

**IN THE COURT OF APPEALS 09/03/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-KA-00165 COA**

**SHIRLEY STOKES A/K/A "FAYE"**

**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. ELZY J. SMITH, JR.

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT: THOMAS H. PEARSON

CARL VINCE MONTGOMERY

ATTORNEY(S) FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY(S): CLYDE V. HILL

NATURE OF THE CASE: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE FIFTEEN (15)  
YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Shirley Stokes was indicted for the aggravated assault of a law enforcement officer, Darry Jenkins. She was subsequently convicted of aggravated assault and sentenced to serve fifteen years in the Mississippi Department of Corrections. We find that Stokes's issues on appeal have no merit and therefore affirm.

## FACTS

Shirley Stokes was tried for the aggravated assault of Jenkins, a Clarksdale police officer. Jenkins testified for the State that he was working as an undercover officer at a Christmas parade on the evening of December 8, 1992. A fight broke out between several people in the crowd; Jenkins intervened, yelled "police" more than three times, and pinned Stokes's cousin, Tiberia, to the ground. Jenkins testified that a .38-caliber automatic handgun fell from Tiberia's belt to the ground. Jenkins said that, as he tried to call for backup assistance, Shirley Stokes grabbed the gun. Jenkins stated that she aimed the gun toward his face, pulled the trigger repeatedly, and simultaneously kept yelling "I'll kill you if you keep messing with him." He said that the gun, although loaded, never fired. Jenkins said that, when Stokes looked down at the gun that she held, he grabbed his own gun. He then began walking toward Stokes and told her to drop the gun. Stokes dropped the gun and fell to the ground herself. The State rested following Jenkins's testimony. Stokes moved for a directed verdict, but the court denied her motion.

Tiberia testified in Stokes's defense that he did not have a gun in his belt that night. He stated that he never heard Jenkins tell him that he was a police officer or Stokes yelling to Jenkins to leave him alone. He said that he did not see Stokes pick up the gun and aim it at Jenkins. Kimberly Simmons, a friend and babysitter, testified to the events at the fight. She stated that she did not see a gun fall to the ground, but that she saw Stokes pick up a gun and tell Jenkins to leave her cousin alone. She said that Stokes did not point the gun toward Jenkins's head or pull the trigger. Finally, she said that Stokes later put down the gun and that Jenkins told another officer that Stokes had tried to kill him. Mary Jones also testified for the defense that she saw no gun, that she never heard anyone yell "police," and that Jenkins said later that Stokes had tried to kill him.

Stokes testified in her own defense that she was knocked down in the ensuing fight. She picked up a gun that she saw lying beside her and began yelling at Jenkins, who was on top of Tiberia. She testified that she never heard anyone yell "police," never pointed the gun at Jenkins, and did not pull the trigger or try to shoot him. The defense rested following Stokes's testimony. Stokes renewed her motion for a directed verdict, which the court again denied. David Bramlett testified as a State's rebuttal witness that he attended the parade and observed the fight. He stated that he saw Jenkins on top of another man, and that Stokes came from around and behind Jenkins and pointed a gun directly at Jenkins. He said that he could easily tell that Jenkins was a police officer because of his gunbelt and badge clipped on his side. Felecia Ann Johnson also testified as a State's rebuttal witness. She stated that she saw that Jenkins had a gun and holster and a badge on his side. She testified that Jenkins told Tiberia that he was a police officer. Johnson said that she never saw Stokes get knocked

to the ground. She said that Stokes came up to Jenkins's side and pointed a silver gun toward his face. She stated that Jenkins also told Stokes that he was a police officer and to put down the gun. Johnson testified that she ran to get another officer to help and told him that Stokes had a gun at Jenkins's head and was trying to shoot him.

The jury found Stokes guilty of aggravated assault. The court sentenced her to fifteen years in the Mississippi Department of Corrections. Stokes moved for a JNOV or, in the alternative, a new trial. The court denied the motion, and Stokes now appeals.

