**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**YALANDA JOHNSON** **APPELLANT**

**V.** **NO. 2009-KA-1287-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. Yalanda Johnson, Appellant
3. Honorable Dewitt (Dee) T. Bates, Jr., District Attorney
4. Honorable Hon. David H. Strong, Circuit Court Judge

This the 23rd day of November, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### STATE CASES



### STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

YALANDA JOHNSON — APPELLANT

V. — NO. 2009-KA-1287-COA

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BRIEF OF THE APPELLANT

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## STATEMENT OF THE ISSUES

I. **THE TRIAL COURT ERRED BY INDIRECTLY AMENDING THE INDICTMENT TO ALLOW THE STATE TO PROCEED UNDER SECTION 97-3-7 (2)(b), THEREBY, ALTERING THE SUBSTANCE OF THE CHARGE AGAINST JOHNSON.**

II. **THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.**

III. **THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH ESTABLISHED THAT JOHNSON WAS GUILTY OF ONLY SIMPLE ASSAULT.**

## STATEMENT OF THE CASE

This case proceeds from the Circuit Court of Lincoln County, Mississippi, and a judgment of conviction for aggravated assault entered against Yalanda Johnson following a jury trial on April 7 and April 8, 2009, the Honorable David Strong, Circuit Judge, presiding. (C.P. 53, 77, R.E. 4-5).

The trial court sentenced Johnson to ten (10) years, the first three (3) to serve with the last seven (7) suspended for five (5) years probation. (C.P. 77, R.E. 5). Johnson was also ordered to pay a fine in the amount of $2,500, as well as court costs and $250 to the crime victim's compensation fund. (C.P. 77, R.E. 5). The trial court denied Johnson's motion for judgment notwithstanding the verdict or ,alternatively, motion for new trial. (C.P. 70-73, 93, R.E. 6-10). Johnson now appeals to this Honorable Court for relief.

## STATEMENT OF THE FACTS

On April 17, 2008, Yalanda Johnson ("Johnson") was at work at Speedee Cash in Brookhaven, Mississippi. (Tr. 183). Johnson's co-worker, Heather Jordan ("Jordan"), went to the bank, and when she returned, Johnson asked her to finish a loan which was for Johnson's mother. (Tr. 106, 183). Later that day, at about 3:00 p.m., Charity Plaisance ("Plaisance"), an area director/supervisor for Speedee Cash, showed up at the store. (Tr. 105-08, 130, 185). Plaisance went to the store with the specific purpose of confronting Johnson about accusations that she stole a calculator from the store and made loans to her parents, in violation of company policy. (Tr. 130-31, 146). Plaisance had spoken with Jordan before she came to the store, and Jordan told her that Johnson was going to take a calculator home from work. (Tr. 147).

Upon entering the store, Plaisance pulled a file for a prior loan made to Johnson's father, and asked Jordan to show her the file for a loan done earlier that day for Johnson's mother. (Tr. 108, 131, Ex. S-11 (DVD of surveillance video)). Plaisance then went over to the desk at which Johnson was working to confront her about the loans and the missing calculator. (Tr. 108, 131, 185-86, Ex. S-11). Plaisance told Johnson that she could either produce the calculator and the monies loaned to her mother or she (Plaisance) would press charges against her. (Ex. S-11, Tr. 149-50). Johnson stated that she did not violate company policy and that Plaisance was breaking the policies and

procedures by discussing the matter in the presence of others. (Ex. S-11). The two debated over their respective interpretations of the policies and procedures for a minute, and Johnson then got up to get a copy of the company manual from a nearby filing cabinet; Plaisance then said "don't pull the handbook out on me," and she followed Johnson to the filing cabinet. (Ex. S-11, Tr. 132-33, 150-51, 186-87).

