IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH BRIGHT — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

NO.2006-KA-01970-COA

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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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. Keith Bright
3. Doug Evans and the Montgomery County District Attorneys Office
4. Honorable Joseph H. Loper, Jr.

THIS 26th day of March 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Keith Bright, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE ISSUES

ISSUE NO. 1: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

ISSUE NO. 2: THE TRIAL JUDGE ERRED IN GRANTING INSTRUCTION S-1 AND DENYING INSTRUCTION D-1.

ISSUE NO. 3: THE TRIAL JUDGE ERRED IN FAILING TO GRANT THE APPELLANT'S LESSER INCLUDED INSTRUCTION ON SIMPLE ASSAULT.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Montgomery County, Mississippi, and a judgment of conviction for the crime of aggravated assault against Keith Bright and resulting in a twenty year sentence with six years suspended for five years, leaving fourteen years to serve with five year probation period after release. This sentence followed a jury trial on October 11, 2006, Honorable Joseph H. Loper, Jr., Circuit Judge, presiding. Keith Bright is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According the trial testimony, on February 25, 2006, the appellant, Keith Bright, along with his nephew, Donny Meadows, entered the Four D Grocery in Stewart, Mississippi. Tr. 17-18. Keith asked the cashier at the grocery, Lisa Davis, if she knew where Bob Woods lived. She told Keith that Woods lived just down the road and gave them directions. Tr. 18. Before Keith left, Davis warned him that Keith needed to watch out for Woods because he would tell you a lie. Tr. 19. Meadows also testified Davis told Keith, "Watch him. He'll tell a damn lie." Keith told Davis that was what he wanted to see Woods about, a lie. Tr. 84.

Woods, 73, lived at 2167 Stewart-Huntsville Road in Stewart. On February 25, 2006, Woods was at home with his step-granddaughter and his great grandson. His granddaughter told him someone was at the door. Tr. 21, 45. Woods opened the screen door and saw Keith standing on the porch. Keith asked if his name was Bob Woods, and if his mother had cleaned his house. Woods testified he said he did not know and was then hit by Keith while standing in the doorway. Tr. 22, 35. Woods did not know Keith. Tr. 22. Woods testified that although he saw the small pick-up in his driveway, he could not see inside the cab. Tr. 24.

Woods testified that after he was hit, he went down outside. Woods grabbed Keith's leg, and when Keith pulled his leg loose, he kicked Woods arm. Woods then testified that was the last he remembered. Woods said the next thing he remembered was having his son and daughter-in-law stand him up to take him to the hospital. The whole incident took place in less than a minute. Tr. 25. On cross-examination, Woods said he remembered Keith kicking him, but described it in this way:

> Q. So he didn't kick you on the arm.
> A. No. No. He pulled his foot out of my arm. I had – I caught around his leg when I went down on the porch.
> Q. He hit you one time.
> A. He hit me one time, yes, sir.

Tr. 36.

Woods then said he thought Keith kicked him after he was on the porch after Keith got his foot loose, but did not remember which foot kicked him and did not see it. "I didn't see him kick me, no." Tr. 36. Woods simply did not know if he was kicked. Tr. 37. He

later testified he remembered the kick, but changed it again to "the kick or hit, whatever you say." Tr. 47-48. Woods denied making any moves against Keith before the assault. Tr. 46, 50. Woods also testified he was knocked unconscious. "I really don't remember anything till my son and his wife had me standing up. And, and I didn't think I was hurt that bad." Tr. 46. Woods was apparently confused about how many times he was hit. He stated the first blow was to the left side of his face, but then could not remember where the second blow hit, "thinking" it was to his face or head. The scrape on his arm came from when Keith tried to get his foot loose. Tr. 48.

Woods later found out that Keith's mother was Pat Hart. Mrs. Hart had cleaned Woods's home about six months prior to the incident. Tr. 27. Woods met Mrs. Hart at a nightclub in August of 2005. Tr. 27, 33. She agreed to come to his house the following Monday morning and clean his house. Tr. 28. Woods claimed that he left shortly after she arrived and returned around 11:00 a.m. She had completed everything but making the bed because she could not find the sheets. Woods claimed he gave her the sheets and they made the bed. Woods then invited her to sit on the bed. Tr. 29. Woods then testified they slept together. Woods paid her $65.00 for cleaning his house. He also offered to go get some food and went out and came back with hamburger steak. Woods got her phone number and promised he would call her, but never did. Tr. 30. He also admitted that he knew Mrs. Hart recently had heart surgery and they discussed their scars. Tr. 40. However, during his testimony, he could not remember exactly where her scar was even though he claimed she had taken her blouse off. Tr. 49. Woods maintained the sex was consensual. He saw Mrs.

