IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEPHEN T. YARBROUGH
a/k/a STEVEN TRACY YARBROUGH — APPELLANT

VS.

NO. 2007-KA-1105-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEPHEN T. YARBROUGH **APPELLANT**
a/k/a STEVEN TRACY YARBROUGH

VERSUS **NO. 2007-KA-01105-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The issues presented in this appeal involve the amendment of an indictment for aggravated assault and the weight of the evidence used to convict Steven Yarbrough of choking a law enforcement officer.

Yarbrough claims the trial judge erred in permitting the State, on the morning of trial, to amend the indictment by deleting the word "serious" preceding the words "bodily injury."

Yarbrough also argues the verdict of the jury was against the overwhelming weight of the evidence.

STEVEN YARBROUGH, a 39-year-old Caucasian male residing in Columbus (C.P. at 37, 48), prosecutes a criminal appeal from the Circuit Court of Lowndes County, Mississippi, James T. Kitchens, Jr., Circuit Judge, presiding.

Yarbrough, in the wake of an indictment returned on February 9, 2007, was convicted of aggravated assault on Clint Sims, a deputy sheriff employed by the Lowndes County Sheriff's

Department.

The indictment, omitting its formal parts, alleged in its original form

> "[t]hat **Steven Yarbrough** . . . on or about the 13th day of October, 2006, . . . did unlawfully, wilfully, feloniously, purposely, and knowingly, cause or attempt to cause serious bodily injury to Clint Sims, a law enforcement officer with the Lowndes County Sheriff's Department, by a means likely to produce death or serious bodily harm, at a time when the said Clint Sims was acting within the scope of his official duties and office, by choking the said Clint Sims, without authority of law and not in necessary self defense, . . ." (C.P. at 3)

A second amendment also charged Yarbrough with recidivism. (C.P. at 13-14, 45)

Following a trial by jury conducted on May 15-17, 2007, and after receiving the so-called *Sharplin* instruction granted in cases where the jury is deadlocked, the jury returned a verdict of "We, the jury, find the Defendant guilty as charged of Aggravated Assault on a Law Enforcement Officer." (R. 232-33; C.P. at 36)

A poll of the jurors, individually by name, reflected the verdict was unanimous. (R. 234-35)

Following a sentence-enhancement proceeding conducted on May 17th, the trial judge adjudicated Yarbrough an habitual offender by virtue of Miss.Code Ann. §99-19-81 and sentenced him to thirty (30) years in the custody of the MDOC without the benefit of probation or parole. (R. 236-48)

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

[1] "The trial court erred in allowing the State to amend the indictment." (Brief of the Appellant at ii, 1)

[2] "The trial court erred in denying Steven's motion for a new trial because the verdict was against the overwhelming weight of the evidence." (Brief of the Appellant at ii, 1)

STATEMENT OF FACTS

During the early morning hours of October 13, 2007, around 1:30 a.m., Clint Sims, a deputy sheriff, was on routine patrol on Lehmberg Road in Lowndes County.

> Q. [BY ASSISTANT DISTRICT ATTORNEY:] Tell the ladies and gentlemen of the jury how that came to be.
>
> A. I was on patrol, I was on Lehmberg Road. I was headed south, right at the 82 overpass. I came in contact with the defendant over there and a female subject, who were walking north on Lehmberg Road.
>
> It seemed odd, 1:30 in the morning, and also he was - - appeared to be holding the female. They were in the roadway, but off to the side of it.
>
> I stopped, activated my overhead lights. I signed out with 911 to see if I could offer any assistance to them.
>
> I noticed down the roadway there was a car. To me it appeared that there were car problems, but I was also concerned that there was a health problem, just by the way the male and female both were walking.
>
> Q. What happened. then sir?
>
> A. I was signing out with 911 and exiting my vehicle at the same time. And as I was doing so, the defendant over here took off running north on Lehmberg Road. Before he done that, he let go of the female, who fell across the hood of my car.
>
> Not knowing the extent - - not knowing what exactly was going on, I felt that I needed to talk to the defendant there, and I yelled at him several times to stop, stop, to which he did not comply. So I gave chase.
>
> Q. Were you able to catch up with the defendant in an effort to see what was going on?
>
> A. Yes, sir, I was. I was about a tenth of a mile from my patrol car. We were running down Lehm - - we were running north on Lehmberg Road.

