IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MIGUEL DECARLOS MCCALLUM — APPELLANT

VS. — NO. 2007-KA-0992-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The denial of a motion for new trial predicated on dual grounds of a sleeping juror and a shortage of proof form the centerpiece of this appeal from a conviction of aggravated assault.

McCallum contends a female juror was sleeping during the two (2) day trial.

He also argues there was no proof he intended to cause bodily injury although admitting at trial he purposely fired a pistol into the ground near the feet of his victim.

MIGUEL MCCALLUM, a 33-year-old African-American male and resident of Hattiesburg (R. 301; C.P. at 48), prosecutes a criminal appeal from the Circuit Court of Forrest County, Robert B. Helfrich, Circuit Judge, presiding.

McCallum, in the wake of an indictment returned on March 27, 2006, was convicted of aggravated assault against Clifton Clark, an automobile mechanic.

The indictment, omitting its formal parts, alleged

> "[t]hat **Miguel Decarlos McCallum** . . . on or about October 30,

> 2005, . . . did unlawfully, feloniously, willfully, and knowingly, cause bodily injury to Clifton Clark, with a deadly weapon, to wit: a pistol, by shooting Clifton Clark with the pistol, contrary to the form of the statute in such cases made and provided . . ." (C.P. at 8)

Following a trial by jury conducted on November 27-28, 2006, the jury returned a verdict of, "We, the jury[,] find the Defendant, Miguel Decarlos McCallum, guilty of aggravated assault upon the person of Clifton Clark." (R. 407; C.P. at 39)

Two (2) issues, articulated by McCallum as follows, are raised on appeal to this Court:

I. "The trial court erred in denying Miguel's motion for a new trial because a juror was sleeping during the trial." (Brief of the Appellant at 1, 3)

II. "The verdict was against the overwhelming weight of the evidence." (Brief of the Appellant at 1, 3)

STATEMENT OF FACTS

Clifton Clark operates a small engine repair shop on Highway 49 in Hattiesburg.

Miguel McCallum has a girlfriend named Tammy Jenkins who owns a Cadillac automobile. The transmission had gone bad on the Cadillac, and McCallum hired Clark, who he had known for several years, to repair it.

Because of Hurricane Katrina and Clark's attention to repairs on other motor vehicles, the work on Jenkins's Cadillac was taking more time than McCallum expected and desired.

On October 20, 2005, McCallum and Jenkins went to Clark's shop where McCallum expressed his profound displeasure over the extended delay. McCallum approached Clark with a pistol in his pocket and, according to McCallum, fired once or twice into the ground after Clark became enraged.

McCallum testified he was afraid of Clark, a much bigger man. (R. 317-23)

Q. [BY DEFENSE COUNSEL:] Why did you see he wanted to fight? What did you observe?

A. Because the manner he was approaching me in - - his clothes. He's a big guy, but his shirt was long. I didn't know what he had under his shirt, if he was packing. He was reaching under his shirt like he had something. I'm like he ain't going to pull a gun on me. I'm smart. You know what I'm saying? (R. 316)

Six (6) witnesses testified on behalf of the State during its case-in-chief, including the victim, Clifton Clark, who gave an entirely different version of the incident.

Clifton Clark (R. 180-222) described the assault and his injuries as follows:

Q. [BY PROSECUTOR:] But you did object to [McCallum} having [whiskey in your shop].

A. Right. I objected to him being in my place with it.

So then as he started coming up towards me, I said, Look, man, I'm doing all I can do. I said, What do you want me to do?

He said, I want you to work on my M F car instead [of] all these other peoples. And I thought he was swinging trying to hit me up side the head. I turned my head and he hit me and it was like a camera flashed. It kind of dumbfounded me I guess because I'm still standing there, and he was down in front of me on the ground. I put my hand on my head and I looked and I had a handful of blood, and as he come up he was doing his hand like that. (Indicating)

Q. What was in his hand?

A. Well, when he got to my face, I realized it was a pistol and he was pulling the trigger.

Q. When you say he was doing that, what was he doing as he was raising the pistol?

A. He was pulling the trigger as he came up.

Q. Did it go off?

A. No, sir, not at that time.

Q. And it ends up in your face?

A. He's got it in my face, and he told me - - and then he ejected it and it spit that shell out, and he put the gun back to my face, and I turned my head, and he hit me in the head again, whop.

