

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.2009-TS-01549-COA

BERTRUE JACKSON

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

**AN APPEAL OF THE CONVICTION FOR COUNT I AGGRAVATED
ASSAULT IN VIOLATION OF MISSISSIPPI ANNOTATED CODE
SECTION 97-3-7 AND A SENTENCE TO TEN YEARS (10) YEARS,
FIVE (5) YEARS TO SERVE ON POST RELEASE SUPERVISION AND
COUNT II POSSESSION OF FIREARM BY CONVICTED FELON TO
SERVE TEN (10) YEARS TO RUN CONCURRENT WITH THE
SENTENCE IN COUNT I WITHIN THE CUSTODY AND
CONTROL OF THE MISSISSIPPI DEPARTMENT
OF CORRECTIONS**

**APPELLANT IS IN THE CUSTODY OF THE MISSISSIPPI
DEPARTMENT OF CORRECTIONS**

(ORAL ARGUMENT REQUESTED)

**JOHNNIE E. WALLS, JR.
163 NORTH BROADWAY STREET
P. O. BOX 634
GREENVILLE, MISSISSIPPI 38702
(662) 335-6001
(662) 378-8958
E-mail: jewalls1@wallslawfirm.com
Bar No. [REDACTED]**

ATTORNEY FOR APPELLANT

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BERTRUE JACKSON

APPELLANT

V.

NO.2009-KA-01549-COA

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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.

Hon. Jim Hood
Mississippi Attorney General
P. O. Box 220
Jackson, Ms 39205

Hon. Johnnie E. Walls, Jr.
Attorney for Appellant
P. O. Box 634
Greenville, MS 38702-0634

Hon. Albert B. Smith, III
Circuit Court Judge
P. O. Box 478
Cleveland, MS 38732-2930

Hon. Allen D. Shackelford
Attorney At Law
P. O. Box 267
149 Delta Ave.
Clarksdale, MS 38614-4310

Hon. Michael S. Carr, ADA
Hon. Walter E. Bleck, ADA
Office of the District Attorney
115 First St. Ste. 130
Clarksdale, MS 38614

Mr. Bertrue Jackson
MDOC #152056 Dorm B
ICCF Post Box 220
Mayersville, MS 39113

Given this the 1st day of July, 2010.

Johnnie E. Walls, Jr.

TABLE OF CONTENTS

Table of Contents.....	I.
Table of Authorities.....	ii.
Statement of the Issue.....	iii.
Statement of the Case.....	1
Statement of Facts.....	3
Summary of the Argument.....	7
Argument.....	9

**I. WHETHER THE COURT WAS IN ERROR BY FAILING TO GRANT
THE APPELLANT A JUDGEMENT OF ACQUITTAL, A JUDGEMENT
NOTWITHSTANDING THE JURY VERDICT OR A NEW TRIAL?**

Conclusion.....	12
Certificate of Service.....	13

TABLE OF AUTHORITIES

Cases:	Page No.
<i>Bush v. State</i> , 895 So. 2d 836 (Miss. 2005)	9-11
<i>Carr v. State</i> , 208 So. 2d 886 (Miss 1968)	9
<i>Jackson v. Virginia</i> , 443 U. S. 307, 315, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)	11
Statutes:	
Mississippi Annotated Code Section 97-35-5	1
Mississippi Annotated Code Section 97-3-7 (2)(b) (1972) As Amended	1, 10
Mississippi Annotated Code Section 97-37-37 (1972)	1

STATEMENT OF THE ISSUE

I.

WHETHER THE COURT WAS IN ERROR BY FAILING TO GRANT THE APPELLANT A JUDGEMENT OF ACQUITTAL, A JUDGEMENT NOTWITHSTANDING THE JURY VERDICT OR A NEW TRIAL?