The subject attempted to cut into the woods, and as he did so, he hit a curb, and he tripped and stumbled, fell to his hands and knees. At that point, I was able to catch up to him. (R. 97-98)

Three (3) witnesses testified on behalf of the State during its case-in-chief, including the victim, Deputy Clint Sims.

Clint Sims (R. 95-146), testified that upon overtaking Yarbrough in a foot pursuit and placing hands on him, Yarbrough ignored Sims' commands and refused to calm down. Applicable colloquy is quoted as follows:

Q. [BY PROSECUTOR:] Let me stop you there. You said you went down on your back.

A. Yes, sir.

Q. When you went down on your back, where was he?

A. He was - - he was coming down with me.

Q. Okay. Would he have been able to get up and get away at that point?

A. Yes, sir.

Q. Did he choose to do that, or did he choose to do something else?

A. He chose to do something else.

Q. Tell the ladies and gentlemen of the jury what it was that he did.

A. When I went down on my back - - we're always taught our main concern is to protect our weapon. I immediately rotated my hips, dropped my forearm down to my weapon to place it on top of where if he did decide to go for it it would be hard for him to get it out. This left me with only one arm to defend myself.

As he was on my chest, he rotated over on top of me, and he came down with his right hand, I batted his right hand away with my left hand, and in doing this he came down and placed his right arm - -

forearm onto my neck.

Q. Were you able to move at that point, sir?

A. No, sir. I was effectively pinned at that point.

Q. Were you able to breath at that point?

A. My breathing was becoming very restricted.

Q. What did the defendant do at that point?

A. The defendant initially told me, I know you, I just want to go home. And I told him to go.

Q. Well, did he - - at that point did he stop pressing down?

A. No, sir. After he said that, I told him to go, he actually rotated his body weight, shifted forward, and I felt his forearm pressing further into me, which forced my head over to the right, and now he was on my brachial artery across my throat and my jaw.

Q. What did you feel yourself doing at this point?

A. At this point, everything was starting to black. I felt that in the position that I was in, I was fixing to go unconscious. So I made a decision at that point to draw my weapon to defend myself.

Q. Were you able to get to your weapon?

A. No, sir.

Q. What happened?

A. I had done so well at protecting it, I couldn't get it out myself. With my hips rotated to my side - - I had a retention holster, which all that means is it makes it a little bit more difficult for someone to get the holster out that I don't want them to.

Pretty much what was going on was as I was trying to draw my weapon, the butt of my pistol was actually digging further into the ground.

This - - the blackness was starting to come in, starting to come in more. I could tell something was fixing to happen.

I made a decision at that time - - I carry a knife in my boot. I was going to at least try to get to my knife in my boot and try to at least get the subject off of me.

As I was bringing my foot up to get my knife out, I was able to clear my weapon from my holster. As I pushed the weapon forward, my left foot dropped inside his hip, and as it did, I kicked with my left foot, as I was pushing the pistol forward, and I was able to get the subject off of me. At that point, I immediately reholstered my weapon.

Q. Did you ever totally lose consciousness, Deputy Sims?

A. No sir.

Q. How close do you feel you were from losing consciousness?

A. I was fairly close. It was less than - - less than a minute, I feel.

Q. Were you able to talk at this point?

A. No, sir.

Q. I'm going to ask you a silly question: What did it feel like when he was on top of you, pushing down on your throat with his forearm?

A. It hurt. It - - I don't know if I can describe it. If you've ever been choked before, you can - - you can tell - - it was restricting the blood flow, is the main thing is what it was, and I could feel my esophagus as it - - as it shifted over.

And it was - - the way when he rotated in for the second time, that's what forced my head and neck over to the side, and that's what really shifted my esophagus over. So at that point, it was starting to hurt. It was starting to hurt pretty bad.

Q. I interrupted you, so keep going, starting from the time which you were finally able to successfully get him off of you by drawing your weapon.

A. After I got him off of me, I immediately reholstered my weapon, because at that point I felt with the condition that I was in,

I was afraid to have the weapon out, since I had gotten him off of me. I was afraid that there might have been a struggle over the weapon. I holstered it.

