

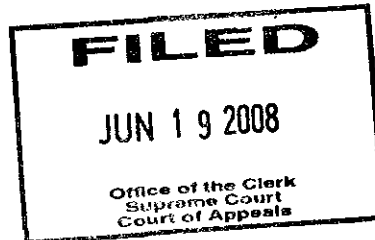
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VICTOR PERRYMAN

APPELLANT

VS.



NO. 2007-KA-1670-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS.

NO. 2007-KA-1670-COA

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APPELLEE

BRIEF FOR THE APPELLEE

COURSE OF PROCEEDINGS BELOW

The Grand Jury for Copiah County, Mississippi indicted Victor Perryman, the defendant, for carjacking and aggravated assault as a habitual offender pursuant to Miss. Code Ann. § 97-3-117, § 97-3-7, and § 99-19-81. CP 7-9. The jury convicted the defendant for carjacking and aggravated assault. T. 161; CP 71-72. Under the habitual offender statute, the court sentenced the defendant to thirty (30) years for carjacking and twenty (20) years for aggravated assault to serve consecutively without a possibility of parole or early release. T. 166; CP 75-76. The defendant appeals his conviction and now appears before this honorable court. CP 87-92.

STATEMENT OF FACTS

Ms. Latoya Dente, a loyal Hinds County Sheriff's Department employee, drove home around six (6) in the morning to kiss her child before school. T. 15-16. As Ms. Dente drove down the street, she spotted her mother driving toward her. T. 19. Ms. Dente and her mother parked in the road. T. 19. Ms. Dente climbed from her vehicle and kissed her son. T. 19.

Ms. Dente continued home. T. 20. Someone called her. T. 20. Ms. Dente recognized him from the neighborhood. T. 20. The man stated he was Victor Perryman, the defendant. T. 20. The defendant requested an application for the Sheriff's Department. T. 21. Ms. Dente regretfully informed the defendant that she had none. T. 21. She promised to drop one off at Denequa's house, the defendant's sister. T. 21, 24, 115. Ms. Dente then told the defendant she needed to leave for work. T. 21. Ms. Dente walked inside and grabbed her duty belt and radio. T. 21.

After retrieving her work items, Ms. Dente climbed into her car and left. T. 21. When Ms. Dente pulled into the street, several CDs slid. T. 21. As Ms. Dente slowed to grab the CDs, her vehicle door suddenly swung open. T. 22. The defendant jumped into her vehicle. T. 22. The felon lunged at Ms. Dente with a sharp object. The defendant slashed Ms. Dente's throat. T. 23-24.

Amazingly, Ms. Dente managed to escape the moving vehicle. When Ms.

Dente hit the ground, she realized she had a gun. T. 24. She fired shots toward her stolen vehicle. T. 25. A bullet pierced a tire. T. 25. The fleeing felon swerved and hit a mailbox. T. 25. Ms. Dente's stolen vehicle started making a weird loud noise. T. 25. Ms. Dente watched the vehicle travel down the street and turn toward Cumberland Apartments. T. 25. Ms. Dente stumbled toward her aunt's house. T. 25.

Linda Coleman, Ms. Dente's aunt and neighbor, heard someone yelling at her door. T. 57. Ms. Coleman opened the door and her wounded niece fell into her house and screamed for a phone. T. 58.

Ms. Dente called 911 while standing in Ms. Coleman's carport. T. 26, 59. Sergeant Brian Reynolds with Crystal Springs Police Department responded to the call. T. 96. Ms. Dente identified the defendant as the carjacker. T. 96.

While speaking to police, both women testified they heard the "humongous" noise of her truck. T. 26, 59. Both women saw the rack on top of Ms. Dente's truck in Cumberland Apartments. T. 26, 64. The booming noise stopped. T. 64.

Soon after the silence, the car thief appeared on a path next to his sister's house. T. 26, 64, 97. He was fidgety. T. 64, 97. Then, the defendant disappeared behind his sister's house. T. 28, 66.

