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APPELLEE.

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CASE No. A09A0540

Benjamin Horne
GDC ID 1254516
Washington State Prison
P.O. Box 206
Davisboro, GA 31018

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

BENJAMIN HORNE)	
)	
APPELLANT,)	
)	
V.)	CASE No. A09A0540
)	
STATE OF GEORGIA,)	
)	
APPELLEE.)	

**BRIEF IN SUPPORT OF APPELLANT’S APPEAL
FROM THE SUPERIOR COURT OF HALL COUNTY**

I. STATEMENT OF THE CASE AND FACTS

Appellant/Defendant Benjamin Horne, by and through his counsel, pursuant to Article VI, Section V, Paragraph III of the Georgia Constitution of 1983 hereby timely files this Brief in Support of his Appeal from the judgment of conviction and sentence entered by the Honorable C. Andrew Fuller of Hall County Superior Court on July 18, 2007. (R, 147-150).

1. Procedural History

On July 10, 2006, Benjamin Horne was indicted in a 7 Count Indictment. Count I alleged that the Defendant committed the offense of Aggravated Sexual Battery against Andrea Golden. (R, 20). In Count II the State of Georgia alleged that Defendant committed the crime of Kidnapping with Bodily Injury by abducting Andrea Golden without lawful authority or warrant and holding her against her will, said person having received bodily injury, to wit: cuts to Andrea Golden's mouth and bruising on her legs. (R, 21). Count III claimed that Defendant assaulted Andrea Golden with a knife constituting Aggravated Assault. Count IV was an additional count of Aggravated Assault alleging that Defendant assaulted Andrea Golden with his hands by beating her and choking her until she lost consciousness. (R, 21-22). In Count V Defendant was charged with False Imprisonment in that he violated the personal liberty of Andrea Golden by barricading her in a closet. (R, 22). Counts VI and VII alleged that Defendant committed Family Violence Battery (m) in that he caused bruising to the eye area of Andrea Golden by punching, kicking and beating her and that he caused bruising to the thighs of Andrea Golden. (R, 23).

On March 13, 2007, Mr. Horne filed a motion for competency evaluation and continuance. (R, 36-41). A brief bench trial was heard and denied by the trial

court on March 16, 2007. (Motion for Competency Evaluation and Continuation, 70). On March 23, 2007, a jury acquitted Defendant of Count I, Aggravated Sexual Battery, and Count III, Aggravated Assault with a knife. (R, 142-143). The jury convicted Defendant of Count II, Kidnapping with Bodily Injury, Count IV, Aggravated Assault by use of hands, Count V, False Imprisonment by barricading her in a closet, and Counts VI and VII, Family Violence Battery (misdemeanor). (R, 142-143).

Defendant was reluctantly sentenced to a mandatory life in prison sentence for the Kidnapping with Bodily Injury conviction at a sentence hearing on July 18, 2007. (Sentencing Hearing, 13, 14) (Hereinafter referred to as "ST"). Defendant was given a sentence of 20 years with 12 to serve concerning the Aggravated Assault charge. (ST, 14). The False Imprisonment charge merged with the Kidnapping with Bodily Injury count for the purposes of sentencing. (ST, 15) On August 7, 2007, Defendant filed a motion for new trial which was heard on November 16, 2007 and denied on August 14, 2008. (R, 125-135, 166-168, 175-247, 335-374). On September 9, 2008, Mr. Horne filed his Notice of Appeal from the denial of his motion for new trial. (R, 1-5). The case was docketed on

November 6, 2008. Mr. Horne requested and was granted an extension of time and now timely files this brief in support of his appeal.

2. Statement of the Facts

(a) Trial Testimony

The facts of this case remain in dispute. The primary witnesses to the incident which lead to the Indictment were the Defendant, Benjamin Horne, and the victim, Andrea Golden. (Prior to the jury trial Ms. Golden changed her name to Andrea Nicole Harkins, for the purpose of this brief she will be referred to as Ms. Golden. (T, 199)). They presented drastically different recollections of the activities of that evening and early morning of April 23 and 24, 2005. The jury rejected some of the claims and defenses of both parties. (T, 855).

It is undisputed that the Defendant and Andrea Golden met in 2002. (T, 588). They lived together at the time of this incident in 2005 and they are the parents of a daughter. Their daughter was not at the residence at the time of this incident. (T, 204). The parties resided in Hall County, Georgia. The parties further agree that on the evening of April 23, 2005 they went to the residence of George Jordan, the brother of Defendant. (T, 200, 603). The parties returned to their residence late that evening. (T, 200, 603). Defendant testified that upon

arriving home the parties engaged in a consensual sexual activity. (T, 604). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

