lid laceration. This means it went not only through the eye, but it went through the eyelids. Eyelids have about three or four millimeter thickness. So it would through the eyelid, and then it hit the eye wall itself. So I think, you know, seeing that type of injury there must have been some force in there.
>
> (T.257-58)

While Gaddy could still detect light and darkness with her injured eye, she had permanently lost more than 90 percent of her vision in it. (T.260)

Detective Keith Denson of the Jackson Police Department testified that after he received the initial report of this incident, he telephoned Ford and asked her to

come to his office to make a statement. After Ford arrived at his office, Detective Denson read her the *Miranda* rights; Ford signed a waiver of those rights and agreed to make a statement. (T.262-68) That statement is set out in pertinent part below:

> While at work another employee, Misty Gaddy, started picking on me, and she came to my area where I work. Once she was in my area, the kitchen, she blocked the doorway, and I couldn't get out. Misty refused to let me out, and I attempted to go past her. This is when she bumped me with her knee.
>
> At this point this is when I told Misty to leave em alone because I had already called my ride, Parnell Stephenson, to go home early.
>
> As I passed Misty and she bumped me with her knee, I told her to leave me alone, and she started– she started screaming for me to get out of her face.
>
> After she yelled at me to get out of her face, she grabbed me around my neck. After she grabbed me around my neck, I started fighting back and defending myself. Then we were fighting, and Misty was kicking me.
>
> So I couldn't stop her, so I searched my pockets for something and found a knife. This is when I got the knife and struck her one time, and this is when she screamed.
>
> Then I backed off of her, and Ms. Willie came in the kitchen. Ms. Willie turned around and ran back into the– ran back into the laundry room. This is when I turned around and ran out the door because I was scared.
>
> (T.273-74)

Detective Denson asked Ford, "Why did you stab her?" Ford replied, "Because I couldn't stop her from kicking and punching me." She acknowledged

that Gaddy did not have a weapon. (T.274)

Asked whether he had observed any injuries, bruises or "choke marks" on Ford's person, Detective Denson replied that he had seen "[n]one whatsoever." (T.276)

Ford testified that she struck Gaddy once with the steak knife because Gaddy would not stop choking her. (T.320)

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in imposing a 17-year sentence in this case.

Nor did the trial court err in granting Instructions S-2 and S-3.

Ford's third proposition is not properly before this Court. Alternatively, the state contends the trial court did not err in refusing to authorize the jury to find Ford guilty of simple assault.

The trial court did not abuse its discretion in allowing the victim's treating physician to describe her injury.

Nor did the trial court abuse its discretion in admitting photographs of the victim's injury and the crime scene into evidence.

Ford's challenge to the trial court's rulings made during closing arguments is without merit.

Finally, the court did not err in overruling the motion for j.n.o.v./new trial.

PROPOSITION ONE:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A 17-YEAR SENTENCE IN THIS CASE

After the verdict was returned and the jury was discharged, defense counsel asked the court to order a pre-sentence investigation. Defense counsel expressed concern that the court had stated during a bench conference that it "already decided" to impose the maximum sentence. The state countered that there was "no need for a pre-sentencing report" because it was undisputed that the defendant had "no prior criminal history." The state went on to contest the suggestion that the court had indicated that it had already decided to impose the maximum sentence. Defense counsel disputed this assertion and reiterated his request for a pre-sentence investigation. (T.440-44) Finally, the court made findings, set out in pertinent part below, before imposing sentence:

> Mr. Fortner was not present when the Court made the remark relating to any sentencing, which Mr. Fortner knows in every case that this Judge has the the Judge always considers the maximum as a possible sentence in any case that is in trial in which the defendant is found guilty.
>
> And, in fact, every time that there is a plea bargain agreement the Court advises the defendant who is pleading guilty to the crime that even though there may be a plea bargain agreement between the State and the defendant's counsel, it is not binding on the Judge; that the Judge may or may not accept the recommendation and could sentence the particular defendant to the maximum.
>
> So this is always a possibility in any plea. It's always a possibility in any trial where a defendant is found guilty.
>
> The Court naturally hears all the evidence and

observes all of the evidence and the injury inflicted on the victim. And, of course, ion this particular case it was a horrendous injury causing the victim to lose her sight in one eye, a very gruesome and brutal stabbing. And, of course, that is a major factor in what the Court would sentence the defendant to for that.

But as far as the bench conference, this Court never said that it was going to sentence this defendant to the maximum, if convicted ...

And, in fact, after the conference or second conference at the bench concerning this matter relating to what was said at the bench concerning the possibility of any case involving the maximum sentence, the Judge mentioned what had occurred after Ms. Mansell mentioned what occurred, and the Judge gave his statement of what he said, and the Court recalls Mr. Fortner saying, "That satisfies me," and then walked away.

