

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00361 COA

PATRICK KING A/K/A PATRICK LeSHAUN KING 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. LAMAR PICKARD

COURT FROM WHICH APPEALED: COPIAH COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: HARVEY C. FREELON

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: ALEXANDER C. MARTIN

NATURE OF THE CASE: CRIMINAL - SIMPLE ASSAULT

TRIAL COURT DISPOSITION: SIMPLE ASSAULT ON A LAW ENFORCEMENT OFFICER:
SENTENCED TO 5 YRS WITH THE MDOC, A \$1,000 FINE

MANDATE ISSUED: 6/24/97

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

PAYNE, J., FOR THE COURT:

Patrick King was convicted of simple assault on a law enforcement officer and sentenced to serve a term of five (5) years in the custody of the Mississippi Department of Corrections and to pay a fine in the amount of \$1000 and all court costs. The trial court denied King's motion for JNOV or, in the alternative, a new trial. Feeling aggrieved, King asserts three issues on appeal: (1) Whether the verdict is contrary to the overwhelming weight of the evidence, (2) Whether the sentence constitutes

disproportionate, cruel, and unusual punishment in relation to the crimes committed, (3) Whether resisting arrest is a lesser offense of simple assault and whether King was entitled to an instruction on resisting arrest because testimony was put forth at trial from which the jury could have inferred that King was merely resisting arrest. We find that King's issues on appeal have no merit and therefore affirm.

FACTS

On November 3, 1994, the Hazelhurst Police Department received information from Dennis McGee regarding a car jacking. McGee reported to Chief Ellis Stewart that his 1981 maroon Cadillac Sedan Deville had been taken at gunpoint by four black males. After interviewing McGee, Chief Stewart instructed his officers to be on the lookout for a car fitting the description given by McGee.

In the early morning hours of November 4, 1994, Officer Milton Twinner radioed the police station and indicated that he had spotted the Cadillac occupied by four black males at the Roebuck Apartments. Chief Stewart and Officer Ron Crew responded to the report and immediately went to the Roebuck Apartments to assist Officer Twinner. Officer Twinner testified that he approached the suspects, who were sitting around a picnic table, and informed them that a Cadillac had been stolen and that he needed to ask them some questions. Shortly thereafter, Chief Stewart and Officer Crew arrived on the scene. Chief Stewart testified that, upon his arrival, he informed the suspects that they were under arrest and instructed them to turn around and place their hands on the table. Chief Stewart indicated that all of the suspects complied with the exception of Patrick King. All of the officers on the scene testified that King finally complied with the order only after being instructed to do so four times. Officer Crew testified that he then approached King to search him for weapons and that King ran before he could begin the search. Chief Stewart stated that King ran directly into him and he grabbed King and wrestled him to the ground. Officer Crew indicated that he went to assist Chief Stewart in getting King under control and that King was lying face down on the ground with his hands reaching toward his waistband. Both Crew and Stewart indicated that they were fearful that King had a gun and were attempting to get King's hands behind his back. Officer Crew testified that he saw King move one of his hands toward his face and that he [Crew] attempted to grab King's hand at which time King clamped down on Crew's hand with his teeth. Chief Stewart testified that he struck King in the back of the head several times trying to get King to release his grasp on Crew's hand, but this attempt was unsuccessful. Officer Crew testified that he then punched King in the face with the palm of his hand at which time King released Crew's hand. Both officers testified that other police officers had arrived on the scene but neither Crew nor Stewart could recall to what extent, if any, the other officers assisted in getting King under control.

King's version of the events differed from that of the police officers. King contends that he did not attempt to run during the search but was only turning around because he saw Chief Stewart reach for his [King's] pocket. King indicated that he was afraid of Chief Stewart and was concerned that the chief was attempting to plant something on him. King testified that Stewart, Crew, and several other officers grabbed him, threw him to the ground and started kicking and beating him. King claims that he bit Officer Crew in self-defense because he was trying to protect himself from the beating. King's witnesses gave similar testimony in corroboration of King's version of the events that took place. King's witnesses, however, did testify that they could not see everything that occurred because they

were facing the opposite direction with their hands on the table.

Nevertheless, King was subsequently handcuffed and transported to the police station. The evidence indicated that King was bleeding about the face and was complaining that he could not see. Upon arrival at the police station, Chief Stewart called the paramedics who subsequently transported King to the hospital. Dr. James Reid testified that he examined King in the emergency room and concluded that King had received a substantial blow to the left eye. Dr. Reid stated that he advised King that he needed to go to Jackson to have an MRI done in order to determine the extent of the damage to his eye. Dr. Reid testified that King's injuries were not so serious that he needed to be hospitalized but that he did advise King to seek further medical attention in Jackson within the next couple of days.

