

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

YALANDA JOHNSON

APPELLANT

VS.

NO. 2009-KA-1287-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LA DONNA C. HOLLAND
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 ISSUES

- I. THE APPELLANT CANNOT CLAIM THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BASED ON A JURY INSTRUCTION THAT SHE SUBMITTED.
- II. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.
- III. THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

Charity Plaisance, area supervisor for Speedee Cash, received information from an employee that another Speedee Cash employee, Yalanda Johnson, had stolen office equipment and written loans to her mother and step-father without approval from a supervisor. T. 130-131. Plaisance went to Speedee Cash to confront Johnson about the alleged theft and breach of company policy in writing the loans to her parents. T. 131. Johnson denied stealing the calculator and claimed that a co-worker processed the loan for her mother. T. 131-132. Plaisance advised Johnson that she knew that Johnson ordered the calculator, that it was delivered that day, and that it had been placed in the trunk

of Johnson's mother's car that day. T. 132. Plaisance further advised Johnson that she needed to produce the calculator and the money for the unapproved loans. T. 132. A heated discussion between the two commenced. Johnson began screaming at Plaisance, who Johnson had backed up against a filing cabinet, and the argument turned violent when Johnson pushed Plaisance and started hitting her. T. 133. Plaisance put her hands in front of her face and Johnson backed her up to a window where she then took Plaisance's head and hit against the frame of a neon sign in the window. T. 133. The victim then fell behind a desk, and Johnson picked up a telephone and hit the victim in the head several times with the receiver. T. 133. The victim was still on the ground when Johnson telephoned two different people advising that she would need to be picked up from jail "because she had just beat the hell out of her supervisor." T. 133. Plaisance got off the floor and walked to the counter to make a phone call after Johnson left the store. T. 133. However, before Plaisance could call for help, Johnson came back in the store screaming, backed Plaisance up against a wall behind the counter, hit her some more, then picked up stapler and hit her with it. T. 134.

Plaisance was taken by ambulance to the hospital. T. 139. She received eight staples in her head to close two lacerations. T. 139. Johnson was indicted for and tried and found guilty of aggravated assault. She was sentenced to ten years with seven suspended. C.P. 77.

SUMMARY OF ARGUMENT

Johnson claims that instruction D-15 substantively amended the indictment. However, Johnson cannot complain on appeal of an instruction which she requested and which was granted at trial. Additionally, the State's elements instruction conformed to the variety of aggravated assault alleged in the indictment. The State's proof never varied from that which was charged in the indictment, and the jury convicted Johnson of the form of aggravated assault alleged in the indictment.

The State presented legally sufficient proof of each element of the crime charged. The victim's testimony alone proved the elements of aggravated assault. The jury also heard testimony from two witnesses who viewed portions of the beating. Also, the jury had the benefit of a video from which it could at least audibly determine Johnson's intent.

The verdict is not against the weight of the evidence. While some conflict arose between the victim's testimony and Johnson's testimony, the duty of resolving such conflict lies within the sole province of the jury. It is not for a reviewing court to determine which witnesses to believe, so long as credible evidence supports the jury's verdict.

ARGUMENT

I. THE APPELLANT CANNOT CLAIM THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BASED ON A JURY INSTRUCTION THAT SHE SUBMITTED.

Johnson was indicted under Mississippi Code Annotated § 97-3-7(2)(a) for attempting to cause serious bodily injury to Plaisance. Although the indictment did not list the subsection, it tracked the language of subsection (2)(a) as follows by stating,

. . . Yolanda Johnson did wilfully, unlawfully, and feloniously attempt to cause serious bodily injury to one Charity Plaisance by beating her about the head with a telephone and slamming her head against a hard object, contrary to and in violation of Section 97-3-7 of the Mississippi Code of 1972, and against the peace and dignity of the State of Mississippi.

C.P. 4. "A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another . . ." Miss. Code Ann. §97-3-7(2)(a).

Johnson claims on appeal that the trial court substantively amended the indictment and erroneously allowed the State to proceed under Mississippi Code Annotated §97-3-7(2)(b) by granting instruction D-15 which stated, "It is a question of fact for you to determine whether the telephone receiver and/or the neon sign casing, claimed to have been used by Johnson, constituted

a means likely to produce death or serious bodily injury.” C.P. 49. It is well-settled that an appellant cannot complain on appeal of an instruction which he requested and which was granted at trial. *Caston v. State*, 823 So.2d 473, 508 (¶121) (Miss. 2002). The appellant almost, but not quite, acknowledges this rule of law by way of footnote. Specifically, Johnson acknowledges that she offered the instruction in question, but claims that “in light of the trial court’s ruling that the State could proceed under Subsection (2)(b), the defense’s offering of the instruction was required as an attempt to inform the jury that it may or may not determine that the phone or sign was a deadly weapon. In sum, the indictment was effectively amended by the trial court’s ruling, and thus required Instruction 9.” Appellant’s brief at 9. The appellant misconstrues the trial court’s ruling. The trial court explicitly stated that it would not amend the indictment and acknowledged on the record that the State was proceeding under Mississippi Code Annotated §97-3-7(2)(a). T. 170-171.

Defense counsel moved for a directed verdict at the close of the State’s case, arguing that the State failed to prove that the victim suffered a serious injury under Mississippi Code Annotated §97-3-7(2)(a). T. 163-164. The State responded that it was not required to prove a serious injury, but instead it was for the jury to decide whether the jury believed that Johnson was attempting to cause serious injury. T. 165. In denying Johnson’s motion for directed verdict, the trial court stated that “it is within the province of the jury to determine whether or not the telephone was a sufficient bludgeoning weapon” T. 170. Defense counsel then asked if the court was amending the indictment from charging subsection (2)(a) to charging subsection (2)(b). The court responded, “I’m not trying to change - the indictment is what it is. It’s not going to be changed substantively.” T. 170. The State repeated that it was traveling under subsection (2)(a), yet defense counsel continued to insist that under 2(a) the State would have to prove a serious injury. T. 171. The trial court repeated to defense counsel that subsection (2)(a) includes “attempts to cause serious bodily injury

to another.” T. 171. The following exchange occurred.

BY MS. PETERSON: And I do understand how the Court could come to that reasoning because if you go under 2(b), you don’t even have to have a serious injury. You can just argue the means. If you go under 2(a), you must have a serious bodily injury, and these injuries were not. That is why, you know, we asserted that there was a fatal flaw.

BY THE COURT: Well, now, no, no, you don’t have to have -- you have to have the attempt to cause a serious bodily injury.

BY MS. PETERSON: Right.

T. 170. Despite the extensive discussions during the argument on Johnson’s motion for directed verdict in which the State and trial court repeated that the State was charged with proving that Johnson attempted to cause serious bodily harm, defense counsel maintained throughout that the State was required to prove that the victim actually sustained serious bodily harm. Johnson’s assertion is simply contrary to the plain language of the statute which states, “A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another . . .” Miss. Code Ann. §97-3-7(2)(a). Additionally, with regard to the subsection in question, this Court has stated, “A person is guilty of the crime of aggravated assault whether there is an attempt to cause the serious bodily injury or whether a person actually causes serious bodily injury to another.” *Genry v. State*, 767 So.2d 302, 311 (¶29) (Miss. Ct. App. 2000). Nothing in the trial court’s decision to deny a directed verdict forced defense counsel to request instruction D-15.

The indictment clearly tracked the language of Mississippi Code Annotated §97-3-7(2)(a). Instruction S-1, the elements instruction, also tracked the language of the indictment. As such, the jury was properly instructed on elements of aggravated assault. The trial court cannot be held in error for defense counsel’s submission of instruction D-15.

Johnson's reliance on *Quick v. State* and *Rushing v. State* is misplaced. The juries in *Quick* and *Rushing* were not instructed on the forms of aggravated assault charged in the indictment. Additionally, the erroneous instructions in those cases were submitted by the State. In *Quick v. State*, 569 So.2d 1197 (Miss.1990), the defendant was indicted under §97-3-7(2)(b) but convicted of violating §97-3-7(2)(a). Clearly, in the present case, Johnson was not convicted of an offense for which she was not indicted.

In *Rushing*, the language of the defendant's indictment showed that he was indicted under Mississippi Code Annotated §97-3-7(2)(a). 753 So.2d at 1146 (¶46). However, the elements instruction, which was submitted by the State, omitted the essential element of "serious bodily injury," and also referenced the use of a deadly weapon, an element of subsection (2)(b). *Id.* The *Rushing* court reversed because while *Rushing* was indicted for attempting to cause serious bodily injury under §97-3-7(2)(a), the only aggravated assault instruction given to the jury stated that the State was required to prove that the defendant attempted to cause or in fact purposefully caused bodily injury in violation of §97-3-7(2)(b). The *Rushing* court stated, "The prosecution is held strictly to prove the allegations of the indictment and may not vary from the proof of those allegations unless the variance is a lesser-included-offense." *Id.* at 1146 (¶45). Again, in the present case, the State indicted Johnson for violating §97-3-7(2)(a), the State's aggravated assault instruction only set out the elements of §97-3-7(2)(a), the State's proof did not vary from that allegation, the State throughout closing arguments implored the jury to understand that its case was based on an attempt to cause serious bodily injury, and Johnson was convicted of violating §97-3-7(2)(a).

In summary, the problems presented in *Quick* and *Rushing* did not occur in the present case. To the extent that D-15 was granted in error, such error cannot be attributed to the trial court, as the instruction was offered by the defense.

II. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

In determining whether the State presented legally sufficient evidence to support the jury's verdict, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005).

As previously stated, and as acknowledged by the appellant, there are two ways which one can commit aggravated assault under Mississippi Code Annotated §97-3-7(2)(a). The State's theory at trial was that Johnson attempted to cause serious bodily injury to the victim. The following evidence adduced at trial supports the jury's verdict. During the verbal altercation, the victim began backing up and covering her face as Johnson began to push the victim. T. 133. Johnson backed the victim up against a window and "took my head and was hitting it up against the frame." T. 133. The victim then fell to the floor, and Johnson then beat the victim over the head with a telephone receiver. T. 133. The victim recalled being hit at least six times with the telephone receiver. T. 136. Heather Jordan, who witnessed a portion of the beating, also recalled seeing Johnson beat Plaisance over the head with the telephone receiver about six times. T. 109, 119. In describing the manner in which Johnson struck her with the telephone receiver, Plaisance stated, "She was reaching all the way back behind her arm --behind her back and swinging back down." T. 137. During the beating, Plaisance recalled Johnson yelling that she should just kill Plaisance and get it over with. T. 140. Additionally, at some point in the beating, Johnson can be heard on the videotape played for the jury saying, "I'm gonna kill that fucking ho." Exhibit 11 at approx. 15:49:09. As the victim lie bleeding on the floor, Johnson placed phone calls to two different people, advising them that "they need to come get her out of jail because she had just beat the hell out of her supervisor." T. 133. Johnson briefly exited the

store, and the victim attempted to make a phone call for help. T. 133. Before the victim could make a phone call, Johnson ran back into the store screaming and continued to hit the victim with her hands and with a stapler. T. 134. The beating subsided when three or four men from an adjacent car dealership came in and advised Johnson to calm down. T. 134. Plaisance testified that at no point during the beating did she hit Johnson. T. 138. Instead, as she lay on the floor being beaten, she covered her face and head as best she could in an attempt to ward off the violent blows. T. 133, 138. The only other witnesses who saw portions of the beating, Jordan and Tim Abbott, testified that the victim never touched Johnson, and instead only covered her own face and head for protection. T. 112, 124.

Relying on *Brooks v. State*, 360 So.2d 704 (Miss. 1978), the appellant claims because the victim did not suffer serious bodily injury, the jury could only speculate as to what Johnson's intent was. In *Brooks*, the defendant forced his way into Ms. Garrard's car, stating, "Move over, or I'll beat you up." *Id.* at 705. Brooks "pushed, shoved and struck [Garrard] with his hands and arms, as well as a school book and a notebook." *Id.* Garrard managed to push Brooks out of the car, and Brooks fled the parking lot. *Id.* Garrard's injuries consisted of bruising on the side of her neck. *Id.* The supreme court reversed the aggravated assault conviction, finding that there was insufficient evidence to prove that Brooks intended to cause serious bodily injury to Garrard. *Id.* at 106. The court stated, "There can only be conjecture as to what his intent was as her injuries were not serious." *Id.*

The supreme court briefly addressed the holding in *Brooks* in a later case in which it determined the legal sufficiency of an aggravated assault conviction. In *Jackson v. State*, the defendant beat his ex-wife with his fists and banged her head against a wall. 594 So.2d 20, 22 (Miss. 1992). Although Jackson was charged with violating Mississippi Code Annotated §97-3-7(2)(b), the supreme court contrasted the lack of proof of intent in *Brooks* with the abundant proof of Jackson's

intent.

