IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JASON C. JOHNSON — APPELLANT

VS. — NO. 2008-KA-0576-COA

STATE OF MISSISSIPPI — APPELLEE

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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STATEMENT OF THE CASE

Jason C. Johnson was convicted in the Circuit Court of Rankin County on a charge of shooting into a dwelling. Thereafter, he was sentenced to a term of a term of ten years in the custody of the Mississippi Department of Corrections and was ordered to pay a fine of $10,000 and court costs. (C.P.6, 56-57) Aggrieved by the judgment rendered against him, Johnson perfected an appeal to this Court.

On the order of the Court, the state files this supplemental brief addressing the specific issues set out in the order.

SUMMARY OF THE ARGUMENT

In light of the definitions of the terms "willfully," "purposely," "knowingly," and "intentionally," set out below, the state submits *Boyd*, infra, did not change the law with respect to the element of willfullness as set out in the statute defining the crime of firing into a dwelling.

PROPOSITION:

BOYD V. STATE, INFRA, DID NOT CHANGE THE LAW WITH RESPECT TO THE ELEMENT OF WILLFULLNESS AS DEFINED BY SECTION 97-37-29

The Court first directs the state to respond to the question whether *Boyd v. State*, 977 So.2d 329 (Miss.2008), holds that Section 97-37-29 is a specific intent crime. The language from that case which raised the Court's concern is set out below:

> Boyd next argues that, in prosecuting him under Section 97-37-29, the state failed to prove an essential element of the crime, that is, that he "willfully" discharged a pistol into a dwelling house. An act "willfully" done is an act "knowingly" and "intentionally" done. *Moore v. State*, 676 So.2d 244, 246 (Miss.1996); *Ousley v. State,* 154 Miss. 451, 122 So. 731, 732 (1929). Thus, the question is whether the state offered sufficient proof that Boyd had an intent to shoot into O'Neal's house on the night of May 1, 2004.
>
> This Court has held that "[u]nless one expresses his intent, the only method by which intent may be proven is by showing the acts of the person involved at the time, and by showing the circumstances surrounding the incident." *Thompson v. State*, 258 So.2d 448 (Miss.1972). Indeed, this Court specifically has held that intent to do an act or commit a crime is:
>
> > ... a question of fact to be gleaned by the jury from the facts shown in the 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.
>
> *Wheat v. State*, 420 So.2d 229, 238 (Miss.1982), quoting *Shanklin v. State*, 290 So.2d 625, 627 (Miss.1974). A jury's resolution of such factual determinations must be respected where, after reviewing all the evidence in the light most consistent with the jury's finding, we conclude there was sufficient evidence to support the finding. *Knox v. State*, 805 So.2d 527, 531 (Miss.2002).
>
> Charles Adams testified that, after O'Neal fired the shots in front of Boyd's house, Boyd stated that he was going to shoot at O'Neal's house in the same way O'Neal "woke [Boyd's] grandfolks up." L.C. Gibson testified that, after Boyd shot the decedent, he remarked, "I just shot because he had shot at my house. I just shot in his house to woke his people up like he did mines." This evidence amply supports the jury's finding that Boyd "willfully" shot into an occupied dwelling.
>
> 977 So.2d at 335-36.

The state contends this language does not mandate proof of specific intent in order to convict a defendant of shooting into a dwelling. That offense is defined by statute as follows:

> If any person shall **willfully and unlawfully** shoot or discharge any pistol, shotgun, rifle or firearm of any nature or description into any dwelling house or any other building usually occupied by persons, whether actually occupied or not, he shall be guilty of a felony whether or not anybody be injured thereby and, on conviction thereof, shall be punished by imprisonment in the state penitentiary for a term not to exceed ten (10) years, or by imprisonment in the county jail for not more than one (1) year, or by fine of not more than five thousand dollars ($5,000.00), or by both such imprisonment and fine, within the discretion of the court.
>
> (emphasis added) MISS. CODE ANN. § 97-37-29 (1972) (as amended).

