

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TIMOTHY WAYNE WALLACE

APPELLANT

VS.

NO. 2008-KA-0785

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court did not err in denying Wallace's simple assault jury instruction since simple assault is not a lesser included offense of sexual battery.

STATEMENT OF THE CASE

On or about March 7, 2007, a Tate County Grand Jury indicted Timothy Wallace on two counts of sexual penetration of M.W., a child under 14 years of age, Wallace being twenty-four (24) or more months older than M.W. (C.P. 5) On January 28 and 29, 2008. Wallace was tried in the Circuit Court of Tate County and was convicted on both counts. (C.P. 27, 28) On January 29, 2008, Wallace filed a Motion for New Trial. (C.P. 29) On April 18, 2008, Wallace filed an Amended Motion for JNOV or in the Alternative for a New Trial in which he added the refusal of Defendant's proposed simple assault jury instruction, D-3, as an assignment of error. (C.P. 34, 35) The Trial Court denied Wallace's post trial motions on April 21, 2008. (C.P. 37) Wallace was sentenced to twenty (20) years in the custody of the Mississippi Department of Corrections for each count of sexual battery, with the two sentences to run consecutively. (C.P. 40-1) The instant appeal ensued on April 30, 2008. (C.P. 43)

SUMMARY OF THE ARGUMENT

Wallace asserts that the lower court erred in refusing his proposed instruction on simple assault as a lesser included offense. The lower court was correct in refusing the instruction since simple assault is not a lesser included offense of sexual battery. The elements of simple assault are not contained in sexual battery. Wallace's reliance on Boyd is misguided, since the physical acts he cites as evidence supporting a simple assault conviction were intended not to put the victim in fear of bodily injury, but were a psychological sexual threat, a prelude to sexual battery.

ARGUMENT

I. The trial court did not err in denying Wallace's simple assault jury instruction since simple assault is not a lesser included offense of sexual battery.

Wallace asserts that the lower court erred in refusing his proposed instruction on simple assault as a lesser included offense. The lower court was correct in refusing the instruction since simple assault is not a lesser included offense of sexual battery. The elements of simple assault are not contained in sexual battery.

In *Seigfried v. State*, 869 So.2d 1040 (Miss.Ct.App. 2004) the Mississippi Court of Appeals cited *Trigg v. State*, 759 So.2d 448 (Miss.Ct.App.2000) for the definition of a lesser including offense, as follows:

Whether applied for the benefit of the State or defense, in order to authorize such instruction, the more serious offense must include all the elements of the lesser offense, that is, it is impossible to commit the greater offense without at the same time committing the lesser included offense. Also, there must be some evidence to support the lesser included offense. *Trigg v. State*, 759 So.2d 448 (Miss.Ct.App.2000).

In *Trigg*, the Mississippi Court of Appeals affirmed the lower court where it did not *sua sponte* offer a simple assault instruction where the defendant was charged with sexual battery. The Court of Appeals opined that simple assault could not be a lesser-included offense of sexual battery, stating:

It seems clear that the more serious offense of sexual battery does not include all of the elements of simple assault. In fact, they are quite dissimilar in that one could conduct a sexual battery against a person and not commit simple assault because the element of "bodily injury" is missing from the sexual battery statute. Therefore, simple assault does not seem to qualify as a lesser-included instruction of sexual battery.

No bodily injury was shown here, nor was any other evidence submitted to support the jury's finding of simple assault rather than sexual battery. We find the trial court did not err in refusing instruction D-4.

Both *Trigg* and *Siegfried* involved a request by the defendant to instruct the jury on simple assault as a lesser included offense of sexual battery. In both cases, the Mississippi Court of Appeals held that the lower court was correct in refusing the instruction since simple assault is not a lesser included instruction of sexual battery.

In the instant case, Wallace was charged with Sexual Battery pursuant to § 97-3-95(1)(d) which states that “[a] person is guilty of sexual battery if he or she engages in sexual penetration with . . . a child under the age of fourteen (14) years of age, if the person is twenty-four or more months older than the child.” Mississippi Code Annotated § 97-3-7 (1972, as amended) defines “simple assault” as follows:

(1) a person is guilty of simple assault if he (1) 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.

The elements of simple assault are not present in the crime of sexual battery. Sexual battery elements in this case consist of proof that the victim was under 14 years of age, proof that the defendant was twenty-four (24) months older than the victim and proof of penetration. All of these elements were clearly proved at trial. Further, the elements of simple assault are not compatible with the definition of sexual battery and therefore simple assault is not a lesser included offense of sexual battery.

CERTIFICATE OF SERVICE

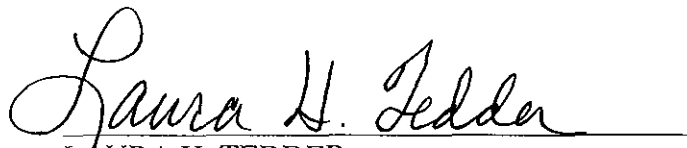
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 27th day of January, 2009.


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