

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00095-COA**

LARRY NEAL

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

DATE OF JUDGMENT:	01/10/96
TRIAL JUDGE:	HON. JOHN LESLIE HATCHER
COURT FROM WHICH APPEALED:	BOLIVAR COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	HELEN E. MORRIS (WITHDRAWN) GLENN H. WILLIAMS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
DISTRICT ATTORNEY:	LAWRENCE Y. MELLEN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	AGGRAVATED ASSAULT: SENTENCED TO SERVE A TERM OF 12 YRS IN THE MDOC 8 YRS SUSPENDED; SUSPENSION OF SENTENCE TO COMMENCE AFTER DEFENDANT HAS SERVED 4 YRS IN THE MDOC; SENTENCE TO RUN CONSECUTIVE TO ANY AND ALL PREVIOUSLY IMPOSED
DISPOSITION:	AFFIRMED-12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

KING, J., FOR THE COURT:

Larry Neal was convicted of aggravated assault in the Bolivar County Circuit Court. He was

sentenced to serve a term of twelve years, with eight of those years to be suspended after having served four years, in the custody of the Mississippi Department of Corrections. On appeal, Neal contends that the trial court committed reversible error by: (1) failing to grant the defendant's motion for mistrial based on certain unsolicited and prejudicial hearsay statements uttered by a prosecution witness, (2) allowing the victim of the alleged crime to give a lay opinion that it was Larry Neal who shot her, and (3) refusing the defendant's requested instruction D-3 and failing to instruct the jury on the defendant's theory of his case. Finding no error, we affirm the circuit court's judgment.

FACTS

On March 19, 1995, Neal, David Scott, a/k/a Punkin, Carol Alexander, and several other people were outside socializing in an area located near the People's Choice Lounge and the Do Drop Lounge in Shelby, Mississippi. While standing in the street, an argument ensued between Neal and Punkin, ultimately escalating to Neal's retrieval of a gun from his car. Several witnesses at the scene stated that Neal shot once into the air. As several people struggled with Neal for the gun, it fell to the ground and discharged. One witness claimed that Neal shot into the air and fired a second shot into the crowd.

In the midst of the confusion, Alexander was shot in the back. She testified that she saw Neal discharge his weapon into the air one time. As she walked away from the street, she was injured a few minutes later by a second gunshot. Alexander and several other witnesses stated that they did not see Neal shoot her. However, Alexander concluded that Neal shot her because he was the only person she had seen in the area with a gun that night. Neal later turned himself in to the police.

Subsequently, Neal was indicted for aggravated assault. A trial was held and the jury convicted Neal of aggravated assault. He was sentenced to a term of twelve years, with eight years to be suspended after having served four. Neal's motion for judgment notwithstanding the verdict or in the alternative, for a new trial was denied. Neal now appeals his conviction and sentence.

ISSUES

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON CERTAIN UNSOLICITED AND PREJUDICIAL STATEMENTS UTTERED BY PROSECUTION WITNESS JOE CRAIG.

Neal contends that Officer Craig, a prosecution witness, offered an inadmissible hearsay statement and the trial judge failed to *immediately* admonish the jury to disregard the statement, thereby constituting a mistrial. We disagree.

The following testimony was elicited by Neal's attorney from Officer Craig, a prosecution witness:

Q. And during the time that you were on the scene, did you make any determination as to who shot Carol Alexander?

A. I asked Carol Alexander who shot her when I arrived and she say Larry Neal.

Immediately after Officer's Craig's statement, Neal's attorney objected to Officer Craig's statement

and moved for a mistrial. The trial judge reserved ruling on the motion, allowing Officer Craig, the Chief of Police of Shelby, and Alexander to complete their testimony. At the conclusion of Alexander's testimony, the trial judge ruled that Officer Craig's statement was inadmissible. After individually polling each of the jurors and determining that they could disregard Officer Craig's statement, the trial judge denied the motion for mistrial.

The decision to declare a mistrial is within the sound discretion of the trial judge. (*citations omitted*). To find error from a trial judge's failure to declare a mistrial, there must have been an abuse of discretion. *Jones v. State*, 398 So.2d 1312, 1318 (Miss.1981). During trial, the judge elected to proceed with Officer Craig's testimony and permit other witnesses to testify before ruling on the motion for mistrial. We find that the trial judge did not abuse his discretion in this regard. A trial judge is vested with the discretion to rule on motions at the time he deems most appropriate. Prejudice did not result to Neal due to the delayed ruling on the motion. This assignment of error is without merit.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE VICTIM OF THE ALLEGED CRIME TO GIVE A LAY OPINION THAT IT WAS LARRY NEAL WHO SHOT HER.

