IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FRANK SANDERS TIPTON — APPELLANT

VS. — NO. 2008-KA-2060

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT JURY INSTRUCTION C-2 WAS IMPROPER; HOWEVER, PROCEDURAL BAR NOTWITHSTANDING, THE JURY WAS FULLY INSTRUCTED AS TO THE ELEMENTS OF EXTORTION.

II. THE TRIAL COURT DID NOT IMPROPERLY INTERPRET THE EXTORTION STATUTE WHEN RULING ON THE APPELLANT'S MOTION FOR DIRECTED VERDICT.

III. THE INDICTMENT WAS LEGALLY SUFFICIENT.

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V. THE APPELLANT DID NOT REBUT THE PRESUMPTION THAT THE TRIAL COURT PROPERLY PERFORMED ITS DUTIES.

STATEMENT OF THE FACTS

Nineteen year-old, LaKay Rayborn pleaded guilty to a misdemeanor offense in Gulfport Municipal Court, was given a six month suspended sentence, and was placed on probation. (Exhibit 3). The oversight of Ms. Rayborn's probation was assigned to Court Programs, Inc., a private company which contracted with the City of Gulfport. (Transcript p. 83 - 84). Court Programs, Inc. employed the Appellant, Frank Tipton, who was assigned to be Ms. Rayborn's probation officer. (Transcript p. 84 and 167). As part of her probation, Ms. Rayborn was ordered to pay certain fines and fees. (Exhibit 3). Ms. Rayborn was unable to pay the required fines and fees, but was petrified of going to jail if her probation was revoked. (Exhibit 1). The Appellant, fully aware of Ms. Rayborn's inability to pay the fines and fees and of her fear of being incarcerated, informed Ms. Rayborn that he would pay the fines and fees if she would either model naked for him or let him watch her take a shower. (Exhibit 1). Ms. Rayborn subsequently contacted investigators at the Mississippi Attorney General's Office who were able to record a conversation between Ms. Rayborn and the Appellant during which the Appellant again informed Ms. Rayborn that he would pay the fines in exchange for her either modeling naked or taking a shower and allowing him to watch. (Exhibit 1).

The Appellant was arrested and charged with extortion for using his position to demand Ms. Rayborn to model naked or shower in front of him. He was tried, convicted, and sentenced to serve five years with one year to be served in the custody of the Mississippi Department of Corrections, two years to be served in the Intensive Supervision Program or house arrest, and the remaining two years to be suspended followed by two years of post-release supervision. (Record p. 101).

SUMMARY OF THE ARGUMENT

The Appellant is procedurally barred from arguing that Jury Instruction C-2 was improper as he failed to raise a contemporaneous objection. There was no plain error as the instruction fully set forth each of the required elements of extortion.

The trial court did not improperly interpret Mississippi Code Annotated §97-11-33 when it ruled on the Appellant's motion for directed verdict. Based on the language used by the legislature in the statute, the trial court properly read the statute to include a broader meaning of the term "any contractor providing incarceration services" which included a contractor providing both probations services and supervision for those under house arrest.

The indictment which charged the Appellant with extortion was legally sufficient. A fair reading of the indictment as a whole evidences that the indictment contained a clear description of the nature and cause of the charges against the accused. Further, the indictment was sufficiently specific to give notice of the unlawful act and exclusive enough to prevent its application to other acts. Additionally, the Appellant was not prejudiced in the preparation of his defense.

There was sufficient evidence establishing each element of the crime charged and the verdict was not against the overwhelming weight of the evidence.

Lastly, the Appellant did not rebut the presumption that the trial court properly performed its duties including that of swearing in the jury. In fact, the record indicates that the jury was sworn.

ARGUMENT

I. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT JURY INSTRUCTION C-2 WAS IMPROPER; HOWEVER, PROCEDURAL BAR NOTWITHSTANDING, THE JURY WAS FULLY INSTRUCTED AS TO THE ELEMENTS OF EXTORTION.

The Appellant first asserts that the jury was improperly instructed, specifically arguing that "Instruction C-2 relieved the jury of its duty to determine if the State had proven all of the elements of the crime charged against [the Appellant]." (Appellant's Brief p. 20). However, the Appellant is procedurally barred from making this argument. According to Mississippi Code Annotated §97-11-33, extortion is proven when a person in any one of the listed capacities (judge, justice court judge, sheriff, deputy sheriff, sheriff's employee, constable, assessor, collector, clerk, county medical examiner, county medical examiner investigator, employee of the Mississippi Department of Corrections, employee of any contractor providing incarceration services or any other officer) demands, takes, or collects, under color of his position, any money fee or reward not authorized by law or demands and receives any fee for service not actually performed. The original "elements" instruction was S-1and reads as follows:

> . . . For you to be able to find him guilty of extortion, you must believe from all the evidence in this case beyond a reasonable doubt:
>
> 1. That the defendant was employed and serving as a probation officer with Court Programs, Inc. during the period on or about April 9, 2004, through on or about April 15, 2004, in Jackson County, Mississippi;
> 2. That he then and there did willfully, unlawfully, feloniously and knowingly demand from Lakay Rayburn, under color of his office as a probation officer, a reward, which was not authorized by law; and
> 3. That said reward he, while acting as Rayburn's probation officer, demanded was for Rayburn to allow him to watch her take a shower in exchange for him paying her fines imposed by the court as part of her sentence for a misdemeanor offense,
>
> then you shall find the defendant guilty as charged.

