IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00529 COA

EUGENE STEWART, SR., BESSIE STEWART AND KELLY STEWART

APPELLANTS

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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: HUMPRHEYS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

DAN W. DUGGAN, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: NOEL CROOK

NATURE OF THE CASE: CRIMINAL -- ALL THREE APPELLANTS INDICTED ON CHARGES OF ROBBERY AND AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER

TRIAL COURT DISPOSITION: EUGENE STEWART--GUILTY OF BOTH CHARGES AND SENTENCED TO SERVE CONCURRENT TERMS OF FIVE YEARS FOR ROBBERY AND

EIGHT YEARS FOR AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER IN CUSTODY OF MISS. DEPT. OF CORRECTIONS.

KELLY STEWART--ACQUITTED OF ROBBERY; GUILTY OF SIMPLE ASSAULT ON A LAW ENFORCEMENT OFFICER AND SENTENCED TO SERVE TWO YEARS IN THE CUSTODY OF MISS. DEPT OF CORRECTIONS, WITH ONE YEAR SUSPENDED.

BESSIE STEWART--ACQUITTED OF ROBBERY; GUILTY OF SIMPLE ASSAULT AND SENTENCED TO SERVE ONE YEAR IN THE CUSTODY OF MISS. DEPT. OF CORRECTIONS, BUT SENTENCE SUSPENDED AND PLACED ON SUPERVISED PROBATION FOR ONE YEAR

BEFORE BRIDGES, P.J., COLEMAN, AND McMILLIN, JJ.

COLEMAN, J., FOR THE COURT:

A grand jury in Humphreys County indicted Eugene Stewart, Sr., Kelly Stewart, and Bessie Stewart for the crimes of (1) aggravated assault on a law enforcement officer, Sedrick Armes, a police officer for the Town of Louise, Mississippi, while he was acting within the scope of his duty and office and (2) robbery of Sedrick Armes by taking his Rossi .357 magnum pistol by putting the said Sedrick Armes in fear of some immediate injury to his person. After the State had rested on rebuttal, the trial court peremptorily instructed the jury to find Kelly Stewart and Bessie Stewart not guilty of robbery. The jury convicted Eugene Stewart, Sr., of both aggravated assault on a police officer while he was acting within the scope of his duty and office and robbery. The jury convicted both Bessie Stewart and Kelly Stewart of simple assault on a police officer while he was acting within the scope of his duty and office. The trial court sentenced Eugene Stewart, Sr., to serve a term of eight years and to pay a fine of one thousand dollars, court costs in the amount of $169.50, and a jury fee of $150.00 upon release from the Mississippi Department of Corrections for the conviction of aggravated assault on a police officer while he was acting within the scope of his duty and office and to serve a term of five years for the conviction of robbery, both of which sentences were to run concurrently. The trial court sentenced Kelly Stewart to serve a term of two years, with the last year suspended, to pay court costs in the amount of $169.50 upon release from the Mississippi Department of Corrections, and to forfeit all firearms for the conviction of simple assault on a police officer while he was acting within the scope of his duty and office. The trial court sentenced Bessie Stewart to serve a term of one year, with that year suspended, to be placed on supervised probation for a period of one year, to pay a fine of $500.00, and to pay court costs in the amount of $169.50 for the conviction of simple assault on a po lice officer while he was acting within the scope of his duty and office. All three of the Stewarts have appealed their respective convictions. We resolve all four issues which they present in their appeal adversely to them and affirm the trial court’s judgments of their guilt and sentences which it imposed on each of them.

I. FACTS

Sometime during the day of January 6, 1993, Sedrick Armes, the only police officer for the town of Louise, had investigated a complaint that Eugene Stewart, Jr., the son of Eugene Stewart, Sr., and

his wife, Bessie Stewart, had pulled a gun on Chester Bramlett and Roger Thompson, two employees of the town of Louise, when they came to the house where Eugene Stewart, Jr., lived to investigate a problem with a water meter about which Eugene Stewart, Jr., had been complaining to the town's officers. Later that same day at approximately 6:30 p.m., Eugene Stewart Sr., Bessie Stewart, and another one of their sons, Kelly Stewart, drove to the house in which Sedrick Armes lived with his eighty-three-year-old godmother, Mary Lee Frazier, to discuss that matter with Armes.