And I looked back around and he said, Come on do something. You're supposed to be bad. And he flipped the gun and pulled the trigger, and he flipped it right back in my face and the smoke was coming out of the barrel, and I turned my head and he cracked me in the head again, whop.

And that's when he said, Come on. You're supposed to be bad ass. Do something.

And he popped the cap again. And he put the barrel right back in my face and I turned my head and he cracked me in the head two or three more times. And by that time you could hear the sirens coming. And Tammy grabbed him by the arm and said, Come on. Let's go.

And when he got to the car - - I was still just standing there holding my head. And he said, If you tell the police who did this, I'll come back and finish you off.

And they drove away.

Q, This is the same guy that you just identified.

A. Yes, sir.

Q. Now, did you have any kind of weapon on you?

A. No sir.

Q. Do you keep a weapon at your place of police?

A. No. sir.

Q. Did you have any bulges like any tools or anything in your pocket that might have looked like a weapon?

A. Keys and chains.

Q. At any time during the last confrontation when it was face to face, did you do anything, any gesture whatsoever, in a threatening way?

A. No sir.

Q. Can you recall doing anything other than verbal conversation prior to that incident?

A. No sir.

* * * * * *

Q. And what did you do thereafter?

A. Well, a man next door came out. I was still just standing in the middle of the parking lot there. He asked me if any of those rounds hit me.

I said, Well, I don't know. I was holding my head. I said, I'm bleeding out of my head. And I said, My feet are burning.

And he said, Well, come over here. And he brought a chair and sat the chair down. And he said, Well, you've got shrapnel. I can't remember, but he used some kind of term on my shoes. He said, Let's pull your shoes off.

So he pulled my right shoe off first, and then there was the blood. He rolled the sock off and there was the hole. And then he took my left shoe off and rolled the sock down, and there was a bullet in that foot, both feet.

Q. Did you later discover any injuries to your head area?

A. Yes, sir.

Q. Where would that have been located?

A. Over the ear and to the back of the head right in this area.

Q. Do you know how that occurred?

A. Yes sir.

Q. How did that occur?

A. That's where he hit me with the pistol. (R. 190-93)

Doctor Patrick Charbonneau, an emergency room physician at Forrest General Hospital, testified he treated Clark and that the laceration to his head was consistent with a blow to the head. (R. 123, 126)

X-rays were made of Clark's feet. (R. 124)

Q. [BY PROSECUTOR:] Did you look at those X-rays after they were done?

A. I did.

Q. Did you see what appeared to you to be medically significant?

A. I did. On both feet x-rays, there were fragments of what appeared to be metal that could be consistent with bullet fragments.

Q. Was any surgery performed on him?

A. No.

Q. Were these fragments removed so far as you know?

A. As far as I know, they were not. (R. 124)

George Butler, a mechanic's helper employed by Clark, testified he was an ear and eyewitness to the entire incident. He observed McCallum strike Clark in the head several times with the pistol and described how McCallum threatened to shoot Clark. (R. 139-40)

McCallum fired two shots into the ground and then placed the smoking gun to Clark's head. "[T]hat's when Cliff turned his head again. That's when he hit him up side the head again." (R. 140-41)

According to Butler, Clark " . . . was shot in both foots." (R. 142) "There was gashes in his

head, and there was blood and stuff all in the top." (R. 142)

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal of aggravated assault on the ground that "[t]here has been no evidence that my client intentionally shot him in the foot [and] [t]he only thing the State can show here, if it's anything at all, it's reckless use of a firearm, which would be simple assault , . ." (R. 223)

This motion was overruled with the following rhetoric: "I think the record is that there is a jury question. Note your motion and overrule the same." (R. 223)

After being personally advised of his right to testify or not, **Miguel McCallum** elected to testify in his own behalf. (R. 223-24)

McCallum admitted he carried a firearm and had it on his side when he got out of his car. (R. 313) He further admitted he

