

**IN THE COURT OF APPEALS 05/21/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00481 COA**

**FLOYD PERRY**

**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 LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WALTER E. WOOD

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN

DISTRICT ATTORNEY: MARK RAY

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: GUILTY VERDICT: SENTENCED TO SERVE 7 YEARS IN  
THE M.D.O.C., PAY COURT COSTS, FEES AND ASSESSMENTS

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Floyd Perry (Perry) was convicted in the Madison County Circuit Court for aggravated assault. He was sentenced to serve seven years in the Mississippi Department of Corrections and ordered to pay court costs. Aggrieved, Perry appeals to this Court asserting the following issues: 1) that the trial court erred in denying his motion to quash the indictment and 2) that the trial court erred in granting jury instructions S-1 and S-2 and in denying instructions D-1, D-10, and D-15. Finding no error warranting reversal, we affirm the judgment of the lower court.

## FACTS

Henry Dixon (Dixon) and Perry have known each other for a long time. The two have had a history of altercations. On June 8, 1993, Patricia Riley (Riley), a mutual friend, asked Dixon and Perry to help her repair her back door. The three went over to Riley's house where Dixon and Perry repaired the door. After they had finished repairing the door, Riley, Dixon, and Perry rode back downtown in Dixon's truck. All three were drinking alcohol the entire time. Dixon testified that upon returning downtown, Perry and Riley got out of the truck. Riley walked across the street, and Perry went to the back of the truck. When Dixon tried to get out of the truck, he testified that Perry started to hit him repeatedly on the head and shoulders with a hammer. Dixon claimed this attack was unprovoked.

According to Perry, he claimed that he got out of Dixon's truck and went by a "store" to have a drink. When he came out of the store and walked past Dixon's truck, he claimed Dixon was drunk and tried to start a fight. He stated that they argued for a few minutes, and Dixon pulled out a gun, but then put it back in his pocket. They continued to argue until Dixon stuck his hand back in his pocket again. At that point, Perry said he "tapped" Dixon on the head and on the shoulder with a claw hammer because he thought Dixon was going to shoot him.

Witnesses claimed that Perry continually hit Dixon with the hammer until he was on the ground. Only one witness claims that he saw Dixon with something shiny in his pocket; however, no gun was ever found in Dixon's possession.

## DISCUSSION

### A. INDICTMENT

Perry's first assignment of error is that the lower court should have granted his motion to quash the indictment because the allegations of the indictment did not fall within the language of the statute under which he was charged. Perry argues that although the indictment stated that he was charged under section 97-3-7(2)(a) of the Mississippi Code, both the wording of the indictment and the evidence presented at trial reflect that he was actually convicted under section 97-3-7(2)(b).

In support of his argument, Perry cites to *Quick v. State*. In *Quick*, the grand jury returned the indictment under section 97-3-7(2)(b) of the Mississippi Code. *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990). On the morning of the trial, the State moved to amend the indictment to include language that would charge Quick in violation of section 97-3-7(2)(a) as well. *Quick*, 569 So. 2d at 1199. There was no order in the record indicating the amendment, but the jury instructions given were consistent with the requested amendment. *Id.* The supreme court held in that instance, that the

trial court impermissibly changed the substance of the indictment. *Id.* Case law clearly supports the rule that the State can only prosecute on the indictment returned by the grand jury. *Id.* The court has no authority to modify or amend the indictment in any material respect. *Id.* Perry compares the *Quick* case to the present case by arguing that if the court was in error to modify the charge in *Quick*, so should the lower court in this case be held in error for granting jury instructions that reflect a charge under section 97-3-7(2)(b) when the indictment stated that Perry was indicted under subsection (2)(a). The *Quick* case is clearly distinguishable from the case at bar.

After reviewing both the indictment and the jury instructions at issue, we begin by stating that in our opinion, both the indictment and the jury instructions at issue were inartfully drawn; however, we do not find any reversible error. In the *Quick* case, the court substantively amended the indictment to include a charge under section 97-3-7(2)(a) as well as subsection (2)(b) without the concurrence of the grand jury. No such amendment is found here. In this case, the indictment returned by the grand jury read in part:

FLOYD PERRY late of the county aforesaid, on or about the 8th day of June, 1993, in the county aforesaid and within the jurisdiction of this Court, did willfully, unlawfully and feloniously cause bodily injury to Henry Dixon with a hammer, a deadly weapon, by striking victim on the head repeatedly and on the back and legs. [sic] in violation of MCA Section 97-3-7(2)(a) (1972, as amended), against the peace and dignity of the State of Mississippi.