(Record p. 53). As noted by the trial judge, Instruction S-1 leaves out an essential element of the

crime, i.e. the "position element.[1]" (Transcript p. 289). After some discussion, including an objection to this particular instruction by the Appellant, it was agreed that the instruction needed to be changed. Later, Instruction C-2, a modified "elements" instruction was presented with NO OBJECTION. (Transcript p. 300 - 301). Instruction C-2, set forth below, is NOT the same instruction as S-1:

> . . . For you to find him guilty of extortion, you must believe from all the evidence in this case beyond a reasonable doubt that the Defendant did:
>
> 1. On or between April 9, 2004 and April 15, 2004, in Jackson County, Mississippi;
> 2. While employed as a probation officer with Court Programs, Inc., a contractor providing incarceration services for the City of Gulfport, Mississippi, and under the color of said office;
> 3. Unlawfully, feloniously and knowingly demanded a reward, not authorized by law, in that he demanded of Lakay Rayburn to allow him to watch her take a shower in exchange for him paying her fines imposed by the court as part of her sentence for a misdemeanor offense,
>
> then you shall find the defendant guilty as charged.

(Record p. 49). As such, the Appellant should have objected to Instruction C-2 at the time it was presented if he did not feel it was an accurate representation of the law. He failed to do so and also failed to specifically raise the issue in his motion for new trial. Thus, the matter is procedurally barred. *See Lepine v. State*, 10 So.3d 927, 944 (Miss. Ct. App. 2009) (holding that "[g]enerally, when a jury instruction is offered at trial, it is the duty of the opposing party, in order to preserve the

[1] "Position element" refers to the requirement in the statute that the person must be operating in any one of the listed capacities (judge, justice court judge, sheriff, deputy sheriff, sheriff's employee, constable, assessor, collector, clerk, county medical examiner, county medical examiner investigator, employee of the Mississippi Department of Corrections, employee of any contractor providing incarceration services or any other officer) during the commission of the crime.

point for appeal, to state a contemporaneous objection in specific terms").[2]

The Appellant, however, argues that granting this instruction constitutes plain error. "To prevail under the doctrine of plain error, the [Appellant] must show that there was error, that the error resulted in a manifest injustice, and that it affected the defendant's fundamental rights." *Hicks v. State,* 973 So.2d 211, 217 (Miss.2007). The Appellant has not proven each of these requirements. While Mississippi law establishes that "failure to submit to the jury the essential elements of the crime is 'fundamental error,'" *Heidelberg v. State*, 976 So.2d 948, 949 (Miss. Ct. App. 2007), the Appellant still must prove that there was an error, in this case, a failure to instruct the jury on each of the required elements. The Appellant cannot do so as Instruction C-2 clearly lists each of the elements required by statute that the jury "must believe from all the evidence in this case beyond a reasonable doubt." Paragraph 1 of the instruction sets forth the time and place. Paragraph 2 sets forth 2 elements: (1) the "position element"and (2) the requirement that the Appellant be acting under color of this position. Paragraph 3 describes the actual act which constitutes extortion that the jury must believe beyond a reasonable doubt that the Appellant committed while acting under the color of the position listed. Instruction C-2 listed each of these elements, unlike proposed instruction S-1 which failed to instruct the jury with regard to the capacity in which the accused must act in order to be guilty of extortion. As such, the jury was fully instructed regarding each element. Thus, there was no error and therefore, no plain error.

On appeal, the Appellant also takes issue with the form of the instruction by stating that "a

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[2] Nonetheless, the Appellant argues that the "error" was preserved for appeal. (Appellant's Brief p. 24). He contends that he made a "related objection" in that he moved for directed verdict based on the State's alleged failure to provide evidence establishing the "position element." He further argues that this objection made the trial court "aware of the elements problem" and therefore, the jury instruction "error" was properly preserved. (Appellant's Brief p. 25). The State would counter that this "related objection" does not meet the requirement of "stat[ing] a contemporaneous objection in specific terms" as required by *Lepine v. State* (*emphasis added*). As such, the "error" was not preserved for appeal.

properly drawn instruction would have separated the element focusing on [the Appellant's] employment status from the element requiring that Court Programs, Inc. 1) was a contractor with the City of Gulfport, and 2) that it provided incarceration services to the city." (Appellant's Brief p. 21 - 22). Again, if the Appellant believed that the instruction could have been worded in a better way, he should have offered an alternative instruction. He did not. In fact, the following exchange took place after the trial court presented both parties with the proposed instruction:

COURT:	I guess I ought to just call this C-2, the elements instruction.
COUNSEL FOR THE STATE:	That's fine with the State.
COUNSEL FOR APPELLANT:	No objection.
COURT:	Is C-2 alright?
COUNSEL FOR THE STATE:	Yes, Your Honor.
COURT:	Anybody have any problem with the Court's C-2, the elements instruction?
COUNSEL FOR APPELLANT:	No, sir.
COUNSEL FOR THE STATE:	No, sir.
COURT:	No objections for the record?
COUNSEL FOR APPELLANT:	Do not, no, sir.
COUNSEL FOR THE STATE:	No, sir.
COURT:	Okay. C-2 will be given and stamped.

