IN THE COURT OF APPEALS 10/01/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00723 COA

FREDRICK L. RUSSELL

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. ROBERT WALTER BAILEY

COURT FROM WHICH APPEALED: WAYNE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

STANFORD YOUNG

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: BILBO MITCHELL

NATURE OF THE CASE: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: GUILTY OF AGGRAVATED ASSAULT AND SENTENCED TO FOUR (4) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

Fredrick L. Russell was tried and convicted of aggravated assault in the Wayne County Circuit Court in April of 1993. Russell defended on the theory of self-defense. He now appeals to this Court, arguing that there was insufficient evidence to support his conviction, that the jury verdict is against the overwhelming weight of the evidence, and that he could not get a fair trial due to general pre-trial publicity about drugs and crime unrelated to this case. Russell's allegations of error are without merit; therefore, we affirm.

FACTS

On September 14, 1991, Fredrick Russell was the passenger in a pickup truck driven by Tracy Jones. Charlie McGill and Charlie Bradley were passengers in an automobile driven by Larry Bishop. Early that afternoon, Jones stopped his pickup truck, blocking the road, while he and Russell conversed with some young women. Bishop's vehicle was stopped behind Jones' pickup truck and had to wait because there was oncoming traffic. An argument in the road ensued between the occupants of the two vehicles. When Jones' pickup finally drove away, Bishop followed him into the Flamingo Club parking lot. Soon thereafter, Russell hurled a four-ended tire iron (tire tool) into Charles McGill's abdomen, causing serious bodily injury.

After being injured by the tire tool, McGill chased Russell but passed out before catching him. McGill regained consciousness in the hospital in Laurel three days later and gave a statement to the police. McGill told the police, "I looked off and the boy with the tire tool threw the tire tool and hit me. I then went back to the car and got my knife."

The only witnesses who testified were McGill, the victim, and Bishop, the driver of the car in which McGill was riding. Bradley and Jones were not called as witnesses by either side, and the appellant, Russell, elected not to testify.

Larry Bishop testified that Russell got out of the truck and was standing with the bed of the pickup between McGill and himself. McGill was cursing Russell, but made no threats of bodily harm. McGill was standing by the car door. At no time did Bishop see a knife, and he did not observe McGill threatening Russell. The verbal argument between McGill and Russell continued for two or three minutes. Bishop told McGill to be quiet, but McGill refused. McGill stepped toward Russell, paused for a minute, and took another step. Russell encouraged him to "come on."

Bishop stated that he saw the tire tool in Russell's hand and saw Russell throw it. He testified that there was no knife in McGill's hand. After the tire tool struck McGill, Russell ran ,and McGill chased him. Bishop waited for a short time, then he followed and found the injured McGill a short distance away.

On cross-examination, Bishop was asked whether McGill ever stated that he had a knife. Bishop responded that McGill first admitted he had a knife after McGill got out of the hospital, but no further details were elicited. Bishop maintained that he had never seen McGill in possession of a knife or any other weapon during the altercation with Russell.

Charlie McGill testified that he had nothing in his hand when Russell retrieved the tire tool. McGill testified that he was walking toward the truck when Russell picked up the tire tool, so McGill turned back toward the car to look for a weapon. Finding none, McGill turned around in time to see the tire tool flying at him and was struck by the pointed prong in his abdomen.

Fredrick L. Russell was tried and convicted of aggravated assault by a Wayne county jury. Russell timely perfected this appeal.

DISCUSSION

While Russell lists three assignments of error on appeal, he cites no legal authority or facts in support of his third assignment of error--that all the publicity about crime and drugs in general prevented him from receiving a fair trial. Therefore, we do not consider this issue on appeal. *Bland v. Bland*, 629 So. 2d 582, 591 (Miss. 1993) (holding that failure to cite authority in support of proposition precludes supreme court from addressing issue on appeal); *see also, Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990).

A. SUFFICIENCY OF THE EVIDENCE

Russell complains that the trial court erred by declining to grant his motion for a directed verdict at the close of the State's evidence because Russell was not the aggressor and he acted in self-defense. Motions for directed verdict, peremptory instruction, and jnov all challenge the *sufficiency* of the evidence. The standard of review is the same in each. *See McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) (standard of review in jnov cases); *Smith v. State*, 523 So. 2d 1028, 1030 (Miss. 1988) (standard of review in peremptory instruction cases); *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987) (standard of review in directed verdict cases). Regarding the legal sufficiency

of the evidence, the standard of review is as follows:

> [W]e must, with respect to each element of the offense, consider all of the evidence -- not just the evidence which supports the case for the prosecution -- in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Wetz, 503 So. 2d at 808 (citations omitted).