## ANALYSIS

### I. DID THE TRIAL COURT ERR BY REFUSING TO GRANT STOKES A CONTINUANCE BASED ON AN ALLEGED DISCOVERY VIOLATION?

Stokes argues that the State committed discovery violations due to untimely disclosure of material witnesses, and that she should therefore have been granted a continuance. She contends that the Uniform Criminal Rules of Circuit Court Practice (now the Uniform Rules of Circuit and County Court Practice) required the court to either continue the case or to exclude the evidence, neither of which the court allowed. She believes that, although the court excluded them as witnesses in chief, her defense counsel should have been given the opportunity to determine the exculpatory value of the evidence. Stokes's complaint centers on her alleged inability to properly interview witnesses that the State presented to her on the Friday prior to her Monday trial and a belated audiotape of the witnesses's statements.

The Mississippi Supreme Court has held that the decision to grant or deny a continuance is within the sound discretion of the trial court. *Jackson v. State*, 672 So. 2d 468, 476 (Miss. 1996) (citations omitted); *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995) (citations omitted). An appellate court should not reverse unless manifest injustice appears to have resulted from the denial of the continuance. *Atterberry*, 667 So. 2d at 631 (citations omitted); *see also Johnson v. State*, 631 So. 2d 185, 189 (Miss. 1994) (citations omitted) (decision to grant or deny continuance is left to sound discretion of trial court and should not be reversed unless manifest injustice results from denial of continuance). A defendant must show both an abuse of discretion, and that this abuse actually worked an injustice in his case. *Morris v. State*, 595 So. 2d 840, 844 (Miss. 1991) (citations omitted). Mississippi statutory law states that "[a] denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom." Miss. Code Ann. § 99-15-29 (1972).

The rule effective at Stokes's trial stated:

If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

Unif. Crim. R. Cir. Ct. Prac. 4.06(i). Moreover, this rule requires the prosecution to disclose to the defendant or the defendant's counsel the identity of all *witnesses in chief* proposed to be offered at trial. *Id.* No duty exists to disclose rebuttal witnesses through discovery. *See also Gowdy v. State*, 592 So. 2d 29, 34 (Miss. 1991) (general discovery Rule 4.06 requires prosecution, upon defense request, to disclose identities of all material witnesses who may or may not be called at trial and who may reasonably be expected to be helpful to the defense); *White v. State*, 566 So. 2d 1256, 1259 (Miss. 1990) (prosecution was not required to disclose rebuttal witness's identity under discovery Rule 4.06 because that rule only requires disclosure of witnesses used by the prosecution in its case in chief).

The court has held that a violation of discovery Rule 4.06 is harmless unless it clearly results in a miscarriage of justice. *Dennis v. State*, 555 So. 2d 679, 682 (Miss. 1989) (citations omitted). When the State is late in furnishing discovery, a defendant is entitled to a continuance, the length of which must be reasonable under the circumstances. *Foster v. State*, 484 So. 2d 1009, 1011 (Miss. 1986). The facts of each case should determine whether a postponement of a day or two, or even an hour, is sufficient. *Id.* Finally regarding procedural issues, a denial of a continuance is not reviewable on appeal unless the party whose motion for continuance was denied moves for a new trial on that ground. *Metcalf v. State*, 629 So. 2d 558, 561-62 (Miss. 1993) (citations omitted). "[I]f an appellant raises for review an issue not raised in the pleadings, transcript, or rulings, the appellant must have preserved the issue by raising it in a motion for new trial." *Ross v. State*, 603 So. 2d 857, 861 (Miss. 1992) (citations omitted). Certain errors must be brought to the attention of the trial judge in a motion for a new trial so that the judge can determine their validity before an appellate court is asked to review them. *Jackson v. State*, 423 So. 2d 129, 131 (Miss. 1982). One such example is the denial of a continuance. *Id.* at 132. This type of alleged error "is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial *on this ground, making the necessary proof to substantiate the motion.*" *Id.* (emphasis added) (citations omitted).

In the present case, the State said that the prosecutor was in another trial the week before Stokes's trial from Monday through Thursday and began Stokes's trial preparation on the Friday before her Monday trial. The State learned from its chief witness, Jenkins, the names of three other witnesses: David Bramlett, Felecia Johnson, and Percy Maddox. The State provided Stokes's counsel with these three names late Friday afternoon. On Monday morning, Stokes moved for a continuance. Stokes's counsel stated that he had interviewed Bramlett and had not interviewed Johnson sufficiently. He said that the State had given him an audiotape of the State's interviews of the witnesses and asked for more time to talk to Jenkins before transcribing the tape and interviewing the witnesses. The State said that it had provided all information to the defense prior to the discovery deadline and that Jenkins gave a taped statement to them in which he named two of the three witnesses.