Hart again about a month later and she appeared to be mad at him. Tr. 31. Woods further testified his medical expenses from the assault were about $74,000.00. Tr. 32.

Mrs. Pat Hart testified and contradicted the majority of Woods's testimony about the day she was raped. She stated that Woods never left the house that day. Tr. 98. Hart said she finished around 11:00 a.m. and Woods seemed antsy. Tr. 98. When she entered the bedroom to clean it, Woods pushed her down on the bed and tore her bottom clothes off. Tr. 99, 104. He did not take her blouse off. Tr. 99 He then had forcible sexual relations with her. She tried to talk Woods out of it because she recently had heart surgery. She begged him to stop but he said she was not hurt. Tr. 99. Contrary to Woods's testimony, her scar was not on her upper chest. Tr. 100. She then checked herself in the bathroom to make sure she was not bleeding and left. Tr. 100-101. Woods never left the house while she was there. She confirmed she saw Woods a few weeks later, but said nothing to him. Tr. 101. She was going to confront him but he left before she could do so. Tr. 102. Mrs. Hart said Woods paid her $40. She never got to clean the bedroom. Tr. 104.

Mrs. Hart reported the rape to police after the incident with Keith. She waited so long to officially report it because she wanted to keep it a secret. Tr. 105. Once the incident with Keith happened, it wasn't a secret anymore, so she reported it. Tr. 105-106. She was ashamed, but she did admit telling her daughter and three other friends about it at the time. Tr. 106. She said she never wanted Keith to know about what happened, but when he called and asked if was true, she confirmed it. Tr. 107. This was the day of the incident involving

Woods. "That is just something a mother don't want their son to know." Tr. 108. Keith told her he hit Woods twice. Tr. 109.

Keith took the stand and testified in his own defense. He was 37 years old at the time of trial and had three children. Tr. 111. Keith said he found out about what happened to his mother on Thursday and went to Woods house on Saturday. He found out when his sister let it slip to him. He talked to his mother on the Saturday of the assault and she confirmed it happened. Tr. 112. Keith said he wanted Woods's version of the story. He admitted he was upset, but just wanted to find out the truth. Tr. 113. Keith testified he knocked on the door and asked Woods to step outside. Tr. 114. He asked the man if he was Bob Woods, because Keith did not know Woods. Keith said he told Woods his mother was Part Hart and that she cleaned his house a few months back. Tr. 115. He then said he heard Woods liked to take advantage of woman. Woods asked what he meant by that. Keith said his mother had told him that Woods had raped her. Tr. 115. Woods then grabbed toward him and Keith hit him twice. "I really feel bad about what did happen. I was going to defend myself either way, you know." Tr. 116.

Again, Keith testified despite all his talk, he just wanted to hear what happened out of Woods's mouth. Tr. 116. Keith made the decision to defend himself when Woods grabbed at him. The second hit was while Woods was going down. Tr. 117, 124. Keith said he knew Woods was more or less unconscious. He saw Woods' s eye bleeding. He then got in the truck and left. Keith didn't hit him again because he knew he would hurt him really bad. Tr. 118. "I never meant to do any seriously harm to that man." Keith never denied he

hit Woods. Tr. 119. Keith was 6'4" and weighed 240 pounds. Tr. 119-120. He believed Woods was about 200 pounds. Tr. 120. He seemed unconscious to Keith. Keith did not hit him once he was down. "...[I]f I had wanted to do seriously body harm to him I could have." Keith swore he only hit Woods twice. He had no idea he was going to do that kind of damage to him. Tr. 124. He admitted driving by the house later because he was concerned about Woods. "I didn't mean to hurt him that bad." Tr. 125. He even had someone in his family later call to check on Woods. Tr. 128.

After Keith was arrested, Mrs. Hart filed rape charges against Woods. Tr. 40-41, 50-51. The charge against Woods was dismissed after a preliminary hearing. Tr. 40. Mrs. Hart testified she did not immediately file charges against Woods because she was ashamed. Tr. 41.

No one else in Woods's house saw the incident. Tr. 46. Woods's son, Jim, did remember seeing the pickup truck pull into Woods's driveway, but did not see the incident. Tr. 53. He did see Keith leaving and then saw his father laying on his porch. Tr. 54. Contrary to the testimony of Woods, Jim testified his father was not unconscious, but spoke to him, telling him he did not know the man who hit him. Tr. 55, 58. (The doctor's report also indicated no loss of consciousness. Tr. 67-68). Jim testified Woods seemed dazed. Tr. 59. Jim also remember seeing another person in the passenger side of the truck. Tr. 57.

