

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**KEVIN MOTON A/K/A LIL WAYNE**

**APPELLANT**

**V.**

**NO. 2007-KA-1389-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**ORAL ARGUMENT NOT REQUESTED**

**MISSISSIPPI OFFICE OF INDIGENT APPEALS**

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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 this court may evaluate possible disqualifications or recusal.

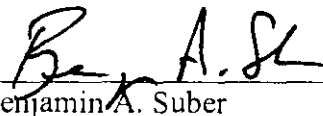
1. State of Mississippi
2. Kevin Moton, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Charles E. Webster, Circuit Court Judge

This the 7<sup>th</sup> day of March, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**KEVIN MOTON A/K/A LIL WAYNE**

**APPELLANT**

**V.**

**NO. 2007-KA-01389-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE ISSUES**

- ISSUE NO. 1**      **THE TRIAL COURT ERRED IN DENYING KEVIN MOTON'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.**
- ISSUE NO. 2**      **THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE CONDOM AND THE CRIME LAB REPORT.**
- ISSUE NO. 3.**      **THE TRIAL COURT ERRED IN DENYING KEVIN MOTON'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

## **STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgment of conviction for the crimes Count I, Burglary of a Dwelling, Count II, Kidnapping, and Count III, Sexual Battery. Kevin Moton was sentenced to twenty (20) years for Count I, the jury affixed the penalty at life imprisonment for Count II, and twenty (20) years for Count III. The sentences will run concurrent with the sentence imposed by the jury in Count II following a jury trial on July 9-10, 2007, Honorable Charles E. Webster, presiding. Kevin Moton is presently incarcerated with the Mississippi Department of Corrections.

## **FACTS**

On September 17, 2004, Henry Wright [hereinafter Wright] was at home with two of his kids. Tr. 59, 60. Wright was living with his girlfriend at the time, Shaneta Johnson [hereinafter Johnson]. Tr. 60. Johnson was starting work at night and she wanted Wright to meet her on her first night after work. *Id.* Wright left somewhere around 10:50 pm to go meet her. *Id.* When Wright left the home, he left his two kids inside the house sleeping. *Id.*

On the way to meet Johnson, Wright spoke to a guy on the corner and told him that he was going to meet his girlfriend because she got off at eleven. *Id.* Wright stated that Kevin Moton [hereinafter Moton] came by and they spoke to each other. Tr. 61.

Wright met Johnson and they came back to the house. Tr. 62. As they went to the back of the house to check on the kids, they realized that one of them was missing. *Id.* Wright and Johnson began to search for the missing child. *Id.* They searched throughout the

house, and then went to all her family members homes nearby to see if they knew anything about their missing daughter. *Id.*

Their daughter was found about an hour later. Tr. 63. The girl was found in an abandoned trailer behind Wright and Johnson's house. *Id.* Wright and Johnson were walking around calling out their daughter's name and heard her say "huh." *Id.* Wright testified that once he heard her say something, he ran around to the back of this abandoned trailer and jumped in the window. *Id.* When he jumped in the window of the trailer, Wright saw his daughter's face. *Id.* She ran to Wright and he handed her to Johnson. *Id.*

Wright stated that Johnson heard someone moving inside the trailer and he went back in the trailer. *Id.* When Wright went back in to confront the person inside the trailer, the person inside hollered "it's me." Tr. 63, 75. Wright inquired "who is me." Tr. 75. The person inside of the trailer ran out the door with Wright running out behind the person. *Id.*

According to Johnson, she did not see Moton exit the door at the abandoned trailer. Tr. 100. She claims she did see him running from the house. *Id.* Johnson testified that she saw the defendant running to the next street, which was close by the house, and he ran under a light pole. Tr. 109-10.

Wright stated that he saw the bike that Moton was riding that night, in the bushes, between his house and the abandoned trailer. Tr. 64. Wright said he put the bike into the back of his truck, but the bike was gone the next day. Tr. 65.