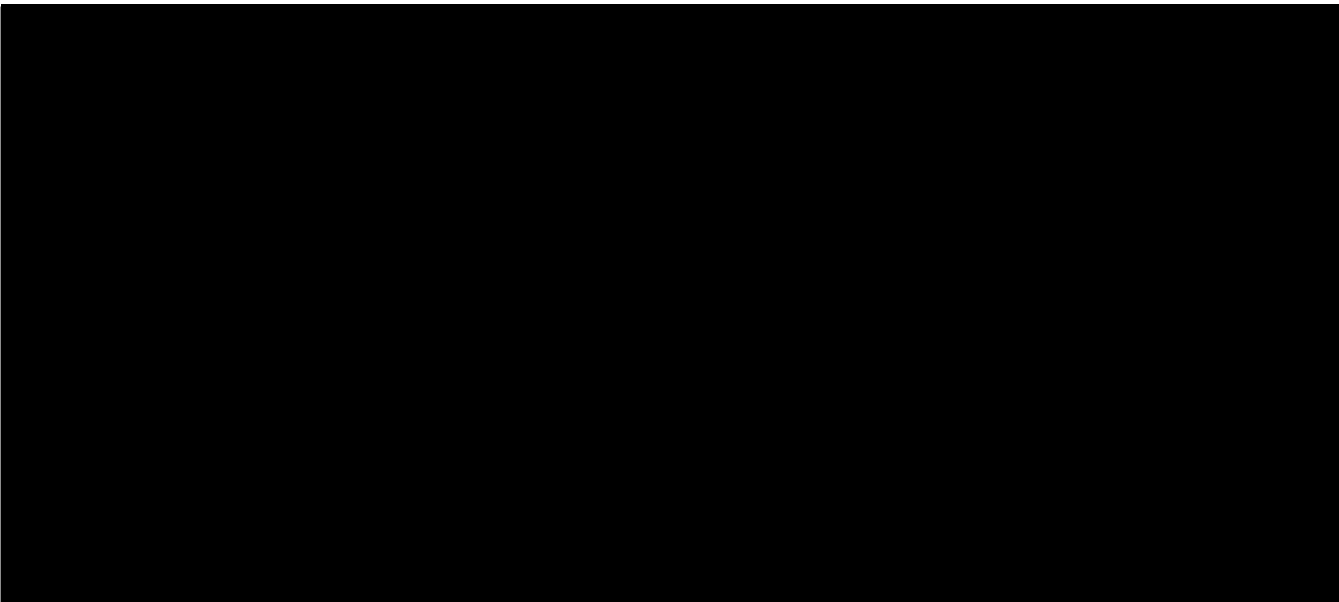
[REDACTED] (T, 604, 606). Ms. Golden recalled that earlier that evening on the way home from Defendant's brother home they starting arguing and that Defendant accused her of flirting with his brother. (T, 200). When they arrived at the house they continued to argue and that she decided to take a bath around 2:00 a.m. (T, 201). Ms. Golden alleged that while she was in the bath the Defendant continued to argue with her and entered the bathroom angry and that he brought a kitchen knife into the bathroom and threatened her and stuck the knife in the wall. (T, 202). Defendant testified that he was disgusted by their relationship and entered the bathroom and requested that she give him their engagement ring and that he did not want to marry her. (T, 608). Ms. Golden said that Defendant forcibly removed the ring and continued to threaten and scare her. (T, 202). Ms. Golden then testified that Mr. Horne threatened to assault her with a knife after taking the ring. (T, 202-204).

At some point between 2:00 and 3:00 a.m., Ms. Golden exited the bath and dressed. (T, 204). Ms. Golden then went into the living room to console Defendant, but the argument persisted for the next few hours. (T, 204-205). Eventually, Ms. Golden left Defendant to go to bed. (T, 208).

Ms. Golden testified that while she was in the bed, Defendant hit her in the face. (T, 208). Ms. Golden could not remember whether this blow knocked her to the floor or the bed. (T, 208). Ms. Golden recalled that Defendant hit her on the legs while intermittently slapping her on top of her head. (T, 208). During this encounter, Ms. Golden backed herself into the closet. (T, 208, 209). Ms. Golden testified that while she was in the closet, Mr. Horne shut the door and kept her from exiting the closet by placing something heavy in front of the door. (T, 209). Defendant denied ever forcing Ms. Golden into the closet. (T-625). According to Ms. Golden, after a few minutes Mr. Horne opened the door to the closet, put his knees on her, placed a strap across her throat and attempted to choke her. (T, 210-211). She then alleged that Mr. Horne attempted to smother her with a pillow and choke her with his hands. (T, 210). She testified that he physically assaulted her by punching and kicking her body. (T, 211) Defendant denied ever threatening Ms. Golden and that she was initially the physical aggressor in the dispute. (T, 619,

620). He further testified that she had physically attacked him in the past. (T, 591). Defendant denied choking Ms. Golden. (T, 624). Defendant acknowledged that the struggle got physical and that he hit and kicked Ms. Golden. (T, 640).

Ms. Golden claimed that Mr. Horne grabbed her by the hair and pulled her out of the closet into the dining room and told her not to move. (T, 213). She further claimed that Mr. Horne retrieved the belt from the bedroom and began beating her again. (T, 214).



Next Ms. Golden testified that Mr. Horne talked to her about killing her with a syringe. (T, 216). Then Mr. Horne pulled her up by her hands and told her that she would die. (T, 217). Ms. Golden then testified that Mr. Horne said he wasn't going to hurt her anymore. (T, 220). Then the two sat on the couch until

approximately 5:30 a.m. (T, 220). There were no allegations of further injuries to Ms. Golden.

The parties agree that the next morning they went to a local convenience store, the mall, and ultimately to the apartment of Defendant's brother. (T, 222-225). Ms. Golden testified that she was scared of Defendant and was forced to go with him in the car. (T, 222). Prior to leaving the house Ms. Golden wrote a letter to Defendant's brother. Ms. Golden testified that she was forced to write the letter. (T, 221). Ms. Golden acknowledged that Defendant told her that she could leave the car at anytime and that she had opportunities to leave at the convenience store and the mall. (T, 223, 224). However, she claimed that she was scared of Defendant and that he would find her and hurt her. (T, 223). Mr. Horne said that they were going to go see his half-brother, George Jordan, and then return their engagement ring. (T, 220).

Mr. Horne and Ms. Golden then drove to the mall to return the ring. (T, 223). Ms. Golden stayed in the car while Mr. Horne went into the mall. (T, 224). After returning to the car, Mr. Horne told Ms. Golden that he was going to deliver her letter to Mr. Jordan, and that when Mr. Jordan's girlfriend read it she would probably "start kicking [Ms. Golden's] ass." (T, 224). On the way to Mr.

Jordan's, Mr. Horne told Ms. Golden that after they stopped at Mr. Jordan's they would go home and that she would clean the house. (T, 224).

After arriving at Mr. Jordan's apartment complex, Mr. Horne left Ms. Golden in the car to enter the apartment. (T, 225). Ms. Golden fled from the vehicle and was picked up by a person driving by in the parking lot. (T, 225). After leaving the vehicle, Ms. Golden called 911, and was eventually taken to the hospital. (T, 225). Defendant testified that Ms. Golden voluntarily went with him that morning was free to leave at any time. (T, 636).

(b) Charge Conference, Closing Argument, and Jury Instructions

During the charge conference, the State proposed that it would argue alternative theories as to the kidnapping charge. (T, 697). These alternative theories were subsequently presented by the State during its closing argument. (T, 776). Specifically, the State submitted to the jury that it could find a kidnapping where Mr. Horne moved Ms. Golden throughout the house, or, alternatively, where Mr. Horne drove Ms. Golden around town. (T, 687). To be explicit in regard to the element of asportation, the State argued that,

[t]he next thing I have to prove is the movement, the asportation. And there are really two movements that we have here. I suspect the judge

will charge you slight movement is enough. Now, when you think of kidnapping in your head, of course what we think about is someone grabs a child and takes off. Movement of a couple of feet can be enough. The defendant drug her into the kitchen and there are drag marks that the officers found which corroborate that.... The defendant admits to doing this. He admits to dragging her a couple of feet.