The subject attempted to crawl away into the woods. Instinct, I reached out to try to get him, and I immediately stopped, because at that point the pain was starting to become great, and my breathing started becoming more restricted. At that point I allowed the subject to leave.

Q. Were you able to inform the 911 dispatcher at this time of your location, via the radio?

A. No, sir.

Q. Why not?

A. I was unable to speak. (R. 100-03)

Sims was able to crawl out of the woods where he was subsequently found by Travis Robertson, an officer with the Columbus Police Department. (R. 104)

Q. Describe your condition at this point.

A. [BY DEPUTY SIMS:] I was unable to get up on my own. I was in pain. I was having a very difficult time breathing. And when Officer Robertson got there, he was asking me questions about the subject and where did he go. I couldn't even give him - - give him that information.

Q. What did your neck do subsequent to this?

A. It had some redness and scratching to the front portion of it, but it mainly had swelling to the left side of my - - to the left side of my neck, which it had a deep bruising to the inside of it. (R. 104-05)

Officer Travis Robertson testified that when he found Sims on the edge of the woods, Sims was not himself.

Q. Explain to the ladies and gentlemen of the jury the condition in which you found Deputy Clint Sims.

A. He could barely breath. I assisted to get him up, and he was like dead weight.

He couldn't talk. His - - his clothes had grass and brush and stuff all over him, and he - - his neck was red and looked - - looked to be swelling at that time, and he had a problem breathing.

Q. Was an ambulance called for Deputy Sims?

A. I was the one that called that ambulance.

Q. Did the ambulance arrive on the scene?

A. They did. (R. 150-51)

Sims was transported to the hospital where he was placed on oxygen. x-rayed, and later released. (R. 105)

Tony Cooper, an investigator with the Lowndes County Sheriff's Department, testified that Steven Yarbrough was identified as the suspect. Cooper found Yarbrough the following day " . . . hiding in the bathtub of his grandmother's apartment here in Columbus." (R. 159) Yarbrough, who was fully clothed at the time and not bathing, was placed under arrest. (R. 159-60)

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 there had been " . . . no proof with regard to bodily injury, no medical proof." (R. 161-62)

Yarbrough also renewed his objection to the State's amendment of the indictment deleting the word "serious." (R. 163-64)

This motion was overruled with the following rhetoric: "The Court finds that the State has made at least a *prima facie* showing. It's a jury issue, and I will overrule your motion for a directed verdict at this point in time." (R. 164)

After being personally advised of his right to testify or not, Yarbrough elected to testify in

his own behalf. (R. 164-65)

There is some undeveloped testimony in the record indicating that Yarbrough and a female passenger had wrecked their motor vehicle by running over a fire hydrant. (R. 179) Yarbrough and the female were walking on Lehmberg Road in the early morning hours when Deputy Sims drove up to investigate an ambiguous situation. (R. 168-69)

Yarbrough testified he ran because he " . . . was overwhelmed with a sense of panic at the police car . . . " (R. 169) He admitted struggling with the deputy who he recognized but claimed he never intended to hurt the officer; rather, he was simply trying to defend himself. (R. 169-70)

> Q. Did you at some point have your forearm on him?
>
> A. It was across his chest, but I wasn't - - it was just a prop. I wasn't trying to - - and I was leveled out, so I wasn't putting full weight on him. I wasn't trying to hurt him. (R. 170)
>
> * * * * * *
>
> Q. Did you do anything to hurt him?
>
> A. No, sir.
>
> Q. Could you have hurt him in the blink of an eye if you wanted to?
>
> A. Easily. (R. 171-72)
>
> * * * * * *
>
> Q. Okay. Did you tell him that you just wanted to go home?
>
> A. No, I didn't say that statement.
>
> Q. What did you say? Did you say anything similar to that?
>
> A. Well, that's after I had - - he had went on the ground and I was on top of him, I patted him on the shoulder, and I felt brotherly love for this man for some reason, and I said, "I love you. man. Just

let me go."

Q. Had you ever - - so you weren't trying to cut off his wind with your elbow?

A. No, sir.

Q. With your forearm?

A. No, it was down here. (R. 175)

During cross-examination the following colloquy took place:

Q, You put your weight on your forearm, and you hurt him, didn't you, sir?

