IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JASON C. JOHNSON — APPELLANT

V. — NO. 2008-KA-0576-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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STATE OF MISSISSIPPI **APPELLEE**

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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Jason C. Johnson, Appellant
3. Honorable David Clark, District Attorney
4. Honorable William E. Chapman, III, Circuit Court Judge

This the 11 day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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STATEMENT OF THE ISSUES

ISSUE NO. 1 : WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A JUDGEMENT NON OBSTANTE VEREDICTO WHERE THE ENTIRETY OF THE EVIDENCE WAS WHOLLY DEVOID OF ANY SHOWING OF WILLFULNESS, A NECESSARY ELEMENT OF SHOOTING INTO AN OCCUPIED DWELLING

ISSUE NO. 2 ; WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL WHERE THE ENTIRETY OF THE EVIDENCE WEIGHED IN FAVOR OF THE DEFENDANT ON THE ELEMENT OF WILLFULNESS.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Rankin County, Mississippi, and a judgement of conviction for the crime of shooting into a dwelling against Jason C. Johnson following a jury trial commenced on February 19, 2008, Honorable William E. Chapman, III, Circuit Court Judge, presiding. The jury acquitted Johnson of the crimes of armed robbery and aggravated assault. Mr. Johnson was sentenced to a term of ten (10) years. (C.P. 55-57) Mr. Johnson is presently incarcerated in an institution under the supervision of the Mississippi of Corrections.

FACTS

Trial testimony began with Kenkalelus Aldridge ["Aldridge"]. Aldridge was returning his twin children to their mother's house when he was approached by three men. One of the men, Sergio Watson ["Sergio"], came up to him and said "Give it up."(T. 79-81) Sergio, it should be noted, also had a child by the mother of the twins, Tyana.

Sergio then punched Aldridge while another man, later identified as Marcus Devine ["Marcus"], began to strike him with a bat. Meanwhile the third man, Sergio's brother "Cook", later identified as Johnson, "came with a rifle, [and] had the rifle aimed at [Aldridge's] face." (T. 83) When asked specifically what "Cook" was doing with the rifle, Aldridge again stated:

A. **Aiming at my face.** (T. 83) (emphasis added.)

Meanwhile the guy with the bat was "snatching" saying "give me that" (T. 83) Aldrige had approximately $80.00 which was taken from him. Meanwhile "the gun was in [his] face" as it fired two times. (T. 84) Aldridge tried to avoid getting shot by "using the other guy as kind of like a shield to block the gun from shooting" him. (T. 84) Jennifer Stokes came out of her trailer, at which time the three men got back in their car and left. (T. 85)

Johnson was identified in court as the man with the gun. (T. 86). It is important to note, that throughout the occurrence, according to Aldridge, the gun was exclusively aimed at him, at his face.

On cross examination, Aldridge denied that there had been a conversation with Sergio about bringing him some marijuana. (T. 89) He denied selling marijuana, denied having a gun. (T. 90,95) Aldridge affirmatively averred that the shots were fired at him, from a distance of about five feet. (T. 95-96, 101) The car was located in front of the dwelling that is the subject of this brief. (T. 97) The fact that the shots were being fired at him was affirmed by the statement made by Sergio, Saying "shoot him (Aldridge)." (T. 99) All the time, Aldridge was also being assaulted with a bat.

Raymond Duke ["Duke'] , a deputy with the Rankin County Sheriff's Department, was the first to arrive on the scene. He found the windshield of Aldridge's car to be broken. Aldridge told him that the men took about $80.00 and his ball cap. He was "advised" that Johnson had the gun, and was told one shot hit the trailer. (T. 112) He found one spent casing and observed one round hole in the trailer. Duke also took pictures of the scene. (T. 107-122)

Deputy Tim Lawless, ["Lawless"], next testified as to his part in the investigation. He testified that one picture showed what "appear[ed]" to be where one round struck the trailer. An objection to what the hole appeared to be was overruled. (T. 126)

Lawless testified to a statement made by Johnson. The jury was excused while the court held a hearing on the voluntariness of the statement. The appropriate standard was applied and the statement deemed admissible. (T. 130-141) According to the alleged statement, Johnson claimed, that although he and the other two men went to the scene to rob Aldridge, he did not have a gun. Instead, in the statement to Lawless, Johnson claimed that Marcus Devine had the gun, and was the shooter.