The only other person to witness the incident was Meadows, Keith's nephew[1]. He testified Keith was very upset after finding out that Woods raped his mother. Tr. 69, 79. Meadows and his wife were able to calm Keith down after talking to him. Tr. 69. Keith was in a good mood when they left to go to Stewart to get some beer. Tr. 69, 81. The cashier at the store told Keith where Woods lived. Meadows testified that Keith knocked on the door and a man came out. Some words were exchanged and then the "man throwed up. When he did, Keith hit him, hit him twice." Meadows, who was a prosecution witness, maintained Woods was the one who "throwed his hands up first." Tr. 70, 82. He remained in the truck throughout the incident. Tr. 71. He further explained what he saw.

> A. Whenever, whenever you reach for somebody, it can be a flinch or, or whatever. I didn't see no fists doubled up or anything like that. I seen him reach for – I seen him reach for Keith.
> Q. So a minute ago when you put your hands up in the air, your fist –
> A. Well, well....
> Q. You are saying that is not what you saw. You saw maybe a flinch.
> A. He put his hands up towards Keith. I'll put it that way.

Tr. 72-73.

Meadows did not believe there was going to be a fight when they arrived at Woods's house. He believed Keith was just going to confront Woods. Tr. 85. It looked to him that Keith "throw up" to protect himself when Woods put up his hands. Tr. 87. Meadows could not remember telling deputies Keith told him he wanted to beat Woods's brains out, but did remember the deputy telling him that if it were his mother, he would have done the same

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[1]Meadows was also Mrs. Hart's brother. Tr. 97.

thing Keith did. Tr. 76. He testified Keith only hit Woods twice. Tr. 77, 82.. He said by the time they got to Woods's house, Keith was not in a hateful mood. Tr. 81. Meadows saw the incident from only 20-25 feet away. Tr. 82. He never saw Keith kick Woods. Tr. 82. The whole incident surprised him, as he had never seen Keith "jump" on anybody his entire life. Tr. 86.

Woods's doctor, Dr. Joseph Boggess, testified as to Woods's injuries. Woods's cheek bones, the eye socket bones, the nasal bones and the upper jaw bones were all broken. Dr. Boggess repositioned the bones and wired or plated them back together. Tr. 66. Although the doctor testified the injury was serious, he could not testify how Woods received the injuries or what force was involved to inflict them. He also testified that Woods had recovered from his injury, but did still have some numbness[2]. Tr. 66-67.

SUMMARY OF THE ARGUMENT

The verdict in this case was clearly against the overwhelming weight of the evidence. (1) The evidence presented failed to establish beyond a reasonable doubt the charge of aggravated assault, as the evidence did not show that appellant's actions manifested an extreme indifference to the value of human life by punching the victim with his fist twice in the face. (2) There was no evidence presented of intent to do serious bodily injury at the time of the assault, and (3) no competent evidence whatsoever that the appellant repeatedly hit and kicked the victim as set forth in the indictment. (4) The trial court erred in granting the elements

[2] Although the victim testified to some hearing loss, there was absolutely no medical testimony that the hearing problems were the result of the assault. Tr. 21, 27.

instruction when insufficient evidence was presented that the victim was kicked. Finally, and most importantly, the appellant was deprived of an instruction on his theory of the case by the court's refusal of a lesser included offense instruction on simple assault. This was clearly reversible error.

ARGUMENT

ISSUE NO. 1: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for Judgment of Acquittal Notwithstanding the Verdict and in the Alternative for a New Trial (JNOV), counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 46, R.E. 23. The trial judge denied this motion. C.P. 56, R.E. 25. The motion should have been granted.

"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." *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). "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. See also Benson v. State*, 551 So.2d 188, 193 (Miss.1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

In the case at bar, two punches to the face was insufficient to support a finding beyond a reasonable doubt that accused's purpose was to commit a serious bodily injury. Since there

was no evidence he acted purposefully to commit serious bodily injury, jury had to find he acted recklessly. There was no evidence presented that Bright had any criminal record. There was no evidence that he was a boxer or any other type of athlete. In fact, there was testimony he was on disability. Tr. 118, 120. Meadows testified he never saw Keith ever jump on anyone in his whole life. Tr. 86.

As set forth in the indictment, the State was required to show that (1) under circumstances manifesting extreme indifference to human life, Keith Bright (2) purposefully, knowingly, or recklessly, (3) attempted to or caused serious bodily injury, by (4) "repeatedly hitting him with his fists and kicking him." C.P. 8, R.E. 8. The State presented no evidence that Keith's conduct, hitting the victim twice, manifested an extreme indifference to human life. The State produced no evidence to show Keith **intentionally** inflicted serious bodily injury. Counsel can find no case where any court in this State has found punching a man, even an elderly man, twice in the face was ever considered reckless conduct. Finally, the weight of the evidence does not support that the victim was kicked. The State used the conjunctive phase "hitting him with his fists and kicking him." The prosecution was therefore bound to prove both hitting and kicking beyond a reasonable doubt. The State failed to do so.

