

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00807 COA**

JASON JROD BOBO

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:	07/12/96
TRIAL JUDGE:	HON. ANDREW CLEVELAND BAKER
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID CLAY VANDERBURG
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEWITT T. ALLRED III
DISTRICT ATTORNEY:	ROBERT L. WILLIAMS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	AGGRAVATED ASSAULT: SENTENCED TO SERVE A TERM OF 12 YRS IN THE MDOC WITH LAST 8 YRS SUSPENDED PENDING THE FUTURE GOOD BEHAVIOR & PAY ALL COSTS OF COURT
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

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

PAYNE, J., FOR THE COURT:

Jason Bobo, a thirteen year old, was convicted of aggravated assault for shooting Kirk Patton. Bobo was tried as an adult and was sentenced to serve a term of twelve years in the custody of the Mississippi Department of Corrections with eight years suspended and four years to serve. Bobo's motion for JNOV or, in the alternative, a new trial was denied. Finding no error on the part of the circuit court, we affirm.

FACTS

On the night of February 19, 1995, Jason Bobo and Kirk Patton got into an argument over \$40 Patton allegedly owed Bobo for two rocks of crack cocaine which Patton had sold for Bobo but for which Patton had not paid Bobo back. The testimony indicated that during the argument Bobo told Patton that he was going to shoot him. Patton testified that Bobo then left and returned shortly thereafter with a gun. Patton stated that Bobo fired the gun at him but missed. The testimony from Patton and another witness indicated that Bobo left again but returned and threw a bottle at Patton, once again missing.

Patton testified that he and his friends then got into a car and rode around, later stopping at the Jr. Food Mart. Patton testified that Bobo approached him, that they again began arguing, and that Bobo and Patton left the Jr. Food Mart and went across the street. Patton testified that Bobo again asked about his money and that Patton told him that he was not going to pay him back. Patton testified that Bobo then said, "I ought to pop your a___." Patton testified that he turned to walk away from Bobo, and Bobo shot him in the hip.

Bobo testified in his own behalf. Bobo denied having given Patton two rocks of crack cocaine to sell. Bobo testified that on the night of the shooting Patton robbed Bobo with a knife outside a convenience store. Bobo indicated that Patton put the knife in his back and took Bobo's \$40. Bobo testified that he ran after the robber but later confronted Patton outside the arcade. Bobo admitted that he threatened to shoot Patton at the arcade but denied that he shot and missed Patton at that time. Bobo then admitted that he left the arcade about an hour after his argument with Patton, that he went to a friend's house, got a gun, and then went looking for Patton. Bobo indicated that he found Patton and confronted him once again. Bobo testified that Patton would not give him his money and that Patton told him to go ahead and shoot him. Bobo testified that he complied with Patton's request and that he shot Patton as he (Patton) walked back to his car. Bobo testified that Patton did not have the knife in his hand at this time but that the knife was in its holster on Patton's belt. Bobo's defense in this case is self-defense.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN DENYING BOBO'S MOTION FOR JNOV.

As the State correctly points out, Bobo makes a poor attempt at any semblance of an argument. Notwithstanding this fact, however, it would appear that Bobo is contending that the evidence was legally insufficient because (1) he asserted at trial that he shot Patton in self-defense and (2) the only testimony for the State was the victim who was a convicted drug user and seller. First of all, we fail to see how Bobo's self-defense claim impacts the sufficiency of the evidence. Secondly, the victim, Kirk Patton, was not the only witness presented by the State.

The standard for reviewing an overruled motion for JNOV is well established. A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court

overruled Bobo's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Bobo's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are 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.

Id. (citations omitted).

In the present case, both the victim and another eyewitness testified that Bobo shot Patton on the night in question. Furthermore, Bobo admitted that he shot Patton. Bobo's claim that the shooting was done in self-defense goes to the credibility of the evidence not the sufficiency. Thus, accepting the evidence consistent with Bobo's guilt as true and giving the prosecution all favorable inferences that may be drawn from the evidence, we find that the jury could not *only* find Bobo not guilty. We therefore find Bobo's argument to be without merit.