The court allowed a delay until Stokes's counsel could talk with the witnesses. The State later proffered the testimony of Bramlett and Johnson. The court subsequently excluded the testimony of these witnesses for use in the State's case in chief. Stokes's counsel again requested a continuance, but the court denied the request and stated that defense counsel would have time to talk to them and call them as witnesses for Stokes. At trial, the State called only Jenkins for its case in chief, and called Bramlett and Johnson as rebuttal witnesses.

Here Stokes's motion for JNOV or new trial stated, among other points, the following: "The Court

erred in overruling any and all objections and/or motion of Defendant." Stokes clearly failed to bring up the specific issue of the overruled motion for continuance in her motion for JNOV or new trial. We believe that she failed: (1) to present sufficiently the issue for the lower court's consideration and (2) to make her motion for new trial on this ground and offer proof to substantiate the motion. Stokes therefore procedurally waived any consideration of this issue on appeal. Stokes's argument on this issue also fails on its merits. The trial court in this case properly excluded the late-discovered witnesses and allowed Stokes's counsel to interview them. We believe that the court provided sufficient time for interviewing the witnesses. The court properly exercised its discretion in both denying the continuance and in excluding the witnesses's testimony in the State's case in chief. The court's allowance of the State's rebuttal testimony by Bramlett and Johnson was clearly proper, particularly in light of Stokes's opportunity to interview both of them and the fact that Stokes exercised her right to cross-examine them extensively at the appropriate time.

We do not believe that the record indicates that the lower court abused its discretion in denying Stokes a continuance beyond that which it *did* allow--an opportunity for Stokes to interview the witnesses. Stokes has failed to show an abuse of discretion or that the court's denial worked any injustice to her or to her defense. No miscarriage of justice occurred regarding this issue.

## II. DID THE TRIAL COURT ERR IN OVERRULING STOKES'S CHALLENGES FOR CAUSE OF JUROR NOS. 5, 10, AND 14?

Stokes contends that three jurors should not have been on the jury and that their service resulted in an unfair trial. She believes that the court erred by overruling her challenges for cause.

The Mississippi Supreme Court has held that before an appellant can challenge a trial court's refusal to excuse a juror for cause, he must show that he used all his peremptory challenges. *Davis v. State*, 660 So. 2d 1228, 1243 (Miss. 1995) (citation omitted). The reason for the rule is that an appellant can cure substantially any error as long as he has remaining unused peremptory challenges. *Id.* The *Davis* court refused to place the integrity of the trial process at risk by allowing a litigant to refrain from using his peremptory challenges and, after an adverse trial verdict, obtaining a reversal on appeal because the trial court did not do what the appellant had the power to do. *Id.* at 1243-44; *see also Chase v. State*, 645 So. 2d 829, 845 (Miss. 1994) (when trial court fails to sustain challenge for cause by defense, it must be shown that defense exhausted all its peremptory challenges before trial court's refusal to allow challenge for cause). Finally, abuse of discretion is the standard of review when examining the conduct of voir dire. *Berry v. State*, 575 So. 2d 1, 9 (Miss. 1990) (citation omitted).

In the present case, the record shows that Stokes challenged jurors 4, 5, 10, 14, and 47 for cause. The trial court excused jurors 4 and 47 and found that jurors 5, 10, and 14 all answered the questions and stated that they could be fair and impartial. The court then proceeded with the peremptory challenge phase. In this phase, the State exercised four challenges to the regular panel and one to the alternate panel, while Stokes exercised six challenges to the regular panel and one to the alternate panel.

Stokes clearly did not exercise any of her peremptory challenges against jurors 5, 10, or 14. She

cannot now claim that the trial court erred in refusing to excuse these jurors when she had full power to use her peremptory challenges at that time to excuse them. Moreover, no evidence exists in the record indicating that the trial court abused its discretion in finding that these three jurors could be fair and impartial. This issue is without merit.

III. DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO UTILIZE REBUTTAL WITNESSES BRAMLETT AND JOHNSON WHO HAD BEEN DISCLOSED TO THE DEFENSE ONLY THREE DAYS BEFORE TRIAL?

