



**In the Missouri Court of Appeals
Eastern District**

DIVISION FOUR

STATE OF MISSOURI,)	No. ED90393
)	
Plaintiff/Respondent,)	Appeal from the Circuit Court
)	of St. Louis County
vs.)	06CR-005859A
)	
GARY R. THOMAS,)	Honorable Robert S. Cohen
)	
Defendant/Appellant.)	FILED: November 18, 2008

OPINION SUMMARY

Gary R. Thomas (Defendant) appeals from the judgment upon his conviction by a jury for second-degree assault, Section 565.060, RSMo 2000,¹ for which Defendant was sentenced to five years' imprisonment. On appeal, Defendant argues the trial court erred: (1) in overruling Defendant's motion for judgment of acquittal at the close of all evidence and in entering a judgment of conviction against Defendant because the State failed to make a submissible case for second-degree assault; (2) in overruling defense counsel's objection to the inclusion of racial epithets used during the assault on Sanchez Jackson (Victim); (3) in excluding Defendant's Exhibit A, an audiotape recording of Defendant's 911 call regarding a hit and run accident prior to the assault on Victim; (4) in excluding evidence from the penalty phase of Defendant's trial relating to the consequences of Defendant receiving a felony conviction; (5) in allowing the prosecutor to argue on rebuttal during the penalty phase closing argument that Defendant was given an opportunity for probation because such references were improper and prejudicial; and (6) in allowing State's Exhibit 15, an audiotape recording of Victim's 911 call following the assault, to be played in front of the jury.

AFFIRMED.

Division Four Holds: The trial court did not err: (1) in overruling Defendant's motion for judgment of acquittal and in entering a judgment of conviction against Defendant because the evidence was sufficient for a rational juror to find beyond a reasonable doubt that Defendant

¹ Unless otherwise indicated, all further references are to RSMo 2000.

caused Victim's serious physical injuries; (2) in overruling defense counsel's objection to the inclusion of racial epithets used during the assault on Victim because such epithets were highly relevant in showing animosity toward Victim as well as motive and intent to do harm; (3) in excluding Defendant's Exhibit A, an audiotape recording of Defendant's 911 call regarding a hit and run accident prior to the assault on Victim because Exhibit A constituted inadmissible hearsay; (4) in excluding evidence of the collateral consequences to Defendant from the conviction because such evidence was inadmissible during the penalty phase of his trial; (5) in allowing the prosecutor to argue in retaliation that Defendant was given an opportunity for probation; and (6) in allowing State's Exhibit 15, an audiotape recording of Victim's 911 call following the assault, to be played in front of the jury because such statements were admissible under the excited utterance exception to the hearsay rule.

Opinion by Mary K. Hoff, Judge

Booker T. Shaw, Presiding Judge and
Kathianne Knaup Crane, Judge, concur.