(T, 776).

Next, the State argued its alternative theory, that the evidence supported asportation by “[t]he defendant[‘s] [admission] to taking her into town and that’s a second movement that we’ve got in this case.” (T, 776).

After closing arguments the trial court charged the jury by reading the indictment. (T, 797-800). In pertinent part, the trial court read Count 2 of the Indictment which provided that Mr. Horne “did abduct Andrea Golden, a person, without lawful authority or warrant and hold said person against her will, said person having received bodily injury, to wit: cuts to Andrea Golden’s mouth and bruising on her legs,....” (T, 798). Later, the trial court gave further instruction to the jury by stating that

[t]o prove abduction, the State must prove the element of asportation.

Asportation means "carrying away." Only the slightest movement of the victim is required to constitute the necessary element of asportation.

(T, 813).

(c) Verdict and Sentencing Hearing

After deliberations the jury returned a verdict of not guilty as to Count 1 of the Indictment, Aggravated Sexual Battery; guilty as to Count 2, Kidnapping with Bodily Injury; not guilty as to Count 3, Aggravated Assault; guilty as to Count 4 Aggravated Assault; guilty as to Count 5, False Imprisonment; and guilty as to Counts 6 and 7, Family Violence Battery. (T, 855). As to Count 2, the jury's verdict did not specify whether it found Mr. Horne committed kidnapping by dragging Ms. Golden from one room of the house to another or whether it found that he committed kidnapping by driving Ms. Golden throughout town.

On July 18, 2007, the trial court conducted its sentencing hearing. (ST, 1). The court specifically noted that for the purposes of sentencing the only bodily injuries associated with the kidnapping were cuts to Ms. Golden's mouth and bruises on her legs. (ST, 11). In discussing the mandatory imposition of Mr.

Horne's life sentence, the trial court stated "that it would find [the life sentence] not very fair and not very just." The court went on to note that, "this case likely would not have warranted this type of sentence if the Court had been given discretion in its sentence." (ST, 14). The court also noted that a sentence of 20 years with 12 to serve in custody was indicative of what the trial court thought to be a fair sentence based upon the aggravating and mitigating factors of Mr. Horne's case. (ST, 14). Finally, the trial court again stated it "[found] life in prison not [to] be a sentence that [was] appropriate for this case." (ST, 15). The trial court merged the false imprisonment count (for barricading Ms. Golden in the closet) guilty verdict with the Kidnapping with Bodily Injury count. (ST, 15).

(d) Motion for New Trial, Ineffective Assistance of Counsel, and Competency

On November 16, 2007, the trial court heard Mr. Horne's motion for new trial. (Motion for New Trial Transcript, 1). (Hereinafter referred to as "MNT"). At the hearing, Mr. Horne elicited testimony from his trial counsel, Daniel Parr, Sr. (MNT, 38). Mr. Parr first met with Mr. Horne on May 18, 2005, less than a month from the date of the incident. (MNT, 42). Mr. Parr quoted and received payment from Mr. Horne an amount that was to cover representation up to a plea with the understanding that if Mr. Horne's case went to trial he would incur a greater fee.

(MNT, 43). Mr. Horne never paid the additional fee. (MNT, 43). Mr. Parr testified that his office did not have an investigator employed, and that he typically did his own investigation. (MNT, 45). Mr. Parr did not file any motions or demurrers relating to the indictment. (MNT, 46). Specifically, Mr. Parr stated that he did not see a need for a clearer definition of the kidnapping charge listed in Count 2 of Mr. Horne's indictment. (MNT, 46).

Mr. Parr never went to the scene of the crime. (MNT, 46). In explaining his failure to file a motion in limine to prohibit the State from using evidence of drug use at the trial, Mr. Parr stated that he hoped the State would overlook it when reviewing the police reports and statements. (MNT, 50). Mr. Parr admittedly did not cross examine Ms. Golden regarding her drug use despite having some knowledge of said use. (MNT, 52). Mr. Parr also failed to secure any type of criminal background check on Ms. Golden. (MNT, 52). Though Mr. Parr was concerned enough for Mr. Horne's competency to file a Motion for Competency Evaluation and Continuance, he inexplicably did not request a special jury trial for competency. (MNT, 54-55).

Mr. Parr also had knowledge of a prior false accusation of violence perpetuated by Ms. Golden. (MNT, 55). In spite of being made aware of this by

Mr. Horne, Mr. Parr failed to perform any investigation into this incident. (MNT, 55-56). Specifically, he did not check for a police report nor did he attempt to contact the falsely accused aggressor. (MNT, 56) (The police report was subsequently produced by appellate counsel at the Motion for New Trial, MNT, 94, Defendant's Exhibit 3). Mr. Parr did, however, attempt to elicit testimony regarding the prior false accusation from Mr. Horne while he was directing his testimony. (MNT, 57). Mr. Parr testified that "[t]here would be no other witnesses" which could have testified about the incident. (MNT, 57).

Though Mr. Parr met with Ms. Golden regarding a custody matter concerning Ms. Golden's and Mr. Horne's child, he did not meet with her concerning this case, nor did he request permission to from the State. (MNT, 58).

Mr. Parr did meet with the emergency room physician who treated Ms. Golden, Dr. Harkrider. (MNT, 58). When the State elected not to call Dr. Harkrider, Mr. Parr followed suit. However, he could not explain why he did not call Dr. Harkrider to refute Ms. Golden's testimony concerning her head injuries. (MNT, 59). Aside from Dr. Harkrider and a brief encounter with a Deputy Crook, Mr. Parr did not speak with any of the State's witnesses prior to trial. (MNT, 60). Finally, Mr. Parr admitted that he did not go to the convenience store or the mall to

investigate or request potential video of Mr. Horne and Ms. Golden on the date of the incident. (MNT, 66-67).

