

VS.

NO. 2006-KA-01890-COA

STATE OF MISSISSIPPI

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF TUNICA COUNTY, MISSISSIPPI

**BRIEF OF THE APPELLANT
LARRY CAREY**

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[REDACTED]

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ORAL ARGUMENT NOT REQUESTED

VS.

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STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Larry Carey, Appellant
2. Helen Bagwell Kelly, Counsel for Appellant
3. Adam A. Pittman, Counsel for Appellant
4. Larry Baker, Assistant District Attorney
5. Honorable Kenneth L. Thomas, Circuit Court Judge
Tunica County, Mississippi

Appellant certifies that he knows of no other person, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case.

By: 

Attorney of record for

Larry Carey

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STATEMENT OF THE ISSUES

- A. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE CHARGE OF ARMED ROBBERY.
- B. THE TRIAL COURT'S SENTENCING OF CAREY TO LIFE IMPRISONMENT WAS IMPORPER ABSENT A RECOMMENDATION FROM THE JURY FOR SUCH A SENTENCE

STATEMENT OF THE CASE

Larry Carey was convicted of one count of armed robbery in the Circuit Court of Tunica County, Mississippi, found to be subject to the provisions of Mississippi Code § 99-19-81 and subsequently sentenced to Life Imprisonment. Appellant now appeals these decisions.

Larry Carey takes this Appeal of Right pursuant to § 99-35-101, Mississippi Code 1972 Annotated, as amended, which provides: "Any person convicted of an offense in a Circuit Court may appeal to the Supreme Court, provided, however, an appeal from the Circuit Court to the Supreme Court shall not be allowed in any case where the defendant enters a plea of guilty." Jurisdiction is proper pursuant to § 9-3-9 Miss. Code Ann. (2005).

1. COURSE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Appellant Larry Carey was indicted on February 10, 2004, in the Circuit Court of the Tunica County. Count 1 of the indictment charged that on March 10, 2002, Carey and Charles Butler did, with intent to steal, take a purse and/or wallet containing approximately \$2,500.00 and various other items of property of Royce Gargus and/or Polly Gargus. Count 2 charged that on March 21, 2002, Carey Mark McLemore, and Charles Butler did, with intent to steal, take a purse and/or wallet containing approximately \$65.00 and various other items of property of Marjorie D. Hamilton by the exhibition of a gun. Count 3 charged that on April 1, 2002, Carey Mark McLemore did, with intent to steal, take a purse and/or wallet containing approximately \$200.00 and a \$300.00 casino credit voucher and various other items of property of Gail Pohl by the exhibition of a gun.

The indictment was amended on June 24, 2005 to indicate that, if convicted, Carey's

causing this consideration.

The matter proceeded to a jury trial on April 3, 2006 and after three (3) days of trial the jury returned a verdict of not guilty on counts 1 and 2 and a verdict of guilty count 3. The matter was continued for sentencing until July 20, 2006 at which time the Trial Court considered whether Carey's punishment qualified for enhancement pursuant with the terms of Miss. Code § 99-19-81. After the hearing the Court found that Carey did fall under the aforementioned code section and sentenced him to serve a term of life imprisonment without the possibility of parole, reduction, suspension or probation. Carey made timely Motions for Directed Verdicts as well as for a Judgment Notwithstanding the Verdict, all of which were denied, the last being denied on October 17, 2006. A Notice of Appeal was timely filed on October 27, 2006.

2. STATEMENT OF RELEVANT SUBSTANTIVE FACTS

Tiffany Hayes gave testimony that on the evening of March 31, 2002, Tiffany Hayes was driving with Jennifer Heath in Tiffany's car, 1991 blue Mercedes, and saw two men whom she identified as Larry Carey and Mark McLemore. She states that McLemore was wearing a white shirt with blue jeans and that Carey was wearing a red shirt with blue jeans. The men indicated that they wanted her to take them to the casino to cash in a cash receipt. It was sometime around 10:00 or 11:00 at night, so she let McLemore drive the car, she got in the back seat with Heath, and Carey sat in the front seat. They proceeded to the Hollywood Casino. Carey got out of the car to cash in this cash receipt and Hayes stayed in the car and fell asleep. She was awoken when Carey got back in the car and he was holding a purse. She admitted that she did not see him prior to him getting back in the car, but she admitted that he did not have the purse when he

who she was, and that they went to Perry Road and Carey threw the purse out the window and told them not to say anything about what had happened. She stated that, when everything was said and done, she dropped off to occupants of her car off at Charles Butler's apartment.