Stokes argues that rebuttal witnesses Bramlett and Johnson should not have been allowed to testify in rebuttal due to disclosure by the State on the Friday afternoon before the Monday trial.

The law and rules cited in Issue I are dispositive of this argument. Although it appears that the State initially planned to use Bramlett and Johnson in its case in chief, the trial court refused to allow the State that opportunity. The State ultimately utilized their testimony on rebuttal only, which does not require identity through discovery. Moreover, the State did notify Stokes as soon as it learned of the witnesses's identity (Friday afternoon), and the trial court granted a short continuance to allow Stokes to interview them as well. Finally, Stokes exercised her right to fully cross-examine them on rebuttal. This issue is without merit.

IV. DID THE COURT ERR IN ALLOWING REBUTTAL WITNESS FELECIA JOHNSON TO TESTIFY THAT SHE WAS AFRAID FOR THE SAFETY OF OFFICER JENKINS AND TO TESTIFY TO THE OUT-OF-COURT CONVERSATION WITH OFFICER GILBERT REGARDING STOKES'S ACTIONS?

Stokes contends that Felecia Johnson's testimony on rebuttal was inadmissible and constituted reversible error. She believes that it was more prejudicial than probative, violating Mississippi Rule of Evidence 403, and that it was not helpful in the determination of any fact in issue, violating Mississippi Rule of Evidence 701. She also argues that Johnson's statements to another officer, Officer Gilbert, were prejudicial, out of the Defendant's presence, and inadmissible hearsay under Mississippi Rule of Evidence 802.

Under the Mississippi Supreme Court's standard of review, the relevancy and admissibility of evidence rest within the discretion of the trial court, which must be exercised within the scope of the Mississippi Rules of Evidence, and reversal is warranted only if that discretion has been abused. *Peterson v. State*, 671 So. 2d 647, 655-56 (Miss. 1996) (citations omitted); *see also Johnson v. State*, 655 So. 2d 37, 42 (Miss. 1995); *Ivy v. State*, 641 So. 2d 15, 18 (Miss. 1994). The *Peterson* court determined that an appellate court must also determine whether the trial court employed the proper legal standards in its findings of fact governing evidence admissibility. *Peterson*, 671 So. 2d at 656. "If in fact the trial court has incorrectly perceived the applicable legal standard in its fact findings, the Court applies a substantially broader standard of review." *Id.* However, the court's evidentiary ruling must have denied the defendant of a substantial right. *Id.* "The mere fact that the trial court committed error in an evidentiary ruling does not by itself warrant a reversal by this

Court." *Id.* The trial court's error must have affected a substantial right of the defendant. *Id.*

Under the Mississippi Rules of Evidence, a statement describing an event or condition and made while the declarant was perceiving the event or condition, or immediately thereafter, is a present sense impression exception to the hearsay rule and is admissible. M.R.E. 803(1). Likewise, a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is the excited utterance exception to the hearsay rule and is admissible. M.R.E. 803(2).

If a witness is not testifying as an expert, the testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the witness's perception and helpful to a clear understanding of the testimony or the determination of a fact in issue. M.R.E. 701. Although certain evidence may be relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. M.R.E. 403.

In the present case, the record indicates the following testimony by Felecia Johnson on direct examination by Assistant District Attorney Clyde Hill regarding her seeing Stokes pointing a gun at Jenkins, how she felt about seeing it, and the action she took:

Q. All right. Now how did you feel when you saw that happen?

A. I was afraid for Officer Jenkins at that time.

BY MR. PEARSON: Objection.

BY MR. HILL:

Q. What did you do then?

BY THE COURT: Overruled.

BY MR. HILL:

Q. What did you do after you feared for Officer --

A. I got real excited and I started running, trying to get the other officer that was on that corner that night, Officer Gilbert, I went and got him and I was trying to tell him that a female over there had a gun and --

BY MR. PEARSON: -- We object to the conversation.

BY MR. HILL: Your Honor, I would offer the comment that she made to the other officer as an exception to the hearsay rule.

BY THE COURT: Objection overruled. She can state what she told him.