(Transcript p. 300 - 301). The trial court gave the Appellant no less than three opportunities to voice any concerns regarding the instruction and each time the Appellant failed to do so.

Additionally, this Court has previously held that "the trial court enjoys considerable discretion regarding the form and substance of jury instructions." *Higgins v. State*, 725 So.2d 220, 223 (Miss. 1998) (citing *Splain v. Hines*, 609 So.2d 1234, 1239 (Miss. 1992)). *See also Armstrong v. State*, 828 So.2d 239, 244 (Miss. Ct. App. 2002). Moreover, simply grouping more than one element into a single paragraph in the instructions does not make the instructions improper. There is no requirement that each individual element be listed in an individual paragraph in the jury instructions. Again, if the Appellant believed that the instruction would be better understood if this

were done, then he should have requested such at the time. As the Court of Appeals held in *Armstrong*, "the dispositive question is whether the jury was fully and correctly instructed on the principle of law involved." 828 So.2d at 244. As shown above, each element was presented to the jury. Thus, the jury was fully and correctly instructed and there is no error.

Nonetheless, the Appellant argues that the instruction was tantamount to granting a peremptory instruction with regard to the "position element" of the crime. However, the record makes clear that it was not the trial court's intent to do so. After the trial court denied the Appellant's motion for directed verdict, specifically with regard to whether the Appellant's position qualified under the extortion statute, the court informed the Appellant that he could argue that point to the jury. (Transcript p. 290).[3] Clearly, the trial court did not, and was not attempting to, grant a peremptory instruction with regard to an element of the crime.

The Appellant further asserts that the instruction was confusing as evidenced by the notes sent to the trial court during deliberation. (Appellant's Brief p. 22). Two notes were sent to the trial court from the jury. The first simply stated:

We would like the legal and dictionary definition of the word EXTORTION.

(Exhibit C-1). The trial court read the note to counsel for both parties. (Transcript p. 323 - 325). After some discussion concerning the best way to respond, the trial judge responded with the following note:

> The Court cannot provide you a dictionary to consult during your deliberations. As to the elements of the offense of extortion, please refer to Jury Instruction 2. Please continue your deliberations.

(Exhibit C-3). The Appellant was given an opportunity to object or to ask that Jury Instruction C-2,

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[3] In fact, the Appellant did argue, in his closing arguments, that there was insufficient evidence to show that the Appellant's position with Court Programs, Inc. fell under the statute. (Transcript p. 315 - 316).

of which he now complains, be clarified. He chose not to do so. The jury then submitted a second note to the trial court which read:

> The program Court Programs, Inc. Is defined as "a contractor providing incarceration services for the City of Gulfport, Mississippi, and under the color of said office, In document C-2 number 2.
> Is this a typographical error in definition and we are only to gather that the defendant worked for this company, or are we to also deliberate about the nature of the services provided by Court Programs, Inc?
> In other words, should the statement read
> "Court Programs, Inc., a contractor providing probation services for the City of Gulfport?

(Exhibit C-2). Again the trial court read the note to counsel for both parties and discussions followed regarding the best way to respond. (Transcript p. 326 - 327). The trial court responded with the following:

> Jury Instruction 2 (designated C-2) is proper as worded, and contains all the essential elements that must be proven beyond a reasonable doubt. Please continue your deliberations.

(Exhibit C-4). When asked if he approved of the response, counsel for Appellant responded, "I can live with that." (Transcript p. 327). Again he was given an opportunity to request that the trial court clarify the instruction and chose not to do so. As such, he cannot, now, take issue with the trial court's response.

Nonetheless, in his brief, the Appellant asserts that the trial court's response to the second note "left intact the jury's impression that the trial court had 'defined' Court Programs, Inc., as a contractor that provided incarceration services and that the state was relieved of the burden to prove this." (Appellant's Brief p. 23). The trial court's response did not, as asserted by the Appellant, impress upon the jury that the instruction defined Court Programs, Inc. The trial court's response explained that the instruction contained each of the elements required and that each element had to be proven beyond a reasonable doubt.

Mississippi law states clearly that "[i]f the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Armstrong*, 828 So. 2d at 244. In the case at hand, the jury was instructed with regard to each element of the crime and the Appellant suffered no injustice. Thus, there is no reversible error.

II. THE TRIAL COURT DID NOT IMPROPERLY INTERPRET THE EXTORTION STATUTE WHEN RULING ON THE APPELLANT'S MOTION FOR DIRECTED VERDICT.

