**IN THE COURT OF APPEALS**
**OF THE**
**STATE OF MISSISSIPPI**
**NO. 96-KA-00052-COA**

**HENRY DOUGLAS RUCKER** **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: | 09/06/95 |
| TRIAL JUDGE: | HON. JOHN H. WHITFIELD |
| COURT FROM WHICH APPEALED: | HARRISON COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | KEITH ROBERTS |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL<br>BY: JEAN SMITH VAUGHAN |
| DISTRICT ATTORNEY: | MARK WARD |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| TRIAL COURT DISPOSITION: | CTS 1 & 2 AGGRAVATED ASSAULT: CT 3 POSSESSION OF A FIREARM ON EDUCATIONAL PROPERTY: CT 4 CARRYING A CONCEALED WEAPON AFTER FELONY CONVICTION: HABITUAL CTS 1 & 2 20 YRS EACH CT, RUN CONCURRENT; CT 3 3 YRS; CT 4 5 YRS; CTS 1, 2, 3 & 4 CONSECUTIVELY |
| DISPOSITION: | AFFIRMED - 11/18/97 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 12/9/97 |

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

DIAZ, J., FOR THE COURT:

Henry Douglas Rucker was convicted of aggravated assault, possession of a firearm on educational property, and carrying a concealed weapon after a felony conviction. He makes the following

arguments on appeal: (1) that the trial court erred in refusing his jury instruction on the lesser-included offense of simple assault, (2) that the trial judge administered inequitable justice by restricting his time for voir dire, (3) that the trial court erred in failing to dismiss his indictment for possession of a firearm on educational property, and (4) that because the combined errors of the case operated to deny him a fair trial, the trial court erred in denying his motion for a new trial. Finding all of Rucker's issues without merit, we affirm.

## FACTS

On the morning of September 15, 1994, Henry Rucker went to Biloxi High School, armed with a gun, to get revenge for a gang fight the night before which had involved his son. While he was there, Rucker approached one of the students, Joseph Williams, and beat him over the head with his gun, causing Williams to be taken to the hospital with a concussion. Seeing all the chaos, the school's principal attempted to subdue Rucker. As the two struggled, Rucker's gun fired. The assistant principal then managed to wrestle the gun away from Rucker, who was later arrested at the scene by police.

## DISCUSSION

### I. DID THE TRIAL COURT ERR IN REFUSING RUCKER'S JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF SIMPLE ASSAULT?

In his first assignment of error, Rucker argues that the trial court erred in refusing to grant jury instruction D-2, which was an instruction on simple assault. The supreme court has repeatedly held that :

> [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).

***Harper v. State,* 478 So. 2d 1017, 1021 (Miss. 1985)** (citations omitted). While the jury may often be instructed to consider a lesser offense, this does not mean that in every case the accused is entitled to a lesser-offense instruction. ***Hutchinson v. State,* 594 So. 2d 17, 18 (Miss. 1992).** Only where there is an evidentiary basis for the lesser offense should such an instruction be given. ***Id.***

Mississippi's assault statute distinguishes between the crimes of simple and aggravated assault. "A person is guilty of simple assault if he . . . negligently causes bodily injury to another with a deadly weapon . . . ." **Miss. Code Ann. § 97-3-7(1)(b) (Rev. 1994).** Conversely, the aggravated assault provision states that "[a] person is guilty of aggravated assault if he . . . attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon . . . ." **Miss. Code Ann. § 97-3-7(2)(b) (Rev. 1994).** The statutory language, therefore, suggests that simple assault becomes aggravated assault when the accused uses a deadly weapon to *intentionally* inflict injury upon another individual. Thus, Rucker's deliberate wielding of a deadly weapon removes this case from the simple assault provision of the statute. Accordingly, we hold that the trial court correctly found that no evidentiary basis existed to warrant a jury instruction on simple assault.