Ms. Tracy Dixon resided at Cumberland Apartments. T. 86. Ms. Dixon walked outside because she heard gunshots. T. 87. Ms. Dixon witnessed Ms. Dente's

black vehicle pull into the complex. T. 87. Ms. Dixon noticed the vehicle had a flat tire. T. 88. Ms. Dixon watched the defendant exit the vehicle, take off his shirt, and wipe down the car with his shirt. T. 88. Ms. Dixon saw the thug flee on the path that led to Ms. Dente's street. T. 88

Malcom Tremble, the defendant's cousin, arrived at Denequa's house. T. 28, 66, 97, 142. Tremble testified Denequa requested him to get the defendant. T. 142. When Malcolm entered the residence, the defendant reappeared from behind the house. T. 28, 67.

The defendant and his cousin tried to depart in Tremble's vehicle. T. 68, 142. The police stopped the vehicle and pulled the defendant from it. T. 68-69, 142-44. Ms. Dente walked up to the defendant, looked him in the face, and identified him as her carjacker. T. 30, 70. Authorities never located the assault weapon. T. 98.

An ambulance rushed Ms. Dente to the emergency room at Hardy Wilson Hospital. T. 30-31, 70. A doctor closed her gash with thirteen (13) stitches. T. 24.

Ms. Dente arrived at the police station after treatment. She reidentified the defendant as her assailant and gave the police her statement. T. 31.

The State indicted the defendant for carjacking and aggravated assault under the habitual offender statute. CP 7-9. The carjacking indictment read as follows:

Victory Perryman did wilfully, unlawfully, feloniously, and knowingly, by force or violence take actual possession of one Toyota Passport from

Latoya Dent, actual owner thereof, contrary to and in violation of Section 97-3-117.

CP 7. The court amended the indictment to reflect the victim's correct name. CP 70.

During the trial, the defendant called Denequa Perryman, the defendant's sister, and Lataunia Catchings, Denequa's roommate, to the stand. T. 115, 133. The defendant tried to establish an alibi. Perryman and Catchings testified the defendant was with them. T. 115, 134. Neither recalled hearing a gunshot during the time the defendant was with them. T. 116, 137.

Ms. Dente pointed the scar on her neck out to the jury. T. 24. The defendant entered Ms. Dente's medical records into evidence. T. 49; EX D-8.

At the end of the trial, the defendant submitted the following jury instruction:

If you, the jury, find from the evidence in this case beyond a reasonable doubt that:

1. Victor Perryman, on or about March 22, 2007, in Copiah County, Mississippi;
 2. Did knowingly or recklessly, by force or violence
 3. Take actual possession of a Toyota Passport from Latoya Dente, the actual owner thereof,
- then you should find that said Victor Perryman guilty of carjacking as to Count I.

CP 53. The court and counsels barely discussed the jury instructions. T. 114. No one objected. T. 114.

The jury convicted the defendant of carjacking and aggravated assault. T. 162; CP 71-72. The judge sentenced the defendant under the habitual offender statute

because of prior grand larceny and burglary convictions. T. 164-65; CP 75-77; EX S-16, S-17. The judge sentenced the defendant to thirty (30) years for carjacking and twenty (20) years for aggravated assault to serve consecutively without possibility of parole or early release. T. 168; CP 75-77.

STATEMENT OF THE ISSUES

I.

Whether the indictment properly informed the defendant of the elements of carjacking?

II.

Whether the jury instruction properly informed the jury of the essential elements of carjacking?

III.

Whether the defendant's counsel effectively assisted with jury instructions?

IV.

Whether the judge legally sentenced the defendant under the habitual offender statute?

V.

Whether the weight of the evidence sufficiently supported the jury's verdict?

