IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAHARRISON JOHNSON — APPELLANT

V. — NO. 2009-KA-1411-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAHARRISON JOHNSON	**APPELLANT**
V.	**NO. 2009-KA-1411-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. Laharrison Johnson, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Charles E. Webster, Circuit Court Judge

This the 30th day of November, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

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V.	**NO. 2009-KA-1411-SCT**
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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN FAILING TO REQUIRE THAT THE JURY DETERMINE THE FACT, USED AS A SENTENCE ENHANCEMENT, OF WHETHER THE DEFENDANT USED A FIREARM DURING THE COMMISSION OF AN ARMED ROBBERY.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgment of conviction for the crime of armed robbery with a firearm enhancement against Laharrison Johnson following a jury trial commenced on August 8, 2009, Honorable Charles E. Webster, Circuit Judge, presiding. Mr. Johnson was convicted of the crime of armed robbery and sentenced, by amended sentencing order, to a term of seven years, with four years suspended for the crime of armed robbery, and an enhanced sentence of five years, said sentence to run subsequent to the sentence imposed for armed robbery. (C.P. 8-11) Mr. Johnson is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

In an unusually brief trial, the State produced two witnesses, beginning with the cited victim,

Travis Amos, ["Amos"]. On December 30, 2008, Amos was working for Domino's Pizza. He was taking a receipt to a customer living in an apartment complex, when he was "flagged down" by Laharrison Johnson, ["Johnson"], a fellow employee at Domino's. (T. 71-74) They discussed car stereos and showed each other their pistols. (T. 75) As Amos started to leave, Johnson hailed him again. He came up to the driver's side window. Amos described his actions as "kind of stalling" while at least two other persons came up to the passenger window, where Amos's cousin Rontavius Morris, ["Morris"], was seated. (T. 76-77) Two of those that came to the passenger widow had masks or scarfs covering their visages. Amos testified that Johnson then pulled his pistol and held it on him. (T. 77) As Johnson held Amos and Morris at gunpoint, the two masked robbers began to remove items from the car. (T. 78) Those items included car stereo amplifiers and the two pistols Amos had with him. (T. 79-81) At the conclusion of the robbery, as Amos was allowed to drive away, Johnson admonished Amos: "I know where you live." (T. 80) Johnson then walked into his apartment and the masked men ran away. The next day, Amos called the police. (T. 83)

The defense brought out that Domino's management had given him the receipt to drop off, but that, according to Johnson, he had not dropped off the receipt before the incident. Johnson claimed the pistols had belonged to his grandfather. He conceded that his first statement to the police had not been truthful. (T. 84-94) Redirect was unable to clarify exactly how he had been untruthful in his first statement to the police. (T. 101-102)

Rontavius Morris was the only other witness to testify for the State. He was fifteen years old at the time of the "wild experience." (T. 103-104) He was riding with Amos as he delivered a receipt in the Bennie Gooden Estates apartments. After the receipt had been delivered, they stopped to talk with Johnson. An acquaintance of Morris, a team-mate, also came up to the car. At some point thereafter, they were leaving when "a guy" flagged" them down. Another male came to Morris' door

and held a gun on him, telling him to get out. (T. 105) As he got out, he was hit by a man wearing a blue scarf on his face. At the same time, Johnson "had Travis [Amos] held hostage with a hand gun." (T. 106) The men began "snatching stuff up out of the car. (T. 106-107) Morris recalled three to four men wearing masks. (T. 108) He also recalled Johnson saying: "I told all y'all I was gonna get all y'all...that worked at Domino's" and that Amos was warned that Johnson knew where he lived. (T. 109) After it was over, they went to his grandmother's house. (T. 111)

On cross examination he confirmed that the receipt had been delivered, contrary to Amos' testimony. Morris did not work for Domino's. (T. 113) Morris contradicted his statement to the police that the gun had been pointed at his head, now claiming he could not recall where the gun was pointed. (T. 116-117)

Although not in this order, the State rested, the defense made a motion for a directed verdict, the defendant was advised pursuant to *Culverson* and the parties agreed on the instructions. (T. 123-133) No instruction was given, or offered, requiring the jury to specifically find that the deadly weapon used was a firearm. Upon a verdict a guilty, Johnson was sentenced to a term of twelve years with four years suspended after serving eight. (T. 161-162) Important to note is the fact that the jury only found Johnson guilty of armed robbery and made no mention of any finding that he had a firearm during the commission of the robbery as defined by statute. (C.P.21,34, R.E.12,14) The following day, the trial court amended it's sentence to include the firearm enhancement. The amended sentence was a term of seven years with four years suspended after serving three for the crime of armed robbery and an additional five years for the firearm enhancement. (T. 167-169)