**II. DID THE TRIAL JUDGE ADMINISTER INEQUITABLE JUSTICE BY RESTRICTING RUCKER'S TIME FOR VOIR DIRE?**

Rucker next argues that he was harmed by the trial judge's imposition of a time limitation for voir dire. He maintains that since the State was not similarly limited, that he was denied a fair trial. The presumption exists "that a judge, sworn to administer impartial justice, is qualified and unbiased." ***Hunter v. State,*** **684 So. 2d 625, 630 (Miss. 1996)** (citing *Turner v. State*, 573 So. 2d 657, 678 (Miss. 1990)). However, we will not hesitate to reverse where we find that the trial judge displayed partiality or conveyed the impression to the jury that he was siding with the State. ***Jones v. State,*** **1383, 1387 (Miss. 1995).** Although the trial judge in the case at bar should have warned both parties in advance of the time limit for voir dire and should have made certain that equal time was provided to both Rucker and the State, his failure to do so does not rise to the level of reversible error. The supreme court has stated that matters of trial decorum are "largely left to the discretion of the trial judge, as he is present, has the opportunity, as well as the duty, to see that the course of the trial is conducted in conformity with traditional notions of fairness and impartiality to the litigants." ***New Orleans & Northeastern R.R. Co. v. Weary,*** **217 So. 2d 274, 279 (Miss. 1968).** Finding no evidence to support Rucker's proposition that he was denied a fair trial, we refrain from concluding that the trial judge committed reversible error on this issue.

**III. DID THE TRIAL COURT ERR IN FAILING TO DISMISS RUCKER'S INDICTMENT FOR POSSESSION OF A FIREARM ON EDUCATIONAL PROPERTY?**

Rucker next argues that the trial court erred in failing to dismiss his indictment for possession of a firearm on educational property. He maintains that the crimes of possession of a firearm on educational property and carrying a concealed weapon after a felony conviction are essentially the same crime and that he was placed in double jeopardy when the State prosecuted him for both offenses. The United States Supreme Court has articulated the applicable rule to be used in determining whether the same act constitutes a violation of two distinct statutory provisions. ***Blockburger v. United States,*** **284 U.S. 299, 304 (1932).**

> [T]he test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not . . . . A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

***Id.*** (citations omitted). Clearly, under the authority of *Blockburger*, the two crimes at issue in this assignment of error are separate and distinct. The crime of possession of a firearm on educational property requires proof of the following elements: possession, a firearm, on educational property. **Miss. Code Ann. § 97-37-17(2) (Rev. 1994).** Conversely, the crime of carrying a concealed weapon after a felony conviction requires proof that the convicted felon carried a deadly weapon, concealed in whole or in part. **Miss. Code Ann. § 97-37-1(d) (Rev. 1994).** The evidence at trial showed that Rucker had possession of a firearm on the property of Biloxi High School. The jury also found that Rucker carried a concealed weapon after having been convicted of a felony. Although the two applicable statutes are similar in that they both require proof of possession of a weapon, they also differ in that each statute requires proof of additional elements. As such, we find that Rucker committed two separate crimes, and prosecution of one did not bar prosecution of the other. ***Simmons v. State,*** **568 So. 2d 1192, 1201 (Miss. 1990).**

**IV. DID THE TRIAL COURT ERR IN DENYING RUCKER'S MOTION FOR A NEW TRIAL?**

Rucker argues that the errors which occurred throughout his case combined to deprive him of a fair trial, and thus that the trial court erroneously denied his motion for a new trial. "This Court will reverse a trial judge's denial of a request for [a] new trial only when such denial amounts to a[n] abuse of that judge's discretion." ***Coleman v. State,*** **697 So. 2d 777, 788 (Miss. 1997)** (citations omitted). A careful review of each of Rucker's assignments of error reveals no sufficient basis for determining that Rucker was denied a fair trial or that the trial judge abused his discretion in failing to order a new trial. Accordingly, we find that Rucker's fourth proposition is without merit.

**THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION AS AN HABITUAL OFFENDER OF COUNTS I AND II OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS EACH, WITH SENTENCES TO RUN CONCURRENTLY; COUNT III OF POSSESSION OF A FIREARM ON EDUCATIONAL PROPERTY AND SENTENCE OF THREE (3) YEARS TO RUN CONSECUTIVE WITH SENTENCES IN COUNTS I AND II; AND COUNT IV OF CARRYING A CONCEALED WEAPON AFTER FELONY CONVICTION AND SENTENCE OF FIVE (5) YEARS TO RUN CONSECUTIVE WITH SENTENCES IN COUNTS I, II, AND III, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS**

**OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.**

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

**THOMAS, P.J., NOT PARTICIPATING.**