

**IN THE COURT OF APPEALS 03/25/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-KA-00218 COA**

**TONY DONALE WILLIAMS**

**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. ROBERT H. WALKER**

**COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT**

**ATTORNEY FOR APPELLANT:**

**H. E. ELLIS, JR.**

**ATTORNEY FOR APPELLEE:**

**OFFICE OF THE ATTORNEY GENERAL**

**BY: SCOTT STUART**

**DISTRICT ATTORNEY: CONO CARANNA**

**NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT**

**TRIAL COURT DISPOSITION: GUILTY VERDICT AND SENTENCED TO 20 YEARS IN  
PRISON**

**EN BANC.**

**SOUTHWICK, J., FOR THE COURT:**

Tony Donale Williams was convicted of aggravated assault and sentenced to twenty years in prison. On appeal, Williams challenges the weight and sufficiency of the evidence, argues that jury instructions were defective, and contends that an exhibit was improperly introduced in evidence. We affirm.

**FACTS**

In early 1993, a gun fight took place at a lounge in Biloxi that resulted in the shooting of a bystander who was rendered paralyzed. The gun fight was precipitated by an argument between Williams and principally Herman Sparkman, but there were other incidents building up to the gunfire. The argument spilled over from the lounge into a parking lot. Williams, his friends, and others retrieved their guns. One witness testified to Williams's and Sparkman's pointing their guns at each other from a distance of ten feet, talking angrily and threateningly. Who fired first the witness could not say. The parking lot was filled with gunfire for up to five minutes. When the gun fight abated, a bystander, Allen Johnson, was found wounded and paralyzed. While the investigation of the incident revealed that Williams was engaged in the gun fight, it did not result in identification of the source of the bullet hitting the bystander.

**DISCUSSION**

*1. Weight and Sufficiency of the Evidence*

Williams's primary challenge to his conviction on appeal rests on the absence of forensic evidence linking his gun to the bullet that hit the bystander. That bullet is still lodged in the bystander's back. In the absence of such evidence, he argues, the State's case against him is defective for want of proof of causation. There is no dispute that Williams actively participated in a gun fight following an argument with others who also became involved in the shooting. The issue here is directly focused on factual causation under the aggravated assault statute. Williams separately challenges jury instructions regarding his culpability as an aider or abettor.

Our standard for reviewing challenges to convictions based on sufficiency of the evidence is well-established. As to each element of the offense, we consider all of the evidence in the light most favorable to the verdict. We reverse when, with respect to an element of the offense charged, the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). As to whether the verdict is contrary to the overwhelming weight of the evidence, a similar standard is employed. We view the evidence in the light most favorable to the verdict. The trial court is given discretion to order a new trial in the face of overwhelming evidence contrary to the jury's verdict to prevent an unconscionable injustice. *McClain*, 625 So. 2d at 781.

We evaluate the evidence in light of this standard within the framework of the offense. The Mississippi Code provides that a person is guilty of aggravated assault if he causes serious bodily injury "recklessly under circumstances manifesting extreme indifference to the value of human life."

Miss. Code Ann. § 97-3-7(2)(a) (1972). In this case, the causation was Williams's reckless participation in a shootout in a crowded area. It takes two or more to trap innocent bystanders in a crossfire. A person who engages in such senseless, wanton conduct should not be able to hide behind difficulty in proving—or even a necessity of proving—whose bullet hit which bystander. All participants have equal culpability in causing the injury.

The fact that forensic evidence failed to link the bullet in the victim to any of the weapons known to have been used in the gun fight does not preclude Williams's conviction. There was ample evidence that he was engaged in an argument that resulted in a gun fight in which he was an active participant. A pointed statement of the principle that should be applied comes from a Maryland court:

The 'bottom line' is that when a group, or two groups, of hoodlums deliberately engage in a gang-war style of shoot-out in a crowded urban area, they collectively trigger an escalating chain reaction creating a high risk to human life. When instead of taking their gunslinging vendetta to an uninhabited island or some remote spot in the desert, they arrogantly indulge in their homicidal insanity in the middle of a crowded block of residences, each participant in such collective madness displays a wanton and depraved indifference to any human life that might randomly fall within their overlapping and deadly enfilades. Should death to one of the innocent bystanders or homeowners ensue, each participant in the lethal encounter has exhibited the *mens rea* that qualifies him for depraved-heart murder.