After Mr. Parr's testimony, Mr. Horne elicited testimony from Ms. Golden's former landlord, Maryann Bates. (MNT, 93). Ms. Bates testified to her recollection of events relating to confrontation and subsequent false accusation lodged against her by Ms. Golden. (MNT, 94-97, MNT, Defendant's Exhibit 3). The incident occurred during Ms. Golden's eviction. (MNT, 94-97, MNT Defendant's Exhibit 3). Specifically, Ms. Bates stated that she did not touch Ms. Golden in spite of her attempts to goad Ms. Bates into hitting her. (MNT, 95). Following Ms. Bates testimony, an incident report from the Hall County Sheriff's Office was admitted into evidence to show that Ms. Golden reported to the police that her landlord, Ms. Bates, had slapped her in the face. (MNT, Defendant's Exhibit 3).

Following Ms. Bates's testimony, Mr. Horne corroborated Ms. Bates story and the incident report. (MNT, 98). Mr. Horne also testified that subsequent to the confrontation with Ms. Bates, Ms. Golden and her mother fabricated a story about Ms. Bates hitting Ms. Golden. (MNT, 98). Furthermore, Ms. Golden scuffed her face with a loofah sponge to create the appearance of an injury and then

photographed the fabricated injury. (MNT, 98). Mr. Horne testified that Ms. Golden then called the police and filled out a statement claiming that Ms. Bates had struck her. (MNT, 99).

In addition to addressing the preparation and performance of Mr. Parr, Mr. Horne produced medical records and elicited testimony from Dr. Rodney L. Smith, M.D. regarding Mr. Horne's type I diabetes and how it affected his competency to stand trial. (MNT, Defendant's Exhibit 1; MNT, 5). After being qualified as an expert in "the effects of diabetes," Dr. Smith testified that the drastic swings in blood sugar associated with uncontrolled diabetes can cause severe confusion, and vision loss. (MNT, 12-13, 16). Upon reviewing Mr. Horne's medical records from both before the trial and immediately after his trial, Dr. Smith specifically noted the medical significance of Mr. Horne's blood sugar fluctuations. (MNT, 19, 23-25). Dr. Smith also testified that Mr. Horne's refusal to accept treatment for those fluctuations were indicative of mental health issues worthy of further examination. (MNT, 26).

3. Preservation of Errors

The first error enumerated below references an intervening change in substantive criminal law which was issued by the Supreme Court of Georgia after

the denial of the Mr. Horne's motion for new trial. Because the change in law involves substantive criminal law, it is to be applied retroactively to appellate review of Mr. Horne's conviction. Further, the first error was also preserved by the denial of the Mr. Horne's Motion for New Trial. The remaining errors enumerated below were preserved by the denial of the Mr. Horne's Motion for New Trial. The fourth error was also preserved by the denial of the Mr. Horne's Motion for Mental Evaluation and Continuance.

II. ENUMERATION OF ERRORS

- 1. Given a supervening change in law announced by the Supreme Court of Georgia in Garza v. State, the Superior Court of Hall County erred in instructing the jury as to the asportation element of kidnapping.**
- 2. The Superior Court of Hall County erred in denying the motion for new trial on the grounds that Mr. Horne's trial counsel was ineffective.**
- 3. The Superior Court of Hall County erred in denying the motion for new trial on the grounds that Mr. Horne's life sentence was cruel and unusual.**
- 4. The Superior Court of Hall County erred in denying the Mr. Horne's motion for competency evaluation and request for funds for an expert**

evaluation and for failing to order a mental competency evaluation during the trial.

STATEMENT OF JURISDICTION

Jurisdiction of this appeal is in the Court of Appeals and not the Supreme Court because the Appellant was convicted of a non-capital felony, and jurisdiction over such appeals is not expressly reserved to the Supreme Court or conferred on other courts by the 1983 Constitution of the State of Georgia, Article VI, Section V, Paragraph III.

III. ARGUMENT AND CITATION TO AUTHORITY

1. The supervening change in law regarding the legal definition of asportation created error in the trial court's jury instruction.

On November 3, 2008, the Georgia Supreme Court issued its decision in Garza v. State, S07G1628. The decision abrogated the legal definition of asportation that was read to the jury by the trial court and argued by the State in Mr. Horne's case. Id. at 13. The trial court's findings of fact are accepted unless clearly erroneous. "However, the trial court's legal conclusions are reviewed de novo." King v. State, 282 Ga. 505, 506 (2007).

In Garza, the defendant was convicted of two counts of kidnapping. “The issue presented [was] whether any of the movements of [the victims] during the course of the incident...constituted asportation within the meaning of the Georgia kidnapping statute. Id. at 2. The Court noted that “[a] person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.” Id. at 3 (citing O.C.G.A. § 16-5-40 (a)). The Court also noted that under Georgia jurisprudence, the element of “‘abduct[ing] or steal[ing] away’ the victim, known in the legal parlance as ‘asportation,’ may be established by proof of ‘movement of the victim however slight.’” Id. (internal citations omitted).

After reviewing the inconsistencies of “hair-splitting decisions as to what [was] sufficient asportation,” the Court noted two constitutional issues that were created by the slight movement standard. Id. at 5. First, the Court noted how the slight movement standard posed the potential for cumulative punishment under more than one criminal statute for a single course of conduct, which “implicates the principle of substantive double jeopardy.” Id. at 7. Second, the Court noted that the standard implicated the Due Process Clause’s prohibition of vague laws because the plain language of the kidnapping statute did not provide sufficient

warning that forcing victims to move, however slightly, would justify prosecution for kidnapping. Id. at 8-9.

The Court also noted that the slight movement standard enabled “abusive prosecution under expansive kidnapping statutes for conduct that a rational mature penal law would have treated as another crime.” Id. at 9 (citing Model Penal Code and Commentaries, Pt. II, at § 212.1, p. 221) (Official Draft and Revised Comments 1980). Further, the Court noted that the slight movement standard “effectively eviscerates the distinction between kidnapping and false imprisonment.” Id.

Ultimately, the Court overruled the slight movement standard, and “adopt[ed] a more cogent standard for determining the sufficiency of evidence of asportation,” The Berry test. Under the Berry test, asportation is determined by assessing four factors: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. Id. at 12-13.

