

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
January 10, 2023 Session

**FILED**  
03/28/2023  
Clerk of the  
Appellate Courts

**STATE OF TENNESSEE V. MICHAEL MOSLEY**

**Appeal from the Criminal Court for Davidson County  
No. 2019-D-2667 Angelita Blackshear Dalton, Judge**

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**No. M2022-00441-CCA-R3-CD**

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Michael Mosley, Defendant, claims the evidence was insufficient to support his conviction of attempted aggravated assault, that the trial court erred by not requiring the State to make an election as to the precise definition of serious bodily injury for which a conviction was being sought, and that the trial court erred by denying Defendant’s request for two special jury instructions. Discerning no error, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JILL BARTEE AYERS, JJ., joined.

Manuel B. Russ, Nashville, Tennessee, for the appellant, Michael Mosley.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Amy Hunter and Janice Norman, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

The Davidson County Grand Jury indicted Defendant for aggravated assault. After a trial, the jury found Defendant guilty of the lesser-included offense of attempted aggravated assault. Following a sentencing hearing, the trial court determined that Defendant was a career offender and sentenced him to twelve years with a sixty percent release eligibility.

### **Trial Testimony**

On December 5, 2018, Mollie Baker (“the victim”) and her sister, Amanda Stansbury, were at the Walmart located at 7044 Charlotte Pike in Nashville. The victim said that she was assaulted and described what was depicted while a video from the Walmart surveillance camera was played for the jury. She said that two of Defendant’s female cousins can be seen walking by her while she was looking at perfume. She said that the girls called her a “b\*\*\*h” as they passed by. As the victim walked away from the perfume section, she was attacked from behind by Defendant.

The victim described getting “stabbed” twice with an object, once in her left eye and once under her left eye. She said that she could tell the “difference between a punch and a stab” but that she did not “know what [Defendant] stabbed” her with. She said that she felt a sharp pain in her left eye. She said that she was knocked to the ground and hit repeatedly. She said that, after Defendant fled, Ms. Stansbury called 9-1-1.<sup>1</sup> The victim said that she had never met Defendant but that she “knew of him” because her daughter and her niece had dated his brother, Gregory Sanders.

After paramedics arrived, the victim was transported by ambulance to Saint Thomas Midtown Hospital. She testified that she “was in a lot of pain” while she sat in the emergency room “for about an hour and a half.” She said that she had no insurance and that she finally “just got up and went home” without being seen by a doctor. She said that she had “sharp, aching” pain in her left eye and could not “see out of it.” She said that she was “hurting everywhere” and that her pain level was a “10 on a scale of 1 to 10.” She said that she could not open her left eye for four days after the attack and that, when she was finally able to open her eye, her eyesight was blurry. She said that the pain in her left eye persisted for several months and that her left eye still gets “infected.” She testified that her left pupil had not returned to its normal size and that the vision in her left eye was “still blurry.”

Photographs that the victim took of her injuries on the day of the incident and over the course of the next several days were entered as exhibits and published to the jury. The photographs showed that the victim had a swollen left eye, significant bruising around her left eye and some bruising around her right eye, and a cut immediately below her lower left eyelid.

The victim agreed that she was convicted of aggravated assault in 2011 and that she pled guilty to filing a false report and leaving the scene of an accident in 2001.

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<sup>1</sup> Ms. Baker testified that Ms. Stansbury passed away before the trial.

The parties stipulated that “Mollie Baker and Daniel Baker were charged in an open pending indictment in Cheatham County, Tennessee[,] with second degree murder related to the death of Gregory Sanders that occurred on December 2, 2016. Gregory Sanders was the half-brother of [Defendant].”

Metropolitan Nashville Police Department (MNPD) Officer Jeremy Huffine testified that he received a report of an assault over his radio and proceeded to Walmart, where he met with the victim. He said that the victim was “bleeding from her face” and “holding her eye.” He described the victim as “hysterical” and said that she was complaining of pain in her eye. He said that she was transported by ambulance to the hospital. Officer Huffine collected a lanyard with attached keys found by Walmart’s loss prevention personnel near the location of the assault. Officer Huffine turned the lanyard into the MNPD property room. On cross-examination, he agreed that the victim thought the person who assaulted her was named Michael Vaughn.

MNPD Detective Zachariah Bevis was tasked with trying to find the owner of the lanyard that Officer Huffine obtained from Walmart’s loss prevention personnel. He was able to identify a Thorntons’ key tab on the lanyard and photographed the barcode on the key tab. He went to a Thorntons’s convenience store, where he asked the clerk to scan the barcode. From the scan, Detective Bevis was able to determine that the key tab was associated with an individual named Michael whose birthday was August 4, 1996. Through a driver’s license search, Detective Bevis was able to confirm that Defendant’s first name was Michael and that his birthdate was August 4, 1996.

MNPD Detective Harry Scarbrough testified that he was assigned to investigate the incident. He obtained surveillance videos from several security cameras at Walmart. Detective Scarbrough “clipped” the videos and put the relevant scenes in chronological order to create a video file for court. According to Detective Scarbrough, the first video clip showed a white Chevrolet Monte Carlo parking in the Walmart lot and Defendant, who was wearing a hoodie with the hood pulled up, exiting the parked vehicle and talking on a cell phone as he walked toward the entrance to Walmart. The second video clip showed Defendant’s entering Walmart, and the third video clip showed Defendant’s walking through the store. The fourth video clip showed Defendant’s meeting two females, “teenagers or younger.” The fifth video clip was taken from a “head high” security camera. Detective Scarbrough said that when he examined still shots from the fifth video clip, he immediately recognized Defendant. The sixth video clip showed a panorama view of the front of Walmart. He said that the two young females could be seen talking with Defendant and then motioning for Defendant to follow them. Detective Scarbrough said a lanyard with keys on the end could be seen hanging out of Defendant’s pants pocket and “slapping against” his right leg as he followed the two females. Detective Scarbrough described what was depicted in the seventh video clip as follows:

[The victim was] just sauntering out looking not in his direction and [Defendant] literally just plants his foot and turns and just goes at her like a linebacker, right at that moment, as soon as he spots her, and then clotheslined her to the ground, grabs her by the hair, starts kicking her in the face, and then he runs out, but from the views of the camera and I believe speaking with the victim initially she never even saw him coming. [The victim] just walks out, is looking around and then all of sudden is just clotheslined, a ferocious attack then starts.

Detective Scarbrough said the victim remained on the ground through the end of the video. The eighth video clip showed the “same two females” outside Walmart, and the ninth video clip showed Defendant’s running out of the store. The tenth video clip showed Defendant’s running in the direction of the white Monte Carlo. The eleventh video clip showed Defendant run past the Monte Carlo and into a wooded area next to Walmart.

Detective Scarbrough was later able to determine the vehicle tag on the Monte Carlo was registered to an Adam Cook. After further investigation pointed to Defendant as the assailant, Detective Scarbrough obtained a warrant for Defendant charging him with aggravated assault.

Terry Faimon testified he was the Director of Communication Research Court Liaison for the District Attorney’s Office in Nashville. As part of his duties, he handled “all electronic monitoring and surveillance which includes prison phone calls and county jail calls here in Nashville.” During his investigation, he obtained recordings of two phone calls made by an inmate to Defendant. The following exchange, from the first recorded jail call made on December 27, 2018, was played for the jury:

[DEFENDANT]: You know I’m with the s\*\*t, you know I popped that b\*\*\*h Mollie Baker.

INMATE: Who?

[DEFENDANT]: That b\*\*\*h Mollie. You know Danny Baxter.

INMATE: That’s the b\*\*\*h, that’s the b\*\*\*h that Greg was f\*\*\*ing with ain’t it?

[DEFENDANT]: No, he was f\*\*\*ing with her daughter.

INMATE: Oh, okay, so, yeah. So that’s the one that Danny was f\*\*\*ing with.

[DEFENDANT]: Yeah, that Danny was f\*\*\*ing with.

INMATE: That's the Momma.

[DEFENDANT]: Yeah. You know, she got charged with it too. You know I caught her at Walmart 'bout two, three weeks ago and beat her f\*\*\*ing head in.

INMATE: Scraped her out there, didn't it?

[DEFENDANT]: Yeah, I sent her to the hospital.

INMATE: Bro, we talked about that though, didn't we? We had this talk, Bro.

The following exchange from the second recorded jail call made on January 3, 2019, was also played for the jury:

INMATE: So is b\*\*\*h showing up to court on you and s\*\*t, the one you dusted?

[DEFENDANT]: Uh, I don't know, uh, I don't know, uh.

INMATE: Did you whip her good?

[DEFENDANT]: Are you talking about Mollie?

INMATE: Yeah.

[DEFENDANT]: Yeah, I beat her good. You know I ain't got charged with that or anything. I ain't got picked up on that. I don't know if I have a warrant on me or not. I might. I don't know.

At the conclusion of the State's proof, Defendant moved for the State to "make an election as to their more precise theory of what serious bodily injury means." Defendant argued that the State should elect one of the six definitions of serious bodily injury set out in Tennessee Code Annotated section 39-11-106(a)(34) (2018). The trial court denied the motion. After the court denied Defendant's motion for judgment of acquittal, Defendant made a request for two special jury instructions, which request was also denied by the trial court. Following a *Momon* hearing, Defendant chose not to testify and called no witnesses.

The jury found Defendant guilty of the lesser-included offense of attempted aggravated assault. The trial court imposed a sentence of twelve years' incarceration with a sixty percent release eligibility. Defendant timely appealed.

### Analysis

On appeal, Defendant claims that the evidence was insufficient to support his conviction of attempted aggravated assault, that the trial court erred by not requiring the State to make an election "as to the manner by which the aggravated assault was committed," and that the trial court erred by denying Defendant's request for two special jury instructions. The State argues that the evidence was sufficient to support the conviction and that the trial court properly declined to require the State to elect the manner by which the offense was committed and properly instructed the jury. We agree with the State.

#### *Sufficiency of the Evidence*

Our standard of review for a sufficiency of the evidence challenge is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh the evidence. *Id.* Our standard of review "is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)) (internal quotation marks omitted).

A guilty verdict removes the presumption of innocence, replacing it with a presumption of guilt. *Bland*, 958 S.W.2d at 659; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant bears the burden of proving why the evidence was insufficient to support the conviction. *Bland*, 958 S.W.2d at 659; *Tuggle*, 639 S.W.2d at 914. On appeal, the "State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007).

A person commits assault who "[i]ntentionally, knowingly, or recklessly causes bodily injury to another." Tenn. Code Ann. § 39-13-101(a)(1) (2018). As applicable here, "[a] person commits aggravated assault who: [i]ntentionally or knowingly commits an assault as defined in § 39-13-101, and the assault: [r]esults in serious bodily injury to another." Tenn. Code Ann. § 39-13-102(a)(1)(A)(i) (2018).

Serious bodily injury is defined as bodily injury that involves:

- (A) A substantial risk of death;
- (B) Protracted unconsciousness;
- (C) Extreme physical pain;
- (D) Protracted or obvious disfigurement;
- (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or
- (F) A broken bone of a child who is twelve (12) years of age or less[.]

Tenn. Code Ann. § 39-11-106(a)(34) (2018).

The crime of criminal attempt is defined as follows:

(a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

(1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

(b) Conduct does not constitute a substantial step under subdivision (a)(3), unless the person's entire course of action is corroborative of the intent to commit the offense.

Tenn. Code Ann. § 39-12-101(a), (b) (2018).

In this case, Sergeant Scarbrough described the assault as a "ferocious attack." He said that when Defendant saw the victim, he charged at her "like a linebacker" and "clotheslined" her to the ground, grabbed her hair, and started kicking her in the face. The victim said that she was "stabbed" in the eye and that she temporarily lost her vision.

Photographs entered as trial exhibits showed that the victim had a swollen left eye, that she had significant bruising around her left eye and some bruising around her right eye, and that she had a cut right below her lower left eyelid. The victim testified that she thought the mark under her left eye was caused by the second time she was stabbed. The victim described her pain as a “10 on a scale from 1 to 10.” She said that she could not open her left eye for four days after the attack and that her eyesight was blurry when she was finally able to open her eye. She said the vision in her left eye was still blurry at the time of the trial, which occurred over three and a half years after she was assaulted by Defendant. She testified that her left eye “will still get infected” and that her left pupil had still not returned to its normal size. In the recorded jail call, Defendant stated that he caught the victim at Walmart and “beat her f\*\*\*ing head in” and sent the victim to the hospital.

Viewed in the light most favorable to the State, the evidence was sufficient for a rational juror to conclude that Defendant assaulted the victim and intended to cause the victim serious bodily injury. Defendant is not entitled to relief on this issue.

*Election as to the Manner of Serious Bodily Injury*

Defendant argues that the State was required to elect the specific definition of serious bodily injury listed in Tennessee Code Annotated section 39-11-106(a)(34) (2018), and that the trial court’s failure to require the State to make an election deprived him of his right to a unanimous jury verdict. We disagree that an election was required.

Where the intent with which, the mode in, or the means by which, an act is done are essential to the commission of the offense, and the offense may be committed with different intents, in different modes, or by different means, if the jury is satisfied that the act was committed with one (1) of the intents, in one (1) of the modes, or by either of the means charged, the jury shall convict, although uncertain as to which of the intents charged existed, or which mode, or by which of the means charged, the act was committed.

Tenn. Code Ann. § 40-18-112 (2018).

