IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES EARL BOYD — APPELLANT

VS. — NO. 2009-KA-0918

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

THE JURY WAS PROPERLY INSTRUCTED.

STATEMENT OF THE FACTS

On March 29, 2008, Dr. Thomas Vincent was working in the emergency room and treated Wanda Sherrod who had multiple stab wounds, sixteen of which he classified as significant wounds. (Transcript p. 138 - 139). On that same date, Officer Scott Glasgow of the Columbus Police Department was called the scene of a stabbing. (Transcript p. 216). On his way to the scene, he noticed someone matching the description of the alleged stabber walking down the street so he stopped his car to question the man. (Transcript p. 216). He asked the Appellant, James Earl Boyd, for his name, noticing that the Appellant's pants had blood on them. (Transcript p. 216-17). The Appellant responded, "I was defending myself. They were getting my money." (Transcript p. 217). After an investigation, the Appellant was arrested, indicted, and tried for aggravated assault.

During trial, the victim, Wanda Sherrod testified that she was sitting on her mother's porch with her mother, four-year-old grandson, and fourteen-year-old nephew when her cousin, the Appellant, approached the house. (Transcript p. 163). She testified that he sat down and spoke to everyone. (Transcript p. 167). She further testified that when she got up shortly thereafter to get her grandson some juice, the Appellant said "hold up Wanda, I got something for you" and began stabbing her. (Transcript p. 167 - 169). He stabbed her multiple times as she tried to push her grandson out of the way. (Transcript p. 168 - 169). Bettie Pratt, Ms. Sherrod's mother, provided similar testimony. Ms. Pratt's neighbor, Linda Tate, testified that she was sitting on her porch when she heard a scream and looked up to see the Appellant stabbing Ms. Sherrod. (Transcript p. 202). She testified that she ran inside to get her husband to help and called 911. (Transcript p. 203 - 204). Ms. Tate's husband, Jesse Tate, testified that when he ran outside, he also saw the Appellant stabbing Ms. Sherrod. (Transcript p. 209 - 211). Mr. Tate testified that he yelled for the Appellant to stop and ran to the Appellant pushing him which caused the knife to fall out of his hand. (Transcript p. 209 - 210). Mr. Tate further testified that he kicked the knife away and that the Appellant just walked away as if nothing had happened. (Transcript p. 210).

The Appellant was convicted of aggravated assault and was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The Appellant is procedurally barred from raising his issue regarding the "elements" jury instruction as he did not object to the "elements" instruction given nor did he submit another instruction to the trial court for its consideration. Additionally, there is no plain error as a fundamental right was not jeopardized. The jury was properly instructed. If, however, this Court holds that giving the instruction in question was error, it was at worst, harmless error as the record

indicates that the instruction did not contribute to the verdict obtained and as there was overwhelming evidence of guilt.

ARGUMENT

THE JURY WAS PROPERLY INSTRUCTED.

The Appellant questions "whether the trial court erred in failing to instruct the jury that in an aggravated assault prosecution that it must find that the instrument used was a deadly weapon." (Appellant's Brief p. 1). However, the Appellant is procedurally barred from making this argument. First, he did not object to the instruction submitted by the State. *See Jackson v. State*, 1 So.3d 921, 930 (Miss. Ct. App. 2008) (holding that the defendant was procedurally barred from arguing on appeal that granting a jury instruction was improper when the defendant did not object to the instruction at trial). Secondly, he did not submit his own instruction correcting the alleged error in the State's submitted instruction. *See Neal v. State*, 15 So.3d 388, 408 (Miss. 2009) (holding that the defendant could not argue that he was entitled to a specific instruction when he did not tender the instruction to the trial court). Lastly, he did not present the matter to the trial judge in his motion for new trial. Mississippi law is clear that "a trial court is not put in error unless it had an opportunity to pass on the question." *Swington v. State*, 742 So.2d 1106, 1110 (Miss. 1999).

The State recognizes, however, that "the procedural bar is lifted in the event that the instruction constitutes plain error." *Heidelberg v. State*, 976 So.2d 948, 949 (Miss. Ct. App. 2007) (citing *Berry v. State*, 728 So.2d 568, 571 (Miss. 1999)). "To rise to the level of plain error, a fundamental right of the defendant must have been violated." *Id.* In the case at hand, the Appellant's fundamental rights were not violated. Again the State recognizes that "failure to submit to the jury the essential elements of the crime is 'fundamental' error." *Id.* (quoting *Hunter v. State*, 684 So.2d 625, 636 (Miss. 1996)). However, the jury was fully instructed regarding the essential

elements of the crime of aggravated assault. "The elements of aggravated assault are (1) attempting to cause or causing serious bodily injury to another purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life or (2) attempting to cause or purposely or knowingly causing bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm. *Conerly v. State*, 879 So.2d 1101, 1108(Miss. Ct. App. 2004) (citing Miss. Code Ann. §97-3-7 (Supp. 2003)). The "elements" instruction given states as follows:

> The Court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that on or about March 29, 2008, James Earl Boyd, did unlawfully, willfully, feloniously, purposely, and knowingly cause bodily injury to Wanda Sherrod with a knife, without authority of law and not in necessary self-defense, then you shall find the defendant guilty as charged.
> If the State fails to prove any one or more of the above elements beyond a reasonable doubt, then you should find the defendant not guilty.

