

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHAUNTELL SUMMERALL

APPELLANT

VS.

NO. 2009-KA-0110

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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STATEMENT OF THE ISSUES

- I. THE APPELLANT FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MISSISSIPPI CODE ANNOTATED §97-37-5 IS UNCONSTITUTIONALLY VAGUE.
- II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.
- III. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE FACTS

Officer Chris Hensley of the Hattiesburg Police Department was patrolling in the early morning hours of September 12, 2007 when he heard loud music in violation of a city ordinance. (Transcript p. 60 - 62). Officer Hensley located the source of the music, a vehicle in a yard near the

intersection of Arledge and Milton Barnes with one individual standing outside the vehicle. (Transcript p. 63). Officer Hensley stopped and explained to the individual why he was there. (Transcript p. 63). The individual, later determined to be the Appellant, Shauntell Summerall, appeared nervous and became confrontational. (Transcript p. 64 - 65). The Appellant had his hands in his pockets and refused to take them out when asked. (Transcript p. 65). Officer Hensley performed a pat down and found a dirk knife in the Appellant's right back pocket. (Transcript p. 65, 75, 84, and 99). Officer Hensley received information from dispatch that the Appellant was a convicted felon. (Transcript p. 67). The Appellant was arrested and charged with being a convicted felon in possession of a weapon. He was tried, convicted, and sentenced to serve ten years in the custody of the Mississippi Department of Corrections with said sentence to run consecutively to a previously imposed sentence.

SUMMARY OF THE ARGUMENT

The Appellant did not establish beyond a reasonable doubt that Mississippi Code Annotated §97-37-5 is unconstitutionally vague. The statute is straightforward and lists each of the weapons that a convicted felon cannot legally possess. The list is not complicated nor does it contain technical words or other words unfamiliar to a person with even a very basic knowledge of weapons. Thus, an ordinary citizen is able to determine what is not allowed.

There was sufficient evidence to support the verdict and the verdict was not against the overwhelming weight of the evidence. The State presented evidence of each of the elements of the crime of being a convicted felon in possession of a weapon, specifically a dirk knife.

ARGUMENT

I. THE APPELLANT FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MISSISSIPPI CODE ANNOTATED §97-37-5 IS UNCONSTITUTIONALLY VAGUE.

The Appellant first raises the issue of “whether Mississippi Code Annotated §97-37-5 is unconstitutionally vague as it applies to the prohibition of the possession of a ‘dirk knife’ by a convicted felon.” (Appellant’s Brief p. 5). The statute in question reads in pertinent part as follows:

§97-37-5 Unlawful for convicted felon to possess any firearms, or other weapons or devices; penalties; exceptions

(1) It shall be unlawful for any person who has who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm unless such person has received a pardon for such felony, has received a relief from disability pursuant to Section 925(c) of Title 18 of the United States code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section.

The Mississippi Supreme Court has set forth “the standard for determining the constitutionality of a statutes” as follows:

A party challenging the constitutionality of a statute must prove his case by showing the unconstitutionality of the statute beyond a reasonable doubt. *Vance v. Lincoln County Dep't of Pub. Welfare*, 582 So.2d 414, 419 (Miss.1991). ‘This Court will strike down a statute on constitutional grounds only where it appears beyond all reasonable doubt that such statute violates the constitution.’ *Wells v. Panola County Bd. of Educ.*, 645 So.2d 883, 888 (Miss.1994). We adhere to the rule that one who assails a legislative enactment must overcome the strong presumption of validity and such assailant must prove his conclusion affirmatively, and clearly establish it beyond a reasonable doubt. All doubts must be resolved in favor of the validity of a statute. If possible, courts should construe statutes so as to render them constitutional rather than unconstitutional if the statute under attack does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity. *Loden v. Mississippi Pub. Serv. Comm'n*, 279 So.2d 636, 640 (Miss.1973) (*citations omitted*).