At this point, the incident escalated, and the two began to raise their voices and argue. (Ex. S-11, Tr. 151). Johnson testified that, as she reached for the manual, Plaisance grabbed her arm to prevent her from getting the manual; Plaisance denied touching Johnson, and claimed that she only put her hand in front of the manual, so as to block Johnson from it. (Tr. 133, 187). Johnson also testified that Plaisance pushed her; Plaisance denied this also. (Tr. 161, 187). Johnson began yelling at Plaisance, telling her "don't touch me anymore." (Tr. 133, 154, 187). She pointed her finger in Plaisance's face, yelling, and Plaisance backed up near a desk by the window, where Johnson slapped/hit her. (Tr. 108, 119, 133, 151-53, 194, Ex. S-11).

Jordan called the police, and when she turned back around she saw Plaisance hit the window and fall to the ground. (Tr. 109). Plaisance claimed that Johnson pushed/banged her head against a sign in the window. (Tr. 133). However, Johnson testified that Plaisance's head hit the window during the struggle, and she did not intentionally bang Plaisance's head against the sign. (Tr. 187). Jordan did not know if Plaisance was pushed or fell into the sign, and she did not testify that Johnson banged Plaisance's head against it. (Tr. 109).

After Plaisance fell to the ground, Johnson picked up a plastic telephone receiver and hit Plaisance in the back of the head a few times; Plaisance and Jordan testified that Johnson hit Plaisance with the phone receiver about six times, and Johnson did not remember exactly but she stated that she hit Plaisance with phone once or twice. (Tr. 109, 119, 133, 136, 159-60, 187, 195,

Ex. S-11). Johnson then dropped the phone, and began walking around screaming in order to get her anger out. (Tr. 187, 191, Ex. S-11). She testified that she did this because she did not want to hurt Plaisance anymore. (Tr. 194).

In the meantime, Jordan had run over to Paul Burnett Nissan (two doors down) to get someone to break up the fight. (Tr. 113). Johnson walked up to the counter and called her mother and mother-in-law to let them know that she just got in a fight and may need to get bailed out of jail. (Tr. 133, 154, 193, Ex. S-11). According to Plaisance, Johnson walked outside briefly, and came back inside the store and began yelling at her again. (Tr. 134). Plaisance testified that she backed up against a calender on the wall (and that Johnson did not push her into the wall), and Johnson hit her a few more times. (Tr. 134, 155, Ex. S-3, S-4). Plaisance also claimed that Johnson hit her somewhere on her right side with a stapler. (Tr. 134). The video shows Johnson pick up a stapler, but it does not show Johnson hit Plaisance with it. (Ex. S-11). On the video, it appears that Johnson picked the stapler up but threw it down on the ground; the video was consistent with Johnson's testimony regarding the stapler. (Ex. S-11, Tr. 201-02).

About this time, Tim Abbot ("Abbot") and two of his co-workers, who were summonsed by Jordan from the Paul Burnett Nissan, arrived. (Tr. 122, 134, 202). Abbot testified that Johnson was hitting Plaisance near the calender when he ran inside. (Tr. 122, 125 Ex. S-4, S-5). Abbott did not try to break up the fight. (Tr. 125-26). To this end, Abbot was asked "if [Plaisance] had been in extreme danger, you would have [broken up the fight], would you not?" (Tr. 126). And he replied, "I guess, to be honest, if it went like really, really too far, I mean, would have had to step in there and do something." (Tr. 126). Abbot did not see Johnson hit Plaisance with any objects, only her hands. (Tr. 127-28). He testified that Johnson "kind of backed off, cooled down a little bit, and that's when we went in." (Tr. 127). Johnson told Plaisance to "get out," and she complied. (Tr. 127).

Johnson then walked back to her desk to gather some of her belongings as the police arrived. (Ex. S-11). Lieutenant Michael Joe Portrey, of the Brookhaven Police Department, entered the store and announced "police," and Johnson said "here I am, and I'm getting ready to go with you." (Tr. 83-84, 89, Ex. S-11). She told Lieutenant Portrey that she and Plaisance got into a fight and she hit Plaisance with a phone receiver a few times. (Tr. 86-87). Johnson cooperated fully with Lieutenant Portrey. (Tr. 90, Ex. S-11). Assistant Chief Nolan Jones interviewed Johnson at the Brookhaven Police Department, and she told him that she hit Plaisance with the phone receiver but did not remember how many times. (Tr. 96, 100-01). At trial, Johnson explained that she lost her temper, but she was not trying to seriously injure Plaisance. (Tr. 192-94).