Under Horne v. State, 254 Ga. App. 207, 208 (2002), “new rules for the conduct of criminal prosecutions ‘[must]’ be applied retroactively to all cases, state or federal, pending on direct [appeal] or not yet final. (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). Furthermore, changes in substantive criminal law are to be applied retroactively. See Luke v. Battle, 275 Ga. 370, 372 (2002). In Luke, the Court held “that when a change in law decides the meaning of a criminal statute and decides that the statute does not reach certain conduct, it has made a ruling of substantive criminal law” and therefore should be applied retroactively. Id. (internal quotations and citations omitted).

As in Luke, the change in law announced in Garza altered the meaning of Georgia’s kidnapping statute and decided that the statute no longer reached certain conduct. Specifically, the kidnapping statute no longer applied to the slight movement of the victim of a false imprisonment. Garza, *supra*, at 16. Thus, the trial court’s jury instruction defining the element of asportation to be “slight movement” was error. As such, Mr. Horne is entitled to have his conviction for kidnapping with bodily injury vacated and his case remanded to the trial court.

The State is likely to argue that the evidence of Mr. Horne driving Ms. Golden around town provides a basis for the jury to find asportation under the

Berry test. Under Stromberg v. California, 283 U.S. 359 (1931), this argument is without merit.

In Stromberg, the defendant was charged in one count with violating a statute that could be violated in three possible ways. Id. at 364. The State presented evidence and argued for a conviction based upon all three. Id. at 368. Subsequently, an appellate court deemed one of the three to be invalid under the Constitution. Id. at 367. Because the jury had been authorized to return a guilty verdict upon finding any one of the three, it was impossible to glean which of the three ways the conviction had been obtained. Id. at 368. The Court further noted that this point was not merely academic, but in fact the State's attorney had emphatically urged the jury to convict the defendant upon the clause which was subsequently deemed invalid. Id. Therefore, the Court overturned the state court ruling that the verdict could be sustained if any of the possible ways of violating the statute were valid. Id. The Court went on to hold that "the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld. Id. See generally. Cramer v. United States, 65 U.S. 918, (1945); Griffin v.

United States, 502 U.S. 1125 (1992); Crawford v. State, 254 Ga. 435 (1985) (all citing and applying Stromberg).

The facts of the Stromberg case are highly analogous to Mr. Horne's case. As in Stromberg, Mr. Horne was charged in one count with violating a statute in two different ways. (T, 697, 776). By abrogating the "slight movement" standard, the Georgia Supreme Court's decision in Garza has effectively deemed one of the ways unconstitutional and legally invalid. Garza, *supra*, at 7-9. As such, Mr. Horne's conviction on the general verdict cannot be sustained simply because there is arguably evidence to support the remaining valid method, i.e. driving Ms. Golden into town.

Also, as with Stromberg, this point is not merely academic, but in fact the State repeated the judge's instruction of "slight movement," and followed it by stating that the jury was authorized to find asportation based upon Mr. Horne's admission that he drug her a few feet. (T, 776). Moreover, based upon the jury's acquittal of Mr. Horne for Aggravated Sexual Battery and one of the counts of Aggravated Assault, the jury did in fact reject some of Ms. Golden's testimony. (T, 855). Thus, it is certainly plausible that the jury could have rejected some of Ms. Golden's testimony regarding the element of asportation. In other words, it is

reasonable to believe that the jury may have doubted Ms. Golden's testimony she went with Mr. Horne voluntarily and whether she had the ability to leave his presence. Furthermore, regardless of Ms. Golden's credibility, Mr. Horne's conviction of Kidnapping with Bodily Injury cannot be upheld because one of the possible ways the jury was authorized to find Mr. Horne guilty has been subsequently deemed legally invalid.

The State is also likely to argue, that Mr. Horne's conduct inside the house would still meet the definition of asportation under the Berry test. First, a ruling based upon this argument would supplant a jury's judgment of the facts with that of this Court. The issue raised by Mr. Horne is not whether there was sufficient evidence to find asportation under the Berry test, but whether his conviction under the "slight movement" standard was unconstitutional and thus legally invalid. The State has no valid method to surmise whether the jury believed that the evidence meet the Berry test. Indeed, as to asportation, the only question asked of the jury was whether the State had proven "slight movement" of Ms. Golden. (T, 813).

Second, the only incite this Court has into the basis of the jury's kidnapping verdict, is the trial court's decision to merge the False Imprisonment count with the Kidnapping with Bodily Injury. (ST, 15). This finding by the trial court and the

State's acquiescence, suggests that the kidnapping occurred during the first movement, i.e. the movement in the house. (ST, 15).

Third, even if this Court were to make a finding of fact as to asportation under the Berry test, the alleged movement of Ms. Golden from the bedroom to the living room would not meet the test under Garza.

In Garza, the defendant was convicted of two counts of kidnapping, four counts of false imprisonment, and one count of aggravated assault. Id. at 1. The evidence at trial that established one of the kidnapping counts was perpetuated against Ms. Mendoza, the second count was committed against, her son, J.M. The evidence at trial showed that Mr. Garza gained entry to the Ms. Mendoza's house by pretext, locked the door, put a gun to Ms. Mendoza's head, and threatened to shoot her. Id. Carley, J, *dissenting*, at 6. Mr. Garza then struck Ms. Mendoza in the head causing her to fall to the floor and her head to bleed. Id. Carley, J, *dissenting*, at 6. Mr. Garza then taped Ms. Mendoza's wrists, tied her ankles, made her sit in a chair, gagged her with a diaper, and told her not to move. Id. Carley, J, *dissenting*, at 6. Then Mr. Garza disabled the phone and removed the bulbs from the lights. Id. Carley, J, *dissenting*, at 6. Throughout the incident, Mr. Garza threatened Ms. Mendoza with the gun, and threatened to shoot her children who

were also present. Id. Carley, J, *dissenting*, at 6. Mr. Garza then allowed Ms. Mendoza to move to a couch, where Mr. Garza tethered her to a baseball bat. Id. Carley, J, *dissenting*, at 7.

After six hours from Mr. Garza's entry, Ms. Mendoza was able to escape. Id. Carley, J, *dissenting*, at 7. In spite of her escape, Mr. Garza was able to hold her J.M. hostage. Id. Carley, J, *dissenting*, at 7. While holding J.M. at gun point, Mr. Garza grabbed J.M. by the shirt and forced him to move from one room to another. Id. Carley, J, *dissenting*, at 7. He also forced J.M. to walk down the hallway and back to the bedroom on multiple occasions. Id. Carley, J, *dissenting*, at 7. J.M. testified that he was scared because he believed that Mr. Garza had used the gun to kill his mother. Id. at 2.

