In the Supreme Court
of the
Mississippi Band of Choctaw Indians

YUNNEL WILLIS **APPELLANT**

vs.

CAUSE NO. SC 2015-02

MISSISSIPPI BAND OF CHOCTAW INDIANS **APPELLEE**

OPINION AND ORDER

(Per Curium) This matter comes before the Court on direct appeal filed by Appellant Yunnel Willis following his January 22, 2015, jury trial and conviction in the Choctaw Criminal Court on one count of Aggravated Assault, a violation of Choctaw Tribal Code § 3-3-4, and a Class A offense. Defendant/Appellant was found "Not Guilty" on eight (8) other counts of Aggravated Assault; and "Not Guilty" on one count of Aggravated Battery, which is a Class A offense under CTC § 3-3-5. During trial, the Court also dismissed one other count of Aggravated Assault because it was determined that the alleged victim of said count was not even present at the scene at the time of that alleged offense. All charges seemingly stemmed from a single ongoing criminal incident which took place October 24, 2014, at the home of Chancie Anderson, located in the Pearl River Community of the Mississippi Band of Choctaw Indians. Following conviction, the Defendant/Appellant on January 27, 2015, was sentenced under the provisions of CTC § 3-1-3 to 180 days in jail, given credit for 87 days served in pretrial detention, and assessed a fine of $500.00.

Defendant/Appellant, through counsel, timely filed on February 2, 2015, a "MOTION FOR RECONSIDERATION OF JUDGMENT. On February 5, 2015, the Tribe filed a RESPONSE TO MOTION FOR RECONSIDERATION OF JUDGMENT. There was no ruling made by the Choctaw Trial Criminal Court within twenty (20) days from the date the appellant's motion to reconsider was filed. Therefore, pursuant to Rule 23(a) Title II of the Choctaw Rules of Criminal Procedure, that motion was deemed automatically denied. Accordingly, the Appellant on March 4, 2015, duly filed his Notice of Appeal to the Choctaw Tribal Supreme Court.

Following briefing by both parties, oral arguments were held before this Court on January 4, 2016, and the case was submitted for final consideration. This Opinion and Order of the Court thereby ensues.

Factual Background

The record reflects that all charges in this case seemingly stemmed from a single ongoing criminal incident which took place September 28, 2014, at the home of Chancie Anderson, located in the Pearl River Community of the Mississippi Band of Choctaw Indians. Defendant/Appellant arrived and entered MS Anderson's home and moved about within the house brandishing a tire iron in a threatening manner. He thereafter left the home through the back door, additionally armed himself with a sledge hammer, and similarly used it and the tire iron threateningly. At the home were the baby-sitter, Heidi Billie, and eight other children and young adults ranging in age from two years to late teen-age. Appellant Willis was demanding the whereabouts of Chancie Anderson, whom he believed to be about the home, but she was not there. As Appellant so threateningly moved through the house, encountering first one set of children, the care provider, then other children, and outside still other principally older boys and girls, his actions prompted varying levels of alarm, fear, panic or other manners of excitability. Once outside, several older youths rallied in defense and Appellant was fought off and ultimately sustained the injuries they inflicted that led to his being transported away by ambulance and hospitalized.

Attalia Amos, on Choctaw Police Department patrol, was dispatched to Heidi Billy's residence and was the third CPD officer to arrive on the scene shortly after the fact. At that time, the Appellant was lying on the road near the intersection of Bell Road and North Oswold, probably 10 to 15 yards distant from Heidi Billy's residence. The ambulance was already at the scene. Officer Amos commenced his on-scene investigation, took the tire iron and sledgehammer into evidence, conducted multiple interviews, and took witness statements. Her work eventually led to the filing of nine individual complaints charging Aggravated Assault, a violation of CTC § 3-3-4, and one individual complaint alleging Aggravated Battery, a violation of CTC § 3-3-5.[1] At trial, one of the Aggravated Assault complaints was dismissed, its filing being an apparent oversight since the person alleged to have been the victim was not even present at the time of the incident.[2] Three of the Aggravated Assault complaints were filed by CPD Cpl. Craig Willis, the balance of the charges by Officer Amos.

At trial, the Prosecution presented five witnesses, two of whom were Officers Willis and Amos; additionally, three of the older children or adult victims testified as to the incident. At the

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[1] With most court systems, and the better practice, is for prosecuting attorneys, and not police officers, to file formal criminal complaints alleging in a single document all charges against a named defendant or defendants arising out of the same criminal action.