A. No, sir.

Q. Whether you hurt him bad or whether you just hurt him a little bit, you hurt him, didn't you, sir?

A. No, sir. He didn't get hurt like that, sir. * * * He didn't get hurt when I was on top of him on the ground. I wasn't trying to hurt him. (R. 185)

At the close of all the evidence, Yarbrough's request for peremptory instruction was refused. (R. 197; C.P. at 31)

The jury retired to deliberate around 4:40 p.m. (R. 229-30) Sometime thereafter, after the jury announced it was deadlocked, the trial judge granted the so-called *Sharplin* instruction. (R. 230-31) The jury subsequently returned with the following verdict at approximately 7:30 p.m. (R. 233):

"We, the jury, find the defendant guilty as charged on aggravated assault on a law enforcement officer." (R. 233)

A poll of the jury, individually by name, reflected the verdict returned was unanimous. (R. 233-34)

Following a sentence-enhancement proceeding conducted on May 17th, the trial judge adjudicated Yarbrough an habitual offender by virtue of Miss.Code Ann. §99-19-81 and sentenced

him to thirty (30) years in the custody of the MDOC without the benefit of probation or parole. (R. 236-48)

On June 1, 2007, Yarbrough filed a motion for new trial (C.P. at 50-51) which was overruled the same day. (C.P. at 52)

Rodney Ray, a practicing attorney in Columbus, represented Yarbrough effectively during the trial of this cause.

Benjamin Suber, a practicing attorney with the Mississippi Office of Indigent Appeals, has filed an excellent brief on appeal.

SUMMARY OF THE ARGUMENT

Issue No. 1. The trial judge did not err in allowing the prosecution to amend the indictment because the amendment was one of form as opposed to substance.

First, it is no defense to the aggravated assault charged here that Yarbrough did not intend to cause or purposely cause "serious" bodily injury.

This is because Yarbrough 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."

"[I]ntent to cause serious bodily injury is not an element of the crime of aggravated assault under section 97-3-7(2)(b)." **Russell v. State,** 924 So.2d 604, 608 (Ct.App.Miss. 2006). Accordingly, the amendment could not have prejudiced Yarbrough in his defense.

Second, the amendment did not change the identity of the crime. It was aggravated assault both prior to and after the criticized amendment.

Third, the defense proffered by Yarbrough was that he did not cause or attempt to cause any bodily injury to Sims in the manner testified to by Sims. Stated differently, Yarbrough never claimed

a lack of intent or purpose to cause or attempt to cause "serious" bodily injury. Rather, according to Yarbrough he neither caused nor attempted to cause any bodily injury at all.

In this posture, the amendment did not materially alter a defense to the indictment and did not prejudice Yarbrough's case. His defense was just as good to the charge made in the amended indictment as it was to the charge in its original form.

Finally, we note that Yarbrough received a lesser included offense instruction authorizing the jury to find him guilty of simple assault. (C.P. at 24, 25-26)

Issue No. 2. The verdict of the jury was not against the overwhelming weight of the evidence which did not preponderate in favor of the defendant. Yarbrough's purpose and intent could be read from the act itself and the surrounding circumstances.

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

ARGUMENT

ISSUE NO. 1.

THE TRIAL JUDGE DID NOT ERR IN ALLOWING THE STATE TO AMEND THE INDICTMENT. THE AMENDMENT WAS ONE OF FORM AS OPPOSED TO SUBSTANCE.

Yarbrough's indictment, in its original form, charged, *inter alia*, that he " . . . did unlawfully, feloniously, purposely, and knowingly, cause or attempt to cause *serious* bodily injury to Clint Sims, a law enforcement officer with the Lowndes County Sheriff's Department, by means likely to produce death or serious bodily harm, at a time when the said Clint Sims was acting within the scope of his official duties and office, by choking the said Clint Sims, . . ." (C.P. at 3)

Quite clearly Yarbrough 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."