(a) Keith's conduct was not under circumstances manifesting extreme indifference to the value of human life.

The prosecution was only able to point to the assault itself to justify Keith's conduct manifested an extreme indifference to human life. During closing argument, the State tried

to convince the jury that Keith's conduct immediately after the assault showed he did not care about Woods. "Under circumstances manifesting extreme indifference to the value of human life. What did – what did Bright tell his uncle on the way back over there? He said I don't care whether I killed him or not." Tr. 148-49. But in Meadows's sworn testimony, he stated that although Keith was quite upset after finding out Woods raped his mother, Meadows and his wife were able to calm Keith down after talking to him. Tr. 69. Keith was in a good mood when they left to go to Stewart to get some beer. Tr. 69, 81.

Meadows did not believe there was going to be a fight when they arrived at Woods's house. He believed Keith was just going to confront Woods. Tr. 85. Meadows said by the time they got to Woods's house, Keith was not in a hateful mood. Tr. 81. Keith confirmed that although he was originally very upset, he just wanted to hear Woods's side of the story from his own mouth. Tr. 116. Keith made the decision to defend himself when Woods grabbed at him. Tr. 117. Keith didn't hit him again because he knew he would have hurt the man really badly. Tr. 118. "I never meant to do any seriously harm to that man." Tr. 119.

Keith's conduct at the moment of the assault is crucial. Once the victim was down, the assault stopped. Woods seemed unconscious to Keith right after the two blows. Keith did not hit him once he was down. "...[I]f I had wanted to do seriously body harm to him I could have." Keith had no idea that his two punches was going to do that kind of damage to him. Tr. 124. He admitted driving by the house later because he was concerned about Woods. "I didn't mean to hurt him that bad." Tr. 125. He even had someone in his family

later call to check on Woods. Tr. 128. This is not conduct evincing extreme indifference to the value of human life.

(b) The evidence did not support a finding that the victim was repeatedly hit and kicked beyond a reasonable doubt.

By alleging in the indictment that Keith committed an aggravated assault by both hitting and kicking the victim, the State took on the burden of proving that Keith repeatedly both hit ***and*** kicked the victim beyond a reasonable doubt[3]. *Gray v. State*, 728 So.2d 36 (¶176-77) (Miss. 1998). The only evidence the State was able to elicit about whether or not Woods was kicked was Woods's testimony that he grabbed Keith's leg, and when Keith pulled his leg loose, Keith foot brushed Woods's arm. Tr. 25.

> Q. So he didn't kick you on the arm.
> A. No. No. He pulled his foot out of my arm. I had – I caught around his leg when I went down on the porch.
> Q. He hit you one time.
> A. He hit me one time, yes, sir.

Tr. 36.

The victim later changed his testimony to say he was hit twice. Tr. 48. "I didn't see him kick me, no." Tr. 36. Woods simply did not know if he was kicked. Tr. 37. He then later testified he remembered the kick, but changed it again to "the kick or hit, whatever you say." Tr. 47-48. Keith testified unequivocally that he only hit Woods twice and did not kick him. Tr. 117, 124. Meadows, the only other witness to the incident, also stated he only saw

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[3] Trial counsel properly objected to S-1 on the issue of sufficiency of the evidence on that basis. Tr. 130. *See* Issue 2, *infer*, on the claim that there was insufficient evidence for the trial judge to submit S-1 to the jury.

Keith hit Woods twice, and never saw him kick the victim. Tr. 82. Woods's doctor testified he was unqualified to determine what kind of force was necessary to inflict Woods's injuries. Tr. 67.

Clearly, given the evidence presented, Keith Bright should be entitled to a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State* 883 So.2d 86 (¶13) (Miss. 2004).

ISSUE NO. 2: THE TRIAL JUDGE ERRED IN GRANTING INSTRUCTION S-1 AND DENYING INSTRUCTION D-1.

After the trial was concluded, the court considered the proposed defense instructions and denied D-1 as a peremptory instruction. C.P. 18, R.E. 17, Tr. 131, R.E. 10-11. Counsel also filed a motion for JNOV. C.P. 46, R.E. 23. This motion was overruled. C.P. 57, R.E. 25. The trial court erred in denying the peremptory instruction and denying the JNOV motion, as the evidence presented was insufficient to show beyond a reasonable doubt that the victim was repeatedly hit and kicked as set for the indictment.