For purposes of its argument, the state sets out MISS. CODE ANN.

§ 97-3-7 (1972) (as amended), in pertinent part:

> 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 state submits at the outset that *Boyd* does not require that the state prove specific intent in order to obtain a conviction for firing into a dwelling. The statue defining that offense employs the term "willfully," which has been held to have substantially the same meaning as "purposely and knowingly," as set out in the aggravated assault statute. *Davis v. State*, 909 So.2d 749, 753 (Miss. App. 2005), citing *Ousley v. State*, 154 Miss.451, 122 So. 731, 732 (1929). It follows that if firing into a dwelling were a specific intent crime, aggravated assault would be as well. Yet it is well settled that aggravated assault is not "a crime of specific intent." *Hogan v. State*, 854 So.2d 497 (Miss. App. 2003), citing *McGowan v. State,* 541 So.2d 1027, 1029 (Miss.1989).

As shown by the excerpt from the opinion set out above, the prosecution In *Boyd* presented direct evidence of defendant's specific intent to shoot into the dwelling. This evidence certainly benefitted the state, but it was not required pursuant to the defining statute.[1] That a certain action is held to meet the minimum legal requirements involved in a given situation does not mean that said action defines the minimum legal requirement

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[1]Indeed, the term "knowingly" has been held to be the equivalent of "intentionally." *Moore v. State*, 676 So.2d 244, 246 (Miss.1996).

for such situations. Cf.: *Fleming v. State*, 604 So.2d 280, 292 (Miss.1992) ("It is obvious that the Court in Colburn was not attempting to establish a minimum threshold for what constitutes `serious bodily injury.' Rather, the Court was simply stating than an attack which caused 'great risk of death' was so clearly within the realm of `aggravated' assault that an instruction concerning 'simple' assault was unnecessary."), and, *Sawyer v. Whitley*, 505 U.S. 344, fn.10 (1992). By equating the term "wilfully" with "intentionally," and going on to address the proof of the direct evidence of the defendant's intent with respect to a challenge to the sufficiency of the evidence, the Court in *Boyd* did not impose upon the state the burden of proving specific intent.

In light of these definitions, the state maintains its position that firing into a dwelling is not a specific intent crime. If it were, aggravated assault would be also, and it is clear that it is not. It follows that there is no need to discuss whether *Boyd* is retroactive, inasmuch as it did not change the law.

Solely in the alternative, for the sake of argument, if the statute could be read to require proof of specific intent, then the doctrine of transferred intent would apply. Presented with substantially similar facts, the Kansas Court of Appeals held as follows:

> Here, the doctrine of transferred intent is applicable because Walker and the shooter standing in front of Toles' apartment intended to injure each other by conducting a shootout with multiple shots fired by each person. The bottom line is that Walker fired his gun at a person standing in front of Toles' apartment. Gratefully, no one was injured in Toles' apartment. However, Walker's criminal intent to shoot another person was transferred into the criminal intent required for the commission of criminal discharge of a firearm into an occupied dwelling. Walker clearly must have known that his shots would hit the apartments if he missed the other gunman.

State v. State, 28 Kan. App. 700, 708-09, 20 P.3d 1269, 1276 (2001).

We continue to assert that *Boyd* did not work a change in the applicable law in this case.

CONCLUSION

The state respectfully maintains that for the reasons set out above and in our principal brief, the judgment rendered below should be affirmed.

Respectfully submitted,

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BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **SUPPLEMENTAL BRIEF FOR THE APPELLEE** to the following:

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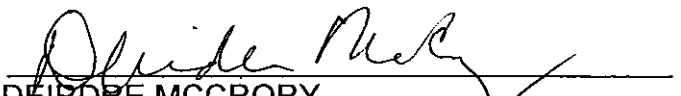
This the 31st day of August, 2009.



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