The morning of trial the State moved, *ore tenus*, to amend the indictment by striking as surplusage the word "serious" which preceded the words "bodily injury." (R. 10) The defendant objected to the proposed amendment on the ground " . . . we're defending, based on the substantive nature of the word 'serious' in the statute." (R. 11) After initially denying the State's motion to amend (R. 11-12), the trial judge reconsidered and allowed the amendment. (R. 14)

The circuit judge made the following observations:

> "[T]he indictment, as it read, did not say that it caused. If it had just said caused serious bodily injury, I would not have allowed [the amendment]. It was cause or attempt to cause serious bodily injury. * * * [T]he statute does not require both. It says that you either caused or attempted to cause serious bodily injury, or caused bodily injury by a means likely to produce death or serious bodily harm." (R. 164)

Yarbrough argues the "substance" of the indictment was materially changed when, on the morning of trial, the trial judge permitted the State to delete the word "serious" modifying the words "bodily injury."

> "Steven contends that he did not try to or attempt to cause serious bodily injury to Sims . . . that he could have possibly caused bodily injury, but there was not any intention to cause serious bodily injury." (Brief of the Appellant at 7)

According to Yarbrough, removing the word "serious" from the indictment changed his defense at trial which was " . . . that he did not try to or attempt to cause serious bodily injury to Sims; [rather], . . . he was trying to defend himself." (Brief of the Appellant at 7)

In short, Yarbrough claims that deletion of the word "serious" materially changed an element of the original offense and materially altered his defense, *viz.*, while he may have caused bodily

injury to Sims, he did not intend to cause "serious" bodily injury to Sims.

The problem with this argument, as we see it, is that an intent to cause "serious" bodily injury is not an element of the aggravated assault charged here.

It is no defense to the aggravated assault charged in the case at bar that Yarbrough did not intend to cause or purposely cause "serious" bodily injury.

This is because Yarbrough 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."

"[I]ntent to cause serious bodily injury is not an element of the crime of aggravated assault under section 97-3-7(2)(b)." **Russell v. State,** *supra*, 924 So.2d 604, 608 (Ct.App.Miss. 2006). Accordingly, the amendment was immaterial to the merits of the case and was one of form as opposed to substance. It could not have prejudiced Yarbrough in his "lack of intent to injure" defense which, we opine, would not have been an available and legitimate defense to the charge.

In addition to all this, 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.

Yarbrough, we note, received a jury instruction authorizing the jury to find him guilty of simple assault, a lesser-included offense. Instruction S-2A stated, in its pertinent parts, as follows:

> If you unanimously find that the State has failed to prove any one or more of the elements of the crime of Aggravated Assault on a Law Enforcement Officer, you may then proceed in your deliberations to consider the lesser charge of Simple Assault on a Law Enforcement

Officer. * * * *

> Therefore, if you find from the evidence in this case beyond a reasonable doubt, that on or about October 13, 2006, the Defendant, Steven Yarbrough, unlawfully, willfully, feloniously, knowingly and intentionally
>
> - caused or attempted to cause bodily injury to Clint Sims
>
> - while Clint Sims was acting within the scope of his official duties as a Law Enforcement Officer,
>
> without authority of law, and not in necessary self defense, then you shall find the Defendant guilty of the lesser included charge of Simple Assault on a Law Enforcement Officer. (C.P. at 25-26)

The law governing the amendment of indictments is summarized in **Jones v. State,** 912 So.2d 973 (Miss. 2005), where we find the following language:

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

See also **Harris v. State,** 757 So.2d 195 (Miss. 2000); **Shumaker v. State,** 956 So.2d 1078 (Ct.App.Miss. 2007).

If a defendant's defense would be equally applicable under both an original indictment and an amended indictment and the evidence remains unhindered, then the amendment is a change in form, rather than a change in substance, and the amendment is permissible. **Goodin v. State,** No. 2006-KA-00756-COA decided May 1, 2007, slip opinion at 8-9 (¶¶ 20-22) [Not Yet Reported]; **Frazier v. State,** 907 So.2d 985 (Ct.App.Miss. 2005), reh denied; **Alexander v. State,** 875 So.2d

262 (Ct.App.Miss. 2004).

The indictment, as amended, still charged the crime of aggravated assault in that intentionally or purposely causing or attempting to cause bodily injury via a means likely to reproduce death or serious bodily harm is, to no less extent, aggravated assault. 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;** * * * However, a person convicted of aggravated assault (a) upon a . . . law enforcement officer . . . while such . . . law enforcement officer . . . is acting within the scope of his duty, office or employment, . . . shall be punished by a fine of not more than Five Thousand Dollars ($5,000.00) or by imprisonment for not more than thirty (30) years, or both.