> " . . . shot at the ground just to warn [the victim] to get back because he got too close up on me and I shot at the ground and I made sure that I wasn't nowhere near his foot. I shot dead at the ground. I had no intention on shooting Cliff. I shot dead in the ground or whatever. Whenever I shot in the ground . . . [well] the concrete, I seen where the bullet entered the concrete, and the concrete splashed up." (R. 119-20)

McCallum denied hitting Clark with the pistol. (R. 320-21) He also denied shooting Clark deliberately; rather, he shot "just to scare him." (R. 352)

At the close of all the evidence, McCallum's renewed motion for a directed verdict and his request for peremptory instruction were both denied. (R. 354; C.P. at 38)

The jury retired to deliberate at 2:47 p.m. (R. 404) Twenty-three (23) minutes later at 3:10 p.m. it returned with the following verdict:

> "We, the jury, find the defendant Miguel McCallum, guilty of aggravated assault upon the person of Clifton Clark." (R. 407)

The defense elected to eschew polling of the jury for the purpose of determining the unanimity of the verdict, and no poll was taken. (R. 407)

Following a pre-sentence report and the presentation of evidence in mitigation of sentence (R. 408-09), the trial judge, on January 24, 2007, sentenced McCallum to serve twenty (20) years in the custody of the MDOC with fifteen (15) years suspended, five (5) years to serve and five (5) years post-release supervision. (C.P. at 43-45)

On February 9, 2007, McCallum filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. (C.P. at 49-50)

Among the grounds cited was the overwhelming weight of the evidence and a claim that

> "[t]he juror Ruth Brown, was observed sleeping by members of the Defendant's family during the course of the trial which was un-noticed by Defense attorney[,] a solo practitioner, as attached to the Affidavit's hereto of the people that were in the court room." (C.P. at 49)

Attached to the motion for new trial were the identical affidavits of six (6) individuals attesting to the fact they " . . . observed juror Number 11, Ruth Brown, sleeping during the course of the trial of Miguel McCallum held on November 27, 2006." (C.P. at 52-57)

Glenn White, a former district attorney for the 12th Circuit Court District and presently a practicing attorney in Petal, represented McCallum quite effectively during the trial of this cause.

Glenn S. Swartzfager, formerly an attorney with the Mississippi Office of Indigent Appeals and presently the director of the Mississippi office of capital post-conviction appeals has filed an commendable brief on direct appeal.

SUMMARY OF THE ARGUMENT

Issue I. The trial judge did not abuse his judicial discretion in denying McCallum's motion for new trial voiced, in part, on the ground that a juror was sleeping during the trial.

First, defense counsel, who tried the case as a solo practitioner, never voiced an objection to an allegedly sleeping juror or brought the matter to the attention of the trial judge.

Second, this Court can take judicial notice that Glenn White, defense counsel, was a former district attorney for the 12th Circuit Court District comprising Forrest and Perry Counties. (R. 376, 383) Accordingly, he would have been observing the jurors with an educated eye.

Third, neither the circuit judge nor the former district attorney observed a sleeping juror in the person of Ruth Brown. This observation simply detracts from the validity of McCallum's complaint. *Fourth,* the trial lasted two days - November 27th and 28th - with the defendant's case presented on the second day. (R. 229-30, 244) On which day, if any, was Ruth Brown observed sleeping?

Fifth, the motion for new trial, based in part on newly discovered evidence concerning the sleeping juror, fails to meet the criteria for newly discovered evidence. "To qualify as 'newly discovered evidence' it must be evidence which could not have been discovered by the exercise of due diligence at the time of trial, as well as being almost certainly conclusive that it would cause a different result." **Frost v. State,** 781 So.2d 155, 158 (Ct.App.Miss. 2000).

Accordingly, the record fails to reflect that Judge Helfrich abused his judicial discretion in denying McCallum's motion for a new trial.

Issue II. The trial judge did not abuse his judicial discretion in overruling McCallum's motion for new trial voiced, in part, on the ground the verdict of the jury was against the

overwhelming weight of the evidence.

First, McCallum confessed prior to trial, and also testified during trial, he intentionally, i.e., deliberately, fired a round into the concrete close to the feet of his victim. It is no defense to the crime of aggravated assault charged here that McCallum did not intend to cause or purposely cause bodily injury.

