IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICKY M. JACKSON — APPELLANT

VS. — NO. 2009-KA-0606

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Procedural History

Ricky M. Jackson was convicted in the Circuit Court of Pike County on a charge of aggravated assault and was sentenced to a term of 20 years in the custody of the Mississippi Department of Corrections with five years suspended. (C.P.37-39) Aggrieved by the judgment rendered against him, Jackson has perfected an appeal to this Court.

Substantive Facts

Willie Hayes testified that on August 8, 2008, he and his wife Tomeka took their five-year-old daughter "to school that morning, that being her first day [of school]." From there, they went to the Wal-Mart in McComb to pay bills and get a prescription filled. Mr. and Mrs. Hayes entered the store "on the food court side."

As Mrs. Hayes purchased bubblegum from a coin-operated machine, Mr. Hayes looked to his left and saw Ricky Jackson "standing over there" in the "lobby area." At that point, Mr. Hayes put himself "on guard" because he "didn't trust" Jackson. (T.73-75)

As Mr. and Mrs. Hayes "proceeded into Wal-Mart," Mrs. Hayes told her husband that she was going to the pharmacy. Mr. Hayes went "on to the money gram center," but he did not turn his "back to the open bay area of Wal-Mart," where Jackson was standing. Because "they had a couple of more customers" ahead of him, Mr. Hayes waited "about 10, 15 minutes or a little longer." After he completed his business, he "headed to the pharmacy" to meet his wife. En route, he saw Jackson. When the two men made eye contact, Jackson "turned around abruptly and sprinted back toward the pharmacy." At that point, Mr. Hayes saw his wife "standing there ... browsing through the ladies' department." Mr. Hayes "walked up to her" and told her that he had "just seen old crazy Ricky." She asked her husband whether he wanted to leave the store, but he declined, and the couple "continued on" with their shopping. (T.75-76)

When Mr. Hayes was asked to recount what happened next, he testified as follows:

> When me and my wife passed a rack of clothes, and when I looked up, he was coming between the clothes and like coming straight at me. And I was pushing a buggy. He moved the buggy to the side and leaned over like he wanted to say something to me. And I give him the benefit of the doubt, like he wanted to say something to me.

> He hawk spit in my face. And I lunged at him. And whatever he had in his hand, that's what he stabbed me in my face with it.
>
> (T.77)

The assistant district attorney then asked, "[W]hat contact did you have with him or anything that you did that in your mind provoked this incident?" Mr. Hayes answered, "I don't have no earthly idea." The two men did not exchange words before Mr. Hayes was attacked. (T.77-78)

After he was stabbed, as Mr. Hayes continued to try to wipe the spit away, he realized that he had "this stick protruding out" of his face. His wife screamed that her husband "had been attacked, assault" and that "somebody" should "call 911." By that time, Jackson had left the store. Mr. Hayes called 911 on his own mobile phone. Officer John Finley advised him that he had called for an ambulance, but Mr. Hayes elected to have his wife drive him to the hospital. At the emergency room, he "had X-rays" and was given "a Tetanus shot." Anticipating that surgery might be necessary, the emergency room physician summoned an ear, nose and throat specialist. (T.78-79) After he was released, Mr. Hayes went back to the hospital for two additional treatments. (T.81) He cheek was still scarred at the time of trial. (T.85)

On redirect examination, the assistant district attorney asked Mr. Hayes, "[H]ow much time passed between you being spit on by the defendant and you being stabbed?" Mr. Hayes responded, "Just like it was all in one motion, sir." (T.92)

Mrs. Hayes testified that when Jackson spit on them, his saliva "got all over" her husband and herself. Mr. Hayes reacted by lunging toward Jackson a few

seconds later. Only a few seconds elapsed between the spitting and the stabbing. Mrs. Hayes corroborated her husband's testimony that physical or verbal altercation occurred between the two men before Mr. Hayes was spat upon and stabbed. (T.100-05)

The next morning Detective Shannon Sullivan of the McComb Police Department began investigating the reported crime. (T.57-58) During the course of her investigation, she interviewed Mr. and Mrs. Hayes, secured photographs of the scene and "a stick" that had been turned into evidence by Officer Finley, and obtained a the security video from Wal-Mart. These items were admitted into evidence. The video showed that "some type of commotion" or "disturbance" occurred at the time in question. (T.57-66) In conclusion, on direct examination, Detective Sullivan testified that her investigation had revealed "[t]hat a assault did occur, and that the assault or this assault did take place in Wal-Mart, and it did take place between Mr. Willie Hayes and Mr. Ricky Jackson." (T.67)

Dr. Brett Ferman, Mr. Hayes's treating physician, testified that Mr. Hayes arrived at the emergency room with "a stick stuck into his face." First, Dr. Ferman examined Mr. Hayes to rule out a fracture or penetration of the sinus. Once tests tests "came back as negative for any fracture or that it had penetrated that sinus," Dr. Ferman "removed the stick." He then "put a packing in there to try to help the healing process" and "put him on pain medicine and antibiotics." (T.94-)

Dr. Ferman went on to testify that the injury was "severe" and that it could have been much worse, potentially fatal," because the wound "wasn't too far from the orbital rim." In view of "the amount of force" that was generated and the location

of the injury, the blow had come close to causing blindness or brain damage "which could have been fatal." When he was asked, "Are injuries of this nature, could they be accidental?" Dr. Ferman answered, "No." (T.97)

Jackson testified that as he walked past "Willie Hayes and his wife, Willie Hayes tried to spit" on Jackson but "spit on his wife" instead. Mr. Hayes then "tried to hit" him "three to four times." Jackson then turned and left the store. (T.110)

On cross-examination, the assistant district attorney asked, "How did Mr. Hayes wind up with a stick in his face?" (T.114) Jackson answered as follows:

> [T]hat's a question that I'm asking myself, sir. ... I keep stuff on me all the time. I keep stuff ... you know, little sutff on me all the time. And I don't know if it came– if he got the stick in the altercation when he approached me, when he lunged at me. I don't [sic] if it happened then. But I know I didn't assault him.
>
> (T.114)

SUMMARY OF THE ARGUMENT

Jackson cannot show that his trial counsel was ineffective in failing to request a lesser-included offense instruction. An instruction authorizing the jury to find him guilty of simple assault would have conflicted with his theory of the case, i.e., that he did not assault Mr. Hayes at all. Therefore, Jackson cannot overcome the presumption that the decision not to proffer a simple assault instruction was strategic.

