IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01312 COA

WILLIE JOHNSON, III A/K/A "THIRD"

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ELZY J. SMITH

COURT FROM WHICH APPEALED: QUITMAN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ALLAN D. SHACKELFORD

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: LAURENCE MELLEN

NATURE OF THE CASE: FELONY: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE 10 YEARS IN THE CUSTODY OF THE MDOC

BEFORE THOMAS, P.J., KING, AND MCMILLIN, JJ.

KING, J., FOR THE COURT

Willie Johnson, III (Johnson) was convicted of aggravated assault in the Circuit Court of Quitman County and sentenced to serve a term of ten years in the custody of the Mississippi Department of Corrections. Aggrieved, Johnson challenges the weight and sufficiency of the evidence supporting the verdict and the propriety of the trial court's sentence. We find no error and affirm.

FACTS

On or about August 13, 1992, Johnson and four companions, Staten, Terry Johnson, Knowles, and Ratliff visited the Bucket of Blood night spot in Marks, Mississippi. Knowles encountered Reed at the night spot and gave Reed drugs for which Reed failed to pay. Knowles advised Johnson and his companions of Reed's conduct, and the quintet called Reed outside the club. When Reed walked outside the club, Knowles hit Reed in the head with bottles, and the quintet proceeded to hit and kick Reed in the face and head until the police arrived.

Reed was taken to the emergency room of the Quitman County Hospital for treatment. Dr. Salvador Petilos treated Reed at the hospital and testified that the lateral wall of Reed's maxillary sinus and Reed's cheekbone were fractured. Dr. Petilos also testified that Reed sustained numerous contusions and lacerations to the head, scalp, face and eye area.

ANALYSIS OF THE ISSUES AND DISCUSSION OF LAW

> DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT?

The Defendant contends that the evidence was insufficient to support the aggravated assault conviction. The Defendant admits that he assaulted Reed, but argues that the assault constituted simple assault because Reed's injuries were most likely caused by a co-defendant, who wore steel-toed boots. In essence, the Defendant argues that his conduct--kicking and hitting--was not a means likely to produce serious bodily injury, thus negating the jury's finding of aggravated assault. We disagree.

Whether hands and fists constitute a "means likely to produce serious bodily harm" is a question of fact to be decided by the jury in light of the evidence. *Jackson v. State*, 594 So. 2d 20, 24 (Miss. 1992). The responsibility for determining likelihood remains with the jury which may be left free to give due weight to the characteristics of the parties, the place, the manner in which hands and fists are used, and the degree of force employed. *Jackson*, 594 So. 2d at 24. Evidence that Johnson and his cohorts vehemently kicked Reed in the face and head supports the jury's findings of aggravated

assault.

Moreover, it is of no consequence that Reed's injuries were probably caused by the steel-toed boots of the co-defendant Johnson. The evidence showed that the Defendant, Johnson, Knowles, Staten, and Ratliff acted collectively and in concert. Each was responsible for and accountable for the wrongful acts of the other. *See Ivey v. State*, 232 So. 2d 368. 369 (Miss. 1970). Thus, Defendant is held accountable for the injuries inflicted by the co-defendant Johnson . Accordingly, we find that sufficient evidence supports the jury's verdict. Defendant's assignment of error lacks merit.

II.

DID THE TRIAL COURT ERR IN FAILING TO GRANT DEFENDANT'S MOTION FOR NEW TRIAL?

The Defendant argues that jury's verdict was against the overwhelming weight of the evidence. In determining whether a verdict is against the overwhelming weight of the evidence, this Court accepts as true the evidence which supports the verdict and will reverse only when it is convinced that the circuit court has abused its discretion in failing to grant a new trial. *Isaac v. State*, 645 So. 2d 903, 907 (Miss. 1994) (citations omitted). Because the verdict is supported by evidence that the Defendant and

his cohorts struck Reed with beer bottles and vehemently kicked and hit Reed, and evidence that Reed sustained a fractured cheekbone and jawbone as a result of the beating, we are unable to find that the trial court abused its discretion in failing to grant Defendant's request for a new trial. Defendant's assignment of error lacks merit.

III.

WAS THE SENTENCE IMPOSED BY THE COURT HARSH?

Defendant argues that the court's sentence was far beyond that commensurate with his actions and history. Because he had not been previously convicted of a crime and did not utilize a weapon in committing the assault, Defendant believes that the court's ten-year sentence is inappropriate. This Court will not reverse the sentence imposed by a trial court if the sentence imposed is within the limits fixed by the statute. *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993). The penalty prescribed for conviction of aggravated assault has been established by statute as imprisonment in the county jail for not more than one (1) year or in the penitentiary for not more than twenty (20) years. Miss. Code Ann. § 97-3-7 (1972). The Defendant's sentence of ten years falls within the limits fixed by statute; therefore, we are without liberty to disturb the sentence. The Defendant's assignment of

error lacks merit.

In conclusion, we find no merit in the Defendant's appeal; therefore, we affirm the conviction and sentence.

THE JUDGMENT OF THE CIRCUIT COURT OF QUITMAN COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF 10 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. COSTS OF THIS APPEAL ARE TAXED TO QUITMAN COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.