BY MR. HILL:

Q. What did you tell the other officer?

A. That a black female had a gun at Officer Jenkins'[s] head.

Q. Did you say what she was trying to do with the gun?

A. She was trying to shoot the gun. I also told him that.

BY MR. PEARSON: We object to that as being a conclusion.

BY THE COURT: The objection is overruled. It's just what she stated. It doesn't prove the truthfulness of it; it's just what she stated to the officer.

Stokes's argument that Johnson's testimony was inadmissible under Rule 701 is inapposite. Johnson's testimony was not in the form of any opinion or inference, but was based on her state of mind, what she immediately did based on her state of mind, and what she said to Gilbert based on that same state of mind. Johnson simply did not express any opinion or inference regarding this portion of her testimony.

Johnson's testimony regarding how she felt upon seeing Jenkins with a gun pointed at his head was not hearsay because it was *not* an out-of-court *statement* made by Johnson. Likewise, her testimony as to what she *did* (her running to get Gilbert) is not hearsay because that action was *not* a statement. Both portions of this testimony were clearly admissible. On the other hand, the testimony regarding what Johnson told Gilbert (that she saw a black female holding a gun to Jenkins's head and trying to shoot him) *was* hearsay because it was clearly an out-of-court statement offered to prove the truth of the matter asserted. However, Johnson's statement to Gilbert of what she had just witnessed falls under both the present sense impression exception and the excited utterance exception to the hearsay rule. Her statement described an event she observed and was made immediately after she perceived it. Moreover, her statement clearly related to a startling event she observed and was made while she was under the stress of excitement caused by what she saw. Stokes's testimony of her state of mind was the basis of proof that she was under the stress of excitement caused by what she observed. We believe that Johnson's statement to Gilbert was an exception to the hearsay rule and clearly admissible.

Moreover, we believe that no evidence exists in the record that the trial court incorrectly applied the proper legal standard regarding the admissibility of this evidence. The trial court properly exercised its discretion within the rules of evidence. Finally the court's admission of Johnson's testimony did not deny Stokes of any substantial right, and she has not indicated what harm or prejudice she has suffered due to that admission.

#### V. DID THE COURT ERR IN ADMITTING A STATE'S QUESTION OF WITNESS FELECIA JOHNSON THAT STOKES OBJECTED TO ON THE GROUND OF LEADING?

Stokes contends that the court erred in allowing the State to ask Johnson, and for her to respond to, a question on direct examination: Was anybody kicking the man on the ground? Stokes believes that

the question was leading and that it should have been excluded under Mississippi Rule of Evidence 611(c).

Mississippi Rule of Evidence 611 states that leading questions should not be used on direct examination except when necessary to develop testimony. M.R.E. 611(c). Leading questions should not be used on direct examination because they suggest the answers the attorney wants from his own witness. *Id.* cmt. The judge has some discretion in allowing leading questions. *Id.*

The Mississippi Supreme Court has stated that trial courts have great discretion in allowing leading questions and, unless there was manifest abuse of discretion resulting in injury to the complaining party, an appellate court will not reverse the decision. *Ballenger v. State*, 667 So. 2d 1242, 1258 (Miss. 1995) (citation omitted). The reasoning behind this approach is that the harm caused is usually inconsiderable and speculative, and the trial court is clearly able to observe the demeanor of the witness and to determine any harm. *Id.*; see also *Jones v. State*, 606 So. 2d 1051, 1059 (Miss. 1992) (trial court has discretion to allow leading questions and, unless there exists an abuse of discretion to the prejudice of a complaining party, appellate court will not reverse).

In the present case, Stokes's counsel asked Tiberia on direct examination how many people were assaulting him, to which he replied about seven or eight. He testified that, when Jenkins had him down and his arms behind him, they were kicking him and knocked Jenkins down on top of him. On rebuttal, Felecia Johnson stated on direct examination that other men were around Jenkins as he held Tiberia on the ground. Her testimony continued:

Q. When you say he was trying to handcuff him, could you describe what you actually saw his hands, that is Officer Jenkins'[s] hands doing?

A. Officer Jenkins had his hand on the black male that he had on the ground like he had crisscrossed them and he just was holding his hands.

Q. Did you see what happened after -- I'm sorry, strike that. When you saw the girl, the defendant over there, Ms. Stokes, pointing the gun at Officer Jenkins'[s] head, was there anybody else around the man on the ground and Officer Jenkins?