* * * * *

The Court is aware of the fact of the family situation that the defendant has. The Court is aware– I mean as far as having children. The Court, of course, is aware of the victim's injury and the fact that it's permanent and the nature of it. The Court is aware of the circumstances surrounding this incident, and it's a tragic situation for both families and both parties involved.

So the Court really doesn't know why it would be necessary in this particular instance to have a pre-sentence investigation based on what factors that the Court would consider.

As I say, it's a hard decision for any judge to decide what a particular sentence is going to be for a criminal defendant, but, yet, at the same time the Court has to do what it thinks is right as far as the nature of the crime committed.

And this is a horrible– one of the worst aggravated assaults this Court has presided over. There have been many others just as bad or worse, but

> this is certainly one of them. And it's unthinkable that somebody would actually stab somebody else in the eye. So it was one of the worst injuries that could be inflicted on anyone is to be without an eye.
>
> So the Court is not going to sentence the defendant to the maximum, which it could, and some would say that it would, and, of course, she will get the benefit of the 85 percent rule presumably, but the Court is going to based on the crime committed and the circumstances involved sentence her into the custody of the Mississippi Department of Corrections for 17 years. So that will be the sentence.
>
> (T.444-47)[1]

Ford did not raise a proportionality claim during the sentencing hearing, but she did advance it during the hearing on her motion for j.n.o.v./new trial. (T.479-81) The state countered that the threshold inquiry in a *Solem v. Helm* analysis is whether "the punishment is excessive for the crime committed." 463 U.S. 277 (1983). The state went on to reiterate that the victim in this case had suffered a "very devastating injury," the loss of an eye; and that "the sentence was proper based upon the amount of the injury sustained by the victim." (T.482) In rejecting the defendant's argument, the court observed that this was an "[h]orrific case, ... [o]ne of the worst this Court has presided over ... It was one of the worst injuries that could be inflicted on anyone to be without an eye." The court then noted that it had "very broad discretion" in sentencing and that the sentence of 17 years, three

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[1]The court had the discretion to order or to decline to order a presentence investigation. URCCC10.04(C)(1). The trial judge understandably declined to do so here, since he was already aware that the defendant had no prior criminal history and that she had young children.

years less than the maximum provided by statute, was appropriate. (T.492)

Ford now argues that analysis of the *Solem* factors demonstrates that her sentence is disproportionate. The state responds first that in light of *Harmelin v. Michigan*, 501 U.S. 957, 991-92 (1991), the three-prong analysis delineated in *Solem* applies *only* after "a threshold comparison of the crime committed to the sentence imposed leads to an inference of *'gross disproportionality.'* ... Absent this initial showing, our appellate courts will not employ the three-prong Solem analysis. *Young v. State*, 731 So.2d 1120, 1125 (Miss.1999)." (emphasis added) *Williams v. State*, 784 So.2d 230, 237 (Miss.App.2000), quoting *Hoops v. State*, 681 So.2d 521, 538 (Miss.1996).

To determine whether Ford has made the requisite threshold showing, this Court must focus first "on the nature of the crime committed." *Williams*, 784 So.2d at 236. It is not an exaggeration to say that Ford committed act of violence, with a deadly weapon, which caused permanent, disabling, disfiguring and unimaginably painful injury. For this act she received a sentence– subject to the possibility of parole– of 17 years, three years short of the maximum.[2] The Legislature has codified its distaste for violent crimes, in part by authorizing trial courts to impose a maximum sentence of 20 years for aggravated assault,[3] and this Court has

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[2]In 17 years, possibly fewer, Ford will probably be free to resume her life. Misty Gaddy will never regain sight in her right eye.

consistently held that trial courts have the discretion to impose sentences within this statutory range. *Williams*, 784 So.2d at 237, citing *Green v. State*, 631 So.2d167, 176 (Miss.1994). The state submits Ford has failed to show that a comparison of the crime committed to the sentence imposed leads to an inference of disproportionality, much less gross disproportionality. Accordingly, she has failed to make the threshold showing which would have required analysis of the *Solem* factors.

Ford goes on to cite *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), for the proposition that the trial court violated her right to due process by relying on its own findings of egregiousness in enhancing her sentence, without jury-made findings of such facts. A similar argument was analyzed and rejected in *Isom v. State*, 928 So.2d 840, 851 (Miss.App.2006). In *Isom*, the appellant had been convicted of burglary of a dwelling and sentenced to a term of 25 years with five years suspended. On appeal, he argued that the trial judge "relied on his own findings of aggravating factors, instead of a jury's findings, to enhance and justify" the long prison sentence. 928 So.2d at 849. The Court of Appeals rejected this argument with the following reasoning, which the state submits is applicable here:

> Isom's reliance on *Apprendi* and *Blakely* is misplaced. Isom cites to *Apprendi* for the proposition that "[o]ther than the fact of a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to a

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[3]The aggravated assault statute has withstood claims that the 20-year maximum violates the constitutional prohibition of cruel and unusual punishment. *Fleming v. State*, 604 So.2d 280, 302 (Miss.1992).