Rule 2.05 of the Criminal Rules for Circuit Court states that technical or formal words are not necessary in the indictment as long as the offense can be substantially described. Unif. Crim. R. Cir. Ct. Prac. 2.05. The current version of Rule 2.05 is contained in Rule 7.06 of the Uniform Rules of Circuit and County Court Practice, effective May 1, 1995. The seven enumerated items required in an indictment are:

- 1) The name of the accused;
- 2) The date on which the indictment was filed in court;
- 3) A statement that the prosecution is brought in the name by the authority of the State of Mississippi.
  
- 4) The county and judicial district in which the indictment is brought;
  
- 5) The date, and if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;
  
- 6) The signature of the foreman of the grand jury issuing it; and

7) The words "against the peace and dignity of the state."

URCCC 7.06. The object of the rule is to provide the defendant with notice of the nature of the charge against him and out of what transaction or occurrence it arose. *Roberson v. State*, 595 So. 2d 1310, 1318 (Miss. 1992). If the indictment reasonably provides the defendant with notice and includes the seven items listed in the rule, then it is sufficient. *Roberson*, 595 So. 2d at 1318. "The description should include a 'concise and clear statement of the elements of the crime charged.'" *King v. State*, 580 So. 2d 1182, 1185 (Miss. 1991) (citations omitted). "Nothing more is required." *Id.* There is no requirement in the rule which states that the statute under which the defendant is charged needs to be cited in the indictment. In fact, it is not ordinarily necessary to designate the statute under which the indictment is drawn. *Pearson v. State*, 158 So. 2d 710, 712 (Miss. 1963). An indictment which properly charges the commission of a crime, in the language of the statute, or in words aptly describing the offense, is sufficient. *Id.* (citations omitted).

We think that the language in this indictment reflected the language of section 97-3-7(2)(b), and not subsection (2)(a). Although the indictment cites to section 97-3-7(2)(a), we think that the charge was mislabeled under this particular circumstance because the language of the charge does not reflect the language in subsection (2)(a); thus, it was merely surplusage language in this instance. Therefore, we hold that according to the language in this indictment, Perry was sufficiently charged under section 97-3-7(2)(b) and was provided with proper notice of the nature of the charge against him and out of what transaction it arose.

## B. JURY INSTRUCTIONS

### 1. GRANTING INSTRUCTIONS S-1 AND S-2

Perry also argues that the lower court should have rejected jury instructions S-1 and S-2. Perry argues that the instructions given reflected a charge under section 97-3-7(2)(b) and not 97-3-7(2)(a). Instruction S-1 read:

Floyd Perry has been charged with the offense of aggravated assault. If you find from the evidence in this case beyond a reasonable doubt that:

1. Floyd Perry, on or about the 8th day of June, 1993, in Madison County, and

2. purposely or knowingly caused, or attempted to cause, serious bodily injury

to Henry Dixon and

3. by striking Henry Dixon with a hammer and that the hammer was a deadly weapon, and

4. and[sic] Floyd Perry was not acting in self-defense

then you shall find the defendant guilty as charged.

If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction S-2 stated:

It is a question of fact for you to determine whether the hammer claimed to have been used by Floyd Perry was a deadly weapon in the manner claimed to have been used in this case.

A deadly weapon may be defined as any object, article, or means which, when used as a weapon under the existing circumstances, is reasonably capable of producing or likely to produce death or serious bodily harm to a human being upon whom the object or article is used.

It is well settled law that an instruction defining the crime with which the defendant is charged is sufficient if it sets forth all of the elements of the crime. *Wilson v. State*, 592 So. 2d 993, 997 (Miss. 1991). Applying the reasoning that Perry was sufficiently indicted under section 97-3-7 (2)(b) and not subsection (2)(a), we hold that the above jury instructions given adequately addressed all the elements of the crime.

## 2. INSTRUCTIONS D-1, D-10, AND D-15

Perry also contends that the trial court should have granted instructions D-1, D-10, and D-15, which were consistent with Perry's theory of self-defense. "This Court does not review jury instructions in isolation." *Eakes v. State*, 665 So. 2d 852, 871 (Miss. 1995). All instructions should be read together, and if the jury is fully and fairly charged by other instructions, the refusal of any similar instruction is not reversible error. *Id.* Refusal of a repetitive instruction is proper. *Id.* After reviewing all of the instructions given, we think that instruction number 8, which was given, sufficiently refers to a self-defense theory. Giving instructions D-1, D-10, and D-15 would have been merely repetitive.

## CONCLUSION

Accordingly, we hold that the trial court correctly denied Perry's motion to quash the indictment since the indictment gave Perry sufficient notice of the charge he faced. We find no modification or amendment to the original indictment. Furthermore, the jury instructions that were given provided the jury with a full and fair statement of the law. Therefore, we affirm the judgment of the trial court.

**THE JUDGMENT OF CONVICTION OF THE MADISON COUNTY CIRCUIT COURT OF AGGRAVATED ASSAULT AND SENTENCE OF SEVEN (7) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO MADISON COUNTY.**

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