IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY ROBERT BABB — APPELLANT

VS. — NO. 2007-KA-2105-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The issues presented in this appeal from convictions of aggravated and simple assault against law enforcement officers responding to a domestic violence communique, focus upon the denial of jury instructions authorizing the jury to find the defendant guilty of the lesser included offense of simple assault (Count I only) and allegedly depriving the non-testifying defendant of a meaningful defense, *viz.*,the defendant did not act intentionally; rather the injury was inflicted by accident.

The sufficiency of the State's evidence proving aggravated assault (Counts I and II) is also assailed in this appeal.

JOHNNY ROBERT BABB, a forty-eight (48) year old disabled Caucasian male and resident of Edwards (R. 190-92; C.P. at 55), prosecutes a criminal appeal from the Circuit Court of Hinds County, Mississippi, Bobby B. DeLaughter, Circuit Judge, presiding.

Babb, following a three count indictment returned on July 17, 2006, was convicted of the following: aggravated assault after cutting one officer superficially on the neck with a hunting knife

(Count I); aggravated assault after attempting to cut and/or cause serious bodily injury to another officer (Count II), and simple assault after attempting by physical menace to put a third officer in fear of imminent serious bodily harm (Count III). (C.P. at 2).

The indictment, omitting its formal parts, alleged in Count I

> "[t]hat Johnny Robert Babb . . . on or about the 26th day of March, 2006, . . . did attempt to cause or purposely, knowingly cause bodily injury to Lynn Butler with a deadly weapon, to wit: a knife by cutting him on the neck with said knife or other means likely to produce death or serious bodily harm and said Lynn Butler was at the time a Hinds County Sheriff's Deputy acting within the scope and duty of his employment, in violation of Section 97-3-7 . . ." (C.P. at 2)

The indictment alleged in Count II that Babb

> "did attempt to cause or purposely, knowingly cause bodily injury to Casey Dennis with a deadly weapon, to-wit: a knife by attempting to cut and/or cause serious bodily injury to said Casey Dennis by striking at him with a knife, and at the time, said Casey Dennis was a Hinds County Sheriff's Deputy acting within the scope and duty of his employment, in violation of Section 97-3-7 . . ." (C.P. at 2)

Finally, the indictment alleged in Count III that Babb

> "did attempt to cause or purposely, knowingly cause bodily injury to Mike Maldonado with a deadly weapon, to-wit: a knife by attempting to cut and/or cause serious bodily injury to said Mike Maldonado by striking at him with a knife, and at the time, said Mike Maldonado was Hinds County Sheriff's Deputy acting within the scope and duty of his employment, in violation of Section 97-3-7 . . ." (C.P. at 2)

Following a trial by jury conducted on November 6-7, 2006, the jury returned the following verdicts:

> "As to count I, we the jury, find the Defendant guilty as charged [of aggravated assault]." (C.P. at 40)
>
> "As to count 2, we, the jury[,] find the defendant guilty as charged [of aggravated assault.]" (C.P. at 41)
>
> "As to Count 3, we the jury[,] find the defendant guilty of simple

assault on a law enforcement officer." (C.P. at 42)

A poll of the jurors, individually by name, reflected the verdicts returned were unanimous. (R. 178-182)

On September 24, 2007, following a presentence investigation which included a mental evaluation report and testimony in mitigation of sentence from the defendant and the defendant's wife (R. 188-202), Judge DeLaughter. sentenced Babb, a prior convicted felon with a history of illegal drug and espousal abuse (R. 198, 201) to serve thirty (30) years in the custody of the MDOC for the aggravated assaults charged in Counts I and II and five (5) years for the simple assault charged in Count III, said sentences to be served concurrently, as opposed to consecutively. (R. 201-02; C.P. at 58-60)

Three (3) issues, articulated by Babb as follows, are raised on appeal to this Court:

I. "The trial court erred in refusing jury instructions D-7 and D-8 as to simple assault against [Deputy Butler] a law enforcement officer in Count I." (Brief on the Merits by Appellant at 7)

II. "The trial court erred in refusing jury instruction D-9 which presented Mr. Babb's theory of defense, thus depriving him of his fundamental right to mount a meaningful defense." (Brief on the Merits by Appellant at 7)

III. "The evidence was insufficient as a matter of law to support the jury verdict of aggravated assault against [Butler and Dennis] . . . law enforcement officer[s]." (Brief on the Merits by Appellant at 7)

STATEMENT OF FACTS

The genesis of this prosecution for aggravated assault against law enforcement officers responding to a domestic disturbance is yet another physical altercation between a man and his wife.

It is enough to say that during the evening hours of March 26, 2006, deputies from Hinds

County responded to a domestic disturbance call at a mobile home in Edwards occupied by Johnny Babb and his wife of twenty-six (26) years, Vivian Babb. (R. 96-97, 190) The officers were met at the door by a very hostile and agitated defendant who demanded they leave the premises. Babb, after pulling a knife from "behind his waistband," cussed the officers and locked the front door. (R. 99, 102)

Vivian Babb, who appeared to have injuries in the form of "pistol marks" and abrasions on her face (R. 100, 128), used, in the presence of Butler and Dennis, her key to unlock the front door. Mr. Babb thereafter greeted the deputies with a 6" hunting knife in his hand which, during the course of ensuing events, he used to make "slashing" and "jigging" motions at the officers to hold them at bay. (R. 108, 137) A melee of sorts thereafter took place which resulted in Deputy Butler suffering a superficial cut to the back of his neck. (R. 110-11)

Three (3) witnesses testified on behalf of the State during its case-in-chief, including the primary victim, Lynn Butler.

Sergeant Lynn Butler (R. 98), an eighteen (18) year veteran with the Hinds County Sheriff's Department, testified he was dispatched to the scene of the altercation around 9:02 pm. (R. 96) Deputies Dennis and Bailey, who were already present, were escorting the complainant, Vivian Babb, back to the single wide mobile home where she and the defendant and their five (5) year old son, Chance, lived. (R. 98) Following the altercation with Mr. Babb, the aggressor, Vivian had gone to her mother's house a short distance away. (R. 97, 101)

After Deputy Dennis got one foot on the door step, the door opened. There stood Johnny Babb who, after issuing "some superlatives" (R. 98-99), " . . . pulled about a six-inch blade hunting knife from behind his waistband in the back and had it in his [right] hand." (R. 102) Babb told the officers to "get the hell off of his property and some other things, and shut the door and locked it."

(R. 99)

Vivian Babb thereafter opened the front door with a door key, and Butler and Dennis entered. Dennis sprayed pepper spray on Babb " . . . in an attempt to get him to drop the knife." (R. 106) Babb continued to hold his four or five year old son as well as the knife.

> Q. [BY PROSECUTOR:] And what was the defendant doing in relation to the child?
>
> A. He had him, holding him like so in front [of] his body.
>
> Q. And did he still have the knife in his possession at this time?
>
> A. He still had - - he was holding one hand like this, and he had the knife with the other hand.
>
> Q. And I assume y'all asked him to put the knife down?
>
> A. We asked him to put the knife down. And some more superlatives. And he said that y'all are going to have to kill me to get me to leave. Just get the hell off my property. You know, y'all broke into my house. And I'm just - - you know, he was real agitated.
>
> Q. At that time, I mean, other than what the defendant is saying to you in a threatening manner, did he make threatening gestures toward you or Deputy Dennis at that time?
>
> A. Yes, he did.
>
> Q. All right. What did he do?
>
> A. He was holding the knife like so. And he took a step or two and started jabbing like that. Well, I had taken a step forward and he started jabbing. And then he went into a slashing motion and I had my defensive instrument with me. And it was almost like a sword fight other than - - I mean, I didn't have a sword, but he was slashing like that, and I was swinging mine to keep him off of me. (R. 107-08)

According to Butler, Deputy Dennis was standing to Butler's immediate left. (R. 108)

> Q. Based on your own recollection, Sergeant, how far were

vou. standing from him in terms of feet?

A. From him?

Q. Yes, sir, as he was slashing at you with the knife.

A. Three or four feet. (R. 11)

* * * * * *

Q. And Deputy Dennis was on either side of you?

A. He was on the left side of me.. (R. 110)

* * * * * *

Q. And were you ever struck in any way by the defendant?

A. Yes, in the neck.

Q. All right. And do you know how you were struck.

A. I don't know exactly how I was struck other than with the knife.

Q. Did you have any injury after being struck with the knife?

A. Yes, I did. I had a cut that was approximately two, two and a half inches. It was more of a scrape than a cut because of the way I figured it happened. (R. 111)

* * * * * *

Q. Now, Sergeant Butler, this injury that you received here, I know you said you don't know exactly how you got it, but I mean, do you have any idea at what time you were struck on the neck, or how you were struck by the defendant?

A. It was during the slashing motion when he was slashing back and forth.

Q. Do you have any idea of what part of the knife it was that cut your neck?

A. I think it was just the tip end of the blade right there.

Q. On this back end?

A. On the back side. I think I got hit with the back side of the blade and not the sharp side. And the point when it came across like that, the point is what did that, I believe. (R. 112)

According to Sergeant Butler, Babb made the slashing motions and gestures at both Butler and Dennis who was by Butler's side. (R. 113-14) Notwithstanding the best efforts of the officers to persuade Babb to do so, Babb never dropped the knife. (R. 114)

Butler testified Babb was slashing at "his chest" area. (R, 121)

Babb was "very agitated" and he continued to hold onto his young son. (R. 125)

Lieutenant Michael Maldonado (R. 112), arrived as chief hostage negotiator. (R. 112-13) After observing that one of his deputies had been cut, he went down the hallway in an attempt to engage Babb. (R. 134) Babb's demeanor was "[h]ostile." (R. 136)

Q. [BY PROSECUTOR:] All right. This [knife] is Exhibit 2. You recognize Exhibit 2?

A. Oh, yes, sir.

Q. How do you recognize [it]?

A. Because it was almost stabbed into me. You don't forget that.

Q. Now, you saw the defendant with this knife?

A. Yes, sir.

Q. What was he doing with the knife?

A. Holding it, just trying to keep everybody at bay. Keep me at bay.

Q. And I saw you gesturing. Can you describe how he was doing it?

A. He was trying to jig at me.

Q. When he was doing this where was the child?

A. In his arms. (R. 137)

* * * * * *

Q. Why did you not fire your weapon when he's yelling at you?

A. He held his son as a shield. * * * (R. 140)

Deputy Keith Henderson (R. 144) subsequently arrived and took over as chief negotiator. The knife was still in Babb's hands. (R. 151) Henderson was able to resolve the situation by telling Babb, who still "was pretty irate," that they would take him to the hospital for evaluation and treatment. (149-50)

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 the State's proof, at best, only made out a case of simple assault against Sergeant Butler.(R. 155-56)

The motion was overruled. (R. 156)

After being advised of his right to testify or not to testify, Babb elected to remain silent. (R. 157) The defendant called no witnesses and rested his case. (R. 157)

Babb's request for peremptory instruction was refused. (R. 159; C.P. at 31)

The jury retired to deliberate at 1:41 p.m. (R. 177) Thirty-nine (39) minutes later, at 2:20 p.m., it returned with unanimous verdicts finding Babb guilty of aggravated assault against Butler (Count I), aggravated assault against Deputy Dennis (Count II), and simple assault against Lt. Maldonado (Count III). (R. 177-78)

A poll of the jury reflected the verdict was unanimous. (R. 178-182)

Sentencing was deferred until September 24, 2007, at which time Judge DeLaughter, after

hearing testimony in extenuation and mitigation of sentence, sentenced Babb to thirty (30) years on Counts I and II and to five (5) years on Count III, said sentences to run concurrently. (R. 200-02)

On October 3, 2007, Babb filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial (C.P. at 61-63) which was overruled October 29, 2007. (C.P. at 64)

Bill Labarre, Office of the Hinds County Public Defender, represented Mr. Babb quite effectively during the trial of this cause.

Virginia Lynn Watkins' representation on appeal has been equally challenging and effective.

SUMMARY OF THE ARGUMENT

I. and II. The trial judge did not err in denying jury instructions D-7, D-8, and D-9 because they either lacked evidentiary support or the legal principles stated therein were adequately covered by other instructions.

III. The evidence proffered by the State was legally sufficient to support findings by a reasonable and fairminded juror that Babb was guilty of aggravated assault against Sergeant Butler (Count I) and Deputy Dennis (Count II).

With respect to Butler, who was cut with a knife, "the prosecution must simply show that the blow itself was purposely inflicted and that the requisite bodily injury resulted." **Griffin v. State,** 872 So.2d 90, 91 (Ct.App.Miss. 2004).

Finally, Babb's overt acts of "slashing" and "jigging" were certainly sufficient to prove an attempt to cause bodily injury to Deputy Dennis.

ARGUMENT

I.

THE TRIAL JUDGE DID NOT ERR IN REFUSING TO GRANT JURY INSTRUCTIONS D-7 AND D-8, BOTH LESSER INCLUDED OFFENSE INSTRUCTIONS AUTHORIZING THE JURY TO FIND BABB GUILTY OF SIMPLE ASSAULT. THEY LACKED EVIDENTIARY SUPPORT.

II.