[2] Prosecutors performing prosecutorial duties (including the filing of formal complaints) enjoy absolute prosecutorial immunity from civil redress for their conduct. Police filing criminal complaints are preforming "quasi-judicial" functions that are outside the pail of absolute protection normally afforded them in their performance of their standard duties, which are deemed "ministerial" functions, and are protected by the narrower shield of "qualified immunity." See, e.g. *Imbler v. Pachtman*, 434 U.S. 409 (1976) (Full immunity for prosecutors) *vs. Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

conclusion of trial proceedings, individual jury instructions and individual verdict forms were included on each victim alleged. Following deliberations, the jury returned a "Not Guilty" verdict on the one Aggravated Battery and also "Not Guilty" verdicts on seven of the eight Aggravated Assault charges. The jury returned a single "Guilty" verdict on the charge of Aggravated Assault brought on behalf of the named minor, "B. Bell, minor daughter of Heidi Billy." At the request of defense counsel, the jurors were polled and the respective verdicts were all affirmed by the panel members.

Standard of Review

Both counsel for the appellant and appellee agree that it is not the role of this court to re-weigh the evidence, but rather to ask "whether the evidence, when reviewed in the light most favorable to the government with all reasonable inferences and credibility choices made in support of a conviction, allows a rational fact finder to find every element of the offense beyond a reasonable doubt." *United States v. Harris,* 293 F.3d 863, 869 (5th Cir. 2002); see also *Glasser v. United States,* 315 U. S. 60, 80 (1941). This court's review of the sufficiency of the evidence is to be "highly deferential to the verdict," *United States v. Gulley,* 526 F.3d 809, 816 (5th Cir. 2008) and, as stated in *Jackson v. Virginia,* 443 U.S. 307, at 318 (1979), the "critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be to determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt." In passing on the correctness of the jury's action, we do so "Viewing the evidence in the light most favorable to the jury verdict, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and, as per U.S. v. Martin, 790 F.2d 1215 (5th Cir. 1986) "We do so, recognizing that 'it is the **sole** province of the jury to weigh the evidence and the credibility of the witnesses.' United States v. Davis, 752 F.2d 963, 968 (5th Cir.1985) (emphasis added).

Arguments and Analysis

Appellant's one contention on appeal is that the verdict is against the sufficiency of the evidence presented. In support of his contention, his argument is essentially that the allegation of swinging a tire iron and sledgehammer in proximity to the minor, "B. Bell," in such a manner as to constitute the intentional and knowing use of a deadly weapon(s) and to thereby put that particular victim in fear of imminent serious bodily harm was the very same allegation on which the jury had found him "not guilty" on nine other alleged victims. He argues that fundamentally identical evidence and testimony elicited in connection with his acquittal on the other eight alleged victims (charges relating to the ninth other victim having been previously dismissed), was also that upon which the single verdict of guilt was rendered in relation to B. Bell. The rebuttal brief of Appellant summarizes his position as follows:

> In this case, there is no way to separate the minor children from each other as the allegations, actions, location, and results were the same. It is impossible to say one child was a victim of aggravated assault while the other children were not. Thus, the jury could not and should not have found Appellant guilty of Aggravated Assault. [Rebuttal Brief of Appellant – P. 5.]

At oral argument Appellant also urged this court to find that the jury convicted defendant of aggravated assault in relation to the wrong victim. He reasoned that because of the similarity of names of the victims identified as "B. Bell" (Minor daughter of Heidi Billy), and "B. Billy" (Minor daughter of Heidi Billy), and given that B. Bell was the named victim on which the aggravated assault "guilty" verdict was rendered, while B. Billy was the victim alleged in the more serious aggravated battery complaint and the single individual sustaining any physical injury, the jury mistakenly rendered its guilty verdict on the wrong victim. In essence, appellant seems to argue the jury intended to convict defendant of aggravated assault against B. Billy, rather than against B. Bell.

On that basis, he asks this court to reverse and render for insufficiency of evidence supporting the verdict actually rendered; alternatively, he prays the court reverse and remand for a new trial.

Appellant provides no legal authority as precedent upon which the court might undertake such a treacherous initiative, second guess the jury, and order reversal and remanding of the matter for a new trial. Juries have historically rendered seemingly illogical, or logically inconsistent, determinations in cases having multiple charges. It has occurred whether they were the same, or similar, charges in relation to multiple victims, or multiple statutory violations associated with a single victim.

