

**IN THE COURT OF APPEALS 12/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00801 COA**

**EDWARD JOHNSON A/K/A EDWARD JOHNSON, JR. A/K/A EDWARD L. JOHNSON**

**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. FRANK G. VOLLOR

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

EUGENE A. PERRIER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: G. GILMORE MARTIN

NATURE OF THE CASE: CRIMINAL (FELONY)

TRIAL COURT DISPOSITION: DEFENDANT JOHNSON CONVICTED OF AGGRAVATED  
ASSAULT AND SENTENCED TO TWENTY YEARS IN THE CUSTODY OF THE MDOC

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

McMILLIN, P.J., FOR THE COURT:

This case is an appeal by Edward Johnson from his conviction for aggravated assault in the Circuit Court of Warren County. Johnson raises two issues on appeal. One involves a claim of prejudicial error in the admission of a photographic line-up, and the other is a general attack on the evidence supporting his conviction. We conclude the matters raised on appeal to be without merit and affirm the conviction.

I.

### The Photographic Line-Up

Johnson claims that the trial court committed reversible error when, over his timely objection, it admitted into evidence a photographic line-up that had been presented to the victim during the course of the investigation. The line-up consisted of six photographs, one of which was the defendant. The investigating officer testified that the victim selected Johnson as her assailant from among the photographs. Johnson's contention is that the photograph, clearly a police mug shot, improperly informed the jury that he had a prior criminal record. Johnson relies for authority on *Sloane v. State*, 437 So. 2d 16 (Miss. 1983). In *Sloane*, the supreme court reversed the defendant's conviction because the trial court allowed into evidence a police photographic line-up that included an old mug shot of the defendant that, on its face, showed it "had no connection with this more recent crime." *Id.* at 17. The court concluded that the photograph made "it undeniably clear to the jurors that Sloane had been involved in or was suspected of prior criminal activity." *Id.* at 18.

The trial court in this case concluded as a matter of fact that it was impossible to determine from the photograph itself whether the picture was taken as a part of the on-going investigation of this crime or whether it was a photograph derived from some previous episode of police involvement in Johnson's life. We cannot conclude that the trial court was manifestly in error in reaching this conclusion. In the *Sloane* case, the court noted "that it is permissible to use mug shots *when necessary* to the State's case or rebuttal that were taken incident to the crime for which the defendant is being tried." *Id.* at 18. The primary impediment to introduction of a police mug shot as set out in *Sloane* is that it "would cause jurors to suspect the appellant had a criminal record or had been in trouble with the police." *Id.* In *Sloane*, the photograph was several years old, a fact that the court seemed to think was evident from an examination of the defendant's physical appearance in the photograph. *Id.* at 17. Therefore, it was readily apparent to the jurors that Sloane had been involved in a prior brush with the law.

There is no similar circumstance in this case. Although the photograph has the earmarks of a police mug shot, there was testimony that the defendant was under suspicion for the crime prior to the time the photographic line-up was assembled. This appears to be the basis for the trial court's determination that it was at least as plausible that the photograph was taken as a part of the

investigation as it was that it reflected some previous criminal involvement. The trial court is given wide discretion in ruling on the admissibility of evidence, and will be reversed only when there is an abuse of that discretion. *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990) (citations omitted). We conclude that the facts of *Sloane* are sufficiently different from the operative facts of this case that reversal of this conviction is not warranted.

## II.

### The Weight and Sufficiency of the Evidence of Guilt

Johnson also attacks both the weight and the sufficiency of the evidence to support his conviction. The entire thrust of his argument consists of a lengthy attack on the credibility of the two eyewitnesses who testified against him. These witnesses were the victim, Tammy Hildebrand, and another witness named Kenneth Hughes, who was in the area at the time the crime was committed. Johnson points out in some detail a number of discrepancies in the testimony of both witnesses and asserts that Hughes's testimony was substantially impeached on cross-examination. He also asserts that Hildebrand is a substance abuser who was so impaired on the night of the crime that no credence can be given to her testimony. Tellingly, however, Johnson declares in his brief that "[t]he only fact which Tammy Hildebrand and Kenneth Hughes actually agreed upon was that Edward Johnson was the assailant." That is, in fact, a fair comment on the testimony of these witnesses.

While there were discrepancies in the testimony of these two witnesses as to the surrounding details of the events of the evening, there is no doubt that Tammy Hildebrand was assaulted, and that she identified Johnson as her attacker. Hildebrand and Hughes vary on their versions of such matters as whether Hildebrand was running away or crawling away after being attacked, yet the fact remains that Hughes testified to seeing the events surrounding the attack, and he also identified Johnson as the perpetrator. The true identification of the assailant was the central issue that the jury was called upon to decide. The discrepancies in the details of the testimony of these witnesses were pertinent only on the issue of the credibility the jury would assign to their testimony establishing the essential elements of the crime. The jury is vested with the responsibility for assessing the worth of the testimony offered by the witnesses. *Holly v. State*, 671 So. 2d 32, 40 (Miss. 1996) (citations omitted). Unquestionably, these witnesses testified to facts that, if believed by the jury, would establish Johnson's guilt of the crime. By its verdict of guilty, the jury indicated that it believed the witnesses on the crucial aspects of their testimony. The contradictions in the details of the testimony of these witnesses do not appear to this Court to have rendered the witnesses so untrustworthy or made the central theme of their testimony so incredible that it would require the jury to reject the evidence presented by them. Thus, we conclude that there was probative evidence presented to establish the essential elements of the crime and the identity of the defendant as the perpetrator. The defendant's attack on the sufficiency of the evidence against him, therefore, fails. *See, e.g., Jones v. State*, 669 So. 2d 1383, 1388-89 (Miss. 1995).

Johnson's defense consisted primarily of his testimony and that of his mother that he had been home since early evening and was asleep in bed when the incident occurred. However, he presented another witness, in an apparent attempt to impeach Kenneth Hughes, who testified to seeing Johnson on the street at 11:00 P.M. on the evening of the crime. It was within the province of the jury to weigh the

credibility of the testimony of Johnson and his mother and to reject it if they found it not worthy of belief. It clearly did so, and we do not find these witnesses' testimony so compelling as to conclude that it outweighs the evidence of guilt presented by the State. There is no basis to grant a new trial based upon a contention that the verdict was against the weight of the evidence. *See, e.g., Robinson v. State*, 662 So. 2d 1100, 1105 (Miss. 1995); *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983). The conviction must be affirmed.

**THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO WARREN COUNTY.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**