> jury." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. The statute at issue in *Apprendi* had an enhancement sentence for hate crimes. The United States Supreme Court found that the jury was to determine if the sentence should be enhanced. Id.
>
> * * * * *
>
> We find that the statute applicable to Isom's crime of burglary of a dwelling is distinguishable from *Apprendi* and *Blakely*. Isom was found guilty by a jury pursuant to Miss.Code Ann. § 97-17-23 which has no sentence enhancement provision. In other words, there is no increased or enhanced punishment pursuant to Miss.Code Ann. § 97-17-23 upon a finding of aggravating factors.
>
> 928 So.2d at 851.

Likewise, MISS.CODE ANN. §97-3-7 has no sentence enhancement provision. Ford's reliance on *Apprendi* and *Blakely* is misplaced. See *McNickles v. State*, __ So.2d ___ (Miss.App., decided May 22, 2007) (2007 WL1470475). Ford's first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN GRANTING INSTRUCTIONS S-2 AND S-3

Ford contends additionally that the trial court committed reversible error in granting Instructions S-2 and S-3, set out below:

[INSTRUCTION S-2]

> The Court instructs the Jury that to make an assault 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 or to do her some great bodily harm, and in addition to this she 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.

(C.P.36)

[INSTRUCTION S-3]

The Court instructs the Jury that a person may not use more force than reasonably appears necessary to save her life or protect herself from great bodily harm. The question of whether she was justified in using the weapon is for determination for the jury.

The law tolerates no justification and accepts no excuse for an assault with a deadly weapon on a plea of self-defense except that the assault by the defendant on the victim was necessary or apparently so to protect the defendant's own life or her person from great bodily injury and there was immediate danger of such design being accomplished. The danger to life or great personal injury must be or reasonably appears to be imminent and present at the time the defendant commits the assault with a deadly weapon. The term "apparent" as used in "apparent danger" means such overt, actual demonstration by conduct and acts of a design to take life or do some great personal injury as would make the assault apparently necessary to self preservation.

(C.P.37)

When Instruction S-2 was tendered, the defense objected that "[i]t's not necessary in an assault case for the defendant to prove that they apprehended a design on the part of the victim to kill her."[4] In support of his argument, defense

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[4]The state contends that the use of the conjunctive *or* in Instruction S-2 demonstrates that the defense of self-defense was available to the defendant even if she had reasonable grounds to apprehend a design on the part of the victim to do her great bodily injury, rather than kill her.

counsel cited *Simmons v. State*, 568 So.2d 1192 (Miss.1990). (T.353-54) The prosecutor countered that *Simmons* relied on *Robinson v. State*, which was overruled by *Flowers v. State*, 473 So.2d 164 (Miss. 1985). She went on to point out that *Montana v. State*, 822 So.2d 954, 958-60 (Miss.2002), was "the prevailing case law that we are supposed to use for self-defense." The court reserved ruling on the objection, and turned to Instruction S-3. (T.357-38)

The defense objected to that charge as well, contending that it placed "the burden on the defendant way beyond what it is supposed to be... " (T.359) The prosecutor responded that the language of S-3 comported with *Montana*. (T.360) Again, the court took the issue under advisement. (T.362)

After the overnight recess, the prosecutor submitted to the court a copy of the *Montana* opinion, asserting that "it has no negative history whatsover. It is still the prevailing law on self-defense." (T.370) The defense continued to attempt to distinguish *Montana* on the ground that it was a murder case, and asserted that in an aggravated assault case, the defense of self-defense was available to the defendant even if she apprehended only an design on the part of the victim to do her great bodily injury, rather than kill her. (T.373) The prosecutor countered as follows: "Now, Mr. Fortner is complaining about the fact that it says intent to kill, but he forgets to point out that it says or, o-r. So it's either– it's not an and. It's an or. Intent to kill or cause serious bodily injury."[5] (T.378)

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[5]Ford reiterates this objection in her brief. The state maintains that the use of the conjunctive *or* shows the fallacy of her argument.

The court found meritorious the prosecutor's citations of authority and ultimately granted Instructions S-2 and S-3. (T.382-83) There is not error in this ruling. The state refuted the defendant's objection on the ground that these instructions placed a "higher burden" on her,[6] and correctly pointed out that the instructions comported with the prevailing case law.