SUMMARY OF THE ARGUMENT

An indictment must list the essential elements of the crime. The indictment did inform the defendant of the essential elements of the crime. Since the indictment informed the defendant of the essential elements of the crime, the indictment is valid.

The court must use jury instructions to inform the jury of elements of the crime. Although the jury instruction did not recite the language of the statute precisely, it provided the jury the essential elements of the crime. Therefore, the jury instruction properly instructed the jury.

The defendant's counsel adequately assisted him with the jury instructions. The questioned jury instruction provided the jury every essential element of the crime. Therefore, the counsel effectively instructed the jury. Even if deficient, the defendant did not prove a change would cause a different result. Therefore, he did not prove the deficiency prejudiced him.

The court sentenced the defendant under the habitual offender statute. Under this statute, the court sentences the defendant the maximum allowed in the statute. The defendant should receive the maximum amount of time provided in the statutes.

The weight of the evidence sufficiently supported the evidence. Although the State did not present a weapon, the jury could still find a weapon existed. The jury considered the testimony and determined enough evidence existed to convict the

defendant of aggravated assault.

ARGUMENT

Issue I.

THE INDICTMENT PROPERLY INFORMED THE DEFENDANT OF THE ELEMENTS OF CARJACKING.

The indictment properly informed the defendant of the elements of carjacking. Although the indictment did not recite the statute precisely, the language of the indictment laid out the essential elements. Therefore, the Court should affirm.

When questioning an indictment, the question is a question of law. *Peterson v. State*, 671 So.2d 647, 652 (Miss. 1996); *Spears v. State*, 942 So.2d 772, 773 (Miss. 2006). The appellate court reviews indictments *de novo*. *Peterson*, 671 So.2d at 652.

According to Uniform Rules of Circuit and County Court Practice Rule 7.06,

The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them.

The indictment is legally sufficient if the indictment clearly presents all elements of the crime when read as a whole. *Henderson v. State*, 445 So.2d 1364, 1368 (Miss. 1985).

In *Williams*, the Grand Jury indicted the defendant of carjacking under Miss. Code Ann. § 97-3-117. *Williams v. State*, 772 So.2d 406, 408 (Miss. Ct. App. 2000). The indictment stated the defendant “did recklessly and knowingly by force or

violence, by exhibition of a knife, take a motor vehicle from Farrah Goodman.” *Id.* The Court held “from Farrah Goodman” is equivalent to “from a person’s immediate possession.” *Id.* at 409.

According to precedent, the indictment fully explained all elements of the crime. Pursuant to Miss. Code Ann. § 97-3-117(1) (1972), the crime of carjacking consists of the following:

Whoever shall knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure, or by putting in fear, or attempting to do so, or by any other means shall take a motor vehicle from another person’s immediate possession shall be guilty of carjacking.

Count One of the indictment read as follows:

Victory Perryman . . . did wilfully, unlawfully, feloniously and knowingly, by force or violence take actual possession of one Toyota Passport from Latoya Dent . . . in violation of Section 97-3-117.

CP 7.

The first element of carjacking consists of knowingly or recklessly using force or violence of any means. The indictment stated “did . . . knowingly by force or violence.” The indictment adequately informed the defendant that an element of the crime involved using force or violence.

The next element of the crime consists of taking a motor vehicle. The indictment stated “did . . . take actual possession of one Toyota Passport.” The

indictment adequately informed the defendant that an element of the crime consisted of taking a motor vehicle.

The final element of carjacking consists of taking from a person's immediate possession. The indictment stated "from Latoya Dent." According to *Williams*, stating "from Latoya Dent" is equivalent to stating "from a person's immediate possession." Accordingly, the indictment adequately informed the defendant that an element of the crime consisted of taking from a person's immediate presence.

Although the indictment did not recite the exact language of the statute, the indictment presented the defendant all elements of the crime. Therefore, the Court should affirm on this issue.

