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

BRIEF ON THE MERITS BY APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and the judges of the Supreme Court may evaluate possible disqualification or recusal.

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So certified, this the 20th day of June, 2008.

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2007-KA-02105-COA

Table of Contents

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Issues	1
Statement of the Case A. Course of the Proceedings Below B. Statement of Facts	2
Summary of the Argument	6
Argument	7
Conclusion	13
Certificate of Service	14

Johnny Robert Babb v. State of Mississippi

2007-KA-02105-COA

Table of Authorities

Cases	***Page***
Boyd v. State, 557 So.2d 1178 (Miss. 1989)	8
Crane v. Kentucky, 476 U.S. 683 (1986)	9
Dilworth v. State, 909 So.2d 731 (Miss. 2005)	11
Harper v. State, 478 So.2d 1017 (Miss. 1985)	7; 9
Hentz v. State, 542 So.2d 914 (Miss. 1989)	10
Taylor v. State, 577 So.2d 381 (Miss. 1991)	8; 9
Wade v. State, 748 So.2d 771 (Miss. 2000)	12

Constitutions, Statutes and other Authorities

MISS.CODE ANN. § 97-3-7 (1972)	2
MISS.CODE ANN. § 97-3-7(1) (1972)	2; 9; 12
MISS.CODE ANN. § 97-3-7(2) (1972)	9

STATEMENT OF THE ISSUES

I. The trial court erred in refusing jury instructions as to simple assault against a law enforcement officer in Count I;

II. The trial court erred in refusing jury instructions which presented Mr. Babb's theory of defense, thus depriving him of his fundamental right to mount a meaningful defense, and

III. The evidence was insufficient as a matter of law to support the jury verdict of aggravated assault against a law enforcement officer.

STATEMENT OF THE CASE

A. *COURSE OF PROCEEDINGS BELOW*

A grand jury of the 2nd Judicial District of Hinds County, Mississippi, indicted Johnny Robert Babb for three counts of aggravated assault against a law enforcement officer in violation of MISS. CODE ANN. § 97-3-7 (1972) in Cause No. 06-5032. CP 1. A jury empanelled on November 6, 2006 heard two days of testimony and on November 7, convicted Mr. Babb of two counts of aggravated assault against a law enforcement officer and one count of simple assault against a law enforcement officer, in violation of MISS. CODE ANN. § 97-3-7(1) (1972) T. 177-178; 201-202; RE 11-13; CP 43-45. The trial court ordered a pre-sentence investigation and on September 24, 2007, the trial court sentenced Mr. Babb to thirty (30) years each on Counts 1 and 2, as well as five (5) years on Count 3, all to be served consecutively in the custody of the Mississippi Department of Corrections. CP 58-60; RE 14-16; T. 201-202.

Mr. Babb timely filed *Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial*, which was denied. CP 61-64; RE 17. Upon denial of his post-trial motion, Mr. Babb appealed his conviction and sentence to this honorable Court.

B. *STATEMENT OF FACTS*

This is a story of tragedy and loss, of a husband and father unable to provide for his wife and young son with Downs Syndrome, of a man in chronic pain due to a degenerative spinal condition, of one who turned to violence in anger and frustration in the haze of pain in which he found himself.

On the evening of March 26, 2006, Hinds County Sheriff's deputies were called on a suspected domestic violence call to 1335 Nobles Drive, the residence of Johnny Robert and Vivian Babb. T.96. Three deputies initially responded: Sgt. Lynn Butler and deputies Casey Dennis and Deborah Bailey. T.96.

Butler, sergeant on the midnight shift, arrived as Dennis and Bailey were walking with Vivian Babb, wife to Mr. Babb, back to their mobile home. T.96-97. Butler testified that Dennis started up the steps to the small porch at the front door of the home, when Mr. Babb opened the door, "issued some superlatives" about leaving the premises, then shut and locked the door. T. 98-99.

Deputies sought to make it appear as though they had left, in hopes Mr. Babb would come out. T. 123. When he did not do so, Mrs. Babb produced a door key and Dennis, Butler and Bailey gained entry through the locked front door. T. 123. Upon entry, a very agitated Mr. Babb again told the deputies to leave his property, so Deputy Dennis (who did not testify at trial) sprayed pepper spray in Mr. Babb's face as he held his son in his arms. T. 123. Mr. Babb then came at the deputies with a six-inch hunting knife, his son still in his arms, Butler testified. T. 123. While Mr. Babb had the knife in his hand when deputies entered, he did not come toward them with the knife until after Deputy Dennis sprayed him with Mace used to induce him to drop the knife, Butler acknowledged during cross examination. T. 124.