Because his father could not see well at night, Kelly Stewart drove Eugene, Sr., in his father's car; and because she was worried about both her son and her husband, Bessie Stewart followed them to Frazier's house in her car. When the Stewart entourage arrived at Mary Lee Frazier's house, Armes, his godmother, Mary Lee Frazier, and Bobby Jean Fountain, the daughter of Mary Lee Frazier, were inside Frazier's house. Upon their arrival, Kelly Stewart honked the horn of his father's car and called for Armes to come out and talk with them. Instead, Armes responded by asking Bobby Jean Fountain to go outside to ask the Stewarts to come inside. All three of the Stewarts accepted Armes' invitation and entered Frazier's house. First to enter was Eugene, Sr., followed by his son Kelly, who was followed by his mother, Bessie Stewart.

Hardly had Armes and Eugene Stewart, Sr., begun to discuss Armes' investigation of the earlier incident, when an altercation erupted between them in the living room of Frazier's house. Not unsurprisingly, the State's and the Stewarts' versions of the cause and progress of this row differed irreconcilably. One consequence of the fight was certain: Armes went to the Humphreys County Hospital where an emergency room physician, Dr. Lawrence Thurston Cox, Jr., treated a bleeding laceration about one inch long in the back of Armes' head by placing three sutures of 3.0 caliber silk across the wound to close it.

All six persons who were present in Frazier's house that evening testified at the Stewarts' trial. According to the State's version of this incident, as established by the testimony of Armes, Frazier, and Fountain, Eugene Stewart, Sr., then sixty seven years old and allegedly disabled, attacked Armes by striking him across his forehead with his walking cane. Both Kelly and Bessie Stewart then quickly joined in the fray. While Kelly held Armes down, either on the couch, where Armes had originally been sitting when the Stewarts entered the house, or on the floor of the living room, both he and Bessie began to beat Armes along with Eugene Stewart, Sr. Eugene Stewart, Sr., removed Armes' gun from his holster and warned Armes not to kick Kelly. Eugene Stewart, Sr., then hit Armes on the back of his head with Armes' pistol. The blow with the walking cane caused a large bump on Armes' forehead, and the senior Stewart's blow to the back of Armes' head with Armes' Rossi .357 magnum pistol caused the one-inch laceration which required the three stitches about which Dr. Cox testified.

According to the Stewarts' version of the mel e, Armes, in an outburst of anger, shouted that he no longer had to put up with the senior Stewart's haranguing and began to go for his pistol. All three testified that Armes' pistol was in its holster attached to his Sam Brown belt. While Kelly testified that Armes had placed the belt and holster beneath the cushion of the couch on which he was sitting when the Stewarts entered the house, Mr. and Mrs. Stewart testified that Armes was wearing the belt and holster when they entered the house. When Armes began to extract his pistol from its holster, Eugene Stewart, Sr., physically interrupted Armes act with his cane. After Armes had been relieved of his weapon, Kelly held Armes down long enough for his parents to leave the house. Eugene Stewart, Sr., admitted that he took Armes' pistol with him and later threw it into a creek. The pistol

was never recovered.

II. Trial

On March 26, 1993, a Humphreys County grand jury indicted all three of the Stewarts on charges of aggravated assault on a law enforcement officer while acting within the scope of his duty and of robbery. On April 8, 1993, eight days before the scheduled trial date of April 16, 1993, the trial judge entered an order allowing the Stewarts' retained counsel to withdraw from further representation of them.

On April 15, 1993, the Stewarts *pro se* filed a motion for continuance because they had been unable to employ new counsel. While the trial judge did not specifically rule on this *pro se* motion for continuance, he reset the Stewarts' trial for Tuesday, April 27, 1993, which was the day immediately following the official state holiday of Confederate Memorial Day. On Saturday, April 24, 1993, the Stewarts retained Dan W. Duggan, Jr. to represent them. On the day of trial, Duggan filed a second motion for a continuance. The record contains no order entered by the trial court either granting or denying the Stewarts' second motion for continuance. When the trial judge called the case for trial, the Stewarts' counsel mentioned the second motion for continuance but nevertheless announced that they were ready for trial.

