IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DECARLOS ANTONIO MOORE — APPELLANT

VS. — NO. 2007-KA-2040

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DECARLOS ANTONIO MOORE **APPELLANT**

vs. **CAUSE No. 2007-KA-02040-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Harrison County, Mississippi, Second Judicial District, in which the Appellant was convicted and sentenced for his felonies of **SEXUAL BATTERY**, **KIDNAPING**, and **AGGRAVATED ASSAULT**.

STATEMENT OF FACTS[1]

On February 14th, 2006, nine-year-old JDP was playing outside with her siblings and other children. The playground was located a short distance from the apartment building in which JDP lived. When it began to get dark, JDP's siblings returned to the apartment. When her father saw that JDP was missing, he sent one of her brothers to look for her. He found her coming up the stairs toward the apartment. Her father testified that she was bruised, with her eyes red and her face swollen. He further stated that she was bleeding and that her clothes were "half on."

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[1] The Appellant was indicted, tried and convicted of kidnaping, aggravated assault and sexual battery. Since the Appellant has challenged the sufficiency of the evidence only with respect to the aggravated assault conviction, we do not think it necessary to set out in detail the evidence in support of sexual battery and kidnaping.

(R.Vol. 2, pp. 107-09). JDP was taken by ambulance to the hospital and remained there overnight. (R.Vol. 2, p. 111).

JDP testified that on that afternoon, Decarlos Moore approached her and offered her chocolate. She followed him into an apartment downstairs from her own. Moore grabbed her and took her into a bedroom (R.Vol. 2, pp. 119-22), locking the front door. (R.Vol. 2, p. 132). Moore then pulled down JDP's pants and panties. No longer wearing his own pants, he then got on top of her and "was going up and down." She saw two boys outside and tried to scream, but Moore put his hand over her mouth. JDP testified that at this point, Moore was on top of her "front." He got off of her and she attempted to walk out of the bedroom. Moore then put his hand over JDP's neck and choked her. She fell to the floor and he "tried to turn [her] neck all around." She then "fell asleep." JDP awoke, still on the floor, and Moore was pulling her pants up. He then dragged her out the sliding door and into the woods near the apartment building. (R.Vol. 2, pp. 123-25). JDP's friend Kieria, a resident of the same apartment complex identified Moore as the man she had seen pulling JDP behind the building that afternoon. (R.Vol. 3, p. 152). After seeing Moore leave, JDP saw her brother and walked back to the apartment building. (R.Vol. 2, p. 126). Kieria also witnessed JDP walking back from behind the building and testified that her pants had been unzipped, she was bleeding, and her eyes were puffy. She had grass in her hair, which was "messed up." (R.Vol. 3, pp. 154-55).

At the hospital, JDP told the doctors and nurses that her face, neck, front, and back were hurt. She further indicated that by "front" and "back," she meant her "private areas." At the hospital, her hair and face were photographed. (R.Vol. 2, pp. 127-28). Her face, neck, and eyes were "messed up" from the choking, her nose was bleeding, and her mouth was hurt and bleeding from having his arm against it. She testified that he put his penis in "the front part" and that it

hurt. (R.Vol. 2, pp. 129-30). JDP had petechiae and hemorrhaging to her eyes. According to the nurse's testimony, petechiae is "a serious condition which is a rupture of the small blood vessels at the surface of the skin." This is caused by an increased pressure such as that from strangulation. The nurse stated that she would consider petechiae a serious bodily injury. JDP also had blood on her nose and in her mouth. (R.Vol. 3, pp. 177-78). She had an abrasion inside her mouth. (R.Vol. 3, p. 188). One of her braids appeared to be missing its beads. (R.Vol. 3, p. 263). Police found nearly identical beads in the bedroom of the apartment into which Moore had taken JDP (R.Vol. 3, pp. 265-66).

SUMMARY OF ARGUMENT

I. THE JURY WAS PROPERLY INSTRUCTED UPON THE ELEMENTS OF THE FELONY OF AGGRAVATED ASSAULT

II. THE EVIDENCE OF AGGRAVATED ASSAULT WAS SUFFICIENT TO SUSTAIN THE VERDICT

III. THE APPELLANT HAS FAILED TO OVERCOME THE PRESUMPTION THAT THE TRIAL COURT PROPERLY ADMINISTERED ITS DUTIES

ARGUMENT

I. THE JURY WAS PROPERLY INSTRUCTED UPON THE ELEMENTS OF THE FELONY OF AGGRAVATED ASSAULT

The appellant argues that the instructions on aggravated assault to the jury should have included the words "means likely to produce death or serious bodily injury," an element of aggravated assault found in Miss. Code Ann. Section 97-3-7(2)(b). However, the appellant was indicted and tried for to form of aggravated assault set out under Miss. Code Ann. Section 97-3-7(2)(a). The indictment cites Section 97-3-7(2)(a) as the statute under which the appellant was charged. Furthermore, it is titled "AGGRAVATED ASSAULT" and alleges that the Appellant "did unlawfully, feloniously, willfully and purposely, cause serious bodily injury to J.D.P., by

choking and punching the said J.D.P." (R.Vol. 1, p. 9). The indictment was sufficient to notify the Appellant of the crime with which he was charged. *Harbin v. State*, 478 So. 2d 796, 798 (Miss. App. 2002).