The Appellant next argues that "in ruling on [the Appellant's] motion for a directed verdict, the trial court construed the statute in favor of the State rather than liberally in favor of [the Appellant] as it was required to do." (Appellant's Brief p. 28). The statute in question is Mississippi Code Annotated §97-11-33 which reads as follows:

> If any judge, justice court judge, sheriff, deputy sheriff, sheriff's employee, constable, assessor, collector, clerk, county medical examiner, county medical examiner investigator, employee of the Mississippi Department of Corrections, employee of any contractor providing incarceration services or any other officer, shall knowingly demand, take or collect, under color of his office, any money fee or reward whatever, not authorized by law, or shall demand and receive, knowingly, any fee for service not actually performed, such officer, so offending, shall be guilty of extortion, and, on conviction, shall be punished by fine not exceeding Five Thousand Dollars ($5,000.00), or imprisonment for not more than five (5) years, or both, and shall be removed from office.

The main focus of the Appellant's argument is whether the Appellant's position at Court Programs, Inc. falls under one of the positions listed in the statute. The trial court held, in ruling on the Appellant's motion for directed for verdict, that there was sufficient evidence that the Appellant's position at Court Programs, Inc. fell under this statute.

This Court has previously held that a statute must be read in such a way as to "make all parts harmonize with each other and render them consistent with its scope and object." *Corning v.*

Mississippi Ins. Guar. Ass'n, 947 So.2d 944, (Miss. 2007). "Courts have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature." *Eason v. State,* 994 So.2d 785, 789 (Miss. Ct. App. 2008) (quoting *Miss. Ethics Comm'n v. Grisham*, 957 So.2d 997, 1001 (Miss. 2007)). The statute at issue here's clear purpose is to make it illegal for a person in certain positions of power and/or trust to use that position to demand or take reward which is not warranted by law or to demand or take a fee for services not rendered. This purpose should be considered when addressing this issue.

The Appellant argues that when the trial court found that there was sufficient evidence that Court Programs, Inc. provided incarceration services, it "expanded the wording of the statute." (Appellant's Brief p. 28). He further argued that the following holding of the trial court:

> Quite frankly, if the Legislature had intended to only include prison, employees of a private contractor providing prison facilities, it could have easily said so. Instead it uses the term "incarceration services."

illustrated that the court was improperly construing the statute in favor of the State and not in favor of the Appellant. (Appellant's Brief p. 29). The State agrees that criminal statutes should be construed in favor of the accused; however, the interpretation should not be unreasonable. *Eason v. State,* 994 So.2d 785, 789 (Miss. Ct. App. 2008).

In the statute at hand, the Legislature placed the word "any" prior to the list of general titles. For example, ANY judge, ANY clerk, and ANY employee of ANY contractor providing incarceration services are a part of that list. The United States Supreme Court has recently held that "read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " *Ali v. Federal Bureau of Prisons,* 552 U.S. 214, 128 S.Ct. 831, 835-36, 169 L.Ed.2d 680 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997)). When analyzing the statute in question in that case, the *Ali* Court, like the trial court

here, noted the absence of any restrictive or limiting language. *Id.* at 836. Furthermore, the inclusion of the catch-all, "any other officer," evidences the Legislatures intent to give the terms an expansive or broad meaning. Thus, the trial court properly read the statute to include a broader meaning of "any contractor providing incarceration services."

The trial court explained its rationale in holding that there was sufficient evidence that the Appellant's position at Court Programs, Inc. fell under the statute as follows:

> Now, [the term "incarceration services"] as I heard yesterday from the testimony . . . , the services provided to the municipal court in Gulfport included house arrest, included what we refer to as intensive supervision. In felony cases, that is equivalent to, as I understand it by our Supreme Court, they have equated that to incarceration. So, those services are included. I think it's without question the testimony here establishes they don't provide prison facilities, but they do provide incarceration services. And I think the status of [the Appellant] would be included, and his conduct proscribed by this particular statute.

(Transcript p. 218 - 219). "House arrest" is defined as "the confinement of a person convicted or charged with a crime to his place of residence under the terms and conditions established by the department or court." Miss. Code Ann. §47-5-1001(e). The Court of Appeals has held that one under house arrest "is an inmate in the custody of the MDOC who is serving time on house arrest instead of being housed in a MDOC facility." *Ivory v. State*, 999 So.2d 420, 426 (Miss. Ct. App. 2008). *See also Lewis v. State*, 761 So.2d 922, 923 (Miss. Ct. App. 2000) (holding that the defendant, "whether participating in the house arrest program or serving time as an inmate in the general prison population, was confined as a prisoner under the jurisdiction of the Mississippi Department of Corrections in the normally-understood sense of that term"); *Perry v. State*, 798 So.2d 643, 645 (Miss. Ct. App. 2001) (holding that the defendant's transfer from house arrest to the general prison population "was merely a reclassification of his confinement"); and *Brown v. Miss. Dept. Of Corr.*, 906 So.2d 833, 835 (Miss. Ct. App. 2004) (holding that when the defendant "was taken off

house arrest and placed in MDOC's custody, he merely experienced a change in his housing assignment and classification"). As set forth in detail later in this brief, there was testimony that Court Programs, Inc. provided supervision of those under house arrest. Thus, the trial court's rationale in denying the Appellant's motion for directed verdict was correct and was not an improper interpretation of the statute.

