IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES EARL BOYD — APPELLANT

V. — NO. 2009-KA-0918-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
W. Daniel Hinchcliff, MS Bar [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for James Earl Boyd

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JAMES EARL BOYD	**APPELLANT**
V.	**NO. 2009-KA-0918-SCT**
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. James Earl Boyd, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 16th day of November, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

W. DANIEL HINCHCLIFF
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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BRIEF OF THE APPELLANT

ISSUES

ISSUE NO. 1 : 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.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgement of conviction for the crime of aggravated assault against James Earl Boyd following a jury trial commenced on May 12, 2009, Honorable James T. Kitchens, Jr., Circuit Judge, presiding. Mr. Boyd was thereafter sentenced to a term of twenty years and is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Prior to trial, the trial court entered an order for a mental examination and the evaluation was provided in letter form. James Earl Boyd, ["Boyd"], was found to been suffering "extreme mental or emotional disturbance" at the time of the crime deeming him to have "diminished" capacity to "conform his conduct to the requirements of the law." The report concluded that he was able to distinguish right from wrong at the time of the act, and was able to participate in his defense. (C.P.

31-46, R.E.11-26) The record does not reflect any motion or order thereafter concerning Boyd's ability to assist in his defense. However, Boyd's mental issues continued to be a part of this trial.

During voir dire and pre-trial matters Boyd interrupted the proceedings to indicate he had evidence, questions, and tendered his medications as evidence. (T. 21, 38-40) Boyd's counsel indicated that his client had refused an insanity defense, which Boyd then denied. The trial judge made a finding on record that Boyd seemed to be able to understand questions and understand what was going on, and that he could distinguish right from wrong. (T. 40, 44) Boyd protested the court's findings by dropping his pants during his counsels voir dire. With the jury then removed, he tossed his trousers to the judge. (T. 83-84) Counsel moved for a mistrial. (T. 101) The trial judge made a finding that Boyd was trying to delay the trial and to manipulate the system. When the jury returned, the court questioned the jurors whether they could not be fair based on Boyd's actions and not be influenced. (T. 105) A jury was then chosen without objection and seated.

Proofs began with Dr. Thomas Vincent, ["Vincent"], an emergency surgeon who treated Wanda Sherrod, ["Sherrod"], the victim. (T. 136-138) She was treated for several knife wounds, sixteen of the injuries requiring either sutures or staples. (T. 140-143) Some of the wounds were labeled as "significant." (T. 140) Asked if the wounds were "life threatening" Dr. Vincent replied "I don't know. Were they a little deeper and so forth they certainly could have been..." (T. 154) Defense counsel elicited that Dr. Vincent could not make a determination whether the wounds were indicative of Sherrod being victim or aggressor. (T. 155)

Ms. Sherrod was next to testify. She related that she was sitting on her porch with her nephew and grandson when Boyd came by. She had known him all her life and he was a frequent visitor. (T. 161-165) Boyd borrowed money from Sherrod and called her to ask for more. She told Boyd she had no money to give him, and shortly thereafter he came by and sat down. (T. 166-167) As Sherrod

arose to go in her dwelling, Boyd said "Hold up Wanda, I got something for you." (T. 168) He then came at her with a knife. He cut her several times, following her and finally standing over her. Sherrod's calls for help produced a neighbor. At this point, Boyd simply walked away. As he did, he dropped the knife, which Sherrod identified. (T. 169-172) Ms. Sherrod was admitted to the hospital overnight, and had continued medical issues with the nerves and ligaments in her hands (T. 172)

Sherrod told Boyd's attorney that Boyd received a "VA check" and that he often gave her money. She has also given him money. (T. 175-177) She remembered telling the investigators that Boyd "had mental problems but that he wasn't crazy." She thought Boyd may be acting crazy so that the courts would go easier on him. (T. 179)

Bettie Pratt, ["Pratt"], Sherrod's mother, had also known Boyd all his life and he came to the house often. (T. 182-185) Sherrod was on the front porch with the two young boys when Boyd came up. She heard him say "Wanda, I got something for you." (T. 1860) To her it appeared that Boyd then began to hit Sherrod. (T. 187) She then realized that Boyd "was steady stabbing her with a knife." A neighbor then came up and appeared to kick the knife from Boyd's hand.(T. 190) She did not see Sherrod with any weapon, nor did she see Sherrod hit Boyd.

