

IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00648 COA

ALLEN POSEY A/K/A ALLEN KEITH POSEY

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. KEITH STARRETT

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LINCOLN COUNTY

ATTORNEY FOR APPELLANT:

JACK G. PRICE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY W. GLENN WATTS

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: CRIMINAL-AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF 5 YEARS IN THE
CUSTODY OF THE MDOC WITH THE LAST THREE YEARS SUSPENDED FOR 5 YEARS
PROBATION; DEFENDANT SERVE A TERM AT HINDS COUNTY RESTITUTION CENTER,
PAY COURT COSTS, ATTORNEY FEES, \$34,074.78 RESTITUTION WITH THE FIRST

\$5093.54 RESTITUTION GOING TO THE VICTIM, JERRY D. KING, AND THE BALANCE TO THE INSURANCE CARRIER AND IF THE VICTIM INCURS MORE EXPENSES THEY ARE TO BE ASSESSED TO THE DEFENDANT.

BEFORE FRAISER, C.J., COLEMAN, AND KING, JJ.

FRAISER, C.J., FOR THE COURT:

On May 1, 1995, Allen Posey (Posey) was tried and convicted by a jury in the Lincoln County Circuit Court of aggravated assault. On appeal he presents the following issues:

I. DOES THE SINGLE BLOW OF A HAND TO THE FACE CONSTITUTE AGGRAVATED ASSAULT?

II. WAS THE JURY MOVED BY PREJUDICE, BIAS OR SYMPATHY IN REACHING THEIR VERDICT?

Posey fails to cite any authority in support of his second assignment of error. The Mississippi Supreme Court has held that failure to cite authority in support of a claim waives any error presented by the issue. *Holloman v. State*, 656 So. 2d 1134, 1141 (Miss. 1995) (citing *Magee v. State*, 542 So. 2d 228, 234 (Miss. 1989)). We therefore address only issue one.

FACTS

The night of November 11, 1994, Leann McCollough (McCollough) and long time friend Jerry Darryl King (King) went to a local high school football game together. King was a student at Southwestern Junior College, and McCollough was recently divorced. They had been friends since junior high school. After the game, McCollough and King went to Vicky's Cafe in Bogue Chitto, Mississippi. There, they joined McCollough's brother and proceeded to play pool and socialize. McCollough mentioned as they entered Vicky's Cafe that her ex-husband, James Thomas (Thomas), was present.

Thomas was with Posey and several friends that night. Posey was home on leave from Marine boot camp. Thomas testified that while he did not have a problem with his ex-wife, McCollough, being at Vicky's with King, Posey had made threats that he was going to hit King. Thomas' testimony reveals the following:

Q. What if anything did Mr. Posey tell you concerning what he was going to do to Jerry King that night?

A. He had mentioned something about fighting and I just kind of tried to talk him out of it.

I thought I had. So that's all he said. I just walked off. I didn't talk to him again.

Posey played pool and did not bother King inside Vicky's. The only contact between Posey and King occurred when Posey asked McCollough for change and King gave it to Posey. Both Posey and King testified that they did not know each other. McCollough and King left Vicky's and proceeded to the parking lot. McCollough testified that as she and King were walking to the parking lot, Posey screamed. In response to the scream, King turned around to find Posey in his face. Without any warning, Posey hit King hard in the face with his fist. McCollough testified as follows:

Q. As you walked out the cafe door there, did anything unusual happen?

A. I looked around and I saw a bunch of people were in the parking lot, and I looked up and Jerry [King] was like a few steps ahead of me, and then I heard Allen [Posey], I guess, scream, and then the next thing I knew Jerry turned around and Allen punched him.

King immediately collapsed and Posey turned and walked away. McCollough's brother and a friend loaded the barely conscious King into a car and drove him to a nearby emergency room. King was transported by ambulance to the Mississippi Baptist Medical Center in Jackson, Mississippi.

At trial, neurosurgeon Dr. Richard H. Bobo's video deposition was played for the jury and revealed the following about King's condition after being hit by Posey:

Q. I want to call your attention to on or about November or in November of 1994, and ask you during that month did you have a case to meet Jerry, I believe, Darryl King?

....

A. I was consulted by Robert Allen Smith, November 12th, 1994. Went to see Mr. King because he had a head injury that Dr. Smith had admitted him for. Dr. Smith had diagnosed him with pneumocephalus, which is air inside the cranial wall. I took a history and did a physical from him at that time.

....

Q. After you conducted your further examination I believe you met with him at the hospital?

....

A. He was alert, oriented, responsive. . . . I looked at the CAT scan. At that time it appeared that the right posterior wall of the frontal sinus -- frontal sinuses are right here. The posterior wall is inside the skull. The anterior wall is beneath the skin of the face. The posterior wall on the right side was fractured, as well as the oral roof. The oral roof is the

bone over the eye. Also had a right maxillary fracture. And a large pneumocephalus in the right frontal region. Air up here. The air comes in from the sinus, the crack through the sinus and through the oral roof, allowing the paranasal sinus in the frontal region to communicate directly with the inside of his skull. Not only is there bone there, there is a lining of the skull called dura matter that is a very tough shiny bluish-white material that's basically the periosteum or lining of the bone inside the skull. This had to be torn to allow the area -- The bone had to be fractured and the periosteum had to be torn. And it was basically in the right frontal region and needed to be fixed. I discussed this with him and discussed doing a combined procedure with Robert Allen Smith.