A. Yes, sir.

Q. Was anybody kicking the man on the ground?

BY MR. PEARSON: Objection to leading the witness.

A. No, sir.

BY THE COURT: Overruled.

Q. Did you see anybody besides Officer Jenkins doing anything to the man on the ground?

A. No, sir.

Q. Was there anybody else doing anything around Officer --

A. -- No. sir.

We believe that the State's question was not leading. Tiberia, testifying on direct examination for his cousin, stated that others had been kicking him while Jenkins held him on the ground. The State was therefore clearly within its rights to ask Johnson on rebuttal if she saw anyone kicking Tiberia while he was on the ground. Moreover, the question was not leading because it did not suggest any answer by either the wording, the form, or the context in which it was asked. We find, even if the question was leading, that the court did not abuse its discretion in overruling Stokes's objection. We believe that if any harm existed it was inconsiderable and speculative.

#### VI. DID THE COURT ERR IN DENYING STOKES'S REQUESTED JURY INSTRUCTIONS?

Stokes argues that her rights to a fair trial and to due process of law were denied because the court refused six of her requested jury instructions. She believes that her instructions should have received preferred status.

The Mississippi Supreme Court has stated that a trial court may deny jury instructions that are abstract principles of the law and unnecessary as guidance for jurors. *Buchanan v. State*, 427 So. 2d 697, 699 (Miss. 1983); *see also Callahan v. State*, 419 So. 2d 165, 176 (Miss. 1982). If a party withdraws or simply does not submit a jury instruction, a trial judge cannot be in error for refusing that instruction because the matter was not presented to him for decision. *Guilbeau v. State*, 502 So. 2d 639, 644 (Miss. 1987). Moreover, the court has stated that "[t]ime and time again we have stated that the trial court 'is not required to give instructions which are covered by other instructions although the language may differ.'" *Hart v. State*, 639 So. 2d 1313, 1316 (Miss. 1994) (quoting *Davis v. State*, 431 So. 2d 468, 475 (Miss. 1983)); *see also Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992). Finally, a trial court is under no obligation to grant cumulative instructions. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 752 (Miss. 1996); *see also Triplett v. State*, 672 So. 2d 1184, 1186-87 (Miss. 1996) (court is not required to grant several instructions on the same question in different verbiage); *Peterson v. State*, 671 So. 2d 647, 659 (Miss. 1996) (a jury instruction may be improper if it is stated elsewhere in the instructions); *Manuel v. State*, 667 So. 2d 590, 591 (Miss. 1995) (trial judge has power to refuse instructions that incorrectly state the law, are without foundation in evidence, or are stated elsewhere in other instructions).

In the present case, the trial court refused Instruction D-1 after hearing the State's objection that it was too abstract and that it did not tell the jury what ignorance, mistake of fact, or mistaken belief that Stokes alleged. The record shows that Stokes withdrew Instruction D-2. The court refused Instruction D-5 on the ground that it was already covered in Instructions C-15 and C-19. It also refused Instruction D-6 by determining that it was covered in Instructions C-1, C-15, and C-19. The court refused Instruction D-7 by stating that it was repetitive and covered in Instructions C-15 and C-19. Finally it refused Instruction D-8 because it was covered in Instructions C-1 and C-15. After a review of the record and the jury instructions that were given and refused, we believe that the trial court denied Stokes's requested jury instructions for valid reasons and committed no error. We

believe that the court presented the jury with proper instructions on all issues.

## VII. DID THE TRIAL COURT ERR IN DENYING STOKES'S MOTIONS FOR DIRECTED VERDICT AND JNOV?

Stokes argues that the court should have granted either her motion for a directed verdict or JNOV. She contends that the proof shows that she attempted to free her cousin from his "terrorist" by threatening to shoot him, an action in which she was clearly justified. She believes that she was exercising her right to freedom from fear and from assault, and that she had a legal right to pick up a gun, aim it at an alleged assailant of her cousin, and pull the trigger.