Johnson took her daughter to her Aunt Ellerwee's house to make sure her daughter was not hurt. Tr. 102. Johnson asked what had happened and the daughter would not



respond back. *Id.* After Johnson made her feel that everything was ok, the daughter stated that "that boy" took her out of the house. *Id.* When asked whether she was hurt the daughter pointed her hand down at her privates and she pointed at her mouth. *Id.*

Johnson took her daughter to the hospital the next day and she was examined. Tr. 103. Doctor Rodney Baine examined Johnson's daughter and the only pertinent physical findings were an irritation of the vagina; a vaginitis type thing, red. Tr. 127.

According to Officer Mario Magsby, he wrote a statement which Moton signed. Tr. 130. According to the statement, Moton claimed to be inside the abandoned trailer, however, he stated that he heard a voice coming from the vacant house. RE 30. Moton stated in his statement that he looked in the door and did not see anybody, but then he walked inside and saw the girl standing by the window. RE 30-31. Moton indicated that he knew who's girl it was and was about to take her home. RE 31. However, as Wright and Johnson were calling her name, the girl answered them. *Id.* Wright then jumped through the window and wanted to know what had happened. *Id.* Moton stated that he had just walked in and saw the girl. *Id.*

### **SUMMARY OF THE ARGUMENT**

The evidence was insufficient to warrant the convictions of burglary of a dwelling, kidnapping, and sexual battery. No evidence was presented to show that Moton broke into the home of Wright and Johnson. Wright claimed the back door was damaged but looking at State's Exhibits 5, 6 and 7, no damage was apparent. Here, Moton by his own statement to Investigator Mario Magsby was inside the abandoned trailer; however, he was there only because he heard the girl inside the trailer. He only went inside to see

what was happening inside and not to hurt her.

The evidence was also not clear to whether there was sexual penetration. Johnson asked her daughter whether she was hurt or if did he touch her, and she point to her mouth and at her privates. Doctor Rodney Baine observed that the girl's vagina was irritated and red. He never indicated that there was penetration. The evidence was insufficient to convict Moton of burglary of a dwelling, kidnapping, and sexual battery.

The condom and crime lab report should have been admitted into evidence to help exclude Moton as the person that was involved with the girl. Generally, relevant evidence is admissible.

The evidence that was presented was against the overwhelming weight of the evidence. The girl did not identify Moton as the one who took her out of Wright and Johnson's house. She only identified the person as "that boy."

Doctor Rodney Baine and Cynthia Patterson, registered nurse, both stated that the girl's vagina was red. Cynthia Patterson stated that the redness could be compatible with an infection. Neither Doctor Rodney Baine or Cynthia Patterson indicated that sexual penetration existed.

## ARGUMENT

**ISSUE NO. 1        THE TRIAL COURT ERRED IN DENYING KEVIN MOTON'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS.**

### **A. Standard of Review**

Denial of a directed verdict and J.N.O.V. challenges the legal sufficiency of the evidence supporting the guilty verdict. *Randolph v. State*, 852 So.2d 547, 554 (Miss. 2002); *Fair v. State*, 789 So.2d 818, 820 (Miss. 2001); *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993). With regard to the issue of the legal sufficiency of the evidence, the Mississippi Supreme Court has held “that reversal can only occur when evidence of one of more of the elements of the charged offense is such that ‘reasonable and fair-minded jurors could only find the accused not guilty.’” *Stewart v. State*, 909 So.2d 52, 56 (Miss. 2005); *Randolph*, 852 So.2d at 555; *Fair*, 789 So.2d at 820; *Wetz v. State*, 503 So.2d 803, 808 (Miss. 1987). “To grant a JNOV the trial court must be convinced that the State has not presented competent evidence to establish each essential element of the offense beyond a reasonable doubt. *McKee v. State*, 756 So.2d 793, 795 (Miss. Ct. App. 1999). See *Franklin v. State*, 676 So.2d 287, 288 (Miss. 1996). Moton was convicted of burglary of a dwelling, kidnapping, and sexual battery.