(Record p. 81).

However, if this Honorable Court were to find that the instruction given did not adequately set forth the elements of aggravated assault, the State would argue that granting the instruction was, at worst, harmless error. In so arguing, the State would rely on the case of *Conlerly v. State*, a case in which the defendant was convicted of two counts of simple assault on a law enforcement officer and one count of aggravated assault of a law enforcement officer. 879 So.2d 1101 (Miss. Ct. App. 2004). The defendant in *Conerly* argued that the trial court failed to instruct the jury with regard to the elements of aggravated assault and the Court of Appeals agreed holding that "the instructions when read and considered together did not inform the jury of the elements which it had to find before it could convict [the defendant] of aggravated assault." *Id.* In its analysis of this issue the Court of Appeals held that:

> The failure, however, to given an instruction on an element of an charge does not

> mean that the State failed to prove the element. Our supreme court has held that the failure to give an instruction on an element of a capital murder charge is subject to the harmless error analysis. *Kolber v. State*, 829 So.2d 29, 51 (Miss. 2002).

Id. at 1107. The Court of Appeals then held that the "test for determining whether a constitutional error is harmless is whether 'it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 1108 (quoting *Kolberg*, 829 So.2d at 50). In its analysis of this test the Court held as follows:

> The crime of aggravated assault is not comprised of numerous or complex elements. And the facts of this case are simple. . . . Therefore, although the trial court failed to instruct the jury of the elements of aggravated assault, we can say with confidence that it appears beyond a reasonable doubt that the absence of the element instruction did not cause or contribute to the jury reaching the verdict that it reached. Consequently, we find this error to be harmless.

Id. As in *Conerly*, the facts of this case are simple. The Appellant came to Ms. Sherrod's mother's house acting very casual and normal and without warning or provocation stabbed Ms. Sherrod countless times with a knife. Moreover, as noted by the *Conerly* Court, the crime of aggravated assault is not comprised of numerous or complex elements. This coupled with the overwhelming evidence of the Appellant's guilt including, but not limited to, the testimony of several eyewitnesses and testimony that the Appellant was found shortly after the commission of the crime in the neighborhood with blood on his clothes fully establishes that the error, if any, was harmless. Additionally, there could be no doubt that the knife in question was "a deadly weapon or other means likely to produce death or serious bodily harm." As previously held by this Court, "even where error has occurred, we will not reverse a conviction when the overwhelming weight of the evidence supports the guilty verdict." *Kolberg*, 829 So.2d at 49 (quoting *Lentz v. State*, 604 So.2d 243, 249 (Miss.1992)).

Furthermore, the Appellant's reliance upon *Williams v. State*, 772 So.2d 406 (Miss. Ct. App.

2000) is misplaced. In this case the defendant was convicted of the crime of armed car jacking. The case was reversed because the indictment was insufficient to charge the defendant with armed car jacking because it "failed to allege the essential elements relative to the alleged use of the knife." *Id.* at 408.

However, the Court of Appeals held that the indictment did sufficiently charge the defendant with car jacking. *Id.* at 409. Thus, the case was reversed and remanded with orders to sentence the defendant for the lesser-included-offense of car jacking. *Id.* at 411.[1] The case at hand is easily distinguishable from *Williams* in that the indictment properly charged the Appellant with aggravated assault. (Record p. 3). As such, there is no reversible error like that in *Williams*.

Accordingly, the Appellant is procedurally barred from raising this issue on appeal as he did not object to the instruction given nor did he submit another instruction to the trial court for its consideration. Additionally, there is no plain error as a fundamental right was not jeopardized. If, however, this Court holds that giving the instruction at issue was error, it was at worst, harmless error as the record indicates beyond a reasonable doubt that the error did not contribute to the verdict obtained and as there was overwhelming evidence of guilt.

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[1] The only issue in *Williams* regarding the jury instruction in light of the Court's holding with regard to the indictment was whether the instruction properly instructed the jury with regard to car jacking. The Court held that "the jury instructions were sufficient to inform the jury of the essential elements of the lesser-included-offense of carjacking" and that "the word 'armed' in the jury instruction and verdict while error is mere surplusage and does not merit reversal." *Williams*, 772 So.2d at 410-11.

CONCLUSION

For the foregoing reasons the State respectfully requests that this Honorable Court affirm the conviction and sentence of James Earl Boyd.

Respectfully submitted,

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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:

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This the 26th day of January, 2010.

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