In regard to Ms. Mendoza's alleged kidnapping, the Court determined there were two distinct movements, "Ms. Mendoza's falling to the floor from standing position and being forced from the floor to the chair," which could have constituted the necessary asportation to support a kidnapping conviction. Id. at 15. The Court ruled both of these movements to be insufficient because both were of minimal duration and occurred during the course of and incidental to Mr. Garza's false imprisonment of Mendoza. Id. Additionally, the Court found that the blow

that caused Ms. Mendoza's fall was an inherent part of the aggravated assault. Id. at 16. Moreover, Ms. Mendoza's movements did not significantly increase the dangers to her over those she faced as a victim of false imprisonment or aggravated assault. Id. The Court held that "[a]pplication of the Berry factors thus clearly support[ed] the reversal of Mr. Garza's conviction of kidnapping Ms. Mendoza." Id.

As to J.M.'s alleged kidnapping, the Court found that when the police arrived on the scene, Mr. Garza grabbed J.M.'s shirt, and forced him into the adjoining bedroom where they stayed for two to three hours. Id. On multiple occasions, Mr. Garza forced J.M. to walk with him to retrieve items from the police. Id. The Court found that each of these movements were of short duration and occurred as minor incidents in the course of Mr. Garza's false imprisonment of J.M. Id. The Court deemed that none of J.M.'s movements served to conceal him from the police, to thwart any appreciable efforts of police to free J.M., or to enhance significantly the risk J.M. already faced as the victim of false imprisonment. Id. at 17. Accordingly, the Court reversed Mr. Garza's conviction for the kidnapping of J.M. Id.

In the instant case of Ms. Golden's alleged kidnapping, the State relied upon two distinct movements – the dragging of Ms. Golden by her hair out of the bedroom into the kitchen, and the admission by Mr. Horne that he drove Ms. Golden into town – to establish the element of asportation. (T, 687, 776).

The first movement argued by the State was of minimal duration and distance. (T, 776). (Oddly, had the jury believed Ms. Golden's testimony concerning aggravated sexual battery, the dragging could have been viewed as incidental to that alleged crime.) (T, 815). Nevertheless, the movement was merely part of the false imprisonment and aggravated assault. Which, according to Ms. Golden's testimony, during the aggravated assault and false imprisonment she was barricaded in the closet, sitting in a defenseless position and repeatedly being beaten and choked. (T, 208-213). Thus, the movement of Ms. Golden from one room to the other, a distance of a few feet, did not significantly increase the dangers to her over those she faced as a victim of false imprisonment and aggravated assault. Therefore, none of the Berry factors indicate that this movement was indicative of asportation.

As to the second movement, driving Ms. Golden around to a convenience store and to the mall did not present a significant danger above and beyond the

aggravated assault and false imprisonment. No allegation was made that Mr. Horne carried a knife or any other weapon from the house. Further, there were no allegations that Mr. Horne was driving erratically or dangerously. Indeed, even if the jury found Ms. Golden's testimony that she was scared to exit the car at any time credible, the movement had the reverse effect by putting her and Mr. Horne in public, which eventually led to her escape and rescue. (T, 225).

Therefore, under Garza, Mr. Horne is entitled to a new trial in which the jury will be properly instructed as the asportation element of the kidnapping. As such, his conviction should be reversed and a new trial should be granted.

2. Mr. Horne is entitled to a new trial due to the ineffectiveness of his trial counsel.

The standard of review for a trial court's decision regarding effectiveness of counsel is whether the trial court's findings are "clearly erroneous." Johnson v. State, 266 Ga. 380, 383 (1996).

Trial counsel was ineffective in his representation of Mr. Horne. Trial counsel at the hearing on the Motion for New Trial acknowledged that this was his first capital case and that the majority of his cases that he has taken to jury trial have been misdemeanors. (MNT, 41). He did not have investigators and did

limited investigation of the case. (MNT, 45). He did not go the scene of the crime or interview any of the witnesses provided by the State. (MNT, 46). Trial counsel did not hire any experts or call any experts at trial. Trial counsel did not see a need for a clearer definition of the Kidnapping with Bodily Injury and therefore did not file any pretrial motions of demurrers. (MNT, 46, 50).

The Georgia Courts have held that trial counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Terry v. Jenkins, 280 Ga. 341 (2006); Gibbs v. State, 287 Ga. App. 694 (2007). When a failure to investigate results “from inattention and not from reasoned strategic judgment”, however it is unreasonable as a matter of law. Terry v. Jenkins, 280 Ga. 341. In Tenorio v. State, 261 Ga. App. 609 (2003), defense counsel’s investigator did not interview or make a diligent effort to locate potential alibi witnesses. In State v. Lamb, 282 Ga. App. 756 (2007) trial counsel made no effort to investigate or to obtain the criminal records or a similar transaction witness and did not ask for more time or a continuance to obtain the records when he discovered it had not been accomplished. In both Tenorio and Lamb the court held that the trial counsel was ineffective and a new trial was granted.

In Lamb it was highlighted that the lack of effort by the trial counsel was more crucial when the evidence was not overwhelming. In the case at bar, the only witnesses to the events were the Mr. Horne and the alleged victim Ms. Golden. It was the testimony of the Mr. Horne that Ms. Golden was ultimately the aggressor and that she was not telling the truth in her testimony. Potential evidence that she had on a previous occasion created a story, including faking injuries, to avoid being dispossessed is critical evidence that at a minimum should have been exhaustively investigated. Instead, trial counsel admitted that he never tried to contact Maryann Bates, the landlord accused of hitting Ms. Golden who testified at the Motion for New Trial hearing. (MNT, 55-57). Trial counsel was unaware that a police report, which was introduced at the hearing, even existed and that Ms. Golden had attempted to have an arrest warrant issued against Maryann Bates that was denied by the Magistrate Court. (MNT, 56). These were not extraordinary efforts to ask of an attorney in his representation. The verdict of the jury in rejecting the claims of Ms. Golden as to the Aggravated Sexual Battery and the Aggravated Assault charge concerning the knife provide a clear indication that the jury had some questions as to the truthfulness of Ms. Golden. Based on this concern on the part of the jury, if they had been made aware of the potential

previous false allegations, there is a reasonable probability the jury would have reached a different verdict or at a minimum could have influenced the outcome of the trial as required by the Georgia Courts. State v. Lamb, *supra*; Goldstein v. State, 283 Ga. App. 1, (2007).

