

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01186 COA

MELVIN JACKSON 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. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: BENTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: CLENCIE L. COTTON

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: LAWRENCE L. LITTLE

NATURE OF THE CASE: CRIMINAL - AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE A TERM OF 20 YEARS IN THE MDOC WITH 5 YEARS OF SAID SENTENCE SUSPENDED

MANDATE ISSUED: 7/8/97

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

HINKEBEIN, J., FOR THE COURT:

Melvin Jackson was convicted in the Benton County Circuit Court of aggravated assault. For his offense, Jackson was sentenced to a term of twenty years in the custody of the Mississippi Department of Corrections with five years of that term suspended. Aggrieved by his conviction, Jackson appeals to this Court on the following grounds:

I. THE TRIAL COURT ERRED BY NOT STRICTLY ENFORCING ITS PRE-TRIAL ORDER LIMITING THE TESTIMONY OF DEFENDANT'S PRIOR CRIMES OR BAD ACTS.

II. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT INTENDED TO CAUSE BODILY HARM IN ORDER TO SUPPORT A CHARGE OF AGGRAVATED ASSAULT.

III. THE COURT ERRED IN GIVING DEFENDANT'S JURY INSTRUCTION D-10 AND THE STATE'S JURY INSTRUCTIONS S-1 AND S-1-A ON THE ISSUE OF AGGRAVATED ASSAULT AND "ATTEMPTED" AGGRAVATED ASSAULT.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

On the afternoon of December 18, 1993, Lane Hobson, an officer of the Mississippi Highway Safety Patrol, was on routine patrol north of Ashland, Mississippi. At this time, Officer Hobson received a radio dispatch indicating that an automobile, matching the description of one used by the suspects in an armed robbery, was headed in his direction. Officer Hobson proceeded to set up a roadblock of the highway, using his squad car with its blue lights activated. Soon thereafter, the suspect's automobile approached the roadblock. As the vehicle came to a rolling stop, Officer Hobson approached the vehicle holding a shotgun in his right hand leaving his left hand free. Officer Hobson instructed the suspects to put their hands up into the air because they were under arrest for armed robbery. Officer Hobson further instructed the driver, Melvin Jackson, to keep his right hand in the air but to use his left hand to turn the car off. Jackson refused to obey Hobson's command to turn the ignition off or to bring the car to a complete stop.

While holding his shotgun to the driver's head, Officer Hobson reached into the car with his left hand to cut off the ignition. With Officer Hobson's left arm in the car but before his hand could reach the ignition, Jackson pressed the accelerator and sped off. The force of the acceleration caused Officer Hobson to be spun around and thrown onto the ground, landing on one knee. As the suspects attempted to flee, Officer Hobson was able to fire one shot at the vehicle's left rear tire, disabling it. The suspects, including the driver, Jackson, were apprehended and taken into custody. Jackson was subsequently indicted in Benton County for aggravated assault upon Officer Hobson and indicted in Marshall County for armed robbery. Jackson was tried in Marshall County for the armed robbery but was acquitted. It is from his conviction of aggravated assault that Jackson raises the instant appeal.

I. THE TRIAL COURT ERRED BY NOT STRICTLY ENFORCING ITS PRE-TRIAL ORDER LIMITING THE TESTIMONY OF DEFENDANT'S PRIOR CRIMES OR BAD ACTS.

Jackson alleges that on four occasions during the trial, the State violated the trial court's order that the State refrain from presenting testimony that Jackson had been charged with armed robbery. The order in question was issued as a result of the trial court's granting of Jackson's motion in limine. Jackson argues that, on the four occasions at issue, the trial court committed reversible error in not compelling compliance with its order. Of note, the order prohibited the State from referring to the fact that Jackson had been charged with armed robbery. The order, however, did allow the State to

put on proof that Officer Hobson stopped Jackson because Jackson's vehicle matched the description of the suspect vehicle in an armed robbery.

The State responds that the alleged violations of the trial court's order were in fact not violations, and that regardless of whether the complained-of questions violated the court's order, Jackson failed to make any motions for mistrial. The State argues that Jackson's failure to make motions for mistrial, contemporaneous to the complained-of questions, constituted a waiver of any error that may have occurred. The State, therefore, contends that Jackson is procedurally barred from raising this alleged error for the first time on appeal.

In the case at bar, on each of the four occasions at issue, Jackson objected to the State's questioning and his objection was sustained by the trial court, albeit on two of the occasions for reasons other than a violation of the court's order. It is unclear from the transcript whether the other two objections were granted on the basis of the State having violated the court's order or were granted on other grounds. On one of these occasions the court, *sua sponte*, further instructed the jury to disregard the testimony.