This is because McCallum was charged under Miss.Code Ann. §97-3-7(2)(b) which defines aggravated assault as "attempt[ing] to cause or purposely or knowingly caus[ing] bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm."

Intent to cause bodily injury is not an element of the crime of aggravated assault under section 97-3-7(2)(b). **Griffin v. State,** 872 So.2d 90, 91 (Ct.App.Miss. 2004). *Cf.* **Russell v. State,** 924 So.2d 604, 608 (Ct.App.Miss. 2006).

Finally, we note that McCallum received a lesser included offense instruction authorizing the jury to find him guilty of simple assault. (C.P. at 24, 28)

Hitting the victim on the head with a gun, threatening to kill him, and shooting into the ground near Clark's feet, however, was not simple assault; rather, aggravated assault was demonstrated beyond a reasonable doubt.

The verdict returned by the jury was not against the overwhelming weight of the evidence which did not preponderate in favor of the defendant. McCallum's purpose and intent could be read from the act itself and the surrounding circumstances.

We disagree with any suggestion by appellant that to allow this verdict to stand would be tantamount to sanctioning an unconscionable injustice.

ARGUMENT

ISSUE I.

THE TRIAL JUDGE DID NOT ERR IN OVERRULING MCCALLUM'S MOTION FOR A NEW TRIAL VOICED, IN PART, ON THE GROUND THAT RUTH BROWN WAS SLEEPING DURING TRIAL.

McCallum claims the trial judge abused his judicial discretion when he denied his motion for a new trial predicated, in part, on the ground that juror Ruth Brown was sleeping during trial.

Specifically, he argues that " , , , there is nothing in the record which disputes McCallum's assertion in his post-trial motion that Juror Ruth Brown was sleeping during trial." (Brief of the Appellant at 5)

McCallum invites this Court to reverse and remand for a new trial. (Brief of the Appellant at 5, 7)

McCollum relies upon **Church v. Massey,** 697 So.2d 407 (Miss. 1997), in support of his claim that the spectre of a sleeping juror warrants a new trial. We can distinguish **Church** on the ground that a complaint was made by Church, the plaintiff, on the second day of trial that one of the jurors had been sleeping. A motion to replace that juror was also made after both sides had rested.

In the case at bar, on the other hand, no complaint was made during trial, and there was no motion bringing the matter to the attention of the trial judge until two (2) months post-verdict when McCallum filed his motion for a new trial.

In this posture, Judge Helfrich was confronted with newly discovered evidence. More on this later.

Any reliance upon **Woodward v. State,** 533 So.2d 418, 424 (Miss. 1988) cert. denied 490 U.S. 1028, 109 S.Ct. 1767, 104 Ed.2d 202 (1989), is also to no avail because in **Woodward** there

was affirmative proof that a juror was constantly falling asleep and heavily medicated during trial. Nothing in the present record affirmatively shows that Ruth Brown was sleeping or even occasionally dozing. In this posture, it seems prudent to defer to the ruling of the trial judge who denied McCallum's motion for a new trial.

Another problem with this argument is that the closed eyelids of Ruth Brown would have been obvious to at least one of the three trial participants, first the trial judge, second defense counsel, and third the prosecutor. Obviously, the prosecution has just as much interest in an attentive juror as the defendant. Neither the trial judge, defense counsel nor the prosecutor ever brought this matter to light during the course of the trial.

"It is . . . of extreme importance that the attorneys and the court consider carefully the awareness of the jury." **Church v. Massey,** *supra*, 697 So.2d 407, 414 (Miss. 1997),

In the case at bar, we note with interest that during voir dire both the judge and the prosecutor took note that venireman Minnie Williams, who did not say a word, "slept through the whole thing." (R. 51)

> THE COURT: I have a note on her. She slept through mine. She slept through yours. I don't think we'll get to Ms. Williams, but she did sleep the whole time. (R. 51)

It appears the lawyers and the trial judge considered the "awareness of the jury." The fact that neither the lawyers nor the judge observed Ruth Brown with her eyes wide shut simply detracts from the idea she was sleeping during the trial.

Contrary to the position taken by McCallum, there *is indeed* something in the record disputing McCallum's claim that Ruth Brown was sleeping during the trial, namely, the sound of silence - the absence of any objection, if you please.