### **B. Burglary of a Dwelling**

Moton was charged with burglary of a dwelling under **Mississippi Code Annotated Section 97-17-23 (Rev. 2006)**. Burglary is defined as [e]very person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another,

whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein, shall be punished by imprisonment. . . .” **Miss. Code Ann. § 97-17-23 (Rev. 2006).**

“There are two elements that must be proven in order to convict a person for the crime of burglary. These are (1) an unlawful breaking and entering, and (2) the intent to commit some crime once entry has been gained.” *Washington v. State*, 753 So.2d 475, 478 (Miss. Ct. App. 1999)(quoting *Harrison v. State*, 722 So.2d 681 (Miss. 1998)). The elements of burglary in this case were not met. In looking at the first element of unlawful breaking and entering, Wright presented evidence that it appeared someone had been picking at the backdoor. Tr. 66. Then he stated that it looked like someone had been snatching, beating on the door. Tr. 69. He continued to state that it is real easy to break into a trailer if someone knew what they were doing. Tr. 69.

However, looking at State’s Exhibit 6, the back door does not appear to be damaged or tampered with. RE 28. No tools marks are apparent from the photo, nor does the door jamb appear to be damaged. *Id.* State’s Exhibit 6 is not consistent with the testimony of Wright that someone was snatching or beating on the door, and possibly picking at the backdoor. Tr. 66, 69.

In examining State’s Exhibit 5, the door does not appear to be damaged from someone snatching or beating on the door. RE 27. By taking a look at State’s Exhibit 7, the back door of the trailer does not seem to be damaged. RE 29. The picture of the door does not show the damage from someone beating on the door or snatching on the door. *Id.* The door in

State's Exhibit 5,6, and 7 does appear to be consistent with normal wear and tear of a door, but not consistent with the testimony of Wright.

In addition, there is a lack of evidence pertaining to the damage of the back door of the trailer. No physical evidence was collected from the back door of the trailer or from the inside of the trailer. No fingerprints or tools were collected that connected Moton to the home of Wright and Johnson. No evidence was delivered to the court to show that Moton was inside the trailer of Wright and Johnson. Therefore the first element of burglary was not proven.

In examining the second element of burglary, this Court stated in *Washington* that “[i]ntent is an emotional operation of the mind, and it is usually shown by acts and declarations of the defendant coupled with facts and circumstances surrounding him at the time. Defendant’s intention is manifested largely by the things he does.” *Washington v. State*, 753 So.2d 475, 478 (Miss. Ct. App. 1999)(quoting *Newburn v. State*, 205 So.2d 260, 265 (Miss. 1967)). Also stated, “[u]nless one expressed his intent, the only method by which intent may be proven is by showing the acts of the person involved at the time in question, and by showing the circumstances surrounding the incident.” *Washington*, 753 So.2d at 478 (quoting *Voyles v. State*, 362 So.2d 1236, 1242 (Miss. 1978)). Moton said in his statement that he went inside the abandoned trailer because he heard a voice. RE 30. As he was going to take her home, Wright came through the window. RE 31. According to his actions, Moton was trying to help the girl not hurt her. The intent of Moton was not to hurt the girl and based in his actions that would not satisfy the intent element of burglary.

The evidence presented before the court was weak connecting Moton to the burglary of the home of Wright and Johnson. No evidence was show where the back door was broken into by Moton. The intent of Moton in the abandoned trailer was to help a distressed girl. Neither of the elements of burglary were proven and therefore this Court needs to reverse and render the conviction of burglary.