On cross examination, Pratt confirmed that Boyd got a "VA check" and often gave people money. Sherrod had often driven Boyd to doctor's appointments and elsewhere. (T. 191-196)

Linda Tate lived across from Bettie Pratt. On the date in question, she was on her porch when she heard Sherrod scream. She saw Boyd with a knife and ran to tell her husband, who ran to the Pratt house and kicked the knife from Boyd's hand. Boyd then walked away as if "he ain't even did nothing." (T. 200-205) Her husband Jessie confirmed that he saw Boyd stabbing Sherrod and ran to her aid. He recalled that Boyd dropped the knife and then he kicked it out of the way. (T. 209-210)

Scott Glascow with the Columbus Police Department, responded to a call of a stabbing and found Boyd walking near the scene. Boyd matched the description and had blood on him. When he asked Boyd his name, Boyd answered: "I was defending myself. They were getting my money." (T. 215-217) Boyd was able to understand and follow his instructions. The officer then went to the scene. Travis Robertson, an investigator, took pictures of the victim, the scene and collected the knife, all of which were admitted into evidence. (T. 224-229) Boyd's hands were bleeding.(T.236)

Upon these proofs the State rested. During the motion for directed verdict, Boyd interrupted to say he was sorry. (T. 239) The motion averred that the State had failed to prove every element of the crime, but was denied. Boyd attempted to continue his intercourse with the court, again indicating he just wanted all of this to go away. He claimed to be as "insane as a boll weevil." (T. 242) The court advised Boyd pursuant to *Culverson* and Boyd chose to not testify.

After closing arguments and the jury had retired to consider it's verdict, Boyd continued his entreaties to the trial judge who again iterated that Boyd had been determined to know right from wrong and understood the legal system. (T. 280-281).

The jury found Boyd guilty of aggravated assault and he was sentenced to a term of twenty years.

SUMMARY OF THE ARGUMENT

The instruction submitted to the jury failed to require that the jury find every element of the crime of aggravated assault, omitting the required element that the jury determine that the knife used was a deadly weapon. As Boyd was indicted for causing bodily injury with a deadly weapon, such a finding was a necessity. Without a jury finding that the knife used was deadly weapon, the State has accordingly failed to prove an essential element of the crime.

ARGUMENT

ISSUE NO. 1 : 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.

The crime of aggravated assault, as indicted in this case, required a finding by the jury that the weapon used was a deadly weapon. The indictment against Boyd read:

> ...did unlawfully, wilfully and feloniously, purposely and knowingly cause bodily injury to Wanda Sherrod, a human being, with a deadly weapon, to wit: a knife, without authority of law and not in necessary self defense...

The proof that the knife was in fact a deadly weapon is a jury question, the absence of which constitutes the failure of the state to prove each and every element of the crime.

> We have often held that the question as to whether or not the instrument used is a deadly weapon or the force used was likely to produce death are questions of fact for the determination of the jury.

Shanklin v. State, 290 So.2d 625, 627 (Miss. 1974) The knife used was not a deadly weapon as defined by statute. Knifes which are deadly weapons, as defined by statute are limited to very specific types of knife; "bowie knife, dirk knife, butcher knife, [or] switchblade knife..."[1] This definition remains consistent in other statutes defining deadly weapons: M.C.A §97-37-3, M.C.A § 97-37-5, M.C.A. §97-37-9, M.C.A. §97-37-11, M.C.A. §97-37-17, M.C.A § 97-37-19. Clearly, a steak knife, or table knife, as was used herein meets the definition. There was no proof offered to show the knife used was among those proscribed by statute.

