IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI



DECARLOS ANTONIO MOORE — APPELLANT

V. — NO. 2007-KA-2040-SCT



STATE OF MISSISSIPPI — APPELLEE

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# BRIEF OF THE APPELLANT

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

**DECARLOS ANTONIO MOORE** **APPELLANT**

**V.** **NO. 2007-KA-2040-SCT**

**STATE OF MISSISSIPPI** **APPELLEE**

## 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. Decarlos Antonio Moore, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Jerry O. Terry, Circuit Court Judge

This the 24th day of March, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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## STATEMENT OF THE ISSUES

**ISSUE NO. 1: WHETHER THE JURY WAS PROPERLY INSTRUCTED UPON THE ELEMENTS OF THE CRIME OF AGGRAVATED ASSAULT.**

**ISSUE NO. 2: WHETHER THE EVIDENCE OF AGGRAVATED ASSAULT WAS SUFFICIENT TO SUSTAIN THE VERDICT.**

**ISSUE NO. 3: WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO ADMINISTER THE REQUIRED OATH TO THE JURY?**

## STATEMENT OF THE CASE

This case proceeds from the Circuit Court of Harrison County, Second Judicial District, Mississippi, and a verdict of guilty for the crimes of kidnapping, aggravated assault and sexual battery as an habitual offender (M.C.A. § 99-19-83) against Decarlos Antonio Moore and a resulting sentences of life without parol to run consecutively following a jury trial commenced September 17, 2007, Honorable Jerry O. Terry, Circuit Judge, presiding. Decarlos Antonio Moore is presently incarcerated with the Mississippi Department of Corrections.

## FACTS

Trial testimony began with Justin P.[1], father of the victim. He lived with his fiancee and five children at Keesler Bay Villas, in Biloxi, Mississippi. On the evening of February 14, 2006, three of Justin P.'s children were outside of the apartment, playing. (T. 106-107) When It got dark, only two of the children returned home. As a search for the missing child began, she returned home. The child, J.P. was bruised and bloody, with her "[c]lothes half on." (T. 109)

The Biloxi Police Department was notified and J.P. was taken to the hospital.

Cross examination revealed that Decarlos Antonio Moore, hereinafter referred to as "Moore", lived with Felicia Spikes and two children in a nearby apartment. J.P. had played with one of the children, Diamond. Moore had been living there about one year. Justin P. had met Moore prior to the crime.

The victim, J.P. testified that she was born on March 9, 1996, and attended elementary school. She lived with her family at Keesler Bay Villas at the time of the crime. She was outside playing when she was offered chocolate by Moore. (T. 118-121) She went with Moore to Diamond's apartment, where Moore grabbed her, took her into Diamond's room and pulled down her pants. Moore removed his pants, climbed on top and began "going up and down." (T. 122-123)

Moore choked J.P. when she tried to leave and "tried to turn her neck all around." (T. 124) As Moore choked her, she "fell asleep." (T. 125) As she came to, Moore began to drag her outside and lay her behind a "big log" in a wooded area. J.P. got up and saw Moore peaking out the window at her. She then walked back to her apartment.

She told her parents what happened and was taken to the hospital. She was in pain, especially

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[1]In an effort to protect the identity of the victim, only the initial for her last name will be used in this brief.

her neck. J.P. also was suffering from pain in her face, eyes, nose and genital region.

Two last details elicited were that Moore put his penis in her front part and he had locked the door to the apartment when he took her in. (T. 131-132)

When subjected to cross examination, she could not recall a prior statement that she was grabbed and drug into the apartment, as contrasted with walking in on her own to get chocolate. She described how she was dragged into the wooded area (T. 139-141) and confirmed that Moore put his "stuff" into her "stuff." (T. 141)

One of the children playing in the play area that day testified. She was twelve years old and lived in the Keesler Bay Villas. J.P. lived in her building. She saw J.P. playing and saw Moore pulling J.P. behind the building. She latter saw coming from behind the building. J.P. was bleeding. Her eyes were puffy, her pants unzipped. (T. 150-155)

The examination by defense counsel uncovered that the little neighbor girl went and told her mother what she had seen. Her mother told her to go tell the victims mother, but she did not know where to find her. (T. 158)

Police Dispatcher, Teresa Goldworthy, authenticated 911 tapes which were played for the jury. In the tapes Moore called 911. Moore told Goldworthy his cousin called him and told him the police were at his apartment, that his name was being "scandalized", and that someone said he had "messed" with someone. He claimed to be in Jackson County with his girlfriend. The police said they would come to talk to him. He said he was with his girlfriend and her mother and they would drive in to the police department. At the end of the tape, Moore's arrest was audible, where he was told to put his hands into clear view.

