

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00340 COA

MARCUS T. HEMPHILL 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. C. E. MORGAN, III

COURT FROM WHICH APPEALED: CHOCTAW COUNTY CIRCUIT COURT

FOR APPELLANT: KEVIN NULL

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: CRIMINAL-ARMED ROBBERY AND AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: SENTENCED TO SERVE LIFE IN MDOC AND 20 YEARS IN MDOC TO RUN CONSECUTIVELY TO LIFE

MANDATE ISSUED: 7/8/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

The defendant, Marcus T. Hemphill, was convicted of armed robbery and aggravated assault in the Circuit Court of Choctaw County. Hemphill was sentenced to life imprisonment for the armed robbery and to a consecutive twenty-year sentence for the aggravated assault. Hemphill appeals from this ruling alleging that four reversible errors were committed by the trial court.

## FACTS

On September 14, 1994, Mrs. Peggy Henderson, who was running D & H Grocery in Choctaw County, Mississippi, was robbed by two masked men at approximately 2:30 p.m. One of the assailants held a gun to Mrs. Henderson and choked her while the other collected the money from the cash register and the bank bag. As the assailants were exiting the grocery store, the gunman who then had Mrs. Henderson by the neck or shoulders, stopped and intentionally threw her towards the counter's edge. Mrs. Henderson barely missed hitting her temple or eye on the sharp edge of the counter. Just as she was about to hit it, she turned her head a little so that the edge hit her cheek instead. Mrs. Henderson had several other bruises on her neck and shoulder area. There were three men involved in the burglary, the gunman, the man who went in the grocery store with the gunman, and the driver of the getaway car. Two of the assailants, Tyrone Potts and William Clark, testified for the State against the gunman in order to receive lighter sentences.

## ISSUES

### **A. Did the trial court err in refusing to quash the aggravated assault charge in Hemphill's indictment?**

Hemphill sets forth four errors which he contends the trial court committed. The first error the defense claims is that the trial judge erred when the judge refused to quash the charge of aggravated assault in the indictment. Count II of the indictment alleges that Marcus T. Hemphill did unlawfully, feloniously, purposely, or knowingly cause bodily injury to another person, by throwing her down on a counter top and causing injury to her face and shoulder, a means likely to produce serious bodily harm. Prior to trial, Hemphill filed a motion to quash the indictment claiming that the indictment was legally insufficient as to the aggravated assault charge. Hemphill backs this claim up with the contention that a person's hands and feet could never be a means likely to produce death. Hemphill cites *Jackson v. State*, 594 So. 2d 20, 23-24 (Miss. 1992), along with *Blaine v. State*, 17 So. 2d 549, 550 (Miss. 1944) as his authority for this contention. However, both of these cases say that in the right circumstances hands and feet can certainly be used to commit aggravated assault. *Jackson v. State*, 594 So. 2d at 23-24; *Blaine v. State*, 17 So. 2d at 550. In *Blaine*, the court held that the only time that a person's hands and feet would not be considered a means of force likely to cause death or serious bodily injury is when use of such is in a manner which would never be likely to cause death or serious injury. *Id.*

In the case at bar, the victim was forcibly thrown across the room towards a sharp counter, the edge of which missed her temple and her eye by only a small distance. The question of whether or not this action is likely to cause death or serious bodily injury was, therefore, best left to the jury to decide. We affirm the trial court's refusal to quash the aggravated assault charge in the indictment.

### **B. Did the trial court err when it overruled Hemphill's motion for a directed verdict as to the aggravated assault charge?**

Hemphill's second issue on appeal is that the court erred when it overruled Hemphill's motion for a directed verdict as to the charge of aggravated assault. Hemphill did not express the deficiency in the

State's case, just that it lacked the requisite sufficiency of evidence. The State is correct in arguing that due to Hemphill's lack of specificity as to why Hemphill should have been granted a directed verdict/new trial, this Court need not consider the issue. *Banks v. State*, 394 So. 2d 875, 877 (Miss. 1981). We will, nevertheless, address the trial court's ruling on Hemphill's motion for a directed verdict.