As a result of the fight, Plaisance suffered only a bruise on her face, a bruise on her left arm, and two cuts (superficial lacerations) on her head. (Tr. 135-36, 139, 157, Ex. D-12, S-6, S-7, S-8, S-9). Plaisance went to King's Daughter's Medical Center, where she was given four staples in each cut and then released. (Tr. 102, 139, Ex. D-12). Assistant Chief Jones took photographs of Plaisance the day after the fight depicting the bruise on the left side of Plaisance's face, the bruise on her left arm, and Plaisance pulling her hair back in an attempt to show a cut on her head. (Tr. 97, Ex. S-6, S-7, S-8, S-9).

Johnson was later indicted for aggravated assault. (C.P. 4). At trial, the jury was instructed on aggravated assault, the lesser included offense of simple assault, and self-defense; the jury returned a verdict finding Johnson guilty of aggravated assault. (C.P. 40-53).

## SUMMARY OF THE ARGUMENT

The trial court erred by indirectly amending the indictment to alter the substance of the charge against Johnson by allowing the State to proceed under Section 97-3-7 (2)(b), which eliminates subsection (2)(a)'s element/requirement that the bodily injury caused be "serious" and

also adds the element/requirement the bodily injury be caused "with a deadly weapon or other means likely to produce death or serious bodily harm." This constituted a change of substance to Johnson's indictment, and she is entitled to have the conviction sentence and fines reversed and her case remanded for anew trial.

The evidence was insufficient to support Johnson's conviction for aggravated assault. Plaisance did not suffer serious bodily injuries, and the evidence shows that Johnson did not even intend to cause serious bodily injuries. Therefore, Johnson is entitled to have this Court reverse her conviction and render a judgment of acquittal in her favor.

Alternatively, the verdict was against the overwhelming weight of the evidence, which established that Johnson was guilty of only simple assault. The overwhelming weight of the evidence established that Plaisance's injuries were nor "serious bodily injuries." The overwhelming weight of the evidence also established that Johnson did not even attempt to cause serious bodily injury. The evidence established that Johnson was guilty only of simple assault. Accordingly, Johnson requests this court to follow the "direct remand rule" and reverse her conviction for aggravated assault and remand this case for re-sentencing for simple assault. Alternatively, Johnson requests that this Court reverse her conviction and remand this case for a new trial.

## ARGUMENT

### I. THE TRIAL COURT ERRED BY INDIRECTLY AMENDING THE INDICTMENT TO ALLOW THE STATE TO PROCEED UNDER SECTION 97-3-7 (2)(b), THEREBY, ALTERING THE SUBSTANCE OF THE CHARGE AGAINST JOHNSON.

"The rule concerning indictments is that they cannot be amended to change the nature of the charge, except by the grand jury." *Jones v. State*, 798 So. 2d 1241, 1250 (¶25) (Miss. 2001) (citing *Miller v. State*, 740 So. 2d 858, 862 (Miss. 1999)). "Any amendment not approved by the grand jury

must be of form only and must not affect the substance of the charge pending." *Jones*, 798 So.2d at 1250 (¶25) (citing *Rhymes v. State*, 638 So. 2d 1270, 1275 (Miss. 1994)). "[A] change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." *Id.* This Court reviews a claim of error in whether the indictment as a question of law, and the standard of review for a question of law is a de novo standard. *Spears v. State*, 942 So. 2d 772, 773 (Miss. 2006).

The State elected to charge Johnson under Section 97-3-7 (2)(a) and was, thus, restricted to subsection (2)(a) in prosecuting Johnson for aggravated assault. The trial court erred by indirectly amending the indictment to alter the substance of the charge against Johnson by allowing the State to proceed under Section 97-3-7 (2)(b), which eliminates subsection (2)(a)'s element/requirement that the bodily injury caused be "serious" and also adds the element/requirement the bodily injury be caused "with a deadly weapon or other means likely to produce death or serious bodily harm."