THE TRIAL JUDGE DID NOT ERR IN REFUSING JURY INSTRUCTION D-9, AN INSTRUCTION AUTHORIZING THE JURY TO ACQUIT IF IT FOUND THAT BABB'S ACTIONS WERE UNINTENTIONAL. THE LEGAL PRINCIPLES IN D-9 WERE ADEQUATELY COVERED IN C-7.

D-9 ALSO LACKED EVIDENTIARY SUPPORT.

Babb contends the trial judge erred in refusing jury instructions D-7 and D-8 authorizing the jury to find him guilty of the lesser included offense of simple assault against Deputy Butler charged in Count I of the indictment. (C.P. at 37-38)

Babb also claims the judge erred in denying jury instruction D-9 which would have allowed the jury to find the injury to Butler was unintentional and that " . . . his actions were accidental." (C.P. at 39)

With respect to Counts II and III charging aggravated assaults against Deputy Dennis and Lt. Maldonado, Babb received a jury instruction authorizing the jury to find him guilty of simple assault, a lesser-included offense.

Jury instructions must be supported by the evidence. **Killen v. State,** 958 So.2d 172 (Miss. 2007), reh denied.

Whether or not a lesser included offense instruction should be given turns on whether or not there exists an evidentiary basis for it. **Ramsay v. State,** 959 So.2d 15 (Ct.App.Miss. 2006). A trial

court should not grant a lesser included offense instruction if no reasonable and fairminded juror could find the defendant guilty of the lesser included offense and ultimately not guilty of at least one element of the principal offense. **Booze v. State,** 964 So.2d 1218 (Ct.App.Miss. 2007).

We agree with Judge DeLaughter that D-7, D-8, and D-9 lacked evidentiary support. Moreover the legal principles contained in D-9 were covered in C-7.

Instructions D-7 and D-8.

Although Babb neither testified nor produced a single witness in his defense, he argues on appeal there was an adequate basis for the granting of D-7 and D-8 based upon the testimony of the officers alone. (Brief on the Merits by Appellant at 7)

We disagree.

The trial judge granted jury instruction C-7 which he described at trial as " . . . an attempt by the Court to combine S-1 with one of the submitted defense instructions asking for a lesser included offense instruction concerning simple assault [a]nd I felt that lesser alternative is justified by the evidence as to counts two and three but not one." (R. 157-58)

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.

D-7 was properly refused because it ignores the undisputed evidentiary fact that a

deadly weapon was used to inflict the injury. Because a deadly weapon was used, Babb was guilty of aggravated assault even if he " . . . knowingly or purposely injured or attempted to cause [mere] bodily injury to Lynn Butler." **Crawford v. State,** Cause Number 2006-KA-01871 decided January 8, 2008 (¶6), slip opinion at 3 [Not Yet Reported] citing **Jackson v. State,** 594 So.2d 20, 24 (Miss. 1992); **Anthony v. State,** 349 So.2d 1066, 1067 (Miss. 1977).

No reasonable and fairminded juror could have found that the injury to Deputy Butler, however slight, was inflicted by means other than the use of a deadly weapon, namely, a knife.

D-8 was properly refused because it lacked evidentiary support. No reasonable and fairminded juror could have found from the evidence that Babb "recklessly" or "negligently" put the knife in motion thereby causing injury to Butler. These two theories are simply inconsistent with the evidentiary facts.

Instruction D-9.

Jury instruction D-9, which was refused (C.P. at 38), would have authorized the jury to acquit Babb of aggravated assault if it found his act(s) resulting in the injury to Butler were unintentional. It presupposes that if the State failed to prove Babb "acted intentionally," then Babb's actions were accidental. (C.P. at 39)

As stated previously, the defendant did not testify and called no witnesses in his defense. Accordingly, there is simply no evidence from which a reasonable and fairminded juror could find that Babb acted unintentionally. Nothing in the record suggests he didn't mean to brandish a knife. No reasonable, fairminded juror could have inferred from the testimony of the officers alone the "slashing" and "jigging" described by the officers was unintentional.

The trial judge, in effect, refused D-9 because it lacked evidentiary support and

because the basic principle stated therein was adequately covered by other instructions. We quote:

> MR. LABARRE: Judge, I felt that D-9 dealing with whether or not it was an intentional act or if it was accidental, I think could be - - as far as the actual striking of Officer Butler on the neck, I know that, you know, there was testimony otherwise, but the actual touching of the knife to the neck could have been accidental. I felt that was appropriate.
>
> THE COURT: Well, I didn't - - the Court doesn't have any affirmative evidence before it that it was accidental. But the Court was still of the opinion that you can certainly argue that. And C-7 clearly indicates that a conviction must be predicated upon a unanimous finding by the jury of a willful, purposeful and knowing act.
>
> MR. LABARRE: Yes, sir.
>
> THE COURT: And that if any of these elements are not proven to their satisfaction beyond a reasonable doubt, the, they are to find the defendant not guilty.
>
> **So the court is of the opinion that the element that you wish to argue is before the jury in the jury instructions.** (R. 160-61) [emphasis ours]

We concur.