Ford also claims on appeal that Instruction S-3 was confusing. This ground was not raised below and may not be advanced for the first time here. *Killen v. State*, 958 So.2d 172, 186 (Miss.2007).

For these reasons, the state respectfully contends Ford's second proposition should be rejected.

PROPOSITION THREE:

FORD'S THIRD PROPOSITION IS NOT PROPERLY BEFORE THIS COURT; IN THE ALTTERNATIVE, THE STATE CONTENDS THE TRIAL COURT DID NOT ERR IN REFUSING TO AUTHORIZE THE JURY TO FIND FORD GUILTY OF SIMPLE ASSAULT

Ford next challenges the trial court's refusal of Instruction D-1, a lesser-included offense charge which would have authorized the jury to find her guilty of

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[6]In addition to pointing out that the defendant's objection was cured by the use of the conjunctive *or*, the prosecutor argued as follows:

> **He [defense counsel] has no case that has received positive treatment reiterating the instructions that he wants. He can't find one because the instructions that are given in aggravated assault cases or murder cases are the same.**
>
> **(T.378)**

simple assault. Counsel for the state has scoured the Clerk's Papers submitted in this case and has been unable to locate Instruction D-1. The failure to include this instruction in the appellate record bars consideration of this issue on appeal. *Rogers v. State*, 796 So.2d 1022, 1029 (Miss.2001).

Solely in the alternative, the state submits the prosecution properly argued, and the trial court correctly found, that no evidentiary basis existed for this instruction. When the defense first stated its intention to submit a simple assault instruction,[7] the prosecution stated its position as follows, in pertinent part:

> Your Honor, if we're going to give simple assault, there has to be some kind of reckless act. Nowhere in the testimony of the defendant or anywhere throughout this trial was there ever any kind of indication that her actions were reckless in any way, shape or form.
>
> She said she purposely stabbed this woman to get her off of her. That was her testimony. That was her statement. So nowhere did she indicate that she did any kind of reckless act.
>
> * * * * *
>
> She said she stabbed her to get her off of her. That's her defense. So there is absolutely no testimony to support a simple assault. None whatsoever.
>
> (T.349-50)

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[7]From the pertinent colloquy taken during the session on jury instructions, it appears that the defense sought to have the jury authorized to find Ford guilty of simple assault as defined by MISS.CODE ANN. 97-3-7 (1) (a) or (b) (1972) (as amended), which provides that "[a] person is guilty of simple assault if he attempts to cause or purposely, knowingly or **recklessly** causes bodily injury to another; or negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm ... "

The prosecution went on to state, "Your Honor, both negligently and recklessly goes to intent. Ms. Ford testified that she intentionally went into her pocket and intentionally stabbed her. Not negligently. Not recklessly. So neither of those would apply ... " (T.351)

The state's final argument on this point is set out below in relevant part:

> There is no evidentiary basis that this was a reckless act nor a negligent act on the part of Ms. Ford. If they wanted that to be a defense, they could have or should have elicited that type of testimony from her.
>
> She said she reached around in her pocket to find a weapon so she could get this woman off of her. That was her defense. She didn't say she recklessly did it. She didn't say she didn't mean to. She didn't say this knife slipped out of her hand. She didn't say she negligently did something. She did an intentional act that caused bodily injury with a weapon, which advances it to an aggravated assault.
>
> (T.352)

The court agreed with the state, finding that "the evidence does not justify a simple assault instruction, ... so that instruction S-1 will be given, and D-1 will be refused." (T.352-53)

The standard for analysis of this issue was reiterated recently as follows in *Chandler v. State*, 946 So.2d 355, 360 (Miss.2006):

> A lesser-included offense instruction should be granted unless the trial judge and ultimately this Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser-included offense (conversely, not guilty of at least one element of the principal charge). *McGowan v. State*, 541 So.2d 1027, 1028 (Miss.1989). However, this Court has repeatedly

> held that a lesser-included offense instruction should not be indiscriminately granted, but rather should be submitted to the jury only where there is an evidentiary basis in the record. *Lee v. State*, 469 So.2d 1225, 1230 (Miss.1985). [citations omitted]

As the prosecutor pointed out, Ford testified that she put her hand inside her pocket, deliberately drew the knife and struck Gaddy with it. (T.320) By Ford's own testimony, this was an intentional act, neither a reckless one nor a negligent one. Her conduct was either justified on the ground of self-defense, or it was an aggravated assault. It was not a simple assault.