After spraying Mr. Babb and his five-year-old son, Chance, with Mace, Butler testified he, Dennis and Bailey, followed by Mrs. Babb, made their way into the mobile home living room. T. 109-110. As they did so, Mr. Babb made "slashing motions" with his knife to keep them at bay. Butler testified Dennis was to his right and both were trying to advance on Mr. Babb with a knife and his son in his hands. At this point, something like a "sword" fight erupted in the Babb living room among Butler, Dennis and Mr. Babb. T. 108-109; 123-124. Dennis had a metal baton with which he struck Mr. Babb between elbow and wrist, then on shoulder, in order to get him to drop the knife. T. 113-114. Butler testified he used a "slapper" nearly an inch thick piece of leather with steel shot on the inside, a weapon not issued for use by the Sheriff's Office. T. 124.

As the confusion ensued, Mr. Babb variously accused deputies of breaking into his home (T. 108; 126). Lieutenant Maldonado and Deputy Keith Henderson also testified that Mr. Babb shouted "kill me, kill me," or warned officers they would have to kill him before taking him to jail. T. 140; 147. Butler, Maldonado and Henderson all testified that Mr. Babb was extremely agitated, irate or hostile. T. 108; 125; 147.

During this altercation, as Mr. Babb "slashed" the advancing deputies, Butler testified Mr. Babb hit the tip end of the back side of the knife blade against Butler's neck, cutting him. T. 112. Butler testified he was moving backward, trying to step out of Mr. Babb's way. T. 112.

Afterwards, Mr. Babb took his son and sat on the living room couch; the child had caught some of the pepper spray in his face and his face was beginning to burn. Mrs. Babb got a washcloth and Mr. Babb attempted to wipe the caustic substance, an effort which only worsened the effects. T. 115. The deputies told Mr. Babb he would have to wash the substance off, and after accusing the deputies of lying, Mr. Babb took his son down the hallway to the bathroom. T. 116.

At this point, Lt. Maldonado, evening shift supervisor, arrived on the scene. T. 133. Maldonado, trained as a hostage negotiator, went down the hallway with Dennis and Butler behind him. T. 134. Mr. Babb was standing in the hallway, holding his screaming child. T. 135. Maldonado testified he told Mr. Babb he needed to come out, at which Mr. Babb began to curse Maldonado, all the while using his knife "to jig at me." T. 136-137. Mr. Babb was trying to put his son in the bathroom because the child had Mace on his face; his mood "would go up and down," Maldonado testified. T. 138. Mr. Babb shouted "kill me, kill me" and Maldonado testified he drew his weapon but did not fire because of the boy's presence. T. 140.

Deputy Keith Henderson next arrived on the scene, summoned by Maldonado, and assumed primary negotiation duties. T. 138; 146. Mr. Babb was "pretty irate" when Henderson

arrived, standing before his bedroom door with the knife still in his hand. T. 147. When Henderson assured Mr. Babb that deputies were not there to arrest him, he told Henderson of a chronic back problem that prevented him from working and how he could no longer deal with the chronic pain. T. 149; 152. Henderson testified Mr. Babb was no longer hostile and appeared "to really want help." T. 150. Henderson quickly arranged for an ambulance to take Mr. Babb to the hospital. After speaking briefly with his wife, Mr. Babb laid the knife down on a chest of drawers, sat down on the bed and cried. T. 150-151. His son, Chance, was asleep in the bed beside him.

Deputies were waiting to arrest Mr. Babb upon his release from the hospital. T. 128.

At the sentencing nearly a year later, the trial court sentenced Mr. Babb to the maximum incarceration on all three charges, to be served concurrently.

SUMMARY OF THE ARGUMENT

Mr. Babb argues that the trial court abused its discretion in denying his request for jury instructions which permitted the jury to consider the lesser offense of simple assault on a law enforcement officer and his proffered theory of defense, that of accident, to the assault claimed in Count I of the indictment. In rejecting Mr. Babb's request for an instruction (D-9) on accidental injury to Sgt. Butler, the trial court cited a lack of an "affirmative" showing of accident, thereby demonstrating clearly on the record that he failed to perceive the correct standard.

Mr. Babb also challenges the sufficiency of the evidence supporting his conviction as to Count II of the indictment, establishing beyond a reasonable doubt he had the requisite intent to "knowingly" and "purposefully" sought to inflict injury upon Sgt. Lynn Butler and Deputy Casey Dennis. The Court has available to it the direct remand rule, by which it could either reverse and remand for a new trial or reverse and remand for re-sentencing as to simple assault on a law enforcement officer.