STATEMENT OF THE CASE

The Appellant, BERTRUE JACKSON, was arraigned and charged in a two count indictment on or about November 19, 2008 by the grand jury prior to the January Term, 2009 in the Circuit Court of Coahoma County, Mississippi, Count I for the charge of aggravated assault in violation of Section 97-3-7 (2)(b) of the Mississippi Code with a deadly weapon, a pistol, on January 1, 2008 in Coahoma County, Mississippi and the Firearm Enhancement Mississippi Code Annotated Section 97-37-37 and Count II Possession of A Firearm by a Convicted Felon in violation of Section 97-37-5 of the Mississippi Code. (R. 002-003) (RE. 4-5)

Counsel for Appellant was appointed in Allen Shackleford by Order dated December 4, 2008 finding the Appellant was indigent and appointed said counsel to represent him at trial. (R. 4)(RE. 6)

The trial commenced July 13, 2009 lasting one day. The jury deliberated and returned a verdict of guilty reduced to Trial Judgement , dated July 14, 2009 (TR. 14-15) (RE.7-8) At the close of the State's Case an *ore tenus* Motion for Directed Verdict was made by Appellant's counsel and denied. (TR 154) (RE. 20) Counsel timely filed a Motion For Judgment Notwithstanding the Verdict or In the Alternative A New Trial. In support of

the Motion, three grounds were propounded: (1) insufficient evidence to sustain guilty verdict; (2) verdict against the over whelming weight of the evidence; and, (3) the court erred in refusing Defendant's instruction D-2. (R. 15-16)(RE. 17-18) The Court denied the Motion without hearing by Order dated August 28, 2009. (TR. 23) (RE. 19).

The Court rendered the Sentencing Judgement Post-Release Supervision Order, August 20, 2009. (R. 17-21) (RE. 9-12) The Court in turn sentenced the Appellant to a term of ten (10) years with five(5) to serve and five (5) years post release supervision in Count I; and ten (10) years in Count II to run concurrent to the sentence imposed in Count I in the custody of the Mississippi Department of Corrections along with costs and assessments.(TR. 191-193) (RE. 14-16).

Hon. Johnnie E. Walls, Jr. was retained by Appellant and counsel promptly filed this Notice of Appeal. (R.24) (RE. 21-22)

Having been aggrieved by the Verdict, the Appellant has appealed his conviction. The Appellant is presently in custody of the Mississippi Department of Corrections.

STATEMENT OF FACTS

During the early morning hours of January 1, 2008, Bertrue Jackson, the Appellant herein, was working as security at a night club named *Diz Muz B De Plaz* in Friars Point, Coahoma County, Mississippi. He along with another employee worked the door of the club with a metal detector and a clicker, checking people as they entered the establishment. (TR. 119)(RE. 23) Frederick Magsby, the victim, and his wife, Ken'Shaundra Davis, Davis' brother, Kendrick, and Magsby's sisters went to the club after midnight..(TR. 59) (RE. 24).

Around 1:00am an argument ensued between the victim's brother-in-law, Kendrick Davis, and another person. Ken'Shaundra Davis, the wife of the alleged victim asked her brother to calm down. He left the club and went outside. Shortly, thereafter, Frederick Magsby, the victim and his wife, Ken'Shaundra Davis had an argument. They, too, walked outside. Once on the outside of the club, the victims brother-in-law, got into another argument with the same men and a fight broke out. Ken'Shaundra Davis jumped in the fight with her brother. (TR 31-32) (RE. 25-26) When Frederick Magsby apparently saw his wife, he got involved. (TR 61)(RE. 27)

Magsby testified that while he was engaged in the fight, he was struck

in the head. He turned around and swung and saw Jackson, Appellant, behind him. He testified he walked toward Jackson. As he walked toward him, Jackson (Appellant) shot him. He ran and was shot again. (TR. 64)(RE. 28) Ken'Shaundra Jackson testified he hit the ground after he got hit in the back of the head. (TR. 34-35) (RE. 29-30) He testified that he only stumbled "a little bit." (TR. 72) (RE. 31) Regardless, the testimony of Magsby and Jackson are consistent in that Magsby approached Jackson before Jackson fired the weapon. No other weapons were retrieved, but there was testimony that something was seen dropping from the victim on surveillance tapes operated by the club owner, Sherman Tyler. He testified that he saw Frederick do some motion with his shirt and saw an object drop. Bertrue is seen picking up the object then he fired. (TR. 131)(RE. 32) The tape was unavailable because it was erased.

