

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00312 COA**

LARRY WELCH A/K/A LARRY DONNELL WELCH **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

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| DATE OF JUDGMENT: | 2/08/96 |
| TRIAL JUDGE: | HON. GRAY EVANS |
| COURT FROM WHICH APPEALED: | SUNFLOWER COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | CLEVE MCDOWELL |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN |
| DISTRICT ATTORNEY: | HALLIE GAIL BRIDGES |
| NATURE OF THE CASE: | CRIMINAL - FELONY - AGGRAVATED ASSAULT |
| TRIAL COURT DISPOSITION: | CONVICTED OF AGGRAVATED ASSAULT AND SENTENCED TO SERVE TEN YEARS IN THE CUSTODY OF THE MDOC |
| DISPOSITION: | AFFIRMED - 11/4/97 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 11/25/97 |

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

HINKEBEIN, J., FOR THE COURT:

While already in the custody of the Mississippi Department of Corrections, Larry Welch was convicted in the Sunflower County Circuit Court of aggravated assault in connection with a prison riot. He was sentenced to serve an additional term of ten years imprisonment to run consecutively with any term previously imposed. Feeling aggrieved by the judgment against him, Welch appeals his conviction on only the following ground:

I. THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

We find the issue raised by Welch does not warrant a reversal of his conviction. Accordingly, we affirm the judgment of the trial court.

FACTS

Myron Stewart was stabbed during a prison riot at Parchman Penitentiary. Stewart survived the life-threatening wound to recall his ordeal at trial. He testified to hearing a commotion below while showering on the prison's second level. He hurriedly dressed and then walked only a few steps before being attacked. Stewart identified Welch as the person who assaulted him. The State produced three additional witnesses, James McCoy, Douglas Smeiley, and Willie Watkins, each of whom identified Welch as Stewart's attacker. McCoy saw Welch retrieve a homemade knife or "shank" from his locker minutes before the incident and then watched Welch use the weapon on Stewart. Smeiley also watched the stabbing from a cubicle facing the shower area. Watkins testified to having viewed the assault from still another vantage point.

In response, Welch denied the stabbing and presented seven additional witnesses. Three of these individuals claimed to have seen an injured Stewart being moved up the stairs between the prison's first and second levels, thereby suggesting that he was in fact stabbed in the chaos of the riot. However, no defense witness claimed to have actually seen the assault. In rebuttal, the prosecution offered the testimony of Wilfred Hill, a guard who had the stairs in constant view during the riot. Hill saw no one carrying Stewart upstairs. In fact, he saw no prisoner at all being carried upstairs during the riot. After hearing this evidence, the jury convicted Welch.

ANALYSIS

Following his conviction, Welch moved for a new trial claiming that the jury's verdict was contrary to the law and the overwhelming weight of the evidence. The trial court denied his motion. On appeal Welch presents the same issue once again characterizing the testimony of the prosecution's witnesses as unreliable due to rival gang membership. The State contends that there is in the record substantial evidence of such quality and weight to support jury's determination of guilt. We agree with the State.

The Mississippi Supreme Court has repeatedly held that the jury bears sole responsibility for determining the weight and credibility of evidence. *May v. State*, 460 So. 2d 778, 781 (Miss. 1985). Therefore, a new trial is appropriate only in instances where a verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice. *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). Such a determination "[implicates] the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). Consequently we will reverse and order a new trial on appeal only if, accepting as true all evidence favorable to the State, we determine that the trial court abused that discretion. *Id.*

At trial, Welch attacked the credibility of his victim, Stewart, as well as the State's three eyewitnesses. He did so by making largely unsubstantiated suggestions regarding their membership in a gang entangled in a rivalry with his own. He then unsuccessfully invited the jury to infer that such membership presented a motive for false accusation.

Welch makes essentially the same assertions on appeal. However, the gang affiliation, if any, of these individuals was not substantiated by credible evidence. Welch makes no attempt to direct our attention

toward tangible evidence indicating ulterior motives for the accusations. Moreover, the record indicates that jurors were presented with no evidence that anyone other than Welch stabbed Stewart. Because the overwhelming weight of the evidence lies with the State, we perceive no injustice in either the jury's finding Welch guilty of aggravated assault or the trial court's allowing the verdict to stand. As a result, this assignment of error is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF SUNFLOWER COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THE SENTENCE TO RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO SUNFLOWER COUNTY.

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