ARGUMENT

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

Denial of a lesser offense instruction (No. I)

Our law guarantees to all citizens certain fundamental rights, even in the most dire of criminal proceedings, to assure a fair and just result. Those fundamental rights were denied here to Johnny Robert Babb, in that the trial court not only refused to permit instruction of the jury as to a lesser offense of simple assault against a law enforcement officer as to Sgt. Lynn Butler (Count I), but also refused to instruct the jury as to his right the possibility of accident. CP 36-38; RE 19; T. 159. The trial court compounded its error by refusing to use the proper legal standard in evaluation of Mr. Babb's proposed jury instructions.

It was error to refuse the submission by Mr. Babb of a lesser offense instruction on simple assault against a law enforcement officer, Instruction D-7 and D-8, as an adequate evidentiary basis existed in the record through testimony of the officers.

"[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." *Harper v. State*, 478 So.2d 1017, 1021 (Miss. 1985). In *Harper*, the trial court reversed a

conviction of burglary of an occupied dwelling for failure to submit the lesser included offense instruction of trespass, even though it found "unassailable" on appellate review the jury finding of Harper's breaking with the "intent to commit some crime therein." *Id.*, at 1020. The jury's finding, however, did not conflict with the fact that jury could have rationally found otherwise because Harper testified he had no intent to commit a crime upon entering the home of his ex-wife. From his testimony alone, the jury could reasonably have found he only committed trespass, thus entitling him to the requested instruction. *Id.*

In *Taylor v. State*, 577 So.2d 381 (Miss. 1991) it was also error to deny the accused a simple assault instruction, when the state requested and was granted an instruction on aggravated assault as a lesser included offense of rape. Taylor punched his former girlfriend so severely in the face and head that she spent four days in the hospital and appeared to have sustained nerve damage. *Id.*, at 383. Nevertheless, it was held reversible error to reject Taylor's request for a simple assault instruction. "Where *[sic]* the defendant requests a lesser-included offense instruction, one factor to be considered is the disparity in maximum punishments between the offenses. A great disparity is a factor in favor of giving the lesser included offense instruction." *Taylor*, quoting *Boyd v. State*, 557 So.2d 1178, 1181 (Miss. 1989).

In this case, Mr. Babb would respectfully submit adequate evidence was adduced to support a simple assault against a law enforcement officer instruction, facts that also support Mr. Babb's assertion regarding his challenge to the sufficiency of the evidence in Issue III. Sgt. Butler testified the cut he received came from the tip end of the back side of the blade as Butler was retreating, as though it were an accident. T. 112. Even Butler himself described the injury as more a scrape than a cut. T. 111. And, it is certainly conceivable Mr. Babb may not have even been able to clearly see where Butler and Dennis were in the trailer after the pepper spray. When

Lt. Maldonado appeared on the scene shortly thereafter, he testified as the fact that eyes of everyone in the trailer were watery from the earlier pepper spray by Dennis. T. 135.

Considering the disparity in sentencing alternatives, Mr. Babb received the maximum sentence for Counts I and II: Two thirty (30) years terms for Counts I and II as opposed to a five (5) year term for Count III. The only "leniency" the trial court showed was to order all sentences to be served concurrently, rather than consecutively. The maximum sentence for conviction of simple assault against a law enforcement officer under MISS. CODE ANN. § 97-3-7(1) (1972) is five (5) years. The maximum sentence for aggravated assault on a law enforcement officer is *thirty* (30) years, MISS. CODE ANN. § 97-3-7(2) (1972), a disparity of *twenty-five-years*.

As in *Harper* and *Taylor*, there existed a more than adequate evidentiary basis for the giving of a simple assault instruction based on the testimony of Sgt. Butler. In addition, there is a great disparity between a five-year prison term and one for thirty years. The trial court abused its discretion in denial of the simple assault instruction Mr. Babb sought.

Denial of Mr. Babb's theory of defense instructions (No. II)

Mr. Babb submits the same standard the Court enunciated in *Harper* is applicable to the trial court's failure to grant an instruction governing his theory of defense. That the trial court failed to understand the correct standard is found in the record, when defense counsel argued for the giving of Instruction D-9, regarding accident. CP 39; RE 19; T.159. In response, the trial court declared there was no affirmative evidence before the court that the injury to Sgt. Butler was accidental, a clear showing the trial court fails to understand the correct legal standard by which Mississippi courts evaluate jury instructions sought by defendants. T. 160. Just as important is the fact that case law interpreting federal constitutional guarantees provides that so long as some evidentiary basis exists for the giving of an instruction, a defendant must be permitted "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476

U.S. 683 at 689-690 (1986). The Mississippi Supreme Court has found that as due process of law "requires a criminal defendant be allowed the opportunity to defend himself." *Hentz v. State*, 542 So.2d 914, 917 (Miss. 1989).

In this case, Mr. Babb sought to assert the defense of accident through Instruction D-9, which reads as follows: CP 39; RE 19; T. 159.