Magsby and his wife Ken'Shaundra testified that Jackson hit him over the head with a metal detector, however, Tim Pollard, the manager of *Diz Muz B Da Plaz*, testified he picked up the both metal detectors, the clicker and took them to the bar. He retrieved them from his brother who was working the door and Bert (Bertrue Jackson) (TR. 110)(RE 33) He viewed the tape and testified:

Q. What did he do? What did Frederick do?

A. When he walked up to Bert, he pretty much picked up that, whatever he picked up off the ground--later they said it was a gun--Frederick had--it looked like he was trying to pull a gun up or something from his shirt and Bert, we couldn't even see the--you know, Bert shot him or what. We couldn't see it, because Bert turned and Frederick turned and ran. We saw him running. We saw Bert step back up to the front door. But they said Bert had shot-- (TR. 112-113) (RE 34-35)

The viewing of the tape by the manager and owner were consistent in that neither saw Bertrue Jackson as the aggressor but only reacted after he was threatened by Magsby.

Officer Oliver Mitchell obtained a statement from the Appellant, which stated that he was breaking up the fight between two men. Officer Kenneth Davis, who was on foot at the scene, shot his shot gun in the air but the men kept fighting. Jackson was trying to pull them apart when one went for his gun, then he shot his gun. Officer Mitchell testified as follows on direct:

Q. And in this particular statement, there is something, it mentions a--somebody else with a gun?

A. Yes, sir.

Q. Do we know who that person was?

A. Uh--

Q. If anybody?

A. If anybody, uh,, I can recall him at the station. It

was another young man that was there that he was referring to along with Magsby to be found out to be Jamarro Foster. And he advised me that both Foster and Magsby were standing side by side real close. And said one of the weapons – one of the subjects, Jamarro, appeared to go for a weapon. And when he started firing, he wasn't firing at Magsby. He was firing at Jamarro but hit Magsby. (TR. 86-87) (RE. 36-37)

The Appellant admitted he shot the weapon but it was clearly in self - defense. It was only after he shot that the aggressors retreated.

SUMMARY OF THE ARGUMENT

Appellant contends that the verdict announced to the Court by the jury foreman was not in conformity with the Court's instructions of law; and the Court erroneously failed to set aside the verdict of the jury after considering Appellant's post trial motions. Appellant further contends that the trial Court erroneously failed to grant him a judgement of acquittal, a judgement notwithstanding the jury verdict, or a new trial. In addition thereto, the Appellant was aggrieved by the Court's denying his jury instruction D-2 which read as follows:

The Court instructs the jury that, although the law prohibits a person convicted of a felony to possess a firearm, that person may retrieve a firearm for the purpose of self-defense if it is immediately accessible to him when he is threatened with severe bodily harm or reasonably fears bodily harm. (R. 39) (RE. 38)

Appellant asserts that this jury instruction spoke directly to self-defense, a necessary element of aggravated assault. It did not mitigate his possession of a firearm as a convicted felon, but he had a right to defend himself.

Appellant invoked his right not to testify after a brief hearing before the Court. The witnesses that viewed the video tape testified it showed no aggression on Appellant's part, therefore, it stands to reason, his state of

mind at the time of the shooting constituted necessary self-defense in defending his person.

ARGUMENT

I.

WHETHER THE COURT WAS IN ERROR BY FAILING TO GRANT THE APPELLANT A JUDGEMENT OF ACQUITTAL, A JUDGEMENT NOTWITHSTANDING THE JURY VERDICT OR A NEW TRIAL?

The Appellant was indicted pursuant to Mississippi Code Annotated Section 97-3-7(2)(b) for the crime of aggravated assault. The Appellant contends and asserts here, as in his Motion For A New Trial which included a request for a judgement notwithstanding the jury verdict, that the verdict of “guilty” on the charge of aggravated assault made in the indictment was invalid and contrary to the law inasmuch as the Court deprived the Appellant of a right to establish a valid defense. The Court refused Defendant’s Jury Instruction D-2 which furthered his assertion on a claim of self-defense.