"When reviewing the sufficiency of the evidence, this Court looks at the lower court's ruling 'on the last occasion when the sufficiency of the evidence was challenged.'" *Ballenger v. State*, 667 So.2d 1242, 1252 (Miss. 1995), *quoting Green v. State*, 631 So.2d 167, 174 (Miss. 1994). The last occasion when Keith Bright challenged the sufficiency of the evidence was in his JNOV motion. Therefore, this Court is to consider all the evidence presented during the entire trial. *Gibson v. State*, 731 So.2d 1087 (¶12) (Miss. 1998).

"The Supreme Court will reverse the lower court's denial of a motion for new trial only if, by denying, the court abused its discretion." *Esparaza v. State*, 595 So.2d 418 (Miss.1992)(citing *Wetz v. State*, 503 So.2d 803, 812 (Miss. 1987); *Crenshaw v. State*, 520 So.2d 131, 135 (Miss.1988); *Leflore v. State*, 535 So.2d 68, 70 (Miss.1988); *Neal v. State*, 451 So.2d 743, 760 (Miss.1984), *cert. denied, Neal v. Mississippi*, 469 U.S. 1098, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984)). "Under this standard, this Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence." *Jefferson v. State*, 818 So.2d 1099, 1111 (Miss. 2002)(citing *Coleman v. State*, 697 So.2d 777 (Miss. 1997)). "If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render." *Id.* "On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required." *Id.*

As argued in Issue 1, *supra*, given the evidence, the trial judge erred in granting the State's elements instruction, S-1. The instruction followed the language of the indictment.

JURY INSTRUCTION NO. 3

> The defendant, KEITH BRIGHT, has been charged in an indictment with the crime of Aggravated Assault.
>
> If you believe from all the evidence in this case beyond a reasonable doubt that:

1. the defendant, on or about the 25th day of February, 2006, in Montgomery County, Mississippi, did wilfully, unlawfully, feloniously, purposely, knowingly or recklessly,

2. under circumstances manifesting extreme indifference to the value of human life,

3. cause serious bodily injury to Bob Woods by hitting him with his fists and kicking him, and

4. the defendant was not acting in necessary self-defense, then you shall find the defendant guilty of Aggravated Assault.

If the State has failed to prove any one of the above elements beyond a reasonable doubt, then you shall find the defendant not guilty of Aggravated Assault.

C.P. 32, R.E. 19.

Trial counsel properly objected to this instruction:

MR. BAILEY: I don't think there was any evidence that any actions by Keith Bright were under circumstances manifesting extreme indifference to the value of human life, no acts by him or as such. So I would object to that being in the instruction.

I also object to the part of the instruction about him kicking Bob Woods. Mr. Woods said he didn't know.

MR.PHILLIPS: I think he said he did get kicked.

THE COURT: I recall him saying he – while he was laying there on the ground he got – he received a blow. And he thought it was a kick, but he was in such state of pain or near unconsciousness that he did not know. So I think it could be reasonably presumed that he was.

In fact, Mr. Bright testified that he hit him twice while he was going down. So if he was already on the ground, then I think the jury could certainly find that he was kicked.

Also there was some testimony about the tearing on the – or some kind of skin ripped off of Mr. Woods' arm. I know he said he grabbed the – at one point he had grabbed on to the leg of Mr. Bright. In loosening himself from

Mr. Wood he had to have kicked back his foot to have loosened himself.[4] So I think that part of the – has been proven enough to give the jury this instruction.
And what's the State's response on Item 2?
MR. PHILLIPS: Well, when you are hitting somebody like that, that is circumstances manifesting extreme indifference to the value of human life and also he did cause serious bodily injury.
THE COURT: I think S-1 is appropriate. I certainly believe that the actions would show an indifference to the value of human life. If he goes and pummels someone in the face and does the type of damage that is done, that is certainly evidence of extreme indifference to human life. So S-1 will be given.

Tr. 130-131, R.E. 10-11.

The evidence and testimony set out in Issue 1(b) clearly show, there was insufficient evidence presented to show that Woods was kicked by Keith. Submitting S-1 to the jury violated Keith's due process rights under the Fourteenth Amendment to the United States Constitution. Viewing the evidence in the light most favorable to the prosecution, a rational jury could not have found the essential elements under S-1 that the victim was kicked beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836 (¶16) (Miss.2005) (*quoting Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). The evidence must show beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that *every* element of the offense existed, and where the evidence fails to meet this test it is

[4] That was not Woods's testimony. "Q. So he didn't kick you on the arm. A. No. No. He pulled his foot out of my arm. I had – I caught around his leg when I went down on the porch....Q. Did you say he kicked you in addition to that? A. After I was on the porch he did. Q. Was that before he got his foot loose from you or after? A. That was after he had got his foot loose.....Q. How do you know it was a kick? A. Because I was laying down on the porch. Q. I mean he could bend over and hit you, could he not? A. I guess he could but...Q. You don't know. A. I don't know. Tr. 36-37.

insufficient to support a conviction. *See Taylor v. State*, No.2004-KA-02384-SCT ¶ 23 (Miss. March 22, 2007), *quoting Bush*, 895 So.2d at ¶16, *quoting Carr v. State*, 208 So.2d 886, 889 (Miss. 1968).