The denial of D-9 was not error because the gist of D-9 was adequately covered in the trial court's C-7 which required the jury to find beyond a reasonable doubt that Babb caused bodily injury "willfully, unlawfully, purposely, and knowingly." (C.P. at 21-24)

"An act 'willfully' done is an act 'knowingly' and 'intentionally' done." **Boyd v. State,** 977 So.2d 329, 335 (Miss. 2008), citing **Moore v. State,** 676 So.2d 244, 246 (Miss. 1996). *See also* **Perrett v. Johnson,** 253 Miss. 194, 175 So.2d 497 (1965); **Ousley v. State,** 154 Miss. 451, 122 So. 731 (1929).

Stated differently, "willful" means intentionally doing the act.

Therefore, accepting as true Babb's argument that " . . . the jury could have easily inferred that this was accidental, rather than intentional" (Brief on the Merits by Appellant at 10), there was no existing impediment to a jury embracing that inference.

A trial judge is not required to instruct the jury over and over on a principle of law, even though some variations are used in the different instructions. **Calhoun v. State,** 526 So.2d 531 (Miss. 1988); **Davis v. State,** 431 So.2d 468 (Miss. 1983); **McWilliams v. State,** 338 So.2d 804 (Miss. 1976); Stated differently, "[t]he trial court is not required to grant several instructions on the same question in a different verbiage . . ." **Jones v. State,** 381 So.2d 983, 991 (Miss. 1980); **Ragan v. State,** 318 So.2d 879, 882 (Miss. 1975). Where the gist of an instruction is included in another instruction, the charge is duplicitous and the court is correct in refusing it. **Evans v. State,** 315 So.2d 1 (Miss. 1975).

"It is a familiar rule that instructions must be taken as one body, and announce the law, not the law of the State or the defendant, but the law of the case." **Sample v. State,** 320 So.2d 801, 805 (Miss. 1975). Stated differently, "[i]nstructions granted both the state and the accused are to be read together. When considered together, if the instructions adequately instruct the jury there is no reversible error present." **Rush v. State,** 278 So.2d 456, 458 (Miss. 1973). *See also* **Wilson v. State,** 592 So.2d 993 (Miss. 1991) [Jury instructions are reviewed as a whole and not individually.] When the totality of the jury instructions given to the jury are considered as a whole and this Court cannot say that the jury was misled by the granting of any or all of them, no error ensues. **Maroone v. State,** 317 So.2d 25, 27 (Miss. 1975); **Shannon v. State,** 321 So.2d 1 (Miss. 1975); **Rayburn v. State,** 312 So.2d 454 (Miss. 1975).

Babb makes much to do over Judge DeLaughter's statement that ". . . the Court doesn't have any affirmative evidence before it that it was accidental." (R. 160) Babb claims the trial judge applied an erroneous standard in denying D-9. (Brief on the Merits by Appellant at 9)

We do not share this concern. Babb, as stated previously, neither testified nor produced any witnesses in his defense. Judge DeLaughter simply meant that D-9 lacked evidentiary support. We agree because no reasonable and fairminded juror could have found from Babb's words, acts, and deeds testified about by the officers that the brandishing of a knife which resulted in the cut to Butler's neck, whether from the tip end of the back side of the blade or from the sharp side, was unintentional and the wound accidentally inflicted. We simply disagree with Babb's claim that " . . . the jury could have easily inferred that this was accidental, rather than intentional." (Brief on the Merits by Appellant at 10) But even if we are wrong, instruction C-7, as stated, allowed the jury to make this inference.

The posture of Babb's complaint targeting the denial of D-7 and D-8 is controlled by the following cases: **Booze v. State,** *supra,* 964 So.2d 1218 (Ct.App.Miss. 2007); **Lackie v. State,** 971 So.2d 601 (Ct.App.Miss. 2007); **Ramsey v. State,** *supra,* 959 So.2d 15 (Ct.App.Miss. 2006), reh denied, cert denied; **Divine v. State,** 947 So.2d 1017 (Ct.App.Miss. 2007); **Odom v. State,** 767 So.2d 242 (Ct.App.Miss. 2000). *Cf.* **Silas v. State,** 847 So.2d 899, 902 (Ct.App.Miss. 2002) ["There is simply no evidentiary foundation for the granting of a petit larceny instruction."]