Hemphill in his brief to this Court argues sufficiency of the evidence, which springs from the trial court's denial of Hemphill's motion for directed verdict. However, post-trial he made a motion for a new trial, which goes to the weight of the evidence. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This denial of Hemphill's motion for a new trial was also his basis for this appeal. This Court must rule on the last challenge made, which is the motion for a new trial in this case. However, because the appellant has argued sufficiency of the evidence in his brief, there appears to be some confusion. We will, for the sake of clarity, address the motion for a directed verdict, which was argued in the brief, as well the weight of the evidence, which was the basis stated for the appeal.

### 1. Sufficiency

A challenge to the sufficiency of the evidence requires an analysis of the evidence by the trial judge to determine whether a hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. *May v. State*, 460 So. 2d 778, 781 (Miss. 1984). If the judge determines that no reasonable juror could find the defendant guilty, then he must grant the motion. *Id.* If he finds that a reasonable juror could find the defendant guilty beyond a reasonable doubt, then he must deny the motion. *Id.* Here Hemphill made a motion for a directed verdict at the end of the State's case. This Court's scope is limited to the same examination as that of the trial court in reviewing the motion for a directed verdict. That is, if the facts point in favor of the defendant to the extent that reasonable jurors could not have found the defendant guilty, beyond a reasonable doubt, viewing all facts in the light most favorable to the State, then it must sustain the assignment of error. *Blanks v. State*, 542 So. 2d 222, 225-26 ( Miss. 1989). Of course, the opposite is also true. *Id.* We may reverse the trial court's ruling only where one or more of the elements of the offense charged is lacking to such a degree that reasonable jurors could only have found the defendant not guilty. *McClain* 625 So. 2d at 778.

In the case at hand, there was sufficient evidence to find Hemphill guilty beyond a reasonable doubt. The State made out its prima facia case by proving that Hemphill committed aggravated assault. The crime of aggravated assault consists of attempting to cause or purposely, knowingly, or recklessly causing bodily injury to another. Miss. Code Ann. 97-3-7 (1972). The State proved that on September 14, 1994, Marcus T. Hemphill purposely, knowingly, or recklessly caused bodily injury to Mrs. Peggy Henderson. This was shown by eyewitness testimony and photographs of the victim's bruises.

### 2. Weight

The argument the defense makes in its motion for a new trial is that the jury's verdict was against the overwhelming weight of the evidence. The fact that a trial judge denies a motion for directed verdict in no way affects his ruling on a motion for a new trial. *May*, 460 So. 2d at 781. The decision of whether or not to grant a motion for a new trial rests in the sound discretion of the trial judge and

should be granted only where the judge is convinced that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant the motion would result in an unconscionable injustice. *Id.* In determining whether a verdict is against the overwhelming weight of the evidence or not, this Court must view all evidence in the light most consistent with the jury verdict and should not overturn the verdict unless we find that the court abused its discretion when it denied the motion. *Blanks*, 542 So. 2d at 228. The proper function of the jury is to decide the outcome in this type of case, and the court should not substitute its own view of the evidence for that of the jury's. *Id.* at 226. Likewise, the reviewing court may not reverse unless it finds there was an abuse of discretion by the lower court in denying the defendant's motion for a new trial. *Veal v. State*, 585 So. 2d 693, 695 (Miss. 1991).

Upon reviewing all of the evidence presented in the light most consistent with the verdict, we find that the trial judge did not abuse his discretion in denying Hemphill's motion for a new trial.

**C. Did the trial court err when it allowed into evidence testimony that Hemphill had threatened prospective witnesses?**

When the State attempted to elicit testimony that Hemphill had previously threatened potential witnesses in order to prevent them from testifying, Hemphill objected, and the judge overruled the objection. In Hemphill's brief, he argues that the testimony was irrelevant, and alternatively, if the testimony was relevant, then its probative value was substantially outweighed by the prejudice to Hemphill. Relevant evidence is that evidence which has a tendency to make a fact which is in issue more or less probable. Miss. R. Evid. 401. Any evidence which is relevant is admissible except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by the Mississippi Rules of Evidence. Miss. R. Evid. 402. Rule 403 states that the probative value must be substantially outweighed by the danger of unfair prejudice. Miss. R. Evid. 403. The State argues that the testimony is admissible evidence because it is relevant under Rule 401 of the Mississippi Rules of Evidence, and that according to Rule 403 of the Mississippi Rules of Evidence, the probative value of the evidence is not substantially outweighed by the prejudice to Hemphill. *See* Miss. R. Evid. 401, 403.

The testimony in question would tend to prove that Hemphill was attempting to conceal the fact that he committed a crime by threatening the prospective witnesses. According to the Mississippi Rules of Evidence, this testimony is obviously relevant. It goes directly to show that Hemphill was trying to hide his involvement in these crimes. It tends to show that it is more probable than not that Hemphill was involved in the burglary/assault. We find, as did the trial judge, that the danger of unfair prejudice does not substantially outweigh the probative value of this evidence. We also hold that the trial judge has the sound discretion to determine the relevancy and admissibility of evidence. *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990). Likewise, the trial judge's ruling will not be reversed unless we find that the judge has abused his discretion. *Watts v. State*, 635 So. 2d 1364, 1367 (Miss. 1994).

In the case at bar, the trial judge did not abuse his discretion, nor was there any resulting unfair prejudice or harm to Hemphill. We therefore, uphold the trial court's admission of the testimony into evidence.

**D. Does the sentence imposed constitute cruel and unusual punishment, and is it proportionate to the crime?**

Hemphill argues that the jury's sentence of life imprisonment for a conviction of armed robbery constitutes cruel and unusual punishment and was not proportionate to the crime. Hemphill's sole case on which he relies is *Solem v. Helm*, 463 U. S. 277 (1983), which sets forth three factors to be examined in determining proportionality. The three factors are: 1) the seriousness of the offense and the harshness of the penalty; 2) the sentences given to other criminals in the same jurisdiction; and 3) sentence given in other jurisdictions for the same crime. *Id.* at 278.

These factors enumerated in *Solem* remain the means by which to examine proportionality of sentences. However, *Solem* has been overruled by *Harmelin* as to the issue of whether the Eighth Amendment guarantees proportionality in sentencing. The court stated that there is no guarantee of proportionality in the eighth amendment. *Harmelin v. Michigan*, 501 U. S. 957, 965-66 (1991). Therefore, in light of the ruling in *Harmelin*, it seems that the only time a person would be entitled to a proportionality review is if, on the face of a comparison between the crime and the penalty imposed, there is evidence of "gross disproportionality." *Hoops v. State*, 681 So. 2d 521, 538 (Miss. 1996).

Nevertheless, this Court will review the proportionality of Hemphill's sentence. As to the first factor--the comparison of the seriousness of the offense to the harshness of the penalty imposed-- Hemphill argues that no serious harm occurred because no one was shot or taken to the hospital. However, this Court holds that an armed robbery is a very serious offense and even has the potential to be deadly. Next we look to the sentences given to other criminals in this jurisdiction. If we compare Hemphill's two accomplices, we determine that the others were not involved to the same extent as was Hemphill. Additionally, they both fully cooperated with the police in the matter, causing them to receive a lesser punishment. Finally, a look to other jurisdictions' punishment for the same crime makes apparent that Mississippi's statute is well within the normal range. Massachusetts calls for an imprisonment term of life or for any term of years, Louisiana calls for hard labor for not less than three years and not more than forty.

"[The Supreme Court] has repeatedly held that a trial court will not be held in error or held to have abused discretion if the sentence imposed is within the limits fixed by statute." *Johnson v. State*, 461 So. 2d 1288, 1292 (Miss. 1984); *Contreras v. State*, 445 So. 2d 543 (Miss. 1984); *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993). In the case at hand the judge was within his discretion to impose the unanimous jury verdict of life imprisonment under the Mississippi statute for armed robbery. Miss. Code Ann. 97-3-79 (1972). We therefore affirm the trial court's overruling of Hemphill's motion for a new trial.

Finding no merit in this appeal, we affirm the trial court's ruling on all issues presented.

**THE JUDGMENT OF THE CHOCTAW COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I OF ARMED ROBBERY AND SENTENCE OF LIFE IMPRISONMENT AND COUNT II OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS TO RUN CONSECUTIVELY TO COUNT I, BOTH TO BE SERVED IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO CHOCTAW COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, HINKEBEIN,  
KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**