Stokes's arguments regarding the denial of her motion for directed verdict and JNOV both challenge the legal sufficiency of the evidence against her. Where a defendant asserts that the evidence was insufficient for a conviction and therefore challenges the legal sufficiency of that evidence, the authority of an appellate court to interfere with the jury's verdict is quite limited. *Williams v. State*, 667 So. 2d 15, 23 (Miss. 1996) (citation omitted). "On appeal, this Court reviews the lower court's ruling when the legal sufficiency of the evidence was last challenged." *Tait v. State*, 669 So. 2d 85, 88 (Miss. 1996) (citing *Smith v. State*, 646 So. 2d 538, 542 (Miss. 1994)); *see also McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) (a sufficiency challenge requires consideration of the evidence before the court when made, so that an appellate court must review ruling on the last occasion the challenge was made at the trial level). In the present case, the last time that Stokes challenged the legal sufficiency of the evidence was when she moved for a post-trial JNOV. The Mississippi Supreme Court has stated that the standard of review regarding a challenge of the sufficiency of the evidence is well established:

[T]he [sufficiency of the] evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Stokes's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

*Jones v. State*, 669 So. 2d 1383, 1388 (Miss. 1995) (quoting *McClain*, 625 So. 2d at 778); *see also Tait*, 669 So. 2d at 88; *Williams*, 667 So. 2d at 23.

In the present case, the evidence was legally sufficient to find that Stokes was guilty of aggravated assault. Officer Jenkins testified that Stokes aimed a gun at his face, pulled the trigger repeatedly, and told him that she would kill him if he did not stop what he was doing to her cousin. Two other State witnesses testified on rebuttal that Stokes had pointed a gun at Jenkins's head. Stokes testified that she never pointed a gun at Jenkins's head, and two other defense witnesses also testified that they never saw Stokes point a gun at Jenkins.

Here, the evidence consistent with the guilty verdict must be accepted as true. *Id.* Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Stokes not guilty. The evidence in this case was clearly legally sufficient to support the conclusion that Stokes attempted to cause bodily injury to Jenkins with a deadly weapon. The State's evidence indicated that Stokes had a gun, pointed it at Jenkins, and pulled the trigger. We believe that the evidence was amply sufficient to support the trial court's denial of Stokes's motions for directed verdict and JNOV. The jury was properly given the opportunity to determine whether Stokes was guilty of aggravated assault on a law enforcement officer or of the lesser crime of aggravated assault. The jury ultimately found Stokes guilty of aggravated assault. The court provided the jury with proper instructions as to aggravated assault on a law enforcement officer and to the lesser crime of aggravated assault, as well as the difference between the two crimes. The jury was clearly within its power to determine that Jenkins's identification as a law enforcement officer, and the fact that he was acting within the scope of his duty that evening, may not have been known to Stokes. Thus, the jury acted well within its discretion to find that Stokes was guilty of the lesser crime of aggravated assault alone.

Mississippi caselaw has long held that the issue of a defendant's conduct in self-defense, and whether that defendant used excessive force in that defense, is a jury question. *See Hall v. State*, 644 So. 2d 1223, 1229-30 (Miss. 1994) (jury was to decide the fact issues of whether aggravated assault defendant acted in self-defense and whether he reasonably used excessive force to repel the attack on him regarding a resistance to arrest); *Hart v. State*, 637 So. 2d 1329, 1339 (Miss. 1994) (justification of whether a self-defense killing falls under a defendant's objectively reasonable apprehension of imminent death or serious bodily injury is a question to be submitted to and decided by a jury); *Hinson v. State*, 218 So. 2d 36, 39 (Miss. 1969) (regarding the self-defense issue, a defendant repelling an assault with a deadly weapon results in a question of fact and is for a jury to determine as to whether he was justified in using such a weapon, unless no reasonable inference appears except that the use of the weapon was reasonable to the person assaulted to be necessary for protection from death or serious harm).

Here, the court provided the jury with proper instructions on justifiable assault in self-defense or in the defense of others. The court instructed the jury that it was to determine the reasonableness of the ground upon which Stokes acted. The issue of Stokes's justification and reasonableness of the manner in which she tried to protect Tiberia was properly a jury question. The jury heard all the evidence and determined her guilt. We believe that the verdict was supported by substantial evidence. We find no error in the court's denial of Stokes's motions for directed verdict or JNOV.

#### CONCLUSION

We find that the trial court did not err and therefore affirm the jury's verdict and the court's sentence.

**THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.**

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