Our legal analysis continues with the general and well-recognized rule of law that "[i]nstructions should be given only if they are applicable to the facts developed in the case being tried." **Pittman v. State**, 297 So.2d 888, 893 (Miss. 1974). In other words, before a

jury instruction may be granted, there must be an evidentiary basis in the record for such. **Gray v. State**, 472 So.2d 409, 417 (Miss. 1985); **Fairchild v. State**, 459 So.2d 793, 800 (Miss. 1984). Instructions which, as here, are *inconsistent* with the evidentiary facts of the case should not be given. **Norman v. State**, 385 So.2d 1298, 1301 (Miss. 1980), and the cases cited therein.

A jury instruction must be supported by the evidence.

In **Gangl v. State**, 539 So.2d 132, 136 (Miss. 1989), this Court discussed the rule applicable to both lesser offense instructions and lesser included offense instructions. We quote:

> Of course, lesser offense instructions should not be granted indiscriminately, and only where there is an evidentiary basis in the record. *Harper v. State*, 478 So.2d 1017, 1021 (Miss. 1985); *Lee v. State*, 469 So.3d 1225, 1230 (Miss. 1985). The evidentiary standard is the same as for lesser included offense instructions, and is laid out in *Harper v. State, supra*, at 1021. Consequently, where as in the instant case, the evidence warrants it, the accused is entitled as a matter of right, upon proper request, to a lesser offense instruction the same as he would be entitled to a lesser included offense instruction. *Griffin v. State, supra.*

The following language found in **Lackie v. State,** *supra*, 971 So.2d 601, 606 (¶¶ 23-24) (Ct.App.Miss. 2007), an appeal from a conviction of aggravated assault, is also relevant here:

> Lackie finally claims that he was entitled to a jury instruction for simple assault. We disagree. It is well settled that a lesser-included offense instruction is required only 'where a reasonable juror could not on the evidence exclude the lesser-included offense beyond a reasonable doubt.' *Mackbee v. State,* 575 So.2 16, 23 (Miss. 1990). Whether a lesser offense instruction should be given turns on whether there exists an evidentiary basis for it. *Hutchinson v. State,* 594 So.2d 17, 20 (Miss. 1992).

Section 97-3-7 of the Mississippi Code Annotated provides for both simple and aggravated assault:

> (1) A person is guilty of simple assault if he attempts to cause or purposely, knowingly or recklessly causes bodily injury to another, or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (c) attempts by physical menace to put another in fear of imminent serious bodily harm; . . .
>
> (2) A person is guilty of aggravated assault if he (a) 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 . . . .
>
> The maximum sentence for simple assault is six months in the county jail; for aggravated assault, it is not more than one year in the county jail or twenty years in the penitentiary.

"Disparity in maximum punishment," even if a factor, does not outweigh the fact that, as to Butler, simple assault instructions were not supported by the evidence.

Babb, on the other hand, did receive simple assault instructions with respect to his actions against Deputy Dennis and Lieutenant Maldonado. (C.P. at 22-24) The jury subsequently found Babb guilty of simple assault against Maldonado but not Dennis. (C.P. at 41-42) The test for determining when a lesser included offense instruction should be given is also set forth in **Harper v. State**, 478 So.2d 1017, 1021 (Miss. 1985), where this Court stated:

> [A] lesser included offense instruction should be granted unless the trial judge - and ultimately this Court - can say,

> taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge.)

See also **Woodham v. State**, 779 So.2d 158, 163 (¶¶ 24, 25) (Miss. 2001), where several jury instructions requested by the defendant " . . . did not have a proper evidentiary foundation in the facts of the present case."

Babb, we note, also cites **Harper**, a direct appeal from a conviction of dwelling house burglary. Babb relies upon the right test but reaches the wrong conclusion. Harper, testified in his own behalf and presented a viable alternative explanation for his presence in the house while Babb did not testify at all.

The question presented within the factual context of the case at bar is whether or not a reasonable, fairminded, hypothetical juror could have, on the facts and favorable inferences presented, found that Babb was guilty of simple assault against Butler, i.e., mere bodily injury sans weapon (D-7) or injury "recklessly" or "negligently" inflicted (D-8), as opposed to aggravated assault.

We think not.

