

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES KENDRICK

APPELLANT

VS.

NO. 2008-KA-1398-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT
- II. INVESTIGATOR KORY HAMILTON DID NOT PROVIDE MEDICAL TESTIMONY.
- III. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE STATE'S BURDEN OF PROOF.

STATEMENT OF FACTS

On August 21, 2006, Parchman inmate Derwin Bozeman was performing maintenance duties in Unit 32. T. 19. After adjusting the water pressure in a cell, Bozeman began walking up the hall to join his supervisor when inmate James Kendrick stabbed Bozeman in the neck with a shank. T. 21,47. Kendrick had attached the shank to the end of a crutch to reach Bozeman as he passed Kendrick's cell. At the time of the incident, Bozeman did not know who had stabbed him. T. 26. Bozeman was first taken to the prison infirmary and then to a local hospital. T. 23. As a result of the stabbing, a nerve in Bozeman's tongue was injured, leaving half of his tongue paralyzed. T. 24. The victim also suffered a vocal cord injury which effects his speech. T. 24.

Johnny Ware, the administrator of the Electronic Surveillance Operation Center at Parchman, testified that he was watching the monitors at the time of the incident. T. 47. Although he observed via lived feed Bozeman before during and after he was stabbed, Ware did not comprehend what he had seen since the incident happened so quickly, and because Bozeman's response was subdued. T. 61. When Ware was alerted by radio that a stabbing occurred, he immediately reviewed the surveillance tapes. T. 61. Ware observed Bozeman walking up the hall toward his supervisor when a spear-like object draped with a white cloth struck Bozeman in the neck as he passed cell 57, Kendrick's cell. T. 47. Ware then observed the white cloth being tossed from cell 57. T. 48. The inmate in cell 56, Reginald Sims, retrieved the white cloth from the floor. T. 48.

During a search of Kendrick's cell, two shanks were found, neither of which appeared to be the weapon used in the stabbing. T. 133. A pair of aluminum crutches was also retrieved from Kendrick's cell. T. 47. Officers found a shank in Sims' cell which was covered in a red substance that appeared to be blood. T. 100.

Kendrick was tried and convicted by a Sunflower County Circuit Court jury of aggravated

assault. Sims was charged with accessory after the fact.

SUMMARY OF ARGUMENT

Viewing the evidence in the light most favorable to the verdict, the State proved each element of the crime charged beyond a reasonable doubt. The State presented eyewitness testimony that the weapon which stabbed the victim was launched from Kendrick's cell. There is only one inmate housed in each cell. A surveillance video also shows objects being tossed from cell 57 and retrieved by the inmate in cell 56. The weapon used in the stabbing was found in cell 56. Based on eyewitness testimony and reasonable inferences, the State proved that Kendrick stabbed the victim. The victim also testified as to the injuries he suffered from the stabbing.

Investigator Hamilton did not violate MRE 701 or 702. He simply testified that he observed the victim's injuries. Hamilton only testified that half of the victim's tongue appeared capable of movement while the other half did not, and that the victim had trouble speaking. His testimony required no specialized knowledge or skill.

When the jury instructions are read as a whole, it is clear that the jury was properly instructed on the State's burden of proof.

ARGUMENT

I. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT

In determining whether the State presented legally sufficient evidence to support the jury's verdict, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005). Kendrick was charged with aggravated assault in violation of Mississippi Code Annotated §97-3-7(2)(b), which required the State to prove that Kendrick caused Bozeman bodily injury with a deadly weapon or other means likely to produce death.

Kendrick first claims that the State failed to prove that he was the inmate who stabbed Bozeman. However, Ware testified that he observed the following on the prison's surveillance system after Bozeman completed work on a pipe chase between cells 56 and 58.

And as [Bozeman] closed the pipe chase, he stood back and he was talking to an offender; and as he turned and walked back to his supervisor, you can see a spear-like object, and I say a spear-like object because at the time we were trying to identify what it was. I – we couldn't exactly tell what it was at the time because it had like a sheet – a white sheet over it or a towel or something white, and it struck the offender in the neck. Okay. The offender, he just grabbed his neck, and he walked back through the gap in the wall, and he said something; and he stood there for maybe two or three seconds. . . . I saw the assault, and later you can see a towel come out fo a cell, and then you can see another hand go up under the – I think 56 – Cell 57 had a white towel, and he dropped something out. And then Cell 56 reached up under the bottom of it, the little gap up under the door, and brought it in real quick. I mean, it happened, and he passed it within seconds.

T. 47-48. Additionally, the surveillance video was played for the jury. The video shows at 9:22:06 Bozeman being stabbed in the neck with a spear-like object. Exhibit 1. Then at 9:26:50, the video shows objects being tossed from the same cell from which the spear was launched, and the hand of the inmate in the adjoining cell reaching out and retrieving the objects. Exhibit 1. Ware explained

the system used by all prison personnel to determine cell numbers and by which he was able to tell that the spear-like object came from cell 57. T. 43. Crutches were found in Kendrick's cell, while a shank with what appeared to be blood on it was found in Sims' cell. T. 47, 57, 90, 100, 108, 133. Taking the evidence in the light most favorable to the State, a reasonable juror could have found that Kendrick stabbed the victim in the neck with a shank attached to a crutch, and then passed the shank used in the assault to inmate Sims.

Kendrick also argues that the State did not present an eyewitness to the assault. However, Ware did in fact witness the assault both on live feed and then again when he reviewed the surveillance video. While it is true that Ware was not able to see Kendrick's face, he was able to testify with certainty that he saw the weapon emerge from Kendrick's cell. There is only one inmate assigned to each cell. T. 40. Therefore, although Ware could not see Kendrick's face, he did see Kendrick commit the assault.

Kendrick also complains about Ware's identification of the cell from which the spear emerged. He claims that the video does not support Ware's interpretation, because the video does not show cell numbers. However, Ware testified that he and the analysts in his division determine cell numbers by the white tiles in front of each cell's door. T. 43, 54. The surveillance video in evidence shows a grey floor with a large white tile in front of each cell door. Also, on a wall partition, there is an arrow and range of numbers pointing to the hall where the incident occurred. Admittedly, the jury would not have been able to make out those numbers, but they could see the white tiles and the blurred range of numbers. Ware described how he and his analysts use the system to determine cell numbers. This is an authentication issue, and Ware is certainly a witness with knowledge of how to determine a cell number.

Kendrick also claims that the State failed to provide medical evidence that the victim's injury

was serious. However, in an aggravated assault prosecution, the State is not required to prove that a victim suffered serious bodily injury. Instead, the State must prove that the victim suffered an injury which was caused with a deadly weapon or other means likely to produce death or serious bodily injury. *Riggs v. State*, 967 So.2d 650, 653 (¶13) (Miss. Ct. App. 2007); *Miller v. State*, 919 So.2d 1067, 1069 -1070 (¶13) (Miss. Ct. App. 2005); *Jackson v. State*, 594 So.2d 20, 24 (Miss. 1992). Bozeman and investigator Kory Hamilton testified about Bozeman's injury. There can be no question that a shank, a homemade knife, is a deadly weapon. Further, it is for the jury to determine whether a weapon used in an assault is a deadly weapon. *Al-Fatah v. State*, 856 So.2d 494, 499 (¶7) (Miss. Ct. App. 2003).

The State proved each element of the crime charged beyond a reasonable doubt. Because there was an eyewitness to the assault, Kendrick was not entitled to a circumstantial evidence instruction. Nevertheless, he received one, and the State proved Kendrick's guilt to the exclusion of every reasonable hypothesis consistent with innocence. Accordingly, Kendrick's first assignment of error must fail.

II. INVESTIGATOR KORY HAMILTON DID NOT PROVIDE MEDICAL TESTIMONY.

Investigator Kory Hamilton testified that when he took Bozeman's statement, Bozeman had trouble speaking and he observed that half of Bozeman's tongue appeared normal and the other half appeared incapable of movement. T. 129-30. Kendrick claims on appeal that Hamilton improperly gave an expert medical opinion without being qualified as an expert. Hamilton's testimony was clearly not governed by MRE 702 because no special expertise, skill, training or experience was necessary to make an observation that half of the victim's tongue did not move and that he had trouble speaking. The State contends that Hamilton's testimony concerned observed facts, but even if this court found that Hamilton gave an opinion, it was clearly a lay opinion. Under MRE 701, a lay witness may give an opinion that is "rationally based on the perception of the witness, helpful to the clear understanding of testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge" MRE 701. Hamilton testified only as to his observations, and whether the victim suffered an injury was a fact in issue, as it is an element of aggravated assault.

Kendrick's erroneous belief that Hamilton's testimony included an expert opinion is based in part on his erroneous belief that the State was required to prove a serious injury. Kendrick claims that the jury would not be familiar with the basic anatomy of the neck, nerves, veins, arteries, skeletal and muscle structure, and would not know whether Hamilton was describing a serious injury. Appellant's brief at 12. As previously stated, the State was only required to prove an injury, not the severity of that injury. Bozeman had already testified that his vocal cords and tongue were injured by the stabbing. Hamilton observed the same when taking Bozeman's statement, and did not cross the bounds of MRE 701 and 702 in testifying about those observations.

III. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE STATE'S BURDEN OF PROOF.

Although Kendrick was not entitled to a circumstantial evidence instruction since Ware was an eyewitness to the stabbing, he nevertheless received a circumstantial evidence instruction. On appeal, he claims that the trial court erred in not modifying other instructions which referred to reasonable doubt. Specifically, he claims that because instruction C-9 stated that the burden was “beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence,” while instructions S-1 and D-1 referred only to “reasonable doubt,” the instructions were hopelessly in conflict.

Jury instructions must be read as a whole. *Jenkins v. State*, 993 So.2d 862, 865 (¶11) (Miss. Ct. App. 2008). In *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), the appellant complained that one jury instruction related the modified burden only to the felonious child abuse charge, but the same instruction related the standard beyond a reasonable doubt burden to the capital murder charge, even though the entire case was a circumstantial evidence case. The Court found that because other instructions explained that the State must prove Jackson’s guilt of capital murder beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence, it was not error for the complained of instruction to not include the modified burden. Similarly, in the case *sub judice* when the instructions are read as a whole, the jury was properly instructed on the State’s burden of proof.

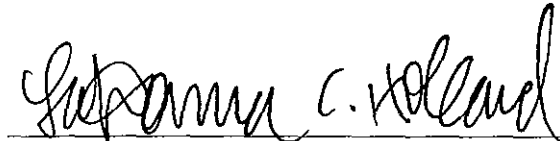
CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Kendrick's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "La Donna C. Holland", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, Speial 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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