

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAHARRISON JOHNSON

APPELLANT

VS.

NO. 2009-KA-1411-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The Grand Jury of Coahoma County indicted defendant Laharrison Johnson for the crime of Armed Robbery with Firearm Enhancement in violation of *Miss. Code Ann.* §§ 97-3-79 & 97-37-37. (Indictment, c.p.2). After a trial by jury, Judge Charles E. Webster presiding, the jury found defendant guilty as charged. (Judgment, c.p.6-7). The trial court sentenced defendant to a term of 12 years with four suspended and 8 to serve. However, the trial court did not consider the sentencing enhancement of § 97-37-37 and subsequently the next day returned defendant to court to correct the sentence. The trial court then sentenced defendant 7 years with 4 suspended, followed by 4 years supervised probation for the Armed Robbery. For the Firearm

Enhancement the trial court sentenced defendant to 5 years, consecutive to the armed robbery sentence. The intent of the court that defendant serve a total of 8 years followed by 4 years of supervised probation under enumerated conditions. (Sentencing Order, c.p.8-11).

After denial of post-trial motions this instant appeal was timely noticed. (C.p. 14 & 15).

STATEMENT OF FACTS

The victim of the armed robbery, Travis Amos, worked with defendant together at Domino's Pizza. They knew each other, they helped install stereos in each others vehicles. One night the victim, and a friend, were working delivering pizza and a receipt. Defendant flagged them down they chatted and then defendant turned on them pulled a gun and some cohorts pulled them out of the car (while defendant pointed a gun on them) and took the stereo, speakers, an Ipod and two guns.

The jury heard the evidence presented by the State, there was no case presented by the defense and found defendant guilty as charged and instructed.

SUMMARY OF THE ARGUMENT

I.

The jury was properly and fully instructed on the elements of armed robbery. In order to convict the jury had to find, beyond a reasonable doubt defendant used a firearm in the commission of the crime. Such is legally sufficient to satisfy the statutory firearm enhancement.

The jury was instructed on the elements of armed robbery. One of the elements is that the victim was put in fear by the use of a deadly weapon – and in this case the indictment specifically listed that weapon as a pistol.

There was ample evidence that a pistol was used in the robbery, and that defendant in fact was holding a pistol.

The jury found defendant guilty of the crime – which means it necessarily found that a firearm had been used (and proved) at trial.

The judge sentenced defendant for a firearm enhancement based upon that jury finding of pistol used in the robbery.

ARGUMENT

I.

THE JURY WAS PROPERLY AND FULLY INSTRUCTED ON THE ELEMENTS OF ARMED ROBBERY. IN ORDER TO CONVICT THE JURY HAD TO FIND, BEYOND A REASONABLE DOUBT DEFENDANT USED A FIREARM IN THE COMMISSION OF THE CRIME. SUCH IS LEGALLY SUFFICIENT TO SATISFY THE STATUTORY FIREARM ENHANCEMENT.

In this singular allegation of trial court error counsel for defendant asserts that since the jury was not properly and specifically instructed on the definition of the weapon used (a pistol) to satisfy the 'firearm' enhancement of *Miss. Code Ann.* ¶ 97-37-37.

First, this issue was never presented to the trial court at either sentencing hearing, or in the motion for new trial. It is the position of the State that this issue was waived and is procedurally barred. *Mayers v. State*, 2010 WL 610667 (¶ 45) (Miss.App. 2010)(dec. Feb.23, 2010).

Without waiving any procedural bar to review, the State would submit that *alternatively* this issue is also without merit at law.

Recently, and after counsel for defendant submitted his brief in this case a similar case was decided that, the State would argue, is controlling, to wit:

¶ 51. Next, Mayers argues that the sentence enhancement was not in the indictment and that the jury did not make findings as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* states that "[o]ther than the fact of a prior conviction, any fact that increases the

penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. Mayers argues that his case is analogous to *Brown v. State*, 995 So.2d 698 (Miss.2008), which was decided after he was convicted and sentenced. In *Brown*, Jureka Brown's sentence for the sale of cocaine was doubled because the offense occurred within 1,500 feet of a church. *Id.* at 701(¶ 6). On appeal, the supreme court vacated the sentence enhancement because the trial judge, rather than the jury, decided whether Brown was within 1,500 feet of a church. *Id.* at 704(¶ 27). Citing *Apprendi*, the supreme court found that “the Sixth Amendment requires that the issue of Brown's sentence enhancement be submitted to a jury.” *Id.* at 705(¶ 29). The supreme court noted that the testimony was unclear on Brown's distance from the church or whether the building was even an operating church. *Id.* at 704(¶ 26).

¶ 52. Despite making this argument, Mayers does not cite to any specific element of the statute that was not decided by the jury. *Brown* is distinguishable from the case at hand because the jury, rather than the trial judge, decided all the elements of the sentence enhancement. ***The jury found beyond a reasonable doubt that Mayers was a convicted felon and that Mayers used a firearm during the commission of a felony. Each factor of section 97-37-37 is contained in the indictment and was submitted to the jury. No other factors were required to be determined by section 97-37-37 that had not already been decided by the jury. Therefore, we find that this issue is without merit.***

Mayers v. State, 2010 WL 610667 (Miss.App. 2010)(dec. Feb.23, 2010) (emphasis added).

In this now on review, counsel has claimed the jury was not instructed on the definition of ‘firearm’ – even thought that in finding defendant guilty of armed robbery it was required to specifically find that defendant used a pistol. (Jury Instruction C-12, c.p.30).

The reviewing courts of this State have heard a similar argument before when

a defendant asserted on appeal from 'felon in possession of a firearm' that the guns were old, needed oiling and needed to be loaded before they could fire. The reviewing court was terse and clear in holding.

¶ 22. Ward next argues that he should not be subject to the enhanced penalty because some of the firearms needed to be oiled and all of the firearms needed to be loaded before they would fire. ***The fact that the firearms were unloaded and may have needed oiling does not preclude Ward from receiving an enhanced sentence*** under Mississippi Code Annotated section 41-29-152(2) (Supp.2000) if he possessed the firearms. The statute makes no such distinction. Section 41-29-152(2) defines a firearm as "any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." ***Ward offered no proof that the firearms were not designed to expel a projectile by the action of an explosive or that they could not be readily converted to do so.*** The firearms were found in the room where the marihuana was found. Clearly, Ward had at least constructive possession of the firearms at the same time of his possession of the marihuana, notwithstanding his arguments to the contrary

Ward v. State, 958 So.2d 1233, 1239 (Miss.App. 2006)(emphasis added).

The State would argue to this reviewing court the same rationale would apply to the firearm enhancement. If this issue were not procedurally barred as having not been presented to the trial court and waived – it is legally without merit. The State offered testimony about a firearm being used during the commission of the crime, – several times. Tr. 98 (Defendant points gun at victim); Tr. 106 (victim hit with a handgun during robbery), Tr. 110-111 (victim describes gun, as a pistol, being held

by defendant).

There was never any objection to the introduction of this evidence and no proof whatsoever that the items described as pistol, gun, or handgun did not fit the definition of firearm.

It is the position of the State that the finding of 'firearm' for sentence enhancement may done at the same time and with the same proof as produced in armed robbery. The jury does not need any special instruction on firearm as it is common knowledge that pistol and firearm are, arguably, the same. "It is common knowledge that the weapon usually used in committing this crime is a pistol or some firearm." *Augustine v. State*, 201 Miss. 277, 290; 28 So.2d 243, 246 (Miss. 1946).

No relief should be granted based on this allegation of error.


CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JEFFREY A. KLINGFUSS, 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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