Jennifer Heath testified that she and Hayes were riding around Tunica in Tiffany Hayes' car when they saw Larry Carey and McLemore and they picked them up. She indicated that they wanted to let them ride because they needed some gas money and they would take her to the casino. Heath indicated that when they got to the casino, they made some "circles," that McLemore was driving, and that she was in the back seat with Hayes. After they made some blocks around, Carey jumped out of the car. She indicated that when he got out of the car, McLemore pulled off, then she went to sleep, and then she was awoken when Carey jumped back in the car with a purse. Carey said something about the fact that the bitch didn't have anything in the purse except for a ticket meaning a pay slip from one of the casinos. She remembered hearing a woman say "bring my license back" as they pulled off, but she didn't see the lady. She indicated they went to Perry Road and he threw the purse out and took the voucher and kept it. Interestingly, when asked Ms. Heath could not identify the Defendant as being Larry Carey, however when she was asked if she knew Larry Carey she said that she did. The Prosecutor asked if Carey was sitting at counsel's table and she said that he was not. She actually said the Larry Carey she knew was darker than the man who was sitting there. When the Prosecutor attempted to get her to admit that the reason she was failing to identify Carey was because she was afraid, she responded that fear was not the reason that she didn't see him,

Tammy Smith testified that she was employed at the Hollywood Casino back in March and April of 2002 and that she was working from March 31 into April 1 on what was known as the graveyard shift as a cashier where she exchanges coupons or cashes checks or chips for money. She then identified the \$300.00 cash voucher that had been converted that night. During cross-examination, Ms. Smith indicated that Larry Carey, the defendant, was not the individual who cashed in the voucher that night. She identified the person who cashed the voucher as Charles Butler, that Butler was not in the courtroom, and that she hadn't seen Mr. Carey at all during the night in question.

James Sanders testified that he was employed at Hollywood Casino as a security officer in March and April of 2002 and that he was on duty on the night of the 31st and the morning of the 1st. He indicated that during that time period he had been contacted by Ms. Gail Pohl who indicated to him that there had been an armed robbery in the hotel parking lot. She indicated that one of the items that was stolen from her was a \$300.00 pay voucher. Mr. Sanders testified that he was able to track down which slot machine produced the voucher and that the voucher had a tracking number that allowed him to track where that specific pay voucher was cashed. He found out later that it had been cashed at the main cage at a specific window. Mr. Baker admitted that he did not see the defendant, Larry Carey, at all any time during that night.

Gail Pohl testified that she went to the Hollywood Casino on the evening of March 31 and the morning of April 1, 2002. She indicated that she had gone down to her car when a man

him her purse. When she said no he threatened to kill her, so she relented and gave him her purse. He grabbed the purse and then took off running. He then got in a car that had been circling around and drove off. She identified the car as being white and she stated that she really didn't see the model. (R.259) She said that the purse contained her had credit cards, a social security card, a \$300.00 cash voucher from the Hollywood Casino, eight Britney Spears tickets, keys, and a cell phone. Following the robbery, Ms. Pohl went to the desk and told the hotel staff that she had been robbed and asked for security. She was later called by law enforcement to see if she could identify the assailant and shown pictures. She looked at a proposed photo lineup and identified the person who was her assailant as photo number five, although she admitted choosing that particular picture because "he's the closest to the one that I remember him looking like" (R265).