Johnson's [sic] intent, on the other hand, was clear. He was drunk and violent and pummeled the victim with hands and closed fists because she left him in Columbus and because she telephoned his daddy. He sat astraddle the victim while he hit and cursed her. He later held his hand around her neck while he repeatedly banged her head against the wall. The force exerted was sufficient to place a dent or split in the wall following impact.

Id. at 24.

The proof of intent in the present case is much stronger than in *Brooks*. Brooks was stranger to the victim and, based on the evidence presented, could have attacked her for any number of reasons - in order to steal her car, steal her purse, etc. In any event, there was no proof in *Brooks* that the beating was an attempt to cause serious bodily injury to the victim. In the present case, Johnson's intent is as clear as the defendant's intent in *Jackson*. It is clear that Johnson was furious with Plaisance for confronting her about stealing the calculator and otherwise violating company policy. Unlike the brief encounter in *Brooks*, the beating in the present case went on for several minutes. The lacerations to Johnson's head required staples. Had Plaisance not been crouched in a defensive posture covering her face and head, and had witnesses not come toward the end of the beating, Plaisance's injuries could very well have been much more serious. Further, Johnson essentially voiced her intent in causing Plaisance serious bodily harm as she told her that she may as well kill her and get it over with during the beating. This is not the ambiguous situation presented in *Brooks*. Intent is always a question for the jury. *Chambliss v. State*, 919 So.2d 30, 35 (¶15) (Miss. 2005). "The intent to commit a crime or do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent." *Id.* In the present case, sufficient evidence was presented for the jury to determine that Johnson was attempting to commit serious bodily injury to the victim.

Additionally, unlike Brooks' jury, the jury in the present case was give the option of finding Johnson guilty of only simple assault. By rejecting that option, it is clear that the jury believed that Johnson did in fact intend to cause serious bodily injury to the victim. When viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved beyond a reasonable doubt that Johnson intended to cause serious bodily injury to the victim. Accordingly, Johnson's legal sufficiency argument must fail.

III. THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

In examining a claim that the verdict is against the weight of the evidence, the reviewing court will only disturb a verdict which is so contrary to the weight of the evidence that requiring it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005). The determination of witness credibility lies within the sole province of the jury. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). The jury is also responsible for resolving any conflicts in witness testimony which may arise. *Id.*

Johnson rehashes much of her legal sufficiency argument in claiming that the verdict is against the weight of the evidence. She characterizes the incident as a fight in which the victim received only minor injuries. This was no fight, it was a beating, as the victim never hit Johnson. Johnson admitted this much at trial. The severity of the victim's injuries is also not at issue, as no proof of injury is required when the aggravated assault is based on an *attempt* to cause serious bodily injury. *Ferguson v. State*, 865 So.2d 369, 371 (¶9) (Miss. Ct. App. 2003).

Johnson admitted being the only one to throw punches, and admitted to beating Plaisance over the head with the telephone. T. 187, 199. The only substantial disputes in the evidence were whether Johnson banged Plaisance's head against the frame of the neon sign and whether Johnson hit Plaisance with a stapler. Plaisance testified that Johnson did these things, Johnson denied it. T. 133-

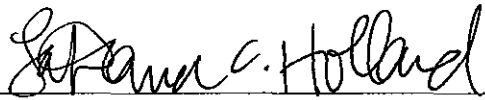
134, 187, 201-202. While admitting to beating the victim with her hands and with a telephone, Johnson claimed that she did not mean to hurt Plaisance, stating, "I would never hurt another human being." T. 188. The evidence showed otherwise. It is not the function of the reviewing court to determine whose testimony to believe. *Smith v. State*, 945 So.2d 414, 421 (¶21) (Miss. Ct. App. 2006) (citing *Taylor v. State*, 744 So.2d 306, 312 (¶17) (Miss. Ct. App. 1999)). So long as substantial credible evidence supports the jury's verdict, the verdict must be affirmed. *Id.* The jury's verdict is not against the weight of the evidence and represents no unconscionable injustice. It must therefore be affirmed.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Johnson's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 
LA DONNA C. HOLLAND
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, LA DONNA C. HOLLAND, 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 David H. Strong, Jr.
Circuit Court Judge
Post Office Drawer 1387
McComb, MS 39649

Honorable Dee Bates
District Attorney
284 East Bay Street
Magnolia, MS 39652

Hunter N. Aikens, Esquire
Attorney at Law
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 4th day of March, 2010.



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

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