IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

REGGIE ANDRE CARTER — APPELLANT

VS. — NO. 2007-KA-1318-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The issues presented in this appeal from a conviction of aggravated assault involve the exclusion, as irrelevant, of testimony from the victim concerning her intimacy with the defendant subsequent to the assault for which the defendant was on trial and the denial of a lesser included offense instruction defining simple assault.

Carter claims the excluded testimony "might" have shown the attack was not as violent as the victim described.

He also argues the jury should have been allowed to consider a charge of simple assault because a fair-minded jury could have found the victim's injuries were not serious.

REGGIE ANDRE CARTER prosecutes a criminal appeal from the Circuit Court of Neshoba County, Mississippi, Marcus D. Gordon, Circuit Judge, presiding.

Carter, in the wake of an indictment returned on May 1, 2007, was convicted of beating and causing injury to "Endia Lyons", his female companion and mother of his child.

The indictment, omitting its formal parts, alleged

> "[t]hat **REGGIE ANDRE CARTER** . . . on or about the 30th day of January . . . 2007, . . . did wilfully, unlawfully feloniously, purposely and knowingly cause serious bodily injury to Endia Lyons, a human being, by hitting her in the face and breaking her arm, said means being likely to produce death or serious bodily harm, contrary to and in violation of Section 97-3-7(2)(b), Miss.Code Ann. (1972), . . . " (C.P. at 3)

Following a trial by jury conducted on July 13, 2007, the jury returned a verdict of "We, the jury, find the defendant, Reggie Andre Carter, guilty as charged." (R. 100; C.P. at 16)

A poll of the jurors reflected the verdict was unanimous. (R. 100-01)

On July 18, 2007, following a presentence investigation and report, Judge Gordon sentenced Carter, a prior convicted felon and misdemeanant, to twelve (12) years in the custody of the MDOC. (C.P. at 20)

Two (2) issues, articulated by Carter as follows, are raised on appeal to this Court:

[1] "Whether the trial court erred by excluding testimony regarding the alleged victim's conduct after the alleged altercation that might tend to show that the claimed attack was not as violent as she described [at trial.]" (Brief of Appellant at 4, 6)

[2] "Whether the trial court erred by refusing to grant a jury instruction which would have permitted consideration of the lesser included offense of simple assault." (Brief of Appellant at 5, 10)

STATEMENT OF FACTS

The genesis of this prosecution for aggravated assault is yet another domestic dispute between a man and a woman.

India [Endia] Lyons is a thirty-three (33) year old female employee of Cingular Wireless in Philadelphia, Mississippi. (R. 48) On January 30, 2007, she was beaten and battered by Reggie

Carter, her twenty-eight (28) year old domestic companion. (R. 48) Carter lived with Lyons and fathered her two (2) year old daughter. (R. 35) During her lunch break Ms Lyons was sitting inside her automobile outside the Cingular store when Carter drove up behind her. Carter exited his vehicle and got into the passenger side of Lyons's automobile.

> Q. [BY ASSISTANT DISTRICT ATTORNEY:] All right. Now, after he did this, tell us what happened.
>
> A. [BY LYONS:] Okay. And when he got out the car - uh - - you know, when he got out the car, we were actually still - - you know, kind of on the phone. We were on the phone, and he walked up to the passenger side. It wasn't locked. Uh - - he got in and - - you know, he said, why you haven't told me this before, and - - you know, and I went, I have told you several times - - you know. It's just a on-going situation and he said - - uh – well, why you didn't tell - - uh - - who sent those damn text messages to your phone? And before I can answer, that's when he - - uh - - hit me in my right eye. (R. 39)

That was just the beginning, not the end. Carter proceeded to hit Lyons in the head and face repeatedly with closed fists, and after attempting to pull her out of the car even kicked her, presumably with shoe clad feet. (R. 41)

The two had argued earlier. Lyons thought Carter was seeing other women, and Carter thought Lyons was receiving racy text messages on her business telephone. (R. 48-50)

Four (4) witnesses testified on behalf of the State during its case-in-chief, including the victim, India Lyons.

Melanie Walton (R. 25), the victim's co-worker at the Cingular Wireless Store in Philadelphia, observed Ms Lyons inside her automobile after the assault. The victim " . . . was limp in her car" and covered with blood. Her face was swollen, and one eye was shut. "She was barely recognizable to me." (R. 27)

Officer Julian Greer (R. 29), a police officer with the Philadelphia police department, was

dispatched to the scene. Greer observed " . . . a black female sitting, I believe, in the passenger side of the vehicle - - uh - - very bloody, and - - uh - - in distress there." (R. 30) Greer summoned an ambulance and a female officer, Marsha Bavetta. (R. 31)

India [Endia] Lyons (R. 34), the victim, described the assault by Carter as well the nature and extent of her facial injuries and the trauma to her left arm which required surgery and stabilizing pins. (R. 41, 46)

Marsha Bavetta (R. 69), an officer with the Philadelphia police department, testified she went to the hospital where she observed the victim and photographed her injuries.

> "I saw that above her . . . left eye there was a deep laceration, her . . . right eye was . . . very swollen and bruised . . . her left forearm was swollen, bruised, kind of out of shape looking. [O]n the back of her head there were numerous spots where there was swelling. Her clothes had been put on a chair to the right of her and there was quite a bit of blood on those, and her cell phone was there and it also had a lot of blood on it." (R. 70)

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal of aggravated assault on the ground the State's proof, at its best, only made out a case of simple assault." (R. 79-81)

A motion to reduce the charge to simple assault was overruled with the court observing, *inter alia*, the testimony and photographs " . . . establishes clearly that this lady was severely beaten." (R. 83)

After being advised of his right to testify or not, Carter personally elected to remain silent. (R. 83-84) The defendant called no witnesses and rested his case. (R. 84)

Carter's request for peremptory instruction was refused. (C.P. at 7)

The jury retired to deliberate at 1:20 p.m. (R. 99) Twenty-five (25) minutes later, at 1:45 p.m., it returned with a verdict of, "We the jury find the defendant, Reggie Andre Carter, guilty as

charged." (R. 100)

A poll of the jury reflected the verdict was unanimous. (R. 100-01)

Sentencing was deferred until July 18, 2007, at which time, according to the court reporter's transcript of the trial, Carter was sentenced to twenty (20) years. (R. 103-04)

The clerk's papers, on the other hand, contain an order signed by the circuit judge sentencing Carter to a term of twelve (12) years in the custody of the MDOC. (C.P. at 20) The order is controlling.

On July 30, 2007, Carter filed a motion for new trial (C.P. at 21-22) which was overruled the same day. (C.P. at 23)

Christopher Collins, a practicing attorney in Union, represented Carter quite effectively during the trial of this cause. Mr. Collins's representation on appeal has been equally effective.

SUMMARY OF THE ARGUMENT

I. The trial judge did not err in sustaining the State's objection to testimony concerning the victim's subsequent conduct, i.e., her continued intimacy with the defendant weeks/months after the assault, because this testimony was not relevant to any material issue in the case. Stated differently, it was probative of nothing.

II. The trial judge did not err in refusing to grant jury instruction D-8 defining simple assault, a lesser-included offense, because this theory of the case lacked evidentiary support. Jury instructions must be supported by the evidence.

ARGUMENT

I.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION WHEN HE EXCLUDED DURING CROSS-EXAMINATION TESTIMONY FROM THE VICTIM REGARDING HER SUBSEQUENT CONDUCT AND INTIMACY WITH THE DEFENDANT WEEKS AND MONTHS AFTER THE ASSAULT RESULTING IN HER INJURIES.

Carter contends the victim's subsequent conduct with respect to her continued intimacy with the defendant after the assault *may be* relevant in assessing her veracity. He claims the trial judge erred by excluding testimony proffered during the testimony of Ms Lyons "... regarding the alleged victim's conduct after the alleged altercation that *might tend* to show that the claimed attack was not as violent as she described." (Brief of Appellant at 6)

We respectfully submit that "may" and "might" are not good enough.

Carter's profert is quoted as follows:

> BY MR. COLLINS: Your Honor, . . . I proffer to the Court that I have substantial *prima facie* evidence that - - in fact, I don't believe the witness on the stand will deny that they have continued to have a very frequent intimate relationship since the time of this - - these allegations. Uh - - I - - I'm very confident I can prove at least twenty times. And, Your Honor, - -
>
> BY THE COURT: What does that show?
>
> BY MR. COLLINS: Your Honor, it shows - - it goes to the issue, and our theory of the case, Your Honor, that . . . this woman does not feel her life was threatened, nor that she suffered some sort of serious bodily injury, or she would not be continuing to perpetuate that relationship. (R. 63)
>
> * * * * * *
>
> BY MR. COLLINS: Your Honor, I've made my . . . proffer into the record of what I believe the evidence will show.

BY THE COURT: That they had subsequent sexual intercourse?

BY MR. COLLINS: Many times.

BY THE COURT: Many times. Objection overruled. Objection - - motion overruled. Objection sustained. (R. 64)

Our answer to Carter's argument is that the proffered testimony was excruciatingly irrelevant. Condonation, i.e., conditional remission or forgiveness, may be a solid defense in a divorce action in Chancery but is no defense at all to a criminal assault.

This Court has held time and again that the "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." **Parker v. State,** 606 So.2d 1132, 1136 (Miss. 1992), citing numerous cases. *See also* **Juarez v. State,** 965 So.2d 1061 (Miss. 2007); **Burrows v. State,** 961 So.2d 701 (Miss. 2007), reh denied: **Miller v. State,** 956 So.2d 221 (Miss. 2007); **Eskridge v. State,** 765 So.2d 508 (Miss. 2000) reh denied; **Tanner v. State,** 764 So.2d 385 (Miss. 2000); **Jones v. State,** 740 So.2d 904 (Miss. 1999); **Edwards v. State,** 737 So.2d 275 (Miss. 1999); **Easterling v. State,** 963 So.2d 49 (Ct.App.Miss.2007); Miss.R.Evid. 103(a). That discretion, although "considerable," [**Edwards,** *supra*], must be exercised within the boundaries of the Mississippi Rules of Evidence. **Zoerner v. State,** 725 So.2d 811 (Miss. 1998), reh denied.

Carter argues this testimony might have reflected unfavorably upon Ms Lyons's credibility and found by a jury to be inconsistent with her description of the assault and the injuries that she suffered. (Brief of Appellant at 7) In other words, the testimony proffered, according to Carter, would refute the victim's version of the facts. (Brief of Appellant at 9)

How can this be?

There is no way under the sun that Ms Lyons's continued sexual intimacy and activity with the accused days, weeks, and even months *after* the assault could have any tendency to prove she was unworthy of belief in her description of the prior assault and the nature of the injuries she received. If anything at all, her trial testimony would have been moderated.

Consequently, the proposed testimony was not relevant and was probative of nothing.

MissR.Evid 401 defines "relevant evidence" as follows:

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MissR.Evid. 402 states that

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. **Evidence which is not relevant is not admissible**. [emphasis supplied]

Evidence is "relevant" if it has any tendency to prove a consequential fact. **Juarez v. State,** 965 So.2d 1061 (Miss. 2007). Relevancy is a threshold requirement for the admissibility of evidence. **Ross v. State,** 954 So.2d 968 (Miss. 2007).

Rules and case law notwithstanding, Carter states that "[b]ehavior after an alleged crime should, reasonably, also provide insight into whether an alleged victim may have exaggerated the culpability of the defendant, while minimizing her own involvement." (Brief of Appellant at 8) Each of the decisions relied upon by Carter involved sexual offenses and sexual violence, a different class of cases entirely. They have no applicability here.

The bottom line is that the testimony excluded here flunked the test for relevancy.

II.

THE TRIAL JUDGE DID NOT ERR IN REFUSING JURY INSTRUCTION D-8, A LESSER INCLUDED OFFENSE INSTRUCTION DEFINING SIMPLE ASSAULT, BECAUSE SUCH AN INSTRUCTION LACKED EVIDENTIARY SUPPORT.

Jury instructions must be supported by the evidence. **Killen v. State,** 958 So.2d 172 (Miss. 2007), reh denied.

Miss.Code Ann. §97-3-7(2)(b) reads, in its relevant parts, as follows:

> (2) A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or **(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm;** * * * However, a person convicted of aggravated assault (a) upon a . . . law enforcement officer . . . while such . . . law enforcement officer . . . is acting within the scope of his duty, office or employment, . . . shall be punished by a fine of not more than Five Thousand Dollars ($5,000.00) or by imprisonment for not more than thirty (30) years, or both.

India Lyons, the victim, described her injuries in the following colloquy:

> Q. [BY PROSECUTOR:] Ms. Lyons, again, I'll ask you, what injuries **do you know** that you sustained to your face, your eye, lips, or whatever?
>
> * * * * * *
>
> A. [M]y face was fractured and I end up - - my arm was broken but they end up having to put pins in my arm because it never would heal.
>
> Q. All right. Did this require you having to undergo surgery?
>
> A. Yes, sir.

Q. And - - uh - - how long after this incident on May [sic] thirtieth was it that you had to undergo this surgery?

A. Uh - - I think I had been in the cast four weeks, and when I went back to get it - - because I - - they were going to have to put three - - three different casts on my arm and when they - - when I went back for my first visit was after four weeks, they realized it wasn't healing so I had to do surgery for them to put a pin in my arm.

Q. And where was this surgery performed?

A. At Rush Medical - - uh – group, in Meridian. Rush Medical Hospital, Meridian.

Q. In regard to your face, cheek, or those areas, you anticipating any further surgery?

A. Uh - - other - - I would have to go back to get this checked because it's still off somewhat. My eye's off.

Q. Well, in short then, are you still undergoing medical treatment for the injuries you sustained?

A. Yes, sir. (R. 46)

Ms Lyons testified on several other occasions her "face was fractured," (R. 44), and she had to go to the doctor on a weekly basis. (R. 44)

With regard to the means used to inflict these injuries, Lyons testified Carter hit her in the right eye with his fist (R. 39) and " . . . he was steady hitting me over and over again." (R. 40) Lyons sustained a cut over her left eye, "both of my lips were busted," and blood was running from her mouth. (R. 40)

Q. [BY PROSECUTOR:] What about kicking you? Anything?

A. [T]hat's - - I believe that's how my arm got broke, I don't know exactly what it was, but I was - - I had my arm up like this trying to block the licks because I was already - - you know, covered with blood. (R. 41)

According to Ms Lyons, Carter called her names and threatened to kill her. (R. 42)

Jury instruction S-1 required the jury to find beyond a reasonable doubt that Carter caused serious bodily injury "by hitting her in the face and breaking her arm, said means likely to produce death or serious bodily harm . . ." (C.P. at 9)

Jury instruction D-7 told the jury it must find Carter "not guilty" unless it found from the evidence beyond a reasonable doubt that " . . . Carter . . . attempted to cause or purposely or knowingly caused bodily injury to Endia Lyons with means likely to produce death or serious bodily harm." (C.P. at 15)

Jury instruction D-8, which was refused (C.P. at 19), would have authorized the jury to find Carter guilty of simple assault if it found from the evidence beyond a reasonable doubt " . . . that Reggie Andre Carter . . . attempted to cause or purposely, knowingly or recklessly caused bodily injury to Endia Lyons . . ." (C.P. at 8)

The trial judge refused D-8 on the ground it lacked evidentiary support. We quote:

> INSTRUCTION NO. D-8: BY THE COURT: Eight?
>
> BY MR. BROOKS: Your Honor, he has tracked the statute on that but I think the proper instruction on that would be one that says, if you do not find him guilty.
>
> BY THE COURT: Well, I think this is repetitious to D-7 - - or - - I'm sorry.
>
> BY MR. BROOKS: He's trying to - - he - - he's giving simple assault but I don't think it ought to go in this form. I think it ought to be something that you - -
>
> BY THE COURT: I'm not going to build a simple assault case - - indictment. I don't think the evidence justifies.
>
> BY MR. COLLINS: Of course, Your Honor for the

record, I'm offering that as a lesser included offense.

> BY THE COURT: Yes, sir. **But there must be evidence to justify it, a lesser included offense. I find no evidence of that. I find evidence of somebody beaten unmercifully.** A big strong male versus a little strong female. Broke arm, hospital bills, permanent injuries, medical treatment going on now for seven months after the accident. (R. 87) [emphasis ours]

Carter argues the denial of this instruction " . . . deprived the finder of fact from considering whether the accuser's injuries were not serious." (Brief of Appellant at 13)

This is a decent argument.

It is our position, however, that by virtue of the uncontradicted facts testified to by the State's witnesses, including the victim, no reasonable, fair-minded juror could have found that **(1)** the blows administered by Carter were unintentional, as opposed to reckless; **(2)** Lyons's injuries were anything other than serious and **(3)** closed fists and shoe clad feet are not a means "being likely to produce death or serious bodily harm."

The truth of the matter is that by virtue of Miss.Code Ann. §97-3-7(2)(b) it was not necessary for the jury to find the victim's injuries were life threatening or even "serious" so long as the jury found, which it obviously did, that "mere bodily injury" was inflicted with a "means likely to produce death or serious bodily harm." *See* **Jackson v. State,** 594 So.2d 20, 24 (Miss. 1992), where we find the following:

> Nor is it necessary under this section for the State to prove the victim suffered "serious" bodily injury. Mere "bodily injury" is sufficient so long as it was caused with "other means likely to produce death or serious bodily harm."

See also **Riggs v. State,** 967 So.2d 650, 653 (Ct.App.Miss. 2007) [("T)he proper inquiry is whether the 'bodily injury' was caused with 'other means likely to produce serious harm.' "

The jury, by virtue of instructions S-1 and D-7 found beyond a reasonable doubt that hitting Lyons with closed fists and kicking her with shoe clad feet constituted a "means likely to produce death or serious bodily harm." (C.P. at 9, 15)

Specifically, jury instruction S-1 authorized the jury to find Carter guilty of aggravated assault if it found beyond a reasonable doubt that

> " . . . at the time and place charged in the indictment and testified about, that the Defendant, Reggie Andre Carter, did willfully, unlawfully, feloniously, purposely and knowingly cause serious bodily injury to Endia Lyons, a human being, by hitting her in the face and breaking her arm, **said means likely to produce death or serious bodily harm, . . .** " (C.P. at 9) [emphasis ours]

Instruction D-7, in like manner, required the jury to find Carter "not guilty" unless it found the injuries were inflicted with "means likely to produce death or serious bodily harm."

D-7 reads, in its entirety as follows:

> The Court instructs the Jury that the Defendant has been charged with the offense of aggravated assault and that you must return a verdict of not guilty, unless you find from the evidence in this case beyond a reasonable doubt that Reggie Andre Carter at the time alleged in Neshoba County, Mississippi, attempted to cause or purposely or knowingly caused bodily injury to Endia Lyons **with means likely to produce death or serious bodily harm.** If the State has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then it is your duty to find the Defendant "Not Guilty." (C.P. at 15) [emphasis ours]

The posture of Carter's complaint targeting the denial of D-8 is controlled by the following cases: **Jackson v. State,** *supra*, 594 So.2d 20, 24 (Miss. 1992); **Riggs v. State,** *supra*, 967 So.2d 650 (Ct.App.Miss. 2007); **Lackie v. State,** *supra*, 971 So.2d 601 (Ct.App.Miss. 2007); **Odom v. State,** 767 So.2d 242 (Ct.App.Miss. 2000). *Cf.* **Silas v. State,** 847 So.2d 899, 902 (Ct.App.Miss. 2002) ["There is simply no evidentiary foundation

for the granting of a petit larceny instruction."]

We agree that D-8 was properly refused because it lacked evidentiary support. Taking the uncontradicted evidence in a light most favorable to Carter, and after consideration of all reasonable inferences which could have been drawn in favor of Carter, it is reasonably clear to us that given the nature of the injuries inflicted by closed fists as well as by, presumably, shoe clad feet, no reasonable and fair-minded hypothetical juror could have found Carter guilty of simple assault.

Unlike the factual environment found in **Odom v. State,** *supra*, 767 So.2d 242, 246 (Ct.App.Miss. 2000), cited and relied upon by Carter, there was no conflict in the testimony concerning whether or not the injuries were serious as opposed to non-serious.

Our legal analysis begins with the general and well-recognized rule of law that "[i]nstructions should be given only if they are applicable to the facts developed in the case being tried." **Pittman v. State**, 297 So.2d 888, 893 (Miss. 1974). In other words, before a jury instruction may be granted, there must be an evidentiary basis in the record for such. **Gray v. State**, 472 So.2d 409, 417 (Miss. 1985); **Fairchild v. State**, 459 So.2d 793, 800 (Miss. 1984). Instructions which are inconsistent with the evidentiary facts of the case should not be given. **Norman v. State**, 385 So.2d 1298, 1301 (Miss. 1980), and the cases cited therein.

A jury instruction must be supported by the evidence.

In **Gangl v. State**, 539 So.2d 132, 136 (Miss. 1989), this Court discussed the rule applicable to both lesser offense instructions and lesser included offense instructions. We quote:

> Of course, lesser offense instructions should not be granted indiscriminately, and only where there is an evidentiary basis in the record. *Harper v. State*, 478 So.2d 1017, 1021 (Miss. 1985); *Lee v. State*, 469 So.3d 1225, 1230 (Miss. 1985). The evidentiary standard is the same as for lesser included offense instructions, and is laid out in *Harper v. State, supra*, at 1021. Consequently, where as in the instant case, the evidence warrants it, the accused is entitled as a matter of right, upon proper request, to a lesser offense instruction the same as he would be entitled to a lesser included offense instruction. *Griffin v. State, supra.*

The following language found in **Lackie v. State,** *supra*, 971 So.2d 601, 606 (¶¶ 23-24) (Ct.App.Miss. May 1, 2007), an appeal from a conviction of aggravated assault, is relevant here:

> Lackie finally claims that he was entitled to a jury instruction for simple assault. We disagree. It is well settled that a lesser-included offense instruction is required only 'where a reasonable juror could not on the evidence exclude the lesser-included offense beyond a reasonable doubt.' *Mackbee v. State,* 575 So.2 16, 23 (Miss. 1990). Whether a lesser offense instruction should be given turns on whether there exists an evidentiary basis for it. *Hutchinson v. State,* 594 So.2d 17, 20 (Miss. 1992).
>
> Section 97-3-7 of the Mississippi Code Annotated provides for both simple and aggravated assault:
>
> > (1) A person is guilty of simple assault if he attempts to cause or purposely, knowingly or recklessly causes bodily injury to another, or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (c) attempts by physical menace to put another in fear of imminent serious bodily harm; . . .
> >
> > (2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value

> of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm
> . . . .
>
> The maximum sentence for simple assault is six months in the county jail; for aggravated assault, it is not more than one year in the county jail or twenty years in the penitentiary.

The test for determining when a lesser included offense instruction should be given is also set forth in **Harper v. State**, 478 So.2d 1017, 1021 (Miss. 1985), where this Court stated:

> [A] lesser included offense instruction should be granted unless the trial judge - and ultimately this Court - can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge.)

See also **Woodham v. State**, 779 So.2d 158, 163 (¶¶ 24, 25), where several jury instructions requested by the defendant " . . . did not have a proper evidentiary foundation in the facts of the present case."

The question presented within the factual context of the case at bar is whether or not a reasonable hypothetical juror could have, on the facts and favorable inferences presented, found that Carter was guilty of simple assault, i.e., no serious injury inflicted by a means likely to cause serious bodily harm, as opposed to aggravated assault where the victim's arm was broken and her eye knocked askew. (R. 46)

We think not.

In answering these inquiries, we keep firmly in mind that " . . . a lesser-included

offense instruction should never be granted on the basis of pure speculation." **Fairchild v. State**, *supra*, 459 So.2d at 801. Indeed, the "[u]nwarranted submission of a lesser offense is an invitation to the jury to disregard the law." **Presley v. State**, 321 So.2d 309, 311 (Miss. 1975). Accordingly, " . . . such an instruction should not be indiscriminately or automatically given, . . . but should only be given after the trial court has carefully considered the evidence and is of the opinion that such an instruction is justified by the evidence." **Jackson v. State**, 337 So.2d 1242, 1255 (Miss. 1976). *See also* **Gangl v. State**, *supra*, 539 So.2d 132, 136 (Miss. 1989).

The posture of the uncontoverted evidence in the case *sub judice* fails to pass muster under the applicable definitions and standards for a lesser included offense instruction of simple assault. The trial judge, as stated previously, granted jury instruction D-7 which instructed the jury it must find Carter "Not Guilty" " . . . unless you find from the evidence . . . beyond a reasonable doubt that Reggie Andre Carter at the time alleged in Neshoba County, Mississippi[,] attempted to cause or purposely or knowingly caused bodily injury to Endia Lyons with means likely to produce death or serious bodily harm." (C.P. at 15)

Carter's indictment charged him with causing "serious bodily injury" with a " . . . means being likely to produce death or serious bodily harm." (C.P. at 3) As noted previously, it was not necessary that the injuries inflicted by Carter be "serious" so long as the jury found they were inflicted with a means likely to produce death or serious bodily harm.

The following language found in **Jackson v. State,** *supra*, 594 So.2d 20, 24 (Miss. 1992), is worth repeating here:

> It is not necessary under §97-3-7(2)(b) that the use of hands and fists constitute the use of a "deadly weapon;" rather,

> it is enough if their use constitutes a "means likely to produce [either] death *or* serious bodily harm." Nor is it necessary under this section for the State to prove the victim suffered "serious" bodily injury. Mere "bodily injury" is sufficient so long as it was caused with "other means likely to produce death or serious bodily harm."

In this posture, the word "serious" found in Carter's indictment was mere surplusage. If the jury found that Carter hit Lyons in the face and broke her arm with "means likely to produce death or serious bodily harm," proof of "serious bodily injury" was not required; rather, "mere bodily injury" was sufficient to support a conviction for aggravated assault.

No reasonable, hypothetical juror could have found that Carter did not cause bodily injury to Lyons with a means likely to produce death or serious bodily harm.

Alternatively, viewing the evidence in a light most favorable to Carter and considering all reasonable inferences which may be drawn in favor of Carter, no reasonable, hypothetical juror could have returned a verdict of simple assault because no reasonable and fair-minded juror could have found the victim's injuries to be anything other than "serious."

In denying D-8, the trial judge placed a great deal of emphasis on Ms Lyons's broken arm, the duration of her medical treatment which was still on-going at the time of trial, and the permanency of her injuries. (R. 87) Lyons, we note, testified her eye was still "off." (R. 46)

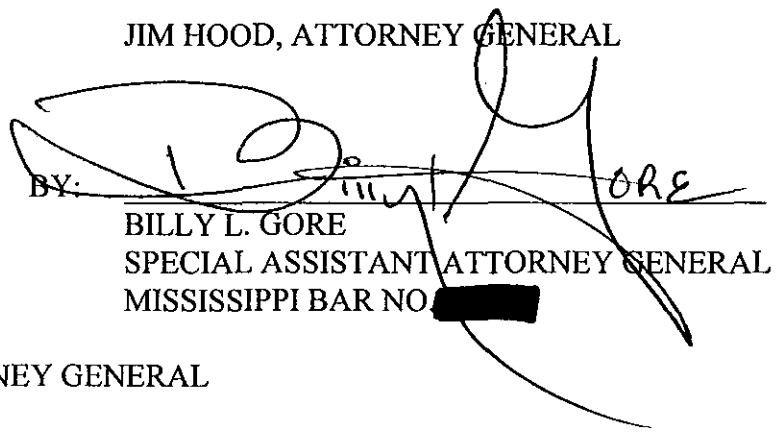
The bottom line is that the trial judge correctly refused instruction D-8 because it lacked evidentiary support.

CONCLUSION

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction and the sentence imposed by the trial court should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Marcus D. Gordon
Circuit Court Judge, District 8
Post Office Box 220
Decatur, MS 39327

Honorable Mark Duncan
District Attorney, District 8
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Christopher A. Collins, Esquire
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This the 30TH day of MAY, 2008.

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