

2009-KA-0606-COAT

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICKY M. JACKSON

APPELLANT

V.

NO. 2009-KA-0606-COA

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.

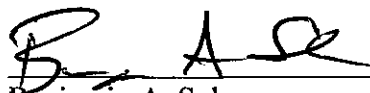
1. State of Mississippi
2. Ricky M. Jackson, Appellant
3. Honorable Dewitt (Dee) T. Bates, Jr., District Attorney
4. Honorable David Strong, Circuit Court Judge

This the 31 day of August, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICKY M. JACKSON

APPELLANT

V.

NO. 2009-KA-00606-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1

JACKSON'S TRIAL COUNSEL WAS INEFFECTIVE BY NOT SEEKING A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT.

ISSUE NO. 2

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE THAT JACKSON COMMITTED AN AGGRAVATED ASSAULT AGAINST WILLIE HAYES.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Pike County, Mississippi, and a judgment of conviction for the crime of Aggravated Assault. Ricky M. Jackson was sentenced to twenty (20) years in the custody of the Department of Corrections with five (5) years suspended and a fine of \$5,000.00 following a jury trial on March 24, 2009, Honorable David H. Strong Jr., presiding. Jackson is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On August 8, 2008, Ricky Jackson [hereinafter Jackson] went to Wal-mart in McComb, Mississippi, to get a backpack and some toiletry items. Tr. 110. According to the testimony of Jackson, Willie Hayes [hereinafter Willie] and his wife Tomeka Hayes [hereinafter Tomeka] were also in Wal-Mart on August 8th. *Id.*

Jackson testified that as he walked by Willie and Tomeka, Willie tried to spit on him. *Id.* Willie in attempting to spit on Jackson, spit on his wife. *Id.* Jackson continued to state that Willie tried to hit him three or four times. *Id.* According to Jackson, Willie was lunging at him with his face. Tr. 113. Jackson blocked all of Willie's attempts to hit him. Tr. 110. Jackson stated that Willie even tried to hit Jackson with his cell phone. *Id.*

Jackson declared that Willie at some point reached down by his side like he was reaching for a gun. *Id.* At that point Jackson turned and walked away. *Id.* Jackson then went and paid for his backpack and toiletry items and walked out of Wal-mart. *Id.*

Jackson stated on cross-examination that he does not know how the small stick wound up in Willie's cheek. Tr. 114. Jackson declared that he does keep a few items in his pockets, including toothpicks, wooden brush, and a pen. *Id.* Jackson believes one the these items could have came out of his pocket while Willie was lunging at him during the minor altercation. *Id.* However, Jackson is not completely sure that the item came from him or out of his pocket. *Id.*

According to Willie, he and his wife walking into the food court side of Wal-mart. Tr. 73. Willie gave his wife some money to get some bubble gum out of the bubble gum machine. *Id.* As Willie's wife, Tomeka, was getting some bubble gum, Willie noticed Jackson standing over to his left. Tr. 74.

Willie and Tomeka continued to shop in Wal-mart and met each other in the ladies' department. Tr. 75. As Willie and Tomeka are looking around in the ladies' department, they saw Jackson coming toward them. Tr. 77. Willie claims in his testimony that Jackson was coming straight at him between the clothes racks. *Id.* Willie further claims that Jackson moved a buggy out of the way and leaned over to tell him something. *Id.* However, Willie alleges that Jackson spat in his face.

Willie then lunged at him to hit him back. *Id.* Willie stated that he put his hands on Jackson but did not hit him the way he wanted to hit him. *Id.* Willie stated that Jackson then went on about his business. *Id.* It was only later when someone in the store saw that Willie had some object lodged in his face. *Id.* Willie then went to hospital where a doctor removed the small stick from his cheek.

Jackson was subsequently arrested a few hours later and charged with aggravated assault.

SUMMARY OF THE ARGUMENT

Jackson's trial counsel was ineffective for not requesting a jury instruction on simple assault. Simple assault is clearly encompassed within the elements of aggravated assault. The main difference between aggravated assault and simple assault is whether the result has serious bodily injury.

Willie Hayes did not have a serious bodily injury. According to the doctor that treated Willie, the sinus had not been punctured, nor was the bone in the cheek broken. The doctor just merely had to pulled the small stick out of Willie's cheek. The jury should have had the opportunity to consider the simple assault instruction. Failure to seek proper jury instructions is a fundamental right effecting a defendant's constitutional right to a fair trial, as a defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Green v. State*, 884 So. 2d 733, 735-38 (Miss 2004).

Also, in the alternative, Jackson asserts that the verdict for aggravated assault was against the overwhelming weight of the evidence. The evidence does not show that Jackson intended to stab Willie with the small stick. Furthermore, through Willie's own testimony he did not see Jackson even stab him with the small stick. The verdict was against the weight of the evidence. Jackson asks that the court reverse and remand his case for a new trial.

ARGUMENT

ISSUE NO. 1

JACKSON'S TRIAL COUNSEL WAS INEFFECTIVE BY NOT SEEKING A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT.

The evidence presented to the court provided a basis for a lesser included instruction of simple assault to have been offered to the jury during their deliberations. Willie, Tomeka, and Jackson all stated that an altercation occurred and the jury should have had the opportunity to consider a simple assault instruction.