In terms of the *actus reus* of this particular depraved-heart murder, the deadly homicidal force was not a bullet. Such an analytic approach would commit us to the trivializing foolishness of seeking to establish the trajectory and provenance of each of forty or fifty bullets fired in the course of a single wild exchange. The deadly homicidal force, rather, was a collective hail of bullets, a collective fusillade, with no further parsing required. Which bullet came from which gun is inconsequential. One does not anguish over which member of the firing squad killed the prisoner.

*Alston v. State*, 662 A.2d 247, 248 (Md. 1995) (quoting *Alston v. State*, 643 A.2d 468, 469 (Md. Ct. Spec. App. 1994)).

Here, fortunately, there was no murder. Nevertheless, the principle applies with equal force to an aggravated assault. A Tennessee court found that the person who laid an unconscious victim in the middle of a roadway, who was then struck by a passing automobile, was guilty of aggravated assault. *State v. Baggett*, 836 S.W.2d 593, 596 (Tenn. Crim. App. 1992). The court found that "one whose wrongdoing is a concurrent proximate cause of an injury may be criminally liable the same as if his wrongdoing were the sole proximate cause of the injury." *Baggett*, 836 S.W.2d at 595.

While there is no Mississippi authority that disposes of the question presented here, we agree with the logic expressed in the cases discussed above and hold that the necessary causation in an aggravated assault may, as here, be supported when the defendant engaged in conduct that provoked and encouraged mass violence that had a likely propensity to injure or kill another.

The dissent appears to believe that there was no evidence that linked the particular shooting incident in which Williams participated, with the injury to Allen Johnson. The dissent points to the fact that

gunfire is common at this club, and Williams's participation in a shootout was not the only shooting incident that evening. Even though there was evidence of unrelated gunfire at other times, the evidence was all but uncontradicted that the victim was shot during the gunfire in which Williams and Sparkman participated. The dissent quotes one of the relevant witnesses, the victim's brother. The witness testified that there had not been any gunfire for an hour or so. When Williams and Sparkman began firing, the witness dropped to the ground. A few minutes later when the shooting stopped, the witness's brother, Allen Johnson, had been shot. Since the witness had seen the victim just before the shooting began, it is evident that the victim was hurt during the gunfire that began when Williams started shooting.

Secondly, the dissent makes much of testimony that some witnesses believed it likely that a third man, Carlos Smith, fired the paralyzing bullet. All three men were indicted -- Williams, Herman Sparkman, and Smith. Smith died in a car accident before trial; Sparkman was acquitted. Smith was not part of the conversation between Williams and Sparkman that immediately preceded the shooting. Exactly why Smith may have joined in the gunfire, or why any others unknown might have started shooting, is not something the State had to prove. The victim and many others who had to seek cover were near Williams when the shooting commenced. If a bullet from Smith's gun caused the injury, and whether Smith was shooting as an ally of Williams, of Sparkman, or of no one, the injury was caused by the reckless indifference to human life that Williams displayed.

Cases need to be decided dispassionately. We have quoted a strongly worded explanation of the law from another court, but the reasoning is sound and inescapable. A willing principal initiator of a shootout in a crowded parking lot, a participant who the jury found was not acting in self-defense, is liable for the consequences of his actions.

Williams's conviction rests on a proper evidentiary foundation.

## *2. Jury Instructions*

Consistent with the nature of his objections to the quality of the evidence against him, Williams objected to the following jury instructions:

The Court instructs the jury that each person present, consenting to the commission of the offense and doing any act which is an ingredient in the crime, or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense. Aiding in the commission of aggravated assault makes the one who aids a principal. To render one criminally responsible as a principal in aggravated assault, it is not necessary that he should personally inflict the injury. (S-15B)

[I]f two or more persons jointly engage in the commission of acts which amount to recklessness, manifesting extreme indifference to the value of human life, which results in serious bodily injury to a third person, all may be found guilty of aggravated assault even though it may be impossible to say whose act actually caused the injury. (S-18B)

Williams acknowledges S-15B is a correct statement of the law. Instead, he contends that the instruction is unsupported by the evidence "since there is no proof as to whom Tony Williams was encouraging or directing to commit a crime." Essentially, this is an argument akin to his argument

that there is insufficient evidence to tie his gun with the bullet lodged in the victim. The argument is fundamentally flawed in its misconception of an abettor's role in a crime. Such a person need not encourage or direct the commission of a particular crime. Rather, it is enough for him to facilitate the crime, without acting as an accomplice. *See Kelly v. State*, 493 So. 2d 356, 359 (Miss. 1986) (approving similar instruction); *White v. State*, 330 So. 2d 877, 879 (Miss. 1976) (same); *see also James v. State*, 307 So. 2d 549 (Miss. 1975).