Specifically, the indictment against Johnson charged that she "did willfully, unlawfully, and feloniously *attempt* to cause *serious bodily injury* to one Plaisance 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. . . ." (C.P. 4) (emphasis added).

During Johnson's motion for a directed verdict, trial counsel argued that the State failed to prove that Johnson was guilty of aggravated assault under Section 97-3-7(2)(a). (Tr. 163). The State acknowledged that, as per the indictment, it was proceeding under "the first clause of Subparagraph A [or 99-3-7-(2)(a)]." (Tr. 165, 166, 171). And the State made abundantly clear that it was attempting to prove that Johnson "attempt[ed] to cause serious bodily injury to [Plaisance]." (Tr. 171).

However, the trial court overruled the motion for directed verdict because it found that it was a question for the jury to determine whether the telephone was a "sufficient bludgeoning instrument," i.e., a deadly weapon. (Tr. 168-70). In overruling Johnson's motion for a directed verdict, the trial court relied on *Parks v. State*, 930 So. 2d 383 (Miss. 2006) and *Beyers v. State*, 930 So. 2d 456 (Miss. Ct. App. 2006), both of which involved a prosecution for aggravated assault under Section 97-3-7(2)(b). *See Parks v. State*, 930 So. 2d 383, 385-86 (¶¶4-6) (Miss. 2006); *Beyers v. State*, 930 So. 2d 456, 457-58 (¶¶7-10) (Miss. Ct. App. 2006).

Trial counsel then asked the trial court: "Your honor, are you then changing the indictment[?], because it was our understanding that the State was pursuing it as a 2(a) Indictment, not a 2(b). And if that is the case, then it is a change of substance, not form, and the Defendant must again reassert it's request for dismissal."[1] (Tr. 170). The trial court responded: "I'm not changing the Indictment to anything, Ms. Peterson. The State chose the - - the State chose - - I just read both of the provisions. I'm not trying to change anything." (Tr. 170).

Although, the trial court might not have intended to change anything, it did. The trial court's basis for overruling the motion for directed verdict–that the jury could determine if the phone was a deadly weapon–effectively amended the indictment by allowing the State to proceed under 97-3-7(2)(b), notwithstanding that the State admittedly indicted and intended to prosecute Johnson under

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[1] In the interests of explanation, it should be noted that, prior to trial, defense counsel, Faye Peterson, filed a motion to quash the indictment arguing that it was unclear under which subsection of our aggravated assault statute the State was proceeding under, Mississippi Code Annotated Section 97-3-7(2)(a) or 97-3-7(2)(b). (C.P. 31-32). The motion also pointed out that Section 97-3-7(2)(a) contains different elements than 97-3-7(2)(b), and the two are substantively different charges. (C.P. 31-32). At a pre-trial hearing, the trial court denied the motion to quash (essentially summarily) but stated that it would revisit the ruling during Johnson's motion for a directed verdict. (Tr. 2).

97-3-7(2)(a).

As a result, the jury was given Instruction 9, which embodied aggravated assault under Subsection (2)(b): "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 harm." (C.P. 49).[2]

Under *Quick v. State*, 569 So.2d 1197 (Miss. 1990) and *Rushing v. State*, 753 So.2d 1136 (Miss. 2000), the trial court's ruling indirectly amended the indictment, as it altered the substance of the charge against Johnson by allowing the State to proceed under Section 97-3-7 (2)(b), which eliminates subsection (2)(a)'s element/requirement that the bodily injury caused be "serious" and also adds the element/requirement the bodily injury be caused "with a deadly weapon or other means likely to produce death or serious bodily harm." Miss. Code Ann. § 97-3-7(2)(a) and (2)(b).

In *Quick v. State*, 569 So.2d 1197 (Miss. 1990), the Mississippi Supreme Court held "that the state can prosecute only on the indictment returned by the grand jury and that the [trial] court has no authority to modify or amend the indictment in any material respect." *Quick*, 569 So.2d at 1199. There, the Court reversed an aggravated assault conviction because the State indicted the defendant for purposefully and knowingly causing bodily injury to the victim with a deadly weapon, as provided for under Section 97-3-7(2)(b), but the jury instructions were changed to include the element of "recklessly under circumstances manifesting extreme indifference to the value of human life," as provided for under Section 97-3-7(2)(a). *See Id*, at 1198-1200.

