

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JANUARY SESSION, 1997**

STATE OF TENNESSEE,)	
)	No. 02C01-9602-CR-00050
Appellee)	
)	SHELBY COUNTY
vs.)	
)	Hon. BERNIE WEINMAN , Judge
GEORGE BROOKS,)	
)	(Aggravated Robbery)
Appellant)	

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OPINION FILED: _____

REVERSED AND REMANDED

David G. Hayes
Judge

OPINION

The appellant, George Brooks, was convicted by a Shelby County jury of aggravated robbery, a class B felony. See Tenn. Code Ann. § 39-13-402 (1991). The trial court sentenced the appellant to eight (8) years imprisonment in the Tennessee Department of Correction. On appeal, the appellant contends (1) that the convicting evidence is insufficient, (2) that the trial court failed to instruct the jury on the statutory definition of "serious bodily injury," and (3) that the trial court failed to charge the jury on aggravated assault, a lesser included offense.

After a review of the record, we reverse the judgment of the trial court and remand for a new trial.

I. Background

The appellant and Terry Howell, the victim in this case, were co-employees at United Liquors Corporation in Memphis and were also social acquaintances. On several occasions on the date of March 25, 1994, the appellant asked Howell for a loan of twenty dollars, which Howell refused.¹ After completing his shift at United Liquors, Howell visited with a friend, and the two consumed a six-pack of beer and a small amount of liquor.

Around 8:00 p.m., Howell left his friend's house and began walking home. The shortest route to his home was through an alley that runs behind the appellant's home. Howell testified that the appellant met him in the alley and, again, requested a loan of twenty dollars. When Howell refused, the appellant

¹Howell testified that he had, on previous occasions, made personal loans to the appellant. However, on the date in question, he did not have the extra money.

hit him in the face with an unidentified black object. After this attack, Howell noticed that sixty dollars was missing from his shirt pocket.

As a result of the assault, Howell sustained two broken bones in his jaw. In addition, his cheekbone was crushed. Howell's injuries also included permanent damage to his eye and the loss of feeling in his mouth. The medical records introduced confirmed that the victim was treated in the emergency room at Baptist Hospital Central and that his injuries required surgery and follow-up treatment.

Jerome Smith, Bill March, and Paul Gray, the appellant's co-workers at United Liquors, testified that, at work, on the Monday following this incident, the appellant bragged about the beating he inflicted upon Howell. Smith, the appellant's supervisor, further testified that the appellant boasted that he had punched Howell because Howell insisted upon smoking crack cocaine in the presence of some children. Moreover, Smith testified that, since being subpoenaed to testify in this case, the appellant has been verbally abusive towards Smith, including physical threats. The defense offered no proof.

Based upon this evidence, the jury found the appellant guilty of aggravated robbery.

II. Sufficiency of the Evidence

The appellant first argues that the evidence is insufficient to support his conviction for aggravated robbery. Specifically, he asserts that the proof failed to show that the victim sustained "serious bodily injury" as defined by Tenn. Code Ann. § 39-11-106(a)(33) (1991). We disagree.

When the sufficiency of the convicting evidence is challenged on appeal, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn.1994), cert. denied, --- U.S. ----, 115 S.Ct. 743 (1995); Tenn.R.App.P. 13(e). This means that an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978). The reviewing court must also accredit the testimony of the witnesses for the State and resolve all conflicts in favor of the State's theory. State v. Williams, 657 S.W.2d 405, 410 (Tenn.1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429 (1984). Additionally, because a jury conviction removes the presumption of innocence and replaces it with one of guilt, a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn.1982). This court, therefore, will not disturb a guilty verdict unless the facts contained in the record and the inferences which may be drawn therefrom are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. State v. Matthews, 805 S.W.2d 776, 780 (Tenn. Crim. App. 1990).

Aggravated robbery requires that a robbery be accomplished with a deadly weapon or that the victim suffer serious bodily injury. Tenn. Code Ann. § 39-13-402. Tenn. Code Ann. § 39-11-106(a)(33) defines "serious bodily injury" as "bodily injury which involves:"

- (A) A substantial risk of death;
- (B) Protracted unconsciousness;
- (C) Extreme physical pain;
- (D) Protracted or obvious disfigurement; or
- (E) Protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty.

At trial, the State produced undisputed proof demonstrating that Howell suffered permanent damage to his left eye, requiring the insertion of a plate, and has also lost the feeling in his mouth as a result of the blow inflicted by the appellant. This evidence sufficiently establishes that the victim suffered "a protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106(a)(33)(E). Thus, we hold that, from this evidence, the jury could have rationally convicted the appellant of aggravated robbery. This issue is without merit.

III. Instruction on "Serious Bodily Injury"

Next, the appellant alleges that the trial court failed to instruct the jury as to the statutory definition of "serious bodily injury." The record reflects that the trial court did so instruct the jury. This issue is without merit.

IV. Lesser Offenses

In his final issue, the appellant contends that the trial court failed to instruct the jury as to the "lesser offense of aggravated assault." The State responds that aggravated assault is not a lesser included offense of aggravated robbery, or, in the alternative, that the evidence clearly demonstrates that the appellant is guilty of the greater offense and, therefore, the omission of the instruction was harmless. Thus, we must first determine whether, under the facts of this case, aggravated assault is a lesser offense or lesser grade of aggravated robbery, and, if so, whether the proof presented at trial required an instruction on aggravated assault.

In determining whether one offense is a lesser grade of another, "[o]ne need only look to the statutes to determine whether a given offense is a lesser grade." Trusty, 919 S.W.2d 305, 310 (Tenn. 1996). The offense of robbery is divided into the following grades: robbery, aggravated robbery, especially aggravated robbery, and carjacking. Clearly, aggravated assault is not a lesser grade of aggravated robbery.

However, a lesser included offense differs from a lesser grade or class of the crime charged. "[A]n offense qualifies as a lesser included offense only if the elements of the included offense are a subset of the elements of the charged offense and only if the greater offense cannot be committed without also committing the lesser offense." Trusty, 919 S.W.2d at 310 (citing Schmuck v. United States, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450-1451 (1989)). The standard is that "[t]he lesser offense may not require proof of any element not included in the greater offense as charged in the indictment." Id. at 311 (interpreting Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979)). Thus, a lesser included offense need not originate from the same class as the greater offense, as long as the lesser offense is established by proof of the same or less than all the elements required to establish the commission of the offense charged.

In the present case, the indictment charged that:

[George Brooks] . . . did unlawfully, intentionally, knowingly, and violently, engage in conduct, as a result of which TERRY W. HOWELL suffered serious bodily injury, and did obtain from the person of TERRY W. HOWELL, a sum of money, all under the value of five hundred dollars . . . in violation of T.C.A. 39-13-402. . .

Aggravated robbery requires the "intentional or knowing theft of property from the person of another by violence or putting the person in fear," and, as charged in the present case, where the victim suffers serious bodily injury. Tenn. Code Ann. § 39-13-401, -402. Under the facts of this case, the relevant provision of

the aggravated assault statute provides that a person commits an aggravated assault when that person intentionally or knowingly causes serious bodily injury to the victim. Tenn. Code Ann. § 39-13-101(a) (1) and Tenn. Code Ann. § 39-13-102(a)(1)(A). In the present case, the elements of aggravated assault are necessarily included within the elements of aggravated robbery. Thus, aggravated assault is a lesser included offense of aggravated robbery. We acknowledge that the appellate courts of this state have repeatedly held that assault is a lesser included offense of robbery. James v. State, 385 S.W.2d 86, 88 (Tenn. 1964), cert. denied, 381 U.S. 941, 85 S.Ct. 1777 (1965); State v. Smith, 751 S.W.2d 468, 471 (Tenn. Crim. App. 1988); State v. Newsome, 744 S.W.2d 911, 915 (Tenn. Crim. App. 1987); State v. Shaw, 619 S.W.2d 546, 549 (Tenn. Crim. App. 1981). Moreover, this court has previously held that aggravated assault is a lesser included offense of attempted aggravated robbery when the indictment relies upon the element of "serious bodily injury." See State v. Armstrong, No. 02C01-9312-CC-00271 (Tenn. Crim. App. at Jackson, Dec. 30, 1994), perm. to appeal denied, (Tenn. Apr. 10, 1995).²

However, this does not mean that the trial court must instruct the jury on the lesser offense of aggravated assault in every indictment which charges aggravated robbery. A trial court must instruct the jury on the lesser offense only if the trier of fact could rationally find the defendant guilty of the lesser offense and not guilty of the greater offense. James, 385 S.W.2d at 89; see also Trusty, 919 S.W.2d at 310; State v. Howard, 926 S.W.2d 579, 586 (Tenn. Crim. App. 1996). Moreover, an instruction on the lesser offense is properly refused where the evidence shows that the defendant is either guilty of the greater offense or not guilty of any offense. Howard, 926 S.W.2d at 585 (citing State v.

²Other jurisdictions, which have also adopted the Model Penal Code and which have statutory provisions for aggravated assault and aggravated robbery similarly defined to those in this state, have consistently held aggravated assault to be a lesser included offense of aggravated robbery. See, e.g., Bishop v. State, 742 S.W.2d 911, 915 (Ark. 1988); Commonwealth v. Nelson, 486 A.2d 1340, 1347 (Pa. Super. 1984).

Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800 (1991); State v. Dulsworth, 781 S.W.2d 277, 287 (Tenn. Crim. App. 1989)).

The State's proof, in the present case, is undisputed that the appellant assaulted Howell on the evening of March 25, 1994, resulting in serious bodily injury to the victim. Thus, the question before the jury was whether the appellant's assault upon the victim was motivated by an intent to rob, i.e., to obtain money, or an intent to prevent unlawful conduct, i.e., to prevent the victim's intended use of crack cocaine.³ See supra, Part I. The State's proof introduced evidence to support both positions, i.e., an aggravated robbery and an aggravated assault. Whether the appellant is guilty of the greater offense of aggravated robbery or the lesser offense of aggravated assault depends upon his intent preceding the incident. This court and the trial court may conclude that the appellant had such intent. See State v. Boyce, 920 S.W.2d 224, 227 (Tenn. Crim. App. 1995). However, the finder of fact is the jury. Id.

We hold that, from the evidence in this case, the jury could have rationally convicted the appellant of aggravated assault and acquitted him of aggravated robbery. By failing to charge the lesser included offense of aggravated assault, the trial court deprived the appellant of his constitutional right to have a jury determine his guilt. Id.; see also State v. Wright, 618 S.W.2d 310, 315 (Tenn. 1981). The omission of the lesser included offense from the charge to the jury in this case requires a new trial. Boyce, 920 S.W.2d at 227; see also State v. Summerall, 926 S.W.2d 272, 279 (Tenn. Crim. App. 1995). Accordingly, the judgment of the trial court is reversed. This cause is remanded for a new trial.

³As to this issue, it is interesting to note that one juror, prior to the onset of deliberations, inquired as to whether "the main focus here is robbery and not the assault? The assault is secondary to the primary charge of robbery; is that correct?"

DAVID G. HAYES, Judge

CONCUR:

JOE B. JONES, Presiding Judge

THOMAS T. WOODALL, Judge