### **C. Kidnapping**

Moton was charged with kidnaping under **Mississippi Code Annotated Section 97-3-53 (Rev. 2004)**. The Mississippi Code sets out the elements of kidnapping as “[a]ny person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any person, or shall inveigle or kidnap any other person with the intent to cause such person to be confined or imprisoned against his or her will, . . .” **Miss. Code Ann. § 97-3-53 (Rev. 2004)**. “Kidnapping is not a specific intent crime. Therefore, it is sufficient that the surrounding circumstances resulted in a way to effectively become a kidnapping as opposed to the actual intent to kidnap.” *Milano v. State*, 790 So.2d 179, 187 (Miss. 2001); *Williams v State*, 445 So.2d 798, 809 (Miss. 1984).

According to Moton’s statement, he was just passing by the vacant house when he heard a voice in the vacant house. RE 30. After he heard the voice, he opened the door and looked inside, but did not see anybody. *Id.* He walked inside the house and he noticed the girl standing by the window. RE 31. He walked up to the girl and saw that the girl was Wright’s<sup>1</sup> and was going to take her home. *Id.* As Moton was about to get the girl and take

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<sup>1</sup> In Moton’s statement he indicated that the girl he saw was Junior’s. Junior and Henry Wright are the same person.

her home, Wright jumped through the window and wanted to know what was going on inside the house. *Id.* Wright passed the girl out the window to Johnson then they left, and Moton left also. *Id.*

Wright and Johnson's testimony do not differ substantially from Moton. They both claim they were calling their daughter's name and heard "huh". Tr. 63. Wright then ran around to the back of this abandoned trailer and jumped in the window. *Id.* When he jumped in the window of the trailer, Wright saw his daughter's face. *Id.* She ran to Wright and he handed her to Johnson. *Id.*

Based on this testimony and statement, Johnson's daughter was not confined or imprisoned against her will. Wright testified that when he jumped in the window, that the girl came up to him and then he passed her out the window. Tr. 63. Also Johnson's daughter did not identify Moton as the person that took her out of the house. She only said "that boy." Tr. 102.

Wright testified that they found their daughter after about an hour or so of looking. Tr. 63. Any reasonable person could believe that many different scenarios could have happened with that hour. The girl could have wandered over to the abandoned trailer looking for daddy since he left her there alone. Someone else could have taken her to the abandoned trailer. It would not be unforeseen for Moton to have heard her inside and went in to see what was happening and Wright jump up in the window. The evidence is insufficient to convict Moton of kidnapping, therefore this Court should reverse and render the conviction of kidnapping.

#### **D. Sexual Battery**

Moton was charged with sexual battery under **Mississippi Code Annotated Section 97-3-95 (Rev. 1998)**. “A person is guilty of sexual battery if he or she engages in sexual penetration with: . . . (d) A child under the age of fourteen (14) years of age.” **Miss Code Ann. § 97-3-95 (Rev. 1998)**.

**Mississippi Code Annotated Section 97-3-97 (Rev. 1998)** defines sexual penetration as follows: “Sexual penetration includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person’s body by any part of a person’s body, and insertion of any object into the genital or anal openings of another person’s body.” **Miss. Code Ann. § 97-3-97 (Rev. 1998)**.

“Penetration is the very essence of the crime of sexual battery.” *Johnson v. State*, 626 So.2d 631, 632 (Miss 1993). *See Thompson v. State*, 468 So.2d 852, 853 (Miss. 1985). In the case at hand, the evidence is not clear whether there was sexual penetration. When Johnson asked her daughter whether she was hurt and did he touch her, she pointed down to her privates and pointed at her mouth. Tr. 102. When Johnson’s daughter was examined by Doctor Rodney Baine, he gave no indication that there was sexual penetration. Tr. 127-128. The testimony was as follows:

Q. What were your observations after seeing the patient?

Dr. Baine. On physical exam the only pertinent physical findings were an irritation of the vagina; a vaginitis type thing, red.

Q. Was there an infection, would you say?

Dr. Baine. Not that I know of. It was just red and irritated.

Q. Okay. Did you prescribe anything for her?



Dr. Baine. When she left I wrote her a prescription for some cortisone ointments.