Neal contends that the trial court should not have allowed Alexander to give a lay opinion regarding who shot her. We disagree. "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to the clear understanding of his testimony or the determination of a fact in issue." **M. R. E. 701**. We find that Alexander testified based on her perceptions and observations at the scene.

The record reveals that in response to questioning from the State, Alexander gave the following lay opinion:

Q. Based on your observations at the scene that night, who did you believe shot you?

A. Larry Neal.

Alexander testified that she was in the area at the time Neal fired the first shot and he was the only person she had seen with a gun. Her statement that Neal shot her appears to have been based on what she observed. We find that this assignment of error is also without merit.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING THE DEFENDANT'S REQUESTED INSTRUCTION D-3 AND FAILING TO INSTRUCT THE JURY ON THE DEFENDANT'S THEORY OF HIS CASE.

Neal contends that Instruction D-3, a lesser-included offense instruction on simple assault, should have been granted. We disagree. "[Lesser-included offense instructions] should be submitted to the jury only where there is an evidentiary basis in the record therefor." *Lee v. State*, 469 So.2d 1225, 1230 (Miss.1985). We find that an evidentiary basis does not exist in this case to support a simple assault instruction.

Instruction D-3 reads as follows:

If you find that the State has failed to prove any one of the essential elements of the crime of aggravated assault, you must find the Defendant, Larry Neal, not guilty of aggravated assault and you will proceed with your deliberations to decide whether the State has proved beyond a reasonable doubt all of the elements of the lesser crime of simple assault.

If you find from the evidence in this case beyond a reasonable doubt that:

(1) Larry Neal purposely, knowingly or recklessly caused or attempted to cause bodily injury to Carol Alexander by a means not likely to produce death or serious bodily injury, or

(2) negligently, as distinguished from purposely or knowingly, caused bodily injury to Carol Alexander by use of a means likely to produce death or serious bodily harm,

then you shall find the Defendant guilty of simple assault.

If the state fails to prove beyond a reasonable doubt any one or more of those elements, then you shall find the Defendant not guilty of simple assault.

As set forth above, you may find the Defendant, Larry Neal, guilty of simple assault, a crime lesser than aggravated assault. However, notwithstanding this right, it is your duty to accept the law as given you by the Court, and if the facts and the law warrant a conviction of the crime of aggravated assault, then it is your duty to make such a finding uninfluenced by your power to find a lesser offense. This provision is not designed to relieve you from the performance of an unpleasant duty. It is included to prevent a failure of justice if the evidence fails to prove the charge of aggravated assault but does justify a verdict for the lesser crime of simple assault.

Instruction D-3 contemplates actions by Neal that merely caused "bodily injury," as distinguished from "serious bodily injury"⁽¹⁾. "[W]hen serious or substantial bodily harm has resulted, we [are] inclined to hold that the case is definitely one of aggravated assault," rather than simple assault. *Jackson v. State*, 684 So.2d 1213, 1230 (Miss.1996). The record reveals that Alexander sustained serious bodily injuries from a bullet that entered her shoulder and lodged in her spine. Considering that Alexander spent over a month in the hospital paralyzed from her breast down, we do not find that the evidence supports a finding of *mere bodily injury*, an element found only in simple assault.

Instruction D-3 asserts that if Neal's actions were negligent, the jury should consider a conviction of simple assault. The facts of this case point only to purposeful or reckless use of a deadly weapon under circumstances manifesting extreme indifference to the value of human life. We are of the opinion that Neal's use of a deadly weapon in an area where many people were present rules out negligence. The jury could not have rationally found Neal guilty of simple assault, rather than aggravated assault. Finding no error, we affirm the circuit court's judgment.

THE JUDGMENT OF THE BOLIVAR COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWELVE YEARS, WITH EIGHT

YEARS SUSPENDED AFTER HAVING SERVED FOUR YEARS, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND RESTITUTION TO VICTIM OF \$15,240.70, IS AFFIRMED. SENTENCE TO RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO BOLIVAR COUNTY.

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

1. The State's aggravated assault instruction read, in pertinent part, "purposely, knowingly or recklessly causing serious bodily injury to Carol Alexander by shooting her in the back with a pistol . . . under circumstances manifesting extreme indifference to the value of human life". The State's aggravated assault instruction adequately tracks the language of Mississippi Code Annotated § 97-3-7(2) which defines aggravated assault.