Trial counsel waived all opening statements, (MNT, 62) did not take advantage of his ability to have a 2 hour closing, (MNT, 62) allowed very damaging evidence of potential drug use of his client to come in under cross examination instead of via direct examination, and did not introduce evidence that the alleged victim was under the influence of drugs are all indications of an ineffective and inadequate defense. Trial counsel admitted that additional resources would have allowed a more thorough investigation and Mr. Horne owed him money. He did not seek any additional funds to aid in the defense.

It is also critical to note that trial counsel's failure to file a demurrer or any pretrial motions concerning the indictment substantially prejudiced Mr. Horne. Count 2 of the Indictment only gave Mr. Horne notice of only one claim of a Kidnapping with Bodily Injury. This vagueness highlights the impossible position for Mr. Horne's defense against the charge. The Indictment alleged that Mr. Horne abducted Ms. Golden without lawful authority or warrant and hold her against her

will, said person receiving bodily injury, to-wit: cuts to her mouth and bruising on her legs. (R, 21).

Therefore, based upon Mr. Horne's trial counsel's failure to investigate and his failure to file a special demurrer to Count 2 of the Indictment the trial court erred in deeming trial counsel effective. The inadequacies of Mr. Horne's trial counsel affected the outcome of the case and thus he should be entitled to a new trial.

3. Mr. Horne's mandatory life sentence is cruel and unusual.

The trial court's findings of fact are accepted unless clearly erroneous. "However, the trial court's legal conclusions are reviewed de novo." King v. State, 282 Ga. 505, 506 (2007).

Under the Eighth Amendment of the United States Constitution and Article 1, Section 1, Paragraph XVII of the Georgia Constitution, a sentence is cruel and unusual if it is grossly out of proportion to the severity of the crime. Whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the evolving standards of decency that mark the progress of a maturing society. Humphrey v. Wilson, 282 Ga. 520. (2007).

In the case at bar, the trial court erred by denying Mr. Horne's Motion for New Trial based upon cruel and unusual punishment in light of the changes in the interpretation of the crime of kidnapping and specifically kidnapping with bodily injury. Mr. Horne argued at the Motion for New Trial that the escalation in the punishment for Kidnapping for Bodily Injury is exacerbated by the diminution in the requirements for a conviction of Kidnapping. (MNT, 104-105). Specifically, Mr. Horne argued that the asportation element of kidnapping have diminished over the years to become almost identical to false imprisonment. In addition, what constitutes "bodily injury" has gone from serious to virtually any injury. When the Trial Court had great discretion in sentencing, the distinction between false Imprisonment, Kidnapping, and Kidnapping with Bodily Injury were not as vital. However, with the advent of the mandatory minimum sentencing in relation to Kidnapping and Kidnapping with Bodily Injury the stakes have drastically grown and the elements in the crimes must be adjusted to meet the severity of the sentence.

As discussed in detail Section III, Subsection 1, *supra*, the Georgia Supreme Court recently narrowed the asportation element of Kidnapping in the Garza v. State, SO7G1628. The logical evolution of the analysis is the sentencing

requirement of a mandatory life imprisonment of death if the person kidnapped received bodily injury. O.C.G.A. § 16-5-40.

To determine whether a sentence set by the legislature is cruel and unusual, Georgia courts rely upon the United States Supreme Court decisions of Harmelin v. Michigan, 501 U.S. 957 (1991) and Ewing v. California, 538 U.S. 11 (2003). The threshold question is whether a blanket sentence of life imprisonment is grossly disproportionate. The Georgia Supreme Court in the Humphrey v. Wilson, *supra*, adopted the analysis of Justice Kennedy's concurrence in the Harmelin in order to determine if a sentence is grossly disproportionate, a court must first examine the "gravity of the offense compared to the harshness of the penalty" and determine whether a threshold inference of gross disproportionality is raised. Wilson at 13. The courts must seek to determine whether the sentence furthers a "legitimate penological goal" considering the offense and the offender in question. Ewing, 538 U.S. at 29. If a sentence does not further a legitimate penological goal, it does not "reflect a rational legislative judgment, entitled to deference," and a threshold showing of disproportionality has been made. Ewing at 30. Once this threshold is crossed the second step is a comparison of the defendant's sentence to sentences

imposed for other crimes within the jurisdiction and for the same crime in other jurisdiction. Harmelin, 501 U.S. at 1004-1005.

The challenge in the case at bar is the focus on “bodily injury” and the diminished requirements to meet the threshold injury when compared to the consequences in determining sentence. The vast majority of case law establishing the meager requirements equaling “bodily injury” were established prior to the 2006 amendment of the sentencing portion of the code section. The courts have held that kidnapping with bodily injury only requires that an injury, not matter how slight, occur during the kidnapping... Bailey v. State, 269 Ga. App. 262 (2004), Green v. State, 193 Ga. App. 894 (1989). However, sentencing requires a mandatory minimum punishment of 10 years with a maximum of 20 years for kidnapping and leaps to a mandatory minimum of life imprisonment for kidnapping with bodily injury. This without a requirement of a “serious injury.”

In the case at bar the jury convicted Mr. Horne of one count of aggravated assault which standing alone could result in a minimum sentence of not less than 1 year to a maximum of 20 years. O.C.G.A. §16-5-21. The trial judge found that for the purposes of sentencing the injuries were cuts to Ms. Goldens’s mouth and bruises on her legs. (ST, 11). There is no evidence that any injuries occurred

immediately prior to or during the morning drive. In fact, Ms. Golden acknowledged that the parties sat and talked on the couch for a considerable period prior to getting in the car. (T, 220-222). The only contact alleged was that “he kicked her in the butt” as she was walking down the hall to get dressed to leave the house. (T, 220).