It is clear the offense is still aggravated assault where, as here, a jury could find an intent to cause mere bodily injury, as opposed to "serious" bodily injury, with means likely to produce serious bodily harm. *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]. *See also* **Goodin v. State,** *supra*, No. 2006-KA-00756-COA decided May 1, 2007, slip opinion at 8-9 (¶¶ 20-22) [Not Yet Reported] [Appellant's claim he lost the defense of lack of force when charged with the crime of sexual battery as opposed to rape, was without merit.]; **Porter v. State,** 339 So.2d 564 (Miss. 1976) [Permitting State to amend indictment by deleting language purporting to charge

"capital murder", leaving charge of "murder less than capital," was not error since amendment neither placed any additional burden on the defendant nor prejudiced the defense in any manner.]; **Ford v. State,** 911 So.2d 1007 (Ct.App.Miss. 2005) [Amending original indictment of burglary of a dwelling house to burglary of a building other than a dwelling house not error where defense would have been the same under both the original as well as the amended indictment.]; **Irons v. State,** 886 So.2d 726 (Ct.App.Miss. 2004), reh denied, cert. denied [Defendant not prejudiced by amendment changing "attempt" to obtain a controlled substance to "actually obtaining" a controlled substance because proof of the charge and available defenses remained the same.]

We are aware that neither trial judges nor prosecutors may amend indictments as to substantive matters without the concurrence of the grand jury that issued the indictment. **Wolfe v. State**, 743 So.2d 380 (Miss. 1999); **Edwards v. State**, 737 So.2d 275 (Miss. 1999).

However, it is permissible to amend an indictment where, as here, the amendment is immaterial to the merits of the case and the defense will not be prejudiced by the amendment. **Edwards v. State**, *supra;* **Eakes v. State**, 665 So.2d 852 (Miss. 1995); **Forkner v. State,** 902 So.2d 615 (Ct.App.Miss. 2004), reh denied, cert denied.

The amendment in the case at bar was an amendment of form over substance. **Doby v. State**, 532 So.2d 584 (Miss. 1988); **Norman v. State**, 385 So.2d 1298 (Miss. 1980); **Shelby v. State**, 246 So.2d 543 (Miss. 1971); **Deaton v. State,** 242 So.2d 452 (Miss. 1970); Miss. Code Ann. § 99-17-13; Miss.Code Ann. Section 99-7-21; Miss.Code Ann. § 99-7-25; Rule 7.09, Uniform Circuit and County Court Rules ["All indictments may be amended as to form but not as to the substance of the offense charged."]

The amendment made at the start of trial did not change the nature of the crime intended - aggravated assault - or add any new elements to the charge. The State was still required to prove bodily injury to another with a means likely to produce death or serious bodily harm.

"The test of whether an accused is prejudiced by the amendment of an indictment or information has been said to be whether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made and whether or not any evidence accused might have would be equally applicable to the indictment or information in the one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance, * * * " **Byrd v. State,** 228 So.2d 874, 876 (Miss. 1969). *See also* **Eakes v. State**, *supra*, 665 So.2d 852 (Miss. 1995); **Givens v. State**, 730 So.2d 81, 87 (Miss. App. 1998), and the cases cited therein.

As stated previously, a specific intent to cause bodily injury, whether serious or not, is not an element of the offense charged here. We concur with the prosecutor that such was "surplusage language."

In any event, the defense actually testified to by Yarbrough was that he did not cause or attempt to cause any bodily injury to Sims in the manner testified to by Sims. Stated differently, Yarbrough never claimed a lack of intent or purpose to cause or attempt to cause "serious" bodily injury. Rather, according to Yarbrough he neither caused nor attempted to cause any bodily injury at all.

In this posture, the amendment did not materially alter Yarbrough's defense to the indictment and did not prejudice Yarbrough's case. Any defense - lack of intent to cause bodily injury - was just as good (or just as ineffective) to the charge made in the amended

indictment as it was to the charge in its original form. Put another way, Yarbrough's "lack of intent" defense was equally "unavailable" after the amendment was made.

The defendant could not have been surprised by an amendment deleting from the indictment the word "serious" and is presumed to have been on notice he was being prosecuted under subsection (2)(b) which states that a person is guilty of aggravated assault if he 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. *Cf.* **Neal v. State,** 936 So.2d 463 (Ct.App.Miss. 2006).