Furthermore, the state contends the verdict is not contrary to the overwhelming weight of the evidence. In light of the proof and the reasonable inferences flowing therefrom, it cannot be said that allowing the verdict to stand would be to sanction an unconscionable injustice.

PROPOSITION ONE:

JACKSON CANNOT SHOW THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LESSER-INCLUDED OFFENSE INSTRUCTION

Jackson first contends his trial counsel rendered ineffective assistance by failing to submit an instruction authorizing the jury to find him guilty of the lesser-included offense of simple assault. It is well-settled that to prevail on such a claim, the defendant bears the burden of proving that his counsel's performance was so deficient as to cause prejudice to the defense. *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss.App.1999), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defense must overcome the strong presumption that counsel's performance fell within the broad parameters of reasonable professional assistance. Furthermore, "[t]here exists a 'strong presumption that the attorney's conduct falls within the wide range of reasonable professional conduct and .... that all decisions made during the course of trial were strategic.'" *Crosby v. State*, 16 So.2d 74, 79 (Miss.2009), quoting *Jones v. State*, 970 So.2d 1316, 1318 (Miss.App.2007). To satisfy the prejudice prong, the defendant must show a reasonable probability that, but for his counsel's lapses, the outcome of the trial would have been different. *Colenburg*, 735 So.2d at 1102-03.

Jackson's defense was that the stabbing might have been accidental or committed in self-defense. (T.124-25) Jackson testified unequivocally that he did not assault Mr. Hayes at all. (T.114) Thus, Jackson's theory of the case was inconsistent with a finding of guilt of simple assault.

Addressing a similar issue, this Court held in *Long v. State*, 934 So.2d 313,

318 (Miss.App.2006), that the appellant had failed to overcome the presumption that trial counsel's failure to request a lesser-included offense instruction was strategic. In *Long*, as in this case, the defendant's "theory and defense were that the State did not prove its case," not that the defendant had merely committed the lesser-included offense. "Therefore, this was proper trial strategy, either all or nothing– guilty or aquittal." *Id.* The same rationale should apply here. Accord, *Ravencraft v. State*, 989 So.2d 437, 443 (Miss.App.2008) (appellant failed to overcome presumption that trial counsel acted strategically in declining to submit a manslaughter instruction in a murder case). See also *Neal v. State*, 15 So.3d 388, 406 (Miss.2009), quoting Smiley v. State, 815 So.2d 1140, 1148 (Miss.2002) (trial counsel's decision not to request a jury instruction falls within the realm of trial strategy and therefore is not subject to review).

A finding of guilty of simple assault would have been inconsistent with the Jackson's defense.[1] Under these circumstances, Jackson cannot overcome the presumption that his trial counsel's decision on this issue was tactical. For these reasons, Jackson's first proposition should be denied.

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[1]For the sake of argument, the state points out that Jackson has not disputed the character of the stick as a deadly weapon. Rather, in his brief, he challenges the proof of the severity of the victim's injuries. (Brief for Appellant 6-7) This argument overlooks the uncontested fact that because a deadly weapon was used, the state was required to show only that the defendant purposely and knowingly caused "bodily injury" as opposed to "serious bodily injury." (C.P.3, 14) Moreover, the fact that a deadly weapon was employed signified that no rational jury could have found Jackson guilty of simple assault and not guilty of aggravated assault. *Stubbs v. State*, 441 So.2d 1386, 1389 (Miss.1985).

PROPOSITION TWO:

THE VERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Finally, Jackson challenges the weight of the evidence undergirding his conviction. To prevail, he must satisfy the following formidable standard of review:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is also well settled. "[T]his 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." *Collins v. State*, 757 So.2d 335, 337(¶ 5) (Miss.Ct.App.2000) (quoting *Dudley v. State*, 719 So.2d 180, 182(¶ 9) (Miss.1998)). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Collins*, 757 So.2d at 337(¶ 5) (citing *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992)). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Collins*, 757 So.2d at 337(¶ 5) (quoting *Dudley*, 719 So.2d at 182).
>
> *Carle v. State*, 864 So.2d 993, 998 (Miss.App.2004).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As the Mississippi Supreme Court reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

We incorporate by reference the proof set out in our Statement of Substantive Facts to support our position that the prosecution presented substantial credible evidence that Jackson purposely and knowingly caused bodily injury to the victim with a deadly weapon, that the action was not accidental[2] and that it was not committed in necessary self-defense. The defendant's attempt to establish these defenses was properly evaluated by the jurors. The fact that they found adversely to Jackson gives him no basis for complaint on appeal.

For these reasons, Jackson's final proposition should be denied.

CONCLUSION

The state respectfully submits the arguments presented by Jackson are without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
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[2]Dr. Ferman testified that the amount of force used to produce this injury signified that it had not been caused accidentally. (T.97)

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 **BRIEF FOR THE APPELLEE** to the following:

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