Issue II.
**THE JURY INSTRUCTION PROPERLY INFORMED THE JURY
OF THE ESSENTIAL ELEMENTS OF CARJACKING.**

The instruction informed the jury of the essential elements of carjacking. Since the instruction informed the jury of the essential elements, it was proper. The Court should affirm.

According to the standard of review, “[j]ury instructions are to be read together and taken as a whole with no one instruction taken out of context.” *Strickland v. State*, 980 So.2d 908, 922 (Miss. 2008) (quoting *Chandler v. State*, 946 So.2d 355, 360 (Miss. 2006)).

Failure to contemporaneously object to a jury instruction bars appellate review. *Wells v. State*, 849 So.2d 1231, 1237 (Miss. 2003); *Killen v. State*, 958 So.2d 172, 187 (Miss. 2007). The instructions must inform the jury the essential elements of the crime. *Johnson v. State*, 744 So.2d 833, 838 (Miss. Ct. App. 1999). The instructions do not have to recite the statute exactly but sufficiently follow the statute. *Broadstreet v. State*, 45 So.2d 590, 592 (Miss. 1950).

In *Williams*, the trial court gave the following instruction to the jury:

[S]hould you find from the evidence in this case, beyond a reasonable doubt, that:

1. On or about November 9, 1997 in Lauderdale County, Mississippi,
2. The Defendant, Antonio Williams, acting alone or with another, did knowingly or recklessly by force or violence, by the exhibition of a knife,

3. Take a motor vehicle from another person's immediate actual possession, namely Farrah Goodman then it is your sworn duty to find the Defendant, Antonio Williams, guilty of armed carjacking.

Williams, 772 So.2d at 410. The Court held the instruction informed the jury of carjacking but not armed carjacking. *Id.* The Court also held that “from Farrah Goodman” was equivalent to “from person’s immediate possession.” *Id.* at 409.

Following precedent, failure to object contemporaneously barred appellate review of the jury instruction. First, the record indicates barely any discussion of instructions. No one objected. T. 114 Second, the defense actually submitted the instruction. CP 53-54; RE 13. Since no one objected to the instruction and the defense submitted it, appellate review of the instruction is procedurally barred.

Even if reviewed, the jury instruction adequately instructed the jury on the essential elements of the crime. The jury instruction is as follows:

If you, the jury, find from the evidence in this case beyond a reasonable doubt that:

1. Victor Perryman, on or about March 22, 2007, in Copiah County, Mississippi;
 2. Did knowingly or recklessly, by force or violence
 3. Take actual possession of a Toyota Passport from Latoya Dente, the actual owner thereof,
- then you should find the said Victor Perryman guilty of carjacking as to Count I.

CP 53; RE 13.

According to § 97-3-117, the first element of carjacking consists of knowingly

or recklessly using force or violence of any means. The second requirement in the instruction required the jury to find the defendant “did knowingly or recklessly, by force or violence.” Therefore, the instruction satisfied the first element in the statute.

The second element in the statute required the defendant to take a motor vehicle. The third part of the jury instruction required the jury to decide if the defendant took “actual possession of a Toyota Passport.” Since a Toyota Passport is a motor vehicle, the instruction satisfied the second element required by the statute.

The last element in the statute required the defendant to take for another person’s actual possession. The third part of the jury instruction required the jury to decide if the defendant took “from Latoya Dente.” According to *Williams*, “from Latoya Dente” is equivalent to saying “from person’s immediate possession.” Since the two phrases are equivalent, the jury instruction satisfied the last element required by the statute.

The instruction informed the jury of all the essential elements of the statute. Therefore, the jury instruction sufficiently instructed the jury. The Court should affirm on this issue.

Issue III.

THE DEFENDANT'S COUNSEL EFFECTIVELY ASSISTED HIM WITH JURY INSTRUCTIONS BECAUSE IT PROPERLY INFORMED THE JURY THE ESSENTIAL ELEMENTS AND ANY CHANGE IN INSTRUCTIONS WOULD NOT HAVE CHANGED THE OUTCOME.