In answering these inquiries, we keep firmly in mind that " . . . a lesser-included offense instruction should never be granted on the basis of pure speculation." **Fairchild v. State**, *supra*, 459 So.2d at 801. Indeed, the "[u]nwarranted submission of a lesser offense is an invitation to the jury to disregard the law." **Presley v. State**, 321 So.2d 309, 311 (Miss. 1975).

Accordingly, " . . . such an instruction should not be indiscriminately or automatically

given, . . . but should only be given after the trial court has carefully considered the evidence and is of the opinion that such an instruction is justified by the evidence." **Jackson v. State,** 337 So.2d 1242, 1255 (Miss. 1976). *See also* **Gangl v. State,** *supra,* 539 So.2d 132, 136 (Miss. 1989).

No reasonable, fairminded, hypothetical juror could have found that Babb did not brandish a knife and attempt to cause bodily injury to Butler (D-7) or cause injury to Butler "recklessly" or "negligently" (D-8).

D-9, as noted previously, was covered by instruction number 5 (C-7). (C.P. at 21-24)

The bottom line is that the trial judge correctly refused instructions D-7, D-8, and D-9 because they either lacked evidentiary support or the legal principles stated therein were adequately covered by other instructions.

III.

THE EVIDENCE WAS SUFFICIENT AS A MATTER OF LAW TO SUPPORT THE JURY'S VERDICTS FINDING BABB GUILTY OF AGGRAVATED ASSAULT AGAINST LAW ENFORCEMENT OFFICERS.

Babb argues " . . . the state failed to prove he caused bodily injury with a deadly weapon to either Sgt. Butler or Deputy Dennis 'purposely or knowingly,' an essential element of the crime." (Brief on the Merits by Appellant at 11)

Babb contends "t]he evidence was insufficient to sustain the element of intentional infliction of the injury upon either Sergeant Butler or Deputy Dennis, but could certainly fulfill the essential elements of simple assault under Miss.Code. Ann. 97-3-7(1) (1972)." (Brief on the Merits by Appellant at 12)

Mr. Doleac, the prosecutor, summarized the entire matter correctly during closing

argument:

> "You cannot just brandish a weapon, brandish this knife at sheriff's deputies and try to stab them and slit their throats then say he didn't mean to do it. It just doesn't work that way, does it[?.] That's not reasonable." (R. 174)

Indeed, words, acts, and deeds described in appellant's brief provide an adequate evidentiary basis for intentional acts. They include the following: "superlatives issued," "very agitated," "slashing motions," "sword fight," "very irate," "hostile," "cursing," and "jigging" of knife. (Brief on the Merits by Appellant at 3-5)

One of the problems with Babb's argument is that a "specific intent" to cause bodily injury is not required by our statute. **Griffin v. State,** 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,** 924 So.2d 604, 608 (Ct.App.Miss. 2006). Rather, the prosecution need only show that the blow itself was purposely and intentionally inflicted and that the requisite bodily injury resulted. **Id.** at 91.

Babb's indictment charged, *inter alia*, that he " . . . did attempt to cause or purposely, knowingly cause bodily injury to Lynn Butler with a deadly weapon, to wit: a knife by cutting him on the neck with said knife or other means likely to produce death or serious bodily harm . . ." (C.P. at 2)

Quite clearly Babb 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 number 5 (C-7) required the jury to find from the evidence beyond

a reasonable doubt that Babb "willfully, unlawfully, purposely, and knowingly caused any bodily injury, without regard to seriousness, to Lynn Butler, a human being with a certain deadly weapon, to wit: a knife at a time and place that said Lynn Butler was a duly appointed and acting law enforcement officer." (C.P. at 21)

Babb apparently interprets the statutory language "purposely or knowingly caused bodily injury" to require a "specific intent" to cause bodily injury. If so, Babb is mistaken. A specific intent to cause bodily injury is not an element of the aggravated assault(s) charged here.

Stated differently, it is no defense to aggravated assault charged under (2)(b) that Babb did not specifically intend to cause bodily injury to Sergeant Butler and Deputy Dennis.

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)."]

Both Butler and Maldonado testified as to Babb's state of mind and described his "slashing" and "jigging" gestures with a 6" inch hunting knife. (R. 108-09, 137-38) There can be no doubt such was intentional and purposeful. The overt acts of "slashing" and "jigging"

demonstrated an attempt to cause bodily injury to Dennis who was standing at Butler's side at the time Butler was cut. (R. 109-10) Butler testified that he and Dennis were standing close together at the time Babb gestured with the knife.