Jesse Calvert, an officer with the Biloxi police, testified next, that he was a responder to the scene, and that he found Moore on the floor of the bathroom, talking on the cell phone, and Moore

was arrested. He was told to put his hands into clear view. Moore explained he was talking to the police on the phone.(T. 169-172)

Stacy Battaya, a registered nurse, examined J.P. the night of the assault. She had been trained in forensic reporting. J.P. told that her "stuff" and her "butt" hurt. Battaya observed petechia, which, she explained, was the rupture of small blood vessels in the eyes. Petechia can be caused by strangulation. Battaya also notice blood around J.P.'s mouth.(T. 175-179) Battaya noticed "moist secretions" on J.P.'s legs and anus. She took swabs for a rape kit.(T. 180-182)

J.P.'s hymen was intact, but Battaya could not say that an intact hymen was indicative of lack of penetration. J.P. was unsure if she had been penetrated. There was no anal dilation or bleeding.

At this point in the trial, the State objected that the witness was being crossed examined on a document that she did not fill out. (T. 193) Battaya had referred to the same document during her direct examination and the trial court ultimately admitted the document into evidence, as requested by the defendant. (T. 194-203, 248-255) While the jury was out, as the court considered the use of the document, a "Polk hearing" was held on the reliability of the impending DNA evidence. The trial court found that DNA evidence from Reliagene Technologies to be admissible.(T. 246)

Redirect of Battaya indicated that the Vaginal swabs taken, were taken from within the labia and that the anal swabs were inserted in the anus. Battaya also explained the lack of anal dialation, saying the anus is elastic.(T. 256-257)

Michael Reid with the Biloxi police, testified he found beads at the scene that were consistent with the beads woven in J.P.'s hair. (T.261-266) He was cross examined on Moore's cell phone recovered in the bathroom at the scene. There were a total of thirteen calls, including two to Biloxi Police Department. He did not investigate where the other calls went. (T. 261-273)

Blood was drawn from Moore by a R.N. at the Gulf Coast Medical center. (T 276-2790 Officer Susan Kimball delivered all the samples to ReliaGene. (T. 281) She testified Moore was twenty-four (24) years of age. On cross examination she testified to having observed the forensic interviews with J.P. and the child that observed J.P. being dragged around the building. The child had seen a shiny object in the man's hands. In her interview, J.P. spoke of Moore moving up and down on her with "his penis in her private parts." (T. 281-286). Redirect on this interview revealed that both victim and witness had positively identified Moore. (T. 286)

Gina Pineda, accepted as an expert, testified that she had reviewed the test/electronic data on the DNA testing done by ReliaGene. The vaginal swab contained sperm which was Moore's, the anal swab produced DNA consistent with Moore's paternal line, including Moore and males in his family line. The defense was not allowed to cross examine this witness on a DNA "chart that was not in evidence and not produced by this witness. (T. 323)

The state rested upon these proofs and Moore, after having been advised on his rights by the trial court, chose not to testify. No other proofs were offered by the defense.

Moore's counsel objected to instruction S-2A as being different from the indictment. The indictment alleged that Moore did "cause serious bodily injury..." ( T.331-333, C.P. 9, R.E. 8-10) The substituted jury instruction required the jury to find that Moore "did cause or attempt to cause serious bodily injury..." (C.P. 106, R.E.15) The trial court apparently sensed this change was error, without recognizing the error, when the Judge ruled in favor S-2A saying: "If I'm wrong then the State's wrong." (T. 333)

## SUMMARY OF THE ARGUMENT

When the State substituted elements instruction S-2A, it induced two errors, first that the substituted instruction, omitted a critical element of the crime of aggravated assault. The jury not

being instructed on an element of a crime cannot be said to have been able to conclude such an element beyond a reasonable doubt. Hence the jury instruction was errant, and the jury verdict could not be founded upon sufficient evidence as a matter of law.

Other than a boilerplate reference found in the Court's Model Jury Instruction, given in every criminal case, this record is devoid of any grounds to assume that this jury was properly sworn. As such, this verdict is void.

## ARGUMENT

### ISSUE NO. 1: WHETHER THE JURY WAS PROPERLY INSTRUCTED UPON THE ELEMENTS OF THE CRIME OF AGGRAVATED ASSAULT.

An element of the crime of aggravated assault under part (b) of the statute is the use of a deadly weapon or other means likely to produce death or serious bodily harm.

> (2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm;

Miss. Code Ann. § 97-3-7 Under the statute it is not enough to charge that the defendant caused or attempted to cause bodily injury by choking and punching, as the jury was instructed in S-2A; the jury as a matter of law must find that punching or choking is a "means likely to produce death or serious bodily injury." As made implicitly clear in the following case the use of either a deadly weapon or means likely to produce death or serious bodily injury must be proved, and thus the jury must be so instructed.

> It is not necessary under § 97-3-7(2)(b) that the use of hands and fists constitute the use of a "deadly weapon;" rather, it is enough if their use constitutes a "means likely to produce [either] death or serious bodily harm." Nor is it necessary under this section for the State to prove the victim suffered "serious" bodily injury. **Mere "bodily**

> **injury" is sufficient so long as it was caused with "other means likely to produce death or serious bodily harm."**
> (Emphasis added)

*Jenkins v. State,* 913 So.2d 1044, 1048 (Miss. App. 2005) The Mississippi Court of Appeals has recently affirmed that the elements of aggravated assault are clearly enunciated in the statute which "sets forth the elements of aggravated assault. It reads, in pertinent part: A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.... "*Russell v. State,* 924 So.2d 604, 607 (Miss. App. 2006) Similarly, the Mississippi Supreme Court has defined the three elements of the crime of aggravated assault as: " the elements of aggravated assault with a deadly weapon consist of (1) attempting to cause or purposely or knowingly causing bodily injury; (2) to another; (3) with a deadly weapon or other means likely to produce death or serious bodily harm." *Reddix v. State,* 731 So.2d 591, 592 (Miss.1999)

It is hornbook law that the instructions to the jury must contain all the elements of a crime. The Mississippi Supreme Court has addressed the necessity of a jury instruction containing all the elements of the crime charged in a remarkably similar circumstance.

> [A]mended indictments... must clearly and correctly state the charge and include all necessary elements of the offense."
>
> ****
>
> "Because the state has to prove each element of the crime beyond a reasonable doubt, then the state also has to ensure that the jury is properly instructed with regard to the elements of the crime. *Hunter* v. *State,* 684 So.2d 625, 635 (Miss.1996).
>
> In this case, it is impossible to know if the jury found that the state proved each element of the crime beyond a reasonable doubt, because the jury was not informed that one of the elements of the crime is lack of consent. Because this element was missing from the jury

> instruction, the trial court failed to properly instruct the jury on the crime of sexual battery.

*Goodin v. State*, ___So. 2d___, 2008 WL 732700, 2 (Miss. March 20, 2008)

Failure to instruct the jury as to the elements of crime is fundamental error requiring reversal. "We conclude the jury was not instructed as to the essential elements of aggravated assault. Consequently, the jury had no way to determine whether the State had met its burden of proof. Therefore, we reverse the judgment of the circuit court and remand the case for a new trial." *Reddix, Id.* at 593

Accordingly the verdict in this charge must be reversed.

**ISSUE NO. 2: WHETHER THE EVIDENCE OF AGGRAVATED ASSAULT WAS SUFFICIENT TO SUSTAIN THE VERDICT.**

As set forth above, said argument being fully adopted herein, the jury verdict cannot as a mater of law be sufficient to all the elements where the jury was not properly instructed as to all the elements. Further the reviewing Court cannot determine whether sufficient facts were proven to sustain the verdict.

> "[i]t is axiomatic that a jury's verdict may not stand upon uncontradicted fact alone. The fact must be found via jury instructions correctly identifying the elements of the offense under the proper standards." "Where the jury had incorrect or incomplete instructions regarding the law, our review task is nigh unto impossible and reversal is generally required."

*Hunter , Id.* at 636. This conclusion has been recently reaffirmed. "[I]t is impossible to know if the jury found that the state proved each element of the crime beyond a reasonable doubt, because the jury was not informed that one of the elements of the crime is lack of consent." *Goodin, Id.* at 3.

Moore moved for directed verdict at the close of the State's case and timely filed his Motion for A New Trial (which requested a judgement not withstanding the verdict) and thus the trial court erred in failing to grant Moore the requested judgement not withstanding the verdict. *Lee v. State*,

469 So. 2d 1225 (Miss. 1985)

The jury verdict being founded upon insufficient evidence, this count should be reversed and rendered.