The defendant's counsel effectively assisted him when he submitted the jury instructions. The jury instructions properly instructed the jury of the elements, so no deficiency existed. The defendant does not prove a different conclusion would have resulted, so no prejudice existed. Therefore, the Court should affirm.

As decided by the United States Supreme Court, the standard of review for ineffective counsel is set out as a two-part test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must prove the following: (1) the counsel performed deficiently and (2) the deficiency prejudiced the defendant. *Id.*

A rebuttable presumption exists where an attorney's behavior lies within the "ambit of reasonable professional standards." *Hulburt v. State*, 803 So.2d 1277, 1279 (Miss. 2002) (quoting *McQuarter v. State*, 574 So.2d 685, 687 (Miss. 1990)). To rebut the presumption, the defendant must prove the proceedings would have ended differently. *Wynn v. State*, 964 So.2d 1196, 1200 (Miss. Ct. App. 2007); *Jones v. State*, 962 So.2d 1263, 1274 (Miss. 2007).

In *Jones*, the defendant's attorney did not instruct the jury on the lesser-included offense. *Jones*, 962 So.2d at 1274. The Court held this was within the

attorney's trial strategy and acceptable. *Id.*

Following precedent, the defendant proved neither his attorney's performed deficiently nor a deficiency prejudiced the defendant. The defendant alleges that Ms. Harrison ineffectively assisted him with jury instructions. T. 1; CP 56; RE 13. The defendant alleges stating "from Latoya Dente" instead of "from another person's immediate possession" prejudiced him.

Ms. Harrison's effectively assisted the defendant. The jury instruction provided the jury with every element required in the statute. The defendant argues "from Latoya Dente" did not instruct the jury that they needed to determine if he took "from another person's immediate possession." According to precedent in *Williams*, "from Latoya Dente" is equivalent to "from a person's immediate possession." Therefore, the jury received the essential elements of the crime. Since the jury received the essential elements, Ms. Harrison effectively assisted the defendant.

Even if the Court determines deficiency existed, the instruction did not prejudice the defendant. To find prejudice, the defendant must prove the proceeding would have ended differently had the jury received an alternative instruction. The defendant cannot prove inserting "from Latoya Dente's immediate possession" would change the outcome. Therefore, the jury instruction did not prejudice the defendant.

Ms. Harrison adequately instructed the jury. The jury instruction did not

prejudice the defendant. The Court should affirm on this issue.

Issue IV.

**THE DEFENDANT'S SENTENCE SHOULD BE THE MAXIMUM
ALLOWED BY THE STATUTE SINCE HE WAS SENTENCED
UNDER THE HABITUAL OFFENDER STATUTE.**

“Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute.” *Isom v. State*, 928 So.2d 840, 850 (Miss. 2006).

In *Williams*, both the indictment and jury instruction charged the defendant with carjacking. *Williams*, 772 So.2d at 411. The court sentenced the defendant under armed carjacking. *Id.* The Court reversed and remanded for resentencing. *Id.* In *Gilmore*, the jury convicted the defendant of armed robbery. *Gilmore v. State*, 772 So.2d 1095, 1099 (Miss. Ct. App. 2000). The Court found the evidence only supported a conviction of the lesser-included crime of simple robbery. *Id.* The Court reversed the conviction and remanded for resentencing for the lesser-included offense. *Id.*

We acknowledge the jury convicted the defendant for carjacking not armed carjacking. We concede the maximum sentence for carjacking is fifteen (15) years according to § 97-3-117. Under the habitual offender statute, the defendant receives the maximum time allowed in the statute without possibility of parole or early release. The case should be reversed and remanded for the defendant to be resentenced to fifteen (15) years for carjacking.

