

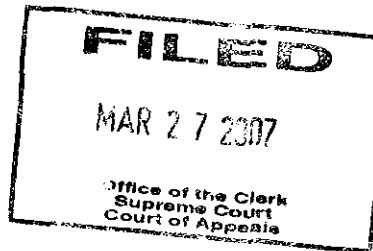
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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**BOBBY HEIDELBERG**

**APPELLANT**

**VS.**



**NO. 2006-KA-1125-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE CASE**

In this appeal involving yet another conviction for felony DUI the focus is upon jury instruction S-1 which allegedly failed to instruct the fact finder as to all of the essential elements of the offense.

It is claimed that S-1 should have told the jury it must find beyond a reasonable doubt the defendant's consumption of intoxicating liquor "impaired his ability to operate a motor vehicle."

BOBBY HEIDELBERG, a forty-four (44) year old African-American male (R. 48; C.P. at 24) twice previously convicted in the state of Mississippi of driving his motor vehicle while under the influence of intoxicants, prosecutes a criminal appeal from the Circuit Court of Jones County, Mississippi, Billy Joe Landrum, Circuit Judge, presiding.

Following a one (1) day trial by jury conducted on April 13, 2006, Heidelberg was convicted of felony DUI based upon the commission of a 3<sup>rd</sup> DUI offense within the past five (5) years. (R. 43-44, 71; C.P. at 19)

On May 16, 2006, Heidelberg was sentenced to serve three (3) years in the custody of the

MDOC. (R. 73-74; C.P. at 22-23)

An indictment returned on July 8, 2003, stated, in its entirety,

“[t]hat BOBBY HEIDELBERG . . . did on or about the 18th day of August, 2002, unlawfully, wilfully, and feloniously drive or operate a vehicle within the State of Mississippi on Highway 84 East, in the Second Judicial district, Jones County, Mississippi, while under the influence of an intoxicating liquor or other substance which impaired his ability to operate said vehicle, in violation of Miss.Code Ann. §63-11-30.

The said BOBBY HEIDELBERG, has two or more convictions within the past five (5) years for violation of Miss.Code Ann. §63-11-30, as illustrated by exhibits A and B attached hereto, thereby constituting the charge of Felony DUI.”

One (1) issue is raised on appeal to this Court:

“Whether the trial court failed to instruct the jury on the [essential] elements of felony DUI.”

(Brief of the Appellant at 2)

Michael D. Mitchell, a practicing attorney in Laurel, represented Heidelberg effectively at trial.

Brenda Jackson Patterson, an attorney for the Mississippi Office of Indigent Appeals has been substituted on appeal.

### **STATEMENT OF FACTS**

Heidelberg, in his appellate brief, has articulated a brief but clear, concise, and accurate “Statement of the Case” and “Statement of the Facts” presenting the relevant facts. We adopt those facts here and add only the following:

According to Deputy Larry Hayes, Heidelberg *did not* decline to take the “portable breath test” at the scene of the traffic stop; rather, he submitted to the test administered by Hayes at the scene. (R. 33) “Based on the results [Hayes] determined that [he] needed to go ahead and transport

[Heidelberg] and offer him a test on the I-5000.” (R. 33)

Heidelberg later refused to take the Intoxilyzer 5000 at the jail “ . . . because he had took the portable alongside the road.” (R. 34) Two (2) witnesses testified for the State of Mississippi during its case-in-chief, including **Deputy Larry Hayes** who conducted the traffic stop, observed Heidelberg’s appearance and demeanor, and testified that in his opinion Heidelberg was impaired and intoxicated. (R. 35)

**Desi King**, a member of the Laurel police department who researched the abstracts, testified that Heidelberg had been twice previously convicted in Jones County of driving under the influence, once in 2000 and again in 2002. (R. 43-44)

At the close of the State's case-in-chief, the defendant moved for a directed verdict on the ground, *inter alia*, the State had failed to prove “ . . . that the defendant Bobby Heidelberg[’s] . . . ability to drive was impaired at the time that he was driving the vehicle.” (R. 46)

Following a response from the State, the motion was denied. (R. 46-47)

**Bobby Heidelberg**, the defendant, testified in his own behalf. He admitted consuming several beers earlier in the day but denied he was driving drunk. (R. 51-52, 55-56)

Heidelberg’s previous convictions consisted of a conviction of DUI, first offense, on June 19, 2000, in the Municipal Court of Laurel and a second conviction on February 25, 2002, also in the Municipal Court of Laurel. Both convictions were proved by conviction abstracts introduced during the testimony of Desi King. (R. 43-44) A cautionary instruction concerning the limited use of the prior convictions was granted by the circuit judge at the close of all the evidence. (C.P. at 16)

Following closing argument, the jury retired to deliberate at 11:40 a.m. and returned with a verdict of guilty twenty (20) minutes later at 12:00 noon. (R. 70)

A poll of the jury, individually by name, reflected the verdict was unanimous. (R. 71-72)

On June 1, 2006, Heidelberg filed his motion for a new trial (C.P. at 20-21) which was overruled on June 14, 2006. (C.P. at 25)

### **SUMMARY OF THE ARGUMENT**

Jury instruction S-1, which was not objected to, contained the essential elements of the crime charged under Miss.Code Ann. §63-11-30(1)(a). It was not necessary for the State to prove the consumption of intoxicants impaired Heidelberg's ability to operate his motor vehicle.

It was only necessary for the State to prove beyond a reasonable doubt that Heidelberg was operating a motor vehicle while "under the influence of intoxicating liquor." **Christian v. State**, 859 So.2d 1068 (Ct.App.Miss. 2003); **Harris v. State**, 830 So.2d 681 (Ct.App.Miss. 2002).

### **ARGUMENT**

#### **THE TRIAL COURT DID NOT ERR IN GRANTING JURY INSTRUCTION S-1 WHICH REQUIRED THE JURY TO FIND BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.**

Heidelberg contends, for the first time on appeal, the trial judge erred in granting jury instruction S-1 because it did not require the jury to find beyond a reasonable doubt that Heidelberg's consumption of intoxicants "impaired his ability to operate a motor vehicle." (Brief of the Appellant at 3) According to Heidelberg, impairment is an essential element of the offense.

We disagree.

The State was not obligated to offer proof on impairment of Heidelberg's driving ability, only proof of his driving under the influence of intoxicating liquor. **Christian v. State**, 859 So.2d 1068, 1073 (Ct. App.Miss. 2003).

At the close of the State's case-in-chief, Heidelberg moved for a directed verdict "... based upon the State's failure to prove that the defendant Bobby Heidelberg, his ability to drive was

impaired at the time that he was driving the vehicle.” (R. 45-46)

The district attorney responded to this argument as follows:

MR. BUCKLEY: Your Honor, I’d just like to clear something up that counsel keeps stating. Under the DUI statute 63-11-30, the State is not required as an element to show that it impaired his ability to drive a motor vehicle. If we’re going under alcohol, according to statute, all we’ve got to prove is that he was intoxicated while under the influence of alcohol while operating a vehicle. (R. 46-47)

We respectfully submit the district attorney was eminently correct.

In *Harris v. State*, *supra*, 830 So.2d 681, 683 (Ct.App.Miss. 2002), the court opined:

\* \* \* Article 3, section 27 of the Mississippi Constitution requires that an indictment enumerate all essential elements of the criminal offense. *Burrell v. State*, 727 So.2d 761 (¶ 10) (Miss.Ct.App. 1998). In this case, the indictment simply charged Harris with operating “a motor vehicle while under the influence of intoxicating liquor,” which is the exact language of the offense codified at Mississippi Code Section 63-11-30(1)(a) (Supp. 2–1). **This statement adequately informed Harris of the elements that the State was required to prove.** There is no merit to this assignment of error. [emphasis ours]

In *Christian v. State*, *supra*, 859 So.2d 1068, 1073 (Ct.App.Miss. 2003), we find the following language:

Christian was charged with driving while under the influence of intoxicating liquor. The applicable statute distinguished this charge from driving while under the influence of another substance that impairs driving ability. **Given the distinction in statutory language, we hold that the State was not obligated to offer proof on impairment of Christian’s driving ability only proof of his driving under the influence of intoxicating liquor.** \* \* \* [emphasis ours]

The cases cited and relied upon by Heidelberg point to fundamental error when the jury is not instructed as to each essential element of the offense charged. No one would argue with the requirement the essential elements of the crime charged must be submitted to the jury.



In this case, they were.

The jury was not required to find beyond a reasonable doubt that Heidelberg's ability to drive was impaired. It was only required to find that Heidelberg was driving under the influence of intoxicating liquor.

Heidelberg admitted to Deputy Hayes he had consumed several beers around noon that day. (R. 51) According to Hayes, Heidelberg's eyes were bloodshot, his speech slurred, and Heidelberg was "unsteady on his feet." He was confused and could not answer questions correctly. Hayes also detected the odor of intoxicating beverage coming from Heidelberg's motor vehicle. (R. 31-32)

Based upon the results of the portable breath test, Heidelberg was taken to the jail where he refused a test on the Intoxilyzer 5000 " . . . because he had took the portable alongside the road." (R. 34)

Q. [BY PROSECUTOR]: Now, I'm going to ask you this question. Based on your training and experience as a DUI officer, just as importantly upon your firsthand knowledge and observations on that night based on your police report of August 18<sup>th</sup>, 2004, do you have an opinion as to whether Bobby Heidelberg was intoxicated on that night in question?

A. [BY DEPUTY HAYES:] Yes.

Q. And what is that opinion?

A. That he was impaired, that he was intoxicated. (R. 35)

Heidelberg's complaint is devoid of merit. *See McCool v. State*, 930 So.2d 465 (Ct.App.Miss. 2006) [Evidence that defendant had slurred speech, bloodshot eyes, smelled of alcohol, had trouble standing, was loud and belligerent, coupled with testimony that defendant was drunk, was sufficient to support McCool's conviction for driving under the influence.]

Finally, S-1 was not the target of an objection at trial. Contrary to Heidelberg's position, no

“fundamental error” or plain error is involved here. Therefore, Heidelberg’s argument is procedurally barred. **Moawad v. State**, 531 So.2d 632 (Miss. 1988); **Carlisle v. State**, 822 So.2d 1022 (Ct.App.Miss.), reh denied, cert denied 829 So.2d 1245; **Cunningham v. State**, 828 So.2d 208 (Ct.App.Miss. 2002), reh denied, cert denied 829 So.2d 1245. *See also* **Pollard v. State**, 932 So.2d 82 (Ct.App.Miss. 2006) [Counsel’s failure to object to jury instruction serves as a procedural bar on appeal unless granting of instruction constitutes plain error.]

### CONCLUSION

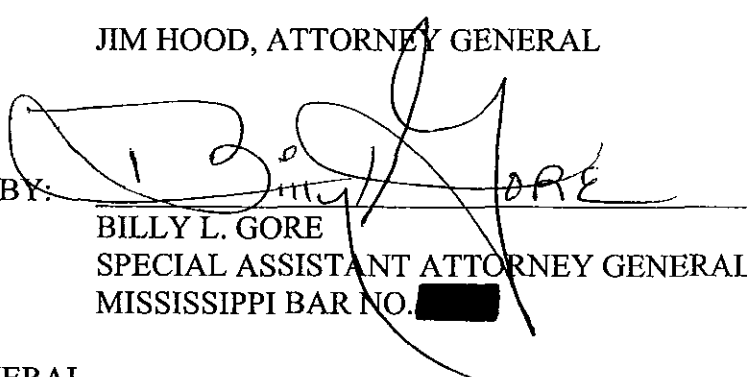
Heidelberg has failed to meet his burden of demonstrating any fundamental error in the granting of jury instructions.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction of felony DUI and the three (3) year sentence imposed in its wake should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

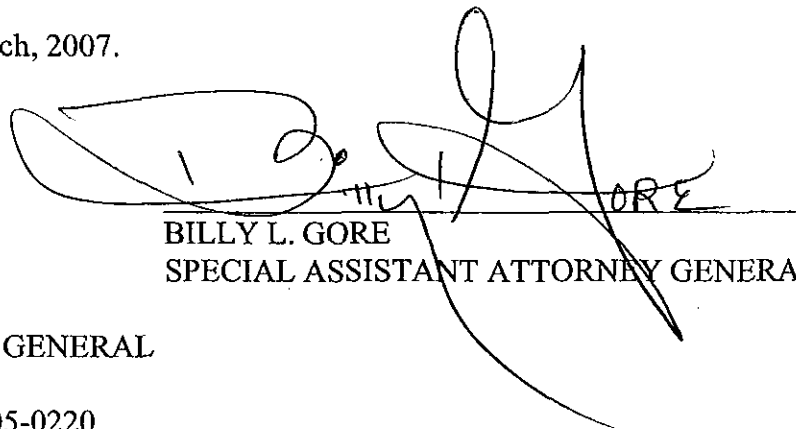
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 27th day of March, 2007.



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