First, the state submits Ford's use of a a deadly weapon takes her action out of the realm of § 97-3-7(1)(a). *Grubbs v. State*, 956 So.2d 932, 937 (Miss.App.2006). Accord, *Harris v. State*, 892 So.2d 830 (Miss.App.2004) citing *Hutchinson v. State*, 594 So.2d 17, 19 (Miss.1992) (conduct which is simple assault under subsection (1)(a) becomes aggravated assault when done with a deadly weapon). Furthermore, The fact that she intentionally stabbed Gaddy signifies that she could not be guilty merely of *negligently* causing bodily injury with a deadly weapon as defined by subsection (1)(b). *Grubbs*, 956 So.2d at 937-38.

Under these circumstances, "no reasonable juror could believe" that Ford "was guilty only of simple assault." *Id.* "When an accused wields a weapon that is without question deadly and then intentionally strikes his victim, he is not entitled to a lesser-included offense instruction for simple assault." *Hoops v. State*, 681 So.2d 521, 535 (Miss.1996). The trial court did not err in refusing Instruction D-1. Ford's third proposition should be denied.

PROPOSITION FOUR:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IN ALLOWING THE VICTIM'S TREATING PHYSICIAN TO DESCRIBE HER INJURY

Ford next contends the trial court committed reversible error in allowing Dr. Wafapoor to testify because his testimony was irrelevant, speculative, outside the area of his expertise and was objectionable on the ground of a discovery violation.

Prior to the testimony of Dr. Wafapoor, outside the presence of the jury, the defense argued that the state had already proved the existence of any injury, which was all it was required to prove under the indictment. (T.216) The state's response is set out below in pertinent part:

> We want to make sure that this jury knows this wasn't some accidental stabbing. This wasn't a just swiping with the knife.
>
> According to the doctor, he's going to testify as to the depth that the knife went into the eye, which is something that obviously the victim could not testify to, that that's only something on CT scan that they could observe, and exactly what happened when that knife went in, the damage that it did to the eye and the surrounding nasal cavity when it entered and the approximate force that would be used to have a knife penetrate your eye and the path of travel that the knife took to cause the type of damage that it did.
>
> It's absolutely relevant, and it's our burden to prove that she unlawfully, feloniously, purposefully and knowingly caused bodily injury.
>
> I have talked to Dr. Wafapoor. I told him that we could not get into any of the rehabilitative things that have gone on with Misty Gaddy's eye. Ms. Gaddy is still in danger of losing that eye.
>
> (T.217-19)

The court reiterated its earlier ruling "that the doctor can testify as to the specific injury involved, the nature of the injury, and cannot testify as to what rehabilitation the victim received ... and also cannot testify as to the expenses involved." (T.219)

Without objection by the defense, Dr. Wafapoor was accepted as an expert in the field of ophthalmology. (T.236-37) He went on to testify about the nature and extent of the victim's injury. (T.237-41, 248, 254-61) The state contends this testimony was absolutely relevant to show the complete story of what happened to the victim. *Weathersby v. State*, 769 So.2d 857, 859 (Miss.App.2000). It is well settled that the prosecution has a legitimate interest in telling a rational and coherent story of what occurred.[8] *Taylor v. State*, 954 So.2d 944, 948 (Miss.2007). Evidence of the nature and extent of the injury, including the force required to inflict it, was also relevant– as the prosecutor pointed out-- to refute any suggestion by the defense that this wound was accidentally or negligently perpetrated. The trial court did not abuse its discretion in allowing Dr. Wafapoor's testimony. E.g., *Spann v. State*, 771 So.2d 883, 893 (Miss.2000) (admissibility of evidence rests within the discretion of the trial court).

Ford next contends Dr. Wafapoor's opinion– that the wound was consistent with having been caused by a knife– should have been excluded because it had not

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[8]Pathologists routinely are allowed to testify about injuries and causes of death even where such facts are uncontested. E.g., *Spann*, 771 So.2d 895. The same rationale should apply here.

been provided to the defense in discovery. (T.242) When this issue was raised below, the prosecutor responded first that there was no dispute that the victim had been stabbed in the eye with a steak knife, and second, that medical records disclosed to the defense in discovery stated that the victim had been so injured. (T.243-44) The court overruled the discovery-based objection.

The prosecutor asserted that the defense had had "the entire medical records ... for at least a year." (T.245) Under these circumstances, no abuse of discretion has been shown in the court's ruling. *Bailey v. State*, 956 So.2d 1016, 1039 (Miss.App.2007); *Coleman v. State*, 915 So.2d 468, 475-76 (Miss.APp.2005). Alternatively, the state submits that it is inconceivable that the admission of this testimony caused an injustice, inasmuch as it was undisputed that the victim had been stabbed with a steak knife, a sharp object. Any arguable error– and we maintain that there was none– should be considered harmless. *Lofton v. State*, 818 So.2d 1229, 1237 (Miss.2002).

Ford also argues that Dr. Wafapoor testified outside the realm of his expertise. Her failure to interpose an objection on this ground bars consideration of this argument on appeal. *Hobgood v. State*, 926 So.2d 847, 851 (Miss.2006). Alternatively, the state reiterates that no prejudice resulted from this testimony. Again, it was undisputed that the injury was caused with a sharp, penetrating instrument.

Finally, the state addresses Ford's argument that the court failed to abide by its own ruling to prohibit Dr. Wafapoor from testifying about Gaddy's rehabilitation. Ford cites to the record at T.256-61. Counsel for the state has examined those

pages and has found no reference to rehabilitation.

For the foregoing reasons, Ford's fourth proposition should be denied.

PROPOSITION FIVE:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TWO PHOTOGRAPHS DEPICTING THE VICTIM'S INJURY

During its direct examination of Misty Gaddy, the state sought to introduce "two photographs, Polaroid photographs, taken of the victim's eye shortly after her injury." The defense objected, essentially on the basis that the pictures were cumulative and probative only of an uncontested issue. The prosecutor countered that photographs depicting an injury, or a decedent, are admissible even when the fact of the injury or death is undisputed. (T.166-69) Ultimately the court ruled as follows:

> The Court is going to overrule the objection of the defendant. The Court does not see anything unfairly prejudicial to the defendant in these photographs.
>
> One of them shows the right eye closed with looks like a – I can't tell whether that's a scar or just stitches, and the second photograph is taken of the eye, right eye, that appears to be partially open and stitches on it. So the Court will admit those.
>
> (T.170)

"Some 'probative value' is the only requirement needed to buttress a trial judge's decision to allow photographs into evidence." *Snow v. State,* 800 So.2d 472, 491 (Miss.2001). That decision lies within the sound discretion of the trial court. *Brawner v. State*, 872 So.2d 1, 14 (Miss.2004). It is "very difficult" to show an abuse of this discretion. *Id.* In fact, the "discretion of the trial judge runs toward

almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value." *Simmons v. State*, 805 So.2d 452, 485 (Miss.2001).

In a homicide case, photographs of decedents may be admitted even where there is no dispute as to cause of death, the place and time of death, the identity of the decedent, and at whose hands he died. *Spann*, 771 So.2d at 895. The same rationale should apply to the question of admissibility of pictures showing injuries to assault victims. The fact that Ms. Gaddy had testified about her injury did not bar the admission of these photographs into evidence.

In light of these authorities, the state submits no error has been shown in the court's admission of these photographs. Ford's fifth proposition should be denied.

PROPOSITION SIX:

THE TRIAL COURT DID NOT ERR IN ADMITTING TWO PHOTOGRAPHS OF THE MOTEL DOORS

Ford argues additionally that the trial court committed reversible error in admitting Exhibits 8 and 9, photographs depicting the view from outside the Comfort Inn Motel, looking through the doors. Laying the foundation for the admission of these photographs, the prosecutor asked Detective Denson whether he had "actually been out to that Comfort Inn"; he answered in the affirmative. Detective Denson testified further, "I did take a look, and the only thing that I could see from standing outside is probably the lobby area, and you can barely see that through the glare on the doors." The state then asked, "Detective Denson, I want to show you these photographs and see if these look similar to the glare in the doors at the Comfort Inn." The defense objected, and a bench conference ensued. Thereafter,

the prosecutor rephrased the question as follows: "Do these photographs accurately depict the doors at the front of the Comfort Inn located on Greenway Drive as you saw it when you went to do your investigation in the month of July of 2003?" He replied, "Yes." (T.278-79)

At that point, the state moved to introduce the photographs into evidence. The defense objected on the basis of improper foundation. (T.279-80) This exchange followed:

> BY MR. ALEXANDER: Your Honor, she asked him do those photographs represent the view from standing outside the Comfort Inn Motel looking through the doors. He said prior to her asking him that that he had been there and he looked. In fact, he said that's what he took special care to do, to look and see if you could see the kitchen area from the doors.
>
> She asked him do those pictures accurately represent the doors in front of the hotel. He said they do. That is the proper foundation, and that's how the pictures come in. There has been a proper foundation laid for them.
>
> BY THE COURT: As long as she establishes that that depicted what it looked like on the date of the incident.
>
> BY MS. MANSELL: Your Honor, I believe I asked Detective Denson, but I'll ask him again.
>
> (T.280)

Thereafter, the prosecutor asked Detective Denson, "Do these photographs appear to represent the doors as you– when you did your investigation back in July of 2003, do they appear to represent the doors as you stood outside looking in? Do they appear to be the same or substantially the same?" Detective Denson answered, "Yes." At that point, the photographs were received into evidence.

(T.280-81)

On cross-examination of Detective Denson, the defense elicited testimony that he observed the motel doors "around lunch" on the day that he went to investigate the scene; that he had "no idea" what time the photographs were taken; that the stabbing occurred at approximately 10:00 a.m.; that the sun rises in the east, behind the motel; that there "was a glare at noon," but that he did not know what the glare would have looked like at 10:00 a.m. (T.282-87)

Ford now contends that admission of these photographs violated the principle stated in *Miller v. Pate*, 386 U.S. 1 (1967), which held that the Fourteenth Amendment is violated by the prosecution's knowing use of false evidence to obtain a criminal conviction. In that case, involving a brutal sex attack on a young girl, the prosecutors repeatedly referred to the defendant's "bloody shorts" even though they knew that the clothing was stained with paint. The state respectfully submits that this case has no application here. The state introduced these exhibits for what they purported to be; it made no misrepresentations about them.

On the issue of authentication of the photographs, Detective Denson testified that they were what they purported to be, i.e., that the accurately represented the scene as he saw it while conducting his investigation. This was a sufficient foundation for admission of these pictures. *Bryant v. State*, 748 So.2d 780, 784 (Miss.App.1999), citing *Wells v. State*, 604 So.2d 271, 277 (Miss.1992). The defense was free to elicit testimony to establish, and to make argument to show, that these photographs were entitled to little if any weight because they were not time-stamped. The amount and severity of the glare were matters of weight, not

admissibility, of these photographs. Selders v. State, 794 So.2d 281, 285 (Miss.App.2001)

As the Court of Appeals reasoned in *Selders*, 794 So.2d at 285,

> Photographs of the crime scene are generally admissible, and "some probative value" is the only requirement for the admission of photographs, absent a clear showing of unfair prejudice to the objecting party outweighing their probative value. Generally, photographs have probative value if they supplement a witness's testimony. Rulings on admission of photographs into evidence are committed to the discretion of the trial court and will be reversed only on a clear showing of abuse of discretion. *Walker v. State*, 671 So.2d 581, 601 (Miss.1995); *Westbrook v. State*, 658 So.2d 847, 849 (Miss.1995); *Jenkins v. State*, 607 So.2d 1171, 1175 (Miss.1992).

The state respectfully submits that in light of these authorities, the court did not abuse its discretion in admitting these photographs to be evaluated by the jury. Ford's sixth proposition should be denied.

PROPOSITION SEVEN:

FORD'S CHALLENGE TO THE TRIAL COURT'S RULINGS MADE DURING CLOSING ARGUMENTS IS WITHOUT MERIT

Under her seventh proposition, Ford asserts the trial court committed reversible error in overruling her objections to portions of the state's closing argument and in sustaining the prosecution's objections to argument by the defense. The first instance occurred after the defense counsel argued, "I'm sorry to say it that way, but we know she's [Gaddy is] lying because in steps Willie O'Quinn, who they fully believed was going to corroborate Misty Gaddy." The state objected on this ground: "He can't cay what we fully believed what a witness was going to say." The court sustained the objection and instructed defense counsel,

"Stay within the evidence." (T.422-23) The state contends this ruling was proper. Defense counsel's argument was purely speculative and therefore objectionable. E.g., *Hughes v. State*, 820 So.2d 8, 12 (Miss.App.2002) (it is error to argue statements of fact which are not in evidence).

Next, defense counsel asserted, "Chances are, she [Gaddy] was going to lose her job..." The prosecution objected, stating, "He can't talk about losing jobs." The court sustained the objection and once more directed defense counsel to "[s]tay within the evidence." (T.424) Again, the state submits defense counsel was arguing a fact not in evidence. The court did not err in sustaining the assistant district attorney's objection.

Finally, the court sustained the prosecutor's objection to defense counsel's statement, "I know what I was taught..." (T.425-26) Once more, the state contends the court did not err in sustaining an objection to argument of facts outside the evidence.

Ford next takes issue with the court's rulings on objections interposed by defense counsel during the state's final closing. First, the assistant district attorney argued, "Mr. Fortner spent about the first ten minutes on Mr. Alexander's opening statement..." The defense objected, and the state countered, "It's rebuttal, Your Honor, and rebuttal goes to what his closing was." The court ruled, "They can rebut an argument. Overruled." (T.427) It is obvious from the context of this portion of the argument that the prosecutor was attempting to rebut arguments made by the defense. The court properly observed that this was the purpose of final closing, and overruled the objection. See *Bailey v. State*, 956 So.2d 1016, 1035

(Miss.App.2007), citing *Morgan v. State*, 818 So.2d 1163, 1175-76 (Miss.2002).

The defense next objected to the state's argument that resistance must be proportionate to the attack. The defense objected on the ground, "That's not what the law says..." The prosecutor responded that she was merely reiterating an instruction, granted by the court, which defense counsel had previously read to the jury. The court ruled, "All right. She may read the instruction now. There's no objection in that."[9] (T.432-33) The state fails to see the error in allowing the state to attempt to apply the court-stated law to the facts in issue.

The final comments in issue are set out as follows: "Because let me tell you what guilty people do. Guilty people flee the scene–" The defense objected, and the prosecutor countered, "Your Honor, she left the scene." The court ruled, "She can argue she left the scene but not what guilty people do. Sustained as to that." The state submits the court properly allowed the assistant district attorney to point out a fact in evidence– that Ford left the scene after the attack– but prohibited her from arguing the inference that flight established guilt. After the court ruled, "Sustained as to that," the defense requested no further action. (T.434-35) Under these circumstances, there is no error. *Fair v. State*, 766 So.2d 787, 794 (Miss.App.2000), citing *Weatherspoon v. State*, 732 So.2d 158, 164 (Miss.1999) (where defendant's objection is sustained, and defense makes no request for admonishment or motion for mistrial, trial court will not be put in error).

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[9]The prosecutor was quoting from Instruction S-6 given by the court without ojbection. (T.411) (C.P.39)

In conclusion, the state points out that the court granted Instruction C-2, set out in pertinent part as follows: "Arguments statements and remarks of counsel are intended to help you understand facts and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark." (C.P.30) Of course, the jury is presumed to have followed this instruction. *McGilberry v. State*, 741 So.2d 894, 919-20 (Miss.1999). "Assuming arguendo the prosecutors comments were improper, such error would be harmless beyond a reasonable doubt in light of the instruction by the trial court that such comments did not constitute evidence and should be disregarded." *Walker v. State*, 913 So.2d 198, 241 (Miss.2005).

For these reasons, the state contends Ford has failed to show that the court committed reversible error in its rulings during closing arguments. Ford's seventh proposition should be denied.

PROPOSITION EIGHT:

THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE; THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR J.N.O.V./NEW TRIAL

Ford finally contends the evidence is legally insufficient to sustain the verdict and, alternatively, that the verdict is contrary to the overwhelming weight of the evidence. To prevail on the claim that she is entitled to a judgment of acquittal, she faces the formidable standard of review set out below:

> In reviewing the sufficiency of the evidence, the standard of review is quite limited. *Clayton v. State*, 652 So.2d 720, 724 (Miss.1995). All of the evidence is to be considered in the light most consistent with the verdict. *Id*. The prosecution is given the benefit of "all

> favorable inferences that may reasonably be drawn from the evidence." *Id.* This Court will not reverse unless the evidence with respect to one or more of the elements of the offense charged is such that reasonable and fairminded jurors could only find the accused not guilty. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993).
>
> *Brown v. State*, 796 So.2d 223, 225 (Miss.2001).

This rigorous standard applies to the claim that the defendant is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his 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(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "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." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss.App.2004),

Furthermore,

> The 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) (citations omitted). **"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).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

The state respectfully submits that Ford's challenge to the sufficiency and weight of the evidence presented is essentially an improper attempt to relitigate factual issues, including credibility of the witnesses, properly resolved by the jury. Incorporating by reference the facts set out under the Statement of Substantive Facts, the state assertss the trial court did not abuse its discretion in submitting this case to the jury and refusing to overturn its verdict. The evidence is not such that reasonable jurors could have returned no verdict other than not guilty, or such that to allow it to stand would be to sanction an unconscionable injustice. Taken in the light most favorable to the verdict, the proof and the reasonable inferences therefrom support the conclusion that Ford committed aggravated assault by

willfully, unlawfully, feloniously, purposefully or knowing causing bodily injury to Misty Gaddy with knife, by stabbing her in the eye, not in necessary self-defense. Gaddy's testimony, the credibility of which was an issue for the jury, established that Ford initiated the physical altercation by asking, "Do you want to kick somebody's ass?" When Gaddy responded, "Are you going to pull a knife on me now?" Ford answered, "You're damned right, you stupid bitch," and stabbed her in the eye. (T.160-61) Gaddy testified that she never attempted to choke Ford. It was undisputed that Gaddy was unarmed.

No basis exists for disturbing the trial court's denial of the motion for j.n.o.v./new trial. Ford's final proposition should be rejected.

CONCLUSION

The state respectfully submits that the arguments presented by Ford have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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