SUMMARY OF THE ARGUMENT

The question of whether a firearm was used during the commission of this purported crime was never properly submitted to the jury. Such a failure is a violation of Johnson's 14th Amendment

Due Process rights to have a jury determine beyond a reasonable doubt whether the firearm enhancement was supported by sufficient evidence.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN FAILING TO REQUIRE THAT THE JURY DETERMINE THE FACT, USED AS A SENTENCE ENHANCEMENT, OF WHETHER THE DEFENDANT USED A FIREARM DURING THE COMMISSION OF AN ARMED ROBBERY.

Although the indictment clearly included the firearm enhancement stating that pursuant to Section 97-37-37, Mississippi Code of 1972, Annotated, as amended, that Johnson had in his possession at the time of the offense, a firearm, a pistol, that charge seemed largely neglected throughout the trial and was initially overlooked during sentencing. Most importantly, the jury was never instructed that it need find that the deadly weapon used during the armed robbery was a firearm. While the jury did receive an instruction regarding the elements of armed robbery, and that instruction did require the finding that Travis Amos was put "in fear of immediate injury to his person by [Laharris Johnson] displaying a deadly weapon, to wit: a pistol," (C.P. 30, R.E. 13), it was not instructed that it need find that the weapon was a firearm as defined by statute.

It is well settled that any facts relied on as sentence enhancements must be specifically and precisely submitted to the jury.

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U. S. 466, 490,120 S. Ct. 2348 (2000) This requirement has been addressed and followed by this Court in *Brown v. State*, 995 So2d 698 (2008) where this Court specifically adopted the foregoing language of *Apprendi, Id.* It is elemental that the jury then must be fully instructed on the elements of the charge:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6.FN3 Taken together, **these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.**

Apprendi, Id. at 476-477.(emphasis added) It is the duty of the State to insure that the jury is fully instructed on the elements and thus failure to fully instruct the jury constitutes incurable fundamental error. *Reddix v. State,* 731 So. 2d 591 (Miss. 1999)

Thus, in the instant matter, the jury need be fully instructed in order to make the factual determination required in *Apprendi, Id.* As can be clearly seen in the following, it is necessary under Mississippi law for the jury to determine the precise nature of the firearm; specifically it must be shown the weapon can fire a projectile, or at least be adapted to do so.

> [U]nder Mississippi Code Annotated section 41-29-152(2) (Supp.2000)... The statute ...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 v. State, 958 So.2d 1233, 1239 (Miss. App.2006) accordingly it is absolutely essential for a jury in Mississippi to be instructed on what constitutes a firearm and to make such a specific finding. In this matter, there is no showing that the "weapon" exhibited was capable of firing a projectile, nor any showing that it could be converted to do so. While Johnson showed Amos something that Amos believed to be a revolver (T. 75), there was no showing, and more importantly no jury determination, that the "revolver" was a real weapon, or even a converted starter pistol. Amos only "looked at it", he never held it in his hand. (T. 76). But whatever he looked at, it was essential for the jury to find beyond a reasonable doubt that the "pistol" could fire a projectile, or at least be converted to do so. It is not for the trial court, a witness, or any one else to determine that what Amos saw was not a toy,

or a fully disabled pistol. That the "pistol" was not some kind of toy or dummy cannot be presumed. The nature of the "pistol" must be decided in the jury room, by a properly instructed jury.

No objection was offered, but as held and analyzed by this Court in *Brown, Id,* at 701-702, this is not fatal to Johnson's argument. Plain error overrides the procedural bar. Fundamental error is error affecting substantive or fundamental rights; and it is recognized that an increase in sentence, deprives the defendant of liberty, and is, hence, fundamental in nature. The error is viewed not through the results but how it was derived. And where an element is not submitted to the jury for it's determination, as determined in *Brown* and *Apprendi*, it is plain error and is reversible. Therefore this cause must be reversed and rendered as to the sentenced rendered under Section 97-37-37, Mississippi Code of 1972, Annotated, as amended.

CONCLUSION

It is respectfully submitted that premised upon the foregoing argument, this cause must be reversed and the enhanced portion of the sentence against Johnson be vacated and rendered.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. 2470

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Laharrison 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:

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This the 30th day of November, 2009.

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