III. THE INDICTMENT WAS LEGALLY SUFFICIENT.

The Appellant also argues that "it was plain error for [him] to be tried on an indictment which failed to set out all the elements required by statute and which did not adequately inform him of what charges he faced." (Appellant's Brief p. 32).[4] The standard of review on this issue is as follows:

> The issue of whether an indictment is so flawed as to warrant reversal is a question of law and allows this Court a broad standard of review. *Steen v. State*, 873 So.2d 155, 161(¶ 21) (Miss. Ct. App.2004). The primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense. *See Lewis v. State*, 897 So.2d 994, 996(¶ 9) (Miss. Ct. App.2004). All that is required is that the indictment provide "a concise and clear statement of the elements of the crimes charged." *Williams v. State*, 445 So.2d 798, 804 (Miss.1984).

Smith v. State, 989 So.2d 973, 979 (Miss. Ct. App. 2008).

Specifically, the Appellant contends that the indictment "failed to allege the required elements" of the crime. (Appellant's Brief p. 30). In this regard, he takes issue with the following portion of the indictment: "while Tipton was employed and serving as a probation officer with Court Programs, Inc." He argues that the indictment should have specifically alleged that "Court Programs, Inc. was a 'contractor' and that it provided 'incarceration services' to the City of

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[4] The Appellant did not raise this issue before the trial court; however, this Court has held that a "defendant may challenge the sufficiency of an indictment for the first time on appeal." *Jordan v. State*, 995 So.2d 94, 109 (Miss. 2008).

Gulfport." (Appellant's Brief p. 30). However, this Court has previously held that "the test of the validity of an indictment is 'not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to the minimal constitutional standards.'" *Madere v. State*, 794 So.2d 200, 212 (Miss. 2001) (quoting *United States v. Webb*, 747 F.2d 278, 284 (5th Cir. 1984)). That standard is whether a from a "fair reading of the indictment, taken as a whole, [it] clearly describes the nature and cause of the charges against the accused." *Berry v. State*, 996 So.2d 782, 787 (Miss. 2008). The indictment in this case states with particularity the Appellant's position and specifically refers to the statute which the Appellant violated while acting under color of said position. (Record p. 5). As this Court noted in *Madere*, "[w]hile a statutory citation cannot, standing alone, meet [the test for a legally sufficient indictment], a citation to the statute reinforces other references within the indictment." 794 So.2d at 212 (*emphasis added*). Thus, the citation of the statute reinforces the reference to the Appellant's employment and position with Court Programs, Inc. Furthermore, the Fifth Circuit has held that "so long as an indictment as a whole 'fairly imports' an element, 'an exact recitation of that element is not required.'" *United States v. Dentler*, 492 F.3d 306, 309 (5th Cir. 2007) (quoting *United States v. Harms*, 442 F.3d 367, 372 (5th Cir. 2006)) (*emphasis added*). As such, each element of the crime was sufficiently addressed in the indictment.

The Appellant also asserts that the indictment "failed to contain a plain, concise, and definite written statement of the essential facts constituting the offense charged and did not fully notify [the Appellant] of the nature and cause of the accusation." (Appellant's Brief p. 30). The indictment charges that the Appellant ". . . did willfully, unlawfully, feloniously, and knowingly demand from Lakay Rayborn, under color of his office as a probation officer, a reward, which was not authorized by law, in that: Lakay Rayborn was convicted of a misdemeanor offense, received a suspended sentence for said offense and was placed on probation, Tipton was assigned as Rayborn's probation

officer, and while supervising Rayborn on probation, Tipton asked the said Rayborn to allow him to watch her take a shower, and in return he would pay her fines imposed by the court as part of her sentence." (Record p. 5). While, as noted above, the question is not whether the indictment could have been framed in a more satisfactory manner, but whether "the language used in the indictment is sufficiently specific to give notice of the act made unlawful, and exclusive enough to prevent its application to other acts." *Madere*, 794 So.2d at 212 (emphasis added). This language certainly notified the Appellant that his act of demanding that Ms. Rayborn shower in front of him in exchange for his payment of her fines was the unlawful act. This language is also exclusive enough to prevent the Appellant from believing he was charged for a different act. "The validity of an indictment is governed by practical, not technical considerations." *United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. 1981). Thus, the standard is met.

Moreover, as recently noted by the Court of Appeals, **"[t]he ultimate test, when considering the validity of an indictment on appeal, is whether the [Appellant] was prejudiced in the preparation of his defense**." *Lyles v. State*, 12 So.3d 532, 539 (Miss. Ct. App. 2009) (quoting *Fuqua v. State*, 938 So.2d 277, 281 (Miss. Ct. App. 2006)) (*emphasis added*). The Appellant did not assert and the record did not illustrate in any way that he was prejudiced in preparation of his defense. In fact, the record shows that he was fully able to present his defense that his position at Court Programs, Inc. did not fall under the statute. As such, it is clear that the indictment is sufficient and there was no plain error.