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[2] It is acknowledged that Instruction 9 appears to have been agreed upon by the parties and offered by the defense as Instruction D-15. (C.P. 49). However, Johnson contends 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.

More recently, in *Rushing v. State*, 753 So.2d 1136 (Miss. Ct. App. 2000), this Court was presented with a similar issue, which is even more closely aligned with the facts of the instant case. In *Rushing*, this Court reversed, in part, because the defendant was indicted for aggravated assault for causing serious bodily injury under Section 97-3-7(2)(a), yet the trial court nevertheless instructed the jury on causing "bodily injury with a deadly weapon," as provided for under Section 97-3- 7(2)(b). *See Rushing*, 753 So.2d at 1145-46 (¶¶41-49). In so doing, this Court explained that, "[u]nder the holding of Quick, the trial court may not directly, or indirectly amend the indictment to alter the substance of the charges against the defendant. By giving jury instruction C-7, the trial court indirectly amended the indictment, by dropping the serious bodily injury element of [section] 97-3-7(2)(a), and substituting the deadly weapon element of [section] 97-3-7(2)(b)." *Id.* at 1146 (¶47)(citing *Quick*, 569 So.2d at 1199).

In *Reid v. State*, 910 So. 2d 615 (Miss. Ct. App. 2005), this Court discussed its holding in *Rushing* as follows:

> In the *Rushing* decision, the trial court indirectly amended the indictment by substituting elements contained in two different subsections of Mississippi Code Annotated § 97-3-7 (Rev.2000). By improperly substituting the "serious bodily injury" element of Miss. Code Ann. § 97-3-7(2)(a) with the "deadly weapon" element of Miss. Code Ann. § 97-3-7(2)(b), the jury instruction effectively melded together the elements of two separate statutes, improperly allowing the State to prove its case.

*Reid v. State*, 910 So. 2d 615 (Miss. Ct. App. 2005) (citing *Rushing*).

In the instant case, the State elected to indict Johnson under Section 97-3-7(2)(a) by charging that she did "willfully, unlawfully, and feloniously *attempt to cause serious bodily injury* to one Plaisance 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. . . ." (C.P. 4) (emphasis added). As stated above, the State readily acknowledged that it intended to indict

Johnson under Section 97-3-7(2)(a) , and it was proceeding at trial under that Subsection. (Tr. 165, 166, 171). Nevertheless, the trial court denied the motion for directed verdict because it determined that the jury could find that the phone and/or neon sign was a deadly weapon or "other means likely to produce death or serious bodily harm," as provided for in Subsection (2)(b).

In sum, the amendment at issue constituted reversible error, as the amendment was substantive in nature, materially changed an element of the original offense charged, and materially altered the defense to the indictment. Under *Quick* and *Rushing*, Johnson is entitled to have this Court reverse her conviction for the material variances between the indictment, the proof and the jury instructions. Accordingly, Johnson is entitled to have her conviction reversed and her case remanded for a new trial.

## II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense." *Id.* (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where the evidence "point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty[.]" *Id.*

Mississippi Code Annotated Section 97-3-7 addresses the crimes of simple assault and

aggravated assault; that Section provides in pertinent part 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. . . .
>
> (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. . . .

Miss. Code Ann. § 97-3-7 (1) and (2) (emphasis added).

Johnson was charged with aggravated assault. (C.P. 4). Specifically, the indictment against her charged that she "did willfully, unlawfully, and feloniously attempt to cause serious bodily injury to one Plaisance 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. . . ." (C.P. 4).

As stated above, the State intended to charge Johnson under Subsection (2)(a). As explained below, the evidence was insufficient to establish that Johnson was guilty of aggravated assault under Subsection (2)(a), as the evidence was insufficient to establish that Johnson either attempted to cause serious bodily injury to Plaisance, or that she actually did cause serious bodily injury to Plaisance.

Section 97-3-7(2)(a) provides that one is guilty of aggravated assault if he or she "(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." Miss. Code Ann. § 97-3-7-(2)(a). Thus, one may commit aggravated assault under this subsection in two ways: (1) if he or she attempts to cause serious bodily injury, and (2) if he or she causes serious bodily injury "under circumstances manifesting extreme indifference to the value of human life."

*Id.*

Recently, in *Bright v. State*, this Court explained that "aggravated assault under section 97-3-7(2)(a) and simple assault under 97-3-7(1)(a) are distinguished mainly by the extent of the victim's injury, i.e., whether the victim suffered "bodily injury" or "serious bodily injury." *Bright v. State*, 986 So. 2d 1042, 1048 (¶24) (Miss. Ct. App. 2008) (citing *Harbin v. State*, 478 So. 2d 796, 798 (Miss. 1985); *Brown v. State*, 934 So. 2d 1039, 1043 (¶10) (Miss. Ct. App. 2006); *Odom v. State*, 767 So. 2d 242, 246 (¶13) (Miss. Ct. App. 2000)). This Court also stated that it is question for the jury to determine whether "bodily injury" or "serious bodily injury" resulted. *Id.* (citing *Odom*, 767 So. 2d at 246 (¶13)).

In the instant case, no reasonable juror could find beyond a reasonable doubt that the injuries Johnson cause to Plaisance were "serious bodily injuries." "Serious bodily injury" has been defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Fleming v. State*, 604 So. 2d 280, 292 (Miss. 1992) (quoting Model Penal Code, Section 210.0.). Plaisance suffered only a bruise to her left arm, a bruise to her face, and two cuts (superficial lacerations) requiring a few staples. (Tr. 135-36, 139, 157, Ex. D-12, S-6, S-7, S-8, S-9). It is unreasonable to contend that two bruises and two cuts created a substantial risk of death. It it likewise unreasonable to conclude that Charities injuries resulted in serious, permanent disfigurement or the loss or impairment of a bodily member or organ. At worst, Plaisance was left with two small scars on her head. This is simply not a *serious*, permanent disfigurement. Accordingly, the evidence was insufficient to establish that Johnson caused serious bodily injury to Plaisance.

The evidence was likewise insufficient to prove that Johnson attempted to cause serious

bodily injury to Plaisance. As the Mississippi Supreme Court has stated in a similar situation, "there can only be conjecture as to what [the defendant's] intent was as [the victim's] injuries were not serious." *Brooks v. State*, 360 So. 2d 704, 706-07 (Miss. 1978). In *Brooks*, the defendant pushed, shoved and struck victim with his hands and arms, as well as a school book and a notebook, resulting in "a few bruises and marks on the left side of victim's neck." *Brooks*, 360 So. 2d at 705. In reversing the defendant's conviction for aggravated assault, the court held: "We can only surmise as to what would have resulted had the attack continued and as we have stated before, the mere probability of the guilt of a particular crime cannot support a verdict of guilty." *Id.* at 707 (citing *Aikerson v. State*, 295 So. 2d 778 (Miss. 1974)).

Just as in *Brooks*, Plaisance did not suffer "serious bodily injury;" therefore, the jury was left to speculate as to what Johnson's intent was. There is no way to know what would have resulted had Johnson not stopped hitting Plaisance–an act which strongly tends to establish that she did not intend to cause serious bodily injury–and any attempt to do so (such as the jury finding Johnson guilty of aggravated assault) would permit a conviction on the mere probability of guilt.

Prior case law holds that there is no specific intent element for aggravated assault. *See McGowan v. State*, 541 So. 2d 1027, 1029 (Miss. 1989) (citing *Davis v. State*, 476 So. 2d 608, 610 (Miss. 1985)); *Bright, v. State*, 986 So. 2d at 1046 (¶13) (citations omitted). As this Court has stated, "[i]ntent is determined by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent." *Bright*, 986, So. 2d at 1046 (¶13) (citing Chambliss v. State, 919 So. 2d 30, 35 (¶15) (Miss. 2005)).

In the instant case, the evidence did not establish beyond a reasonable doubt that Johnson attempted to cause serious bodily injury to Plaisance. The facts related to the act itself and the surrounding circumstances reveal that this incident was simply a fight. Plaisance confronted Johnson

and provoked her; the two began arguing and raising their voices, and Johnson lost her cool. Johnson hit Plaisance several times with her hands, causing two bruises. She also hit Plaisance in the head several times with a plastic telephone receiver. There was also evidence that Plaisance hit her head on a sign, but the evidence was unclear as to whether Plaisance fell into the sign or whether Johnson banged her head into the sign. (Tr. 109, 133, 187). In any event, Plaisance herself testified that the cuts to her head were caused by the telephone; she did not testify that she was injured by the sign. (Tr. 136).

Moreover, it is very significant that Johnson stopped hitting Plaisance with the phone for the very reason that she did not want to hurt Plaisance anymore than she had. (Tr. 194). Further still, Abbot did not even feel the need to try and break up the fight because he did not feel that Plaisance was in serious danger. (Tr. 125-26).

In sum, the evidence was insufficient to establish beyond a reasonable doubt that Johnson attempted to cause or caused serious bodily injury to Plaisance. Therefore, Johnson respectfully requests this Court to reverse her conviction sentence and fines for aggravated assault, and render a judgment of acquittal in her favor on that charge. Johnson further request's that this Court follow the "direct remand rule," and remand this case for re-sentencing on the lesser included offense of simple assault. *See Shields v. State*, 722 So. 2d 584, 587 (¶7) (Miss. 1998) (where there is insufficient evidence to support the greater offense, but sufficient evidence to support lesser-included offense, appellate court may remand for re-sentencing on the lesser offense.)

## III. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH ESTABLISHED THAT JOHNSON WAS GUILTY OF ONLY SIMPLE ASSAULT.

Should this Court reject Johnson's contention that the State presented insufficient evidence to support her conviction for aggravated assault, Johnson asserts, in the alternative, that the verdict

was was against the overwhelming weight of the evidence, which established that she was guilty only of simple assault.

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.*

As explained above in the argument pertaining to the sufficiency of the evidence, the evidence established that Johnson and Plaisance simply got into a fight, during which Johnson hit Plaisance several times with her hands, and hit her in the head a few times with a plastic telephone receiver. Plaisance did not suffer serious bodily injuries, only two bruises and two cuts requiring a few staples. The weight of the evidence further established that Johnson did not intend to seriously injure Plaisance, as she stopped hitting her with the phone because she did not want to hurt her anymore. Also, Abbot did not even feel that Plaisance was in enough danger for him to have to step in and break up the fight.

In light of the above-detailed evidence, the verdict reached in the instant case (if supported by sufficient evidence) is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. The weight of the evidence showed that Johnson did not attempt to cause, and in fact, did not cause serious bodily injury to Plaisance; therefore, the verdict was against the overwhelming weight of the evidence, which established that Johnson was

guilty only of simple assault.

Therefore, the trial court erred in denying Johnson's motion for a new trial, and this Court should reverse Johnson's conviction and remand this case for re-sentencing for the lesser offense of simple assault under the "direct remand rule" as provided for in *Shields v. State*, 722 So. 2d 584, 587 (¶7) (Miss. 1998). Alternatively, Johnson respectfully request that this Court remand this case for a new trial.

## CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Johnson respectfully submits that the evidence was insufficient to support her conviction for aggravated assault. Therefore, Johnson requests that this Court reverse her conviction, sentence, and fines, render a judgment of acquittal, and order her immediate release. Alternatively, Johnson submits that the verdict was against the overwhelming weight of the evidence. Because the weight of the evidence showed that Johnson was not guilty of aggravated assault, buy guilty only of simple assault, Johnson requests that this Court reverse the judgment of the trial court and remand this case for re-sentencing for simple assault. Alternatively, Johnson requests that this Court reverse the judgment of the trial court and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens
COUNSEL FOR APPELLANT

## CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Yalanda Johnson, 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 Hon. David H. Strong
Circuit Court Judge
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Honorable Dewitt (Dee) T. Bates, Jr.
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This the 23rd day of November, 2009.

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