Issue V.
**THE WEIGHT OF THE EVIDENCE SUFFICIENTLY
SUPPORTED THE JURY'S VERDICT.**

The weight of evidence sufficiently supported the verdict of the jury. Therefore, it would be conscionable to uphold the verdict. Since it would be conscionable to uphold the verdict, the Court should not overturn the verdict.

The Court's standard of review for sufficiency of evidence is as follows:

If a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusion on every element of the offense," the evidence will be deemed sufficient.

Bush v. State, 895 So.2d 836, 843 (Miss. 2005) (citing *Edwards v. State*, 469 So.2d 68, 70 (Miss. 1985)).

The Court regards the evidence in the light most favorable to the verdict. *Brown v. State*, 890 So.2d 901, 917 (Miss. 2004); *Boyd v. State*, 977 So.2d 329, 336 (Miss. 2008). The Court should only overturn the jury's verdict "when it is so contrary to the overwhelming weight of evidence that allowing it to stand would sanction an unconscionable injustice." *Boyd*, 977 So.2d at 336.

When a statute requires use of a deadly weapon, the State does not have to produce the actual tool. *Moore v. State*, 933 So.2d 910, 921 (Miss. 2006). The jury is free to consider the absence of the evidence when deliberating. *Id.*

In *Moore*, the State never produced the weapon. The Court held the claim was without merit. *Id.* In *Davis*, the State also never produced the weapon. *Davis v. State*, 909 So.2d 745, 752 (Miss. Ct. App. 2005). The Court held sufficient evidence supported the jury verdict. *Id.*

Following precedent, sufficient evidence supported the jury verdict. No one ever found the knife or razor that sliced Ms. Dente's throat. T. 98. Ms. Dente testified something sharp penetrated her skin. T. 24. Ms. Dente required thirteen stitches to close the gash. T. 24. The jury saw her scar. T. 24. The jury saw her medical records. T. 49; EX D-8. The State presented sufficient evidence for the jury to decide if the defendant used a deadly weapon. Although the State entered no weapon into evidence, the jury decided the defendant used a deadly weapon.

Since the State presented sufficient evidence for the jury to ponder whether the defendant used a deadly weapon, it would be conscionable to affirm this decision. Since it would be conscionable, the Court should affirm.

CONCLUSION

First, although the indictment did not follow the precise language of the statute, it contained all essential elements of carjacking. By containing all essential elements, the indictment informed the defendant of all elements. Because the indictment informed the defendant of all elements, the indictment was proper. Therefore, the Court should affirm on the indictment issue.

Next, the jury instruction informed the jury of all required elements of carjacking. Furthermore, the defendant actually submitted the instruction. Since there was no contemporaneous objection and the jury knew the required elements, the Court should affirm on the jury instruction issue.

Additionally, the defendant's counsel effectively assisted him. The jury instruction adequately instructed the jury on the essential elements. Since the jury instruction adequately instructed, the counsel performed sufficiently. Even if the Court found deficiency, the defendant did not prove that another jury instruction would have changed the outcome. Since the outcome would not have change, the deficiency did not prejudice the defendant. Since the counsel did not assist the defendant deficiently nor did the instruction prejudice the defendant, the counsel effectively assisted the defendant.

Next, the defendant should receive a sentence of fifteen (15) years for

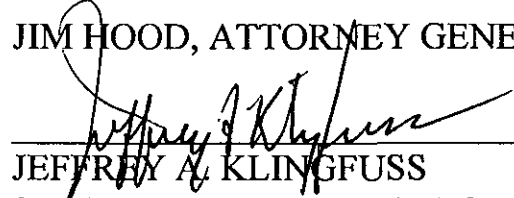
carjacking and (20) years for aggravated assault without parole or early release.


Finally, the State did not have to present an actual weapon into evidence for jury to find the defendant possessed a deadly weapon. Since the jury convicted the defendant, they found sufficient evidence to find a weapon existed. Since the weight of the evidence sufficiently supported the use of a deadly weapon, the Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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:

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This the 19th day of June, 2008.



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