IV. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The Appellant also argued that "the State produced insufficient evidence to support [his] conviction." (Appellant's Brief p. 33). He specifically argued (1) that there was a "failure to prove

that Court Programs, Inc., provided 'incarceration services' as required by the statute," (2) that "the State put on no proof that Court Programs, Inc., was a 'contractor' which provided any type of services to the City of Gulfport," and (3) that "the State produced no proof that [the Appellant] made a 'demand' on Ms. Rayborn." (Appellant's Brief p. 34 - 35). "In reviewing a sufficiency of the evidence claim, [appellate courts] consider the evidence in the light most favorable to the verdict." *Spencer v. State,* 944 So.2d 90, 91 (Miss. Ct. App. 2006) (citing *Bush v. State,* 895 So.2d 836, 844 (Miss. 2005)) (*emphasis added*). "If any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt, [the court] will uphold the verdict." *Id.* (*emphasis added*).

Specifically, the Appellant argues that "there was clearly no proof that Court Programs, Inc., provided 'incarceration services.'" (Appellant's Brief p. 35). He also argues that "the State put on no proof that Court Programs, Inc. was a 'contractor' which provided any type of services to the City of Gulfport." (Appellant's Brief p. 35). However, there was ample testimony from the Gulfport office manager of Court Programs, Inc. which established that Court Programs, Inc. was a contractor providing incarceration services as envisioned by the statute:

> Q: So, some cities have an option to contract with a private company to do some supervision over people who go through their court system in an effort to collect fines and monitor some of their activities, is that correct?
> A: That is correct, yes, sir.

(Transcript p. 89).

> Q: . . . . Now, Court Programs, Inc. provided contract services for the City of Gulfport for probation services and monitoring potential sentences or probation of various people who pled guilty in the City of Gulfport?
> A: Yes, sir.

(Transcript p. 90).

> Q: Okay. As office manager, what type of probations did Court Programs, Inc.

monitor?

A: Court Programs monitored orders of the court. The court of original jurisdiction would authorize a probation order. This order was filled out with many different items. For example, MASEP, Victim's Impact Panel, payment of fines, community service, things such as administrative issues as far as for the court. If at any time those criteria were not met in the guidelines of the time frame, then it was the duties and responsibilities of a probation officer to, in writing, notify the court in what we call a probation violation. It was a formatted form. This would indicate the violations as per the time frames. And also, if the proper monies were not paid in fines, the probation officer would notify the court with this form, and then the court itself would determine the disposition of the case, whether it be a show cause hearing for contempt or what have you. But basically, it was an administrative function to inform the court of original jurisdiction that the person was in violation by not doing the actual orders of the judge.

Q: Did Court Programs, Inc. ever monitor anyone on house arrest?

A: Yes, they monitor house arrest on a daily basis.

* * *

Q: How did y'all monitor people on house arrest?

A: It was with ankle bracelets. It was also with voice recognition via telephone calls from a computerized system, and also GPS monitoring which was in itself a different design of ankle bracelet.

Q: Okay. Did Court Programs monitor any felony cases prior to this trial?

A: Yes, sir.

(Transcript p. 200 - 201). As set forth earlier in this brief in regard to Issue 2, providing monitoring services for house arrest falls under "incarceration services." As such, the above referenced testimony sufficiently established that Court Programs, Inc. was a contractor providing incarceration services as intended by the statute.

The Appellant further argues that "the State produced no proof that Mr. Tipton made a 'demand' on Ms. Rayborn" and therefore, the trial court should have granted his motion for directed verdict. (Appellant's Brief p. 33 and 35). As noted by the trial judge during the hearing on the Appellant's motion for directed verdict, "an individual in a position . . . as Ms. Raybrun was, under apparent authority of an individual acting as an officer of the municipal court, contract or other wise, you know, what occurred, statements made, offers and/or veiled demands" is sufficient under the

circumstances. (Transcript p. 217 - 218). Ms. Rayborn's testimony at trial certainly evidences that a demand was made.

Q: . . . Why had you called the Attorney General's office or why had you reported this?
A: Because he was going to sign a warrant for me to go to jail if I didn't pay the fine or do something like take a shower. And I didn't want to go to jail, so I called Mike cause I didn't know what else to do.
Q: All right. Did Mr. Tipton make it clear to you that you had monthly fines to pay?
A: Yes, ma'am.
Q: Did he make it clear to you that there was charge in Ocean Springs? In city court in Ocean Springs? Did he bring that up?
A: Oh, yes, ma'am.
* * *
Q: Did you think he had authority over you? Was he - - he was a person of respect?
A: Uh - huh.
Q: Is that correct?
A: Yes, ma'am.
* * *
Q: . . . He's your probation officer right?
A: (nodded headed up and down)
Q: If he tells you you've got to pay a fine, do you believe you've got to pay a fine?
A: Yes, ma'am.
* * *
A: He asked me, he told me that if I took a shower and let him watch me, then he would pay my find and give me a receipt every time.

(Transcript p. 169 - 172).