Russell was convicted of aggravated assault in violation of section 97-3-7(2)(b), which provides that "[a] person is guilty of aggravated assault if he . . . purposely or knowingly causes bodily injury to another with a deadly weapon." Miss. Code Ann. § 97-3-7(2)(b) (1972). Viewing the evidence in the light most favorable to the verdict, we cannot conclude that reasonable and fair-minded jurors could only find Russell not guilty. There is sufficient evidence that Russell intentionally threw a deadly weapon and struck McGill, and thereby caused serious bodily harm.

Further, McGill argues that there was insufficient evidence for the jury to find that Russell acted other than in self-defense. We disagree. The evidence adduced by the prosecution was that there was no weapon in McGill's hand at the time he was hit by the tire tool and that McGill had not threatened harm to Russell. This was sufficient evidence to submit the question of self-defense to the jury. We cannot say with respect to one or more of the elements of assault or self-defense that the evidence is such that reasonable and fair-minded jurors could only find Russell not guilty. The evidence was clearly sufficient.

B. WEIGHT OF THE EVIDENCE

Russell filed a motion in the trial court for a new trial alleging that the verdict was against the overwhelming weight of the evidence. The trial court denied the motion. On appeal, Russell argues that the trial court erred in refusing to grant his motion and contends the verdict is against the overwhelming weight of the evidence.

A challenge to the weight of the evidence via a motion for a new trial implicates the trial court's sound discretion. New trial decisions rest in the sound discretion of the trial, court and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for an abuse of discretion, and on review we accept as true all evidence favorable to the State. *Wetz v. State,* 503 So. 2d 803, 807-08 (Miss. 1987).

The jury is charged with the responsibility of weighing and considering the conflicting evidence and the credibility of the witnesses. *Lewis v. State,* 580 So. 2d 1279, 1288 (Miss. 1991); *Benson v. State,* 551 So. 2d 188, 191 (Miss. 1989); *Dixon v. State,* 519 So. 2d 1226, 1228 (Miss. 1988); *Temple v. State,* 498 So. 2d 379, 382 (Miss. 1986).

The evidence adduced at trial was that Russell and McGill were arguing over a traffic violation when Russell procured a four ended tire tool. McGill had no weapon. Russell threw the tire tool at McGill striking him in the abdomen and causing serious bodily injury. Russell argues that the verdict is against the overwhelming weight of the evidence because he produced overwhelming evidence that he threw the tire tool in self-defense. Russell's evidence consists of the fact that McGill admits he had drank a quart of beer, that McGill was older and heavier than Russell, and that there is evidence that McGill had a knife. We would first note that the police statement used to impeach McGill as to whether he had a knife or not is only admissible as impeachment evidence and could not be used as substantive evidence. *Brown v. State*, 556 So. 2d 338, 340-41 (Miss. 1990). Even if it could have been used as substantive evidence, the statement reflects that McGill retrieved a knife from the vehicle in which he was riding only after he was struck by the tire tool. Such a statement would not allow the jury to conclude that Russell was in imminent danger before McGill had the knife and

therefore, could not have justified Russell throwing the tire tool in self-defense. Additionally, Bishop's testimony that McGill, after leaving the hospital, told Bishop that he had a knife is of little use. Russell's counsel never asked Bishop to elaborate on McGill's statement. We do not know whether McGill stated he had the knife in his possession before or after the attack. As such, Bishop's testimony would be of little use in determining whether Russell acted in self-defense.

Viewing the evidence in a light most favorable to the verdict, we cannot say that the jury reached the wrong verdict. The trial court did not abuse its discretion in denying Russell's motion for a new trial. We are not persuaded that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice.

Wetz, 503 So. 2d at 812; *Temple*, 498 So. 2d at 382; *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983).For all of the above reasons, the judgment of the Wayne County Circuit Court is affirmed.

THE JUDGMENT OF THE WAYNE COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF FOUR (4) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND PAYMENT OF $12, 000.00 RESTITUTION IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO WAYNE COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.