Dr. Reid also testified that he examined Officer Crew's hand shortly after tending to King's injuries. Dr. Reid indicated that Crew had sustained a superficial cut on the back of his hand and that he gave Crew a tetanus shot and prescribed antibiotics.

The evidence indicated that the car jacking report turned out to be false. King was therefore not charged with car jacking but was indicted for simple assault on a police officer. King contends that the arrest was unlawful and that he had a right to resist the arrest and to defend himself from the beating. The case was submitted to the jury with an instruction regarding self-defense, but the jury did not buy King's story and convicted him of simple assault on a police officer.

ANALYSIS

I. WHETHER THE VERDICT IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *Id.* (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *McClain*, 625 So. 2d at 781. This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the State presented the testimony of three police officers that Officer Crew was bitten while trying to place King under arrest, as well as testimony from Dr. Reid who indicated that he treated Crew for an injury to the back of his hand which was consistent with a bite wound. King testified in his own behalf and did not deny that he bit Officer Crew. King presented testimony that he bit Officer Crew in self-defense from an unlawful and overly violent arrest. Furthermore, the record indicates that King requested and was granted a self-defense instruction. Instruction D-5B:

The Defendant, Patrick King has been charged with the crime of simple assault on a police officer. If you find from the evidence in this case that the Defendant, Patrick King did not commit a simple assault on a police officer or that the simple assault was in the process of reasonable self-defense against an unlawful overly violent act of a police officer or if you find that all the elements of simple assault on a law enforcement officer have not been proven beyond a reasonable doubt, then you shall find the Defendant, not guilty. The jury heard the witnesses and the evidence as presented by both the State and the defense. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict King. The trial court did not abuse its discretion by refusing to grant King a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would be to promote an unconscionable injustice. The trial court properly denied King's motion for a new trial.

II. WHETHER THE SENTENCE CONSTITUTES DISPROPORTIONATE, CRUEL, AND UNUSUAL PUNISHMENT IN RELATION TO THE CRIME COMMITTED.

King argues that his sentence of five (5) years imprisonment and \$1000 fine is disproportionate to the crime charged and therefore violates his Eighth Amendment right against cruel and unusual punishment. King relies on *Solem v. Helm*, 463 US 277, 292 (1982), to support his proportionality argument. We note, however, that *Solem* was overruled in *Harmelin v. Michigan*, 501 U.S. 957, 965-66 (1991), to the extent that no guarantee of proportionality was found in the Eighth Amendment. *Solem* sets forth a three-prong test, which has been adopted by the Mississippi Supreme Court, for determining proportionality in certain sentences: "1) the gravity of the offense and the harshness of the penalty; (2) comparison of the sentence with sentences imposed on other criminals in the same jurisdiction; and (3) comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case." *Edwards v. State*, 615 So. 2d 590, 598 (Miss. 1993). King argues that the severity of the crime is not such that warranted the maximum sentence, especially in light of the fact that the car jacking allegation turned out to be false. King contends that the alleged assault was minor, as the bite on Officer Crew's hand barely broke the skin.

King also addresses the second and third prongs of the *Solem* test by making a comparison between his sentence and other sentences imposed for the same crime in the same jurisdiction as well as in other jurisdictions. In reviewing sentences imposed in the same jurisdiction, King cites to two Mississippi cases each of which imposed a lesser sentence for the crime of simple assault on a law enforcement officer. Also, in an addendum to his Appellant's Brief, King provides this Court with copies of indictments and sentences imposed by Copiah County as well as affidavits from City of Jackson police officers regarding the types of sentences imposed in that jurisdiction. Finally, King cites to the simple assault statutes of Vermont, Oklahoma, and Rhode Island. According to King, of these three, only Rhode Island imposes a maximum sentence of five (5) years for simple assault on a police officer. Vermont and Oklahoma have maximum penalties of one (1) year and six (6) months, respectively.

The Mississippi Supreme Court has long held that "a trial court will not be held in error or held to have abused its discretion if the sentence imposed is within the limits fixed by statute." *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993) (citing *Johnson v. State*, 461 So. 2d 1288, 1292 (Miss.

1984)); *see also* *Barnwell v. State*, 567 So. 2d 215, 221 (Miss. 1990) (save for instances where the sentence is "manifestly disproportionate" to the crime committed, extended proportionality analysis is not required by the Eighth Amendment); *Corley v. State*, 536 So. 2d 1314, 1319 (Miss. 1988); *Reed v. State*, 536 So. 2d 1336, 1339 (Miss. 1988). In the present case, the sentence does not exceed the statutory maximum as provided by the Mississippi Code. Miss. Code Ann. 97-3-7(1) (Rev. 1994).