II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE A "DISPARITY-IN-SIZE" INSTRUCTION AND ERRED IN REFUSING TO GIVE A SIMPLE ASSAULT INSTRUCTION.

Bobo first argues that the trial court erred in refusing to grant the following "disparity-in-size" instruction:

If the evidence shows that the victim, Kirk Patton, was a much larger and stronger man than the Defendant, Jason Bobo, and the victim was capable of inflicting great and serious bodily harm upon the Defendant with his hands and feet, or either, and that the Defendant had reason to believe or did believe as a man of ordinary reason that he was then and there in danger of such harm at the hands of the victim, and used his gun, with which he shot the victim, to protect himself from such harm, and the Defendant was justified, your verdict will be not guilty, even though the victim was not armed.

Bobo contends that the law entitles him to this instruction when an unarmed attacker is larger than the one being attacked and the one being attacked cannot reasonably defend himself without resorting to the use of a deadly weapon. Bobo argues that because he is so much smaller than Patton he had to use a gun to defend himself.

The State argues that there was no evidence of self-defense in this case and that the trial court was being overly generous in granting any self-defense instruction much less a "disparity-in-size" instruction. We agree.

Bobo is correct in that the law does permit a "disparity-in-size" instruction when the circumstances so warrant. *Hinson v. State*, 218 So. 2d 36, 39 (Miss. 1969). In the present case, however, we must agree with the trial judge when he stated that it was a "stretch" to even give the standard self-defense

instruction. It would appear that the trial judge was being cautious when he agreed to instruct the jury on Bobo's theory of self-defense, and we certainly do not find fault in that decision. *See Triplett v. State*, 672 So. 2d 1184, 1186 (Miss. 1996) (holding that a defendant is entitled to have the jury instructed as to his theory of the case, even though the evidence in support of that theory may be slight). However, we are of the opinion that Bobo's contention that he was also entitled to a "disparity-in-size" instruction is really stretching the boundaries of his case as there was absolutely no proof that Patton, at the time of the shooting, was even attempting to inflict bodily injury upon Bobo with his hands and feet. Bobo's own testimony indicated that Patton was walking away from Bobo at the time Bobo fired the shot. Bobo testified that he was afraid of Patton because of the alleged earlier altercation with the knife but the law clearly states that fear is not sufficient. *See Marshall v. State*, 220 Miss. 846, 855, 72 So. 2d 169, 172 (1954) ("[T]he mere fact that the deceased may have been 'physically capable of inflicting great and serious bodily harm upon the defendant with his feet and hands,' and that the defendant was afraid of the deceased, was not sufficient in itself to justify the stabbing."). Furthermore, even if we were to believe that Patton robbed Bobo at knife-point earlier that evening, Bobo's later acts of seeking out and confronting Patton not once but twice that same evening nullifies any claim of self-defense he might have. *Griffin v. State*, 495 So. 2d 1352, 1354 (Miss. 1986) ("[O]ne who leaves an altercation, arms himself, and returns with the intent to and does use his weapon on the other party cannot claim self-defense.").

Finally, Bobo's mere request for the "disparity-in-size" instruction would indicate that Patton was unarmed at the time of the shooting. According to Bobo, Patton was armed. He allegedly had a knife on his person. Thus, an instruction based on disparity in size and physical condition has no application. *Cochran v. State*, 278 So. 2d 451, 452 (Miss. 1973).

Bobo next argues that the trial court erred in refusing his lesser included offense instruction on simple assault. Bobo, quoting *Harper v. State*, 478 So. 2d 1017, 1021 (Miss. 1985), contends:

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 a lesser included offense (and conversely not guilty of at least one essential element of the principal charge.)

Bobo argues that considering the facts and evidence in the light most favorable to the accused, the jury could have found Bobo guilty of simple assault. Bobo bases this argument on the fact that Patton's injury was so slight that someone else had to tell him that he had been shot.

The State responds that the seriousness of the injury sustained by the victim is immaterial to a charge of aggravated assault under Miss. Code Ann § 97-3-7(2)(b) (Rev. 1994). The State argues that because the assault was committed intentionally with a deadly weapon, Bobo's crime is without a doubt aggravated assault.

As the State correctly points out, the supreme court has interpreted the assault statute in the context of the issue before us in *Hutchinson v. State*, 594 So. 2d 17, 18-20 (Miss. 1992). In *Hutchinson*, the supreme court determined that the defendant was not entitled to a lesser included offense instruction on simple assault by virtue of the fact that the defendant used a knife in his assault upon the victim. In distinguishing between the simple assault statute, Miss. Code Ann. § 97-3-7(1) (Rev.

1994), and the aggravated assault statute, Miss. Code Ann. § 97-3-7(2) (Rev. 1994), the supreme court stated as follows:

From the language of these statutes, it becomes apparent that aggravated assault is a carbon copy of simple assault, with the exception that aggravated assault has added the words ". . . with a deadly weapon . . ." This suggests a statutory scheme where conduct which is simple assault under Section 97-3-7(1)(a) becomes aggravated assault under Section 97-3-7(2)(b) when done "with a deadly weapon." The scheme is completed when we realize that a subsequent subsection of the simple assault definition includes the negligent injury to another with a deadly weapon. Miss. Code Ann. § 97-3-7(1)(b) (Supp. 1987). No evidence suggests or even hints that Hutchinson acted negligently.

. . .

The question is whether the statutory scheme precludes an intentional assault with a knife such as that used here ever being assault. We think it does . . . In its definitions, the statute draws a distinction between intentionally inflicted bodily injury, which is simple assault, and a like, intentionally inflicted injury "with a deadly weapon," which is defined as aggravated assault. The further distinction between negligently inflicted injuries with a deadly weapon, which are simple assaults, and intentionally inflicted bodily injuries with a deadly weapon, which are aggravated assaults, confirms this view. Hutchinson's use of this knife takes the case out of Section 97-3-7(1)(a) simple assault, and, as noted above, his deliberate wielding of the knife removes the case from Section 97-3-7(1)(b) simple assault.

***Id.* at 19-20.** The *Hutchinson* court went on to state that "just because injuries may be characterized as slight does not mean the case is automatically one of simple assault." ***Id.* at 20.**

We find *Hutchinson* to be directly on point with the issue before us. We therefore find that Bobo's intentional shooting of Patton takes him out of the simple assault statute and plants him squarely within the confines of the aggravated assault statute and the circuit court made no error in so concluding.

III. WHETHER THE TRIAL COURT ERRED IN OVERRULING BOBO'S PRE-TRIAL MOTION TO DISMISS THE INDICTMENT AS UNCONSTITUTIONAL AND BOBO'S POST-TRIAL MOTION TO SET ASIDE HIS SENTENCE OF INCARCERATION IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

Bobo takes issue with the fact that the trial judge sentenced a thirteen year old child to a term of twelve years in the Mississippi Department of Corrections. Bobo argues that the sentence is cruel and unusual and that the judge abused his discretion in not considering sentencing alternatives under the Youth Court Act.

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). Turning to the controlling statutes, we note that the circuit court has original jurisdiction to try any offense committed by a child with the use of a deadly weapon and who has reached his thirteenth birthday. Miss. Code Ann. 43-21-151(1)(b) & (3) (Supp. 1996). In the present case, Bobo had reached his thirteenth birthday and was charged with using a deadly weapon to commit an assault. As such, the trial judge had full authority to impose a sentence on Bobo that falls within the statutory limits of Miss. Code Ann. § 97-3-7(2)(b) (Rev. 1994). The maximum sentence provided by section 97-3-7(2)(b) is twenty years incarceration. Here, the trial judge sentenced Bobo to serve a term of twelve years in the custody of the Mississippi Department of Corrections with eight years suspended and four years to serve. We find that the sentence imposed is well within the statutory limit, and there is no showing by Bobo that the trial court abused its discretion in imposing his sentence.

We therefore find that Bobo's arguments are without merit and affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWELVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH EIGHT YEARS SUSPENDED AND FOUR YEARS TO SERVE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO PANOLA COUNTY.

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