Furthermore, Appellant's suggestion that the jury actually intended to convict the defendant of aggravated assault against B. Billy is a conjecture of a legally impossible outcome because defense counsel at trial had either failed, or elected to not request that a jury instruction on the lesser included offense of aggravated assault be given – or, for that matter, multiple jury instructions on the even lesser included offenses of battery or of simple assault. This he failed or chose not to do despite his entitlement to have such an instruction, provided the evidence would permit a jury rationally to find him guilty of any of the lesser offense. On those possibilities this court would pass no judgment.

The U.S. Supreme Court has twice in the body of Federal Indian Law passed on, and recognized Indian defendants' rights to lesser included assault jury instructions in federal felony prosecution cases under the Major Crimes Act, *18 U.S.C. § 1153.* The first occasion was in *Keeble v. U.S.* 412 U.S. 205 (1973) where the Court describes the lesser-included offense

doctrine's common law origins, its purpose in criminal trials, and federal codification attendant to felony assault or battery and lesser offenses. It wrote in the following excerpt:

> Although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged, **it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.** The Federal Rules of Criminal Procedure deal with lesser included offenses, see Rule 31 (c), 6 and the defendant's right to such an instruction has been recognized in numerous decisions of this Court. See, e. g., Sansone v. United States, 380 U.S. 343, 349 (1965); Berra v. United States, 351 U.S. 131, 134 (1956); Stevenson v. United States, 162 U.S. 313 (1896). (*Id. at p. 208*)

In the *Keeble* case, Petitioner, an Indian, was convicted of assault with intent to commit serious bodily injury on an Indian reservation, a federal crime under the Major Crimes Act of 1885, after the trial court refused to instruct the jury on the lesser included offense of simple assault. The Supreme Court reversed, writing "We hold only that where an Indian is prosecuted in federal court under the provisions of the Act, the Act does not require that he be deprived of the protection afforded by an instruction on a lesser included offense, assuming of course that the evidence warrants such an instruction." (*Id. at p. 214.*)

Justices STEWART, POWELL and REHNQUIST dissented, with Justice Stewart writing: "I think this holding would be correct only if the lesser included offense were one over which the federal court had jurisdiction. Because the trial court did not have jurisdiction over the 'lesser included offense' in the present case, I must respectfully dissent.[1]" (*Id. At p. 215.*) Contrary to the dissenting justices' viewpoint, the Fifth Circuit on remand of United States v. John, 437 U.S. 634 (1978) upheld to the contrary in United States v. John, 587 F.2d 683 (CA5 1979): "We are of the opinion that the District Court had jurisdiction to enter the judgment of conviction for the offense of simple assault, and we therefore affirm. This conclusion is, in most respects, identical to that reached by the only other circuit which has considered this precise problem. See Felicia v. United States, 8 Cir. 1974, 495 F.2d 353, Cert. denied, 419 U.S. 849, 95 S.Ct. 88, 42 L.Ed.2d 79 (1974)." 587 F.2d at p. 635. The Supreme Court denied *cert* review of the question and thereby acquiesced in the Fifth Circuit's determination. The doctrine of the availability of lesser included instructions to more serious aggravated battery charges at Choctaw was in that context expressly recognized.

While the above discussion documents the right to lesser instructions, Title II, Rule 18(b), of the Choctaw Rules of Criminal Procedure explains the process whereby it is available in tribal court:

> (b) Instructions to Juries: In a jury trial, questions of law shall be decided by the judge and questions of fact shall be decided by the jury. * * * * The parties may file requested instructions in writing at the close of the evidence or otherwise as the judge may direct, furnishing copies thereof to the other party. The judge shall inform the parties of his action on such requests prior to oral argument. Either party may object to instructions and such objections shall be made outside the hearing of the jury. **Objections not made before the jury retires to determine its verdict shall be waived.** (Emphasis added.)

In this present case, defense counsel requested no jury instruction on any lesser offenses to those charged in connection with each named victim. Because he did not request that if the jury could not reach a unanimous verdict of "guilty" on the more serious aggravated battery charge, that they instead consider the possibility of guilt on the lesser included offense of aggravated assault, or, for that matter, of battery or even of simple assault. Appellant is now therefore legally estopped from raising his theoretical explanation that they intended to render its single "guilty" verdict in relation to B. Billy -- and not on B. Bell -- for this court's contemplation. Furthermore, the jury verdict form had no place for the jury to check either "not guilty" or "guilty" as regards that lesser charge of aggravated assault under the count relating to B. Bell, minor daughter of Heidi Billy, so there would be no way on this review to even determine that they considered, yet rejected, the possibility of guilt of a lesser charge on her.

Neither could this court remand this case for a retrial on all nine counts anew. Defendant has already been acquitted on eight of the nine counts, *including the more serious charge of aggravated battery in relation to B. Billy.* Such action, this court has previously held, would violate fundamental principles of double jeopardy in relation to the eight acquittals (plus, of course, the dismissed case.) *See, e.g.,* Constitution and By-Laws of the Mississippi Band of Choctaw Indians, Article X, § 1(b); Indian Civil Rights Act of 1968, Pub. L. 109-136, 119 stat. 2643, 25 U.S.C. Sec. 1302(a); *MBCI vs, Donovan Allen,* SC No. 2013-03, (April 17, 2014); and *Ashe v. Swenson,* 397 U.S. 436 (1970).]

Similarly, this court could not remand for retrial on defendant's conviction of aggravated assault on B. Bell ***together with*** a refiling charging aggravated assault, rather than the former aggravated battery count, on B. Billy. Though an aggravated assault retrial on the B. Bell conviction may be feasible alone, retrial on the lesser included offense of aggravated assault – or for that matter, battery or simple assault – on B. Bell would be a legal impossibility due to

Defendant's acquittal on the greater offense of aggravated battery on her. Once again, the double jeopardy doctrine, as well as the multiplicity problem and "merger of offenses" doctrine prohibit retrial on a different charge arising out of the same criminal offense. Multiplicity is the "practice of charging the commission of a single offense in several counts. This practice is prohibited because a single wrongful act cannot furnish basis for more than one criminal prosecution." Black's Law Dictionary 1016 (6th ed. 1990). Finally, the merger of offenses doctrine applies when a defendant commits a single act, that simultaneously fulfills the definition of two separate offenses, because merger will occur. This means that the lesser of the two offenses will drop out and the defendant will only be charged with the greater offense. This would have been the same, even if the defendant had been convicted on the aggravated battery charge: he could not have been tried anew on aggravated assault or even simple assault. See, e.g. *Harris v. Oklahoma,* 433 U.S. 682 (1977): "Where petitioner had been convicted of his companion's felony murder based on his killing of a victim during the course of an armed robbery, the Double Jeopardy Clause of the Fifth Amendment barred a separate prosecution of petitioner for the lesser crime of robbery with firearms, since conviction of the greater crime of murder could not be had without conviction of the lesser crime."

This would leave the court's sole remaining alternative action on remand to be only for retrial on the single instance of conviction: the aggravated assault in relation to B. Billy (minor daughter of Heidi Billy.) If that were to happen, (which it will not), it could still leave unanswered that original question on whether the jury's actual intent was to instead convict in relation to the offense against B. Billy. That would be so unless, of course, the new jury once again convicted only on the offense against B. Bell. In short, a "redo" in a such way as to determine which of the two victims was the actual one on which the jury intended its conviction to be based would now not simply be a legal impossibility, but also an unnecessary waste of judicial resources.

Ultimately, in any case, it is not within the proper role or function of this court to necessarily reconcile the logic of one verdict of guilt against other jury "not guilty" determinations as regards other alleged victims of the same ongoing criminal transaction, so long as the prosecution has met its evidentiary burden on the single conviction. We do find upon proper examination of the record that the tribe did in fact adduce ample testimonial evidence and proof in support of each element requisite to the establishment of defendant's guilt on the charge of aggravated assault in regards to the victim B. Bell, minor daughter of Heidi Billy. That, alone, suffices to uphold the conviction.

Conclusion

Premises considered and based upon this court's review of the record in light of the earlier-stated standards of review, it is our determination that the Tribe did adduce evidence and testimony sufficient for a rational fact finder to find every element of aggravated assault charge

beyond a reasonable doubt in relation the victim "B. Bell." The alternative possibility appellant would urge the Court to contemplate is a legal impossibility because the jury received no instruction even making such consideration available to them. Finally, appellant's request of remand for retrial would offer no opportunity for the jury to render any other verdict of guilt than the one this jury rendered. Lastly, it would be a waste of court resources which is not necessary since the prosecution has once proven its case on the single charge of conviction.

For the above and foregoing reasons, we would therefore then affirm the Appellant's conviction.

SO ORDERED, this the 24th day of October, 2016.

Kevin Briscoe, Chief Justice

Brenda Toinetta Pipestem

Brenda Toinetta Pipestem, Associate Justice

Edwin R. Smith, Associate Justice

CHOCTAW SUPREME COURT
CHOCTAW, MS

CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 24th day of October, 2016 cause to be forwarded by the United States Mail or Hand Delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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