Williams cites other cases in which the supreme court used expansive language to explain the role of an abettor that appeared to indicate the need for some cooperative concert of action to warrant an abettor instruction. One such case is *Hogan v. State*, 580 So. 2d 1275, 1278-79 (Miss. 1991). In *Hogan*, the supreme court affirmed the aggravated assault conviction of an individual who, while not directly involved in physically delivering the assault, was an accomplice to the crime. In that case, the supreme court approved a view of aiding and abetting as including the conduct of an accomplice. However, the court did not limit the applicability of a charge of aiding and abetting to circumstances in which the accused is an accomplice. Accordingly, Williams argument is without merit.

As to S-18B, Williams argues that it is abstract, contradictory, and confusing. While the instruction is technically abstract in that it fails to expressly relate the law to the facts of the case, when read with the other instructions presented, S-18B makes perfect sense. The instruction is consistent with the language of our aggravated assault statute. It "substantially tracks the language of the statute, thereby defining the nature of the offense charged and correctly informing the jury of the necessary elements of the aggravated assault offense . . . ." *Buchanan v. State*, 427 So. 2d 697, 698 (Miss. 1983) (citations omitted). The latter part of the instruction, *i.e.*, that part allowing a finding of guilt "even though it may be impossible to say whose act actually caused the injury," is consistent with our holding here that a person may be guilty of aggravated assault without physically inflicting the injury on the victim.

### 3. Evidentiary Objection

At trial, a map of the parking lot in which the gun fight took place was admitted in evidence, despite the presence of an accumulation of notations made on the map by witnesses. Williams argues that the admission of what he terms a "pre-marked" exhibit, coupled with other unspecified errors, warrants reversal of his conviction. The issue is unavailing for Williams.

In support of his position, Williams properly relies on *Jones v. State*, 342 So. 2d 735 (Miss. 1977). In *Jones*, the supreme court refused to reverse a conviction based on the admission of evidence from a prior trial that had been marked by a witness. *Jones*, 342 So. 2d at 736-37. While the court noted that in some circumstances admitting an exhibit so marked may be error, the main thrust of its instruction is that admission of a marked exhibit is permissible so long as the exhibit's sponsoring witness testifies concerning the marks on the exhibit and has some personal knowledge that makes the marks properly authenticated and relevant. *Id.*

In this case, the record reveals that the sponsoring witnesses properly authenticated the markings on the exhibit. Accordingly, the trial judge did not err in admitting the document.

**THE JUDGMENT OF CONVICTION OF THE HARRISON COUNTY CIRCUIT COURT  
(SECOND DISTRICT) OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20)**

**YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.**

**BRIDGES, C.J., McMILLIN, P.J., AND PAYNE, J., CONCUR.**

**DIAZ, J., CONCURS IN RESULT ONLY.**

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

**KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, J.**

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**KING, J., DISSENTING:**

With all due deference to the majority, I am compelled to dissent.

The majority premises its affirmation of this conviction on the theory that "all participants have equal culpability in causing the injury." In support of this theory, the majority opinion, discusses at length cases from Maryland and Tennessee. While the referenced cases make for emotional and indignant reading, they are not consistent with the facts of this case.

While these quoted cases evoke great passion in the majority opinion, they likewise reflect the flaw in the analysis of the majority. That flaw is unwittingly set out by the majority, on page 3 of its opinion when it says, "... forensic evidence failed to link the bullet in the victim to any of the weapons known to have been used in the gun fight ...."

The majority opinion omits many salient facts, which are necessary for a fair and accurate discussion of this case. The Blue Note is a night club in Biloxi. The regular display and random discharge of firearms is an integral part of the culture of the Blue Note. March 21, 1993, was a typical night at the Blue Note. There was the regular display and random discharge of firearms. Additionally, the gunfight, which is the basis of this case occurred at the Blue Note on March 21, 1993. At some point during the gunfire on March 21, 1993, Allen Johnson, a bystander was shot and as a result paralyzed.

The prosecution did not establish (1) which gun fired the bullet which struck Allen Johnson, or (2) which shooting incident provided the bullet which struck Allen Johnson. We are required to accept as credible that testimony which favors the prosecution. *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss. 1989). Therefore, it is best that we look at the testimony of the prosecution's witness for the facts omitted from the majority opinion.

At the joint trial of Sparkman and Williams, which commenced on January 25, 1994, the victim, Allen Johnson, testified that on March 21, 1993, he was in the parking lot of the Blue Note Club socializing when he saw Fred Hartwell, a friend of his, give Herman Sparkman a gun. Thereafter, he heard gunfire. After one of the shots shattered the window on the driver's side of his vehicle, where he was standing, Johnson fell to the ground and crawled toward the rear of his vehicle. As he reached the back tire, a bullet hit him in the shoulder. Johnson did not see who fired the bullet that struck him. Additionally, because the bullet was not recovered from his body, he does not know the type of bullet or the make of the gun used to fire the bullet.

Frederick A. Hartwell testified that he was in the parking lot of the Blue Note Club talking to his friends when the incident occurred. Hartwell explained that approximately half an hour before Johnson was shot, Williams randomly shot some rounds in the air. It was peaceful after that. However, Hartwell explained that it was not uncommon for men to fire their guns for no reason. Hartwell explained that later that night, Sparkman had asked him for his gun to protect himself from Williams and others. Prior to giving the gun to Sparkman, Hartwell placed fifteen rounds in it. When the shooting began, "Herman Sparkman was in the front of my car off to the side, and Tony Williams was off to the side of the rear end of Allen Johnson's car." Johnson was in his vehicle. Sparkman fired the first shot, whereupon Williams returned fire.

The victim's brother, Sardie Canaan, testified that around twelve o'clock on March 21, 1993, he, Allen Johnson, Frederick Hartwell, and Anthony Mitchell were in the parking lot of the Blue Note Club having a few beers when they heard a few shots being fired in the air, not at anybody in particular. It was peaceful after that. About an hour later, Sparkman and Williams began arguing, and

Hartwell gave Sparkman his gun. Canaan explained that:

They just argued, argued while they had the gun pointed at each other. Tony lowers his gun to walk away, and like the music, maybe a tape stopped or somewhere [sic]. I don't know who fired first. Just fire started --started off and everybody started ducking down, I'd say about a quick -- quick three minutes fire -- firearms and it was over with. And before I knew it, my brother was shot and we rushed him to the hospital.

Canaan explained that there were "many people out there that did a lot of shooting before this incident." Out of the approximately fifty shots that were fired that night, most of them came from around the building where Carlos Smith and some of his friends were. Canaan further explained that before the shooting, Tony Williams was standing to the back of the victim's vehicle. Canaan agreed with the defense that Carlos Smith was the most likely person to have fired the bullet which struck his brother. However, he didn't know from whose gun the bullet came.

Anthony Carnel Mitchell, Jr., testified that he arrived at the Blue Note Club at approximately eleven o'clock on the night of the incident. Mitchell heard Sparkman tell Hartwell that somebody was after him and asked Hartwell for a gun. Thereafter, Williams and Sparkman exchanged words with each pointing his respective gun at the other. Mitchell explained that a person behind the building who he did not see fired between ten and twenty shots in the general direction of where the victim was injured. At the conclusion of the State's case, the trial court denied the defense motions for directed verdicts.

A review of the testimony elicited from prosecution witnesses reveals that (1) Sparkman fired at Tony Williams, (2) Tony Williams returned fire at Sparkman, (3) Carlos Smith, who was not involved in the fight between Sparkman and Williams was behind a building from where a number of shots were fired, during the shootout between Sparkman and Williams, (4) Tony Williams was to the rear of Allen Johnson's vehicle, and (5) the shot which hit Allen Johnson was more consistent with a shot fired from where Carlos Smith was located

The prosecution failed to establish (1) which gun fired the bullet which struck Allen Johnson, and (2) which shooting incident provided the bullet which struck Allen Johnson. Was it a bullet from the shootout between Sparkman and Williams, or was it a bullet fired by Carlos Smith, who at best decided to gratuitously involve himself in the shootout (3) was it Carlos Smith with whom Tony Williams is alleged to have been acting in concert?

An indictment which charges that parties acted in concert, does not relieve the prosecution of the obligation to establish (1) a joint action, and (2) injury occurring as a result of that joint action, rather than some other action . *Hedrick v. State*, 637 So. 2d 834, 837 (Miss. 1994) (citations omitted).

As a society we must clearly send a message that random violence, will not be tolerated. However, we do not send that message by either random indictment or random conviction. Both indictment and conviction should be based upon the actual facts which show participation as opposed to presence.

**COLEMAN, J., JOINS THIS OPINION.**