It is true that when the charge is aggravated assault under Section 97-3-7(2)(b), there is the requirement that the injury be caused by a deadly weapon or by "means likely to produce death or serious bodily injury." However, under Section 97-3-7(2)(a) there is no such requirement. Subsection (2)(a) requires that the accused either cause or attempt to cause serious bodily injury to another. It also requires that the accused do so either purposely, knowingly *or* recklessly under circumstances manifesting extreme indifference to the value of human life. In the words of the Mississippi Supreme Court, "[a]s can be readily seen, one violates the statute [Section 97-3-7(2)(a)] by simply attempting to cause serious bodily injury. One also violates the statute when one causes serious bodily injury either intentionally or 'recklessly under circumstances manifesting extreme indifference to the value of human life[.]'" *Harris v. State*, 642 So. 2d 1325, 1327 (Miss. 1994)(clarifying the statute "in the interest of the fair administration of justice"). There is no mention of the means used to cause the injury in subsection (2)(a) and there is no specific requirement thereof.

The appellant cites *Jenkins v. State*, 913 So. 2d 1044, 1048 (Miss. App. 2005) for the proposition that either a deadly weapon or means likely to produce death or serious bodily injury must be used in order for a finding of aggravated assault to be justified. The *Jenkins* court goes on to clarify that Section 97-3-7 is "abundantly clear that there are two methods in which a person may be found guilty of aggravated assault, hence the use of subsections (a) and (b)." *Jenkins*, 913 So. 2d at 1049. Under subsection (2)(a), 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[.]" Miss. Code Ann. § 97-3-7(2)(a). Subsection (2)(b) aggravated assault occurs when a person "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[.]" Miss. Code Ann. § 97-3-7(2)(b). Jenkins, however, was charged under Section 97-3-7(2)(b), unlike the Appellant here.

The appellant also cites *Reddix* ,731 So. 2d 591 (Miss. 1999) for the proposition that it is necessary to allege the use of either a deadly weapon or a means likely to cause serious bodily harm as elements of aggravated assault. However, like *Jenkins, supra,* Reddix was charged under subsection (2)(b) of the aggravated assault statute. The case at bar involves subsection (2)(a), which, according to the text itself, clearly does not require an allegation of the use of a deadly weapon or means likely to cause death or serious bodily injury.

The appellant in this case was charged with aggravated assault under Mississippi Code Annotated Section 97-3-7(2)(a). Because use of a deadly weapon or means likely to cause serious bodily harm was not a required element of aggravated assault under Section 97-3-7(2)(a), there was no error in the exclusion of such language from the jury instructions. The jury was therefore properly instructed.

II. THE EVIDENCE OF AGGRAVATED ASSAULT WAS SUFFICIENT TO SUSTAIN THE VERDICT[2]

The appellant contends that because the jury was improperly instructed as to the elements of aggravated assault, there is no way to determine whether the jury believed beyond a reasonable doubt that the evidence proved those elements. However, the language that the appellant contends was a required element of aggravated assault was not erroneously omitted from the jury instructions. The language is found in an entirely different subsection from that under which the appellant was charged. The omission of the language did not render the jury instructions deficient. Other than alleging that the jury instruction was an incorrect statement of law, the Appellant does not attempt to demonstrate that the evidence was insufficient to support a verdict of guilty. Since he has presented no argument as to this, the Second Assignment of Error should be regarded as having been abandoned by him. *Sumrall v. State*, 758 So.2d 1091 (Miss. Ct. App. 2000).

The standard for evaluating whether a verdict is not supported by sufficient evidence is well established. In considering a motion for a judgment not withstanding the verdict, the trial court must weigh all evidence in the light most favorable to the verdict and consider all favorable, reasonable inferences from that evidence. If reasonable, fair-minded men could not have found the defendant guilty beyond a reasonable doubt, the motion should be granted. The motion should be denied if, bearing in mind the reasonable doubt standard, reasonable men might, in the exercise of impartial justice, reach differing conclusions. *May v. State*, 460 So. 2d

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[2] In the Second Assignment of Error, the Appellant challenges the sufficiency of the evidence as to his conviction for aggravated assault only. Since he brings no such challenge as to his other convictions, we do not consider it necessary to discuss the evidence in support of them. Needless to say, though, the evidence overwhelming demonstrated his guilt for them.

778, 781 (Miss. 1984).

During the trial, JDP testified that the appellant choked her and that she "fell asleep." (R.Vol. 2, pp. 124-25) It is reasonable to infer from this that JDP was choked so much that she temporarily fell unconscious. The nurse who assisted in JDP's treatment at the hospital testified that this choking also caused petechiae, rupturing of small blood vessels under the surface of the skin. When asked if she considered petechiae a serious bodily injury, the nurse answered in the affirmative. JDP also had hemorrhaging to her eyes. (R.Vol. 3, p. 178). JDP further stated that he twisted her neck around and that he put his hand over her mouth to prevent her from screaming for help. (R.Vol. 2, p. 123). JDP was found to have an abrasion in her mouth caused by her teeth. (R.Vol. 3, p. 188). Finally, the appellant dragged JDP out of the room and into the woods near the apartment building. (R.Vol. 2, p. 125). JDP had to stay overnight at the hospital.