Q. The irritation, how did the vagina appear?

Dr. Baine. It was red, swollen and irritated, kind of like you would rub - - I can show you what roses do to your arm. It was just an irritation, a redness. *Id.*

Dr. Baine did not suggest that there was any sexual penetration. He just stated that the vagina was irritated and red. The Mississippi Supreme Court has held “that the parameters of the definition of sexual penetration are logically confined to activities which are the product of sexual behavior or libidinal gratification.” *Williams v. State*, 757 So.2d 953, 956 (Miss. 1999). *See also Roberson v. State*, 501 So.2d 398, 400 (Miss. 1987). “Contact between a person’s mouth, lips, or tongue and genitals of a person’s body, whether by kissing, licking, or sucking, is sexual penetration.” *Williams*, 757 So.2d at 956-57; *Hennington v. State*, 702 So.2d 403, 408 (Miss. 1997). In this case the evidence does not indicate any type of sexual battery.

In *Williams*, the Court stated that “[w]hile there was no physical evidence presented by the State in this case, this Court has held that the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where the testimony is not discredited or contradicted by other credible evidence.” *Williams*, 757 So.2d at 967; *Collier v. State*, 711 So.2d 458, 462 (Miss. 1998)(citing *Christian v. State*, 456 So.2d 729, 734 (Miss. 1984)). *Williams* can be distinguished, from the case at hand. Johnson’s daughter did not relay any message to her mother other than point to her mouth and between her legs. Tr. 102. Just point to your mouth and between your legs does not automatically mean there was sexual

battery. Dr. Baine only observed that the vagina was red and irritated, and did indicate that any type of sexual penetration. Tr. 127.

In *Williams*, the children testified about the actions that pertained to sex crime that occurred and there was no testimony to discredit or contradict that testimony. However, Johnson's daughter did not indicate a sex crime and the testimony of Dr. Baine did not state that there was any kind of sexual battery. Sexual battery was not proven as no evidence of sexual penetration was established and this Court should reverse and render the conviction.

The state must prove each element of the indicted offensive beyond a reasonable doubt. *Hobson v. State*, 730 So.2d 20, 28 (Miss. 1998); *Heidel v. State*, 587 So.2d 835, 843 (Miss. 1991). The Court in *Turner* did say that it is the jury's job to determine the weight and credibility of the evidence presented. *Turner v. State*, 726 So.2d 117 (Miss. 1999). *See also Fair*, 789 So.2d at 821. No reasonable jury could or should have convicted Moton of burglary, kidnapping, and sexual battery looking at the weight and credibility of the evidence that was presented to the trial court.

Taking the evidence that was presented to the Court, the elements of burglary, kidnapping, and sexual battery were not proven beyond a reasonable doubt and this Court should reverse and render this case based on these facts.

**ISSUE NO. 2      THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE CONDOM AND THE CRIME LAB REPORT.**

"The standard of review for the admission or exclusion of evidence is an abuse of discretion." *Rankin v. State*, 963 So.2d 1255, 1258 (Miss. Ct. App 2007); *Chandler v. State*,

946 So.2d 355, 364 (Miss. 2006). “A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.” *Rankin*, 963 So.2d at 1258 (quoting *Fisher v. State*, 690 So.2d 268, 274 (Miss. 1996)).

The Court granted a Motion in Limine to Exclude Condom and Crime Lab Report from the trial. Tr. 2. The condom was found in the area where the girl was found. Tr. 3. The condom was sent to the crime lab for DNA testing and the crime lab determined that the DNA residue did not match the defendant nor did it match the victim. Tr. 4. The Court ruled that the condom and the crime lab report were not relevant to the case at hand. Tr. 8.

“Evidence is admissible if it is relevant.” **Mississippi Rule of Evidence 402, 403.** “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 probably or less probable that it would be without the evidence.” **Mississippi Rule of Evidence 401.** The evidence of the condom is relevant to show that Moton was not the person who was with the girl in trailer. The evidence could also verify Moton story of the events that happened. Moton claims he heard the girl in the abandoned trailer and then went inside to see what was happened inside. The condom was found in the area where the girl was found. Tr. 3. The exclusion of evidence with regard to the condom and crime lab report was prejudicial to Moton; therefore this was error and he is entitled to a reversal.

**ISSUE NO 3. THE TRIAL COURT ERRED IN DENYING KEVIN MOTON’S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

“When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). In reviewing such claims, the Court “sits as a thirteenth juror.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(citing *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss.2000)(footnote omitted)).

“[T]he evidence should be weighed in the light most favorable to the verdict.” *Herring*, 691 So.2d at 957. “A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, ‘unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.’” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(quoting *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982)). It means that “as the ‘thirteenth juror,’ the court simply disagrees with the jury’s resolution of the conflicting testimony,” and “the proper remedy is to grant a new trial.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)(quoting *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982)(footnote omitted)).

In the present case, even if the Court finds that the evidence was sufficient to support the verdict, and Moton is not entitled to an acquittal as a matter of law, he is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence.

In the case *sub judice*, there was absolutely no evidence that Moton had any reason or motive to break and enter the home of Wright and Johnson and take their daughter. The

girl only indicated that someone took her out of the house, but only identified the person as “that boy.” Tr. 102. No evidence was presented to the court that placed Moton at the home of Wright and Johnson. Wright indicated that the back door of their home looked like someone had been picking at the door. Tr.66. However, viewing State’s Exhibits 5, 6, and 7 it does not appear to be consistent with Wright’s testimony.

Moton’s claimed in his statement that he was only in the abandoned trailer because he heard the girl inside. RE 30. As he was going to take her home, Wright jumped through the window. RE 31. Wright never saw Moton restraining her or trying to engage in sexual contact with the girl. The girl only stated that the person who took her from her house was “that boy.” Tr. 102. Moton was not present when Johnson’s daughter made this statement.

Furthermore, Doctor Rodney Baine observed that the only pertinent physical findings were that the vagina was red swollen and irritated. Tr. 127-28. The doctor never indicated that there was any type of penetration. Also, Cynthia Patterson who is a registered nurse at the Northwest Regional Medical Center testified that the redness of the girl’s vagina could be described as compatible with an infection. Tr. 125.

This case is a circumstantial evidence case, and the State is required to prove its case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence. *Leflore v. State*, 535 So.2d 68, 70 (Miss. 1988)(quoting *Guibeau v. State*, 502 So.2d 639, 641 (Miss. 1987)); *Baker v. State*, 317 So.2d 901, 902 (Miss. 1975). Moton claiming to hear the girl inside the trailer and going inside to find out what was going out was also a reasonable hypothesis that was not excluded by the evidence.

The verdict was against the overwhelming weight of the evidence. Kevin Moton therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State*, 883 So.2d 86 (Miss. 2004).

### CONCLUSION

Kevin Moton asserts that the evidence was insufficient to support the verdicts. Therefore, Kevin Moton contends that the Court should reverse and render his convictions. However, should the Court not reverse and render, Kevin Moton contends that the verdicts were against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



BENJAMIN A. SUBER  
COUNSEL FOR KEVIN MOTON

## CERTIFICATE OF SERVICE

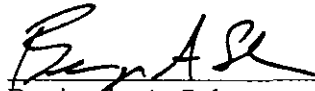
I, Benjamin A. Suber, Counsel for Kevin Moton, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Charles E. Webster  
Circuit Court Judge  
149 Delta Avenue  
Clarksdale, MS 38614

Honorable Laurence Y. Mellen  
District Attorney, District 11  
Post Office Box 848  
Cleveland, MS 38732

Honorable Jim Hood  
Attorney General  
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This the 7<sup>th</sup> day of March, 2008.

  
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