"The Court instructs the jury that in order to find Johnny Robert Babb [guilty] of aggravated assault on a law enforcement office [sic], the jury must find, from the evidence, beyond a reasonable doubt, that he acted intentionally. If the State has not proven to you from the evidence, beyond a reasonable doubt, that he acted intentionally, then his actions were accidental and you should find Johnny Robert Babb not guilty. "

From Sgt. Butler's testimony, the jury could easily have inferred that the "scrape" he incurred was an accident. Butler clearly testified that it appeared his cut came from the tip of the back blade of the knife. T.112. The cut occurred *after* deputies entered, *after* deputies sprayed Mace in the face of Mr. Babb and his five-year-old child. T.124.While the record does not reflect what time Lt. Maldonado arrived on the scene, his testimony was clear. The eyes of everyone in the Babbs' trailer were watery from the earlier pepper spray. T. 135. Mr. Babb was highly agitated, a fact which appears through testimony throughout this brief record.

True, there was no *affirmative* showing of accident, but clearly from the testimony the jury could have easily inferred that this was accidental, rather than intentional. The issue of accident was covered no where else in the instructions. Thus Mr. Babb was deprived of his fundamental right to present his theory of defense through jury instructions for which an adequate evidentiary basis existed.

III. The evidence was insufficient as a matter of law to support the jury verdict of aggravated assault against a law enforcement officer.

In evaluation of whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict at the close of the prosecution's case and motion for judgment notwithstanding the verdict, "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that *every element of the offense existed*; and where the evidence fails to meet this test, it is insufficient to support a conviction." *Dilworth v. State*, 909 So.2d 731, 736; ¶ 17 (Miss. 2005) (internal citations omitted).

Under MISS. CODE ANN. § 97-3-7(2) (1972), prosecutors were required to prove Mr. Babb attempted to cause or purposely or knowingly cause bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.

Mr. Babb respectfully 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. Deputy Dennis did not testify at trial; nor did Deputy Deborah Bailey who was also present on the scene. The prosecutor explained in opening statements that Dennis would not appear because he was now living Georgia.

The testimony by Sgt. Butler, the only one of the three first on the scene to testify, is as susceptible to an inference of accident as it is to intent. Butler described the injury as more of a scrape; that he believed the cut occurred with the tip of the back of the blade. T.112. Again, as noted above, it was Deputy Dennis who had sprayed Mr. Babb in the face with Mace, a caustic substance, upon the deputies' entrance into his home. T. 124. It is unclear from the record whether Mr. Babb could see clearly; it is series of events completely capable of supporting an inference of accident or merely trying to ward away additional attacks by the armed deputies.

In the case of *Wade v. State*, 748 So.2d 771 (Miss. 2000), the Mississippi Supreme Court held the prosecution failed to establish the accident had the malicious intent necessary to meet that essential element of murder. The evidence did, however, support a finding of heat of passion manslaughter and so the Court used the "direct remand" rule to send the case back to the lower court for re-sentencing for the lesser crime of manslaughter.

Mr. Babb submits that such a situation may obtain here. The evidence was insufficient to sustain the element of intentional infliction of the injury upon either Sgt. Butler or Deputy Dennis, but could certainly fulfill the essential elements of simple assault under MISS. CODE ANN. 97-3-7(1) 91972).

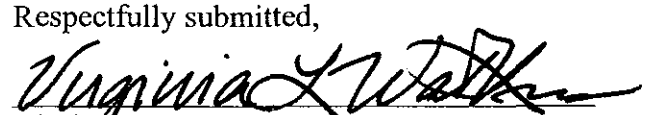
Therefore, Mr. Babb respectfully seeks reversal of his conviction on this assignment of error and either remand for a new trial or remand for re-sentencing for simple assault of a law enforcement officer on Counts I and II.

CONCLUSION

Counsel for Mr. Babb respectfully submits the trial court abused its discretion in refusing jury instructions D-7, D-8 and D-9, primarily by failing to use the proper legal standard in evaluating his requested instructions. Furthermore, the trial court's refusal to give Instruction D-9 essentially denied to Mr. Babb his right to present to the jury his theory of defense, that the act was not done intentionally or purposefully, but accidentally. Finally, Mr. Babb humbly contends that the prosecution failed to adduce evidence of sufficient quality to undergird its verdict that he intentionally sought to inflict bodily injury upon either Sgt. Butler or Deputy Dennis.

Based on the facts and citation of authority herein, Mr. Babb therefore beseeches this honorable Court to reverse and remand his cause for a new trial.

Respectfully submitted,



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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 BRIEF OF APPELLANT ON THE MERITS to the following:

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So certified, this the 20th day of June, 2008.

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