After jury selection, Judge Helfrich charged the jurors as follows: "You should give careful attention to the testimony and evidence presented during the trial . . ." (R. 57)

"[I]t is generally presumed that jurors will obey and apply the instructions of the [trial] court." **Branch v. State,** 882 So.2d 36, 76 (Miss. 2004). In other words, "[a]ppellate courts assume that juries follow the instructions." **Clemons v. State**, 535 So.2d 1354, 1361 (Miss. 1988). "Our law presumes the jury does as it is told." **Williams v. State,** 512 So.2d 666, 671 (Miss. 1987). "To presume otherwise would be to render the jury system inoperable." **Johnson v. State**, 475 So.2d 1136, 1142 (Miss. 1985).

Yet a third problem with McCallum's argument is that the trial of this case lasted two days, November 27th and 28th. The prosecution put on its case on the 27th (R. 76) while the defendant put on his case the following day on the 28th. (R. 229) None of the affidavits submitted by the defendant in support of a new trial indicates on which particular day the juror was observed sleeping. More importantly, none of the identical affidavits - no, not one - attests to the fact the affiant even attended the trial, whether in whole or in part.

A fourth problem with McCallum's argument is the idea that simply because a juror, or anyone else, has her eyes closed, does not necessarily mean she is sleeping and inattentive.

Finally, the identical affidavits submitted by McCallum on January 30, 2007, over two months following trial on November 27-28, 2006, are in the nature of newly discovered evidence. It is enough to say that McCallum's affidavits fail to meet the criteria for newly discovered evidence. **Carr v. State,** 873 So.2d 991 (Miss. 2004); **Shelby v. State,** 402 So.2d 338, 340-41 (Miss. 1981). *See also* **Frost v. State,** 781 So.2d 155, 158 (Ct.App. Miss. 2000) ["To qualify as 'newly discovered evidence' it must be evidence which could not have been discovered by the exercise of due diligence

at the time of trial, as well as being *almost certainly conclusive* that it would cause a different result."]

Not one of the affidavits submitted by McCallum, asserts, under oath, that due diligence was exercised with regard to the discovery of the allegedly sleeping Ruth Brown.

In **Shelby v. State,** 402 So.2d 338, 340-41 (1981), we find the following language applicable here:

> "A motion for new trial on the ground of newly discovered evidence must be supported by an affidavit of the defendant and her attorney that diligence was exercised with reference to discovery of the evidence and that the evidence was unknown to them at the time of trial. The court must be satisfied that (1) the evidence came to the defendant's knowledge since trial, (2) the evidence could not have been discovered sooner by diligence, and (3) such evidence would probably produce a different result, if a new trial were granted. *Stewart v. State,* 203 Miss. 295, 33 So.2d 787 (1948).

The case at bar simply does not exist in this posture.

ISSUE II.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN OVERRULING MCCALLUM'S MOTION FOR A NEW TRIAL BECAUSE THE JURY VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

McCallum argues " . . . the weight of the evidence clearly showed that McCallum had no intent to cause any injury to Clark [because] [t]he evidence showed that McCallum fired into the ground, and that it was either shards from concrete or fragments from the bullet that actually caused Clark's injury." (Brief of the Appellant at 6)

He laments " . . . that no reasonable juror could have found that Miguel purposely or knowingly caused bodily injury to Clark as is required by the statute . . ." (Brief of the Appellant at 7)

The problem with this argument is that a "specific intent" to cause bodily injury is not required by our statute. **Griffin v. State,** *supra*, 872 So.2d 90, 91 (Ct.App.Miss. 2004), citing **McGowan v. State,** 541 So.2d 1027, 1029 (Miss. 1989) ["There is apparently no specific intent requirement."]; *Cf.* **Russell v. State,** *supra*, 924 So.2d 604, 608 (Ct.App.Miss. 2006).

McCallum's indictment charged that he " . . . did unlawfully, feloniously, willfully, and knowingly, cause bodily injury to Clifton Clark, with a deadly weapon, to-wit: a pistol, by shooting Clifton Clark with the pistol, contrary to the form of the statute in such cases made and provided . . ." (C.P. at 8)

Quite clearly McCallum was charged under Miss.Code Ann. §97-3-7(2)(b) which defines aggravated assault as "attempt[ing] to cause or purposely or knowingly caus[ing] bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm."