Q: . . . And in your mind, did you think - - What did you think would happen if you did not accept?
A: He said that he's got a warrant and could - - all he has to do is take it over and get the judge to sign it to violate my probation.
Q: Okay. Each time Mr. Frank said you could take a shower or you could model, did he follow that with talking . . . what did he talk about after that?
A: **He always came back to saying that: You've just got to remember you got these fines and you got this warrant and you got this thing in Ocean Springs. And it's like giving me an ultimatum. Either I have to do it or I go back to jail.**

(Transcript p. 180 - 181) (*emphasis added*).

The Appellant, nonetheless, argues that during the recorded conversation between himself and Ms. Rayborn, no demand was made. (Appellant's Brief p. 35). He argues that the "tape shows only a long back-and-forth set of negotiations for [the Appellant] to pay Ms. Rayborn's fines in exchange for allowing him to view her in the nude." (Appellant's Brief p. 35). Certainly the word "demand" was never used in the conversation. However, as Ms. Rayborn testified, she was given an ultimatum. The Appellant knew that she had no money and no job and could not pay the fines. He told her that if she did not pay the fines she would go to jail, but if she would either allow him to watch her shower or model nude then he would pay the fines. The Appellant did not specifically use the words, "Model naked or go to jail," but that does not mean that those exact words were not implied. Looking at the entire conversation and realizing that there was testimony that this was not the first conversation regarding the so called "negotiations," it is obvious that there was, in fact, a demand. (Transcript p. 169).

In the recorded conversation played for the jury, the Appellant first reminds her of the importance of paying her fines. (Exhibit 2, page 2). He tells her that "each month money's due, expect something of the, some . . . something about the same thing. You know, and each month that will be your payment to me." (Exhibit 2, page 6). He then makes it sound like the situation is completely innocent stating that:

> each time I do something for you, you do something for me. We'll scratch each other's back. Anytime you want, like I told you before, anytime you want to stop, we'll stop. Each month, you know, some for me from you. I think that's fair.

(Exhibit 2, page 6). The Appellant makes it seem as though its entirely up to Ms. Rayborn when he knows full well that she cannot afford the fines and that she is petrified of going to jail. (Exhibit 2, pages 10, line 212 and page 11, line 214). This is certainly evidenced by the fact that as soon as Ms. Rayborn expresses her fear of going to jail, the Appellant replies with "I know. Well, work with

me." (Exhibit 2, page 11). The following exchange also fully illustrates his intent:

> Rayborn: So, if I don't take a shower, that will not, will the warrants still come up?
>
> Appellant: I'll just fight, well, what, what with that, I'll fight for you more. You'll go get that fifty dollars, that fifty dollars off, okay? I'll pay it each month, if we make an agreement on whatever we gonna do, okay. Uh, if you go in front of a judge, I'll go in front of the judge and say just ask, ask him to give you additional uh, ask him to give you additional, uh probation time. In other words, you know, just give her probation time, she's going through a bad time in her life, work with me, just put her on probation and just give her, let's give her another chance.

(Exhibit 2, page 11 - 12). Even though he states during the conversation that its up to her and that there is no pressure, he continues to make statements such as "I don't know how much longer Gulfport will wait" and "I wasn't sure if you wanted me to go ahead and get on that fifty dollars right away before, because once they do something, I'm, I may not be able to do anything after that." (Exhibit 2, page 13, line 272 and page 18, lines 373 - 375). Regardless of whether he says he is not putting pressure on her, he is by making those type of statements. He makes clear to her that the only thing that is really up to her is whether she showers, models, or gets in trouble for not paying her fines:

> Appellant: Yeah. And like I said, if you don't want to do the shower thing, you just want to model for me or whatever, pose, whatever, if that's better for you, then that's okay too. I mean, just , that was, the shower was an idea, a thought, you know.
>
> * * *
>
> Rayborn: . . . So I can either take the shower and you watch me take a shower or I can model.
>
> Appellant: Right. Either way. Whatever you're comfortable with.
>
> * * *
>
> Appellant: It's weird. But I mean, people get paid for all kind of things, and that was just a thought. I figured you would probably be more comfortable, I just thought you'd be more comfortable at first with a shower and I thought after, I said well maybe not, and then somebody might be coming in all of a sudden and you're wet and it doesn't look right, that's why I was thinking you know, doing a little modeling

stuff real quick, would might be better for you.

(Exhibit 2, page 16).

Rayborn:	. . . So, now I got two options of what I can do.
Appellant:	(laughs)
Rayborn:	I can take a shower and you can watch me . .
Appellant:	um-hum.
Rayborn:	. . . or, I can model with my clothes on?
Appellant:	No. .
Rayborn:	Unh...
Appellant:	That's not fair.
Rayborn:	Why isn't it fair?
Appellant:	Let me say, you can, like I sit while, I, I , I, if you feel better with clothes, I can just, while you're changing clothes or something. I don't, you know, it's just different options. You know, I mean, because I'm a guy and all that kind of stuff, I mean just, we all have our little things and that's okay with me. You know, but that, it's just an option and that's again, that's for you.