ISSUE NO. 3: THE TRIAL JUDGE ERRED IN FAILING TO GRANT THE APPELLANT'S LESSER INCLUDED INSTRUCTION ON SIMPLE ASSAULT

Trial counsel submitted an instruction on the lesser-included offense of simple assault The trial judge found no evidentiary support for the instruction and denied it. This was error, as it deprived Keith to any instruction regarding his theory of the case.

> THE COURT: Okay. Now, what on earth would support D-3 and D-4?
> MR. HOPPER: Your Honor, I don't believe there has been any evidence that says this is anything other than aggravated assault. These injuries are quite substantial and severe. And I don't believe there is any testimony that would substantiate a simple assault instruction.
> THE COURT: What does the defense –
> MR. BAILEY: Well, Your Honor, I mean it was no outside object used. It was only the defendant's fist and only two strikes by that.
> MR. HOPPER: Your Honor, there is case law that says hitting somebody with your fist is aggravated assault if you do enough damage. I think it's obvious from the testimony and evidence presented there was substantial damage done to Mr. Woods.
> THE COURT: I know Jackson versus State stands for that proposition. That was a case that happened to arise out of my home county. I was familiar with the case.
>
> And actually in D-4 you are just saying that simple assault is – you are trying to distinguish simple assault versus aggravated assault in D-4 as being caused versus just bodily injury. I think the testimony from the doctor is clear it was serious bodily injury.
>
> I don't see that there is anything at all that would warrant a lesser included or simple assault. Jackson case and others that have followed that indicate that fists alone are enough to warrant a charge of aggravated assault. So D-3 and -4 will be refused.

Tr. 131-32.

Both the trial judge and the prosecution misunderstood the charge in this case. It was not aggravated assault under Miss. Code Ann. §97-3-7(2)(b). Fists alone have been successfully alleged as deadly weapons under that subsection, but that was not what Keith Bright was charged with in his indictment. It is a jury question on whether fists alone constitute a means likely to produce serious bodily injury. *Jackson v. State*, 594 So.2d 20, 24 (Miss. 1992). There was no instruction informing the jury that they could find fists may be considered a deadly weapon since Keith was not charged with using a deadly weapon.

A similar fact scenario was present in *Harrison v. State*, 737 So.2d 385 (¶12) (Miss.App. 1998). An older man was assaulted by a younger defendant, and the Court, citing *Jackson*, held it is a jury question if the use of fists alone is a means likely to produce death or serious bodily injury. However, just like Jackson, Harrison was charged under subsection (2)(a) of the aggravated assault statute. This is an entirely different case. The jury question in the case at bar was whether two blows to the face should be considered extreme indifference to the value of human life. By denying a simple assault instruction, the jury was given only the choice of convicting of the greater offense or acquitting the defendant altogether.

In *Taylor v. State*, 577 So.2d 381 (Miss. 1991), the defendant was accused of repeatedly punching the victim in the face and head, causing the victim to have nerve damage and spend four days in the hospital. She also had to have follow-up treatment with a neurologist. The attack left both of her eyes swollen shut, and one had to be pried open to test her sight. She had "significant bruising and bleeding into the skin of her face." *Id.* at

383. Taylor was denied a simple assault instruction. The Mississippi Supreme Court held this was error and remanded the case for a new trial. The case is worth quoting at length.