Cross examination revealed that even though Lawless dug for the bullet in the purported bullet hole, no bullet was found.(T. 151)

The last witness for the State, Jennifer Stokes, ["Jennifer"], lived in the trailer and was at the trailer at the time of the occurrence. She was the grandmother of Aldridge's twins and Sergio's child. (T. 156) She knew Johnson (as "Cook"), and also Sergio and Marcus. She was the only other eyewitness to testify and her testimony confirmed that Johnson's intention was to shoot Aldridge, not into the trailer, but he missed. (T. 157) She was very positive in her statement that Johnson "had a gun, and he was...**aiming, like he was intending to shoot [Aldridge].**"(emphasis added) (T. 158)

After the shots, she told the men she would call the police and the three men left. She

believed that one of the shots hit the trailer. (T. 160) She pointed out a hole that had not been there before. She also confirmed that Aldridge's car, where the event took place, was parked directly in front of the trailer. (T. 161)

Upon Jennifer being excused, the State rested. After a hearing on the defense motion for a directed verdict, Johnson took the stand on his own behalf.

Johnson had been working on his sister's car when he got a "strange" phone call. The caller asked for Sergio. The phone was handed to Sergio and put on speaker. Sergio told the caller to bring some marijuana, about $100.00 worth. (T. 182-183) A second call directed Sergio to come to the trailer and Sergio asked Johnson to take him there. (T. 183) When they arrived, Sergio went to Aldridge and they shook hands and Aldridge pulled out a bag of marijuana. (T. 184) Johnson was calling his dog when a fight broke out between Sergio and Aldridge. According to Johnson, Aldridge got the gun from his car. (T. 185) Meanwhile Marcus ran and grabbed a bat and told Aldridge to put the gun down. Fearing Aldridge would fire, Marcus hit him with the bat and Aldridge dropped the gun. Johnson then grabbed the gun and tried to eject the magazine, just as Jennifer came out. Johnson told her he wasn't trying to shoot anyone. Aldridge attempted to grab the gun back, and that is when the weapon was discharged. (T. 186) Johnson ran, Marcus grabbed the marijuana and they drove off. (T. 187) He specifically denied telling Lawless about a plan to rob Aldridge. (T. 189-190)

The defense rested and the State finally rested without any proofs before the jury that any shots were aimed at or intended for the dwelling.[1] Instead the State's evidence only showed an intention to shoot Aldridge, while the defense proof's showed only an intent to keep the gun away from Aldridge.

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[1]Common sense would dictate that Johnson would not intend to shoot into the house where his twins were.

The jury retired to consider its verdict and returned with a verdict of not guilty as to armed robbery and aggravated assault, but guilty on Count III, shooting into an occupied dwelling.

SUMMARY OF THE ARGUMENT

Whereas the case was well tried and resulted in a possibly surprising acquittal on two counts, one issue, an issue of first impression, remains.

The evidence entirely fails to show that Johnson willfully or intentionally shot into a dwelling. To the contrary, all the State's evidence clearly manifested that Johnson's intention was to shoot Kenkalelus Aldridge. Johnson denied having any intention to discharge the gun in any fashion. As the statute require's that a shooting into the dwelling be "willful" there must be some scintilla of evidence indicating that Johnson intended to shoot into the dwelling. Accordingly, the judgement of conviction should be reversed and rendered, or at least, reversed and remanded.

ARGUMENT

ISSUE NO. 1 : WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A JUDGEMENT NON OBSTANTE VEREDICTO WHERE THE ENTIRETY OF THE EVIDENCE WAS WHOLLY DEVOID OF ANY SHOWING OF WILLFULNESS, A NECESSARY ELEMENT OF SHOOTING INTO AN OCCUPIED DWELLING.

The statute for the crime of shooting into an occupied dwelling is transcribed below for the sake of convenience.

> 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.

Miss. Code Ann. § 97-37-29. The statute requires the act of shooting into a dwelling be willful. As

such, willful is a necessary element of the crime. The indictment herein (C.P.11-12, R.E. 6,7) and the court's instruction to the jury (C.P. 50, R.E. 8) ratify this requirement. The use of willful requires that Johnson intended to shoot into the dwelling, that he intended the result of his act to be a bullet entering the dwelling. This meaning of the term willful has been previously and conclusively established by the Mississippi Supreme Court as follows:

> "Wilfully or willfully" and "intentionally" have the same meaning, both in ordinary understanding and as legal terms. Black's Law Dictionary defines "willful" as "Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. **Intending the result which actually comes to pass;** designed; intentional; purposeful; not accidental or involuntary." Black's Law Dictionary 1599 (6th ed. 1990) (emphasis added). Black's defines "intentionally" in part as "For purposes of criminal statute means willfully or purposely, and not accidentally or involuntarily." Black's Law Dictionary 810 (6th ed. 1990) (emphasis added) (citations omitted). Webster's defines "willful or wilful ....2: done deliberately: not accidental or without purpose: intentional...." Webster's Third New International Dictionary 2617 (1986). "[S]ynonymous phrases or interchangeable words may be used in a jury instruction and the jury still be properly instructed." Lancaster v. State, 472 So.2d 363, 367 (Miss.1985) (citing Erving v. State, 427 So.2d 701, 703-05 (Miss.1983)). Since the two words are synonymous, no error occurred in substituting "wilfully" for "intentionally" in the jury instructions. (Emphasis added)

Lester v. State, 692 So.2d 755, 790 (Miss.1997) (Overruled on other grounds). Thus, Johnson, by statutory requirement and Supreme Court definition, must have aimed at the dwelling, intending his shot to enter therein. Such a result cannot be accidental, or without the purpose of hitting the dwelling.

Accordingly, Johnson's request for a peremptory instruction and motion for acquittal notwithstanding the verdict should not have been overruled (C.P. 54,62, R.E. 9,15), as the evidence of willfulness was lacking and therefore insufficient. *Lee v. State,* 469 So. 2d 1225, 1229-1230 (Miss. 1985) A jury finding that the act of shooting into an occupied dwelling in the factual situation

here is simply contrary to all of the evidence, thus meriting the granting of an order of judgement not withstanding the verdict. *Waterman v. State*, 822 So. 2d 1030, 1034 (Miss. App. 2002)

This case is somewhat analogous to *Maudlin v. State,* 750 So. 2d 564 (Miss. App. 1999). Maudlin was convicted of knowingly and intentionally transferring a controlled substance. In that case, while the facts were indisputable that Maudlin transferred a cigarette case containing methamphetamine, the proofs that he knowingly and intentionally transferred drugs was simply lacking. Like *Maudlin, Id.* the incriminating evidence here is insufficient. The burden of proof is with the State to produce sufficient evidence to support all of the elements of the crime. *Brown v. State,* 556 So. 2d 338, 339-340 (Miss. 1990)

For this reason, the verdict of the jury should be reversed and rendered.

ISSUE NO. 2 ; WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL WHERE THE ENTIRETY OF THE EVIDENCE WEIGHED IN FAVOR OF THE DEFENDANT ON THE ELEMENT OF WILLFULNESS.

Appellant Johnson also moved for a new trial asserting that the verdict was contrary to the weight of the verdict. If this Court were to find that there did exist some scintilla of inference that provided the barest minimum of sufficiency, then the Court still has the opportunity to view the same evidence as to the weight and award the defendant a new trial. The appellate court should undertake to review the evidence on it's own. *Windham v. State*, 800 So. 2d 1257, 1263-1264 (Miss. App. 2001)

The argument regarding the weight of the evidence is substantially the same as the argument made above, but tested by a different standard. Johnson therefore adopts the foregoing argument in his second issue. Given the above facts, the evidence proving that Johnson willfully shot into the occupied dwelling is lacking. Even when viewing the evidence in a light consistent with the verdict (*Green v. State,* 762 So. 2d 810, 813 (Miss. App. 2000)), evidence of intentionally or willfully is still

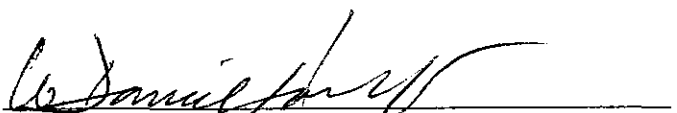
absent. "[A] greater quantum of evidence favoring the [S]tate is necessary for the [S]tate to withstand a motion for a new trial..." *Dilworth v. State,* 909 So. 2d 731, 737 (Miss. 2005), citing *Pharr v. State,* 465 So. 2d 294, 302 Miss. 1984) As there is really no evidence, beyond purely conjectural supposition that is not found in the proofs, the facts of this case must be held to weigh in favor of Johnson, and if this matter is not reversed and rendered, it should certainly be reversed and remanded for a new trial.

CONCLUSION

While there does not appear to be a case right on point, that a shooting into a dwelling must be done intentionally, the statute should be given it's clear meaning consistent with other case law and the definition of willful. Accordingly, this cause should be reversed and rendered, or at a minimum, reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Jason C. Johnson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 7th day of August, 2008.

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