This Honorable Court set out the standard of review when an appellant moves for a judgment of acquittal and/or judgment notwithstanding the verdict stating that it was actually a challenge to the sufficiency of the evidence. In ***Bush v. State***, 895 So. 2d 836, 843 (Miss. 2005), the Court

citing **Carr v. State**, 208 So. 2d 886, 889 (Miss. 1968), “we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence, ‘ “shows beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.’ ”

The appellant was indicted under Mississippi Code §93-3-7 (2)(b) 1972. The elements of the crime of aggravate assault as set out in the Jury Instruction in pertinent part:

If you find from the evidence in this case beyond a reasonable doubt that:

- (1) on or about January 1, 2008, in Coahoma County, Mississippi the defendant, BERTRUE JACKSON, did willfully, and feloniously and purposely or knowingly,
- (2) cause bodily injury to Frederick Magsby,
- (3) with a deadly weapon, to-wit: a gun, by shooting Frederick Magsby,
- (4) and not in necessary self-defense.

then you shall find the defendant BERTRUE JACKSON guilty of Count I of the indictment.

If the State has failed to prove any one or more of the above elements beyond a reasonable doubt, then you shall find the defendant not guilty in Count I. (R. 35)(RE. 39)

The Court in **Bush** further states that “the relevant question is

verdict was against the overwhelming weight of the evidence.

The **Bush** Court cites the United States Supreme Court case **Jackson v. Virginia**, 443 U. S. 307, 315, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) which held,

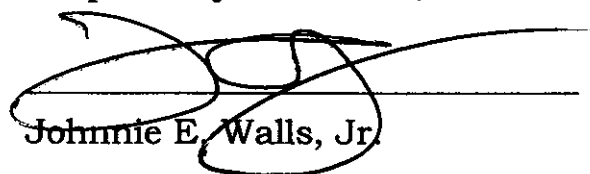
“Should the facts and inferences considered in a challenge to the sufficiency of the evidence ‘point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,’ the proper remedy is for the appellate court to reverse and render.” Id. at 844

Accordingly and for the reasons aforementioned, the Appellants urges this Honorable Court to reverse and render a verdict in his favor.

CONCLUSION

For the above stated reasons BERTRUE JACKSON, Appellant herein, respectfully requests that this Honorable Court reverse and render his conviction and sentence herein, and/or remand his case to the trial court for a new trial or further appropriate proceedings.

Respectfully submitted,



Johnnie E. Walls, Jr.

CERTIFICATE OF SERVICE

I, Johnnie E. Walls, Jr., attorney of record for Appellant, hereby certify that I have this day caused to be mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to:

Hon. Jim Hood
Mississippi Attorney General
P. O. Box 220
Jackson, Ms 39205

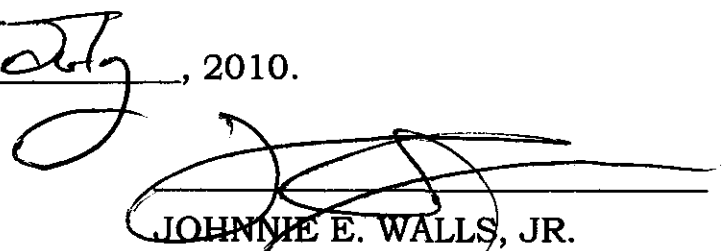
Hon. Albert B. Smith, III
Circuit Court Judge
P. O. Box 478
Cleveland, MS 38732-2930

Hon. Michael S. Carr, ADA
Hon. Walter E. Bleck, ADA
Office of the District Attorney
115 First St. Ste. 130
Clarksdale, MS 38614

Hon. Allen D. Shackelford
Attorney At Law
P. O. Box 267
149 Delta Ave.
Clarksdale, MS 38614-4310

Mr. Bertrue Jackson
MDOC #152056 Dorm B
ICCF Post Box 220
Mayersville, MS 39113

This the 1st day of July, 2010.


JOHNNIE E. WALLS, JR.
Attorney for Appellant