We have previously explained the course and result of the trial. After their convictions and sentencing, the Stewarts then filed a motion for a new trial or, in the alternative, for JNOV. The trial judge denied this motion.

III. Issues

The Stewarts present four issues in their appeal. We state these four issues in the language which the Stewarts employed in their brief:

> First, the trial court committed reversible error in failing to grant the Appellants' motion for continuance.
>
> Secondly, the trial court erred in permitting the jury instruction S-1 to be admitted over the Appellants' objection.
>
> Thirdly, the court committed error in failing to grant the judgment notwithstanding the verdict, or the motion for a new trial, filed by the Appellants.
>
> Finally, the trial court committed error in revoking the appeal bond for the Appellant, Eugene Stewart, Sr., without holding a hearing.

IV. Analysis and resolution of the issues

A. First, the trial court committed reversible error in failing to grant the Appellants' motion for continuance.

To support their position on this issue, the Stewarts argue that their new counsel, Dan W. Duggan, Jr., whom they hired on Saturday, April 24, had had no opportunity to contact any of the seventeen witnesses whom Eugene Stewart, Sr., had subpoenaed on Friday, April 23, the day before they hired Duggan. They argue that the intervening holiday of Confederate Memorial Day, when all offices and many businesses were closed, exacerbated their counsel's difficulty in interviewing these witnesses and thus preparing for trial the following Tuesday.

Nonetheless, on the morning of trial, before the trial judge even called the case for trial, the following colloquy ensued between the trial judge and Stewarts' newly hired counsel:

> BY MR. DUGGAN: [The Stewarts] came up Saturday. I did file a motion asking for a continuance on the case. I would hope the Court would grant it. If it doesn't, I am prepared to go with whatever. I've been able to do some checking.
>
> BY THE COURT: Well, you can understand . . .
>
> BY MR. DUGGAN: I do, yes, sir.
>
> BY THE COURT: . . . we are prepared to go forward.
>
> BY MR. DUGGAN: I'm ready to go forward. Like I say, they had several . . . seventeen witnesses subpoenaed and I have not had an opportunity to talk to them but I will talk to them at lunch time . . .
>
> BY THE COURT: All right.
>
> BY MR. DUGGAN: . . . and get prepared the best I can.

Moments later, the trial judge called the case for trial and then asked the Stewarts' counsel, "Defendants ready?" to which Stewarts' counsel replied, "Defendants ready, Your Honor."

There remain three unrelated reasons for resolving this issue adversely to the Stewarts. The first reason is that their counsel announced that he was ready for trial. In *Triplett v. State*, 666 So. 2d 1356, 1361 (Miss. 1995), the Mississippi Supreme Court opined about the defendant's announcing that he was ready for trial as follows:

> In view of the different versions of how this killing took place, counsel should not have

> announced ready for trial, but sought a continuance until he had an opportunity to interview every possible eyewitness.

A review of the previously quoted portion of the record discloses that while the Stewarts' counsel mentioned his motion for continuance to the trial judge before he announced that they were ready for trial, he represented to the trial judge that "I am prepared to go with whatever. I've been able to do some checking." He then added: "I'm ready to go forward. . . . I will talk to [the seventeen witnesses whom the senior Stewart had subpoenaed the previous Friday] at lunch time. The first reason to resolve this issue adversely to the Stewarts is their counsel's announcement that they, and therefore he, were ready for trial.

In *Lambert v. State*, 518 So. 2d 621, 622-23 (Miss. 1987), the defendant, who was on trial for embezzlement, filed a motion for continuance in order to review information supplied pursuant to discovery requests. On appeal the defendant argued that the trial court erred when it failed to grant his motion for continuance. *Id.* at 623. However, aside from the motion itself and a mention of the motion in the defendant's motion for new trial, there was no record of any argument in furtherance of the motion. *Id*. The Mississippi Supreme Court held:

> [I]t is paramount on the party filing a motion to follow up that action by bringing it to the attention of the trial judge and requesting a hearing on it.

