

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00342 COA

JIMMIE F. HILL

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. C.E. MORGAN, III

COURT FROM WHICH APPEALED: CHOCTAW COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

KEVIN NULL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN

DISTRICT ATTORNEY: KEVIN HORAN

NATURE OF THE CASE: CRIMINAL: FELONY CHILD ABUSE, TWO COUNTS

TRIAL COURT DISPOSITION: SENTENCED TO FIFTEEN (15) YEARS ON EACH COUNT,
CONCURRENTLY, WITH FIVE (5) YEARS SUSPENDED

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

PER CURIAM:

Jimmie Hill was convicted by the Choctaw County Circuit Court of abusing his two stepsons, James, 8, and Marques, 12. The indictment alleged that Hill committed felonious child abuse by causing serious bodily injury by striking his stepchildren with a stick. Hill admitted to whipping the children, but denied striking them in any manner so as to cause any serious injuries. On appeal he argues that the trial court erred in allowing testimony of prior abuse to be heard by the jury. He also argues that the court erred in refusing to instruct the jury on simple assault. We disagree and affirm the decision of the lower court.

The lower court did not err in allowing testimony of prior abuse into evidence. First, Hill opened the door for cross-examination about prior abuse by comments he made in his direct examination. The Mississippi Supreme Court has specifically held that in a prosecution for felonious abuse and battery of a child, evidence of prior acts of child abuse is admissible in rebuttal to negate the idea that the injuries resulted from an isolated accident. *Houston v. State*, 531 So. 2d 598, 599 (Miss. 1988); *Shelton v. State*, 445 So. 2d 844, 848 (Miss. 1984).

Hill also argues that the court erred when it sustained an objection against allowing evidence of a prior incident, but did not admonish the jury to disregard the question. However, no request was made that the judge admonish the jury. It is the rule in this State that where an objection is sustained, and no request is made to admonish the jury, there is no error by the court if it does not admonish the jury. *Perry v. State*, 637 So. 2d 871, 874 (Miss. 1994).

Additionally, Hill argues that the jury should have been instructed on simple assault. However, the evidence in the record does not justify that instruction. In *Mease v. State*, the court held that where no reasonable jury could find the defendant guilty of the lesser-included offense, taking the evidence in the light most favorable to the defendant, there is no error in refusing to grant the instruction. *Mease v. State*, 539 So. 2d 1324, 1330 (Miss. 1989). The jury and the court heard testimony from the boys, their mother, a nurse, the sheriff, the principal, and a social worker concerning the severity of the boys' injuries, including the scars, the lacerations, the blood in one of the boy's ear canal, and the hematoma on James' head. There was also a video tape showing the boys' injuries as they appeared three days after the beatings.

Further, in *Payton v. State* the court focused on whether the defendant acted "in such a manner as to cause" serious bodily injury; if so, a court does not err by refusing to grant a lesser instruction on simple assault. *Payton v. State*, 642 So. 2d 1328, 1335 (Miss. 1994). The evidence in the record is clear that serious bodily injuries occurred. Thus, the trial court did not err by refusing to grant the lesser instruction on simple assault.

For these reasons, the conviction and sentence are affirmed.

THE JUDGMENT OF THE CHOCTAW COUNTY CIRCUIT COURT OF CONVICTION OF TWO COUNTS OF FELONY CHILD ABUSE AND SENTENCE OF FIFTEEN (15) YEARS ON EACH COUNT TO RUN CONCURRENTLY, WITH FIVE (5) YEARS SUSPENDED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF

CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO CHOCTAW COUNTY.

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