“If there is any evidence which would support a conviction of a lesser-included offense, an instruction should be given.” *Graham v. State*, 582 So. 2d 1014, 1018 (Miss. 1991). It is well established that:

[A] lesser included offense instruction should be granted unless the trial judge -- and ultimately this Court -- can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge). *Graham v. State*, 582 So. 2d 1014, 1017 (Miss. 1991), citing *Gates v. State*, 484 So. 2d 1002, 1004 (Miss. 1986).

Under the facts presented in this case, there was a factual basis for a simple assault jury instruction, under **Mississippi Code Annotated Section 97-3-7 (Supp. 1994)**. Looking at the section of the Mississippi Code Annotated pertaining to simple and aggravated assault is as follows:

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

(2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; and ...

Miss.Code Ann. § 97-3-7 (Supp.1994).

“Simple assault is clearly contained within aggravated assault, the main difference pertaining to whether serious bodily injury resulted.” *Odom v. State*, 767 So.2d 242, 246 (Miss. App. 2000). In the case at bar, a jury instruction should have been before the jury. No testimony was offered that explained how the small stick ended up in Willie’s cheek. Willie did not notice the small stick in his cheek, until it was brought to his attention by an onlooker. Tr. 77. Tomeka also did not see how the small wooden stick was inserted into Willie’s cheek. Tr. 100-01. Furthermore, Jackson himself was confused how the small stick ended up in the cheek of Willie. Tr. 114.

Doctor Brett Ferman treated Willie at the hospital. Tr. 95. Doctor Ferman indicated that the small stick in Willie’s face did not project into the sinus or break any bones underneath the skin. *Id.* He removed the stick and applied antibiotics and put in there to help the healing process. Tr. 96. The doctor indicated that the injury could have been fatal, nevertheless, the injury was a very minor wound. Tr. 97. The doctor stated the if the injury

had been closer to the eye, the injury might have been serious. *Id.* However, the injury was not near the eye and was not serious. In fact if the small stick was a few inches the other way, it would have missed Willie's cheek all together.

In the *Odom* case, the State presented a witness that stated there was serious bodily injury, and the defense brought forth a witness that the injuries were not that serious. The Mississippi Court of Appeals held that the trial judge was proper in granting the simple assault instruction. *Odom*, 767 So.2d at 246. As in the case at bar, the injuries to Willie were not serious. Since the injuries to Willie were not serious, as in *Odom*, Jackson should have had the option to present the jury with a simple assault jury instruction.

Failure to seek proper jury instructions is a fundamental right effecting a defendant's constitutional right to a fair trial, as a defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Green v. State*, 884 So. 2d 733, 735-38 (Miss 2004).

In *Madison v. State* , 932 So. 2d 252, 255 (Miss. App. 2006), the court reiterated:

[the Supreme] Court applies the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under *Strickland*, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). This Court examines the totality of the circumstances in determining whether counsel was effective.

Id.

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether:

(a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed.

Id. The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

The prejudice to Jackson under the *Strickland* test was that the jury was simply not given the opportunity to consider the lesser offense of simple assault. The fair result would be a new trial. *Havard v. State*, 928 So. 2d 771, 789-90 (Miss. 2006).

ISSUE NO. 2

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE THAT JACKSON COMMITTED AN AGGRAVATED ASSAULT AGAINST WILLIE HAYES.

Should this Court reject Jackson's contention that he was entitled to a simple assault jury instruction, Jackson asserts, in the alternative, that the verdict for aggravated assault was against the overwhelming weight of the evidence.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical

thirteenth juror.” *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). “If, in this position, the Court disagrees with the verdict of the jury, ‘the proper remedy is to grant a new trial.’” *Id.* In the instant case, the overwhelming weight of the evidence established that Jackson did not commit an aggravated assault against Willie Hayes.

The evidence is not present that shows that Jackson actually stuck the small wooden stick in Willie’s cheek. Through Willie’s own testimony, he stated that he lunged at Jackson trying to hit Jackson. Tr. 77. Besides, it was not until after someone noticed the object in his cheek, that Willie realized he had a small object sticking out of his cheek. *Id.*

Furthermore, when Willie was asked on redirect how he would characterize whether he lunged at Jackson or whether he was hitting Jackson, Willie replied, “[l]unging at him. When I lunged at him to hit him, that’s when he hit me, defending himself, after he spit in my face.” Tr. 92. Willie never states that he saw Jackson try to stick him with a small stick in the cheek.

The evidence is not present that proves that Jackson intended to stab Willie with the small stick. It is possible that Willie, while lunging at Jackson, could have stuck himself with a small stick in the cheek. Stranger things have happened. The video from security cameras at Wal-mart were inadequate to show exactly what happen at the alleged incident. The only evidence introduced was that of Willie, his wife Tomeka, and that of Jackson, none of which ever saw Jackson put the small wooden stick in Willie’s cheek.

In light of the above-detailed evidence, the verdict reached in the instant case is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Therefore, the trial court erred in denying Jackson's motion for a new trial, and this Court should reverse Jackson's conviction and remand this case for a new trial.

CONCLUSION

Ricky Jackson is entitled to have his aggravated assault conviction reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Ricky M. Jackson, Appellant

BY: 

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CERTIFICATE OF SERVICE

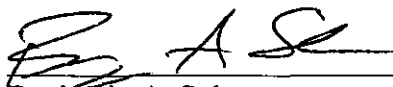
I, Benjamin A. Suber, Counsel for Ricky M. Jackson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge
McComb, MS 38649

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This the 31 day of August, 2009.


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