Finally, Yarbrough did not seek a continuance in the wake of the amendment deleting the word "serious" (R. 222-25) He has neither complained about nor identified any specific post-amendment prejudice to his defense to a charge of aggravated assault. If a defendant does not request a continuance upon the amendment of an indictment, he cannot afterward object he was surprised and prejudiced in his defense thereby. **Peebles v. State,** 55 Miss. 434 (1877).

This claim is devoid of merit.

ISSUE NO. 2.

THE VERDICT OF THE JURY WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Yarbrough seeks a reversal and remand for a new trial. (Brief of the Appellant at 11) He argues he had no intent to hurt Sims and was just defending himself after Sims grabbed him and attempted to force him to the ground. (Brief of the Appellant at 9)

We submit, on the other hand, the testimony of Deputy Sims describing the injuries received and the pain he suffered was not outweighed by Yarbrough's testimony that he meant

no harm. Yarbrough's argument that he did not intend to hurt Sims is not a defense where, as here, the proof demonstrates the blow was purposely inflicted. **Griffin v. State,** *supra*, 872 So.2d 90 (Ct.App.Miss. 2004).

Sims' testimony was corroborated by the testimony of Travis Robertson who testified that when he found Sims, Sims could barely breath, could not talk, and was dead weight. (R. 150-52)

The testimony of Investigator Tony Cooper that Yarbrough was found, fully clothed, hiding in a bathtub inside the home of his grandmother added icing to an already palatable cake. (R. 159-60)

Whether Yarbrough intentionally, i.e., purposely, pressed his forearm against Sims' neck causing bruising, intense pain and suffering or pressed his forearm harmlessly against Sims' chest as a "prop" was a jury issue.

Defense counsel argued to the jury that "[m]y client didn't intentionally cause any injury to [Sims]. (R. 217) This is no defense to the charge.

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]

Jury instruction S-2A authorized the jury to find Yarbrough guilty of aggravated assault if it found beyond a reasonable doubt that on or about October 13, 2006, the Defendant, Steven Yarbrough, did

> " . . . unlawfully, willfully, feloniously, knowingly and intentionally
>
> - caused or attempted to cause bodily injury to Clint Sims
>
> - by choking Clint Sims, a means likely to produce death or serious bodily harm,
>
> - while Clint Sims was acting within the scope of his official duties as a Law enforcement Officer,
>
> without authority of law, and not in necessary self defense . . . " (C.P. at 25)

The same instruction authorized the jury to find Yarbrough guilty of simple assault if it found from the evidence that Yarbrough did

> " . . . unlawfully, willfully, feloniously, knowingly and intentionally
>
> - caused or attempted to cause bodily injury to Clint Sims
>
> - while Clint Sims was acting within the scope of his official duties as a Law Enforcement Officer,
>
> without authority of law, and not in necessary self defense, . . . " (C.P. at 26)

The grade of the offense was a question for the jury. Obviously, the jury found from the evidence beyond a reasonable doubt that Yarbrough caused bodily injury by choking Sims which was found to be a means likely to produce death or serious bodily harm.

Judge Kitchens, by denying Yarbrough's motion for a directed verdict and request for peremptory instruction, correctly held the question of Yarbrough's intent was a jury issue.

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 Yarbrough's purpose and intent could be read from the act itself and the surrounding circumstances. Deputy Sims was in hot pursuit of Yarbrough for the purpose of resolving an ambiguous situation. Yarbrough did not stop after being ordered to do so by an individual Yarbrough recognized as a law enforcement officer. He resisted Sims' attempt to resolve the ambiguity by struggling with Sims and pressing his forearm against Sim's throat and windpipe.

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 Yarbrough guilty of aggravated assault.

Our position on the issue concerning the grade of the offense can be summarized in only three (3) words: "classic jury issue." A reasonable hypothetical jury could have found Yarbrough guilty of aggravated assault.

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).

This is not an exceptional case where the evidence preponderates heavily against the

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 Yarbrough, with the able and effective assistance of his trial and appellate counsel, has argued with sincerity, his claims, we respectfully submit, are devoid of merit.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgments of conviction and the sentence 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:

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This the _____ day of December, 2007.

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