However, where a sentence is "grossly disproportionate" to the crime committed, the sentence is subject to attack on the ground it violates the Eighth Amendment prohibition of cruel and unusual punishment. *Edwards*, 615 So. 2d at 597 (citing *Wallace v. State*, 607 So. 2d 1184, 1188 (Miss. 1992); *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992)); *see also* *Hoops v. State*, 681 So. 2d 521, 538 (Miss. 1996) (stating that "[i]n light of *Harmelin*, it appears that *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.>"). As stated previously, King, on appeal, makes the argument that his sentence is disproportionate. King, however, raises this issue for the first time on appeal. It is well established that issues raised for the first time on appeal are not properly before the Court and, as such, we are not obligated to address them. *Fleming*, 604 So. 2d at 293. We note that the record is devoid of any mention of King's objection to the sentence. King had the opportunity to object at the time of sentencing and could have also raised the issue in his motion for JNOV/new trial. King failed to raise this issue in the court below and we now find that he is procedurally barred from raising it now.

III. WHETHER RESISTING ARREST IS A LESSER OFFENSE OF SIMPLE ASSAULT AND WHETHER KING WAS ENTITLED TO AN INSTRUCTION ON RESISTING ARREST BECAUSE TESTIMONY WAS PUT FORTH AT TRIAL FROM WHICH THE JURY COULD HAVE INFERRED THAT KING WAS MERELY RESISTING ARREST.

King argues that resisting arrest is a lesser offense of simple assault and he was entitled to an instruction on resisting arrest because testimony was put forth at trial from which the jury could have inferred that King was merely resisting arrest. King relies heavily on *Murrell v. State*, 655 So. 2d 881, 885 (Miss. 1995), and the cases cited therein to support his contention that a resisting arrest instruction should have been granted. In *Murrell*, the Mississippi Supreme Court, quoting from previous cases, set out the guiding principle regarding lesser included offense instructions:

[W]hen warranted by the evidence, the trial court may instruct the jury with reference to lesser included offenses. However, such an instruction should not be indiscriminately or automatically given, as was condemned in *Roberts v. Louisiana*, 428 U.S. 325 at 334, 96 S. Ct. 3001 at 3007, 49 L. Ed. 2d 974 at 982 (1976), but should only be given after the trial court has carefully considered the evidence and is of the opinion that such an instruction is justified by the evidence.

Murrell, 655 So. 2d at 885-86. In determining whether there is an evidentiary basis in the record for granting a lesser included offense instruction, the supreme court has stated:

[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).

Id.

Having carefully reviewed *Murrell* in light of the facts in the case before us, we find the supreme court's synthesis of the case law on the subject of lesser included offenses and resisting arrest instructions to lend greater support for the denial of a resisting arrest instruction than the granting of such an instruction as King claims. *Murrell* involved a defendant who resisted an unlawful arrest by throwing the arresting officer to the ground and choking him. *Id.* at 882. The *Murrell* jury returned a verdict of guilty of simple assault on a police officer but the supreme court reversed on grounds that the verdict was against the overwhelming weight of the evidence and that a resisting arrest instruction should have been granted. *Id.* at 885-86. The court stated that the prosecution failed to prove bodily injury as is required by the simple assault statute which is contained in section 97-3-7(1) of the Mississippi Code. *Id.* The court indicated that the prosecution could have easily satisfied the bodily injury statute by asking the officer if he suffered pain. *Id.* Elaborating further, the court stated:

It is clear . . . that the question of whether the state proved all of the elements of simple assault is a close one. If Murrell did not cause pain, he is not guilty of simple assault. He could still be guilty of resisting arrest. A reasonable fact-finder could conclude, based on the evidence, that Murrell resisted arrest, but have a reasonable doubt whether he injured the officer within the meaning of the statute. The trial court erred in failing to give the resisting arrest instruction.

Id. at 886.

In the present case, there is no question that Officer Crew suffered a "bodily injury." Officer Crew testified that he felt pain when King bit down on his hand. Chief Stewart indicated that he observed Crew's hand bleeding after the bite, and Dr. Reid testified that he treated Crew for a bite wound to the back of his hand. Even King's witnesses indicated that Officer Crew yelled out when King bit down on his hand.

Considering the evidence in a light most favorable to the accused, we find that no reasonable jury could find King guilty of the lesser included offense of resisting arrest and conversely not guilty

of at least one essential element of the principal charge of simple assault on a law enforcement officer. We therefore find King's argument to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF COPIAH COUNTY OF CONVICTION OF SIMPLE ASSAULT ON A LAW ENFORCEMENT OFFICER AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF \$1,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR.