

ARKANSAS COURT OF APPEALSDIVISION IV
No. CACR11-949

ALQUANTIS KENTREL PITTS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 4, 2012

APPEAL FROM THE CHICOT
COUNTY CIRCUIT COURT
[NO. CR-2011-18-4B]HONORABLE DON GLOVER,
JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

A Chicot County jury convicted Alquantis Kentrel Pitts of aggravated assault and sentenced him to 72 months in the Arkansas Department of Correction. On appeal, Pitts argues that where the charge was “based” upon an allegation that he displayed and used a firearm, the evidence was insufficient to convict him of aggravated assault because the jury determined that he did not possess a firearm. We affirm.

At trial, the victim, England Wallace, testified that late in the evening of December 10, 2010, Pitts, a long-time acquaintance, approached him from behind. When he turned around, Pitts told him that he needed to talk to him. Pitts hit him on the right eye with the butt of a pistol. He stumbled back, and Pitts hit him again, knocking him to the ground. Pitts hit him with the pistol four to six times, then got up and stomped and kicked him in the back, ribs, and side. Wallace stated that he was bleeding from his right eye and mouth and sustained broken facial bones. The injuries required two surgeries and hospitalization. He was left with a

permanent eye “twitch.” Wallace’s nephew, Allen Charles McGehee, corroborated Wallace’s account of the crime. The State also introduced pictures showing Wallace with his right eye swollen shut, other facial lacerations, and blood stains on his shirt.

Pitts made the following directed-verdict motion:

One of the elements that the State has to prove or make a prima facie case on is the element that [Pitts’s] conduct created a substantial danger of death or serious physical injury. There’s been no testimony indicating that his conduct created that substantial danger of death. I mean there’s no dispute that my client hit Mr. Wallace. But there is no medical testimony to indicate that the action, that there was a great danger of substantial death [sic] in what he did even if he did have a gun in his hand. He didn’t use it to shoot him. He didn’t pull the trigger. There was no indication that he intended to use a gun for the purpose of shooting. And of course, you know, anybody shot with a firearm, I think it’s common knowledge that that would create a substantial danger of death.

But the allegation here is that my client just struck him in the head with the butt of the gun. Now, while that might cause injury, I don’t think there’s any evidence to show that that caused substantial danger of death.

Now, the other element is serious physical injury. Even here there’s no evidence that he sustained serious physical injury. Yes, he sustained a wound to his eye, but there is no medical testimony indicating that he sustained a serious physical injury.

Pitts presented the testimony of Roy Lavell Hampton, who observed the incident. Hampton claimed that he did not see a gun in Pitts’s hand during the beating. However, Hampton conceded that the lighting was poor. He nonetheless confirmed that Pitts knocked Wallace to the ground and pummeled and kicked the victim. Pitts then timely renewed his directed-verdict motion.

The jury found Pitts guilty of aggravated assault. It also found, however, that Pitts did not employ a firearm. Pitts argued that the verdict was inconsistent and moved for judgment notwithstanding the verdict. The trial court denied the motion, and Pitts appealed.

On appeal, Pitts argues his aggravated-assault conviction should be reversed and

dismissed because there was insufficient evidence that he purposely displayed a firearm in such a manner that it created a substantial danger of death or serious physical injury to another person. He asserts that the Information specified that the course of conduct that he allegedly engaged in was “the display and use of a firearm,” and he argued in his directed-verdict motion that there was inadequate proof that he engaged in conduct creating a substantial danger of death or serious injury. Finally, he notes that the trial court submitted an interrogatory to the jury regarding whether he employed a firearm as a means of committing aggravated assault, and the jury determined that he had not. Pitts asserts that he asked for judgment notwithstanding the verdict, but concedes that it was a civil-procedure remedy that is not available in a criminal prosecution. He concludes by noting that the conduct he engaged in constituted a battery, not the aggravated-assault charge for which he was convicted. We find this argument unconvincing.

Although Pitts’s appeal is essentially a challenge to the sufficiency of the evidence, we believe it is necessary to examine the charge to be able to properly discuss the issues before us.

Aggravated assault is defined in our criminal code as follows:

- (a) A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely:
 - (1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person;
 - (2) Displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person; or
 - (3) Impedes or prevents the respiration of another person or the circulation of another person’s blood by applying pressure on the throat or neck or by blocking the nose or mouth of the other person.