Under Mississippi law, it is presumed that the sustaining of an objection causes the jury to disregard the objected-to material. *See Lanier v. State*, 533 So. 2d 473, 482 (Miss. 1988) (stating that after court sustained defense counsel's objection to prosecutor's statements, it was presumed that jury disregarded prosecutor's statements). Controlling our analysis of the facts at bar is the Mississippi Supreme Court's holding in *Johnson v. State*, where the court held that "[i]f the argument is improper, and the objection is sustained, it is the further **duty of trial counsel** to move for a mistrial." *Johnson v. State*, 477 So. 2d 196, 210 (Miss. 1985) (emphasis added), *rev'd on other grounds*, *Johnson v. Mississippi*, 484 U.S. 1003 (1988). Restated, if a defendant regards "the sustaining of his objection insufficient to remove any supposed harmful effect which may have resulted from the district attorney's remark to the court," it is necessary that he immediately move for a mistrial. *Saucier v. State*, 328 So. 2d 355, 358 (1976).

Because Johnson failed to move for a mistrial at the time the remarks he now complains of were made, the trial court never had an opportunity to address his concerns. *See Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991) (holding that trial judge may not be put in error on matter which was not presented to him for his consideration at trial). As stated by the Mississippi Supreme Court, "before an issue may be assigned and argued here, it must first have been presented to the trial court. Where the issue has not been timely presented below, it is deemed waived. The point is thus said to be procedurally barred when urged here [for the first time]." *Read v. State*, 430 So. 2d 832, 838 (Miss. 1983). Had Johnson considered the State's remarks to be unduly prejudicial to his case, and any resulting prejudice not cured by the judge's sustaining of his objections, he should have

moved for a mistrial. In the absence of such motion before the trial court, this assignment of error is without merit.

II. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT INTENDED TO CAUSE BODILY HARM IN ORDER TO SUPPORT A CHARGE OF AGGRAVATED ASSAULT.

Jackson challenges the legal sufficiency of the evidence, arguing that it was insufficient to support his

conviction for aggravated assault. Jackson made a motion for directed verdict at the close of the State's case-in-chief, which was denied. After presenting his defense Jackson renewed his motion for directed verdict, which was again denied. After the jury returned a verdict of guilty Jackson made a motion for JNOV, which was also denied. It is the denial of this motion for JNOV that Jackson argues constitutes reversible error. Jackson claims that, as a matter of law, the State failed to produce evidence sufficient to satisfy the elements of the offense charged. The State responds that the testimony of Benton County Sheriff Arnie McMullen and Mississippi Highway Safety Patrol Officer Lane Hobson was legally sufficient evidence to satisfy each element of Mississippi's aggravated assault statute.

Directed verdict and JNOV motions challenge the legal sufficiency of the evidence. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true by this Court and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *McClain*, 625 So. 2d at 778. This Court is 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. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987).

In the case at bar, Jackson was charged with violating section 97-3-7(2) of the Mississippi Code, which mandates that:

[a] person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

Miss. Code Ann. 97-3-7(2) (Rev. 1994).

At trial, the State argued that Jackson was guilty of violating sub-part (b) of section 97-3-7(2). The State asserted that Jackson's actions in rapidly accelerating the automobile, while Officer Hobson had the majority of his left arm inside the car, was an "attempt to cause bodily injury to another." The State further argued that, under the circumstances, Jackson used the automobile (considering its weight and tremendous power to accelerate rapidly) as a "deadly weapon" within the plain meaning of section 97-3-7(2)(b). We agree. Considering the testimony of the sheriff and the state trooper, it is clear to this Court that the trial court's denial of Jackson's motion for directed verdict and JNOV was correct as a matter of law. This assignment of error is without merit.

III. THE COURT ERRED IN GIVING DEFENDANT'S JURY INSTRUCTION D-10 AND THE STATE'S JURY INSTRUCTIONS S-1 AND S-1-A ON THE ISSUE OF AGGRAVATED ASSAULT AND "ATTEMPTED" AGGRAVATED ASSAULT.

Jackson contends that the jury instructions "are in conflict and cannot be reconciled." More specifically, Jackson alleges that his instruction, D-10, conflicted with the State's instructions S-1 and S-1-A. The State responds that Jackson not only failed to object to the State's instruction S-1 and S-1-A when they were offered at trial, but that Jackson approved of the State's instructions informing

the trial court that he had "no objection to it." The State contends that Jackson's attempt to raise this issue for the first time on appeal is procedurally barred.

We have reviewed the trial transcript and hold that the State is correct in concluding that Jackson is procedurally barred from raising this point of alleged error on appeal. Indeed, as the State argues, the trial court asked Jackson if he had any objection to the State's proposed instructions S-1 and S-1-A, and he responded in the negative. It is well settled in Mississippi jurisprudence that "before an issue may be assigned and argued here, it must first have been presented to the trial court. Where the issue has not been timely presented below, it is deemed waived. The point is thus said to be procedurally barred when urged here [for the first time]." *Read v. State*, 430 So. 2d 832, 838 (Miss. 1983).

Because the defendant's instruction D-10 frames the charge as "attempted aggravated assault," and the State's instructions S-1 and S-1-A likewise characterize the offense as an "attempt to cause bodily injury," this Court is at a loss as to how Jackson could perceive these instructions to be "inconsistent." We find that Jackson is procedurally barred from raising this error, there is no inconsistency in the instructions, and that this assignment of error is without merit.

THE JUDGMENT OF THE BENTON COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER AND SENTENCE OF TWENTY (20) YEARS WITH FIVE (5) YEARS SUSPENDED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST APPELLANT.

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