Edwards v. State, 800 So.2d 454, 460-61 (Miss. 2001) (quoting *Jones v. State*, 710 So.2d 870, 877 (Miss.1998)) (*emphasis added*). The *Edwards* Court further noted with regard to criminal statutes:

Although a statute imposing criminal penalties must be strictly construed in favor of the accused, it should not be so strict as to override common sense or statutory purpose. *United States v. Brown*, 333 U.S. 18, 25, 68 S.Ct. 376, 380, 92 L.Ed. 442, 448 (1948); *see also State v. Burnham*, 546 So.2d 690, 692 (Miss.1989). Strict construction means reasonable construction. *State v. Martin*, 495 So.2d 501, 502 (Miss.1986). This Court has held that the test concerning statutory construction is whether a person of ordinary intelligence would, by reading the statute, receive fair notice of that which is required or forbidden. *Burnham*, 546 So.2d at 692; *Roberson v. State*, 501 So.2d 398, 400 (Miss.1987); *Cassibry v. State*, 404 So.2d 1360, 1368 (Miss.1981).

Id. at 461 (quoting *Reining v. State*, 606 So.2d 1098, 1103 (Miss. 1992)) (*emphasis added*). The State of Mississippi respectfully contends that Mississippi Code Annotated §97-37-5 does provide the citizens of Mississippi fair notice of what is forbidden under the statute and therefore, is not unconstitutionally vague.

“[A] statute is unconstitutionally vague if its prohibitions are not clearly defined from the standpoint of an ordinary person.” *Westbrook v. State*, 953 So.2d 286, 289 (Miss. Ct. App. 2007) (citing *J & B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 367 (5th Cir.1998)). “A restriction must be reasonably clear, enabling a citizen to understand what is allowed, and what is not.” *Id.* (quoting *Mayor of Clinton v. Welch*, 888 So.2d 416, 420(¶ 21) (Miss.2004)). Mississippi Code Annotated §97-37-5 clearly explains that a person previously convicted of a felony may not possess any type of firearm, certain knives, and other specific weapons. One convicted of a felony need only read the list of weapons that he or she is not allowed to possess. This list is not complicated nor does it contain technical words or other words unfamiliar to a person with even a very basic knowledge of weapons.

Nonetheless, the Appellant claims that the presence of the term “dirk knife” on the list

renders the statute unconstitutionally vague. However, as set forth in detail later in this brief, the witnesses who testified at trial regarding the knife found on the Appellant were able to explain that the knife found was a dirk knife and were also able to explain the basis for that conclusion. One previously convicted of a felony should readily be able to review this list and know what types of knives he or she is allowed to possess. Admittedly one who has absolutely no knowledge of weapons or knives would not know whether a particular knife was a dirk knife, a pocket knife or a bowie knife. But such a person, if he or she was a convicted felon, would not need this knowledge as he or she would most likely not be carrying any knife at all if he or she had no knowledge of knives.

In support of his argument that the statute is vague, the Appellant argues that “‘dirk knife’ is an antiquated term” and asserts that the term “dirk knife” “has no use in society today.” (Appellant’s Brief 14 and 15). Yet, the Mississippi Supreme Court has used the term numerous times to describe the factual situations involved in its opinions and did not feel obligated to define or explain the term “dirk knife” in any of those opinions as it is not an “unrecognizable” term. *See Holmes v. State*, 537 So.2d 882, 883 (Miss. 1988); *Belina v. State*, 87 So.2d 919, 920 (Miss. 1956); *Duckworth v. State*, 46 So.2d 787, 787-88 (Miss. 1950); *Shaffer v. State*, 46 So.2d 545, 546 (Miss. 1950); *Riley v. State*, 44 So.2d 455, 456-57 (Miss. 1950); *White v. State*, 29 So.2d 650, 650-51 (Miss. 1947); *Augustine v. State*, 28 So.2d 243, 246 (Miss. 1946); and *Craig v. State*, 660 So.2d 1298, 1303 (Miss. 1995).

Thus, “[k]eeping in mind that statutes come before [appellate courts] clothed with a heavy presumption of constitutional validity,” it is clear that the Appellant has failed to meet his burden of proving that the statute is unconstitutionally vague beyond a reasonable doubt. *Trainer v. State*, 930 So.2d 373, 381 (Miss. 2006). Accordingly, the Appellant’s first issue is without merit.

II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

The Appellant next argues that “even if §97-37-5 is not unconstitutionally vague, the State failed to provide sufficient evidence that the knife possessed by the Appellant was, in fact, a dirk knife.” (Appellant’s Brief p. 16). “In reviewing a sufficiency of the evidence claim, [appellate courts] consider the evidence in the light most favorable to the verdict.” *Spencer v. State*, 944 So.2d 90, 91 (Miss. Ct. App. 2006) (citing *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)). “If any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt, [the court] will uphold the verdict.” *Id.*

The crime of “possession of a firearm or other weapon by a convicted felon” has two elements: (1) possession of a firearm or other weapon; (2) by one who has been convicted of a felony. *Short v. State*, 929 So.2d 420, 427 (Miss. Ct. App. 2006) (citing Miss.Code Ann. § 97-37-5(1)). In the case at hand, the State presented sufficient proof of each of these elements. First, there was a stipulation that the Appellant was a convicted felon. (Transcript p. 111). Second, there was no argument made that the Appellant was not in possession of the knife in question. Lastly, there was ample testimony that the knife in question was one of the “weapons” prohibited by § 97-37-5, specifically a “dirk knife.” (Transcript p. 75, 84, and 99). Mississippi Code Annotated §1-3-65 states that “all words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning . . .” Each of the witnesses who testified regarding the type of knife the Appellant possessed testified that according to their understanding of the common and ordinary description of a “dirk knife,” the knife in question was, in fact, a dirk knife:

TESTIMONY OF OFFICER CHRIS HENSLEY:

- Q: . . . Can you look at that knife and based on your experience as a law enforcement officer tell me what type of knife that is?
- A: Yes, sir.

Q: What type of knife is it?
A: It's a fixed-blade knife approximately eight to ten inches long.
Q: Now, has that commonly been referred to as a dirk knife?
A: Yes, sir.

(Transcript p. 81).

TESTIMONY OF OFFICER MICHAEL WALKER:

Q: (after being presented the knife in question - State's Exhibit 2) Can you identify that object sitting in front of you?
A: Yes, sir, I can.
Q: Now, can you explain what that object is?
A: Yes, sir. That is a dirk knife.
* * *
Q: Are you sure that that knife has been consistently called a dirk knife?
A: Yes, sir, I can.

(Transcript p. 84).

Q: Can you explain to the jury what you call a dirk knife based on your experience and why you say that's a dirk knife?
A: Yes, sir. Growing up basically - - I was in the military when I was 18. And, you know, growing up I was a country boy. Usually, anything that you can collapse the blade that's called a pocket knife. I grew up with that. When I got in the military, anything that had a straight fixed blade usually with one edge we would call a dirk knife. That's just what everybody called it. I'm not sure of the definition at the time, but that's just what we called a dirk knife.
* * *
Q: Now, based on that training what type of knife is that?
A: I would call that a dirk knife, sir.

(Transcript p. 96 - 97).

TESTIMONY OF OFFICER MARK MITCHELL:

Q: Now, based on all of that training that you received, the law enforcement training, the ATF training, the Department of Justice training, how would you classify that knife?
A: As a dirk knife.

(Transcript p. 103 - 104).

The Appellant, however, contends that the witnesses' responses regarding the definition of a "dirk

knife” “covered a wide spectrum of knives.” (Appellant’s Brief p. 13 - 14). A look at the definitions cited by the Appellant as well as the case law from around the country cited by the Appellant and the testimony of the above mentioned witnesses establishes that the term “dirk knife” covers a variety of knives just as there are a variety of pocket knives, swords, and other knives. The knife in question does not cease to become a dirk knife simply because it does not meet every single requirement of every single definition of “dirk knife.”

As such, it is evident that a reasonable juror could have found that each element of the crime of felon in possession of a weapon was proven beyond a reasonable doubt. Therefore, noting that the State presented the jury with evidence of each of the elements of the crime in question, the trial court properly ruled that there was sufficient evidence to support the verdict. Thus, the Appellant’s second issue is without merit.

III. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Lastly, the Appellant argues that his “conviction was against the overwhelming weight of the evidence.” (Appellant’s Brief p. 23). The following standard has previously been set forth by this Court with regard to weight of the evidence issues:

In determining whether a jury verdict is against the overwhelming weight of the evidence, the court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. (*citations omitted*). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will it be disturbed on appeal. (*citations omitted*). It has been said that on a motion for new trial the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. (*citation omitted*). Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict. (*citation omitted*).

Wooten v. State, 752 So.2d 1105, 1108 (Miss. Ct. App. 1999) (*emphasis added*).

With regard to this issue, the Appellant first argues that he “could not have known he was breaking the law by possessing the knife in question” and that “no citizen could have.” (Appellant’s Brief p. 4). He further argues that “the average citizen would have no chance, no matter how much research done on definitions of the term, of determining whether or not he or she was breaking the law” and further contends that “the citizens of the State of Mississippi, with ordinary mental faculties that allow them to use common sense and reason, are incapable of understanding terms that are simply not part of the everyday vernacular” such as the term “dirk knife.” (Appellant’s Brief p. 15 and 21). However, the State of Mississippi would respectfully counter that the Appellant underestimates the citizens of this State. The average citizen in this state would readily recognize that if he or she is a convicted felon, he or she has no business whatsoever carrying the weapon the Appellant was carrying. A citizen would not have to be a “soothsayer” as the Appellant contends to determine that the Appellant’s actions were not legal. (Appellant’s Brief p. 16). Furthermore, the average citizen of the State of Mississippi is quite capable of understanding terms not used in their everyday vernacular as evidenced by the fact that citizens across this state sit on juries everyday hearing cases involving all sorts of crimes, tax issues, business issues, and other cases involving highly specialized terms, many of which require expert witnesses to explain, and are able to render verdicts which are supported fully by the evidence even if much of that evidence is in the form of testimony with terms in which they are not familiar. Thus, simply because the jurors in the Appellant’s case may not use the term “dirk knife” in their everyday language does not mean that they are incapable of understanding the term. The Appellant’s jury, fully instructed and having been presented with the evidence, found that the Appellant was in possession of a dirk knife. Absent proof that allowing this verdict to stand would cause an unconscionable injustice, this Court cannot

disturb the verdict on appeal.

The Appellant next argues that the testimony of the witnesses was “significantly impeached” during cross-examination. However, as this Court has previously noted, “[i]t has long been a rule in Mississippi that ‘the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness.’” *Graham v. State*, 812 So.2d 1150, 1153 (Miss. Ct. App. 2002) (quoting *Meshell v. State*, 506 So.2d 989, 992 (Miss.1987)). Viewing the evidence in “the light most favorable to the verdict,” it is clear that the verdict was not against the overwhelming weight of the evidence. As such, the Appellant’s third issue is without merit.

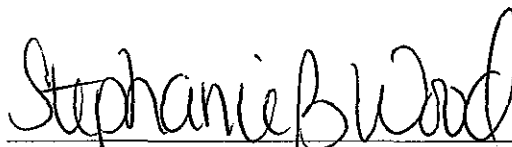
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the Appellant’s conviction and sentence as the statute the Appellant violated is not unconstitutionally vague, as there was sufficient evidence to support the verdict, and as the verdict was not against the overwhelming weight of the evidence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

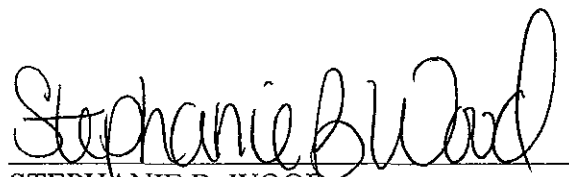
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert B. Helfrich
Circuit Court Judge
P. O. Box 309
Hattiesburg, MS 39403

Honorable Jon Mark Weathers
District Attorney
P. O. Box 166
Hattiesburg, MS 39403-0166

Justin T. Cook, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 30th day of July, 2009.


STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680