

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00554 COA**

DONNELL LEWIS

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

DATE OF JUDGMENT:	OCTOBER 11, 1991
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CHRISTOPHER G. HOLT
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEWITT ALLRED III
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT 1: AGGRAVATED ASSAULT - 20 YRS IN MDOC. CT 2: BURGLARY OF AN OCCUPIED DWELLING - 10 YRS IN MDOC CONSECUTIVE TO COUNT 1.
DISPOSITION:	AFFIRMED - 11/4/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/25/97

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

McMILLIN, P.J., FOR THE COURT:

Donnell Lewis was convicted of aggravated assault and burglary of an occupied dwelling by a Hinds County Circuit Court jury. The charges arose out of an incident where an intruder broke into the residence of Lewis's former girlfriend and attacked her with a razor. The woman received severe lacerations to her face and back, requiring extensive plastic surgery to her face. Lewis claims that his conviction should be reversed because (a) the trial court erred in admitting the testimony of the plastic surgeon who treated the victim's facial injuries and (b) the trial court erred in denying his new trial motion claiming that the verdict was against the weight of the evidence. These issues are without merit. This Court affirms the convictions.

The Doctor's Testimony

The State called the plastic surgeon who had repaired the lacerations to the victim's face. The defense had previously objected, outside the jury's presence, to the doctor being called. Lewis claimed that the victim's testimony and photographs introduced by the State had already established the fact that the victim had received bodily injury within the meaning of the statute governing aggravated assault. Miss. Code Ann. § 97-3-7(2) (Rev. 1994). The defense argued at trial that this additional evidence was, therefore, not relevant since the fact of injury was already well established. On appeal, Lewis also seeks to argue that the prejudicial impact of the "gory details" of the doctor's treatment outweighs any probative value it might have, relying on Mississippi Rule of Evidence 403. We will deal first with the "relevance" objection.

A.

Relevancy

Evidence does not become irrelevant by virtue of being cumulative. Rule 403, dealing with the admissibility of cumulative evidence, specifically informs us of that fact in its first two words. M.R.E. 403. Evidence may be *inadmissible* on account of its cumulative nature, but admissibility of evidence often hinges on considerations other than relevancy. The doctor's testimony was certainly relevant on the question of whether the victim had received a bodily injury, and the trial court was correct in admitting the doctor's testimony over an objection based on relevancy.

Despite the "relevancy" language in the defendant's objection, the trial court appeared to also treat it as a Rule 403 objection based on the cumulative nature of the evidence since, in ruling on the objection, the court mentioned the possibility of "overkill" in the State's proof. The court, after deliberation, rejected that notion. The trial court is vested with wide latitude in controlling the flow of evidence. *Johnson v. State*, 655 So. 2d 37, 42 (Miss. 1995). We may reverse for improperly admitted evidence only upon a finding that (a) the court abused its discretion in admitting the proof and (b) a substantial right of the defendant has been affected by the erroneous ruling. *Burt v. State*, 493 So. 2d 1325, 1326 (Miss. 1986); M.R.E. 103(a).

At the outset, this Court is not prepared to conclude this evidence was necessarily cumulative. The jury was entitled to be informed with some measure of particularity as to the extent of the victim's injuries. Her own testimony and a series of photographs do not seem to provide the proof of the nature of the injuries with the same certainty that the treating physician, with his experience and first-hand knowledge, can provide. There is, however, a more fundamentally fatal aspect to Lewis's argument. Conceding the cumulative nature of the evidence for sake of argument, this Court is unable to see how evidence that is merely cumulative on an issue the defendant is prepared to concede can be so prejudicial as to deprive him of a fundamentally fair trial. Without such a finding, even the erroneous admission of this evidence does not warrant reversal. *Holland v. State*, 587 So. 2d 848, 864 (Miss. 1991).

B.

The Prejudicial Impact of the Doctor's Testimony

We decline to consider Lewis's alternative argument that the doctor's testimony was so gory that its prejudicial impact substantially outweighed any probative value the evidence had. *See* M.R.E. 403. That particular aspect of Rule 403 was neither raised in Lewis's objection at trial nor considered by the trial court, sua sponte. We decline to consider for the first time on appeal an issue not presented to the trial court for resolution. *Lester v. State*, 692 So. 2d 755, 779 (Miss. 1997).

II.

The Weight of the Evidence

Lewis presented two alibi witnesses. One was a woman friend who claimed Lewis had been with her at the time of the crime. Another was a dentist who testified that Lewis had called him in the early morning hours complaining of tooth pains and claiming that he had been awake all night drinking alcoholic beverages to ease his pain. Lewis claimed in his new trial motion that the jury's decision to convict him in the face of this testimony was against the weight of the evidence. The trial court rejected this argument and denied Lewis a new trial. We may put the trial court in error for this ruling only if we conclude that a manifest injustice has occurred as a result. *Burrell v. State*, 613 So. 2d 1186, 1191 (Miss. 1993).

The State presented two eyewitnesses to the incident, one of whom was the victim herself. Both witnesses were very familiar with the defendant prior to the night of the assault. Both of them positively identified Lewis as being the assailant in this crime. Our legal system vests the authority to resolve disputed questions of fact in the jury. *Abram v. State*, 606 So. 2d 1015, 1041-42 (Miss. 1992). This case ultimately had to be decided on the issue of which fact witnesses the jury would choose to believe. Neither of the State's eyewitnesses were substantially impeached. Nor can it reasonably be said that their testimony was inherently incredible. The jury, by its verdict, indicated its decision to believe those witnesses over the defendant's alibi witnesses. There is no basis for this Court to disturb the verdict of the jury.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF COUNT ONE, AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS TO RUN CONSECUTIVELY TO ANY OTHER SENTENCE PREVIOUSLY IMPOSED, AND COUNT TWO, BURGLARY OF AN OCCUPIED DWELLING AND SENTENCE OF TEN YEARS TO RUN CONSECUTIVELY TO COUNT ONE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HINDS COUNTY.

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