> Q. [BY PROSECUTOR:] Now, if you say it was before this when you were testifying that you were struck on the neck with the knife, did the defendant make any of these slashing gestures or stabbing motions at Deputy Dennis?
>
> A. [BY BUTLER:] We were - - like I say, we were standing so close together, he made them at him and me.
>
> Q. Was Deputy Dennis struck with the knife?
>
> A. No, he wasn't.
>
> Q. Why is that?
>
> A. He had the 21-inch ASP baton. (R. 113-14)

Admittedly, the cut to Butler's neck was superficial. Nevertheless, any assault with a deadly weapon that causes *any* bodily injury, whether serious 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.]

It is clear to us 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 itself was intended or not. There is nothing in this record to suggest that Babb did not mean to brandish a knife, i.e., intend to shake or waive it menacingly in an aggressive manner.

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]

Even if a specific intent to injure was required by our statute, the proof was sufficient, nevertheless, to support the jury's finding that Babb was guilty of aggravated assault.

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 Babb'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 the state's evidence was sufficient for a reasonable and fairminded juror to find that Babb was guilty of aggravated assault against Butler as well as Dennis.

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 fairminded juror could only find the accused not guilty. *See* **McClain v. State,** 625 So.2d 774, 778 (Miss. 1993). It is clear that " . . . after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime(s) beyond a reasonable doubt." **Bush v. State,** 895 So.2d at 843, quoting **Jackson v. Virginia,** 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Stated differently " . . . reasonable fairminded men in the exercise of impartial judgment might reach different conclusions on every element of the offense(s)." **Chambliss v. State,** *supra,* 919 So.2d 30, 34 (Miss. 2005).

Neither discharge of the appellant nor invocation of the so-called "direct remand" rule is warranted in this case.

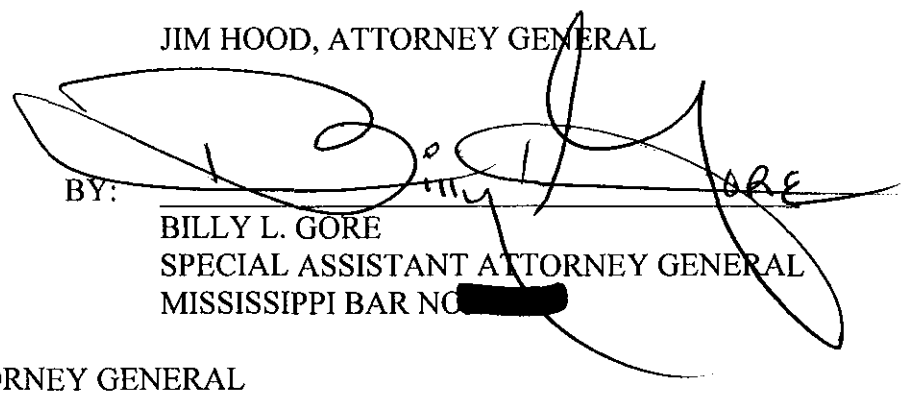
CONCLUSION

We eschew comment on appellant's statement of "tragedy and loss" of a husband and father. (Brief on the Merits by Appellant at 2) The facts are what they are, and the trial judge heard and considered testimony in extenuation and mitigation of sentence. (R. 189-202) Judge DeLaughter was aware of Babb's prior use of cocaine and methamphetamine and his history of domestic violence against his wife, Vivian. (R. 196, 198)

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 affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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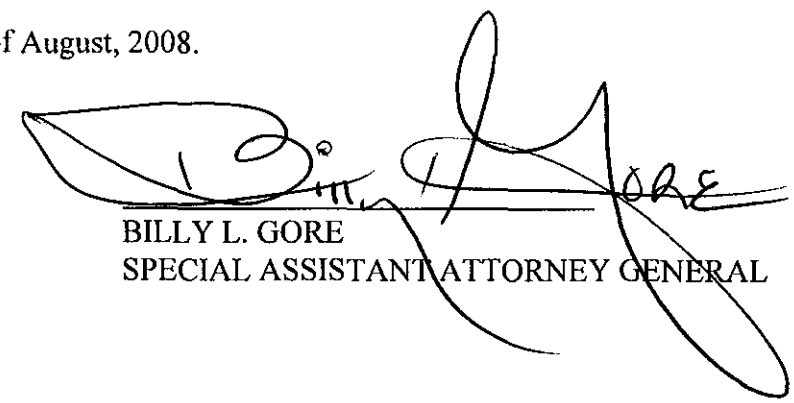
This the 20th day of August, 2008.



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