Jury instruction S-1B required the jury to find from the evidence beyond a reasonable doubt that McCallum "[u]nlawfully, willfully, feloniously, and knowingly caused bodily injury to Clifton Clark, with a deadly weapon to wit: a pistol, by shooting Clifton Clark with a pistol; and [t]hat such behavior was not done in necessary self-defense, accident, or misfortune." (C.P. at 25)

McCallum interprets the statutory language "purposely or knowingly caused bodily injury" to require a "specific intent" to cause bodily injury. McCallum is mistaken. An intent to cause bodily injury is not an element of the aggravated assault charged here.

Stated differently, it is no defense to aggravated assault charged under (2)(b) that McCallum did not intend to cause or purposely cause bodily injury to Clark.

We find in **Griffin v. State,** 872 So.2d 90, 91 (Ct.App.Miss. 2004), the following language applicable here:

> Assault is not a crime requiring proof of specific intent; that

> is, the State need not prove that the defendant had formed the specific purpose of inflicting bodily injury on his victim in order to convict. *McGowan v. State,* 541 So.2d 1027, 1029 (Miss. 1989). **Rather, the prosecution must simply show that the blow itself was purposely inflicted and that the requisite bodily injury resulted.** [emphasis ours]

See also **McGowan v. State,** *supra,* 541 So.2d 1027, 1029 (Miss. 1989) ["There is apparently no specific intent requirement."]. *Cf.* **Russell v. State,** *supra,* 924 So.2d 604, 608 (Ct.App.Miss. 2006) ["(I)ntent to cause serious bodily injury is not an element of the crime of aggravated assault under section 97-3-7(2)(b)."]

McCallum confessed prior to trial and admitted during trial he carried a firearm and had it on his side when he got out of his car. (R. 313) He also admitted at trial he intentionally, i.e., deliberately, fired a round into the concrete but claimed it was no where near the feet of the victim. We quote:

> "[I] shot at the ground just to warn [the victim] to get back because he got too close up on me and I shot at the ground and I made sure that I wasn't nowhere near his foot. I shot dead at the ground. I had no intention on shooting Cliff. I shot dead in the ground or whatever. Whenever I shot in the ground . . . [well] the concrete, I seen where the bullet entered the concrete, and the concrete splashed up." (R. 320)

It is no defense to the crime of aggravated assault charged here that McCallum did not intend to cause or purposely cause bodily injury to Clark who testified that immediately after the incident he removed his shoes " . . . and there was a bullet in . . . both feet." (R. 193).

Any assault with a deadly weapon that causes any bodily injury, whether severe or not, is aggravated assault. **Anthony v. State,** 935 So.2d 471 (Ct.App.Miss. 2006). *See also* **Hughes v. State,** 807 So.2d 426 (Miss. 2001), reh denied [Hitting victim on head with a gun during armed robbery and threatening to kill victim was not simple assault.]

McCallum, we note, received a jury instruction authorizing the jury to find him guilty of simple assault, a lesser-included offense. Instruction D-1 stated, in its pertinent parts, as follows:

> If you find the Defendant is not guilty of the crime of Aggravated Assault, then you may consider whether or not the Defendant committed the crime of Simple Assault. In order to be convicted of the crime of Simple Assault, the jury must find that the Defendant, Miguel McCallum, did beyond a reasonable doubt on or about the 30th day of October, 2005 in Forrest County, Mississippi;
>
> 1. If he negligently caused bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm;
>
> And that such behavior was not done in necessarily [sic] self defense, accident or misfortune; then you shall find the Defendant, Miguel McCallum guilty of Simple Assault.
>
> If the State has failed to prove any or more of the above listed elements beyond a reasonable doubt, then you shall find Miguel McCallum, not guilty of the crime of Simple Assault. (C.P. at 28)

Miss.Code Ann. §97-3-7(2)(b) reads, in its relevant parts, as follows:

> (2) A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or **(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm;** * * *

It is clear the offense of aggravated assault is complete where, as here, a jury might find no intent to actually cause bodily injury but could, on the other hand, find an intent to put into motion the mechanism that caused the bodily injury, whether the injury was intended or not. *Cf.* **Russell v. State,** *supra*, 924 So.2d 604 (Ct.App.Miss. 2006) [Intent to cause serious bodily injury is not an element of the crime of aggravated assault under statute 97-3-7(2)(b) defining one type of aggravated assault as attempting to cause or purposely or knowingly

causing bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm].