Detective Cedrick Davis with the Tunica County Sheriff's Department investigated the robberies at the Hollywood and Sams Town Casinos in March of 2002 and April of 2002. He described the photo lineup that was given to Ms. Pohl. He indicated that she identified number five as her assailant and that the person in photo number five is Larry Carey, however the Detective admitted that when he presented the photo lineups, neither Mark McLemore's nor Charles Butler's photos were put in the lineup. (R.310) Det. Davis indicated that he had been contacted by Ms. Heath and Ms. Hayes, and that they had indicated to him that the purse had been thrown at the bridge at Old Moon Parkway. Although the Detective searched the area indicated by Ms. Heath he did not find Ms. Pohl's purse or anything else. (R.288) The Detective

charged, but did state that he went to the casino with Charles McLemore and Charles Butler in reference to cashing a check. The officer then testifies that Carey, in a separate statement, admitted that he was involved in two of the robberies and that Mark McLemore and Tiffany Hayes were involved in the other robbery. Detective Davis testified that, in this second statement, Carey said that he did snatch a purse on the 1st of April around midnight. Carey said that Mark McLemore was driving Tiffany Hayes' vehicle and that Tiffany Hayes was a passenger with Jennifer Heath. He advised the Detective that he got out of the vehicle, snatched the purse, and that he didn't use a weapon.

Larry Carey testified in his own defense. Carey states that he did give one statement to Detective Davis in which he denied any involvement with any of the robberies for which he was charged, but denies that he gave any other statements to the detective. Furthermore, Carey refutes from the stand that he had any involvement in the crimes charged.

- A. The evidence presented is so inconsistent and conflicting that, when taken as a whole, it cannot provide a substantial and credible basis, having in mind the beyond a reasonable doubt burden of proof standard, to support a conviction in this case
- B. Because the jury did not recommend a sentence of life imprisonment, the Trial Court was without the authority to impose such a sentence regardless of the finding by the Trial Court that Carey's sentence must be enhanced pursuant with Miss. Code § 99-19-81.

IV.

ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE CHARGE OF ARMED ROBBERY.

In challenging the Trial Court's decision to deny a Motion of Judgment Notwithstanding the Verdict, Carey is testing the sufficiency of the evidence presented in the case.

On the question of whether or not the evidence presented at trial is sufficient to support a conviction on appeal, our Mississippi Supreme Court has recently held:

"When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give the prosecution the benefit of all inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered points in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is beyond our authority to disturb. Brooks v. State, 695 So.2d 593, 594 (Miss. 1997)."

McDougle v. State, 721 So.2d 660 at 662 (Miss.App. 1998)

State must present evidence that "the accused took or attempted to take the personal property of the victim from his presence and against his will, by violence, or by putting him in fear of immediate injury to his person by exhibiting a deadly weapon" Gisch v. State, 259 So.2d 118 (Miss. 1972). The question then becomes, was there sufficient evidence to support Carey's conviction in this matter.

Although there was substantial testimony presented in this case, the testimony of Polly Gargus, Bo Wheeler and Marjorie Hamilton all related to the charges for which Carey was ultimately acquitted. Of the remaining witnesses, the only testimony which appears to implicate Carey in the crime for which he was convicted is the testimony of Tiffany Hayes, Jennifer Heath, Gail Pohl and possibly Detective Cedrick Davis. Although Tammy Smith and James Sanders testified that the \$300.00 voucher stolen from Ms. Pohl was later cashed at the casino, Sanders did not provide any information that would connect the voucher to Carey, and Smith actually testified that the person who cashed the voucher was not Carey but was, instead, Charles Butler (R. 230).

The testimony of the remaining witnesses is so fraught with inconsistencies that it is rendered wholly unreliable and non-credible. While Tiffany Hayes and Jennifer Heath both tell a story of how they accompanied Carey and Mark McClemore to the Hollywood casino on the evening of March 31st and the morning of April 1st, neither of them witnessed any crime because they were both asleep in the back seat of the car when the crime was supposed to be occurring (R.200, 205, 215). Although the victim stated that Carey had a gun, neither Hayes nor Heath ever provide any account of Carey ever having a weapon of any kind, nor was any weapon ever

getting into a white car (R.259), Ms. Hayes testifies that Carey was wearing a red shirt and blue jeans (R. 208) and that they were riding in her blue Mercedes (R.198). Although Ms. Hayes and Ms. Pohl provide in-court identification of Carey, Ms. Heath states unequivocally that the person she knows as Larry Carey, the person with whom she was on the evening of March 31st and morning of April 1st, was not the person sitting at the defense table in court that day (who was, in fact, Carey) (R.217-218). Although Ms. Pohl identified a photograph of Carey in the photo line-up presented to her, Det. Cedric Davis admitted that the photo line-up presented to Ms. Pohl did not contain a photo of either Mark McLemore (the supposed get-away driver) or Charles Butler (the person who cashed Ms. Pohl's \$300 voucher)(R.310) Although both Ms. Hayes and Ms. Heath indicated to Det. Davis where the purse was disposed of, Det. Davis, after searching the area, was unable to find anything (R. 288). Although Carey gave a statement to Det. Davis (which Carey denies ever giving) in which Carey admitted to committing a robbery, he specifically stated in this admission that he did not use a weapon.

Even when viewing all the evidence in a light most favorable to the State, the inconsistencies and contradictions leave questions as to material points: was there a weapon used, where are the items that were taken, was Carey the person who was with Hayes and Heath that night, was Carey the person who robbed Ms. Pohl, was the crime described by Hayes and Heath the same crime committed on Mr. Pohl? As a result of these questions the reasonable inferences which are relied upon by the State erode to the point where there is no longer substantial evidence of such quality and weight that, having in mind the beyond a reasonable

denying Carey's Motion for a Judgment Notwithstanding the Verdict.

B. THE TRIAL COURT'S SENTENCING OF CAREY TO LIFE IMPRISONMENT WAS IMPORPER ABSENT A RECOMMENDATION FROM THE JURY FOR SUCH A SENTENCE.

When describing the penalty a person is to receive as a result of their conviction for armed robbery the Mississippi Legislature states that a person so convicted "shall be imprisoned for life in the state penitentiary **if the penalty is so fixed by the jury**; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years." §93-3-79 MS Code of 1972, emphasis added.

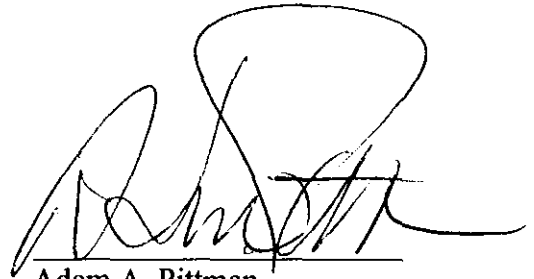
Although the jury in the instant case was released without being asked to consider the question of whether Carey should receive a sentence of life imprisonment, the Trial Court imposed a life sentence upon Carey based upon the Court's belief that such a sentence was required by the fact that Carey was a "Habitual Criminal" as described by MS Code § 99-19-81. Following a finding that Carey satisfied the requirements of §99-19-81 the Trial Court states "in the instant case of armed robbery he is hereby sentenced to the maximum term of imprisonment prescribed for this armed robbery charge, which is, it says life if imposed by a jury; but under 99-19-81, it's still life and this is what the Court is now sentencing him under." (R.477) The Trial Court sentenced Carey under the belief that Mississippi Code §99-19-81 required a life sentence, yet the statute only requires that a person found to satisfy the "habitual criminal" definition be sentenced to the maximum term of imprisonment prescribed for such felony. And as stated

I, Adam A. Pittman, counsel for Appellant, hereby certify that I have this day mailed with postage prepaid a true and accurate copy of the Appellant's Brief to the following persons:

Honorable Kenneth L. Thomas
Tunica County Circuit Court Judge
P.O. Drawer 548
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Jim Hood, Esq.
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Jackson, MS 39205

This the 29th day of October, 2007.

A handwritten signature in black ink, appearing to read 'Adam A. Pittman', written over a horizontal line.

Adam A. Pittman
Attorney for Appellant