....

A. As I said, I planned a procedure with Dr. Smith, combined neurological and plastic surgical procedure.

....

A. All I did in the operation was patch the hole in the skull. And the only reason I did this was to prevent him from getting a meningitis. And I told that more than likely I would have to knock out any sense of smell, at least on that side, to do it. But I wasn't sure and would try not to. Because the crack went right down through where the nerve to the nose went, nearby. So I went in with Dr. Smith, opened the skull up with an incision from just in front of the one ear to just in front of the other ear, peeled the scalp down, leaving the covering of the skull, the pericranium, intact. Then as the separate layers, starting back here, three inches behind the incision I dissected the pericranium off and folded it down. It's a flap, so I had to make a flap of tissue sticking out. And I used that flap to patch the hole. I cut the bone off right here, right across above the eyebrows from forehead side to forehead side, by the temple region, right up across the middle. And I took out this plate or bone fold, and folded the patch in over the hole inside the dura, than cut the dura open, laid it down between the brain and the skull, and I used the other patch material to patch the outside. I cut a little piece, extra piece off.

Q. The condition when you talked with him and the diagnosis and the procedure you performed, if you had not performed those procedures, what , if anything could have happened to him?

A. Meningitis.

Q. Based upon your expertise in this field, do you have an opinion as to the seriousness of the injuries he sustained?

....

Q. Were they life threatening?

A. Potentially life threatening.

At trial, King testified as to how Posey's blow had impacted his features:

A. Well, my nose has been pushed to the right more because of the fracture. My eye -- I have a piece of plastic in the lower eye socket that's, you know, they had to remove bone and replace it with plastic. My eye doesn't, it catches on that piece of plastic. My forehead has a seam across my forehead where my front skull plate was removed and for repair back here there's a scar. You can see where the bone sphere came out. And I also have a, you know, just a visible stitching here.

At the time of trial, King was scheduled for several more surgeries to repair the damage done to his face.

I. DOES THE SINGLE BLOW OF A HAND TO THE FACE CONSTITUTE AGGRAVATED ASSAULT?

Section 97-3-7 of the Mississippi Code defines aggravated assault:

(2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm. . . .

Miss. Code Ann. § 97-3-7 (Rev. 1994). The indictment charging Posey stated that Posey "did wilfully, unlawfully, feloniously and purposely cause serious bodily injury to another, namely, one Jerry D. King, a human being, by striking the said Jerry D. King in the face with his fist. . . ." On appeal, Posey claims that the trial court erred in failing to try him on simple assault only. In his motion for directed verdict, Posey claimed that the State had failed to prove that Posey committed the assault knowingly and purposely. On appeal, he repeats his argument that by using his fist in a single blow to King's face, he had no idea that he could hurt him so badly. Therefore, Posey argues, because he was ignorant of his own strength, he only used his fist, and he only hit him once, he should only have been charged with simple assault.

Posey's argument is similar to that of John Michael Jackson, appellant in *Jackson v. State*, 594 So. 2d 20, 23 (Miss. 1992). Jackson entered his estranged wife's house near midnight, dragged her through the driveway after she had tried to flee, dumped her back inside the house, and pummeled her head with his fists. *Id.* at 22. Tammy Jackson sustained a ruptured eardrum and was hospitalized for thirty-six hours. *Id.* Jackson, however, claimed that he was only liable for simple assault because the indictment failed to allege use of a deadly weapon. *Id.* at 23. Like Posey, Jackson argued that injury by his fists was not sufficient to warrant a charge of aggravated assault. *Id.* The Mississippi Supreme Court disagreed:

It is not necessary under § 97-3-7(2)(b) that the use of hands and fists constitute the use of a "deadly weapon;" rather, it is enough if their use constitutes a "means likely to

produce [either] death or serious bodily harm."

....

We hold that whether or not hands and closed fists constitute, under § 97-3-7 (2)(b), a "means likely to produce serious bodily harm" involves a question of fact to be decided by the jury in light of the evidence. The responsibility for determining likelihood remains with the jury which may be left free to give due weight to the characteristics of the parties, the place, the manner in which hands and fists are used, and the degree of force employed.

Jackson, 594 So. 2d at 24. King's injuries far surpassed Tammy Jackson's ruptured eardrum. After invasive surgery and several restructuring operations, King's face and appearance are changed forever. At trial, his medical bills totaled over \$34,000.00, and more surgeries were anticipated. King's neurologist testified about the grave possibility of meningitis caused by Posey's punch. The evidence is overwhelming that the injury caused by Posey's solitary "blow" to King's face was "serious bodily harm." Posey admitted hitting King, but his excuse that he did not knowingly and purposely commit serious bodily harm because he did not know his punch would be that hard is not acceptable. It borders on the ridiculous. The evidence shows that Posey contemplated hitting King early in the evening. He bragged about it to his friends. Posey knowingly and purposely hit King in the face with no advance warning and no reason.

The law is clear that it is the province of the jury to determine whether a fist constitutes means likely to produce serious bodily harm. The jury determined that Posey's fist was means sufficient to cause serious bodily harm and therefore convicted him of aggravated assault upon Jerry D. King. Finding no error, we affirm.

THE JUDGMENT OF THE LINCOLN COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THREE YEARS SUSPENDED AND FIVE YEARS PROBATION AND ORDER TO PAY RESTITUTION IS AFFIRMED. COSTS ARE TAXED TO LINCOLN COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.