

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00248 COA

GEORGE FORD III

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. JOSEPH H. LOPER, JR.

COURT FROM WHICH APPEALED: GRENADA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MITCHELL M. LUNDY, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: DIERDRA MCCRORY

DISTRICT ATTORNEY: CLYDE HILL

NATURE OF THE CASE: CRIMINAL - ATTEMPTED AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE A TERM OF 16
YEARS IN MDOC, WITH 4 YEARS SUSPENDED FOR 5 YEARS, THE REMAINING 12
YEARS TO SERVE.

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

BARBER, J., FOR THE COURT:

George Ford III was indicted and convicted of attempted aggravated assault. He was sentenced to serve a term of sixteen years in the custody of the Mississippi Department of Corrections, with four years of the sentence suspended. Feeling aggrieved, Ford raises the following issues on appeal:

I. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO RETURN THE CASE TO YOUTH COURT.

II. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO AMEND THE INDICTMENT.

III. THE TRIAL COURT ERRED IN NOT GRANTING A CONTINUANCE TO THE DEFENDANT TO ALLOW HIM TO PREPARE FOR THE AMENDED INDICTMENT.

IV. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE DEFENDANT'S INSTRUCTION D-1.

Instruction D-1 - The Court instructs the jury that you may find George Ford III guilty of simple assault if he attempted to cause bodily injury to another or attempted by physical menace to put another in fear of imminent serious bodily harm.

Finding no merit in the issues raised, we affirm the decision of the court below.

FACTS

On the evening of February 25, 1993, Officer James Fox of the Grenada Police Department was dispatched to Neely's Cab Stand on a call of "a shooting in progress." When he arrived, Fox saw that "a gunshot" had been "fired below the window" of the cab stand. Furthermore, "a shot had been fired into the left rear tire of one of the taxi cab cars." After interviewing several witnesses, Fox arrested Jimmy Spearman and George Ford III.

Ford, along with Spearman, was indicted on July 14, 1993 for the crime of attempted aggravated assault. They were both charged with attempting to shoot Anthony Brown on February 25, 1993. At the time of the shooting, Ford was seventeen years old, but was certified as an adult. His case was transferred to and tried in the Circuit Court of Grenada County. Before the trial began, an error in the indictment stating that the offense had occurred on or about the 25th day of May was changed to February in order to reflect accurately the date of the shooting.

ANALYSIS

I. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO RETURN THE CASE TO YOUTH COURT.

Prior to trial, the defense filed a motion to return this case to youth court. The motion was denied after a hearing thereon. Ford asserts that errors occurred in the original certification process. He argues that his attorney at the time "apparently" waived the certification process. It was later determined that because this attorney was also representing Spearman, the other defendant, he had a conflict of interest and could no longer represent Ford. Ford claims that this conflict relates back to the waiver, and is thereby ineffective as it was not knowingly and intelligently made.

This court adheres to the well settled principle that we may only act upon the record presented to us on review. *Branch v. State*, 347 So. 2d 957, 958 (Miss. 1977). Likewise, we do not "act upon innuendo and unsupported representations of fact by defense counsel." *Gerrard v. State*, 619 So. 2d 212, 219 (Miss. 1993). Instead, we "must decide each case by the facts shown in the record, not assertions in the brief. . . ." *Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995). The Mississippi Supreme Court in *Phillips v. State*, 421 So. 2d 476, 478 (Miss. 1982) explained:

[O]ur consideration of a case on appeal will be confined strictly to the record, both in terms of facts occurring prior to trial and to facts occurring since trial. This rule holds true regardless of the nature of the facts sought to be placed before this Court, or the sincerity of counsel in attempting to do so.

With respect to the first issue presented, the record contains only the motion to return the case to youth court, and the order denying that motion. If there is a factual basis for this assertion of error, it does not appear in the record. Because of this, we cannot find that the circuit court erred or abused its discretion in denying Ford's motion to return the case to youth court.

II. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO AMEND THE INDICTMENT.

Ford's second contention is that the trial court erred in allowing the State to amend the indictment on the day of the trial. The State moved to change the month stated in the indictment from May to February. The defendant objected to the amendment, claiming it was prejudicial to his case.

On appeal Ford argues that according to *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990), "the State can prosecute only on the indictment returned by the grand jury, and that the court has no authority to modify or amend the indictment in any material respect." According to Ford, changing the date of the indictment by three months is material and is not cured by the State's discovery

reflecting the month of February.

At the time the motion was made, the State explained that this was only a typographical error and would not prejudice the defendant. The following inquiry was made:

BY THE COURT: Is this a case where any alibi witnesses are being called to say that he wasn't out there. I mean, I need to know about that.

BY MR. LUNDY: No.

BY MR. HILL: I might also advise the court that all of the discovery documents provided to counsel for the defendant showed that the crime occurred on February 25, so it could not be a surprise as to the date that the alleged offense occurred.

BY THE COURT: Given the facts I will allow the indictment to be amended to reflect February.

The law of Mississippi allows an indictment to be amended to correct defects of form. *Evans v. State*, 499 So. 2d 781, 785 (Miss. 1986). Where, as here, the date of the offense is not a material element or factor in the crime, an amendment changing the date on which the offense occurred is one of form only. *Baine v. State*, 604 So. 2d 258, 261 (Miss. 1992).

Prior to granting the State's motion, the trial court ascertained that the date was not material to the defense. Indeed, at trial, the position of the defense was that the defendant was present at the scene of the crime, but that he did not shoot at the victim. Thus, the amendment did not foreclose an alibi or other defense. Given these facts, we do not find that the trial court erred in granting the State's motion to amend the indictment.

III. THE TRIAL COURT ERRED IN NOT GRANTING A CONTINUANCE TO THE DEFENDANT TO ALLOW HIM TO PREPARE FOR THE AMENDED INDICTMENT.

Ford argues this assignment of error by simply stating that if the State is allowed to amend the indictment over the defendant's objection, then the defendant should be granted a continuance to prepare properly for the amended indictment. Ford cited no authority for his position, and without such, we find it wholly unpersuasive. There exists a presumption of correctness in the actions of the lower court. Ford has completely failed to rebut this presumption by failing to give a reason why additional time was needed.

IV. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE DEFENDANT'S INSTRUCTION D-1 which read:

"Instruction D-1 - The Court instructs the jury that you may find George Ford III guilty of simple assault if he attempted to cause bodily injury to another or attempted by physical menace to put another in fear of imminent serious bodily harm."

Ford argues that because simple assault is a lesser included offense of aggravated assault, it should have been submitted to the jury for consideration. Citing *Callahan v. State*, 419 So. 2d 165, 177 (Miss. 1982) as authority, Ford states that "on indictment for any offense the jury may find the defendant guilty of the offense as charged or any attempt to commit the same offense or may find him guilty of an inferior offense."

It is also the case, however, that all instructions must be supported by the evidence, *Rogers v. State*, 599 So. 2d 930, 934 (Miss. 1992). In *Mease v. State*, 539 So. 2d 1324, (Miss. 1989), the Supreme Court recounted Mississippi law on the giving of lesser included offense instructions.

We have repeatedly held that the accused is entitled to a lesser offense instruction only where there is an evidentiary basis in the record therefor. Such instructions should not be granted indiscriminately, nor on the basis of pure speculation.

Our evidentiary standard is laid out in *Harper v. State*, 478 So. 2d 1017, 1021 (Miss. 1985):

[A] lesser included offense instruction should be granted unless the trial judge - and ultimately this Court - can say, taking the evidence in the light most favorable to the accused and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge).

Mease v. State, 539 So. 2d 1324, 1329-30 (citations omitted).

Keeping these standards in mind, the court in the instant case found that the evidence did not support the instruction for simple assault. The trial judge has the discretion to admit or refuse an instruction, and the trial court commits no error in refusing an instruction which is incorrect or misleading to the

jury. *Presley v. State*, 321 So. 2d 309, 310 (Miss. 1975). It can be reasonably inferred from the record that the judge did not consider the proposed instruction to be supported by the evidence. The State's evidence showed that Ford deliberately aimed and fired a deadly weapon at the victim after having suggested to Spearman that he (the victim) should be killed. The defense was that Ford, although on the scene, did not fire a weapon. No proof was adduced which would justify a rational juror to conclude that Ford was not guilty of aggravated assault, but was instead guilty of simple assault. In *Hutchinson v. State*, 594 So. 2d 17, 19 n.3-20 (Miss. 1992), the court held that the State's proof of deliberate use of a deadly weapon, opposed by the defendant's position that "he did not act at all," obviated a simple assault instruction.

In light of the above, the judge did not abuse his discretion in refusing to give Jury Instruction D-1. We, therefore, find this assignment of error to be without merit.

THE JUDGMENT OF THE GRENADA COUNTY CIRCUIT COURT OF CONVICTION OF ATTEMPTED AGGRAVATED ASSAULT AND SENTENCE OF SIXTEEN (16) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH FOUR (4) YEARS SUSPENDED IS AFFIRMED. COSTS ARE ASSESSED AGAINST GRENADA COUNTY.

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