1

Except as otherwise provided in Section 45-9-101, any person who carries, concealed in whole or in part, any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver, or any rifle with a barrel of less than sixteen (16) inches in length, or any shotgun with a barrel of less than eighteen (18) inches in length, machine gun or any fully automatic firearm or deadly weapon, or any muffler or silencer for any firearm, whether or not it is accompanied by a firearm, or uses or attempts to use against another person any imitation firearm, shall upon conviction be punished as follows: Miss. Code Ann. § 97-37-1 (1)

The law is trenchant, a knife not defined as a deadly weapon by statute, is not a deadly weapon until a properly instructed jury says it is.

> As to any other instrumentality used in the commission of an assault and battery, the question of whether it is a deadly weapon is an issue of fact for determination by the jury.

Batteast v. State, 60 So. 2d 814 (Miss. 1952). However, when the instructions given the jury in this case are examined, it is readily evident the jury was never presented with the issue. The elements instruction only required that the jury find the instrument to be a knife, but left the question unasked, do you find this particular knife to be a deadly weapon. (C.P. 81, R.E. 27) A proper instruction was cited and affirmed in a recent case before the Mississippi Court of Appeals:

> Yucaitis next argues that the trial court erred in granting jury instruction S-1. He claims that the trial court, in granting the instruction, removed from the jury's province the determination of whether a knife was used during the commission of the crime, thus making the instruction peremptory in nature. Yucaitis also contends that the instruction conflicted with other instructions given by the court.
>
> Instruction S-1 instructed the jury as follows:
>
> It is a question of fact for the jury to determine whether the knife used in this case was a deadly weapon in the manner claimed to have been used in this case.
>
> A deadly weapon may be defined as any object, article, or means which, when used as a weapon is, under the existing circumstances, reasonably capable or likely to produce death or serious bodily harm to a human being upon whom the object, article or means is used as a weapon.

Yucaitis v. State, 909 So.2d 166, 169 (Miss. App. 2005)

Where the jury is not properly instructed on the question of whether the knife used was a deadly weapon, the cause must be reversed and remanded. This was reaffirmed in another case, virtually on all fours with the present case, before the Court of Appeals. In the case of *Williams v.*

State, 772 (Miss. App. 2000). In that case Williams was charged with armed car-jacking, a statute requiring the use of a deadly weapon, or alternatively that the object used be capable of inflicting death or serious bodily harm. The instruction in that matter, as did the instruction in the present cause, only required the jury to find a knife was used, without that knife being specifically found to be a deadly weapon. The Court found that instruction failed to charge Williams with an essential element of the crime; that if it found a knife was used, it must then "determine that the knife was a deadly weapon." The Court then enunciated an axiomatic principle, that "if the trial judge fails to present the jury with every essential element of the crime, a fundamental error has occurred." *Williams, Id, at* 410. There the Court relied on the law as confirmed in *Duplantis v. State,* 708 So. 2d 1327 (Miss. 1998).

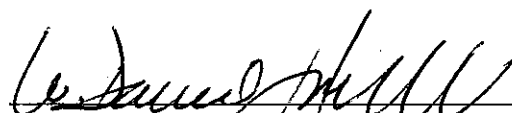
Accordingly, where the jury has not had the opportunity to determine an essential element of the crime, the error is fundamental and reversal is required. And, as in *Williams, Id.* Upon remand, Boyd should be re-sentenced under M.C.A. § 97-3-7(1); simple assault.

CONCLUSION

Appellant respectfully asserts that, based upon the foregoing argument, that this cause must be reversed and remanded for sentencing under the lesser included offense of simple assault.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. 2470

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for James Earl Boyd, 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:

Honorable James T. Kitchens, Jr.
Circuit Court Judge
P.O. Box 524
Columbus, MS 39703

Honorable Forrest Allgood
District Attorney, District 16
Post Office Box 1044
Columbus, MS 39703

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 16th day of November, 2009.

W. DANIEL HINCHCLIFF
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200