> Where the defendant requests a lesser-included offense instruction, one factor to be considered is the disparity in maximum punishments between the offenses. A great disparity is a factor in favor of giving the lesser included offense instruction. *Boyd v. State,* 557 So.2d 1178, 1181 (Miss.1989). Rape carries a penalty of life in prison; simple assault carries the maximum penalty just mentioned. Because Kendall Taylor requested the instruction, the evidence would be viewed in a light most favorable to him. As was stated in *Mease v. State,* 539 So.2d 1324, 1330 (Miss.1989):
>
> > A third and simpler version [of the evidentiary standard] is found in *Monroe v. State,* 515 So.2d 860, 863 (Miss.1987): "[T]he evidence in a particular case generally warrants granting a lesser offense instruction if a 'rational' or a 'reasonable' jury could find the defendant not guilty of the principal offense charged in the indictment yet guilty of the lesser included offense." Only where the evidence could *only* justify a conviction of the principal charge should a lesser offense instruction be refused. (emphasis added) *Ruffin v. State,* 444 So.2d [839] at 840 [Miss.1984]; *Fairchild [v. State],* 459 So.2d [793] at 800 [Miss.1984]; *Lee [v. State],* 469 So.2d [1225] at 1231 [Miss.1985].
>
> In *Boyd* this Court added the following language:
>
> > The jury may consider any of the evidence presented at trial. It is not limited to the testimony of the defendant. *See Griffin,* 540 So.2d at 21. Moreover, "[n]either the trial court nor this Court should ask which way the evidence preponderates--[the greater or lesser offense]." *Mease,* 539 So.2d at 1330. Likewise, neither the trial court nor this Court can "merely ask if there is sufficient evidence to sustain the jury's verdict of guilty of [the greater offense]. The answer to that question in this and other cases may be 'yes' and there still be reversible error in not giving the lesser-included instruction." *Fairchild,* 459 So.2d at 801; *see also, Mease,* 539 So.2d at 1330.
>
> This Court's most recent dictation of the standard further

drives the point home by stating "[a] lesser-included offense instruction must be granted where a reasonable juror could not on the *evidence* exclude the lesser-included offense beyond a reasonable doubt." *Griffin [v. State],* 540 So.2d [17] at 21 [Miss.1989]. (emphasis added) (*quoting Harbin v. State,* 478 So.2d 796 (Miss.1985)); *see also, Griffin [v. State],* 533 So.2d 444 [Miss.1988]; *Fairchild, supra.*

The language is not limiting. It does not compel the jury to consider only the testimony of the defendant, but the jury may consider any of the evidence presented at trial. Of course it is the jury, not the trial court nor this Court, who resolves the weight and credibility to be accorded evidence, and the members of the panel can believe any or all of the evidence presented. *Neal v. State,* 451 So.2d 743, 758 (Miss.1984).

Boyd, 557 So.2d at 1182.

Kendall Taylor relies on *Lee v. State,* 469 So.2d 1225 (Miss.1985), in which a prisoner overpowered a jail guard, struck him, and then put a knife to the guard's throat and attempted to use him as a hostage to escape. Lee's version was that he had attempted to bribe the guard to let him escape, and that he never threatened anyone with a knife. Lee was convicted of aggravated assault. This Court reversed and remanded for a new trial for failure of the trial court to grant a lesser included offense instruction. *Lee,* 469 So.2d at 1232.

A common feature of most cases of this kind is the defendant's testimony, in which he gives his version of the incident in question. Kendall Taylor did not take the stand, and the only version of the events in question comes from the state's witnesses. Taking all the evidence in a light most favorable to Kendall Taylor, including the fact that he did transport Martel to the hospital, and considering the elements of both aggravated and simple assault, we cannot say that a rational, reasonable jury could find Taylor guilty only of aggravated assault. The circuit court erred in not giving Instruction D-3. Kendall Taylor's conviction is reversed and the case remanded for a new trial consistent with this opinion.

Taylor, 577 So.2d at 383-84.

As the facts undoubtedly prove, there was a factual basis for the simple assault instruction even though the evidence showed Woods's injuries were serious. Keith testified that when he approached Woods's house, he only wanted to talk to him. Tr. 114, 116. It was only when Woods appeared to "throw up" that Keith hit him. Tr. 116. He did not bring a weapon with him. There was no intent to cause serious bodily injury. Tr. 119. Keith showed remorse and drove by later to check on the victim and even had a relative call to check on Woods. Tr. 125, 128. Keith knew after the incident that he was probably going to jail. Tr. 83. He felt remorse after the incident. Tr. 116. The simple fact that Keith testified he was concerned about the victim's welfare should have been sufficient to grant the instruction, as the testimony disproves the assault occurred under circumstances manifesting an extreme disregard for the value of human life.

Furthermore, even if Keith's actions were not objectionably reasonable to allow the jury to find he acted in self-defense, his testimony at least showed imperfect self-defense, which would have allowed a lesser-included offense instruction. *See Wade v. State,* 748 So.2d 771, 774 (Miss.1999) *quoting Lanier v. State*, 684 So.2d 93, 97 (Miss.1996). Again, whether or not the jury would have bought this theory of defense is not the test.