The Supreme Court of Georgia has directed that the law concerning Kidnapping be adjusted to the gravity of the sentence and the impossibly broad definition of asportation. The case at bar raises the stakes with the added challenge of asking a Mr. Horne to guess when the kidnapping occurred and if the injuries sustained were associated with that particular event. It is more troubling when a logical review would conclude that the activities inside the residence would not constitute a Kidnapping under the Garza case. Therefore, and especially in light of the changes in the elements to kidnapping in Garza, it is time to reevaluate the bodily injury element in Georgia law.

The appropriate standard is to require a “serious bodily injury” equally the seriousness of the sentence. It is unfortunate that the legislature did not properly update the elements of the crime of kidnapping when changing the sentencing requirements. However, based upon the analysis in the Wilson case and the

changes provided in the Garza case, it should be clear that the sentence in the case at bar is grossly disproportionate to his crime and constitutes cruel and unusual punishment under both the Georgia and United States Constitutions.

4. The trial court erred by failing to convene a special jury to determine if Mr. Horne was competent to stand trial.

The standard of review for a trial court's determination of whether to grant funds for a competency evaluation is whether the trial court abused its discretion in the denial of funding. Callaway v. State, 208 Ga. App. 508, 510 (1993).

Mr. Horne was diagnosed with Type I diabetes in August of 2006. (T, 587, 589). In the months leading up to the trial of this case Mr. Horne's trial attorney and family members were concerned with his physical and mental health. Mr. Horne experienced extreme difficulties with stabilizing his diabetes which resulted in weight loss, lack of concentration, lack of understanding the realities facing him in his upcoming trial and the inability to understand potential plea offers and aid in his available defenses. Mr. Horne testified during his trial that he was having problems with his blood sugar level during the trial and during his testimony. (T, 589).

Mr. Horne's trial counsel filed a Motion for Competency Evaluation and Continuance on March 13, 2007. (R, 36-41). Mr. Horne's trial counsel did not present the court with any expert testimony. Trial Counsel did request funds to acquire funds to have Mr. Horne evaluated and said request was denied. (Motion for Competency Evaluation Transcript, 61-63) (Hereinafter referred to as "MCT"). The Trial Court held a non jury hearing concerning the issue of competency and of a continuance and denied the request. (MCT, 70).

At Mr. Horne's Motion for New Trial the medical records were evaluated by an expert in family medicine, in particular the effects of diabetes. (MNT, 10-11). The records provided that Mr. Horne, listed as being a height of 5'7, went from a weight of 150 pounds in January of 2006 to a weight of 125 pounds in August of 2006. (MNT, 17). Mr. Horne's expert witness reviewed prior medical records, specifically March 14, 2007, in which Mr. Horne's treating physician was very concerned that he had not been taking his medication and seeing the proper physicians. (MNT, 21-22). In addition, Mr. Horne had been prescribed Prozac to deal with his depression. (MNT, 22). In reviewing Mr. Horne's medical record from March 24, 2007 until March 28, 2007, Mr. Horne's blood sugar levels were often and a critical and dangerous level. (MNT, 25). The levels were at such a

level that it may have resulted in Mr. Horne's inability to function and need of immediate medical attention. (MNT, 29, 30). The trial of the case at bar concluded on March 22, 2007.

Courts must inquire into competency and hold a hearing on the issue, even during trial, if evidence raising the issue of incompetence becomes apparent. Baker v. State, 250 Ga. 187 at 190, (1982). Factors such as a history of irrational behavior, the defendant's demeanor at trial, and prior medical opinions are relevant to deciding whether the inquiry is necessary. Drope v. Missouri, 420 U.S. 162 (1975). Upon receiving information which, objectively considered, should reasonably raise a doubt about the defendant's competence, trial courts should conduct a civil proceeding before a special jury, even where state procedures are not followed. Holloway v. State, 257 Ga. 620, 621 (1987), Brogdon v. State, 220 Ga. App. 31 (1996).

The trial court was put on notice of the potential for this problem with the Motion for Competency Evaluation filed prior to trial. When Mr. Horne chose to testify at the trial the court should have provided additional opportunity to evaluate his competency. The trial court was provided additional opportunity for alarm when the following testimony was provided:

Q. (From Trial Counsel) The volume of your voice is starting to go down.

A. (Mr. Horne) I'm sorry. I'm having a lot of problems with my sugar today.

(T, 589).

At a minimum the trial court should have inquired about the physical and mental state of Mr. Horne. In addition, if Mr. Horne's trial counsel had been granted the necessary funds to obtain a proper pretrial evaluation, Mr. Horne and his counsel could have better prepared him to testify.

In Brogdon, the court held that once the court is or should be aware of the issue of competency, a hearing to determine competence to stand trial is required. Brogdon at 34. To remedy this harmful error, remand for a hearing to determine Mr. Horne's competence to stand trial is required. Id. at 34. The state bears the initial burden of showing that the evidence is sufficient to permit a meaningful competency determination. Should the court decide that such a determination is not now possible, then Mr. Horne would be entitled to a new trial on the offenses charged and he may again raise the issue of incompetence by special plea pursuant to O.C.G.A. §17-7-130. Id. at 34.

Therefore, based upon the denial of the Motion for Competency Evaluation and because the trial court failed to act upon Mr. Horne's competency issues at trial, the trial court erred by not properly addressing Mr. Horne's competency to stand trial. Given that Mr. Horne testified, and that some of this testimony was damaging to his case, he should be entitled to a new trial with sufficient investigation into his competency, as envisioned by this Court in Brogdon.

IV. CONCLUSION

The recent changes in substantive Kidnapping law set forth in Garza v. State regarding the element of "asportation" require the reversal of Mr. Horne's conviction and the granting of a new trial. In addition, Mr. Horne's trial counsel was ineffective because he failed to inquire into the State's case and also failed to pursue an investigation into the complaining witness's prior false accusation of violence. These two failures of trial counsel adversely affected the outcome of Mr. Horne's trial and therefore the trial court erred in denying his Motion for New Trial on this ground. Further, the trial court erred by not deeming Mr. Horne's sentence cruel and unusual. Finally, because the trial court knew or should have known that the Mr. Horne was having mental capacity issues, it was error for the court not to conduct a further inquiry into Mr. Horne's competency. Therefore, for

the above stated reasons Mr. Horne respectfully requests that his case be remanded to the trial court and that he be granted a New Trial.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "W. Andrew Maddox", written over a horizontal line.

W. Andrew Maddox
Attorney for Appellant
State Bar No. 465517