As stated previously, a specific intent to cause any bodily injury, whether serious or not, is not an element of the offense charged here. The State only had to prove that McCallum intentionally and purposely shot the pistol and that the requisite bodily injury to Clark resulted therefrom.

In any event, the defense actually testified to by McCallum was self-defense. (R. 319-21; C.P. at 26) He claimed that Clark, a hunk of a man, was advancing toward him and that he pulled the pistol from his pocket and intentionally fired into the concrete in order to scare Clark.

The language found in **Griffin v. State,** *supra*, 872 So.2d 90, 91 (Ct.App.Miss. 2004), is worth repeating here:

> Assault is not a crime requiring proof of specific intent; that is, the State need not prove that the defendant had formed the specific purpose of inflicting bodily injury on his victim in order to convict. *McGowan v. State,* 541 So.2d 1027, 1029 (Miss. 1989) **Rather, the prosecution must simply show that the blow itself was purposely inflicted and that the requisite bodily injury resulted.** [emphasis supplied]

Judge Helfrich, by denying McCallum's motion for a new trial, correctly held the question of McCallum's intent was a jury issue and that its verdict should not be disturbed.

Assuming a specific intent was required by our statute, the proof still fails to preponderate in favor of McCallum. If we accept as true the testimony of Clifton Clark that he was hit in the head with the pistol while the target of McCallum's verbal threats (R. 211-13), it is clear a fair-minded juror could have found an intent to cause bodily injury. According to Clark, not only was a shot fired, Clark was also pistol-whipped about the head

causing a small laceration which apparently bled profusely. (R. 190-93)

In **Newburn v. State**, 205 So.2d 260, 265 (Miss. 1967), this Court stated:

> "Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances."

In **Shanklin v. State**, 290 So.2d 625, 627 (Miss. 1974), this Court further opined:

> Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent. [citations omitted]

Here McCallum's purpose and intent could be read from the act itself and the surrounding circumstances.

Accepting as true all evidence favorable to the State, together with all reasonable inferences to be drawn from that evidence, and viewing it in a light most favorable to the prosecution's theory of the case, we submit a reviewing Court can conclude that a reasonable, hypothetical juror could have found McCallum guilty of aggravated assault.

Our position on the issue of intent can be summarized in only three (3) words: "classic jury issue."

This is not a case where the evidence, at least as to one of the elements of the crime charged, is such that a reasonable and fair-minded juror could only find the accused not guilty. *See* **McClain v. State,** 625 So.2d 774, 778 (Miss. 1993).

Nor is this an exceptional case where the evidence preponderates heavily against the verdict.

We find in **Smoot v. State,** 780 So.2d 660, 664 (Ct.App.Miss. 2001), a prosecution for aggravated assault, the following language:

> * * * Basically, Smoot calls into question his whole ordeal before the trial court. Still, he has not shown how an unconscionable injustice has resulted, as all the evidence points to the guilty verdict. The evidence consisted primarily of Clark's testimony positively identifying Smoot as one of his assailants, but also included Williams's eyewitness testimony which implicated Smoot. Smoot presented no evidence whatsoever, called no witnesses, and offered no proof to contradict the State's convincingly made case. The jury verdict reflected the facts presented and no unconscionable injustice resulted in Smoot's being convicted. This issue is without merit.

Finally, in **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983). The case at bar certainly does not exist in this posture.

CONCLUSION

"This Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

In the case at bar it could, and he was.

Although McCallum, with the able and effective assistance of his trial and appellate counsel, has argued with sincerity, his claims are devoid of merit.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction of aggravated assault and the twenty (20) year sentence with fifteen (15) years suspended, five (5) years to serve, and five (5) years of post-release supervision imposed by the trial court should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert B. Helfrich
Circuit Judge, District 12
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Honorable Jon Mark Weathers
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This the 26th day of February, 2008.

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