(Exhibit 2, page 17)

Additionally, the taped conversation between the Appellant and Ms. Rayborn shows that Mr. Rayborn had become suspicious and was "watching [him]self." (Exhibit 2, page 3). This most likely caused him to be less aggressive in his so-called "negotiations." During the conversation he also stated that he "took a little chance, and maybe it's gonna come back to haunt [him] and that's okay." (Exhibit 2, page 3). He even acknowledges that he could be in trouble for the whole thing. (Exhibit 2, page 15, line 307). The saddest and most disgusting part of it all is that the Appellant keeps stating that "the only thing I'm helping you, is helping out." (Exhibit 2, page 12, line 256). He even refers to himself as her "sugardaddy." (Exhibit 2, page 6).

A review of this entire conversation makes it very clear that the Appellant was making a demand. He knew that Ms. Rayborn, only nineteen years old, had no money, had no family willing to pay the fines, and no job to earn the money. He also knew that she did not want to go to jail. He used this information against her and reinforced that she would go to jail if the fines were not paid.

He then, in an attempt to "help her out," offered to pay the fines for her if she would chose between letting him watch her shower or model naked. He kept saying that there was no pressure and it was her decision but ultimately there was pressure in that the fines were due and the only decision she had was to model or shower. These circumstances clearly evidence a demand.

Accordingly, there was sufficient proof of each element of the crime charged. A reasonable juror could have the essential elements of the crime beyond a reasonable doubt. Thus, the trial court acted within its discretion in denying the Appellant's motion for directed verdict and motion for judgment notwithstanding the verdict.

The Appellant also argues that "his verdict was against the overwhelming weight of the evidence." (Appellant's Brief p. 36). The following standard has previously been set forth with regard to weight of the evidence issues:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, the court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. (*citations omitted*). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will it be disturbed on appeal. (*citations omitted*). It has been said that on a motion for new trial the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. (*citation omitted*). Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict. (*citation omitted*).

Wooten v. State, 752 So.2d 1105, 1108 (Miss. Ct. App. 1999) (*emphasis added*). The Appellant specifically argues in this regard that "the State failed to marshal enough credible evidence for [his] conviction to stand." (Appellant's Brief p. 36). However,"[i]t has long been a rule in Mississippi that 'the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness.'" *Graham v. State,* 812 So.2d 1150, 1153 (Miss.

Ct. App. 2002) (quoting *Meshell v. State*, 506 So.2d 989, 992 (Miss.1987)). Viewing the evidence in "the light most favorable to the verdict," it is clear that the verdict was not against the overwhelming weight of the evidence. As such, the trial court properly denied the Appellant's motion for new trial.

V. THE APPELLANT DID NOT REBUT THE PRESUMPTION THAT THE TRIAL COURT PROPERLY PERFORMED ITS DUTIES.

Lastly, the Appellant argues that his "jury was not a legally valid one" and that "its verdict is a nullity" because the record does not reflect that his jury was "sworn with the oath mandated to be administered to petit juries as set out in Miss. Code Ann. §13-5-71." (Appellant's Brief p. 38). However, as in *Holbrook v. State*, there is nothing in the record to indicate that the jury was not sworn in either. 4 So.3d 382, 383 (Miss. Ct. App. 2008). In fact, just the opposite, as in *Holbrook*, the jury instructions indicate that the jury was sworn:

> . . . When you took your places in the jury box, you made an oath to follow and apply the instructions of the Court regarding the law. . . .

(Record p. 46). Also, as in *Wilson v. State*, the cover page of the transcript states that the jury was duly impaneled. 990 So.2d 798, 801 (Miss. Ct. App. 2008).

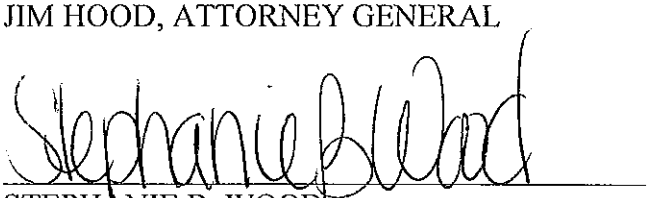
Furthermore, there is a rebuttable presumption that the trial judge has properly performed his or her duties and it is the duty of the respective defendants to overcome this burden. *Wilson*, 990 So.2d at 801 (citing *Bell v. State*, 360 So.2d 1206, 1215 (Miss. 1978)). This burden cannot be overcome "with a bald assertion that the jury was not sworn." *Holbrook*, 4 So.2d at 384 (citing *Allen v. State*, 945 So.2d 422, 425 (Miss. Ct. App. 2006)). As the Appellant provided nothing more than an assertion that the jury was not sworn, the presumption is not overcome.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the Appellant's conviction and sentence as there were no reversible errors and as he received a fair trial.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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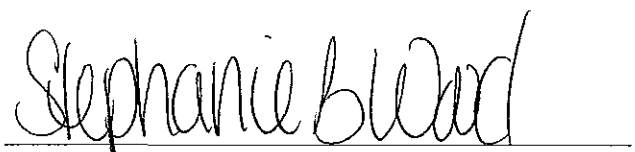
This the 15th day of October, 2009.



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