In this case, Defendant was charged with only one offense, aggravated assault, that was based on a single occurrence. “Generally, alternative theories, mental states, modes of committing the crime, or means by which the crime was committed may be submitted to the jury without necessity of precautions to assure jury unanimity.” *State v. Hood*, 221 S.W.3d 531, 547 (Tenn. Ct. App. 2006) (quoting *State v. James Clayton Young, Jr.*, No. 01C01-9605-CC-00208, 1998 WL 258466, at \*5 n.4 (Tenn. Crim. App. May 22, 1998)) (emphasis in original omitted). Tennessee courts have consistently held that “the State is not required to make an election when a statute presents alternative modes of committing



a single offense.” *State v. James Rodney Smith*, No. M2021-00547-CCA-R3-CD, 2022 WL 1653471, at \*11 (Tenn. Crim. App. May 25, 2022), *no perm. app. filed*; see *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000). The multiple definitions of serious bodily injury are simply alternative means by which a defendant could commit aggravated assault and not alternative offenses themselves.

The trial court did not err when it denied Defendant’s request to make the State elect the specific definition of serious bodily injury.

### *Jury Instructions*

Defendant submitted two requests for special instructions to the jury. According to Defendant, the first requested instruction was based on the holding of *State v. Farmer*, 380 S.W.3d 96 (Tenn. 2012), and specifically related to whether the action of Defendant created a “substantial risk of death.” The requested instruction was as follows:

The statute provides that a “serious bodily injury” is an injury that involves substantial risk of death. To determine whether there was a “serious bodily [injury]” based on a “substantial risk of death” jurors must look to the injury that occurred rather than the injury that *could* have occurred or the manner in which it occurred.

According to Defendant, the second requested instruction was based on the holding of *State v. Sims*, 909 S.W.2d 46, 49 (Tenn. Crim. App. 1995), and *State v. Eddie Leroy Rowlett*, No. M2011-00485-CCA-R3-CD, 2013 WL 749502, at \*16 (Tenn. Crim. App. Feb. 26, 2013), and specifically related to the whether the victim suffered “extreme physical pain.” The second requested instruction was as follows:

The pain necessary to establish serious bodily injury by extreme physical pain must be enough of the same class as an injury which involves a substantial risk of death, protracted or permanent disfigurement or the loss or impairment of the use of a bodily member, organ or mental faculty.

Defendant claims that the requested instructions were correct statements of the law and that the absence of the instructions was unfair to Defendant and did not provide the jury with a sound basis to adjudicate his guilt or innocence.

The trial court declined to provide the jury with Defendant’s special requested instructions and instead charged the jury with the statutory definition of “serious bodily injury” taken verbatim from the pattern jury instruction. The trial court instructed the jury that: “‘serious bodily injury’ means bodily injury that involves a substantial risk of death;

protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty.” T.P.I. Crim. § 6.02(a); Tenn. Code Ann. § 39-11-106(a)(34)(A)-(E).

Whether jury instructions are sufficient is a question of law, which we review de novo with no presumption of correctness. *State v. Clark*, 452 S.W.3d 268, 295 (Tenn. 2014). “[T]he trial court has a duty to provide a ‘complete charge of the law applicable to the facts of the case.’” *State v. James*, 315 S.W.3d 440, 446 (Tenn. 2010) (quoting *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986)). “It is not error to refuse a special request where the charge as given fully and fairly states the applicable law.” *Edwards v. State*, 540 S.W.2d 641, 649 (Tenn. 1976); see *State v. Gilley*, 297 S.W.3d 739, 766 (Tenn. Crim. App. 2008) (reiterating that “[w]hen a trial court’s charge to the jury is complete, it need not give additional special instructions requested by the defendant”). Only if the jury charge, when read as a whole, “fails to fairly submit the legal issues or misleads the jury as to the applicable law” is an instruction considered prejudicially erroneous. *State v. Majors*, 318 S.W.3d 850, 864-65 (Tenn. 2008).

The pattern instruction given to the jury by the trial court properly defined “serious bodily injury.” The pattern instruction fully and fairly stated the applicable law and submitted the legal issues to the jury. The trial court did not err by declining to give Defendant’s proposed special instructions. See *State v. Shanda Alene Wright*, No. M2006-02343-CCA-R3-CD, 2008 WL 371258, at \*7-8 (Tenn. Crim. App. Feb. 11, 2008) (affirming trial court’s decision to decline to give a special jury instruction defining “extreme pain” when the trial court provided a full and accurate statement of the law), *perm. app. denied* (Tenn. Oct. 27, 2008). Defendant is not entitled to relief on this issue.

### **Conclusion**

The judgment of the trial court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE