

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**REGGIE ANDRE CARTER**

**APPELLANT**

**VERSUS**

**FILED**

**STATE OF MISSISSIPPI**

**APR 18 2008**

**APPELLEE**

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COURT OF APPEALS

**SUPREME COURT DOCKET NO. 2007-<sup>KA</sup>~~TS~~-01318-COA**

**APPEAL FROM THE  
CIRCUIT COURT OF NESHOBAMA COUNTY**

**BRIEF OF APPELLANT  
REGGIE ANDRE CARTER**

**ORAL ARGUMENT NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

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.

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Respectfully submitted,

  
Christopher A. Collins

## **TABLE OF CONTENTS**

Certificate of Interested Persons.....	ii
Table of Contents.....	iii
Table of Authorities.....	iv
Statement of the Issues.....	1
Statement of the Case.....	2
Summary of the Argument.....	4
Argument.....	6
Conclusion.....	13
Certificate of Service.....	14
Certificate of Filing.....	15

## TABLE OF AUTHORITIES

### CASES

<i>Baker v. State</i> , 82 Miss. 84; 33 So. 716 (1903).....	7
<i>Ely v. State</i> , 192 Ga. App. 203, 384 S.E.2d 268(Ga. Ct. App. 1989).....	8
<i>Johnson v. State</i> , 213 Miss. 808, 58 So. 2d 6 (1952).....	6
<i>Odom v. State</i> , 1999-KM-00520-COA (Miss. App. 2000).....	5, 10, 11
<i>Parker v. State</i> , 846 A.2d 485(Md. App. 2004).....	7
<i>People v. Williams</i> , 223 Ill. App. 3d 692, 585 N.E.2d 1188, 166 (1992).....	8
<i>Purifoy v. State</i> , 307 Ark. 482, 822 S.W.2d 374 (1991).....	12
<i>Simmons v. State</i> , 504 N.E.2d 575 (Ind. 1987).....	8
<i>State v. Alexander</i> , 446 S.E.2d 83 (N.C. 1994).....	12
<i>State v. Barnes</i> , 954 S.W.2d 760 (Tenn. Crim. App. 1997).....	12
<i>State v. Bishop</i> , 240 Kan. 647, 732 P.2d 765 (1987).....	8
<i>State v. Cosey</i> , 873 P.2d 1177 (Utah App. 1994).....	9
<i>State v. Croom</i> , 166 Conn. 226, 348 A.2d 556 (1974).....	7
<i>State v. Dube</i> , 598 A.2d 742 (Me. 1991).....	8
<i>State v. P.H.</i> , 803 A.2d 661 (N.J. App. 2002).....	6

<i>State v. Robinson</i> , 392 A.2d 475 (Conn. 1978).....	12
<i>State v. Seiter</i> , 949 S.W.2d 218 (Mo. App. 1997).....	9
<i>State v. Shaw</i> , 149 Vt. 275, 542 A.2d 1106 (1987).....	9
<i>State v. Shankle</i> , 172 S.E.2d 904 (N.C. App. 1970).....	12
<i>Street v. United States</i> , 602 A.2d 141 (D.C. 1992).....	8
<i>Upton v. State</i> , 192 Miss. 339, 6 So. 2d 129 (1942).....	4, 7

## **STATEMENT OF THE ISSUES**

### **I.**

**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.**

### **II.**

**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.**

## **STATEMENT OF THE CASE**

### **A. Course of the Proceedings Below**

The Defendant was charged with Aggravated Assault.. (T.<sup>1</sup> p.3). At the conclusion o the State's case, the Defendant made a Motion for Directed Verdict. )T. p. 80). This Motion was denied by the trial court. (T. p. 81.). During consideration of jury instructions, the Defendant requested that Instruction D-8 be given, instructing the jury with regard to the lesser included charge of simple assault. (R.E. p. 9, T. p. 87). The trial court refused to grant Instruction D-8. (T. p. 87).

The jury deliberated and found the Defendant guilty of Aggravated Assault. (T. p. 100). The trial court entered a Judgment finding the Defendant guilty and sentencing him to twelve years imprisonment. (R.E. p. 4). The Defendant filed a Motion of New Trial or Other Relief. (R.E. p. 6). An Order Overruling Motion for New Trial was thereafter entered. (R.E. p. 8). The Defendant thereafter filed timely Notice of Appeal. (R.E. p. 10).

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<sup>1</sup> The following abbreviations are used: R.E. for Appellant's Record Excerpts; T for Transcript.

**B. Statement of Relevant Facts**

India Lyons testified that she had a relationship with Defendant and that they had a child together. (T. p. 35). According to her testimony, Defendant came to her place of work while she was outside sitting in her car. (T. pp. 38-39). She testified that he got into her car on the passenger side and struck her with his fist. (T. p.39). Her testimony indicated that he continued to strike her. (T. p. 39). She stated that he then attempted to pull her from the car and began kicking her. (T. p. 41).

Ms. Lyons was taken to the hospital for treatment of her injuries, but was not hospitalized. (T. p. 44). She testified, over objection, that her face was fractured and her arm was broken. (T. p. 46).

On cross-examination, Ms. Lyons admitted that the prior statement she gave to Defense Counsel had made no mention of any kicking. (T. p. 58). She further testified that she had feared for her life. (T. p. 61).

However, when Defendant's counsel questioned her about her continued and subsequent intimate relationship with Defendant an objection based on relevancy was sustained. (T. pp. 61-62). Defendant's counsel then proffered that the witness would have testified that India Lyons and the Defendant have continued to have frequent intimate relationships since the time of the incident. (T. p. 63). According to defense counsel, this testimony was needed to show the Defendant's theory of the case that Ms. Lyons had not suffered a serious bodily injury and did not feel seriously threatened by the Defendant. (T. p. 63).



## **SUMMARY OF THE ARGUMENT**

### **I.**

**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.**

Courts have widely recognized that the conduct of an alleged victim or that of an accused, after a purported crime was to have been committed, may be relevant. The subsequent conduct of an alleged victim may be difficult to reconcile with the normal reaction of a person who was suffered the crime charged. Even the interaction between an accused and a supposed victim after the crime was to have occurred was been considered significant by the Mississippi Supreme Court. See *Upton v. State*, 192 Miss. 339, 6 So. 2d 129 (1942)(it appeared from defendant's and the victim's conduct after alleged crime that neither of them was conscious of such a wrong having been done).

The Defendant was entitled to attack the credibility of the prosecution's witnesses. In the case *sub judice*, he sought to do so by casting doubt on the severity of the alleged attack. To this end, he sought to introduce testimony that the parties had completely resumed their close personal relationship, virtually as though nothing had happened. This subsequent conduct, generally inconsistent with what most persons would do, could have given the jury a basis on which to doubt the witness' version of what occurred. By excluding such testimony, the trial court deprived the Defendant of his right to attack the credibility of the only witness to testify as to Defendant's behavior.

## II.

**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.**

A trial court is required to give a requested lesser-included- offense instruction, unless looking at the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences that may be drawn in favor of the accused, the court finds that no reasonable jury could find the accused guilty of the lesser offense, but not guilty of at least one element of the principal charge. *Odom v. State*, 1999-KM-00520-COA (¶11)(Miss. App. 2000). Arguably, the evidence was sufficient to convict the Defendant of aggravated assault. However, just as arguably, the evidence was sufficient only to convict of simple assault.

In this case, the distinction between simple assault and aggravated assault was whether the injuries were “serious.” Put another way, in the case *sub judice* had the jury found the injuries not to be serious; the Defendant could have been convicted of simple assault. The jury was not permitted to consider this possibility.

The Court has given little guidance as to when an injury is serious. Apparently, injuries from being kicked sufficient to cause bleeding from the ear and requiring one night of hospitalization could be either serious or non-serious, if not life threatening. See e.g. *Odom v. State*, 1999-KM-00520-COA (Miss. App. 2000). Neither has the Legislature assisted in defining the term. This is for good reason. The term “serious injury” like “reasonable doubt” may not be the same for all reasonable persons and is best left for determination by a jury. Other jurisdictions have widely recognized that a jury, not the court, must determine whether an injury is serious.

By finding no evidence to support a charge of simple assault the trial court effectively found as a fact that the accuser's injuries were serious. Otherwise, no reason existed to deny the Defendant the right to have the jury instructed on the lesser included offense of simple assault. The jury should have been instructed regarding a charge of simple assault, and the ultimate finding of fact left in its capable hands.

## ARGUMENT

### I.

**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, the Defendant offered no evidence. Instead, he relied on inconsistencies in the alleged victim's prior statements, together with subsequent behavior generally inconsistent with being the recipient of the brutal attack that she claimed to have received. By this means he sought to establish reasonable doubt in the minds of the jurors as to whether the events transpired generally as related by the alleged victim. One of the fundamental procedural protections of the Due Process and Confrontation Clauses is the right of an accused to attack the credibility of the prosecution's witnesses. *State v. P.H.*, 803 A.2d 661, 667 (N.J. App. 2002)

Conduct of the alleged victim after the alleged crime occurred may be relevant in assessing her veracity. In *Johnson v. State*, 213 Miss. 808, 813, 58 So. 2d 6 (1952), the Court noted that certain conduct of the alleged victim was difficult to reconcile with the reactions of a normal woman who has been the victim of the crime there charged. In effect, the Court

recognized that the behavior of an alleged victim that is in some measure inconsistent with what she claims to have occurred has probative value.

Similarly, the Court reversed a conviction in *Upton v. State*, 192 Miss. 339, 341, 6 So. 2d 129 (1942). The Court in *Upton* noted that it appeared from defendant's and the victim's conduct after the alleged crime that neither of them was conscious of such a wrong having been done. *Id.* at 341. Thus, the Court found facts in evidence sufficient to discredit the alleged victim's testimony such that a new trial was required. *Id.*

In *Baker v. State*, 82 Miss. 84; 33 So. 716, 716 (1903) the Court also commented on the course of conduct of the accusing witness after the alleged crime. In *Baker*, the alleged victim has simply failed to report the crime for an extended period of time. *Id.*

Although each of the cited cases is factually distinguishable from the case *sub judice*, there is a clear thread throughout that the conduct of an alleged victim after she has alleged a crime may call into question her truthfulness. Thus, although there is no dispute that an altercation took place between Reggie Carter and India Lyons, a jury was entitled to hear evidence that might indicate that India Lyons had afterward acted as the attack had not been as severe as she claimed.

Other jurisdictions have found conduct subsequent to an alleged crime probative in a variety of circumstances. *State v. Croom*, 166 Conn. 226, 230, 348 A.2d 556 (1974), for example, held that evidence of the conduct of a defendant subsequent to the commission of a crime is admissible to show the defendant's state of mind at the time of the crime. Indeed, the Maryland Court of Special Appeals stated in *Parker v. State*, 846 A.2d 485, 496 (Md. App. 2004):

“It is well-recognized that a person's post-crime behavior often is considered relevant to the question of guilt because the particular behavior provides clues to the person's state of mind.”

Surely, not only the state of mind of the accused can often be gleaned by subsequent conduct. Behavior 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.

Indeed, the courts have frequently permitted the prosecution to introduce evidence of a victim's post-crime conduct to bolster the argument that a crime occurred. *See e.g. Street v. United States*, 602 A.2d 141, 143-44 (D.C. 1992) (trial court did not abuse its discretion in admitting testimony that after the alleged rape, complainant had to be escorted to and from the bus stop, was jumpy and fearful of men on the street, had not dated since the incident, and appeared "solemn" when the topic of sexual assault was discussed in her presence, because such evidence made it more probable that the complainant did not consent to the sexual intercourse); *Ely v. State*, 192 Ga. App. 203, 384 S.E.2d 268, 272 (Ga. Ct. App. 1989)(testimony of victim's mother that after the crime the victim "just gets raving" and that the incident "affected [the victim's] nerves" was properly admitted as it had some evidentiary value tending to prove force and lack of consent); *People v. Williams*, 223 Ill. App. 3d 692, 585 N.E.2d 1188, 1193, 166 Ill. Dec. 166 (Ill. App. Ct. 1992) (trial court properly admitted testimony (as relevant to issue of consent) that following sexual assault the victim suffered depression, experienced panic attacks and nightmares, and received treatment from a doctor); *Simmons v. State*, 504 N.E.2d 575, 581 (Ind. 1987) (trial court did not abuse its discretion in admitting testimony from family members that following rape, victim became afraid to go outside by herself, stayed at home more often, and feared for family members who went out alone as it was probative of the fact that victim had been raped); *State v. Bishop*, 240 Kan. 647, 732 P.2d 765, 774 (Kan. 1987) (victim's testimony that she received counseling as a result of what happened to her was circumstantial evidence that she was raped); *State v. Dube*, 598 A.2d 742, 746 (Me. 1991)("Evidence of changes in the

victim's personality and behavior immediately after the time of the reported assault tends to prove that something of a traumatic nature had in fact occurred and thus was clearly relevant to the State's case."); *State v. Seiter*, 949 S.W.2d 218, 223 (Mo. Ct. App. 1997) (experts and laymen can testify about their observations concerning physical and psychological changes in the victim because such evidence helps to prove the elements of the sexual offense itself and thus may be admitted to show the offense did in fact occur); *State v. Cosey*, 873 P.2d 1177, 1181-82 (Utah Ct. App. 1994) (testimony of victim's mother contrasting victim's behavior prior to the incident with that after the incident was properly admitted as "circumstantial evidence that a traumatic experience such as rape has occurred."); *State v. Shaw*, 149 Vt. 275, 542 A.2d 1106, 1107-08 (Vt. 1987) (whether a sexual assault occurred was the key question at trial and evidence of changes in the complainant's personality was material on that question).

Admittedly, the cases cited deal with a far different class of cases, those dealing with sexual violence. Nonetheless, each holding demonstrates that an alleged victim's conduct after a crime purportedly occurred can be used to bolster- or as in the case at bar, refute – the victim's version of the facts.

## II.

**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.**

It is well settled that a lesser-included-offense instruction should be given unless the trial judge determines, by looking at 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 ultimately not guilty of at least one element of the principal charge. *Odom v. State*, 1999-KM-00520-COA (¶11)(Miss. App. 2000). In many instances simple assault has been deemed a lesser-included-offense of the crime of aggravated assault. *Id.* at ¶10.

The trial court refused Instruction D-8, which would have permitted the jury to return a verdict of simple assault. The Defendant maintains that this was error.

Although the Defendant challenges the veracity of India Lyons, if her testimony is accepted, she was struck and kicked by the Defendant. The facts are virtually identical to those of *Odom v. State*, 1999-KM-00520-COA (Miss. App. 2000).

In *Odom*, the victim claimed that the defendant attacked him without provocation, striking him in the face and then kicking him about the face and ribs. *Id.* at (¶2). The victim testified that he saw something resembling brass knuckles in the defendant's hand. *Id.* The victim suffered a swollen eye and blood was coming from his ear, indicating a possible skull fracture. *Id.* He was treated at a local hospital and then transferred to the University of Mississippi Medical Center for further tests. *Id.* The victim was hospitalized and released the next day. *Id.* at (¶3). At trial the treating physician testified that none of the injuries turned out to

be life threatening. *Id.* at (¶3). A final similarity between *Odom* and the case at bar was that in neither case did the defendant testify.

In direct contrast to the case now before the Court, however, Odom argued that the jury should not have been permitted to consider a charge of simple assault. *Id.* at (¶7). The *Odom* court noted that the principal difference between simple assault and aggravated assault is whether serious bodily injury resulted. *Id.* at (¶13). According to the court, the State presented a witness claiming there was serious bodily injury and the defense present a witness who said there was not. *Id.* This was an apparent reference to testimony that the victim has a swollen eye and was bleeding from his ear versus testimony of the treating physician that the injuries were not “life threatening.” *Id.* at (¶3). This, the court held, created a classic jury question and a simple assault instruction was appropriate. *Id.* at (¶13).

What then does *Odom* mean? Does it mean that a swollen eye and bleeding from the ear resulting in a night’s stay in the hospital is a serious injury? If so, does *Odom* also mean that testimony that an injury is not life threatening then transforms it into something less than a serious injury? Does *Odom* mean that the State and the Defendants are not treated equally, such that the State may receive a lesser included instruction under circumstances where the Defendant may not? The Defendant argues that *Odom* means neither.

Instead, Defendant urges simply that *Odom* stands for the proposition that a jury is well capable of determining, and should determine, whether or not a victim has suffered a serious injury. This is particularly true since “serious injury” in the context of a criminal proceeding does not appear to have been defined by either the Mississippi Legislature or the courts.<sup>2</sup>

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<sup>2</sup> Some jurisdictions have defined “serious injury” by statute. *See e.g. Iowa Code* § 702.18 (2008). Others have declined such specific definition. *See e.g. State v. Jones*, 128 S.E.2d 1 (N.C. 1962) (Holding the injury must be serious but must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case.)



With regard to how other jurisdictions have treated this question, the North Carolina Supreme Court noted that cases that have addressed the issue of the sufficiency of evidence of serious injury appear to stand for the proposition that as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious. *State v. Alexander*, 446 S.E.2d 83, 87 (N.C. 1994). In discussing the distinction between the simple assault and aggravated assault, the Tennessee Court of Criminal Appeals stated,

“While the phrase ‘serious bodily injury,’ an essential element of the offense of aggravated assault, is not susceptible to precise legal definition, it must describe an injury of a greater and more serious character than that involved in a simple assault. The distinction between “bodily injury” and “serious bodily injury” is generally a question of fact for the jury and not one of law. “

*State v. Barnes*, 954 S.W.2d 760, 765 (Tenn. Crim. App. 1997)

Indeed Defendant’s research indicates wide acceptance of the view that only the jury may decide if an injury is serious. See e.g. *State v. Shankle*, 172 S.E.2d 904, 905 (N.C. App. 1970)(Whether injury was serious was jury question to be determined by the particular facts disclosed by the evidence); *Purifoy v. State*, 307 Ark. 482, 489 822 S.W.2d 374 (1991)(Whether injuries from gunshot wound requiring week in hospital constituted serious injury for jury to decide.); and *State v. Robinson*, 392 A.2d 475, 475(Conn. 1978)(victim suffered lacerations of the face and scalp, fractured ribs, and multiple bruises, yet determination as to whether victim’s injuries were “serious physical injuries” was properly question for jury). No cases were found from any other jurisdiction where the court held that an injury was serious as a matter of law.

By rejecting Instruction D-8, the trial court effectively ruled as a matter of law that India Lyons’ injuries were serious within the meaning of the statute. Had the question remained for the jury, it may well have determined that the injuries were not serious.

It should be clearly understood that Defendant does not argue that a rational jury could not have found India Lyons' injuries to be serious. Defendant contends merely that the jury should have been afforded an opportunity to determine whether he was guilty of the lesser included offense of simple assault. Had the trial court not concluded that "no evidence" had been introduced to show simple assault, doubtless a simple assault instruction would have been given. To have reached its conclusion, the trial court would necessarily have concluded that the injuries to India Lyons were serious as a matter of law. Had the injuries been deemed not to be serious, Defendant would have been entitled to have the jury instructed as to lesser included charge of simple assault.

Simply put, the trial court should have permitted the jury to be instructed regarding simple assault. To do otherwise deprived the finder of fact from considering whether the accuser's injuries were not serious.

### **CONCLUSION**

Wherefore, Appellant prays that the Order of the Circuit Court of Neshoba County styled "Order Overruling Motion for New Trial" be reversed, and that Defendant be granted a new trial.

**CERTIFICATE OF SERVICE**

I, Christopher A. Collins, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following:

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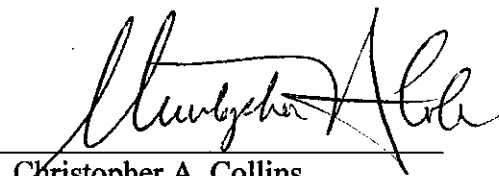
SO CERTIFIED, this the 18<sup>th</sup> day of April, 2008.

  
\_\_\_\_\_  
Christopher A. Collins

**CERTIFICATE OF FILING**

I, Christopher A. Collins, attorney for the Appellant, Reggie Andre Carter, do hereby certify that I have this date filed Brief of Appellant by depositing an original and three copies of Brief of Appellant with the United States Postal Service, first class postage prepaid, addressed to Betty W. Sephton, Clerk, Supreme Court and Court of Appeals, Post Office 249, Jackson, Mississippi 39205-0249.

This, the 18<sup>th</sup> day of April, 2008.

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

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