IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01205 COA

RICHARD HOYLE

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. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: BENTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DANNY LAMPLEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY DEWITT ALLRED III

ASSISTANT DISTRICT ATTORNEY: DAVID ROBINSON

NATURE OF THE CASE: CRIMINAL - SIMPLE ASSAULT

TRIAL COURT DISPOSITION: FOUND GUILTY OF SIMPLE ASSAULT ON POLICE OFFICER. SENTENCED TO FIVE YEARS AS HABITUAL OFFENDER.

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Richard Hoyle was convicted by a Benton County Circuit Court jury of simple assault. He appeals, alleging that he should have been granted a lesser-included-offense instruction on resisting arrest. We agree, and therefore reverse and remand for further proceedings. A sentencing issue that Hoyle also raises need not be resolved.

FACTS

On November 5, 1991, Hoyle was a spectator at a high school basketball game in Ashland. He was drunk and became noisy and rowdy, eventually interrupting the game. Officers James Williams and Robert Burton of the Benton County Sheriff's Department were on duty at this game and were alerted to Hoyle's disruptive behavior. Williams asked Hoyle to quiet down, but Hoyle continued to disrupt the game. What happened when Williams attempted to escort Hoyle out of the game forms the evidentiary dispute. Hoyle was charged with two counts of simple assault on a police officer. He was found guilty of the count against Williams, but was found not guilty of the count against Burton.

DISCUSSION

The indictment under which Hoyle was convicted charged:

> That Richard Hoyle . . . did then and there unlawfully, willfully and feloniously, purposely and knowingly attempt to cause bodily injury to James Williams, a law enforcement officer . . . by fighting, hitting, or kicking the said James Williams, in violation of the provisions of Section 97-3-(1)(a) of the Mississippi Code of 1972. . . . .

Hoyle argues that the trial court should have granted his requested instruction D-8 because the evidence was disputed as to whether he actually attempted to or did, in fact, hit Williams. He contends instruction D-8 would have allowed the jury to consider what he denominates as a lesser included offense, that of resisting arrest. That instruction reads:

> The court instructs you that if you are not convinced beyond a reasonable doubt that the defendant, Richard Hoyle, committed a simple assault against either Officer James Williams and/or Constable Robert Burton, but that you find beyond a reasonable doubt that the arrest of the defendant, Richard Hoyle, was lawful, and that the defendant, Richard Hoyle, did unlawfully and without justification resist such arrest, then you may find the defendant, Richard Hoyle, guilty of the lesser included offense of resisting arrest.

The state argues that instruction D-8 was properly denied in that resisting arrest is not a lesser included offense of assault on a law enforcement officer. However, in *Murrell v. State*, 655 So. 2d 881, 885 (Miss. 1995), a case decided after Hoyle's trial, the supreme court concluded that resisting arrest is a lesser included offense of simple assault on a police officer. In *Murrell*, the court reiterated

that in order to determine whether there is an evidentiary basis for a lesser included offense instruction, the test is:

> [A] lesser included offense instruction should be granted unless the trial judge -- and ultimately this Court--can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge).

Murrell, 655 So. 2d at 886 (quoting *Harper v. State*, 478 So. 2d 1017, 1021 (Miss. 1985)).

The indictment in *Murrell* charged the defendant with "willfully, unlawfully, feloniously, and knowingly caus[ing] injury to [a police officer]. . ." Therefore, it was necessary for the state to prove that Murrell actually caused injury in order for him to be guilty under the indictment. The statutory crime of simple assault does not require injury, and thus the indictment was more restrictive than it needed to be. The court concluded that based on the evidence presented in that case, "[a] reasonable fact-finder could conclude, based on the evidence, that Murrell resisted arrest, but have a reasonable doubt whether he injured the officer within the meaning of the statute. The trial court erred in failing to give the resisting arrest instruction." *Murrell*, 655 So. 2d at 886.

The trial judge refused Hoyle's request for this instruction, apparently agreeing with the State's argument that resisting arrest was not a lesser included offense of simple assault. The normal and necessary analysis for whether one offense is lesser and included within another, is whether all the necessary elements for conviction of the lesser are contained within the greater. *See Porter v. State*, 616 So. 2d 899, 910 (Miss. 1993) (Hawkins, C.J., concurring). Such a rule allows the State to charge the greater offense but through a proper instruction receive a conviction on the lesser. However, it does not allow the State, through a lesser-offense-instruction argument, in effect to indict at trial for a less serious offense that was not charged in the original indictment. As Chief Justice Hawkins said, there may "be a separate, distinct and less serious crime which the proof at trial shows the defendant committed, but this does not necessarily mean it is a lesser included offense." *Id.* at 910 (Hawkins, C.J., concurring).

The court in *Murrell* did not go through a formal analysis of whether each element of the crime of resisting arrest is included within the crime of simple assault, but held that the former is a lesser included offense of the latter. Our assault statutes have changed in recent years, but the relevant statutes as they existed at the time of the offense committed in *Murrell*, which was July, 1991, were the same as existed at the time of this incident at the Ashland High School in November 1991. Thus we are bound by the *Murrell* holding.

In the case before us, the indictment charged Hoyle with "unlawfully, willfully and feloniously, purposely and knowingly *attempt*[ing] to cause bodily injury to James Williams. . ." Therefore, it was necessary for the State to prove that Hoyle had purposefully attempted to cause injury to Williams,

but was not required to prove an actual injury. There was testimony from which a jury could conclude that Hoyle attempted to injure Williams. There was also testimony, however, that could lead the jury to determine that Hoyle took no affirmative action. Hoyle testified that he never attempted to hit Officer Williams, and that he merely pulled away from the officer as he was being led outside. Hoyle also testified that after pulling away, he was hit by Williams.

The lesser-included-offense instruction of resisting arrest should have been granted because "taking the evidence in the light most favorable to the accused, and considering all reasonable inferences which may be drawn in favor of the accused from the evidence," reasonable jurors could find the defendant guilty of the lesser included offense of resisting arrest and not of any affirmative acts of assault.

Hoyle also complains that the trial court did not follow the proper procedures for determining whether he should be sentenced as a habitual criminal. Because we are reversing the conviction and remanding for further proceedings, it is not necessary for us to address the alleged error. If a new trial is held and a conviction obtained, the trial court at that time will be constrained to follow the dictates of the relevant sentencing procedures.

THE JUDGMENT OF THE CIRCUIT COURT OF BENTON COUNTY OF CONVICTION OF SIMPLE ASSAULT AGAINST A POLICE OFFICER IS REVERSED AND REMANDED. ALL COSTS ASSESSED TO BENTON COUNTY.

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