IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-02105-COA

JOHNNY ROBERT BABB — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE 2ND JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BY APPELLANT

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REPLY

Comes now Johnny Robert Babb, Appellant herein, and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 28(C) makes this, his *Reply* to *Brief of the Appellee* on selected issues, I and II. In so doing, Mr. Babb reiterates all errors, arguments and citation of authority in *Brief on the Merits by Appellant*, incorporated herein by reference, and in no way abandons other errors and issues not specifically addressed in this *Reply*.

> **I. The trial court erred in refusing jury instructions D-7 and D-8 as to simple assault against a law enforcement officer in Count I;**
>
> **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, and**

As Mr. Babb noted at the outset, Issues I and II are so intertwined as to require discussion together.

Under Mississippi case law, the trial court should give a lesser offense instruction so long as an evidentiary basis exists.

Under decisional and constitutional law, both state and federal, a defendant is entitled to a jury instruction or instructions which present his or her theory of defense.

In both cases, the trial court erred by failing to give Instructions D-7 and D-8 which would have permitted the jury to consider the lesser offense charge of simple assault against a police officer. RE 19; T. 159.

> Only if 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, and considering that the jury may not be required to believe any evidence offered by the State, that no hypothetical, reasonable jury could convict ... [the defendant] of simple murder, can it be said that the refusal of the lesser-included offense instruction was proper. *Fairchild v. State*, 459 So.2d 793 at 801, (Miss. 1984)

The fact that a deadly weapon was involved does *not*, as honored counsel for the state would have this Court believe, automatically remove the lesser offense from consideration, for such injuries may be negligently or mistakenly inflicted and therefore, qualify as simple assault. As the Court noted in *Harbin v. State*, 478 So.2d 796, 800 (Miss. 1985), the seriousness of the injury may play a role in considering whether a simple assault instruction may be given. While the injuries to the complaining witness in *Harbin* were too serious to allow a simple assault instruction, the fact remains that in *this* case, the trial court failed to use the proper standard in evaluation of the request for D-7 and D-8 as required by *Fairchild* and its progeny. [CP 37-38].

Consider the testimony in this case:

- Sgt. Butler testified the cut he received came from the tip end of the back side of the blade as Butler was retreating *after having sprayed Mr. Babb and five-year-old son in the face with pepper spray*; T. 106; 112.

- Sgt. Butler's description of his injury was "it was more a scrape than a cut because of the way I figured it happened." T. 111.

- As noted, Mr. Babb had been sprayed in the face and eyes with pepper spray, a measure Sgt. Butler testified was designed to "incapacitate" an individual by producing a "burning" sensation. It is entirely possibly that Mr. Babb was unable to see where the advancing officers were in his home and was attempting to defend himself and his son against further onslaught. T. 106.

Clearly, Sgt. Butler's testimony establishes the basis for the simple assault instruction, as Mr. Babb, blinded by pepper spray, could have easily mistakenly or negligently inflicted the wound, such as it was, against Dennis [Count II], who never appeared to testify, and Butler [Ct. 1]. The clear inference of negligence or mistake may easily be drawn when one uses the required standard for evaluation of jury instructions. All doubts are to be resolved to the benefit of the defendant and that the jury may disbelieve some, all or none of the State's evidence. *Fairchild,* supra. The trial court's misperception of the proper standard for evaluation of jury instructions is evident from the record; he said "affirmative" evidence of accident was missing from the record

and so refused D-7 and D-8. T. 160. As the Mississippi Supreme Court declared in *Alexander v. State*, 749 So.2d 1031, 1037 (Miss. 1999) "Defendants are entitled to have instructions on their theory of the case presented to the jury for which there is a foundation in evidence, *even though the evidence might be weak, insufficient, inconsistent or of doubtful credibility*, and even though the sole testimony in support of the defense is the defendant's own testimony.

The trial court similarly failed to consider the tremendous disparity in potential sentences. For simple assault against a law enforcement officer the maximum penalty is five (5) years; for aggravated assault against a law enforcement officer, the maximum penalty is *thirty* (30) years, a sentence Mr. Babb ultimately received.

Counsel for Mr. Babb does not by any means intend slighting of the daily and dangerous burden our law enforcement officers undertake each time they leave the safety of home for the uncertainty of another shift. It is said that domestic disputes are the most feared calls by law enforcement, due to the volatile and dangerous situation such occurrences present.

Nevertheless, the record shows the trial court obviously used the incorrect standard in evaluation of the jury instructions, clearly not covered elsewhere, to his extreme prejudice.

Mr. Babb also disputes that C-7 covered his instruction as written in D-9. (CP 39). As the Mississippi Supreme Court has said, "[w]here a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error." *Giles v. State,* 650 So.2d 846, 849 (Miss.1995) [internal citations omitted].

An adequate evidentiary basis existed, all inferences from Sgt. Butler's testimony is that the scrapes could've been inflected negligently or by mistake and the disparity in sentencing is great.

Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing REPLY BY APPELLANT to the following:

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Jackson, Mississippi 39201

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And by United States Mail, postage prepaid, to

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So certified, this the 2nd day of September, 2008.

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Certifying Attorney