There is little doubt that JDP suffered serious bodily injury at the hands of the appellant. Again, the standard for determining sufficiency of the evidence requires considering all evidence and reasonable inferences in the light most favorable to the State. There is sufficient evidence to support the guilty verdict. The trial court did not err in denying the motion for a judgment not withstanding the verdict.

III. THE APPELLANT HAS FAILED TO OVERCOME THE PRESUMPTION THAT THE TRIAL COURT PROPERLY ADMINISTERED ITS DUTIES

The appellant contends that the omission from the record of the oath administered to the jurors indicates that it was not administered. He readily admits that the objection was waived when it was not made during the trial or in his motion for a new trial. As a result, the appellant must prove that the court below committed plain error. In order to find plain error, the appellant must show that the oath was never given to the jury. *Lawrence v. State*, 928 So. 2d 894, 897 (Miss. App. 2005). The appellant has failed to establish that the jury was not administered the oath. Furthermore, the appellant makes no argument that such failure to administer the oath would have been error which caused a manifest miscarriage of justice or that such error would have substantially affected his substantive or fundamental rights. In order for an appellant to prevail because of an omitted jury oath, *Lawrence* requires that the reviewing court find all three elements. *Id.* Consequently, the Third Assignment of Error is barred for review.

Assuming for argument that the Third Assignment of Error is properly before the Court, there is no merit in it.

Though it is true that the transcript of the record does not contain a jurors' oath, there are references made concerning the giving of the oath. Jury instruction C-1 read in pertinent part "[w]hen you took your places in the jury box, you made an oath that you would follow and apply these rules of law to the evidence and in this way arrive at a verdict."(R.Vol. 1, p. 94). The trial judge read this instruction aloud to the jury before they began deliberations. (R.Vol. 4, p. 345). The State mentioned the oath in its closing arguments: "you have to base your verdict under your oath on what you heard." (R.Vol. 4, p. 376). In addition, the judgment of the court refers to the jury as having been "empanelled, chosen, and accepted." (R.Vol. 1, p. 93). This implies that the

jury was empanelled according to the law. This would include administering the oath to the members of the jury. There is nothing in the trial record to contradict any of these references to the jury oath or to otherwise indicate that such oath was not given. The appellant has failed to offer sufficient affirmative proof that the oath was not given. He has not overcome the presumption that the court below properly fulfilled its duties and administered the required jury oath.

In *Bell v. State*, 360 So. 2d 1206, 1215 (Miss. 1978), the Mississippi Supreme Court held that there is a rebuttable presumption that the trial judge performed his duties according to the law. The Court has long been reluctant to find that the juror oath was not administered based solely on its absence from the record. In *McMillan v. State*, 2 So. 2d 823, 824 (Miss. 1941), the Court found that "[t]he phrase, 'having been organized', carries with it the idea that the jury was legally organized-the statutory oath administered and the other things done required by law." The language "empanelled, chosen, and accepted" in the judgment below carries similar implications.

Overcoming the presumption that the oath was administered requires more than merely showing that the oath is not found in the record. In *Biggs v. State*, 942 So. 2d 185, 192 (Miss. App. 2006), the Mississippi Court of Appeals determined that a "sole mention of the oath in the record indicate[d] that the oath was administered." In *Carlisle v. State*, 936 So. 2d 415, 422 (Miss. App. 2006), the Mississippi Court of Appeals found a jury instruction identical to C-1, along with a reference to the oath in the judgment, sufficient to withstand an attempt to rebut the presumption that the oath was given. In both *Biggs* and *Carlisle*, the court noted that there was nothing in the record to contradict the presumption that the oath was given and affirmed the verdicts of the trial courts. *Biggs*, 942 So. 2d at 192; *Carlisle*, 936 So. 2d at 422. In *Lawrence*, *supra*, the court found a boilerplate mention of the oath along with references to the oath made

by counsel and the court sufficient to support the presumption that the oath was given. *Lawrence*, 928 So. 2d at 897.

The appellant has failed to overcome the presumption that the court below properly fulfilled its duty to administer the jury oath.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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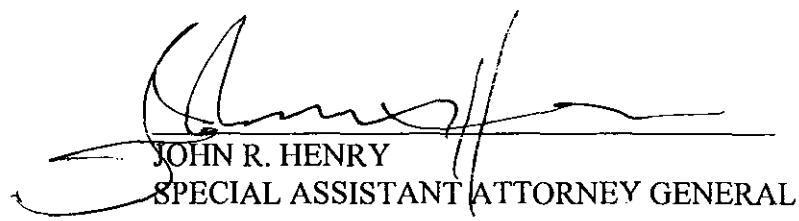
This the 18th day of June, 2008.



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