Id. The supreme court decided that the trial court had not erred when it denied his motion for continuance because, among other reasons, Lambert had failed to obtain the trial court's ruling on his motion. In the case *sub judice*, the Stewarts failed to obtain the trial court's ruling on their second motion for continuance. Their failure to obtain the trial court's ruling on their motion for continuance is the second reason for our deciding this issue adversely to them.

The Appellants' attorney stated to the trial court that in the event the court decided not to grant the motion, he was prepared to go forward and that the Appellants already had subpoenaed seventeen witnesses to testify on their behalf and he would interview these witnesses during the lunch recess. The Appellants now assert that the trial court's decision not to grant the continuance was erroneous.

Our third reason for resolving this issue adversely to the Stewarts is that it is procedurally barred from our review. The rule in Mississippi is that "[t]he denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground, making the necessary proof to substantiate the motion." *Pool v. State*, 483 So. 2d 331, 336 (Miss. 1986). The Stewarts' motion for a new trial or, in the alternative, for JNOV, omitted entirely the denial of their motion for a continuance as a ground for the motion. Accordingly, this Court is barred from reviewing it on this ground alone. Regardless of any of the foregoing three reasons for resolving this issue adversely to the Stewarts, we also think that the following quotation from *Plummer v. State*, 472 So. 2d 358, 362 (Miss. 1985) (citations omitted), is apt:

> In summary, from this record, it does not appear Plummer would have been the least bit

> better on the evidence or that his lawyer could have served him any better if the trial had been delayed a month.

The Mississippi Supreme Court then affirmed Plummer's conviction of rape even though his counsel had been retained only four days before his trial began. *Id.* In the case *sub judice*, all six persons who witnessed or were involved in the Armes-Stewart row in Frazier's house testified during the Stewarts' trial as did both of the persons who may have been involved in the water-meter incident with Eugene Stewart, Jr. Never in the course of the Stewarts' trial did their counsel profess surprise or prejudice because of the testimony of any witness, whether called by the State or by the Stewarts, or the introduction of any exhibit into evidence. We decide this issue against the Stewarts.

> **B.** Secondly, the trial court erred in permitting the jury instruction S-1 to be admitted over the Appellants' objection.

Instruction S-1 defined the elements of the two felonies for the commission of which the State was prosecuting the Stewarts. The portion of that instruction which dealt with the aggravated assault on Armes as a police officer read as follows:

> [I]f you believe from the evidence in this case beyond a reasonable doubt that on the date testified about, Sedrick Armes was policeman of the Louise, Mississippi, Police Department and was acting within the scope of his duty and office as a policeman; and the Defendants, Eugene Stewart, Sr., Bessie Stewart, and Kelly Stewart, well knew him to be a policeman so acting and one or more of them acting in concert with the others did unlawfully, wilfully, and feloniously cause serious bodily injury to Sedrick Armes by striking him with a firearm, a deadly weapon, and/or striking him with a cane and/or fists, then it is your sworn duty to find the Defendants guilty of aggravated assault on a law enforcement officer . . . .

The Stewarts argue that while the Mississippi Supreme Court has reviewed no less than seventeen cases in which the issue of whether a law enforcement officer was acting within the scope of his or her employment as described in Section 97-3-7(1)(2) of the Mississippi Code of 1972 was involved, that court has never defined the meaning of the phrase, "acting within the scope of his duty." The Stewarts concede that "[t]here can be little doubt that [they] knew that Sedrick Armes was a police officer," but they also contend that the second prong of Section 97-3-7(1)(2) requires that the State prove that a law enforcement officer such as Sedrick Armes was *acting within the scope of his duty* when he was assaulted. The Stewarts contend that because the State failed to prove that Armes was acting within the scope of his duty when the row with them began in Mary Lee Frazier's house, the trial court erred by granting Instruction S-1.

To support their position on this issue, the Stewarts stress their testimony that when they entered the house, Armes was wearing a tee shirt, a pair of blue or black jeans, white socks, and had his feet

propped up on the coffee table. They further assert that "[t]here was no criminal law violation which required the confrontation between [them] and the police officer." They stress that Armes testified that he had been at home for about thirty five or forty minutes with his godmother and her daughter, Bobby Jean Fountain, when the Stewarts drove up outside and honked the horn. The Stewarts conclude that a police officer, who is not in uniform as they testified they found Armes that evening "is not enforcing the law" (1) "sitting in the living room of his house for 34 - 40 minutes, talking to his godmother and a friend," (2) "when he invites citizens of his own community into his living room to discuss a matter," and (3) "when he becomes so agitated that he pulls his weapon on a citizen of his own community without justifiable cause."

The Stewarts' argument overlooks the following additional evidence. First, Armes testified that he worked different days as a police officer for the town of Louise, sometimes on Monday, Tuesday, and Wednesday, and sometimes on Monday, Wednesday, and Thursday. He testified that when he worked for the town, his shift began at 6:00 p. m. and ended at 2:00 a. m. On direct examination Armes testified that he was on duty the night of January 6, 1993. He further testified that earlier that same evening, he had gone to Eugene Stewart's house to investigate the report he had been given, also earlier that same shift, that Eugene Stewart. Jr., had pulled a gun on the two employees of the town of Louise. He, Mary Lee Frazier, and Bobby Jean Fountain testified that he was wearing his police officer's uniform that he had worn to court the day of the trial. Both Eugene Stewart, Sr. and Bessie Stewart testified that Armes was wearing his Sam Brown belt to which the holster, in which the pistol was resting, was attached when they entered Frazier's house.

Section 97-3-7 of the Mississippi Code sets forth the elements of the crimes of simple and aggravated assault on a law enforcement officer. Under both subparagraph (1) for simple assault and subparagraph (2) for aggravated assault the officer who is the victim must be "acting within the scope of his duty, office or employment" at the time that the assault, whether aggravated or simple assault occurs.

In *Callahan v. State*, 419 So. 2d 165, 168-69 (Miss. 1982), a confrontation occurred near the hour of midnight among the mayor and certain officers of the town of Tchula, among whom were two policemen, one alderman, and several auxiliary policemen, all of whom were armed with pistols, rifles, or shotguns, and one Jim Andrews, whom a majority of the board of aldermen, had appointed police chief earlier that same night. In anticipation of the confrontation, police chief Andrews instructed James Harris, who was also at the town hall and who had worked as a policeman for the town for four years, to go home to get his equipment and to return to the town hall. *Id.* at 170. After Harris returned to the town hall, the mayor of Tchula located him in a darkened room and ordered him out of the room while he pointed a pistol at Harris' head. *Id.* at 173. Harris testified positively that he was working on the night of April 30 and that he was on duty at the time the incident occurred. *Id.* In his appeal, Callahan raised the issue of whether James Harris was actually on duty the night of that mel e. *Id*. at 174. The Mississippi Supreme Court responded to that issue as follows:

> Appellants claim that they were entitled to the peremptory instruction because the state failed to prove that Harris was a police officer acting within the scope of his duty . . . . The only question was whether or not he was on duty at the time of the incidents revealed in the record. There was a conflict on this question. Harris stated positively that he was on duty. . . . Whether or not Harris was acting within the scope of his office as a full-time

> policeman depends on whether or not he was performing a legal duty associated with his office as distinguished from engaging in a personal frolic of his own. *United States v. Martinez*, 465 F.2d 79 (2d Cir. 1972); *United States v. Cho Po Dun*, 409 F.2d 489 (2d Cir. 1969); . . . . *See also Watkins v. State*, 350 So. 2d 1384 (Miss. 1977); and *Gardner v. State*, 368 So. 2d 245 (Miss. 1979).

Callahan, 419 So. 2d at 174-75.

In the case *sub judice*, Armes testified that he was on duty the day of January 6, 1993, from 6:00 p.m. until 2:00 a.m. He had gone home after he had spoken with the wife of Eugene Stewart, Jr., earlier in his shift about the report that her husband had pulled a gun on two employees of the town of Louise. The avowed purpose of the Eugene Stewart's conference with Armes was to discuss Armes' investigation of that report. Thus, there was evidence that Armes' conversation with Eugene Stewart, Sr., began pursuant to a legal duty associated with his office of policeman for the town of Louise. The legal duty was to gather information about the incident from Eugene Stewart, Sr., and to confer with a citizen of Louise about a potential violation of the law by a member of that citizen's family. The ensuing row between Armes and the senior Stewart was not Armes' "personal frolic."

While the witnesses contradicted whether Armes was in uniform, even Eugene Stewart, Sr., and his wife, Bessie Stewart, testified that Armes was wearing his Sam Brown belt with the pistol in the holster attached to it, and Kelly Stewart placed the pistol in the holster beneath the cushion of the couch were he found Armes sitting when he entered Frazier's house with his parents. All of the foregoing evidence, if believed by the jury, established that Armes was acting within the scope of his duty as a police officer when Eugene Stewart. Sr. confronted him.

In *Ashley v. State*, 538 So. 2d 1181, 1184 (Miss. 1989), the Mississippi Supreme Court stated that "[o]ur trial courts are required to instruct juries regarding issues of fact only where there appears in the record credible evidence upon which the jury might reasonably find the fact in favor of the requesting party." In *Norman v. State*, 385 So. 2d 1298, 1301 (Miss. 1980), the Mississippi Supreme Court instructed that "[i]nstructions unsupported by the evidence need not, and should not, be given." Thus, it would be error to grant an instruction that is not supported by the evidence. *See Lancaster v. State,* 472 So. 2d 363, 365 (Miss. 1985).

In the case *sub judice* we find that the evidence which we previously related supported the trial court's granting of Instruction S-1 in so far as that instruction referred to the Stewarts' assault on Armes while he was acting as a police officer in the scope of his duty. Thus, we affirm the trial court's grant of Instruction S-1 and resolve the Stewarts' second issue adversely to them.

> **C.** Thirdly, the court committed error in failing to grant the judgment notwithstanding the verdict, or the motion for a new trial, filed by the Appellants.

1. Standard of Review

Our standard of review provides that this Court must view all of the evidence presented at trial in the light most favorable to the State. As stated by the Mississippi Supreme Court in *McFee v. State*, 511 So. 2d 130, 133-34 (Miss. 1987):

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence -- not just that supporting the case for the prosecution -- in the light most consistent with the verdict. We give prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb. (citations omitted).

Id. The same rule as to the scope of appellate review applies in motions for directed verdicts and judgment notwithstanding the verdict. *Litton Systems, Inc. v. Enochs,* 449 So. 2d 1213, 1214 (Miss. 1984).

"In determining whether or not a jury verdict is against the overwhelming weight of the evidence, this Court must accept 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). "Unless the lower court abused its discretion in finding that the verdict was not against the overwhelming weight of the evidence, we will not reverse." *James v. Mabus,* 574 So. 2d 596, 601 (Miss. 1990). Thus, this Court must affirm the trial court's judgment of the Stewarts' guilt of the felonies of which the jury found each of them guilty and their respective sentences which the trial court imposed on each of them unless we determine that the trial court abused its discretion in denying their post-conviction motions.

2. Motion for judgment JNOV

There is a "distinction with a difference" between a motion for JNOV (judgment notwithstanding the verdict) and a motion for new trial. The ultimate function of a criminal defendant's motion for JNOV is to attack the sufficiency of the State's evidence. The motion for directed verdict which a defendant makes at the close of the state's case in chief serves that same purpose at an earlier stage in the prosecution. Either a motion for a peremptory instruction or another motion for directed verdict made by the criminal defendant after both the State and the defendant have finally rested tests the sufficiency of the state's evidence at that point in the trial.

The Mississippi Supreme Court explained these relationships in *Wetz v. State*, 503 So. 2d 803, 807 n.3 (Miss. 1987):

> [A]ll of these motions--the motion for directed verdict made at the end of the case for the

> prosecution, the request for a peremptory instruction at the end of all of the evidence or the motion for a directed verdict at that point, or, finally, a motion for judgment of acquittal notwithstanding the verdict--are procedural vehicles for challenging the sufficiency of the case for the prosecution. Each requires that the court consider all of the evidence before it at the time the motion is considered. When the sufficiency of the evidence is challenged on appeal, this Court properly should review the Circuit Court's ruling on the last occasion when the sufficiency of the evidence was challenged before the trial court. Here, of course, that was when the Circuit Court overruled the motion for a new trial which contained at least two paragraphs challenging the legal sufficiency of the evidence.

In *Harveston v. State*, 493 So. 2d. 365, 370 (Miss. 1986), the Mississippi Supreme Court explained when it could reverse the trial court's denial of any of these motions as follows:

> 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.

Our standard of review reminds us that the weight of the evidence is not the subject of a motion for a JNOV, which we are presently considering. Instead the issue which a motion for JNOV addresses is the sufficiency of the evidence.

The Stewarts detail the inconsistencies in the testimonies of the six witnesses and/or participants in the Armes-Stewart altercation, some of which we have already described. The issue to which the Stewarts' motion for JNOV related was whether Armes was acting in the scope of his duty as a police officer. Our earlier determination that there was adequate evidence to support the trial court's grant of Instruction S-1 actually also determines this issue. The State had produced evidence that Armes was on duty from 6:00 p.m. until 2:00 a.m. on the night of January 6, 1993, and the Stewarts' testimony established that they had sought Armes so that Eugene Stewart, Sr., might discuss with him the report that Eugene Stewart, Jr., had pulled a gun on employees of the town of Louise. Thus, there was sufficient evidence on this issue to support our determination that reasonable and fair-minded jurors could find the Stewarts guilty of aggravated and simple assault on a police officer who was acting within the scope of his duty and office. Thus, we affirm the trial court's denial of that part of the Stewarts' post-trial motion in which they moved for a JNOV.

B. Motion for New Trial

Whereas a motion for JNOV challenges the sufficiency of the evidence, a motion for a new trial challenges the weight of the evidence. *James v. Mabus*, 574 So. 2d 596, 601 (Miss. 1990). In *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993), the Mississippi Supreme Court explained the trial court's discretion to deny motions for new trials as follows:

> Moreover, the challenge to the weight of the evidence via 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 abuse of discretion, and on review we accept as true all evidence favorable to the State.

In addition to the issue of whether Armes was acting within the scope of his duty as a police officer when the altercation with the Stewarts began, another issue in this case was whether Eugene Stewart, Sr., acted in self-defense when he struck Armes, with his walking cane or with Armes' pistol. About the issue of self-defense, the Stewarts acknowledge in their brief:

> The trial court did include a self-defense instruction in this instance. . . . So, self-defense was argued to the jury and they were instructed on that defense. However it is clear that the jury failed to act upon the testimony they heard.

We first note that the Stewarts raise no issue in their appeal about self-defense. They do not complain about the content of the jury instruction which the trial court granted. They do not complain that the trial court erred by admitting or failing to admit evidence relevant to Eugene Stewart's defense of self-defense.

In *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983), the Mississippi Supreme Court wrote, "It is the function of the jury to pass upon the credibility of the evidence." The supreme court then further explained:

> In a criminal prosecution, the jury may accept the testimony of some witnesses and reject that of others, and may accept in part and reject in part the testimony of any witnesses, or may believe part of the evidence on behalf of the state and part of that for the accused, and the credibility of such witnesses is not for the reviewing court, but only for the jury.

Id. at 300-01. All of the inconsistencies in the testimony of the witnesses, especially those who testified for the State, were resolved by the jury adversely to the Stewarts' defense of self-defense and to the issue of whether Armes was acting in the scope of his duty as a policeman when the Stewarts attacked him.

We therefore conclude that the trial court did not abuse its discretion when it denied that part of the Stewarts' post-trial motion which was for a new trial. The weight and worth of all the testimony and evidence was for the jury to determine -- not the trial court and not this Court. Thus, we affirm the trial court's denial of the Stewarts' motion for a new trial and resolve this issue adversely to the Stewarts.

> **D.** Finally, the trial court committed error in revoking the appeal bond for the Appellant, Eugene Stewart, Sr., without holding a hearing.

After the trial judge had sentenced all three of the Stewarts, their defense counsel requested and obtained appeal bonds for all three of them. Subsequently, the trial judge decided to revoke Eugene, Sr.'s bond. Citing Section 99-35-115 of the Mississippi Code and Rule 7.02 of the Uniform Criminal Rules of Circuit Court Practice, Eugene Stewart, Sr. argues that the trial judge erred when he revoked his appeal bond because the trial judge never held a hearing to determine whether the appeal bond should have been denied.

On May 11, 1993, the senior Stewart filed a motion to consider setting an appeal bond with the trial court, which denied that motion by its order entered two days later on May 13, 1993. In its order entered on May 13, the trial court recited that it denied Stewart's request for bond because "[C]ourt officials have notified the Court that [Stewart] has made the threat that he will kill [Armes] before he goes to prison." On December 10, 1993, Eugene Stewart, Sr., filed a petition for emergency hearing on denial of bail in the Mississippi Supreme Court. On January 28, 1994, the Mississippi Supreme Court entered an order in which it recited the trial court's finding that Eugene Stewart, Sr., constituted a special danger pursuant to Section 99-35-115 of the Mississippi Code and denied the senior Stewart's petition for emergency hearing on denial of bail.

The supreme court's decision on this matter renders this issue moot, at least for purposes of Eugene Stewart, Sr.'s appeal; and we therefore do not consider it.

V. Summary

Because the Stewarts' counsel announced that his clients and he were ready for trial in response to the trial judge's inquiry and did not obtain the trial court's denial of the second motion for continuance, and because the Stewarts failed to include the matter of their second motion for continuance as a ground for granting them a new trial, we cannot put the trial court in error pursuant to the Stewarts' first issue. The Stewarts' second and third issues are quite similar in purpose because both of these issues present for this Court's analysis and resolution the question of whether Sedrick Armes was acting within the scope of his duty as a policeman when Armes' altercation with the three Stewarts began in his godmother's house in Louise. We decided the second issue and the part of the third issue which dealt with the motion for the grant of judgment JNOV against the Stewarts because we find from our review of the testimony and evidence in the record that there was sufficient evidence to support the element of Armes' acting within the scope of his duty as a policeman when the confrontation with the Stewarts began.

We have affirmed the trial court's denial of the Stewarts' motion for a new trial because we conclude that the issues of who were the aggressors and whether Eugene Stewart, Sr., acted in self-defense were for the jury's consideration and resolution. The order entered by the Mississippi Supreme Court on January 28, 1994, has rendered the fourth issue, which was peculiar to Eugene Stewart, Sr.'s, appeal bond, moot. Thus, we affirm the trial court's judgments of the Stewarts' guilt and their respective sentences which the trial court imposed on each of them.

THE HUMPHREYS COUNTY CIRCUIT COURT'S JUDGMENT OF EUGENE STEWART, SR.'S GUILT OF AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER ACTING WITHIN THE SCOPE OF HIS DUTY AND ITS SENTENCE TO SERVE A TERM

OF EIGHT YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY A FINE OF $1,000 ARE AFFIRMED.

THE HUMPHREYS COUNTY CIRCUIT COURT'S JUDGMENT OF EUGENE STEWART, SR.'S GUILT OF ROBBERY AND ITS SENTENCE TO SERVE A TERM OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WHICH SENTENCE IS TO RUN CONCURRENTLY WITH THE SENTENCE OF EIGHT YEARS FOR AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER ACTING WITHIN THE SCOPE OF HIS DUTY ARE AFFIRMED.

THE HUMPHREYS COUNTY CIRCUIT COURT'S JUDGMENT OF KELLY STEWART'S GUILT OF SIMPLE ASSAULT ON A LAW ENFORCEMENT OFFICER ACTING WITHIN THE SCOPE OF HIS DUTY AND ITS SENTENCE TO SERVE A TERM OF TWO YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THE LAST YEAR SUSPENDED ARE AFFIRMED.

THE HUMPHREYS COUNTY CIRCUIT COURT'S JUDGMENT OF BESSIE STEWART'S GUILT OF SIMPLE ASSAULT ON A LAW ENFORCEMENT OFFICER ACTING WITHIN THE SCOPE OF HIS DUTY AND ITS SENTENCE TO SERVE A TERM OF ONE YEAR IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THAT ONE YEAR SUSPENDED BUT PLACED ON SUPERVISED PROBATION FOR ONE YEAR, TO PAY A FINE OF $500 ARE AFFIRMED.

COSTS ARE ASSESSED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., NOT PARTICIPATING.