**ISSUE NO. 3: WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO ADMINISTER THE REQUIRED OATH TO THE JURY?**

The reviewing Courts have been presented with multiple occasions of a transcript which lacks any positive direct affirmance that the jury had been properly sworn to try the issue at bar. In each such instance, the Court has utilized the presumption that a jury has been properly sworn by depending on the usual references that the jury was administered the oath that can be found in most records; the written expression of the oath traditionally recited in the sentencing order and oral references to the oath by the trial judge and the attorneys. In this case, this Court has a transcript devoid of any corroboration that the oath was administered. Only in the cookie-cutter standard general jury instruction usually designated "C-1" is there a mention of the jury oath. This instruction is ubiquitous and inevitably copied *verbatim* from Mississippi Model Jury Instructions Criminal-Court's Standard Instructions §1:2. A sentencing order is the written findings of the court, a jury instruction is not. Here, the sentencing order did not contain an assurance the jury was administered the oath. A written order not assuring this Court that the jury was properly sworn should be given it's clear meaning...that the jury was not sworn.

The critical importance of a judicial finding that the jury was sworn is embodied in the following cases. In *Acreman v.State,* 907 So.2d 1005, 1008 (Miss. App. 2005), the Mississippi Court of Appeals relied upon the sentencing order, where it "clearly state[d] that the jury was duly 'sworn.'" Still a clear written order in that instance, had to be corroborated by two instances within the record transcript where the judge reminded the jury orally that they had been sworn to truly try the case. *Carlisle v. State,* 936 So. 2d 415 (Miss. App. 2006) recognizes that while it is presumed

the jury was properly sworn, the record must still contain affirmative proof. In *Carlilse, Id.* at 422, both the model jury instruction as in this case and the court's written sentencing order were relied on to undergird the presumption. However, it is urged that it is not the boiler plate jury instruction, but a recitation of the jury being sworn in the sentencing order that is necessary before the presumption can be invoked. This proposition is supported by the finding the sole mention of the jury being sworn, if found in the sentencing order is sufficient. *Young v. State*, 425 So. 2d 1022, 1025 (Miss. 1983)

The critical nature of the finding the jury was sworn is apparent in the recent

> The record in this case does not indicate that the jury was not sworn. When we look to the final sentencing, it states that the jury was composed of twelve jurors "who were duly sworn, empaneled and accepted by the State and the Defendant...."

*Biggs v. State,* 942 So.2d 185, 192 (Miss. App. 2006) Again, it is noted, this critical finding of fact that should be embodied in the sentencing order was absent, therefore leading to the inescapable conclusion that the order meant what it said and what it did not say. Moore's jury was never administered the proper (or any ) jury oath.

No objection was raised at trial, and therefore this error must be presented under the doctrine of plain error. Failure to administer the oath is plain error. "For there to be plain error in Lawrence's case, Lawrence would have to show that there was no oath given to the jury." *Lawrence v. State*, 928 So. 2d 894, 897 (Miss. App. 2005) Such has been the undisputed law in Mississippi for at least 87 years:

> To say that the jury gave the same careful and conscientious consideration to the evidence when they heard it while not acting under the sanctity of an oath as they would have given had they been bound and obligated by a solemn oath would be to enter the field of speculation, and to so decide would be to say that this court could look into the minds of the jurors and determine with certainty that the effect of a solemn oath upon them would have made no change in the

> conscientious manner in which they received and considered the evidence offered in the case. It would seem to be more probable, in such a case, that the sanctity of an oath would have its bearing and influence upon the jurors in their consideration of the proof before them.

*Miller v. State,* 84 So. 161, 162 (Miss. 1920)

In the case at bar, the court reporter was present as the jury was selected and empaneled. The transcript clearly reflects a conscientious transcription, yet no oath is found. Two orders were entered one sentencing and one "Partial Trial (1st day). Neither order reflects the jury as having been sworn. A jury that is "empaneled, chosen and accepted" is NOT sworn. (C.P. 93, R.E. 11) And it should not be presumed, when twice omitted from the court's written orders.

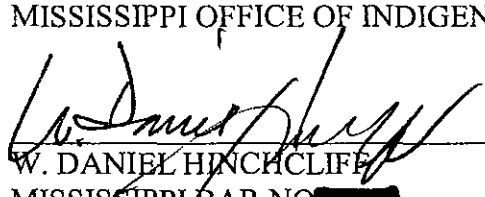
Accordingly, this case should be reversed and rendered. This defendant has been tried and convicted by nothing more than a panel of onlookers. The presumption Moore received a fair trial should not be posited by a universal recitation, found in the boilerplate language of a model jury instruction given as written in every criminal case.

## CONCLUSION

Appellant respectfully submits that this cause should be reversed and rendered for the reasons set forth in the arguments above.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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## CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Decarlos Antonio Moore, 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:

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This the 24th day of March, 2008.

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