Ark. Code Ann. § 5-13-204 (Supp. 2011). We agree with Pitts that it is somewhat puzzling that the State chose to charge Pitts with aggravated assault inasmuch as that crime has historically involved a threat or attempted battery and the evidence adduced at trial proved that Pitts committed a battery. See, e.g., *Johnson v. State*, 132 Ark. 128, 200 S.W. 982 (1918). However, charging decisions are within the exclusive province of the State. See Ark. R. Crim. P. 1.8(d) (2011). Here, nonetheless, the Information, in pertinent part, charged Pitts as follows:

COUNT ONE - AGGRAVATED ASSAULT: On or about December 10, 2010, [Pitts] did purposely engage in a course of conduct involving the display and use of a firearm creating a substantial danger of death or serious physical injury to England Wallace and others, under circumstances manifesting extreme indifference to the value of human life.

We acknowledge that there was a defect in the Information in that the drafter combined portions of section 5-13-204(a) subparagraphs (1) and (2). However, Pitts did not object at trial to the wording of the Information, and therefore the issue is not preserved for appeal. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

Moreover, when the jury was charged, the instructions referred to the offenses described in section 5-13-204(a) subparagraphs (1) and (2) separately. It was instructed as follows:

Alquantis Pitts is charged with the offense of aggravated assault. To sustain this charge, the State of Arkansas must prove the following things beyond a reasonable doubt.

First, the State must prove that Alquantis Pitts purposely engaged in conduct that created a substantial danger of death or serious physical injury to England Wallace. And secondly, that Aquantis Pitts did so under circumstances manifesting extreme indifference to the value of human life.

And I have some sub-definitions. I have one for purposely. A person acts purposely with respect to his conduct when it is his conscious object to engage in that conduct.

And I have a sub-definition for serious physical injury. Serious physical injury means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the

function of any bodily member or organ.

Now, ladies and gentlemen, if you find Alquantis Pitts guilty of the offense of aggravated assault, you will do [sic] indicate on a verdict form to be given to you. If you find Alquantis Pitts not guilty, you will so indicate it on the appropriate verdict form.

Ladies and gentlemen of the jury, the State has also alleged that Alquantis Pitts employed a firearm as a means of committing aggravated assault. To sustain this allegation the State must prove beyond a reasonable doubt that Alquantis Pitts employed a firearm as a means of committing the alleged aggravated assault.

If you find Alquantis Pitts guilty of the offense of aggravated assault, you will so indicate on the verdict form provided to you. You will also make a finding about whether Alquantis Pitts employed a firearm as a means of committing the offense.

And I have a sub-definition for firearm, which means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use, including such a device that is not loaded or lacks a clip or other component to render it immediately operable, and components that can be readily assembled into such a device.

These instructions were given without objection. Accordingly, the jury's conclusion that Pitts did not employ a firearm, a necessary element of subparagraph (2) aggravated assault, did not render his conviction infirm because employment of a firearm is not an element in subparagraph (1) aggravated assault. In this way, the instant case is analogous to *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004), where the supreme court upheld a conviction for DWI when the offense had two separate types of proscribed conduct.

Turning finally to Pitts's sufficiency argument, we disagree that there was insufficient evidence that his conduct created a substantial danger of death or serious physical injury. In our review, we consider the evidence in the light most favorable to the State, and we consider only the evidence that supports the verdict. *Banks v. State*, 2011 Ark. App. 249. We affirm if the conviction is supported by substantial evidence. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture.

Id.

“Serious physical injury” is defined in our criminal code as “physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.” Ark. Code Ann. § 5-1-102(21) (Repl. 2006). Here, there was evidence that Pitts hit Wallace with the butt of a pistol with sufficient force to knock him down. The blow to his right eye caused it to swell completely shut. The eye injury required hospitalization and two surgical treatments. After treatment, Wallace’s eye had a permanent “twitch.” Wallace also stated that the blows he suffered at the hands of Pitts caused broken facial bones. Additionally, when Pitts knocked Wallace to the ground, he continued to pummel him, then kicked and stomped him. Viewed in the light most favorable to the verdict, we hold that there is substantial evidence that Pitts’s conduct created a substantial risk of serious physical injury because his conduct *did* cause serious physical injury. See, e.g., *Cox v. State*, 2010 Ark. App. 478 (broken nose held to be serious physical injury); *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992) (bruised shoulder, nerve damage to arm causing victim to wear a brace for a week, held to be serious physical injuries).

Affirmed.

VAUGHT, C.J., and ROBBINS, J., agree.