> Under *Lee*, supra, at 1231, and *Murray v. State*, 403 So.2d 149 (Miss.1981), this testimony could bring this case within the statutory definition of simple assault. Of course the jury was not required to believe any of this testimony. That is not dispositive here. As long as the testimony muddies the water enough, the defendant is entitled to the lesser included offense instruction. *Boyd v. State*, 557 So.2d 1178 (Miss.1989); *Harbin v. State*, 478 So.2d 796, 799-800 (Miss.1985). It follows then that we must reverse the convictions on counts two and three and remand for a new trial.

Robinson v. State, 571 So.2d 275, 276-77 (Miss. 1990).

The Supreme Court was concerned in *Boyd* that trial courts were not granting lesser-included instructions often enough.

> For some unknown reason, our competent and able trial judges continue to refuse instructions on lesser included offenses when the evidence warrants them. This in essence allows the jury to hear the defendant's side of the story; however, it also bars that same jury from using that evidence during its deliberations. This forces the jury, when it has the choice between finding the defendant guilty of something or allowing him to go free, to convict a defendant of a greater offense when he could possibly only be guilty of a lesser crime.
>
> In deciding whether lesser included instructions are to be given, trial courts must be mindful of the disparity in maximum punishments. Generally, where the disparity is great this Court has required lesser included instructions to be given. *Griffin*, 533 So.2d at 447. In the case sub judice, for example, a maximum penalty for simple assault carries a six month jail term in the county jail and a five hundred dollar fine; whereas the maximum penalty for aggravated assault carries a twenty-year prison term in the penitentiary. MCA §§ 97-3-7(1),(2) (Supp. 1989).

Boyd, 557 So.2d at 1181.

The jury heard Keith admit he hit Woods, but that he did not mean to cause such an injury, and did so only in his defense. Tr. 124. The jury, however, had no means of finding Keith guilty of a lesser offense to aggravated assault. Although heat of passion is not a defense to aggravated assault, it should be considered a mitigator. *Brown v. State*, 749 So.2d 204 (¶14) (Miss. App. 1999). Keith was not asking to be acquitted because of heat of passion, but surely the jury should have been the means to find him guilty of simple assault. There was absolutely no evidence of aggravation presented by the State. There was no indication Keith was a violent man, that he had any prior criminal convictions, or that he was a threat or a continuing danger to the community. He assaulted a man who he believed raped

his mother, and that he believed was going to strike him after Keith confronted him. The victim did not even realize he was hurt badly and had fully recovered by the time of trial. Tr. 46, 67.

A defendant is entitled to jury instructions on his theory of the case whenever there is evidence that would support a jury's finding on that theory. *Jackson v. State*, 645 So.2d 921, 924 (Miss. 1994). Even the 'flimsiest of evidence' is sufficient to mandate a trial court's giving an instruction on the [defendant's] proposed theory, but there must be some 'probative value' to that evidence. *Miller v. State*, 733 So.2d 846 (¶7) (Miss.App. 1998)." *Goff v. State*, 778 So.2d 779 (¶5) (Miss.App. 2000).

The denial of the simple assault instruction also violated Keith's due process rights under the Fourteenth Amendment to the United States Constitution. *See Beck v. Alabama*, 447 U.S. 625 (1980). By denying the instruction, the court required to jury to find Keith guilty of aggravated assault or allow him to walk free. The standard in determining if a lesser included offense in warranted in a non-capital case is whether the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater offense. *Id.* at. 633-37. As the Fifth Circuit Court of Appeals noted, the purpose of granting the lesser included instruction "was to ensure that the jury would accord the defendant the full benefit of the reasonable doubt standard. *Id.* at 634.

> Though Alabama argued that its "all or nothing" death penalty statute furthered that goal, the Court concluded that the statute actually risked undermining the reliability of a jury's verdict because "the unavailability of the third option ... may encourage the jury to convict for an impermissible reason

– its belief that the defendant is guilty of some serious crime and should be punished."

Allridge v. Scott, 41 F.3d 213, 218 (5th Cir. 1994), *quoting Beck* at 642.

The trial judge erred in refusing the instruction, and Keith should be granted a new trial with a jury properly instructed on his theory of the case.

CONCLUSION

Given the unique circumstances of this case, the verdict was contrary to the overwhelming weight of the evidence and every element as alleged in the indictment was not sufficiently proven. Keith Bright is entitled to have his aggravated assault conviction reversed and remanded for a new trial where the jury will be allowed to consider the lesser included offense of simple assault.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Keith Bright, Appellant

By: 
Leslie S. Lee

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 26th day of March, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

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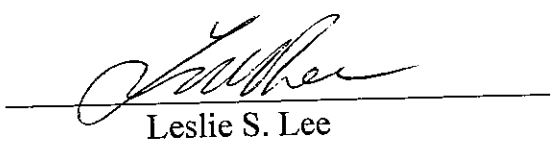

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